

SELECTED ENVIRONMENTAL HEARING BOARD AND RELATED DECISIONS OF 2004

Act 90

The Board held that the \$4.00 per ton fee imposed by Act 90 on solid waste disposed of at municipal waste landfills applies to waste used as alternate daily cover unless it is process residue or unprocessable waste that originated from a resource recovery facility in *Joseph J. Brunner, Inc. v. DEP*, EHB Docket No. 2002-304-L (Opinion issued September 1, 2004). This opinion has been appealed to the Commonwealth Court.

Administrative Finality

The Board explored application of the doctrine of administrative finality in an appeal from a permit renewal for an NPDES permit issued for a manufacturing facility in *Wheatland Tube Co. v. DEP*, EHB Docket No. 2003-221-L (Opinion issued March 16, 2004). The Department issued the underlying NPDES permit in 1996 and the permittee applied for a permit renewal in 2001. Review of the renewal application took several years and included a debate between the parties over a change in the permit's effluent limits. Eventually, the Department approved the renewal, changing some effluent limits and retaining others. The permittee appealed from the renewal. In deciding the motion for summary judgment filed by the Department, the Board rejected the Department's motion and held that administrative finality did not apply. The Board held that a permittee may seek changes to its permit and appeal from the Department's final decision regarding those changes, noting that the "key question" is whether the proposals were considered and acted upon. *See also Hankin v. DEP*, EHB Docket No. 2003-186-K (Opinion issued July 9, 2004).

The Board also denied a motion to dismiss filed by the Department in *Cooley v. DEP*, EHB Docket No. 2003-246-K (Opinion issued July 16, 2004). Judge Krancer held that it was too early in the proceedings for the Board to make a determination that administrative finality applied to an appeal from an air quality plan approval. Although the appellants had failed to appeal earlier approvals, it was unclear whether the subsequently issued permit completely superseded or supplanted those earlier approvals.

Attorneys' Fees & Costs

In *Solebury Township v. Department of Environmental Protection*, __ A.2d __ (824 C.D. 2004, Pa. Cmwlth. filed December 8, 2004), the Commonwealth Court held that where the Department withdrew a Section 401 Water Quality Certification on the eve of oral argument, without explanation, the appellants were entitled to attorneys' fees under the Clean Streams Law. Specifically, the Court found that they did indeed achieve some success on the merits and were therefore prevailing parties, since they had achieved

their objective, namely rescission of the approval, and were therefore entitled to fees in accordance with the language of the statute.¹

In a related matter, the Board found in *Solebury Township v. DEP*, Docket No. 2002-323-K (consolidated)(Opinion issued March 4, 2004), that appellants were not entitled to attorneys' fees under the Costs Act for their appeal of a Section 401 Water Quality Certification because they did not meet the prerequisites of the Costs Act. Specifically, in that: (1) there was no "adversarial adjudication" initiated; (2) Appellants were not "prevailing parties;" and (3) since there was no disposition on the merits of the appeal, there was no basis to conclude that the positions of the Commonwealth agencies were substantially unwarranted.

Similarly, in *Adam v. State Conservation Commission*, EHB Docket No. 2002-189-MG (Opinion issued July 12, 2004), the Board held that the appellant did not qualify for fees and costs pursuant to the Costs Act because the adjudication in the appellant's favor was the result of the appellant's appeal and not the result of any adjudication initiated by a state agency. The claim that fees might be awarded for creating a common benefit was rejected because no statute authorizes an award by the Board under those circumstances.

Board Procedure

Discovery

The Board granted the Department's motion for a protective order for the deposition of the Secretary of the Department in a complaint for civil penalties in *DEP v. Neville Chemical Company*, EHB Docket No. 2003-297-CP-R (Opinion issued September 27, 2004). The Secretary filed a verification that she had no personal involvement in the matter, never visited the site and had no role in the calculation of the penalty. Accordingly, the Board concluded that her deposition was unlikely to lead to relevant evidence. However, the Board denied the Department's motion to bar the appellant from deposing the Director of the Office of Land Recycling and Community Revitalization because his deposition may lead to relevant evidence.

Experts

The Commonwealth Court affirmed an adjudication by the Board which held that the opinions of Department employees on the issue of hydraulic overload involved in the appeal of an administrative order were not subject to Pa. R.C.P. No. 4003.5 relating to the discovery of experts, because the employees' conclusion was not formed with an eye toward litigation. The court did not comment on the Board's ruling requiring all parties to

¹ In the underlying case, the Board dismissed an appeal of a Section 401 Water Quality Certification because the Department withdrew the certification at the permittee's request. *Solebury Township v. DEP*, EHB Docket No. 2002-232-K (consolidated)(Opinion issued January 16, 2004).

supply expert reports or answers to interrogatories for experts who will testify at a hearing. *Borough of Edinboro v. DEP*, 2696 C.D. 2003 (Pa. Cmwlth. 2004)(see below for a discussion of the substantive issues of the opinion).

Although required to file expert reports, the Department is not required to answer expert interrogatories in advance of the deadlines provided by the Board's prehearing orders. The Board held that it has ample procedures in place to provide extensions of time for the serving of discovery or to require supplemental expert reports; therefore, the appellant will suffer no prejudice by following the normal procedure. *City of Titusville v. DEP*, EHB Docket No. 2003-097-R (Opinion issued May 19, 2004).

Jurisdiction

In *Lang v. DEP*, EHB Docket No. 2003-145-R (Opinion issued July 21, 2004), Judge Renwand held that in a third party appeal the Board has the power to both set aside a consent order and agreement, and also the power to modify such an agreement if the Board finds that the Department abused its discretion.

Motion for Stay

A motion to stay an appeal on an order alleging the illegal disposal of solid waste was granted by the Board in *Niebauer v. DEP*, EHB Docket No. 2004-038-R, pending resolution of a criminal complaint against one of the appellants. The Board held that to continue the appeal before the Board risked negatively impacting the appellant's criminal defense, but granting the stay would result in little prejudice to the Department.

Privilege

The Board recognized that a deliberative process privilege may apply to protect governmental officials from disclosing their confidential deliberations of law or policymaking, reflecting opinions, recommendations, or advice. The Board will determine whether the privilege is applicable on a case-by-case basis after considering several factors, such as whether the communication in question was confidential, deliberative and whether it concerned issues of law or policymaking, together with comparing the opposing party's interest in disclosure of the communication with the Department's interest in maintaining its confidentiality. *Joseph J. Brunner, Inc. v. DEP*, EHB Docket No. 2002-304-L (Opinion issued January 8, 2004).

The Board applied the factors outlined when it considered a motion to compel testimony of two Department witnesses. The Department opposed the motion, claiming the testimony was protected from disclosure under the deliberative process privilege. The Board concluded that the evidence's potential probative value outweighed the Department's need to shield the evidence from disclosure. *Joseph J. Brunner, Inc. v. DEP*, EHB Docket No. 2002-304-L (Opinion issued April 6, 2004).

The Board denied in part and granted in part a motion for protective order filed by the Department in response to an appellant's request to depose the Department's counsel. The motion for protective order was denied as it related to a conversation that the Department's counsel had with a representative of the permittee during the Department's consideration of the permit application and observations the Department's counsel may have made at the site. However, the motion for protective order was granted to the extent the appellant sought discovery of legal advice the Department's counsel provided to Departmental personnel for their use in making a determination on the permit application. *Morris Township Property Owners v. DEP*, EHB Docket No. 2003-183-MG (Consolidated with 2003-184-MG)(Opinion issued February 13, 2004).

Standing

The Board held in *Borough of Roaring Spring v. DEP*, EHB Docket No. 2003-106-C (consolidated)(Opinion issued December 21, 2004), that an association had standing to pursue its appeal of a noncoal surface mining permit revision based on the standing of several of its members. The Board found that under Section 7514(c) of the Environmental Hearing Board Act, the association had representational standing even though several of its members did not formally belong to the association at the time that the appeal was filed. Since the effect of the permit revision arguably affected aesthetical and recreational interests of members, the group adequately demonstrated its standing to appeal.

Supersedeas

The Board denied a petition for supersedeas in an appeal of the Department's issuance of amendments to water obstruction and encroachment permits that authorized commercial sand and gravel dredging in the Allegheny River. Appellant claimed the protocol used by the Department to determine whether an endangered species of mussel existed in the permit area was inadequate and that the Department should not have issued the permit without requiring that fish surveys be conducted in the permit area. The Board denied the petition because the appellant presented insufficient evidence for the Board to conclude that endangered mussels and fish were present in the proposed permit areas. While the appellant presented very informative and illuminating testimony on the species of endangered mussels at issue in the case, the surveying methods used to detect the presence of mussels, and fish habitat, appellant did not present evidence that endangered mussels and fish were actually present in the permit areas. The granting of a supersedeas is an extraordinary remedy that the Board will grant only when it is clearly demonstrated that the supersedeas is warranted. Since the burden in a supersedeas proceeding is on the petitioner to demonstrate the likelihood of success on the merits and the irreparable harm that will be suffered if a supersedeas is not granted, the appellant in this case was required to come forth with more than speculation that adverse effects may occur in the absence of a supersedeas. *Pennsylvania Fish and Boat Comm'n. v. DEP*, EHB Docket No. 2004-053-R (Consolidated with 2004-054-R and 2004-055-R) (Opinion issued May 24, 2004).

In *UMCO Energy, Inc. v. DEP*, EHB Docket No. 2004-245-L (Opinion issued November 30, 2004), the Board was constrained to deny a petition for supersedeas of an underground mining company from an order of the Department prohibiting the company from longwall mining an area in the vicinity of a stream. After carefully considering the environmental consequences of dewatering the stream and the economic harm to the mining company and its employees, the Board concluded that the mining company had failed to demonstrate that it had any likelihood of prevailing on the merits of the appeal.

Withdrawal of Appeal

The Commonwealth Court in *City of Erie v. DEP*, 844 A.2d 586 (Pa. Cmwlth. 2004), affirmed two companion cases in which the Board held that the City of Erie could withdraw an appeal filed on its behalf from the issuance of permits allowing the fluoridation of city water by the Erie City Water Authority. Pursuant to Plan A of the Optional Third Class City Charter Law, the power to bring and commence lawsuits on behalf of the City is vested solely in the City Solicitor and not the City Council.

Dam Safety and Encroachments Act

The Commonwealth Court affirmed an order of the Board dismissing the appeal of a landowner from a compliance order issued by the Department as a result of the landowner's failure to secure a permit to fill in wetlands on his property. *Baehler v. Department of Environmental Protection*, __ A.2d __ (1142 C.D. 2004 Pa. Cmwlth. filed December 6, 2004). The Court held, among other things, that the landowner did not have a vested right to build a home on the property, nor was his takings claim ripe for review because he had never applied for a permit and the Department had not denied him a permit.

The Commonwealth Court affirmed the Board in *Pennsylvania Trout v. Department of Environmental Protection*, __ A.2d __ (1033 C.D. 2004 Pa. Cmwlth. filed December 7, 2004), and upheld the Department's issuance of a permit to fill wetlands because appellants failed to demonstrate by a preponderance of the evidence that the Department abused its discretion in issuing the permit. Permittee met its burden under 25 Pa. Code § 105.18(b)(3) of rebutting the presumption that a practicable alternative existed to the proposed project that would not involve a wetland or would have less adverse impact on a wetland and other environmental resources. The evidence demonstrated that adverse impacts to the site had been reduced to the maximum extent possible.

The Board dismissed the appeal of the Department's revocation of a general permit for the continued operation of a box culvert where the applicant failed to identify the location of the culvert as being in a FEMA floodway. In *Attawheed v. DEP*, EHB Docket No. 2002-018-R (consolidated) (Adjudication issued December 21, 2004), the Board found, among other things, that the Department had properly revoked the permit and the property owner did not hold a vested right in it, as the culvert's location posed a risk to public safety, health and welfare.

Enforcement

The Board upheld the Department's assessment of a \$3,465,660 penalty against a company that failed to install RACT air pollution control equipment on a timely basis on two boilers at one of its facilities in *Sunoco, Inc. (R&M) v. DEP*, EHB Docket No. 2002-268-K (Adjudication issued April 12, 2004). The underlying statutory violations were admitted, only the Department's methodology used to calculate the penalty and whether the penalty was reasonable were at issue before the Board. The Board sustained the penalty as a lawful application of the Department's enforcement authority pursuant to the Air Pollution Control Act. This decision is currently on appeal by the company to the Commonwealth Court.

The Board dismissed an asbestos removal contractor's appeal of a civil penalty assessed by the Department for violations relating to the contractor's handling of waste at an asbestos removal project at a school. In this appeal, the contractor did not challenge the method used to calculate the penalty or the reasonableness of the penalty. The only issue before the Board was whether the incidents in question constituted violations of the applicable regulations. The Board held that the violations did in fact occur. This decision was affirmed by the Commonwealth Court *Chippewa Hazardous Waste, Inc. v. DEP*, EHB Docket No. 2002-295-L (Adjudication issued April 16, 2004), *affirmed*, 971 C.D. 2004 (Pa. Cmwlth. filed October 28, 2004).

Mining

In an appeal from a compliance order issued to a mine operator for failing to conduct preshift examinations of the mine for the workers going into a mine at odd times, the Board held that section 228(a), of the Pennsylvania Bituminous Coal Mine Act, 52 P.S. § 701-228(a), unambiguously requires preshift examinations timed for each shift entering a mine. Further, a shift is a distinct subset of workers regularly scheduled to work at a distinct time. This decision has been appealed by the mine operator to the Commonwealth Court, which has not yet issued a decision. *RAG Cumberland Resources LP v. DEP*, EHB Docket No. 2003-067-L (consolidated) (Opinion issued January 27, 2004).

In an appeal initiated by the host municipality challenging the renewal of an NPDES permit for the operation of a quarry, the Board remanded the case for further consideration by the Department of the discharge rate authorized by the permit. In view of residential well failures and data indicating that the authorized discharge was in excess of the basin's recharge, the Board found that the Department did not adequately consider the availability of water for other users. Further, the permit placed no limits upon the permittee's ability to pump even during times of drought or low water supply in the basin. The Board also concluded that the municipality's challenge to the permit renewal was not foreclosed by the doctrine of administrative finality because it was a challenge to the continuation of the NPDES permit at a particular discharge rate and not a collateral attack upon past approvals or the mining permit. This adjudication was appealed to the Commonwealth Court which quashed the appeal because the decision of the Board

remanding the matter to the Department for further consideration was not a final order subject to appeal. *Solebury Township v. DEP*, EHB Docket No. 2002-288-MG (Adjudication issued March 5, 2004).

The Board sustained an appeal challenging issuance of a noncoal surface mining permit for a proposed siltstone/sandstone mining operation traversed by an exceptional value stream. Specifically, the Board found that the Department failed to require the permittee to engage in an alternatives analysis to a direct point source discharge into the stream of runoff from the disturbed mining area in the event of certain rainfall events. The Board found the lack of alternatives analysis was a violation of 25 Pa. Code § 93.4c(b)(1)(i), the Department's water quality regulations. *Zlomsowitch v. DEP*, EHB Docket No. 2002-131-C (Adjudication issued November 15, 2004).

Nutrient Management

In an appeal from the approval of a nutrient management plan prepared under the Nutrient Management Act and the regulations of the State Conservation Commission, the Board held that both the Commission's regulations and the plan were deficient for failure to provide any site specific standards for the control of phosphorus contained in the application of manure in a concentrated animal operation for sows. The Nutrient Management Act requires the Commission to identify and establish application standards for all nutrients, but the Commission's regulation only requires the plan to contain an application standard for nitrogen. Shortly after this decision, the Commission published interim guidelines for the regulation of the application of phosphorus. *Adam v. State Conservation Commission*, EHB Docket No. 2002-189-MG (Adjudication issued May 12, 2004).

Sewage Planning

The Commonwealth Court in *Borough of Edinboro v. DEP*, 2696 C.D. 2003 (Pa. Cmwlth. 2004), affirmed an adjudication by the Board which concluded that the Department properly determined that the municipality was in a state of hydraulic overload. The Board had dismissed an appeal from an Administrative Order issued by the Department requiring two municipalities to jointly address regional sewage needs and requiring both municipalities to submit a Joint Official Plan Update Revision. The Board determined that the Department has the authority to order neighboring municipalities to jointly address the sewage needs of their region. Further, an order requiring such joint action does not constitute a taking.

The Board denied the appeal of a public interest group which challenged the approval of a revision to a borough sewage facilities plan for a central sewage treatment plant and collection system and issuance of a related NPDES permit. Although the plan revision contemplated possible further development of the plant to accommodate flows from a neighboring township, the approval did not constitute planning for that municipality. The Board further held that the appellant failed to prove environmental harm from either the plan revision or the discharge permit. This adjudication has been

appealed to the Commonwealth Court. *Delaware Riverkeeper v. DEP*, EHB Docket No. 2003-083-MG (consolidated)(Adjudication issued August 12, 2004).

An appeal from the Department's disapproval of an Act 537 sewage plan revision was dismissed as moot in *Stewart & Conti Dev. Co., Inc. v. DEP*, Docket No. 2002-059-L (Opinion issued January 12, 2004). A developer appealed the Department's disapproval of a revision to the municipality's Act 537 official plan to cover the developer's subdivision. While the appeal was pending, the municipality submitted and the Department approved, a revision to the official plan that provided a sewage treatment plan for the subdivision that differed from and supplanted the official plan revision that the Department had denied. The Board granted the Department's motion to dismiss because the approval of the second plan revision deprived the Board of the ability to render meaningful or effective relief.