COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

ADJUDICATIONS

VOLUME II

(Pages 431—866)

1988

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OF THE

ENVIRONMENTAL HEARING BOARD

DURING THE PERIOD OF THE
ADJUDICATIONS

1988

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FORWARD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1988.

The Environmental Hearing Board was created by the Act of December 3, 1970, P.L. 834, which amended the Administrative Code of 1929, the Act of April 9, 1929, P.L. 177, as amended. Section 21 of Act 275, §1921-A(a) of the Administrative Code, empowered the Board:

> "to hold hearings and issue adjudications under the provisions of the act of June 4, 1945 (P.L. 1388), known as the "Administrative Agency Law," on any order, permit, license or decision of the Department of Environmental Resources."

1988

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

DEL-AWARE UNLIMITED, INC.	:	
v.	:	EHB Docket No. 87-037-R
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and NESHAMINY WATER RESOURCES AUTHORITY, Permittee and PHILADELPHIA ELECTRIC COMPANY, Permittee-Intervenor and NORTH PENN/NORTH WALES WATER AUTHORITIES, Intervenors	:	Issued: May 24, 1988

OPINION AND ORDER

Synopsis

Appellant's motion for additional deposition discovery is granted. Though Appellant should have served interrogatories regarding the testimony of Intervenor's expert witness, Intervenor raised no objection to the deposition of its expert conducted within the discovery period. Appellant may now complete the deposition of Intervenor's expert.

OPINION

This opinion deals with yet another discovery motion in one of several appeals challenging the so-called Point Pleasant Project. For background on and a history of the project, and for the scope of the issues in this appeal, the reader is referred to the Board's adjudication of Del-AWARE

Unlimited, Inc. v. DER, 1984 EHB 178 (Del-AWARE I) and its opinions and orders in this matter dated May 27, 1987, July 17, 1987 and April 21, 1988.

Appellant Del-AWARE Unlimited, Inc. (Del-AWARE) has filed a motion to compel deposition discovery. The discovery period in this matter expired on September 30, 1987. Del-AWARE alleges that Intervenors North Penn and North Wales Water Authorities (NP/NW) hindered its discovery prior to the September 30, 1987 deadline when it instructed expert witness Stephen F. Talian, at a deposition conducted by Del-AWARE, not to answer questions regarding the methodology used in NP/NW's needs assessment. Del-AWARE asks that NP/NW be ordered to make its expert available for additional deposition discovery and that the witness be ordered to answer questions regarding his needs estimates.

NP/NW objects to Del-AWARE's motion, arguing that: 1) the motion is untimely; and 2) Del-AWARE is not entitled to depose NP/NW's expert witness, since such deposition is permissible only after interrogatories had first been filed and leave of the Board was granted. In addition, NP/NW suggests that there is a chance that the expert Del-AWARE seeks to depose may not even be called when this matter is heard on the merits. In such case, discovery is not permitted.

We find NP/NW's timeliness argument to be without merit, since the time for conducting discovery is within the Board's discretion. We do note, however, that Del-AWARE appears to have attached no particular urgency to its request for additional deposition discovery, since some six months had passed before it decided that the September, 1987 deposition of NP/NW's expert was insufficient.

NP/NW is correct when it argues that Del-AWARE should have first propounded interrogatories. Pursuant to Pa.R.C.P. 4003.5, supplemental oral questioning is permitted only when the party seeking discovery does not obtain

sufficient information by such interrogatories. Sunny Farms Limited v. DER, 1981 EHB 595; Goodrich-Amran 2d §4003.5(a):1(3). A review of the docket reveals that while Del-AWARE filed notices of depositions and requests for the production of documents, no interrogatories appear to have been served. Thus, on the basis of Del-AWARE's failure to conduct discovery of NP/NW's expert witness consistent with Pa.R.C.P. 4003.5, we would deny its motion. However, the Board notes that NP/NW raised no objection when Mr. Talian was noticed for deposition during the discovery period. Indeed, NP/NW willingly permitted Mr. Talian to be deposed though, it claims, not for the purposes of the instant appeal.

On the basis of the pleadings, we find that subject matter of Del-AWARE's requested discovery appears to be within the scope of the issues remaining in this appeal, i.e., the need for the project. Certainly, the methods NP/NW used to determine that the project is necessary is most relevant in determining whether a conclusion of necessity was warranted. Moreover, it is not a ground for objection that the information sought may be inadmissible at the hearing if the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence. It thus appears that the subject area of Del-AWARE's requested discovery is appropriate. The decision we must make here, then, is whether to allow Del-AWARE to conduct additional discovery and in what form.

Pa.R.C.P. 126 states that the Pennsylvania Rules of Civil Procedure ". . . shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties." Essentially, Del-AWARE began the deposition of Mr. Talian, without

any objection from NP/NW, but was unable to complete that portion of its discovery. It was only in the context of Del-AWARE's motion that NP/NW raised its objections to Mr. Talian's deposition. Though we believe that NP/NW has waived any objection to Mr. Talian's deposition, we also believe that Del-AWARE is entitled to complete its discovery in a manner which is not onerous on NP/NW or its expert.

We note NP/NW's argument that it considers discovery of Mr. Talian's facts and opinions to be improper because he might not be called as an expert witness at trial. If so, that is its choice. However, under Pa.R.C.P. 4003.5, if Mr. Talian will be an expert witness for NP/NW, Del-AWARE is entitled to inquire into the substance and grounds for the opinions and facts to which he will testify, as well as any of his reports and data which directly bear on his testimony. Magnum Minerals, Inc. v. DER, 1985 EHB 687. Thus, we believe that Del-AWARE is entitled to complete its deposition of Mr. Talian within the scope of the issues remaining in this appeal regarding which he may testify. We stress that, at this point, this is the one and only open discovery issue we see, since the deadline for discovery into any other matter has long since passed. Additionally, in the seven months that have passed since the discovery deadline, Del-AWARE should have had ample opportunity to pore over documents submitted by NP/NW as part of the discovery process and, by now, should have a narrowly drawn and focused list of questions in mind. The Board will not condone or countenance an open ended fishing expedition. We believe this will result in the speediest and least expensive completion of discovery.

At this point, the Board believes that a pre-hearing schedule can be re-established. In view of this last discovery extension, the following is appropriate:

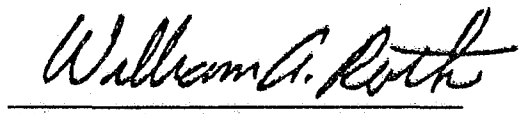
July 1, 1988	Del-AWARE completes deposition

August 1, 1988	Del-AWARE Pre-Hearing Memorandum filed
September 1, 1988	Appellees' Pre-Hearing Memoranda filed

O R D E R

AND NOW, this 24th day of May, 1988, it is ordered that Del-AWARE Unlimited, Inc.'s motion to compel deposition discovery is granted consistent with the foregoing opinion. It is further ordered that Del-AWARE shall complete the remaining deposition on or before July 1, 1988, that Del-AWARE shall file its pre-hearing memorandum on or before August 1, 1988 and that the Appellees shall file their pre-hearing memoranda on or before September 1, 1988.

ENVIRONMENTAL HEARING BOARD



WILLIAM A. ROTH, MEMBER

DATED: May 24, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Louise Thompson, Esq.
For Appellant:
Robert J. Sugarman, Esq.
For Permittee:
Lois Reznick, Esq.
For Philadelphia Electric Co.:
Bernard Chanin, Esq. and
Michael Meloy, Esq.
WOLF BLOCK SCHORR & SOLIS-COHEN
Philadelphia, PA

Eugene Bradley, Esq.
Philadelphia, PA

Troy Conner, Esq.
CONNER & WETTERHAHN
Washington, DC
For North Penn/North Wales Water Authorities:
Jeremiah J. Cardamone, Esq.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

BIG "B" MINING COMPANY	:	
	:	
v.	:	EHB Docket No. 83-215-G
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
TROUT UNLIMITED, Intervenor	:	Issued: May 26, 1988

OPINION AND ORDER
SUR
PETITION FOR SUPERSEDEAS
PENDING APPEAL

Synopsis

A petition for supersedeas pending appeal is denied where the petitioner has shown little likelihood that it will prevail on the merits of its petition for review.

OPINION

On October 26, 1987, the Board issued an adjudication which sustained an appeal by Big "B" Mining Company (Big B) from the Department of Environmental Resources'(DER) denial of its application to conduct surface mining on a site which would discharge into a high quality water. See Big "B" Mining Company v. DER, EHB Docket No. 83-215-G (Opinion and order issued October 26, 1987), hereinafter Big "B" II. The Board remanded the permit application to DER for further action. On November 25, 1987, DER filed a petition for review with the Commonwealth Court, No. 2744 C.D. 1987, alleging

various factual and legal reasons why the Board erred in not upholding the permit denial. On February 29, 1988, DER filed with this Board a petition for supersedeas pending appeal, wherein it asked the Board to supersede its remand order pending review by the Commonwealth Court.

Before turning to DER's petition, a brief review of the holdings in Big "B" II would be useful. The appeal dealt solely with the application of DER's anti-degradation regulations to a proposed mining operation which would have discharges to a so-called "high quality waters". DER denied Big B's mining application based on its conclusion that Big B had not shown the proposed mining operation to be economically justified. The regulation in question, 25 Pa.Code §95.1(b), states:

> Waters having a water use designated as "High Quality Waters" in §§93.6 and 93.9 (relating to general water quality criteria and designated water uses and water quality criteria) shall be maintained and protected at their existing quality or enhanced, unless the following are affirmatively demonstrated by a proposed discharger of sewage, industrial wastes, or other pollutants:
>
> (1) The proposed new, additional, or increased discharge or discharges of pollutants is justified as a result of necessary economic or social development which is of a significant public value.
>
> (2) Such proposed discharge or discharges, alone or in combination with other anticipated discharges of pollutants to such waters, will not preclude any use presently possible in such waters and downstream from such waters, and will not result in a violation of any numerical water quality criteria specified in §93.9 which are applicable to the receiving waters.

The Board ruled that 25 Pa.Code §95.1(b) requires that high quality waters be maintained at their existing quality unless the prospective discharger could affirmatively demonstrate, under 25 Pa.Code 95.1(b)(1), that the proposed discharge is socially or economically justified and that, under 25 Pa.Code §95.1(b)(2), present uses of the waters would not be precluded and

applicable numerical water quality criteria would not be violated. If both of these criteria could be satisfied, then some degradation of the high quality water would be permissible. Thus, though the regulation may be termed "anti-degradation," some reduction of quality is nonetheless possible, provided certain conditions are met.

The Board concluded that Big B had shown economic justification for its proposed discharge when it found that net economic benefits of significant public value are likely to be realized. We construed §95.1(b)(1) to require that the economic development must serve more than a de minimus public need and that the economic benefits to be derived from the proposed mining be "important." On the basis of Big B's operational record at an adjacent mine site, which discharged to the same high quality water, the Board concluded that the existing uses of the high quality water could be maintained despite the mining, thus complying with part of the requirements under §95.1(b)(2). However, the Board remanded the permit application to DER to fix the effluent limitations necessary to comply with applicable numerical quality criteria of the receiving stream, as is also required under §95.1(b)(2).

In evaluating DER's petition for supersedeas, we are guided by the four standards adopted by the Pennsylvania Supreme Court in Pennsylvania Public Utility Commission v. Process Gas Consumers Group, 502 Pa. 545, 476 A.2d 805 (1983) (Process Gas), which are: a strong showing that the petitioner is likely to succeed on the merits of its appeal; a demonstration that the petitioner will suffer irreparable harm if not granted the supersedeas; the effect of the supersedeas on other interested parties; and the effect of the supersedeas on the public interest.

DER argues to us that it very likely to prevail on the merits of its appeal to the Commonwealth Court for 5 reasons which we will, in turn,

consider.

Failure to Afford Agency Deference

DER charges that the Board, in upholding Big B's appeal, made a marked departure from judicial tradition, arguing that we have not ". . . afforded DER the great deference in its decisions regarding the issuance and denial permitting applications." In support DER cites Harman Coal Company v. Commonwealth, DER, 34 Pa.Cmwlth. 610, 384 A.2d 289 (1978) and Compass Coal, Inc. v. DER, et al., 1975 EHB 129.

We believe that DER's reliance on these two cases is erroneous and that Big B's appeal is clearly distinguishable. Harman Coal was an appeal from a DER denial of mine permit application on the basis of a strong potential for acid mine drainage contamination of surface and underground waters. Though Harman bore the burden of proof, DER, to support its case, presented evidence of extensive water quality studies in the area, including analyses of discharges which showed acid mine drainage problems from previously mined areas on the same site on which Harman was seeking a permit. Moreover, DER put on credible evidence that the type of test Harman used on its overburden samples was no longer considered reliable. Finally, as the Commonwealth Court wrote, ". . . DER adduced extensive testimony which tended to show that the disturbance of the overburden would significantly increase the amount of ground water contribution . . . to the flow of the [receiving stream]; that pH tests of the soil . . . on the site produced acidic results; that a fault existed at ;the site which would cause any acid drainage to reach an pollute domestic wells in the vicinity; and that both the [receiving surface waters] have inconsistent water quality with low buffering ability and consequent low resistance to acid drainage." Harman Coal, 384 A.2d, at 292.

The Compass Coal case is also off the mark. In that case, DER denied a mining permit application on the basis of a thoroughly deficient application. As the Board concluded, "[w]here an applicant does not provide sufficient information in its mine drainage permit application to permit DER to determine whether the proposed plan of drainage will prevent pollution to waters of the Commonwealth, the applicant has not met its burden of showing entitlement to a mine drainage permit. Compass Coal, at 137.

In each of the two DER-cited cases, the conclusions rested, not on giving deference to DER's decisions, but on substantial evidence DER presented that outweighed that of the appellant, and which thoroughly supported DER's permit denials. In Big B's case, the speculative testimony presented by DER regarding, for example, the prospects of operating the mine site without affecting the use of Silver Creek as a trout fishery, could not match, in the finding of this Board, the demonstrated operational ability of Big B.

We agree that DER's interpretation of its regulations is entitled to deference. See, e.g., Barr v. Department of Public Welfare, 62 Pa.Cmwlth. 211, 452 A.2d 603 (1982). However, when DER has neglected to communicate its interpretation of the regulation at issue, we are at a loss to understand what we should be deferring to.

To prepare for the hearing on the merits in this matter, the Board specifically ordered the respective parties to file memoranda of law addressing two crucial issues as follows:

> a. In order to establish "social and economic justification,' what elements is it the appellant's burden to prove?
>
> b. What testimony, in the context of the present appeal, will be germane to this burden?

Obviously, since DER denial denied the permit because Big B allegedly failed

to demonstrate that the discharge was economically justified, these two questions would play a paramount role in this case of first impression. However, for whatever reason, DER never submitted a memorandum on these issues. Though the Board found Big B's memorandum to be of little use, it nonetheless issued an interlocutory opinion and order construing how economic justification would have to be shown for the purposes of presenting evidence at the hearing. See Big "B" Mining Company v. DER, 1985 EHB 925 (Big "B" I) The only thing we heard from DER on the matter was in its post-hearing brief in which it agreed with the Big "B" I construction.

We believe that Big B made the showing that its proposed mine would yield net economic benefits of a significant public value. (See additional discussion, infra.) Moreover, Big B demonstrated that it would be likely to mine the site without precluding any existing uses of the receiving stream. In this regard, Big B presented credible evidence in the form of its operational record with regard to erosion and sedimentation control at an adjacent mine site which discharged into the same receiving water. That record showed that there were absolutely no deleterious affects on the receiving stream due to its prior operation. DER's contravening evidence consisted of the assertion that there was a risk of malfunction of controls and the conjecture of failure. DER made no attempt to quantify the risk or to any other aspect of control measures.

Failure to Properly Allocate the Burden of Proof

DER alleges that the Board improperly ". . . imposed the burden on [DER] to prove that there would be no economic losses." The burden of showing that DER's denial of the permit application was an abuse of discretion fell squarely on Big B, pursuant to 25 Pa.Code §21.101(c)(1). With

regard to the economic justification issue, we held that the economic benefits to be realized must be net benefits, i.e., positive benefits must outweigh negative costs.

We believe that we have committed no error. Big B presented credible evidence regarding employment, payroll, taxes, and other economic benefits that would flow from its mining operation. Big B presented no evidence as to economic losses. However, DER put on evidence with regard to the economic losses could result if trout fishing on Silver Creek were lost as a result of the mining. As we stated in Big "B" II, this potential loss does not enter into our calculation of net benefits since, by regulation, the mining operation cannot be permitted to take place unless the trout fishing will continue. If trout fishing and other uses continue, we are at a loss to understand how there will be economic losses. We do not believe we shifted any burden to DER. Rather, after Big B presented its evidence, DER had and used the opportunity to present opposing evidence. Quite simply, DER's evidence was insufficient to show that Big B's evidence was invalid or that the magnitude of it benefits should be reduced. Indeed, we found Big B's economic benefit data to be credible.

Failure to Make Finding of Necessity of Economic Development

DER asserts that the Board confused "use" with "necessity" when it concluded that Big B's mining operation was necessary. 25 Pa.Code §95.1(b)(1) reads as follows:

> The proposed new, additional, or increased discharge or discharges of pollutants is justified as a result of necessary economic or social development which is of a significant public value.

Contrary to DER's assertion, we construed the word "necessary" to

mean more than a de minimus public need which, we concluded, Big B's mining operation could satisfy. As we stated,

> ". . . we recognize that we have been measuring the public need for coal by the ability to command a good market price. While this criterion surely can be questioned, we have been able to think of no better alternative at all. For an energy source like coal it is not unreasonable to measure the public need by market price; we are not attempting to measure, e.g., the public need for private yachts"

Admittedly, the measure of "necessary" development is hard to pinpoint. We believe that low sulfur coal of the type which would be produced at Big B's mine is needed by the public. We believe that such coal serves more than a de minimus public need, e.g., cleaner air from coal burning. Finally even in its petition, DER has given us no new clue as to how to better get a handle on "necessary".

Failure to Apply Proper Standard For What Constitutes Significant Public Value

DER argues that the Board erred when it revised its construction of "significant" from "unquestionably important" to "important." We think not. As we stated in our adjudication,

> We do not believe that it was the intention of the EQB, nor the federal regulation on which §95.1(b) is modeled [40 C.F.R. §131.12], that a mining company like Big B never would be able to justify mining near a high quality stream, however minor the environmental degradation threatened, solely because Big B's mining operations are too small to convey unquestionably important economic effects onto Butler County and its legitimate subcommunities.

There is no question that changing the construction of "significant" from "unquestionably important" to "important" meant that Big B could satisfy this portion of its burden. DER states that "[b]ecause Member Roth did not

want to reach this result [i.e., Big B failing the "unquestionably important" test], he lowered the standard articulated by Member Gerjuoy [in Big "B" I] to "important." Far from shaping a criteria to yield a desired result, the Board considered the totality of the situation at hand. First, as we noted, the federal regulation, on which Pennsylvania's are modeled, use the term "important". Second, we still do not believe that the EQB intended that an hurdle so high that only a select few large operators or operations could ever make a showing of significant development. It is safe to say that, save an exceptional few, most businesses are not, by themselves, "unquestionably important" to Butler County or any other locale. However, their importance arises to legitimate subcommunities and, cumulatively, to the larger public.

Our holding that "unquestionably important" was too strong a construction of "significant" still stands. We also note that the construction in Big "B" I was interlocutory. We further note that DER never shared with the Board its own construction of "significant."

Board's Analysis Nullifies the Anti-Degradation Requirement

DER argues that the anti-degradation requirement is nullified because the ". . . Board's Adjudication essentially stands for the proposition that the economic benefits flowing from any proposed coal mine are 'necessary and of significant public value.'" We disagree. The finding of that there are net economic benefits was based on the credible and substantial evidence presented at hearing that identified benefits and to whom those benefits would accrue. Far from nullifying the anti-degradation policy, the Board's adjudication merely has upheld the proposition that when economic benefits can be shown and when streams uses can be maintained and water quality criteria maintained, then a certain amount of degradation is permitted. This is, after

all, what the regulation at issue permits.

We conclude that DER has not shown us a likelihood that it would prevail on the merits of its appeal. As such, it is unnecessary to consider the other criteria of the Process Gas test. Nonetheless, we do not believe that the interests of DER or the public are in peril. As we discussed in Big "B" II, the only environmental issue of concern due to Big B's proposed mining operation is the threat of siltation of Silver Creek and the potential effects on the native trout. However, we had credible and substantial evidence regarding Bib B's adjacent operation which discharged into the same waters. In that case, Big B operated the mine without any impacts. Indeed, the portion of Silver Creek to which Big B discharged was upgraded to an exceptional value water.

When Big B was mining the adjacent site, DER had nothing but praise for Big B's siltation control. After a particularly devastating rainstorm in the area which cause loss of life, DER's inspector found no signs of overflow from Big B's controls and even stated in his report that "[w]hen any strip operator can survive a storm of this magnitude, without damage to any surrounding environment, then we have accomplished something." It is in this regard that we are perplexed as to how DER's faith in siltation controls and Big B's abilities have shifted from decidedly positive during the prior mining to negative in the context of a new permit application. We believe that an exemplary siltation control record is worth something, especially when all DER has to back up its decision is conjecture. On the basis of Big B's demonstrated track record, we envisage no deleterious effects should the mining commence. Accordingly, we see no injury to DER's or the public interest.

In view of the foregoing, we deny DER's petition for supersedeas pending review.

ORDER

AND NOW, this 26th day of May, 1988, it is ordered that the Department of Environmental Resources' petition for supersedeas pending review is denied.

ENVIRONMENTAL HEARING BOARD

WILLIAM A. ROTH, MEMBER

DATED: May 26, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Diana J. Stares, Esq.
Western region
For Appellant:
Bruno A. Muscatello, Esq.
STEPANIAN & MUSCATELLO
Butler, PA
For Intervenor:
Michael J. Boyle, Esq.
MEYER, UNKOVIC & SCOTT
Pittsburgh, PA

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

CONSOL PENNSYLVANIA COAL COMPANY	:	
	:	
v.	:	EHB Docket No. 87-284-R
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 26, 1988

OPINION AND ORDER
SUR
CROSS-MOTIONS FOR SUMMARY JUDGMENT

Synopsis

A DER motion for summary judgment, based on an assertion that the appealed-from action is non-appealable, is denied. DER's denial of a request for permit revision is an appealable action where DER's rules and regulation explicitly require a permit change when there is any change in mining activities from those set forth in the permit application. Appellant's cross motion for summary judgment is denied where based solely on unsupported allegation.

O P I N I O N

This matter is an appeal by Consol Pennsylvania Coal Company (Consol PA) from the Department of Environmental Resources' (DER) rejection of its request for a change in permit limitations pertaining to osmotic pressure for Outfall 009 at the Bailey Mine in Greene County. The relevant limitations are contained in Mining Activity Permit 30841316.

On November 4, 1987, DER filed a motion for summary judgment, in which its alleged that, in response to Consol PA's request, it issued an October 3, 1986 amendment to the permit which added a new discharge point known as Outfall 009. Among other things, the amended permit set a monthly effluent limitation of 60 milliosmoles per liter (mo/l) for osmotic pressure at Outfall 009. DER asserts that Consol PA did mot appeal the amendment. DER argues that Consol PA is collaterally estopped and/or barred under the principles of finality of administrative actions from challenging DER's factual or legal basis for denying its request. DER further argues that Consol PA has shown no truly exceptional circumstances warranting a collateral attack on a final and unappealed permit condition. Finally, DER argues that its denial of the requested revision is unappealable since Consol Pa's rights before and after the denial were unchanged. DER sees no disputes as to material facts and requests summary judgment in its favor.

Consol PA responded by alleging that, when the amended permit was issued, the limitation regarding osmotic pressure at Outfall 009 was acceptable. However, over time, conditions in the so-called West Bleeders area of the Bailey Mine such that the osmotic pressure was so high that a permit amendment was necessary. Consol PA alleges that DER's motion makes clear that it gave no consideration whatsoever to its request for a permit amendment and makes a cross-motion for summary judgment, requesting that the Board order DER to give full considerations to its requested permit amendment.

The Board may grant summary judgment where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Summerhill Borough v. DER, 34 Pa.Cmwlth. 574, 383 A.2d 1320, 1322 (1978).

A threshold issue we must first consider involves the nature of the appealed-from DER action. According to DER's motion, Consol PA is appealing the osmotic pressure limitations of the permit amendment by which Outfall 009 was added. If this is, in fact, the case, we could easily dispose of this matter since, under the principles of administrative finality, Consol PA's unappealed permit became final and unassailable 30 days after it received notice of its issuance. However, Consol PA argues that it is appealing a denial of a request for yet another amendment to its permit. To resolve this matter we must examine the substance of the documents involved.

Consol PA asserts that it filed it request for a modification to the osmotic pressure limitations on January 5, 1987 and sent a cover letter which stated, in relevant part:

> Bailey Mine requests approval for a change in the permit limitations, pertaining to Osmotic Pressure, for [Mining Activity Permit 80841316]. We seek approval to discharge water with significantly higher Osmotic Pressure levels at a reduced flow rate. This proposal, as detailed in the Attachments, would comply with in stream water quality of 60 mo/kg Osmotic Pressure. . .

Attached to Consol PA's letter were maps, descriptions, calculations, stream flow data and a schematic which, presumably, serve to support its request.

DER's letter to Consol PA, which is the subject of this appeal, states, in relevant part, as follows:

> We have received and reviewed your request for a change in the limitations, pertaining to osmotic pressure, for [Outfall 009].
>
> Chapter 93.5 issued under sections 5 and 402 of the Clean Streams Law specifically states that the excepted [sic] design flow, to which the Water Quality criteria as set forth in Chapter 93 shall apply, as the actual or estimated lowest seven consecutive-day average flow that occurs once in ten years for a stream with unregulated flow, or the estimated minimum flow for a stream with regulated flows. Thus, you proposal to discharge into the stream at varying discharge rates, depending upon the

> measured stream flow, cannot be considered a viable alternative to meeting the osmotic pressure limit set forth in the permit. This would be a direct violation of regulation 93.5 and the Clean Streams Law.

Revisions to mining activity permits are specifically contemplated in DER's rules and regulations. 25 Pa.Code §§86.51 and 86.52 provide the situations, applicable to both DER and permittees, respectively, which may give rise to the need for permit revisions. Specifically, §86.52(a) provides, in relevant part, that:

> A revision to a permit shall be obtained:
>
> (1) For any change to coal mining activities set forth in the application upon which the permit is issued.
>
> (emphasis added)

In this matter, Consol PA alleges that it discovered, on the basis of random sampling of mine water in the vicinity of the so-called West Bleeders, that its discharge at Outfall 009 could meet all discharge limitations except for osmotic pressure. See Notice of Appeal, Appellant's Attachments. Certainly, this appears to be a change from the information set forth by Consol PA in its application for Outfall 009, in which it anticipated that osmotic pressure limitations could be met. SEE Consol PA's Response to Motion for Summary Judgment. Accordingly, a permit revision, pursuant to §86.52(a)(1), appears to be required. Indeed, since Consol PA could no longer challenge the limitations of the unappealed amendment challenging Outfall 009, it took the one and only administrative remedy open to it in the face of an allegedly onerous permit requirement, namely, to seek a permit revision as provided for in the regulations. See Kidder Township v, DER, 1977 EHB 300, aff'd. 41 Pa.Cmwlth. 376, 399 A.2d 799 (1979); Theodore Genovese II v. DER, EHB Docket No. 87-165-R (Opinion and order issued May 23, 1988).

As DER notes in its reply to Consol PA's cross-motion, "[i]t is

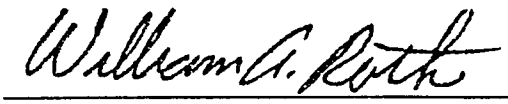
clearly established in Pennsylvania that [DER's] issuance of a permit or of a permit amendment is an appealable action." Since a permit amendment is provided for in DER's rules and regulations, and since the issuance of an amendment is appealable, we are at a loss to understand DER's contention that a denial of an amendment is not appealable.

In view of the foregoing, we will not grant DER's motions for summary judgment. However, we likewise will not grant Consol PA's cross-motion for summary judgment. The central issues is this matter is whether DER correctly applied its regulations and whether Consol PA' ". . . proposal to discharge into the stream at varying discharge rates, depending upon the measured stream flow, cannot be considered a viable alternative to meeting the osmotic pressure limit set forth in the permit." Consol PA's mere allegations concerning the extent of DER's review of its revision request hardly make for undisputed material facts.

ORDER

AND NOW, this 26th day of May, 1988, it is ordered that the cross-motions for summary judgment filed by the Department of Environmental Resources and Consol Pennsylvania Coal Company are denied.

ENVIRONMENTAL HEARING BOARD



WILLIAM A. ROTH, MEMBER

DATED: May 26, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Donna J. Morris, Esq.
Katherine S. Dunlop, Esq.
Western Region
For Appellant:
Daniel E. Rogers, Esq.
Consol Pennsylvania Coal Company
Pittsburgh, PA

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

ERNEST C. BARKMAN and GRACE BARKMAN	:	
	:	
v.	:	EHB Docket No. 87-161-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 27, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A motion to dismiss an appeal of an order requiring property owners to allow the Department of Environmental Resources (Department) access to their property to conduct tests is granted where the order is amply justified by conditions on the site and the Department has minimized intrusion and disruption to the property owners' business activities. Appellants' challenge to the methodology and cost of the Department's study is properly raised in an action by the Department to recover the costs of remedial action at the site.

OPINION

This matter was initiated by the April 22, 1987 filing of a notice of appeal and petition for supersedeas by Ernest C. and Grace Barkman (hereinafter Barkmans) from the March 25, 1987 order of the Department of Environmental Resources (Department) requiring the Barkmans to allow the Department access to their property, the Welsh landfill, to conduct a remedial

investigation and feasibility study (RI/FS).[1] The Department and the Environmental Protection Agency (EPA) have a cooperative agreement under Section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §9604 (1982) providing federal money from the Hazardous Substance Response Trust Fund (Superfund), 42 U.S.C. §9631, to the Department to perform an RI/FS at the Welsh landfill site.

After a conference with the parties, the Board, by order dated May 4, 1987, denied the petition for supersedeas and directed the Commonwealth and the Barkmans to meet and discuss minimizing intrusion to the Barkmans' property as a result of the RI/FS. As a result of arguments the Department made during the conference, the Board ordered it to file a written motion to dismiss the Barkmans' appeal.

The Department filed a motion to dismiss on May 6, 1987, stating that the Barkmans' appeal fails to state a claim upon which relief can be granted, since the Department's authority to order the Barkmans to allow access to the site based on known or suspected contaminants is well-founded in Pennsylvania law and any arguments regarding the economic consequences of the RI/FS are both irrelevant and purely conjectural.

On June 1, 1987, the Barkmans filed a memorandum of law opposing the Department's motion to dismiss, stating that although they fully recognize the statutory authority of the Department to make inspections of private property as necessary to insure compliance with environmental laws, the March 25, 1987 order lacked a factual basis and was, therefore, unjustified and unreasonable.

---

[1]During the remedial investigation, data about the site and waste characteristics, hazards, treatability of waste, and routes of exposure are collected and analyzed. In the course of the feasibility study, a number of potential remedial alternatives are developed, screened and evaluated, culminating in the selection of a remedy.

The Barkmans assert they are entitled to an evidentiary hearing to assess the reasonableness of the order based on existing allegations, including the costs of the study and whether or not less costly alternatives were considered. In addition, the Barkmans asserted in their appeal that the study will cause unreasonable interference with their present use of the property for equipment storage and repair, and, therefore, constitutes a taking of their property without due process of law.

The Department filed a reply memorandum, arguing that the order was based on sampling results from 1982; the continued unpermitted operation of the site, despite a closure order; and a 1985 EPA order to remove 26 drums of hazardous waste from the site which may have caused contamination of local groundwater. The Department also explained that pursuant to the Board's directive, it had met with the Barkmans and an agreement was reached resolving conflicts regarding intrusion upon the Barkmans' business and the location of personnel and contractors on the property. The Barkmans agreed to provide ready access to all personnel, provided that the Department informs Mr. Barkman of the various stages and locations of work at the site. The Department, therefore, contends that only two narrow issues remain; first, whether or not the Department may order the Barkmans to allow access to conduct an extensive study of pollution problems on the site based upon its factual findings to date, and, second, whether the Board may consider the economic impact of the proposed RI/FS workplan on the Barkmans.

Both parties agree that the Welsh landfill site was designated as a Superfund site on the National Priorities List pursuant to Section 105 of CERCLA. It is also uncontroverted that five monitoring wells were sunk around

the perimeter of the site and samples taken from those wells in December, 1982 disclosed the presence of trichloroethylene (TCE), benzene, tetrachloroethane, 1,2-dichloroethene, and 1,1,1-tricholorethane.

In 1976, the Department ordered the landfill closed. The Department alleges the site was never properly closed and continued to operate without a permit. In 1985, the EPA ordered the Barkmans to remove 26 drums containing hazardous wastes which were found to be on the site in excess of 90 days. The Department contends that this finding necessarily admits that disposal activities continued on the site through 1985, despite the 1976 closure order.

The Barkmans claim the site was used only for municipal waste and this use ceased over ten years ago. Any use of the landfill during the 1970's, they claim, was authorized by the permit application pending before the Department. The Barkmans allege the costs of complying with the Department's requirements for continued operation caused them to cease pursuing this permit in 1976. The Barkmans claim they temporarily stored the 26 drums of hazardous waste that were the subject of the 1985 EPA order on a flatbed truck pending their removal to a proper handling facility and that subsequent soil samples of the site did not reveal any of the chemicals recited in the Department's March 25, 1987 order in any detectable amounts. They aver that no chemicals are on the site, and if present, they claim they are not of sufficient quantity to be dangerous.

The Department, however, contends that according to the Lancaster Laboratories' "Analysis Report" which the Department attached to its motion to dismiss, the Barkmans own soil sampling revealed the presence of napthalene. Further, the Department concludes that the site contaminants are migrating

into local groundwater supplies, resulting in a nuisance at numerous homes downslope from the landfill and, thus, necessitating an RI/FS study to formulate an effective cleanup program.

There is ample statutory and case law clearly granting the Department the authority to enter the Barkmans' property in order to perform investigatory activities such as are contemplated by an RI/FS. Specifically, sections of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (CSL), §1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 (the Administrative Code), and the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. (SWMA), vest the Department with authority to issue its March 25, 1987 order.

Numerous provisions of the CSL operate to support the Department's contentions, including §§5, 304, 305, 316, 402(a), 604, and 610. These statutory provisions may be broken down into two broad areas, those which authorize investigation of a pollution problem and those which allow the Department to order testing and corrective measures or abate the problem itself. Sections 5(b)(8), 304, 305, and 604 fall into the former category, while §§5(b)(1), 5(d)(7), 316, 402(b), and 610 are in the latter category. More specifically, §5(b)(8) provides that

> (b) The department shall have the power and its duty shall be to:
>
> * * * * *
>
> (8) Make such inspections of public or private property as are necessary to determine compliance with the provisions of this act, and the rules, regulations, orders or permits issued thereunder.

Section 304 empowers the Department to "make a complete survey of the waters of the Commonwealth in order to ascertain the extent of pollution in each of

said waters..." while §305 gives the Department broad authority to investigate and research all facts relating to pollution of waters of the Commonwealth by industrial waste, including the right of entry upon lands, buildings and premises.

In the latter category of authority, §§5(b)(1), 5(d)(7), 402(b), and 610 give the Department far reaching authority to issue whatever orders are necessary to eliminate pollution to the waters of the Commonwealth. Section 316 provides that when the Department finds pollution, or even a danger of pollution to exist, it may order either a landowner or occupier to allow a person or agency of the Commonwealth access to the land to abate a pollutional condition. Similarly, §604 of the CSL makes it the Department's duty, upon complaint of an alleged violation, to investigate and institute appropriate proceedings to abate the violation.

The Pennsylvania Supreme Court, the Commonwealth Court, and this Board have all broadly construed the Clean Streams Law to authorize the issuance of orders requiring testing by the appellants under the Department's supervision to determine the extent of pollution, as well as performance of abatement measures. The landmark case of National Wood Preservers v. Com., 489 Pa. 221, 414 A.2d 37 (1980), upheld this Board's adjudication ordering appellants to conduct drilling and water sampling to identify the nature and extent of a groundwater contamination problem and then to remove it to be a valid exercise of the police power in light of the existence of a pollutional condition in the form of pentachloraphenol and fuel oil in the ground and surface waters of the area. Indeed, the Commonwealth Court has held in A. H. Grove & Sons, Inc. v. DER, 70 Pa.Cmwlth. 34, 452 A.2d 586 (1982), that circumstantial evidence of a pollutional problem will support an order to

perform testing.[2] Furthermore, it is unnecessary to await concrete, irrefutable evidence of contamination prior to the issuance of a testing or inspection order where there is a danger of pollution. COA Pallets, Inc. v. DER, 1979 EHB 267.

Under the circumstances described in this appeal, we believe that the issuance of the Department's order was justified under the CSL. The contaminants found in the 1982 sampling of the Barkman's property include substances previously recognized as pollutants for purposes of the Clean Streams Law. See, Dillsburg Septic Service v. DER, 1976 EHB 184 (1,1,1 trichlorethane), William Fiore v. DER, 1983 EHB 528 (benzene, napthalene). Furthermore, this Board has held any detectable concentration of either vinyl chloride or benzene causes pollution under the Clean Streams Law. Tenth Street Building Corporation v. DER, 1985 EHB 829. And, while there is disagreement between the Barkmans and the Department on the soil sampling results, there is certainly evidence of naptholene. Although the 1982 sampling results alone provide ample basis for the March, 1987 order, there is also evidence in the form of the Barkman's unpermitted operation of the site and their unauthorized storage of drums of hazardous wastes on the site which establishes, at the very least, a danger of potential pollution on the site.

Like the Clean Streams Law, the SWMA contains various provisions which authorize the Department to issue orders requiring entry upon property to conduct investigations and inspections and orders mandating the abatement of nuisances and pollutional conditions. Sections 104(7) and 608(3) empower the Department to enter upon property to investigate compliance with the SWMA

---

[2] While the Grove decision dealt with an order for the landowner to perform the testing, we believe its reasoning to be equally applicable here.

and to perform sampling and analysis. Sections 104(7), 104(13) and 602 give the Department broad power to issue orders to effectuate compliance with the SWMA and abate nuisances; violations of the SWMA are declared to be public nuisances under §601 of the SWMA.

The Department's order is within the scope of its regulatory authority under the SWMA, given the conditions at the site. The Barkmans' unpermitted disposal of solid waste is a violation of §501 of the SWMA and is, therefore, a statutory nuisance under §601 of the SWMA. Consequently, the Department has authority under §§104 and 602 of the SWMA to issue its order. Even assuming that EPA had no authority to issue its 1985 order to the Barkmans, state law still proscribes their storage of hazardous wastes on the site. The storage of hazardous wastes in drums on the site without a permit is a violation of §401 of the SWMA and, therefore, constitutes a statutory nuisance under §601 of the statute. It, too, is the proper subject of orders issued pursuant to §602 of the SWMA. And, the presence of napthalene in the Barkmans' soil sampling and the 1982 water quality sampling also justified the issuance of an order under §§104(7) and 104(13) of the SWMA.

Even if the Clean Streams Law and the SWMA did not provide the requisite authority for issuance of the Department's order to the Barkmans, §1917-A(2) of the Administrative Code empowers the Department to:

> ...cause examination to be made of nuisances, or questions affecting the security of life and health, in any locality, and, for that purpose without fee or hindrance (sic), to enter, examine and survey all grounds, ...buildings, and places, within the Commonwealth.

Nuisances, for purposes of §1917-A of the Administrative Code, include any conditions which are statutorily declared to be nuisances. Matter of Ryan v.

DER, 30 Pa.Commwlth. 180, 373 A.2d 475 (1977). Here, there are several statutory nuisances: the operation of a solid waste disposal site without a permit; the storage of hazardous waste on the site without a permit; and the failure to comply with a Department order requiring closure of the site, all of which are statutory nuisances by virtue of §601 of the SWMA. Thus, the Department's order is certainly authorized by §1917-A of the Administrative Code.

The Barkmans have claimed that the Department's order will result in an unreasonable intrusion upon their ability to use their property for their business purposes and, therefore, will result in a taking of their property without due process of law. The Pennsylvania Courts have upheld the Department's authority to issue far more intrusive orders restricting business activity than that at issue here. See National Wood Preservers, supra, A. H. Grove and Sons, supra. Furthermore, the Department has attempted to minimize the intrusion on the Barkmans' property.

The major thrust of the Barkman's economic arguments relates to the cost of the RI/FS. The Barkmans have also contended that they should be allowed to challenge whether the RI/FS is too costly and whether the Department should have considered less costly alternatives. The Barkmans claim that the Department's RI/FS workplan exceeds what is reasonably required and that, because of this, the contract price is not justified. They criticize the methodologies in the RI/FS and allege that the Department should first re-test the existing monitoring wells before embarking on a comprehensive investigation. They are concerned about costs because of the potential for either the Department or EPA to recover monies expended on the RI/FS in a cost recovery action. The Department counters these arguments by contending that the Barkmans are attempting to mount an impermissible--at

least under federal law--challenge to the RI/FS and that the Barkmans' challenge to costs of the study is premature.

In resolving this part of the Department's motion to dismiss, we must examine the purpose of the order. It simply requires that the Barkmans allow the Department and its contractors access to the site to perform tests or other activities necessary to conduct the RI/FS:

> A. Beginning on March 25, 1987, the Barkmans shall allow the Deprtment and its contactors, agents, employees and representatives with all necessary and convenient personnel, materials and equipment, free access to the Superfund site to do any and all things that may be necessary, convenient or required for the purpose of conducting a RI/FS as more fully described in the workplan, and any subsequent amendments, attached hereto as Exhibit B and made a part hereof.
>
> B. The Barkmans shall not obstruct, impede or otherwise interfere with the entry and conduct of any investigative, monitoring and related work conducted by the Department and its contractors, employees, agents, or representatives.
>
> C. This Order shall apply to all agents, employees and other representatives of the Barkmans, all persons in active concert and participation with the Barkmans and their successors or assigns, during the time necessary to conduct the RI/FS.

Thus, the only question which is properly before the Board at this time is whether the order <u>to allow access</u> was an abuse of discretion. Since we have already determined, <u>supra</u>, that the Department's order was amply justified given the conditions at the site and the Department has negotiated with the Barkmans to assure that it does not unreasonably intrude upon the Barkmans' everyday activities, there remains nothing for the Board to decide.

However, we will address the Barkmans' arguments regarding the scope and cost of the RI/FS, which we believe to be premature. Under 42 U.S.C.

§9607, an owner or operator of a facility at which hazardous substances were disposed of is liable for:

> (A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

As a means of enabling EPA or a state to recover such costs in a recovery action, 40 CFR §300.69(a) specifies that in the course of conducting an RI/FS that:

> During all phases, documentation shall be collected and maintained to support all actions taken under this Plan, and to form the basis for cost recovery. In general, documentation should be sufficient to provide the source and circumstances of the condition, the identity of responsible parties, accurate accounting of Federal costs incurred, and impacts and potential impacts to the public health, welfare and environment.

The federal courts have held that there is no review of the RI/FS workplan until EPA files a suit for reimbursement of costs under §107 of CERCLA, 42 U.S.C. §9607. See Lone Pine Steering Committee v. U.S. EPA, 600 F.Supp. 1487 (D.N.J. 1985), and Wheaton Industries v. EPA, 751 F.2d 354 (3d Cir 1986). In reasoning that the non-availability of review of the RI/FS workplan was not a deprivation of due process, the New Jersey District Court held in Lone Pine that a potentially responsible party is given the opportunity to raise objections to the cleanup in the cost recovery action by the federal government, a wholly separate procedure.

There are four state statutory provisions relevant to this matter which authorize the Department to abate pollutional conditions or nuisances and recover the costs from the responsible persons: §316 of the Clean Streams Law, §§601 and 613 of the SWMA, and §1917-A of the Administrative Code.

Section 316 of the Clean Streams Law provides in relevant part that:

> Whenever the department finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the department may order the landowner or occupier to correct the condition in a manner satisfactory to the department or it may order such owner or occupier to allow a...person or agency of the Commonwealth access to the land to take such action...
>
> For the purpose of collecting or recovering the expense involved in correcting the condition, the department may assess the amount due in the same manner as civil penalties are assessed under the provisions of Section 605.
>
> (emphasis added)

Similarly, §§601 and 613 of the SWMA state, respectively:

> Any violation of any provision of this act, any rule or regulation of the department, or any term or condition of any permit, shall constitute a public nuisance. Any person or municipality committing such a violation shall be liable for the costs of abatement of any pollution and any public nuisance caused by such violation. The Environmental Hearing Board and any court of competent jurisdiction is hereby given jurisdiction over actions to recover the costs of such abatement.
>
> (emphasis added)

and

> Any person or municipality who causes a public nuisance shall be liable for the costs of abatement. The department, any Commonwealth agency, or any municipality which undertakes to abate a public nuisance may recover the cost of abatement in an action in equity brought before any court of competent jurisdiction. In addition, the Environmental Hearing Board is hereby given jurisdiction over actions by the department to recover the costs of abatement.

(emphasis added)

And, §1917-A(5) of the Administrative Code provides:

> The Department shall have the power and its duty shall be for the purpose of collecting or recovering the expense of the abatement or removal of a nuisance, to file a claim, or maintain an action in such a manner as may now or hereafter be provided by law, against the owner or occupant of the premises upon or from which such nuisance shall have been abated or removed by the Department.

Thus, as is the case at the federal level, a separate proceeding exists to recover the costs of abatement of a nuisance or pollutional condition. The appropriate time to question the costs of the RI/FS and any resultant remedial action undertaken by the Department is when such a recovery action is brought by the Department. Otherwise, the swift elimination of pollutional and nuisance conditions will be impeded, resulting in a frustration of the statutory purpose of abatement and remedial actions. We will end up devoting considerable resources to endless challenges to the methodologies and costs of the studies, thus becoming so engrossed in studying the studies that we lose sight of their purpose. This is wholly inconsistent with the General Assembly's intention in authorizing the Department to abate nuisances and pollutional conditions and later recover the cost from responsible parties.

Because the Department's order is amply warranted under the circumstances, the Barkmans' challenge to the methodology and cost of the RI/FS is not relevant to our review of the order, and the Department and the Barkmans have reached an accommodation regarding minimizing intrusion on the Barkmans' business, there is no relief that we can grant and the Barkmans' appeal must be dismissed.

O R D E R

AND NOW, this 27th day of May, 1988, the Department of Environmental Resources' Motion to Dismiss is granted and the appeal of Ernest C. and Grace Barkman is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: May 27, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Douglas Brennan, Esq.
Donald A. Brown, Esq.
Central Region
For Appellant:
Marvin L. Wilenzik, Esq.
Richard S. Watt, Esq.
Norristown, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

ANDERSON W. DONAN, M.D.	:	
	:	
v.	:	EHB Docket No. 85-308-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	Issued: June 1, 1988
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	

OPINION AND ORDER SUR
MOTION TO LIMIT ISSUES

Synopsis

A Motion to Limit Issues filed by the Department of Environmental Resources (DER) is denied in a case where DER rejected as "frivolous" a petition to declare an area unsuitable for mining. The Board's review of DER's action is de novo; therefore, the Board may consider evidence which was not submitted to DER at the time the petition was filed. While the regulations provide that a party whose petition is deemed frivolous may refile that petition with DER along with additional supporting evidence, this does not alter the Board's scope of review.

Discussion

This proceeding involves an appeal by Anderson W. Donan, M. D. (Donan) from a DER letter dated June 28, 1985 rejecting as "frivolous" Donan's petition to declare an area in Irwin Township, Venango County unsuitable for mining. Hearings on the merits of this appeal are scheduled for June 12 and 13, 1988. The issue which must now be resolved is whether to grant DER's

Motion to Limit Issues, which was filed on September 8, 1987. Donan has filed a memorandum opposing DER's motion.

In its motion, DER seeks to bar Donan from presenting any allegation or evidence at the hearing which was not submitted to DER prior to rejection of the petition. DER recognizes that the Board's review is de novo; however, it asserts that since the regulations governing these petitions provide for resubmitting a petition and additional information where the petition was rejected as frivolous (25 Pa. Code §86.124(a)(3)), Donan should refile its petition with DER instead of presenting this new evidence to the Board. DER explains that while a petition is pending, there is a temporary ban on issuing mining permits within the area covered by the petition (25 Pa. Code §86.124(a)(6)), and that this ban could constitute a government "taking" of private property which requires compensation under the United States Constitution. Therefore, it is important for DER to promptly reject petitions which clearly lack merit. DER asserts that the submission of new evidence to the Board, instead of to DER in the form of a new petition, will adversely affect DER's ability to review petitions and may lead to renewed challenges to the process of designating areas as unsuitable for mining.[1]

In his memorandum opposing DER's motion, Donan argues that since the Board's review is de novo, the Board may consider evidence beyond that reviewed by DER. Moreover, Donan submits that while he is planning to present additional evidence in support of his petition, he is still asserting the same three reasons why the area should be declared unsuitable for mining: the effect of mining upon springs and brooks on his property, the effect on the

---

[1] DER filed an amendment to its motion on January 26, 1988. This amendment sets out additional evidence which DER asserts should be barred at the hearing because it was not submitted to DER before the petition was rejected.

Venango Trail and other historical sites, and the effect on habitat of the eastern massasauga. So long as the evidence tends to establish these three grounds, Donan asserts that the evidence is admissible.

It is settled law that the Board conducts its hearings de novo; thus, it is the Board's duty to determine if DER's action can be sustained based upon the evidence presented to the Board, not based upon the evidence submitted to DER. Warren Sand & Gravel Co., Inc. v. Commonwealth, DER, 20 Pa. Commonwealth Ct. 186, 341 A.2d 556 (1975). DER's argument that in this case the Board should depart from this principle and consider only the evidence submitted to DER is based upon 25 Pa. Code §86.124(a)(3), which provides:

> When considering a petition for an area which was previously and unsuccessfully proposed for designation, the Department will determine if the new petition presents new allegations of fact. If the petition does not contain new allegations of fact, the Department will refuse to consider the petition and may return the petition to the petitioner, with a statement of its findings and a reference to the record of the previous designation proceedings where the facts were considered.

25 Pa. Code §86.124(a)(3).

The regulation quoted above states how the Department will handle petitions which were rejected previously; the language implies that DER will reconsider the merits of petitions which are supported by new factual allegations. This language does not, however, change the Board's scope of review when there is an appeal from a determination that a petition is frivolous. At most, it gives the petitioner the option of refiling its petition instead of prosecuting an appeal. The mere fact that a party may refile a petition does not change the Board's scope of review in an appeal from the denial of the original petition.

Moreover, DER has not explained how accepting evidence which was not submitted to DER will endanger the review process. We would not expect

parties to withhold information from DER because doing so would increase the risk that the petition will be rejected as frivolous; once the petition is rejected, the temporary ban on granting mining permits in the area is lifted. 25 Pa. Code §86.124(a)(6).

ORDER

AND NOW, this 1st day of June, 1988, the Motion to Limit Issues filed by the Department of Environmental Resources is denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Hearing Examiner

DATED: June 1, 1988

cc: For the Commonwealth, DER:
Richard Mather, Esq.
Regulatory Counsel
For Appellant:
Michael Boyle, Esq.
Pittsburgh, PA
nb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

RIGHT OF WAY PAVING COMPANY, INC.	:	
	:	
v.	:	EHB Docket No. 86-079-R
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 2, 1988

OPINION AND ORDER
SUR
PETITION TO INTERVENE

Synopsis

A petition to intervene is granted where the petitioner's interests are inadequately represented by an existing party to the appeal.

OPINION

This matter was initiated by the February 13, 1986 filing of a notice of appeal by Right of Way Paving Company, Inc. (ROW) from two Department of Environmental Resources (DER) bond forfeiture actions pertaining to two ROW mine sites located in Fallowfield Township, Westmoreland County. One site was a surface coal mining site, while the second was a sandstone quarry mining site. With respect to the sandstone quarry, DER forfeited surety bond No. 2453829 written by American Insurance Company (AIC). The bond was in the amount of $10,982.50 and covered an area of 19.1 acres.

The matter before the Board at this point is a renewed petition to intervene filed by AIC. On March 24, 1986, AIC filed its original petition to intervene in this appeal. The Board denied the petition on the basis that AIC

failed to show that its interests would be inadequately represented by ROW but nonetheless permitted AIC to amend its petition to show that the criteria for intervention at 25 Pa.Code §21.62 could be met. See Right of Way Paving Company, Inc. v. DER, 1986 EHB 364 (ROW I). After reviewing AIC's amended petition to intervene, the Board again denied intervention. See Right of Way Paving Company, Inc. v. DER, 1986 EHB 621 (ROW II). As before, the basis for denial was the Board's conclusion that AIC failed to show that ROW, whom the Board viewed as having coincident interests, would not adequately represent its interests. However, this second denial was provisional and the Board specifically stated that AIC could renew its intervention request if it turned out that ROW was not adequately representing its interests.

In due course, this appeal was scheduled for a hearing on the merits for April 19-22, 1988. Notice of the hearing was given to the parties by the Board's notice of March 21, 1988. On the morning of the first scheduled day of the hearing, April 19, 1988, Counsel for ROW telephoned the Board and stated that neither he nor his client would be attending the hearing. At the appointed hour of 10:00 am, with no one from ROW being in attendance, Board Member Roth, who was to have heard this appeal, made a statement on the record in which he outlined the events pertaining to ROW non-appearance and indicated his intention to propose an order to his fellow Board Members which would dismiss this appeal for failure to prosecute. Given these circumstances, there appeared no need to require DER to put forth any evidence and the record was thus closed. On April 22, 1988, but before this matter could be disposed of, the Board received the instant renewed petition to intervene from AIC.

DER opposes this renewed petition, arguing that AIC should have

timely appealed the forfeiture action.[1] Having failed to so, DER maintains that the forfeiture became final and unappealable and that AIC may not be permitted a second challenge via intervention. Indeed, DER maintains that this intervention request is merely AIC's attempt to circumvent its failure to timely appeal.

The issue to be resolved here is not one of administrative finality of DER's forfeiture action but, rather, the conditions under which a party may intervene in an appeal brought by some other party. In ROW I, the Board dealt with this issue and found that AIC would be qualified to intervene if it could meet the requirements of 25 Pa.Code §21.62. Moreover, the Board allowed AIC the opportunity to amend its petition to make such a showing. Additionally, the Board concluded that ". . .DER's main argument to AIC's intervention -- namely that AIC by intervening is attempting to circumvent its original failure to timely appeal the . . . forfeiture letter -- lacks merit." ROW I, at 366. Indeed, as the Board stated in ROW II, ". . . AIC's petition to intervene will be adjudged solely on its petition's merits, wholly irrespective of the history of AIC's own attempts to appeal DER's forfeiture letter." ROW II, at 623. The specific criteria of focus was the adequacy of representation by a present party to the appeal, namely, ROW. With regard to this issue, the Board, in ROW II, stated that :

> ". . . we provisionally deny AIC's petition to intervene, but do not make this ruling final. AIC's counsel can observe the progress of this litigation, especially the conduct of ROW's counsel at the hearing on the merits of this matter. Even after the hearing on the merits begins, the Board will permit AIC to renew its petition if AIC believes the course of events have strengthened its reasons for intervention, to the point

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[1] AIC did file its own appeal of the forfeiture of surety bond No. 2453829, EHB Docket No. 86-106-R which, however, the Board dismissed as having been untimely filed.

> where the Board's standards under §21.62 will be met. Because the Board is deferring a final ruling on AIC's petition, AIC's rights of intervention under §21.62(a) will not lapse when the hearing on the merits of this appeal begins.
>
> ROW II, at 624

Obviously, as matters turned out, ROW provided no representation at all. We have no reason to think that we incorrectly considered the criteria for intervention in ROW I or ROW II. We believe that AIC is qualified to intervene in this matter and that, clearly, the reason we earlier denied it intervention is no longer applicable. Accordingly, we will grant AIC's petition.

ORDER

AND NOW, this 1st day of June, 1988, it is ordered that American Insurance Company's petition to intervene in this matter is granted with respect to the forfeiture of Surety Bond No. 2453829. It is also ordered that, on or before September 1, 1988, AIC shall file its prehearing memorandum, to be followed in 15 days by that of DER.

ENVIRONMENTAL HEARING BOARD

WILLIAM A. ROTH, MEMBER

DATED: June 2, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Joseph K. Reinhart, Esq.
Western Region
For Appellant:
Gregg M. Rosen, Esq.
ROSEN & MAHFOOD
Pittsburgh, PA

For Intervenor:
Robert F. McCabe, Esq.
LINDSAY, McGINNIS, McCANDLESS & McCABE
Pittsburgh, PA

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

AMERICAN TANK TRANSPORT, INC.	:	
	:	
v.	:	EHB Docket No. 87-455-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 2, 1988

OPINION AND ORDER
SUR
MOTION TO COMPEL

Synopsis

The Board will grant a motion to compel responses to interrogatories, admissions, and requests for production of documents where the information sought is relevant to the subject matter of the appeal. Information relating to corporate officers' alleged participation in violations of manifest requirements is not deemed relevant where the Department of Environmental Resources has not specifically identified those officers as the recipients of the assessment. The alleged violator's profit from waste shipments where purportedly non-complying manifests were used is relevant to calculation of the penalty.

OPINION

American Tank Transport, Inc. (ATT) is a licensed transporter of hazardous waste pursuant to Pennsylvania License No. PA-AH0081. On nine occasions, ATT accepted for transport waste hydrochloric acid, a hazardous waste pursuant to 25 Pa.Code §75.261(g)(3), generated by Wheeling-Pittsburgh

Steel Corporation and transported to K. A. Steel Chemicals, Inc. in Gary, Indiana. Each shipment was accompanied by a uniform Hazardous Waste Manifest which listed K. A. Steel Chemicals, Inc. as the transporter, using its U.S. Environmental Protection Agency (EPA) identification number. The manifests allegedly failed to list a state identification number and in no way identified ATT as the transporter. On one occasion, ATT accepted for transport waste solium hydroxide, a hazardous waste pursuant to 25 Pa.Code §75.261(g)(3), generated by Chem-Clear of Baltimore, Inc. and transported to Waste Conversion, Inc. of Hatfield, Pennsylvania. The Department of Environmental Resources (Department) alleges that Items 13 (Total Waste Quantity) and Item 14 (Unit Wt./Volume) of its copy of the manifest accompanying this shipment were incomplete and/or incapable of being read. ATT maintains that, according to copies of this manifest available to it, Item 13 was filled out.

The Department issued a notice of violation and civil penalty assessment to ATT for its alleged violations of numerous provisions of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq., and the regulations promulgated thereunder. On October 23, 1987, ATT filed a notice of appeal of the civil penalty assessment.

The present controversy stems from several outstanding discovery motions in this matter.

Department's First Set of Interrogatories

On November 15, 1987, the Department served its First Set of Interrogatories upon ATT. On December 11, 1987, ATT responded, but objected to two of the interrogatories. On January 5, 1988, the Department filed a Motion to Dismiss Objections and to Compel Responses to Interrogatories. On

January 27, 1988, ATT filed its response to the motion. We will address the interrogatories individually.

Interrogatory No. 1 requested ATT to provide the names of each fact witness it intends to call at trial and summarize all the relevant facts, opinions and subject matter on which he or she is expected to testify. ATT objected to the request to summarize the testimony of each witness as seeking disclosure of trial strategy, citing Pa.R.C.P. 4003.3.

The Department contends it is addressing the substance of the testimony of proposed fact witnesses and is not seeking mental impressions or conclusions about the value or merit of a claim or defense or trial strategy or tactics. ATT argues that revealing what facts each witness will testify to is revealing its tactics and strategy.

Rule 4003.3 provides as follows:

> Subject to the provisions of Rules 4003.4 and 4003.5, a party may obtain discovery of any matter discoverable under Rule 4003.1 even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, including his attorney, consultant, surety, indemnitor, insurer or agent. The discovery shall not include disclosure of the mental impressions of a party's attorney or his conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

Even if ATT's fact witnesses would be classified as representatives of the party, the information sought here is not protected by Rule 4003.3. The Department is requesting information in the nature of facts, opinions and

basic subject matter of the witnesses' testimony, not opinion testimony on the merit of any claims or defenses. The Department's motion to compel is granted for Interrogatory No. 1.

Interrogatory No. 9(b) requested ATT to state whether K. A. Steel Chemicals was licensed to transport hazardous waste in Pennsylvania. Interrogatory No. 9(c) requests ATT to state if it has ever acted as "in house carrier" for any other company and used that company's name and U.S. EPA identification number on the manifest. If yes, ATT was requested to give the company's name, a copy of the manifest and answer whether or not that company had a Pennsylvania license to transport hazardous waste. ATT objected to both 9(b) and (c) as seeking information not relevant nor calculated to lead to the discovery of admissible evidence.

The Department asserts this information is necessary to determine ATT's lawful status as an "in-house carrier" for K A. Steel and other companies. If K. A. Steel lacks a Pennsylvania license to transport hazardous waste, then ATT's own name and identification number, both U.S. EPA and PA, must be on the manifests. Here, they were not. ATT responds that it has dropped as a basis for its appeal its argument that it was acting as "in-house carrier" for K. A. Steel and that whether it acted as in-house carrier for any other companies has no bearing on the issue of whether or not these particular manifests were completed correctly.

We find only question 9(b) to be relevant to the question of whether or not ATT completed the manifests correctly and the motion to compel with respect to that request is granted. Because ATT has dropped as a defense its argument that it acted as an in-house carrier for K. A. Steel, any questions regarding that defense are no longer relevant and we will sustain the objection to that request.

Department's Request for Admissions

On November 11, 1987, the Department served a Request for Admissions on ATT. On December 11, 1987, ATT provided both answers and objections. On January 6, 1988, the Department filed a Motion to Determine Sufficiency of Objections and to Compel Answers, to which ATT filed a response on January 27, 1988. We will address the contested admissions individually.

Admission No. 2 requested ATT to admit that William E. Stevens is the President and William J. Stevens is the Secretary/Treasurer of ATT. ATT objected that the information is neither relevant nor calculated to lead to the discovery of admissible evidence. The Department states this information is a relevant finding of fact in the civil penalty assessment, and its seeking confirmation of the identification of the company officers is relevant to litigation of the issue of liability of ATT's officers. ATT responds that because its officers were not directly named in the civil penalty assessment, this issue is beyond the scope of this appeal. Furthermore, ATT has not alleged that the Department's finding in the assessment on this matter is incorrect and the issue would be more properly decided if and when there is a collection action.

While corporate officers may be held jointly and severally liable with the corporation, there must first be a showing that the officers participated to some extent in the conduct leading to the violations or there must be a showing sufficient to justify piercing the corporate veil. But, we need not reach this question, since the Department has not named ATT's officers as recipients of the assessment, and, therefore, this request is beyond the scope of discovery for this appeal. The Department's motion to compel this admission is accordingly denied.

Admission No. 6 requests ATT to admit K. A. Steel was not licensed to transport hazardous wastes in Pennsylvania. ATT objected to this request as not relevant nor calculated to lead to the discovery of admissible evidence. The Department asserts this information is necessary to determine if ATT should have used its own name and identification numbers, both U.S. EPA and PA, on the manifest forms. ATT states it has dropped its in-house carrier argument and that even if it had not done so, whether or not K. A. Steel had a license is not relevant to the issue of whether the assessment against ATT was lawful. Again, because ATT has dropped its in-house carrier defense, any questions relating to that defense are no longer relevant and we will sustain ATT's objection to this request.

Admission No. 9 requests ATT to admit that at all times relevant to the manifests, ATT was under the direction and control of its officers, William E. Stevens and William J. Stevens. The Department states this is a finding in its civil penalty assessment relevant to the involvement and/or direction of ATT's principal officers and to a determination of the liability and willfulness of the violations. ATT argues that it never alleged this finding in the assessment to be untrue and that it is irrelevant and beyond the scope of the case since the officers were not named in the assessment and their liability is not the issue at this time.

The Department has not named or implicated ATT's officers in any way to date, and, therefore, this request is beyond the scope of discovery for this appeal and the motion to compel this admission is denied.

Department's Second Set of Interrogatories and Request for Production of Documents

On January 5, 1988, the Department served a Second Set of Interrogatories on ATT. On February 1, 1988, ATT objected to both

interrogatories posed in the second set. The Department filed a Second Motion to Dismiss Objections and to Compel Responses to Interrogatories and Production of Documents on February 17, 1988. The Department filed a reply to ATT's response on March 7, 1988. We will address the two contested interrogatories separately.

Interrogatory No. 1 requested ATT to state the profit earned on each individual shipment of waste represented by each manifest at issue in this appeal and to show the complete calculation and state the source upon which the calculation is based. ATT objected to the request, stating that the information sought is neither relevant nor calculated to lead to the discovery of admissible evidence.

The Department answers that the relevance is clear and that the Board has recognized the profit earned by an operator in transporting hazardous waste in violation of the SWMA is a relevant factor in determining the amount of the civil penalty assessment. ATT insists it is the savings to the violator from the violation that is the relevant inquiry. The Department finds this distinction inappropriate and argues that profit gained by leaving manifest items blank or the difference in cost in typing in the name of the correct transporter are not the focus of the profit factor. The profit inquiry encompasses both the savings to the violator from the violation and the deterrence effect engendered by the amount of the civil penalty.

The relevant language of Section 605 of the SWMA is as follows:

> In determining the amount of the penalty, the department shall consider the willfulness of the violation, damage to air, water, land or other natural resources of the Commonwealth or their uses, cost of restoration and abatement, savings resulting to the person in consequence of such violation, and other relevant factors.

The Board has held that one consideration in determining the deterrent effect of the penalty is the profit, if any, generated by the operator in connection with the violations. Refiner's Transport and Terminal Corporation v. DER, 1986 EHB 400, 447. See also, Southwest Equipment Rental, Inc. v. DER, 1986 EHB 465, 480. It is not unreasonable to request these profit figures even if only to use for comparison purposes in ascertaining the savings to the violator. The profit earned by ATT on each shipment is a relevant area of inquiry, and the motion to compel is granted.

Interrogatory No. 2 requested ATT to state, in detail, the involvement of William E. Stevens and William J. Stevens in the decision to use K. A. Steel's name as the transporter on the manifests at issue in this appeal. ATT objected to the request as not relevant nor calculated to lead to the discovery of admissible evidence. The Department argues that the SWMA provides that in assessing a civil penalty, the Department is to consider willfulness and negligence among other factors, 35 P.S. §6018.605, and the extent of the knowledge and involvement of ATT's officers in the alleged violations is central to this determination. ATT responds that the relevance of corporate officers' involvement has been addressed repeatedly in prior motions and continued questioning on this issue has caused unreasonable annoyance, embarrassment and oppression in violation of Pa.R.C.P. 4011(b).

Again, we need not reach this question since the Department has not named ATT's officers as recipients of the assessment, and, therefore, this request is beyond the scope of discovery for this appeal. Accordingly, ATT's objection to this request is sustained.

Department's Second Request for Production of Documents Finally, ATT objected to the Department's Second Request for Production of Documents,

Request No. 2 asking ATT to provide all receipts, bills, accounting ledgers, or any other document which shows payment to ATT for the shipments represented by the manifests at issue as not relevant nor calculated to lead to the discovery of admissible evidence. The Department argues that the distinction between savings to the violator gained by filling out the manifests improperly and the profit gained from the actual unlawful shipment is inappropriate for the reasons stated earlier in its reply to the objections to Interrogatory No. 1 in the Department's Second Set of Interrogatories.

Again, for the reasons stated in the discussion following Interrogatory No. 1 in the Department's Second Set of Interrogatories, we find information on the profits earned by ATT on each shipment to be a relevant area of inquiry and the motion to compel is granted with respect to the Request for Production of Documents, Request No. 2.

The Department, on January 19, 1988, filed a Motion for Extension of Time for Discovery Nunc Pro Tunc, seeking an additional 45 days of discovery beyond the date ATT reponds to all presently outstanding interrogatories, including those subject to the Department's Motion to Compel. On January 27, 1988, ATT filed its response, calling the motion premature since, if the Board grants the motions to compel, ATT will then be required to provide further responses to the subject discovery. ATT claims any further discovery would cause unreasonable annoyance, oppression, burden and expense. Pa.R.C.P. 4011(b). In light of our disposition of the Department's motion to compel responses to discovery requests filed in this case, extended discovery time periods are now a necessity and we will grant the motion.

O R D E R

AND NOW, this 2nd day of June, 1988, it is ordered that:

1) The Department of Environmental Resources' Motion to Compel Discovery is granted with respect to Interrogatory Nos. 1 and 9(b) of the Department's First Set of Interrogatories, Interrogatory No. 1 of the Department's Second Set of Interrogatories, and Request No. 2 of the Department's Second Request for Production of Documents;

2) The Department's motion is denied and ATT's objections are sustained with respect to Interrogatory No. 9(c) of the Department's First Set of Interrogatories, Admission Nos. 2, 6, and 9 of the Department's Request for Admissions, and Interrogatory No. 2 of the Department's Second Set of Interrogatories;

3) On or before June 15, 1988, ATT shall respond to the interrogatories and requests in Paragraph 1 above; and

4) All discovery in this matter shall be completed on or before July 15, 1988.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: June 2, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
David Wersan, Esq.
Central Region
For Appellant:
Bernard A. Labuskes, Jr., Esq.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

SALFORD TOWNSHIP BOARD OF SUPERVISORS, et al.	:	
v.	:	EHB Docket No. 86-660-W
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and MIGNATTI CONSTRUCTION CO., INC., Permittee	:	Issued: June 3, 1988

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

Motion for summary judgment reversing the Department of Environmental Resources' issuance of mining and mine drainage permits and an air quality plan approval for a quarry is denied where there are numerous issues of material fact in dispute.

OPINION

This matter was initiated with the filing of four separate appeals challenging the Department of Environmental Resources' (Department) November 7, 1986 issuance of surface mining and mine drainage permits and an air quality plan approval to Mignatti Construction Company (Mignatti) authorizing the construction and operation of the Naceville Quarry (Quarry) in West Rockhill Township, Berks County.

Surface Mining Permit No. 300696-09850601-01-0 (the mining permit) was issued pursuant to the Noncoal Surface Mining Conservation and Reclamation

Act, the Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. §3301 et seq. (Noncoal SMCRA); Mine Drainage Permit No. 09850601 was issued pursuant to the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (the Clean Streams Law); and Air Quality Plan Approval No. 09-310-028 was issued pursuant to the Air Pollution Control Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 et seq. (the Air Pollution Control Act). The appeal of West Rockhill and Salford Townships was docketed at 86-660-W, the appeal of Dr. Donald W. Raub at Docket No. 86-678-W, the appeal of Margaret A. Fitzgerald at Docket No. 87-005-W, and the appeal of Dr. David C. Rilling at Docket No. 87-007-W. They were consolidated at Docket No. 86-660-W by order of the Board dated March 19, 1987.

The Department originally issued a mine drainage permit to Mignatti for the Quarry in November, 1974, and a surface mining permit in October, 1976. The Townships and others appealed the surface mining permit in Township of Salford v. DER and Mignatti Construction Company, 1978 EHB 62, and the Board remanded the matter to the Department to require Mignatti to submit a soil and erosion plan and an application for an air quality permit for an integrated quarry operation. The Department was then to decide whether or not to reinstate the contested mine drainage permit. The Board's holding was affirmed in part by the Commonwealth Court in Mignatti Construction Company, Inc. v. EHB, 49 Pa.Cmwlth.497, 411 A.2d 860, (1980), which reversed that portion of the Board's decision requiring Mignatti to submit an erosion and soil plan.

On June 7, 1984, Mignatti was advised by the Department to submit an application for reissuance of the mine drainage permit because the Quarry had not been placed in operation within two years of the issuance of the permit. While Mignatti contested the need to reapply, it did file the application and

on November 7, 1986, the mine drainage permit was reissued, the surface mining permit was reinstated, and the air quality plan approval was issued. These appeals followed.

The Townships have now moved for summary judgment in their appeal on four grounds: Mignatti's officers' alleged past non-compliance with Department orders, thus precluding Mignatti from qualifying for an operator's license; application materials indicating emissions of total suspended particulate matter from the Quarry will violate air quality standards; the location of the Quarry in violation of buffer zones as set forth in the Clean Streams Law and Noncoal SMCRA; and finally, drainage features at the Quarry resulting in the discharge of fill material into wetlands in violation of the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §679.101 et seq (DSEA).

In its disposition of a motion for summary judgment, the Board is authorized to render summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The Board must read the motion for summary judgment in the light most favorable to the non-moving party. Robert C. Penoyer v. DER, 1987 EHB 131. We will individually address the Township's four bases for summary judgment.

Compliance History of Mignatti's Officers

First, the Townships contend the Department should have denied the mining permit based on the alleged non-compliance of Mignatti's officers with Department orders as cited in the October 23, 1986 Consent Order and Agreement (COA) between Bethayres Reclamation Corporation, whose officers are also officers of Mignatti, and the Department. The Townships maintain that this

failure to comply with Department orders bars Mignatti from receiving an operator's license under §§5(c) and 8(a) of Noncoal SMCRA.

In its answer to the motion and brief in opposition thereto, Mignatti states this argument is without merit since Noncoal SMCRA does not impose such a requirement, and, in any event, Mignatti, is and has been the holder of an operator's license for a surface mine since 1972; that Mignatti has not failed to comply with any "adjudicated" proceeding, order, consent order and agreement or decree according to the precise language of §5(c) of Noncoal SMCRA; and that the COA between the Department and Bethayres does not conclusively establish violations of the Clean Streams Law and the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq.

The Department also opposes this portion of the Township's motion, contending that the alleged violations by Mignatti's officers cited in the COA are still issues of fact to be litigated by third parties and the Townships are precluded from challenging the validity of any operator's license issued to Mignatti in this appeal of the mining and mine drainage permits. We agree with the Department's assessment of this portion of the Township's motion.

The Township's contentions relating to Mignatti's operator's license, in essence, constitute an impermissible collateral attack upon the propriety of the Department's issuance of an operator's license to Mignatti. The Townships have not appealed that license in this proceeding, nor in any matter related to Mignatti pending before the Board.

Furthermore, there are material issues of fact relating to Mignatti's alleged violations. The COA between the Department and Bethayres Reclamation Corporation (BRC) contains the following paragraph:

> The execution of this document by BRC shall

> be without prejudice to BRC, as between itself and third parties, to assert any defenses BRC may have with respect to claims at law or in equity that may be made by third parties against BRC and the execution by BRC shall not be construed as an admission by BRC with respect to the alleged violations, in litigation with third parties.

The COA, therefore, may not be raised by the Townships as conclusive and final findings of violations against BRC and its officers, and these alleged violations remain an issue of fact between the Townships and Mignatti. Consequently, we must deny summary judgment on this issue.

Compliance with Total Suspended Particulate Limits

Second, the Townships aver that they are entitled to summary judgment reversing and revoking the air quality plan approval because evidence in Mignatti's application demonstrates that the Quarry will cause violations of the Secondary National Ambient Air Quality Standards (NAAQS) for total suspended particulates (TSP) as set forth in 40 C.F.R. §50.7 (1986) and incorporated by reference in the Department's regulations at 25 Pa.Code §131.2.

Mignatti argues that the Townships' assertions are based upon data generated from a sampling station several miles from the Quarry and a model in which arithmetic mean, rather than geometric mean, annual concentrations were employed. Data from a new sampling station in close proximity to the Quarry, Mignatti contends, are more appropriately considered in evaluating Mignatti's compliance with the Secondary NAAQS for TSP.

The Department argues that Mignatti has raised an issue of fact with regard to the proper mean to be employed in computing air quality monitoring

data sufficient to defeat a summary judgment motion and, further, asserts that exceeding Secondary NAAQS would not invalidate the permit and that the Department has discretion to allow such excesses.

We believe that summary judgment on this issue is not warranted because there are material issues of fact relating to the proper statistical methodology to be employed in assessing the modeling data and to the location of the sampling station.

Buffer Zones

Third, the Townships aver they are entitled to summary judgment revoking the mining and Clean Streams Law permits because mining in the form of Mignatti's access road will occur within buffer zones where mining is proscribed by the Clean Streams Law and Noncoal SMCRA. Specifically, they allege mining will occur within 300 feet of an occupied residence (the Fitzgerald residence) and 100 feet of a township road in violation of §11(c) of Noncoal SMCRA and §315(o)(4) of the Clean Streams Law. The Townships further allege that the application materials contain no justification for a waiver under §11(c)(2)(ii) of Noncoal SMCRA. They also contend that §315(o) of the Clean Streams Law does not authorize any waivers from the residential buffer zone unless the owner of the occupied dwelling gives consent, and that Mrs. Fitzgerald has not given her consent.

Mignatti responds by contending that the Townships' interpretation of the site map (Twp's Ex. 17) is erroneous and that it has obtained a waiver with respect to the distance between its access road and the Fitzgerald residence located on County Line Road. It argues that it has valid existing rights by virtue of the Department's 1974 issuance of a mine drainage permit and, therefore, §315(o) of the Clean Streams Law is inapplicable to its present permits. Mignatti also contends that an access road does not

constitute surface mining for purposes of §11(c) of Noncoal SMCRA and believes that a waiver to the buffer zone requirement was proper since it qualified as a "special circumstance" under §11(c)(3)(ii) of Noncoal SMCRA.

The Department adds to the variety of disparate opinions on this issue by urging us that summary judgment is inappropriate here because the 1980 amendments to the Clean Streams Law, specifically §315(o), do not apply to noncoal mining.

Certainly, the Department's position regarding the inapplicability of the 1980 Clean Streams Law amendments to noncoal mining offers a simple solution to this problem. However, we cannot accept that simple solution, given the clear and unambiguous language in the Clean Streams Law. Summary judgment is unjustified here because there are issues of material fact relating to property lines and distances, the applicability of the waiver provisions, and whether Mignatti had valid existing rights as of August 3, 1977. In addition, it is not at all clear that the Townships are entitled to judgment as a matter of law, given differences in language between §11(c)(2) of Noncoal SMCRA and §315(o) of the Clean Streams Law, an issue not addressed by any of the parties.

Wetlands Protection

Fourth, the Townships claim that they are entitled to summary judgment and a reversal of all the permits issued to Mignatti because certain of Mignatti's operations will involve the placement of obstructions and the discharge of fill in wetlands in violation of §404 of the Clean Water Act, 33 U.S.C.A. §1344, the DSEA, and Article I, §27 of the Pennsylvania Constitution. They also argue that Mignatti could never obtain the DSEA permit because its activities are in an "important" wetland as defined in 25 Pa.Code §105.17(a) and that Mignatti could never satisfy the public benefit requirement of that

regulation and 25 Pa.Code §105.16, which applies to discharges of fill material. As a consequence of these alleged infirmities, the Townships urge us that §7(c)(9) of Noncoal SMCRA and §315(f) of the Clean Streams Law proscribed the issuance of the mining and mine drainage permits to Mignatti.

The Department responds that the Board has no jurisdiction to determine whether a §404 Clean Water Act permit is required for Mignatti's activities. The Department advises us that on the basis of a May, 1987 investigation of the site, it agrees with the Townships' assertion regarding the existence of wetlands. As a consequence, the Department does join in the Townships' other arguments, urging us to remand the permits to it for consideration of the wetlands issues.

Mignatti disputes the existence of the wetlands, as well as the applicability of the DSEA and §404 of the Clean Water Act to its activities. Because its mining and mine drainage permits were originally issued prior to the enactment of the DSEA, Mignatti argues that the DSEA is not applicable. Furthermore, the Water Obstructions Act, the Act of June 25, 1913, P.L. 555, as amended, 32 P.S. §681 et seq., the predecessor act to the DSEA, did not, Mignatti contends, apply to its activities, and, therefore, Mignatti believes its encroachments are properly authorized solely under the Clean Streams Law and Noncoal SMCRA. Moreover, even if the DSEA is applicable to its activities, Mignatti believes that they fall within the waiver provisions of 25 Pa.Code §§105.12(a)(2) and 105.12(b)(3).

Again, we must deny the Townships' motion for summary judgment. Material facts relating to the existence of wetlands on the site, the nature of the wetlands, and the size of the watershed are in dispute. And, the question of the applicability of the DSEA to Mignatti's activities, which, in turn, affects the issue of whether the mining and mine drainage permits should

have been denied, is dependent on the resolution of these facts. We note that it would be simple to accept the Department's declaration of its failure to address the wetlands issue and remand these permits. However, that requires us to accept the Townships' and the Department's characterization of facts which are in dispute.

O R D E R

AND NOW, this 3rd day of June, 1988, it is ordered that:

1) Salford and West Rockhill Townships' motion for summary judgment is denied;

2) All discovery in this matter shall be completed on or before August 3, 1988;

3) Salford Township, West Rockhill Township, Margaret A. Fitzgerald, and Dr. David C. Rilling shall file their pre-hearing memoranda on or before August 18, 1988.

4) Mignatti and the Department shall file their pre-hearing memoranda on or before September 2, 1988.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: June 3, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Kenneth A. Gelburd, Esq.
Eastern Region
For Salford and Rockhill Townships:
Robert B. McKinstry, Jr., Esq.
WOLF, BLOCK, SCHORR & SOLIS-COHEN
Philadelphia, PA
For Margaret A. Fitzgerald and David C. Rilling:
Stephen A. Shelly, Esq.
HUNN, SHELLY & SAMEL
Lansdale, PA
For Dr. Donald W. Raub:
Carl N. Weiner, Esq.
HAMBURG, RUBIN, MULLIN & MAXWELL
Lansdale, PA
For Mignatti Construction Co.:
Paul C. Callahan, Esq.
FOX, DIFFER, CALLAHAN, ULRICH & O'HARA
Norristown, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

BETHAYRES RECLAMATION CORPORATION	:	
	:	
v.	:	EHB Docket No. 83-227-W
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
	:	
and	:	
	:	Issued: June 13, 1988
LOWER MORELAND TOWNSHIP	:	

OPINION AND ORDER SUR
MOTION FOR PARTIAL SUMMARY JUDGMENT

Synopsis

Motion for partial summary judgment regarding a municipality's appeal of a consent order and agreement between the Department of Environmental Resources and a landfill operator is denied where there are genuine issues of material fact regarding the appropriateness of the leachate level requirement and gas collection system set forth in the consent order.

OPINION

The procedural history of this matter is set forth at great length in the Board's March 18, 1988 opinion and order denying the Department of Environmental Resources' (Department) motion to dismiss Lower Moreland Township's (Lower Moreland) appeal as moot, so we will not repeat it here. We will deal only with Lower Moreland's March 12, 1987 motion for partial summary judgment at Docket No. 83-227-W prior to its consolidation with Docket No. 88-005-W.

Lower Moreland contends that partial summary judgment in its favor is warranted with respect to paragraphs one and five of the October 23, 1986 consent order and agreement between the Department and Bethayres Reclamation Corporation (Bethayres). It alleges that the Department committed an abuse of discretion in permitting Bethayres to maintain the level of leachate in the quarry at 90 feet Mean Sea Level and in authorizing the continued use of a passive gas collection system. In support of its position, Lower Moreland primarily relies on the deposition testimony of Messrs. Lynn and Lunsk of the Department's Norristown Regional Office and Mr. Joseph A. Mignatti, the president of Bethayres. It believes that, in particular, the comments relating to the Department's review of Bethayres' solid waste permit amendment application summarized in a December 11, 1986 letter from Mr. Lunsk to Mr. Mignatti firmly establish that the Department's position regarding leachate pumping and the nature of the gas collection system at the Bethayres site was erroneous.

Both the Department and Bethayres filed responses opposing Lower Moreland's motions. Both contended that material facts regarding leachate level and the gas collection system still were in dispute, and that, contrary to Lower Moreland's representations, the Department had not reached a final position on these two issues in its review of the permit amendment application submitted by Bethayres.

The Board is empowered to grant summary judgment where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. The Board must read the summary judgment motion in the light most favorable to the non-moving party. C&K Coal Company v. DER, EHB Docket No. 85-306-W (Opinion and order issued February 16, 1988). In deciding a motion for summary judgment, we are to determine whether there are genuine

issues of material fact, not resolve them. Tom Morello Construct. v. Bridgeport Federal, 280 Pa.Super.329, 421 A.2d 747 (1980).

We agree with Bethayres and the Department that genuine issues of material fact regarding the leachate level and the gas collection system remain to be decided by the Board. We have reviewed at length the deposition testimony of Messrs. Bonner, Lynn, Lunsk, and Mignatti and the other documents filed in support of Lower Moreland's motion and do not believe they unequivocally establish that the Department committed an abuse of discretion in incorporating conditions one and five into the October 23, 1986 consent order and agreement. Rather, the testimony and documents support the Department's position that the consent order was an interim solution and that the Department, as of the date of the depositions, had not reached any final position regarding leachate levels and the gas collection system. In fact, during the course of the April 10, 1987 hearing on the merits, the parties stipulated that the October 23, 1986 consent order was intended to represent an interim solution until final action on the Bethayres permit amendment application.

Furthermore, the Department's subsequent action on the Bethayres permit application, which was appealed at Docket No. 88-005-W by Bethayres and Docket No. 88-006-W by Lower Moreland, reveals that these issues are still very much in dispute.[1] The Department required the leachate level to be maintained at -13 feet Mean Sea Level; Lower Moreland believes this level is required, while Bethayres contests it. And, the Department authorized the

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[1] Both of these appeals were consolidated at Docket No. 83-227-W by the Board's order of March 18, 1988.

continued use, for the time being, of the passive gas collection system, which Lower Moreland contests in its appeal of the permit amendment. Under these circumstances, we can hardly grant summary judgment.

O R D E R

AND NOW, this 13th day of June, 1988, it is ordered that Lower Moreland Township's motion for partial summary judgment is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: June 13, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Kennth A. Gelburd, Esq.
Eastern Region
For Bethayres:
Paul W. Callahan, Esq.
FOX, DIFFER, CALLAHAN,
ULRICH & O'HARA
Norristown, PA
For Lower Moreland:
Hershel J. Richman, Esq.
COHEN, SHAPIRO, POLISHER,
SHIEKMAN & COHEN
Philadelphia, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

ROBBI	:	
v.	:	EHB Docket No. 87-225-W
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
YORK COUNTY SOLID WASTE AND REFUSE AUTHORITY, Permittee	:	Issued: June 13, 1988

OPINION AND ORDER SUR MOTION TO COMPEL AND MOTION TO STRIKE OR FOR PARTIAL SUMMARY JUDGMENT

Synopsis

The permittee's Motion to Strike or for Partial Summary Judgment is granted where claims set forth in appellant's pre-hearing memorandum are outside the scope of the original appeal.

OPINION

This matter was initiated by the filing of a notice of appeal by the Residents Opposed to Black Bridge Incinerator (ROBBI) on June 12, 1987. ROBBI is seeking review of Plan Approval No. 67-340-001 (plan approval), which was issued to the York County Solid Waste and Refuse Authority (Authority) by the Department of Environmental Resources (Department) pursuant to the Air Pollution Control Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. 4001 et seq. (Air Pollution Control Act).

On January 30, 1988, the Authority filed a Motion to Strike or for Partial Summary Judgment, seeking to strike those claims set forth in ROBBI's pre-hearing memorandum allegedly outside the scope of ROBBI's appeal. Specifically, Items 6-8 of ROBBI's pre-hearing memorandum state that it intends to prove that:

> -6) the ash residue to be produced by the plant is a hazardous waste under current federal standards, and that the Plan Approval has not addressed this fact, and has not required the permittee to provide for the disposal of this residue as a hazardous waste;
>
> -7) the Water Quality Management permit fails to consider the adverse impacts of: the discharge of quenchwater into the sanitary sewer system; airborne emissions settling into Lake Redman; the local drinking water supply; ash disposal near Lake Redman; and the depletion of Lake Redman by water supply demands of the plant;
>
> -8) the Plan Approval fails to compare the technology of the permittee with existing technology for waste handling that does not employ incineration methods, is not a source of air contamination, and yet achieves as great or greater amounts of waste volume reduction than the proposed method of the permittee.

The Authority argues that these contentions in ROBBI's pre-hearing memorandum constitute impermissible and untimely challenges to the water quality and solid waste management permits issued for the Black Bridge Incinerator, since the only Department action specified and attached to ROBBI's appeal was the air quality plan approval. The Department filed a response in support of the Authority's motion.

ROBBI answered the Authority's motion on February 22, 1988, claiming that its appeal was intended to oppose all three permits issued to the Authority and that the air quality plan approval incorporated the terms and conditions of the water quality and solid waste permits. In support of this

argument, ROBBI points to language in a Department press release it claims indicates the other permits were part of the plan approval conditions; to the involvement of John B. Moyer, Regional Director of the Department's Harrisburg Regional Office, since he reviewed all of the permits and was mentioned in ROBBI's notice of appeal as the Department official who took the action appealed; and to the numerous and varied objections listed in the notice of appeal which go beyond air quality-related issues.

On March 3, 1988, the Authority filed a reply in support of its motion, arguing that this appeal's procedural history evidences ROBBI's intent to appeal only the air quality permit. Specifically, the Authority points to ROBBI's failure to contest the Authority's objection to ROBBI's request for production of documents as going beyond the air quality permit and the Board's earlier opinion and order (1987 EHB 803) holding that ROBBI's document production requests were irrelevant because they were outside the scope of the air quality permit. The Authority further alleges that ROBBI has distorted the Department's press release and is using John Moyer's involvement to improperly bootstrap the other two permits into this appeal.

Under 25 Pa.Code §21.52, the Board's jurisdiction does not attach to an appeal of a Department action unless the appeal is in writing and is filed within 30 days of written notice or publication in the Pennsylvania Bulletin. Norman P. Straub v. DER, Docket No. 88-039-R (Opinion and order issued March 31, 1988).

The Department issued Waste Management Permit No. 400561 to the Authority for a mass burn resource recovery facility on May 13, 1987; notice of its issuance was published at 17 Pa.B 2262 (June 13, 1987), the same issue in which notice of the plan approval was published. The Department also issued NPDES Permit No. PA0083321 to the Authority for the discharge of

stormwater related to the resource recovery facility on May 13, 1987; notice of its issuance was published at 17 Pa.B. 2088 (May 30, 1987). ROBBI received notice of all these permits on May 14, 1987 (See Answer of Appellant at 4).

In its notice of appeal, it is clear that ROBBI has only appealed the plan approval. Paragraph 2 of the appeal form requires the appellant to specify the action for which review is sought. In response, ROBBI answered, "Plan Approval No. 67-340-001 (copy attached)," and attached a copy of only the plan approval. And, contrary to ROBBI's assertion, we find nothing in the language of the plan approval or in the controlling statutory and regulatory provisions indicating that the plan approval incorporated the other two permits.

A case directly on point is Association of Property Owners of the Hideout, Inc. v. DER, 1987 EHB 714, wherein we held that the appeal of an encroachments permit for wetland excavation did not operate to confer jurisdiction on the Board to review the Department's separate action of issuing a water quality certification under §401 of the Clean Water Act, 33 U.S.C.A. §1241, for the same excavation where the appellants did not seek timely review of the water quality certification. It logically follows from that case that we have no jurisdiction here to review any other Department actions relating to the Black Bridge Incinerator unless ROBBI has specifically and timely sought our review of those related actions. ROBBI has not done so. Nor can we adopt ROBBI's arguments that it intended to appeal the other Department actions, because to do so would render jurisdiction an amorphous and ever-changing concept dependent on a litigant's state of mind.

The Authority has also filed a motion to compel ROBBI to answer the Authority's interrogatories pursuant to Pa.R.C.P. 4019. The interrogatories

were first served upon ROBBI August 12, 1987, and no answers have been filed to date. ROBBI has not responded to this motion. The Board is aware of ROBBI's difficulties in obtaining counsel and will grant ROBBI additional time to answer these interrogatories.

O R D E R

AND NOW, this 13th day of June, 1988, it is ordered that:

1) The York County Solid Waste and Refuse Authority's Motion to Strike will be treated as a motion to limit issues and is granted. The appeal of Residents Opposed to Black Bridge Incinerator is limited to Plan Approval 87-340-001 and all references to issues pertaining to the water quality and solid waste permits in Appellant's pre-hearing memorandum are stricken.

2) The Authority's Motion to Compel is granted and ROBBI shall answer the Authority's August 12, 1987 interrogatories on or before June 28, 1988.

3) The Authority shall file its pre-hearing memorandum on or before July 13, 1988.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: June 13, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
J. Robert Stoltzfus, Esq.
Eastern Region
For Appellant:
Mark S. Lohbauer, Esq.
LEATHER & LOHBAUER
Philadelphia, PA
For Permittee:
John P. Proctor, Esq.
Scott M. DuBoff, Esq.
Scott W. Clearwater, Esq.
BISHOP, COOK, PURCELL & REYNOLDS
Washington, DC

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

DEL-AWARE UNLIMITED, INC., et al.	:	
	:	
v.	:	EHB Docket No. 83-054-R
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
NESHAMINY WATER RESOURCES AUTHORITY,	:	
Permittee	:	
and	:	
NORTH PENN/NORTH WALES WATER AUTHORITIES,	:	
Intervenors	:	Issued: June 14, 1988

OPINION AND ORDER
SUR
MOTION FOR RECONSIDERATION

Synopsis

A motion for reconsideration, treated as a motion to dismiss, is granted and an appeal is dismissed for lack of jurisdiction. A third party challenging a DER §401 certification must file its appeal within 30 days from the earlier of its actual notice of the certification or the date on publication of a notice of the certification in the Pennsylvania Bulletin. The filing of an appeal five months after a notice appeared in the Pennsylvania Bulletin is untimely and deprives the Board of jurisdiction. Appellant's argument that it was misled by the terminology used in the certification will not be accepted when it appears that appellant was not misled by identical terminology in a related case.

OPINION

On March 21, 1983, Del-AWARE Unlimited, Inc. and five individuals[1] (hereinafter Del-AWARE) filed an appeal from a September 30, 1982 Section 401 certification letter from the Department of Environmental Resources (DER) to the Neshaminy Water Resources Authority (NWRA) regarding the realignment of the North Branch Neshaminy Creek and Pine Run in Bucks County.[2] Section 401 refers to that section of the Federal Water Pollution Control Act, 33 U.S.C. §1341, under which DER certified that there would be no violation of water quality standards for the Delaware River as a result of the realignments of North Branch Neshaminy Creek and Pine Run, which realignments are elements of the so-called Point Pleasant Project.

The matter before the Board at this point is North Penn/North Wales Water Authorities' (NP/NW) motion for reconsideration of the Board's March 7, 1988 denial of motions to dismiss made separately by NP/NW and the Philadelphia Electric Company (PECO). The Board dismissed PECO's motion as having been made by a non-party to this appeal.[3] NP/NW's motion to dismiss was denied principally because the action appealed by Del-AWARE was not included in the Board's lengthy adjudication of Del-AWARE Unlimited v. DER, 1984 EHB 178 (Del-AWARE I), as affirmed in all respects by the Commonwealth

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[1] James Greenwood, Doylestown; Colleen Wells, Pipersville; Richard Meyers, Furlong; Val Sigstedt; Point Pleasant; and Marion Maslano, Salford Township.

[2] Del-AWARE states in its notice of appeal that it did not receive notice of the September 30, 1982 letter until February 23, 1983. However, as discussed, infra, Del-AWARE claims that was the date it received notice that the certification pertained to water quality standards for the two affected streams as well as the Delaware River.

[3] PECO has filed a petition to intervene as well as its own motion for reconsideration of the Board's March 7, 1988 order. Because of the result reached, infra, it is unnecessary to rule on PECO's motions.

Court in Del-AWARE Unlimited v. DER, et al., ___ Pa.Cmwlth ___, 508 A.2d 348 (1986).

NP/NW's motion to dismiss also asserted that the appeal was untimely filed, but NP/NW provided no support for this allegation. In its motion for reconsideration, NP/NW alleges that DER published a notice of its action on NWRA's request for a 401 certification in the September 18, 1982 issue of the Pennsylvania Bulletin, 12 Pa.Bulletin 3315. NP/NW argues that, pursuant to 25 Pa.Code §21.52, Del-AWARE had thirty days from the date of publication to file its appeal and, having failed to do so, the Board is deprived of jurisdiction.

The Board's denial of the motions to dismiss was clearly interlocutory. The Board has held that interlocutory orders are not proper subjects for reconsideration, Springettsbury Township Sewer Authority v. DER, 1985 EHB 612, unless there are exceptional circumstances, Magnum Minerals v. DER, 1983 EHB 589. We find no exceptional circumstances present here, since the supporting allegations contained in the motion for reconsideration were known to NP/NW when its motion to dismiss was filed. However, since NP/NW's motion for reconsideration now places before the Board for the first time an adequately supported jurisdictional question, it amounts to a new and distinct motion to dismiss. We will treat it as such for purposes of disposition.

Del-AWARE's response to NP/NW's motion for reconsideration is hardly a model of clarity, but we can glean several issues. Del-AWARE contends that NP/NW's motion is untimely since it raises the timeliness issue five years after the appeal was filed. Second, Del-AWARE argues that the Board has discretion to determine the date from which the appeal period runs, and that an appeal nunc pro tunc should be allowed. Third, Del-AWARE alleges that it

did not receive notice that the September 30, 1982 certification applied to the Delaware River Basin until it deposed a DER official on February 23, 1983. Finally, Del-AWARE argues that the Pennsylvania Bulletin notice is irrelevant as it alleges that no certification had been made as of September 18, 1982.

The first two arguments are without merit. Jurisdiction may be raised at any time during an appeal, Thomas Fitzsimmons v. DER, 1986 EHB 1190, since it is a fundamental prerequisite to Board action. The Board has jurisdiction only over appeals filed within the 30 day appeal period. 25 Pa.Code 21.52(a) and Rostosky v. DER, 26 Pa.Cmwlth. 478, 364 A.2d 761 (1976). Nunc pro tunc appeals are permitted only where fraud or breakdown in the Board's procedures cause the untimely filing. See Appalachian Industries v. DER, EHB Docket No. 86-521-W (Opinion and order issued May 24, 1987). In this matter, Del-AWARE has alleged no facts which justify a nunc pro tunc appeal.

The notice published September 18, 1982 in the Pennsylvania Bulletin states, in relevant part, as follows:

> The Department of Environmental Resources pursuant to §401(a) of the 1972 amendments to the Federal Water Pollution Control Act, 33 U.S.C. §1341(a), certifies that there is reasonable assurance that the construction described herein will not violate applicable Federal and State Water Quality standards.
>
> * * * * *
>
> Requests Initiated By: Neshaminy Water Resources Authority, Plumstead Township, Bucks County.
>
> Project Description: Construction of water intake structure and realignment of North Branch Neshaminy Creek and Pine Run.

This notice unmistakably announces an unrestricted certification by DER that the construction of water intake structures and the realignments of North Bank Neshaminy Creek and Pine Run will not violate applicable Federal and State Water Quality Standards.

On September 30, 1982, a letter was sent by DER's C. T. Beechwood to NWRA stating, inter alia, that the realignments of North Branch Neshaminy Creek and Pine Run will not violate water quality standards for the "Delaware River." A copy of this letter is shown to have been sent to Del-AWARE's legal counsel.

Del-AWARE argues, in effect, that it was misled by the use of the term "Delaware River" in the September 30, 1982 letter. It did not learn until February 23, 1983, when DER's Charles Rehm was deposed in connection with some other Del-AWARE appeals, that the term was meant to include the Delaware River Basin, of which the North Branch Neshaminy Creek and Pine Run are a part.

We are not persuaded by this argument. DER employed the same terminology in its section 401 certification of the construction of a raw water pump station at Point Pleasant, issued September 2, 1982. Del-AWARE's notice of appeal from that certification, filed September 24, 1982 at Board Docket Number 82-229-M, raised a number of issues related to bodies of water other than the Delaware River. Included was the North Branch Neshaminy Creek. to conclude that Del-AWARE was misled by a DER letter issued six days later and using the same terminology requires us to stretch credulity farther than we are prepared to go.

Section 21.52(a) of the Board's rules of practice and procedure regarding timeliness of filing appeals, 25 Pa.Code 21.52(a), provides, in relevant part, as follows:

> ". . . jurisdiction shall not attach to an appeal from an action of [DER] unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of such action or within 30 days after notice of such action has been published in the Pennsylvania Bulletin . . ."

The Board has consistently held that §21.52(a) provides for a 30-day appeal period which begins to run either from the date of receipt of written notice or the date of publication of notice of the action in the Pennsylvania Bulletin, whichever is earlier. Association of Property Owners of the Hideout, Inc., EHB Docket No. 87-052-W (Opinion and order issued August 19, 1987); Consolidation Coal Company v. DER and J&D Mining, Inc., 1983 EHB 339; Eldred Township Planning Commission v. DER and Eastern Industries, 1980 EHB 626. Del-AWARE's 30-day period in which to challenge DER's 401 certification that the stream realignments would not violate applicable water quality criteria began on September 18, 1982, when the notice appeared in the Pennsylvania Bulletin, and ended on October 18, 1982. Its filing of the appeal on March 21, 1983 was untimely by over five months and the Board is deprived of jurisdiction. Accordingly we must dismiss this appeal.

ORDER

AND NOW, this 14th day of June, 1988, it is ordered that the motion for reconsideration filed by North Penn and North Wales Water Authorities, treated as a motion to dismiss, is granted and the appeal of Del-AWARE Unlimited, Inc., et al. is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

Board Chairman Maxine Woelfling did not participate in the disposition of this matter because of a conflict created as a result of her previous position in the Department of Environmental Resources.

DATED: June 14, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Louise Thompson, Esq.
For Appellant:
Robert J. Sugarman, Esq.
For Permittee:
Lois Reznick, Esq.
For Philadelphia Electric Co.:
Bernard Chanin, Esq. and
Michael Meloy, Esq.
WOLF BLOCK SCHORR & SOLIS-COHEN
Philadelphia, PA

Eugene Bradley, Esq.
Philadelphia, PA

Troy Conner, Esq.
CONNER & WETTERHAHN
Washington, DC
For North Penn/North Wales Water Authorities:
Jeremiah J. Cardamone, Esq.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

THROOP PROPERTY OWNERS ASSOCIATION	:	EHB Docket Nos. 87-185-W
	:	88-028-W
v.	:	88-114-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
	:	
and	:	
	:	Issued: June 14, 1988
KEYSTONE LANDFILL, Permittee	:	

OPINION AND ORDER SUR
RULE TO SHOW CAUSE AND
MOTION TO CONSOLIDATE

Synopsis

Where duplicate appeals of a suspension order are filed with the Board on different dates, the Board will use the first-filed appeal to determine whether the appeal is timely. A motion to consolidate appeals of two consent orders between a landfill permittee and the Department of Environmental Resources (Department) and an order by the Department suspending the landfill's permit is granted, since the appeals relate to the same facility and involve common issues of fact and law.

OPINION

This matter has a rather tangled procedural history. We will begin by addressing Docket No. 88-028-W. On February 3, 1988, a notice of appeal was filed with the Board, seeking review of December 18, 1987 and January 8, 1988 orders from the Department of Environmental Resources suspending the Keystone Landfill's solid waste management permit for the Logan site in

Dunmore Borough, Lackawanna County; it was docketed at 88-028-W. The notice of appeal form identified the Throop Property Owners Association (Throop), Dorothy Toth, Edward Wotcechowski, Frederick Soltis, and Eugene Sholtes as the appellants, with the phrase "c/o Throop Property Owners Assoc." The appeal was signed by the four named individuals and a John Evarone. The Law Offices of Randall J. Brubaker were indicated as counsel for Throop and Mr. Brubaker's xeroxed signature appeared below his address. The notice of appeal was accompanied by a xerox copy of a January 25, 1988 transmittal letter from Mr. Brubaker to the Board.

The Board thereafter on February 5, 1988, received a notice of appeal form which appeared to be the original of the notice of appeal form filed on February 3, 1988, but without the signatures of Ms. Toth and Messrs. Wotcechowski, Soltis, Sholtes, and Evarone; Mr. Brubaker's signature was original and the transmittal letter accompanying it was the original of the xeroxed January 25, 1988 transmittal letter accompanying the notice of appeal filed on February 3, 1988.

Both the February 3 and February 5 notices of appeal indicated December 20, 1987 as the date of receipt of the Department's December 18, 1987 order;[1] no date of receipt was indicated for the January 8, 1988 order. The Board then, on February 22, 1988, received a letter dated February 11, 1988 from Throop's counsel transmitting an amended notice of appeal; the amended notice of appeal indicated that Throop had received notice of the Department's December 18, 1987 order on December 30, 1987, rather than on December 20, 1987, and that the December 20, 1987 date of receipt was a typographical error.

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[1] Obviously, since the February 3 notice of appeal was the signed original of the February 5 notice of appeal.

The Board thereafter on April 27, 1988, issued a rule upon Throop to show cause why its February 3, 1988 appeal of the Department's December 18, 1987 order should not be dismissed as untimely.

Throop's May 27, 1988 response to the rule stated:

> On Monday, January 25, 1988 Appellant's attorney prepared the papers for Appeal of the December 18th Order. As indicated by the Memorandum attached as exhibit D they were unable to be mailed because of a change in post office hours and were mailed on the following day January 26, a Tuesday. At the same time, a copy of the appeal papers were sent to the Appellant's for their signature and transmission onto the Board. (See exhibit E).
>
> It would be unexpected for the post office to take until the middle of the following week to deliver the appeal papers. Those papers may have been confused with the second form received from the Appellants (and signed by them) as opposed to the appeal form filed by counsel, or the documents may have been confused with the original appeal filed in this matter.
>
> (emphasis added)

The January 25, 1988 letter from Mr. Brubaker to Throop stated:

> Enclosed please find two copies of the appeal documents which I am mailing today to the Environmental Hearing Board.
>
> This form should preferably be signed by each of the aggrieved parties and a representative of the Throop Property Owners Association or at least by one of them. Therefore, will you please sign the extra copy or have it signed by one of the other three individuals listed, and mail it directly to the Board in the envelope I have provided.
>
> (emphasis added)

For whatever reason, the notice of appeal form transmitted to Throop by counsel's January 25, 1988 letter and executed by Throop was filed with the Board before the unexecuted notice of appeal form transmitted to the Board by counsel's letter of the same date and referred to in counsel's letter to his client. Indeed, it appears that Throop's counsel is unaware of this fact.

Giving Throop the benefit of any doubt and viewing this situation in the light most favorable to Throop, we will regard December 30, 1987 as the date of Throop's receipt of notice of the Department's December 18, 1987 order and February 3, 1988 as the date of filing of Throop's appeal. Even so, Throop's appeal was filed 35 days after it had received notice of the Department's action, and we are clearly without jurisdiction to hear Throop's appeal of the December 18, 1987 order.[2] 25 Pa.Code §21.52, Joseph Rostosky v. Commonwealth, DER, 26 Pa.Cmwlth.478, 364 A.2d 761 (1976), and G. Schieb Coal v. DER, 1987 EHB 899.[3]

The transmittal letter accompanying both the February 3 and February 5 notices of appeal stated that "We expect to consolidate this appeal of the December 18th Order and the January 8th Order with the appeal referenced in the first paragraph." The appeal referenced was Docket No. 87-185-W, Throop's appeal of an earlier consent order and agreement between the Department and Keystone Landfill. The Board, on February 9, 1988, erroneously sent out a motion letter to the parties regarding Throop's request and subsequently, by letter dated March 1, 1988, informed them that since it hadn't received a proper motion from Throop, it would not rule on the request. In the meantime, Throop, on March 25, 1988, filed an appeal of a February 25, 1988 consent order and agreement between the Department and Keystone Landfill, and that

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[2] Throop has not alleged any grounds for allowance of an appeal nunc pro tunc with respect to the February 3, 1988 notice of appeal. While problems with the U. S. Postal Service may, under some circumstances, be grounds for an allowance of an appeal nunc pro tunc, Charles A. Kayal v. DER, 1987 EHB 809, Throop has only alleged such problems with the February 5, 1988 notice of appeal filed by its counsel. As already noted, we are accepting the February 3, 1988 notice of appeal and disregarding the February 5, 1988 notice of appeal in disposing of this case.

[3] Throop's appeal of the Department's January 8, 1988 order is not affected by this ruling.

appeal was docketed at 88-114-W. The Board advised the parties by letter dated March 31, 1988, that a response to Throop's motion should be filed on or before April 19, 1988.

Keystone, by letter dated April 12, 1988, opposed Throop's request, principally because the Board had yet to rule on Keystone's motions to dismiss Throop's appeal at Docket No. 87-185-W and that ruling could impact the disposition of Docket Nos. 88-028-W and 88-114-W. The Board has disposed of Keystone's motions at Docket No. 87-185-W, denying them, for the most part, in an April 28, 1988 opinion and order. Because the three appeals involve the same facility and common issues of fact and law, consolidation is appropriate.

O R D E R

AND NOW, this 14th day of June, 1988, it is ordered that:

1) The Board's April 27, 1988 rule is made absolute and that portion of Throop's appeal at Docket No. 88-028-W relating to the Department's December 18, 1987 order is dismissed as untimely;

2) Throop's motion to consolidate is granted and these matters are consolidated at Docket No. 87-185-W. All future pleadings and correspondence must bear this docket number (87-185-W); and

3) The pre-hearing schedule established in the Board's April 28, 1988 order at Docket No. 87-185-W is amended as follows:

a) All discovery in this matter shall be completed on or before July 13, 1988;

b) Throop shall file its pre-hearing memorandum on or before July 27, 1988;

c) Keystone shall file its pre-hearing memorandum on or before August 10, 1988; and

d) The Department shall file its pre-hearing memorandum, if any, on or before August 17, 1988.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: June 14, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
David Wersan, Esq.
Central Region
For Appellant:
Randall J. Brubaker, Esq.
Philadelphia, PA
For Permittee:
William P. Conaboy, Esq.
ABRAHAMSEN, MORAN, CONNOLLY
& CONABOY
Scranton, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

THE RONDELL COMPANY (a Partnership),	:	
and	:	
WENDELL CHARLES and RONALD LOVRICH, (Partners)	:	
v.	:	EHB Docket No. 84-156-M
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 16, 1988

ADJUDICATION

By the Board

Synopsis

An Order by the Department of Environmental Resources (DER) finding that the Rondell Company (Rondell) released acid mine drainage which degraded three springs, and ordering Rondell to treat the three springs to meet effluent standards, is upheld. The Clean Streams Law prohibits a discharge from a mine into the waters of the Commonwealth unless the discharge complies with the effluent standards in DER's regulations. DER's unrebutted testimony established that Rondell released a non-complying discharge into the three springs.

INTRODUCTION

This adjudication involves an appeal filed on May 21, 1984 by the Rondell Company, a partnership, and its partners, Wendell Charles and Ronald Lovrich (hereinafter collectively "Rondell") from an Order issued by DER on April 18, 1984. The Order found that Rondell had violated Section 315(a) of

the Clean Streams Law (CSL), the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.315(a), and Section 18.6 of the Surface Mining Conservation and Reclamation Act (SMCRA), the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.24, by discharging water that did not meet the effluent standards in 25 Pa. Code §87.102 from its Correal Strip Mine, located in Saltlick and Bullskin Townships, Fayette County. This discharge allegedly degraded three springs serving as water supplies for the residences of Veronica Correal, Strawn Knopsnyder, and John Clark (the Correal, Knopsnyder, and Clark Springs). The Order also required Rondell to treat the three springs to bring them to effluent standards.

Board Member Anthony J. Mazullo presided over hearings held on July 9 and 10, 1985.[1] Rondell did not present any testimony at the hearing or file a post-hearing brief.

FINDINGS OF FACT

1. The appellants are the Rondell Company (Rondell), a partnership located at R.D. #3, Box 536, Monongahela, PA 15063, and Wendell Charles and Ronald Lovrich, partners in Rondell.

2. The appellee in this proceeding is the Commonwealth of Pennsylvania, Department of Environmental Resources, which is the agency of the Commonwealth empowered to administer and enforce the Clean Streams Law (CSL), the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., the Surface Mining Conservation and Reclamation Act (SMCRA), the Act of May 31,

---

[1] Mr. Mazullo has since resigned from the Board and did not prepare this adjudication. The Board has previously ruled that it may issue adjudications based upon a "cold record" (where the person who presided over the hearings cannot participate in the adjudication because he is no longer employed by the Board) See e.g. Penn-Maryland Coals, Inc. v. DER, 1986 EHB 758.

1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq., Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. 510-17, and the rules and regulations adopted thereunder.

3. Rondell is the permittee of a surface mine known as the Correal Strip Mine, located in Saltlick and Bullskin Townships, Fayette County, which was operated pursuant to Mine Drainage Permit No. 33735M7 (the MDP). (Exhibits C-6, C-11)

DESCRIPTION OF THE CORREAL STRIP

4. The Correal Strip Mine is located on an isolated hilltop, broad at the top and gently sloping in all directions from an elevation near the top of 2320 feet, down to an elevation of about 2140 feet. (T. 144)

5. The main structural feature of this area is the Chestnut Ridge Anticline, which is located approximately one mile to the northwest of the Correal Strip. An anticline is a geologic structure in which the earth's strata are warped upward in a ridged shaped structure, with two limbs dipping away from each other. (T. 146-148)

6. The Correal Strip Mine is located on the eastern limb of the Chestnut Ridge Anticline, so the strata on the site dip to the east-southeast, with groundwater flow in an east-southeast direction across the Correal Strip. (T. 148, 149)

7. The Correal Spring is 600 feet south of the Correal Strip. (T. 86)

8. The Knopsnyder Spring is 800 feet south of the Correal Strip. (T. 80, 86)

9. The Clark Spring is approximately 1300 to 1600 feet southeast of the Correal Strip. (T. 83, 86)

10. The recharge area for a spring is the area which is topographically and stratigraphically higher in elevation; the areas mined by Rondell under mining permits 511-10, 511-10(A), and 511-10(A2) are within the recharge area for the Correal, Knopsnyder, and Clark Springs. (T. 201, 209)

11. Prior to mining, groundwater flow is influenced most by topography; after mining, groundwater flow is influenced most by dip direction. (T. 150)

HISTORY OF MINING ON THE CORREAL STRIP

12. Prior to Rondell's mining on the Correal Strip, a field engineer's report dated April 30, 1973 (1973 Field Engineer's Report) was prepared based upon field inspections and water samples. This report indicated that previous strip mining had been conducted at the Correal Strip but that there was no acid mine discharge from the area. (T. 25, 26, 30, Exhibit C-2)

13. Sample No. 1899, cited in the 1973 field engineer's report, was taken from Correal Spring in 1973 and the laboratory results showed the following characteristics:[2] pH 5.3, acidity 0, alkalinity 6, iron .1, and sulfates 44. (T. 27, 28, Exhibit C-2)

14. Sample 1901, also cited in the 1973 field engineer's report was collected at the Knopsnyder Spring in 1973 and the laboratory results indicated: pH 4.7, alkalinity 4, acidity 0, iron .1, and sulfates 30. (T. 29, Exhibit C-2)

15. No water samples of the Clark Spring were taken by DER prior to Rondell's mining; however, based upon the stratigraphic relationship of the

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[2] All of the laboratory results except pH listed in this Adjudication are expressed in terms of milligrams per liter.

three springs and the similarity of the pre-mining quality of the Correal and Knopsnyder Springs, the water quality of the Clark Spring would have been very similar to that of the Correal and Knopsnyder Springs. (T. 233)

16. Sample No. JK-1900, cited in the 1973 field engineer's report was taken from a borehole dug into the Brookville seam, and yielded the following results: pH 3.5, alkalinity 0, acidity 54, iron .2, and sulfates 160. (T 160)

17. The water in the borehole could not have caused the degradation of the Correal, Knopsnyder, and Clark Springs because the area affected by the prior mining was too small to create a discharge large enough to pollute the three springs, because other water samples taken from areas close to Rondell's mining site after Rondell began mining showed degradation more severe than that of the water in the borehole, and because a tributary of Newmyer Run located close to the mining site was unaffected by acid mine drainage until after Rondell began mining. (T. 160-163)

18. The MDP application for the Correal Strip, dated January 25, 1973, identified the surface area to be affected as 57.5 acres; the MDP was amended on May 22, 1974 to increase the surface area to be affected to 284.2 acres. (Exhibits C-3, C-6)

19. The first mining permit issued for the MDP was Mining Permit (MP) 511-10, which was issued to Rondell on June 28, 1973, authorizing mining on 10 acres. (T 31, Exhibit C-4)

20. Four to five acres of the area within MP 511-10 had been mined, but not backfilled, prior to Rondell's mining; Rondell re-affected and backfilled all but approximately one acre of this area. (T. 48-50, Exhibit C-12)

21. MP 511-10(A) was issued to Rondell on December 14, 1973

authorizing mining on ten additional acres of the Correal Strip. (T. 31, Exhibit C-5)

22. On August 19, 1974, DER mine inspector John Bates prepared a field engineer's report for the Correal Strip because Rondell proposed to increase the acreage it would mine and the increase would affect additional watersheds. (T. 33, Exhibit C-8)

23. Water sample 2003 was taken by DER at the Correal Spring on August 19, 1974, at the same location as sample 1899 was collected from in 1973; sample 2003 indicated the following: pH 4.5, alkalinity 0, acidity 15, iron less than .05, and sulfates 315. The level of sulfates in this sample indicated that the Correal Spring was beginning to be affected by acid mine drainage. (T. 35-36, 224, Exhibit C-8)

24. On November 8, 1974, MP 511-10(A2) was issued to Rondell, authorizing surface mining on an additional ten acres of the Correal Strip. (T. 38, Exhibit C-9)

25. On January 7, 1975, MP 511-10(A3) was issued to Rondell, authorizing mining on an additional 18.5 acres of the Correal Strip. (T. 38)

26. On August 7, 1975, MP 511-10(A4) was issued to Rondell, authorizing mining on an additional ten acres of the Correal Strip. (T. 39, Exhibit C-11)

27. In addition to its mining on permitted areas, Rondell mined approximately 15-20 acres beyond its permit boundaries. (T. 43-44)

28. On January 24, 1974, Rondell was cited by DER for failure to properly dispose of acidic material and for failing to keep backfilling concurrent with mining. (T. 54)

29. On May 22 and 23, 1975, Rondell was cited by DER for allowing a gravity drain from the pit, and for failure to treat water and maintain a

twenty-five foot crop barrier in accordance with conditions in Rondell's permit. (T. 54, 55)

30. On June 24, 1976, Rondell was cited by DER for a pit water accumulation and on March 30, 1977, Rondell was cited for not having adequate backfilling equipment on the site and for not keeping backfilling concurrent with mining. (T. 55)

31. Rondell subsequently abated all of the conditions which led to the violations listed in Findings of Fact 26, 27, and 28. (T. 109-111)

32. Rondell completed its backfilling of the Correal Strip in 1977. (T. 111)

33. Since 1973, the only significant earth moving activity which occurred in the recharge area of the springs was the mining by the Rondell Company. (C-40)

RELATIONSHIP BETWEEN MINING AND DEGRADATION OF SPRINGS.

34. Acid mine drainage occurs when pyrite, which is present within the coal seam or within rocks in the overburden, is broken up and exposed to air and water. This causes the pyrite to oxidize and form an acid discharge. (T. 234, 235)

35. Rondell's mining under permits 511-10, 511-10(A), and 511-10(A2) was from the Lower Kittanning seam, which is stratigraphically 50-60 feet higher than the Correal, Knopsnyder, and Clark Springs. (T. 205, 211-212)

36. The Lower Kittanning seam has historically had acid mine drainage problems according to DER's review of surface mining permits in this area. (T. 165)

37. On September 16, 1982, after Rondell completed its mining, a sample taken from the Correal Spring yielded the following results: pH 4.3,

alkalinity 7, acidity 196, iron .46, sulfates 630, manganese 29.45, and aluminum 11.6.

38. Subsequent to September of 1982, sampling of the Correal Spring revealed the following:

	pH	Alkalinity	Acidity	Iron	Sulfates	Manganese
March 25, 1983 (Exhibit C-26)	4.4	8	162	.02	500	18.4
April 28, 1983 (Exhibit C-27)	4.3	7	192	.06	530	23.1
June 18, 1985 (Exhibit C-38)	4.3	7	122	.3	570	34

39. The samples taken from the Clark Spring in 1982, 1983, and 1985 show that it has been affected by acid mine drainage. (T. 200, 230)

40. Subsequent to Rondell's mining, samples of the Knopsnyder Spring revealed the following:

	pH	Alkalinity	Acidity	Iron	Sulfates	Manganese
April 28, 1983 (Exhibit C-27)	4.6	8	56	.07	145	4.5
June 18, 1985 (Exhibit C-38)	4.3	5	144	.3	237	11.1

41. The samples taken from the Knopsnyder Spring in 1983 and 1985 confirm that it has been affected by acid mine drainage. (T. 231, 232)

42. On September 16, 1982, subsequent to Rondell's mining, a sample from the Clark Spring showed the following characteristics: pH 4.4, alkalinity 6, acidity 142, iron .05, sulfates 390, manganese 25.65, aluminum 8.14. (T. 232-233, Exhibit C-21)

43. Other samples taken from the Clark Spring in 1983 and 1985 revealed the following:

	pH	Alkalinity	Acidity	Iron	Sulfates	Manganese
March 25, 1983 (Exhibit C-26)	4.6	8	82	.03	265	9.9

April 28, 1983 (Exhibit C-27)	4.6	7	60	.17	275	10.1
June 18, 1985 (Exhibit C-38)	4.4	7	76	.3	488	25.9

44. The results of the 1982, 1983, and 1985 water samples confirm that the Clark Spring has been affected by acid mine drainage. (T. 233)

45. The cause of the acid mine drainage which has degraded the Correal, Knopsnyder, and Clark Springs is Rondell's surface mining on the Correal Strip. (T. 234)

DISCUSSION

The Rondell Company has appealed a DER Order finding that Rondell violated the Clean Streams Law and the Surface Mining Conservation and Reclamation Act by discharging acid mine drainage which degraded the Correal, Knopsnyder, and Clark Springs. The Order also required Rondell to treat to effluent standards the water in the three Springs. Since this is an appeal from a DER Order which requires that Rondell take affirmative action to abate pollution, DER bears the burden of proof. 25 Pa. Code §21.101(a)(3).

Rondell did not file a post-hearing brief explaining its position on the facts and the law applying to this appeal, so we are unaware of why it contends DER has abused its discretion in issuing the Order. Consistent with our prior precedent, we must deem Rondell to have waived any of the issues it may have raised in its notice of appeal, its pre-hearing memorandum, or at hearing because of its failure to submit a post-hearing brief. Robert Kwalwasser v. DER and Kerry Coal Company. 1986 EHB 24.[3]

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[3] An examination of the issues raised in Rondell's pre-hearing memorandum reveals them to be without merit.

THE FACTUAL AND LEGAL BASIS FOR DER'S ORDER

DER's Brief puts forward two separate legal theories in support of its Order. First, DER asserts that Rondell has violated Section 315(a) of the CSL, 35 P.S. §691.315(a), by discharging acid mine drainage from its mine on the Correal Strip into waters of the Commonwealth. (DER Brief, pp. 35-49). Second, DER argues that its Order is sustainable under public nuisance law. (DER Brief, pp. 49-52). Since DER has focused its analysis in its Brief on these two grounds, and since we find that the Order is sustainable on these grounds, we will not address whether Rondell violated the SMCRA.

DER devoted much of its Brief to discussing the case law on a mine operator's responsibility for acid discharges which emanate from its site into the waters of the Commonwealth. First, DER argues that a mine operator is liable under Section 315(a) of the CSL, 35 P.S. §691.315(a), and public nuisance law when its mining causes a discharge which does not meet the effluent standards in 25 Pa. Code §87.102. Commonwealth v. Barnes & Tucker Co., 455 Pa. 392, 319 A.2d 871 (1974). Second, DER asserts that a mine operator is also liable under Section 315(a) of the CSL and public nuisance law for a discharge emanating from its site even where the operator did not cause the condition which led to the discharge (for example, where the discharge was caused by previous mining on the site), so long as the mine operator has engaged in some affirmative conduct--such as re-mining the land--which indicates an adoption of the condition. Hawk Contracting, Inc. and Adam Eidemiller, Inc. v. DER, 1981 EHB 150.

We will not discuss the arguments for holding Rondell responsible without a showing of causation, because the evidence submitted by DER clearly

indicated that Rondell violated Section 315(a) of the CSL, 35 P.S. §691.315(a), by causing the acid mine drainage which degraded the Correal, Knopsnyder, and Clark Springs. Section 315(a) provides, in relevant part:

> No person or municipality shall operate a mine or allow a discharge from a mine into the waters of the Commonwealth unless such operation or discharge is authorized by the rules and regulations of the department or such person or municipality has first obtained a permit from the department. Operation of the mine shall include preparatory work in connection with the opening or reopening of a mine, refuse disposal, backfilling, sealing, and other closing procedures, and any other work done on land or water in connection with the mine. A discharge from a mine shall include a discharge which occurs after mining operations have ceased. . . . The operation of any mine or the allowing of any discharge without a permit or contrary to the terms or conditions of a permit or contrary to the rules and regulations of the department, is hereby declared to be a nuisance.

35 P.S. §691.315(a). A review of the evidence indicates that Rondell has run afoul of this section.

DER submitted testimony that the Correal, Knopsnyder, and Clark Springs have all been affected by acid mine drainage. (T. 200, 231-232, 233) DER's witness Joseph Schueck testified that the cause of the acid mine drainage was Rondell's mining on the Correal Strip. (T. 234) These conclusions are buttressed by other evidence in the record. The 1973 field engineer's report, which was prepared prior to Rondell's mining on the Correal Strip (T. 25, 26), listed samples which were taken from the Correal and Knopsnyder Springs,[4] and concluded that although there had been prior mining

[4] Although the Clark Spring was not tested prior to Rondell's mining, Mr. Schueck, a DER hydrogeologist, testified that based upon the stratigraphic relationship of the three springs and the pre-mining quality of the Correal and Knopsnyder Springs, that it was possible to say "with a reasonable degree of scientific certainty" that the water quality of the Clark Spring would have been very similar to the quality of the other two. (T. 233) We accept Mr. Schueck's testimony as to the pre-mining quality of the Clark Spring.

on the Correal Strip, there was no acid mine discharge from the area at that time.[5] (T. 26-30) After Rondell completed its mining, however, numerous water samples all showed that the three springs had been affected by acid mine drainage. (Exhibits C-21, C-26, C-27, C-38; T. 229-233)

DER submitted additional testimony which strengthened the link between Rondell's mining and the degradation of the three springs. The Correal Strip area mined by Rondell is located on the eastern limb of the Chestnut Ridge Anticline,[6] so the strata on the site dip to the east-southeast, and groundwater flows in an east-southeast direction across this section of the Correal Strip. (T. 148, 149, Exhibit C-7) The Correal and Knopsnyder Springs are located 600 and 800 feet, respectively, south of the Correal Strip, and the Clark Spring is located 1300 to 1600 feet southeast of the Strip.[7] (T. 76-79, 80, 83, 86) Finally, DER's testimony established that Rondell's mining under MP 511-10, 511-10(A), and 511-10(A2) was in the Lower Kittanning coal seam, and that this seam has historically had acid mine

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[5] The only evidence that there could have been an acid mine discharge from the prior mining was evidence that a borehole on the mining site contained acidified water prior to Rondell's mining. (T. 159-160) However, DER's witness Michael Smith concluded that this could not have caused the degradation of the springs because the area affected by the prior mining was too small to create a discharge of this magnitude, other water samples taken near Rondell's mining site after Rondell began mining showed degradation more severe than that found in the borehole water, and a tributary of Newmyer Run located close to the mining site was unaffected by acid mine drainage until after Rondell began mining. (T. 160-163) We accept Mr. Smith's conclusion.

[6] An anticline is a geologic structure, where the earth's strata are warped upward in a ridged shaped structure with two limbs dipping away from each other. (T. 146-148, Exhibit C-7)

[7] The record is unclear as to the exact distance of the Clark Spring from the mining area--Ms. Gunter testified that the distance was 1300 feet (T. 83), but testified later that the distance was 1600 feet (T. 86). We are not concerned about this discrepancy because there is nothing in the record to indicate that it affects the conclusion that the mining on the Correal Strip degraded the Clark Spring.

drainage problems associated with it. (T. 205, 165)

This evidence, which was not refuted by Rondell either through testimony or in a Brief, is sufficient to establish that Rondell's mining caused the degradation of the springs, and that Rondell is responsible for treating the three springs to effluent standards, as ordered by DER.

In summary, DER has shown by a preponderance of the evidence that Rondell's mining on the Correal Strip caused an acid mine discharge which polluted the Correal, Knopsnyder, and Clark Springs. Therefore, we will uphold DER's Order finding that Rondell violated Section 315(a) of the CSL, 35 P.S. §691.315(a), and ordering Rondell to treat the three springs. Since Rondell is a partnership, Mr. Charles and Mr. Lovrich are also responsible for complying with DER's Order. Commonwealth v. King Coal Co., 82 Pa. Commonwealth Ct. 487, 475 A.2d 939 (1984).

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and the subject matter of this proceeding.

2. DER has the burden of proof in cases where it orders a mine operator to take affirmative action to abate pollution. 25 Pa. Code §21.101(a)(3).

3. Issues not raised by a party in a post-hearing brief are deemed waived. Robert Kwalwasser v. DER and Kerry Coal Company, 1986 EHB 24.

4. DER met its burden of proving that Rondell violated Section 315(a) of the Clean Streams Law, 35 P.S. §691.315(a), by discharging water which did not meet the effluent standards in DER's regulations from Rondell's mine into waters of the Commonwealth.

5. Partners are responsible for complying with DER's order to their partnership. Commonwealth v. King Coal Co., 82 Pa. Commonwealth Ct. 457, 475 A.2d 839 (1984).

ORDER

AND NOW, this 16th day of June, 1988, it is ordered that the appeal of the Rondell Company (a Partnership) and Wendell Charles and Ronald Lovrich (Partners) at Docket Number 84-156-M is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: June 16, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Joseph K. Reinhart, Esq.
Western Region
For Appellant:
Allan E. MacLeod, Esq.
Coraopolis, PA

nb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

THEODORE V. SKOTEDIS and TEDD'S LANDING, INC.	:	EHB Docket No. 88-181-W
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	Issued: June 23, 1988
BOROUGH OF SHAMOKIN DAM, Permittee	:	

OPINION AND ORDER SUR
PETITION TO INTERVENE

Synopsis

Petition to intervene in a third party appeal of the issuance of an encroachments permit for the placement of fill in a floodplain is denied where the petitioner has failed to substantiate the nature and relevance of its interest and has failed to demonstrate how the permittee would not adequately represent its interest. Intervention by the contractor performing the deposition of the fill for the permittee would unduly confuse and complicate matters before the Board.

OPINION

This matter was initiated on May 3, 1988 with the filing of a notice of appeal by Theodore V. Skotedis and Tedd's Landing, Inc. (collectively, Skotedis) seeking review of the Department of Environmental Resources' (Department) issuance of a permit pursuant to the Dam Safety and Encroachments

Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 et seq., to the Borough of Shamokin Dam, Snyder County. The permit authorized the placement of fill material within the 100 year floodplain of the Susquehanna River in Shamokin Dam. Among other things, Skotedis contends that the permit was issued in violation of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq., and in contravention of 25 Pa.Code §105.17, a rule adopted under the DSEA which regulates the placement of obstructions in wetlands. Skotedis also filed a petition for supersedeas, but that petition was dismissed by a May 10, 1988 stipulation of the parties.

The Board, on May 17, 1988, received a petition for intervention in this matter from Nestlerode Contracting Company, Inc. (Nestlerode). Nestlerode alleges that it is the contractor which conducted the fill operation authorized by the permit, that it will suffer irreparable harm through "the imposition of damages and penalties by the Pennsylvania Department of Transportation and through the potential loss of ability to enter into contracts with the Commonwealth of Pennsylvania;" and that if Skotedis' appeal is successful, Nestlerode may have to remove the fill. It contends that it will present evidence which establishes that the permit was properly issued, that there will be no harm to the wetlands, that there will be no significant increase in flooding, and that the fill is in the public interest. Nestlerode also represents that its interest will not be adequately represented because the Department will not actively defend its issuance, that Shamokin Dam is failing to defend its permit, and that Shamokin Dam has inadequate resources to defend the permit's issuance.

Shamokin Dam advised the Board on June 3, 1988 that it had no objections to Nestlerode's petition. However, Skotedis, in an answer to

Nestlerode's petition filed on June 8, 1988, opposed the petition. In the main, Skotedis argues that Shamokin Dam, as the permittee, is ultimately responsible for the activity presently authorized by the permit and that Nestlerode's interests are co-extensive with those of Shamokin Dam. Skotedis also contends that Shamokin Dam is actively defending its permit; that the evidence Nestlerode will present is duplicative of that which will be presented by Shamokin Dam; and that Nestlerode's participation will unduly prolong and complicate the resolution of this matter. For the reasons set forth below, we agree with Skotedis that Nestlerode's petition should be denied.

At the outset, we must note that Nestlerode's petition, although in the form prescribed by 25 Pa.Code §21.62, does not satisfy the requirements of 1 Pa.Code §35.29, which is incorporated into our rules by 25 Pa.Code §21.62(e). That provision of the General Rules of Administrative Practice and Procedure provides, in relevant part, that "Petitions to intervene shall set out clearly and concisely the facts from which the nature of the alleged right or interest of the petitioner can be determined,..." Nestlerode has only averred that it is the contractor conducting the fill operation and that it may be penalized in its future dealings with PennDOT. Those averments are supported only by a verification signed by Nestlerode's president. We have nothing before us which would identify the nature of Nestlerode's contractural relationship with Shamokin Dam or substantiate its claim of possible penalties in its dealings with PennDOT. These deficiencies alone provide adequate basis to deny Nestlerode's petition. Robert A. and Florence Porter v. DER and Consol Pennsylvania Coal Company, EHB Docket No. 84-240-R (Opinion and order issued May 13, 1988).

Even if we were to disregard these deficiencies, Nestlerode's request must still be denied. As Skotedis correctly points out, the Board's decision in Franklin Township Board of Supervisors et al. v. DER, 1985 EHB 853, is directly on point. There, the Board considered a petition to intervene in an appeal of a landfill permit denial by trash haulers contending that the permit denial would have an adverse economic impact on them, would impact the general health and welfare of Blair and Huntingdon Counties, and would impair contracts between them and the permit applicant. In denying the petition, we held that the haulers' contractual interests and obligations vis-a-vis the permit applicant were not cognizable before the Board; that the economic impact of the permit denial on the haulers was irrelevant; that to the extent the haulers had any interest in the permit application, it would be adequately represented by the applicant; and that intervention would lead to a proliferation of irrelevant issues. The situation here is no different. Nestlerode's contractual relationship with Shamokin Dam and its potential problems in securing future PennDOT contracts are not relevant to the issues before the Board. To the extent Nestlerode has any interest in the permit issuance, it will be adequately represented by Shamokin Dam, which has retained counsel and is actively defending its permit. And, Nestlerode's intervention would unduly complicate matters.

O R D E R

AND NOW, this 23rd day of June, 1988, it is ordered that Nestlerode Contracting Company, Inc.'s petition to intervene at Docket No. 88-181-W is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: June 23, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Timothy D. Searchinger, Esq.
For Appellant:
Bernard A. Labuskes, Jr., Esq.
McNEES, WALLACE & NURICK
Harrisburg, PA
For Permittee:
Eugene E. Dice, Esq.
Harrisburg, PA
For Petitioning Intervenor:
Joel R. Burcat, Esq.
KIRKPATRICK & LOCKHART
Harrisburg, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

JOHN H. MILLER	:	
	:	
v.	:	**EHB Docket No. 87-065-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 27, 1988

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

Summary judgment may be granted where there are no disputes as to material facts and where the movant is entitled to judgment as a matter of law. The Department of Environmental Resources has a mandatory duty to forfeit bonds posted for a surface mining site where the operator has failed to fulfill its reclamation obligations. Appellant's failure to respond to Department of Environmental Resources' (DER) request for admissions renders the subject matter of the requested admissions as admitted by the Appellant. There is no dispute that the site has not been backfilled, regraded and revegetated, that backfilling equipment was removed, and that water monitoring had not been performed. That Appellant, who collateralized the operator's surety bonds, was not involved in the operation of the mine site or was not aware of the operator's failure to backfill, regrade and revegetate the mine site does not alter DER's duty to forfeit the operator's bonds.

OPINION

This matter was initiated by John H. Miller's (Miller) February 23, 1987 filing of a notice of appeal from the Department of Environmental Resources (DER) February 12, 1987 forfeiture pursuant to the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et al. (SMCRA) of seven bonds relating to R & K Coal Company's (R & K) surface mine for R & K's failure to backfill and regrade concurrent with mining, failure to maintain adequate backfilling equipment on site, failure to monitor surface and ground water in the vicinity of the site, and failure to comply with an order of DER. R & K operated its mine pursuant to Mine Drainage Permit 6579113 (MDP) and Mining Permits (MP) Nos. 2037-1, 2037-6579113-01-0 (1-0), 2037-6579113-02-1 (2-1), 2037-6579113-02-2 (2-2), 2037-6579113-02-3 (2-3), 2037-6579113-02-4 (2-4), and 2037-6579113-02-5 (2-5). In his notice of appeal Miller alleges that he collateralized four of the seven forfeited surety bonds: SM322 (MP 2037-1), Fortune Assurance Company, $25,600; SM665 (MP 2-1), Fortune Assurance Company, $1,300; SM669 (MP 2-2), Fortune Assurance Company, $7,500; and SM-1193 (MP 2-3), Rockwood Insurance Company, $7,500. He also contends that DER should have advised him of R & K's non-compliance and that DER should have given him an opportunity to cure R & K's violations prior to forfeiture.

On July 22, 1987, DER filed a motion for summary judgment, alleging that, on May 13, 1987, it served Miller with interrogatories and a first request for admissions and that, because Miller neither responded nor objected to these discovery requests, they are deemed admitted. DER asserts that the subject matter of the requested admissions would show that R & K failed to comply with reclamation and water monitoring requirements, as cited in the forfeiture order and, as a result, DER had a mandatory duty to forfeit R & K's

bonds. Since there are no material facts in dispute and DER contends it is entitled to judgment as a matter of law, DER argues that we should enter summary judgment in its favor.

Miller, in his August 21, 1987 response, disputes neither the existence of the various violations attributed to R & K which form the basis of DER forfeiture action nor DER's allegation that he failed to respond to the requested discovery. Rather, Miller alleges a distant relationship with R & K, indicates his willingness to negotiate a consent order with DER to bring the site into compliance, and contends that there is a third party planning to utilize the site for an alternative purpose and, therefore, reclamation of the site would be unreasonable. Finally, Miller requested an additional 120 days to conduct discovery in order to determine the feasibility of reclamation.

The Board may grant summary judgment when the pleadings, depositions, and answers to interrogatories, and admissions on file [illegible] affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035. Summerhill Borough v. DER, 34 Pa.Cmwlth. 574, 383 A. 2d 1320 (1978).

Section 315 of the Clean Stream Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (CSL) and §4(d) of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52. P.S. §1396.1 et seq. (SMCRA), both provide for the posting of bonds for mine sites. The bonds must be conditioned upon faithful compliance with the requirements of the two statutes and regulations promulgated thereunder. Section 4 of SMCRA, 52 P.S. §1396.4(h), provides, in relevant part, as follows:

> If the operator fails or refuses to comply with the requirements of the act in any respect for which liability has been charged on the bond, [DER] shall declare such portions of the bond forfeited . . .

It has been held that §4 imposes a mandatory duty upon DER to forfeit the bonds for failure to comply with the requirements of SMCRA. See Morcoal Company v. DER, 74 Pa.Cmwlth. 108, 459 A.2d 1303 (1983). Thus, if R & K's violations of SMCRA and the CSL are established, DER has a duty to forfeit R & K's bonds and is, therefore, entitled to summary judgment.

The material facts needed to resolve DER's motion involve the conditions at R & K's mine site, which were also the subject matter of DER's Requests for Admissions. Since Miller filed no answers or objections to DER's requests, they are deemed admitted by Miller by Pa.R.C.P. 4014(b). Thus, it is established that the areas covered by MPs 2037-1, 2-1, 2-2, and 2-3 have not been backfilled, graded and revegetated (Requests for Admissions 1, 3, 4 and 5), in violation of 25 Pa.Code §87.141(c) which provides that the "[t]iming of backfilling and grading shall be concurrent with mining . . ." It is also admitted that, contrary to 25 Pa.Code §87.141(d), all backfilling and grading equipment was removed from the site covered by the MDP (Request for Admissions 8), and that R & K failed to monitor the surface and ground water in the vicinity of the MDP as required by the monitoring plan approved by DER (Request For Admission 9), and 25 Pa.Code §§87.116 and 87.117. These violations of the regulations adopted under SMCRA, therefore, mandate bond forfeiture.

The arguments raised by Miller in its notice of appeal and response to DER's motion are without merit. Miller's relationship to R & K

and the sureties and the possibility that he will suffer financial loss in the event of forfeiture cannot affect the Department's exercise of its responsibilities under SMCRA and the CSL. The Department has no obligation to advise Miller of the status of R & K's compliance. Furthermore, Miller's arrangements with R & K and the sureties are entirely private contractual matters over which DER exercises no control.[1] That Miller wishes to enter into a consent agreement with DER to reclaim the site is likewise irrelevant to our disposition of DER's motion. The Board's inquiry into DER's forfeiture action is limited to determining whether the forfeiture is an abuse of discretion. Warren Sand and Gravel Co., Inc. v. DER, 20 Pa.Cmwlth. 186, 341 A.2d 556 (1975). Under the facts of this matter, we must conclude that the forfeiture is justified and, accordingly, DER is entitled to judgment as a matter of law.

---

[1]DER is probably completely unaware of the collateralization requirements imposed on permittees by sureties. Neither the statutes nor the relevant regulations contain provisions requiring submission of information relating to collateralization as part of a surety bond. DER does not possess the expertise or the authority to assess the wisdom of collateralization agreeements among private parties which are indirectly related to DER's regulation of mining.

ORDER

AND NOW, this 27th day of June, 1988, it is ordered that the Department of Environmental Resources' motion for summary judgment is granted and the appeal of John H. Miller is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: June 27, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
George Jugovic, Jr., Esq./ Western Region
For Appellant:
Gregg Rosen, Esq.
ROSEN & MAHFOOD
Pittsburgh, PA

rm

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

R & H SURFACE MINING	:	
	:	
v.	:	**EHB Docket No. 88-030-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** June 27,1988

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A motion to dismiss an appeal is granted. A notice of a proposed civil penalty assessment is not a fin[illegible] DER action and [illegible] therefore, not an appealable action.

OPINION

On February 4, 1988, R & H Surface Mining (R & H) filed a notice of appeal by which it challenged a January 5, 1988 compliance order (88G004) and a January 22, 1988 DER letter advising R & H that it was subject to a potential civil penalty because of violations identified in Compliance Order 88G004. These two DER actions pertained to R & H's surface mine known as the No. 1 Strip Site located in Burrell Township, Armstrong County.

DER has filed a motion to dismiss this appeal, contending that the language of R & H's appeal makes it clear that it is only appealing the proposed civil penalty assessment. Since, according to DER, proposed assessments are not appealable actions, this appeal should be dismissed.

R & H, in a less than clear answer, objects to the motion.

It is well settled that a proposed civil penalty assessment is not an appealable action. See Laurel Ridge Coal, Inc. v. DER, 1987 EHB 744. Accordingly, R & H's appeal of DER's January 22, 1988 letter must be dismissed. However, R & H clearly stated that it was also seeking review of "1/5/88 Compliance Order 88G004 - Discharge of water from area disturbed by mining activities . . ." In addition, R & H, in its answer to DER's motion, begins by stating that "[o]n January 5, 1988 Compliance Order 88G004 was issued by [DER]. On February 2, 1988, R & H Surface Mining filed an instant appeal." Accordingly, the remainder of this appeal will be limited to whether DER's issuance of Compliance Order 88G004 was an abuse of discretion.

ORDER

AND NOW, this 27th day of June, 1988, it is ordered that: 1) The Department of Environmental Resources' motion to dismiss this appeal is granted and the appeal of R & H Surface Mining is dismissed with respect to the January 22, 1988 notice of proposed civil penalty assessment; 2) the remainder of this appeal is limited to the issue of whether Compliance Order 88G004 was an abuse of discretion; R & H Surface Mining shall file its pre-hearing memorandum on or before July 27, 1988, and the Department shall file its pre-hearing memorandum within 15 days of receipt of R & H's.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: June 27, 1988

cc: Bureau of Litigation
Harrisburg, PA
For the Commonwealth, DER:
Katherine S. Dunlop, Esq.
Western Region
For Appellant:
Robert Helfer
R & H Surface Mining
Shelocta, PA

rm

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

DEL-AWARE UNLIMITED, INC., et al.	:	
	:	
v.	:	EHB Docket No. 88-075-R
	:	(Consolidated Appeals)
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES,	:	
et al.	:	Issued: June 28, 1988

OPINION AND ORDER
SUR
JOINT PETITIONS TO INTERVENE

Synopsis

Joint petitions to intervene are denied where petitioners failed to state their relevant interests in the appeal, explain why their interests were likely to be inadequately represented by any current parties to the appeal, or indicate the evidence they would be presenting.

OPINION

These consolidated appeals are from various permits issued by the Department of Environmental Resources (DER) to the Neshaminy Water Resources Authority (NWRA), the Philadelphia Electric Company (PECO) or North Penn/North Wales Water Authorities (NP/NW). The permits in question authorize the construction of various components of the so-called Point Pleasant Project. For a description of the project, see the Board's adjudication at Del-AWARE Unlimited v. DER, 1984 EHB 178.

The Board has received a joint petition to intervene filed on behalf of 12 organizations which have purportedly formed the Coalition to Stop the

Point Pleasant Pump in conjunction with the original appellants in this matter. The organizations seeking intervention are: Natural Resources Defense Council, a New York not-for-profit membership corporation; Environmental Defense Fund, a New York non-profit public benefit membership corporation; American Littoral Society, a national non-profit, naturalist public interest organization; National Water Well Association, a membership organization; Pennsylvania Sierra Club, a membership organization; Pennsylvania Federation of Sportsmen's clubs, a membership organization; STAND, a political issues committee; Paunacussing Watershed Association, a membership organization; Clean Energy Collective; Citizens for Environmental Rights; a membership organization; Consumer Education and Protection Association membership organization; Friends of the Earth in the Delaware Valley. These 12 groups will be collectively referred to as the Petitioners.

Petitioners seek intervention in the following four appeals consolidated herein: 88-075-R, appeal of water allocation permit WA-0978601A issued to NWRA; 88-076-R, issuance/transfer of water allocation permit WA-0978601B to NP/NW; 88-078-R, outfall to East Branch Perkiomen Creek issued to PECO; and 88-080-R, outfall to North Branch Neshaminy Creek, transfer of permit from NWRA to NP/NW. NP/NW and PECO have filed objections to intervention. DER takes no position on the petition and the other parties, though advised of the joint petition, have not responded.

Intervention before the Board is governed by 25 Pa.Code §21.62. The Board has consistently asserted that intervention is discretionary with the Board and that petitioners must show a direct, substantial and immediate interest in the outcome of the litigation. Franklin Township v. DER, 1985 EHB 853. The factors considered by the Board in ruling on a petition to intervene include: 1) the prospective intervenor's relevant interest; 2) the

adequacy of representation provided by the existing parties; and 3) the ability of the prospective intervenor to present relevant evidence. BethEnergy Mines, Inc. v. DER, 1987 EHB 873, citing Franklin Township, supra.

Petitioner's request is deficient with regard to all of these factors. None of the individual petitioners have come close to setting forth an interest in the appealed from actions that is direct, substantial and immediate. What has been stated are broad and general interests in environmental issues. Typical of the interests stated are the following 3 examples:

> 5. The Environmental Defense Fund (EDF) . . . is a national environmental advocacy organization supported by approximately 60,000 members. EDF is dedicated to the preservation and protection of the environment, public health, and national resources.
>
> * * * * *
>
> 7. National Water Well Association is a membership organization dedicated to the conservation, utilization and protection of groundwater. The association is an education foundation, a research institute, and the world's largest private publisher of literature on groundwater hydrology.
>
> * * * * *
>
> 15. Friends of the Earth in the Delaware Valley is organized to educate citizens of the Delaware Valley about their environment, to advocate the preservation of the natural environment and to propose alternatives to pollution and waste.

Without question, the individual Petitioners directly and indirectly provide a valuable service to not only their members but to the public as well. Many of the gains in environmental quality have been possible only through the research, educational or advocacy activities of groups such as the Petitioners. However, the Petitioners bear the burden of persuasion in intervention matters. Sunny Farms Ltd v. DER, 1982 EHB 442. On the basis of Petitioners' general statements of concern about environmental matters, we are left to boundless speculation as to how the appealed-from permits affect any

interests which may be direct, substantial and immediate. We will not do so. The Petitioners have failed in persuading us as to this criteria.

In Paragraphs 2 and 16 of their petition, Petitioners state that, with the original appellants herein, they have formed the Coalition to Stop the Point Pleasant Pump. However, the Petitioners neglect to discuss why the original appellants are likely to inadequately represent whatever interests they may have. Assuming the Petitioners have a relevant interest in these appeals, they would appear to be nearly identical to those of the original appellants. Given the history of litigation of these matter before the Board, we cannot conceive of a situation where the original appellants would provide representation that is anything less than adequate.

As to evidence they may present, Petitioners are just as unenlightening. In Paragraph 18 of their petition, they state that ". . . Intervenors will join in the appeal and, to the maximum extent feasible, join with the original plaintiffs in presenting evidence and making argument, and their individual counsel will limit their presentation to necessarily separate presentations." Board is left to speculate as to what might be "necessarily separate presentations" might consist of. We will not do so.

In light of foregoing, we have little difficulty in denying the joint petition to intervene.

ORDER

AND NOW, this 28th day of June 1988, it is ordered that the Joint Petition to Intervene filed by Natural Resources Defense Council, et al. is denied.

ENVIRONMENTAL HEARING BOARD

WILLIAM A. ROTH, MEMBER

DATED: June 28, 1988

cc: **For the Commonwealth, DER:**
Louise S. Thompson, Esq.
For Appellants Del-AWARE, et al.
Robert J. Sugarman, Esq.
For Appellants Friends of Branch Creek:
James M. Neill, Esq.
For Permittee NWRA:
Lois Reznick, Esq.
For Permittees NP/NW Water Authorities:
Jeremiah J. Cardamone, Esq.
For Permittee PECO:
Bernard Chanin, Esq.
For Petitioners to Intervene:
Robert J. Sugarman, Esq.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

SMITH'S BLACKTOP PAVING COMPANY	:	
	:	
v.	:	EHB Docket No. 87-141-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 29, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

Appeals not timely filed pursuant to 25 Pa.Code §21.52 will be dismissed. In the absence of fraud or a breakdown in the Board's operations, mere failure to mail the notice of appeal to the correct address does not warrant the allowance of an appeal nunc pro tunc.

OPINION

On April 15, 1987, Smith's Blacktop Paving Company (Smith's) filed an appeal with this Board seeking review of the Department of Environmental Resources' (Department) March 6, 1987 forfeiture of Smith's bonds posted pursuant to the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq., for its surface mining site in Derry Township, Westmoreland County.

On September 10, 1987, the Department filed a motion to dismiss the appeal on the grounds that it was untimely. While Smith's admits that it

received notification of the bond forfeiture on March 11, 1987, it denies that the filing of its appeal was untimely. Smith's alleges that its notice of appeal was mailed to the Board at the Board's former address in the Blackstone Building in Harrisburg and returned as undeliverable because the forwarding order expired; this address was given on a now-superseded notice of appeal form Smith's had in its possession. Smith's argues that its appeal would have been timely but for its mailing to the incorrect address.

Smith's also contends that it had sufficient justification to file an appeal nunc pro tunc and alleges that the Department waived its right to object to the Board's acceptance of this appeal since the Department filed pleadings and conducted discovery in this matter and received its copy of the notice of appeal within the 30 day time limit.

The Department replied to Smith's objections on October 22, 1987, asserting that Smith's error in addressing its appeal does not relieve it of the obligation to file a timely appeal, that Smith's has not sufficiently pleaded or established that reason exists to permit this appeal nunc pro tunc,[1] that jurisdictional issues may be raised at any time during a proceeding, and that receipt of the appeal by the Department does not satisfy the statutory requirement of receipt by the Board.

For the reasons which follow, the Department's motion is granted and Smith's Petition for Leave to Appeal Nunc Pro Tunc is denied.

It is well established, by both regulation and case law, that jurisdiction of the Board does not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party has received written notice. Rostosky v. DER, 26

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[1] Although not phrased specifically as a petition to file nunc pro tunc, we will treat Smith's pleading as such a request.

Pa.Cmwlth.478, 364 A.2d 761 (1976). The timely filing of the notice of appeal with the Department, rather than the Board, does not confer jurisdiction upon the Board. Appalachian Industries, Inc. v. DER, 1987 EHB 325.

In a matter directly on point, Eugene Petricca v. DER, 1984 EHB 519, the appellant incorrectly mailed his appeal to the Board's former address at the Blackstone Building in Harrisburg. The Board held that where the administrative order appealed from correctly gave the Board's current address, it was negligent for the appellant not to check with the Board before mailing the notice of appeal to a different address. Here, Smith's was faced with the same disparity in addresses and, yet, it, too, chose to mail the appeal without first verifying the Board's mailing address.

The Board may grant leave for the filing of an appeal nunc pro tunc upon written request and good cause shown. 25 Pa.Code §21.53(a). The Board has found good cause to allow an appeal nunc pro tunc where fraud or breakdown in the Board's procedures has contributed to the late filing of an appeal. Borough of Youngwood v. DER, 1986 EHB 1070. Smith's has not alleged that any fraud or breakdown in the Board's procedures caused its untimely filing and we find no evidence to that effect.

Finally, Smith's argument that the Department has somehow waived its right to raise the issue of timeliness, and, therefore, the question of the Board's jurisdiction over this matter, lacks merit. We have consistently rejected such arguments, holding that jurisdictional issues may be raised at any time during a proceeding. Thomas Fitzsimmons v. DER, 1986 EHB 1190.

O R D E R

AND NOW, this 29th day of June, 1988, it is ordered that the Department of Environmental Resources' Motion to Dismiss is granted and Smith's Blacktop Paving Company's request to file an appeal nunc pro tunc is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: June 29, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Joseph K. Reinhart, Esq.
Western Region
For Appellant:
George A. Conti, Jr., Esq.
CONTI AND CONTE
Greensburg, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

CENTERVILLE BOROUGH SANITARY AUTHORITY	:	
	:	
v.	:	EHB Docket No. 87-532-R
	:	(Consolidated Appeals)
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 30, 1988

OPINION AND ORDER
SUR
PETITION FOR SUPERSEDEAS

Synopsis

A petition for supersedeas is denied without hearing where facts are not pleaded with particularity in the petition and are unsupported by affidavits, where no legal authority is stated, and where petitioner fails to state grounds sufficient for the granting of a supersedeas.

OPINION

The Centerville Borough Sanitary Authority (Authority) and the Borough of Centerville (Borough) separately filed timely appeals, now consolidated, from a December 1, 1987 Department of Environmental Resources (DER) order which ordered the Borough, together with the Borough of Beallsville and West Pike Run Township to adopt certain revisions to their official sewage facilities plan and, with the Authority, to implement the so-called 201 Facility Plan. DER issued its order pursuant to the Clean Streams Law, the Act of June 22, 1937, as amended, 35 P.S. §691.1 et seq.

(CSL) and the Sewage Facilities Act, the Act of January 24, 1966, P.L. 1535, as amended, 35 P.S. §750.1 et seq. (SFA).

The Authority and the Borough (collectively, Centerville) have filed a petition for supersedeas. DER filed a motion to dismiss the petition on the basis that it failed to conform to the Board's rules on the contents of such petitions.

The Board's rules of practice and procedure, governing the contents of a petition for supersedeas, 25 Pa. Code §21.77, states, in relevant part:

> (a) A petition for supersedeas shall plead facts with particularity and shall be supported by one of the following:
> (1) Affidavits, prepared as specified in 231 Pa. Code Rules 76 and 1035 (d) (relating to definitions and motion for summary judgment), setting forth facts upon which issuance of the supersedeas may depend.
> (2) An explanation of why affidavits have not accompanied the petition if no supporting affidavits are submitted with the petition for supersedeas.
> (b) A petition for supersedeas shall state with particularity the citations of legal authority the petitioner believes form the basis for the grant of supersedeas.
> (c) A petition for supersedeas may be denied upon motion made before a supersedeas hearing or during the proceedings, or sua sponte, without hearing, for one of the following reasons:
> (1) Lack of particularity in the facts pleaded.
> (2) Lack of particularity in the legal authority cited as the basis for the grant of the supersedeas.
> (3) An inadequately explained failure to support factual allegations by affidavits.
> (4) A failure to state grounds sufficient for the granting of a supersedeas.

* * * * *

Centerville's petition is deficient in every regard. Facts are not pleaded with particularity. Rather, the petition merely alleges that certain of the findings in DER's order cannot be used as bases for the order. See Paragraphs 14-24 of Centerville's petition. Even if we could consider these

as having been pleaded with particularity, they are unsupported by affidavits. Though Centerville included what it deems to be affidavits by 5 officials of the Authority's Board, they are totally deficient. Other than stating that the affiant is an official on the Authority's Board, each of the documents is an identical repetition of Paragraphs 14-24 of Centerville's petition for supersedeas. In fact, Centerville has submitted 5 identical "fill-in-the-name" form affidavits. There is no indication of the affiants' personal knowledge, no setting forth of facts as might be admissible in evidence and no indication that the affiants are competent to testify. In essence, Centerville presents no facts to affirmatively support its supersedeas petition.

Centerville's petition also fails to cite legal authority for the grant of a supersedeas. Its reference to §1921-A(e) of the Administrative Code, 71 P. S. §510-21(e), is irrelevant. The Administrative Code provides the authority for the Board to, inter alia, grant a supersedeas from a DER action. However, the legal basis for granting Centerville's petition, if warranted, is found in the CSL, the SFA and applicable caselaw.

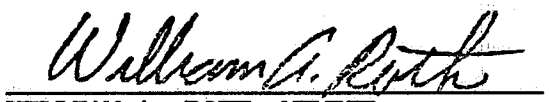
The most obvious deficiency in Centerville's petition is the failure to state grounds sufficient for the granting of a supersedeas. In granting a petition for supersedeas, the Board considers questions of irreparable harm to the petitioner, the likelihood that it will prevail on the merits, and the likelihood of injury to the public or other parties. Other than its mere allegation of irreparable harm, Centerville has alleged no facts to even indicate irreparable harm. As to prevailing on the merits, Centerville has offered no theory as to why DER's order may have been an abuse of discretion. Finally, Centerville has not even touched upon the question of injury to third parties.

The Board may deny a petition for supersedeas if for any one of the deficiencies cited in §21.77(c) is present. Mill Service, Inc. v. DER, 1986 EHB 991. In light of the shortcomings of Centerville's petition for supersedeas, we have little difficulty in denying it.

ORDER

AND NOW, this 30th day of June, 1988, it is ordered that Appellants' petition for supersedeas is denied.

ENVIRONMENTAL HEARING BOARD



WILLIAM A. ROTH, MEMBER

DATED: June 30, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Gary A. Peters, Esq.
Western Region
For Appellant:
Oliver N. Hormell, Esq.
California, PA

ef

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
v.	:	EHB Docket No. 81-021-CP-M
LAWRENCE COAL COMPANY	:	Issued: July 5, 1988

ADJUDICATION

By the Board

Synopsis

This proceeding involves a Complaint for Civil Penalties filed by the Department of Environmental Resources (DER) against Lawrence Coal Company (Lawrence) under Section 605 of the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605. DER sustained its burden of proving by a preponderance of the evidence that Lawrence had violated provisions of the CSL, provisions of DER's regulations, and provisions of its mine drainage permits by discharges of acid mine drainage (AMD) and sediment at two surface mining sites in Fayette County, and by the improper handling of reject material at one of the sites. The unlawful discharges were shown to have degraded Buck Run (a high quality cold water fishery) and to have interfered with its use as a fishing stream.

In determining the amount of a civil penalty, the Board considered wilfullness and the damage to Buck Run. It did not consider the cost of

restoration or employ a deterrence factor because of insufficient evidence.

PROCEDURAL HISTORY

On February 25, 1981, DER filed a Complaint for Civil Penalties against Lawrence, alleging (1) the discharge of acid mine drainage, (2) the failure to implement and maintain effective erosion and sedimentation controls, (3) the failure to properly dispose of toxic waste, and (4) the disturbing of land designated as a barrier. The allegations pertained to Lawrence's surface mining operations under Mining Permit No. 1063-5 in Springfield Township, Fayette County, and under Mining Permits Nos. 1063-7 and 1063-8 in Dunbar Township, Fayette County, during 1980 and the early months of 1981.

On March 16, 1981, Lawrence filed an Answer denying the allegations of the Complaint, alleging in New Matter that it had attempted in good faith to cooperate with DER in determining the cause of the alleged pollution of the waters of the Commonwealth. DER filed a Reply to this New Matter on April 1, 1981, denying the allegations.

Hearings began before Board Chairman Dennis J. Harnish in Pittsburgh on June 2, 1981. At that time it was stipulated that the Complaint did not include any alleged violations with respect to Mining Permit No. 1063-5A. DER filed on July 6, 1981, an Application for Leave to Amend Complaint to include Mining Permit No. 1063-5A, to which Lawrence objected in an Answer filed on July 19, 1981. Chairman Harnish denied DER's Application at the outset of the hearing on July 26, 1981.

A total of eleven days of hearings were held before they concluded on November 23, 1982. By agreement of counsel, the deposition of Donald L. Streib, dated January 21, 1983, together with exhibits, was filed as part of the record on January 31, 1983. Post-hearing briefs were filed by both

parties during March 1983. On March 28, 1983, DER filed a Motion to Amend Complaint to Conform to Proof. Lawrence filed an Answer to the Motion on April 7, 1983.

Chairman Harnish resigned from the Board on May 16, 1983, without having prepared an Adjudication. The case was assigned to Edward R. Casey, a Board-appointed Hearing Examiner, who began reviewing the record on September 15, 1983. On October 20, 1983, Mr. Casey wrote a letter to legal counsel for both parties, setting forth his candid overview of the case and suggesting a settlement that would involve the assessment of civil penalties in the maximum amount of $1,000.

On November 7, 1983, DER filed a Petition for Recusal of Mr. Casey and a Motion for Reassignment, alleging, inter alia, that Mr. Casey had ignored a recommendation of former Board Chairman Harnish to find in favor of DER. On November 22, 1983, the Board entered an Order recusing Mr. Casey and reassigning the case to Board Member Anthony J. Mazullo, Jr. for the purpose of preparing an Adjudication.

On November 30, 1983, Lawrence filed a Petition, requesting either a dismissal of the case because of alleged improper communications between former Board Chairman Harnish and legal counsel for DER or, in the alternative, a reassignment of the case to a neutral hearing examiner who was not involved with the Board during Harnish's tenure. The Petition was denied in an Opinion and Order issued by the Board (Members Mazullo and Edward Gerjuoy) on December 12, 1983.

Board Member Mazullo prepared a draft Adjudication which had not been adopted by the Board at the time of his resignation on January 31, 1986. On May 27, 1986, the Board (acting through its remaining incumbents, Chairman Maxine Woelfling and Member Gerjuoy) issued an Adjudication, which adopted

Mazullo's draft Adjudication with certain modifications and which assessed civil penalties in the amount of $150,700.

On June 6, 1986, Lawrence filed a Petition for Reconsideration. As supplemented on June 24, 1986, the Petition requested that the Adjudication of May 27, 1986, be vacated and that Chairman Woelfling and Member Gerjuoy be recused from any further participation in the case. William A. Roth became a Member of the Board on June 24, 1986. On August 7, 1986, the Board informed the parties that Members Gerjuoy and Roth would decide whether Chairman Woelfling should be recused.

On September 12, 1986, the Board (Members Gerjuoy and Roth) issued an Opinion and Order deferring a decision on the recusal of Chairman Woelfling until Gerjuoy and Roth acted on Lawrence's Petition for Reconsideration. On September 19, 1986, the Board (Members Gerjuoy and Roth) issued an Opinion and Order denying the Petition for Reconsideration and dismissing as moot the request for the recusal of Chairman Woelfling.

Lawrence filed with Commonwealth Court (No. 3062 C.D. 1986) on October 16, 1986, a Petition for Review of the Board's Orders of September 19, 1986, and May 27, 1986. Commonwealth Court handed down a Memorandum Opinion and Order on January 25, 1988, vacating the Board's Orders and remanding the case for new hearings. On April 8, 1988, the Order was amended to provide for a new Adjudication, to be issued within 90 days, on the basis of the 1982 record and associated briefs and papers, and without the participation of Chairman Woelfling and Member Roth. (Board Member Gerjuoy had left the Board in 1987 and had been succeeded by Robert D. Myers.)

The record consists of the pleadings, a transcript of 1914 pages, a deposition of 54 pages and 118 exhibits.

FINDINGS OF FACT

1. DER is an administrative department of the Commonwealth of Pennsylvania, and is responsible for administering the provisions of the CSL and the rules and regulations adopted pursuant thereto. (Complaint, Para. 1; 71 P.S. §61)

2. Lawrence is a company engaged in the surface mining of coal at sites in Springfield and Dunbar Townships, Fayette County. (Complaint Para. 2 and 3)

3. Lawrence's surface mining operation in Springfield Township is the Rogers Mill Strip. (N.T. 10)

4. Mine Drainage Permit No. 3376SM15 (MDP), which pertains to the Rogers Mill Strip, was issued by DER to William K. Tedesco on November 10, 1976, and was transferred to Lawrence on July 19, 1977. (N.T. 11)

5. Mining Permit No. 1063-5 (MP5), covering 63 acres of the Rogers Mill Strip, was issued by DER to Lawrence on July 1, 1977. (N.T. 11-12)

6. Mining Permit No. 1063-5A (MP5A), covering an additional 20.4 acres of the Rogers Mill Strip, was issued by DER to Lawrence on July 29, 1977. (N.T. 11-12)

7. Mining Permit No. 1063-7 (MP7) and Mine Drainage Permit No. 3374SM31T both pertain to a surface mining operation conducted by Lawrence at the Kennedy Strip in Dunbar Township. (Complaint Para. 4; N.T. 275)

8. Mining Permit No. 1063-8 (MP8) and Mine Drainage Permit No. 3378BC10 both pertain to a surface mining operation conducted by Lawrence on the Spruell Strip in Dunbar Township. (Complaint Para. 4; N.T. 264)

9. The Rogers Mill Strip lies east of the junction of T-683 (Pirl Spring Road) with T-687 (Fish Hatchery Road). Fish Hatchery Road runs in a

northeasterly-southwesterly direction and forms the western boundary of MP5A. Pirl Spring Road runs in a northwesterly-southeasterly direction and forms the southwestern boundary of MP5. T-685 (Haul Road) runs in a general easterly direction from Pirl Spring Road (about 250 feet away from the junction with the Fish Hatchery Road), crosses the Rogers Mill Strip and forms the dividing line between MP5 and MP5A. (N.T. 21-24; Commonwealth Exhibit (CX) 1)

10. Topographically, the Rogers Mill Strip descends about 500 feet from the southeast to the northwest with a slight ridge or "tongue" extending through the center. Drainage from the Strip flows southwest toward Buck Run and northeast toward Middle Fork. (N.T. 13, 720-721; CX 1)

11. Also located in the Buck Run watershed is a surface mining operation, conducted by Marsalino Coal & Coke, Inc. (Marsalino) pursuant to Mining Permit No. 71-27 on the Chanin Strip, upgradient from and immediately to the south of, the Rogers Mill Strip. (N.T. 17-18; CX 1)

12. The Rogers Mill Strip and the Chanin Strip are the only current mining operations in the Buck Run watershed. (N.T. 18)

13. In prior years, deep mining had been conducted beneath both the Rogers Mill Strip and the Chanin Strip, and surface mining had been conducted on the Rogers Mill Strip by William K. Tedesco, Lawrence's predecessor. (N.T. 606-610, 750-757, 918, 1377-1378, 1392-1393)

14. Buck Run flows in a northerly direction west of the Pirl Spring Road, but veers toward the west near the junction of the Pirl Spring Road with the Fish Hatchery Road, running beneath the latter at the Rogers Mill Bridge. About 700 feet upstream from this bridge, Buck Run divides into two branches which rejoin after a distance of about 500 feet. An unnamed tributary flows

west of Pirl Spring Road and empties into the easterly branch of Buck Run about 150 feet upstream from its junction with the westerly branch. (N.T. 13, 86, 104-107; CX 1)

15. Buck Run has been classified as a cold water fishery and was stocked with trout by the Pennsylvania Fish Commission from 1976 through 1978. (N.T. 14, 1837, 1853)

16. The Rogers Mill Strip and the Chanin Strip are situated on the northwestern flank of the Laurel Ridge anticline. Both Strips are geologically similar, characterized by moderately steeply dipping sedimentary rock. The main coal seam (the seam mined by both Marsalino and Lawrence) strikes North 30° East and dips to the northwest. It is overlain with 50 to 60 feet of sandstone. A rider seam lies below the main seam, separated from it by 40 to 60 feet of sandstone and shale. (N.T. 712-713, 731-735, 790-791, 1326-1327)

17. In the vicinity of the Haul Road, a roll occurs in the main seam, causing it to flatten considerably while still dipping to the northwest. (N.T. 735)

18. The main seam outcrops on the southwestern portions of the Rogers Mill Strip and the Chanin Strip along a line that runs roughly parallel to, and about 400 feet away from, Pirl Spring Road. The outcrop line then swings toward the north on the Rogers Mill Strip and runs parallel to, and about 150 feet away from, Fish Hatchery Road. (CX 1; Defendant's Exhibit (DX) 4)

19. The rider seam outcrops at Pirl Spring Road. (DX 4)

20. Goundwater penetrating the surface at the higher elevations would tend to flow in a northwesterly direction, discharging at the lower

elevations in the vicinity of Pirl Spring Road and Fish Hatchery Road. (N.T. 736-737)

21. Lawrence's MP5 pit was 1,000 feet to 1,200 feet long. The highwall was about 60 feet high and oriented in a general north-south direction. It was composed of highly fractured sandstone. The northern endwall was adjacent to the Haul Road and the southern endwall was next to the boundary line between the Rogers Mill Strip and the Chanin Strip. (N.T. 716-717, 720; CX 1; CX 36; DX 4)

22. A series of ten culverts carry water under Pirl Spring Road to Buck Run and the unnamed tributary. The first five of these are adjacent to the MP5 portion of the Rogers Mill Strip and the remaining five are adjacent to the Chanin Strip. Culvert 1 (the farthest toward the northwest) and culvert 2 flow directly toward Buck Run. The others all flow toward the unnamed tributary. (N.T. 20, 39; CX 1)

23. On January 23, 1980, Mark Frederick, a Surface Mining Conservation Inspector for DER, observed discharges of water from culverts 1 through 5 and obtained samples for analysis. (N.T. 19-20)

24. Mr. Frederick determined the following sources for the flows at culverts 1 through 5:

culvert 1 - sediment pond on MP5A (not relevant to this proceeding)

culvert 2 - swampy area at toe of spoil on MP5

culvert 3 - swampy area at toe of spoil on MP5

culvert 4 - toe of spoil near dead tree on MP5

culvert 5 - embankment above ditch along Pirl Spring Road near boundary between Rogers Mill Strip and Chanin Strip. Since the precise source of the discharge could not be determined, Mr. Frederick was unable to decide whether

Lawrence or Marsalino was responsible for it. (N.T. 24-25, 51-54, 64-66)

25. Marsalino had been cited by DER on July 31, 1979, for discharging AMD into Buck Run and its tributaries. Marsalino's discharges continued into 1980. (N.T. 317-325; DX 1)

26. The analysis of water samples obtained by Mr. Frederick on January 23, 1980, revealed that the discharges at culverts 2 through 5 exceeded the effluent limitations imposed by Lawrence's MDP and by DER's regulations, and constituted AMD. (N.T. 40-48)

27. Mr. Frederick recommended that Lawrence develop and implement a plan to collect and treat any substandard water leaving the Rogers Mill Strip and flowing toward Buck Run or the unnamed tributary. (N.T. 25)

28. Mr. Frederick inspected the Rogers Mill Strip on January 28, 1980, in the company of Archie Johnson, Lawrence's foreman. Mr. Frederick observed discharges of water from culverts 2 through 5 but did not obtain any samples. There was no treatment of the discharges but Mr. Johnson agreed to look into the feasibility of constructing a ditch to collect and divert water to a treatment basin. (N.T. 70-72)

29. Mr. Frederick inspected the Rogers Mill Strip on February 28, 1980, accompanied by James V. Filiaggi, Lawrence's Supervisor, Mr. Johnson, Mr. Frederick's immediate superior and another DER mine inspector. Mr. Frederick directed Lawrence to install the siltation (toe of spoil) ditch required by the MDP by March 30, 1980, and to construct it at a grade and depth adequate to collect both surface runoff and discharges of AMD. (N.T. 73-74)

30. The toe of spoil ditch was dug between May 27, 1980, and June 10, 1980, but was not deep enough or long enough to intercept all the water

discharging at the culverts. Lawrence extended the ditch as far as the dividing line between the Rogers Mill Strip and the Chanin Strip by July 1, 1980. The ditch was dug in rubbly material and was not impermeable. (N.T. 170-171, 182,194, 851)

31. Water in the toe of spoil ditch was diverted to a sedimentation pond constructed by Lawrence between May 13, 1980, and June 12, 1980. A second sedimentation pond was in place by July 1, 1980. Discharges from the ponds flowed to culvert 2. (N.T. 132, 134, 182, 194, 1516)

32. After the toe of spoil ditch and the two sedimentation ponds had been constructed, the amount of water discharged at culverts 2, 3 and 4 decreased significantly. (N.T. 225, 238-239,489)

33. On October 10, 1980, Mr. Frederick suggested that Lawrence deepen the original section of the toe of spoil ditch in an effort to intercept seepage still reporting to culverts 3 and 4. (N.T. 252-254)

34. DER did not hold Lawrence responsible for treating the discharge at culvert 5 from January 23, 1980 to June 10, 1980, did hold Lawrence responsible from June 10, 1980, to July 1, 1980, did not hold Lawrence responsible from July 1, 1980, to September 10, 1980, and held Lawrence jointly responsible with Marsalino after September 10, 1980. (N.T. 168, 201-202, 249, 299-300)

35. Mr. Frederick also sampled the discharges at the Rogers Mill Strip on February 28, 1980, March 12, 1980, March 20-21, 1980, May 13, 1980, May 21, 1980, June 10, 1980, July 7, 1980, July 22-23, 1980, August 14, 1980 and October 3, 1980. (N.T. 74-79, 80, 82, 84, 90, 123, 131, 139, 147, 168-169, 171-172, 223-224, 226-227, 237-238, 245, 249)

36. Discharges at culvert 2:

(a) exceeded effluent limitations and constituted

AMD on February 28, 1980, March 12, 1980, March 20-21, 1980, May 21, 1980, July 7, 1980, August 14, 1980, and October 3, 1980; (N.T. 74-79, 80, 82, 90, 148, 225, 239, 250; CX 33A)

(b) were being treated on May 13, 1980, June 10, 1980, July 1-2, 1980, and July 22-23, 1980. P_h and acidity levels may have been within effluent limitations on these dates, but metal concentrations exceeded effluent limitations. (N.T. 133, 173, 201, 227, 237; CX 33A)

37. Discharges at culvert 3:

(a) exceeded effluent limitations and constituted AMD on February 28, 1980, March 12, 1980, March 20-21, 1980, May 21, 1980, August 14, 1980, and October 3, 1980; (N.T. 74-79, 80, 82, 90, 148, 238, 250; CX 33A)

(b) were being treated on May 13, 1980, June 10, 1980, July 1-2, 1980, and July 22-23, 1980. P_h and acidity levels may have been within effluent limitations on these dates, but metal concentrations exceeded effluent limitations; (N.T. 133, 172, 201, 227, 234; CX 33A)

(c) were not sufficient to take laboratory samples on July 7, 1980, and August 14, 1980; (N.T. 224, 238)

38. Discharges at culvert 4:

(a) exceeded effluent limitations and constituted AMD on February 28, 1980, March 12, 1980, March 20-21, 1980, May 21, 1980, June 10, 1980, July 7, 1980, August

14, 1980, and October 3, 1980; (N.T. 74-79, 80, 82, 90, 148, 172, 225, 238, 250; CX 33A)

(b) were being treated on May 13, 1980, July 1-2, 1980, and July 22-23, 1980. P_h and acidity levels may have been within effluent limitations on these dates, but metal concentrations exceeded effluent limitations; (N.T. 132, 201, 227; CX 33A)

(c) were not sufficient to take a laboratory sample on July 7, 1980. (N.T. 224)

39. During the periods when DER considered Lawrence wholly or partly responsible for the discharges at culvert 5, such discharges:

(a) were not being treated on June 12, 1980; (N.T. 182)

(b) were being treated on July 1, 1980, but not for the removal of metals; (N.T. 198)

(c) exceeded effluent limitations and constituted AMD on October 3, 1980. (N.T. 250)

40. The only method employed by Lawrence to neutralize the discharges involved the placement in the culverts of burlap bags filled with sodium carbonate briquettes. This treatment did not remove metals or solids. (N.T. 116-117, 134, 224, 602)

41. The toe of spoil ditch and the sedimentation ponds constructed by Lawrence on MP5 provided a facility for the removal of metals and solids from water intercepted by the ditch; but no similar treatment was administered to the water that continued to discharge at culverts 2 through 5. (N.T. 171, 181, 222-223, 227, 256)

42. Karl K. Shaeffer, a Water Pollution Biologist for DER, performed a macro invertebrate study of Buck Run adjacent to the Rogers Mill Strip and Chanin Strip on March 20, 1980. This type of study attempts to measure the quality of a stream as a fishery by observing the insects resident in the stream. (N.T. 85-89, 388, 392) The March 20, 1980, study disclosed:

(a) that Buck Run met the requirements for a high quality cold water fishery upstream from a haul road built by Marsalino in conjunction with the Chanin Strip operation; (N.T. 402, 406-407)

(b) that Buck Run was somewhat degraded below Marsalino's haul road to the point where the unnamed tributary enters the stream, but still met the requirements for a high quality cold water fishery; (N.T. 402, 407, 409)

(c) that Buck Run below the point where the unnamed tributary enters the stream was degraded to the extent that the macro invertebrate community was nonexistent. Siltation and metal deposition on the substrate were readily observable; (N.T. 402, 407)

(d) that the metal deposition observable in Buck Run is typical of what occurs when AMD enters a stream and undergoes a certain amount of neutralization. (N.T. 408)

43. Karl K. Shaeffer conducted an electrofishing survey of Buck Run adjacent to the Rogers Mill Strip and Chanin Strip on October 3, 1980. This

type of study attempts to measure the quality of a stream as a fishery by stunning the fish, counting them, and identifying them by species and size. (N.T. 411-414) The October 3, 1980, survey disclosed:

(a) that 75 brook trout of varying sizes, as well as some other associated cold water species, were found in that part of Buck Run immediately above the Marsalino haul road; (N.T. 417)

(b) that 3 brook trout were found in that part of Buck Run immediately above the Rogers Mill Bridge; (N.T. 416)

(c) that the fish community in Buck Run below the confluence with the unnamed tributary had been almost completely devastated; (N.T. 419)

(d) that Buck Run below the confluence with the unnamed tributary was affected by AMD, siltation and metal deposition, all of which is harmful to fish life; (N.T. 430-432, 436-438)

(e) that surface mining operations were the cause of the conditions in Buck Run below the confluence with the unnamed tributary. (N.T. 438-439)

44. The water in the Pirl Spring and the water discharging at culverts 7, 8, 9 and 10 are unaffected by surface mining on the Rogers Mill Strip and Chanin Strip, and represent background water quality for Buck Run. This water has a P_h between 5 and 6; alkalinites are usually between 10 and 20 parts per million (ppm); acidities are usually less than 10 ppm; iron, manganese and aluminum are all under 1 ppm. It does not constitute AMD. (N.T. 497-500, 759-761, 1612)

45. The background water quality of Buck Run is such that the stream has little or no capacity to handle AMD. (N.T. 499, 761)

46. Observations and water samplings of Buck Run and the unnamed tributary on May 12, 1980, established:

(a) that Buck Run was slightly turbid, somewhat more alkaline and contained a higher concentration of iron below the confluence with the unnamed tributary; (N.T. 118-119; CX 33A)

(b) that Buck Run below the confluence with the unnamed tributary became highly polluted with silt and iron after a heavy rain shower; (N.T. 120-121; CX 33A)

(c) that the unnamed tributary reflected increases in alkalinity and iron as it flowed past the Rogers Mill Strip and Chanin Strip toward Buck Run; (N.T. 110-115; CX 33A)

(d) that the unnamed tributary near its confluence with Buck Run was discolored and reflected metal deposition; (N.T. 115)

(e) that both Marsalino and Lawrence were treating discharges with sodium carbonate briquettes on that day, accounting for the increases in alkalinity in the unnamed tributary and Buck Run; (N.T. 115-116)

(f) that neither Marsalino nor Lawrence was using any facilities for the removal of solids on that day, accounting for the increases in iron and turbidity in the unnamed tributary and Buck Run. (N.T. 116)

47. Observations and water samplings of Buck Run and the unnamed tributary on May 13, 1980, established:

(a) that both Marsalino and Lawrence were treating discharges with sodium carbonate briquettes on that day; (N.T. 130, 132; CX 33A)

(b) that neither Marsalino nor Lawrence was using any facilities for the removal of solids on that day; (N.T. 130, 132; CX 33A)

(c) that the eastern branch of Buck Run below the confluence with the unnamed tributary had a yellowish appearance and metal deposition, but the western branch was very clear; (N.T. 135; CX 33A)

(d) that the condition of the eastern branch of Buck Run was caused by the inadequate treatment of the discharges from the Rogers Mill Strip and the Chanin Strip. (N.T. 135; CX 33A)

48. Observations and water samplings of Buck Run and the unnamed tributary on May 21, 1980, established:

(a) that both branches of Buck Run above the confluence with the unnamed tributary were clear and had no signs of metal deposition; (N.T. 160; CX 33A)

(b) that the eastern branch of Buck Run below the confluence with the unnamed tributary was slightly turbid and had metal deposition; (N.T. 160; CX 33A)

(c) that Buck Run below the joinder of the two branches was slightly cloudy and had metal deposition. (N.T. 161; CX 33A)

49. Observations and stream samplings of Buck Run and the unnamed tributary on June 10, 1980, established:

(a) that both branches of Buck Run above the confluence with the unnamed tributary were very clear; (N.T. 175; CX 33A)

(b) that the eastern branch of Buck Run below the confluence with the unnamed tributary was slightly turbid; (N.T. 175; CX 33A)

(c) that the unnamed tributary at its mouth was turbid and alkaline. (N.T. 175, CX 33A)

50. On July 1-2, 1980, the eastern branch of Buck Run was clear above the confluence with the unnamed tributary and turbid below it. (N.T. 200, 209-213, CX 14C-CX 14H)

51. On July 22-23, 1980, silt deposits were in the unnamed tributary and in Buck Run below the confluence with the unnamed tributary. (N.T. 233)

52. Observations and water samplings established that Lawrence's discharges into Buck Run and the unnamed tributary exceeded effluent limitations for total suspended solids on March 20, 1980, May 12-13, 1980, May 21, 1980, June 10, 1980, July 1-2, 1980, and July 22-23, 1980. (N.T. 90, 96-123, 125-135, 151-161, 172-179, 198-199, 209-223, 233-237; CX 8; CX 9; CX 10; CX 14C; CX 14D; CX 14E; CX 33A)

53. Buck Run (for a couple of miles below the unnamed tributary) and the unnamed tributary itself were degraded by the surface mining operations of both Lawrence and Marsalino. (N.T. 438-439, 461)

54. Lawrence's discharges, taken alone, or Marsalino's discharges, taken alone, were sufficient to degrade these waterways. Taken together, they had a cumulative effect. (N.T. 473-474)

55. The surface mining operations of Lawrence and Marsalino are the only apparent sources of AMD flowing into culverts 2 through 5. (N.T. 870-871)

56. The Pennsylvania Fish Commission ceased stocking Buck Run after the 1978 fishing season, primarily because of the AMD caused by Marsalino's operation on the Chanin Strip. At that time, there were no discernible discharges from the Rogers Mill Strip. (N.T. 555-557, 559-564, 1853)

57. From 1978 through 1981 there was little fishing done on Buck Run below the confluence with the unnamed tributary. (N.T. 1846-1848)

58. Samples of water in the toe of spoil ditch, taken on July 1-2, 1980, and July 22, 1980, had the characteristics of AMD and were similar in chemical composition to the water discharging at the culverts, with the exception of iron. Iron concentrations were higher in the ditch water than in the culvert water. (N.T. 241-245, 865-866, 1070-1072; CX 17A; CX 33A)

59. Lawrence's pit floor dipped, in part, toward Pirl Spring Road and, in part, toward Fish Hatchery Road. Initially, water flowed across the pit floor at a 45 degree angle away from the highwall and toward Pirl Spring Road. Later, it tended to flow toward the highwall and into the corner formed by the highwall and the northern endwall. (N.T. 260-263, 717)

60. Lawrence's pit floor water was analyzed in 1977, 1980, 1981 and 1982 and determined to be AMD. (N.T. 150, 1069; CX 18)

61. On May 13, 1980, Mr. Frederick informed Lawrence personnel that reject material was to be buried above the level of the pit floor to reduce the possibility of contaminating pit floor water. (N.T. 124-125, 375-380)

62. Lawrence continued to pile reject material on the pit floor on June 10, 1980, and on July 1-2, 1980. (N.T. 171, 219-220; CX 14P)

63. The surface mining of coal disturbs the normal flow of groundwater in the overburden. During and after the removal of coal, groundwater tends to penetrate to the pavement below the point where the coal seam was located and to discharge at the crop line. (N.T. 769-770)

64. Groundwater also may penetrate into the rock strata lying below the point where the coal seam was located. (N.T. 777)

65. Water flowing into the toe of spoil ditch and into culverts 2 through 5 represents both crop line discharges and discharges from below the crop line. (N.T. 782)

66. The roll in the main seam in the vicinity of the Haul Road diverts groundwater toward culvert 4 (at a point below the crop line of the main coal seam where a dead tree is the predominant landscape feature). This groundwater was intercepted by the toe of spoil ditch after it was constructed. (N.T. 798-799, 884-885)

67. Water that discharges into the toe of spoil ditch previously flowed off the Rogers Mill Strip and was affected by Lawrence's surface mining operations. (N.T. 801, 1029)

68. Water that continued to discharge into culverts 2, 3, 4 and 5 after construction of the toe of spoil ditch flowed off the Rogers Mill Strip, but may have had its source, in part, on the Chanin Strip. The water was affected both by Lawrence's and by Marsalino's surface mining operations. (N.T. 808-812, 1031-1036)

69. There is a hydrologic connection between water disturbed by Lawrence's surface mining operation on the Rogers Mill Strip and water discharged at culverts 2 through 5. (N.T. 487-494, 579-580, 782, 808-812, 838-844, 884-885, 1029-1036, 1633; CX 28)

70. Lawrence has acknowledged that some of the water that previously flowed to culvert 4 before construction of the toe of spoil ditch originated on the Rogers Mill Strip. (N.T. 487-488, 1162-1163, 1283, 1632-1633)

71. Lawrence has acknowledged that it never performed any analysis of the water discharging at culverts 2 through 5. (N.T. 1512-1513)

72. A study of Buck Run in 1981 and 1982 established:

(a) that fish and macro invertebrates were reestablished in that part of Buck Run below the confluence with the unnamed tributary; (N.T. 451-457, 1674-1676)

(b) that metal deposition still existed in that part of Buck Run below the confluence with the unnamed tributary, but that recovery was taking place; (N.T. 455)

(c) that the recovery of Buck Run was attributable directly to the reduction or elimination of discharges of AMD, silt and metals from the Rogers Mill Strip and the Chanin Strip; (N.T. 457)

(d) that, given the status quo, Buck Run will be completely restored in three to five years. (N.T. 460-461)

73. On September 4, 1980, Lawrence did not have a toe of spoil ditch on the Spruell Strip, had not constructed sedimentation ponds in accordance with plans approved by DER and was not providing separate treatment in the sedimentation ponds. There was evidence of sediment runoff from the site into a tributary of Morgan Run. (N.T. 269-270, 274)

74. On September 4, 1980, Lawrence allowed a discharge of AMD to flow from the Spruell Strip into a tributary of Morgan Run. (N.T. 270, 274)

75. On September 15, 1980, Lawrence had spoils piled on the Kennedy Strip within several feet of Dickerson Run. (N.T. 275-276)

DISCUSSION

DER has brought this action under Section 605 of the CSL, 35 P.S. §691.605. During the time period covered by the alleged violations, Section 605 read, in pertinent part, as follows:

> "In addition to proceeding under any other remedy available at law or in equity for a violation of a provision of this act, rule, regulation, order of the department, or a condition of any permit issued pursuant to this act, the department, after hearing, may assess a civil penalty upon a person or municipality for such violation. Such a penalty may be assessed whether or not the violation was wilful. The civil penalty so assessed shall not exceed ten thousand dollars ($10,000) per day for each violation. In determining the amount of the civil penalty the department shall consider the wilfullness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant factors...."

DER has the burden of proving by a preponderance of the evidence that Lawrence committed violations of the CSL and that civil penalties should be assessed: 25 Pa. Code §21.101(b)(1).

Count I - AMD

In Count I of its Complaint, DER alleged that Lawrence discharged AMD from the MP5 portion of the Rogers Mill Strip into Buck Run and its tributaries. The discharges were alleged to have been continuous, specifically including the following dates: January 23, February 28, May 13, May 21, May 27, June 2, June 10, July 1, July 2, July 7, July 22, July 23, August 14, October 10, October 23, November 17, all in 1980, and January 7, and January 28 in 1981. In its post-hearing brief, DER abandoned entirely the period following October 10, 1980, and eliminated the claim of continuous discharges for the period subsequent to May 27, 1980.

There is no dispute about the fact that discharges at culverts 2 through 5 constituted AMD. There is serious dispute, however, about the source of those discharges.

DER points, inter alia, to the following evidence linking those discharges to Lawrence's surface mining operation on the MP5 area of the Rogers Mill Strip:

1. the discharges emanated from MP5;
2. the discharges at culverts 2, 3 and 4 were traced to the toe of spoil on MP5;
3. construction of the toe of spoil ditch on MP5 reduced the flows at culverts 2, 3 and 4;
4. Lawrence mined MP5 above culverts 2 through 5;
5. the discharges at culverts 7 through 10 are not AMD;
6. the water discharged at culverts 2 through 5 is chemically similar to the water on MP5;
7. there is no other logical source of AMD than the surface mining operations of Lawrence on MP5 and Marsalino on the Chanin Strip.

Lawrence disputed much of this evidence. Its witnesses maintained that the discharges could not have been traced to the toe of spoil on MP5; that the water discharged at the culverts is chemically different in certain respects from the water on MP5; that there is no geologic mechanism on MP5 that would enable water to penetrate below the crop line of the main seam; and that the water discharged from MP5 constituted AMD before any surface mining had been done.

Much time could be devoted to weighing the evidence on each of these disputed points, resolving the many conflicts and attempting to reach sensible

conclusions. That is unnecessary, in my judgment, because Lawrence's evidence failed to address several decisive points in DER's case.

The first of these pertains to the flow of water at culverts 2, 3 and 4. DER's undisputed evidence is that such flows diminished substantially but not completely after the toe of spoil ditch was constructed. This fact is strong evidence that some hydrologic connection existed between the MP5 area and culverts 2, 3 and 4. While Lawrence's experts went to great lengths to disprove any connection, they offered no explanation at all for the reduction in flows.

Lawrence's experts also were hardpressed to explain why discharges at culverts 2, 3, 4 and 5 constituted AMD while discharges at culverts 7, 8, 9 and 10 did not. The latter culverts all were along and down gradient from Marsalino's Chanin Strip; and yet the discharges showed no evidence of AMD. Beginnning with culvert 5, however (just 300 feet or so away), and continuing downgrade to culvert 2, the discharges are AMD. This evidence clearly points primarily to Lawrence, and not to Marsalino, as the generator of the condition.

Lawrence's witnesses attempted to establish that the discharges at culverts 2 through 5 cannot originate on MP5 because they emanate from below the crop line of the main seam which Lawrence mined. The pavement below the main seam, these witnesses contend, is impermeable, preventing any vertical percolation of AMD from Lawrence's operation. The only other currently possible source of these discharges would be Marsalino; but that operator mined the same coal seam as Lawrence and as close as one hundred feet upgrade from Lawrence's south endwall. If AMD could not percolate below that coal seam on Lawrence's site, it is unlikely that it could have done so on Marsalino's. Lawrence's final rationale maintains that discharges from MP5

were AMD prior to any mining activity at all. Aside from the fact that this is possible, the only evidence to support the argument is a comment supposedly made by a former DER inspector in 1975 and overheard by the man who now is Lawrence's foreman. After securing a sample of water from the ditch along Pirl Spring Road, the inspector reportedly said that he had not found any good water in the vicinity.

At best, this evidence provides feeble support for Lawrence's position. It loses even this significance when measured against other evidence. It is undisputed that Buck Run was classified as a high quality cold water fishery and was stocked with trout by the Pennsylvania Fish Commission before any surface mining began on nearby land. After the 1978 season, Buck Run was taken off the stocking list because the portion of it below the confluence with the unnamed tributary had degraged to the point where macro invertebrates were completely absent. While this action was taken as a result of Marsalino's operation on the Chanin Strip (which was cited for AMD discharges in 1979), the evidence substantiates the fact that Buck Run was not degraded prior to 1979. This means that there could not have been any appreciable volume of AMD entering the stream from the Rogers Mill Strip, the Chanin Strip or any other source.

If the water in the ditch along the Pirl Spring Road had any negative characteristics when tested by the DER inspector in 1975, the nature of the contaminant and the volume of the discharge obviously were not enough to impact Buck Run. This fact is reinforced by the testimony of Terry Confer, a DER inspector, who walked the Pirl Spring Road with Lawrence's foreman on July 24, 1979, and could find no discharges at all from the Rogers Mill Strip. Six months later, when the flows at culverts 2 through 5 amounted to thousands of gallons per day, the impact on Buck Run was devastating. Clearly, these

discharges were caused by Lawrence's surface mining operation and exceeded in volume and, perhaps, in potency any AMD that previously might have originated from the Rogers Mill Strip.

DER has not shown the precise mechanism by which AMD migrated below the crop line of the main seam on the Rogers Mill Strip, has not explained the disparity in iron concentrations revealed by the water samples, and has not shown a precise breakdown of the volumes of AMD contributed by Lawrence's operation and by Marsalino's operation.[1] Nonetheless, the evidence connecting Lawrence's operation to the discharges of AMD at culverts 2 through 5 is overwhelming. Lawrence, in fact, has admitted to part of it.

The burden of proof in a case like this does not require that every stone be turned, that every detail be completely explained. Evidence can be compelling and overpowering even though it is circumstantial. Dillsburg Septic Service v. DER, 1976 EHB 184; DER v. Bucks County Water and Sewer Authority and The Korman Corp., 1975 EHB 414. The circumstantial evidence of a hydrologic connection in this case, unlike that in Hepburnia Coal Company v. DER, 1986 EHB 563, rises to that level and implicates Lawrence. The fact that Marsalino also may be at fault does not exonerate Lawrence. Lawrence is responsible for all discharges caused by its surface mining operation, even though some of the AMD may originate off the Rogers Mill Strip. Commonwealth v. Barnes & Tucker Company, 472 Pa. 115, 371 A.2d 461 (1977); Commonwealth v. Harmar Coal Company, 452 Pa. 77, 306 A.2d 308 (1973).

DER has carried its burden of proving that the discharges from culverts 2, 3 and 4 violated the effluent limitations contained in DER's

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[1] DER's pollution loading calculation, which attempts to estimate the pounds per day of pollutants discharging at the culverts along Pirl Spring Road, assigns about 50% of the total pollution load to Lawrence. See CX 29, CX 30 and CX 31.

regulations and in Lawrence's MDP on a number of dates in 1980. DER maintains that the discharges were continuous from January 23, 1980, to May 27, 1980.[2] The evidence shows that during this period, laboratory samples and/or field P_h tests were run on each of these culverts on January 23, 1980, February 28, 1980, March 12, 1980, March 20-21, 1980, May 13, 1980, and May 21, 1980. In every instance, the discharges violated the effluent limitations in one or more respects. Treatment was being provided by Lawrence only on one of those dates, May 13, but the metals were not being affected.

The flows at culverts 2, 3 and 4 did not diminish significantly until construction of the toe of spoil ditch began on May 27, 1980. It is reasonable to conclude that, up to that point, the discharges were flowing continuously into the culverts. It is also reasonable to conclude that, since this water was not diverted to sedimentation ponds until after May 27, 1980, the metals were never treated in any manner prior to that time. Since the concentrations of metals consistently exceeded effluent limitations when they were measured prior to May 27, it is reasonable to conclude that they did so on every day.

DER claims that, for the period following May 27, 1980, the discharges at culverts 2, 3 and 4 exceeded effluent limitations only on the actual dates when DER inspected the Rogers Mill Strip. However, there were some inspections when no laboratory or field tests were done. When these are excluded, the pertinent dates for culverts 2 and 4 are the following dates in 1980: June 10, July 1-2, July 7, July 22-23, August 14 and October 3. For culvert 3 they are June 10, July 1-2, July 22-23, August 14 and October 3.

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[2] The evidence could support a conclusion that the discharges were continuous to a date beyond May 27, 1980; but, since DER has not made such a claim, the Board will not impose it.

The evidence establishes that, on these dates, the discharges violated the effluent limitations in one or more respects.

In summation, Lawrence's discharges from the Rogers Mill Strip into Buck Run or the unnamed tributary violated effluent limitations for 125 days beween January 23, 1980, and May 27, 1980, and for a maximum of 6 days between May 28, 1980, and October 10, 1980.

DER acknowledges that it vacillated on culvert 5, charging Lawrence with the duty to treat that discharge only for the period June 11, 1980, to June 30, 1980, and for the period September 10, 1980, to October 10, 1980. While DER claims that the discharges were continuous during these two periods, aggregating 52 days, water samples were taken only on October 3, 1980. There is no question that the discharge on that date exceeded effluent limitations, but to extrapolate that one instance into 52 days would be highly inappropriate. Moreover, Lawrence already has been charged with unlawful discharges on October 3, 1980, at culverts 2, 3 and 4. The fact that the culvert 5 discharge also was unlawful on that date does not add another day to the total.

In its Complaint, DER charged Lawrence with discharging AMD into the waters of the Commonwealth from the Spruell Strip "at all times material to the Complaint, including September 4, 1980...." In its Motion to Amend Complaint to Conform to Proof, DER requests that the allegation with respect to AMD at the Spruell Strip be limited to September 4, 1980. Since the evidence in the record concerns only that one date, DER's Motion is granted.

DER's evidence firmly establishes the fact that Lawrence allowed AMD to discharge from the Spruell Strip on September 4, 1980. Lawrence presented no evidence to the contrary. Accordingly, I conclude that Lawrence violated its effluent limitations on discharges from the Spruell Strip on one day.

In its Complaint, DER alleges that the discharges of AMD constitute violations of Sections 3, 301, 307, 315 and 401 of the CSL, Sections 77.92(c), 99.33(a), (b) and (c) of DER's regulations in 25 Pa. Code, and Standard Conditions 10, 11 and 12 of Lawrence's mine drainage permits. All statutory and regulatory citations, of course, relate to those in effect during the period January 23, 1980, to October 10, 1980.

Section 3 of the CSL, 35 P.S. §691.3, declares the discharge of industrial waste into the waters of the Commonwealth, causing or threatening pollution, to be a public nuisance. Mine drainage is specifically included in the definition of "industrial waste" in Section 1 of the CSL, 35 P.S. §691.1. Section 301, 35 P.S. §691.301, prohibits the discharge of industrial waste, except as provided later in the statute. Section 307, 35 P.S. §691.307, prohibits the discharge of industrial waste unless it is pursuant to a permit from DER or in accordance with DER regulations. Section 315, 35 P.S. §691.315, prohibits any discharge from a mine unless it is pursuant to a permit from DER and in accordance with DER regulations. Section 401, 35 P.S. §691.401, declares it to be unlawful to pollute the waters of the Commonwealth by the discharge of any substance of any kind.

25 Pa. Code §77.92(c) sets forth water quality criteria for permittees under the CSL. Pertinent to this discussion are requirements that discharges of mine drainage have a P_h between 6 and 9 and no concentrations of iron exceeding 7 milligrams per liter. 25 Pa. Code §99.33(a), (b) and (c), which also relate to mine drainage, impose the additional requirement that the discharge not be acid. These same effluent limitations are incorporated into Lawrence's mine drainage permits as Standard Conditions 10, 11 and 12.

Certainly Lawrence's discharges violated all of these provisions.

Count II - Erosion and Sedimentation Controls

In Count II of the Complaint, DER alleged that Lawrence failed to implement and maintain effective erosion and sedimentation (E&S) control measures on the MP5 portion of the Rogers Mill Strip, resulting in the conveyance of sediment into Buck Run and its tributaries. The discharges were alleged to have been continuous, specifically including the following dates: February 28, May 13, May 21, May 27, June 2, June 10, July 1, July 2, July 7, July 22, July 23, August 14, October 3, all in 1980, and January 26, 1981.

In the Application for Leave to Amend Complaint filed by DER on July 6, 1982, DER sought to revise the allegations in Count II to include discharges emanating from MP5A. The Application was denied by former Board Chairman Harnish, as stated in the procedural history portion of this Adjudication, but testimony relating to the inadequacy of E&S controls on MP5A was admitted into the record. DER again sought to include the MP5A violations in the Complaint in its Motion to Amend Complaint to Conform to Proof filed after the hearings were concluded.

The precise scope of Harnish's ruling is not clear from the record. Nonetheless, the ruling denied DER's Application to Amend and, on its face, appeared to exclude E&S violations on MP5A from the case. Even though some testimony on these violations was introduced and even though Lawrence has made no claim of being prejudiced by DER's post-hearing Motion to include them, I am not convinced that the subject was fully litigated. Accordingly, I deny DER's Motion to Amend with respect to alleged E&S violations on MP5A and refuse to consider them in assessing civil penalties against Lawrence.

The evidence discloses that Lawrence's MDP required the construction of a toe of spoil ditch prior to commencement of any mining operations. The

primary purpose of this ditch was E&S control. Lawrence commenced mining without having constructed the ditch, relying instead on the grading of roads to keep surface runoff on the site. No DER inspector had complained about the absence of the toe of spoil ditch until February 28, 1980, when Mark Frederick ordered that it be dug. It is clear that Mr. Frederick's chief concern at that time was not E&S but AMD. He directed that the ditch be dug long enough and deep enough to intercept the discharges flowing to culverts 2, 3 and 4.

E&S problems on MP5 became a concern on March 20, 1980, when a heavy discharge of muddy water was observed flowing from the Haul Road into Buck Run. Subsequently, on May 12-13, May 21, June 10, July 1-2 and July 22-23, in 1980, observations and water samplings revealed that discharges from MP5 into Buck Run and the unnamed tributary exceeded the effluent limitation for total suspended solids.

Lawrence began constructing the toe of spoil ditch on May 27, 1980. By July 1, 1980, the ditch and the two sedimentation ponds to which it connected were completely installed. These facilities provided effective E&S controls for much of the discharge emanating from culverts 2, 3 and 4. In addition, since the flows at those culverts significantly lessened after the ditch was dug and deepened, the amount of silt washing off the site was also reduced. In fact, on July 7, 1980, the flows at culverts 3 and 4 were so low that laboratory samples were not taken; and the total suspended solids measured at the culvert 2 discharge were within effluent limitations.

The failure to have effective E&S controls on MP5 was continuous from March 30, 1980, when the toe of spoil ditch was supposed to have been in place pursuant to Mr. Frederick's order, to July 1, 1980, when the E&S facilities were completely installed. March 20, 1980, must be considered an isolated violation since it occurred prior to the compliance date mandated by

Frederick. Likewise, July 22-23, 1980, must be treated apart from the continuous violations, since there was a period earlier in July when E&S controls were working effectively. The violations cover a total of 95 days.

In its Complaint, DER also charged Lawrence with E&S violations at the Spruell Strip "on dates including but not limited to September 4, 1980." In its Motion to Amend Complaint to Conform to Proof, DER seeks to revise its allegation with respect to the Spruell Strip so as to limit it to September 4, 1980. Since the only evidence presented concerned this date alone, the amendment will be allowed.

DER proved that on September 4, 1980, Lawrence had not constructed a toe of spoil ditch on the Spruell Strip, as required by its mine drainage permit, and there was evidence of sediment runoff into a tributary of Morgan Run. Lawrence made no attempt to dispute these facts. Accordingly, I conclude that Lawrence violated the E&S requirements of its permit pertaining to the Spruell Strip on one day.

DER's Complaint alleges that Lawrence's failure to implement and maintain effective E&S controls resulted in the conveyance of sediment into the waters of the Commonwealth, including Buck Run, which contamination has destroyed Buck Run's capacity to support benthic macro invertebrate and other aquatic communities. In its Motion to Amend Complaint to Conform to Proof, DER proposes to revise this allegation so as to limit it to the MP5 and MP5A portions of the Rogers Mill Strip.

As already noted, the inclusion of MP5A at this late point in the proceedings is not appropriate. However, the only evidence of stream pollution presented by DER relates to Buck Run and the unnamed tributary. No

evidence concerning the tributary to Morgan Run appears in the record. Consequently, DER's Motion to Amend will be granted to the extent that it limits the allegation of stream pollution to E&S violations on MP5.

These violations, according to the Complaint, are contrary to the provisions of Sections 3, 301, 307, 315 and 401 of the CSL, the provisions of 25 Pa. Code §102.4(a) and Standard Condition No. 3 of Lawrence's mine drainage permits. It should be noted, at this point, that "industrial waste" as defined in Section 1 of the CSL, 35 P.S. §691.1, includes "silt, coal mine solids, rock, debris, dirt and clay from coal mines...." Thus, the provisions of Sections 3, 301 and 307 of the CSL, as applied previously with respect to AMD, is equally applicable to the discharges caused by the E&S violations.

Section 315 of the CSL, 35 P.S. §691.315, which prohibits mining operations or discharges except in accordance with a permit and DER regulations, also applies. 25 Pa. Code §102.4(a) requires the implementation of E&S controls to minimize accelerated erosion and sedimentation. Standard Condition No. 3 of Lawrence's mine drainage permits mandates that no silt, coal mine solids, rock, debris, dirt and clay be washed, conveyed or otherwise deposited into the waters of the Commonwealth. Lawrence clearly has violated these provisions.

Section 401 of the CSL, 35 P.S. §691.401, the "catch-all" provision that prohibits pollution by any substance of any kind, also has been violated by Lawrence's failure to provide effective E&S controls.

Count III - Improper Disposal of Toxic Material

In Count III of the Complaint, DER alleges that Lawrence failed to properly dispose of acid-bearing material "at the site covered by Mining Permit No. 1063-5 and amendments on dates including but not limited to May 12, 1980;" and has caused degradation of the waters of the Commonwealth.

DER's evidence involved only MP5; so it is unnecessary to discuss any allegations concerning MP5A. The evidence presented shows that Mark Frederick observed on May 13, 1980, that Lawrence was disposing of acid and toxic bearing materials on the floor of the pit against the spoils. Lawrence's foreman told him that the previous DER inspector had approved that method of handling reject material. Mr. Frederick examined Lawrence's MDP and concluded that Lawrence's method violated Standard Condition No. 29. He ordered Lawrence to change its method of handling this type of material. Mr. Frederick observed that Lawrence had not changed its handling method on June 10, 1980, or on July 1-2, 1980.

As noted above, DER charged in the Complaint that these alleged violations occurred on dates including but not limited to May 12, 1980, but no evidence was presented concerning that date. In its post-hearing brief, DER states that the alleged violations occurred on May 13, June 6, June 16, and July 1, all in 1980, and were not continuous. But there is no testimony whatever concerning June 6 and June 16. The only dates for which there is any testimony on this subject are May 12, June 10 and July 1-2.

DER claims that Lawrence's handling method violated Standard Condition No. 29 of the MDP. However, the precise language of this Standard Condition is not part of the record. Mr. Frederick testified that Lawrence's handling method "was indeed contrary to the permit" (N.T. 125), and Lawrence made no attempt to show that it was not. Consequently, I conclude that Standard Condition No. 29 of the MDP was violated by Lawrence's method of handling reject material.

DER concedes that these violations did not directly cause any injury to waters of the Commonwealth, but argues that they may have contributed to

the AMD discharges from MP5. In the Complaint, DER alleged violations of Sections 315 and 402 of the CSL, in addition to Standard Condition No. 29 of the MDP. Section 315, 35 P.S. §691.315 prohibits the operation of a mine except in accordance with a DER permit and DER regulations. Section 402, 35 P.S. §691.402, provides for regulatory control over activities creating a danger of water pollution. Since DER has not cited any regulation governing the handling of reject materials in a mining operation, Section 402 is not in issue.

The record does establish, however, that Lawrence violated the MDP and Section 315 of the CSL on a total of three days.

Count IV - Disturbing Land Designated as a Barrier

In this Count, DER alleged that on September 5, 1980, Lawrence disturbed land within 75 feet of a stream on the Kennedy Strip by pushing spoils and rock onto the area. This is alleged to be a violation of Standard Condition No. 35 of Lawrence's mine drainage permit and of Section 315 of the CSL, 35 P.S. §691.315.

The only evidence presented by DER on this subject involved September 15 and not September 5, as alleged in the Complaint. DER made no request to amend this Count in its post-hearing Motion to Amend Complaint to Conform to Proof. As a result, the allegations of the Complaint remain in effect and have not been proved. This Count, accordingly, will be disregarded.

Assessment of Civil Penalty

Section 605 of the CSL, 35 P.S. §691.605 (quoted at the the outset of this Discussion), requires the Board to consider the following factors in determining the amount of a civil penalty:

1. wilfullness of the violation;
2. damage or injury to the waters of the Commonwealth or their uses;

3. cost of restoration; and

4. other relevant factors.

The Board has interpreted the last factor to include deterrence. DER v. Jefferson Township, 1978 EHB 134. No evidence has been presented on the cost of restoration; so that factor will be excluded.

The Board has discussed wilfullness in a number of prior opinions, especially in DER v. Rushton Mining Co., 1976 EHB 117. In that case the Board observed that there is a degree of wilfullness evident from the knowledge that certain consequences are likely to result from a particular action or failure to act. Lawrence's AMD discharges from MP5 certainly involved this level of wilfullness from January 23, 1980, when first informed of them, until July 1, 1980, when the toe of spoil ditch had been dug deep enough and long enough to intercept most of the flow going to culverts 2, 3 and 4. Only four instances of unlawful discharges occurred subsequent to July 1, 1980. These involved flows that continued to emanate from MP5 despite the efforts previously devoted to intercepting them. While Lawrence's responsibility was no different with respect to these flows than it was with respect to those previously discharged, the wilfullness does not seem to rise to the same level.

The circumstances surrounding the AMD discharge at the Spruell Strip were not developed on the record to any great extent. Therefore, it is not possible to assign a level of wilfullness to this discharge.

Lawrence's failure to construct the toe of spoil ditch to provide E&S controls on MP5, which was required by its permit, until months after being ordered to do so by DER rises to a high level of wilfullness and constitutes nearly intentional conduct. Lawrence's failure is more egregious with respect to E&S violations than with respect to AMD violations because the primary

purpose of the ditch was E&S control. While Lawrence's resistance to digging the ditch deep enough and long enough to intercept groundwater flowing to the culverts is perhaps understandable (but not excusable), there is absolutely no reason why it did not immediately construct the ditch in order to stop surface runoff. This wilfullness on Lawrence's part must be deemed to have affected all of the E&S violations on MP5 except for the one on March 20, 1980, before the ditch was required to be installed, and the one on July 22-23, after the toe of spoil ditch and sedimentation ponds had been completely installed.

As with the AMD discharge, the circumstances surrounding the E&S violation at the Spruell Strip are not sufficiently developed in the record to enable a determination to be made as to whether it was wilfull.

Lawrence is charged with improperly handling reject materials on three days. Apparently, Lawrence was not aware that its method was improper until the violation was observed on the first day. That violation cannot be viewed as wilfull; but the other two subsequent violations are inexcusable.

DER presented an overwhelming array of evidence to show the injury done to Buck Run and the unnamed tributary by Lawrence's discharges of AMD, metals and suspended solids. While Lawrence's witnesses attempted to soften the force of this evidence, it remained basically untouched. The combined effects of AMD, metals and suspended solids rendered Buck Run unsuitable as a fishery. It is true that Marsalino's discharges had created the first significant impact on Buck Run and had prompted the Pennsylvania Fish Commission to remove it from the stocking list. Nonetheless, Lawrence's discharges added to the problem and, most assuredly, prolonged the recovery period for the stream. DER's witness estimated in 1982, two years after the date when Lawrence finally began to take some steps to control the discharges, that it would take another three to five years for Buck Run to recover to its

pre-mining condition. On the other hand, Lawrence's witness maintained that neither Buck Run nor the unnamed tributary showed any signs of degradation in 1982. This opinion is of questionable value since this witness did not believe that the two streams had ever been seriously degraded in the first place.

The preponderance of the evidence clearly proves that Buck Run and the unnamed tributary were seriously and adversely affected by Lawrence's discharges and that the use of Buck Run as a fishery was interrupted for a period of years.

In its post-hearing brief, DER submits that Lawrence's degrading of Buck Run and the unnamed tributary is a violation of Section 401 of the CSL, 35 P.S. §691.401, separate and distinct from the violations of other sections of the CSL and DER's regulations. Lawrence argues that the violations merge. DER's position is legally correct, although its impact on the final outcome of this case is not significant. Violations of regulations and permit conditions can occur even if they do not result in the degradation of waters of the Commonwealth. Section 401 of the CSL, already referred to in this Adjudication as a "catch-all" provision, was intended to prohibit water pollution by whatever means, whether the activity is lawful or not. Accordingly, there can be a violation of Section 401 even if no other sections of the CSL are involved.

DER presented no evidence to show what, if any, impact the discharges of AMD and suspended solids from the Spruell Strip had on the waters of the Commonwealth. Likewise, it presented no evidence to establish that the improper handling of reject materials on MP5 polluted the waters of the Commonwealth. Accordingly, that factor will not be considered in determining civil penalties for these violations.

Fashioning a civil penalty containing an element of deterrence is appropriate in this case because of the dramatic effect discharges of AMD, metals and suspended solids have on streams like Buck Run that are uniquely suited for the propagation of native brook trout and the accommodation of introduced species. The delicate ecosystem of such streams is easily devastated; and restored, if at all, only by the slow, painstaking work of Mother Nature.

The problem posed by the present case is the total absence of evidence on which to base a meaningful decision that will serve as a deterrent to Lawrence and to others. There is no evidence of Lawrence's net worth; no evidence of the amount of money Lawrence saved by not implementing control measures earlier than it did; no evidence of the cost of injury to Buck Run or the cost of restoring it; no evidence of any kind to suggest an amount of civil penalty that would deter Lawrence from similar actions in the future. Absent such evidence, we are left only with a very generalized approach to deterrence whereby something more than a "nominal" amount is assessed. Since the nature and extent of Lawrence's violations already demand something more than a nominal penalty, deterrence cannot be much of a factor in determining the final amount.

The discharges of AMD from the Rogers Mill Strip warrant a civil penalty of $500 for each of the days of continuous violations from January 23, 1980, to May 27, 1980, and for June 10, 1980, and July 1-2, 1980, when the toe of spoil ditch was completed. The discharges of AMD subsequent to that date, not rising to the same level of wilfullness, warrant a civil penalty of $450 each. Since the record is not as complete with respect to the discharge of AMD at the Spruell Strip, a civil penalty of $350 will be assessed for that one day's violation.

The violations of E&S controls at the Rogers Mill Strip were not as serious in nature as the discharges of AMD. However, the wilfullness of the continuing violations from March 30, 1980, to July 1, 1980, rises to a higher level than that for AMD. Accordingly, a civil penalty of $400 is appropriate for those 93 days while a civil penalty of $250 is appropriate for the two remaining days. Circumstances surrounding the E&S violation at the Spruell Strip, being equally as uncertain as the AMD discharges at that Strip, a civil penalty of $200 is all that seems appropriate.

Lawrence's improper handling of toxic material cannot be considered serious violations since DER did not show any impact on waters of the Commonwealth. Accordingly, a civil penalty of $100 is all that should properly be imposed for the first day's violation. Since the other two days involve a higher element of wilfullness, however, a civil penalty of $200 will be imposed for each of those days.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of this appeal.

2. DER has the burden of proving by a preponderance of the evidence that Lawrence violated the CSL and that civil penalties should be assessed.

3. The AMD discharges at culverts 2, 3 and 4 emanated from Lawrence's MP5 area, were affected by Lawrence's surface mining operations on the MP5 area, and constituted violations of Sections 3, 301, 307, 315 and 401 of the CSL, 35 P.S. §§691.1 et seq., Sections 77.92(c), 99.33(a), (b) and (c) of DER's regulations in 25 Pa. Code, and Standard Conditions 10, 11 and 12 of Lawrence's MDP.

4. The unlawful discharges of AMD at culverts 2, 3 and 4 were continuous for 125 days from January 23, 1980, to May 27, 1980, and intermittent on six days between May 28, 1980, and October 10, 1980.

5. The AMD discharges at culvert 5 emanated from Lawrence's MP5 area, were affected by Lawrence's surface mining operations on MP5, and constituted violations of Sections 3, 301, 307, 315 and 401 of the CSL, 35 P.S. §§691.1 et seq., Sections 77.92(c), 99.33(a), (b) and (c) of DER's regulations in 25 Pa. Code, and Standard Conditions 10, 11 and 12 of Lawrence's MDP.

6. The unlawful discharges of AMD at culvert 5, during the periods when DER held Lawrence solely or jointly responsible for them, occurred only on one date and that date coincided with unlawful discharges of AMD at one or more of the other culverts.

7. On September 4, 1980, a discharge of AMD emanated from Lawrence's Spruell Strip, was affected by Lawrence's surface mining operations

on the Spruell Strip, and constituted violations of Sections 3, 301, 307, 315 and 401 of the CSL, 35 P.S. §§691.1 et seq., Section 77.92(c), 99.33(a), (b) and (c) of DER's regulations in 25 Pa. Code, and Standard Conditions 10, 11 and 12 of the mine drainage permit for the Spruell Strip.

8. Lawrence's failure to implement and maintain adequate E&S controls on the MP5 area resulted in discharges of sediment from the MP5 area that violated Sections 3, 301, 307, 315 and 401 of the CSL, 35 P.S. §§691.1 et seq., Section 102.4 (a) of DER's regulations at 25 Pa. Code, and Standard Condition No. 3 of Lawrence's MDP.

9. The unlawful discharges of sediment from MP5 were continuous for 93 days from March 30, 1980, to July 1, 1980, and intermittent on March 20, 1980, and July 22-23, 1980.

10. On September 4, 1980, as a result of Lawrence's failure to implement and maintain adequate E&S controls on the Spruell Strip, sediment was discharged from the Spruell Strip in violation of Sections 3, 301, 307, 315 and 401 of the CSL, 35 P.S. §§691.1 et seq., Section 102.4(a) of DER's regulations at 25 Pa. Code, and Standard Condition No. 3 of the mine drainage permit for the Spruell Strip.

11. On 3 separate dates, Lawrence improperly handled reject material on the pit floor of the MP5 area in violation of Section 315 of the CSL, 35 P.S. §691.315, and Standard Condition No. 29 of Lawrence's MDP.

12. Lawrence's unlawful discharges of AMD and sediment from the MP5 area degraded Buck Run and the unnamed tributary and adversely affected the use of Buck Run as a cold water high quality fishery.

13. Lawrence's unlawful discharges of AMD from the MP5 area were wilfull from January 23, 1980, until July 1, 1980, but were less wilfull after that date.

14. Lawrence's unlawful discharges of sediment from the MP5 area were wilfull nearly to the point of being intentional on all relevant dates except March 20, 1980, and July 22-23, 1980.

15. Lawrence's unlawful handling of reject material on the pit floor of the MP5 area was wilfull on the last two of the three dates involved.

16. DER did not present sufficient evidence to show any degree of wilfullness connected with Lawrence's unlawful discharges of AMD and sediment from the Spruell Strip.

17. DER did not present sufficient evidence to enable the Board to consider deterrence and the cost of restoration in setting a civil penalty.

18. DER did not present evidence to sustain the allegations in the Complaint relating to the Kennedy Strip.

19. The assessment of civil penalties is appropriate in this case in the following amounts:

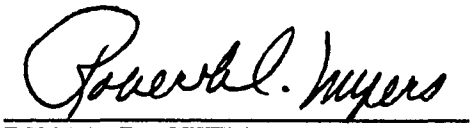
Rogers Mill Strip					
AMD	127 x $500	= $	63,500		
	4 x $450	=	1,800		
				$ 65,300	
E&S	93 x $400	= $	37,200		
	2 x $250	=	500		
				37,700	
Rejects	1 x $100	= $	100		
	2 x $200	=	400		
				500	
Total					$ 103,500
Spruell Strip					
AMD	1 x $350	=		$ 350	
E&S	1 x $200	=		200	
Total					550
GRAND TOTAL					**$ 104,050**

ORDER

AND NOW, this 5th day of July, 1988, civil penalties are assessed against Lawrence Coal Company in the aggregate amount of $104,050 for violations of the CSL, the regulations of DER, and the provisions of its mine drainage permits.

The entire civil penalty is due and payable immediately into the Clean Water Fund. The Prothonotary of Fayette County is ordered to enter the full amount of the civil penalty as a lien against any property of Lawrence Coal Company, together with interest at the rate of 6% per annum from the date hereof. No costs may be assessed upon the Commonwealth for entry of the lien on the docket.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS, MEMBER

DATED: July 5, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Diana J. Stares, Esq.
Western Region
For Appellant:
William M. Radcliffe, Esq.
Uniontown, PA

In accordance with the order of Commonwealth Court, neither Chairman Maxine Woelfling nor Member William A. Roth participated in the decision of this case.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

STASH BROTHERS INC.	:	
	:	
v.	:	EHB Docket No. 88-106-R
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 8, 1988

OPINION AND ORDER
SUR
MOTION TO LIMIT ISSUES

Synopsis

A motion to limit issues is granted in part and denied in part. Appellant is precluded from challenging the factual or legal basis of civil penalty insofar as it is based on an unappealed underlying compliance order. However, the unappealed compliance order is not conclusive as to violations alleged to have occurred after the date of the inspection on which the compliance order was based. Appellant may challenge facts of the violations underlying the civil penalty assessment insofar as it may be based on subsequent alleged violations not included in the underlying compliance order.

OPINION

On March 18, 1988, Stash Brothers Inc. (Stash) filed a notice of appeal from a $1,000.00 civil penalty imposed by the Department of Environmental Resources (DER) pursuant to, inter alia, the provisions of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L.

1198, as amended, 52 P.S. §1396.1 et seq. (SMCRA). The assessment was issued in connection with alleged violations of backfilling requirements at Stash's Rider Strip Mine located in Fallowfield Township, Washington County. In particular, DER alleges that "[c]ommencing on or about March 6, 1984, and continuing to June 19, 1984, Stash failed to maintain backfilling equipment at the Rider Strip Mine capable of completing reclamation of the mine site . . . " which, DER claims, is a violation of 25 Pa.Code §87.141(d).

On May 27, 1988, DER filed a motion to limit issues, asserting that the instant appealed-from civil penalty assessment is based on Compliance Order (CO) 84G127 issued to Stash on the basis of a March 6, 1984 inspection, and which, DER alleges, Stash did not appeal. CO 84G127 cited Stash for, inter alia, failure to maintain backfilling equipment at the Rider Strip Mine. DER argues that the facts contained in the unappealed CO 84G127 may not be challenged in this appeal of the civil penalty. Rather, this appeal should be limited solely to the issue of whether the amount of the civil penalty is reasonable.

Though advised of the pendency of DER's motion, Stash has not responded. Accordingly, relevant factual allegations in DER's motion are deemed as having been admitted by Stash. 25 Pa.Code §21.64(d).

Unappealed orders of DER become final after the 30 day appeal period expires. Failure to appeal precludes any challenge to the factual or legal bases of unappealed orders in subsequent proceedings. Ingram Coal Company v. DER, EHB Docket No. 87-256-R (Opinion and order issued February 3, 1988). Thus, by virtue of Stash's failure to appeal CO 84G127, it is established that, as of March 6, 1984, Stash had removed backfilling equipment from Rider Strip Mine. However, the finality of CO 84G127 is not conclusive as to any violations which may have occurred after March 6, 1984. For example, Stash may

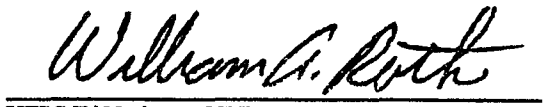
have returned the necessary backfilling equipment on March 7, 1984. Motions to dismiss must be viewed in a light most favorable to the non-moving party.

In view of the foregoing, we can grant DER's motion only with respect to the violations cited for March 6, 1984. Thus, the facts of the assessment may not be challenged only insofar as it is based on the violation of March 6, 1984. Stash may only challenge the amount of the assessment associated with the March 6, 1984 violation. However, Stash may challenge the reasonableness of the amount of the violation as well as the factual basis of the assessment insofar as it is based on any alleged violations which occurred during the period March 7, 1984 through June 19, 1984.

ORDER

AND NOW, this 8th day of July, 1988, it is ordered that the Department of Environmental Resources' motion to limit issues is granted in part and denied in part. Stash Brothers Inc. may not challenge the facts of violations which occurred on March 6, 1984 but may challenge the facts of alleged violation which may have occurred during the period March 7, 1984 through June 19, 1984. It is also ordered that Stash may continue to challenge the reasonableness of the amount of the civil penalty assessment.

ENVIRONMENTAL HEARING BOARD



WILLIAM A. ROTH, MEMBER

DATED: July 8, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Michael D. Bedrin, Esq.
Timothy J. Bergere, Esq.
Western Region
For Appellant:
Donald Stash
Stash Brothers Inc.
Dunbar, PA

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

MUNICIPAL AUTHORITY OF BUFFALO TOWNSHIP	:	
	:	
v.	:	EHB Docket No. 88-041-M
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 15, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A Motion to Dismiss an appeal will be denied when the facts of record are insufficient to enable the Board to determine whether the letter from which the appeal was taken constituted a denial of a permit or the disapproval of a revision to an Official Sewage Plan or, on the other hand, amounted only to an expression of unofficial opinion.

OPINION

On February 16, 1988, Municipal Authority of Buffalo Township and Buffalo Township, Butler County, Pennsylvania (Appellants), filed a Notice of Appeal from a letter dated January 12, 1988, in which the Department of Environmental Resources (DER) stated that "construction of a sewage treatment plant at the Buffalo/Fawn Township line would be inconsistent with these planning efforts and is an unacceptable alternative."

According to the Notice of Appeal, Appellants had asked DER to issue a permit and give information as to the water quality required for the

construction of a plant that would be used to treat sewage along the Ekastown Road in Buffalo Township. Appellants contend that the DER letter is a denial of their request for a permit and, therefore, constitutes an appealable action. DER, however, filed a Motion to Dismiss on May 12, 1988, arguing that its letter is unappealable. Appellants filed a response to the Motion on May 31, 1988.

Actions of DER are appealable only if they are "adjudications" within the meaning of the Administrative Agency Law, 2 Pa.C.S.A. §101, or "actions" under §1921-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21, and 25 Pa.Code §21.2(a)(1). Adjudications are defined as those actions which affect the personal or property rights, privileges, immunities, duties, liabilities or obligations of the parties. An appealable action is defined in 25 Pa.Code §21.2(a) as follows:

> "Any order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any person, including, but not limited to, denials, modifications, suspensions and revocations of permits, licenses and registrations; orders to cease the operation of an establishment or facility; orders to correct conditions endangering waters of the Commonwealth; orders to abate air pollution; and appeals from and complaints for the assessment of civil penalties."

These definitions are easy to state but are often very difficult to apply. A review of prior Board decisions in this area discloses an inevitable lack of consistency, with the rulings necessarily turning on the particular facts involved. Board precedence is only of marginal value, as a result, and the decision in the present case will depend upon the facts presented in the

documents in the record. While the precise wording of the documents is important, it is the substance that controls. Meadville Forging Company v. DER, 1987 EHB 782.

Unfortunately, the parties have provided only one document, DER's letter of January 12, 1988. Appellants' letter of December 17, 1987, to which DER's letter responded, is not part of the record. All we are told in the Notice of Appeal is that Appellants made a demand on DER "to issue a permit to construct a sewage treatment plant and to give information as to the water quality required for the construction of such a plant which would be used to treat sewage along the Ekastown Road...."

DER's letter refers to planning efforts which apparently concluded that the best way to handle the sewage needs of the Ekastown Road area is by a conveyance system that would transport sewage wastes to the Upper Allegheny Joint Authority treatment plant. This conveyance system would have to go through Fawn Township, and the Official Sewage Plans of both Fawn Township and Buffalo Township apparently provide for this system. However, Fawn Township has not permitted construction to begin. While DER states in its letter that Appellants' plan to build its own treatment plant is an unacceptable alternative, DER does promise to take steps to force Fawn Township to cooperate.

In the Notice of Appeal, Appellants state that they have attempted unsuccessfully to get Fawn Township's agreement to construction of the conveyance system and that DER refuses to issue any orders to compel Fawn Township to act. In their response to DER's Motion to Dismiss, Appellants aver that DER still has failed to take action against Fawn Township.

DER maintains that its letter of January 12, 1988, did not refuse permission for Appellants to construct their own sewage treatment plant. The

letter "was simply a response which outlines the Department's opinion of past planning efforts by the [Appellants] and the need to address existing and future sewage needs through implementation of the current 537 Official Sewage Plans."

Since the Board does not know the precise nature of the correspondence that preceded DER's January 12, 1988 letter, there is no way for the Board to make a conclusive determination of whether the letter constituted a denial of a permit (as Appellants claim) or the mere expression of unofficial opinion (as DER claims).

There can be no doubt about the fact that the denial of a permit for a sewage treatment plant is an appealable action. See 25 Pa.Code §21.2(a) and §21.101(c)(1). It is also beyond question that the disapproval of a revision to an Official Sewage Plan is appealable. See 25 Pa.Code §71.16(f). Consequently, DER's letter of January 12, 1988 is appealable if, in substance, it amounted to a denial of a permit or a disapproval of a revision to Appellants' Official Sewage Plan. If, in substance, the letter did no more than articulate an opinion without any binding legal effect upon either Appellants or DER, it would not afford grounds for an appeal. Michael G. Sabia, Sr., and The Warehouse 81 Limited Partnership v. DER, 1984 EHB 850.

As already noted, we are unable to resolve this central issue on the basis of the meager facts given to us. In disposing of a Motion to Dismiss, the Board is required to view the record in a light most favorable to the non-moving party. Meadville Forging Company v. DER, supra. When that is done in the present case, we are compelled to deny DER's Motion.

O R D E R

AND NOW, this 15th day of July, 1988, it is ordered that the Department of Environmental Resources' Motion to Dismiss the appeal of Municipal Authority of Buffalo Township and Buffalo Township, Butler County, Pennsylvania, is denied. The Order of May 23, 1988, suspending discovery deadlines is revoked and the provisions of paragraphs 2 and 3 of Pre-Hearing Order No. 1, dated March 22, 1988, are extended to reflect due dates 75 days from the date of this order.

ENVIRONMENTAL HEARING BOARD

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: July 15, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Gary A. Peters, Esq.
Western Region
For Appellant:
John J. Morgan, Esq.
Butler, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

T. C. INMAN, INC. and THEODORE C. INMAN	:	
v.	:	EHB Docket No. 85-417-G
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 19, 1988

A D J U D I C A T I O N

By the Board

Syllabus

The Board affirms in part and reverses in part in an appeal from three separate determinations by the Department of Environmental Resources (DER) with regard to an unpermitted landfill: the denial of a solid waste disposal permit, an order closing the landfill and requiring the filing of a closure bond, and a civil penalty assessment imposed for violations of statutes and regulations. DER is justified in denying an application for a permit where the applicant does not provide information within the period requested by DER, and where the proposed operation does not meet the requirements of DER's regulations. In addition, DER is upheld in ordering an unpermitted landfill to cease operations and perform remedial work. A DER order requiring the filing of a closure bond is reversed and remanded, however, where DER does not prove that the amount of the bond was calculated

in accord with DER's bonding policy and regulations. Additionally, a civil penalty assessment is lowered because DER did not provide sufficient evidence to establish the frequency of the violation which formed the basis for the assessment.

INTRODUCTION

This Adjudication involves three appeals, which were consolidated by the Board on January 3, 1986, by Theodore C. Inman and T. C. Inman, Inc. (Inman) from DER actions affecting Inman's landfill in Daugherty Township, Beaver County. The first appeal (Docket No. 85-417-G) is from a DER letter dated September 12, 1985 informing Inman that his application for a permit to operate a landfill had been denied. The second appeal (Docket No. 85-418-G) contested a DER order dated September 11, 1985 requiring Inman to cease operations at the landfill and to perform remedial work. The third appeal (Docket No. 85-419-G) contested a civil penalty assessment dated September 11, 1985 against Inman for violations of DER's regulations governing landfills and for operating without a permit.

Hearings on the consolidated appeals were held on October 20 and 21, 1986. DER presented testimony from Charles Duritsa, regional manager of the Bureau of Waste Management in DER's Pittsburgh Regional Office, and from Michael G. Forbeck, facilities chief in the same bureau and office. The bulk of Inman's testimony was from Theodore C. Inman, the operator of the landfill, and from Robert W. Stevens, a registered engineer who worked on Inman's permit application. Inman also presented testimony from four other witnesses in an attempt to demonstrate a need for his landfill: Frank W. Romanchak, a member of the Board of Supervisors of Daugherty Township; Louis

Pappan, a restaurant owner in Beaver County; Carl Dioguardi, President of Rome Metals, Inc. in Beaver County; and Lawrence Morley, Borough Manager for the Borough of New Brighton.

Both DER and Inman filed post-hearing briefs and this matter is now ripe for adjudication.[1]

FINDINGS OF FACT

1. The Appellants are T. C. Inman, Inc., a Pennsylvania corporation formed in December, 1973, whose principal place of business is located at R. D. #2, Box 342, Allendale Road, New Brighton, PA 15066, and Theodore C. Inman, an individual residing at the same address.

2. The Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, which is the agency of the Commonwealth empowered to administer and enforce the Solid Waste Management Act, the Act of July 7, 1980, P. L. 380, as amended, 35 P.S. §6018.101 et seq. (the Solid Waste Management Act), the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (the Clean Streams Law), Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17, and the rules and regulations adopted under these laws.

3. From 1955 to 1985, Theodore C. Inman operated a landfill in Daugherty Township, Beaver County, on a 71 acre tract of land owned by Inman and his wife. Since 1974, T. C. Inman, Inc. has also operated the landfill. (Bd.Ex.1, Stip.3,4)

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[1] Board Member Edward Gerjuoy presided at the hearings in this case, but he has since resigned from the Board. The Board has held that it may issue adjudications based upon a "cold record" (where the person who presided at the hearings does not prepare the decision). See e.g., Penn Maryland Coals, Inc. v. DER, 1986 EHB 758.

The Permit Application

4. Neither T. C. Inman, Inc. nor Theodore C. Inman has ever been granted a permit to operate a landfill pursuant to either the 1980 Solid Waste Management Act or its predecessor statute. (Bd.Ex.1, Stip.5)

5. In 1970 Inman applied, and in 1972 Inman reapplied, to DER for a permit to operate the landfill. (Bd.Ex.1, Stip.6,7)

6. On August 15, 1972, Theodore C. Inman and DER entered into a consent decree before the Beaver County Court of Common Pleas in settlement of an equity action brought by DER against Inman for operating the landfill without authorization by permit and in violation of applicable statutes and regulations. The consent decree authorized Inman to continue operations so long as he submitted to DER, within 60 days, a full and complete application for a permit ("solid waste disposal permit") to operate a landfill pursuant to the Solid Waste Management Act, and for a permit ("industrial waste permit") to authorize the discharge of treated leachate from the landfill pursuant to the Clean Streams Law. The decree further provided that if there were any deficiencies in the permit applications, Inman was to submit any necessary corrections within 30 days of notification by DER. (Bd.Ex.1, Stip.8, Attach.A)

7. On August 29, 1973, DER issued Industrial Waste Permit 0472208 to Inman, authorizing the construction and operation of a leachate treatment facility at the landfill. (Bd.Ex.1, Stip.9, Attach.B)

8. In conjunction with the Industrial Waste Permit, DER issued Letter of Authorization No. 100521, which authorized Inman to continue operating the landfill, provided that the site was operated in accord with approved plans and with the rules and regulations of DER. The Letter of Authorization further advised Inman that a solid waste permit could not be

issued until the leachate collection and treatment system had been constructed and operated to the satisfaction of DER. (Bd.Ex.1, Stip.10, Attach.C)

9. In 1977, Chapter 75 of DER'S rules and regulations, 25 Pa.Code Ch. 75, was amended to establish specific design standards for landfills. (T.182-184)

10. On September 16, 1982, Inman submitted another application for a solid waste permit to DER. (Bd.Ex.1, Stip.11, Attach.D)

11. On February 9, 1983, DER held a field meeting at Inman's landfill as part of its review of the application. At the meeting, DER's staff reviewed the conditions of the site and became familiar with the manner in which the landfill was operated. (T.246)

12. On March 28, 1983, DER sent a letter to Inman outlining the deficiencies which had been identified in the permit application. The letter advised Inman that the application was insufficient in that it lacked, among other things, adequate soils information, an adequate geologic investigation, adequate information on the liner system, adequate waste monitoring information, adequate engineering design, and an adequate operating plan. (Bd.Ex.1, Attach.E; T.241-245)

13. On June 2, 1983, representatives of DER met with Inman and its technical consultant, Stevens Associates, to discuss the alleged deficiencies in the application and to review DER's letter of March 28, 1983. (Bd.Ex.1, Stip.13; T.247)

14. On July 22, 1983, DER sent a letter advising Inman of deficiencies in the operation of the landfill. (T.247-248; Comw.Ex.4)

15. On September 16, 1983, the engineering firm retained by Inman, Stevens Associates, sent a letter to DER in response to DER's letter of July

22, 1983. Enclosed with the letter were two plan sheets, or maps with design information, which were to be included in the permit application. (T.247-249)

16. The September 16, 1983 letter from Stevens Associates did not address, or did not adequately address, all of the permit application deficiencies raised in the Department's letter of March 28, 1983. (T.249-252)

17. On May 8, 1984, DER sent a letter to Inman again requesting that the information requested in the March 28, 1983 letter be sent to DER, and setting a deadline of June 8, 1984 to submit the information. (Bd.Ex.1, Stip.14, Attach.F)

18. On June 13, 1984, Mr. Stevens submitted a response on behalf of Inman to DER's letter of May 8, 1984. This response did not adequately address DER's concerns that Inman had dug an insufficient number of test pits to determine the uniformity of the soil proposed to be used as a liner or cover material, and that Inman had not submitted a comprehensive and consistent proposal for a liner for the landfill. (Bd.Ex.1, Stip.15, Attach.G; T.255-262, 278-284, 324-326)

19. On December 7, 1984, DER sent a letter to Inman stating that the permit application was being returned because it was incomplete and that the permit would be denied if Inman failed to reply to the letter within 30 days. (Bd.Ex.1, Stip.16, Attach.H)

20. On February 21, 1985, representatives of DER met with Inman and explained the deficiences in the permit application. (Bd.Ex.1, Stip.17)

21. On February 25, 1985, DER sent a letter to Inman stating that a complete permit application must be submitted within 30 days or the application may be denied as incomplete. (T.83-84; Comw.Ex.3)

22. Inman did not submit any additional information or respond in any way to the February, 1985 meeting or letter. (T.365)

23. On September 12, 1985, DER denied the permit application on the grounds that it was technically deficient and incomplete. (Bd.Ex.1, Stip.18, Attach.I; T.290-291)

24. DER's general policy of requiring applicants to excavate roughly one test pit per acre is designed to assure the uniformity of soil conditions across a site, as required by 25 Pa.Code §75.24(b)(4). (T.261-262)

25. DER's policy of requiring applicants to test the compatibility of the proposed liner with leachate to determine the liner's permeability is designed to assure that leachate does not enter the groundwater. (T.329-335; Comw.Ex.7)

26. Inman's permit application did not comport with the applicable regulations in that Inman did not conduct compatibility testing to determine the resistance of the proposed liner materials to the leachate. (T.78, 363-364, 369-371)

The Closure Order

27. On September 11, 1985, DER issued an Order directing Inman to cease operations at the landfill effective December 31, 1985, to submit a closure plan and other related information to DER, to implement the closure plan and perform other corrective work to remedy the violations at the landfill, and to submit a bond to guarantee that the landfill is properly closed. (Bd.Ex.1, Stip.26)

28. Inman ceased disposing of waste at the landfill on December 31, 1985, pursuant to DER's Order. (Bd.Ex.1, Stip.24)

29. The Order required Inman to post a bond in the amount of $140,000. (Order dated September 11, 1985, para.3)

30. Under DER's bonding policy for natural renovation landfills, which parallels DER's regulations at 25 Pa.Code §101.9(f)(1), the method for

calculating a bond for a landfill such as Inman's is to multiply the number of acres by $5,000, and then to add $7,500 to this amount. (T.291-292)

31. DER's testimony did not establish whether the $140,000 bond required in this case was calculated in accord with its bonding policy for natural renovation landfills. (T.292)

The Civil Penalty Assessment

32. On September 11, 1985, DER assessed a $5,000 civil penalty against Inman for operating without a permit and for alleged operational violations at the landfill. (Bd.Ex.1, Stip.27)

33. The alleged operational violations were failure to submit a closure bond to DER, the lack of a synthetic or natural liner and adequate renovative soil at the landfill, failure to submit a groundwater monitoring plan to DER, failure to sample and analyze the groundwater monitoring wells, failure to install a gas venting and monitoring system, failure to construct final slopes between 1% and 15%, failure to apply six inches of daily cover at the end of each working day, failure to manage surface water at the landfill, failure to adequately vegetate final slopes, failure to control blowing litter, and discharging untreated leachate into waters of the Commonwealth. (Civil Penalty Assessment, I.D. No. 100521, dated September 11, 1985)

34. In calculating the amount of the civil penalty assessment, DER did not consider all of the factors listed in section 605 of the SWMA, 35 P.S. §6018.605, because the resulting amount would be "astronomical", and DER deemed that it would be more important to allow Inman to use any available funds for a closure bond and for financing remedial work at the landfill. (T.189-192, 233)

35. DER did not explicitly rescind the letter of authorization issued to Inman in 1973. (T.200)

36. At times, Inman discharged leachate into waters of the Commonwealth. (T.48-52, 85-87)

37. Inman on occasion failed to apply daily cover at the landfill. (T.57-58)

38. DER did not establish the frequency with which Inman discharged leachate into waters of the Commonwealth. (T.48-52, 85-87)

39. DER did not establish the frequency with which Inman failed to apply daily cover at the landfill. (T.57-58)

DISCUSSION

This Adjudication will address the legality of three separate DER determinations: the denial of Inman's application for a solid waste permit, the order directing Inman to close the landfill, perform remedial work, and file a closure bond, and the civil penalty assessment of $5,000. Inman has the burden of proof on the permit denial issue. 25 Pa.Code §21.101(c)(2). DER has the burden of proving that the civil penalty assessment and the closure order should be upheld. 25 Pa.Code §21.101(b)(1),(3). In reviewing all of these determinations by DER, the Board's task is to determine whether DER abused its discretion or carried out its duties and functions in an arbitrary manner. Pennsbury Village Condominium v. DER, 1977 EHB 225, 231.

The Permit Denial

A review of the lengthy and somewhat confusing history of Inman's efforts to obtain a solid waste permit from DER is necessary to understand the arguments on this issue. Theodore C. Inman has operated the landfill in question since 1955 (Bd.Ex.1, Stip.3). Since 1974, T. C. Inman, Inc. has also operated the landfill (Bd.Ex.1, Stip.4). Inman originally filed a permit application in 1970; he resubmitted the application in 1972 (Bd.Ex.1, Stip.6,7). Also in 1972, Inman and DER signed a consent order in the Beaver

County Court of Common Pleas - Inman was allowed to continue operations at the landfill, provided he submitted a full and complete permit application to DER within 60 days (Bd.Ex.1, Stip.8, Attach.A). In 1973, DER issued an Industrial Waste Permit authorizing Inman to construct and operate a leachate treatment facility at the landfill (Bd.Ex.1, Stip.9, Attach.B). Later in 1973, DER sent Inman a letter (referred to as a "letter of authorization") stating that the plans for the design and operation of his landfill were approved; therefore, he could continue to operate the landfill (Bd.Ex.1, Stip.10, Attach.C). This letter also stated that a permit could not be issued until Inman had constructed and operated the leachate treatment facility to DER's satisfaction (Id.).

The next significant event was on September 16, 1982, when Inman submitted a new application for a solid waste disposal permit (Bd.Ex.1, Stip.11, Attach.D). This new application became necessary due to a major revamping of DER's solid waste regulations, 25 Pa.Code Ch.75, in 1977, and the enactment in 1980 of the Solid Waste Management Act (T.182-184). From 1982 to 1985, numerous meetings were held between DER officials and Inman and his consultant to discuss deficiencies in the application and what would be required to remedy these deficiencies.[2] On February 25, 1985, DER sent a letter to Inman stating that a complete permit application must be submitted within 30 days or the application would be denied as incomplete (T.83-84; Comw.Ex.3). Inman did not respond to this letter, and on September 12, 1985, DER issued a letter denying the application on the grounds that it was technically deficient and incomplete (Bd.Ex.1, Stip.18, Attach.I; T.290-291).

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[2] See Findings of Fact 11-20 for a detailed account of these meetings and citations to the record.

Inman argues in its brief (pp.2-5) that DER abused its discretion and acted arbitrarily by applying an overly strict interpretation of the regulations in denying Inman's application. Inman contends that DER discriminated against it by applying standards which similarly situated landfills were not required to meet. Examples of these allegedly discriminatory standards were that Inman, unlike previously permitted landfills, was required to meet the requirements of the 1977 regulations and the 1980 Solid Waste Management Act on cells he was working at the time the new requirements became effective, that DER required Inman to conduct a clay liner compatibility test (to determine the resistance of the liner to leachate) which is only applicable to industrial or hazardous waste sites, and that Inman was required to test the soils on its site by digging one test pit per acre. Inman also argues that DER erred in requiring Inman to apply for a permit in 1982 because Inman should have received a permit based upon the applications in the early 1970's (Inman Brief, p.5).

In its brief (pp.25-28), DER argues that its denial of a permit to Inman should be upheld. DER points out that it was Inman's burden to prove that it had satisfied the requirements of the statute and the regulations, citing Compass Coal Co., Inc. v. DER, 1975 EHB 129, 134. DER further argues that Inman's consultant, Mr. Stevens, admitted in his testimony that the application did not meet the requirements of the regulations. Finally, DER contends that it was justified in denying the application - as opposed to requesting further information - because DER cooperated with Inman over a three year period, and because Inman failed to respond to DER's letter of February 25, 1985 within the time set out in the letter.

Inman's argument that DER discriminated against it by applying an overly strict interpretation of the regulations must fail. First, Inman's own

witness, Mr. Stevens, testified that the application did not comport with the regulations in that the material which Inman proposed as a liner had not been tested for its resistance to leachate (T.78, 363-364, 369-371). The section of the regulations which Mr. Stevens was referring to was 25 Pa.Code §75.25(o)(6), which provides in relevant part:

> (6) Natural systems may be utilized to collect leachate from landfills. The methods to utilize the natural systems may be...naturally occurring impermeable zones.
>
> * * * * *
>
> (iii) When naturally occurring impermeable zones are to be utilized, the minimum site requirements shall be as follows:
>
> (A) Zones with a uniform thickness of greater than two feet must have a permeability of less than 1×10^{-7} cm/sec.
>
> (B) Zones with a uniform thickness of greater than four feet and an upwater groundwater gradient into the zone may be approved with a maximum permeability of less than 1×10^{-6} cm/sec.

25 Pa.Code §75.25(o)(6)(iii). It is apparent from our review of these regulations that while the method of testing is not explicitly set out in the regulations, as Mr. Stevens implied, that the results of a test or some other type of evidence would have to be introduced for an applicant to show that a "naturally occurring impermeable zone" meets the criteria of the regulations.[3] In this case, Inman did not supply the results of such a test or other evidence either to DER or to the Board.

Inman's theory that the testing requirement was discriminatory seems to be based on the contention that the test is only applicable to industrial

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[3] DER has prepared written guidelines for conducting such a test. See Comw.Ex.7.

or hazardous waste sites, but that in this case DER required the test for Inman's municipal landfill (Inman Brief, p.4). While it is true that the second page of Commonwealth Exhibit 7, which contains the guidelines for conducting such a test, states that the guidelines apply to testing a soil liner in contact with industrial or hazardous waste, Mr. Forbeck testified that this policy is also uniformly applied to municipal landfills (T.332-333). Inman was informed of the testing requirement in a meeting with DER personnel on February 21, 1985 (T.335), yet Inman has not supplied the results of such a test to either DER or to this Board. Therefore, Inman has not carried its burden of proving that the conditions on its site meet the permeability standards in DER's regulations, and for this reason alone we must uphold DER's denial of the application.[4]

Inman's argument that DER's denial of a permit should be reversed because Inman should have received a permit prior to the 1980 SWMA must also be dismissed. The permit denial at issue here originated with Inman's application for a solid waste permit in 1982. What DER did, or should have done, with regard to Inman's earlier applications in 1970 and 1972 is not before us. The filing of an appeal from DER's denial of the 1982 permit application does not empower the Board to scrutinize every DER decision affecting Inman over the past 20 years.

The Closure Order

On September 11, 1985, one day before DER issued the letter denying Inman's permit application, DER issued an order directing Inman to cease

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[4] Since we conclude that Inman did not meet the permeability testing requirement, it is unnecessary for us to address Inman's arguments that certain other requirments were also discriminatory.

operations at the landfill as of December 31, 1985 (Bd.Ex.1, Stip.26). The order also directed Inman to submit a closure plan, to perform corrective work to remedy violations at the landfill, and to submit a bond in the amount of $140,000 to guarantee that the landfill would be properly closed (Id.).

Inman argues that DER has failed to prove the necessity of the order directing it to cease operations, file a closure plan, and submit a bond (Inman Brief, pp.5-7). With regard to the order to cease operations, Inman argues that it has been operating under the 1973 letter of authorization and that any deficiencies which may exist in its application are correctable and do not create an imminent danger to the environment. Inman also argues that the landfill should be allowed to remain open because the benefits of operating the landfill outweigh the possibility of environmental harm, citing Pennsylvania Environmental Management Services, Inc. v. Commonwealth, DER (hereinafter "PEMS"), 94 Pa.Commw.Ct. 182, 503 A.2d 477 (1986). Inman further contends that the cessation order violated its right to due process because there was not a prior hearing, and that the closure order amounts to a taking of property without just compensation. Finally, Inman argues that the $140,000 closure bond required by DER is excessive.

DER states that the order directing Inman to cease operations, file a closure plan, and submit a bond of $140,000 must be upheld (DER Brief, pp.28-36). With regard to the order that Inman cease operations, DER points out that Sections 201 and 501 of the SWMA, 35 P.S. §§6018.201 and 6018.501, prohibit the operation of a landfill without a permit. Thus, DER argues that it was compelled to close the landfill once it denied the permit application. DER also asserts that the 1973 Letter of Authorization does not prohibit its closure order because the regulatory requirements for landfills have changed drastically since the letter was issued, and because Inman has not abided by

the conditions stated in the letter in that it has not operated the landfill in compliance with statutory and regulatory requirements. With regard to the order to cease operations, DER contends that Inman's reliance on PEMS is misplaced in that a balancing of benefits and environmental harm from the landfill is not appropriate in a case where DER is acting to remedy a violation of statutes and regulations. Finally, DER argues that the $140,000 closure bond should be upheld because the filing of such a bond is required by the Solid Waste Management Act and because the amount of the bond was calculated in accord with DER's bonding policy and regulations.

As stated earlier in this Adjudication, DER has the burden of proving that the order to cease operations, submit a closure plan, and file a $140,000 bond should be upheld. 25 Pa.Code §21.101(b)(3). Our review of the record and the briefs of the parties persuade us that DER has carried it burden with regard to the order to cease operations and submit a closure plan, but DER has not satisfied its burden of showing that the amount of the closure bond was reasonable.

DER's order that Inman cease operations at the landfill and file a closure plan was justified by the simple fact that Inman did not have, and was not likely to get, a permit, as required by Sections 201 and 501 of the Solid Waste Management Act. 35 P.S. §§6018.201 and 6018.501. While DER's argument that it had no choice but to issue the cessation order goes too far,[5] DER was certainly acting reasonably and within its legitimate area of discretion when it ordered Inman to cease operations roughly three months after Inman's permit application was denied. Section 602(a) of the Solid

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[5] If DER were compelled to order every unpermitted landfill to cease operations, it would have been required to close Inman down long before the permit application was denied. Technically, an unpermitted landfill with a pending application is no different from any other unauthorized landfill.

Waste Management Act, 35 P.S. §6018.602(a) specifically authorizes DER to require persons to cease unlawful activities. DER worked with Inman on the permit application for several years but it was not required to allow Inman to continue its unpermitted operation forever.

We also agree with DER that Inman's reliance on PEMS is misplaced. In PEMS, the Commonwealth Court ruled that the Board, in reviewing an application for a solid waste permit, must balance the regionwide benefits of a landfill against the environmental harm it threatens. This ruling was based upon the third prong of the test enunciated for implementing Article 1, Section 27 of the Pennsylvania Constitutition in Payne v. Kassab, 11 Pa.Cmwlth.Ct. 14, 312 A.2d 86 (1973), affirmed, 468 Pa. 226, 361 A.2d 263 (1976). In Payne, Commonwealth Court stated:

> The Court's role must be to test the decision under review by a threefold standard: (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

Payne, 11 Pa.Cmwlth.Ct. at 29-30, 312 A.2d at 94.

When a permit application is denied as technically deficient and incomplete, as Inman's was here, the applicant has not satisfied the prerequisite for reaching the third prong of the test enunciated in Payne. Indeed, as a simple matter of common sense, an application which is technically deficient and incomplete does not allow such a balancing because it is impossible to determine what the environmental effects of the operation will be. Moreover, if we were to adopt Inman's interpretation of Payne and

PEMS, an applicant could disregard statutory and regulatory requirements simply by making the argument that it must be allowed to remain open anyway because the benefits of its operation outweigh the known - and unknown - environmental detriments.

With regard to Inman's constitutional arguments - that it was denied due process of law by being ordered to cease operations without a prior hearing and that the closure order amounts to a taking of private property without compensation - we note that Inman has only made bare allegations with regard to these claims; it has not cited any authority or supplied any analysis to support the allegations. With regard to the due process argument, Inman's rights were satisfied by the hearing held before the Board; due process did not require that he be afforded a hearing prior to DER's ordering him to cease operations. Commonwealth, DER v. Borough of Carlisle, 16 Pa.Cmwlth.Ct. 341, 330 A.2d 293 (1974). With regard to the "taking" argument, we shall summarily dismiss it because Inman has not supported it with legal analysis.

The final issue with regard to DER's order of September 11, 1985 is the amount of the bond Inman was required to file. Inman has made a bare assertion that the bond amount is excessive. (Inman Brief, p.6) Our review of the record indicates that DER has not explained how it calculated the $140,000 bond in this case. DER's witness, Michael Forbeck, testified that under DER's bonding policy for natural renovation landfills, which parallels DER's regulations at 25 Pa.Code §101.9(f)(1), the method for calculating a bond for a landfill such as Inman's is to multiply the number of acres by $5,000, and then to add $7,500 to the amount. (T-291-292; Comw.Ex.8) However, Mr. Forbeck did not know the number of acres used in the calculation to derive the $140,000 bond. (T.292) DER has attempted to fill this gap in

the record by submitting an affidavit by Mr. Forbeck attached to its brief; this affidavit states that the $140,000 bond was based upon 28 acres ($5,000 x 28 = $140,000), and that "for reasons that he (Mr. Forbeck) does not recollect," the additional $7,500 called for by the bonding policy was not added to this amount. (Affidavit, para.9)

Mr. Forbeck's affidavit cannot be relied upon by the Board because it was not introduced into evidence at the hearing, and, thus, Inman was not accorded his right to cross-examination based upon the information in the affidavit. Disregarding, as we must, the affidavit, there is insufficient evidence as to how DER calculated the amount of the bond. Therefore, we conclude that DER has not carried its burden of proof on this issue, and we have no choice but to remand this matter to DER to calculate the bond amount.[6]

The Civil Penalty Assessment

On September 11, 1985, DER issued a civil penalty assessment in the amount of $5,000 to Inman for operating without a permit and for a number of alleged operational violations at the landfill (Bd.Ex.1, Stip.27). The alleged operational violations were failure to submit a closure bond to DER, the lack of a synthetic or natural liner and adequate renovative soil at the landfill, failure to submit a groundwater monitoring plan to DER, failure to sample and analyze the groundwater monitoring wells, failure to install a gas venting and monitoring system, failure to construct final slopes between 1% and 15%, failure to apply six inches of daily cover at the end of each working day, failure to manage surface water at the landfill, failure to adequately

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[6] Inman has not raised the issue whether section 505 of the Solid Waste Management Act, 35 P.S. §6018.505, authorizes DER to require a bond in a situation involving an unpermitted landfill which has already been ordered to close. Therefore, this Adjudication does not rule on the question.

vegetate final slopes, failure to control blowing litter, and discharging untreated leachate into waters of the Commonwealth. (Civil Penalty Assessment, I.D. No. 100521, dated September 11, 1985)

Inman argues that the civil penalty assessment should be overturned because Inman had permission to operate the landfill from 1973 until the landfill was closed at the end of 1985. (Inman Brief, pp.7-8) Inman does not address the operational violations alleged by DER. DER argues that Inman has been operating unlawfully without a permit since 1977 and, additionally, that there were operational deficiencies at the landfill - the failure to apply daily cover, failure to control blowing litter, and the discharge of untreated leachate to waters of the Commonwealth[7] - which justify the civil penalty assessment (DER Brief, pp.36-38).

As with the closure order, DER has the burden of proof with regard to the civil penalty assessment. 25 Pa.Code §21.101(1). Western Hickory Coal Co. v. DER, 1983 EHB 89, 94, affirmed, 86 Pa.Cmwlth.Ct. 562, 485 A.2d 877 (1984). We find that DER has not met its burden of proof with regard to the $5,000 civil penalty assessment.

First, we disagree with DER's argument that Inman can be penalized for operating without a permit from 1977 to 1985. While it is true that Inman has never obtained a permit from DER for the landfill, a letter authorizing the continued operation of the landfill was issued by DER in 1973. (Bd.Ex.1, Stip.10, Attach.C) DER's argument that this letter of authorization was voided by the amendments to 25 Pa.Code, Chapter 75 in 1977 is unpersuasive. DER has not cited any provision in the regulations which state that previous

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[7] DER's brief does not discuss the other operational violations listed in the civil penalty assessment. Therefore, these alleged violations are deemed waived. Robert Kwalwasser v. DER and Kerry Coal Co., 1986 EHB 24, 39.

authorizations to operate landfills were withdrawn by the regulations. Nor has DER presented evidence that it notified Inman that it considered the new regulations to have the effect of withdrawing the letter of authorization. Therefore, while the new regulations imposed new requirements upon Inman, which DER had the right to enforce, the regulations did not have the effect of rendering Inman's operation illegal per se.

We also disagree with DER's argument that Inman's alleged operational violations at the landfill render the letter of authorization void, based upon a condition in the letter that Inman would conduct his activities in accordance with the law. (DER Brief, pp.30-31) This condition makes the letter voidable, but DER must first establish that Inman has violated the condition in the letter before the letter of authorization is deemed void. DER did not establish the grounds for voiding the letter of authorization during the period 1977-1985; therefore, the alleged violations could not render Inman's operations illegal during that period.

Finally, based upon our review of the record, we do not believe DER has carried its burden of proving that the $5,000 civil penalty assessment is justified by the operational violations at the landfill. DER did not present a witness of its own to go through each allegation in the civil penalty assessment and testify that Inman had committed the alleged violations. Moreover, DER has waived its argument on most of the violations alleged in the civil penalty assessment - DER's brief refers only to the allegations regarding failure to apply daily cover, failure to control blowing litter, and discharging untreated leachate into waters of the Commonwealth.

With regard to the three alleged operational violations cited in DER's brief, DER attempted to prove these violations through cross-examination

of Mr. Inman and Mr. Stevens. Both of these witnesses admitted that there were discharges of untreated leachate from the landfill - an apparent violation of sections 301 and 307 of the Clean Streams Law, 35 P.S. §§691.301 and 691.307 (T.48-52, 85-87). However, because paragraph "T" of the civil penalty assessment incorrectly stated that these discharges were a violation of the Solid Waste Management Act, we will not assess a civil penalty for the discharges.[8] With regard to the alleged failure to apply daily cover, as required by 25 Pa.Code §75.26(1), Mr. Inman admitted that there have been occasions when, due to equipment breakdowns, daily cover was not applied. (T-57-58). However, there was no evidence to establish how often this occurred. Finally, with regard to the allegation that Inman failed to control blowing litter, DER cites Mr. Inman's testimony that the western border of his landfill is unfenced. (T.59) This testimony does not, in itself, establish a violation of 25 Pa.Code §75.26(j) and (k) - the provisions cited in paragraph "S" of the civil penalty assessment - because those provisions do not require that fences be located along the entire border of a landfill.

Therefore, while it appears that Inman has committed a violation of DER's regulations in that he has occasionally failed to apply daily cover at the landfill, DER has not proven the frequency with which this violation occurred. While we recognize that there will always be an element of subjectivity in assessing a civil penalty, DER must submit evidence to show that the penalty was computed with some degree of precision. DER has failed to carry its burden of proof in the instant case; accordingly, we conclude

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[8] DER's citation of the Solid Waste Management Act instead of the Clean Streams Law was more than a mere technical mistake. Under section 605 of the Clean Streams Law, 35 P.S. §691.605, a party has a right to a hearing <u>before</u> a civil penalty is assessed, whereas under section 605 of the Solid Waste Management Act, 35 P.S. §6018.605, DER may assess a civil penalty and the party may then appeal the assessment to this Board.

that DER abused its discretion in assessing the $5,000 civil penalty. Since we find that DER abused its discretion, we may substitute our discretion and recalculate the penalty. Refiner's Transport and Terminal Corp.v.DER, 1986 EHB 400, 449.

The failure to apply daily cover violated DER's solid waste regulations at 25 Pa.Code §75.26(1); DER is expressly authorized by section 605 of the Solid Waste Management Act, 35 P.S. §6018.605 to impose civil penalties for violations of regulations governing solid waste. The standards for assessing such a civil penalty include consideration of the willfulness of the violation, damage to the environment and its uses, cost of restoration and abatement, savings resulting to the person in consequence of the violation, and other relevant factors. 35 P.S. §6018.605. The maximum civil penalty under the Solid Waste Management Act is $25,000 per offense. 35 P.S. §6018.605.

The record contains little evidence which would enable us to evaluate the violation in light of the above criteria, and the parties have not addressed this in their briefs. Under the circumstances, we will consider that there was only one occurrence of failure to apply daily cover. Furthermore, we will consider the violation to have been merely negligent, and not to have caused environmental degradation. Based upon these considerations, we will assess a civil penalty of $500 for this violation.

CONCLUSIONS OF LAW

1. An appellant has the burden of proof in an appeal from the denial of a solid waste disposal permit to show that it has met the requirements of the statutes and regulations. 25 Pa.Code §21.101(c)(2), Compass Coal Co., Inc. v. DER, 1975 EHB 129, 134.

2. DER has the burden of proof in a case where it orders a landfill operator to cease operations, file a closure plan, and submit a bond to guarantee proper closure of the landfill. 25 Pa.Code §21.101(b)(3)

3. DER has the burden of proof in an appeal of a civil penalty assessment to show that it did not commit an abuse of discretion. 25 Pa.Code §21.101(b)(1), Western Hickory Coal Co. v. DER, 1983 EHB 89, 94, affirmed, 86 Pa.Cmwlth. 562, 485 A.2d 877 (1984).

4. DER was justified in denying Inman's application for a municipal waste disposal permit due to Inman's failure to provide evidence that its proposed clay liner was resistant to leachate, as required by DER's regulations. 25 Pa.Code §§75.22(c) and 75.25(o)(6)

5. DER exercised its discretion reasonably in ordering Inman to cease operations and submit a closure plan after Inman's permit application had been denied.

6. DER did not carry its burden of proving that the $140,000 closure bond which it ordered Inman to file was computed in accord with its bonding policy and 25 Pa.Code §101.9.

7. The letter issued to Inman in 1973, authorizing him to operate his landfill, was not voided by the 1977 amendments to 25 Pa.Code, Chapter 75.

8. Inman's failure to apply daily cover to the waste at his landfill was a violation of DER's solid waste regulations at 25 Pa.Code §75.26(1).

9. DER did not carry its burden of proving that the $5,000 civil penalty assessment was warranted by operational violations at the landfill.

10. The Environmental Hearing Board may substitute its discretion for DER's and modify a civil penalty assessment when it finds that DER has abused its discretion. Refiner's Transport and Terminal Corp. v. DER, 1986 EHB 400, 449.

O R D E R

AND NOW, this 19th day of July, 1988, it is ordered that:

1. The appeal by Inman from DER's September 12, 1985 denial of Inman's application for a solid waste disposal permit is dismissed.

2. The appeal by Inman from DER's September 11, 1985 closure order is sustained with regard to the $140,000 closure bond, and this issue is remanded to DER for recalculation of the bond based upon DER's bonding policy and regulations within 60 days of the date of this order. In all other respects, Inman's appeal of the closure order is dismissed.

3. The appeal by Inman from DER's civil penalty assessment of $5,000 is sustained, in part, and the penalty is modified to $500. The entire civil penalty is due and payable immediately into the Solid Waste Abatement Fund. The prothonotary of Beaver County is ordered to enter the full amount of the civil penalty as a lien against any property of T. C. Inman, Inc. and Theodore C. Inman, together with interest at the rate of 6% per annum from

the date hereof. No costs may be assessed upon the Commonwealth for entry of the lien on the docket.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: July 19, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Diana J. Stares, Esq.
Western Region
For Appellant:
John G. Good, Jr., Esq.
REED, LUCE, GOOD, TOSH & McGREGOR
Beaver, PA
and
Robert J. Fall, Esq.
WYMARD, DUNN & GORDON
Pittsburgh, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

AMERICAN TANK TRANSPORT, INC.	:	
	:	
v.	:	EHB Docket No. 87-455-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 20, 1988

OPINION AND ORDER
SUR
MOTION FOR PARTIAL SUMMARY JUDGMENT

Synopsis

The Board will deny a motion for partial summary judgment finding the transporter of hazardous waste liable for failing to accurately and fully complete manifest forms where numerous factual, as well as legal, issues relating to the transporter's duty and responsibility for completing the manifest forms remain in dispute.

OPINION

American Tank Transport, Inc. (ATT) is a licensed transporter of hazardous waste pursuant to Pennsylvania License No. PA-AH0081. On nine occasions, ATT accepted for transport waste hydrochloric acid, a hazardous waste pursuant to 25 Pa.Code §75.261(g)(3), generated by Wheeling-Pittsburgh Steel Corporation and transported it to K. A. Steel Chemicals, Inc. in Gary, Indiana. Each shipment was accompanied by a uniform Hazardous Waste Manifest which listed K. A. Steel Chemicals, Inc. as the transporter, using its U.S. Environmental Protection Agency (EPA) identification number. The

manifests allegedly failed to list a state identification number and in no way identified ATT as the transporter. On one occasion, ATT accepted for transport waste sodium hydroxide, a hazardous waste pursuant to 25 Pa.Code §75.261(g)(3), generated by Chem-Clear of Baltimore, Inc. and transported it to Waste Conversion, Inc. of Hatfield, Pennsylvania. The Department of Environmental Resources (Department) alleges that Items 13 (Total Waste Quantity) and Item 14 (Unit Wt./Volume) of its copy of the manifest accompanying this shipment were incomplete and/or incapable of being read. ATT maintains that, according to copies of this manifest available to it, Item 13 was filled out.

The Department issued a notice of violation and civil penalty assessment to ATT for its alleged violations of numerous provisions of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq., and the regulations promulgated thereunder. On October 23, 1987, ATT filed a notice of appeal of the civil penalty assessment.

On May 10, 1988, the Department filed a motion for partial summary judgment, arguing that, based upon the Board's holdings in two earlier decisions, Southwest Equipment and Rental Inc., d/b/a Southwest Motor Freight v. DER, 1986 EHB 465 and Refiner's Transport and Terminal Corp. v. DER, 1986 EHB 400, and ATT's admissions that it was, in fact, the transporter for each of the contested manifests, ATT is liable for the acceptance and transport of the ten shipments accompanied by inaccurate or incomplete manifests.

ATT filed its response on June 1, 1988, calling the Department's motion "vexatious and premature" and citing the numerous outstanding discovery motions filed by the Department, the resolution of which could have significant impact on the issues of liability and the amount of the civil

penalty in this appeal. The Board disposed of these discovery motions in an opinion and order issued June 2, 1988. ATT argues that ruling on the summary judgment motion will not result in any savings of time for the Board, since the remaining issue on the amount of the civil penalty involves all the same facts and issues raised in the motion. Additionally, ATT avers that several issues of fact and law relevant to the Department's motion remain in dispute. ATT is contesting the fact that Items 13 and 14 were left blank on the tenth manifest. ATT defends that each manifest carried the name and signature of agents of ATT in the section of the form to be completed by the transporter. ATT argues that the caselaw cited is not directly related to the issues in this appeal. Finally, ATT maintains that no regulation cited makes the transporter a guarantor of all information set forth in the manifest as completed by the generator.

In its disposition of a motion for summary judgment, the Board is authorized to render summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The Board must read the motion for summary judgment in the light most favorable to the non-moving party. Robert C. Penoyer v. DER, 1987 EHB 131.

There remain numerous issues of fact and law to be resolved in this case, specifically, the limits of a transporter's duties and responsibilities in completing the manifest, thus making summary judgment inappropriate.

The first case cited by the Department in support of its motion, Southwest Equipment Rental, deals primarily with whether the Department properly computed a civil penalty assessment against an appellant who transported hazardous waste without a license. The Southwest Equipment case

deals at length with the factors considered in determining the amount of a civil penalty assessment. Any discussion of manifest violations in that case focuses on the wilfulness of the violations in relation to calculating the amount of the civil penalty assessment. The amount of the civil penalty is not an issue raised in the current motion for partial summary judgment. There is no analysis in Southwest Equipment relating to the liability issues raised in the Department's motion for partial summary judgment.

In the second case cited by the Department in support of its motion, Refiner's Transport, the Board was reviewing the Department's denial of a hazardous waste transporter license and a civil penalty assessment for appellant's repeated license violations and for accepting hazardous waste without a completed manifest. Although the Board held that the Solid Waste Management Act, and the regulations promulgated thereunder, impose joint responsibility upon the generator and the transporter of hazardous waste, ATT correctly maintains that the issues presented and briefed in that case were very different from those at issue in the current case. The issue of the degree and limits of responsibility of the transporter for completing the manifest was not adequately discussed in that case. In addition, ATT has raised a factual and legal query regarding whether or not Items 13 and 14 were completed on copies other than those received by the Department and whether there is a violation if the transporter receives a manifest with entries that appear on some, but possibly not all, copies.

Clearly, there are numerous outstanding issues of fact and law remaining in the appeal sufficient to defeat a summary judgment motion at this time.

O R D E R

AND NOW, this 20th day of July, 1988, it is ordered that the Department of Environmental Resources' Motion for Partial Summary Judgment is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: July 20, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
David Wersan, Esq.
Central Region
For Appellant:
Bernard A. Labuskes, Jr., Esq.
McNEES, WALLACE & NURICK
Harrisburg, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

JOHN R. YENZI, JR.	:	
	:	
v.	:	EHB Docket No. 85-194-R
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 26, 1988

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

Summary judgment may be granted where there is no dispute as to material fact and the moving party is entitled to judgment as a matter of law. The Appellant's failure to respond to a request for admissions renders the requests admitted. Appellant admits to operating the mine site in question and that the discharges were pollutional and flowed into the waters of the Commonwealth. Under §315 of the Clean Streams Law, Appellant may be held responsible for treatment of these discharges. Under §1921-A of the Administrative Code, DER need not give notice of its intent to issue a compliance order.

O P I N I O N

This action was commenced on May 9, 1985 with the filing of a notice of appeal by John R. Yenzi, Jr. (Yenzi) from an April 10, 1985 Department of Environmental Resources (DER) compliance order (hereinafter referred to as

CO-85) issued as a result of DER's allegation that, on March 20, 1985, Yenzi permitted discharges in violation of 25 Pa.Code §87.102 at his surface mine site in McCalmont Township, Jefferson County, known as Yenzi Strip No. 1. Yenzi operated his mine pursuant to Mine Drainage Permit No. 3875SM42 (MDP). DER issued its order pursuant to the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (CSL), the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. (SMCRA), and Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 (the Administrative Code).

On April 22, 1987, DER filed a motion for summary judgment (motion) alleging that, on January 2, 1986, it served Yenzi with requests for admissions and that because he never responded to the requests for admissions,[1] each matter for which an admission was requested is deemed admitted pursuant to Pa. R.C.P. 4014(b). In the main, according to DER, these admissions establish that, in 1984, it issued Compliance Order K-84-775 (CO-84) to Yenzi for the same violations of 25 Pa. Code §87.102 and at the same locations as those cited in CO-85; that Yenzi never appealed CO-84; and that Yenzi failed to construct treatment facilities for the non-complying discharges cited in CO-85. DER argues that, due to Yenzi's failure to appeal CO-84, he has admitted to the pollutional discharges from Yenzi Strip No. 1, as well as his liability for treatment, under the principle of administrative finality. DER contends that there is no dispute as to any material fact and requests summary judgment be granted in its favor.

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[1]DER has also filed a motion for sanctions, alleging that Yenzi failed to respond to either the request for admissions or interrogatories, which were contemporaneously served. Because of the result reached in this opinion and order, it is not necessary to rule on DER's motion for sanctions.

Yenzi in his May 22, 1987 answer to DER's motion, admits that he never responded to the request for admissions but argues that the 30 day response period was tolled because of ongoing negotiations with DER. He also contends that the discharges pre-existed his mining of the site and that because he neither caused nor worsened the discharges, he is not responsible for them. Yenzi argues that DER's issuance of CO-85 was unauthorized by 25 Pa. Code §87.102, was contrary to its own rules and procedures, and was a violation of due process because it was not preceded by a notice of violation.

Pennsylvania Rule of Civil Procedure 1035 provides that summary judgment may be rendered where, based on an examination of the pleadings, depositions, answers to interrogatories, and admissions of the parties, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Marlin L. Snyder v. DER, 1985 EHB 671.

The Board finds no merit in Yenzi's interpretation of Pa. R.C.P. 4014(b). In relevant part, the rule states that a request for admissions "...is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission [an answer or objection]..." (emphasis added). The Board's docket reveals no request by Yenzi for an extension of time to answer or object. Furthermore, the Board finds no provision in Pa. R.C.P. 4014 which operates to stay the obligation to answer or object to a request for admissions pending negotiations. Therefore, DER's requested admissions must be deemed admitted as a result of Yenzi's failure to file either answers or objections thereto or a request for an extension of time to respond.

The material facts necessary to determine Yenzi's responsibility have been established by virtue of his failure to respond to DER's requests

for admission. Yenzi operated Yenzi Strip No. 1 pursuant to the MDP after May 3, 1978. (DER Request for Admissions (Request) No. 7.) A June 21, 1982 amendment to the MDP contained Special Condition No. 49 (Request Nos. 10 and 11), which set the effluent limitations as follows:

Parameter	Maximum Allowable[2]
Iron, total	6.0 (mg/l)
Manganese, total	4.0 (mg/l)
Total Suspended Solids	70.0 (mg/l)
pH	6.0 to 9.0

The two discharges from Yenzi Strip No. 1 identified in CO-85 failed to meet these effluent limitations (Request Nos. 16, 17 and 25), as indicated by the following discharge characteristics:

Parameter	Sediment Pond 6	Ditch
Iron	24.6 mg/l	22 mg/l
Manganese	14.2 mg/l	15.1 mg/l
pH	4.0	3.6

The two discharges are from areas affected by Yenzi's mining operations at Yenzi Strip No. 1 and flow into an unnamed run to Little Sandy Creek (Request Nos. 25 and 26).

The question of a mine operator's responsibility for non-complying discharges from an active, permitted site was addressed by the Board in Benjamin Coal Company v. DER, 1987 EHB 402. In Benjamin the Board held that, pursuant to §315(a) of the CSL, mine operators are responsible for pollutional discharges emanating from their permit areas, regardless of whether their actions led to the worsening of the discharges. Consequently, since Yenzi did operate Yenzi Strip No. 1 and the discharges from Yenzi Strip No. 1 failed to

[2]These limitations are identical to those in DER's rules and regulations at 25 Pa.Code §87.102, except for iron. §87.102 states that iron shall be a maximum of 7.0 mg/l. Thus Special Condition No. 49 is more stringent in this regard.

meet applicable effluent limitations, Yenzi is liable for their treatment.

Yenzi's other arguments are wholly without merit. DER did not violate Yenzi's right to due process of law by not issuing a notice of violation before it issued the compliance order, since §1921-A of the Administrative Code allows DER to issue an order without previous notice to the persons to whom the order is directed. Sellersville Borough v. DER, 1973 EHB 89. Moreover, DER's authority to issue compliance orders does not stem from 25 Pa. Code §87.102, as Yenzi suggests, but rather from the underlying statutes, namely §610 of the CSL, 35 P.S. §691.610, and §4.3 of SMCRA, 52 P.S. §1396.4c. Since there are no disputed material facts and DER is entitled to judgment as a matter of law, we will grant DER's motion.

O R D E R

AND NOW, this 26th day of July, 1988, it is ordered that the Department of Environmental Resources' motion for summary judgment is granted and the appeal of John R. Yenzi, Jr. at EHB Docket No. 85-194-R is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: July 26, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Joseph K. Reinhart, Esq.
Western Region
For Appellant:
R. Edward Ferraro, Esq.
FERRARO & YOUNG
Punxsutawney, PA

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

HELEN MOREHOUSE	:	
	:	
v.	:	EHB Docket No. 86-339-F
	:	
COMMONWEALTH OF PENNSYLVANIA	:	Issued: July 26, 1988
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and GREENE INDUSTRIAL LANDFILL, Permittee		

OPINION AND ORDER SUR MOTION TO DISQUALIFY COUNSEL

Synopsis

A Motion to Disqualify Counsel is denied where disqualification is not necessary to preserve a fair hearing.

OPINION

This proceeding involves two appeals, one by Helen Morehouse and one by George and Shirley Wisniewski (collectively referred to as Morehouse), from a letter of the Department of Environmental Resources (DER) dated May 6, 1986. The appeals were consolidated by an order dated October 2, 1986. In the letter which is the subject of this appeal, DER reinstated a permit to Greene Industrial Landfill (Greene) to operate a demolition waste landfill in Greene Township, Erie County. The original permit was issued by DER on December 22, 1981, and was then appealed to this Board (EHB Docket No. 82-045-G). On February 7, 1986, the Board issued an Adjudication dismissing most of the appellant's arguments but remanding the permit to DER to reconsider a dust

control plan for an access road. George and Shirley Wisniewski, et al. v. DER, 1986 EHB 111. DER's reinstatement of the permit on May 6, 1986 followed this remand.

This Opinion and Order addresses Morehouse's Motion to Disqualify Counsel which was filed on May 12, 1988. In this motion, Morehouse seeks to disqualify Greene's counsel, Paul F. Burroughs, of the law firm of Quinn, Gent, Buseck and Leemhuis, Inc., on the basis that he was counsel for DER in the earlier EHB proceeding involving this permit at 82-045-G. In support of its Motion, Morehouse quotes rule 1.11 of the new Rules of Professional Conduct (effective April 1, 1988), which provides in relevant part:

> RULE 1.11 Successive Government and Private Employment.
>
> (a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. . . .

On May 16, 1988, Greene filed an Answer to the Motion to Disqualify. In this answer, Greene admits Mr. Burroughs's involvement as counsel for DER in the appeal at EHB Docket No. 82-045-G. In paragraph seven, Greene states:

> [T]he Appellant [Morehouse] fails to state that the appropriate government agency, in this case the Department of Environmental Resources, failed to consent after consultation. DER is aware of Permittee's counsel's involvement due to counsel's filing of documents, entry of appearance and participation in conversations not only between the parties but with the Environmental Hearing Board as well.

Although the exact meaning of this statement is obscure, and the statement itself constitutes a virtual admission that Rule 1.11 has been violated, Greene seems to be implying that since DER knows of Mr. Burroughs' involvement and has not objected, Mr. Burroughs should be allowed to continue as Greene's counsel.

Rule 201 of the Pennsylvania Rules of Disciplinary Enforcement provides that exclusive jurisdiction to enforce the Code of Professional Responsibility (and, we assume, the new Rules of Professional Conduct) rests with the Disciplinary Board and the Supreme Court of Pennsylvania. Lower courts do not have authority to enforce these ethical rules, except that they may disqualify counsel where this is necessary to insure a fair trial as required by the constitutional right to due process. In re Estate of Pedrick, 505 Pa 530, 482 A.2d 215 (1984). Administrative agencies, as well as courts, are bound to conduct their proceedings in accord with the requirements of due process. Straw v. Commonwealth, Human Relations Commission, 10 Pa Commonwealth Ct. 99, 308 A.2d 619 (1973), affirmed, 478 Pa. 463, 387 A.2d 75 (1978). Therefore, this Board has authority to disqualify counsel when such action is necessary to insure a fair trial.

Applying these principles to the instant case, the Motion to Disqualify must be denied. Even conceding, arguendo, that Mr. Burroughs has breached an ethical rule here, disqualification is not necessary to preserve a fair hearing. DER is the party whose interest could be compromised when one of its former attorneys represents a private litigant in a matter in which the attorney had previously represented DER, and DER has not filed an objection here. As a practical matter, DER and Greene have had similar interests--upholding DER's initial grant and reinstatement of permits to Greene--in both of the proceedings before this Board. The fact that DER's former counsel is now representing Greene does not deprive Morehouse of her right to a fair hearing.

Since disqualification is not necessary to preserve a fair trial, the question raised in the motion to disqualify is within the jurisdiction of the

Disciplinary Board, not the Environmental Hearing Board.

ORDER

AND NOW, this 26th day of July, 1988, it is ordered that the Motion to Disqualify Counsel filed by Helen Morehouse is denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Hearing Examiner

DATED: July 26, 1988

cc: **For the Commonwealth, DER:**
Kenneth Bowman, Esq.
Western Region
For Appellant:
George Schroeck, Esq.
Erie, PA
For Permittee:
Paul Burroughs, Esq.
Erie, PA

nb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

HELEN MOREHOUSE	:	
	:	
v.	:	EHB Docket No. 86-339-F
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 26, 1988
and GREENE INDUSTRIAL LANDFILL, Permittee	:	

OPINION AND ORDER SUR
MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE
FOR A CONTINUANCE

Synopsis

A motion to dismiss an appeal from the grant of a solid waste disposal permit or, in the alternative, for a continuance of the hearing, is denied as premature because the Department of Environmental Resources (DER) has not yet ruled that the disposal facility in question is exempt from permitting requirements.

Discussion

The background of this proceeding is set out in an "Opinion and Order Sur Motion to Disqualify Counsel" issued on this same date and will not be repeated here.

On May 2, 1988, the Permittee, Greene Industrial Landfill (Greene) filed the instant motion to dismiss appeal or, in the alternative, for a continuance. In its motion, Greene alleges that the materials disposed of in its landfill are exempt from permit requirements because they are being used as "clean fill" under a provision of DER's new regulations governing solid

waste, 25 Pa. Code §271.101(b)(6). Under these regulations, a permit is not required for disposal of clean fill provided it is separate from other wastes. Greene alleges that DER has contacted it to determine whether Greene intends to limit its activities to those materials which are exempt under the regulations, or, if not, to advise Greene to upgrade its permit to meet the new requirements for demolition waste landfills. Greene further alleges that it has responded to DER that it will dispose of only those materials which are exempt from permitting requirements. Based upon these allegations--which are supported by an affidavit--Greene contends that Morehouse's appeal should be dismissed as moot, or in the alternative that hearings should be continued pending the Board's disposition of the motion.

Morehouse filed an answer to the motion on May 12, 1988. Morehouse admits that Greene has correctly stated the regulations applicable to permit requirements, but denies that the regulations apply to the instant case. Morehouse also states that Greene is required to have a permit under section 201(a) of the Solid Waste Management Act of 1980, the Act of July 7, 1980, P. L. 380, No. 97, as amended, 35 P.S. §6018.201(a).

To rule on this motion, the Board need not determine whether Greene's landfill will be exempt from permitting requirements. Greene's request to dismiss this appeal is premature. The initial decision as to whether Greene's landfill is exempt is up to DER, and Greene admits that DER has not yet ruled on that question. At the present time, Greene still has a permit authorizing its disposal activities. If the Board were to dismiss the appeal we would be prejudging DER's determination as to whether Greene's operation is exempt. Therefore, we will deny the Motion to Dismiss without prejudice to refiling it if DER rules that Greene's operation is exempt.

Since we are denying the motion to dismiss, it is not necessary for the Board to rule on whether a continuance should be granted pending our consideration of the motion.

ORDER

AND NOW, this 26th day of July, 1988, it is ordered that Greene's "motion to dismiss appeal or in the alternative for a continuance" is denied without prejudice.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Hearing Examiner

DATED: July 26, 1988

cc: For the Commonwealth, DER:
Kenneth Bowman, Esq.
Western Region
For Appellant:
George Schroeck, Esq.
Erie, PA
For Permittee:
Paul Burroughs, Esq.
Erie, PA
nb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

OLD HOME MANOR, INC.	:	
	:	
v.	:	EHB Docket No. 82-006-G
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 29, 1988

OPINION AND ORDER
SUR
PETITION FOR RECONSIDERATION

Synopsis

The Board reconsiders its earlier holding that the Department of Environmental Resources' (Department) issuance of a cessation order where mining had long ago ceased was an abuse of discretion and a mere gratuitous act. The Board notes that 25 Pa.Code §86.212(a)(3) imposes a duty on the Department to insure the cessation of mining operations where, such as in this appeal, the operator has failed to abate violations by a required deadline. This may be accomplished through the issuance of a cessation order, suspension or revocation of permits, or suspension or revocation of operators' licenses. The fact that an operator has voluntarily terminated mineral extraction on a site is irrelevant to the Department's execution of this duty; however, the termination of mineral extraction should be assessed by the Department in choosing the means to accomplish cessation. The underlying violations giving

rise to the cessation order, and not the cessation order, form the basis for a civil penalty assessment. The Board modifies its earlier adjudication consistent with its opinion.

OPINION

On December 24, 1986, the Board issued an adjudication in this matter which sustained in part and dismissed in part Old Home Manor, Inc.'s (OHM) appeals of a number of orders issued to it by the Department pursuant to the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (the Clean Streams Law), and the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. (SMCRA). Old Home Manor, Inc. v. DER, 1986 EHB 1248. On January 13, 1987, the Department petitioned the Board for reconsideration of that portion of the adjudication which held that the Department's 1982 issuance of a cessation order (Order II) to OHM for Mining Permit 615-17 and its various amendments was an abuse of discretion because coal removal from the site had ceased in November, 1979. A response to the Department's petition was filed by OHM on January 21, 1987, and, the Board, by order dated January 21, 1987, granted the Department's petition. The Department and OHM thereafter filed briefs in support of their respective positions.

In our adjudication we held that Order II was issued pursuant to the Department's discretionary authority under SMCRA and that its issuance was an abuse of discretion because mineral extraction had long ceased. We also characterized the issuance of Order II as gratuitous and expressed our concern that Order II would subject OHM to mandatory civil penalties under circumstances where the General Assembly could not have envisioned the imposition of penalties.

The Department contends that our decision was erroneous because 25 Pa.Code §86.212 mandates the issuance of a cessation order if, as we found in this case, there are violations which have not been corrected during the specified abatement period. Because the issuance of the cessation order was mandatory, the Department argues that our only responsibility was to uphold the order, as the failure by OHM to abate the violations was firmly established in the record. The Department questions our characterization of Order II as gratuitous, claiming that the cessation order serves as a penalty and prevents continued or renewed mining on a site where there are uncorrected violations. The Department urges us that our view of the penalty implications of the cessation order is erroneous, as the underlying violations which give rise to the cessation order, and not the cessation order, are the basis for imposition of penalties. Finally, the Department believes that our interpretation of 25 Pa.Code §86.212 will jeopardize its grant of primacy for surface mining regulation from the Department of the Interior.

On the other hand, OHM argues that the Department has failed to set forth any compelling or persuasive reasons for reconsideration of our earlier decision. It believes that the Department has exaggerated our decision as invalidating 25 Pa.Code §86.212 and jeopardizing primacy, since our interpretation is limited to the facts presented in this case. OHM also disputes the Department's view of 25 Pa.Code §86.212 as mandating the issuance of an order ceasing the entire operation.

For the reasons which follow, we will modify our earlier adjudication relative to this aspect of Order II. We believe that we neglected to give proper consideration to the primacy-related aspects of the Department's issuance of the cessation portion of Order II.

The enforcement requirements of the Surface Mining Control and Reclamation Act, 30 U.S.C.A. §1201 et seq. (federal SMCRA), and the rules and regulations adopted thereunder greatly influence our interpretation of the Department's primacy program. Section 521(d) of federal SMCRA provides that:

> **(d) Sanctions; effect on additional enforcement rights under State law**
>
> As a condition of approval of any State program submitted pursuant to section 1253 of this title, the enforcement provisions thereof shall, at a minimum, incorporate sanctions no less stringent than those set forth in this section, and shall contain the same or similar procedural requirement relating thereto. Nothing herein shall be construed so as to eliminate any additional enforcement rights or procedures which are available under State law to a State regulatory authority but which are not specifically enumerated herein.
>
> (emphasis added)

Section 521(a)(3) of federal SMCRA[1], in turn, states that:

> (3) When, on the basis of a Federal inspection which is carried out during the enforcement of a Federal program or a Federal lands program, Federal inspection pursuant to section 1252, or section 1254(b) of this title, or during Federal enforcement of a State program in accordance with subsection (b) of this section, the Secretary or his authorized representative determines that any permittee is in violation of any requirement of this chapter or any permit condition required by this chapter; but such violation does not create an imminent danger to the health or safety of the public, or cannot be reasonably expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or authorized representative shall issue a notice to the permittee or his agent fixing a reasonable time but not more than ninety days for the abatement of the violation and providing opportunity for public hearing.
>
> If, upon expiration of the period of time as

[1] The federal regulations pertaining to enforcement codified at 30 CFR §843.11(b)(1) contain language similar to §521(a)(3) of federal SMCRA.

originally fixed or subsequently extended, for good cause shown and upon the written finding of the Secretary or his authorized representative, the Secretary or his authorized representative finds that the violation has not been abated, he shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the violation. Such cessation order shall remain in effect until the Secretary or his authorized representative determines that the violation has been abated, or until modified, vacated, or terminated by the Secretary or his authorized representative pursuant to paragraph (5) of this subsection. In the order of cessation issued by the Secretary under this subsection, the Secretary shall determine the steps necessary to abate the violation in the most expeditious manner possible and shall include the necessary measures in the order.

(emphasis added)

The Department's mining program must be no less stringent than the enforcement provisions if the Department is to have primary responsibility under federal SMCRA for regulating surface coal mining in the Commonwealth.

The state regulation promulgated at 25 Pa.Code §86.212 does mirror §521(a)(3) of federal SMCRA and its implementing regulations:

§86.212. Federal minimum enforcement action.

(a) As required by section 521 of the Federal Surface Mining Control and Reclamation Act (P.L. 95-87), 30 C.F.R. §§840.13 and 843.11, the Department will issue a cessation order, or take other appropriate enforcement action to accomplish cessation, if the Department determines that a condition, practice, or violation exists which:

(1) Creates an imminent danger to the health of the public;

(2) Is causing, or in the opinion of the Department can reasonably be expected to cause, significant, imminent harm to land, air, or water resources; or

(3) Will not be abated within an abatement period specified in a Department order.

(b) The requirements that the Department issue

> cessation orders in those circumstances specified in subsection (a)(1), (2), and (3) shall not be construed to limit the Department's discretionary authority to issue cessation orders, or to modify Pennsylvania's criteria for the issuance of cessation orders in other cases. The requirement placed on the Department to issue cessation orders under this section shall not be deemed to limit the availability of other remedies at law or in equity. When cessation of the operator does not in itself abate the violation, the cessation order shall impose affirmative obligations to abate the violation condition or practice.
>
> (emphasis added)

Reading 25 Pa.Code §86.212 in concert with the federal statute and regulations, we find that the Department has a mandatory duty to insure that mining operations cease where an operator has been issued a compliance order with specified dates for abatement of violations and the operator has failed to correct the violation by the abatement date. However, we also find that the Department, in accomplishing cessation of mining operations, can employ other enforcement mechanisms and that the selection of the mechanism requires an exercise of discretion by the Department. In this case, we believe that the Department's choice of a cessation order where mining had long ceased was an abuse of discretion, as it was, in reality, a meaningless act.

We see little merit in the Department's alarmist claim that its primacy program is in jeopardy unless we reverse our earlier holding concerning the cessation order for MP 615-17. The language of 25 Pa.Code §86.212 was specifically approved as part of Pennsylvania's primacy program by the federal Office of Surface Mining. And the language of federal SMCRA, with its "no less stringent" requirement, recognizes that other means may exist under state law to accomplish the objectives of the federal surface mining regulation program. Under Pennsylvania law, there is no mystery regarding the other means of accomplishing cessation. The Department has the authority to

suspend or revoke permits and licenses; the suspension or revocation of a permit, in particular, is a powerful enforcement tool and is expressly authorized by 52 P.S. §1396.4c where there is non-compliance with rules and regulations adopted under the statute. Obviously, without permits, there can be no mining operations.

In its request for reconsideration the Department emphasizes that there must be a means to prevent OHM from resuming mining operations and that a cessation order is the only means to deter mining activity. We are at a loss to understand why OHM had to be ordered to cease an activity in which it was not engaged when the Department could have easily suspended or revoked OHM's mining permits and prevented any renewed mining by OHM. As matters turned out, OHM's repermitting application was denied in April, 1985 and no further mining by OHM on the area covered by the cessation order was possible (See Finding of Fact No. 159).

And, finally, our holding concerning the civil penalty consequences of Order II was without consideration of the regulations relating to the Department's SMCRA enforcement program. The relevant regulation, 25 Pa.Code §86.193, provides that: "The Department will assess a civil penalty for <u>each violation which is included as a basis for a cessation order</u>. The underlying violations leading to the cessation order, and not the cessation order itself, are the basis of the assessment, and the imposition of the civil penalty is independently mandated under §18.4 of SMCRA and §605 of the Clean Streams Law.

O R D E R

AND NOW, this 29th day of July , 1988, it is ordered that the Board's December 24, 1986 adjudication in this matter is modified consistent with this opinion and OHM's appeal of that portion of Order II requiring cessation of mining activity on MP 615-17 and its various amendments is sustained.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: July 29, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Diana J. Stares, Esq.
Western Region
For Appellant:
Gregg M. Rosen, Esq.
ROSEN & MAHFOOD
Pittsburgh, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

LOWELL AND BARBARA GARDENHOUR	:	
v.	:	EHB Docket No. 87-371-W
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 29, 1988
and	:	
RICHARD G. GREEN, Permittee	:	

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

Permittee's motion to dismiss for lack of prosecution is granted where appellants have failed to file their pre-hearing memorandum despite two default notices from the Board and failed to respond to the motion to dismiss.

OPINION

This matter was initiated with the September 3, 1987 filing of a notice of appeal by Lowell and Barbara Gardenhour (Gardenhours). The Gardenhours were seeking review of a National Pollution Discharge Elimination System permit issued to Richard G. Green by the Department of Environmental Resources (Department). The Board thereupon issued its standard pre-hearing order which, in this case, required the Gardenhours to file their pre-hearing memorandum on or before December 15, 1987.

When the Gardenhours failed to file their pre-hearing memorandum, the Board, by letter dated May 3, 1988, notified the Gardenhours of their default

and advised them that unless their memorandum were filed on or before May 13, 1988, the Board could apply sanctions. The Gardenhours again failed to file their pre-hearing memorandum by the required date, and the Board, in a letter dated May 23, 1988, advised them that sanctions would be applied unless their pre-hearing memorandum were filed on or before June 3, 1988.

In the meantime, on May 23, 1988, Richard Green filed a motion to dismiss the Gardenhour's appeal for lack of prosecution. The Board informed the Gardenhours by letter dated May 31, 1988, that any objection to Green's motion must be filed on or before June 13, 1988.

The Gardenhours, despite two notices from the Board, have failed to either file their pre-hearing memorandum or request an extension of time to file it. The Gardenhours have also failed to respond to Green's motion. Because the Gardenhours bear the burden of proof in this appeal under 25 Pa.Code §21.101(c)(3) and the Gardenhours have failed to take any action to prosecute their appeal, the sanction of dismissal is appropriate here. John J. Karlavage, M.D. v. DER and Reading Anthracite Company, EHB Docket No. 87-215-W (Opinion and order issued February 15, 1988).

O R D E R

AND NOW, this 29th day of July, 1988, it is ordered that Richard G. Green's motion is granted and the appeal of Lowell and Barbara Gardenhour is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: July 29, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
John R. Embick, Esq.
Eastern Region
For Appellant:
Lowell and Barbara Gardenhour
Malvern, PA
For Permittee:
John C. Snyder, Esq.
LENTZ, CANTOR, KILGORE & MASSEY
Paoli, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

THE TUNKHANNOCK BOROUGH MUNICIPAL AUTHORITY	:	
v.	:	EHB Docket No. 88-083-W
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 29, 1988

OPINION AND ORDER
SUR
MOTION FOR JUDGMENT ON THE PLEADINGS

Synopsis

Where the deadline for the filing of an application for an Act 339 subsidy falls on a Sunday, the deadline is extended to the next business day. The Department of Environmental Resources' refusal to process an Act 339 subsidy application postmarked February 1, 1988 is an abuse of discretion where the January 31, 1988 filing deadline fell on a Sunday.

OPINION

This matter was initiated by the Tunkhannock Borough Municipal Authority (Authority) with the March 14, 1988 filing of a notice of appeal seeking review of the Department of Environmental Resources' (Department) February 17, 1988 letter denying the Authority's 1987 application for a sewage treatment plant operating subsidy under the Act of August 20, 1953, P.L. 1217, as amended, 35 P.S. §701 et seq., commonly referred to as Act 339. The

Authority's application was denied as untimely in accordance with 25 Pa.Code §103.23, since it bore a postmark of February 1, 1988 and was not received by the Department until February 2, 1988.

After an examination of the notice of appeal and its supporting documentation, the Board determined that the Authority's appeal could be disposed of without hearing, as the only issue was a legal issue. The Board then conducted a telephonic conference with the parties on April 21, 1988 and directed them to file cross motions for judgment on the pleadings on or before May 20, 1988. The Authority filed its motion on May 19, 1988, arguing that, by virtue of §1908 of the Statutory Construction Act, 1 Pa.C.S.A. §1908, its application for an Act 339 subsidy was timely, since the January 31, 1988 deadline specified in the statute and 25 Pa.Code §105.23 fell on a Sunday and the application was postmarked on the next business day, Monday, February 1, 1988.

The Department, in a letter dated May 19, 1988, informed the Board that:

> In its review of statutory construction of similar deadlines throughout state law, the Department has decided that when a deadline falls on a Sunday, as in the instant case, the Department will allow a day for the workings of the Postal System.
>
> The Department will not pursue the instant litigation and considers this decision a policy one, not a matter of law, which renders the dispute moot.

After a review of the Department letter, the Board requested the Department to clarify its position as it related to disposition of the Authority's appeal. Although the Board requested the Department to provide such clarification on or before June 1, 1988, the Department has failed to do so as of the date of this opinion and order. We do not agree with the Department's

characterization of the Authority's appeal and will sustain the Authority's appeal for the reasons which follow.

Section 3 of Act 339 provides that

> The amounts to be expended for any of the foregoing purposes shall be recommended by the Secretary of Health and approved by the Governor, in accordance with rules and regulations which the Department of Health is hereby authorized to promulgate, and shall be based upon reports filed with the Secretary of Health prior to the thirty-first day of January, one thousand nine hundred fifty-four, and annually thereafter, by the municipalities, municipality authorities or school districts entitled to receive such payments, setting forth the amounts expended for the acquisition and construction of sewage treatment plants from the effective date of the act, approved the twenty-second day of June, one thousand nine hundred thirty-seven (Pamphlet Laws 1987), up to and including the thirty-first day of December of the preceding year.

The rules and regulations implementing Act 339 state at 25 Pa.Code §103.23(a) that:

> The required application and supporting documentation shall be filed with the Department prior to January 31, 1954 and prior to February 1 annually thereafter. No application received by the Department <u>or postmarked later than January 31 will be accepted for processing by the Department</u>.
>
> (emphasis added)

The Board has previously interpreted §3 of Act 339 and 25 Pa.Code §103.23(a) in <u>Sanitary Authority of the City of Duquesne v. DER</u>, 1984 EHB 635, but has never addressed the issue of whether the filing deadline is extended where the last day falls on a Sunday. However, as the Authority correctly points out, the issue is easily disposed of by applying §1908 of the Statutory Construction Act, 1 Pa.C.S.A. §1908.

Section 1908 of the Statutory Construction Act provides that:

> When any period of time is referred to in any statute, such period in all cases, except as otherwise provided in section 1909 (relating to publication for successive weeks) and section 1910 of this title (relating to computation of months) shall be so computed as to exclude the first and include the last day of such period. Whenever the last day of any such period shall fall on Saturday or Sunday, or on any day made a legal holiday by the laws of this Commonwealth or of the United States, such day shall be omitted from the computation.
>
> (emphasis added)

The Statutory Construction Act is made expressly applicable to regulations codified in the Pennsylvania Code. 1 Pa.C.S.A. §1502(a)(1)(ii). Consequently, when the January 31 deadline specified in 25 Pa.Code §103.23(a) falls on a Sunday, the filing period is extended to the next business day which was, in this case, Monday, February 1, 1988. Because the Authority's application was postmarked February 1, 1988, it was timely and the Department abused its discretion by refusing to process the Authority's application and returning it.

O R D E R

AND NOW, this 29th day of July, 1988, it is ordered that the Tunkhannock Borough Municipal Authority's motion for judgment on the pleadings is granted and the Authority's appeal is sustained. The Authority shall submit its 1987 Act 339 application to the Department of Environmental Resources on or before August 28, 1988, and the Department shall reach a determination regarding the Authority's application within 30 days of the Authority's resubmission of its application.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: July 29, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Norman G. Matlock, Esq.
Eastern Region
For Appellant:
James E. Davis, Esq.
FARR, DAVIS & FITZE
Tunkhannock, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

ROARING BROOK TOWNSHIP, ROARING BROOK TOWNSHIP SEWER AUTHORITY	:	
v.	:	EHB Docket No. 88-239-W
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 29, 1988

OPINION AND ORDER

Synopsis

Appeal is dismissed as untimely filed. The date of receipt by the Board, rather than the date of mailing, is determinative of whether an appeal has been timely filed. Neither settlement discussions with the Department of Environmental Resources nor the necessity for a public meeting prior to the filing of an appeal constitute grounds for allowance of an appeal nunc pro tunc where there is no evidence otherwise of fraud, misrepresentation, or unavoidable events which may have prohibited timely filing.

OPINION

This matter was initiated with the June 16, 1988 filing of a notice of appeal by Roaring Brook Township and the Roaring Brook Township Sewer Authority (collectively, Roaring Brook). Roaring Brook was seeking the Board's review of a May 12, 1988 order from the Department of Environmental Resources (Department) directing, inter alia, that Roaring Brook revise its official plan adopted under §5 of the Pennsylvania Sewage Facilities Act, the

Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.5, and construct sewage systems and treatment plant improvements. Because Roaring Brook indicated on its notice of appeal that the Department's order was received on May 14, 1988 and the Board had not received Roaring Brook's notice of appeal until June 16, 1988, the Board, on June 29, 1988, issued a rule upon Roaring Brook to show cause why its appeal should not be dismissed as untimely filed.

Roaring Brook duly filed its response to the rule on July 19, 1988, advancing three arguments why its appeal should not be dismissed as untimely filed. Roaring Brook first contends that because its appeal was mailed on June 13, 1988, it was, in fact, timely filed. It next alleges that any delay in the Board's receiving the appeal is minimal and that, under such circumstances, dismissal of its appeal would result in a denial of due process. And, finally, Roaring Brook urges us that extenuating circumstances are present which would justify a late filing. Those extenuating circumstances include its negotiations with the Department subsequent to the issuance of the order and prior to the filing of the appeal and the necessity for a public meeting before authorization could be received to file the appeal.

We must reject Roaring Brook's first two contentions. This Board has consistently held that for an appeal to be timely, it must be received by the Board within 30 days of the appellant's receipt of notice of the Department action and that failure to timely file an appeal within the 30 day period deprives the Board of jurisdiction. 25 Pa.Code §21.52(a) and G. Scheib Coal Company v. DER, 1987 EHB 899. The Commonwealth Court has sustained the Board's interpretation of 25 Pa.Code §21.52(a) in Rostosky v. Commonwealth, Dept. of Env. Resources, 26 Pa.Cmwlth. 478, 364 A.2d 761 (1976), wherein the Board's dismissal of an appeal filed one day late was upheld.

We will treat Roaring Brook's allegation regarding extenuating circumstances as a request for an allowance of an appeal nunc pro tunc. The Board does have authority to grant leave to file an appeal nunc pro tunc where a party satisfies the common law standards applicable to analogous cases in the Courts of Common Pleas. 25 Pa.Code §21.53(a). The Commonwealth Court has recently analyzed this rule in C&K Coal v. Dept. of Environmental Resources, ___ Pa.Cmwlth. ___, 535 A.2d 745 (1988), wherein the Board's dismissal of a petition for allowance of an appeal nunc pro tunc was upheld where the petitioner failed to allege any fraud, unavoidable events which precluded timely filing, or the receipt of inaccurate or misleading information regarding the perfection of its appeal. The petitioner in the C&K case had, much like Roaring Brook, alleged that it was attempting to resolve the matter with the Department. Roaring Brook has made no allegations regarding representations that its attempts to settle the matter with the Department tolled the appeal period, so we cannot accept this argument as the basis for allowing an appeal nunc pro tunc. As to Roaring Brook's allegation that a public meeting was necessary before it could file an appeal, we do not dispute that contention, given the language of §8 of the Sunshine Act, the Act of July 3, 1986, P.L. 388, 65 P.S. §278. But, Roaring Brook has failed to substantiate how the necessity for a public meeting prohibited it from filing a timely appeal, so we must also reject this argument.

O R D E R

AND NOW, this 29th day of July, 1988, it is ordered that the Board's rule of June 29, 1988 is made absolute and the appeal of Roaring Brook Township and the Roaring Brook Township Sewer Authority is dismissed as untimely filed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: July 29, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Donald A. Brown, Esq.
Central Region
For Appellant:
Arthur J. Rinaldi, Esq.
RINALDI & RINALDI
Scranton, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

SALFORD TOWNSHIP BOARD OF SUPERVISORS, et al. v. COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and MIGNATTI CONSTRUCTION CO., INC., Permittee	:	EHB Docket No. 86-660-W Issued: August 1, 1988

OPINION AND ORDER
SUR
MOTION FOR RECONSIDERATION

Synopsis

A motion for reconsideration is denied where the reasons put forth for such reconsideration are neither compelling and persuasive nor within the grounds stated in 25 Pa.Code §21.122. The Board will not grant a motion for reconsideration of an interlocutory order unless there are exceptional circumstances.

OPINION

The procedural history of this matter is recounted in detail in the Board's June 3, 1988 opinion and order denying West Rockhill and Salford Townships' (Townships) motion for summary judgment, so we will not repeat it here. In denying the Townships' motion, the Board found that numerous legal and factual issues remained in dispute. On June 23, 1988, the Townships, pursuant to 25 Pa.Code §21.122, filed a request for reconsideration of the Board's order.

The thrust of the Townships' argument in support of reconsideration is nothing more than a re-articulation of the arguments made in support of their summary judgment motion. In addition, the Townships argue that reconsideration is appropriate, apparently under 25 Pa.Code §21.122(1), in light of the fact that neither party addressed the differences in language between §11(c)(2) of the Noncoal Surface Mining Conservation and Reclamation Act, the Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. §3311(c)(2), and §315(o) of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.315(o), as they relate to the buffer zones, an issue addressed by the Board in its opinion denying summary judgment. The Department joins in the Townships' motion insofar as it relates to the wetlands issues, and Mignatti Construction Company (Mignatti) opposes the motion.

The Board's rules state at 25 Pa.Code §21.122 that the Board may review and reconsider its decisions only for compelling and persuasive reasons. Section 21.122 also generally limits this authority to instances where:

> (1) The decision rests on a legal ground not considered by any party to the proceeding and that the parties in good faith should have had an opportunity to brief such question.
>
> (2) The crucial facts set forth in the application are not as stated in the decision and are such as would justify a reversal of the decision. In such a case reconsideration would only be granted if the evidence sought to be offered by the party requesting the reconsideration could not with due diligence have offered the evidence at the time of the hearing.

The Townships here seek reconsideration of an interlocutory order denying summary judgment. The Board has consistently held that it will not reconsider

interlocutory orders unless there are exceptional circumstances. Chemical Waste Management, Inc. et al. v. DER, 1982 EHB 482, and Brdaric Excavating, Inc. v. DER, 1986 EHB 768. We will deny the Townships' motion for the reasons set forth below.

The arguments in the motion for reconsideration and the responses illustrate the very reasons why summary judgment was denied. There are disputes as to the proper interpretation of distance limitations on the site maps submitted with the application, the efficacy of a waiver granted for one residence on the site, the existence of wetlands on the site, and the validity of affidavits offered, all of which are material facts. There is hardly a fact here which is not in dispute, and, as such, it would have been clear error for the Board to determine that summary judgment is warranted under these conditions, especially since we must view the summary judgment motion in the light most favorable to Mignatti, the non-moving party.

Regarding the buffer zone issue, while both parties made references to these statutory provisions in their original briefs, neither offered a comprehensive explanation of the differences in language used in the two provisions in order to clarify their meaning. The Board's reference to this unexplained disparity was offered, as Mignatti points out, as yet another reason not to hastily dispose of this case on summary judgment.

And finally, the Townships have not established that exceptional circumstances exist which would warrant reconsideration of an interlocutory order.

O R D E R

AND NOW, this 1st day of August, 1988, it is ordered that:

1) Salford and West Rockhill Townships' motion for reconsideration is denied and the Board's June 3, 1988 opinion and order in this matter is affirmed;

2) All discovery in this matter shall be completed on or before September 30, 1988; and

3) Appellants' pre-hearing memoranda shall be filed on or before October 17, 1988.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: August 1, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Kenneth A. Gelburd, Esq.
Eastern Region
For Salford and Rockhill Townships:
Joseph M. Manko, Esq.
Michael M. Meloy, Esq.
Timothy F. Malloy, Esq.
WOLF, BLOCK, SCHORR & SOLIS-COHEN
Philadelphia, PA
For Margaret A. Fitzgerald and David C. Rilling:
Stephen A. Shelly, Esq.
HUNN, SHELLY & SAMEL
Lansdale, PA
For Dr. Donald W. Raub.
Carl N. Weiner, Esq.
HAMBURG, RUBIN, MULLIN & MAXWELL
Lansdale, PA
For Mignatti Construction Co.:
Paul C. Callahan, Esq.
FOX, DIFFER, CALLAHAN, ULRICH & O'HARA
Norristown, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

FELTON ENTERPRISES, INC.	:
	:
v.	: **EHB Docket No. 86-192-R**
	: (Consolidated appeal)
COMMONWEALTH OF PENNSYLVANIA,	:
DEPARTMENT OF ENVIRONMENTAL RESOURCES	: Issued: August 2, 1988

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

A motion for summary judgment is granted where there are no material facts in dispute as a result of the non-moving party's failure to respond to requests for admissions and the moving party is entitled to judgment as a matter of law. DER's issuance of compliance orders which cited Appellant for failing to comply with a prior, final compliance order was not an abuse of discretion where Appellant admits that it did not comply with the prior order.

O P I N I O N

These consolidated appeals were filed by Felton Enterprises, Inc. (Felton) from the Department of Environmental Resources' (DER) issuance of two compliance orders (CO) pertaining to Felton's mining operation known as Felton No. 2 Strip located in Derry Township, Westmoreland County. The compliance orders were issued by DER pursuant to the Surface Mining Conservation and

Reclamation Act (SMCRA), the Act of May 31, 1945, P. L. 1198, as amended, 52 P.S. §1396.1, et seq. and the Clean Streams Law (CSL), the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq.

In the appeal at EHB Docket No. 86-192-R, Felton is challenging DER's March 3, 1986 issuance of CO 86G138, which cited Felton for failing to comply with Paragraphs 1 and 2 of an earlier compliance order, CO 86G070, issued by DER on January 31, 1986. In Paragraph 1 of CO 86G070, DER alleged that Felton failed to monitor ground and surface water in the vicinity of its mine site in the manner specified in its surface mining permit. Felton was ordered to perform the required monitoring and to submit surface water monitoring reports for the last two quarters of 1985 and the first quarter of 1986 by February 28, 1986. In Paragraph 2, Felton was cited for allowing water to accumulate in the pit, thereby creating an unsafe condition and a potential for pollution. Felton was ordered to pump the water accumulation to approved treatment ponds for treatment so as to conform with applicable effluent limitations. Compliance was required by February 28, 1986.

Felton's appeal at EHB Docket No. 86-255-R seeks review of DER's April 7, 1986 issuance of CO 86G194 which cited Felton for failure to comply with Paragraph 3 of CO 86G070, which required that Felton backfill concurrent with mining by March 30, 1986. The Board consolidated Felton's two appeals at Docket No. 86-192-R on May 29, 1986.

On July 21, 1986, DER filed a motion to limit issues, alleging that because Felton's appeal of CO 86G070 at EHB Docket No. 86-149-G was dismissed by the Board as untimely filed on April 21, 1986, the violations in CO 86G070 were deemed established. The Board, in a September 15, 1986 opinion and order, granted DER's motion, stating that, as a result of Felton's failure to timely appeal CO 86G070, the violations of Paragraphs 1, 2

and 3 of CO 86G070 were deemed established and that the remedial actions ordered by DER were deemed to have been within DER's discretion. The Board consequently limited this appeal to the subject of whether the issuance of CO 86G136 and CO 86G194 were abuses of DER's discretion.

On July 15, 1987, DER filed a motion for summary judgment. In support of its motion, DER alleged that, on February 5, 1987, it served interrogatories and requests for admissions on Felton and that Felton failed to file either answers or objections. DER asserts that Pa. R.C.P. 4014(b) provides that the subject matter for which an admission is requested is admitted if a verified answer or objection is not served upon the requesting party within 30 days of service. DER alleges that the requested admissions established that, as of February 28, 1986, Felton neither submitted the required monitoring reports nor pumped the pit water accumulations, as was required by Paragraphs 1 and 2 of CO 86G070. Further, the requested admissions would show that, as of March 31, 1986, Felton failed to backfill its site in compliance with Paragraph 3 of CO 86G070. Because the violations and remedial measures cited in CO 86G070 are final and unassailable as a result of Felton's failure to timely appeal the order and because Felton is deemed to have admitted that it has failed to comply with CO 86G070 as required by CO 86G136 and 86G194, DER argues that there are no material facts in dispute and it is entitled to judgment as a matter of law. Felton did not respond to DER's motion, even though it was notified of its pendency by the Board.

The Board has authority to grant summary judgment if the pleadings, depositions, answers to interrogatories, admissions and affidavits show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Bell v. DER, 1986 EHB 273.

In this instance, the materials facts involve Felton's compliance with CO 86G070. By virtue of Felton's failure to answer DER's requests for admissions, the subject matter for which admissions were requested is deemed admitted. Pa. R.C.P. 4014(b). Consequently, Felton has admitted that it failed to submit the surface water monitoring reports required on or before February 28, 1986 by Paragraph 1 of CO 86G070; that it failed to pump and treat accumulations of pit water by February 25, 1986, as required by Paragraph 2 of CO 86G070; and that, as of March 31, 1986, Felton had not backfilled and regraded Felton No. 2 Strip concurrent with mining as required by Paragraph 3 of CO 86G070. Therefore, as a result of these admissions, there are no material facts in dispute.

Felton's failure to comply with CO 86G070 is unlawful conduct under §18.6 of SMCRA and, therefore, the Department is authorized to issue compliance orders to remedy Felton's violations. DER is entitled to judgment as a matter of law and we will grant its motion.

O R D E R

AND NOW, this 2nd day of August, 1988, it is ordered that the Department of Environmental Resources' motion for summary judgment is granted, and the consolidated appeals of Felton Enterprises, Inc. at EHB Docket No. 86-192-R are dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: August 2, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Joseph Reinhart, Esq./Western Region
For Appellant:
Clifford Felton, President
Felton Enterprises
Loyalhanna, Pa.

Allan E. MacLeod, Esq.
Coraopolis, Pa.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

DELTA CHEMICALS, INC.	:	
	:	
v.	:	**EHB Docket No. 86-677-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: August 2, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

An appeal is dismissed for failure to prosecute.

O P I N I O N

On December 18, 1986, Delta Chemicals, Inc. (Delta) filed this appeal from a November 17, 1986 Department of Environmental Resources (DER) order rescinding Delta's authority to accept, store, treat or dispose of hazardous waste at its North Buffalo Township, Armstrong County facility. In addition, Delta was ordered to initiate groundwater assessment and abatement action, collect and treat groundwater, develop and submit a closure plan, and remove hazardous and residual waste to an approved facility. DER issued the order pursuant to, inter alia, the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq.

On May 16, 1988, DER filed a motion to dismiss this appeal,

asserting that Delta has shown no intention of prosecuting this matter. DER points to Delta's repeated requests for extensions of time to file its pre-hearing memorandum, as well as its failure to respond to DER discovery requests. Although it was advised of the filing of DER's motion, Delta has not filed an answer.

The relevant facts and chronology of this appeal are as follows. Delta was required by Board order to file its pre-hearing memorandum on or before March 23, 1987. On March 30, 1987, Delta's counsel requested an extension of time, which was consented to by DER and granted by the Board. In the meantime, on May 18, 1987, Delta's counsel withdrew. After the Board sent two default notices to Delta regarding its failure to file its pre-hearing memorandum on or before June 30, 1987, Delta, through its Chief Operating Officer, George Chada, requested another extension so that it could retain new counsel and bring the site into compliance. The Board granted Delta's request and ordered that Delta file its pre-hearing memorandum on or before September 28, 1987. On September 2, 1987, Delta advised the Board that it would be proceeding pro se and requested additional time to file its pre-hearing memorandum. The Board again granted Delta's request and required that Delta's pre-hearing memorandum be filed on or before October 30, 1987.

On November 2, 1987, Chada informed the Board he was trying to sell Delta, that he was unable to continue pro se and that he needed additional time in which to prepare his pre-hearing memorandum. The Board granted Delta's request and ordered that it file its pre-hearing memorandum on or before December 31, 1987. On January 11, 1988, Delta requested yet another extension. On January 20, 1988, after a telephone conference with parties, the Board ordered Delta, on or before April 29, 1988, to either file its

pre-hearing memorandum, inform the Board that counsel had been retained and propose a new, expedited pre-hearing schedule, or withdraw its appeal.

On April 29, 1988, Chada advised the Board that he was retaining new counsel and that, if counsel had no conflicts arising out of its representation of other clients, Delta's pre-hearing memorandum would be filed by May 19, 1988. Counsel subsequently informed the Board that he did not take the case. As of the date of this opinion and order, the Board has received no further communication from Delta.

The Board is generally reluctant to dismiss appeals where DER bears the initial burden of proof. Furthermore, the Board is generally more lenient toward pro se litigants. But, when attempts to spur an unresponsive appellant to prosecute its appeal fail, dismissal is appropiate, even if DER bears the initial burden of proof. Albert J. Harlow Jr. v. DER, 1987 EHB 258. In light of the history of this appeal, it is evident that Delta will not prosecute its appeal and, therefore, we will grant DER's motion.

O R D E R

AND NOW, this 2nd day of August, 1988, it is ordered that the Department of Environmental Resources' motion to dismiss is granted and the appeal of Delta Chemicals, Inc. is dismissed for failure to prosecute.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: August 2, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
George Jugovic, Jr., Esquire
Western Region
Appellant:
George Chada. C.O.O.
Delta Chemicals, Inc.
Natrona Heights, PA

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

CENTRE LIME & STONE COMPANY, INC.	:	
	:	
v.	:	EHB Docket No. 88-095-F
	:	
COMMONWEALTH OF PENNSYLVANIA	:	Issued: August 3, 1988
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and BELLEFONTE LIME COMPANY, INC., Permittee		

OPINION AND ORDER

The above-captioned appeal was filed by Centre Lime & Stone Company, Inc. (Centre) on March 17, 1988. The appeal contested an Authorization to Mine Permit issued on February 17, 1988, by the Department of Environmental Resources (DER) to Bellefonte Lime Company, Inc. (Bellefonte). The gravamen of the appeal was that DER erred in not including special conditions and safeguards with regard to mine drainage in the February 17, 1988 permit. These conditions allegedly were included in a previous permit issued to Bellefonte on April 29, 1986.

On June 9, 1988, Bellefonte filed a Motion to Dismiss the above-captioned appeal. In support of its Motion, Bellefonte states that DER issued a new Authorization to Mine Permit to Bellefonte on June 8, 1988 which has the effect of retracting the February 17, 1988 Permit being contested in this appeal.[1] Bellefonte further states that counsel for DER and for Centre do

[1] We note that Centre has filed an appeal from the issuance of the new permit. (EHB Docket No. 88-271-F)

not oppose the Motion to Dismiss.

Since DER has retracted the permit which was the basis for the appeal in this case, it is appropriate to dismiss the appeal.

ORDER

AND NOW, this 3rd day of August, 1988, it is ordered that the appeal of Centre Lime & Stone Company, Inc. docketed at 88-095-F is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: August 3, 1988

cc: **For the Commonwealth, DER:**
Michael Heilman, Esq.
Central Region
For Appellant:
Terry J. Williams, Esq.
State College, PA
co/counsel:
John Carroll, Esq.
Donna Fisher, Esq. Harrisburg, PA
For Permittee:
Bruce Katcher, Esq.
Philadelphia, PA

nb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101
717-787-3483
TELECOPIER: 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

KEYSTONE SANITATION CO., INC.	:	
	:	
v.	:	**EHB Docket No. 84-349-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
	:	
and	:	
	:	**Issued:** August 5, 1988
UNION TOWNSHIP, Intervenor	:	

OPINION AND ORDER SUR
MOTION TO DISMISS

Synopsis

A motion to dismiss as moot is granted where the appellant withdrew its request for approval to dispose of additional waste streams at its disposal facility.

OPINION

Keystone Sanitation Company (Keystone) initiated this matter with the October 9, 1984 filing of a notice of appeal seeking review of a September 7, 1984 letter from the Department of Environmental Resources (Department) denying Keystone approval of its Module 1 requests to dispose of asbestos waste and Spectra-Kote sludge at Keystone's landfill in Union Township, Adams County, because of alleged groundwater contamination problems at the site. The Department also advised Keystone that it would not consider any new Module 1 requests from Keystone until the groundwater contamination problems were

resolved.[1]

On September 29, 1986, Union Township (Union), the host municipality for Keystone's landfill, filed a petition to intervene in this appeal. A second petition to intervene was filed by Citizens Urging Rescue of the Environment (CURE) on December 17, 1986. On January 26, 1987, the Board, over Keystone's objections, granted Union Township's petition to intervene, but limited it to the issue of off-site groundwater contamination. CURE's petition to intervene was denied because it would result in confusion and a multiplicity of arguments. Keystone Sanitation Co., Inc. v. DER, 1987 EHB 22.

In the meantime, the Department and Keystone had been attempting to negotiate a settlement of this matter. The Department, on February 3, 1987, filed a consent adjudication with the Board for its review and approval pursuant to 25 Pa.Code §21.120; Union was not a party to the proposed consent adjudication. In light of its recent grant of intervention to Union, the Board held a February 17, 1987 conference call with the parties to discuss whether Union's participation in the proposed consent adjudication was a necessary prerequisite for the Board's approval of the agreement. The Department, Keystone, and Union were directed to submit their positions on the issue.

Keystone, in a March 5, 1987 letter to the Board, contended, citing Bethlehem Mines Corporation v. DER and the United Mine Workers of America, 1983 EHB 383, that Union's participation in the consent adjudication was not necessary and that its proper remedy was an appeal of the Board's approval of

---

[1] In the description of the Department's September 7, 1984 letter in our earlier ruling on Union Township's petition to intervene we stated "The Department also ordered that no Module 1 requests would be considered by DER until the on-site groundwater pollution was corrected." We believe, for reasons stated, infra, that our characterization of this portion of the Department's letter, even though dicta, was erroneous.

the consent adjudication under 25 Pa.Code §21.120. The Department, in a March 9, 1987 letter, concurred with Keystone's position.

On the other hand, Union argued, in a March 6, 1987 memorandum of law, that the Board's rules incorporated the Pennsylvania Rules of Civil Procedure, that Pa.R.C.P. 2330 conferred party status upon an intervenor, and, therefore, Union's participation in the proposed consent adjudication was required. Union also asserted that the Bethlehem Mines Corporation case cited by the Department and Keystone did not ultimately dispose of this issue. Along with its memorandum of law, Union filed a motion to dismiss Keystone's appeal as moot, since Keystone was no longer seeking approval to dispose of the asbestos waste and Spectra-Kote sludge.

Keystone, by response filed March 26, 1987, and the Department, by response dated March 30, 1987, opposed Union's motion, admitting that Keystone no longer sought the two approvals, but contending that the appeal was not moot, as the Department had also, in its September 7, 1984 letter to Keystone, stated its position that no further Module 1 requests from Keystone would be considered until the groundwater contamination problems at the site were addressed by Keystone, and that because Union was not a party to the appeal, it had no standing to file a motion to dismiss.

For the reasons which follow, we will will grant Union's motion to dismiss Keystone's appeal as moot. In light of this disposition, it is unnecessary for us to address the issue of whether Union's assent to the settlement is a pre-requisite to our approval of it under 25 Pa.Code §21.120.

Turning now to Union's motion to dismiss, we will first address the claim of Keystone and the Department that Union has no standing to file such a motion. Neither the Board's rules nor the General Rules of Administrative Practice and Procedure, 1 Pa.Code §31.1 et seq. (General Rules) contain any

language regarding the rights and responsibilities of an intervenor to a proceeding. While we do not agree with Union's assertion that the Pennsylvania Rules of Civil Procedure are generally applicable to proceedings before the Board, we will look to Pa.R.C.P. 2330(a) for guidance in reaching a determination on this issue. Rule 2330(a) provides that after the entry of an order allowing intervention, the intervenor has all the rights and liabilities of a party to the action. In light of this, we believe that Union may file a motion to dismiss.

The Board will dismiss an appeal as moot if, during the pendency of the appeal, an event occurs which deprives the Board of its ability to provide effective relief. Swatara Township et al. v. DER and the Harrisburg Sewerage Authority, EHB Docket No. 87-404-W (Opinion and order issued April 12, 1988). A matter will not be dismissed as moot if the issue presented is of great public importance and is of a recurring nature but capable of repeatedly avoiding review. Chester Upland School Dist. v. Chester Upland Education Ass'n., 64 Pa.Cmwlth. 523, 440 A.2d 1283 (1982). We believe that the issue of the Department's disapproval of Keystone's request to dispose of the asbestos waste and Spectra-Kote sludge is moot and that the underlying issues presented in it do not fall within the exceptions to the mootness doctrine.

The first three paragraphs of the Department's September 7, 1984 letter[2] stated that:

> This letter pertains to the requests submitted to this office to dispose of asbestos-containing waste and Spectra-Kote dewatered treatment sludge at Keystone Sanitation Landfill.
>
> Currently, Keystone Sanitation Landfill is

---

[2] The last paragraph contained the notice of appeal rights typically set forth in Department actions.

> contaminating groundwater and is, therefore, in violation of P.L. 1987, No. 394, known as "The Clean Streams Law." Therefore, based on the provisions of Section 503(c) of Act 97, "The Solid Waste Management Act of 1980", the requests to accept and dispose of asbestos-containing waste and/or Spectra-Kote dewatered treatment sludge at Keystone Sanitation Landfill are denied.
>
> The Department will consider no additional Module 1 requests for permit modification until the groundwater contamination problems at Keystone Sanitation Landfill are corrected.

Both Keystone and the Department believe the appeal is not moot because the Department has notified Keystone of its position regarding approval of any future Module 1 requests from Keystone.

Paragraph three of the Department's letter does not compel any action on the part of Keystone. It is merely a statement of the Department's interpretation of the permitting requirements of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. (Solid Waste Management Act). Keystone could well decide that it did not wish to seek any additional Module 1 approvals, in which case it would still not be under any obligation, pursuant to the Department's letter, to develop an abatement plan for the groundwater contamination at its site. The language of paragraph three of the Department's letter is very similar to the language held to be non-appealable in Chambers Development Company et al. v. DER, EHB Docket No. 87-228-W (Opinion and order issued March 15, 1988). Being no more than a statement of the Department's interpretation of the Solid Waste Management Act, we cannot hold that paragraph three operates to preserve the issue of the appropriateness of the Department's disapproval of the Module 1 requests for asbestos waste and Spectra-Kote sludge.

Nor do we regard this controversy as one which would fall within the exceptions to the mootness doctrine. The issues raised herein are not of great public importance. And, it is not likely that dismissal will result in an evasion of review. If Keystone pursues any new Module 1 requests and if the Department again denies them, Keystone would still have its remedy of review by the Board.

O R D E R

AND NOW, this 5th day of August, 1988, it is ordered that Union Township's Motion to Dismiss is granted and the appeal of Keystone Sanitation Company, Inc. is dismissed as moot.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: August 5, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
John R. Embick, Esq.
Eastern Region
For Appellant:
Franklin L. Kury, Esq.
REED SMITH SHAW & McCLAY
Harrisburg, PA
For Intervenor:
Eugene E. Dice, Esq.
Harrisburg, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101
717-787-3483
TELECOPIER: 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

MR. AND MRS. PETER KRISS	:	
	:	
v.	:	**EHB Docket No. 88-036-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** August 10, 1988
and CHRISTOPHER RESOURCES, Permittee	:	

OPINION AND ORDER

Synopsis

In an appeal from the issuance of surface mining permits, two persons owning and residing on property within the immediate area will be allowed to intervene in order to represent special interests that may not coincide with the general interests of other nearby property owners. A school district, concerned with possible damage to an elementary school building on adjacent land and with maintaining a safe environment conducive to education will be allowed to intervene. A non-profit corporation will not be allowed to intervene absent allegations specifically identifying the number of its members who have a direct, substantial and immediate interest not adequately represented by other parties to the appeal.

OPINION

This proceeding involves an appeal from the action of the Department of Environmental Resources (DER) in issuing Surface Mining Permits to Christopher Resources, Inc. (Permittee) for two sites in Dunbar Township, Fayette County.

On July 18, 1988, a Petition to Intervene was filed by Catherine McKnight, Coriena Garletts and CIDS, Inc., a Pennsylvania non-profit corporation. On July 25, 1988, a separate Petition to Intervene was filed on behalf of the Connellsville Area School District (School District). The Appellants, Mr. and Mrs. Peter Kriss, filed their consents to both Petitions on July 27, 1988. DER consented on August 1, 1988. On that same date, Permittee filed its Objections to both Petitions.

Intervention in proceedings pending before the Board is governed by 25 Pa. Code §21.62. That section of the Board's Rules and Regulations makes it clear that granting or denying intervention is discretionary with the Board. As a matter of practice, the Board has granted intervention where the petitioner has a direct, substantial and immediate interest in the outcome of the litigation, Franklin Township v. DER, 1985 EHB 853, an interest that may be inadequately represented in the proceeding, Keystone Sanitation Co., Inc. v. DER, 1987 EHB 22.

In their Petition, Catherine McKnight and Coriena Garletts allege that they own and reside on land within the immediate area of the property covered by the Surface Mining Permits issued to Permittee. They believe that the surface mining operations contemplated by Permittee will alter the quality of life in the area, create a substantial risk of harm to them and their children, and damage buildings in the area. The Permittee objects to the intervention of these persons primarily because they have not alleged the exact distance separating their properties from that of Permittee and because their interests are already adequately represented by Appellants.

The allegation in the Petition concerning the proximity of the properties is sufficient to make a prima facie showing of a direct,

substantial and immediate interest. If Permittee wished to challenge this showing, it was required to allege what the distances are or, at least, to deny that the properties are in the "immediate area." Permittee has done neither of these things.

Catherine McKnight's and Coriena Garletts' allegation that their interests may not be adequately represented in the litigation has been challenged by Permittee on the basis that those interests are already represented by Appellants. It appears that all of these individuals are residents and property owners within the immediate area of the proposed surface mines. While their interests may coincide on many of the issues in this appeal, they may diverge on other issues, since the impact of the surface mining operations may vary from property to property.

For these reasons, Catherine McKnight and Coriena Garletts will be allowed to intervene.

The School District seeks to intervene because it has an elementary school "immediately adjacent" to the proposed surface mining sites. It is concerned about damage to its building, the risk of harm to students and others using the facility, and the potential altering of the quality of life in the area. The Permittee objects solely on the ground that the School District's interests are already adequately represented by Appellants.

As already noted, there is the likelihood that the interests of nearby property owners will coincide on some issues and diverge on others. The School District, as an adjacent property owner, should have the opportunity of representing its own special interest. Moreover, the interest of the School District in maintaining a safe environment conducive to the instruction of young children is distinct from that of any other party. For these reasons, the School District will be allowed to intervene.

CIDS, Inc. alleges that it is a non-profit corporation, at least some of whose members own and reside on property in the "immediate" area and/or have children attending the elementary school. It seeks to intervene on behalf of these persons. Permittee objects on the same grounds cited as objections to the intervention of Catherine McKnight and Coriena Garletts. Those objections carry heavier weight here because CIDS' Petition appears to overlap those of the other potential intervenors.

Those members of CIDS whose interests pertain to the elementary school will be adequately represented by the School District. Those members who are nearby property owners may have the requisite interest to intervene, but CIDS has not identified them either by name or number. The Board has no way of determining from the face of the Petition whether the nearby property owners represent a sufficiently large class within the membership of CIDS to justify the intervention of this organization as their surrogate. Since CIDS has not carried its burden of persuasion in this connection, it will not be allowed to intervene.

ORDER

AND NOW, this 10th day of August, it is ordered that:

1. The Petitions to Intervene of Catherine McKnight and Coriena Garletts are granted.

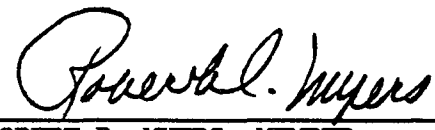
2. The Petition to Intervene of Connellsville Area School District is granted.

3. The Petition to Intervene of CIDS, Inc. is denied.

4. Since intervention is granted to Catherine McKnight, Coriena Garletts and Connellsville Area School District, the caption in this case henceforth shall be:

MR. AND MRS. PETER KRISS	:	
and CATHERINE McKNIGHT,	:	
CORIENA GARLETTS and CONNELLSVILLE	:	
AREA SCHOOL DISTRICT, Intervenors	:	
v.	:	EHB Docket No. 88-036-M
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and CHRISTOPHER RESOURCES, Permittee	:	

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS, MEMBER

DATED: August 10, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Katherine S. Dunlop, Esq.
Western Region
For Appellant:
Harley N. Trice, II, Esq.
Pittsburgh, PA
For Permittee:
Louise D. Monaghan, Esq.
Uniontown, PA
For Petitioning Intervenors:
Richard F. Pohl, Esq./Catherine McKnight and Coriena Garletts and CIDS, Inc.
Murray I. Horewitz, Esq./Connellsville Area School District

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101
717-787-3483
TELECOPIER: 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

THEODORE GENOVESE	:	
	:	
v.	:	**EHB Docket No. 87-506-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** August 16, 1988

OPINION AND ORDER
SUR
MOTION TO LIMIT ISSUES

Synopsis

A motion to limit issues is denied. In an appeal of a civil penalty assessment, an Appellant may be precluded from challenging the facts of the underlying violation where that violation was cited in a prior unappealed compliance order. In this matter, other than mere allegation, there is nothing to show that the location "toe-of-spoil seep area below Sediment Pond C" cited in the civil penalty assessment is the same as the location "seep at culvert" cited in earlier, unappealed compliance orders. This factual doubt is resolved against the Department for the purposes of its motion.

OPINION

On December 11, 1987, Theodore R. Genovese II (Genovese) filed a notice of appeal from the Department of Environmental Resources' (DER) November 12, 1987 assessment of a $625.00 civil penalty for an alleged

discharge of acid mine drainage from his Black Nugget mine site in Springhill Township, Fayette County. DER assessed the civil penalty pursuant to the provisions of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (CSL) and the Surface Mining Conservation and Reclamation Act, the Act of May 32, 1945, P. L. 1198, as amended, 52 P.S. §1396.1 et seq. (SMCRA).

On March 17, 1987, DER filed a motion to limit issues, alleging that the acid discharge violation cited in the civil penalty assessment is the same acid discharge violation cited in Compliance Orders (CO) 87-G-364, which DER issued to Genovese on or about July 30, 1987, and which Genovese did not timely appeal. Citing Commonwealth, DER v. Derry Township, 466 Pa. 31, 351 A.2d 606 (1971) and Commonwealth, DER v. Williams, 57 Pa. Cmwlth. 8, 425 A.2d 871 (1981), DER contends that Genovese is collaterally estopped and/or barred under principles of administrative finality from challenging the factual or legal basis of the civil penalty assessment by virtue of his failure to timely appeal the underlying CO. Rather, Genovese may now only challenge the reasonableness of the amount of the assessment.

Genovese objects to DER's motion, contending that CO 87-G-364 was actually lifted by DER prior to his receipt of it and, therefore, he had nothing to appeal from. Genovese draws our attention to the words "lifted today seeps dry" hand printed at the top of the first page of CO 87-G-364 which, Genovese argues, misled him into not appealing CO 87-G-364. Genovese also contends that DER's caselaw reliance is erroneous, maintaining that Derry Township and Williams dealt with outstanding violations. Genovese argues that constitutional rights were violated when DER issued a compliance order with an allegedly lifted violation and then, well past the appeal period, assessed a civil penalty.

DER is correct when it asserts that unappealed compliance orders become final and unassailable in subsequent proceedings. Derry Township, supra; Williams, supra. Moreover, this Board has consistently held that where a civil penalty assessment is based on a violation cited in an unappealed compliance order, the Appellant may be precluded from challenging the factual basis for the assessment and may only challenge the reasonableness of the amount of the assessment. See Ingram Coal Company v. DER, EHB Docket No. 87-256-R (Opinion and order dated February 3, 1988), citing Kent Coal Mining v. DER, 1987 EHB 731. Thus, our resolution of DER's motion turns on whether the violation cited in the civil penalty assessment is the same violation cited in CO 87-G-364. If the violations are identical, DER's motion may be granted.

Paragraphs 9 and 11 of DER's civil penalty assessment state, in relevant part, as follows:

> 9. On or about June 18, 1987, Genovese caused or allowed a discharge of mine drainage from the toe-of-spoil seep areas below Sediment Pond C on the Black Nugget site with a pH value less than 6.0...
>
> * * * * *
>
> 11. On or about June 18, 1987; Genovese caused or allowed a discharge of mine drainage from the toe-of-spoil seep area below Sediment Pond C on the Black Nugget site which was acid.

In Paragraph 4 of its motion, DER states that it "...issued Compliance Order 87-G-364 to Genovese citing the company for an unauthorized discharge of mine drainage from the toe-of-spoil seep area below Sediment Pond C..."

It is abundantly clear that the civil penalty assessment is based on a discharge of acid mine drainage occurring at "the toe-of-spoil seep area below Sediment Pond C." An examination of CO 87-G-364, however, reveals no

mention whatsoever of "the toe-of-spoil seep area below Sediment Pond C," but, rather, clearly shows the location on the alleged acid discharge to be "seep at culvert on 6-18-87." If these two locations are physically the same and differ only in nomenclature, we could easily grant DER's motion. Other than its allegation that the civil penalty assessment and CO 87-G-364 cover the same violation, DER draws no spatial relationship between "seep at culvert" mentioned in CO 87-G-364 and "toe-of-spoil seep area below Sediment Pond C" referred to in the assessment. Thus, on June 18, 1987, these could have been one violation at one location having two different names. Or, these could have been two violations at two separate locations, with only one being the subject of CO 87-G-364.

In considering a motion to limit issues, these types of factual inconsistencies must be resolved against the moving party. Unless and until a case is made that the "seep at culvert" and "toe-of-spoil seep area below Sediment Pond C" are merely different names for the same physical location, we must deny DER's motion.

ORDER

AND NOW, this 16th day of August, 1988, it is ordered that the Department of Environmental Resources motion to limit issues is denied.

ENVIRONMENTAL HEARING BOARD

WILLIAM A. ROTH, MEMBER

DATED: August 16, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Timothy J. Bergere, Esq.
Katherine S. Dunlop, Esq.
For Appellant:
William W. Schrimpf, Sr., Esq.
MELENYZER & TERSHEL
Charleroi, PA 15022

ef

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

T. C. INMAN, INC. and THEODORE C. INMAN	:	
v.	:	EHB Docket No. 85-417-G
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: August 18, 1988

OPINION AND ORDER SUR PETITION FOR RECONSIDERATION OR CLARIFICATION

By the Board

Synopsis:

A Petition for Reconsideration or Clarification is denied when the Petition is based upon an argument which the party did not raise during the course of the proceedings.

OPINION

This case involves three consolidated appeals by T. C. Inman, Inc. and Theodore C. Inman (Inman) from actions of the Department of Environmental Resources (DER). The orders denied Inman's application for a solid waste disposal permit, ordered Inman to cease operations at its landfill and file a closure bond, and assessed a civil penalty against Inman for alleged violations of statutes and regulations. The Board issued an Adjudication on July 19, 1988 which upheld the permit denial and order to cease operations, but reversed DER's order regarding the closure bond, and lowered the amount of the civil penalty.

This Opinion and Order addresses DER's Petition for Reconsideration and Clarification which was filed on August 8, 1988. In its Petition, DER asserts that the Board erred in its discussion regarding the civil penalty by stating that Inman's unauthorized discharge of leachate did not constitute a violation of the Solid Waste Management Act, 35 P.S. §6018.1 et seq. DER argues that this discharge violates Sections 601 and 610 of the Act, 35 P.S. §§6018.601, 6018.610. In support of its position, DER cites the Board's decision in Sechan Limestone Industries, Inc. v. DER, 1986 EHB 134, 165.

To put this matter in perspective, we stated in our Adjudication that the discharge of leachate was an apparent violation of sections 301 and 307 of the Clean Streams Law, 35 P.S. §§691.301 and 691.307; however, we did not assess a civil penalty for the discharge because DER "incorrectly" had charged Inman under the Solid Waste Management Act. (Adjudication, p. 21) In a footnote, we explained that DER's reliance upon the Solid Waste Management Act instead of the Clean Streams Law was more than a technical error, because while the Solid Waste Management Act allows DER to assess a civil penalty, with the aggrieved party then having a right to a hearing before the Board, the Clean Streams Law gives the party a right to a hearing in front of the Board prior to the assessment of a civil penalty.[1]

It is not necessary for the Board to address DER's argument that the discharge of leachate violated Sections 601 and 610 of the Solid Waste Management Act. Since DER, which had the burden of proof with respect to the civil penalty assessment, did not raise this argument during the course of these proceedings, the argument is deemed waived. Schneider v. Albert Einstein Medical Center, 257 Pa Super. 348, 390 A.2d 1271 (1978). William

[1] See Section 605 of the Clean Streams Law, 35 P.S. §691.605

J. McIntire Coal Co., Inc., 1986 EHB 969. In its post-hearing brief, and in the Civil Penalty Assessment itself, DER cited sections of the Solid Waste Management Act other than Sections 601 and 610. In paragraph "T" of the civil penalty assessment, DER stated that the unauthorized discharge of leachate violated Sections 301 and 501 of the Solid Waste Management Act, 35 P.S. §§6018.301 and 6018.501. Neither of these sections addresses discharges of leachate. In addition, DER's brief states that the discharge of leachate violates Sections 301 and 307 of the Clean Streams Law, 35 P.S. §§691.301 and 691.307, and Sections 301 and 501 of the Solid Waste Management Act, 35 P.S. §§6018.301 and 6018.501. (Proposed Conclusions of Law 22, 28) Nowhere in either the Civil Penalty Assessment or in its brief does DER argue that the discharge violates Sections 601 and 610 of the Solid Waste Management Act, 35 P.S. §6018.601 and 6018.610. DER may not assess a penalty for a violation of an inapplicable provision of law and then win reconsideration after the Board has issued an Adjudication reversing DER's error.

Since the argument that the discharge of leachate violates Sections 601 and 610 of the Solid Waste Management Act is deemed waived, it does not provide a basis for reconsidering or clarifying our order.

ORDER

AND NOW, this 18th day of August, 1988, it is ordered that the Department of Environmental Resources' Petition for Reconsideration or Clarification is denied and the Board's adjudication of July 19, 1988 is affirmed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Robert D. Myers

ROBERT D. MYERS, MEMBER

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: August 18, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Diana J. Stares, Esq.
Western Region
For Appellant:
John G. Good, Jr., Esq.
REED, LUCE, GOOD, TOSH & McGREGOR
Beaver, PA
and
Robert J. Fall, Esq.
WYMARD, DUNN & GORDON
Pittsburgh, PA

nb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES BUREAU OF DEEP MINE SAFETY, Plaintiff	:	EHB Docket No. 84-334-F
v.	:	Issued: August 19, 1988
FRANCIS DWYER, Defendant	:	

OPINION AND ORDER SUR
MOTION TO SEVER AND CONTINUE HEARING

Synopsis

A Motion to Sever and Continue Hearing filed by a Defendant, whose case had previously been consolidated for hearing with three other Defendants, is denied. The fact that the Defendant has retained employment outside the Commonwealth, so that attending a hearing would be inconvenient, is not a sufficient reason to sever and continue his hearing, particularly where the Defendant does not state when it would be convenient for him to attend a hearing.

OPINION

This proceeding involves a Complaint by the Department of Environmental Resources (DER) seeking a one-year suspension of the assistant mine foreman certificate of Francis Dwyer (Dwyer). This complaint arose out of the events leading to an accident in which a miner was killed at the Helen Mining Company Mine in Homer City, Indiana County, on July 3, 1983. Dwyer was an assistant foreman at the mine. On May 12, 1988, this proceeding was

consolidated for hearing with complaints involving three other assistant foremen at the mine: Wilbur Guile (Docket No. 84-332-F), Angelo Swanhart (Docket No. 84-333-F), and James Milligan (Docket No. 84-335-F). Hearings on these complaints are scheduled for September 12, 13, 14, 15 and 16, 1988.

This Opinion and Order addresses the Motion to Sever and Continue Hearing filed by Defendant Dwyer on July 25, 1988. In the Motion, Dwyer asserts that he has obtained employment--not in the underground mining industry--in the Washington, D.C. area. The motion states "it may jeopardize Mr. Dwyer's continued employment if he is required to attend the hearing on September 12-16." (Motion, para. 6). The motion also suggests that resolution of the complaints against Milligan, Swanhart, and Guile--as well as those against Messrs. Dunn, Hancher, and McElhoes[1]--"may assist in achieving a resolution" of the complaint against Mr. Dwyer (Motion, para. 9).

DER filed a reply opposing this motion on August 9, 1988. DER asserts that the reason given for severing and continuing the case is insufficient because Dwyer does not suggest when it <u>would</u> be convenient for him to attend a hearing--giving rise to the implication that he is asking for an indefinite continuation of his hearing while he is employed in the Washington, D.C. area. DER also argues that this issue should have been raised earlier, and that DER has already expended resources to prepare for the hearing.

Dwyer filed a response to DER's reply on August 15, 1988. Dwyer asserts that his motion was timely and that the issue could not have been

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[1] Dunn, Hancher, and McElhoes were, respectively, the acting mine foreman, superintendent, and mine foreman at the Helen Mine. The complaints against these three individuals were consolidated on May 12, 1988 for a separate hearing.

raised earlier because his employment in Washington, D.C. is a recent development.

We agree with DER that the motion to sever and continue hearing should be denied. While we are sensitive to the fact that Mr. Dwyer will be required to be absent from his job while attending the hearing on September 12-16, 1988, we also recognize that Mr. Dwyer has responsibilities which go along with his mine foreman certificate. One of those responsibilities is that he must take the time to attend a hearing in which the Commonwealth alleges that he has not properly discharged his duties under the certificate. Moreover, we might be more receptive to Mr. Dwyer's plight if he had suggested a time when a hearing would be convenient for him. His failure to do so implies that he wishes to postpone his hearing indefinitely, and we do not believe that an indefinite postponement is reasonable. Finally, we find Mr. Dwyer's contention that a resolution of the other complaint proceedings may "assist in achieving a resolution" of the complaint against him to be vague and speculative.

ORDER

AND NOW, this 19th day of August, 1988, it is ordered that the Motion to Sever and Continue Hearing filed by Francis Dwyer is denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Hearing Examiner

DATED: August 19, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Gail B. Phelps, Esq.
Regulatory Counsel
For Appellant:
R. Henry Moore, Esq.
Pittsburgh, PA

nb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101
717-787-3483
TELECOPIER: 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

WESTERN PENNSYLVANIA WATER COMPANY	:	
	:	
v.	:	**EHB Docket No. 84-351-G**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** August 25, 1988

ADJUDICATION

By the Board

Synopsis:

A water company that encounters an abandoned oil well in the course of laying a water pipe line in an easement can be compelled to take corrective action under Section 316 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (CSL), even though it is without fault. The installation of a water pipe line makes the water company an occupant of the land. An easement for the installation of a water pipe line is an interest in land sufficient to bring the water company within the scope of Section 316 of the CSL. The application of Section 316 of the CSL to the water company, under the facts of the case, is a valid exercise of the state's police power.

A water company that encounters oil contaminated soil in the course of laying a water pipe line can be compelled to dispose of it properly.

PROCEDURAL HISTORY

Western Pennsylvania Water Company (WPW) instituted this proceeding on October 15, 1984, when it filed a Notice of Appeal from an Order of the Department of Environmental Resources (DER), dated September 13, 1984 (DER's Order), directing WPW to plug an abandoned oil well, to dispose of the contaminated soil, to determine the extent of groundwater pollution, and to submit a preparedness, prevention and contingency (PPC) plan to handle future problems of a similar nature. With its Notice of Appeal, WPW also filed a Petition for Supersedeas. The Board's docket and files do not reflect any action that might have been taken on this Petition. Apparently, WPW did not pursue the matter, possibly because DER did not threaten immediate enforcement action against it.

After the parties had engaged in extensive discovery, DER filed a Motion for Summary Judgment on December 13, 1985, submitting depositions and affidavits in support. WPW opposed the Motion in an Answer filed on January 9, 1986. On January 22, 1986, Board Member Edward Gerjuoy deferred a ruling on DER's Motion until the final Adjudication.

Mr. Gerjuoy also ruled, on January 10, 1986, that no evidence would be admitted on the question of whether WPW was negligent, since he deemed that issue to be irrelevant to this proceeding. He reaffirmed this ruling on January 21, 1986, at the outset of the hearings.

Hearings were held before Mr. Gerjuoy on January 21, 22 and 23, 1986, in Pittsburgh. Post-hearing briefs were filed by the parties on April 8, 1986 (DER), and on May 14, 1986 (WPW). Mr. Gerjuoy left the Board on January 1, 1987, without having prepared an Adjudication in this case. In similar

situations, the Board has upheld the propriety of issuing an Adjudication based upon a "cold record" (where the person preparing the Adjudication did not preside at the hearings). Penn Maryland Coals, Inc. v. DER, 1986 EHB 758.

The record consists of the pleadings, a transcript of 511 pages, a Stipulation of Facts and 30 exhibits.

FINDINGS OF FACT

1. WPW is a Pennsylvania corporation with its registered office at 410 Cook Lane, Pittsburgh, Pennsylvania 15234. (Bd. Ex. No. 1, para. 1)

2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the CSL; the Gas Operations Well-Drilling Petroleum and Coal Mining Act, Act of November 30, 1955, P.L. 756, as amended, 52 P.S. §2101 et seq. (Gas Operations Act); the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. (SWMA); Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and the rules and regulations adopted pursuant to said statutes. (71 P.S. §61)

3. By a Deed of Easement and Right of Way, dated May 13, 1983, Leah Bellaire granted to WPW an "easement and a free uninterrupted and unobstructed right of way, in, under, across and over" Bellaire's property in the Borough of McDonald, Washington County, Pennsylvania (Bellaire Easement). The Bellaire Easement was 20 feet wide; ran in an east-west direction along the southern boundary of Bellaire's property and the northern right-of-way line of Johns Avenue; and was granted, inter alia, for the purpose of installing pipes for the transmission and distribution of water. (Bd. Ex. No. 1, para. 2; WPW Ex. A)

4. WPW contracted with Alex E. Paris Contracting Company, Inc. (Paris) for the installation of a 24-inch water pipe line, among other locations, in the Bellaire Easement. (Bd. Ex. No. 1, para. 3)

5. Prior to beginning installation of the 24-inch water pipe, Paris employees cleared brush, garbage and other debris from the area within the Bellaire Easement, and inspected the area for obstructions. (N.T. 466, 480, 495-496; Bd. Ex. No.1, para. 4)

6. Paris employees generally adhered to the following procedure in installing the 24-inch water pipe in the Bellaire Easement:

(a) a backhoe was used to open a trench. The backhoe operator, who was positioned facing to the rear, opened the trench by scooping up the earth with a bucket swinging in toward the machine. The excavated earth was then deposited to the operator's left along the side of the trench;

(b) the bucket was 4 feet wide but had teeth extending approximately 1 1/2 inches beyond the bucket on each side;

(c) the trench was excavated to a depth of approximately 6 feet and a bottom width of approximately 4 feet;

(d) the sides of the trench, which was excavated through unconsolidated fill material, had to be sloped back to provide stability;

(e) when a sufficient amount of trench had been excavated to the required width and depth, an 18-foot section of water pipe was placed in it and joined to the completed length of the pipeline. The trench was then partially backfilled with 18 to 24 inches of material, sufficient to cover the newly-laid section of pipe up to about 24

inches from its open end. The trench excavation would then be advanced to the point necessary to accommodate another 18-foot section of pipe.

(N.T. 80, 96-98, 461-463,469-470; Bd. Ex. No. 1, paras. 5, 6 and 12)

7. On or about November 10, 1983, while Paris employees were working in the Bellaire Easement:

(a) the outermost teeth on the left side of the bucket of the backhoe caught a piece of wood and pulled it out;

(b) at the same time, a greenish substance seeped into the open trench at the lower side and bottom of the excavation where the piece of wood had been pulled out;

(c) the greenish substance was believed by Paris employees to be crude oil; it floated on a small amount of water that was present in the bottom of the trench;

(d) at the time of the incident, the trench was open for a distance of 6 to 10 feet;

(e) Paris employees quickly installed another section of water pipe to prevent the substance from entering the completed portion of the line;

(f) a Paris employee used a shovel to remove dirt from the area where the piece of wood had been pulled out. He found several additional boards which appeared to be fastened together in a circular fashion. Approximately 4 to 6 boards were exposed or partially exposed at their top and the outer circumference was partially exposed. The wooden structure was situated entirely below ground

level and represented a wooden conductor casing of an abandoned oil well.

(N.T. 462, 468-469, 473-475, 478-480; Bd. Ex. No. 1, paras. 7-11, 14, 15 and 19; Comm. Ex. No. 1)

8. Wooden conductor casings were used by oil well drillers, prior to the late 1940s, to hold the upper part of well bores open when passing through unconsolidated material. These casings were octagonal with interior diameters of about 12 inches. They generally extended from the derrick floor (about 4 feet above ground level) to a depth of 15 to 30 feet. They were not intended to prevent oil from leaking out into the surrounding material. (N.T. 24-25, 49-52, 54-55, 60-61; Comm. Ex. No. 1)

9. The abandoned oil well encountered in the Bellaire Easement (Abandoned Well):

(a) is located near the center of the McDonald Field, a high production field discovered about 1890 and which is still producing;

(b) penetrates both the Gordon Sand and the McDonald Fifth Sand;

(c) is at a lower elevation than most of the surrounding wells;

(d) was abandoned in the late 1940s or earlier;

(e) was not plugged to prevent the escape of oil;

(f) is prone to leakage because of the possibility of water entering other unplugged wells in the McDonald Field and forcing oil out of unplugged wells at lower elevations.

(N.T. 31-37, 41-44, 46-48; Comm. Ex. No. 2)

10. DER oil and gas inspectors who visited the site of the Abandoned Well on November 11, 13 and 14, 1983:

(a) observed the wooden conductor casing which the backhoe had

encountered;

(b) saw crude oil in the open trench but took no samples of it.

(N.T. 24-25; Bd. Ex. No. 1, paras. 16, 17 and 20; Comm. Ex. No. 1)

11. DER instructed WPW not to cover the Abandoned Well, but to collect the oil, gather up the contaminated soil and have it properly disposed of. (N.T. 28)

12. Paris employees pumped water and oil from the open trench into a 500 gallon tank over a 3 to 4 week period subsequent to the incident. The portion of the mixture deemed to be water was drained out of the tank onto the ground surface. (N.T. 195-196, 201-202; Bd. Ex. No. 1, para. 21)

13. The contaminated soil was removed from the open trench and piled 7 to 8 feet high on the adjacent ground. (N.T. 98, 222)

14. The Abandoned Well was covered over and the trench was completely backfilled. (N.T. 174-175; Comm. Ex. Nos. 13 and 14)

15. Prior to the incident on November 10, 1983, Paris employees had not encountered any oil in excavating the trench for the water pipe line. (Bd. Ex. No. 1, para. 22)

16. Robinson Run flows in a northeast direction approximately 225 to 300 feet north of the Abandoned Well. (Bd. Ex. No. 1, para. 23)

17. The topography of the land between the Bellaire Easement and Robinson Run is relatively flat. Shallow groundwater would tend to flow in a northeast direction. (N.T. 84, 86)

18. DER's hydrogeologist examined Robinson Run on or about May 30, 1984, and saw no indication that oil was present in the water. (N.T. 105)

19. DER never sampled the water in Robinson Run to determine whether oil was present. (Bd. Ex. No.1, para. 27)

20. DER has not received any formal complaint from any source that oil from the Abandoned Well has entered Robinson Run. (Bd. Ex. No. 1, para. 28)

21. In January 1984, a water well was drilled on the property of Hi-View Lumber Company (Hi-View Well) approximately 150 feet east-northeast of the Abandoned Well. Oil was encountered during the well-drilling operation. (N.T. 104; Bd. Ex. No. 1, paras. 24 and 25; Comm. Ex. No. 3)

22. On May 30, 1984, DER's hydrogeologist lowered a bailer into the Hi-View Well. When he retrieved the bailer, it was covered with oil. (N.T. 89-93; Bd. Ex. No. 1, para. 26)

23. Water samples of the Hi-View Well obtained by DER on June 6, 1984, October 11, 1984, and December 9, 1985, indicated the presence of crude oil. (N.T. 93-96, 117-122, 126-147; Bd. Ex. No. 1, para. 30; Comm. Ex. Nos. 4-12)

24. The owner of the Hi-View Well has made no complaint to DER about the presence of oil. (N.T. 99-101)

25. DER did not sample the oil that entered the open trench when the Abandoned Well was encountered, did not sample the oil and water pumped out of the trench thereafter and did not sample the contaminated fill removed from the trench and piled on the site. (Bd. Ex. No. 1, paras. 20 and 29)

26. If the Abandoned Well is not properly plugged, it will continue to leak. (N.T. 44)

27. There are other abandoned oil wells in the vicinity of the Abandoned Well. (Bd. Ex. No. 1, para. 31)

DISCUSSION

DER's Order charged WPW with violating Sections 206(c) and 207 of the Gas Operations Act (52 P.S. §§2206(c) and 2207); Sections 3, 301, 307, 401,

402 and 611 of the CSL (35 P.S. §§691.3, 691.301, 691.307, 691.401, 691.402 and 691.611); the SWMA (35 P.S. §§6018.101 et seq.); and the requirements of 25 Pa. Code §101.3(b).

DER then ordered WPW to (1) file a notice of intent to plug the Abandoned Well pursuant to Section 205(a) of the Gas Operations Act (52 P.S. §2205(a)); (2) proceed to plug the Abandoned Well in accordance with provisions of Section 206(c) of the Gas Operations Act (52 P.S. §2206(c)); (3) submit a PPC plan; (4) file a request for approval of a disposal method for, and proceed to dispose of, the contaminated soil; and (5) submit a report on the extent of groundwater contamination prepared by a hydrogeologist.

DER has the burden of proving its allegations by a preponderance of the evidence. 25 Pa. Code §21.101(a) and (b)(3).[1]

The evidence clearly establishes that the Abandoned Well leaked oil into the surrounding earth, contaminated the groundwater and will continue to do so in the future unless properly plugged. However, the evidence is not sufficient to prove that WPW's pipe laying activities caused the Abandoned Well to leak or that the oil in the Hi-View Well has come from the Abandoned Well.[2] On the basis of these meager facts, we are called upon to decide

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[1] The Board's Rules and Regulations at 25 Pa. Code §21.101(d) provide for placing the burden of proof on the alleged polluter when DER has established that environmental damage is occurring, and that the alleged polluter knows, or should know, the facts giving rise to it. DER has made no such claim here and, consequently, the provisions of 25 Pa. Code §21.101(b)(3) apply.

[2] DER's attempt to link to WPW a piece of steel casing sunk in a ball of concrete, discovered on the site about two months after the incident and supposedly resembling a makeshift well plug, failed for lack of proof. DER's failure to sample the oil in the open trench or in the holding tank, making it impossible to compare it with the oil found in the Hi-View Well, left another critical gap in the chain of evidence.

what, if any, responsibility can be imposed upon a water company that encounters a leaking abandoned oil well while laying a water pipe line in an easement.

Certainly, if it could be determined that WPW performed some affirmative act that caused or contributed to the problem, there would be no difficulty in upholding DER's Order under the numerous statutory and regulatory provisions cited by DER. Commonwealth v. Harmar Coal Co., 452 Pa. 77, 306 A.2d 308 (1973), appeal dismissed 415 U.S. 903, 94 S. Ct. 1395, 39 L. Ed. 2d 460 (1974). But, as already noted, the evidence does not support any such conclusion except with respect to the contaminated soil.

Irrespective of whether DER can legally require WPW to plug the Abandoned Well, DER clearly was authorized to order WPW to dispose properly of the contaminated soil. The oil-contaminated soil certainly falls within the broad definition of "solid waste" enunciated in §103 of the SWMA and its improper disposal subjects WPW to the issuance of an order under §§104(7) and 602(b) of the SWMA. WPW's anomalous position, that it has no responsibility for deleterious materials encountered during excavation and that it can simply dump them in a pile on the surface of the ground and leave them there, is inconceivable in this day and age. It is even more distressing to find that position being taken by a public utility charged with supplying clean, unpolluted water to the public. Paragraph 4 of DER's Order, which pertains to the disposal of the contaminated soil, is sustained.

The only statutory provision that may have some pertinence to the remainder of DER's Order is Section 316 of the CSL, 35 P.S. §691.316, also cited in DER's Order. That Section provides, in part, as follows:

> Whenever the department [DER] finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the department

> may order the landowner or occupier to correct the condition in a manner satisfactory to the department.... For the purpose of this section, "landowner" includes any person holding title to or having a proprietary interest in either surface or subsurface rights.

WPW in this case stands in a position similar to the appellant in Philadelphia Chewing Gum Corporation v. Commonwealth, Dept. of Environmental Resources, 35 Pa. Cmwlth. 443, 387 A.2d 142 (1978). In that case, the actions of National Wood Preservers, Inc. (National) on an adjacent parcel of land introduced contaminants into the groundwater that migrated beneath the surface of the appellant's land without appellant's knowledge. DER's order directing the appellant to abate the pollution on its own land pursuant to Section 316 of the CSL was reversed by Commonwealth Court on the rationale that requiring corrective action solely on the basis of land ownership or occupancy was unduly oppressive.

This decision was not appealed to the Supreme Court; but related cases involving National and the owners of the land occupied by National were appealed after Commonwealth Court upheld their responsibility to correct the problem. In the course of its decision sustaining these rulings of Commonwealth Court, the Supreme Court staked out an expansive position on the use of the police power. Citing the U.S. Supreme Court's decision in Penn Central Transportation Co. v. New York, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), the Court held that the validity of an exercise of the police power over land, such as in Section 316 of the CSL, depends little upon the owner or occupier's responsibility for causing the condition giving rise to the regulation. National Wood Preservers, Inc. v. Commonwealth, Dept. of Environmental Resources, 489 Pa. 221, 414 A.2d 37 (1980), appeal dismissed 449 U.S. 803, 101 S. Ct. 47, 66 L. Ed. 2d 7 (1980).

In a more recent decision, Bonzer v. Commonwealth, Dept. of Environmental Resources, 69 Pa. Cmwlth. 633, 452 A.2d 280 (1982), Commonwealth Court noted that its decison in Philadelphia Chewing Gum, supra, was of doubtful validity in light of the Supreme Court's ruling in National Wood Preservers, supra. Accordingly, it upheld a DER order requiring a property owner to correct a flooding condition caused by the collapse of culverts installed on his property by unknown persons before he acquired it. See also Commonwealth, Dept. of Environmental Resources v. PBS Coals, Inc., ___ Pa. Cmwlth ___, 534 A.2d 1130 (1987).

On the basis of these decisions, we conclude that a landowner or occupant can be ordered to take corrective action under Section 316 of the CSL even though it is without fault.[3] WPW argues, however, that it is not an owner or occupant of land. Referring to its easement as a "limited purpose right-of-way," WPW maintains that it was only temporarily present for the purpose of installing a water pipe line. In support of its argument, WPW cites language from Redevelopment Authority of Allegheny County v. Stepanik, 25 Pa. Cmwlth. 180, 360 A.2d 300 (1976), affirmed 479 Pa. 199, 387 A.2d 1292 (1978), to the effect that an occupant must be in actual possession rather than simply having the right to gain possession.

We agree, but fail to understand how this construction helps WPW's position. Clearly, WPW is in actual possession of the Bellaire Easement since its water pipe line is buried there. The line is not there temporarily or for only part of the day or week. It is there continually in a "permanent" easement granted to WPW "forever" (WPW Ex. A). It is difficult to conceive of a situation where occupancy could be considered more pervasive.

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[3] This holding confirms Mr. Gerjuoy's rulings of January 10 and 21, 1986, excluding any evidence on the question of whether WPW was negligent.

The fact that WPW owns only an easement does not change the result. As defined in Section 316 of the CSL, "landowner" includes those who have only a partial proprietary interest. An easement is an "interest in land" within the meaning of Pa. R.C.P. 1061 (action to quiet title), Versailles Tp. Authority of Allegheny County v. City of McKeesport, 177 Pa. Super. 377, 90 A. 2d 581 (1952); and within the meaning of the Statute of Frauds, 33 P.S. §1, Burns v. Baumgardner, 303 Pa. Super. 85, 449 A.2d 590 (1982). We believe that a permanent easement for the installation of a water pipe line also is a sufficient interest in land to bring the owner of the easement within the scope of Section 316 of the CSL.

Having concluded that DER legally can order WPW to correct the condition existing on the Bellaire Easement, we must next determine whether or not the provisions of DER's Order were reasonable under the circumstances.[4] In Lawton v. Steele, 152 U.S. 133, 14 S. Ct. 499, 38 L. Ed. 389 (1894), the U. S. Supreme Court articulated three standards to be used in determining whether a state's exercise of the police power is valid: (1) the interests of the public must require it, (2) the means chosen must be reasonably necessary for the accomplishment of the purpose, and (3) the means chosen must not be unduly oppressive upon individuals.

In the National Wood Preservers case, supra, our Supreme Court held that a DER order to a landowner or occupant under Section 316 of the CSL, requiring correction of a condition causing pollution, satisfied the first two standards announced in Lawton. DER's Order in the present case, which calls only for the correction of the condition on the Bellaire Easement and a plan

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[4] Since an inquiry into reasonableness is always relevant to a proceeding of this sort, summary judgment can not be entered even where there is no dispute about the applicability of Section 316 of the CSL. For this reason, DER's Motion for Summary Judgment will be denied.

to handle similar problems in the future, is not materially different. It too must be held to satisfy Lawton's first two standards.[5]

In determining whether or not DER's Order is unduly oppressive under Lawton, we are to consider the economic impact on WPW and the extent to which the Order intrudes upon WPW's property rights in the Bellaire Easement. Penn Central Transportation Co. v. New York, supra. Unfortunately, WPW has presented no evidence on either of these points, relying instead on the argument that it is unduly oppressive to impose this duty upon an easement holder. As noted above, that argument is rejected. In the absence of any evidence dealing with the economic and intrusive impact of DER's Order, we must conclude that it is not unduly oppressive upon WPW. Bonzer v. Commonwealth, Dept. of Environmental Resources, supra.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of this appeal.

2. DER has the burden of proving its allegations by a preponderance of the evidence.

3. WPW's handling of the contaminated soil was a violation of the CSL and the SWMA; and paragraph 4 of DER's Order, requiring the proper disposal of this material, is reasonable and proper.

4. A landowner or occupant can be compelled to correct a condition on its land, under Section 316 of the CSL, even though it is without fault.

5. WPW is an occupant of the Bellaire Easement since it has its water pipe line installed there.

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[5] Even though WPW is not subject to the Gas Operations Act (52 P.S. §2101 et seq.) on the basis of the record in this case, it was still lawful for DER to order WPW to plug the Abandoned Well in accordance with the provisions of that Act, since that was the appropriate corrective action to be taken.

6. An easement for the installation of a water pipe line is a sufficient interest in land to bring the owner of the easement within the scope of Section 316 of the CSL.

7. A Motion for Summary Judgment is properly denied in a case falling within the scope of Section 316 of the CSL, because an inquiry into the reasonableness of DER's action is always relevant.

8. DER's Order, requiring WPW to correct the condition existing on the Bellaire Easement and to devise a plan for handling similar problems in the future, is valid because (1) the interests of the public require such action and (2) the means chosen by DER are reasonably necessary to accomplish the purpose.

9. In the absence of any evidence on the subject, DER's Order must be deemed not unduly oppressive upon WPW.

ORDER

AND NOW, this 25th day of August, 1988, it is ordered that:

1. DER's Motion for Summary Judgment is denied.

2. The appeal of Western Pennsylvania Water Company from the September 13, 1984, Order of the Department of Environmental Resources is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Robert D. Myers

ROBERT D. MYERS, MEMBER

Member Roth did not participate in the decision of this case.

DATED: August 25, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Zelda Curtiss, Esq.
Western Region
For Appellant:
Raymond H. Conaway, Esq.
Pittsburgh, PA

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101
717-787-3483
TELECOPIER: 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

RESCUE	:	
v.	:	**EHB Docket No. 88-204-W**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
ENVIROTECH SANITARY SERVICES, INC.,	:	**Issued:** August 29, 1988
Permittee	:	

OPINION AND ORDER

Synopsis

A proposed consent order and agreement (COA) is not a final action or adjudication of the Department and is, therefore, not reviewable by the Board.

OPINION

This matter was initiated on May 19, 1988 with the filing of a notice of appeal by RESCUE, an unincorporated association which includes the Susquehanna County Board of Commissioners, the North Branch Concerned Citizens Committee of RESCUE, and the Middletown Township Board of Supervisors (hereinafter "RESCUE"), seeking review of a proposed COA dated April 20, 1988 entered into by and between the Department of Environmental Resources (Department) and Envirotech Sanitary Systems, Inc. (Envirotech).

The Department filed a motion to dismiss on June 17, 1988, alleging that the proposed COA was not an adjudication because it was not yet effective. The Department also contended that the COA merely reiterated obligations imposed upon Envirotech's predecessor-in-interest by earlier Department orders, and that because RESCUE was a party to the appeals of those

orders to the Board, RESCUE's present appeal constituted a prohibited collateral attack.

Envirotech, on June 21, 1988, also filed a motion to dismiss the appeal for lack of jurisdiction, contending that the April 20, 1988 COA was not a final action of the Department and is not to become final or effective until the public comment period is over and a review of those comments is made by the Department for possible modification to the COA. Under the terms of the COA, the public comment period is to last 30 days from the date of publication of a summary of the terms and conditions of the COA in a newspaper of general circulation.

On July 6, 1988, RESCUE filed its answer and memorandum of law opposing the motions to dismiss, responding that in deciding, ruling, or determining to negotiate, enter and sign the COA with Envirotech, to the exclusion of RESCUE, the Department's action was final.

Actions of the Department are appealable only if they are "adjudications" within the meaning of the Administrative Agency Law, 2 Pa.C.S.A. §101, or "actions" under §1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21, and 25 Pa.Code §21.1(a). We have consistently interpreted these statutes to confer jurisdiction on the Board to review any decision of the Department which is final and affects the personal or property rights, privileges, immunities, duties, liabilities or obligations of a person. North Penn Water Authority v. DER, EHB Docket No. 87-120-R (Opinion and order issued March 17, 1988).

We find this proposed COA similar to the proposed civil penalty assessment considered in Amerikohl Mining, Inc. v. DER, 1986 EHB 1, in which the appeal of a proposed consent assessment of a civil penalty was dismissed for lack of jurisdiction because it was not a final action. Paragraph 1 of

the order portion of the COA clearly states that the COA is not effective until after the comment period is over and recognizes that modifications of the COA may occur in response to public comments. Because the proposed COA is not yet effective and subject to further modification, there is no final action for the Board to review and RESCUE's appeal must be dismissed. In light of this disposition, we need not address the other contentions raised in the Department's motion to dismiss.

Since the COA is not final, there has been no appealable action and, accordingly, we must grant the Department's and Envirotech's motions to dismiss.

O R D E R

AND NOW, this 29th day of August, 1988, it is ordered that the Department's and Envirotech's motions to dismiss the appeal of RESCUE at Docket No. 88-204-W are granted and the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: August 29, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Norman G. Matlock, Esq.
Eastern Region
For Appellant:
Gerald C. Grimaud, Esq.
Tunkhannock, PA
For Permittee:
Brigid E. Carey, Esq.
Scranton, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101
717-787-3483
TELECOPIER: 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

PHILADELPHIA SUBURBAN WATER COMPANY	:	
	:	
v.	:	**EHB Docket No. 85-151-M**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** August 30, 1988
and NORTH WALES WATER AUTHORITY, Permittee	:	

OPINION AND ORDER
SUR
MOTION FOR LEAVE TO CONDUCT DISCOVERY

Synopsis

A Motion for Leave to Conduct Discovery will be denied, in the absence of compelling circumstances, when it is filed more than three years beyond the period allowed for discovery.

OPINION

On June 30, 1988, Philadelphia Suburban Water Company (Appellant) filed a Motion for Leave to Conduct Discovery, to which the Department of Environmental Resources (DER) filed Objections on July 27, 1988. The Permittee, North Wales Water Authority, has filed no response to Appellant's Motion.

Discovery can be conducted by the parties to a case, without Board approval, during the 60 days following the filing of an appeal. 21 Pa. Code §21.111(a). That time period expired in this case on June 24, 1985. Appellant made no request for permission to conduct discovery outside of the 60-day period until it filed the present Motion more than three years later.

The case has been delayed for several reasons. At the request of the

parties, the Board granted a series of continuances to allow settlement negotiations to take place. After these negotiations failed, pre-hearing memoranda were filed and the case was ready for hearing by the end of July, 1986. Because of the Board's crowded dockets, the case was not scheduled for hearing until February 26, 1988. On that date, a Notice was sent to the parties advising them that the case would be heard on June 7, 8 and 9, 1988.

On May 12, 1988, Appellant requested that the hearings be cancelled, because of pending legislation that would resolve the controversy, and be rescheduled after August 23, 1988. The Board granted this request in an Order dated May 23, 1988.

Appellant's Motion for Leave to Conduct Discovery is untimely by any measure; it should not be granted without compelling circumstances. Since the subject of the discovery request involves issues present in the case from the outset, there is no basis for arguing that the discovery could not have been conducted earlier.

Appellant maintains that, because of the ongoing settlement negotiations, it did not want to place any burdens on DER. That excuse does not cover the situation, however. It was obvious by June of 1986 that settlement negotiations were not going to resolve the case. Yet, Appellant made no effort to pursue discovery for another two years. Even when faced with scheduled hearing dates of June 7, 8 and 9, 1988, Appellant made no request to conduct discovery.

Even though new hearing dates have not yet been set, allowing discovery at this late date has the potential for introducing further delay into an already protracted case.

ORDER

AND NOW, this 30th day of August, 1988, Appellant's Motion for Leave to Conduct Discovery is denied.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS, MEMBER

DATED: August 30, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Cathy Curran Myers, Esq.
Bureau of Regulatory Counsel
For Appellant:
Jack E. Jerrett, Esq.
Philadelphia, PA
For Permittee:
Ann Thornburg Weiss, Esq.
Ambler, PA

mjf

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

GRAND CENTRAL SANITARY LANDFILL, INC.	:	
	:	
v.	:	EHB Docket Nos. 88-163-F
	:	88-211-F
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: August 30, 1988

OPINION AND ORDER
SUR MOTION TO DISMISS

Synopsis:

A request for leave to file appeals nunc pro tunc is denied. Attempts to resolve the matter with the Department of Environmental Resources do not constitute an adequate basis for allowing the appeals nunc pro tunc.

OPINION

This Opinion and Order involves two separate appeals which have not been consolidated. Both appeals were filed by Grand Central Sanitary Landfill, Inc. (Grand Central) from letters issued by the Department of Environmental Resources (DER). The first of these letters--dated March 21, 1988--pointed out several technical deficiencies in Grand Central's pending application for an amendment to its solid waste permit. Grand Central filed an appeal from this letter on April 25, 1988 (EHB Docket No. 88-163-F). The second letter--dated April 15, 1988--advised Grand Central of steps which must be taken to bring the same application in line with the new Municipal Waste Management Regulations, 25 Pa. Code Ch. 271. Grand Central filed its appeal from this letter on May 26, 1988. (EHB Docket No. 88-211-F)

DER filed a motion to dismiss both of these appeals on July 11, 1988. With regard to the appeal at Docket No. 88-163-F, DER points out that the parties have stipulated that Grand Central received the March 21 letter on March 23, yet did not file its appeal with the Board until April 25, 1988. Thus, the appeal was filed more than thirty days after Grand Central received the March 21 letter. Similarly, with regard to the appeal at Docket No. 88-211-F, DER states that the parties have stipulated that Grand Central received DER's April 15 letter on April 19, yet did not file its appeal until May 26, 1988, a lapse of more than thirty days. Since both of the appeals were filed more than thirty days after Grand Central received the letters, DER contends that the Board lacks jurisdiction to hear the appeals. 25 Pa. Code §21.52, Rostosky v. Commonwealth, DER, 26 Pa. Commw. 478, 364 A.2d 761 (1976).

Grand Central filed a reply to the motion to dismiss on July 29, 1988. This reply is, in essence, a request for leave to file the appeals nunc pro tunc; the reply does not deny that the appeals were filed late. Grand Central alleges that the Board should grant it leave to file the appeals nunc pro tunc because it was attempting to resolve the disputes underlying the appeals, and that the appeals were only filed when "it became apparent that a resolution was not imminent" (Reply, para. 2). Grand Central also avers that DER will not be prejudiced by allowing the filing of the appeals nunc pro tunc, and that the issues raised in the appeals are "significant in the solid waste disposal industry and should therefore be heard by this Board" (Reply, para. 4). Finally, Grand Central contends that it is entitled to a hearing on whether the appeals may be filed nunc pro tunc.

It is settled law that the Board only has jurisdiction to decide appeals which are filed in writing with the Board within thirty days after the

party has received notice of DER's action. 25 Pa. Code §21.52(a), Rostosky v. Commonwealth, DER, 26 Pa. Commw. 478, 364 A.2d 761 (1976), Appalachian Industries, Inc. v. DER, 1987 EHB 325. The Board may, however, grant leave to file an appeal nunc pro tunc when good cause is shown. 25 Pa. Code §21.53(a). What constitutes "good cause" is defined by common law standards for nunc pro tunc cases. Id. Thus, the Board permits filing of an appeal nunc pro tunc when fraud or a breakdown in the Board's procedures contribute to the tardy filing of an appeal. Borough of Youngwood v. DER, 1986 EHB 1070, Petricca v. DER, 1984 EHB 519, East Side Landfill Authority v. DER, 1982 EHB 299. In addition, an appeal nunc pro tunc will lie when non-negligent acts of a third party not part of the litigtion process cause the tardy filing. Roderick v. Commonwealth, State Civil Service Commission, 76 Pa. Commw. 329, 463 A.2d 1261 (1983).

In this case, Grand Central has not cited any legal authority for its argument that it should be granted leave to file its appeals nunc pro tunc because it was attempting to settle the matter with DER. We seriously doubt that any such authority could be found. In fact, it is a common practice in such cases to file a "protective appeal" and then to attempt to settle the dispute. In addition, Grand Central's argument that DER has not been prejudiced by the delay in filing the appeals and that the appeals involve "significant issues" are also unpersuasive. Neither of these arguments gives a legitimate reason why the appeals were not timely filed in the first place, which is the key element in ruling upon a request for leave to file an appeal nunc pro tunc.

With respect to Grand Central's contention that it is entitled to a hearing on its right to have the appeals filed nunc pro tunc, Grand Central

has not stated specifically what facts it intends to prove at such hearing. Even if Grand Central proved its contentions that it was attempting to settle the cases, that DER has not been prejudiced by the delay in filing the appeals, and that the appeals involve significant issues in the solid waste disposal industry, it would still have failed to establish a sufficient basis for filing the appeals nunc pro tunc. Therefore, a hearing would be a waste of the Board's resources.

ORDER

AND NOW, this 30th day of August, 1988, it is ordered that:

1. The motion filed by the Department of Environmental Resources to dismiss the appeals at Docket Nos. 88-163-F and 88-211-F is granted, and the appeals are dismissed.

2. The request of Grand Central Sanitary Landfill, Inc. for leave to file its appeals nunc pro tunc is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Robert D. Myers

ROBERT D. MYERS, MEMBER

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: August 30, 1988

cc: **For the Commonwealth, DER:**
Kenneth A. Gelburd, Esq.
Philadelphia, PA
For Appellant:
Leonard N. Zito, Esq.
Bangor, PA

nb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101
717-787-3483
TELECOPIER: 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

SRP COAL COMPANY, INC., ROBERT C. PENOYER t/a D. C. PENOYER AND COMPANY	:	
v.	:	**EHB Docket No. 85-154-M**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** August 31, 1988

OPINION AND ORDER SUR
MOTION TO LIMIT ISSUES

Synopsis

A motion to limit issues is granted where a previous opinion by the Board granting the Department of Environmental Resources' motion for summary judgment established appellant's liability for two of the three discharges at issue in the present appeal.

OPINION

This matter was initiated by SRP Coal Company, Robert C. Penoyer t/a D. C. Penoyer and Company[1] on April 26, 1985. Penoyer was contesting Compliance Order 85 N 029 (the 1985 Compliance Order), which was issued by the Department of Environmental Resources (Department) on March 26, 1985, and which required Penoyer to cease operations at its Rougeux #1 mine in Covington Township, Clearfield County, as a result of Penoyer's failure to treat Discharges 1 and 2 in accordance with the terms and conditions of a consent

[1] Penoyer is the successor of SRP Coal Company, Inc., and, as such, has assumed all rights and obligations arising under SRP Coal Company's permits. See Penoyer v. DER, 1984 EHB 919.

order and agreement entered into by the Department and Penoyer on April 5, 1983. The 1985 Compliance Order cited Penoyer for an additional discharge and ordered Penoyer to treat this third discharge (Discharge 3) and file an abatement plan by May 3, 1985.

On December 31, 1987, the Department filed a motion to limit issues, alleging that since responsibility for two of the discharges contested by Penoyer in this appeal has been resolved by a prior Board order, Penoyer is collaterally estopped from relitigating those issues. Penoyer did not respond to the Department's motion.

SRP Coal Company, Penoyer's predecessor, had appealed a previous Department order of December 1, 1982,[2] requiring it to treat all discharges on the site, including Discharges 1 and 2. On March 19, 1987, the Board issued an opinion and order granting the Department's motion for summary judgment in that appeal and holding Penoyer responsible for Discharges 1 and 2. Robert C. Penoyer t/a D. C. Penoyer & Co. v. DER, 1987 EHB 131.

The doctrine of collateral estoppel prohibits the relitigation of matters previously adjudicated. To invoke the doctrine of collateral estoppel, the following elements must be met:

> 1. The issue is identical to the issue in prior litigation;
>
> 2. There is a final judgment on the merits;
>
> 3. The party against whom collateral estoppel is asserted was a party to the prior action, or was in privity with that party; and
>
> 4. The party against whom it was asserted has had a full and fair chance to litigate the issue.

Schubach v. Silver, 461 Pa. 366, 336 A.2d 328, 333-34 (1975).

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[2] Docket No. 82-303-M.

All of the elements of collateral estoppel are met in this case. Penoyer was a party to the litigation at Docket No. 82-303-M and fully litigated the issues, the issues at Docket No. 82-303-M pertained to Penoyer's liability for Discharges 1 and 2 in the prior proceeding, and a summary judgment was entered by the Board. Since collateral estoppel applies here, Penoyer will be precluded from relitigating the issue of its liability for Discharges 1 and 2, and the issues in this appeal will be limited to those dealing with Discharge 3.

O R D E R

AND NOW, this 31st day of August, 1988, it is ordered that the Department of Environmental Resources' motion to limit issues is granted, and the issues in this appeal are limited to Penoyer's liability for Discharge 3.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: August 31, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Michael J. Heilman, Esq.
Central Region
For Appellant:
Alan F. Kirk, Esq.
KRINER, KOERBER & KIRK
Clearfield, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101
717-787-3483
TELECOPIER: 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

MAX FUNK, WILBUR E. JOHNSON and WILLIAM GLOECKLER	:	EHB Docket No. 87-078-W
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
ERIE ENERGY RECOVERY COMPANY, INC., Permittee	:	Issued: August 31, 1988

OPINION AND ORDER SUR MOTION TO DISMISS FOR LACK OF STANDING

Synopsis

An appeal will not be dismissed for lack of standing where the facts alleged are sufficient to establish the potential for direct, immediate and substantial harm to appellants.

OPINION

This case was initiated with the March 3, 1987 filing of a notice of appeal by Max Funk, Wilbur E. Johnson and William Gloeckler (Appellants) challenging the February 5, 1987, issuance of a solid waste management permit and air quality plan approval by the Department of Environmental Resources (Department) to Erie Energy Recovery Company, Inc. (EERC). The permit and plan authorized the construction of a waste-to-energy incinerator facility in Erie.

On September 22, 1987, EERC filed a motion to dismiss the appeal, alleging that Appellants have suffered no harm of a substantial, direct or

immediate nature and, therefore, Appellants lacked standing to bring this appeal. Based on its deposition of Appellants, EERC contends that the only interest demonstrated by Appellants was the general and abstract interest of all citizens in having the law properly enforced.

Appellants filed a brief opposing the motion on October 15, 1987, responding that they will suffer a direct injury, since they live within one-half mile of the incinerator and its dispersion area and their health and property may be placed in jeopardy. They argue, in the alternative, that they have standing to bring this appeal under a private attorney general theory pursuant to Article 1, Section 27 of the Pennsylvania Constitution, or to pursue the action under the civil remedies provisions of the state and federal air pollution control statutes.

EERC filed a response to Appellants' brief on January 25, 1988, reiterating its argument that Appellants have not met the "person aggrieved" test for standing and challenging Appellants' private attorney general theory.

The Commonwealth has remained neutral concerning the substantive merits of the motion to dismiss. It did apprise the Board, in a letter of February 1, 1988, of a recent Commonwealth Court decision, Commonwealth, et al. v. PBS Coals, Inc., et al., ___ Pa.Cmwlth. ___, 534 A.2d 1130 (1987), which deals with the rights of individual citizens to enforce the environmental rights amendment to the Pennsylvania Constitution.

The basic principles of standing require an aggrieved party to have an interest in the subject matter litigated which is substantial, immediate, and direct. William Penn Parking Gargage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). In the William Penn case, the Supreme Court specifically rejected the argument advanced by EERC that Appellants have no

standing because their interest is no different from that of the general public, concluding that the standing test enunciated in William Penn "does not deny relief to one injured by breach of a public duty simply because many others have suffered a similar injury resulting from that breach." William Penn, at 286.

The Appellants here allege, and EERC has not disputed, that they all live within one-half mile of the incinerator site, and, according to EERC's application documents, all are within the dispersion area of the incinerator. All Appellants contend they are detrimentally affected and aggrieved by the permits due to possible health effects of pollutant emissions from the incinerator which they allege will not be in compliance with applicable federal control requirements for municipal solid waste incinerators. The threat of possible health effects was held to confer standing on a citizens' group in Throop Property Owners Association v. DER, Docket No. 87-185-W (Opinion and order issued April 28, 1988), and we find a similar situation here. The facts alleged by Appellants are sufficient to establish the potential for direct, immediate and substantial harm to them under the William Penn test.

We, therefore, find that Appellants have standing to pursue their appeal under the William Penn test. As a result, it is unnecessary to address the private attorney general theory at this time.

O R D E R

AND NOW, this 31st day of August, 1988, it is ordered that Erie Energy Recovery Company's motion to dismiss the appeal of Max Funk et al. for lack of standing is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: August 31, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Ward T. Kelsey, Esq.
Western Region
For Appellant:
Paul D. Shafer, Jr., Esq.
Louis J. Stack, Esq.
SHAFER, SWICK, BAILEY,
IRWIN AND STACK
Meadville, PA
For Permittee:
Eugene E. Dice, Esq.
Harrisburg, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101
717-787-3483
TELECOPIER: 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

RONALD BURR	:	**EHB Docket No. 87-434-R**
ROY AND MARCIA CUMMINGS	:	**EHB Docket No. 87-435-R**
CHARLES AND MARY LOU HAUDENSHIELD	:	**EHB Docket No. 87-436-R**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: August 31, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A motion to dismiss appeals for lack of jurisdiction is denied. Section 24.1 of the Subsidence Act specifically giving the Environmental Hearing Board jurisdiction to hear appeals from denial of mine subsidence insurance claims to the Coal and Clay Mine Subsidence Insurance Board prevails over §16 which generally states the powers of that Board. Section 24.1, which deals with subsidence insurance contractual disputes, prevails over §4 of the Board of Claims Act, which governs contractual disputes generally.

OPINION

On October 9, 1987, appeals were filed by Ronald Burr (EHB Docket No. 87-434-R), Ray and Marcia Cummings (EHB Docket No. 87-435-R), and Charles and Mary Lou Haudenshield (EHB Docket No. 87-436-R) (collectively, Appellants) from the September 10, 1987 denial of mine subsidence damage

claims Nos. B-1865, B-1786 and B-1876, respectively, by the Coal and Clay Mine Subsidence Insurance Fund (Subsidence Fund). Each of the Appellants lives on Stonebrook Drive, McMurray, Washington County and each claims damages to their respective residences due to coal mine subsidence. The Subsidence Fund is administered by the Coal and Clay Mine Subsidence Insurance Board (Subsidence Board), which is chaired by the Secretary of the Department of Environmental Resources, and also composed of the Commissioner of Insurance and the State Treasurer. The Subsidence Fund and Subsidence Board were created by the Act of August 23, 1961, P. L. 1068, as amended, 52 P. S. §3201 et seq. (Subsidence Act).

On December 24, 1987, DER filed a motion to dismiss these appeals for lack of jurisdiction. Since the Appellants' claims against the Subsidence fund were denied because the damage to their respective structures was not the result of mine subsidence, DER argues that the Board of Claims properly has jurisdiction to review the denial. Applying the tenets of the Statutory Construction Act, 1 Pa.C.S.A. §1501 et seq., DER urges us to disregard the language of §24.1 of the Subsidence Act, 52 P.S. §3224.1, specifically conferring jurisdiction upon us to hear appeals from anyone aggrieved by an action of the Subsidence Board. DER contends that the language of §16 of the Subsidence Act, 52 P.S. §32.16, which is, in part, a recitation of the general powers of the Subsidence Board, is a more specific provision of the Subsidence Act and that, by virtue of §1933 of the Statutory Construction

Act. 1 Pa.C.S.A. §1933[1], it governs review of the Subsidence Board's denial of damage claims.

Appellants oppose DER's motion, contending that §24.1 of the Subsidence Act is clear and unambiguous in prescribing an appeal to the Environmental Hearing Board for persons aggrieved by an action of the Subsidence Board. Further, they argue that DER's reliance on §1933 of the Statutory Construction Act, 1 Pa.C.S.A. §1933, to vest jurisdiction in the Board of Claims is erroneous, because §24.1 is more specific than §16. Appellants also point out that §24.1 of the Subsidence Act was enacted subsequent to 72 P.S. §4651-4 (which defined the Board of Claims jurisdiction) and, therefore, by virtue of §1933 of the Statutory Construction Act, 1 Pa.C.S.A. §1933, §24.1 of the Subsidence Act would prevail to confer jurisdiction to the Environmental Hearing Board.

Our resolution of this matter necessarily requires an examination of §§16 and 24.1 of the Subsidence Act, as well as §4651.4 of the Act defining the jurisdiction of the Board of Claims. Section 16 of the Subsidence Act, 52 P.S. §3216, states in toto:

> In every case where a claim is made against the fund, the fund shall be entitled to every defense against such claim under the policy and shall be subrogated to every right of the subscriber arising out of such accidents against any third persons. The fund may, in the name of

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[1] Section 1933 of the Statutory Construction Act, 1. Pa. C.S.A. §1933, upon which DER relies, states:

> Whenever a general provision in a statute shall be in conflict with a special provision in the same or another statute, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions is unreconcilable, the special provisions shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest intention of the General Assembly that such general provision shall prevail.

> the fund, sue or be sued to enforce any right given against or to any subscriber or other persons under this act.

Section 24.1 of the Subsidence Act, 52 P.S. §3224.1, states in toto:

> Any party aggrieved by an action of the board hereunder shall have the right to appeal to the Environmental Hearing Board.

Contrary to DER's suggestion, §16 of the Subsidence Act does not in any fashion address the remedy available to a dissatisfied claimant against the Subsidence Fund; it is merely a statement of the powers of the Subsidence Fund. It can hardly be in conflict with §24.1, as it does not address the same subject. And, even if it were in conflict with §24.1, §24.1 is specific as to the issue of review of actions by the Subsidence Board and, by virtue of §1933 of the Statutory Construction Act, 1 Pa.C.S.A. §1933, it prevails.

DER's arguments regarding the Board of Claims' jurisdiction over subsidence claim denials are equally unpersuasive. Jurisdiction is conferred upon the Board of Claims by §4 of the Act of May 20, 1937, P.L. 728, as amended, 72 P.S. §4651-4 (the Board of Claims Act), to hear and determine all claims against the Commonwealth arising from contracts hereafter entered into with the Commonwealth, where the amount in controversy amounts to $300.00 or more. Both §4 of the Board of Claims Act and §24.1 of the Subsidence Act address remedies to contest contractual claims against the Commonwealth.[2] However §4 of the Board of Claims Act deals generally with contractual claims, while §24.1 of the Subsidence Act deals particularly with contractual claims arising out of subsidence insurance contracts. Because the provisions of the two statutes conflict, the more specific, §24.1 of the Subsidence Act,

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[2] Section 4 of the Board of Claims Act was originally enacted in 1937 (Act of May 20, 1937, P.L. 728), while the Subsidence Act was first adopted in 1961 (Act of August 23, 1961, P.L. 1068). Jurisdiction over subsidence insurance claims appears to have been vested in the Board of Arbitration (now Board of Claims) until the 1972 amendments to the Subsidence Act (when §24.1 was added).

prevails over the general provisions of §4 of the Board of Claims Act. 1 Pa.C.S.A. §1933.

In view of the foregoing, we conclude that the Environmental Hearing Board has jurisdiction to hear the instant appeals.

ORDER

AND NOW, this 31st day of August, 1988, it is ordered that the Department of Environmental Resources' Motion to Dismiss is denied.

ENVIRONMENTAL HEARING BOARD

WILLIAM A. ROTH, MEMBER

DATED: August 31, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Virginia Davison, Esq.
Bureau of Regulatory Counsel
For Appellant:
Howard J. Wein, Esq.
BERKMAN, RUSLANDER POHL LIEBER & ENGEL
Pittsburgh, Pa.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101
717-787-3483
TELECOPIER: 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

KERRY COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 86-640-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** September 1, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS FOR MOOTNESS

Synopsis

An appeal from an Order will not be dismissed as moot, even though it has been complied with, if the Order has not been withdrawn.

OPINION

On May 27, 1988, the Department of Environmental Resources (DER) filed a Motion to Dismiss for Mootness the above-captioned appeal of Kerry Coal Company (Kerry). After Kerry filed Objections to the Motion on June 2, 1988, the parties were ordered to prepare and file legal memoranda. DER complied on July 8, 1988, and Kerry complied on July 15, 1988. The matter is now ready for disposition.

DER's Motion is premised on the allegation that, since Kerry has fully complied with DER's administrative order (Order), dated November 17, 1986, there is no relief that the Board can grant Kerry in this proceeding. Kerry maintains, however, that DER's Order was an abuse of discretion from the outset. Since it has not been withdrawn or vacated, it will remain on Kerry's compliance record and affect future permit proceedings.

Kerry has conducted a surface coal mining operation in Big Beaver Borough, Beaver County, pursuant to Surface Mine Permit No. 04823005 issued by DER. In its Order, DER found that (1) Kerry's mining activities had adversely affected the water quality in a well situated on the property of Mr. and Mrs. Robert McKim (McKim) and (2) Kerry had failed to provide a replacement water supply. Kerry was ordered, inter alia, to provide a temporary supply of water to the McKims within 48 hours and to provide a permanent supply within 45 days.

Kerry filed a Notice of Appeal from the Order on November 24, 1986, and petitioned for a supersedeas. On December 10, 1986, the parties entered into a Consent Supersedeas which, after acknowledging that Kerry had provided a temporary supply of water to the McKims within 48 hours, suspended the remaining portions of the Order so long as Kerry continued to provide the temporary supply pending the final disposition of the appeal. The Board approved the Consent Supersedeas on December 30, 1986.

The negotiations that produced the Consent Supersedeas continued in an effort to resolve the entire controversy. An oral agreement was reached on June 16, 1987, but its terms are in dispute. It is undisputed, however, that Kerry performed certain work on the McKim's well as part of the agreement and that, as a result of this work, the water quality improved. On September 10, 1987, DER notified Kerry that Kerry had satisfied the terms of the Order and could cease the temporary supply of water to the McKims.

Kerry argues that it tried to convince DER from the beginning that the problems with the McKim's well stemmed from a sunken wellhead and a deteriorated casing that allowed the entry of surface water, including water backflushed through the McKim's water treatment system. Kerry asserts that it agreed to replace the casing, raise the wellhead and divert the backflushed

water on the strength of oral assurances from DER that the Order would be withdrawn if Kerry's efforts proved successful. According to Kerry, the water quality in the McKim's well improved immediately. Nonetheless, DER refused to withdraw the Order.

DER, on the other hand, maintains that the June 16, 1987, oral agreement determined the remedial work that Kerry would perform on the McKim's well to satisfy its obligations under the Order. After completion of the work, Kerry was to withdraw its appeal.

It is obvious that, while each of the parties firmly believed that a meeting of minds had been reached, no consensus occurred either on the purpose to be served by Kerry's work on the well or on the effect that such work would have on the Order and the appeal. Absent any agreement on these points, the Board must reach its decision by the application of decisional and statutory law.

A case is considered moot when a party has been deprived of the necessary stake in the outcome or when the Board is no longer able to grant effective relief. In Re Gross, 476 Pa. 203, 382 A.2d 116 (1978); Commonwealth v. One 1978 Lincoln Mark V, 52 Pa. Cmwlth, 353, 415 A.2d 1000 (1980). Where a surface mining order is concerned, an operator still has a stake in the outcome of the case even though the order has been complied with. Al Hamilton Contracting Company v. Commonwealth of Pennsylvania, Dept. of Environmental Resources, 90 Pa. Cmwlth. 228, 494 A.2d 516 (1985). This conclusion recognizes the fact that an operator's record of past violations has a critical impact upon the issuance, reissuance and transfer of permits, upon the issuance and renewal of licenses and upon the assessment of civil penalties. See, e.g., 25 Pa. Code §86.36, §86.37 (a) (8), (9) and (10), §86.55 (g) (1) and (2), §86.56 (c) (1), §86.61, §86.63, §86.194 (b) (6),

§87.16, §87.17. If an operator is prevented from fully litigating a DER order, because he has complied with it, he will be deprived of any opportunity to strike the alleged violation from his compliance record.

The present case does not fall within that category, according to DER, because, in paragraph 7 of its Motion to Dismiss for Mootness, DER has stated the following:

> Kerry will not suffer any collateral administrative or regulatory consequences as a result of the Department's issuance of the Order. In this case, the Department's finding that Kerry had adversely affected the McKim's private water supply was never treated by the Department as a violation of law. Therefore, the Department never assessed, nor will it assess, any penalties against Kerry for either the changes in the ground water quality or for the effects on the McKim's water supply resulting from the operation of the McKee Mine. Moreover, the Department never entered, nor will it enter, into Kerry's compliance history the fact that Kerry adversely affected the McKim's water supply. Therefore, the fact that Kerry has adversely affected the water supply never was used and never will be used in determining the company's eligibility for future permits under Section 3.1(d) of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.3a(d); also, the fact never was used and never will be used in assessing future civil penalties against Kerry, under 25 Pa. Code §86.194.

DER argues that these assurances protect Kerry from any future adverse consequences stemming from the alleged degradation of the McKim's well. Since paragraph 7 does not address the issuance and renewal of licenses under Section 3.1(b) of the Surface Mining Conservation and Reclamation Act (SMCRA), supra, 52 P.S. §1396.3a(b), the assurances could be dismissed as inadequate for that reason alone. Even if the matter of licenses were included, however, the assurances would not satisfy Board precedent. In Bell Coal Company v. DER, 1987 EHB 883, the Board held that, absent evidence that DER has "withdrawn" the orders giving rise to the appeal, the case would not be dismissed as moot.

DER has not withdrawn its Order in the present case. It intends to keep it alive, but is willing to assure Kerry that the Order will never be used to Kerry's prejudice. The Board can only speculate on DER's motives. No attempt has been made to explain why the Order should not be withdrawn if it is never to be used against Kerry. Without such an explanation, there is no reason to depart from the ruling in the Bell Coal Company case, supra. Accordingly, since DER has not withdrawn its Order, the case is not moot.

ORDER

AND NOW, this 1st day of September, 1988, it is ordered that the Motion to Dismiss for Mootness filed by the Department of Environmental Resources is denied.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS, MEMBER

DATED: September 1, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Diana J. Stares, Esq.
Western Region
For Appellant:
Bruno A. Muscatello, Esq.
Butler, PA

mjf

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101
717-787-3483
TELECOPIER: 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

THEODORE V. SKOTEDIS and TEDD'S LANDING, INC.	:	
v.	:	**EHB Docket No. 88-181-W**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
BOROUGH OF SHAMOKIN DAM, Permittee	:	**Issued:** September 2, 1988

OPINION AND ORDER SUR
MOTION TO DISMISS AS MOOT

Synopsis

A permittee's motion to dismiss an appeal of the grant of a permit to place fill in a floodplain as moot because fill deposition has been completed is denied where the permit authorizes placement of other fill and the installation of a culvert. Permittee's claim that the Board could provide no effective relief to the appellant because it could not order remedial work at the site was also rejected, since the Board has the authority to order the suspension of the permit. And, the Board's examination of whether the permit was issued in compliance with other applicable statutes did not result in its rendering of an advisory opinion.

OPINION

This matter was initiated on May 3, 1988 with the filing of a notice of appeal by Theodore V. Skotedis and Tedd's Landing, Inc. (collectively,

Skotedis) seeking review of the Department of Environmental Resources' (Department) issuance of a permit pursuant to the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 et seq. (the DSEA), to the Borough of Shamokin Dam (Borough), Snyder County. The permit authorized the placement of fill material within the 100 year floodplain of the Susquehanna River in Shamokin Dam. Among other things, Skotedis contends that the permit was issued in violation of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. (the SWMA), and in contravention of 25 Pa.Code §105.17, a rule adopted under the DSEA which regulates the placement of obstructions in wetlands.

Skotedis also filed a petition for supersedeas, but that petition was dismissed by a May 10, 1988 stipulation of the parties. A petition to intervene in the matter by Nestlerode Contracting was denied by Board order dated June 23, 1988. The Board refused to reconsider its denial of the petition to intervene by order dated August 31, 1988.

We have now before us the Borough's June 15, 1988 motion to dismiss the appeal for mootness. The Borough alleges that because the placement of the fill material authorized under the DSEA permit was completed, there is, even by Skotedis' admission in its petition for supersedeas, no relief for the Board to grant. As to Skotedis' claim that the permit was issued in contravention of the SWMA, the Borough asserts that it is impossible for the Board to grant any effective relief because the Board lacks the power to issue an advisory opinion or issue an affirmative order requiring the Borough to take corrective action.

Skotedis, by response of July 21, 1988, has opposed the Borough's motion. Skotedis alleges that although placement of fill has been completed,

it has not been completed in accordance with the terms and conditions of the permit. The permit, Skotedis notes, does not expire until December 31, 1990 and authorizes the placement of additional wastes, including the concrete and stone piers of the Bainbridge Street Bridge which were still standing in the Susquehanna River. Because the Board can determine the legality of placing additional fill on the site, Skotedis argues that effective relief can be granted by the Board.

The Board will dismiss a matter as moot if, during the course of an appeal, an event occurs which deprives us of our ability to provide meaningful relief. Keystone Sanitation Co., Inc. v. DER and Union Township, EHB Docket No. 84-349-M (Opinion and order issued August 5, 1988). Our examination of the terms and conditions of the Borough's permit, as well as the relevant regulations promulgated under the DSEA, leads us to conclude that this matter is not moot and that there is relief which can be afforded to Skotedis by the Board.

The permit authorizes the Borough to "place and maintain fill within the 100 year floodplain of the Susquehanna River in Shamokin Dam Borough, Snyder County" (emphasis added) and extends until December 31, 1990 (Condition 11). The permit also authorizes, in Special Condition C, the installation of a culvert. Thus, even if placement of the fill were completed, as the Borough alleges, the permit still authorizes maintenance of the fill, as well as installation of a culvert. Therefore, the completion of fill placement does not render this controvery moot.

As to the Borough's claim that we can provide no meaningful relief to Skotedis because we are not empowered to render advisory opinions or issue orders compelling affirmative action, we acknowledge that we are not authorized to issue advisory opinions. Eva E. and Joseph Varos v. DER, 1985

EHB 892. However, the issuance of an advisory opinion would not be the result of allowing Skotedis to maintain this appeal. In reviewing the Department's actions in issuing this permit under the DSEA, we must determine whether the Department's issuance of the permit was an abuse of discretion or an arbitrary exercise of its duties. Ohio Farmers Insurance Co. v. DER, 73 Pa.Cmwlth.18, 457 A.2d 1004 (1983). This requires us, at the very least, to make a determination as to whether the Department's issuance of the permit was in accordance with the applicable statutes and regulations.

Contrary to the Borough's claim that the issue of compliance with the SWMA is not properly before us and any adjudication of this issue would be nothing more than an advisory opinion, the issue is properly before us because the rules and regulations adopted pursuant to the DSEA compel such an examination. In particular, 25 Pa.Code §105.14(b)(6) requires that:

> (b) In reviewing a permit application under this chapter for construction or substantial modification of a...water obstruction or encroachment, the Department will consider the following factors:
>
> * * * * *
>
> (6) Compliance by the proposed project with all applicable laws administered by the Department, the Fish Commission and any river basin commission created by interstate compact.
>
> * * * * *
>
> (emphasis added)

Further, 25 Pa.Code §105.21(a) authorizes the Department to issue a permit if it determines that:

> (1) The application is complete.
>
> (2) The proposed project or action complies with the standards and criteria of this title and with other laws administered by the Department, the Fish Commission and a river basin commission created by interstate compact.

> (3) The proposed project or action will adequately protect public health, safety and the environment.
>
> (4) The proposed project or action is consistent with the environmental rights and values secured by Pa. Const. Art. I, §27 and with the duties of the Commonwealth as trustee to conserve and maintain public natural resources of Pennsylvania.
>
> (emphasis added)

And, 25 Pa.Code §105.272 provides that:

> No waste materials of a type shall be used in the construction of fills, levees or similar structures, except under the Solid Waste Management Act (35 P.S. §§6018.101-6018.1003) and Chapter 75 (relating to solid waste management).

Because of the mandates of these regulations, the issue of whether the Department violated the SWMA in granting this permit under the DSEA is now properly before us.

Finally, as to the Borough's claim that we can provide no effective relief because we cannot order affirmative remedial action, we do not believe, the question of authority aside, that ordering remedial action by the Borough is the only effective relief that could be afforded. If we were to decide that the Department had abused its discretion in issuing this permit, we could certainly suspend the permit and remand the permit to the Department for further action, thereby preventing the placement of additional fill or the installation of the culvert on the site.

O R D E R

AND NOW, this 2nd day of September, 1988, it is ordered that:

1) The Borough of Shamokin Dam's motion to dismiss the appeal of Theodore V. Skotedis and Tedd's Landing as moot is denied.

2) Theodore V. Skotedis and Tedd's Landing shall file their pre-hearing memorandum on or before September 21, 1988.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: September 2, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Timothy Searchinger, Esq.
For Appellant:
Bernard A. Labuskes, Jr., Esq.
McNEES, WALLACE & NURICK
Harrisburg, PA
For Permittee:
Eugene E. Dice, Esq.
Harrisburg, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101
717-787-3483
TELECOPIER: 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

JOSEPH R. AMITY, t/d/b/a AMITY SANITARY LANDFILL	:	
v.	:	**EHB Docket No. 88-318-W**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** September 2, 1988

OPINION AND ORDER SUR PETITION FOR SUPERSEDEAS AND MOTION TO DENY PETITION FOR SUPERSEDEAS

Synopsis

A motion to deny a petition for supersedeas without hearing is granted where the relief sought by the petition is authorization to conduct disposal of solid waste on the area for which a permit modification had been denied by the Department of Environmental Resources. The relief requested would drastically alter the status quo ante and, as such, would contradict the purpose of a supersedeas.

OPINION

This matter was initiated by the August 16, 1988 filing of a notice of appeal by Joseph R. Amity t/d/b/a Amity Sanitary Landfill (Amity). Amity is seeking the Board's review of the Department of Environmental Resources' (Department) July 18, 1988 denial of Amity's application to modify Solid Waste Permit No. 100932 to allow for a 4.5 acre lateral expansion of its disposal facility in the borough of Taylor, Lackawanna County. Amity's notice of

appeal was accompanied by a petition for supersedeas alleging that Amity was entitled to approval of its expansion request under the applicable regulations and, therefore, likely to succeed on the merits of his appeal; that Amity would suffer irreparable harm in that he would be forced to cease landfilling and dishonor commitments with waste generators; and that municipalities with which Amity had contracted for waste disposal would suffer economic harm if forced to dispose of their wastes at other sites at higher rates, as well as harm to the welfare of their citizens.

The Department, by motion dated August 22, 1988, requested the Board to deny the petition without a hearing pursuant to 25 Pa.Code §21.77(c), since the relief requested by Amity would, in essence, amount to the issuance of the disputed permit modification. This, the Department argues, would be an alteration of the status quo ante in contravention of the purpose of a supersedeas. For the reasons set forth below, we will grant the Department's motion and deny Amity's request for a supersedeas without hearing.

In ruling on petitions for supersedeas, this Board has consistently held that it could not grant relief which would alter the status quo ante. Staying the Department's permit denial and allowing an appellant to conduct the activity for which the Department has denied authorization does not preserve the status quo; rather, it drastically alters the status quo, as, in reality, it operates as a grant of the authorization. Raymark Industries, Inc. v. DER, 1986 EHB 176 and Hepburnia Coal Co. v. DER, 1985 EHB 713.

The relief sought by Amity in its petition for supersedeas is an alteration of the status quo which would permit Amity to expand its solid waste disposal activities to an area presently not permitted for waste disposal. Under our precedent, we have no authority to grant Amity that relief. William Fiore v. DER, 1985 EHB 113, 412.

O R D E R

AND NOW, this 2nd day of September, 1988, it is ordered that the Department of Environmental Resources' motion to dismiss Joseph R. Amity's petition for supersedeas is granted.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: September 2, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Michael J. Heilman, Esq.
Kurt J. Weist, Esq.
Central Region
For Appellant:
Brigid E. Carey, Esq.
Scranton, PA
and
Anthony J. Mazullo, Jr., Esq.
Doylestown, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101
717-787-3483
TELECOPIER: 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

DEL-AWARE UNLIMITED, INC., et al.	:	
	:	
v.	:	**EHB Docket No. 88-075-M**
	:	**(Consolidated Appeals)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES,	:	**Issued:** September 6, 1988
et al.	:	

OPINION AND ORDER
SUR
PETITION FOR RECONSIDERATION

Synopsis

A Petition for Reconsideration of an order denying a joint Petition to Intervene will not be granted when the decision on the Joint Petition to Intervene was based on the failure to aver facts known at the time which allegedly show a direct, substantial and immediate interest. The Board may deny a Petition to Intervene without holding a hearing, and may consider objections filed to the Petition by other parties.

OPINION

On July 18, 1988, the Natural Resources Defense Council, Environmental Defense Fund, American Littoral Society, National Water Well Association, Pennsylvania Sierra Club,[1] Pennsylvania Federation of Sportsmen's Clubs, STAND, Paunacussing Watershed Association, Clean Energy Collective, Citizens for Environmental Rights, Consumer Education and Protection Association and Friends of the Earth in the Delaware Valley

[1] The Pennsylvania Sierra Club is listed in the title of the Petition but not in the body. This omission may have been inadvertent, and we will treat the Petition as including this organization.

(Petitioners) filed a Petition for Reconsideration of the Board's Order of June 28, 1988, denying a Joint Petition to Intervene filed by these same Petitioners.

In support of their current Petition, Petitioners assert that (1) they can show that they have a direct, substantial and immediate interest in the outcome of the case, (2) they are entitled to a hearing on their intervention request, and (3) objections to their intervention should not have been considered. Petitioners also attach to their Petition for Reconsideration a five-page exhibit describing the interest each organization has in this case.

North Penn and North Wales Water Authorities (NP/NW), permittees or intervenors in these consolidated proceedings, filed an Answer on August 8, 1988, opposing the Petition. Philadelphia Electric Company (PECO), permittee or intervenor in these consolidated proceedings, filed objections on August 23, 1988.

Petitions for Reconsideration are governed by the provisions of 25 Pa. Code §21.122. In essence, the Petitioners must persuade the Board that its initial decision (1) rests on a different legal ground than those treated by the parties, or (2) rests on facts which after-discovered evidence shows to be erroneous. The Board's initial decision was based primarily upon the Petitioners' failure to allege sufficient facts to show that they have a direct, substantial and immediate interest in these cases. Petitioners' efforts to supply additional facts at this point are not enough, because those facts were known and could have been alleged in the Petition for Intervention. 25 Pa. Code §21.122 (a) (2).

The other reasons advanced by Petitioners in their Petition for Reconsideration challenge the Board's procedure in disposing of the Petition

for Intervention. These reasons do not fall precisely within the scope of either paragraph (1) or paragraph (2) of 25 Pa. Code §21.122 (a); but, since they could not have been raised earlier, we will consider them now.

Petitioners cite Pa. R.C.P. 2329 as authority for imposing a hearing requirement on Petitions for Intervention. However, that rule applies only to civil actions or proceedings at law or in equity brought in or appealed to any court of record. (Pa. R.C.P. 2326). This Board does not fall into that category. 42 Pa. C.S.A. §§301 and 321. Instead, it is subject to the General Rules of Administrative Practice and Procedure (1 Pa. Code §§31.1 et seq.) to the extent that its own rules do not set up a different procedure.

The intervention rules set forth in 1 Pa. Code §§35.27 et seq. do not require a hearing. Nor do the Board's rules at 21 Pa. Code §21.62. This departure from civil practice can be explained on the ground that intervention before administrative agencies, while broader in scope, is regulated by the wide discretion vested in the agency to grant or deny an intervention request.

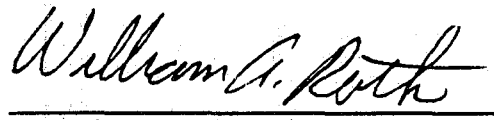
The General Rules of Administrative Practice and Procedure also permit an answer to be filed to a Petition for Intervention, providing that the failure to file one may be deemed a waiver of objections. 1 Pa. Code §35.36. This too is a departure from civil parctice which makes no provision for such an answer. Here again, the distinction arises from the broad nature of intervention allowed in administrative agency proceedings and the desirability of handling such applications with dispatch.

It is obvious that Petitioners' objections to the manner in which their Joint Petition to Intervene was disposed of procedurally are meritless.

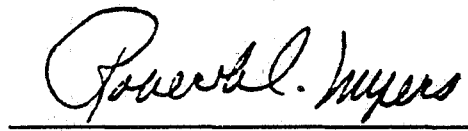
ORDER

AND NOW, this 6th day of September, 1988, the Petition for Reconsideration filed by the organizations listed above is denied.

ENVIRONMENTAL HEARING BOARD



WILLIAM A. ROTH, MEMBER



ROBERT D. MYERS, MEMBER

Chairman Woelfling did not participate in the decision of this case.

DATED: September 6, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Louise S. Thompson, Esq.
Eastern Region
For Appellants:
Robert J. Sugarman, Esq./Del-AWARE, et al.
James M. Neill, Esq./Friends of Branch Creek
For Permittees:
Lois Reznick, Esq./NWRA
Jeremiah J. Cardamone, Esq./NP/NW Water Authorities
Bernard Chanin, Esq./PECO

mjf

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ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101
717-787-3483
TELECOPIER: 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

ROBERT H. GLESSNER, JR.,	:	
	:	
v.	:	**EHB Docket No. 82-198-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** September 8, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A letter from the Department of Environmental Resources which notes violations and directs the permittee to undertake specific corrective actions is an appealable action, notwithstanding its being characterized as a notice of violation.

OPINION

Robert H. Glessner, Jr. (Glessner) initiated this matter on August 12, 1982 when he appealed a July 14, 1982 letter from the Department of Environmental Resources (DER) concerning alleged reclamation and discharge violations at Glessner's Lowery Surface Mine, located in Stonycreek Township, Somerset County. This six-year old appeal is currently scheduled for a hearing on the merits for October 3-5, 1988.

On September 1, 1988, DER filed a motion to dismiss this appeal as having been taken from a non-appealable action. Because of the closeness in time to the scheduled hearing, and although Glessner has not yet responded

to DER's motions, we are proceeding to rule because it is abundantly clear that DER's motion is completely without merit.

DER states that its letter informed Glessner of certain reclamation and discharge violations and advised Glessner that if he did not correct the alleged violations, DER would declare his bonds forfeit (Motion, Para. 4), DER also states that the letter contained no paragraph informing Glessner of his appeal rights (Motion, Para. 5). DER contends that its letter is merely a notice of violation and, therefore, not appealable since, it argues, Glessner's legal status quo has not been altered. DER also contends that there is no relief that this Board can grant since no bonds have been forfeited.

Notices of violations, absent some action affecting the violator's rights or duties, are not appealable. Perry Brothers Coal Company v. DER, 1982 EHB 501. Actions of DER are appealable only if they affect the personal or property rights, immunities, duties, liabilities, or obligations of the party. Chester County Solid Waste Authority v. DER, 1987 EHB 523.

The letter in question reads, in toto, as follows:

> This letter is a notice of violation on the above described operation, which has been affected by surface mining but not reclaimed.
>
> The operation was inspected by Mine Conservation Inspector Joseph Kaufman on December 12, 1981. The following violations of the Surface Mining Conservation and Reclamation Act, the Clean Streams Law, adopted rules and regulations under these laws and condition of the permit are described below for the above operation:
>
> 1) Acid discharge.
>
> 2) Iron discharge.
>
> You shall start corrective work on the violations, restoration and submit within thirty (30) days of receipt of this notification a plan and schedule for implementation of the plan to complete backfilling and treatment of

> discharge on the affected area. One copy of the plan and schedule shall be submitted to the Mine Inspector and one copy shall be submitted to the Ebensburg Office of the Bureau of Mining and Reclamation for approval.
>
> If you fail to provide the plan and schedule as required above, the Department will take action to declare a forfeiture on the bond under the provisions of Section 4(h) of the Surface Mining Conservation and Reclamation Act.
>
> The declaration of bond forfeiture by the Department is an irreversible action. After initiation of the forfeiture action, negotiations to withdraw the forfeiture through a satisfactory resolution will not be possible.
>
> (emphasis added)

The beginning of DER's letter indeed suggests that it ". . . is a notice of violation . . ." However, the title affixed to, or the characterization of, correspondence from DER does not necessarily establish the appealability of the correspondence. Chester County Solid Waste Authority v. DER, 1986 EHB 116.

For some reason not apparent to this Board, DER seems to have forgotten about the letter's third paragraph in making its motion. The inclusion of the word "shall" at several places in paragraph 3 imposes a clear, unmistakable and immediate obligation upon Glessner to begin corrective work on the discharge violations, commence backfilling and submit a plan for the completion of these activities. Thus, the letter does three things: informs Glessner of reclamation deficiencies and discharge violations; orders him to begin remedial action and submit a plan and schedule for final mitigation; and warns him of the consequences of not providing the required mitigation plan and schedule. In reality, the third paragraph is an order. An order from DER which notes violations and which directs specific corrective actions is an appealable action, notwithstanding its being characterized as a notice of violation. William H. Martin, Inc., v. DER, 1987 EHB 612.

The Board disagrees that there is no relief available to Glessner. As suggested by DER in Paragraph 21 of its motion, it could still forfeit Glessner's bond wholly or in part on the basis of the findings in the appealed from order. Thus, whatever may result from the Board's adjudication herein could affect any future DER enforcement action.

In view of the foregoing, we deny DER's motion.

ORDER

AND NOW, this 8th day of September, 1988, it is ordered that the Department of Environmental Resources' motion to dismiss the appeal of Robert H. Glessner, Jr. is denied.

ENVIRONMENTAL HEARING BOARD

WILLIAM A. ROTH, MEMBER

DATED: September 8, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Donald A. Brown, Esq.
Central Region
For Appellant:
Robert A. Glessner, Jr.
Berlin, Pa.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101
717-787-3483
TELECOPIER: 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

ROTHERMEL COAL CO., INC.	:	
	:	
v.	:	**EHB Docket No. 86-569-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: September 14, 1988

OPINION AND ORDER
SUR MOTION TO DISMISS
FOR LACK OF PROSECUTION

Synopsis

Appeal is dismissed for lack of prosecution where the Board has received no communication from the appellant for 17 months.

OPINION

This matter was initiated with the October 14, 1986 filing of a notice of appeal by Rothermel Coal Co., Inc. (Rothermel) seeking the review of two compliance orders issued by the Department of Environmental Resources (Department) on September 4, 1986. The orders, which related to Rothermel's Lykens Valley #5 Slope, a deep mine in Tremont, Schuylkill County, alleged that Rothermel had refused access to Department personnel and was conducting surface mining in an area adjacent to its deep mine without the necessary permits or operator's license.

The Board issued its customary pre-hearing order which required Rothermel to file a pre-hearing memorandum on or before January 5, 1987.

Rothermel, in a letter dated January 29, 1987, requested that the matter be continued so that it could finalize a settlement agreement with the Department. The Board thereupon continued the matter and required Rothermel to submit a status report on or before March 9, 1987. Rothermel advised the Board by letter dated March 26, 1987, that the execution of a consent adjudication was imminent.

There was no activity at the docket until July 18, 1988, when the Department filed a motion to dismiss for lack of prosecution. The Department alleged that it had received no communication from Rothermel since its receipt of a copy of Rothermel's March 26, 1987 letter to the Board.

The Board advised Rothermel's counsel in a letter dated July 26, 1988, that any response to the Department's motion was to be filed on or before August 8, 1988. Counsel of record notified the Board in a letter dated July 29, 1988, that Rothermel had not had any communication with his office for several months and that he believed his firm was no longer authorized to represent Rothermel.

The Board thereupon, by letter dated August 9, 1988, transmitted a copy of the Department's motion directly to Rothermel and advised it that any response must be filed with the Board by August 26, 1988. The Board has received no response from Rothermel.

It is apparent that Rothermel has no intention of prosecuting this appeal. The Board will no longer devote its resources to a fruitless attempt to compel Rothermel to pursue this matter.

O R D E R

AND NOW, this 14th day of September, 1988, it is ordered that the Department of Environmental Resources' motion to dismiss is granted, and the appeal of Rothermel Coal Co., Inc. is dismissed for lack of prosecution.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: September 14, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Michael J. Heilman, Esq.
Central Region
For Appellant:
Kenneth Rothermel
ROTHERMEL COAL CO., INC.
Hegins, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101
717-787-3483
TELECOPIER: 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

E. & L. EARTHMOVERS	:	
	:	
v.	:	**EHB Docket No. 86-675-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 16, 1988**

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

Summary judgment may be granted where there are no disputes as to material facts and where the movant is entitled to judgment as a matter of law. The Department of Environmental Resources (DER) has a mandatory duty to forfeit bonds posted where the operator has failed to bring its site into compliance with the Surface Mining, Conservation and Reclamation Act and the Clean Streams Law, and the regulations promulgated thereunder. Appellant's failure to respond to DER's request for admissions renders the subject matter of the requested admissions as admitted by the Appellant. There is no dispute that the site has not been backfilled, regraded and revegetated, that backfilling equipment was removed, that pit water accumulated at the site and that water monitoring had not been performed. Therefore, DER's forfeiture of the bonds was mandated by the applicable statutes, and DER is entitled to judgment as a matter of law.

OPINION

This matter was initiated by E. & L. Earthmovers, Inc. (E. & L.) with the December 16, 1986 filing of a notice of appeal from the Department of Environmental Resources' (DER) November 21, 1986 forfeiture of bonds relating to E. & L.'s surface mining site (the "Jer-Jon" mine) in Oliver Township, Jefferson County. DER's action was taken pursuant to the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. (SMCRA), and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1, et seq. (CSL). The "Jer-Jon" mine operated its mine pursuant to surface mining permit No. 33840109 (SMP) which was supported by Surety Bond No. SM3189. DER alleged that E. & L. failed to backfill and regrade concurrent with mining, removed backfilling equipment from the site, allowed water to accumulate in the pit area, and failed to comply with a DER order.

On May 23, 1988, DER filed a motion for summary judgment to which E. & L. has yet to respond, even though it was notified by the Board of the motion's pendency.

In its motion, DER details the compliance history of the Jer-Jon mine. On June 23, 1986, DER issued Compliance Order (CO) No. 86-K-195S, citing E. & L. for a water accumulation in the pit mine and directing it to pump and treat accumulated pit water by August 1, 1986. On August 11, 1986, DER issued CO No. 86-K-206S, citing E. & L. for its failure to comply with CO No. 86-K-195S. On June 30, 1986, DER issued CO No. 86-K-184-S which cited E. & L. for failing to backfill the area within sixty days of coal removal and for removing backfilling equipment from the affected area. E. & L. was directed to immediately commence backfilling of the area. On August 11, 1986, DER issued CO No. 86-K-203S citing E. & L. for failing to comply with CO No. 86-K-184-S.

Finally, on November 18, 1986, DER issued CO No. 86-K-160S citing E. & L. for failure to monitor surface and groundwater in the vicinity of its site and directing it to submit groundwater monitoring reports to DER by December 1, 1986. E. & L. failed to timely appeal any of the above COs.

DER contends that, by virtue of E. & L.'s failure to appeal the compliance orders enumerated, supra, the facts of the cited violations are established and impervious to attack in this bond forfeiture proceeding. DER further contends that, since E. & L. never responded to its November 9, 1987 request for admissions, E. & L. has admitted that it failed to correct any of the violations cited in the compliance orders and which form the basis of the instant forfeiture action. DER's requests for admissions included statements regarding the violations cited in each of the above discussed compliance orders issued to E. & L, the fact that E. & L. received these COs, and E. & L's failure to appeal each of the COs. DER argues that since there are no material facts in dispute and it has a mandatory duty to forfeit bonds where the operator fails to bring its site into compliance with SMCRA and the regulations promulgated thereunder, it is entitled to summary judgment.

The Board may grant summary judgment when the pleadings, depositions, and answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035; Summerhill Borough v. DER, 34 Pa. Cmwlth. 574., 383 A. 2d 1320 (1978).

Both §315 of the CSL, 35 P.S. 691. 315, and §4(d) of SMCRA, 52 P.S. §1396.4(d), provide for the posting of bonds for mine sites. The bonds must be conditioned upon faithful compliance with the requirements of the two statutes and regulations promulgated thereunder. Section 4 of SMCRA, 52

P.S. §1396.4(h), provides, in relevant part, as follows:

> "If the operator fails or refuses to comply with the requirements of the act in any respect for which liability has been charged on the bond, [DER] shall declare such portions of the bond forfeited..."

It has been held that §4 imposes a mandatory duty upon DER to forfeit the bonds for failure to comply with the requirements of SMCRA. See Morcoal Company v. DER, 74 Pa. Cmwlth. 108, 459 A. 2d 1303 (1983). Thus, if E. & L.'s violations of SMCRA and the CSL are established, DER has a duty to forfeit its bonds and is, therefore, entitled to summary judgment.

The material facts needed to resolve DER's motion involve the conditions at E. & L.'s mine site, as cited in the unappealed compliance orders, and which were also the subject of DER's request for admissions. Since E. & L. failed to challenge any of the COs, their factual bases are conclusively established. James E. Martin v. DER, 1987 EHB 100. Moreover, since E & L. filed neither answers nor objections to DER's requests for admissions, they are deemed admitted by E. & L. pursuant to Pa.R.C.P. §4014(b).

E. & L. has permitted water to accumulate in the pit at the Jer-Jon mine (CO 86-K-19S) and has not provided the required treatment (Request for Admissions Nos. 13-16), in violation of §4.2(a) of SMCRA, 52 P.S. §1396.4 and §402 of the CSL, 35 P.S. §691.402. SMCRA provides, in relevant part, that "failure to prevent water from . . . accumulating in the pit . . . shall render the operator liable to the sanctions and penalties provided in [SMCRA and CSL] . . ." 52 P.S. §1396.4(a)(2). E. & L. removed backfilling equipment, did not backfill and regrade its site concurrent with mining (CO 86-K-184S) and has not corrected the backfilling/regrading deficiencies or returned equipment to the site (Request for Admissions Nos. 9-12), in violation of 25

Pa. Code §§87.141(c)(1) and 87.141(d). Finally, E. & L. failed to monitor surface and groundwaters in the vicinity of its mine site (CO 86-K-260S) and did not submit the required reports to DER (Request for Admissions Nos. 25-28), in violation of its permit and 25 Pa. Code §§87.116 and 87.117. The violations of the regulations adopted under SMCRA, therefore, mandate bond forfeiture. There are no material facts in dispute and DER is entitled to judgment as a matter of law.

ORDER

AND NOW, this 16th day of September, 1988, it is ordered that the Department of Environmental Resources motion for summary judgment is granted and the appeal of E. & L. Earthmovers is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: September 16, 1988
cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Joseph K. Reinhart, Esq., and
Donna J. Morris,Esq.
For Appellant:
Robert M. Hanak, Esq.
Reynoldsville, PA

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

ELMER R. BAUMGARDNER, BAUMGARDNER OIL CO., ECONO FUEL, INC., and WASTE-OIL PICKUP AND PROCESSING	:	
v.	:	EHB Docket No. 88-343-F
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: September 16, 1988

OPINION AND ORDER SUR
PETITION FOR SUPERSEDEAS

Synopsis

A Petition for Supersedeas is granted in a case where the Department of Environmental Resources (DER) ordered the immediate cessation of operations at a used oil recycling facility on the grounds that the facility was required to have a solid waste permit. The Petitioner has shown that the Order is likely to cause him irreparable harm and to injure the public. The Petitioner has also shown that he is likely to prevail on the merits of his appeal in that it was arbitrary for DER to announce its interpretation that used oil is a solid waste in an order closing the recycling facility.

OPINION

This is an appeal by Elmer R. Baumgardner, et al (Baumgardner) from an order of the Department of Environmental Resources (DER) dated August 29, 1988. Baumgardner owns and operates the Baumgardner Oil Co. and Econo Fuel, Inc. (both are Pennsylvania corporations) and Waste-Oil Pickup and Processing (a sole proprietorship) at a facility located at Fayetteville, Franklin

County, Pennsylvania. In its August 29, 1988 order, DER determined, among other things, that the used oil being picked up and processed by Baumgardner constituted "solid waste" under Section 103 of the Solid Waste Management Act(SWMA), 35 P.S. §6018.103; thus, Baumgardner was acting illegally by operating without a permit to process, treat, and dispose of solid waste. In addition, DER determined that the "sludge" which Baumgardner generates as a byproduct of his recycling process was a hazardous waste (EP toxic for lead), and that Baumgardner's containment of this sludge in tanks for over one year constituted"disposal" under Section 103 of the SWMA, 35 P.S. §6018.103. Therefore, DER determined that the disposal of hazardous waste without a permit was a violation of Section 401(a) of the SWMA, 35 P.S. §6018.401(a).[1] As a remedy for the alleged violations, DER ordered that Baumgardner immediately cease and desist from processing, transporting, and accepting solid waste in connection with his operation at Fayetteville. DER also ordered that he cease hindering DER inspections of his facility, that he conduct hazardous waste determinations on solid wastes at the facility, and that he dispose of solid wastes at permitted facilities.

Baumgardner filed a Notice of Appeal and Petition for Supersedeas[2] on September 2, 1988. A hearing on the Petition for Supersedeas was held on September 9, 1988. This Opinion and Order addresses the Petition.

In ruling on a petition for supersedeas, the Board considers the following factors:

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[1] DER did not order Baumgardner to file an application for a hazardous waste permit although it did order him to conduct a hazardous waste determination on all solid wastes at the plant.

[2] As will be discussed in more detail below, Baumgardner's Petition only seeks a partial supersedeas of DER's order.

1) irreparable harm to the petitioner,

2) the likelihood of the petitioner's prevailing on the merits, and

3) the likelihood of injury to the public.

25 Pa. Code §21.78(a). The Petitioner bears the burden of establishing that the factors are present. Lower Providence Township v. DER, 1986 EHB 395. However, evaluation by the Board of the three criteria essentially requires the Board to conduct a balancing test. Houtzdale Municipal Authority v. DER, 1987 EHB 1, Chambers Development Co., Inc. v. DER, EHB Docket No. 87-464-W (Opinion and Order issued February 16, 1988), Pa. P.U.C. v. Process Gas Consumers Group, 502 Pa. 545, 467 A.2d 805 (1983).

In this case, we find that Baumgardner has shown that he will be irreparably injured by the cessation of operations at his Fayetteville plant. The Board has held that loss of customers and significant economic or financial harm constitutes irreparable harm. William Fiore v. DER, 1983 EHB 528, 531. Mr. Baumgardner will be deprived of income from his Fayetteville operation if the plant is closed during the prosecution of this appeal. Mr. Baumgardner's customers will be required to switch to other fuel sources during this period. For example, Mr. O'Brien of U.S.X. Corporation, a customer of Baumgardner, testified that U.S.X. Corp. would be required to shift to other fuel supplies to replace the recycled oil previously purchased from Baumgardner. Clearly, the closing of Baumgardner's recycling plant will result in injuries to his business which are irreparable.

We also find that, considering the evidence as a whole, Baumgardner has established that the immediate closing of the Fayetteville plant will result in injury to the public. Baumgardner collects roughly 400,000 gallons of used oil per week from the Commonwealth and other states. This used oil comes from both industries and from service stations which act as collection

points for "do it your-selfers" (individuals who change their own motor oil). The extent of Baumgardner's operation is entitled to at least some consideration in weighing injury to the public in light of the Pennsylvania Used Oil Recycling Act's[3] policy of encouraging recycling to conserve petroleum resources and to discourage disposal of used oil in ways which damage the environment.[4] See, 58 P.S. §471. In addition to the broad public benefits of recycling, we must also consider the interests of the purchasers of Baumgardner's end product. Mr. O'Brien, an employee of U.S.X. Corporation, testified that U.S.X. Corporation values Baumgardner's fuel from both an economic and environmental standpoint. Finally, we must consider that Baumgardner's Fayetteville plant employs 110 people, and has an annual payroll of roughly $2 million.

In considering the likelihood of injury to the public, we must also consider our tentative conclusion, explained below, that used oil is a solid waste. If this is correct, then Baumgardner is not operating in accordance with Sections 201(a) and 301 of the Solid Waste Management Act, 35 P.S. §§6018.201(a), 6018.301. This operation without a permit constitutes an injury to the public per se. See Pa. P.U.C. v. Israel, 356 Pa. 400, 52 A.2d 317 (1947), DER v. Coward, 489 Pa. 327, 414 A.2d 91 (1980). The Board has held, however, that a violation of a statute by the Petitioner does not automatically preclude a grant of supersedeas. Armond Wazelle v. DER, 1984 EHB 865. It is necessary to examine the likelihood of actual environmental harm. Id. As we explain below, the evidence introduced at the supersedeas

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[3] Act of April 9, 1982, P.L. 314, No. 89, 58 P.S. §471 et seq.

[4] Naturally, this assumes that recyclers handle the used oil and byproducts of the recycling process in an environmentally sound manner. This will be discussed in more detail below.

hearing did not establish actual environmental harm in this case. Moreover, to the extent that there may be a danger of environmental harm from Baumgardner's handling of hazardous waste, Baumgardner is not seeking to supersede the portions of DER's order which deal with hazardous waste. Therefore, weighing the evidence, and also recognizing that Baumgardner is operating without a permit, we conclude that the public is likely to be injured by the closing of his Fayetteville plant pending the outcome of this appeal.

The third factor in deciding whether to grant supersedeas is the likelihood of the Petitioner's success on the merits. The merits of this appeal raise two questions. First, is used oil which is in the process of being recycled subject to regulation as a "solid waste" pursuant to the statutes and regulations administered by DER? Second, assuming that used oil may be regulated as a solid waste, did DER abuse its discretion in ordering Baumgardner to immediately cease and desist from processing, transporting, and accepting this waste?

On the first question, we believe it is likely that the Board will uphold DER's position that "used oil" is subject to regulation as a "solid waste." The Solid Waste Management Act defines "solid waste" as:

> any waste, including but not limited to municipal, residential or hazardous wastes, including solid, liquid, semisolid or contained gaseous materials. The term does not include coal, ash or drill cuttings.

35 P.S. §6018.103. The term "waste" is defined in the recent amendments to the solid waste regulations:[5]

> "waste"--a material whose original purpose has been completed and which is directed to a disposal or processing facility or is otherwise disposed. The term does not include source

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[5] See, 18 Pa Bulletin No. 15, pp. 1681-1814 (April 9, 1988).

> separated recyclable materials or material approved by the department for beneficial use under Section 271.232 (relating to beneficial uses).

25 Pa. Code §271.1. Baumgardner seizes upon the second sentence in the definition of "waste" and argues that used oil is a "source separated recyclable material"; therefore, according to Baumgardner, it is not subject to regulation as solid waste.

DER presented the testimony of Keith Kerns, an employee in the Bureau of Waste Management, to give its interpretation of the solid waste regulations. Mr. Kerns stated that the new solid waste regulations should be read in conjunction with Act 101 of 1988, the "Municipal Waste Planning, Recycling and Waste Reduction Act." He interpreted the term "source separated recyclable material" contained in the regulations as being restricted to the recyclable materials listed in Section 1501 of Act 101--"clear glass, colored glass, aluminum, steel and bimetallic cans, high-grade office paper, newsprint, corrugated paper and plastics."[6] Based upon the above reasoning, Mr. Kerns concluded that used oil is not a source-separated recyclable material; hence, he concluded that used oil is a solid waste.

Based upon the arguments presented at the supersedeas hearing, it appears likely that the Board will accept DER's interpretation of the solid waste regulations and Act 101. Although Act 101 is not yet effective, there is no reason why it cannot be used as a guide in interpreting the regulations. DER's interpretation of the regulations and the Act is reasonable. Moreover, an agency's interpretation of regulations it administers is controlling unless

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[6]Section 1501 of Act 101 is entitled "Municipal implementation of recycling programs." In general terms, it requires that communities with 10,000 or more people establish a recycling program. This program must include, at a minimum, an ordinance requiring people to separate three materials--these three materials must be chosen from the materials listed above.

that interpretation is clearly erroneous or contrary to the underlying legislation (Montgomery County Geriatric and Rehabilitation Center v. Commonwealth, DPW, 75 Pa. Commw. Ct. 248, 462 A.2d 325 (1983)), and an agency's interpretation of the statutes it administers is entitled to great weight. (Dear v. Holly Jon Equipment Co., 283 Pa. Super. 74, 423 A.2d 721 (1980)).

Baumgardner also argued at the hearing that the definition of solid waste should not be read to include used oil because this interpretation would conflict with the Pennsylvania Used Oil Recycling Act, 58 P.S. §471, et seq. This argument is not persuasive. There is nothing in the Used Oil Recycling Act which explicitly exempts used oil from regulation as solid waste. Nor is such an exemption implicit in the Act's policy of encouraging recycling. Whether it is a wise policy to regulate used oil as a solid waste is a question which we must leave to other branches of government to decide.

The second issue raised by the merits of this appeal is whether DER abused its discretion by ordering the immediate cessation of all aspects of the operations at Baumgardner's Fayetteville facility. We find that the Petitioner is likely to prevail on this issue.

It is necessary to distinguish between the used oil which Baumgardner collects, transports, and processes at its Fayetteville plant from the sludge which is a byproduct of the recycling process. DER views the used oil as a solid waste (DER Order, para. 6) and the sludge as a hazardous waste (DER Order, para. 9). The ordering paragraphs which Baumgardner seeks relief from--paragraphs A, B, C, and F--require him to cease handling solid waste, and to file an application for a solid waste permit. Baumgardner has not sought relief from paragraphs G and H, which require him to conduct a hazardous waste determination on all solid wastes at the plant and to dispose

of solid wastes--specifically, sludge--at permitted facilities.[7] Paragraph D, which requires Baumgardner to cease hindering Department employees in conducting inspections of his facility, would also remain in force.

The distinction between used oil and sludge is important, because the August 29, 1988 Order appears to be the first time that DER has taken the position that used oil is a solid waste. The evidence indicated that DER knew about Baumgardner's operation since the early 1980's, but did not until now take the position that he needed a solid waste permit. The Notice of Violation dated February 24, 1987 which was sent to Baumgardner by DER (Exhibit C-5) was based upon the sludge and "extracted solvents" from the processing operation. The Notice claimed that these materials were solid wastes and hazardous wastes, but the Notice did not take the position that the used oil itself was a solid waste.

It is probable that the Board, in deciding the merits of this case, will find that it was arbitrary for DER to announce its interpretation that used oil is a solid waste in an order which immediately closed all operations at Baumgardner's Fayetteville plant.[8] This is not to suggest that DER is forever precluded from enforcing its current interpretation of the definition of "solid waste." As stated above, DER's interpretation seems to have merit. But when DER chose to begin enforcing this policy it had to give affected parties a reasonable opportunity to either contest the interpretation or to file applications for the appropriate permits before it threatened to put them

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[7] It would be unreasonable for DER to construe "solid waste" in paragraph H to include used oil and, thus, to require Baumgardner to immediately begin disposing of used oil at permitted facilities.

[8] While it was reasonable for DER to take action with regard to hazardous waste disposal, as stated above, the portions of the order relating to hazardous wastes are not being superseded.

out of business. DER failed to do so in this case constitutes an abuse of discretion.

DER also argued in this case that the order ceasing operations at the Fayetteville plant was justified by the danger of environmental harm at the facility. We do not agree for two reasons. First, DER's allegations regarding environmental harm arise from Baumgardner's handling of hazardous waste (sludge) which is a byproduct of the used oil recycling process, not from the recycling process per se. Therefore, the danger of environmental harm associated with the hazardous waste does not support closing all aspects of Baumgardner's operation. Baumgardner is not seeking to supersede paragraphs D, E, G, H, I, and J of DER's order; these paragraphs constitute a shutdown of any hazardous waste disposal which may be occurring at the Fayetteville plant. Second, the evidence of environmental harm was inconclusive. Mr. Kenneth Parks, a former employee of Baumgardner, testified that on two occasions he saw sludge from the process tanks being mixed with cement and deposited either on the ground or in a hole at the Fayetteville plant. He testified that he did not know whether the sludge was processed before it was mixed with the cement. On rebuttal, Mr. Baumgardner testified that the sludge (which he conceded may be hazardous) was processed to separate the "grits"--a non-hazardous sandy material--and it was only the grits which were mixed with the cement. Taken as a whole, this evidence is not sufficient to establish that Mr. Baumgardner dumped hazardous materials into the ground.

In conclusion, Baumgardner had the burden of establishing that the three criteria for granting supersedeas were met in this case. In evaluating the evidence and arguments on the three criteria, the Board must consider and weigh the showing on each criterion relative to the showing on the other criteria. See, Pa. P.U.C. v. Process Gas Consumers Group, 502 Pa. 545, 467

A.2d 805, 809 (footnote 8) (1983). Applying these standards to this case, Baumgardner has established the necessary grounds for a partial supersedeas of DER's order.

ORDER

AND NOW, this 16th day of September, 1988, it is ordered that the Petition for Supersedeas filed by Elmer R. Baumgardner, et al, is granted, and paragraphs A, B, C, and F of the Order of the Department of Environmental Resources dated August 29, 1988 are superseded pending the disposition of this appeal.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Hearing Examiner

DATED: September 16, 1988

cc: **For the Commonwealth, DER:**
Robert Stoltzfus, Esq./Eastern
and John R. McKinstry, Esq./Central
For Appellant:
Hershel J. Richman, Esq.
and Mark A. Stevens, Esq.
Philadelphia, PA

nb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101
717-787-3483
TELECOPIER: 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

REITZ COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 87-509-M**
	:	**87-510-M**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** September 21, 1988

OPINION AND ORDER
SUR
MOTIONS FOR RECONSIDERATION

Synopsis:

Reconsideration of orders dismissing appeals for lack of prosecution will be denied when no reasonable excuse is offered for legal counsel's failure to respond to the Board's default notices and Rules to Show Cause.

OPINION

Reitz Coal Company (Appellant) filed Motions on July 25, 1988, asking the Board to reconsider its Orders of July 13, 1988, dismissing the above appeals for failure to prosecute. Along with these Motions, Appellant also filed Motions to Consolidate and requested oral argument. The Department of Environmental Resources (DER) filed its Responses on August 15, 1988, neither supporting nor opposing Appellant's Motions.

The Board's Pre-Hearing Orders No. 1, issued on December 23, 1987, required Appellant to file its Pre-Hearing Memoranda on or before March 7, 1988. Appellant did not do so. On March 21, 1988, the Board notified Appellant of its delinquency and advised Appellant that, if the Pre-Hearing

Memoranda were not filed by March 31, 1988, the Board could impose sanctions that could include a dismissal of the appeals.

Appellant did not meet the March 31, 1988, deadline. Accordingly, the Board advised Appellant on April 8, 1988, that sanctions would be imposed unless Appellant filed its Pre-Hearing Memoranda by April 18, 1988. Appellant did not do so.

On May 24, 1988, the Board issued Rules for Appellant to Show Cause on or before June 13, 1988, why its appeals should not be dismissed for lack of prosecution. Appellant did not do so. On July 13, 1988, the Board entered Orders dismissing both appeals. Appellant's request for reconsideration was filed 12 days later.

The only excuse advanced by Appellant is the "oversight" of its legal counsel, who mistakenly assumed that these appeals had been consolidated with a number of other appeals in which stay orders were in effect. Legal counsel's dereliction cannot be characterized so innocently or treated so indulgently. What is represented as "oversight" is legal counsel's receipt of all the Board's communications, replete with admonitions and threats of dismissal, and his failure to perform the simple task of (1) reviewing his own files to determine whether consolidation had been requested and granted, or (2) telephoning the Board's Secretary to obtain the correct information. Such conduct does not merit reconsideration under the standards set forth in 21 Pa. Code §21.122.

Appellant argues, by way of mitigation, that no one has been prejudiced by its failure to comply with the Board's Order. Since DER does not oppose Appellant's Motion for Reconsideration, Appellant argues that the

Board can assume that DER has not been adversely affected. Our consideration does not end at this point, however, because Appellant's conduct has impacted upon the Board's operations.

Because of Appellant's failure to comply with Pre-Hearing Orders No. 1, the Board was compelled to devote administrative resources to issuing default letters and Rules to Show Cause in an effort to secure Appellant's compliance. When those efforts failed, the Board had no alternative but to issue Orders dismissing the appeals. This waste of the Board's limited resources of time and money is an aggravating, rather than a mitigating, factor.

ORDER

AND NOW, this 21st day of September, 1988, it is ordered that:

1. Reitz Coal Company's Motions for Reconsideration are denied.
2. Reitz Coal Company's Motions for Consolidation are denied.
3. Reitz Coal Company's requests for oral argument are denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: September 21, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Ward T. Kelsey, Esq.
Western Region
For Appellant:
Henry Ingram, Esq.
Thomas C. Reed, Esq.
Pittsburgh, PA

mjf

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101
717-787-3483
TELECOPIER: 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

INGRAM COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 88-071-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** September 21, 1988

OPINION AND ORDER
SUR
MOTION TO LIMIT ISSUES

Synopsis

A motion to limit issues is granted. Appellant's failure to appeal prior compliance orders relating to the same discharge that is the subject of the instant appeal has rendered the factual and legal bases of those orders as final and unassailable. Thus, Appellant may not, in this proceeding, challenge its liability for pollutional off-permit discharges since it failed to challenge any of the prior orders by which DER charged it with liability. Appellant's argument that the liability question can be reopened on the basis of newly discovered, previously unavailable evidence which allegedly shows the appellant to be not liable for the discharge is without merit. While such evidence was received after the first in a series of compliance orders, it was available to the Appellant when the last two of the prior orders was issued, and hence should have prompted Appellant to appeal those prior orders.

OPINION

On March 11, 1988, Ingram Coal Company (Ingram) filed this appeal from Compliance Order (CO) 88-K-020S issued by the Department of Environmental Resources (DER) pursuant to the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. (SMCRA), the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (CSL) and Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17. DER alleged that, on January 22, 1988, Ingram failed to install adequate treatment facilities at a location designated as "Permit #1476-2(A2) - site of present treatment." Ingram was ordered to submit a plan and schedule, on or before March 14, 1988, for the installation of treatment facilities. In its notice of appeal, Ingram contests its liability for the discharge in question which, Ingram alleges, is outside of its permit boundaries.

On July 7, 1988, DER filed a motion to preclude Ingram from contesting its liability for the discharge and to limit the issues in this appeal to 1) whether, on January 22, 1988, Ingram's treatment facilities were adequate and 2) whether DER's plan submission requirement was reasonable. In support of its motion DER draws attention to four compliance orders it issued between April, 1985 and March, 1987. CO 85-K-091S, issued April 10, 1985, cites Ingram for a March 14, 1985 discharge of acid water (pH of 3.8 and acidity greater than alkalinity) at a location designated "discharge on outslope on the eastern end of affected area." CO 86-K-030S, issued January 27, 1986, cites Ingram for failing, on January 21, 1986, to maintain adequate treatment facilities at a location designated "south section of mining permit 1476-2(A2) (the area of present limestone treatment)." Finally CO's 87-K-020S, issued February 4, 1987, and 87-K-043S, issued March 6, 1987, cite

Ingram for failing, on December 30, 1986 and March 4, 1987, respectively, to construct adequate treatment facilities at a location designated as "permit #1476-2(A2) site of present treatment." DER asserts that Ingram failed to appeal these compliance orders, all of which, it alleges, pertain to the discharge that is the subject of the compliance order now before us and argues that, under the principles of administrative finality, Ingram is now precluded from challenging DER's factual and legal bases for imposing liability on Ingram for the discharge.

Ingram admits that the 1986 and 1987 CO's all pertain to the same off-permit discharge but asserts that CO 85-K-091S concerns a discharge at a different location. Ingram further contends that CO 87-K-020S was superseded by CO 87-K-043S and that it appealed CO 87-K-0435 at EHB Docket No. 87-256-R. As to CO 86-K-030S, Ingram alleges, that subsequent to the issuance of CO 86-K-030 it discovered previously unavailable and compelling evidence which establishes that Ingram's operations did not the degrade the discharge in question, and that this evidence is a proper basis for reopening CO 86-K-030S.

One aspect of DER's motion can be disposed of quickly, namely, the relationship of CO 85-K-091S to the other 4 CO's. CO 85-K-091S clearly states that the location of the alleged violation is a "discharge on outslope of the eastern end of affected area" while the other four CO's all deal with a discharge whose location can be described as "Permit #1476-2(A2) site of present treatment." Aside from DER's mere allegation, there is nothing to show that the two locations coincide. In light of Ingram's denial that the two locations are identical, there is doubt as to their coincidence and we will resolve this doubt against DER for the purposes of this motion. Accordingly, our disposition of DER's motion will be based solely on the preclusive effects of CO's 86-K-030S, 87-K-020S and 87-K-043S.

It has been consistently held that the factual and legal bases of unappealed administrative orders are final and unassailable. Department of Environmental Resources v. Wheeling-Pittsburgh Steel, 22 Pa. Cmwlth. 280, 348 A.2d 765 (1975), aff'd., 473 Pa. 432, 375 A.2d 320, cert. denied, 434 U.S. 969. Most recently Commonwealth Court has held in Dithridge House Association v. DER, _____ Pa. Cmwlth. , 541 A.2d 827 (1988) that the failure of a party to appeal an order, precludes it from any subsequent challenge to the factual or legal bases for that order, unless some exception applies.

Ingram's contention that CO 87-K-020S was superseded by CO 87-K-043S is completely unsupported. There is nothing on the face of CO 87-K-043S which in any way makes reference to CO 87-K-020S. Moreover, Ingram points to no explicit DER action or any principle or operation of law which rendered CO 87-K-020S null and void upon issuance of CO 87-K-043S. Assuming, arguendo, that CO 87-K-020S was nullified or otherwise superseded by CO 87-K-0435, Ingram failed to appeal CO 87-K-043S. As to Ingram's contention that its appeal at EHB Docket No. 87-256-R is from CO 87-K-043S, it is actually from a civil penalty assessment based on CO 87-K-043S. The Board has already limited the issues in Docket No. 87-256-R to the reasonableness of the amount of the civil penalty because of Ingram's failure to appeal the underlying CO, CO 87-K-043S. See Ingram Coal Company v. DER, EHB Docket No. 87-256-R (Opinion and order issued February 3, 1988). The fact is that Ingram never appealed CO's 87-K-020S or 87-K-043S. Thus, these CO's are immune from attack, absent any applicable exception to the administrative finality doctrine.

Ingram argues that previously unavailable, newly discovered, compelling evidence justifies a reopening of the liability issue, stating in support of its argument that the affidavit of one Alan J. Miller was appended to Ingram's reply to the memorandum submitted by DER in support of its motion.

Paragraph three of Miller's affidavit states:

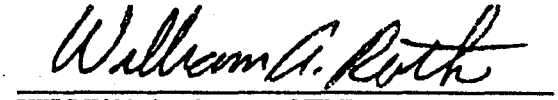
> In February, 1987, we received extensive evidence that Ingram Coal Company is not responsible for the seep that is in issue in Docket No. 88-071-R, which evidence consists of geological information obtained from drill holes drilled in August, 1986, piezometer studies conducted in September, October and November of 1986, water samples taken in October and November of 1986, other water data obtained in 1987, hydrological and geological assessments by hydrogeologists and geologists in 1987, all of which evidence shows that Ingram mining operation known as the Green Job is not responsible for the degradation of the seep that is in question in the Environmental Hearing Board Docket No. 88-071-R.

This "newly discovered," "previously unavailable" evidence was known to Ingram during the appeal period following the issuance of CO 87-K-020S and prior to the issuance of 87-K-043S and Ingram still did not appeal the issuance of these compliance orders. This evidence, thus, is hardly compelling or newly discovered and we must grant the Department's motion.

O R D E R

AND NOW, this 21st day of September, 1988, it is ordered that the Department of Environmental Resources' motion to limit issues is granted and the issues in this matter are limited to whether Ingram Coal Company's treatment facilities were adequate at the time of issuance of the compliance order and whether the requirement that it submit an abatement plan and schedule was reasonable.

ENVIRONMENTAL HEARING BOARD



WILLIAM A. ROTH, MEMBER

DATED: September 21, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Edward H. Jones, Jr., Esq.
Western Region
For Appellant:
Vincent J. Barbera, Esq.
BARBERA & BARBERA
Somerset, PA

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

JOSEPH GRANTEED	:	
	:	
v.	:	EHB Docket No. 88-031-M
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: September 22, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS FOR MOOTNESS

Synopsis:

An appeal from a noncoal surface mining order will not be dismissed as moot, even though it has been complied with, because of the threat of civil penalties.

OPINION

The Department of Environmental Resources (DER) has filed a Motion seeking the dismissal of this appeal on the ground of mootness. Joseph Granteed (Appellant) has filed an Answer opposing the Motion. In its Motion, DER represents that, since Appellant has complied fully with the Compliance Order forming the basis of the appeal, there is no longer any controversy to be resolved. Appellant maintains, however, that he complied with the Compliance Order solely to mitigate penalties and not with the intent to waive his claim that the Compliance Order was unlawful.

The Compliance Order charged appellant with conducting a noncoal surface mining operation in Exeter Borough, Luzerne County, without a license

or permit. Appellant was directed to cease operations and either to obtain a license and permit or to reclaim the area. DER alleges in its Motion that appellant has applied for, obtained and currently holds a license and permit. Appellant has not denied these allegations and they will be accepted as true for purposes of this Opinion and Order.

A case is considered moot when a party has been deprived of the necessary stake in the outcome or when the Board is no longer able to grant effective relief. In Re Gross, 476 Pa. 203, 382 A.2d 116 (1978); Commonwealth v. One 1978 Lincoln Mark V, 52 Pa. Cmwlth. 353, 415 A.2d 1000 (1980). Where a coal surface mining order is concerned, an operator still has a stake in the outcome of the case even though the order has been complied with. Al Hamilton Contracting Company v. Commonwealth of Pennsylvania, Dept. of Environmental Resources, 90 Pa. Cmwlth. 228, 494 A.2d 516 (1985). This conclusion recognizes the fact that an operator's record of past violations has a critical impact upon the issuance, reissuance and transfer of permits, upon the issuance and renewal of licenses and upon the assessment of civil penalties. If the operator is prevented from fully litigating a DER order, because he has complied with it, he will be deprived of any opportunity to strike the alleged violation from his compliance record. Kerry Coal Company v. DER (Opinion and Order issued September 1, 1988).

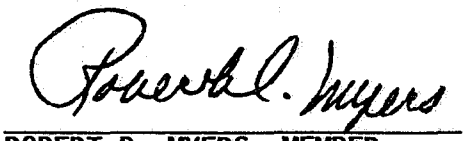
While the impact is not as precisely defined where a noncoal surface mining order is involved, an operator's record of past violations nonetheless influences the issuance and reissuance of permits and the assessment of civil penalties under Sections 8(b) and 21 of the Noncoal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. §3308(b) and §3321. Since Appellant maintains that he is not engaged in mining, he probably has little concern about the future issuance or

reissuance of permits. But the civil penalties are an immediate threat. DER can assess them at any time, and Appellant's compliance with the Compliance Order would be no defense to the assessment. Therefore, it must be held that Appellant continues to have a necessary stake in the outcome of this appeal.

ORDER

AND NOW, this 22nd day of September, 1988, the Motion to Dismiss for Mootness filed by the Department of Environmental Resources is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS, MEMBER

DATED: September 22, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Kurt J. Weist, Esq.
Central Region
For Appellant:
Guy J. DePasquale, Esq.
Harrisburg, PA
nb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

JOSEPH GRANTEED	:	
	:	
v.	:	EHB Docket No. 88-031-M
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: September 22, 1988

OPINION AND ORDER
SUR
MOTION TO STRIKE

Synopsis:

A Motion to Strike is not an appropriate method to challenge the right of another party to raise a legal issue in the pre-hearing memorandum. A legal issue arising out of a statutory provision cited in a Compliance Order forming the basis of an appeal is properly before the Board.

OPINION

Joseph Granteed (Appellant) has filed a Motion to Strike that portion of the pre-hearing memorandum filed by the Department of Environmental Resources (DER) which refers to Section 11(b) of the Noncoal Surface Mining Conservation and Reclamation Act (Noncoal Act), Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. §3311(b). Appellant maintains that DER has never previously alleged that Appellant's operation constituted a nuisance or a hazard to public safety. To permit that issue to be raised at this point, Appellant argues, violates his rights to due process.

DER has objected to Appellant's Motion, asserting that the Board can consider a legal basis for DER's action even if it is not specifically cited in the Compliance Order from which the appeal was taken.

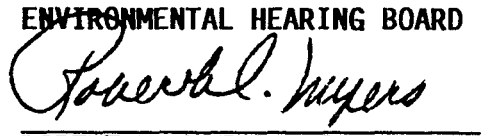
A pre-hearing memorandum is required by the Board's Pre-Hearing Order No. 1, issued on February 11, 1988. It is primarily for the convenience of the Board, serving to define and narrow the factual and legal issues involved in the appeal. In the civil courts, this function is performed by the pleadings. In most of the cases coming before the Board, the only document resembling a pleading is the Notice of Appeal. While the Appellant is required to set forth his factual and legal grounds in the Notice of Appeal (25 Pa. Code §21.51(e)), the other parties are not required to file answers (25 Pa. Code §21.64(c)). The pre-hearing memorandum furnishes these parties with the first opportunity to set forth their factual and legal positions.

A Motion to Strike all or part of a pre-hearing memorandum is not the appropriate vehicle to challenge an issue raised by another party. A Motion to Limit Issues or a Motion for Partial Summary Judgment should be used. Even if Appellant's Motion were treated as having been properly filed, it would have to be denied. The Compliance Order attached to the Notice of Appeal specifically refers to Section 11 of the Noncoal Act, clearly putting Appellant on notice that DER was acting pursuant to the provisions of that section.

ORDER

AND NOW, this 22nd day of September, 1988, the Motion to Strike filed by Joseph Granteed is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS, MEMBER

DATED: September 22, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Kurt J. Weist, Esq.
Central Region
For Appellant:
Guy J. DePasquale, Esq.
Harrisburg, PA

nb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101
717-787-3483
TELECOPIER: 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

NEW HANOVER TOWNSHIP, et al.	:	
v.	:	**EHB Docket No. 88-119-W**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
NEW HANOVER CORPORATION	:	**Issued:** September 22, 1988

OPINION AND ORDER SUR
PRAECIPE FOR INVOLUNTARY SUBSTITUTION/JOINDER,
MOTIONS FOR PROTECTIVE ORDER, AND MOTIONS TO COMPEL

Synopsis

The Board rules on various discovery motions relating to appeals of permits authorizing the construction and operation of a municipal waste landfill. The Board is without authority to join the prospective purchaser of the landfill operator's stock as a party to the appeals and rules that information regarding the purchase negotiations is irrelevant. The Board holds that information relating to the landfill operator's preparation of an application for a permit modification under the new municipal waste management regulations is irrelevant, as is whether the Department of Environmental Resources would permit the landfill under the new regulations. A protective order is granted to the permittee's co-counsel prohibiting the appellant from seeking the law firm's documents relating to the appeal, as it would place the permittee's counsel in a potentially conflicting situation.

OPINION

This matter was initiated on March 29, 1988 with the filing of a notice of appeal by New Hanover Township (Township) challenging the issuance of Solid Waste Permit No. 101385, National Pollutant Discharge Elimination System (NPDES) Permit PA 0052345, and a water quality certification by the Department of Environmental Resources (Department) to New Hanover Corporation (Corporation). The Township also challenged the Department's waiver of permit requirements under the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 et seq. and its failure to require permits under certain other statutes administered by the Department. These approvals by the Department authorized the construction and operation by the Corporation of a municipal waste landfill in New Hanover Township, Montgomery County.

The Paradise Watch Dogs also appealed the issuance of the solid waste permit at Docket No. 88-126-W, the issuance of the NPDES permit at Docket No. 88-127-W, and the issuance of the water quality certification at Docket No. 88-128-W. The Boyertown Area School District appealed all three approvals at Docket No. 88-129-W. By order of April 29, 1988, the Board consolidated all five appeals at Docket No. 88-119-W. We deal here with a number of disputes which have arisen during the course of discovery in these matters.

New Hanover Township's Motion for Substitution/Joinder of Browning-Ferris Industries

On April 27, 1988, the Township served a notice of deposition on the Corporation requesting to depose an employee of Browning-Ferris Industries (BFI). The Corporation responded that it would not accept the notice of deposition or produce any witness or document without a subpoena, since BFI is not a party to this action.

On May 10, 1988, the Township filed a praecipe for involuntary substitution/joinder of BFI, alleging that BFI has taken certain actions sufficient to find that BFI has succeeded to the legal and equitable interests of the Corporation and is subject to involuntary substitution as a party pursuant to Pa.R.C.P. 2351 and 2352.

On May 31, 1988, the Corporation filed its answer opposing the joinder, arguing that the Board's rules do not permit joinder and, in the alternative, that BFI has not legally succeeded the Corporation, but rather, has only an option to purchase the Corporation's stock and, therefore, may not be substituted for the Corporation as permittee in this appeal.

Although denominated as a motion under Pa.R.C.P. 2351 and 2352, the relief requested by the Township is that BFI "be substituted as the permittee-appellee in this case and both New Hanover Corporation and BFI should be subject to full party discovery as permitted by the Pennsylvania Rules of Civil Procedure." This relief is, in essence, a motion for joinder under Pa. R.C.P. Rule 2229(b) and we will treat it as such.

Neither the Board's Rules of Practice and Procedure, 25 Pa.Code §21.1 et seq., nor the General Rules of Administrative Practice and Procedure provide explicitly for joinder. The Board has held that it is not authorized to join additional parties. In denying a joinder motion in North Cambria Fuels v. DER, 1986 EHB 777, the Board stated that the Board's Rules and Regulations "make no provision for joinder of additional parties, even where joinder appears to be in the interest of facilitating a just resolution of a dispute..." 1986 EHB 784. Similarly here, the Board is without authority to join BFI as an additional appellee.

The Township has cited DER v. Consolidated Rail Corporation, 1980 EHB 415 (Conrail) in support of its motion that BFI be joined as a party. We

decline to follow that opinion here for various reasons. Conrail involved a complaint for civil penalties, and Conrail attempted to join the Drake Chemical Company as an additional defendant. The matter before us involves a challenge to a permit that was initiated by the Township,a situation quite different from that in Conrail.

And, the reasoning in the Conrail opinion was based on an interpretation of our rules which is inconsistent with commonly accepted definitions of terms used therein. The Conrail opinion was based on the Supreme Court's decision in Stevenson v. Com., Dept. of Revenue, 489 Pa. 1, 413 A.2d 667 (1980), which interpreted the Act of May 20, 1937, P.L. 728, as amended, 72 P.S. §4651-1 et seq. (The Board of Claims Act). Section 8 of the Board of Claims Act specifically stated that proceedings before the Board of Claims were to be governed by the Pennsylvania Rules of Civil Procedure to the extent not inconsistent with the statute. In particular, the Court interpreted 4 Pa.Code §121.1, which provided in relevant part that

> All proceedings in an action before the Board of Arbitration of Claims shall be, as nearly as possible, in accordance with the Pennsylvania Rules of Civil Procedure relating to the action of assumpsit.

In reaching his holding in Conrail, then Chairman Waters stated that because 25 Pa.Code §21.64 was analogous to 4 Pa.Code §121.1, the Board also had the power to join additional defendants. However, 25 Pa.Code §21.64(a), which states

> Except as provided otherwise in these rules of procedure, the various pleadings described in the Pennsylvania Rules of Civil Procedure shall be the pleadings permitted before this Board, and such pleadings shall have the functions defined in the Pennsylvania Rules of Civil Prodedure.

is not analogous to 4 Pa.Code §121.1. A pleading is not a proceeding,[1] and it does not follow that because the Board's rules recognize pleadings under the Pennsylvania Rules of Civil Procedure that they incorporate all other provisions of the Pennsylvania Rules of Civil Procedure.

As a result, we will deny the Township's motion for joinder of BFI.

New Hanover Corporation's Motion for Protective Order Relating to the Deposition of James Marinari

On May 13, 1988, the Corporation filed a motion for protective order relating to the deposition of James Marinari, claiming that the purpose of the deposition is to explore the financial and corporate relationship between the Corporation and BFI. Mr. Marinari is Secretary/Treasurer of the Corporation. The Corporation contends this information is unnecessary, irrelevant, and should be protected, since BFI is not yet a party to this action and information regarding its option agreement with the Corporation is highly sensitive commercial information entitled to a protective order under Pa.R.C.P. 4012(a)(g).

On May 26, 1988, the Township filed its motion in opposition to the protective order, arguing that Marinari is a fact witness on numerous issues and that the Corporation's relationship with BFI has direct bearing on the joinder issue.

---

[1] Pleadings, as defined in Rule 1017(a), Pa.R.C.P. include a complaint, the answer, a reply if the answer contains new matter or a counterclaim, a counter-reply if the reply contains new matter, preliminary objections and an answer thereto. On the other hand, "proceeding" is defined in §102 of the Judicial Code, 42 Pa.C.S.A. §102 as

> every declaration, petition or other application which may be made to a count under law or usage or under special statutory authority, but the term does not include an action or appeal.

The Board has the power to issue a protective order under Pa.R.C.P. 4012(a)(4) under the authority granted in 25 Pa.Code §21.111(e).

The Board is hard-pressed to ascertain the relevancy of the negotiations between the Corporation and BFI to the Department's issuance of the regulatory approvals for the landfill. Therefore, the Corporation's protective order is granted to the extent the Township seeks to depose Mr. Marinari regarding the Corporation's negotiations with BFI. Mr. Marinari, however, may be deposed regarding technical assistance provided by BFI to the Corporation during the course of the permit application process and any other relevant matters.

New Hanover Township's Motion to Compel Production of Documents by New Hanover Corporation

On June 15, 1988, the Township filed a motion to compel production of documents. The Township, in its first request for production of documents to the Corporation requested:

> 1) All documents in possession of the Corporation, BFI, any consultant or James or Albert Marinari concerning any permit or waiver issued by the Department to any of entities listed here.
>
> 2) All documents in possession of the entities named above regarding the incinerator operated by any of those entities in the Township.
>
> 3) All correspondence between these entities and any state, local or federal government entity concerning either the proposed landfill or the existing incinerator.

The Township now claims that the Corporation improperly objected to the production of documents in the possession of BFI and other consultants, failed to identify documents it claims are provileged, and improperly objected

to producing documents created after the date the landfill permits were issued and to the production of financial statements and insurance applications for the landfill.

On July 7, 1988, the Corporation filed its opposition to the motion, alleging that files produced by the Corporation's counsel pursuant to a subpoena identify with specificity all documents for which an attorney-client privilege was claimed, and that documents relating to BFI, those issued after the date of the permit, and financial and insurance statements are irrelevant.

We will dismiss the Township's motion as regards identification of documents for which the attorney-client privilege is asserted as moot. And, consistent with our disposition of the Township's motion for substitution/joinder of BFI, we will deny the motion to compel with respect to BFI, as it is not a party to this action. However, we will grant the motion, subject to the limitations below, as it relates to documents relating to the permit applications which were prepared by BFI for the Corporation.

We will sustain the Corporation's objections to providing financial statements and other documents relating to its efforts to secure a bond to satisfy the obligtions imposed by §§503 and 505 of the Solid Waste Management Act (SWMA), the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. The SWMA does not require the Department to look behind the bond at the arrangements between the permittee and surety to collateralize the bond; if the Corporation were to default on its obligations, the Department would forfeit the bond and collect from the surety, not the Corporation. We, therefore, believe that this information is not relevant to the matters before us.

The Corporation has objected to providing the Township with documents generated after the issuance of the permits and certification, and, in

particular, objects to information relating to the preparation of a permit modification under the Department's new municipal and residual waste management regulations. The Township contends that this information is necessary to ascertain whether the Corporation is complying with certain of the solid waste permit conditions. We will sustain the Corporation's objections to documents relating to preparation of the permit modification application, as that matter is not yet before us. Nor is the Corporation's compliance with permit conditions, as there is no Department action before us relating to the Corporation's compliance with the permit conditions. However, we will not sustain the Corporation's objection that any document related to the issuance of the permits, certification, and waivers which was generated after the Department's actions is irrelevant.

Motion for Protective Order by Counsel for New Hanover Corporation

On June 10, 1988, the Township served a subpoena, following service by mail of a notice of deposition, attempting to compel the production of records of Silverman & Jonas (counsel), co-counsel of record for the permittee.

On June 15, 1988, counsel filed a motion for a protective order, claiming that the notice of deposition was of no force and effect since counsel is not a party to this action and that the matters sought by discovery are either privileged or irrelevant, sought in bad faith, or would cause unreasonable annoyance, burden or expense to the firm.

On July 1, 1988, the Township filed its motion in opposition to the protective order, arguing that the defendant's counsel is a potential witness in this case, and that the documents requested here are not privileged, are relevant and, although previously requested from alternate sources, were not produced, thus forcing the Township to seek them directly from counsel.

Counsel filed its reply on July 7, 1988, arguing that the Township is seeking to place counsel in the impermissible position of being both attorney and witness in violation of Rule 3.7 of the Rules of Professional Conduct and that the documents sought here can be, and probably have been, obtained by the Township without creating a conflict in the role of counsel.

The Board has the power to issue protective orders pursuant to 25 Pa.Code §21.111(e). Pa.R.C.P. 4012 states

> (a) Upon motion by a party or by the person from whom discovery or deposition is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, burden or expense.

It is not necessary to address the numerous arguments and counter arguments relating to the actual documents requested here, since we can dispose of this matter based on the fact that discovery was directed to the Corporation's counsel. Under Pa.R.C.P. 4009(a)(5), a request for the production and inspection of documents may be served on "any other party." While Pa.R.C.P. 4009(c) allows an individual action against a non-party, there exist other problems when the non-party is the defendant's counsel. Although the law firm may be in custody, possession, or control of its client's documents in accordance with Pa.R.C.P. 4009(a)(6), it is not the best or first source for these documents. It creates a conflict of interest for the law firm to be zealously representing the Corporation while acting as a conduit for the Corporation's papers for the opposing party.

If the Township has experienced difficulty in obtaining its document requests from other parties, there exist other remedies which would not create a conflicting role for defendant's counsel. Accordingly, we will grant counsel's motion for a protective order.

Roy F. Weston's Motion for Protective Order

On June 6, 1988, the Township served a subpoena on a non-party witness, Roy F. Weston,Inc. (Weston). Weston had provided engineering services to the Corporation during the course of preparation of its permit applications to the Department and to BFI as part of BFI's evaluation of whether to enter into an option agreement to purchase the Corporation's stock.

On July 20, 1988, Weston filed a motion to quash the subpoena or for a protective order limiting the scope of the documents request. Weston alleges the document request is overbroad because it is not confined to a specific time period, permit, or party and includes documents previously produced.

On July 28, 1988, the Township filed its motion in opposition to Weston's request for a protective order, claiming that Weston has failed to sufficiently identify documents withheld on the basis of privilege and that one letter obtained from another source proves Weston has improperly withheld documents under prior document requests.

The document request was phrased as follows:

> Any and all documents, whether in draft or final form, charts, graphs, computer printouts, diskettes, correspondence, or other written matter of any nature whatsoever concerning the proposed New Hanover Corporation landfill, the leachate treatment plant proposed for the landfill, and wetlands or other environmental evaluations, or any document or other thing submitted to any local, state, or federal agency concerning the above-mentioned landfill, leachate treatment system, or environmental or wetland evaluation.

The request is overbroad, as it is not limited to a particular client of Weston's. Any documents related to services performed for BFI constitute irrelevant information that is not reasonably calculated to lead to the discovery of admissible evidence. Pa.R.C.P. 4003.1. At present, BFI is not a

party to the litigation. Documents prepared to assist BFI in evaluating its option agreement with the Corporation are not relevant to this appeal. Further, Pa.R.C.P. 4012(a)(9) provides that a protective order may be used to prevent the disclosure of confidential research, development or commercial information. Here, disclosure of information on BFI's commercial relationship could injure BFI in anticipated contract negotiations.

Therefore, we will grant Weston's motion for a protective order and limit the Township's request to documents prepared by Weston for the Corporation and not previously produced. Weston is directed to specify the evidentiary documents for which it claims any privilege.[2]

New Hanover Township's Motion to Compel Answers to its First Set of Requests for Admissions

On March 29, 1988, the Township served its first set of requests for admissions on the Department. The Department objected to three of the requests for admissions on the basis that they require conclusions of law and denied one request on the basis that it was without sufficient information to form a response. The Corporation filed its objections as well.

On July 21, 1988, the Township, pursuant to Pa.R.C.P. 4019, filed a motion to compel answers to its first set of requests for admissions. We will address each of the contested admissions separately.

Request for Admission No. 11

The Township's Request for Admission No. 11 was as follows:

> 11. The Pennsylvania Solid Waste Management Act and regulations do not allow a hospital waste incinerator to operate simultaneously on the same plot of ground that is

[2] As for the Township's claim that it has secured information which establishes that Weston improperly withheld information during prior document requests, that is not a basis to deny Weston's motion. If the Township believes Weston is not producing documents, remedies exist to secure their production.

being actively landfilled.

The Department objected to this request, claiming it required a pure conclusion of law rather than the interpretation of any particular provision of the SWMA. The Corporation agreed, finding the request overbroad, hypothetical, and beyond the facts of this case. The Township argues that this request requires only an opinion as to the application of law to fact, and, as such, is not objectionable under Pa.R.C.P. 4014, which allows discovery of "statements or opinions of fact or the application of law to fact."

The request is vague; the Township has failed to show how it relates to the facts of this case, since the Department denied in Request No. 9 that it permitted a solid waste landfill on top of an area that is currently permitted for a hospital waste incinerator, explaining that the incinerator is adjacent to the landfill. Accordingly, the motion to compel a response to Admission No. 11 is denied.

Request for Admission No. 19

The Township's Request for Admission No. 19 was as follows:

> 19. If PaDER had reviewed this application under the new municipal solid waste regulations, the proposed landfill could not be permitted at the site in New Hanover Township where it was permitted.

The Department objected to this request on the basis that it required a conclusion of law and because the Department was without sufficient information to form an answer. The Corporation concurred, finding the request to be purely speculative and irrelevant.

The Township counters that this is a classic application of law to particular facts of the challenged landfill and that this information is

relevant to its theory that the Department was prohibited under SWMA and Article 1, Section 27 of the Pennsylvania Constitution from permitting an environmentally destructive landfill as defined in the new regulations.

The permit at issue here was issued prior to the enactment of the new municipal solid waste regulations and, therefore, the request is irrelevant to any issue in this appeal. Accordingly, the motion to compel a response to Request for Admission No. 19 is denied.

Request for Admission No. 24

The Township's Request for Admission No. 24 was as follows:

> 24. Residents, schools, and businesses within one mile of the site are totally reliant of well water for drinking, bathing, and cooking.

The Department objected to this request, claiming that, although it had information relating to the locations and owners of wells within one mile of the site, it was without sufficient information to form a response. The Corporation concurred, adding there exists no requirement that the Department have such information and that the request is overbroad since wells upgradient from the proposed landfill will not be affected.

The Township argues that the Department should have this information as part of its regulatory review.

There is no requirement under the SWMA or the rules and regulations adopted thereunder that the Department make an assessment of the degree well users within a certain distance of a proposed disposal site rely upon their wells for various purposes, and, in any event, that information is in the possession of the users. We will sustain the Department's objection to this request.

Request for Admission No. 25

The Township's Request for Admission No. 25 was as follows:

> 25. The site of the landfill contains important wetlands as defined in 25 Pa.Code §105.17.

The Department objected that this request requires a pure conclusion of law. The Corporation concurred.

The Township responds that this request asks for an application of 25 Pa.Code §105.17 to the facts of this case. The Township has alleged that the landfill will disrupt important wetlands and that the procedural protections set forth in the regulations were not employed.

The request seeks an admission as to whether the Department made a determination as to the existence of important wetlands at the site and the Department should answer or deny the request.

O R D E R

AND NOW, this 22nd day of September, 1988, it is ordered that:

1) New Hanover Township/s praecipe for involuntary substitution/ joinder of Browning-Ferris Industries is denied;

2) New Hanover Corporation's motion for a protective order relating to the deposition of James Marinari is granted insofar as it relates to New Hanover Township's attempts to question Mr. Marinari regarding New Hanover Corporation's negotiations with Browning-Ferris Industries. The deposition of James Marinari, which was postponed by the Board's order of May 18, 1988, may otherwise proceed;

3) New Hanover Township's motion to compel production of documents by the Corporation is granted in part and denied in part:

A) The motion as it related to the Corporation's failure to specify documents for which the attorney-client privilege is asserted is denied as moot;

B) The motion to compel BFI to produce documents is denied;

C) The Corporation's objections to producing documents regarding its financial and insurance statements are sustained;

D) The Corporation's objections to producing documents relating to preparation of an application for permit modification pursuant to 25 Pa.Code §271.11 are sustained; and

E) The Township's motion is granted in all other respects and the Corporation is directed to produce the contested documents on or before October 12, 1988.

4) Silverman and Jonas' motion for a protective order is granted;

5) Roy F. Weston, Inc.'s motion for a protective order is granted. Weston shall, on or before October 12, 1988, produce only those documents relating to its performing services for New Hanover Corporation during the permit application process and shall indicate, with specificity, those documents for which it is asserting a privilege.

6) New Hanover Township's motion to compel answers to its first set of requests for admissions is granted in part and denied in part:

A) The Department of Environmental Resources' objections to Requests No. 11, 19, and 24 are sustained; and

B) The Township's motion is granted with respect to Request No. 25. The Department shall respond to this request on or before October 12, 1988.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: September 21, 1988

cc: For the Commonwealth, DER:
Mary Young, Esq.
Eastern Region

For New Hanover Township:
Albert J. Slap, Esq.
SLAP, WILLIAMS & CUKER
Philadelphia, PA
and
Alan Lee Levengood, Esq.
Pottstown, PA

For Paradise Watchdogs:
John E. Childe, Esq.
Hummelstown, PA

For Boyertown Area School District:
Jeffrey T. Sultanik, Esq.
PEARLSTINE/SALKIN ASSOCIATES Lansdale, PA

For New Hanover Corporation:
Hershel J. Richman, Esq.
Janet S. Kole, Esq.
Mark A.Stevens, Esq.
COHEN, SHAPIRO, POLISHER
SHIEKMAN & COHEN
Philadelphia, PA
and
Mark D. Jonas, Esq.
SILVERMAN AND JONAS
Norristown, PA

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

DEL-AWARE UNLIMITED, INC.	:	
	:	
v.	:	EHB Docket No. 87-037-M
	:	(Consolidated Appeal)
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: September 26, 1988
and NESHAMINY WATER RESOURCES AUTHORITY,	:	
Permittee and PHILADELPHIA ELECTRIC	:	
COMPANY, Permittee-Intervenor and	:	
NORTH PENN AND NORTH WALES WATER	:	
AUTHORITIES, Intervenors	:	

OPINION AND ORDER
SUR
MOTION TO DISMISS APPEAL

Synopsis

A Motion to Dismiss Appeal will be denied when it is filed two days after the filing deadline for a pre-hearing memorandum. The filing of such a Motion, under these circumstances, is viewed as overreaching.

OPINION

North Penn and North Wales Water Authorities (NP/NW), Intervenors, filed a Motion to Dismiss Appeal on August 3, 1988, arguing that Del-AWARE Unlimited, Inc.'s (Appellant's) failure to file its pre-hearing memorandum by August 1, 1988, warranted a dismissal of the appeal. Appellant has not filed a specific response to this Motion, but did file its pre-hearing memorandum on August 5, 1988. Along with the pre-hearing memorandum, Appellant filed a Motion to Extend the filing deadline to cover the four days of delinquency. NP/NW has not responded to this Motion.

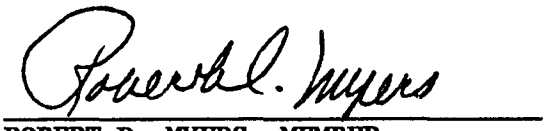
NP/NW's Motion to Dismiss, filed two days after a filing deadline, requires the Board to employ its extremely limited resources of time and money in a useless manner. The filing of such a Motion, under these circumstances, is a blatant example of overreaching. In the future, such motions will be denied summarily.

The Board is fully capable of policing the filing deadlines established in its own orders, and has regularly dismissed appeals after it became clear that the appellants were not going to prosecute them. While it is proper for a party to raise a lack of prosecution by means of a Motion to Dismiss, a lapse of more than two days must be shown before such a Motion will be treated seriously.

ORDER

AND NOW, this 26th day of September, 1988, the Motion to Dismiss Appeal filed by North Penn and North Wales Water Authorities is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS, MEMBER

DATED: September 26, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Louise S. Thompson, Esq.
Eastern Region
For Appellants:
Robert J. Sugarman, Esq.
Philadelphia, PA
For Permittee-Intervenor PECO:
Bernard Chanin, Esq.
Philadelphia, PA

Eugene Bradley, Esq.
Philadelphia, PA
For Permittee NWRA:
Lois Reznick, Esq.
Philadelphia, PA

For Intervenors NP/NW:
Jeremiah J. Cardamone, Esq.
Ambler, PA

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101
717-787-3483
TELECOPIER: 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

JAMES KACER	:	
	:	
v.	:	**EHB Docket No. 88-257-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** September 26, 1988
and JOSEPH CICCONE & SONS, INC.,	:	
Permittee	:	

OPINION AND ORDER
SUR
PETITION FOR LEAVE TO FILE APPEAL NUNC PRO TUNC

Synopsis

A Petition for Leave to File an Appeal Nunc Pro Tunc is denied when the Petitioner fails to allege good cause for failure to file the appeal on time.

OPINION

On June 28, 1988, James Kacer (Petitioner) filed with the Board a Petition for Leave to File Appeal Nunc Pro Tunc from the approval by the Department of Environmental Resources (DER) of a plan for the construction by Joseph Ciccone & Sons, Inc. (Ciccone) of a bituminous concrete drum mix plant and fabric collector in the City of Allentown, Lehigh County. The plan approval, issued pursuant to the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, as amended, 35 P.S. §4001 et seq., was dated January 7, 1988, and was published in the Pennsylvania Bulletin on March 26, 1988.

Petitioner claims that he did not actually become aware of the plan approval until May 23, 1988. Ciccone filed Objections to the Petition on July 28, 1988.

Traditionally, the Board has held that its jurisdiction attaches to an appeal only if it is properly filed within 30 days after the appellant has received written notice of DER's action or within 30 days after notice of such action has been published in the Pennsylvania Bulletin, whichever comes first. 25 Pa. Code §21.52(a); Association of Property Owners of the Hideout, Inc. v. DER, 1987 EHB 714.

This interpretation by the Board of its own Rules and Regulations was rejected recently by Commonwealth Court in Lower Allen Citizens Action Group, Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources (Opinion and Order entered September 1, 1988). Perceiving an ambiguity between the terms used in 25 Pa. Code §21.52(a) and those used in 25 Pa. Code §21.36, the Court held that the appeal period for a third-party appellant does not begin to run until the notice appears in the Pennsylvania Bulletin, even though the appellant has received written notice prior to that date.

According to Petitioner, he received notice of the plan approval on May 23, 1988, but it was published in the Pennsylvania Bulletin on March 26, 1988. The facts here are just the opposite of what they were in Lower Allen. As a result, the Lower Allen ruling, which gives priority to the publication of the notice in the Pennsylvania Bulletin, happens to coincide with Board precedents in cases where the published notice preceded the actual notice. Petitioner's appeal period, therefore, began to run on March 26, 1988, and expired 30 days later. We note, in passing, that even if the May 23, 1988, date were considered, Petitioner's appeal period would have expired on June 22, 1988, some 6 days prior to the date when he filed his Petition.

An appeal nunc pro tunc is provided for in 25 Pa. Code §21.53 if a petitioner can establish good cause in accordance with common law standards. Board decisions interpreting this provision have required a showing that the tardy filing was caused by fraud or a breakdown in the Board's procedures. Borough of Youngwood v. DER, 1986 EHB 1070; Petricca v. DER, 1984 EHB 519; East Side Landfill Authority v. DER, 1982 EHB 299.

Petitioner does not allege that such circumstances occurred in this case. He merely states that he has been an objector "of record" in a related proceeding before the Allentown Planning Commission, learned of DER's plan approval only on May 23, 1988, and learned of potential public health risks from a report dated May 16, 1988, and revised May 23, 1988. These potential public health risks, which Petitioner characterizes as "after-discovered information," constitute the issues Petitioner desires to raise on appeal. However appropriate these issues might have been in a seasonably filed appeal, they are not sufficient to warrant the filing of an appeal nunc pro tunc.

ORDER

AND NOW, this 26th day of September, 1988, it is ordered that the Petition of James Kacer for Leave to File an Appeal Nunc Pro Tunc is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: September 26, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
John R. Embick, Esq.
Eastern Region
For Appellant:
Samuel R. Kasick, Esq.
Allentown, PA
For Permittee:
Wesley M. Wasylik, Esq.
Bethlehem, PA

mjf

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

GOOD SHEPHERD REHABILITATION HOSPITAL	:	
	:	
v.	:	EHB Docket No. 88-258-M
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: September 26, 1988
and JOSEPH CICCONE & SONS, INC.,	:	
Permittee	:	

OPINION AND ORDER
SUR
PETITION FOR LEAVE TO FILE APPEAL NUNC PRO TUNC

Synopsis

A Petition for Leave to File an Appeal Nunc Pro Tunc is denied when the Petitioner fails to allege good cause for failure to file the appeal on time.

OPINION

On June 28, 1988, Good Shepherd Rehabilitation Hospital (Petitioner) filed with the Board a Petition for Leave to File Appeal Nunc Pro Tunc from the approval by the Department of Environmental Resources (DER) of a plan for the construction by Joseph Ciccone & Sons, Inc. (Ciccone) of a bituminous concrete drum mix plant and fabric collector in the City of Allentown, Lehigh County. The plan approval, issued pursuant to the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, as amended, 35 P.S. §4001 et seq., was dated January 7, 1988, and was published in the Pennsylvania Bulletin on March

26, 1988. Petitioner claims that it did not actually become aware of the plan approval until it received a letter from DER, dated February 8, 1988. Ciccone filed Objections to the Petition on July 28, 1988.

Traditionally, the Board has held that its jurisdiction attaches to an appeal only if it is properly filed within 30 days after the appellant has received written notice of DER's action or within 30 days after notice of such action has been published in the Pennsylvania Bulletin, whichever comes first. 25 Pa. Code §21.52(a); Association of Property Owners of the Hideout, Inc. v. DER, 1987 EHB 714.

This interpretation by the Board of its own Rules and Regulations was rejected recently by Commonwealth Court in Lower Allen Citizens Action Group, Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources (Opinion and Order entered September 1, 1988). Perceiving an ambiguity between the terms used in 25 Pa. Code §21.52(a) and those used in 25 Pa. Code §21.36, the Court held that the appeal period for a third-party appellant does not begin to run until the notice appears in the Pennsylvania Bulletin, even though the appellant has received written notice prior to that date.

According to Petitioner, it received notice of the plan approval by a letter from DER, dated February 9, 1988. Petitioner does not specify when this letter was received, but we assume that it was in Petitioner's hands a few days after its date. In any event, the approval was published in the Pennsylvania Bulletin on March 26, 1988. According to the Lower Allen ruling, Petitioner would have had to file an appeal within 30 days of the latter date in order to invoke the Board's jurisdiction.

An appeal nunc pro tunc is provided for in 25 Pa. Code §21.53 if a petitioner can establish good cause in accordance with common law standards.

Board decisions interpreting this provision have required a showing that the tardy filing was caused by fraud or a breakdown in the Board's procedures. Borough of Youngwood v. DER, 1986 EHB 1070; Petricca v. DER, 1984 EHB 519; East Side Landfill Authority v. DER, 1982 EHB 299.

Petitioner does not allege that such circumstances occurred in this case. It merely states that it has been an objector "of record" in a related proceeding before the Allentown Planning Commission and learned of potential public health risks from a report dated May 16, 1988, and revised May 23, 1988. These potential public health risks, which Petitioner characterizes as "after-discovered information," constitute the issues Petitioner desires to raise on appeal. However appropriate these issues might have been in a seasonably filed appeal, they are not sufficient to warrant the filing of an appeal nunc pro tunc.

ORDER

AND NOW, this 26th day of September, 1988, it is ordered that the Petition of Good Shepherd Rehabilitation Hospital for Leave to File an Appeal Nunc Pro Tunc is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: September 26, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
John R. Embick, Esq.
Eastern Region
For Appellant:
Samuel R. Kasick, Esq.
Allentown, PA
For Permittee:
Wesley M. Wasylik, Esq.
Bethlehem, PA

mjf

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

NEW HANOVER TOWNSHIP, et al.	:	
v.	:	EHB Docket No. 88-119-W
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
NEW HANOVER CORPORATION	:	Issued: September 27, 1988

OPINION AND ORDER SUR
NEW HANOVER CORPORATION'S
MOTION TO COMPEL

Synopsis

A motion to compel answers to interrogatories will be granted where a party has improperly alleged that documents sought are irrelevant, burdensome or harassing to produce or where a party has failed to produce complete and responsive answers. The motion will be denied where a party cannot yet identify expert witnesses or the subject matter is privileged.

OPINION

This discovery dispute arises from an appeal by New Hanover Township (Township) challenging the Department of Environmental Resources' (Department) issuance of permits to New Hanover Corporation (Corporation) authorizing the construction and operation of a municipal waste landfill in New Hanover Township. The procedural history of this matter is described in the Board's September 22, 1988 opinion and order relating to various other discovery disputes.

On or about May 5, 1988, the Township was served with the Corporation's first set of interrogatories. On June 23, 1988, the Township filed its objections and answers to these interrogatories.

On August 15, 1988, the Corporation filed its motion to compel the Township to answer these interrogatories, arguing that the Township had objected to 86 of the Corporation's 96 interrogatories, and where it did not object, most of its answers were incomplete or non-responsive.

On September 13, 1988, the Township filed its response to the motion to compel, defending its objections as proper and its answers as complete.

The first broad category of objections is based on the Township's inability to answer interrogatories based on expert opinions, since it does not yet know what experts will testify at the hearing. The Corporation claims it is entitled to know the factual basis for the Township's contentions as listed in its appeal and the names of experts retained in anticipation of its appeal, even if the expert is not expected to be called at trial, citing Pa.R.C.P. 4003.5.(a)(3), which provides

> A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except a medical expert as provided in Rule 4010(b) or except on order of court as to any other expert upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means, subject to such restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate.

While the federal rule and caselaw have permitted discovery of the names of experts, even if they will not be called at trial, without a special showing from the party seeking discovery, the Pennsylvania state courts still hold

such discovery is improper. Sanctions do exist in case the Township should attempt to unfairly surprise the Corporation by calling expert witnesses not identified in advance of the hearing. Accordingly, the Township's objections to Interrogatories 1, 7, 11, 13, 15, 17, 19, 21, 23, 25, 28, 32, 34, 37, 39, 41, 43, 46, 48, 51, 53A, 57, 59, 61, 64, 66, 68, 70, 72, 74, 77, 79, 81, 83, 85, 87, and 88 are sustained, and the Corporation's motion to compel answers to these interrogatories is denied.

The next category of objections raised by the Township was that it was burdensome and harassing to identify documents as part of its response to interrogatories relating to the factual bases of the contentions in its appeal. In response to these interrogatories, the Township answered it would supply all relevant documents pursuant to a proper request for production of documents under Pa.R.C.P. 4006(b).

Because most of the interrogatories in this category of objections deal with a specific contention, we do not find it burdensome for the Township to have to produce the documents supplying the factual bases for these contentions or documents relied on by experts in formulating these contentions. Accordingly, the Corporation's motion to compel production of documents requested for Interrogatories 2, 2A, 4, 5, 8, 9, 10, 12, 13, 14, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 50, 53, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 71, 72, 73, 74, 75, 76, 77, 78, 79, 81, 83, 84, 85, 86, 87, 89, 90, and 92 is granted.

The Township objected to Interrogatories 86 and 90 on the basis of relevance.

Interrogatory 86 reads as follows:

> Describe the organizational structure of New

> Hanover Township for both elected and appointed officials, agents, servants and employees, and with respect to each office, bureau, department, unit, section or division, state the following: a) the name of the office, b) the term of that office, c) the purpose or function of that office, d) the identify of those with managerial responsibility within each office and e) whether the office or someone within the office performed any work relating to the certification, permits or applications.

The Corporation claims it needs this information to direct its discovery to the proper deponents and to discover when the Township had notice of certain events. The Township responds that it has already supplied the Corporation with its organizational chart, directory of officials, and descriptions of its boards and committees. The organizational chart and other information supplied are responsive to items (a)-(d) of Interrogatory 86, but the Township must also indicate which offices performed any work relating to the permits, certification or applications of the Corporation. Accordingly, we will grant the motion in part.

Interrogatory 90 reads as follows:

> Identify <u>each and every member</u> of Appellant Paradise Watch Dogs and Appellant Boyertown Area School District who New Hanover Township contacted or was contacted by, consulted or was consulted by, or in any way communicated with concerning the Landfill.

Again, the Township maintains this is irrelevant. The Corporation repeats its argument that it needs this information to direct its discovery. Because Paradise Watch Dogs were the original Appellants before this appeal was consolidated and discussions with the group may have formed the basis of some of the Township's contentions, we believe the information is relevant and grant the Corporation's motion to compel.

Interrogatory 90 requested the Township to identify all Township meetings or work sessions in which the certification, permits or related applications were discussed or mentioned and to identify all documents evidencing, recording or summarizing these meetings. The Township objected to this interrogatory as burdensome and harassing and argued that the material is protected by the attorney-client privilege and the Pennsylvania Sunshine Act,[1] but that the documents would be supplied pursuant to a proper request for production of documents.

The Corporation responds that such a request is unnecessary and that the Sunshine Law mandates that such meetings be completely open to the public. The Township responded by citing §§277(a), 278(a)(4), and 286 of the Sunshine Act which exempt executive sessions concerning litigation from the open meeting requirement. Any minutes of Township meetings discussing issues relevant to the landfill must be produced; all meetings conducted to consult with an attorney regarding litigation are privileged pursuant to 65 P.S. §278(a)(4).

The Corporation protested that several of the answers to interrogatories were incomplete and non-responsive. In its responses to these interrogatories, the Township often cites a statute without citing the specific provisions of that statute, refers to a letter from an agency without giving dates or the names of correspondents or a copy of that letter, refers to a statement of a person without giving the date or place where the statement was delivered, and often fails to substantiate in any way assertions made in its appeal to which these interrogatories are directed. Upon review of the 35 contested answers, the Corporation's motion to compel more complete answers to Interrogatories 5,

---

[1] The Act of July 6, 1986, P.L. 388, No. 84, 65 P.S. §271.1 et seq.

10, 16, 20, 22, 25(f), 27, 29, 30, 35, 38, 42, 45, 47, 56, 58, 60, 63, 73, 76, 78, 80, 82,and 84 is granted but limited to the degree they rely solely on testimony of experts not yet identified; and with respect to Interrogatories 3, 4, 6, 8, 26, 40, 53, 65, 67, 69, and 71 is denied.

And, finally, certain of these interrogatories were also objected to by the Township as being incomprehensible or confusing. Some degree of cooperation must exist between the parties in discussing and resolving these interpretative questions without constantly involving the Board in the controversy. The Board has spent an inordinate amount of time disposing of nine separate discovery related motions in this one appeal. The Board does not have the luxury of devoting its limited resources to resolving what are, in some cases, petty squabbles, and counsel are directed to make some attempts on their own to work out disputes without the constant intervention of the Board.

O R D E R

AND NOW, this 27th day of September, 1988, it is ordered that New Hanover Township's Motion to Compel Answers to Interrogatories is granted in part and denied in part consistent with the foregoing opinion.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: September 27, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Mary Young, Esq.
Eastern Region
For New Hanover Township:
Albert J. Slap, Esq.
SLAP, WILLIAMS & CUKER
Philadelphia, PA
and
Alan Lee Levengood, Esq.
Pottstown, PA
For Paradise Watchdogs:
John E. Childe, Esq.
Hummelstown, PA
For Boyertown Area School District:
Jeffrey T. Sultanik, Esq.
PEARLSTINE/SALKIN ASSOCIATES Lansdale, PA
For New Hanover Corporation:
Hershel J. Richman, Esq.
Janet S. Kole, Esq.
Mark A.Stevens, Esq.
COHEN, SHAPIRO, POLISHER
SHIEKMAN & COHEN
Philadelphia, PA
and
Mark D. Jonas, Esq.
SILVERMAN AND JONAS
Norristown, PA

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

NEW HANOVER TOWNSHIP, et al.	:	
v.	:	EHB Docket No. 88-119-W
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
NEW HANOVER CORPORATION	:	Issued: September 27, 1988

OPINION AND ORDER SUR
MOTION FOR PROTECTIVE ORDER

Synopsis

A motion for a protective order from a request for production of documents will be granted only to the extent that the documents sought are irrelevant, will not lead to the discovery of admissible evidence, or are protected from discovery under the Pennsylvania Rules of Civil Procedure.

OPINION

This discovery dispute arises from an appeal by New Hanover Township (Township) challenging the Department of Environmental Resources' (Department) March 1, 1988 decision to issue certain permits to New Hanover Corporation (Corporation) authorizing the construction and operation of a municipal waste landfill. The procedural history of this matter is described more fully in the Board's September 22, 1988 Opinion and order dealing with various other discovery disputes.

In response to the Township's requests for production of documents, the Corporation filed its August 22, 1988 motion for a protective order objecting

to the production of any documents produced after March 1, 1988, the date the permits were issued. The Corporation maintains that the Department's decision must be evaluated according to the information it had when it made the decision to issue the permits; any documents created after that date dealing with the process of permit modification would be prejudicial, misleading and irrelevant; and finally, any documents prepared in anticipation of litigation are privileged under the work product doctrine of Pa.R.C.P. 4003.3.

On September 12, 1988, the Township filed its memorandum in opposition to the protective order, arguing that because the Board has de novo review, it may consider evidence acquired after the date of the appealed-from action; the Corporation failed to substantiate its claims or provide a proper legal foundation for its arguments; and Pa.R.C.P. 4003.3 does not protect all documents prepared in anticipation of litigation. We will address each of these contentions.

Hearings by the Board on appeals from actions of the Department are conducted de novo, Warren Sand & Gravel v. DER, 20 Pa.Cmwlth. 186, 341 A.2d 556 (1975). The Board held in Commonwealth of Pennsylvania Game Comm'n v. DER, 1985 EHB 1, aff'd, 97 Pa.Cmwlth. 78, 509 A.2d 877 (1986), that the de novo review can be based on evidence acquired after the appealed-from Department action took place and permitted into evidence the testimony of a Department consultant who conducted a reevaluation of the factual basis for a permit denial after it was denied. 1985 EHB at 31. Correspondingly, it follows that a party may procure evidence such as this through discovery, as long as it is relevant and reasonably calculated to lead to the discovery of admissible evidence in conformity with Pa.R.C.P. 4003.1.

Consistent with the Board's earlier opinion of September 22, 1988 in this matter, we will not sustain the Corporation's objection that every

document related to the issuance of the permit or certification which was generated after the Department's actions is irrelevant. It is conceivable that some documents produced after the date of issuance may have bearing on the issues in this appeal, and the Corporation's blanket assertion of irrelevance as a basis for a protective order is denied.

While the objection that information in a document to be produced may be prejudicial or misleading is not a discovery objection recognized in Pa.R.C.P. 4003.1 through 4003.5, the point is well taken that materials relating solely to permit modification under the new municipal waste management regulations are irrelevant, since that matter is not yet before us. However, to the extent that any such documents may contain information relevant to the pending appeal or leading to the discovery of admissible evidence, they must be produced.

Rule 4003.3 of the Pennsylvania Rules of Civil Procedure states that:

> [A] party may obtain discovery ot any matter discoverable under Rule 4003.1 <u>even though prepared in anticipation of litigation or trial by or for (another party) or by or for that other party's representative, including his attorney, consultant, surety, indemnitor, insurer or agent</u>. The discovery shall not include disclosure of the mental impressions of a party's attorney or his conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. <u>With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics</u>.
>
> (emphasis added)

The rule does not provide blanket protection for every document prepared in anticipation of litigation, but rather limits the protection for a

representative of a party, other than his attorney, from disclosure of his mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

Again, to the extent that any documents were prepared in anticipation of litigation, but do not deal with mental impressions, conclusions or opinions respecting the value or merit of a claim, defense, strategy or tactics, they are not protected and should be produced for the Township. If the Corporation has any documents that it believes are protected by the explicit language of Pa.R.C.P. 4003.3, then these documents and materials can be readily submitted to the Board for in camera inspection for a determination whether they are covered by the limited protection of Pa.R.C.P. 4003.3. Any documents not submitted to the Board for in camera inspection shall be forthwith produced for the Township.

O R D E R

AND NOW, this 27th day of September, 1988, it is ordered that New Hanover Corporation's motion for a protective order is granted in part and denied in part consistent with the foregoing opinion. On or before October 13, 1988, New Hanover Corporation shall file with the Board copies of all documents for which it is claiming a privilege pursuant to Pa.R.C.P. 4003.3 for the Board's in camera inspection, and shall file with New Hanover Township a list of such documents. All other documents shall be produced for the Township at that time.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: September 27, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Mary Young, Esq.
Eastern Region
For New Hanover Township:
Albert J. Slap, Esq.
SLAP, WILLIAMS & CUKER
Philadelphia, PA
and
Alan Lee Levengood, Esq.
Pottstown, PA
For Paradise Watchdogs:
John E. Childe, Esq.
Hummelstown, PA
For Boyertown Area School District:
Jeffrey T. Sultanik, Esq.
PEARLSTINE/SALKIN ASSOCIATES Lansdale, PA
For New Hanover Corporation:
Hershel J. Richman, Esq.
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SHIEKMAN & COHEN
and
Mark D. Jonas, Esq.
SILVERMAN AND JONAS
Norristown, PA

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

DEL-AWARE UNLIMITED, INC.	:	
	:	
v.	:	EHB Docket No. 87-037-M
	:	(Consolidated Appeal)
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: September 30, 1988
and NESHAMINY WATER RESOURCES AUTHORITY,	:	
Permittee and PHILADELPHIA ELECTRIC	:	
COMPANY, Permittee-Intervenor and	:	
NORTH PENN AND NORTH WALES WATER	:	
AUTHORITIES, Intervenors	:	

OPINION AND ORDER
SUR
MOTION TO STRIKE

Synopsis

A Motion to Strike portions of a pre-hearing memorandum (treated as a Motion to Limit Issues) will be granted when the challenged portions relate to an issue precluded by a prior adjudication. The fact that discovery was allowed with respect to the issue does not determine its relevance.

OPINION

On August 16, 1988, North Penn and North Wales Water Authorities (NP/NW), Intervenors, filed a Motion to Strike portions of the pre-hearing memorandum filed by Del-AWARE Unlimited, Inc. (Appellant) and to prohibit Appellant from introducing irrelevant evidence. Appellant filed an Answer to this Motion on September 19, 1988.

In its Motion, NP/NW asserts that, since prior Board rulings have held that the issue of alternatives to the Point Pleasant Project is

precluded, Appellant should not be permitted to raise the issue. NP/NW points out that certain portions of Appellant's pre-hearing memorandum relate to alternatives and should be stricken. Appellants argue that a consideration of alternatives is necessarily involved in weighing the need for the Point Pleasant Project, an issue which the Board has previously ruled not to be precluded.

While the Board in the past has entertained motions to strike with respect to pre-hearing memoranda, it has never been satisfied with the use of this procedural device for this purpose. A Motion to Limit Issues or a Motion for Partial Summary Judgment would be a more appropriate vehicle to challenge the right of an opposing party to raise a factual or legal issue set forth in a pre-hearing memorandum. Counsel are urged to employ these types of motions in the future.

The disposition of NP/NW's Motion requires an examination of the past history of the proceedings relating to the Point Pleasant Project. The seminal decision of the Board, issued on June 18, 1984 [Del-AWARE Unlimited, Inc. v. DER, 1984 EHB 178, (Del-AWARE I)], devoted considerable attention to the need for the Project and the possible alternatives to it (See Findings of Fact, Nos. 17-23, 142-196; Discussion, pp. 130-150; Conclusions of Law, Nos. 6-8, 10-11). The Board sustained all of DER's actions in that appeal except for the issuance of the outfall permits ENC 09-77 and ENC 09-81. These were remanded to DER for consideration of several issues. One of these involved the erosive effect of the outfall discharges on the North Branch Neshaminy Creek and the East Branch Perkiomen Creek. The Board stated, in Conclusion of Law No. 10:

> "In order to comply with the second and third of the three Payne standards, DER should have required NWRA and PECO to cease discharges if and when the flow velocities

> of the respective creeks below their outfalls exceed 2.0 fps, or, in the alternative, DER should have quantified the damage to the receiving streams caused by velocities above 2.0 fps and determined that the benefits to be derived from the project would clearly outweigh this environmental harm."

Del-AWARE I was appealed to Commonwealth Court, where it was affirmed, 96 Pa. Cmwlth. 361, 508 A.2d 348 (1986), allocatur denied, 523 A.2d 1132 (1986).

Appeals filed with the Board from DER's extensions of the permits applicable to the Point Pleasant Project have been dealt with in several later decisions of the Board. The first of these, Del-AWARE Unlimited, Inc. v. DER, 1986 EHB 919 (Del-AWARE II), dealt extensively with a determination of which issues had been precluded by Del-AWARE I and which had not. On page 933, the Board alluded to Del-AWARE's claim that "groundwater studies published in the past few months indicate that, contrary to the basic assumptions that informed the project, there is adequate groundwater to supply the needs of Bucks County." After further discussion, the Board concluded at page 936:

> "It is to be expected that some of the information on which DER relied when it originally granted the permits would turn out to be somewhat inaccurate as new information became available with the passage of time. It would be bad public policy, inconsistent with the sensible public policy reasons underlying issue preclusion, to use the instant appeals of these constuction permit extensions as an excuse to (in effect) reopen the Del-AWARE I hearing to supplement that record with the new information which inevitably and expectedly has accumulated since the Del-AWARE I record was closed. As the Clark court indicated, it is essential that PECO and NWRA be able to rely on the finality of our Del-AWARE I judgment, which now has been affirmed in all respects. Del-AWARE Unlimited, Inc. et al. v. DER and PECO v. DER, 508 A.2d 348 (Pa.Cmwlth.1986). As the Day court indicated, because even more new information will accumulate with the passage of time, there really is no assurance that reopening the Del-AWARE I record now will lead to a decision on the issues litigated in Del-AWARE I which will be superior to the actual Del-AWARE I judgment in the long run."

In a follow-up decision, Del-AWARE Unlimited, Inc. v. DER, 1987 EHB 351 (Del-AWARE III), the Board dealt more specifically with issue preclusion. The existence of alternatives available to Philadelphia Electric Company (PECO) was held to be one of the issues precluded from appeals subsequent to Del-AWARE I (page 367). The same result was reached with respect to new Delaware River Basin Commission (DRBC) evidence (page 368) and with respect to the results of an investigation conducted by Neshaminy Water Resources Authority (NWRA) (page 374). Appellant had argued that NWRA's investigation had demonstrated that the original project approvals had been secured with the aid of false and misleading information about Bucks County's water needs.

The Board concluded in Del-AWARE III that only four issues remained in the appeals. One of these concerned the erosive effects of the discharges upon the North Branch Neshaminy Creek and the East Branch Perkiomen Creek (pages 377-378). The sole inquiry, according to the Board, was whether DER's remand decision on this issue properly comports with the Board's order in Del-AWARE I (page 378).

A review of several Board opinions on discovery disputes rounds out our historical examination. In Del-AWARE Unlimited, Inc. v. DER, 1987 EHB 600, the Board denied discovery with respect to alternatives to the Point Pleasant Project and certain other issues deemed precluded. It permitted discovery, however, into matters pertaining to the "need" for the Project, considering them to be necessary components of the balancing process DER was ordered to perform in Delaware I.

In Del-AWARE Unlimited, Inc. v. DER (Opinion and Order issued April 21, 1988), the Board acknowledged the propriety of discovery into NP/NW's

water supply and demand. And in Del-AWARE Unlmited, Inc. v. DER (Opinion and Order issued May 24, 1988), the Board permitted a further deposition of NP/NW's expert on methods used to determine the need for the Project.

In the midst of these drawn out and entangled proceedings it is easy to lose sight of the ultimate goal -- a final adjudication on the legality of the issuance of outfall permits ENC 09-77 and ENC 09-81. To achieve this goal, the Board must determine whether DER's remand decision on the stream erosion issue comports to the Board's ruling in Del-AWARE I. As already noted, that ruling required DER to limit the discharge flow rate to 2.0 fps or, in the alternative, to quantify the damage that will be caused by higher flow rates and weigh it against the benefits to be derived from the Project.

These actions were required of DER in order to satisfy the second and third inquiries in the test set forth in Payne v. Kassab, 11 Pa. Cmwlth. 14, 312 A.2d 86 (1973), exceptions dismissed, 14 Pa. Cmwlth. 491, 323 A.2d 407 (1974), affirmed 486 Pa. 226, 361 A.2d 263 (1976). Those inquiries, in the language of Commonwealth Court, are "(2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?" (312 A.2d 86 at 94).

By requiring DER to weigh the benefits against the harm, the Board did not intend to reopen for relitigation the whole question of "need" for the Point Pleasant Project. That question had already been litigated in Del-AWARE I where extensive evidence had been received concerning projections of water usage and alternative sources of supply. Del-AWARE's attempts in later appeals to show that there was adequate groundwater to supply Bucks County's needs were rejected in Del-AWARE II. Del-AWARE's efforts to show that the

evidence of Bucks County's water needs was false and misleading were repudicated in Del-AWARE III. These decisions are clearly and absolutely consistent with Del-AWARE I's holding that there is a need for the Point Pleasant Project.

Appellant apparently interpreted the Board's discovery rulings of July 17, 1987, April 21, 1988, and May 24, 1988, as reopening the "need" issue. A careful reading of those decisions, however, reveals that they were based on a broad construction of relevancy in resolving discovery disputes. The Board specifically cautioned the parties at 1987 EHB 609 that:

> "Relevancy, however, is not to be construed as interchangeable with admissibility.... Nonetheless, the Board will not construe relevancy so broadly that issues which have been excluded through the Board's opinion and order in Del-AWARE III are bootstrapped back into the proceeding through discovery."

The "benefits to be derived" from a project necessarily relate to the "needs" that will be met by the project, but may also involve other benefits occurring as by-products. The balancing test required by the Payne decision and by the prior decisions of the Board on the Point Pleasant Project involves a weighing of the benefits against the harm to be done.

Accordingly, the Board will admit proper evidence on benefits to be derived, if any, over and above the meeting of needs which already have been established in Del-AWARE I, and proper evidence on the nature and extent of environmental harm, if any, that will be inflicted upon the North Branch Neshaminy Creek and East Branch Perkiomen Creek by the erosive effect of the discharge flow rates allowed by DER in outfall permits ENC 09-77 and ENC 09-81.

Since the evidence proposed to be offered in part III of Appellant's pre-hearing memorandum (pages 17-34) does not fall within the parameters

established above, it will be excluded.

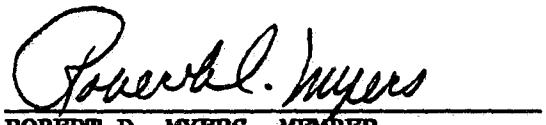
ORDER

AND NOW, this 30th day of September, 1988, it is ordered that:

1. The Motion to Strike (treated as a Motion to Limit Issues) of North Penn and North Wales Water Authorities is granted.

2. All parties who have not yet filed pre-hearing memoranda shall do so within 30 days after the date of this Opinion and Order.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS, MEMBER

DATED: September 30, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Louise S. Thompson, Esq.
Eastern Region
For Appellants:
Robert J. Sugarman, Esq.
Philadelphia, PA
For Permittee-Intervenor PECO:
Bernard Chanin, Esq.
Philadelphia, PA

Eugene Bradley, Esq.
Philadelphia, PA
For Permittee NWRA:
Lois Reznick, Esq.
Philadelphia, PA
For Intervenors NP/NW:
Jeremiah J. Cardamone, Esq.
Ambler, PA

mjf

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101
717-787-3483
TELECOPIER: 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

WESTINGHOUSE ELECTRIC CORPORATION	:	
	:	
v.	:	**EHB Docket No. 88-296-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** October 3, 1988

OPINION AND ORDER
SUR
PETITION FOR SUPERSEDEAS

Synopsis

A partial supersedeas will be granted when an Order issued by the Department of Environmental Resources (DER) interferes with the performance of a Remedial Investigation/Feasibility Study (RI/FS) mandated by the Environmental Protection Agency (EPA) under Federal law. Even though Federal legislation has not preempted the field, state actions are subordinate to it.

OPINION

Westinghouse Electric Corporation (Petitioner) has appealed from a July 22, 1988, Order of DER directing Petitioner to begin operation, within 48 hours, of a packed column air stripping tower installed at Petitioner's elevator manufacturing plant in Cumberland Township, Adams County. With the appeal, Petitioner also has filed a Petition for Supersedeas, which it amended on September 8, 1988. DER filed a Motion to Deny the Petition for Supersedeas on August 26, 1988. Petitioner responded to this Motion on September 9, 1988.

Hearings were held in Harrisburg on September 13 and 14, 1988, and both parties have filed legal memoranda. The record consists of the pleadings, a hearing transcript of 381 pages and 24 exhibits.

Petitions for Supersedeas are governed by the Board's Rules and Regulations compiled in 25 Pa. Code §21.76 et seq. Such Petitions must meet the standards of form and substance contained in §21.77 and survive the scrutiny required by §21.78. That scrutiny involves a consideration of relevant factors, including (1) irreparable harm to the petitioner, (2) the likelihood of the petitioner prevailing on the merits, and (3) the likelihood of injury to the public or other parties. Evaluation of these factors requires the Board to conduct a balancing test, Pa. P.U.C. v. Process Gas Consumers Group, 502 Pa. 545, 467 A.2d 805 (1983), with the burden of proof on the petitioner. Lower Providence Township v. DER, 1986 EHB 395.

The facts established at the hearing reveal that Petitioner has been operating its elevator manufacturing plant in Adams County since 1969. In its operations, Petitioner has used degreasing compounds, containing trichloroethylene (TCE) from 1969 to 1975 and containing 1,1,1-trichloroethane (1,1,1-TCA) subsequent to 1975. Both TCE and 1,1,1-TCA are volatile organic compounds (VOCs) and have been designated as toxic pollutants pursuant to Section 307(a) of the Clean Water Act (CWA), 33 U.S.C. §1317, and Section 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), as amended, 42 U.S.C. §9601(14).

TCE and 1,1,1-TCA were detected in a well on Petitioner's plant site and in residential wells in the vicinity of the plant site during the latter part of 1983. Early in 1984, Petitioner hired R. E. Wright Associates, Inc. (Wright) as its hydrogeologic consultants. Wright supervised the installation of a number of monitoring wells on Petitioner's plant site and designed an air

stripping tower to be used in conjunction with monitoring well no. 1 (MW-1). The air stripping tower is a device used to remove VOCs from groundwater.

The air stripping tower was placed into operation in June 1984 under temporary permission given by DER and which was scheduled to expire on December 31, 1984, unless permits were obtained for the tower and the discharge. Petitioner's request for a 90-day extension to the temporary permits was denied by DER on January 18, 1985, because final permits had not been applied for. As a result, the air stripping tower was shut down.

Petitioner filed applications for final permits in mid-February 1985, and DER granted temporary approval for the operation of the tower on April 26, 1985. Petitioner did not resume operation of the tower, however, until May 1986 when final permits had been issued. The tower operated more or less continuously from that time until August 1987 when it was shut down for maintenance work and an operational assessment. Petitioner had been experiencing increasing problems with the operation of the tower, specifically the level of contaminants in the discharge water that exceeded concentrations established in the NPDES permit.

In the meantime, Petitioner's plant site had been placed on the Superfund National Priorities List, in accordance with Section 105(8) of CERCLA, 42 U.S.C. §9605(8), during the late spring or early summer of 1986. On March 10, 1987, EPA had issued a Consent Order at docket no. III-87-4-DC, directing Petitioner, inter alia, to conduct an RI/FS. A draft work plan for the RI/FS, dated May 30, 1987, was filed with EPA and was the subject of an EPA comment letter of September 18, 1987. One of these comments concerned the air stripping tower. After suggesting that the effectiveness of the tower be assessed, the EPA official stated:

> "It should be determined whether this interim remedial

> measure is appropriate or if it will interfere with the RI/FS work. Pumping and treating contaminated ground water at this point could make more difficult the task to determine the full extent of contamination in the future and the sources of contamination, especially if the studies performed by R. E. Wright Associates, Inc. were more or less limited to the boundaries of the plant."

In view of these comments and Petitioner's desire to conduct a thorough operational assessment of the tower, Petitioner decided not to restart it. This decision was incorporated in Petitioner's final work plan submitted to EPA in February 1988.

During 1986 and 1987, Petitioner arranged for Gettysburg municipal water lines to be extended into the area in the vicinity of the plant site and for residents whose wells were contaminated to hook on to the municipal system. Residents were offered filtration units and bottled water as interim measures prior to hook-up. Of the 131 residences involved, 95 had been connected and were receiving municipal water at the time of the hearing. The others had been hooked up but were awaiting the completion of final testing that must be done before service can be provided. All of this work was done at Petitioner's expense.

DER's position, communicated to Petitioner in 1986 and 1987, was that the seven residences on Pin Oak Lane also should be hooked on to the municipal system. Petitioner has not offered the opportunity to these residents because Petitioner believes their wells are not contaminated to the point of causing any problems.

In meetings with representatives of Petitioner subsequent to the shutdown of the air stripping tower in August 1987, representatives of DER took the position that the tower should be put back into service. When efforts to convince Petitioner to do this failed, DER issued its Order of July 22, 1988. The fact that residents in the neighborhood of the plant were being

provided with filtration units and bottled water while work was progressing to hook them on to the municipal water system was one factor that influenced DER to withhold its Order for nearly a year.

The basic objectives of the RI/FS are to identify the sources, nature and extent of the contamination; to determine pathways of migration; and to come up with remedial alternatives. In order to meet these objectives, determinations must be made (1) of the horizontal and vertical extent of the contamination, and (2) of the elevations, gradients and flow directions of the naturally occurring groundwater. Since existing data is not sufficient to make these determinations, the RI/FS proposes the drilling of new monitoring wells and the renovation of previously drilled wells.

When the air stripping tower is in operation, it is fed by water pumped at the rate of 17gpm from MW-1, located about 100 feet south of the northeast corner of Petitioner's plant building and about 50 feet away from the building itself. This pumping draws down the groundwater in the direction of the well, creating a cone of depression that extends basically to the boundaries of the plant site. When pumping ceases, the groundwater gradually resumes its natural flow characteristics and the cone of the depression disappears.

Petitioner's environmental engineering consultant maintains that, in order to meet the objectives of the RI/FS, the air stripping tower must be shutdown during the period when groundwater monitoring is being done and for a prior period of sufficient duration to enable the groundwater to resume its natural flow characteristics. In the consultant's judgment, the prior period would have to extend from several weeks to several months.

According to the work schedule incorporated into the RI/FS work plan as Figure 5-1, the Phase I Field Investigation would begin at the end of two

months into the project and would take three months to complete. In anticipation of EPA approval, Petitioner has actually begun the mobilization phase of the project and, at the time of the hearing, was about three weeks into the work schedule. The official EPA approval, dated September 13, 1988, was issued during the hearing.

DER witnesses acknowledged that the integrity of the RI/FS depended, to an extent, on the ability to monitor groundwater in its natural state, unaffected by pumping. They argued, however, that pumping would have to be suspended only for two weeks prior to doing the study and only for a few more days while the measurements and samples were being taken.

At Petitioner's request, Wright has made an operational assessment of the air stripping tower and has proposed a series of modifications to incorporate current technology. It will take 3 to 6 weeks to make these modifications and put the tower back into operating condition. The operation of the tower recovers contaminants from the groundwater beneath the plant site but has no effect on contaminants that already have migrated off the site.

An examination of the Petition for Supersedeas and its amendment shows that it satisfactorily conforms to the requirements of 25 Pa. Code §21.77. Accordingly, DER's Motion to Deny Petition for Supersedeas is denied to the extent that it is based upon this section of the Board's Rules and Regulations. The substantive prerequisites of 25 Pa. Code §21.78 require more extensive discussion.

In the amendment to its Petition for Supersedeas, Petitioner asserts that DER's Order is null and void because the Federal Government under CERCLA has preempted the field. Petitioner maintains that this preemption bars DER from exercising any jurisdiction with respect to Petitioner's plant site. A review of the pertinent sections of CERCLA does not support this argument.

Section 114(a), 42 U.S.C. §9614(a), specifically states that nothing in CERCLA shall be construed as preempting any state from imposing "any additional liability or requirements" with respect to the release of hazardous substances. This provision was relied on by Commonwealth Court in concluding that CERCLA did not preempt section 505(e) of Pennsylvania's Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.505(e), in Chemclene Corp. v. Commonwealth, Dept. of Environmental Resources, 91 Pa. Cmwlth. 316, 497 A.2d 268 (1985).

Petitioner argues that section 121 of CERCLA, 42 U.S.C. §9621, added by amendment in 1986, mandates a different result because of its provisions for state involvement at every step of the way where Superfund sites are involved. Petitioner points out that DER was involved in meetings pertaining to the RI/FS work plan and gave its approval to the final version. Since DER had the opportunity to propose a requirement that the air stripping tower be restarted and failed to take advantage of it, DER should now be precluded from demanding more than the RI/FS work plan requires.

Section 121 appears to be directed to the choosing of remedial measures to clean up the contamination, a point which has not yet been reached in this situation. DER's involvement in reviewing the RI/FS work plan, which deals solely with the methods to be used to determine the nature and extent of the contamination, can not be construed as a waiver of its police powers secured by 42 U.S.C. §9614(a).

DER's Order to restart the air stripping tower, while not preempted by CERCLA, nonetheless may not interfere with, or contradict, actions ordered by EPA pursuant to its powers under CERCLA. Even though the Federal Government has not preempted the field, its actions take precedence over conflicting state actions. U.S. Constitution, Article VI, Section 2; In re

Cochran's Estate, 398 Pa. 506, 159 A.2d 514 (1960). Petitioner argues that DER has violated this principle because restarting the air stripping tower will interfere with Petitioner's performance of the RI/FS mandated by EPA.

The Order requires the air stripping tower (or an approved alternate system) to be put into operation within 48 hours and to be operated continuously until DER determines that the public health and environment no longer demand it. The Order makes no provision for shutting down the tower for purposes of the RI/FS. It is clear from the evidence presented at the hearing that the integrity of the RI/FS will be seriously impaired by a pumping operation that distorts the natural flow characteristics of the groundwater. The findings of the RI/FS, performed under such conditions, would very likely result in remedial measures wholly or partially ineffective in cleaning up the contamination. To the extent that DER's Order interferes with the proper performance of the RI/FS mandated by EPA, it is unlawful.

DER's witnesses conceded as much during the hearing, acknowledging the desirability of shutting down the air stripping tower while groundwater studies are being done. They disagreed with the amount of time needed to perform the studies, however, maintaining that a shutdown of several weeks' duration would be sufficient.

Since DER's Order is unlawful to the extent that it requires operation of the air stripping tower while the groundwater studies of the RI/FS are in progress, Petitioner is not required to satisfy the prerequisites for a supersedeas set forth in 25 Pa. Code §21.78. Lower Providence Township v. DER, 1986 EHB 395. It is not clear from the Petition for Supersedeas or its amendment whether Petitioner is seeking a complete suspension of DER's

Order or just a partial suspension during the groundwater study phase of the RI/FS. To the extent that Petitioner seeks more than a partial suspension, it must meet the requirements of 25 Pa. Code §21.78.

It is apparent from the evidence that Petitoner has failed to carry its burden of proof in this respect. It has not shown any irreparable harm or any likelihood that it can prevail on the merits of the controversy. Moreover, the evidence is overwhelming that, without operation of the air stripping tower, further contaminants will migrate off Petitioner's plant site into the groundwater in the adjacent areas. This constitutes "pollution" under 25 Pa. Code §21.78(b) whether or not the neighboring residences are hooked on to a municipal water supply.

Establishing the time limits for a partial supersedeas is difficult in this case because there is a disagreement over the amount of time necessary to perform the groundwater studies. In resolving this issue, I have been influenced most heavily by the critical importance of the RI/FS in framing the remedial measures that ultimately will be used to clean up the contamination. That clean up, in my judgment, is paramount and should not be jeopardized by a too restrictive supersedeas during the investigative phase.

Since EPA approved the RI/FS work plan on September 13, 1988, and since Petitoner already was about three weeks into the work schedule on that date, it is reasonable to anticipate that Petitioner will be ready to begin the field investigation by October 20, 1988. The proximity of that date makes it inexpedient to require any start up of the air stripping tower now. The field investigation phase is scheduled to last for three months, or until January 20, 1989.

Although DER maintains that the actual groundwater measurements will only require a few days, I am not inclined to restrict the supersedeas to that

extent. Human endeavors are too fraught with the possibilities of error and delay to warrant such an approach. Accordingly, I have concluded to allow the supersedeas to remain in effect until January 20, 1989, with the condition that, if the field investigation is actually completed prior to that time, Petitioner will notify DER and start up the air stripping tower at once.

ORDER

AND NOW, this 3rd day of October, 1988, it is ordered that:

1. The Motion to Deny Petition for Supersedeas filed by the Department of Environmental Resources is denied.

2. The Petition for Supersedeas, as amended, filed by Westinghouse Electric Corporation is granted in part and denied in part in accordance with the foregoing Opinion.

3. The Order of July 22, 1988, issued by the Department of Environmental Resources to Westinghouse Electric Corporation is susperseded until January 20, 1989; provided, however, that, if said corporation completes the Phase I Field Investigation provided for in its Remedial Investigation/Feasibility Study approved by the Environmental Protection Agency on September 13, 1988, prior to January 20, 1989, said corporation shall notify the Department of Environmental Resources and begin immediately to comply fully with the aforesaid Order.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS, MEMBER

DATED: October 3, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Mary Young, Esq.
Eastern Region
For Appellant:
David J. Armstrong, Esq.
Leonard A. Costa, Jr., Esq.
Pittsburgh, PA