

Environmental Hearing Board

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**Adjudications**  
and  
**Opinions**



**1989**

**Volume II**

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COMMONWEALTH OF PENNSYLVANIA  
Maxine Woelfling, *Chairman*

MEMBERS  
OF THE  
ENVIRONMENTAL HEARING BOARD

DURING THE PERIOD OF THE  
ADJUDICATIONS

1989

Chairman.....MAXINE WOELFLING  
Member .....WILLIAM A. ROTH  
(Resigned March 31, 1989)  
Member .....ROBERT D. MYERS  
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Member .....JOSEPH N. MACK  
  
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Environmental Hearing Board Reporter

Thus: 1989 EHB 1

## FORWARD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1989.

The Environmental Hearing Board was originally created as a departmental administrative board within the Department of Environmental Resources by the Act of December 3, 1970, P.L. 834, No. 275, which amended the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended. The Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, No. 94, upgraded the status of the Board to an independent, quasi-judicial agency and expanded the size of the Board from three to five Members. The jurisdiction of the Board, however, is unchanged by the Environmental Hearing Board Act; it still is empowered "to hold hearings and issue adjudications... on orders, permits, licenses or decisions" of the Department of Environmental Resources.

1989

ADJUDICATIONS

<u>CASE NAME</u>	<u>PAGE</u>
Canada-PA, Ltd. (3/21/89)	319
Chrin Brothers (8/7/89)	875
Norman Duncan et al. (4/27/89)	459
John Flati and Louis Gagliardi (3/28/89)	343
F. R. & S., Inc. (7/14/89)	769
Keystone Water Company (9/19/89)	1059
Marileno Corporation and Cuyahoga Wrecking Corporation (2/9/89)	206
Dwight L. Moyer, Jr., Elizabeth H. Steele and Francis L. Lagan (8/10/89)	928
Newlin Corporation (10/18/89)	1106
City of Philadelphia (6/6/89)	653
Philadelphia Suburban Water Company (9/19/89)	1035
County of Schuylkill and F.A. Potts & Co., Inc. (11/24/89)	1241
Robert F. Sterrett (10/31/89)	1176
Technic, Inc. (8/30/89)	978
Dale A. Torbert and Barbara Torbert and Vaughn Torbert, et al. (7/27/89)	834
T.R.A.S.H. (4/28/89)	487
Municipal Authority of the Township of Union (10/25/89)	1156
WABO Coal Company (6/23/89)	737
Westfield Borough Authority (4/17/89)	407

OPINIONS AND ORDERS

<u>CASE NAME</u>	<u>PAGE</u>
ACF Industries, Inc. (2/8/89)	201
Adams County Sanitation Company and Kenneth Noel (3/1/89)	258
Allied Steel Products (1/18/89)	112
Aloe Coal Company (6/30/89)	757
Joseph R. Amity (1/4/89)	6
Lorraine Andrews and Donald Glatfelter et al. (5/10/89)	612
M. C. Arnoni (87-416, 87-418, 87-468, 87-469) (1/5/89)	22
M. C. Arnoni (87-425)	27
Mark Basalyga, t/a Tamarack Topsoil Company (4/5/89)	388
Elmer R. Baumgardner, Baumgardner Oil Co., Econo Fuel, Inc., and Waste-Oil Pickup and Processing (1/10/89)	61
Elmer R. Baumgardner (1/17/89)	108
Elmer R. Baumgardner (2/2/89)	172
Elmer R. Baumgardner (4/13/89)	400
Borough of Bellefonte and Bellefonte Borough Authority (5/3/89)	599
Louis Beltrami and Beltrami Enterprises, Inc. (5/2/89)	594
Benjamin Coal Company and Westport Mining Company (6/7/89)	683
Benjamin Coal Company (12/5/89)	1315
Gregory and Caroline Bentley (8/15/89)	960
Berks Products Corporation (10/10/89)	1086
Charles Bichler and Mr. and Mrs. John Korgeski (1/6/89)	36
Bison Coal Company (3/28/89)	358
Mr. and Mrs. Daniel E. Blevins and Nancy Lee Ellis (6/8/89)	692
Mr. and Mrs. Daniel E. Blevins (7/21/89)	813
Joseph Blosenski, Jr., et al. (8/11/89)	946

Joseph Blosenski, Jr., et al. (9/22/89)	1067
Bologna Mining Company (3/3/89)	270
John Bower (10/31/89)	1207
Ronald Cummings Boyd (7/19/89)	810
Brady's Bend Corporation (1/23/89)	133
Bridgeview, Inc. (9/14/89)	1007
BVER Environmental, Inc. (1/17/89)	97
C & L Enterprises and Carol Rodgers (Discovery) (1/10/89)	55
C & L Enterprises and Carol Rodgers (Incorporate Supersedeas) (1/10/89)	58
Citizens for Upper Dauphin, et al. (6/16/89)	706
C. N. & W., Incorporated (4/17/89)	432
Clearfield Municipal Authority (6/1/89)	627
Willard M. Cline (10/16/89)	1101
Frank Colombo d/b/a Colombo Transportation Services and Northeast Truck Center, Inc. (5/4/89)	606
Frank Colombo (12/7/89)	1319
Columbia Park Citizens Association (88-449-F) (8/7/89)	899
Columbia Park Citizens Association (88-509-F) (8/7/89)	905
Robert D. and Elizabeth L. Crowley (1/9/89)	44
Robert D. and Elizabeth L. Crowley (10/11/89)	1097
Cubbon Lumber Company (1/27/89)	160
Decom Medical Waste Systems (N.Y.), Inc. (10/5/89)	1079
Delta Excavating and Trucking Co., Inc. and Delta Quarries & Disposal, Inc. (3/1/89)	250
Borough of Dickson City (8/15/89)	956
Anderson W. Donan, M.D., Shirley M. Donan, Edward M. Brodie, and Joanne M. Brodie (1/12/89)	82
Dunkard Creek Coal, Inc. (2/10/89)	218

Ralph D. Edney (12/8/89)	1356
Edward Elersic, et al. (4/21/89)	438
Felton Enterprises, Inc. (11/17/89)	1231
Fetterolf Mining, Inc. (4/28/89)	478
Fidelity & Deposit Company of Maryland (6/28/89)	751
William Fiore, d/b/a Municipal and Industrial Disposal Company (3/1/89)	254
F. R. & S., Inc. (7/21/89)	817
Franklin Township Municipal Sanitary Authority and Borough of Delmont (6/22/89)	727
Giorgio Foods, Inc. (3/24/89)	331
H & H Coal Company (2/10/89)	215
Al Hamilton Contracting Company (4/4/89)	383
Harbison-Walker Refractories (10/26/89)	1166
City of Harrisburg (Limiting the Issues) (3/29/89)	365
City of Harrisburg (Request for Certification for Interlocutory Appeal (3/29/89)	373
Lawrence Hartpence and Imogene Knoll (10/18/89)	1141
George W. Hatchard (4/21/89)	442
Robert Helfer d/b/a R & H Surface Mining (5/1/89)	587
Dorothy E. Hendrickson et al. (10/19/89)	1148
Herald Products (10/23/89)	1152
James Kacer (8/8/89)	914
Kerry Coal Company (86-124-M) (9/8/89)	996
Kerry Coal Company (89-231-E) (12/7/89)	1337
Keystone Sanitation Company, Inc. (11/29/89)	1287
Samuel B. King (10/11/89)	1093
Kirila Contractors (1/13/89)	94
Lancaster Press, Inc. (3/24/89)	337

Lancaster Sewer Authority (10/31/89)	1202
Leech Tool and Die Works, Inc. (2/2/89)	177
Lor Can, Inc. (1/4/89)	17
James E. Martin (4/27/89)	472
James E. Martin (6/12/89)	697
James E. Martin (7/26/89)	821
James E. Martin and American Insurance Co. (1/13/89)	86
J. P. Mascaro & Sons, Inc. et al. and Lehigh Valley Recycling, Inc. (7/31/89)	869
Mark and Elaine Mendelson (1/25/89)	142
Mark and Elaine Mendelson (2/15/89)	247
Mid-Continent Insurance Company (11/30/89)	1299
Mignatti Construction Company, Inc. (11/21/89)	1236
Morco Corporation (9/25/89)	1071
Ingrid Morning (6/16/89)	702
William V. Muro (8/15/89)	953
Francis Nashotka, Sr., et al. and Lawrence Hartpence and Imogene Knoll (8/11/89)	950
Francis Nashotka, Sr., et al. (10/18/89)	1132
New Hanover Township, et al. (1/5/89)	31
New Hanover Township, et al. (1/25/89)	138
New Hanover Corporation (9/29/89)	1075
Newlin Corporation (4/25/89)	453
Newlin Corporation (11/16/89)	1219
Newtown Township et al. (5/16/89)	616
Newtown Township et al. (6/6/89)	672
Newtown Township et al. (10/31/89)	1195

Pennbank, et al. (2/15/89)	228
Pennbank, et al. (3/15/89)	317
Pennsylvania Fish Commission and Little Clearfield Creek Watershed Association (5/23/89)	619
Philadelphia Electric Company (6/7/89)	678
R & H Surface Mining (3/29/89)	361
R.E.M. Coal Company, Inc. (3/1/89)	263
George Reinert (1/12/89)	77
ROBBI (9/8/89)	1002
Roswell Coal Company, Inc. (2/15/89)	224
Salford Township Board of Supervisors (9/7/89)	988
County of Schuylkill (7/28/89)	860
County of Schuylkill (8/8/89)	918
Scranton Sewer Authority (8/8/89)	910
Scurfield Coal, Inc. (12/27/89)	1359
Frances Skolnik, et al. (11/7/89)	1214
Frances Skolnik, et al. (11/30/89)	1304
Carl Snyder (6/22/89)	731
Robert L. Snyder and Jessie M. Snyder et al. (5/2/89)	591
John P. and Ann M. Suchanek (1/30/89)	164
Swistock Associates Coal Corporation (3/15/89)	314
Swistock Associates Coal Corporation (12/8/89)	1346
Andrew Sysak (1/18/89)	126
Texas Eastern Gas Pipeline Company (1/4/89)	1
Texas Eastern Gas Pipeline Company (2/7/89)	186
In re: Texas Eastern Gas Pipeline Co. (3/10/89)	281
Rena Thompson (88-399-M) (3/14/89)	289

Rena Thompson (88-405-M) (3/14/89)	292
Rena Thompson (88-406-M) (3/14/89)	295
Thompson & Phillips Clay Company, Inc. (3/15/89)	298
Throop Property Owners Association (7/11/89)	764
Union Township (11/29/89)	1295
Upper Allegheny Joint Sanitary Authority (3/15/89)	303
Valley Forge Plaza Associates (8/21/89)	967
Wallenpaupack Lake Estates (4/21/89)	446
WAWA, Inc. (2/2/89)	169
DER v. WAWA, Inc. (11/16/89)	1224
Michael F. and Karen L. Welteroth (9/15/89)	1017
Borough of West Chester (6/19/89)	719
West Chillisquaque Township (4/7/89)	392
West Penn Power Company (1/27/89)	157
County of Westmoreland (1/26/89)	149
Wharton Township (12/27/89)	1364
Wheeling-Pittsburgh Steel Corporation (4/12/89)	398
Zinc Corporation of America (1/18/89)	117

1989 DECISIONS

Air Pollution Control Act, 35 P.S. §4001 et. seq.

definitions §4003--201

*permitting process -- 487*  
powers and duties of DER §4004--1304

regulations

25 Pa. Code, Chapter 127 (Construction, Modification, Reactivation  
and Operation)--1214

Act 339, 35 P.S. §701 et seq. (Sewage Facilities Grants Program)--407

regulations

25 Pa. Code, Chapter 103; Subchapter B: Date of filing application  
(103.23)--303

Clean Streams Law, 35 P.S. §691.1 et. seq.

civil penalties (691.605)--319

appeal bond/prepayment of penalty--224

operator responsibility for pre-existing discharges--270, 298

powers and duties of DER (691.5)

open fields doctrine-inspections--834

regulations

25 Pa. Code, Chapter 92 (NPDES)

Approval of Applications (92.31)--1156

25 Pa. Code, Chapter 95

Wastewater Treatment Requirements (95.2)--1156

responsibility of land-owner/occupier (691.316)--834, 1166

joint venture liability--1106

personal liability--1106

search and seizure--834

sewage discharges (691.3, 202, 203, 207, 209, 210)--834

Costs Act (Award of Fees and Expenses for Administrative Agency Actions),

71 P.S. §§2031-2035--697, 821

award of fees and expenses (2033)--821

prevailing party--821

Dam Safety and Encroachments Act, 32 P.S. §693.1 et seq.--1241

civil penalties (693.21)--319

definitions (693.3)--343

permits (693.5-9)--442, 967, 1017

Department of Environmental Resources--Powers and Duties--

abuse of discretion--6, 36, 343, 1093, 1241

duty to consider traffic effects of permit grants--36

duty to enforce regulations--1241

entitlement to reliance on findings by other governmental entities--1241

prosecutorial discretion--1356

Environmental Hearing Board--Practice and Procedure

amendment of pleadings--1067

appealable actions--27, 250, 258, 388, 392, 697, 905, 960, 1075, 1236,  
1295, 1315.

appeal nunc pro tunc--160, 337, 599, 813, 869, 960, 1152, 1202

burden of proof

    Sewage Facilities Act--928

    Solid Waste Management Act--487

    Surface Mining Conservation and Reclamation Act--459

    25 Pa. Code §21.101

        shifting burden of proof--674

        third party appeals of license or permit issuance--627

civil penalty assessments--206

certification of interlocutory appeal--281, 373

clarification of order--317  
collateral attack on a final order--270  
consent adjudications, decrees and agreements--683  
consolidation--764  
declaratory judgment--331  
default adjudications--206, 1224  
defenses  
    corporate veil--1106  
    financial impossibility--224  
discovery  
    depositions--453, 606, 1071  
    experts--31, 55  
    interrogatories  
        motion to compel--94, 133, 169, 186  
    leave of court required--55  
    privileges  
        confidentiality of identity of complainant--606  
        deliberative process--186  
    production of documents--1132, 1141  
    protective orders--31, 82, 108, 138, 1337  
    relevancy--247  
    request for admissions--142  
        failure to respond resulting in waiver--361, 432  
    sanctions--108, 946, 950  
    scope of discovery--55, 186  
    stay of discovery--82, 108  
dismissal of appeal--169

evidence

admissibility-hearsay--61

incorporating previous testimony--58

relevancy--314

scientific tests--1346

failure to prosecute appeal--112, 215, 254

failure to respond to pleadings--206

finality--270, 914

General Rules of Administrative Practice and Procedure (1 Pa Code §31.1  
et seq.)--281

intervention--373, 446, 678, 1287, 1315

joinder--383

judgment on pleadings--303

jurisdiction--281, 487, 594, 956, 1075, 1152

mootness--77, 157, 331, 398, 591, 810, 813, 956, 988, 1101, 1359

ability to assess future penalty--157

motion to dismiss--22, 157, 160, 164, 247, 250, 258, 289, 292, 295, 594,  
599, 627, 813, 860, 899, 905, 960, 1017, 1195, 1359.

motion to disqualify counsel--616

motion to limit issues--314, 914, 1002

motion for nonsuit--1346

motion to strike--453, 627, 1148, 1224

motion to suppress--692

notice of appeal--899

powers of the Board--331

pre-hearing memorandum--112, 289, 1299

preliminary objections--1, 1224

pro se appellant--1017

publication in Pa Bulletin--869, 1241

reconsideration--86, 317, 365, 373, 627, 1219, 1364

    exceptional circumstances--61

    new evidence--61, 172

rule to show cause--254

sanctions--94, 206, 289, 292, 295, 1002

standing--678, 702, 860

summary judgment--6, 36, 44, 97, 117, 149, 201, 298, 303, 361, 388, 432,  
438, 442, 478, 587, 612, 683, 719, 727, 731, 751, 757, 764, 910,  
918, 953, 996, 1007, 1071, 1093, 1097, 1148, 1231

supersedeas--126, 172, 177, 263, 400, 619, 672, 706, 764, 817, 967, 1079,  
1086, 1166, 1207, 1214, 1304, 1319

timeliness of filing of notice of appeal--22, 247, 358, 594

waiver of issues--1359

Explosives Regulation, 73 P.S. §151 et seq.

    suspension of blasting license--126

Federal Law

    Bankruptcy Code--206

    CERCLA (Superfund) 42 U.S.C. §9601 et seq.

        security interest--228

    Clean Water Act, 33 U.S.C. §§1281-1297--727, 1156

        costs: obligation to keep costs low--653

        grants--653, 719

        NPDES--719, 727

        water quality certifications (401)--365

Infectious Waste Incinerator Construction Moratorium, 35 P.S. §6019.1  
et seq.--1007

Non-coal Surface Mining Conservation and Reclamation Act, 52 P.S. §3301  
et seq.--1086

Oil and Gas Act, 58 P.S. §601.101 et seq.--228, 1101

bonding requirements--1101

definitions (601.103)--228

plugging well (601.210)--228

secured creditors (UCC, 13 Pa CSA 9207)--228

Sewage Facilities Act, 35 P.S. §750.1 et seq.--1195

official plans (750.3)--44, 77, 706, 928

penalties (750.13)--1132

permits (750.7)--1195

regulations

25 Pa. Code, Chapter 71: Administration of Sewage Facilities Program

Subchapter B: 71.11-71.26--44, 77, 1097

Solid Waste Management Act, 35 P.S. §6018.101 et seq.--769

civil penalties (6018.605)--875, 978, 1141, 1176

closure orders (6018.602)--1207

definitions

authorized representative--22, 27

used oil as a solid waste--61

hazardous waste--117

generation, transport, disposal, storage and treatment--117

licenses (6018.501 and 6018.502)--1079

municipal waste

submission of plans (6018.201)--1079

transfer facility--1079, 1319

permits-applications (6018.501, 6018.502, 6018.503)--1207

grant, denial, modification, revocation, suspension (6018.803)--  
149, 769

personal liability--1106

powers and duties of DER (6018.104)--487

recommendations of local governing body (6018.504)--36

regulations

25 Pa Code, Chapter 75

Subchapter C: Permits and standards (75.21-75.38)--875, 1176

Subchapter D: Hazardous Waste (75.259-75.267)--97, 117, 978

residual waste

disposal, processing and storage (6018.302)--875

transition scheme (6018.404)--487

unlawful conduct--1176

Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1,  
et seq.--459, 737

award of attorney fees--697

bonds (1396.4(d)-(j))--298, 478

annual report--996

forfeiture (1396.4(h))--86, 432, 751, 757, 1231

partial release (1396.4(g))--459

per acre liability--86

violation of reclamation requirements--86

civil penalties (1396.22)--737

appeal bond/prepayment--17, 218, 224, 472

licenses and withholding or denial of permits and licenses (1396.3(a))

refusal by DER to issue, renew or amend (1396.3(b))--731

permits (1396.4)

attorney fees awarded--697

public notice, application for bond release (1396.4(b))--438  
regulations

(25 Pa Code, Ch. 77) Surface and Non-coal Mining Operations  
(Subchapter E)--988

Water Allocation Permits--1035, 1059

Water Rights Act, 32 P.S. §631 et seq.--1035



COMMONWEALTH OF PENNSYLVANIA  
**ENVIRONMENTAL HEARING BOARD**  
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M. DIANE SMITH  
 SECRETARY TO THE BOARD

**NEWLIN CORPORATION, SOMERSET OF  
 VIRGINIA INCORPORATED, DAVID EHRLICH  
 and RICHARD WINN**

v.

**COMMONWEALTH OF PENNSYLVANIA  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES**

:  
 : **EHB Docket No. 83-237-W**  
 :  
 :  
 :  
 :  
 :  
 :  
 : **Issued: April 25, 1989**

**OPINION AND ORDER  
 SUR  
MOTION TO STRIKE**

**Synopsis**

A motion to strike portions of a post-hearing brief is granted where appellee seeks to introduce deposition testimony and other unrelated court records from ancillary proceedings which were not offered or received into evidence in the instant proceeding.

**OPINION**

This matter was initiated by the filing of an appeal by Newlin Corporation (Newlin) and the two stockholders of Newlin, David Ehrlich and Richard Winn (collectively, Appellants) seeking review of an order of the Department of Environmental Resources (Department) requiring them to perform a complete hydrogeologic study and develop an abatement program to address groundwater contamination by leachate from the Strasburg Landfill in Newlin

Township, Chester County. The procedural history of this matter is described in the Board's opinion and order at 1988 EHB 976 denying Appellants' motion for summary judgment, and we will not repeat it here.

The Board held a hearing on the merits on November 22, 1988. The Department filed its post-hearing brief on January 9, 1989. On February 1, 1989, Appellants filed a motion to strike or quash the Department's post-hearing brief, alleging that the Department's post-hearing brief improperly included numerous references to matters which were not in the record as developed at the November 22, 1988, hearing. Specifically, Appellants have objected to the Department's reference to testimony by Richard Winn from a January 31, 1984, deposition which was never offered into evidence at the hearing, and references to documents, allegations or other materials in ancillary proceedings also not offered into evidence in this matter.

On February 21, 1989, the Department filed its response in opposition to Appellants' motion to quash, arguing that because the Board relied on the factual findings in Newlin Township v. DER, 1979 EHB 33, rev'd in Strasburg Associates v. Newlin Township, 52 Pa.Cmwlth 514, 415 A.2d 1014 (1980), in its opinion denying Appellants' motion for summary judgment, the Department is also entitled to rely on these findings. The Department further contends that the Board, as well as the Department, is entitled to rely on the deposition excerpts, since they are of record as part of the Department's summary judgment response and much of the deposition testimony was duplicated at the hearing.

### 1. Deposition Testimony

The Department's references to Richard Winn's January 31, 1984, deposition testimony in the Department's post-hearing brief are not a part of

the record in this matter, since this deposition was never offered into evidence.

The General Rules of Administrative Practice and Procedure found at 1 Pa.Code §35.151 specifically provide that:

No part of a deposition may constitute a part of the record in the proceeding, unless received in evidence by the agency head or presiding officer. Objections may be made at the hearing in the proceeding to receiving in evidence a deposition or part thereof for a reason which would require the exclusion of the evidence if the witnesses were then present and testifying.

The Department's argument that this same deposition testimony is "of record" since it was raised in the Department's May 12, 1988, brief in opposition to summary judgment has no merit. Attaching excerpts of this deposition to a pleading does not satisfy the specific and formal procedures required to comply with the rules of evidence for making such a deposition a part of the record at a hearing on the merits.

The Pennsylvania caselaw demonstrates the courts' reluctance to expand the record in the manner suggested by the Department. In Zinman v. Commonwealth of Pennsylvania, Department of Insurance, 42 Pa. Cmwlth 270, 400 A.2d 689 (1979), the findings of the Insurance Commissioner were vacated and remanded when the Commonwealth Court determined that the Commissioner improperly relied on documents attached to a post-hearing brief because Zinman had no opportunity to offer evidence in rebuttal. Again, in Miller v. Comm., Dept. of Public Welfare, 99 Pa.Cmwlth 392, 513 A.2d 569 at 570, n. 5 (1986), it was held that the Department of Public Welfare was precluded from considering statistical studies attached to petitioner's brief, but not introduced at the hearing on the merits. This Board, in T. C. Inman, Inc. v. DER, 1988 EHB 613, rejected an attempt by the Department to introduce testimony not pre-

mented at the hearing on the merits by incorporating it into an affidavit attached to its post-hearing brief.

## 2. References to Ancillary Proceedings

The Department's references to Appellants' other corporate ventures and legal proceedings in Pennsylvania, as well as New Jersey, and to a 1984 Department denial letter and an April, 1983, order, are also improper, since none of these matters or documents was offered into evidence or made part of the record.

The Department avers it is entitled to reference these matters, since the Board, in its October 21, 1988, opinion and order, relied on factual recitations in Strasburg Associates v. Newlin Township, *supra*. However, we point out that the Board relied on that proceeding solely to describe the procedural history.

The General Rules of Administrative Practice and Procedure, 1 Pa.Code §31.1 *et seq.*, are applicable to proceedings before the Board, unless inconsistent with a specific Board rule, 25 Pa.Code §21.1(c). The Board's rules have no specific provision governing introduction of a record from other proceedings, so we must apply the General Rules of Administrative Practice and Procedure.

The formal record in an adjudicatory proceeding is defined at 1 Pa.Code §31.3 as not including any proposed testimony or exhibits not offered or received into evidence. The requirements for introducing a record produced in another proceeding are set forth at 1 Pa.Code §31.167:

When any portion of the record in any other proceeding before the agency is offered in evidence and shown to be relevant and material to the instant proceeding, a true copy of such record shall be presented in the form of an exhibit, together with additional copies as provided in §35.169 (relating to copies to

parties and agency), unless:

(1) The participant offering such record agrees to supply, within a period of time specified by the agency head or the presiding officer, such copies at his own expense, if and when so required.

(2) The portion is specified with particularity in such manner as to be readily identified, and upon motion is admitted in evidence by reference to the records of the other proceedings.

Even assuming that 1 Pa.Code §31.167 applies to proceedings outside the Board, the Department failed to follow the procedure, and it is, therefore, now precluded from referencing these ancillary matters in its post-hearing brief.

**O R D E R**

AND NOW, this 25th day of April, 1989, it is ordered that:

1) Any and all portions of the post-hearing brief of the Department of Environmental Resources dealing with matters not made a part of the record, including deposition testimony of Richard Winn, and any documents, allegations or other materials in ancillary proceedings, are stricken; and

2) Appellants shall file their post-hearing brief on or before May 24, 1989.

**ENVIRONMENTAL HEARING BOARD**

*Maxine Woelfling*  
**MAXINE WOELFLING, CHAIRMAN**

**DATED:** April 25, 1989

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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

**NORMAN DUNCAN**

v.

**COMMONWEALTH OF PENNSYLVANIA  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES**

and

**THE ARCADIA COMPANY, INC., Permittee**

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**EHB Docket No. 83-300-M**

**Issued: April 27, 1989**

**A D J U D I C A T I O N**

**By: Maxine Woelfling, Chairman**

**Synopsis**

The Board issues an adjudication dismissing an appeal challenging the Department of Environmental Resources' decision to grant a mine operator's Stage I bond release request. The appellant failed to meet his burden of proof to establish the operator's alleged non-compliance with its approved plans for backfilling, regrading, and drainage control. The operator is subject to the 1980 amendments to the Surface Mining Conservation and Reclamation Act and regulations promulgated thereunder.

**INTRODUCTION**

This matter stems from the December 30, 1983, notice of appeal filed by Norman Duncan (Duncan), seeking review of the Department of Environmental

Resources' (Department) decision to recommend Stage I bond release 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 regulations promulgated thereunder for bonds posted by the Arcadia Company, Inc. (Arcadia) for Mining Permit Nos. 164-19, 164-19(A), and 164-19(A2). The Department's recommendation was in response to Arcadia's filing of a completion report on November 12, 1982, which included an October 12, 1982, Stage I bond release application. The appeal was docketed as a skeleton appeal, since it did not contain the information required by 25 Pa.Code §21.51. Duncan's perfection of his appeal was inadvertently docketed by the Board at Docket No. 84-003-M, and, on January 13, 1984, the two appeals were consolidated at EHB Docket No. 83-300-M. On April 16, 1984, the Department granted Arcadia's bond release request and on May 21, 1984, Duncan appealed the Department's decision. This appeal was docketed at EHB Docket No. 84-157-M. On June 22, 1984, the two appeals were consolidated at EHB Docket No. 83-300-M. A hearing on the matter was held on May 4, 1987.

Duncan submitted a post-hearing brief on July 29, 1987, arguing, *inter alia*, that Arcadia should not have received Stage I bond release because of discrepancies between site conditions and the permit, that the issuance of numerous compliance orders by the Department to Arcadia was indicative of the lack of adequate provisions for drainage on the site, that the measurements taken of the slope on the permitted area were an average, that the Department's mining specialist was unaware of the rainfall conditions prior to the time water samples were taken, and that the area covered by Mining Permit No. 164-19(A2) contributes to runoff and a lack of drainage control.

Arcadia submitted its post-hearing brief on August 14, 1987, arguing that Duncan had not met his burden of proof to establish Stage I bond release

criteria had not been met. Additionally, Arcadia claims that the preponderance of the evidence does not establish that the slope exceeds 35° on any portion of the site and asserts that the measurements taken by its witness were more reliable than the measurements taken by Duncan. Arcadia maintains that reclamation was properly completed and that samples taken of water in two unnamed tributaries indicate no excess erosion is occurring on Duncan's property. Finally, Arcadia contends that Duncan's arguments concerning its alleged activities off the mining permit area are not relevant to whether Arcadia satisfied the criteria for Stage I bond release.

The Department, on August 25, 1987, submitted a letter to the Board in lieu of a post-hearing brief, arguing that 25 Pa.Code §86.172(d) was not the only criteria for Stage I bond release and asserting that §4(g) of the SMCRA, which states "no part of the bond shall be released under this subsection so long as the lands to which the release would be applicable are contributing suspended solids to stream flow or runoff outside the permit area in excess of the requirements of the law...", was also applicable. The Department indicated, however, that no evidence was introduced by Duncan to establish that Arcadia had not met the requirement of §4(g) of SMCRA.

#### FINDINGS OF FACT

1. Appellant is Norman Duncan, a landowner in Montgomery Township, Indiana County.
2. Permittee is the Arcadia Company, Inc., which mined land now owned by Duncan.
3. Respondent is the Department of Environmental Resources, the agency charged with the administration of 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), and the rules and regulations promulgated thereunder.

4. On November 26, 1970, Arcadia was issued Mine Drainage Permit (MDP) No. 2967BSM30 for a mining operation in Montgomery Township, Indiana County, known as the Arcadia #1 Strip. (Board Ex. 5)

5. Arcadia obtained a permit to engage in coal mining by the surface mining method in June, 1972 (MP No. 164-19); the permit was amended in September, 1972 (MP No. 164-19(A)), and again in April, 1974 (MP 164-19(A2)). (Board Ex. 2, 3, and 4)

6. The mining permits contained a condition subjecting Arcadia to the requirements of SMCRA and all regulations adopted thereunder.

7. Arcadia's backfilling plan was approved for terracing. (Board Ex. 2, 3, and 4)

8. Arcadia had removed all coal from the property by 1981, but was continuing reclamation activities. (N.T. 97)

9. Duncan purchased the property which is within Arcadia's MDP from Mollie Ganoë in 1981. (N.T. 24)

10. On October 25, 1982, Arcadia applied for Stage I bond release for MP Nos. 164-19, 164-19(A), and 164-19(A2). (Board Ex. 1)

11. On November 12, 1982, Arcadia submitted a completion report to the Department for MP Nos. 164-19, 164-19(A), and 164-19(A2). (Board Ex. 1)

12. On April 16, 1984, the Department released 60% of the bonds posted for MP Nos. 164-19, 164-19(A), and 164-19(A2); this amount of bond release is commonly referred to as Stage I bond release. (Board Ex. 5)

13. When Duncan bought the Ganoë property in 1981, the land was at least partially backfilled. (N.T. 98)

14. Duncan is 67 years old and wears eyeglasses (trifocals). (N.T.

123-124).

15. Duncan is not a registered surveyor. (N.T. 53)

16. Duncan has conducted two surveys, both on his own property in Ohio and Pennsylvania. (N.T. 52)

17. Duncan measured a slope of the backfilled area on the east side of his property as  $41^{\circ}$ . (N.T. 78; Board Ex. 1)

18. The  $41^{\circ}$  slope was measured at the north facing slope towards the eastern end of the property (N.T. 105) at the area next to the unnamed tributary. (N.T. 41)

19. Duncan did not take any measurement under  $35^{\circ}$ . (N.T. 110)

20. Duncan did not determine the average slope. (N.T. 110)

21. To determine slope, Duncan used a gravitational angle indicator. (N.T. 40-41)

22. Harry Hanchar, mining engineer for North Cambria Fuel with primary responsibilities in the area of Arcadia's holdings and mining activities, along with Ron McCracken, inspector for the Department, measured the same slope measured by Duncan. (N.T. 187, 194)

23. The slope measurements (average readings) taken by Hanchar were  $33^{\circ}$  and  $34^{\circ}$ . (N.T. 194)

24. These measurements were taken with a planimeter, a typical instrument used by surveyors and engineers to measure slope. (N.T. 195)

25. Hanchar is a registered surveyor and a registered professional engineer. (N.T. 188)

26. Duncan claims that Arcadia affected areas off its permit, but could not do more than point out their general location. (N.T. 59-66)

27. There are gullies of one to two feet off of Arcadia's permitted areas between the Mattis property and the old haul road entrance. (N.T. 65)

28. Duncan contends that areas exist where erosion is occurring, but he could not locate them with any precision. (N.T. 66-72)

29. Arcadia's permits call for diversion ditches to be built above the highwall to prevent surface water from entering the pit and for pit water to be directed to sumps for storage until treatment, if treatment is necessary. (Board Ex. 2, 3)

30. Duncan claims that the use of hay bales in the northwest corner as temporary drainage control was evidence that Stage I bond release was not proper. (N.T. 67-68)

31. Washes as deep as 18 inches exist on the permitted areas. (N.T. 69-70)

32. Some of the rock and fines placed in the washes has been carried downstream. (N.T. 75)

33. Stone placed by Arcadia in the northwest corner of Duncan's property is washing down and breaking up; additional stone will have to be placed in this area. (N.T. 169)

34. There are repaired slumps, i.e. areas where drainage courses are evolving, on the eastern side of Duncan's property. (N.T. 169-171)

35. The slump areas have required some repair since Arcadia requested bond release, but are now stable. (N.T. 170)

36. There is a good growth of grass above the repaired slumps (N.T. 171) and some volunteer tree growth. (N.T. 174)

37. There is substantial vegetation and grass cover on the vast majority of Duncan's property. (N.T. 99)

38. The total suspended solid samples taken both upstream and downstream of the Arcadia #1 Strip were within the effluent limit of 750 milligrams per liter. (N.T. 183)

39. Arcadia has re-mulched, re-planted, re-grassed, and placed hay bales on portions of Duncan's property. (N.T. 131)

40. The proposed toe of spoil as shown in the permit was to be between 400-500 feet from the stream, but in some areas it is actually on the banks and in the stream. (N.T. 136)

41. There are no backfilling, sedimentation, or erosion control problems on the portion of Duncan's property covered by Mining Permit No. 164-19(A2), although water may be going from this area to another area and causing erosion. (N.T. 143-146)

#### DISCUSSION

Our scope of review is limited to determining whether or not the Department's grant of Stage I bond release was an abuse of discretion or an arbitrary exercise of power. Warren Sand and Gravel v. DER, 20 Pa Cmwlth 186, 341 A.2d 556 (1975). Under 25 Pa.Code §21.101(c)(3), Duncan has the burden of proof in this appeal. We must hold that Duncan did not meet his burden of proof to substantiate by a preponderance of the evidence that Arcadia's backfilling, regrading, and erosion control measures did not conform with its approved reclamation plans.

In this adjudication we must determine whether the Department abused its discretion in granting Arcadia's Stage I bond release request. To reach this determination we must examine whether Arcadia complied with the criteria for Stage I bond release found at §4 of SMCRA and 25 Pa.Code §86.172. Arcadia suggests that it may not be subject to the 1980 amendments to the SMCRA or to

25 Pa.Code §86.172 because it was not actually mining coal at the time that statute was amended and the regulations were promulgated. However, the 1980 amendments to SMCRA were effective on October 10, 1980, and Arcadia was still mining coal in 1981 (Finding of Fact 8). Furthermore, Arcadia had not completed reclamation activities as of the date of the adoption of Chapter 86, so it was still subject to its requirements. WABO Coal Company v. DER, 1985 EHB 71, citing Comm. v. Barnes and Tucker, 319 A.2d 871 (1974).

Section 4 of SMCRA, 52 P.S. §1396.4(g) provides that

...if the department is satisfied the reclamation covered by the bond or portion thereof has been accomplished as required by this act, it may, in the case of surface coal mining operations, upon request by the permittee, release in whole or in part the bond or deposit according to the following schedule: (1) When the operator has completed the backfilling, regrading and drainage control of a bonded area in accordance with his approved reclamation plan, the release of sixty per cent of the bond for the applicable permit area,...

(emphasis added)

As part of its application for MP No. 164-19, Arcadia submitted a Supplemental B form which set forth its backfilling and water-handling proposals. The Supplemental B which was approved as part of Arcadia's permit by the Department, states that

Backfilling shall be terrace type since area to be stripped has slope of 12° or more. Backfilling shall be kept as current with the removal of coal as practical mining procedures allow.

\* \* \* \* \*

Diversion ditches shall be built and maintained above the highwall to prevent surface water from entering the pit.

\* \* \* \* \*

Pit water shall be directed to sumps for storage until it can be pumped to treatment ponds if treatment is required.

(Board Ex. 1)

The amended MPs, Nos. 164-19(A) and 164-19(A2), incorporated the reclamation plan approved in MP No. 164-19 (Board Ex. 2, 3). Terracing was defined in MP Nos. 164-19(A) and 164-19(A2) as the condition whereby the steepest contour of the highwall shall not be greater than  $35^{\circ}$  from the horizontal. That definition of terracing is essentially the same as that in the statute. 52 P.S. §1396.3.

At the hearing held on May 4, 1987, Duncan testified that when he bought the property in 1981, the land was backfilled, although not with reference to the reclamation plan (N.T. 98). He measured the slope at the north facing slope towards the eastern end of his property as  $41^{\circ}$  (N.T. 105). He testified that he measured the slope with a gravitational angle indicator (N.T. 40-41) and stood at the top of the terrace table, rather than on the slope, where he would have rather been standing to take a measurement, because the slope area was unstable (N.T. 113-114). However, Duncan testified that he was not a professional surveyor and did not know whether the device he used, a gravitational angle indicator, was a common device in the surveying industry (N.T. 54).

Arcadia's witness, Harry Hanchar, testified that he and the Department inspector, Ron McCracken, measured the slope in many areas and found a high average measurement of  $33^{\circ}$  or  $34^{\circ}$  (N.T. 194). Mr. Hanchar, a registered surveyor and registered professional engineer, testified that his measurements were taken with a planimeter, an instrument commonly used by surveyors and engineers to measure slope (N.T. 188, 194-195).

We believe that Mr. Hanchar is more qualified to testify as to the slope measurement and must accord his testimony greater weight. As a registered surveyor, he would be more likely to accurately measure the slope than Mr. Duncan, who had only surveyed two pieces of his own property, with an instrument of doubtful accuracy (N.T. 52, 115). Since no credible evidence exists that the slope exceeded the 35<sup>0</sup> limit for terracing established in SMCRA and regulations promulgated thereunder and contained in Arcadia's reclamation plan, we must hold that Duncan did not meet his burden of proof with regard to his contention that Arcadia's backfilling and regrading of the permitted area resulted in slopes that exceeded the provisions in its permit.<sup>1</sup>

Duncan presented testimony about erosion problems at the Arcadia #1 Strip. He testified about the existence of gullies one to two feet deep and washes as deep as 18 inches. But, he was unable to locate those areas with any specificity. He also testified about Arcadia's attempts to control drainage through the placement of rocks and stones in the gullies and washes and how this material was washing downstream (N.T. 75, 169). He described slumps, which he characterized as areas where drainage courses are evolving, which have required repair since the time the bond release was requested (N.T. 169-171). But, the Department inspector testified that the slumps were stable (N.T. 176). Furthermore, Duncan admitted Arcadia has re-grassed, re-mulched, and re-planted the area and has placed hay bales on portions of the property to correct the problem of wash going down the slope. Duncan even admitted that there are no erosion control problems (or for that matter, any

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<sup>1</sup> We do note that Duncan argues that his method of measuring slope is more appropriate for purposes of the definition of terracing because it measures actual slope, not average slope. However, since we do not find the 41<sup>0</sup> measurement to be credible, we need not address this argument.

backfilling or sedimentation problems) on the area covered by MP No. 164-19(A2) (N.T. 142-146), but did say he objected to the runoff on that area (N.T. 146). While his testimony may indicate drainage problems at some time, Duncan did not prove that Arcadia did not implement the drainage control measures in its approved reclamation plans. Thus, we cannot conclude that Stage I bond release was improper.

The Department has urged us that §4(g) of SMCRA mandates that no bond be released if the land covered by the bond is contributing suspended solids outside the permit area in excess of the requirements of law. While we note that this provision in SMCRA is contradicted by 25 Pa.Code §86.172(d)(2), which defines Stage II reclamation as complete when the land subject to the bond is not contributing suspended solids outside the permit area in excess of the requirements of law, we need not resolve this inconsistency, since the only testimony on this issue was John Dehaas' testimony that all samples taken upstream and downstream of the Arcadia #1 Strip were within the applicable effluent limitation of 750 milligrams per liter (N.T. 183; Arcadia's Ex. 2, 3).

Finally, as for Duncan's arguments about mining activities occurring off the mining permit area, they are not relevant to the issue of whether Arcadia met Stage I bond release requirements for the permitted area, as the bond only covers the permitted area. The Department has other enforcement remedies available to deal with this problem, and, in any event, Duncan presented no evidence to substantiate this claim.

#### CONCLUSION

Norman Duncan failed to meet his burden of proof to demonstrate that the Department abused its discretion in granting Stage I release to Arcadia.

While testimony was presented that the area did not properly comply with approved reclamation plans because an area existed which had a slope of 41°, other testimony from a registered surveyor indicated the slope was less than the 35° limit contained in the approved reclamation plan, in SMCRA, and in the regulations promulgated thereunder. Although Duncan presented testimony about the ineffectiveness of drainage control measures, he did not prove that Arcadia failed to comply with the plans approved for MP Nos. 164-19, 164-19(A), and 164-19(A2). Consequently, we must dismiss Duncan's appeal.

#### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this appeal.
2. Norman Duncan has the burden of proof in this appeal. 25 Pa.Code §21.101(c)(3).
3. Terracing means grading such that the steepest contour of the highwall does not exceed 35° from the horizontal, with the table portion of the restored area a flat terrace with no depressions. (Board Ex. 2, 3, and 4; 52 P.S. §1396.3)
4. The testimony of a registered surveyor regarding the measurement of slope must be accorded more weight than the testimony of a non-surveyor.
5. 25 Pa.Code §86.172(d)(1) states that Stage I bond release is appropriate when permittee completes backfilling, regrading, and drainage control in accordance with the approved plan.
6. Duncan failed to establish Arcadia's non-compliance with its reclamation plans.
7. Duncan failed to establish that Arcadia has not complied with statutes and regulations applicable to Stage I bond release.

8. The Department did not abuse its discretion in granting Arcadia's Stage I bond release request.

**ORDER**

AND NOW, this 27th day of April, 1989, it is ordered that the Department's approval of Arcadia's Stage I bond release request is sustained and the appeals of Norman Duncan are dismissed.

**ENVIRONMENTAL HEARING BOARD**

*Maxine Woelfling*

**MAXINE WOELFLING, CHAIRMAN**

*Robert D. Myers*

**ROBERT D. MYERS, MEMBER**

**DATED:** April 27, 1989

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M. DIANE SMITH  
 SECRETARY TO THE BOARD

JAMES E. MARTIN :  
 :  
 v. : EHB Docket No. 88-365-W  
 : (consolidated)  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: April 27, 1989

OPINION AND ORDER  
 SUR  
 MOTION TO DISMISS

Synopsis

Appeals of civil penalty assessments under the Surface Mining Conservation and Reclamation Act and the Clean Streams Law will be dismissed where the appellant fails to prepay the assessments or post bonds as required by the statutes governing surface mining. The inability to prepay is not a defense to this requirement.

ORDER

This matter was initiated by the filing of nine separate appeals by James E. Martin (Martin) seeking review of nine civil penalty assessments issued by the Department of Environmental Resources (Department) 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 notice of appeal docketed at EHB Docket No. 88-333-R, filed on August 29, 1988, seeks review of a July 28, 1988, civil penalty assessment

issued as a result of Martin's alleged failure to maintain backfilling equipment at his Boarts Strip operation in Kittanning Township, Armstrong County which was conducted pursuant to Mine Drainage Permit (MDP) No. 3578BC16. The notice of appeal at Docket No. 88-365-W was filed on September 19, 1988, and seeks review of an August 12, 1988, civil penalty assessment issued for Martin's alleged failure to maintain backfilling equipment, properly dispose of non-coal wastes, eliminate pit water accumulation, adequately provide for erosion and sedimentation controls, and comply with a Departmental order at his Heilman surface mine in Boggs Township, Armstrong County which was operated pursuant to MDP No. 3573SM14. The notice of appeal at Docket No. 88-366-W, filed on September 19, 1988, seeks review of an August 12, 1988, civil penalty assessment relating to Martin's Valray site in Valley Township, Armstrong County which was operated pursuant to MDP No. 2869BSM25 and Mining Permit (MP) No. 419-4(c); the penalty was assessed for Martin's alleged failure to identify the site with a sign, stabilize hills and gullies, complete revegetation, reclaim the haul road or provide notarized landowner release, and comply with a Department order. The notices of appeal at Docket Nos. 88-367-W, 88-368-W, 88-369-W, 88-370-W, and 88-373-W, filed on September 19, 1988, seek review of August 11, 1988, civil penalty assessments issued for Martin's alleged failure to comply with an October 18, 1983, consent order and agreement (COA).<sup>1</sup> The notice of appeal at Docket No. 88-371-W, filed on September 19, 1988, seeks review of a civil penalty assessment issued for Martin's alleged failure to eliminate pit water accumulation and comply with

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<sup>1</sup> The appeal at Docket No. 88-367-W related to violations of the COA at the Boarts site, while the appeals at Docket Nos. 88-368-W, 88-369-W, 88-370-W, and 88-373-W related to violations of the COA at Martin's Karcher Mine in Boggs and Valley Townships, Armstrong County. The Karcher Mine was operated pursuant to MDP No. 3574SM12 and MP Nos. 419-7, 419-7(a), 419-7(A-2), 419-7(A-3), 419-7(A-4), 419-13, and 419-14, and amendments thereto.

the COA at his Karcher Mine. The notice of appeal at Docket No. 88-372-W, filed on September 19, 1988, seeks review of an August 12, 1988, civil penalty assessment issued for Martin's alleged failure to dispose of non-coal wastes at the Karcher Mine.

Since the nine appeals involved common issues of fact and law, the Board, on December 12, 1988, ordered that they be consolidated at Docket No. 88-365-W.

On October 24, 1988, the Department filed a motion to dismiss the appeal at each of the nine separate docket numbers. The Department argued that this Board lacks jurisdiction to hear Martin's appeals because of Martin's failure to prepay the penalties into an escrow account or post a bond for the assessed amounts, as required by §18.4 of SMCRA, 52 P.S. §1396.22, and §605(b) of the CSL, 35 P.S. §691.605(b). The Department's motion cites several cases, including Boyle Land and Fuel v. Comm., EHB, 82 Pa. Cmwlth. 452, 475 A.2d 928 (1984), aff'd, 507 Pa. 135, 488 A.2d 1109 (1985), in which the Commonwealth Court held the prepayment requirement to be a reasonable condition on the right to appeal and, therefore, constitutional.

On October 31, 1988, Martin filed his answer to the motion, arguing that he lacked the ability to pay the civil penalty or post a bond. Martin argued that the Commonwealth Court did not, in Boyle, address the constitutionality of the prepayment requirement where an appellant lacked the ability to pay the civil penalty or post a bond. Martin contended that the courts have never definitively addressed this issue and requested the Board to allow him to develop a record on the issue of ability to pay the penalty so that he could bring this issue before Commonwealth Court on appeal.

The Department filed a response to Martin's answer on November 14, 1988, disputing Martin's contention that the issue of the

constitutionality of the prepayment requirement has not been settled where an appellant alleges an inability to prepay and, therefore, opposing an evidentiary hearing on the issue of ability to pay.

In an effort to avoid the necessity for a hearing on the issue of Martin's ability to pay the assessments, the Board conducted a telephone conference with the parties on November 17, 1988. As a result of that conference, the Board issued a November 22, 1988, order continuing the appeals until January 20, 1989, in order to allow the Department to depose Martin on the issue of his ability to pay the assessments and requiring the parties to advise the Board on or before January 20, 1989, whether Martin's deposition should be considered by the Board in ruling on the motions to dismiss. When the parties failed to so advise the Board, the Board, on February 22, 1989, issued an order notifying the parties that it would reach a decision solely on the basis of the motions and Martin's response thereto.

Section 18.4 of SMCRA states, in pertinent part:

"When the department proposes to assess a civil penalty, the secretary shall inform the person or municipality within a period of time to be prescribed by rule and regulation of the proposed amount of said penalty. The person or municipality charged with the penalty shall then have thirty (30) days to pay the proposed penalty in full or, if the person or municipality wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the secretary for placement in an escrow account with the State Treasurer or any Pennsylvania bank, or post an appeal bond in the amount of the proposed penalty. Failure to forward the money or the appeal bond to the secretary within thirty (30) days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty."

(emphasis added)

Section 605(b) of the CSL contains similar language. The Board has held that the prepayment requirement is jurisdictional and that failure to comply with

it is grounds for dismissal. 3 L Coal Co. v. DER, 1988 EHB 16, and William J. McIntire Coal Company Inc. v. DER, 1988 EHB 339.

Although we believe that Martin waived the issue of inability to pay by his failure to comply with the Board's November 22, 1988, order, the Board recently upheld prepayment requirements in a case where financial hardship was alleged and found the prepayment requirement to be consistent with the Commonwealth Court's holding in Boyle. In Dunkard Creek Coal, Inc. v. DER, EHB Docket Nos. 88-015-W, 88-046-W, and 88-047-W (Opinion issued February 10, 1989) the Board considered the argument that Boyle merely found the prepayment requirement to be constitutional on its face but failed to discuss whether or not it could be unconstitutionally applied. The Board held that the inability to pay is not a defense to the failure to prepay, stating;

"Even if the facts of these appeals differ from those in Boyle, in that Dunkard cannot afford to comply with the prepayment provisions.... The outcome is the same. This Board has ruled that financial inability to prepay will not waive this jurisdictional requirement."

Accordingly, this Board has no authority to waive the jurisdictional prerequisite of prepayment and Martin's appeals must be dismissed.

**ORDER**

AND NOW this 27th day of April, 1989, it is ordered that the Department of Environmental Resources' motion to dismiss is granted and the consolidated appeal of James E. Martin at Docket No. 88-365-W is dismissed.

**ENVIRONMENTAL HEARING BOARD**

*Maxine Woelfling*  
MAXINE WOELFLING, CHAIRMAN

*Robert D. Myers*  
ROBERT D. MYERS, MEMBER

**DATED:** April 27, 1989

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M. DIANE SMITH  
 SECRETARY TO THE BOARD

**FETTEROLF MINING, INC.** :  
 :  
 v. : **EHB Docket No. 87-035-W**  
 :  
**COMMONWEALTH OF PENNSYLVANIA,** :  
**DEPARTMENT OF ENVIRONMENTAL RESOURCES** : **Issued: April 28, 1989**

**OPINION AND ORDER**  
**SUR**  
**CROSS-MOTIONS FOR SUMMARY JUDGMENT**

**Synopsis**

Summary judgment may not be granted in favor of either party on cross-motions for summary judgment in an appeal from the Department of Environmental Resources' return of a Completion Report. Disputes exist as to whether Stage I bond release requirements were met, and there is uncertainty as to which bonds support which portions of the mine site. Consequently, the Board cannot enter summary judgment.

**O P I N I O N**

On January 26, 1987, Fetterolf Mining, Inc. (Fetterolf) filed a notice of appeal from the Department of Environmental Resources' (DER) January 12, 1987, return of Completion Report 386070 (CR-3) which pertained to Fetterolf's mining site in Stoney Creek Township, Somerset County, known as the Ross Mine. Operation of the Ross Mine is authorized by Mine Drainage Permit (MDP) No. 41735M8 and Mining Permit No. 101928-4173SM8-01-0 (MP). In

returning CR-3, DER denied Fetterolf's Stage I bond release<sup>1</sup> request, asserting that it had denied an earlier Stage I release request for the same site on March 11, 1986, and alleging that there was no change in the conditions at the Ross Mine which would alter its earlier decision.

On October 30, 1987, DER filed a motion for summary judgment, which was followed by Fetterolf's November 10, 1987, answer and cross-motion for summary judgment. The following undisputed facts emerge from the parties' motions.

As a condition of the issuance of the MDP and the MP, Fetterolf posted Surety Bond 2518 in the amount of \$305,520 for the 195.92 acres of the Ross Mine.<sup>2</sup> In July, 1984, Fetterolf submitted Completion Report No. 23-84-165(C) (CR-1) to DER, requesting a Stage I bond release. DER denied the requested bond release in a letter dated March 11, 1986, for the reason that the "[s]ite has produced a discharge that does not meet state effluent standards." Fetterolf did not appeal this denial.

In November, 1985, Fetterolf submitted a second completion report, No. 385134(CR-2), by which it requested a Stage I bond release for a 95.42 acre portion of the Ross Mine. This 95.42 acre area, which Fetterolf labels Area B, is separate from Area A, but lies within the boundary of the MDP and the MP. By letter dated April 3, 1986, DER denied Fetterolf's second bond release request, stating that the "site has not been completely regraded to

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<sup>1</sup>Stage I refers to that phase of surface mining operations at which the permittee has completed backfilling, regrading and drainage control in accordance with its approved reclamation plan. See 25 Pa.Code §86.172(d)(1), cited infra.

<sup>2</sup>On page 4 of Fetterolf's cross-motion for summary judgment, a reference is made to Bond No. 2518 supplemented by Bond Nos. 2627, 2677 and 2728. The only explanation as to which land is supported by these supplemental bonds is contained in a reference to an exhibit attached to the "Fetterolf Deposition." Fetterolf did not file this deposition with the Board.

approximate original contour." No reference was made to the reasons for the denial of CR-1. Fetterolf did not appeal DER's second bond release denial.

In June, 1986, a third completion report, No. 386070 (CR-3) was returned to Fetterolf by DER. Fetterolf timely appealed this return, which is the subject of this appeal. In this third request, Fetterolf sought a Stage I bond release for a 98.4 acre portion of the Ross Mine. Fetterolf refers to this tract as Area C. Area C lies within the boundary of the MDP and the MP, is entirely separate from Area A, but encompasses all of the 95.42 Area B acreage. DER's January 12, 1987 letter, by which it returned CR-3, states:

"This office has received your completion Report 386070 requesting a Stage I Bond Release for the [Ross Mine]. As you are aware, the Department has previously denied Stage I release by letter dated March 11, 1986. Fetterolf Mining did not file any appeal from the earlier denial. There has been no change in the condition of this site which would cause the Department to alter its previous decision. Accordingly, we are returning your application."

No reference was made in this letter to either DER's denial of CR-2 or to any regrading deficiencies. Although Area A, the 96.5 acre portion covered by CR-1, and Area C, the 95.42 acre portion covered by CR-3, are alleged to be entirely separate tracts within the MDP, DER denied CR-3 for the same reason it denied CR-1, namely that the "site has produced a discharge that does not meet state effluent standards."

DER urges us to grant summary judgment in its favor, arguing that collateral estoppel/res judicata or, in the alternative, administrative finality, mandate judgment in its favor. First, DER asserts that Fetterolf was found liable by the Somerset County Court of Common Pleas for pollution of surface and ground water in the vicinity of the Ross Mine due to its mining activities, a finding affirmed by the Commonwealth Court. See Commonwealth, DER v. PBS Coals, Inc., 112 Pa.Cmwlth. 1, 534 A.2d 1130 (1987).

DER contends that principles of collateral estoppel and/or res judicata attach to the Court of Common Pleas' order. Therefore, Fetterolf may not now challenge the finding that the Ross Mine was the cause of acid mine drainage. Second, DER argues that the principles of administrative finality preclude Fetterolf from challenging the fact that pollutional discharges exist at the Ross Mine, since Fetterolf never appealed the denial of CR-1. Finally, DER asserts that partial bond release for any given portion of the affected acreage within a permitted area is not authorized by the applicable statutes and regulations or the language of the bond instrument.

Fetterolf's cross-motion for summary judgment rests on the premise that liability under Surety Bond 2518 accrues on a per acre basis. While Fetterolf's motion references supplementary Bonds 2627, 2677 and 2728, it does not explain the areas within the permit which each of these bonds support. Fetterolf argues that because Area C (the area covered by CR-3) and Area A (the area covered by CR-1) are separate, the CR-1 denial is immaterial to the CR-3 denial. Furthermore, Fetterolf contends that the only problem identified by DER specific to Area C was that the "site has not been completely regraded to approximate original contour," the basis for DER's refusing to release bonds for Area B, a part of Area C. In response to the April 3, 1986, denial of Stage I Bond Release for Area B, Fetterolf alleges that it completed regrading of the area in accordance with its reclamation plan and, as a result, it is entitled to Stage I bond release for Area B, notwithstanding the existence of problems in other, separate areas.

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Robert C. Penoyer v. DER,

1987 EHB 131. However, it is not for the Board in considering a motion for summary judgment to decide issues of fact, but rather to decide if there exist issues of fact. See Bolinger v. Palmerton Area Communities Endeavors Inc., 241 Pa.Super. 341, 361 A.2d 676 (1976).

Section 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), requires that a mine operator, prior to commencing mining, file a bond for the land to be affected by his operation. The bond is conditioned upon the faithful performance of the requirements of SMCRA; the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (the CSL); and other related statutes. The amount of the bond is calculated based upon the cost of completing the reclamation plan approved as part of the permit. The Department may require additional bond amounts for "the permitted area," if necessary to fulfill the requirements of SMCRA, and §4(d) of SMCRA allows the posting of a single bond to satisfy all of the statutory bonding requirements for the permitted area. The CSL contains analogous provisions.

The subject of bond release is addressed in §4(g) of SMCRA:

"Subject to the public notice requirements of subsection (b), if the department is satisfied the reclamation covered by the bond or portion thereof has been accomplished as required by this act, it may, in the case of surface coal mining operations upon request by the permittee release in whole or in part the bond or deposit according to the following schedule: (1) When the operator has completed the backfilling, regrading and drainage control of a bonded area in accordance with his approved reclamation plan, the release of sixty percent of the bond for the permit area; (2) When revegetation has been successfully established on the affected area in accordance with the approved reclamation plan, the department shall retain that amount of the bond for the revegetated area which would be sufficient for the cost to the Commonwealth for reestablishing revegetation."

(emphasis added)

The implementing regulations at 25 Pa.Code §§86.170 - 86.173 contain

detailed requirements regarding the procedure and criteria for bond release.

In particular, 25 Pa.Code §86.171(a) states:

The permittee may file an application with [DER] for the release of all or part of the bond liability applicable to a permit or designated phase of a permit area after all reclamation, restoration, and abatement work in a reclamation stage, as defined in §86.172 (relating to criteria and schedule for release of bond) has been completed on the permit area or designated phase of a permit area . . .

The Board has previously analyzed the mechanics of the surface mining permitting programs in Robert Kwalwasser v. DER and Kerry Coal Company, 1986 EHB 24. There, we recognized that the permit (MDP) encompassed the entire area to be affected by a surface mining operation, even though the authorization to conduct mining operations (MP) may only involve a portion or phase of the acreage of the operation. The operation challenged in Kwalwasser involved 1087 acres, only 44.3 of which the operator had bonded and received authorization to mine. In this instance, for whatever reason, Fetterolf chose not to phase its mining activities. Instead, Fetterolf's MDP, MP and bond all cover the same area. Accordingly, Fetterolf's bonds may only be released in accordance with the relevant sections of 25 Pa.Code §86.172:

(a) [DER] will not release any portion of the liability under bonds applicable to a permit area . . . until it finds that the permit has accomplished the reclamation schedule of this section.

(b) The amount of bonds applicable to a permit area . . . which may be released shall be calculated on the following basis:

(1) Release of an amount not to exceed 60% of the total bond amount on the permit area . . . upon completion and approval by [DER] of Stage I reclamation.

\* \* \* \* \*

(d) For the purposes of this part:

(1) Reclamation Stage I shall be deemed to have

been completed when the permittee completes backfilling, regrading and drainage control in accordance with the approved reclamation plan.

\* \* \* \* \*

For the Board to enter summary judgment in favor of either party, there must be no dispute relative to the compliance or lack of compliance with the requirements for Stage I bond release. We do agree with DER that, pursuant to principles of administrative finality, its denials of CR-1 and CR-2 became unassailable, since they were not appealed by Fetterolf within 30 days of receipt. See James E. Martin v. Commonwealth, DER, 1987 EHB 100. However, that issue is somewhat academic, as there is nothing in the bond release requirements to preclude an operator from again seeking bond release if it believes deficiencies have been corrected. In addition, we are concerned here with whether the area covered by CR-3, which is separate from the area covered by CR-1 and encompasses the area covered by CR-2, met bond release requirements.

Fetterolf's failure to appeal the March 11, 1986, denial of the CR-1 has conclusively established that, as of March 11, 1986, a polluttional discharge existed at the Ross Mine in the area encompassed by CR-1. Even if CR-1 and CR-3 covered the same area, for the period between March 11, 1986, and January 12, 1987, the date of denial of the CR-3, we have conflicting reports as to polluttional discharges at the site. DER alleges that "[t]here has been no change in the condition of this site . . . to alter [its] previous [March 11, 1986] decision." Fetterolf has not admitted this allegation. Further, statements made during the taking of the depositions in 1987 are in conflict, although they do contain some support for Fetterolf's allegation that there was no further risk of significant discharge from the permitted area. (See, e.g., Deposition of David Leiford, April 3, 1987, at p. 12 and

Deposition of Richard Lamkie, April 3, 1987, at pps. 15 and 20.) As to the earlier regrading deficiencies addressed in the denial of CR-2, there is clearly no agreement between the parties as to their nature and extent.

There are other disputed material facts relating to which bond(s) cover which portions of the site; DER cites only bond instrument number 2518, but Fetterolf refers to 3 supplementary bonds. The mining permit referred to on page 3 of Fetterolf's cross-motion for summary judgment is dated February 6, 1984, while the permit attached to DER's motion as an exhibit indicates the date of permit issuance as June 3, 1982. Similarly, Fetterolf's cross-motion must be denied because of the disputes as to material fact regarding the correction of the reclamation deficiencies at the site.

Because of the many disputed material facts in this matter, we cannot grant summary judgment for either party.

**ORDER**

AND NOW, this 28th day of April, 1989, it is ordered that the Department of Environmental Resources' motion for summary judgment is denied and that Fetterolf Mining Inc.'s cross-motion for summary judgment is denied.

**ENVIRONMENTAL HEARING BOARD**

*Maxine Woelfling*  
**MAXINE WOELFLING, CHAIRMAN**

**DATED:** April 28, 1989

**cc: Bureau of Litigation**  
Harrisburg, PA  
**For the Commonwealth, DER:**  
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M. DIANE SMITH  
 SECRETARY TO THE BOA

<b>T.R.A.S.H., LTD. and PLYMOUTH TOWNSHIP</b>	:	
<b>v.</b>	:	<b>EHB Docket No. 87-352-W</b>
<b>COMMONWEALTH OF PENNSYLVANIA</b>	:	
<b>DEPARTMENT OF ENVIRONMENTAL RESOURCES</b>	:	
<b>and</b>	:	
<b>DRAVO ENERGY RESOURCES, Permittee</b>	:	
<b>and</b>	:	<b>Issued: April 28, 1989</b>
<b>COUNTY OF MONTGOMERY, Intervenor</b>	:	

**A D J U D I C A T I O N**

By: Maxine Woelfling, Chairman

**Synopsis:**

The Board dismisses appeals of the Department of Environmental Resources' (Department) issuance of a solid waste management permit and an air quality plan approval to a resource recovery facility, holding that the appellants failed to satisfy their burden to prove by a preponderance of the evidence that the Department had abused its discretion.

With regard to the solid waste permit, the Board held that the Department must consider traffic safety issues in evaluating a solid waste permit application and that, although the Department may defer to the Department of Transportation's judgment in this respect, it still has the ultimate authority to issue the solid waste permit. The Board concluded that the permittee had adequately and safely provided for any increased traffic volume from its facility. The Board also held that the Department could consider the geology underlying a resource recovery facility, as well as the stability of

the facility's foundation, and concluded that the Department did not abuse its discretion in determining that the foundation of the facility was designed so as to minimize any adverse environmental effects from subsidence. The Board concluded finally that the permittee had provided for proper disposal and testing of the residue from the facility.

As for the air quality plan approval, the Board held that it had no jurisdiction to review Department policies outside of their implementation in a particular case. In reviewing the conduct of a former Department employee in reviewing a plan approval application when he was negotiating employment with a consultant which had prepared a portion of the application, the Board determined that no conflict of interest existed, but admonished the Department on its lack of guidelines on conflict of interest. The Board determined that the establishment of best available technology was a source-specific determination and refused to equate minimum attainable emissions utilizing best available technology with the lowest achievable emission rate. The Board held that the conditions imposed in the plan approval for the various air contaminants represented best available technology and that the facility was economically and socially justified.

#### **INTRODUCTION**

This matter was initiated with the August 20, 1987, filing of notices of appeal by The Residents Against Solid Waste Hazards (T.R.A.S.H.) and Plymouth Township (Plymouth), seeking the Board's review of the Department's July 23, 1987, issuance of an air quality plan approval, solid waste management permit, and National Pollutant Discharge Elimination System (NPDES) permit to Dravo Energy Resources, Inc. of Montgomery County (Dravo) for the construction and operation of a resource recovery facility on land owned by Montgomery County (County) in Plymouth Township, Montgomery County. The

permits were issued pursuant to, respectively, 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 Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* (SWMA); and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* The appeal of T.R.A.S.H. was docketed at No. 87-352-W, and the appeal of Plymouth was docketed at No. 87-355-W.

A petition to intervene was filed by the County on August 21, 1987, and the Board granted the petition in an order dated September 1, 1987. The Board also consolidated the appeals of T.R.A.S.H. and Plymouth at Docket No. 87-352-W in that same order.

Dravo and the County filed a motion for expedited proceedings on August 26, 1987, alleging as grounds the public importance of the project in light of the solid waste disposal crisis in southeastern Pennsylvania and the financial losses which would be suffered by the County and its taxpayers as a result of delaying construction of the resource recovery facility. The Board, over the objections of T.R.A.S.H. and Plymouth, granted the motion for expedited proceedings on September 16, 1987. Plymouth and T.R.A.S.H. discontinued their challenges to the Department's issuance of the NPDES permit by a stipulation of the parties filed with the Board on October 27, 1987.

On October 16, 1987, Dravo filed a motion for summary judgment on Paragraph 12 of Plymouth's notice of appeal and a motion in limine to exclude evidence concerning the Montgomery County Solid Waste Plan. That paragraph of Plymouth's notice of appeal alleged that the Department's issuance of a solid waste management permit to Dravo was, in reality, the implementation of the

Montgomery County Solid Waste Plan, a plan which had not been and could not be approved by the Department. Dravo contended that nothing in the SWMA prohibited the Department's issuance of the solid waste permit.

Plymouth also moved for summary judgment on October 16, 1987, arguing that the Department had committed an abuse of discretion in issuing permits to Dravo, as the permits represented the implementation of a solid waste plan which could not be approved by the Department because it lacked the requisite resolutions of adoption by the County's constituent municipalities.

The Department advised the Board by letter dated October 30, 1987 that it had no objection to Dravo's motion for summary judgment.

In an opinion and order of November 5, 1987 (1987 EHB 906), the Board granted Dravo's motion and denied Plymouth's motion, holding that there was no requirement under the SWMA that permits issued under its provisions conform with solid waste plans developed under the statute.

A motion for partial summary judgment was filed by Plymouth and T.R.A.S.H. on October 19, 1987. They argued that the Department's issuance of the air quality plan approval to Dravo was improper because the Department had failed to incorporate emission limits for heavy metals based on best available technology into the plan approval. As support for their contention, Plymouth and T.R.A.S.H. cited a plan approval incorporating such emission limits which was issued by the Department to Westinghouse Electric Corporation for the construction of a solid waste incinerator in Manchester Township, York County.

The County opposed the motion for partial summary judgment in an answer filed with the Board on October 30, 1987, contending that the Department was not legally mandated to incorporate emission limits into the plan approval and that, even if it were, there were disputed issues of material fact concerning whether emission limits were incorporated into the

plan approval. Dravo joined in the County's answer on October 30, 1987, and filed a separate memorandum of law in opposition to the motion. The Department, by answer filed November 13, 1987, opposed the motion for much the same reasons as the County and Dravo.

By order dated December 7, 1987, the Board denied the motion for partial summary judgment on the emission limit issue. The Board stated that summary judgment was inappropriate in light of disputed issues of material fact concerning whether emission limits were, in fact, incorporated into the plan approval and further noted that T.R.A.S.H. and Plymouth were not entitled to judgment as a matter of law, since the authority cited in support of their motion, 25 Pa.Code §127.12, did not mandate inclusion of emission limits in plan approvals.

T.R.A.S.H. filed a second motion for summary judgment on November 13, 1987, arguing that the Research-Cottrell dry gas scrubber/fabric filter system for the resource recovery facility failed to meet condition (5)(A)(2) of the plan approval. Dravo and the County jointly opposed T.R.A.S.H.'s motion on December 3, 1987, contending that, at the very least, genuine issues of material fact remained as to whether the Research-Cottrell system could not achieve the applicable sulfur dioxide emission reduction level.

The Board denied T.R.A.S.H.'s second motion for summary judgment in an order dated December 7, 1987, stating that the testimony adduced at the November 19 and 20, 1987 hearings demonstrated the existence of genuine issues of material fact on this issue.

On December 7, 1987, T.R.A.S.H. moved to remand the plan approval to the Department as a result of the Department's adoption of new Best Available Technology (BAT) criteria for municipal waste incineration resource recovery facilities. The County opposed T.R.A.S.H.'s motion on December 8, 1987,

citing a condition in the plan approval which allegedly made the new criteria inapplicable unless construction of the facility was not initiated within 18 months of the issuance of the plan approval. Dravo joined in the County's answer on December 15, 1987. The issues addressed in that motion will be decided herein.

Hearings on the merits were held on November 4-6 and 16-20, and December 7-11 and 17-18, 1987. The parties also designated and counter-designated substantial portions of deposition testimony for inclusion in the record. The record comprises 2343 pages of notes of testimony, over 100 exhibits, and substantial portions of 773 pages of deposition testimony and the exhibits thereto. The filing of post-hearing briefs was bifurcated, with briefs initially filed on the solid waste permit and then on the plan approval.<sup>1</sup> Filing of post-hearing briefs was completed on March 18, 1988, and the matter is now ripe for adjudication.<sup>2</sup>

Consistent with our precedent, as upheld most recently by the Commonwealth Court in Lucky Strike Coal Company and Louis J. Beltrami v. Department

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<sup>1</sup> By agreement of the appellants, Plymouth submitted the post-hearing brief on the solid waste permit for both appellants and T.R.A.S.H. submitted the post-hearing brief on the plan approval for both appellants. The Department did not file a post-hearing brief on issues relating to the solid waste permit.

<sup>2</sup> This project has been vociferously contested by the parties before the Board, the trial courts, and the appellate courts. Aware of the public importance of the project and the need for a prompt adjudication of the issues, the Board has made every human effort to digest a voluminous record, document an array of findings of fact on complex technical matters, and reach appropriate conclusions of law - all as expeditiously as possible. Given the Board's limited resources of personnel and its rapidly expanded caseload, it was not possible to complete the adjudication earlier. The Board's docket contains a host of appeals relating to incinerators, hazardous waste sites, municipal waste disposal facilities, and numerous other projects which are comparable to these two appeals in public significance and complexity. The passage of additional environmental legislation will lead to further appeals of a similar nature. The Board's ability to adjudicate these appeals in a timely manner depends entirely upon the prompt filling of vacancies on the Board and the continued receipt of adequate funding.

of Environmental Resources, \_\_\_ Pa.Cmwltth \_\_\_, 546 A.2d 447 (1988), the failure by a party to raise an issue in its post-hearing brief results in a waiver of that issue. The appellants have raised four issues relating to the propriety of the Department's issuance of the solid waste permit: traffic safety and hazards; the geologic suitability of the site; ash and residue handling and disposal; and foundation stability. Our adjudication of the solid waste permit appeal will be confined to these four issues, and all other

issues relating to the issuance of the solid waste permit are deemed waived.<sup>3</sup>

The issues raised by Appellants concerning the propriety of the Department's issuance of the air quality plan approval are more numerous. They may be divided into two categories: those dealing with alleged abuses of discretion by the Department's Central Office staff in preparing and disseminating the BAT guidelines for municipal waste resource recovery facilities and those dealing with alleged abuses of discretion committed by the Department's Norristown Regional Office in reviewing the Dravo plan approval application. More specifically, Appellants contend that the Norristown Regional Office abused its discretion in the manner in which it reviewed the application and by tolerating a conflict of interest in an employee with responsibility for reviewing the plan approval application. They also argue that the Department abused its discretion by not incorporating heavy metal emission limits in the plan approval as required by 25 Pa.Code §127.12(a)(5); by failing to review the plan approval application pursuant to 25 Pa.Code §127.1; and by failing to assure that emissions from the Dravo facility would represent the minimum attainable through the use of BAT, in violation of 25 Pa.Code §127.12(a)(2) and (5). Our adjudication will address only these issues, and all others relating to the air quality plan approval are deemed waived.

With the issues so defined, we make the following findings of fact.

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<sup>3</sup> We incorporate herein and affirm our grant of summary judgment at 1987 EHB 906 to Dravo on the issue of conformity of the solid waste permit to the County Solid Waste Plan.

### FINDINGS OF FACT

1. Appellants are T.R.A.S.H. and Plymouth. (Notices of Appeal) ✓
2. T.R.A.S.H. is an association of persons opposed to the issuance of the solid waste permit and the plan approval to Dravo. (N.T. 12, 16)<sup>4</sup> ✓
3. Plymouth is a former township of the first class which has adopted a home rule charter; it is situated in Montgomery County and has a mailing address of 700 Belvoir Road, Norristown, Pennsylvania 19401. (N.T. 826) ✓
4. Appellee is the Department, the administrative agency of the Commonwealth of Pennsylvania vested with the duty and authority to administer the Air Pollution Control Act; the SWMA; §1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 (Administrative Code); and the rules and regulations adopted thereunder.
5. Permittee is Dravo, a wholly owned subsidiary of Dravo Corporation, with a business address of One Oliver Plaza, Pittsburgh, Pennsylvania 15222. (Ex. B-5 and B-17)
6. Intervenor is the County, a county of the second class A, with a mailing address of c/o the Board of County Commissioners, Montgomery County Courthouse, Norristown, Pennsylvania 19404. (N.T. 825)
7. On July 23, 1987, the Department issued Solid Waste Permit No. 40058 (solid waste permit) and Air Quality Plan Approval No. 46-340-002 (plan

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<sup>4</sup> References to the transcripts of the hearing on the merits will be denoted "N.T. \_\_\_\_." References to deposition testimony will be denoted by "\_\_\_\_ Dep. at \_\_\_\_." References to exhibits will be "Ex. B-\_\_\_\_" for stipulated exhibits, "Ex. D-\_\_\_\_" for the Department, Ex. M-\_\_\_\_" for the County, and "Ex. T-\_\_\_\_" for T.R.A.S.H.

approval) to Dravo for the construction and operation of a 1200 ton per day municipal waste incineration resource recovery facility (facility) in Plymouth Township, Montgomery County, on land owned by the County which is adjacent to the former Alan Wood Steel plant. (N.T. 4, 22, 24, 27, 704, and 768; Ex. B-2, B-16, B-47, and M-60)

8. Dravo Corporation, Dravo, and another wholly owned subsidiary of Dravo Corporation, Dravo Operations of Montgomery County, Inc., have entered into contracts to design, construct, and operate the facility. (N.T. 826)

#### SOLID WASTE PERMIT

9. Dravo submitted the solid waste permit application to the Department's Norristown Regional Office on April 16, 1986. The submission was comprised of Volume I: Plans and Documents (Ex. B-1); Volume II: Module 9 Submission (Ex. B-2); Volume III: Traffic Analysis (Ex. B-3); Compliance History Module No. 10 (Ex. B-4); and Volume V: Form No. 1 Phase 1, Form No. 3 Phase II, Operational Narrative and Module No. 1 (Ex. B-5).

10. By letter dated May 2, 1986, the Department accepted the solid waste permit application for technical review. (Ex. M-2)

11. The Department's review of the solid waste permit application occurred over a 15 month period and involved staff from the Bureau of Waste Management's Central and Norristown Regional Office staffs. (Lunsk Dep. at 7-11)

12. Lawrence Lunsk, the Norristown Regional Solid Waste Facilities Supervisor, coordinated the review of the solid waste permit application, assigning various portions of the application to appropriate members of his staff for review. (Lunsk Dep. at 8-9)

13. After review of the application, the technical staff forwarded their comments to Mr. Lunsk, who, in turn, coordinated the comments and used

them as a basis for comment letters sent to Dravo. (N.T. 35 and 36; Lusk Dep. at 8-10; Rajkotia Dep. at 44; Ex. M-5, M-7, M-9, M-10, M-12, M-14, M-19, M-22, M-23, M-25, and M-27)

14. The Department sent Dravo comment letters dated July 24, 1986, December 1, 1986, January 13, 1987, and March 13, 1987. (Ex. M-5, M-7, M-14, and M-25)

15. Dravo responded to these comment letters by providing additional information in letters dated November 5, 1986, December 19, 1986, January 7, 14, and 16, 1987, February 3, 1987, and April 22, 1987. (Ex. B-12 to B-15, M-13, M-15, and M-16)

16. Plymouth received a copy of each comment and response letter. (Lusk Dep. at 9)

17. Extensive comments on the solid waste permit application were submitted to the Department by Plymouth, interested citizens, and other members of the public. (N.T. 142, 151, 152, 159, 177-178)

18. On October 21, 1986, the Department held a public hearing on the permit application. (N.T. 142-143)

19. As a result of concerns voiced at the public hearing, the Norristown Regional Office requested additional technical consultation from the Bureau of Waste Management's Central Office. (Gonshor Dep. at 22, 59)

20. Based on his review of Dravo's comments and the review and recommendations of the Bureau of Waste Management's Central and Norristown Regional Offices, Mr. Lusk recommended to Wayne Lynn, the Norristown Regional Solid Waste Manager, that the solid waste permit be issued to Dravo. (N.T. 121, 169-170)

21. The solid waste permit, as issued by Mr. Lynn on July 23, 1987, includes

- a) Form 1, Phase I (Ex. B-5),
- b) Form 3, Phase II (Ex. B-5),
- c) Module 9 (Ex. B-2),
- d) Module 10 (Ex. B-4),
- e) Operational narrative (Ex. B-5),
- f) Plans and documents for facility construction (Ex. B-1),
- g) Traffic Analysis (Ex. B-3),
- h) Subsurface investigation report (Ex. B-6),
- i) PPC Plan as revised on January 20, 1987 (Ex. B-8),
- j) Erosion and sedimentation control plans (Ex. B-9),
- k) Inter-municipal agreement for the disposal of municipal waste at the facility from the participating municipalities (Ex. B-10), and
- l) Operations Manual and Training Program received on January 8, 1987 (Ex. B-11(a)).

The solid waste permit also incorporates Dravo's November 5, 1986, response to the Department's July 24, 1986, review letter, Dravo's December 19, 1986, response to the Department's December 1, 1986, review letter, Dravo's February 3, 1987, response to the Department's review letter, and Dravo's April 22, 1987, response to the Department's March 23, 1987, review letter. (Lunsk Dep. at 58-60; Ex. B-12 to B-16, Ex. M-5, M-7, M-14, and M-25)

22. Irwin Lourie of the Department's Norristown Regional Office was assigned the task of reviewing the Module 9 (environmental assessment) portion of Dravo's solid waste permit application. (N.T. 35-36; Lunsk Dep. at 8-24)

23. As part of the Module 9 submission, Dravo submitted a March, 1986 traffic analysis and recommendations prepared by Konheim and Kitcham and

a November 6, 1985, letter from the Pennsylvania Department of Transportation (PennDOT) approving, in concept, Dravo's plans to improve Alan Wood Road and to add a right turn ramp from Alan Wood Road to Ridge Pike. (Ex. B-2 and B-3)

24. Based on his review of the traffic analysis and the PennDOT letter, Lourie determined that there would be a traffic problem as a result of increased vehicular volume. In accordance with the Department's policy, he referred this information to PennDOT for its review and recommendations. (N.T. 45-49, 62-63)

25. PennDOT reviewed the information and advised the Department, by letter dated April 8, 1987, that it concurred with Dravo's proposed improvements to Alan Wood Road and that, with the proposed improvements, there would be no adverse traffic impact from the facility. (N.T. 48-49, 63-64; Ex. B-15)

26. The Department, as it did with the Dravo solid waste permit application, normally defers to PennDOT's judgment in assessing potential traffic problems. (N.T. 63-64)

27. The proposed facility is located on Alan Wood Road south of its intersection with Ridge Pike. (Ex. B-2)

28. Ridge Pike is heavily traveled, especially by trucks. (N.T. 249)

29. Alan Wood Road is 28 feet wide at its intersection with Ridge Pike, but after several hundred feet, south of the entrance to the proposed facility where it is known as Alan Wood/Brook Road, narrows to 18 to 20 feet wide with no shoulder and encroachments to the road's edge. (N.T. 257)

30. Alan Wood/Brook Road south of the facility entrance is in poor condition. The surface is cracked and the roadbed is deteriorated. (N.T. 257)

31. There is an abrupt vertical drop and horizontal curve in Alan Wood/Brook Road about 100 feet south of the facility entrance. The road is gouged there because of vehicles "bottoming out." (N.T. 257)

32. Alan Wood/Brook Road south of the facility entrance is substandard for passenger travel and not wide enough to accommodate trash trucks. (N.T. 261, 277)

33. The traffic analysis submitted by Dravo assumed a 5% increase in traffic on Alan Wood Road south of the facility entrance; this would amount to approximately 35 vehicular trips per day. (N.T. 245; Ex. B-3)

34. The traffic analysis stated that of the 366 trucks entering and leaving the facility, 30 trucks would be removing ash residue from the facility. (N.T. 285; Ex. B-3)

35. Carman W. Daecher was qualified as an expert in traffic engineering, including the study of roadways with regard to traffic safety and hazards. (N.T. 243)

36. Mr. Daecher reviewed the traffic analysis prepared for Dravo, as well as actual conditions at the facility site. (N.T. 243)

37. Mr. Daecher believed that the traffic analysis contained a fair assessment of the number of vehicular trips to and from the facility because the number of trips were calculated on the basis of the smallest size of collector vehicle; therefore, this would result in a maximum number of trips. (N.T. 284-285; Ex. B-3)

38. Mr. Daecher admitted that his testimony that the traffic analysis did not account for trips by trucks removing ash residue was incorrect when shown the traffic analysis. (N.T. 284-285)

39. Mr. Daecher believed that Dravo's proposed improvements from the intersection of Ridge Pike and Alan Wood Road south to the entrance of the

facility were sufficient to handle the projected increase in traffic to and from the facility from Ridge Pike. (N.T. 245)

40. Daecher's chief concern was with road conditions on Alan Wood/Brook Road south of the facility entrance; he believed that the clear site distance from the entrance south should be increased by at least 50 feet, that the road should be widened, that a bump at the facility entrance should be corrected, and that the area should be repaved. (N.T. 278)

41. Dravo proposed to increase the clear site distance for vehicles turning south from the facility onto Alan Wood/Brook Road from less than 100 feet to 510 feet, to correct the bump at the present entrance, and to widen Alan Wood Road to 52 feet. These improvements were approved by PennDOT on April 8, 1987. (N.T. 289-290; Ex. B-15A)

42. Mr. Daecher never considered Ex. B-15A before testifying and reviewed the proposed improvements contained therein for the first time at the hearing. (N.T. 286-287)

43. Mr. Daecher admitted that the proposed improvements with respect to site distance south of the plant entrance, the bump at the plant entrance, and road width satisfied his concerns in these areas. (N.T. 267, 289, 290-291)

44. Mr. Daecher never presented any evidence concerning his assertion that more than 5% of the increased traffic volume would be from the facility entrance south onto Alan Wood Road.

45. Dravo's proposed roadway improvements, as approved by PennDOT, will adequately handle any increased traffic volume and provide for traffic safety in the vicinity of the facility. (N.T. 63, 64, 169-170, 267, 279, 289-291; Ex. B-3, B-15, and B-15A)

**SUBSURFACE CONDITIONS: SINKHOLE/SUBSIDENCE PROPENSITY**

46. Even before Dravo submitted its solid waste permit application, it recognized that the proposed site of the facility was underlain by limestone and prone to solutioning activity. (N.T. 672-673, 702)

47. Test borings were conducted by Woodward-Clyde Consultants in April and May, 1984, and by Gannett-Fleming in August, 1985. (N.T. 724-725; Ex. B-2 at 61, App. A)

48. Dravo indicated in its Module 9 submission that the site had a geologic propensity to develop subsidence. (Ex. B-2)

49. Delta Geophysical Service (Delta) conducted extensive borings as part of a subsurface investigation conducted for Dravo in April and May, 1986. (Ex. B-6 at App. A)

50. The Delta subsurface report was submitted by Dravo to the Department in June, 1986. (Ex. B-6)

51. The potential for subsidence at the site was also raised by the citizens of Plymouth at the October 21, 1986, public hearing on the solid waste permit application. (N.T. 142, 143, 159; Gonshor Dep. at 22-59, Lusk Dep. at 17-18)

52. The Department conducted an extensive geologic review of the site, involving geologists and hydrogeologists in the Norristown Regional Office of the Bureau of Waste Management and the Bureaus of Waste Management and Topographic and Geologic Survey in Harrisburg. (Gonshor Dep. at 59; Lusk Dep. at 19)

53. Thomas Buntin, the Regional Hydrogeologist, was initially assigned the task of reviewing hydrogeologic conditions at the facility site. (Lusk Dep. at 18-19; Buntin Dep. at 39-40)

54. Mr. Buntin's duties and responsibilities in the Bureau of Waste Management include, *inter alia*, the interpretation of hydrogeologic studies and groundwater monitoring data. (Buntin Dep. at 8)

55. Mr. Buntin commenced his review by studying the Subsurface Report, which also contained the conclusions and recommendations of Dr. Paul Rizzo. (N.T. 812; Buntin Dep. at 11; Ex. B-6)

56. Wayne Lynn, the Regional Solid Waste Manager, requested William Pounds, Chief of the Facilities Section of the Bureau of Waste Management, to assist the Norristown Regional Office by having an individual with expertise in subsidence activity review the solid waste permit application. (N.T. 160, 163, and 179; Pounds Dep. at 25-27)

57. Pounds assigned this task to Jay Ort, the Senior Hydrogeologist in the Bureau's Facilities Section. (Ort Dep. at 3, 4, and 6)

58. Mr. Ort reviewed information concerning potential subsidence activity at the site, including the Subsurface Report; a memorandum from Mr. Buntin to Mr. Lusk dated December 15, 1986; a memorandum from Mr. Buntin to Mr. Lusk dated December 29, 1986; a memorandum from Mr. Pounds to Mr. Lynn dated January 15, 1987; a memorandum from Mr. Rajkotia to Mr. Lusk dated January 7, 1987; a memorandum from Mr. Lusk to Leon Gonshor dated January 13, 1987; and a letter from Mr. Lusk to Dravo dated January 13, 1987. (Ort Dep. at 8-9; Ex. M-9, M-12, and M-14)

59. After reviewing these documents, Ort contacted William Kochanov, a geologist in the Department's Bureau of Topographic and Geologic Survey, who has an extensive background in subsidence-related geology. (N.T. 163; Pounds Dep. at 27; Ort Dep. at 9-10; and Kochanov Dep. at 3-5)

60. Mr. Kochanov is presently cataloguing and mapping Karst-related features in Pennsylvania. (Kochanov Dep. at 4-5)

61. Mr. Kochanov reviewed the same materials that Mr. Ort reviewed and, in addition, obtained other available literature, bore hole loggings of the site, a blue line map of the area, and aerial photographs. (Kochanov Dep. at 8-9, 28, 37, and 48)

62. Messrs. Ort, Kochanov, and Buntin visited the proposed facility site and the adjacent quarries on January 28, 1987. (Ort Dep. at 10; Kochanov Dep. at 9, 37-38; Buntin Dep. at 43-44)

63. Topographically, the Schuylkill River runs through a valley to the west of the site, Plymouth Creek runs through a valley to the southeast of the site, and an unnamed tributary runs through a valley to the east of the site. A valley exists to the north of the site, Veterans Quarry is to the northwest of the site, and Ivy Rock Quarry is to the southwest of the site. (N.T. 709-710; Ex. M-1, M-60 to M-64; and Ex. B-2 at Fig. 1.1)

64. The facility would be on a site consisting of a mound of limestone and weathered soil which peaks at approximately the northwest entrance of the site and grades off in three directions over the site. The peak grades down to Plymouth Creek in the southeast, to Veterans Quarry to the northwest, and down to the valley in the north. (N.T. 709; Ex. M-1, M-60 to M-64)

65. The proposed site is underlain by the ledger formation, a fractured carbonate structure characterized by pinnacles, irregular bedrock surface and solutioning. (N.T. 324)

66. A pinnacle structure is a rock structure wherein calcium carbonate ( $\text{CaCO}_3$ ) weathers more readily than other materials, producing an irregular bedrock surface. (N.T. 325)

67. Solutioning is the differential dissolution of carbonate by groundwater, wherein carbonate materials along bedding or stress fractures are dissolved. (N.T. 325)

68. A void is an enlarged open space in bedrock caused by ground-water dissolving rock material. (N.T. 326)

69. A solution cavity is the annular space developed as groundwater dissolves a susceptible material. (N.T. 325)

70. A ledger formation may be subject to soft zones and sinkhole development. (N.T. 324)

71. The boring logs in the Subsurface Analysis indicated carbonate underlying the site, with a bedrock surface that was highly fractured, weathered and irregular. (N.T. 327)

72. The boring logs revealed the presence of voids and soft zones, areas which contain essentially no rock material. (N.T. 337)

73. Competent bedrock is that which exhibits a rock quality designation (RQD) of greater than 50%; competent bedrock doesn't exhibit any significant voids, soft zones, or highly fractured zones. (N.T. 366)

74. The determination of competent bedrock is a factor in ascertaining the stability of a site. (N.T. 349)

75. Of the 138 RQDs listed in the boring log cross-sections, only 14%, or 19 values, were greater than 50%; the average rock quality was 31.9%. (N.T. 338, 342)

76. RQDs of less than 50% lie in the poor to very poor category of rock quality. (N.T. 338)

77. Traditional test borings are usually four inches in diameter, so examination of quarry faces near a site allow one to view actual subsurface rock conditions. (N.T. 714-715)

78. The Gibbs and Hill report which was submitted with the solid waste permit application was based on test borings of mostly 14 to 40 feet, although one was at 80 feet and the deepest was at 90 feet. (Ort Dep. at 22)

79. Thomas Buntin required Dravo to drill additional test borings at depths up to 150 feet in the southwestern part of the site, where the heavy boiler and steam turbine would be placed. (Buntin Dep. at 16, 20)

80. Dravo submitted the additional borings in a June, 1986, Subsurface Report. (Ex. B-6)

81. The June, 1986 Subsurface Report accurately describes the site conditions. (Buntin Dep. at 13)

82. Examination of quarry faces in proximity to a site is superior to an analysis of test borings in evaluating subsurface conditions. (N.T. 714)

83. David Hassrick, a consultant retained by Plymouth who was qualified as an expert in geology, observed what he believed to be sinkhole activity in the overlying material of two of the faces of the Ivy Rock Quarry. (N.T. 322, 370)

84. One of the sinkholes observed by Hassrick in the Ivy Rock Quarry face had a diameter of 10 to 15 feet. (N.T. 371)

85. The groundwater elevation of Veterans Quarry is in the range of 50 to 55 feet. (N.T. 764)

86. The surface water elevation of the Schuylkill River in the vicinity of the site is approximately 75 feet. (N.T. 764)

87. The surface water elevation of Plymouth Creek in the vicinity of the site is approximately 75 feet. (N.T. 764)

88. The Schuylkill River and Plymouth Creek are natural boundaries of the relevant area for determining the elevation and flow of groundwater in the vicinity of the site. (N.T. 765)

89. The site of the facility is at the area's topographic high, with an elevation of approximately 150 feet. (N.T. 764)

90. The elevation of groundwater at the site is approximately 70 to 75 feet. (N.T. 765-768)

91. Groundwater recharge for the facility site is rain falling onto the ground on which the facility is located; there is no recharge from outside of the facility area. (N.T. 765, 768)

92. If pumping presently occurring at Ivy Rock Quarry is discontinued, the groundwater elevation at the site would rise to a maximum of 83 to 85 feet. (N.T. 765-767)

93. The foundation elevation of the proposed site is at an elevation of 138 feet, 50 feet above the groundwater elevation if pumping were to cease at Ivy Rock Quarry. (N.T. 767)

94. Subsidence activity in the area cannot be caused by underground solution activity; rather, it is caused by lack of surface water management. (N.T. 723-724)

95. Proper engineering measures can prevent surface subsidence. (Ort Dep. at 12, 32)

#### FOUNDATION STABILITY

96. In November, 1985, Gibbs and Hill, on behalf of Dravo, retained Dr. Paul C. Rizzo, founder, President, and chief executive officer of Paul C. Rizzo Associates, Inc., a consulting firm specializing in foundation engineering, to evaluate the adequacy of the site and to make recommendations regarding the design and construction of the foundation for the facility. (N.T. 672-673, 692, and 701-702)

97. Dr. Rizzo made extended visits to the site. (N.T. 690-691, 703-707, 770-774)

98. During his November, 1985, site visit, Dr. Rizzo and his associate hydrogeologist walked the facility site and the adjacent areas, in-

cluding the access road. He also drove to the Schuylkill River, traversed the major and minor roads in the vicinity, and viewed the neighboring properties, including the Ivy Rock and Veterans Quarries. (N.T. 704-706; Ex. M-60 to M-63)

99. After his site visit in November, 1985, Dr. Rizzo advised Gibbs and Hill of the foundation concepts necessary for the facility; Gibbs and Hill incorporated those concepts into its June, 1986, Subsurface Report. (N.T. 727, 812; Ex. B-6)

100. The implementation of the erosion and sediment control plan (E&S plan) is the first step in construction of the foundation; it is important because it manages surface water, which is crucial in the prevention of surface subsidence. (N.T. 723-724, 735, 736, 767)

101. Plymouth's foundation engineering expert, Dr. Arthur A. Fungaroli, acknowledged the importance of surface water management to lessen the propensity for subsidence, but he never examined the E&S plan prepared by Dravo and approved by the Department. (N.T. 462, 736, 754-757)

102. Dravo submitted an E&S plan to the Department in May, 1986. The plan included a Rough Grading and Phase I Erosion Control Plan and a Proposed Grading and Paving Plan. (Ex. B-9)

103. The E&S plan contained temporary and permanent measures to prevent erosion and sedimentation, including revegetation, slope stabilization, diversion of surface waters, hay bale sediment traps and a sedimentation control pond. (Ex. B-9 at 1)

104. The E&S plan also incorporates the construction of a storm water management basin southwest of the facility to serve as a sedimentation basin during construction and a retention basin afterward during the operation of the facility. (Ex. B-9 at 1)

105. The E&S plan includes a site maintenance program as part of the facility operating plan; its purpose is to minimize erosion, promote vegetative stabilization, and prevent sediment accumulation. (Ex. B-9 at 6)

106. The E&S plan was reviewed by Mark Geosits, the Bureau of Soil and Water Conservation's Regional Engineer. Mr. Geosits reviews E&S control plans for earth disturbance permits, and he is responsible for an 18 county area in southeastern Pennsylvania. (N.T. 83-85)

107. Mr. Geosits reviews E&S control plans to determine if they conform to the erosion and sediment control regulations at 25 Pa.Code §102.1 *et seq.* (N.T. 90-91)

108. Mr. Geosits' comments on the Dravo E&S plan were set forth in a June 13, 1986, memorandum in which he requested additional information relating to the construction and design of the sedimentation basin, swales, and diversion channels; suggested that a stone entrance road be constructed as a measure to clean excess mud from the tires of vehicles entering and exiting the facility; advised Dravo of the requirements for temporary seeding and mulching; and asked Dravo to indicate in a statement that the E&S control facilities would be periodically inspected and cleaned. (N.T. 86-89)

109. Dravo responded to Mr. Geosits' comments on December 22, 1986, providing a revised Rough Grading and Phase I Control Plan. (N.T. 96; Ex. M-8)

110. Mr. Geosits advised the Bureau of Waste Management in a memorandum dated January 15, 1987, that Dravo's E&S plan as revised in December, 1986, met nearly all of his recommendations and requirements, with the exception of two "minor" additions. (N.T. 96-97; Ex. M-19)

111. These additions involved the placement of silt fencing and hay bales along the downslope berm of the sedimentation basin during construction

and the placement of silt fencing at the end of a swale to catch sediment while the basin berm was being built up. Dravo agreed to incorporate these additions into the E&S control plan. (N.T. 96-97; Ex. B-15 at para. 5, Ex. M-25 at para. 5)

112. The next step in constructing the foundation is to strip the vegetation and topsoil. (N.T. 736)

113. The surface will then be graded and flattened to suit the contours of the facility. (N.T. 737)

114. The surface will then be "proof-rolled," i.e. compacted by heavy rollers. (N.T. 737)

115. A structural fill will then be constructed in order to raise the surface elevation six feet (from 138 feet to 144 feet). (N.T. 737)

116. Because the fill will settle, another 16 feet of soil, the "pre-load," will be placed to cause the structural fill and soil cover to settle before construction of the foundation. (N.T. 738)

117. Settlement will be monitored in the field, rather than the laboratory, because field monitoring is more reliable when soils are sandy or silty in nature, as they are here. (N.T. 741; Ex. B-6)

118. The soil will be monitored until the differential settlement is one-half inch per 50 feet. (N.T. 743-745; Ex. B-6)

119. The differential settlement rate indicates the amount of movement a structure can tolerate without any impact on its structural integrity. (N.T. 743-745)

120. The differential settlement rate utilized by Dravo is commonly used for structures like the facility. (N.T. 744)

121. When the desired differential settlement rate is attained, the pre-load will be removed. (N.T. 745)

122. Next, a series of 15 feet deep borings will be drilled into the rock (to the 115 feet elevation, which is 30 feet below grade). (N.T. 745)

123. At the Department's recommendation, specifically that of Messrs. Ort and Buntin, Dravo will pressure grout the rock through these borings. The pressure grouting will bind the joints, bedding planes and fractures below the soil surface with a cement mixture, resulting in a rock plate. (N.T. 160, 166, 745-746, 752; Buntin Dep. at 21, 22, Ort Dep. at 27; Ex. M-24(a))

124. Grouting fills all voids with grout, displacing air or water in the voids and gluing together the soil particles. (N.T. 747-748; Buntin Dep. at 22)

125. Pressure grouting, rather than gravity grouting, as originally proposed by Dravo, provides additional protection for the site. (N.T. 751)

126. After the completion of the pressure grouting, the foundation will be laid. (N.T. 752-753)

127. Dravo proposes to utilize a concrete foundation in the facility. (N.T. 422)

128. Mat foundations distribute the load of a structure in the overburden above the bedrock and span any sinkholes which may develop over the life of the facility. (N.T. 422)

129. Separate mat foundations will be installed for various areas of the site. (N.T. 753)

130. The concrete mats are five feet thick and contain reinforced structural steel rods on top and bottom. (N.T. 753, 758-760)

131. The principal mat is 180 x 180 feet and runs under the main part of the facility from the refuse bunker wall to the back of the base of the air pollution control equipment. (N.T. 753)

132. A deeper-situated mat underlies the refuse bunker area. (N.T. 730, 759)

133. The tipping hall (area where the refuse trucks deposit refuse) and the baghouse are supported by individual strip or spread footings six feet square and two feet deep. (N.T. 730-731)

134. Dr. Rizzo recommended an additional measure to deal with problems such as surface subsidence, unencountered/unknown soft spots, or surface water penetration of the clay liner. It would involve the placement of 10 feet circular pods as bridges beneath the strip footings. (N.T. 758-761)

135. The structural columns of the facility are to be secured to the mats by anchor bolts. (N.T. 753)

136. The entire area of the site will be paved or sealed with a two feet thick clay barrier to prevent the penetration of rainwater and assure that it is diverted away from the structure in the collection ditches. (N.T. 754-756; Ex. M-64)

137. The final step in the construction of the foundation is to assure the mitigation of surface water effects, which, in turn, will minimize the potential for surface subsidence. (N.T. 754)

138. Dravo's surface water management program, which is incorporated in its E&S plan, assures that surface water is diverted into collection devices and does not pond on the site. (N.T. 754)

139. All of the drains and collection devices are clay-lined and installed on top of a clay liner. (N.T. 757)

140. The site is suitable from a foundation engineering perspective to support the facility if Dr. Rizzo's foundation design is implemented. (N.T. 725-727, 763)

141. The conditions of the solid waste permit are consistent with Dr. Rizzo's November, 1985, recommendations. (N.T. 754, 762, 773)

142. Dr. Rizzo holds B.S., M.S., and Ph.D. degrees in civil engineering from Carnegie Mellon University. (N.T. 677; Ex. M-57)

143. Prior to founding his own firm, Dr. Rizzo was associated with the D'Appolonia Group, an engineering and construction firm with world-wide engineering subsidiaries specializing in earth science engineering, geotechnical engineering, foundation engineering, and civil engineering. (N.T. 675-676)

144. Dr. Rizzo has broad world-wide experience with large foundation facilities spanning limestone-type and similar subsurface conditions. (N.T. 677-680)

145. For example, Dr. Rizzo has been the engineer responsible for the foundation and design of a nuclear power plant in North Carolina supported by mat foundations underlain by sand which, in turn, overlies limestone; an oxygen furnace for Bethlehem Steel in Bethlehem, underlain by true karst limestone; a nuclear power plant on the coast of southern Brazil, one part of which is sited on massive rock and the other part of which is sited on residual soils; a nuclear power plant in Northern Italy, supported by large mats underlain by sand silts and clay which, in turn, rests on limestone; and a power plant in Northern Yugoslavia underlain by silts and clays. (N.T. 676-680)

146. Dr. Rizzo was the only witness qualified as an expert in these proceedings who has experience with the design of resource recovery facilities over foundations underlain by limestone, and he is currently advising designers and builders on two other such projects. (N.T. 307, 404, 682-683)

147. Dr. Rizzo was the only witness qualified as an expert in these proceedings who has experience with the design of foundational support systems for large industrial structures over foundations underlain by limestone. (N.T. 307, 404, 682-683)

148. Dr. Rizzo is eminently well-qualified as an expert in the area of foundation engineering. (N.T. 672-688, 699-700)

149. In contrast to Messrs. Ort, Buntin, Kochanov, and Dr. Rizzo, two experts whom appellants offered to testify concerning subsidence, David Hassrick and A. Alexander Fungaroli (both associated with the AGES consulting firm), never walked the actual site of this facility. (N.T. 355-358, 458)

150. Mr. Hassrick agreed with the conclusions of the Subsurface Report that incorporates Dr. Rizzo's recommendations. (N.T. 327; Ex. B-6)

151. Mr. Hassrick agreed with the foundation recommendations of Messrs. Buntin, Ort, and Kochanov. (N.T. 327)

152. Dr. Fungaroli, who was qualified as an expert in the field of geotechnical engineering, has no experience with foundation engineering for a resource recovery facility. (N.T. 404, 408)

153. Dr. Fungaroli never visited the site of the proposed facility or its environs. (N.T. 458)

154. Dr. Fungaroli never studied Dravo's E&S plan which he further admitted plays an important role in minimizing the potential for subsidence. (N.T. 462)

155. Despite the AGES firm having prepared a ninety page expert report addressing the permitted facility, neither Dr. Fungaroli nor AGES provided a written report on the alleged subsidence issue. (N.T. 471)

156. The testimony of Dr. Fungaroli and Mr. Hassrick did not materially refute the expert opinions of Dr. Rizzo, nor the opinions of

Messrs. Ort, Buntin, Kochanov, Lunsk, or Lynn of the Department. (N.T. 119-181, 302-373, 387-476, 672-819; Ort Dep., Buntin Dep., Kochanov Dep., Lunsk Dep.)

157. In view of Dr. Rizzo's superior credentials, training, experience, and site specific knowledge and preparation with respect to the subsurface geology and foundation engineering aspects of this facility, the opinions and conclusions of Dr. Rizzo are entitled to far more weight than the opinions of Mr. Hassrick and Dr. Fungaroli, to the extent that any inconsistencies exist. (N.T. 302-321, 387-408, 672-819)

158. Mr. Ort concluded that the Dravo foundation plan would overcome any potential for surface subsidence. (Ort Dep. at 13, 37)

159. The Department properly concluded that the Dravo solid waste permit application adequately addressed any potential for subsidence and that the foundation design will maintain the long-term integrity of the facility. (N.T. 169-170, 725-727, 763; Buntin Dep. at 30, Ort Dep. at 19, Lunsk Dep. at 61-63; Ex. B-16, M-24(a), and M-27)

#### ASH RESIDUE

160. Residual waste generated by the facility will consist of bottom ash from the furnace where the waste is incinerated and fly ash from the air pollution control system and boiler hoppers. (Ex. B-1 at 5-43)

161. The fly ash will be combined with lime, and a chemical reaction will ensue in which the heavy metals in the fly ash are bound to the fly ash, precluding their leaching out of the ash when it is ultimately disposed of. (Rajkotia Dep. at 52, 59, 62, 63)

162. The lime-treated bottom ash and the fly ash will then be combined in the ash extractor, a totally enclosed system, and allowed to cool in

a water bath within the ash extractor. After cooling, the combined residue will be discharged onto a conveyor belt by hydraulically-operated rams. (Ex. B-1 at 5-43)

163. A ferrous metals removal system removes ferrous metals from the combined residue on the conveyor belt. (Ex. B-1 at 5-112)

164. The combined residue is deposited in an ash pit where it is transferred by a crane to ash removal trucks. (Ex. B-1 at 5-43)

165. The combined residue will then be disposed of in lined sanitary landfills with leachate collection systems. The ash presents no leachability problem, and, even if it did, the lined facility would prevent it from leaching into the environment. (Lunsk Dep. at 30; Rajkotia Dep. at 64)

166. It is a widely accepted and sound environmental practice to combine bottom ash with lime-treated fly ash, because the potential leachability of the combined ash is minimized when it is disposed of at a lined sanitary landfill. (Rajkotia Dep. at 52, 59, 62; Lunsk Dep. at 30)

167. Dravo submitted analyses of the process residue from the RESCO facility in Baltimore, Maryland as part of its Module 1 submission to the Department. (N.T. 666; Ex. B-5 at Attachment A of Module 1; Rajkotia Dep. at 70)

168. The Module 1 is that portion of the solid waste permit application dealing with process residue and its disposal. (Pounds Dep. at 7)

169. The RESCO test results were of combined ash residue and were the most analogous test results for advanced incinerator technology such as that proposed for the Dravo facility. (N.T. 667; Ex. B-5 at Attachment A of Module 1)

170. EP toxicity tests performed on residue from the RESCO facility indicated that contaminants were below the applicable regulatory limits for classifying a waste as hazardous. (Ex. B-5 at Attachment A of Module 1)

171. The EP toxicity test, which was developed by the U. S. Environmental Protection Agency (EPA), is a test to determine the leachability of materials to ascertain whether they are hazardous. (Pounds Dep. at 11)

172. At the Department's request, Dravo also submitted analyses of process residue from the Stapelfeld, West Germany incinerator; the Stapelfeld residue was of fly ash only. (N.T. 669, 671)

173. Dravo contended that analyses from Stapelfeld were not germane because the electrostatic precipitator (ESP) preceded the wet scrubber and German testing methodology was different. (N.T. 666, 671)

174. Dinesh Rajkotia reviewed the portion of Dravo's solid waste permit application concerning process residue and concluded that, except for a few minor items, it generally met regulatory requirements. (Rajkotia Dep. at 26, 70; Ex. M-4)

175. The process residue from the Dravo facility is not expected to be hazardous. (N.T. 78, 151-157, 666; Ex. B-5 at Attachment A of Module 1; Lusk Dep. at 31; Rajkotia Dep. at 26, 45-46, 49, 70)

176. Messrs. Lynn, Lusk, and Rajkotia of the Department reviewed the comments of Robert H. Smith, Ph.D., Plymouth's consultant, concerning the characterization of the process residue from the Dravo facility and disagreed with his conclusions. (N.T. 151-155, 178; Lusk Dep. at 31; Rajkotia Dep. at 49)

177. Dr. Smith testified for Plymouth on the nature of the process residue from the Dravo facility, but his testimony was stricken by the Board

because his conclusions were based on data he admitted were inherently unreliable. (N.T. 500, 513, 525-623)

178. There was no competent evidence produced by Plymouth establishing that the process residue from the Dravo facility would be hazardous.

179. The solid waste permit issued to Dravo provides that the ESP dust and the incinerator residue must be tested separately and then tested combined on a monthly basis for the first six months of operation and quarterly thereafter. (Ex. B-16; Rajkotia Dep. at 34)

180. William T. Pounds, the Chief of Facilities Management in the Bureau of Waste Management, and his staff developed written guidance relating to the permitting of mass burn facilities, such as the Dravo facility, in January, 1986. (Pounds Dep. at 3, 4-5, 7-8, 10)

181. The guidance, which was to be utilized by the Department's regional offices in evaluating permit applications, also addressed residue handling and disposal. (Pounds Dep. at 4-5)

182. Although the guidance recommends that fly ash from air pollution control equipment at mass burn facilities be sampled separately from the bottom ash or unburned residue from the incinerator portion of the facility, the guidance also recommends that if there is common quenching of fly ash and residue, the combined ash should also be analyzed and that the decision to grant or deny the permit application be based on the leaching analysis of the combined residue. (Pounds Dep. at 13, Ex. DER-2)

183. In examining the nature of process residue from a facility, the Department reviews the design of the facility, especially from the standpoint of whether the waste streams are separate or combined. (Pounds Dep. at 13-14)

184. The testing requirements imposed in the Dravo solid waste permit are consistent with the Department's January, 1986, guidance. (Pounds Dep. at 37, Ex. 2)

185. The Bureau of Waste Management's January, 1986, guidance classified municipal incinerator residue as a special handling waste requiring disposal at a lined landfill. (Pounds Dep. at Ex. 2)

186. As part of its solid waste permit application, Dravo submitted letters of intent from five landfill operators indicating their willingness to accept process residue from the Dravo facility. (Ex. B-12(F))

187. The Bureau of Waste Management's central and regional offices evaluated the five proposed disposal sites and concluded that three of the five sites were suitable for disposal of the process residue. (Lunsk Dep. at 32; Pounds Dep. at 28-30; Rajkotia Dep. at 64; Ex. M-28)

188. Based on the recommendations of his staff, Mr. Lynn concluded that Dravo's permit application had adequately provided for process residue disposal. (N.T. 146-147, 151, 153-154)

189. Plymouth offered no evidence to rebut the Department's decision regarding process residue disposal.

#### **AIR QUALITY PLAN APPROVAL**

##### **Review Process**

190. Prior to Dravo's submission of its plan approval application, Dravo and the County met with the Department on three occasions - March 6, 13, and 20, 1986 - to discuss state and federal requirements relating to the proposed facility. (Ex. B-33 at 7; Ex. T-60 at Attach. 1A)

191. Dravo also submitted modeling protocol regarding Prevention of Significant Deterioration (PSD) Requirements to the Department prior to

submission of its plan approval application. (N.T. 1446-1447; Ex. B-32; Ex. T-47; Egan Dep. at 53)

192. The modeling protocol, which was prepared by Betz Converse Murdoch (BCM) Eastern Inc., Dravo's consultant, was submitted to Robert Simonsen in the Department's Bureau of Air Quality Control, Harrisburg. (N.T. 1446-1447; Ex. B-32, Ex. T-47; Egan Dep. at 53)

193. On April 30, 1986, Dravo's three volume "Application for Prevention of Significant Deterioration Permit" (plan approval application) was submitted to the Department by the County. (Ex. B-32 to B-35)

194. The plan approval application included the following elements:

- a) Project Description
- b) Discussion of Applicable Regulations
- c) Emission Data for the Proposed Facility
- d) Evaluation of Best Available Control Technology
- e) Discussion of Impacts Associated with Facility Construction and Operation
- f) Air Quality Impact Analysis
- g) Toxic Air Pollutant Analysis
- h) Detailed Project Plans and Specifications
- i) Copy of Federal Aviation Administration -- Notice of Proposed Stack Construction
- j) Air Quality Impact Analysis Report
- k) Toxic Air Pollutant Analysis Report
- l) PSD Modeling Output.

(Ex. B-33 to B-35)

195. In a letter dated May 2, 1986, the Department accepted the plan approval application for technical review. (Ex. M-2)

196. Dravo submitted a Toxic Air Risk Assessment (Risk Assessment) prepared by Roy F. Weston, Inc. (Weston) to the Department on May 30, 1986. (Ex. M-43(c), (d))

197. N. Rao Kona, the Norristown Regional Air Pollution Control Engineer, supervised the review of the Dravo plan approval application and was ultimately responsible for issuing or denying the plan approval application. (N.T. 1408, 1499; Ex. B-47)

198. After he received the Dravo plan approval application, Kona assigned it to John Egan, Chief of the Engineering Services Section of the Norristown Regional Office of the Bureau of Air Quality Control, for technical review. (N.T. 1383, 1497-1498)

199. As Chief of the Engineering Services Section, Egan's responsibility was to oversee the permitting of new and modified sources of air pollution within the Norristown Region. (N.T. 1372-1373; Egan Dep. at 22-23)

200. In March, 1987, prior to the Department's approval of Dravo's plan approval application, Egan became employed by Weston. (N.T. 1373-1374)

201. Egan initially reviewed the plan approval application for completeness and then referred various portions of it to the Bureau of Air Quality Control's Central Office in Harrisburg for review. (N.T. 1446; Egan Dep. at 53)

202. Robert C. Simonsen, Air Pollution Meteorologist, Division of Air Resource Management's Central Office, reviewed the proposed modeling protocol and the ambient air impact analysis portion of the plan approval application. (N.T. 1446; Ex. M-43(A); Egan Dep. at 53)

203. Douglas L. Leshner, Chief, Engineering Services Section, Central Office, reviewed the Risk Assessment, which was prepared by Weston. (N.T. 1224-1225; Ex. T-47)

204. Egan knew in January, 1987, that he was going to join Weston.  
(N.T. 1374)

205. Egan was aware that Weston had provided consulting services to Dravo in the preparation of the plan approval application. (N.T. 1375)

206. Egan first advised N. Rao Kona, his supervisor, that he would be resigning to join Weston approximately three weeks before his departure in mid-February or early March, 1987. (N.T. 1374-1375)

207. Mr. Kona did not reassign review of the Dravo plan approval application to another member of his staff after Egan advised him of his impending departure to join Weston. (N.T. 1375)

208. Mr. Egan completed his review of the Dravo plan approval application by the time he left the Department in early March, 1987. (N.T. 1425)

209. The Department would not knowingly permit an employee to review a permit application if the employee were negotiating employment with a consulting firm which had prepared all or part of the permit application. (N.T. 1848)

210. The Department has no formal policies regarding contacts of its employees with consulting firms submitting work to the Department. (N.T. 1856-1857)

211. Thomas J. McGinley succeeded Egan as Chief of Engineering Services in the Norristown Regional Office of the Bureau of Air Quality Control. (N.T. 1464, 1467)

212. Mr. McGinley was advised by Mr. Kona that review of the Dravo plan approval application was essentially finished and that he (Kona) would assume the responsibility for addressing any remaining issues. (N.T. 1468)

213. Mr. McGinley did not review any documents submitted by Dravo.  
(N.T. 1471)

214. The Department met with Dravo and the County on June 27, 1986, to discuss the Department's initial review comments. (Ex. T-45, T-60 at Attachment 1A)

215. Dravo submitted supplemental information on the PSD permit application on July 16, 1986. (N.T. 1517; Ex. B-38)

216. After Messrs. Leshner and Simonsen reviewed the Risk Assessment, Mr. Leshner, on July 16, 1986, requested additional information concerning predicted concentration levels. (Ex. T-47)

217. Dravo submitted the requested information to the Department on August 18, 1986. (Ex. B-39(a))

218. The Department advised Dravo that its plan approval application must be in conformance with the Department's August, 1986, Best Available Technology Guidance for Municipal Waste Resource Recovery Facilities (BAT Guidance). (N.T. 1433)

219. The Department, Dravo, and the County again met on August 4 and 18, 1986, to discuss the plan approval application. (Ex. T-60 at Attachment 1A)

220. Dravo, in response to the comments and requests of the Department at the August, 1986 meetings, submitted the following information to the Department:

Attachment 1: Scaled-up drawings and narrative describing:

- a) furnace geometry
- b) burner locations
- c) underfire air ducts and overfire air nozzles

- d) isotherm analysis
- e) locations of thermocouples and combustion gas sampling devices
- f) ash removal system.

Attachment 2: Description of the combustion system control logic

Attachment 3: Spray dryer scrubber bid specification

Attachment 4: Description of start-up and shut-down procedures

Attachment 5: Air Pollution Episode Strategy Form (completed)

- a) "Design and Operating Guidance to Minimize Dioxins and other Emissions from Municipal Waste Combustors," May 19, 1986 (draft)
- b) A technical process description of the Steinmuller system
- c) The operation and maintenance guide for the Herten (W. Germany) Steinmuller facility

(Ex. B-40(a) and B-40(b))

221. Dravo submitted additional Air Pollution Episode Strategy Forms to the Department on August 22, 1986, and supplemented that material on September 5, 1986. (Ex. B-41(a), B-41(b), B-42(a))

222. Dravo transmitted supplemental data relating to the monitoring systems and control elements for the spray dryer scrubber on September 5, 1986. (Ex. B-42(b))

223. The Department, Dravo, and the County met on September 8, 1986, to discuss the design for the air pollution control system and, thereafter, Dravo submitted technical data sheets for proposals from six vendors. (Ex. B-43(a), B-43(b)(1)-(b)(6), B-44, B-45)

224. The Department conducted a public hearing on the plan approval application on October 21, 1986. (N.T. 142-143; Gonshor Dep. at 59)

225. The Department met with Dravo and the County on November 24, 1986, to discuss final design plans for the facility. (Ex. B-46, T-60 at Attachment 1A)

226. Designs for the Steinmuller furnace system to be utilized at the facility were submitted by Dravo to the Department on December 18, 1986. (Ex. B-46)

227. Designs for the air pollution control system at the facility were submitted by Dravo to the Department on January 9, 1987. Among the designs submitted were

- a) Research-Cottrell Proposal P-3764 - Scrubber/ESP Technical Data Sheets
- b) Research-Cottrell Proposal P 3764A - Scrubber/Bag-house Technical Data Sheets
- c) Specification MS-2 - Secondary Air, Induced Draft and Gas Reduction Fans
- d) Specification MS-4 - Primary Combustion Air Pre-heater

228. The methodology and modeling data of the Risk Assessment were verified by Mr. Simonsen. (Ex. T-47)

229. Mr. Leshar approved the Toxic Assessment after reviewing Mr. Simonsen's verification and other supplementary materials. (Ex. T-47, M-43)

230. Mr. Egan concluded that the Steinmuller furnace represented the best available municipal waste combustor technology and complied with the BAT Guidance. (Ex. M-43 at 2, 6-7; Egan Dep. at 56-57, 81, 116, 118-119)

231. Egan advised Mr. Kona in a March 11, 1987, memorandum that either Research-Cottrell Air Pollution Control Proposal P-3764, utilizing

ESPs, or P-3764(a), utilizing fabric filters, constituted best available air pollution control technology and complied with all applicable laws and regulations and the BAT Guidance. He recommended that the plan approval be issued. (Ex. M-43; Egan Dep. at 52, 56-57, 81, 87, 110, 126-127)

232. Kona concurred with Egan's conclusions regarding the Steinmuller furnace and the Research-Cottrell control technology. (N.T. 1443, 1496, 1526; Ex. B-47)

233. Based on the recommendations of Messrs. Egan, Leshner, and Simonsen, Mr. Kona issued the Dravo plan approval. (N.T. 1443, 1446-1449; Ex. B-47, M-43, M-43(a), T-47; Egan Dep. at 52, 56-57, 65, 66, 81, 110-111, 116, 118-119, 126-127)

234. The Dravo facility will utilize two L. C. Steinmuller 600 tons per day mass burn type, furnace/stoker waterwall boiler municipal waste incinerators. (N.T. 863, 1764, 2281; Ex. B-47)

235. The combustion gas temperature of each furnace will be maintained at 1800<sup>o</sup>F, at a minimum, with an associated one second gas retention time. (Ex. M-43, B-33 at 12, B-47)

236. Each furnace will have two No. 2 oil-fired auxiliary burners (66 million BTUs per hour rating) located adjacent to each other in the front wall. (Ex. M-43, B-33 at 12).

237. The burners are designed to raise the combustion gases to the proper temperature prior to the introduction of refuse into the furnaces. (Ex. M-43, B-33 at 12)

238. The furnace gas combustion temperature will be monitored and the auxiliary burners will be modulated by automatic controls to ensure that the proper combustion temperature is maintained. (Ex. M-43, B-33 at 12)

239. Each incinerator will be equipped with an interlock system to automatically stop the feeding of solid waste material in the event that: a) the temperature drops below 1600<sup>0</sup> for 15 minutes; b) combustion efficiency drops below 99.5% for 15 minutes; c) the flue gas oxygen level drops below three percent for 15 minutes; d) the opacity of the exhaust gases is equal to or greater than 10% for 15 minutes; or, e) the stack emissions exceed the sulfur dioxide or hydrochloric acid emission limitations specified in the air quality plan approval. (Ex. B-47 at Cond.(6)D, Egan Dep. at 65-66)

240. Combustion efficiency for the Dravo facility is expressed as

$$\frac{CO_2}{CO_2 + CO} \times 100$$

where

CO<sub>2</sub> = Concentration of Carbon Dioxide

CO = Concentration of Carbon Monoxide

It must be at least 99.9% as a daily average. (Ex. B-47 at Cond.(6)B; Egan Dep. at 65-66)

241. Large non-combustible materials, such as automobile batteries and bulky materials, will be removed from the refuse pit. (Ex. B-47 at Cond.(6) J-K; Egan Dep. at 84)

242. The Dravo facility will employ Research-Cottrell spray dry acid gas scrubbers and fabric filters as part of the air pollution control system. (N.T. 1540, 2205-2206, 2210-2211; Ex. B-33, B-46 to B-48, T-44)

243. The furnace gases will exit the individual boilers, which will have monitors to measure the concentration of CO, CO<sub>2</sub>, Oxygen (O<sub>2</sub>), and hydrochloric acid (HCl), and enter the Research-Cottrell air pollution control system. (N.T. 865, 913-914, 1764; Ex. B-48, M-43)

244. The units in the spray dry scrubbing system are 52 feet high and 24 feet in diameter. (Ex. M-43)

245. The units spray the exhaust gases with a water/lime slurry, and the gases react with the slurry and dry into a particulate. (Ex. M-43)

246. The lime slurry in the scrubber quenches the furnace gases, resulting in dust particles attaching to heavier particulates which will ultimately be removed in the fabric filter collection system. (Ex. M-43)

247. The scrubber outlet gases are monitored and controlled so that a temperature of 275<sup>0</sup>F to 285<sup>0</sup>F is maintained. (Ex. M-43)

248. The exhaust gases from the scrubber then enter the fabric filters where the filters collect the fine particulates. (Ex. M-43)

249. The fine particulates form a dust cake on the filters and are then caught in high temperature fiberglass bags with an acid-resistant coating. (Ex. M-43)

250. The cleansed gases exiting the fabric filters are drawn out by a fan and discharged through two flues within a 305 feet high stack. (Ex. M-43, B-34)

### **Plan Approval Process**

251. Plan approvals authorize the construction of an air contaminant source and contain certain operating conditions. (Egan Dep. at 22-24)

252. Operating permits govern the long-term operation of air contaminant sources. (Egan Dep. at 22-24)

253. An applicant for a plan approval is required by statute and regulation to demonstrate that the proposed air contaminant source will be using BAT for the control of air emissions. (Deputy Secretary McClellan's answer to T.R.A.S.H.'s Interrogatory 15(b))

254. BAT is the equipment, devices, methods or techniques which will prevent, reduce, or control emissions of air contaminants to the maximum degree possible and which are available and may be made available. (N.T. 989, 1015)

255. The Department determines BAT on a case-by-case basis, taking into account the type of equipment and other control technologies proposed by the applicant, the location of the facility, the type and source of the waste stream, and many other factors.

256. BAT does not require the imposition of the lowest achievable emission rate (LAER); LAER is imposed on major sources of pollution in non-attainment areas. (N.T. 1362-1363; Ex. D-4)

257. Plymouth Township is in an attainment area for particulates, sulfur oxides, nitrogen oxides, carbon monoxides and lead. (Ex. B-33 at 20, B-47)

258. Although Plymouth Township is in a non-attainment area for ozone, the Dravo facility is not subject to ozone non-attainment requirements because it will emit less than 50 tons per year of volatile organic compounds. (Ex. B-33 at 20, B-47)

259. Specific numerical emission limitations are used by the Department as indications of whether an air contaminant source is being operated in accordance with the design criteria and is being maintained and operated in accordance with good engineering practice for the particular design. (N.T. 1015)

260. The Department defers issuance of an operating permit to an air contaminant source where there is an inadequate data base to calculate emission limits for the source. (N.T. 1081-1082)

## **BAT Guidance**

261. The Bureau of Air Quality Control's central office staff began developing BAT guidance for municipal waste incineration resource recovery facilities in 1985. (N.T. 989-990, 999-1018, 1107, 1110, 1247-1249, 1250-1316; Salvaggio Dep. at 10)

262. BAT guidance documents are statements of policy developed to assist the Department's regional offices in applying best engineering judgment in determining what constitutes BAT for a particular air contaminant source. (N.T. 1379, 1502, 1512; Ex. T-41; Salvaggio Dep. at 33-34, 97)

263. BAT guidance is also developed to assure application of consistent requirements in permits and plan approvals issued by the Department's regional offices. (N.T. 1107-1108, 1308)

264. BAT guidance represents the baseline for determining Best Available Control Technology (BACT) for PSD requirements. (Ex. T-41)

265. BAT guidance for resource recovery facilities was developed in response to resource recovery facilities being proposed to address solid waste disposal needs. (N.T. 1107-1108, 1308)

266. In developing the resource recovery BAT guidance document, the Department's objective was to establish emission limitations which could be sustained and verified over the life of a municipal waste incinerator using BAT. (N.T. 1259, 1262; Ex. D-4)

267. James M. Salvaggio, Chief, Division of Abatement and Compliance; William Thompson, Assistant Bureau Director; Douglas L. Leshner, Chief, Engineering Services Section; and Krishnan Ramamurthy, Control Technology Engineer, Engineering Services Section, were primarily responsible for developing the resource recovery BAT Guidance. (N.T. 999, 1001, 1106, 1247, 1261)

268. The Department conducted extensive research in its development of the BAT Guidance. (N.T. 1097, 1251-1253, 1259-1260, 1278; Ex. D-5)

269. The Department reviewed numerous scientific publications, papers, and reports relating to municipal waste incinerators, incinerator technology, air pollution control technology, and municipal waste incinerator emissions. (Ex. D-5)

270. The Department reviewed EPA publications, papers, and reports relating to municipal waste incinerators and related topics. (Ex. D-5)

271. The Department investigated and reviewed emissions data from operating municipal waste incinerators in the United States and foreign countries. (N.T. 1251-1252, 1253, 1254, 1263, 1268-1269; Ex. D-5)

272. The Department reviewed numerous scientific publications, papers, and reports regarding the potential public health impact of emissions from municipal waste incinerators. (Ex. D-5)

273. The Department investigated and reviewed the regulations and recommendations of other states concerning municipal waste incinerators. (N.T. 1251, 1259; Ex. D-5)

274. Recommendations for the draft BAT Guidance were circulated to Bureau of Air Quality Control regional offices and discussed with central office at staff meetings. (N.T. 1111-1112, 1228, 1231-1232; Ramamurthy Dep. at 85)

275. The Department published a draft BAT Guidance at 16 Pa.B 877 (March 13, 1986). (Ex. D-4)

276. The public was invited to review and comment upon the draft BAT Guidance. (Ramamurthy Dep. at 80-81)

277. The Department received and considered comments on the draft BAT Guidance from environmental interest groups and manufacturers and vendors of municipal waste incinerators. (N.T. 1228, 1313)

278. The Department published the final BAT Guidance on August 9, 1986. (N.T. 990, 999)

279. The Department initiated the development of revisions to the BAT Guidance and followed a process similar to that described in Findings of Fact 265 through 274. (N.T. 1020, 1027; Ex. D-5)

280. The Department published a draft revised BAT Guidance on July 7, 1987. (N.T. 1018; Ex. T-42)

#### **Application of BAT Guidance**

281. The regional offices of the Bureau of Air Quality Control have the discretion to impose more stringent limitations in a plan approval than those contained in the BAT Guidance. (N.T. 1036, 1389-1392, 1503-1504; Ex. T-66)

282. The Bureau of Air Quality Control's policy is that a regional office receive approval from central office prior to imposing more stringent limitations than those contained in the BAT Guidance in a municipal waste incineration resource recovery facility plan approval. (N.T. 1037-1038, 1911-1915; Ex. T-66)

283. This policy is to ensure that all of the regional offices are kept informed of new regional BAT determinations for municipal waste incineration resource recovery facilities and to provide for the consistent application of the Department's BAT requirements. (N.T. 1037-1038)

284. The Department determines BAT on a case-by-case basis, considering, *inter alia*, the type of equipment and other control technologies

proposed by the applicant, the facility's location, and the source and character of the waste stream. (N.T. 1012)

285. In reviewing the Dravo plan approval application and writing the plan approval, the Norristown Regional Office of the Bureau of Air Quality Control relied upon and applied the criteria set forth in the BAT Guidance and the draft revised BAT Guidance. (N.T. 1395-1396, 1546)

286. The Department concluded that the Dravo facility was designed in conformance with the BAT Guidance. (Ex. M-43)

287. Dravo's combustion technology and air pollution control equipment represent BAT for control of air emissions from municipal waste incinerators. (N.T. 1766; Ex. M-43)

#### **DRAVO PLAN APPROVAL CONDITIONS**

##### **1) Particulate Matter Emission Limitation**

288. The Dravo plan approval includes a condition that emissions of particulate matter from the permitted facility shall not exceed 0.015 grains per dry standard cubic foot, corrected to 7% oxygen ( $O_2$ ) on a dry basis (0.015 gr/dscf). (Ex. B-47)

289. The particulate matter emission limitation is taken from the BAT Guidance and draft revised BAT Guidance. (Ex. B-47, T-41, and T-42)

290. The 0.015 gr/dscf particulate matter emission limit was determined by the Department to be the minimum limitation which could be sustained and verified over the life of a facility utilizing BAT. The Department based this conclusion on a review of numerous scientific reports, studies and articles concerning particulate matter emissions from municipal waste incinerators, test data from operating municipal waste incinerators, the

recommendations and requirements of other states, and the public comments on the draft BAT Guidance. (N.T. 1259, 1262, 1263, 1267-1272, 1308; Ex. D-4 and D-5)

291. In reaching its conclusion regarding the 0.015 gr/dscf limitation, the Department rejected the California Air Resources Board's (CARB) recommendation of an 0.01 gr/dscf particulate matter emission limit because of the variability of test data and the limited data base for state-of-the-art municipal waste incinerators. (N.T. 1263)

292. CARB allows the rounding off of data to the nearest one-hundredth; CARB considers emissions greater than 0.01 and less than 0.015 gr/dscf to be in compliance with its recommended 0.01 gr/dscf limit. (N.T. 1263; Ex. D-4)

293. The Department does not permit emissions data to be rounded down. (Ramamurthy Dep. at 30; Ex. D-4)

294. The Department also rejected the CARB particulate matter emissions recommendation because it was based on only five tests, with only two of those tests being conducted on full-scale operating plants, one of which is no longer in operation because of plant design problems. (Ex. D-4)

295. Test data from operating municipal waste incinerators with combustion and air pollution control technology similar to the Dravo facility indicated particulate matter emissions ranging from below 0.01 gr/dscf to above 0.015 gr/dscf. (N.T. 1007-1008, 1263; Ex. D-4)

296. The BAT Guidance requires source tests for particulate matter emissions at least every six months. (N.T. 1263; Ex. T-41)

297. Particulate matter emissions must not exceed 0.015 gr/dscf in each source test, and data cannot be averaged. (N.T. 1263)

298. The Department considered its source testing requirements in establishing the particulate matter emissions limits in the BAT Guidance. (N.T. 1007, 1263)

299. Appellants' experts - Allen Hershkowitz, Michael Budin, and Dr. Frederick Higgins - believed, based on their review of a June, 1987 draft EPA report, "Municipal Waste Combustion Study: Emission Data Base for Municipal Waste Combustors" (Draft EPA Report), that a more stringent particulate emission limit could be imposed. (N.T. 1616-1619, 1769-1770, 1809-1810, 1975; Ex. T-29)

300. The Draft EPA Report states that test data was scarce and concludes that caution should be exercised in relying on it. (N.T. 2028-2031; Ex. T-29 at 00, 1-5, 1-9, 2-1, 2-2)

301. The Draft EPA Report contained three test results from only one facility, Marion County, Oregon, utilizing technology similar to Dravo's. (N.T. 1823-1825, 2012; Ex. T-29)

302. Neither Mr. Budin, Dr. Higgins, nor Mr. Hershkowitz reviewed the actual test data; their conclusions were based on summaries of the test data. (N.T. 1683, 1821)

303. Data from three tests does not form an adequate basis for the establishment of an emission limit which must be sustained on a continuous basis over the life of a facility. (N.T. 1825-1826)

304. Messrs. Budin and Hershkowitz also based their opinions that a more stringent particulate emission limit could be imposed on Dravo on the National Incinerator Testing Evaluation Program (NITEP) report prepared by Environment Canada. (N.T. 1619, 1657, 1769, 1809-1810; Ex. T-1)

305. The NITEP report only contains data from a single test of a pilot resource recovery facility. (N.T. 1658, 1810-1811; Ex. T-1)

306. Allen Hershkowitz is employed by INFORM, Inc., a non-profit environmental research group, where he directs research and public education efforts relating to solid waste issues, particularly incinerator technology. (N.T. 1556, 1558)

307. Mr. Hershkowitz has no experience with the design of air pollution control systems. (N.T. 1582)

308. INFORM does not perform independent research. (N.T. 1575)

309. Michael Budin is an employee of AGES, where he is involved with marketing and is a project engineer for incineration and air pollution control. (N.T. 1741, 1749)

310. Mr. Budin spends 60% of his time at AGES in marketing and 40% in engineering. (N.T. 1752)

311. Mr. Budin also worked at Trane Thermal Research and Engineering from 1969 to 1979 and at CJS Energy Resources from 1980 to 1986; he was involved with combustion and incineration equipment, but not as it related to municipal solid waste incinerators. (N.T. 1743-1746, 1748)

312. Dr. Frederick B. Higgins is Dean of the College of Engineering, Computer Science, and Architecture at Temple University and has bachelor's, master's and doctor's degrees in civil/sanitary engineering from Georgia Tech. (N.T. 1945-1946)

313. Dr. Higgins is a registered professional engineer in Pennsylvania and New Jersey and a member of the American Society of Civil Engineers and the American Society for Engineering Education. (N.T. 1952)

314. On the average, over the past five years, Dr. Higgins has been involved in six to eight consulting projects per year. (N.T. 1949-1950, 1954)

315. Of the last 100 consulting projects with which Dr. Higgins has been involved since 1969, 20 to 25 have dealt with incineration and five to seven of those incineration projects have dealt with municipal incinerators. (N.T. 1955)

316. Dr. Kay Jones of Roy F. Weston, who testified on behalf of Dravo and whose qualifications are described at Findings of Fact 366 through 379, *infra*, criticized the EPA Draft Report. (N.T. 2128)

317. Dr. Jones' opinion that the 0.015 gr/dscf particulate emission limit is proper is entitled to more weight than the opinions of Messrs. Budin and Hershkowitz and Dr. Higgins in light of Dr. Jones' superior education and experience.

318. The particulate emission limitation in Dravo's plan approval represents the minimum attainable through the application of BAT. (N.T. 1008, 1259, 1308, 1359-1360, 1413, 1501-1504, 1512, 2295; Salvaggio Dep. at 22-23; Ramamurthy Dep. at 23, 26-29, 30, 33-34; Egan Dep. at 56-57, 60-61, 116-117)

## 2) Sulfur Dioxide Emission Limitation

319. The Dravo plan approval requires that SO<sub>2</sub> emissions be reduced by not less than 70% by weight on an hourly average basis, with a waiver of this

requirement if the exhaust concentrations are less than 30 parts per million, by volume (ppmv) on an hourly average basis, corrected to 7% O<sub>2</sub> on a dry basis.

(Ex. B-47)

320. The SO<sub>2</sub> emission limitation in Dravo's plan approval was the guideline in the draft revised BAT Guidance. (Ex. B-47, T-42)

321. The Department determined that the 70% reduction with the 30 ppmv waiver was the minimum limitation which could be sustained and verified over the life of a facility using BAT after a review of numerous scientific reports, studies, and articles concerning SO<sub>2</sub> emissions from municipal waste incinerators, test data from operating municipal waste incinerators, the recommendations and requirements of other states, and the public comments on the draft BAT Guidance. (N.T. 1018-1019, 1130-1131; Ex. T-42, D-5)

322. EPA regards the 70% SO<sub>2</sub> reduction by inlet weight as BAT. (N.T. 2208-2209, 2313-2314)

323. The Department considered the CARB recommendation of an SO<sub>2</sub> emission limit of 30 ppmv as an eight hour average, but rejected it because there was insufficient data to establish that such a level could be achieved on a continuous basis in a municipal waste incinerator utilizing BAT. (N.T. 1280, 1297-1299, 1131-1133)

324. One of the vendors considered by Dravo represented that its product could achieve a higher level of SO<sub>2</sub> reduction, but refused to guarantee that level of reduction. As a result, Dravo rejected that proposal. (N.T. 932, 935-936; Ex. B-43(b)(4))

325. Messrs. Budin and Hershkowitz and Dr. Higgins opined that SO<sub>2</sub> emissions could be further reduced, but their opinions were based on the EPA

Draft Report and the NITEP report. (N.T. 1626-1627, 1775, 1809-1810, 1984-1985; Ex. T-29)

326. The Draft EPA Report and the NITEP report are unreliable because of the deficiencies described in Findings of Fact 299, 300, 304, and 305.

327. The Dravo plan approval requires that hydrochloric acid (HCl) emissions be reduced by not less than 90% (by weight) on an hourly average basis, with a waiver of the requirement if the exhaust concentrations are less than 30 ppmv on an hourly average basis, corrected to 7% O<sub>2</sub> on a dry basis. (Ex. B-47)

328. The HCl emission limitation in the Dravo plan approval was that set forth in the BAT Guidance and the draft revised BAT Guidance. (Ex. B-47, T-41, T-42)

329. The Department determined that the 90% reduction HCl emission limitation with the waiver for exhaust concentrations less than 30 ppmv was the minimum limitation which could be sustained and verified over the life of a facility using BAT after a review of numerous scientific reports, studies, and articles concerning HCl emissions from municipal waste incinerators, test data from operating municipal waste incinerators, the recommendations and requirements of other states, and the public comments on the draft revised BAT guidance. (N.T. 1026-1027; Salvaggio Dep. at 59; Ex. T-41, T-42, D-5)

330. Appellants' expert, Mr. Hershkowitz, considered the HCl emission level as the lowest achievable through the application of BAT. (N.T. 1633-1634)

#### **4) Nitrogen Oxide Emission Limitation**

331. The Dravo plan approval requires that nitrogen oxide (NO<sub>x</sub>) emissions, expressed as NO<sub>2</sub>, not exceed 300 ppm as a daily average, corrected to 7% oxygen on a dry basis. (Ex. B-47)

332. The  $\text{NO}_x$  limitation in Dravo's plan approval is that set forth in the draft revised BAT Guidance. (N.T. 1149-1150; Ex. B-47, T-42)

333. The Department determined that an  $\text{NO}_x$  emission limitation of 300 ppm on a daily average basis was the minimum limitation which could be sustained and verified over the life of a facility using BAT after a review of numerous scientific reports, studies, and articles concerning  $\text{NO}_x$  emissions from municipal waste incinerators, test data from operating municipal waste incinerators, and the recommendations and requirements of other states. (N.T. 1151; Ex. D-5, T-42)

334.  $\text{NO}_x$  emissions are controlled through combustion efficiency requirements. (N.T. 1149-1150)

335. The 99.9% combustion efficiency requirement in the Dravo plan approval is, by Mr. Hershkowitz's admission, the most stringent in the United States. (N.T. 1653; Ex. B-47)

336. The Steimmuller furnace technology is the best available technology for minimizing  $\text{NO}_x$  emissions. (N.T. 1778, 2187; Ex. M-43)

337. There is insufficient data available to establish the reliability of add-on equipment, referred to as a de- $\text{NO}_x$  system, for the reduction of  $\text{NO}_x$  emissions from a municipal waste incinerator. (N.T. 2213-2214)

338. Although the removal of yard wastes could reduce  $\text{NO}_x$  emissions, there is no currently available technology for the removal of yard waste from the mixed municipal waste. (N.T. 2203)

339. The  $\text{NO}_x$  emissions from the Dravo facility will be insignificant and will not increase ambient ozone levels. (N.T. 2192-2201)

5) Heavy Metal Emissions

340. The Dravo plan approval includes ambient concentration limits for arsenic, beryllium, cadmium, hexavalent chromium, lead, mercury, and nickel, and their compounds. (Ex. B-47)

341. The ambient concentration levels for heavy metals specified in the Dravo plan approval are:

<u>Heavy Metals</u>	<u>Ambient Concentration (mg/m<sup>3</sup>)</u>
Arsenic and compounds	$0.23 \times 10^{-3}$
Beryllium and compounds	$0.42 \times 10^{-3}$
Cadmium and compounds	$0.56 \times 10^{-3}$
Hexavalent chromium and compounds	$0.83 \times 10^{-4}$
Lead and compounds	0.50
Mercury and compounds	0.08
Nickel and compounds	$0.33 \times 10^{-2}$

(Ex. B-47 at Condition (5)(B)(2)(a))

342. The Department utilized the BAT Guidance in establishing the condition in Dravo's plan approval relating to heavy metals. (N.T. 1501-1504, 1512; Egan Dep. at 116-117; Ex. M-43 at 6)

343. Specific numerical emission limitations for heavy metals were not included in the BAT Guidance and the draft revised BAT Guidance because there is insufficient test data for heavy metal emissions from state-of-the-art municipal waste incinerators upon which to base such limitations. (N.T. 1047, 1938; Ex. D-7A)

344. Only three or four data points are available for most of the heavy metals covered by the BAT Guidance and draft revised BAT Guidance. (Ex. D-7A)

345. The current data base is insufficient to determine heavy metal emission limitations which are representative of the levels that can be continuously achieved using state-of-the-art technology. (N.T. 1047, 1938, 2164; Ex. D-7A)

346. The ambient concentration levels for arsenic, cadmium, hexavalent chromium, nickel, and beryllium, all of which are carcinogens, are based on EPA estimated unit cancer risk rates which correspond to a one in a million ( $1 \times 10^{-6}$ ) risk of cancer by inhalation for a person stationed continuously for 70 years at the point of maximum emission impact from a facility. (N.T. 1066-1067, 2161-2163; Salvaggio Dep. at 60-61, Ramamurthy Dep. at 45-46; Ex. P-1 at 10-11)

347. Because lead and mercury are not carcinogens, they do not have cancer risk levels. The Department established limits for lead and mercury which reflect a very small fraction of the "acceptable daily intake" (ADI) levels recommended by the Federal Center for Disease Control. (Salvaggio Dep. at 60-61; Ex. P-1 at 11)

348. The heavy metal ambient concentration levels in Dravo's plan approval include an appropriate margin of safety and represent a conservative approach. (N.T. 1067, 2142-2144, 2162-2163; Salvaggio Dep. at 36; Ramamurthy Dep. at 46)

349. Compliance with the heavy metal ambient concentration limits will be determined through the use of actual stack emission rates, the exhaust parameters from each stack test specified in condition (9) of the Dravo plan approval, and the dispersion modeling techniques used in the Dravo plan approval application. (Ex. B-47)

350. Condition (5)(B)(2)(a) of the Dravo plan approval operates to establish emissions limitations on heavy metals because the stack emissions from the Dravo facility cannot be at a level which would result in the exceedance of the heavy metal ambient concentration limits. (N.T. 2161; Salvaggio Dep. at 98-99; Ex. B-47 at Condition 5(B)(2)(a))

351. The information submitted by Dravo with its plan approval application demonstrates that the heavy metal emissions from the facility will not result in an exceedance of the ambient concentration levels in the plan approval. (N.T. 2142-2144; Ex. B-33, B-34, B-35, M-43)

352. Heavy metal emissions are also controlled in the particulate control system, since heavy metals are absorbed into particulate matter. (N.T. 2156, 2164, 2297; Egan Dep. at 8; Ex. P-1 at 11)

353. The Dravo plan approval provides that:

Maximum allowable emission rates for Arsenic, Beryllium, Cadmium, Nickel, Hexavalent Chromium, Lead and Mercury and their compounds shall be established after the completion of the initial six (6) month and one (1) year source tests. These maximum allowable emission rates shall be incorporated into an operation permit that will be reissued after completion of the one year source tests. Thereafter, operation of the combustor shall not exceed these emission rates.

(Ex. B-47)

354. The Department decided not to include heavy metal emissions limitations in the Dravo plan approval because the existing data base is not sufficient to establish appropriate heavy metal emission limits. (N.T. 1047, 1071, 1073-1076, 1436, 1439, 1544, 1929-1931, 1933-1938, 2156; Egan Dep. at 128-129; Ex. D-7, D-7A)

355. It is more technically sound to establish heavy metal emission limits based on experience with operation of the facility and control technology and observation of the impact of waste stream variability. (N.T. 1436, 1439, 1441-1442; Salvaggio Dep. at 98-99)

#### RISK ASSESSMENT

356. Dr. Kay Jones performed a Risk Assessment on behalf of Dravo to assess the potential risk of cancer from pollutants for which there are no established air quality standards. (N.T. 874, 2132, 2320; Ex. M-32 at ES4-8)

357. The parameters addressed in the Risk Assessment included antimony, arsenic, beryllium, cadmium, chromium, hexavalent chromium, cobalt, copper, lead, manganese, mercury, molybdenum, nickel, selenium, tin, vanadium, zinc, PCB, total carcinogenic PAN, aldehyde, 2,3,7,8-T4CDD, T4CDDs, PCDD, T4CDFs, and PCDF. (Ex. M-32 at Table ES-1)

358. The Risk Assessment is based on very conservative assumptions such as the assumption that a person is exposed to the maximum impact continuously over a 70 year period. (N.T. 1718-1719)

359. Because the Risk Assessment is based on conservative assumptions, the risk estimates are higher than any actual risk. (N.T. 2147-2148)

360. The risk of cancer to humans from the Dravo facility's emissions is extremely small in comparison to other normal, everyday risks. (N.T. 2246, 2152-2153; Ex. M-32, K-3)

361. Comparative cancer risks have been established for many types of exposure. The risk of contracting cancer, expressed as chances in one million, for some of the more common exposure scenarios is:

Lower range of normal cancer risk (non-fatal included)	250,000
Average radon levels in Philadelphia homes	5,000
Pesticides on fresh foods	4,600
Children eating one peanut butter sandwich per month for 15 years	250
Benzene exposure from industrial sources	180
Diagnostic x-ray exposure	20
Radiation from frequent airplane flying	4
Drinking and showering with chlorinated water	2.4
BAT Guidance ambient guidelines for carcinogenic pollutants	1.1

(N.T. 2148-2150, 2268-2270;  
Ex. M-32 at Table E5-6)

362. The risk of cancer, expressed as chances in one million, for certain emissions from the Dravo facility for which there are no established air quality standards is:

Dioxin	.03
Chromium VI	.004
Cadmium	.002
Nickel	.007
Arsenic	.0002
Beryllium	.000002

(N.T. 2151-2152)

363. The maximum cancer risk to individuals from the Dravo facility due

to inhalation at the point of maximum exposure, in addition to various other exposure pathways including food chain pathways and skin contact, is estimated to be between 0.43 and 0.55 chances in one million. (N.T. 1718-1719; Ex. M-32)

364. The risk of a child contracting cancer from eating one peanut butter sandwich per month for 15 years is approximately 500 times greater than the risk of contracting cancer as a result of emissions from the Dravo facility. (Ex. M-32)

365. The risk of cancer to humans from emissions from the Dravo facility is extremely small in comparison to other normal everyday risks. (N.T. 2152-2153, 2246; Ex. M-32)

366. Dr. Kay Jones, a vice president of Roy F. Weston Consulting Engineers, was initially called by Appellants as their witness and later testified as an expert for Dravo. (N.T. 1690-1723, 2087-2330)

367. Dr. Jones has a bachelor's degree in Civil Engineering and a master's and doctoral degree in Environmental Engineering from the University of California at Berkley. (N.T. 2104)

368. Dr. Jones' doctoral thesis concerned combustion chemistry and its relationship to the formation of toxic air pollutants in the combustion of pulp and paper mill wastes. (N.T. 2104)

369. Dr. Jones has been responsible for the preparation of numerous health risk assessments for industrial and combustion-related sources, with a major focus on municipal solid waste incinerators. (N.T. 2089-2090)

370. Dr. Jones examined more than 20 health risk assessments for municipal waste facilities and has supervised the preparation of 10 health risk assessments for various projects in the two to three years preceding his testimony. (N.T. 2091-2092)

371. From 1979 to 1981, prior to his current position at Weston, Dr. Jones was Deputy Director of the Environmental Institute and a professor of Environmental Engineering specializing in air pollution at Drexel University. (N.T. 2095-2096)

372. Dr. Jones was Senior Advisor for the Air Quality Section of the President's Council on Environmental Quality (CEQ) from 1975 to 1979. (N.T. 2096-2097)

373. While at CEQ, Dr. Jones participated in the development of policies regarding automobile emissions standards and the application of scrubbers and other control equipment to the utility industry. (N.T. 2097)

374. Dr. Jones' responsibilities at CEQ included submitting annual reports to Congress on the status and trends of the environment, including the development of risk assessment models. (N.T. 2098-2099)

375. From 1967 to 1974, Dr. Jones was employed by the EPA and its predecessor agency, where he ascended from Deputy Director of Research to Senior Advisor of the Air Quality Program. (N.T. 2101-2102)

376. Dr. Jones served on special assignment from EPA as a consultant to the World Health Organization. (N.T. 2100)

377. In this capacity, Dr. Jones served as a consultant to the Prime Minister of Israel in developing a comprehensive long-range air quality management program for the State of Israel that focused on the application of scrubbers to utility plants, the development of emission standards and ambient monitoring programs, and the conduct of risk assessments for industrial sources of emissions. (N.T. 2100-2101)

378. Dr. Jones has authored in excess of 40 publications, of which approximately one-third to one-half involved risk assessments. (N.T. 2105)

379. Dr. Jones is a member of the Air Pollution Control Association, the American Society of Civil Engineers, Tau Beta Pi, and Chi Epsilon. (N.T. 2105-2106, 2111)

#### OTHER FACTORS

380. Section B, Item No. 10 of Dravo's plan approval application contained a description of the economic or social benefits to be derived from the construction of the facility. (Ex. B-33 at 3 of 13)

381. In response to Item No. 10, Dravo stated that:

- (1) the facility is not expected to cause significant social change in the area;
- (2) construction of the facility will provide indirect economic benefits of \$30 million to the area;
- (3) during operation the facility will provide employment to approximately 39 persons;
- (4) the facility will provide the County with environmentally safe waste disposal for twenty (20) years;
- (5) the host township will benefit from significant increases in property tax revenue and decrease in waste disposal costs.

(Ex. B-33 at 3 of 13, 3A of 13)

382. Construction of the Dravo facility is justifiable as a result of necessary economic and social development. (Ex. B-47)

#### DISCUSSION

Under 25 Pa.Code §21.101(c)(3), a third party appealing the Department's issuance of a permit has the burden of proof. Snyder Township Residents for Adequate Water Supplies v. DER and Doan Mining Company, 1988 EHB 1202. The scope of the Board's review is to determine whether the Department's action was

an abuse of discretion or an arbitrary exercise of its duties. Warren Sand and Gravel v. DER, 20 Pa.Cmwlth 186, 341 A.2d 556 (1975). Our review is *de novo*, and where the Department has taken discretionary action, such as the issuance of permits under the Air Pollution Control Act and the SWMA, we may substitute our discretion for the Department's if we determine that the Department has committed an abuse of discretion. Rochez Bros., Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources, 18 Pa.Cmwlth 137, 334 A.2d 790 (1975). Accordingly, T.R.A.S.H. and Plymouth have the burden of establishing that the Department's issuance of the solid waste permit and the plan approval to Dravo constituted an abuse of discretion or an arbitrary exercise of the Department's authority.

As with our Findings of Fact, our discussion will be divided into subsections, each addressing the issues raised by the Appellants in their post-hearing briefs.

#### SOLID WASTE PERMIT

The Board is reviewing Dravo's solid waste permit to determine whether the Department's issuance of the permit was in conformance with the SWMA. Section 201(a) of the SWMA provides that no person shall own or operate a municipal waste processing or disposal facility unless a permit has been obtained from the Department. Permitting requirements applicable to all solid waste storage, treatment or disposal facilities are set forth in §§501 to 503 of the SWMA. In particular, §502(a) of the SWMA provides that

Application for any permit...shall be in writing, shall be made on forms provided by the department and shall be accompanied by such plans, designs and relevant data as the department may require....

Regulations relating to the issuance of solid waste permits have been promulgated at 25 Pa.Code §75.1 *et seq.*, Subchapter C. In general, 25 Pa.Code §75.21(e) declares that "Planning, design and operation of any solid waste processing or disposal facility...including resource recovery systems...incinerators, shall be in accordance with the standards of the Department." The Department cannot issue a permit unless it has determined that the application is complete and the proposed facility complies with the pertinent statutes and regulations.

The Department's regulations relating to solid waste incinerators contain broad generalities and do not specifically address the complexities of technology such as is contemplated in the Dravo facility. However, various portions of the regulations (e.g., 25 Pa.Code §§75.30(e)(1)(vi) and (vii)) do give the Department broad latitude in requiring the submission of all relevant information necessary to evaluate the application.

### Traffic Considerations

The regulations promulgated pursuant to the SWMA contain little specific language relating to traffic or road safety issues. The general standards for solid waste disposal facilities provide at 25 Pa.Code §75.21(i) that:

Access roads suitable for use in all types of weather by loaded collection vehicles shall be provided to the entrance of the site or facility.

(1) The minimum cartway width for two-way traffic shall be 22 feet or a single cartway of 12 feet with pull-off intervals at no greater than 100 yards or with pull-off intervals at such distance where clear sight is available.

(2) For one-way traffic, separate roads with a minimum cartway of 12 feet shall be available.

(3) The maximum sustained grade shall not exceed 12%.

The Department also requires permit applicants to submit detailed information concerning traffic safety issues in the Module 9, or environmental assessment questionnaire, portion of the permit application.

The Board has previously held that the Department has the authority, under the SWMA, to consider issues of traffic safety as they relate to the operation of a solid waste disposal facility. The earlier decisions relating to traffic safety analyzed it in the context of the Department's authority to consider it as part of its mandate under Article I, §27 of the Pennsylvania Constitution, e.g., Township of Middle Paxton et al. v. DER, 1981 EHB 315. However, in Pennsylvania Environmental Management Services, Inc. v. DER, 1984 EHB 94, the Board, in turning aside a challenge to the Department's authority to consider traffic safety issues under Article I, §27, analyzed the Department's authority under the SWMA to consider traffic issues, noting that language in §§102(4) and 104(6) of the SWMA empowers the Department to regulate the transportation of solid waste and that regulation of traffic safety was an "inherent and necessary factor to be considered in the regulation of solid wastes..." 1984 EHB at 148.

The Board refined its holdings on the traffic safety issue in Township of Indiana v. DER, 1984 EHB 1, Robert Kwalwasser v. DER, 1986 EHB 24, and Wisniewski v. DER, 1986 EHB 111, wherein the Board held that the Department did not commit an abuse of discretion by referring traffic safety issues to PennDOT and deferring to PennDOT's conclusions.

During the course of the hearings on the merits Dravo and the County sought to have Appellants' evidence on the traffic safety issues excluded,

contending that no further evidence was necessary once it was established that the Department deferred to the judgment of PennDOT. The Board permitted Appellants to present testimony, deferring a ruling on the motion of Dravo and the County until this adjudication.

As we recently noted in Charles Bichler and Mr. and Mrs. John Korgeski v. DER, EHB Docket No. 86-552-W (Opinion and order issued January 6, 1989), the Department, even where it has referred traffic safety issues to PennDOT, still has the ultimate authority to issue permits under the SWMA. The Board can hardly evaluate the Department's deference to PennDOT's evaluation and judgment regarding traffic safety unless the Board is aware of the issues identified in the Module 9 and referred to PennDOT.

With all of this aside, we turn now to the traffic safety issues.

Appellants' arguments regarding traffic safety center on the stretch of Alan Wood Road south of the facility; this portion of the road is also known as Brook Road (Alan Wood/Brook Road). Indeed, Appellants' expert, Carmine Daecher, was satisfied that the improvements for Alan Wood Road from its intersection with Ridge Pike south to the facility, proposed by Dravo and approved by PennDOT, would be sufficient to handle the increased traffic volume to and from the facility (Finding of Fact 39).

As for Alan Wood/Brook Road, Mr. Daecher believed that the clear sight distance from the facility entrance south should be increased, that a bump at the entrance to the facility should be smoothed, and that the road should be widened (Finding of Fact 40). But, he was unaware that Dravo had proposed these improvements to PennDOT and that PennDOT had approved the Dravo proposal

(Finding of Fact 41). And, when confronted with evidence of PennDOT's assent to these proposed improvements, Mr. Daecher then admitted that his concerns were satisfied (Finding of Fact 43).

Appellants have placed great emphasis on the condition of Alan Wood/Brook Road, but we are at a loss to understand this, given the relative usage of this road by vehicular traffic to and from the facility. Although Appellants asserted that more than 5% of the increased volume resulting from the Dravo facility would use Alan Wood/Brook Road, no evidence was produced to substantiate their claim. Nor was any evidence produced by Appellants to establish the volume and type of existing vehicular traffic on Alan Wood/Brook Road and how the anticipated increased volume from the Dravo facility would impact Alan Wood/Brook Road. Given the evidence we do have on the record, we must conclude that any impact would be insignificant.

Thus, we must conclude that the Department did not commit an abuse of discretion in deferring to PennDOT's assessment that the improvements proposed by Dravo would adequately address any problems caused by increased vehicular traffic on Alan Wood and Alan Wood/Brook Roads.

#### **Geologic Characteristics of the Site and Foundation Engineering**

Neither the general permit application requirements for solid waste processing and disposal facilities, 25 Pa.Code §75.23, nor the specific standards for incinerators at 25 Pa.Code §75.30,<sup>5</sup> contain any requirements relating to geologic characteristics of a proposed incinerator site or the

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<sup>5</sup> We do not believe that 25 Pa.Code §75.30 was ever intended to address the complexities of resource recovery incinerators such as the Dravo facility. This is certainly understandable in light of the fact that these regulations were adopted in 1977 when the state of the art in solid waste disposal was landfilling.

foundation/structural integrity of the incinerator.<sup>6</sup> We do believe that the Department has broad authority to require such information under the SWMA and the regulations promulgated thereunder. In particular, §§102(2) and 102(4) of the SWMA provide that

The Legislature hereby determines, declares, and finds that, since improper and inadequate solid waste disposal practices create public health hazards, environmental pollution, and economic loss, and cause irreparable harm to the public health, safety and welfare, it is the purpose of this act to:

\* \* \* \* \*

(2) encourage the development of resource recovery as a means of managing solid waste, conserving resources, and supplying energy;

\* \* \* \* \*

(4) protect the public health, safety and welfare from the short and long term dangers of transportation, processing, treatment, storage and disposal of all wastes;

Certainly, subsidence is a potential danger from a facility which is improperly sited and designed, and the goals of resource recovery are not promoted if multi-million dollar, publicly-financed resource recovery facilities are permitted without thoughtful consideration of the geology of the site and the stability of the facility's foundation. Consistent with this, 25 Pa.Code §75.23(a)(1), which states in relevant part that

The applicant shall describe the general operational concept of disposal or processing which will be submitted with the application. The concept shall include a narrative explain-

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<sup>6</sup> We address these two issues together because foundation design will be dictated, to a large extent, by subsurface conditions.

ing the...anticipated environmental effects of the facility on the physical characteristics of the site and adjacent properties.

gives the Department discretion to make such an evaluation.

Appellants argue that the Department abused its discretion in that it did not require Dravo to submit data sufficient to make an accurate assessment of the geologic characteristics of the site, including the evaluation of competent bedrock. They also allege that the Department ignored the recommendations of its own employee concerning the dewatering of the site. Dravo and the County contend that the Department conducted an exhaustive review of these aspects of the facility and that its conclusions regarding the geologic suitability of the site were well supported.

We agree with Dravo and the County. What emerges from the evidence is that extensive and detailed geologic information was presented by Dravo to the Department and that, in turn, the Department conducted a thorough and comprehensive evaluation of this information, utilizing data provided by Dravo, the observations of its professional staff who routinely review the geologic aspects of solid waste permit applications, and the expertise of William Kochanov, the Bureau of Topographic and Geologic Survey's specialist in subsidence-related geology.

The Dravo facility is at a topographic high in an area bounded by the Schuylkill River on the west, Plymouth Creek to the southeast, and an unnamed tributary to the east (Findings of Fact 63 and 89). Veterans Quarry lies to the northwest and Ivy Rock Quarry to the south (Finding of Fact 63). It is underlain by the ledger formation, a fractured carbonate structure characterized by pinnacles and solutioning (Findings of Fact 65-67). The formation is subject to soft zones and voids, i.e. areas which contain essentially no rock material, a

fact confirmed by the boring logs (Findings of Fact 70 and 72). While the average RQD, which is calculated with the data obtained by the boring logs, was 31.9% (Finding of Fact 77), this data must be viewed with some reservation in this case.

The results of test borings are normally used to characterize subsurface conditions because it is generally impossible to directly observe subsurface conditions. But because test borings are normally only four inches in diameter, a proposed site would have to be riddled with test borings to present a completely accurate depiction of subsurface conditions. There may be circumstances where there is more direct and reliable evidence of subsurface conditions - an exposed high wall or quarry face adjacent to a site - and this presents the opportunity for direct observation of actual, subsurface conditions (Finding of Fact 82). Such is the case here, as we have adjacent quarrying operations with exposed working faces. The exposed faces also provide important information relating to the cause of the voids and the soft zones.

The voids and soft zones in the formation may be the result of underground solutioning activity or solutioning activity caused by poor surface water management (N.T. 723-724). Given the surface and groundwater elevations in the area and taking into account the pumping at the Ivy Rock Quarry, any subsidence activity at the site is the result of poor surface water management (Findings of Fact 85-90 and 94). Furthermore, even if pumping were to cease at Ivy Rock Quarry, resulting in a rise in groundwater elevation, we would expect no adverse impact on the Dravo facility. Contrary to Appellants' assertions, both Dravo and the Department considered this possibility and accounted for it in the facility design (Findings of Fact 92 and 93). If pumping ceases at the Ivy Rock Quarry, the groundwater level is expected to rise 10 to 15 feet, to a

maximum elevation of 83 to 85 feet (Findings of Fact 90 and 92). But, the foundation of the Dravo facility is at elevation 138 feet, 50 feet above the natural (undepressed) groundwater elevation (Finding of Fact 93).

While we are aware of no Department regulations which would preclude the siting of the facility in areas prone to subsidence,<sup>7</sup> the presence of such characteristics would, we believe, obligate the permit applicant to employ measures to minimize any environmental damage. The Department has recognized that proper engineering measures can prevent subsidence (Finding of Fact 95) and Dravo, we believe, has incorporated such measures into its facility design with its foundation concept and surface water management program.

This concept is highly detailed and consists of many steps which we will not repeat at length here (Findings of Fact 112 to 139). Extensive measures will be undertaken to contour, grade, and compact the site in order to prevent differential settlement at a rate which will impact structural integrity. The subsurface will be pressure grouted with a cement mixture at 30 feet below grade, filling the voids and creating a rock plate (Findings of Fact 122 to 125). Then, five feet thick concrete mat foundations with reinforced structural steel rods will be placed under the wall of the refuse bunker to the back of the air pollution control equipment, under the refuse bunker, and under the tipping hall (Findings of Fact 127 to 134). A surface water management program will be implemented before and during the construction of the foundation, and the area around the facility will be paved or sealed with two feet of clay to assure that surface water runs off into diversion ditches and collection devices rather than penetrate the subsurface (Findings of Fact 136 to 139). This foundation design,

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<sup>7</sup> Assuming this area is subsidence prone, which we do not.

including the surface water management program, properly takes into account the geologic characteristics of the site and will either prevent or minimize any adverse environmental consequences. The Department's approval of the Dravo facility in these two respects was not an abuse of discretion as it carefully and thoroughly considered all relevant data and assured the avoidance of adverse environmental effects.

In reaching our conclusions we have relied heavily on the expert testimony of Dr. Paul C. Rizzo and have placed greater weight on his testimony to the extent there was any conflict between it and that of David Hassrick and Dr. A. Arthur Fungaroli, Appellants' experts. Although Mr. Hassrick and Dr. Fungaroli were forthright and credible witnesses, we must place greater weight on the opinions of Dr. Rizzo in light of his extensive experience with large scale projects in difficult and unusual geologic circumstances (Findings of Fact 142 to 148). William A. Fiore v. DER, 1986 EHB 744, 753-754, and Magnum Minerals v. DER, 1988 EHB 867. As Plymouth states in its post-hearing brief, "One can hardly forget his grandiloquent and lengthy discourse of his 'plan' for the site." While we have great respect for Dr. Fungaroli, he has never been involved with projects of the nature of the Dravo facility, concentrating on more conventional solid waste disposal facilities (i.e., landfills) (N.T. 404, 408).

#### Ash Residue Characterization, Testing, and Disposal

The standards for incinerator facilities at 25 Pa.Code §75.30(b) require permit applicants to specify "...the method to be used in disposing of residue,..." Subsection (h)(1) of that same regulation further provides that "solids, residue, fly ash and siftings shall be disposed of as approved by the Department."

Appellants argue that the Department, based on the data submitted by Dravo, was incapable of determining whether the ash residue produced by the facility would be hazardous or non-hazardous, and, given that fact, should have imposed a condition in the solid waste permit requiring alternative methods of handling and disposing of the residue. Dravo and the County assert that because the testimony of Dr. Robert H. Smith, Appellants' expert on this issue, was stricken and Appellants failed to offer any further evidence, Appellants failed to meet their threshold burden of proceeding. They argue in the alternative that the evidence establishes that the ash residue will not be hazardous and that measures for proper testing and disposal have been incorporated into the permit and that, therefore, Appellants have failed to meet their burden of proof. Again, we must hold with the County and Dravo.

We struck Dr. Smith's testimony during the hearing because it was utterly speculative by reason of his own admission that it was based on data which he found to be unreliable.<sup>8</sup> More specifically, Dr. Smith advised the Joint Legislative Committee on Air and Water Pollution that it was necessary to take at least 50 samples of ash residue over a three month period to accurately characterize it, with another like series of samples for reproducibility (N.T. 599-600). Yet, Dr. Smith's conclusion that because of the addition of lime scrubber waste to the combined fly and bottom ash, the residue from the Dravo facility would be EP toxic (hazardous) with regard to lead and/or cadmium 60% of

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<sup>8</sup> Even if we hadn't struck Dr. Smith's testimony as speculative, we do not believe it to be credible. For example, the testing program for fly ash/slag that Dr. Smith proposed to the Plymouth Township Council in a March 12, 1987, letter was particularly troublesome, as he projected a cost of \$400 to \$500 (N.T. 607-608). How such a figure could even begin to cover the costs of the comprehensive testing program Dr. Smith believed was necessary to properly characterize ash residue (see discussion, *infra*) is puzzling.

the time, was based on his review of studies of three facilities using acid gas scrubbers. The three incinerator facilities were in Framingham, Massachusetts; Clairmount, New Hampshire; and Marion County, Oregon. The Framingham study consisted of 25 tests of ash residue and the Clairmount, 17 tests; Dr. Smith was unaware of how many tests were involved with the Marion County facility. Furthermore, Dr. Smith only reviewed summaries of the Framingham and Marion County studies (N.T. 600-606). Considering that he believed that a data base of less than 50 tests of ash residue was unreliable and considering that his opinion that the Dravo ash residue would be hazardous for lead and cadmium was based on data from significantly fewer tests at each of the other facilities, his opinion that the Dravo ash residue would be hazardous was utterly speculative and we had no choice but to strike it. Terrell v. W.C.A.B. (McNicholas), \_\_\_ Pa.CmwltH \_\_\_, 535 A.2d 310 (1988).

Dr. Smith's testimony aside, the issue is not whether the ash residue is hazardous or non-hazardous,<sup>9</sup> as the regulations do not prohibit the construction and operation of an incinerator which generates hazardous residue. Rather, the issue is whether the permit contains requirements to assure the proper testing and disposal of the residue. Although Dravo's residue is not expected to be hazardous (Finding of Fact 174), the Department has imposed on-going sampling and analysis requirements in the permit (Finding of Fact 179). If the residue proves to be hazardous, the Department has broad powers under §§503(e)(3) and (4) and 602 of the SWMA to modify Dravo's permit or to otherwise impose conditions on Dravo to assure that the residue is properly disposed of by Dravo. We also believe that given the newness of the technology and the paucity

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<sup>9</sup> Appellants have produced no credible evidence to dispute the Department's determination that the residue would be non-hazardous.

of available data on residue, the Department's permit conditions were reasonable. There must be some flexibility built into the regulatory process to address developing technologies, for, otherwise, no one will be willing to deviate from the commonplace methodology for addressing environmental problems. As for disposal, the Appellants did not attack the Department's determination that suitable disposal sites were available (Finding of Fact 187).<sup>10</sup>

Finally, much is made by Appellants of the permit condition requiring separate and then combined testing of the fly ash and the incinerator residue. Appellants offered no evidence to refute the wisdom of the permit condition. It is consistent with the Department's policy, as the Department requires combined ash testing if there is common quenching of fly ash and residue (Finding of Fact 182), and Appellants failed to place any testimony on the record which questioned the soundness of the Department's policy.

We conclude that the Department did not abuse its discretion in determining that process residue from the Dravo facility would be non-hazardous, in imposing the residue testing requirements, and in concluding that appropriate sites were available for disposal of the process residue.

#### **AIR QUALITY PLAN APPROVAL**

The issues relating to the plan approval fall into two categories, which, for want of a more precise description, we will characterize as procedural and substantive.<sup>11</sup> The procedural issues relate to the process whereby the Bureau of Air Quality Control's Central Office formulated and dis-

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<sup>10</sup> Appellants' contention is that alternative disposal requirements should be imposed on Dravo to address the possibility that the residue may be hazardous.

<sup>11</sup> T.R.A.S.H. characterizes them as abuses of discretion by the Department Central Office and abuses of discretion by the Department Regional Office.

seminated the BAT Guidance to its Regional Offices and the procedure of the Norristown Regional Office in assigning lead responsibility for reviewing the Dravo plan approval application to an individual who was, at some time in the review process, involved in employment negotiations with a consulting firm which prepared part of the Dravo plan approval application.

#### **Development and Dissemination of the BAT Guidance**

Appellants contend that the Department's actions in developing and disseminating the BAT Guidance for resource recovery facilities were an abuse of discretion. More specifically, they argue that the process was highly informal and that the deliberations on the BAT Guidance and the Secretary of the Department's ultimate decision to approve it were not incorporated into a written record necessary to support what they characterize as "rulemaking." They assert that the Central Office should be held to the same standards in developing the BAT Guidance as the Regional Offices are in substantiating requests to deviate from it in formulating plan approval conditions; namely, the preparation of a detailed written justification. Appellants claim that the Department committed an abuse of discretion by not informing the Regional Offices of the Deputy Secretary for Environmental Protection's decision to incorporate heavy metal emission limits into a plan approval issued by the Harrisburg Regional Office to the York County Solid Waste Authority. Appellants cite no law in support of their arguments other than an analogy to the rulemaking requirements under the federal Clean Air Act, 42 U.S.C. §7401 *et seq.*

The Department, Dravo, and the County all respond to these arguments by contending that the development and adoption of a policy is not an appealable action. Furthermore, Dravo and the County contend that formal rulemaking requirements do not apply to the adoption of policies and that even if the

adoption of a policy were an appealable action, Appellants' challenge to the BAT Guidance was untimely.

We do not believe that the Department's adoption of a policy is an appealable action. While the promulgation of a policy is a decision of the Department, it does not affect the rights, duties, privileges, and obligations of anyone until it is applied through an action such as the issuance of a permit or order to that person. As a result, we decline to review the BAT Guidance in the abstract.

Although we decline to review the BAT Guidance, we do wish to address several arguments raised by Appellants. We reject their contention that the development of a policy necessitates the preparation of a written record.<sup>12</sup> The BAT Guidance is what the Commonwealth Court has identified as an "interpretive" rule, or one which interprets the requirements of a statute or regulation, as opposed to a "legislative" rule, or one which defines those requirements in the first instance. The Commonwealth Court has held in Chemclene Corp. v. Com., Dept. of Env. Res., 91 Pa.Cmwlt 316, 497 A.2d 268 (1985), that such policies are not subject to the Act of July 31, 1968, P.L. 769, as amended, 45 P.S. §1101 *et seq.*, commonly referred to as the Commonwealth Documents Law, and in Grandview Surgical v. Holy Spirit Hosp., 111 Pa.Cmwlt 159, 533 A.2d 796 (1987), that they are not subject to the Regulatory Review Act, the Act of June 25, 1982, P.L. 633, as amended, 71 P.S. §745.1 *et seq.*

Moreover, we do not believe that Appellants have any standing to raise alleged deficiencies in the Department's internal operating procedures - i.e.,

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<sup>12</sup> While policy development does not mandate the preparation of such a document, we believe that the practice of memorializing an agency's policies and the rationales for those policies is a highly desirable practice.

the manner in which it prepares and distributes information to its Regional Offices and processes plan approval applications,<sup>13</sup> for if such deficiencies exist, the entity most directly harmed is the Department itself, which is defending its action before the Board. We know of no legal requirements governing the development and adoption of policies by the Department, and we would be loathe to exercise any jurisdiction on this area for fear of stifling the free interchange of ideas among Department staff and of intruding upon the Secretary's prerogatives in managing the Department.

#### Conflicts of Interest by the Lead Reviewer of the Plan Approval Application

T.R.A.S.H. claims that John Egan, the Department engineer assigned lead responsibility for review of the Dravo plan approval application, had a conflict of interest by virtue of his employment negotiations with Weston, the consulting firm which prepared the Risk Assessment and multi-pathway risk evaluation submitted with the application. T.R.A.S.H. also argues that the failure of Mr. Egan's supervisor to relieve him of this responsibility once the supervisor became aware of Egan's employment plans was an abuse of discretion.

The Department, Dravo, and the County counter the arguments of T.R.A.S.H. by asserting that Egan did not have a conflict of interest because Douglas Leshner, and not Egan, reviewed the Risk Assessment and because the multi-pathway risk assessment prepared by Weston was not submitted to the Department until after Egan's resignation.

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<sup>13</sup> The alleged failure of the Department to communicate the Deputy Secretary for Environmental Protection's decision to incorporate heavy metal emission limits in the York County Solid Waste Authority plan approval falls into this category. We also believe that this is irrelevant, for as we explain, *infra*, the Department's decision to issue the Dravo plan approval must be judged on the basis of its compliance with the applicable requirements and not in comparison with other plan approvals.

Our review of the record indicates that Egan was assigned responsibility for review of the Dravo plan approval application by N. Rao Kona, the Norristown Regional Air Pollution Control Engineer (Findings of Fact 197 and 198), and that after reviewing the application for completeness he referred various parts of it to the Central Office for review (Finding of Fact 201). The Risk Assessment, which was prepared by Weston (Findings of Fact 196 and 203), was reviewed by Douglas Leshner of the Central Office (Finding of Fact 203). Although Egan knew in January, 1987, that he would be resigning to join Weston (Finding of Fact 204), he did not advise Mr. Kona of his departure until three weeks beforehand (Finding of Fact 206) and continued to complete his review of the plan approval application (Finding of Fact 208). Once informed of Egan's impending resignation, Kona did not relieve Egan of his responsibility for reviewing the plan approval application (Finding of Fact 207), nor did he request Mr. Egan's successor, Thomas McGinley, to review any of the plan approval application (Finding of Fact 213).

While §1928-A of the Administrative Code prohibits Department employees from performing any functions or duties relating to the regulation of surface mining and oil and gas extraction if they have a direct or indirect pecuniary interest in the mineral extraction activity, there are no analogous provisions in the Air Pollution Control Act. The Act of October 4, 1978, P.L. 883, as amended, 65 P.S. §401 *et seq.*, commonly referred to as the Ethics Act, does contain general prohibitions on conflicts of interest.<sup>14</sup>

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<sup>14</sup> The Professional Engineers Registration Law, the Act of May 23, 1945, P.L. 913 as amended, 63 P.S. §148 *et seq.*, is applicable to registered professional engineers. But, there is no evidence in the record that Mr. Egan is a registered professional engineer.

Public employees, who are defined in §2 of the Ethics Act as anyone responsible for taking or recommending non-ministerial regulatory action, are subject to §3 of the Ethics Act, which provides that:

...no public...employee...shall solicit or accept, anything of value, including a...promise of future employment based on any understanding that the... official action, or judgment of the...public employee...would be influenced thereby.

The Ethics Act does not, however, address the issue of the validity of an agency action where it can be demonstrated that a public employee had a conflict of interest and took or recommended official agency action which would benefit that interest.

We can conceive of situations where evidence of conflict of interest, coupled with evidence that a public employee took or recommended action contrary to applicable law, regulations, and policies to benefit that interest, would result in the invalidation of the Department action. The primary consideration for the Board would be the establishment that the action itself was an abuse of discretion in that it was contrary to law, not that the employee had a conflict.<sup>15</sup> Moreover, that is not the situation here. Mr. Egan did not review the Weston submission, and, therefore, he made no recommendations concerning its adequacy. The decision to issue the plan approval was made months after his resignation, and, for reasons stated *infra*, the plan approval was in accordance with applicable requirements.

But, we cannot dismiss this lightly. We are disturbed at Mr. Egan's failure to perceive what we would regard as the appearance of a conflict and in-

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<sup>15</sup> We recognize also that our responsibility is to determine whether the Department committed an abuse of discretion in issuing the plan approval and that the State Ethics Commission has the duty to determine whether an individual has violated the Ethics Law.

form his supervisor of his employment discussions. In fairness, we cannot fault him too heavily when he has been provided with no guidance from the Department (Finding of Fact 210). The Department cannot be blind to the fact that its employees seek employment with or are sought after by the very consulting firms whose work they review day after day. The Department would do well to instruct its employees in this area.

### Air Quality Permitting Program

The Board has recognized that securing approval for an air contamination source under §6.1 of the Air Pollution Control Act is a two-tiered process:

To initiate and operate an air contamination source in Pennsylvania, it is necessary to procure two permits from the DER; a plan approval permit prior to construction of the source and an operating permit after construction has been completed but prior to its operation...

Doris J. Baughman, et al. v. DER  
and Bradford Coal Company, 1979  
EHB 1, 10 (citations omitted)

The general purpose of the air contamination source regulatory program is set forth at 25 Pa.Code §127.1:

It is intended that by the application of the provisions of this article, air quality shall be maintained at existing levels in those areas where the existing ambient air quality is better than the applicable ambient air quality standards, and that air quality shall be improved to achieve the applicable ambient air quality standards in those areas where the existing air quality is worse than the applicable ambient air quality standards. ...

To assure the achievement of this purpose, new sources in attainment areas (i.e. areas where the existing ambient air quality is better than the applicable ambient air quality standards), must, in accordance with 25 Pa.Code §127.1, demonstrate that:

In accordance with this intent it is the purpose of this chapter to insure that all new sources shall conform to the applicable standards of this article and that they shall not result in producing ambient air contaminant concentrations in excess of those specified in Chapter 131 (relating to ambient air quality standards). It is further the intent of this chapter to insure that in those areas of this Commonwealth where concentrations of air contaminants are significantly lower than those specified in Chapter 131 (relating to ambient air quality standards), new sources may not be established unless it is affirmatively demonstrated that:

- (1) The establishment of new sources is justifiable as a result of necessary economic or social development.
- (2) The new sources may not result in the creation of air pollution as defined in section 3 of the act (35 P.S. §4003).
- (3) The new sources shall conform to applicable standards of this article.
- (4) The new sources may not result in the creation of ambient air contaminant concentrations in excess of those specified in Chapter 131 (relating to ambient air quality standards).
- (5) The new sources shall control the emission of air pollutants to the maximum extent, consistent with the best available technology.

To obtain plan approval for any source, 25 Pa.Code §127.12 requires:

- (a) Applications for approval shall:
  - (1) Identify the location of the source.
  - (2) Contain information that is requested by the Department and as is necessary to perform a thorough evaluation of the air contamination aspects of the Source.
  - (3) Show that the source will be equipped with reasonable and adequate facilities to monitor and

record the emissions of air contaminants and operating conditions which may affect the emissions of air contaminants.

(4) Show that the source will comply with applicable requirements of this article and those requirements promulgated by the Administrator of the United States Environmental Protection Agency under the provisions of the Clean Air Act (42 U.S.C. §§1857 and 7401-7706).

(5) Show that the emissions from a new source will be the minimum attainable through the use of the best available technology.

(6) When requested by the Department, show that the source will not prevent or adversely affect the attainment or maintenance of ambient air quality standards.

(7) Contain a plan of action for the reduction of emissions during each level specified in Chapter 137 (relating to air pollution episodes).

(b) The Department will not approve any application which fails to meet the requirements of subsection (a). An approval may be granted with appropriate conditions.

Of particular relevance to the issues now before the Board are 25 Pa.Code §§127.12(a)(2), (4), and (5), but most particularly, 25 Pa.Code §127.12(a)(5).

The parties have advanced differing interpretations of what constitutes BAT for an air contamination source. The Department and Dravo cite the definition in 25 Pa.Code §121.1, emphasizing that BAT is technology (i.e., hardware or equipment), rather than an emission limitation, and that the determination of what constitutes BAT is a source-specific determination, taking into account energy, environmental, and economic factors. They argue that T.R.A.S.H. is mistakenly confusing BAT with emission limitations and is, in essence, substituting the concept of "Lowest Achievable Emission Rate" (LAER) for BAT by urging the Board to adopt its contentions that the Department abused its discretion by

not negotiating/imposing more stringent emission limitations on Dravo than those contained in the Department's BAT Guidance for resource recovery incinerators.

BAT is defined at 25 Pa.Code §121.1 as

Equipment, devices, methods or techniques which will prevent, reduce or control emissions of air contaminants to the maximum degree possible and which are available or may be made available.

Although the regulations employ differing terms to describe what BAT must achieve - "prevent, reduce or control emissions...to the maximum degree possible" (25 Pa.Code §121.1), "control...emission...to the maximum extent" (25 Pa.Code §127.1(5)), and "emissions...will be the minimum attainable" (25 Pa.Code §127.12(a)(5)), the effect is to minimize the emission of air contaminants in light of the design and operating features of the control technology.

We do not read these regulations as mandating a plan approval applicant to select a piece of control technology simply because it, without consideration of any other factors, controls emission of a particular contaminant to the maximum degree possible. We are aware that the design and operation of an air contaminant source and control technology associated with it is a complex engineering decision. Indeed, we have recognized this complex and source-specific process in Baughman, *supra*, where we found that under particular operating conditions a scrubber may be as effective as a baghouse for controlling particulates. We also recognized in Baughman that "The best available technology requirement does not require the addition of control devices in series, *ad infinitum*..." 1979 EHB at 14.

The air quality control regulations do not prescribe BAT for particular sources. Undoubtedly, the Environmental Quality Board and the Department

recognize the immensity of such a task, given the number and variety of air contaminant sources, the complexity of control technology, and the dynamic nature of engineering and the applied sciences.<sup>16</sup> However, the lack of source-specific BAT in the air quality regulations does not necessarily mandate that BAT be determined anew as the Department reviews each plan approval application, for this also would be problematic in that it may result in inconsistent formulation and application of BAT among the Department's regional offices.

This is where BAT Guidance serves a necessary regulatory purpose by eliminating the time-consuming task of determining BAT for each plan approval application and avoiding inconsistency among Department regional offices. The Department's reliance on the BAT Guidance document here was not an abuse of discretion, especially in light of the extensive effort undertaken by the Department to review the scientific literature (Findings of Fact 229, 270, 272), consult with other regulators (Finding of Fact 273), analyze the performance of municipal waste incinerators (Finding of Fact 271), and subject its conclusions to peer and public review (Findings of Fact 274-277). Its objective of setting the guideline limitations in the BAT Guidance on the basis of whether the limitation could be sustained and verified over the life of the facility was also not an abuse of discretion, in that it reasonably recognized that the slavish establishment of a number simply because it is the most stringent

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<sup>16</sup> The Environmental Protection Agency's efforts to accomplish this task under the Clean Water Act, 33 U.S.C. §1251 *et seq.*, have consumed over 16 years and have been subject to numerous, protracted lawsuits.

unrealistically ignores actual operating capabilities and limitations.<sup>17</sup>

We also conclude that the Department did not abuse its discretion in not requiring Dravo to furnish information about various other resource recovery facilities throughout the country, or by not imposing the same conditions in Dravo's plan approval as it did in other municipal resource recovery plan approvals (e.g., the York County Solid Waste Authority facility). Our task is to determine whether the Department, after a consideration of the Dravo plan approval application and the relevant regulations and policies, committed an abuse of discretion in issuing the Dravo plan approval, not whether the Dravo plan approval was different than the York County plan approval and, therefore, constituted an abuse of discretion. Not only are we not legally required to make this comparison, it is a meaningless one unless we have every relevant fact regarding the design and operation of both facilities before us.

We turn now to an evaluation of the plan approval as it relates to the various regulated air contaminants.

#### Particulate Matter

The Dravo plan approval incorporates a condition that emissions of particulate matter shall not exceed 0.015 gr/dscf, corrected to 7% oxygen, a limitation taken from the BAT Guidance (Findings of Fact 288-289). T.R.A.S.H. contends that the Department erred in that by not requiring Dravo to present information on particulate matters emissions from facilities in Maine and California, as well as West Germany, the Department did not have sufficient information to reach the conclusion that the Dravo facility met BAT

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<sup>17</sup> We do not mean to imply that the determination of control technology and allowable limitations may not, in some circumstances, be technology-forcing. Such is not the case here.

requirements. T.R.A.S.H. also argues that, in light of CARB's 0.01 gr/dscf standard and emissions data from other facilities, the Department should have imposed a more stringent particulate emissions limitation on Dravo. We reject T.R.A.S.H.'s arguments because they are premised on, *inter alia*, inherently unreliable data.

Initially, we observe that the mere fact that another regulatory jurisdiction imposes an apparently more stringent limitation on a source does not necessarily compel the invalidation of the limitation imposed by the Department. A regulatory program is not represented solely by numbers, for they alone cannot reveal the regulator's philosophy, its method of administration, or its enforcement policy. That is evident with the CARB particulate matter limitation. The CARB limitation is based on a limited data base (Finding of Fact 294). And, CARB calculates compliance in a different fashion than the Department, as it permits the rounding off of data to the nearest one-hundredth (0.01 gr/dscf may be, in reality, 0.010 gr/dscf to 0.014 gr/dscf). The Department, on the other hand, does not permit such rounding off (Finding of Fact 293).

The scarcity of test data and its reliability is confirmed by results from the studies cited by T.R.A.S.H.'s experts as support for the imposition of more stringent emission limits for particulates. The actual test data in the Draft EPA Report and the Canadian NITEP report were not reviewed by Messrs. Budin and Hershkowitz and Dr. Higgins (Finding of Fact 302). The Draft EPA Report notes that the test data was scarce (based on three tests) and caution should be exercised in utilizing it, while the NITEP report was based on one test from a pilot resource recovery facility (Finding of Fact 305).

Dravo's expert, Dr. Kay Jones, severely criticized the EPA Draft Report (Finding of Fact 316), concluding that the 0.015 gr/dscf limitation imposed by the Department was appropriate. We believe that his opinion is entitled to more weight than the contrary opinions of T.R.A.S.H.'s experts. Mr. Hershkowitz has had no experience in the design of air pollution control technology and directs research and public education efforts for a non-profit environmental research group (Findings of Fact 306 and 307). Mr. Budin, while an engineer involved with incineration projects, devotes the majority of his time to marketing for AGES (Finding of Fact 310). Dr. Higgins, whose credentials as an engineering educator are impeccable, has not had the depth of experience relating to municipal incinerators that Dr. Jones has had in his professional career (Findings of Fact 312-315, 366-379).

The standard selected by the Department was not unreasonable, given the literature (Finding of Fact 290) and test data from facilities with combustion and air pollution control technology similar to Dravo's (Finding of Fact 295). Furthermore, based on the relative weight of the experts' testimony and the deficiencies in the data base on which their testimony was based, we cannot conclude that the Department's selection of a 0.015 gr/dscf particulate limitation as representative of BAT and the imposition of that limitation in Dravo's plan approval was an abuse of discretion.

### HCl

The Department imposed a requirement in Dravo's plan approval that HCl be reduced by not less than 90% (by weight) on an hourly average basis, with a waiver if the exhaust concentrations were less than 30 ppmv on an hourly average basis, corrected to 7% oxygen on a dry basis (Finding of Fact 327). This limitation was the same as the limitation contained in the BAT Guidance and the

draft revised BAT Guidance. As Mr. Hershkowitz, Appellants' expert, regarded the HCl limit as the lowest achievable emission through the application of BAT (Finding of Fact 330), we can hardly conclude that the imposition of this emission limitation was an abuse of discretion by the Department.

### Nitrogen Oxides

The Department determined that an emission limitation of not greater than 300 ppm as a daily average, corrected to 7% oxygen on a dry basis, constituted BAT for NO<sub>x</sub> (Finding of Fact 332) and imposed that limit in Dravo's plan approval (Finding of Fact 331). Appellants believe that the addition of de-NO<sub>x</sub> equipment, or the removal of yard wastes, could further reduce NO<sub>x</sub> emissions. We cannot accept that conclusion.

NO<sub>x</sub> emissions are controlled through combustion efficiency requirements (Finding of Fact 334), and the Department has imposed a 99.9% combustion efficiency requirement in Dravo's plan approval. Again, by Mr. Hershkowitz's own admission, this is the most stringent combustion efficiency requirement imposed on a resource recovery facility in the country (Finding of Fact 335). The other measures advanced by T.R.A.S.H. for reducing NO<sub>x</sub> are not sufficiently proven to substantiate the claim that they will reduce NO<sub>x</sub> emissions even further. The Department's imposition of this emission limit was not an abuse of discretion.

### SO<sub>2</sub> Emissions

Applying the recommendations in the BAT Guidance, the Department imposed a limitation that SO<sub>2</sub> emissions be reduced by not less than 70% by weight on an hourly average basis, waiving the requirement if exhaust gas concentrations were less than 30 ppmv on an hourly average basis (Findings of Fact 319, 320). Appellants believe that a more stringent emission level could have been imposed

in Dravo's plan approval, as indicated by the results of the draft EPA report and the NITEP report and the recommendations of CARB. For the same reasons as we rejected this contention as it related to particulates, we must reject it for SO<sub>2</sub>. The data is too unreliable and sparse to support this conclusion.

Dravo will utilize a spray dryer scrubber for SO<sub>2</sub> control (Finding of Fact 220). As part of the plan approval application process, it presented data and specifications from six potential vendors (Finding of Fact 223). After review of this material, the Department determined that two of the six proposals represented BAT for SO<sub>2</sub> removal (Finding of Fact 231) and so advised Dravo. Dravo then selected the Research-Cottrell spray dry acid gas scrubber and fabric filter system (Finding of Fact 342). T.R.A.S.H. sought to introduce evidence at the hearing regarding all six of the SO<sub>2</sub> control proposals considered by Dravo. So long as the proposal selected by Dravo and approved by the Department represented BAT, as we have concluded here, the relative merits of the other proposals were irrelevant.

### **Heavy Metal Limitations**

The Dravo plan approval incorporates ambient concentration, as opposed to emission, limits for heavy metals (Findings of Fact 340, 341). These ambient limits were developed utilizing the BAT Guidance (Finding of Fact 342). The plan approval also contained a condition providing that the Dravo operating permit would contain heavy metal emission limitations based on source tests at the facility (Finding of Fact 353). Appellants argue that the Department abused its discretion by not incorporating emission limits. We cannot agree with this argument.

Initially, we are aware of no requirement that the Department include emission limitations in plan approvals. The Department is given wide latitude

to formulate plan approval conditions. Furthermore, we cannot lose sight of the two-tiered approval system under the Air Pollution Control Act and the fact that there is a difference between an authorization to construct a facility, as opposed to an authorization to operate it. We recognize that a facility must be designed and constructed to meet a certain performance level, but there are circumstances, such as here with heavy metals, where, because of the scarcity of reliable performance data, it is not inappropriate to defer the setting of emission limits until some actual performance data is available. The fact that the Department incorporated heavy metal emission limits in the York County facility does not alter our conclusion, for reasons we stated, *supra*.

We do agree with the Department's assessment that there is insufficient test data available to establish heavy metal emissions limits for municipal waste resource recovery facilities (Findings of Fact 343-345). And, we believe that the Department was responsibly carrying out its duty to protect the public health by imposing ambient concentration limits based on EPA's estimated cancer risk rates and the Federal Center for Disease Control's ADI levels (Findings of Fact 346, 347). The ambient concentration levels contain adequate margins of safety and will assure protection of the public health until more specific heavy metal emissions data becomes available.

#### **SOCIAL AND ECONOMIC JUSTIFICATION**

A new source must demonstrate that its establishment is justifiable "as a result of necessary economic or social development." 25 Pa.Code §127.1(1). Appellants argue that this requirement is part of the Department's obligation under Article I, §27 of the Pennsylvania Constitution. The Department's obligation, as articulated by the Commonwealth Court in Payne v. Kassab, 11 Pa. Cmwlth 14, 312 A.2d 86 (1973), is to perform a three part analysis:

(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?

312 A.2d at 94.

We believe that this obligation has been satisfied by the Department.

Although Appellants contend that Dravo never submitted a social and economic justification, Dravo's plan approval application contained a description of the economic and social benefits that would result from the construction of the municipal resource recovery facility (Findings of Fact 380, 381). There is no evidence on the record which would support Appellants' contention that the Department failed to review the justification; Appellants bear the burden of proof to substantiate their claim that the Department committed an abuse of discretion by not performing the analysis and they have failed to come forward with any evidence to substantiate their claim.

Even if we were to conclude otherwise, we exercise our *de novo* review and conclude, after considering Dravo's submission, that this facility is justified as a result of necessary economic and social development. Concerned Citizens of Breakneck Valley v. DER and Mine Safety Appliances, 1979 EHB 201. The fact that the Dravo facility will provide environmentally safe waste disposal at a minimum risk to the health of the population (Finding of Fact 365) for one of the Commonwealth's most populous counties is of particular significance. As for the Payne analysis, we have determined that all relevant

statutes have been complied with, that Dravo has reduced environmental incursion to a minimum, and that any environmental harm which will result will be outweighed by the benefits of this facility to the citizens of Montgomery County.

**Remand to Assess Conformance with Revised BAT Guidance**

As noted in the introduction to this adjudication, T.R.A.S.H. has requested the Board to remand the plan approval to the Department because of November, 1987, revisions to the BAT Guidance. Our task in reviewing the Department's grant of the plan approval is to determine whether, at the time of the issuance of the plan approval, all applicable requirements were satisfied. Wolfe Dye and Bleach Works v. DER, 1978 EHB 215.<sup>18</sup> The plan approval does contain a condition recognizing the applicability of new or changed requirements under certain circumstances:

If construction of the facility does not commence within 18 months of the date of issuance of this Plan Approval, the approval will become invalid and the permittee shall be required to submit revised applications demonstrating that the proposed facility will comply with all requirements contained in any revised Department BAT Criteria Document in effect at the time of resubmission of the application. [Emphasis supplied.]

(Condition (4)(A) of Ex. B-47)

Thus, the appropriate time to review the plan approval for compliance with the revised BAT Guidance is when the situation contemplated by Condition (4)(A) or some other circumstance requiring a new review of the facility by the Department arises. If we were to hold otherwise, there would be no certainty in the permitting process for the applicant, the Department, or the public.

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<sup>18</sup> The result reached in Wolfe was to remand the Department's action to ascertain whether the appellant had satisfied treatment requirements subsequently adopted by the Environmental Quality Board. However, Wolfe involved a permit denial, unlike the case now before us.

Having also determined that the Department's issuance of the plan approval to Dravo did not constitute an abuse of discretion, we make the following conclusions of law and enter the following order.

#### CONCLUSIONS OF LAW

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

2. Plymouth and T.R.A.S.H. have the burden of proving that the Department's issuance of the solid waste permit and plan approval to Dravo was an abuse of discretion or an arbitrary exercise of the Department's duties. 25 Pa.Code §21.101(c)(3); Snyder Township Residents for Adequate Water Supplies v. DER and Doan Mining, 1988 EHB 1202.

3. Any issue not expressly addressed by the parties in their post-hearing briefs is waived. Lucky Strike Coal Company and Louis J. Beltrami v. Department of Environmental Resources, 119 Pa.Cmwlth 410, 546 A.2d 447 (1988).

4. The Department has the authority under the SWMA and Article I, §27 of the Pennsylvania Constitution to consider traffic safety issues in its review of a solid waste management permit application. Pennsylvania Environmental Management Services, Inv. v. DER, 1984 EHB 94.

5. Although the Department may defer to PennDOT's judgment regarding traffic safety issues, Wisniewski v. DER, 1986 EHB 111, the Department still has the ultimate authority to issue a permit under the SWMA.

6. Unless the Board hears evidence regarding traffic safety issues, it cannot conclude whether the Department did, in fact, defer to PennDOT's judgment.

7. The Department did not commit an abuse of discretion in concluding that Dravo's proposals to improve Alan Wood Road and Alan Wood/Brook Road would

adequately and safely handle any increased traffic volume from the Dravo facility.

8. Sections 102(2) and (4) of the SWMA and 25 Pa.Code §75.23(a)(1) empower the Department to review the geologic characteristics underlying a resource recovery facility and the stability of the facility's foundation.

9. The Department had sufficient information to assess the geology underlying the Dravo facility and did not abuse its discretion in approving a solid waste permit based on that information.

10. The Dravo facility foundation design took into account the site's geologic features and contained measures to prevent or minimize any adverse environmental effects in the nature of subsidence.

11. Because of his superior experience with designing foundations for large facilities in peculiar or unusual geologic circumstances, Dr. Rizzo's testimony is entitled to more weight than that of Mr. Hassrick or Dr. Fungaroli, to the extent that there are any inconsistencies.

12. Applicants for incinerator permits must submit information to the Department indicating the method to be used in disposing of residue and this method must be approved by the Department. 24 Pa.Code §§75.30(b) and 75.30(h)(1).

13. The Department is not prohibited from issuing a permit for an incinerator under the SWMA if the residue remaining from the incineration process will be hazardous. However, the Department must be assured that the residue, whether it is hazardous or non-hazardous, will be properly disposed of by the permittee.

14. Expert testimony will be stricken as speculative where it is based on unreliable data. Terrell v. W.C.A.B. (McNicholas), \_\_\_ Pa.CmwltH \_\_\_, 535 A.2d 310 (1988).

15. The residue testing requirements in the Dravo solid waste permit were consistent with the Department's policy and appropriate in light of the common quenching process to be used by Dravo.

16. The Department properly concluded that suitable disposal sites were available for the Dravo residue.

17. Should the testing of the Dravo residue establish that it is hazardous, the Department has the authority under §§503(e)(2) and (3) and 602 of the SWMA to modify or otherwise condition Dravo's solid waste permit to require proper disposal of the hazardous residue.

18. Appellants have failed to meet their burden of proof to demonstrate that the Department abused its discretion in issuing a solid waste permit to Dravo.

19. The Department did not abuse its discretion in issuing a solid waste permit to Dravo.

20. The Board has no jurisdiction to review the Department's promulgation of the BAT Guidance because the policy, in and of itself, does not constitute an appealable action.

21. The Department is not required to support its adoption of policies with written "rulemaking" records.

22. The Board will not review the manner in which policies have been developed by the Department.

23. The Air Pollution Control Act has no provisions governing conflicts of interest by Department personnel implementing that statute.

24. The Professional Engineers Registration Law and the Ethics Act do not address the effect on an agency action where it is established that a public employee acting in furtherance of a conflict of interest, takes or recommends regulatory action contrary to applicable law, regulations, or policies.

25. The State Registration Board for Professional Engineers has the authority to determine whether a professional engineer has engaged in unprofessional conduct.

26. The Ethics Commission has responsibility for determining whether the conduct of a public employee constitutes a conflict of interest.

27. Any conflict of interest John Egan may have had did not affect the Department's review of the plan approval.

28. A new source seeking plan approval must demonstrate that the emissions from the facility would be the minimum attainable through the use of BAT. 25 Pa.Code §127.12(a)(5).

29. BAT is a source-specific determination which takes into account the design and operating conditions of the air contaminant source and the design and operating conditions of the control technology. 25 Pa.Code §121.1.

30. The BAT requirement for new sources does not mandate the imposition of the lowest achievable emission rate.

31. The Department's reliance on the BAT Guidance in formulating the conditions of Dravo's plan approval was not an abuse of discretion where the guidance was based on extensive literature research, review of the performance of municipal resource recovery facilities, and consultation with other regulators, and subjected to peer and public review.

32. The setting of guideline limitations in the BAT Guidance based on limitations which could be sustained and verified over the life of the facility was not an abuse of discretion.

33. The Department is not required to review data from like facilities throughout the country whenever it reviews a plan approval application, as it has already undertaken such an effort in developing the BAT Guidance.

34. The Department did not abuse its discretion by not imposing identical conditions in the Dravo and York County plan approvals.

35. The Department's imposition of a 0.015 gr/dscf limitation for particulate matter in Dravo's plan approval represented BAT.

36. The Department's imposition of a condition in Dravo's plan approval that HCl be reduced by not less than 90% by weight on an hourly average basis represented BAT.

37. The 99.9% combustion efficiency requirement for Dravo's furnace, combined with the  $\text{NO}_x$  emission limitation of 300 ppm as a daily average represented BAT.

38. The  $\text{SO}_2$  limitation imposed in Dravo's plan approval represented BAT.

39. The Research-Cottrell dry acid gas scrubber and fabric filter system constitute BAT for  $\text{SO}_2$ .

40. There is no specific requirement under the Air Pollution Control Act or the regulations promulgated thereunder that emissions limitations be incorporated into a plan approval.

41. It was not an abuse of discretion for the Department to specify heavy metal ambient concentration limits, rather than emission limits, in

Dravo's plan approval, given the absence of sufficient, reliable data to establish BAT emissions limitations for heavy metals.

42. The fact that the Department incorporated heavy metal emissions limits in a municipal resource recovery plan approval issued by another Department Regional Office does not invalidate this portion of the Dravo plan approval, where the evidence establishes that the Department's action was not otherwise an abuse of discretion.

43. The Department evaluated and properly concluded that Dravo's facility was justified as a result of necessary economic or social development. 25 Pa.Code §127.1(1).

44. Appellants failed to satisfy their burden of proof to demonstrate that the Department abused its discretion in issuing the plan approval to Dravo.

45. The Department complied with 25 Pa.Code §§127.1(1) and 127.12 in issuing the plan approval to Dravo.

46. The Department's action in issuing the plan approval must be evaluated in light of the requirements in existence at the time of the plan approval issuance.

47. The Department's issuance of the plan approval to Dravo was not an abuse of discretion.





COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 101 SOUTH SECOND STREET  
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 HARRISBURG, PA 17101  
 717-787-3483  
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M. DIANE SMIT  
 SECRETARY TO THE BOARD

ROBERT HELFER d/b/a  
 R & H SURFACE MINING

v.

COMMONWEALTH OF PENNSYLVANIA,  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES

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 :  
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 : EHB Docket No. 87-365-R  
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 : Issued: May 1, 1989

**OPINION AND ORDER  
 SUR  
 MOTION FOR SUMMARY JUDGMENT**

**Synopsis**

Summary judgment is granted where there are no disputed facts due to the Appellant's admissions of violations alleged by the Department of Environmental Resources (DER) in its compliance orders, and where DER is entitled to judgment as a matter of law.

**OPINION**

This action was initiated by the August 31, 1987 appeal by Robert Helfer d/b/a as R&H Surface Mining (R&H) from two Department of Environmental Resources (DER) compliance orders, one, 87-G-390, dated August 12, 1987 (CO-A), and the other, 87-G-398, dated August 21, 1987 (CO-B). DER alleged in CO-A and CO-B that R&H violated 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 various regulations

promulgated thereunder at R&H's strip mine site in Burrell Township, Armstrong County.

On January 17, 1989, DER filed a motion for summary judgment. With respect to CO-A, DER alleged that in violation of SMCRA, the CSL and the regulations adopted thereunder, R&H failed to backfill its site within 60 days of coal removal, failed to establish adequate ground cover of permanent plant species on areas located west of the proposed rock channel on Phase I of the operation and on areas where treatment ponds were removed on Phase II of the operation, failed to properly maintain sedimentation ponds, failed to backfill concurrent with mining, failed to establish adequate ground cover of permanent plant species, and failed to properly construct and maintain sedimentation ponds. DER avers that R&H admitted to the existence of these violations in its response to DER's request for admissions.

With respect to CO-B, DER alleged that R&H failed to comply with the August 12, 1987 order, in violation of Section 18.6 of SMCRA, 52 P.S. §1396.24, and Section 611 of the CSL, 35 P.S. §691.611. Since R&H admitted in its response to DER's request for admissions that it had failed to backfill as required by the August 12, 1987 order, DER alleges that there are no disputes as to fact and it is entitled to judgment as a matter of law.

Although it received notice from the Board of the pendency of DER's motion, R&H did not file a response.

The Board has the authority to grant summary judgment if the pleadings, depositions, answers to interrogatories, admissions and affidavits show there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. Robert C. Penoyer v. DER, 1987 EHB 131. We hold that there are no disputes as to material fact and that DER is entitled to judgment as a matter of law.

The Department's regulations at 25 Pa.Code §87.141(c)(1) provide that rough backfilling and grading must follow within 60 days of coal removal. R&H admitted that it was in violation of 25 Pa.Code §87.141(c)(1) in its response to Paragraph 7 of DER's request for admissions, and, as a result, a violation of 25 Pa.Code §87.141(c)(1) has been established.

Criteria for successful vegetation of surface mines are established at 25 Pa.Code §87.155. R&H admitted that it was in violation of 25 Pa.Code §87.155 in its response to Paragraph 14 of DER's request for admissions. As a result, a violation of 25 Pa.Code §87.155 has been established.

25 Pa.Code §§87.106 and 87.108(b) and (c) require the proper construction, location and maintenance of sedimentation ponds and detail the mine operator's duties in connection with these ponds. R&H admitted that it was in violation of 25 Pa.Code §§87.106 and 87.108(b) and (c) in its response to Paragraph 16 of DER's request for admissions. As a result, violations of 25 Pa.Code §§87.106 and 87.108(b) and (c) are established.

CO-B cited R&H for failing to comply with the remedial measures mandated in Paragraph 1 of CO-A. R&H admitted in its response to Paragraphs 8 and 18 of DER's request for admissions that it failed to comply with Paragraph 1 of CO-A. Therefore, it is established that R&H violated §18.6 of SMCRA, 52 P.S. §1396.24, and §611 of the CSL, 35 P.S. §691.611 in failing to comply with CO-A.

Having established that R&H violated SMCRA, the CSL, and the rules and regulations of DER governing surface mining, it is clear that DER had the statutory authority to issue both CO-A and CO-B pursuant to 52 P.S. §1396.4c. Thus, DER is entitled to judgment as a matter of law, and summary judgment must be granted.

**O R D E R**

AND NOW, this 1st day of May, 1989, it is ordered that the Department of Environmental Resources' motion for summary judgment is granted and the appeal of Robert Helfer d/b/a R&H Surface Mining is dismissed.

**ENVIRONMENTAL HEARING BOARD**

*Maxine Wockfling*  
**MAXINE WOELFLING, CHAIRMAN**

*Robert D. Myers*  
**ROBERT D. MYERS, MEMBER**

**DATED:** May 1, 1989

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

rm



On January 13, 1988, DER filed a motion to dismiss the appeal for mootness.<sup>1</sup> In support of its motion DER alleges that MP 847-4(A) encompassed 102.6 acres and was covered by a collateral bond in the amount of \$45,000. Subsequent to the filing of Snyder's appeal, the area encompassed by MP 847-4(A) was permitted and bonded by Catch 40 Systems, Inc. and Catch 40 Systems agreed to assume all liabilities associated with the site. Accordingly, on December, 1981, DER rescinded the forfeiture and canceled MP 847-4(A). As to its forfeiture of the \$5,000 surety bond covering MP 847-5, DER alleges that Snyder's failure to backfill and replant the permitted area was the basis of the forfeiture, but that as a result of corrective action by Snyder, DER released the surety bond in full on December 11, 1987. Because of these events, DER believes that there is no further relief that the Board can grant regarding MP 847-4(A) and 847-5 and the matter should be dismissed as moot.

Snyder responded to DER's motion on February 1, 1988, generally denying the factual allegations in DER's motion, but not opposing the request to dismiss the appeals with respect to MPs 847-4(A) and 847-5. AH-RS did not file a response to the motion.

Because of the bond release on MP 847-5 and the rescission of the bond forfeiture on MP-847-4(A), there is no further relief the Board can grant and the appeal as it relates to MP 847-4(A) and 847-5 must be dismissed as moot. A. P. Weaver & Sons, Inc. v. DER, EHB Docket No. 88-027-R (Opinion and order issued October 31, 1988).

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<sup>1</sup> DER has also filed a motion for partial summary judgment which the Board will address in a separate opinion and order.

**ORDER**

AND NOW, this 2nd day of May, 1989, it is ordered that the Department of Environmental Resources' motion to dismiss the appeals of Robert L. and Jessie M. Snyder and AH-RS Coal Corporation as to Mining Permits 847-4(A) and 847-5 is granted.

**ENVIRONMENTAL HEARING BOARD**

*Maxine Woelfling*

**MAXINE WOELFLING, CHAIRMAN**

*Robert D. Myers*

**ROBERT D. MYERS, MEMBER**

**DATED:** May 2, 1989

**cc: Bureau of Litigation**  
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**For Appellants (Snyders):**  
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rm



COMMONWEALTH OF PENNSYLVANIA  
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M. DIANE SMITH  
 SECRETARY TO THE BOARD

LOUIS BELTRAMI and  
 BELTRAMI ENTERPRISES, INC.

v.

COMMONWEALTH OF PENNSYLVANIA  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES

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EHB Docket No. 84-084-F

Issued: May 2, 1989

**OPINION AND ORDER SUR  
 MOTION TO DISMISS FOR LACK OF JURISDICTION**

**Synopsis**

A motion to dismiss for lack of jurisdiction filed by the Department of Environmental Resources is granted. The appellant's clerk was acting within the scope of her apparent authority as an agent of the appellant when she signed for and received the certified mail containing the civil penalty assessment. Since the appeal was filed more than thirty (30) days after the appellant's receipt of the civil penalty assessment, the appeal must be dismissed for lack of jurisdiction.

**OPINION**

This is an appeal by Beltrami Enterprises, Inc. (Beltrami) from a civil penalty assessment of fifty-one thousand three hundred and one dollars (\$51,301) issued by the Department of Environmental Resources (DER). The civil penalty assessment was based upon Beltrami's alleged violations of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., at Beltrami's coal breaker in Kline Township, Schuylkill County. DER

issued the civil penalty assessment on January 27, 1984. Beltrami filed its appeal on February 28, 1984.

This Opinion and Order addresses DER's motion to dismiss for lack of jurisdiction. Beltrami filed a reply to this motion. A hearing on the motion was held on August 12, 1988, and both parties later filed post-hearing briefs.

DER argues in its brief that Beltrami's appeal must be dismissed for lack of jurisdiction because it was not filed within thirty (30) days of Beltrami's receiving notice of DER's action. See 25 Pa. Code §21.52(a), Rostosky v. Commonwealth, DER, 26 Pa. Commw. 478, 364 A.2d 761 (1976). DER contends that Beltrami received notice of the civil penalty assessment on January 28, 1984, the date that Irene Heidrich, one of Beltrami's clerks, signed receipts for the certified mail. (Hearing Exhibit 1, para. 5(b), (c)<sup>1</sup>). DER argues that Ms. Heidrich's acceptance of the certified mail was binding on Beltrami because Ms. Heidrich was acting within the scope of her "apparent authority" as an agent of Beltrami. See Bolus v. United Penn Bank, 363 Pa. Super. 247, 525 A.2d 1215 (1987) allocatur denied, 541 A.2d 1138 (1988). DER argues that Ms. Heidrich had accepted certified mail from non-governmental sources on other occasions. (Transcript, 30).

In its post-hearing brief, Beltrami argues that DER failed to prove that Ms. Heidrich had authority to accept the certified mail. Beltrami contends that the established policy of the corporation was that only Mr. Louis Beltrami was authorized to accept governmental correspondence.

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<sup>1</sup> Beltrami filed its appeal on February 28, 1984, which is more than thirty (30) days after January 28, 1984. (Hearing Exhibit 1, para. 5(e)). Therefore, DER contends that the appeal was untimely.

Therefore, Beltrami argues that the date it received notice of DER's action was January 30, 1984--the date that Mr. Louis Beltrami personally received the notice.

Whether Ms. Heidrich's signing for the certified mail is binding upon Beltrami must be answered by referring to agency law.<sup>2</sup> Since Ms. Heidrich was a Beltrami employee, there is no question that she was an agent of Beltrami; the question is whether her signing the receipt binds Beltrami. Pennsylvania courts have held that an agent can bind the principal when the agent is acting within the scope of his "apparent authority"--authority which the principal has led others to believe the agent possesses. Bolus, Sauers v. Pancoast Personnel, Inc., 294 Pa. Super. 306, 439 A.2d 1214 (1982). Furthermore, an admitted agent is presumed to be acting within the scope of his authority when the act is legal and the third party has no notice of the limitation on the agent's authority. Bolus, Trident Corp. v. Reliance Insurance Co., 350 Pa. Super. 142, 504 A.2d 285 (1986).

Applying these principles to this case, it is clear that Irene Heidrich's signing the receipt and accepting the certified mail is binding on Beltrami. Ms. Heidrich, as a Beltrami employee, was an agent of Beltrami, and her acceptance of the mail was a legal act. Furthermore, there was no evidence that either DER or the U. S. Postal Service had notice that Ms.

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<sup>2</sup> We disagree with DER's argument that this case is controlled by the Board's decisions in Borough of Lilly v. DER, 1987 EHB 972 and Kayal v. DER, 1987 EHB 809. In both of those cases, the appellant had specified in its notice of appeal that it had received notice on a certain date, but then it later asserted that a different date applied because the person who received the notice was not authorized to do so. The Board held in both cases that the date the appellant listed on the notice of appeal form was controlling. This case is different because the Board's records reveal that Beltrami did not list, on its notice of appeal form, the date that it received the civil penalty assessment. Therefore, we must determine whether Beltrami received notice on the date Irene Heidrich signed for the certified mail or on the day Louis Beltrami received notice.

Heidrich was not authorized to accept governmental correspondence, and she had signed for certified mail from non-governmental sources in the past (T. 30). Therefore, it is clear that Ms. Heidrich was acting within the scope of her apparent authority. Bolus, Trident.<sup>3</sup>

In summary, the date that Beltrami Enterprises, Inc. received notice of DER's action was January 28, 1984--the date Irene Heidrich signed for and received the certified mail containing the civil penalty assessment. Since February 28, 1984, the date on which Beltrami filed its appeal with the Board, is more than thirty (30) days after January 28, we must dismiss the appeal for lack of jurisdiction. Rostosky v. Commonwealth, DER, 26 Pa. Commw. 478, 364 A.2d 761 (1976).

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<sup>3</sup> Beltrami's argument that Ms. Heidrich did not have actual authority to sign for the mail misses the point since a principal may be bound not only when an agent is acting within his actual authority, but also when he is acting within his apparent authority. Thus, it is not necessary for us to address whether the evidence established that Beltrami had an effective operating policy that only Mr. Louis Beltrami could receive governmental correspondence.

**ORDER**

AND NOW, this 2nd day of May, 1989, it is ordered that the Department of Environmental Resources' motion to dismiss for lack of jurisdiction is granted, and this appeal is dismissed.

**ENVIRONMENTAL HEARING BOARD**

*Maxine Woelfling*  
MAXINE WOELFLING, CHAIRMAN

*Robert D. Myers*  
ROBERT D. MYERS, MEMBER

**DATED:** May 2, 1989

**cc:** Bureau of Litigation  
Harrisburg, PA  
For the Commonwealth, DER:  
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Central Region  
For Appellant:  
Edward E. Kopko, Esq.  
Pottsville, PA

nb



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M. DIANE SMITH  
 SECRETARY TO THE BC

**BOROUGH OF BELLEFONTE  
 and BELLEFONTE BOROUGH AUTHORITY**

v.

**COMMONWEALTH OF PENNSYLVANIA  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES**

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 : **EHB Docket No. 88-458-F**  
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 : **Issued: May 3, 1989**

**OPINION AND ORDER SUR  
 MOTION TO DISMISS and  
REQUEST FOR LEAVE TO FILE APPEAL NUNC PRO TUNC**

Synopsis

A motion to dismiss filed by the Department of Environmental Resources (DER) is granted, and an appellant's request for leave to file its appeal nunc pro tunc is denied. The appellant does not have a right under 32 P.S. §640 to a hearing on an appeal which is filed more than thirty (30) days after the appellant received notice of DER's action on its water allocation permit. In addition, the appellant's claim that the failure to file a timely appeal was due to the emotional distress of its counsel's secretary does not constitute unique and compelling circumstances which justify granting appellant's request for leave to file its appeal nunc pro tunc.

**OPINION**

This case involves an appeal filed on November 9, 1988 by the Borough of Bellefonte and Bellefonte Borough Authority (collectively, "Bellefonte"), Centre County, Pennsylvania, contesting certain conditions in a water allocation permit granted to the Borough by DER.

This Opinion and Order addresses DER's motion to dismiss filed on November 29, 1988, and Bellefonte's request for leave to file its appeal nunc pro tunc.<sup>1</sup> Bellefonte filed an answer to DER's motion on December 9, 1988 (this answer was incorrectly captioned "Answers to Appeal"). On December 20, 1988, DER filed a memorandum of law responding to Bellefonte's answer. On January 25, 1989, Bellefonte filed a memorandum of law and a "motion for evidentiary hearing and/or consideration of evidence by affidavit" in support of its request for leave to file its appeal nunc pro tunc. Finally, on February 14, 1989, DER filed objections to Bellefonte's memorandum of law and motion.

The controversy here stems from Bellefonte's failure to file its appeal with the Board within thirty (30) days of receiving notice of DER's action on the permit.<sup>2</sup> Normally, this fact would require the Board to dismiss the appeal for lack of jurisdiction. 25 Pa. Code §§21.11(a), 21.52(a), Rostosky v. Commonwealth, DER, 26 Pa. Commw. 478, 364 A.2d 761 (1976). In this case, however, Bellefonte raises two arguments why it should be granted leave to file its appeal nunc pro tunc. First, Bellefonte argues that it has a right, which transcends the Board's usual appeal procedures, to a public hearing under 32 P.S. §640, a provision of the law governing water rights. Second, Bellefonte contends that it should be permitted to proceed nunc pro tunc because the failure to file a timely appeal was attributable to

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<sup>1</sup> This request was first raised in Bellefonte's answer (filed December 9, 1988) to DER's motion to dismiss. However, as we will discuss below, most of the facts upon which the request is based were set forth in Bellefonte's memorandum of law and motion for hearing or consideration of evidence by affidavit filed on January 25, 1989.

<sup>2</sup> The notice of appeal states that Bellefonte received notice of DER's action on October 4, 1988. The Board's records indicate that the appeal was filed on November 9, 1988.

the emotional distress suffered by the secretary of Bellefonte's counsel. We will address these arguments separately.

We disagree with Bellefonte's argument that 32 P.S. §640 gives Bellefonte a right to a hearing before this Board even though it did not file a timely appeal. 32 P.S. §640 is part of the Act of June 24, 1939, P.L. 842, 32 P.S. §631 et seq., which addresses water rights. This section provides:

Any party or applicant who may be directly or adversely affected by any decision or finding of the board under any of the provisions of this act, shall be entitled, upon application, to be heard in person or by counsel in a public hearing, on reasonable notice, before the board or its duly designated agent. All members of the board and its duly designated agents shall have power to administer oaths to any witness appearing for any party in interest in said hearings. All testimony and argument shall be recorded and transcribed and shall be read and considered by the board before it shall make its decision.

32 P.S. §640. As DER correctly points out, the term "board" in 32 P.S. §640 refers to the now defunct "Water and Power Resources Board," See 32 P.S. §631(a). The general powers originally vested in the Water Power and Resources Board have now been transferred to DER. See Section 1901-A of the Administrative Code, 71 P.S. §510-1(1). However, the responsibility to hold hearings and issue adjudications on matters previously entrusted to the Water Power and Resources Board has now been transferred to the Environmental Hearing Board. See Section 1921-A of the Administrative Code, 71 P.S. §510-21. Thus, there is a question whether "board" in 32 P.S. §640 should be interpreted to mean DER or the Environmental Hearing Board.

This question, while interesting academically, does not affect our decision here. If the hearing described in 32 P.S. §640 is construed as one to be held by DER before DER issues a decision,<sup>3</sup> then this section does not

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<sup>3</sup> The language in the first sentence of this section ("Any party or applicant who may be . . . affected") supports an interpretation that the hearing is to be held by DER before a decision is issued.

affect Bellefonte's duty to file a timely appeal from DER's decision--even if DER did not hold a hearing before issuing its decision. If the hearing referred to in 32 P.S. §640 is construed as a hearing before the EHB, on the theory that the power to hold hearings has been transferred to the EHB, then the appellant must comply with the EHB's rules to protect its right to a hearing. One of these rules is that an appeal from a DER action must be filed within thirty (30) days of the appellant's receipt of that action. 25 Pa. Code §21.52(a). Therefore, neither interpretation of 32 P.S. §640 gives Bellefonte the right to file an untimely appeal, or provides a basis for allowing the appeal to be filed nunc pro tunc.

Bellefonte's second argument in support of its request for leave to appeal nunc pro tunc is that its failure to file its appeal on time was due to the "emotional distress" of its counsel's secretary. This argument was first raised in Bellefonte's memorandum of law and motion for hearing or consideration of evidence by affidavit filed on January 25, 1989. Bellefonte alleges that the secretary had recently separated from her husband, and was also in the process of changing jobs. As a result of the stress caused by these events, the secretary failed to mail the notice of appeal to the Board, although she did mail a copy of the notice of appeal to DER. Bellefonte contends that, under these circumstances, the failure to file the appeal on time was attributable to non-negligent conduct of its attorney and his employee; therefore, the request for leave to appeal nunc pro tunc should be granted. See Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979).

Unless the requirements for an appeal nunc pro tunc are met, the Board lacks jurisdiction over untimely appeals. Rostosky v. Commonwealth, DER, 26 Pa. Commw. 478, 364 A.2d 761 (1976). The general rule is that an appeal nunc pro tunc will only be permitted in extraordinary circumstances, namely,

when there is fraud or some breakdown in the processes of the court or agency receiving the appeal. West Penn Power Co. v. Goddard, 460 Pa. 551, 333 A.2d 909 (1975). Neglect or a mistake by the appellant or his counsel will not excuse the failure to file a timely appeal. State Farm Mutual Automobile Insurance Co. v. Schultz, 281 Pa. Super. 212, 421 A.2d 1224, 1227 (n.7) (1980).

In Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979), the Supreme Court held that a non-negligent failure of counsel to file an appeal would constitute grounds for an appeal nunc pro tunc when the error was quickly discovered and the party promptly requested leave to appeal nunc pro tunc. As we stated in Lancaster Press, Inc. v. DER, EHB Docket No. 88-410-W (Opinion and Order issued March 24, 1989), the Pennsylvania intermediate appellate courts have limited the holding in Bass to cases involving non-negligent happenstance where unique and compelling facts are presented. See In Re Interest of C. K., 369 Pa. Super. 445, 535 A.2d 634 (1987), Guat Gnoh Ho v. Unemployment Compensation Board of Review, 106 Pa. Commw. 154, 525 A.2d 874 (1987).

Applying the above principles to this case, Bellefonte's request for leave to appeal nunc pro tunc will be denied. Bellefonte's reliance upon Bass is misplaced. In Bass, the appeal papers had been typed six days before the expiration of the appeal period, and were placed in a folder on the secretary's desk. On the day the papers were typed, however, the secretary became ill and left work, not returning for over a week. The secretary stated that she was treated by a doctor, and was too ill to call the office. The normal office practice was to have a secretary check the desk of absent secretaries, but the secretary who normally did the checking was the one who became ill in this case. The petition for permission to appeal nunc pro tunc

was filed four days after the expiration of the appeal period, on the same day that the ill secretary returned to work. On these facts, the Court held that neither the attorney nor the secretary was negligent. 401 A.2d at 1135.

In the instant case, the secretary was not absent from work-- Bellefonte alleges that she was suffering from emotional distress. In addition, in this case the appeal papers were not left on the secretary's desk, as in Bass. The secretary mailed copies of the appeal to DER, but she somehow failed to send the original appeal form to the Board.<sup>4</sup> Allowance of an appeal nunc pro tunc based upon these facts would represent an unwarranted extension of Bass. It would require the Board to delve into the secretary's mental and emotional state and to determine whether the failure to file a timely appeal resulted from emotional distress or from a simple mistake. The facts alleged do not constitute unique and compelling facts which would justify allowing an appeal nunc pro tunc.<sup>5</sup>

In summary, it is clear that the instant appeal was filed more than thirty (30) days after Bellefonte received notice of DER's action on the water allocation permit. Neither the argument that Bellefonte is entitled to a hearing under 32 P.S. §640, nor the argument that the failure to submit the appeal on time was due to the emotional distress of the secretary of Bellefonte's counsel, persuades us to allow Bellefonte's appeal to be filed

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<sup>4</sup> Since DER and the Board are separate entities, mailing a copy of the appeal to DER instead of the Board does not establish a basis for allowing an appeal nunc pro tunc. See generally, C. W. Brown Coal Co. v. DER, 1987 EHB 161.

<sup>5</sup> Another factor which militates against allowance of an appeal nunc pro tunc is Bellefonte's tardiness in raising the facts regarding its counsel's secretary. Unlike Bass, where the facts which led to the untimely appeal were immediately brought to the court's attention, Bellefonte did not inform the Board of the emotional distress issue until January 25, 1989, while it filed its untimely appeal on November 9, 1988. Bellefonte has not explained why it failed to raise this issue when it filed its appeal or when it filed its answer on December 9, 1988 to DER's motion to dismiss.

nunc pro tunc. Therefore, the appeal must be dismissed for lack of jurisdiction.

**ORDER**

AND NOW, this 3rd day of May, 1989, it is ordered that:

- 1) The Appellant's "motion for evidentiary hearing and/or consideration of evidence by affidavit" is denied.
- 2) The Appellant's request for leave to file its appeal nunc pro tunc is denied.
- 3) The Department of Environmental Resources' motion to dismiss is granted.
- 4) This appeal is dismissed for lack of jurisdiction.

**ENVIRONMENTAL HEARING BOARD**

*Maxine Woelfling*  
**MAXINE WOELFLING, CHAIRMAN**

*Robert D. Myers*  
**ROBERT D. MYERS, MEMBER**

**DATED:** May 3, 1989

**cc: Bureau of Litigation**  
Harrisburg, PA  
**For the Commonwealth, DER:**  
Kurt J. Weist, Esq.  
Central Region  
**For Appellant (Borough of Bellefonte):**  
David A. Flood, Esq.  
Charles J. Kroboth, Jr., Esq.  
Bellefonte, PA  
**For Appellant (Bellefonte Borough Authority):**  
John W. Blasko, Esq.  
State College, PA

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filed a similar Motion to Compel DER to file further responses to Appellants' Interrogatories Nos. 1(a) and 1(b) of Set II served on DER on February 13, 1989. DER responded to the Motions on March 24 and 30, 1989.

Appellants' Interrogatory No. 1 served on December 20, 1988, requested DER to identify and produce copies of correspondence between DER and the parties whose complaints gave rise to the order which is the subject of the appeal. DER provided Appellants with the substance of the complaint but refused to release the name of the complainant.

DER has a privilege to protect its confidential sources of information to insure the free flow of information concerning activities that violate statutes enacted for the protection of the environment, the public health and the public safety. This privilege must be balanced against Appellants' right to a fair hearing. If it appears that the informant's testimony would exculpate Appellants, disclosure should be granted.

Appellants have the burden of establishing their entitlement to the evidence; a bare allegation that the information would be helpful is insufficient.

Commonwealth v. Dorsey, 266 Pa. Super. Ct. 442, 405 A.2d 516 (1979). See also Commonwealth v. Carter, 427 Pa. 53, 233 A.2d 284 (1967); and Commonwealth v. Bradshaw, 238 Pa. Super. Ct. 22, 364 A.2d 702 (1975).

Appellants have not demonstrated their entitlement to the name of the complainant; they have simply asserted that the information would help them to present a better, more complete case. This assertion falls short of what is required to overcome DER's privilege of confidentiality. Accordingly, Appellants' Motion will be denied with respect to this Interrogatory.

Appellants' Interrogatory No. 5(c) served on December 20, 1988, requested "any findings made as a result of each visit, with attached written

reports" by each person identified by DER in Interrogatory No. 4 as having visited Appellants' property in Scranton as part of DER's investigative process. Two of the persons identified by DER in Interrogatory No. 4 are William F. McDonnell, the Wilkes-Barre Regional Solid Waste Operations Manager, and Jerome J. Lehman, the Wilkes-Barre Regional Solid Waste Operations Field Supervisor, both of whom visited the Scranton premises on September 12, 1988. In response to Interrogatory No. 5(c), DER listed a September 26, 1988 memorandum and two Complaint/Violation Reports issued during the preceding January and August.

Appellants' Motion refers only to a September 6, 1988 memorandum. A memorandum bearing this date is not mentioned in DER's response to Interrogatory No. 5(c), but is mentioned in its response to several other Interrogatories.<sup>1</sup> DER's Answer to Appellants' Motion also refers to a September 6, 1988 memorandum and the document furnished to the Board for an in camera inspection bears this date. While we remain uncertain about the precise Interrogatory we are being called upon to enforce, we are satisfied that the document in controversy is the September 6, 1988 memorandum from Mr. Lehman to Mr. McDonnell pertaining to the Northeast Truck Center. Apparently, this is also the document involved in Appellants' Motion with respect to Interrogatories Nos. 1(a) and 1(b) of Set II.

In furnishing Appellants with a copy of the September 6, 1988 memorandum, DER deleted a paragraph described by DER as containing a quotation from a DER attorney yielding legal advice on the definition of transfer

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<sup>1</sup> At first, we thought the date might be a typographical error; but DER's responses identify memoranda bearing both dates.

station and the activities which may be included therein. This is exempt from discovery, according to DER, under the attorney-client/attorney-work product privileges.

This Board ruled in Bradford Coal Company, Inc. v. DER, 1985 EHB 682, that the attorney-client privilege set forth in the Judicial Code, Act of July 9, 1976, P.L. 586, as amended, at 42 Pa. C.S.A. §5928, protects only a communication from the client to the attorney. It does not protect a communication running in the opposite direction, as the one involved here, unless that communication discloses prior communications from the client. Our in camera examination of the disputed paragraph in the September 6, 1988 memorandum convinces us that the attorney-client privilege does not apply.

The attorney-work product privilege was discussed in a subsequent opinion in Bradford Coal Company, Inc. v. DER, 1985 EHB 938, where it was held that advice given by a DER attorney to a mine conservation inspector in connection with the inspection of a mining site involved in ongoing litigation was not discoverable. The Board relied on Pa. R.C.P. 4003.3, which protects from discovery the "mental impressions . . . conclusions, opinions, memoranda, notes or summaries, legal research or legal theories" of a party's attorney. DER argues that the deleted portion of the September 6, 1988 memorandum falls within the scope of this language.

We have reviewed the paragraph in camera. It contains, as described in DER's legal memorandum, "generic advice of counsel on activities which may be included in the definition of transfer stations for all regions." Since the advice is general in nature and does not pertain to Appellants' premises or even to activities specific to the Wilkes-Barre region, we fail to see how it is protected under Pa. R.C.P. 4003.3. This rule was adopted to broaden discovery into trial preparation materials previously protected under former

rule 4011(d). While the broader scope of discovery still does not reach an attorney's work product, the protected documents must still be material prepared in anticipation of the specific litigation in which its discovery is sought. See discussion in Goodrich-Amram 2d §4003.3:1 et seq.

The advice of counsel contained in the deleted paragraph of the September 6, 1988 memorandum does not qualify for protection. It is collective advice applicable to all transfer stations, with no precise correlation to the particular site involved here. It is not the product of an attorney's assessment of specific facts and the application of appropriate legal theories to those facts. Pa. R.C.P. 4003.3 is designed to protect an attorney's work product that is case-specific, as in the second Bradford opinion, supra, not the generic advice involved here.

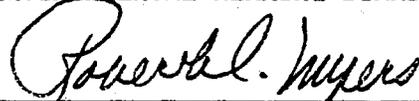
**ORDER**

AND NOW, this 4th day of May, 1989, it is ordered as follows:

1) Appellants' Motion to Compel Further Responses to Appellants' Interrogatory No. 1 served on December 20, 1988, is denied.

2) Appellants' Motion to Compel Further Responses to Appellants' Interrogatory No. 5(c) served on December 20, 1988, and Interrogatories Nos. 1(a) and 1(b) of Set II served on February 13, 1989, is granted insofar as it involves the previously deleted paragraph in the memorandum of September 6, 1988, from Jerome J. Lehman to William F. McDonnell.

**ENVIRONMENTAL HEARING BOARD**



**ROBERT D. MYERS, MEMBER**

**DATED:** May 4, 1989

**cc: Bureau of Litigation**  
Harrisburg, PA  
**For the Commonwealth, DER:**  
Anderson Lee Hartzell, Esq.  
Eastern Region  
**For Appellant:**  
George E. Mehalchick, Esq.  
Scranton, PA

nb



ning module for the proposed development, to adequately respond to problems raised by Appellants, to test for the availability of an adequate groundwater supply, to establish whether the plan was consistent with a comprehensive program of water quality management in the watershed as a whole, to adequately assess the environmental impact of the proposed subdivision and ensure the impact will be minimized, to consider whether the subdivision was consistent with the York County comprehensive plan and master plan, and to comply with Article 1, §27 of the Pennsylvania Constitution. The Appellants also asserted that the module did not demonstrate whether the subdivision was in compliance with county or local storm water management plans.

A petition to intervene, filed on December 10, 1987, by Norman Berman and David Schad (Intervenors), the landowners and developers of Riverview, was granted by Board order dated January 6, 1988.

The Intervenors filed a motion for summary judgment on December 2, 1988, arguing that no issues of material fact remain in dispute and, as a matter of law, the Department's approval should be upheld by the Board. The Intervenors contend that the Appellants' claim that the revision did not conform with a comprehensive water quality management plan for the watershed as a whole was without foundation, that the Appellants' claim that there could be floodplain obstruction was premature and, in any event, under the jurisdiction of the local government, and that the Appellants' remaining claims were beyond the scope of the Board's power to review.

On December 20, 1988, Appellants responded to Intervenors' motion, averring that genuine disputes over material facts exist and, where there was no dispute, Appellants, and not Intervenors, were entitled to judgment as a matter of law. Moreover, Appellants argue, in their brief in opposition to this motion, that Intervenors have the burden of proof in a motion for summary

judgment and they did not meet this burden of establishing that there are no issues of material fact.<sup>1</sup>

Summary judgment is appropriate when there are no genuine disputes over material facts and the moving party is entitled to judgment as a matter of law. Pa.R.C.P. No. 1035(b), Summerhill Borough v. DER, 34 Pa.Cmwlth 574, 383 A.2d 1320 (1978). In ruling on a motion for summary judgment, the Board will look at "the pleadings, depositions, answers on file, together with the affidavits, if any," to determine whether any material facts are in dispute, Pa.R.C.P. No. 1035(b), and will view the facts in the light most favorable to the non-moving party, Robert C. Penoyer v. DER, 1987 EHB 131.

Intervenors have not demonstrated that they are entitled to judgment as a matter of law. Appellants' depositions indicate concerns for, *inter alia*, adequate groundwater supply, impact on Codorus Creek, traffic congestion, loss of farmland, loss of historic value, and loss of aesthetic value if the proposed subdivision is built.<sup>2</sup> Intervenors argue that the Department is not allowed to take into account any of these considerations, since they are not specifically mentioned in the Sewage Facilities Act or regulations promulgated thereunder, and, therefore, the Department properly approved the plan revision. On the contrary, we believe that 25 Pa.Code §§71.14 and 71.16 give the Department wide latitude in considering a broad range of factors in

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<sup>1</sup> While we note this argument, we also note that briefs filed with a motion or response to a motion for summary judgment may not be relied on in granting or denying that motion. 6 Standard Pa. Practice 2d, 34:50.

<sup>2</sup> See Andrew's deposition, pp. 18-19, 25, 29; See Glatfelter's deposition, pp. 8-12, 15.

reviewing a sewage facilities plan revision.<sup>3</sup> Moreover, the Department must satisfy its obligations under Article 1, §27 of the Pennsylvania Constitution, in reviewing plan revisions, Eagles View Lake, Inc. v. DER and William Cohea, 1978 EHB 44, 60, and Appellants have raised sufficient questions as to the nature of the Department's review which would preclude the entry of summary judgment in Intervenor's favor.

**O R D E R**

AND NOW, this 10th day of May, 1989, it is ordered that the Intervenor's motion for summary judgment is denied.

**ENVIRONMENTAL HEARING BOARD**

*Maxine Woelfling*  
**MAXINE WOELFLING, CHAIRMAN**

**DATED:** May 10, 1989

**cc: Bureau of Litigation**  
Harrisburg, PA  
**For the Commonwealth, DER:**  
Norman G. Matlock, Esq.  
Eastern Region  
**For Appellants:**  
Eugene E. Dice, Esq.  
Harrisburg, PA  
**For Intervenor:**  
William G. Baughman, Esq.  
**For East Manchester Township:**  
William H. Poole, Jr., Esq.  
York, PA

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<sup>3</sup> See, e.g., 25 Pa.Code §71.16(e)(4), which states that in reviewing a plan revision the Department will consider

"whether the plan or revision furthers the policies established under Section 3 of the Act (35 P.S. 750.3) and Sections 4 and 5 of the Clean Streams Law (35 P.S. §§691.4 and 691.5)."



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

**NEWTOWN TOWNSHIP**

v.

**COMMONWEALTH OF PENNSYLVANIA,  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES and  
 BUCKS COUNTY SEWER AND WATER AUTHORITY,  
 Permittee and NESHAMINY SEWER COMPANY,  
 INC. and NORTHAMPTON MUNICIPAL AUTHORITY,  
 Intervenors**

:  
 :  
 : **EHB Docket No. 88-490-M**  
 :  
 : **Issued: May 16, 1989**  
 :  
 :  
 :  
 :

**OPINION AND ORDER  
 SUR  
 PETITION TO DISQUALIFY COUNSEL**

Synopsis:

A Petition to Disqualify legal counsel will be denied summarily when the party filing the Petition, despite being in possession of all the relevant facts, does not act diligently in filing the Petition but allows the case to proceed toward a hearing.

**OPINION**

On April 25, 1989, Northampton, Bucks County, Municipal Authority, an Intervenor in the above-captioned appeal, filed a Petition to Disqualify Stephen Harris as legal counsel for Newtown Township, the Appellant. At the time the Petition was filed, a hearing had already been scheduled for April 28, 1989, on a Petition for Supersedeas filed by Appellant on March 31, 1989.

The case had begun on December 1, 1988. Intervenor's Petition to Intervene had been filed on February 6, 1989, and had been granted by a Board

order dated March 2, 1989. Pre-hearing memoranda had been filed by Appellant on March 14, 1989, and by Intervenor (jointly with Bucks County Water and Sewer Authority, the Permittee, and Neshaminy Sewer Company, Inc., another intervenor) on April 21, 1989. Stephen Harris had acted as legal counsel for the Appellant from the outset.

A hearing on a Petition for Supersedeas is required by 25 Pa. Code §21.76(c) to be held expeditiously, within two weeks after the filing of the Petition, if feasible. Because of the hearing schedule of the undersigned Board Member, a hearing on Appellant's Petition could not be held within the suggested two-week period but was scheduled for the first suitable date thereafter. The Board has power to disqualify an attorney from appearing in a case before it, Morehouse v. DER, 1988 EHB 649, but the power cannot be exercised without a prior hearing : 2 Pa. C.S.A. §503 and 1 Pa. Code §31.28.

Since Intervenor's Petition to Disqualify was filed only a few days before the supersedeas hearing, it was not possible to act on the Petition prior to the hearing. This reason, coupled with the realization that Intervenor had waited nearly eight weeks to file its Petition and the realization that Mr. Harris had already been heavily involved in the case and would continue to be so involved until the Petition could be completely processed, prompted the undersigned Board Member to deny the Petition summarily at the opening of the supersedeas hearing on April 28, 1989. All parties had been informed orally of the intended action on April 25 or 26, 1989.

There is no reason why Intervenor could not have filed its Petition immediately after its intervention. The facts and circumstances alleged in

the Petition were all known to Intervenor at that time.<sup>1</sup> A party who fails to act diligently under such circumstances, while the case continues to proceed toward hearing, properly forfeits the opportunity to have this Board act on a requested disqualification.<sup>2</sup>

**ORDER**

AND NOW, this 16th day of May, 1989, it is ordered that the summary denial of the Petition to Disqualify Stephen Harris rendered orally on April 28, 1989, is affirmed.

**ENVIRONMENTAL HEARING BOARD**



**ROBERT D. MYERS, MEMBER**

**DATED:** May 16, 1989

**cc: Bureau of Litigation**  
Harrisburg, PA

**For the Commonwealth, DER:**

Vincent Pompo, Esq.  
Martha Blasberg, Esq.  
Eastern Region

**For Appellant:**

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Warrington, PA

**For Permittee:**

Edward Rubenstone, Esq.  
Mark Goldberg, Esq.  
Bensalem, PA

**For Intervenor:**

William Eastburn, II, Esq./Neshaminy Sewer Company  
John A. VanLuvanee, Esq.  
Doylestown, PA  
Donald McCoy, Esq./Northampton Municipal Authority  
Newtown, PA

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<sup>1</sup> The Petition alleges that Mr. Harris served as Intervenor's solicitor and represented Intervenor in negotiations resulting in an agreement that underlies the permit contested by Appellant in this appeal.

<sup>2</sup> It should be noted that the Board's rejection of a tardy Petition to Disqualify does not necessarily end the matter. Attorneys who violate the Rules of Professional Conduct are subject to discipline under the Rules of Disciplinary Enforcement.



COMMONWEALTH OF PENNSYLVANIA  
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M. DIANE SMITH  
 SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA,  
 PENNSYLVANIA FISH COMMISSION  
 and LITTLE CLEARFIELD CREEK  
 WATERSHED ASSOCIATION :  
 :  
 : EHB Docket No. 86-338-W  
 v. :  
 :  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES :  
 and AL HAMILTON CONTRACTING CO., Permittee: :  
 :  
 : Issued: May 23, 1989

**OPINION AND ORDER  
 SUR  
 PETITION FOR SUPERSEDEAS**

Synopsis

Confirming an earlier order, the Board supersedes provisions of a surface mining permit authorizing mining within 25 feet of the center of a stream and augering beneath it. Analyzing the Fish and Boat Code, 30 Pa. C.S.A. §101 et seq., the Board concludes that the petitioner, the Pennsylvania Fish Commission, satisfied the irreparable harm and likelihood of injury to the public tests in 25 Pa. Code §21.78(a) by demonstrating that the character of the stream would be irreversibly altered by the proposed mining. The Board also rules that the Fish Commission demonstrated a reasonable likelihood of success on the merits in light of the requirements of 25 Pa. Code §§86.102(12), 87.101, 87.115, and 87.138.

**OPINION**

The procedural history of this matter is recounted in the Board's November 4, 1988, opinion and order at 1988 EHB 1058 denying Al Hamilton

Contracting Company's (Al Hamilton) motion to dismiss the Pennsylvania Fish Commission's (Fish Commission) appeal for lack of standing, and we will not repeat it here.<sup>1</sup> This opinion confirms the Board's March 23, 1987, order granting the Fish Commission's petition for supersedeas.

The Board's rules of practice and procedure at 25 Pa. Code §21.78 provide that:

(a) The Board, in granting or denying a supersedeas, will be guided by relevant judicial precedent and the Board's own precedent. Among the factors to be considered are:

- (1) Irreparable harm to the petitioner.
- (2) The likelihood of the petitioner prevailing on the merits.
- (3) The likelihood of injury to the public or other parties, such as the permittee in third party appeals.

(b) A supersedeas will not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect.

(c) In granting a supersedeas, the Board may impose conditions that are warranted by the circumstances, including the filing of a bond or other security.

The party seeking the supersedeas bears the burden of satisfying all three criteria in 25 Pa. Code §21.78(a). Carroll Township Authority v. DER, 1983 EHB 239, 240. However, evaluation by the Board of the three criteria essentially requires the Board to perform a balancing test. Chambers Development Company et al. v. DER et al., 1988 EHB 68; affirmed 110 Pa. Cmwlth 432, 545 A.2d 404 (1988). The Fish Commission has demonstrated that the grant

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<sup>1</sup> A hearing on the merits is scheduled for June 5-7, 1989.

of a supersedeas of those portions of Al Hamilton's permit which allow auger mining to be conducted beneath Campbell Run and which authorize surface mining within 25 feet of Campbell Run on either side is appropriate.

There is ample evidence that the Fish Commission will suffer irreparable harm. The evidence presented by John Arway, the Fish Commission's Fisheries Biologist, and Robert N. Hershey, a hydrogeologist with the consulting firm of Meiser and Earl, establishes that Campbell Run is, by virtue of the benthic invertebrates present, a perennial stream and that naturally reproducing brook and brown trout inhabit it (N.T. 65). Furthermore, Campbell Run is a gaining stream in that it takes flow from groundwater. Mr. Hershey's testimony, in particular, establishes that the placement of back-filled mine spoil, which is 2-3 times more permeable than undisturbed land (N.T. 106-107), would prevent recharge of the stream because the spoil would intercept water which would have recharged Campbell Run (N.T. 107). This, in turn, would cause Campbell Run to become a losing stream, or one where water flows out of the stream bed, and become an intermittent stream with an entirely different aquatic community (N.T. 78-79, 109, 196-197). Mining within 25 feet of the center of Campbell Run would increase the chances of siltation, especially since the soils are highly erodible (N.T. 198). Taking this evidence together, we believe that the very nature of Campbell Run may be irreversibly altered by permitting surface mining within 25 feet of the stream.

Much of the testimony was devoted to the effects of mining within 25 feet of the center of the stream, as opposed to the effects of augering beneath Campbell Run, since mining so close to the stream would cause the major impact (N.T. 109-110). What little evidence was presented on the effects of augering related to the unlikelihood of possible subsidence effects from the drilling of the auger holes and the means to minimize potential subsidence. However,

the augering beneath Campbell Run was an integral part of Al Hamilton's proposal to mine within 25 feet of the center of Campbell Run rather than relocate the stream, and it is impossible and illogical to separate the two components of the mining plan for purposes of this opinion.

We must analyze this evidence in light of the criteria for grant of a supersedeas. In this case, we believe that irreparable harm to the petitioner and harm to the public are intertwined as a result of the Fish Commission's legislative mandate. The General Assembly has declared, in §2506(a) of the Fish and Boat Code, 30 Pa. C.S.A. §2506(a), that:

Declaration of policy - The Commonwealth has sufficient interest in fish living in a free state to give it standing, through its authorized agencies, to recover damages in a civil action against any person who kills any fish or who injures any streams or stream beds by pollution or littering. The proprietary ownership, jurisdiction and control of fish, living free in nature, are vested in this Commonwealth by virtue of the continued expenditure of its funds and its efforts to protect, perpetuate, propagate and maintain the fish population as a renewable natural resource of this Commonwealth.

(emphasis added)

To effectuate this policy, the Fish Commission is entrusted by §321 of the Fish and Boat Code, 30 Pa. C.S.A. §321, with the administration and enforcement of the laws relating to:

- 1) The encouragement, promotion and development of the fishery interests.
- 2) The protection, propagation, and distribution of fish.

\*\*\*\*\*

More specifically, §2502(a) of the Fish and Boat Code, 30 Pa. C.S.A. §2502(a), provides that:

No person shall alter or disturb any stream, stream bed, fish habitat, water or watershed in any manner that might cause damage to, or loss of, fish without the necessary permits

and §2504(a) of the Fish and Boat Code, 30 Pa. C.S.A. §2504(a), states that

General rule - No person, regardless of intent, shall:

(1) Put or place in any waters within or on the boundaries of this Commonwealth any electricity, explosives or any poisonous substances except that, for the purposes of research and fish management, agents of or persons authorized by the executive director may use any method or means to collect, eradicate or control fish.

(2) Allow any substance, deleterious, destructive or poisonous to fish, to be turned into or allowed to run, flow, wash or be emptied into any waters within or bordering on this Commonwealth.

Reading these sections in the context of the general policy expressed in the Fish and Boat Code leads to the conclusion that because the Fish Commission is entrusted with the duty and responsibility of protecting and managing the Commonwealth's fishery resources, that any irreparable harm suffered by the Fish Commission is harm to the public. The evidence demonstrates that a fishery resource may be irreversibly altered by the mining activity and this, we believe equates to a demonstration of both irreparable harm and harm to the public.<sup>2</sup>

We are also required by 25 Pa. Code §21.78(a)(2) to consider the likelihood of the Fish Commission's prevailing on the merits when considering its request for a supersedeas. We have stated in Houtzdale Municipal Authority v. DER, 1987 EHB 1, 4 that:

A petitioner's chance of success on the merits must be more than speculative, but he need not be required to establish his claim absolutely. Fisher v. Department of Public Welfare, 497 Pa. 267, 439 A.2d 1172(1982). Rather, the

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<sup>2</sup> We are required to consider the likelihood of injury to the permittee by 25 Pa. Code §21.78(a)(3). Since no evidence was presented by Al Hamilton concerning any harm it may suffer as a result of the grant of a supersedeas, we will deem this issue waived.

petitioner must garner a prima facie case of showing a reasonable probability of success. Maurat v. C.P. Ct. of Lehigh Co., 515 F. Supp. 1074 (E.D. Pa., 198\_)....

We believe that the Fish Commission has also satisfied this criteria.

The Fish Commission argued during the course of the supersedeas hearing that the issuance of the permit to Al Hamilton violated a memorandum of understanding between the Fish Commission and the Department. We attach little weight to this argument for several reasons. Even if such a violation were established, it would not be grounds for invalidation of the permit. The memorandum of understanding binds the Department and the Fish Commission and no one else. There is nothing in 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., or the rules and regulations adopted thereunder which would extend that argument to permit applicants or the public. Furthermore, if there were conflicts between the two agencies over the memorandum of understanding, other avenues exist to resolve the conflict, including, presumably, an action in the Commonwealth Court, or an appeal to this Board in the case of a particular permit, as we now have before us.

The Fish Commission's likelihood of success on the merits is found in potential violations of the surface mining regulations, specifically 25 Pa. Code §§86.102(12), 87.101, 87.115, and 87.138. Regarding 25 Pa. Code §86.102(12), mining is generally prohibited within 100 feet of the bank of a perennial or intermittent stream. However, the Department may grant a variance from this requirement if the applicant demonstrates "beyond a reasonable doubt" that there will be no adverse hydrologic or water quality impacts from mining closer than 100 feet to the stream. The evidence here establishes otherwise. Similarly, the general surface mining performance standards at 25 Pa. Code §§87.101(a) and (b) require that:

(a) Surface mining activities shall be planned and conducted to prevent to the maximum extent possible the disturbances to the prevailing hydrologic balance in the permit and adjacent areas.

(b) Changes in water quality and quantity, the depth to groundwater, and the location of surface water drainage channels shall be minimized so that the approved postmining landuse of the permit area is not adversely affected.

and the requirements of 25 Pa. Code §87.115(a) mandate that:

Surface mining activities, except for coal processing waste and underground development waste disposal areas and fills, shall be conducted to restore the recharge capacity of the area of the operation to approximate premining conditions.

For the same reasons we concluded that 25 Pa. Code §86.102(12) may not have been complied with, we must reach a similar result with 25 Pa. Code §§87.101(a), 87.101(b), and 87.115(a). The character of Campbell Run may be irreversibly altered by Al Hamilton's mining plan from a perennial stream to an intermittent stream, thereby resulting in a different type of aquatic community. This, in turn, is contrary to 25 Pa. Code §87.138(a)(1) which requires mining activities to "Prevent disturbances and adverse impacts...on fish...and related environmental values, and achieve enhancement of such resources when practicable." Our assessment of the evidence presented, when evaluated in the context of these regulations, demonstrates that the Fish Commission has a reasonable probability of success on the merits.

Having determined that the Fish Commission satisfied the three criteria of 25 Pa. Code §21.78, the following order is entered.

**O R D E R**

AND NOW, this 23rd day of May, 1988, it is ordered that Board's order of March 23, 1987, imposing a supersedeas in this matter is affirmed.

**ENVIRONMENTAL HEARING BOARD**

*Maxine Woelfling*  
**MAXINE WOELFLING, CHAIRMAN**

**DATED:** May 23, 1989

**cc: Bureau of Litigation**  
Harrisburg, PA  
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Central Region  
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Clearfield, PA  
**For Permittee:**  
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M. DIANE SMITH  
 SECRETARY TO THE BOARD

**CLEARFIELD MUNICIPAL AUTHORITY** :  
 :  
 v. : **EHB Docket No. 83-137-W**  
 :  
**COMMONWEALTH OF PENNSYLVANIA** :  
**DEPARTMENT OF ENVIRONMENTAL RESOURCES** :  
 :  
 and :  
 :  
**E. M. BROWN, INC., Permittee** : **Issued: June 1, 1989**

**OPINION AND ORDER SUR MOTION TO DISMISS,  
 MOTION TO STRIKE A SUPPLEMENTAL PRE-HEARING  
 MEMORANDUM, MOTION FOR RECONSIDERATION  
 AND MOTION FOR SUMMARY JUDGMENT**

Synopsis

A motion to dismiss made after the presentation of an appellant's case-in-chief will be granted where appellant has failed to present evidence sufficient to sustain its burden of proof. A motion to strike a supplemental pre-hearing memorandum will be denied where issues raised in the supplemental memorandum are related to issues raised in the original pre-hearing memorandum. A motion for reconsideration of a denial of supersedeas will be denied where it is determined that a surface mining permit adequately dealt with air pollution control issues related to the mine and a separate air pollution control permit was not required.

**OPINION**

This matter was initiated with the filing of two appeals by the Clearfield Municipal Authority (Authority) challenging the issuance by the

Department of Environmental Resources (Department) of surface mining permits for a 59 acre surface mine in Pike Township, Clearfield County, to E. M. Brown, Inc. (Brown). The first appeal, filed July 15, 1983, challenged the issuance of Surface Mining Permit No. 17810140 and was docketed at Docket No. 83-137-M. The second appeal, filed on December 14, 1984, challenged the issuance of a surface mining primacy permit for the same site and was docketed at Docket No. 84-420-M. On January 10, 1985, the Authority filed a motion to consolidate the two appeals, and this Board, by order dated January 18, 1985, consolidated the two appeals at Docket No. 83-137-M.

The factual background is taken from the pre-hearing memoranda filed by the parties.

The Authority is a body politic and corporate, created under the Municipality Authorities Act of 1945, the Act of May 2, 1945, P.L. 392, as amended, 53 P.S. §301 *et seq.*, to acquire, hold, construct, improve, maintain, operate, own, and lease water works and water distribution systems to the Borough of Clearfield and other territories. The Authority owns and operates the Montgomery Reservoir, its primary source of drinking water, which is located on Montgomery Creek in Pike Township. The watershed in which the Montgomery Reservoir is located is adjacent to the watershed in which the mine site is located. The mine site is approximately one-half mile northeast of the Montgomery Reservoir.

The Authority, in its pre-hearing memorandum, asserted that E. M. Brown's proposed mining operations will result in pollution of the Montgomery Reservoir as a result of the production of acid mine drainage and that the acid-base accounting overburden analysis data used by E. M. Brown and the Department to evaluate the potential for the formation of acid mine drainage at the site was unrepresentative and unreliable. Further, the Authority

contended that the blasting plan for the site failed to adequately protect the reservoir.

In its pre-hearing memorandum, Brown alleged that surface water from the site drains into the valley and discharges into an unnamed tributary which empties into Montgomery Creek, approximately 3500 feet southeast and downstream from the breastwork of the Authority's reservoir. Brown asserts there will be no discharge of surface water or groundwater from the mine site to the reservoir and that groundwater will flow towards the southeast, down structural dip and away from the reservoir's tributary watershed. Also, Brown contended that the special overburden handling techniques outlined in Special Condition 54 of the permit would prevent production of acidmine drainage on the site. Lastly, Brown defended that its blasting plan would not cause or threaten damage to the breastwork of the Authority's reservoir or cause fractures in coal seams underlying the Clarion coal to be mined.

A hearing on the merits of the appeal was conducted by former Board Member Anthony J. Mazullo on February 4-7, 1985. At the conclusion of the Authority's case, Brown orally moved that the appeal be dismissed on the grounds that the Authority had failed to produce any expert testimony that its reservoir was in any way endangered by blasting or water pollution as a result of Brown's proposed mining activities, and, secondly, that the Authority lacked standing to pursue its claim. Member Mazullo deferred ruling on the motion to dismiss at the hearing. Subsequently, on June 12, 1985, Brown filed a brief in support of its motion to dismiss, arguing that the Authority lacked standing to pursue its claim that a separate air quality permit was required because the Authority has no direct or immediate interest in pursuing this claim, and, that, even if the Authority had standing, it had waived this issue by not raising it in its initial pre-hearing memorandum.

During the hearing, on February 4, 1985, the Authority filed a petition for supersedeas seeking an order suspending the reissued surface mining permit pending a decision on the merits of the Authority's appeal. Member Mazullo orally denied the petition for supersedeas at the conclusion of the Authority's case-in-chief on the grounds that the Authority failed to demonstrate irreparable harm from issuance of the permit.

On February 27, 1985, the Authority filed a motion for reconsideration of the denial of supersedeas based solely on the fact that the Department issued the permit without requiring Brown to obtain a separate air quality permit. The Authority maintained this was a clear violation of law under the holding in Mignatti Construction Co., Inc. v. EHB, 49 Pa.Cmwlth 497, 411 A.2d 860 (1980), and constituted sufficient injury to justify grant of a supersedeas.

On April 8, 1985, Brown filed a response opposing the Authority's motion for reconsideration of the supersedeas denial, alleging that the Department satisfied the requirements of the Mignatti holding and that the Authority failed to demonstrate it was entitled to a supersedeas because it did not establish that it would suffer irreparable harm.

On May 3, 1985, Former Board Member Mazullo issued an order granting the Authority's request for reconsideration and reopening the record to take testimony on issues raised in the motion for reconsideration of denial of supersedeas.<sup>1</sup>

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<sup>1</sup> Member Mazullo's order was not accompanied by any explanation of his reasoning for granting reconsideration. As the grant or denial of supersedeas is an interlocutory order, exceptional circumstances must be present to justify reconsideration, Magnum Minerals v. DER, 1983 EHB 589. We find no such circumstances here, but will proceed to dispose of the issues raised in the motion for reconsideration on the merits.

On May 17, 1985, the Authority filed a third supplemental pre-hearing memorandum addressing air pollution control issues.

On July 2, 1985, the Authority filed its brief in opposition to Brown's oral motion to dismiss, maintaining that the evidence at the hearing on the merits established that the Department's issuance of the permit was arbitrary, capricious, and an abuse of discretion because of the lack of minimal protection for the dam and the likelihood of acid mine discharges from the E. M. Brown site.

On July 1, 1985, the Department joined in E. M. Brown's motion to dismiss the appeal for the reasons stated in Brown's brief in support of its motion to dismiss.

On June 30, 1986, the Authority filed a motion for summary judgment, contending that the Department had committed an abuse of discretion by not requiring E. M. Brown to obtain a new source permit under the Air Pollution Control Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 *et seq.* (APCA). E. M. Brown's obligation to reply to that motion was stayed pending the Board's disposition of the motion to dismiss.

We will attempt to untangle this procedural morass by first addressing E. M. Brown's motion to dismiss.<sup>2</sup> The Pennsylvania Rules of Civil Procedure provide for compulsory nonsuit to be entered at the end of plaintiff's case, upon defendant's motion, because of plaintiff's failure to prove a *prima facie* case. The courts have limited nonsuits to clear cases of insufficiency of the plaintiff's case as a matter of law. Goodrich Amram 2d. §231(b)(3). Whether E. M. Brown's motion is treated as a motion to dismiss or

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<sup>2</sup> Although the hearing was conducted by former Member Mazullo, the Board has the authority to dispose of this appeal on the basis of the record made before Mr. Mazullo. Lucky Strike Coal Co. and Louis J. Beltrami v. DER, \_\_\_ Pa.Cmwlth \_\_\_, 546 A.2d 447 (1988).

a motion for compulsory nonsuit, Member Mazullo had no authority to grant such a motion, since any motion which would finally dispose of an appeal must be granted by the Board as a whole. 25 Pa.Code §21.86(a).

The Authority, as a third party appellant from the issuance of a permit, has the burden of proof in this case. 25 Pa.Code §21.101(c)(3). To sustain its burden, the Authority must show that the Department acted contrary to law or abused its discretion in issuing the permit. Warren Sand and Gravel Co., Inc. v. DER, 20 Pa.Cmwlth 186, 341 A.2d 556 (1975); Snyder Township Residents for Adequate Water Supplies v. DER, 1988 EHB 1202. In disposing of E. M. Brown's motion to dismiss at the close of the Authority's case-in-chief, we will examine the testimony relating to the hydrogeologic connection between the reservoir and the E. M. Brown mine and the evidence relating to the propensity of the site to produce acid mine drainage.

#### Hydrogeological Connection

The Authority introduced the testimony of Dr. Richard Parizek, an expert in hydrogeology (N.T. 469). Dr. Parizek addressed the threat of altering water quality in the Montgomery reservoir as a result of the proposed mining activities. He also explained his method of test drilling around the site in order to establish the sequence of rocks, verify the groundwater divide separating the mine site and the reservoir, and establish piezometric surface configurations for the water yielding rocks at depth (N.T. 478) to determine the direction of groundwater flow and determine whether there was a connection between the reservoir and mine site at depth (N.T. 479). Dr. Parizek explained that a groundwater divide is

a high point on a water table, which is the first saturated interval you come to in rock or soil materials. It is a line that sort of separates the direction in which groundwater can flow on either side of that divide. Water may move to the right

of the divide or to the left of the divide or may move downward vertically along the divide.

(N.T. 505).

Of the three test wells Dr. Parizek attempted to drill, only two could be set at depths below the Intermediate Sandstone. No measuring point at Test Hole 3 in the Intermediate Sandstone strata could be obtained (N.T. 509). Dr. Parizek concluded the direction of groundwater flow to be from the mine site toward the vicinity of the reservoir in the Upper Member of the Basal Sandstone (N.T. 529) and the Lower Member of the Basal Sandstone (N.T. 532). Dr. Parizek stated the location of the groundwater divide to be to the right, or easterly, of Test Hole 1 on Exhibit A-2(b) (N.T. 530-531).

Dr. Parizek concluded that groundwater would flow in a north and northwest direction toward the reservoir (N.T. 605, 607), despite the fact that he was unable to measure the Intermediate Sandstone in Municipal Authority Well 3 (N.T. 594) and the E. M. Brown wells did not penetrate the Upper Sandstone Member (N.T. 594) or the Lower Member of the Basal Sandstone (N.T. 608). He further concluded the risk of a vertical connection and downward leakage is a very high probability (N.T. 629), adding that additional hydraulic head data would be necessary to eliminate the risk of a vertical connection.

In an attempt to explain his references to deep groundwater flows (N.T. 663-664), Dr. Parizek explained,

As the water moves deeper into the hill, it is getting into a flow regime that is moving on a much more regional scale. And some of that water, as I testified, can go from the Intermediate Sandstone from Well 1 toward Well 2, as well as from 1 toward 2 toward 3, when we get into the lower sandstones on a number of occasions. That is a deeper route through which mine waters might move toward the reservoir, under the surface divide and under the shallow

groundwater divide defined by the shallow groundwater mound that has been identified as being present on the hill. The flow is coming out in the unnamed tributary on the west bank of it and the east bank of it. Those can be shallow discharges coming down the dip of the beds, as identified by Mr. Riggins and as supported by the new monitoring data that was taken as part of my study and some of the data that was recorded by Dr. Earl. That is a shallower system.

It is true that the waters that come out of it make the springs and the seeps and some of the mine impacted waters that have already been measured down along the unnamed tributary.

It is not known if those waters now enter and attempt to move downward still further into lower sandstone rock units and, therefore, might move back toward the reservoir by a funny route--eastward, southeastward, downdip, downward into the rocks beneath the valley and back underneath the hill back toward the reservoir. That is not an out-of-the-realm possibility and probability, based on the information shown in these two exhibits. That is exactly what was happening there. No one suspected those kind of flows in Mons Run and Dinges Run prior to the time that kind of work was done.

So, there is a relevance here in showing that surprises of the subsurface aren't surprises. Water will move in the direction of the hydraulic heads that dictate which way that water will go and will move through rock layers, both confining in nature as well as acting as aquifers, providing that water is not impeded by a groundwater divide or some other geological feature that precludes water movement in that area.

(N.T. 667-668)  
(emphasis added)

At this point in Dr. Parizek's testimony, Member Mazullo questioned his earlier testimony that there was a groundwater divide somewhere to the east of the Authority's Well No. 1 (N.T. 667-668). Dr. Parizek replied that, in light of the piezometric head data in Municipal Authority Well No. 1, the divide would have to be east of Well No. 1, but there was no data to confirm

how far east. He noted that the location is relevant to the question of whether or not mine waters on the site may be free to move downward under the gradients that could exist in that area entering the deep sandstone, mentioning also the mechanism of backflow which, if not explored or understood, could create a water quality problem in the reservoir (N.T. 669-670).

Member Mazullo interjected here, stating that he failed to recall sufficient data to scientifically support certain expert conclusions by Dr. Parizek. Specifically, Member Mazullo questioned the fact that Dr. Parizek had steadfastly held there is a divide somewhere there, remarking, "If that divide is on the west side of that unnamed tributary, what you say could happen can't happen because the divide is there" (N.T. 670).

Dr. Parizek acknowledged this was correct and so long as the divide in each strata was present all through time, then any waters falling to the right of the divide would find another way out, not to the reservoir watershed but through some other discharge route, possibly directly to the south.

The discussion continued among Member Mazullo, Ms. Coulson, counsel for the Authority, and Dr. Parizek, as follows:

**Hearing Examiner Mazullo:** And because of that possibility and because of the inability to locate it and the data present, it would seem to me that you are precluded, based on the objection made by counsel, from rendering an opinion that the reservoir could be affected by backflow through the sandstone area because we don't know whether or not that in fact could happen, and we don't have any information. What we would be doing would be speculating. It is brought into the realm of speculation. At least it seems that way to me.

**Ms. Coulson:** Your Honor, you put your finger on another problem that we have with lack of information as well.

Dr. Parizek has documented flows toward the reservoir in the Upper and Lower Basal Sandstone Units which he refers to as the deeper flows from CMA-1 out to the reservoir. The problem is: Is there a groundwater divide between the mine site and CMA-1? I think Dr. Parizek's point is that based on the data we have, he cannot say conclusively that it is between the mine site and the reservoir but if it is on the other side of the mine, then mine drainage will move to the reservoir.

The reason we don't have the data on that is because Brown didn't drill their wells deep enough to allow us to collect the data to make that determination.

If they had drilled EMB-1 into the Basal Unit --and EMB-1 is located on the mine site in the area to be mined--we would have had the information that would have told us if the divide was between the mine and the reservoir. They didn't do that, so we don't have that data.

Our feeling is, Your Honor, that based on the data that we have collected, it indicates that there is a deep flow to the reservoir and that we have established that there is a potential problem here and at some point the burden has got to shift back to the Permittee or to the Department to obtain the data to show that it isn't a problem.

The Authority can't be expected to drill fifty holes to protect the reservoir. We have demonstrated, we have provided enough evidence to show that based on what Dr. Parizek has reviewed, there are horizontal flows in the deep sandstones that lead from CMA-1 toward the reservoir and those same flows may start underneath the mine site. We don't have any information that indicates that the divide would preclude flows from the mine to the area of CMA-1 and from there to the reservoir.

**BY HEARING EXAMINER MAZULLO:**

Q Dr. Parizek, isn't the gradient in the Basal Sandstone to the east, according to A-2(d)?

A A-2(b)?

Q (d)?

A A-2(d) has no broad level directions indicated on either the vertical or horizontal. It identifies units of rock and shows the piezometer settings.

A-2(b), on the other hand, shows flow in the deeper sandstones on February 12 to be from Well 1 toward 2 and 3, or toward the west.

Q What are the lines that are present on (b) between Wells 1 and 2? What do they represent?

A They are matches between packages or sequences of rock which could be identified in Well 1 as being also present in Well 2 in that common interval, and they have these labels of Intermediate Sandstone, or Basal Sandstone, or Upper Member, or Lower Member.

So, it is a sequence of rocks that can be...

Q So, it represents thicknesses only.

A Thickness and continuousness of that layer, in my opinion, between the three drill holes.

Q It has nothing to do with gradient?

A It does not show the gradient of water flow, no. They are not water level gradients. That information would come out of the piezometer values, piezometric head values that were recorded in the other figures.

**Hearing Examiner Mazullo:** Well, we will accept the doctor's statement, but the weight to which we would attach that conclusion would be a matter of resting with the Board.

I can tell you that based on what we have, although I appreciate the Authority's concerns, by reason of the admission that there is a divide somewhere there, it has to make it less than what we would perhaps accept from other conclusions reached by the doctor.

(N.T. 671-674)

On cross-examination, Dr. Parizek was questioned again on his conclusions regarding a vertical connection and asked whether for the flow to con-

tinue into the Basal Sandstone, a piezometer reading of less than 1485 would have to exist in the Upper Member of the Basal Sandstone (N.T. 809). Counsel's cross examination proceeded as follows:

Q For the flow to continue into the Basal Sandstone, am I correct that you would have to have a piezometer reading of less than 1485 roughly, which appears to be the average of those readings along the bottom of Table 2?

A It would have to have an elevation lower than the last elevation shown in the piezometer 153 setting.

(N.T. 809)

A Well, the piezometric surface level that you would measure would have to be lower in the next piezometer.

Q Something less than 1485 before the vertical connection would actually be established in EMB-2, is that correct?

A That is correct.

Q In the Upper Member of the Basal Sandstone?

A Right.

(N.T. 810)

Dr. Parizek testified as to his predictions of piezometric surface contours based on data gathered in Authority Wells 1, 2, and 3 (N.T. 810). While looking at Figure 4, counsel for Brown noted that EMB-2 is predicted to have a piezometric surface in the Upper Member of Basal Sandstone of 1585 and noted it would be impossible to have a vertical connection to the Upper Member because the level immediately above has a consistently lower piezometric surface elevation (N.T. 811).

Again, later, counsel referred to Figure 4 and noted the prediction of a piezometric surface at EMB-1 in excess of 1590. Dr. Parizek responded:

A In order to have the gradient persist to the

west, to have the divide located to the right, you would have a level that would be in the vicinity higher than the 1580, it might be 1590, it might be 1581. As long as it is higher than 1580 then you still could have a westerly flow. I show a line 1590 without any measurement except what was taken at CMA-1. So, the position of that contour line can only be drawn. It is inferred to be there. I drew it in.

(N.T. 813)

At this point, Member Mazullo began to question Dr. Parizek on his figures in the following discourse:

**Hearing Examiner Mazullo:** Wouldn't it have to be in excess of 1590 in order for you to be consistent that the deep water divide is significantly to the east of the site?

**Witness:** The 1590 line could be anywhere to the east as long as it was higher than the 1580 line. The 1590 line might be 100 feet to the east, it might be 1,000 feet to the east or some considerable distance greater than that to the east. You still would have, according to this interpretation, gradient to the west or northwest.

**Hearing Examiner Mazullo:** Think back and listen to my question. In order for your testimony to be consistent with regard to the placement of the deep water divide significantly east of the initial phase of mining, doesn't EMB-1 have to be at a potential level in excess of 1590? Yes or no?

A No. It would be higher than 1580.84.

**BY HEARING EXAMINER MAZULLO:**

Q You show 1590 west of EMB-1.

A Yes, and if that 1590 line is in fact correct --

Q Wait a second. Let's go back then. Are those representations you give us representations that you want to Board to rely on -- yes or no?

A Yes.

Q Is 1590 and 1580 approximately correct?

A The 1580 I can feel more secure about than 1590.

Q Then do we disregard 1590 and we don't know what is there? And could there be a divide between 1580 and EMB-1? That is the basis of your testimony and I want to know since the question has already been asked which brings us to that point of where we are. If you are telling me you don't know that is one thing, but your testimony has been consistent throughout all the time you have been on the stand that the line is significantly east of the beginning active mining area. So, either 1590 is between Authority Well 1 and EMB-1 or there is a divide there, according to your testimony now, as I recall it.

A The line that I drew is based on the three measurement points that were available.

Q Then it is there. 1590 is there then?

A In the absence of any other measurement points to the east, the exact placement of the 1590 line is subject to some degree of uncertainty. The position of the 1580 line is at least bounded by Municipal Authority Well 1 and 2 data, and 3 data, which it limits the location of where it might be located.

Q You also have 1580.88, do you not?

A I have 1580.84. That was used to establish the 1580 line and then it says 1590 would have to be to the right of it. I have spaced it about the same spacing as all the other lines in the absence of any other information. As I drew it, it is my best interpretation given those three measurement points.

Q What is your best interpretation of the piezometric potential value for EMB-1?

A EMB-1, by this map would have to be in the vicinity of 1590 or higher.

(N.T. 813-816)  
(emphasis added)

Again, viewing Figure 4, Dr. Parizek admitted that under those piezometric yields there could not be a vertical connection between the unnamed tributary and the Basal Sandstone (N.T. 818).

At the conclusion of the cross examination of Dr. Parizek, Brown moved to strike Dr. Parizek's direct testimony insofar as it was offered to show a hydrogeologic connection between the mine site and the reservoir on the grounds that the testimony was inherently inconsistent, in that to find the existence of the connection, one would have to reject Dr. Parizek's prior testimony concerning the direction of horizontal flow (N.T. 832-833). Counsel for the Authority presented no redirect testimony of Dr. Parizek and chose not to oppose the motion to strike his testimony (N.T. 834). Member Mazullo granted the motion.

We confirm Member Mazullo's ruling and strike this testimony. Accordingly, we must rule that the Authority failed to sustain its burden of proof on the issue of a hydrogeologic connection between the reservoir and the E. M. Brown site and grant E. M. Brown's motion to dismiss the appeal on this issue.

### **Acid Mine Drainage**

The Authority introduced the testimony of Roger Hornberger and Joseph Lee, both Department hydrogeologists, and Dr. Harold Lovell, a professor of mineral engineering specializing in acid mine drainage, to support its contention that the site would produce acid mine drainage.

The Authority questioned Hornberger generally about the review he performed of the site and specifically about black shale, sulfur contents and alkalinity potentials in the overburden. Hornberger explained that the Department policy on overburden analysis required the inclusion of coal and underclay values in the acid-base accounting in most cases, but it did allow

for some case-by-case discretion in circumstances where the applicant demonstrates it is unable to collect the sample, as here (N.T. 175, 186-187). Hornberger testified that he recommended coal values and underclay samples be collected after mining began and there had been some addition of lime on the site. Permit Condition No. 54 required an analysis of only the Clarion underclay, not the coal. Hornberger explained that the purpose of the fence diagrams or stratigraphic cross sections included in the application was to correlate overburden strata both lithologically and chemically (N.T. 197). Although the diagram in the application materials had been prepared by Mr. Lee, and not the applicant, Hornberger suggested it was sufficient, remarking,

I don't recall going back and wondering whether there should have been more cross-sections drawn by the applicant or whatever. This cross-section as part of Joe's report served to help correlate the strata and look at the chemical and lithologic variations.

(N.T. 198)

Hornberger explained that the permit was conditioned upon the addition of alkaline material during mining and reclamation because none of the strata had neutralization potentials high enough to be alkaline producers, there was a lack of samples of the underclay and coal because of drilling problems (N.T. 202), and problems could occur with either the rider coals or black shale units (N.T. 205). Hornberger opined that low neutralization potentials sometimes require the submission of leachate analysis as part of the overburden evaluation procedure, but leachate analysis was not specifically required by the Department at the time of E. M. Brown's application (N.T. 221). Hornberger repeatedly characterized the lime addition technique as "somewhat experimental and unproven," explaining:-

I think that more needs to be known before it is explicitly proven exactly how much alkaline mater-

ial you need to add, much like a prescription. I think we see that mechanism naturally occurring in areas where calciferous materials exist on jobs and we also see it in research studies done by Dr. Parizek and others where alkaline has been applied to the surface and have resulted in the reduction of acid mine drainage. So, it is not something that is completely unproven and experimental, but we do feel that it needs more experimentation, more refinement, before it can be taken as a more or less routine prescription.

(N.T. 224)

Next, the Authority called Joseph Lee to testify on the geology review performed on the permit application. Lee explained that although there is a lack of correlation of overburden analysis test holes due to the different logging techniques employed by the driller and Brown's geologist, inferences can be drawn analyzing both sets of data (N.T. 320, 321). Lee stated he requested additional drill hole information (N.T. 325). He ensured the accuracy of the drill holes by having holes he drilled and overburden analysis holes redrilled and logged by a geologist (N.T. 338). Here, Lee was willing to rely on the two overburden analyses and the drill logs with certain limitations he recognized based on his knowlege of these different techniques at the time of his review (N.T. 326). When questioned regarding his procedure of not verifying the location of the re-drill test holes, Lee responded that he has to accept the information submitted by the Appellant until there is reason to believe it is inaccurate (N.T. 327). Lee indicated that although he was concerned about the absence of clay in the original test holes, there were other indications of a clay (N.T. 331) and he refused to characterize this test data as being evidence of a stratigraphic variability (N.T. 335). Lee explained that the Department required test hole strata information only for those test holes marked on the property map and this requirement was met (N.T. 344). Lee testified that he had considered the effects of acid mine drainage

resulting from other mining along these same coal seams (N.T. 372-376) and that he had noted this in his review memorandum and it prompted the return of the overburden analysis by the applicant (N.T. 377). Finally, Lee said the Department accepted Brown's explanation that it was not possible to sample the Clarion coal and underclay, since the coal was not recovered during drilling (N.T. 389-390). The lack of this test data prompted the proposal for an application of 20 tons of lime per 1000 tons mined in the pit (N.T. 391) and Hornberger noted that it was quite possible that further analysis of the coal and underclay would be needed and that a modification of the liming rate could be necessary as a result of these analyses (N.T. 393).

Lee also addressed the issue of the Department's reliance on the Smith/Sobek technique of overburden analysis and Brown's use of an air rotary drilling rig to obtain representative sampling. Lee testified that it is common practice in overburden analysis to use an air rotary drill (N.T. 397). Lee acknowledged he made no inquiry as to the specific manner in which E. M. Brown collected any of the samples for the overburden analysis (N.T. 396), but noted he was aware of the method employed and remarked that the use of an air rotary drill did not mean that an unrepresentative sample would be produced (N.T. 398).

Finally, the Authority introduced the testimony of Dr. Harold Lovell. At the close of his testimony, Dr. Lovell was asked whether, based on his review of all the information, his background and professional experience, he had formed an opinion to a reasonable degree of scientific certainty regarding the acid producing potential of this site (N.T. 905-906). Dr. Lovell replied:

It is my opinion that the acid forming potential of the site, of the proposed mining site, based upon the data made available to me in the permit and other data submitted as Exhibits, that the acid forming potential is relatively low. For reasons I have ex-

plained, however, I believe that the uncertainty in whether large levels of acid or high concentrations of acid would form, I believe the uncertainty of this propensity is very high.

(emphasis added)

Thus, Dr. Lovell opined that there was a low risk of acid mine drainage. Both Hornberger and Lee expressed their satisfaction with permit conditions and felt that adequate safeguards in combination with the low risk of acid mine drainage justified the permit issuance.

The burden of showing that the permit issuance was an abuse of discretion falls on the Authority. 25 Pa.Code §21.101(c)(1). The Authority has not proved that Brown failed to demonstrate that there was no presumptive evidence of potential pollution to waters of the Commonwealth in accordance with 25 Pa.Code §86.37(a)(3). The Authority has not, by its evidence, convinced this Board that its assertion that pollution will occur from mining activities outweighs the evidence that pollution will not occur. Magnum Minerals v. DER, 1988 EHB 867. Furthermore, there has been no evidence introduced by the Authority establishing a hydrogeological connection between its reservoir and Brown's site, even if the threat of acid mine drainage had been more concretely established.

### Blasting

In its challenge to E. M. Brown's proposed blasting plan, the Authority called Theodore Williams, the Department's blasting inspector, as a witness to testify regarding his review of the plan. The Authority, in its brief in opposition to the motion to dismiss, referred to Williams' statement that the Department failed to incorporate a necessary protective measure, requiring monitoring of test blasts by seismograph (N.T. 457-458). Further, the Authority noted that the Department did not deny the permit or conduct an

investigation when Brown failed to comply with requests to submit an engineering study of vibration limits at the reservoir (N.T. 451-457) When asked, "In view of your experience, did you consider it unimportant that Brown submit engineering studies to determine what vibrations the dam, by reason of its condition at the time, could withstand should be submitted?" (N.T. 460), Williams responded, "I didn't think so, no" and then, "Not to my experience with the amount of work we are doing, using a seismograph at that distance from that blast, it is very likely it wouldn't trigger the seismograph" (N.T. 460). This evidence is hardly the sort required to satisfy the Authority's burden of proof on this issue, and we must grant E. M. Brown's motion to dismiss on this issue.

#### Air Pollution Control Issues

Finally, we must dispose of the issues raised in Brown's motion to dismiss and the Authority's motion for reconsideration of the supersedeas denial; namely, standing, and the air pollution control plan and permit procedures. Before we can address these issues on the merits, we must first establish that the Authority has standing to raise the issue and has not waived the right to do so by failing to raise the issue in its original pre-hearing memorandum.

In Brown's brief in support of its motion to dismiss the appeal, Brown contends that the Authority lacks standing to pursue its claim that the procedure followed in this case violated the Mignatti holding because it has no direct interest and has made no allegation that it will be harmed by air pollution emanating from Brown's site.

In its brief in opposition to the motion to dismiss, the Authority argues that it has standing to raise the Mignatti issue, citing §1396.4(b) of

the SMCRA, which defines the test for standing as "any person having an interest which is or may be adversely affected by any action of the Department." As an adjacent property owner, the Authority avers it "is or may be affected" by the permit since the permit contains a condition expressly requiring protection for the reservoir from blasting activities. The Authority also contended that once a party has standing, that party should be able to challenge the validity of that action on any basis, not only on those grounds directly affecting the challenging party. The test for standing under The Wm. Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975), is explained as follows:

The core concept, of course, is that a person who is not adversely affected in any way by the matter he seeks to challenge is not "aggrieved" thereby and has no standing to obtain a judicial resolution of his challenge. In particular, it is not sufficient for the person claiming to be "aggrieved" to assert the common interest of all citizens in procuring obedience to the law. 464 Pa. at 192, 346 A.2d at 280.

Although the Authority failed to specifically address the threat of air pollution harm to its reservoir, it is conceivable that blasting on the site could create dust which might eventually affect the water system. The Board has held in the past that a threat that could have an effect suffices to establish a direct, immediate and substantial interest in the permit issuance. Harlan J. Snyder v. DER, 1988 EHB 1084. And, since the SMCRA requires compliance with the APCA, including the air quality review provisions of 25 Pa.Code, Chapter 127, the Authority can properly raise the Department's compliance with the APCA in its appeal from the surface mining permit.

The Authority's original pre-hearing memorandum raised legal contentions relating only to blasting and the water pollution control issues.

In its supplemental pre-hearing memorandum, the Authority asserted that issuance of the surface mining permit without a separate air quality permit was a violation of the SMCRA, as well as Article I, § 27 of the Constitution of the Commonwealth of Pennsylvania.

In its third supplemental pre-hearing memorandum, the Authority raised new factual issues asserting the air pollution control plan's fugitive dust control measures did not meet best available technology and that the plan did not meet permitting requirements for new air contamination sources. Up to this point, the Authority had not challenged the adequacy of the air pollution control plan or its technology and it was prevented from raising this new issue at hearing (N.T. 368). Member Mazullo then limited the questioning at the hearing to the legal issue of whether a separate review by the Bureau of Air Quality Control or issuance of a separate permit under the APCA was required (N.T. 360, 368), and correspondingly, whether the first prong of the Payne v. Kassab, 11 Pa.Cmwlth 14, 312 A.2d 86 (1973), aff'd 468 Pa. 226, 361 A.2d 263 (1976), test requiring proof of compliance with all applicable statutes and regulations was met (N.T. 358).

At the hearing, the Authority raised the air pollution control issue during its examination of Joseph Lee, who testified that a separate air pollution control permit was not issued. The Authority asserted on the record that this failure to issue a separate air quality permit was contrary to law according to the Mignatti case (N.T. 353). Member Mazullo concluded that the only issue relating to air pollution which could be considered was whether under the Mignatti holding a separate air pollution control permit must be issued (N.T. 327).

Member Mazullo apparently reconsidered his earlier ruling on this issue, but we see no reason to disturb the ruling made at hearing. Brown

filed a motion to strike the Authority's third supplemental pre-hearing memorandum, arguing the issues raised therein were beyond the scope of those raised in the motion for reconsideration, were waived by counsel at the hearing, and should be barred since they were not raised in the original pre-hearing memorandum. Since the issues were limited at the hearing on the merits, and for the reasons that follow, we need not dispose of this motion.<sup>3</sup>

Our examination of the relevant statutes, regulations, and precedent leads us to the conclusion that a separate document entitled "air quality permit" is not required and that the Department's practice in issuing a single permit under the authority of several applicable statutes after a review of the applicant's compliance with those requirements, is not an abuse of discretion.

Section 4 of SMCRA provides expressly for compliance with certain other statutes, including the APCA, as follows:

H. The application shall also set forth the manner in which the operator plans to comply with the requirements of the act of January 8, 1960 (1959 P.L. 2119, No. 787), known as the "Air Pollution Control Act," the act of June 22, 1937 (P.L. 1987, No. 394)... No approval shall be granted unless the plan provides for compliance with the statutes hereinabove enumerated.

52 P.S. §1396.4(a)(2)(H)

The surface mining regulations relating to permitting specifically address air pollution control issues:

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<sup>3</sup> In not deciding this motion, we do not condone the practice of filing numerous "supplemental" pre-hearing memoranda. Such filings cloud issues, protract litigation, and are unfair. Furthermore, they contribute to procedural morasses such as the one now before us.

**25 Pa.Code §87.66. Air pollution control plan.**

The description shall include an air pollution control plan which includes the following:

(1) A plan for fugitive dust control practices, as required under §87.137 (relating to air resources protection), and if applicable, how the requirements of Chapter 123 (relating to standards for contaminants) and Chapter 127 (relating to construction, modification, reactivation, and operation of sources) will be met.

(2) If required by the Department, an air quality control monitoring program to provide sufficient data to evaluate the effectiveness of the air pollution control plan.

and

**25 Pa.Code §87.137. Air resources protection.**

Air pollution control measures shall be planned and employed as an integral part of the surface mining activities and shall meet the following requirements:

(1) If processing facilities are to be used at the mining site, the facilities shall meet the requirements of Chapter 123 (relating to standards for contaminants) and Chapter 127 (relating to construction, modification, reactivation and operation of sources).

(2) Fugitive dust control measures shall demonstrate compliance with Chapter 121 (relating to general provisions), Chapter 123 (relating to standards for contaminants), Chapter 127 (relating to construction, modification, reactivation and operation of sources), and Chapter 129 (relating to standards for sources).

Clearly, these regulations incorporate requirements under the APCA and provide for a thorough review of any air pollution considerations relating to surface mining activity. We find these provisions to be consistent with the requirement found in §4006.1(a) of the APCA that

On or after July 1, 1972, no person shall construct, assemble, install or modify any stationary

air contamination source, or install thereon any air pollution control equipment or device or reactivate any air contamination source after said source has been out of operation or production for a period of one year or more unless such person has applied for and received from the department written approval so to do.

We find nothing in either statute or the regulations that compels the conclusion that separate permits are required in these instances. As for the Authority's contention that the Mignatti case held that a separate air quality permit was required prior to the operation of a stone quarry, that case arose prior to the 1980 amendments to SMCRA when the statute made no reference to air pollution control requirements.

Because a separate permit is not required, any reconsideration of the denial of supersedeas on this basis is unwarranted, and we deny the Authority's motion. Similarly, without input from E. M. Brown, we deny the Authority's motion for summary judgment on this issue. E. M. Brown has also moved to dismiss this appeal as it relates to the issue of a separate air quality permit and having affirmed Member Mazullo's ruling that the only air pollution issue which may be raised by the Authority is the necessity for a separate air quality permit and having determined that a separate permit is not required for surface mining operations, we grant E. M. Brown's motion to dismiss as it relates to this issue. Since we have already granted E. M. Brown's motion to dismiss on the issues of hydrogeologic connection, acid mine drainage, and blasting, we must now dismiss the Authority's appeal.

**ORDER**

AND NOW, this 1st day of June, 1989, it is ordered that:

1) Clearfield Municipal Authority's motion for reconsideration of the denial of supersedeas and motion for summary judgment are denied; and

2) E. M. Brown's motion to dismiss is granted and the appeal of the Clearfield Municipal Authority is dismissed.

**ENVIRONMENTAL HEARING BOARD**

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MAXINE WOELFLING, CHAIRMAN

*Robert D. Myers*  
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DATED: June 1, 1989

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 SECRETARY TO THE BOARD

CITY OF PHILADELPHIA

v.

COMMONWEALTH OF PENNSYLVANIA  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES

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EHB Docket No. 83-036-M

Issued: June 6, 1989

A D J U D I C A T I O N

By Robert D. Myers, Member

Syllabus

After receiving approval for a federal construction grant for the upgrading of its Southeast Wastewater Treatment Plant and after receiving construction bids, the City of Philadelphia sought and obtained permission to reevaluate the design of the plant. While this reevaluation was going on, but beyond the time allotted for it, the City allowed the lowest bids on two of the contracts for a compressor building to expire, because some of the alternatives being considered by the City eliminated the need for the building.

Later, after the City elected to reduce the capacity of the plant without changing the size of the compressor building, it awarded two of the contracts to the second lowest bidders at a total additional cost of \$762,196. Even though the redesigned plant resulted in lowering total costs by millions of dollars, the Department of Environmental Resources disallowed the additional costs on the compressor building.

The Board holds that a grant recipient has an obligation to keep costs as low as possible. If the recipient fails to make good faith efforts to do so, it may suffer the loss of additional costs directly related to the failure. Good faith efforts require positive conduct consistent with a genuine regard for saving public funds--not just in general, but in detail also. While the City acted responsibly in reevaluating the plant, its failure to act in time to preserve the lowest bids on the compressor building fell short of the good faith efforts required. The additional costs of \$762,196, being directly related to this failure, were properly disallowed.

#### Procedural History

The City of Philadelphia (Appellant), acting through its Water Department, filed a Notice of Appeal on February 14, 1983, contesting a December 8, 1982, decision of the Department of Environmental Resources (DER) refusing to reconsider its prior ruling that declared \$762,196 to be ineligible for consideration in a sewage treatment plant construction grant application with respect to Appellant's Southeast Wastewater Treatment Plant (Southeast Plant).<sup>1</sup> The case was assigned to the Honorable Anthony J. Mazullo, Jr., who was then a Member of the Board.

A hearing was held in Philadelphia on December 11, 1985, during which a stipulation with attached exhibits was presented to the Board along with the testimony of several witnesses. Appellant's post-hearing brief was filed February 7, 1986; DER's post-hearing brief was filed April 22, 1986; and Appellant's reply brief was filed September 8, 1986.

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<sup>1</sup> DER's decision was communicated to EPA. EPA informed Appellant by a letter dated January 13, 1983 and received by Appellant several days later. The filing of a Notice of Appeal on February 14, 1983, was, therefore, timely.

Mr. Mazullo, in the meantime, had resigned from the Board effective January 31, 1986, without having prepared an Adjudication. Ultimately, the case was assigned to Board Member Robert D. Myers to prepare an Adjudication based on the record made at the hearing on December 11, 1985, and the post-hearing briefs.<sup>2</sup> An examination of the file at that time revealed that the stipulation with attached exhibits presented at the hearing was missing. At the request of the Board, the parties submitted a duplicate copy on April 25, 1989. The record consists of the stipulation, 14 attached exhibits and a hearing transcript of 114 pages.

#### Findings of Fact

1. Appellant is the City of Philadelphia, a municipality of the Commonwealth of Pennsylvania.
2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible jointly with the U.S. Environmental Protection Agency (EPA) for administering the grant funding allocated to Pennsylvania pursuant to the Federal Clean Water Act (Clean Water Act), 33 U.S.C.A. §1251 et seq., and the regulations adopted pursuant to said statute (Stipulation par 2).
3. On April 18, 1979, Appellant applied for a grant under the Clean Water Act, supra, for the construction of wastewater treatment facilities at the Southeast Plant (Stipulation par. 1).
4. The purpose of the project was to upgrade the Southeast Plant from a primary treatment facility to a secondary treatment facility by the

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<sup>2</sup> The propriety of this procedure has been upheld in Lucky Strike Coal Co. and Louis J. Beltrami v. Commonwealth, Dept. of Environmental Resources, \_\_\_ Pa. Cmwlth. \_\_\_, 547 A.2d 447 (1988).

addition of aeration tanks, settling tanks and related equipment, piping and structures (N.T. 5).

5. Included in the project was a compressor building to house compressors used to generate oxygen for the aeration tanks (Stipulation par 1 and par 9; N.T. 5).

6. On September 27, 1979, Appellant was awarded a grant under the Clean Water Act to finance 75% of the cost of upgrading the Southeast Plant in accordance with approved plans providing for a minimum plant capacity of 100 million gallons per day (mgd) (Stipulation par 3).

7. The 100 mgd capacity was based upon the supposition that Appellant would implement a program to eliminate infiltration into the sewer lines. This infiltration, estimated to amount to 40 mgd, was believed to come, to a great extent, from water leaking from Appellant's water distribution mains which are installed in the same trench as the sewers in many sections of the municipality (N.T. 7-12).

8. According to EPA and DER procedures, Appellant was required to obtain DER approval of:

- (a) the final plans and specifications prior to bidding; and
- (b) the bidding procedures prior to awarding contracts

(Stipulation par 4 and par 5).

9. In 1980 and through the summer of 1981, Appellant proceeded with the final design of the facilities at the Southeast Plant. Since grant funding was not available to fix leaks in the water mains and since Appellant determined that it was more cost effective to handle the infiltration at the treatment facility than it was to fix the leaks in the sewers, the capacity of

the Southeast Plant was increased to 140 mgd. EPA and DER awarded Appellant a grant increase of approximately \$15 million on June 30, 1981, in recognition of the additional plant capacity (Stipulation par 6; N.T. 10-13).

10. EPA and DER approved the final plans and specifications, providing for a minimum plant capacity of 140 mgd, on August 4 and 12, 1981, respectively (Stipulation par 7).

11. On August 4, 1981, Appellant received construction bids for the upgrading of the Southeast Plant. Under the provisions of Section 2 of the Act of November 26, 1978, P.L. 1309, as amended, 73 P.S. §1622, construction bids had to be accepted and contracts awarded by Wednesday, December 2, 1981<sup>3</sup> (Stipulation par 8).

12. By early September 1981:

(a) Appellant was concerned about the impact of additional capital costs on its customers;

(b) Appellant became aware of preliminary 1980 census figures reflecting a population decline which appeared to explain why flows at the existing Southeast Plant had not been increasing at the rate originally projected;

(c) Appellant's recently inaugurated program to repair leaks in its water distribution mains appeared to promise a substantial reduction in the amount of water infiltrating the sewers;

(d) Appellant determined that these factors warranted a careful reexamination of the need for a 140 mgd capacity at the Southeast Plant (Stipulation par 11; N.T. 6-8).

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<sup>3</sup> The stipulation refers to December 3 rather than December 2. However, if the bids were opened on August 4, the statutory 120 days (counted in accordance with the Act of December 6, 1972, P.L. 1339, as amended, 1 Pa. C.S.A. §1910) would appear to expire on December 2.

13. On September 11, 1981, Appellant's Water Commissioner, William J. Marrazzo, wrote to EPA, with a copy to DER, suggesting a reevaluation of the Southeast Plant's design capacity to "allow us to decrease the scale and the expense without disrupting our abatement program or adversely effecting [sic] the environment" in an effort to keep "capital and operating expenditures tightly in check." Mr. Marrazzo also requested a meeting at the agencies' "earliest convenience" to discuss the proposed reevaluation (Stipulation par 12 and Exhibit A).

14. Appellant's requested reevaluation was discussed in the next regular monthly telephone conference among representatives of Appellant, DER and EPA held on September 30, 1981. Representatives of DER and EPA questioned whether the reevaluation would affect the compressor building for which bids had already been received and Appellant's representative indicated that a reduction in plant capacity from 140 mgd to 100 mgd would not affect the size of the building (N.T. 13-14, 84-86, 108-109).

15. The design of a compressor building at a wastewater treatment plant may be directly affected by the proposed capacity of the plant to treat wastewater. A compressor building at a relatively small wastewater treatment plant may be designed to house less equipment than a similar facility at a larger wastewater treatment plant (Stipulation par 10; N.T. 5-6).

16. On October 7, 1981, Peter J. Ludzia, Team Leader, Eastern Pennsylvania Section of EPA, wrote to Mr. Marrazzo, with a copy to DER, to inquire whether the possibility of reducing the capacity of the Southeast Plant, as suggested in Mr. Marrazzo's September 11, 1981 letter, would affect the proposed contracts for the compressor building for which bids had been received on August 4, 1981. Although Mr. Ludzia noted that Mr. Thomas Walton of Appellant's Water Department had indicated that no changes would be

required, Mr. Ludzia stated, inter alia: "it would appear that if 40 MGD of wastewater were removed from the facility, the blower [compressor] and oxygen requirements could be reduced," (Stipulation par 13 and Exhibit B; N.T. 15, 109-110).

17. On October 16, 1981, pursuant to Mr. Marrazzo's September 11, 1981 request, a meeting was held among representatives of Appellant, DER and EPA to discuss reevaluation. Peter N. Bibko, EPA's Regional Administrator, was unable to attend the meeting but met earlier with representatives of Appellant. Although Mr. Bibko was enthusiastic about the possibilities of lowering the project costs, DER and EPA representatives at the October 16, 1981, meeting were concerned about further delays. Appellant's representatives indicated a reevaluation would take 3-5 weeks; DER's representatives tried to get the time shortened to 2 weeks (Stipulation par 14; N.T. 15-20, 86, 90-91, 110-112).

18. On October 20, 1981, Leonard K. Bernstein, Chief of Appellant's Water Pollution Abatement Program, wrote to Mr. Ludzia, with a copy to DER, responding to the inquiry in Mr. Ludzia's October 7, 1981, letter as to whether the possible revisions in the Southeast Plant would affect the proposed contracts for the compressor building for which bids had been received on August 4, 1981. In light of discussions at the October 16, 1981, meeting among Appellant, DER and EPA, Mr. Bernstein advised, "it is our opinion that at the present time, we should defer from responding to the questions in your letter of October 7 until such time as EPA, DER, and the City are in complete agreement as to the direction we should undertake to construct a Water Pollution Facility at the Southeast Plant" (Stipulation par 15 and Exhibit C).

19. On October 21, 1981, Mr. Bibko wrote to Mr. Marrazzo expressing approval of Appellant's proposal "to investigate changes in the City's wastewater treatment program that may allow it to achieve water quality goals at lower cost than you now project." Mr. Bibko added, "[s]uch efforts are entirely consistent with the goals of this Administration ... what we both want to achieve is the most cost-effective system consistent with State and federal requirements." Mr. Bibko anticipated "receiving more concrete suggestions from you in about three weeks" (Stipulation par 16 and Exhibit D).

20. On November 9, 1981, approximately three weeks after the October 16, 1981, meeting among Appellant, DER and EPA, Mr. Marrazzo wrote to Mr. Bibko, with a copy to DER, to provide an update "on those options which we have examined which appear to have the potential for cost savings without sacrificing environmental quality." Mr. Marrazzo advised, however, that Appellant's "investigation of alternatives is not complete" and that Appellant would present a program within two weeks (Stipulation par 17 and Exhibit E).

21. Mr. Marrazzo's letter of November 9, 1981, was prompted by the fact that Appellant's engineering consultants, Greeley & Hansen, had come up with a broader range of alternatives than Appellant had expected. Two of these new alternatives would have eliminated the need for a compressor building at the Southeast Plant (N.T. 21-24).

22. Greeley & Hansen submitted to Appellant on or about November 23, 1981, a more complete identification and analysis of alternatives (N.T. 26-27).

23. Appellant completed its consideration of the alternatives; and, on December 4, 1981, Mr. Marrazzo wrote to Mr. Bibko, with a copy to DER, outlining Appellant's proposals for the revised design capacity for the Southeast Plant. Mr. Marrazzo set forth 9 alternatives, including for

comparison purposes, the proposed 140 mgd capacity design which had been previously approved by EPA and DER (Stipulation par 19 and Exhibit F; N.T. 27).

24. Two of the 9 alternatives would have eliminated the need for a compressor building at the Southeast Plant. Several other alternatives were not in compliance with then current EPA regulations but were proposed for consideration because of statements emanating from EPA's Washington, D.C. office indicating that the regulations might be relaxed (N.T. 29-32).

25. Contrary to its agreement at the October 16, 1981, meeting, Appellant did not indicate a preference among the 9 alternatives proposed in Mr. Marrazzo's December 4, 1981, letter (Exhibits F and H; N.T. 91-92).

26. On December 4, 1981, the lowest bidder for the general/mechanical work for the compressor building withdrew its bid, despite Appellant's request for a time extension. Other bidders for the work on the compressor building granted time extensions (Stipulation par 20).

27. On December 8, 1981, Mr. Marrazzo submitted to Mr. Bibko additional materials relating to the proposed alternatives for the revised design capacity of the Southeast Plant (Stipulation par 21).

28. On January 18, 1982, Mr. Bibko wrote to Mr. Marrazzo, with a copy to DER, following EPA's "expeditious review" of the alternatives for improved design capacity for the Southeast Plant as outlined in Mr. Marrazzo's December 4, 1981, letter. EPA eliminated 5 of the 9 alternatives proposed by Appellant, inquired as to Appellant's preference with respect to the remaining 4 alternatives and offered comments regarding the remaining 4 alternatives (Stipulation par 22 and Exhibit H).

29. Of the remaining 4 alternatives, 2 would have necessitated changes in the design of the compressor building at the Southeast Plant (Stipulation par 23; N.T. 32-33).

30. Upon receipt of Mr. Bibko's letter of January 18, 1982, Appellant, in conjunction with Greeley & Hansen, performed additional analytical work on the 4 remaining alternatives in order to determine which was preferable (Stipulation par 25; N.T. 33-34).

31. On February 9, 1982, although Appellant requested a further extension of the statutory bid award period, the lowest bidder for the plumbing contract for the compressor building withdrew its bid. The remaining bidders for the work on the compressor building granted time extensions (Stipulation par 24).

32. By March 1982, Appellant had determined that it preferred the alternative of reducing the capacity of the Southeast Plant from 140 mgd to 100 mgd without changing the design of the compressor building (Stipulation par 25).

33. On March 2, 1982, Mr. Marrasso wrote to Mr. Charles Godfrey of DER, with a copy to EPA, advising DER that during the time period that the design alternatives for the Southeast Plant were being evaluated, the lowest bidders for general/mechanical work and for plumbing work on the compressor building had exercised their option to withdraw their bids. Mr. Marrasso advised that Appellant proposed to award these contracts to the next lowest bidders rather than rebid these contracts, "because of the potentially significant cost increase due to inflation associated with rebidding." Accordingly, Mr. Marrasso submitted to DER for approval the "Part B" documents which reflected the revised bid costs (Stipulation par 26 and Exhibit I).

34. Appellant's decision not to rebid the contracts was based also on the following considerations not mentioned in Mr. Marrasso's letter:

(a) the time it would take to rebid; and

(b) the anticipation that the lowest bidder on the general/mechanical contract, whose bid had been significantly lower than the other bidders and which had been withdrawn at the first opportunity, would bid substantially higher on a rebidding (N.T. 38-39).

35. On March 23, 1982, Mr. Marrazzo wrote to Mr. Bibko, with a copy to DER, outlining in detail Appellant's preferred alternative for a 100 mgd design for the Southeast Plant. Mr. Marrazzo pointed out that Appellant estimated that capital costs for the previously approved 140 mgd design would be \$81.6 million and that annual operating costs for such a facility would be \$2.2 million. By contrast, Appellant estimated that the 100 mgd design would involve \$68.3 million capital costs and \$2.0 million annual operating costs. Thus, it was estimated that the proposed alternative would reduce capital costs by \$13.3 million and annual operating costs by \$200,000 (Stipulation par 34 and Exhibit J).

36. On March 31, 1982, C. T. Beechwood, Regional Water Quality Manager for DER, wrote to Mr. Marrazzo, with a copy to EPA, informing Mr. Marrazzo that the bidding procedures for bids on the compressor building "have been reviewed and are approved." Mr. Beechwood authorized Appellant to award the contracts on the compressor building "to the low responsive bidders, as indicated by the proposals you submitted" (Stipulation par 28 and Exhibit K)

37. Upon receipt of Mr. Beechwood's March 31, 1982, letter, Appellant accepted the bids of the next lowest bidders and awarded contracts (N.T. 39).

38. The lowest bids received for the general/mechanical work and the plumbing work on the compressor building were as follows:

General :	\$4,470,807
Plumbing:	<u>198,215</u>
Total:	\$4,669,022

(Stipulation par 30).

39. The second lowest bids received for the general/mechanical work and the plumbing work on the compressor building were as follows:

General	:	\$5,197,225
Plumbing	:	<u>233,993</u>
Total:		\$5,431,218

(Stipulation par 31).

40. Because the grant funding for the compressor building was limited to lowest bids, the \$762,196 difference between the lowest bids and second lowest bids was not eligible for 75% funding participation (Stipulation par 32).

41. On May 20, 1982, Joseph A. Galda, Chief, Pennsylvania/West Virginia Branch, Water Management Division of EPA, wrote to Mr. Marrasso, with a copy to DER, advising Appellant that federal funding of the Southeast Plant would be limited to the lowest bids received for the general/mechanical work and plumbing work contracts for the compressor building (Stipulation par 29 and Exhibit L).

42. On August 31, 1982, Appellant's Mr. Walton wrote to EPA's Mr. Ludzia, with a copy to DER, requesting that the agencies reconsider the determination of partial funding ineligibility in light of the substantial overall monetary savings (in the millions of dollars) achieved by the Southeast Plant design capacity reanalysis (Stipulation par 42 and Exhibit M).

43. On December 8, 1982, Mr. Ronald Furlan, Project Manager, Construction Grants, for DER, wrote to Mr. Ludzia regarding Mr. Walton's request that the agencies reconsider the decision of partial funding ineligibility. Mr. Furlan concluded, "we do not plan to change our decision of ineligibility" (Stipulation par 34 and Exhibit N).

44. On January 13, 1983, EPA's Mr. Galda wrote to Mr. Walton informing him that DER had, as of December 8, 1982, reconfirmed its original decision of ineligibility (Stipulation par 35 and Exhibit 0).

45. Appellant was hesitant to award contracts on the compressor building prior to a decision on the alternatives for the following reasons:

(a) if the compressor building was totally eliminated in the alternative eventually chosen, Appellant would be potentially liable for breaches of contract; and

(b) if the compressor building was reduced in size in the alternative eventually chosen, the costs savings would be diminished by Appellant's having to proceed by way of change orders rather than rebidding (N.T. 36-37).

46. Appellant acknowledges, however, that the major cost of a compressor building project is not the building itself but the compressors. Reducing the capacity of the Southeast Plant without reducing the size of the compressor building could still produce substantial savings by the elimination of one of the compressors (N.T. 44-45).

47. If Appellant had decided to accept the lowest bids on the compressor building and to award contracts before the expiration of the statutory 120-day period, DER would have given approval by telephone, if necessary (N.T. 92).

#### Discussion

Appellant has the burden of showing by a preponderance of the evidence that DER abused its discretion in disallowing \$762,196 of Appellant's costs eligible for grant funding: 25 Pa. Code §21.101.

The pertinent regulations adopted pursuant to the Clean Water Act are 40 CFR §35.935-1 and §35.965. The first section authorizes EPA's Regional

Administrator to take appropriate action if he determines that the recipient of a grant "has failed to make good faith efforts to meet its obligations under the grant." The second section provides that one of those appropriate actions is disallowance of project costs "directly related" to the recipient's noncompliance with its obligations.

While the regulations contain no specific provision regarding the lapsing of bids, they refer frequently to "economic" and "cost-effective" practices (See, for example, 40 CFR §35.350(a) and §35.805-1, §35.835-6, §35.917(b), §35.925-7 and Part 35, Subpart E, Appendix A). Contract awards to the responsible bidders lowest in amount are expected: 40 CFR §35.840(b) and §35.938-4(b). A grant recipient has a clearly implied obligation to keep project costs as low as possible.

DER claims that Appellant failed to meet this obligation when it let the lowest general/mechanical and plumbing bids on the compressor building expire. The \$762,196 were project costs "directly related" to Appellant's breach of duty, according to DER, and properly disallowed. Appellant argues that DER's view of the situation is too narrow. When the project costs are viewed as a whole, Appellant points out, the time expended on reevaluation is fully justified by millions of dollars of savings, far outweighing the \$762,196 of additional costs cited by DER.

Appellant's argument is superficially appealing but does not withstand close analysis. Additional costs necessarily incurred in performing a reevaluation may properly be offset against the savings produced, but that does not excuse all additional costs.

The circumstances that prompted Appellant to request a reevaluation, according to the evidence, were (1) a concern about mounting capital costs,

(2) updated population data, and (3) the implementation of a leak detection program. The last two items indicated that the Southeast Plant may be oversized at 140 mgd. If the capacity could be reduced to 100 mgd, capital costs could be reduced. Such a reduction in capacity would not necessarily entail a smaller compressor building<sup>4</sup>; it might involve only the elimination of some of the machinery within the building--facilities that were not part of the general/mechanical and plumbing work.

It appears that, when Appellant requested the reevaluation on September 11, 1981, its sights were set solely on reducing the capacity of the Southeast Plant. It may be that Appellant was misled by the enthusiastic response of Mr. Bibko, EPA's Regional Administrator, into broadening the scope of the reevaluation to include alternatives beyond the limits of the existing regulations. If so, Appellant ignored the reactions of the EPA and DER staffs and their expressed concerns about the delays and about the bids for the compressor building. That Mr. Bibko also shared these concerns should have been clear to Appellant when it received Mr. Bibko's October 21, 1981, letter placing a three-week limit on the reevaluation to come up with "the most cost-effective system consistent with State and federal requirements."

Appellant's initial presentation of alternatives in its November 9, 1981, letter (within the three-week period) revealed its expanded outlook and promised to present a cost-reduction program in two more weeks. While this letter may have put EPA and DER on notice that Appellant was falling behind schedule, the additional two weeks referred to would still allow time to award the compressor building contracts before the bids expired on December 2, 1981. The evidence shows that Appellant's consultants gave their assessment of

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<sup>4</sup> When Appellant finally settled on a 100 mgd capacity, it elected to stay with the same size compressor building as designed for a 140 mgd capacity plant.

alternatives to Appellant at the end of that two-week period--November 23--but Appellant had to do some work on them itself. This work was not finished and a report prepared for EPA and DER until December 4. On that same day, the lowest bidder on the general/mechanical contract withdrew its bid.

It is puzzling to us why Appellant let the bids expire without either (1) accepting them or (2) requesting guidance from the regulatory agencies. A prudent regard for the administration of public funds--whether those of Appellant or those of the state and federal governments--would have dictated the pursuit of at least one of these options. Yet, Appellant did neither. This lack of positive action was characteristic of Appellant's conduct during this period. Appellant failed to complete the reevaluation within the time period allowed, then submitted 9 alternatives without expressing a preference or order of priority, as it agreed to do at the October 16, 1981, meeting. This delayed unnecessarily EPA's review of the alternatives and prompted Mr. Bibko's reproach in his January 18, 1982, letter. It may be that Appellant feared that, if it awarded a contract on the compressor building, it would harm its chances of securing approval for one of the alternatives that eliminated the need for the building. If so, Appellant was taking a gamble that is inappropriate when public funds are involved. This is especially objectionable in a situation where Appellant, by its own admission, had an extremely favorable low bid for the general/mechanical contract on the compressor building--more than \$700,000 lower than the next lowest bidder on a \$4.5 million to \$5 million contract.

Appellant argues that, if it had proceeded to award contracts on the compressor building prior to deciding on an alternative, it would have exposed itself to potential losses. If the alternative ultimately chosen would have eliminated the compressor building, Appellant would have been potentially

liable for the lost profits of the contractors. If the chosen alternative would have merely reduced the size of the building, Appellant would have been forced to seek cost reductions by way of change orders, a device that seldom is the most cost-effective. All of this may be true,<sup>5</sup> but it still does not explain why Appellant chose to do nothing. Appellant's potential losses in awarding the contracts were speculative; its losses in letting the lowest bids expire and going to the next lowest bidders were certain and substantial. At the very least, Appellant should have apprised EPA and DER of its dilemma and sought their advice. In taking upon itself the sole responsibility for this decision, Appellant assumed the risk that EPA and DER would disallow the increased costs.

Appellant's inaction that allowed the lowest bids to expire fell short of the "good faith efforts" demanded by the federal regulations.<sup>6</sup> While the quoted phrase has an elastic meaning that fluctuates somewhat from one context to another, we are convinced that, as used here, it requires positive conduct consistent with a genuine regard for saving public funds--not just in a broad, general sense but in a narrow, detailed sense also. Appellant's decision to reevaluate the Southeast Plant, made with the best of intentions, produced substantial savings for which Appellant properly takes credit. In the process, however, Appellant failed to make "good faith efforts" to save the lowest bids on the compressor building--a failure that

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<sup>5</sup> We note, however, that if the lowest bidder on the general/mechanical contract was anxious to get out of his bid because he was so much lower than the other bidders (see Finding of Fact No. 34(b)), Appellant's liability for lost profits should have been minimal.

<sup>6</sup> This is especially true of the lowest bid on the plumbing contract. This bidder gave a time extension initially and did not withdraw its bid until February 9, 1982. By that time, Appellant had about three weeks to consider Mr. Bibko's letter which rejected most of the alternatives.

unnecessarily increased costs and reduced the savings achieved by the reevaluation. These increased costs were "directly related" to Appellant's failure.

EPA and DER might have chosen to overlook this dereliction in the context of the overall savings produced; but they were not required to overlook it. Their disallowance of the \$762,196 increased costs was not an abuse of discretion.

#### Conclusions of Law

1. The Board has jurisdiction over the parties and the subject matter of the appeal.
2. Appellant has the burden of proving that DER abused its discretion in disallowing the \$762,196 increased costs on the compressor building.
3. Federal regulations adopted under the Clean Water Act impose an obligation on grant recipients to keep project costs as low as possible.
4. If a grant recipient fails to make "good faith efforts" to fulfill this obligation, EPA's Regional Administrator (acting through DER) is empowered to disallow project costs "directly related" to the failure.
5. The "good faith efforts" demanded by the regulations require positive conduct consistent with a genuine regard for saving public funds both in general and in detail.
6. Appellant's inaction that allowed the lowest bids on the general/mechanical and plumbing contracts on the compressor building to expire fell short of the "good faith efforts" required by the regulations.
7. The \$762,196 increased costs on the compressor building were "directly related" to Appellant's inaction.

8. DER's disallowance of these increased costs was not an abuse of discretion even though Appellant produced substantially greater cost savings by its reevaluation of the Southeast Plant.

ORDER

AND NOW, this 6th day of June, 1989, it is ordered that the appeal of the City of Philadelphia, acting through its Water Department, filed on February 14, 1983, is dismissed.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*  
MAXINE WOELFLING, CHAIRMAN

*Robert D. Myers*  
ROBERT D. MYERS, MEMBER

*Terrance J. Fitzpatrick*  
TERRANCE J. FITZPATRICK, MEMBER

DATED: June 6, 1989

cc: Bureau of Litigation  
Harrisburg, PA  
For the Commonwealth, DER:  
Louise Thompson, Esq.  
Eastern Region  
For Appellant:  
Mark H. MacQueen, Esq.  
Philadelphia, PA

nb



Upon learning that construction had begun on the 30" interceptor, Newtown filed a Petition for Supersedeas on March 31, 1989. Motions to Dismiss Newtown's Petition were filed by DER and by BCWSA (joined by Neshaminy Sewer Company, Inc. and Northampton Municipal Authority, Intervenors). A hearing was convened in Harrisburg on April 28, 1989, before the undersigned Board Member. The Motions to Dismiss the Petition were denied at the outset of the hearing and Newtown was directed to focus its evidence on the subject of irreparable harm. After some discussion, it was agreed that the parties would submit as stipulated exhibits Newtown's zoning ordinance, zoning map and comprehensive plan, and/or such other ordinances or officially adopted plans that are relevant to the issue of irreparable harm. Testimony was then presented by a witness for Northampton Municipal Authority on the subject of current environmental problems with the 18" interceptor.

On May 11, 1989, the parties submitted the Newtown Region Joint Municipal Comprehensive Plan (Summary) 1983, a portion of the Comprehensive Plan dealing specifically with wastewater facilities, and the Joint Municipal Zoning Ordinance of Newtown Borough, Newtown Township, Wrightstown Township and Upper Makefield Township, together with a zoning map. Newtown filed its legal memorandum on the same date. On May 19, 1989, legal memoranda were filed by all the other parties.

The Board's rules at 25 Pa. Code §21.78 set forth the factors to be considered in ruling on a supersedeas request. They include (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. If pollution or injury to the public health, safety or welfare exists or is threatened, a supersedeas may not be granted. Northampton Municipal Authority's testimony at the hearing was directed to this latest point but, in

my judgment, fell short of the definite proof required to deny the Petition summarily without considering the other factors.

Newtown acknowledges the need for another interceptor but objects to anything over 24" in size. Additional capacity beyond 24", according to Newtown, will stimulate growth to the point where Newtown will no longer be able to maintain the integrity of its Conservation Management (CM) zoning district.<sup>1</sup> The Comprehensive Plan, noting that the Newtown region relies primarily on groundwater for its water supplies, expounds the need for replenishing the groundwater with effluent from wastewater treatment facilities. This recharging is intended to be done in the CM district.

The existing facilities within this district consist primarily of individual on-lot disposal systems. It is not planned that extensions of the existing public sewer systems will be made to serve into this district. In light of the questionable long-term availability of groundwater in the region, highest priority will be given to facilities that will recharge the groundwater table in order that this district shall continue to serve as the Region's area for groundwater resources. For this reason development is permitted on large lots or on smaller lots with large amounts of open space in order to provide the maximum opportunity for land disposal of wastewater that will be technically, economically, and environmentally sound. The CM district is also intended to serve as the area for wastewater disposal from adjacent non-sewered higher density districts. (Comprehensive Plan, pp. 30-31)

Section 401 of the Zoning Ordinance sets forth specific regulations for the CM district consistent with the objectives of the Comprehensive Plan. Section 305B, which discusses the purpose of the CM district, states that "[s]ingle-family detached, single-family detached cluster, and performance

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<sup>1</sup> The cost differential between a 24" and a 30" interceptor is not involved, since Neshaminy Sewer Company, Inc. is paying for the line. Newtown argues, however, that this corporation, funded by developers, will pass on the cost to future home purchasers, some of whom may be residents of Newtown. This argument is discussed, *infra*.

subdivisions are permitted, provided the sewage disposal methods utilized shall replenish the water table in accordance with the wastewater policies of the Joint Municipal Comprehensive Plan . . . ."

Newtown argues that this carefully structured land use plan will be undermined if the 30" interceptor is built. The additional capacity above and beyond 24" will encourage developers in the CM district to seek the use of the public sewer system rather than the more expensive alternative systems that would recharge the groundwater. Such developers will file a private request with DER, pursuant to Section 5(b) of the Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.5 (commonly referred to as Act 537), seeking to have DER order Newtown to revise its Official Plan to permit the use of public sewers in the CM district. Newtown, according to its Memorandum of Law, "will be unable to resist" such actions.

While Newtown's concerns undoubtedly are deeply felt, they are too remote and speculative at this point in time to warrant the granting of a supersedeas: Berkowitz v. Wilbar, 416 Pa. 369, 206 A.2d 280 (1965); Bliss Excavating Company v. Luzerne County, 418 Pa. 446, 211 A.2d 532 (1965). They presume that developers will seek to avoid the wastewater provisions of the CM district and that DER will assist them by ordering Newtown to change its Act 537 Official Plan.<sup>2</sup> One or both of these presumptions may, in fact, never materialize. This is also true of Newtown's argument that the additional cost of a 30" interceptor will be passed on to home purchasers located in Newtown. While it may be reasonable to presume that the developer-shareholders of Neshaminy Sewer Company, Inc. will attempt to recover their costs by raising

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<sup>2</sup> We note that Section 5(b) of Act 537, 35 P.S. §750.5(b), requires a resident or property owner to show that the Official Plan is "inadequate to meet [his] sewage disposal needs." A mere preference to use a less expensive system would not appear to be enough.

the price of lots and homes, it is speculative to presume that this will affect home purchasers in Newtown.

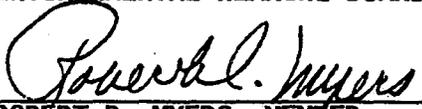
Even if we overlooked the speculative nature of Newtown's fears, we could not attribute the threatened harm to the installation of a 30" interceptor rather than one of 24". In its legal memorandum, Newtown represents that a 24" line will be adequate to handle all of the anticipated future needs of the three municipalities "through the year 2000 and provide sufficient reserve for the foreseeable future beyond the year 2000." It is obvious that a new interceptor, whether 24" or 30" in size, will create an immediate capacity for additional sewage flows. If this additional capacity, even in a 24" line, will handle all of the future needs of three municipalities for at least the next 11 years and beyond, it is apparent that the same incentives will exist as with a 30" line for developers to seek the use of public sewers in the CM district. If Newtown "will be unable to resist" such pressure where a 30" line is concerned, it will be similarly handicapped with respect to a 24" line.

Newtown, having failed to show that it will be irreparably harmed by the action complained of, is not entitled to a supersedeas. As a result, it is unnecessary for us to discuss the other issues raised by the parties.

**ORDER**

AND NOW, this 6th day of June, 1989, it is ordered that the Petition for Supersedeas, filed by Newtown Township on March 31, 1989, is denied.

**ENVIRONMENTAL HEARING BOARD**

  
**ROBERT D. MYERS, MEMBER**

**DATED:** June 6, 1989

**cc: Bureau of Litigation**

Harrisburg, PA

**For the Commonwealth, DER:**

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**For Intervenors:**

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John A. VanLuvanee, Esq.

Doylestown, PA

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Newtown, PA

nb



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M. DIANE SMITH  
 SECRETARY TO THE BOARD

PHILADELPHIA ELECTRIC COMPANY, et al. :  
 :  
 v. : **EHB Docket No. 88-309-M**  
 : **(Consolidated)**  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES, : **Issued: June 7, 1989**  
 et al. :

**OPINION AND ORDER  
 SUR  
 PETITIONS TO INTERVENE, MOTIONS TO DISMISS FOR LACK OF  
 STANDING AND SUNDRY MOTIONS RELATING TO DISCOVERY**

Synopsis:

Allegations of standing are adequate to survive a motion to dismiss, at this stage of the proceedings, with respect to 12 of 17 organizations that joined in two appeals and sought intervention in three others. Of the remaining 5 organizations, 3 are dismissed for lack of standing and 2 are allowed to continue only with respect to certain of the appeals. A suspension of discovery is revoked.

**OPINION**

These consolidated appeals all relate to NPDES permits issued by the Department of Environmental Resources (DER) on July 14, 1988. NPDES Permit No. 0052221 was issued to Philadelphia Electric Company (PECO) for a discharge into the East Branch Perkiomen Creek from a facility located in Bedminster Township, Bucks County. NPDES Permit No. 0054909 was issued to North Penn-North Wales Water Authorities (NP/NW) for a discharge into the North Branch Neshaminy Creek from a facility located in Plumstead Township, Bucks

County. Both facilities are part of the Point Pleasant Project which has been the subject of continuous litigation before this Board and the civil courts for many years.

In the appeal originally docketed at 88-309-M, PECO challenged some of the requirements of the NPDES permit issued to it. That same permit was challenged by a coalition of 17 organizations (Coalition) in the appeal originally docketed at 88-315-M. NP/NW's NPDES permit was the subject of appeals originally docketed at 88-311-M, filed by Neshaminy Water Resources Authority (NWRA); 88-312-M, filed by NP/NW; and 88-314-M, filed by the Coalition. As the permittees, PECO has been included as a party in the appeal originally docketed at 88-315-M and NP/NW has been included as a party in the appeals originally docketed at 88-311-M and 88-314-M. The Coalition has petitioned to intervene in the appeals originally docketed at 88-309-M, 88-311-M and 88-312-M. Discovery was suspended pending Board action on these petitions.

By an Order dated February 15, 1989, the Board consolidated all of the appeals, directed the 17 organizations that make up the Coalition to make specific allegations regarding their standing, and deferred action on the Coalition's Petitions to Intervene. The Coalition filed their allegations on March 22, 1989, and supplemented them on May 19, 1989. PECO and NP/NW have moved to dismiss certain organizations from the Coalition's appeals and to deny the Coalition's Petitions to Intervene in the other three appeals. In addition, both movants sought a lifting of the ban on discovery.

The Coalitions's allegations of standing, as supplemented, are adequate to survive a motion to dismiss at this stage of the proceedings with respect to most of the 17 organizations. The allegations with respect to three organizations are deficient, however. No specific data was submitted at

all with respect to the Consumer Education and Protection Association (CEPA). Only very general allegations were made with respect to the Environmental Policy Institute (EPI); and, in essence, this organization is only asserting the general interest that the law be observed. This is not sufficient to confer standing: William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269, 280-281 (1975).

The allegations concerning the Paunacussing Watershed Association (PWA) do not show standing to be involved in these appeals. PWA consists of 120 families residing in the Paunacussing watershed, a tributary of the Delaware River downstream of the diversion station at Point Pleasant. While PWA and its members are properly concerned with projects that affect the Paunacussing and the Delaware, they have not alleged a substantial interest in the water quality of the North Branch Neshaminy Creek and the East Branch Perkiomen Creek.

The allegations that relate to Friends of Branch Creek (FBC) limit its concern to the East Branch Perkiomen Creek. The allegations that relate to Pennsylvania Trout Unlimited (PATU), while not as clearly confined, nonetheless limit its involvement to the North Branch Neshaminy Creek.<sup>1</sup> The remaining organizations have made allegations concerning both creeks.

Allegations of standing, of course, may be sufficient to survive a motion to dismiss but must be proved ultimately. The remaining members of the Coalition will be required to submit their proof at the hearing on the merits. In the meantime, the other parties to these appeals will have the opportunity to probe the allegations by way of discovery. Discovery may also be resumed

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<sup>1</sup> All of this may be academic, since the appeals have been consolidated and all of the organizations making up the Coalition are currently represented by the same attorney.

on other aspects of these appeals now that the matter of standing has been dealt with.

#### ORDER

AND NOW, this 7th day of June, 1989, it is ordered as follows:

1. The Consumer Education and Protection Association, the Environmental Policy Institute and the Paunacussing Watershed Association are dismissed as appellants in the appeals originally docketed at 88-314-M and 88-315-M, and are denied intervention in the appeals originally docketed at 88-309-M, 88-311-M and 88-312-M.

2. The Friends of Branch Creek is dismissed as an appellant in the appeal originally docketed at 88-314-M, and is denied intervention in the appeals originally docketed at 88-311-M and 8-312-M. Intervention is allowed in the appeal originally docketed at 88-309-M.

3. Pennsylvania Trout Unlimited is dismissed as an appellant in the appeal originally docketed at 88-315-M, and is denied intervention in the appeal originally docketed at 88-309-M. Intervention is allowed in the appeals originally docketed at 88-311-M and 88-312-M.

4. The Environmental Defense Fund, Natural Resources Defense Council, American Littoral Society, National Waterwell Association, Friends of the Earth in the Delaware Valley, Pennsylvania Sierra Club, Del-AWARE Unlimited, Inc., Montco-AWARE, STAND, Clean Energy Collective, Citizens for Environmental Rights and Pennsylvania Federation of Sportsmen's Clubs are permitted to intervene in the appeals originally docketed at 88-309-M, 88-311-M and 88-312-M.

5. Discovery may resume immediately and may relate to the allegations of standing as well as the merits of the appeals. All parties

shall coordinate their discovery efforts so that persons will not be subjected to multiple depositions and duplicate interrogatories.

6. Discovery shall be completed by July 14, 1989.

7. Philadelphia Electric Company, Neshaminy Water Resources Authority, North Penn-North Wales Water Authorities, and the organizations remaining as appellants in the appeals originally docketed at 88-314-M and 88-315-M shall file pre-hearing memoranda on or before August 3, 1989.

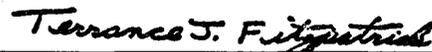
8. The Department of Environmental Resources shall file its pre-hearing memorandum within fifteen (15) days after the filings referred to in paragraph 7 hereof.

9. All provisions of Pre-Hearing Order No. 1, issued in each of the consolidated appeals, shall remain in effect to the extent that they are not in conflict with the provisions of this Order.

**ENVIRONMENTAL HEARING BOARD**



**ROBERT D. MYERS, MEMBER**



**TERRANCE J. FITZPATRICK, MEMBER**

Chairman Woelfling did not participate in the decision of this case.

**DATED:** June 7, 1989

**cc: Bureau of Litigation**  
Harrisburg, PA

**For the Commonwealth, DER:**

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**For Appellant:**

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Robert J. Sugarman, Esq./Environmental Defense Fund, et al.  
Jeremiah J. Cardamone, Esq./North Penn-North Wales Water Authorities  
Jennifer Clarke, Esq./Neshaminy Water Resources Authority



COMMONWEALTH OF PENNSYLVANIA  
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M. DIANE SMITH  
 SECRETARY TO THE BOARD

**BENJAMIN COAL COMPANY and  
 WESTPORT MINING COMPANY**

**v.**

**COMMONWEALTH OF PENNSYLVANIA  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES**

:  
 : **EHB Docket No. 89-099-W**  
 :  
 :  
 :  
 :  
 :  
 : **Issued: June 7, 1989**

**OPINION AND ORDER SUR  
 MOTION FOR SUMMARY JUDGMENT**

**Synopsis**

A motion for summary judgment predicated on the provisions of a consent order and agreement is denied where the provisions are susceptible to different interpretations. The differing interpretations preclude a finding that there are no genuine issues of material fact which would prevent the entry of judgment in the Department's favor. A consent order and agreement must be construed in accordance with the principles of contract law.

**OPINION**

This matter was initiated by the April 12, 1989, filing of a notice of appeal by Benjamin Coal Company and Westport Mining, Inc. (collectively, Benjamin) seeking review of an April 5, 1989, order issued by the Department of Environmental Resources (Department) relating to Surface Mining Permit No. 1779132, which authorized Benjamin to conduct surface mining operations at a site in Gulich Township, Clearfield County. The order required Benjamin to, *inter alia*, install piezometers at specified locations and elevations, monitor

water quality and piezometric heads in each of the piezometers, measure static water elevations in each of the piezometers, and plug and cap existing piezometers where necessary to ensure the integrity of the newly installed piezometers.

Benjamin challenged the order on various grounds, all of which relate to a May 13, 1986, compliance order which required Benjamin to install piezometers to gather data to determine whether Benjamin's mining operations were degrading Little Muddy Run. It claims that because the design of the piezometers required by the 1986 order was defective and, therefore, resulted in invalid data, the Department was estopped from requiring the installation of additional piezometers. Furthermore, Benjamin argues that the 1989 compliance order was little more than an attempt by the Department to compel Benjamin to gather data to substantiate the 1986 order, the appeal of which is docketed at No. 86-125-W and is presently being heard on the merits. This, Benjamin contends, is an abuse of the Department's power to issue hydrologic study orders under the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, 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.* Benjamin also claims that the 1989 order would be held unnecessary if the Board sustained its appeal of the 1986 order.

The Department filed a motion for summary judgment on May 19, 1989, asserting that it is entitled to judgment as a matter of law because Benjamin and the Department had entered into a June 13, 1986, consent order and agreement in which Benjamin had recognized the Department's authority to require the installation of additional piezometers and had waived its right to appeal any such requirement by the Department. Since the additional piezometers are being required pursuant to the 1986 consent order and Benjamin waived its

rights of appeal, the Department argues that Benjamin's appeal of the 1989 order must be dismissed.

On May 31, 1989, Benjamin responded to the Department's motion, alleging that the 1986 consent order is a contract and, therefore, must be construed in accordance with the rules of construction normally applicable to contracts. It further contends that because the 1986 consent order and the 1986 order are interrelated, they must be construed together, and that, in doing so, the conclusion which must be reached is that the 1986 consent order only applied to the initial set of piezometers required by the 1986 order and not to any piezometer at any point in time. Benjamin also argues that the Department's contention regarding Benjamin's waiver of its appeal rights is inconsistent with and would result in an abrogation of Paragraphs 11, 12, 19, and 20 of the 1986 consent order.

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. Bethayres Reclamation Corporation v. DER and Lower Moreland Township, 1988 EHB 496. The Board must read the summary judgment motion in the light most favorable to the non-moving party. C&K Coal Company v. DER, 1988 EHB 63. 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). Applying these principles to the motion now before us, we must conclude that the Department is not entitled to summary judgment in its favor.

As Benjamin correctly asserts in its response to the Department's motion, a consent decree or a consent order must be construed in accordance with contract law principles. International Organization Masters, Mates and Pilots of America, Local No. 2 v. International Organization Masters, Mates

and Pilots of America, Inc., 439 A.2d 621, 497 Pa.102 (1982), and Lower Paxton Authority et al. v. DER, 1982 EHB 111. The Superior Court has held in West-inghouse Air Brake Division v. United Electrical, Radio, and Machine Workers of America, 294 Pa.Super.407, 440 A.2d 529 (1982), that "When interpreting a consent decree or any other agreement, words must be read in context. The decree must be read as a whole, each of its provisions being interpreted together with its other provisions." 440 A.2d at 533. Thus, in determining whether the Department is entitled to summary judgment, we cannot look at Paragraphs 16 and 22 of the 1986 consent order in a vacuum. We must read them in context with all the other provisions of the 1986 consent order, as well as the 1986 order, for the 1986 consent order directly refers to the 1986 order and its provisions.

Furthermore, in construing a consent order, the Superior Court has held in Z&L Lumber Co. of Atlasburg v. Nordquist, 348 Pa.Super.580, 502 A.2d 697 (1985) that:

The fundamental objective of contract construction is to ascertain the intention of the parties. Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1131 (3d Cir.1969); Robert F. Felte, Inc. v. White, 451 Pa. 137, 143, 302 A.2d 347, 351 (1973); Metzger v. Clifford Realty Corp., 327 Pa.Super. 379, 385, 476 A.2d 1, 5 (1984); 8 P.L.E. Contracts § 144 (1971). When the terms of the contract are clearly expressed, the intention of the parties must be determined from the language used. East Crossroads Center, Inc. v. Mellon-Stuart Co., 416 Pa. 229, 230, 205 A.2d 865, 866 (1965); Pennsylvania Turnpike Commission v. U.S. Fidelity & Guaranty Co., 412 Pa. 222, 231, 194 A.2d 423, 428 (1963); 8 P.L.E. Contracts § 161 (1971). However, [w]here the language of the written contract is ambiguous, extrinsic or parol evidence may be considered to determine the intent of the parties. Metzger v. Clifford Realty Corp., *supra*, 327 Pa.Super at 385, 476 A.2d at 5. See: Herr Estate, 400 Pa. 90, 94, 161 A.2d 32, 34 (1960); 8 P.L.E. Contracts § 161 (1971).

The standard for determining the existence of an ambiguity was stated in Metzger v. Clifford Realty Corp., *supra*, as follows:

A contract will be found to be ambiguous:

if, and only if, it is reasonably or fairly susceptible of different constructions and is capable of being understood in more senses than one and is obscure in meaning through indefiniteness of expression or has a double meaning. A contract is not ambiguous if the court can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends; and a contract is not rendered ambiguous by the mere fact that the parties do not agree upon the proper construction.

Commonwealth State Highway and Bridge Authority v. E. J. Albrecht Co., 59 Pa. Commw. Ct. 246, 251, 430 A.2d 328, 330 (1981) (Quoting 8 P.L.E. CONTRACTS § 146 (1971)). Ambiguities may be either patent or latent. A patent ambiguity appears on the face of the instrument and arises from the defective, obscure, or insensible language used. Steuart v. McChesney, 498 Pa. 45, 444 A.2d 659 (1982). Latent ambiguities arise from extraneous or collateral facts which render the meaning of a written contract uncertain although the language, on its face, appears clear and unambiguous.

502 A.2d at 700

The Board has applied this standard in Lower Paxton Township, *supra*.

The two paragraphs of the 1986 consent order which form the basis of the Department's argument are Paragraphs 16 and 22. Paragraph 16 provides that:

If the water quality data and analysis provided pursuant to Paragraphs 17 below shall, in the sole opinion of the Department, require the installation of additional piezometers in order to determine the full extent of ground or surface water contamination, the Benjamin Coal Companies shall, within twenty-one (21) days of notification by the Department, install piezometers 15, 13 and 21, at

the locations indicated on Exhibit B or at such other and additional<sup>1</sup> locations as the Department indicates.

Paragraph 22, the waiver provision, states:

The Benjamin Coal Companies expressly, knowingly, intelligently, and with the advice of counsel, waive their right to appeal or otherwise challenge the installation of all piezometers which are or may be required by this Consent Order and Agreement. This waiver extends to any appeal to, or challenge in, any forum, including without limitation, the Environmental Hearing Board, the Office of Surface Mining, or any court of the Commonwealth of Pennsylvania or the United States (including without limitation the Bankruptcy Court).

Reading these two paragraphs alone, the interpretation urged upon us by the Department is certainly plausible.

But, a closer examination of the 1986 consent order and the 1986 compliance order does cast doubt on the Department's assertion that the 1986 consent order was a broad authorization to compel Benjamin to install piezometers whenever the Department determined it was necessary. Paragraphs 13 and 14 of the 1986 consent order state:

13. On May 13, 1985,<sup>2</sup> the Department issued a compliance order (the "Compliance Order") to the Benjamin Coal Companies ordering them to determine the extent and nature of the water being discharged from the Site by installing and gathering data from certain piezometers and to submit plans for and to implement interim treatment and permanent treatment and/or abatement. A copy of the Compliance Order is included as Attachment A hereto.

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<sup>1</sup> This underlining was present in the copy of the consent order attached to the motion for summary judgment. We are unable to determine whether the underlining was affixed before or after the execution of the consent order.

<sup>2</sup> The consent order, in several places, erroneously refers to the date of issuance of the compliance order as "May 13, 1985."

14. The parties desire to modify Paragraphs 1, 2 and 3 of Exhibit A to the Compliance Order, but only those paragraphs.

(emphasis added)

Paragraphs 1, 2, and 3 of Exhibit A to the 1986 compliance order, which are of record in Docket No. 86-125-W, and of which we take official notice,<sup>3</sup> provide that:

1. The Benjamin Coal Companies shall within thirty (30) days from receipt of this Order install twelve (12) piezometers at locations shown on Exhibit "B" to specifications indicated on Exhibit "C".

2. The Benjamin Coal Companies shall within sixty (60) days from receipt of this Order submit to DER water quality analysis for pH, acidity, alkalinity, specific conductance, sulfates, iron, manganese, and aluminum as well as static water elevations for the piezometers referenced above and existing piezometers 10, 12 and 14 referenced on Exhibit "A". The Benjamin Coal Companies shall submit additional water quality analysis and static water elevations for all these piezometers seventy-five (75), ninety (90), and one hundred twenty (120) days from receipt of this Order.

3. The Benjamin Coal Companies shall within forty-five (45) days from receipt of this Order submit to DER logs of drilling, well completion procedures for the above-referenced piezometers, including existing piezometers 10, 12 and 14. Precise location and surface elevation shall be surveyed and documented with this information.

These provisions deal with the number, location, manner of installation, and monitoring data for the piezometers required by the 1986 compliance order.

Paragraphs 15, 17, and 18 of the 1986 consent order, respectively, modify Paragraphs 1, 2, and 3 of the exhibit to the 1986 compliance order. Examining Paragraphs 13, 14, 15, 17, and 18 of the 1986 consent order and Paragraphs 1,

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<sup>3</sup> Although the 1986 compliance order was an attachment to the 1986 consent order, the Department did not include it in its motion for summary judgment.

2, and 3 of Exhibit A to the 1986 compliance order, it appears equally plausible that the 1986 consent order was only intended to operate as a modification to the 1986 compliance order. Furthermore, the language in Paragraph 16 of the 1986 consent order relating to the installation of piezometers at "other and additional locations" is also susceptible to the interpretation that the Department could only specify different locations for the three other piezometers and not compel the installation of another, entirely different set of piezometers.

Similarly, with regard to the waiver provision in Paragraph 22 of the consent order, it may not operate as the broad waiver of appeal rights that the Department suggests when one examines Paragraphs 19 and 20 of the consent order. These two paragraphs recognize Benjamin's challenge to the 1986 compliance order and its contention that it is not liable for the degradation of Little Muddy Run. A waiver of all future appeal rights regarding additional piezometers would be inconsistent with these reservations.

Because we are required to view the Department's motion in the light most favorable to Benjamin and, by doing so, we find that there are disputed issues of material fact relating to the interpretation of the 1986 consent order, we cannot grant the Department's motion.

**O R D E R**

AND NOW, this 7th day of June, 1989, it is ordered that the Department of Environmental Resources' motion for summary judgment is denied.

**ENVIRONMENTAL HEARING BOARD**

*Maxine Woelfling*  
**MAXINE WOELFLING, CHAIRMAN**

**DATED:** June 7, 1989

**cc: Bureau of Litigation**  
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M. DIANE SMITH  
 SECRETARY TO THE BOARD

MR. & MRS. DANIEL E. BLEVINS  
 and NANCY LEE ELLIS  
 v.  
 COMMONWEALTH OF PENNSYLVANIA  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES  
 and  
 SOUTHEASTERN CHESTER COUNTY REFUSE  
 AUTHORITY and NEW GARDEN TOWNSHIP

: EHB Docket No. 82-154-W  
 :  
 : Issued: June 8, 1989  
 :  
 :

OPINION AND ORDER  
 SUR  
 MOTION TO SUPPRESS

Synopsis

Permittee's motion to suppress appellant's post-hearing memorandum is denied where the post-hearing memorandum raises issues permissible under a prior ruling on the permittee's motion to dismiss.

OPINION

This matter has its genesis in the Department of Environmental Resources' (Department) September 9, 1977, issuance of a permit to AAK for the operation of a natural renovation landfill. This initial issuance of the permit was not appealed to the Board. Subsequently, the Department reissued the permit to New Garden Township pursuant to the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. (SWMA), and Mr. and Mrs. Daniel E. Blevins and Nancy Lee Ellis (Appellants) appealed the issuance of the permit at EHB Docket No. 82-154-M. In 1984, the permit was again reissued, this time to the Southeastern Chester County Refuse Authority (SECCRA), and Appellants challenged the reissuance on November 15,

1984. That appeal was docketed at EHB Docket No. 84-382-M. By a September 18, 1985, Board order, the two appeals were consolidated at EHB Docket No. 82-154-M.

During the course of hearings on the merits conducted on April 1, 3, and 4, 1986, SECCRA moved to dismiss the appeal, arguing that since Appellants failed to appeal the initial 1977 permit issuance to AAK, they could not now raise those issues which were considered by the Department in the course of its review of the prior, unappealed, permit. In response, Appellants argued that the new SWMA required review of factors not considered by the Department in its review of the original permit application and those issues were properly before the Board. The Board agreed with the Appellants in a September 17, 1986, opinion, holding that these issues were properly before the Board for review:

"...Module 10 history of compliance considerations; Module 9 constitutional concerns, including increase in traffic, the threat to endangered wildlife, and comments of Chester County and London Grove Township; and finally, groundwater pollution problems possibly associated with natural renovation landfills." Blevins v. DER, et al., 1986 EHB at 1008.

Further hearings were held, and on February 2, 1987, Appellants submitted a post-hearing memorandum, which is the subject of SECCRA's December 28, 1987, motion to suppress now before us for disposition.<sup>1</sup> SECCRA argues that Appellants' post-hearing memorandum fails to comply with the Board's opinion limiting the issues. On February 9, 1988, Appellants filed a response, maintaining that the brief, proposed findings of fact, and

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<sup>1</sup> SECCRA has also moved to dismiss the consolidated appeals as moot. We will deal with that motion in a separate opinion.

conclusions of law address only those issues properly before the Board.<sup>2</sup>

We will not suppress Appellants' post-hearing memorandum because we believe that they have substantially complied with the Board's previous opinion. Appellants' post-hearing memorandum is set out in the framework of the test enunciated in Payne v. Kassab, 11 Pa. Cmwlth 14, 312 A.2d 86 (1973). We stated in the 1986 opinion on SECCRA'S motion to dismiss that:

"It should be noted that the DER was obligated to consider both Article 1, §27 and the Payne decision at the time of the initial permit issuance.

Since August 1, 1980, however, the DER satisfies the obligation of Article 1, §27 by requiring the submission of an environmental assessment statement. This environmental assessment statement, or Module 9, is a questionnaire, required for all permits, inquiring extensively into the environmental ramifications of a proposed DER action."

(1986 EHB at 1007)

Since Appellants' proposed findings of fact, proposed conclusions of law and memorandum address the factors required by an environmental assessment statement, or Module 9, we will not suppress that portion of the brief.

SECCRA has also requested the Board to suppress portions of Appellants' brief dealing with environmental pollution insurance because of the Board's ruling during the course of the hearings on the merits that the existence or non-existence of environmental pollution insurance does not bear on whether or not risks exist (N.T. 1281). However, the existence of such risks may provide justification for the Department to impose an insurance requirement. The Board, as it stated at N.T. 1279 and as Appellants pointed

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<sup>2</sup> The Department, on January 20, 1988, filed a response to SECCRA's motion. Since this response dealt mostly with SECCRA's motion to dismiss, it will be considered in that context. The Department's response did refer to the issue of liability insurance which we feel is properly before us.

out in their post-hearing memorandum, ruled in Mill Service, Inc. v. DER and Concerned Residents of the Yough, 1987 EHB 73, that the Department could impose such a requirement on non-hazardous waste disposers where sufficient justification was present. The issue of environmental pollution insurance was raised in Blevins' February 12, 1985, pre-hearing memorandum. As a result, we will allow Blevins to raise this issue and not strike this portion of the post-hearing memorandum.

**O R D E R**

AND NOW, this 8th day of June, 1989, it is ordered that:

- 1) SECCRA's motion to suppress Blevins' post-hearing memorandum is denied;
- 2) SECCRA shall file its post-hearing brief on or before July 7, 1989; and
- 3) The Department of Environmental Resources shall file its post-hearing brief on or before July 22, 1989.

**ENVIRONMENTAL HEARING BOARD**

*Maxine Woelfling*  
**MAXINE WOELFLING, CHAIRMAN**

**DATED:** June 8, 1989

**cc: Bureau of Litigation**  
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M. DIANE SMITH  
 SECRETARY TO THE BOARD

**JAMES E. MARTIN**

v.

**COMMONWEALTH OF PENNSYLVANIA  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES**

:  
 :  
 : **EHB Docket No. 85-064-W**  
 :  
 :  
 : **Issued: June 12, 1989**

**OPINION AND ORDER  
 SUR  
 PETITION FOR AWARD OF ATTORNEY FEES**

Synopsis

A request for attorney's fees under §4(b) of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.4(b), will be denied where no proceeding was properly initiated before the Board. The letter appealed from by the petitioner, being a re-iteration of the Department of Environmental Resources' prior position, did not alter the petitioner's rights, duties, or obligations, and therefore, was not an appealable action.

**OPINION**

This matter was initiated with the February 27, 1985, filing of a notice of appeal by James E. Martin challenging a January 28, 1985, letter from counsel for the Department of Environmental Resources (Department) advising Martin's counsel that the Department would not modify Mining Permit No. 419-6 and Mine Drainage Permit No. 3573SM14 to allow terrace, rather than approximate original contour, backfilling because Martin was in violation 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). On August 27, 1985,

the Department moved to dismiss the appeal for mootness because it had approved the requested permit modification, and the Board, by order dated October 10, 1985, granted the Department's motion.

On November 6, 1985, Martin filed a petition for award of attorney fees under §4(b) of SMCRA, 52 P.S. §1396.4(b), and the Department filed a response opposing the petition on December 16, 1985. In a February 7, 1986, opinion (1986 EHB 101) the Board determined that the attorney fee provision in SMCRA should be construed in pari materia with the Act of December 13, 1981, P.L. 1127, as amended, 71 P.S. §2031 et seq., commonly referred to as the Costs Act, and directed the parties to submit briefs on the issue of how the term "prevailing party" should be interpreted where an appeal has been dismissed as moot.

In its brief in support of the petition for attorney's fees, Martin asserts that dismissal for mootness is grounds for award of attorney's fees, that prevailing in part is sufficient to qualify as a prevailing party, and that the reversal of the Department's position here meets this standard. Martin avers that denying recovery due to mootness subverts the intent of the General Assembly and contends that the "substantially justified" language used in the Costs Act should not be imputed to the costs provision of SMCRA.

On June 23, 1986, the Department filed its brief in opposition to the petition for award of attorney's fees, as well as a motion to dismiss. The Department's lengthy response brief first argues that the Board does not have jurisdiction in this appeal, since a letter from counsel advising Martin of the Department's position is not a final adjudication affecting the rights and privileges of Martin; that allowing Martin to now attack the original permit condition to backfill to approximate original contour would constitute an impermissible collateral attack on the Department's action; and that Martin's

appeal was untimely, since the action Martin should have appealed was the Department's August 24, 1984, letter denying Martin's request to revise the permit to allow terrace backfilling, which letter was cited in the January 28, 1985, letter at issue here. Martin filed no response to the motion to dismiss.

We will first address the Department's motion to dismiss. While this appeal has already been dismissed for mootness, the question of a tribunal's subject matter jurisdiction may be raised at any time. T.W. Phillips Gas v. People's Natural Gas Co., 89 Pa. Cmwlth 377, 492 A.2d 776 (1985).

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 Section 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 §21.2 (a)(1).<sup>1</sup> Adjudications are defined as those actions which affect the personal or property rights, privileges, immunities, duties, liabilities or obligations of the party.

The January 28, 1985, letter from the Department's counsel states in pertinent part:

\* \* \* \* \*

I am in receipt of your January 18, 1985 letter. John Matviya and I have reviewed your requests.

\* \* \* \* \*

Our decision on the Mining Permit 419-6 remains unchanged. We do not believe the law allows us to modify a permit when the operator is in violation of the law.

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<sup>1</sup> This matter was initiated before the passage of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. \_\_\_\_\_, No. 94, 35 P.S. §7511 et seq., but even if the new statute were applied, the result would not change in this case.

\* \* \* \* \*

The January 28, 1985, letter at issue here merely re-iterates the Department's August 24, 1984, position that it could not modify Mining Permit No. 419-6 to allow terrace backfilling because Martin was in violation of SMCRA. The August 24, 1984, letter of the Department expressing that position stated in relevant part:

RE: James E. Martin  
Terrace Backfilling Request  
Mine Drainage No. 3573SM14  
Township: Boggs County:  
Armstrong

Dear Sir:

This is to inform you that we have completed our review of the above-referenced application revision. The permit revision cannot be issued at this time because your company or related company is in violation of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. Section 691.1 et seq., or the regulations promulgated under one of these laws. You have been notified of the specific violation in a Departmental inspection report.

\* \* \* \* \*

As such, the January 28, 1985, letter did not alter Martin's rights, duties, or obligations and, therefore, did not constitute an adjudication reviewable by the Board. Commonwealth, DER v. New Enterprise Stone and Lime Co., Inc. 25 Pa. Cmwlth 389, 359 A.2d 845 (1976).

The Board may award attorney's fees under SMCRA where the fees are incurred by a party in proceedings pursuant to 52 P.S. §1396.4(b). But since the letter appealed by Martin was not a final action or adjudication affecting Martin's rights, obligations or duties, no "proceeding" was ever properly initiated before this Board which would make the attorney fee award provision of SMCRA applicable. Consequently, we must deny Martin's request.

**O R D E R**

AND NOW, this 12th day of June, 1989, it is ordered that James E. Martin's Petition for Award of Attorney's Fees is denied.

**ENVIRONMENTAL HEARING BOARD**

*Maxine Woelfling*

**MAXINE WOELFLING, CHAIRMAN**

*Robert D. Myers*

**ROBERT D. MYERS, MEMBER**

*Terrance J. Fitzpatrick*

**TERRANCE J. FITZPATRICK, MEMBER**

**DATED:** June 12, 1989

**cc: Bureau of Litigation**  
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M. DIANE SMITH  
 SECRETARY TO THE BOARD

**INGRID MORNING**

v.

**COMMONWEALTH OF PENNSYLVANIA  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES  
 and PIKE TOWNSHIP**

:  
 :  
 : **EHB Docket No. 88-094-M**  
 :  
 :  
 : **Issued: June 16, 1989**  
 :

**OPINION AND ORDER  
 SUR  
 MOTION TO DISMISS APPEAL**

Synopsis

An appeal from the "deemed approval" of an Official Plan amendment of one municipality by a resident of an adjacent municipality will not be dismissed for lack of standing when the appellant alleges that she owns property and resides in the "affected area"; but the allegations must be proved at a hearing on the merits.

**OPINION**

Ingrid Morning (Appellant) initiated this proceeding on March 16, 1988, by filing a Notice of Appeal from the alleged failure of the Department of Environmental Resources (DER) to act upon a proposed amendment to the Official Plan of Pike Township, Berks County, pertaining to the Hidden Hollow Subdivision located partly in Pike Township and partly in District Township. Appellant alleged that, since DER had not acted on the proposed amendment within 120 days after it had been filed, the amendment was deemed approved under 25 Pa. Code §71.16.

DER challenged Appellant's standing to appeal in a Motion to Dismiss filed on July 18, 1988. Appellant's Answer, filed on August 30, 1988, was accompanied by a Joint Motion of Appellant and DER for Judgment on the Pleadings. The Board declined to act on the Joint Motion, in an Opinion and Order issued October 6, 1988, (1) because a precedent-setting ruling should not be handed down without being thoroughly litigated, and (2) because Pike Township, a necessary party, had not participated in the proceeding. Pike Township was added to the caption as an appellee and given 30 days to respond to the Joint Motion.

Pike Township responded on November 4, 1988, opposing the Joint Motion on several grounds, including the existence of factual disputes. The Joint Motion was denied for this reason by an Opinion and Order issued by the Board on December 22, 1988. Since the Board had treated DER's Motion to Dismiss as having been superseded by the Joint Motion, the Order gave DER until February 15, 1989, to renew the Motion. DER filed a renewed Motion to Dismiss on January 6, 1989, which Pike Township supported in a filing on January 17, 1989. Appellant filed an Answer to the Motion on January 18, 1989.

The two Motions to Dismiss and Answers are basically identical. DER alleges several grounds in support of its position, but only one relates to Appellant's standing. The others seek a resolution of the same issues included in the Joint Motion, issues which are not ripe for decision because of factual disputes. Accordingly, they will be ignored in this Opinion and Order.

DER alleges that (1) Appellant has made no private request for an amendment to the Official Plans, and (2) any right of appeal would inure

through the municipalities or developer and not through Appellant, who is not an aggrieved party. Appellant acknowledges that she is a resident of District Township (not Pike Township), but alleges that she owns property and resides in the "affected area" and will suffer a diminution of enjoyment if the development is constructed as proposed.

Even though Appellant's residence and property may be situated in District Township, she still may be aggrieved by the approval of an amendment to Pike Township's Official Plan. (See, for example, Miller v. Upper Allen Township Zoning Hearing Board, \_\_\_ Pa. Cmwlth. \_\_\_, 535 A.2d 1195 (1987)). Consequently, the allegations of standing are adequate to survive a Motion to Dismiss. Standing must be proved, however, and Appellant will be called upon to do so at the hearing on the merits.

DER's assertions that standing to appeal rests only with the municipalities, the developer and the persons who have made private requests for an Official Plan amendment are unsupported by citation or reasoning. Our examination of the Sewage Facilities Act (SFA), Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 et seq., has not produced any basis at all for these assertions. Besides, limiting standing in the manner suggested would represent a major departure from a long line of Board decisions in appeals from Official Plan amendments (see, for example, Thompson v. DER, 1980 EHB 224, Langan v. DER, 1985 EHB 139, and Hill v. DER, 1988 EHB 228). Obviously, we are not prepared to make such a departure.

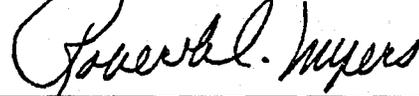
**ORDER**

AND NOW, this 16th day of June, 1989, it is ordered as follows:

1. The Motion to Dismiss, filed by the Department of Environmental Resources on January 6, 1989, is denied.

2. Pike Township and the Department of Environmental Resources each shall file a pre-hearing memorandum on or before July 14, 1989.

**ENVIRONMENTAL HEARING BOARD**



**ROBERT D. MYERS, MEMBER**

**DATED:** June 16, 1989

**cc: Bureau of Litigation**  
Harrisburg, PA  
**For the Commonwealth, DER:**  
Norman G. Matlock, Esq.  
Eastern Region  
**For Appellant:**  
Randall J. Brubaker, Esq.  
Philadelphia, PA  
**For Permittee:**  
Paul T. Essig, Esq.  
Reading, PA

nb



and located in the Township. As the municipality whose Official Plan was involved in the appeal, the Township automatically became an appellee. The School District was permitted to intervene by a Board Order dated March 27, 1989.

Appellants filed a Petition for Supersedeas on May 5, 1989, alleging that the proposed elementary school is under construction and that Appellants will be irreparably harmed if DER's approval of the Official Plan revision is allowed to remain in effect while the appeal is proceeding to a final disposition on the merits. The School District filed a Motion to Deny or Dismiss the Petition for Supersedeas on May 10, 1989. The Township filed a similar Motion on May 18, 1989. Appellants answered these Motions on June 1, 1989. A hearing on the Petition for Supersedeas was held that same day in Harrisburg before the undersigned Board Member. Legal memoranda have now been filed by Appellants and the School District (in which the Township has joined).

Appellants claim that DER abused its discretion in approving the Official Plan revision by disregarding the comprehensive planning requirements of the Pennsylvania Sewage Facilities Act (SFA), Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 et seq., and the regulations adopted thereunder at 25 Pa. Code §71.1 et seq. They point out that the Township's Official Plan, effective in 1971, has never been subjected to a thorough review; that the approval of the revision for the proposed elementary school without first requiring the Township to resolve the sewage disposal problems in the immediate vicinity of the school site demonstrates an absolute lack of planning.

The pertinent facts revealed by the record show that a middle school has existed on the site since about 1971. At the time the middle school was

built, a package sewage treatment plant was constructed on the site with the appropriate DER permits. This treatment plant, designed and permitted to handle wastewater flows of 16,000 gallons per day (gpd), has functioned during the past 18 years treating flows averaging about 4,500 gpd. The School District has been somewhat derelict in its duty to operate the treatment plant properly and to keep its permits in effect. The violations noted by DER, however, have never involved the effluent limitations of the discharge permit. Water has been supplied to the middle school by an on-site well.

Sometime prior to 1988, the School District decided to build an elementary school as an addition to the middle school and to abandon four other elementary schools throughout the District. The middle school site was chosen for the new elementary school because of its central location and because of the available capacity in its sewage treatment plant.<sup>1</sup> A Planning Module for Land Development (Module) was submitted by the School District to the Township on or about June 21, 1988, revealing, inter alia, (1) that the proposed elementary school would be served by the same on-site well that serves the middle school, and (2) that the proposed elementary school would add flows of about 6,600 gpd to the existing sewage treatment plant. The Township's Board of Supervisors adopted a Resolution on July 19, 1988, approving the Module for submission to DER as a revision to the Township's Official Plan.

Tri-County Regional Planning Commission (TRPC) reviewed the Module and issued its comments on July 28, 1988. Among them was the following:

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<sup>1</sup> The sewage treatment plants in Elizabethville and Lykens, where two of the existing elementary schools are located, are at or near capacity. The plant in Berrysburg, where another elementary school currently exists, has some capacity available. The fourth elementary school, located in Gratz, is served by an on-site septic system.

Recognizing the current well pollution and on-site system problems being experienced in the Village of Loyalton and costs associated with providing public conveyance and treatment (either by extension of the Elizabethville Borough or Lykens Borough systems or construction of a separate treatment facility by the Township to service the Village area), the Commission strongly recommends that the Board of Supervisors consider the benefits of a joint Township and School District venture to upgrade and utilize the school facility treatment plant to service both the school and Village areas.

The problems referred to had existed in the Village of Loyalton for a number of years. The Township engineer's feasibility study of 1982 or 1983 had concluded that it was not economically feasible to install sewers in Loyalton. The middle school site is adjacent to the Village and some of the residences are as close as 500 yards to the school building. Because some of these residences have malfunctioning on-site sewage disposal systems, inadequately treated effluent flows into an open drainage ditch and drains into Wiconisco Creek. One potential solution to this problem is the installation of collection lines that would transport the sewage to the School District's treatment plant on the middle school site. This, in effect, was the joint venture recommended by TRPC.

The Township, in the meantime, had decided to do a comprehensive review and update of its Official Plan. It had forwarded its proposed plan of study to DER on June 21, 1988, and had received DER's approval either on July 5 or July 27, 1988.<sup>2</sup> The study was expected to take a full year, including DER approval of revisions, but was dependent on the availability of aerial mapping.

When the Module was received and reviewed by DER, officials in the Bureau of Water Quality Management concluded that it was incomplete. The

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<sup>2</sup> Two approval letters have been offered into evidence bearing these dates--Appellants' Exhibits Nos. 12 and 15.

reason was set forth in DER's letter of October 21, 1988, addressed to the Township.

The Department [DER] cannot properly complete the review of this proposal without knowing how it fits into the Township's overall plan. In particular, we must know how it relates to providing for the existing and future sewage disposal needs of the Loyalton area. Please discuss this in your resubmission.

Unknown to DER at the time this letter was written, the School District (apparently in response to TRPC's comments) had written to the Township on August 22, 1988, expressing its willingness to discuss a joint venture such as that suggested by TRPC but making it clear that it would not allow any such discussions to delay the construction of the new elementary school. The Township responded on October 21, 1988, expressing its willingness to discuss a joint venture but stating that it would not be in a position to determine its total needs in the Loyalton area until the Official Plan study had progressed to that point.

After receipt of DER's "incomplete" letter of October 21, 1988, consultants for the Township and the School District discussed with G. Roger Musselman, Chief of the Water Quality Planning Section in DER's Bureau of Water Quality Management, what was needed to satisfy DER's concerns. Mr. Musselman suggested that they resubmit the Module accompanied by the letters exchanged by the School District and Township expressing their willingness to discuss a joint venture to solve the problems in the Loyalton area. The Module was resubmitted as suggested on or about November 21, 1988, and was approved by DER on January 10, 1989, subject to the following condition:

The School District will continue to cooperate with Washington Township to help alleviate sewage disposal problems in this area, as expressed in the Superintendent's letter of August 22, 1988.

During the time it was seeking approval of the Module, the School District also was applying to DER for amendments to its Water Quality Permit to enable it to upgrade and modernize the sewage treatment plant on the middle school site, without enlarging its capacity. The School District considered this work to be necessary, regardless of any decision to construct the elementary school, because of the age of the treatment plant and the operational problems experienced in the past. This project, estimated to cost approximately \$119,000, was approved by DER on December 13, 1988. No appeal has been filed from that approval and Appellants state that they are in favor of having the work done.

Subsequent to receipt of DER's approval of the Module, the School District commenced construction of the elementary school. Construction is in progress currently and the school is expected to be ready for occupancy at the beginning of the 1990-1991 school year. The School District has spent \$600,000 on the building and may be liable to contractors for another \$1 million for specially-fabricated material already produced.

The Township has fallen behind schedule on its Official Plan study because of a delay in obtaining aerial mapping. The study is expected to be completed by the end of 1989. The only two viable options for solving the sewage problems in the Loylton area appear to be (1) using the School District's treatment plant on the middle school site, or (2) constructing a separate plant owned by the Township. If the first option is chosen, the treatment plant will have to be expanded because it lacks sufficient capacity to handle the flows from Loylton, whether or not the elementary school is built. If the second option is chosen, the School District will be required to abandon its plant and to hook on to the Township's system, perhaps 3 to 5 years in the future. The construction of the elementary school and the

upgrading of the sewage treatment plant will not limit or influence the Township's options regarding Loyalton.

There are about 20 residences with malfunctioning on-site sewage disposal systems close to the middle school site. The combined flows from these residences would amount to about 5,000 gpd. There is sufficient capacity in the treatment plant on the middle school site, even considering the additional flows to be generated by the elementary school, to handle the 5,000 gpd if the Township and School District decide to take that approach as a temporary or permanent solution. The well on the middle school site is tested at least every three months and has not shown contamination. Water quality problems have been experienced at the Lykens and Berrysburg elementary schools, however, and water had to be supplied to them from the well on the middle school site.

Among the factors to be considered by the Board in granting or denying a supersedeas are (1) irreparable harm to the petitioner, (2) the likelihood of petitioner prevailing on the merits, and (3) the likelihood of injury to the public or other parties. A supersedeas may not be issued where there is an actual or threatened injury to the public health, safety or welfare: section 4(d), The Environmental Hearing Board Act, Act No. 94 of 1988; 25 Pa. Code §21.78.

Appellants' assertion of irreparable harm falls into three categories. The first, financial harm, is based on the argument that, unless a supersedeas is granted, the taxpayers of the School District will be saddled with a \$3.8 million school on a site developed without the planning mandated by the SFA. This argument presumes that, if the planning had been done beforehand, the School District would have been compelled to build the school elsewhere or to abandon the project entirely.

There are serious problems with this argument. Since it is based upon a presumption, it is speculative and may not occur at all. See Berkowitz v. Wilbar, 416 Pa. 369, 206 A.2d 280 (1965), and Bliss Excavating Company v. Luzerne County, 418 Pa. 446, 211 A.2d 532 (1965). Besides, it lacks a causative chain of reasoning. Even if we presume, along with Appellants, that proper planning would have required the School District to build elsewhere, we are not shown how Appellants will suffer financial harm by having the school built on the middle school site. Appellants have not alleged that the school could have been built at a lower cost if the planning had been done beforehand. They have not alleged that any modifications will have to be made after the school is built because of the lack of prior planning. Even if we accept Appellants' assertions of all the failures that supposedly occurred in this planning process, we are unable to see how the taxpayers of the School District have been, or will be, burdened by one additional dollar of cost as a result.<sup>3</sup>

Appellants' second category of alleged irreparable harm involves the health hazards associated with the malfunctioning on-site sewage disposal systems in the Loyaltown area. Appellants claim that DER's approval of the School District's Module without compelling a resolution of this problem will

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<sup>3</sup> At first blush, the \$119,000 being spent to upgrade the treatment plant on the middle school site appeared to be an expenditure that might not have been made if the Township's Official Plan study had been completed beforehand and would have provided for the abandonment of the School District's treatment plant. However, all parties agree that this upgrading was necessary to be done, regardless of whether or not the new elementary school was built on the site. Since a Township-owned treatment plant would not be available for 3 to 5 years, in any case, some upgrading of the School District's plant probably would have been necessary. In any event, Appellants have not raised the point; and the financial harm, if any, would be speculative.

force some 500 elementary-age children (some of whose parents are members of Citizens for Upper Dauphin, one of the Appellants) to attend a school in close proximity to an area contaminated by raw sewage flowing in a drainage ditch.

Since no children will be attending the new elementary school until the beginning of the 1990-1991 school year, it is unlikely that any of them will be subjected to a health risk during the time necessary to dispose of this appeal on the merits.<sup>4</sup> Aside from that, however, we are persuaded that the health risks have been exaggerated and have only recently become a focal point for Appellants' objections. We do not discount the threat to human health posed by raw sewage in an open drainage ditch. That threat has existed, however, for at least 10 years and perhaps as long as the middle school has existed on the site. If the condition poses a hazard to the 500 pupils of the new elementary school, it poses the same hazard to the 485 pupils of the middle school. Yet, Appellants have presented no evidence to show that any students have been affected.

Appellants' lead-off witness, James A. Reed, a member of the School District's Board of Directors and an opponent of the new school, testified that he was aware of the condition but had not actually seen it until the day before the hearing. When asked whether he thought the School District should close the middle school until the condition was corrected, his answer was non-responsive. When asked whether he thought the School District should offer to assist the Township to put in collection lines to eliminate the problem, he replied that it was a Township problem and only an indirect problem for the School District. This testimony undermines Appellants'

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<sup>4</sup> All pre-hearing memoranda have been filed and the appeal is ready to be scheduled for a hearing on the merits. Even if the hearing does not take place for several months, there will still be adequate time for the Board to issue an Adjudication prior to September 1990.

efforts to portray this condition as a dire threat to the health of school children.

Appellants' second witness, George E. Luther, testified to the pollution of Wiconisco Creek by the raw sewage flowing from the drainage ditch. He produced correspondence documenting his 10-year effort to get the problem resolved. Yet, he acknowledged that his concern related to the Creek and to the children swimming in it, not the pupils at the middle school.

Charles D. Ferree, Jr. of DER's Bureau of Water Quality Management, testified that he has been aware of the raw sewage condition in the drainage ditch for at least 3 years. Dr. Andrew W. Hills, Superintendent of the School District for the past 3 years, testified that he has been aware of the condition but that the School District has done nothing to correct the problem except to offer its cooperation to the Township. He testified further that no complaints about the condition had been made to him by parents or anyone else.

Dr. Hills pointed out that, despite the proximity of the drainage ditch, contamination has not shown up in the well on the middle school site. In contrast, contamination has forced the School District to cease temporarily the use of wells supplying the Lykens and Berrysburg elementary schools. During those shutdowns, water was shipped from the middle school site.

The evidence simply does not establish a threat to the public health (including that of school children) sufficient to warrant the issuance of a supersedeas. Besides, DER's approval of the School District's Module may hasten the day when the sewage disposal problems of the Loyalton area are finally resolved. DER's insistence on a commitment from both the Township and the School District to cooperate on this problem, and DER's insertion of a condition to that effect in the approval letter, may move discussions forward at a faster pace than otherwise might be the case. There is no guarantee that

discussions will lead to an agreement, but DER has sent a clear signal to both entities that the problem must be solved.

Appellants contend that a faster solution would have been found if DER had refused to approve the Module until the Township had made a firm commitment on when and how it would correct the Loyaltown problems. Given the status of the Township's Official Plan study, that contention is of doubtful validity. Moreover, DER had only a limited discretion. It was presented with a proposal to build an addition to a school, utilizing available capacity in an existing, duly permitted treatment plant owned by the School District. If DER had denied approval until the Township had made a comprehensive revision to its Official Plan, it might well have amounted to an unconstitutional confiscation of property: Commonwealth, Dept. of Environmental Resources v. Trautner, 19 Pa. Cmwlth. 116, 338 A.2d 718 (1975).

Appellants assert, finally, that DER's action, being in violation of the SFA, the regulations and Article I, Section 27, of the Pennsylvania Constitution, constitutes irreparable harm per se, citing Pa. P.U.C. v. Israel, 356 Pa. 400, 52 A.2d 317 (1947). Without deciding whether the doctrines announced in the Israel case are available to Appellants, we fail to see their application where a prima facie case of unlawful conduct has not been established. Appellants have made many assertions of illegality and have placed on the record admissions by certain DER officials that they did not consider this point or that fact in reviewing the Module. However, it is far from clear that these omissions constituted unlawful conduct in the context of the Module being reviewed. Absent clear evidence of illegality, the Israel case has no application.

We conclude that Appellants have not shown that they will suffer irreparable harm if the case proceeds on its merits in the normal course of

events. Since irreparable harm is an essential prerequisite to the granting of a stay, Pa. P.U.C. v. Process Gas Consumers Group, 502 Pa. 545, 467 A.2d 805 (1983), Appellants are not entitled to a supersedeas. Accordingly, it is unnecessary to discuss the other points raised by Appellants in their Petition or those raised by the School District and the Township in their Motions to Deny or Dismiss Appellants' Petition.

**ORDER**

AND NOW, this 16th day of June 1989, it is ordered:

(1) the Petition for Supersedeas, filed by Appellants on May 5, 1989, is denied.

(2) The Motions to Deny or Dismiss Petition for Supersedeas, filed by the School District on May 10, 1989, and the Township on May 18, 1989, are denied as moot.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS, MEMBER

DATED: June 16, 1989

cc: Bureau of Litigation  
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For the Commonwealth, DER:  
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M. DIANE SMITH  
 SECRETARY TO THE BOARD

BOROUGH OF WEST CHESTER

v.

COMMONWEALTH OF PENNSYLVANIA  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES

:  
 :  
 : EHB Docket No. 86-327-W  
 :  
 :  
 : Issued: June 19, 1989

**OPINION AND ORDER**  
**SUR MOTION FOR SUMMARY JUDGMENT**

Synopsis

The Department of Environmental Resources' motion for summary judgment is denied and the grantee's motion for summary judgment is granted where the Department improperly denied federal sewage treatment construction grant monies to fund the costs of hauling and disposing unsuitable fill material encountered during the construction of an access road to a sewage treatment facility. The Board holds that the hauling and disposing were necessary for the process integrity of the facility and, therefore, eligible for funding under 25 Pa. Code §103.14(b)(2)(i).

OPINION

This matter was initiated by the Borough of West Chester's (Borough) July 1, 1986, filing of a notice of appeal seeking review of the Department of Environmental Resources' (Department) partial denial of a request for grant monies under the Clean Water Act, 33 U.S.C. §1251 et seq. (CWA), to fund the costs of hauling and disposing unsuitable fill material found during the construction of an access road to the Borough's wastewater treatment facility.

By request of the parties, the Board canceled a hearing on the merits scheduled for October 20, 1988, and the parties agreed to resolve this matter through the filing of cross motions for summary judgment. On December 23, 1988, the parties submitted a stipulation of facts, and the cross motions, filed on January 25, 1989, by the Borough, and March 1, 1989, by the Department, are now before the Board for determination.

The following facts have been stipulated by the parties. The Borough constructed the Goose Creek Wastewater Treatment Plant pursuant to Grant No. C-421013-03, approved by the Department and authorized by the CWA (S.F.1). On April 1, 1985, the Department approved contract documents, plans and specifications, known as Contract 22, prepared by BCM Eastern, Inc. (BCM) on behalf of the Borough (S.F. 2-3). On September 11, 1985, the Borough entered into a contract with McElwee-Scarborough, Inc., Construction Corp. (McElwee) to perform work specified in Contract 22 (S.F. 4). Drawings submitted as part of the Contract 22 package, Nos. 102, 108, 109 and 110, show the access road or portions thereof (S.F. 7). Woodward-Clyde Consultants (WCC) performed soil borings in the areas of the mechanical bar screen and aerated grit chamber, shown on drawings Nos. 102, 109 and 110 (S.F. 5). The tests borings showed "firm to stiff brown to greenish-brown medium to fine sandy clayey silt with wood pieces, rock and brick fragments, paper, organic material, vegetation, and plastic material (Fill) (S.F. 6)." The results of these test borings were not made a part of the contract drawings, nor were they indicated on the contract drawings (S.F. 7). Pursuant to Contract 22, McElwee constructed the access road at a certain location (S.F. 8). Prior to the letting of the contract, WCC did not conduct soil borings in the location of the proposed access road, nor did it conduct soil borings in the actual location of the access road after letting of the contract (S.F. 11).

On February 13, 1986, the Department notified the Borough that 1762 cubic yards of unsuitable material encountered during construction of the access road to the sewage treatment facility had to be disposed of at a permitted landfill (S.F. 12-13). This material was removed to the Knickerbocker Landfill between February 13, 1986, and late February or early March, 1986 (S.F. 14). Meanwhile, on January 28, 1986, BCM prepared a change order to Contract 22, requesting, inter alia, a \$98,000 addition to the contract price (S.F. 15). On June 2, 1986, the Department approved grant participation for \$45,472, the cost of excavating the proposed access road and backfilling the site with suitable material (S.F. 16).<sup>1</sup>

The Department denied grant participation for the remaining \$52,528, the cost of hauling and disposing of the unsuitable material, on the basis that the costs were not associated with an unforeseen condition encountered during construction, but rather were caused by an inadequate investigation prior to bidding resulting from omissions in the project plans and specifications submitted to the Department. (S.F. 17)

The Borough contends that under both 25 Pa. Code §§103.14(b)(2)(i) and (ii), the Department was required to approve funding for the costs of hauling and disposing this material. It argues that the costs were related to and incident to the change in scope of the project and that the hauling and disposing were necessary to protect the structural or process integrity of the facilities. Additionally, it claims that the unsuitable fill material could not have been foreseen prior to the start of the access road. In support of

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<sup>1</sup> The Department approved this amount based on the rationale in an April 22, 1986, letter from BCM to the Department which stated that because materials were found on which a road could not be built, McElwee was authorized to remove that material and backfill the area. This was over and above the contract scope of work.

the latter argument, the Borough submitted the affidavit of Thomas E. Johns, P.E., Director of BCM's Construction Services Department. In his affidavit, Mr. Johns avers that BCM conducted a physical inspection of the property prior to preparation of the plans; that no test borings were taken at the location of the proposed service road and, in fact, industry practice does not dictate taking soil borings for the development of roadway placement and/or design; that prior to construction of the road, no one at BCM had any knowledge that unsuitable fill material was located where part of the road was to be built; and that additional excavation and disposal of the material were beyond the scope of Contract 22.

The Department's motion asserts that the investigation conducted by BCM was inadequate, that grant funds cannot be used to pay for impact costs of changes in scope caused by defects in the project's plans, and that hauling and disposing of the material was not necessary to protect the structural or process integrity of the facility, since the costs could have been avoided by locating the access road elsewhere. Moreover, the Department maintains that the removal of the unsuitable fill material was not a change in scope of the project because Contract 22 (Section 2.1B, page 02211/3) requires the contractor to pay for the costs of disposing excavated material deemed unsuitable backfill. The Department points out that it is unclear that this is even a change in scope because of the contractor's responsibility under the contract.<sup>2</sup> It claims the contract requires the contractor to dispose of unsuitable material encountered in the course of construction, but that this material was not so encountered, since "construction" must be construed as

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<sup>2</sup> This is a rather curious argument because if the costs of disposal are not outside the scope of Contract 22, then the Department should have approved the costs associated with it for grant participation.

construction within the scope of the project and the unsuitable fill was found below the depth called to be excavated under the contract.

We believe the issues for determination are whether this requirement to haul and dispose of the material excavated beyond that called for in the original contract was outside the scope of the original contract, and if so, whether it was necessary for the integrity of the facility or was unforeseen by the design engineer before the material was encountered. See 25 Pa. Code §103.14.

The term "change in scope" is not defined in Chapter 103 or the CWA and the regulations promulgated thereunder. Based on our reading of 40 CFR §35.930-4, which requires the grant agreement to define the scope of the project for which federal assistance is awarded, the determination of whether a situation is within or outside the scope of the grant must be made on a case-by-case basis based upon an examination of the contracts encompassed by the grant agreement. The Department argues that the disposal costs are not a change in scope because the contract documents required the contractor to pay the disposal costs of all unsuitable fill. On the other hand, the Borough claims that this section of the contract plans, Section 2.1 B, p. 02211/3, refers to material excavated within the course of construction, which construction is specified in the contract documents, and that since this section only applies to hauling/disposing of excavated material to the depth required by the contract, any excavation beyond the depth specified in Contract 22 is outside the scope of the contract.

Upon review of the contract documents, we must hold that hauling and disposing of unsuitable fill which was not originally required to be excavated under the original contract was not within the scope of the project. While it is true that the parties agreed the contractor would construct an access road,

the contract documents do not indicate hauling and disposing of unsuitable fill was part of the original scope of the contract. While portions of the contract mention excavating and backfilling the area, we believe that the actual hauling and disposing of the unsuitable fill from the area not originally required to be excavated was not contemplated and thus was outside the scope of Contract 22.

Although we believe that these costs were the result of a change in scope of Contract 22, the Borough must still satisfy 25 Pa. Code §§103.14(b)(2)(i) or (ii) before grant participation can be approved by the Department. That section states

(b) Grant funding for changes in the scope of a grant project will be approved by the Department:

\* \* \* \* \*

(2) In the case of a Step 3 grant project:

(i) Where the change in scope is necessary to protect the structural or process integrity of the facilities; or

(ii) Where adverse conditions are identified during the construction of the facilities which could not have been foreseen by the design engineer prior to encountering the condition.

(emphasis added)

Of course, the significance of the word "or" at the end of subsection (i) is that the Borough must satisfy either subsection (i) or (ii); it need not satisfy both subsections to be eligible for grant funding.

We do believe that the change in scope, namely the hauling and disposing of the excavated, unsuitable fill material, was, like the construction of the road, necessary to protect the structural or process integrity of the facility, given our examination of the plans and specifications and the Department's own recognition of the necessity of the access road and the infeasibility of redesigning and relocating it. Since the

access road is part of the facility by virtue of the broad definition of "facility" in 25 Pa. Code §103.1 and the Department has already approved funding for other construction-associated costs of the road, it is logical to conclude that the costs of hauling and disposing of unsuitable fill, which were a necessary component of the access road construction, are eligible for funding. Thus, under 25 Pa. Code §103.14(b)(2)(i), the Borough was eligible for grant funding for the costs associated with hauling and disposing the unsuitable fill material.<sup>3</sup>

Accordingly, we will deny the Department's Motion for Summary Judgment and grant the Borough's Motion for Summary Judgment.

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<sup>3</sup> Since we have held that the disposal and hauling costs are eligible for grant funding under 25 Pa. Code §103.14(b)(2)(i), it is not necessary for us to decide whether the change order was eligible for funding under 25 Pa. Code §103.14(b)(2)(ii). Based on our analysis of the stipulated facts, particularly that a refuse dump was nearby, soil borings in the area of the mechanical screen and aerated grit chamber indicated unsuitable material and that the access road was located near to these areas, it appears that problems concerning the quality of fill in the area of the access road were foreseeable.

**ORDER**

AND NOW, this 19th day of June, 1989, it is ordered that:

- 1) The Department's Motion for Summary Judgment is denied, and
- 2) The Borough's Motion for Summary Judgment is granted, and its appeal is sustained; and
- 3) The Department shall, on or before July 10, 1989, take the necessary action to approve funding for the remainder of the costs (\$52,528) associated with the change order to Contract 22.

**ENVIRONMENTAL HEARING BOARD**

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

*Robert D. Myers*

ROBERT D. MYERS, MEMBER

*Terrance J. Fitzpatrick*

TERRANCE J. FITZPATRICK, MEMBER

DATED: June 19, 1989

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M. DIANE SMIT  
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FRANKLIN TOWNSHIP MUNICIPAL SANITARY :  
 AUTHORITY and BOROUGH OF DELMONT :  
 v. : EHB Docket No. 88-155-W  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: June 22, 1989

OPINION AND ORDER  
 SUR  
 MOTION FOR SUMMARY JUDGMENT

Synopsis

A motion for summary judgment is denied where it is unclear that no material facts remain in dispute.

OPINION

This matter was initiated by the April 20, 1988, filing of a notice of appeal by the Franklin Township Municipal Sanitary Authority (FTMSA) and the Borough of Delmont (Delmont) (collectively, Appellants) seeking review of the March 21, 1988, denial by the Department of Environmental Resources (Department) of the Appellants' request to release \$247,000 remaining in Delmont's grant (C-42118-02) for construction of sewage treatment facilities pursuant to §201 of the Clean Water Act, 33 U.S.C. §1281. Appellants sought the \$247,000 for the upgrade of FTMSA's Meadowbrook Sewage Treatment Plant, contending that it was a change in scope of the original grant project and eligible for grant funding under 25 Pa. Code §103.14(b) because the plant upgrade was directed by the Department through its June 30, 1987, issuance of a new NPDES permit with more stringent terms and conditions.

On March 27, 1989, the Appellants filed a motion for summary judgment. Most simply put, Appellants claim that the grant was to upgrade treatment of the Meadowbrook plant to secondary treatment; that the Department imposed more stringent effluent limitations in its 1987 NPDES permit renewal for the Meadowbrook plant which could only be met by advanced secondary treatment; that FTMSA was required to enter into a consent agreement with the Department to provide for the achievement of the effluent limits in the 1987 permit; and that, upgrading the FTMSA Meadowbrook plant from secondary to advanced secondary treatment was a change in scope in the grant project directed by the Department, and, therefore, eligible for construction grant funding under 25 Pa.Code §103.14(b)(1).

On April 19, 1989, the Department filed its reply to the Appellants' motion, arguing, *inter alia*, that the grant of summary judgment is inappropriate because genuine disputes of material fact exist, namely, that FTMSA and Delmont were not jointly awarded a federal construction grant, that Appellants have not proven that the current NPDES permit limits can be met only through advanced secondary treatment, and that FTMSA was not required to enter into a consent agreement with the Department. The Department also argues that, since the grant was awarded to Delmont, upgrading FTMSA's Meadowbrook plant would not be an allowable change in the scope of Delmont's project, since the Department cannot approve a change of scope for another municipality's project. In the alternative, the Department requested that Appellants' motion for summary judgment be dismissed, with costs awarded to the Department.

This Board will grant summary judgment when there are no genuine disputes over material facts 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 (1978). When deciding a motion for summary judgment, the Board will look at

the facts in the light most favorable to the non-moving party. Robert C. Penoyer v. DER, 1987 EHB 131.

Looking at the facts in the light most favorable to the Department, we must deny Appellants' motion for summary judgment. There are disputed material facts regarding the necessity for the treatment plant upgrade, the circumstances leading to the grant, and the terms and conditions of the grant. Furthermore, material facts relating to the grant agreement have not been brought before the Board, and this absence of facts relating to the terms and conditions of the underlying grant agreement make it impossible for the Board to reach any conclusion whether the Department acted improperly in denying the release of federal grant monies to fund the upgrade of the Meadowbrook plant. Therefore, this matter is not appropriate for summary disposition, and we will deny Appellants' motion.

**O R D E R**

AND NOW, this 22nd day of June, 1989, it is ordered that Appellants' motion for summary judgment is denied.

**ENVIRONMENTAL HEARING BOARD**

*Maxine Woelfling*  
**MAXINE WOELFLING, CHAIRMAN**

**DATED:** June 22, 1989

**cc: Bureau of Litigation**  
Harrisburg, PA  
**For the Commonwealth, DER:**  
Gary A. Peters, Esq.  
Western Region  
**For Appellant:**  
Ronald Kuis, Esq.  
KIRKPATRICK & LOCKHART  
Pittsburgh, PA

b1



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

CARL SNYDER

v.

COMMONWEALTH OF PENNSYLVANIA  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES  
 and ED MIKEL COAL COMPANY, Permittee

EHB Docket No. 88-277-F

Issued: June 22, 1989

**OPINION AND ORDER SUR  
 MOTION FOR SUMMARY JUDGMENT**

Synopsis

A permittee's motion for summary judgment is granted in a case where the appellant is contesting the Department of Environmental Resources' (DER) grant of a revision to the permittee's surface mining permit. This revision provided for the permanent relocation of a road which had been temporarily relocated to facilitate mining under the original permit. After mining on the site was completed, the Township in which the site was located approved a resolution calling for the permanent relocation of the road. Since the Township has primary authority over relocation of roads in the Township, DER's decision to revise the permit to reflect the permanent relocation was correct as a matter of law.

**OPINION**

This case involves an appeal by Carl Snyder (Snyder) from a decision by the Department of Environmental Resources (DER) which granted a permit

revision to Ed Mikel Coal Company (Mikel)<sup>1</sup>. This permit revision approved the permanent relocation of Township Route T-388, which had been temporarily relocated (under the original permit) to facilitate Mikel's mining of this site in South Huntingdon Township, Westmoreland County. Snyder is a landowner on the mining site; his notice of appeal alleges that he has been adversely affected by the permanent relocation of the road because he has lost seven hundred and twenty-five (725) feet of road frontage without compensation. He also alleges that he would not have permitted Mikel to mine on his property had he known the road relocation would be permanent, and that, as a result of the road relocation, he cannot quarry stone from his property as he had intended to do.

This Opinion and Order addresses Mikel's Motion for Summary Judgment filed on December 16, 1988. Snyder filed an answer opposing the motion. DER filed a letter which neither supported nor opposed the motion, but which explained the standards and procedures applied by DER in reviewing the application for the permit revision.

In its motion, Mikel states that Township Road T-388 was temporarily relocated pursuant to its mining permit and with the consent of the Township Supervisors. Upon completion of mining, the Supervisors determined that the new location of the road was an improvement over the prior location because the new location had a lower grade and was more easily maintained during the winter months. The Supervisors then contacted Edward and Irene Mikel--the owners of the land on which the newly relocated road was situated--and

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<sup>1</sup> Snyder states in his notice of appeal that he is also seeking review of the "effective release" of the bond posted by Mikel by the granting of this permit revision. Snyder has not elaborated on this issue in either his Pre-Hearing Memorandum or in his answer to the motion for summary judgment; therefore, we will consider it waived. In any event, it seems that Snyder's argument regarding the bond hinges on the propriety of the permit revision.

obtained their consent to the permanent relocation of the road in lieu of the condemnation of their property for that purpose. The agreement between the Mikels and the Township was ratified in Resolution No. 168 of the Township Supervisors. The Department then granted the permit revision to accommodate the permanent relocation of the road as agreed to by Edward and Irene Mikel and the Township. Mikel argues that the legal authority over location of roads in the Township is vested in the Supervisors of the Township, not DER. Finally, Mikel contends that this Board does not have jurisdiction to review a decision of the Township's Supervisors.

In his answer to the motion, Snyder repeats the statements he made in his notice of appeal. He also contends that the new location of the road has not resulted in an improvement to the road itself, and that the right-of-way he has been granted to obtain access to the road does not provide adequate access or the same degree of access which he previously enjoyed.<sup>2</sup>

DER's letter, while not taking a position on the motion for summary judgment, does acknowledge the authority of the Township Supervisors to relocate a Township road. DER goes on to state that this case is governed by the regulations at 25 Pa. Code §86.103(c). Under these regulations, when relocation of a public road is sought pursuant to a surface mining permit application, or, as in this case, an application to revise a permit, DER will:

- (1) Require the applicant to obtain necessary approvals of the authority with jurisdiction over the public road.
- (2) Provide notice in a newspaper of general circulation in the affected locale of a public hearing, if one has been requested, at least two weeks before the hearing.

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<sup>2</sup> Although Snyder captioned his pleading as an "answer," he did not specifically admit or deny the factual averments in the motion. Instead, he simply set forth the statements described above. Accordingly, we will deem the factual averments of the motion admitted. Pa. RCP 1029, Herskovitz v. Vespico, 238 Pa. Super. 529, 362 A.2d 394 (1976).

(3) Insure that an opportunity for a public hearing has been afforded in the locality of the proposed mining operations, at which any member of the public may participate, for the purpose of determining whether the interests of the public and affected landowners will be protected.

(4) Review the information at the public hearing, if one has been held, and the findings of applicable Commonwealth and local agencies as to whether the interests of the public and affected landowners will be protected from the proposed mining operations.

25 Pa. Code §86.103(c)(1)-(4). DER states that it complied with these procedures in this case.

The Board has the authority to grant summary judgment only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summerdale Borough v. DER, 34 Pa. Commw. 574, 383 A.2d 1320, 1322 (1978). The Board must read the motion for summary judgment in the light most favorable to the non-moving party. Palisades Residents in Defense of the Environment v. DER, 1988 EHB 8, 10-11.

Applying these standards to this case, Mikel's motion for summary judgment will be granted. It appears from our reading of the relevant provisions of the Second Class Township Code that the general authority to supervise roads in a township is vested in the township supervisors. See 53 P.S. §66101-66197. In particular, the township supervisors may consider whether it is advisable to relocate a road. 53 P.S. §66115. Accepting as true the statements in Mikel's motion that the South Huntingdon Township Supervisors approved a resolution to relocate the road, and then signed an

agreement in lieu of condemnation with the Mikels,<sup>3</sup> it is clear that the Township Supervisors have exercised their general authority over the relocation of this road.

DER's authority over road relocation arises only because road relocation is sometimes necessary to facilitate the mining of coal. In the present case, Township Route T-388 was temporarily relocated as part of DER's mine permitting process. After mining was completed, the Township Supervisors decided that the new location of the road was an improvement over the old location, and they approved a resolution which had the effect of making the temporary relocation permanent. Under these facts, DER had no choice but to approve the permit revision to reflect the permanent relocation of the road. If we were to hold otherwise, we would be authorizing DER to usurp the Township's general authority over roads within its jurisdiction.

Snyder's argument that he has not been compensated for the alleged decline in value of his property is one that goes to the validity of the Township's decision to relocate the road, and this Board does not have jurisdiction to review the validity of the Township's decision. The Board's function is to review the legality of DER's decision to grant the permit revision, and it is clear that DER's decision was proper. Therefore, we will grant Mikel's motion for summary judgment.

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<sup>3</sup> As explained in footnote 2, the factual allegations in Mikel's motion will be deemed admitted since Snyder did not deny them. We also note that Mikel's motion was supported by affidavits from Edward Mikel and from the Chairman of the South Huntingdon Township Supervisors.

ORDER

AND NOW, this 22nd day of June, 1989, it is ordered that the Motion for Summary Judgment filed by Ed Mikel Coal Company is granted, and this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*  
MAXINE WOELFLING, CHAIRMAN

*Robert D. Myers*  
ROBERT D. MYERS, MEMBER

*Terrance J. Fitzpatrick*  
TERRANCE J. FITZPATRICK, MEMBER

DATED: June 22, 1989

cc: Bureau of Litigation  
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For the Commonwealth, DER:  
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COMMONWEALTH OF PENNSYLVANIA  
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M. DIANE SMITH  
 SECRETARY TO THE BOARD

**WABO COAL COMPANY** : **EHB Docket No. 85-416-W**  
 : **(Consolidated Docket)**  
 v. :  
 :  
**COMMONWEALTH OF PENNSYLVANIA** :  
**DEPARTMENT OF ENVIRONMENTAL RESOURCES** : **Issued: June 23, 1989**

**A D J U D I C A T I O N**

**By: Maxine Woelfling, Chairman**

**Synopsis**

Appeals of compliance orders will be dismissed when no evidence was presented to establish that the Department of Environmental Resources acted improperly in issuing the orders. The 1980 amendments to the Surface Mining Conservation and Reclamation Act apply to instances where reclamation activities on a permitted area have not been completed as of the effective date of that Act. Appellant is responsible for backfilling unreclaimed areas on its permit area which came into existence subsequent to the permit issuance. Issues raised by the Appellant concerning whether the five-year statute of limitations contained at 52 P.S. §1396.22 bars the assessment of civil penalties against the Appellant and whether the Department is estopped from assessing a civil penalty where it has previously granted a partial bond release to the Appellant are not addressed, since Appellant did not contest the final assessment of civil penalties.

## INTRODUCTION

This matter was initiated by the October 11, 1985, filing of a notice of appeal by WABO Coal Company (WABO) seeking review of the Department of Environmental Resources' (Department) September 11, 1985, compliance order citing WABO for violations of 25 Pa.Code §§88.115, 88.119, and 88.121, and a September 12, 1985, proposed civil penalty assessment; both the compliance order and the proposed civil penalty assessment were issued 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 regulations promulgated thereunder. This appeal was docketed at Docket No. 85-416-W. On December 19, 1985, WABO filed a notice of appeal seeking review of a November 19, 1985, compliance order citing WABO for the violation of 25 Pa.Code §§88.115 and 88.121. This appeal was docketed at Docket No. 85-543-W, and on April 7, 1986, the two appeals were consolidated at Docket No. 85-416-W.

WABO filed a petition for supersedeas on October 11, 1985. A hearing on the petition was held on November 4, 1985, and the petition was denied by order of November 8, 1985; an opinion affirming that order was issued on January 24, 1986 (1986 EHB 71). The Board held a hearing on the merits of the appeal on June 19, 1986, and at the outset of that hearing the parties stipulated that the notes of testimony from the November 4, 1985, hearing on the petition for supersedeas would be incorporated as part of the record of the June 19, 1986, hearing on the merits. A briefing schedule was established on the record at the close of the hearing; the Department was to file its post-hearing brief on or before August 15, 1986, while WABO was to file its brief on or before September 2, 1986 (N.T. 286). After receiving a requested extension, the Department filed its brief on August 25, 1986. WABO has not filed a post-hearing brief.

## FINDINGS OF FACT

1. Appellant is WABO Coal Company, a sole proprietorship owned by Robert Barnhart, Sr. (N.T. 21)<sup>1</sup>

2. Appellee is the Department, the agency authorized to administer the SMCRA, the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, and the rules and regulations promulgated thereunder.

3. WABO engaged in the strip mining of anthracite coal by the surface mining method in Reilly Township, Schuylkill County. (N.T. 6)

4. WABO's mining activities were conducted pursuant to Mining Permit (MP) No. 164-1 and Mine Drainage Permit (MDP) No. 5470330, which were originally issued on or about November 5, 1970, by the Department of Mines and Mineral Industries and the Sanitary Water Board, respectively. MP No. 164-1 was amended by MP No. 164-1A on May 13, 1971. (N.T. 28-29; DER Ex. 1, 5)

5. The mining permits covered an area owned by Walter Barnhart, deceased (uncle of Robert Barnhart, Sr.), and now owned by Walter Barnhart's children. (N.T. 6, 56; DER Ex. 1)

6. Robert Barnhart, Sr. never owned the property covered by the mining permits, although he was listed as one of the landowners on the completion report which was part of WABO's bond release request. (N.T. 60; DER Ex.5)

7. Robert Barnhart, Jr., Michael Barnhart, and William Barnhart are the sons of Robert Barnhart, Sr. (N.T. 87-88, 112, 216)

8. Robert, Jr. and Michael are estranged from their parents. (N.T. 108-109, 123)

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<sup>1</sup> The notes of testimony from the hearing on the petition for supersedeas and the hearing on the merits are numbered sequentially.

9. Confusion existed as to the exact location of the 10 acres permitted as part of WABO's operation. (N.T. 195-202)

10. WABO mined an area referred to as Pit No. 1 on the upper portion of its site and an area referred to as Pit No. 2 on the lower portion of its site. (N.T. 38-40, 242, 243, 253; DER Ex. 2)

11. WABO requested Stage I and II bond release on a 1.5 acre portion of its permitted area by application dated May 13, 1983. (DER Ex. 5)

12. On October 18, 1983, a replacement bond of \$300 was deposited by WABO, in place of its \$5000 original bond. (DER Ex. 9)

13. The Department's release of \$4700 of WABO's bond, as evidenced by the replacement bond, was based on the backfilling and reclamation of areas mined which were never encompassed by the bond and never permitted. (N.T. 210-212)

14. The completion report supporting WABO's bond release request did not indicate that the areas where Pit No. 1 and Pit No. 2 were located had ever been mined. (N.T. 178; DER Ex. 5)

15. The areas of Pit No. 1 and Pit No. 2 had not been inspected by the Department prior to bond release. (N.T. 178)

16. Toxic material is located within 100 to 150 yards of Pit No. 2. (N.T. 203)

17. Aerial photographs taken in 1966 do not show WABO's operation in existence. (N.T. 250; DER Ex. 17, 18)

18. As of 1966, the areas on which WABO conducted mining activity at Pit No. 1 and Pit No. 2 were not shown as affected by mining activity. (N.T. 254)

19. WABO's permit application included a map indicating pre-existing stripping operations in the vicinity of its proposed operation. (N.T. 34-41, 244; DER Ex. 2)

20. The 1966 aerial photographs show a large, water-filled pit southwest of where WABO operated, a small narrow pit east of where WABO operated, and a smaller, water-filled pit due west of where WABO operated, all predating WABO's operation. (N.T. 250; DER Ex. 17, 18)

21. These pits in the aerial photograph correlate with the areas of pre-existing stripping in WABO's permit application. (N.T. 252; DER ex. 2, 11, 17-18)

22. No evidence exists to establish any mining activity in the areas of Pit No. 1 and Pit No. 2 after 1966 and before WABO began its mining activities. (N.T. 259)

23. An aerial photograph taken in 1971 shows that the areas identified as Pit No. 1 and Pit No. 2 had been affected. (N.T. 258-259; DER Ex. 20)

24. Pit No. 1 and Pit No. 2 are found on a 1976 aerial photograph of the site. (N.T. 260-264; DER Ex. 20)

25. An aerial photograph taken in 1976 shows that an area identified as Pit No. 3 had been affected. This area was not affected in the earlier photographs. (N.T. 261)

26. WABO ceased mining in the area of Pit No. 1 in 1971-1972 and ceased mining in the area of Pit No. 2 by 1974. (N.T. 102-104)

27. Stockpiled coal was sold by WABO until 1982. (N.T. 48)

28. In 1982, Robert Barnhart, Sr. told Department officials of his intent to stop mining activity. (N.T. 45)

29. With the exception of the pre-existing pits, the area of WABO's operation was covered by forest in 1966. (N.T. 259; DER Ex. 17-19)

30. WABO removed vegetation from the site when it commenced its mining activity. (N.T. 259; DER Ex. 17-21)

31. Succession is an ecological principle characterized by progressive changes in vegetation, beginning with short-lived, light-seeded, light-demanding species capable of growing on bare ground and later by longer-lived species which generally require initial vegetation on the ground. (N.T. 265-274)

32. Species invading abandoned mine sites would start to grow immediately after abandonment. (N.T. 284)

33. Vegetation in and around the area of Pit No. 1 and Pit No. 2 in 1985 was characterized by "early successional" species which are "volunteer" in nature. (N.T. 185-186, 266, 270-271)

34. Volunteer species are those which invade a site in some manner other than by human planting. (N.T. 185, 266-267, 269)

35. By contrast, vegetation growing in 1985 on nearby spoilbanks of pits in existence prior to 1966 was characterized by older, midsuccessional species. (N.T. 273-274)

36. Pit No. 1 had volunteer vegetation in 1985 indicating a growth of at least 12-13 years. (N.T. 275-277)

37. A piece of wood taken from a tree growing in Pit No. 1 in 1986 was 11 years old. (N.T. 275-277; DER Ex. 22)

38. Pit No. 2 had vegetation in 1985 indicating a growth of about 10 years. (N.T. 275-277)

39. A piece of wood taken from a tree growing in Pit No. 2 in 1986 was nine years old. (N.T. 275-277; DER Ex. 23)

40. The toxic material near Pit No. 2 was at least three years old in 1985, based on the growth of blue stem grasses. (N.T. 277-278)

#### DISCUSSION

In this consolidated appeal of two compliance orders issued to WABO by the Department, our scope of review is limited to a determination of whether or not the Department committed an abuse of discretion in issuing these compliance orders. Warren Sand and Gravel Company, Inc. v. DER, 20 Pa.Cmwlth 186, 341 A.2d 556 (1975). The Department has the burden of proving by a preponderance of the evidence that its actions were not arbitrary, capricious, or otherwise an abuse of discretion. 25 Pa.Code §21.101(b)(3).

WABO appealed these two compliance orders, asserting that it backfilled a greater area than it had affected, that the area where toxic material was present did not belong to it and was not stripped by it, that SMCRA and the regulations promulgated thereunder do not apply in this situation, that the statute of limitations bars the civil penalty assessment, and that the Department is estopped from ordering WABO to backfill and reclaim the permitted area.

Some arguments advanced by WABO need not be addressed here, having already been disposed of by the Board's 1986 opinion and order denying WABO's petition for supersedeas. That opinion, at 1986 EHB 71, held that SMCRA and the regulations promulgated thereunder were applicable to WABO and that the Department was not estopped from using additional enforcement measures, such as a civil penalty assessment, to compel compliance after it had approved a bond release. That opinion is incorporated by reference into this adjudication.

We turn now to WABO's argument that §18.4 of SMCRA, 52 P.S. §1396.22, bars the Department from assessing a civil penalty. Section 18.4 of

SMCRA, 52 P.S. §1396.22, states, in pertinent part:

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 may assess a civil penalty upon a person or municipality for such violation... Any other provision of law to the contrary notwithstanding, there shall be a statute of limitations of five (5) years upon actions brought by this Commonwealth pursuant to this section.

(emphasis added)

WABO argues that it finished mining and completed its backfilling by 1974, and, thus, any civil penalty assessment for violations of SMCRA or the regulations adopted thereunder is barred because the violations, if any, occurred over 11 years before the issuance of the compliance orders and the notice of proposed assessment. In support of its contention, WABO points to the 1976 aerial photograph introduced as DER Exhibit 21 at the hearing on the merits and argues that the Department must have been aware of the violation since that time.

Regardless of when the violations were discovered, we need not reach the question of whether the statute of limitations barred the Department from

issuing the civil penalty assessment.<sup>2</sup> WABO's notice of appeal at Docket No. 85-416-W concerned the Department's September 12, 1985, proposed civil penalty assessment. Since the proposed civil penalty assessment was not an appealable action, Laurel Ridge Coal Co. v. DER, 1987 EHB 744, we have no jurisdiction to consider any claims relating to it.

The only issues remaining for our determination are whether WABO, as cited in the compliance orders, violated 25 Pa.Code §§88.115, 88.119, and 88.121 on its permitted area.

We will address the violations of 25 Pa.Code §§88.115 and 88.121(b) together. WABO's violation of 25 Pa.Code §88.115 related to its failure to complete backfilling of the permitted area within six months of the cessation of operations.

25 Pa.Code §88.115 provides, in pertinent part, that:

(a) All disturbed areas shall be returned to their approximate original contour except as specifically exempted in §88.116 (relating to backfilling and grading: re-affecting previously mined lands).

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<sup>2</sup> We do note that we believe insufficient evidence was presented to prove that the Department knew about violations on site more than five years prior to issuing the compliance order. The 1976 aerial photograph introduced by the Department is a U.S. Geologic Survey photograph. No evidence was presented that the Department had the photograph in its possession, or even knew of its existence, for five years. Also, the testimony of a Department inspector indicates that the completion report submitted by WABO did not indicate the areas of Pit No. 1 and Pit No. 2 had been mined. Therefore, as of May, 1983, the date of the completion report, these portions of the permitted area had not been inspected (N.T. 177-178). We cannot say that the Department had knowledge of the violation, whether or not it should have had this information. Even without this unrebutted evidence, there is sufficient evidence to establish that WABO did not stop activity on-site until sometime in 1982. Robert Barnhart, Sr. testified that equipment was left on-site and periodically started (N.T. 45), stockpiled coal was sold between 1980-1982 (N.T. 48, 50), and royalty checks were paid to Walter Barnhart's children (DER Ex. 4A-4F). Robert Barnhart, Sr. also testified that in 1982 he went with Department inspectors on the site and told them he no longer intended to conduct mining at the site (N.T. 45). He also testified that while WABO stopped its active operation in 1976, backfilling had not been completed until 1983 (N.T. 20).

\* \* \* \* \*

(c) Timing of backfilling and grading shall not exceed the following:

\* \* \* \* \*

(2) If the method of mining is open pit mining, rough backfilling and grading shall occur in accordance with the time schedule approved by the Department, which shall specifically establish in stated increments the period between removal of coal and completion of backfilling and grading.

\* \* \* \* \*

The compliance orders allege that WABO failed to establish permanent vegetation on the site in violation of 25 Pa.Code §88.121(b). That regulation states:

Revegetation shall provide for a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural revegetation process when desirable and necessary to achieve the approved postmining land use plan.

We believe that the Department has established that WABO did not backfill and revegetate its permit area.

Conflicting testimony was heard as to WABO's activities on the site. Robert Barnhart, Sr. stated that pits existed before he began mining on the permit site; one pit to the west of his pit and another to the east of his pit (N.T. 11). Michael Barnhart testified that his father told him he left coal in the cut of a pit so that the Department would think WABO would be returning for the coal (N.T. 90-91), and that WABO was finished at the first pit, on the

area marked 1.49 acres,<sup>3</sup> by 1971-1972, and finished at the second pit by 1974 (N.T. 102; DER Ex. 2, 5).

Robert Barnhart, Jr. testified that there were no old cuts predating WABO's operation to the east of the area marked stripped and affected on Exhibit 2 (N.T. 116), that the area so marked was stripped and affected by WABO (N.T. 117), that there was a large water-filled pit to the west of WABO's operation which predated WABO's operation (N.T. 137), and that a partially open pit seen in Exhibit 10 (in the area marked proposed amendment) still exists (N.T. 116). Glen Greenawald, the husband of Jane Barnhart Greenawald, daughter of the late Walter Barnhart, testified that he was very familiar with the permit area, that no pre-existing strips existed east of WABO's operation (N.T. 142), and that no mining occurred in these areas between 1965 and 1970 (N.T. 165).

While the testimony of Michael and Robert Barnhart, Jr. and Glen Greenawald may be regarded as biased because of the familial conflicts existing within the Barnhart family (and extended family), the Department inspector, Bradley Elison, provided unrebutted evidence supporting the conclusion that WABO affected the areas designated as Pit No. 1 and Pit No. 2 and failed to reclaim and revegetate the areas. Elison stated that there was no indication of there being any old pits in the area of Pit No. 1 (N.T. 244), no old pits existed to the east of the area on Exhibit 2 labeled 1.49 acres (N.T. 245), aerial photographs taken in 1966 did not show the areas where Pit No. 1 and Pit No. 2 are located as being affected by mining, but the aerial photograph taken in 1971 did show these areas affected, and that investigation

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<sup>3</sup> Counsel's question at N.T. 102 refers to a .49 acre area; however, the exhibits in evidence indicate that this area was 1.49 acres, rather than .49 acres (DER Ex. 2, 5).

results indicate no evidence of any mining activity after 1966 but before WABO began its operations (N.T. 245-263). Further testimony by Mr. Elison, and DER Exhibits 22 and 23, show that a tree from Pit No. 1 was 11 years old and that a tree from Pit No. 2 was nine years old in 1986 (N.T. 275-278; DER Ex. 22, 23). Also, testimony shows volunteer vegetation, which grows on its own at disturbed sites, was approximately 12-13 years old at Pit No. 1 and approximately 10 years old at Pit No. 2 in 1985 (N.T. 275-278), corresponding to testimony about when these areas were last mined.

WABO was also alleged to have failed to cover toxic material in violation of 25 Pa.Code §88.119, which addresses handling of toxic materials. The evidence establishes the existence of toxic material near Pit No. 2 and there is nothing in the record to suggest that WABO was not responsible for creating the situation. In fact, Robert Barnhart, Sr. admitted that he could have created the situation (N.T. 25). There is also evidence that coal was left in the open pits by WABO in violation of 25 Pa.Code §88.119. Contrary to WABO's assertions, we have been presented with no reason to believe the toxic material was placed on site by others.

In light of these violations of 25 Pa.Code §§88.115, 88.119, and 88.121, the Department's issuance of compliance orders was proper under §4c of SMCRA, 52 P.S. §1396.4c, and we must dismiss WABO's consolidated appeals.

#### **CONCLUSIONS OF LAW**

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

2. The Department is not estopped from issuing compliance orders under SMCRA relating to areas where it has partially or fully released bonds.  
1985 EHB 71.

3. A proposed civil penalty assessment is not a final action of the Department and is, therefore, not reviewable by the Board..

4. The Board has no jurisdiction to consider WABO's argument that the five-year statute of limitations in §18.4 of SMCRA, 52 P.S. §1396.22 bars the assessment of civil penalties in this appeal because WABO's appeal relates to the Department's proposed civil penalty assessment.

5. WABO opened and stripped Pit No. 1 and Pit No. 2 on MDP No. 5470330.

6. WABO failed to backfill Pit No. 1 and Pit No. 2 in violation of 25 Pa.Code §88.115.

7. WABO failed to revegetate its permitted area in violation of 25 Pa.Code §88.121.

8. WABO failed to cover toxic materials on its permitted area in violation of 25 Pa.Code §88.119.

9. The Department's issuance of compliance orders to WABO for violations of 25 Pa.Code §§88.115, 88.119, and 88.121 was authorized by §4c of SMCRA, 52 P.S. §1396.4c.

10. The Department's issuance of compliance orders to WABO requiring WABO to backfill and revegetate Pit No. 1 and Pit No. 2 and to cover toxic materials on the permitted area was not an abuse of discretion.

**O R D E R**

AND NOW, this 23rd day of June, 1989, it is ordered that the appeals of WABO Coal Company are dismissed.

**ENVIRONMENTAL HEARING BOARD**

*Maxine Woelfling*  
MAXINE WOELFLING, CHAIRMAN

*Robert D. Myers*  
ROBERT D. MYERS, MEMBER

*Terrance J. Fitzpatrick*  
TERRANCE J. FITZPATRICK, MEMBER

DATED: June 23, 1989

cc: Bureau of Litigation  
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b1



COMMONWEALTH OF PENNSYLVANIA  
**ENVIRONMENTAL HEARING BOARD**  
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M. DIANE SMITH  
 SECRETARY TO THE BOARD

**FIDELITY & DEPOSIT COMPANY OF MARYLAND** :  
 :  
 v. : **EHB Docket No. 87-445-F**  
 :  
**COMMONWEALTH OF PENNSYLVANIA** :  
**DEPARTMENT OF ENVIRONMENTAL RESOURCES** : **Issued: June 28, 1989**

**OPINION AND ORDER**  
**SUR**  
**MOTION FOR SUMMARY JUDGMENT**

**Synopsis**

The Department's motion for summary judgment is granted. The Department did not abuse its discretion in forfeiting bonds since violations of the statutes have been established by unappealed compliance orders.

**ORDER**

This matter was initiated by the October 15, 1987, filing of notices of appeal by Fidelity and Deposit Company of Maryland (F&D) and H & H Coal Company (H&H) seeking review of the Department of Environmental Resources' (Department) action forfeiting bond No. 6049484, posted on SMP No. 56803061 (the Rininger Strip) for the amount of \$104,870.00. The reasons for the forfeiture were that H&H caused or allowed water to accumulate in the pit area creating an unsafe condition and potential for pollution, in violation of the Surface Mining Conservation and Reclamation Act (SMCRA), the Act of May 31, 1945, PL 1198, as amended, 52 P.S. §1396.4(b)(a) and the Clean Streams Law (CSL), the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.402, and

that H&H ceased mining operations for more than 90 days without approval, in violation of 25 Pa. Code §87.157(b). Additionally, H&H allegedly failed to comply with various compliance orders, in violation of 52 P.S. §1396.24 and 35 P.S. §§691.402, 691.601 and 691.611.

These appeals were docketed at EHB Docket Nos. 87-445-W and 87-446-W. On October 26, 1987, the two appeals were consolidated at EHB Docket No. 87-445-W and on February 10, 1989, H&H's appeal originally docketed at EHB Docket No. 87-446-W was dismissed for lack of prosecution.

On May 3, 1988, F&D filed two notices of appeal seeking review of the Department's forfeiture of Bond No. 6076965 posted on SMP No. 56783046 (the Long Strip) for the amount of \$134,120.00 (docketed at EHB Docket No. 88-179-W) and Bond No. 6076996 posted on SMP No. 56793045 (the Reitmeyer Strip) for the amount of \$103,185.00<sup>1</sup> (docketed at EHB Docket No. 88-180-W) for failure to comply with 25 Pa. Code §§87.102, 87.106, 87.116 and 87.117 and various compliance orders of the Department, in violation of 52 P.S. §1396.24 and 35 P.S. §§691.601 and 691.611. These two appeals were consolidated with the previously consolidated appeals at EHB Docket No. 87-445-W.

On December 15, 1988, the Department filed a motion for summary judgment alleging that no genuine disputes as to material facts exist and that it is entitled to judgment as a matter of law. The Department maintains that it has established the above-cited violations and that under 52 P.S. §1396(4)(h), 35 P.S. §691.315(b) and 25 Pa. Code §86.181, the Department is

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<sup>1</sup> This bond apparently had been partially released at some point in the past. The remaining amount of the bond, according to the forfeiture notice, is \$40,922.50.

required to forfeit bonds when the operator fails or refuses to comply with the requirements of SMCRA and the CSL, citing Morcoal Co. v. DER, 74 Pa. Cmwlth 108, 459 A.2d 1303, (1983).

On February 24, 1989, F&D filed its response in opposition to the Department's motion, arguing that the Department has not established that H&H failed to comply with applicable statutes and regulations, and that the Department, which has the burden of proving it acted properly in these bond forfeitures, did not establish that it properly exercised its discretion in the timing of the forfeiture and the sequencing of the enforcement measures. F&D further argues that the Department prejudiced its rights by forfeiting bonds when it did. F&D claims that the Department was aware, at the time of the forfeitures, that the former owners had sold the stock of H&H to the new owners; that the bonds had not been replaced by the new owners as the contract for sale of the stock called for; that there was ongoing litigation concerning ownership of and responsibility for the mine site; that forfeiting bonds at that time would bring financial pressures on the former owners, serving the litigation strategy of the new owners; and that forfeiture would not penalize the new owner or secure a speedy clean-up of the site.

This Board is empowered to grant summary judgment when there are no genuine disputes over material facts and the moving party is entitled to judgment as a matter of law. Borough of Summerhill v. DER, 34 Pa. Cmwlth 574, 383 A.2d 1330 (1978).

The Department alleges that it issued compliance orders concerning the Rininger Strip, SMP 56803061, to H&H on April 1, 1987, for causing or allowing water to accumulate in the pit area thereby creating an unsafe condition and potential for pollution in violation of 52 P.S. §1396.4(b)(a) and 35 P.S. §691.402; on April 14, 1987, for failure to comply with the

previous compliance order; on August 7, 1987, for ceasing mining operations for more than 90 days without approval of the Department in violation of 25 Pa. Code §87.157(b); and on August 17, 1987, for failure to comply with the previous compliance order.

Further, the Department alleges that it issued compliance orders for the Long Strip, SMP No. 56783046 on December 2, 1987, for failure to monitor groundwater, in violation of 25 Pa. Code §87.116, and failure to monitor surface waters, in violation of 25 Pa. Code §87.117; on December 30, 1987, for the failure to maintain adequate erosion and sedimentation control measures, in violation of 25 Pa. Code §87.106; on January 6, 1988, for failure to comply with the December 2, 1987 order, and on January 7, 1988, for failure to comply with the December 30, 1987 order, in violation of 52 P.S. §1396.24 and 35 P.S. §691.611.

The Department also claims that it issued compliance orders to H&H for the Reitmeyer Strip, covered by SMP No. 56793045 on August 21, 1987, for the failure to monitor groundwater in violation of 25 Pa. Code §87.116 and failure to monitor surface water, in violation of 25 Pa. Code §87.117; and on October 7, 1987, for the failure to comply with the August 21, 1987, order in violation of 52 P.S. §1396.24 and 35 P.S. §691.611. Neither F&D nor H&H appealed any of the above-mentioned compliance orders for any of the strips; therefore, the violations cited therein are established and cannot now be collaterally attacked in these appeals of bond forfeitures. E & L Earthmovers v. DER, 1988 EHB 781 citing James Martin v. DER, 1987 EHB 100.

52 P.S. §1396.4(h) states, in part:

"If the operation fails to comply with the requirements of the act in any respect for which liability has been charged on the bond, the department shall declare such portion of the bond forfeited . . ."  
(emphasis added)

Recent Board decisions have held that the Department has a mandatory duty to forfeit bonds for failure to comply with SMCRA. See E & L Earthmovers v. DER, 1988 EHB 781; John H. Miller v. DER, 1988 EHB 538; Morcoal Co. v. DER, 74 Pa. Cmwlth 108, 459 A.2d 1303 (1983). Violations of SMCRA and regulations promulgated thereunder have been conclusively established by the unchallenged compliance orders. James Martin v. DER, 1987 EHB 100. Therefore, the Department's actions in forfeiting the bonds were not an abuse of discretion. Even looking at the facts in the light most favorable to F&D, Robert C. Penoyer v. DER, 1987 EHB 131, the Department is entitled to judgment as a matter of law.

F&D makes much of the fact that it is indemnified by the former owners of H&H Coal and, therefore, financial responsibility ultimately rests on those former owners. However, for our purposes, F&D is the party bearing responsibility since it is the surety on the bonds in question. Any action for indemnification between F&D and the former owners is not before the Board and is irrelevant to the issue of bond forfeiture which is before us now.

**ORDER**

AND NOW, this -28th day of June, 1989, the Department's motion for summary judgment is hereby granted.

**ENVIRONMENTAL HEARING BOARD**

*Robert D. Myers*

**ROBERT D. MYERS, MEMBER**

*Terrance J. Fitzpatrick*

**TERRANCE J. FITZPATRICK, MEMBER**

\*Chairman Woelfling did not participate in this opinion.

**DATED:** June 28, 1989

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M. DIANE SMITH  
 SECRETARY TO THE BOARD

ALOE COAL COMPANY :  
 :  
 v. : **EHB Docket No. 86-633-W**  
 :  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : **Issued: June 30, 1989**

**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 when 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. Where there are factual disputes with regard to the grounds for DER's bond forfeiture, it is not established, as a matter of law, that DER's statutory duty to forfeit bonds is triggered and DER's summary judgment motion must be denied.

**OPINION**

This matter was initiated by Aloe Coal Company's (Aloe) November 14, 1986 filing of a notice of appeal from the Department of Environmental Resources' (DER) October 9, 1986 forfeiture of bonds posted by Black Carbon

Fuels, Inc. (Black Carbon) in connection with the issuance of permits to operate its Toth Mine in Smith Township, Washington 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 Toth mine was operated pursuant to Surface Mining Permit (SMP) No. 63840103 and Mining Authorization (MA) Nos. 102514-63840103-01, 102514-63840103-01(C), and 102514-63840103-01(C)(2). As a basis for its forfeiture, DER alleged that Black Carbon failed to backfill and regrade concurrent with mining, allowed more than one pit to remain open at any given time, allowed water to accumulate in the pit, failed to properly handle acid-forming and toxic-forming spoil, and failed to comply with an order of the Department.

Aloe, which is the guarantor of the two bonds forfeited by DER, alleges in its notice of appeal that the bond forfeiture was an abuse of discretion because it is unlikely that DER will use the funds to reclaim the Toth mine and that at the time of forfeiture DER and Aloe were negotiating to complete the reclamation. Aloe also contends that the forfeiture was an abuse of discretion because DER improperly issued permits to Black Carbon in light of information that parties related to Black Carbon had outstanding violations.

On August 17, 1987, DER filed a motion for summary judgment and, on October 30, 1987, amended its motion. In support of its motion DER contends that, in response to DER's first request for admissions, Aloe admitted that there was an open pit at the site and that the pit had an accumulation of water in it, in violation of §§4(a)(2)(G) and 4b(a) of SMCRA, 52 P.S. §§1396.4(a)(2)(G) and 1396.4b(a). DER further argues that Black Carbon's

failure to appeal compliance orders issued to it established that there was a prolonged lack of personnel at the site, demonstrating a failure to backfill and regrade concurrent with mining in violation of 25 Pa. Code §87.141, and that equipment was being removed from the site in violation of 25 Pa. Code §87.141(d). DER also contends that because Black Carbon was found to be in violation of the provisions of various administrative orders in a Commonwealth Court order of October 1, 1987, the forfeiture was proper. DER asserts that as a result of these established statutory and regulatory violations, DER had a mandatory duty, pursuant to §4(h) of SMCRA, 52 P.S. §1396.4(h), to forfeit Black Carbon's bonds. With respect to Aloe's contention that the permit was improperly issued to Black Carbon, DER claims that Aloe is precluded from raising this issue because the permit was issued on January 18, 1985, and published at 15 Pa.Bull. 489 (January 18, 1985), and Aloe did not file its appeal until November 14, 1986. Finally, DER argues that Aloe has no standing to appeal the forfeiture.

On November 23, 1987, Aloe filed objections to, and a motion to strike, DER's amended motion for summary judgment. The Board denied Aloe's motion to strike on January 26, 1988. Aloe responded to DER's amended motion for summary judgment on February 18, 1988, denying that it admitted that there were violations at the site and contending Black Carbon's failure to backfill and regrade is not established simply by virtue of DER's few, short visits to the site. Additionally, Aloe argues that DER does not have a mandatory duty to forfeit bonds if there are violations at a site and that it has standing to appeal the forfeiture because, as guarantor of the bonds, Aloe is obligated to pay the full amount of the bonds to the surety company if the forfeiture is upheld.

We will treat that portion of DER's motion alleging that Aloe has

no standing to appeal the bond forfeiture as a motion to dismiss. The Board has consistently applied the standing test set forth in William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975), which established that any party with a direct, immediate and substantial interest in a DER action has standing to appeal that action. Del-Aware Unlimited, Inc. v. DER et al., 1986 EHB 221. The forfeiture in this appeal obligates Aloe, as guarantor of Black Carbon's bonds, to pay the entire bond amount to Aetna Casualty & Surety Company. Therefore, we believe that Aloe's interest is substantial, immediate, and direct.

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. No. 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(a), provide for the posting of bonds for mine sites. The bonds are 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 portion of the bond forfeited..."

It has been held that §4 imposes a mandatory duty upon DER to forfeit 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 Black Carbon's violations of SMCRA and the CSL are established, DER has a duty to forfeit its bonds and is, therefore, entitled to summary judgment. To grant summary

judgment in the Department's favor, there must be no dispute as to the existence of violations of SMCRA, the CSL, and the rules and regulations adopted thereunder.

The Board cannot conclude that there are no material facts in dispute. Of the six grounds cited in DER's forfeiture notice, two were the subject of DER requests for admissions. These two grounds are the causing or allowing of water to accumulate in the pit, in violation of §4.2(a) of SMCRA, 52 P.S. §1396.4 and §402 of the CSL, 35 P.S. §691.402, and the failure to backfill and regrade concurrent with mining, in violation of 25 Pa.Code §87.141, as evidenced by failure to backfill within 60 days of mining. DER argues that these violations are established by virtue of Aloe's responses to DER's request for admissions. Regarding the pit work, Request for Admission No. 4 and Aloe's response are:

"Do you admit that the operators of the mine have failed to prevent water from draining to and accumulating in the mine pit?"

"Appellants admit that on the last time a representative of Appellant viewed the mine pit, it did contain an accumulation of water. After reasonable inquiry, the information known or readily obtainable to Appellant is insufficient to enable Appellant to admit or deny whether the operators failed to prevent water from draining to and accumulating."

The Board believes that this statement on the part of Aloe is insufficient to establish a violation, as it is unknown when water was in the pit. The Board does not see a reference to a time in DER's request, and therefore cannot hold that this is an admission, or that this statement by Aloe establishes that this violation exists on the mine site. Just because there was water in the pit at some unspecified time when a representative of Aloe was on site, does not establish that this violation existed at the time of DER's forfeiture.

The other request which DER alleges establishes a violation relevant

to this forfeiture action, and Aloe's response, read as follows:

"2. Do you admit that the operators of the mine have failed to backfill and grade the mine?"

"Appellant admits that there is an open pit in the property and that the disturbed area is not reclaimed to approximate contour. Appellant, however, is uncertain as to the current specific reclamation requirements to the mine."

We cannot reach any conclusion regarding the propriety of the forfeiture from this response, other than there is an open pit somewhere on the site and an area has not been reclaimed to approximate original contour. Since the reclamation plan has not been placed before us, we have no way of establishing that approximate original contour was required on the disturbed area. We also cannot conclude from this response that Black Carbon allowed more than one pit to remain open at a time.

DER's amended motion refers to four compliance orders, dated May 6, May 8, June 6 and July 2, 1986, citing Black Carbon for various violations and argues that because Black Carbon failed to appeal those compliance orders, the violations alleged therein are conclusively established. This view of the law is correct, James E. Martin v. DER, 1987 EHB 100, but DER has provided no authentication via an affidavit or certification from the Board's custodian of records that no appeals were filed from the issuance of these four compliance orders, as is required by 42 Pa.C.S.A. §6103. While the Board may search its docket for this information, it is not the Board's duty to provide substantiation for the relief requested by a party in a matter before it.

As for the Commonwealth Court's order, it establishes that Black Carbon failed to comply with DER orders of "June 6, 1987 and July 2, 1986." The forfeiture at issue here occurred on October 9, 1986 and the letter of forfeiture makes no reference to any specific order. Thus, we cannot

conclude from the Commonwealth Court's 1987 order that DER's 1986 forfeiture was proper.

Because a motion for summary judgment must be viewed in the light most favorable to the non-moving party and because we cannot determine that DER is entitled to judgment as a matter of law, DER's motion must be denied.

ORDER

AND NOW, this 30th day of June, 1989, it is ordered that the Department of Environmental Resources' motion for summary judgment is denied.

ENVIRONMENTAL HEARING BOARD

*Maxine Worfling*  
\_\_\_\_\_  
MAXINE WORFLING, CHAIRMAN

DATED: June 30, 1989

cc: **Bureau of Litigation**  
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M. DIANE SMITH  
 SECRETARY TO THE BOARD

THROOP PROPERTY OWNERS ASSOCIATION

v.

COMMONWEALTH OF PENNSYLVANIA  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES  
 and KEYSTONE LANDFILL, INC., Permittee

:  
:  
:  
:  
:  
:

EHB Docket No. 87-185-W

Issued: July 11, 1989

OPINION AND ORDER  
 SUR  
 MOTION FOR SUMMARY JUDGMENT,  
 REQUEST FOR SUPERSEDEAS, MOTION TO CONSOLIDATE AND  
 REQUEST TO SHIFT THE BURDEN OF PROOF AND PERSUASION

Synopsis

Appellant's motion for summary judgment is denied. The motion is insufficient on its face, failing to assert that no genuine disputes over material facts exist and failing to discuss why appellant is entitled to judgment as a matter of law. A request for supersedeas is denied where it is factually deficient, and a motion to consolidate and request to shift the burden of proof are denied where no grounds for the requested relief are set forth by the moving party.

OPINION

This matter was initiated by the May 14, 1987, filing of a notice of appeal by Throop Property Owners Association (Throop), seeking review of an April 23, 1987, consent order and agreement (CO&A) entered into by the Department of Environmental Resources (Department) and Louis DeNaples and Keystone Landfill, Inc. (collectively, Keystone). The CO&A addressed

violations 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), 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 rules and regulations adopted thereunder, at Keystone's three landfills: the Keystone site, which is operated pursuant to Solid Waste Permit No. 100803; the Dunmore site, which is operated pursuant to Solid Waste Permit No. 100174; and the Logan site, which is operated pursuant to Solid Waste Permit No. 101247. Throop claims in its notice of appeal that the CO&A allows the continued operation of the landfills, despite the findings of violations of applicable laws, and that the conditions at these sites violate its rights under Article 1, Section 27 of the Pennsylvania Constitution.

Throop has also filed an appeal at Docket No. 88-028-W, of two suspension orders issued to Keystone, dated December 18, 1987, and January 8, 1988,<sup>1</sup> and an appeal at Docket No. 88-114-W of a February 25, 1988, CO&A between Keystone and the Department. These two appeals were consolidated with Docket No. 87-185-W.

On September 27, 1988, Throop filed a motion for summary judgment, requesting the Board to find that the April 23, 1987, and February 25, 1988, CO&As were contrary to law, arbitrary and capricious, or otherwise an abuse of discretion and to order Keystone to undertake various remedial measures at the Logan site. Throop's motion essentially repeats the allegations in its notice of appeal. It also contends that since Keystone, as it was required by the February 25, 1988 CO&A, withdrew its appeals at Docket Nos. 88-016-W and

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<sup>1</sup> Keystone separately appealed these compliance orders on January 20, 1988, and its appeals were docketed at Nos. 88-016-W and 88-017-W. These appeals were withdrawn by Keystone on February 23, 1988.

88-017-W, the findings of fact in the suspension orders were conclusively established. Throop's motion also contains a request that the Board shift the burden of production and persuasion to the Department, a petition for supersedeas, and a motion to consolidate Docket No. 87-185-W with Docket No. 88-320-W, Throop's appeal of the Department's issuance of a solid waste permit to Keystone for its Tabor site.

Keystone filed its answer to Throop's motion for summary judgment on October 17, 1988, generally opposing it, but also requesting that Throop's appeal at EHB Docket No. 87-185-W be dismissed as meritless and that the request to consolidate be denied.

On October 19, 1988, the Department responded to Throop's motion, arguing that summary judgment is inappropriate because numerous facts are in dispute or subject to interpretation. The Department also claims that Throop's motion completely fails to set forth the reasons why Throop is entitled to judgment as a matter of law. The Department objects to Throop's request to shift the burden of proof, arguing that Throop failed to allege any basis for this request or point to any Board precedent to support its request. Finally, the Department opposes Throop's motion to consolidate.

This Board is empowered to grant summary judgment if there are no genuine disputes over material facts and the moving party is entitled to judgment as a matter of law. Pa. R.C.P. No. 1035; Summerhill Borough v. DER, 34 Pa. Cmwlth 574, 383 A.2d 1320 (1978). In ruling on a motion for summary judgment, the Board will look at the facts in the light most favorable to the non-moving party. Robert C. Penoyer v. DER, 1987 EHB 131.

We agree with the Department that Throop's motion for summary judgment is insufficient. The motion fails to properly allege that there are

no genuine disputes over material fact, and even if we were to assume that no disputed material facts existed, the motion fails to explain why Throop is entitled to judgment as a matter of law. Under such circumstances, we are loathe to devote our limited resources to ascertaining whether Throop is entitled to summary judgment.

Throop has provided us with no reasons for the grant of its motion to consolidate or its request to shift the burden of production and of persuasion, and we will deny them. Similarly, Throop's request for supersedeas is facially insufficient and patently devoid of any supporting allegations, so we will deny it.

**O R D E R**

AND NOW, this 11th day of July, 1989, it is ordered that:

- 1) Throop's motion for summary judgment is denied;
- 2) Throop's motion to consolidate this matter with Docket No. 88-320-W is denied;
- 3) Throop's request to shift the burden of proof is denied;
- 4) Throop's request for supersedeas is denied; and
- 5) This matter is placed on the hearing list.

**ENVIRONMENTAL HEARING BOARD**

*Maxine Woelfling*  
**MAXINE WOELFLING, CHAIRMAN**

**DATED:** July 11, 1989

**cc: Bureau of Litigation**  
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**ENVIRONMENTAL HEARING BOARD**  
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M. DIANE SMITH  
 SECRETARY TO THE BOARD

FR&S, INC.

v.

COMMONWEALTH OF PENNSYLVANIA  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES

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EHB Docket No. 83-093-M

Issued: July 14, 1989

**A D J U D I C A T I O N**

**By the Board**

**Syllabus**

Where a Solid Waste Permit for a landfill is prepared and signed by officials of the Department of Environmental Resources (DER) but not finally approved and physically released, the applicant has the burden of proof in an appeal filed from a subsequent denial of the application.

Where the applicant sustains its burden of proof (1) that the existing landfill site meets DER's requirements for a "natural" liner; (2) that the soils on the site meet DER's suitability and quantitative requirements for cover material; (3) that the leachate collection system is basically effective; and (4) that the other cited deficiencies are technical in nature and capable of being corrected, DER nonetheless is justified in denying the application on the basis of the applicant's long history of unlawful conduct.

## PROCEDURAL HISTORY

On May 10, 1983, FR&S, Inc. (FR&S) filed a Notice of Appeal from an Order of DER dated April 11, 1983, denying FR&S' application for a Solid Waste Permit and requiring the closure of FR&S' existing landfill facility in Exeter Township, Berks County.

Prior to filing the Notice of Appeal, FR&S had filed an application for a supersedeas with Commonwealth Court (No. 2252 C.D. 1978), which granted the application on April 14, 1983. After several days of hearings, Commonwealth Court issued an order on June 10, 1983, extending the supersedeas for another 30 days and providing that, if FR&S files a Petition for Supersedeas with the Board during the extension period, the supersedeas issued by Commonwealth Court on April 14, 1983, would remain in effect until the Board issues a decision on the Petition for Supersedeas filed with it.

FR&S filed a Petition for Supersedeas with the Board on July 8, 1983, within the 30 day period prescribed by Commonwealth Court. As a result, the supersedeas issued by Commonwealth Court remained in effect. By agreement of the parties on August 15, 1983, hearings on the Petition for Supersedeas were merged with hearings on the merits of the appeal. The hearings began on October 11, 1983, in Norristown, and extended over 39 days before ending on August 15, 1984.

Prior to the conclusion of the hearings, the Board vacated the supersedeas on June 13, 1984, because of actions by FR&S' authorized agent, Donald L. Peifer. A Motion to Reinstate Supersedeas was filed by FR&S on June 14, 1984, and was followed by a second motion on July 3, 1984. Both motions were opposed by DER. On August 6, 1984, the Board authorized FR&S to resume operation of the landfill pursuant to specific conditions. This authorization was revoked on August 15, 1984, because of the violation of certain conditions

set forth in the August 6, 1984, order. FR&S filed a petition for review of the Board's action with Commonwealth Court on August 22, 1984 (initially at No. 2252 C.D. 1978 but subsequently at No. 2473 C.D. 1984), but the Court denied the request for immediate stay on August 24, 1984.

Post hearing briefs, supplemental briefs and requests for findings of fact were filed by FR&S and DER by May 1, 1985. Board Member Anthony Mazullo, Jr., who had presided at the hearings, resigned his position on January 31, 1986. Prior to his departure, Mr. Mazullo had prepared a draft adjudication in this case but had not circulated it among the other Board Members, Maxine Woelfling and Edward Gerjuoy. Mr. Mazullo's draft adjudication would have required DER to issue a permit to FR&S but would have barred Donald L. Peifer from acting as agent or operator of the landfill.

In September 1986, FR&S filed with Commonwealth Court a petition for review in the nature of a mandamus action (No. 3044 C.D. 1986), seeking an order compelling the Board to issue an adjudication. While this action was pending, Board Member Edward Gerjuoy resigned, leaving on the Board Maxine Woelfling and William Roth who had been appointed to fill the vacancy created by Mr. Mazullo's resignation. FR&S filed a motion for the recusal of Maxine Woelfling on May 26, 1987. On June 16, 1987, the Board issued an Adjudication, denying the motion for recusal and affirming the denial by DER of a permit for the landfill. FR&S filed a petition for review with Commonwealth Court (No. 1667 C.D. 1987) on July 16, 1987.

On February 22, 1988, Commonwealth Court issued an opinion and order (No. 3044 C.D. 1986 and No. 1667 C.D. 1987), vacating the Adjudication issued June 16, 1987, and remanding the case to the Board for a new decision, to be

issued within 90 days without the participation of Maxine Woelfling and William Roth, on the basis of the 1984 record and the 1984 and 1985 briefs filed by the parties.

On or about March 8, 1988, the Board filed with the Supreme Court a notice of appeal from the opinion and order of Commonwealth Court at No. 3044 C.D. 1986. Despite the fact that this appeal was pending and that only 42 of the 90 days allotted for a new decision had expired, Commonwealth Court issued another opinion and order (No. 3044 C.D. 1986 and No. 1667 C.D. 1987) on April 4, 1988. While refusing to grant FR&S permission to reopen the landfill, the Court nonetheless expressly found "(1) that the FR&S site is located above a naturally occurring impermeable zone so that it is hydrogeologically suitable for a landfill site, (2) that there is suitable and sufficient cover material at the site for landfill operation, and (3) that there is no substantial evidence that FR&S has been polluting or contaminating groundwater." Whether or not these findings were intended to remove the underlying issues from the Board's consideration is uncertain, since the opinion is silent on that point and makes no express modification to the order of February 22, 1988.

On April 27, 1988, FR&S filed a Petition for Oral Argument before the Board. DER opposed the Petition in an Answer filed May 4, 1988. On May 6, 1988, the Board issued an Order denying FR&S' Petition on the basis of an opinion from the Office of General Counsel stating, inter alia, that the Board's filing of an appeal with the Supreme Court acted as an automatic supersedeas of Commonwealth Court's February 22, 1988, Order. Commonwealth Court issued an Order on May 27, 1988, lifting the automatic supersedeas and requiring the Board to issue its new Adjudication within 90 days from the date of this latest Order.

Oral argument was heard by the Board on June 16, 1988, at which time the views of counsel were requested on the effect of Commonwealth Court's April 4, 1988, Opinion and Order. DER's counsel was of the opinion that the Court's three findings in that Opinion were not intended to remove those issues from the Board's consideration in its new Adjudication. FR&S' counsel acknowledged the uncertainty but took no position.

On August 25, 1988, the Supreme Court of Pennsylvania reinstated the automatic supersedeas, relieving the Board of the necessity of issuing a new decision while its appeal was pending. On January 1, 1989, the Environmental Hearing Board Act (Act No. 94 of 1988) became effective, establishing the Board as an independent quasi-judicial agency and expanding its membership from three persons to five. Board Member William Roth resigned his position on March 29, 1989. Terrance Fitzpatrick, appointed to fill one of the two additional seats created by the Environmental Hearing Board Act, entered upon his duties on May 11, 1989.

On June 2, 1989, the Supreme Court affirmed Commonwealth Court's decision of February 22, 1988. With the supersedeas no longer in effect, the Board had the duty to issue an Adjudication in obedience to Commonwealth Court's remand Order. In order to perform this duty, the Board needed to have the record returned from the appellate courts and needed to have the remand Order clarified as to whether Board Member Fitzpatrick had to participate in the decision. Fitzpatrick's participation would delay the issuance of an Adjudication because of the time he would have to devote to reading the enormous record in this case. The Office of General Counsel (the Board's legal counsel) advised Commonwealth Court on June 26, 1989, that a new Adjudication could be issued by July 14, 1989, if the record was returned expeditiously and if Board Member Fitzpatrick did not have to participate.

The record was not returned to the Board until July 10, 1989. Not having received any written direction from Commonwealth Court concerning Board Member Fitzpatrick's participation, the Board (through the Office of General Counsel) made a request to the Court for such direction. The Board was informed that no written direction would be issued. The Office of General Counsel subsequently advised the Board in writing that, based upon oral discussions with the Commonwealth Court judge supervising the case, it should issue the Adjudication without the participation of Board Member Fitzpatrick. This Adjudication is issued pursuant to that advice, but without any certainty that it complies with the remand Order.<sup>1</sup>

As noted above, there is also an uncertainty about the effect of Commonwealth Court's decision of April 4, 1988. In the judgment of the undersigned Board Member, the most appropriate course to pursue at this point is to adjudicate all of the relevant issues in strict obedience to the remand Order of February 22, 1988. If that includes issues removed from the Board's consideration by the April 4, 1988, decision, Commonwealth Court may simply ignore them.

The record in this case consists of the pleadings, 3 depositions, a transcript of 5,250 pages and 410 exhibits.

#### FINDINGS OF FACT

1. FR&S is a corporation with its principal place of business at P. O. Box 23, Birdsboro, Berks County. (Ex. A-4)
2. DER is an administrative department of the Commonwealth of Pennsylvania, and is responsible for administering the provisions of the Solid

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<sup>1</sup> We assume that a Board Member should participate in all Adjudications issued after the Board Member takes office, regardless of whether the Board Member was in office at the time the matter was remanded from an appellate court.

Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, the provisions of the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, and the rules and regulations adopted pursuant to said statutes. (35 P.S. §691.1 and §6018.103, 71 P.S. §61)

3. FR&S is wholly owned by Landfill Associates, a corporation of which Donald L. Peifer is majority shareholder. (N.T. 496-497)

4. Since 1968 FR&S has been operating a sanitary landfill on a site in Exeter Township, Berks County, now owned by FR&S, Landfill Associates, and A.V.M. Nursery Corp. (N.T. 3500; Ex. A-4)

5. The site had been used for dumping since the early 1940s and had been the location of a small landfill operation prior to 1968. (N.T. 3500; Ex. A-4)

6. On April 24, 1970, the Department of Health (predecessor in interest to DER) issued to FR&S Solid Waste Disposal Permit #100346, authorizing FR&S to operate a sanitary landfill on the site until December 31, 1970. (Ex. A-24)

7. FR&S continued to operate a sanitary landfill on the site after Permit #100346 expired on December 31, 1970, and while it was attempting to satisfy the requirements of the Department of Health and DER. (N.T. 276-277)

8. On February 3, 1977, a Consent Order and Agreement was entered into between FR&S and DER, requiring FR&S, inter alia, to comply with specific operational mandates and to submit a completed application for a permit by February 1, 1978. (Consent Order and Agreement)

9. FR&S filed a completed application for a permit by February 1, 1978. DER sent a review letter to FR&S on March 31, 1978, listing

deficiencies in the application and requiring the submission of corrective data within 90 days. FR&S submitted corrective data on July 3, 1978. (N.T. 142-147)

10. By letter dated September 14, 1978, DER denied the application filed by FR&S, listing nine separate deficiencies. FR&S did not appeal this action of DER. (N.T. 147-150; Ex. A-10)

11. On September 22, 1978, DER filed with Commonwealth Court (No. 2252 C.D. 1978) a Complaint in Equity, Petition to Enforce Department Order and Motion for a Preliminary Injunction, seeking to compel FR&S to cease operations in accordance with the Consent Order and Agreement of February 3, 1977. (No. 2252 C.D. 1978)

12. On October 17, 1978, FR&S resubmitted its application, providing additional data in response to the deficiencies noted by DER in its letter of September 14, 1978. (N.T. 127, 150; Ex. A-11)

13. On October 20, 1978, Commonwealth Court issued an Order, allowing FR&S to continue its landfill operation, subject to certain conditions, until DER completes its review of the application. (No. 2252 C.D. 1978)

14. As resubmitted on October 17, 1978, FR&S' application covered a 45 acre site situated between Route 82 on the east, Lincoln Road on the south, Red Lane Road on the west and Route 422 at some distance to the north. (Ex. A-2 and A-5) The site:

- (a) was divided into roughly equal north and south portions by a Metropolitan Edison Company power line that crossed the site in an east-west direction; (Ex. A-2)
- (b) was divided into unequal east and west portions by a natural channel that crossed the site from north

to south and conveyed an intermittent stream to the Schuylkill River, about 1,000 feet south of the site; (Ex. A-2 and A-5)

- (c) accommodated the existing landfill on 15 to 20 acres, basically located in the southeast quadrant of the site but extending westward across the natural channel, blocking it and creating a pond just north of the power line (North Pond); (N.T. 130-133, 394; Ex. A-2 and A-5)
- (d) was surrounded by land devoted to a wide range of residential, commercial, industrial and institutional uses. (N.T. 244-275; Ex. A-2 and A-5)

15. The intermittent stream is formed on the northern portion of the site by the junction of three tributaries. Surface water drains into the intermittent stream and its tributaries from areas to the east, west and north, including areas beyond the boundaries of the site. (N.T. 243-244)

These areas include:

- (a) an unregulated dump along Route 422, containing uncovered refuse, tires, appliances and barrels; (N.T. 246, 682; Ex. A-75, A-76 and A-77)
- (b) residential and commercial properties north of the site with malfunctioning on-site sewage disposal systems; (N.T. 245-247)
- (c) the Pagoda Motorcycle Club, along Red Lane Road, a badly eroded and unvegetated racing facility; (N.T. 249, 680-681; Ex. A-61 through A-74)
- (d) the Smith Trailer Park, along Lincoln Road, housing

- about 130 persons and with an on-site sewage disposal system that overflows; (N.T. 254, 683)
- (e) an old abandoned landfill saturated with leachate; (N.T. 683-684; Ex. A-60)
  - (f) Furnace Hill, an area south of Lincoln Road, where foundry refuse and domestic waste have been deposited for a number of years; (N.T. 256-263, 684-685; Ex. A-22)
  - (g) the Robert and Brenda Smith property (Smith Property), along Lincoln Road, where a malfunctioning on-site sewage disposal system is in use and where a small automobile salvage operation is conducted; (N.T. 255-256, 699-701, 703-705; Ex. A-125, A-126, A-127, A-128 and A-129)
  - (h) the Ralph and Mary Jett property (Jett Property), along Lincoln Road, where a commercial establishment existed for many years with an inadequate on-site sewage disposal system; (N.T. 264-271, 685; Ex. A-23)
  - (i) the Hoffman Pig Iron property, south of Lincoln Road, where pig iron and coke are stored in the open; (N.T. 251-253, 685-688; Ex. A-20 and A-115)
  - (j) a foundry sand recycling operation conducted by John Fadler south of Lincoln Road; (N.T. 273)
  - (k) an area between Lincoln Road and the Schuylkill River, where a railroad siding crosses the intermittent stream and where abandoned vehicles, metal drums, slag and other types of industrial refuse are deposited. (N.T. 274, 689)

16. Orange-colored leachate from the Furnace Hill area seeps out periodically to the surface of the Jett Property (Jett Seep) and drains into the intermittent stream. (N.T. 702-703, 963, 965; Ex. A-130 and A-131)

17. The intermittent stream flows only about 6 months out of the year and is not a water source. (N.T. 699)

18. Pursuant to paragraph 2d of the Commonwealth Court Order of October 20, 1978 (No. 2252 C.D. 1978), FR&S constructed a diversion ditch to keep the waters of the intermittent stream out of the North Pond and to carry them around the site to a discharge point near Lincoln Road. (N.T. 121-122, 165-166, 223)

19. When the existing landfill expanded to the point where it blocked off the natural channel of the intermittent stream, about 1972, FR&S installed a solid 24-inch pipe to carry the waters of the intermittent stream under the landfill from the North Pond to a valve-controlled discharge point south of the landfill. (N.T. 283-285; Ex. A-15)

20. Beginning in 1973, FR&S installed three lines of perforated 6-inch pipe and connected them to the solid 24-inch pipe at a point south of the landfill. The purpose of the installation was to drain leachate from landfill areas east and west of the solid 24-inch pipe. (N.T. 287-290; Ex. A-15)

21. In 1976, two 12,000 gallon tanks were installed at the end of the solid 24-inch pipe south of the landfill. At the same time, the solid 24-inch pipe was extended from the tanks to a point near the Jett Property. The control valve also was moved to that point. (N.T. 287, 373-375; Ex. A-59 and A-78)

22. Pumps were installed in 1976 to convey leachate through a 24-inch pipe from the tanks to the top of the landfill where it was recirculated. (N.T. 389-392)

23. FR&S did not submit any plans to DER prior to installing the facilities described in paragraphs 19 through 22, but DER officials were generally aware of the installations and occasionally were present at the site when some of the work was being done. (N.T. 291-294, 298, 376, 390, 406, 537-538)

24. FR&S did not submit a plan of its leachate collection system to DER in conjunction with its application because Mr. Gaydos, the engineer who was retained by FR&S in November 1976 to prepare the application, did not know the exact locations of the facilities and was under the impression that DER officials were already aware of the system. (N.T. 163-164)

25. FR&S' application was based on 25 Pa. Code §75.25 (o)(6)(iii), which authorized naturally occurring impermeable zones to be utilized for the collection of leachate. (N.T. 109)

26. Site studies performed in 1977 and 1978 by Carlyle Gray, a consulting geologist retained by FR&S to assist in the preparation of its application, determined that:

- (a) the predominant soil on the site was Penn Silt Loam;  
(Ex. A-5)
- (b) the bedrock was of the Brunswick Formation, dipping northwest; (Ex. A-5)
- (c) the joints in the bedrock were tight except where opened by mass movement; (Ex. A-5)
- (d) pumping tests conducted on shallow and deep test wells revealed that no hydraulic connection existed between

- the deep aquifer and the shallow aquifer; (Ex. A-6)
- (e) the barrier between the two aquifers most likely evolved by the concentration of clay particles released by the weathering of the siltstones and shales closer to the surface; (Ex. A-6)
  - (f) the transmissivity of the shallow aquifer is exceedingly low; (Ex. A-5)
  - (g) the water supply wells in the area draw their water from the deep aquifer; (Ex. A-5)
  - (h) the surface discharge of effluent from on-site sewage disposal systems in the area is further evidence of the impermeability of the weathered shale; (Ex. A-6)
  - (i) the shallow aquifer discharges to local streams and springs and the deep aquifer discharges to the Schuylkill River. (Ex. A-5)

27. Soil tests conducted in 1978 by Allentown Testing Laboratories, Inc., retained by FR&S for that purpose, revealed that the average permeability of soils on the site was  $1.07 \times 10^{-7}$ . (Ex. A-5)

28. In its application, FR&S proposed to continue recirculating leachate until the landfill became saturated. At that point, FR&S would either haul leachate in tank trucks to a nearby sewage treatment plant or construct its own on-site treatment facilities in accordance with plans included with the application. (N.T. 170-171; Ex. A-5, A-7 and A-11)

29. DER's Emil S. Washko acknowledged to DER Regional Director John B. Moyer on November 30, 1978, that the landfill had adequate capacity to handle leachate for another 32 months. (Ex. A-12)

30. Water quality analyses of background wells (considered to be unaffected by the landfill) were included in the original submission of FR&S' application. As part of the resubmission, water quality analyses were obtained with respect to wells downgradient from the landfill, drilled at locations agreed upon by representatives of FR&S and DER. (N.T. 125, 198-199, 807; Ex. A-4, A-5 and A-6)

31. DER's Richard L. Kraybill reviewed the water analyses submitted by FR&S. While he was of the opinion that contamination reported in MW#23 was related to the landfill, he did not think it was sufficient to warrant denial of a permit. (N.T. 833-834)

32. Mr. Kraybill had found the site unsuitable for a permit in 1970. While he found the existing landfill to meet the requirements for a permit in 1978, he recommended against any expansion north of the power line without the use of a man-made liner. (N.T. 810-832; Ex. C-6, C-7, C-9 and C-10)

33. On November 30, 1978, DER's Emil S. Washko advised DER Regional Director John B. Moyer that FR&S had satisfied the nine items listed in DER's letter of September 14, 1978, rejecting the application. (N.T. 128; Ex. A-12)

34. Also on November 30, 1978, DER's Emil S. Washko recommended to William C. Bucciarelli, Chief of DER's Division of Solid Waste Management, that a permit be issued to FR&S, subject to ten stipulations. (N.T. 129-130; Ex. A-13)

35. One of the stipulations limited the landfill to an elevation of 240 feet rather than 325 feet as proposed by FR&S. (N.T. 114-119)

36. The final elevation of the landfill was discussed between representatives of FR&S and DER over a period of several months in late 1978 and early 1979. On April 10, 1979, FR&S submitted calculations to justify the 325 feet elevation. DER agreed to this elevation on condition that the final

slopes of the existing landfill be changed from a 2 to 1 ratio to 3 to 1 ratio. FR&S agreed to this condition. (N.T. 114-119, 201-202; Ex. A-9)

37. On February 9, 1979, DER sent a letter to FR&S advising that a tentative determination had been made to issue to FR&S an NPDES permit, a draft of which was enclosed. (N.T. 429-430; Ex. A-84)

38. Acting on the assumption that DER was about to issue a Solid Waste permit, as well as an NPDES permit, FR&S filed an application with the Delaware River Basin Commission and received approval. (N.T. 430)

39. On an unknown date, DER prepared Solid Waste Disposal permit No. 100346 for the FR&S landfill, stipulating, inter alia, a final elevation of 325 feet. Both the permit and the transmittal letter were signed by Donald A. Lazarchik, DER's Director of Solid Waste Management, but were left undated. They were never sent to FR&S and were marked "void" early in 1983 by DER legal counsel, John Wilmer. (N.T. 452, 478; Ex. A-90)

40. On an unknown date, DER prepared Water Quality Management Permit No. 0678204 for the FR&S landfill. The permit was signed by George L. Parks, DER's Regional Water Quality Manager, but was left undated. It was never sent to FR&S and was marked "void" early in 1983 by DER legal counsel, John Wilmer. (N.T. 452, 478; Ex. A-91)

41. On December 13, 1979, DER's Emil S. Washko sent a letter to FR&S' legal counsel, enclosing Collateral Bond forms and listing the conditions of the Solid Waste Disposal Permit. One of the conditions was a final elevation of 325 feet. (N.T. 130; Ex. A-14)

42. On November 7, 1980, Commonwealth Court entered an Order, augmenting the Order entered October 28, 1978 (No. 2252 C.D. 1978), by adding paragraphs requiring FR&S to file a Collateral Bond and other security no later than December 8, 1980. This Order was entered as the result of an

application by DER to enforce the Order of October 28, 1978. (N.T. 445-447; Ex. A-86)

43. FR&S complied with the November 7, 1980, Order of Commonwealth Court. (N.T. 445)

44. At the conclusion of the November 8, 1980, hearing before Commonwealth Court, Donald L. Peifer of FR&S was under the impression that the only requirement remaining to be fulfilled was the filing of the Collateral Bond and other security. (N.T. 446-448)

45. In December (presumably 1980), DER prepared a news release for Regional Director John B. Moyer, announcing that a Solid Waste Disposal Permit would be issued for the FR&S landfill within the next few weeks. The announcement was never released. (N.T. 454-455; Ex. A-92)

46. FR&S did not receive any permits from DER. (N.T. 546-547)

47. FR&S has kept Collateral Bonds on file with DER at least from 1980 to 1984. (N.T. 448-451; Ex. A-87, A-88 and A-89)

48. Filing the Collateral Bond is the last stage of the permit issuance process, after DER is satisfied with the technical review of the application. (N.T. 3632-3633)

49. No facility in the region, other than FR&S, has a bond on file with no permit having been issued. (N.T. 3633)

50. An area in the southwest corner of the site and two other areas north of the power line have been used by FR&S as borrow pits. Soil and shale excavated from these pits have been used as cover material in the landfill. (N.T. 134-137; Ex. A-59)

51. At least by 1982, FR&S was applying leachate to the surface of the borrow pits to aid in compaction of the material. (N.T. 137-138, 166-168)

52. In order to convey leachate to the borrow pits, FR&S built a small pond near Lincoln Road (South Pond) at the terminus of the 24-inch solid pipe, apparently allowed the pond to fill with leachate and then pumped the leachate to the borrow pits. (N.T. 400)

53. FR&S made other revisions to its leachate collection system between 1978 and 1983. (N.T. 398-399)

54. In 1982, after the processing of FR&S' application was transferred to DER's Norristown Regional Office, different technical personnel became involved. (N.T. 1954-1956, 3521; Ex. A-185)

55. Prior to 1983, DER's inspectors had cited FR&S only for violations relating to the placement of daily cover material; thereafter DER's inspectors cited FR&S for numerous violations involving cover materials, slopes, groundwater monitoring, leachate treatment and surface water management. (Ex. A-85, A-105, A-106, C-37 through C-42)

56. In memoranda dated August 25, 1982, and December 15, 1982, Joseph Manduke, a DER hydrogeologist, recommended to Lawrence Lusk, DER's Solid Waste Facilities Supervisor, that FR&S' application be denied and the landfill closed. (Ex. C-57 and C-58)

57. In a memorandum dated December 29, 1982, John F. Zwalinski, a Soil Scientist for DER, recommended to Lawrence Lusk, DER's Solid Waste Facilities Supervisor, that FR&S' application be denied. (Ex. C-70)

58. Representatives of DER met with representatives of FR&S at the landfill site on March 24, 1983, and discussed the probability that the application would be denied and the landfill ordered closed. (N.T. 3638-3639)

59. Convinced that the technical personnel of the Norristown Regional Office did not have the understanding of the landfill site possessed by the

technical personnel that had reviewed the application previously at the Wernersville Regional Office, representatives of FR&S offered to attend further meetings with DER's representatives in an effort to satisfy their concerns. (N.T. 3639-3652)

60. On April 11, 1983, DER denied FR&S' application (citing 17 specific deficiencies) and ordered the landfill closed on April 16, 1983. (Notice of Appeal)

61. Commonwealth Court Orders of April 14, 1983, and June 10, 1983, allowed the landfill to continue to operate pending a Board decision on FR&S' Petition for Supersedeas. (No. 2252 C.D. 1978)

62. The 17 deficiencies listed by DER in its April 11, 1983, denial of FR&S' application included a number of items not previously mentioned by DER. Among them were requirements for gas venting plans, erosion and sedimentation control plans and vector control plans. (Notice of Appeal; Ex. A-10)

63. Walter B. Satterthwaite, a professional geologist retained by FR&S in April, 1983 to evaluate the landfill, reviewed the work of Carlyle Gray and made a thorough study of the landfill and its environs. (N.T. 679-680)

64. From his study of the area surrounding the landfill site, Mr. Satterthwaite established that:

(a) sediment is carried onto the landfill site and into the diversion ditch from the Pagoda Motorcycle Club racing grounds; (N.T. 680-682; Ex. A-61 through A-64)

(b) drainage enters the landfill site from the unregulated dump along Route 422; (N.T. 682; Ex. A-75 through

A-77)

- (c) drainage enters the landfill site from properties along Route 82 where malfunctioning on-site sewage disposal systems exist; (N.T. 683)
- (d) the intermittent stream that flows through the landfill site into the Schuylkill River is impacted by malfunctioning on-site sewage disposal systems in Smith Trailer Park, by leachate mounded in the old landfill, by foundry and refuse materials dumped in the Furnace Hill area, by the coke operation south of Lincoln Road, by the foundry sand retrieval operation south of Lincoln Road, and by the quantities of slag, junk and other refuse lying between the railroad and the river; (N.T. 683-698; Ex. A-115 through A-124)
- (e) the slag, vehicles and appliances scattered over the Smith Property, along with an old septic system, also impact on the intermittent stream; (N.T. 699-701, 703-706; Ex. A-125 through A-129)
- (f) the Jett Seep drains to the intermittent stream; (N.T. 690, 702-703; Ex. A-119, A-130 and A-131)
- (g) the intermittent stream is little more than a drainageway and cannot be used as a water source. (N.T. 698-699)

65. From his study of the geology of the area and the drilling and monitoring of additional wells, Mr. Satterthwaite reached the same conclusions

reached by Carlyle Gray and set forth in paragraph 26. (N.T. 706-737, 862-881; Ex. A-132, A-133, A-144 through A-148) In addition, Mr. Satterthwaite established that:

- (a) the shallow aquifer (or "aquiclude") discharges into the North Pond throughout the year and discharges at the lower portion of the site near Lincoln Road during the wet months of the year; (N.T. 720)
- (b) the distance between the shallow aquifer and deep aquifer varies throughout the site from about 2 feet to 65 feet; (N.T. 728-730)
- (c) the zone of impermeability is in excess of 75 feet; (N.T. 735)
- (d) the absence of contamination in the deep wells at Smith Trailer Park, despite the presence of the old landfill next door, corroborates the existence of the barrier between the shallow aquifer and the deep aquifer. (N.T. 735-737)

66. Field permeability tests conducted by Walter B. Satterthwaite Associates, Inc. and laboratory permeability tests conducted by Valley Forge Laboratories, Inc. in 1983 corroborated the test results obtained in 1978 by Allentown Testing Laboratories, Inc. and set forth in paragraph 27. (N.T. 737-738, 756-764; Ex. A-135)

67. On the basis of the permeability tests, Mr. Satterthwaite determined that the soils on the site meet DER's requirements for a natural liner and for cover material. Mr. Satterthwaite determined also that adequate quantities of suitable cover material are present on the site. (N.T. 763-770, 790-792)

68. During the summer of 1983, FR&S installed underdrains as part of the leachate collection system. One segment of about 1,000 feet was placed along the north side of the landfill beneath the power line. The other segment of about 1,100 feet was placed in zig-zag fashion through the southwest corner of the site. FR&S did not notify DER in advance, but DER representatives observed the construction of these underdrains. (N.T. 540-544, 795-798; Ex. A-59, A-137 through A-141)

69. Using a series of tests, Mr. Satterthwaite determined that the leachate collection system was working effectively and that leachate was not ponding within the landfill itself. (N.T. 793-795, 881-883)

70. In 1983, FR&S and DER undertook a joint sampling program in an effort to determine if the landfill was having an impact on the surface water and groundwater. Joint samples were taken in most instances and split between the two parties for individual analysis. DER utilized its own personnel and facilities for sampling and analysis. FR&S used Walter B. Satterthwaite Associates, Inc. for field sampling and used both Roy F. Weston, Inc. laboratory and Gilbert Laboratories for analysis. Both of these laboratories are approved by the Environmental Protection Agency (EPA). (N.T. 863, 884, 885, 893, 1115, 1127, 2371, 2399, 2451-2452)

71. In order to be certain of accuracy, sampling must be done in accordance with a quality assurance, quality control (QA/QC) program that deals with field parameters, purging, preservation, containers, chain of custody and lab verification. (N.T. 884-890)

72. Replicate samples, field blanks, lab blanks and spikes are used to verify the accuracy of the lab results. (N.T. 890-892, 1683-1691)

73. A QA/QC program for the laboratory requires trained personnel and calibrated instruments. In addition, it is necessary to have the findings

reviewed by experienced personnel to avoid the effects of cross contamination within the laboratory itself. (N.T. 1683-1704)

74. In analyzing samples, "limit of detection" is the lowest concentration of a component that the particular analytical process can measure reliably--every time. (N.T. 1712)

75. According to the protocol used in the Roy F. Weston, Inc. laboratory:

(a) a component measured at a concentration falling below the limit of detection is reported as "not detected"; (N.T. 1713)

(b) a component measured in concentrations above the limit of detection in some samples but not detected in other samples is reported as "not reliably found"; (N.T. 1717)

(c) a component measured positively in only one of a series of samples is reported as "false positive". (N.T. 1717-1719)

76. Method 624 was proposed by EPA in 1979 for the analysis of 35 volatile organic compounds. It has never been formally promulgated by EPA but is used extensively for what are known as priority pollutants. (N.T. 1696)

77. Method 625 is a method of extracting organics from a water matrix and analyzing them from the extract. (N.T. 1698)

78. In the opinion of James Stanley Smith, Director of Roy F. Weston, Inc. laboratory, and other chemists, 10 parts per billion (ppb) is an appropriate limit of detection for Method 624 and Method 625. (N.T. 1715-1716, 1719-1721; Ex. A-179)

79. Other analytical methods can be used to measure components reliably at concentrations less than 10 ppb, but they are costly. (N.T. 1721-1723)

80. To analyze samples from FR&S, Roy F. Weston, Inc. laboratory used Method 624 and Method 625 with a 10 ppb limit of detection suggested by EPA in 1979. Gilbert Laboratories used the same methods with a 5 ppb limit of detection allowable by EPA in 1982. (N.T. 1746-1752)

81. DER's laboratory analyzed samples from FR&S using Method 624 and Method 625. However, it employed limits of detection which vary from compound to compound and which may fall below 10 ppb as permitted by EPA in 1982. (N.T. 2465-2468)

82. According to the protocol used in the DER laboratory:

- (a) analytical reports contain categories for "quantitative analysis" and "qualitative analysis"; (N.T. 2461-2462)
- (b) if a number appears in the quantitative analysis, it means that the compound was found at a higher concentration than the limit of detection for that compound established by DER; (N.T. 2468)
- (c) "estimated" is used in the quantitative analysis when the results are not deemed to be extremely reliable; (N.T. 2463)
- (d) "trace" or "possible trace" are used in the quantitative analysis when there is spectral evidence indicating the presence of a compound but not of high enough quality to make a positive identification; (N.T. 2463)
- (e) a compound is listed in the qualitative analysis, even though it cannot be quantified, if the identification

is certain; (N.T. 2462)

(f) "possible" is used in the qualitative analysis when the identification is tentative. (N.T. 2463)

83. The protocols and QA/QC procedures adopted by DER, on the one hand, and by Walter B. Satterthwaite Associates, Inc. and Roy F. Weston, Inc. laboratory, on the other hand, are similar but not identical. The differences account for some variations in result but they are not significant. (N.T. 884-892, 1683-1752, 2453-2474, 2499-2576, 2685-2688, 3864-3875, 3928-3935).

84. In the testing done in connection with FR&S' landfill, DER did not generally employ replicate samples or spikes and violated other QA/QC procedures. (N.T. 1352, 1362-1363, 1370, 1377, 1447, 1449, 2456, 2576-2577)

85. Walter B. Satterthwaite selected six samples of leachate from FR&S' landfill as representative of the material. The important characteristics, in his opinion, were specific conductance, pH, BOD, COD, TOC, phenolics, ammonia, turbidity, chlorides, sulfates, phosphorus, metals and organics. (N.T. 903-907; Ex. A-149)

86. Components of leachate may change over the course of time, but no drastic changes should occur over a short period of time in a landfill where leachate is being recirculated. (N.T. 1760-1761)

87. Surface water samples taken by DER were not obtained in conformity with proper procedure. (N.T. 2944-2946, 2985, 3983-3999; Ex. A-195)

88. Considering the surface water samples and the land uses in the vicinity of the landfill site, it is determined that:

(a) the surface waters upgradient from the landfill site are degraded by organics and sediment, the result of overflowing on-site sewage disposal systems

- and the activities at the Pagoda Motorcycle Club; (N.T. 957-961; Ex. A-157)
- (b) the surface waters from the power line to the southern edge of the landfill meet conventional water quality standards; (N.T. 962-969; Ex. A-158)
  - (c) the Jett Seep degrades the surface water on the landfill site downgradient of the landfill itself; (N.T. 965-969; Ex. A-158)
  - (d) the surface waters from Lincoln Road to the Schuylkill River are degraded by organics and metals, the result of present and former industrial activities in that area; (N.T. 969-974; Ex. A-159)
  - (e) the FR&S landfill may have caused some periodic instances of contamination but has caused no permanent degradation to the surface waters. (N.T. 973-974)

89. Shallow wells, drilled to a depth, and constructed, to intercept water only from the shallow aquifer, were used to measure the impact of the landfill upon the shallow aquifer. (N.T. 863-864, 2370-2375)

90. Walter B. Satterthwaite Associates, Inc. purged every well before sampling but DER did not do so in all instances. (N.T. 922-923, 1383-1385, 1402, 1591, 3094)

91. Purging assures that the water quality being measured is that of the aquifer rather than that of the water standing in the well. (N.T. 887; Ex. A-186)

92. Considering the reliable samplings of water in the shallow wells, there is no scientific basis for concluding that the landfill is having any adverse impact upon the shallow aquifer. (N.T. 808-809, 924-951, 990)

93. When a number of compounds showed up in shallow wells 35 and 36 that were different from any found in the other wells, Walter B. Satterthwaite Associates, Inc. undertook an examination of the Smith Property across Lincoln Road from where the wells were located. (N.T. 943-944, 980)

94. Mr. Satterthwaite had his associate, Michael L. McCarthy, take seven soil samples from this property which were sent to Roy F. Weston, Inc. laboratory for analysis. (N.T. 980-981, 1661-1663)

95. Tests on the soil samples support the conclusion that shallow wells 35 and 36 are being degraded by the Smith Property and not by the landfill. (N.T. 980-987, 1046-1051, 1489-1493, 1734; Ex. A-160 through A-167)

96. The landfill is having no adverse impact upon the deep aquifer. (N.T. 919, 990, 2399, 2753)

97. The absence of leachate contamination in the surface water, shallow aquifer and deep aquifer establishes that the leachate collection system installed by FR&S is capable of functioning adequately under normal circumstances. (N.T. 862-863, 881-884)

98. Representatives of Exeter Township in 1983 discussed with representatives of FR&S the possibility of constructing collection lines and pumping stations to convey leachate from the landfill to the Township's sewage treatment plant. (N.T. 412-419, Ex. A-81)

99. Leachate from the FR&S landfill can be handled by the Exeter Township sewage treatment plant without pretreatment or limitation as to volume. (N.T. 421)

100. Representatives of FR&S agreed to contribute \$100,000 toward the cost of construction of the sewage collection facilities and to grant the necessary rights-of-way across the FR&S property. \$10,000 actually was paid as earnest money. (N.T. 431-432, 4434)

101. During the latter part of 1983, representatives of Exeter Township sought approval from DER for the acceptance of FR&S leachate into the Township's sewage collection and treatment system. (N.T. 417, 4432)

102. DER took no action on the request for approval because DER legal counsel, John Wilmer, put a hold on it. (N.T. 4432-4433)

103. On June 26, 1984, representatives of Exeter Township informed representatives of FR&S that, as soon as an affirmative response was received from DER, the Township would be in a position to conduct a test on the leachate. (N.T. 4433; Ex. A-513)

104. On July 2, 1984, DER notified Exeter Township that it approved the acceptance of FR&S leachate. (N.T. 4432; Ex. A-512)

105. At a meeting of the Board of Supervisors of Exeter Township on July 9, 1984, attended by numerous citizens of the Township, including opponents of the FR&S landfill, a decision was deferred on whether to proceed with testing the FR&S leachate. (N.T. 4437, 4528-4532)

106. Donald L. Peifer was FR&S' authorized agent and operator of the landfill from 1973 until June 1984. (N.T. 239, 286, 4216)

107. In his capacity as authorized agent for FR&S, Mr. Peifer:

(a) made changes and additions to the leachate collection system without submitting plans to, and obtaining prior approval from, DER; (N.T. 534, 537, 538, 540, 542-544, 3605)

(b) installed a gas venting system without obtaining a permit from DER; (N.T. 1914-1915)

(c) consistently ignored DER's requirements for daily, intermediate and final cover; (N.T. 442, 459, 484, 486, 1867, 1885, 1892, 1895, 1900, 1902, 1908, 1913,

3255, 3259, 3377; Ex. A-85, A-93, A-105, A-106,  
C-37 through C-42, C-44, C-45, C-68 and C-69)

- (d) consistently ignored DER's requirements for slopes;  
(N.T. 459-460, 461-463, 1873-1875, 1885-1886, 1892,  
1895, 1899-1900, 1902, 1908, 1913, 3255, 3259,  
3373-3374; Ex. A-93, C-37 through C-42, C-44, C-45,  
C-68, C-69)
- (e) consistently ignored DER's requirements for operational  
records; (N.T. 482-483, 557, 563, 1899, 1902, 1908,  
1913, 3255; Ex. A-103, C-3, C-4, C-5, C-41, C-42,  
C-44, C-45, C-68 and C-69)
- (f) accepted sludge for disposal in the landfill without  
the approval of DER and continued to accept it  
after being cited for it; (N.T. 565, 595-600,  
643-649, 773-781, 1880, 1888, 1894, 1897, 1900,  
1903, 1908-1909, 1914, 3256, 3260; Ex. C-37 through  
C-42, C-44, C-45, C-68 and C-69)
- (g) failed to file with DER annual reports summarizing  
the types and quantities of solid waste received at  
the landfill; (N.T. 560-561)
- (h) failed to file with DER quarterly and annual groundwater  
monitoring reports; (N.T. 1877-1878)
- (i) intimidated and used abusive language toward  
representatives of DER and impeded them in the  
performance of their duties; (N.T. 547-556)
- (j) risked contaminating the surface water and groundwater  
by applying leachate to the surface of the borrow

pit and to the surface of the access road; (N.T. 400-401, 1935-1936)

(k) mismanaged the leachate collection system, enabling leachate to escape into the surface waters on and adjacent to the site; (N.T. 570-573, 1963-1972, 2041-2044)

(l) allowed noxious odors to spread beyond the boundaries of the site; (N.T. 1785-1845, 1912)

108. On May 1, 1984, representatives of DER observed that FR&S was in the process of excavating an area in the southwest quadrant of the site, and that a 16-inch or 18-inch steel pipe had been installed from the South Pond into this excavation. (N.T. 4071-4080; Ex. C-100 through C-103)

109. On May 30, 1984, representatives of DER observed that the excavation had leachate in it to a depth of several feet. (N.T. 4081-4085; Ex. C-104)

110. On June 7, 1984, representatives of DER observed an outflow pipe from the excavation to a newly-constructed culvert under Red Lane Road. A trickle of liquid was flowing from the pipe and very little liquid remained in the excavation. (N.T. 4086-4093; Ex. C-105)

111. When representatives of DER attempted to discuss their observations with Mr. Peifer on June 7, 1984, he verbally abused them and ordered them off the site. (N.T. 4091-4093)

112. FR&S had not shown the excavation or the pipe on its plans and had not notified DER in advance of construction. (N.T. 4167-4168, 4176)

113. On June 13, 1984, after Board Member Mazullo had vacated the superseedeas as a result of Mr. Peifer's actions on June 7, 1984, Mr. Peifer

resigned as authorized agent of FR&S and a new management team was put in charge of the landfill. (Ex. A-400)

114. After the new management team took over, representatives of DER observed:

- (a) liquid being pumped from the North Pond on June 15, 1984, onto the surface of the site from whence it flowed into the diversion ditch; (N.T. 4260; Ex. C-108 through C-115)
- (b) noxious odors spreading from the landfill site to other points in the vicinity; (N.T. 4306, 4346-4347)
- (c) leachate overflowing the South Pond on July 7, 1984, and finding its way into the intermittent stream; (N.T. 4747-4751)
- (d) a black, foaming liquid being pumped from the North Pond onto the surface of the site on July 27, 1984; (N.T. 4990-4992)
- (e) numerous other violations of the Board's Orders of June 13, 1984 and August 6, 1984. (N.T. 4189, 4605-4606, 4654, 5008-5010, 5040-5041, 5043-5045, 5048, 5057-5064; Ex. C-318, C-342, C-343, C-349 and C-350)

#### DISCUSSION

The long history of this case holds no honor for the parties or the tribunals, judicial and quasi-judicial, involved with it. Simply stated, the controversy should have been resolved on its own merits years ago. This Adjudication is another attempt to reach that elusive goal.

The threshold issue is burden of proof. 25 Pa. Code §21.101(c)(1) places the burden of proof upon the appellant in a permit refusal case, but FR&S argues that this is a permit revocation case, placing the burden of proof on DER under 25 Pa. Code §21.101(b)(2). The permit issued by the Department of Health on April 24, 1970, expired by its own terms at the end of that calendar year. FR&S filed an application for another permit on or about February 1, 1978, and refiled it on October 17, 1978, after DER denied it.

FR&S never physically received another permit and has the burden of proving that one was, in fact, issued. The evidence shows that FR&S advanced into the last stage of permit issuance after it posted a Collateral Bond in December 1980, but does not show conclusively that DER actually gave final approval. Permit forms were prepared and signed but were never dated and sent out. It may be that they should have been sent out, as FR&S maintains, but the evidence is clear that the application remained under continuing DER scrutiny. Given these circumstances, I must conclude that DER's action on April 11, 1983, from which FR&S appealed, was a permit denial. Accordingly, FR&S has the burden of proof on all issues.

In denying FR&S' application for a permit, DER cited 17 deficiencies. The major shortcoming is claimed to be the lack of a naturally occurring impermeable zone meeting the requirements of 25 Pa. Code §75.25(o)(6)(iii). Much of the evidence presented in this case focuses on this issue. The DER regulation, which has since been rescinded,<sup>2</sup> read as follows:

"(6) Natural systems may be utilized to collect

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<sup>2</sup> At oral argument, DER insisted that the Board had to apply the latest revision of the regulations which outlaw the "natural" liners previously allowed under 25 Pa. Code §75.25(o)(6)(iii). Whatever the situation might be in a normal appeal, this case is governed by Commonwealth Court's Remand Order which specifically limits my consideration to the record and briefs already on file.

leachate from landfills. The methods to utilize the natural systems may be the manipulation of the groundwater flow system(s) or naturally occurring impermeable zones.

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(iii) Where naturally occurring impermeable zones are to be utilized, the minimum site requirements that must be met are:

(A) Zones with a uniform thickness of greater than two feet (2') must have a permeability of less than  $1 \times 10^{-7}$  cm/sec.

(B) Zones with a uniform thickness of greater than four feet (4') and an upward groundwater gradient into the zone may be approved with a maximum permeability of less than  $1 \times 10^{-6}$  cm/sec."

FR&S argues that the landfill site meets these requirements; DER argues that it does not.

Geological analysis has convinced both protagonists that a barrier exists in the Brunswick bedrock underlying the site, separating the deep aquifer from the shallow aquifer. Both parties agree that the deep aquifer has not been impacted by the landfill. There the agreement ends. DER asserts that the bedrock is fractured and jointed, that the subsurface conditions under the existing landfill have not been analyzed, and that the shallow aquifer and surface water are degraded by the landfill.

It is true that the Brunswick formation is fractured and jointed; but, if these faults are open, it is obvious that leachate from the landfill would be able to penetrate to the deep aquifer and contaminate it. The uncontaminated condition of the deep aquifer proves that the joints and fractures are not open. In all likelihood they have been plugged solidly by the clay particles released by the weathering of material near the surface, as suggested by Dr. Gray and Mr. Satterthwaite. The soil permeability tests show that the on-site material is capable of producing this effect.

DER is correct in its assertion that no determination has been made of the precise soil and subsurface conditions beneath the existing landfill.

However, there are sound reasons why that has not been done. Borings made through a mound of solid waste into the bedrock could breach the barrier between the aquifers and carry pollutants into the deep groundwater. It is unnecessary to run that risk in this case. Evidence gained by analysis of conditions surrounding the existing landfill conclusively establish the existence of an impermeable barrier. Inferentially, that barrier extends throughout the area occupied by the existing landfill. If it did not, there would be evidence of landfill contamination in the deep aquifer.

The shallow aquifer cannot be used as a water source because of meager supply and weak flow. However, there is movement within this aquifer, as DER points out, that has a recharging effect upon surface streams and springs. If leachate from the landfill penetrates the shallow aquifer, it will contaminate these water zones. DER maintains that this has happened and puts forth its water samples as proof. FR&S produces its own samples in response.

A great deal of hearing time was devoted to the water samples that were taken and to the techniques of obtaining, preserving and analyzing them. The evidence reveals the ease with which mistakes can be made, even by highly trained persons, and the absolute necessity of following a rigorous quality assurance, quality control program. DER's sampling practices, both for surface water and for shallow groundwater, did not always adhere to its own standards and, as a whole, did not exhibit the high degree of professional care employed by the experts for FR&S. For this reason, DER's water sample analyses are not entitled to as much weight.

Furthermore, many of the results presented by DER involve very minute concentrations. Such results would have to be treated with the utmost caution

even under favorable conditions. When they are presented as part of a sampling program that is somewhat deficient in quality control procedures, they must be viewed with great suspicion. Weighing the evidence with these considerations in mind, it is clear that the surface water has not been contaminated by the landfill except when deliberate or careless acts of FR&S personnel have caused it to occur. While it is not possible to rule out completely any contamination of the shallow groundwater, the evidence does not prove that it exists.

Considering all of the relevant evidence, it is clear that the existing FR&S landfill site fulfills the requirements of 25 Pa. Code §75.25 (o)(6)(iii) for the use of a "natural" liner. The suitability of the proposed expansion area north of the power line is less clear. The shallow aquifer is very close to the surface in that area and discharges into the North Pond. Much of the area has been stripped of topsoil and weathered shale. While the impermeable barrier between the two aquifers presumably will keep contaminants from affecting the water supply, there appears to be little assurance that leachate will not pollute the shallow groundwater and surface water. The proposed expansion area, therefore, does not qualify for the use of a "natural" liner on the basis of the record before me.<sup>3</sup>

DER found the application defective in a number of other instances. The soils on the site were not deemed either suitable or adequate for use as intermediate or final cover material. DER's soil scientist, John Zwalinski, testified that he agreed with FR&S that the soils were suitable (N.T. 3395-3396). He simply did not believe that the data submitted justified the

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<sup>3</sup> Mr. Gaydos, the engineer for FR&S, acknowledged (N.T. 3793-3794) that further engineering needed to be done in order to satisfy DER that the expansion area met the requirements of 25 Pa. Code §75.25 (o)(6)(iii).

conclusion that the soils were there in sufficient quantity. That data previously had been accepted, however, by DER's Emil Washko (Ex. A-12) who agreed that the 8.3 million cubic feet of suitable cover material was adequate for FR&S' needs. The evidence preponderates in favor of FR&S on this issue and DER's position is rejected.

The leachate collection system was criticized for the absence of definitive plans and for a lack of assurance that it would be able to control outbreaks. The criticism is understandable when it is recognized that the system is a hodge-podge of ponds, pipes and pumps installed over the course of a dozen years and connected together in a haphazard manner. The system was built without a long-range comprehensive plan, based on sound engineering practices. Components were added to solve specific immediate problems with little regard for what may occur in the future.

Despite the profusion of negative comments that can be made about it, the leachate collection system has worked, and is capable of working, in an acceptable manner. The absence of hard evidence of leachate in the waters on and adjacent to the site is abundant proof of the basic effectiveness of the system. Its only demonstrated weakness appears to be its storm-sensitivity. Heavy rains are able to supercharge the system, necessitating relief measures to prevent a massive outbreak from the landfill itself. The relief measures employed by FR&S have been unacceptable, but hauling the leachate off-site to an appropriate disposal facility can remedy that situation. With the correction of its storm-related problem, there is no reason why the leachate collection system in place should not be approved.

The other shortcomings found by DER in the application are more technical in nature. Some of them (final elevation, degree of slope) had been

resolved previously between FR&S and DER. Others (plans for gas venting, vector control and erosion and sedimentation control) had not been cited by DER in any prior correspondence with FR&S. Still others (groundwater monitoring, for example) must be deemed satisfied by actions taken by FR&S since April 1983. All of these deficiencies, in my judgment, are capable of being cured and should not be used as a basis for final rejection.

Compliance problems are another matter, however. Section 503(c) of the SWMA, 35 P.S. §6018.503(c), authorizes DER to deny a permit if it finds that the applicant "has failed or continues to fail," or "has shown a lack of ability or intention," to comply with environmental laws, regulations and orders. Subsection (d) of the same section reads, in part, as follows:

"Any person or municipality which has engaged in unlawful conduct as defined in this act, or whose partner, associate, officer, parent corporation, subsidiary corporation, contractor, subcontractor or agent has engaged in such unlawful conduct, shall be denied any permit or license required by this act unless the permit or license application demonstrates to the satisfaction of the department that the unlawful conduct has been corrected."

"Unlawful conduct" is defined in Section 610 of the SWMA (35 P.S. §6018.610) to include (1) operating without a permit; (2) operating in violation of the SWMA or in violation of rules, regulations and orders of DER; (3) operating so as to create a public nuisance or threat to public health, safety and welfare; and (4) refusing, hindering, obstructing, delaying or threatening any representative of DER in the performance of any duty, including entry or inspection.

FR&S is hardpressed to deny that it has engaged in unlawful conduct; the record is filled with one incident after another. Disregarding the fact that the landfill operated without a permit for nearly 14 years (since that was allowed either by DER or Commonwealth Court for about one-half of that

time), the other examples of unlawful conduct still weigh heavily against FR&S. The particulars are set forth in detail in findings of fact 107 through 112 and need no repetition here. Suffice it to say that they furnish ample basis for DER to conclude that "FR&S lacks both the ability and the intention to obey the laws of the Commonwealth."

At oral argument, FR&S suggested that it was improper for the Board to consider any evidence of unlawful conduct that occurred subsequent to DER's Order of April 11, 1983. There might be some merit to this argument if DER had not listed FR&S' unlawful conduct as a reason for its denial of a permit. This was one of the major reasons given, however, and DER presented adequate evidence to show that FR&S engaged in unlawful conduct consistently throughout the long history of this case. Evidence that FR&S continued in that same pattern after its permit application was finally denied on April 11, 1983, was clearly relevant to show that DER's conclusion was justified.

It is tempting to lay the blame for all of the unlawful conduct at Mr. Peifer's doorstep. Certainly, he was the dominant factor throughout the landfill's long history of violations. Enmeshed in a thickening tangle of regulation, generated by the 1968 version of the SWMA and intensified by the 1980 replacement, and faced with the increasing hostility of DER toward unlined landfills, any operator in Mr. Peifer's position could be expected to exhibit a degree of exasperation. His actions went beyond that, however, and demonstrated a complete disregard for the regulations and the public policy behind them. His rough, free-wheeling and impulsive nature was ill-suited to the management of a modern waste disposal facility, where environmental and health concerns demand close regulation and the direction of professionally-trained people.

Significantly, however, the unlawful conduct did not come to a halt after Mr. Peifer departed the scene. FR&S' replacement management proved to be just as indifferent to regulations as Mr. Peifer (see finding of fact 114). I do not belittle the difficulties faced by the new management when they took over; or ignore the attitude of DER which, at times, was something less than cooperative. Nonetheless, the replacements for Mr. Peifer were incapable of making the difficult and costly decisions necessary to protect the environment. On the basis of the record made in 1983 and 1984 (the only evidence before me under the terms of Commonwealth Court's remand Order), I conclude that there is nothing to indicate that FR&S either is capable of, or committed to, correcting its course of unlawful conduct. Accordingly, it is not entitled to a permit.

The conclusion reached in this case was not affected by the placing of the burden of proof. The preponderance of the evidence shows that FR&S satisfied the technical and scientific requirements to obtain or to keep a permit. But the evidence also shows, overwhelmingly, that FR&S lacked the ability and intention to obey the law. DER would have been justified, on the basis of this evidence, to deny a permit application or to revoke a permit already issued.

#### **CONCLUSIONS OF LAW**

1. The Board has jurisdiction over the parties and the subject matter of this appeal.
2. DER did not issue a permit to FR&S after the permit issued on April 24, 1970, expired by its own terms on December 31, 1970.
3. Since this appeal is from DER's action denying a permit, FR&S has the burden of proof.

4. The site of the existing FR&S landfill is underlain by a naturally occurring impermeable zone meeting the requirements of 25 Pa. Code §75.25(o)(6)(iii).

5. FR&S has not shown that the proposed expansion site also is underlain by a naturally occurring impermeable zone meeting the requirements of 25 Pa. Code §75.25(o)(6)(iii).

6. The soils on the landfill site are of suitable quality and sufficient quantity for use as intermediate and final cover material.

7. The leachate collection system, modified to include an environmentally acceptable way of relieving storm-related pressures, is entitled to approval.

8. The more technical deficiencies found by DER in the application are capable of being cured and should not be used as a basis for final rejection.

9. FR&S and its agents have engaged in unlawful conduct as defined in Section 610 of the SWMA.

10. DER was justified in finding that FR&S lacks both the ability and the intention to obey the laws of the Commonwealth.

11. The unlawful conduct of FR&S' replacement management establishes that FR&S is neither capable of, nor committed to, correcting the unlawful course of conduct engaged in by prior management.

12. FR&S' unlawful conduct justified DER in denying the permit application and also would justify DER in revoking a permit already issued.

**ORDER**

AND NOW, this 14th day of July, 1989, the appeal of FR&S, Inc., docketed at No. 83-093-M is dismissed and the action of the Department of Environmental Resources in denying the application of FR&S, Inc. for a Solid Waste Permit is sustained.

**ENVIRONMENTAL HEARING BOARD**



**ROBERT D. MYERS, MEMBER**

Board Chairman Maxine Woelfling and former Board Member William A. Roth did not participate in the disposition of this matter in accordance with the Order of Commonwealth Court. Board Member Terrance Fitzpatrick also did not participate.

**DATED:** July 14, 1989

**cc: Bureau of Litigation**  
Harrisburg, PA

**For the Commonwealth, DER:**  
Vincent Pompo, Esq.  
Eastern Region

**For Appellant:**  
Edward C. German, Esq.  
Philadelphia, PA

William Fox, Esq.  
Norristown, PA

mjf





COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 101 SOUTH SECOND STREET  
 SUITES THREE-FIVE  
 HARRISBURG, PA 17101  
 717-787-3483  
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M. DIANE SMITH  
 SECRETARY TO THE BOARD

RONALD CUMMINGS BOYD

v.

COMMONWEALTH OF PENNSYLVANIA,  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES  
 and WAYNE MARCHO, Permittee

:  
 :  
 : EHB Docket No. 88-285-M  
 :  
 :  
 :  
 : Issued: July 19, 1989

OPINION AND ORDER  
 SUR  
 MOTION TO DISMISS APPEAL

Synopsis:

Where a permit authorizes the removal of silt and the construction and maintenance of channels downstream from an earthen dam which the Appellant claims is unpermitted and which causes flooding on Appellant's upstream land, an appeal from the permit issuance will not be dismissed as moot simply because the dredging work has been completed. The maintenance of the channels and the continued existence of the dam, which is a necessary part of the entire project, are not moot.

OPINION

Ronald Cummings Boyd, Appellant, filed a Notice of Appeal on July 22, 1988, contesting the issuance by the Department of Environmental Resources (DER) of Water Obstruction and Encroachment Permit No. E58-118 to Wayne Marcho (Permittee) on July 12, 1988. The permit authorized the Permittee to "remove silt from the wetland near the headwaters of Bell Creek and to construct and maintain two channels upstream of said wetland located at points approximately 2,400 feet downstream of Potter Lake in Gibson Township, Susquehanna County."

Appellant complained that the wetland area covered by the permit is drained and accessed by an unpermitted earthen dam that backs up Bell Creek and floods wetland area on Appellant's land.

Appellant inserted the words "request supersedeas" on his Notice of Appeal form. Although notified by the Board that he would have to file a petition conforming with 25 Pa. Code §21.77, Appellant failed to do so and no supersedeas was granted. Proceeding without legal representation, Appellant filed a pre-hearing memorandum on November 30, 1988. On January 27, 1989, Permittee filed a Motion to Dismiss the appeal. Appellant responded to this Motion on February 10, 1989.

In his Motion, Permittee argues that, since all the work authorized by the permit was completed by September 1988, the matter is now moot. We disagree. The permit authorized the removal of silt and the construction of two channels in Bell Creek, but also authorized the maintenance of the channels. Thus, even if the dredging work has been completed, the permit remains active insofar as the maintenance of the channels is concerned.

Appellant's main objection to the permit relates to the earthen dam which is essential to the wetland area below it. Appellant alleges that this dam is unpermitted and, therefore, illegal, and that it causes flooding on Appellant's land. This dam is still in place, so far as the record shows at this point, and apparently must remain in place in order for Permittee's wetland area to exist. Consequently, the gravamen of Appellant's complaint has not been mooted by the completion of the dredging operation.

Permittee also argues that Appellant lacks standing to appeal since he has failed to demonstrate a direct, immediate and substantial interest in the permit issuance. We do not take this argument seriously. Appellant's ownership of adjacent upstream property allegedly flooded by a dam necessary

to Permittee's wetland area is such an obvious demonstration of interest that no further discussion is warranted.

**ORDER**

AND NOW, this 19th day of July, 1989, it is ordered as follows:

1. The Motion to Dismiss, filed by Wayne Marcho on January 27, 1989, is denied.

2. DER and Wayne Marcho each shall file a pre-hearing memorandum on or before August 4, 1989.

**ENVIRONMENTAL HEARING BOARD**



**ROBERT D. MYERS, MEMBER**

**DATED:** July 19, 1989

**cc: Bureau of Litigation**  
Harrisburg, PA  
**For the Commonwealth, DER:**  
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**For Appellant:**  
Ronald Cummings Boyd  
Susquehanna, PA  
**For Permittee:**  
John T. Dooley, Esq.  
Lansdale, PA

mjf



COMMONWEALTH OF PENNSYLVANIA  
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M. DIANE SMITH  
 SECRETARY TO THE BOARD

MR. & MRS. DANIEL E. BLEVINS	:	
and NANCY LEE ELLIS	:	
v.	:	EHB Docket No. 82-154-W
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	Issued: July 21, 1989
SOUTHEASTERN CHESTER COUNTY REFUSE	:	
AUTHORITY and NEW GARDEN TOWNSHIP	:	

OPINION AND ORDER  
 SUR  
 MOTION TO DISMISS AS MOOT

Synopsis

Permittee's motion to dismiss an appeal of the issuance of a solid waste management permit as moot because of the subsequent modification of the permit is denied because the disposition of the motion is dependent on the Commonwealth Court's decision on the Board's denial of a petition for allowance of an appeal nunc pro tunc of the permit modification.

OPINION

The relevant procedural history of this matter is recounted in the Board's June 8, 1989, opinion regarding the Southeastern Chester County Refuse Authority's (SECCRA) motion to suppress Appellants' post-hearing brief.

On December 28, 1987, SECCRA filed a motion to dismiss, claiming that since Appellants did not timely appeal the 1987 amendments to SECCRA's

permit,<sup>1</sup> this appeal was now moot because the 1987 amendments took into consideration all issues properly before the Board, and, as a result, the Board could no longer grant any meaningful relief to Appellants. On January 20, 1988, the Department responded to SECCRA's motion, generally concurring with SECCRA's motion. The Department did concede that the issue of traffic safety was not moot.

On April 3, 1989, SECCRA submitted a letter to the Board arguing that the appeal was moot as a consequence of the municipal waste management regulations, 25 Pa. Code §271.1 et seq., because if its repermitting application is granted, the facility will become a lined landfill and, if its application is denied, it must cease operations. SECCRA requested that the matter be stayed until the Commonwealth Court rules on Appellants' petition for review of the Board's denial at 1988 EHB 1075 of Appellants' petition for allowance of an appeal nunc pro tunc of the 1987 amendments to SECCRA's permit<sup>2</sup> or until the Department acts on SECCRA's repermitting application.

We must deny SECCRA's motion because the issue of whether the appeal is moot is dependent on whether the Commonwealth Court sustains the Board's denial of Appellants' petition for allowance of an appeal nunc pro tunc of the 1987 permit amendments. If the Board's decision is not sustained, then SECCRA's argument that Appellants are precluded from raising certain issues by virtue of their failure to appeal the 1987 permit amendments is no longer viable. If, however, the Commonwealth Court sustains the Board's denial of Appellants' petition, it is possible that certain issues raised in Appellants'

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<sup>1</sup> Appellants filed a petition for allowance of an appeal nunc pro tunc at Docket No. 88-018-W.

<sup>2</sup> The Commonwealth Court heard oral argument on Appellants' petition for review on June 9, 1989.

post-hearing memorandum may be mooted and/or precluded by the 1987 permit amendments and a hearing on these issues would be necessary before the Board could determine whether the appeal is moot.

Since we cannot speculate as to the outcome of Appellants' petition for review before the Commonwealth Court and we must view this motion in the light most favorable to the non-moving party, we must deny SECCRA's motion.

By letter dated June 27, 1989, SECCRA requested, inter alia, that the Board rescind the briefing schedule established in our June 8, 1989, opinion regarding SECCRA's motion to suppress Appellants' post-hearing brief and rule on its April 11, 1989, letter requesting a stay, which request was not opposed by the Department. Appellants, by letter dated July 5, 1989, opposed SECCRA's request for a stay. In light of this opinion, it is hardly an efficient use of resources to require the submission of post-hearing briefs by SECCRA and the Department when the Commonwealth Court's decision on Appellants' petition for review could radically alter the substantive framework of this appeal.

**ORDER**

AND NOW, this 21st day of July, 1989, it is ordered that:

- 1) SECCRA's motion to dismiss is denied;
- 2) This matter is stayed pending Commonwealth Court's decision on Appellants' petition for review at No. 2897 C.D. 1988.

**ENVIRONMENTAL HEARING BOARD**

*Maxine Woelfling*

**MAXINE WOELFLING, CHAIRMAN**

**DATED:** July 21, 1989

**cc: Bureau of Litigation**  
Harrisburg, PA  
**For the Commonwealth, DER:**  
Kenneth A. Gelburd, Esq.  
Eastern Region  
**For the Appellant:**  
Robert W. Lentz, Esq.  
Paoli, PA  
**For SECCRA:**  
Roger E. Legg, Esq.  
West Chester, PA  
**For New Garden Township:**  
George A. Brutscher, Esq.  
Kennett Square, PA

sb



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M. DIANE SMITH  
 SECRETARY TO THE BOARD

**FR&S, INC.**

v.

**COMMONWEALTH OF PENNSYLVANIA,  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES**

:  
:  
:  
:  
:  
:  
:

**EHB Docket No. 83-093-M**

**Issued: July 21, 1989**

**OPINION AND ORDER  
 SUR  
 APPLICATION FOR SUPERSEDEAS**

Synopsis:

An Application for Supersedeas is denied where the applicant has failed to show a likelihood of prevailing on the merits and where there is a clear threat of environmental harm if a landfill is permitted to reopen under the circumstances. A supersedeas also will not be granted when it seeks to alter the status quo and when there are a number of practical impediments militating against it.

**OPINION**

On July 14, 1989, the undersigned Board Member issued an Adjudication in this appeal as a result of a February 22, 1988, Order of Commonwealth Court (No. 3044 C.D. 1986 and No. 1667 C.D. 1987) remanding the case for reconsideration. The Adjudication, inter alia, dismissed the appeal and sustained the April 11, 1983, action of the Department of Environmental Resources (DER) denying an application by FR&S, Inc. (FR&S) for a Solid Waste Permit for an existing landfill in Exeter Township, Berks County. On July 19, 1989, FR&S filed an Application for Supersedeas, requesting that the Board

suspend its July 14, 1989, Order and permit FR&S to reopen the landfill. The landfill has been closed since February 1, 1985.

To be entitled to a supersedeas, a litigant must show (1) a strong likelihood of prevailing on the merits, (2) irreparable harm, (3) the lack of substantial harm to other parties, and (4) an absence of any adverse affect upon the public interest. Pa. P.U.C. v. Process Gas Consumers Group, 502 Pa. 545, 467 A.2d 805 (1983). FR&S has failed to satisfy items (1) and (4). The Adjudication held that DER was justified in denying FR&S' application for a permit because FR&S had engaged in unlawful conduct and lacked both the ability and the intention to obey the laws of the Commonwealth. This unlawful conduct had involved FR&S' management, original and replacement, up to the end of the hearings and had resulted in the closing of the landfill. Except for an allegation that Donald Peifer (the original manager) is no longer associated with, and has no ownership interest in, the landfill, FR&S has made no showing whatever that it is likely to prevail on this critical issue.

The record amply demonstrates the environmental harm posed by incompetent or indifferent management. Allowing the landfill to open under these circumstances would clearly be contrary to the public interest.

Other reasons support the denial of FR&S' application. Board precedents consistently have refused to grant a supersedeas which would alter the status quo and allow activities for which a permit has been denied by DER: William Fiore v. DER, 1985 EHB 113; Hepburnia Coal Co. v. DER, 1985 EHB 713, Raymark Industries, Inc. v. DER, 1986 EHB 176; Amity Sanitary Landfill v. DER, 1988 EHB 766. The status quo in this case, for the past 4 1/2 years, has been the inoperation of the landfill. Granting FR&S' application would disturb this condition. When the landfill was closed for the last time on February 1, 1985, it was done on the orders of Commonwealth Court. There is a serious

question about the Board's power to change that, even if legal considerations warranted it.

There are also practical considerations to be weighed. FR&S does not have a permit. If the Board allowed the landfill to reopen, what conditions would govern its operations? The conditions set forth in Solid Waste Disposal Permit No. 100346 (Exhibit A-90, prepared and signed by DER but never issued) are now about 10 years old. We have no idea whether or not they are appropriate today in light of the technological and social developments that have taken place since then. DER's regulations governing landfills also have changed. We have no way of knowing whether or not FR&S can comply with them as they exist today. Landfills with so-called natural liners are not even permitted anymore.

This Board does not have the expertise to answer these questions on the basis of the record which was before us. For us to order DER to prescribe conditions appropriate for a reopening of the landfill would produce even more litigation and, possibly, place an impossible burden upon a regulatory agency.

Allowing the landfill to reopen in the face of these practical and legal impediments would be, in our judgment, an anomalous decision.

**ORDER**

AND NOW, this 21st day of July, 1989, it is ordered that the Application for Supersedeas, filed by FR&S, Inc. on July 19, 1989, is denied.

**ENVIRONMENTAL HEARING BOARD**



---

**ROBERT D. MYERS, MEMBER**

**DATED:** July 21, 1989

**cc: Bureau of Litigation**  
Harrisburg, PA  
**For the Commonwealth, DER:**  
Norman Matlock, Esq.  
Eastern Region  
**For Appellant:**  
Edward C. German, Esq.  
Philadelphia, PA

William Fox, Esq.  
Norristown, PA

mjf



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M. DIANE SMITH  
 SECRETARY TO THE BOARD

JAMES E. MARTIN : EHB Docket Nos. 83-121-G  
 : 84-016-G  
 v. : 84-028-G  
 :  
 :  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: July 26, 1989

**OPINION AND ORDER SUR APPLICATION  
 FOR AWARD OF ATTORNEYS FEES AND COSTS**

Synopsis

In evaluating a claim under the Costs Act, 71 P.S. §2031 *et seq.*, the Board will not retroactively apply the statute to instances where an adversary adjudication was initiated by the Department of Environmental Resources prior to the effective date of the statute. The determination of even a *de minimus* violation is sufficient to defeat the claim of being a "prevailing party." Appellant is eligible for costs where he is found to be a prevailing party and the Department's action is found to be not substantially justified, provided Appellant submits a statement of net worth and detailed records of time sheets and billing in conformity with the regulations under the Costs Act.

**OPINION**

This application for attorneys fees and costs stems from three appeals filed with this Board at Docket Nos. 83-121-G, 84-016-G, and 84-028-G, seeking review of compliance orders relating to surface mining operations

conducted by Martin under the authority of Mine Drainage Permit Nos. 3574SM14 and 3578BC16. These appeals were consolidated for the purposes of the hearing.

Martin's June 10, 1983, appeal at Docket No. 83-121-G challenged a May 24, 1983, compliance order citing Martin for failure to backfill and grade all disturbed areas to approximate original contour (AOC) in violation of 25 Pa.Code §87.141(a). In a letter dated September 30, 1985, after the hearing on the merits and prior to the adjudication, the Department vacated the order and moved to dismiss the appeal as moot.

The appeal at Docket No. 84-016-G challenged a compliance order citing Martin for failing to comply with an October 18, 1983, Consent Order and Agreement (COA) requiring Martin to develop a plan and implement erosion and sedimentation controls at certain mine sites.

The appeal at Docket No. 84-028-G challenged a December 28, 1983, compliance order citing Martin for failing to reclaim a mined area to AOC in violation of 25 Pa.Code §87.140. The Department's letter of September 30, 1985, vacated that portion of the order asserting a violation of the reclamation plan and moved to dismiss that portion of Martin's appeal as moot. The compliance order also cited Martin for a violation of 25 Pa.Code §87.97(a) for failing to remove and save all topsoil in a separate area and for wasting topsoil by depositing it in the pit.

On April 10, 1986, the Board issued an adjudication dismissing Martin's appeal at Docket No. 83-121-G as moot. The Board also dismissed Martin's appeal at Docket No. 84-016-G, holding that although Martin's submission of the erosion and sediment control plan one day late was a *de minimus* violation of the COA, the Department's issuance of the compliance order was a proper exercise of its discretion. The adjudication also dismissed that part

of Martin's appeal at Docket No. 84-028-G dealing with violations of the reclamation plan as moot and sustained that part of the appeal relating to topsoil violations. James E. Martin v. DER, 1986 EHB 313.

On May 12, 1986, Martin filed an application for award of attorneys fees and costs under the Act of December 13, 1982, P.L. 1127, as amended, 71 P.S. §2031 *et seq.* (the Costs Act), alleging that Martin's net worth was less than \$500,000 as required by the Costs Act, that Martin was the prevailing party in the appeals at Docket Nos. 83-121-G and 84-028-G, and partially the prevailing party at Docket No. 84-016-G, and that the position of the Department was not substantially justified. Martin sought fees in the amount of \$7145 at Docket No. 83-121-G, \$1790.28 at Docket No. 84-016-G, and \$5053 at Docket No. 84-028-G.

On June 6, 1986, the Department filed its response to Martin's application for attorneys fees, arguing that the Costs Act cannot be retroactively applied to the appeal at Docket No. 83-121-G, since Martin's appeal predated the effective date of the Costs Act. The Department also claimed that Martin failed to attach a proper statement of his net worth and detailed fee and cost information as required by regulations promulgated under the Costs Act, that Martin is not a prevailing party in these appeals as defined in the Costs Act, and that the award of fees would be unjust where the alleged violations still exist and several deadlines have been missed.

On August 13, 1986, Martin filed a reply to the Department's response, arguing that the Department never adopted the regulations under the Costs Act, and, therefore, none of these regulations were applicable to Martin's request. Further, Martin contends that he was the prevailing party even where the appeal was dismissed as moot, since the appeal still achieved the desired result in getting the Department to rescind its compliance order.

The Department, on October 23, 1986, filed its brief in support of its response to the application for attorneys fees, reiterating its previous arguments and alleging again that to grant fees would constitute a retroactive application of the Costs Act with regard to the appeal at Docket No. 83-121-G. The Department also argued that Martin did not prevail, since the rescission of the compliance orders did not alter Martin's underlying responsibility to reclaim the mining sites to AOC and to implement the erosion and sedimentation plan.

We will address each of the appeals individually.

Docket No. 83-121-G

The Department has raised the argument that with regard to this appeal any application of the Costs Act would constitute a retroactive application of the statute. The notice of appeal at Docket No. 83-121-G was filed June 10, 1983, and was from a May 24, 1983, compliance order. The Department alleges that, for the Costs Act to apply, an adversary adjudication must have been initiated on or after the effective date of the Costs Act, which was July 1, 1983, since §3 of the Costs Act is prospectively worded, evidencing the Legislature's intent to have the Act prospectively applied. Martin predictably responds that nothing in the Costs Act indicates applications for attorneys fees can be made only in instances where adjudications were initiated after July 1, 1983.

We agree with the Department's construction of the Costs Act.

Section 3(a) of the Costs Act, 71 P.S. §2033(a) provides:

(a) Except as otherwise provided or prohibited by law, a Commonwealth agency that initiates an adversary adjudication shall award to a prevailing party, other than the Commonwealth, fees and other expenses incurred by that party in connection with this proceeding, unless the adjudicative officer finds that the position of the agency, as a party

to the proceeding, was substantially justified or that special circumstances make an award unjust.

(emphasis added)

In a case directly on point, Kealy v. Liquor Control Bd., 106 Pa.Cmwlth 527, 527 A.2d 556 (1987), the Commonwealth Court held

We agreed with the Commission in Lehotzky that the employee was not entitled to an award of counsel fees since her matter predated the effective date of the Costs Act. Here, the challenged personnel action, occurring on March 25, 1983, was prior to the effective date but the Commission's adjudication was entered on February 23, 1984, after the effective date. We are convinced that the date of the challenged personnel action, not the date of the Commission's adjudication on that challenge, is the key date when determining whether the Costs Act applies, as indicated by our ruling as to the date when Kealy's right to lost wages commenced. In so holding, we note that the Costs Act provides parties an additional remedy and relief that did not exist previously in either statutory or common law. As such, the Costs Act makes a substantive change in the parties' rights in that it subjects the Commonwealth agency to potential liability to pay costs and counsel fees and gives parties the right to seek an award of counsel fees and costs from a Commonwealth agency when they prevail in an adversary adjudication. A statute is substantive where it places or imposes new legal burdens upon past transactions or occurrences. Department of Labor and Industry, Bureau of Employment Security v. Pennsylvania Engineering Corp., 54 Pa.Commonwealth Ct. 376, 421 A.2d 521 (1980). Section 1926 of the Statutory Construction Act of 1972, 1 Pa.C.S. §1926, provides that '[n]o statute shall [be] construed to be retroactive unless clearly and manifestly so intended by the General Assembly.' There is no such clear intent of retroactivity within the provisions of the Costs Act. Accordingly, we must agree with the Commission that it is inapplicable to Kealy's discrimination complaint that occurred prior to July 1, 1983.

(527 A.2d 589-590)  
(emphasis added)

Thus, we must conclude that the Costs Act cannot be applied retroactively to

give this Board the authority to award fees in instances where an adversary adjudication was initiated by the Department prior to the effective date of that statute. Accordingly, this Board is without authority to award fees in the appeal at Docket No. 83-121-G, and Martin's application will be denied.

Docket No. 84-016-G

In the appeal at this docket, the Board determined that although Martin's submission of an erosion and sedimentation plan one day late was a *de minimus* violation of the COA, the Department had not abused its discretion.

Martin argues that the Department did not admit until the time of hearing that the part of the order requiring development of the plan by December 5, 1985, had been complied with and receipt of the plan one day late was a *de minimus* violation. Martin maintains that on this part of the order he was the prevailing party and that the Department's position was not substantially justified.

The Department argues that the *de minimus* violation, along with the outstanding obligation to install controls, defeats the determination that Martin was the prevailing party in this appeal. The Department also maintains that even if Martin were found to be a prevailing party, the Department was substantially justified in its position.

Section 2 of the Costs Act, 71 P.S. §2032 defines "prevailing party" as one

"in whose favor an adjudication is rendered on the merits of the case or who prevails due to withdrawal or termination of charges by the Commonwealth agency or who obtains a favorable settlement approved by the Commonwealth agency initiating the case."

In its April 10, 1986, adjudication, the Board concluded that the Department met its burden of proof with regard to the compliance order and

that Martin failed to comply with Paragraph 4(a) of the COA. Martin, at 314-317. The Commonwealth Court affirmed the Board's April 10, 1986, adjudication. James E. Martin v. Com., Dept. of Envir. Res., \_\_\_ Pa.CmwltH \_\_\_, 548 A.2d 675 (1988). Based on the adjudication and the Commonwealth Court's opinion, we must conclude that Martin was not a prevailing party in whose favor an adjudication was rendered on the merits of the case or otherwise and deny his application for attorney fees at Docket No. 84-016-G.

**Docket No. 84-028-G**

The first part of the compliance order in this appeal cited Martin for his failure to reclaim all disturbed land in conformance with his approved reclamation plan in violation of 25 Pa.Code §87.140. The Department vacated this portion of the order on September 30, 1985, offering no reason for this action.

Martin claims his action in pursuing the appeal in this case achieved the desired result of getting the Department to withdraw its compliance order. Martin argues that the Board should evaluate success on a claim based upon the consequences subsequent to the appeal, and that during this process, Martin had to engage in extensive discovery and file all pre-trial documents, and, therefore, fairness and equity demand he be recompensed.

The Department argues that Martin was not a prevailing party, since the only effect of its rescission order was to remove the long passed date by which Martin was to regrade these sites to AOC and because Martin was still responsible for the regrading under his permits and the regulations.

"Prevailing party" is defined in §2 of the Costs Act, 71 P.S. §2032, to include one who prevails due to the withdrawal or termination of charges by the Commonwealth agency. Clearly, Martin is within the Act's definition of prevailing party in this appeal and is entitled to attorneys fees, unless the

Board finds the position of the Department was substantially justified or that special circumstances would make an award unjust. §3 of the Costs Act, 71 P.S. §2033(a).

Section 2 of the Costs Act, 71 P.S. §2032, defines a "substantially justified" position as one which has a reasonable basis in law and fact, noting that the failure of an agency to prevail in a proceeding or the agreement of an agency to settle a controversy shall not raise a presumption that the position of the agency was not substantially justified.

The Department's letter of September 30, 1985, informing Martin that the Department had vacated that portion of the order requiring backfilling to AOC gave no explanation for this action. Nothing in the current record, save for a statement in the Department's brief in support of its response to Martin's application, offers any reason for vacating the order. We are without authority to re-open the record from the previous adjudication in this matter to seek out this information. 4 Pa.Code §2.14 authorizes reopening the record following the adjudication to require additional evidence relating to the amount of fees and expenses and whether or not they were reasonable and necessary. Additionally, this regulation proscribes the presentation of any evidence relating to whether the position of the Commonwealth agency giving rise to the claim for fees and expenses was or was not substantially justified.

The very purpose of the Costs Act was to deter Commonwealth agencies from initiating substantially unwarranted actions against individuals and businesses. 71 P.S. §2031. Given the record before the Board, the Department's conduct in initiating this action and then withdrawing it for no apparent reason after causing Martin to expend considerable funds in pursuit of his appeal seems just the sort of arbitrary action the Act intends to

redress. Accordingly, because we have no explanation on the record regarding the withdrawal of the order, other than an assertion that it was moot, we must now find that the Department lacked substantial justification for its action in this appeal. As for the Department's contention that an award of fees would be unjust in light of Martin's continuing obligations under the COA and his alleged violations of those obligations, as evidenced by Martin's appeals of the Department's forfeiture of Martin's bonds at Docket Nos. 85-120-G and 85-156-G, we do not believe that we can look outside the record of this appeal at Docket No. 84-028-G to reach a conclusion regarding the appropriateness of a fee award.

The second part of the compliance order appealed at Docket No. 84-028-G cited Martin for violating 25 Pa.Code §87.97(a). The Board sustained this part of Martin's appeal in its April 10, 1986, adjudication when it determined that the Department had not met its burden of proof. James E. Martin v. DER, 1986 EHB 313, at 326-329. Although mere failure to prevail does not necessarily establish that the position of the agency was not substantially justified, we believe, based on our previous Findings of Fact (Nos. 22-39) at 1986 EHB 313 that the Department's position was not substantially justified. We, therefore, conclude that Martin was the prevailing party in this portion of the appeal and that the Department's position was not substantially justified.

Having found Martin to be the prevailing party in both portions of the appeal at Docket No. 84-028-G, we must now address certain objections raised by Martin regarding the applicability of the regulations promulgated under the Costs Act.

The Department contends that Martin has failed to meet the threshold net worth requirement of \$500,000 or less in §2 of the Costs Act, 71 P.S.

§2032. The regulations promulgated under the Costs Act require an applicant to provide a statement showing his net worth, including all assets and liabilities. 4 Pa.Code §§2.6, 2.7(c). Martin did not attach this information to his application, and, instead, provided only a general statement that his net worth did not exceed \$500,000 at the time of the application.

Martin responds that the mere statement of net worth in his application is satisfactory and the Department's reference to regulatory requirements promulgated by the Office of Budget and Administration is inappropriate, since these regulations were never adopted by the Department. 4 Pa.Code §2.9(c).

This Board has held that, although agencies were given the choice in 4 Pa.Code §2.9 to adopt the procedures in the regulations set forth at 4 Pa.Code §2.1 *et seq.*, the Department's failure to adopt the regulations implementing the Costs Act does not preclude this Board from using the uniform procedures in 4 Pa.Code §2.1 *et seq.* as guidance. Hepburnia Coal Company v. DER, 1988 EHB 967, at 970.

4 Pa.Code §2.6(c) provides:

(c) Each applicant shall provide a statement showing the net worth of the applicant. The statement may be in any form convenient to the applicant that provides full disclosure of assets and liabilities and is sufficient to determine eligibility under this subchapter. The net worth statement shall be made available only to the adjudicative officer and the Commonwealth agency except when an appeal is taken, in which case the net worth statement shall be included in the record of the proceeding in which an award is sought.

(emphasis added)

Martin's mere statement of his net worth does not satisfy this requirement. Since the net worth amount is a threshold requirement to be eligible for fees under the Costs Act, the adjudicatory agency must have sufficient information

presented to it to enable it to conclude that the applicant satisfies the net worth criteria of the statute. Therefore, Martin must submit a statement providing full disclosure of all assets and liabilities before the Board can make a final determination that an award under the Costs Act is appropriate at Docket No. 84-028-G.

There are no disputes between the parties as to the fee rate. But, the Department asserts that Martin failed to submit a sufficiently specific itemized list of fees from the attorney, agent, or expert witnesses as required by §3(b)(2) of the Costs Act, 71 P.S. §2033(b)(2). Although Martin did submit a list detailing the time expended on the appeal by specific month and year, the Department generally claims that this was inadequate because the lists do not discriminate among numerous communications between the parties relating to other matters. The Department also raises the allegation that costs attributed to these appeals may reflect, in part, time spent by Martin's counsel in dealing with related bond forfeiture actions at other docket numbers. Martin responds that any greater level of detail as to fees would result in unnecessary and unreasonable expense.

Section 3(b)(2)(i) of the Costs Act, 71 P.S. §2033(b)(2)(i) requires the submission of:

An itemized list of fees from any attorney, agent, or expert witness represented or appearing on behalf of the party;

The only regulation addressing the itemizing of fees requires detailed contemporaneous records verifying the actual time spent on behalf of the prevailing party where fees are in dispute. 4 Pa.Code §2.5(b).

Martin's submission hardly constitutes "detailed contemporaneous records" of the actual time spent by Martin's counsel on his behalf. It is

nothing more than a compilation of counsel's hours by month from January, 1984, through April, 1986, and counsel's expenses, and a general statement of a consultant's fee and expenses. Although we do not doubt counsel's veracity and honesty, we do believe that a more detailed justification in the form of copies of timesheets or billings is required before an award of public monies can be made.

**ORDER**

AND NOW, this 26th day of June, 1989, it is ordered that:

1) James E. Martin's applications for attorney fees at Docket Nos. 83-121-G and 84-016-G are denied;

2) On or before August 25, 1989, James E. Martin shall submit a statement of his net worth in conformity with 4 Pa.Code §§2.6 and 2.7(c), as well as copies of counsel's timesheets and billings to Martin. Upon receipt of this information, the Department will be accorded an opportunity to respond to the information, including requesting a hearing. Failure to submit the information as ordered will result in denial of Martin's application for attorney fees.

**ENVIRONMENTAL HEARING BOARD**

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TERRANCE J. FITZPATRICK, MEMBER

DATED: July 26, 1989

cc: Bureau of Litigation  
Harrisburg, PA  
For the Commonwealth, DER:  
Zelda Curtiss, Esq.  
Western Region  
For Appellant:  
Eugene E. Dice, Esq.  
Harrisburg, PA



COMMONWEALTH OF PENNSYLVANIA  
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 SECRETARY TO THE BOARD

DALE A. TORBERT and BARBARA TORBERT :  
 v. : EHB Docket No. 86-217-M  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES :

VAUGHN TORBERT, et al. :  
 v. : EHB Docket No. 86-218-M  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: July 27, 1989

A D J U D I C A T I O N

By Robert D. Myers, Member

Synopsis

Discharges of manure from swine feeder operations in Fawn Township and Lower Chanceford Township, York County, entered into waters of the Commonwealth and polluted them. The Department of Environmental Resources (DER), charging the owners and operators with having undersized manure storage facilities and with improper land application practices, ordered them to take corrective action. The orders were challenged primarily on the basis that they resulted from unconstitutional searches by DER inspectors. The Board holds that the inspections were constitutional, that the evidence was insufficient to establish that the manure storage facilities were undersized, but that it was sufficient to prove the improper land application practices. DER's orders are held to be justified by the circumstances and a proper exercise of discretion. They are

held applicable to owners of the farms (even if they did not cause the pollution) and to the operators of the swine feeding enterprises. They are held not applicable to individuals who were not shown to have any involvement either as owners or operators.

#### PROCEDURAL HISTORY

These two appeals were never formally consolidated, but were tried together since they involved related parties and similar factual and legal considerations. The appeal docketed at 86-217-M was filed by Dale A. Torbert and Barbara Torbert (Torberts) on April 21, 1986, challenging a March 20, 1986 Order of DER pertaining to a swine feeder operation on the Torberts' farm in Fawn Township, York County (Fawn Township farm). The appeal docketed at 86-218-M was filed by Vaughn Torbert, Jack Koontz, Dale A. Torbert, Barbara Torbert, Joseph P. Deller and Norma J. Deller (Dellers) on April 21, 1986, challenging a March 20, 1986, Order of DER pertaining to a swine feeder operation on a farm owned by the Dellers in Lower Chanceford Township, York County (Lower Chanceford farm).

With the appeals, the Torberts filed Motions to Quash, alleging that they were involved in bankruptcy proceedings. They also alleged that Vaughn Torbert and Jack Koontz had no ownership interest in the operation conducted on the Lower Chanceford farm and were, therefore, improperly joined as parties. DER opposed these Motions in Responses filed on May 19, 1986. The Motions were denied by the Board in two Opinions and Orders issued on April 29, 1988.

Hearings were held in Harrisburg before Board Member Robert D. Myers on August 30 and November 1, 1988, at which Dale A. Torbert, Barbara Torbert,

Vaughn Torbert and Jack Koontz were jointly represented by legal counsel. The Dellers did not appear either in person or by legal counsel. DER was represented by legal counsel. A post-hearing brief was filed on behalf of all Appellants except the Dellers on December 12, 1988. DER's post-hearing brief was filed on January 17, 1989. The record consists of a hearing transcript of 273 pages and 22 exhibits. After a full and complete review of the record, we make the following findings.

#### FINDINGS OF FACT

1. The Torberts are individuals who own and reside on the Fawn Township farm, consisting of approximately 386 acres (Commonwealth Exhibits Nos. 24 & 25).
2. Vaughn Torbert and Jack Koontz are half-brothers and relatives of the Torberts. The degree of relationship is not clear from the record (N.T. 164, 167-168).
3. The Dellers are individuals who, between February 15, 1985, and July 29, 1988, owned the Lower Chanceford farm, consisting of approximately 46 acres (N.T. 164; Commonwealth Exhibit No. 26).
4. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Clean Streams Law (CSL), the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., the provisions of 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 pursuant to said statutes.
5. During the latter part of 1985, the Torberts conducted a swine feeder operation on the Fawn Township farm (N.T. 16-17).
6. On September 9, 1985, Brian B. Burger, a waterways conservation officer for the Pennsylvania Fish Commission, received a public complaint of a

potential pollution problem at a site in Fawn Township. Mr. Burger notified Mark A. Lavin, a water quality specialist in DER's Bureau of Water Quality Management, and the two of them went to the site that day. It turned out to be the Torberts' Fawn Township farm (N.T. 17-18, 127).

7. Mr. Lavin in a DER vehicle and Mr. Burger in a Fish Commission vehicle arrived at the Fawn Township farm on a public road and parked in a driveway near the residence. They did not see any "no trespassing" signs and did not have to pass through any gates or other bars to entry (N.T. 20-21, 128-129).

8. Shortly after the arrival of Messrs. Lavin and Burger, Barbara Torbert appeared. The men identified themselves and learned that Barbara Torbert owned and resided on the Fawn Township farm. Mr. Burger was wearing his prescribed uniform, which included a gun (N.T. 21, 95, 127-129).

9. Dale A. Torbert soon arrived. Messrs. Lavin and Burger identified themselves to him and explained that they were there to investigate a complaint about manure overflowing a lagoon. Dale A. Torbert acknowledged that he was an owner of the Fawn Township farm and consented to an inspection (N.T. 21-22, 26-27, 130).

10. No force or coercion was used to obtain Dale Torbert's consent to the inspection. Neither Dale A. Torbert nor Barbara Torbert expressed or implied any opposition to the presence of Messrs. Lavin and Burger on their property (N.T. 27, 129-131).

11. Upon receiving Dale A. Torbert's consent to an inspection, Messrs. Lavin and Burger drove their vehicles on a farm lane to a manure lagoon (N.T. 29, 131).

12. A facility for housing swine (hog house) was located about 500 feet from the residence. The manure lagoon was located about 50 feet beyond

the hog house. The manure lagoon was not visible from a public road (N.T. 29, 96, 131; Commonwealth Exhibit No. 23).

13. A manure lagoon typically is an in-ground facility with earthen banks, open to the sky, and used to store manure until it can be disposed of by some appropriate means (N.T. 101-102, 151; Commonwealth Exhibit No. 17).

14. The manure lagoon on the Fawn Township farm, as observed by Messrs. Lavin and Burger on September 9, 1985,

(a) was oval in shape, surrounded by an earthen dike and located near the top of a rather steep hill leading down to a perennial stream that is an unnamed tributary (UNT) to Muddy Creek (N.T. 29, 33);

(b) was filled with liquid manure up to six inches from the top (referred to as six inches of freeboard) (N.T. 29-30); and

(c) had a fan-shaped trail of manure, averaging 100 feet in width, extending about 600 feet from the edge of the dike down the steep slope to the bank of the UNT where it was seeping into the water (N.T. 31-34, 100-101, 131-132).

15. The fan-shaped trail of manure

(a) consisted of fresh manure near the dike, where an erosion channel was visible, and dried manure near the base of the slope (N.T. 33-34);

(b) appeared to have been pumped or sprayed across the hillside (N.T. 33-34);

(c) appeared to have killed all of the vegetation on the hillside, including trees (N.T. 32, 131; Commonwealth Exhibits Nos. 3, 4 and 16);

(d) appeared to have been there for some time and was not the result only of a recent discharge (N.T. 131);

(e) smelled like hog manure (N.T. 36); and

(f) turned the UNT gray and turbid (N.T. 36, 132).

16. Water samples taken of the UNT by Mr. Lavin on September 9, 1985, revealed the following:

<u>Sampling Point</u>	<u>Sample Number</u>	<u>pH</u>	<u>B.O.D. 5 day</u> mg/l	<u>Susp. Solids</u> mg/l	<u>NH<sub>3</sub>-N</u> mg/l	<u>phosphate</u> mg/l	<u>fecal coliform</u> per 100 ml
50' upstream	0302230	6.8	1.0	32.0	0.05	0.07	1,100
disch. point	0302231	7.9	1,055.0	1,410.0	188.0	46.9	90,000
15' downstream	0302232	7.7	310.0	252.0	49.5	10.8	8,000

(N.T. 36-37, 132-133; Commonwealth Exhibits Nos. 4 and 5).

17. After taking the water samples on September 9, 1985, Mr. Lavin filled out a Waste Discharge Inspection Report noting two violations - (1) less than 2' of freeboard in the manure lagoon, and (2) an unauthorized polluttional manure discharge. Mr. Lavin and Mr. Burger discussed their findings with Dale A. Torbert and he signed the Inspection Report (N.T. 37-41, 133; Commonwealth Exhibit No. 4).

18. On September 18, 1985, Mr. Lavin telephoned Barbara Torbert and requested that hay bales be placed between the manure lagoon and the UNT as a temporary measure to stop the flow of manure into the UNT. She agreed to the request (N.T. 46-47).

19. Messrs. Lavin and Burger (in uniform) made a follow-up inspection at the Fawn Township farm on September 25, 1985 (N.T. 46, 133).

20. Upon arriving at the farm, Messrs. Lavin and Burger found Barbara Torbert, informed her of the purpose of their visit and requested her consent. She consented (N.T. 47).

21. Upon receiving Barbara Torbert's consent, Messrs. Lavin and Burger proceeded in their vehicles to the manure lagoon (N.T. 47).

22. Conditions observed by Messrs. Lavin and Burger on September 25, 1985, were the following:

(a) the manure lagoon had only three inches of freeboard (N.T. 48; Commonwealth Exhibits Nos. 3 and 16);

(b) the fan-shaped trail of manure was basically unchanged and still extended from the edge of the dike down the steep slope to the bank of the UNT (N.T. 49, 134; Commonwealth Exhibit No. 10);

(c) some of the manure nearest the dike was fresh, appearing to have recently overflowed the lagoon (N.T. 49);

(d) manure was still discharging into the UNT and causing turbidity, but the rate of flow was reduced from that on September 9, 1985 (N.T. 49-50, 134); and

(e) no hay bales had been put in place as requested (N.T. 53).

23. Water samples of the UNT were taken by Mr. Lavin on September 25, 1985, at the same discharge point and downstream point where samples were taken on September 9, 1985. In order to get a representative upstream water sample, Mr. Lavin went 100 feet above the discharge point (N.T. 50-51; Commonwealth Exhibit No. 5).

24. Water samples taken by Mr. Lavin on September 25, 1985, revealed the following:

<u>Sampling Point</u>	<u>Sample Number</u>	<u>pH</u>	<u>B.O.D. 5 day</u> mg/l	<u>Susp. Solids</u> mg/l	<u>NH<sub>3</sub>-N</u> mg/l	<u>phosphate</u> mg/l	<u>fecal coliform</u> per 100 ml
100' upstream	0302267	6.8	1.0	4.0	0.03	0.05	200
disch. point	0302266	7.7	645.0	2,630.0	8.67	32.1	1,000
15' downstream	0302265	7.2	3.0	8.0	1.98	0.62	200

(Commonwealth Exhibits Nos. 5 and 6).

25. After taking the water samples on September 25, 1985, Mr. Lavin filled out a Waste Discharge Inspection Report, noting the same two violations as on September 9, 1985, discussed the findings with Barbara Torbert and

secured her signature on the Inspection Report (N.T. 50-53; Commonwealth Exhibit No. 6).

26. In response to an odor complaint, Mr. Lavin went to the Lower Chanceford farm on October 1, 1985. He found Dale A. Torbert and Barbara Torbert at a hog house on the farm, learned that they were involved in the operation and learned that the manure was stored in a pit under the hog house. Mr. Lavin found no signs of manure runoff and left. No one ordered him off the farm (N.T. 68-70).

27. At a conference in Harrisburg on November 1, 1985, Dale A. Torbert and Barbara Torbert told Mr. Lavin and others that (1) they did not know who owned the Lower Chanceford farm, and that (2) their only connection with it was helping their sons with a swine feeder operation (N.T. 73-76, 163-164).

28. In response to a report of a possible water quality problem involving the East Branch of Tom's Run in Lower Chanceford Township, Mr. Burger:

(a) went to the intersection of Reed Road with the East Branch of Tom's Run at midafternoon on November 5, 1985 (N.T. 126-127, 134-135);

(b) walked upstream to a point where an extremely turbid discharge entered the East Branch of Tom's Creek from a small tributary (N.T. 135);

(c) followed the tributary upstream to a point near its source where a large quantity of liquid manure was flowing out of a cornfield into the tributary (N.T. 136); and

(d) suspended his search because of darkness and reported his observations to Mr. Lavin (N.T. 136).

29. In response to Mr. Burger's report on November 5, 1985, Mr. Lavin:

(a) went to the point where Reed Road crosses the East Branch of Tom's Creek on November 6, 1985 (N.T. 58-61);

(b) walked upstream about 1,600 feet to the point where the manure was entering the East Branch of Tom's Run from a small tributary or swale (N.T. 62; Commonwealth Exhibit No. 22);

(c) After stopping to take water samples of the East Branch of Tom's Run, proceeded up the small tributary about 1,200 feet to a point where the manure was flowing into the tributary from a cornfield (N.T. 63; Commonwealth Exhibit No. 22);

(d) followed the trail of manure through the cornfield about 800 feet to a point where it appeared that the manure had been dumped (N.T. 62; Commonwealth Exhibits Nos. 9, and 22);

(e) observed a nearby hog house and recognized it as the one located on the Lower Chanceford farm (N.T. 64; Commonwealth Exhibit No. 9);

(f) looked for the Torberts but did not find any of them (N.T. 65);

(g) did not see any "no trespassing" signs (N.T. 65);

(h) found only one fence on the entire route - a barbed wire fence serving an adjacent property (N.T. 65); and

(i) filled out a Waste Discharge Inspection Report, noting an unauthorized pollutorial discharge of manure to waters of the Commonwealth. For some unexplained reason, a copy of this report was not mailed to any of the Torberts (N.T. 71-72).

30. Water samples taken by Mr. Lavin on November 6, 1985, revealed the following:

<u>Sampling Point</u>	<u>Sample Number</u>	<u>pH</u>	<u>B.O.D. 5 day</u> mg/l	<u>Susp. Solids</u> mg/l	<u>NH<sub>3</sub>-N</u> mg/l	<u>phosphate</u> mg/l	<u>fecal coliform</u> per 100 ml
10' upstream	0302315	6.3	0.4	3.0	0.02	0.02	300
10' downstream	0302314	6.5	7.0	2.0	3.15	0.39	1,500

(Commonwealth Exhibits Nos. 10 and 11).

31. On November 21, 1985, Mr. Lavin and Lee A. Yohn, a water quality compliance specialist for DER, visited the Fawn Township farm. They were unable to find anyone there; but, since the Torberts previously had given permission to inspect that farm, Messrs. Lavin and Yohn proceeded to do so (N.T. 77-78, 151, 155-156).

32. While at the Fawn Township farm on November 21, 1985, Messrs. Lavin and Yohn:

(a) observed straw bales staked out along the steep slope on the downstream side of the manure lagoon (N.T. 78);

(b) observed that the manure lagoon had about 12 inches of freeboard (N.T. 78, 156; Commonwealth Exhibit No. 12);

(c) found four sites where large quantities of manure had been dumped on the ground and allowed to flow through cornfields towards tributaries of Muddy Creek (N.T. 80-88, 158-161; Commonwealth Exhibits Nos. 12, 13 and 23);

(d) followed the manure trails from two of these sites and found that one of them had reached and entered a tributary to Muddy Creek (N.T. 83, 85-87, 158-161; Commonwealth Exhibit No. 12);

(e) again attempted unsuccessfully to find one of the Torberts (N.T. 88, 161); and

(f) did not see any "no trespassing" signs and did not have to go through any gates or fences (N.T. 157).

33. Mr. Lavin filled out a Waste Discharge Inspection Report for his inspection of the Fawn Township farm on November 21, 1985, noting two

violations - (1) an unauthorized discharge of manure to waters of the Commonwealth, and (2) insufficient freeboard in the manure lagoon. For some unexplained reason, a copy of this report was not mailed to any of the Torberts (N.T. 88-89; Commonwealth Exhibit No. 12).

34. After completing their inspection of the Fawn Township farm on November 21, 1985, Messrs. Lavin and Yohn went to the Lower Chanceford farm (N.T. 89, 161).

35. At the Lower Chanceford farm on November 21, 1985, Messrs. Lavin and Yohn:

(a) drove up the lane to the hog house where they inspected the manure pits and found them to be filled to the brim (N.T. 89-90, 161-162);

(b) saw no evidence of recent manure discharge (N.T. 91);

(c) found Dale A. Torbert at the hog house and warned him of the danger posed by the brimfull manure pits (N.T. 90, 162-163); and

(d) were not ordered off the premises by Dale A. Torbert (N.T. 91, 163).

36. Mr. Lavin filled out a Waste Discharge Inspection Report for his inspection of the Lower Chanceford farm on November 21, 1985, noting no violations but commenting on the filled manure pits under the hog house (Commonwealth Exhibit No. 12).

37. By an undated Lease Agreement, the Dellers leased the Lower Chanceford farm to "Torbert Farms" and its assigns for the period March 1, 1985, to March 1, 1986, with an option to renew for 5 additional one-year periods. Dale A. Torbert and Barbara Torbert executed the Lease Agreement as lessee without any indication that they were signing in a representative capacity (Commonwealth Exhibit No. 19).

38. Proper manure management seeks to return to the soil the optimum quantity of nutrients without polluting the surface or underground waters (N.T. 150; Commonwealth Exhibit No. 17, p. 3). Proper manure management practices for a particular farm are determined by a consideration of a number of variables, including the following:

(a) the number and species of animals (N.T. 235);

(b) the nature of the operation - the length of time the animals will be housed on the farm and the optimum animal weight at the end of the feeding cycle (N.T. 235-236);

(c) the number of acres available for land application of manure (N.T. 236);

(d) the type of crops grown on the farm (N.T. 236, 255-257);

(e) the amount of manure storage required in order to compensate for the unavailability of land application sites because of standing crops or adverse weather conditions (N.T. 236-239, 253-254); and

(f) the economic feasibility of the various disposal methods (N.T. 250).

39. In October 1984, Dale A. Torbert and Barbara Torbert requested the assistance of the York County Conservation District and the U.S. Department of Agriculture's Soil Conservation Service (SCS) in developing a conservation plan (including manure management practices) for the Fawn Township farm (N.T. 219-220, 242-243; Commonwealth Exhibit No. 24).

40. Riggs Harwell, the district conservationist for the SCS who worked on the plan for the Fawn Township farm, and the Torberts themselves believed that the existing manure lagoon on that farm was not of adequate size (N.T. 244-245).

41. A manure storage facility with a minimum capacity equal to 180 days was recommended by the SCS in 1985 but the Torberts believed that such a facility was too costly (N.T. 243-244; Commonwealth Exhibit No. 24).

42. None of the Appellants has a permit from DER or other DER approval for the manure storage facilities or the land application practices employed at the Fawn Township and Lower Chanceford farms (N.T. 111-112, 181-182).

### DISCUSSION

DER's Order of March 20, 1986, charged the Torberts with several violations at the Fawn Township farm - (1) discharges of manure into the waters of the Commonwealth on September 9 and 25, 1985, as a result of an overflowing lagoon, (2) possessing a manure lagoon of inadequate capacity and operating it in disregard of approved manure management practices, without a permit to do so, and (3) the land application of manure on November 21, 1985, in a manner contrary to approved manure management practices, without a permit to do so.

The Order issued on the same date with respect to the Lower Chanceford farm charged the Torberts, the Dellers, Vaughn Torbert and Jack Koontz with similar violations - (1) discharge of manure into the waters of the Commonwealth on November 6, 1985, (2) possessing manure pits of inadequate capacity and operating them in disregard of approved manure management practices, without a permit to do so, and (3) the land application of manure on November 21, 1985, in a manner contrary to approved manure management practices, without a permit to do so.

Both Orders required prompt action to develop and implement plans for disposing of the manure already in storage, for upgrading the storage

facilities to provide adequate capacity, and for managing manure in a comprehensive way. DER has the burden of proving by a preponderance of the evidence that the violations occurred and that the action mandated by the Orders is an appropriate response. 25 Pa. Code §21.101(b)(3); Western Pennsylvania Water Company v. DER, 1988 EHB 715. DER maintains that it has carried the burden and the appeals should be dismissed. The Appellants<sup>1</sup> presented no evidence on the merits of their appeals, relying instead on their argument that the investigations conducted by DER violated the Fourth Amendment to the U.S. Constitution, which guarantees freedom from unreasonable searches and seizures. In support of this argument, they presented certified copies of the record of the Court of Common Pleas of York County in the case of Commonwealth v. Dale A. Torbert, No. 555 Criminal Action 1986.

That case involved a criminal complaint brought against Dale A. Torbert by the Pennsylvania Fish Commission for polluting waters of the Commonwealth in violation of Section 2504(a)(2) of the Fish and Boat Code, Act of October 16, 1980, P.L. 996, as amended, 30 Pa. C.S.A. §2504(a)(2), when he allowed swine manure to enter the UNT on the Fawn Township farm on September 9, 1985 (Appellants' Exhibit No. 1). Dale A. Torbert's pre-trial motion in that case, seeking to suppress the evidence gained by Messrs. Lavin and Burger during their inspection of the Fawn Township farm on September 9, 1985, was denied by Judge Erb on the authority of the "open fields" doctrine announced by the U.S. Supreme Court in Hester v. United States, 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1924), and recently affirmed in Oliver v. United States, 466 U.S. 170, 104 S. Ct. 1735, 80 L.Ed. 2d 214 (1984).

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<sup>1</sup> The term, as used here, does not include the Dellers who did not appear at the hearings or offer any legal arguments.

After Mr. Torbert was convicted of the offense in a jury trial, Judge Buckingham granted a motion in arrest of judgment on the ground that the "open fields" doctrine does not apply to a business or commercial property according to the Pennsylvania Supreme Court decision in Commonwealth v. Lutz, 512 Pa. 192, 516 A.2d 339 (1986).

Appellants argue that Judge Buckingham's decision is binding upon this Board with respect to the inspections at the Fawn Township farm under the collateral estoppel theory discussed by Commonwealth Court in Fiore v. Commonwealth, Department of Environmental Resources, 96 Pa. Cmwlth. 477, 508 A.2d 371 (1986). DER points out, however, that the Buckingham decision was based solely on the holding in the Lutz case, a holding that had been vacated by the U.S. Supreme Court on March 23, 1987 (107 S. Ct. 1560), and had been remanded to the Pennsylvania Supreme Court for further consideration in light of United States v. Dunn, 480 U.S. \_\_\_\_\_, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987). The Pennsylvania Supreme Court, in turn, had remanded the case to Westmoreland County on March 21, 1988 (538 A.2d 872), and a final decision has not yet been issued.

A decision based upon an interpretation of law that subsequently is vacated has no preclusive effect on a later proceeding. Accordingly, we are not bound by Judge Buckingham's application of the "open fields" doctrine. Even if the Lutz case had not been vacated, we would be loathe to apply it here. Fourth Amendment protection against unreasonable searches and seizures exists to deter police officials from engaging in improper conduct to obtain criminal convictions; it has little viability in proceedings that are administrative in nature: Menosky v. Commonwealth, \_\_\_\_ Pa. Cmwlth. \_\_\_\_, 550 A.2d 1372 (1988). The proceedings before the Board are strictly administrative and not criminal. Thus, the Fourth Amendment decisions of the

York County Court in Dale A. Torbert's criminal case are not binding upon us. See also Commonwealth, Dept. of Transportation v. Crawford, \_\_\_ Pa. Cmwlth. \_\_\_\_, 550 A.2d 1053 (1988), where it was held that the results of a criminal trial do not collaterally estop an administrative agency in an administrative proceeding.

The evidence presented at the hearings establishes clearly that the Torberts consented to the inspections of the Fawn Township farm on September 9 and 25, and November 21, 1985.<sup>2</sup> Viewing the totality of the circumstances, including the fact that Mr. Burger was in uniform, we are convinced that the consent was given voluntarily: Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d. 854 (1973); Mascaro v. DER, 1987 EHB 718. The two inspections of the Lower Chanceford farm - on November 6 and 21, 1985 - present different circumstances. There is no evidence that any of the Appellants specifically consented to either of those inspections.

The first, on November 6, 1985, occurred because of the fact that pollution had been detected in Tom's Run, outside the boundaries of the Lower Chanceford farm. Mr. Lavin, following the trail of pollution up Tom's Run and then up a small tributary or swale, came to the point on the Lower Chanceford farm where manure was flowing out of a cornfield into the tributary. He did not know that he was on the Lower Chanceford farm until he walked through the cornfield to the hog house. He testified that he did not see any "no trespassing" signs at any point on the route and passed only one fence - used to restrain cows on an adjacent farm. This inspection, authorized by Section

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<sup>2</sup> The York County Court did not reach the issue of consent in Dale A. Torbert's criminal case because the parties stipulated that the search was conducted "without consent of the defendants." No such stipulation has been made in the proceeding before us, and the testimony of Messrs. Lavin and Burger has not been challenged by Appellants.

5(b)(8) of the C.S.L. (35 P.S. §691.5), is a classic example of the "open fields" doctrine under the Hester and Oliver cases, supra. Mr. Lavin never entered any structures or looked within them. He confined his activities to open fields, clearly beyond the curtilage as defined most recently in the Dunn case, supra. Such an inspection would easily pass muster even in a criminal proceeding.

The second inspection, on November 21, 1985, was completed before the DER officials located Dale A. Torbert. They spoke to him briefly and then left, without being ordered off the farm. We are hesitant to treat this as implied consent, because Mr. Torbert was preoccupied with loading hogs onto a truck during all the time the inspectors were there. Nonetheless, the inspection was authorized by the CSL and was legal under the restrictive definition of the curtilage sanctioned in the Dunn case, supra.

The inspections having been conducted in accordance with law, it is entirely appropriate for the Board to consider the facts revealed by the inspections. Those facts establish the discharge of manure into the waters of the Commonwealth and the pollution of those waters on September 9 and 25, 1985, at the Fawn Township farm and on November 6, 1985, at the Lower Chanceford farm. "Sewage", defined in the CSL (35 P.S. §691.1) to include animal manure, may not be discharged into the waters of the Commonwealth except (1) in accordance with DER's rules and regulations or (2) in accordance with a permit (35 P.S. §691.3, §691.201 and §691.202). The regulations at 25 Pa. Code §101.8 exempt from permit requirements the storage of manure and the land application of manure if done in accordance with DER's approved practices contained in a publication entitled "Manure Management for Environmental Protection" (Manure Manual).

This publication (Commonwealth Exhibit No. 17), while not a regulation itself, determines whether an animal-feeding operation is entitled to exemption from the permit requirements. DER claims that the manure lagoon at the Fawn Township farm did not comply with the approved practices in the Manure Manual, in that the facility was not adequate to prevent runoff and polluttional incidents as evidenced by the condition of the steep slope on the downstream side of the lagoon.

There is no evidence to show the capacity of the lagoon, the size and nature of the swine feeding operation or the acreage available for the land application of manure.<sup>3</sup> In short, DER did not prove that the lagoon is undersized for the magnitude of the operation.<sup>4</sup> We are asked to assume that such is the case simply because the lagoon either overflowed or had to be pumped down. We cannot make such an assumption, however. It is conceivable that a lagoon, designed and built to provide the recommended 200 days of storage, could fill to the brim near the end of the storage period because of unusual rainfall that adds to the storage volume and, at the same time, prevents the farmer from spreading the manure on his fields.

What the evidence shows is a lagoon that, apparently for some period of time, has been relieved by the periodic discharge of manure onto the

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<sup>3</sup> There is hypothetical evidence derived from studies made by the SCS and inquiries made to the SCS by the Torberts. There is also evidence that the Torberts thought the facilities were inadequate. There is no evidence, however, of the precise details of the operation at the time of the violations.

<sup>4</sup> Even the amount of freeboard required is uncertain. While it would appear that 25 Pa. Code §101.4(a), which contains a 2 feet freeboard requirement, would apply to manure impoundments, 25 Pa. Code §101.8(a) exempts farmers following the practices of the Manure Manual from the permitting requirements of 25 Pa. Code §101.4. The Manure Manual states on page 26 that freeboard requirements need to be determined on a case-by-case basis and provides a formula for the calculation. We need not reach the question of which freeboard requirement applies, since DER did not prove that the lagoon was undersized under either criterion.

downstream slope in concentrations sufficient to carry it to the UNT. Whether this has occurred because of inadequate capacity or because of deliberate or negligent acts of the Torberts has not been shown. Even though this evidence is not sufficient to charge the Torberts with operating an undersized lagoon, it is more than adequate to show their disregard of the land application provisions of the Manure Manual. The provisions are found in Technical Supplement 9, pages 44 to 52 of the Manual. Throughout those pages, the farmer is cautioned against using land application practices that result in pollution of surface or underground waters. On page 48, under the heading "Surface Spreading," is the following statement:

Manure should be spread uniformly and not dumped in piles. Uniform spreading provides more efficient use of the nutrients in any given quantity of manure and decreases the potential for pollution due to drainage or runoff.

The manner in which manure was spread on the downstream slope of the lagoon clearly violated this principle. That is true also of the piles of manure dumped on other areas of the Fawn Township farm and observed by Messrs. Lavin and Yohn on November 21, 1985.

DER's allegations with respect to the Lower Chanceford farm are similar to those made with respect to the Fawn Township farm. DER claims that the storage pits under the hog house did not provide adequate capacity in accordance with the Manure Manual. This is apparent, according to DER, because of the fact that the pits were nearly full on November 6 and 21, 1985, when DER officials observed areas where manure had been dumped in concentrated quantities at the edge of cornfields. We have the same difficulty with this argument here that we did when attempting to apply it to the lagoon on the Fawn Township farm. The fact that the pits were nearly full does not necessarily mean that they were undersized. Additional evidence is needed to

prove that point - evidence of the size of the pits, the nature of the operation and the acreage available.

The evidence shows, however, that the manner in which manure was dumped at the edge of a field of standing corn in such concentrations that it flowed some 2,000 feet into Tom's Run on November 6, 1985, violated the land application methods approved in the Manure Manual. The evidence with respect to November 21, 1985, is contradictory. While Mr. Yohn testified briefly that he and Mr. Lavin observed an area where manure had been dumped in concentrated quantities (N.T. 162), Mr. Lavin made no mention of it. Mr. Lavin's Waste Discharge Inspection Report (Commonwealth Exhibit No. 12), in fact, states that "evidence of manure discharges in the recent past was not present." The preponderance of the evidence convinces us that Mr. Yohn was mistaken in this portion of his recollection.<sup>5</sup>

DER has carried its burden of proving that the operators of the swine feeding enterprises on both the Fawn Township farm and the Lower Chanceford farm disregarded approved land application practices and, as a result, forfeited their exemption from permit requirements under 25 Pa. Code §101.8(b). DER also proved that the land application of animal manures at these two farms brought about polluttional discharges into waters of the Commonwealth. Since these discharges were not authorized by permit or by regulations, they violated Sections 3, 201 and 202 of the CSL (35 P.S. §691.3, §691.201 and §691.202). DER clearly was justified in issuing enforcement orders under section 610 of the CSL (35 P.S. §691.610). The orders required the operators to do the following:

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<sup>5</sup> Since we have found no basis for the violations charged with respect to the Lower Chanceford farm on November 21, 1985, our determination that the inspection was constitutional is now moot.

1. Submit to DER an interim plan for disposal of the manure from the storage facilities on both farms.

2. Submit to DER a plan and schedule for upgrading the manure storage facilities on both farms to provide sufficient capacity.

3. Submit to DER a comprehensive conservation and manure management plan and schedule for both farms.

4. Make such revisions to the plans and schedules as DER determines is necessary.

5. Timely implement the plans and schedules.

It is difficult to comprehend how the provisions of these Orders could be considered an abuse of discretion in light of the violations found by DER. No requirement to suspend operations was imposed. No affirmative action was demanded to minimize or correct the pollution already caused. Appellants were merely directed to relieve the supercharged condition of the storage facilities in an appropriate manner, to submit a plan for increasing the capacity of those facilities, and to submit a comprehensive plan for proper management of manure. These mandates were fully justified under the circumstances, and were clearly within the discretion of DER.

Since we have held that DER did not prove that the storage facilities were undersized, it could be argued that it was an abuse of DER's discretion to require that they be pumped down and to require a plan for enlarging them. Even though proof was lacking to charge Appellants with that violation, the totality of the conditions found on the two farms creates a serious doubt that the storage facilities are adequate. DER, therefore, was acting within the bounds of its discretion in requiring that they be relieved and that plans be submitted to upgrade them. If Appellants are able to convince DER that the existing facilities are of adequate size for their operations, applying the

principles of the Manure Manual, the requirements of paragraph 2 of the Orders will be deemed satisfied.

Dale A. Torbert and Barbara Torbert, who own the Fawn Township farm and conduct the swine feeding operation there, are the proper parties to comply with DER's Order with respect to that farm. The fact that DER cannot prove who actually dumped the manure is immaterial. The Torberts are responsible for their own land and operations: Section 316 of the CSL, 35 P.S. §691.316.

Joseph P. Deller and Norma J. Deller, the owners of the Lower Chanceford farm, can legally be required to comply with DER's Order under Section 316 of the CSL, 35 P.S. §691.316, even though they did not cause the pollution: 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); Bonzer v. Commonwealth, Dept. of Environmental Resources, 69 Pa. Cmwlth. 633, . 452 A.2d 280 (1982); Western Pennsylvania Water Company v. DER, 1988 EHB 715, affirmed by Commonwealth Court on June 21, 1989, at No. 2285 C.D. 1988. The Lower Chanceford farm is leased to "Torbert Farms" and the lessee conducts the swine feeding operation there. No evidence was presented to show whether "Torbert Farms" is a corporation, partnership or simply a fictitious name for Dale A. Torbert and Barbara Torbert. These two persons signed the lease as lessees (without indicating any representative capacity) and the evidence clearly places Dale A. Torbert in the midst of the operation on this farm. In our judgment, this is a sufficient connection to hold both of them responsible to comply with DER's Order.

Vaughn Torbert and Jack Koontz, relatives of Dale and Barbara Torbert, may also be involved in the operations at one or both farms.

However, DER, which bears the burden of proof in this matter, presented no evidence with respect to either of them, and we cannot hold them liable under either Order.

#### CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of the appeals.
2. DER has the burden of proving by a preponderance of the evidence that the violations occurred and that the actions mandated by the Orders are appropriate.
3. A decision of the Court of Common Pleas has no preclusive effect upon the Board when it is based solely upon an appellate court decision that is subsequently vacated.
4. A prior decision in a criminal case that an inspection violated the Fourth Amendment to the U.S. Constitution is not binding upon an administrative agency in a subsequent administrative proceeding.
5. Dale A. Torbert and Barbara Torbert voluntarily consented to DER's inspections of the Fawn Township farm on September 9, September 25, and November 21, 1985.
6. DER'S inspection of the Lower Chanceford farm on November 6, 1985, was constitutional under the "open fields" doctrine.
7. DER's inspection of the Lower Chanceford farm on November 21, 1985, was constitutional under the restrictive definition of the curtilage announced in United States v. Dunn, 480 U.S. \_\_\_\_\_, 107 S. Ct. 1134, 94 L. Ed. 2d. 326 (1987).
8. It is a violation of the CSL to discharge animal manure into the waters of the Commonwealth except in accordance with a permit or in accordance with DER's rules and regulations.

9. DER's rules and regulations exempt from the permit requirements the storage of manure and the land application of manure if done in accordance with approved practices set forth in the Manure Manual.

10. There is insufficient evidence to conclude that the manure storage facilities at the Fawn Township and Lower Chanceford farms were not of adequate capacity.

11. There is sufficient evidence to conclude that the land application of manure at the Fawn Township and Lower Chanceford farms did not conform with approved practices set forth in the Manure Manual.

12. Because of the manner in which manure was applied to the land on the Fawn Township and Lower Chanceford farms, the operators of the farms forfeited their exemption from permit requirements under 25 Pa. Code §101.8(b).

13. The land application of manure at the Fawn Township and Lower Chanceford farms caused pollutional discharges to the waters of the Commonwealth.

14. Since these discharges were not authorized by permit or regulation, they violated Sections 3, 201 and 202 of the CSL (35 P.S. §691.3, §691.201 and §691.202).

15. The mandates of DER's Orders of March 20, 1985, were justified by the circumstances and were a proper exercise of DER's discretion under Section 610 of the CSL (35 P.S. §691.610).

16. Even though there was insufficient proof that the manure storage facilities were of inadequate capacity, DER was justified, by the totality of the circumstances, to order that the facilities be pumped down and that plans be submitted to upgrade them.

17. Dale A. Torbert and Barbara Torbert, as owners and operators of the Fawn Township farm, are responsible parties to comply with DER's Order with respect to that farm.

18. Joseph P. Deller and Norma J. Deller, as owners of the Lower Chanceford farm, are responsible parties to comply with DER's Order with respect to that farm, even though they did not cause the pollution.

19. Dale A. Torbert and Barbara Torbert, as signatories to the lease for the Lower Chanceford farm, are responsible parties as lessees and operators to comply with DER's Order with respect to that farm.

20. Vaughn Torbert and Jack Koontz are not responsible parties to comply with DER's Orders with respect to either farm.

ORDER

AND NOW, this 27<sup>th</sup> day of July, 1989, it is ordered as follows:

1. The appeal of Dale A. Torbert and Barbara Torbert, filed on April 21, 1986, at docket number 86-217-M, is dismissed.
2. The appeal of Dale A. Torbert, Barbara Torbert, Joseph P. Deller and Norma J. Deller, filed on April 21, 1986, at docket number 86-218-M is dismissed.
3. The appeal of Vaughn Torbert and Jack Koontz, filed on April 21, 1986, at docket number 86-218-M, is sustained.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*  
MAXINE WOELFLING, CHAIRMAN

*Robert D. Myers*  
ROBERT D. MYERS, MEMBER

*Terrance J. Fitzpatrick*  
TERRANCE J. FITZPATRICK, MEMBER

DATED: July 27, 1989

cc: Bureau of Litigation  
Harrisburg, PA  
For the Commonwealth, DER:  
Amy Putnam, Esq.  
Central Region  
Appellant:  
John W. Thompson, Jr., Esq.  
York, PA

sb



tion of a dam across Mill Creek in Pine Grove and Tremont Townships, Schuylkill County. Lebanon is the owner of an existing dam and reservoir, known as the High Bridge Dam, which will be replaced by the dam authorized by this permit. Schuylkill claimed that the Department's issuance of the permit was an abuse of discretion because it failed to consider the impact of the project on riparian and property rights, particularly on the development of coal reserves, as required by 25 Pa.Code §105.14(b)(3) and because it failed to consider the effect of the construction of the dam on access to nearby State Game Lands, as required by 25 Pa.Code §105.14(b)(5). It also alleged that the Department, in violation of 25 Pa.Code §105.14(b)(8), failed to consider the reasonably foreseeable development of coal-bearing lands within the watershed, that the environmental evaluation required by 25 Pa.Code §105.15 was deficient in that it failed to address the historic significance of stone bridge abutments from the original dam, and that the Department violated its duties under Article I, §27 of the Pennsylvania Constitution by not conducting a thorough evaluation of the project under 25 Pa.Code §§105.14, 105.15, and 105.16. Schuylkill also questioned the necessity for construction of a new dam and alleged certain procedural defects in the permit application process.

On June 5, 1989, Lebanon filed a motion to dismiss, a motion for summary judgment, and a motion for expedited proceedings. The Board, by order dated June 27, 1989, granted the motion for expedited proceedings and scheduled hearings on the merits for July 31-August 4, 1989. Lebanon's motion to dismiss is addressed in this opinion; the motion for summary judgment will be addressed in a separate opinion.

Lebanon first requests the Board to dismiss Schuylkill's appeal for lack of standing because Schuylkill has failed to allege any direct, substan-

tial, and immediate interest in the Department's action. Lebanon also contends that Schuylkill's argument regarding impact of the dam on coal reserves in the watershed constitutes little more than an impermissible collateral attack on the Department's denial of surface mining permit applications in the watershed and that consideration of any impact of the dam on historic resources is outside the scope of the Department's authority under the DSEA and, therefore, outside of the purview of the Board.

By letter filed June 27, 1989, the Department advised the Board that it did not oppose Lebanon's motion to dismiss.

Schuylkill responded to the motion to dismiss on June 26, 1989. In support of its allegation that it had standing to appeal the permit's issuance, Schuylkill cited the County Code, in general, and specifically referred to its duty to value property for taxation purposes and its holding, in trust, of 2200 acres within the High Bridge Reservoir watershed upon which there is a \$3.6 million tax delinquency. Schuylkill also argued that 72 P.S. §510-5, which we presume Schuylkill meant to be §1905-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-5, gave municipalities standing to contest the Department's actions. Denying that its appeal was an impermissible collateral attack on the Department's denial of surface mining permit applications in the watershed, Schuylkill argues that the Department is required by its own regulations adopted pursuant to the DSEA to consider the impact of a project on property and riparian rights, as well as on development in the watershed. Schuylkill similarly contended that the Department's regulations empowered it to consider the impact of the High Bridge Reservoir project on historic resources.

This Board has consistently applied the test for standing enunciated in Wm. Penn Parking Garage v. City of Pittsburgh, 464 Pa.168, 346 A.2d 269

(1975), namely that one must have a direct, immediate and substantial interest in the matter being challenged. Clearfield Municipal Authority v. DER and E. M. Brown, Inc., EHB Docket No. 83-137-W (Opinion issued June 1, 1989). However, our Supreme Court has elaborated on the law of standing as it relates to government agencies in Game Comm. v. Dept. of Env. Resources, \_\_\_ Pa. \_\_\_, 555 A.2d 812 (1989), wherein it reversed the Commonwealth Court's determination that the Game Commission lacked standing to raise considerations under the DSEA as grounds for challenging the Department's issuance of a permit for a solid waste disposal site near wetlands owned and managed by the Game Commission. The Supreme Court stated

Although our law of standing is generally articulated in terms of whether a would-be litigant has a "substantial interest" in the controverted matter, and whether he has been "aggrieved" or "adversely affected" by the action in question, we must remain mindful that the purpose of the "standing" requirement is to insure that a legal challenge is by a proper party, *Application of Biester, supra*. The terms "substantial interest", "aggrieved" and "adversely affected" are the general, usual guides in that regard, but they are not the only ones. For example, when the legislature statutorily invests an agency with certain functions, duties and responsibilities, the agency has a legislatively conferred interest in such matters. From this it must follow that, unless the legislature has provided otherwise, such an agency has an implicit power to be a litigant in matters touching upon its concerns. In such circumstances the legislature has implicitly ordained that such an agency is a proper party litigant, *i.e.*, that it has "standing." An instructive illustration of this point is the case of *Chapman v. Federal Power Commission*, 345 U.S. 153, 73 S.Ct. 609, 97 L.Ed. 918 (1953), in which the United States Supreme Court held that the Secretary of Interior had standing to challenge an order of the Federal Power Commission licensing a new hydroelectric generating station. The Court's decision was based on the fact that the action of the Power Commission impacted upon the Department of Interior's statutorily mandated role as the

marketer of excess hydroelectric power and its general statutory duties relating to the conservation of the nation's water resources. We find *Chapman* to be a sound principle for resolving certain questions of standing that may arise in our jurisdiction.

555 A.2d at 815-816 (emphasis added)

It continued on to cite the duties and powers of the Game Commission, concluding that because §2161(c) of the Game and Wildlife Code, 34 Pa.C.S. §2161(c), gave the Game Commission concurrent authority to enforce the DSEA where a violation of the statute would adversely impact upon the Commission's property, the Game Commission did indeed have standing to challenge the Department's issuance of the solid waste permit.

We believe that a similar result must be reached in this case, based upon our reading of the Real Estate Tax Sale Law, the Act of July 7, 1947, P.L. 1368, as amended, 72 P.S. §5860.101 *et seq.* (the Real Estate Tax Sale Law), and the regulations adopted under the DSEA. Schuylkill stated in Paragraph 3A of its notice of appeal that:

Specifically, the Department of Environmental Resources failed to consider that the County of Schuylkill by the Schuylkill County Tax Claim Bureau holds in trust for the various taxing districts approximately 2200 acres of coal-bearing land within the watershed of the High Bridge Reservoir which has a tax delinquency of approximately \$3.6 million. The County of Schuylkill has in the past, does now and will in the future actively promote the development of these coal reserves. The County's lessees on County land have been denied mining permits because the coal land is within the watershed of the High Bridge Reservoir...

And, in its brief in opposition to Lebanon's motion to dismiss, Schuylkill declares that:

Further, Schuylkill County is charged with the responsibility of collecting delinquent real estate taxes pursuant to the Real Estate Tax Law,

72 P.S. 5860.101 *et seq.* By order of the Court of Common Pleas of Schuylkill County dated January 15, 1985, the Schuylkill County Tax Claim Bureau, an office within the Office of the County Commissioners, was appointed sequestrator of certain tax delinquent properties among which are the properties comprising the 2,200 acres of coal-bearing land in Tremont Township within the watershed of the High Bridge Reservoir. Schuylkill County has alleged in its notice of appeal, Paragraph 3a, that Schuylkill County holds in trust for the various taxing districts approximately 2,200 acres of coal-bearing land within the watershed of the High Bridge Reservoir which has a tax delinquency of approximately \$3.6 million.

(Schuylkill Brief in Opposition to Motion to Dismiss and Motion for Summary Judgement, pp 3-4)

As sequestrator of these properties, Schuylkill is empowered by §404 of the Real Estate Tax Sale Law to

retain possession of the property, as sequestrator, until all taxes owing to the several taxing districts shall have been collected or paid. He shall have power (a) to lease the property for a period not exceeding one (1) year, with the usual privilege of renewal or termination thereof upon three (3) months' notice, (b) to make such repairs to the property as may be reasonably necessary to restore and maintain it in a tenantable condition, and to carry insurance on such property, (c) to advertise the property for rent, (d) to collect the costs of repairs, advertising and commissions of rental agents from rentals collected or from a redeeming owner, (e) to sell and dispose of growing crops, and (f) to appoint a licensed real estate broker or agent, as agent to collect the rentals of the property, and pay such agents the customary commissions for rent collections. The bureau shall not, in any case, without prior approval of the county commissioners, incur any expense for the maintenance, repair or alteration of any property in excess of eighty per centum (80%) of the amount of rental to be received from such property within a period of one (1) year under a lease entered into at or before the time such expense is incurred. All commissions, costs and necessary expenses shall be deducted from the rents collected before paying the net balance toward taxes.

Thus, Schuylkill has a direct property interest in the sequestered lands in the High Bridge Reservoir watershed.

This property interest, in and of itself, does not lead to the conclusion that Schuylkill has standing. When evaluated in concert with the factors which must be considered in evaluating a permit for a dam, it does lead to that conclusion. The Department is required by 25 Pa.Code §105.14(b)(3) to consider the effect of a project on property and riparian owners above, below, and adjacent to the project. It is also mandated by 25 Pa.Code §105.14(b)(8) to evaluate the present conditions and effects of the project on reasonably foreseeable development within the affected watershed. The use of the terms "project" and "affected watershed" is sufficiently broad to conclude that the development potential of these 2200 acres in Tremont Township must be analyzed by the Department.

We will not grant Lebanon's motion to dismiss with regard to those issues concerning the impact of the dam construction on development in the watershed. While we do agree that Schuylkill cannot be allowed to collaterally attack the Department's denial of surface mining permits in the watershed, we believe the effect the dam will have on development, including mineral resource development on the 2200 acres of land held by Schuylkill within the watershed, is a proper consideration under 25 Pa.Code §§105.14(b)(3) and (8), which we have discussed above.

Finally, we will deny Lebanon's motion to dismiss regarding its allegations that the historic significance determination concerning the abandoned bridge abutments is outside the Department's authority and not properly before the Board. Again, the regulations adopted under the DSEA are sufficiently broad to authorize such an inquiry. The Department is empowered by 25 Pa.Code §105.15(b) to require the submission of information regarding,

*inter alia,*

The potential impacts to the extent applicable of the proposed activity on water quality, stream flow, fish and wildlife, aquatic habitat, federal and state forests, parks, recreation, instream and downstream water uses, prime farmlands, areas or structures of historic significance, streams which are identified candidates for or included within the federal or state wild and scenic river systems and other relevant significant environmental factors.

(emphasis added)

Section 105.16(a) also recognizes the Department's authority to examine the potential impact of a project on historic resources. In light of the broad authority in these regulations to consider the impact of structures and activities regulated under the DSEA on historic resources and the language of Article I, §27 of the Pennsylvania Constitution, we cannot agree with Lebanon that determinations regarding the impact of the project on historic resources are within the exclusive domain of the Pennsylvania Historical and Museum Commission.

**O R D E R**

AND NOW, this 28th day of July, 1989, it is ordered that the City of Lebanon Authority's Motion to Dismiss is denied.

**ENVIRONMENTAL HEARING BOARD**

*Maxine Woelfling*

**MAXINE WOELFLING, CHAIRMAN**

**DATED:** July 28, 1989

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M. DIANE SMI  
 SECRETARY TO THE

J. P. MASCARO & SONS, INC., et al.	:	EHB Docket Nos. 85-434-M
	:	88-210-F
v.	:	88-377-F
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
LEHIGH VALLEY RECYCLING, INC.	:	EHB Docket Nos. 87-280-W
	:	87-386-F
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	Issued: July 31, 1989
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	

**OPINION AND ORDER SUR  
PETITION FOR LEAVE TO APPEAL NUNC PRO TUNC**

**Synopsis**

Appellant's petition for leave to file a notice of appeal *nunc pro tunc* is denied. Appellant has provided no extraordinary circumstances to justify allowing the late filing of its appeal.

**OPINION**

This matter had its genesis in five appeals filed by J. P. Mascaro & Sons, Inc., Lehigh Valley Recycling, Inc., and Hoch Sanitation Company (collectively, Mascaro) seeking review of various actions by the Department of Environmental Resources (Department) relating to Mascaro's transfer facilities in Franconia Township, Montgomery County, and in North Whitehall Township, Lehigh County.

On January 11, 1989, the Board approved a settlement of the five appeals in the form of a November 30, 1988, consent adjudication between the

Department and Mascaro. The order approving the settlement dismissed the five appeals, subject to the condition that if an appeal of the settlement was timely filed in accordance with 25 Pa.Code §21.120(b), the appeals would be reinstated.

Notification of the Board's approval of the settlement agreement was published at 19 Pa.B. 373 (January 28, 1989). On April 7, 1989, Franconia Township, Montgomery County (Franconia) filed a petition for leave to file an appeal of the settlement *nunc pro tunc*. Franconia was concerned with a provision in the settlement which resulted in increasing the capacity of Mascaro's Franconia solid waste transfer station from 900 cubic yards per day to 600 tons per day. As grounds for its request to appeal *nunc pro tunc*, Franconia contended that the notice of settlement in the Pennsylvania Bulletin was deficient in that it did not mention the increase in capacity, and that, despite a notice of appearance filed with the Department by Franconia's counsel on December 28, 1988, to formally appear in the permit modification proceedings, Franconia received no notice regarding the proposed consent adjudication.

Franconia also argued that its interest in the transfer station facility was not adequately represented by the Department, that if the appeal *nunc pro tunc* is not allowed, the interests of its residents will be prejudiced, and that Mascaro will not be prejudiced by allowing this appeal *nunc pro tunc*.

On April 11, 1989, the Board advised Mascaro and the Department that any objections to Franconia's petition should be received by April 27, 1989. Neither party filed any objections to Franconia's petition.

The Board has jurisdiction to hear appeals from settlement agreements which are filed within 20 days after the major substantive provisions thereof

are published in the Pennsylvania Bulletin.<sup>1</sup> The Board is empowered to grant a petition to file an appeal *nunc pro tunc* if the petitioner can demonstrate good cause, such as fraud or a breakdown in the operations of the Board. 25 Pa.Code §21.53(a); Borough of Bellefonte v. DER, EHB Docket No. 88-458-F (Opinion issued May 3, 1989).

Franconia argues that good cause exists to allow this petition because the publication notice did not contain any reference to the increase in permitted capacity. We must disagree. While the notification did not directly refer to an increase in the permitted capacity, it did specifically refer to J. P. Mascaro's appeal docketed at EHB Docket No. 88-210-F, which related to the Department's May 23, 1988, order. The May 23, 1988, order contained a Finding of Fact that:

F. The transfer station permit authorizes Mascaro to accept a maximum of 900 cubic yards of waste per day.

This issue of what waste volume was authorized at the transfer station was specifically addressed in J. P. Mascaro's notice of appeal:

Mascaro's permit does not limit Appellants to the receipt of no more than 900 cubic yards of waster (sic) per day. DER has expressly and tacitly approved daily volume limits on solid waste at the transfer station site in excess of 900 cubic yards per day.

Since the notice of approval of the settlement agreement in the Pennsylvania Bulletin referred to EHB Docket No. 88-210-F, Franconia should have been put on notice that the issue of waste volume may have been addressed by the

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<sup>1</sup> The Commonwealth Court's decision in East Lampeter Twp. Sewer Auth. v. Butz, 71 Pa.Cmwlth 105, 455 A.2d 220 (1983), contains language that the 30 day appeal period in 25 Pa.Code §21.52(a), rather than the 20 day appeal period in 25 Pa.Code §21.120(b), applies to appeals of settlements by non-parties. We need not address that issue, as Franconia's appeal was untimely under both rules.

settlement and should have, in accordance with the notice of approval of the settlement, obtained and reviewed the settlement agreement.

Our rules (25 Pa.Code §21.120) require only that the "major substantive provisions" of a settlement agreement be published in the Pennsylvania Bulletin. Obviously, what may be substantive to one interested party may be inconsequential to another. The parties to a settlement agreement, who are responsible for preparing the notice, will not be held to a mindreader's standard. If the notice fairly describes the major terms of the settlement agreement and informs the reader where complete copies are available for examination, it satisfies our requirements.

The settlement agreement between Mascaro and the Department consists of eight pages of text. Included are 16 findings of fact and some 20 specific terms on which the parties agree in settling these five appeals. These provisions can be summarized only in the most general language. The notice mentions three broad categories which, in our judgment, fairly describe the terms of settlement. Readers of the notice are informed that complete copies of the settlement agreement are available for inspection at the office of Mascaro's attorney in Norristown, at the office of the Department's attorney in Philadelphia, and at the office of the Board in Harrisburg. This was sufficient to put Franconia on inquiry.

"...whatever fairly puts a person on inquiry is sufficient notice where the means of knowledge are at hand; and if he omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained."

Quigley et al. v. Breyer Corporation et al., 362 Pa. 139, 66 A.2d 286 (1949) (quoting American Jurisprudence). See also, Borough of Bridgewater v. Pa. P.U.C., 181 Pa.Super.Ct. 84, 124 A.2d 165 (1956).

Franconia also argues that it should have received notice of the

change in capacity at Mascaro's transfer station facility because its counsel filed a notice of appearance to formally appear in the permit modification proceedings, entitling it to notice in all proceedings touching upon its interest in the permitted capacity of the transfer facility. We are aware of no procedure by which an interested person files a notice of appearance with the Department during the course of its consideration of a permit application. Even if such a procedure did exist, the Department's consideration of the permit modification is separate and distinct from Mascaro's appeals before the Board. Moreover, Franconia's participation in the consideration of the permit does not entitle it to any greater notice of the settlement reached by Mascaro and the Department than that accorded to any member of the general public. Franconia was not, and is not, a party to the appeals or to the settlement agreement; therefore, it received adequate notice via publication of the settlement agreement in the January 28, 1989, Pennsylvania Bulletin.

Similarly, Franconia's claims that its interests are not adequately represented by the Department, that its residents will be prejudiced if this petition is denied, and that Mascaro would not be prejudiced by the allowance of this petition do not constitute good cause under 25 Pa.Code §21.53 to allow the consideration of its appeal *nunc pro tunc*.

**O R D E R**

AND NOW, this 31<sup>st</sup> day of July , 1989, it is ordered that Franconia Township's petition for leave to appeal *nunc pro tunc* is denied.

**ENVIRONMENTAL HEARING BOARD**

*Maxine Woelfling*  
MAXINE WOELFLING, CHAIRMAN

*Robert D. Myers*  
ROBERT D. MYERS, MEMBER

*Terrance J. Fitzpatrick*  
TERRANCE J. FITZPATRICK, MEMBER

**DATED:** July 31, 1989

**cc: Bureau of Litigation**  
Harrisburg, PA  
**For the Commonwealth, DER:**  
Mary Young, Esq.  
Eastern Region  
**For Appellants:**  
William F. Fox, Jr., Esq.  
FOX, DIFFER, CALLAHAN,  
ULRICH & O'HARA  
Norristown, PA  
**For Franconia Township:**  
Philip R. Detwiler, Esq.  
Blue Bell, PA

b1



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

CHRIN BROTHERS

v.

COMMONWEALTH OF PENNSYLVANIA  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES  
 and SAVE OUR LEHIGH VALLEY ENVIRONMENT,  
 Intervenor

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EHB Docket No. 84-283-F

Issued: August 7, 1989

A D J U D I C A T I O N

By Terrance J. Fitzpatrick, Member

Syllabus:

A Civil Penalty Assessment issued by the Department of Environmental Resources (DER) under the Solid Waste Management Act, 35 P.S. §6018.101 et seq., is affirmed in part and reversed in part. The Board's role in reviewing a civil penalty assessment is to determine whether DER abused its discretion. Of the seven alleged violations for which DER assessed civil penalties, the Board upholds the assessments for two. The Board reverses two assessments because DER did not prove that the Appellant committed violations. The Board decreases the amount of three assessments because they did not fit the severity of the violations.

INTRODUCTION

This Adjudication involves an appeal by Chrin Brothers (Chrin), a general partnership, from an Order and Civil Penalty Assessment issued by the

Department of Environmental Resources (DER) on July 18, 1984. Chrin is the owner and operator of the Chrin Landfill in Washington Township, Northampton County. DER's Order required closure of the landfill by December 31, 1984 due to alleged violations 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 Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq and the regulations adopted under these laws. The violations alleged in the Order were also the basis for the Civil Penalty Assessment by DER.<sup>1</sup>

Intervention was granted to a group of citizens living in the area who took the name "Save Our Lehigh Valley Environment" (SOLVE). Intervention was also granted to a number of municipalities and local organizations: City of Easton, Forke Township, Two Rivers Area Commerce Council, and Easton Area Joint Sewer Authority. Hearings on this matter were held on eight days in November and December, 1984. Following these hearings, former Board Member Anthony J. Mazzullo granted Chrin's petition for supersedeas from the closure order. Chrin Brothers v. DER, 1985 EHB 383. Additional hearings were held in 1985 (5 days) and in 1986 (2 days).<sup>2</sup>

On January 27, 1989, the Board issued a Rule to Show Cause as to why the appeal should not be dismissed, in part, as moot. DER filed a response

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<sup>1</sup> This appeal was originally consolidated with another Chrin appeal at EHB Docket No. 84-286-G, which was an appeal from DER's failure to act upon an expansion application filed by Chrin. These appeals were severed on June 17, 1986. DER has since granted Chrin's expansion application (on August 27, 1986), and this decision is before us in the case of Save Our Lehigh Valley Environment (SOLVE) v. DER, EHB Docket No. 86-542-F.

<sup>2</sup> The hearings in 1986 were held before former Board Member Edward Gerjuoy, who took over this proceeding when Mr. Mazzullo left the Board. Mr. Gerjuoy has since resigned from the Board as well, and the appeal has been reassigned to Board Member Terrance J. Fitzpatrick. The Board may issue an Adjudication where the Member who presided at the hearings has left the Board without drafting an Adjudication. Lucky Strike Coal Co., et al. v. Commonwealth, DER, \_\_\_ Pa. Commw. \_\_\_, 547 A.2d 447 (1988).

stating that since Chrin's expansion application was granted on August 27, 1986, the only current activity in the original landfill area was grading; therefore, the closure order had become moot. No other party filed a response. On June 2, 1989, the Board made the Rule to Show Cause absolute, and dismissed the appeal to the extent that it contested the closure order. As a result, the only issues which remain for adjudication are those concerning the civil penalty assessment.

After a full and complete review of the record, we make the following findings of fact:

#### FINDINGS OF FACT

1. The Appellant in this proceeding is Chrin Brothers, a Pennsylvania general partnership doing business at 400 South Greenwood Avenue, Easton, Northampton County, Pennsylvania. Chrin operates a landfill on Industrial Drive in Williams Township, Northampton County. (Transcript 236, 237)

2. The Appellee in this proceeding is the Department of Environmental Resources (DER), the executive agency of the Commonwealth of Pennsylvania with the authority and duty 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 Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 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 under these laws.

3. On July 18, 1984, DER assessed a civil penalty of \$45,240 against Chrin for alleged violations of the Solid Waste Management Act and the regulations adopted under this law.

4. DER Inspector James Kunkle concluded that the water he observed discharging onto Industrial Drive from the landfill on December 15, 1983 was

leachate based upon the appearance and odor of the water, together with the laboratory test results of a water sample which he took. (Second Transcript, 100-103)<sup>3</sup>

5. Mr. Kunkle had experience and training in reviewing laboratory results for indications of municipal waste leachate. (Second T. 110)

6. The inorganic analysis of the water sample collected by Mr. Kunkle contained certain parameters indicative of municipal landfill leachate, such as ammonia, total dissolved solids, iron, manganese, specific conductivity, and BOD. (Second T. 125-127)

7. As of the date of DER's Order, leachate generated by Chrin's landfill was collected in manholes 1, 3, and an unnumbered manhole, and was directed to manhole 5, from which it was discharged to groundwater. (T. 171)

8. As of the date of DER's Order, Chrin exceeded the boundary and elevation limits contained in the permit it was issued on June 2, 1975 (Permit No. 100022). (T. 68, 177)

9. Chrin's permit provided for a maximum elevation of 450 feet. Chrin's closure plan submitted on October 31, 1984 showed that the elevation at the landfill was 510 feet. (T. 910-913)

10. Bruce Beitler, the Supervisor of Operations for the Bureau of Solid Waste Management in the Norristown Regional Office, had been aware since February of 1982 that Chrin was exceeding the elevation limits of its permit. (T. 1318, 1374)

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<sup>3</sup> The record in this proceeding consists of two transcripts. The first, occupying 2,313 pages, covers the hearings in 1984 and 1985. This will be referred to as "Transcript" or "T." The second transcript, occupying 159 pages, covers the 1986 hearings. This will be referred to as "Second Transcript" or "Second T."

11. Charles Chrin knew that the landfill was exceeding the elevation limits, and he had discussions with DER regarding his application for expansion of the landfill. Mr. Chrin was informed that the application had not been acted upon because DER was understaffed. (T. 527-528)

12. DER Inspector Carl Gicher was aware that Chrin was exceeding the elevation limits of the permit. He told Charles Chrin, "Well, you just have to keep on going. You can't stop." (T. 528)

13. As of July 18, 1984, the western and northern slopes of the Chrin Landfill had excessive grades. (Second T. 115-116)

14. As of July 18, 1984, DER had not approved a gas venting and monitoring system for the Chrin Landfill (Second T. 71)

15. DER Inspector James Kunkle's conclusion that daily cover had not been applied at the Chrin landfill on several dates was not based upon observations at the end of each working day. (Second T. 118-119)

16. Chrin accepted residual waste from Asbury Graphite Mills, Inc. on May 31, 1983. (Second T. 93-98, 117)

17. Chrin submitted a Module One (an application) for acceptance of waste from Asbury Graphite Mills, Inc. prior to accepting this waste. (T. 184)

18. Charles Chrin was not aware on May 31, 1983 that Chrin lacked authority to accept waste from Asbury Graphite Mills, Inc. (Second T. 145)

#### DISCUSSION

DER has assessed a civil penalty totaling \$45,240 against Chrin for seven alleged violations of the Solid Waste Management Act.<sup>4</sup> DER bears the

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<sup>4</sup> The alleged violations which led to the Civil Penalty Assessment were set out in DER's Closure Order. In that closure order, two of these violations were alleged to constitute violations of the Clean Streams Law as well as the Solid Waste Management Act. (Order, para. D.1, 2). However, the civil penalties for these two violations were assessed solely under the Solid Waste Management Act, and we shall discuss the violations solely in terms of this Act.

burden of proving that the civil penalty assessment should be upheld. 25 Pa. Code §21.101(b)(1)(3), T. C. Inman, Inc., et al. v. DER, 1988 EHB 613. In reviewing DER's action, the Board's task is to determine whether DER abused its discretion or carried out its duties in an arbitrary manner. Pennsbury Village Condominium v. DER, 1977 EHB 225, 231. In this case, our review of DER's action will entail a two step process. First, we must determine whether Chrin committed the violations for which the civil penalties were assessed. Second, if we find that Chrin has committed violations, we must review whether there is a "reasonable fit" between the violations and the amount of the penalties. Refiner's Transport and Terminal Corp. v. DER, 1986 EHB 400, 447-448, Trevorton Anthracite Company v. DER, 42 Pa. Commw. 84, 400 A.2d 240, 243 (1979).

The standards for determining the amount of a civil penalty under the Solid Waste Management Act are set out in section 605 of the Act, 35 P.S. §6018.605:

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.

As we will discuss below, DER has not explained either in its testimony or in its Brief how it computed the civil penalties under the standards set out in Section 605.<sup>5</sup>

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<sup>5</sup> At the close of the record, DER stated that if the Board found that the violations occurred, it would be "making no great leap of faith" to affirm the amounts assessed. (Second T. 153) We should not have to rely on "leaps of faith" to determine whether DER acted properly. We will be less hesitant to substitute our discretion for DER's because DER has not explained the basis for its actions.

## 1. The Discharge of Leachate Onto Industrial Drive.

The first violation for which DER assessed a civil penalty was an alleged discharge of leachate from the landfill onto Industrial Drive, in violation of Section 610(1) of the Solid Waste Management Act, 35 P.S. §6018.610(1). (Order, para. D. 1) DER assessed a civil penalty of \$7700 for this violation. (Civil Penalty Assessment, para. 1)

DER Inspector James Kunkle testified that he observed leachate flowing from the landfill onto Industrial Drive on December 15, 1983. (Second T. 101)<sup>6</sup> This discharge flowed into a drainage pipe and toward the Lehigh River. (Id.) He concluded that the water was leachate based upon its appearance and its "distinct . . . . rotten smell," which, from his experience, he associated with municipal landfill leachate. (Second T. 100-102) His conclusion that the discharge was leachate was also based, in part, upon his analysis of laboratory results from a sample he took of the discharge. (Second T. 101-103) Mr. Kunkle testified that he had experience and training in reviewing laboratory results to determine whether they indicated the presence of municipal waste leachate. (Second T. 110)<sup>7</sup> In this case, the inorganic analysis of the sample contained parameters which indicated the presence of leachate, such as ammonia, total dissolved solids, iron, manganese, specific conductivity, and BOD. (Second T. 125, 127)

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<sup>6</sup> DER's Order claimed that this discharge occurred on May 6 and December 15, 1983. (Order, para. D.1) The evidence at the hearing, however, was restricted to December 15. (Second T. 100)

<sup>7</sup> Chrin objected to Mr. Kunkle's testimony regarding the laboratory reports on the basis that the laboratory reports themselves were not in evidence, and because Mr. Kunkle was not qualified to testify regarding the reports. (Second T. 102, 114) Board Member Gerjuoy overruled both of these objections. (Id.) Chrin has not argued in its Brief that Mr. Gerjuoy erred in allowing Kunkle to testify regarding the laboratory reports; therefore, we will not consider this issue. Robert Kwalwasser v. DER and Kerry Coal Co., 1986 EHB 24, 39.

Chrin denies that the discharge was leachate. Chrin's witness Edward Prout testified that the compounds found in the laboratory results of the sample originated from highway run-off. (T. 169-170) Specifically, he stated that the compounds were components of gasoline, diesel fuel, or hydraulic fuel. (T. 170)

Section 610(1) of the Solid Waste Management Act, 35 P.S. §6018.610(1), states, among other things, that it is unlawful to deposit solid waste on to the ground or into waters of the Commonwealth unless authorized by a permit granted by DER. The term "solid waste" is defined to include liquid waste. 35 P.S. §6018.103. Although the parties have not stated precisely what test they would apply to determine whether a liquid is "leachate," it seems obvious that it refers to a liquid which has acquired some of the chemical characteristics of the waste in a landfill as a result of its contact with that waste. Under the Act, then, leachate is a "solid waste."

Evaluating the evidence as a whole, DER has carried its burden of establishing a violation here. We accept Mr. Kunkle's testimony that the inorganic analysis of the discharge indicated the presence of leachate. (Second T. 125, 127) Mr. Prout based his conclusion that the discharge was road run-off on the organic analysis of the sample, not the inorganic analysis. (Second T. 125-128) Although Mr. Kunkle did not know what the inorganic parameters of road run-off were, Chrin did not introduce any evidence that the inorganic analysis indicated that the discharge was road run-off rather than leachate. Moreover, we note that the discharge flowed from the landfill onto Industrial Drive and then into a drainage ditch next to the road. (Second T. 101, 123) Mr. Prout's testimony establishes only that the discharge might have acquired some characteristics of road run-off as it flowed across Industrial Drive. This is hardly surprising. Mr. Prout's

testimony did not establish that the discharge consisted solely of run-off rather than leachate.

We must next address whether the amount assessed for this violation--\$7700--was appropriate. As we stated above, DER did not provide any explanation on the record or in its Brief as to how it arrived at this figure. Analyzing this violation under the standards set out in Section 605 of the Solid Waste Management Act, 35 P.S. §6018.605, we do not find any evidence relating to willfulness, cost of restoration and abatement, or savings resulting from the violation. On the issue of harm to the environment, the record indicates that the leachate flowed toward the Lehigh River. (Second T. 101) There was no specific evidence to establish that this discharge contributed to the pollution of residential wells in the area.

Based upon the evidence, we conclude that DER abused its discretion in assessing a civil penalty of \$7700 for this violation. It is true that DER may consider the need to deter violations such as this in setting the amount of a civil penalty. See Western Hickory Coal Co. v. DER, 1983 EHB 89, affirmed 86 Pa. Commw. 562, 485 A.2d 877 (1984). It is also true that the \$7700 penalty is less than the maximum civil penalty of \$25,000 per violation allowed under Section 605 of the Solid Waste Management Act, 35 P.S. §6018.605. However, there was no evidence introduced regarding the factors set out in Section 605. In addition, the \$7700 civil penalty assessed for this violation is disproportionate to the amounts assessed for some of the other violations covered by the July 18, 1984 Civil Penalty Assessment. The instant violation was a one-time occurrence (see footnote 6), whereas some of the other violations occurred for a period of years. In particular, the \$7700 civil penalty seems to be out of line with the \$5000 civil penalty assessed for the next violation we will discuss--the discharge of leachate from manhole

no. 5. DER has not explained why it assessed a \$7700 penalty for a one-time discharge, but a \$5000 penalty for a discharge which occurred on an on-going basis.

Since we conclude that DER abused its discretion, we will substitute our own discretion. Warren Sand and Gravel, Inc. v. DER, 20 Pa. Commw. 186, 341 A.2d 556 (1975), Refiners Transport and Terminal Corp. v. DER, 1986 EHB 400, 449. We will assess a civil penalty of \$2500 for this violation. This amount reflects the need to deter discharges of leachate, and we believe that the amount is consistent with the amounts assessed for the other violations involved here.

## 2. The Discharge of Leachate From Manhole No. 5 to Groundwater.

The second alleged violation by Chrin was the discharge of leachate from manhole no. 5 on the landfill site to groundwater, in violation of Section 610(1) of the Solid Waste Management Act, 35 P.S. §6018.610(1). (Order, para. D. 2) DER assessed a civil penalty of \$5000 for this violation. (Civil Penalty Assessment, para. 2)

Chrin's witness Edward Prout admitted that leachate generated by the landfill was collected in manholes nos. 1, 3, and an unnumbered manhole, and that it was directed to manhole no. 5, and then to groundwater. (T. 171) Chrin argues, however, that this system was installed over the years with DER's knowledge and approval, and that in a natural renovation landfill such as Chrin's, a system can intercept some seepage, but it is not designed to collect all leachate generated by the landfill.<sup>8</sup> Chrin also argues that it

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<sup>8</sup> The concept behind a natural renovation landfill is that if there is enough soil beneath the landfill, pollutants will be removed from the leachate as it percolates through the soil. (T. 136) Generally, a one-to-one ratio of soil to waste material is considered necessary for renovation of the leachate. (T. 1326-1329) A landfill with a synthetic liner, on the other hand, is designed to capture and treat the leachate. (T. 136)

installed additional monitoring wells when requested by DER (T. 71), and that it eventually linked its system with the City of Easton's sewer system at a cost of \$150,000. (T. 80)

In light of Mr. Prout's admission that leachate was discharged from manhole no. 5 to groundwater, there is no question that Chrin violated Section 610(1) of the Solid Waste Management Act, 35 P.S. §6018.610(1). As we will explain in more detail in discussing the next violation, Chrin's argument that DER tolerated this condition over a period of time does not constitute a valid defense.

The only remaining issue is whether DER abused its discretion in assessing a \$5000 civil penalty for this violation. We do not find any evidence that the violation was willful. Nor is there evidence regarding savings to Chrin as a result of the violation.

On the question of environmental harm, the issue arises whether this violation caused groundwater pollution which affected residential wells in the area. It is not necessary for us to decide whether Chrin caused the degradation of residential wells. While this issue was of central importance in determining whether closure of the landfill was warranted--an issue which has become moot since the hearings were held--it is not critical to our ruling on the reasonableness of the \$5000 civil penalty assessment. The amount of this penalty is easily justified even if we were to assume that this discharge did not cause degradation of the wells. The unauthorized discharge of leachate is a serious offense, and the need to deter this type of violation may be considered. In the case of this particular discharge, Mr. Prout's testimony portrays an on-going condition. (T. 77, 171) No doubt, it was the on-going or regular nature of this discharge which led Chrin to connect its leachate interception system with the City of Easton's sewer system. (T. 77)

The \$5000 civil penalty assessment was only one-fifth of the maximum penalty per violation under section 605, 35 P.S. §6018.605.<sup>9</sup> Therefore, even considering as mitigating factors that Chrin installed monitoring wells when requested by DER, and that Chrin connected its leachate interception system with the City of Easton's sewer system at a cost of \$150,000 (T. 71, 80), the amount assessed by DER was reasonable.

3. Exceeding the Boundary and Elevation Limits in Chrin's Permit.

The third alleged violation was that Chrin exceeded the elevation and boundary limits set out in its permit, in violation of Sections 201, 301, 302, 610(1), 610(2), and 610(4) of the Solid Waste Management Act, 35 P.S. §§6018.201, 6018.301, 6018.302, 6018.610(1), 6018.610(2), and 6018.610(4). (Order, para. F) DER assessed a civil penalty of \$15,500 for this violation. (Civil Penalty Assessment, para. 3)

There is no doubt that Chrin did, in fact, exceed the boundary and elevation limits. Mr. Prout admitted that Chrin exceeded these limits. (T. 68, 177) Charles Chrin acknowledged the same. (T. 527-528) Chrin argues, however, that its actions do not constitute a violation of the Solid Waste Management Act because DER knew of this situation long before it issued the civil penalty assessment, and that DER "tacitly approved" of Chrin's actions. Chrin also argues that exceeding the boundary and elevation limits did not cause environmental harm, as evidenced by the fact that DER's proposed closure plan for the landfill did not require Chrin to reduce the final elevation. (T. 109, 936, 947)

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<sup>9</sup> Each day that this discharge occurred constituted a separate offense under section 605, 35 P.S. §6018.605. Therefore, the maximum penalty for this discharge could have been far more than \$25,000.

The record shows that DER knew Chrin was violating the boundary and elevation limits for years before DER issued the civil penalty assessment. DER's Bruce Beitler testified that he had been aware since February of 1982 that Chrin was exceeding these limits--this was approximately two and one-half years before DER issued the civil penalty assessment. (T. 1374) Charles Chrin testified that he inquired about the status of the expansion application because he was concerned about exceeding the limits--he was told that the application had not been processed because DER was understaffed. (T. 527) Mr. Chrin also testified that DER Inspector Carl Gicher told him, "Well, you just have to keep on going. You can't stop." (T. 528)

We disagree with Chrin that DER's actions, and inactions, lead to a conclusion that Chrin did not violate the Solid Waste Management Act by exceeding the boundary and elevation limits set out in its permit.<sup>10</sup> Chrin argues, in essence, that DER is estopped from claiming that Chrin has committed a violation. The defense of estoppel may be raised against the Commonwealth in appropriate cases. Commonwealth, DPW v. UEC, Inc., 483 Pa. 503, 397 A.2d 779 (1979), Refiner's Transport and Terminal Corp. v. DER, 1986 EHB 400, 417-418. In this case, however, Chrin did not establish grounds for invoking estoppel. To the extent that Chrin claims DER is estopped because it misled Chrin into committing the violation, Chrin would have to prove that it was ignorant of the fact that it was violating the permit. 14 Pa. Law

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<sup>10</sup> Of the sections cited by DER in its Order, we find that Chrin has violated all of those sections except sections 301 and 302, 35 P.S. §§6018.301 and 6018.302. These sections require, among other things, that residual waste disposal be conducted in compliance with permits, orders, and regulations issued by DER. Since Chrin's landfill was a municipal waste landfill, these sections are not applicable here. The allegation that Chrin accepted residual waste from Asbury Graphite Mills, Inc. was listed by DER as a separate violation and DER assessed a \$6040 civil penalty for this violation. (Order, para. H, Civil Penalty Assessment, para. 7) We shall discuss this alleged violation below.

Encyclopedia, Estoppel, §22. In this case, Mr. Chrin knew that the landfill was exceeding the limits in the permit; he does not allege that anyone from DER misled him on that point.<sup>11</sup> To the extent that Chrin argues that DER is estopped from finding a violation because DER knew Chrin was exceeding its permit for years before taking action, DER's inaction did not vest Chrin with the right to continue violating its permit. Lackawanna Refuse Removal, Inc. v. DER, 65 Pa. Commw. 372, 442 A.2d 423, 426 (1982), Chambers Development Company, Inc., et al. v. DER, 1988 EHB 68, 100-101, affirmed 118 Pa. Commw. 97, 545 A.2d 404 (1988).

Since we have concluded that Chrin violated the Solid Waste Management Act by exceeding its permit limitations, we must decide whether the \$15,500 civil penalty assessed by DER constituted an abuse of discretion. Turning to the factors discussed above, we conclude, first, that this violation was willful to the extent that Mr. Chrin knew that the landfill was exceeding the permit limitations. (T. 527-528) The violation was not willful in the sense of being openly defiant, however, in that DER did not take any steps to halt this or to warn Chrin--such as by sending a notice of violation. Regarding environmental harm, we do not find any specific, probative evidence that this violation caused harm to the environment.<sup>12</sup>

The need to deter violations of permit boundaries is an important factor, but it is unlikely that a civil penalty will deter violations when

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<sup>11</sup> DER Inspector Carl Gicher's statement to Mr. Chrin does not constitute a sanctioning of Chrin's activity by DER. The statement appears to be in the nature of practical advice that Chrin had to keep accepting waste unless it wanted to cease operations.

<sup>12</sup> We recognize that the more waste Chrin piled on the landfill, the less likely it was that the soil beneath the landfill could renovate the leachate. However, there was no direct evidence to establish that the violation of the permit limitations caused leachate to be discharged.

DER acts as it did in this case. While we presume that the major cause for DER's course of conduct was a lack of sufficient manpower and other resources, we must say that the Department's behavior here created an environment in which violations were likely to flourish. DER's failure to act upon Chrin's expansion application, which was filed in 1978 (T. 58), put Chrin in the unenviable position of either ceasing operations or violating its current permit. When Chrin chose to continue accepting waste, in violation of its permit, DER did not take any sort of action against Chrin for years. Nor did DER even warn Chrin to stop accepting waste. According to Charles Chrin's unrebuted testimony, a DER Inspector actually encouraged Chrin to continue accepting waste. While these actions do not entirely excuse Chrin's violation of its permit, they are certainly mitigating circumstances which ought to be considered in setting the amount of the civil penalty.

Evaluating the above factors, we conclude that the \$15,500 civil penalty assessed by DER was an abuse of discretion. Although Chrin knew that it was exceeding the boundary and elevation limits in its permit, the mitigating circumstances discussed above persuade us that the penalty must be reduced. Substituting our discretion for DER's, we will reduce the civil penalty assessment for this violation from \$15,500 to \$10,000.

#### **4. Excessive Grades and Failure to Terrace and Stabilize Slopes.**

The Fourth alleged violation by Chrin was that the western and northern slopes of the landfill had excessive grades and were not terraced or stabilized, in violation of 25 Pa. Code §§75.24(c)(2)(ii) and (iii), and 75.26(o) and (p), and, therefore, in violation of Sections 610(1), 610(2), and 610(4) of the Solid Waste Management Act, 35 P.S. §§6018.610(1), 6018.610(2), and 6018.610(4). (Order, para. G. 1.) DER imposed a civil penalty of \$8000 for this violation. (Civil Penalty Assessment, para. 4).

DER Inspector James Kunkle testified that the grades were not in compliance with the regulations when he conducted his inspection on December 15, 1983. (Second T. 115-116) Chrin argues, however, that DER agreed that Chrin need not alter the final grades as part of the closure of the landfill. (T. 178-180, Second T. 122) In its Brief, Chrin wrote the following proposed Conclusion of Law on this issue:

14. Under the circumstances, Chrin's failure to terrace, stabilize and grade the western and northern slopes of the landfill does not constitute violation of 25 Pa. Code §§75.24(c)(2)(ii), 75.24(c)(2)(iii), 75.26(o) and 75.26(p), and, therefore, violations of Sections 610(1), 610(2), and 610(4) of the Solid Waste Management Act, 35 P.S. §§6018.610(1), 6018.601(2), 6018.610(4).

Chrin Brief, pp. 6-7. Chrin also concedes later in its Brief that it failed to maintain appropriate grades and to terrace and stabilize the slopes; however, it argues that such violations can be, at most, negligent, because DER knew of the violations for years and tacitly approved of them. (Chrin Brief, pp. 14-15)

It is clear that, as Chrin concedes, it violated the regulations cited above. As we stated in discussing the previous violations, the argument that DER "tacitly approved" is not a defense to the finding of a violation. Therefore, the only question is whether the \$8000 civil penalty imposed by DER was reasonable.

We find that the \$8000 civil penalty assessed by DER did not constitute an abuse of discretion. Although we do not find any evidence of willfulness or environmental harm, there is a need to deter violations such as this. Maintaining excessive grades clearly creates an additional danger that leachate will run off on the surface of the site instead of migrating through the soil beneath the landfill. In addition, the \$8000 civil penalty assessed for this violation was less than one-third of the maximum daily penalty

authorized by the Act, and Chrin admits that the violation was on-going for years. (Chrin Brief, pp. 14-15) Therefore, we find that DER did not abuse its discretion in setting the amount of this penalty.

**5. Failure to Have an Adequate Gas Monitoring and Venting System.**

The fifth alleged violation by Chrin was the failure to have an acceptable gas venting and monitoring system in operation, in violation of 25 Pa. Code §75.24(c)(2)(xxiv). (Order, para. G. 2) DER assessed a civil penalty of \$1500 for this violation. (Civil Penalty Assessment, para. 5)

DER witness Lawrence Lusk testified that as of the date of the civil penalty assessment (July 18, 1984), DER had not approved a gas venting and monitoring system for the Chrin landfill. (Second T. p. 71) Such a plan was submitted and approved by DER in the spring or summer of 1986. (Id.) Chrin's witness Edward Prout testified that Chrin had an acceptable gas venting and monitoring system in operation. (T. 180-181)

DER's evidence did not establish that Chrin violated 25 Pa. Code §75.24(c)(2)(xxiv). This regulation states:

(xxiv) Gas venting and gas monitoring systems shall be installed at all sites. Gas venting may be accomplished by construction of lateral or vertical venting, or both. Pipe vents located within 100 feet of any building, mechanical structure, or roadway shall be constructed so as to discharge above the roof line of such building or mechanical structure and to discharge a minimum of 12 feet above the roadway surface.

25 Pa. Code §75.24(c)(2)(xxiv). DER's evidence established only that DER had not approved a gas venting or monitoring plan for the landfill as of July 18, 1984. (Second T. 71) But the above regulation does not require pre-approval of the plans for such a system. DER did not present evidence to establish specific deficiencies in Chrin's system as of July 18, 1984, the date of the Order and Civil Penalty Assessment. Chrin's witness Edward Prout stated

simply that Chrin had an acceptable gas venting and monitoring system.

(T.180) There is no evidence in the record to shed light on what type of gas venting and monitoring system Chrin had in place as of July 18, 1984.

We conclude that DER has not carried its burden of proving a violation; therefore, the \$1500 civil penalty assessment constituted an abuse of discretion.

#### 6. Failure to Apply Daily Cover.

The sixth alleged violation by Chrin was the failure to provide daily cover at the landfill, in violation of 25 Pa. Code §75.26(1). (Order, para. G. 2) DER assessed a penalty of \$1500 for this violation.

DER Inspector James Kunkle testified that Chrin failed to comply with the daily cover requirement on six particular dates from March, 1983 to April, 1984. (Second T. 91-93) On cross-examination, Mr. Kunkle stated that he was never there at the end of the working shift on the landfill. (Second T. 118-119) Edward Prout testified that Chrin does "the best job they (sic) can in providing daily cover," and that cover is applied unless the weather prevents it. (T. 182-183)

The regulation involved here, 25 Pa. Code §75.26(1), provides:

(1) A uniform 6-inch compacted layer of daily cover material shall be placed on all exposed solid waste at the end of each working day.

25 Pa. Code §75.26(1). DER's evidence does not establish that Chrin violated this regulation because Mr. Kunkle's observations were not made at the end of the working day. (Second T. 118-119) Nor is there any evidence from which we can infer that the condition which Mr. Kunkle observed during the day was still in existence at the end of the day. Therefore, we conclude that the \$1500 civil penalty imposed by DER for this alleged violation constituted an abuse of discretion.

7. Accepting Residual Waste from Asbury Graphite Mills, Inc.

The seventh (and last) alleged violation by Chrin was the acceptance, without the required permit, of residual waste consisting of graphite waste flakes and waste powder from Asbury Graphite Mills, Inc., in violation of Sections 301 and 302 of the Solid Waste Management Act, 35 P. S. §§6018.301 and 6018.302. (Order, para. H) DER assessed a civil penalty of \$6040 for this violation. (Civil Penalty Assessment, para. 7)

James Kunkle testified that on May 31, 1983, he saw a truck back up to the working face of the landfill and dump a "black powdery substance" from a rolloff container. (Second T. 93-94) It was evident to him that the material was not municipal waste. (Second T. 94, 117) The driver of the truck, who Mr. Kunkle recognized as a Chrin employee, told him that the source of the waste was Asbury Graphite Mills. (Second T. 98) Mr. Kunkle sent an inspection report to Chrin on June 7, 1983 stating, among other things, that waste from Asbury Graphite Mills had been dumped at the landfill, and advising Chrin not to accept industrial wastes without prior approval from DER. (Civil Penalty Commonwealth Exhibit 1, Second T. 99-100)

Chrin's position on this issue is confusing. At the hearing, Chrin sought to exclude Mr. Kunkle's testimony regarding what the driver told him on grounds that it constituted hearsay. (Second T. 94) Former Board Member Gerjuoy admitted the testimony, even though he felt that it was hearsay, and stated that he would decide later how much weight to give it. (Second T. 97-98) Chrin's witness Edward Prout testified that Chrin had submitted a Module One (an application) to DER for waste from Asbury Graphite. (T. 184) DER did not respond to this submission, and "at that point it didn't make any difference because Asbury Graphite then stopped being our customer." (T. 185) In its Brief, Chrin states: "[t]he landfill did not accept graphite waste

from Asbury Graphite prior to the submission of a Module I. (NT 184)" (Chrin Brief, p. 5, proposed finding of fact no. 22) Chrin also states in its proposed conclusions of law that:

Chrin's acceptance on May 31, 1983 of waste from Asbury Graphite Mills Incorporated was done subsequent to the submission of a Module I and therefore does not constitute a violation of Sections 301 and 302 of the Solid Waste Management Act, 35 P.S. §§6018.301 and 6018.302.

(Chrin Brief, p. 7, proposed conclusion of law 17)

Based upon the above evidence and the statements in Chrin's Brief, we conclude that Chrin did accept waste from Asbury Graphite on May 31, 1983. Mr. Prout's statement that Asbury Graphite "then stopped being our customer" is sufficient to link Asbury Graphite to the dumping Mr. Kunkle observed on May 31, 1983, even if we disregard, as hearsay, Mr. Kunkle's recitation of what the Chrin driver told him. In addition, Chrin's Brief appears to concede that residual waste from Asbury Graphite was accepted by Chrin.

Chrin's argument that accepting the waste from Asbury Graphite did not constitute a violation because Chrin had submitted a Module One to DER to accept this waste is plainly lacking in merit. Chrin could not legally accept this residual waste until DER had first granted it authority to do so. See Section 301 of the Solid Waste Management Act, 35 P.S. §6018.301.

Evaluating this violation under the standards set out in Section 605, 35 P.S. §6018.605, we find, first, that the violation was negligent, not willful. Although someone at Chrin obviously knew that Chrin needed additional authority to accept this waste, as evidenced by the submission of the Module One, Charles Chrin testified that he had not been aware that the partnership lacked authority to accept this waste. (Second T. 145-146) This confusion within the organization was negligent; the individuals who operate the landfill have a responsibility to know what wastes may be accepted under

the permit issued by DER. We do not find any evidence in the record relating to environmental harm or the other factors set out in Section 605.

We find that the \$6040 civil penalty assessed by DER was an abuse of discretion. Under the evidence, this was a one-time, negligent act which did not cause environmental harm. We do not mean to diminish the seriousness of this violation. However, all of the violations involved in this Adjudication were serious, and the instant violation--unlike most of the others--was a one-time event. To maintain some degree of consistency and a sense of proportion among the penalties, the civil penalty for the instant violation must be decreased.

Substituting our discretion for DER's, we will assess a civil penalty of \$2500 for this violation.

#### CONCLUSIONS OF LAW

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

2. DER bears the burden of proving that a civil penalty assessment does not constitute an abuse of discretion. 25 Pa. Code §21.101(b)(1)(3), T. C. Inman, Inc. v. DER, 1988 EHB 613.

3. 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.

4. The discharge of leachate from Chrin's landfill onto Industrial Drive on December 15, 1983 constituted a violation of Section 610(1) of the Solid Waste Management Act, 35 P.S. §6018.610(1).

5. The \$7700 civil penalty assessed by DER for the December 15, 1983 discharge of leachate onto Industrial Avenue constituted an abuse of discretion.

6. The discharge of leachate from manhole no. 5 on the landfill site to groundwater constituted a violation of Section 610(1) of the Solid Waste Management Act, 35 P.S. §6018.610(1).

7. The \$5000 civil penalty assessed by DER for the discharge of leachate from manhole no. 5 was not an abuse of discretion.

8. Chrin's exceeding of the boundary and elevation limits set out in its permit constituted a violation of Sections 201, 610(1), 610(2), and 610(4).

9. The \$15,500 civil penalty assessed by DER for Chrin's exceeding the boundary and elevation limits in its permit was an abuse of discretion.

10. The excessive grades on the western and northern slopes of Chrin's landfill, and Chrin's failure to terrace and stabilize those slopes, constituted a violation of 25 Pa. Code §75.24(c)(2)(ii) and (iii), §75.26(o) and (p), and, therefore, sections 610(1), 610(2), and 610(4) of the Solid Waste Management Act, 35 P.S. §§6018.610(1), 6018.610(2), and 6018.610(4).

11. The \$8000 civil penalty assessed by DER for the excessive grades and for Chrin's failure to terrace and stabilize the slopes did not constitute an abuse of discretion.

12. Chrin's failure to have its gas venting and monitoring system plan approved by DER as of July 18, 1984 did not constitute a violation of 25 Pa. Code §75.24(c)(2)(xxiv); therefore, the \$1500 civil penalty assessed by DER for this alleged violation constituted an abuse of discretion.

13. DER did not carry its burden of proving that Chrin violated 25 Pa. Code §75.26(1) by failing to apply daily cover at the landfill; therefore,

the \$1500 civil penalty assessed by DER for this alleged violation constituted an abuse of discretion.

14. Chrin's acceptance of residual waste, a waste which it was not authorized to accept under its permit, from Asbury Graphite Mills, Inc. on May 31, 1983 constituted a violation of Sections 301 and 302 of the Solid Waste Management Act, 35 P.S. §§6018.301, 6018.302.

15. The \$6040 civil penalty assessed by DER for Chrin's acceptance of residual waste from Asbury Graphite Mills, Inc. constituted an abuse of discretion.

**ORDER**

AND NOW, this 7th day of August, 1989, it is ordered that Chrin's appeal from DER's Civil Penalty Assessment of \$45,240 is sustained in part and denied in part, and the penalty is modified to \$28,000. The entire civil penalty is due and payable immediately to the Solid Waste Abatement Fund. The prothonotary of Northampton County is ordered to enter the full amount of the civil penalty as a lien against any property of Chrin Brothers, 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:** August 7, 1989

**cc: Bureau of Litigation**  
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**TERRANCE J. FITZPATRICK, MEMBER**

\*Board Chairman Maxine Woelfling did not participate in this decision.

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