Environmental Hearing Board

Adjudications
and
Opinions

1991

Volume I

PAGES 1-506

COMMONWEALTH OF PENNSYLVANIA

Maxine Woelfling, *Chairman*

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OF THE

ENVIRONMENTAL HEARING BOARD

1991

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Environmental Hearing Board Reporter

Thus: 1991 EHB 1

ISBN No. 0-8182-0160-6

FORWARD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1991.

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. 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.

1991

ADJUDICATIONS

CASE NAME	PAGE
A.C.N., Inc.	1587
Allegro Oil and Gas Company	821
Gordon and Janet Back	1667
Board of Supervisors of Middle Paxton Township	546
Gerald E. Booher	987
Broad Top Township	214
C & L Enterprises, Inc. and Carol Rodgers	514
Chevron U.S.A. Inc.	1025
C. W. Brown Coal Co., Inc.	1063
Edward Davailus, et al.	1191
Ward I. Dran	1402
Fry Communications, Inc.	1734
Gabig's Service	1856
Robert K. Goetz, Jr.	1433
George W. Hatchard	1691
Hrivnak Motor Company	1811
T. C. Inman, Inc. and Theodore C. Inman	1512
Kennametal, Inc.	1847
Mr. and Mrs. John Korgeski	935
McDonald Land & Mining Co., Inc.	1956
Midway Sewerage Authority	1445
Mustang Coal & Contracting Corporation	1707
N & L Coal Company	1331

Newtown Township 150

Carl Oermann 1542

Pennsylvania Fish Commission 740

Pennsylvania State University 1374

P.N.B.P. Coal Company 412

Shipman Sanitary Service, Inc. 1122

Max L. Starr 494

Western Pennsylvania Water Company and
Armco Advanced Materials Corporation 287

OPINIONS AND ORDERS

CASE NAME	PAGE
A.C.N., Inc.	686
Adams Sanitation Company, Inc.	249
Al Hamilton Contracting Co.	1799
Allegro Oil and Gas Company, DER v.	34
Altoona City Authority	1381
Avery Coal Company and Thompson Brothers Coal Company (2/1/91)	146
Avery Coal Company, Inc. (4/19/91)	662
Ernest Barkman, Grace Barkman, Ern-Bark, Inc.	649
Bemco Recycling, Louis W. Belsito, III	734
Bethayres Reclamation Corporation	816
Bethenergy Mines, Inc.	847
City of Bethlehem	224
Bethlehem Steel Corporation	1218
Lawrence Blumenthal	357
Borough of Catasauqua	1537
Borough of Dunmore	1918
Borough of Ford City	169
George D. Bowling	1579
Bridgeview, Inc. & BVW Acquiring Corp.	1949
J. C. Brush	258
Carl E. Brunecke	1498
C & K Coal Company (8/26/91)	1484
C & K Coal Company (10/1/91)	1604
Cambria Coal Company	361
The Carbon/Graphite Group, Inc. (2/19/91)	234

The Carbon/Graphite Group, Inc. (3/22/91). 461

The Carbon/Graphite Group, Inc. (4/10/91). 620

The Carbon/Graphite Group, Inc. (4/19/91). 668

The Carbon/Graphite Group, Inc. (4/23/91). 690

The Carbon/Graphite Group, Inc. (4/24/91). 704

Borough of Catasauqua 1537

Centre Lime and Stone Company, Inc. 1144

Chevron U.S.A., Inc. 1635

City of Bethlehem 224

City of Harrisburg (1/30/91) (Joint Motion for Reconsideration). . . . 87

City of Harrisburg (1/30/91) (Pending Motions Regarding Discovery) . . 94

Clements Waste Services, Inc., et al. (4/29/91). 712

Clements Waste Services, Inc., Recycling Works, Inc. and Brian Clements (5/17/91) 806

George A. Clopper 1914

Coalition of Religious and Civic Organizations, Inc. (CORCO) 631

Frank Colombo, d/b/a Colombo Transportation Services and Northeast Truck Center, Inc. et al. and Northeast Rental Corporation d/b/a Colombo Transportation Lines . . 370

Concerned Citizens of Earl Township, et al. (1/7/91) 18

Concerned Citizens of Earl Township, et al. (7/12/91). 1167

Louis Costanza t/d/b/a Elephant Septic Tank Service (5/13/91). 780

Louis Costanza t/d/b/a Elephant Septic Tank Service (7/3/91) 1132

County of Schuylkill, et al. 1

Cratty, Gower & Hyduke, Inc. c/o Diamond Coal & Coke Co. 979

Croner, Inc. (11/20/91) 1828

Croner, Inc. (12/30/91) 2019

Darmac Coal, Inc. 1883
Davis Coal (2/21/91) 270
Davis Coal (12/12/91). 1908
DER v. Allegro Oil & Gas Co. 34
DER v. Monessen, Inc. 568
DER v. U.S. Wrecking, Inc. (4/17/91) 645
DER v. U.S. Wrecking, Inc. (10/23/91). 1704
Diamond Fuel Company 897
George Skip Dunlap 1562
Borough of Dunmore 1918
Eagle Crest Development, Ltd. 266
East Penn Manufacturing Company. 277
Edgewater Municipal Utilities Authority. 1600
Empire Sanitary Landfill, Inc. (1/24/91) 66
Empire Sanitary Landfill, Inc. (1/30/91) 102
Empire Sanitary Landfill, Inc. (9/17/91) (Motion to Exclude Evidence). 1567
Empire Sanitary Landfill, Inc. (9/17/91) (Motion for Summary Judgment) 1572
Environmental Neighbors' United Front, et al. 1891
E. P. Bender Coal Company (5/14/91) 790
E. P. Bender Coal Company (6/17/91) 969
Estate of Charles Peters, Jane P. Albrecht, & Linda P. Pipher (4/17/91) 653
Estate of Charles Peters, Jane P. Albrecht, & Linda P. Pipher (5/24/91) 837
Falcon Oil Company, Inc. 1503
F.A.W. Associates 601
William Fiore, d/b/a Municipal and Industrial Disposal Company 785
The Florence Mining Company 1301
Borough of Ford City 169

Franconia Township 1290

Robert F. Freeauf 1421

Fry Communications, Inc. 1895

Ganzer Sand & Gravel, Inc. (3/20/91) 430

Ganzer Sand & Gravel, Inc. (6/13/91) 957

Ganzer Sand & Gravel, Inc. (8/5/91) 1371

Glendon Energy Company 182

Grand Central Sanitary Landfill, Inc. 1160

Greenbriar Associates 1638

City of Harrisburg (1/30/91) (Joint Motion for Reconsideration). . . . 87

City of Harrisburg (1/30/91) Pending Motions Regarding Discovery). . . 94

Lawrence W. Hartpence and Imogene Knoll t/b/a Hydro-Clean, Inc.
and Tri-Cycle, Inc. (4/17/91) 641

Lawrence W. Hartpence and Imogene Knoll t/b/a Hydro-Clean, Inc.
and Tri-Cycle, Inc. (5/31/91) 876

Larry D. Heasley, et al. (3/25/91) 473

Larry D. Heasley, et al. (5/13/91) 772

Larry D. Heasley, et al. (11/7/91) 1758

Melvin J. Hoffer 682

Pauline Hughes 1597

J. C. Hayes, Inc.. 924

Joseph Kaczor 865

Kerry Coal Company 73

Keystone Coal Mining Corporation 1655

Kirila Contractors, Inc. 13

Morton Kise, et al. 1138

Lehigh Township, Wayne County (9/6/91) 1531

Lehigh Township, Wayne County (11/13/91) 1795

Alpert P. Leonardi & Hubert D. Taylor 699

George Matusavige 1555

McDonald Land & Mining Company, Inc. (1/31/91) 129

McDonald Land & Mining Company, Inc. (7/25/91) 1226

McDonald Land & Mining Company, Inc. and Sky Haven Coal, Inc. (7/29/91) 1230

McDonald Land & Mining Co., Inc. (10/1/91) 1610

McKees Rocks Forging, Inc. (3/15/91) 405

McKees Rocks Forging, Inc. (5/1/91) 730

McKees Rocks Forging, Inc. (8/1/91) 1313

Mil-Toon Development Group 209

Modern Trash Removal of York, Inc. (4/30/91) 726

Modern Trash Removal of York, Inc. (6/3/91) 879

DER v. Monessen, Inc. 568

Montgomery County (3/20/91). 435

Montgomery County (4/12/91). 625

Montgomery County (8/2/91) 1341

Montgomery County (12/3/91). 1874

Montgomery County (12/19/91) 2004

Montgomery County (12/23/91) 2013

Montgomery County, Clements Waste Service, Inc., Recycling Works, Inc. and Brian Clements (6/6/91). 906

Municipal Authority of the Borough of St. Marys (3/12/91). 391

Municipal Authority of the Borough of St. Marys (3/22/91). 450

Mustang Coal & Contracting Corporation 1999

Francis Nashotka, Sr., et al. (88-216-M); Lawrence Hartpence & Imogene Knoll (89-033-M); Lawrence Hartpence & Imogene Knoll t/b/a Hydro-Clean, Inc. & Tri-Cycle, Inc. (90-028-MR). 1900

Navy Ships Parts Control Center 198
New Hanover Corporation (3/21/91) (Montgomery County Intervention) . . 440
New Hanover Corporation (3/21/91) (New Hanover Township Intervention). 445
New Hanover Corporation (5/14/91) 800
New Hanover Corporation (5/29/91) 859
New Hanover Corporation (6/14/91) (Amending decision dated 5/29/91). . 963
New Hanover Corporation (6/19/91) 975
New Hanover Corporation (6/21/91) 1020
New Hanover Corporation (7/3/91) 1127
New Hanover Corporation (7/19/91) 1185
New Hanover Corporation (8/9/91) 1395
New Hanover Township & Paradise Watch Dogs 1234
Edgar Newman, Jr. 1508
North American Oil & Gas Drilling Company, Inc. (1/7/91) 22
North American Oil & Gas Drilling Company, Inc. (1/8/91) 46
Carl Oermann 1943
Paradise Township Citizens Committee, Inc., et al. 1647
Parker Oil Co. 1180
Parker Township Board of Supervisors 1724
Pennsylvania Public Interest Research Group, Inc. 1171
Pennsylvania Mines Corporation (8/2/91). 1348
Pennsylvania Mines Corporation (11/12/91). 1790
Estate of Charles Peters, Jane P. Albrecht, & Linda P. Pipher (4/17/91) 653
Estate of Charles Peters, Jane P. Albrecht, & Linda P. Pipher (5/24/91) 837
Phoenix Resources, Inc. 1681
P.O.E., Inc. 1492
Township of Potter 564

Power Operating Co., Inc. 1015
William Ramagosa, Sr., et al. (6/4/91) 889
William Ramagosa, Sr., et al. (8/23/91). 1427
William Ramagosa, Sr., et al. (9/9/91) 1535
William Ramagosa, Sr., et al. (10/28/91) 1720
William Ramagosa, Sr., et al. (12/12/91) 1904
Carol Rannels 1523
Raymark Industries, Inc., et al. 186
Cecelia and Tony Recklitis 365
S. A. Kele Associates 854
County of Schuylkill 1
Schuylkill Township Civic Assoiation 483
S. H. Bell Company 587
Shipman Sanitation Service, Inc. 61
Edward Simon 765
Fern E. Smith 1116
Richard Smith t/a Acme Drilling Company 1753
Harlan J. Snyder and Fred Eyrich 1558
Solomon Run Community Action Committee 1660
South Fayette Township 900
Clayton Stine 398
Hubert D. Taylor 1926
Township of Potter 564
University Area Joint Authority 893
U.S.P.C.I. of Pennsylvania, Inc. 1728
DER v. U.S. Wrecking, Inc. (4/17/91) 645

DER v. U.S. Wrecking, Inc. (10/23/91). 1704
Washington Township Concerned Citizens (2/8/91). 205
Washington Township Concerned Citizens (10/17/91). 1687
Westinghouse Electric Corp. (3/1/91) 353
Willowbrook Mining Company (1/8/91) 52
Willowbrook Mining Company (3/12/91) 376
Willowbrook Mining Company (3/27/91) 478
Willowbrook Mining Company (4/1/91) 507
Willowbrook Mining Company (5/7/91) 761
Willowbrook Mining Company (6/6/91) 917
James E. Wood 1156
Wood Processors, Inc., et al. 607
Wesley H. Young, Carole O. Young, and James Au 1323
Andrew J. and Georgia V. Zetts 1583

1991 DECISIONS

Administrative Code

§1921-(A)(b)--865

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

regulations

25 Pa. Code, Chapter 123 (Standards for Contaminants)

Odor emissions (123.31)--1572

Visible emissions (123.4-123.46)--1218

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

Subchapter A: Plan Approval and Permits--631

Subchapter B: Coke Oven Battery Abatement Plans--631, 1218

25 Pa. Code, Chapter 137 (Air Pollution Episode Standby Plans)--631

Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. §1406.1 et seq.--1348

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

civil penalties (691.605)--34, 821

Appeal bond/prepayment of penalty--897

definitions--1610

DER approval of plans, designs, and relevant data (691.308)--1234

DER enforcement orders (691.210, 691.610)--1063

discharge of industrial waste (691.301, 691.303-307)--514

operation of mines (691.315)--1226, 1610

bonds--1421

operator responsibility for pre-existing discharges--1063

other pollutants (691.401)--1063

powers and duties of DER (691.5)

inspection-open fields doctrine--1883

regulations

25 Pa. Code, Chapter 92-NPDES

Application for permits (92.21-92.25)--150

approval of applications (92.31)--1635

monitoring by permittee (92.41)--1635

NPDES permits (92.81-92.83)--1635

25 Pa. Code, Chapter 93-Water Quality Standards

application of water quality standards to discharge of pollutants (93.5)--1635

25 Pa. Code, Chapter 95-Wastewater Treatment Requirements

waste load allocations (95.3)--1635

responsibilities of landowners and occupiers (691.316)--234, 249, 514, 1063, 1313, 1381, 1610, 1667, 1811, 1856

unlawful conduct (691.611)--398

Cost Act (Award of fees/expenses for Administrative Agency Actions) 71 P.S. §2031-2035

prevailing party--357

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

permits (693.6-693.9)

compliance with regulations of Pa. Fish Commission--1691

notice requirement--1234, 1562

regulations (25 Pa. Code, Chapter 105, 106)

wetlands

definition/determination--1191, 1691

permits--1191

restoration--1191

Decertification Act, 54 P.S. §11--865

Defenses

compliance coerced--287

corporate veil--607

estoppel--969, 1331, 1381

sovereign immunity--198

waiver--150

Department of Environmental Resources--Powers and Duties

abuse of discretion--1, 150, 287, 546, 935, 1542, 1587

actions taken pursuant to §1915 Administrative Code (71 P.S. §510-515)--865

actions taken pursuant to §1917-A of Administrative Code (71 P.S. §510-517)--1348

administrative compliance orders--1348

duty to consider economic effects--1381, 1758

duty to enforce regulations--169, 209

duty to consider traffic effects of permit grant--1758

duty to provide reasons for permit denial--1374

power to enforce a policy not enacted into regulation--2019

pre-emption--198

presumption of validity of regulation--2019

prosecutorial discretion--205, 370, 730, 765, 917, 969, 1116

supremacy over local law--1138, 1758

Environmental Hearing Board--Practice and Procedure

amendment of pleadings and notice of appeal--186, 601

amicus curiae--1891

appealable actions--169, 205, 587, 765, 790, 854, 1116, 1132, 1681

appeal nunc pro tunc--13, 365, 564, 1180, 1503, 1638

burden of proof

Coal Refuse Disposal Control Act--1691

Gas Operations Act--150, 740

Surface Mining Conservation and Reclamation Act--412, 1707

25 Pa. Code 21.101--494, 1191

civil penalties--987, 1433, 1542, 1999

in general, party asserting affirmative of issue--704, 1122, 1445, 1856, 1908

orders to abate pollution or nuisance (21.101(b)(3) and 21.101(d) and 21.101(e))--704, 1063, 1667, 1734, 1956

shifting burden of proof--704, 1908

third party appeals of license or permit issuance--214, 1926

certification of interlocutory appeal--461, 876, 1371, 1523, 1604, 1904

clarification of Board order--1635

collateral estoppel--935, 957

collateral attack on a DER order--483, 979, 1926

compulsory non-suit--1, 1926

consent adjudications, decrees, and agreements--1900

demurrer--22, 568, 1704

discovery-889

completion of discovery--73, 94, 353, 391, 847, 1167, 1498, 1535, 1558, 1567

depositions--376, 975, 1427

entry for inspection and other purposes-1883

experts--391, 620, 975, 1301, 1445

motion to compel answers--1167, 1537, 1655

interrogatories

agreements regarding discovery-653

motion to compel--18, 52, 376, 391, 450, 620, 653, 699, 837, 1144, 1537, 1790

privileges--649

attorney-client--376, 641, 1185, 1395

work product--376

production of documents and things--87

motion to compel--649, 1144

protective orders--975, 1395, 1883

relevancy--641, 653, 837

requests for admissions--73, 473, 1484, 1498

sanctions--94, 699, 847, 1427, 1883

scope of discovery--2013

stipulations--686

subpoenas--1395

dismissal of appeal--1914

dissenting opinion--987, 1943

evidence--494, 514

experts--353, 1799

relevancy--631

failure to comply with Board order--682, 1445

failure to prosecute appeal--1156

finality--662, 785, 790, 979, 1063, 1234, 1301, 1847, 1874

intervention--435, 440, 445, 625, 662, 712, 726, 761, 800, 806, 859, 906, 917, 1020, 1323

joinder--405, 1724

judgment on pleadings--22, 27, 169, 1015, 1381, 1908

judicial notice--1348

jurisdiction--214, 365, 405, 483, 662, 1132, 1138, 1508, 1531, 1555, 1724, 1728, 1874, 1900

mootness--146, 483, 631, 1127, 2004

factor in assessing future penalty--1512

no relief available--66, 370, 1579

motion to dismiss--730, 772, 897, 1015, 1492, 1555, 1949, 2004

motion to limit issues--61, 507, 668, 900, 1301, 1492, 1908

motion to strike--182, 1600, 1891, 2013

notice of appeal--186, 893

issue preclusion--61, 73, 234, 668, 690, 1191, 1313, 1402, 1600

perfection of appeal--186, 1949

parties--712, 1891

post-hearing brief--412, 514

powers of the Board--287, 478

adjudication of cold record--412, 1063

declaratory relief--780, 2004

pre-hearing memorandum--631, 1445, 1600

preliminary objections--568

pro se appellant--1116, 1660, 1926

reconsideration--258, 601, 900, 1720, 1895, 2019

exceptional circumstances--87, 1523, 1562, 1943

interlocutory order--186, 361, 690

new evidence--1999

remand--2019

reopening of record--1230, 1660

res judicata--287, 935, 957

ripeness--2004

sanctions--645, 1122, 1156, 1445, 1567

scope of review--1492, 1811, 1856

service--73

standard of review--87

standing--772, 900, 1758, 1828, 2004

stay of Board proceeding--1341

summary judgment--46, 73, 270, 430, 478, 483, 501, 785, 790, 969, 1116, 1171, 1226, 1290, 1301, 1313, 1421, 1484, 1572, 1758, 1828, 1918

affidavits--979, 1874

appeal sustained--1218

statute vs. policy--686

statutory construction--587

supersedeas--102, 129, 209, 224, 234, 249, 277, 398, 607, 734, 816, 865, 924, 1160, 1348, 1583, 1610, 1728, 1753

stay of judicial order--224

timeliness of filing of notice of appeal--246, 765, 1508, 1531, 1555, 1597, 1647

verification--806

waiver of issues--182, 412, 821, 1122, 1512, 1758, 1856

Federal Law

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

interrelationship with state law

sovereign immunity, waiver of--198

Clean Water Act (33 U.S.C. §1281-1297)

costs--1234

sovereign immunity--198

regulations (40 CFR)--277

intake credits (122.45(g))--1025

Resource Conservation and Recovery Act (42 U.S.C. §6901 et seq.)

interrelationship with state law

sovereign immunity, waiver of--198

Hazardous Sites Cleanup Act, 35 P.S. §6020.101 et seq.--1381

Municipal Waste Planning, Recycling, and Waste Reduction Act, 53 P.S. §4000.101 et seq.--169, 734

Chapter 11: Assistance to municipality--102

fees--879

municipalities--1918

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

civil penalties (3321)--1914

Oil and Gas Act, 58 P.S. §5601.101

civil penalties--34, 821

Pennsylvania Constitution

Article I, §27--287, 935, 1234, 1758

Pennsylvania Rules of Civil Procedure

default adjudication (Rule 1037)--34

Pennsylvania Safe Drinking Water Act, 35 P.S. 721.1 et seq.--209

penalties and remedies

amount of civil penalties--1542

regulations (25 Pa. Code §109)

definition "Bottled Water System" (109.1)--1523

general requirements (109.4)--1542

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

definitions--1402

official plans (750.3)--1402

permits (750.7)--546

powers/duties-DER (750.10)--546
regulations
25 Pa. Code, Chapter 71: Administration of
Sewage Facilities Program
Subchapter B: 71.11-71.26--854, 1138, 1290
Subchapter C: 71.31-71.63--1402
sewage enforcement officers--1402
SWMA 35 P.S. §6018.101 et seq.
bonds (6018.505)--1234, 1512
civil penalties (6018.605)--987, 1433, 1587
definitions--277, 734, 987
storage facility--494
transfer facility--587
enforcement orders--1734, 1847
Governor's 1989 Executive Order--102, 169, 1758
legislative findings and policy (6018.102)--102
permits--1758
grant denial--102
municipal waste--1758
required (6018.501(a))--494
residual waste--587, 1734
recommendations of a local governing body (6018.504)--1234
regulations
25 Pa. Code, Chapter 75: Solid Waste Management
Subchapter C: Permits and Standards (75.21-75.38)--935
Subchapter D: Hazardous Waste (75.259-75.267)--1847

25 Pa. Code, Chapter 271: Municipal Waste Management--987
continued operation under prior permit (271.112)--224
insurance (271.371)--1758
mandatory closure (271.113)--169
permit exclusion for clean fill (271.101(b))--398
transition scheme (271.111)--224, 816
25 Pa. Code, Chapter 273: Municipal Waste Landfills--1572, 1758
Subchapter A: Operating Requirements (§201 et seq.)--1160
Subchapter D: Special Handling Requirements (§401 et seq.)--1160
25 Pa. Code, Chapter 283: Resource Recovery/Processing Facilities)
storage, collection, transport--734
residual waste
disposal, processing, storage (6018.302)--1734
unlawful conduct--1433
Statutory Construction Act, 1 Pa. C.S.A. §1501 et seq.--494
legislative intent controls (§1921)--287, 1610
presumptions in ascertaining legislative intent (§1922)--287
Storage Tank and Spill Prevention Act, 35 P.S. 6021.101--1811
definitions (§103)--924
enforcement (Chapter 13)
responsibility of owners/operators (1302)--924
Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1, et seq.
bonds (1396.4(d)-(j))
forfeiture (1396.4(h))--979
per acre liability--412
violation of reclamation requirements--412
partial release (1396.4(g))--214, 1421

civil penalties (1396.22)--1331

prepayment requirement--897

DER right of entry (1396.4c)--1883

designation of areas unsuitable for mining (1396.4e)

notice/comment requirements--740

enforcement orders--1063

health and safety (1396.4b)

abatement of nuisances (1396.4b(a))--1828

blasting (1396.4b(b))--1828

mining within prohibited distance of certain structures (1396.4b(c))-1828

off-site discharges and operator's responsibility for cleanup--1753, 1956

permits (1396.4)--1191

content of permit application (1396.4(a))--1883

regulations

25 Pa. Code, Chapter 86: Surface and Underground Coal Mining-General--740

Subchapter F: Bonding and Insurance Requirements (86.141-185)--214, 1421

Subchapter G: Civil Penalties for Coal Mining (86.191-86.203)--1707

25 Pa. Code, Chapter 87: Surface Mining of Coal

Subchapter D: Minimum Requirements for Operation and Reclamation Plan--1063, 1908

Subchapter E: Minimum Environmental Standards--270, 412, 1610

U.S. Constitution

commerce clause--102

due process--102

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

water allocation permits--287

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

COUNTY OF SCHUYLKILL, et al.	:	
	:	
v.	:	**EHB Docket No. 90-124-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and CITY OF LEBANON AUTHORITY, Permittee	:	**Issued:** January 3, 1991

OPINION AND ORDER
SUR MOTION FOR NON-SUIT

By Maxine Woelfling, Chairman

Synopsis

A permittee's motion for non-suit is granted where the appellants failed to make a *prima facie* case that the Department of Environmental Resources (Department) abused its discretion in reissuing a permit after remand from the Board. Appellants relied solely on the Department's Report of Decision (ROD) and their interpretation of the Board's previous adjudication; they presented no testimony or other documentary evidence.

The Board is not bound by the prohibition in Pa.R.C.P. No. 230.1 against granting a motion for compulsory non-suit after a defendant puts in evidence because of the differences between practice before the Courts and practice before the Board.

DISCUSSION

This matter was initiated with the March 22, 1990, filing of a notice of appeal by the County of Schuylkill, Tremont Township, and the Pine Grove

Area School District (collectively, County), seeking review of the Department's February 23, 1990, ROD reissuing a permit for the construction and operation of the Christian E. Siegrist Dam (Dam) to the City of Lebanon Authority (Lebanon) pursuant to the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 *et seq.* (DSEA). In its appeal, the County argued that the Department abused its discretion and acted arbitrarily, capriciously and in violation of the law by ignoring the Board's directives for re-evaluating the permit on remand set forth in County of Schuylkill v. DER, 1989 EHB 1241 (Schuylkill I).

The procedural history is recounted in further detail in the most recent opinion issued in this case, and, therefore, we will not repeat it here. County of Schuylkill et al. v. DER and City of Lebanon Authority, EHB Docket No. 90-124-W (Opinion issued November 6, 1990).

A hearing on the merits was held on November 13, 1990. The County rested its case after the admission into evidence of the ROD; no testimony was presented by the County. Lebanon immediately made a motion for non-suit, which was joined by the Department.

The County responded to Lebanon's motion by asserting that it had, through the ROD, established a *prima facie* case that the Department failed to comply with its mandatory duty under Schuylkill I to balance the harm versus the benefits of the Dam and evaluate alternatives (N.T. 29). The County maintained that the issue before the Board was not whether the Department had abused its discretion in reissuing the permit, but, rather, whether the Department had balanced the benefits of the Dam against the significant harm found by the Board in Schuylkill I and evaluated alternatives (N.T. 20).

Chairman Woelfling then advised the parties that she, as a single Board Member, could not grant Lebanon's motion and that the hearing could

either go forward or be recessed in order for the entire Board to consider the motion. Lebanon responded that in light of the time pressures associated with the financing and construction of the Dam, it would proceed with the presentation of its case on the merits (N.T. 30). The Department concurred (N.T. 30), and the County expressed no preference (N.T. 30). Thereafter, the hearing on the merits proceeded.

On November 15, 1990, Lebanon filed a written motion for non-suit, arguing that the ROD, on its face, does not establish any abuse of discretion by the Department and that, as a result, the County failed to sustain its burden of proof under 25 Pa.Code §21.101(c). In support of this contention, Lebanon asserts that this balancing is required under §105.16(a) only if the Department finds that significant environmental harm will occur. The ROD, however, states that the only potential environmental harm found was mitigated and there was found to be no impact upon mineral resources within the watershed (ROD, at 13-14). Secondly, Lebanon disagrees with the County's interpretation of the Board's findings in Schuylkill I, asserting that the decision neither precluded the Department from exercising its discretion in making an independent assessment of the environmental impact of the mineral resources in the watershed nor directed the Department only to conduct the balancing required by §105.16(a).

On December 3, 1990, the County filed its brief in opposition to Lebanon's motion, arguing that the motion for non-suit was improper because it could not be granted once the moving party, Lebanon, put in its own case. Based on its interpretation of Schuylkill I, the County asserts that Lebanon's motion must also fail on the merits. Because the Board already found in Schuylkill I that the Dam would have a significant impact on natural resources, the County claims that the ROD demonstrates that the Department

failed, in the remand, to balance the harm and the benefits of the Dam, minimize environmental harm, and examine alternatives, as required by 25 Pa.Code §105.16 and Article I, §27 of the Pennsylvania Constitution.

On December 5, 1990, Lebanon replied to the County's brief, citing instances where motions for non-suit were granted after the introduction of evidence by the non-moving party and questioning whether the Board, given the nature of its proceedings, was bound by the precedents relating to non-suits.

Before we address the merits of Lebanon's motion for non-suit, we will dispose of the County's contention that the Board has no authority to grant a non-suit here because Lebanon presented its case-in-chief. The Board has evaluated motions to dismiss/sustain appeal[1] made at close of a party's presentation of its evidence in light of the standards for grant of a compulsory non-suit under the Pennsylvania Rules of Civil Procedure, Michael and Karen L. Welteroth v. DER and Clinton Township Board of Supervisors, 1989 EHB 1017, 1022. But, in doing so, it cannot be implied that the Pennsylvania Rules of Civil Procedure are applicable, in their entirety, to proceedings before the Board. That simply is not the case, for proceedings before the Board are governed by the Administrative Agency Law, 2 Pa.C.S. Ch.5, Subch.A. There are instances where proceedings before the Board are governed by the Rules of Civil Procedure - *e.g.*, certain aspects of discovery - or where the reviewing courts have held that the Board may take actions set forth in the Rules of Civil Procedure - *e.g.*, entry of summary judgment. Here, the Rules of Civil Procedure relating to non-suit cannot be absolutely applied, for a single Board Member sitting as Administrative Law Judge could not, like a judge of the Courts of Common Pleas, grant a motion for non-suit, since the

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[1] Depending on which party bears the burden of proof.

Board's rules of practice and procedure require a majority of Board Members to enter a final order, 25 Pa.Code §21.86. See Clearfield Municipal Authority v. DER and E. M. Brown, Inc., 1989 EHB 627.

Even if we were to hold that Pa.R.C.P. No. 230.1 is, in its entirety, binding upon the Board in ruling on a motion for non-suit, the Board would not be precluded from granting Lebanon's motion because the appellate courts have held expediency or judicial economy may dictate going forward with the defendant's case where a motion for compulsory non-suit has been made. In the case of Kukich v. Serbian Eastern Orthodox Church of Pittsburgh, 415 Pa. 28, 202 A.2d 77 (1964), the Pennsylvania Supreme Court examined such a situation and concluded:

> A close examination of the record discloses additional fallacy in the above contention. When plaintiffs - appellant's case was finished except for the testimony of a vital witness who was out of the state and unavailable, the court continued the hearing and fixed a subsequent date for the accommodation of this witness. After three such dates for hearing had been scheduled, and two months had past without this testimony being available, the chancellor in the interest of expediency directed that the defendants proceed without prejudice and reserving the right to apply for a compulsory non-suit, when the plaintiffs - appellant's testimony was in fact completed. To this, all counsel agreed. It was after the plaintiffs had completed their case-in-chief that the judgment was entered without consideration being given to the evidence of the defendants. Under such circumstances, the chancellor clearly had the power to enter the compulsory non-suit.

415 Pa. at 29-30 (emphasis added). See also, Target Sportswear, Inc. v. Clearfield Foundation, 327 Pa.Super.1, 474 A.2d 1142 (1984).

The situation here is not much different than that in Kukich. The sitting Board Member could not grant the motion on her own and swift disposition of the appeal was required because of financing and contracting

considerations for the Dam. Furthermore, the parties were presented with the option of recessing the hearing to consider the motion for non-suit, but chose, instead, to proceed due to time pressure. The County did not contest this decision at the hearing and responded that it had no preference (N.T. 30). Accordingly, it does not appear that the County was prejudiced in any way by this course of action.

We will proceed to the merits of the motion. In this third-party appeal of the Department's reissuance of the permit for the Dam, the County bears the burden of proving by a preponderance of the evidence that the Department abused its discretion, 25 Pa.Code §21.101(c)(3). Where a party with the burden of proof and the initial burden of proceeding fails to make out a *prima facie* case, the Board may grant a motion to dismiss made by the opposing party at the close of the presentation of evidence,[2] Welteroth, *supra*. The motion must be viewed in the light most favorable to the non-moving party, Swistock, *supra*, and should be granted only where the non-moving party's case is clearly insufficient, Clearfield Municipal Authority, *supra*. The grant of Lebanon's motion here is warranted, for the County has clearly failed to make out a *prima facie* case in support of its contention that the Department abused its discretion.

As a threshold issue, we must address the County's contention that the Board, in Schuylkill I, already determined that the Dam would have a significant impact, thus triggering the requirements under 25 Pa.Code §105.16 to evaluate the harms versus the benefits of the project, possible mitigation methods, and any available alternatives. The County argues that this became a

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[2] In the case where the Department bears the burden of proof and fails to make out a *prima facie* case after the presentation of its evidence, the motion would be a motion to sustain appeal, Swistock Associates v. DER, 1989 EHB 346.

mandatory duty under the remand order, the regulation cited above, and Article I, §27 of the Pennsylvania Constitution. The County alleges that Schuylkill I makes this mandatory duty very clear and the issue of significant impact need not be relitigated. As a result, the County maintains that abuse of discretion by the Department is not at issue; the only remaining issue is whether or not the Department complied with its mandatory duty.

We disagree with the County's characterization of Schuylkill I, and we do not interpret its remand order and intent so narrowly. We believe Schuylkill I instructed the Department to re-evaluate its assessment upon upstream landowners in the watershed, including future development of mineral resources, in a more thorough manner pursuant to 25 Pa.Code §105.16.

It is misleading to read the text and footnote on page 1281 of Schuylkill I in a vacuum. The County relies on the passage which states: "Of concern, however, is the Department's evaluation of the public economic and social benefits of the project under 25 Pa.Code §105.16(a) in light of the significant impact of the project on natural resources in the watershed." The related footnote provides: "We are not suggesting that the Department must evaluate the effect of a project permitted under the DSEA on every conceivable land use and landowner in the watershed. What we hold is that there is a significant impact on mineral resources in light of the fact that the County and GMP own surface and/or coal rights to nearly 40% of the land in the watershed."

When read in the context of the entire adjudication, as it must be, this reference has a much broader meaning. There are critical portions of the adjudication which point out difficulties and issues on which the Board could

not substitute its own discretion for that of the Department because there was insufficient evidence on the record relating to the impact of the Dam and its benefits. In particular,

> The Board has the authority, when it finds that the Department has abused its discretion, to substitute its discretion for the Department's and make a determination on the basis of the record before it. <u>However, we will not step into the Department's shoes when we have insufficient evidence to make such a determination as we believe the case to be here</u>.
>
> <u>Schuylkill I</u>, at page 1281.
> (emphasis added).

We believe the adjudication did not limit the Department to conducting a balancing analysis under 25 Pa.Code §105.16(a) without making a determination of whether or not the Dam would have an adverse impact upon mineral resources in the watershed. The specific wording of the Board's remand order is instructive:

> We will remand this matter to the Department to make an <u>assessment of the Christian E. Siegrist Dam's effect on future development of the watershed, including mineral resource development</u>, <u>and</u> reach a conclusion pursuant to 25 Pa.Code §105.16.
>
> <u>Schuylkill I</u>, pages 1281-82.
> (emphasis added)

Here, the Board was requiring the Department to make the proper environmental assessment on remand, including a determination of significant impact, choosing not to substitute its own discretion when faced with such an incomplete record.

In light of our determination that the Department was left with the discretionary determination of whether or not the Dam will result in

significant impact, we must evaluate its undertaking. Lebanon, in its motion for non-suit, maintains the ROD evidences the Department's compliance with the remand order. We agree.

The relevant regulation, 25 Pa.Code §105.16(a), provides that:

> The determination of whether the potential for significant environmental harm exists will be made by the Department after consultation with the applicant and other concerned governmental agencies. <u>If the Department determines that there may be a significant impact on natural, scenic, historic, or aesthetic values of the environment, the Department will consult with the applicant to examine ways to reduce the environmental harm to a minimum. If, after consideration of mitigation measures, the Department finds that significant environmental harm will occur, the Department will evaluate the public social and economic benefits of the project to determine whether the harm outweighs the benefits</u>.
>
> (emphasis added)

The ROD contained an extensive evaluation of the impact of the Dam on natural, scenic, historic, and aesthetic values of the environment, addressing, *inter alia*, land ownership in the watershed, coal reserves, land use, and mineral resource development potential in the watershed. Based upon this evaluation, the Department concluded that the Dam would not have a significant impact on natural, scenic, historic, or aesthetic values (ROD, at 13). Because the Department determined that the Dam would have no significant impact on the environment, the Department was not required by 25 Pa.Code §105.16 to reduce environmental harm to a minimum or balance the harms against the benefits.[3] The County presented no evidence to counter either the Department's

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[3] However, the Department did conclude that the public, social and economic benefits of the Dam outweigh any harm (ROD, at 14).

assumptions or its conclusions in reaching its finding that the Dam would have no significant impact on the environment. It follows then that its claims regarding minimizing harm and balancing harm against benefits must fail.

The County also contends that the Department erred in failing to consider alternatives to the Dam, because the ROD concluded, "It is not necessary to consider alternatives where there is no harm from a project." (ROD, at 14). The Department is authorized by 25 Pa.Code §105.15(b)(2) to require, during the course of its review of an environmental assessment, the submission of additional information concerning "alternatives to the proposed action including alternative locations, routings or designs to avoid or reduce significant adverse environmental impacts." Again, since the Department concluded that there would be no significant adverse environmental impact, it was not required to request additional information on alternatives, much less evaluate them.[4]

The Department satisfied its obligation upon remand to perform an assessment pursuant to 25 Pa.Code §105.16 and we cannot conclude, on the face of the ROD, that the Department abused its discretion in deciding to reissue the permit. As a result, Lebanon's motion for non-suit must be granted.

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[4] In any event, Findings of Fact 131 to 133 in Schuylkill I address alternative water supply sources.

O R D E R

AND NOW, this 3rd day of January, 1991, it is ordered that the City of Lebanon Authority's motion for non-suit is granted and the appeal of Schuylkill County, et al. is dismissed.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

Board Member Terrance J. Fitzpatrick did not participate in this decision.

DATED: January 3, 1991

cc: See following page.

cc: **Bureau of Litigation**
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Eastern Region
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M. DIANE SMITH
SECRETARY TO THE BO

KIRILA CONTRACTORS, INC.	:	**EHB Docket No. 90-471-E**
	:	**2/26/88 Assessment of Civil**
v.	:	**Penalty**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: January 3, 1991**

OPINION AND ORDER
SUR PETITION TO FILE APPEAL
NUNC PRO TUNC

By: Richard S. Ehmann, Member

Synopsis

Where Appellant's Petition To File Appeal Nunc Pro Tunc fails to set forth any ground for its failure to timely appeal from a civil penalty assessment other than Appellant's confusion over whether its settlement of another assessment settled both assessments, it fails to state grounds on which its Petition can be granted.

OPINION

According to the Petition To File Appeal Nunc Pro Tunc filed on November 1, 1990, on behalf of Kirila Contractors, Inc. ("Kirila"), on June 18, 1987, the Department of Environmental Resources ("DER") issued a civil penalty assessment in the amount of $3,500 against Kirila under the Non-coal Surface Mining Conservation and Reclamation Act, the Act of December 19, 1984, P.L. 1093, No. 219, as amended, 52 P.S.§3301 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.[1] DER's assessment was based upon Kirila's violation of a DER Compliance Order bearing DER number 86-K-227-N. In response to this civil penalty assessment by DER, Kirila appealed to this Board, and its appeal received Docket No. 87-282-MJ.

On February 26, 1988, DER issued another civil penalty assessment against Kirila in the amount of $22,500. No timely appeal to this Board was taken by Kirila, which now seeks leave to take an appeal therefrom nunc pro tunc.

In the period between Kirila's filing of the appeal at our Docket No. 87-282-MJ and February 26, 1988, nothing is alleged in Kirila's Petition to have happened which is of any consequence in the instant matter. The Petition does say that between February 26, 1988 and November 1, 1990, when we received Kirila's Petition, one thing of substance occurred. According to Kirila's Petition, on February 12, 1990, DER and Kirila settled the appeal of Docket No. 87-282-MJ.[2]

As has been said repeatedly in the past, a failure to file an appeal in a timely fashion deprives this Board of the jurisdiction to hear it. Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). Our jurisdiction to hear an untimely appeal does not exist unless we grant a Petition such as that which is now before us in the instant case. For us to

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[1]Kirila's Petition contained two counts seeking leave to appeal nunc pro tunc from two different civil penalty assessments. One assessment occurred in 1988. The other occurred in 1990. Accordingly, we have separated them into two separate appeals. The other appeal is docketed at No. 90-488-E. Our response thereto is not addressed herein, but will be addressed in a separate opinion and order.

[2]DER does not dispute any of the above, and our review of the file at Docket No. 87-282-MJ confirms this settlement, as does 20 Pa. Bull. 1758, where notice thereof is published.

grant it, the Petition must meet the requirements of 25 Pa. Code §21.53. While this Petition is in writing, as required by Section 21.53, it fails to aver good cause. Good cause is fraud or the breakdown in Board procedures which contribute to the tardy filing. JEK Construction Co. v. DER, 1987 EHB 643, Mario L. Marcon v. DER and National Waste and Energy Corp., EHB Docket No. 90-078-E (Opinion issued May 8, 1990). No allegation of fraud or breakdown in this Board's procedure exists in the petition.

The Petition alleges Kirila's confusion is the cause of this tardiness. Allegedly, Kirila was confused because it thought the 1990 settlement of the appeal at Docket No. 87-282-MJ settled everything, not just that appeal. As pointed out in DER's Brief, the Consent Order and Adjudication which settled that appeal (attached to DER's response to the Petition) states more than once that it only settles the assessment at Docket No. 87-282-MJ.

Even if we could somehow hold Kirila's confusion over the settlement in 1990 of the 1987 appeal was caused by fraud or a breakdown in our operations, this would not be sufficient reason for us to grant this Petition. Any confusion arising in 1990 about settlement discussions cannot excuse failure to file a timely appeal in 1988 from DER's February 26, 1988 assessment. Kirila's 1990 actions might, if caused by fraud, be an excuse for an untimely filing where a timely filing would also have had to occur in 1990. Here, Kirila had to have appealed the 1988 assessment within thirty days of

receipt of notice of the assessment in order for it to be timely. As a result, events causing this confusion and occurring in 1990 or in 1989 could not constitute cause for granting of this appeal nunc pro tunc.[3]

O R D E R

AND NOW, this 3rd day of January, 1991, the Petition To File Appeal Nunc Pro Tunc filed on behalf of Kirila Contractors, Inc. is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

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[3]If this 1987 matter was settled in February or March of 1990, the allegations of confusion do not explain why Kirila waited until November of 1990 to file its Petition. Had we reached this point, this too, might have forced us to conclude the Petition was too late.

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: January 3, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
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M. DIANE SMITH
SECRETARY TO THE BOARD

CONCERNED CITIZENS OF EARL TOWNSHIP, et al.	:	
V.	:	**EHB Docket No. 88-516-M**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES AND DELAWARE COUNTY SOLID WASTE AUTHORITY, PERMITTEE	:	**Issued: January 7, 1991**

OPINION AND ORDER
SUR
APPELLANT FRANK J. SZARKO'S
SEVENTH MOTION TO COMPEL
AND MOTION FOR SANCTIONS

Robert D. Myers, Member

Synopsis

A Board Order granting a Motion to Compel a deponent to answer deposition questions related to the period subsequent to permit issuance does not authorize other types of discovery into that subject matter.

OPINION

The nature of this consolidated appeal is documented in numerous prior decisions of the Board and will not be repeated here. Before us for resolution is Szarko's Seventh Motion to Compel and Motion for Sanctions, filed on November 21, 1990. Delaware County Solid Waste Authority (DCSWA) filed its Response to the Motions on December 14, 1990; Szarko filed a Reply on December 20, 1990.

The Motions relate to Szarko's Fourth Set of Interrogatories and Fourth Request for Production of Documents, served on DCSWA on September 28,

1990 and pertaining to the period after November 16, 1988, the date of permit issuance. DCSWA filed its Response to these Requests on or about November 6, 1990, setting forth 4 general objections of which the most significant is the fact that discovery had ended. Szarko maintains that the discovery was permitted by the Board's Order of August 23, 1990 and that DCSWA should be sanctioned for its refusal to obey that Order.

This particular discovery dispute had its genesis on April 6, 1990 at the deposition of Robert Keates, an engineer employed by DCSWA. When Szarko's legal counsel asked questions pertaining to the period subsequent to the issuance of the permit on November 16, 1988, DCSWA's legal counsel objected on grounds of relevancy and instructed Keates not to answer. As a result, Szarko filed on May 22, 1990 a Motion to Compel Keates to appear for a continuation of his deposition and to answer questions regarding activities at the landfill after November 16, 1988. DCSWA filed its Response to the Motion on June 15, 1990 and Szarko filed a Reply on June 20, 1990.

While the Motion to Compel Keates was pending, Szarko filed on June 1, 1990 its Sixth Motion to Compel directed against the refusal of both DCSWA and DER to permit discovery into matters subsequent to permit issuance. Before any responses were filed to this Sixth Motion to Compel, the parties engaged in negotiations which were reported to the board in a telephonic conference on June 29, 1990. According to this report, all but one issue had been resolved in connection with the Motion to Compel Keates and the Sixth Motion to Compel. Szarko's legal counsel made a more formal report in a July 3, 1990 letter to the Board, reading in part, as follows:

> Therefore, we request that we be allowed to withdraw the [Sixth Motion to Compel] without prejudice to refile with respect to any matter which may remain unresolved in the future.

* * *

> One matter which all counsel agree will have to be addressed by the Board, is whether post-November 16, 1988, (the date of issuance of the permits) compliance violations issues may be at issue in the hearing on this permit appeal [footnote reference to Motion to Compel Keates], however, the parties have not yet agreed on what the best vehicle is for the determination of that matter.

After further negotiations proved unsuccessful, Szarko's legal counsel wrote to the Board on August 10, 1990 requesting us to rule on the Motion to Compel Keates. We did so in an Order dated August 23, 1990 in which we granted the Motion and explained why certain matters occurring subsequent to permit issuance could be relevant to that deposition. Szarko's Fourth Set of Interrogatories and Fourth Request for Production of Documents, served on DCSWA about a month later, seek information and documents relating to the post-permit issuance period.

Szarko misconstrued our August 23, 1990 Order. We authorized Szarko to continue his deposition of Keates by inquiring into matters occurring subsequent to November 16, 1988. We did not authorize any broader reopening of discovery on that subject, partly because we were not asked to do so. Szarko's Sixth Motion to Compel, which sought an overall ruling on the relevance of the post-permit issuance period for discovery purposes, was withdrawn and never refiled. Szarko cannot use the narrow relief afforded by the granting of the Motion to Compel Keates to launch a general discovery expedition into the subject matter covered by the Sixth Motion to Compel. Our August 23, 1990 Order places Szarko in the same position he would have been in on April 6, 1990 if DCSWA's legal counsel had not directed Keates to refuse to answer - nothing more and nothing less than that.

ORDER

AND NOW, this 7th day of January, 1991, it is ordered that the Seventh Motion to Compel and Motion for Sanctions, filed by Frank J. Szarko on November 21, 1990, are denied.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: January 7, 1991

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOARD

NORTH AMERICAN OIL & GAS DRILLING COMPANY, INC.	:	
v.	:	**EHB Docket No. 90-258-E**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: January 7, 1991**

OPINION AND ORDER
SUR APPELLANT'S MOTION FOR JUDGMENT
ON THE PLEADINGS

Synopsis

North American Oil & Gas Drilling Company, Inc.'s ("North American") Motion for Judgment on the Pleadings is denied.

North American's Motion does not contain the claim contained in its brief in support of its Motion that the Department of Environmental Resources' ("DER") Order is unenforceable because it fails to plead sufficient facts. North American also has not filed any document which could be viewed as Demurrer which this section of North American's brief could be said to be supporting. Absent such Demurrer, we cannot grant the relief. We also would not find in North American's favor on this issue if we were to treat its brief as both a Demurrer and a brief because a DER administrative Order is not a "pleading" which can be demurred to in an appeal therefrom.

As to the "judgment on the pleadings" issue, a Motion for Judgment On The Pleadings is not an appropriate procedural vehicle in this matter, since the

only "pleading" before us is North American's Notice of Appeal and it is the party seeking judgment on the pleadings.

Even assuming arguendo that it is a proper vehicle, North American has failed to show judgment on the pleadings to be warranted. North American did not raise the constitutionality of Section 402 of the Clean Streams Law in its Notice of Appeal. Therefore, that argument is raised in its Motion in an untimely fashion which bars our considering same. Also, this Board is not empowered to declare a statute to be either constitutional or unconstitutional.

Additionally, neither DER's Order nor the Notice of Appeal references the regulations found at 25 Pa. Code Chapter 101. North American's contentions as to Chapter 101 seek a declaratory judgment or advisory opinion from us, since no Chapter 101 regulation is mentioned in DER's Order. We are not empowered to render a declaratory judgment or an advisory opinion. Allegations in North American's Motion regarding Chapter 101 of the regulations have also been raised in an untimely fashion since they do not appear in the Notice of Appeal. This, too, precludes our consideration of the issues concerning Chapter 101. Lastly, North American's argument is that these regulations are unconstitutional because the statute under which they were promulgated is unconstitutional. Since we cannot declare a statute unconstitutional, we cannot sustain this argument.

Finally, North American has made no showing that the regulations found at 25 Pa. Code §§78.55 and 78.57 were promulgated pursuant to Section 402 of the Clean Streams Law. Absent such a showing, judgment on the pleadings as to its remaining arguments is unwarranted and inappropriate.

OPINION

On June 29, 1990, North American filed an appeal with this Board from the DER's issuance to it on June 6, 1990 of an Order addressed to North American's oil and gas production and exploration operations in Pennsylvania. DER's Order first charges North American failed to identify its wells by posting their permit numbers or registration numbers thereon, contrary to certain requirements of the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, as amended, 58 P.S. §601.101 et seq., (Oil and Gas Act), as revealed by inspections conducted by DER personnel in May of 1990. The next section of DER's Order states that North American has abandoned certain oil or gas wells and has failed to plug them, contrary to the Oil and Gas Act and 25 Pa. Code §78.91(a), as revealed in inspections conducted in May of 1990. The final section of findings in DER's Order states that North American is required to control and dispose of brines produced in drilling and operation of wells in a specific manner set forth in the statutes and regulations, particularly 25 Pa. Code §78.57 (a) and (b), but has failed to do so. It states that North American's discharge of brine to the waters of the Commonwealth from the operation of its wells without first having obtained a permit is a violation of Sections 301 and 307 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (Clean Streams Law). DER's Order directs North American (1) to cease the discharge of brine to the waters of the Commonwealth; (2) to submit to DER a plan to eliminate unauthorized brine disposal pits at its oil and gas wells; (3) to submit to DER a plan to plug, operate, or secure inactive status for each of its wells; (4) to submit to DER a plan for future brine disposal in accordance with 25 Pa. Code §78.55; and

(5) to install registration or permit numbers on each of its wells.[1] The only regulations mentioned in DER's Order are 25 Pa. Code §§78.55, 78.57(a), 78.57(b), and 78.91(a).

In its five page Notice of Appeal, North American contends, in part, that its wells are ready to resume production, having stopped only in response to DER admonitions. It also states in part, that DER's regulations are facially unconstitutional, they are void as beyond the scope of the enabling legislation, they are void as promulgated without the prerequisite findings of the enabling legislation, and, as enforced, they are violative of North American's state and federal constitutional rights.

In its Pre-Hearing Memorandum, North American states that its legal contentions are those set forth in its Notice of Appeal and those in its Motion for Judgment On The Pleadings, both of which are incorporated therein by reference. Its Motion For Judgment On The Pleadings was filed simultaneously with its Pre-Hearing Memorandum on October 24, 1990.

In its Motion For Judgment On The Pleadings and supporting Brief, filed October 24, 1990, North American states DER's Order is void and unenforceable because: (1) Section 402 of the Clean Streams Law, supra, ("Section 402"), is unconstitutional; (2) DER's regulations found in 25 Pa. Code §§78.51 to 78.63 and 25 Pa. Code §§101.1 to 101.4 are invalid as having been adopted under this unconstitutional statute section; and (3) these regulations are void and unenforceable for several reasons. North American's Brief in support of its

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[1]DER's Order is issued pursuant to Section 503 of the Oil and Gas Act, 58 P.S. §601.503; Sections 5, 316, 402, 501, and 610 of the Clean Streams Law, 35 P.S. §§691.5, 691.316, 691.402, 691.501, 691.610; and Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 (Administrative Code).

Motion contains six separate segments which address the issues raised in the Motion. The Brief then adds a seventh segment arguing that DER's Order is unenforceable because it fails to plead facts showing how DER found North American's activities constitute a "danger of pollution", and, thus, that DER's Order fails to plead the facts upon which the regulations are made applicable to North American by the findings required by Section 402.

DER's Brief in opposition to North American's Motion argues the regulations at 25 Pa. Code Chapter 78 were promulgated under many statutes and are valid, Section 402 is constitutional, the regulations contain the required findings, the regulations are designed to control activities which present a danger of pollution, Section 402 does not mandate a compliance period in 25 Pa. Code Chapter 78, and DER's Order is legally sufficient.

Initially, we address the section of North American's Brief captioned "VII FAILURE TO STATE A CAUSE OF ACTION". The section argues that DER's Order is unenforceable because it fails to plead sufficient facts. Nothing in North American's Motion make such an assertion, and it has not filed any documents with us which we could call the Demurrer being supported by this section of North American's Brief. Moreover, the filing of North American's Motion predates our receipt of its Brief by four days, which suggests to us this section was either an after-thought or was deleted from North American's Motion and was inadvertently retained in its Brief. In either case, North American's counsel should be sufficiently aware of proper procedure before this Board and in the Courts of Pennsylvania to know that attorneys do not raise an argument for the first time in a supporting brief. Briefs are filed to support contentions advanced initially in motions, preliminary objections, and petitions or to oppose an opponent's responses thereto. We can see no

solid reason, nor has North American provided us with one, to depart from our normal procedure and treat this Brief as if it were both a Motion and Brief. We can see good reasons not to do so, i.e., discouraging parties or their counsel from ignoring our rules and the Pennsylvania Rules of Civil Procedure. Accordingly, except as mentioned immediately below, we will not address Section VII of North American's Brief.

Even if we elected to ignore the lack of a Demurrer and to treat North American's Brief as both such a preliminary objection and Brief, we could not find in North American's favor. This Board is not a Court of Common Pleas but is an administrative tribunal with limited jurisdiction. Our authority to review a DER Order is limited. Accordingly, our procedural rules and powers vary from those of the courts of this state. We may review an Order as to factual and legal issues. North American's brief seriously miscasts the nature of a DER Order and misconstrues this Board's authority to deal with it in the instant appeal where it suggests an Order is a pleading. DER's Order is not a "pleading" under the Pennsylvania Rules of Civil Procedure or any rule of this Board. Which legal filings constitute "pleadings" is spelled out in Pa. R.C.P. 1017 and 25 Pa. Code §§21.64 through 21.66. An administrative order issued by DER is not listed therein. Thus, North American may not demur to it as has been done here. North American might demur to it when, and if, DER were to file a Complaint In Equity seeking to enforce one of its Orders by filing a demurrer to the Complaint, but it may not demur here.[2]

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[2]If North American is convinced, as it alleges, that the Order is fatally flawed, we wonder why it is wasting its time in an appeal from such a terminally imperfect action. If the Order states no "cause of action," as North American urges, then it must be incapable of being successfully enforced (footnote continues)

This brings us to the question of whether there can be a motion for judgment on the pleadings here. It appears questionable to us whether judgment on the pleadings is an appropriate procedural vehicle in this case since the only "pleading"[3] before us is appellant's notice of appeal and it is the party seeking such judgment. We do allow some Motions For Summary Judgment and Motions To Dismiss to be treated as Motions For Judgment On The Pleadings. Upper Allegheny Joint Sanitary Authority v. DER, supra. Such Motions generally deal with allegations in Notice of Appeal and the failure thereof to state a cause of action on behalf of an Appellant. Borough of Dunmore v. DER et al., EHB Docket No. 87-401-F (Opinion issued June 28, 1990) and Winton Consolidated Companies v. DER et al., EHB Docket No. 89-356-E (Opinion issued July 31, 1990). We have treated Motions For Summary Judgment as Motions For Judgment On The Pleadings in cases where the motion can be disposed of by examination of the Notice of Appeal and where both no material facts are in dispute and a hearing would be pointless since the law on the issue is clear. Upper Allegheny, supra. We point this out to show the narrowness of our authority to act in an appeal from a DER Order when compared to the authority of the Courts of Common Pleas. We do not have the power to treat a DER administrative Order as if it were a Complaint filed in a Common Pleas Court for purposes of entertaining the merits of either North American's demurrer thereto or its Motion For Judgment On The Pleadings.

(continued footnote)
by DER. If this is true, how would it have sufficient impact on North American to warrant an appeal?

[3]We have observed that a Notice of Appeal is not a pleading, but for purposes of ruling on a motion for Judgment On The Pleadings, we have treated it as such. Upper Allegheny Joint Sanitary Authority v. DER, 1989 EHB 303.

Even if we assume we may hear the merits of North American's Motion, other roadblocks exist to our granting it. As DER correctly points out, this Board has limited authority as an administrative "court". While we may declare a regulation unconstitutional, we are not empowered to declare Section 402 to be either constitutional or unconstitutional. St. Joe Minerals Corp. v. Goddard, 14 Pa. Cmwlth. 624, 628, 324 A.2d 800 (1974). However, this lack of authorization does not preclude us from other comment on North American's argument as to the constitutionality of Section 402 in this specific appeal. North American has failed to timely raise the constitutionality of Section 402 in this specific appeal. North American failed to raise the constitutionality of Section 402 in its Notice of Appeal and no leave to amend its Notice of Appeal has been granted by this Board to North American. Since this argument first appears in North American's Motion, which we received on October 24, 1990, such an issue was raised in an untimely fashion as it relates to DER's Order dated June 6, 1990. Accordingly, North American is barred from raising this issue in this appeal. Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. Cmwlth 78, 509 A.2d 877 (1989), affirmed, 521 Pa. 121, 555 A.2d 812 (1989).

This same rationale applies to North American's next contention as well. Nothing in either DER's Order or North American's Notice of Appeal references the regulations found at 25 Pa. Code Chapter 101. DER's Order mentions only three sections of the many regulations it administers. None of them is found in Chapter 101. Turning to the Notice of Appeal, North American argues certain regulations on which Paragraphs 1, 2, and 4 of DER's Order are based are facially unconstitutional. Paragraph 1 directs cessation of brine discharges. Paragraph 2 directs submittal of a plan and schedule to eliminate

unauthorized unlined impoundments. Paragraph 4 directs submission of the plan required by §78.55. A fair reading of the regulations shows that only §§78.55, 78.56, 78.57, 78.58, 78.59 and 78.60 deal with brine and these pits. Using this Motion to ask this Board to address the constitutionality of Chapter 101, thus, is seeking either some type of declaratory judgment or an advisory opinion. We are not empowered to render either. See Eva E. Varos et al. v. DER, 1985 EHB 892, and Boyle Land and Fuel Co. v. DER, 1982 EHB 326. Moreover, Game Commission, supra, bars our even considering such a request when issues are not raised in a timely fashion.

Further, North American's Motion is based in part on the contention that these regulations are unconstitutional because they are based on an unconstitutional statute, to wit Section 402. As stated above, we are not empowered to declare a section of a statute unconstitutional. If we were to rule in favor of this argument, such a ruling would contain within it a determination of the unconstitutionality of Section 402. If we are not authorized to rule on the constitutionality of the statue directly, we do not become authorized to do so by North American's attempted internalization of such a ruling within another of its arguments. Accordingly, even if it had appeared in the Notice of Appeal, we would have been unable to rule on North American's argument that the regulations are facially unconstitutional because they are promulgated pursuant to an unconstitutional statute.

Finally, appellant has failed to show that judgment on the pleadings is warranted here as to the remainder of its contentions. In argument 2(c), North American's Motion contends that the regulations set forth at 25 Pa. Code §§78.51 through 78.63 and 25 Pa. Code §§101.1 through 101.4 are void and unenforceable because they were promulgated: 1) beyond the scope of the

enabling legislation; 2) without the prerequisite findings required by the legislative standards set forth at section 402 of the Clean Streams Law; and 3) without the requisite provisions required by the last sentence of §402(a) of the Clean Streams Law. This broad allegation is made without any factual support, and the remainder of its arguments hinge on this assertion being correct.

In its Brief In Opposition to North American's Motion, DER argues that there is no basis for us to conclude that the challenged regulations were enacted under section 402 of the Clean Streams Law.

When considering a Motion For Judgment On The Pleadings, we grant it only when no material facts are in dispute and a hearing is pointless because the law is clear on the issue. Winton, supra; Upper Allegheny, supra.

As we have ruled above, North American may not challenge the regulations at Chapter 101 since its Notice Of Appeal does not mention those regulations and challenges only the regulations upon which the Order is predicated. The Order does not mention the Chapter 101 regulations. Also, according to the foregoing discussion, our review of the Chapter 78 regulations is confined to those which are included in the Order, i.e., §§78.55 and 77.57.

An examination of the Chapter 78 regulations, to which this appeal is limited, shows that they were adopted as amendments to Chapter 78 by the Environmental Quality Board at its February 21, 1989 meeting and that they were effective immediately upon publication in the Pennsylvania Bulletin. Such publication occurred on July 29, 1989. See 19 Pennsylvania Bulletin 3229. The publication in the Pennsylvania Bulletin also recites that the amendments were adopted under the authority of the following:

> The Oil and Gas Act (act) (58 P.S. §§601.101-601.605).

The Coal and Gas Resource Coordination Act (58 P.S. §§501-518).

The Oil and Gas Conservation Law (58 P.S. §§401-419).

The Clean Streams Law (35 P.S. §§691.1-691.1001).

The Solid Waste Management Act (35 P.S. §§6018.101-6018.1003).

Article XIX-A of The Administrative Code of 1929 (71 P.S. §§510-1-510-108).

North American has made no attempt to demonstrate the validity of its claim that the regulations were promulgated pursuant to section 402 of the Clean Streams Law. It does not address the fact that the regulations were not promulgated solely under the authority of the Clean Streams Law, but were promulgated pursuant to authority of five statutes in addition to that act.[4] Moreover, insofar as the Clean Streams Law is one of the statutes upon which the challenged regulations were promulgated, North American does not eliminate the possibility that they were promulgated pursuant to some section of the Clean Streams Law other than 402, such as section 5 or 304.

Without a showing that the challenged regulations were promulgated pursuant to section 402 and not some other section, and with DER challenging North American's allegation that the regulations are based upon section 402, it cannot be said that no material facts are in dispute and that the law is clear on the issue. Accordingly, Judgment On The Pleadings is inappropriate as to this issue. See Winton, supra, Upper Allegheny, supra. For this same reason, we cannot consider North American's further contention that the

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[4] We do not rule on whether the challenged regulations were validly promulgated and are reasonable, since the allegations contained in North American's Motion and Brief do not necessitate that we do so.

challenged regulations are invalid because they lack the findings required by section 402 and do not provide for a reasonable period of time for affected persons and municipalities to obtain permits, as stated in section 402.

O R D E R

AND NOW, this 7th day of January, 1991, upon consideration of North American's Motion For Judgment On The Pleadings and the objections thereto filed on behalf of DER, it is ordered that the Motion is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: January 7, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
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SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
	:	
v.	:	**EHB Docket No. 90-313-E**
	:	
ALLEGRO OIL AND GAS COMPANY	:	**Issued: January 7, 1991**

OPINION AND ORDER
SUR PRAECIPE FOR
ENTRY OF DEFAULT JUDGMENT

By: Richard S. Ehmann, Member

Synopsis

The Department of Environmental Resources ("DER") may Praecipe For a Default Judgment as to civil penalties assessed in a Complaint For Civil Penalties filed under The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. ("the Clean Streams Law"), and The Oil and Gas Act, Act of December 19, 1984, P.L. 1140, as amended, 58 P.S. §601.101 et seq. ("the Oil and Gas Act"). Where DER demonstrates both its compliance with the procedures to obtain a default judgment set forth in Pennsylvania Rules of Civil Procedure and Allegro Oil and Gas Company's ("Allegro") failure to respond in any fashion to its Complaint, we will enter such a judgment as to liability.

Section 506 of the Oil and Gas Act contains an implicit grant of authority to DER from the General Assembly to seek civil penalties under this act through the filing of a Complaint For Civil Penalties with this Board.

DER's request that it be awarded the specific amount of civil penalties sought through use of the mechanism set forth in Pa. R.C.P. 1037(b)(1) must be rejected. This Board is only empowered by the legislature to award civil penalties after a hearing. We are not empowered to award penalties through ministerial review of DER's assessment thereof as occurs under Pa. R.C.P. 1037(b)(1). Accordingly, this requires the exercise of our discretion and mandates a hearing to establish the basis on which to make such an award.

OPINION

On July 27, 1990 DER filed with this Board a Complaint For Civil Penalties against Allegro. The six count Complaint pleads five separate counts under the Clean Streams Law and a sixth count under the Oil and Gas Act concerning violations of these statutes on Allegro's Prince lease in Sharon Township, Potter County.

Specifically, Count 1 alleges violations by Allegro of 25 Pa. Code §§101.3(a) and 101.4(a) and Section 611 of the Clean Streams Law because of oil discharged or flowing from the impoundment around its storage tank on the Prince lease into a stream known as Wapsena Hollow. DER seeks a civil penalty of $20,900 based upon nineteen inspections of this site occurring from January 31, 1989 through June 6, 1989.

Count 2 of DER's Complaint seeks $2,700 in penalties from Allegro based on Allegro's discharge of oil (as a pollutant) without a permit on January 28, 1990, which discharge allegedly continued until June 9, 1989 (when DER alleges that the United States Environmental Protection Agency ("EPA") cleaned up the site), contrary to Sections 301, 307, 401 and 611 of the Clean Streams Law.

Count 3, after incorporating DER's prior averments as did Count 2, seeks $5,700 from Allegro for violations of Sections 301, 307 and 401 of the Clean

Streams Law. It alleges that on April 27, 1989, Allegro attempted to remove oil from its tank and impoundment by burning same and that Allegro's fire became uncontrollable and, as a result, burned 70 acres of land. In the course thereof, it burned a wooden oil and water separator located on another portion of the Prince lease, which separator is owned by Allegro and contained oil sludges. This, in turn, is alleged to have caused the sludge to melt and to discharge into the waters of Wapsena Hollow.

Count 4 also incorporates the prior allegations. It seeks a $2,000 penalty from Allegro for violation of 25 Pa. Code §101.2(a) and Section 611 of the Clean Streams Law. It is based on the requirement of Section 101.2 that a person such as Allegro notify DER when a polluting substance is discharged to the waters for the Commonwealth and the allegations that Allegro never notified DER of either the discharge referenced in Count 2 which occurred on or about January 28, 1989 or the discharge caused by the fire and described in Count 3.

Count 5 seeks $13,000 from Allegro for violation of 25 Pa. Code §101.2(b) and Section 611 of the Clean Streams Law. It incorporates DER's prior allegations, also. In Count 5, DER contends Allegro failed to clean up the oil on the banks of Wapsena Hollow and Honeoye Creek; failed to remove the oil contained behind the containment booms Allegro placed on Wapsena Hollow, allowing it to flow downstream; failed to remove either the waste oil previously removed from Wapsena Hollow and placed in drums alongside Wapsena Hollow from these drums or the drums themselves, permitting the drums to fill and overflow back into Wapsena Hollow. DER alleges it observed these

conditions on 13 inspections through June 6, 1989 and that thereafter, EPA cleaned up the site. It also alleges these violations by Allegro were willful.

After incorporating DER's prior allegations, Count 6 recites Allegro's failure to place its well's permit number on well No. 9 in Project HMT-1 in violation of section 201(h) of the Oil and Gas Act, 58 P.S. §601.201(h). For this violation, the Complaint seeks a $1,000 penalty from Allegro. Exhibit A to the Complaint is a breakdown of how DER arrived at the amounts it has sought in each of the six Counts (which total $45,300) and, of course, the allegations of the Complaint are verified as true by a DER employee.

On August 2, 1990, counsel for DER filed a "Proof of Service" with us. It avers that the Complaint was served by first class and certified mail on James Lee, Allegro Oil & Gas Co., P. O. Box 1077, Jamestown, New York, 14702. Attached thereto is a Return Receipt showing James Lee signed for the Complaint on July 28, 1990.

On August 9, 1990, we issued our Pre-Hearing Order No. 1-CP indicating the assignment of this case to the writer and stating that further orders would issue when the pleadings were closed. On August 31, 1990, counsel for DER filed a copy of his Notice of Praecipe for Entry of Default Judgment with us as is required by Pa. R.C.P. 237.1.

On October 1, 1990, we issued an Order which recited that as of that date, no answer to DER's Complaint had been filed with this Board and directed DER to file a report on the status of this matter with us by October 15, 1990. By letter dated October 12, 1990, DER advised us it would soon file a Praecipe For Entry of Default Judgment. On November 19, 1990, we received this Praecipe from DER.

The Praecipe seeks entry of a $45,300 judgment against Allegro and in favor of DER. This is exactly the total amount sought by DER's Complaint. Accompanying the Praecipe is a five-page affidavit from David English, Chief of Enforcement and Administration for DER's Bureau of Oil and Gas Management, which states that he determined the amount of the penalties recited in the Complaint and that he believes them reasonable. The affidavit also explains how he arrived at the dollar figure for each count. The allegations in DER's Praecipe as to service, the Notice of Default, and the expiration of the time to file an answer are averred to be true in a verification signed by counsel for DER, which is also attached to DER's Praecipe. A Certificate of Service on Allegro of DER's Praecipe and attachments was also filed simultaneously with the Praecipe, as was DER's Brief in support of its Praecipe.

As of the date of this opinion, we have received neither pleadings nor communications of any other type from Allegro.

With this background, we now turn to the merits of DER's Praecipe to enter this judgment.

Under the Rules of this Board applicable to this type of proceeding (25 Pa. Code §§21.65 and 21.66), and our own decisions, including DER v. Marileno Corporation and Cuyahoga Wrecking Corporation, 1989 EHB 206, and with an eye on the Pennsylvania Rules of Civil Procedure, we start our review of this matter.

As filed with us on July 27, 1990, DER's Complaint contains the requisite Notice To Defend mandated by Pa. R.C.P. 1018.1. The notice tells Allegro that if it wishes to defend against DER's claims, it must file an Answer, and if

Allegro fails to do so, it may have a judgment entered against it for the money DER claims in the Complaint. Clearly, an early warning is thus given to Allegro on the face of the Complaint.

Counts 1 through 5 of DER's Complaint are brought under Section 605 of the Clean Streams Law. In defining "Department", Section 1 of the statute, 35 P.S. §691.1, says it means either DER, this Board or the Environmental Quality Board. Applying this definition to Section 605 and the circumstance where DER files a Complaint For Civil Penalties, we must read the language of Section 605(a): "...the department, after hearing, may assess a civil penalty upon a person or municipality for such violation," (emphasis supplied) to mean that this Board may assess a penalty, but only after a hearing.

Count 6 of DER's Complaint is a different matter. It is brought pursuant to the authorization to assess civil penalties found in Section 506 of the Oil and Gas Act which provides in part:

> In addition to proceeding under any other remedy available at law or in equity for a violation of a provision of this act or a rule or regulation of the department or any order of the department, the Environmental Hearing Board, after hearing, may assess a civil penalty upon a person for such violation. (emphasis supplied)

58 P.S. §601.506

There are no appellate cases interpreting this language, nor have we written any opinion on the intent of this language. The sentence raises two questions of concern in regard to the instant matter: How do civil penalty issues under this section reach this Board for adjudication, and can we grant a default judgment to DER for a sum specific without a hearing? Nothing in the statute helps us to answer either question. As a quasi-judicial administrative "tribunal", however, it is obvious that our role under this section is to

adjudicate the reasonableness of a request for a civil penalty, and, further, that we have no role as advocate for a particular penalty. Also obviously, that role logically falls on DER, which administers the Oil and Gas Act. Accordingly, we hold that DER's election to use a Complaint For Civil Penalties as the method to bring this specific civil penalty assessment to this Board is a proper procedural instrument authorized to DER under this Act. It is obvious only this Board may assess penalties under this Section and DER may not do so, even though it is authorized to adopt that approach elsewhere in other regulatory statutes not involved in this appeal. Section 605(b) of the Clean Streams Law (35 P.S. §691.605(b)) is an example. It is also obvious that the General Assembly implicitly authorized DER to proceed in this fashion when it enacted this section. See 1 Pa. C.S. §1922(1) and Pennsylvania Human Relations Commission v. St. Joe Minerals Corp., 476 Pa. 302, 382 A.2d 731 (1978).

With regard to the Praecipe from DER seeking Default Judgment in a specific dollar amount, however, the Oil and Gas Act raises a barrier to our awarding damages at this time. Section 506 mandates that we hold a hearing prior to a civil penalty's assessment just like Section 605(a) of the Clean Streams Law. If we are required to decide the proper amount "after hearing", we cannot grant DER all of the relief its Praecipe seeks as to Count 6, either.

Before any default judgment question can be considered as to Counts 1 through 6, however, the Board must determine whether or not DER appears to have dotted each procedurally prerequisite "i" and crossed each such "t". DER's Brief avers it has served Allegro pursuant to the requirements of Pa. R.C.P. 404(2), which incorporates service by mail pursuant to Pa. R.C.P. 403.

DER says it did this because the individual named as Allegro's in-state representative has been deceased for some time. According to the filings with us, Allegro was served by certified mail, return receipt requested, in Jamestown, New York on July 28, 1990. DER has duly filed with us its Proof of Service and the certified mail return receipt card showing this. DER has thus complied with Pa. R.C.P. 404(2) as to service. Accordingly, the period of time for the filing of Allegro's response to DER's Complaint, as specified in the Notice To Defend, began to run at that time.

Under Pa. R.C.P. 1018.1, Allegro had 20 days in which to file a timely answer of the type visualized by 25 Pa. Code Section 21.66. This time expired on August 20, 1990. As our records show, no answer has ever been filed by Allegro.

When duly served parties fail to file answers, default judgments are authorized to be entered, but only after compliance by the complainant with Pa. R.C.P. 237.1, which requires that DER mail Allegro a Notice of Praecipe for Entry of Default Judgment. On August 31, 1990, DER filed a copy of such a Notice with us. It conformed to the requirements of Pa. R.C.P. 237.1. This Notice was a clear warning to Allegro of the impending DER Praecipe so that Allegro had one final chance to file its answer. DER's Notice produced no communication to this Board from Allegro.

While DER's Notice said Allegro had ten days in which to answer DER's Complaint, DER waited through September and October until November 22, 1990 to file its Praecipe For Default Judgment with us.

As DER's Praecipe appears to us to comply with Pa. R.C.P. 237.1, it only remains for us to decide whether or not to grant the judgment sought or to hold a hearing thereon, as we previously held in Marileno Corporation, supra

that we must. Our historical precedent weighs heavily against DER. See DER v. Canada-PA, Ltd., 1987 EHB 177. There, we held we could not grant a sum certain without a hearing because of a potential violation of Pa. R.C.P.1037(b)(1), in light of this Board's duty to assess a variety of subjective factors in setting the penalty amount.

In an attempt to circumvent these holdings, DER's Brief argues that pursuant to Pa. R.C.P. 1037(b)(1), the Board can ministerially assess a sum certain in penalties against Allegro. DER argues that the Appendix to DER's Complaint shows precisely how the $45,300 figure which DER now seeks as determined by DER. Citing us to Baraonfski v. Malone, 371 Pa. 479, 91 A.2d 908 (1952) and Johnson v. Earl Scheib, Inc., 352 Pa. Super. 278, 507 A.2d 1228 (1986), DER says unless the Board has evidence to the contrary, it should honor the amount in the Complaint.

DER's argument miscasts our role as to civil penalty actions of the type before us in this matter. We are not legislatively charged with the duty to review DER's assessments, but are directed to conduct our own assessment of an appropriate civil penalty through the hearing procedure. To do this we must consider the evidence offered by the parties and exercise our discretion to determine the appropriate amount of such a penalty. This independent adjudicatory function is not performed if we adopt the procedure outlined in Pa. R.C.P. 1037(b)(1).

Moreover, we are surprised that DER would ask us to adopt the procedure set forth in Pa. R.C.P. 1037(b)(1) in these cases, in light of problems with the bankruptcy issues which our use of such procedures would resurrect for DER where it proceeds against a bankrupt. As we said in Marileno, supra:

> [W]e believe that the filing of a civil penalties complaint is an attempt to fix damages

> for violations of a police power statute and not an attempt to collect a money judgment. We conclude this action seeks to enforce the Commonwealth's police and regulatory power and is, therefore, exempted from the automatic stay provisions.

We believe that our use of the procedure set forth in Pa. R.C.P. 1037(b)(1) would give credence to the argument that actions of the instant type are suits to collect money damages and thus subject to an "automatic stay". Such a finding is hardly in DER's interest. Marileno, supra, and the instant opinion should end such arguments.

Since we are granting judgment by default as to liability, our findings of fact as to liability will be based on the factual allegations contained within DER's Complaint. We specifically incorporate Paragraphs 2, 3, 4, 5, 8, 12, 13, 19, 20, 21, 24, 25, 26, 30, 35, 36, 37, 38, 39, 40 and 44 of DER's Complaint herein by reference, as if set forth at length as our findings of fact as to liability in this proceeding. As to conclusions of law, with regard to liability, we adopt the same procedure. We specifically incorporate Paragraphs 1, 8, 14, 15, 22, 27, 31, 41 and 45 of DER's Complaint, herein, by reference, as if set forth at length as our conclusions of law with regard to Allegro's liability. We will enter a partial default adjudication as to Allegro's liability, based on these findings and conclusions however.

Further, we will schedule a separate hearing to determine the amount of penalties based on factors such as those enunciated in Marileno, supra.[1]

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[1] In writing this opinion in this fashion, I express the position on this matter of the other four members of this Board, rather than my own. I would let DER lie in the bankruptcy "bed" created by its decision to use this approach. I would also grant DER a judgment for the amount sought in its Complaint by interpreting "after hearing" as used in both statutes in light of Pa. R.C.P. 1037(b)(1) to allow entry of such a judgment in the limited (footnote continues)

Accordingly, we enter the following Order:

ORDER

AND NOW, this 7th day of January 1991, it is ordered that a judgment by default as to liability is entered against Allegro for the violations of the Clean Streams Law and the Oil and Gas Act pled in DER's Complaint. A hearing will be scheduled to determine the amount of the civil penalty to be imposed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

(continued footnote)
circumstances created by Allegro's total silence in this case. Allegro could then challenge that decision in a variety of ways if it wished to do so. I do not write for myself alone, we are a Board. Accordingly, I acknowledge the position of the other Board members with the respect to which it is entitled. While I thus dissent on this question of judgment for a specific amount, this opinion is not a final order on this issue. Accordingly, I have set forth my position on this matter in this footnote rather then in a formal dissenting opinion.

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED : January 7, 1991

cc: **Bureau of Litigation**
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Western Region
For Appellant:
James Lee, President
Allegro Oil & Gas Company
Jamestown, NY

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M. DIANE SMITH
SECRETARY TO THE BOARD

NORTH AMERICAN OIL & GAS DRILLING COMPANY, INC.	:	
v.	:	**EHB Docket No. 90-258-E**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: January 8, 1991**

OPINION AND ORDER
SUR DER'S MOTION FOR
PARTIAL SUMMARY JUDGMENT

By Richard S. Ehmann, Member

Synopsis

The Department of Environmental Resources' ("DER") Motion for Partial Summary Judgment is denied. North American Oil and Gas Drilling Company, Inc. ("North American") has raised issues in its Notice of Appeal and Pre-Hearing Memoranda bearing upon Paragraphs 1, 2, and 4 of DER's Order which DER's Motion does not address. Accordingly, we cannot rule that there are no genuine disputes over material facts and DER is entitled to judgment as a matter of law.

OPINION

The procedural history of this appeal by North American of DER's June 6, 1990 Order is set forth in our January 7, 1991 Opinion and Order which denied North American's Motion for Judgment on the Pleadings. While North American's Motion for Judgment on the Pleadings was pending, DER filed with us

on December 4, 1990 a Motion for Partial Summary Judgment.[1] We instructed North American to file by December 24, 1990 any objections it might have to DER's Motion. No such objections have been timely filed with the Board. On December 26, 1990, North American did, however, file with us a second amended Pre-Hearing Memorandum[2] and its own Motion for Summary Judgment and brief in support thereof.[3] DER's response thereto, if any, is due to be filed

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[1]On December 20, 1990, also without previously requesting leave to amend its Pre-Hearing Memorandum or having received permission to do so, DER filed an amendment to its Pre-Hearing Memorandum.

[2]On November 21, 1990, DER filed with us a Motion to Compel North American to sufficiently comply with our Pre-Hearing Order No. 1. The Motion sought more specificity of North American's Pre-Hearing Memorandum as to the facts it intends to prove at the hearing. A brief in support of this Motion was received by us on December 7, 1990. On December 10, 1990, North American filed an amended Pre-Hearing Memorandum in response to DER's Motion to Compel. Upon consideration of the Motion to Compel and North American's response thereto, we issued an order on December 14, 1990 granting DER's Motion and ordering North American to file by December 27, 1990 a further amended Pre-Hearing Memorandum containing a Statement of Facts North American intends to prove. Subsequently, without previously seeking or receiving leave to amend, on December 26, 1990, North American filed its second amended Pre-Hearing Memorandum.

[3]In the "Summary" portion at the end of its Brief sur Motions for Summary Judgment, North American appears to indicate that it is relying upon its Motion and this Brief as a response to DER's Motion. We do not treat its Motion and Brief as a Response, however, because North American did not indicate in a timely writing to this Board its desire to have us treat its subsequently filed Brief supporting its Motion for Summary Judgment (untimely as a Response) as a timely objection and Brief in support thereof. No leave to file an objection at a later date was sought or granted either. We repeat for lawyers practicing before us that when we receive a Motion we offer the opposing party the opportunity of timely filing Objections thereto and a Brief supporting same. Failure to timely respond to a Motion can be interpreted as a lack of opposition to the Motion. Responding to a Motion by filing only a motion and brief may not clearly respond to the initial motion and work to the prejudice of a lawyer's client since we are then asked to hunt through pages of various documents and interpret whether or not document B is an objection to an opponent's prior motion (Document A), a wholly separate motion, both a motion and an objection, or something else entirely. Clearly the approach (footnote continued)

with us on January 14, 1991. The instant Opinion addresses only DER's Motion for Partial Summary Judgment.

In its Motion, DER asks us to grant partial summary judgment to decide two issues: 1) North American is legally responsible to comply with paragraphs 1, 2, and 4 of DER's June 6, 1990 Order; and 2) paragraphs 1, 2, and 4 of DER's Order provide North American a reasonable amount of time to comply with each obligation imposed on it.

North American's Notice of Appeal (at paragraph 4) raises several objections to paragraphs 1, 2, and 4 of the Order. North American asserts that the regulations upon which DER's Order is predicated are: 1) void and unenforceable as being beyond the scope of the enabling legislation; 2) void and unenforceable as having been promulgated without the prerequisite findings as required by the enabling legislation; 3) unconstitutional on their face as being arbitrary, capricious, and unreasonable; and 4) as enforced against North American, violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 17 of the Pennsylvania Constitution.

North American further explains its objections to DER's Order in paragraph 5 of its Notice of Appeal. The bulk of these claims rest upon the validity of its assertion that the challenged regulations are promulgated pursuant to Section 402 of the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.402. In addition to the claims which rest upon Section 402, North American urges the cost of compliance with the brine

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(continued footnote)
with the smallest chance to be misinterpreted is Motion with Brief responded to by Objection with Brief followed by separate Motion with supporting Brief dealing with any new issues--all of course being timely filed.

disposal regulations by North American will render the wells uneconomic to produce, resulting in substantial economic loss. It further asserts that the challenged regulations are unreasonable, arbitrary, and capricious in that they place an excessive economic burden on the operator and owners of wells. Paragraph 5 of the Notice of Appeal also explains in more detail the constitutional claims. North American asserts that DER has afforded "affected persons" other than North American up to five years within which to eliminate discharges of brine into unpermitted pits and has formalized this by agreement. It claims that prior to DER's issuance of the order to it, North American had requested similar treatment, but its request was denied. It asserts that DER's refusal to afford it the same reasonable time as it has afforded others similarly situated to it constitutes a violation of its right to equal protection of the law under the Fourteenth Amendment of the United States Constitution. North American also asserts that DER's refusal constitutes a violation of Article I, Section 17 of the Pennsylvania Constitution in that it creates in favor of such others an irrevocable grant of special privilege and immunity.[4]

The Board is empowered to grant summary judgment when there are no genuine disputes over material facts and the moving party is entitled to

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[4]North American's initial Pre-Hearing Memorandum as well as its first amended Pre-Hearing Memorandum state as North American's contentions of law: "Appellant incorporates herein by reference the legal contentions and citations set forth in its Notice of Appeal...." Its second amended Pre-Hearing Memorandum does not purport to alter that section of the amended or initial Pre-Hearing Memorandum. Our Pre-Hearing Order No. 1 specifically directed North American to include in its Pre-Hearing Memorandum contentions of law and <u>detailed citations</u> to authorities, <u>including specific sections of statutes</u>, <u>regulations</u>, etc. <u>relied upon</u> by it. It is not the preferred procedure for an appellant to merely state in its Pre-Hearing Memorandum that it incorporates by reference the legal contentions and citations contained in its Notice of Appeal, however DER has not objected to such in this appeal.

judgment as a matter of law. Summerhill Borough v. Commonwealth, DER, 34 Pa.Cmwlth. 574, 383 A.2d 1320 (1978); County of Schuylkill et al. v. DER et al., 1989 EHB 918. In deciding a motion for summary judgment, the Board must view it in the light most favorable to the non-moving party. Plymouth Township v. DER et al., EHB Docket No. 89-039-W (Opinion issued October 23, 1990). With this rule in mind, we observe that in order for us to rule that North American is legally responsible to comply with paragraphs 1, 2, and 4 of DER's Order and that those paragraphs provide a reasonable time in which North American must comply, we would necessarily be ruling that North American's challenges to those paragraphs fail.

We cannot grant the partial summary judgment requested for several reasons. First, DER's Motion does not address North American's contentions that the challenged regulations upon which paragraphs 1, 2, and 4 of the order are based, are void and unenforceable. North American has maintained throughout this appeal (and contends in its pending Motion for Summary Judgment) that the challenged regulations draw their authority from Section 402 of the Clean Streams Law. DER's Motion does not address North American's contention that the challenged regulations are based on Section 402. As we stated in our Opinion denying North American's Motion for Judgment on the Pleadings, the matter of whether or not the challenged regulations were promulgated pursuant to Section 402 is in dispute. Clearly, DER's Response to North American's Motion for Judgment on the Pleadings did not concur with the assertion that the regulations were promulgated under Section 402 of the Clean Streams Law. Additionally, DER's Motion does not address the allegations raised in North American's Notice of Appeal that the cost of compliance with the brine disposal regulations by North American will render the wells

uneconomic to produce and will result in substantial economic loss. Nor does DER's Motion address North American's claim that the regulations are unreasonable, arbitrary, and capricious in that they place an excessive economic burden on the operator and owners of wells. Likewise, DER's Motion does not even acknowledge the issues raised in the Notice of Appeal that the regulations upon which the Order is predicated are violative of North American's state and federal constitutional rights.

With these issues in dispute and unaddressed by DER's Motion, we cannot find that there are no genuine disputes over material facts and that DER is entitled to judgment as a matter of law as to paragraphs 1, 2, and 4 of DER's Order. Accordingly, we must deny DER's Motion.

O R D E R

AND NOW, this 8th day of January, 1991, it is ordered that the Department of Environmental Resources' Motion for Partial Summary Judgment is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: January 8, 1991

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOARD

WILLOWBROOK MINING COMPANY	:	
v.	:	**EHB Docket No. 90-346-E**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: January 8, 1991**

OPINION AND ORDER
SUR
DER'S Motion To Compel And To Extend Discovery[1]

Synopsis

A Department of Environmental Resources ("DER") Motion To Compel answers or supplemental answers to interrogatories will be granted as to interrogatories which were answered inadequately. The granting of the Motion To Compel does not bar the subsequent filing of a well-founded Motion For Protective Order dealing with the confidentiality of the materials sought by the Motion To Compel, where, in response to the motion, Willowbrook Mining Company ("Willowbrook") agrees to furnish the information, subject to confidentiality restrictions. A motion to compel disclosure of the factual basis for a particular contention in a notice of appeal will be denied where the Appellant states the contention is a legal rather than a factual

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[1]DER's Motion says it incorporates its brief. A Motion is a Motion and a Brief is a Brief. Hybrid Motions, incorporating extensive legal arguments and case citations, are not encouraged. Each document is designed to serve a separate distinct purpose. When combined they may not serve either purpose well. Counsels are advised that it may not be in the best interest of their clients to submit such hybrids, as they facilitate the intermingling of concepts which increases the possibility that an adjudicatory body may misinterpret what is submitted to it.

contention. A Motion To Compel disclosure of the identity of witnesses and the subject matter of their testimony is denied as to a witness who has been identified and deposed by the Movant.

OPINION

DER's denial on July 17, 1990 of Willowbrook's surface mining permit application No. 43900101 was appealed to us by Willowbrook on August 15, 1990. Thereafter, the parties engaged in discovery, with DER seeking information through interrogatories propounded to Willowbrook. Willowbrook has objected to same but has provided answers to the interrogatories subject to and supplementing these objections. DER's instant Motion seeks to compel more extensive answers from Willowbrook to certain interrogatories and supplemental discovery as needed based on such additional answers. Willowbrook's response to DER's Motion addresses DER's Motion on an interrogatory by interrogatory basis. As set forth below, we have addressed the issues raised by the parties in similar fashion.

The first interrogatory at issue is DER's Interrogatory No. 4, which seeks the identity of each non-expert witness Willowbrook will call. In answering, Willowbrook has identified only Douglas E. Spicuzza and stated very generally the subject matter about which he will testify. It defends against this Motion by saying DER deposed Spicuzza on December 21, 1990, so further responses would be repetitive and burdensome. We agree and deny DER's Motion on that basis as to Spicuzza while simultaneously limiting Spicuzza's testimony to the specific areas covered by his deposition. Willowbrook's answer also says that if it decides to call any other witnesses later, it will supplement its answers. This approach by Willowbrook keeps the identity of witnesses from DER during the period this Board provides for discovery as set

forth in our Pre-Hearing Order No. 1. Under this approach, if Willowbrook reveals a new witness after discovery is closed DER is either prevented from conducting discovery as to such a witness by this approach or forced to seek leave to conduct discovery at that time. Leave to discover is not always granted and, if granted, may be granted at the time immediately prior to hearing, which time should be used for trial preparation. Clearly, discovery immediately prior to trial, occurs at a time by which discovery should have been ended. We cannot look favorably on such a reservation of leave to add witnesses under such circumstances, especially where it shifts to the opponent the burden of convincing us to allow discovery and when the better approach is to require witness disclosures prior to the filing of each party's Pre-Hearing Memorandum. Board procedures found in 25 Pa. Code §21.111 and Pre-Hearing Order No. 1 clearly envision that discovery will precede the Pre-Hearing Memorandum during the "discovery stage". Accordingly, Willowbrook must answer DER's Interrogatory No. 4 now as to all non-expert witnesses other then Spicuzza or be barred from adding subsequent non-expert witnesses.

DER Interrogatory No. 7 seeks the facts to support Willowbrook's contention that the promulgation of 25 Pa. Code Section 105.17 is beyond the authority of the Environmental Quality Board. In its interrogatory answer, Willowbrook says that certain restrictions in Section 105.17 "are not authorized by the Pennsylvania Dam Safety and Encroachment Act." DER's Motion seeks to compel an answer providing the factual support for Willowbrook's contentions. In its response to DER's Motion, Willowbrook states this is a contention of law. If this is purely legal contention, then Willowbrook cannot offer factual evidence to DER as to this interrogatory and DER's Motion regarding same must be denied with the understanding that

Willowbrook will be barred from offering factual evidence on this issue based on its response to DER's Motion.

DER's Motion next addresses Interrogatory No. 15 and Willowbrook's answer thereto. The Interrogatory seeks the factual basis for Willowbrook's contention that "DER's action is contrary to its own regulations" and asks for the regulations to be identified along with documents relating to the answers and persons with knowledge thereof. Willowbrook's reply says: "See Answers to Interrogatory No. 8(a)." In turn, its answer to Interrogatory No. 8(a) says: "DER relied upon other agency input in violation of its responsibility." There is no question this is an inadequate answer to DER's four part interrogatory, but Willowbrook's response to DER's Motion indicates Willowbrook will supplement its answer. As set forth in our order, Willowbrook is directed to do so. It is to answer all four parts of the Interrogatory <u>in full</u>.

The next interrogatory and answer at issue in DER's Motion is Interrogatory No. 16 and Willowbrook's response. The Interrogatory asks the identity of each piece of data, documents, or information within Surface Mine Permit Application No. 43900101 relating to the public benefit of the proposed mine and the factual basis for each identified piece of information. Willowbrook's response refers to its answer to Interrogatory No. 5(a). In its Answer to Interrogatory 5(a), after making several general statements about the public benefit from this mine, Willowbrook references modules 9, 10, and 20. This is an inadequate response to Interrogatory No. 16. An adequate answer would identify each piece of "public benefit" information in Willowbrook's application and state the basis for it. Willowbrook must furnish such an answer or run the risk that DER will successfully move for sanctions barring evidence from Willowbrook on this issue.

DER's Motion next challenges the adequacy of Willowbrook's answer to DER Interrogatory No. 17. DER seeks a list of townships, counties, and states in which Willowbrook is currently mining and a list of the operating surface mining permits. Willowbrook says this information is in the application for permit now under appeal. It goes on to say that the information is in DER's files. Its answer also offers to let DER's counsel come to Willowbrook's office to copy Willowbrook's records. Finally, and in contradiction to the prior statements in its answer, Willowbrook says it objects to answering this question to the extent of information not already provided to DER. In response to DER's Motion, Willowbrook says merely that it is proper to incorporate documents by reference in answering interrogatories, so DER's Motion should be denied.

Either this information is all in DER's hands or Willowbrook must furnish it. It cannot say the information is in the application filed with DER and object to furnishing the information not already in DER's hands. Willowbrook has options on how it furnishes the information, however. Willowbrook may make the information available at its offices. Willowbrook may also specify the exact location (by permit numbers, for example) of each piece of the information it says is in DER's files and incorporate same by reference. Willowbrook can even combine these options by making some of the information sought available by each method or it may re-answer this interrogatory and set it forth at length in the interrogatories in the space provided for its answer, but it must supply this information. Kerry Coal Company v. DER, 1989 EHB 1337 at 1339. ("Kerry Coal I")

DER's Motion next addresses Interrogatory No. 18 and Willowbrook's answer thereto. Interrogatory No. 18 is identical to Interrogatory No. 17

except that the information on current mine sites is sought for Willowbrook's parent (Adobe Mining Company), not Willowbrook. In response to Interrogatory 18, Willowbrook has answered by directing DER to Willowbrook's answer to Interrogatory 17. In response to DER's Motion, however, Willowbrook has indicated it will supplement its answer to Interrogatory 18. In doing so, Willowbrook is to guide itself using the discussion above relating to its inadequate response to Interrogatory 17.

DER's Interrogatory No. 19 and Willowbrook's response thereto are next on the list of interrogatories covered by DER's Motion. Willowbrook's response to DER's Motion objects to providing the information on coal reserves of Adobe and Willowbrook for a series of reasons including relevancy, the need for confidentiality since disclosure of the information might harm its competitive position in this industry and the fact that disclosure of the information may adversely impact on pending negotiations between Willowbrook and third parties. Willowbrook raised the latter two objections previously in its answer to DER's Interrogatories. DER's Motion does not address relevancy, but we have done so previously. As stated in Etna Equipment & Supply Company, Inc. v. DER, 1987 EHB 675, relevancy is given broad meaning during discovery. See also Kerry Coal Company v. DER, EHB Dkt. No. 89-231-E (Opinion issued January 30, 1990), ("Kerry Coal II"). If information sought by an interrogatory may lead to admissible evidence, Willowbrook must provide it. Tenth Street Building Corporation v. DER, 1987 EHB 151; Kerry Coal II, supra.

Here, DER denied Willowbrook's application for permit. As DER points out in its Motion, Willowbrook's appeal contends DER's denial of the application based on Willowbrook's failure to provide sufficient information on the need to surface mine a specific wetlands area, was in error. DER

justifies this interrogatory as inquiry into the factual support for this aspect of Willowbrook's appeal. DER argues that if there is enough coal available elsewhere to Willowbrook, DER may consider this fact in properly refusing to authorize the surface mining in this wetlands. DER may make this inquiry because an answer thereto could, at least, lead to relevant and admissible evidence.

Willowbrook's other objections to providing the information DER seeks have more merit. DER asserts that our decision in Kerry Coal I, supra, controls and that it requires a Motion For Protective Order filed by Willowbrook to bar inquiry on a "confidentiality" basis. We agree and thus grant DER's Motion as to an answer to this interrogatory. In doing so, however, we believe our ruling allows Willowbrook to subsequently file a Motion For Protective Order. If Willowbrook files such a motion and supports it, we might be compelled to impose confidentiality restrictions on DER's counsel and staff as to the information sought. We have not ruled on this issue here, however, because it would be premature to do so and because Willowbrook's response to the Motion offers this information subject to confidentiality restrictions. For this same reason we also do not rule on Willowbrook's objection that disclosure of this information might hurt its negotiations with others. We leave it to the counsel for the parties to make a first attempt to agree on such restrictions. If they cannot agree, we will deal with this issue when and if Willowbrook files such a motion.

DER's Motion next seeks to compel further answers from Willowbrook to interrogatories 20 and 21. The interrogatories are identical and seek a list of all mining permit applications pending before any state or federal agency. Interrogatory 20 deals with Willowbrook's applications. Interrogatory 21 deals

with applications on behalf of Adobe Mining Company (Willowbrook's parent) and its subsidiaries. Willowbrook's answer is to see its answer to Interrogatory 17. We have addressed the inadequacy of Interrogatory No. 17's answer above. In its response to DER's Motion, Willowbrook raises the relevancy of the information DER seeks. In response, we, in turn, direct Willowbrook pursuant to the discussion above on relevancy to answer these interrogatories. Willowbrook's Response to DER's Motion offers supplemental answers to Interrogatories 20 and 21. Willowbrook is to be guided by our instant opinion in providing same.

DER's Motion next raises Willowbrook's answer to Interrogatory 22. Again, not conceding relevancy, Willowbrook's response to DER's Motion indicates a supplemental answer will be forthcoming from Willowbrook. Willowbrook's supplemental answer should be guided by this opinion. Of course, if information gathered through discovery is offered in the hearing on the merits of this appeal and objected to as not relevant, we will rule on its relevancy at that time, just as we do in all proceedings before us.

Finally, DER's Motion seeks a better answer to Interrogatory 26. In response Willowbrook has agreed to provide a supplement addressing DER's concern, as we would have required had it not been volunteered.

Accordingly, we enter the following Order.

ORDER

AND NOW, this 8th day of January, 1991, upon consideration of DER's Motion To Compel, which seeks further answers by Willowbrook to DER's Interrogatories, and Willowbrook's Response In Opposition To [DER's] Motion To Compel, the motion is granted in part. Willowbrook is ordered to provide DER supplemental answers to DER Interrogatories Nos. 4, 15, 16, 17, 18, 19, 20, 21, 22, and 26 by **January 28, 1991**. DER's Motion To Compel is denied as to a supplemental answer to Interrogatory No. 7. DER's Motion To Compel as to Interrogatory No. 4 is denied as to Douglas E. Spicuzza.[2]

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: January 8, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Steven Lachman, Esq.
Western Region
For Appellant:
Stephen C. Braverman, Esq.
Stephen G. Allen, Esq.
Philadelphia, PA

med

[2]We have neither granted or denied DER's request for supplemental discovery since until Willowbrook complies with this Order, we do not know if supplemental discovery will be necessary. If DER reviews Willowbrook's supplemental answers to DER's interrogatories and believes additional discovery is warranted based thereon, it may make a request for us to grant it leave to engage in same. We will evaluate that request and the basis therefor when, and if, it is made.

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M. DIANE SMITH
SECRETARY TO THE BOAR

SHIPMAN SANITATION SERVICE, INC.	:	
v.	:	**EHB Docket No. 90-275-E**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: January 10, 1991**

OPINION AND ORDER
SUR
DER MOTION TO LIMIT ISSUES

Synopsis

When an Appellant fails to raise an issue in its timely-filed Notice Of Appeal, it may not raise that issue for the first time in its Pre-Hearing Memorandum absent having shown this Board good cause for such an untimely addition.

OPINION

On July 6, 1990, Shipman Sanitation Service, Inc. ("Shipman") appealed from the issuance of Permit 603077 to it by the Department of Environmental Resources ("DER") on June 6, 1990. The permit authorizes the agricultural utilization of sewage sludge by Shipman, under certain terms and conditions. The Permit states that it is issued under the authority of the Pennsylvania Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, No.97, as amended 35 P.S. §6018.101 et seq.

In its Notice Of Appeal, Shipman challenges five conditions of his Permit. According to Shipman's Notice of Appeal, they are: Condition 19 (as to the posting of a bond); Condition 23 (as to the landowner's consent); Condition 10 (as to the submission to DER of an annual fee with Shipman's

annual report); Condition 17 (requiring special monitoring for phosphorous in Area 3); and Condition 3 (limiting particular sludges to specific acreages on the permit). Its Notice Of Appeal closes with a Prayer For Relief which seeks that Condition 19 be deleted, Condition 23 be stricken, DER be barred from enforcing Condition 10, and Condition 3 be deleted. Nothing more is sought.

No timely amendment of Shipman's Notice Of Appeal was filed and Shipman neither sought nor was granted leave to subsequently add any other grounds for appeal.

When Shipman filed its Pre-Hearing Memorandum on October 23, 1990, it raised these conditions and various challenges thereto, sharply challenging the bond requirement imposed in this permit as not being legislatively mandated. As is set forth below, the parties agree that Shipman's Pre-Hearing Memorandum also proposes a broad attack on both the promulgation of the regulations concerning agricultural utilization and DER's interpretation of the promulgated regulations. While my reading of this Pre-Hearing Memorandum does not make this clear to me, the parties agree this is so and it forms the basis for DER's Motion so we will address the Motion as if there is such a broad attack.

Thereafter, on December 20, 1990, we received a DER Motion To Limit Issues. DER's Motion requests this Board limit issues at the trial to the four permit conditions in Shipman's Permit. Its simultaneously filed Brief supporting this Motion says Shipman failed to raise any broad challenge to DER's entire sewage sludge permitting scheme in its Notice Of Appeal, but raised such an attack in its Pre-Hearing Memorandum. DER then cites <u>James Kacer v. DER</u>, 1989 EHB 914, as a bar to adding new grounds for appeal via a Pre-Hearing Memorandum.

In its January 7, 1991 Reply to DER's Motion, Shipman says it agrees with the allegations on the face of DER's Motion, but not with the allegations in DER's Brief. Shipman's supporting Brief says that Paragraph 6 of Shipman's Notice Of Appeal is a "broad attack" on the scheme of permitting adopted by DER. It goes on to indicate that counsel for the opposing parties do not agree as to whether Shipman's appeal includes "matters of interpretation and promulgation of the regulations upon which [DER relies] as authority for the conditions imposed". Its final sentence also confirms the scope of Shipman's present plan of attack in the hearing on its appeal by seeking review by this Board of disputed documents to rule on their admissibility and their relevance in interpretation of both the intent of the Environmental Quality Board ("EQB") and DER.

Under Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986) affirmed on other grounds, 521 Pa. 121, 555 A 2d 812 (1989) it is clear that a party may not raise a new ground in its Pre-Hearing Memorandum, absent leave to amend granted on a showing of good cause. In accord, see F.A.W. Associates v. DER, EHB Docket No. 90-228-B (Opinion issued December 31, 1990) and the cases cited therein. Here, no leave to amend was sought or granted to Shipman; thus, we must return to its Notice Of Appeal to determine whether issues as to the EQB's promulgation of regulations were raised therein. The only paragraph of the Notice Of Appeal which Shipman contends raises such issues is Paragraph 6. Our review of Shipman's Notice Of Appeal confirms that this is the only paragraph therein which could be stretched far enough to be said to raise such issues. Paragraph 6 provides:

> Appellants generally submit that the program maintained by Appellee has virtually extinguished

> agricultural utilization within the Commonwealth; and object to requirements which cumulatively require extraordinary effort to lawfully use any premises for what the legislature defines as normal farming operations; and that as maintained, permit conditions merely subject persons as Appellants to increased scrutiny for lawful and safe use which is far out of proportion to any restrictions placed upon their unpermitted competitors or to disposal facilities.

While this paragraph is not as clearly written as it might be, nothing in this paragraph references the promulgation of regulations, the EQB or issues concerning same. Accordingly, under Game Commission, supra, we will hear no evidence relating to same.

These various filings by the parties also raise the issue of whether we can hear testimony about DER interpretation of the (EQB-promulgated) regulations DER administers. Clearly, DER's permit conditions must be based on these regulations or the Pennsylvania Solid Waste Management Act, supra. They are thus an interpretation of same. DER's Brief in support of the Motion In Limine concedes that Shipman challenges the four permit conditions as "excessive, unreasonable, and without authority in law". Thus, Shipman has raised a challenge to DER's interpretation of the regulations as the interpretation is reflected by these four permit conditions. Because Shipman may challenge DER as to these conditions this does not mean that Shipman may not generally challenge all regulations affecting agricultural utilization. Clearly, from the Prayer For Relief in Shipman's Notice Of Appeal, only these four conditions were put at issue. If we granted all the relief thus sought by Shipman, all of the other regulations would remain in place and be binding on Shipman, as would all of the other conditions of Shipman's permit. Accordingly, challenges to DER interpretations of the regulations must be

limited to those pertaining directly to these conditions, and we enter the following order.

O R D E R

AND NOW, this 10th day of January, 1991, upon consideration of DER's Motion To Limit Issues and Shipman's Reply thereto, the motion is granted in part and denied in part. The Motion is granted as to all issues involving promulgation of the Regulations by the EQB, and it is ordered that Shipman is prohibited from introducing evidence relating to its contentions concerning same at the hearing on the merits of its appeal. It is further ordered that the Motion is denied as to issues of DER interpretation of the regulations it administers which relate to the placement of Conditions 3, 10, 19, and 23 in Shipman's Permit, but is granted as it relates to DER's interpretation of the regulations it administers relating to agricultural utilization, which are not related directly to these four permit conditions.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: January 10, 1991

cc: **Bureau of Litigation**
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EMPIRE SANITARY LANDFILL, INC.	:	**EHB Docket No. 90-187-W**
	:	**(Consolidated Docket)**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** January 24, 1991

OPINION AND ORDER SUR
MOTION TO DISMISS FOR MOOTNESS

By Maxine Woelfling, Chairman

Synopsis

An appeal of a Department of Environmental Resources' (Department) modification to appellant's solid waste permit is dismissed as moot when the Department issues a subsequent permit modification which supersedes the earlier modification.

OPINION

This matter was initiated with the May 7, 1990, filing of a notice of appeal by Empire Sanitary Landfill (Empire) seeking review of the Department's April 6, 1990, issuance of a modification to Empire's solid waste permit (the "April permit"), which authorizes the operation of a municipal waste landfill in the Borough of Taylor and Ransom Township, Lackawanna County. The permit modification, *inter alia*, limited Empire to disposing of no more than 3109 tons per day, on a quarterly basis, of solid waste from outside the Commonwealth. Empire challenged the action as *ultra vires*, an abuse of discretion, and a violation of various provisions of the federal and state constitutions.

The Department filed a motion to limit the issues in the appeal of the April permit on June 20, 1990. Empire, meanwhile, filed a motion for summary judgment on October 5, 1990.[1]

On October 29, 1990, the Department issued Empire another permit modification (the "October permit") which explicitly superseded the April permit where there were discrepancies or inconsistencies between the two permits.[2] On October 31, 1990, Empire filed an appeal and a petition for supersedeas of the October permit. Initially, Empire's appeal of the October permit was docketed at EHB Docket No. 90-467-W, but on October 31, 1990, the Board consolidated the October permit appeal with the April permit appeal at EHB Docket No. 90-187-W.

The Board conducted a supersedeas hearing on the consolidated actions on November 1 and 2, 1990.[3] Subsequently, on December 13, 1990, the Department filed a motion to dismiss Empire's appeal of the April permit, asserting that the appeal and petition for supersedeas were moot because the October permit rendered the April permit null and void.

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[1] Empire and the Department engaged in lengthy settlement discussions which, at first, appeared to resolve the appeal. However, those negotiations broke down and culminated in Empire's filing a motion to enforce the alleged settlement agreement. That motion was denied in an October 17, 1990, opinion which held that the Board had no jurisdiction to enforce an alleged settlement agreement. Empire petitioned the Commonwealth Court for review of the Board's opinion at No. 2288 C.D. 1990.

[2] The first page of the October permit states:

> All the conditions of the attached permit amendment/modification shall supersede conditions in the original permit if discrepancies or inconsistencies between the documents become evident.

[3] By order dated December 26, 1990, Paragraphs 3, 4, 5, 6, 7, and 9(b) of the October permit were superseded.

Empire filed its response to the Department's motion on January 2, 1991, asserting that the Department had no authority to supersede the April permit during the pendency of Empire's appeal of that permit to the Board and that the Department was collaterally estopped from moving to dismiss the April permit appeal because the Board had denied the Department's request to cancel the supersedeas hearing on the grounds that the October permit rendered the April permit moot. In addition, Empire contended that the October permit did not supplant the objectionable conditions in the April permit and that if the Board were to grant the Department's motion, it would, in essence, condone the Department's controlling or subverting review of its actions by the Board. Finally, Empire argued that its appeal of the April permit was not moot because it presented issues of public importance, likely to recur and likely to escape review.

A matter before the Board becomes moot when an event occurs during the pendency of the appeal which deprives the Board of the ability to provide effective relief, Willard M. Cline v. DER, 1989 EHB 1101. There are exceptions to the mootness doctrine, such as Empire points out, where an issue is likely to recur and escape review, Bethayres Reclamation Corporation v. DER and Lower Moreland Township, 1988 EHB 220. After examining the conditions of the April and October permits being challenged by Empire, we must conclude that Empire's appeal of the April permit is moot.

Paragraph 2 of the April permit prescribes a maximum daily volume of 3539 tons, while Paragraph 2 of the October permit contains a maximum daily volume limit of 5000 tons. Paragraph 3 of the April permit sets forth an average daily volume of 3109 tons, while Paragraph 3 of the October permit contains a 3900 ton average daily volume. The April permit has no specific references to waste contracts, base Pennsylvania waste limits, the so-called

70/30 in-state/out-of-state waste ratios, or Executive Order 1989-8. Paragraphs 4 through 7 of the October permit address these subjects in great detail. Paragraph 4 of the April permit sets forth operating days and hours and the means to calculate waste volume averages. Paragraph 8 of the October permit also enumerates operating days and hours, but elaborates in much greater detail on the calculation of the waste volume averages. Because the October permit contains altered and additional conditions regarding waste volumes and averaging, it, by its own terms, supersedes the relevant portions of the April permit and, therefore, Paragraphs 2, 3, and 4 of the April permit are now moot.

With regard to those provisions of the April and October permits relating to traffic impacts, namely Paragraph 5 of the April permit and Paragraph 9 of the October permit, both require trucks going to the Empire facility to utilize the Keyser Avenue Interchange of the Northeastern Extension of the Pennsylvania Turnpike when the interchange is completed. But, the measures to be employed by Empire in the interim period differ in the April and October permits. Paragraph 9(a) of the October permit limits the number of vehicles going to the landfill via the intersection of Keyser Avenue and the Morgan Highway to a certain number between 7 to 9 A.M. and 3 to 6 P.M.; the April permit has no such limitation. While both permits require a biannual traffic study in accordance with the same parameters, the April permit relieves Empire of that responsibility when the Keyser Avenue interchange becomes operational. The October permit, on the other hand, mandates Empire to perform another traffic impact study within three months of the opening of the Keyser Avenue interchange and allows for Empire to seek

modification of the interim requirements. Again, the October permit altered and imposed additional conditions relating to traffic impacts and, as a result, Paragraph 5 of the April permit is now moot.

Where Departmental action supersedes a prior appealed action, the prior action is null and void; the Board can grant no relief and must dismiss the appeal as moot, Glenworth Coal Company v. DER, 1986 EHB 1348, citing Silver Springs Township v. DER, 28 Pa.Cmwlth 302, 368 A.2d 866 (1977). As for Empire's arguments that exceptions to the mootness doctrine apply, the issues raised by Empire in its appeal of the April permit are the same as the issues raised in its appeal of the October permit, so these issues will not escape review. Furthermore, the Department's subsequent modification of Empire's permit has not resulted in a subversion of Board review of the Department's actions, since the Board immediately consolidated the two appeals and proceeded to hear Empire's petition to supersede both the April and October permits.

Because we are dismissing Empire's appeal of the April permit as moot, it is unnecessary to address the Department's motion to limit issues on Empire's petition for supersedeas in that appeal. Similarly, Empire's motion for summary judgment pertained only to its appeal of the April permit and we will, therefore, not address it in light of our disposition of the April permit appeal. Empire may, of course, refile this motion in its appeal of the October permit.

O R D E R

AND NOW, this 24th day of January, 1991, it is ordered that:

1) The appeals consolidated at Docket No. 90-187-W are unconsolidated;

2) The Department's motion to dismiss Empire's appeal of the April permit at Docket No. 90-187-W is granted; and

3) All future filings pertaining to Empire's appeal of the October permit shall bear Docket No. 90-467-W.

ENVIRONMENTAL HEARING BOARD

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Joseph N. Mack

JOSEPH N. MACK
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DATED: January 24, 1991

cc: See following page.

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KERRY COAL COMPANY	:	
v.	:	**EHB Docket No. 90-333-E**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: January 29, 1991**

OPINION AND ORDER
SUR
DER'S MOTION FOR SUMMARY JUDGMENT

By: Richard S. Ehmann, Member

Synopsis

A Motion For Summary Judgment, filed by the Department of Environmental Resources ("DER") in an appeal from DER's assessment of a civil penalty as to alleged violations at Kerry Coal Company's ("Kerry") Eichorn Mine, is granted in part. Kerry did not timely file an Answer to DER's Request For Admissions, so it is deemed to admit them. Kerry's "faxing" to one Board member in Pittsburgh of a copy of a Response To Motion For Summary Judgment and a copy of an unsigned and unverified "Answer" to DER's Request For Admissions is not a filing of a response with the Board in Harrisburg, as mandated by 25 Pa. Code §21.32(e) of the Board's rules. The fact that Kerry responded nearly sixty days after expiration of the thirty-day period for filing the Answer to DER's Request also requires us to deem these Admissions to be admitted by Kerry. Kerry is not excused from its obligation

under Pa. R.C.P. No. 4014 to respond to a Request For Admissions where the response period expires after the deadline for completion of discovery set by the Board in Pre-Hearing Order No. 1.

Where DER's Request For Admissions fails to establish the facts supporting one of the three violations underlying DER's civil penalty assessment, that violation is disputed by Kerry, and the sole remaining support of DER's factual contentions is an affidavit by its employee, then the rule in Nanty-Glo v. American Surety Co., 309 Pa. 236, 163 A. 523 (1930), requires the denial of DER's Motion as to that violation and the portion of the total civil penalty assessed by DER which relates thereto.

OPINION

The instant appeal was filed with us by Kerry on August 6, 1990. Kerry's appeal challenges the propriety of DER's assessment of a civil penalty in the amount of $26,010 against Kerry under section 18.4 of the Surface Mining Conservation and Reclamation Act ("SMCRA"), the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.22, and Section 605(b) of the Clean Streams Law ("Clean Streams Law"), the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691. 605(b). DER's civil penalty assessment was, in turn, based on three alleged violations by Kerry, to wit: (1) Kerry's failure to comply with the terms of Compliance Order No. 90-K-015S; (2) Kerry's mining a portion of the Eichorn Mine without first constructing Sedimentation Pond G ("Pond G") to control sedimentation from that portion of the mine site; and (3) Kerry's failure to backfill the area affected by surface mining the Freeport Seam on Phase 10 of the Eichorn mine concurrently with the mining of that seam on that Phase.

After the filing of the Pre-Hearing Memoranda in this appeal, DER filed its Motion For Summary Judgment. In support thereof, DER attached a detailed affidavit of Stephen Amster with the exhibits referenced in the affidavit, DER's Request For Admissions which DER says were not timely answered by Kerry, and an affidavit by counsel for DER concerning the said admissions and exhibits identified therein.[1] Simultaneously, DER filed its Brief in support of its Motion.

On December 19, 1990, counsel for Kerry "faxed" us Kerry's Response To Motion For Summary Judgment. In it, Kerry recites that we must review it in a light most favorable to Kerry. Kerry's response disputes several of DER's key allegations of facts. Kerry also argues that DER's Motion is founded in large part on Kerry's alleged failure to respond to DER's Request For Admissions in a timely fashion. Kerry alleges it lacked the requisite thirty-day period between the time it received the Request For Admissions and the end of the Board-mandated discovery period on October 23, 1990 and, thus, it was not required to answer them. It also says DER sought no extension of the October 23rd discovery deadline for Kerry to respond to the Request For Admissions. Kerry's Response To Motion For Summary Judgment also admits that Kerry mailed its Answer to DER's Request For Admissions to DER on December 14, 1990.

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[1]While DER attached a certified mail return receipt (Exhibit M) to its Motion, purporting to show something was delivered to Kerry's counsel on September 28, 1990, nothing on the receipt relates it to the specific Requests For Admission (Exhibit L) in this appeal. Nothing on the Request For Admissions relates it to this particular return receipt, either. The only link between these two documents is the affidavit from counsel for DER, which, of course, is not referenced in the Request For Admissions or the return receipt. The "cover" letter transmitting the Request For Admissions from DER to Kerry, which undoubtedly ties the receipt's number to the transmitted Request, is not attached to DER's Motion.

On January 3, 1991, counsel for DER sent us DER's Reply to Kerry's Response To Commonwealth's Motion For Summary Judgment.

When considering a Motion For Summary Judgment, Commonwealth Court has held we may grant it only when the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and DER is entitled to judgment as a matter of law, Summerhill Borough v. Commonwealth, DER, 34 Pa. Cmwlth. 574, 383 A.2d 1320 (1978). See also Carol Rannels v. DER, EHB Docket No. 90-110-F (Opinion issued December 11, 1990).

The success of DER's Motion hinges on how we address the argument that we must deem all of the admissions contained in DER's Request For Admissions to be admitted because of Kerry's failure to timely answer them. We have held that where there is a failure to answer Requests For Admissions, they may be deemed admitted. John H. Miller v. DER, 1988 EHB 538. We have also indicated that where a response to a Request For Admissions admits the key facts in part by admissions and in part by failure to answer them, we may grant summary judgment based thereon. R&H Surface Mining v. DER, EHB Docket No. 87-478-E (Opinion issued April 4, 1990). Finally, where responses to a request for admissions are untimely filed and are neither signed nor verified, we have granted summary judgment after deeming the facts admitted. Energy Resources, Inc. v. DER, EHB Docket No. 89-534-MJ (Opinion issued August 15, 1990)[2]

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[2]In Energy Resources, supra, we recognized our discretion to allow a withdrawal of admissions, deemed to be admitted, by the filing of a Motion seeking to withdraw such admissions and substitute other responses thereto. No such Motion has been filed by Kerry in the instant matter.

In the instant appeal, Kerry is correct that Pa. R.C.P. 4014 allows Kerry thirty days to serve its responses to DER's Request For Admissions. If DER's Admissions were received by Kerry's counsel on September 28, 1990, as DER urges, then Kerry had until October 29, 1990 to file its objections or answers thereto. If Kerry filed neither, we can deem the admissions to be admitted by Kerry according to Miller, supra.

Kerry has never filed with this Board any response either to DER's Request For Admissions or its Motion For Summary Judgment. Kerry's Response to DER's Motion says it mailed responses to the Request For Admissions to DER on December 14, 1990. Kerry's counsel also "faxed" a copy of its Response To Motion For Summary Judgment and Appellants' Response To Commonwealth's First Request For Admissions on December 19, 1990 to Board member Ehmann's Pittsburgh office. Kerry never filed either its Response To Motion For Summary Judgment or its Response To Commonwealth's First Request For Admissions with the Secretary of the Board at the Board's office in Harrisburg, as required by 25 Pa. Code §21.32(e) of our rules.[3] Moreover, the materials faxed to Board member Ehmann in December of 1990 do not comply with Pa. R.C.P. 4014(b) because Kerry was given thirty days to make a sworn answer "signed by the party or his attorney." Kerry's "Answer" is unsigned, has not been sworn to by anyone and was received clearly outside of the thirty day period. DER's Reply to Kerry's Response indicates the copy of the Answer which DER received from Kerry is unverified, too.

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[3]Kerry complied with this requirement in all other filings in this appeal, so it was clearly aware of this requirement. Board member Ehmann directed the docketing of a copy of what was faxed to him when he discovered this omission while preparing this opinion but this occurred in January of 1991. Such a filing in January merely emphasizes the untimely nature of Kerry's response.

Accordingly, the admissions in this Request For Admissions must be deemed admitted by Kerry. Had a filing with the Board (as required by Section 21.32(e)) been made in December, we might have been in a position to consider whether to treat Kerry's Response as a request for withdrawal of the "deemed admitted" admissions.[4] We do not believe we can do so when our rules unequivocally require a filing in Harrisburg, since this would reward non-compliance with those rules.

Even if we ignored Kerry's failure to file in Harrisburg, Kerry sat on its hands and never timely filed either its Answer to DER's Request For Admissions or a request for postponement of the deadline by which the Answer or objections to DER's Request For Admissions was due. We cannot ignore the fact that if in September or October of 1990, Kerry was unsure of its obligations vis a vis the Request For Admissions, it could have sought clarification thereof from us, but it made no attempt to secure such a clarification.

Kerry's only defense to its failure to file a timely Answer or to seek a clarification on this point is its alleged absolute trust in the idea that if less than thirty days of the discovery period remained after DER served its Request For Admissions, Kerry could ignore the DER's Request entirely. Kerry offers us no cases in support of this contention or rational argument as to how it acquired a right to treat the Request as if it had never been made. We have had this issue come before us, however, in Academy of Model Aeronautics v. DER, EHB Docket No. 89-365-MR (Opinion issued January 12, 1990). There, Board member Robert D. Myers found discovery commenced within

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[4]In light of Commonwealth v. Diamond Shamrock Chemical Co., 38 Pa. Cmwlth. 89, 391 A.2d 1333 (1978), we might also have denied this request.

the discovery period was timely and had to be answered even if the thirty day period for filing answers ran beyond the end of the discovery period because "the answering party typically requests and is granted an extension of time." Aeronautics, supra, at page 3. We do not wish our adoption of that rationale in this case to be read as an endorsement of the concept that parties should routinely wait to file discovery until the end of the period of time we authorized for discovery when we issued Pre-Hearing Order No. 1. The reverse is true. Discovery should be commenced as close to the beginning of the discovery period as possible. However, where the thirty-day period for filing Answers to Requests For Admissions (as prescribed in the Rules of Civil Procedures) ends at a date beyond the end of the authorized discovery time period, we wish it to be clear that, that event's occurrence does not relieve the answering party of any obligation to file its sworn Answer or authorize such a party to sit on its Answers for nearly two months before making any attempt to provide them.

Having stated the above and concluding that the admissions are deemed admitted, we now turn to the allegations in DER's Motion, Kerry's Notice Of Appeal, its Pre-Hearing Memorandum, and the Admissions to see if summary judgment is appropriate.[5]

Kerry's first issue on the merits of this appeal in its Notice Of Appeal is that DER's Compliance Order was issued in error. Kerry says it did not fail to comply with a valid order since DER's January 23, 1990 Compliance Order was invalid. Kerry then says there were no violations by Kerry of any

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[5]Other than the issues raised by Kerry, which are discussed above, Kerry's Response To Motion For Summary Judgment does not point to any legal dispute which bars us from granting summary judgment here, but we cannot do so unless our review indicates it is appropriate.

rule, regulation, or permit condition. The deemed admitted admissions establish that Kerry is permittee under Surface Mining Permit No. 37840101 for the Eichorn Mine, located in Little Beaver Township, Lawrence County. The Eichorn Mine is surface mined in two pits: one containing the Upper and Lower Freeport Coal Seams ("Freeport Pit"), and one containing the Middle and Lower Kittanning Coal Seams ("Kittanning Pit"). Kerry completed mining of the Kittanning Pits on November 8, 1989. Pursuant to 25 Pa. Code §87.141(c)(1), Kerry was required to complete backfilling the Kittanning Pit by January 7, 1989, except for the section used as a haulroad for the Freeport Pit. As of January 23, 1990, Kerry had not completed backfilling the portion of the Kittanning Pit not used as the haulroad. DER issued Compliance Order 90-K-015S to Kerry on January 23, 1990, which required Kerry to backfill and regrade the Kittanning Pit by noon on March 23, 1990. Kerry took no appeal to this Board from that Order except through the instant appeal of the civil penalty assessment. Kerry did not complete backfilling of this pit by noon on March 23, 1990. Kerry's Pre-Hearing Memorandum admits rough backfilling was not completed until April 5, 1990. It offers no defense to these admitted facts or explanation of why DER's Order was invalid other than through assertions of alleged facts which controvert its deemed admissions and, hence, must be ignored. Accordingly, we conclude DER's January 23, 1990 Compliance Order was valid, based on the backfilling violation at the Kittanning Pit.

These admissions also mean we cannot subscribe to the next assertion in Kerry's Notice of Appeal to the effect that backfilling was concurrent with mining. Based on Kerry's admissions and the allegations in its Pre-Hearing Memorandum, we are thus forced to conclude DER has established that Kerry has violated Compliance Order 90-K-015S as alleged.

The next assertion in Kerry's Notice of Appeal is that its sedimentation pond was properly constructed. Admissions Nos. 21 through 23 establish that through its March 21, 1990 inspection report, DER advised Kerry that Pond G had to be built and certified prior to the drainage area for Pond G being affected. Kerry admits DER's inspection showed Kerry conducting earth moving activities, including coal mining, within a drainage area of Eichorn mine, without having constructed Pond G. The admission does not say that this was Pond G's drainage area. Kerry also admits its certification of Pond G was submitted to DER on April 5, 1990.

Kerry's Pre-Hearing Memorandum alleges that no area draining to Pond G was affected prior to the pond's certification. It further asserts the affected area did not drain to Pond G and the affected area's erosion and sedimentation was controlled by other ponds. The Notice Of Appeal says the area, if affected, was affected to build the sediment pond. DER's Admission 30, which Kerry is deemed to admit, states:

> Kerry's failure to construct and certify a sedimentation pond to conducting earthmoving activities at the Eichorn Mine in the drainage areas of the earthmoving activities, was a violation of 25 Pa. Code §§87.106 and 102.4.

We may hazard a guess as to what this means, but we cannot grant a summary judgment based upon a guess as to the facts or legal theory contained therein. Summerhill Borough, supra. DER's factual support for its Motion in the form of its admissions does not show us a violation by Kerry of any regulations in terms of Pond G and Kerry's nearby surface mining activity. Further, from the way Admission No. 21 is worded, all we know is that on March 27, 1990, in a drainage area of the Eichorn Mine, Kerry conducted earth moving and Pond G was not constructed within that portion of the mine. That does not

show Pond G was not in another portion of the mine or that in the area draining to Pond G, Kerry was conducting surface mining. In sum, DER has not shown us enough to secure a summary judgment on this aspect of its Civil Penalty Assessment through Request For Admission No. 30.

It might be argued that deemed admitted Admission 27 cures this deficiency because Kerry admits DER did not abuse its discretion in issuing Compliance Order No. 90-K-058S. We do not buy this argument. This Compliance Order was not attached to the Request For Admissions, but was only attached to DER's Motion. Moreover, this Compliance Order recites three separate alleged violations. Two of these violations appear to have nothing to do with DER's contention as to earth-moving near Pond G, and the single violation in that Order which relates thereto is obviously disputed. Moreover, when we subtract these deemed admitted Admissions on this issue from the calculation as we must, since Compliance Order No. 90-K-058S is not attached and there is confusion within Admissions themselves as pointed out above, it is clear the remainder of DER's factual support is an insufficient basis on which to grant summary judgment.

All we have remaining on this point are exhibits referenced in Mr. Amsler's affidavit and the affidavit itself. Under Nanty-Glo v. American Surety Co., 309 Pa. 236, 163 A. 523 (1930), we cannot accept these as an adequate basis on which to grant summary judgment. See Goodrich Amram, 2d, §1035(b):4. We must thus conclude that at this time, DER has not established its case with sufficient clarity for us to find the violation on which the second portion of DER's total civil penalty assessment is based.

DER's Reply argues that we can still grant DER summary judgment because Kerry's contentions as to Pond G, raised in its Pre-Hearing

Memorandum, were not raised in its Notice Of Appeal, and, thus, are barred under Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986); affirmed on other grounds, 521 Pa. 121, 555 A.2d 812 (1989). Unfortunately for success of this DER argument, Kerry's Notice Of Appeal is very general and DER made no attempt to request us to force Kerry to specify its grounds for appeal in a more specific fashion prior to filing the Motion now before us. As a result, we are unwilling at this point to say the general allegations in Kerry's Notice Of Appeal, such as: "G. The DER abused its discretion in issuing the Compliance Order", do not include the challenge by Kerry that the water from the affected area did not flow to Pond G.

As to the third portion of DER's Civil Penalty Assessment, which relates to Kerry's alleged failure to backfill and regrade the Freeport Seam in Phase 10 concurrent with the mining thereof, Kerry admits that on March 27, 1990, the distance between backfilling and grading and the highwall on the Freeport Pit exceeded 300 feet and, in some places, was at least 600 feet. (Admissions 17 and 18)[6] Kerry also admits this failure was cited in DER's Compliance Order No. 90-K-058S and was a violation of 25 Pa. Code §87.141(c)(2). (Admissions No. 31) The allegation in Kerry's Notice Of Appeal that the backfilling was less than 300 feet from the face of the Freeport Seam

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[6]Admissions 19 and 20 reference a letter dated April 5, 1990, from Kerry to DER, identified as Exhibit C to the Admissions, which is not attached as an Exhibit to DER's Request For Admissions as submitted to us with DER's Motion For Summary Judgement. A letter of April 5, 1990, labeled as Exhibit I is attached to DER's Motion which says, this is the aforementioned April 5, 1990 letter but all we have to prove this is an affidavit from DER's counsel. Under Nanty-Glo, supra, this is not an adequate basis on which to grant Summary Judgment.

and DER abused its discretion in issuing its Compliance Order must thus be disregarded. Clearly, DER has also established the violation underlying the third part of its Civil Penalty Assessment.

Concerning the civil penalty itself, Kerry is deemed to admit that penalties assessed do not exceed those which may be imposed by DER under the Clean Streams Law and SMCRA. (Admission 24) Kerry admits they are reasonable and properly determined in light of the violations of the Clean Streams Law, SMCRA and the regulations. (Admission 25) Kerry's Notice Of Appeal says it challenges the penalties as improperly determined and excessive. It also says DER abused its discretion in assessing a penalty. Kerry's Pre-Hearing Memorandum adds nothing to the Notice Of Appeal on these issues other than saying DER must establish the penalties are not arbitrary and capricious. In light of Kerry's admissions, these objections must be disregarded with regard to the allegation of violation contained in Compliance Order 90-K-015S, concerning backfilling the Kittanning Pit at the Eichorn Mine, and the violation contained in Compliance Order 90-K-058S, as to the backfilling and grading of the Freeport Pit.

Since in cases like this we are only called upon to review DER's assessment of civil penalty, as opposed to those cases where we are asked to assess a civil penalty, (such as under Section 605(a) of the Clean Streams Law), nothing prevents our granting the DER motion in the instant case to the extent it is warranted. Accordingly, we enter the following Order:

O R D E R

AND NOW, this 29th day of January, 1991, upon consideration of DER's Motion For Summary Judgment, the Motion is granted in part and denied in part. Insoafar as DER seeks summary judgment as to its assessment of an $840

civil penalty for Kerry's alleged "mining without having constructed Sediment Pond G," the motion is denied. Insofar as DER seeks summary judgment as to its assessment of a $23,370 civil penalty for Kerry's "failing to comply with Compliance Order 90-K-015S," the motion is granted and Kerry's appeal is dismissed in regard thereto. Insofar as DER seeks summary judgment as to its assessment of a $1,800 civil penalty for Kerry's "failing to backfill and regrade the Freeport Seam on Phase 10 concurrent with mining," the motion is granted and Kerry's appeal is dismissed in regard thereto.

ENVIRONMENTAL HEARING BOARD

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RICHARD S. EHMANN
Administrative Law Judge
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JOSEPH N. MACK
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DATED: January 29, 1991

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M. DIANE SMITH
SECRETARY TO THE BO

CITY OF HARRISBURG	:	
v.	:	**EHB Docket No. 88-120-F**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and THE PENNSYLVANIA FISH COMMISSION, Intervenor	:	**Issued:** January 30, 1991

OPINION AND ORDER SUR
JOINT MOTION FOR RECONSIDERATION

By Terrance J. Fitzpatrick, Member

Synopsis

The Board grants reconsideration of a prior ruling directing the Department of Environmental Resources (DER) to disclose information which DER claimed was subject to the attorney-client privilege and the attorney work product doctrine. Reconsideration is granted due to the need to move forward to a hearing on the merits, because DER has already disclosed a significant amount of information of the type sought, and because the importance of the specific information sought is negligible.

OPINION

The background of this litigation has been stated in previous opinions and will not be repeated in detail here. See City of Harrisburg v. DER, 1989 EHB 365, 1989 EHB 373. This Opinion addresses a Joint Motion for Reconsideration filed by the City of Harrisburg (City) and DER on September 18, 1990. In this motion, the parties ask us to reconsider our prior rulings holding that certain DER documents and the substance of certain conversations

within DER were not subject to the attorney-client privilege and the attorney work product doctrine. Thus, we ruled that the City was entitled to discovery of these documents and conversations. See City of Harrisburg v. DER, EHB Docket No. 88-120-F (April 30, 1990.)

In their joint motion, the parties state:

> 4. The Department and the City agree that oral and written communications between agency staff and lawyers for the Department are entitled to protection under the attorney-client communications privilege and the attorney work-product doctrine that is co-extensive with that protection available to private litigants, regardless of when such communications were exchanged in the agency decision-making process.
>
> 5. The Department and the City agree that statements by the agency and its staff made in the context of an attorney-client relationship for the purpose of securing legal assistance are protected from disclosure by the attorney-client communications privilege.
>
> 6. The Department and the City agree that material representing or containing the mental impressions, conclusions, opinions, advice, legal research or theories of lawyers for the Department are protected from disclosure by the attorney work-product doctrine.

The parties go on to say that although they agree that the privilege and doctrine (collectively referred to as "the privilege") are available, they disagree over whether the privilege applies to certain conversations and documents. Therefore, the parties ask us to reconsider our prior rulings on these issues and to appoint a Hearing Examiner to conduct a hearing, to inspect documents, and to render a decision on the applicability of the privilege to the documents and conversations.

The parties also filed a stipulation along with the joint motion.[1] The stipulation lists various categories of information which DER had previously withheld on the basis of privilege, but which it has now agreed to provide to the City. Among the types of information which DER agreed to supply were information regarding meetings held by DER (para. 1), who attended the meetings and what their role was (para. 1, 3), what standards DER has applied to judge other requests for certification (para. 5), identification of each person within DER who made decisions regarding the City's request and what facts and standards each person relied upon (para. 7), and, finally, what information Secretary Davis relied upon in making the ultimate decision upon the City's request (para. 17).

The Board will grant reconsideration of interlocutory decisions, such as our April 30, 1990 decision, only when "exceptional circumstances" are present. Baumgardner v. DER, 1989 EHB 400. For the reasons stated below, we will grant reconsideration in this case, but only to cut-off further discovery into areas which DER claims are privileged.

It is important to our decision that almost three years have passed since the City filed this appeal in March, 1988. The undersigned has already issued eight opinions (counting the two issued today) disposing of roughly two dozen motions and petitions.[2] Despite these efforts, this proceeding has still not progressed to the point where hearings can be scheduled on the merits of this appeal. Some of this delay has been attributable to the

---

[1] Both the joint motion and the stipulation were filed to settle a declaratory judgment action which DER had filed in Commonwealth Court. In that action, DER had essentially sought to overturn our opinion and order of April 30, 1990 regarding applicability of the privilege.

[2] Two of our opinions and roughly four of the motions or petitions dealt with requests by other parties to intervene in this proceeding.

significant legal issues regarding the scope of DER's authority in ruling upon requests for certification. For the past year and a half, however, the delay has been largely attributable to the parties' wrangling over discovery matters. On April 30, 1990, we issued an Opinion and Order disposing of nine discovery motions. Today we are issuing two opinions and orders disposing of seven more discovery motions. If we were to grant reconsideration of our previous rulings and refer this matter to a Hearing Examiner for a hearing on discovery issues, more delay would result.

Another important factor is the amount of information which DER has already supplied regarding the basis for its decision on the City's request. To the extent the City wishes to attack the basis for DER's decision, it already has, assuming the stipulation has been complied with, information regarding facts and standards which DER relied upon, DER's general policy for reviewing certification requests,[3] information which Secretary Davis relied upon in making his decision, etc. Thus, DER has already supplied a substantial amount of information to the City regarding DER's decision-making process.

Finally, we note that the information which the City continues to seek is only marginally relevant, and is of very little importance to the Board's ultimate decision. Simply put, the City is seeking to discover what DER's lawyers said orally and in writing to DER employees, what DER employees said to DER's lawyers, and what was said at certain meetings attended by - among others - DER's lawyers. The City may wish to use this information in an attempt to show that DER relied upon improper factors or considerations in

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[3] DER attached to its response (filed on October 2, 1990) to the City's motion for sanctions, copies of internal memoranda which spell-out DER's present and past policies governing requests for certification.

denying the City's request. With regard to the factors DER applied here, the Board has already found that DER exceeded its scope of authority. City of Harrisburg v. DER, 1988 EHB 925, 1989 EHB 365. Commonwealth Court has upheld the Board's decisions. Commonwealth, DER v. City of Harrisburg, __ Pa. Commonwealth Ct. ____, 578 A.2d 563 (1990). Moreover, to the extent that the City might accuse DER of basing its actions upon improper facts or considerations, it must be remembered that the Board conducts a de novo[4] review of DER's decision - that is, the Board bases its decision upon the record developed before the Board, not upon the facts considered by DER. Warren Sand and Gravel, Inc. v. Commonwealth, DER, 20 Pa. Commonwealth Ct. 186, 341 A.2d 556 (1975). Based upon this evidentiary record, the Board may substitute its discretion for that of DER. Id., 341 A.2d at 565. Thus, even if DER did consider irrelevant facts, etc., this will not affect the Board's decision.[5]

Under the circumstances, we will not sanction further delays in this proceeding and squander the Board's resources by conducting hearings on discovery issues when the information sought will have no effect upon the Board's ultimate decision. Therefore, we will grant reconsideration of our prior rulings regarding information DER claims to be subject to the attorney-client privilege and attorney work product doctrine, and we rule that DER need not disclose any further information which it claims is privileged. We are aware that there may be a small amount of discovery yet to be completed

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[4] "De novo" is Latin for "anew; afresh; a second time." Black's Law Dictionary (4th ed., 1968).

[5] In the present case, the Board's decision will hinge on whether the evidence shows that the project is likely to cause discharges of pollutants in violation of state laws governing water quality. It will not matter whether DER based its decision upon this same issue.

- for example - depositions which were scheduled before the discovery period closed but which have not been held for various reasons. We will re-open discovery for a 30 day period, <u>but only to allow completion of discovery initiated before the discovery period closed on July 20, 1990, or to allow submission of information covered by the stipulation, if necessary.</u> We will also set dates for filing pre-hearing memorandums.

ORDER

AND NOW, this 30th day of January, 1991, it is ordered that:

1. Reconsideration of the Board's April 30, 1990 opinion and order is granted to the extent said opinion and order required DER to disclose information which DER argued was subject to the attorney client privilege and the attorney work product doctrine.

2. DER need not comply with any outstanding discovery requests which DER has argued are subject to the attorney-client privilege or attorney work product doctrine. This paragraph is not intended to release DER from its obligations under the stipulation submitted with the joint motion.

3. Discovery is re-opened for the period of February 11 to March 11 (inclusive), 1991, to allow completion of discovery which was initiated before the discovery period closed on July 20, 1990, or to allow submission of information covered by the stipulation, if necessary. The parties shall not attempt to initiate new discovery requests.

4. The City of Harrisburg shall file its pre-hearing memorandum on or before April 8, 1991.

5. DER and the Fish Commission shall file their pre-hearing memorandums on or before April 29, 1991.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATE: January 30, 1991

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M. DIANE SMITH
SECRETARY TO THE BOARD

CITY OF HARRISBURG	:	
	:	
v.	:	**EHB Docket No. 88-120-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** January 30, 1991
and THE PENNSYLVANIA FISH COMMISSION,	:	
Intervenor	:	

OPINION AND ORDER SUR
PENDING MOTIONS REGARDING DISCOVERY

By Terrance J. Fitzpatrick, Member

Synopsis

The Board issues an Opinion and Order disposing of various discovery matters. The Board denies a request by the Department of Environmental Resources (DER) to extend the discovery period because a reasonable period has already been provided for discovery and because it is necessary to move this appeal toward a hearing on the merits. A motion for sanctions filed by the City of Harrisburg (City) is denied because, among other reasons, DER has already produced voluminous amounts of information from its files, and because sanctions will not usually be imposed for failure to produce a witness for deposition unless the Board first issues an order compelling production of the witness.

OPINION

The background of this litigation has been stated in previous opinions and will not be repeated in detail here. See City of Harrisburg v. DER, 1989 EHB 365, 1989 EHB 373. This Opinion addresses six motions filed by

the parties regarding discovery issues.[1] We shall address these motions individually.

1. The City's Motion for Protective Order (filed July 9, 1990).

In this motion, the City asks the Board to issue a protective order limiting the scope of a deposition of one of the City's experts - David A. Brinjac, P.E. The City asserts that the notice of deposition indicates DER will seek information regarding "upstream improvements" and "identification and selection of alternatives" as those terms are used in the City's application for a permit from the Federal Energy Regulatory Commission (FERC). The City contends that these issues are only relevant to the extent they relate to "discharges of pollutants" resulting from the project. See Commonwealth, DER v. City of Harrisburg, __ Pa. Commonwealth Ct. ___, 578 A.2d 563 (1990).

Although we tend to agree with the City's argument regarding the scope of the issues, we need not grant a protective order, because, as DER points out, the motion appears to be moot. DER's response indicates that the Brinjac deposition was conducted on July 11, 1990, and that Mr. Brinjac was permitted to testify regarding, among other things, upstream improvements which could be related to discharges of pollutants. We might add that to the extent the City might have directed Mr. Brinjac not to answer certain questions, the proper remedy at this stage would be for DER to file a motion to compel. DER has not filed such a motion.

Therefore, we will deny the City's motion for protective order since it is moot.

2. DER's Motion to Extend the Discovery Period (filed July 20, 1990)

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[1] On this same date, the Board is issuing a separate opinion disposing of a joint motion for reconsideration filed by DER and the City.

In this motion, DER seeks a sixty-day extension of the discovery period, which closed on July 20, 1990. DER contends that it still has depositions it wishes to conduct, that additional expert reports surfaced during depositions and these reports require further discovery, and that the hearing on the merits will be protracted if further discovery cannot be conducted so that the parties can stipulate as to test results.[2] The City objects to extending the discovery period, contending that the Board has already allowed a reasonable period of time for discovery, that the City initiated all the discovery it needed to conduct within the discovery period, and that DER's need for additional time for discovery is a result of DER's fixation on issues which are beyond the scope of the proceeding.

We will deny DER's motion to extend the discovery period. In a complex case such as this one, a party can always think of more information that it would like to have regarding the opposition's case. And yet, discovery must end at some point if a hearing is to be held. We believe that the discovery period we have allowed here is more than reasonable. With regard to DER's claim that it has not had sufficient time to inquire about new studies and reports developed by the City's experts, if we were to extend discovery on this basis, we anticipate that more "new studies" would surface, leading to additional pleas to extend discovery. The parties are required to describe their evidence in their pre-hearing memorandums, and we will deal with any claims of unfair surprise at that time.

3. <u>The City's Motion for Protective Order (filed August 2, 1990)</u>

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[2] DER also claimed that additional time was needed for discovery because the City refused to provide certain information during depositions, such as information regarding financing of the project. We will not address these issues since DER has not filed a motion to compel the City to release this information.

Here, the City seeks a protective order with regard to certain interrogatories served upon it by DER on July 20, 1990. The City asserts that the interrogatories are largely duplicative of earlier interrogatories and that the filing of the interrogatories on the last day of the discovery period is evidence of bad faith.

We will deny the City's motion. It is our impression from DER's response to the City's motion that DER's interrogatories were designed to elicit information which the City could not supply previously. Moreover, while serving discovery requests on the last day of the discovery period is not the preferred practice, the Board has held that doing so is not impermissible, per se. Academy of Model Aeronautics v. DER, EHB Docket No. 89-365-MR (January 12, 1990).

Therefore, we will deny the City's motion for protective order.

4. The City's Motion for Sanctions (filed on August 2, 1990)

In this motion, the City asks the Board to enter sanctions against DER for DER's alleged transgressions of the Board's orders and the rules regarding discovery. Specifically, the City alleges that DER has failed to make available information from the Wilkes-Barre, Meadville, and Norristown regional offices regarding other requests for certification, and that DER has failed to make available any documents regarding DER's general policy for reviewing requests for certification. In addition, the City argues that DER continues to withhold information which DER claims is subject to the attorney-client privilege and the attorney work product doctrine - despite Board decisions holding that the privilege and doctrine do not apply here, that DER failed to produce Leon Oberdick and Peter Slack for scheduled depositions, and that DER served interrogatories on the City on the last day of the discovery period.

We will deny the City's motion for sanctions. With regard to DER's regional office files on requests for certification, we are not convinced that sanctions are warranted due to DER's failure to produce every file on these requests. In light of the number of these files and the fact that they are spread out through DER's regional offices, we must assume - absent proof to the contrary - that DER's failure to produce every one of these files reflects a problem with DER's recordkeeping rather than an intent to withhold information. We will not impose sanctions in this situation. Moreover, the City has not convinced us that whatever it was looking for in these files could not be gleaned from the files which were produced.[3]

With regard to the City's allegation that DER has not produced its general policy regarding requests for certification, we note that copies of DER internal memorandums spelling out the current policy and the previous policy are attached to DER's response to the City's motion for sanctions (Exhibit 2 to DER's response). DER alleges that these documents were supplied to the City at an earlier date, but, in any event, the City has the documents now.

The City's allegations regarding the information which DER claims is subject to the attorney-client privilege and the attorney work product doctrine do not warrant sanctions. As DER points out, the City agreed when it executed the joint motion for reconsideration on these issues that it withdrew its request for sanctions with regard to DER's failure to supply the contested material. (See letter from City to the Board dated September 18, 1990).

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[3] We are not certain how the City intends to use this information, however, we do not intend to litigate DER's past rulings on other requests for certification in addition to its ruling on the City's request. Whatever DER did in other cases, the instant appeal will turn on whether the project will cause discharges of pollutants in violation of state laws governing water quality. See, City of Harrisburg v. DER, 1988 EHB 925, 1989 EHB 365.

With regard to DER's failure to produce Messrs. Oberdick and Slack for depositions, we would not sanction DER for this conduct without first issuing an order which compels DER to produce the witnesses. See Anderson W. Donan, et al. v. DER, et al., EHB Docket No. 88-375-F (December 11, 1990). Moreover, this issue may be moot as to Mr. Oberdick since DER alleges that he has since been deposed by the City.

Finally, sanctions are not warranted due to DER's serving interrogatories on the City on the last day of the discovery period. As stated in section 3 above, DER's actions were not, per se, improper.

In summary, the City's motion for sanctions will be denied.[4]

5. DER's Motion for Protective Order (filed November 15, 1990)

In this motion, DER requests that the Board grant a protective order with regard to a deposition of DER Secretary Arthur Davis which the City scheduled for November 16, 1990. DER alleges that it should not be required to produce Secretary Davis until the issues surrounding the joint motion for reconsideration regarding the applicability of the attorney-client privilege and attorney work product doctrine, have been resolved.

We will deny DER's motion for a protective order. Since the date scheduled for Secretary Davis' deposition has passed, DER's motion is moot. More importantly, however, the Board is ruling in a separate opinion and order issued today that DER need not provide any additional information, beyond that which it has already provided or has agreed to provide, which it claims is subject to a privilege claim. This ruling eliminates the concern which underlies DER's motion.

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[4] We will also deny the City's motion to strike DER's response to the motion for sanctions. Assuming that a verification was required for the response, DER did supply one, even though it was tardy in doing so.

Accordingly, we will issue an order disposing of all of the above motions.

ORDER

AND NOW, this 30th day of January 1991, it is ordered that:

1. The motion for protective order filed by the City on July 9, 1990 is denied as moot.

2. DER's motion to extend discovery, filed on July 20, 1990, is denied.

3. The motion for protective order filed by the City on August 2, 1990 is denied, and the City is ordered to respond to the interrogatories in question by March 11, 1991.

4. The motion for sanctions filed by the City on August 2, 1990 is denied. DER is ordered to produce Peter Slack for deposition, if requested to do so by the City, sometime during the period of February 11 to March 11, 1991.

5. The City's motion filed October 19, 1990, to strike DER's response to the motion for sanctions is denied.

6. DER's motion for protective order filed on November 15, 1990 is denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATE: January 30, 1991

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M. DIANE SMITH
SECRETARY TO THE BOARD

EMPIRE SANITARY LANDFILL, INC.	:	
	:	
v.	:	**EHB Docket No. 90-467-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** January 30, 1991

OPINION AND ORDER SUR
PETITION FOR SUPERSEDEAS

By Maxine Woelfling, Chairman

Synopsis

Conditions in a solid waste management permit are superseded pending an adjudication on the merits. Petitioner is likely to succeed on the merits for several reasons. The volume limitations in the permit discriminate against the importation of out-of-state waste and, as such, are an unconstitutional restriction on interstate commerce. The reductions in the waste volume limitations in petitioner's permit do not fall within the categories of authorized permit modifications in the relevant statutes. The imposition of a requirement to perform biannual traffic studies is not justified where the relevant roadway is a heavy industrial and commercial corridor and vehicular traffic to and from petitioner's facility only constitutes 20% of the traffic. Restrictions on use of a particular intersection during peak use by the motoring public are not an abuse of discretion.

Petitioner has established that the grant of a supersedeas will not cause any environmental harm where it or its affiliated companies are not in

violation of relevant regulatory requirements and where the Department of Environmental Resources (Department) admits that the geographic source of waste is irrelevant to its environmental impact. Petitioner's loss of millions of dollars of expected profits and the adverse effect on its business reputation constitute irreparable harm.

DISCUSSION

The extensive and convoluted procedural history of this matter is set forth in the Board's December 5, 1990, opinion denying Empire Sanitary Landfill's (Empire) request for a supersedeas of the Board's October 17, 1990, opinion denying Empire's motion to enforce a settlement agreement, the Board's December 18, 1990, opinion denying Empire's request to adjudicate the merits on the basis of the record of the November 1 and 2, 1990, supersedeas hearing, and the Board's January 24, 1991, opinion and order dismissing as moot Empire's appeal of the April 6, 1990, modification to its solid waste permit at Docket No. 90-187-W. In accordance with the Board's November 7, 1990, order, the parties filed memoranda of law relating to whether a supersedeas of the April 6 and October 26, 1990, modifications (October permit) to Empire's solid waste permit should be imposed pending an adjudication on the merits. Because the filing of the memoranda of law was simultaneous, both parties filed reply briefs.[1] Since Empire's appeal of the April 6, 1990, permit modification was dismissed as moot, this opinion will deal only with the October permit.

The Department's implementation of Executive Order 1989-8 led to the permit modification at issue here. Entitled "Municipal Waste Reduction and

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[1] The Department sought and was granted the Board's leave to file its reply brief. Empire did not seek the Board's leave and the Department moved to strike its reply brief. The Department's motion was denied in light of 1 Pa. Code §35.191.

Planning Program," the Executive Order was adopted on October 17, 1989, pursuant to Article I, §27 of the Pennsylvania Constitution; the Solid Waste Management Act, the Act of July 9, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* (the Solid Waste Management Act); and the Municipal Waste Planning, Recycling and Waste Reduction Act, the Act of July 28, 1988, P.L. 566, 53 P.S. §4000.101 *et seq.* (Municipal Waste Act). Two portions of the Executive Order are relevant to this controversy. Pending development of the Pennsylvania Municipal Waste Management Plan,[2] Section 1(a)(1) of the Executive Order prohibits the Department from approving modifications to existing municipal waste disposal permits which would authorize an expansion of disposal capacity unless the applicant demonstrates a need for additional capacity and shows that at least 70 percent of the municipal waste proposed to be received at the facility is generated in Pennsylvania and accepted pursuant to county implementing documents specified in Section 513(b) of the Municipal Waste Act or such other documents as the Department deems acceptable. The Department is also directed by Section 2(a) to establish maximum and average waste volume limits for operating municipal waste landfills "based on the actual daily volume disposed at the landfill and reported to the Department for days the facility was in operation during the period of October 26, 1988 to June 30, 1989." The operator may petition the Department for additional waste volumes if required to implement "signed and binding contracts" which have been entered into prior to October 17, 1989, and which call for performance during the period of time from October 17, 1989, to the adoption of the Pennsylvania Municipal Waste Management Plan. Operators of municipal

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[2] Section 3 of the Executive Order directs the Department to develop a <u>proposed</u> plan by September 26, 1991. No date is provided for the adoption of a final plan.

waste disposal facilities may also request increases in waste volume limitations in their permits, provided that at least 70% of the additional waste is generated in Pennsylvania.

Empire was authorized by Solid Waste Permit No. 100933, issued March 14, 1986, to dispose of solid waste on a 25.74 acre site in Ransom Township and the Borough of Taylor, Lackawanna County (Department's Answer to Empire's Statement of Undisputed Facts, ¶ 3). The permit was amended on May 22, 1987, to authorize the expansion of the site to 487.16 acres, of which 150 acres were a lined disposal area; the disposal of 5000 tons per day (TPD) as a daily maximum; and an increase of up to 10% of this daily volume if approved by the Department (Ex. P-1; N.T. 21).[3] Empire advised the Department that it intended to continue operating under the April 9, 1988, municipal waste management regulations, filing the necessary preliminary and complete repermitting applications (N.T. 26-27; ¶ 3). The Department thereafter, on August 16, 1988, issued a modification to Empire's permit which restricted construction and operation to Pads 2 through 4 (Ex. P-4).

The Department, implementing its responsibilities under the Executive Order, determined maximum and average daily waste volumes for Empire of 4,987 TPD and 3,109 TPD, respectively (Ex. P-6). It also advised Empire that if it wished to qualify for increased waste volumes to honor existing waste disposal contracts, it would have to submit copies of contracts executed before October 17, 1989, which provided for waste disposal between October 17, 1989, and March 26, 1992. Empire was also made aware that it could avail itself of the opportunity to take additional waste under Sections 2(c) and 2(d) of the

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[3] "N.T." denotes the notes of testimony from the November 1 and 2, 1990, supersedeas hearing, while "Ex. P- " denotes Empire's exhibits and "Ex. C- " denotes the Department's exhibits.

Executive Order (Ex. P-6).

Although disputing the Department's right to request information pursuant to the Executive Order, Empire submitted information to the Department on November 3, 1989 (N.T. 31). Thereafter, on April 6, 1990, the Department issued a modification to Empire's permit decreasing its maximum daily volume to 3,539 TPD, decreasing its daily average volume to 3,109 TPD,[4] limiting its imported daily average waste volume to 3,109 TPD,[5] and imposing various restrictions relating to vehicular access to the landfill (N.T. 33; Ex. P-8).

The Department again modified Empire's permit on October 26, 1990 (Ex. P-13). That modification, which superseded the April 6, 1990, permit modification, imposed a 5000 TPD maximum daily waste volume and a 3900 TPD average daily waste volume;[6] limited out-of-state waste to waste received pursuant to Empire's contracts with Bridgwater Resources, Inc. (BRI), Morris County Transfer Station, Inc. and Chambers Development Company, Inc.; imposed a "base Pennsylvania Municipal Waste volume" of 317 TPD for purposes of Empire's seeking additional waste capacity under the Executive Order; restricted vehicular access to the landfill; and required Empire to conduct a biannual traffic impact study.

An order was issued by the Board on December 26, 1990, superseding Paragraphs 3, 4, 5, 6, 7, and 9(b) of Part III of the October permit. This opinion is issued in confirmation of that order.

In order for Empire to obtain a supersedeas, it must show by a

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[4] Computed over a calendar year quarter.

[5] Computed over a calendar year quarter.

[6] Computed over a calendar year quarter.

preponderance of the evidence, (1) that it is likely to prevail on the merits, (2) that it will suffer irreparable harm, and (3) that there is no likelihood of injury to the public or other parties, §4(d) of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7514 (Environmental Hearing Board Act), 25 Pa. Code §21.78, and Al Hamilton Contracting Company v. DER, EHB Docket No. 90-268-W (Opinion issued August 9, 1990). While the party seeking the supersedeas must satisfy all three of these criteria, the Board's evaluation of the evidence relating to the three criteria necessarily involves a balancing test, Chambers Development Company, Inc., et al. v. DER et al., 1988 EHB 68, aff'd at 118 Pa.Cmwlth 97, 545 A.2d 404 (1988).

LIKELIHOOD OF SUCCESS ON THE MERITS

In its petition for supersedeas, Empire asserts it is likely to prevail on the merits with regard to three aspects of the permit modification. The first pertains to provisions which limit the amount of out-of-state waste Empire can accept. The second is the reduction in Empire's maximum and average daily volume limits. The third relates to provisions in the permit which require Empire to conduct a biannual traffic study and direct Empire to order its haulers to follow a prescribed route when traveling to the landfill.

Paragraphs 4, 5, 6, and 7 of Part III of the October permit restrict the amount of waste Empire can accept from sources outside Pennsylvania. The provisions prohibit Empire from accepting new out-of-state waste except to fill certain existing contracts or unless the out-of-state waste is matched by a fixed proportion of new in-state waste. Empire contends that scheme implemented in Paragraphs 4, 5, 6, and 7: 1) violates the commerce clause of the United States Constitution, Article I, §8; 2) is outside the scope of the Department's authority; 3) violates the contracts clause of the Federal Constitution, Article I, §10, and the Pennsylvania Constitution, Article I,

§17; 4) violates the takings clause of the Fifth Amendment to the Federal Constitution and its counterpart in the Pennsylvania Constitution, Article I, §10; and 5) violates the due process clause of the Fourteenth Amendment to the Federal Constitution and its counterpart in the Pennsylvania Constitution, Article I, §§1 and 9.

Empire is likely to prevail on the merits that the imported waste restrictions in the October permit violate the commerce clause of the Federal Constitution. As discussed below, the permit conditions erect a barrier to the interstate movement of municipal wastes, and Congress did not, by enacting the Resource Conservation and Recovery Act, the Act of October 21, 1976, P.L. 94-480, as amended, 42 U.S.C. §6901 *et seq.* (RCRA), authorize this restriction on interstate commerce.

The Supreme Court in City of Philadelphia v. New Jersey, 437 U.S. 617 at 622-23, 98 C.Ct. 2531 at 2535 (1978), expressly concluded that the interstate movement of solid and liquid wastes is commerce. In determining whether a state has overstepped its role in regulating interstate commerce, courts distinguish between state laws that burden interstate transactions only incidentally and those that affirmatively discriminate against such transactions. Statutes in the first group violate the commerce clause only if the burdens they impose upon interstate trade are clearly excessive in relation to the putative local benefits, Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S.Ct. 844 (1970), while laws in the second group are subject to more demanding scrutiny: the state must demonstrate both that the regulation serves a legitimate local purpose and that the purpose could not be served as well by nondiscriminatory means. Hughes v. Oklahoma, 441 U.S. 322 at 336, 99 S.Ct. 1727 at 1736 (1979), and Maine v. Taylor, 477 U.S. 131 at 138-39, 106 S.Ct. 2440, at 2447 (1986).

The permit conditions imposed by the Department discriminate against the importation of out-of-state waste on their face. The Department does not assert that waste generated inside Pennsylvania differs from that imported from other states,[7] but the permit conditions treat Pennsylvania waste and out-of-state waste differently. Even if the Department's purpose in imposing the permit modifications is to protect human health and the environment in Pennsylvania, that purpose "may not be accomplished by discriminating against articles of commerce coming from outside the state unless there is some reason, apart from their origin, to treat them differently." City of Philadelphia, 437 U.S. at 626-27, 98 S.Ct. at 2537. There is no valid reason on the record to support the Department's different treatment of out-of-state waste. The Department admits the environmental impact of solid waste is irrelevant to the state of origin. Although the Department contends that all landfills create an environmental incursion, the environmental effects of waste disposal are extensively regulated by the Department. The Department also argues that excess landfill capacity is a disincentive to recycling, but whether or not a landfill is the ultimate disposal site for municipal wastes, the Municipal Waste Act independently imposes recycling obligations on municipalities. The Department also asserts that curbs on the importation of out-of-state waste are required to preserve landfill capacity for Pennsylvania needs, yet it admits that Pennsylvania waste goes out-of-state (N.T. 241-242) and that waste disposal is a regional problem (N.T. 276). At best, these reasons advanced by the Department would seem to substantiate a prohibition on all landfill disposal, rather than disposal of out-of-state waste.

What does appear from the record is that the Department is determined

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[7] Indeed, the Department admits that the environmental impacts of Pennsylvania waste and out-of-state waste are identical (N.T. 271).

to control the siting of landfills in the Commonwealth not just from an environmental control perspective, but also from the standpoint of need, a subject not addressed in either the Solid Waste Management Act or the Municipal Waste Act. Keith Kerns, the Chief of the Division of Waste Minimization Planning in the Bureau of Waste Management, candidly responded to the Board's question about this subject:

> Q In essence, isn't what DER is saying here is that we should have something like a public utility system for landfills where they have specified monopolies and they have to come in to DER and prove that there's a need for their service before DER will permit it? That's essentially what the PUC does. Is that what DER is trying to do here?
>
> A We are trying to make sure that if a landfill is sited and built, that there is some need for it, yes, because every landfill does present another environmental incursion. We don't feel that we need more -- if you have four there and four holes in the ground that are able to handle the waste, why build a fifth?
>
> Q But if all Pennsylvania needs were to be satisfied, would DER prohibit the construction of a facility that would take, say, solely out-of-state waste?
>
> A The way the Governor's Order is written right now, probably, yes. But this is the kind of thing that we're looking at under the planning process.
>
> MR. BOWSER: I'm sorry, Your Honor. I can't hear the witness.
>
> THE WITNESS: The way the Governor's Order is written right now, if a facility came in right now, built and designed to take solely out-of-state waste, it would not meet the need requirements.
>
> (N.T. 232-233)

This, in and of itself, does not provide justification to treat out-of-state waste differently.

A state statute that erects a barrier to interstate commerce may nonetheless be upheld where Congress authorizes the state to regulate in such a manner. See White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204, 103 S.Ct. 1042 (1983). Because of the important role the commerce clause plays in protecting the free flow of interstate trade, state regulation is exempt from the implied limitations of the clause only when the congressional direction to do so is "unmistakably clear." South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 at 91, 104 S.Ct. 2237 at 2242 (1984).

In this case, there is no unambiguous statement of any congressional intent to alter the limits of state power otherwise imposed by the commerce clause. The Department contends that Congress authorized state regulation of interstate trade in waste when Congress enacted RCRA and empowered the Environmental Protection Agency (EPA) to set municipal waste planning requirements for the states. There is nothing in RCRA to support such a conclusion. While the objectives of Subchapter IV, pertaining to state or regional solid waste plans, do encourage states to develop methods for disposal of solid waste which are environmentally sound, RCRA contains no unambiguous congressional direction authorizing the Commonwealth to discriminate against out-of-state waste. Nor did Congress, by enacting RCRA, delegate to the EPA the power to authorize states to regulate interstate commerce in waste. RCRA simply contains no clear grant of that power.[8]

Because Empire is likely to prevail on the merits of its commerce

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[8] The Eleventh Circuit Court of Appeals and several other courts have recently invalidated state restrictions on the importation of out-of-state wastes. See, e.g., National Solid Wastes Management Association v. Alabama Department of Environmental Management, No. 90-7047 (11th Cir., Aug. 8, 1990), published at 31 ERC 1793, and Government Suppliers Consolidating Services, Inc. v. Indiana, No. IP 90-303-C (D.C. S.Ind., December 27, 1990).

clause challenge to the provisions contained in Paragraphs 4, 5, 6, and 7, it is unnecessary to address whether Empire would likely succeed on the merits of its other challenges to these provisions.

Paragraphs 2 and 3 of Part III of the permit limit the maximum amount of waste Empire may accept on any given day or in any quarter. Empire contends that the Department does not possess the legal authority to reduce Empire's maximum and average daily waste volumes. Paragraphs 2 and 3 will be addressed separately.

While on its face Paragraph 2 provides that Empire can accept a daily maximum of 5,000 tons, other provisions of the same permit essentially reduce Empire's daily maximum to less than the 5,000 TPD limit. Paragraphs 4, 5, 6, and 7 - discussed earlier in regard to Empire's commerce clause challenge - implement a complex scheme limiting the amount of out-of-state waste Empire can accept. Even if Empire were to receive the maximum amount of out-of-state waste possible under its pre-existing contracts, the landfill could not realistically approach the 5,000 ton daily maximum. To accept an additional 445 TPD in out-of-state waste, Empire would have to also locate and accept an additional 1,038 TPD of Pennsylvania waste.[9] Mr. Mariani, however,

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[9] The October permit assigned Empire a daily maximum of 5,000 tons per day and a base Pennsylvania volume of 317 tons per day. Under the permit, if Empire accepts the maximum amount possible under its contracts (3,200 tons per day) and succeeds in obtaining the daily maximum, then:

$$3{,}200 \text{ tons/day} + 317 \text{ tons/day} + x + y = 5{,}000 \text{ tons/day}$$
$$x = 1{,}483 \text{ tons/day} - y$$

where

y = new non-Pennsylvania waste (out-of-state waste accepted outside of contracts specifically approved in paragraph 4)

and

x = total amount of Pennsylvania waste less the base Pennsylvania waste volume.

footnote continued

testified that while Empire has been committed to obtaining as much Pennsylvania waste as possible, Empire cannot compete with out-of-state landfills, since landfills outside Pennsylvania need not comply with Department requirements for liners and modules (N.T. 146-47). In short, the Department may have reinstated the 5,000 TPD maximum in Paragraph 2, but, by implementing Paragraphs 4, 5, 6, and 7, the Department effectively reduced Empire's daily maximum. As noted earlier in this opinion, Empire is likely to prevail on the merits of its commerce clause challenge to the latter permit provisions. Since Paragraph 2 must be read to incorporate the provisions of Paragraphs 4, 5, 6, and 7, the restrictions on out-of-state waste importation which have been superseded are also superseded as they apply to Paragraph 2.[10]

As for Paragraph 3, Empire is likely to prevail on the merits that

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continued footnote

Since, under the permit, new non-Pennsylvania waste may account for no more than 30% of the total of new non-Pennsylvania waste and the amount of Pennsylvania waste received beyond the base Pennsylvania volume, the maximum amount of new out-of-state waste which can be received is:

$$y = .30\ (y + x)$$

$$\frac{y}{.30} = y + x$$

$$x = \frac{y}{.30} - y$$

Substituting for x:

$$1{,}483 \text{ tons/day} - y = \frac{y}{.30} - y$$

$$1{,}483 \text{ tons/day} = \frac{y}{.30}$$

$$y = 445 \text{ tons/year}$$
$$x = 1{,}483 \text{ tons/day} - 445 \text{ tons/day}$$
$$x = 1{,}038 \text{ tons/day}$$

[10] The 5,000 TPD maximum daily volume is also the *status quo ante*, for the May, 1987 permit amendment contained this limit. For a discussion of the *status quo ante*, see page 26 of this opinion.

the Department acted outside the scope of its authority when it imposed the 3,900 TPD ceiling on the amount of waste Empire could accept per day during any quarter of the year. The Department, in its brief in opposition, notes that the General Assembly, when it enacted the Municipal Waste Act, declared that the purposes of the act included: 1) encouraging waste reduction and recycling, 53 P.S. §4000.102(b)(2); 2) protecting the public from the long and short term dangers of municipal waste, 53 P.S. §4000.102(b)(3); and 3) strengthening the Department's authority to regulate waste volumes to insure that the facilities operate in a manner that protects the environment as well as public health and safety, 53 P.S. §4000.102(b)(14). The Department argues that, because the Municipal Waste Act must be read *in pari materia* with the Solid Waste Management Act, the Department may consider the first two factors listed above - encouraging waste reduction and recycling, and weighing the danger posed to the public by municipal waste - when modifying a permit under §503(e) of the Solid Waste Act.

Section 503(e) of the Solid Waste Management Act provides that the Department may modify a permit at any time the Department determines that a landfill:

> (1) is, or has been, conducted in violation of this act or the rules, regulations, adopted pursuant to the act;
>
> (2) is creating a public nuisance;
>
> (3) is creating a potential hazard to the public health, safety and welfare;
>
> (4) adversely affects the environment;
>
> (5) is being operated in violation of any terms or conditions of the permit; or
>
> (6) was operated pursuant to a permit or license that was not granted in accordance with law.

The Municipal Waste Act is not as clearly phrased as the Solid Waste Management Act. Section 1112(c)[11] authorizes the Department to review the volume limits in municipal waste landfill permits, considering

> (1) That the proposed maximum and average daily waste volumes will not cause or contribute to any violations of this act; the Solid Waste Management Act; any other statute administered by the department; or any regulation promulgated pursuant to this act, the Solid Waste Management Act or any other statute administered by the department.
>
> (2) That the proposed maximum and average daily waste volumes will not cause or contribute to any public nuisance from odors, noises, dust, truck traffic or other causes.
>
> (3) That the proposed maximum and average daily waste volumes will not interfere with, or contradict any provision contained in, any applicable county solid waste management plan that has been approved by the department.

The statute is silent as to what the Department is to do with the results of its review. However, §301(6) empowers the Department to "issue orders...to implement the provisions and purposes of this act and the regulations promulgated pursuant to this act." Thus, the Department may modify waste volume limitations in permits under the circumstances enumerated in §503(e) of the Solid Waste Management Act or §1112(c) of the Municipal Waste Act. However, none of those circumstances is present here.

Mr. McDonnell, program manager for the Bureau of Solid Waste Management at the Department's Wilkes-Barre Office, who testified as to the factors he considered when he set the 3,900 TPD quarterly limit, stated that the ceiling was selected on the basis of: 1) Empire's pre-existing contracts to accept out-of-state waste (N.T. 302) and Pennsylvania waste (N.T. 308), 2)

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[11] Section 1112(d) contains similar language regarding approval of requests to modify permits to authorize increased waste volumes.

the amount of residual waste the landfill typically received (N.T. 311-313), and a cushion designed to allow Empire flexibility in its residual waste business[12] (N.T. 313). There is no evidence showing that the 3,900 TPD figure was chosen to minimize the risk to the public from municipal waste.

There is also no evidence that the volume limitations were otherwise necessary to implement the planning objectives of the Municipal Waste Act. Mr. Kerns noted concerns that excess landfill capacity in the state would discourage recycling and proper solid waste planning (N.T. 225) and testified about increasing amounts of out-of-state waste being disposed of at Pennsylvania landfills, roughly in a proportion of 70% in-state waste to 30% out-of-state waste (N.T. 228).[13] On the other hand, he testified that 10-15% of Pennsylvania solid waste is exported out-of-state for disposal, but that the Department did not know in which counties this was occurring (N.T. 241-242). He also noted that the Department would not discourage Pennsylvania waste from going out-of-state (N.T. 230-231). As for the effect of restricting out-of-state waste on Lackawanna County's ability to dispose of waste generated within its borders, he testified that Lackawanna County doesn't have an approved solid waste plan (N.T. 230) and that, in any event, Keystone Landfill and Empire have adequate capacity to deal with the County's waste (N.T. 233). None of those reasons relate to the provisions of §503 of the Solid Waste Management Act or §1112 of the Municipal Waste Act.

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[12] Empire was contractually obligated to accept 3,200 TPD of out-of-state waste (N.T. 302) and up to 600 TPD of Pennsylvania waste (N.T. 308, Ex. P-7). In addition, Empire typically received 25 TPD of residual waste (N.T. 311-312). The remainder of 75 TPD was intended to serve as a cushion for Empire.

[13] This 70/30 figure was generated from landfill fee reports submitted in 1989 (N.T. 228).

Thus, it must be concluded that Empire is likely to succeed on the merits of its claim that the Department abused its discretion under the Solid Waste Management Act and the Municipal Waste Act in imposing the waste volume and source limitations, other than the 5,000 TPD maximum, in the October permit.

TRAFFIC CONSIDERATIONS

The final argument raised by Empire concerning its likelihood of success on the merits relates to the traffic provisions in the October permit. Empire contends that the traffic provisions are outside the scope of the Department's authority. Empire also argues that the traffic provisions violate the due process clause of the Fourteenth Amendment and its counterpart in the Pennsylvania Constitution because the Department acted with improper or arbitrary motives and because the Department did not provide Empire with notice or a hearing before imposing the permit conditions.

The permit conditions at issue here are set forth in Paragraph 9 of the October permit. Paragraph 9(a) directs Empire to restrict the number of times its haulers pass through the intersection of the Morgan Highway and Keyser Avenue during the period from 7 AM to 9 AM and 3 PM to 6 PM. Paragraph 9(b) requires Empire to, *inter alia*, conduct biannual traffic impact studies on Keyser Avenue. The Department contends that both provisions are within the Department's discretion because the Solid Waste Management Act empowers the Department to consider traffic safety ramifications when regulating the transportation of solid waste.

This Board examined the Department's authority to consider traffic safety issues under the Solid Waste Management Act in Pennsylvania Environmental Management Services, Inc. v. DER, 1984 EHB 94, wherein the Board noted that the language in §§102(4) and 104(6) of the statute 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. See also, TRASH, Ltd. and Plymouth Township v. DER et al., 1989 EHB 486, aff'd, ___ Pa. Cmwlth ___, 574 A.2d 721 (1990).

The fact that the Department may consider traffic safety issues when regulating solid waste does not mean that the Department has unfettered discretion to impose any traffic safety regulation it sees fit. Since the Department's power to regulate traffic safety emanates from its power to regulate solid waste, the Department's authority to impose particular traffic safety provisions in a permit depends upon the nexus between those provisions and transportation of solid waste.

Paragraph 9(b), which requires Empire to conduct biannual traffic studies, is not sufficiently connected with the transportation of solid waste to bring that condition within the Department's authority. Trucks travelling to or from Empire account for only about 21% of all truck traffic on Keyser Avenue (Ex. C-7, Executive Summary). Other commercial facilities along Keyser Avenue which can produce truck traffic include a large food distribution facility, light manufacturing facilities, a mobile home manufacturer, retail businesses and truck terminals (N.T. 351-352). The proportion of truck traffic to Empire related to transporting waste is not, in this instance, sufficient to justify requiring Empire to conduct surveys of all the traffic using Keyser Avenue; there is simply not a sufficient nexus between the permit provision and traffic safety considerations emanating from the transport of

solid waste.[14]

Because we deem Empire likely to prevail on the merits on the basis of this challenge to Paragraph 9(b), we need not decide whether Empire would likely succeed on the merits of its other challenges to the traffic study provisions.

Paragraph 9(a), which provides that Empire must restrict the number of haulers destined for the landfill which travel through the Morgan Highway intersection at particular times, is not an abuse of the Department's discretion. This permit provision is more intimately associated with the regulation of solid waste transportation than Paragraph 9(b), discussed above. Paragraph 9(a) affects only those trucks hauling trash to Empire. And, unlike the traffic study, it pertains only to the transportation of solid waste.

As for Empire's due process claims against the traffic restriction contained in Paragraph 9(a), Empire is unlikely to prevail on the merits of its claim that the Department denied Empire due process by imposing paragraph 9(a) without first providing Empire with notice or a hearing. The procedures employed by the Department in this case comport with §4(c) of the Environmental Hearing Board Act, which allows the Department to take an action initially without an opportunity for hearing. In interpreting essentially identical

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[14] The studies envisioned by Paragraph 9(b) of the October permit appear to be the type most appropriately conducted by the Pennsylvania Department of Transportation (PennDOT) pursuant to its authority in §3754(a) of the Motor Vehicle Code, 75. Pa C.S.A. §3754. That statutory provision empowers PennDOT to conduct

> "in-depth...safety studies of the human, vehicle, and environmental aspects of traffic accidents for the purpose of determining the causes of traffic accidents and the improvements which may help prevent similar types of accidents or increase the overall safety of roadways and bridges."

language in the Board's previous enabling statute, §1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21, the Commonwealth Court held that a Board hearing subsequent to Departmental action satisfies due process requirements, Commonwealth v. Derry Tp., Westmoreland County, 10 Pa. Cmwlth 619, 314 A.2d 874 (1973). Because Empire has the opportunity to challenge the disputed condition in this proceeding, its due process rights have not been violated.

Empire is also unlikely to prevail on its claim that Paragraph 9(a) violates the due process clause because it was imposed for improper or arbitrary purposes. Empire does not say specifically how the provision directing Empire to restrict the amount of traffic it received from the Morgan Highway intersection is violative of due process guarantees. Instead, Empire seems to assert that the Board can infer that the permit provisions Empire appeals here are arbitrary or politically motivated from certain facts: (1) the volume levels changed from the April permit to the October permit; (2) it was an election year; and (3) the Governor held a press conference at Empire to discuss the Governor's program to halt transportation of waste in violation of state laws--despite the fact that no evidence links Empire to illegal transportation.

Due process guarantees under the State Constitution are no greater than those afforded by the Federal Constitution. Coades v. Commonwealth, Bd. of Probation and Parole, 480 A.2d 1298, 84 Pa. Cmwlth 484 (1984). The Supreme Court, in Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed 940 (1934), set forth the applicable standard: "The guarantee of due process demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained." Id. at 523, 54 S.Ct. at 509.

In this instance, there is a rational relationship between the traffic restriction in Paragraph 9(a) and a legitimate state interest. As discussed above, the Department has the authority to consider ramifications on traffic safety in its regulation of solid waste. Traffic safety and regulation of solid waste are legitimate state interests: both areas fall within the state's police power to regulate for the health, safety, and welfare of the community.

The traffic restrictions bear a rational relationship to the state interest in traffic safety related to the transportation of solid waste. Mr. Bonacci's testimony and the PennDOT traffic study indicate that the Morgan Highway intersection was especially congested during the hours the Department seeks to restrict the number of trucks destined for Empire which use the intersection (N.T. 510-513; Ex. C-7). Limiting the number of trucks traveling to Empire through the intersection is one rational way for the Commonwealth to address the traffic problems at the intersection during peak-use periods. "[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil on hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." Williamson v. Lee Optical Inc., 348 U.S. 483 at 488, 75 S.Ct. 461 at 464, 99 L.Ed. 563 (1955). In this instance, the restriction of trash trucks traveling through the Morgan Highway-Keyser Avenue intersection during the hours of peak use by the motoring public is a rational way to reduce traffic hazards.

IRREPARABLE HARM TO EMPIRE

Empire's claims of irreparable harm focus on four areas: substantial financial losses, threat to its viability as an on-going business, loss of customers, and exposure to large civil penalty liabilities. The Department

disputes Empire's assertions by arguing that the permit allows Empire to honor all of its current contracts, that Empire can take additional waste, and that any losses it may suffer can be made up over the life of the landfill, which will be lengthened as a result of the permit modification.

The Board has held that where it is established that the Department lacked the underlying authority to take the action at issue, the petitioner is not required to establish irreparable harm or no likelihood of injury to the public to obtain a supersedeas, Lawrence Blumenthal v. DER, EHB Docket No. 89-230-F (Opinion issued March 6, 1990). Thus, Empire is not required to establish either of these elements in light of the rulings on the Department's authority to restrict the amount and source of wastes and to require Empire to conduct a traffic study. Nevertheless, Empire's claim of irreparable harm will be addressed.

The question of what constitutes irreparable harm has been examined in a number of Board opinions. The loss of customers and significant financial or economic harm was held to be irreparable harm in Elmer P. Baumgardner et al. v. DER, 1988 EHB 786 and Decom Medical Waste Systems, Inc. v. DER, 1989 EHB 1079. Curtailing operations and furloughing employees was regarded as irreparable harm in Globe Disposal Company, Inc. et al. v. DER, 1986 EHB 899. And, where the petitioner would suffer monetary damages for which there was no adequate recourse, the Board has treated that as irreparable harm, Silverbrook Anthracite, Inc. v. DER, 1988 EHB 365. However, claims that a petitioner would be subject to potential civil penalty liability if the Department's challenged action were not superseded has been held not to constitute irreparable harm, Harbison-Walker Refractories v. DER, 1989 EHB 1166.

The Department contends that with respect to the question of

irreparable harm Chambers Development Company, Inc. v. DER et al., 1988 EHB 68, aff'd 118 Pa. Cmwlth 97, 545 A.2d 404, (1988), is directly on point. There, it was held that where the petitioner was aware of the consequences of entering into contracts with New Jersey entities and did negotiate escape clauses to deal with regulatory actions, that the petitioner did not suffer irreparable harm. Chambers, however, is distinguishable, for it was left to Chambers to decide what contracts it could honor and still remain within the volume limitations of its solid waste permit. Here, despite the Department's argument to the contrary, it is the Department, through its designation of authorized out-of-state waste contracts, and not Empire, which is making that business decision. And, unlike Chambers, the Department is also severely proscribing future out-of-state business for Empire by subjecting it to the 70/30 in-state/out-of-state ratio. Finally, Chambers is also inapposite because we have also held that irreparable harm must be examined in the context of whether the Department abused its discretion in the first place, Globe Disposal, *supra*,[15] and the volume limitations in Chambers were found not to be an abuse of discretion. Here, for the reasons set forth in the portions of this opinion dealing with likelihood of success on the merits, the volume limitations are an abuse of discretion.

Renato Mariani, the President and Chief Executive Officer of Empire, testified that Empire spent $30 million to construct a state-of-the-art landfill with a life expectancy of ten years (N.T. 126-127). Applying the volume limits in Empire's 1987 permit and a tipping fee of $50 per ton (N.T.

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[15] Put another way, the supersedeas decision involves a balancing of the criteria in 25 Pa.Code §21.78, and if evidence of irreparable harm is not particularly strong, but that of likelihood of success on the merits is, the petitioner may succeed. See Houtzdale Municipal Authority v. DER, 1987 EHB 1, 3-4.

127), Empire expects profits of $783 million over the life of the landfill (N.T. 128). Applying the volume limits of the October permit, a profit margin of 58% (¶ 18, October 3, 1990, Affidavit of Renato Mariani), and the tipping fee of $50 per ton (N.T. 127), Empire expects a $9 million loss in profits for 1991 when compared to the profits as a result of the limits in the 1987 permit amendment (N.T. 129-130). These are losses for which Empire cannot be compensated. Empire's ability to solicit additional business is also proscribed by the 70/30 ratio in the permit. It would have to secure disposal contracts for Pennsylvania waste, which are, according to Mr. Mariani's unrebutted testimony, hard to come by because of stiff competition with both in-state and out-of-state disposal companies.[16] Given the long-term nature of such contracts, Empire would have had to initiate its marketing efforts some time ago. However, its marketing strategy was formulated before the Department's implementation of the Executive Order and shaped by the volume limits in its 1987 permit and the presence of the Keystone and Amity landfills in Lackawanna County (N.T. 125-126); in fact, Empire lost the bid for the Lackawanna County contract to Keystone (N.T. 99).

Finally, Empire's business reputation will also suffer as a result of the Department's permit modification, since Empire may not be able to either satisfy or timely satisfy obligations which were being negotiated while the

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[16] The Department cast aside this problem with a glib assertion that Empire can seek other waste contracts in Pennsylvania. Empire detailed its unsuccessful efforts to do so, including its loss of the bid in Lackawanna County by a difference of 25 cents per ton (N.T. 99-100). Empire also related its difficulty in securing the contracts for disposal of wastes from southwestern Pennsylvania, largely because of transportation problems. Apparently, the traffic considerations in transporting Pennsylvania waste across Pennsylvania are less than those of transporting New Jersey wastes to northeastern Pennsylvania.

Department formulated its implementation of the Executive Order.[17]

HARM TO THE PUBLIC

Empire contends that a supersedeas should be issued because it will not result in any harm to the public, either as a result of contamination or threat to public safety. The Department, on the other hand, contends that harm to the public will result if its municipal waste planning program is impaired and if Empire is relieved of its obligation to conduct traffic studies.

There is no evidence in the record that any contamination or pollution is emanating from Empire's operations or that Empire's related companies, including Danella Environmental Technologies, are in violation of any of the laws relating to waste management (N.T. 142-143). Furthermore, Mr. Kerns, of the Department, who supervises its solid waste disposal planning efforts, testified that the geographic origin of waste is irrelevant to its environmental impact (N.T. 271). Thus, all other things being equal, the out-of-state waste will have no greater environmental impact than the in-state

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[17] The Department devoted a great deal of time and energy at the hearing and in its post-hearing brief to arguing that evidence relating to Empire's alleged contract with Hudson County should not have been considered because the best evidence of that alleged contract--the contract itself--was not produced. The Department also attempted to dispute the existence and/or effect of the alleged contract through the filing of the affidavits of Samuel Sloan of the Department and one Gary Sondermyer of the New Jersey Department of Environmental Protection approximately two weeks after the hearing on the petition for supersedeas. The Board struck the affidavits by order dated December 18, 1990. While the Department may argue that the time between its October permit modification and the supersedeas hearing was so short, the nature of requests for extraordinary relief such as a supersedeas is such that tribunals take swift action in scheduling. The Department could have produced these individuals at the hearing where Empire would have had the opportunity to cross-examine them. Moreover, the Department could hardly have been surprised, given the history of this conflict, that Empire would have sought to have the October permit superseded. In any event, the existence or non-existence of that contract was irrelevant to the ultimate conclusion in this opinion.

waste and, if there is no environmental impact now at the Empire landfill, then the out-of-state waste will have no environmental impact.

As to the Department's contentions regarding impairment of its planning program, Empire is not seeking the invalidation of that planning effort,[18] but rather is seeking the invalidation of the application of that program to its operations in the permit modification.

As to the harm that will allegedly result if Empire no longer has to conduct traffic studies, the evidence of the Department is somewhat contradictory. While Mr. McDonnell testified that traffic considerations played no part in the drafting of the October permit (N.T. 413), the Department now argues that harm to the public will result if Empire does not have to undertake the traffic studies mandated by the October permit. Furthermore, the efficacy of any such study is highly suspect, given the character of the surrounding area and the limits of Empire's authority and ability as a private entity. Mr. McDonnell, in response to a Board inquiry, testified that Keyser Avenue is a commercial/industrial corridor with a great deal of truck traffic (N.T. 349-352). Mr. Stephens, Empire's Operations Manager, corroborated this assessment and also indicated that there were 19 trucking companies along Keyser Avenue (N.T. 66). Thus, while Empire may perform a traffic study, it may well be merely a study for study's sake. Empire, as a private entity, does not have the fact-gathering ability of a regulatory agency such as the Department or PennDOT. And, beyond that, Empire would have no ability, outside of its own operations, to effectuate any recommendations in the study. Because the traffic problem along Keyser Avenue

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[18] Nor is the Board reviewing the Executive Order in the abstract. The Commonwealth Court is presently reviewing it in National Solid Waste Management Association v. Casey, No. 5 Misc.Dkt. 1990.

is not solely attributable to Empire[19] and because even the Department is powerless to direct the companies and facilities not subject to its regulation to alter their operations, it is difficult to attribute any public harm to the stay of this condition of Empire's October permit.

PRESERVATION OF THE STATUS QUO ANTE

In granting supersedeas relief the Board will not alter the *status quo ante*, Joseph R. Amity v. DER, 1988 EHB 766. Since the daily average waste volume restrictions in Paragraph 3 and the waste source restrictions in Paragraph 4 through 7 are being superseded, Empire is left with a 5,000 TPD maximum waste volume limit. We then would look to the May, 1987 permit amendment for a daily average waste volume limit;[20] that permit amendment contains no daily average volume limit, so the only volume limit applicable to Empire is the 5,000 TPD maximum. Recognizing, however, that §1112 of the Municipal Waste Act directs the Department to set daily average volume limits, the Department, consistent with this opinion, may fashion such a limit.

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[19] The reportable accident data for 1987-1990 which was provided by PennDOT further points this out. Within a 2000 feet radius of the Empire facility, there were 12 reportable accidents involving 18 vehicles, none of which was larger than a small truck (N.T. 523-524, 528-530).

[20] Since the April, 1990 permit amendment would have been superseded for the same reasons as the October permit had it not been mooted by the October permit, the May, 1987 permit amendment is the *status quo ante*.

O R D E R

AND NOW, this 30th day of January, 1991, it is ordered that the December 26, 1990, order superseding Paragraphs 3, 4, 5, 6, 7, and 9(b) of Part III of Empire's October 26, 1990, permit modification is confirmed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: January 30, 1991

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOA

MCDONALD LAND & MINING COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 90-464-E**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: January 31, 1991**

OPINION AND ORDER
SUR
PETITION FOR SUPERSEDEAS

Synopsis

The Board supersedes two Compliance Orders issued by the Department of Environmental Resources ("DER") to McDonald Land & Mining Co., Inc. ("McDonald"), directing it to provide interim treatment and then either permanent treatment or abatement of a discharge of mine drainage originating in an area outside of McDonald's permit boundaries. As required by 25 Pa. Code §21.78(a), McDonald has shown that it will be irreparably harmed by the impact of the cost of compliance with these Orders on its current financial condition and by the "permit block" placed on it by DER. By showing the distinct possibility that this discharge is the responsibility of another, now bankrupt, mining company's adjacent operation, McDonald made a reasonable showing that it will prevail on the merits, because the burden of proof on the merits belongs to DER. This showing also demonstrates that though the waters of the Commonwealth, and, hence, the public, will be injured by pollution

while the supersedeas is in place, the injury does not occur as a result of McDonald's actions or omissions at its mine site, and thus, this forms no basis to deny the Petition.

OPINION

On September 26, 1990, DER served Compliance Order No. 904093 ("CO-1") on McDonald. CO-1 was issued in regard to McDonald's "Schrot Mine" located in Ferguson Township, Clearfield County. McDonald mined this site pursuant to Surface Mining Permit No. 17860128. CO-1 directed McDonald: (1) to submit to DER its plan to provide interim treatment of an off-site discharge, identified in the hearing on the Petition at various times as Monitoring Point No. 1, the seep or the discharge ("MP-1")[1] ; (2) to implement this plan after DER's approval of same; (3) to submit a plan for permanent treatment or abatement of the discharge; and (4) after DER approval of this plan, to implement it. On October 26, 1990, McDonald filed its appeal with this Board from CO-1.

On December 27, 1990, McDonald filed its Petition For Supersedeas with us. It sought a Board order granting a supersedeas of CO-1. By Order of January 3, 1991, we scheduled a hearing on the Petition for January 16, and 17, 1991. Thereafter, on January 7, 1991, DER filed a Motion In Limine and Motion To Strike with us which sought an Order barring evidence at the supersedeas hearing of the bankruptcy of Benjamin Coal Company ("Benjamin") and DER's motive in issuing CO-1. Simultaneously, DER filed a Motion To Deny

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[1]CO-1's reference to the discharge as Monitoring Point No. 2 is confusing because this is the only document referencing it as such, and, because the testimony at the hearing identified another location as Monitoring Point No. 2. Accordingly, this Opinion uses the references for MP-1 and Monitoring Point No. 2 developed at the hearing on the Petition.

Petition For Supersedeas Without A Hearing. On January 10, 1991, DER also filed its Reply To Petition For Supersedeas.

On January 14, 1991, McDonald faxed us its responses to DER's Motions. Simultaneously, we received McDonald's appeal from DER's Compliance Order No. 904124AE ("CO-2") as issued by DER on December 28, 1991. CO-2 charges McDonald with failing to comply with CO-1, directs McDonald to do so, and says that pursuant "to Section 86.194(6)(c)"[2] McDonald is subject to a $750 per day civil penalty until it complies. This appeal was assigned Docket No. 91-021-E. Also on January 14, 1991, McDonald filed a Petition For Supersedeas as to CO-2 and a Motion To Consolidate the two appeals.

By Order dated January 15, 1991, we granted DER's Motion In Limine and Motion To Strike. By a separate Order dated January 15, 1991, we denied DER's Motion To Deny Supersedeas Without A Hearing, in part because on January 14, 1991, McDonald filed an amendment of its initial Petition For Supersedeas. Upon consent of the parties and prior to the hearing on the Petition For Supersedeas filed at this docket number, we issued an Order consolidating these two appeals at Docket No. 90-464-E. We then held hearings on January 16 and 17, 1991 on the consolidated appeal's Petitions For Supersedeas.[3]

In ruling on a Petition For Supersedeas, 25 Pa. Code §21.78(a) mandates that we consider three factors which are:

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[2]There is no Section 86.194(6)(c) in the regulations, but there is a Section 86.194(c) which we believe is the subsection DER intended by this reference.

[3]Because McDonald had timely raised Benjamin's Bankruptcy in its Notice Of Appeal filed at Docket No. 91-021-E, the consolidation of the two appeals clearly reraised in the hearing on the Petition For Supersedeas this issue and DER's motive in issuing its orders. We so informed the parties at the beginning of the hearing.

(1) Irreparable harm to the petitioner.
(2) The likelihood petitioner will prevail on the merits;
(3) The likelihood of injury to the public if the petition is granted.

Additionally, Section 21.78(b) requires us to deny supersedeas if pollution or injury to public health exists or is threatened during the supersedeas period. In ruling on such petitions, we also must keep in mind that McDonald is the petitioner and bears the burden of proof. Globe Disposal Company et al. v. DER, 1986 EHB 891; Elmer R. Baumgardner et al. v. DER, 1988 EHB 786. While McDonald has the burden of proof, there is a balancing test which must be conducted by this Board in regard to the three enumerated factors. Baumgardner, supra; Pennsylvania Fish Commission et al. v. DER, 1989 EHB 619.

We are satisfied that McDonald will suffer irreparable harm if supersedeas is not granted. Fahy McDonald testified as President and owner of McDonald. He indicated McDonald has not built the interim treatment facility required of it in CO-1 and that his cost estimates for its construction and set up are $39,566.24. He also indicated "engineering" costs would be an estimated additional $11,500. Treatment costs would run an estimated $2,000 to $2,200 per month, with quarterly cleaning and maintenance exceeding $4,000 per year. Thus, building and operating this plant for 1 year represents an outlay for McDonald of over $60,000. Fahy McDonald also testified that in the last six months, his company has lost from $120,000 to $130,000. Moreover, since September of 1990, it has laid off one third of its staff. Accordingly, since Fahy McDonald says that McDonald cannot pay all of its bills now, the impact of this estimated $60,000 outlay would be serious.

McDonald argues that this discharge is the responsibility of Benjamin, not McDonald. The evidence offered at the hearing establishes that

Benjamin is in the process of completing a liquidation in a Chapter 7 bankruptcy proceeding and is insolvent. This is important, since if McDonald is right as to responsibility for the discharge, and Benjamin is insolvent, there is no party from whom McDonald may recover these costs.

Finally, Mr. McDonald testified that DER has put a "permit block" in place. A "permit block" is a bar to the issuance of new mining permits to McDonald, and it will last until McDonald makes satisfactory efforts to comply with CO-1 (as judged by DER). Mr. McDonald said that because of current conditions, the permit block is not hurting his company much at present, but if the coal market were to turn around, it would shut his company down, preventing its recovery.

This Board's cases on whether economic loss can be considered irreparable harm appear to go in two different and somewhat conflicting directions. Cases such as Tenth Street Building Corporation v. DER, 1985 EHB 829, and C&L Enterprises, Inc. et al. v. DER, 1987 EHB 67, appear to say that the cost of compliance with a lawful DER order can never constitute irreparable harm for supersedeas purposes. This position seems to spring from William Fiore et al. v. DER, 1983 EHB 528, which says that the cost of compliance with a DER Order, the issuance of which is not an abuse of discretion, cannot be irreparable harm. Of course, the latter test is not the exact equivalent of that test set forth in Tenth Street, supra.

Our more recent cases, including Globe Disposal, supra, Baumgardner, supra, and Silverbrook Anthracite, Inc. v. DER, 1988 EHB 365, all seem to hold that significant economic harm to a party may constitute irreparable harm, particularly where a party, such as McDonald in this case, has no remedy with which to recover its compliance costs. It appears that this is the better

reasoning, since it is difficult to perceive of a harm which is more irreparable to a private enterprise than the unrecoverable loss of money, or business, i.e., financial or economic harm.

Having said this, we hasten to add that a permit block which bars issuance of new permits to a miner is more than just financial harm. Left in place, a permit block is the end of any mining company, which must have authorizations to mine new areas in order to make money. Even if the other evidence did not establish irreparable harm (and since it was unrebutted, we believe it does), a permit block is significant economic harm to McDonald and irreparable harm under 25 Pa. Code §21.78(a)(1).

We next consider the question of whether there is harm to the public if McDonald's supersedeas request is granted. There was no contention advanced by DER that the discharge at MP-1, which flows into an unnamed tributary of Wilson Run, will worsen, from its present condition if supersedeas is granted. No evidence was offered on this point by DER. However, the discharge at MP-1 is clearly acid mine drainage. It was shown to be having an adverse impact on the tributary's water quality as measured downstream (south) of the mine site and across LR 17018 on this tributary at Monitoring Point No. 2 (MP-2). DER's Mine Conservation Inspector, Floyd Schrader, has inspected both the Schrot operation and Benjamin's prior, but partially overlapping, "Wiley Mine" operation for DER. Since Schrader began inspecting these operations in 1982, the unnamed tributary has had a portion of its bottom begin to be covered with "yellowboy." Yellowboy is the sludge-like precipitate material formed when acid mine drainage emerges from underground and in the open air mixes with a receiving stream. Schrader has not conducted an aquatic survey of this tributary, but he testified that he

did not see minnows in the tributary recently when he looked, whereas had seen them in the past at MP-2. Schrader did not say this resulted from the discharge at MP-1, but left us to draw this inference. We were also not offered any evidence of the uses, if any, of this unnamed tributary and how they were affected by MP-1's existence.

DER's calling of the Pennsylvania Fish Commmission's Steven R. Kepler as a witness did not advance its position on this issue. Kepler is a Fisheries Biologist who is familiar with Wilson Run, which has been a stocked trout stream since 1985. While Kepler appeared knowledgeable as to the stream and the potential impact on it of acid mine drainage, he concluded that he had too little information as yet to form a conclusion as to whether Wilson Run is being adversely affected by the MP-1 discharge or not. This lack of any clear indicia of damage may result from the fact that between MP-2 and the point this tributary enters Wilson Run, the tributary flows into what we have been told is a reasonably-sized swampy area. We are aware of other situations where wetlands have actually been constructed to treat mine drainage, so it is possible some of MP-1's impact may be mitigated by the swamp. In any case, Mr. Kepler's testimony does not support denial of McDonald's Petition. It is neutral at best and fails to show any injury to the public's use of Wilson Run as a trout fishery.

As a Board, we have written very little about this aspect of our consideration of this aspect of the supersedeas "test". In Fish Commission et al. v. DER, supra, however, we did note that when a stream's nature may be irreversibly altered, there would be a showing of harm to the public. We have no evidence of such an alteration as to Wilson Run. While we have been offered insufficient evidence to conclude "irreversible alteration" will occur

as to the tributary, we have ample evidence to show a significant downturn in the stream's water quality, the deposition of yellowboy on the tributary's bottom, and an apparently corresponding disappearance of the fish life from this area of the tributary. Clearly, this is at least alteration of a continuing and substantial character.

Intertwined with this evidence is the evidence which goes to issues under 25 Pa. Code §21.78(b), which bars supersedeas where pollution exists or is threatened during the period which the supersedeas would cover if granted. There is no question this unnamed tributary is polluted by MP-1's poor quality discharge and will continue to be polluted by this discharge if supersedeas is granted. The unnamed tributary is a water of this Commonwealth. It is one for which the party responsible for the discharge has obtained no license to despoil. Rather, both Benjamin and McDonald mined their respective mine sites under permits, regulations, and statutes barring such despoliation. If the evidence establishes McDonald's liability for this discharge, then we are barred by Section 21.78(b) from issuing supersedeas here, and there would be a sufficient showing of continuing public harm under Section 21.78(a)(3) to prevent our issuance of a supersedeas Order, also.

Having said this, we must now turn to the key issue here, which is McDonald's likelihood of prevailing on the merits. To prevail, McDonald need not establish its contentions absolutely, but it must show its chance of success on the merits is more than speculation. Houtzdale Municipal Authority v. DER, 1987 EHB 1; Fish Commission et al. v. DER, supra. Here, on the merits, DER issued an Order to McDonald, so at the hearing on the merits of this appeal, the burden of proof will be DER's. At that hearing, DER will have to show that the discharge at MP-1 is polluted and McDonald is

responsible for this discharge's quality. Accordingly, at this point, McDonald must make a reasonable showing that DER will be unable to do that. F.A.W. Associates v. DER, EHB Docket No. 90-228-B (Opinion issued December 31, 1990); Bethayres Reclamation Corporation v. DER, EHB Docket No. 83-227-W (Opinion issued May 29, 1990).

Having said this, we turn to the evidence on point. MP-1 is not the headwaters of the unnamed tributary. MP-1 is located on the western side of a draw, at a point about five hundred feet downstream from the headwaters of the tributary, as shown Exhibit M-4.[4] The unnamed tributary flows in a southerly direction down this draw, beneath LR 17018 and eventually into Wilson Run.

Benjamin mined the area covered by the permit for the Wiley Mine and had backfilled, graded, and planted it before McDonald started mining under the permit issued for its Schrot Mine. The area actually affected by Benjamin's mining operation is located to the west and north of MP-1 and the tributary as shown on Exhibits M-6 and page three of Exhibit C-1. It is also north of LR 17018. Benjamin's haulroad ran approximately parallel to the tributary and perpendicular to LR 17018 as it enters the Wiley Mine site, which lies directly behind and above MP-1, as shown on the photograph which is Exhibit C-3. The parties agreed that the area of the headwaters of this unnamed tributary was affected by Benjamin's mine. They did not agree as to what seam or seams of coal were mined by Benjamin, however. DER contends

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[4]On Page 1 of Exhibit C-1, DER's Geologist marked the location of MP-1 to be even further south of the headwaters of this tributary than the location indicated above, but DER's mine conservation inspector and McDonald's witnesses all appear to agree to MP-1's approximate location as set forth above, so we will accept their testimony as more accurate.

Benjamin mined only the Upper Kittanning seam. Benjamin's permit speaks of the Lower Kittanning at one point and the Upper Kittanning in others (Exhibit C-34). We believe a fair reading of the permit application indicates it sought authorization for mining of the Upper Kittanning Coal, and the reference to Lower Kittanning should be read as a reference to Upper Kittanning (the Lower Kittanning coal was not identified as found at the Wiley Mine in any of Benjamin's drill logs).[5] One of McDonald's experts says, that Benjamin must have mined a part of the Middle Kittanning seam of coal, too, considering the depth of its pits and his experience with the depth of the Middle Kittanning seam in this area. The area of MP-1 was within the area of Benjamin's permit. The evidence shows that it emanates at the toe of Benjamin's spoil.

MP-1 is not within the area of McDonald's permit. McDonald mined coal in an area north but predominantly east of MP-1, with the majority of its mine being on the opposite side of this draw from MP-1. McDonald bonded a portion of the adjacent surface area as a support area. This support area includes the area of the headwaters of this tributary, north of the MP-1 and a haulroad area (partially identical with Benjamin's haulroad) to the west of MP-1. When it backfilled the site after mining, it graded out a hollow north

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[5]Benjamin's drill logs (Exhibit C-24) only reference Upper Kittanning Coal, but they show as many as five coal seams, all identified as Upper Kittanning Coal, even though the top and bottom seams are separated by as much as 66 feet 11 inches in drill hole three and 65 feet in drill hole eleven. Such data, even though we are told the Upper Kittanning seam splits in this area, was conceded by DER's hydrogeologist to be questionable. It suggests to this Board that there was a misidentification of seams, but we did not have evidence offered as to whether the top or the bottom seams were the apparently misidentified seams. If it were the top seam, it could have been a Freeport seam, and if it were the bottom seam, it could have been a Middle Kittanning seam. If the latter, it weakens DER's case materially, while reinforcing conclusions drawn by McDonald's witnesses.

of the headwaters of the tributary, and it graded spoil into the area of the springs forming the tributary's headwaters (support area), but it did not mine in this support area. Thus, Benjamin's Wiley Mine and McDonald's Schrot Mine overlap, with both miners affecting the area of the headwaters of this tributary, and with Benjamin mining by MP-1 and with McDonald also bonding a portion of the area adjacent to MP-1 for its haulroad.

According to McDonald's surveyor, McDonald's permit area did not come within 100 feet of the tributary. Mr. Yost said, his formal post-mining survey for McDonald shows MP-1 is located seventy-four feet lower in elevation than the average depth of the Upper Kittanning coal, as mined on McDonald's Schrot site.

McDonald's next witness was David C. Lindahl, who is a geologist. He is currently chief geologist for a consulting engineering firm, but previously, he worked for Benjamin in preparing an update of Benjamin's Wiley permit at the time an update had to be submitted to DER. He testified that the Upper Kittanning coal dips to the southeast on the Wiley site, which means it dips toward MP-1. While Lindahl opined that Benjamin also must have mined the Middle Kittanning coal, he never saw any Middle Kittanning highwall when he was at the Wiley site though he was at the site and saw some of the mining of the Upper Kittanning seam. Lindahl believes the mining of both seams by Benjamin is the cause of MP-1's poor quality. He also opined that the dip of the Upper Kittanning Coal on the Schrot site is to the southeast, and then, in the eastern areas of the Schrot mine (away from MP-1), the slope of the coal shifts to the northeast. His testimony was, thus, that the dip of the coal on Schrot is away from MP-1. This makes him conclude McDonald would not have caused this discharge. Much of what Lindahl testified to seems subject to

some question, however, since, for example, the update for the Wiley site which Benjamin submitted to DER (and which Lindahl worked on) says only Upper Kittanning Coal was mined on the Wiley site and Benjamin's drill hole data never to identify any Middle Kittanning Coal seams.

Leo Nelen supervised the Schrot operation for McDonald and testified on its behalf. He concurred with Lindahl's testimony to the effect that the Upper Kittanning's dip was to the southeast, at least in the portion of the Schrot site on the northeastern and eastern side of the draw in which MP-1 is located. Importantly, because McDonald's appeal is based on its argument that its mine is not hydrologically connected to MP-1 while Benjamin's mine is so connected, Nelen testified that DER's Floyd Schrader told him of the connection of Benjamin's Mine and MP-1. Nelen met Schrader at the site prior to beginning mining of the Schrot mine. Nelen says Schrader advised him that when Benjamin mined the Wiley operation, an acid seep developed on the western side of the Wiley site. He told Nelen that there was a bed of lime to treat this seep installed by Benjamin near the haulroad and that McDonald should not touch it, or McDonald would have water problems for which it would be responsible. Nelen said, other than filling potholes, McDonald never touched the road and never touched the bed. He indicated that Schrader told him this lime bed was located just across the haulroad from MP-1. Nelen also testified that all pit water in the area of the Schrot site north and east of the tributary flowed toward the highwall, i.e., away from the direction of MP-1, and that there was no acid mine drainage problem encountered before or during mining.

According to testimony from Dorothy Colna, Schrader told her the same thing he told Nelen as it relates to Benjamin's lime trench and McDonald's

need to avoid the trench area. Colna, a former DER employee now working for McDonald, first met Schrader at the Schrot mine site in connection with her preparation of McDonald's application for the Schrot permit. Schrader told her Benjamin installed this pit to clean up this seep so it could get its bond released. Colna also stated that Schrader said that Benjamin's lime trench was connected to MP-1. According to Colna, Schrader later told her the discharge was starting to get bad and it needed more lime to "sweeten it up", but McDonald should not add the lime, or it would be responsible for this discharge. Colna said that she and Schrader discussed MP-1 and this trench on three separate occasions. Finally, Colna said both DER's District Mining Manager (Gary Byron) and Schrader told her McDonald was not liable for MP-1 and they authorized the return of the Schrot mine's Stage I and Stage II bonds to McDonald.[6] DER admits that in the fall of 1988, after a meeting between Schrader, Gary Byron and DER's hydrogeologists to consider the MP-1's impact on McDonald's request for bond release, it approved bond release on the Schrot site.[7]

McDonald's final supersedeas hearing witness was James R. Eby, a hydrogeologist employed by the consulting hydrogeology firm of Meiser & Earl, Inc. He had been hired by McDonald to investigate the source of MP-1 just before DER issued CO-1 to McDonald. Eby concluded that McDonald is not

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[6]This is confirmed, at least by inference, by Exhibits M-14, M-15, M-16, and M-17, which are 1988 inspection reports from the DER Mine Conservation Inspector who was responsible for the Schrot site in 1988 while Schrader was off work for several months with an illness.

[7]Mining on the Schrot site was completed in 1988. DER also admitted in responding to the Petition that between the Bond release and the issuance of CO-1, it performed no further hydrogeologic examination of MP-1 and its relation to the Schrot site.

responsible for this discharge because the Schrot site's ground water flows to the southeast and the recharge area for MP-1 lies to the northwest of MP-1 on the Wiley site. He believes the lime in the lime trench may have "worn out" its neutralizing potential, perhaps by becoming coated, thus cutting off a portion of its neutralizing potential. In sum, he believes the ground water flow northwest of MP-1 is toward MP-1 and is the source of the discharge's quality, and since this is Benjamin's area of responsibility, McDonald is not liable for this discharge.

In DER's case, it called two basic witnesses, Mr. Schrader and one of its hydrogeologists, David Bisko. Schrader testified that he has inspected these two mines since 1982. When he first began inspecting the Wiley site, it was backfilled, graded, and planted. Schrader admitted that he suggested the use of the lime trench to Benjamin's job supervisor (Hutton). Schrader said that when he was a miner, prior to his working for DER, his company would sweeten up a discharge in this fashion and he told Hutton this. Later, when he returned to the Wiley site, Hutton told him that the lime trench had been installed. Schrader testified that the trench is not in the location identified by Colna and Nelen, but is south of that point, as shown on the photos which are Exhibits C-2 and C-3. On cross-examination, however, Schrader refused to deny telling Nelen and Colna that the lime trench is connected to MP-1. On direct-examination he said the trench treats a seep identified as Seep D not MP-1, but, when cross-examined on the testimony of Colna and Nelen, he would not say that they recollected his prior comments wrongly. Schrader admitted he could have done what they said he did but he doubted it. At present, he does not recollect telling them this. Schrader also admitted that he never required Benjamin to treat MP-1 when its quality

was unsatisfactory during the portion of the time prior to McDonald's Schrot operation. Finally, he stated that the tributary's water quality has varied over time, but in the last year it has become severely degraded.

David Bisko was first at the Wiley/Schrot site in 1988. He was not again involved on this Schrot site until October of 1990 when, after McDonald's appeal of CO-1 was filed, he was asked to gather all evidence available to support the issuance of CO-1. In this regard, it should be pointed out, as was shown on cross-examination, that Bisko's work was not a scientific investigation aimed at determining th cause or source of MP-1, but was simply the gathering of any and all evidence supporting a previously reached conclusion i.e., MP-1 was McDonald's responsibility. Bisko testified that McDonald's Schrot Mine was the source of MP-1's acid mine drainage rather than Benjamin's Wiley Mine. Contrary to Eby's conclusion on behalf of McDonald, Bisko found the ground water on the Schrot site migrating from the northern end of the draw (in the area graded by McDonald) toward MP-1. Where McDonald offered evidence concluding that the Middle Kittanning and Upper Kittanning seams are somewhat isolated from each other in part because of the clay underlying the Upper Kittanning seam, Bisko said there is communication of ground water between these geologic units, and that the clay beneath the Upper Kittanning seam is not plastic, but flinty. Whereas Eby concluded MP-1's recharge area is west and northwest of MP-1, Bisko shows it lying almost due north. In short, the hydrogeologists see the area from completely different positions apparently with little, if any, room for divergent opinion.

On direct examination, Bisko offered his coal structure contour map (Exhibit C-25) as "a more accurate measure" of the Upper Kittanning coal's

elevation on Schrot and Wiley, than that testified by McDonald's experts. Bisko prepared this map using the drill holes data for both mines. He believed it helped show why McDonald is responsible. On cross-examination, however, he admitted omitting several drill holes on the Wiley site in plotting these elevations, but he could not offer a reason why he had done so. Moreover, when the fact of multiple seams of coal all identified as Upper Kittanning on the Wiley site, was pointed out to him by this Board, he said that he had simply used the lowest seam to plot his contour map assuming it was the Upper Kittanning Coal. As noted above in footnote four, there is a legitimate question of which seam is which on the Benjamin site, and maps based on assumptions and omissions (and opinions based on such maps) must be questioned. Moreover, Bisko admitted that if the lime trench were connected to MP-1, that fact would impact on his conclusions, as would a lack of interconnection/groundwater communication between the two Kittanning seams.[8]

By its nature, a supersedeas hearing is of briefer duration than a merits hearing, and, therefore, it approaches the issues on appeal from a different angle than the merits hearing. It is also clear that there is more to this appeal which remained behind the scenes at the hearing on the Petition. Nevertheless, since, as stated above, we do conduct a balancing test as to the enumerated factors, we have done so here. We believe, based on the evidence briefly discussed above, that McDonald has made a reasonable showing that it will prevail on the merits of this appeal. While we clearly see that MP-1 is polluting this tributary, there is a serious question as to

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[8]There were questions raised as to the accuracy of the conclusions of witnesses for both sides through the careful cross-examination of opposing witnesses. These "holes" in their stories will undoubtedly be filled in when a hearing is held on the merits of this appeal.

whether McDonald caused the discharge's quality to become so degraded. As of yet, DER's evidence has not convinced us of the merit of its contentions, when presented along side McDonald's rebuttal thereof. McDonald's evidence was at least equally as strong in favor of its theory as that offered by DER, particularly since DER's hydrologic evidence was all assembled ex post facto. Accordingly, we enter the following order.

O R D E R

AND NOW, this 31st day of January, 1991, it is ordered that the Petition For Supersedeas filed by McDonald in this consolidated appeal are granted. Paragraphs 1, 2, 3 and 4 of DER's Compliance Order No. 904093, dated September 26, 1990, as issued to McDonald and Paragraph 1 of DER's Compliance Order No. 904124AE dated December 28, 1990, also as issued to McDonald are superseded pending disposition of the merits of this consolidated appeal.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: January 31, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Michael J. Heilman, Esq.
Central Region
For Appellant:
Carl A. Belin, Jr., Esq.
Clearfield, PA

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M. DIANE SMITH
SECRETARY TO THE BOARD

AVERY COAL COMPANY and THOMPSON BROTHERS COAL COMPANY	:	
v.	:	**EHB Docket No. 90-350-MJ (Consolidated)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** February 1, 1991

OPINION AND ORDER SUR MOTION FOR DISMISSAL

By Joseph N. Mack, Member

Synopsis

An appeal of a DER Compliance Order which has been superseded by a subsequent Compliance Order, and thus rendered null and void, is dismissed as moot.

OPINION

On or about July 18, 1990, the Department of Environmental Resources (DER) issued Compliance Order 904070 (July 18 CO) to Thompson Brothers Coal Company (Thompson), as owner/operator/permittee of the Alder Run mine site in Clearfield County, and to Avery Coal Company, Inc. (Avery), as subcontractor. Avery and Thompson appealed the July 18 CO on August 17, 1990 and August 20, 1990, respectively. By order dated November 13, 1990, the two appeals were consolidated at EHB Docket No. 90-350-MJ.

On or about August 28, 1990, DER issued to the parties Compliance Order 904079 (August 28 CO) which contained all the violations cited in the July 18 CO, as well as an additional violation which was based on a later sample. The DER inspection report accompanying the August 28 CO stated that the August 28 CO superseded the July 18 CO. Avery took an appeal from the August 28 CO which is docketed at EHB Docket No. 90-406-MJ. No appeal was filed by Thompson.

On November 16, 1990, Avery filed a motion to dismiss the appeals docketed at 90-350-MJ as moot, based on the contention that since the August 28 CO superseded the July 18 CO, which was the basis of the earlier appeal, the issues raised by that appeal are now moot. DER has joined therein. Thompson opposed the motion, arguing that the effect of the August 28 CO was simply to restate and reissue the violations set forth in the July 18 CO and, therefore, the issues raised in the appeal of the July 18 CO are not moot.

After an examination of the two Compliance Orders, we find that we must agree with Avery. Thompson's argument that the August 28 CO simply "restates", rather than supersedes, the earlier order is without merit. Although only the face of the inspection report form accompanying the August 28 CO states that the July 18 CO is superseded by the August 28 CO, the provisions of the August 28 CO do operate to supersede the July 18 CO. In particular, the August 28 CO lists an abatement date of "October 16, 1990," whereas the July 18 CO required "immediate" abatement. Where an order of DER is superseded by a subsequent order which renders the earlier order null and void, any appeal taken from the earlier order must be dismissed as moot. Glenworth Coal Co. v. DER, 1986 EHB 1348. It should further be noted that if there were some overlap between the CO's, the appellant has the responsibility

for appeal of the most recent one to preserve its rights. This clearly follows because an appeal to the EHB does not preclude DER from issuing other or additional orders. Blevins v. Commonwealth, DER, 128 Pa.Cmwlth. 533, 563 A.2d 1301 (1984).

Also in support of its position that the appeal of the July 18 CO is not moot, Thompson cites the case of Al Hamilton Contracting Co. v. Commonwealth, DER, 90 Pa.Cmwlth. 228, 494 A.2d 516 (1985). There, the Commonwealth Court held that an appeal of a Compliance Order pertaining to a surface mine was not rendered moot by the operator's compliance with the order because the violation cited in the order could be a basis for subsequent civil penalty assessments. Thus, the Court reasoned, the operator would have been deprived of a stake in the outcome of the appeal if it were dismissed as moot. However, the reasoning of Al Hamilton is not applicable in the consolidated appeals now before us. Here, the Compliance Order which forms the basis of the appeals has been superseded. Since it has been superseded, it no longer has any legal effect and, therefore, cannot be used as a basis for subsequent civil penalties. Thus, there is no longer any stake in the outcome of the appeals.

We, therefore, enter the following order.

O R D E R

AND NOW, this 1st day of February, 1991, in consideration of the Motion for Dismissal filed by Avery Coal Company, Inc., the appeals consolidated at Docket No. 90-350-MJ are hereby dismissed as moot.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: February 1, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
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Central Region
For Avery Coal Co., Inc.:
Stanley R. Geary, Esq.
Pittsburgh, PA
For Thompson Brothers Coal Co.:
William C. Kriner, Esq.
Clearfield, PA

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M. DIANE SMITH
SECRETARY TO THE BOARD

NEWTOWN TOWNSHIP	:	
	:	
V.	:	**EHB Docket No. 88-490-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: February 5, 1991**
and BUCKS COUNTY WATER AND SEWER	:	
AUTHORITY, Permittee	:	
and NESHAMINY SEWER COMPANY, INC.	:	
and NORTHAMPTON MUNICIPAL AUTHORITY,	:	
Intervenors	:	

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

By Robert D. Myers, Member

Synopsis

One of the municipalities served by an existing 18-inch interceptor sewer, which has to be relieved by the installation of a parallel interceptor, objected to the installation of a 30-inch line rather than a 24-inch line, arguing that the larger line will provide excess capacity that will defeat the municipality's purpose in the creation of a Conservation Management Zoning District. The Board holds that DER was justified in approving the 30-inch interceptor and that the municipality's concerns were speculative and just as likely to occur with a 24-inch line as a 30-inch line.

Procedural History

This proceeding originated on December 1, 1988 when Newtown Township (Newtown) filed a Notice of Appeal contesting the issuance by the Department of Environmental Resources (DER) on November 3, 1988 of Water Quality

Management Permit No. 0988444 (Permit) to Bucks County Water and Sewer Authority (BCWSA) authorizing the dualization of the Neshaminy Interceptor by the installation of a new line 30-inches in diameter. On March 2, 1989 Neshaminy Sewer Company, Inc. (Neshaminy) and Northampton, Bucks County, Municipal Authority (Northampton Authority) were allowed to intervene in support of the issuance of the Permit.

Newtown's Petition for Supersedeas, filed on March 31, 1989, was denied in an Opinion and Order issued June 6, 1989 (1989 EHB 672). A Motion to Dismiss, filed by BCWSA and Neshaminy on April 26, 1989, was denied in an Opinion and Order issued October 31, 1989 (1989 EHB 1195).[1]

A hearing on the merits of the Appeal was held in Harrisburg on April 4-5, 1990 before Administrative Law Judge Robert D. Myers, a Member of the Board. All parties were represented by legal counsel. Post-hearing briefs were filed by Neshaminy on July 30, 1990, by Newtown on August 6, 1990, and by BCWSA on August 31, 1990. Northampton Authority and DER did not file briefs.[2]

The record consists of the pleadings, a hearing transcript of 263 pages and 25 exhibits. After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. Newtown is a municipality of the Commonwealth of Pennsylvania located in Bucks County (Notice of Appeal).

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[1] A Petition to Disqualify Newtown's legal counsel, filed by Northampton Authority on April 26, 1989, was denied as untimely at the beginning of the Supersedeas hearing on April 28, 1989 and affirmed in a written Opinion and Order issued May 16, 1989 (1989 EHB 616).

[2] This is in accordance with DER's policy with respect to third-party appeals from issuance of permits.

2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq.; the Pennsylvania Sewage Facilities Act (SFA), Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 et seq.; the Dam Safety and Encroachments Act (DSEA), Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 et seq.; and the rules and regulations adopted pursuant to said statutes.

3. BCWSA is a Pennsylvania municipality authority organized by the County of Bucks (Neshaminy Exhibit No. 1).[3]

4. Neshaminy is a Pennsylvania business corporation with its principal place of business at 207 Leedom Street, Jenkintown, PA 19046 (Neshaminy's Pet. to Intervene, ¶1).

5. Northampton Authority is a Pennsylvania municipality authority organized by Northampton Township, Bucks County (Northampton Authority's Pet. to Intervene, ¶1).

6. By an Agreement dated September 9, 1975 (1975 Agreement) among BCWSA, Newtown, The County of Bucks and the Borough of Newtown (Borough), to which Newtown, Bucks County, Joint Municipal Authority (Newtown Authority) was added by joinder, BCWSA agreed to construct an interceptor sewer to serve the Lower Neshaminy Creek watershed area including Newtown and the Borough (Neshaminy Exhibit No. 1).

7. Pursuant to the 1975 Agreement, BCWSA constructed an 18-inch diameter interceptor sewer known as the Neshaminy Interceptor and has operated

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[3] Neshaminy exhibits are denoted NSC-1 to NSC-17 in the transcript. Newtown exhibits are denoted A-A to A-J.

it continuously, providing service to Newtown, the Borough, Northampton Township and Middletown Township[4] (Neshaminy Exhibit No. 2).

8. By 1988 the 18-inch Neshaminy Interceptor was at capacity during dry weather and above capacity during wet weather (N.T. 140-143, 241).

9. On February 9, 1988 BCWSA advised its municipal service customers of the situation and notified them that no building permits could be issued if they involved new connections to sewer facilities flowing into the 18-inch Neshaminy Interceptor (Newtown Exhibit J).

10. At or about the same time, BCWSA directed Carroll Engineering Corporation (Carroll), its design engineers, to prepare a Facility Plan for the relief of the 18-inch Neshaminy Interceptor as contemplated by the Bucks County Sewerage Facilities Plan of 1970 which had been adopted by Newtown (N.T. 12-14; Newtown Exhibit E).

11. When designing a facility such as that involved here, generally accepted engineering practices require that it be sized so as to be adequate for 25 to 50 years (N.T. 225-226).

12. DER guidelines in its Sewerage Manual require sewer facilities to be designed for the estimated ultimate tributary population except where portions of the facilities can be readily increased in capacity or where it may be more cost effective to increase capacity at a later date (Neshaminy Exhibit No. 13, section 22).

13. The guidelines in DER's Sewerage Manual conform to generally accepted engineering practices (N.T. 228; Neshaminy Exhibit No. 13, Preface).

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[4] Northampton Township and Middletown Township have separate agreements with BCWSA.

14. In May 1988 Carroll presented a Facility Plan for the relief of the 18-inch Neshaminy Interceptor by the construction of a parallel interceptor (Neshaminy Exhibit No. 9).

15. Before proposing the parallel interceptor, Carroll had considered:

(a) metered flows in existing facilities;

(b) population and growth projections supplied by Newtown, Newtown Authority, Northampton Township, Wrightstown Township, Middletown Township and Delaware Valley Regional Planning Commission;

(c) grades at which the parallel interceptor would have to be constructed; and

(d) the fact that inadequate space, expense and unacceptable environmental damage will prohibit any future enlargement or supplementation of the facility

(N.T. 146, 195-198, 226-228, 260-261; Neshaminy Exhibits Nos. 4, 7 and 8; Newtown Exhibit I).

16. Based on these considerations, Carroll concluded that by the year 2000:

(a) 3823 additional equivalent dwelling units (EDUs) would be connected to the sewer system in Newtown and the Borough producing additional peak flows (on the basis of 2.8 persons per EDU x 100 gallons per day per person x 2.5 peaking factor) of 2.68 million gallons per day (MGD);

(b) 1056 additional EDUs would be connected to the sewer system in Northampton Township providing additional peak flows (on the basis of 3.5 persons per EDU x 100 gallons per day per person x 2.5 peaking factor) of .92 MGD;

(c) 942 additional EDUs would be connected to the sewer system in Wrightstown Township producing additional peak flows of .46 MGD; [5]

(d) the additional peak flows would total 4.06 MGD;

(e) the additional peak flows of 4.06 MGD combined with the existing flows of 2.8 MGD (metered in June 1988 in the 18-inch interceptor at a point near Newtown Creek) would produce total flows of 6.86 MGD; and

(f) additional allowance would have to be made for infiltration which was known to occur but had not been quantified.

(N.T. 141, 151, 233-235; (Neshaminy Exhibit No. 9).

17. Relying on these conclusions, Carroll advised that a 30-inch interceptor with a calculated peak capacity of 7.5 MGD would be a more prudent installation than the next smaller-sized pipe, a 24-inch interceptor, with a calculated peak capacity of 4.3 MGD (Neshaminy Exhibit No. 9).

18. According to Carroll's design for the parallel interceptor:

(a) a 30-inch interceptor would run parallel to the 18-inch interceptor from its most upstream point (north bank of Newtown Creek) to a railroad bridge at station 98 + 60;

(b) the two interceptors would be combined into one 30-inch interceptor to go under the railroad bridge because of insufficient space for two interceptors;

(c) the combined flows would continue in the 30-inch interceptor below the railroad bridge;

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[5] The basis for this calculation is not apparent from the record. In any event, the expected flows from Wrightstown Township are not significant enough to affect the outcome.

(d) the existing 18-inch interceptor would remain in place below the railroad bridge, capped off at its upstream end but continuing to receive flows from Northampton and Middletown Townships;

(e) the two interceptors would be combined again into one 36-inch interceptor at station 60 + 00 because the available space between a rapidly eroding stream bank and existing houses is insufficient for two interceptors;

(f) the combined flows would continue in a 30-inch interceptor below station 60 + 00;

(g) the existing 18-inch interceptor would remain in place below station 60 + 00, capped off at its upstream end but continuing to receive flows from Northampton and Middletown Townships;

(h) the two interceptors would continue to run parallel to their junction with the Core Creek Interceptor on the north bank of Core Creek; and

(i) the parallel interceptor would cover a total distance of about 10,400 feet with very little drop in elevation.

(N.T. 143-150; Board Exhibit No. 1; Neshaminy Exhibit Nos. 6 and 10).

19. Carroll's design requires:

(a) that, from the railroad bridge at station 98 + 60 to station 60 + 00, the relief interceptor must be capable of handling at least[6] the 2.8 MGD presently flowing in the 18-inch interceptor and the 2.68 MGD projected flows from Newtown and the Borough, a total of 5.48 MGD;

(b) that, from station 60 + 00 to the Core Creek Interceptor, the parallel interceptor must be capable of handling at least[6] the 5.48 MGD

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[6] Carroll's flow projections are somewhat higher than the figures used in these findings, but it is clear that, based on Carroll's design, the parallel interceptor must be capable of handling <u>at least</u> the quantities listed in order to accommodate to Newtown and the Borough.

discussed in subparagraph (a) and the .69 MGD projected to be diverted from the 18-inch interceptor at station 60 + 00, a total of 6.17 MGD (Board Exhibit No. 1; Neshaminy Exhibit No. 9)

20. A 24-inch parallel interceptor, installed at the available grades, would have a capacity of 7.64 MGD under the railroad bridge, 4.84 MGD at station 85 + 00, 4.68 MGD at station 60 + 00 and 4.33 MGD at station 51 + 00 (Neshaminy Exhibit No. 10).

21. Although Carroll's design configuration was not challenged, Newtown contested Carroll's flow projections and maintained that a 24-inch interceptor would be adequate if proper projections were used (Notice of Appeal; Neshaminy Exhibit No. 6).

22. Carroll's design was presented to DER as part of BCWSA's application for the Permit (N.T. 11-12).

23. On July 7, 1988 a Sewer Facilities Agreement (1988 Agreement) was entered into among BCWSA, Newtown Authority, Northampton Authority and Neshaminy. In essence, this Agreement provided (a) that Neshaminy would construct the parallel interceptor at its own cost and expense and dedicate it to BCWSA, (b) that Neshaminy's shareholders (landowners and developers in the affected municipalities) would have certain reserve capacity in the parallel interceptor, and (c) that BCWSA would reimburse Neshaminy from future connections to the Neshaminy Interceptor (Neshaminy Exhibit No. 2).

24. By letter of July 13, 1988 BCWSA requested DER to approve the 1988 Agreement and a plan to modify the ban on connections until the parallel interceptor was constructed [7] (Neshaminy Exhibit No. 3).

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[7] The record does not contain evidence establishing precisely whether or when DER approved the 1988 Agreement, but all parties proceeded as though it
footnote continued

25. Because of Newtown's objections to the proposed size of the parallel interceptor, DER personnel walked the length of the proposed project, talked with homeowners and municipal officials, reviewed the design of the parallel interceptor and re-examined the projections and calculations. DER concluded that the differences in the projections were not enough to warrant a reduction in size from 30-inch to 24-inch (N.T. 16-19, 27-31, 59-60; Neshaminy Exhibits Nos. 14 & 15).

26. On November 3, 1988 DER issued the Permit on the basis of Carroll's design (Notice of Appeal).

27. Newtown's evidence projected about 1800 additional EDUs Newtown would have flowing to the Neshaminy Interceptor by the year 2000 and 2256 additional EDUs by the year 2035. However, Newtown acknowledged that as of June 1988 there were at least 2150 EDUs for which the plans had already been approved and another 1000 EDUs for which the plans were awaiting approval (N.T. 93-97, 112-118, 133-134, 137).

28. Newtown's Act 537 Sewage Facilities Plan of May 1989 projects 4299 additional EDUs sending flows to the Neshaminy Interceptor by the time Newtown is completely built-up. Of this number, 3122 EDUs have sewer permits but either have not yet been built or have not yet been occupied. (N.T. 124-128; Newtown Exhibit A, pp. 63-65, Table 14).

29. Based on the evidence, it is reasonable to project that sometime between the years 2000 and 2010 the following EDUs will be contributing flows to the Neshaminy Interceptor:

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continued footnote
had been approved. In view of this and the fact that Newtown has not challenged its terms, we will treat the 1988 Agreement as having been approved by DER.

Newtown Township	3200 existing 1988 2150 plans approved 1000 plans pending	
Sub-total		6400
Newtown Borough		1100
Middletown Township		489
Northampton Township		500
	Grand Total	8489

(N.T. 110-119, 140, 195, 246-248; Neshaminy Exhibit No. 17).

30. Using a factor of a 2.8 persons per EDU[8] x 100 gallons per day per person[9] x 2.5 peaking factor[9], 8489 EDUs would generate expected flows of 5.9 MGD (N.T. 23-24, 57-58, 232-233, 247-248).

31. Infiltration, which was determined by metering in November 1988, would add another 1.3 MGD to the expected flows, bringing the required capacity of the Neshaminy Interceptor to 7.2 MGD (N.T. 234-236).

32. A 24-inch interceptor installed at the available grades would not provide adequate capacity for 7.2 MGD (N.T. 246-247; Neshaminy Exhibit No. 10).

33. The 2.8 MGD metered in June 1988 in the 18-inch interceptor and considered as an indication of existing flows is only about 75% of the peak dry weather flows expected from the then existing EDUs when employing the factors explained in footnotes 8 and 9. Because of this, Newtown would have the projected peak dry weather flow of 5.9 MGD in Finding of Fact No. 30 reduced to 4.4 MGD (N.T. 249-255, 257-258).

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[8] Based on 1980 census figures.

[9] Specified by DER's Sewerage Manual, section 24 (Neshaminy Exhibit No. 13).

34. Although a flow of 4.4 MGD would fall within the capacity of a 24-inch interceptor at some points along the proposed installation route, Newtown's approach is imprudent for the following reasons:

(a) the 2.8 MGD metered in June 1988 cannot be accepted as highly accurate because the 18-inch line was at or above capacity at the time;

(b) at most it would provide margins too slim for an interceptor laid at such a relatively flat grade; and

(c) when the infiltration flows of 1.3 MGD are added to the 4.4 MGD, the total (5.7 MGD) exceeds the capacity of a 24-inch line throughout the length of installation

(N.T. 233-234, 256-257, 260-261).

DISCUSSION

Newtown, as a third-party appellant from the issuance of the Permit, has the burden of proof: 25 Pa. Code §21.101(c)(3). To carry the burden, Newtown must show by a preponderance of the evidence that DER acted unlawfully or abused its discretion in issuing the Permit: 25 Pa. Code §21.101(a). Newtown's assertion that DER and BCWSA have the burden of proof is meritless.

In its brief, Newtown contends that DER acted unlawfully and abused its discretion in issuing the Permit because (a) the evidence available established the need only for a 24-inch interceptor, (b) allowing the installation of an oversized interceptor violates Article I, Section 27 of the Pennsylvania Constitution, (c) DER did not require Newtown to file a supplement to its Official Plan, and (d) the excess capacity in the interceptor will defeat Newtown's purpose in creating the Conservation Management Zoning District. Arguments (b) and (c) were not raised in the Notice of Appeal or Newtown's pre-hearing memorandum. Consequently, they will not be considered: Max Funk et al. v. DER et al., 1988 EHB 1242.

Prior to constructing the parallel interceptor, BCWSA was required to obtain the Permit from DER: section 207 of the CSL, 35 P.S. §691.207. To receive the Permit, BCWSA had to submit "plans, designs and relevant data": section 207(a) of the CSL, 35 P.S. §691.207(a). Since the Permit was for a facility intended to relieve an overloaded facility, BCWSA was required to design it to provide "required capacities to meet anticipated demands for a reasonable time in the future": 25 Pa. Code §94.21(a)(2). Neither the CSL nor the regulations contain guidance on determining "required capacities," "anticipated demands" or "a reasonable time in the future." DER's Sewerage Manual (Neshaminy Exhibit No. 13) does provide some guidance, however.

Section 1.1 of the Sewerage Manual points out that, where sewage facilities are concerned, DER's dominant interest under the CSL is the protection of the waters of the Commonwealth from pollution. Accordingly, it reviews plans and designs to assure the "suitability, adequacy and operating reliability" of the proposed facility to prevent pollution. Section 22 suggests that facilities be designed "for the estimated ultimate tributary population" with two exceptions: (a) where parts of a system may be readily increased in capacity, and (b) where it may be more cost effective to increase capacity at a later date. Section 24 suggests the use of 100 gallons as the average daily per capita flow for design purposes "unless a rigorous justification for a lesser per capita flow can be established." The 100 gallons per day (gpd) includes normal infiltration; additional allowance is to be made "where conditions are unfavorable." Peak flows should be computed for interceptors by using a per capita figure of 250 gpd.

DER's guidelines set forth in the Sewerage Manual basically conform to generally accepted engineering practices (N.T. 228; Neshaminy Exhibit No. 13, Preface). In the absence of statutory or regulatory establishment of any

other standard, we conclude that the design of sewer facilities is to be measured by generally accepted engineering practices as set forth in the Sewerage Manual. Newtown has not challenged the guidelines of the Sewerage Manual - only the manner in which BCWSA's design interpreted them.

Since a facility like the parallel interceptor is required to accommodate future demands, the design must include an element of speculation. No matter how carefully present conditions and historic trends are analyzed, future projections are little more than educated guesses. Conditions change, trends reverse, sometimes quickly and sometimes gradually, and the most careful predictions go wide of the mark. This common knowledge is repeated here only by way of saying that what we are dealing with does not lend itself to mathematical certainty despite everyone's efforts to make it do so.

Newtown argues strenuously that we cannot consider any evidence that was not before DER at the time the Permit was issued. We are puzzled somewhat by this argument. Proceedings before the Board are de novo (Warren Sand and Gravel Co., Inc. v. Commonwealth, Department of Environmental Resources, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975)), giving us the opportunity to consider relevant evidence not considered by DER. Aside from that, we would think that Newtown (and all the other parties) would want us to consider the latest available data on housing construction and population growth, since that will help determine the size of the facility all of them will have to live with for another generation.

Carroll, BCWSA's design engineers, made no projections of its own but used projections supplied by the municipalities expected to contribute flows to the parallel interceptor. Based on these projections, Carroll calculated that by the year 2000 there would be a need for an additional 4.06 MGD dry weather peak flow. This figure, when added to the existing flow metered at

2.8 MGD, produced a total required capacity of 6.86 MGD. While this total included normal infiltration, Carroll concluded that some additional capacity should be provided for excessive infiltration which was known to exist but which had not been quantified. As a result, Carroll recommended construction of a 30-inch parallel interceptor with a 7.5 MGD capacity at the available grades. The next smaller standard-sized pipe, 24-inch, would provide a capacity of only 4.3 MGD at those grades.

Newtown's attack on Carroll's work focuses on (a) projections of population growth in Newtown, and (b) projections of per capita flows from Newtown. Only the first was presented to DER. Charles Rehm, Chief of the Planning Section in the Bureau of Water Quality Management in DER's Norristown Regional Office, examined the projections made by Carroll and by Newtown. He calculated that the differences involved flows ranging from 1.097 MGD to 1.97 MGD, not enough to warrant the use of a smaller-sized pipe. The calculations fully support Rehm's conclusion and DER's approval of the 30-inch interceptor.

Newtown now argues that Carroll's projections and Rehm's calculations are incorrect because they employed a per capita flow figure much higher than actual. As noted above, the Sewerage Manual recommends that designers use a per capita flow of 100 gpd as the average daily flow "unless a rigorous justification for a lesser per capita flow can be established." Both Carroll and Rehm used the 100 gpd which, when multiplied by the 2.8 persons per EDU applicable to Newtown, produced average daily flows of 280 gallons per EDU. Newtown argues that, if the 2.8 MGD metered in the 18-inch interceptor in 1988 and used in Carroll's analysis to represent existing flows are divided by the number of EDUs flowing to the interceptor at that time, the result is much

lower than 280 gallons per EDU per day. This, according to Newtown, represents "rigorous justification" for using a per capita figure of about 75 gpd rather than 100 gpd.

Aside from the fact that Newtown never presented this to DER, the argument is meritless. The 2.8 MGD metered in 1988 cannot be viewed as finite data on existing per capita flows. At the time of metering, the 18-inch line was at or above capacity. The flows, therefore, were greater by some undefinable quantity than the meter could record. Moreover, an allowance still would have to be made for excessive infiltration. To the extent that any capacity margins would exist in a 24-inch interceptor, they would be too slim for the nearly flat grades involved here. When the post-Permit issuance evidence - the November 1988 metering of infiltration and Newtown's May, 1989 Act 537 Sewage Facilities Plan - is considered in the context of the other evidence, it is clear that the installation of a 30-inch interceptor is appropriate.

To this point we have confined our discussion to the projections of population growth and sewage flows. Two additional factors also mandate the larger-sized interceptor. The first is the fact that whatever is done now to increase the capacity of the Neshaminy Interceptor will be the final step. Space will not exist for any additional interceptors, and replacing an interceptor by a larger one will be expensive and productive of unacceptable environmental damage. It is essential, therefore, that margins of safety be built into the design of the parallel interceptor.

The other factor is Carroll's design which Newtown has not challenged. At two places, the existing 18-inch interceptor is combined with

the new interceptor because of inadequate space for two lines. Downstream of each of those locations, the new interceptor must be capable of handling the combined flows. A 24-inch interceptor cannot do so.

Newtown's argument that a 30-inch interceptor will defeat Newtown's purpose in creating the Conservation Management Zoning District was discussed in our Opinion and Order sur Petition for Supersedeas, 1989 EHB 672. We held in that Opinion that Newtown's concerns were too remote and speculative to warrant the relief requested and, besides, would be as likely to come about with a 24-inch interceptor as a 30-inch interceptor. We have found nothing in the evidence or in Newtown's brief to change our minds on this aspect of the case. Accordingly, we will not discuss it further.

Conclusions of Law

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

2. As a third-party appellant from the issuance of the Permit, Newtown has the burden of proving by a preponderance of the evidence that DER acted unlawfully or abused its discretion in issuing the Permit.

3. Not having been raised in its Notice of Appeal or pre-hearing memorandum, Newtown's arguments regarding Article I, Section 27 of the Pennsylvania Constitution and an Official Plan supplement will not be considered.

4. The guidelines set forth in DER's Sewerage Manual, conforming to generally accepted engineering practices, are the proper standard for the design of sewer facilities, in the absence of any other standard mandated by statute or regulation.

5. BCWSA was required to design the parallel interceptor to provide required capacities to meet anticipated demands for a reasonable time in the future.

6. BCWSA's design was required to reflect estimated ultimate tributary population since (a) the system could not be readily increased in the future, and (b) attempts to do so would be expensive and productive of unacceptable environmental harm.

7. Projections of future population growth and future sewage flows cannot be made with mathematical certainty.

8. BCWSA's projections were reasonable and proper on the basis of the data available at the time and the data which has become available since issuance of the Permit.

9. Newtown's projections did not provide a reduction in flows sufficient to warrant a reduction in size from 30-inch to 24-inch.

10. Even if a per capita flow figure of 75 gpd is used, the projected flows allow too thin a capacity margin in a 24-inch interceptor installed at the relatively flat grades involved.

11. BCWSA's design of the parallel interceptor, which empties the flows from the 18-inch interceptor into the new interceptor at two locations where space permits only one line, requires the new interceptor to have a capacity greater than that available in a 24-inch interceptor.

12. The potential effect of the new interceptor upon Newtown's Conservation Management Zoning District is speculative at best and is as likely to occur with a 24-inch interceptor as a 30-inch.

13. DER did not act unlawfully or abuse its discretion in issuing the Permit.

ORDER

AND NOW, this 5th day of February, 1991, it is ordered that the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

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JOSEPH N. MACK
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DATED: February 5, 1991
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M. DIANE SMITH
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BOROUGH OF FORD CITY	:	
v.	:	**EHB Docket No. 90-014-MJ**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** February 7, 1991

OPINION AND ORDER SUR
MOTION TO DISMISS

By Joseph N. Mack, Member

Synopsis

The Department of Environmental Resources' (Department) denial of a request that a municipal waste landfill be allowed to remain open after the closure date set forth in 25 Pa.Code §271.113 constitutes an appealable action, because it affects the appellant's interest and rights in the landfill. However, the Department's denial of the request for an extension does not constitute an abuse of discretion where the Department is simply enforcing the mandatory closure date set forth in the regulations. We elect to treat the Department's Motion to Dismiss as a Motion for Judgment on the Pleadings, and enter judgment on the pleadings on behalf of the Department where there are no facts in issue and where we have no basis for granting the relief sought by the appellant.

BACKGROUND

This matter originated on January 8, 1990 with the filing of an appeal by the Borough of Ford City (Ford City) seeking review of a December 7, 1989 letter from the Department to the Armstrong County Board of Commissioners (the County). The Department's letter responds to a November 7, 1989 letter from the County requesting, inter alia, that a municipal waste landfill operated by Ford City be allowed to remain open until the County completed development of a county-wide waste management plan as mandated by the Municipal Waste Planning, Recycling and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, 53 P.S. §4000.101 et seq. (Act 101). The Ford City landfill was scheduled to close on or before April 9, 1990 in accordance with §271.111 of the municipal waste regulations (the regulations), 25 Pa.Code §271.1 et seq., which were promulgated on April 8, 1988 pursuant to the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. Section 271.111 of the regulations required all persons and municipalities holding a permit for a municipal waste disposal facility issued prior to April 9, 1988 to file with the Department a preliminary application for permit modification to meet the more stringent standards of the new regulations or to submit a closure plan. Ford City opted for the latter. Pursuant to §271.113 of the regulations, anyone submitting a closure plan was to begin implementation of the plan no later than April 9, 1990.

In responding to the County's request that the Ford City landfill be allowed to remain in operation after the April 9, 1990 deadline, the Department stated that it did not have the authority to grant an extension of the closure date set forth in the regulations. Ford City then brought this appeal, arguing that the Department's refusal to grant the requested extension

was arbitrary and capricious and constituted an abuse of discretion. Ford City also asserted that the aforesaid provisions of the municipal waste regulations were superseded by Act 101 which gives counties until March 1991 to develop a county-wide waste management and disposal plan.

The Department, on January 29, 1990, filed a Motion to Dismiss the appeal. In its Motion, the Department states that its letter of December 7, 1989, which is the basis of the appeal, simply explained that the Department had no discretion to extend the closure deadline established by regulation, and that it did not affect the personal or property rights or duties of either the County or Ford City. Therefore, the Department contends, the letter did not constitute an appealable action or adjudication. Ford City filed Objections thereto on February 26, 1990, asserting that the Department may extend or modify the regulations upon good cause shown and that the December 1987 letter of the Department did in fact constitute an appealable action since it affected Ford City's property rights in the landfill.

On March 12, 1990, Ford City filed a petition for supersedeas and a hearing thereon was held before Board Member Joseph N. Mack on March 22, 1990.[1]

OPINION

We will first address the Department's assertion that its December 7, 1989 letter responding to the County's request for an extension of the closure date does not constitute an appealable action or adjudication. It is well established that an appeal will lie only if the subject matter thereof is an "action," as defined in 25 Pa.Code §21.2(a), or an "adjudication," as defined

---

[1]Our dismissal of this appeal renders moot the matters raised in the supersedeas hearing and, therefore, we do not address them herein.

in the Administrative Agency Law at 2 Pa.C.S.A. §101. Peterson and Clinger v. DER, EHB Docket No. 90-269-MJ (Opinion & Order issued October 4, 1990); Adams County Sanitation Co. v. DER, 1989 EHB 258. As noted in the Adams case, our review of whether there has been an action or adjudication is made on a case-by-case basis, with an exploration of whether there exist consequences which may adversely affect the rights of a person. Id. at 260. In the instant case, the Department's December 7, 1989 letter denied the County's request that the Ford City landfill be allowed to remain in operation after the April 9, 1990 closure deadline until the County was able to develop a waste management plan. In its letter the Department stated that it was not able to grant the County's request in that it had no authority to extend the closure date set forth by the regulations. Regardless of the answer to the underlying question on the merits, i.e. whether the County or Ford City is entitled to such an extension, the Department's letter is a denial of that request and, as such, clearly affects the County's and Ford City's property rights in the landfill. Therefore, the Department's letter constitutes an action from which an appeal may be taken. We further note that although it was the County, and not Ford City, that requested the extension, and although the Department's letter was addressed to the County, since the landfill is operated by Ford City, it clearly is adversely affected by the Department's decision, and properly has standing to bring this appeal on its own behalf.

Since we have determined that the Department's December 7, 1989 letter does in fact constitute an appealable action, we cannot grant the Department's Motion to Dismiss on that basis. Instead, we elect to treat the Department's Motion as one for judgment on the pleadings, as governed by Rule 1034 of the Pennsylvania Rules of Civil Procedure, since the issues may be

resolved simply by an examination of Ford City's notice of appeal, Upper Allegheny Joint Sanitary Authority v. DER, 1989 EHB 303, aff'd at ___ Pa.Cmwlth. ___, 567 A.2d 342 (1989), allocatur denied, ___ Pa. ___, 582 A.2d 327 (1990). Judgment may be entered on the pleadings where there are no issues of fact and the pleadings do not state a valid cause of action. Pa.R.C.P. 1034; Pennsylvania Gas and Water Co. v. Kassab, 14 Pa.Cmwlth. 564, 322 A.2d 775 (1974); G. B. Mining Co. v. DER, 1988 EHB 1065. In the present case, we find that there are no facts in dispute and no ambiguity in the applicable law.

The position of the Department is two pronged. First, the Department argues that it does not have the authority to grant the requested extension as the deadline established by the regulations is mandatory. Secondly, the Department asserts that §§271.111(a)(1) and 271.112 of the regulations provide a means for Ford City to re-permit its landfill and remain in operation, but that Ford City has elected to close the landfill, having filed a closure plan pursuant to §§271.111(a)(2) and 271.113 of the regulations.

In response, Ford City argues that the requirements of the Solid Waste Management Act and the regulations issued pursuant thereto have been superseded by Act 101 and the Governor's Executive Order of October 17, 1989.

The first issue deals with the Department's right or authority to extend the date of closing mandated for all municipal waste landfills in the state which have not upgraded or filed a plan to upgrade in compliance with §271.111 of the municipal waste regulations.

These regulations were promulgated pursuant to the Solid Waste Management Act. That act provides in part in §104(7), 35 P.S. §6018.104(7), that the Department shall have the power and duty to

> issue permits, licenses and orders, and specify the terms and conditions thereof, and conduct inspections and abate public nuisances to implement the purposes and provisions of this act and the rules, regulations and standards adopted pursuant to this act. (Emphasis added)

The Solid Waste Management Act grants rule making authority to the Environmental Quality Board (EQB), a departmental administrative board within the Department. 35 P.S. §6018.105. The EQB has exercised this authority by promulgating the current regulations at 25 Pa.Code §271.1 et seq., effective April 9, 1988. The Department's function is to administer and enforce the regulations. Although the Department is to be accorded deference in its interpretation of the regulations it enforces, it is nevertheless bound by the regulations and cannot ignore the plain language thereof. County of Schuylkill v. DER, 1989 EHB 1241.

Ford City asks us to consider the case of Commonwealth v. Overlook Medical Clinic, 518 Pa. 507, 544 A.2d 935 (1988). In that case, Overlook had requested an extension of time in which to file its final cost report with the Department of Public Welfare (DPW). DPW denied the request on the basis that its regulations did not make any provision for extensions in filing such reports. The Commonwealth Court held that DPW's denial of the request was arbitrary and capricious since the agency had the "inherent authority" to grant extensions where good cause was shown. In affirming the Commonwealth Court's decision, the Pennsylvania Supreme Court cited 1 Pa.Code §31.15 which provides that, except as otherwise prohibited by law, an agency may grant extensions for acts to be performed pursuant to its regulations where good cause is shown.

However, unlike the situation in Overlook, the municipal waste regulations encompass a comprehensive statutory and regulatory scheme to upgrade municipal waste disposal facilities in Pennsylvania. Under the regulations, all municipal waste disposal facilities were given the same options, that of closure or re-permitting, and the same deadlines for implementing these options, i.e. no later than April 9, 1990. This contrasts with the situation in Overlook where the regulations involved an on-going program, as opposed to a one-time upgrade/closure decision.

Ford City also makes the assertion in its appeal that §§271.111, 271.112, and 271.113 of the regulations are "superseded by, preempted by and contrary to the provisions of [Act 101]." Act 101 requires each county in the Commonwealth to develop by March 1991 a comprehensive municipal waste management plan for municipal waste generated within its boundaries. 53 P.S. §4000.501(a). Act 101 also requires municipalities of an established size to develop and implement a recycling program. 53 P.S. §4000.1501. With respect to the question of whether Act 101 supersedes the Solid Waste Management Act and the regulations promulgated thereunder, Section 104 of Act 101, 53 P.S. §4000.104, specifically provides as follows:

> Construction of Act
>
> a) Liberal construction - The terms and provisions of this act are to be liberally construed, so as to best achieve and effectuate the goals and purposes hereof.
>
> b) Pari materia - This act shall be construed in pari materia with the Solid Waste Management Act. (Emphasis added.)

With this statutory instruction, it is clear that Act 101 was not intended to supersede or preempt any provisions of the Solid Waste Management Act or the regulations promulgated thereunder.

Finally, Ford City directs our attention to the Governor's Executive Order of October 17, 1989 (Executive Order) which addresses solid waste management practices within the Commonwealth. Ford City contends that the Executive Order provides a basis for extension of the landfill closure date. Ford City specifically points to subsection (2) of paragraph 1(a) of the Executive Order which provides for expansion of landfill capacity. However, this provision must be read together with paragraph 1(a) which directs the Department to "immediately cease reviewing applications or issuing new permits for new municipal waste landfills..." Subsection (2) then goes on to say that an application may be processed for the following:

> An existing <u>permitted</u> municipal waste landfill facility applying for an <u>expansion of capacity</u> for the disposal of municipal and residual waste, provided that the applicant demonstrates a need for additional capacity and shows that at least 70 percent of the municipal waste proposed to be received at the facility is generated in Pennsylvania and accepted pursuant to county implementing documents specified in Section 513(b) of [Act 101]... (Emphasis added.)

The Ford City municipal waste landfill does not come within the parameters set forth in paragraph 1(a)(2) of the Executive Order. It is not a <u>currently permitted</u> landfill, having elected to close rather than upgrade its facility to qualify for re-permitting under the municipal waste regulations.

Furthermore, in the opening paragraphs of the Governor's Executive Order it becomes clear that the primary problem to be addressed is that of adjoining or nearby states exporting solid waste for disposal in facilities

within Pennsylvania. The moratorium set forth therein instructs the Department to cease reviewing new applications and issuing new permits for solid waste facilities unless there is a demonstration of need for additional capacity and, additionally, that 70 percent or more of the waste load to be received at the facility is generated in Pennsylvania. Contrary to Ford City's contention, the Executive Order provides no authority for extension of the April 9, 1990 deadline for landfills which opted for closure under the municipal waste regulations.

In summary, Ford City has provided us with no basis for finding that DER's refusal to extend the mandatory closure deadline set forth in the municipal waste regulations was arbitrary and capricious or an abuse of discretion. The relief sought by Ford City is not available under the Solid Waste Management Act and the regulations. Nor is it available under Act 101 or the Governor's Executive Order. The Department has a mandatory duty to enforce the requirements of the Solid Waste Management Act and the regulations promulgated thereunder. This includes the mandate that all municipal waste landfills within the Commonwealth either upgrade through re-permitting or file with the Department an approved closure plan providing for closure of the landfill by April 9, 1990. Ford City has elected the latter option and is now bound by the April 1990 closure date. There are no provisions in the regulations or in the law cited by Ford City which would allow an extension of that date. Therefore the Department acted within the scope of its authority and did not abuse its discretion in refusing the request for an extension of time for operation of Ford City's landfill. We therefore enter the following order.

O R D E R

AND NOW, this 7th day of February, 1991, the Motion to Dismiss filed by the Department will be treated as a Motion for Judgment on the Pleadings under Pa.R.C.P. 1034 and, as such, will be granted for the reasons set forth herein. Consequently, Ford City's request for a supersedeas is denied as moot and its appeal docketed at 90-014-MJ is dismissed.

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JOSEPH N. MACK
Administrative Law Judge
Member

DATED: February 7, 1991

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SECRETARY TO THE BOARD

BOROUGH OF FORD CITY	:	
	:	
v.	:	**EHB Docket No. 90-014-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** February 7, 1991

DISSENTING OPINION
BY RICHARD S. EHMANN

OPINION

While I concur with the other Board members that the Department's action is appealable, I must disagree with the result arrived at by the majority as reflected in their foregoing opinion. The majority is correct that for a judgment on the pleadings to be entered, there must be no issues of fact, and that in reviewing such a motion, we must first consult Ford City's Notice Of Appeal. The majority opinion states this but then does not address the issues set forth in the Notice Of Appeal. Rather, the majority opinion reviews the alleged contentions in the Department's Motion and Ford City's Objections thereto but without returning to that Notice Of Appeal.

In its Notice Of Appeal, Ford City states it is appealing in part because:

> the application of the requirements of 25 Pa. Code Paragraphs 271.111 & 271.112 et seq., as applied to Ford City Borough:
>
> (1) Are beyond the scope of DER's statutory authority and area of expertise.
>
> ...
>
> (3) Constitutes an abuse of discretion.

In what way application of these regulations is beyond the scope of the Department's area of expertise or constitutes an abuse of its discretion the Notice Of Appeal does not say. We could make this determination by reference to Ford City's Pre-Hearing Memorandum and the statement of facts and legal issues set forth therein, except that by Order dated June 5, 1990, we postponed the filing of Ford City's Pre-Hearing Memorandum until after we render our decision on the instant Motion. Thus, we have positioned ourselves to decide this Motion with no knowledge as to the factual contentions raised through these allegations in Ford City's Notice Of Appeal. In turn, we then are forced to decide the merits of the Department's motion in the dark, without being able to know if there are material factual issues in dispute. Under these circumstances, we cannot conclude absence of a factual dispute, and, thus, we should not grant this motion. To do so is premature.

More troubling than this prematurity problem, however, is the fact that the majority opinion fails to address these issues raised by Ford City. To grant this motion now, this Board must find that under all circumstances, the Department's action would not be an abuse of its discretion or beyond the area of its expertise. This is not undertaken in the majority opinion. Absent such a conclusion by the majority, the entry of a judgment on these pleadings is inappropriate.

The final concern raised by the majority's opinion is the opinion's creation of an argument on the Department's behalf to reach the point of entering a judgment on the pleadings, which argument is not raised in the Department's Motion. The majority reasons the Department's position is two pronged. It says that the first prong is the Department's argument that it lacks the authority to grant the requested extension. This is untrue. The

Department's Motion never advances this argument. Its motion deals with one issue and one issue only. That issue is whether the Department's letter constitutes an appealable action. The Department's letter which generated this appeal says that the Department does not have the authority to act as requested, but no such argument appears in this Motion. Since it is not in the Motion, the majority should not manufacture such an argument on the Department's behalf, insert it in the motion, provide Ford City no opportunity to reply thereto, subscribe to its creation, and grant a judgment on the pleadings based on it.

Accordingly, I would deny this Motion and have us move on to render an opinion on Ford City's Motion For Supersedeas.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: February 7, 1991

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GLENDON ENERGY COMPANY	:	
	:	
v.	:	**EHB Docket No. 90-104-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** February 7, 1991

OPINION AND ORDER SUR
MOTION FOR VOLUNTARY DISMISSAL AND TO STRIKE

By Terrance J. Fitzpatrick, Member

Synopsis

A motion for voluntary dismissal and to strike is granted in part and denied in part. An appellant may waive the sole remaining argument in its appeal (after the entry of partial summary judgment against it), thus leading to a voluntary dismissal of the appeal. The Board is not compelled to address the merits of the argument appellant seeks to waive. A motion to strike from the record briefs, etc. filed by a party which was not permitted to intervene is denied where the party is contesting the Board's denial of intervention in Commonwealth Court.

OPINION

This is an appeal by Glendon Energy Company (GEC) from issuance of a solid waste permit for a resource recovery facility. Specifically, GEC objects to a condition in the permit which requires GEC to obtain a siting waiver from the City of Easton prior to constructing this facility in the Borough of Glendon, Northampton County. DER inserted this condition pursuant

to Section 511 of the Municipal Waste Planning, Recycling, and Waste Reduction Act, the Act of July 28, 1988, P.L. 566, No. 101, 53 P.S. §4000.511 (Act 101) based upon the belief that the facility would be located within 300 yards of a park known as "Glendon Woods," which is located in the Borough of Glendon but which is owned by the City of Easton. Section 511 requires a siting waiver from the owner of a park prior to siting a facility within 300 yards of the park.

This Opinion and Order addresses GEC's "motion for voluntary dismissal and to strike" filed on December 28, 1990. In this motion, GEC seeks to waive its argument that Glendon Woods is not a "park" within the meaning of Section 511. If this argument is waived, then GEC's appeal would be dismissed, because the Board issued a ruling on December 4, 1990 which granted partial summary judgment to DER on the other issues raised by GEC in its appeal. GEC also seeks in its motion to strike from the record of this proceeding the briefs, etc. filed by the Borough of Glendon. GEC contends that this is appropriate because the Board, in another ruling issued on December 4, 1990, denied the Borough of Glendon's petition to intervene in this appeal.[1]

The Borough of Glendon responded to GEC's motion. The Borough does not object to GEC's request for voluntary dismissal, but it argues that its briefs and other submissions should not be struck from the record. DER responded to GEC's motion by filing a motion for summary judgment, arguing that since GEC wishes to waive the issue of whether Glendon Woods is a park, that summary judgment should be granted to DER.

We will allow GEC to waive its argument that Glendon Woods is not a

---

[1] The Borough filed a separate appeal from DER's issuance of the permit. This appeal is docketed at EHB Docket No. 90-100-F.

"park"; thus, we will grant GEC's request for voluntary dismissal. GEC raised this argument and it should have the latitude to waive it prior to the Board's ruling on its merits. DER appears to take the position that the Board must rule on the merits of the argument, but we are not certain how dismissing this issue on its merits - thus, granting summary judgment in favor of DER - will "clarify matters on appeal." (DER motion, page 2) It is clear to us that GEC is willing to waive its argument that Glendon Woods is not a park in order to obtain an earlier review in Commonwealth Court of the Board's rejection of GEC's other arguments.

We will, however, deny GEC's motion to strike the Borough of Glendon's briefs, etc. from the record. We do not view the Borough's filings as inappropriate, even though the Board ultimately denied its request for intervention. Moreover, we note that the Borough has filed a petition for review in Commonwealth Court from the Board's denial of its petition to intervene.

Accordingly, we enter the following order.

ORDER

AND NOW, this 7th day of February, 1991, it is ordered that:

1) GEC's "motion for voluntary dismissal and to strike" is granted in part and denied in part.

2) GEC's motion is granted to the extent that it seeks to waive the contention that Glendon Woods is not a "park" within the meaning of Section 511 of Act 101.

3) GEC's motion is denied to the extent it seeks to strike from the record the briefs, etc. filed by the Borough of Glendon.

4) GEC's appeal at EHB Docket No. 90-104-F is dismissed.

ENVIRONMENTAL HEARING BOARD

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MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATE: February 7, 1991

RICHARD S. EHMANN
Administrative Law Judge
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Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

RAYMARK INDUSTRIES, INC., et. al.	:	
v.	:	**EHB Docket No. 90-180-E (Consolidated)**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: February 7, 1991**

FURTHER OPINION AND ORDER
SUR PETITION FOR LEAVE TO AMEND
NOTICE OF APPEAL

Synopsis

We deny a Petition For Leave To Amend Notice Of Appeal to add a paragraph which would specifically raise the objection that the Department of Environmental Resources' ("DER") Order from which appeal has been taken holds Raymark Corporation ("Corporation") vicariously liable for alleged violations of law by Raymark Industries ("Industries") and Raymark Friction ("Friction") (collectively, the "Raymarks"). In our Opinion and Order issued in this matter on September 20, 1990, we ruled that the Raymarks' notice of appeal did not raise as a specific objection an objection to DER's 1990 Order imposing liability on Corporation (the vicarious liability objection), and, as such, that objection was not properly before us. The Raymarks, particularly Corporation, have not shown good cause why we should permit them to amend their notice of appeal and agree to hear the vicarious liability objection.

OPINION

On November 9, 1990, Industries, Friction, and Corporation filed a petition and accompanying memorandum with us seeking to amend their Notice of Appeal filed on May 7, 1990. On December 28, 1990, we issued our Opinion and Order Sur Petition For Leave To Amend Notice Of Appeal, reserving until after oral argument, requested by Corporation, our ruling on whether leave to amend the notice of appeal so as to include paragraph 8 of the proposed amendments should be permitted. On January 16, 1991, Corporation filed a supplemental brief in support of its petition. DER filed its brief opposing the petition on January 17, 1991. We entertained oral argument by counsel for Corporation and DER on January 18, 1991.[1] We now rule on whether we should permit proposed paragraph 8 (the vicarious liability objection) to be included by amendment to the notice of appeal.

We have previously decided in our Opinion And Order Sur Corporation's Motion For Summary Judgment, issued September 20, 1990, that the vicarious liability objection was not to be found in the original notice of appeal. The petition asserts several grounds upon which Corporation argues we should grant leave to amend the notice of appeal to include the vicarious liability objection. Thus, through its petition, Corporation is seeking to amend the notice of appeal to add an objection which we have decided was not set forth in its original notice of appeal. Our rules at 25 Pa. Code §21.51(e) state:

> (e) The appeal shall set forth in separate numbered paragraphs the specific objections to the action of the Department. Such objections may be factual or legal. Any objection not raised by the appeal shall be deemed waived, provided that, upon good cause shown, the Board

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[1]Raytech Corporation ("Raytech") chose not to participate in the oral argument.

> may agree to hear such objection or objections. For the purpose of this subsection, good cause shall include the necessity for determining through discovery the basis of the action from which the appeal is taken.

As we explained in our December 28, 1990 Opinion and Order, specifying grounds for appeal is a jurisdictional prerequisite, and we may only grant an appellant permission to amend its notice of appeal to add an objection in limited circumstances, where good cause is shown for so doing. See Commonwealth, Pennsylvania Game Commission v. Commonwealth of Pennsylvania, Department of Environmental Resources, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), (1989); affirmed on other grounds, 521 Pa. 121, 555 A.2d 812; NGK Metals Corp. v. DER, EHB Docket No. 90-056-MR (Opinions issued April 5, 1990 and August 21, 1990). In Game Commission, the Commonwealth Court held "a decision to allow a party to amend an appeal to include new grounds, after the thirty-day period has run, is analogous to a decision to allow an agency appeal nunc pro tunc." Id. at ___, 509 A.2d at 885. The Court continued by stating that the Board need not grant the petition absent a showing of good cause. Good cause has been interpreted as involving, among other things, fraud or breakdown in the operation of the Board. Cubbon Lumber Co. v. DER, 1989 EHB 160; Charles Kayal v. DER, 1987 EHB 809. Good cause can also be found where discovery was necessary to formulate an issues and where the right to amend was reserved in the notice of appeal. See our December 28, 1990 Opinion and Order in this matter. Thus, we will examine the petition for allegations which might amount to good cause.

The petition raises several allegations supporting amendment. We first examine the allegation that neither DER nor Raytech will be prejudiced by the amendment because DER has been on "notice" of Corporation's vicarious

liability objection since the "second week of this case" and Corporation has raised the objection throughout the proceedings. Whether DER and Raytech have "notice" of the objection and will not be prejudiced by amendment has no bearing on whether good cause exists for amendment. Although neither the petition nor the supplemental brief uses the words "good cause", the Raymarks recognize in the memorandum in support of the petition the good cause requirement. In the memorandum, the Raymarks do not cite Board cases defining good cause. Rather, they argue good cause should be interpreted according to the case law defining the propriety of amendment under Pa. R.C.P. 1033. They thus assert amendment should be permitted absent prejudice to the parties. Clearly, had they read the Commonwealth Court's discussion in Game Commission, the Raymarks would have seen that the Commonwealth Court has stated that a case before us is not like a civil suit, "where leave to amend should be liberally granted absent an error of law or prejudice to the opposing party." Id. at ___, 509 A.2d at 886. Good cause for our assuming jurisdiction over an amendment cannot depend on whether the parties had notice of that objection. We have previously held that DER's receipt of even the entire notice of appeal before it is filed with the Board cannot show good cause for our assuming jurisdiction. Cubbon Lumber, supra; Jake C. Snyder v. DER, 1987 EHB 388.

The second argument advanced in support of amendment is that the notice of appeal already raised the vicarious liability objection and that paragraph 8 would merely constitute a "more specific statement of an objection raised in paragraph 3 of the notice of appeal." DER's Brief responds by arguing that through its petition, Corporation is actually seeking untimely reconsideration of our September 20, 1990 decision that the vicarious liability objection was not raised in the notice of appeal. Corporation, on

the other hand, maintains that it does not seek reconsideration of our order denying summary judgment. Rather, it urges that it is seeking to be heard on the issue of vicarious liability, which it says is the "normal consequence" of our denial of its summary judgment motion. Corporation also urges that our reconsideration rule does not apply to interlocutory orders, our September 20, 1990 Order was interlocutory, and, therefore, our reconsideration rule is not applicable to the petition to amend. Corporation further argues that even if our opinion which accompanied the order "implied that DER is entitled to dismissal of Corporation's objection to imposition of vicarious liability upon Corporation, as between the opinion and order, the order controls." Corporation attaches significance to the fact that we did not enter an order dismissing its appeal on the issue of vicarious liability, nor did we enter an order granting partial judgment on the issue.

Our rule regarding reconsideration states in part: "The Board may on its own motion or upon application of the counsel, within 20 days after a decision has been rendered, grant reargument before the Board en banc." 25 Pa. Code §21.122. We have interpreted §21.122 as providing for reconsideration following final decisions of the Board, but we have held that we are empowered to reconsider any of our rulings at any time prior to final adjudication. Neshaminy Water Resources Authority v. DER, 1985 EHB 676; Culp v. DER, 1984 EHB 611; Magnum Minerals, Inc. v. DER, 1983 EHB 589; Old Home Manor, Inc. v. DER, 1983 EHB 463. When we grant reconsideration of interlocutory decisions, however, it is only when extraordinary circumstances are present. City of Harrisburg, EHB Docket No. 88-120-F (Opinion issued January 30, 1991); Baumgardner v. DER, 1989 EHB 400. We agree with DER in that to the extent Corporation's argument is that the vicarious liability objection was already

contained in the notice of appeal, it is seeking our de facto reconsideration of a decision which we made in our September 20, 1990 Opinion and Order. Our Order implemented in summary fashion what we had reasoned in our Opinion; it did not conflict with anything said in the opinion. Since we have yet to render a final adjudication in this matter, we would only reconsider the decision made in our September 20, 1990 Opinion and Order if exceptional circumstances existed. The petition does not point out any exceptional circumstances which would prompt us to re-examine our prior ruling that paragraph 3 of the Notice of Appeal did not raise the vicarious liability issue.

Also contrary to Corporation's argument, our hearing of an objection which we have determined to have been absent from the notice of appeal would not be a normal consequence of our denial of a motion for summary judgment. As we stated in our September 20, 1990 Opinion and Order, "the Board cannot consider issues which were not raised in the notice of appeal because they are untimely when they are later raised." In this instance, the motion for summary judgment was not denied for the reason that genuine issues of material fact remained. Rather, the motion was denied because of our lack of jurisdiction over the vicarious liability objection. It would not have been appropriate for us to have granted the motion when the objection was not properly before us, nor could we have dismissed an objection which we found had not been made part of the appeal. Yeagle v. DER, 89-086-F (Opinion and Order issued June 19, 1990). Our reason for denying the motion necessarily precludes the objection from going to a hearing. Thus, we cannot

find good cause to be shown in an argument by which Corporation is trying to "use the back door" to introduce the vicarious liability objection into the appeal.

The third argument advanced in support of amendment is that the Raymarks reserved the right to amend the notice to restate "with more specificity" the grounds set forth in the notice.[2] We have already addressed this argument in relation to amendment to include proposed paragraphs 4-7. We incorporate herein the discussion in our December 28, 1990 Opinion and Order in this matter and reject this argument as to paragraph 8 as well.

An additional argument which Corporation makes in support of its petition is "[a] failure to plead a notice of appeal with specificity does not deprive the Board of jurisdiction to permit an amendment." This argument misstates the question before us. We are not examining whether we have jurisdiction to permit the amendment, but whether Corporation has shown good cause for us to exercise jurisdiction over the objection which is absent from its notice of appeal. In support of its argument, Corporation cites our rule regarding skeleton appeals, 25 Pa. Code §21.52(c), and states, "the Board has jurisdiction over any appeal filed in writing within 30 days of receipt of the order appealed from, even when the notice of appeal does not meet the form and content requirements of 25 Pa. Code §21.51." Corporation further states that

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[2]We note that contrary to Corporation's belief, our September 20, 1990 Opinion and Order did not invite further amendment of the notice of appeal but, rather, merely observed that no leave to amend the notice to add the vicarious liability objection had ever been sought.

such skeleton appeals may be supplemented after the 30 day appeal period has expired. Through its argument, Corporation is including the Raymarks' appeal in the skeleton appeal concept.

We have docketed as skeleton appeals those appeals which were perfected in accordance with §21.52, but otherwise did not conform with the form and content requirements of §21.51. These skeleton appeals were missing necessary information, such as the DER Order or letter from which appeal was taken; were filed without benefit of legal counsel; were filed by mailgram when time for filing was expiring; and stated little else other than appellant objected to DER's action. See Raymond Proffitt v. DER, EHB Docket No. 89-053-M (Opinion issued March 19, 1990); Bison Coal Co. v. DER, 1988 EHB 1072; Fero P. Rice v. DER, 1986 EHB 1220; York Resources Corp. v. DER, 1985 EHB 899; T&T Co. v. DER, 1986 EHB 1196; Felton Enterprises v. DER, 1984 EHB 665; J&P Mining Co. v. DER, 1982 EHB 317.

Under the theory advocated by Corporation, all appeals filed with us are skeleton appeals. If this were true, it would render meaningless the Commonwealth Court's instruction in Game Commission, supra, that the waiver provision of §21.51(e) has been strictly upheld, and our opinions enforcing the requirement that objections be specified in the notice of appeal. See James Kacer v. DER, 1989 EHB 914; NGK, supra; ROBBI v. DER et al., 1988 EHB 500. We do not believe the Commonwealth Court intended for its comments to be meaningless, nor do we wish to contradict our previous rulings. Moreover, the Raymarks' appeal was clearly not a skeleton appeal. They filed a detailed eleven-page notice of appeal which conforms to the requirements of our rules at 25 Pa. Code §21.51. Their appeal purports to state their specific objections, both legal and factual, to the action taken by DER. Paragraph 3

of the notice contains legal objections, including citations to several acts and to the state and federal constitutions. Paragraph 4, which purports to set forth a ground for appeal separate from and independent of those in paragraph 3, contains over twenty subparagraphs which recite in detail the alleged facts surrounding the appeal. There is no intent of the skeleton appeal rule to permit such obvious bootstrapping of an eleven-paged notice of appeal which complies with §21.51 but which has neglected to state a specific objection which the appellant later wishes to add.

Also, we do not find good cause for permitting amendment to exist in the argument raised as an aside in Corporation's brief that the "standard for specificity" was set forth in a Board opinion which was not published until after the Raymarks had filed their notice of appeal (citing NGK Metals, supra (Opinion issued April 5, 1990)). The Raymarks' notice of appeal was filed on May 7, 1990, which is almost one month after NGK had been issued. NGK did not set a "standard for specificity." Rather, in NGK, we followed the Commonwealth Court's instruction in Game Commission as to permitting amendment of a notice of appeal. The Commonwealth Court's decision in Game Commission was published in May of 1986, and the affirmance of that decision by the Supreme Court was published in March of 1989, well in advance of the Raymark's filing of their notice of appeal.

The next reason given in support of the petition is "even if a failure to raise an argument with specificity were jurisdictional, Corporation met the jurisdictional requirements of the Board's rules." In support of this argument, Corporation argues that the vicarious liability objection was asserted during the first few weeks of the appeal when it was raised at paragraph 18 of the petition for supersedeas which was filed by the Raymarks

during the thirty day appeal period. Upon our consideration of Corporation's motion for summary judgment, had we given the parties the opportunity to address whether the petition for supersedeas contained the vicarious liability objection, we would not have reached a different conclusion. This is because the objection would still have to have been contained in the notice of appeal in order for it to have been timely raised with the Board under Game Commission, supra. Further, there was no indication that the petition for supersedeas was in any way an amendment to the notice of appeal. Leave to amend was neither sought nor granted. The fact that the objection of vicarious liability might have been stated in the petition for supersedeas is not good cause for permitting amendment.

In its final argument Corporation says that DER's theory of liability against Corporation cannot be discerned from DER's 1990 Order, which merely identified Corporation as Industries' parent and asserted Corporation's liability. Corporation states that DER later made its theory clearer in its brief in opposition to summary judgment. Corporation then states that in the notice of appeal, it "objected", and on May 14, 1990 (in the petition for supersedeas), it made that objection "more specific." Corporation summarizes its argument by saying, "DER cannot seriously maintain that an order need not articulate a theory of liability, but that a notice of appeal from that order must object to the unarticulated theory with specificity."[3] This argument amounts to Corporation claiming that because DER was unspecific in its order as to its theory of liability against Corporation, the Raymarks were entitled

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[3]Although the petition was filed by the Raymarks, the supplemental brief was filed only on behalf of Corporation. The Raymarks' counsel orally indicated that only Corporation was advancing the petition to amend as to paragraph 8.

to be unspecific in their notice of appeal as to their objection regarding the imposition of liability on Corporation. Even if we were to agree DER's Order is unspecific, and we are not so concluding, Corporation could not assert that it is entitled to be unspecific in the notice of appeal. Our rules require the appellant to state specific objections in the notice of appeal. 25 Pa. Code §21.51(e).[4] Regardless of what Corporation may believe DER's position to be, our jurisdiction is not controlled by whether DER's position is inconsistent as to the specificity required of a DER order and of a notice of appeal. Thus, this argument, like all of Corporation's arguments in support of its petition, does not demonstrate good cause for permitting the amendment.

ORDER

AND NOW, this 7th day of February, 1991, it is ordered that the Petition For Leave To Amend Notice Of Appeal so as to include paragraph 8 of the proposed amendments in the notice of appeal, filed by the Raymarks on November 9, 1990, is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: February 7, 1991

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[4]We note that DER issued a lengthy, detailed order in this matter which certainly was not lacking of specificity. While DER's theory of liability against Corporation may not have been outlined in detail by the order, and Corporation may have desired to challenge whether DER can impose liability on it, Corporation has failed to include as an objection in its notice of appeal the fact that DER is imposing liability on it.

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M. DIANE SMITH
SECRETARY TO THE BOARD

NAVY SHIPS PARTS CONTROL CENTER	:	
	:	
V.	:	**EHB Docket No. 88-376-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: February 8, 1991**

OPINION AND ORDER
SUR
MOTION AND CROSS-MOTION FOR
PARTIAL SUMMARY JUDGMENT

Robert D. Myers, Member

Synopsis

The Board grants partial summary judgment to DER in a proceeding involving DER orders to the U.S. Department of the Navy to cease and desist and take remedial action with respect to PCB contamination at a Navy facility. The Board holds that the waivers of sovereign immunity contained in RCRA, CWA and CERCLA are sufficient to bring the Navy within the scope of DER's orders issued pursuant to the CSL, the SWMA and the Administrative Code. The Board also rules that the Navy's argument that DER's directives are preempted by CERCLA under the supremacy clause is irrelevant because either there was no conflict between the two or the Navy waived it.

OPINION

On August 24, 1988 the Department of Environmental Resources (DER) issued an Order which recited findings of polychlorinated biphenyls (PCBs) in a surface water drainage swale located on the grounds of the Department of Navy's Navy Ships Parts Control Center in the Township of Hampden and Borough

of Mechanicsburg, Cumberland County, and which directed the Department of Navy (Navy) to take remedial action. The Order was issued pursuant to sections 316 and 610 of the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.316 and §691.610, sections 104 and 602(a) of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, 35 P.S. §6018.104 and §6018.602(a), and section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17. The Navy's appeal from this Order was filed on September 22, 1988 at docket number 88-376.

DER issued an Amended Order, pursuant to the same statutory provisions, on March 6, 1989. The Navy's appeal from the Amended Order was filed on March 23, 1989 at docket number 89-077. On March 31, 1989 the two appeals were consolidated at docket number 88-376.

On August 9, 1990 DER filed a Motion for Partial Summary Judgment (and supporting brief). On August 29, 1990 the Navy filed Objections to DER's Motion and its own Cross-Motion for Partial Summary Judgment (and accompanying brief). DER filed its Reply Brief on September 24, 1990. The issue is whether the Pennsylvania environmental regulatory laws underlying DER's Order and Amended Order can be enforced against a facility of the United States (a) in any manner and (b) in the specific manner attempted here.

Congress has waived the sovereign immunity of the United States in three statutes pertinent to environmental regulation. Section 6001 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C.A. §6961, provides in relevant part as follows:

> Each department, agency, and instrumentality of...the Federal Government...engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all...State...requirements, both substantive and procedural (including any requirement for permits or reporting or any

> provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges.

Stripped of its extraneous language, section 313 of the Clean Water Act (CWA), 33 U.S.C.A. §1323, reads as follows:

> (a) Each department, agency, or instrumentality ...of the Federal Government...engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants...shall be subject to, and comply with, all...State... requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsover), (B) to the exercise of any...State... administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner.

Similarly abridged, section 120(a) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C.A. §9620(a), reads as follows:

> (1) In general
> Each department, agency, and instrumentality of the United States...shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity...
>
> ****
>
> (4) State laws
> State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States when such facilities are not

> included on the National Priorities List. The preceding sentence shall not apply to the extent a State law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency or instrumentality.

DER argues that these statutory waivers bring the Navy's facility in Cumberland County within the regulatory scope of the CSL, the SWMA and section 1917-A of the Administrative Code. The Navy argues that (a) waivers of sovereign immunity must be clear and unambiguous and are to be narrowly construed; (b) the waivers in RCRA and CWA authorize state regulation only under objectively ascertainable, quantifiable, or administratively - predetermined requirements, none of which is established by the Pennsylvania statutes cited by DER; (c) the waiver in CERCLA consents only to the application of state laws which, like CERCLA, specify procedures and standards for remedial actions, and not to the Pennsylvania statutes cited by DER which involve permits rather than remedial action; and (d) the supremacy clause preempts state requirements conflicting with CERCLA requirements.

The first argument is conceded and needs no discussion. The next two arguments were made by the United States Small Business Administration with respect to the identical statutes involved here and were rejected by Commonwealth Court in Commonwealth of Pennsylvania, Department of Environmental Resources v. United States Small Business Administration, ____ Pa. Cmwlth. _____, 579 A.2d 1001 (1990). This precedent controls our determination of the sovereign immunity issue in these appeals.

The final argument has merit but appears to have no present relevance to these appeals. The conflict mentioned by the Navy relates to DER's mandate to take immediate action versus CERCLA's mandate to study the problem first. The Navy's brief on page 22 refers to a proceeding initiated in Commonwealth

Court by DER to enforce the Amended Order (Civ. A. No. 77 Misc. 89). On March 15, 1990, after an evidentiary hearing, the Court entered an Order which incorporated the Navy's plans and schedule for further action. By letter dated March 22, 1990 DER incorporated the Court Order into an enforcement schedule with which the Navy has complied.

If there was a conflict between DER's directives and the Navy's requirements under CERCLA, it either has been resolved or the Navy has waived any objection to it. Accordingly, the supremacy clause is not an issue.

There being no issues of material fact on this aspect of the appeals and DER being entitled to judgment as a matter of law, we will enter partial summary judgment in favor of DER on the issue of sovereign immunity and the issue of the supremacy clause.

ORDER

AND NOW, this 8th day of February, 1991, it is ordered as follows:

1. DER's Motion for Partial Summary Judgment is granted and partial summary judgment is entered in favor of DER on the issue of sovereign immunity and on the issue of supremacy.

2. The Navy's Cross-Motion for Partial Summary Judgment is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: February 8, 1991

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M. DIANE SMITH
SECRETARY TO THE BOAR

WASHINGTON TOWNSHIP CONCERNED CITIZENS	:	
V.	:	**EHB Docket No. 90-152-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** February 8, 1991
and GABLE ENTERPRISES, INC., Permittee	:	

OPINION AND ORDER SUR
MOTION TO DISMISS

By Terrance J. Fitzpatrick, Member

Synopsis

A motion to dismiss filed by the Department of Environmental Resources (DER) is granted. The Board's jurisdiction to review "actions" of DER does not empower it to review allegations that DER has failed to enforce the conditions of a permit.

OPINION

This is an appeal by the Washington Township (Berks County) Concerned Citizens (Citizens) filed on April 18, 1990. In this appeal, the Citizens seek to contest the alleged failure by DER to enforce the conditions of a non-coal mining permit issued to Gable Enterprises, Inc. (Gable) on October 3, 1986. Specifically, the Citizens object, among other things, to DER's failure to enforce permit conditions regarding location of a retention basin within 300 feet of an occupied dwelling, reclamation and blasting on the site, and compliance with the zoning laws of Washington Township. In addition, the Citizens appear to complain that DER erred by granting the above permit to Gable.

This Opinion and Order addresses DER's motion to dismiss, filed on August 13, 1990. In the motion, DER contends that both the Citizen's notice of appeal and their pre-hearing memorandum attack DER's alleged failure to enforce the conditions of a permit granted to Gable in October, 1986. DER argues that such an alleged "failure to act" does not constitute an "action" by DER which may be appealed to the Board, citing Westinghouse Electric Corp. v. DER, EHB Docket No. 89-058-F (May 14, 1990). Thus, DER contends that the appeal should be dismissed.[1]

The Citizens responded to DER's motion to dismiss. They contend that an "action" may be taken by omission or commission. In this case, they assert that DER has acted by omission which has resulted in infringement of the Citizens property rights.

Evaluating these arguments, it is clear that DER's motion to dismiss must be granted. To be appealable to the Board, a DER decision must constitute an "action" which affects the appellant's "personal or property rights, immunities, duties, liabilities, or obligations." 25 Pa. Code §21.2(a); Delta Excavating & Trucking Co., Inc. v. DER, 1987 EHB 319. In Westinghouse Electric Corp. v. DER, EHB Docket No. 89-058-F (May 14, 1990), the Board stated emphatically that it no longer considered itself to have jurisdiction over appeals which alleged that DER had failed to act. In addition, even if DER had refused a request by the Appellants to initiate an enforcement action, exercises of DER's prosecutorial discretion are not adjudicatory in nature and are not subject to review by the Board or by the

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[1] DER also filed a motion to strike the citizens' pre-hearing memorandum; this motion was filed in the alternative to the motion to dismiss. Since we are granting DER's motion to dismiss, it is not necessary to rule upon the motion to strike. It is also unnecessary to rule upon an earlier motion to quash which was filed by Gable.

Courts. Edney v. DER, 1989 EHB 1356; Downing v. Commonwealth, Medical Education & Licensure Bd., 26 Pa Commonwealth 517, 364 A 2d 748 (1976).

Before concluding, we note that the Citizens were not represented by counsel in this proceeding. As a result, we have attempted to exercise special care to understand the nature of the Citizens' objections. In this vein, we have reviewed the Citizens' notice of appeal, their response to an earlier motion to quash filed by Gable, and their pre-hearing memorandum, as well as their response to DER's motion to dismiss. While the appeal filed by the Citizens on April 16, 1990 could be construed as objecting to the issuance of the permit as well as to DER's failure to enforce conditions of the permit, the Citizens made it clear in their pre-hearing memorandum that their concern is limited to DER's failure to enforce: "It is not the conditions of the permit that we seek to change, only to beg for the enforcement of those conditions". (Citizens' pre-hearing memorandum, p.8) [2] Therefore, we conclude that the gravamen of the Citizens' appeal is the contention that DER failed to enforce conditions of the permit. As stated above, we lack jurisdiction to consider this issue.

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[2] Moreover, it is unlikely that an appeal from the issuance of the permit would be timely since the permit was issued in October of 1986 and the instant appeal was not filed until April 18, 1990. See 21 Pa. Code §21.52, Rostosky v. Commonwealth, DER, 26 Pa. Commonwealth Ct. 478,364 A.2d 761 (1976).

O R D E R

AND NOW, this 8th day of February, 1991, it is ordered that DER's motion to dismiss is granted, and the appeal at EHB Docket No. 90-152-F is dismissed.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

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Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: February 8, 1991

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M. DIANE SMITH
SECRETARY TO THE BOA

MIL-TOON DEVELOPMENT GROUP	:	
	:	
v.	:	**EHB Docket No. 90-556-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** February 12, 1991

OPINION IN SUPPORT OF ORDER
DENYING PETITION FOR SUPERSEDEAS

By Terrance J. Fitzpatrick, Member

Synopsis

A petition for supersedeas filed by the Appellant is denied when a permit amendment issued by the Department of Environmental Resources is consistent with state and federal regulations governing nitrate levels in public water supplies.

OPINION

This is an appeal by Mil-Toon Development Group (Mil-Toon) from an action of the Department of Environmental Resources (DER), dated November 19, 1990, amending Mil-Toon's public water supply permit. In this amendment, which we shall refer to as Amendment No. 2, DER changed certain special conditions regarding the nitrate levels in Mil-Toon's water supply. Specifically, Amendment No. 2 required:

1) monthly sampling,

2) the taking of a second sample within 24 hours whenever a sample showed a nitrate level exceeding 10 milligrams per liter (m.g./l.), and

3) whenever the mean of the two samples referred to in paragraph 2 exceed 10 m.g./l., submission within 30 days of an application to initiate treatment to reduce the nitrate levels.[1]

Mil-Toon filed a petition for supersedeas along with its appeal. A hearing on this petition was held on January 23, 1991. On February 1, 1991, the undersigned issued an Order denying the petition. This Opinion is now issued in support of that Order.

In ruling upon a petition for supersedeas, the Board considers the following factors:

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.

Section 4(d) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, No. 94, 35 P.S. §7514(d). Applying these factors here, Mil-Toon's petition must be denied because Mil-Toon has not shown that it is likely to succeed on the merits.

It is not disputed that DER issued Amendment No. 2 after jurisdiction over Mil-Toon's permit was transferred from DER's Norristown regional office

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[1] Prior to Amendment No. 2, Mil-Toon's permit contained Amendment No. 1, which required:

1) sampling twice per year,

2) the taking of a second sample within 48 hours whenever a sample showed a nitrate level exceeding 10.9 m.g./l,

3) whenever the mean of the two samples referred to in paragraph 2 exceeded 10.9 m.g./l., initiation of monthly sampling, and

4) submission of an application to initiate treatment to reduce nitrate levels whenever the monthly samples "consistently" showed nitrate levels exceeding 10.9 m.g./l.

to its Wilkes-Barre regional office. The Wilkes-Barre office concluded that Amendment No. 2 was necessary to bring Mil-Toon into compliance with state regulations issued pursuant to the Pennsylvania Safe Drinking Water Act, Act of May 1, 1984, P.L. 206, 35 P.S. §721.1 et seq.[2] Mil-Toon argues, however, that Amendment No. 2 was arbitrary because: 1) Mil-Toon had a quasi-contractual right to continue operating under Amendment No. 1, 2) the 10.9 m.g./l. standard in Amendment No. 1 incorporated a scientifically valid margin of error, and 3) the state and federal regulations are merely guidelines and do not have the force of law.

DER's issuance of Amendment No. 2 was in accord with the state and federal regulations. The MCL for nitrate in the federal regulations is 10 m.g./l., not 10.9 m.g./l. 40 CFR §141.11(b). In addition, the federal regulations call for repeat sampling within 24 hours, not 48 hours, when the first sample shows levels exceeding the MCL. 40 CFR §141.23(d). With regard to DER's requirements that Mil-Toon conduct monthly sampling and submit an application to initiate treatment when the mean of two samples exceeds the MCL of 10 m.g./l., the state regulations allow DER to impose these requirements. See 25 Pa.Code §§109.302(a)(b), 109.601, 109.602. Moreover, in light of Mil-Toon's recent difficulty in staying below the MCL for nitrate, DER's imposition of these requirements appears to be reasonable. (Transcript, 144-145, Appellant's Exhibit 1.)

Mil-Toon's arguments regarding the merits of its appeal are not persuasive. Mil-Toon did not acquire a quasi-contractual right to continue operating under Amendment No. 1. The SDWA expressly authorizes DER to modify

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[2] The state regulations require public water suppliers to meet the maximum contaminant levels (MCLs) contained in the federal regulations. See 25 Pa.Code §109.202, 40 CFR §141.11.

permits to correct violations of the regulations. 35 P.S. §721.7(k). Moreover, the fact that DER might have been lax in applying the regulations in Amendment No. 1 did not preclude DER from remedying this situation in Amendment No. 2. See, Lackawanna Refuse Removal, Inc. v. Commonwealth, DER, 65 Pa. Commonwealth 372, 442 A.2d 423 (1982), Chambers Development Co., Inc. v. DER, 1988 EHB 68, 100-101, affirmed, 118 Pa. Commonwealth 97, 545 A.2d 404 (1988).

Mil-Toon's argument that the 10.9 m.g./l. standard for nitrate in Amendment No. 1 was appropriate because it incorporated a "scientifically valid margin of error" (Mil-Toon's Brief, p.2) cannot be accepted because it has the practical effect of increasing the MCL of 10 m.g./l. to 10.9 m.g./l. In addition, a margin of error is already built in because the mean of two samples is used to determine compliance, and because DER allows decimal points to be rounded off to the nearest whole number. (Transcript, 146-147, 161-164, 172.)

Finally, Mil-Toon's argument that the regulations are not binding because they constitute "guidelines" is simply false. Duly promulgated regulations have the force of law and DER is not at liberty, despite what it did in Amendment No. 1, to ignore them.[3] Fumo v. Commonwealth, Insurance Department, 58 Pa. Commonwealth 392, 427 A.2d 1259 (1981), In re Bentleyville Plaza, Inc., 38 Pa. Commonwealth 235, 392 A.2d 899 (1978).

It follows from what we have stated above that Mil-Toon's petition for supersedeas must be denied because Mil-Toon is not likely to succeed on

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[3] The SDWA authorizes DER to grant variances from the MCLs; however, it may do so only when the water system is unable to comply "despite application of the best technology, treatment techniques or other means" 35 P.S. §721.6(a)(1). In the present case, such a variance would not be appropriate because Mil-Toon has not initiated any treatment techniques to attempt to lower the nitrate levels.

the merits of its appeal. Accordingly, we need not discuss the other requirements for granting a supersedeas. Leech Tool and Die Works, Inc. v. DER, 1989 EHB 177, 184.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: February 12, 1991

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M. DIANE SMITH
SECRETARY TO THE BOARD

BROAD TOP TOWNSHIP	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA	:	**EHB Docket No. 86-607-W**
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
DASH COAL COMPANY, Permittee	:	**Issued:** February 13, 1991

ADJUDICATION

By Maxine Woelfling, Chairman

Synopsis

When a municipal third party challenges a Stage I bond release for a portion of a surface coal mine based upon the alleged impact of runoff from an adjacent bank of reclaimed spoil, but the evidence shows neither the road nor the 100 feet wide strip of land next to the road to be in the area subject to the release, the appellant failed to demonstrate that the Department of Environmental Resources (DER) abused its discretion in granting the release, and the appeal must be dismissed.

A motion to dismiss the appeal because the Board lacks jurisdiction to enforce an agreement between appellant and the mine operator relating to road restoration must be denied, since the appellant is also challenging the propriety of the Stage I bond release under the applicable law and the Board has jurisdiction to adjudicate those issues.

BACKGROUND

On October 29, 1986, Broad Top Township ("Broad Top"), filed an appeal with this Board from DER's letter of October 3, 1986 informing Broad Top that, despite its objections, DER was granting a Stage I bond release to Dash Coal Company, Inc., ("Dash") for a 33.5 acre portion of Dash's Reed No. 1 mine in Broad Top Township, Bedford County. Dash's operations at the Reed No. 1 mine are authorized by Surface Mining Permit ("SMP") No. 0575004.

Broad Top's appeal raised three issues. Broad Top contends that the site did not meet the standards for a Stage I bond release and that Dash gerrymandered the boundaries of the area for which it sought bond release to avoid Broad Top's concerns. Broad Top also argues that the bond's purpose is return of the mine site to its pre-mining state, and this purpose would be thwarted if the release decision is upheld.

On February 17, 1987, DER filed a motion to dismiss the appeal in that Broad Top's appeal sought the enforcement of an agreement between Broad Top and Dash over which the Board had no jurisdiction. DER's motion was denied in an opinion and order dated July 2, 1987, because the supporting pleadings and documents failed to establish that the Board lacked jurisdiction.[1]

One day of hearing in this matter, January 19, 1989, produced all of the evidence which the parties chose to offer. The Post-Hearing Briefs of Broad Top and Dash were filed on March 3, 1989 and March 31, 1989, respectively. DER elected not to file a post-hearing brief. After a full and complete review of the record, the Board makes the following findings of fact.

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1 The opinion is found at 1987 EHB 540.

FINDINGS OF FACT

1. Appellant is Broad Top, a municipality with an address of Box 57, Defiance, PA 16633. (Notice of Appeal)

2. Appellee is DER, the agency of the Commonwealth with the authority to administer and enforce the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq.; the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. (Surface Mining Act), and the rules and regulations adopted thereunder.

3. Dash is a licensed surface mine operator with an address of R.D. 32, Box 55-A, Dunbar, PA 15432. (Notice of Appeal and Exh. P-3)[2]

4. Dash is authorized by SMP No. 0575004 to conduct surface coal mining at the Reed No. 1 Mine, a 222 acre mine which is located in part in Broad Top Township, Bedford County. (S-2, Exh. P-3, and T-72)

5. Dash posted bonds in the amount of $52,000, $67,000 and $51,000 for the Reed No. 1 Mine. (S-2)

6. In June, 1986, Dash submitted a completion report to DER requesting Stage I bond release of $60,300 for 33.5 acres of the lands within the Reed No. 1 Mine. (Exh. P-2 and S-2)

7. Stage I bond release was sought by Dash because it believed that it had backfilled and rough graded this 33.5 acres to the point it had returned this area to its pre-mining approximate original contour ("AOC"), as required for a Stage I release. (S-2, P-2, and T-81, 112)

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2 For purposes of these Findings of Fact, Dash's exhibits will be designated P-___, and Broad Top's exhibit is designated A-___. Transcript citations appear as T-___. Citations to the Stipulation of Counsel are S-___.

8. Dash was conservative about the amount of land on which it sought a Stage I Release. (T-93)

9. Dash's Completion Report did not seek release of any bond posted for the mining which occurred within 100 feet of Broad Top's Township Road No. 596 ("T-596") or the road itself. (T-74, 102, 111, 113, 123, 128-129)

10. John Drexel McIntyre ("McIntyre"), who is Chairman of the Broad Top Township Supervisors, is familiar with the area around the Reed No. 1 Mine. (T-8)

11. McIntyre understands that T-596 is the southern boundary of the Reed No. 1 Mine for about 600 feet. (T-9,11)

12. In the era of the Works Progress Administration, or WPA, T-596 was "piked" across its entire width; when a road is "piked", stones are pounded into it for a base and dirt is placed over the stones. (T-8-10, 35)

13. In 1957 and 1958, there was mining on both sides of T-596, but not in the area of the Reed No. 1 Mine. (T-10-11)

14. In 1981 Dash sought a road variance from Broad Top to allow mining of the Reed No. 1 mine site (T-19), and Broad Top and Dash agreed that Dash could mine up to T-596. (T-19-20)

15. Broad Top did not offer the Board any evidence as to the terms and conditions of its agreement with Dash as to the variance.

16. When Dash mined or regraded the portion of the Reed No. 1 Mine next to T-596, it removed part of the road. (T-20, 36)

17. The road, as regraded, has piking only halfway across its width and has more curves than the pre-mining road. (T-21, 35-36, 38, 43)

18. Since the road has been regraded, it is harder for Broad Top to plow and maintain. (T-21-22)

19. The road is rougher now than it was before Dash's mining operations. (T-12, 21-22)

20. Prior to mining, the land on the uphill side of T-596 where Dash mined was a bank between four and five feet high which rose in a gradual slope. (Exh. A-1, T-12-15, 23) The post-reclamation bank on the side of T-596 is 15 to 20 feet high and steeply sloped. (Exh. A-1, T-23)

21. With the steeper and higher post-mining bank of spoil next to the road, precipitation washes down it and floods over the road. (T-22)

22. The road has washed out and been rebuilt once since Dash started mining in this area. (T-25)

23. There were no such problems prior to Dash's mining and there were no pre-mining maintenance problems, generally, with this portion of the road. (T-21, 25)

24. The problem with precipitation washing out the road can be remedied by placing drainage tiles across the road to carry water in the roadside ditch on the mine's side of the road beneath the road to the opposite downslope side of the road. (T-24)

25. Dash offered to purchase drainage tile and pipe to convey storm water beneath T-596 for Broad Top, but Broad Top has not accepted that offer. (T-131)

26. The area covered by the SMP did not include the road itself, but the permit area ran up to the very edge of the road. (T-142)

27. Henry Jolly is DER's mine inspector for the Reed No. 1 Mine. (T-109)

28. Mr. Jolly inspected the Reed Mine every month from January, 1982 up to the month of the hearing date, and he conducted an inspection of the mine site in connection with Dash's request for the Stage I bond release. (T-109-110)

29. The 33.5 acres covered by Dash's request for Stage I bond release does not include any part of T-596. (T-111)

30. The distance from T-596 to the edge of the area in the proposed release is 100 feet. (T-112)

31. The area covered by Dash's request meets the standards for a Stage I bond release because it has been backfilled and graded to AOC. (T-112) It has also been planted. (T-115-116)

DISCUSSION

The first issue to confront us in this proceeding arises because of issues raised in DER's motion to dismiss, which we previously denied. Dash has renewed the contention that Broad Top's appeal essentially seeks to have the Board enforce the agreement between Broad Top and Dash concerning T-596 and that since the agreement is not part of its permit, the Board lacks jurisdiction to adjudicate the rights of the parties under it. On the other hand, Broad Top argues that the Board clearly has jurisdiction to review DER's bond release decision.

As Dash argues, the Board does not have any authority to decide or enforce rights of the parties arising under a private contract. Berwind Natural Resources v. DER, 1985 EHB 356; Donald T. Cooper et ux v. DER, 1982 EHB 250; City of York v. DER, 1976 EHB 18; Welch Foods, Inc. v. DER, 1974 EHB 508. The Board is a tribunal of limited jurisdiction, as reflected in § 4 of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7514.

But while Dash advances an accurate view of our jurisdiction, the fact remains that the issue of the agreement has not been raised in this appeal. Broad Top's notice of appeal challenges DER's decision to release Dash's bond for the 33.5 acre portion of this mine site, but no reference is made therein

to the agreement between Dash and Broad Top. Other than the statement that Broad Top proposes to introduce the agreement at the hearing on the merits of its appeal, no mention of it appears in Broad Top's pre-hearing memorandum. Furthermore, at the hearing, the agreement was not offered into evidence. Since Broad Top has not raised this issue, Dash's motion to dismiss must be denied. The Board must, therefore, determine whether DER's bond release decision is in accordance with the Surface Mining Act and the rules and regulations adopted thereunder.

Under 25 Pa. Code §21.101, Broad Top bears the burden of proof in this appeal. Ray Carey v. DER, EHB Docket No. 88-521-E (Adjudication issued July 24, 1990). Broad Top has not met its burden of showing by a preponderance of the evidence that DER abused its discretion. When reviewing a challenge to DER's release of bonds the Board must examine whether the permittee has satisfied the criteria in § 4 of the Surface Mining Act and 25 Pa. Code §86.172. Section 4(g) of the Surface Mining Act allows the Department to release 60% of a bond where the permittee has shown that it has completed backfilling, regrading, and drainage control of the bonded area in accordance with its approved reclamation plan. See also, Norman Duncan v. DER and Arcadia Coal Company, 1989 EHB 459, 465-466.

While Broad Top contends that the 33.5 acres do not meet the Stage I release requirements, there was no evidence offered to support this contention. Broad Top's evidence establishes legitimate concerns with portions of the mined site and T-596, but its own witnesses believe these areas are not the area for which release was sought. (T-15-16, 23, 34) Dash's evidence shows this road and the adjacent 100 feet of mined area are not in the bond release area. Accordingly, Broad Top has not met its burden as to this issue.

Broad Top next argues that Dash has gerrymandered the bond release area to prevent the Board from reviewing Broad Top's concerns. Dash's failure to include the 100 feet wide strip of land in this release request may be unusual (T-124-125), but there was no showing it is unlawful. In any event, this area is not yet ready for a Stage I bond release, since there is still a large spoil pile on a portion of it. (T-114) When and if DER approves a bond release for this area, Broad Top may challenge that decision by filing a timely appeal with the Board, but the Board cannot now sustain this appeal on that basis.[3]

The last argument advanced by Broad Top is that the bond's purpose - return of the site to its pre-mining condition - would be thwarted by bond release at this time. A Stage I release for these 33.5 acres is appropriate under § 4(g) of the Surface Mining Act if the site is backfilled and graded. The evidence shows it has been backfilled, graded, and planted. This portion of the bond for this 33.5 acre portion of the mine has thus served its statutory purpose.

CONCLUSIONS OF LAW

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

2. The Board lacks authority to interpret and enforce an agreement between Broad Top and Dash regarding a township road.

3. In a third party's appeal from a DER decision to approve a request for Stage I bond release, the third party bears the burden of proof. Carey, supra.

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3 It may also bring any portion of its concerns as arise under the Board Top/Dash agreement to the appropriate Court of Common Pleas whenever it wishes.

4. Stage I bond release may be granted by DER where a permittee establishes that the area of the mine for which bond release is sought has completed backfilling, regrading, and drainage control. § 4(g) of the Surface Mining Act and 25 Pa. Code § 86.172.

5. Broad Top has failed to establish by a preponderance of the evidence that Dash did not complete backfilling, regrading, and drainage control on the 33.5 acres for which it sought Stage I bond release.

6. Since Broad Top failed to carry its burden of proof, its appeal must be dismissed.

ORDER

AND NOW, this 13th day of February , 1991, it is ordered that Broad Top's appeal is dismissed and DER's approval of Stage I bond release for a 33.5 acre portion of SMP No. 05753004 is sustained.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
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JOSEPH N. MACK
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DATED: February 13, 1991

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M. DIANE SMITH
SECRETARY TO THE BOARD

CITY OF BETHLEHEM	:	
	:	
V.	:	**EHB Docket No. 90-319-MR**
	:	**(consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: February 15, 1991**

OPINION AND ORDER
SUR
PETITION FOR SUPERSEDEAS

Robert D. Myers, Member

Synopsis

A Solid Waste Management Permit was issued to a previously permitted municipal waste landfill as part of the repermitting scheme established in the new regulations (25 Pa. Code Article VIII) effective April 9, 1988. After it became apparent that the new permit was ambiguous with respect to a previously permitted unlined area, DER issued a modification excluding the area. The municipal owner of the landfill requested a supersedeas of the modification. The Board held that a supersedeas could not be granted because the municipality had not shown a likelihood of prevailing on the merits. 25 Pa. Code §271.112(c) was not intended to act as a grandfather clause, authorizing continued disposal on previously permitted areas, but as a transition provision pending issuance of the new permit.

OPINION

Pursuant to an application filed on June 30, 1989, the Department of Environmental Resources (DER) issued to the City of Bethlehem (City) on June

29, 1990, Solid Waste Management Permit No. 100020 (1990 Permit) for the repermitting of the City's Landfill located in Lower Saucon Township, Northampton County, pursuant to provisions of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. The City filed a Notice of Appeal on July 27, 1990 (docket number 90-319-MR), challenging various provisions of the 1990 Permit including its one-year term.

On November 23, 1990 DER unilaterally issued to the City a Modification to the 1990 Permit (Modification) limiting the area where waste can be disposed. The City filed a Notice of Appeal from the Modification on December 14, 1990 (docket number 90-548-MR). On December 20, 1990 the two appeals were consolidated at docket number 90-319-MR.

The City filed a Petition for Supersedeas on January 11, 1991 to which DER responded on January 29, 1991. In the meantime, DER issued a Compliance Order to the City on January 15, 1991. The City's appeal from the Compliance Order was filed on January 28, 1991 (docket number 91-044-MR) and was consolidated with the other two appeals at docket number 90-319-MR on January 29, 1991.

A hearing on the Petition for Supersedeas was held in Harrisburg on January 31, 1991 before Administrative Law Judge Robert D. Myers, a Member of the Board. Both parties were represented by legal counsel and presented evidence in the form of testimony and exhibits. The City submitted a Memorandum of Law at the time of the hearing. With the permission of the Board, DER submitted its Memorandum of Law and the City submitted its Supplemental Memorandum of Law on February 7, 1991. The record consists of the pleadings, a hearing transcript of 191 pages and 22 exhibits.

The record discloses the following factual situation. The City has operated its Landfill on the site in Lower Saucon Township for several

decades. On October 31, 1983 DER issued the first Solid Waste Management Permit No. 100020 (1983 Permit) for the Landfill under the SWMA. The 1983 Permit covered the 31 acres of the original Landfill and 23.6 acres of expansion area, divided into Phase I (10 acres) and Phase II (13.6 acres). The original area was unlined. All of the expansion area was to be lined except an 8-acre portion of Phase II (referred to as Phase II-B) adjacent to the original area and already containing refuse. Profiles submitted with the application for the 1983 Permit revealed the City's intention to maintain a continuous slope on the original Landfill and Phase II of the expansion area. This would necessitate placing additional refuse on Phase II-B, the unlined portion of the expansion area. This intention was sanctioned by DER's approval of the application and issuance of the 1983 Permit.

Effective April 9, 1988 DER issued new regulations for municipal waste management facilities (25 Pa. Code Article VIII). Under §271.111(a) of the new regulations existing landfill permittees were required to file with DER by October 11, 1988 either a preliminary application for permit modification or a closure plan. The City filed its preliminary application for permit modification on June 20, 1988 to upgrade the design of the liner system in order to meet the requirements of the new regulations. The preliminary application involved only Phase II since Phase I was already being filled. DER acted on this preliminary application on December 6, 1988 by issuing a modification to the 1983 Permit.

The City was required to file a complete application for permit modification (§271.111(d)) and did so on June 30, 1989. There was some ambiguity in the application documents about the precise area involved. The narrative referred to the 5.6 - acre lined portion of Phase II (referred to as Phase II-A) but some of the drawings showed a continuous slope from the

original Landfill entirely across Phase II. To achieve that slope refuse would have to be placed on Phase II-B. As noted at the outset, DER issued the 1990 Permit on June 29, 1990. This Permit was issued only for a one-year term, according to DER, because of a history of compliance problems at the Landfill. Dissatisfied with this limitation and other aspects of the 1990 Permit, the City filed its appeal at docket number 90-319-MR.

The ambiguity in the application underlying the 1990 Permit apparently came to light after the Permit was issued and DER learned of the City's intent to place refuse on Phase II-B. To remove any ambiguity from the 1990 Permit, DER issued the November 23, 1990 Modification limiting disposal to Phase II-A. The City, as noted previously, appealed this Modification at docket number 90-548-MR. At the time when the Modification was received, the City had not placed any additional refuse on Phase II-B but intended to do so by filling in the cavity between the slope of the original Landfill and Phase II-A as the level of Phase II-A rose. DER's January 15, 1991 Compliance Order was directed toward the placement of refuse on Phase II-A within 15 feet of the edge of the liner in the area of the cavity. The City's appeal from the Compliance Order, already referred to, is docketed at 91-044-MR.

At the time of the hearing, the City had enough capacity left in Phase II-A for two months of operation. The cavity area would provide capacity for another nine months of operation. The City's engineering consultants have begun work on the next expansion area (Phase III) and expect to have an application ready to be filed with DER by September 1991. After a permit is received for Phase III, it will take six to nine months to prepare the site for the disposal of refuse. The City had not moved sooner on Phase III because of the capacity believed to be available in Phase II, especially in the cavity.

To gain capacity pending the availability of Phase III, the City presented a plan for the filling of the cavity in such a manner that leachate is not discharged, and filed an application (1991 Application) with DER on January 28, 1991 to steepen the slopes in Phase II-A. If a supersedeas is not granted, according to the City, disposal activities at the Landfill will have to be suspended within two months. There are other disposal sites available for the City's municipal waste, but using them will deprive the City of the profit realized from Landfill operations which fund about 10% of the City's budget.

According to DER, issuance of a supersedeas will allow the City to dispose of refuse on an unlined area of the Landfill, contrary to current regulations and further increasing the likelihood of already existing groundwater pollution.

To be entitled to a supersedeas, the City must show, by a preponderance of the evidence, (1) irreparable harm, (2) the likelihood of prevailing on the merits, and (3) the unlikelihood of injury to the public. If pollution or injury to the public health, safety or welfare exists or is threatened, a supersedeas may not be granted. Environmental Hearing Board Act, section 4(d), Act of July 13, 1988, P.L. 530, 35 P.S. §7514(d); 25 Pa. Code §21.78.

We have held that DER action forcing the shutdown of a business operation inflicts irreparable harm: Elmer R. Baumgardner et al. v. DER, 1988 EHB 786; Frank Colombo et al. v. DER, 1989 EHB 1319. We see no reason to exclude municipal activity from this principle, especially activity that produces a profit used to fund other operations. Accordingly, we conclude that the City has shown that it will suffer irreparable harm if the supersedeas is not granted.

Despite the threat of irreparable harm, we are unable to conclude that the City is likely to prevail on the merits. We are convinced that the revised Municipal Waste regulations, effective April 9, 1988, prohibit the disposal of refuse on unlined areas. By allowing the City to do that on Phase II-B through the issuance of a supersedeas, we would be sanctioning a clear violation of law - a step we have consistently refused to take: FR&S, Inc. v. DER, 1989 EHB 817; Amity Sanitary landfill v. DER, 1988 EHB 766.

Persuaded that landfill design and operation standards needed to be upgraded, the Environmental Quality Board (EQB) promulgated new regulations pursuant to authority contained in the SWMA; the Clean Streams Law, (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq.; and the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §51 et seq. Existing landfills (those permitted prior to April 9, 1988) were required to upgrade their facilities to satisfy the new standards or to close down: 25 Pa. Code §271.111(a).

A landfill electing to remain open had to file a preliminary application for permit modification by October 11, 1988, detailing the differences between the requirements of its existing permit and the requirements of the new regulations: 25 Pa. Code §271.111(a) and (b). After approval of its preliminary application, the landfill had to file a complete application for permit modification to correct the differences: 25 Pa. Code §271.111(d). After April 9, 1990 the only landfills authorized to operate

were (1) those which had permits issued under the new regulations and (2) those with complete applications for permit modification still awaiting DER action: 25 Pa. Code §271.112(b).[1]

Having elected to upgrade the Landfill and having complied with the filing requirements of 25 Pa. Code §271.111(a) and (d), the City could legally continue operating after April 9, 1990 in the areas covered by the 1983 Permit since it was still awaiting DER action on its complete application for permit modification. Once the 1990 Permit was issued, however, Landfill operations had to conform to its requirements. While they may have been ambiguous at first with respect to Phase II-B, they were clarified by the Modification.

The City argues that, under the provisions of 25 Pa. Code §271.112(c), it has the legal right to continue disposing on Phase II-B until it reaches the final elevations set by the 1983 Permit. That provision reads as follows:

> An operator may continue to dispose of waste, up to final permitted elevations as of December 15, 1987, on permitted disposal areas where waste was disposed as of April 9, 1988 if the operator complies with this section and §271.111. [DER] may take action it deems necessary at the facilities to enforce the act, the environmental protection acts and the regulations promulgated thereunder.

The City quotes from the preamble to the new regulations, as printed in the Pennsylvania Bulletin of April 9, 1988, the following language:

> [T]he final regulations have been clarified to allow an operator to continue to dispose of waste, up to final permitted elevations, on permitted disposal areas where waste had been disposed of before the effective date of this chapter, if the operator complies with the transition scheme set forth in these sections.

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[1] Landfills electing to close down had to begin implementation of a closure plan by April 9, 1990 at the latest: 25 Pa. Code §271.113(e).

> (§271.112(c) (relating to continued operations under prior permits)). 18 Pa. B. 1684

Since the City had disposed of waste on Phase II-B prior to April 9, 1988 and since the City has complied with the provisions of 25 Pa. Code §271.111 and §271.112, it fulfilled the stated conditions.

The City's interpretation would convert §271.112(c) from a transition provision into a grandfather clause giving the City the legal authority to continue using Phase II-B until it reaches the final permitted elevations, no matter how long that takes. Such an interpretation ignores the clear intent of the new regulations to force existing landfills to meet higher standards or close down. Itemizing the differences between the pre-existing permit and the standards of the new regulations, as landfills were required to do in their preliminary applications for permit modification, §271.111(b), serves no purpose except to define areas where upgrading is needed. This purpose is made plain by the requirement in §271.111(d) that the complete application for permit modification "correct differences between the existing permit and the requirements of this Chapter [271]." While these applications are pending, landfills are allowed to continue using previously permitted areas up to their final permitted elevations. When the new permit is issued, however, conforming to the new standards, landfills can operate only in accordance with permit conditions.

This interpretation is apparent from a portion of the preamble preceding that quoted by the City.

> [L]anguage in the proposed regulations seemed to make continued operation of a previously permitted landfill dependent on immediate compliance with all the requirements in the regulations.....Such provisions have been deleted because the EQB did not intend to require closure of facilities in that manner. Rather, the EQB intended to establish <u>an orderly system for</u>

> existing facilities to come into compliance with those regulations which require prior [DER] approval of plans and designs. 18 Pa. B. 1684 (emphasis added)

Phase II-B could not come into compliance with the new regulations without a liner, at least: 25 Pa. Code §273.251(a). Consequently, it could not legally be used as a disposal area under the 1990 Permit. If the 1990 Permit was capable of being construed to allow disposal on Phase II-B, DER had a mandatory duty to change it. The issuance of the Modification was the fulfillment of that duty and, therefore, cannot be considered illegal or an abuse of discretion.

The five months that elapsed between issuance of the 1990 Permit and issuance of the Modification may have given the City a false sense of security in its belief that Phase II-B could still be used and may be justification for an extension of the one-year term to which the 1990 Permit is limited. We have not been asked to grant a supersedeas with respect to that term; but only with respect to the Modification which, as noted, we cannot grant.

Having determined that the City is unlikely to prevail on the merits, we deem it unnecessary to discuss the other points raised by the parties.

ORDER

AND NOW, this 15th day of February 1991, it is ordered that the Petition for Supersedeas, filed by the City on January 11, 1991, is denied.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: February 15, 1991

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

THE CARBON/GRAPHITE GROUP, INC.	:	
v.	:	**EHB Docket No. 90-524-E**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: February 19, 1991**

OPINION AND ORDER SUR DER'S MOTION TO DISMISS SECOND PETITION FOR SUPERSEDEAS

By: Richard S. Ehmann, Member

Synopsis

Pursuant to 25 Pa. Code §21.77(c)(4) and upon motion of the Department of Environmental Resources ("DER"), we deny without a hearing The Carbon/Graphite Group's ("C/GG") Second Petition For Supersedeas. Although we reject DER's contention that the petition does not meet the requirements of 25 Pa. Code §21.77(a), C/GG's Second Petition contains nothing which would indicate C/GG will be successful in prevailing on the merits of its appeal. As C/GG must necessarily make such a showing before we may grant supersedeas, we may deny the petition.

The arguments raised in C/GG's petition do not show it has a reasonable probability of succeeding on the merits of its claim that DER cannot force it to treat acid mine drainage (AMD) which it admits is passing onto and under its property, and then is entering its storm water collection system or being pumped from its furnace basements to be discharged to Elk Creek. Under previously decided law, it is clear that DER is authorized, pursuant to §316 of the Clean Streams Law, to require C/GG to remediate the

AMD on its land. Moreover, C/GG has waived both its allegation that DER has violated its own regulations at 25 Pa. Code §92.55 and its allegation that DER did not take into account the existing quality of Elk Creek in imposing this requirement by C/GG's failure to raise these grounds in the notice of appeal. Even if this latter argument were not waived, it would be of no consequence, since DER is authorized to proceed against a discharger of pollution even when it discharges to a stream polluted by others. Further, C/GG's allegation that it did not mine its property is irrelevant to DER's authority under §316. Additionally, C/GG has not stated grounds which show it is likely to prevail on the merits of its appeal by arguing that it cannot be required to remediate AMD because DER is authorized to abate AMD from abandoned mines.

OPINION

The instant appeal was commenced on November 29, 1990 by C/GG's filing with us a notice of appeal which challenged certain provisions of its National Pollutant Discharge Elimination System (NPDES) permit PA 0003085. On December 24, 1990, C/GG filed a petition for supersedeas. By an Order dated January 4, 1991, we denied the petition because it did not comply with the requirements of 25 Pa. Code §21.77(a). Subsequently, on January 14, 1991, C/GG filed a second petition. On January 28, 1991, DER filed its answer to the second petition, along with a motion to dismiss, requesting us to deny the petition, and a brief in support thereof. Following a conference call with counsel for both parties, we issued an Order on January 30, 1991 which stated that upon the representation of counsel for both parties that the parties had agreed in principal to a settlement of the remaining merit issues raised in C/GG's appeal, it was agreed that C/GG's response to DER's motion should only address the issue of C/GG's liability for the treatment of AMD currently

collected and discharged to Elk Creek from its facility and how this relates to its petition and the NPDES permit. C/GG's response was filed on February 4, 1991. Based upon our review of the motion and response, we issued an Order on February 5, 1991, granting DER's motion to dismiss and indicating that this Opinion would follow.

The objection stated in the notice of appeal upon which we are focusing contests the pH effluent limitations in the permit for outfalls 001, 002, 003, 006, 007, 010, 035, 039, and 041, and the limitations on iron, aluminum, and manganese as components of AMD.[1] C/GG argues in its Brief that limitation should be deleted because, in effect, the Permit requires C/GG to treat AMD for which it has no legal responsibility, since the AMD emanates from abandoned mines not located on C/GG's property and C/GG has never mined its property. In addition, the notice of appeal alleges DER is responsible for remediation of AMD from abandoned mines, and DER cannot place this responsibility on C/GG. For these reasons, C/GG's notice of appeal alleges these effluent limitations are unlawful, an abuse of discretion, arbitrary, capricious, and a violation of its due process and equal protection rights.

In the second petition for supersedeas, C/GG requests that the effluent limitations for pH for the above-mentioned outfalls be stayed. (It does not specifically address the iron, aluminum, and manganese components of AMD.) While C/GG admits that the mine drainage is highly acidic, it maintains that the AMD seeps onto the surface of its property or

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[1]A review of the permit, as attached to the Notice of Appeal, shows that there are not 41 consecutively numbered outfalls at C/GG's plant and that the mine discharges at issue here are to contain either groundwater only or a mixture of groundwater and storm water runoff, but <u>no</u> waste water from C/GG's manufacturing operations.

into ground water flowing beneath its property from off-site abandoned mines. It alleges the AMD collects in storm drains on the C/GG property and discharges to Elk Creek, or is pumped out of the basements of C/GG's furnaces into Elk Creek. C/GG maintains that if the AMD were not collected by its storm drains or pumped out of the furnace basements, it would run across and under the C/GG property and into Elk Creek, damaging the C/GG property in its path.

DER's motion first asks us to dismiss the second petition because it is procedurally defective. DER asserts that under 25 Pa. Code §21.77, C/GG's petition for supersedeas must be supported by affidavits setting forth specific information to show C/GG's entitlement to supersedeas. DER states that rather than attaching an affidavit on the quality of Elk Creek, C/GG attached to its petition a 1986 DER study to establish the water quality of Elk Creek and the public will not be harmed if supersedeas is granted. DER asserts that this procedure does not comply with 25 Pa. Code §21.77(a).

Under 25 Pa. Code §21.77(a),

> A petition for supersedeas shall plead facts with particularity and shall be supported by one of the following:
> (1) Affidavits, prepared as specified in 231 Pa. Code Rules 76 and 1035(d) (relating to definitions and motion for summary judgment), setting forth facts upon which issuance of the supersedeas may depend.
> (2) An explanation of why affidavits have not accompanied the petition if no supporting affidavits are submitted with the petition for supersedeas.

We reject DER's argument that C/GG's second petition is procedurally defective. The affidavit of Raymond A. Miller, attached to C/GG's petition, states that Elk Creek has been subjected to AMD for many years from many

sources. The DER study is offered by C/GG to support this allegation. C/GG sought and received a subpoena to compel the testimony of a person at DER who was involved in preparing this study, and it is obvious he will be asked to testify in regard thereto. This is sufficient under this appeal's circumstances to demonstrate compliance with 25 Pa. Code §21.77(a).

Under 25 Pa. Code §21.77(c)(4), a petition for supersedeas may be denied upon motion made before a supersedeas hearing, or sua sponte, without hearing, for a failure of the petition to state grounds sufficient for the granting of a supersedeas. A party seeking a supersedeas must satisfy all of the criteria of 25 Pa. Code §21.78(a) which we consider upon examining a request for supersedeas. F.A.W. Associates v. DER, EHB Docket No. 90-228-B (Opinion issued December 31, 1990); Al Hamilton Contracting Co. v. DER, EHB Docket No. 90-268-W (Opinion issued August 9, 1990); Carroll Township Authority v. DER, 1983 EHB 239. These criteria 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. 25 Pa. Code §21.78(a). In order to demonstrate that it is likely to prevail on the merits, C/GG's petition must "garner a case (of) showing a reasonable probability of success." F.A.W., supra. If C/GG's petition has not stated such grounds, we can deny its petition.

C/GG's petition represents that it satisfies all of the factors we must consider before granting a supersedeas. It places particular weight on its demonstration that it is likely to prevail on the merits, arguing DER has abused its discretion in imposing the effluent limitations because it was without authority to do so. C/GG asserts that this lack of authority for DER's action is all it need show to support a grant of supersedeas.

Preliminarily, C/GG contends in its petition that by way of the permit effluent limitations, DER is ordering C/GG to take action which DER is not authorized to directly order. C/GG's Brief states that the only possible authority DER might have for forcing C/GG to treat the AMD is pursuant to §316 of the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.316.[2] C/GG also states in its Brief, however, that §316 does not authorize DER to issue discharge permits, making §316 only inferentially relevant. Factually, C/GG's Petition and affidavits show its prior permits from DER did not require treatment of this AMD. They also establish the fact that in 1988, Airco Carbon (C/GG's predecessor) collected all the waste water discharges from this plant and caused them to flow to the St. Marys Borough sewage treatment plant, so these outfalls discharge only AMD collected from surface seeps, groundwater contaminated by AMD which enters these drains by gravity or is pumped there by C/GG (the furnace basements), and storm water. As stated in Footnote 1, supra, the NPDES permit confirms that these outfalls must discharge only groundwater (the AMD) or storm water and AMD, in combination. DER's Answer to the Second Petition also concedes that C/GG's manufacturing waste waters are not discharged here, but, rather, flow to the St. Marys plant.

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[2]Section 316 of the CSL provides in pertinent part:

> Whenever the department finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the department may order the landowner or occupier to correct the condition in a manner satisfactory to the department.

35 P.S. §601.316.

Based on these facts, we disagree with C/GG's contentions. DER's action in imposing these new effluent limitations, aimed solely at this AMD, via the NPDES permit gives this permit the effect of an Order issued under §316 of the CSL. Monessen, Inc. v. DER, EHB Docket No. 88-486-E (Opinion issued May 21, 1990). Moreover, Sections 301 and 307 of the CSL, 35 P.S. §§691.301 and 691.307, require a permit to discharge industrial waste into waters of the Commonwealth. The definition of industrial waste contained in the CSL at 35 P.S. §691.1 includes mine drainage. C/GG's NPDES permit serves as the permit authorizing the discharge of industrial waste under §307. See 25 Pa. Code §92.5. Thus, absent such a permit, no discharge can occur. Since this permit authorizes the discharge, but only if the AMD is treated to the proper degree, for purposes of this appeal it is also an order under §316.

C/GG also contends that §316 does not authorize DER to require C/GG to remediate AMD from off-site abandoned mines. In support of this position, C/GG offers the Commonwealth Court decision in Philadelphia Chewing Gum Corp. v. Commonwealth, DER, 35 Pa. Cmwlth. 443, 387 A.2d 142 (1978), affirmed in part sub nom. National Wood Preservers, Inc. v. Commonwealth, DER, 489 Pa. 221, 414 A.2d 37 (1980), appeal dismissed, 449 U.S. 803, 101 S.Ct. 48, 66 L.Ed.2d 7 (1980). C/GG argues Chewing Gum held a landowner or occupier cannot be held responsible for remediating pollution pursuant to §316 unless the person 1) knows or should know of the existence of the condition on the land; and 2) associates himself in some positive respect with the condition after its creation, beyond mere ownership or occupancy of the land. C/GG admits it has knowledge of the AMD but it says it has done nothing to associate itself with or adopt the AMD.

In its motion, DER argues C/GG has not shown it is likely to succeed on the merits of its appeal.[3] DER urges that C/GG erroneously relies upon Chewing Gum, supra. DER contends that National Wood makes it clear that pollution must be eliminated even when a landowner or occupier did not create the condition.

C/GG's response concedes that the cases which DER has cited in its motion state that fault is not required for liability under §316. It argues, however, that in the instant case, it is the source of the pollution, rather than fault for it, which is our concern. C/GG urges that in National Wood, only those entities who owned or occupied the property on which the polluting condition existed were held liable under §316.

Our review of Chewing Gum (and National Wood) convinces us that under the facts of that case, there was no question before the Commonwealth Court that the condition involved therein, was on the appellants' land. The situation in Chewing Gum was that pentachlorophenol mixed with oil was present in groundwater under the surface of four appellants' land. These appellants were Philadelphia Chewing Gum ("Gum"), Shell Oil ("Shell"), National Wood Preservers ("Wood"), and Rogers. None of the appellants had created the condition, but DER issued an order to all four appellants under §316 directing them to take corrective action. The Commonwealth Court stated that the Board had found the pollutant was discharged into Naylors Run in the following manner:

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[3]DER's brief in support of its Motion to Dismiss notes that without admitting the truth of C/GG's allegations, DER will assume that C/GG will demonstrate the waste water which must achieve a pH limitation of 6-9 S.U. is affected by AMD and the source of the AMD is off-site abandoned mines which were mined by entities other than C/GG's predecessors.

> Pentachlorophenol mixed with oil flows mostly on top of the water table, under the surface of the property of Rogers' and leased, in part to Shell and in part to Wood. This material then flows in a southwesterly direction under Eagle Road....Pentachlorophenol mixed with oil flows, mostly on top of the water table, under the surface of the property of Gum. This material then infiltrates the storm sewer pipe which is maintained by the Township.... Pentachlorophenol mixed with oil travels in this storm sewer pipe and is discharged to Naylors Run at the terminus of this pipe.

Chewing Gum at ___, 387 A.2d at 145.

The Commonwealth Court said it appeared Gum had "acquired" the presence of pentachlorophenol under its land due to the downward slope of the subsurface water table from the site where another entity had had a disposal well. The Court did not disturb the Board's determination that the condition existed on each of the appellants' property.

C/GG admits that AMD seeps onto the surface of its property or into groundwater under its property.[4] It also admits the AMD collects in storm drains on the C/GG property and discharges to Elk Creek or is pumped out of C/GG's furnace basements into storm drains and flows out to Elk Creek through the outfall pipes referenced in the permit. See Petition and attached affidavits. Accordingly, DER had a basis for finding the condition exists on C/GG's property from which pollution or danger of pollution is resulting.

Since DER could have found the condition to exist on C/GG's property, the question raised by C/GG is that addressed in Chewing Gum and National Wood: When may the Commonwealth order a landowner or occupier to correct a

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[4]While C/GG does not so state in its appeal or petition, during a conference call with Board Member Ehmann, counsel for C/GG indicated that some AMD drains onto C/GG's property from neighboring property and other AMD comes to the surface for the first time on C/GG's property.

condition existing on his land which is causing pollution of Commonwealth waters where the polluting condition was created by the conduct of someone other than the owner or occupier? The Commonwealth Court, in considering this question in Chewing Gum, was concerned that serious constitutional problems arise if the police power of the Commonwealth can be wielded against landowners or occupiers whose ownership or occupancy bears absolutely no relationship to the polluting condition.

Quoting Commonwealth v. Barnes & Tucker Co.(Barnes & Tucker I), 455 Pa. 392, 418, 319 A.2d 871, 885 (1974), the Commonwealth Court said:

> Our Supreme Court has deemed "instructive" the standard enunciated by the United States Supreme Court in Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894):
>
> > "To justify the State in...interposing its authority in behalf of the public, it must appear, first, that the interests of the public...require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. Id. at 137, 14 S.Ct. at 501"

Chewing Gum at ___, 387 A.2d at 148.

The Commonwealth Court then stated that it believed that requiring the appellants in Chewing Gum to spend financial sums necessary to abate this condition, based solely upon their ownership or occupancy of land, would be to employ means unduly oppressive upon these individuals." It stated, "[t]he key to imposing liability under §316 upon an owner or occupier for the correction of a condition which he did not create is that such an owner or occupier, after knowing of the condition, engages in some affirmative conduct indicating his adoption of the condition." Chewing Gum at ___, 387 A.2d at 150. As to the four appellants, the Commonwealth Court made the following determinations.

Section 316 had been improperly applied to Gum because there was no evidence to indicate Gum knew of the condition prior to the institution of the proceedings. Also, there was no reason why Gum, as a landowner adjacent to the land on which the condition was created, ought to have become aware of the presence of pentachlorophenol mixed with oil under its land. Additionally, Gum had never engaged in any affirmative conduct which could be viewed as indicating an association with or its adoption of the condition. As to Shell, the Commonwealth Court found it probably knew of the condition, but there was no evidence it had ever engaged in any affirmative conduct indicating an association with or adoption of the condition. The Court, therefore, found the Board had improperly applied §316 to Shell. As to Wood, the Commonwealth Court found that it knew of the condition and engaged in affirmative conduct indicating an association with the condition. With respect to Rogers, the Commonwealth Court held §316 was applicable because they should have known of the condition and had sufficiently associated themselves with the existence of the condition.

National Wood is the appeal brought by the two landowners, Rogers and Wood, to which the Commonwealth Court had held §316 was applicable.[5] In National Wood, the Supreme Court considered, inter alia, whether §316 is an impermissible exercise of the police power. It examined this question by adopting the standard set forth in Lawton, and determined that a DER order to a landowner or occupant under Section 316, requiring correction of a condition causing pollution, satisfied the first two prongs of the Lawton standard. As

[5]The Supreme Court dismissed DER's petition for allowance of appeal regarding the Commonwealth Court's holdings as to Gum and Shell as improvidently granted because it had been untimely filed.

to the third prong of the Lawton standard, the Supreme Court observed that the appellants were not arguing that §316 is "unduly oppressive" because of its economic impact or its interference with their use of property. It stated, "appellants advance the somewhat unique argument that Section 316 is unduly oppressive because it imposes liability upon appellants solely on the basis of their ownership or occupancy of the land in question." National Wood, supra at ___, 414 A.2d at 45. The Supreme Court rejected this argument, stating that the exercise of police power over land depends little upon the owner or occupier's responsibility for causing the condition giving rise to the regulation. It then affirmed the orders of the Commonwealth Court regarding Wood and Rogers.

Subsequent to the National Wood decision, the Commonwealth Court has indicated in several matters before it that its decision in Chewing Gum is of questionable continuing validity in light of National Wood, which it interprets as holding fault is not a prerequisite to liability under §316. See Commonwealth, DER v. PBS Coals, Inc., 112 Pa. Cmwlth. 1, 534 A.2d 1130 (1987), petition for allowance of appeal denied, 520 Pa. 592, 551 A.2d 218 (1988); Bonzer v. Commonwealth, DER, 69 Pa. Cmwlth. 633, 452 A.2d 280 (1982). See also Western Pennsylvania Water Co. v. Commonwealth, DER, 127 Pa. Cmwlth. 26, 560 A.2d 905 (1989).

In the present matter, C/GG's Brief holds to the petition's contention that the culpability standard of Chewing Gum, supra, has not been satisfied. As we noted above, even the Commonwealth Court itself questions the validity of that decision. Nevertheless, C/GG's reliance upon Chewing Gum is misplaced, because even under the Commonwealth Court's reasoning in that decision, DER would have a basis for holding C/GG responsible for

treating the discharge pursuant to §316. Like Gum, C/GG is a landowner adjacent to the land on which the condition was created. Unlike Gum, however, C/GG has been aware of the pollutant on and under its land. Additionally, C/GG has engaged in affirmative conduct which could be viewed as indicating an association with or adoption of the condition. C/GG has admittedly changed the flow of the AMD by collecting it in its drainage system and pumping it from its furnace basements into Elk Creek so that it may more fully utilize its property in connection with its business. Thus, even using a culpability standard, C/GG's petition has not stated grounds which show it has a reasonable probability of succeeding on the merits of its appeal as to its argument that DER cannot force it to treat "off-site" AMD.

C/GG's Brief in Opposition to DER's motion states that the petition raises several other grounds upon which the Board could find the pH limitation constituted unlawful action. One of the grounds the petition asserts is that DER did not provide a schedule of compliance in the permit, although DER knew C/GG could not comply with the pH limitations, and that DER has, thus, violated its own regulations at 25 Pa. Code §92.55. This ground has been waived by C/GG's failure to raise it in the notice of appeal. See Raymark Industries, Inc. et al v. DER, EHB Docket No. 90-180-E (Opinion issued February 7, 1991); Commonwealth, Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), affirmed on other grounds, 521 Pa. 121, 555 A.2d 812 (1989).

Likewise, C/GG has waived the assertion in its petition that DER abused its discretion in imposing the effluent limitations in C/GG's permit because it failed to take into account the existing quality of Elk Creek, which has been subjected to AMD for many years from many other sources besides

C/GG. Moreover, even if it could be said that this argument was raised in the Notice of Appeal, it is wholly without merit, since the CSL empowers DER to require the ceasing of a pollutional discharge into the waters of the Commonwealth, even if those waters are, at the time, polluted from other sources. See Commonwealth v. Gilpin Township, 52 Pa. Cmwlth. 414, 415 A.2d 1002 (1980); §606 CSL, 35 P.S. §691.606.

Citing §315(a) of the CSL, C/GG's petition for supersedeas also claims that since it never mined its property, DER is without authority to force it to treat the AMD. Our Supreme Court has said in National Wood, "Section 316 makes evident, the Legislature has clearly and unambiguously authorized DER to require the correction of water-polluting conditions without regard to the source of the pollution." National Wood at ___, 414 A.2d at 40. Thus, whether or not C/GG mined its property is irrelevant to DER's ability to order it to correct this water-pollutioning condition.

Finally, C/GG's petition asserts that it is DER's responsibility and duty to treat and remediate AMD from abandoned mines, so that DER abused its discretion in imposing pH limitations on C/GG's discharges which require C/GG to treat AMD. In support of this contention, C/GG cites the Land and Water Conservation and Reclamation Act (LWCRA), Act of January 19, 1968, P.L. 996, 32 P.S. 5101 et seq. This is the Act which provides for the spending of Pennsylvania's "Project 500" bond monies. It is not a regulatory statute. Moreover, this Act, while at §5116(a)(1)(II) authorizing DER to construct and operate a plant or plants for control and treatment of water pollution resulting from mine drainage, states that the provisions of that paragraph shall not be deemed in any way to repeal or supersede any portion of the CSL. There is, thus, no reasonable probability that C/GG will succeed on the merits

of its appeal as to its claim that it cannot be held responsible for remediating the AMD because DER has authority under the LWCRA to treat water pollution resulting from mine drainage.

Because C/GG's Second Petition For Supersedeas fails to state any ground that it is likely to succeed on the merits of its appeal, we accordingly deny that petition without a hearing.

ORDER

AND NOW, this 19th day of February, 1991, we affirm our Order issued February 5, 1991 denying C/GG's Second Petition For Supersedeas.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: February 19, 1991

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M. DIANE SMITH
SECRETARY TO THE BO

ADAMS SANITATION COMPANY, INC.	:	**EHB Docket No. 90-479-W**
	:	**(Consolidated Docket)**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** February 20, 1991

OPINION AND ORDER SUR
APPLICATION FOR STAY PENDING APPEAL

By Maxine Woelfling, Chairman

Synopsis

An application for a stay pending appeal is denied where appellant is unlikely to succeed on the merits of its claim that the Department of Environmental Resources (Department) had no authority to order it to abate groundwater contamination emanating from a 108 acre site leased by appellant. Landfilling was conducted on a large portion of the site by appellant's predecessor and appellant contended that the contamination emanated from this portion of the site rather than from the 8.8 acre portion of the site where appellant disposed of waste. Since appellant leased the entire 108 acres, it was liable under §316 of the Clean Streams Law for abating the contamination. Since appellant is unlikely to succeed on the merits of its contention, the issues of irreparable harm and harm to the public need not be considered.

DISCUSSION

This matter was initiated with the September 11, 1990, filing of a notice of appeal by Adams Sanitation Company, Inc. (Adams) seeking review of

the Department's August 21, 1990, letter advising Adams that it was responsible for water supply contamination at the Strine residence adjacent to Adams' municipal waste landfill in Tyrone Township, Adams County. The letter further directed Adams to provide a replacement water supply to the Strine residence in accordance with §1104(a) of the Municipal Waste Planning Recycling and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, 53 P.S.§4000.1104(a), and 25 Pa.Code §273.245(c). Adams' appeal was docketed at No. 90-375-W.

Thereafter, the Department, on October 22, 1990, issued Adams an order directing it to develop and implement an abatement plan to remedy the groundwater and surface water contamination emanating from the Adams landfill. Adams appealed that order on November 8, 1990, and that appeal was docketed at No. 90-479-W. Adams, then, on November 19, 1990, filed an application for a stay of the Department's October 22, 1990, order. The Department filed a motion to deny the application for a stay without hearing, and the Board denied that motion on November 28, 1990.

The parties jointly requested the Board to consolidate Adams' appeals at Docket Nos. 90-375-W and 90-479-W, and the Board consolidated the appeals at Docket No. 90-375-W by order dated December 4, 1990.

A hearing on Adams' application for a stay was conducted on December 3 and 4, 1990. Although Adams' appeals of the Department's August 21, 1990, and October 22, 1990, actions were consolidated, Adams is seeking a stay of only the Department's October 22, 1990, order.

The parties filed memoranda of law in support of their respective positions. The crux of Adams' argument is that the Department lacked the authority under the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* (the Solid Waste Management Act),

or 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), to issue the October 22, 1990, order, since Adams only leased the 108 acres which were the subject of the order and had only conducted landfilling on an 8.8 acre[1] portion of its 30 acre permitted area within the 108 acre site. Adams contends that any contamination from the site is the result of disposal activities by other entities and that there has been no "significant contaminant migration" from the acreage on which Adams conducted disposal activities. In line with this, Adams argues that the Department's order is unduly oppressive and, therefore, a violation of the due process clause of the U.S. Constitution. In the event the Board rejects these theories, Adams urges that it is likely to succeed on the merits, that the costs of implementing the abatement plan directed by the Department are prohibitive and would cause it to suffer irreparable harm, and that the public will suffer no harm due to the isolated location of the landfill and the Department's less than expedient action in issuing the order.

The Department asserts that Adams is barred by the doctrine of administrative finality from challenging the Department's authority to issue the October 22, 1990, order because Adams withdrew its appeal of the Department's August 14, 1989, order to submit a groundwater assessment plan and failed to appeal the Department's April 11, 1990, order to implement the assessment plan.The Department disputes Adams' interpretation of the relevant law, asserting that the Solid Waste Management Act provided authority for issuance of the order, since Adams, in essence, succeeded to the interests of the previous owner, Adams Sanitation Company (ADSCO), and that, in any event,

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[1] The area filled by Adams is variously referred to as eight or 8.8 acres. Although it will be referred to as 8.8 acres throughout this opinion, it must be stressed that the precise acreage does not affect the conclusion here.

Adams' disposal activities were responsible for contamination emanating from the 108 acre site. The Department also argues that Adams, as a landowner or occupier, is liable under §316 of the Clean Streams Law for contamination emanating from the 108 acre site, and that the Department has broad authority under §1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 (Administrative Code), to issue the order in question. Finally, the Department contends that Adams failed to substantiate its claim that the October 22, 1990, order was unduly oppressive and that there would be no harm to the public if a supersedeas should issue.

In order for Adams to obtain a supersedeas, it must show, by a preponderance of the evidence, that it satisfied the criteria set forth in §4(d) of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7514(d), and 25 Pa.Code §21.78.[2] It is not necessary to demonstrate irreparable harm or lack of harm to the public where the Board finds that the Department had no authority to take the underlying action at issue, Empire Sanitary Landfill, Inc. v. DER, EHB Docket No. 90-467-W (Opinion issued January 30, 1991). Similarly, the Board need not consider the issues of irreparable harm or harm to the public where there is no likelihood that a petitioner will succeed on the merits, Andrew Sysak v. DER, 1989 EHB 126, 131. For the reasons set forth below, Adams will not succeed on its claim that it is not responsible for contamination emanating from the 108 acre site and, therefore, it is not entitled to a supersedeas of the Department's October order.

The October order was issued pursuant to the authority contained in §§104 and 602 of the Solid Waste Management Act, §§5, 316, and 610 of the

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[2] Namely, that the petitioner is likely to succeed on the merits, that it will suffer irreparable harm, and that there will be no harm to the public.

Clean Streams Law, and §1917-A of the Administrative Code. The Board has held that mere ownership of property is not a sufficient basis for imposing liability under the Solid Waste Management Act, Newlin Corporation et al. v. DER, 1989 EHB 1106, aff'd ___ Pa.Cmwlth ___, 579 A.2d 996 (1990), and Lawrence Blumenthal v. DER, EHB Docket No. 89-230-F (Opinion issued March 6, 1990). However, the liability which attaches to ownership or occupation of property pursuant to §316 of the Clean Streams Law is another matter. In analyzing whether joint venturers had a proprietary interest sufficient to attach liability under §316 of the Clean Streams Law, the Board stated in Newlin, *supra*, that:

> We have recently interpreted the nature of the interest in land sufficient to support an order under §316 of the Clean Streams Law in Western Pennsylvania Water Co. v. DER, 1988 EHB 715, aff'd ___ Pa.Cmwlth ___, 560 A.2d 905 (1989), wherein we held that an easement for the purpose of laying a water pipe line was an interest in land sufficient to bring the water company within the scope of Section 316 of the Clean Streams Law. There, the water company, in the course of laying a water pipe line, encountered oil-contaminated soil resulting from the improper plugging of an oil well. The Board held it responsible for clean-up of the site. We noted that the Department's exercise of its authority under §316 of Clean Streams Law depended little upon the owner or occupier's responsibility for causing the condition giving rise to the pollution....
>
> 1989 EHB at 1121

Applying the standards set forth in Newlin, *supra*, and Western Pennsylvania Water Co., *supra*, Adams is liable under §316 of the Clean Streams Law for the contamination emanating from the entire site.

The facts leading to this conclusion are not very complicated. Adams Sanitation Company, known by the trade name ADSCO, which was incorporated in

1960 (Ex. P-18),[3] entered into a lease with Netta S. Deatrick on July 22, 1977, which lease authorized ADSCO to conduct a sanitary landfill operation on an approximately 108 acre site in Tyrone Township, Adams County (Ex. C-8). ADSCO received a permit to conduct solid waste disposal activities on the site from the Department on February 2, 1979 (Ex. C-11).

Adams is a wholly-owned subsidiary of Keystone Sanitation Company, Inc. (N.T. 9, 71; Ex. P-17, Module No. 10). Keystone Sanitation acquired the assets of ADSCO, including its rolling stock, customers, landfill equipment, and office equipment in an October 22, 1983, agreement (N.T. 79; Ex. P-21, Paragraph 2(a)). As part of that agreement, ADSCO agreed also to assign its lease for the landfill facility, as well as its name and trade name (Ex. P-21), Paragraphs 2(b) and 2(f)). The lease for the facility was assigned to Adams on November 15, 1983 (Ex. C-8). In November, 1983, Adams submitted an application to operate the landfill, since the then-applicable regulations prohibited the transfer of solid waste permits[4] (Ex. P-17). The permit application indicated that the property encompassed 108 acres, but that only 30 acres were proposed for landfilling (N.T. 73-74).

The Department issued a permit for the facility on February 1, 1984 (Ex. C-5). Adams began operating that same month and ceased operations in April, 1990 (N.T. 10). Adams filled 8.8 acres of the 30 acres covered by the permit (N.T. 39), and no disposal occurred on the "old" part of the landfill

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[3] The notation "Ex. P-__" will denote the exhibits introduced by Adams at the supersedeas hearing, while the notation "Ex. C-__" will denote exhibits introduced by the Department.

[4] See 25 Pa.Code §75.22 (f)(1) which was superseded by 25 Pa.Code §271.221 on April 9, 1988. The 1988 regulation, like §75.22(f), requires the reissuance of the solid waste permit, but contains more detailed requirements.

after February, 1984 (N.T. 17).[5] Finally, Adams acknowledges, as the plain language of the lease indicates, that the Deatrick lease assigned from ADSCO to Adams covers the entire 108 acres (N.T. 60).

Under these facts Adams is clearly liable under §316 of the Clean Streams Law as an occupier of land. Adams cites Gerald E. and Marilyn Olgin v. DER, 1985 EHB 811, for the proposition that it cannot be held liable under §316 of the Clean Streams Law for pollution emanating from the area outside the 8.8 acres on which it disposed of waste. The Olgin decision has been severely limited by subsequent decisions such as Western Pennsylvania Water Company and Newlin. Even if this were not so, there is a critical difference between the Olgin case and this matter. Unlike the Olgins, who only had a four month lease for a small portion of the entire landfill site, Adams here holds the lease for the entire 108 acre site.[6]

Finally, Adams argues that it would be unduly oppressive and, therefore, a violation of the Due Process clause of the U.S. Constitution to force it to abate contamination from the entire site where it did not conduct any economic activity or make any profit from the acreage filled by ADSCO. In support of this argument, Adams cites Commonwealth v. Harmar Coal Company, 452

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[5] There is a lot of uncertainty in the record on the part of both Adams and the Department as to what area was covered by the 1984 permit. See the testimony of Bill C. Bryant, General Manager of Keystone Sanitation (N.T. 9), at N.T. 3739, 47-48, 55 and the testimony of Francis Fair, Regional Solid Waste Manager of the Department's Harrisburg Regional Office (N.T. 228), at N.T. 236, 246. The precise location of Adams' waste disposal activities, however, is irrelevant to the outcome here.

[6] In deciding to supersede the Department order under appeal in Olgin, the Board also placed a great deal of reliance upon the fact that the direction of groundwater flow on the portion of the site leased by the Olgins was away from the remainder of the site. Even if the lease is disregarded here, Adams still would not be in the same position as the Olgins, for the evidence strongly suggests that contaminants are migrating from the acreage filled by Adams to the area filled by ADSCO and then to the groundwater monitoring wells.

Pa. 77, 306 A.2d 308 (1973). However, in Harmar the Pennsylvania Supreme Court was construing §315 of the Clean Streams Law, which relates to authorization to operate a mine, and not §316, which grants the Department broad authority to order landowners or occupiers to correct polluting conditions. Indeed, Adams' arguments regarding the constitutionality of the Department's order are remarkably similar to those rejected by the Pennsylvania Supreme Court in National Wood Preservers, Inc. v. Department of Environmental Resources, 489 Pa. 221, 414 A.2d 37 (1980), wherein it construed the constitutionality of §316 of the Clean Streams Law. The Court turned aside arguments that imposing liability solely on the basis of ownership or occupancy of land was unduly oppressive, citing the purpose of the Clean Streams Law and the fact that a polluting substance lay beneath the appellant's land. There is little difference between National Wood and the situation in this appeal.

Because the Department had ample authority under §316 of the Clean Streams Law to issue the October order, it is unnecessary to consider whether it was authorized by either the Solid Waste Management Act or the Administrative Code to issue the order. Similarly, because Adams is unlikely to succeed on the merits of its claim, it is unnecessary to consider whether Adams established that it would suffer irreparable harm or that there would be no harm to the public.

O R D E R

AND NOW, this 20th day of February, 1991, it is ordered that Adams Sanitation Company, Inc.'s application for a stay of the Department of Environmental Resources' October 22, 1990, order pending appeal is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: February 20, 1991

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

J. C. BRUSH	:	
v.	:	**EHB Docket No. 87-492-MJ**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
RAMPSIDE COLLIERIES, INC. Permittee	:	**Issued: February 21, 1991**

OPINION AND ORDER
SUR PETITION FOR RECONSIDERATION

By: Joseph N. Mack, Member

Synopsis

A request for reconsideration of our adjudication of this matter is denied where the appellant fails to present compelling and persuasive reasons, as required by 25 Pa. Code §21.122(a).

OPINION

On December 5, 1990, the Board issued an adjudication dismissing the appeal of J. C. Brush (Appellant) docketed at EHB Docket No. 87-492-MJ, thereby sustaining the Department of Environmental Resources' (DER) issuance of Mining Activity Permit No. 11861301 to Rampside Collieries, Inc. (Permittee).

Appellant timely filed a petition for reconsideration on December 19, 1990. On January 15, 1991, the Board notified DER and the Permittee that

any objections to the petition were due on or before February 4, 1991. DER filed its Objections on January 30, 1991. On February 6, 1991, Permittee joined in DER's Objections.

Our rules at 25 Pa. Code §21.122(a) provide that reconsideration may be granted "only for compelling and persuasive reasons" and will generally be limited to the following instances:

> (1) The decision rests on a legal ground not considered by any party to the proceeding and that the parties in good faith should have had an opportunity to brief such question.
> (2) The crucial facts set forth in the application are not as stated in the decision and are such as would justify a reversal of the decision. In such a case reconsideration would only be granted if the evidence sought to be offered by the party requesting the reconsideration could not with due diligence have offered the evidence at the time of the hearing.

In her petition, Appellant has set forth numerous reasons for reconsideration, none of which we find persuasive or compelling. We shall address each argument individually.

First, Appellant asserts that our adjudication was based on an erroneous hearing transcript. In making this assertion, she directs us to page 1, paragraph 1 of her Post-Hearing Brief. In essence, Appellant contends that her closing argument at hearing (N.T. 141-142), which she states was read verbatim from a document which she had filed with the Board on March 15, 1990 in response to our Order of December 29, 1989, is not set forth verbatim in the transcript. We first note that the transcript has been certified by the Court Reporter as being a "true and correct" copy of the stenographic notes taken at the proceeding. However, even if we were to accept Appellant's statement that her summation was read verbatim from the March 15, 1990 document, the transcription errors which appear are not errors of substance

and had no effect on the outcome of this appeal. Appellant directs us to no other alleged errors in the transcript.

Secondly, Appellant argues that she was not granted time in which to file an Answering Brief to Permittee's Post-Hearing Brief, which was submitted to the Board on August 20, 1990. At the hearing on this matter, the parties were advised they had 15 days after receipt of Post-Hearing Briefs in which to file Answering or Reply Briefs. (N.T. 145) Appellant had ample opportunity to respond to Permittee's Post-Hearing Brief, but failed to do so.

Appellant next argues that certain evidence was improperly refused admission at hearing. Here, she is referring to testimony which she wished to present regarding her "water line right of way" and "lease riders for property purchased after 1968". She directs our attention to page 9 of our Adjudication, paragraph f. Paragraph f states that DER's witness, Thomas Callaghan, a Hydrogeologist, presented clear and convincing testimony that the Permittee had obtained the necessary right of entry from the legal owner of the property on which the mining was to be conducted, as required by 25 Pa. Code §86.37(7). Appellant offered no evidence contrary to this finding. Moreover, as for Appellant's argument that certain evidence was improperly excluded, we point out that, throughout the course of the hearing, Appellant attempted to introduce testimony on matters not set forth in her Notice of Appeal and which had never been raised prior to the hearing, including the aforesaid "water line" and "lease riders". Since no good cause was shown for allowing these matters to be raised at such a late date, they were properly excluded. Pennsylvania Game Commission v. Department of Environmental Resources, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), aff'd, 521 Pa. 121, 555 A.2d 812 (1989).

Appellant's fourth argument, that the Permittee appeared at the hearing without a complete copy of the permit application, is not a basis for reconsideration. The Permittee did not seek to introduce into the record a copy of the permit application, nor was it under any obligation to do so. Had Appellant wished to review or obtain a copy of the permit application, she could have requested it through the discovery process. If she wanted it made part of the record, she could have sought to introduce it at the hearing.

We offer the same response to Appellant's fifth argument, that Fish Commission and Game Commission witnesses were not present at the hearing. Had Appellant sought to introduce testimony from a representative of the Fish Commission or Game Commission, she could have subpoenaed these individuals to ensure their appearance at the hearing.

Next, Appellant contends that our finding that no discharge was proposed by Permittee (Finding of Fact No. 9.m.) was erroneous. She asserts that a discharge was referenced in the permit application. Finding of Fact No. 9 (m.) was based on the testimony of DER Hydrogeologist, Thomas Callaghan, who had been involved in the review of the permit application. In responding to Appellant's question regarding pollution, Mr. Callaghan stated that no discharge had been proposed by Permittee. Appellant did not question him further on this subject. Nor did she seek to introduce into evidence the permit application which she alleges makes reference to a proposed discharge. In the past, the Board has denied petitions for reconsideration where new evidence which allegedly justified the relief sought was previously available and could have been introduced at hearing. See Elmer R. Baumgardner v. DER, 1989 EHB 172; See also 25 Pa Code §21.122(a)(2). Since Appellant could have pursued this issue at the hearing but failed to do so, she cannot now assert

it as grounds for reconsideration. As the Board stated in Baumgardner, we cannot permit a losing party to keep coming back with additional evidence to support arguments which were rejected by the Board based upon the record developed at the hearing. 1989 EHB at 175-176.

Appellant's next two arguments can be addressed together. Appellant asserts that there remain "conflicts as to what the mining procedure is to entail" and that the "actual area to be mined remains ambiguous". Appellant could have addressed these matters through the discovery process and at hearing in order to resolve any confusion or ambiguity on her part. That Appellant failed to avail herself of these opportunities is not grounds for reconsideration.

Ninth, Appellant claims, "The coal seam having been mined using the room method and back filled does not now meet the definition of a mine", and refers us to 25 Pa. Code §89.5. That section defines "mine" as "[u]nderground areas contained within a continuous barrier of undisturbed coal and openings to the surface from those areas". We cannot even hazard a guess as to the meaning or significance of Appellant's claim, and she provides no further explanation. If Appellant considered this relevant to her case, she could have pursued it further during the course of her appeal. Since she did not raise this argument in her appeal, it is deemed to have been waived. See T.C. Inman, Inc. v. DER, 1988 EHB 707 (DER's Petition for Reconsideration was denied where grounds asserted for reconsideration were based on an argument which DER had failed to raise during the course of proceedings and which was thereby deemed to have been waived.)

In paragraph 10 of her petition, Appellant challenges our interpretation of "double jeopardy". (See Adjudication, p. 7-8) She now asserts that we

have moved into the arena of "triple jeopardy", and that there is a "continuous potential for an invasion of privacy claim". Appellant provides no further explanation, and we fail to understand the meaning of this claim. If Appellant is again pursuing her argument of "jeopardy to life and limb", which she raised throughout the appeal, we have already addressed this argument and found that Appellant failed to present any concrete evidence of potential harm to be caused by Permittee's mining activities. (See Adjudication p. 8) We also note that Appellant, as the petitioner, has the burden of convincing us that reconsideration is warranted. Obscure allegations of "triple jeopardy" and "invasion of privacy", without further support in the petition, fail to carry that burden.

Next, Appellant states that she has located "significant pertinent eyewitness testimony that was not previously available". Our rules state that, where new evidence is available, reconsideration may be granted only if the evidence sought to be offered could not, with due diligence, have been offered at the time of hearing and would justify reversal of the decision. 25 Pa. Code §21.122(a)(2). In the instant case, Appellant has given us no clue as to the nature of the testimony she seeks to introduce, the names of the eyewitnesses, and why this testimony was not previously available. A vague, general claim of "significant pertinent eyewitness testimony," with nothing to support it, provides us with no basis for determining that the testimony Appellant seeks to introduce was not, with due diligence on her part, available at the time of hearing, or that it would justify a reversal of our decision. Lacking that, we cannot allow reconsideration based on this claim.

Appellant next argues that she "had no way of knowing that [her] testimony would not be accepted [at hearing]." Appellant was permitted to testify at

great length at the hearing. It is true that she was barred from testifying as to certain matters. However, these consisted of matters which were not raised in her notice of appeal and which, therefore, were not before us for review. See Pennsylvania Game Commission. Furthermore, any matters not preserved in her Post-Hearing or Answering Briefs were deemed to have been waived. Laurel Ridge Coal, Inc. v. DER, EHB Docket No. 86-349-E (Adjudication issued May 11, 1990).

Finally, Appellant challenges a "recent Department of Environmental Resources decision regarding the proposed 'galleria' on the Industrial Park Road discharging water into the Solomon Run Stream". This appears to involve a wholly separate matter unrelated to the issuance of Permittee's mining permit and, therefore, has no bearing on this appeal.

Since the aforesaid arguments raised by Appellant are neither persuasive nor compelling, we enter the following order:

ORDER

AND NOW, this 21st day of February, 1991, it is ordered that J.C. Brush's petition for reconsideration is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick
TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: February 21, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
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Kirk Junker, Esq.
Western Region
For Appellant:
J. C. Brush
Johnstown, PA
For Permittee:
John J. Dirienzo, Jr., Esq.
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M. DIANE SMITH
SECRETARY TO THE BOARD

EAGLE CREST DEVELOPMENT, LTD.	:	
	:	
v.	:	**EHB Docket No. 90-074-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: February 21, 1991**

OPINION AND ORDER SUR
MOTION TO DISMISS

By Terrance J. Fitzpatrick, Member

Synopsis

A motion to dismiss an appeal as untimely is denied where the moving party fails to adequately support its allegation of untimeliness. A statement in the Notice of Appeal that the Appellant received notice of the Department of Environmental Resources (DER) action on or about a certain date is equivocal and does not, of itself, bind the Appellant to that date as the date from which the appeal period runs.

OPINION

This proceeding involves an appeal by Eagle Crest Development, Ltd. (Eagle Crest) of the Department of Environmental Resources[1] (DER) denial of a revision to the official sewage plan of Stroud Township, Monroe County, Pennsylvania. Eagle Crest sought the revision in order to build a sewage treatment plant in Stroud Township which would service Eagle Crest's development.

On January 11, 1990, DER denied the permit by letter. Eagle Crest

stated in its Notice of Appeal that it received the letter "on or about January 13, 1990," a Saturday. On February 13, 1990, Eagle Crest filed this appeal with the Board.

This opinion and order addresses DER's motion to dismiss, filed on March 13, 1990. DER moves for dismissal on grounds that Eagle Crest's appeal was not timely filed because Eagle Crest received notice of the denial on January 13, 1990, but did not file the appeal until February 13, 1990, more than 30 days after receiving notice.

Eagle Crest responded to the motion to dismiss, arguing that its appeal was timely filed because the date the letter was received at the Eagle Crest Offices was a Saturday, and the offices were closed. With no one to receive notice, Eagle Crest maintains that the appeal period would not have begun until the next business day, January 15, 1990.

It is well established, and not disputed here, that an appeal will be dismissed for lack of jurisdiction if the appealing party files it more than 30 days after receiving written notice of the action appealed. Rostosky v. Commonwealth, DER, 26 Pa. Commw. 478, 364 A.2d 761 (1976). The dispute before us centers on the computation of the appeal period. DER has not shown that the appeal period began on January 13, 1990. As DER argues, this Board has often held that, with regard to the date an appellant received notice of DER's action, an appellant is bound by the clear language in its notice of appeal. Carter Farm Joint Venture v. DER, EHB Docket No. 88-251-MJ (Slip Opinion, July 6, 1990); Borough of Lilly v. DER, 1987 EHB 972, 973; Kayal v. DER, 1987 EHB 809, 811. However, the instant matter differs from these precedents in two respects: 1) ostensibly, there was no person at all - authorized or unauthorized - to accept receipt of notice at the Eagle Crest offices, on January 13, 1990; 2) the language in Eagle Crest's notice of

appeal is not "clear," but equivocal. In response to Paragraph 2 (d) of the Notice of Appeal form, which asks for the date and means by which the appealing party received notice of the DER action, Eagle Crest responded:

> "On or about January 13, 1990 Spellant [sic] received a copy of the DER letter from Paul A. Franklin dated July 11, 1990, a copy of which is attached hereto as Exhibit 'A'."

Where, as in the instant appeal, a date certain is not given in the notice of appeal, the Board will look to other evidence as support for an allegation of untimeliness. Arnoni v. DER, 1989 EHB 22 (where the notice of appeal gave no date of notice of the DER action appealed, the party moving for dismissal must otherwise support its allegation of untimeliness). Beyond its reference to the language in the notice of appeal, DER has offered nothing to show that the appeal period began running on January 13, 1990. For example, DER has not alleged that it has a certified mail receipt showing that an agent of Eagle Crest received the DER letter on January 13. Compare, Beltrami v. DER, 1989 EHB 594. We note that January 13, 1990 was indeed a Saturday. Eagle Crest stated that its offices are closed Saturdays, and that DER's letter was not received by an authorized representative of Eagle Crest until January 15, 1990. (Griffin affidavit.) We must view the facts before us in a light most favorable to the non-moving party (Eagle Crest) in determining this motion. Arnoni at 24. Therefore, we must deny DER's motion to dismiss.[1]

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[1] Because of our finding here, we do not reach the issue raised by Eagle Crest that February 12, 1990 was a legal holiday for purposes of computing the appeal period.

ORDER

AND NOW, this 21st day of February, 1991, it is ordered that:

1) The Commonwealth Department of Environmental Resources' Motion to Dismiss is denied; and

2) The deadline for compliance with Pre-Hearing Order No. 1 is 60 days from the date of this order.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATE: February 21, 1991

cc: Bureau of Litigation
Library, Brenda Houck
For the Commonwealth, DER:
Barbara L. Smith, Esq.
Northeastern Region
For Appellant:
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jm

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M. DIANE SMITH
SECRETARY TO THE BOARD

DAVIS COAL	:	
	:	
v.	:	**EHB Docket No. 90-347-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** February 21, 1991

OPINION AND ORDER SUR
DEPARTMENT'S MOTION FOR JUDGMENT ON
THE PLEADINGS/MOTION FOR SUMMARY JUDGMENT

By Joseph N. Mack, Member

Synopsis

The Department of Environmental Resources' Motion for Summary Judgment is granted. Section 87.141(d) of the surface mining regulations, 25 Pa.Code §87.141(d), requires not only that backfilling equipment be maintained on a site during the course of mining, but that it be operable and capable of meeting the requirements of the reclamation plan throughout the life of the mining operation. Backfilling equipment which is "down for repair" for a period of more than one month fails to comply with the requirements of §87.141(d).

OPINION

This matter originated with the filing of a notice of appeal by Davis Coal ("Davis") on August 15, 1990 from Compliance Order No. 90G233 issued by the Department of Environmental Resources ("DER") on July 12, 1990. The

Compliance Order cited Davis for failing to comply with a previous Compliance Order (No. 90G221) issued to Davis for failure to maintain operable backfilling equipment on its mine site, in violation of 25 Pa.Code §87.141(d). Davis filed an appeal from the earlier Compliance Order at EHB Docket No. 90-351-MJ. However, since the appeal was filed more than 30 days after Davis' receipt of Compliance Order 90G221, it was dismissed as untimely by Order of the Board dated November 5, 1990.

On September 24, 1990, DER sent Davis the Commonwealth's First Request for Admissions, which Davis received on October 3, 1990. Davis has failed to respond within the required 30 days, and, thus, the statements contained within the Request are deemed admitted. Pa.R.C.P. 4014(b); R & H Surface Mining v. DER, 1989 EHB 361.

On November 28, 1990, DER filed a Motion for Judgment on the Pleadings/Motion for Summary Judgment and a brief in support thereof. Davis, although given notice of DER's motions, has chosen not to respond.

In support of its motions, DER relies on Davis' notice of appeal and deemed admissions, and the affidavits of DER counsel and the mine inspector who issued the Compliance Orders discussed herein. DER asserts that Davis has admitted, both in its notice of appeal and through its deemed admissions, that although backfilling equipment was on the site, it was not operable as required by 25 Pa.Code §87.141(d). DER contends that even if the factual contentions raised in Davis' notice of appeal are true, Davis would not be entitled to judgment since it has failed to state a claim upon which relief may be granted, and that, as a result, DER is entitled to judgment on the pleadings or summary judgment.

Our review of Davis' notice of appeal, the deemed admissions, and DER's motion and supporting affidavits leads us to conclude that DER is entitled to summary judgment.

We will first address DER's joint motions for judgment on the pleadings or summary judgment. Pa.R.C.P. 1034(a) provides that "[a]fter the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings." The Board has entertained motions for judgment on the pleadings where the motion can be disposed of by an examination of the notice of appeal, and where no material facts are in dispute and the law on the issue is clear. North American Oil & Gas Drilling Co., Inc. v. DER, EHB Docket No. 90-258-E (Opinion and Order issued January 7, 1991). Summary judgment, on the other hand, may be entered where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Pa.R.C.P. 1035(b); Summerhill Borough v. Commonwealth, DER, 34 Pa.Cmwlth. 574, 383 A.2d 1320 (1978). The Commonwealth Court in Beardell v. Western Wayne School District, 91 Pa.Cmwlth. 348, 496 A.2d 1373 (1985), quoting Goodrich-Amram 2d §1035(a):3, compares the two types of motions as follows:

> [t]he motion for judgment on the pleadings was created to permit an overall examination of pleadings in the action...after the pleadings are closed, to determine whether judgment should be entered upon the pleadings prior to trial...[while]...[t]he motion for summary judgment is designed...to provide for an equivalent summary disposition of the case where the pleadings may be sufficient, on their face, to withstand a demurrer but where, in actuality,

> there is no genuine issue of fact and this can be conclusively shown through depositions, answers to interrogatories, admissions or affidavits.

496 A.2d at 1375.

Since, in ruling on DER's motions, we have relied on Davis' deemed admissions and DER's affidavits, together with Davis' notice of appeal, summary judgment is the appropriate disposition of this matter. In ruling on a motion for summary judgment, we must view the evidence in the light most favorable to the non-moving party. Glendon Energy Co. v. DER, EHB Docket No. 90-104-F (Opinion and Order sur Motion and Cross-motion for Summary Judgment issued December 4, 1990)

The sole issue in this appeal is whether Davis failed to comply with Compliance Order No. 90G221 and the requirements of 25 Pa.Code §87.141. Section 87.141 of 25 Pa.Code discusses backfilling and grading requirements for surface mining operations. Paragraph (d) of that section states in relevant part as follows:

> Backfilling equipment needed to complete the restoration may not be removed from the operation until backfilling and leveling has been completed and approved in writing by the Department...Upon written request by the operator to the Department specifying the need to remove backfilling equipment for...required maintenance...the Department may approve, in writing, the temporary removal if inspection of the site demonstrates that the operation is in compliance with the rules of the EQB and the statutes of the Commonwealth relating to environmental protection and that the request for temporary removal is justified...Backfilling equipment shall be operable, in use and capable of meeting the requirements of the reclamation plan throughout the life of the mining operation.

Emphasis added.

By its failure to respond to DER's Request for Admissions, Davis has admitted that on June 4, 1990, when Mine Conservation Inspector Russell Dill conducted an inspection of Davis' mine site, a D9 Cat Bulldozer which Davis had been using to conduct backfilling and other earthmoving was inoperable. On Inspector Dill's site visits of June 15, 1990, July 5, 1990, and July 12, 1990, the bulldozer was still inoperable. At no time while the bulldozer was inoperable did Davis notify DER of its intention to temporarily cease operation at the mine site. Davis further admitted that during the period from June 4, 1990 through July 26, 1990 it did not maintain backfilling equipment at its site which was capable of completing restoration of the site, despite the fact that reclamation of the mine site was not complete during that period.

As the basis of its appeal, Davis argues that §87.141(d) simply prohibits backfilling equipment from being removed from the mining site. Davis asserts that its equipment was never removed from the site and that it was simply "down for repair" at the time the compliance orders in question were issued. As to the length of time the equipment was "down", Davis has admitted, by its failure to respond to DER's Request for Admissions, that during the period, at least, from June 4, 1990 to July 26, 1990, Davis did not maintain at its site backfilling equipment which was capable of completing reclamation of the mine. Clearly, Davis was not in compliance with §87.141(d) which requires that the backfilling equipment be "operable, in use and capable of meeting the requirements of the reclamation plan throughout the life of the mining operation." According to the affidavit of Mr. Dill, attached to DER's Motion, Davis never sought nor was it granted written approval from DER which would have allowed it to temporarily remove or place the equipment out of

service for maintenance. Davis has also admitted that it failed to comply with Compliance Order No. 90G221 which required Davis to either repair or replace the equipment on its site.[1]

There are no factual issues in dispute. For a period of more than one month, Davis clearly did not maintain adequate backfilling equipment on its mine site as required by 25 Pa.Code §87.141(d). Further, by its own admission, Davis failed to comply with Compliance Order No. 90G221. Therefore, DER's issuance of Compliance Order No. 90G233 was proper. Because there are no factual issues in dispute and DER is entitled to judgment as a matter of law, DER's Motion for Summary Judgment is granted and Davis' appeal is dismissed.

O R D E R

AND NOW, this 21st day of February, 1991, the Department of Environmental Resources' Motion for Summary Judgment is granted and the appeal of Davis Coal, docketed at EHB Docket No. 90-347-MJ is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

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[1]Furthermore, by its failure to timely appeal Compliance Order No. 90G221, Davis cannot now contest the finding of that Order that Davis did not maintain adequate backfilling equipment on site.

Terrance J. Fitzpatrick
TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann
RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack
JOSEPH N. MACK
Administrative Law Judge
Member

DATED: February 21, 1991

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SECRETARY TO THE BOAR

EAST PENN MANUFACTURING COMPANY	:	
	:	
v.	:	**EHB Docket No. 90-560-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: February 21, 1991**

OPINION IN SUPPORT OF ORDER
GRANTING PETITION FOR SUPERSEDEAS

By Terrance J. Fitzpatrick, Member

Synopsis

The Board grants a petition for supersedeas of an order of the Department of Environmental Resources (DER) which revoked the Appellant's permit to discharge treated wastewater to an ore pit, and which required Appellant to clean-up the ore pit. The evidence at the supersedeas hearing did not support DER's findings that the ore pit is polluting groundwater and that solid wastes and hazardous wastes are present in the ore pit.

OPINION

This is an appeal by East Penn Manufacturing Company, Inc. (East Penn), Richmond Township, Berks County, from an Order of DER dated November 26, 1990. In this Order, DER revoked the authority, previously granted to East Penn in a water quality management permit, to discharge treated

wastewater to an abandoned ore pit on East Penn's property.[1] DER also ordered East Penn to submit by February 1, 1991 a plan to clean-up wastes in the ore pit, to conduct a hazardous waste determination on solid wastes in the ore pit, and to implement the clean-up plan by December 1, 1991.

East Penn filed a petition for supersedeas on January 23, 1991. A hearing on the petition was held on January 30 and 31, 1991. On February 5, 1991, the undersigned issued an Order granting the petition. This Opinion explains the basis for that Order.

In ruling on a petition for supersedeas, the Board considers the following factors:

> 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.

Section 4(d) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, No. 94, 35 P.S. §7514(d). In addition, the Board shall not issue a supersedeas where pollution is threatened during the period when the supersedeas would be in effect. Id. Normally, a petitioner must show that all of the above factors warrant a supersedeas. Lower Providence Township v. DER, 1986 EHB 395. However, the petitioner need not demonstrate irreparable injury and likelihood of injury to the public if the petitioner shows that DER lacked authority to take the action at issue or if it is apparent that DER's

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[1] On the same day it issued the instant Order, DER also issued a National Pollutant Discharge Elimination System (NPDES) permit to East Penn. This permit authorized East Penn to discharge its wastewater to a dry swale. East Penn appealed this permit at EHB Docket No. 90-567-F. On January 25, 1991, the appeal of the NPDES permit and the instant appeal were consolidated at EHB Docket No. 90-560-F.

action was unlawful. Id., Westinghouse Corp. v. DER, 1988 EHB 857, Blumenthal v. DER, EHB Docket No. 89-230-F (Opinion issued March 6, 1990).

Applying these factors to this case, a supersedeas was issued because East Penn demonstrated at the hearing that DER's action was unlawful. DER's Order was based upon several legal and factual conclusions. As we will discuss below, DER's legal conclusions are not persuasive, and DER's factual findings are not supported by the evidence introduced at the supersedeas hearing. We will discuss each of DER's legal and factual conclusions individually.

> 1) The industrial waste East Penn is discharging to the ore pit constitutes a solid waste and is subject to the Solid Waste Management Act (SWMA), Act of July 7, 1980, No. 97, P.L. 380, as amended, 35 P.S. §6018.101 et seq. East Penn does not have a SWMA permit to dispose of solid waste. (Order, para. 4)

It is not clear to us how DER abruptly decided that the treated discharge from East Penn's facility constituted a "solid waste."[2] James Pagano testified that he was responsible for the parts of the Order regarding solid waste. (Transcript, 133-134) He testified that he concluded the liquid discharged into the pit was a solid waste because East Penn exceeded the effluent limitations set out in its water quality management permit (T. 151, 162-163). This appears to be a completely subjective standard; DER has not cited any legal rationale to support it. Moreover, Mr. Pagano's statement assumes that East Penn exceeded the effluent limitations in its water quality management permit, but there was no evidence introduced at the hearing to establish a violation of the effluent limitations.

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[2] "Solid waste" is defined as "[a]ny waste, including but not limited to municipal, residual or hazardous wastes, including solid, liquid, semi-solid or contained gaseous materials. The term does not include coal ash or drill cuttings." 35 P.S. §6018.103

In considering this paragraph of the Order, we must also consider that DER has granted East Penn an NPDES permit to discharge its wastewater to a dry swale. (See footnote 1, above). DER has not offered an explanation of why the wastewater constitutes a solid waste when it is discharged to the ore pit, but not when it is discharged to the dry swale. Along the same lines, DER has not explained why its reasoning here would not require all holders of water quality management permits and NPDES permits to also have solid waste permits.[3]

In sum, DER's conclusion that the wastewater discharged to the pit is a solid waste appears to be arbitrary.

> 2) <u>East Penn has consistently exceeded the effluent limits in its water quality management permit and the interim limits set in a consent order and agreement.</u> (Order, para. 6)

As stated in the previous section, there was no evidence introduced at the hearing that East Penn had exceeded the effluent limitations in its water quality management permit, nor was there any evidence regarding a consent order. Therefore, this allegation does not support the requirements that East Penn cease discharging to the ore pit and clean-up the ore pit.

> 3) <u>DER has determined from inspections and samples taken from the ore pit that the water in the pit is contaminated with high levels of various pollutants, including lead, and that waste solids have accumulated in the pit. These solids constitute solid wastes and the concentration of lead in the wastes and/or the pH of the wastes renders them hazardous wastes.</u> (Order, para. 7)

The evidence regarding contamination of the water in the ore pit

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[3] DER's counsel contended that the mixing of the discharge with the water already in the ore pit, and the high levels of certain contaminants in the ore pit water and sediment, rendered the water a solid waste. (T.304) We will discuss the quality of the ore pit water and sediment below.

centers around three reports which contain water sampling results: 1) the Conlin and Gray Associates report (September, 1976) (Exhibit C-1), 2) the East Penn report (September, 1982) (Exh. C-9), and 3) the Dunn Geoscience Corporation report (October, 1989) (Exh. C-2).

DER hydrogeologist Robert E. Day-Lewis testified regarding these reports. He testified that samples in all of the reports showed levels of certain contaminants which exceeded the maximum contaminant levels (MCLs) in the federal primary drinking water regulations, 40 CFR §141.11.[4] The Conlin and Gray study contained sample results which exceeded the MCLs as to pH, lead and sulfates (Exh. C-1, T. 235-238). With regard to the East Penn report (Exh. C-9), Mr. Day-Lewis testified that the samples showed levels which exceeded the MCLs for pH, lead, arsenic, copper, iron, and zinc (T. 215-224). The Dunn Geoscience report listed sample results which exceeded the MCLs for lead and cadmium (Exh. C-2, T. 239-245.)

This evidence concerning water quality in the ore pit does not support DER's order requiring East Penn to cease discharging to, and to clean-up, the ore pit. First, the fact that the water in the ore pit contains levels of certain contaminants which exceed the MCLs does not, by itself, justify DER's order. The MCLs constitute standards for public drinking water supplies, and the ore pit water is not used as a water supply.[5] East Penn reinforced this point by showing that the effluent limitations in the NPDES permit granted to East Penn were not set at levels which would meet the MCLs (T. 275-282). Second, the evidence regarding the water samples in the reports

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[4] These federal standards are incorporated into Pennsylvania's drinking water regulations. See, 25 Pa.Code §109.202.

[5] As we will discuss below, there is no evidence that the ore pit water is contaminating ground-water or private wells.

showed that the water quality in the pit has improved from 1982, the date of the East Penn report, (Exh. C-9) to 1989, the date of the Dunn Geoscience report (Exh. C-2) (T. 263-267).[6]

The evidence did not support DER's finding that the solid wastes (the water or the sediment) in the ore pit were hazardous wastes due to the concentration of lead and/or the pH of the wastes. James Pagano, a Compliance Specialist in the Bureau of Waste Management, was responsible for the language in the order relating to solid waste (including hazardous waste) (T. 133-135). Mr. Pagano concluded that the liquid in the ore pit constituted a hazardous waste based upon the analytical results contained in the East Penn report (Exh. C-9) (T. 145-146, 162). However, he admitted that he did not know whether the results relating to lead content in the East Penn report were derived by using the "extraction process" testing method which is required by the federal regulations.[7] In addition, Mr. Pagano did not know whether the pH results were arrived at by using the required tests for corrosivity (T. 147-148). See, 25 Pa. Code §261.22. Thus, Mr. Pagano's testimony does not support a finding that the liquid in the ore pit is hazardous waste.

Mr. Day-Lewis also testified regarding the sediment in the ore pit. Using data from the East Penn report (Exh. C-9), he stated that the sediment was 5 to 16% lead by weight. Using a standard reference text, he estimated

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[6] DER did not explain why it relied upon a 1982 report to take action eight years later. Such an explanation was in order, particularly since the more recent Dunn Geoscience report indicated an improvement in the quality of the ore pit water.

[7] See 40 CFR §261.24(a). This testing method is also adopted in the Pennsylvania regulations. See 25 Pa.Code §§261.24(a), 261.34(b). This "E.P. Toxicity" test is "designed to identify wastes likely to leach hazardous concentrations of particular toxic constituents into the groundwater as a result of improper management." C. C. Lee, Ph.D., Environmental Engineering Dictionary, (Government Institutes, Inc. 1989) (p. 259).

this weight to be equivalent to a lead content of 52,000 to 169,000 parts per million, as compared to a normal background range for lead of 2 to 200 parts per million (T. 224-230). Although we do not have great faith in the exact numbers Mr. Day-Lewis used, this testimony does show that the lead level in the sediment is elevated above background levels. This conclusion is buttressed by examining the Dunn Geoscience report (Exh. C-2, p. 3-9), which reported a lead level in the sediment of 9140 parts per million (T. 247).[8] The author of the Dunn Geoscience report concluded that this concentration was elevated with respect to background concentrations (Exh. C-2, p. 3-10).

These results certainly warrant further investigation, but they do not support a conclusion that the sediment is hazardous waste. As we stated above, an EP toxicity test must be conducted in order to reach this conclusion. As to whether the lead concentration in the sediment justifies the conclusion that the sediment is a solid waste, DER did not explain how it reached this conclusion. Moreover, we stated above our doubts regarding DER's conclusion that the discharge from East Penn's facility constitutes a solid waste. Since the sediment is a result of the discharge, these doubts would also apply to the sediment.[9]

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[8] If we compare the sediment lead levels in the 1982 East Penn report (52,000 to 169,000 parts per million, after conversion by Mr. Day-Lewis) to the lead levels in the 1989 Dunn Geoscience report (9140 parts per million), we see that the quality of the sediment appears to have improved over time. This is consistent with the trend in the quality of the ore pit water.

[9] Even if we were convinced that either the ore pit water or the sediment constituted a solid waste, this would not necessarily justify DER's Order. We are skeptical of DER's reasons for citing the SWMA in support of its Order. There was no evidence that DER had ever advised or ordered East Penn to apply for a solid waste permit, even though DER received the East Penn report - which it now relies so heavily upon - in 1982. Under the circumstances, DER's argument that the SWMA applies here seems calculated to justify DER's
footnote continued

4) Monitoring data from wells in the vicinity of the ore pit indicate that groundwater in the area has been polluted by East Penn's activities. (Order, para. 8.)

Again, the evidence did not support this paragraph of the Order. Mr. Day-Lewis testified that a monitoring well (well "7M") northwest of the ore pit showed signs of degradation, but he could not trace this degradation to leakage from the pit. (Exh. A-4, p.2, T. 35-36.) In addition, he stated that DER does not know the direction of groundwater flow in the area (T. 48), and that he is not aware of any data indicating that contaminants are moving from the ore pit (T. 62).

5) Samples from a private water supply located within 2,500 feet of the facility show lead levels which exceed the federal standard of 50 parts per billion. (Order, para.9)

DER did not offer any evidence in support of this paragraph of the Order. Moreover, this paragraph would not, by itself, support the action taken by DER, because it does not assert that the elevated lead levels in the well were caused by East Penn.

6) Continued use of the ore pit for disposal of industrial and solid waste would result in further pollution of groundwater.

As stated above, there was no evidence that East Penn's ore pit is contaminating groundwater. It follows that the evidence did not establish that the future use of the ore pit would cause further pollution.

7) The findings in the Order demonstrate that pollution or a danger of pollution is resulting from conditions on East Penn's property, and DER may order East Penn to correct these conditions

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continued footnote
decision, which was otherwise based upon speculative evidence, that the discharge to the ore pit should be halted and that the ore pit should be cleaned-up.

pursuant to Section 316 of the Clean Streams Law, 35 P.S. §691.316. (Order, para. 11, 12)

The evidence at the hearing did not show that East Penn is causing pollution. With regard to whether there is a "danger of pollution," we agree that it is possible that the ore pit could contaminate the groundwater. However, we note that there would be a possibility of pollution even if DER's Order were allowed to take effect. The NPDES permit issued to East Penn authorizes East Penn to continue its discharge, but to a dry swale instead of to the ore pit (T. 281-282). Mr. Day-Lewis testified that in his opinion, the discharge to the dry swale would be preferable to continuing the discharge to the ore pit (T. 258). This was because the discharge to the dry swale would allow greater aeration, bacterial decomposition, dilution, absorption, and adsorption of the contaminants in the discharge (Id.). But Mr. Day-Lewis also admitted that he is concerned that the discharge to the dry swale could cause pollution (T. 77). He admitted that DER had previously expressed concerns regarding the possibility of pollution emanating from detention ponds that would be used if the discharge to the dry swale takes place (T. 63-65). In addition, the discharge to the dry swale may terminate in a farmer's field, and there has been no hydrogeologic study of the dry swale system despite the fact that the aquifer system in the area around the end of the dry swale supplies water to private wells (T. 67, 71).

Under these circumstances, East Penn should not be forced to alter its point of discharge at this time. This is particularly true because an investigation is currently underway, pursuant to federal law, which will "fill in the data gaps" regarding the effect of the ore pit on groundwater (T. 78-79). When we consider the fact that this investigation is pending, the length of time the present situation has existed, and the fact that the water quality in the ore pit seems to be improving, it is clear that DER's decision

to change the point of discharge is, at least, premature.

CONCLUSION

East Penn demonstrated at the Supersedeas hearing that DER did not have the evidence to back-up the assertions in its Order. In such a case, where a petitioner establishes that DER's decision was clearly unlawful, it is not necessary for us to consider the likelihood of injury to the public or whether the petitioner will be irreparably injured. Westinghouse Corp. v. DER, 1988 EHB 857, Blumenthal v. DER, EHB Docket No. 89-230-F (Opinion issued March 6, 1990). Therefore, the Order issued by the undersigned on February 5, 1991, granting the petition for supersedeas, was proper.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: February 21, 1991

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WESTERN PENNSYLVANIA WATER COMPANY and ARMCO ADVANCED MATERIALS CORPORATION	:	
v.	:	**EHB Docket No. 88-325-E (Consolidated)**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: February 22, 1991**

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

By Richard S. Ehmann, Member

Synopsis

The Department of Environmental Resources' Bureau of Water Resources Management ("BWRM" or "DER") was empowered by the Water Rights Act to place conditions on the water allocation permit it issued pursuant to Western Pennsylvania Water Company's ("WPWC") application for additional allocations of water from Connoquenessing Creek and Thorn Run to be provided to customers in the Butler area. Further, it was empowered to place conditions in such a permit by Article I, Section 27 of the Pennsylvania Constitution where they were required by virtue of DER's evaluation of the application for permit pursuant to Payne v. Kassab. This legislative empowerment includes authority to impose conditions specifying mandatory conservation releases from WPWC's reservoirs to maintain downstream flow. DER is not required by the Commonwealth Documents Law to have its written general policy for review of

applications for water allocation permits codified as a regulation. Accordingly, its procedure to implement this authorization to condition such permits was not flawed by virtue of procedure selected.

BWRM's determination of the minimum volume of water to require WPWC to release from the two dams was not shown by WPWC to have been too stringent or unwarranted. Armco Advanced Materials Corporation ("Armco") showed that DER's conservation release requirements for WPWC's Thorn Run Reservoir and Oneida Reservoir/Boydstown Reservoir ("Oneida/Boydstown") set forth in the permit issued to WPWC were arbitrary and capricious because the release volumes set by BWRM were not reasonably related to protection of downstream uses and protection of the downstream aquatic community. Protection of such interests is required of BWRM in issuing these permits by both the Water Rights Act and Article I, Section 27 of the Constitution.

If BWRM's staff lacks the expertise necessary to set a release rate sufficient to protect downstream water quality in these streams or the downstream aquatic community, it must set its release requirements based upon the recommendation of those with such competency. Since Section 7 of the Water Rights Act requires BWRM's consideration of proof by the applicant of no substantial injury to the Commonwealth before issuance of these permits, BWRM may properly consider WPWC's history of willful non-compliance with the terms of prior permits in conditioning permits issued to WPWC or the granting of further permits to WPWC.

It is no defense to the existence of mandatory release rates in permits that compliance therewith may cause the rationing of water among a water supplier's customers where the evidence shows the supplier's continuing failure to develop alternative supplies and fails to show that rationing must occur.

WPWC, having the burden of proof as to its contentions as applicant for this permit, has failed to show us that BWRM abused its discretion by using two different formulas to set the release rates for WPWC's two reservoirs where WPWC is shown to use the two reservoirs in two distinctively different fashions.

BWRM erred by refusing to consider the insertion of any "triggers", allowing the reduction of the volume of a conservation release in times of severe drought. Since triggers exist in other water allocation permits invoking water supply reservoirs, refusal to consider them at all, based on WPWC's past compliance record, was an abuse of BWRM's discretion. Further, it was an abuse of discretion for BWRM to want to wait for a drought's occurrence before considering the need for these triggers or only to consider a trigger concept outside the four corners of the permit.

BWRM was correct in inserting as a condition in this permit a requirement for subsidiary permits for all new or increased bulk sales of water by WPWC to other public water supply agencies. It was also proper for BWRM to require WPWC to update its drought contingency plan where there are new conservation release requirements and the evidence shows WPWC has not been complying with its existing plan.

Armco's challenge to BWRM's issuance of a permit with a 50 year duration also has merit where the evidence shows that DER concurs that projections of water needs beyond 20 years into the future are meaningless, and prior use of 50 years for a permit's life is only based on a historical "benchmark".

Where BWRM's policy on public input during review of an application changes while a permit application is under review, to allow more input by persons potentially affected by BWRM's decision on the application, it is an

abuse of BWRM's discretion not to deal with those persons. Thus, where DER knew of Armco's interest as a downstream water user in WPWC's application for a permit and the conservation release issues, it was an abuse of BWRM's discretion not to follow the revision of its policy on review of applications for permits which provided for input from any downstream users identified by the applicant in its application.

Armco's Motion to Shift the Burden of Proof to DER from Armco under the rational in Marcon, Inc. v. Commonwealth, DER was not adjudicated herein because it was unnecessary to do so, as Armco prevailed on its issues without shifting any burden to DER. Nevertheless, there could have been no shifting of the burden of proof but only of the burden of proceeding according to Pennsylvania Game Commission v. Commonwealth, DER.

Because DER did not have access to the same volume of information from WPWC as to water use, current methods of reservoir operations, and projections of future water needs, and because of the existence of two different sets of recommendations for release rates from the Fish Commission, coupled with the newness of one of these methods, we remand this permit to BWRM. We decline, contrary to Armco's urgings, to substitute our discretion for that of DER on this issue, at least at this time.

Background

On July 29, 1983, WPWC submitted an application to DER for a water allocation permit which would authorize the withdrawal by WPWC of an additional volume of water from Connoquenessing Creek and Thorn Run for provision by WPWC to its Butler District water supply customers in and around the City of Butler, in Butler County, Pennsylvania. Five years later, on July 27, 1988, in response to that application, DER issued WPWC Permit No. WA-153-D

which authorized the withdrawal of more water from these streams, subject to various conditions. On August 22, 1988, WPWC filed its appeal with us challenging DER's imposition of specific conditions in this permit, in essence, suggesting the conditions were too stringent or otherwise unwarranted or unlawful. WPWC's appeal was assigned Docket No. 88-325-M.

Not long thereafter, on October 11, 1988, Armco filed its appeal from DER's issuance of Permit WA-153-D to WPWC. In essence, Armco's challenge is that certain of the same conditions in the permit issued to WPWC were too lenient. It also challenges specific permit conditions as arbitrary and capricious. This appeal was assigned Docket No. 88-413-F. Thereafter, DER filed a motion to consolidate these two appeals and, by Order dated April 14, 1989, they were consolidated at the instant docket number.

After consolidation, and throughout 1989 and early 1990, the parties engaged in discovery, as evidenced by our docket and by the many deposition references in the hearing record. The parties then filed their Pre-Hearing Memoranda as directed, with the last one being received by us on March 19, 1990.

On April 20, 1990, Armco filed with us its Motion To Shift The Burden Of Proof. This Motion sought to shift the burden of proof from Armco to DER, and was opposed by DER. By an Opinion and Order bearing this matter's caption dated May 21, 1990, we denied Armco's Motion.

Also on April 20, 1990, DER filed a Motion For Partial Summary Judgment, wherein it sought to bar Armco's and WPWC's challenges to Condition 9 of WPWC'S Permit. WPWC and Armco opposed this Motion. By an Opinion and Order bearing the instant case caption dated May 23, 1990, we denied DER's Motion.

The parties filed their Joint Stipulation with us on May 23, 1990. We held four days of hearings in this case on June 12, 1990 through June 15, 1990.

On July 20, 1990, having received transcripts of these hearings, we issued our order directing the filing of the parties' Post-Hearing Briefs by August 20, 1990 and Reply Briefs by September 4, 1990. These deadlines were later extended to August 30, 1990 and September 20, 1990 at the request of DER. After receiving initial Post-Hearing Briefs from each party, on September 18, 1990, we granted Armco's Motion for additional time to file Reply Briefs (consented to by all parties), making that deadline October 1, 1990. We have received each party's Reply Brief.

Based on a thorough and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. WPWC, now known as Pennsylvania-American Water Company, is a water utility under the Public Utility Code, Act of July 1, 1978, P.L. 598, as amended, 66 P.S. §101 et seq. Its registered corporate office is located at 800 West Hershey Park Drive, Hershey, Pennsylvania 17033. (B-1)[1]

2. DER is the agency of the Commonwealth of Pennsylvania authorized to enforce and administer the Act of June 24, 1939, P.L. 842, as amended, 32 P.S. §631 et seq. ("the Water Rights Act"); the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 et seq.; the

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[1]B-1 stands for Board Exhibit 1 which is the Joint Stipulation of the parties containing the facts stipulated to by all parties. In the remaining Findings of Fact, the exhibits stipulated to by all parties in their Joint Stipulation are listed as "JE-__." WPWC's separate exhibits are listed as "WPWC-___"; DER's separate exhibits are "C-___"; and Armco's are "Armco-___." References to the transcript are "T-___."

Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq.; and Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 (Administrative Code); and the rules and regulations promulgated thereunder. (B-1)

3. Appellant, Armco, is a Pennsylvania corporation with a mailing address of P.O. Box 832, Butler, Pennsylvania 16001. Armco produces, distributes, and sells steel and steel products, and is the owner and operator of the "Butler Works", located in Butler, Butler County, where a portion of its products are manufactured. The Butler Works is downstream of WPWC's water supply reservoirs and treatment plant on Connoquenessing Creek. (B-1)

WPWC's System

4. WPWC's Butler District provides community water service to the City of Butler, East Butler Borough, and portions of Butler, Center, Summit, Oakland, and Connoquenessing Townships. In addition, WPWC also sells water in bulk to municipal water authorities in the same area for distribution to their respective customers. These municipal purchasers include: Butler Area Water and Sewer Authority (serving portions of Butler Township); Center Township Water and Sewer Authority (serving portions of Center Township); Summit Township Municipal Authority (serving portions of Summit Township); and Connoquenessing Borough Authority (serving portions of Connoquenessing Borough and Connoquenessing Township). (B-1)

5. WPWC provides the community water supply service to approximately 36,000 persons and commercial and industrial water users in its service area. (B-1) Its largest customer is Armco, which uses between 30% and 35% of the water WPWC produces each day. (T-37, 40)

6. WPWC is currently authorized to withdraw water at five locations. (B-1; JE-6, 8-9; WPWC-2) These locations are: Lake Oneida Reservoir, Boydstown Reservoir, and the in-stream intake at WPWC's Oneida Valley Treatment Plant (all of which are located on Connoquenessing Creek); Thorn Run Reservoir located on Thorn Run, a tributary to Connoquenessing Creek; and Bradys Bend on the Allegheny River, where the company is authorized to withdraw up to 5.5 million gallons per day (mgd). (JE-7-9, 18; WPWC-2)

7. WPWC's Boydstown Reservoir ("Boydstown") is man-made and was built in 1897. It is located on Connoquenessing Creek at the upper end of the pool of WPWC's Lake Oneida Reservoir ("Oneida"). (JE-18) Boydstown's capacity is about 70 million gallons; it acts as a sediment catching pond for Oneida (JE-18; T-85)

8. WPWC's Oneida is also a man-made reservoir located on the main stem of Connoquenessing Creek. It was built in 1918. (JE-18; WPWC-2)

9. The Oneida/Boydstown reservoir complex was estimated to be 27% silted in the 1980 report prepared by Burgess and Niple, Limited (Burgess and Niple), consultants for WPWC. It retained an estimated capacity of 440 million gallons. (T-200; B-1; JE-18; WPWC-2) The formal siltation study of Oneida, conducted in 1988 for WPWC by Ocean Surveys, Inc. (JE-39), shows Oneida's siltation was not that great and Oneida's actual capacity (without Boydstown) was 452 million gallons. (JE-39; T-200-201)

10. WPWC's third reservoir is located on a tributary of Connoquenessing Creek known as Thorn Run. (WPWC-2; B-1) This reservoir, known as the Thorn Run Reservoir, is man-made and was constructed in 1903. (JE-18)

11. Burgess and Niple's 1987 study for WPWC (WPWC-2) states the Thorn Run Reservoir has a 180 million gallon capacity, of which an estimated 65 million

gallons is lost by being filled with sediment, leaving a capacity of 115 million gallons. The 1988 Ocean Surveys, Inc. study shows that, in fact, there is 138.7 million gallons of remaining capacity. (JE-39; T-201)

12. WPWC has no program to keep silt out of its reservoirs and has no plans to remove the existing silt therefrom. (T-112)

13. WPWC owns the land around its dams and reservoirs. (B-1)

14. Water from Boydstown flows into Oneida, and Oneida's water is transported to WPWC's treatment plant by a 24-inch gravity water main. Water from the Thorn Run Reservoir flows by a 16-inch and a 24-inch main to a point where these pipes join the 24-inch water main bringing water to the plant from Oneida. (B-1)

15. Subject to the restrictions in its permits, WPWC is also authorized and has the capacity to draw water directly from Connoquenessing Creek at WPWC's treatment plant. (B-1)

16. Finally, WPWC is also authorized to obtain up to 5.5 mgd of water from the Allegheny River. WPWC may remove water from the river at Bradys Bend and pump it through 11 miles of 16-inch pipe into either the headwaters of Connoquenessing Creek above Boydstown or into Thorn Run, at a point up-stream of WPWC's reservoir, where it flows into WPWC's reservoir system. (B-1)

Prior Allocations Of Water To WPWC

17. By an Order of Confirmation, No. WA-153, dated April 12, 1944, the Water and Power Resources Board (DER's predecessor) gave WPWC's predecessor a right to withdraw up to 4.5 mgd from Connoquenessing Creek and Thorn Run. (B-1; JE-38) The Order expressly does not convey property rights or exclusive privileges and does not authorize an infringement on Federal, State or local laws or regulations. (JE-38)

18. On June 20, 1960, the Water and Power Resources Board issued Permit WA-153-A to WPWC's predecessor, authorizing withdrawal of an additional 5.5 mgd of water from Connoquenessing Creek and Thorn Run. It also required a daily conservation release from Thorn Run and Oneida/Boydstown equal to .15 cubic feet per second per square mile of drainage area ("csm") upstream of each dam. (JE-4)

19. On February 7, 1961, the Water and Power Resources Board issued Water Allocation Permit WA-153-B to WPWC's predecessor, authorizing its withdrawal for fifty years of up to 5.5 mgd from the Allegheny River. (JE-3; B-1)

20. Permit WA-153-B expressly revoked WA-153-A, but it continued the daily conservation release requirements as to Thorn Run and Oneida/Boydstown as had been set forth in Permit WA-153-A. (JE-3)

21. On January 21, 1981, WPWC filed an application to acquire an additional water allocation from Connoquenessing Creek. In its application, WPWC stated it had withdrawn 7.27 mgd from Connoquenessing Creek in 1979. (B-1) In regard to the use of this 7.27 mgd of water, WPWC offered the Board no evidence indicating that it had any authorization or approval from DER or its predecessor to exceed the limitations on water use from this creek found in Permits WA-153 and WA-153-B or that it had even sought such approval prior to doing so.

22. The report of WPWC's consultant submitted with this application stated WPWC was going to expand Thorn Run Reservoir to increase its storage capacity. (B-1) The December 1980 Burgess and Niple report, prepared for WPWC, recommended this course of action. (JE-18)

23. In response to WPWC's application, DER's BWRM issued Water Allocation Permit WA10:1 occasionally known as WA-153-C on March 13, 1981. This

fifty-year permit authorized the withdrawal of an additional 5.5 mgd by WPWC from the three reservoirs, for a total withdrawal of 10 mgd from Connoquenessing Creek (including Thorn Run) on an average daily basis. (B-1; JE-8) It revoked Permit WA-153-A and amended Permit WA-153-B to reflect that WPWC was now permittee. (JE-8) The Permit also mandated that WPWC develop and implement both a continuous water conservation program to cover conservation of available supply and a Drought Contingency Plan to reduce water use during droughts. (JE-8)

24. Permit WA10:1 mandated that WPWC construct a larger dam near its existing dam on Thorn Run, with construction to take place in two phases. Conservation releases from this reservoir were tied into construction. Until Thorn Run Reservoir's storage was increased from 560 acre-feet to 3,400 acre-feet, WPWC was limited to withdrawing 4.5 mgd of water from the Connoquenessing Creek (including Thorn Run), at which time WPWC could withdraw 8.0 mgd. When, but only when, the increase in storage capacity from 3,400 acre-feet to 4,600 acre-feet was completed and the reservoir behind the dam was 100% full, could WPWC withdraw 10 mgd from this creek (including Thorn Run). (JE-8)

25. Permit WA10:1 also imposed a conservation release of 1.04 cubic feet per second (cfs), or .67 mgd, on WPWC until the Thorn Run dam was built, at which time the conservation release from this reservoir was to increase to 1.59 cfs, or 1.03 mgd. It also placed a conservation requirement on water to be taken in for treatment from Connoquenessing Creek directly at WPWC's treatment plant. (JE-8)

26. Neither WPWC nor Armco appealed the issuance of Permit WA10:1. (B-1)

27. Permit WA10:1 contained no conservation release for Oneida/Boydstown. DER mistakenly omitted this conservation release because it was rushing to get this permit issued in response to pressure to do so from WPWC and various legislators. (T-498)

28. After issuance of WA10:1, WPWC never began construction of the new dam on Thorn Run provided for in this permit. (T-90) WPWC did not offer the Board any evidence that it had developed any new water storage capacity for its water supply systems or had expanded any existing water reservoir storage so as to make such construction unnecessary.

29. WPWC's failure to construct the enlarged dam on Thorn Run required in WA10:1 is the second time in which it has failed to do this. In 1960, it had also committed to such construction on Thorn Run and, after permit issuance, had reneged on it. (T-89, 94)

30. Had DER known that WPWC would not build the new dam, it probably would not have issued WA10:1 to WPWC, because its issuance was based on WPWC's commitment to dam construction. (T-350-352)

31. In April of 1982, WPWC advised DER orally and in writing that it would not build a new Thorn Run dam or enlarge that reservoir because of WPWC's perception of Butler area economic conditions and WPWC's implementation of its conservation plan. (JE-20)

32. In response, BWRM advised WPWC that under the terms of Permit WA10:1, it could withdraw only 4.5 mgd from the reservoirs and must meet the rest of its demand from the Allegheny River. (JE-21)

WPWC's Latest Permit Application

33. By letter of April 4, 1983, BWRM advised WPWC it was in violation of Permit WA10:1 because WPWC had failed to start construction of the new dam within the time frame specified by this permit. The letter also said that if conditions had changed and there were deficiencies in WPWC's permit, then WPWC should apply for a new permit, since WPWC's demand for water exceeded the safe yield of Thorn Run and Boydstown/Oneida reservoirs. (JE-22)

34. On July 29, 1983, WPWC filed an application with BWRM to permit it to withdraw 10 mgd from Connoquenessing Creek and 5.5 mgd from the Allegheny River without changing its three reservoirs. (B-1; JE-7) The application was the basis for the issuance to WPWC by DER of Permit WA-153-D on July 27, 1988, which permit is the subject of this appeal. (B-1 and the Notices of Appeal filed by WPWC and Armco)

35. BWRM published notice of WPWC's 1983 application in the Pennsylvania Bulletin on October 15, 1983. (B-1)

36. At the time BWRM received WPWC's 1983 application, its policy on reviewing applications, while unwritten, was generally that subsequently spelled out in General Policy and Procedure For The Review of Water Allocation Permit Applications, dated April 16, 1985, which is Commonwealth Exhibit 5. (C-5; T-413)

37. This BWRM policy is not codified in any regulations promulgated under the Water Rights Act. (T-465-466)

38. The Water Rights Act does not explicitly state within it the policy positions stated in the two BWRM written policies on review of water allocation permit applications which are identified as C-5 and JE-1. (T-464-465)

39. A difference between BWRM's 1983 unwritten policy and that found in the 1985 written policy (C-5) is that the 1985 policy says DER will contact downstream water users that are identified in the application or which DER knows to exist, about the application, and while this was done by BWRM for applications received in 1985, it was not done in 1983 when WPWC's application for Permit WA-153-D was received. (T-413)

40. WPWC's 1983 application identified Armco as a downstream user but, in the period from 1983 to 1988 in which DER was reviewing this application, BWRM never sought Armco's comments thereon. (JE-7; T-559)

BWRM Review Of WPWC's Application

41. Though BWRM's policy does not so provide, BWRM may meet with an applicant before or after an application is formally filed to discuss the proposed permit; BWRM did meet with WPWC to discuss the proposed permit at issue here. (T-403, 428)

42. After receiving this application and publishing notice of it in the Pennsylvania Bulletin, BWRM notified various governmental agencies so they could comment on it. (T-401-402). These agencies included the Pennsylvania Fish Commission ("Fish Commission") and DER's Bureau of Water Quality Management ("BWQM"), both of which gave comments to BWRM concerning the application. (T-401, 415, 553-556)

43. The BWRM did not provide the Fish Commission any proposal as to conservation release requirements when it first sought comment from that agency. (T-426)

44. Immediately after WPWC submitted its application for permit to DER, WPWC's manager of the Butler district wrote to his superiors at the company's headquarters suggesting that WPWC's proposal to wait to build a new dam until

demand for water reached 7.8 mgd was unwise. This was because the lead time needed to build a new dam was two years or more, during which time WPWC would have to rely on Oneida and the pipeline to the river which could not deliver enough water to meet demand if the economy of the area would improve. (JE-35) Previously, in 1974, WPWC had been advised by internal correspondence of its staff's perception that WPWC needed to increase its sources of supply. (JE-37)

45. JE-6 is the report prepared by Thomas Denslinger for DER's BWRM as part of BWRM's review of WPWC's application. (T-473; B-1)

46. Denslinger has worked for BWRM since 1981. From 1981 to 1989, he was Chief of the Water Use and Water Allocation Section of BWRM and was responsible for processing the first version of permits like the one sought by WPWC. (T-344)

The First Version Of Permit WA-153-D

47. JE-9 is the first draft of permit No. WA-153-D ("First Draft") prepared by Denslinger in response to WPWC's application. (T-428; JE-9)

48. The $Q_7 10$ flow or "ten year low flow", is a drought statistic which is the average amount of water which will flow past a particular point over a seven day period in a drought with a likelihood of occurrence of once in ten years. (T-187)

49. To calculate the $Q_7 10$ flow on a portion of Connoquenessing Creek (such as one of the reservoirs), one looks at the information gathered by the water level gauge in the Connoquenessing Creek at Zelienople, which is virtually the entire watershed and then pro-rates that flow or volume directly to the area draining to a specific reservoir. (T-189)

50. In JE-9, Condition 8 sets the conservation release requirement for Oneida at 1.4 cfs, which is equivalent to .9 mgd. (T-355)

51. The Oneida conservation release was arrived at by DER using the calculation set forth in Appendix A-3 of the State Water Plan. (T-356)

52. WPWC's consultants calculated the same release rate for Oneida as DER. (T-227, 362)

53. The formula in Appendix A-3 which was used to set the release rate provides the use of the $Q_7 10$ flow at the dam and additional flow to account for the storage capacity of the reservoir, which is expressed as a percentage of average annual runoff retained. Using a graph which is a part of Appendix A-3 and is found on page 52 of the State Water Plan (JE-2), DER calculates what is called the PDF factor, expressed as a percentage figure, which is then applied to a .25 csm runoff rate minus the $Q_7 10$ csm figure. This resulting number is then added back to the $Q_7 10$ csm number to produce the conservation release rate. This release rate formula is expressed in CSM as:

$$Q_7 10 + PDF\ (.25 - Q_7 10) = \text{conservation release rate.}$$

This conservation release rate is then pro-rated to the drainage basin behind the dam to produce the conservation release rate actually required to be made. (T-359-360; JE-2)

54. When water is drawn from a source for use in the water supply system, this is called "drafting" that source. (T-360)

55. More than a $Q_7 10$ flow is used in establishing a conservation release because when a reservoir is a water source, there are often periods of time when the reservoir is drafted and no water is passing over the reservoir dam's spillway. During such times, essentially what the water company is releasing to the stream below the dam is $Q_7 10$ plus compensation for the reservoir's impoundment of the natural stream flow and its diversion of this flow elsewhere. Thus, when a reservoir's size is increased, there is an increase

in the period of time when the stream below the reservoir will not see any discharge from the reservoir if it were not for the conservation release. (T-360-361)

56. "Safe yield" is a term representing the volume of water available from a source for use by the water company during a drought of a specific intensity. In Pennsylvania, safe yield is measured using a drought with a likelihood of occurrence of once in 50 years. This volume number assumes some replenishment of the dam from upstream drainage and conservation releases from the dam based on the Appendix A-3 Formula. (T-183)

57. Using BWRM's methodology (described in Findings of Fact 54), Oneida/Boydstown's safe yield is 3.3 mgd and Thorn Run's is 1.1 mgd. (T-183) WPWC's records show that WPWC is drafting Oneida at just slightly above safe yield. (T-434)

58. Condition 9 in JE-5 is the Conservation Release Requirement for Thorn Run Reservoir. (T-355)

59. DER did not use the formula in Appendix A-3 to calculate the conservation release rate for Thorn Run Reservoir. (T-363-364, 563)

60. Unlike its use of Oneida, WPWC was drafting Thorn Run Reservoir at 3.5 times the reservoir's safe yield of 1.1 mgd. This is known as "overdrafting". WPWC drafts Thorn Run Reservoir at 3.5 to 4.0 mgd. (T-371, 432)

61. The reason that WPWC overdrafts Thorn Run Reservoir is that it pumps water into the reservoir from the Allegheny River pipeline. The pumping to Thorn Run Reservoir "makes sense" because evaporation loss is less in this reservoir than at Oneida. In the past, WPWC always pumped the water from the Allegheny River to Thorn Run Reservoir. (T-370-371)

62. The impact of overdrafting Thorn Run Reservoir at levels in excess of its safe yield is that this causes protracted periods when the reservoir level is below the spillway and, consequently, there is no discharge to the portion of Thorn Run downstream of the reservoir. (T-432-433) If it were drafted at its safe yield, the number of days where there would be no discharge over the spillway would be less. (T-368-370)

63. Rather than setting release rates based on Appendix A-3, DER "made a determination of what conservation release should be required based upon the draft rate that the company was applying to the reservoir." (T-363, 430) Based on this determination, DER calculated the release rate for Thorn Run Reservoir to be 1.73 cfs or 1.12 mgd and inserted this release rate in the first draft of permit WA-153-D. (T-363-364)

64. Generally, DER uses Appendix A-3's formula to set release rates for water supplies unless the water supply uses a run-of-stream intake (which means no water storage factor needs to be included in setting the release rate.) (T-377) In run-of-stream situations, the release rate is the $Q_7 10$ flow of the stream. (T-377)

65. WPWC's Allegheny River allocation is a run-of-stream intake. (T-378) WPWC's second such intake is its 12-inch pipe in Connoquenessing Creek at the treatment plant. (T-379)

66. The situation at Thorn Run Reservoir is unusual in Pennsylvania because of WPWC's pumping of water into Thorn Run from the Allegheny River. (T-432-433)

67. In setting Thorn Run Reservoir's release rate, Denslinger used BWRM's unwritten policy on how to deal with situations like that found at this reservoir. (T-486)

68. Denslinger is aware of only three or four other situations in Pennsylvania like that at Thorn Run Reservoir where a water supplier pumps water into a reservoir and then overdrafts the reservoir. (T-487-488)

69. Had DER had access to Ocean Surveys' report (JE-39), which shows less silt actually present than was estimated to be present in the 1980 report from WPWC's consultant, when it issued Permit WA-153-D, it would have set a conservation release at 920,000 gallons per day (gpd) at Oneida. (T-376)

70. In setting the conservation release rates for WPWC's reservoirs in the draft permit, DER considered siltation and evaporation. (T-371-372, 377)

71. WPWC's pipeline from the Allegheny River could only yield 3.6 to 3.9 mgd when the application was submitted, even though it is sized to 5.5 mgd, because silt in the pipeline limited its potential capacity. (T-185-186)

72. Based on a total safe yield of 8.0 mgd from Thorn Run, Oneida/Boydstown, and the Allegheny River, WPWC's consultants told WPWC it could not live with release rates set forth in DER's draft permit. (T-187, 191)

73. After setting these release rates in the draft permit, in February 1987 Denslinger met with representatives of WPWC because WPWC was concerned with the release rate at Thorn Run. (T-428, 435, 565)

74. This meeting and others between WPWC and DER were negotiating sessions. (T-557-558)

75. The release rate in the draft permit (JE-9) was what Denslinger felt to be necessary to protect downstream uses, to support aquatic life, and to insure compliance with water quality standards. (T-564-565)

76. Armco-1 is a second draft permit dated August 24, 1987, prepared by BWRM pursuant to WPWC's application and the negotiating sessions, which

contains different release rates for Oneida/Boydstown and Thorn Run Reservoirs. (T-565-566) The release rates in this second draft permit are for Thorn Run, 1.33 cfs, equivalent to .86 mgd, and for Oneida/Boydstown, 1.80 cfs, equivalent to 1.16 mgd. (Armco-1)

77. The release rates in Armco-1 collectively total the same volume of water to be released into the Connoquenessing Creek Watershed as was proposed to be released in total from both reservoirs in the first draft permit. (JE-9;T-566-567) The total release rate in Armco-1 is also 3.13 cfs or 2.02 mgd. (T-567)

78. A higher release rate appears in Armco-1 for Oneida because WPWC requested it. The company asked to shift a portion of the Thorn Run Reservoir release rate to Oneida, and the director of the BWRM authorized a shift of .4 cfs or .26 mgd to Oneida from Thorn Run. (T-567-568) This was agreed to by BWRM in an attempt to avoid an appeal of the release rates by WPWC, but no new calculations were made by DER to arrive at this new allocation. (T-568-569)

79. WA-153-D, as issued (JE-5), modified the proposed conservation release rates yet a third time. This was an attempt to head off an appeal from the Thorn Run Reservoir release rate by WPWC. (T-568-569)

80. In WA-153-D, BWRM rolled the Thorn Run release rate back to .67 mgd which is the release rate in the 1981 permit issued to WPWC. (JE-5, 8; T-364-369, 572-573)

81. In making this decision, BWRM made no attempt prior to the permit's issuance to study the impact of this rollback on fish and aquatic life or to see what the impact would be on the downstream water quality. (T-444-445, 570)

BWRM made no effort to see if making this rollback violated any DER regulations and it took no steps to minimize adverse impact on the environment from these new release rates. (T-571-572)

82. DER did not ask WPWC to perform any studies of either the impacts on the water quality of Connoquenessing Creek or Thorn Run or on the aquatic life therein prior to setting the release rates in Permit WA-153-D. (T-445)

Consultation With The Fish Commission

83. Denslinger admits that in setting conservation release rates, BWRM is supposed to consider the impact on downstream aquatic life and on the downstream water quality of any proposed rate. (T-552-553)

84. Denslinger says BWRM is not competent internally to consider the impacts on aquatic life and downstream water quality itself and must rely on the Fish Commission and BWQM, respectively, in regard thereto. (T-553-554)

85. Initially, the Fish Commission gave a recommendation to BWRM of 1.73 cfs as a conservation release rate for Thorn Run Reservoir, but gave no recommendation as to Oneida because it was told that BWMR and WPWC were already in agreement on a release rate for Oneida. (T-452-453)

86. The Fish Commission never changed from its recommendation of 1.73 cfs release rate for Thorn Run Reservoir. (T-454)

87. When the BWRM changed the conservation release rates to those it put in Permit WA-153-D as issued to WPWC, BWRM never checked with the Fish Commission or BWQM as to their positions on these new rates. (T-573)

88. The formula found in Appendix A-3 and used to set Oneida's release rate is the same as that found in 25 Pa. Code §105.113 (T-477-479), but Section 105.113 was promulgated in a group of regulations meant to deal with dam safety issues. (T-470)

89. 25 Pa. Code Chapter 105 is administered by DER's Bureau of Dams and Waterway Management, not BWRM. (T-471)

Triggers To Reduce Release Rates

90. In the negotiations between WPWC and BWRM the concept of conservation releases with a trigger for reducing the rate of release were discussed. (T-499)

91. WPWC made no proposals as to "triggers" regarding Oneida, but did so as to Thorn Run Reservoir. DER rejected WPWC's Thorn Run Reservoir trigger proposal as totally unacceptable. WPWC had proposed to have conservation releases only until the water level behind the dam was two feet below the spillway and, at that point, to cease any conservation release. (T-503-504)

92. Denslinger is aware of only one permit with a conservation release in it which contained a release rate reduction trigger, and in that case the trigger only reduced the release's volume; it did not eliminate it. (T-505, 579)

93. BWRM was also concerned about agreeing to a trigger for Thorn Run with WPWC because WPWC was already not following its drought contingency plan. (T-67-78, 140, 502-503, 528) DER believes that a water supplier must make efforts to reduce water demand in its system before it asks DER for conservation release reductions, and WPWC has not done this. (T-502-503)

WPWC's Compliance History

94. Richard Ross, vice president of WPWC, stated that WPWC had never complied with the conservation release requirements in any of its water allocation permits. (T-38, 63, 137) It was WPWC's general operating procedure not to comply therewith. (T-63) WPWC does not make releases to maintain downstream flows today and has no plans to do so in the future. (T-64)

95. WPWC says the reason it does not meet the permit's conservation release requirements is that to meet release requirements without pumping water from the Allegheny River it would have to require either voluntary or mandatory rationing by its customers, and WPWC refuses to pump water from that river just for low flow augmentation of Thorn Run and Connoquenessing Creek. (T-38, 137)

96. According to Ross, WPWC accepted the release requirements in the permit issued to it by DER in 1981 in order to get that permit, but it had no intention of complying therewith. (T-138-139)

97. Ross admitted that WPWC developed a drought contingency plan (JE-7) as required by the 1981 permit, which plan provides that WPWC will pump water to the reservoirs from the river when the level of the water drops to 24-inches below the spillway. (T-67-69) WPWC has never complied with this plan and it has let the water in the reservoirs fall as far as seven feet below the spillway before commencing the pumping. (T-140)

98. Ross further testified that Condition 14 of Permit WA-153-D sets a schedule for WPWC to acquire a new source of water supply, with the supply to be available within four years of the permit's issuance or by July of 1992. WPWC is not complying with this condition and has no plans to do so. (JE-5; T-144-145)

99. WPWC exceeded the maximum withdrawal rate, measured in millions of gallons per day and set in each permit issued it, in at least every year from 1970 until BWRM's issuance of Permit WA-153-D. (T-541-542)

100. Conditions 7, 8 and 9 of Permit WA-153-D require WPWC to install accurate in-stream flow monitoring equipment, but, as of the hearing date, WPWC has not done this. (JE-5; T-257)

101. Most of the water removed from the Connoquenessing Creek and Thorn Run flows back into the creek as the discharge from the Butler Sewer plant, which is between 6 and 15 miles downstream of WPWC's reservoirs. (T-522)

102. The water quality of the sewage treatment plant's effluent is poorer than the water quality of water released at the dams. (T-524, 527)

103. The failure to make the conservation releases also affects the volume of water in Connoquenessing Creek all the way to its mouth (T-546), and, thus, the quality of Connoquenessing Creek below the sewage treatment plant's discharge would be adversely affected by WPWC's failure to make the releases. (T-526)

Permit Duration

104. WA-153-D recites that it has a 50 year duration. (JE-5)

105. WPWC did not request that the permit be for 50 years. (T-147)

106. DER has projected water need in the area served by WPWC for 20 years. Beyond that point in time, Denslinger admits the soundness of the projections is speculative and projections to 50 years are meaningless. (T-529-532)

107. In the past, as to WPWC's Butler district, the longest interval between permits was 20 years. (T-547)

108. DER set the fifty year period solely because of its interpretation of the original 1939 Water Rights Act. (T-548)

109. The permit's fifty year duration stems solely from DER's perception that in 1939, 50 years was the period needed to provide adequate time to retire loans and revenue bonds issued for construction of public water supply facilities. (T-548)

Downstream Water Quality Impacts

110. In 1985, DER's BWQM issued Armco an NPDES Permit setting the effluent limitations on pollutants discharged from Armco's Butler Works. Some of these limitations are water-quality-based. (T-599-601)

111. In setting Armco's water-quality-based effluent limitations, BWQM assumed a stream flow of 3.24 mgd based on a conservation release of 4.32 mgd from reviewing WPWC's permits and a 75% allocation of the 4.32 mgd for assimilation of the wastes in Armco's discharges. (T-601)

112. Armco challenged the NPDES permit's effluent limitations which are based on this stream flow. (T-601-602)

113. When DER's BWQM calculates a water-quality-based effluent limitation on a stream controlled by a dam, it uses the conservation release figure as the $Q_7 10$ and performs a mass balance equation to establish the stream's waste assimilation criteria and then back calculates to set the water-quality-based effluent limitation for a specific discharge. (T-602-603, 607)

114. If the 4.32 mgd number used by BWQM to set these releases is in error because less water is being released by WPWC's reservoirs, BWQM would have to set more stringent effluent limits for Armco's discharges. (T-604-605, 608)

115. BWQM is currently reviewing Armco's application to renew its NPDES permit using the conservation releases in WPWC's existing permit. (T-605-606)

116. DER offered no evidence to the Board as to why, when it issued Permit WA-153-D to WPWC, BWRM deleted language as to conservation releases in Paragraphs 7 and 8 of the draft permit saying: "Failure to comply with this water release requirement shall be cause for this permit to be declared null and void." (T-574-575)

117. While BWRM's written policy on permit review was not in effect as of the date the application was submitted, it went into effect long before BWRM issued Permit WA-153-D to WPWC. (T-559-561)

The Wetted Perimeter Study

118. After WPWC filed its appeal, BWRM sought support for the permit from the Fish Commission, which, in response, volunteered to undertake a study of Thorn Run and Connoquenessing Creek. (T-710)

119. There are three basic methods of analysis with which to study a stream and determine the need for a specific conservation release. They are the "Tennant Method", the "In-Stream Flow Incremental Method" ("IFIM"), and the "Wetted Perimeter" method. (T-621-627)

120. When John Arway initially commented on the Fish Commission's behalf to Denslinger on a release rate for the Thorn Run Reservoir in regard to WPWC's pending application for permit, he used an in-house procedure based on the average daily flows in streams which is like the Tennant Method. (T-616-624, 644-645, 652)

121. The IFIM approach is the "cadillac" of the various methods and it can take years to conduct such a study. The Fish Commission has never used this method but has reviewed studies where it was the method used. (T-626-627)

122. Leroy Young has been a fishery biologist for the Fish Commission since 1988. (T-612) His job is to look at water allocation permit applications on behalf of the Commission. (T-614) He and John Arway, who is his supervisor (T-651), made a joint decision to do a Wetted Perimeter study in this matter. (T-628-629, 654)

123. Each of the three identified study methodologies has its strengths and weaknesses, without any one being clearly superior. (T-628-629)

124. The Wetted Perimeter study on Thorn Run and Connoquenessing Creek was the first one Young ever ran; he has been involved as a participant in one other. (T-629-630)

125. Young learned about the Wetted Perimeter method through readings and talking to persons in governmental agencies who had conducted such studies. (T-629)

126. He thinks some of the techniques he has been taught in connection with IFIM studies methodologies are transferable to the Wetted Perimeter methodology. (T-630)

127. Using this methodology, Young has studied Thorn Run and Connoquenessing Creeks to produce the report which is JE-10. In it, he has concluded the release rate for Oneida must be 3 cfs or 1.9 mgd and it should be 2.5 cfs or 1.6 mgd for Thorn Run Reservoir. (T-632-643)

128. Young believes that when inflow to one of these reservoirs does not equal the mandated release rate, that should trigger reduction in the mandated release to the level it equals. (T-643, 651-652)

129. Young has had no formal training in using the Wetted Perimeter Method, and the treatise which describes this methodology says that investigators must be trained before attempting measurements. (T-670-672)

130. When Young conducted his study of Thorn Run and Connoquenessing Creek, he did not use all of the techniques listed in the published studies of this method. (T-661)

131. There is no literature available which takes a position on whether this Wetted Perimeter Method is suitable or unsuitable for use in Pennsylvania, but many states use it. (T-673, 678, 716).

132. Based on Young's study of the two streams using the Wetted Perimeter Methodology, he concludes that both streams are adversely impacted currently by periods when there is no discharge from WPWC's reservoirs. (T-720-721)

133. The cost, without WPWC's pipeline to the Allegheny River being cleaned out, of pumping water to comply with the release requirements is $370 per million gallons pumped but, if WPWC were to clean the pipeline, there would be more flow and the cost would come down. (T-735-737)

134. In order to pump water to the reservoirs to comply with a release rate of 1.57 mgd, WPWC's customers would have to pay an increase of $10.59 on top of the average annual bill of $250. (T-737-738)

135. The cost of pumping river water is one which is authorized by the PUC to be passed on to WPWC's customers. (T-741)

136. At the time Permit WA-153-D was issued to WPWC, the data WPWC provided to DER (found in JE-6) showed that WPWC drafted water from both Thorn Run and Oneida simultaneously, but its 1990 data (C-1) shows that WPWC drafts all water from one reservoir and then "flip flops", drafting all the water from the other reservoir. (T-437-439)

137. Denslinger would have made different release requirements in Permit WA-153-D if, at the time it was issued, WPWC had been drafting its reservoirs in the fashion it does in 1990. (T-441-442)

138. BWRM has projected that by the year 2000, WPWC will need 11.84 mgd of water to supply its customers. (T-530)

139. BWRM received a copy of a Burgess and Niple study conducted in 1987 for WPWC only a month before the hearing in this appeal. (T-535) It was not given to DER before issuance of Permit WA-153-D, and the study had not been fully evaluated by BWRM as of the hearing date. (T-244, 535-537)

140. Burgess and Niple believe that WPWC should make a conservation release equal to the estimated $Q_7 10$ flow and should not let the creeks dry up. (T-232-233)

141. As WPWC's consultant, Burgess and Niple take the position that they believe the conservation release rates in Permit WA-153-D are too high but they concede that there are a number of ways to set release rates and that reasonable people can disagree on appropriate rates. (T-237)

142. Burgess and Niple's 1987 report is a draft, and, while six months before the hearing during depositions it was agreed that Burgess and Niple would prepare a final version of it, Burgess and Niple did not do so because they were told not to do so by WPWC's counsel. (T-244-245)

143. Counsel for WPWC is also listed as a corporate secretary of WPWC in its Notice of Appeal. (WPWC's Notice of Appeal)

144. As to Thorn Run Reservoir, WPWC's records show that in the last five years for over half of each calendar year, the water level was below the spillway so no water was discharged downstream in those periods. (T-250)

145. WPWC's records as to Oneida show that in the last five years, the reservoir's water level was below the reservoir spillway for at least one third of each year, so no water was discharged downstream in those periods. (T-251-252)

146. In the opinion of Burgess and Niple, WPWC could comply with all of Permit WA-153-D's conservation release requirements during a drought with a ten year frequency without the reservoirs running dry and marginally could also do so in a drought with a reoccurrence frequency of once in twenty years, but WPWC cannot currently make the conservation releases in the permit during a fifty year drought without the reservoirs running dry. (T-259-296)

147. The WPWC position that it does not have enough water in its system to comply with Permit WA-153-D's release requirements was not an engineering-based position but, in the opinion of Burgess and Niple, was a corporate decision. (T-280-281)

148. The cost of pumping sufficient water from the Allegheny River to make the mandated conservation releases from the reservoirs is calculated by Burgess and Niple to be $33,218 annually. (T-285-286)

149. Not complying with the conservation release requirements costs WPWC less than compliance achieved by pumping water from the Allegheny River. (T-38)

150. Population projections beyond ten years are speculative in planning for future water needs. (T-287-289)

151. Since 1970, WPWC has lost some industrial customers in the Butler area. (T-51) While WPWC says demand in Butler is not growing (T-59), WPWC admits it has received requests to sell more water in bulk to Connoquenessing Borough and Center Township. (T-105, 739)

152. WPWC has never sought a rate increase from the PUC to cover the cost of pumping water from the Allegheny River to make the conservation releases mandated by its permits. (T-67)

153. WPWC was advised when Permit WA-153-D was issued in 1988 to start developing an additional source of water supply. (JE-12; T-110-111)

154. WPWC's only response to BWRM's advice to develop another source of supply has been to clean a portion of its pipeline to the Allegheny River to restore lost pumping capacity in that portion of the line. (T-111)

155. In its 1987 study, Burgess and Niple take the position that pumping from the Allegheny River to meet conservation release requirements is wasting electric power. (WPWC-2)

156. Permit WA-153-D gives WPWC maximum water allocations from all sources totalling 15.5 mgd, (JE-5), but safe yields from its existing reservoirs coupled with an average yield from the Allegheny River of 3.6 mgd totals 8.0 mgd, with average current demand in 1987 of 7.19 mgd and projected demand by the year 2002 averaging only 6.6 mgd. (WPWC-2)

157. The 1987 study done for WPWC by Burgess and Niple presents conflicting information. On one hand it projects in Table I that by the year 2002, peak daily demand for water in WPWC's Butler District will decrease from 9.99 mgd, to 9.17 mgd, but the same study's Table 2, projecting a worst-case scenario, shows peak demand could rise to 12.27 mgd by the year 2002. (WPWC-2)

158. In its 1987 report, Burgess and Niple continue to recommend that WPWC build a new, higher Thorn Run Dam as the way to meet future water supply needs in this area. (WPWC-2)

159. The present cost for raising the height of the Thorn Run Dam is $8,530,000, and this, too, would increase available water supplies by 5 mgd. (WPWC-2)

160. According to the 1980 Burgess and Niple report (JE-18), if the dam at Thorn Run Reservoir had been raised in elevation at that time, the cost would have been $7,130,000, and at that time, there were more WPWC customers among which to spread the cost. (T-275-276)

161. Constructing an additional pipeline to the Allegheny River would cost WPWC more than building a new Thorn Run dam and would involve higher operating costs, according to this 1987 study. (WPWC-2)

162. Burgess and Niple estimate in their 1987 study that it would only cost $65,000 to clean the existing pipeline and restore it to its 5.0-5.5 mgd capacity. (WPWC-2)

163. As of the appeal's hearing date, WPWC has ruled out raising the height of its Thorn Run dam as impractical and thinks a second Allegheny River pipeline is the only practical option in terms of a source of more water. (T-58)

164. WPWC estimates it will cost $13,926,000 to lay an additional 24-inch pipeline to the Allegheny River and says this represents a $220 per year increase in cost to residential customers. (T-59) If Armco were to close its Butler Works, the cost to residential customers would be even higher. (T-60-61)

165. To design and build another pipeline to the Allegheny River from WPWC's Butler District is estimated to take 2½ to 3 years. (T-218-219)

166. If the Thorn Run Dam had been raised even to the lower height of the two height options proposed in the 1980 Burgess and Niple report, then WPWC would have had ample water available with which to make the conservation releases mandated in WA-153-D. (T-278-279)

DISCUSSION

Burden Of Proof

The first matter which must be addressed in dealing with the issues raised herein is that of burden of proof. As to matters arising from WPWC's challenge of portions of Permit WA-153-D, it is clear that under 25 Pa. Code §§21.101(a) and (c)(1), WPWC has the burden because it is challenging the permit as permittee and urging that DER erred in inserting certain conditions in its permit. Equally clear is that Armco has the burden of proof as to its contentions because it is the third party challenging DER's decision to issue this permit. See 25 Pa. Code §21.101(c)(3).

The central issue raised by all of the parties in this case is that of what, if any, conservation releases should be mandated by BWRM in WPWC's new Water Rights Act permit. It should be observed at this point that if we first find that DER is empowered to place such release requirements in permits issued under this act, we are empowered to substitute our discretion as to proper releases for that of DER, assuming we first find that DER abused its discretion in choosing the rates set forth in the permit. Warren Sand and Gravel Co. v. Commonwealth, DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975). In regard to this issue, Armco does not dispute DER's ability to set release requirements, although it argues fiercely that DER erred in setting the release requirements as low as it did. DER, of course, says it is authorized to mandate releases and the release rates specified are at exactly the right rate. Like the third of Goldilock's three bears, WPWC says these releases are wrong and should be done away with. WPWC also argues DER lacks the legal

authority to impose any conservation release and alternatively, if it has that authority, the procedure it employed was unlawful. Because of the nature of these latter arguments, we must address them first.

Authority For DER's Imposition Of Release Requirements

Citing Pennsylvania Human Relations Commission v. St. Joe Minerals Corp., 476 Pa. 302, 382 A.2d 731 (1978), for the principle that DER cannot act unless its enabling legislation clearly empowers it to do so, WPWC argues that under the Water Rights Act, the only grant of authority to DER to impose conditions in the permits it issues is found in Section 7 of the Act (32 P.S. §637), which authorizes conditions in permits only where there are conflicting water allocation requests by separate water supply agencies. WPWC then concludes that since there are no such conflicts here, there exists no authority for DER to put any conditions in WPWC's permit. Following this logic to its conclusion, this means that all sixteen conditions in this permit, including those voiding prior permits, setting the permit's duration, requiring installation of measurement devices to accurately measure the volumes WPWC drafts from the reservoirs, dealing with drought contingency plans and water conservation plans, and each and every other condition are void as unlawfully added to the permit. Thus, the essence of this argument is that absent an express legislative delegation of power, DER may only issue or deny the permit sought; it may not condition any permit issued under this Act, including the one issued to WPWC.

In reply, DER argues: (1) that Article I, Section 27 of the Pennsylvania Constitution allows it to condition this permit; (2) that Section 1904-A of the Administrative Code, and 25 Pa. Code §9.152 allow it to establish and enforce minimum standards; (3) that Borough of Collegeville v. Philadelphia

Suburban Water Company, 377 Pa. 636, 105 A.2d 722 (1954), authorizes it to condition permits; (4) that DER's interpretation of the statute should not be ignored unless clearly erroneous; and (5) that res judicata bars WPWC from challenging conservation releases not challenged in its prior permits.

Res Judicata

DER urges us to find that since WPWC failed to challenge DER's inclusion of conservation releases in WPWC's prior permits, it is barred by the principle of res judicata from challenging the concept that DER may include such releases in the present permit. In support, DER cites us to Primrose Mining Inc. v. DER, 1978 EHB 191, and Bethlehem Steel Corp. v. DER, 37 Pa. Cmwlth.479, 390 A.2d 1383 (1978). In response, WPWC says that we considered this argument in response to DER's Motion For Partial Summary Judgment and rejected it. WPWC then cites us to its brief submitted in response to DER's motion.

Our Opinion and Order of May 23, 1990, did indeed address this res judicata issue and we rejected DER's argument. Our opinion shows that we denied DER's Motion because there remained a dispute over material facts between DER and WPWC concerning whether conditions had changed, and, thus, summary judgment was inappropriate. We no longer have a factual dispute because the facts before us are now of record, and we have made our findings therefrom. We can properly review this issue now. Here, DER urges that the doctrine bars WPWC from attacking the concept that DER is lawfully empowered to place conservation releases in WPWC's permit because WPWC never raised any attack on the prior permits' conservation releases. Looking at the issue with the evidence set forth above causes us to conclude that there is an identity of the thing sued for, identity of the potential causes of action, identity of

the persons or parties, and identity of the parties against whom the claim is made. Under both Bethlehem Steel, supra, and Primrose Mining, supra, DER's argument passes the test for application of res judicata. Thus, WPWC may not raise this challenge to the concept in this appeal even though it may challenge a specific release gallonage where it varies from that in its prior permit.

DER's Duty Under Article I, Section 27

Next, we turn to DER's argument based on Article I, Section 27 of the Constitution. Article I, Section 27 of the Constitution, as adopted in 1971, states:

> The people have a right to clean air, pure water, and to the preservation of the natural scenic, historic, and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all of the people.

This Amendment does not require the passage of implementing statutes or promulgation of regulations because it is self-executing and establishes rights which it is DER's duty to protect. Commonwealth v. National Gettysburg Battlefield Tower Inc., 8 Pa. Cmwlth. 231, 302 A.2d 886 (1973), affirmed, 454 Pa. 193, 311 A.2d 588 (1973). In protecting these rights in this situation, DER is required to measure its actions concerning issuance of WPWC's permit by the three point test announced in Payne et al. v. Kassab et al., 11 Pa. Cmwlth. 14, 312 A.2d 86 (1973), affirmed, 14 Pa. Cmwlth. 491, 323 A.2d 407 (1974), affirmed, 468 Pa. 226, 361 A.2d 263 (1976). This test is:

> 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 environmental incursion to a minimum?
>
> 3. Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

Payne, supra, 11 Pa. Cmwlth. at 29.[2]

We agree with WPWC that the Water Rights Act does not explicitly provide that DER may condition permits where there are no conflicting water allocations. Our inquiry does not end at that point, however, because, as stated in Pennsylvania Human Relations Commission, supra, the powers given a state agency include those given by necessary implication. Article I, Section 27 came into existence over thirty years after the Water Rights Act, at a time when our state and its citizens were beginning to fully recognize our common need to preserve and protect our environment. We find that Article I, Section 27 of the Constitution implicitly authorizes DER to place conditions in these permits when it conducts the review thereof mandated under Payne v. Kassab, supra. To hold otherwise would require the totally illogical rejection of an otherwise sound application for a permit because the applicant either failed to recognize one of the many environmental regulations binding it or recognized it, but failed to fully address it in its application.

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[2]Mr. Denslinger testified that BWRM made no attempt to comply with part two of the Payne v. Kassab, supra, test when the conservation release numbers were put into Permit WA-153-D. The evidence shows that there is serious injury to the aquatic community and water quality in Connoquenessing Creek and Thorn Run resulting from WPWC's current operating practices. Thus, because the water in these two streams is a public, rather than a private resource, if we had agreed with the argument set forth in WPWC's Reply Brief, we would have been compelled by this evidence to find that DER erred in issuing this permit and to reverse DER by denying the application for permit.

It also appears to us that implicit within the legislative authorization to DER of the greater power to deny a permit because of harm to the Commonwealth must be the lesser power to avoid denial of the permit application by including conditions in the permit which eliminate the perceived harm. We cannot believe the legislature did not implicitly recognize that some conditioning of permits is required when it first passed this statute. How else could any agency administering this act set a permit's duration? 1 Pa. C.S. §1921 (c)(6) clearly instructs us to interpret legislative intent by looking at the consequences of a particular interpretation. 1 Pa. C.S. §1922 (1) then makes it clear that one presumption we must follow in reviewing this act is that the General Assembly did not intend an absurd or unreasonable result in enacting this statute. Accordingly, to interpret the statute to say there is no authorization for DER to impose conditions on permits would lead us to an absurd result and one contrary to the language in Pennsylvania Human Relations Commission, supra.

Dicta in cases arising under this statute also appears to support the concept that DER is authorized to insert conditions in WPWC's permit, although this point has not been directly addressed by our appellate courts. In Borough of Collegeville, supra, a group of municipalities, individuals, and corporations sought an injunction to bar the water company's construction of a dam authorized by an order of a Water and Power Resources Board. The water company filed preliminary objections to the complaint, raising the failure to exhaust statutory remedies and adequate remedy at law. On appeal from the lower court's order sustaining these preliminary objections, the Supreme Court was faced with a challenge to the conditions of the water company's permit, including a conservation release requirement such as is the main bone of

contention here. After a review of the purposes of this act, as set forth in its preamble, and the powers of the Water and Power Resources Board, the Court concluded that there was no equity jurisdiction because of an adequate statutory remedy. As pointed out by Armco's brief, the Supreme Court quoted Mr. Justice Holmes in observing:

> few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a state, and grows more pressing as population grows.

Borough of Collegeville, supra, 105 A.2d at 728.

The court specifically held prior thereto, without reference to Section 7 of the Act, that:

> The Board is empowered to issue, modify, or impose conditions in permits theretofore or thereupon issued when deemed necessary in the public interest. (emphasis supplied)

Borough of Collegeville, supra, 105 A.2d at 728.

Recently, this Water Rights Act was again before an appellate court in Commonwealth, DER v. Philadelphia Suburban Water Company, ___Pa. Cmwlth. __, 581 A.2d 984 (1990), where the Commonwealth Court was asked to review a 1989 decision by this Board.[3] We had decided that a condition in Philadelphia Suburban Water Company's permit requiring a DER issued subsidiary permit for the bulk sale of water by Philadelphia Suburban Water Company to any other

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[3]Reported at 1989 EHB 1035.

public water supply agency was beyond the scope of DER's authority under this act. Commonwealth Court has reversed our decision on this point. In so doing, it found it likely that the legislature never considered bulk sales scenario issues when adopting this act, but said that did not mean such transfers were outside the act. The Court then resorted to the same portion of Statutory Construction Act of 1972 as cited above (1 Pa. C.S. §1922 (1)), and the presumption that statutory interpretations should favor public interests over private interests, to interpret the preamble to show legislative intent to insure water is conserved, controlled, and used equitably in the best interest of all concerned, and to interpret the statute to authorize this type of condition in a permit.[4]

While it is clear the specific argument raised here has not been raised in either appellate court, both courts have recognized the need for public regulation of the withdrawal of water so as to conserve it and preserve our streams for other uses. We believe that the dicta in the aforementioned decisions represents an indication of the direction which we have pursued herein. In light of the above, where we have sustained DER's action on several different theories, we do not render an opinion on whether, as it alleges, DER is authorized by 25 Pa. Code §9.152 to condition this permit by inserting conservation releases. The same is true as to DER's arguments concerning Section 1904-A of the Administrative Code and that its own interpretation of the Water Rights Act should not be accorded great (controlling) weight.

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[4]Commonwealth, DER v. Keystone Water Company, ___Pa. Cmwlth. ___, ___A.2d___(1990). (No. 2009 C.D. 1989 issued September 26, 1990), is a companion case on the same issue decided in the same fashion.

Proper Implementation Of DER's Authority To Condition Permit

Having decided that DER has the authority to place conditions in WPWC's permit, the next question posed by WPWC is whether DER implemented that authority properly. WPWC argues that Denslinger's testimony established that BWRM has a formal written policy for permit review known as "General Policy And Procedure For The Review Of Water Allocation Permit Applications" (hereinafter "General Policy"), which incorporates Appendix A-3 of the State Water Plan as the methodology to be used to establish conservation release rates.[5] WPWC, citing Rushton Mining Co. v. DER, EHB Docket No. 85-213-F (issued January 22, 1990) and the Commonwealth Documents Law, Act of July 31, 1968, P.L. 769, as amended, 45 P.S. §1101 et seq., argues that DER's General Policy (Commonwealth 5 and JE-1) and Appendix A-3 are required to be regulations if used to set release rate permit conditions. WPWC then continues that because they are not regulations and were used to set the Oneida/Boydstown release rate, these release rates must be struck from the permit. As to the Thorn Run release rate, WPWC argues the evidence shows DER's BWRM used an unwritten policy to set that release rate, which policy also should be a regulation, and concludes this requires the deletion of that release rate, also.

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[5]WPWC has made a great fuss over references by Denslinger to a formula found in 25 Pa. Code §105.113 instead of the same formula as found in Appendix A-3. It also is concerned about how DER's General Policy wrongly references this section but it is clear from the record that the Appendix and the regulation contain identical formula, even if they are used by different programs (25 Pa. Code §105.113 deals with dam safety issues and has nothing to do with water allocation issues). While such BWRM references are sloppy, there was never any question at the hearing that BWRM utilized the same formula throughout permit review and that Denslinger used the formula in Appendix A-3 for the Oneida/Boydstown release calculation.

The fact that this policy is not in a regulation does not, standing alone, win the day for WPWC. It does require that we decide whether BWRM's policy and Appendix A-3 need to be encased in a regulation format before DER may utilize them to set conservation releases. In our opinion, it is significant in this appeal that the Commonwealth Documents Law recognizes that not every position adopted by an agency of the Commonwealth needs to be reduced to a duly promulgated regulation. Section 1102 (45 P.S. §1102) of that statute defines not only "Regulation" but also "Statement of Policy" and "Adjudication". While the statute's definitions of these three terms are not of help to us here, the fact that these three separate definitions exist makes it clear that the General Assembly is well aware that not every position taken by an agency is in regulation form and it did not insist on changing this situation when it enacted the Commonwealth Documents Law. It is also clear that by definition, a Statement of Policy can set forth substantive or procedural personal or property rights or obligations of the public, and can interpret or implement a statute enforced by the agency without needing to be a regulation.

Turning to DER's General Policy itself, we see it as a narrative of how DER goes about conducting a permit review. It is not a binding obligation of general applicability and future effect as discussed in Rushton, supra, and the cases cited therein. This General Policy is not a condition inserted in each permit as in Rushton, supra, but rather describes the process by which DER will determine what conditions it may or may not insert and if a condition will be inserted, what DER may look at before drafting the conditions to be inserted in a permit. We do not see this General Policy as establishing a standard of conduct having the force of law; rather, it announces BWRM's

intentions. See Lopata v. Commonwealth, Unemployment Comp. Bd of Review, 507 Pa. 570, 493 A.2d 657 (1985); Pennsylvania Human Relations Commission v. Norristown Area School District, 473 Pa. 334, 374 A.2d 671 (1977); and Miller v. Commonwealth, Department of Banking, 87 Pa. Cmwlth. 576, 487 A.2d 1059 (1985). The fallacy in WPWC's argument is that there was no showing of a standard condition on conservation release rates automatically placed in WPWC's permit or all allocation permits as there was in the mine drainage permits in Rushton, supra. Here, DER uses a formula referenced in the General Policy to set a conservation release tailored to the specific reservoir, the method with which this specific reservoir is drafted, and the circumstances disclosed during application review. Further, DER did not use this General Policy's formula to set the Thorn Run Reservoir release rate. It considered the General Policy's second sentence to the effect that special circumstances may require special procedures, and in its initial draft of the permit, it used a formula to set a release rate which takes into account what the evidence showed to be WPWC's nearly unique combination of overdrafting of this reservoir and reservoir refilling procedure. In our opinion this, too, demonstrates the true nature of this General Policy, and we thus reject WPWC's argument.[6]

Permit WA-153-D's Release Rates

We now must turn to the question of the specific conservation releases set in the permit issued by DER to WPWC. Here the parties argue from three separate points of view and they ask the Board to be Goldilocks by determining which result is "just right."

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[6]In issuing this permit, we see DER's action as being of an adjudicatory nature. Miller, supra.

WPWC urges that DER used the wrong numbers to determine release rates, made calculation errors on top of those numbers, used the wrong formula to set Thorn Run's release rate, and that the strain of complying with the release rates would have too drastic an impact on Butler WPWC's customers because it will compel mandatory conservation measures such as rationing. WPWC also asserts that without triggers to end mandatory releases in droughts, the release rates are arbitrary and DER lacked legal authority to set release rates here because they are unnecessary to protect downstream aquatic life or the quality of the water downstream. Armco asserts that DER set the release rates at too low a level, considering DER's duty under Article I, Section 27, that DER failed to protect downstream water quality and aquatic life in Connoquenessing Creek and Thorn Run and, thus, that DER acted arbitrarily and capriciously in setting these release rates. Finally, DER takes the middle ground and alleges naturally that its actions were lawful and its calculations and its numbers unassailable. Sadly, the facts show that this representation of DER's actions does not comport with what actually occurred.

DER's Review Of BWRM's Application

BWRM's Denslinger testified that he reviewed WPWC's application for BWRM and that BWRM's staff discussed with BWQM the conservation release requirements needed to protect the quality of downstream water. Denslinger testified that this was done because BWRM is not competent to judge what release rate is necessary to protect downstream water quality. Downstream of the dams are various waste treatment plants which discharge treated effluent to the Connoquenessing Creek (at points below where it and Thorn Run merge). The standards for the degree of treatment that is required from these plants by DER, prior to discharge of their effluents, are found on the NPDES permits

for these plants. A group of these standards, called water-quality-based effluent limitations, are set based on the specific quality and volume of the water in the stream at the treatment plant's discharge point. BWQM sets each such water-quality-based limitation in NPDES permits for plants below the dams on these two streams based on the assumption that conservation release requirements in WPWC's permits will be adhered to by WPWC and, thus, that the downstream plant's effluent can be assimilated into a certain volume of clean water already in the receiving stream. DER's BWQM could be forced to make this group of effluent limits more stringent, in turn causing downstream dischargers to build and operate more elaborate (and more expensive) treatment plants if it determined the conservation releases required in the permit were not occurring. Based on the assumed discharges, however, BWQM agreed to the conservation releases set forth in Denslinger's initial draft permit. (JE-9)

Denslinger also testified to BWRM's consultation with the Fish Commission concerning the conservation release rates for those two dams and the volume needed to protect the downstream aquatic community. Again, this was done because BWRM is not competent to judge what is needed to protect the downstream aquatic community. The Fish Commission recommended a release rate only for Thorn Run because Denslinger told it that the release rate for Oneida/Boydstown was already agreed to by DER and WPWC. The release rate for Oneida/Boydstown was set by Denslinger using the formula from Appendix A-3. At that point in time, he thought it was satisfactory to WPWC. Prior to issuance of permit WA-153-D, the Fish Commission was not provided an opportunity to make recommendations as to a release rate from Oneida/Boydstown which would protect downstream aquatic life, even though Denslinger stated that BWRM was not competent to judge what release rates were necessary to

protect downstream aquatic life. The Fish Commission's recommended release rate for Thorn Run was used by Denslinger in his draft permit.

Denslinger's initial proposal for the WA-153-D Permit in the form of a draft permit set release rates as follows:

	cfs	mgd
Thorn Run	1.73	1.12
Oneida/Boydstown	1.4	.9

After setting these rates, BWRM met with WPWC for negotiating sessions because WPWC was not happy with the draft permit, including its release rates. These meetings produced a second BWRM draft permit which is Armco's Exhibit No. 1. In this second draft permit, the release rates are:

	cfs	mgd
Thorn Run	1.33	.86
Oneida/Boydstown	1.80	1.16

BWRM did not discuss these changes with the Fish Commission and there is no evidence they were reviewed with BWQM. There was no independent evaluation of the impact on downstream water quality or the downstream aquatic community in Thorn Run conducted by BWRM before making these changes. BWRM simply switched a portion of the release rate previously set for Thorn Run to Oneida/Boydstown to accommodate a request from WPWC to do so.

This change reflected in release rates in the second draft permit did not end the disagreement on rates between WPWC and BWRM for the new allocation permit, however. As a result, Denslinger recommended to his superiors at BWRM that to prevent an appeal to this Board by WPWC as to the Thorn Run Reservoir's release rate, BWRM revert to the release rate previously calculated using BWRM's former formula and place this in WPWC's then existing permit. Denslinger felt this would eliminate an appeal by WPWC. Again, without conducting any review of the water quality impacts or impacts on the

aquatic community, and without securing a review from BWQM or the Fish Commission, BWRM, which admits its own incompetency in this area, acted to further modify these release rates to:

	cfs	mgd
Thorn Run	1.04	.67
Oneida/Boydstown	1.40	.9

These are the release rates in Permit WA-153-D now challenged by both Armco and WPWC. In the hearing, Denslinger also admitted that prior to issuance of Permit WA-153-D containing these release rates, BWRM did not make any effort to determine the environmental impact of these release rates or to keep any such impacts to a minimum.

Were Permit WA-153-D's Release Rates Set Arbitrarily

With this background, we return to WPWC's arguments and those of Armco, and we sustain Armco's argument that the release rates in this permit are arbitrary and capricious. BWRM has a series of duties under Article I, Section 27 of the Constitution, including the setting of release rates considering downstream water quality needs and the need to protect the downstream aquatic community. Of equal clarity is that BWRM did not make a sound decision on this aspect of the permit. The only defense offered for BWRM's action is that it was balancing the competing pressures from the Fish Commission and WPWC. Apparently, BWRM performed this balancing using the tried and true "coin toss" method. If, as testified by Mr. Denslinger, BWRM must rely on BWQM and the Fish Commission, because of their respective areas of expertise, for recommendations as to conservation release requirements to protect water quality and the aquatic community, then BWRM is bound by those recommendations absent evidence of error in the recommendations or alternative recommendations and data to support them. Under these circumstances, BWRM is

incompetent to do any balancing, and balancing based on competing pressures is exactly the arbitrary action DER is to avoid. Here, the Fish Commission was not even allowed a pre-issuance recommendation on the Oneida/Boydstown release, and there is no data to support the conclusion that the release rate selected is adequate to protect downstream aquatic life. Indeed, the data which exists as a result of a post-issuance study by the Fish Commission says the number ultimately selected by BWRM is much too low. Here, too, the recommendation of the Fish Commission as to a Thorn Run release rate was thrown out, based on an expediential but unanswered prayer that insertion of a lower number (arrived at using a method at variance with BWRM's own current methods) would prevent an appeal by WPWC. We cannot easily think of a more capricious and arbitrary approach that BWRM could have taken.

We also sustain Armco's challenge to DER's issuance of this permit as arbitrary and capricious based on the argument that BWRM's decision ignores its duties under Section 7 of the Water Rights Act, 32 P.S. §637. Section 7 says BWRM is to issue a permit only where the applicant demonstrates to BWRM that no substantial injury to the Commonwealth will occur. To sustain this permit issuance decision, BWRM would have us conclude that BWRM should ignore WPWC's compliance history under WPWC's prior permits when deciding whether to issue this permit, even if it shows a series of violations. Apparently BWRM reasons that that is not a substantial injury to the Commonwealth. Sadly, this is not a "water over the dam" case, and BWRM would also have us ignore the miles of what must be virtually dry stream bed created by WPWC's refusal to make the mandatory conservation releases set forth in its permit and say this, too, is not substantial injury to the Commonwealth, even when the ability to cure this condition lies exclusively within WPWC's hands by virtue

of its right to pump up to 5.5 mgd from the Allegheny River and its control of these dams. We cannot do so.

WPWC's compliance history is more aptly described as a non-compliance history. Since issuance of Permit WA-153-A to WPWC on June 20, 1960, each of WPWC's permits has contained a conservation release requirement. Indeed, WPWC's most recent permit, other than that now on appeal (JE-8), also specified in its Condition 12 that failure to comply with the low flow release requirement would render the permit null and void.[7] Despite the conditional nature of these prior permits and the indication that non-compliance would void the permit, WPWC adopted a policy of making no attempt to comply with the conservation release requirements. Its corporate vice president testified that up until the hearing date (apparently despite this appeal), as far as he knew, WPWC had never complied. Moreover, the testimony made it clear that the issue on compliance was never a lack of water with which to do so. WPWC has always found DER's BWRM willing to issue WPWC permits to take more water from its sources regardless of WPWC's history of non-compliance with its permit conditions. Indeed, WPWC has admitted it could have complied with release requirements at Thorn Run and Oneida/Boydstown simply by pumping enough Allegheny River water into the very reservoirs it was draining of water to sell to its customers. WPWC simply refused to pump water from the Allegheny River just for "low flow augmentation." As of the hearing date, WPWC's Ross testified WPWC had no plans to comply in the future with such conservation

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[7]BWRM never explained why it dropped such language from WA-153-D. Such an explanation was in order considering WPWC's compliance history.

release conditions. He also testified his company accepted its 1981 permit with the release requirements in it in order to get the permit, but that it had no intent to comply with them.

By way of further evidence as to "compliance history", the record shows that WPWC also routinely violated the withdrawal limits in its permits. At least in the period from 1979 until permit WA-153-D was issued in 1988, WPWC routinely exceeded the maximum gallons per day withdrawal limits in its permit for Thorn Run and Oneida/Boydstown. Water from the Allegheny River was available during this time period which could have been used to avoid violating the withdrawal limits, but use of this source is more costly than overuse of the two reservoirs. Moreover, WPWC twice made commitments to DER to develop a new dam to increase storage capacity and twice reneged on same. According to the evidence, WPWC has also failed to timely comply with conditions 7, 8, and 9 of Permit WA-153-D in that it failed to install the flow measuring devices mandated therein. WPWC developed a drought contingency plan as required of it in Permit WA:10-1 but has not followed it. Finally, WPWC has failed to comply with the requirements of Condition 14 of Permit WA-153-D, which mandates a schedule both for studying options for new water supply sources and the selection and development of a new water supply source.

As stated above, all uses of the stream must be considered and protected to the extent possible if BWRM is to fulfill its Article I, Section 27 duties and those arising under Section 7 of the Water Rights Act when issuing a permit. As Payne v. Kassab, supra, teaches, if injuries to other stream uses must occur, they are to be kept at a minimum. When injury to other stream uses and protracted permit violations occur, it is arbitrary and capricious for BWRM to conclude under Section 7 of the Water Rights Act that the

applicant has shown that no substantial injury to the Commonwealth (including DER's program of regulating water allocations) has occurred or will occur by issuing the new permit.

Rejection Of WPWC's Challenge To The Release Requirements

In light of the above, it should be clear that we have also rejected WPWC's attack on this permit's conservation release rates. WPWC shows us that different formulas were used to set the release rates for each dam, but that does not show us that DER's use thereof was in error. DER used the Appendix-A-3 formula with regard to Oneida/Boydstown because WPWC drafted water from it at approximately that reservoir's safe yield. The evidence showed that WPWC drafts water from Thorn Run at several times the reservoir's safe yield; thus, use of a formula which takes this into account is not unreasonable, if setting a release rate is a portion of the actions taken by DER to ensure a year-round downstream flow of sufficient water to protect other uses of the stream. It is also obvious that we reject WPWC's argument that release rates are unnecessary to protect downstream water quality aquatic life. If the normal volume of the stream with the releases being made is five, ten, or one hundred times the volume without the releases from these dams, then the fact that a fish or several fish survive in the remaining pools and flow from other sources or that this remaining amount of water is of reasonable quality does not mean the releases are unnecessary. It only means, given DER's failure to enforce the permit and WPWC's refusal to comply therewith, that the stream and downstream users of this stream have not suffered as much as they might. The releases are meant to retain the two streams, allowing them to function downstream at a level closer to what their pre-reservoir levels would be, rather than remain in their current virtually

non-functioning condition. Since there is ample water for WPWC and other uses, DER could not both perform its duties and fail to include such release rates.

In challenging insertion of these release rates in its permit WPWC asserts that compliance with these rates will force its customers into mandatory water rationing. WPWC's argument is premature. It addresses the impact of these releases from the standpoint of what will happen if there is compliance with the release requirements. The appeal before us today is not one based upon enforcement of these conditions by DER. Instead, it is a challenge to whether these release rates should be inserted in WPWC's permit in the first place. Whether their enforcement should occur or what the impact will be if DER tries to enforce them must be judged on another day in a subsequent proceeding. Compliance issues are just not relevant at this point in time. Ramey Borough v. DER, 15 Pa. Cmwlth. 601, 327 A.2d 647 (1974), affirmed on other grounds, 466 Pa. 53, 351 A.2d 613 (1976).

Such an argument must also be given serious consideration not because of the release rates impact on WPWC, but because of the impact on its customers. By use of this argument, WPWC is trying to hold its customers hostage to pressure the entire Commonwealth into letting it violate these permits, and, thus, this statute. The making of such argument deserves condemnation. Insofar as this is the crisis portrayed by WPWC, it is one which WPWC has inflicted on the very customers it is supposed to serve. WPWC's staff has warned it repeatedly to develop another source of supply, but to no avail. WPWC has twice backed out of commitments to DER to do this. Even today, its consultant's draft report prepared in 1987, recommending a new, larger Thorn Run reservoir, remains to be acted on by WPWC. Meanwhile, WPWC continues to

violate its permit. WPWC's only reason for failing to create a new source is to suggest this will cost money. This is true but is hardly a sufficient reason to place its customers' water usage in jeopardy, as it has done here. WPWC says it projects flat demand or no growth in usage, but acknowledges that it has been receiving requests from area municipalities to sell water in bulk to them, so this projection's validity is questionable at best. Moreover, this "cost" is no excuse for its violation of the environmental laws of the Commonwealth. Rochez Brothers, Inc. v. Commonwealth, DER, 18 Pa. Cmwlth. 137, 334 A.2d 790 (1975).

Finally, we are not convinced that water rationing measures would be required, as WPWC contends. WPWC says that while it is authorized to take 5.5 mgd from the Allegheny River, its high pressure line from there to the water treatment plant has become partially filled with silt or otherwise restricted so that it can only pump a maximum of 3.6 mgd. The evidence shows it has cleaned a portion of the line and was to start cleaning the remainder of it at the time of the hearings. WPWC projected that this would restore all or nearly all of this line's capacity. Moreover, its consultant's 1987 report (WPWC Exh. 2) shows average water demand of 7.19 mgd and peak demand of 9.99 mgd as of 1987. Thus, using only 5 mgd from the Allegheny River, WPWC's two dams need only jointly produce a flow of between 2.19 and 4.99 mgd. Since WPWC has been taking flows grossly in excess of this amount from its reservoirs in the past, it appears that absent an unusually severe drought, the needs of its customers can be met without rationing.

As reflected below, we are remanding this entire permit to DER for the reasons set forth herein. In doing so, we are aware that by its terms it revoked Permit WA 10:1 and WA-153-B. As reflected below, those revocations

are suspended. Accordingly, as our Order states, WPWC is authorized by these two permits to withdraw up to 5.5 mgd from the Allegheny River and 10 mgd from its other sources in accordance with the conditions of those permits. This should be ample water in light of the Burgess and Niple projections of demand.

Triggers For Modification Of Release Requirements

Next, we address "triggers" for terminating or reducing the amount of releases. Denslinger said no trigger was placed in this permit in part because DER did not trust WPWC not to abuse it, in part because it wants to see voluntary conservation efforts by the permittee before stopping releases, and in part because it likes to keep triggers out of permits. While we can see why DER does not trust WPWC not to abuse a trigger and why it wants voluntary conservation efforts to be used first, these are not sufficient reasons to eliminate all triggers in the permit; rather, they are reasons to carefully craft the trigger language and condition its use. There are triggers in other permits issued under this act, as is evident from the discussion in Borough of Collegeville, supra, 105 A.2d at 725, which mentions that permit's trigger, and from Denslinger's testimony. Moreover, the trigger in Borough of Collegeville, supra, reduced but did not eliminate the conservation release. A reduction in the volume of conservation releases also appears to us to be a reasonable option to have available if a severe drought were to create a situation where all users of a stream cannot have access to the volumes parcelled out therefor by the allocating process. Moreover, it makes less sense to wait for such a natural calamity to occur before considering how to address it than it does to address it now. Accordingly, on remand, DER is instructed to address the inclusion of triggers as to release rates for each reservoir in any permit it issues to WPWC.

Subsidiary Water Allocation Permits

The next issue specifically raised by WPWC's Post-Hearing Brief concerns whether DER could properly require WPWC not to supply any new or additional quantity of water to another public water supply agency until that agency gets a water allocation permit from DER. While in a recent appeal we had previously held that DER could not do this, this holding was appealed to Commonwealth Court. Between the time of the hearing in this appeal and the issuance of this adjudication, we were reversed on this point by decision of the Commonwealth Court in Commonwealth, DER v. Philadelphia Suburban Water Company, supra. In accordance with that decision, we hold that DER is empowered by the Water Rights Act of 1939 to impose such a condition in Permit WA:153-D issued to WPWC.

Updating WPWC's Drought Contingency Plan

The last issue raised in WPWC's appeal is whether DER reasonably required WPWC to update its drought contingency plan to address this new permit's release requirements. WPWC says that it was unreasonable because if the release requirements were arbitrary, capricious, and unreasonable, as it contends, then requiring an update to address them is also unreasonable, arbitrary, and capricious. At the hearing, the evidence made it clear that WPWC had a contingency plan but routinely failed to follow it. This alone shows that revision of the existing contingency plan to one which WPWC can follow, and which DER can also approve, is appropriate. The fact that we are remanding this permit to DER because the release rates appear to have been set with insufficient thought to protecting downstream uses only confirms the

reasonableness of this requirement, since it appears that based on the data so far available, any new permit will require conservation releases as large or larger than those in remanded Permit WA:153-D.

Permit Duration

Turning to Armco's remaining arguments, Armco argues that issuing a permit with a fifty year duration is unreasonable. On DER's behalf, DER called Mr. Denslinger as its BWRM witness. He was forthright in his testimony on direct and cross-examination. He stated that the reason BWRM proposed a permit of 50 years duration is a historical happenstance. When this act was passed in 1939, the Water and Power Resources Board (DER's predecessor) started using this length of time because at that time, this was the amount of time necessary to pay off bonds floated to finance construction of public water supply systems. In the instant appeal, this Board was provided no evidence suggesting this is still true today. Moreover, Denslinger also admitted that the permits that BWRM issues are based on projections of population growth and the need for water to serve this population. He then admitted that projections beyond 20 years are not accurate and are meaningless. Under these conditions, we cannot find a 50 year life for a permit is reasonable today. The evidence in this case dealing with new source development and WPWC's compliance history make this particularly true. Moreover, we were offered no reason why in 1990, BWRM should make all allocation permits this length. As conditions vary from public water supply to public water supply, so too should the duration of the permit which is supposed to address the needs of a specific water supply. We will not say that 1 year, 5 years, 10 years, 20 years or more is too short or too long. On remand, however, DER is to address this issue as to this application and make the permit of a reasonable duration

based on the facts before it. Its decision will be reviewed by us if an appeal therefrom is taken on this point by Armco or WPWC.

Failure To Seek Comments

Armco next argues that DER should have allowed it to comment on this permit application prior to permit issuance. The evidence establishes that prior to permit issuance, DER's BWRM was well aware of Armco's interest and of the potential impact on Armco of this permit but it made no attempt to involve Armco in the comment process, despite soliciting comments from many others. Armco argues that Section 10 of the Water Rights Act of 1939, supra, 32 P.S. §641, requires BWRM to allow Armco to comment, as does DER's General Policy, which took effect between the time the permit application was received from WPWC and the date BWRM issued this permit for DER. We disagree that Section 10 requires DER to solicit comments from Armco on WPWC's application. Section 10 deals with challenges to DER's decision (as successor to the Water Power Resources Board) on a permit application and hearings on appeals therefrom. It does not create any right of comment. Accordingly, it is clear BWRM did not violate this act in this regard.

BWRM's General Policy clearly requires it to solicit comment from the downstream water users that are identified in the application. Armco was so identified. The BWRM General Policy (DER Exh. 5) is dated April 16, 1985. This policy's date is more than three years prior to the permit's issuance. BWRM's only defense to the allegation that it ignored its policy is that this policy was not in effect when the application was received in 1983. It is not a sufficient defense. Where DER has a policy aimed at providing DER the greatest possible factual input before it makes a decision to issue, condition, or deny a permit, it must follow that policy. When it does not, it

abuses its discretion. In the future, we must expect, as to decisions on whether to issue permits, that DER will be governed by the policy in effect when the permit is under review rather than by that in effect only at the time the permit application is filed with DER. When, pursuant to our remand of this permit, DER re-evaluates this permit, as required herein, it must consider input from the downstream water users identified in WPWC's application.

Armco's Motion To Shift The Burden Of Proof

Until this point in this Adjudication, we have expressed no opinion concerning Armco's Motion to shift the burden of proof in this appeal from Armco to DER. In light of our opinion as set forth above on the issues raised in these consolidated appeals and the remand of this permit to DER, we do not feel compelled to pass on the motion's merits, since Armco has prevailed on the arguments it has raised as discussed above. As we stated in Easton Area Joint Sewer Authority, et al. v. DER et al., Docket No. 86-559-W (Adjudication issued October 29, 1990), we have recognized that in Pennsylvania, the burden of proof never shifts but under Marcon, Inc. v. Commonwealth, DER, 76 Pa. Cmwlth. 56, 462 A2d 969 (1983), the burden of proceeding may shift. Had we passed on the merits of this contention here, we would have followed that Adjudication's position on this question.

The Wetted Perimeter Study

We have also purposefully deferred review of the question as to adequate releases raised by the Fish Commission's post-permit "Wetted Perimeter" analysis of flows in Connoquenessing Creek and Thorn Run below WPWC's two dams. This evidence was offered by Armco, though it was prepared by the Fish Commission in response to a request from DER's BWRM for support from the Fish

Commission on WPWC's appeal of the permit's release rates. The conclusion from the Fish Commission's Wetted Perimeter Study is that the release rates should be even higher than those set by DER in the initial draft of permit WA:153-D, which included a release rate for the Thorn Run Reservoir recommended by the Fish Commission.

The Fish Commission's Wetted Perimeter Study was the first use of this type of study undertaken by the Fish Commission. The Fish Commission's Leroy Young, who undertook the study, had not received training in this methodology prior to the study's commencement, but relied instead on reading accounts of the methodology, talks with those familiar with it, and training he received in relation to conducting an alternative method to evaluate this same issue. Young also admitted he did not follow all of the guidelines in the methodology and the originators of study recommend training in this study technique before it is utilized. Young also testified about the other two methods of studying this problem and stated that the first recommendation from his agency was based on one of these other methods and that each method had its strong points.

Armco's offer of this information is clearly directed toward causing this Board to substitute its discretion for that of DER's BWRM by our insertion of the release rates from the Wetted Perimeter Study into WPWC's permit. We have already found BWRM's "numbers" to be improper and indicated we are remanding this permit to DER.

We are not comfortable placing all of our eggs in this basket and substituting our discretion for that of DER's BWRM on this point at this time. BWRM now has two separate recommendations for releases from Thorn Run from the Fish Commission. We have no evidence before us that the Fish Commission has

withdrawn or repudiated its first recommendation. BWRM never gave the Fish Commission a chance to make a first recommendation as to a release rate from Oneida/Boydstown which would protect downstream aquatic life and it issued the permit to WPWC before receiving this subsequent "supporting" recommendation. We believe BWRM should be allowed to evaluate the scientific validity of the Wetted Perimeter study, a new recommendation for release rate for Oneida/Boydstown based upon the same Fish Commission's methodology initially used for its first recommendation as to Thorn Run and any other readily available information so that it may have a first chance to formulate release rates based on these materials.

Finally, we must briefly address an additional reason why we are remanding this permit. The evidence we received established that DER issued this permit to WPWC in 1988 based on data available in 1983 and on an assumption that WPWC would continue to draft water from these reservoirs in the same fashion as WPWC had been drafting water from them while the permit application was under review. At the hearing, it became clear that WPWC no longer drafts these reservoirs as it did prior to permit issuance. Denslinger made it clear that had he known the current drafting method would be used, he would have written a different permit.[8] Moreover, the 1987 study by WPWC's consultant, though completed before permit issuance, was kept from DER by WPWC until discovery mechanisms employed by DER in this appeal forced its production. This study's conclusions might be read by DER to say there is no need to issue WPWC a permit allocating as much water from Connoquenessing Creek and Thorn Run as

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[8]It pains us to have to point DER to the obvious, i.e., the need to condition any new permit on compliance by WPWC with a specific plan for drafting the reservoirs. If release rates are tied in to how reservoirs are drafted, as Denslinger has stated, the need for such conditions is obvious.

WPWC seeks. For example, Table 1 of this study shows peak daily demand through year 2002 falling from 9.99 mgd in 1987 to 9.17 mgd. If all that is needed is less than 10 mgd, then 5.0 million gallons of this water allocation is not necessary to meet future needs of WPWC. This is not the only pertinent revelation in the study, however, since a worst case scenario in this same study shows a peak daily demand by the year 2020 of 15.90 mgd (WPWC-2), and the study says it uses both sets of projections to evaluate possible courses of action for WPWC. While its track record on this permit makes us cautious about this remand, we believe a second chance for BWRM to couple our opinion and this additional information is warranted, since we do not want to assume DER's issuance role as to future water allocation permits.

We believe DER's handling of this Water Allocation Permit leaves much to be desired. It is attempting regulation in a critically important area based on a statute which is half a century old. Moreover, the statute is vague and contains internal inconsistencies. Further, DER is attempting regulation in this allocations area without regulations. In short, the need for new legislation is obvious.

We will retain jurisdiction over this permit and this appeal, however, to insure prompt action by DER on this remand and a timely review of any challenges to DER actions taken in response to this remand. Accordingly, we enter the Order set forth below.

CONCLUSIONS OF LAW

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

2. WPWC bears the burden of proof as to its contentions in this appeal pursuant to 25 Pa. Code §21.101(a) and (c)(1).

3. Armco bears the burden of proof as to its contentions in this appeal pursuant to 25 Pa. Code §21.101(c)(3).

4. The concept of res judicata bars WPWC from challenging DER's authority to condition this permit in a fashion similar to that which it conditioned WPWC's prior unappealed permits.

5. Pursuant to its obligations under Article I, Section 27 of the Constitution, as quantified in Payne v. Kassab., supra, DER is empowered to insert conditions in water allocation permits issued under the Water Rights Act.

6. The legislature implicitly granted DER the power to place appropriate conditions in allocation permits issued pursuant to the Water Rights Act, since any other interpretation of this statute would lead to an absurd result and would favor private interests over public interests.

7. DER's use of the procedures set forth in its written General Policy for review of these types of permits did not violate the Commonwealth Documents Law, supra, because this policy need not be codified in a regulation.

8. The formula in Appendix A-3 which DER used to set a release rate for the Oneida/Boydstown Reservoir did not have to be codified as a regulation prior to its use as to this case.

9. The unpublished alternative formula used by DER to set the release rate for Thorn Run Reservoir did not have to be codified as a regulation prior to its use by DER as to this permit.

10. BWRM's decision as to the two conservation release requirements to place in the permit issued to WPWC was made arbitrarily, unreasonably, and

capriciously. It was not based on the methodologies and procedures developed by BWRM to set conservation release rates.

11. The fact that DER uses different formulas to set release rates for different reservoirs did not make DER's actions arbitrary and capricious where the facts justified their use.

12. In issuing a permit under the Water Rights Act, both this act and Article I, Section 27 mandate that BWRM consider downstream uses of the water in this stream.

13. In issuing a permit under the Water Rights Act, the act allows DER to consider the applicant's history of compliance with its permit, because it is only to issue a permit where the applicant shows no substantial injury to the Commonwealth.

14. In issuing a permit under the Water Rights Act, Article I, Section 27 mandates that adverse downstream environmental impacts are minimized by the Permit issued.

15. WPWC failed to show that the conservation releases are not necessary to protect downstream water-quality-based stream uses and the downstream aquatic community.

16. The fact that compliance with its permit's terms may make water more costly to WPWC's customers is not a justification for the elimination of the conservation release requirements in WPWC's permit.

17. A challenge to release requirements contained in a water allocation permit based on the impact of future compliance therewith is premature, under Ramey Borough, supra, in an appeal from the initial insertion of these conditions.

18. DER's insertion of conservation releases in WPWC's permit is not in error because of an assertion that it may cause the rationing of water among WPWC's customers, where proof thereof is not forthcoming.

19. DER's refusal to consider the insertion of a "trigger" in WPWC's permit to reduce the volume of the conservation release during drought conditions was unreasonable, arbitrary, and capricious.

20. DER properly conditioned WPWC's permit to require water allocation permits prior to any new or increased bulk rates of water by WPWC to other water supply agencies.

21. Where WPWC has a drought contingency but fails to follow same, it is not unreasonable for BWRM to require the plan's revision so that one exists which BWRM can approve and WPWC will follow.

22. DER's issuance of a permit with a 50 year duration was unreasonable, arbitrary, and capricious, where it admitted projection on water needs beyond 20 years is meaningless and failed to show any basis other than historical happenstance for use of this period.

23. Where, during a five year period of permit review, and at least two years prior to permit review, DER revises its policy on permit application review to allow greater public participation therein, and where DER knows of a party who falls within the new group of potential participants who is interested in the decision review process, DER acts unreasonably if it refuses to involve such a party in the review process.

24. Where the permit-issuing agency lacks expertise in a field related to the issuance of its permits and relies on another agency for recommendations therein, it is arbitrary and capricious for the permit-issuing agency to issue a permit which totally ignores those recommendations.

25. Where this Board possesses the authority to substitute its discretion for that of DER, it does not abuse its authority by refusing to do so where subsequent to permit issuance, additional factual information has been developed which DER did not have an opportunity to review prior to permit issuance.

ORDER

AND NOW, this 22nd day of February, 1991, it is ORDERED that:

(1) The appeal of WPWC on the issue of the insertion of "triggers" to reduce conservation releases in its permit is sustained, but the appeal is denied on all other issues;

(2) the appeal of Armco is sustained;

(3) Permit WA-153-D issued by DER's BWRM to WPWC is remanded to DER for further review and evaluation in light of the above opinion and the points addressed therein;

(4) insofar as the issuance of Permit WA-153-D to WPWC was intended by DER to void Permits WA-153-B and WA 10:1 as of its issuance, these permits are reinstated during DER's further evaluation of this permit pursuant to this Order; and

(5) DER is to make its final decision on the issuance of Permit WA-153-D and any conditions to be contained therein within ninety days of the date of this Order.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK*
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: February 22, 1991

* Member Fitzpatrick concurs in the result only.

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M. DIANE SMITH
SECRETARY TO THE BC

WESTINGHOUSE ELECTRIC CORPORATION	:	
v.	:	**EHB Docket No. 88-319-F**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: March 1, 1991**

OPINION AND ORDER SUR MOTION TO STRIKE DOCUMENTS AND PRECLUDE EXPERT TESTIMONY

By Terrance J. Fitzpatrick, Member

Synopsis

A motion filed by the Department of Environmental Resources (DER) to strike documents and to preclude expert testimony to be offered by Westinghouse Electric Corporation (Westinghouse) is denied. Westinghouse may move to amend its pre-hearing memorandum based upon a study which was completed after the discovery period closed. In this situation, the Board will grant DER permission to conduct additional discovery regarding the study.

OPINION

This proceeding involves both a complaint for civil penalties filed by DER against Westinghouse, and an appeal by Westinghouse from an order of DER which required Westinghouse to resume operation of an air stripping tower. For purposes of this Opinion, it is sufficient to state that both of these matters, which have been consolidated, involve alleged contamination of groundwater in the vicinity of Westinghouse's former elevator manufacturing plant in Cumberland Township, Adams County.

This Opinion and Order addresses DER's "Motion to Strike Documents Generated and Filed After Close of Discovery and After Commencement of Hearing and Motion to Preclude Expert Testimony Enlarged After Close of Discovery," which was filed on September 5, 1990. In its motion, DER seeks to exclude from the upcoming hearings[1] a letter dated July 3, 1990, signed by Westinghouse's consultant Patrick F. O'Hara, which Westinghouse submitted to the Board and DER on August 2, 1990 via amendments to its pre-hearing memorandum and its response to pre-hearing order number 2.[2] In the alternative, DER seeks permission to conduct discovery regarding the letter.

DER argues in support of its motion that the letter should be excluded, and that Westinghouse's expert witnesses Roffman and O'Hara should be precluded from testifying regarding its contents, because the letter was not produced until the re-opened discovery period had elapsed. In addition, DER asserts that both Dr. Roffman and Mr. O'Hara had stated during their depositions that they had not studied the transfer of TCE and TCA from air to soil. In support of its arguments, DER cites Pa. RCP 4003.5(c), which provides that to the extent the facts known, or opinions held, by an expert have been developed during discovery, the expert's testimony at trial may not be inconsistent with or go beyond the scope of his testimony at deposition.

Westinghouse filed a response and a brief opposing DER's motion. Westinghouse asserts that the July 3, 1990 letter was not produced at an

---

[1] Five days of hearings were held in December, 1989. The undersigned re-opened discovery after these hearings to allow both Westinghouse and DER to depose certain witnesses prior to scheduling of further hearings.

[2] The first sentence of the letter states that it "provides an estimate of the concentration in groundwater of trichloroethylene (TCE) and trichloroethane (TCA) from a permitted air discharge at the Elevator Plant Site in Adams County, Pennsylvania."

earlier time because the studies upon which it is based had not been completed. Westinghouse states that Mr. O'Hara's letter, which reflects his attempts to ascertain the amount of contaminants transferred from air to soil, was based in large measure upon Dr. Roffman's work, which addressed whether contaminants were transferred from air to soil. Dr. Roffman's work was not completed until March, 1990. Westinghouse asserts that it has merely supplemented its earlier responses to DER's discovery requests. In addition, Westinghouse contends that DER is seeking to suppress relevant information, and that DER could have asked for leave to conduct additional discovery regarding the July 3, 1990 letter.

We will deny DER's motion to the extent it seeks to preclude our consideration of the July 3, 1990 letter and expert testimony based upon it. We do not interpret Pa. RCP 4003.5 as constituting an absolute bar against evidence which only came into existence after discovery was completed, as is the case here. In addition, we do not have any information which would lead us to conclude that Westinghouse should have conducted the analysis in the O'Hara letter at an earlier time, so that the analysis would have been available during the earlier discovery proceeding. Finally, Westinghouse does not object to DER conducting further discovery regarding the O'Hara letter.

Under the circumstances, we will deny DER's motion to strike the O'Hara letter and expert testimony based upon it. We will, however, allow DER to conduct additional discovery regarding the letter.

ORDER

AND NOW, this 1st day of March, 1991, it is ordered that:

1) DER's motion to strike the July 3, 1990 letter signed by Patrick F. O'Hara, and expert testimony based upon it, is denied.

2) DER may conduct discovery regarding the O'Hara letter and expert testimony which will be based upon it. Such discovery shall be completed by April 12, 1991.

3) Hearings will be scheduled for some time after May 1, 1991.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge

DATED: March 1, 1991

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M. DIANE SMITH
SECRETARY TO THE BOA

LAWRENCE BLUMENTHAL	:	
	:	
v.	:	**EHB Docket No. 89-230-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: March 1, 1991**

OPINION AND ORDER SUR
APPLICATION FOR AWARD OF FEES AND EXPENSES

By Terrance J. Fitzpatrick, Member

Synopsis

An application for award of fees and expenses under the Costs Act, 71 P.S. §2031 et. seq., is dismissed without prejudice. A ruling on a petition for supersedeas is not an "adjudication," and an adjudication must be issued before the Board can consider an application for an award of fees and expenses.

OPINION

This is an appeal by Lawrence M. Blumenthal (Blumenthal) from an order of the Department of Environmental Resources (DER) dated July 18, 1989, and amended on September 13, 1989. In the amended order, DER directed Blumenthal, and others, to take certain actions to study and clean-up soil which was contaminated with lead at a site in Waynesboro, Franklin County. Blumenthal filed a petition for supersedeas, and on March 6, 1990, after a hearing, the Board granted the petition.

This Opinion and Order addresses Blumenthal's "Application for Award

of Fees and Expenses" filed on July 23, 1990. In this application, Blumenthal seeks an award of attorney's fees and expenses under the "Costs Act,"[1] Act of December 13, 1982, P.L. 1127, No. 257, 71 P.S. §2031 et seq. In support of his application, Blumenthal contends among other things, that he was a prevailing party on his petition for supersedeas, that DER's position was not substantially justified, and that the amount he is seeking to recover ($9,857.45) is reasonable.

DER filed an Answer opposing the application. DER contends that an award cannot be made because the Board's decision on the petition for supersedeas was not a final disposition of an adversary adjudication. DER also contends that the application is flawed in that it was filed more than thirty days after the alleged final disposition. Blumenthal then filed a brief in reply to DER's Answer, contending that the decision on the supersedeas petition can form the basis for an award of fees and expenses, and also contending that its application was timely.

We agree with DER that a decision on a petition for supersedeas cannot form the basis for an award under the Costs Act. The Costs Act provides that an application for an award of fees and expenses shall be filed within thirty days after the "final disposition of the adversary adjudication." 71 P.S. §2033(b). The Act defines "adversary adjudication" as "[a]n adjudication as defined in 2 Pa. C.S. §101 ... ." The term "adjudication" is defined in 2 Pa. C.S. §101 as:

> Any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the

---

[1] More formally titled: "An Act requiring every Commonwealth agency to award certain fees and expenses in certain agency actions and providing for appeals from decisions of an adjudication officer."

> parties to the proceeding in which the adjudication is made. The term does not include ... .

(emphasis supplied)

The courts have held that interlocutory orders are not adjudications because they are not final determinations. See, Bethlehem Mines Corp. v. Commonwealth, DER, 13 Pa. Commonwealth 213, 318 A.2d 373 (1974). A ruling on a petition for supersedeas is an interlocutory decision. Borough of Baldwin v. Commonwealth, DER, 16 Pa. Commonwealth 545, 330 A.2d 589 (1974). Therefore, it follows that a ruling on a petition for supersedeas is not an adjudication, and cannot serve as a basis for an award of fees and expenses under the Costs Act.[2]

Based upon the above reasoning, we will dismiss Blumenthal's application for an award of fees and expenses, without prejudice to his right to refile it when the Board does issue an adjudication.

---

[2] In light of our finding on this issue, it is not necessary to address the other arguments raised by the parties.

ORDER

AND NOW, this 1st day of March, 1991, it is ordered that the Application for Award of Fees and Expenses filed by Lawrence M. Blumenthal is dismissed, without prejudice to his right to refile it after the Board issues an adjudication.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 1, 1991

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M. DIANE SMITH
SECRETARY TO THE BOARD

CAMBRIA COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 90-394-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 4, 1991

OPINION AND ORDER SUR
PETITION FOR RECONSIDERATION

By Joseph N. Mack, Member

Synopsis

DER's Petition for Reconsideration of an Order imposing sanctions for noncompliance with Pre-Hearing Order No. 1 is denied where DER has not presented exceptional circumstances warranting reconsideration.

OPINION

This matter arose on September 24, 1990 with the filing of a notice of appeal by Cambria Coal Company ("Cambria") seeking review of the Department of Environmental Resources' ("DER") termination of its surface mining permit.

On September 26, 1990, the Board issued Pre-Hearing Order No. 1 requiring Cambria to file a pre-hearing memorandum on or before December 10, 1990 and DER to submit its pre-hearing memorandum within 15 days of receipt of Cambria's memorandum. On December 14, 1990, when no pre-hearing memorandum had been submitted by Cambria, the Board issued a Rule to Show Cause why

Cambria's appeal should not be dismissed, which was returnable January 3, 1991. Cambria responded to the Rule on January 3, 1991 and simultaneously submitted its Pre-Hearing Memorandum. Thereupon, the Rule to Show Cause was discharged.

When no pre-hearing memorandum was filed by DER within 15 days thereafter, a Rule was issued upon DER on January 24, 1991 to show cause why sanctions should not be imposed for failure to comply with Pre-Hearing Order No. 1. The Rule was returnable on or before February 13, 1991.

No response was received from DER until February 19, 1991, at which time DER faxed to the Pittsburgh Office of the Board a letter stating that, due to an oversight, DER's counsel had not become aware of the Rule to Show Cause until that day and requested an extension until February 22, 1991 in which to file its pre-hearing memorandum. The following day, February 20, 1991, DER's counsel faxed a second letter to the Pittsburgh Office stating that Cambria's counsel did not oppose the request for an extension. No motion for an extension of time was filed, however.

On February 21, 1991, this Board Member issued an Order barring DER from presenting its case-in-chief as a sanction for failure to comply with Pre-Hearing Order No. 1 and failure to respond to the Rule to Show Cause. On that same day, DER submitted its pre-hearing memorandum.

The matter now before us is a Petition for Reconsideration of our February 21, 1991 Order, filed by DER on February 25, 1991. As the basis for its Petition, DER states that it failed to respond to the Rule to Show Cause because it had been misfiled internally, that upon discovering its mistake DER

requested an extension by a panafax letter, that opposing counsel did not object to the extension, and, finally, that Cambria was not prejudiced by the late filing of DER's pre-hearing memorandum.

The Board's rules provide that reconsideration may be granted only for compelling and persuasive reasons which are generally limited to the following circumstances:

> (1) The decision rests on a legal ground not considered by any party to the proceeding and that the parties in good faith should have had an opportunity to brief such question.
>
> (2) The crucial facts set forth in the application are not as stated in the decision and are such as would justify a reversal of the decision. In such a case reconsideration would only be granted if the evidence sought to be offered by the party requesting the reconsideration could not with due diligence have offered the evidence at the time of the hearing.
>
> 25 Pa.Code §21.122(a)

With regard to interlocutory orders, such as the one involved here, reconsideration will be granted only when "exceptional circumstances" are shown. City of Harrisburg v. DER, EHB Docket No. 88-120-F (Opinion & Order issued May 30, 1990); Salford Township Board of Supervisors v. DER, 1988 EHB 676; Conneaut Condominium Group v. DER, 1987 EHB 504.

A similar situation arose in Wharton Township v. DER, 1989 EHB 1364. In that case, DER failed to file its pre-hearing memorandum despite two notices from the Board requesting it to do so. Sanctions were imposed on DER precluding it from presenting its case-in-chief. DER petitioned for reconsideration. The basis for its petition was that the intervening party had not sent a copy of its pre-hearing memorandum to DER's counsel at the Pittsburgh Office of Chief Counsel but, rather, had sent it to the Harrisburg

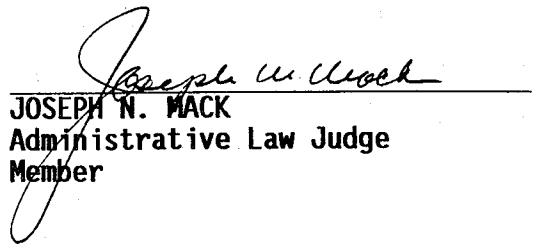
Office. The petition was denied for failure to present sufficient circumstances warranting reconsideration.

Similarly in the instant case, DER has not presented any exceptional circumstances which would warrant reconsideration of the February 21, 1991 Order. We cannot accept DER's argument that this matter was resolved by the filing of its pre-hearing memorandum on February 21, 1991, more than one month after it had been due, and after failing to respond to a Rule to Show Cause. Nor can we justify DER's failure to file a timely response to the Rule to Show Cause where the reason for the failure was that the Rule had been misfiled internally and the error was not discovered until almost one week after the Rule was returnable. These do not constitute exceptional circumstances for which reconsideration may be granted.

O R D E R

AND NOW, this 4th day of March, 1991, DER's Petition for Reconsideration is denied.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 4, 1991

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M. DIANE SMITH
SECRETARY TO THE BO

CECELIA AND TONY RECKLITIS	:	
	:	
v.	:	**EHB Docket No. 90-477-B**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 5, 1991
and NORTHAMPTON TOWNSHIP, Permittee		

OPINION AND ORDER SUR
MOTION TO DISMISS AND PETITION
FOR ALLOWANCE TO APPEAL NUNC PRO TUNC

By Thomas M. Ballaron, Hearing Examiner

Synopsis

A third party appeal will be dismissed for lack of jurisdiction since it was not filed with the Environmental Hearing Board (Board) within thirty days of the publication of the Notice in the Pennsylvania Bulletin of the adverse action taken by the Department of Environmental Resources (DER). The Petition for Allowance to Appeal *Nunc Pro Tunc* will be denied when the Appellants have failed to demonstrate fraud or breakdown in the operations of the Board.

OPINION

In the present matter, Mr. and Mrs. Recklitis (Appellants) have filed a third party appeal from the issuance by DER of a water obstruction and encroachment permit (permit) to Northampton Township (Township) on August 16, 1990. Notice of the permit was published in the Pennsylvania Bulletin, on September 1, 1990, 20 Pa.B. 4662; Appellants did not file their Notice of

Appeal until November 5, 1990. DER, contending that the appeal was not filed in a timely manner, moved to dismiss; Appellants answered and filed a Notice of Appeal *Nunc Pro Tunc.*

The genesis of this dispute lies with certain drainage problems on the Appellants' property which they argue were caused by the Township's failure to properly control development of the surrounding areas. According to the Appellants, this dispute was resolved through an agreement with the Township which allegedly required it to include in its permit application a request to pipe approximately 670 feet of a drainage course to prevent further damage to the Appellants' property. It was obviously the omission of this element in the permit that generated the appeal. The Appellants claimed that they did not learn of the omission until October 27, 1990, since the published notice did not indicate that the installation request had been denied. Contending that their appeal period was triggered by receipt of actual notice on October 27, 1990, rather than the publication date of September 1, 1990, the Appellants assert that their appeal was indeed timely. In the alternative, the Appellants argue that they should be granted leave to appeal *nunc pro tunc.*

Neither argument is convincing. With regard to the Appellants' initial contention, the permit was issued pursuant to §9 of the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 *et seq.* As required by 25 Pa.Code §105.19(a), DER caused the notice of the permit issuance to be published in the Pennsylvania Bulletin. The publication in the Pennsylvania Bulletin constituted proper notice to Appellants of DER's action; see 1 Pa.Code §5.4 relating to constructive notice and P.R.I.D.E. v. DER, 1986 EHB 905. DER was not obligated or required to include any information in its notice regarding its review and disposition of

that part of the application involving the settlement agreement between Appellants and the Township or provide any explanation of how it arrived at the conditions specified in the permit, Quaker State Oil Refining Corp. v. DER, 1986 EHB 245.[1] The Appellants had thirty days from the publication of the notice in the Pennsylvania Bulletin within which to file their appeal. Blevins v. DER, 128 Pa. Cmwlth. 533, 563 A.2d 1301 (1989); Lower Allen Citizens Action Group v. DER, 119 Pa. Cmwlth. 240, 546 A.2d 1330 (1988). Having failed to file within the prescribed period, the Board does not have jurisidiction to consider their appeal. Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976).

The appellants have also petitioned for leave to appeal *nunc pro tunc*. The Board's rules of practice and procedure at 25 Pa.Code §21.53(a) provide a framework for reviewing these petitions:

> (a) The Board upon written request and for good cause shown may grant leave for the filing of an appeal *nunc pro tunc*; the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in Courts of Common Pleas in the Commonwealth.

It is well settled that "good cause" constitutes fraud or breakdown in the operation of the Board. Kerry Coal Company v. DER, EHB Docket No. 90-291-MJ (Opinion issued September 27, 1990); Marcon v. DER and National Waste and Energy Corp., EHB Docket No. 90-078-E (Opinion issued May 8, 1990). Appellants have not alleged this, arguing instead that the appeal should be allowed, essentially, as a matter of fundamental fairness due to several factors. These include their ignorance of the law, their lack of any adequate

---

[1] To the extent the Appellants might have been unsure of the scope of DER's action, they had a duty to inquire. J. P. Mascaro & Sons, Inc., et al. v. DER, 1989 EHB 869.

remedy at law, their exhausted finances, their misplaced trust in the Township and the allegedly inadequate notice from DER. (Appellants' Petition paragraphs 1-17). In support of this argument, they have only cited Lower Allen, *supra*, contending that as taxpayers they have a right to be heard. In effect Appellants are requesting that the Board consider the impact of their exigent circumstances as good cause. While certainly presenting a sympathetic picture, there is simply no statutory or case law authority upon which to base such an expansion of the very narrow exception to the jurisdictional requirement of timely filing found in 25 Pa.Code §21.53. Neither potential injustice nor hardship is sufficient to justify granting the requested relief. Blevins, *supra*, Rostosky, *supra*.

Having determined that Appellants did not file their appeal in a timely manner, and that they have failed to demonstrate good cause as required by 25 Pa.Code §21.53, the appeal must be dismissed.

O R D E R

AND NOW, this 5th day of March, 1991, it is ordered that the Motion to Dismiss filed by DER is granted; the Petition for Leave to Appeal Nunc Pro Tunc filed by Appellants is denied, and the appeal is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 5, 1991

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For Permittee:
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M. DIANE SMITH
SECRETARY TO THE BOARD

FRANK COLOMBO, d/b/a COLOMBO TRANSPORTATION SERVICES and NORTHEAST TRUCK CENTER, INC. et al.	:	
v.	:	**EHB Docket No. 88-420-M (consolidated)**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES AND CITY OF SCRANTON, et al., Intervenors	:	
NORTHEAST RENTAL CORPORATION d/b/a COLOMBO TRANSPORTATION LINES	:	
v.	:	**EHB Docket Nos. 90-535-MR 91-036-MR**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: March 12, 1991**

OPINION AND ORDER
SUR
DER'S MOTION TO DISMISS FOR
MOOTNESS ALL ISSUES EXCEPT AS TO CIVIL PENALTIES

Robert D. Myers, Member

Synopsis

DER's decision to remove from its administrative orders all requirements except the payment of a civil penalty constitutes an exercise of prosecutorial discretion which the Board is powerless to reverse. The issues pertaining to the removed requirements are moot. Accordingly, two related appeals pertaining solely to the mooted issues will be dismissed.

OPINION

The history of the consolidated appeals identified above is documented fully in an Opinion and Order at 1989 EHB 1315 and, more recently, in an Opinion and Order issued December 21, 1990. Before us for action at this point is a Motion of the Department of Environmental Resources (DER) to

Dismiss for Mootness All Issues Except as to Civil Penalties, filed on December 24, 1990. Appellants filed their Answer on January 22, 1991 and DER responded in a letter docketed on January 31, 1991.

DER's Motion is prompted by a letter dated December 21, 1990 from William F. McDonnell, Regional Solid Waste Manager, Bureau of Waste Management in DER's Wilkes-Barre Regional Office, to Appellants. By this letter DER, inter alia, formally withdrew all requirements of the Order (October 5, 1988) and Amended Order (August 18, 1989) except as to the civil penalty assessment in the Amended Order. Paragraphs 2 to 10 of the Amended Order were specifically withdrawn.

The Order cited Appellants for operating a municipal waste transfer facility without a permit allegedly required by the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. Appellants were directed to apply for a permit and to pay a civil penalty of $1500.00. The Amended Order reaffirmed the provisions of the Order but, in addition, required Appellants to cease operations immediately, to prepare and file an abatement plan with DER and to implement it when approved. The Amended Order also assessed an additional civil penalty of $15,750.00.

In our Opinion and Order at 1989 EHB 1315 we held that the SWMA did not mandate a permit for an operation such as that carried on by Appellants. Accordingly, we entered partial summary judgment for Appellants on the permitting issue. We denied Appellants' request for a supersedeas, however, since it was apparent that Appellants' operation was conducted in such a manner as to create a public nuisance. The abatement requirements of the Amended Order and the civil penalties assessed in the Amended Order remained as the principal issues in the case. DER's Motion for Reconsideration of our Opinion and Order and for Summary Judgment in its own favor, filed on August

6, 1990 (after the enactment of Act 109 of 1990, amending the SWMA), was denied as untimely in our Opinion and Order issued on December 21, 1990.

The permitting issue, accordingly, is no longer viable. DER maintains that the abatement issue also has been removed by DER's December 21, 1990 letter. Since the Order dealt solely with permitting and a civil penalty applicable thereto, our Opinion and Order at 1989 EHB 1315 effectively terminated all issues pertaining to the Order. Paragraphs 2 to 10[1] of the Amended Order dealt with the cessation of operations, the details of an abatement plan, the filing of permit applications and the reaffirmance of the Order. The only portions of the Amended Order not included in the withdrawal are the Recital and the paragraphs dealing with the civil penalty. If the withdrawal is effective, DER is correct that the only issue remaining before us will be the $15,750.00 civil penalty assessed in the Amended Order.

DER's action has engendered a highly agitated response from Appellants, who accuse DER of bad faith, myopic, self-serving, frivolous, surreptitious, etc. actions to keep Appellants from having their abatement plan approved.[2] They argue that, having called for an abatement plan and having put Appellants to the trouble of preparing one, DER is estopped from withdrawing that portion of the Amended Order. The cases cited by Appellants do not support their argument. Just as district attorneys have prosecutorial

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[1] The Amended Order begins with paragraphs A through V in the Recital. Then, in the body, contains paragraphs 1 through 10 followed by paragraphs 1 through 4 under the heading "Civil Penalty Assessment." Despite some duplication in numbering, it is clear that the paragraphs withdrawn by DER are those unrelated to the civil penalty.

[2] DER's letter docketed January 31, 1991 is a response in kind to Appellants' accusations. While this on-the-record venting of hostility may ease the tensions of legal counsel, it does nothing to promote the cause of justice. If anything, it detracts from the substance of the positions advanced.

discretion whether to initiate or terminate criminal cases (Commonwealth v. Eisemann, 276 Pa. Super. Ct. 543, 419 A.2d 591 (1980)), DER has wide discretion in the enforcement of environmental statutes. That discretion necessarily includes the choice of which enforcement tool to use, the vigor with which it is employed and the extent to which it is carried to a final conclusion: Downing v. Commonwealth, Medical Education and Licensure Board, 26 Pa. Cmwlth. 517, 364 A.2d 748 (1976); Consolidation Coal Company v. DER, 1985 EHB 768; Ralph D. Edney v. DER, 1989 EHB 1356.

In the exercise of the discretion vested in it by the legislature, DER has elected to withdraw all of the Order and Amended Order except that which pertains to the $15,750.00 civil penalty. The Board has no power to substitute its own discretion for that of DER in this prosecutorial area. The issues withdrawn by DER are, therefore, moot.

That being the case, the appeals filed at docket numbers 90-535 and 91-036 also are moot. The former appeal was filed on December 10, 1990 from what was claimed to be DER's de facto disapproval of the abatement plan by failing to act on it within a reasonable time. A Motion to Amend this appeal was filed on January 22, 1991 in order to object to DER's December 21, 1990 withdrawal letter. The latter appeal was filed on January 24, 1991 as a skeleton appeal[3] from the same withdrawal letter. This appeal was "fleshed out" by a filing on February 7, 1991. Since these appeals contest DER's power to withdraw the portions of the Amended Order pertaining to an abatement plan and raise no other issues, they are governed by our disposition of that contention earlier in this Opinion.

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[3] See 25 Pa. Code §21.52(c).

ORDER

AND NOW, this 12th day of March, 1991, it is ordered as follows:

1. DER's Motion to Dismiss for Mootness All Issues Except as to Civil Penalties is granted; the only remaining issue in the appeals consolidated at 88-420-M is the civil penalty assessment of $15,750.00 contained in the Amended Order.

2. The consolidated appeals shall be placed on the list of cases to be scheduled for hearing.

3. The appeals docketed at 90-535-MR and 91-036-MR are dismissed as moot.

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DATED: March 12, 1991

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WILLOWBROOK MINING COMPANY	:	
	:	
v.	:	EHB Docket No. 90-346-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: March 12, 1991

OPINION AND ORDER
WILLOWBROOK'S MOTION TO COMPEL
AND FOR LEAVE TO CONDUCT ADDITIONAL DISCOVERY

By: Richard S. Ehmann, Member

Synopsis

While a lawyer's work product may not be discovered under Pa. R.C.P. 4003.3, a party may not refuse to answer Interrogatories asking for the authority it relied upon to use certain identified documents to review the appellant's application for permit, particularly since each party must disclose its legal contentions on filing its Pre-Hearing Memorandum. Where an interrogatory seeks the identification of documents related to a proposed witness' projected testimony or correspondence between the permitting agency and other agencies about the mine site, it must be answered and cannot be objected to on the basis of burden or overbreadth, although, if the information has already been provided and that is indicated in answering the interrogatory, it need not be provided again. It would, however, be overbroad to require DER to search other agencies' records to produce such correspondence or documents.

A witness may invoke the attorney-client privilege to refuse to answer questions about discussions he had with his counsel, and his counsel may assert same on his client's behalf in the course of a deposition. Where a non-party witness refuses to answer certain questions based on his lawyer's claim of the attorney-client privilege on his client's behalf, that same lawyer is also acting simultaneously as counsel to a party (not the witness's employer) and the questions relate to the party's strategy in this appeal, we will allow a further limited deposition to explore those areas which are thus not subject to this privilege.

A motion for leave to conduct additional discovery, based on the contention that an agency's designated person did not know the answers to questions put to him at his oral deposition, which motion is objected to as burdensome and unnecessary, will be granted, but will be limited to the areas of testimony about which the prior witness knew not. Further, to minimize any burdensomeness of these depositions, they shall be scheduled at a date, time, and place to accommodate opposing counsel's schedule.

OPINION

The instant proceeding involves Willowbrook Mining Company's ("Willowbrook") appeal from the Department of Environmental Resources' ("DER") denial of Willowbrook's surface coal mine permit application No. 43900101 on July 16, 1990. Initially, in our Pre-Hearing Order No. 1 of August 20, 1990, we directed the parties to complete discovery by November 5, 1990. Thereafter, on October 24, 1990, we granted Willowbrook's motion to extend the discovery deadline and ordered discovery concluded by December 24, 1990.

On December 3, 1990, DER filed a Motion To Compel And To Extend Discovery, and Willowbrook responded thereto, opposing DER's Motion. On

January 8, 1991, we issued our Opinion and Order on this Motion which granted major portions of the motion seeking to compel further answers from Willowbrook but did not adjudicate the merit of DER's request to extend the discovery period.

On February 4, 1991, we scheduled this matter for hearings to begin on April 15, 1991. On that same date, Willowbrook filed its instant motion with us. We have received DER's response in opposition thereto.

Interrogatories 12 and 25

Willowbrook's Motion seeks to compel DER to answer Interrogatories No. 12 and 25 of the Set of Interrogatories served on DER on November 27, 1990. DER objected to doing this on December 24, 1990. Its objection to both interrogatories is that they are overbroad and unreasonably burdensome to answer.

Interrogatory No. 12 seeks the identification of all documents and communications which relate to the testimony that two non-expert witnesses identified by DER in a prior interrogatory are expected to give. As to Interrogatory 12, DER objects that the interrogatory is overbroad and burdensome to answer. DER's Response To Willowbrook's Motion To Compel correctly points out that Willowbrook has already received a great deal of information from DER through interrogatories, depositions, and production of documents. It then incorrectly contends it has furnished enough information. This is not a decision for DER to make. DER's two identified non-expert witnesses may reasonably be asked to identify and describe all documents and communications relating to the testimony they will give in this matter. Willowbrook Mining Co. v. DER, EHB Docket No. 90-346-E (Opinion and Order issued January 8, 1991). The volume of the information otherwise provided

does not go to the reasonableness of asking this question, which does not appear to seek information sought in Willowbrook's other interrogatories. Of course, the answering of this interrogatory will impose some burden on each of these prospective witnesses, but all burdens are not unreasonable burdens. Moreover, these witnesses are DER employees, rather than third parties or strangers, and it was DER which engendered this appeal by denying this Willowbrook's application and which selected these persons as witnesses.

We also fail to see how Interrogatory 12 is overbroad. Concluding that "Willowbrook's search for more information is a wild goose chase", as does DER's brief, neither makes it so nor demonstrates overbreadth. DER's two employees must attempt to reasonably respond to this interrogatory. In its Response, DER also raises the contention that Interrogatory 12's statement "relate in any way to the testimony" is unduly vague. This undue vagueness contention was not raised previously. Nevertheless, using common English definitions for these words, we do not find them so, particularly where no attempt to answer has been tried. DER has failed to establish a basis to bar this discovery authorized by Pa. R.C.P. 4003.1. Accordingly, it must provide further answers to Interrogatories. Kerry Coal Company v. DER, 1989 EHB 1337.

Interrogatory 25 seeks DER's identification of documents, correspondence, and meetings referring to or relating to the [proposed mine] site involving DER, USFWS, PFC, PGC, the Corps or any other state or federal agency. Again, DER objects, says this is grossly overbroad, and adds that it was previously objected to by DER. We know nothing of prior objections, so we can not rule on them. In its Response, DER urges that Willowbrook has already received all of the information sought in Interrogatory No. 25. If this is true, and we assume DER did not provide information not sought by Willowbrook,

we cannot see how this interrogatory could be overbroad. If DER did identify and describe this information in discovery, as its Answer implies, it need not do so again and may answer this interrogatory in this fashion. If there are documents, correspondences, or meetings relating to this mine site and the conclusions in Willowbrook's Notice Of Appeal that DER's staff is aware of, and which are not otherwise privileged from discovery and have not been produced and identified, it must identify and describe same. However, DER need not direct its staff to conduct an independent search of the files of any and all state and federal agencies on Willowbrook's behalf. That would be overbroad.

Interrogatory 29

DER has provided a new answer to Interrogatory 29 with its Response to Willowbrook's Motion. Absent further complaint from Willowbrook, we will assume it is adequate and devote no more space thereto.

Interrogatories 33, 44, 47, 57, 61, 65 and 75

Each party groups these interrogatories together, so we shall treat them in this same fashion to the extent possible. In part, DER says these interrogatories seek the disclosure of attorney work product because they cover "his theory of the case", contrary to Pa. R.C.P. 4003.3.

Interrogatory No. 33 asks for a statement of authority under which DER entered into specific previously identified agreements. Interrogatory No. 44 asks for the authority upon which DER relies in issuing previously identified documents used to evaluate wetlands. Interrogatory No. 47 asks the same authority question with regard to documents used to evaluate permit applications under 25 Pa. Code §105.17(b). Interrogatory No. 57 asks the same question as to 25 Pa. Code §105.17(c). Interrogatory No. 61 asks this same

question as to 25 Pa. Code §105.16(a). Interrogatory No. 65 asks the same question as to 25 Pa. Code §105.16(b). Interrogatory No. 75 asks for the "authority" upon which DER relies to use certain previously identified documents to determine what constitutes "adequate embankment compaction".

DER denied Willowbrook's permit application, citing in part Section 105.17 and a lack of adequate embankment compaction. Section 105.16 deals with environmental harm assessments and economic balancing, which, at least at this point in this appeal, goes to the issues under consideration here, i.e., the impact of the proposed strip mine in an allegedly "important wetland". Thus, interrogatories based on it are apparently germane to this matter, too. Accordingly, DER cannot refuse to answer these interrogatories at all. At a minimum, it must state its position as to what it felt its authority was as of the time it denied this application. It cannot use the shield of attorney work product to hide the basis for its initial decision in this matter. Goodrich Amram, 2d §4003.3:2. As Board Member Fitzpatrick said in City of Harrisburg v. DER, EHB Docket No. 88-120-F (Opinion issued April 30, 1990):

> [t]o the extent an attorney employed by a government agency contributes to an adjudicatory decision, the attorney's function cannot be separated form the client's function of rendering a decision. In this situation, rather than acting as the client's legal representative, the attorney is acting in a role which cannot be separated form the role of the client.

To hold any other way would allow DER to effectively bar inquiry into that decision making process by merely involving its trial counsel therein.

Where the current "theory of the case" for DER's lawyer in this appeal is the same as the theory at the time DER denied the permit, there can be no successful defense to answering these interrogatories under this

assertion of privilege.

If DER's counsel has created a new legal or factual theory for DER's "authority" to act as it did which differs from that under which DER acted when it denied this application for permit, that theory would have to appear in the recital of DER's factual and legal contentions contained in its Pre-Hearing Memorandum. This is because all such contentions must be set forth therein, and because Paragraph 5 of our Pre-Hearing Order No. 1 says that we may deem a party to abandon all contentions of law or fact not set forth in its Pre-Hearing Memorandum. Were our requirements for disclosure in Pre-Hearing Memoranda different, we might come to a different conclusion. But, with DER's Pre-Hearing Memorandum having been filed with us on January 22, 1991, we see no reason to bar Willowbrook's interrogatories on this theory.

In so doing, we are not authorizing Willowbrook's review of files of DER's counsel nor requiring counsel to answer these interrogatories so as to state his theory of the case, but we are requiring DER to set forth what it concludes is the authority for its actions.

DER's Response also objects to these interrogatories because they call for "a legal conclusion as to the support for the documents". It offers us nothing other than this statement of objection to show that Willowbrook may not inquire into the "legal conclusions" underpinning DER's decision to deny this permit application. Our research has disclosed no basis for this objection by DER, either. When DER acts through its staff, we presume its staff is acting in a way they believe is both rational and lawful. When this staff denies an application for permit, and that action is challenged in an appeal, it is not objectionable for a challenger to inquire as to how the

staff came to believe they had legal authority to act as they did.[1] It is clear opinions on this point may be discovered. Goodrich Amram, 2d §4003.1:24 and §4003.3:2. Accordingly, we cannot sustain these objections. DER must provide Willowbrook with answers to Interrogatories Nos. 33, 44, 47, 57, 61, 65, and 75 which disclose what it believes is its authority to act as it has, but it need not disclose its trial counsel's conclusions, legal research, theories, etc., for defending DER's beliefs as to its legal authority to act.[2] In so doing, it shall define the word authority as defined in the fourth edition of Black's Law Dictionary.

Compelling Answers By Denver McDowell

To Deposition Questions

Willowbrook's Motion next seeks an order to compel Pennsylvania Game Commission employee, Denver McDowell, to answer questions put to him by Willowbrook's counsel in a deposition held on December 12, 1990. From the transcript pages attached to this Motion, it is obvious these questions dealt with a discussion he had with trial counsel for DER on the morning of the deposition. The questions at issue and their lead-in questions are:

> Q Did [you] discuss or prepare with anyone, other than your attorney, discuss any aspect of this?

---

[1]DER's Response to Willowbrook's Motion includes numerous factual allegations and a verification signed by its attorney. This wrongly suggests we are dealing with a dispute based on factual differences. We are not. The issue put before us in this Motion is access to information which may be evidence or may lead to admissible evidence, not the extent of counsel's involvement in the facts of the case.

[2]We further specifically affirm the observation made in footnote three in City of Harrisburg, supra.

A No, just Steve. Well, we talked this morning in Mr. Grabowicz's office, but not about the case specific.

Q What did you discuss with Mr. Lachman?

MR. LACHMAN: I would object to that.

MR BRAVERMAN: Why?

MR. LACHMAN: That's attorney-client privilege.

...

Q Did you discuss any aspect of this case with Mr. Lachman?

MR. LACHMAN: I would recommend you not answer that question.

A. No comment.

...

Q. What did Mr. Lachman discuss regarding your deposition with you today?

MR. LACHMAN: Don't answer the question.

BY MR. BRAVERMAN:

Q Did Mr. Lachman advise you of any of the department's theories or strategies regarding this case?

MR. LACHMAN: I advise you not to answer the question.

BY MR. BRAVERMAN:

Q Did Mr. Lachman review with you any anticipated questions and suggest to you any answers or discuss with you any answers to those questions prior to your deposition?

MR. LACHMAN: I advise you not to answer the question.

Q And is it my understanding that those questions are not being answered because of an assertion of the attorney-client privilege?

MR. LACHMAN: That is the reason.

...

(Deposition Transcript pages T 92 through 97)

The transcript also makes clear that prior to these questions, Mr. McDowell was asked if he was represented by counsel and he indicated Mr. Lachman was his attorney. It also shows he is not, and never has been, employed by DER, and that the Game Commission is not part of DER. Finally, on the record, Lachman disclosed that prior to the deposition, he and the Game Commission's General Counsel talked because that attorney could not attend the deposition and agreed that Lachman would represent McDowell at the deposition. Based on this record, DER asserts McDowell cannot be compelled to answer these questions because of his privilege. Willowbrook takes the opposite position.

The first hurdle we must clear on this issue concerns whether Lachman was counsel for McDowell. McDowell's statement on the record is that this is so. The discussion between Lachman and the Commission's General Counsel does not change this fact; it merely explains how it came into being. Nothing offered by Willowbrook's Motion or its Brief in support of this Motion rebuts McDowell's statement.

This being true, we turn to the issue of whether a lawyer may direct his client not to answer. Willowbrook argues that a lawyer may not instruct his client not to answer, as did Lachman. Further, it argues that the questions asked did not require disclosure of McDowell's communications to Lachman and that the privilege does not protect Lachman's communications to McDowell. Willowbrook says that it seeks "only the information and directions communicated from Lachman to McDowell".

DER's Response does not address these contentions. As we said in City of Harrisburg, supra, the privilege is only a one way privilege. It only applies to communications made to an attorney by his client, Bradford Coal Company, Inc. v. DER, 1985 EHB 682, and the communication of the attorney to the client to the extent they reveal or are based on the client's confidential communication. City of Shamokin v. West End National Bank, 22 D&C 3d 232 (1982). The privilege exists to allow Lachman to be an effective advocate for McDowell, and to do this, he needs full disclosure from his client (McDowell) of all relevant facts and circumstances. Since such disclosures to Lachman from McDowell might include potentially damaging information, which Lachman could then be compelled to reveal; this privilege operates to allow communication from McDowell to Lachman without McDowell being put at risk thereby. See Bradford Coal, supra.

With this brief explanation of the privilege, we turn back to these questions. "What did you discuss with Mr. Lachman", is too broad a question, since it allows for an answer which might include the type of information discussed above, although it might also have revealed no damaging information. The same is true as to the question of discussion of any aspect of the appeal and as to the question of what Mr. Lachman discussed regarding McDowell's deposition. This privilege also bars inquiry by Willowbrook about McDowell's review with his lawyer of anticipated questions and suggestions or discussing answers to such questions. Again, this is because of the breadth of the question, and does not suggest a question dealing with this same subject matter could not have been asked if properly phrased. However, the question of whether Lachman advised McDowell of any of DER's theories or strategies requires only a "yes" or "no" answer, and reveals nothing. It further does

not appear to be subject to this privilege, since it is not addressed to disclosures by Mr. McDowell. Moreover, if properly phrased, much of what appears to have been sought by Willowbrook might have been securable if the questions were phrased differently. We will not take the space to recite what the proper questions were however.[3]

In this deposition, Mr. Lachman sought to wear the hat of counsel for DER and the hat of counsel for Mr. McDowell, so he has elected to walk a very narrow line.[4] The line is narrow because he must be sure before McDowell answers a question by asserting this privilege that the privilege is asserted to protect McDowell rather than to protect DER or the Game Commission. Nevertheless, if this is done, we do not believe that he can be barred from asserting this privilege on behalf of Mr. McDowell. It is he, after all, and not Mr. McDowell, who is the person expected to know the length and breadth of both Mr. McDowell's disclosures to him and this privilege.

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[3]Of course, the witness may elect to say nothing on the basis of this privilege, and may even wish to discuss his proposed answer with his attorney before giving it. It is also clear, however, that this privilege cannot be asserted by McDowell to block answering questions which, in his own opinion, are in no way potentially injurious to him, just to "clam up" on behalf of DER. Mr. McDowell may not assert this privilege on DER's behalf, but only on his own.

[4]How Mr. Lachman can simultaneously act as counsel for Mr. McDowell and DER in light of the Commonwealth Attorneys Act, Act of October 15, 1980, P.L. 950, No. 164 as amended, 71 P.S. §732-101 et seq., is far from clear. How Lachman can represent the Game Commission which is an independent commission and DER (an executive agency), has not been addressed. Moreover, we are told that Mr. McDowell said Lachman was his lawyer rather than that Lachman was acting as counsel for the Game Commission. This suggests a private attorney-client relationship. How Mr. Lachman could undertake such a relationship while still representing DER is also not explained. However, Willowbrook did not raise these issues and we do not adjudicate same herein.

Having thus come full circle on this issue, we will grant Willowbrook the right to depose Mr. McDowell further on the limited issue of the information and directions communicated by Mr. Lachman to Mr. McDowell immediately prior to McDowell's first deposition. The granting of this Motion is, however, subject to the attorney-client privilege afforded Mr. McDowell as discussed above. At this deposition, common sense compels us to recommend strongly that McDowell's counsel not wear any hats other than that of counsel to McDowell. McDowell's personal lawyer should not be asked to bear the difficult burden of being counsel to McDowell and counsel to DER or counsel to the Game Commission.

Willowbrook's Request For Additional Discovery

Finally, Willowbrook's motion seeks leave of this Board to conduct discovery in the form of additional deposition of Game Commission and Pennsylvania Fish Commission representatives. As a basis therefor, it asserts that each agency was subpoenaed and told to designate a person to testify on its behalf as to categories of matters specified by Willowbrook, but when the designated individuals were deposed, the deposition transcripts revealed that they did not know the answers to every question asked by Willowbrook's lawyer.

In response, DER correctly observes that Willowbrook could have taken these depositions earlier in the authorized discovery period and could have filed this motion either in that period or at least much closer to the end of it. DER also says that depositions are unnecessary.

We do not wish to reward Willowbrook's counsel for either his failure to take these depositions earlier in the discovery period or his failure to seek leave for this discovery sooner than he did. Nor do we suggest a witness's failure to know everything about everything on the list of subjects

in the subpoena is the fault of the witness. It is not. When designation of a single witness is all that is sought by a party, such as Willowbrook, and the witness designated is the person best able to discuss a subject matter category, the fact that the witness cannot answer all questions asked of him or her in that category does not give rise to a right to seek further discovery in the subpoenaing party.

However, it is not for DER to judge whether or not further discovery will add something to Willowbrook's case, and we observe from the procedural record of this appeal that DER's counsel also engaged in discovery even closer to the end of the discovery period than the depositions of the representatives of these two Commissions. Further, this Board generally favors discovery so that there is no trial by surprise. Discovery makes for informed parties who see their respective case's strengths and weaknesses and can thus best judge when to try their cases and when to settle same. Moreover, the burden and annoyance to DER of further limited discovery can be minimized if this discovery occurs promptly, at a date of DER's choosing. Accordingly, further discovery by Willowbrook is approved, but is specifically limited to the subject matter area where the prior witnesses were without sufficient information to provide information, as reflected by the portions of the transcripts attached to Willowbrook's Motion. It is further limited, as reflected below, to minimize its burden on DER.

ORDER

AND NOW, this 12th day of March, 1991, it is ordered that by March 29, 1991, DER shall provide further answers to Willowbrook's Interrogatories Nos. 12, 25, 33, 44, 47, 57, 61, 65, and 67 to the extent set forth in the foregoing opinion.

Subject to this Opinion, Willowbrook is authorized to conduct a further deposition of Denver McDowell. Mr. McDowell's deposition shall be limited to the questions of information and directions communicated to Mr. McDowell by Mr. Lachman immediately prior to Mr. McDowell's first deposition. Mr. McDowell's deposition shall occur prior to March 29, 1991, and he shall not be barred therein from asserting the attorney-client privilege to protect his communications with his personal counsel.

Willowbrook is granted leave to conduct an additional depositions of a representative of the Fish Commission and a representative of the Game Commission. Each deposition shall be limited to inquiry into the areas covered by questions asked of the persons previously deposed on behalf of each Commission and responded to by that deposed person, with answers indicating a lack of sufficient knowledge to answer same, as reflected in the deposition transcript attached to Willowbrook's Motion. The date, time, and place of these depositions shall be set to accommodate the schedule of counsel for DER and must be completed by **April 5, 1991.**

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: March 12, 1991

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOA

MUNICIPAL AUTHORITY OF THE BOROUGH OF ST. MARYS	:	
v.	:	EHB Docket No. 90-448-E
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: March 12, 1991

OPINION AND ORDER
SUR DEPARTMENT OF ENVIRONMENTAL RESOURCES'
MOTION TO COMPEL
AND TO EXTEND TIME FOR DISCOVERY

By Richard S. Ehmann Member

Synopsis

A motion for a fourth extension of a discovery completion deadline is denied absent a showing of previous diligent efforts to initiate and conclude discovery.

DER is entitled to the discovery of expert witnesses, the subject matter of the proposed testimony, the substance of the facts and opinions of the expert, the identity of each significant document relied upon by the expert, the expert's curriculum vitae and the names of non-expert witnesses plus the subject matter areas in which the non-experts will testify. Pa.R.C.P. 4003.5 protects the appellant from disclosure of a summary of the non-expert's testimony. DER may not discover the names of all experts consulted by Appellant, but only those to be called as witnesses. An

interrogatory seeking a detailed statement of the substance of the facts and opinions constituting the relevant knowledge of each person known to an appellant to have knowledge of the matters in the appeal, is too broad.

Since Appellant's counsel and at least three consulting firms are disclosed by the Notice of Appeal to have been working on matters relating to this appeal for the past six months, and since Appellant is currently under orders to file its Pre-Hearing Memorandum with us in less than a month (on which it must list its expert witnesses), Appellant may not refuse to identify its experts based on an argument that it has not chosen them yet and, thus, deprive DER of an opportunity to conduct discovery regarding same.

OPINION

This appeal arose because on September 25, 1990, the Department of Environmental Resources ("DER") issued NPDES Part I Permit No. PA. 0026387 to the Municipal Authority of the Borough of St. Marys ("St. Marys"), which set effluent limitations for the discharge from St. Marys' sewage treatment plant. The Notice of Appeal itself was filed with the Board on October 23, 1990[1] and, on October 25, 1990, we issued Pre-Hearing Order No. 1, which provided the parties with a 75-day window (until January 6, 1991) in which to complete discovery.

For reasons unknown, DER undertook no discovery in October or

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[1]Exhibit C to St. Marys' Notice of Appeal is the comments submitted by St. Marys to DER in regard to the DER's draft version of the permit ultimately issued to St. Marys by DER. A portion of this Exhibit is a twenty-one-page document titled "St. Marys Sewage Treatment Plant Biological Assessment," dated September 1990 and prepared by RMC Environmental Services, Inc. for St. Marys' lawyers. The introduction to Exhibit C indicates a detailed review of the draft permit was performed for St. Marys by Earth Science Consultants, Inc., KLH engineers, and St. Marys' attorneys, Anthony P. Picadio and Alan S. Miller.

November of 1990 and waited until December 21, 1990 (until the 58th day of the 75 days) to begin discovery by filing its First Set of Interrogatories and Request for Production of Documents. St. Marys' Response to DER's instant motion indicates that St. Marys received this material from DER on December 26, 1990. These interrogatories direct that St. Marys' answers were to be filed in 30 days. Of course, that is beyond the end of the aforementioned 75-day discovery window. Apparently unconcerned with that fact, DER's unverified Motion alleges that counsel for both parties then agreed that the interrogatories were complex so that St. Marys should have the original 30 days plus 15 days more, or a total of 45 days, to respond thereto. Thus, a response was due by February 9, 1991 under this agreement.

On January 2, 1991, the parties jointly moved this Board to extend the discovery deadline for 60 additional days because of the volume of interrogatories filed and the alleged technical complexity of this appeal. The joint motion also alleged that granting this motion will not unduly delay a hearing in this matter. By Order dated January 3, 1991, we granted this motion and extended the deadline for discovery's completion to March 5, 1991.

On February 14, 1991, or 50 days after service of DER's Interrogatories and Request for Production of Documents on St. Marys, St. Marys gave its Responses thereto to DER.

On March 1, 1991, the parties jointly filed another motion seeking a second extension of the discovery deadline for roughly 70 more days or until May 15, 1991. On March 4, 1991, we issued an Order extending this deadline, but only until March 20, 1991. On March 5, 1991, after a conference call with all counsel, we further extended it until March 29, 1991.

Two days later, on March 7, 1991, a full three weeks after receiving

St. Mary's response to its discovery request, DER filed its instant Motion to Compel and to Extend Time for Discovery.

DER's Motion seeks to compel St. Marys to disclose in answer persons knowledgeable about the subject matters raised in the appeal and identify lay and expert witnesses and summarize the testimony of each identified witness. DER claims this was not done as requested in answering Interrogatories Nos. 2, 5, 6, 7, 8, 9, 10, 11, 12. Taken as a whole, most of the information sought is discoverable now. We find Interrogatory No. 2 to be overbroad and burdensome because it asks for a detailed statement of the substance of the facts and opinions constituting the relevant knowledge of each person known to St. Marys to have knowledge of the matters in St. Marys' appeal. We have so held previously in Hugh K. Johnston v. DER, et al., 1986 EHB 824. Discovery of all experts consulted by St. Marys is also beyond what is allowed by Pa.R.C.P. 4003.5. Further, DER knows or should know this type of question is improper since we so held (in DER's favor) in Kerry Coal Company v. DER, EHB Docket No. 89-231-E (Opinion issed January 30, 1990).

Aside from these questions, however, DER asks for the identity of expert witnesses, the subject matter of each expert's testimony, the substance of the facts and opinions each expert will testify to, with a summary of the grounds for each opinion, the identity of each document the expert relies on, the curriculum vitae of each expert, the names of each non-expert witness and the subject matter areas of the non-expert testimony . Clearly such requests are proper subjects for discovery and responding thereto is not too burdensome

or annoying.[2]

We deny the merit of St. Marys' objection that it has not selected which expert to use so it need not disclose same yet. For at least the past six months, St. Marys has had the three consulting firms identified in Footnote 1 working for it on these matters, so it has had ample time to pick its expert. Moreover, its attorneys appear before this Board regularly on behalf of a variety of clients--thus we believe them knowledgeable in this field--and they, too, have been involved in this matter on St. Mary's behalf since at least September of 1990. Finally, St. Marys' Pre-Hearing Memorandum, in which it must list its expert and non-expert witnesses, is currently scheduled to be filed with this Board by April 5, 1991, and, with this date, we project that it is likely the hearing on the merits of St. Marys' appeal should occur around July of this year. In short, St. Marys must disclose its witnesses now to allow DER to depose same, if it wishes to do so before the close of discovery. We can not allow a party to thwart discovery by its opponent through a refusal to name the selected expert and non-expert witnesses until after discovery closes.

We also reject St. Marys' argument that it cannot identify its experts because DER has failed to answer St. Marys' Interrogatories in a way which allows St. Marys to select an expert. Like DER, St. Marys did not seek answers by DER to St. Marys' Interrogatories until December of 1990, and it failed to file a Motion to Compel DER to provide better answers until February

---

[2]Counsel cannot refuse to produce same, contrary to St. Marys' assertion that this list of witnesses is its attorney's work product, but it can properly say that "describing all documents consulted by an expert to form an opinion" may be too broad an interrogatory, whereas describing all documents of significant impact on that opinion is not. The interrogatory should be answered in this latter fashion.

28, 1990. Since St. Marys' counsel knew each ground for appeal in the appeal as of the day it was filed and conducted a detailed review of the draft version of this permit as early as September of 1990, St. Marys and its counsel should have been able to select experts to testify on St. Marys behalf in this past six months. Moreover, St. Marys' counsel had ample opportunity to file interrogatories and secure answers to these interrogatories on St. Marys' behalf so that even if this argument held merit in January, it no longer holds merit in the month of March.

Interrogatory 12 is objectionable, however, because it seeks a summary of the non-expert testimony to be given. St. Marys objects that as asked, it seeks information which is part of St. Marys' counsel's work product and is protected by Pa.R.C.P. 4003.5. We agree with St. Marys. We believe that DER may inquire to determine the subject matter areas about which each such non-expert witness will testify under Pa.R.C.P. 4003.3 as it did in Interrogatory 11 and St. Marys must answer Interrogatory 11 but not Interrogatory 12.

By order of March 5, 1991, we directed the disclosure of St. Marys' experts to DER by March 14, 1991, and we understand from St. Marys' counsel, and thus expect, a summary of each expert's testimony will accompany that identification. As reflected below in our Order, we see no reason to change that date.

DER also seeks a Board Order extending the March 29, 1991 discovery deadline because, it contends, it has insufficient time between March 14, 1991 and March 29, 1991 to prepare for and take the depositions it wishes to take. Had DER begun discovery more promptly after this appeal was filed and pressed it more vigorously, it would have demonstrated to us a diligent effort to

conduct and conclude discovery. The record of DER's discovery efforts in this case to date do not reflect such an effort. There has been only one set of interrogatories and one Motion to Compel answers to same filed by DER in nearly five months. Perhaps by March 29, 1991, DER will be capable of making such a demonstration and, as a result, will seek a further extension of this deadline. If it does, then at that time we will rule on such a request based on any such attempted demonstration. In the interim, however, no extension of this deadline is warranted.

O R D E R

AND NOW, this 12th day of March 1991, DER's Motion to Compel is granted in part and denied in part. By March 26, 1991, St. Marys shall answer DER Interrogatories Nos. 5, 6, 7, 8, 9, 10 and 11 in accordance with the above opinion but shall name its experts and provide a summary of each named expert's testimony by March 14, 1991 as previously ordered. We deny DER's Motion as to Interrogatories Nos. 2 and 12. We also deny DER's Motion to Extend Time for Discovery without prejudice to its filing a similar subsequent motion.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMAN
Administrative Law Judge
Member

DATED: March 12, 1991

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M. DIANE SMITH
SECRETARY TO THE BOARD

CLAYTON STINE

	:	
v.	:	**EHB Docket No. 90-395-B**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 13, 1991

OPINION AND ORDER SUR
PETITION FOR SUPERSEDEAS

Thomas M. Ballaron, Hearing Examiner

Synopsis

A Petition for Supersedeas is denied for failure to demonstrate the likelihood of prevailing on the merits of the underlying appeals. The Landowner filed appeals from two Orders issued by DER alleging that his disposal activities were violative of the Solid Waste Management Act, and the Clean Streams Law. The Landowner contended that he was entitled to a supersedeas since DER lacked the authority to issue an order barring him from depositing tree stumps and land clearing debris on his property, since, as clean fill, this was a disposal activity for which permits were not required. In order to qualify for the exclusion provided in 25 Pa.Code §271.101(b), the stumps and debris cannot be mixed with other solid waste, and the material had to be used as clean fill. The preponderance of evidence demonstrated that the Landowner commingled the stumps and debris with construction/demolition waste in numerous areas on his property, thereby justifying DER's Order.

OPINION

This action involves two appeals filed by Clayton Stine, Jr. in his individual capacity and as president and chief executive officer of Stine Farms and Recycling Inc. (Stine) from a Field Compliance Order and a subsequent Administrative Order issued by DER.

In the Field Compliance Order of September 12, 1990, DER alleged that Stine had disposed of construction and demolition waste on his property and had burned the waste without valid permits in violation of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* (SWMA). This order required Stine to immediately cease all dumping of solid waste, begin removing it and extinguish the underground fire observed by the DER inspectors.

The Administrative Order of October 3, 1990, amended the September 12, 1990, Field Compliance Order. It incorporated the September 12, 1990, allegations with a series of similar allegations from site visits on March 28, 1988, October 23, 1989, May 5, 1990, and September 17, 1990. Each was based upon observations of unpermitted disposal activities involving construction, demolition and/or residual waste. In the Administrative Order DER contended that Stine's disposal activities violated the SWMA in several respects including, but not limited to: the disposal of solid waste without a permit in violation of §610(1); the operation of a solid waste disposal facility without a permit in violation of §610(2); and the burning of solid waste without a permit in violation of §610(3). In addition, the disposal activities allegedly constituted "unlawful conduct" under §611 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* (CSL) as well as constituting a public nuisance under both §601 of SWMA and §§402 and 503 of CSL. As a result, Stine was ordered to immediately cease all disposal activity including the dumping of tree stumps and land

clearing debris upon his property. In addition, Stine was ordered again to extinquish the underground fire which was still burning at the disposal site and initiate appropriate remediation measures. These included, in pertinent part, providing DER with information regarding the source of the waste, the quantity, its characteristics, and a plan to test, remove, transport and properly dispose of the waste.

Stine filed timely appeals from both orders and a Petition for Supersedeas, on which a hearing was held December 10, 1990. Stine has requested a supersedeas from only those provisions of DER's Administrative Order (Exh. P-9) which required him to cease all disposal activity. The relevant sections at pages 7-8 state:

> 1. Stine shall immediately cease the open burning and/or disposal of all solid, residual and/or hazardous waste, including, but not limited to, stumps and land clearing debris, on the property located in Lower Mount Bethel Township, Northampton County.
>
> 2. Stine shall immediately cease accepting for disposal all solid, residual and/or hazardous waste, including, but not limited to, stumps and land clearing debris, on the property.

In cases involving Petitions for Supersedeas, the party requesting the protection afforded by this remedy must demonstrate by a preponderance of evidence: (1) that he will suffer irreparable harm, (2) that he is likely to succeed on the merits of the underlying action, and (3) that there is no likelihood of injury to the public. §4(d) of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7514, 25 Pa.Code §21.78, and Bethayres Reclamation Corporation v. DER and Lower Moreland Township, EHB Docket No. 83-227-W, (Opinion issued May 29, 1990).

Stine contends in both the underlying appeal and in his Petition for Supersedeas that his disposal activities are exempt from the permit

requirements of the SWMA, since he allegedly limited his operation to the receipt of clean fill. The focus of Stine's argument rests entirely upon the exclusion provided in the regulations at 25 Pa.Code §271.101(b)(6) for the disposal of clean fill:

> No person or municipality is required to obtain a permit:
>
> *****
>
> (6) For the use as clean fill of the following materials if they are separate from other waste:
>
> (i) Uncontaminated soil, rock, stone, gravel, unused brick and block and concrete.
>
> (ii) Waste from land clearing, grubbing and excavation, including trees, brush, stumps and vegetative material.

As a result, he reasons that these disposal activities and materials are excluded from regulation under the SWMA. Therefore, he contends that he is likely to prevail on the merits of the underlying appeal and is entitled to a supersedeas without establishing the remaining elements of 25 Pa.Code §21.78, since DER lacked the authority to restrict this activity. Blumenthal v. DER, EHB Docket No. 89-230-F (Opinion issued March 6, 1990).

Stine's argument is not convincing. The flaw in his reasoning arises from his assumption that tree stumps and land clearing debris constitute clean fill per-se. He is incorrect. Stumps and land clearing debris are defined at 25 Pa.Code §271.1 as construction/demolition waste:

> Construction/demolition waste-solid waste resulting from the construction or demolition of buildings and other structures.
>
> *****
>
> The term does not include the following if they are separate from other waste and are used as clean fill:
>
> (i) Uncontaminated soil, rock, stone, gravel unused brick and block and concrete.
>
> (ii) Waste from land clearing, grubbing and excavation, including trees, brush, stumps and vegetative material.
>
> (emphasis Added)

The regulation sets forth two fundamental criteria. The stumps and land clearing debris must not be mixed with other solid waste, and the material must be used as clean fill. Unless the material falls within this exclusion, it is considered construction/demolition waste and a permit is necessary pursuant to 25 Pa.Code §271.101(a) for its disposal.

The preponderance of evidence in this case demonstrates that the stumps and land clearing debris were not separated, but were commingled with other construction/demolition waste. Much of the activity at the site involved the disposal of stumps and land clearing debris in "fill-area" No. 1, which was also the site of the underground fire alleged in both of DER's Orders. DER's expert on underground fires testified, without contradiction, that he also observed ground-up demolition waste in the fill area and that the varied colors of smoke rising from the fire signaled the presence of heavy metals within the constitutents of the site (N.T. 174). Processed demolition waste (particles of flake board, asphalt roofing, wire, insulation and glass intermixed with wood chips) was observed spread over and mixed with stumps and logs on other areas of Stine's property (N.T. 321-234 and Exh. C-30(e), C-30(f)). In addition, DER inspectors observed numerous piles of crushed and broken railroad ties, metal scraps, asphalt, concrete and wood chips on the property, which were often intermixed with stumps (N.T. 235-236). Of note, Stine's expert conceded that it was difficult to classify this material as it became commingled through the transportation process (N.T. 134). Of further concern to DER inspectors was a pile consisting of at least eight tractor trailer loads of contaminated soil which Stine had intended to deposit with the other solid waste on his property. DER fortuitously discovered this

during a site visit when an inspector asked for the soil analysis which accompanied the loads of "clean fill". The analysis (Exh.C-4) indicated that the soil was contaminated with hydrocarbons (N.T. 220-222).

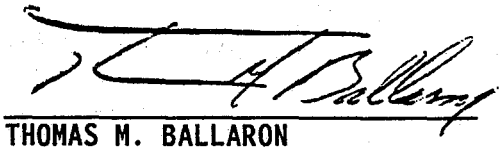
Clearly, Stine's disposal activities involved the regular and indiscriminate commingling of stumps and land clearing debris with other types of solid waste. It is equally clear that these disposal activities, conducted without a permit, constituted unlawful conduct under §§610(1), (2), (3) and (4) of the SWMA. As such, DER had the authority under §602 of the SWMA to order a cessation of the violative conduct, including Stine's receipt and disposal of tree stumps and land clearing debris.

Stine's evidence did not rebut DER's allegations. The only substantive evidence was directed to the issue of minimizing the likelihood of another underground fire by grinding the stumps and debris into chips and dumping the material in an area where no other disposal activity had taken place (N.T. 131-132). Since there is nothing in the record that would demonstrate that Stine is likely to prevail on the merits of the underlying appeal, it is unnecessary to consider the remaining elements of 25 Pa.Code §21.78 in finding that DER's Administrative Order of October 3, 1990, cannot be superseded.

O R D E R

AND NOW, this 13th day of March, 1991, it is ordered that Stine's Petition for Supersedeas is denied.

ENVIRONMENTAL HEARING BOARD



THOMAS M. BALLARON
Hearing Examiner

DATED: March 13, 1991

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MCKEES ROCKS FORGING, INC.	:	
v.	:	EHB Docket No. 90-310-MJ
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: March 15, 1991

OPINION AND ORDER
SUR THIRD PARTY CLAIM

By Joseph N. Mack, Member

Synopsis

A Third Party Claim filed by McKees Rocks Forging, Inc. seeking to join additional parties is dismissed. The Board has no authority to compel joinder of additional parties.

OPINION

This matter involves a Third Party Claim filed by McKees Rocks Forging, Inc. (McKees Rocks) in its appeal docketed at EHB Docket No. 90-569-MJ.[1] That appeal challenges a November 28, 1990 Order of the Department of Environmental Resources (the Department) requiring McKees Rocks to perform a groundwater assessment and to submit a Phase I and Phase II Groundwater Cleanup Plan with respect to groundwater contamination found at its axle forging facility in Stowe Township, Allegheny County.

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[1]By Order of February 4, 1991, this appeal was consolidated with the appeal of McKees Rocks docketed at EHB Docket No. 90-310-MJ.

On January 28, 1991, McKees Rocks filed a Third Party Claim against USX Corporation (USX) and Century America Corporation (Century).

According to McKees Rocks' Claim, USX owned and operated the axle forging facility prior to McKees Rocks. From approximately July 1986 to January 1989, USX leased the facility to McKees Rocks. On or about December 27, 1988, McKees Rocks was purchased by Standard Forgings, Inc. (SFP) through a Purchase and Sale Agreement. The Purchase and Sale Agreement was executed by Century as a selling shareholder. In January 1989, SFP entered into an Asset Sales Agreement with USX for the purchase of the axle forging facility. McKees Rocks argues that any groundwater contamination which allegedly exists at its facility occurred or existed while USX owned and/or operated the facility, and that the Asset Sales Agreement between USX and SFP provides that USX shall remain responsible for and indemnify SFP, and hence McKees Rocks, against any obligation or expense arising from any such condition which existed at the facility at the time USX leased it to McKees Rocks. McKees Rocks, therefore, argues that USX should be required to respond to the Department's order and to perform any investigative or remedial work required by the order. McKees Rocks additionally argues that Century should be joined in this action since the Purchase and Sale Agreement provided that the McKees Rocks facility, prior to its sale to SFP, had complied with all applicable environmental laws, and, further, that the selling shareholders, including Century, agreed to indemnify and hold McKees Rocks and SFP harmless against any obligation or expense resulting from a breach of warranty contained in the Agreement.

On February 11, 1991, the Department filed Objections to McKees Rocks' Third Party Claim, asserting that the Board does not have authority to

join additional parties. Also on February 11, 1991, USX filed objections to McKees Rocks' Claim in the form of a Motion to Dismiss. On February 19, 1991, Century joined in the Department's Objections. McKees Rocks responded to USX's Motion to Dismiss on March 7, 1991.

As both USX and the Department correctly point out, the Third Party Claim filed by McKees Rocks is outside the Board's jurisdiction. This Board has previously held that it has no authority to compel the joinder of additional parties. Al Hamilton Contracting Co. v. DER, 1989 EHB 383, 386; New Hanover Township v. DER, 1988 EHB 812, 814; Berwind Natural Resources v. DER, 1985 EHB 356, 358. As was noted in these cases, nothing in the Board's Rules of Practice and Procedure, 25 Pa.Code §21.1 et seq., nor the General Rules of Administrative Practice and Procedure, 1 Pa.Code §31.1 et seq., provides explicitly for the joinder of third parties.

McKees Rocks cites us to section 4(b) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7511 et seq., at §7514(b), as authority for joinder. That section simply states that the Board shall continue to exercise the power to hold hearings and issue adjudications which power was vested in it by section 1901-A of the Admininistrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 35 P.S. §570-1 et seq., at §510-1. There is nothing in either section 4(b) of the Environmental Hearing Board Act nor section 1901-A of the Administrative Code which provides any authority for the Board to exercise compulsory joinder of additional parties in actions before it.

McKees Rocks also refers us to section 21.64(a) of the Board's Rules of Practice and Procedure, 25 Pa.Code §21.64(a). McKees Rocks argues that this section specifically incorporates the pleading practices of the

Pennsylvania Rules of Civil Procedure, and particularly Pa.R.C.P. 2252 which expressly allows for joinder of additional parties. Section 21.64(a) of our rules reads as follows:

> (a) Except as provided otherwise in these rules of procedure, the various pleadings described in the Pennsylvania Rules of Civil Procedure shall be the pleadings permitted before this Board, and such pleadings shall have the functions defined in the Pennsylvania Rules of Civil Procedure.
>
> 25 Pa.Code §21.64(a)

As for McKees Rocks' argument that section 21.64(a) of our rules, 25 Pa.Code §21.64(a), should be read as authorizing joinder as per Pa.R.C.P. 2252, this argument was rejected in New Hanover Township, where it was held that "[a] pleading is not a proceeding" and "it does not follow that because the Board's rules recognize pleadings under the Pennsylvania Rules of Civil Procedure that they incorporate all other provisions of the Pennsylvania Rules of Civil Procedure." 1988 EHB at 816. As noted in Al Hamilton, the Pennsylvania Rules of Civil Procedure, as a whole, are not generally applicable to proceedings before the Board. 1989 EHB at 385.

McKees Rocks points to two earlier decisions of the Board in which joinder was allowed pursuant to section 21.64(a): DER v. Envirogas, Inc., 1981 EHB 525, and DER v. Consolidated Rail Corp., 1980 EHB 415. In each of these cases the Department had filed a complaint for civil penalties, and the defendant sought to join a third-party defendant which it alleged was liable for any penalty assessment. Joinder was allowed in those two cases based upon an erroneous reading of the Pennsylvania Supreme Court's decision in Stevenson v. Comm., Dept. of Revenue, 489 Pa. 1, 413 A.2d 667 (1980). That case interpreted the language of 4 Pa.Code §121.1 which governs the rules of

practice and procedure before the Board of Arbitration of Claims. That Section in pertinent part provides that "all proceedings in an action before the Board of Arbitration of Claims shall be, as nearly as possible, in accordance with the Pennsylvania Rules of Civil Procedure relating to the action of assumpsit." (emphasis supplied) 4 Pa.Code §121.1. This provision was interpreted as allowing joinder of additional defendants in matters before the Board of Arbitration of Claims.

In contrast, Section 21.64 of the Environmental Hearing Board's Rules of Practice and Procedure is entitled "Pleadings: Generally" and deals only with the subject of pleadings. Section 21.64(a) provides in pertinent part that "...the various pleadings described in the Pennsylvania Rules of Civil Procedure shall be the pleadings permitted before this Board..." (emphasis supplied) 25 Pa.Code §21.64(a). It is not to be given the same interpretation as 4 Pa.Code §121.1. The cases cited hereinabove, namely Al Hamilton, supra, New Hanover Township, supra, and Berwind Natural Resources, supra, properly set forth the Board's position with respect to third party practice and lack of authority to order joinder.

Nor does the Board have authority to enforce rights of parties which may arise under a private contract, such as the indemnification clauses contained in the Purchase and Sale Agreement between SFP and the selling shareholders of McKees Rocks or the Asset Sales Agreement between SFP and USX. Broad Top Township v. DER, EHB Docket No. 86-607-W (Adjudication, February 13, 1991); Berwind Natural Resources, supra. Any such claims for indemnification or for enforcement of a contract are not proper matters for resolution before the Board but, rather, must be raised in a separate civil action. As noted in Berwind Natural Resources, the Board's jurisdiction is limited to appeals of

actions taken by the Department; it has no authority to adjudicate the rights of parties vis-a-vis each other. 1985 EHB at 358.

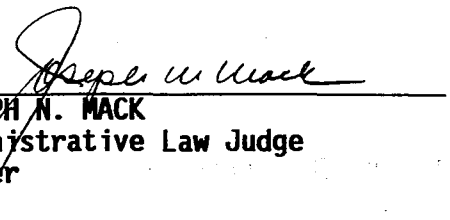
Finally, McKees Rocks argues that the Department has failed to show that McKees Rocks is in any way responsible for the alleged groundwater contamination, and, further, that the Department has failed or refused to take any action to prosecute USX and Century, whom McKees Rocks alleges to be the parties responsible for the pollution. McKees Rocks' objection to the Department's failure to exercise its prosecutorial discretion, whether justified or not, is not an adjudicatory action subject to the Board's review. Ralph D. Edney v. DER, 1989 EHB 1356. Secondly, McKees Rocks' argument that the Department has failed to show that McKees Rocks is responsible for any of the alleged contamination is a matter properly brought out in its appeal, but does not serve as a basis for joinder of third parties. Berwind Natural Resources, 1985 EHB at 359.

Since the Board has no authority to compel the joinder of USX and Century in this appeal, the Third Party Claim filed by McKees Rocks must be dismissed as being outside the Board's jurisdiction.

O R D E R

AND NOW, this 15th day of March, 1991, it is ordered that the Third Party Claim filed by McKees Rocks Forging, Inc. is dismissed.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 15, 1991

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M. DIANE SMITH
SECRETARY TO THE BOARD

P.N.B.P. COAL COMPANY	:	
v.	:	EHB Docket No. 85-196-G
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: March 19, 1991

ADJUDICATION

By the Board

Synopsis

The Department of Environmental Resources' (DER's) forfeiture of bonds, in the amounts of $8,075, $5,750, $10,000, $10,000, $500, and $350, posted with six mining permits is sustained where DER has shown that violations sufficient to justify bond forfeiture existed on the permit areas in this appeal.

INTRODUCTION

This matter was commenced on May 14, 1985 by PNBP Coal Company (PNBP) through its owner, Robert E. Ankney (Ankney), filing a notice of appeal seeking our review of a letter from DER dated March 28, 1985. The letter stated that DER had notified Ankney, through a letter dated November 22, 1983, of its intent to declare forfeited the bonds posted in connection with PNBP's mining operations in Mount Pleasant Township, Westmoreland County, at

the area covered by mining permits (MPs) 1345-1(c), 1345-2, 1345-2A, 1345-2A2, 1345-2A3, and 101345-3473SM19-01-4, because of numerous violations of the law. A hearing on the merits was conducted by former Board Member Edward Gerjuoy on September 17 and 18 of 1986. At the hearing, PNBP appeared pro se through its president, Ankney. Following the hearing, on February 9, 1987, DER filed its post-hearing brief. PNBP, however, did not file a post-hearing brief. Former Board Member Gerjuoy resigned from the Board in December of 1986 without preparing an adjudication. This adjudication has been prepared from a cold record. Lucky Strike Coal Co. and Louis J. Beltrami v. Commonwealth, DER, 119 Pa.Cmwlth. 440, 547 A.2d 447 (1988). After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. Appellant is PNBP Coal Company (PNBP), which is owned by Robert E. Ankney and has an address of R.D. #6, Somerset, Pennsylvania, 15501. (Notice of Appeal)

2. Appellee is DER, the agency with the authority to administer and enforce the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (CSL); the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. (SMCRA); the rules and regulations adopted thereunder; and §1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 (Administrative Code).

3. On June 26, 1975, DER issued mine drainage permit (MDP) No. 3473SM19 to PNBP authorizing it to conduct strip mining at a site known as

the Whetsel strip in Mount Pleasant Township, Westmoreland County. C Ex. A-1)[1] This MDP was corrected by a second MDP issued on November 18, 1975 bearing the same number. (C Ex. A-2)

4. The surface mine is located on 60.85 acres. (N.T. 36)

5. The Whetsel strip has been abandoned since March of 1983. (N.T. 30)

6. DER issued six mining permits (MPs) for the area encompassed by the MDP No. 3473SM19 which are involved in this appeal (N.T. 37-38):

a)	MP 1345-1(c)	(C Ex. B)
b)	MP 1345-2	(C Ex. C)
c)	MP 1345-2A	(C Ex. D)
d)	MP 1345-2A2(RE)	(C Ex. E)
e)	MP 1345 2A3	(C Ex. F)
f)	MP 101345-3473SM19-01-4	(C Ex. G)

Mining Permit No. 1345-1(c)

7. MP 1345-1(c) authorizes PNBP to mine 30 acres. (C Ex. B; N.T. 37)

8. First National Bank of Mercersburg Certificate of Deposit No. 1788, in the amount of $575, and Certificate of Special Deposit No. FM580, in the amount of $7,500, were collateral for the bond posted in connection with the MP 1345-1(c); liability under the bond was to accrue in proportion to the area of land affected by surface mining at a rate of $500 per acre or part thereof, with a minimum liability of $5000. (C Ex. I-1, C Ex. I-2)[2]

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[1]References to "N.T." followed by a page number are references to a page in the volume of the transcript of the September 18, 1986 hearing. "C Ex. _" designates an exhibit introduced by the Commonwealth.

[2]C Ex. I-2, the collateral bond for MP 1345-1(c), reflects that a total of footnote continued

9. Of the 30 acres permitted by MP 1345-1(c), the 16.2 acres for which DER forfeited the bond have been affected by PNBP's surface mining activities. (N.T. 41)

Mining Permit No. 1345-2

10. MP 1345-2 authorizes PNBP to mine 10 acres. (C Ex. C; N.T. 41)

11. First National Bank of Mercersburg Certificate of Special Deposit (Collateral Bond) No. FM 587, in the amount of $5750, was posted in connection with the 10 acres of MP 1345-2; liability under the bond was to accrue in proportion to the area of land affected by surface mining at a rate of $575 per acre or part thereof, with a minimum liability of $5,000. (C Ex. J)

12. All of the 10 acres permitted by MP 1345-2 have been affected by PNBP's surface mining activities. (N.T. 41)

Mining Permit No. 1345-2A

13. MP 1345-2A authorizes PNBP to mine 10 acres. (C Ex. D; N.T. 41)

14. Mid-Continent Insurance Company (Mid-Continent) Surety Bond No. B 1003, in the amount of $10,000, was posted in connection with the 10 acres of MP 1345-2A; liability under the bond was to accrue in proportion to the area of land affected by surface mining at a rate of $1000 per acre or part thereof, with a minimum liability of $5,000. (C Ex. K)

15. All of the 10 acres permitted by MP 1345-2A have been affected by PNBP's surface mining activities. (N.T. 41)

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continued footnote
four pieces of collateral were posted in connection with MP 1345-1(c); the forfeiture of only two of the pieces of collateral, CD No. 1788 and CD No. FM580, is part of this appeal. (See C Ex. I-2; N.T. 40)

Mining Permit No. 1345-2A2(RE)

16. MP 1345-2A2(RE) authorizes PNBP to mine 10 acres. (C Ex. E; N.T. 41)

17. Mid-Continent Surety Bond No. B1015, in the amount of $10,000, was posted in connection with the 10 acres of MP 1345-2A2(RE); liability under the bond was to accrue in proportion to the area of land affected by surface mining at a rate of $1,000 per acre or part thereof, with a minimum liability of $5,000. (C Ex. L)

18. All of the 10 acres permitted by MP 1345-2A2(RE) have been affected by PNBP's surface mining activities. (N.T. 41)

Mining Permit No. 1345-2A3

19. MP 1345-2A3 authorizes PNBP to mine .5 acres. (C Ex. F; N.T.41)

20. Somerset Trust Company (Somerset) Treasurer's check (Collateral Bond) No. 160996, in the amount of $500, was posted in connection with the .5 acres of MP 1345-2A3; liability under the bond was to accrue in proportion to the area of land affected by surface mining at a rate of $1,000 per acre or part thereof, with a minimum liability of $5,000. (C Ex. M)

21. All of the .5 acres permitted by MP 1345-2A3 have been affected by PNBP's surface mining activities. (N.T. 41)

Mining Permit No. 101345-3473SM19-01-4

22. MP 101345-3473SM19-01-4 authorizes PNBP to mine .35 acres. (C Ex. G; N.T. 41)

23. Somerset Treasurer's check (Collateral Bond) No. 195838, in the amount of $350, was posted in connection with the .35 acres of

MP 101345-3473SM19-01-4. Liability for the bond is for the amount specified, which is an amount equal to the estimated current cost of completing the surface mine operator's obligations under the law. (C Ex. N)

24. All of the .35 acres permitted by MP 101345-3473SM19-01-4 was affected by PNBP's surface mining activities. (N.T. 41)

25. All of the bonds were conditioned on PNBP's performance of its obligations under the CSL, the SMCRA, the applicable rules and regulations promulgated thereunder, and the provisions and conditions of the permits issued to PNBP. (C Ex. I-2, C Ex. J, C Ex. K, C Ex. L, C Ex. M, C Ex. N)

26. On September 18, 1979, DER issued an Order to PNBP based on conditions which were found to exist at the Whetsel strip that violated the terms and conditions of MDP 3473SM19, MPs 1345-1 and 1345-2, SMCRA, CSL, and the rules and regulations thereunder. These violations included PNBP's failure to backfill concurrent with mining, failure to prevent accelerated erosion and sedimentation, and failure to construct adequate treatment facilities. (C Ex. P; N.T. 73)

27. On December 23, 1980, DER and Ankney, on behalf of PNBP and individually, entered a consent order and agreement under which they agreed that paragraphs 1 through 6 thereof would have the force and effect of an order of DER. Paragraph 4 required Ankney to replant MP 1345-1 by not later than May 15, 1981. Paragraph 6 required that all surface mining to be conducted on MP 1345-2 be in full compliance with the laws of Pennsylvania. (C Ex. Q; N.T. 73)

28. On August 11, 1982, DER and PNBP and Robert E. Ankney, individually and on behalf of PNBP, entered into an amendment to the consent order. The amendment provided that the provisions of the consent order

remained in full force and effect, except as specifically amended. The amendment provided inter alia at paragraph 9 that Ankney was to have completed final backfilling on the area covered by MP 1345-2 on or before November 30, 1982 and was to have completed spreading topsoil and seeding on or before May 15, 1983. (C Ex. R; N.T. 73)

29. On April 29, 1983, DER issued an abatement order to PNBP in relation to MPs 1345-1, 2, and the amendments to those MPs. The violations DER cited PNBP as causing or allowing were its failure to pump pit water accumulation in accordance with §4.2(a) of SMCRA; failure to construct or maintain adequate erosion and sedimentation controls, contrary to 25 Pa.Code §87.106; and failure to backfill and grade concurrent to mining, contrary to 25 Pa.Code §87.141(c). (C Ex. S; N.T. 73)

30. DER issued a second abatement order to PNBP on August 23, 1983 in relation to MP 1345-1(c). The violations upon which this abatement order was based include: failure to properly handle acid-forming and toxic-forming spoil, which is a violation of 25 Pa.Code §§87.110 and 87.145; failure to construct adequate access road safety berms, in violation of §4.2(a) of SMCRA; failure to store, protect and provide treatment to any discharge caused by temporary storage of toxic and acid-forming material, in violation of 25 Pa.Code §87.110(3); failure to comply with the requirements of paragraphs 1, 2, and 3 of the April 29, 1983 abatement order, in violation of §18.6 of SMCRA and §610 of CSL; failure to comply with the requirements of paragraphs 3 and 9 of the amended consent order, in violation of §18.6 of SMCRA and §610 of CSL. (C Ex. T; N.T. 73)

31. On September 26, 1983, DER issued a compliance order to PNBP citing it for failing to comply with paragraphs 3 and 9 of the August 11, 1982

consent order and the two abatement orders. (C Ex. U; N.T. 74) These failures were stated as violations of §§18.6 of SMCRA and 610 of the CSL. (C Ex. U)

32. The orders, consent orders, and abatement orders were not appealed. (N.T. 76)

33. DER Mine Conservation Inspector (MCI) Robert Musser inspected the PNBP surface mine site at various times from December of 1984 until the time of the hearing, with his last inspection on September 5, 1986. (N.T. 34-35, 40-41)

34. By letter dated March 28, 1985, DER declared forfeited the bonds posted in connection with MPs 1345-1(c), 1345-2, 1345-2A, 1345-2A2, 1345-2A3, and 101345-3473SM19-01-4 because of the following violations by PNBP:

a) MP 1345-1(c) -- backfilling and regrading not performed concurrent with mining, rills and gullies not stabilized, and revegetation not completed (N.T. 51-52);

b) MP 1345-2 -- backfilling and regrading not accomplished concurrent to mining, adequate erosion and sedimentation controls not constructed, water permitted to accumulate in the pit, and adequate road safety berms not constructed (N.T. 52-53);

c) MP 1345-2A -- backfilling and regrading not accomplished concurrent with mining, adequate erosion and sedimentation controls not constructed (N.T. 53);

d) MP 1345-2A2(RE) -- backfilling and regrading not accomplished concurrent with mining, adequate erosion and sedimentation controls not constructed, water allowed to accumulate in the pit, acid-bearing materials not properly handled (N.T. 53);

e) MP 1345-2A3 -- backfilling and regrading not accomplished concurrent with mining, adequate erosion and sedimentation controls not constructed (N.T. 54-55);

f) MP 101345-1473SM19-01-4 -- backfilling and regrading not accomplished concurrent with mining, adequate erosion and sedimentation controls not constructed (N.T. 57).

35. The violations contained in the bond forfeiture letter had existed when Musser first inspected the site in December of 1984 and continued to exist without change through his last inspection on September 5, 1986. (N.T. 60-61)

36. In citing PNBP for failure to backfill and reclaim, Musser was also including failure to revegetate. (N.T. 72)

37. Photographs which Musser took of the site on August 29, 1986 show conditions as they would have existed at the time of bond forfeiture since the site had not changed since that time. (C Ex. O-1, C Ex. O-2, C Ex. O-3, C Ex. O-12, C Ex. O-13; N.T. 61)

DISCUSSION

We begin our discussion with a determination of the party which bears the burden of proof in this matter. In this appeal of bond forfeitures, DER bears the burden of proving by a preponderance of the evidence that conditions at the Whetsel strip justify bond forfeiture, and, as to per acre liability on the bond instruments, that it forfeited the proper amount of bond. John Percival v. DER, EHB Docket No. 83-094-W (Adjudication issued September 13, 1990); James E. Martin and American Insurance Company v. DER, 1988 EHB 1256, aff'd, ___ Pa.Cmwlth. ___, 570 A.2d 122 (1990).

In its post-hearing brief, DER contends it has met its burden by proving that PNBP has not reclaimed the permits pursuant to the requirements of SMCRA, CSL, and the rules and regulations adopted thereunder, and that its forfeiture of the entire amount of each bond was not an abuse of discretion. We agree that DER has met its burden.

DER is mandated by §4(h)[3] of SMCRA to forfeit bonds when the operator has failed to comply with the requirements of SMCRA. Percival, supra; Morcoal Co. v. Commonwealth, DER, 74 Pa.Cmwlth. 108, 459 A.2d 1303 (1983). In reviewing a bond forfeiture, in addition to determining whether violations have been established by DER, the Board must examine the language of the bond instruments in order to ascertain the obligations of the parties and to determine the manner in which liability accrues under the bond. Percival, supra; James E. Martin, supra; Yellow Run Energy Co. v. DER, 1986 EHB 171. We review DER's decision to forfeit as of the date of forfeiture. Russell W. Joki v. DER, EHB Docket Nos. 85-137-G, 85-138-G (Adjudication issued October 30, 1990); Laurel Ridge Coal, Inc. v. DER, EHB Docket No. 86-349-E (Adjudication issued May 11, 1990). DER, through the testimony of MCI Musser, established that PNBP did not comply with the requirements of

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[3]Section 4(h) provides in pertinent part:

> (h) 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, the department shall declare such portion of the bond forfeited, and shall certify the same to the Department of Justice, which shall proceed to enforce and collect the amount of liability forfeited thereon, and where the operator has deposited cash or securities as collateral in lieu of a corporate surety, the department shall declare such portion of said collateral forfeited....

52 P.S. §1396.4(h)

SMCRA and the rules and regulations thereunder. Musser testified he first observed the violations in December, 1984 and that these violations continued to exist at the time of the hearing. (Findings of Fact Nos. 35, 37)[4]

Mining Permit No. 1345-1(c)

Certificate of Deposit No. 1788, in the amount of $575, and Certificate of Special Deposit No. FM580, in the amount of $7,500, from the First National Bank of Mercersburg were posted as collateral in the bond submitted by PNBP for MP 1345-1(c). The bond is conditioned upon PNBP's faithful performance of all requirements of SMCRA, CSL, the applicable rules and regulations thereunder, and the provisions of its permits. (Findings of Fact Nos. 8, 25)

On MP 1345-1(c), Musser found several violations which had existed at the time of forfeiture. These included backfilling and regrading not performed concurrent with mining, in violation of 25 Pa.Code §87.141(c)(1); rills and gullies not stabilized, in violation of 25 Pa.Code §87.146; and revegetation not completed, in violation of 25 Pa.Code §87.147. (Findings of Fact No. 34; C-O-12; N.T. 71)[5]

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[4]To the extent that Musser's testimony and photographs were based upon his inspections of the site following the forfeiture, we may still consider that evidence. See Robert L. Snyder v. DER, EHB Docket No. 79-201-R (Opinion issued April 27, 1990).

[5]In its post-hearing brief, DER urges that there exist on the various MPs violations of the standard conditions of PNBP's MDPs. DER has attached to its post-hearing brief an affidavit of DER's District Mining Manager, Thomas R. Vayansky, to establish their applicability to PNBP's MDPs and has attached a copy of the standard conditions. These standard conditions were not part of the evidence at the hearing on the merits. This being the case, it would be inappropriate for this Board to examine them. They were not before the Board at the hearing and appellant, therefore, was not accorded an opportunity to challenge their applicability in this matter.

The collateral bond for MP 1345-1(c) is proportional, i.e., liability accrues in proportion to the amount of the permitted area affected by mining activity, and it was forfeited for 16.2 of the 30 acres of MP 1345-1(c). DER's evidence showed that PNBP affected 16.2 acres under this MP. DER could have forfeited no more than 16.2 acres x $500 per acre, or $8,100. (Findings of Fact Nos. 8, 9, Exhibit to Notice of Appeal) Thus, DER was justified in forfeiting First National Bank of Mercersburg Certificate of Deposit No. 1788 and Certificate of Special Deposit No. FM580, in the respective amounts of $575 and $7,500, for a total of $8,075.

Mining Permit No. 1345-2

First National Bank of Mercersburg Certificate of Special Deposit (Collateral Bond) No. FM587, in the amount of $5750, was posted in connection with PNBP's mining of the 10 acres of MP 1345-2 and was conditioned upon PNBP's faithful performance of the requirements of SMCRA, CSL, the rules and regulations thereunder, and the conditions of its permits. (Findings of Fact Nos. 11, 25)

On MP 1345-2, Musser found the following violations: backfilling and regrading not performed concurrent to mining, in violation of 25 Pa.Code §87.141(c)(1); adequate erosion and sedimentation controls not constructed, in violation of 25 Pa.Code §87.106; water permitted to accumulate in the pit, a violation of §4.2(a) of SMCRA, 52 P.S. §1396.4(b)(a); and adequate road safety berms not constructed, in violation of §4.2(a) of SMCRA, 52 P.S. §1396.4b(a). (Findings of Fact No. 34; C-O-1, O-3; N.T. 63, 65, 87)

Since DER introduced evidence that PNBP affected the entire 10 acres of MP 1345-2 (Findings of Fact Nos. 11, 12), DER was, thus, justified in forfeiting the entire amount of the bond.

Mining Permit No. 1345-2A

Mid-Continent Surety Bond No. B1003, in the amount of $10,000 was posted in connection with the 10 acres of MP 1345-2A and was conditioned on PNBP's faithful performance of SMCRA, CSL, the rules and regulations thereunder, and permit conditions. (Findings of Fact Nos. 14, 25)

Musser observed two violations on MP 1345-2A, inadequate erosion and sedimentation controls, in violation of 25 Pa.Code §87.106; and backfilling and regrading not accomplished concurrent with mining, in violation of 25 Pa.Code §87.141(c). (Findings of Fact No. 34)

DER proved that all 10 acres covered by the bond were affected by PNBP's surface mining. (Findings of Fact No. 15) Accordingly, DER was justified in forfeiting the entire amount of the bond.

Mining Permit No. 1345-2A2(RE)

Mid-Continent Surety Bond No. B1015, in the amount of $10,000, was posted in connection with the 10 acres of MP 1345-2A2(RE), with the condition that PNBP faithfully perform the requirements of SMCRA, CSL, the rules and regulations promulgated thereunder, and the conditions of its permits. (Findings of Fact Nos. 17, 25)

On MP 1345-2A2(RE), Musser observed the following violations: adequate erosion and sedimentation controls not constructed, contrary to 25 Pa.Code §87.106; water allowed to accumulate in the pit, contrary to §4.2(a) of SMCRA, 52 P.S.§1396.4(b)(a); acid-bearing materials not properly handled, contrary to 25 Pa.Code §§87.110 and 87.145; backfilling and regrading not accomplished concurrent to mining, contrary to 25 Pa.Code §87.141(c). (Findings of Fact No. 34; C-O-2, O-13; N.T. 64, 71)

DER was justified in forfeiting the full amount of this proportional liability bond because it showed that all of the 10 acres of MP 1345-2A2(RE) was affected by PNBP's surface mining. (Findings of Fact No. 18)

Mining Permit No. 1345-2A3

Somerset Trust Company Treasurer's check (Collateral Bond) No. 160996, in the amount of $500 was posted in connection with the .5 acres of MP 1345-2A3 and was conditioned on PNBP's faithful performance of the requirements of SMCRA, CSL, the rules and regulations promulgated thereunder, and the provisions of its permits. (Findings of Fact Nos. 20, 25)

In his inspection of MP 1345-2A3, Musser found two violations to exist. They were inadequate erosion and sedimentation controls, in violation of 25 Pa.Code §87.106; and backfilling and regrading not accomplished concurrent to mining, in violation of 25 Pa.Code §87.141(c). (Findings of Fact No. 34)

Liability on Bond No. 160996 accrues proportionally. DER showed PNBP affected the entire acreage, and, thus, its forteiture of the entire amount of the bond was justified. (Findings of Fact Nos. 20, 21)

Mining Permit No. 101345-3473SM19-01-4

Somerset Trust Company Treasurer's check No. 195838 (Collateral Bond) in the amount of $350 was posted in connection with the .35 acres of MP 101345-3473SM19-01-4. (Findings of Fact No. 23) The bond was conditioned on PNBP's compliance with SMCRA, CSL, the rules and regulations thereunder, and PNBP's permit conditions. (Findings of Fact No. 25)

Musser found two violations which existed on this MP. They were inadequate erosion and sedimentation controls, in violation of 25 Pa.Code

§87.106; and backfilling and regrading not accomplished concurrent with mining, in violation of 25 Pa.Code §87.141(c). (Findings of Fact No. 34)

Since liability under this bond was for the entire amount (Findings of Fact No. 23), DER's forfeiture of the entire amount of the bond was justified. (Findings of Fact No. 24)

Although PNBP attempted to rebut DER's evidence by Ankney's testimony that some of the mining permits on the site had been backfilled, seeded, and approved, and that completion reports had been filed (N.T. 127-128), Ankney's testimony was not specific as to which permit sites he was alleging to be completed, nor did Ankney have copies of the completion reports he testified were filed. (N.T. 132) MCI Musser testified that the file did not contain any record of a completion report having been filed. (N.T. 134-135) Thus, PNBP's evidence was not sufficient to rebut that of DER. In view of the fact that PNBP has not presented us with any legal defense to the bond forfeiture which we may consider, we sustain DER's forfeiture of the seven appealed bonds in their full amounts.

CONCLUSIONS OF LAW

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

2. The Board may issue an adjudication based upon a cold record. Lucky Strike Coal Company, supra.

3. The burden of showing the forfeiture of PNBP's bonds was not an abuse of discretion or an arbitrary exercise of its duties or responsibilities falls on DER. Percival, supra.

4. When DER finds violations of SMCRA on a permit area, it has a mandatory duty to forfeit bonds associated with the permits. Percival, supra; Morcoal Co., supra.

5. When DER forfeits a proportionate bond, i.e., one on which liability accrues at a specified rate per acre, it must also establish how much acreage on the permit area was affected by the violations. Percival, supra.

6. DER established through unrebutted evidence violations of SMCRA and the regulations thereunder on MPs 1345-1(c), 1345-2, 1345-2A, 1345-2A2(RE), 1345-2A3, and 101345-3473SM19-01-4.

7. The bonds posted with MPs 1345-1(c), 1345-2, 1345-2A, 1345-2A2(RE), and 1345-2A3 were proportionate bonds.

8. DER established that 16.2 acres of MP 1345-1(c) were affected by violations on that permit. DER was entitled to forfeit a proportional amount of the bond for that permit, which amounts to 16.2 acres x $500 per acre, or $8,100. DER was, therefore, entitled to forfeit $8,075 of the bond posted in connection with MP 1345-1(c).

9. DER established that the acreage affected by the violations on MPs 1345-2, 1345-2A, 1345-2A2(RE), and 1345-2A3 was the entire acreage covered by each permit, and, therefore, DER was entitled to forfeit the entire amount of each bond.

10. Violations on MP 101345-3473SM19-01-4 mandated DER forfeit the $350 collateral bond associated with that MP.

11. DER was entitled to forfeit the entire amount of the $350 collateral bond posted with MP 101345-3473SM19-01-4 because liability was for the entire amount.

12. Any arguments raised by PNBP during these proceedings have been waived by its failure to file a post-hearing brief. Joki, supra.

ORDER

AND NOW, this 19th day of March, 1991, it is ordered that:

1) The appeal of PNBP Coal Company is dismissed;

2) DER's forfeiture of First National Bank of Mercersburg Certificate of Deposit No. 1788 and Certificate of Special Deposit No. FM580 in the respective amounts of $575 and $7,500, posted in connection with MP 1345-1(c) at the Whetsel strip, is sustained;

3) DER's forfeiture of First National Bank of Mercersburg Certificate of Special Deposit No. FM587 in the amount of $5750 (Collateral Bond) posted in connection with MP 1345-2 is sustained;

4) DER's forfeiture of Mid-Continent Insurance Company Surety Bond No. B1003 in the amount of $10,000, which was posted in connection with MP 1345-2A, is sustained;

5) DER's forfeiture of Mid-Continent Insurance Company Surety Bond No. B1015 in the amount of $10,000, which was posted in connection with MP 1345-2A2(RE), is sustained;

6) DER's forfeiture of the $500 Collateral Bond, Somerset Trust Company Treasurer's Check No. 160996, posted in connection with MP 1345-2A3 is sustained;

7) DER's forfeiture of the $350 Collateral Bond, Somerset Trust Company Treasurer's Check No. 195838, posted in connection with MP 101345-3473SM19-01-4 is sustained.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

Board Member Richard S. Ehmann has recused himself in this matter.

DATED: March 19, 1991

cc: **Bureau of Litigation**
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M. DIANE SMITH
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GANZER SAND & GRAVEL, INC.	:	
v.	:	**EHB Docket No. 89-585-MJ**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 20, 1991

OPINION AND ORDER
SUR APPELLANT'S MOTION FOR SUMMARY JUDGMENT

By Joseph N. Mack, Member

Synopsis

A motion for summary judgment must be denied where the moving party fails to properly support it with affidavits, pleadings, depositions, answers to interrogatories, or admissions, as required by Pa.R.C.P. 1035(b) and where material facts are in dispute.

OPINION

This matter arose on December 1, 1989 with an appeal by Ganzer Sand and Gravel, Inc. ("Ganzer") contesting the revocation of its solid waste permit by the Department of Environmental Resources ("the Department") on November 2, 1989. The Department's letter of revocation stated that the permit had been revoked due to Ganzer's alleged failure to provide certain collateral bonds required by the permit.

Ganzer and the Department filed their pre-hearing memoranda on March 20, 1990 and July 26, 1990, respectively. The Department's pre-hearing memorandum not only addressed the collateral bond requirement, but also asserted that Ganzer had, in effect, "abandoned" the permit because it had taken no action to construct the landfill authorized by the permit. The Department also asserted that the permit had been issued in 1982 based on information which was now obsolete, particularly with respect to the landfill's proposed design, and that under currently available standards and information, the Department could not have issued the permit.

On November 6, 1990, Ganzer filed a Motion to Limit Issues and Motion to Strike Appellee's Pre-Hearing Memorandum, asserting that the Department's pre-hearing memorandum raised issues not contained in the revocation letter. Ganzer also asserted that the Department was barred by the doctrines of res judicata and collateral estoppel from raising issues concerning the adequacy of the proposed design of the landfill since that same issue had been defended by the Department in other litigation involving Ganzer's permit. The Department filed Objections to Ganzer's motions on November 30, 1990.

On January 25, 1991, following a conference call between the parties and the Board, the parties filed a Joint Stipulation wherein Ganzer advised the Board that it was withdrawing its Motion to Limit Issues and Motion to Strike Appellee's Pre-Hearing Memorandum subject to its right to move for summary judgment based on the aforesaid argument of res judicata.

The matter now before the Board is Ganzer's Motion for Summary Judgment filed on February 21, 1991. In its motion, Ganzer again asserts that the Department is barred under the doctrines of res judicata and collateral estoppel from challenging the adequacy of the proposed landfill design since

the landfill's design had been successfully defended by the Department in other litigation before this Board and in appeals before Commonwealth Court and the Pennsylvania Supreme Court.[1]

The Department responded to Ganzer's motion on or about March 8, 1991. In its brief, the Department argues that although this Board has previously upheld the Department's issuance of the subject permit to Ganzer, that case involved a third-party appeal by the Pennsylvania Game Commission, which had been granted limited standing to raise only certain issues. (See Pennsylvania Game Commission v. DER, et al., 1985 EHB 1.) The Department asserts that the same legal and factual issues are not involved in this appeal and, therefore, the doctrine of res judicata is not applicable. The Department also asserts that the doctrine of collateral estoppel, likewise, is not applicable since previously litigated issues have not remained static. Therefore, the Department asserts that Ganzer's Motion for Summary Judgment must be denied.

The Board has the power to grant summary judgment where

> ...the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Pa.R.C.P. 1035(b); Summerhill Borough v. Commonwealth, Department of Environmental Resources, 34 Pa.Cmwlth. 574, 383 A.2d 1320 (1978).

The evidence must be viewed in a light most favorable to the non-moving party.

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[1]Although Ganzer makes the argument that the adequacy of the design of the landfill was upheld in prior litigation, it provides no citation to these prior appeals.

Robert C. Penoyer v. DER, 1987 EHB 131.

It is not necessary to reach the merits of Ganzer's motion since it fails to meet the requirements of Pa.R.C.P. 1035. Not only is the motion unverified, but Ganzer has offered no pleadings, depositions, answers to interrogatories, admissions, or affidavits in support of the factual assertions made in its motion. These deficiencies alone are grounds for denying the motion. County of Schuylkill v. DER, EHB Docket No. 90-124-W (Opinion and Order issued November 6, 1990); Monessen, Inc. v. DER, EHB Docket No. 88-486-E (Opinion and Order issued May 7, 1990).

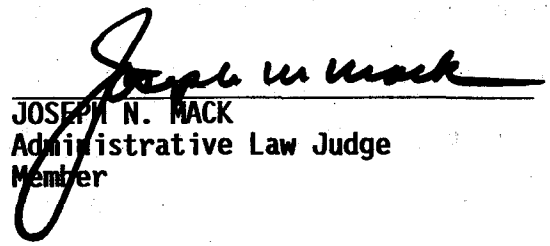
In addition to the above-stated deficiencies, Ganzer's motion does not address all the allegations in this appeal. Specifically, Ganzer's motion does not address the basis of the Department's revocation letter, i.e. that Ganzer allegedly failed to provide sufficient collateral bonding, as required by its permit. Since this allegation remains in dispute, summary judgment cannot be granted. North American Oil & Gas Drilling Co., Inc. v. DER, EHB Docket No. 90-258-E (Opinion and Order issued January 8, 1991). Even if Ganzer were asking for only partial summary judgment with respect to the issue of the adequacy of the landfill design, there remain questions of fact on this issue, as well, since the factual allegations contained in Ganzer's motion are unsupported.

Because Ganzer's Motion for Summary Judgment fails to meet the requirements of Pa.R.C.P. 1035(b) and because material facts remain in dispute, the motion must be denied.

O R D E R

AND NOW, this 20th day of March 1991, it is ordered that Ganzer Sand & Gravel's Motion for Summary Judgment is denied.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 20, 1991

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M. DIANE SMITH
SECRETARY TO THE BOARD

MONTGOMERY COUNTY	:	
v.	:	**EHB Docket No. 91-053-E**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and BERKS COUNTY, Permittee	:	**Issued: March 20, 1991**

OPINION AND ORDER
SUR HAY'S RUN ASSOCIATES'
PETITION TO INTERVENE

By: Richard S. Ehmann, Member

Synopsis

Before the Board is an appeal by Montgomery County from DER's approval under the Municipal Waste Planning, Recycling and Waste Reduction Act of the Berks County Municipal Waste Management Plan, which proposes to send a portion of Berks County's municipal waste to a resource recovery facility to be constructed in Montgomery County.

Intervention is sought by one of the owners of land on Berks County, on which Browning-Ferris, Inc., proposes to build a landfill which would be used to dispose of all or a portion of the municipal wastes not sent to the facility in Montgomery County. Intervention under these circumstances is denied because the Petitioner lacks a direct, immediate and substantial interest in the outcome of this appeal, especially where its Petition asserts that the Berks County Plan contains a provision to automatically correct any deficiency therein which might result if the resource recovery facility is not constructed.

OPINION

Montgomery County (Montgomery) has filed an appeal with us from the January 9, 1991 approval by the Department of Environmental Resources' ("DER") under the Municipal Waste Planning, Recycling and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, No.101, 53 P.S. §4000.101 et seq., ("Act 101") of the Berks County Municipal Waste Management Plan. According to the Notice Of Appeal, the Plan provides in part that 500 tons per day of municipal waste generated in Berks County is to be disposed of by haulage to a resource recovery facility which Wheelabrator Pottstown, Inc. proposes to construct and operate in Montgomery. Montgomery challenges the plan because Montgomery says it has also prepared a plan for Montgomery County and, while Wheelabrator's proposal facility could be selected to become a portion of its plan, at present it has not been incorporated in Montgomery's plan. Alternatively, Montgomery says the Berks County plan should have been approved by DER conditioned upon its being consistent with Montgomery's Plan.

According to its Petition To Intervene, Hay's Run Associates ("HRA") is a tenant-in-common owner of a tract of land located in Berks County on which Browning-Ferris, Inc. ("BFI") has applied to DER for a permit to operate a municipal waste landfill. The Petition then states this landfill (assuming DER "permits" it) will receive all or a portion of the Berks County municipal waste which does not go to the proposed resource recovery facility. Further, HRA's petition says Berks County's plan provides that unless the resources recovery facility becomes operational, all municipal wastes will go to the BFI landfill. Finally, the Petition says because HRA is to be paid a royalty by BFI for the wastes disposed of at the proposed landfill, it has a substantial, direct and immediate interest in the appeal's outcome. HRA's

Petition does not indicate that HRA will offer any evidence in this matter, however.

While neither Montgomery nor Berks County has responded to the Petition To Intervene, DER has done so. DER opposes it and alleges that HRA's Petition fails to show why it should be allowed to intervene.

We have generally held that intervention is authorized at the discretion of the Board. Keystone Sanitation Co., Inc. v. DER, 1987 EHB 22. We generally grant intervention where the Petitioner establishes that he has a direct, immediate and substantial interest which is not adequately represented by the parties already appearing before the Board. Save Our Lehigh Valley Environment v. DER, 1987 EHB 117. Of course the Petitioner has the burden of proof as to these issues. Sunny Farms, Ltd. v. DER, 1982 EHB 442.

HRA has not met this burden here. If the plan is self-adjusting, as HRA alleges, and places all trash in the BFI landfill, in the event the resource recovery facility never becomes operational, then HRA benefits through increased royalties at least over the short term. At worst, on the opposite side of the equation, the Berks County plan is valid as approved and the BFI landfill gets what is currently proposed in the Plan (all but 500 tons per day of the wastes). In neither case is HRA's interest in this appeal shown to be direct, immediate or substantial as a result. In light of the nature of Montgomery's challenge, HRA's interest is remote and speculative.

Even if Berks County eventually takes the position in this appeal of "the plan or nothing", as HRA says Berks County might, that changes nothing for HRA. This is because HRA says the plan self-adjusts and because as an adjudicatory tribunal, this Board is not bound in its adjudication of the appeal by any "all or nothing" positions taken by any party.

The same is true as to HRA's allegation that, in part, the relationship between BFI and Berks County has occasionally been adversarial. Even if the current relationship between Berks County and BFI was openly hostile, HRA's interest in this appeal would be too remote and speculative, considering the nature of Montgomery's limited challenge to Berks County's Plan and HRA's allegations as to the nature of the plan. Under these circumstances, HRA has not met its burden. New Hanover Corporation v. DER, EHB Docket No. 90-225-W (Opinion issued September 21, 1990); BethEnergy Mines, Inc. v. DER, 1987 EHB 873.[1]

ORDER

AND NOW, this 20th day of March, 1991, the HRA's Petition To Intervene in the instant proceedings is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: March 20, 1991

[1]Nothing prevents HRA form filing a Brief *Amicus Curiae* in this case. City of Harrisburg v. DER, 1988 EHB 946.

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NEW HANOVER CORPORATION	:	**EHB Docket No. 90-225-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 21, 1991

OPINION AND ORDER SUR
PETITION TO INTERVENE

By Maxine Woelfling

Synopsis

Interests of a host county are sufficient to warrant its intervention in an appeal of the denial of a permit modification for a solid waste disposal facility where the appellant is challenging the host county's solid waste disposal plan.

OPINION

This matter was initiated with the June 5, 1990, filing of a notice of appeal by New Hanover Corporation (Corporation) seeking review of the Department of Environmental Resources' (Department) May 7, 1990, denial of the Corporation's re-permitting application for a waste disposal facility in New Hanover Township, Montgomery County. The Corporation challenges the Department's denial on many grounds, most of which are not relevant to the issue presently before the Board for disposition.

A petition to intervene in this matter was filed on September 14, 1990, by the County of Montgomery (County).[1] The County seeks to intervene in this matter primarily because the Corporation's notice of appeal disputes the validity and application of the County's Solid Waste Management Plan. The County alleges that the Plan represents a great investment of the County's time, money, and resources, and that, as the host County of the Corporation's proposed facility, it has a right to intervene.

If intervention is granted, the County intends to present evidence that its Plan was approved; that parts of the plan were "grandfathered" under the Municipal Waste Planning Recycling and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, 53 P.S. §4000.101 *et seq.* (commonly referred to as Act 101); that the County has complied with the Plan, the Department's approval and the relevant statutes; that the Corporation had notice of this; and finally, that the Plan is vital to solving the County's current waste disposal crisis. The County maintains its interests are not adequately represented by other parties to this appeal and that since it developed and is implementing the Plan, it is best able to support and defend it.

On September 31, 1990, the Corporation filed its answer in opposition to the County's petition to intervene, arguing that its challenges to the County Plan and the Department's interpretation of Act 101 are legal questions

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[1] A petition to intervene by Paradise Watch Dogs was denied in a September 21, 1990, opinion and Paradise Watch Dogs has petitioned for review of that decision at No. 2143 C.D. 1990. New Hanover Township also filed a petition to intervene on October 1, 1990, and that petition is being granted in an opinion and order of this same date.

and that their resolution does not require the County's participation. The Corporation also alleges that the County has failed to demonstrate a substantial, direct, and immediate interest in this appeal.[2]

The Department did not answer the County's petition.

Intervention before the Board is governed by 25 Pa.Code §21.62. The Board has consistently held that intervention is discretionary and that petitioners must show a direct, immediate and substantial interest in the outcome of the litigation. Keystone Sanitation, Inc. v. DER, 1989 EHB 1287, 1289-90. The factors considered by the Board in ruling on a petition to intervene include, 1) the prospective intervenor's relevant interest; 2) the adequacy of representation provided by the existing parties; and 3) the ability of the prospective intervenor to present relevant evidence. BethEnergy Mines, Inc. v. DER, 1987 EHB 873. Intervention is not allowed where it will overly broaden the scope of the original appeal or result in a multiplicity of arguments or confusion of issues. City of Harrisburg v. DER, 1988 EHB 946. A prospective intervenor has the burden of showing that intervention should be granted. Del-Aware Unlimited, Inc. v. DER, 1988 EHB 547. Here, the County has demonstrated that intervention is appropriate.

Paragraphs 3 and 4 of the Department's denial letter make specific reference to the County Plan. Paragraph 3 advises the Corporation that it has

[2] The County filed a reply to the Corporation's answer on October 9, 1990, and the Corporation filed a memorandum of law in opposition to the petition on October 17, 1990. The County's reply is best characterized as a *motion in limine* which, although it may resolve some of the issues in the appeal, is inappropriate at this stage of the proceedings. The County has also requested that we take official notice of the orders of the Montgomery County Court of Common Pleas and the Commonwealth Court in related litigation between the Corporation and the County. The Montgomery County Court stayed the Corporation's action against the County pending disposition of the Corporation's appeal before the Board, and the Commonwealth Court quashed the Corporation's appeal of that order. Although official notice is taken of the County Court's order, that order, in and of itself, does not provide grounds for the County's intervention here.

failed to demonstrate that its proposed facility is consistent with applicable planning or that there is a need for it, while Paragraph 4 notes that the County does not provide for use of the Corporation's landfill for Montgomery County waste, as is required by §507 of Act 101. The Corporation's appeal asserts that the Plan does not cover the region of the County in which the Corporation's solid waste facility would be located (§3.4.2), that the Plan is a nullity without force and effect (§3.4.4), that the Plan did not require designated disposal facilities (§3.4.5), and that the County did not comply with other provisions of Act 101 (§3.4.3, 3.4.6, 3.4.8). Given the issues regarding Act 101 raised in the Corporation's notice of appeal, the County has a direct, immediate, and substantial interest in the outcome of this appeal. Whether such issues are factual or legal does not diminish the County's interest in this appeal.

Furthermore, the County has also satisfied the other criteria applied by the Board in ruling on petitions to intervene. The County is best able to present evidence regarding the provisions of the Plan and how they have been implemented. While the Department has an overall responsibility in administering Act 101 to assure that its planning provisions are implemented in permitting decisions under the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, the County also has a more direct interest in assuring that the waste disposal needs of its citizens are addressed through sound planning decisions and can more directly represent those interests than the Department. And, the County is not seeking to broaden the scope of the issues in the appeal or inject a multiplicity of issues or confusion into the proceeding, for it has limited its request to intervene to the planning issues raised in the Corporation's notice of appeal.

O R D E R

AND NOW, this 21st day of March, 1991, it is ordered that:

1) The County's petition to intervene is granted, with its participation limited to Act 101 planning issues;

2) The period during which discovery may be conducted in this matter is extended to May 15, 1991; and

3) The Department and the County shall file their pre-hearing memoranda on or before May 29, 1991.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: March 21, 1991

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SECRETARY TO THE BOA

NEW HANOVER CORPORATION	:	**EHB Docket No. 90-225-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 21, 1991

OPINION AND ORDER SUR PETITION TO INTERVENE

By Maxine Woelfling

Synopsis

The interests of a host municipality are sufficient to warrant intervention in the appeal of the denial of a permit modification to a solid waste disposal permit. The extent of the municipality's participation is limited to supporting the reasons stated by the Department in its denial letter in order to assure that the issues in the appeal are not needlessly broadened or confused.

OPINION

This matter was initiated with the June 5, 1990, filing of a notice of appeal by New Hanover Corporation (Corporation) challenging the Department

of Environmental Resources' (Department) May 7, 1990, denial of the Corporation's re-permitting application for a waste disposal facility in New Hanover Township, Montgomery County.[1]

The Township filed a petition to intervene[2] on October 1, 1990, alleging that, as the host municipality, its interests in protecting the health, safety, welfare, and property of its citizens is sufficient to warrant its intervention. The Township further contends that it actively participated in the review of the permit application and that the Department relied on its comments in the permit denial letter. It maintains that its interests would not be adequately represented by the Department, since it and the Department are adversaries in a related appeal at Docket No. 88-119-W.

While the Department generally supported the Township's intervention in its October 15, 1990, answer to the Township's petition, it urged that the intervention be limited to those issues set forth in the permit denial letter. The Corporation opposed the Township's petition in its October 16, 1990, answer, arguing that the Township's interests were either irrelevant, raised in related appeals, or adequately protected by the Department.

On October 22, 1990, the Township replied to the Department's answer, disputing that the issues it raised in its related appeal at Docket No. 90-227-W would expand the scope of this appeal. The Township alleged that

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[1] New Hanover Township (Township) also filed an appeal of the permit denial at Docket No. 90-227-W. The Township contended that the Department should have cited additional reasons in its denial letter. The Department, relying on Union Township v. DER, 1989 EHB 1295, moved to dismiss the appeal, and the Township thereafter sought to withdraw its appeal. The docket at No. 90-227-W was marked discontinued by order dated November 20, 1990.

[2] A petition to intervene by Paradise Watch Dogs was denied in a September 21, 1990, opinion and order. Paradise Watch Dogs petitioned for review of that decision at No. 2148 C.D. 1990. The County of Montgomery also filed a petition to intervene on September 14, 1990, and that petition is being granted in an opinion and order of this same date.

such issues were, in essence, an elaboration on the Department's denial of the application on the grounds that it failed to conform to the requirements of Article I, §27 of the Pennsylvania Constitution.

Intervention in a matter before the Board will be permitted where a petitioner demonstrates a substantial, immediate, and direct interest in the outcome of the appeal, Keystone Sanitation, Inc. v. DER, 1989 EHB 1287, 1289-90. A prospective intervenor must also show that it will present relevant evidence and that its interests will not be adequately represented by the existing parties, BethEnergy Mines, Inc. v. DER, 1987 EHB 873. Intervention may not be used as a vehicle to overly broaden the scope of the original appeal or inject a multiplicity of arguments or confusion into the proceedings, City of Harrisburg v. DER, 1988 EHB 946.

Applying the criteria articulated in these decisions, the Township has demonstrated that its intervention is warranted. As the host municipality, the Township has both a direct interest in this appeal and unique knowledge of local conditions, Keystone Sanitation, Inc., *supra*, at 1290. It has certainly demonstrated its ability to present relevant evidence through its active participation in the permit application process. And, its interests, not being identical to those of the Department, will not be adequately represented by the Department.

The real issue here, as in Keystone Sanitation, is the scope of the Township's intervention. Twenty reasons were set forth in the Department's permit denial letter, all of which were challenged by the Corporation. These reasons are complex and detailed. The Township now seeks to introduce additional evidence regarding technical deficiencies in the Corporation's application which were not cited as bases for the permit denial. Since the Board is reviewing whether the Department's letter was an abuse of discretion,

what other grounds the Department could have, but did not cite, as reasons for its denial is of little relevance. Moreover, any one of the 20 reasons set forth in the permit denial letter is theoretically a sufficient grounds for denial of the permit application, given the broad language of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 350, as amended, 35 P.S. §6018.101 *et seq.* Presenting one, five, or 35 additional reasons for denial of the permit would inject a multiplicity of issues, create confusion, and further prolong resolution of this matter.

Thus, the Township's participation in this appeal will be limited to the reasons set forth in the denial letter. The Township is encouraged to coordinate its efforts with those of the Department to assure that duplicative evidence will not be presented at the hearing on the merits.

O R D E R

AND NOW, this 21st day of March, 1991, it is ordered that:

1) The Township's petition to intervene is granted, with its participation limited to the reasons set forth in the Department's May 7, 1990, denial letter;

2) The period during which discovery may be conducted in this matter is extended to May 15, 1991; and

3) The Department, the County, and the Township shall file their pre-hearing memoranda on or before May 29, 1991.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: March 21, 1991

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M. DIANE SMITH
SECRETARY TO THE BOARD

MUNICIPAL AUTHORITY OF THE BOROUGH OF ST. MARYS	:	
v.	:	**EHB Docket No. 90-448-E**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: March 22, 1991**

OPINION AND ORDER
SUR APPELLANT'S MOTION TO COMPEL ANSWERS
TO INTERROGATORIES AND REQUEST FOR PRODUCTION
OF DOCUMENTS

By: Richard S. Ehmann, Member

Synopsis

A motion to compel DER to answer certain interrogatories and produce documents is denied where DER has indicated through its response to the motion that it will be providing Supplemental Answers to a series of interrogatories.

The motion is granted as modified where although use of the terms "welfare" and "public welfare" in interrogatories 16-19, 43-45, 75-78, and 104-107 is too broad in scope, DER is capable of answering these interrogatories using a narrower definition. The motion is granted as to interrogatories 67 and 68, as modified to reference Exhibit C of the Notice of Appeal, where refusal to answer is based upon appellant's failure to provide DER information which is identified as in DER's exclusive possession. The motion is granted as to interrogatory 128, since DER's answer that facts upon which it is relying for a particular position can be found somewhere within fourteen documents, fails to specify what those facts are or in which document

they are found. The motion is also granted as to interrogatories 145 and 146 since DER can answer the interrogatory after appellant defines the term "validated" as used in its interrogatory.

OPINION

This appeal was initiated on October 23, 1990, by the Municipal Authority of the Borough of St. Marys ("St. Marys") and was taken from the Department of Environmental Resources' ("DER") issuance of NPDES Part I Permit No. PA 0026387 to St. Marys, which set effluent limitations for the discharge from St. Marys' sewage treatment plant. The procedural history outlining a series of discovery extensions, resulting with March 29, 1991 as the deadline for the completion of discovery, is set forth in our Opinion and Order Sur DER's Motion to Compel and to Extend Time for Discovery, issued March 12, 1991. On February 28, 1991, St. Marys filed a Motion to Compel Answers to Interrogatories with an accompanying brief and a Request for Production of Documents. Subsequently, on March 11, 1991, we received a supplement to St. Marys' Motion to Compel and Request for Production of Documents. On March 18, 1991, DER filed its Response to St. Marys' Motion and Request and supplemental motion, along with a supporting brief. It is St. Marys' Motion to Compel and Request for Production of Documents, as supplemented, which we address in this Opinion.

In its Motion, St. Marys alleges that on or about December 11, 1990, it served on DER a First Set of Interrogatories and Request For Production of Documents, and that on or about February 5, 1991, it received DER's responses thereto. St. Marys further alleges that DER supplemented its responses on or about February 12, 1991. St. Marys urges, "DER's responses to Interrogatories, 9, 16-19, 21, 23, 28, 30, 32, 34, 42-45, 47, 49, 53, 58, 60,

62, 64, 66, 67, 68, 75-78, 80, 82, 84, 86, 89, 91, 93, 96, 98, 100, 104-107, 114, 116, 118, 120, 122, 125, 128, 129, 130, 134, 145, 146, 154 and 156 are insufficient under the Pennsylvania Rules of Civil Procedure as set forth more specifically in Appellant's Brief...."[1] Accordingly, St. Marys requests us to compel DER to serve full and complete answers to the above-referenced interrogatories. Further, St. Marys' supplement to its Motion alleges that DER's supplemental answer to interrogatory 10 is insufficient, and St. Marys requests us to compel DER to fully answer that interrogatory.

As to St. Marys' challenge to DER's answers to interrogatories 9, 21, 23, 28, 30, 32, 34, 42, 47, 49, 53, 58, 60, 62, 64, 66, 80, 82, 84, 86, 89, 91, 93, 96, 98, 100, 105, 114, 116, 118, 120, 122, 125, 126, 129, 130, 134, 154 and 156, we do not address these in this Opinion because DER's response indicates that it is preparing supplemental answers to these interrogatories and we assume those answers will sufficiently meet the concerns raised by motion to compel. DER's supplemental answers are due in St. Marys' possession by March 29, 1991. Thus, we will address only the answers to interrogatories 10, 16, 17, 18, 19, 43, 44, 45, 67, 68, 75, 76, 77, 78, 104, 106, 107, 128, 145 and 146 in this Opinion.

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[1]The form of St. Marys' Motion is inadequate for purposes of the Board's ruling on it. St. Marys has, in a four-paragraph motion, challenged over 50 answers to interrogatories, stating that those answers are insufficient. To its Motion, St. Marys has attached 84 pages of Interrogatories and Answers and a 23-paged brief. The brief, which fails to address the interrogatories sequentially and jumps forward and back between them, is also not structured in a fashion which facilitates our ruling on the motion. Motions are to set forth within their four corners the reasons why they should be granted. Briefs, if any are filed, are to discuss the legal theories supporting the reasons spelled out in the motion. Motions merely alleging that over 50 answers are insufficient are themselves insufficient and invite a response based solely on their own insufficiency. The clearly preferable form for a motion such as this deals with each interrogatory separately, showing why the answer was unsuitable.

Interrogatory 10

Addressing DER's answer to interrogatory 10, we deny St. Marys' motion to compel DER to fully answer that interrogatory. Interrogatory 10 asked DER to state in detail all facts and assumptions that supported promulgation of the effluent limitation for silver of 0.2 ug/l set forth at 25 Pa. Code §16.51, Table I. DER responded by referring St. Marys to a document numbered 18, which is an October 1980 publication of the U.S.E.P.A. entitled "Ambient Water Quality Criteria for Silver", and by stating the criterion for silver was developed according to the procedures outlined in 25 Pa. Code §§16.22(2)(i)(C) and 16.22 (2)(ii). St. Marys objects that DER did not indicate how it arrived at the instream standard of 0.2 ug/l from the data set forth in the U.S.E.P.A. study. DER's response, while maintaining that the answer is fully responsive, states that DER will re-create its calculation of the silver criterion, using the data in Document 18 and the formula set forth in 25 Pa. Code Chapter 16. This appears to meet St. Mary's needs. As set forth below, DER is to provide this formula to St. Marys by March 29, 1991.

Interrogatories 16, 17, 18, 19, 43, 44, 45, 75, 76, 77, 78, 104, 105, 106 and 107

We next address St. Marys' motion to compel answers to interrogatories 16, 17, 18, 19, 43, 44, 45, 75, 76, 77, 78, 104, 105, 106 and 107. St. Marys' motion states that in each of these interrogatories, DER was asked "specific questions about whether it contended that the various effluent limitations were necessary to protect welfare", and DER objected to these questions as vague and requested a clarification of the term "welfare". St. Marys urges that the term "welfare" is reasonably clear in the context of an action challenging the terms of a discharge permit issued pursuant to the

Clean Streams Law, ("CSL") Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. It contends the CSL focuses on pollution, which is defined as including anything which "renders waters harmful to...welfare". DER's response to St. Marys' Motion takes the position that the all-incompassing nature of the terms "welfare" and "public welfare" makes those terms vague, since they could encompass many issues "beyond the Department's ken". Also, DER maintains that interrogatories which asked DER whether the effluent limitations in question and the current discharge from the POTW affected aquatic communities and human health could include issues falling within the terms "welfare" and "public welfare", so that DER's responses to those interrogatories based on these impacts should suffice.

The format of the interrogatories at issue is as follows.

> 16. Do you contend that an effluent limitation for silver of .0002 mg/l in the Permit is necessary to protect welfare?
>
> 17. If your answer to the preceding interrogatory is in the affirmative,
> (a) state each fact that supports your contention:
> (b) state each fact that does not support your contention;
> (c) state each assumption and opinion upon which you rely to support that contention;
> (d) identify each person who has knowledge of the facts, assumptions and opinions that support that contention;
> (e) identify and produce all documents which relate to that contention.
>
> 18. Does DER contend that the current level of silver discharging from the POTW is injurious or harmful to public welfare?
>
> 19. If your answer to the preceding interrogatory is in the affirmative,
> (a) state all facts that support the contention that the current level of silver discharging from the POTW is injurious or harmful to public welfare;

> (b) identify and produce all reports, studies, surveys and sample analysis which support that contention;
> (c) produce all documents that relate to your contention;
> (d) identify each person with knowledge of whether the current level of silver discharging from the POTW is injurious or harmful to the public welfare.

Interrogatories 42-45 follow this same format and are aimed at the copper effluent limitations and discharges; interrogatories 75-78 follow the format of paragraphs 16-19 and are aimed at the zinc effluent limitations and discharges; interrogatories 104-107 follow the same format and are aimed at effluent limitations and discharges of dissolved iron.

We agree with DER's assertion that St. Marys' usage of the terms "welfare" and "public welfare" is undefined. The terms are so indefinite that these interrogatories are not reasonably calculated to lead to relevant information.[2] Nevertheless, we believe DER to be capable of answering these interrogatories to a greater extent. Insofar as by "welfare" and "public welfare" St. Marys' seeks information concerning the welfare of the aquatic community and public health impacts, DER has answered interrogatories specifically aimed at those concerns and it need not answer these challenged interrogatories as to those concerns. However, insofar as DER has not answered any of the interrogatories regarding the non-aquatic biological community, it must answer these interrogatories. Also, insofar as by "welfare" and "public welfare" St. Marys means the pollution impact on Elk Creek of each particular chemical component, other than as measured by the

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[2]Where possible, we expect that counsel will word interrogatories so as to limit their scope. Interrogatories should be focused on gathering information either directly of use in this proceeding or likely to produce information of use in this proceeding, rather than all information on a subject.

impact on human public health and the aquatic community, DER can and should answer these interrogatories. Thus, we sustain St. Marys' Motion in part, in that DER must answer these interrogatories to give information in accordance with this opinion by March 29, 1991, and we deny the motion to compel in part, in that DER has already provided answers regarding the aquatic community and of public health elsewhere in its answers.

Interrogatories 67 and 68

St. Marys' motion to compel next asserts DER's objection to interrogatory 67 is without merit and DER should be required to answer that interrogatory and interrogatory 68. Interrogatory 67 stated: "Why did DER assume that copper concentrations in samples reported as below the detection limit of 10 ug/l indicated a level of copper at 10 ug/l?" DER said it could not respond because this interrogatory is vague in that it does not specify when or how DER allegedly made the assumption described. Interrogatory 68 directed: "State in detail the reasons why DER made a different assumption with respect to zinc, and assumed that zinc concentrations in samples reported as below the detection limit indicated a level of zinc at 0 ug/l." In response, DER gave the same response it had given to interrogatory 67.

St. Marys states it does not know when DER made its assumption, but it contends DER is aware the assumption referenced is contained in the WQAT 2.04 model data because it was raised as a question by St. Marys in its Comments Letter prior to this appeal as submitted to DER in regard to the draft NPDES Permit. This Comments Letter is Exhibit C to the Notice of Appeal. DER's response indicates that it understands St. Marys is referring to

assumptions allegedly made during the WQAT 2.04 computer modeling process, but it says it objects because the interrogatories did not specify when or how DER allegedly made the described assumption.

We cannot fault St. Marys' lack of precision in its drafting of interrogatory 67, where the computer model run by the regulatory agency which was used to set effluent limitations in the permit was not provided to St. Marys prior to issuance of the permit, taking of the appeal, serving of interrogatories, or filing of the motion to compel DER to answer. By March 29, 1991, DER must answer interrogatory 67, as modified to reference subparagraph D(2) on page 14 of Exhibit C to the Notice of Appeal, which is the comments on DER's Draft of NPDES Permit No. PA 0026387 submitted on behalf of St. Marys. Similarly, DER must answer interrogatory 68, as modified in the same fashion as paragraph 67, by March 29, 1991.

Interrogatory 128

Interrogatory 128, following the question of whether DER contends St. Marys' discharge interferes with any present use of the stream, stated:

> 128. If your answer to the preceding interrogatory is other than an unqualified negative,
> a) state each stream use you contend is interfered with by St. Marys' discharge;
> b) state in detail all facts that support the contention that the St. Marys discharge interferes with any stream use identified;
> c) identify and produce all documents that relate to such facts.

DER responded to subpart (a) by stating aquatic life and water supply. As to subparts (b) and (c), DER responded, "Pursuant to Pa. R.C.P. 4006(b), the Department refers Appellant to Documents No. 1-11 and 13-15." St. Marys contends this is not an adequate response. We agree. DER's response to subparagraph (b) leaves St. Marys (and this Board) to guess which facts in

these numerous documents DER believes support its contention that the St. Mary's discharge interferes with either identified stream use. DER has only generally pointed St. Marys in the direction of the facts, and St. Marys has no way of knowing upon which facts contained in which documents DER is basing its contention. DER must provide St. Marys with a more specific response to interrogatory 128 by March 29, 1991.

Interrogatories 145 and 146

St. Marys requests us to compel DER to answer interrogatories 145 and 146. Interrogatory 145 reads: "Was the WQAT 2.04 model validated by any accepted engineering and technical methods". Interrogatory 146 then provides: "If your answer to the preceding interrogatory is in the affirmative, (a) state the validation method used; (b) identify the persons who performed the validation procedure; (c) produce all data generated from model validation." DER objected to both of these interrogatories, stating that the question in 145 was unclear, vague, and requesting clarification. DER's response to the motion makes it clear that it objects to these interrogatories because the term "validated" is unclear and in need of a more definite statement by St. Marys.[3] We direct St. Marys to provide DER with a definition of the term "validated" and direct DER to then answer these interrogatories within seven days of receipt thereof.

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[3]It pains us to point out the obvious, but many discovery disputes should be resolved without resort to this Board. In the future, where the meaning of only one word in an interrogatory is unclear, it would be appropriate for the responding party to promptly respond that it will answer the interrogatory upon definition of that term, and for the interrogatory's propounder to then promptly provide a definition such as is found in a standardized dictionary. If the search for relevant factual information is truly the driving force behind a party's discovery, this approach produces that information much faster than the exchange of stings in Motions and Replies.

ORDER

AND NOW, this 22nd day of March, 1991, it is ordered that St. Marys' Motion to Compel Answers to Interrogatories and Request for Production of Documents is granted in part and denied in part. In that DER has indicated that it will be supplementing its answers to interrogatories 9, 10, 21, 23, 28, 30, 32, 34, 42, 47, 49, 53, 58, 60, 62, 64, 66, 80, 82, 84, 86, 89, 91, 93, 96, 98, 100, 105, 114, 116, 118, 120, 122, 125, 126, 128, 129, 130, 134, 154 and 156, and DER's supplemental answers are due in St. Marys' possession by March 29, 1991, the motion is denied. The motion is granted in part and denied in part as to interrogatories 16, 17, 18, 19, 43, 44, 45, 75, 76, 77, 78, 104, 105, 106, and 107, and DER is directed to by March 29, 1991 provide answers to those interrogatories insofar as it has not answered them regarding the non-aquatic biological community, and insofar as by "welfare" and "public welfare" St. Marys means the pollution impact of the chemicals on Elk Creek other than as measured by the impact on human public health and the aquatic community. The motion is granted as to interrogatories 67 and 68, as those interrogatories are modified to reference Exhibit C to the Notice of Appeal. DER must answer interrogatories 67 and 68 by March 29, 1991. The motion is granted as to interrogatory 128, and DER must answer it by March 29, 1991. We also grant the motion as to interrogatories 145 and 146, and, within seven days of definition by St. Marys of the word "validated", DER must answer interrogatories 145 and 146.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: March 22, 1991

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M. DIANE SMITH
SECRETARY TO THE BOARD

THE CARBON/GRAPHITE GROUP, INC.	:	
v.	:	EHB Docket No. 90-524-E
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: March 22, 1991

OPINION AND ORDER SUR
THE CARBON/GRAPHITE GROUP, INC'S
PETITION TO AMEND ORDERS

By: Richard S. Ehmann, Member

Synopsis

Appellant's Petition To Amend Orders, seeking Board authorization of an appeal to Commonwealth Court from our Order dismissing its Second Petition For Supersedeas, is denied because it fails to meet the standards for certification under 42 Pa. C.S. §702. Under this statute the Petition must show: (1) a controlling question of law; (2) on this question of law, there is a substantial ground for difference of opinion; and (3) it is likely that an immediate appeal could advance the ultimate determination of the merits of the appeal.

Where the appeal is scheduled for a hearing on its merits in just over two months from the date of the Petition's filing and the Petition offers nothing more than an assertion that this certification may advance the ultimate determination, the Petition fails to show how an immediate appeal may advance the ultimate determination of the merits of the controversy such as warrants amendment of the orders.

Appellant's contention that there is substantial ground for difference of opinion as to whether Section 316 of the Clean Streams Law authorizes DER to act to impose treatment requirements on Appellant cannot be sustained where the Board's Order adopts as its rationale the only decision by the Supreme Court interpreting that section.

A Petition seeking certification for purposes of taking an appeal from an interlocutory order must be rejected, where it fails to plead more than that a particular issue is a controlling issue and that there is a substantial ground for difference of opinion as to interpretation. The Petition must set forth why the issue is controlling and show how there is a substantial ground for difference of opinion on this issue.

An issue of law is not controlling for purposes of certification for interlocutory appeal where the Petition For Supersedeas, which was denied, never raised the issue on which certification is now sought.

OPINION

On February 5, 1991, we issued an Order in the above-captioned appeal, denying The Carbon/Graphite Group, Inc.'s (CGG) Second Petition For Supersedeas without hearing. The order was issued (without an accompanying opinion) on the day prior to that on which the hearing was to be held as an accommodation to the parties to minimize the expenses in time and money to which they would be exposed by such a hearing. The order advised the parties that our opinion explaining the Order would follow shortly.

On February 19, 1991, we issued our Opinion and Order Sur DER's Motion To Dismiss [CGG's] Second Petition For Supersedeas. That Opinion

granted DER's Motion and explained the basis for our Order of February 5, 1991. Attached to that Opinion was an Order specifically affirming the Order of February 5, 1991.

On March 1, 1991, CGG filed its Petition To Amend Orders with this Board. This petition seeks an order from this Board amending our Orders of February 5, 1991 and February 19, 1991 to incorporate a statement in accordance with the requirements of 1 Pa. Code §35.225 and 42 Pa. C.S. §702, in order to allow CGG to pursue an interlocutory appeal therefrom to the Commonwealth Court. On March 11, 1991, we received DER's response to CGG's Petition. In the interim and on March 5, 1991, after a conference call with counsel for both parties, we scheduled the hearing on the merits of this appeal to begin on May 22, 1991, and, after a recess for the Memorial Day weekend, to conclude by May 31, 1991. These hearing dates were selected as the first mutually satisfactory hearing dates for counsel for both parties, though the Board was prepared to hear this appeal sooner.

CGG's Petition asks that we add the following language to these two Orders:

> This Opinion and Order involves a controlling question of law as to which there is a substantial ground for difference of opinion, and an immediate appeal from such order may materially advance the ultimate determination of the matter.

It then goes on to recite the issues on which CGG contends we should grant its Petition. These issues are: (1) the opinion finds CGG adopted the acid mine drainage ("AMD") on its property and accordingly finds DER could require CGG to treat same without case law support for this conclusion; (2) the opinion finds that the condition causing this pollution exists on CGG's property, and,

thus, CGG can be ordered to treat this AMD, whereas CGG contends that this condition does not exist on its property; (3) the opinion presumes Section 315 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.315 does not apply to this appeal, whereas CGG contends it applies and compels a finding that CGG is not responsible for treatment of the AMD; and (4) that the Land and Water Conservation and Reclamation Act applies and empowers DER to treat the AMD, so DER's order for CGG to treat this AMD constitutes an abuse of discretion. Nothing in CGG's Petition addresses how an appeal of this interlocutory order will materially advance the ultimate determination of these issues, other than to assert in conclusory fashion that such an appeal will do so.

On March 11, 1991, DER delivered us its Objections to CGG's Petition. On March 12, 1991, our mail brought us DER's Brief in support of its Objections.[1]

It appears that there is a three-pronged test for the granting of Petitions of this type. First, there must be a controlling question of law. Second, on that question of law, there must be a substantial ground for difference of opinion. Finally, it must appear likely that an immediate appeal could advance the ultimate determination of the merits of the appeal. We will consider these requirements in sequence.

In response to CGG's first issue identified as a controlling question of law, DER asserts that our Opinion of February 19, 1991, correctly interprets the law on this issue as set forth by the Supreme Court in National

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[1]Also, currently pending before us is DER's Motion In Limine, DER's Amendment To Motion In Limine and its Motion To Compel. They are not addressed herein. Additionally, we do not address herein CGG's pending Motion For Rehearing and Reconsideration En Banc.

Wood Preservers v. Commonwealth, DER, 489 Pa. 221, 414 A.2d 37 (1980), which enlarged upon the Commonwealth Court's holding as to Section 316 of the Clean Streams Law, supra, 35 P.S. §691.316, in Philadelphia Chewing Gum Corporation v. Commonwealth, DER, 35 Pa. Cmwlth. 443, 387 A.2d 142 (1978). DER's Objections correctly observe that on two occasions since National Wood, supra, was decided, Commonwealth Court has refused to limit application of Section 316 to a "faultless landowner" by conditioning the landowner's liability on established knowledge and adoption of the polluting condition. DER then concludes that until National Wood, supra, is reversed, distinguished, or re-interpreted by the Supreme Court, there is no issue of law on which there is a substantial ground for difference of opinion.

CGG incorrectly reads the Opinion as adopting in part a Philadelphia Chewing Gum rationale for holding CGG liable. We said that even if that case's standards were used, CGG would be liable, but the opinion adopts as the standard for CGG's liability that set forth in National Wood. Since the Supreme Court published its opinion in National Wood, there have been no opinions from that court modifying National Wood, and several opinions from Commonwealth Court which appear to be in line therewith. Under these circumstances, DER is correct in asserting that there does not appear to be a substantial ground for difference of opinion on which to base a certification. See In re Texas Eastern Gas Pipeline Company Litigation, 1989 EHB 281.

CGG next suggests that the opinion finds the conditions creating pollution exist on its land and that whether or not this is correct is a controlling question of law. DER responds the location of the condition is a fact issue rather than one of law.

Since the filing of its Notice Of Appeal, CGG has contended in that Notice, its Petition For Supersedeas, its affidavits supporting same, and its Pre-Hearing Memorandum that neither it nor its predecessor operators of its manufacturing plant conducted mining operations, but that AMD is generated by mines located off its property on lands of others, which mines were once operated by others but are now abandoned. CGG's documents state that the AMD seeps onto CGG's property or into the groundwater beneath CGG's property from these off-site mines. CGG's storm drains collect this AMD in part, and, in part, CGG pumps the AMD entering the basements of its carbon furnaces into its storm sewers. Finally, CGG contends that, if unintercepted by CGG's storm drains and furnace basements, the AMD would flow across and beneath its property to Elk Creek.

In its Petition To Amend Orders, CGG argues the opinion concludes the "condition causing pollution" of Elk Creek exists on CGG's property, and, thus, under National Wood, CGG can be ordered to treat same. CGG then says the location of this "condition" is a legal issue, but its Petition does not say how this is so. Apparently CGG confuses the meaning of "condition" and believes that the Board thinks the condition, i.e., the mines, are located on CGG's lands or are CGG's mines. The Board recognized in writing the prior opinion that for purposes of that opinion the mines are on land owned by others and are not mines owned or operated by CGG. Those mines are not the "condition causing pollution" we addressed. The AMD is the condition on CGG's land causing pollution (of Elk Creek). Our reading of National Wood is that its reasoning would hold CGG liable for this AMD's contamination of Elk Creek under Section 316. It was not on-going pollution generating operations which were addressed by DER's Order in the fact scenario in Philadelphia Chewing

Chewing Gum/National Wood. There, DER was faced with a large body of migrating contaminated groundwater beneath several separate properties which it wanted the Appellants (not all of whom were owners of the real estate on which the pollution was initially generated) to clean up. CGG's admission that the AMD is on and under its plant site and that it collects it and pipes it into Elk Creek, appeared to the Board sufficiently likely to make it responsible therefor under National Wood that the supersedeas petition could be dismissed. Of course, this is a legal issue, not a factual one as DER asserts, but we can not find that under National Wood this issue warrants an interlocutory appeal. Bethenergy Mines, Inc. v. DER, 1987 EHB 941; City of Harrisburg v. DER et al., 1989 EHB 373.

In subparagraph 9-E of its Petition To Amend Orders, CGG says our Opinion presumes Section 315 of the Clean Streams Law, supra, does not apply here. CGG contends that whether 315 applies is a controlling issue because if it does, CGG could not be held responsible for treatment of the AMD since it originates from coal mines which became inactive before 1966. CGG contends that to interpret Sections 315 and 316 to give effect to the more specific section, which it says is Section 315, is required by 1 Pa. C.S. §1933. It then argues that by doing so, this AMD is excluded from Section 316's coverage. Of course, if we overlook the fact that we granted DER's Motion on grounds other then Section 315, this is clearly a legal issue and one of CGG's chief contentions in terms of the decision reflected by the Opinion.

DER's response to CGG's assertion goes not to the substance of the assertion and whether the issue fits the test for certification but to whether it was timely raised by CGG. DER says the applicability of Section 315 of the Clean Streams Law, supra, was not raised in CGG's Notice Of Appeal, and, as

such, it cannot be raised now since that would constitute an untimely appeal on this ground under Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), affirmed on other grounds, 521 Pa. 121, 555 A.2d 812 (1989). In its Amendment To Motion In Limine filed with us on March 4, 1991, DER raises this same issue and asks that in addition to the other relief requested in the Motion In Limine, we preclude CGG's raising this issue as a defense in this appeal.

We agree with the law cited by DER on this issue but not with its applicability here. CGG's Notice Of Appeal challenged DER's legal authority to require it to treat this AMD through DER's unilateral imposition of unsolicited effluent limitations in CGG's NPDES Permit, which limitations can only be met through AMD treatment. DER is correct that CGG's Notice Of Appeal does not cite Section 315. The Notice Of Appeal did not cite any sections of the Clean Streams Law as to its contentions on the effluent limitations dealing with this AMD. CGG's Notice Of Appeal does say imposition of these limitations is "unlawful, an abuse of discretion, arbitrary, capricious, and a violation of due process and equal protection". Its allegation of unlawfulness was not made more specific until the filing of its Petition For Supersedeas, which must be specific in legal citations according to 25 Pa. Code §21.77(c)(2).[2] Paragraph 9 of the Petition raises Section 315's applicability to the issues before us. Accordingly, we cannot say that under Game Commission, supra, Section 315 was not raised in the imprecisely worded Notice Of Appeal.

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[2]On February 12, 1991, CGG filed its Pre-Hearing Memorandum which references various legal contentions including the impact of Section 315.

While we hold that the Notice Of Appeal could be read to include the impact of Section 315, that does not answer all concerns here. CGG's Petition argues that our opinion fails to consider the need to read Sections 315 and 316 of the Clean Streams Law together to give effect to Section 315, contending that if we do this, our opinion interprets Section 316 wrongly. Our review of CGG's Second Petition For Supersedeas shows CGG never raised this "conflict of Sections" issue in its Second Petition For Supersedeas. Our failure to divine this issue's existence, in light of its absence from the Second Petition For Supersedeas, can only be laid at CGG's door. If it was not raised as a grounds for supersedeas, the Board cannot be faulted for a failure to address the issue in its opinion. CGG's Petition is 18 pages long; surely if it wanted to address this issue CGG could have raised it therein. Where a party fails to raise an issue in its Petition For Supersedeas it cannot return to us and ask for certification of an appeal on such an issue based on a contention that the issue is a controlling issue of law on which there is substantial ground for difference of opinion.

Finally, CGG's Petition's Paragraph 10-F asserts correctly that our Opinion held that the Land and Water Conservation and Reclamation Act, Act of January 19, 1968, P.L. 996, 32 P.S. §5101 et seq., ("LWCRA") was a "spending" bill rather than a regulatory statute. CGG asserts the opinion is in error on this point and that the "LWCRA" is a regulatory act which places the burden of abating AMD on DER, not CGG. It then asserts that because the opinion disagrees with its contentions, this is a controlling question of law on which there should be appellate review now because such review would advance the ultimate determination of this Appeal, "especially if a finding were entered in CGG's favor." While we cannot deny that from CGG's position appellate

reversal of our opinion would be helpful to CGG's appeal, the assertion that there is disagreement with the opinion's conclusions does not create a controlling question of law. City of Harrisburg v. DER et al., EHB Docket No. 88-120-F (Opinion issued May 30, 1990). Neither does the simple assertion that CGG believes it is a controlling question. CGG's Petition fails to tell us why it is such a question; it merely reasserts CGG's position which we previously rejected. Moreover, CGG's Petition fails to address the point raised in our Opinion that the LWCRA specifically states that it neither repeals nor supersedes any section of the Clean Streams Law, supra. In short, disagreement over the merit of CGG's legal theory did not automatically create a controlling issue of law on which certification is appropriate. This Petition thus makes no case for certification of this issue to Commonwealth Court.

In the event that after a hearing on the merits CGG is unsuccessful in its appeal and wishes to seek a reversal by Commonwealth Court of this Board's Adjudication of the merits of its appeal, it has the right to do so. Its Petition fails to demonstrate to us, that there are controlling questions of law in this opinion on which there is a substantial ground for difference of opinions.

Equally important with all that has been said above is the fact that the Petition makes no attempt to show why an immediate appeal may materially advance the ultimate determination of the merits of CGG's claims. On March 5, 1991, Pre-Hearing Order No. 2 was issued in this appeal and trial dates in May of 1991 were established. This means that a hearing on the merits of CGG's case, creating a full factual record, occurs in just over two months from the date of this Opinion. Depending on the schedule agreed to by the parties for

their Post-Hearing Briefs, this, in turn, means we could be issuing a full adjudication of the merits of this appeal by this fall. Common sense tells us it is unlikely an immediate appeal to Commonwealth Court will result in any decision on the merits of CGG's contentions by the Commonwealth Court in a fashion which could accelerate resolution of an appeal which is already set to be heard in May. The absence of any attempted showing in this regard by CGG seals the fate of this Petition on this ground, also. Accordingly, we enter the following Order.

ORDER

AND NOW, this 22nd day of March, 1991, the Petition To Amend Orders, filed on behalf of CGG, is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: March 22, 1991

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M. DIANE SMITH
SECRETARY TO THE BOARD

LARRY D. HEASLEY, et al.	:	
v.	:	EHB Docket No. 90-311-MJ
	:	(Consolidated with 90-459-MJ)
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
COUNTY LANDFILL, INC., Permittee	:	Issued: March 25, 1991

OPINION AND ORDER
SUR MOTION OF THE DEPARTMENT OF ENVIRONMENTAL RESOURCES TO STRIKE APPELLANTS' ANSWERS TO DER'S REQUEST FOR ADMISSIONS AND DEEM ALL OF THE ADMISSIONS TO BE ADMITTED

By Joseph N. Mack, Member

Synopsis

Answers to a Request for Admissions which are filed more than 90 days after service of the Request will be stricken and the matters contained within the Request will be deemed admitted. Where the 30-day period for responding to a Request for Admissions (pursuant to Pa.R.C.P. 4014) extends beyond the discovery period, that does not relieve the answering party of its obligation to file answers. The extension of the discovery period does not in and of itself extend the 30-day period for answering the Request for Admissions.

OPINION

This appeal was initiated by the appellants, Larry D. Heasley, et al. (Appellants), on or about July 27, 1990 when they filed with the Board an

appeal seeking review of the Department of Environmental Resources' (DER) issuance of Solid Waste Disposal and/or Processing Facility Permit No. 101187 to County Landfill, Inc. (County Landfill) on June 27, 1990, as well as the issuance of Water Obstruction and Encroachment Permit No. E16-072 to the same permittee on June 29, 1990. On August 9, 1990, the Board issued Pre-Hearing Order No. 1, which allowed discovery to continue through October 23, 1990. On October 17, 1990, DER sent Appellants its first discovery request, which included a Request for Admissions. This was received by Appellants on October 18, 1990. (Appellants' Answer to DER's Motion to Strike)

Pursuant to Pa.R.C.P. 4014(b), Appellants' Answers to the Request for Admissions were due November 19, 1990, thirty days after service by DER.[1] However, Appellants' Answers were not filed until approximately January 18, 1991, more than 90 days after the service date. Thereafter, on February 27, 1991, DER filed a "Motion to Strike Appellants' Answers to the Department's Request for Admissions and Deem the Admissions to be Admitted" (Motion to Strike), due to Appellants' failure to file timely answers. Appellants responded to the Motion to Strike on March 18, 1991.

Rule 4014(b) of the Pa.R.C.P. provides in pertinent part as follows:

> Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission an answer verified by the party or an objection, signed by the party or by his attorney...

---

[1]The thirty day period expired on November 17, 1990, a Saturday. Therefore, the answers were not due until the next business day, which was Monday, November 19, 1990.

Appellants point out that DER did not serve the Request for Admissions until only four days remained before end of the discovery period set by Pre-Hearing Order No. 1. Since they lacked the requisite 30 days between service of the Request and the end of the discovery period, Appellants argue they were not required to respond. Upon the motion of County Landfill, the discovery period was reopened for 60 days on December 26, 1990, when this appeal was consolidated with a related appeal at EHB Docket No. 90-459-MJ. Appellants assert that their Answers were timely since they were filed within 30 days of the date on which the discovery period was reopened.

The fact that the 30-day period for filing Answers to DER's Request for Admissions ended beyond the original discovery period did not relieve Appellants of their obligation to file Answers to the Request for Admissions within that 30-day period. As noted in Kerry Coal Co. v. DER, EHB Docket No. 90-333-E (Opinion issued January 29, 1991), "...where the thirty-day period for filing Answers to Requests for Admissions (as prescribed in the Rules of Civil Procedure) ends at a date beyond the end of the authorized discovery time period...that event's occurrence does not relieve the answering party of any obligation to file its sworn Answer..." Id. at p.7 See also Academy of Model Aeronautics v. DER, EHB Docket No. 89-365-MR (Opinion issued January 12, 1990), which held that discovery which was commenced within the discovery period was timely even though the 30-day period for filing answers ran beyond the discovery period. Id. at p.3. Likewise, in the instant case, Appellants

were required to provide Answers to DER's Request for Admissions within 30 days of service of the Request, i.e. November 19, 1990, even though this ran beyond the discovery period set by Pre-Hearing Order No. 1.[2]

By way of further response to the Motion to Strike, Counsel for Appellants states that she was in Seattle, Washington, and San Francisco, California from October 25 through November 7, 1990. However, this does not excuse her from having to comply with filing deadlines, nor does she indicate that an extension of time for filing the Answers was ever requested or contemplated.

The Board considered a similar situation in Energy Resources, Inc. v. DER, EHB Docket No. 89-534-MJ (Opinion issued August 15, 1990). In that case an untimely filing of answers to a Request for Admissions was treated as a failure to respond, and the matter contained in the Request for Admissions was deemed admitted.

In their brief, Appellants cite two appellate cases dealing with failure to respond to a request for admissions: Lenkiewicz v. Lange, 242 Pa.Super. 87, 363 A.2d 1172 (1976) and Innovate, Inc. v. United Parcel Service, Inc., 275 Pa.Super. 276, 418 A.2d 720 (1980). Appellants point out that in those cases summary judgment was granted based upon the failure of the respondents to file any answers to a Request for Admissions. We do not find any difference between those cases and the present case where the matter contained in the Request for Admissions is deemed admitted due to Appellants' failure to file a timely response.

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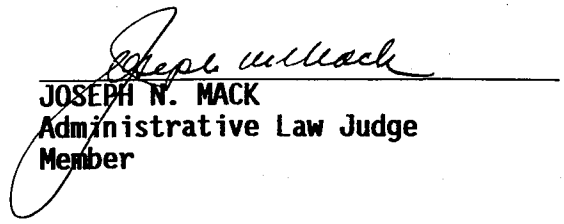
[2]As stated in Kerry, we do not wish this to be interpreted as condoning parties to wait until near the end of the discovery period before initiating discovery requests. Rather, parties should make diligent efforts to commence discovery as close to the beginning of the discovery period as possible.

In conclusion, we find that Appellants' failure to respond to DER's Request for Admissions within 30 days of service of the Request, as required by Pa.R.C.P. 4014(b), deems the matter contained in the Request for Admissions to be admitted.

O R D E R

AND NOW, this 25th day of March, 1991, it is ordered that DER's Motion to Strike is granted and the matter contained in its Request for Admissions, served upon Appellants, is deemed admitted for the purposes of this action.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 25, 1991

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M. DIANE SMITH
SECRETARY TO THE BOARD

WILLOWBROOK MINING COMPANY	:	
v.	:	**EHB Docket No. 90-346-E**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: March 27, 1991**

OPINION AND ORDER

By: Richard S. Ehmann, Member

Synopsis

When the parties to an appeal from a denial of an application for surface mining permit, dispute the adequacy of the permit applicant's demonstration that the benefits of the proposed coal mine outweigh the adverse impact on wetlands on the mine site and the adequacy thereof is a ground for the appeal, there is a dispute as to material facts which requires denial of a Motion For Summary Judgment.

OPINION

The instant proceeding revolves around DER's rejection of Willowbrook's Surface Mining Permit Application No. 43900101. This matter is before us at this stage because on February 27, 1991, DER filed with us its Motion For Summary Judgment/Motion To Limit Issues. In response, on March 19, 1991, Willowbrook filed Appellant's Willowbrook's Cross Motion For Summary Judgment And For A Ruling In Limine And Answer In Opposition To The Department

Of Environmental Resources Motion For Summary Judgment/Motion To Limit Issues. This Opinion and Order does not deal with DER's Motion To Limit Issues or Willowbrook's Motion For A Ruling In Limine.

We also do not address Willowbrook's Cross Motion For Summary Judgment herein. This is because we sua sponte denied Willowbrook's Motion For Summary Judgment by Order dated March 20, 1991. We denied Willowbrook's motion because it was filed only less than one month before the April 15, 1991 commencement of hearings on the merits of this appeal. Our basis for denial of Willowbrook's Cross Motion was that Pa. R.C.P. 1035(a) allows these motions only when filed "within such time as not to delay trial." Clearly, if DER were provided twenty days to respond thereto, its response would arrive only one week prior to trial. This is insufficient time for a five member Board to research and compose an opinion granting such a motion, let alone secure the review thereof by all five Boardmembers. Further, we bifurcated our ruling on DER's Motion For Summary/Motion To Limit Issues because with the merits hearing less than a month away, it is critical that the parties be aware of our denial of this request for summary judgment as early as possible so that they have sufficient time prior to hearing for trial preparation.

In accordance with Rule 1035 of the Pennsylvania Rules of Civil Procedure, the DER moved the Environmental Hearing Board to grant it summary judgment based upon the pleadings, admissions, depositions, and supporting affidavits which have been filed with the Board. The Board is entitled to grant such relief. See R&H Surface Mining v. DER, EHB Docket No. 87-478-E (Opinion of April 4, 1990), citing Summerhill Borough v. Commonwealth, DER, 34 Pa. Cmwlth. 574, 383 A.2d 1320 (1978). Summary judgment is properly granted to the Department if the pleadings, answers to interrogatories and requests for admissions, and affidavits show no genuine issue as to any material fact

and the Department is entitled to judgment as a matter of law. Thorsen v. Iron and Glass Bank, 328 Pa. Super. 135, 476 A.2d 928, 930 (1984). See also Carol Rannels v. DER, EHB Docket No. 90-11 (Opinion of December 11, 1990).

In appeals from permit denials, the appellant carries the burden of proof. 25 Pa. Code §21.101(c), William V. Muro v. DER, EHB Docket No. 87-512-M (Opinion of September 20, 1990). However, in this Motion for Summary Judgment, it is the Department which must show that no genuine issue of material fact exists and that the Department is entitled to judgment as a matter of law. Travelers Indemnity Company and Old Home Manor, Inc. v. DER, EHB Docket No. 90-081-MJ (Opinion of August 24, 1990).

Review by the Board in this case is de novo. Robert L. Snyder and Jessie M. Snyder et al. v. DER, EHB Docket No. 79-201-R (Opinion of April 27, 1990), citing 35 P.S. §7511 et seq. While DER contends in this regard that we only review DER's actions in deciding Willowbrook did not submit enough information to justify permit issuance and can not independently review whether Willowbrook should be issued a permit, that does not mean the Board views itself as so limited. We would point out that where we find DER has abused its discretion, we may elect to substitute our own discretion. Black Fox Mining and Development Corporation v. DER, 1985 EHB 172; Philadelphia Chewing Gum Company et al. v. DER, 1976 EHB 269. Moreover, in an appropriate case, our exercise of discretion can include setting aside a permit denial and direct issuance of a permit. Harman Coal Company v. DER, 1977 EHB 1. However, we need not address this issue further at this time in denying DER's motion.

DER contends Willowbrook's application for permit lacked sufficient information within it to show that the benefits of the proposed surface mining

operation outweighed the harm to the wetlands resource located within the perimeter of the mine site, which wetlands, both sides essentially concede, will be affected if Willowbrook operates the proposed mine, although they disagree on the amount of impact. DER contends it denied this permit based on this lack of adequate information. Willowbrook's Answer to DER's Motion contends it has provided DER sufficient information upon which DER could act. On page 30 of its Brief, DER concedes that Willowbrook made a submission to DER on this issue as part of its application. However, DER urges that even a cursory review of that submission shows its inadequacy.

We are at a loss to understand how DER could consider the filing of a Motion For Summary Judgment in light of this dispute on the evidence. Reduced to its simplest terms, Willowbrook contends its submission is adequate on this point and DER contends it is inadequate. This is thus a straightforward factual dispute between the parties. It is precisely the type of a case in which the inappropriateness of a Motion For Summary Judgment is obvious. It is hornbook law that where there is a dispute on material facts, a Motion For Summary Judgment does not lie. Summerhill Borough, supra; Travelers Indemnity Company, supra. As we have pointed out in denying similar motions in the past, these motions are construed in favor of the non-moving party; thus, any such showing by the movant must be clear. Palisades Residents In Defense Of The Environment (P.R.I.D.E.) v. DER, EHB Docket No. 86-265-E (Opinion issued June 27, 1990). We never approach this standard here.

ORDER

AND NOW, this 27th, day of March, 1991, DER's Motion For Summary Judgment is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: March 27, 1991

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M. DIANE SMITH
SECRETARY TO THE BOARD

SCHUYLKILL TOWNSHIP CIVIC ASSOCIATION	:	
v.	:	**EHB Docket No. 90-541-E**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and VALLEY FORGE SEWER AUTHORITY Permittee	:	**Issued: March 27, 1991**

OPINION AND ORDER
SUR PERMITTEE'S MOTION FOR SUMMARY JUDGMENT

By: Richard S. Ehmann, Member

Synopsis

A permittee's Motion For Summary Judgment is granted where certain issues raised by the third party appellant constitute an impermissible collateral attack upon provisions of a prior unappealed Clean Streams Law permit and on unmodified provisions of a prior unappealed Dam Safety and Encroachments Act permit. Summary Judgment based on mootness is also appropriate as to inclusion of a condition in the challenged permit requiring the permittee to comply with a local floodplain ordinance, where the local zoning board has already issued its final opinion holding that it lacked jurisdiction over this encroachment under the local ordinance. Finally, where Appellant seeks Board review of DER's general administrative procedures in issuing a permit

containing a condition which is subsequently deleted from a permit by DER when challenged in an appeal to this Board, we grant summary judgment because we possess no authority to conduct such a review.

OPINION

On December 13, 1990, the Schuylkill Township Civic Association ("STCA") filed an appeal from the issuance of Water Obstruction and Encroachment Permit No. E15-362 (amended) (hereinafter the "amended permit") by the Department of Environmental Resources ("DER") to the Valley Forge Sewer Authority ("VFSA"). This amended permit (attached to the notice of appeal) was issued by DER on November 2, 1990, but STCA contends it did not learn about its issuance until November 14, 1990, and this contention is not disputed by the other parties.

The amended permit says it is for construction and maintenance of a 120 - foot diameter final clarifier and return sludge wetwell at VFSA's sewage treatment plant which is located within the 100-year floodplain of the Schuylkill River in Schuylkill Township, Chester County.

On February 8, 1991, prior to the dates for filing of any Pre-Hearing Memoranda by the parties, VFSA filed its Motion For Summary Judgment in this appeal. Accompanying its Motion were an affidavit and a Memorandum Of Law. By letter dated February 28, 1991, counsel for DER advised us of DER's support for this Motion. Also, on February 28, 1991, we received STCA's Response to VFSA's Motion and a Memorandum Of Law supporting STCA's Response. On March 11, 1991, VFSA filed its reply to STCA's Memorandum Of Law.

STCA's unverified Response admits each of the first twenty-two paragraphs of the twenty-four numbered in VFSA's Motion, but denies the allegations that there are no facts in dispute (Motion Paragraph No. 23), or that VFSA is entitled to summary judgment as a matter of law. (Motion Paragraph No. 24) STCA's Response fails to say what facts are in dispute or give any clue as to

why VFSA is not entitled to summary judgment. Its position on these issues is set forth in its unverified Memorandum Of Law. Since the twenty-two paragraphs in the motion are admitted and form the backbone of this Motion, we turn to them first.

According to the admitted portion of VFSA's Motion, on July 18, 1990, DER issued Water Obstruction and Encroachment Permit No. E15-362 (hereinafter the "unamended permit") to VFSA pursuant to the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 et seq.; the Flood Plain Management Act, Act of October 4, 1978, P.L. 851, 32 P.S. §679.101 et seq.; the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq.; and the Administrative Code of 1929, P.L. 177, as amended, 71 P.S. §1 et seq.[1] This unamended permit was identical to the amended permit at issue here in all respects except that it contained a condition D which was absent from the amended permit. The Motion recites that STCA did not appeal from the issuance of the unamended permit.

According to the Motion, on July 17, 1990, DER issued Water Quality Management Permit No. 1590406 to VFSA, authorizing it to construct its clarifier, return sludge wetwell and other facilities. Again, says the Motion, STCA took no appeal to us.

The unamended permit's Condition D made that permit contingent on VFSA compliance with the local floodplain ordinances and codes. Upon receipt of

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[1] Copies of both versions of this permit, Water Quality Management Permit No. 1590406, the letter from counsel for DER to counsel for VFSA, the Schuylkill Township Zoning Hearing Board's Opinion and Order of November 14, 1990 (concerning VFSA's proceeding there) and Building Permit No. 1-0290 issued to VFSA by Schuylkill Township on December 14, 1990 (for the facilities identified in the amended permit) are attached as exhibits to the affidavit accompanying VFSA's Motion.

this Permit, VFSA took an appeal to this Board, challenging Condition D on the ground that Section 302 of the Flood Plain Management Act, 32 P.S. §679.302, vested exclusive jurisdiction in DER to regulate VFSA's facilities insofar as they are obstructions and therefore Condition D conflicted with that act. In response to this appeal DER agreed by letter of October 10, 1990 to issue this permit as an amended permit deleting Condition D. DER issued the amended permit on November 2, 1990, and STCA filed the instant appeal, while VFSA withdrew its prior appeal (docketed at EHB Docket No. 90-348-W).

Paragraph 18 of the Motion then recites:

> On November 14, 1990, in proceedings before the Zoning Hearing Board of Schuylkill Township ("Zoning Board") initiated by the Authority [VFSA] at the direction of the Schuylkill Township Zoning Officer pursuant to the Schuylkill Township Floodplain Ordinance, the Zoning Board issued an Opinion and Order decreeing that the Zoning Board lacked subject matter jurisdiction under the local floodplain ordinance since the Department has exclusive jurisdiction for the project under the Flood Plain Management Act. A true and correct copy of the Opinion and Order of the Zoning Board is attached as Exhibit "P-6" to the Affidavit.

Neither STCA nor Schuylkill Township appealed this Zoning Board decision, according to the Motion.

Finally, the admitted portion of the Motion says that Schuylkill Township issued VFSA a building permit for its authorized sewage facilities based on this opinion, and STCA took no appeal from that decision, either.

Citing Summerhill Borough v. Commonwealth, DER, 34 Pa. Cmwlth. 574, 383 A.2d 1320 (1978), VFSA correctly contends this Board is empowered to grant a summary judgment to a party where there is no genuine dispute between the parties as to material facts. Of course, the second portion of the test for

granting a summary judgment is that, based on these undisputed facts, the Movant is entitled to such a judgment as a matter of law. Felton Enterprises, Inc. v. DER, EHB Docket No. 87-104-E (Opinion issued January 17, 1990). VFSA's Motion next states no such dispute exists, but STCA disagrees on this point.

STCA's Memorandum of Law says that Article X of the Schuylkill Township Zoning Ordinance of 1955 regulates construction in flood hazard districts. It also says a copy of the ordinance is attached to the Memorandum, but it is not. STCA then argues that this ordinance sets standards for review of construction in these flood hazard districts, but that all of this review is foreclosed by DER's issuance of the amended permit, so STCA, through this appeal, is "seeking to have [DER] re-examine the basis on which it issued the original unamended permit and conduct further investigation as prerequisite to issuance of the amended permit". STCA says it is challenging:

> 1. DER's procedure in issuing the amended permit,
> 2. The basis for DER's issuance of the amended permit,
> 3. The failure of DER to consider alternative sites for this facility,
> 4. The inconsistency of VFSA's project with Act 537 plans, and
> 5. To the extent, VFSA's project incorporates plans for future expansion, DER's failure to consider cumulative impact of these future projects on the floodplain.

As pointed out by VFSA, we cannot consider these last three challenges in this proceeding. Our jurisdiction over any appeal depends on whether or not it is timely, Joseph Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976); Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), affirmed on other grounds, 521 Pa. 121, 555

A.2d 812 (1989). Neither DER's issuance of the water quality management permit on July 17, 1990 nor its issuance of the unamended permit on July 18, 1990 generated appeals thereof to this Board by STCA. The issues which could have and should have been raised by timely STCA appeals therefrom are thus barred from challenge in this appeal. Wheeling Pittsburgh Steel v. Commonwealth, DER, 22 Pa. Cmwlth. 280, 348 A.2d 765 (1975), 473 Pa. 432, 375 A.2d 320 (1977), cert. denied, 434 U.S. 969; James R. Sable v. DER, EHB Docket No. 86-686-E (Adjudication issued June 22, 1990). Thus, the only issues which can be before us, since STCA failed to challenge the unamended permit by timely appeal, are the deletion of Condition D from the amended Permit and the DER procedure in issuing this permit. Hatfield Township Municipal Authority v. DER, 1988 EHB 122; Bobbi L. Fuller et al. v. DER et al., EHB Docket No. 89-142-W (Adjudication issued December 20, 1990).

In its Notice Of Appeal, STCA says it was informed that Condition D was originally included in this permit through "clerical error", the error has cost money to VFSA and Schuylkill Township in legal fees and expenses, and this cost is too high for this to be a clerical error. Accordingly, it seeks review of DER's jurisdiction and administrative practices to prevent a repetition thereof. Even if we assume these allegations to be factually accurate, they are not the only facts before us. DER issued the unamended permit containing Condition D and VFSA promptly challenged that decision in its appeal thereof to this Board. DER's staff apparently then recognized what it perceived to be an error in its actions and modified the permit to delete Condition D. We can find nothing inappropriate or in need of modification there since, as set forth below, we find DER acted properly in making this deletion. Moreover, this Board is an administrative tribunal of limited

jurisdiction. See the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, No. 94, 35 P.S. §7511 et seq. We know of no authority for us to tamper with the DER procedures used to amend this permit. Nothing in the Flood Plain Management Act, supra; Clean Streams Law, supra; or Dam Safety and Encroachments Act, supra, the status under which this permit was issued empowers us to conduct the review which STCA seeks. Moreover, nothing it has filed with us to date cites us to any authority for us to conduct general reviews of DER administrative procedures. We can appreciate STCA's desire to have Schuylkill Township save the costs of Zoning Hearing Board operations and to have VFSA save its legal fees. Even if this were not a time of tight governmental budgets, governmental economy is a salutary goal. We observe, however, that for this Board to conduct such a review of DER's procedures without any legislative authorization to do so would be to ignore this goal.

Finally, we turn to the question of DER's decision to delete Condition D. Citing both the final decision of the Zoning Hearing Board to the effect that the Zoning Hearing Board lacks jurisdiction under its ordinance over this sewage facility's obstruction of this floodplain and STCA's lack of any appeal from that decision, VFSA concludes that STCA's appeal is moot because this Board lacks jurisdiction over appeals from the Zoning Hearing Board.

In response to this argument, STCA argues that if its appeal is sustained, then Condition D is re-inserted in the Permit and VFSA "should be required to resubmit its application...to the Zoning Board". STCA then states that the Zoning Board's prior decision did not reach the merits of STCA's issues and should not be controlling in this matter. STCA says by sustaining its appeal, we can invalidate the Zoning Board's prior jurisdictional findings or at least require that Board to re-examine its jurisdictional ruling. Alternatively,

STCA says we could require DER to do a review of VFSA's project at the level of review which the Zoning Hearing Board would have done.

This STCA argument contains a serious flaw. It assumes that this Board has jurisdiction over Schuylkill Township's Zoning Hearing Board in this appeal or that we are a court of superior jurisdiction to that Board with an authorization to countermand the Zoning Hearing Board's prior ruling. Schuylkill Township is not a party to this appeal and STCA offers us no legal authority to support the suggestion that we may require its Zoning Hearing Board to change its prior decision. As stated above, the Environmental Hearing Board's jurisdiction is limited. Moreover, it is clear, and STCA admits, there was no appeal from the Zoning Hearing Board's decision. Finally, we are not the forum for appeals from the Zoning Hearing Board. The Court of Common Pleas of Chester County might reverse the decision of the Zoning Board or require it to re-examine its jurisdiction, since that Court has jurisdiction to hear appeals therefrom. 42 Pa. C.S.A. §5105 (a)(2). We cannot do this.

Further, it is clear that this Board cannot direct VFSA to re-apply to Schuylkill Township's Zoning Hearing Board, which has already ruled that it lacks jurisdiction over the VFSA's project. We have the jurisdictional authority to require the re-insertion of Condition D into VFSA's permit by DER, but we are not legislatively empowered to force VFSA to act in any particular fashion once re-insertion is accomplished. The same is true as to STCA's suggestion that we can require DER to undertake a zoning hearing board level of review of this project. Nothing in the statutes under which DER acted authorizes it to act as a super zoning hearing board. As we have ruled above, STCA cannot use the vehicle of this appeal to collaterally attack the

DER actions reflected in the remainder of the amended permit, because STCA failed to challenge that permit in a timely appeal from the unamended permit's issuance. Finally, we believe even STCA must concede that, assuming we had the power to require VFSA to re-submit an application to the Zoning Hearing Board and exercised same, until the Zoning Hearing Board's "no jurisdiction" decision is reversed, we would be requiring VFSA to do a meaningless act.

In considering mootness in relation to dismissal of an appeal, we have held repeatedly that we will dismiss an appeal as moot if during its pendency an event occurs which deprives us of the ability to render meaningful or effective relief. Giorgio Foods, Inc. v. DER, 1989 EHB 331; Borough of Dickson City v. DER, 1989 EHB 956; Scurfield Coal, Inc. v. DER, 1989 EHB 1359. See also Al Hamilton Contracting Co. v. Commonwealth, DER, 90 Pa. Cmwlth. 228, 494 A.2d 516 (1985). Since all we could grant STCA is re-insertion of Condition D in the Permit, but that would not change the Zoning Board's final decision, it is clear this appeal is moot.

STCA is correct that such a decision leaves it without a forum in which to raise its issues, but STCA's desire for such a forum does not equate to legislative authorization for this Board to allow pursuit of this appeal. Moreover, the lack of a timely appeal from the Zoning Hearing Board's final decision must rest on shoulders other than ours. Accordingly, we enter the following Order.

ORDER

AND NOW, this 27th day of March, 1991, the Motion For Summary Judgment filed on behalf of VFSA is granted and the appeal of STCA is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 27, 1991

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M. DIANE SMITH
SECRETARY TO THE BOARD

MAX L. STARR	:	
	:	**EHB Docket No. 87-203-W**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** April 1, 1991

ADJUDICATION

By Maxine Woelfling, Chairman

Synopsis

An appeal of an order issued 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.* (the Solid Waste Management Act) is dismissed. The Board holds that discarded tires, obtained from commercial tire dealers, constitute "solid waste" under the statute. Where an appellant retains tires directly on the surface of the ground, the tires are either "stored" or "disposed" of, and, where those tires remain on the land for over a year, they are presumed to be disposed of. Evidence is properly excluded where it was not probative of a material issue in the case.

INTRODUCTION

This matter was initiated with the May 28, 1987, filing of a notice of appeal by Max L. Starr (Starr) seeking review of a May 1, 1987, order from the Department of Environmental Resources (Department). The order, which was issued pursuant to §§104(7) and 602 of the Solid Waste Management Act

and §1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 (Administrative Code), alleged, *inter alia*, that Starr was operating a waste tire storage, processing, and disposal facility without a permit in violation of the Solid Waste Management Act and that the tires were stored in a manner which resulted in the creation of a public nuisance through the harborage and breeding of mosquitoes and stormwater problems. The order directed Starr to cease accepting tires, to determine the total number of tires which were on the site and which left it, to submit copies of pertinent contracts relating to the recovery or removal of the tires and, finally, to submit either a permit application or a closure plan for the facility.

The Board conducted a hearing on the merits on February 1, 1989. The Department submitted its post-hearing brief to the Board on March 27, 1989, and Starr responded with his brief on April 21, 1989. The Department filed a reply brief on May 8, 1989. Any issues not raised in the parties' post-hearing briefs are deemed waived. Lucky Strike Coal Co. and Louis J. Beltrami v. Dep't of Environmental Resources, ___ Pa.Cmwlth ___, 546 A.2d 447 (1988).

Starr contends in his post-hearing brief that the tires did not constitute solid waste within the meaning of the Solid Waste Management Act. In the event, however, that the Board holds that the tires are solid waste, Starr still challenges the necessity for a permit, arguing that he did not have to obtain a permit to collect and pile tires, since they were neither "disposed" of nor "stored" under the terms of the Act; that the statutory presumption in §103 of the Solid Waste Management Act that solid waste stored in excess of one year constitutes disposal was unlawful; and, that 25 Pa.Code

§§75.28(a) and (g),[1] pertaining to standards for vector control and fire safety, were impermissibly vague. Furthermore, with regard to the hearing, Starr asserts that Chairman Woelfling erred when she admitted testimony pertaining to tire-pile fires and when she did not permit testimony relating to Starr's efforts to obtain a permit for a tire shredder.

The Department argues in its post-hearing brief that the tires received by Starr were municipal waste and that by dumping the tires on the surface of the ground Starr was disposing of solid waste. In the alternative, the Department contends that because the tires were stored on the site for longer than a year, Starr is presumed to be disposing of them. Finally, the Department alleges that Starr's storage of the tires did not comply with 25 Pa.Code §§75.28(a) and (g) and constituted a public nuisance.

After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. Appellant is Max Starr, an individual with his principal place of business at R. D. 3, Box 216, Benton, PA 17814. (the Columbia County site). (N.T. 65)

2. Appellee is the Department, the agency with the authority to administer and enforce the Solid Waste Management Act and the rules and regulations adopted thereunder and §1917-A of the Administrative Code.

3. Since 1981, Starr has been collecting discarded tires from various commercial tire dealers and taking them to the Columbia County site. (N.T. 33, 68-69, 85, 86)

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[1] These provisions were superseded by 25 Pa.Code §285.115 on April 9, 1988. See 18 Pa.B. 1681 (April 9, 1988).

4. Starr has never received a permit or approval from the Department for the storage or disposal of tires at the Columbia County site. (Appellant's Response to Appellee's Request for Admission No. 6)

5. On January 10, 1986, the Department issued a notice of violation notifying Starr that a written proposal was to be submitted to the Department within ninety days for the closure or permitting of the Columbia County site. (N.T. 8; Commonwealth Exhibit 1)

6. On May 1, 1987, the Department issued an order to Starr directing him to accept no more tires at the Columbia County site, to document the total number of tires at the Columbia County site, and to submit a permit application or closure plan for the Columbia County site. (Notice of Appeal)

7. Commercial tire dealers paid Starr to dispose of their discarded tires. (N.T. 69, 85-86)

8. The tires were brought in tractor trailers to the Columbia County site, where the wheels were removed from the tires and then crushed in a wheel crusher. (N.T. 12, 68-69, 85, 86)

9. The tires were then randomly dumped in piles on the surface of the ground. (N.T. 12, 13, 84)

10. By January 3, 1986, approximately two million to five million tires had accumulated at the Columbia County site. (N.T. 6, 35; Appellant's Response to Appellee's Request for Admission No. 2)

11. The tires were dumped in three disposal areas, two large areas adjacent to one another and a smaller pile across the valley. (N.T. 6-7)

12. Township Route 19063 runs between the two large piles, which are located at the top of a hill on the north and south sides of the road, respectively. (N.T. 6-7)

13. The smaller pile lies across the valley on the next hillside from the two larger piles. (N.T. 7)

14. There is no fence surrounding the tires. (N.T. 85, 87)

15. As of the date of the hearing on the merits, the two large piles had a total area of 11 acres. (N.T. 9)

16. Assuming that the height of the two large piles was 11 feet and that there are ten tires per cubic yard, there were approximately 5.9 million tires in the two large piles on the date of the hearing. (N.T. 9)

17. There was no significant change in the volume of the tires between January 3, 1986, and the date of the hearing. (N.T. 8, 84)

18. Of all the tires Starr collected, no more than one out of three ever left the Columbia County site. (N.T. 71)

19. Of those tires which did leave the Columbia County site, Starr sold some for reuse and others for recapping. (N.T. 70, 71)

DISCUSSION

Under 25 Pa.Code §21.101(b)(3), the Department bears the burden of proof in an appeal of an order. Bear Creek Township v. DER, EHB Docket No. 87-428-F (Adjudication issued November 19, 1990). In reviewing the action of the Department, our duty is to determine whether the Department's action is supported by a preponderance of the evidence and whether it is arbitrary, capricious or unreasonable. Because the issuance of orders under the Solid Waste Management Act is discretionary, we may, based on the record before us, substitute our discretion for that of the Department should we find that the Department committed an abuse of discretion. Novak Sanitary Landfill v. DER, 1987 EHB 680, at 693-94.

The Department issued the order that is the subject matter of this appeal pursuant to §§104(7) and 602 of the Solid Waste Management Act and

§1917-A of the Administrative Code. Section 104(7) of the Solid Waste Management Act authorizes the Department to issue orders to implement the purposes and provisions of the Solid Waste Management Act and the rules and regulations promulgated under that act, while §602 empowers the Department to issue orders wherever necessary to aid in the enforcement of the provisions of the act, including orders requiring persons to cease unlawful activities. Section 1917-A of the Administrative Code similarly allows the Department to issue orders to abate nuisances; violations of the Solid Waste Management Act are public nuisances by virtue of §601 of the statute.

We must first decide whether, as Starr contends, the tires on his property fall outside the definition of solid waste under the Solid Waste Management Act because they have economic value or whether, as the Department argues, the tires are municipal waste.

Municipal waste is expressly included in the statute's definition of solid waste. "Municipal waste" is defined in §103 of the Solid Waste Management Act as "any garbage, refuse ... and other material ... resulting from operation of ... commercial ... establishments...." Since Starr testified that he obtained the tires from tire dealers (N.T. 68-69, 85-86), the tires, therefore, are waste material resulting from the operation of a commercial establishment and fall within the definition of municipal waste.

The fact that the discarded tires may have value to Starr does not mean that they are not waste. "Waste" is material discarded as worthless, or of no use, Zinc Corporation of America v. DER, 1989 EHB 117. The tires on Starr's Columbia County site are waste under this definition. Tire dealers discarded the tires as worthless or of no use and paid Starr to remove them

(N.T. 68-69, 85-86). Whether Starr attributed any value to the tires is irrelevant, for the tires were waste when he collected them from the tire dealers and brought them to the Columbia County site.

Having determined that the tires are waste, we must next decide where Starr's activity falls under the Solid Waste Management Act. The statute recognizes four activities relating to non-hazardous waste--storage, treatment, processing, and disposal. Neither the Department nor Starr asserts that the tires were being processed or treated.[2] That leaves storage or disposal. The Department contends that Starr was either disposing of the tires by virtue of dumping them on the ground or storing them in excess of a year and that, as a result, §501 of the Solid Waste Management Act requires that he obtain a permit. On the other hand, Starr maintains that he was not "disposing" of the tires because neither the tires nor their components entered the environment and that he was not "storing" solid waste because the tires were not placed in containers, and, therefore, there was no "containment" of them.

The terms "disposal" and "storage" are defined in §103 of the Solid Waste Management Act as:

> "Disposal." The incineration, deposition, injection, dumping, spilling, leaking, or placing of solid waste into or on the land or water in a manner that the solid waste or constituent of the solid waste enters the environment....
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> * * * * *
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> "Storage." The containment of any waste on a temporary basis in such a manner as not to con-

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[2] The Department's order alleges that Starr was operating a solid waste processing facility, but the Department does not argue in its post-hearing brief that Starr was operating a processing facility without a permit in violation of §501(a) of the Solid Waste Management Act. Consequently, the Department is deemed to have abandoned this contention.

> stitute disposal of such waste. It shall be presumed that containment of any waste in excess of one year constitutes disposal. The presumption can be overcome by clear and convincing evidence to the contrary.

Put another way, one disposes of solid waste if he:

> (1) places solid waste on land in a manner that a constituent of the solid waste enters the environment; or
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> (2) places solid waste on land in a manner that the solid waste enters the environment; or
>
> (3) stores waste on his property in excess of one year without clear and convincing evidence showing that the waste was not disposed.

Applying these definitions, we hold that all of the tires were stored on the Columbia County site and that a portion of them were disposed of since they were on the property for more than a year.

Starr disputes that containment of the tires, and, therefore, storage, was occurring on the property. The word "containment" is not defined in the Solid Waste Management Act or in the regulations promulgated thereunder, so we must look to the term's common and ordinary meaning. §1903 of the Statutory Construction Act, 1 Pa. C.S.A. §1903. Webster's New Collegiate Dictionary (8th ed.) defines "contain" as "to keep within limits." Waste that is not kept within limits migrates into the surrounding environs. Because Starr kept the tires in discrete piles directly on the ground (N.T. 13, 84), within the confines of his property, it was stored.

A portion of the tires fall within the statutory presumption of disposal. The majority of the tires remained at the site for over a year: from January 3, 1986, to January 24, 1989, at least a million and a half tires, and as many as 5.9 million tires, were stored at the Columbia County site (N.T. 6, 7, 8, 9, 12, 35, 83, 84); only one out of every three tires

Starr collected ever left the site (N.T. 71). Starr offered no evidence establishing when tires were placed on the Columbia County site, much less removed, and the Department's evidence showed at least a million and a half tires and as many as 5.9 million tires were on the site in a three-year period, so we must conclude that there was disposal of the tires.

Starr next disputes the lawfulness of the statutory presumption that storage for more than a year constitutes disposal. Specifically, Starr maintains:

> The presumption ... is irrational and unlawful because [it] is not connected to an essential element of disposal. An essential element of "disposal" is the entry of waste material or a constituent part into the environment, the air or waters of the Commonwealth.... Appellant contends that the presumption applies only to those circumstances where there is a possibility that the waste material would enter the environment after a relatively limited period of time.
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> (p. 11, Appellant's Post-Hearing Brief)

It is difficult to characterize Starr's argument. To the extent that Starr's argument is a challenge to the constitutionality of the statutory presumption, we have no power to consider it. St. Joe Minerals Corp. v. Goddard, 14 Pa.Cmwlth 624, 358 A.2d 800 (1974).

But, to the extent Starr is challenging the application of the statutory presumption to him because he contends that no waste material is entering the environment, we must conclude that the Department properly applied the statute. Given the General Assembly's expressed intention to comprehensively regulate solid waste practices in order to protect the public health, welfare, and safety, a presumption of disposal of stored waste is entirely logical. At some point the storage of waste materials becomes disposal, especially when the waste is exposed to the elements and there is no

other disposition in the foreseeable future. Then, storage becomes merely a sham to avoid the more extensive--and expensive--requirements pertaining to disposal.[3]

Finally, the Administrative Law Judge did not err when she refused to permit testimony pertaining to Starr's efforts after the issuance of the order to obtain a permit for a tire shredder (See N.T. 77). Starr contends that testimony on the subject was relevant because it would prove that he intended to utilize the tires and not to store or dispose of them. Again, we must disagree. Testimony pertaining to Starr's efforts or plans to recycle the tire piles for business purposes at some time in the future is simply not relevant to a determination whether the Department lawfully issued the order in question. At the time of issuance of the order, Starr was either storing or disposing of solid waste on his property. Starr is not excused from his present obligations under the Solid Waste Management Act because of what may be laudable future goals.

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[3] We need not decide upon Starr's last challenge to the Department's order - that the standards for the storage of waste set forth at 25 Pa.Code §§75.28(a) and (g) are unlawfully vague because they do not provide for specific standards relating to vector control and fire and safety hazards. Since we have determined above that Starr stored and disposed of solid waste without a permit, the Department had the authority under §§104(7) and 602 of the Solid Waste Management Act to issue the order, for Starr was engaging in unlawful conduct. Starr's alleged violations of the regulation would have been another grounds to support the order. Similarly, we need not decide Starr's contention that the admission of testimony relating to tire fires elsewhere and the potential danger of fire in his own tires was irrelevant and prejudicial. Such testimony was relevant to establishing that Starr had violated 25 Pa.Code §75.28(g), and, therefore, that the Department properly issued the order. But since we have found that Starr's storage and disposal of the tires without a permit was adequate grounds for issuance of the order, this testimony is not material to the outcome.

CONCLUSIONS OF LAW

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

2. The Department has the burden of proof in an appeal of an order, 25 Pa.Code §21.101(b)(3).

3. Section 501 of the Solid Waste Management Act requires a permit to store or dispose of solid waste.

4. Municipal waste is expressly included in the Solid Waste Management Act's definition of "solid waste." §103 of the Solid Waste Management Act.

5. Discarded tires resulting from the operation of commercial tire dealerships are "municipal waste." §103 of the Solid Waste Management Act.

6. Storage includes the containment of waste on a temporary basis in such a manner as not to constitute disposal. §103 of the Solid Waste Management Act.

7. Waste is contained if it is kept within limits.

8. Solid waste is being stored on Starr's Columbia County site.

9. Containment of any waste in excess of one year is presumed to constitute disposal, absent clear and convincing evidence to the contrary. §103 of the Solid Waste Management Act.

10. The accumulation of at least a million and a half tires on the Columbia County site over a three year period with no evidence of if, when, and what amounts of tires were ever removed falls within the statutory presumption of disposal.

11. The Environmental Hearing Board does not have the authority to decide the constitutionality of a statute. St. Joe Minerals Corp. v. Goddard, 14 Pa.Cmwlth 624, 358 A.2d 800 (1974).

12. The Department properly applied the presumption that storage for more than a year constitutes disposal to Starr's activities.

13. The storage and disposal of tires on the Columbia County site required a permit under §501 of the Solid Waste Management Act.

14. Storage and disposal of tires on the Columbia County site without a permit constituted unlawful conduct and a public nuisance.

15. Admission of testimony pertaining to Starr's efforts to obtain a permit for a tire shredder was properly denied, since the efforts occurred after the issuance of the order.

16. The Department did not abuse its discretion in issuing the order to Starr.

O R D E R

AND NOW, this 1st day of April, 1991, it is ordered that the Department's May 1, 1987, order is sustained and the appeal of Max L. Starr is dismissed.

ENVIRONMENTAL HEARING BOARD

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DATED: April 1, 1991

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