Environmental Hearing Board

Adjudications
and
Opinions

1994

Volume III

COMMONWEALTH OF PENNSYLVANIA
Maxine Woelfling, *Chairman*

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

1994

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(Resigned August 1, 1994)

Secretary.....M. DIANE SMITH

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 1994 EHB 1

ISBN No. 0-8182-0194-0

FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1994.

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.

ADJUDICATIONS

CASE NAME	PAGE
Al Hamilton Contracting Company (7/18/94)	1027
Al Hamilton Contracting Company (7/27/94)	1074
Al Hamilton Contracting Company (8/10/94)	1148
Ted Babich	1281
Benco, Inc. of Pennsylvania	168
Bethenergy Mines, Inc.	925
Bethlehem Steel Corporation	1371
Butler Township Area Water and Sewer Authority	1674
Rudy Byler	874
Concerned Citizens of Earl Township	1525
Delaware Environmental Action Coalition and Dr. James E. Wood	1427
Empire Sanitary Landfill, Inc. (2/1/94)	30
Empire Sanitary Landfill, Inc. (11/1/94)	1489
Franklin Plastics Corporation	100
Furnley H. Frisch d/b/a Furnley H. Frisch & Sons	1226
Stephen Haydu	826
Larry D. Heasley, et al.	624
Jay Township, et al.	1724
Thomas Kilmer	1799
Harold S. Landis	1781
George Leck & Son, Inc.	1811
Lehigh Gas & Oil Company	767
George M. Lucchino	380

McDonald Land & Mining Company, Inc. and Sky Haven Coal, Inc. 705
McKees Rocks Forging, Inc. 220
David A. Murdoch 1817
National Forge Company 553
North Pocono Taxpayers' Association and North Pocono C.A.R.E. 449
P.A.S.S., Inc. 1875
Perry E. and Jeanne E. Phillips 1266
Seneca Landfill, Inc. 1190
Daniel Weimer 1850
Edmund Wikoski 1461
Wilbar Realty, Inc., and Carl Kresge, President 999
Wood Processors, Inc. and Archie Joyner 315

OPINIONS AND ORDERS

CASE NAME	PAGE
Adams Sanitation Company, Inc. (4/5/94)	502
Adams Sanitation Company, Inc. (11/1/94)	1482
Ted Babich	541
Blue Marsh Laboratories Inc.	1451
Borough of Ridgway	1090
Butler Township Area Water and Sewer Authority	592
Richard P. Butler	1184
Joseph F. Cappelli & Sons, Inc.	1835
Chester Residents Concerned for Quality Living	204
City of Harrisburg (2/16/94)	155
City of Harrisburg (9/16/94)	1309
City of Harrisburg (11/7/94)	1706
Christine Ann Crawford and Corey Eichman, et al. (4/28/94)	583
Christine Ann Crawford and Corey Eichman, et al. (7/6/94)	912
Foster R. College	1642
Del-Aware Unlimited, Inc. (5/17/94)	744
Del-Aware Unlimited, Inc. (7/14/94)	983
Downingtown Area Regional Authority	440
Doylestown Federal Savings & Loan (5/6/94)	618
Doylestown Federal Savings & Loan (9/28/94)	1362
Doylestown Federal Savings & Loan (11/2/94)	1632
Dunkard Creek Coal, Inc.	1655
Dunkard Township, Greene Township, Washington Township, Cumberland Township, Monongahela Township, and Morgan Township	1635

East Penn Manufacturing Company, Inc. 1454

Electric Motor and Supply, Inc. 1478

Empire Sanitary Landfill, Inc. (9/30/94) 1365

Empire Sanitary Landfill, Inc. (10/14/94) 1419

Envyrobale Corporation (11/7/94) 1714

Envyrobale Corporation (12/6/94) 1842

Eric Joseph Epstein 1471

William Fiore, d/b/a Municipal and Industrial Disposal Company (2/2/94) 90

William Fiore, d/b/a Municipal and Industrial Disposal Company (11/2/94) 1629

Furnley H. Frisch d/b/a Furnley H. Frisch & Sons 1409

Mrs. Peggy Ann Gardner, Mrs. Barbara Judge and Mrs. Mary Jane Eckert (4/14/94) 529

Mrs. Peggy Ann Gardner, Mrs. Barbara Judge and Mrs. Mary Jane Eckert (9/7/94) 1250

Greene County Citizens United et al. 1217

Gerald C. Grimaud, Anna Kroptavich, Widow of Joseph Kroptavich and Irene L. Kitchnefsky 303

Harmar Township (3/8/94) 296

Harmar, Township of, and Bauerharmar Coal Corp. (8/9/94) 1107

The Harriman Coal Corporation 1331

Ronald S. Kell and Edith M. Kell 1301

Kenneth P. Koretsky 905

Alvin and Lois Lampenfeld 1777

Lehigh Township, Wayne County (93-341-W) 406

Lehigh Township, Wayne County (91-090-W) 402

Lower Paxton Township Authority 1826

George M. Lucchino (9/23/94) 1346

George M. Lucchino (10/19/94) 1434

Mountain View Reclamation and Geological Reclamation Operations
Waste Systems, Inc. 1790

Multilee, Inc. 989

New Castle Township Board of Supervisors (7/7/94) 919

New Castle Township Board of Supervisors (9/22/94) 1336

New Hanover Corporation 1353

Newtown Land Limited Partnership 856

P.A.S.S., Inc. 522

Pequea Township (3/25/94) 415

Pequea Township and E. Marvin Herr, E.M. Farms (5/27/94) 755

Philadelphia Electric Company, et al. 810

QC, Inc. 1242

Quehanna-Covington-Karthaus Area Authority 571

Rescue Wyoming, et al. (3/30/94) 425

Rescue Wyoming, et al. (9/13/94) 1304

Rescue Wyoming, et al. (9/20/94) 1324

Ridgway, Borough of 1090

SCA Services of Pennsylvania, Inc. 1

Snyder Brothers, Inc. (11/4/94) 1702

Snyder Brothers, Inc. (12/29/94) 1888

Solar Fuel Company, Inc., A Corporation 737

Township of Harmar and Bauerharmar Coal Corp. (8/9/94) 1107

John D. and Sandra T. Trainer, Bruce A. and Alyce Curtis, and The Plumstead Township Civic Association 749

Geoffrey B. Tyson 868

University Area Joint Authority, et al. 1671

Elva Wickizer, Timmy Paul Wickizer and Victoria Wickizer 1412

Wood Processors, Inc. and Archie Joyner 597

James E. Wood 347

Zanita A. Zacks-Gabriel 536

1994 DECISIONS

Act 339, 35 P.S. §701, *et seq.*

Payments toward costs of sewage treatment plants (701)--440

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

Civil penalties (4009.1)--30, 100

Definitions (4003)--1724

Permits (4006.1)--1724

Powers and duties of DER (4004)

Enforcement orders--100

Regulations

25 Pa. Code, Chapter 123: Standards for Contamimants

fugitive emissions (123.1-123.2)--100

odor emissions (123.31)--30, 100

Bituminous Coal Mine Act, 52 P.S. §701.101, *et seq.*--737

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

Regulations

25 Pa. Code, Chap. 89, Underground Mining of Coal

Subchapter F: Subsidence Control (89.141 *et seq.*)--925

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

Civil penalties (691.605)--1781

Definitions (691.1)--220

DER enforcement orders (691.210, 691.610)--1027

Operation of mines (691.315)

Operator responsibility for pre-existing discharges--749

Potential pollution (691.402)--1226

Regulations

25 Pa. Code, Chapter 92, NPDES

Permits (92.3-92.17)--1525

Approval of applications (92.31)--1090

Permit conditions (92.51-92.67)--1090

Renewal of NPDES permit--90

25 Pa. Code, Chapter 102, Erosion Control

General Provisions (102.1-102.5)--1226

Erosions and Sedimentation Control Measures and Facilities (102.11-102.13)--1226

Responsibilities of landowners and occupiers (691.316)--220, 1027

Personal liability--502

Coal Refuse Disposal Control Act, 52 P.S. §30.51, *et seq.*

Permits--1724

Costs Act (Award of Fees and Expenses for Administrative Agency Actions), 71 P.S. §§2031-2035

Award of fees and expenses (2033)--597, 1434, 1642, 1655

Definitions (2032)--597, 1642, 1655

Prevailing party--597

Substantial justification--597, 1655

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

Permits (693.6-693.9)--425, 449

Regulations

25 Pa. Code, Chapter 105, Dam Safety and Waterway Management--1724

Subchapter A: General Provisions (105.1 *et seq.*)--449, 1817

25 Pa. Code, Chapter 106, Flood Plain Management--1817

Defenses

De minimus non curat lex--30, 100

Discriminatory enforcement--220

Estoppel--874, 999

Retroactive application of the law--502

Environmental Hearing Board Act, 35 P.S. §7511, *et seq.*--90, 168, 1674

EHB Practice and Procedure

Admissions--220, 440, 919, 1331

Amendment of pleadings and notice of appeal--449, 1702, 1850

Appeal *nunc pro tunc*--303, 402, 868, 1217, 1242, 1471, 1635, 1777

Appealable actions--155, 406, 571, 749, 1250, 1346, 1412, 1471, 1799, 1888

Burden of proof

Under acts

Clean Streams Law--1226

Under Board's rules (25 Pa. Code §21.101)

Civil penalties (21.101(b)(1))--100, 999, 1266, 1811, 1850

In general, party asserting affirmative (21.101(a))--30, 100, 315, 449, 705, 1148, 1190, 1226, 1281, 1371

Orders to abate pollution or nuisance (21.101(b)(3), (d), and (e))--30, 100, 168, 315, 705, 767, 925, 1027, 1074, 1148, 1461, 1850

Refusal to grant, issue, or reissue a license or permit (21.101(c)(1))--1281, 1489

Third party appeals of license or permit (21.101(c)(3))--347, 380, 425, 449, 624, 826, 1427, 1525, 1724, 1817, 1875

Certification of interlocutory appeal to Commonwealth Court--1362, 1419

Civil penalties assessments--999, 1799

Proposed--618

Collateral estoppel

Of a DER order--90, 168

Of an EHB final order--744

Consent orders, adjudications, and agreements--1250

Continuance and extensions--347

Declaratory judgment--1371

Demurrer--1454

Directed adjudication--30, 347, 1027

Discovery

Interrogatories--1184

Motion to compel--919

Sanctions--919, 1304

Estoppel

Equitable--1371

Evidence

Best evidence rule--347, 592, 1674

Demonstrative evidence--100

Experts--30, 347, 449, 1027, 1148, 1489, 1674

Hearsay--30, 100, 347, 597, 1324

Missing witness inference rule--1148

Motion in limine--856, 1324, 1655

Parol evidence--592, 1674

Scientific tests--220

Scope of cross-examination--100, 449

Weight--925, 1489

Ex parte communications--1304

Finality--303, 1090, 1346, 1353, 1826

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

Chapter 35: Formal Proceedings

Subchapter C: Evidence and Witnesses--30

Intervention--755, 912, 989

Joinder--618, 1365

Judicial notice--347

Jurisdiction--425, 529, 755, 810, 856, 1217, 1242, 1346, 1371, 1674, 1724, 1777, 1850

Mootness--755, 810, 983, 1371

No relief available--30, 425, 737, 1451, 1478

Motion to dismiss--303, 406, 529, 737, 744, 810, 856, 905, 1242, 1346, 1451, 1888

Motion for judgment on the pleadings--1835, 1888

Motion to limit issues--425, 905, 919, 1336

Motion for nonsuit--168, 1074, 1427

Motion to strike--1027

Motion for summary judgment--1, 90, 425, 440, 502, 541, 571, 583, 737, 1301, 1309, 1331, 1336, 1353, 1482, 1629, 1671, 1714, 1790, 1842

Notice of appeal

Issue preclusion (25 Pa. Code §21.51(e))--100, 168, 905, 919, 1525, 1674, 1850, 1888

Perfection of appeal (timeliness)--303, 536, 810, 826, 856, 868, 1217, 1242, 1353, 1371, 1777, 1888

Pennsylvania Rules of Civil Procedure--571, 618

Post-Hearing Memoranda--1817

Failure to file--1781

Pre-Hearing Memoranda--905, 1324, 1724

Preliminary objections--1454

Pro se appellants--1184, 1281

Reconsideration--296, 1842

By non-party--1706

Exceptional circumstances--1409, 1482, 1632

Interlocutory order--1250, 1632

Timeliness--1706, 1842

Relevancy--30, 220, 874

Reopening of record--347, 592, 1027, 1706

Res judicata--90, 541

Ripeness--1

Rule to show cause--1412, 1478

Sanctions--1027, 1184, 1304

Scope of review--100, 1027, 1148

Settlements--1724

Standard of review--220, 1371, 1674

Standing--155, 1353, 1365, 1724

Stay proceedings--744

Supersedeas--415, 522

Stay of EHB order--1826

Waiver of issues--624, 856, 905, 1427, 1482, 1525, 1724, 1817

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

Regulations

40 CFR, Chapter 403--1090

Infectious Waste Incinerator Construction Moratorium, 35 P.S. §6019.1 *et seq.*--204

Judicial Code

Adverse interest rule--100, 347

Municipal Waste Planning, Recycling and Waste Reduction Act, 53 P.S. §4000.101 *et seq.* (Act 101)

Assistance to municipalities (Ch. 11)

Waste volumes (§1112)--1

Fees

Recycling (Ch. 7)--1790

General provisions (Ch. 1)

Definitions--583

Grants (Ch. 9)--155, 1309

Municipal Waste Planning (Ch. 5)--583

Recycling and waste reduction (Ch. 15)--1

Municipalities Planning Code, 53 P.S. §10101 *et seq.*

Approval of plats (§10508)--755

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

Definitions (§3303)--1461

Mining permit; reclamation plan (§3307)--1461

Operator's license (§3305)--1461

Permit approval or denial (§3308)--425

Pennsylvania Constitution

Article I, Section 1 (inherent rights)--30

Article I, Section 10 (takings)--1799

Article I, Section 27 (natural resources)--449, 624, 1525, 1724, 1875

Pennsylvania Safe Drinking Water Act, 35 P.S. §721 *et seq.*

Civil penalties (§721.13(g))--999

Powers and duties of DER

Abuse of discretion--767, 1371, 1461, 1489, 1799

Department's interpretation of its regulations controls--553, 1309, 1371, 1790

Enforce regulations, duty to--220, 1371

Police or regulatory powers--220, 1027, 1790

Prosecutorial discretion--449, 755

Traffic effects of permit grant, duty to consider--624

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

Definitions (§750.2)--571

Grants (§750.6)--571

Official plans (§750.5)--168, 874

Permits (§750.7)--168

Powers and duties of DER (§750.10)

Recission of official plan revision approvals--168

Regulations

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

Subchapter C: Development Plan Revisions (§§71.31-71.63)--415, 874

25 Pa. Code, Chapter 94, Municipal Wasteload Management

Action on overloaded facilities (§§94.21-94.30)--1826

Sewage enforcement officers

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

Bonds (6018.505)--624

Civil penalties (6018.605)--1266, 1811, 1850

Closure orders (6018.602)--315

Daily waste volume limits--1

Definitions (6018.103)

Processing (Act 109)--315

Storage/Disposal--1850

Transfer facility (Act 109)--583

DER enforcement orders (6018.602, 6018.603, and 6018.104(7))--1850

Executive orders

1989 Executive Order--1

Legislative findings and policy (6018.102)--1850

Licenses (6018.501, 502, and 503)

Grant, denial, modification, revocation, suspension (6018.503)--1525

Permits (6018.501, 502 and 503)--1190, 1850

Grant, denial, modification, revocation, suspension (6018.503)--1724

Requirement of (6018.501(a))--905

Record keeping requirements (6018.608)--1

Regulations

25 Pa. Code, Chapter 75, Solid Waste Management

Subchapter C: Permits and Standards (75.21-75.38)--1724

25 Pa. Code, Chapter 271, Municipal Waste Management

Subchapter A: General (271.1-271.100)--204, 553, 1525

Subchapter B: General Requirements for Permits and Applications (271.101-721.200)--1875

Subchapter C: Permit Review (271.201-271.300)--1, 1525

Subchapter D: Financial Requirements (271.301-271-400)--624

Subchapter E: Civil Penalties (271.401-271-500)--1266, 1850

25 Pa. Code, Chapter 272, Municipal Waste Recycling--1309

25 Pa. Code, Chapter 273, Municipal Waste Landfills

Application requirements (273.101-273.200)--1525

Operating requirements (273.201-273.400)--30, 502, 624, 1525, 1790

25 Pa. Code, Chapter 275, Land Applicaiton of Sewage Sludge--522, 1875

25 Pa. Code, Chapter 281, Composting Facilities--1525

25 Pa. Code, Chapter 283, Resource Recovery--1525

25 Pa. Code, Chapter 285, Storage, Collection and Transportation of Municipal Waste--1525, 1811

25 Pa. Code, Chapter 287, Residual Waste Management--553, 1714, 1850

Wastes, types of

Residual waste

Permits (6018.301)--1714

Statutory Construction Act, 1 Pa.C.S.A. §1501 *et seq.*

Later enactments control over earlier (1936)--1674

Legislative intent controls (1921)--1309

Presumptions in ascertaining legislative intent (1922)--571, 874,

Storage Tank and Spill Prevention Act, 35 P.S. §6021.101 *et seq.*

Definitions (§103)--767

Presumption of liability--767

Regulations

25 Pa. Code, Chapter 245: Spill Prevention Program--541, 1281

Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 *et seq.*

Bonds--705

Enforcement orders (1396.4c)--1148

Health and safety (1396.4b)--1148

Affecting water supply (1396.4b(f))--826

Payment of costs and attorney fees--1434

Mining permits (1396.4)--1331

Award of attorneys fees (1396.4(b))--1107

Content of permit application (1396.4(a))

Consent of landowner to entry--380

Off-site discharges--705

Regulations

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

Subchapter B: Permits (86.11-86.70)--1336

Subchapter G: Civil Penalties for Coal Mining (86.191-86.203)--1331

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

Subchapter E: Surface Coal Mines: Minimum environmental standards--1027, 1148

United States Constitution

Commerce Clause--1

Due Process--30, 449, 1250

Equal Protection--874

Takings (Fifth Amendment)--874, 1250, 1281

Water Rights Act, the Act of June 24, 1939, P.L. 42, as amended, 32 P.S. §631 *et seq.*

Water allocation permits--1674

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M. DIANE SMITH
SECRETARY TO THE BOARD

DEL-AWARE UNLIMITED, INC.	:	
v.	:	EHB Docket No. 84-361-MJ
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and PHILADELPHIA ELECTRIC COMPANY, Permittee	: : :	Issued: July 14, 1994

OPINION AND ORDER
SUR MOOTNESS

By Joseph N. Mack, Member

Synopsis

The Board dismisses an appeal of a National Pollutant Discharge Elimination System ("NPDES") permit as moot. Where the permit in question has expired by operation of law and the appellant has not appealed the renewal permit issued by the Department of Environmental Resources ("Department"), there is no longer any meaningful relief which the Board can grant.

An exception to the general doctrine of mootness is where an issue is of a recurring nature, but evading review. The issue of fish protection at the Delaware River intake of the Point Pleasant Project does not fall into this category, particularly where this issue has already been addressed by the Board in a separate appeal filed by Del-Aware Unlimited, Inc. ("Del-Aware") and in an earlier opinion issued by the Board in the present appeal.

The argument that this matter involves a "new source" permit, and should be given special consideration, may not be relied upon by Del-Aware as

a basis for avoiding dismissal of its appeal where Del-Aware has no standing to raise this issue.

Background

This appeal originated on October 22, 1984 with the filing of a notice of appeal by Del-Aware, challenging the issuance by the Department of an NPDES permit to Pennsylvania Electric Company ("PECO") for a discharge or discharges to the Schuylkill River at its Limerick plant. That permit, by its terms, expired September 19, 1989. Prior to that date the Department issued a new permit to PECO for the same discharge or discharges effective December 20, 1988.[1] Del-Aware did not appeal the issuance of the new permit.

By Order dated March 25, 1994, Board Member Richard S. Ehmann, to whom this matter had been assigned on March 11, 1994 for primary handling, requested the parties to file separate written reports concerning the status of this appeal and specifically to address the issue of whether this appeal had been rendered moot by virtue of the permit's expiration or renewal. PECO and the Department filed status reports on April 6, 1994 and April 8, 1994, respectively, suggesting that this appeal should be dismissed for mootness. Del-Aware filed a status report/response on May 4, 1994 and a corrected version thereof on May 12, 1994, arguing that the appeal was not moot. (Both filings are hereinafter collectively referred to as "status report/response").

On April 12, 1994, this appeal was reassigned to Board Member Joseph N. Mack, who on May 9, 1994, directed the parties to brief the issues raised in Del-Aware's status report/response. PECO and the Department filed briefs on June 1, 1994 and June 6, 1994, respectively.

---

[1] A more detailed history of this case appears in our Opinions of May 13, 1985; November 21, 1985; and March 14, 1986.

Del-Aware, in its status report/response admits that the NPDES permit which is the subject of this appeal has expired and that Del-Aware has not appealed the new permit issued on December 20, 1988. Del-Aware argues, however, that two issues prevent this appeal from being moot: First, Del-Aware argues that the issue of fish protection will arise repeatedly and unless reviewed here will continue to escape review. Secondly, Del-Aware asserts that the appeal is not moot because it is from a "determination of a new source under the Federal Clean Water Act, and pursuant to [that] Act, different standards apply to the issuance of an initial permit for a new source, as compared with continuing permits". Finally, Del-Aware alleges that the concept of mootness does not apply to "continuing discharges where the act complained of continues".

This Board has held that where a new permit or permit renewal is issued by the Department, the original permit is superseded by the new permit. See New Jersey Zinc Company v. DER, 1986 EHB 1199. This is based upon the proposition that the subject matter of the older permit no longer exists. Because the Board can no longer grant any meaningful relief, the appeal of the initial permit is rendered moot. *Id.*

An exception to the general rule of mootness is where an issue is of a recurring nature or capable of repetition but avoiding review. Metro Transportation Co. v. Pennsylvania Public Utility Commission, 128 Pa. Cmwlth. 223, 563 A.2d 228, 230 (1989). Del-Aware argues that the issue of protecting the fish population at the Delaware River intake of the Point Pleasant Project is one which will repeatedly escape review. Del-Aware's argument is without merit, however, since this very issue was addressed by the Board in an earlier appeal at Del-Aware Unlimited, Inc. v. DER, 1984 EHB 178 ("Del-Aware I"). The issue of the protection of fish at the Delaware River intake was considered by

the Board in Del-Aware I, wherein the Board concluded that the intake's operation would not adversely impact the aquatic community of the Delaware River at Point Pleasant. *Id.* at 296-300.

Moreover, this issue has also been dealt with in this appeal. In an Opinion and Order Sur Motion to Dismiss, at 1985 EHB 478, former Board Member Edward Gerjuoy ruled that the issue of best available technology to protect fish at the Point Pleasant Project was irrelevant in a case involving a point source discharge on the Schuylkill River far removed from the Point Pleasant Project. He further held that even if this issue were properly raised in this appeal, Del-Aware would be precluded from relitigating it pursuant to the doctrine of collateral estoppel since the Board had already made a final determination of the matter in Del-Aware I. Having already addressed this issue once, and having found the issue to be irrelevant in the present appeal, we must conclude that this issue is not a basis for avoiding dismissal of this appeal as moot.

Del-Aware argues as its second basis for avoiding dismissal for mootness that the discharge from the Limerick plant is a "new source", and that under the Clean Water Act, 33 U.S.C. §1372(c)(1), it is subject to a more intense scrutiny in the first or "new source" permit which will not arise on a repermitting.

This issue is not before the Board. In a March 14, 1986 Opinion in this matter, 1986 EHB 221, the Board reviewed the contentions raised by Del-Aware in its appeal and issued the following order:

> 1. Del-Aware has standing to litigate its allegation that DER has misapplied the regulations used to set the effluent discharge limits in the appealed-from permit, because DER allegedly has incorrectly assumed the intake pollutant concentrations to the Limerick facility will be the same as present concentrations in the East Branch of the Perkiomen.

> 2. Del-Aware does not have standing to litigate -- and therefore will not be allowed to present testimony which bears on -- any Del-Aware complaints about the permit other than the complaint for which standing was granted in paragraph 1, *supra*.
>
> *Id.* at 232.

Based upon our earlier order, Del-Aware does not have standing to raise the issue of a "new source" permit, and, therefore, it cannot be a basis for avoiding dismissal of the appeal for mootness.[2]

Finally, Del-Aware makes the following assertion: "The concept of mootness is inapplicable to continuing discharges, where the act complained of continues". Del-Aware provides the Board with no legal citation for this proposition, nor are we aware of any such authority. Moreover, as the Department points out in its brief, although the concept of mootness may not be applicable to continuing discharges, the action which was appealed was the issuance of an NPDES permit to PECO, a discrete event. It is not the discharge which is moot, but the permit which authorized the discharge. Had Del-Aware wanted to raise concerns about the continuing discharge, it had every opportunity to appeal the permit renewal issued to PECO. Because the subject matter of Del-Aware's appeal, that is, the NPDES permit issued to PECO in 1984, has expired and no longer exists, there is no meaningful relief which the Board can grant thereon, and, therefore, this appeal must be dismissed as moot.

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[2] Moreover, an examination of the notice of appeal reveals that Del-Aware did not at any point address the Clean Water Act or the issue of a "new source" either directly or by implication.

O R D E R

AND NOW, this 14th day of July, 1994, we hereby dismiss the appeal of Del-Aware Unlimited, Inc. at EHB Docket No. 84-361-MJ, as moot.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

Board Chairman Maxine Woelfling and Board Member Richard S. Ehmann did not participate in this decision.

DATED: July 14, 1994

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M. DIANE SMITH
SECRETARY TO THE BOARD

MULTILEE, INC.	:	
	:	
v.	:	EHB Docket No. 94-047-MJ
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 15, 1994

OPINION AND ORDER
SUR PETITION TO INTERVENE

By Joseph N. Mack, Member

Synopsis

The interests of a host municipality are sufficient to warrant intervention in an appeal of the Department's denial of a permit to construct and operate a municipal waste disposal facility. The municipality's participation is limited to supporting the reasons set forth by the Department in its denial letter, since intervention may not broaden the scope of an appeal. Evidence of the proposed landfill's effect on the environment or on public health and safety will not be permitted where the Department's denial letter dealt solely with the issue of compliance with Act 101.

OPINION

This matter was initiated on March 25, 1994 with the filing of a notice of appeal by Multilee, Inc. ("Multilee"), challenging the Department of Environmental Resources' ("Department's") denial of its application for a permit to construct and operate a municipal waste landfill in St. Thomas Township, Franklin County.

In its letter of February 24, 1994, the Department set forth the following reasons for its denial of the permit application:

> 1. By not providing valid contracts for disposal of municipal waste as of the effective date of Act 101 (September 28, 1988), Multilee has not satisfied Section 502(c)(3) of Act 101, the Municipal Waste Planning, Recycling and Waste Reduction Act. Therefore, your proposed facility is not considered to be "existing" under Act 101.
>
> 2. Multilee has not established that approval of the application would be consistent with the applicable municipal waste management plans and laws.
>
> Multilee contends that waste will be received from the host county as well as other counties and states. The host county municipal waste management plan, however, does not expressly provide for the facility, and the plan's implementing documents submitted to the Department do not designate the facility to receive a specified waste volume, both of which are required by law to prove planning consistency. [53 P.S. Section 4000.507(a); 25 Pa. Code Sections 271.201(b), and 272.245 and 273.139(b)(1)]. Therefore, Multilee may not accept municipal waste from Franklin County.
>
> Multilee also may not accept municipal waste from any Pennsylvania County other than Franklin County. To prove planning consistency for acceptance of municipal waste from another county, Multilee must demonstrate that each such county expressly provided for the proposed facility in its plan and that the implementing documents submitted to the Department designate the facility to receive a specified volume of waste [25 Pa. Code Sections 271.125(b) and 271.201(a)(6)]. To date, no waste has been designated, through approved county plans, to Multilee.
>
> Multilee may not accept municipal waste from any state, county, or municipality located out of state with an approved waste management plan because Multilee has not demonstrated that the facility is expressly provided for in such plans and implementing documents (if there are implementing documents) of those states, counties, or municipalities. [25 Pa. Code Sections 271.125(b) and 271.201(a)(6)].

For acceptance of municipal waste from states, counties, or municipalities outside of Pennsylvania that do not have planning requirements, the application must demonstrate compliance with all applicable laws of the state, county or municipality [25 Pa. Code Section 271.125(b)]. Additionally, Multilee must demonstrate that binding commitments for delivery of municipal waste exist. Multilee has not met these requirements.

3. Multilee has not established "need" for the proposed facility.

Since Multilee has not established that it is expressly provided for in Franklin County's plan and that Franklin County's implementing documents designate it to receive a specified volume of municipal waste, (above), Multilee has failed to establish "need" for the facility with regard to the host county. [25 Pa. Code Sections 271.125(b), and 272.201(a)(6)].

With regard to municipal waste from places other than the host county, Multilee has also failed to establish "need". Need does not exist where consistency with plans and applicable laws (above) has not been established. Even when consistency with plans and applicable laws has been established, need can only be shown by conducting an environmental siting analysis for each county generating the municipal waste that the applicant proposes to be disposed at the facility. If Multilee had demonstrated consistency with the Franklin County plan, then in order to receive municipal waste from other counties in addition to Franklin County, Multilee would have to demonstrate that no site in the county generating the waste is more suitable than the proposed facility [25 Pa. Code Section 271.201(b)(2)]. Multilee did not however, establish consistency with the Franklin County plan. Therefore, in order for Multilee to have obtained approval to have received municipal waste from other counties, Multilee would have had to demonstrate that the proposed location for the facility is at least as suitable as alternative locations in the generating county [53 P.S. Section 4000.507(a)(2)(iii); 25 Pa. Code Section 273.139(c)(1-3) and d-f)]. Multilee has not met these requirements.

On June 22, 1994, St. Thomas Township ("the Township"), the host municipality for the proposed landfill, petitioned to intervene in the appeal.

Multilee filed an answer opposing the petition to intervene on July 5, 1994. With its answer, Multilee submitted a supporting memorandum, the affidavits of Harold L. Brake, Multilee's president, and Samuel W. Worley, Chairman of the Franklin County Board of Commissioners. The Department filed no response to the petition.

Section 4(e) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7511 *et seq.*, at §7514(e), allows the intervention of interested parties in proceedings before the Board. Intervention is not an automatic right but is within the discretion of the Board. New Hanover Corporation v. DER, 1991 EHB 1020, 1022. To be an "interested party" for purposes of intervention, a petitioner must demonstrate that his interest is direct, immediate and substantial. Concord Resources Group of Pennsylvania, Inc. v. DER, 1992 EHB 1563, 1566. A "substantial" interest is one which has substance; that is, there must be some discernable adverse effect, rather than an abstract interest in having others comply with the law. William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269, 282 (1975).[1] A "direct" interest requires that the aggrieved party show causation between the harm to his interest and the matter of which he complains. *Id.* Finally, an "immediate" interest is one which is more than a remote consequence of the judgment. *Id.* at 203.

Applying these criteria to the present case, the Township has demonstrated that its intervention is warranted. As the host municipality to the site of the proposed Multilee landfill, the Township has a direct,

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[1] Although William Penn dealt with the issue of whether a party had standing to bring an appeal, the Board and the Commonwealth Court have applied the same test for intervention. Borough of Glendon v. DER, 145 Pa. Cmwlth. 238, 603 A.2d 226 (1992), allocatur denied, ___ Pa. ___, 608 A.2d 32 (1992). Concord Resources, *supra*.

immediate, and substantial interest in the Department's denial of the permit application. Prior Board decisions have recognized this interest and have permitted intervention by a municipality in an appeal of the Department's denial of a solid waste disposal permit, Keystone Sanitation Company, Inc. v. DER, 1989 EHB 1287, and the denial of a modification to a solid waste disposal permit, New Hanover Corporation, 1991 EHB 445.

At issue, however, is the scope of the Township's intervention, since intervention will not be permitted where it will expand the scope of the appeal or where the evidence sought to be introduced by the intervenor is not relevant to the issues before the Board. New Hanover Corporation v. DER, 1991 EHB 440, 442; New Hanover, 1991 EHB at 1022.

If permitted to intervene, the Township seeks to present two categories of evidence. The first group of evidence deals with the effect of the proposed landfill on the environment and on the health and safety of the Township's citizens. The evidence which the Township intends to present from this first category is as follows:

1. Testimony establishing that construction and operation of the landfill will cause adverse effects on the health and safety of the Township's citizens.

2. Expert testimony regarding the climate, topography, soils, geology, and hydrogeology of the proposed site, showing that the site is unsuitable for use as a municipal waste landfill.

3. Expert testimony demonstrating that the proposed landfill will adversely affect air quality, groundwater, wetlands, and historical and archeological resources.

4. Evidence demonstrating that construction and operation of the landfill will cause traffic congestion and road safety hazards.

5. Expert testimony demonstrating that the permit application does not comply with the Department's regulations on landfill design and operation.

The issue in this appeal is a narrow one: Did the Department abuse its discretion in denying Multilee's permit application on the basis that it had failed to satisfy certain provisions of Act 101? There is no indication of whether the Department, in its review of Multilee's permit application, ever reached the question of what effects, if any, the proposed landfill would have on the environment and public health and safety. Since the Department did not cite environmental effects or health and safety as grounds for denial of the permit, any evidence which the Township may have regarding these matters is of no relevance in this appeal. Therefore, the Township may not introduce any evidence dealing with effects of the proposed landfill on the environment or on health and safety.

The second category of evidence which the Township intends to introduce deals with Act 101. This evidence is as follows:

1. Testimony showing that there are no township or county needs for the landfill.

2. Testimony showing how township and county-wide needs are being met by other facilities.

3. Evidence showing that the application did not comply with Act 101.

The Township argues that it can "more directly address the local needs and planning status of municipal waste disposal, transportation, storage and processing than can the Department."

Multilee argues that the Township is precluded from raising any challenge regarding the "need" for the landfill since the proposed facility is

included in the Franklin County Act 101 plan,[2] which the Township did not appeal.

The Franklin County Act 101 plan was approved by the Department on or about October 30, 1991.[3] (Affidavit of Harold L. Brake) Multilee would have us rule that the Township has waived any right to challenge whether there is a "need" for the landfill or whether the permit application complies with relevant provisions of Act 101 since the landfill is included in the Franklin County Act 101 plan. As we read the Department's denial letter, however, there is some question as to whether the proposed facility is "consistent with" the Franklin County Act 101 plan and whether the plan "expressly provide[s] for the facility". Since a basis of contention in this appeal is whether the Multilee facility is, in fact, "provided for" in the Franklin County Act 101 plan, we cannot rule, as Multilee argues, that the Township's failure to appeal the Franklin County plan precludes it from now arguing that the proposed facility fails to comply with Act 101.

The Township's participation in this appeal, however, will be limited solely to the question of compliance with the applicable provisions of Act 101 as specifically set forth in the Department's denial letter.

ORDER

AND NOW, this 15th day of July, 1994, it is hereby ordered that the Petition to Intervene filed by the Township of St. Thomas is granted. The

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[2] Pursuant to §501(a) of Act 101, counties were given a timeframe in which to submit to the Department an officially adopted municipal waste management plan for municipal waste generated within the county's boundaries. 53 P.S. §4000.501(a).

[3] A true and correct copy of the Franklin County Act 101 Plan is included as Exhibit A to Multilee's answer to the petition for intervention. (Exhibit A to Multilee's Answer; Affidavit of Samuel W. Worley)

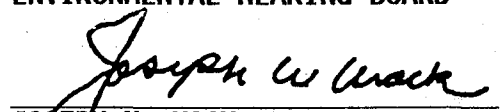
Township's participation in this appeal is limited solely to the issues of compliance with Act 101, set forth in the Department's denial letter.

The caption of this matter shall henceforth be:

Multilee, Inc.
v.
Commonwealth of Pennsylvania
Department of Environmental Resources
and St. Thomas Township, Intervenor

The provisions of Pre-Hearing Order No. 1, issued by the Board on April 1, 1994, shall apply to St. Thomas Township. A copy of the order is attached hereto.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: July 15, 1994

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M. DIANE SMITH
SECRETARY TO THE BOARD

MULTILEE, INC.	:	
v.	:	EHB Docket No. 94-047-MJ
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	2/24/94 Denial of Application

PRE-HEARING ORDER NO. 1

AND NOW, this 1st day of April, 1994, upon the filing of a notice of appeal in the above matter, it is ordered that:

1. The above matter has been assigned to Board Member, the Honorable Joseph N. Mack, for primary handling.

2. All discovery in this matter shall be completed within 75 days of the date of this Order, unless extended for good cause upon written motion.

3. The Appellant shall file its pre-hearing memorandum on or before June 15, 1994. The pre-hearing memorandum shall contain the following:

A. A statement of facts the party intends to prove.
B. Contentions of law and detailed citations to authorities supporting these contentions, including specific sections of statutes, regulations, etc., relied upon.
C. A description of any scientific tests relied upon by the party.
D. A list of fact and expert witnesses.
E. A summary of testimony of experts.
F. A list of documents sought to be introduced into evidence, copies of which shall be attached.
G. Dates on which the party is not available for hearing.

4. The Commonwealth and any other appellee(s) shall file an answering pre-hearing memorandum within fifteen (15) days after the receipt of Appellant's pre-hearing memorandum. The answering pre-hearing memorandum shall follow the format of Paragraph 3.

5. A party may be deemed to have abandoned all contentions of law or facts not set forth in its pre-hearing memorandum. The Board may enter other appropriate sanctions against a party failing to comply with Paragraphs 3 and 4 above.

6. Each party shall serve a copy of its pre-hearing memorandum on the other party in accordance with 25 Pa. Code §21.32(a). A proof of service shall be filed with the Board.

7. Any request for a continuance or extension shall be made by formal motion, pursuant to 25 Pa. Code §21.17, except when opposing counsel consent to the continuance or extension. When there is such consent, the request may be embodied in an informal letter, provided the letter indicates the consent of opposing counsel. Whether in motion or letter form, the request for continuance or extension shall state a specific time period or due date for the requested action.

8. Any party desiring to respond to a petition or motion shall do so within 20 days of the filing of the petition or motion, or within such time period as otherwise established by the Board. A party will be deemed to have waived the right to contest any motion or petition to which a timely response has not been filed. The Board will notify the parties that a response may be due.

9. The parties may, with the approval of the Board pursuant to §4(h) of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7514(h), utilize voluntary mediation to resolve or narrow their disputes. In the event the parties so choose, the Board, upon motion of the parties, may stay the proceedings pending submission of the mediator's report.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: April 1, 1994

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M. DIANE SMITH
SECRETARY TO THE BO.

WILBAR REALTY, INC., AND CARL KRESGE, PRESIDENT	:	
v.	:	EHB Docket No. 91-242-MJ
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 18, 1994

ADJUDICATION

By Joseph N. Mack, Member

Synopsis

An appeal of a civil penalty assessed pursuant to the Pennsylvania Safe Drinking Water Act, the Act of May 1, 1984, P.L. 206, 35 P.S. §721.1 *et seq.* ("Safe Drinking Water Act") and the regulations thereunder is dismissed. To determine whether a civil penalty assessment is unreasonably high or low, the Board looks to the total penalty assessed and the violations proven.

Where the Department of Environmental Resources ("Department") assesses a civil penalty on the basis of a violation with respect to a four-year monitoring period ending in 1984, but provides inadequate notice that the penalty was assessed on the basis of that monitoring period, the Department does not prevail with respect to that violation and is precluded from assessing a penalty for that violation. Therefore, the amount of $1850 assessed for this particular violation must be deducted from the total assessment.

The remaining penalty assessment of $35,050 is not unreasonably high where an operator of a community water supply system unlawfully operated a well for three years after the effective date of the Safe Drinking Water Act, where the operator knew and was repeatedly reminded that operation of the well without a permit was unlawful, where the operator's refusal to submit a proper permit application prevented the Department from determining whether water from the well was safe, and where the act authorized penalties of up to $5,000 per violation per day.

The Appellants fail to prove that the Department is estopped from assessing a penalty for a violation on the basis of representations made by a Department representative where the Appellants fail to show that the representations pertained to the violation or that the violation was induced by those representations.

The Board will not impose a higher civil penalty than that in the assessment where it appears that the Department requested higher penalties simply to chasten the Appellants for appealing the civil penalty assessment.

INTRODUCTION

This matter was initiated with the June 14, 1991, filing of a notice of appeal by Wilbar Realty, Inc. ("Wilbar") and Carl Kresge ("Kresge"), Wilbar's president. Wilbar is a Pennsylvania corporation, located in Bear Creek Township, Luzerne County, which owns and operates the Forest Park public water system in Bear Creek Township, Luzerne County, and the Laurel Lakes public water system in Rice Township, Luzerne County. Kresge and Wilbar (collectively, "the Appellants") seek review of a civil penalty which the Department assessed on May 15, 1991. The Department assessed a penalty of $36,900 against Wilbar for various alleged violations of the Pennsylvania Safe

Drinking Water Act, and the regulations thereunder, relating to the operation of the Forest Park and Laurel Lakes water systems.

According to the Appellants, the Department:

1) abused its discretion because it did not give sufficient weight to the small size of the water systems when calculating the penalties;

2) abused its discretion by deeming the operation of Forest Park well no. 2 to constitute a "reckless" and "priority" violation;

3) was estopped from assessing many of the penalties it did by virtue of the representations of Paul Franklin, a Sanitarian Regional Manager for the Department;

4) abused its discretion by considering the duration of the penalties;

5) abused its discretion by assessing the penalties so long after the violations, and only after Wilbar had received a PENNVEST loan;

6) abused its discretion by assessing penalties for the alleged violations pertaining to the emergency response plan, the operation and maintenance plan, and radiological monitoring because some of those violations are fully contained within others;

7) abused its discretion by assessing the penalty it did for not having a certified operator, since Wilbar's operator was qualified even if not certified;

8) abused its discretion by assessing the penalty it did for not monitoring radiological contamination because, if there was in fact a violation, that violation was not the Appellants' fault;

9) abused its discretion with respect to the penalty assessed for Wilbar's failure to notify the Department of knowing that some Forest Park customers were receiving inadequate water, since the deficiency resulted from severing well no. 2 in response to a Department order, and the Department had constructive knowledge that severing the well would result in inadequate water;

10) abused its discretion with regard to the penalty assessed for Wilbar's alleged failure to issue a boil water advisory as ordered in the emergency compliance order of January 4, 1988, because Wilbar had issued a boil water advisory before receiving the order;

11) abused its discretion with respect to the penalty assessed for Wilbar's alleged failure to notify the Department within one hour of discovering that some Laurel Lakes customers were receiving inadequate water because, although the Department was notified 12 hours after the Appellants knew of the problem, the Department did nothing in response for four days;

12) abused its discretion with regard to the penalty assessed for failure to issue a boil water advisory to Laurel Lakes customers after the Department determined an imminent hazard existed, because Wilbar had already issued a boil water advisory; and,

13) abused its discretion with respect to the penalty assessed for failure to comply with the emergency compliance order of June 6, 1989, by issuing a written boil water advisory within four hours, because Wilbar had already issued a boil water advisory.

On March 25-27, 1992, the Board conducted a hearing on the merits. The Appellants filed their post-hearing brief on July 13, 1992. The Department filed its post-hearing brief on September 3, 1992.

In their post-hearing brief, the Appellants contest only one of the actual violations attributed to Wilbar in the civil penalty assessment: the violation pertaining to radiological monitoring. According to the Appellants, Wilbar complied with the provisions governing radiological monitoring in the Department's regulations. The Appellants also assert that the Department abused its discretion when it determined the amount of the penalty to assess. Indeed, the Appellants assert that the Department should have imposed no penalty at all. All other issues which Wilbar did not address in its

post-hearing brief are deemed waived. Lucky Strike Coal Co. and Louis J. Baltrami v. Commonwealth, Department of Environmental Resources, 119 Pa. Cmwlth. 440, 546 A.2d 447 (1988).

In its post-hearing memorandum, the Department takes issue with each of the arguments raised by the Appellants and argues that if the penalty assessed was unreasonable, it was unreasonably low--not unreasonably high. Accordingly, the Department requests that the Board substitute its discretion and increase the amount of the penalty assessed.

The record consists of a transcript of 564 pages and 56 exhibits. After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. Appellants are Wilbar, a Pennsylvania corporation with its principal place of business at R. D. 1, Box 332, Wilkes Barre, Luzerne County, Pennsylvania 18702, and Kresge, the president of Wilbar. (N.T. 12; Ex. B-1, paragraphs 2-3)[1]

2. Appellee is the Department, the agency with the authority to administer and enforce the Safe Drinking Water Act, the rules and regulations promulgated thereunder, and §1917-A of the Administrative Code of 1929, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510.17. (N.T. 12; Ex. B-1, paragraph 1)

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[1] Exhibits from the appellants are designated as "Ex. A-__", Department exhibits as "Ex. C-__", and Board exhibits as "Ex. B-__". The notes of testimony, meanwhile, are referred to as "N.T. ___".

3. Wilbar owns and operates a public water system known as Forest Park (PWS I.D. No. 2400078) and a public water system known as Laurel Lakes (PWS I.D. No. 2400111). (N.T. 12; Ex. B-1, paragraph 5)

4. The Department and Appellants have stipulated that Forest Park and Laurel Lakes are "community water systems", as that term is defined under §3 of the Safe Drinking Water Act, 35 P.S. §721.3, and §109.1 of the Department's regulations, 25 Pa. Code §109.1. (Ex. B-1, paragraphs 10-11)

5. The Department and Appellants have stipulated that Kresge and Wilbar are "persons" as the term "person" is defined in §3 of the Safe Drinking Water Act, 35 P.S. §721.3, and §109.1 of the Department's regulations, 25 Pa. Code §109.1. (N.T. 12; Ex. B-1, paragraph 4)

6. Wilbar (as owned and operated by Kresge) became owner and operator of Forest Park on January 1, 1978. (Ex. B-1, paragraph 6)

7. Forest Park consists of collection, storage, and distribution facilities, and generally uses two wells to tap a groundwater source. (N.T. 12; Ex. B-1, paragraph 12)

8. Forest Park serves approximately 335 year-round residents and has about 70 service connections. (N.T. 12; Ex. B-1, paragraph 7)

9. Wilbar (as owned and operated by Kresge) became owner and operator of Laurel Lakes in May, 1983. (Ex. B-1, paragraph 8)

10. Laurel Lakes consists of collection, storage, and distribution facilities and generally uses ten wells to tap a groundwater source. (N.T. 12; Ex. B-1, paragraph 13)

11. Laurel Lakes serves at least 80 customers and has approximately 53 service connections. (N.T. 12; Ex. B-1, paragraph 9)

12. On May 15, 1991, the Department issued a civil penalty assessment to Wilbar. (Ex. C-47)

13. The Department assessed the civil penalty in response to the following alleged violations pertaining to the Forest Park and Laurel Lakes systems:

1) operating Forest Park well no. 2 without a permit;

2) failing to submit its 1985 and 1986 annual reports for Forest Park within the time prescribed by law;

3) failing to provide a certified operator for Forest Park;

4) failing to develop an emergency response plan for Forest Park;

5) failing to conduct annual sanitary surveys for Forest Park;

6) failing to develop or implement an operation and maintenance plan for Forest Park;

7) failing to prepare, maintain, or submit monthly operational reports for Forest Park;

8) failing to monitor and report radiological contamination;

9) failing to comply with the Department's compliance order of December 29, 1987;

10) failing to notify the Department within one hour of knowing that Forest Park customers were receiving inadequate drinking water;

11) failing to comply with the Department's emergency compliance order of January 4, 1988, regarding Forest Park, which, among other things, directed Wilbar to issue a boil water advisory within four hours;

12) failing to notify the Department within one hour of knowing that Laurel Lakes customers were receiving inadequate drinking water;

> 13) failing to issue a boil water advisory to Laurel Lakes customers after the Department determined that an imminent hazard was present; and,
>
> 14) failing to comply with the Department's emergency compliance order of June 30, 1989.
>
> (Ex. C-47)

14. The civil penalty assessment did not specify whether Wilbar was alleged to have violated the regulations regarding radiological monitoring during the monitoring period ending in 1980, the monitoring period ending in 1984, or the monitoring period ending in 1988. (Ex. C-47)

15. John Bent, a compliance specialist for the Department, prepared the civil penalty assessment. (N.T. 288, 292-293)

16. During the course of his testimony, Bent stated that he assessed the penalty with regard to radiological monitoring because Wilbar failed to comply with the appropriate regulations during the compliance period ending in 1984. (N.T. 321-322)

17. The Department listed the radiological violation in the assessment because the Department believed Wilbar had failed to comply with the regulations during the monitoring period ending in 1984. (N.T. 321-324)

18. The radiological violation listed in the assessment is followed by a citation to paragraph 44 of the Forest Park compliance order, issued on December 29, 1987. (Ex. C-12; Ex. C-47, page 4)

19. Although the Forest Park compliance order alleges that Wilbar violated §§109.301 and 109.701(a)(1) of the Department's regulations, 25 Pa. Code §§109.301 and 109.701(a)(1)--the same violations listed in the assessment

with respect to radiological monitoring--the Forest Park compliance order does not specify during which monitoring period the violations occurred. (Ex. C-12)

20. The Department assessed a civil penalty of $36,900. (Ex. C-47)

21. The Department determined the amount of the civil penalty by calculating a penalty for each individual violation listed in the assessment and then totaling them. (Ex. C-47)

22. The penalty calculated for operating Forest Park well no. 2 without a permit was $3,250. (Ex. C-47, paragraphs 11-13)

23. The penalty calculated for failing to submit annual reports for Forest Park for 1985 and 1986 was $750. (Ex. C-47, paragraphs 11-13)

24. The penalty calculated for failing to provide a certified operator for Forest Park was $2,350. (Ex. C-47, paragraphs 11-13)

25. The penalty calculated for failing to develop an emergency response plan for Forest Park was $850. (Ex. C-47, paragraphs 11-13)

26. The penalty calculated for failing to conduct annual sanitary surveys for Forest Park was $850. (Ex. C-47, paragraphs 11-13)

27. The penalty calculated for failing to develop or implement an operation and maintenance plan for Forest Park was $750. (Ex. C-47, paragraphs 11-13)

28. The penalty calculated for failing to prepare, maintain, or submit monthly operation reports for Forest Park was $750. (Ex. C-47, paragraphs 11-13)

29. The penalty calculated for failing to monitor and report for radiological contamination at Forest Park was $1,850. (Ex. C-47, paragraphs 11-13)

30. The penalty calculated for failing to comply with the Forest Park compliance order of December 29, 1987 was $5,000. (Ex. C-47, paragraphs 11-13)

31. The penalty calculated for failing to notify the Department within one hour of knowing that Forest Park customers were receiving inadequate drinking water was $3,500. (Ex. C-47, paragraphs 11-13)

32. The penalty calculated for failing to comply with the Department's emergency compliance order of January 4, 1988 was $5,000. (Ex. C-47, paragraphs 11-13)

33. The penalty calculated for failing to notify the Department within one hour of knowing that Laurel Lakes customers were receiving inadequate drinking water was $3,500. (Ex. C-47, paragraphs 11-13)

34. The penalty calculated for failing to issue a boil water advisory to Laurel Lakes customers after the Department determined that an imminent hazard was present was $3,500. (Ex. C-47, paragraphs 11-13)

35. The penalty calculated for failing to comply with the Laurel Lakes emergency compliance order of June 8, 1989 was $5,000. (Ex. C-47, paragraphs 11-13)

36. Wilbar operated well no. 2 without a permit continuously from January 1, 1978, until December 29, 1987. (N.T. 482, 509, 541-542; Ex. C-16)

37. The Department informed Kresge in writing no less than eleven times that he needed a permit to operate well no. 2: on June 6, 1978 (Ex. C-2); September 26, 1978 (Ex. C-51); November 17, 1980 (Ex. C-34); August 31, 1981 (Ex. C-26, N.T. 173-174); January 21, 1982 (Ex. C-3, N.T. 49-51); May 26,

1982 (Ex. C-4, N.T. 51-53); September 1, 1982 (Ex. C-30); November 22, 1982 (Ex. C-5, N.T. 53-54); May 14, 1985 (Ex. C-38); May 28, 1986 (Ex. C-39, N.T. 109-110); and, December 30, 1986 (Ex. C-40, N.T. 110-112)

38. On August 9, 1978, Kresge responded to the Department's letter of September 26, 1978. (Ex. C-52, N.T. 45-49)

39. Kresge did not submit a permit application for well no. 2 until May of 1982. (N.T. 177)

40. On June 8, 1982, the Department sent Kresge a letter (1) informing him that the permit application was incomplete, (2) specifying the information the Department required to finish processing the application, and (3) requesting that the information be sent to the Department as soon as possible. (N.T. 177-179; Ex. C-28)

41. When Kresge failed to respond by July 19, 1982, the Department sent him a letter reminding him of its June 8 letter and informing him that if he did not respond by August 20, 1982, "appropriate action" would be taken on the permit application. (N.T. 177-179; Ex. C-29)

42. When Kresge again failed to respond, the Department, on September 1, 1982, returned his application and reminded him that operating the well without a permit violated public water supply law. (N.T. 183-184; Ex. C-30)

43. Although Kresge admits that he received the Department's letter of September 1, 1982, he did not attempt to get a permit for well no. 2 again until January 1, 1988, when he submitted an emergency permit application for the well. (N.T. 482, 545)

44. The Department issued an emergency permit for well no. 2 on January 5, 1988. (Ex. C-16)

45. Well no. 2 was disconnected in response to a Department compliance order on December 29, 1987, and was not turned on again until January 1 or 2, 1988. (N.T. 509)

46. Well no. 2 was the last unpermitted well used in a public water system in the region. (Ex. C-6; N.T. 54-55)

47. There was nothing unique about the well which would account for Wilbar's delay in submitting the permit applications. (N.T. 59)

48. The Department could not determine whether the water from well no. 2 was safe because Wilbar refused to submit an engineering design, required as part of the permitting process. (Ex. C-6)

49. The engineering design was necessary to determine how susceptible well no. 2 was to contamination and whether there was adequate contact time to kill any bacteria present. (Ex. C-6)

DISCUSSION

Under 25 Pa. Code 21.101(b)(1), the Department bears the burden of proof in an appeal of a civil penalty assessment. DER v. Franklin Plastics Corp., EHB Docket No. 90-316-CP-E (Consolidated) (Opinion issued February 11, 1994). When reviewing a civil penalty assessment, the Board looks to see whether there is a "reasonable fit" between the violations and the amount of the penalty. Robert K. Goetz, Jr. v. DER, EHB Docket No. 91-153-E (Consolidated) (Opinion issued September 22, 1993). The first step in ascertaining whether a reasonable fit exists is to determine which alleged violations occurred.

In their post-hearing brief, the Appellants contested only one of the violations attributed to them in the civil penalty assessment--the violation pertaining to radiological monitoring. In the assessment, the Department

asserted that Wilbar violated 25 Pa. Code §§109.301 and 109.701 of the Department's regulations "by failing to monitor and report for radiological contamination at Forest Park". (Ex. C-47, paragraph 12(h)). Section 109.301 incorporates by reference the National Primary Drinking Water Regulations, 40 C.F.R. §141.1 *et seq.*, which require, among other things, that public water suppliers must complete radiological monitoring within three years of the effective date of those regulations and once every four years thereafter. 40 C.F.R. §141.26(a).

The situation here is complicated by the fact that each party's post-hearing brief assumes that compliance with a different monitoring period is at issue. The Appellants assume that the alleged violation pertains to the monitoring period ending June 24, 1988, and argue that they complied with the relevant provisions of the Safe Drinking Water Act and the Department's regulations. The Department, however, argues that the violation pertains to the monitoring period ending in 1984, and argues that Wilbar failed to conduct radiological monitoring for that monitoring period.

Since each party's arguments deal exclusively with one monitoring period, the situation here would be simple to resolve if the assessment itself specified the monitoring period to which the violation pertained. However, the Department's penalty assessment never specifies the monitoring period to which it refers. (Ex. C-47)

The Department maintains, nonetheless, that it is clear that the assessment pertains to the monitoring period which ended in 1984. It points to the testimony of John Bent, a Department compliance specialist, regarding the calculation of the penalty for the radiological monitoring violation and to the citation to paragraph 44 of the Forest Park compliance order which

follows the allegations pertaining to that penalty in the assessment. Bent referred to the monitoring period in response to two questions asked on direct examination:

> [Counsel for the Department]: How many violations are described by paragraph [12](h) [of the assessment]?
>
> [Bent]: I think that's only one violation; one that would be a violation for the radiological monitoring period that ended in 1984, I believe...
>
> ...
>
> [Counsel for the Department]: How many days did this problem go on, according to your information?
>
> [Bent]: Well, it went on from the end of that monitoring period then in 1984. I guess that puts it at the thousand day mark.
>
> (N.T. 321-322)

Paragraph 44 of the Forest Park compliance order, meanwhile, asserts that Wilbar violated §§109.301 and 109.701(a)(1) of the Department's regulations--the same violations listed in the assessment. (Ex. C-12) While the Forest Park compliance order, like the assessment, does not actually mention which monitoring period the alleged violations pertain to, the compliance order was issued months before the monitoring period ending in 1988 expired. (Ex. C-12) According to the Department, the reference to the compliance order in the assessment shows that the violation in the assessment does not pertain to the monitoring period ending in 1988. The Department does not explain, however, how the Appellants would have known that the violation pertained to the monitoring period ending in 1984 as opposed to the one ending in 1980.

Based on Bent's testimony, it appears that the violation in the assessment did, in fact, pertain to the monitoring period ending in 1984. Nevertheless, confusion regarding which monitoring period formed the basis of the assessment creates an unfair situation for the Appellants. In accordance with the constitutional guarantee of due process, notice must be given to the "accused" in an administrative proceeding so that he may adequately prepare his defense. McClelland v. Commonwealth, State Civil Service Commission, 14 Pa. Cmwlth. 339, 322 A.2d 133 (1974). For such notice to be adequate, it must at the very least contain a sufficient listing and explanation of any charges so that the individual involved can know against what charges he must defend himself. Begis v. Industrial Board of the Department of Labor and Industry, 9 Pa. Cmwlth. 558, 308 A.2d 643 (1973).

In this case, some notice was provided to the Appellants since Bent alluded to the monitoring period ending in 1984 when he testified about calculating the assessment, the assessment specified the regulations alleged to have been violated, and it referred to the compliance order issued before the end of the 1988 monitoring period. Nevertheless, it was incumbent upon the Department to clearly state in the civil penalty assessment the monitoring period to which the assessment pertained. Evidence offered at the hearing as to the monitoring period covered by the penalty assessment is too late to serve as proper notice to the Appellants.[2]

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[2] See, *e.g.* Wood Processors, Inc. v. DER, 1991 EHB 607, 615-616, in which former Board Member Fitzpatrick held that an appellant had not received adequate notice of a legal theory advanced by the Department dealing with liability of corporate officers where the Department had not included this theory in its Order to the appellant but first raised it at the supersedeas hearing on the Order.

Moreover, in light of the fact that the assessment was issued after the monitoring period ending in 1988 expired and the fact that neither the assessment nor the compliance order indicated that they applied to the monitoring period ending in 1984, the Appellants were not necessarily unreasonable to conclude that the violation pertained to the most recent monitoring period--in spite of the reference to the compliance order in the assessment. As for Bent's testimony at the hearing, it would be unreasonable to conclude that two passing references to the monitoring period ending in 1984, during the course of a three-day hearing, were sufficient to provide the Appellants with adequate notice that that was the monitoring period at issue.

Based on the Department's failure to provide adequate notice to the Appellants of the monitoring period allegedly covered by the penalty assessment, we find that the Department abused its discretion in assessing a penalty against Wilbar for failing to conduct radiological sampling and monitoring during the compliance period ending in 1984.

The remaining violations stated in the penalty assessment, however, have not been contested by the Appellants, and, therefore, we turn to the question of whether the penalty assessed was reasonable given those violations. To establish that a "reasonable fit" exists between the violations and the penalty assessed, the Department need only show that the <u>total</u> penalty assessed is reasonable given the violations proven. It need not show that a reasonable fit exists between each individual penalty used in the calculation of the total and each individual violation. In <u>Delaware Valley Scrap Company v. DER</u>, EHB Docket No. 89-183-W (Consolidated) (Adjudication issued August 5, 1993), for instance, the Board sustained a civil penalty in full--despite the fact that the Department failed to prove one of the

violations it had used to calculate the total penalty--because the total penalty assessed was reasonable given the violations the Department did prove.

The Appellants argue that the penalty assessed is unreasonably high and that this Board should either reduce it or strike it in its entirety. The Department argues, meanwhile, that the penalty is, if anything, unreasonably low. It asks us to substitute our discretion and impose a higher penalty. We shall examine each of these arguments separately below.

I. Was the penalty assessed unreasonably high?

The amount of the civil penalty assessed by the Department is $36,900. Of this total, $1850 represents that portion of the penalty assessed against Wilbar for failing to monitor and report for radiological contamination during the monitoring period ending in 1984. As we noted earlier, because the Department failed to provide Wilbar with adequate notice as to the monitoring period covered by the penalty assessment, the Department is precluded from assessing a penalty for this particular violation. Therefore, the sum of $1850 must be deducted from the penalty assessment. This leaves a penalty assessment of $35,050. We now turn to a review of whether this assessment is reasonable based on the evidence before us.

The evidence establishes the following: Kresge bought Wilbar, and became the owner and operator of the Forest Park water system, on January 1, 1978. (N.T. 467; Ex. B-1, paragraph 6) Wilbar operated well no. 2 without a permit continually from that time until January of 1985. (N.T. 482, 541-542; Ex. C-16) The Department informed Kresge in writing at least eleven times during that time that a permit was required to operate well no. 2. (Exs. C-2, 3, 4, 5, 26, 30, 34, 38, 39, 40, 51) On October 9, 1978, Kresge responded to the Department's second letter, and, he had actual knowledge of the

Department's position with regard to the well from at least that date. (N.T. 45-49; Ex. C-52) Nevertheless, he failed to submit a permit application for the well until May 6, 1982, more than two and a half years later. (N.T. 177, 479, 541; Ex. A-1)

On June 8, 1982, the Department sent Kresge a letter (1) informing him that the permit application was incomplete, (2) specifying the information the Department required to finish processing the application, and (3) requesting that the information be sent to the Department as soon as possible. (N.T. 177-179; Ex. C-28) When Kresge failed to respond by July 19, 1982, the Department sent him a letter reminding him of its June 8 letter and informing him that if he did not respond by August 20, 1982, "appropriate action" would be taken on the permit application. (N.T. 177-179; Ex. C-29) When Kresge again failed to respond, the Department, on September 1, 1982, returned his application and reminded him that operating the well without a permit violated public water supply law. (N.T. 183-184; Ex. C-30) Although Kresge admitted that he received the letter, he did not attempt to get a permit for well no. 2 again until January 1, 1988--more than five years later--when he submitted an emergency permit application for the well. (N.T. 482, 545)

Well no. 2 was the last well in use without a permit in a public water system in the region. (Ex. C-6; N.T. 54-55) There was nothing unique about the well which would account for Wilbar's lengthy delay in submitting the permit applications. (N.T. 59)

Given the egregious and protracted nature of Wilbar's unlawful operation of well no. 2, a penalty of $35,050 is not unreasonably high, even if the entire amount were based solely on the unlawful operation of well no. 2. Section 13(g) of the Safe Drinking Water Act, 35 P.S. §721.13(g), provides

that each day of a violation is a separate violation and that the maximum penalty is $5,000 per day per violation.[3] Although the Safe Drinking Water Act did not become effective until December 8, 1984--almost seven years after Wilbar had started its unlawful operation of the well--Wilbar continued to operate the well without a permit for three more years. Since each day of a violation constitutes a separate offense, the Department could have assessed a penalty of $5,000 per day for each day well no. 2 was operated without a permit. The total penalty of $35,050 breaks down to a daily penalty rate of approximately $32.[4]

In light of Wilbar's conduct with respect to well no. 2, we cannot conclude that a penalty of $32 per day is unreasonably high. It is true that Forest Park is small as far as community water systems go: it has about 335 year-round residents and approximately 70 service connections. (Ex. B-1, paragraph 7) Even considering the size of Forest Park, however, a penalty of $32 per day of violation is more than justified based on the seriousness of

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[3] In light of 35 P.S. §721.13(g), the Appellants' argument that the Department abused its discretion by considering the duration of the violations is untenable.

[4] This is a conservative figure. A $35,050 penalty for a three-year (1,095 day) continuing violation breaks down to approximately $32 per day. Although Kresge himself testified that he operated well no. 2 continuously without a permit until August of 1988--about three years eight months after the Safe Drinking Water Act became effective--it is clear from other evidence adduced at the hearing that he was not operating the well without a permit that entire time. The Department issued an emergency permit for the well on January 5, 1988. (Ex. C-16) There was also an interruption in the operation of the well before Wilbar received the emergency permit. The well was disconnected in response to a Department compliance order on December 29, 1987, and not turned on again until January 1 or 2, 1988. (N.T. 509) Even if we assume the violation ended on December 29, 1987, the violation would have lasted 21 days longer than the 1,095 day period we used to determine whether the $35,050 penalty would be unreasonably high if it were based solely on the unauthorized operation of well no. 2.

the violation and the extent of Wilbar's culpability. In particular, the Department could not determine how safe the water from well no. 2 was because Wilbar refused to submit an engineering design, required as part of the permitting process. (Ex. C-6) The engineering design is necessary to determine how susceptible the well is to contamination and whether there is adequate chlorine contact time to kill any bacteria present. (Ex. C-6)

Moreover, Kresge knew that a permit was required to operate the well years before the Safe Drinking Water Act was enacted. Nevertheless, Kresge steadfastly failed to obtain one--despite the Department's repeated efforts to convince him to do so--for over three years after the act became effective.

In their post-hearing memorandum, the Appellants maintain that the Department is estopped from assessing penalties for the violations alleged in sub-paragraphs 12(a) through 12(i) of the assessment because of the representations of Paul Franklin, Sanitarian Regional Manager for the Department, at a March 3, 1988 meeting between Kresge and the Department. Sub-paragraph 12(a) pertains to the operation of well no. 2 without a permit. (Ex. C-47) According to the Appellants, the Department agreed to a timetable at that meeting for Wilbar to come into compliance with various provisions of the Safe Drinking Water Act. The Appellants argue that they relied on and met this timetable, and, as a result, the Department cannot assess any penalties for violations of those provisions.

The burden of proof regarding a claim of estoppel falls upon the party asserting the claim. In re Tax Claim Bureau of Lehigh County 1981 Upset Tax Sale Properties, 96 Pa. Cmwlth. 452, 507 A.2d 1294 (1986), appeal denied, 514 Pa. 640, 523 A.2d 346 (1987), and Appeal of Haas, 514 Pa. 640, 523 A.2d 346 (1986). The Appellants, however, failed to adduce any evidence to show

that the operation of well no. 2 was even discussed at the meeting. Even if they had, it is impossible to fathom how a violation which ended in January of 1988 could have been induced by representations Franklin supposedly made two months later. Inducement is an essential element of estoppel. Novelty Knitting Mills, Inc. v. Siskind, 500 Pa. 432, 457 A.2d 502 (1983). Thus, we find no merit to the Appellants' argument of estoppel.

The Appellants also assert that the Department abused its discretion by assessing a penalty long after the violation and only after Wilbar received a PENNVEST loan. We need not decide this issue, however, since the Appellants failed to raise this issue in their notice of appeal. The only objection the Appellants made in their notice of appeal with respect to the time intervening between a violation and the assessment pertained to the alleged violation of the December 29, 1987 compliance order. (Appellants' notice of appeal, p. 7) Objections not made in the notice of appeal are deemed waived.[5] 25 Pa. Code _21.51(e); Commonwealth, Game Commission v. Commonwealth, Department of Environmental Resources, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), aff'd, 521 Pa. 121, 555 A.2d 812 (1989).

Was the penalty assessed unreasonably low?

Having established that a civil penalty assessment of $35,050 is not unreasonably high, we turn to the Department's assertion that the penalty is unreasonably low and that, as a result, we should substitute our discretion and impose a higher one.

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[5] The argument that the Department should have imposed a lower civil penalty for the December 29, 1987 compliance order is immaterial here--as are all of Wilbar's arguments pertaining to penalties for violations other than the unlawful operation of well no. 2--since the entire $35,050 penalty would not be unreasonably high even if it were assessed solely on the basis of the unlawful operation of well no. 2.

The Department adduced evidence from Bent, the compliance specialist who calculated the civil penalty assessment, in support of the proposition that the Department could have imposed higher penalties. Bent testified that, under the Safe Drinking Water Act, the Department could have assessed a $5 million penalty for the violation pertaining to the operation of well no. 2 and multi-million dollar penalties for at least five of the other violations the Department has established here. (N.T. 303, 309, 311, 314, 318, 319) In addition, Bent testified that the Department ignored or reduced the culpability with regard to several of the violations to avoid running up the amount of the penalty and that, since it was Wilbar's first assessment, he did not treat each day the violations continued as separate violations. (N.T. 298-299, 335-337)

Even if we were to find that the penalty imposed by the Department was unreasonably low given the violations involved, we would not impose a higher total penalty here since doing so would violate the Appellants' right to procedural due process.[6]

To comport with due process, states must provide persons with a meaningful opportunity to be heard before depriving them of life, liberty or

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[6] We need not decide whether the Board could, consistent with due process, impose a penalty which was higher--but not significantly higher--than that assessed by the Department. If the difference between the penalty the Board would impose and the one assessed by the Department is insignificant then a "reasonable fit" exists between the violations and the penalty assessed and the Board will let the penalty in the assessment stand. As noted in a prior Board decision, "A mere difference of opinion, or even a demonstrable error in judgment, is insufficient under Pennsylvania decisional law to constitute an abuse of discretion; such abuse comes about only where manifestly unreasonable judgment, partiality, prejudice, bias, ill-will, misapplication or overriding of the law, or similarly egregious transgressions on the part of DER...can be shown to have occurred. Sussex, Inc. v. DER, 1984 EHB 355, 366 (citing Garrett's Estate, 335 Pa. 287 (1939).)

property. Martin v. Department of Environmental Resources, 120 Pa. Cmwlth. 269, 548 A.2d 675 (1988). An opportunity to be heard may not qualify as "meaningful" if a person aggrieved by government action must subject himself to the risk of substantially greater penalties just to challenge that action. In his opinion for the Supreme Court in its 1901 decision of Cotting v. Kansas City Stock Yards Co., 183 U.S. 79, 22 S. Ct. 30 (1901), Justice Brewer wrote:

> [W]hen the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws.
>
> 183 U.S. 79, 102.

Seven years later the Supreme Court held that due process was violated "when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation..." Ex parte Young, 209 U.S. 123, 28 S. Ct. 441 (1908).

Although neither the federal nor the Commonwealth courts have addressed the issue in a civil case in decades, Supreme Court decisions in more recent criminal appeals show that the Court still subscribes to the view that the risk of greater penalties can prove an impediment to due process. The most relevant of these for our purposes is Blackledge v. Perry, 417 U.S. 21, 94 S. Ct. 2098 (1974).[7]

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[7] Other criminal cases in which the Supreme Court has addressed the issue include North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072 (1969), footnote continued

In Perry, a prosecutor brought a greater charge when the defendant, after conviction, exercised his state statutory right to a trial *de novo* in a higher court. After noting that the Due Process Clause was not offended by all possibilities of increased punishment upon retrial, but only those "that pose a realistic likelihood of 'vindictiveness'", the Court held that by "upping the ante" on the charges to deter a challenge to the original conviction, the prosecution had unconstitutionally interfered with the defendant's appellate rights.

> A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial *de novo* in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final... [I]f the prosecutor has the means readily at hand to discourage such appeals--by "upping the ante" through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy--the State can insure that only the most hardy defendants will brave the hazards of a *de novo* trial.
>
> ...A person convicted of an offense is entitled to pursue his right to a trial *de novo* without apprehension that the state will retaliate by substituting a more serious charge for the original one...
>
> 417 U.S. 27-28.

Although courts traditionally accord more deference to the rights of an accused in a criminal proceeding than to parties in a civil action, the reasons for recognizing that "upping the ante" in an appeal of a civil penalty assessment may violate due process are as compelling as those in Perry. In Perry, the Court held that using the threat of increased penalties to deter a

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continued footnote
Bordenkircher v. Hayes, 434 U.S. 357, 98 S. Ct. 663 (1978), and Thigpen v. Roberts, 486 U.S. 27, 104 S. Ct. 2916 (1984).

criminal defendant from exercising a statutory right to appeal rose to the level of a constitutional violation, a violation of due process. The threat of increased penalties in an appeal of a civil penalties assessment, meanwhile, would deter an appellant from exercising a constitutional right, his opportunity to be heard in the first instance with regard to the threatened deprivation of property.

Given Perry and the Court's earlier pronouncements with regard to when the risk of increased penalties unduly burden a party's right to be heard in civil actions, granting the Department's request for increased penalties here would violate due process. There is good reason to suspect that the request for increased penalties here is vindictive. The Department never asserts that new evidence arose between the time it assessed the civil penalty and its request that we substitute our discretion and impose a higher penalty. Absent such evidence, it is difficult to conceive of why a penalty the Department felt was appropriate at the time it was assessed would be inappropriate now, unless the Department means to chasten the Appellants for challenging the assessment. The Department sought a specific penalty when it issued the civil penalty assessment to Wilbar. If at any point it believed its assessment to be in error, it had the power to withdraw it and to issue a corrected civil penalty assessment. By defending its civil penalty assessment in this appeal before the Board, the Department maintained that its action was reasonable and not an abuse of discretion; therefore, it cannot now argue that the penalty amount is unreasonably low.[8] Had the Appellants withdrawn or

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[8] Moreover, it is difficult to attach any credence to the Department's argument that the penalty should be increased when the civil penalties for footnote continued

never filed their appeal, they would have been liable for the penalty listed in the assessment and nothing more.

Therefore, we make the following conclusions of law and enter the appropriate order:

CONCLUSIONS OF LAW

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

2. The Department bears the burden of proof when it issues a civil penalty assessment. 25 Pa. Code §21.101(b)(1)

3. When reviewing a civil penalty assessment, the Board looks to see whether there is a "reasonable fit" between the violations and the amount of the penalty. Goetz, *supra*.

4. Where the Department assesses a civil penalty on the basis of a violation with respect to a four-year monitoring period ending in 1984, but provides inadequate notice that the penalty was assessed on the basis of that monitoring period, the Department does not prevail with respect to that violation simply because the Department addressed the 1984 monitoring period in its post-hearing memorandum and the Appellants addressed compliance during another monitoring period; at an absolute minimum, the Department must show it is clearly entitled to judgment as a matter of law.

5. The Safe Drinking Water Act does not authorize the Department to assess civil penalties for violations of the National Primary Drinking Water Regulations which occurred before the act became effective.

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continued footnote
certain violations were not assessed until nearly seven years after their occurrence.

6. To establish that a "reasonable fit" exists between the violations which form the basis of a civil penalty assessment and the penalty assessed, the Department need only show that the total penalty assessed is reasonable given the violations proven; it need not show that a reasonable fit exists between each individual penalty used in the calculation of the total and each individual violation.

7. The burden of proof regarding a claim of estoppel falls upon the party asserting the claim. Tax Claim Bureau of Lehigh County 1981 Upset Tax Sale Properties, *supra*.; Haas, *supra*.

8. Inducement is a necessary element of estoppel. Novelty Knitting Mills, *supra*.

9. The Department may not assess a penalty of $1850 against Wilbar for failing to conduct radiological monitoring where the Department fails to specify the monitoring period covered by the penalty assessment.

10. A penalty in the amount of $35,050 assessed against Wilbar is not unreasonably high.

11. The Board will not impose a higher civil penalty than that in the assessment where it appears that the Department requested that the Board impose a higher civil penalty simply to chasten the Appellants for appealing the civil penalty assessment.

O R D E R

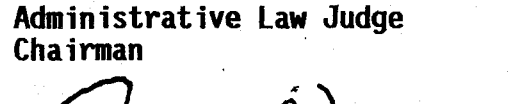
AND NOW, this 18th day of July, 1994, it is ordered that:

1. The appeal of Wilbar and Kresge is sustained in part and dismissed in part; and

2. The Department's May 15, 1991, civil penalty assessment is reduced to $35,050.

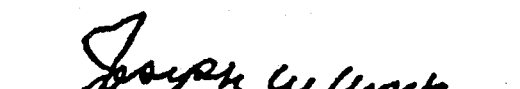
ENVIRONMENTAL HEARING BOARD

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

DATED: July 18, 1994

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M. DIANE SMITH
SECRETARY TO THE BOARD

AL HAMILTON CONTRACTING CO.	:	
v.	:	EHB Docket No. 92-471-E
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 18, 1994

ADJUDICATION

By Richard S. Ehmann, Member

Synopsis

The Board dismisses appellant/ coal mine operator's appeal challenging the Department of Environmental Resources' (DER) issuance to it of an order, *inter alia*, directing it to study the groundwater flow from its mine site so DER can confirm its hydrogeologist's opinion that polluted groundwater is flowing from the operator's mine site and discharging at the property of a nearby resident, Evelyn Cowder.

The Board grants the appellant's motion to strike DER's post-hearing brief as a sanction pursuant to 25 Pa. Code §21.124 for DER's failure to comply with the filing deadline contained in the Board's previous order.

The Board denies appellant's motion to sustain its appeal, finding DER has established by a preponderance of the evidence that its issuance of the groundwater study order was not contrary to law or an abuse of DER's discretion. In order to make out its *prima facie* case, DER did not have to establish a hydrogeological connection between the pollutional condition at

Evelyn Cowder's home and the appellant's mine site; it needed only to establish the existence of a pollutional condition at Evelyn Cowder's home and some nexus to the appellant's mine site. Harbison-Walker Refractories v. DER, 1989 EHB 1166. The presiding Board Member did not abuse his discretion in allowing DER to reopen its case, after Hamilton made its motion to sustain appeal but before the hearing adjourned, in order to allow DER to cause one of the reports submitted by the appellant to DER and used by DER's expert in forming his expert opinion to be admitted into evidence. Further, DER's expert hydrogeologist's opinions were sufficiently based on facts of record, and did not have to meet the "rule of certainty." Finally, Appellant failed to establish that DER's order was not "reasonably necessary" for eliminating the pollution and was "unduly oppressive" to appellant.

Background

Al Hamilton Contracting Company (Hamilton) filed this appeal on October 19, 1992, challenging DER's issuance to it of a Groundwater Study Order on September 25, 1992 (and amended on September 29, 1992 to reflect a docket number). DER's Groundwater Study Order was issued in connection with Hamilton's Little Beth mine site located in Bradford Township, Clearfield County. Hamilton was authorized to surface mine coal thereon by Surface Mining Permit (SMP) No. 17723164. DER's Groundwater Study Order asserted that after Hamilton's completion of mining on the Little Beth site, the Evelyn Cowder property began to suffer degradation of the groundwater flowing through it. The Order, *inter alia*, directed Hamilton to submit to DER a groundwater monitoring plan for defining the geology and hydrogeology of the Little Beth operation relative to the pollutional conditions in the groundwater at Evelyn

Cowder's property. Upon DER's approval of this plan, Hamilton is to complete installation of, and commence measurements and sampling of, all monitoring wells and piezometers which are called for by the plan.

A hearing on the merits of this appeal initially was held on June 1-3, 1993. On June 3, 1993, the parties represented that they had reached a settlement of the issues between them. After allowing some time for the parties to submit their settlement document, Board Member Richard S. Ehmann, to whom this matter was assigned for primary handling, contacted them via a telephone conference call and was informed that they could not agree on the terms of a written settlement. Thereafter, the merits hearing resumed on October 7, 1993.

After DER had presented its case-in-chief, Hamilton moved to have its appeal sustained. Board Member Ehmann advised the parties that he could not rule on Hamilton's motion but it would have to be considered by the Board *en banc*. (N.T. Vol. IV, 76)[1] See 25 Pa. Code §21.86. Hamilton opened its case for the sole purpose of admitting certain exhibits into evidence, but presented no witness' testimony.

Hamilton filed its Motion to Sustain Appeal and accompanying legal memorandum on October 18, 1993. DER filed an answer to this motion and an accompanying legal memorandum. DER then filed its post-hearing brief on December 3, 1993, and Hamilton filed its post-hearing brief on December 20, 1993. DER filed a reply post-hearing brief on December 30, 1993.

Hamilton has filed a motion to strike DER's post-hearing brief, arguing it was untimely. DER filed its answer to Hamilton's motion to strike

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1 "N.T." indicates a reference to the notes of testimony from the merits hearing. "Vol. IV" indicates the transcript from October 7, 1993. "C-" indicates a DER exhibit; "A-" represents an exhibit of the appellant.

on January 3, 1994. We will first consider this motion in this Adjudication before proceeding to the merits of the appeal.

The record before us consists of a transcript of four volumes and a number of exhibits. Any arguments not raised in the parties' respective post-hearing briefs are deemed waived. Lucky Strike Coal Co. 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 Hamilton, a corporation with a business address of R.D. 1, Woodland, PA 16881.

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 Clean Streams Law); 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.* (the Surface Mining Act); and the regulations adopted thereunder.

3. Hamilton is the permittee and operator of a bituminous surface coal mine, pursuant to SMP No. 17723164, known as the Little Beth Operation located in Bradford Township, Clearfield County. (Stipulation of the Parties (Stip.))

4. Evelyn Cowder has resided on Shilo Road in Woodland, Bradford Township, Clearfield County, since 1960. (N.T. 45) Her property lies north of the Little Beth Operation and is located approximately 700 feet from the boundary of the Little Beth Operation. (Stip.)

5. Between Evelyn Cowder's property and the Little Beth Operation lie Township Route 605 (T- 605) and the right-of-way and travelled portions of Interstate 80 (I-80). (Stip.)

6. The Little Beth Operation lies south of T-605. (Stip.)

Condition of Evelyn Cowder's Property

7. Evelyn Cowder's property was formerly an operating dairy farm. (N.T. 45, 112) The prior owners of her house had constructed a cement trough around a spring which surfaced in the basement to keep their dairy products cooled. The overflow from this trough ran out a drain. (N.T. 46-47, 75, 77)

8. Evelyn Cowder's sole source of water was a well which she used for drinking and residential purposes. (N.T. 46, 68, 102)

9. During the early 1980s, her well water became "hard" so she discontinued using it for drinking and cooking purposes. (N.T. 47-48, 102)

Cowders' Water Problem

10. After a storm in 1985 or 1986, water began flowing into Evelyn Cowder's basement through the trough until its level was four feet. (N.T. 50-53) This water did not have a bad odor at first. (N.T. 84)

11. As a steady flow of water continued to enter Evelyn Cowder's basement, the drain plugged up with red muck and the water would not drain out the drain pipe. (N.T. 81-82, 96, 114-115)

12. Evelyn Cowder's husband installed a sump pump in her basement which drained out the basement window. This sump pump and two subsequent sump pumps were "burned out" by the water, however. (N.T. 53, 78-79, 113)

13. Evelyn Cowder's furnace and hot water tank were all ruined by the red water. (N.T. 49-50, 75, 82, 110) She stopped using her well entirely and was connected to the "city water" line in 1988. (N.T. 49-50, 110)

14. Evelyn Cowder's son, Seth, who built a home near her home in 1979, also had problems with water entering his basement in 1985 or 1986. (N.T. 59, 66) In an effort to solve this problem, he deepened a ditch located south of his property and north of I-80 from which water was seeping (i.e.,

"Seth's ditch"), and had a sump pump installed in his basement. (N.T. 60, 64-66, 74, 432)

15. Evelyn Cowder's husband was sick during the late 1980s and he died in 1989. She did not complain to DER about the condition at her property until 1991 because her husband's medical problems were of greater concern to her. (N.T. 59, 84, 103)

16. As of one week prior to the merits hearing, Evelyn Cowder's basement contained two to three feet of foul-smelling standing water which had a thick red scum and was hard in places. (N.T. 47, 53, 97) Each time Seth Cowder attempts to unplug his mother's drain, it clogs again with more red muck. (N.T. 53-54, 95-97, 115) This red muck has destroyed two outside basement doors and the basement steps. The door area is blocked off with insulation. (N.T. 97-99) Because she has no central heating, she has lived in only three rooms of her home and has not been able to use the basement for eight years. (N.T. 54-55)

17. Outside of Evelyn Cowder's home, there is red water running in her yard, the vegetation on her yard and surrounding property has been burned out, and the ground's surface is barren and covered with red muck. (N.T. 48, 99)

<u>DER's Investigation of Evelyn Cowder's Complaint</u>

18. Scott Barnes is a hydrogeologist employed by DER's Bureau of Mining and Reclamation, Hawk Run District Office. (N.T. 120) Barnes received a bachelor of science degree in geophysics from the Pennsylvania State University in 1982. (N.T. 121, 126) Barnes was hired by DER in September of 1986, where he first functioned as a mining specialist. In 1988, he became a hydrogeologist. (N. T. 124, 125)

19. Barnes completed a hydrogeology training course at Penn State in 1988, and he has taken additional hydrogeology training courses at DER. (N.T.

126) He has conducted more than thirty hydrogeologic investigations for DER. (N.T. 130) This matter is the first which has resulted in his recommending DER issue a groundwater study order, however. (N.T. 137)

20. Barnes was admitted as an expert in hydrogeology over Hamilton's objection. (N.T. 140)

21. After Evelyn Cowder complained to DER in August of 1991, DER assigned Barnes to investigate her complaint in September of 1991. Barnes met with DER's mine conservation inspector, Dave Butler, who showed him the Little Beth site, Evelyn Cowder's home, and the strip mines in the area. (N.T. 142, Vol. IV 18, 30)

22. In January of 1992, Barnes examined the geological literature for the area, the Little Beth site, and old strippings in the area. He also collected some water samples from springs and seeps in the area. (N.T. 143)

Pollutional Condition at Evelyn Cowder's Property

23. On January 6, 1992, Barnes began collecting water samples from the basement overflow in the four inch plastic pipe at Evelyn Cowder's home. He also collected samples there on April 5, 1993. DER's Butler collected samples of the basement overflow on August 26, 1991. (N.T. 204-206; C-7B) Exhibit C-7B shows the results of sampling on water collected by Barnes and Butler from the seepage at Evelyn Cowder's basement. (N.T. 257-258) These sample analyses results have a pH of 3, are high in acidity, high in metals concentration, especially with respect to iron, and are high in sulfate concentration. (N.T. 258)

24. Exhibit C-7 includes two samples collected November 16, 1992 from the basement overflow discharge at Evelyn Cowder's home. (N.T. 258; C-7)

25. DER's sample analyses results indicate to Barnes that the water is of a quality which is typical of acid mine drainage (AMD).[2] In particular, he notes that the sulfate and iron levels are very high. (N.T. 207, 258)

26. Evelyn Cowder's basement overflow does not meet the discharge parameters contained at 25 Pa. Code §87.102. (N.T. 207)

27. In Barnes' expert opinion, there exists a pollutional condition at the Evelyn Cowder residence. He bases this conclusion on water samples collected at the drainage outflow from her basement and the hard orange precipitate which has built up in the basement drain. This precipitate indicates to Barnes a discharge which is high in iron and is related to AMD. (N.T. 257-259; C-7)

Some Nexus Between Little Beth and Evelyn Cowder's Pollutional Condition

28. It is Barnes' expert opinion that there is a probable connection between the pollutional condition at Evelyn Cowder's basement and the mining on Hamilton's Little Beth mine site. He bases this conclusion on the topography of the area and the coal seam crop lines, proximity and timing of mining, direction of groundwater flow, the T-605 culvert discharge, water quality samples, Seth's ditch, and monitoring data for monitoring point CAH-4.[3]

29. In his hydrogeological investigation, Barnes reviewed and considered: the Pennsylvania Geological Survey Atlas' geological map for the Little Beth area; United States Government Survey (USGS) topographic maps

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2 AMD is typified by low pH, high acidity, high sulfates, high iron, high manganese, and high aluminum concentrations. (N.T. 207)

3 The outcrop or crop line of a coal seam is defined as "[t]he exposing of ... strata projecting through the overlying cover of detrius and soil." Environmental Engineering Dictionary, C.C. Lee, Ph.D.

revised in 1959, and 1960s, 1970s and 1980s; aerial photographs; the Little Beth SMP application and data contained therein; and mine drainage permit (MDP) and SMP applications for nearby mines. This gave him an indication of the progression of mining from 1958 to 1990. (N.T. 145)

Topography and Geological Setting

30. Exhibit C-2 is an enlargement of a USGS topographic map which was based on aerial photography taken in the late 1970s and was photo revised in 1981. (N.T. 146-147; C-2)

31. The Cowders' properties are indicated by an "E" for Evelyn and an "S" for Seth on Exhibit C-2. (N.T. 62-63, 156)

32. Exhibit C-2 depicts a synclinal structure known as the Clearfield Syncline.[4] The Little Beth mine site is on the southeast limb of the synclinal structure. (N.T. 158) This indicates the regional dip[5] is to the northwest in this area. (N.T. 159)

33. Barnes calculated the strike and dip on the Little Beth Mine site using test hole information from the Little Beth SMP application. (N.T. 158-159) Barnes' strike and dip agree with the regional structure; it is west northwest. (N.T. 159-160)

34. I-80, which was constructed in the mid-1960s, is indicated on Exhibit C-2 by solid black lines north of the Little Beth SMP running approximately west to east. T-605 is indicated on Exhibit C-2 in black pen running west to east south of I-80. T-605 forms the northern boundary of the

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4 A "syncline" is a geological structural feature which is analogous to a trough of a strata. (N.T. 493) It is a folded rock structure in which the sides dip toward a common line or axis. Penn Maryland Coals, Inc. v. DER, 1992 EHB 12, at n.7.

5 Dip refers to the direction and angle at which the rock bedding is inclined. Strike is perpendicular to the dip. See C&K Coal Company v. DER, 1992 EHB 1261, notes 5 and 7.

Little Beth SMP. (N.T. 73, 154) The yellow line on Exhibit C-2 indicates the Little Beth SMP boundary. (N.T. 148)

35. In determining the location of the Lower Kittanning coal seam crop line on Exhibit C-2, Barnes relied on the Pennsylvania Geological Survey map, the drill hole data in the Little Beth SMP and the Brookhart and Tyo Engineering Subsurface Investigation Profile and Report (Brookhart Report), and the date of the Brookhart Report. The Brookhart Report was provided by Hamilton to DER in September of 1992. (N.T. 155) He also relied on old mining in the area, and Pennsylvania Department of Transportation (PennDOT) maps for the area along I-80 generated from 1961 aerial photography. (N.T. 169-170)

36. Exhibit C-4A is Sheet No. 5 of the PennDOT topographic map; it shows in greater detail the topographic contours of the northern portion of the Little Beth SMP area. (N.T. 170)

37. Exhibit C-4A shows that a cut was excavated on the Middle Kittanning seam prior to 1961. It also shows a tailings[6] pile at its western end, which Barnes believes might be from a deep mine, at an elevation of 1,635 feet. (N.T. 170)

38. Exhibit C-4B, which adjoins Exhibit C-4A Sheet No. 5 on its western edge, indicates some surface mining spoils and cuts on the Lower Kittanning coal seam. None of this mining extended south of T-605. (N.T. 171)

39. Exhibit C-4C, which adjoins Exhibit C-4B, shows the Lower

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6 "Tailings" are residue of raw materials or waste separated out during the processing of the coal. See Environmental Engineering Dictionary, C.C. Lee, Ph.D.

Kittanning strippings and the current Lower Kittanning highwall. It also shows the Middle Kittanning strippings which approach 1,800 feet at the eastern portion of the map. (N.T. 174)

40. Exhibit C-5 is a reduction of Exhibits C-4, C-4B, and C-4C. (N.T. 175) It shows the area in the northwest of the Little Beth SMP and Evelyn Cowder's property. (N.T. 177)

41. Barnes concludes the Middle Kittanning coal seam crop line is at an elevation of 1,660 to 1,670 feet and rising toward the east. He concludes the crop of the Lower Kittanning coal seam is at an elevation 1,610 feet. (N.T. 173)

42. Using the Brookhart Report's drill holes into the Lower Kittanning coal seam north of Little Beth and its inferred surface on the pit floor of the Lower Kittanning spoil, Barnes made a determination of where the Lower Kittanning crop line lies north of the Little Beth permit. (N.T. 162-163) He also relied on the general strike and dip of the strata in the area in generating the Lower Kittanning coal seam crop line. (N.T. 347)

43. The dashed line on Exhibit C-2 indicates the original location of old T-605 before I-80 was constructed in that area. (N.T. 155) Barnes took the location of old T-605 from the Brookhart Report and old USGS topographical maps. (N.T. 155, 237)

44. The Lower Kittanning coal seam crops to the north of the T-605 relocation area and down slope from it. (N.T. 174)

45. I-80's embankment has been built on top of the Lower Kittanning seam's crop line. (N.T. 180-181)

46. The Cowder homes are at an elevation of approximately 1,580 and 1,600 feet. The Lower Kittanning coal seam crop line is at an elevation just above the Cowder Homes. (N.T. 180-181)

47. Barnes opines Evelyn Cowder's home is topographically downgradient and structurally down dip from the Little Beth mine site. (N.T. 202)

Proximity and Timing of Mining

48. Aerial photography taken in 1958 or 1959 shows mining occurred north of the Little Beth SMP area in the 1950s, including mining on the Lower Kittanning coal seam north of the Little Beth SMP area, and mining on the Middle Kittanning coal seam on the top of a hill northeast of the Little Beth SMP area. The spoils from this mining are indicated on a more detailed PennDOT topographic map. The map, based on aerial photography taken in 1961, shows that south of I-80, almost directly south of the Cowder properties, there is an old mining cut, establishing that this mining was conducted prior to 1961. (N.T. 164-165)

49. The aerial photographs also show surface mining on the Middle Kittanning seam, west of the bonded area of the Little Beth SMP, in the late 1950s. (N.T. 164-165)

50. Additional mining occurred in the vicinity of Test Holes (THs) 1A, 6, and 7 in the 1960s on the Middle Kittanning seam. (N.T. 165)

51. There was an old mining cut in the area just north of TH 5A on the Lower Kittanning seam which was from mining conducted in the 1940s. (N.T. 165)

52. Below T-605 is unmined strata which separates mining on the Little Beth SMP from old mining to the north which occurred in the 1950s. The area beyond where old T-605 used to run to the northwest was also unmined, so that the entire area to the southeast of the Evelyn and Seth Cowder properties is unmined strata. (N.T. 180) The Cowder property is undisturbed by mining. (N.T. 427)

53. Hamilton's Little Beth SMP application contained a map which showed some highwalls and indicated the direction and advance of Hamilton's mining. (N.T. 166) The dated highwalls are indicated on Exhibit C-2. (N.T. 167)

54. In the central portion of the Little Beth SMP bonded area is a highwall indicating that by 1979, Hamilton had advanced its mining northward to there. (N.T. 167) Approximately 300 feet north of that highwall is another highwall dated 1980, showing Hamilton's advance was still to the north. (N.T. 167) The "extent of highwall 1980" is indicated in the hill in the northwestern portion of the Little Beth bonded area in 1980. (N.T. 167)

55. From Hamilton's cut in the northwestern corner of the SMP in 1980, it advanced its mining from west to east. (N.T. 167)

56. Near the completion of that mining on the Little Beth SMP, there is a highwall labeled 1983. (N.T. 167-168)

57. Barnes opines the most important aspect of the geological setting on the Little Beth SMP area is that the Lower Kittanning coal seam crops to the north of T-605. (N.T. 178)

58. Barnes opines that when Hamilton reached the northwestern corner in 1979 and 1980, its mining made a boxcut. (N.T. 179)

59. Barnes' theory is that when Hamilton began mining in 1979 or 1980 on the Little Beth SMP in the northwestern corner of the area bonded for mining, Hamilton was mining the Lower Kittanning seam below the elevation of T-605. He believes the highwall extent 1980 on Exhibit C-2 was the highwall into the hill on the Lower Kittanning seam. Hamilton then mined the Lower Kittanning coal seam eastward below the elevation of T-605 along its length to the northeastern extent of the SMP. (N.T. 179) Barnes opines this mining would have produced a low wall along T-605 in the northern corner of the SMP

in the area where Hess and Fisher indicated a buried highwall in their Hydrologic Evaluation (Hess & Fisher Report). (N.T. 179)

60. Hess and Fisher's buried highwall is marked "H&F buried highwall" on Exhibit C-2. (N.T. 168) The Hess & Fisher Report was submitted by Hamilton to DER after October 16, 1992. (Stip.)

Direction of Groundwater Flow

61. Barnes opines that the groundwater flowing on the pit floor of the Little Beth mine site would be directed to the northwestern corner of the mine site in accordance with the regional dip. (N.T. 182-183)

62. Barnes opines that as the vegetation became established on the Little Beth mine site, there was a "fair percentage" of infiltration of precipitation which would recharge to the spoils and the pit floor of the Little Beth mine site. (N.T. 181)

63. Barnes opines the spoil material on the Little Beth mine site would be more conducive to groundwater flow than the unmined strata, although the unmined strata would not be impermeable. (N.T. 182) He opines that the unmined strata beneath T-605 acts as a relative barrier to groundwater flow in the north and northeastern portions of the Little Beth SMP. (N.T. 182)

64. It is Barnes' opinion that with additional groundwater recharge, the elevation of the water would rise and there would be an accumulation of groundwater in the boxcut area. (N.T. 182-183)

65. Barnes opines that as the water accumulates, the spoils saturate, and the water table rises, there is leakage in the adjacent unmined strata from the boxcut area. (N.T. 183)

66. Barnes opines that the area only gradually accumulated groundwater, and that no significant leakage would have occurred until after 1983. (N.T. 188)

67. Barnes opines the most likely avenue of leakage is a tributary to the Valley Fork Run, which lies within a swale or hollow Barnes called the Cowder Tributary Hollow, circled in red on Exhibit C-2. (N.T. 183, 209-210)

68. The old stream channel from the Cowder Tributary Hollow ran southeast from the Cowder homes, parallel to old T-605 and is now covered by the I-80 embankment, south of I-80 and T-605 onto the northwestern portion of the Little Beth SMP area. (N.T. 183-184) Hamilton mined the upper portions of this tributary and filled the remainder of the tributary with fill where the highwall ended. (N.T. 186)

69. Barnes opines this leakage from the boxcut area does not travel directly down the Cowder Tributary Hollow but spreads out in a northwesterly direction. (N.T. 186, 189)

T-605 Culvert Discharge

70. There is a discharge from a culvert ditch running beneath T-605 (T-605 culvert discharge). (N.T. 190-191)[7]

71. The T-605 culvert ditch runs along the eastbound lane of I-80. (N.T. 192)

72. The T-605 culvert, which is in the area of the old stream channel, is now buried by fill for the relocated section of T-605 and by fill from the northwestern portion of the Little Beth SMP site. (N.T. 189-190)

73. The T-605 culvert ditch is above the elevation of the Lower Kittanning coal seam crop line at the original ground surface elevation where it abuts the I-80 embankment. (N.T. 193)

74. The T-605 discharge flows a couple of feet below the T-605 culvert pipe through a bed of limestone and gravel. (N.T. 496)

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[7] The T-605 discharge is the subject of another DER order appealed by Hamilton at Docket No. 92-468-E.

75. The T-605 discharge follows the T-605 culvert ditch to the west then enters the 40-inch culvert pipe which passes beneath both lanes of I-80 and which is located just south of the Cowder properties. The flow then enters the original stream channel of the Cowder Tributary. (N.T. 191)

76. Barnes opines groundwater emanating from the T-605 culvert discharge is overflow from saturated spoil in the northwestern corner of the Little Beth SMP area. He believes it is emanating there because it is where the stream channel would have been and is the natural low point in the area. (N.T. 193) Barnes theorizes that the groundwater at the level of the Lower Kittanning coal seam and below that level migrates from Little Beth. This groundwater flows from the northern portion of Little Beth beneath the original ground's elevation and T-605. It flows beneath the I-80 embankment and toward the northwest. (N.T. 195) The path of this expected flow is indicated on Exhibit C-2 by a red arrow toward the northwest. Barnes opines this groundwater spreads out in a fan-like configuration. (N.T. 195)

77. Exhibit C-6 is a cross-section which Barnes prepared of the area northwest of in the Little Beth mine site and the Cowder properties using Exhibit C-4B. (N.T. 197) This cross-section indicates the Lower Kittanning coal seam's horizon, the original ground surface, the Hess and Fisher buried highwall, I-80, T-605, and Evelyn Cowder's home. (N.T. 201-202, 342-343, 345, 347)

78. The Exhibit C-6 cross-section illustrates from a profile viewpoint the mining on the northwest part of the Little Beth mine site, the Lower Kittanning coal seam beneath T-605 and beneath a portion of I-80, and Evelyn Cowder's home which is topographically below the Lower Kittanning coal horizon. (N.T. 202)

79. Barnes opines the waters in the northwestern corner of the Little Beth mine site would be flowing toward the northwest at or near the Lower Kittanning coal seam elevation, and he would expect to see some leakage beneath the Lower Kittanning coal seam. (N.T. 194)

80. Barnes opines that groundwater leakage that has accumulated in the spoil on the Little Beth mine site would generally flow in the direction of this cross-section line on Exhibit C-6 toward the northwest along the Lower Kittanning coal horizon and also below the Lower Kittanning coal horizon. (N.T. 202)

81. In Barnes' opinion, Evelyn Cowder's home is hydrologically downgradient from the Little Beth mine Site. (N.T. 203)

DER's Water Quality Sampling

82. Barnes also collected water quality samples in January of 1992 from areas east of the Cowders' property, which he called the Eastern Tributary Hollow, in response to Hamilton's assertion that the mining conducted in the 1950s on the Lower Kittanning seam just east of the Cowder homes is the cause of the pollution in Evelyn Cowder's basement. (N.T. 208-209) The Eastern Tributary hollow is a tributary to Valley Fork Run and is circled in blue on Exhibit C-2. (N.T. 209-210)

83. Exhibit C-7 contains the results of sampling Barnes conducted in January of 1992, June of 1992, and in October and November of 1992; Exhibit C-7A is a tabulation of this water sampling data that Barnes collected north of the Little Beth SMP. (N.T. 211, 217-219)

84. Barnes indicated the levels of acidity and iron on the water quality maps because in his previous sampling of the Cowder properties, he noticed that the acidity and iron in the water was extremely high. (N.T. 223)

85. Barnes concludes from his water quality mapping that the water quality in the Cowder tributary hollow compared to the water quality in the Eastern Tributary Hollow is very different; the acid concentrations in the Cowder Tributary Hollow are much higher overall than in the Eastern Tributary Hollow. (N.T. 224-226)

86. Located beneath the Lower Kittanning coal horizon are sample points Nos. 10 and 11 (drainage into John Mayes' pond), No. 3 (Evelyn Cowder's basement discharge), No. 2 (a ditch to the southeast of Evelyn Cowder's home), and No. 7 (an orange iron mound seepage to the northwest of Evelyn Cowder's house). (N.T. 227; C-7A) These sampling points all show very high concentrations of iron. (N.T. 227) From them, Barnes concludes the pollutional plume fans out but does not extend eastward beyond John Mayes' pond. (N.T. 227)

87. Based on his water quality sampling, Barnes concludes that waters from the Little Beth mine site have a higher overall concentration of iron and acidity and that it is migrating toward the northwest in the Cowder Tributary Hollow. (N.T. 227)

88. Barnes opines that the Eastern Tributary Hollow is receiving drainage from the old 1950s strippings on the Lower Kittanning and Middle Kittanning and is not receiving any drainage from the Little Beth mine site. (N.T. 228)

89. Because of the dip and groundwater flow direction, Barnes would not expect groundwater to migrate from the northern and northeastern portions of the Little Beth site across T-605 and commingle with flow from strippings from the 1950s mining in the Eastern Tributary Hollow. (N.T. 224)

90. Barnes concludes that the Eastern Tributary Hollow sampling results are indicative of the quality of the groundwater and surface water

in the Cowder Tributary Hollow prior to Hamilton's mining on the Little Beth site. (N.T. 229)

91. Barnes believes the Cowder Tributary Hollow shows the pollutional effects of old 1950s strippings as well as additional mine drainage from the northwestern corner of the Little Beth mine site. (N.T. 229) He opines that the quality of the groundwater and surface water at the Cowder Tributary Hollow was formerly AMD, but has been degraded by Hamilton's mining. (N.T. 229-230)

92. Exhibit A-1 is the Abatement Area Q portion of Skelly & Loy Operation Scarlift Report submitted to DER by Hamilton after October of 1992 to support Hamilton's position that the pollution in the Cowder Tributary Hollow and Evelyn Cowder's basement was caused by the old mining. (N.T. 230-231)

93. Abatement area Q of Operation Scarlift includes strip mines mined in the 1950s and 1960s on the Lower Kittanning and Middle Kittanning coal seams to the west of the northern portion of the Little Beth bonded area, and to the northeast of the Little Beth SMP and north of I-80. (N.T. 233)

94. Barnes opines the conditions outlined in Abatement Area Q would not have any effect on the water quality at Evelyn Cowder's house because that mining occurred in the 1950s, whereas the problem that occurred at the Cowder Tributary Hollow was in the 1980s. He also bases this opinion on his water sampling. (N.T. 231-233)

<u>Seth's Ditch</u>

95. Exhibit A-5 is the Hess and Fisher Report which Barnes reviewed in early November of 1992. (N.T. 237-238) This report concludes that the mining to the east of the Cowder homes is contributing to the pollution at the Evelyn Cowder property. (N.T. 238-239)

96. Hess and Fisher concluded that the eastern end of Seth's ditch which is closest to the old strippings is the source of the water in Seth's ditch, that the water is coming from the east from the strippings, and that it is contributing to the problems in Evelyn Cowder's basement. (N.T. 238-239)

97. Seth's ditch is located just beyond the right-of-way of I-80 on the westbound lane. (N.T. 192)

98. Seth's ditch is indicated on Exhibit C-2 by arrows running from east to west just south of Seth Cowder's house. (N.T. 192)

99. The flow in Seth's ditch begins near where old T-605 was located and runs west-southwest to where the former Cowder Tributary was located; it then adjoins the Cowder Tributary at a point where it has not been affected by the embankment fill from I-80. (N.T. 434-436, 438)

100. Barnes observed groundwater flow near the surface of Seth's ditch flowing into the ditch from its sides. (N.T. 242) Based at least in part on this observation, Barnes opines there is groundwater flow entering Seth's ditch, contrary to the Hess and Fisher Report's conclusion that the water is losing flow to the groundwater system as it flows east to west down the ditch. (N.T. 243)

101. Barnes took portable flume readings at points in Seth's ditch designated as A, B, C, and D on November 13, 1992. (N.T. 457-460, 500; C-5)

102. The conclusion from Barnes' flume readings was that the flow was "gaining"[8] as it flowed down the ditch. (N.T. 240)

Hamilton's Groundwater Monitoring Data for CAH-4

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8 By "gaining," Barnes means that there was flow coming into the ditch from the subsurface, and that it was not losing flow to the groundwater system. (N.T. 241)

103. Hamilton submitted self-monitoring water data (Exhibit C-9-E) with regard to a monitoring point on Valley Fork Run just on the south side of I-80. The approximate location of that monitoring point is indicated on Exhibit C-2 as CAH-4. (N.T. 244)

104. Exhibit C-9F is Hamilton's tabulation of this monitoring data. (N.T. 245)

105. Barnes generated the graphs which are Exhibits C-9A, C-9B, C-9C, and C-9D using a computer program to reflect the tabulated data. (N.T. 247)

106. The data on Exhibits C-9A, C-9B, C-9C, and C-9D indicates to Barnes that there has been some instability at monitoring point CAH-4 since 1979 and during the 1980s, with an increase in pollutants there since 1980. This indicates to Barnes some introduction of pollutants into this system above monitoring point CAH-4. (N.T. 248)

107. If the sole pollutant source of the Valley Fork run were the 1950s mine spoil, Barnes would not expect to see data of the type depicted on Exhibits C-9A, C-9B, C-9C, and C-9D, but rather would expect to see a decline in some of these pollutants over time. (N.T. 248)

DER's Study Order

108. DER's Hawk Run District Mining Manager Michael Smith is primarily responsible for overseeing the mining program covered by the Hawk Run District. (N.T. Vol. IV, 15-16) Smith previously was a hydrogeologist for DER. (N.T. Vol. IV, 16)

109. Smith was aware of Evelyn Cowder's complaint and was familiar with the Little Beth mine site. (N.T. Vol. IV, 17) He was overseeing Barnes' hydrogeologic investigation and was involved in many of DER's meetings with Hamilton. (N.T. Vol. IV, 17)

110. In May of 1992, Barnes recommended in a written report to Smith that DER issue a Study Order to Hamilton Regarding the Evelyn Cowder problem. (N.T. 272)

111. DER representatives met with Hamilton on July 17, 1992, and discussed why DER thought it was likely that Hamilton caused the basement seepage problem at Evelyn Cowder's home. DER discussed the need for a groundwater study, including installation of piezometers. Hamilton did not agree to install piezometers but suggested it would submit other data which was available from exploration for the construction of I-80 and its water sampling data. (N.T. Vol. IV, 20)

112. DER allowed Hamilton 60 days to submit its data. Hamilton's information included the Brookhart Report, additional water sampling, and portions of the Operation Scarlift study. (N.T. Vol. IV, 20-21)

113. This information confirmed Barnes' conclusions. (N.T. Vol. IV, 27)

114. Smith discussed with Barnes the possibility of other potential causes of the pollution on Evelyn Cowder's property, particularly the old abandoned mines in the area. (N.T. Vol IV, 33) Based on the water sampling and drilling data collected by Barnes, they did not think it was very likely that any of these other potential sources was contributing to the conditions at Evelyn Cowder's home. (N.T. Vol. IV, 34)

115. Smith agrees with Barnes that the most likely cause of the pollutional problem at Evelyn Cowder's home is the Little Beth SMP site. (N.T. Vol. IV, 34, 68)

116. Smith wants to confirm that Little Beth is the source of the pollution at Evelyn Cowder's home with subsurface data to provide groundwater

flow directions and groundwater quality between Evelyn Cowder's home and the northwestern portion of the Little Beth mine site. (N.T. 269)

117. On September 25, 1992, Smith decided that DER would issue the challenged Study Order to Hamilton. (N.T. Vol. IV, 20-22, 29) DER's order was issued pursuant to sections 5, 316, 402, 601 and 610 of the Clean Streams Law, 35 P.S. §§691.5, 691.316, 691.402, 691.601, and 691,610; section 4.2 and 4.3 of the SMCRA, 52 P.S. §§1396.4b and 1396.4c, and section 1917-A of the Administrative Code, 71 P.S. §510-17, and the applicable rules and regulations found in chapters 86 and 87 of 25 Pa. Code. (Order attached to notice of appeal)

118. The Study Order, *inter alia*, requires Hamilton to: submit to DER a plan for defining the geology and hydrogeology of the Little Beth mine site relative to the pollutional conditions at the Cowder properties. This plan is to provide for the installation and sampling of monitoring wells and piezometers. Upon DER's approval, the order requires Hamilton to complete the installation and commence the measurements and sampling of all the monitoring wells and piezometers which are called for by the plan, and to submit reports to DER. (Order attached to notice of appeal)

119. DER did not issue an abatement order, as opposed to a Study Order, to Hamilton because Smith believes a confirmation that Little Beth is the cause of Evelyn Cowder's problem is necessary as there is a remote chance that the abandoned mining is the cause. (N.T. Vol. IV 59, 68)

120. After October 16, 1992, Hamilton submitted the following information to DER: Skelly and Loy's Operation Scarlift Report for the Clearfield Creek Watershed; highway construction information for I-80; highway

relocation information for T-605; mining history information and accompanying map; subsurface data; and a Hydrologic Evaluation prepared by Hess & Fisher Engineering, Inc. (Stip.)

121. Hamilton submitted a plan to DER on May 19, 1993. (N.T. 290)

DISCUSSION

Motion To Strike DER's Post-Hearing Brief

The Board initially ordered DER's post-hearing brief to be filed by November 19, 1993, and, in a November 29, 1993 order, later granted DER's request for an extension of this deadline until November 30, 1993. On November 30, 1993, DER filed a motion for an extension of time until December 3, 1993. The Board denied this request by an order issued December 1, 1993. The Board received DER's post-hearing brief on December 3, 1993.

Hamilton asserts that the interests of justice require that DER be sanctioned for its non-compliance with the Board's November 29, 1993 order. Hamilton claims that it did not receive a copy of DER's post-hearing brief until December 8, 1993, and that it was deprived of eight days in which to meet the arguments presented in DER's brief. Hamilton also raises DER's failure to file its exhibits as required by the Board's Pre-Hearing Order No. 2. (N.T. 7) (Board Member Ehmann had denied Hamilton's motion to impose sanctions on DER and bar from evidence DER's exhibits, and had indicated to counsel for DER that the Board would sanction any further non-compliance with its orders. (N.T. 5, 40)) Hamilton urges that DER has acted with total disregard for the Board's orders.

DER responds by arguing it did not receive the Board's November 29, 1993 order until December 1, 1993 and did not receive the Board's December 1, 1993 order until December 6, 1993. It argues that Hamilton should have requested an extension of its deadline. Moreover, DER claims it believed it

was filing its brief within the requested extension period. Citing Sunshine Hills Water Co. v. DER, EHB Docket No. 88-538-E (Adjudication issued January 27, 1993), DER contends that if it had not filed its motion for extension of time or post-hearing brief, the Board would have followed its "standard procedure" and issued a rule to show cause against DER, then would have discharged this rule when DER filed its post-hearing brief on December 3, 1993 in any event.

The Board's issuance to the appellant of the rule to show cause why his appeal should not be dismissed for failure to file his post-hearing brief in Sunshine Hills, *supra*, is not "standard procedure," contrary to DER's argument. Here, DER's counsel was aware of his filing deadline and brought a motion for extension of that deadline before the Board, then assumed that it had been granted and filed DER's post-hearing brief according to that assumption. The Board's regulations at 25 Pa. Code §21.124 empower the Board to impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. We find the sanctioning of DER to be appropriate here. We thus will not consider its post-hearing brief. In this matter, however, DER has filed its response to Hamilton's motion to sustain appeal, in which DER raises its arguments in support of its position. To the extent that DER's response encompasses DER's arguments raised in its post-hearing brief, they are before the Board in any event.

Motion to Sustain Appeal

We have recently stated in McKees Rocks Forging, Inc. v. DER, EHB Docket No. 90-310-MJ (Consolidated) (Adjudication issued March 2, 1994), that where DER orders a party to undertake corrective action, it bears the burden of proving by a preponderance of the evidence that its order was authorized by statute and was a proper exercise of its discretion. 25 Pa. Code

§21.101(b)(3); C&L Enterprises, Inc. v. DER, 1991 EHB 514. Thus, DER must show its issuance of the groundwater study order to Hamilton was lawful and a sound exercise of its discretion. The Board's review is de *novo*; thus, we may substitute our discretion for that of DER where we find DER has abused its discretion. Residents Opposed to Black Bridge Incinerator (ROBBI) v. DER, *et al.*, EHB Docket No. 87-225-W (Adjudication issued May 18, 1993); Morcoal Co. v. DER, 74 Pa. Cmwlth. 108, 459 A.2d 1303 (1983).

As we explained in County of Schuylkill, *et al.* v. DER, 1991 EHB 1, 6, where DER is the party with the burden of proof and initial burden of proceeding and fails to make out a *prima facie* case, the Board may grant a motion to sustain appeal made by the opposing party at the close of the presentation of DER's evidence. The motion must be viewed in the light most favorable to DER as the non-moving party, and should be granted only where DER's case is clearly insufficient. *Id.*

The first point of contention between the parties is what DER must prove in order to make out its *prima facie* case. DER contends that it must show the existence of a pollutional condition at Evelyn Cowder's property and establish some nexus between Hamilton's Little Beth mine site and that pollutional condition. DER further argues that it shows "some nexus" exists when it establishes a reasonable basis to believe that a pollutional condition is linked to a particular source. DER asserts that here, its circumstantial evidence supports its expert's opinion that Hamilton's Little Beth mine site is the most likely source of the pollutional condition at Evelyn Cowder's residence.

Hamilton, on the other hand, argues that DER must establish, by a preponderance of the evidence, that there is a hydrogeologic connection between the discharge and Hamilton's mine site. Hamilton asserts that because

of the ubiquitous nature of AMD and the existence of other possible causes for the problem at Evelyn Cowder's property, DER has failed to prove a hydrogeologic connection. Hamilton did not present any countervailing expert testimony of its own, however.

Must DER prove a Hydrogeologic Connection?

We have previously upheld DER's issuance of orders under the Clean Streams Law requiring testing by the appellants, under DER's supervision, to determine the extent of pollution, as well as performance of abatement measures. Harbison-Walker Refractories v. DER, 1989 EHB 1166, involved an appeal by a clay mine operator, Harbison-Walker, challenging DER's issuance of an order to it pursuant to sections 5, 316, 402, and 610 of the Clean Streams Law, and sections 4.2 and 4.3 of the SMCRA, regarding Harbison-Walker's Smith mine located within the boundaries of Ohiopyle State Park. There were three distinct sets of AMD discharges involved in that matter: Groups A, B and C. DER's order required Harbison-Walker to submit a written, detailed history of its operations at the Smith Mine and to develop and implement, upon DER approval, a monitoring plan which would define the hydrogeology of the Smith Mine and identify the source of the AMD discharges from the site. Harbison-Walker filed a petition for supersedeas of DER's order. Quoting Ernest C. and Grace Barkman v. DER, 1988 EHB 454, the Board stated:

> The Pennsylvania Supreme Court, the Commonwealth Court, and this Board have all broadly construed the Clean Streams Law to authorize the issuance of orders requiring testing by the appellants under the Department's supervision to determine the extent of pollution, as well as performance of abatement measures. The landmark case of National Wood Preservers v. Com., 489 Pa. 221, 414 A.2d 37 (1980), upheld this Board's adjudication ordering appellants to conduct drilling and water sampling to identify the nature and extent of a groundwater contamination problem and then to remove it to be a valid exercise of the police power in light of

> the existence of a pollutional condition in the form of pentachloraphenol and fuel oil in the ground and surface waters of the area. Indeed, the Commonwealth Court has held in A. H. Grove & Sons, Inc. v. DER, 70 Pa. Cmwlth. 34, 452 A.2d 586 (1982), that circumstantial evidence of a pollutional problem will support an order to perform testing. Furthermore, it is unnecessary to await concrete, irrefutable evidence of contamination prior to the issuance of a testing or inspection order where there is a danger of pollution. COA Pallets, Inc. v. DER, 1979 EHB 267.

Harbison-Walker, 1989 EHB at 1171 (citation omitted). We concluded that there must be evidence of a pollutional condition and some nexus between Harbison-Walker and that condition for us to sustain DER's order. We found ample evidence in the record in Harbison-Walker to defeat the petition for supersedeas, pointing out that DER had clear authority under section 316[9] of the Clean Streams Law to issue an order to a mine operator if the mine operator has a proprietary interest in the land on which the pollutional

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9 Section 316 of the Clean Streams Law provides in relevant part as follows:

> Section 316. RESPONSIBILITIES OF LANDOWNERS AND LAND OCCUPIERS
>
> Whenever the department finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the department may order the landowner or occupier to correct the condition in a manner satisfactory to the department or it may order such owner or occupier to allow a mine operator or other person or agency of the Commonwealth access to the land to take such action ...

35 P.S. §691.316

condition exists. We further stated that DER also had authority under sections 5, 402 and 610 of the Clean Streams Law to issue the order to Harbison-Walker.

In McKees Rocks Forging, Inc., *supra*, we addressed the issue of whether DER was authorized under §316 of the Clean Streams Law to order the appellant, an occupier of a wheel and axle forging facility site, to conduct a groundwater assessment at the site. McKees Rocks, *supra*, involved a discharge which existed on the appellant's site; we thus rejected the argument in McKees Rocks that a showing of causation was necessary for DER to sustain its order.

We find Harbison-Walker to be applicable in this matter, regardless of the fact that it was our ruling on a petition for supersedeas. DER need not prove a hydrogeologic connection exists before it issues a groundwater study order for an off-site discharge. As to Hamilton's contention that this allows DER to impermissibly delegate its responsibility of proving a nexus to Hamilton, both the Commonwealth Court and the Board have recognized DER's authority under the Clean Streams Law to issue orders directing a party to conduct studies or testing to determine the source or extent of pollution. See *e.g.*, A.H. Grove & Sons, Inc. v. Commonwealth, DER, 70 Pa. Cmwlth. 34, 452 A.2d 586 (1982); Gabig's Service, 1991 EHB at 1856, 1869; Harbison-Walker Refractories, 1989 EHB at 1166, 1171; Ernest C. Barkman and Grace Barkman v. DER, 1988 EHB 454, 459; McKees Rocks, *supra*.

Based on what we said in Harbison-Walker, *supra*, in order to sustain its *prima facie* case, DER must show evidence that a pollutional condition exists at Evelyn Cowder's property and some nexus between that pollutional condition and Hamilton's Little Beth mine site.

Is There A Pollutional Condition at Evelyn Cowder's Property?

The evidence presented by DER at the merits hearing shows that conditions on Evelyn Cowder's property, especially in the groundwater flowing through her basement, are terrible at the present time. A cement trough, through which formerly potable water flowed, has always been located in Evelyn Cowder's basement. At some point in 1985 or 1986, water started to quickly flow into her basement. As the drain in her basement began to "clog up" with red muck and mire, the water level in her basement rose to as much as four feet. As of the week prior to the merits hearing, Evelyn Cowder's basement had two to three feet of standing water in it which had a hard, red scum on its surface. This water emits a foul odor, and she has lived in only three rooms of her nine room home because her furnace has been ruined. Although her son Seth attempts to unplug the drain, each time the drain clogs again with more red muck. Her well and her basement are not in the same condition they were in when she moved into her home. On the property outside Evelyn Cowder's home, the grass is dead and there is red water running in her yard.

The laboratory analyses results of DER's sampling of the basement overflow at Evelyn Cowder's home are indicative of AMD. These sample analyses results also show the discharge at Evelyn Cowder's basement does not meet the discharge parameters found at 25 Pa. Code §87.102. DER's expert, Barnes, opines that the red muck in Evelyn Cowder's basement drain is iron precipitate which is characteristic of AMD. Based on this precipitate and on the water samples he collected at the drainage outflow from Evelyn Cowder's basement, it is Barnes' expert opinion that a pollutional condition exists at Evelyn Cowder's property. We find there is no question that DER established by a preponderance of the evidence that pollutional condition exists on Evelyn Cowder's property.

Is There Some Nexus Between Cowder Pollution and Little Beth?

DER presented ample evidence that there is some nexus between the pollutional condition at Evelyn Cowder's home and the Little Beth mine site. Its expert hydrogeologist, Barnes, investigated the hydrogeology at the Little Beth mine site and the Cowder properties. Based on his investigation, it is Barnes' expert opinion that there is a probable connection between the pollutional condition at Evelyn Cowder's basement and the mining on Hamilton's Little Beth site.

Barnes bases his opinion on the topography of the area, the direction of groundwater flow, water quality samples, proximity of mining, timing of mining, "Seth's ditch," the T-605 culvert discharge, monitoring data for monitoring point CAH-4, and the locations of coal seam outcrops. Barnes calculated the strike and dip on the Little Beth mine site and determined that it is west northwest by using drill hole information. He also generated the location of the coal seam crop lines by using the drill hole information. Aerial photography taken during the 1950s and 1960s showed where mining had previously occurred in the area. This previous mining was also reflected on PennDOT topographic maps. Through the dated highwall information which Hamilton submitted, Barnes determined that Hamilton had begun mining in the northwestern corner of the mine site in 1980 and advanced from west to east. The Hess and Fisher report submitted to DER by Hamilton in October of 1992 indicated the presence of a buried highwall in the northwestern corner of the Little Beth SMP. Barnes concluded that the Middle Kittanning coal seam crops at an elevation of 1,660 to 1,670 feet and the Lower Kittanning coal seam crops at an elevation of 1,610 feet. From the PennDOT topographic maps, Barnes concluded the most important aspect of the geological setting on the Little Beth SMP area is that the Lower Kittanning coal seam crops to the north

of T-605. He opined that Hamilton's mining in the northwestern corner of Little Beth produced a low wall along T-605 in the northern corner of the SMP where Hess and Fisher indicated the buried highwall, and that this formed a boxcut.

It is Barnes' opinion that after Hamilton completed mining on the northwestern corner of Little Beth in 1983, any precipitation that reached the pit floor tended to flow toward the west northwest in accordance with the dip. With additional groundwater recharge through infiltration of precipitation into the spoils and pit floor, he believes the water flowed into the adjacent unmined strata below T-605 from the boxcut area. It is Barnes' opinion that the most likely avenue for this leakage is a tributary which runs to Valley Fork Run through an area he calls the Cowder Tributary Hollow and which formerly ran to the area south of I-80 and T-605 and south of the Cowder properties from the northwest portion of the Little Beth SMP area. He opines that this leakage does not directly flow down the Cowder Tributary Hollow but spreads out in a northwesterly direction.

It is Barnes' opinion that no significant leakage would have occurred until after 1983 from this area. Barnes also points to the T-605 culvert discharge. This T-605 culvert discharge follows the culvert ditch west until it enters the 40-inch culvert pipe which passes beneath both lanes of I-80 and is located south of the Cowder properties, and the flow then enters the original stream channel of the Cowder Tributary. Barnes believes this stream channel is the natural lowpoint in the area. He opines groundwater emanating up from the T-605 culvert discharge is overflow from the saturated spoil in the northwestern corner of the Little Beth SMP at the low point.

Barnes also points to the flow from Seth's ditch, which runs from where old T-605 was located toward the west and enters the original Cowder

Tributary stream channel. His flow testing there showed a gain as the flow travelled east to west down Seth's ditch, indicating to Barnes that there is groundwater flow entering Seth's ditch. He disagrees with the Hess and Fisher Report's conclusion that Seth's ditch loses flow to the groundwater system.

Moreover, the results of water sampling conducted by DER lead Barnes to conclude that waters from the Little Beth mine site have a higher overall concentration of iron and acidity and that it is migrating toward the northwest in the Cowder Tributary Hollow. Additionally, monitoring data for Hamilton's monitoring point CAH-4, which is located on Valley Fork Run just south of I-80, leads Barnes to conclude that the increase in pollutants there over time since 1980 shows there has been some introduction of pollutants into this system above monitoring point CAH-4 during that time period.

DER's District Mining Manager Michael Smith, who was also a DER hydrogeologist before becoming Mining Manager, believes that the most likely cause of the pollutional problem at Evelyn Cowder's home is the Little Beth SMP site. He bases his opinion on the conclusions of Barnes' investigation. It was Smith who made the decision to issue the Study Order to Hamilton. Because DER believed a confirmation of Barnes' opinion was necessary to rule out what it believed was a remote chance that abandoned mining was the cause of Evelyn Cowder's problem, DER issued a groundwater study order to Hamilton rather than an abatement order.

Pursuant to this evidence, it appears that DER established its *prima facie* showing of some nexus between the Cowder pollution and the Little Beth mine site, but Hamilton argues there are reasons which should cause us to find this is not so.

Did the Board Member Err in Allowing DER to Reopen Its Case?

After DER rested its case, Hamilton made its motion to sustain its appeal. (N.T. Vol. IV 69-70) One of the reasons advanced for Hamilton's motion was that there was insufficient evidence in the record on which Barnes could base his opinions in the matter, citing the Brookhart Report which was marked Exhibit A-7 but was not moved into evidence by DER. (N.T. Vol. IV 70-73) DER then requested to have the Brookhart Report made part of the record, citing In Re J.E.F., 487 Pa. 455, 409 A.2d 1165 (1979). Board Member Ehmann allowed the reopening of DER's case to admit the Brookhart Report as Exhibit C-11 over Hamilton's objection. (N.T. Vol. IV 105-107) Hamilton then opened its case for the sole purpose of admitting into the record Exhibits A-1, A-2, A-3, A-4, and A-5. (N.T. Vol. IV 108) Exhibits A-1, A-2, A-3, A-4 were admitted into the record. (N.T. Vol. IV 114-117) Exhibit A-5 was the Hess and Fisher report, which had been stipulated by the parties to be admissible on the basis of Mr. Fisher testifying. (N.T. Vol. IV 112-117) DER objected to its admission because Mr. Fisher was not present for any cross-examination but did not object to the admission of Exhibit A-5 insofar as it said there was a buried highwall. (N.T. Vol. IV 118, 121) Hamilton then withdrew Exhibit A-5 as an exhibit and the hearing was adjourned. (N.T. Vol. IV 126-129)

Hamilton argues that the sitting Board Member failed to follow the requirements of 1 Pa. Code §35.231, regarding reopening of a proceeding, citing Spang & Co. v. DER, 140 Pa. Cmwlth. 306, 592 A.2d 815 (1991), and that the evidence (Exhibit C-11) admitted after the reopening must be stricken from the record.

Regarding petitions to reopen, 1 Pa. Code §35.231(a) provides:

> (a) Petition to reopen. After the conclusion of a hearing in a proceeding or adjournment thereof

> sine die, a participant in the proceeding may file with the presiding officer, if before issuance by the presiding officer of a proposed report, otherwise with the agency head, a petition to reopen the proceeding for the purpose of taking additional evidence. The petition shall set forth clearly the facts claimed to constitute grounds requiring reopening of the proceeding, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing.

The Commonwealth Court in Spang, *supra*, held that 1 Pa. Code §35.231(a) should have been applied by the Board, not 25 Pa. Code §21.122, in ruling on a petition to reopen the record after the hearing before the Board had been adjourned but prior to issuance of the Board's adjudication. That is not the situation we have before us. Here, the hearing had not yet adjourned when DER requested permission to reopen its case to introduce Exhibit A-7 as a Commonwealth exhibit.

The Supreme Court in In Re J.E.F. reviewed the circumstance in which reopening of a case for further evidence would be appropriate:

> This Court has previously found it proper to reopen a case to allow the introduction of additional evidence where the evidence has been omitted by accident, inadvertence, or even because of mistake as to its necessity (*Seaboard Container Corp. v. Rothschild*, 359 Pa. 51, 58 A.2d 800 (1948)), but not where the omission was intentional (*Ebersole v. Beistline*, 368 Pa. 12, 82 A.2d 11 (1951)). We have also stated that a case may be reopened where it is desirable that further testimony be taken in the interest of a more accurate adjudication (*Thomas v. Waters*, [350 Pa. 214, 38 A.2d 237 (1944)]; *Massachusetts B & I Co. v. Johnston & Harder, Inc.*, 343 Pa. 270, 22 A.2d 709 (1941)) and where an honest purpose would be justly served without unfair disadvantage (*Van Buren v. Eberhard*, [377 Pa. 22, 104 A.2d 98 (1954)].

Id. at ___, 409 A.2d at 1166.

On the basis of In Re J.E.F., we find no abuse of Board Member Ehmann's discretion in allowing DER to reopen its case. DER's failure to introduce the Brookhart Report appears to have occurred through inadvertence, since it had been identified as one of the appellant's exhibits and DER did not know that the appellant would decide not to present its case-in-chief. (DER's failure to introduce the Hess and Fisher Report appears to have occurred in a similar fashion.) Since Barnes testified that he reviewed the Brookhart Report's contents in arriving at his expert opinion, reopening DER's case so the Brookhart Report could be introduced into evidence would serve an honest purpose and create a more complete picture for the Board. Clearly Hamilton was familiar with its contents, as Hamilton had submitted it to DER. Additionally, Barnes' testimony, when DER reopened its case, was limited to the fact that the Brookhart Report to which he had referred in his previous testimony was received by DER from Hamilton in September of 1992, was originally identified as Exhibit A-7, and was being moved into evidence by DER as Exhibit C-11. (N.T. Vol. IV, 105-107) Thus, we reject Hamilton's argument on this issue.

Are the Facts Upon Which Barnes' Based His Expert Opinion In Evidence and Was His Opinion Speculative?

Hamilton argues that DER has not established its *prima facie* case because the factual bases for Barnes' opinions are not facts in evidence, specifically pointing to the Brookhart Report and the Hess and Fisher Report. Moreover, Hamilton argues that Barnes' expert opinion failed to meet the so-called "certainty test" as described in Kravinsky v. Glover, 263 Pa. Super. 8, 396 A.2d 1349 (1979), asserting that Barnes couched his opinion in "shoulds" and pointing to Barnes' testimony regarding the existence of the low wall along T-605 and his estimate of the height of that low wall. (N.T.

178-179) Hamilton contends Barnes' opinion is speculation as to the existence of any low wall along T-605. Hamilton also points to Barnes' testimony on cross-examination regarding the drill hole data contained in Exhibit C-3 in relation to the coal seams that were encountered on Little Beth. Hamilton argues Barnes' testimony shows he recast the drill hole data and shows Barnes engaged in irresponsible speculation.

Regarding the necessity for an expert to base his opinion on facts of record, in In Re Glosser Bros., Inc., 382 Pa. Super. 177, 555 A.2d 129 (1989), the Superior Court stated:

> The rule that restricts the basis for an expert's opinion to facts properly of record is grounded in the view that while an expert may have a particular expertise in judging the consequences attendant upon a certain factual matrix, or the causes therefor, or the significance thereof, he cannot base this expert judgment on conjecture concerning those facts. *Collins v. Hand*, [431 Pa. 378, 246 A.2d 398 (1968)]. However, courts have now begun to recognize that there are situations where the source of factual material relied upon by an expert is not admitted and/or admissible in evidence but is nevertheless not the product of mere conjecture by the expert. It is rather the type of source material the expert reasonably would rely on in forming his expert opinion. Thus, many courts have begun to liberalize their view as to the permissible underpinnings of expert testimony.

Id. at ___, 555 A.2d at 140.

Subsequently, the Commonwealth Court, in Milan v. Commonwealth, DOT, ___ Pa. Cmwlth. ___, 620 A.2d 721 (1993), addressed the question of when an expert may rely on reports of others which are not admitted into evidence, stating:

> [O]ur courts have held that experts, by necessity, may rely on the reports of others, not admitted into evidence. See *Commonwealth v. Thomas*, 444 Pa. 436, 282 A.2d 693 (1971) (a

> psychiatrist may base his opinion on reports which were not in evidence prepared by psychologists); *Steinhauer v. Wilson*, 336 Pa. Super. 155, 485 A.2d 477 (1984) (expert testified as to construction costs, basing his opinion, in part, on estimates not in evidence, which were provided by contractors); *B.P. Oil Co., Inc. v. Delaware County Board of Assessment Appeals*, 114 Pa. Commonwealth Ct. 549, 539 A.2d 473 (1988) (in appeals from tax assessment, valuation experts could rely upon information not offered in evidence); *In re: Glosser Brothers*, 382 Pa.Super. 177, 555 A.2d 129 (1989) (expert testimony on value of stock could be based on appraisals not admissible in evidence).

Id. at ___, 620 A.2d at 721. Further, the facts assumed by an expert need not be conclusively proven; it is sufficient if the evidence of record tends to establish these assumptions. Vernon v. Stash, 367 Pa. Super. 36, ___ 532 A.2d 441, 449 (1987).

Here, we find Barnes' expert testimony and any assumptions he made regarding "some nexus" between the pollutional condition at Evelyn Cowder's home and the Little Beth mine site were sufficiently based on the facts of record. While the Brookhart Report and the Hess and Fisher Report were not admitted as exhibits when he testified that he relied in part on information contained in them in forming his expert opinion, these were reports provided by Hamilton to DER and were the type of information upon which a hydrogeologist relies. Barnes testified to their contents in his testimony, and Hamilton had an opportunity to cross-examine him regarding his testimony. We thus reject the first portion of Hamilton's argument.

Further, we reject Hamilton's argument that Barnes engaged in impermissible speculation. As we have previously explained, with the "rule of certainty" the courts have merely taken the standard of proof required to prove causation (or future events) and made it into a rule of evidence: "expert testimony is not admissible unless it is sufficient to prove the issue

in question." Al Hamilton Contracting Co. v. DER, 1991 EHB 1799, 1809; Pagnotti Enterprises, Inc., d/b/a Tri-County Sanitation Co. v. DER, *et al.*, EHB Docket No. 92-039-E (Adjudication issued July 7, 1993). We concluded in both of these cases that the rationale for the rule breaks down where expert testimony need not be certain to prove the issue in question.

In the instant matter, we have previously determined in this Adjudication that in order to sustain its *prima facie* case, DER need not prove Hamilton's Little Beth operation is the "cause" of the pollutional condition at Evelyn Cowder's home in order to sustain its issuance of the Study Order to Hamilton. It is sufficient that DER established "some nexus" between the two sites. Thus, we hold the rule of certainty is inapplicable to the present appeal.[10] Having concluded DER established its *prima facie* case and Hamilton has not persuaded us it has failed, we deny Hamilton's motion to sustain its appeal and move on to consider its post-hearing brief.

The argument laid out in Hamilton's post-hearing brief to show DER has failed to prove any hydrogeologic connection is based on conclusions as to groundwater flow and the effects of previous mining its counsel is drawing from the exhibits in the record. It is not based on any testimony offered by

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10 Additionally, regarding Barnes' "recasting" of the coal seams at the Little Beth mine site, we point out that even if we were to assume that Barnes has misnamed the coal seams, there is no dispute that there is coal located at those locations and that the discharge is located down dip at Evelyn Cowder's property. The Pennsylvania Geological Survey information is an approximation of the locations and elevations of the coal seams in the area. To establish with absolute certainty that a series of coal seams at Little Beth bear one set of names, as opposed to another, would require a geological survey of those seams; we need not have such a survey before us in determining whether DER's issuance of the study order was proper. Hamilton has not offered any evidence which conclusively refutes Barnes' nomenclature for the seams.

Hamilton at the merits hearing since Hamilton chose not to put on its case-in-chief. This is not adequate to establish that DER has failed to prove its case by a preponderance of the evidence.[11]

We reject Hamilton's argument that DER's order here does not fall within the purview of the prior case law authorizing DER's issuance of orders requiring testing because the order issued to Hamilton concerns a pollutant which surrounds Evelyn Cowder's property. DER's evidence shows some nexus between the AMD at Evelyn Cowder's home and the Little Beth mine site. DER's expert witness gave extensive testimony which, along with the exhibits offered into evidence by DER, supports DER's issuance of the study order in this matter.[12]

Hamilton contends DER's Study Order here is unreasonable under the test in Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894), as described in National Wood Preservers, Inc. v. Commonwealth, DER, 489 Pa. 221, 414 A.2d 37 (1980). Hamilton argues the Study Order is not "reasonably necessary" for the accomplishment of its purpose (which Hamilton says is abatement of the pollution) because the source of the pollution is unknown.

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11 To the extent that Hamilton argues, DER's order must be supported by "substantial evidence," citing A.H. Grove, *supra* at 452 A.2d at 588, we point out that DER's order must be supported by a preponderance of the evidence according to 25 Pa. Code §21.101(a); in Grove, it was the Board's findings which had to be supported by substantial evidence. See Department of Environmental Resources v. Borough of Carlisle, 16 Pa. Cmwlth. 341, 330 A.2d 293 (1974).

12 We reject Hamilton's contention that DER's reliance on evidence it received after issuance of its order in its testimony at the merits hearing is beyond the Board's *de novo* review authority. See Willowbrook Mining Co. v. DER, 1992 EHB 303.

Additionally, Hamilton contends DER's Study Order is "unduly oppressive," apparently because it was issued to establish that Little Beth is the source of the pollution at Evelyn Cowder's property.

We explained in McKees Rocks, *supra*,

> Lawton sets forth a three-pronged standard to be used by courts in determining whether a state's exercise of its police power is valid: (1) the interest of the public must require it; (2) the means chosen must be reasonably necessary for the accomplishment of the purpose; and (3) the means chosen must not be unduly oppressive upon individuals. This standard has been adopted by the Pennsylvania Supreme Court in the assessment of regulatory legislation under the Pennsylvania Constitution. National Wood Preservers, 414 A.2d at 43-44; Western Pennsylvania Water, 560 A.2d at 909.

McKees Rocks, at 46.

It was Hamilton's burden to demonstrate that DER's order was an invalid or unreasonable exercise of its power under the Lawton test, as it bears the burden of proving any affirmative defenses it has to DER's order. In National Wood Preservers, the Supreme Court stated that section 316's authorization of DER to order a landowner or occupier to correct conditions on his land causing pollution or a danger of pollution is "reasonably necessary" for eliminating water pollution, pointing out that the owner or occupier of land is well situated to remove harmful conditions from his land. Moreover, the court in National Wood Preservers rejected the contention raised therein that it was unconstitutional under the Lawton test for DER to issue a corrective order to a landowner or occupier absent a showing of the party's responsibility for causing the polluting condition; the Court accordingly found the DER order challenged in that matter was not "unduly oppressive." Hamilton attempts to draw a distinction here in that DER has not ordered it to correct the condition on its Little Beth mine site but to study the

groundwater flow. Hamilton has failed to show us how DER's Study Order is not reasonably necessary for eliminating the pollution at Evelyn Cowder's property or is unduly oppressive on Hamilton, where DER could have issued an abatement order to Hamilton instead of the Study Order. If anything, DER's Study Order gives Hamilton the chance to prove its theories are correct and that Barnes is incorrect. Thus, we find Hamilton failed to establish that the Study Order was outside DER's authority pursuant to Section 316 of the Clean Streams Law under the Lawton test.[13]

We accordingly make the following conclusions of law and enter the following order which sustains DER's issuance of the study order to Hamilton and dismiss Hamilton's appeal.

CONCLUSIONS OF LAW

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

2. The Board sanctions DER pursuant to 25 Pa. Code §21.124 and strikes DER's post-hearing brief for DER's failure to comply with the filing deadlines set forth in the Board's November 29, 1993 order.

3. DER bears the burden of proof in this matter to show it did not abuse its discretion or commit an error of law by issuing Hamilton the groundwater study order. 25 Pa. Code §21.101(b)(3); McKees Rocks, *supra*.

4. The Board's scope of review is *de novo*. Our duty is to determine whether DER's action is supported by a preponderance of the evidence before

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13 To the extent that DER asserts it was authorized to issue the groundwater study order pursuant to its regulations at 25 Pa. Code §87.116, we need not address this issue, since we have found DER's order was appropriate pursuant to one of its other bases for its issuance. See Willowbrook Mining Company v. DER, 1992 EHB 303.

us, not by the evidence before DER when it acted. Willowbrook Mining Co., *supra*.

5. The Board may grant a properly timed motion to sustain appeal where DER is the party with the burden of proof and initial burden of proceeding if it fails to make out its *prima facie* case. County of Schuylkill, *supra*. The motion must be viewed in the light most favorable to the non-moving party. *Id*.

6. DER is authorized pursuant to sections 316 and 610 of the Clean Streams Law, 35 P.S. §691.316 and 35 P.S. §691.610, to authorize the groundwater study order. Harbison-Walker, *supra*.

7. DER need only show a pollutional condition at Evelyn Cowder's home and "some nexus" between that condition and Hamilton's Little Beth mine site to make out its *prima facie* case and sustain its burden of proof. Harbison-Walker, *supra*. DER need not establish a hydrogeologic connection exists between the discharge at Evelyn Cowder's home and the Little Beth mine site.

8. The sitting Board Member did not abuse his discretion in allowing DER to reopen its case (after Hamilton's motion to sustain appeal but prior to adjournment of the hearing) in order to allow DER to have the Brookhart Report (Exhibit C-11) admitted into evidence. In Re J.E.F., *supra*. DER did not have to follow the procedure for reopening a matter outlined in 1 Pa. Code §35.231 and Spang & Co., *supra*, as the hearing had not adjourned in this matter.

9. Barnes' expert testimony and assumptions he made regarding some nexus between the pollutional condition at Evelyn Cowder's home and the Little Beth mine site was sufficiently based on the facts of record. In Re Glosser, *supra*; Milan, *supra*; Vernon, *supra*.

10. The rule of certainty enunciated in Kravinsky, *supra*, is not applicable in this matter to Barnes' testimony because his expert testimony need not be certain to prove causation in order to support DER's issuance of the groundwater study order to Hamilton. Al Hamilton Contracting Co. v. DER, 1991 EHB 1799; Pagnotti Enterprises, *supra*.

11. DER established by a preponderance of the evidence that some nexus exists between the pollutional condition at Evelyn Cowder's home and Hamilton's Little Beth mine site.

12. Hamilton bears the burden of proving any affirmative defenses it has to DER's order. McKees Rocks Forging, *supra*.

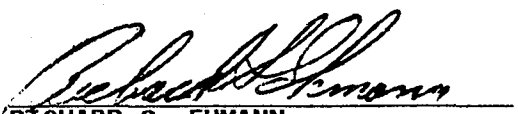
13. Hamilton has failed to sustain its affirmative defenses.

ORDER

AND NOW, this 18th day of July, 1994, it is ordered that Hamilton's appeal at EHB Docket No. 92-471-E is dismissed, and DER's issuance of the September 25, 1992 groundwater study order to Hamilton, as amended on September 29, 1992, is sustained.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: July 18, 1994

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M. DIANE SMITH
SECRETARY TO THE BOARD

AL HAMILTON CONTRACTING COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 92-471-E**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: July 18, 1994**

CONCURRING OPINION BY
CHAIRMAN MAXINE WOELFLING

I concur with the result reached by the majority of my fellow Board Members and the reasoning to achieve that result. Even so, I feel it necessary to comment on the Board's affirmance of the presiding Board Member's ruling permitting the Department of Environmental Resources to reopen its case to allow the introduction of the Brookhart Report.

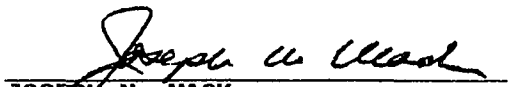
I would ordinarily defer to the presiding Board Member with regard to evidentiary rulings. I also recognize that the presiding judge is given wide discretion in permitting the record to be reopened and that the factors to be considered include whether the evidence was omitted by virtue of accident, inadvertence, or mistake as to its necessity; whether further testimony is in the interest of a more accurate adjudication; and whether an honest purpose would be served without conferring an unfair advantage. In re J.E.F.., 457 Pa. 455, 409 A.2d 1165 (1979). Obviously, it is difficult for someone other than the litigants and the presiding Board Member to ascertain whether the omission of certain evidence was intentional, rather than accidental or inadvertent. Sound trial preparation avoids putting the tribunal in the position of having to make this judgment. This preparation involves defining the elements of proof,

identifying the order of proof, and anticipating the opposing party's case. There may come a time when a litigant's trial preparation is so deficient that omission of evidence must be regarded as intentional and, therefore, efforts to reopen a case to cure such deficiencies must be rejected. I respect the presiding Board Member's judgment that such was not the case here.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

* Board Member Joseph N. Mack joins in this separate concurring opinion.



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: July 18, 1994

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M. DIANE SMITH
SECRETARY TO THE BOARD

AL HAMILTON CONTRACTING COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 88-113-W**
	:	**(Consolidated with**
	:	**88-475-W and 89-045-W)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** July 27, 1994

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

By Maxine Woelfling, Chairman

Synopsis:

An appeal from a Department of Environmental Resources' (Department) compliance order is sustained, as is an appeal from an administrative order attempting to amend the compliance order. The Department failed to prove that a discharge of mine drainage was located within the boundaries of a mine operator's permitted area or was hydrogeologically connected to the operator's mining activities. The Board, in adjudicating the merits, will not automatically find that the Department has sustained its burden of proof on the basis that the Department has presented a case sufficient to withstand the appellant's motion to sustain appeal. An appeal from a groundwater study order is dismissed as moot where the Department vacated the order.

INTRODUCTION

This is an adjudication on the merits of appeals by Al Hamilton Contracting Company, Inc. (Hamilton) from a February 22, 1988, Compliance

Order (C.O. 88-H-008); an October 21, 1988, Administrative Order; and a February 7, 1989, Groundwater Study Order, all of which the Department issued in connection with Hamilton's surface mining activities at the Caledonia Pike Mine Site (Site) in Covington Township, Clearfield County.

In C.O. 88-H-008, the Department cited Hamilton for: 1) causing or allowing six unlawful discharges of water from areas disturbed by mining; 2) failing to monitor groundwater; 3) failing to properly maintain sedimentation ponds; and 4) failing to design, construct, and maintain adequate treatment ponds and facilities, and ordered Hamilton to abate these violations within a specified time period. Hamilton filed a timely notice of appeal from C.O. 88-H-008 on March 24, 1988, which we docketed at 88-113-W.[1]

In the October 21, 1988, Administrative Order, the Department amended C.O.s 88-H-008 and 88-H-008A, which originally only covered the area encompassed by Hamilton's Surface Mining Permit Number (SMP) 17773155, to also include the area encompassed by Hamilton's Mine Drainage Permit Number (MDP) 4577SM8. Hamilton filed a timely notice of appeal from this administrative order on November 18, 1988, which we docketed at No. 88-475-W and subsequently consolidated with No. 88-113-W at that docket.

The last Department action covered by this docket is the Department's February 7, 1989, Groundwater Study Order, which Hamilton timely appealed on February 27, 1989, and we initially docketed at No. 89-045-W. Prior to consolidating this appeal with the appeals already at No. 88-113-W, on April 19, 1989, we granted Hamilton's petition for supersedeas. The

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[1]The Department later issued Hamilton C.O. 88-H-008A on April 7, 1988, to extend the time for Hamilton to submit an interim plan for treating the six unlawful discharges (Ex. C-2). Hamilton, however, did not file a notice of appeal from this compliance order.

Department subsequently vacated the Groundwater Study Order on August 24, 1990, then filed a motion to limit issues on September 7, 1990, arguing that the issues raised by this order were now moot and should not be argued in the upcoming hearing on the merits. We agreed and granted the Department's motion on July 9, 1992. Al Hamilton Contracting Co. v. DER, 1992 EHB 821. Technically, however, Hamilton's appeal of the Groundwater Study Order is still ongoing. Since there is no relief that we can grant with regard to this order, Hamilton's appeal of it will be dismissed as moot.

Board Chairman Maxine Woelfling conducted a view of the Caledonia Pike Mine Site on September 11, 1990. The Department presented its case-in-chief on September 17, 18, and 19 and October 3, 1990, before Chairman Woelfling at the Board's offices in Harrisburg. During the course of the Department's case-in-chief, Hamilton moved to strike the Department's exhibit C-10 (N.T. 87) and the testimony of the Department's expert hydrogeologist, John Berry (N.T. 654). At the conclusion of the Department's case, Hamilton moved to sustain its appeal. Because the admissibility of Ex. C-10 and Berry's testimony would greatly affect whether the Department presented a *prima facie* case against Hamilton, we ordered the parties to brief the evidentiary issues, as well as the motion to sustain appeal.

In opinions dated August 27 and October 29, 1992, respectively, we denied Hamilton's motion to strike the expert testimony of John Berry and granted Hamilton's motion to strike Ex. C-10. Al Hamilton Contracting Co. v. DER, 1992 EHB 1122 and 1992 EHB 1366. In our December 24, 1992, opinion partially sustaining Hamilton's appeal, we noted that the Department presented absolutely no evidence to support the second, third, and fourth violations cited in C.O. 88-H-008 (failure to monitor groundwater, failure to maintain

sedimentation ponds, and failure to design, construct, and maintain treatment ponds and facilities). Al Hamilton Contracting Co. v. DER, 1992 EHB 1747, 1750. We also found the Department failed to prove that there was a hydrogeologic connection between any of the discharges and Hamilton's mining activities or that five of the six discharges were located within the boundaries of MDP 4577SM8. *Id.* at 1752-1754. As a result, we sustained Hamilton's appeal with respect to the second, third, and fourth violations in C.O. 88-H-008, as well as to five of the six discharge areas cited in the first violation. *Id.* at 1756.

The Department subsequently filed an application for reconsideration, which we granted on January 22, 1993. In an April 1, 1993, opinion and order *sur*, the Board adopted Chairman Woelfling's evidentiary rulings and affirmed its earlier decision partially sustaining Hamilton's appeal. Al Hamilton Contracting Co. v. DER, 1993 EHB 418.

The Department filed a petition for review in Commonwealth Court on May 4, 1993, and the Board's order dated May 24, 1993, stayed this matter until the Department's petition was resolved. Commonwealth Court subsequently quashed the petition on July 13, 1993, holding that the Board's decision to partially sustain Hamilton's appeal was interlocutory because Hamilton's liability for discharge area four was not yet resolved.

The parties concluded the merits hearing on October 12, 1993, before Chairman Woelfling at the Board's offices in Harrisburg. The Department and Hamilton filed their post-hearing briefs on December 20, 1993, and January 24, 1994, respectively, and the Department filed a reply brief on February 7, 1994.

The record in this matter consists of 824 pages of testimony, 45 exhibits, and the parties' stipulations pursuant to Pre-Hearing Order Number Two. After a full and complete review of this record, we make the following findings of fact.

FINDINGS OF FACT

1. Appellant is Al Hamilton Contracting Company, Inc., a Pennsylvania corporation with a mailing address of R.D. #1, Woodland, Pennsylvania 16881 (Notice of Appeal).

2. Appellee is the Department, the agency with the duty and 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.*, (Clean Streams Law), 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), Section 1917-A of the Administrative Code of 1929, the Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §510-17, and the rules and regulations promulgated thereunder.

3. The Department issued Hamilton MDP 4577SM8 in August, 1977 (N.T. 779).[2]

4. Hamilton was authorized by MDP 4577SM8 to conduct surface mining activities at the Caledonia Pike Mine Site (Site) in Covington Township, Clearfield County (Stip. i; N.T. 779).

5. The Department issued Hamilton C.O. 88-H-008 on February 22, 1988, citing Hamilton for, among other things, causing or allowing a discharge

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[2]References to the record will be made as follows: "N.T." refers to the transcript of the merits hearing; "Ex. C-" refers to the Department's exhibits; "Ex. A-" refers to Hamilton's exhibits; and "Stip." refers to the parties pre-hearing stipulations pursuant to Pre-Hearing Order Number Two.

of acid mine drainage from an area known as discharge area four (Notice of Appeal).

6. Discharge area four is located in the vicinity of erosion and sedimentation pond number four (Pond Four) (N.T. 333, 356-357, 786).

7. Hamilton built Pond Four in 1979 on the area encompassed by Mining Permit 533-15(a) (MP 533-15(a)) (N.T. 790).

8. The area encompassed by MP 533-15(a) is located within the boundaries of MDP 4577SM8 (N.T. 802, 811).

9. Pond Four is located within the boundaries of MDP 4577SM8 (N.T. 790, 802, 811).

10. The Department issued Hamilton SMP 17773155 on May 11, 1984 (N.T. 794; Ex. A-16).[3]

11. Because it did not include areas that had already been mined, reclaimed, and were awaiting completion reports, SMP 17773155 encompassed a smaller area than MDP 4577SM8 (N.T. 138-139, 797; Ex. A-16).

12. Mining had been completed on the area encompassed by MP 533-15(a) when Pond Four was built (N.T. 790).

13. The area encompassed by MP 533-15(a) is not located within the boundaries of SMP 17773155 (N.T. 138-139, 790, 797).

14. On February 9, 1988, the Department collected two water samples from discharge area four, which exhibited the following quality[4]:

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[3]The Department issued Hamilton SMP 17773155 on May 11, 1984, pursuant to its primacy program under the federal Surface Mine Control and Reclamation Act of 1977, the Act of August 3, 1977, P.L. 95-87, *as amended*, 30 U.S.C. §1201 *et seq.* (N.T. 137, 794). Prior to attaining primacy over the federal program, the Department had issued Mine Drainage Permits, such as MDP 4577SM8, to regulate the discharge of mine drainage to the waters of the Commonwealth (N.T. 137).

[4]Expressed in milligrams per liter (mg/l) for all parameters except pH, which is expressed in standard units.

Parameter	Sample 1	Sample 2
pH	3.4	3.4
Iron (Fe)	2.61	.158
Sulfates (SO_4)	1.43	2.83
Aluminum (Al)	48.6	77.1
Manganese (Mn)	34.6	92.2

Alkalinity exceeded acidity in both samples (N.T. 183, 184, 190; Exs. C-19, C-20).

15. On June 18, 1990, the Department collected one water sample from discharge area four, which exhibited the following quality:

Parameter	Sample 1
pH	3.4
Fe	1.19
SO_4	1.92
Al	56.4
Mg	119.0

Alkalinity exceeded acidity in this sample (N.T. 328; Ex. C-26).

16. Exs. C-7(a) and (b) are ground level photographs of discharge area four (N.T. 26-27; Exs. C-7(a) and (b)).

17. The breastwork of Pond Four is not visible in Exs. C-7(a) or (b) (N.T. 333; Exs. C-7(a) and (b)).

18. Exs. C-7(c) and (d) are aerial photographs of discharge area four (N.T. 27-28; Exs. C-7(c) and (d)).

19. It is not clear from Exs. C-7(c) and (d) whether discharge area four is located on the breastwork of Pond Four (N.T. 333; Exs. C-7(c) and (d)).

20. Department Hydrogeologist John Berry testified that discharge area four is located to the right of the outslope from Pond Four (N.T. 356-357; Exs. C-7(c) and (d)).

21. Mr. Berry did not testify that discharge area four is located on the breastwork of Pond Four.

22. James McNeil worked for Hamilton from 1976 until 1985, where he was responsible for environmental concerns, including Department compliance orders (N.T. 776).

23. Since leaving Hamilton, Mr. McNeil has been a consultant with Energy Environmental Services, where he performed an investigation for Hamilton on the discharges cited in C.O. 88-H-008 (N.T. 801).

24. Mr. McNeil testified that discharge area four is located approximately 15 to 20 feet from the toe of the embankment of Pond Four, not on the breastwork of Pond Four (N.T. 786-787).

25. Discharge area four is not located on the breastwork of Pond Four (N.T. 333, 356-357, 786-787).

26. There is no evidence in the record showing the boundaries of MDP 4577SM8.

27. The Department presented no evidence that discharge area four is located within the boundaries of MDP 4577SM8.

DISCUSSION

In the remainder of this appeal, the Department bears the burden of proving by a preponderance of the evidence that it did not abuse its discretion or commit an error of law in issuing Hamilton C.O. 88-H-008 and the October 21, 1988, Administrative Order. 25 Pa.Code §21.101(b)(3). *See also*, McDonald Land & Mining Co. and Sky Haven Coal, Inc. v. DER, EHB Docket No. 89-096-MJ (Adjudication issued May 16, 1994). To satisfy its burden, "the evidence of facts and circumstances on which [the Department] relies and the inferences logically deductible therefrom must so preponderate in favor of the

basic proposition [the Department] is seeking to establish as to exclude any equally well supported belief and any inconsistent proposition." McDonald Land & Mining Co., at 17-18.

In our December 24, 1992, opinion, we established the standard for Hamilton's liability in this appeal, stating, in relevant part:

> Liability for discharge violations from surface mining activities is founded in §315(a) of the Clean Streams Law . . . . To establish liability under §315(a), the Department must prove that the discharges emanating from the six DAs violated the effluent limitations of 25 Pa.Code §87.102 and that Hamilton's mining operations caused the discharges. The Department can prove Hamilton caused the discharges if it shows that the discharges are either located on Hamilton's MDP or hydrogeologically connected to Hamilton's mining activities. *See*, Penn-Maryland Coals, Inc. v. DER, [1992 EHB 12, 33-34].

Al Hamilton Contracting Co., 1992 EHB at 1752.

We sustained Hamilton's appeal with respect to five of the six discharges cited in C.O. 88-H-008 because the Department failed to prove they were hydrogeologically connected to Hamilton's mining activities, *Id.* at 1753-1754, or were located within the area encompassed by MDP 4577SM8, *Id.* at 1751-1753. The Department failed to prove the discharges were located within the area encompassed by MDP 4577SM8 because it did not introduce into evidence a map showing the boundaries of that permit. *Id.* at 1751.

With respect to the last discharge area, discharge area four, we found that although the Department failed to prove it was hydrogeologically connected to Hamilton's mining activities, discharge area four was deemed to be located within the area encompassed by MDP 4577SM8.

> Although the Department presented no evidence of the location of [Pond Four], under [25 Pa.Code] §87.108(a) it is deemed to be within Hamilton's MDP. The Board

> can infer from the location of DA four on the breastwork of [Pond Four] that DA four is located within the boundaries of Hamilton's MDP. Because the discharge from DA four exceeds the effluent limits of 25 Pa.Code §87.102 and the location of DA four is deemed to be within Hamilton's permit area the Department has established a *prima facie* case that Hamilton is liable for that discharge.

Id. at 1752.

In resolving Hamilton's motion to sustain appeal, we were required to "view the evidence in a light most favorable to the Department, giving the Department the benefit of all inferences arising from that evidence and resolving all evidentiary conflicts in favor of the Department." *Id.* at 1749. In this adjudication on the merits, however, we grant the Department's evidence no special consideration. In other words, merely because the Department presented a *prima facie* case against Hamilton does not mean that it has automatically satisfied its burden of proof. We still must decide, therefore, whether discharge area four is located within the boundaries of MDP 4577SM8.

In its post-hearing and reply briefs, the Department contends we should find discharge area four to be located within the boundaries of MDP 4577SM8 because it is located on the breastwork of Pond Four. Since Pond Four is located within the boundaries of MDP 4577SM8, the Department argues, discharge area four must be located within the area encompassed by that permit as well. Hamilton responds in its post-hearing brief that we incorrectly deemed discharge area four to be located on the breastwork of Pond Four. According to Hamilton, discharge area four is at least 15 feet away from Pond Four.

In support of its argument, the Department relies on ground level and aerial photographs of discharge area four, as well as the testimony of

Surface Mine Inspector Supervisor Steven Starner, Mining Inspector Nancy Rieg, and Hydrogeologist John Berry to show discharge area four is located on the breastwork of Pond Four. This reliance is misplaced. Although discharge area four is clearly visible in each of the Department's photographs, they do not show that the discharge emanates from the breastwork of Pond Four (Exs. C-7(a), (b), (c), and (d)). Similarly, although Mr. Starner and Ms. Rieg mentioned discharge area four during their testimony, neither stated it is located on the breastwork of Pond Four (N.T. 26-28, 190).

Mr. Berry's testimony is also inadequate, since he failed to state or even imply that discharge area four is located on the breastwork of Pond Four.

> Q. Mr. Berry, would you please describe the topography of the site?
>
> A. . . . The topography for [dishcharge area four] can be seen on Exhibit 7(c). [Discharge area f]our is in the lower righthand side of the photograph, emanating just above the breastwork, well to the right side of the breastwork of the sediment pond that is located just above the trees in the foreground . . . .

(N.T. 333). From this testimony, we only know that discharge area four is located "to the right side of the breastwork of the sediment pond," and that this location is shown in Ex. C-7(c). Mr. Berry later testified as follows:

> Q. Mr. Berry, have you been able to determine the location of Discharge Area No. 4 with respect to the affected area?
>
> A. Yes, I have.
>
> Q. Would you please describe its location?
>
> A. Discharge Area 4 can be best seen on Photographs 7(a) and 7(c).
>
> On Photograph 7(a), although not apparent on the photograph, the lefthand side of the photograph with

> the lush vegetation is actually the outslope of the sediment pond.
>
> It has been my observation in the field that adjacent to the outslope is a riprap channel with shales, weathered shales emanating from the -- that would be considered the emergency spillway for that sediment pond.
>
> Discharge Area 4 is the large area in the lower righthand corner showing seepage areas and sheet flow across the ground.
>
> Discharge Area 4 can also be seen in the pond on Exhibit 7(c). The pond breastwork can be seen with the road on top of it and the water immediately to the left.
>
> The outslope from the previous photograph is shown immediately to the right of the road on the pond breastwork. It's difficult to discern, but then the emergency spillway has been lined with shales and then the discharge area is emanating the water down immediately to the right of that area.

(N.T. 356-357). Again, Mr. Berry failed to state that discharge area four is located on the breastwork of Pond Four. The "water immediately to the left" of the breastwork, which at first glance appears to be a reference to discharge area four, is, instead, merely a reference to the water contained in Pond Four (*See*, Ex. C-7(c)). In Ex. C-7(c), discharge area four is clearly seen to the right of Pond Four (*Id.*). It is not clear from Ex. C-7(c), however, whether discharge area four is located on the breastwork of Pond Four (Finding of Fact 19).

In addition to the Department's witnesses, James McNeil, a former Hamilton employee and consultant, also testified about the location of discharge area four.

> Q. Now, what relevance do these ponds have to Discharge Area 4?
>
> A. Discharge Area 4 is located in an area near Pond No. 4, which is one of the two ponds that was approved for removal.
>
> Q. . . . Where is Discharge Area 4 located?

> A. Discharge Area 4 as has been identified to us by the Department is located approximately 15 to 20 feet away from the tow [sic] of the embankment of Pond No. 4.
>
> Q. Do you agree with the characterization that it's found on the Breastwork of Sediment Pond No. 4?
>
> A. No, I don't agree.
>
> Q. Why not?
>
> A. It's removed from the pond. It's not part of the pond. It's not on the breast of the pond.

(N.T. 786-787). Mr. McNeil, therefore, clearly believes discharge area four was not located on the breastwork of Pond Four. Given the lack of evidence to the contrary, we must agree. Discharge area four is not located on the breastwork of Pond Four. Because the Department offers no additional arguments to place discharge area four within the boundaries of MDP 4577SM8, we cannot find discharge area four to be located within the area encompassed by that permit.[5]

Hamilton, therefore, is not liable for the discharge emanating from discharge area four. Accordingly, the remainder of Hamilton's appeal from C.O. 88-H-008, as amended by the October 21, 1988, Administrative Order, is sustained.

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[5]Hamilton also makes several arguments that MDP 4577SM8 is not the relevant permit boundary since it was replaced by SMP 17773155. In light of the result we reach, we need not discuss the merits of Hamilton's position.

CONCLUSIONS OF LAW

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

2. An appeal of an order will be dismissed as moot where the order has been subsequently vacated by the Department.

3. The Department bears the burden of proving by a preponderance of the evidence that it did not abuse its discretion or commit an error of law in issuing Hamilton C.O. 88-H-008 and the October 21, 1988, Administrative Order.

4. To establish Hamilton's liability for discharge area four under §315(a) of the Clean Streams Law, the Department must prove that the discharge is either located within the boundaries of MDP 4577SM8 or hydrogeologically connected to Hamilton's mining activities.

5. The Department did not show that discharge area four is hydrogeologically connected to Hamilton's mining activities.

6. The Department did not show that discharge area four is located within the boundaries of MDP 4577SM8.

7. Hamilton is not liable for the discharge emanating from discharge area four.

8. The Department abused its discretion in issuing Hamilton C.O. 88-H-008 and the October 21, 1988, Administrative Order.

O R D E R

AND NOW, this 27th day of July, 1994, it is ordered that:

1) Hamilton's appeal from the Department's February 7, 1989, Groundwater Study Order, originally docketed at No. 89-045-W, is dismissed as moot;

2) Hamilton's appeal from C.O. 88-H-008 is sustained; and

3) Hamilton's appeal from the Department's October 21, 1988, Administrative Order is sustained.

ENVIRONMENTAL HEARING BOARD

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Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: July 27, 1994

cc: See next page for service list

EHB Docket No. 88-113-W
(Consolidated Docket)
Service List

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BOROUGH OF RIDGWAY	:	
	:	
v.	:	EHB Docket No. 93-231-MJ
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 28, 1994

OPINION AND ORDER SUR CROSS-MOTIONS
FOR PARTIAL SUMMARY JUDGMENT

By Joseph N. Mack, Member

Synopsis

The Department is granted summary judgment on the issues of whether it has the authority to impose pretreatment conditions and instantaneous maximum effluent limitations in an NPDES permit. The Department has broad power under the Clean Streams Law and the regulations promulgated thereunder to impose conditions in a permit to ensure protection of waters of the Commonwealth. The fact that Pennsylvania does not yet have a federally-approved pretreatment program under 40 C.F.R. Part 403 does not preclude the Department from imposing pretreatment conditions in a permit where it has the authority to do so pursuant to state law. Pursuant to the federal Clean Water Act and federal regulations, a state may impose additional requirements for pretreatment or effluent limitations provided that the state requirements are not less stringent than the federal standards.

OPINION

On July 14, 1993, the Department of Environmental Resources ("Department") reissued NPDES Permit No. PA 0023213 ("permit") to the Borough of Ridgway ("Borough"), authorizing the Borough to continue discharging from its publicly-owned treatment works ("POTW") into the Clarion River. The permit contained a number of conditions, including the requirement of a pretreatment program and technology-based instantaneous maximum effluent limitations for carbonaceous biochemical oxygen demand ("$CBOD_5$") and total suspended solids ("TSS").

The Borough filed an appeal on August 13, 1993, asserting, *inter alia*, that the Department did not have the legal authority to impose pretreatment program requirements or instantaneous maximum effluent limitations. On December 27, 1993, the Borough filed a Motion for Partial Summary Judgment on these issues. On February 8, 1994, the Department filed an Answer to the Borough's Motion, a Motion to Strike the Borough's Motion for procedural deficiencies, and its own Cross-Motion for Partial Summary Judgment, addressing the same two issues as the Borough's Motion. In response to the Department's Motion to Strike, on March 9, 1994, the Borough filed an Amended Motion for Partial Summary Judgment correcting the procedural deficiencies raised by the Department in its Motion to Strike. On the same date, the Borough also filed a Reply to the Department's Motion to Strike and Cross-Motion for Summary Judgment. Thereafter, on April 15, 1994, the Department filed an Answer to the Amended Motion for Partial Summary Judgment, along with a supporting memorandum. By Order of June 8, 1994 the Board denied the Department's Motion to Strike on the basis that the Borough had corrected any procedural deficiencies with its Amended Motion. Therefore, this Opinion addresses the Amended Motion for Partial Summary Judgment filed by the Borough

and the Cross-Motion filed by the Department, as well as the replies and supplemental replies filed by each of the parties.

Summary judgment may be granted on an issue where no question of material fact exists and the movant is entitled to judgment as a matter of law. Pa. R.C.P. §1035(b); New Hanover Corporation v. DER, 1992 EHB 570, 572-573. In ruling on a motion for summary judgment, the Board must view the evidence in the light most favorable to the non-moving party. Robert C. Penoyer v. DER, 1987 EHB 131.

The parties' motions request summary judgment on the following two issues: (1) whether the Department has the legal authority to require the Borough to develop a pretreatment program for its POTW and (2) whether the Department has the authority to impose instantaneous maximum effluent limitations for $CBOD_5$ and TSS in the Borough's NPDES permit.

Does the Department have the authority to require the Borough to develop a pretreatment program?

The Borough argues that the Department does not have the authority under state or federal law to require a POTW to develop a pretreatment program. We will first address the question of whether the Department has authority under state law to impose pretreatment standards in an NPDES permit.

Statutory authority for Pennsylvania's NPDES program is derived from both the federal Clean Water Act, 33 U.S.C. §1251 *et seq.*, and Pennsylvania's Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* Chevron U.S.A., Inc. v. DER, 1991 EHB 1025, 1043. Pursuant to the Clean Streams Law, the Department is empowered to issue permits in accordance with the provisions of that Act and the rules and regulations promulgated thereunder. The regulations governing the issuance of NPDES permits appear at 25 Pa. Code Chapter 92. Section 92.3 of that chapter provides, "no person

shall discharge pollutants from a point source into navigable waters except as authorized pursuant to a NPDES permit." 25 Pa. Code §92.3.

The basis for the Borough's contention that Pennsylvania lacks authority to impose pretreatment standards centers around certain amendments to Chapter 94 of the regulations adopted by the Environmental Quality Board in February 1988. The amendments set forth specific requirements for industrial waste pretreatment programs, and take effect upon delegation of authority by the federal Environmental Protection Agency ("EPA") to the Department to administer a federally-approved pretreatment program under §402(b) of the Clean Water Act, 33 U.S.C. §1342(b). 18 Pennsylvania Bulletin 846. The parties acknowledge that Pennsylvania does not yet have a federally-approved pretreatment program and, therefore, the regulatory amendments at 25 Pa. Code Chapter 94 have not yet taken effect. See also, 57 Fed. Reg. 9725 (list of states with approved programs).

The Borough argues that, because the amendments at Chapter 94 have not yet taken effect, the Department lacks the legal authority under state law to impose any pretreatment conditions in an NPDES permit. The Borough's argument is persuasive only if the Department, in imposing the pretreatment conditions, acted pursuant to the amendments at 25 Pa. Code Chapter 94, which are not yet in effect, and lacks any other authority under state law to impose such conditions in an NPDES permit.

The Department asserts that, in imposing pretreatment conditions in the Borough's permit, it acted pursuant to the broad powers granted to it by the Clean Streams Law and Article I, §27 of the Pennsylvania Constitution to condition permits as necessary to ensure compliance with Pennsylvania's environmental statutes and regulations. Under the Clean Streams Law, the Department is granted the authority to "take appropriate action on all permit

applications submitted pursuant to the provisions of [the Clean Streams Law] and to issue, modify, suspend, limit, renew or revoke permits pursuant to this act and to the rules and regulations of the [D]epartment." 35 P.S. §691.5(b)(5). Pursuant to §§202 and 307 of the Clean Streams Law, 35 P.S. §§691.202 and 691.307 the Department is authorized to regulate direct and indirect discharges into Commonwealth waters. This may be done by issuance of an order, pursuant to §610 of the Clean Streams Law, 35 P.S. §691.610, by permit denial, or by inserting conditions in a permit necessary to protect the waters of the Commonwealth. This Board has previously recognized that the Department has broad powers under the Clean Streams Law to condition permits to protect the waters of the Commonwealth. New Hanover Township v. DER, 1991 EHB 1234, 1287. As noted in Western Pennsylvania Water Co. v. DER, 1991 EHB 287, inherent within the power to deny a permit because of harm to the waters of the Commonwealth is the "lesser power to avoid denial of the permit application by including conditions in the permit which eliminate the perceived harm." *Id.* at 324. Thus, we find that the Department has the authority under the Clean Streams Law to include pretreatment conditions in a permit in order to protect the waters of the Commonwealth.[1]

In addition to the general authority granted to it under the Clean Streams Law, the regulations provide the Department with additional legal authority to impose pretreatment standards in a permit. Specifically, §92.31(3) of the regulations, relating to NPDES permits, provides as follows:

---

[1] Because we have determined that the Clean Streams Law provides the Department with the authority to include pretreatment conditions in a permit, we need not address whether the Department is also provided with such authority by Article 1, §27 of the Pennsylvania Constitution.

§92.31 Effluent standards

> No permit shall be issued for discharge of pollutants unless the proposed discharge is in compliance with all the following, when applicable...
>
> (3)...pretreatment standards under section 307 of the Federal [Clean Water] Act (33 U.S.C. §1317).
>
> 25 Pa. Code §92.31(3).[2]

Thus, pursuant to 25 Pa. Code §92.31(3), not only does the Department have the ability to impose pretreatment conditions in an NPDES permit, but it is required to do so if pretreatment is necessary to ensure that the standards of §307 of the Clean Water Act are met. Section 307(c) of the Clean Water Act deals specifically with pretreatment standards necessary to ensure that any new source introducing pollutants into a POTW will not cause a violation of the effluent limitations established for that POTW. Section 307(c) provides, "Such pretreatment standards shall prevent the discharge of any pollutant into such treatment works, which pollutant may interfere with, pass through, or otherwise be incompatible with such works." 33 U.S.C. §1317(c). Therefore, the Department clearly has the authority to impose pretreatment conditions in an NPDES permit when necessary to ensure compliance with a POTW's effluent limitations.[3]

It is the Borough's contention, however, that federal law prohibits the Department from imposing pretreatment standards in an NPDES permit for a

---

[2] Section 92.31(3) was not affected by the February 1988 amendments described earlier herein.

[3] Whether pretreatment standards are necessary in the present case to ensure compliance with the Borough's effluent limitations is a separate issue not addressed in the parties' cross-motions for partial summary judgment. This Opinion addresses only the question of whether the Department has such authority, not whether this authority was properly exercised in the present case.

POTW with a flow rate less than 5 million gallons per day ("mgd").[4] Under the federal regulations governing pretreatment standards, a POTW with less than 5 mgd of flow may be required to establish a pretreatment program in only two cases: (1) if the EPA Administrator for that particular region (in this case, Region III) finds that a pretreatment program is warranted due to the nature or volume of industrial influent, treatment process upsets, violations of POTW effluent limitations, contamination of municipal sludge, or other circumstances or (2) if the "Director" for a state with a federally-approved pretreatment program finds that pretreatment is warranted due to these circumstances. 40 C.F.R. §403.8(a). *Id.* "Director" is defined as:

> the chief administrative officer of a State or Interstate water pollution control agency with an NPDES permit program approved pursuant to section 402(b) of the [Clean Water] Act and an approved State pretreatment program.
>
> 40 C.F.R. §403.3(e).

As noted earlier, Pennsylvania does not have an approved pretreatment program under the federal regulations. Therefore, argues the Borough, the Department cannot be a "Director" for purposes of 40 C.F.R. §403.8(a) and, thus, cannot require pretreatment standards for a POTW with less than five mgd of flow.

There is nothing, however, in the Clean Water Act or federal regulations which prevents the Department from imposing pretreatment standards on smaller POTWs where it has the authority to do so under state law. In fact, the Clean Water Act contemplates this type of regulation by state and local agencies. Section 307(b)(4) of the Act specifies, "Nothing in this

---

[4] According to the affidavit of Martin R. Schuller, the Borough Manager of the Borough of Ridgway, the flow rate at the Borough's POTW is less than 5 mgd. (Schuller Affidavit, Borough's Amended Motion) Moreover, the permit states an interim flow rate of 1.25 mgd and final rate of 2.2 mgd.

subsection shall affect any pretreatment requirement established by any State or local law not in conflict with any pretreatment standard established under this subsection." 33 U.S.C. §1317(b)(4). Section 510 of the Clean Water Act further provides as follows:

> Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof...to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if...[a] pretreatment standard is in effect under this chapter, such State or political subdivision...may not adopt or enforce any...pretreatment standard...which is less stringent than the...pretreatment standard...under this chapter.
>
> 33 U.S.C. §1370 (Emphasis added).

The federal regulations also contemplate the development of state standards for pretreatment programs. Section 403.4 of the federal regulations provides as follows:

> Nothing in this regulation is intended to affect any Pretreatment Requirements, including any standards or prohibitions, established by State or local law as long as the State or local requirements are not less stringent than any set forth in National Pretreatment Standards, or any other requirements or prohibitions established under the Act or this regulation...
>
> 40 C.F.R. §403.4.

Thus, a state is not precluded from imposing its own pretreatment conditions so long as they are not <u>less</u> stringent than the federal standards. In a case where the state-based requirements are more stringent than the federal standards, the state standards shall be controlling. 25 Pa. Code §92.17. Therefore, the Borough's argument that the Department may not impose pretreatment conditions on POTWs with flow of less than 5 mgd is without

merit since the imposition of a more stringent pretreatment standard is clearly consistent with the Clean Water Act, the federal regulations, and state law.

Finally, the Borough relies on an unpublished memorandum opinion by the federal district court for the Northern District of Illinois for the proposition that in NPDES-approved states without an approved pretreatment program only the EPA Regional Administrator may require a POTW with a design flow of less than 5 mgd to develop a pretreatment program. The case of U.S. v. City of Geneva and State of Illinois, No. 85 C 3917 (N.D. Ill., 1986) (Exhibit 6, Borough's Memorandum in Support of Motion for Partial Summary Judgment), involved a state which had been approved under §402(b) of the Clean Water Act, 33 U.S.C. §1342(b)(2), for the NPDES program but not for a pretreatment program. The Borough relies on the following language of the Court:

> Thus, the regulations as a whole provide that in states without approved pretreatment programs only the Administrator may require a POTW with a design flow less than 5 mgd to develop a pretreatment program...and...only in accordance with the standards under §403.8(a).
>
> *Id.* at 3-4.

The Borough relies on this language as prohibiting a state without an approved pretreatment program from requiring a POTW with a design flow of less than 5 mgd to develop a pretreatment program.

As the Department correctly notes in its Memorandum, however, the Court went on to state as follows:

> Had the [state agency] invoked its own state law powers, the permit condition would also have been proper. The [state agency] was therefore not without 'inherent authority' on the subject matter

> of pretreatment plans, but simply acted without the proper procedural prerequisites and factual findings.
>
> *Id.* at 5.

Thus, the Court in Geneva recognized that a state may act pursuant to its own state authority in requiring pretreatment for a POTW with a flow rate of less than 5 mgd and that it is not restricted by 40 C.F.R. §403.8(a) from doing so.[5]

In conclusion, we find that the Department is authorized pursuant to the Clean Streams Law and 25 Pa. Code §92.31(3) to place pretreatment conditions in an NPDES permit where necessary to ensure protection of the waters of the Commonwealth. We further find that the Department is not precluded by the Clean Water Act or federal regulations from requiring pretreatment for a POTW with a flow rate of less than 5 mgd. Since no questions of material fact remain on this issue and the Department is entitled to judgment as a matter of law, summary judgment is granted to the Department on the question of whether it has the legal authority to impose pretreatment conditions in an NPDES permit pursuant to the Clean Streams Law and the regulations promulgated thereunder.[6] Because we have determined that the

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[5] Moreover, we agree with the Department that an unpublished memorandum opinion for the Northern District of Illinois is of no precedential value in this appeal. In Pennsylvania, the Superior Court has held that unpublished memoranda, at least of that court, are of no precedential value and are not to be cited. Commonwealth v. Sperry, 395 Pa. Super. 400, 577 A.2d 603, 605, n. 4 (1990); Commonwealth v. McPherson, 368 Pa. Super. 274, 533 A.2d 1060, 1062, n. 4 (1987).

[6] Summary judgment is granted to the Department solely on the issue of whether the Department has the authority to impose pretreatment conditions in an NPDES permit. Whether the Department properly imposed such conditions in the Borough's NPDES permit, pursuant to its authority under the Clean Streams Law and regulations, remains to be adjudicated since this issue was not dealt with in either party's motion.

Department has the authority under the Clean Streams Law and the regulations promulgated thereunder to impose pretreatment requirements in an NPDES permit, we need not address the question of whether EPA also recommended or required the inclusion of pretreatment requirements in the Borough's permit.

Does the Department have the authority to impose technology-based instantaneous maximum limitations for $CBOD_5$ and TSS in the Borough's NPDES permit?

Before reaching this issue, we must first address the Department's argument that the Borough is precluded from raising this challenge pursuant to the doctrine of administrative finality. The doctrine of administrative finality precludes one from raising an issue which could have and should have been raised in an earlier proceeding. Commonwealth, DER v. Wheeling-Pittsburgh Steel Corp., 22 Pa. Cmwlth. 280, 348 A.2d 765 (1975), aff'd, 473 Pa. 432, 375 A.2d 320 (1977); E. P. Bender Coal Co. v. DER, 1991 EHB 790, 793. The Department contends that because the effluent limitations for $CBOD_5$ and TSS in the Borough's reissued NPDES permit are the same as those in its previous NPDES permit issued on July 25, 1989, which the Borough did not appeal, it has waived its right to challenge the limitations in the reissued permit.[7]

In its Reply to the Department's Cross-Motion, the Borough argues that the effluent limitations for $CBOD_5$ and TSS in the reissued permit are not the same as those in the previous permit. The Borough asserts that, although the concentration limits for $CBOD_5$ and TSS remain the same, they pertain to an

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[7] The Department also argues that the Borough is precluded from challenging the effluent limitations under the doctrine of *res judicata*, which holds that matters which have been litigated or ruled on in a prior proceeding may not be relitigated. Booher v. DER, 1992 EHB 1638, 1640. Because the issue of the Department's ability to impose instantaneous maximum effluent limitations in the Borough's NPDES permit has not been previously litigated, the doctrine of *res judicata* is not applicable.

increased rate of flow in the new permit and, therefore, are not, in fact, the same. In support of its argument, the Borough submitted on March 9, 1994 the affidavit of Martin R. Schuller, Manager for the Borough. In his affidavit, Mr. Schuller states that, while the previous NPDES permit contained effluent limitations at a flow rate of 1.25 mgd, the new permit contains a revision, providing for an interim flow rate of 1.25 mgd and final flow rate of 2.2 mgd. (Schuller Affidavit, paragraph 20) A copy of the July 1989 NPDES permit is included with Mr. Schuller's affidavit. Page 2 of the 1989 permit specifies that "[t]he average monthly flow of effluent discharged from the wastewater treatment facility shall not exceed 1.25 [mgd]." A copy of the permit which is the subject of this appeal is also included with the Schuller affidavit. A comparison of the two permits reveals that the figures shown for the instantaneous maximum concentrations for $CBOD_5$ and TSS are the same. However, as Mr. Schuller states in his Affidavit, the flow rates for the two permits vary. Whereas the 1989 permit specifies an average monthly flow rate of 1.25 mgd for effluent discharge, the new permit provides for an interim flow rate of 1.25 mgd, increasing to a final rate of 2.2 mgd.

The Department argues that, while the difference in flow rate may change the calculated mass limitations,[8] it in no way affects the <u>concentration</u> limits.[9] Because the concentration limits remain the same, argues the Department, administrative finality does apply, and the Borough is precluded from raising any challenge to these limits.

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[8] The mass limitations for TSS and $CBOD_5$ set forth in the 1989 permit differ from those set forth in the amended permit at the increased flow rate.

[9] More importantly, and not stressed by the Department, the effluent limits are technology-based.

Although the parties are in dispute over whether the change in flow rate affects the effluent limitations, that is not relevant to our determination of this matter. What is being challenged by the Borough's Motion is not the actual instantaneous maximum effluent limits set by the Department but the more general question of whether the Department has the authority to impose instantaneous maximum effluent limits in an NPDES permit. Although the flow rate has changed from the 1989 permit to the present one, that does not affect the question of the Department's ability to impose such limits regardless of the flow rate. Thus, if the Borough sought to challenge the Department's ability to impose such limits in an NPDES permit, it had the opportunity to do so when the Department issued the 1989 permit containing instantaneous maximum effluent limitations for $CBOD_5$ and TSS. Because the Borough failed to object to the Department's authority to impose instantaneous maximum effluent limits when they were first imposed in its initial NPDES permit, it is now precluded by the doctrine of administrative finality from challenging their inclusion in its permit reissuance. "If an uncontested permit is reissued, matters necessarily considered during the original issuance proceeding are unappealable upon reissuance." Blevins v. DER, 1986 EHB 1003, 1005. Where an appellant appeals a permit renewal or reissuance, he may challenge only those issues which have arisen between the time the permit was first issued and the time it was renewed. Specialty Waste Services, Inc. v. DER, 1992 EHB 382, 384. The Borough has not demonstrated that circumstances have arisen between the time of the permit issuance in July 1989 and its reissuance in July 1993 which would deprive the Department of authority to impose instantaneous maximum effluent limitations. Therefore, summary judgment is granted to the Department on this issue.

Moreover, even if this issue were not precluded by the doctrine of administrative finality, we find that the Department has the authority under state law to impose instantaneous maximum effluent limitations in an NPDES permit. As noted earlier, the Department has broad power under the Clean Streams Law to impose conditions in a permit to ensure the protection of waters of the Commonwealth. In addition, the Department has specific authority under 25 Pa. Code §92.57 to impose effluent limitations in an NPDES permit. That section provides as follows:

> NPDES permits shall specify average and maximum daily quantitative limitations for the level of pollutants in the authorized discharge in terms of weight except pH, temperature, radiation, and any other pollutants not appropriately expressed by weight. Permits may in addition impose limitation on frequency of discharge, concentrations, or percentage removal.
>
> 25 Pa. Code §92.57.
> (Emphasis added)

Although §92.57 specifically calls for average and maximum daily limitations, it also provides the Department with authority to impose additional limitations as necessary. Thus, where the Department determines that more stringent effluent limitations are necessary to ensure protection to waters of the Commonwealth, it has the power to impose such limitations in an NPDES permit.

Section 95.2(a) requires that wastes shall be given a minimum of secondary treatment. Secondary treatment for waste discharges from POTWs is defined as that treatment which shall

> Comply with the requirements of secondary treatment as defined by the Administrator of the EPA under section 304 of the Federal Water Pollution Control Act (33 U.S.C.A. §1314). The regulations promulgated by the EPA at 40 CFR Part 133 (relating to secondary treatment regulations)

> including amendments thereto, are incorporated by reference.
>
> 25 Pa. Code §95.2(b)(1).

The Borough points to the fact that federal requirements for technology-based limitations do not provide for instantaneous maximum limitations and that, pursuant to 25 Pa. Code §95.2(b)(1), the federal standards are incorporated into the state regulations by reference.[10] Based on this, the Borough argues that the Department has no authority to impose instantaneous maximum limitations.

We disagree. As noted earlier herein, §510 of the Clean Water Act, 33 U.S.C. §1370, provides that a state may impose more stringent requirements. Thus, even though the federal regulations provide only for average monthly and weekly limitations for $CBOD_5$ and TSS, a state is not precluded from imposing a more stringent requirement, such as instantaneous maximum limitations. This is also contemplated by Pennsylvania's regulations dealing with NPDES permits. Section 92.6(b) of the regulations provides as follows:

> Acceptance of an NPDES permit from the Regional Administrator shall not supersede any permit previously issued under the State Act. All provisions of both permits shall be in force; except, in the event of a conflict between the provisions of a Clean Streams Law permit and an NPDES permit applicable to the same discharge, the more stringent provision shall apply.
>
> 25 Pa. Code §92.6(b).

Finally, §92.31 of the regulations, dealing with effluent standards, provides that no permit shall be issued for discharge of pollutants unless the proposed discharge is in compliance with applicable provisions of the federal Clean Water Act and "[a]ny more stringent limitation established pursuant to any law

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[10] The federal standards require average monthly and weekly limitations for $CBOD_5$ and TSS.

of this Commonwealth." 25 Pa. Code §92.31(8). We, therefore, find that the Department does have the authority to impose instantaneous maximum effluent limitations in an NPDES permit.

In conclusion, we find that the Department is entitled to summary judgment on the issues of whether it has the authority to impose pretreatment conditions and instantaneous maximum effluent limitations for $CBOD_5$ and TSS in an NPDES permit.[11] Accordingly, we enter the following order

ORDER

AND NOW, this 28th day of July, 1994, upon consideration of the parties' cross-motions for partial summary judgment and responses thereto, it is hereby ordered that summary judgment is granted to the Department on the issues of whether the Department has authority to impose pretreatment conditions and instantaneous maximum effluent limitations in an NPDES permit.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

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[11] In its Memorandum of Law in Support of its Answer to the Appellant's Amended Motion, filed on April 15, 1994, the Department argues that the Borough has waived any arguments dealing with *res judicata* or the Commonwealth Court's holding in Commonwealth, DER v. Rushton Mining Co., 139 Pa. Cmwlth. 648 591 A.2d 1168 (1991), allocatur denied, 529 Pa. 626, 600 A.2d 541 (1991), by failing to raise these arguments in its notice of appeal. Because the Borough has not raised these issues in its Amended Motion, we need not address them or the Department's opposing arguments. Moreover, we do not reach these issues in light of our holding herein.

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: July 28, 1994

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
Matthew L. Wolford, Esq.
Northwest Region
For Appellant:
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M. DIANE SMIT
SECRETARY TO THE B

TOWNSHIP OF HARMAR and BAUERHARMAR COAL CORP., Intervenor	:	
v.	:	EHB Docket No. 90-003-MJ
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and MINERALS TECHNOLOGY, INC., Permittee	:	Issued: August 9, 1994

OPINION AND ORDER
SUR PETITION FOR
AWARD OF ATTORNEY FEES AND COSTS

By the Board

Synopsis

Harmar Township is awarded $32,632.05 in costs and attorney fees under §4(b) of SMCRA, payable by the Department of Environmental Resources. A petitioner is entitled to costs and attorney fees under §4(b) of SMCRA where the following four criteria are met: a final order has been issued, the applicant for fees and costs was the prevailing party, the applicant achieved some degree of success on the merits, and the applicant made a substantial contribution to a full and final determination of the issues.

The petitioner bears the burden of proving it is entitled to the costs and fees it seeks to recover. Where, after having had two opportunities, the petitioner fails to provide sufficient evidence documenting the reasonableness of rates billed by certain attorneys and law clerks or the relation of certain invoice entries to the litigation of this appeal, the

amounts will be deducted from the sum sought to be recovered by the petitioner.

OPINION

The appellant, Township of Harmar ("Harmar Township") seeks an award of attorney fees and costs pursuant to §4(b) of the Surface Mining Conservation and Reclamation Act ("SMCRA"), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.*, at §1396.4(b).

The background of this matter is as follows. On December 6, 1989, the Department of Environmental Resources ("the Department") issued to Minerals Technology, Inc. ("MTI") an amended surface mining permit which authorized MTI to dispose of fly ash and bottom ash as fill in its reclamation of a coal refuse site in Harmar Township. MTI had mined the site pursuant to an earlier surface mining permit.

Harmar Township appealed the issuance of the amended permit, contending that MTI's permit application failed to contain certain information required by the then-applicable regulations[1] and that the application failed to demonstrate that groundwater pollution or noise pollution would not occur. In an adjudication of this matter issued on December 30, 1993, we sustained Harmar Township's appeal on the basis that the permit application failed to

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[1] At the time of the Department's review of the permit application, the standards governing the disposal of fly ash and bottom ash were contained at 25 Pa. Code §75.37. In July 1992, prior to an adjudication being issued in this matter, the Environmental Quality Board promulgated a comprehensive revision of the regulations dealing with residual waste management. One of the amendments was the deletion of §75.37. The new regulations governing the disposal of fly ash or bottom ash at surface coal mining sites appear at 25 Pa. Code §§287.663 and 287.664. Our review of this appeal, however, focused on §75.37, since that was the provision in effect at the time of the Department's issuance of the amended permit. See Harmar Township v. DER and Minerals Technology, Inc., EHB Docket No. 90-003-MJ (Adjudication issued December 30, 1993), p. 28-29.

contain certain information required by former 25 Pa. Code §75.37.[2] Because the applicable regulations governing ash disposal had changed between the time of the issuance of the permit and the issuance of our adjudication in this matter, rather than remanding this matter to the Department to require the information which had been contained in §75.37, we simply sustained the appeal and advised MTI that it was free to reapply under the new regulations governing ash disposal.

The matter now before us is a Petition for Award of Attorney Fees and Costs filed by Harmar Township on January 14, 1994 under §4(b) of SMCRA, 52 P.S. §1396.4(b). Harmar Township filed a Supplement to its Petition on January 24, 1994. (Harmar Township's Petition and Supplement are hereinafter collectively referred to as "Petition".) The Department and MTI filed Objections to the Petition on March 7, 1994. Harmar Township requested and was granted leave to file a Response to the Department's and MTI's objections, which it filed with the Board on April 25, 1994.

Section 4(b) of SMCRA provides in relevant part as follows:

> ...the Environmental Hearing Board, upon the request of any party, may in its discretion order the payment of costs and attorney's fees it determines to have been reasonably incurred by such party in proceedings pursuant to this section...
>
> 52 P.S. §1396.4(b).

The Department and MTI object to the Petition on a number of grounds. First, they contend that §4(b) of SMCRA is not applicable to this case. Second, they assert that even if §4(b) is found to be applicable to this case, Harmar Township has not demonstrated that it meets the standards required for an award under this section. Third, they assert that, if the Board determines

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[2] Because we reached this conclusion, we did not address the remaining issues raised by Harmar Township regarding noise and groundwater pollution.

that Harmar Township is entitled to an award of attorney fees and costs under §4(b), the amount requested by the Petition exceeds the amount to which Harmar Township may be entitled.

Is §4(b) of SMCRA applicable to this case?

Both the Department and MTI argue that §4(b) of SMCRA is not applicable to this case since the Board's adjudication found no violation of SMCRA or the rules and regulations promulgated thereunder and did not affect MTI's ability to conduct coal refuse operations at the site. Rather, the Board's adjudication disallowed the disposal of fly ash and bottom ash at the site under the authority of the Solid Waste Management Act ("SWMA"), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, and the regulations promulgated thereunder.

It is true that the Board's decision was based on former §75.37 of the solid waste regulations, which is separate from the surface mining regulations promulgated under SMCRA. It is also true that the Board's decision only affected MTI's ability to dispose of fly ash and bottom ash at the mine site in accordance with the requirements of SWMA, and did not affect MTI's ability to conduct coal refuse operations at the site in accordance with the terms of SMCRA.

However, the ash was to be used in the reclamation of the site and the means by which the Department authorized the ash disposal was not by issuing a separate solid waste disposal permit under SWMA, but by amending MTI's surface mining permit. The amended permit states that it was issued "in accordance with, *inter alia*, the provisions of the Surface Mining Conservation and Reclamation Act..." and the regulations thereunder. Because the action

being appealed involves an amendment to a surface mining permit issued under SMCRA, in connection with the reclamation of a mine site, that brings this matter under the realm of SMCRA and, therefore, subject to §4(b) of the Act.

Has Harmar Township met the standards for an award under §4(b) of SMCRA?

A number of Board decisions have addressed the award of attorney fees and costs under §4(b) of SMCRA. See, *e.g.*, Sheesley v. DER, 1982 EHB 85; James E. Martin v. DER, 1986 EHB 101; Jay Township v. DER, 1987 EHB 36; Kwalwasser v. DER, 1988 EHB 1308, aff'd, 131 Pa. Cmwlth. 77, 569 A.2d 422 (1990); Pearl Marion Smith v. DER, 1990 EHB 1281. In Sheesley, *supra.*, the Board denied the appellants' request for attorney fees where they had not succeeded in meeting their burden of proof on the merits of their appeal. In Jay Township, the Board held that attorney fees may be allowed under §4(b) where the petitioner "substantially contributed" to the outcome of the litigation. 1987 EHB at 42.

In Kwalwasser v. Commonwealth, DER, 131 Pa. Cmwlth. 77, 569 A.2d 422 (1990), the Commonwealth Court affirmed the Board's denial of an appellant's request for attorney fees and costs under §4(b) of SMCRA in an appeal of a surface mining permit. In construing the language of §4(b) of SMCRA, the Court noted that "[t]he language of [§4(b) of SMCRA] clearly vests broad discretion in the Board in awarding costs and attorneys fees. There are no further guidelines provided in the statute addressing when costs and fees may be awarded." 131 Pa. Cmwlth. at ___, 569 A.2d at 424.

In the more recent case of Big B Mining Co. v. Commonwealth, DER, 155 Pa. Cmwlth. 16, 624 A.2d 713 (1993), appeal denied, ___ Pa. ___, 633 A.2d 153 (1993), the Court reversed the Board's denial of attorney fees and costs to a mining company which had succeeded in overturning the Department's denial of its permit application. In ruling on the appellant's petition for costs and

attorney fees, the Board had held that a permittee seeking to recover under §4(b) of SMCRA must prove that the Department's action was "patently unjust and oppressive, a flagrant abuse of governmental power." The Board had relied on the Federal Surface Mining Control and Reclamation Act ("Federal SMCRA"), P.L. No. 95-87, 30 U.S.C. §1201 *et seq.*, and the Pennsylvania Costs Act, Act of December 13, 1982, P.L. 1127, 71 P.S. §2031 *et seq.*, in reaching this conclusion.

On appeal, the Commonwealth Court reversed the Board, holding that it had erred in applying this standard. The Court then set forth the following criteria for eligibility for an award of costs and attorney fees under §4(b) of SMCRA:

> 1) a final order has been issued;
>
> 2) the applicant for fees and expenses was the prevailing party;
>
> 3) the applicant achieved some degree of success on the merits; and
>
> 4) the applicant made a substantial contribution to a full and final determination of the issues.
>
> 155 Pa. Cmwlth. at ___, 624 A.2d at 715.[3]

Because Harmar Township bears the burden of proving that it is entitled to attorney fees and costs, Jay Township, *supra.* at 40, it must demonstrate that the criteria set forth above have been met.

The first criterion is that a final order must have been issued. This criterion has been met with the issuance of the Board's adjudication on the merits sustaining Harmar Township's appeal. Neither MTI nor the Department contest that this criterion has been satisfied.

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[3] These criteria had been applied by the Board in its earlier decision in Kwalwasser, 1988 EHB 1308.

The second criterion is that the applicant for fees and costs must be the prevailing party. This status must be measured at the time the final order is entered. Kwalwasser, 1988 EHB at 1312. This criterion, too, has been met since Harmar Township prevailed in its appeal to overturn the permit issuance.[4]

The third criterion is that the applicant for fees and costs must have achieved some degree of success on the merits. This requires success of a substantive nature, that is, success on one of the central issues of the case, rather than a purely procedural victory. The Department argues that any success which Harmar Township achieved is merely illusory because the new regulations replacing 25 Pa. Code §75.37, to which MTI would be subject should it reapply for approval for ash disposal at its site, do not recognize as violations the issues on which Harmar Township prevailed. In support of its argument, the Department refers us to the Commonwealth Court's opinion in Kwalwasser, *supra.*, which found that the appellant was not entitled to attorney fees where his success on the merits was merely illusory.

Kwalwasser also involved a third-party appeal of a surface mining permit. In that case, the Board suspended the permit and remanded it to the Department to give consideration to the issues of noise pollution and dust control. On remand, the Department concluded that neither noise or dust warranted a denial or modification of the permit. Because the suspension of the permit was short-lived, the Board denied the appellant's application for

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[4] Although the Department challenges Harmar Township's status as a prevailing party, we read its objection as dealing with the third criterion, "success on the merits", as discussed hereinafter.

attorney fees. This denial was affirmed by the Commonwealth Court, holding that "...while the suspension of the permit appeared to be a success for Kwalwasser, it proved to be illusory." Kwalwasser, 569 A.2d at 425.

In the present appeal, had we remanded this matter to the Department to review the permit against the new regulations, it may well be that the permit would have met the requirements thereof and the violations complained of by Harmar Township would not have been a factor. Nonetheless, MTI and the Department, in approving MTI's permit, were subject to the regulations in effect at the time of the permit's issuance, which was §75.37. The fact that the new regulations may not require all of the information which was required by §75.37 does not negate the fact that MTI's application did not comply with the regulations under which its permit was issued. Moreover, there is no certainty that the permit would have met the requirements of the new regulations. Thus, we cannot say that Harmar Township's success was merely illusory. There is no question that Harmar Township succeeded on the merits of its appeal in demonstrating that the Department had not complied with §75.37 in issuing the permit to MTI. Therefore, we find that the third criterion has been met.

The final criterion is that the applicant must have made a substantial contribution to a full and final determination of the issues. The Department asserts that Harmar Township has not met this criterion because the issues adjudicated in its favor are not substantial when compared to the number and types of claims raised in the notice of appeal. The types of claims raised by Harmar Township in its notice of appeal may be summarized as follows: the permit application failed to comply with or contain information required by 25 Pa. Code §75.37, Chapter 86 and 87 of the regulations, and the Department's Program Guidance Manual; the permit application failed to

demonstrate that there was no presumptive evidence of potential pollution; and the Department failed to consider noise pollution or potential pollution to groundwater.

The bulk of the hearing and much of Harmar Township's post-hearing brief deals with the issue of whether there was compliance with former 25 Pa. Code §75.37 in the issuance of MTI's permit. Of the issues raised concerning 25 Pa. Code §75.37, our adjudication found that MTI's permit application was lacking in four areas under §75.37: failing to contain a physical description of soils as required by §75.37(b)(1), failing to contain a physical analysis and description of geologic foundation materials as required by §75.37(b)(3), failing to comply with §75.37(e)(1) with respect to diversion of surface water runoff from the ash disposal area, and failing to comply with §75.37(f) regarding groundwater monitoring points. Much of what the Board relied on in reaching these conclusions was the testimony of Harmar Township's expert witness, Dr. Donald Streib. Therefore, Harmar Township did make a substantial contribution to a full and final determination of whether there was compliance with 25 Pa. Code §75.37 in the issuance of the permit.

The Department argues that Harmar Township did not substantially contribute to success on the merits because the number of issues adjudicated in its favor are not substantial compared to the number of issues raised in its appeal. It is true that our decision rested on only a few of the issues raised by Harmar Township. However, once we ruled that issuance of the permit failed to comply with §75.37, it was unnecessary to address the remaining issues dealing with noise or groundwater pollution or compliance with Chapters 85 and 86 of the regulations. This is not to say that Harmar Township would not have prevailed on these issues had we found it necessary to reach them. Moreover, as Harmar Township points out in its Response, had it not raised

these issues in its appeal, it would have waived any right to raise them at a later date pursuant to Commonwealth, Game Commission v. Commonwealth, DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), aff'd on other grounds, 521 Pa. 121, 555 A.2d 812 (1989). Because Harmar Township did substantially contribute to our determination that issuance of the permit did not comply with 25 Pa. Code §75.37, and, therefore, was an abuse of discretion, it has met the fourth criterion of the Big B Mining test.

Because we read the decision in Big B Mining as requiring us to award costs and attorney fees under §4(b) of SMCRA so long as the above four criteria are met, we now turn to a calculation of the award to which Harmar Township is entitled.

Calculation of Award

In Jay Township, *supra.*, the Board discussed the factors to be considered in calculating an award of attorney fees and costs under §4(b) of SMCRA. Because the issue of calculating the amount of an award under §4(b) was not addressed by the Commonwealth Court in Big B Mining, *supra.*, we shall follow the guidelines set forth in Jay Township.

Any inquiry into a determination of an award of costs and attorneys fees under §4(b) must begin by establishing the "lodestar" figure. The lodestar figure is the number of hours reasonably expended multiplied by the reasonable market value of the services rendered. Jay Township, *supra.* at 45. The petitioner has the burden of proof as to both of these factual determinations. *Id.* When the petitioner has carried the burden of proving that both the number of hours claimed to have been expended and the rate charged are reasonable, the resulting figure is presumed to be the reasonable fee award. *Id.* at 45-56.

Harmar Township is seeking to recover $51,577.56 in legal fees and costs which it alleges it incurred in connection with this appeal. The Department disputes this figure and asserts that, if it is found to be eligible for attorneys fees and costs under §4(b), Harmar Township is entitled to no more than $5,030.84. MTI simply disputes Harmar Township's eligibility for an award under §4(b), and does not make a separate argument as to the amount of the award requested by Harmar Township.

In support of its Petition, Harmar Township has attached copies of invoices for legal fees (Petition, Exhibit 1), a copy of the letter retaining legal counsel in this matter (Petition, Exhibit 2), copies of invoices for services provided by its expert witness, Dr. Streib (Petition, Exhibit 3), and an affidavit signed by its legal counsel concerning legal fees and costs associated with the expert witness retained in this matter (Petition, Exhibit 4). In determining the adequacy of the evidence provided by Harmar Township in support of its Petition, we may look to the federal regulations, at 43 C.F.R., Part 4, and federal case law as guidance for the type of evidence required to support a petition for attorney fees and costs filed under the Federal SMCRA. Jay Township, *supra*. 48, n.2. A petition for costs and attorney fees brought under the Federal SMCRA must be accompanied by the following:

> 43 CFR §4.1292 (Contents of petition)
>
> (a) ...the following shall be submitted in support of the petition -
>
> (1) An affidavit setting forth in detail all costs and expenses including attorneys' fees reasonably incurred for, or in connection with, the person's participation in the proceeding;
>
> (2) Receipts or other evidence of such costs and expenses; and

> (3) Where attorneys' fees are claimed, evidence concerning the hours expended on the case, the customary commercial rate of payment for such services in the area, and the experience, reputation and ability of the individual or individuals performing the services.
>
> 43 C.F.R. §4.1292(a).

Reviewing the evidence before us, we now turn to calculating the lodestar figure.

Hourly Rate for Attorneys and Legal Staff

In Jay Township, we held that the "reasonable hourly rate" is the rate prevailing in the community for similar work, taking into consideration the level of skill of the attorney, the level of skill necessary to bring the case to trial, and the undesirability of the case. 1987 EHB at 46. The Board further held that in determining the market value of services, it is appropriate to examine rates charged by comparable attorneys in the same locality litigating similar matters. *Id.*

According to Harmar Township's Petition, four attorneys, two paralegals, and two law clerks were involved in the preparation and litigation of this appeal. There is no statement in the Petition itself as to the rates billed for each individual's work. However, this information can be gathered from the exhibits to the Petition. Exhibit 1 consists of copies of invoices for legal fees charged to Harmar Township in connection with this appeal as well as a breakdown of rates, hours, and work performed. Exhibit 2 is a copy of a letter from attorney Gregg M. Rosen to the Board of Supervisors of Harmar Township documenting the latter's decision to retain Mr. Rosen's firm to represent the Township in this appeal. The letter states as follows with regard to legal fees:

> Fees for all legal work performed by me for you or any of your affiliates for which you may retain me will be billed at the rate of $125.00 per hour. Work performed by other partners and associates in

> my law firm will be billed at differing rates depending on the level of experience and expertise of the lawyer. Their fees range to a low of $90.00 for junior associate time. Paralegals and law clerks are billed at the rate of $40.00 per hour.

The invoices attached to the Petition as Exhibit 1 show that the attorneys involved in Harmar Township's appeal billed at the following rates:

Gregg M. Rosen	$125/hr.[5]
Michael McGreal	$105/hr.
Robert G. Bello	$100-105/hr.[6]
Thomas M. Ferguson	$85/hr.

Work performed by paralegals and law clerks was billed as follows:

Paralegals

Diane L. McDonough	$45/hr.
Harold Yanko	$45/hr.

Law Clerks

Stuart M. Levine	$50-52.50/hr.
David A. Levine	$52.50/hr.

In determining what constitutes a reasonable hourly rate, we shall consider the following factors: the prevailing hourly rate in the community for similar legal work, the level of skill necessary to perform the work in question, time constraints if any, the reputation of the attorney, and the desirability or undesirability of the case in question. Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980). Given these factors, the reasonable hourly rate may vary for each attorney and for the different types of work involved. *Id.*

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[5] Although the invoices show a billing rate of $140 per hour for Mr. Rosen for services rendered from January 1990 to December 1990, Mr. Rosen states in his affidavit that he "maintained [an] hourly rate to Harmar Township at $125 per hour for the duration of the case..." (Petition, Exhibit 4) Secondly, Table A to Harmar Township's Response to the Department's and MTI's objections reflects an hourly rate of $125 for all work performed by Mr. Rosen.

[6] The work performed by Attorney Bello was not billed to Harmar Township. (Table A to Harmar Township's Response)

In the case of Mr. Rosen, who was the primary attorney representing Harmar Township's interests in this appeal, we must consider whether $125 per hour is a reasonable rate given the prevailing hourly rate in the community, Mr. Rosen's reputation and expertise, the level of skill necessary to perform the work, and the undesirability, if any, of handling this appeal. In his affidavit (Petition, Exhibit 4), Mr. Rosen states that in January 1990, at the time when this appeal was filed, his standard hourly rate was $150 per hour. His rate increased incrementally to $200 per hour in 1994. Mr. Rosen states that he agreed to represent Harmar Township in this matter at a reduced rate of $125 per hour out of consideration for its status as a municipality and a not-for-profit organization. (Petition, Exhibit 4, paragraph 5) Mr. Rosen further states that he is familiar with the rates which other lawyers in Allegheny County have charged from 1990 to the present, and that an hourly rate of $125 for the subject time period is reasonable and consistent with or substantially below rates charged by lawyers in the community having comparable experience in the practice of environmental law. (Petition, Exhibit 4, paragraph 6)

In Jay Township, the Board found $100 to be a reasonable hourly rate in awarding attorney fees under §4(b) of SMCRA. That case arose in December 1982 with the filing of a notice of appeal and was litigated before the Board in August 1983. The petition for award of attorney fees was filed in 1984, and fees were awarded by the Board in 1987. In support of the petition, counsel for the petitioner presented evidence that the market rate in the Pittsburgh area ranged from $65 to $100 per hour for the time period in question, that the bulk of his experience was in the field of environmental law, and that his rate for environmental matters had been $75 per hour in 1982 and $100 per hour since 1984. Given the prevailing market rate, the billing

rate of the petitioner's counsel, and the experience of petitioner's counsel in the practice of environmental law, the Board determined $100 to be a reasonable hourly rate in awarding attorney fees to the petitioner. The Board also considered the case to be somewhat "undesirable" due to the fact that Department-issued permits are rarely overturned by the efforts of third parties.

The Department argues that we should rely on the prevailing market rate established by the Board in Jay Township since that case was decided only two years prior to the fee arrangement entered into between Harmar Township and its counsel. The Department also notes that if we average the rates of the four attorneys, we arrive at a figure of $103.75 per hour, which is close to the $100 per hour rate established in Jay Township. In averaging these rates, the Department acknowledges that this assumes equal ability on the part of each attorney. We cannot make this assumption, however, and we recognize that the skill level of each attorney depends on his or her experience and background, and particularly his or her experience in the practice of environmental law. On this basis, it would not be fair to average the rates, particularly if an attorney at a higher skill level, and presumably billing at a higher rate, spent more hours on a particular case than did a less experienced attorney billing at a lower rate. Therefore, we reject the Department's argument that we should average the rates. We also reject the Department's argument that we find $100 to be the reasonable market rate. Although we agree with the Department's reliance on Jay Township, it is a starting point from which we may work to determine the reasonableness of the rates charged in this case, taking into consideration the rate of inflation and other factors which may affect the market rate.

Given the Board's determination in Jay Township that $100 was a reasonable hourly rate for the time period involved in that appeal, 1982 through 1984, one might be inclined to say that $125 is a reasonable rate for the time period covered by this appeal, from approximately January 1990 to May 1992. However, we cannot make that simple assumption. Although we recognize that attorney rates generally rise over time, we cannot simply conclude that because $100 was determined to be a reasonable rate in Jay Township for legal services rendered in 1982 through 1984, $125 is a reasonable rate for legal services rendered from 1990 through 1992. Moreover, the Board's determination in Jay Township that $100 was a reasonable hourly rate was based not only on evidence of the prevailing rates charged by other attorneys in the area but also on the level of expertise in environmental law held by counsel for the petitioner. The Board in Jay Township noted that the bulk of the practice of the petitioner's counsel was in the field of environmental law.

Therefore, in order to determine whether the rates charged by Mr. Rosen and the other attorneys at his firm were reasonable, we must examine not only the prevailing market rate charged by attorneys in the Pittsburgh area for similar work but also the level of expertise of the attorneys involved.

Attached to Harmar Township's Response is an affidavit signed by Howard J. Wein, Esq., a shareholder in the Pittsburgh law firm of Klett Lieber Rooney and Schorling. (Response, Exhibit A) Mr. Wein was admitted to practice law in Pennsylvania in 1975 and has practiced environmental law during his entire legal career, first as an attorney with the Department until March 1986 and, then, with his present firm. (Response, Exhibit A, paragraphs 2-5) As an environmental law practitioner, Mr. Wein has appeared before the Board both in defenses of and challenges to Department actions, such as permit issuances. (Response, Exhibit A, paragraph 6) In preparing his affidavit,

Mr. Wein read various pleadings and other documents involved in this appeal and met with Mr. Rosen to discuss the appeal. (Response, Exhibit A, paragraph 11-12) Mr. Wein states that Mr. Rosen's level of experience and qualifications in the practice of environmental law are at least equal to his own level of experience and qualifications. (Response, Exhibit A, paragraph 21) Mr. Wein attests that the hourly rate charged by Mr. Rosen in this case is "more than reasonable" and at least $40 per hour lower than the hourly rates charged by Mr. Wein during the period in question. (Response, Exhibit A, paragraph 22) Mr. Wein also attests that the hourly rates charged by Mr. Rosen's firm for paralegal support are "more than reasonable" and at least $25 lower than the rates charged by Mr. Wein's firm for the same period. (Response, Exhibit A, paragraph 23)

There is, however, nothing in Mr. Wein's affidavit pertaining to the hourly rates and level of experience of the other attorneys or law clerks involved in this appeal.[7] We have no evidence of their level of experience or skill or the prevailing market rate billed by attorneys of that level of skill or experience in the Pittsburgh legal community. Without such evidence, we have no basis for determining the reasonableness of their rates. In his affidavit, Mr. Rosen states, "The rates charged to Harmar Township for associates...are comparable to those charged by other law firms in the community." (Petition, Exhibit 4, paragraph 6) Even if we accept Mr. Rosen as being capable of providing an expert opinion regarding what constitutes a reasonable hourly rate in the Pittsburgh community for the type of legal

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[7] This includes work performed by Attorney Michael McGreal, who billed at an hourly rate of $105, and Attorney Thomas Ferguson, who billed at an hourly rate of $85. Attorney Robert Bello did not bill for his work. This also includes work performed by Law Clerks David A. Levine and Stuart M. Levine who billed at hourly rates of $52.50 and $50-$52.50, respectively.

services rendered in this appeal, he, nonetheless, must provide some factual data to support his conclusion.

We do, however, accept Mr. Wein as being an expert on the prevailing market rate in the Pittsburgh community in the field of environmental law. Mr. Wein has nearly twenty years of experience in the practice of environmental law and has been involved in appeals before the Board, including challenges to permit issuances by the Department. We find his statement as to the reasonableness of rates charged by Mr. Rosen and his firm to be credible and convincing. We, therefore, accept Mr. Wein's statement as to the reasonableness of the hourly rate billed by Mr. Rosen for his legal services in connection with this appeal and the reasonableness of the rates charged by Mr. Rosen's firm for work performed by paralegals.

As to the other attorneys and law clerks involved in this appeal, Harmar Township has failed to provide any evidence by which we can judge the reasonableness of their rates. In light of this lack of evidence, we must determine whether Harmar Township should be given an opportunity to present evidence that the rates billed by the other attorneys and law clerks participating in this case were reasonable.

It is true that, under certain circumstances, a hearing is necessary to allow a petitioner for attorney fees and costs the opportunity to present necessary, competent evidence in support of his petition. Joyner v. Commonwealth, Department of Environmental Resources, 152 Pa. Cmwlth. 441, 619 A.2d 406, 411 (1992).[8] However, in this case, Harmar Township has been given not one, but two, opportunities to present evidence in support of its

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[8] It should be noted that Joyner involved a petition for attorney fees and costs filed under the Costs Act, Act of December 13, 1982, P.L. 1127, 71 P.S. §2031 *et seq.*

request for attorney fees and costs: once with its Petition and second with its Response to the Department's and MTI's Objections. Even though Harmar Township failed to submit all the necessary evidence with its Petition, it certainly was made aware by the Department's Objections of the evidence which was lacking, and, thus, it had an opportunity to correct the areas of deficiency when it filed its Response.[9] Since Harmar Township has already been given "two bites at the apple", we fail to see what purpose it would serve to provide it with yet a third opportunity to supply the evidence which is lacking, whether at a hearing or in the form of a written submission to the Board. After all, the burden is on the petitioner to supply the necessary information in support of its petition for costs and attorney fees. Where the petitioner has had two opportunities to supply this information and has failed to do so, it has failed to meet its burden of proof with respect to that part of its claim for which it has not provided sufficient evidence. Because Harmar Township has failed to provide sufficient evidence from which we can judge the reasonableness of the rates billed by the firm's law clerks and attorneys other than Mr. Rosen, we are unable to award Harmar Township fees for the work performed by these individuals.

Billable Hours

The second part of the lodestar equation is the calculation of billable hours reasonably expended on the appeal in question.

The Department argues that Harmar Township has not provided sufficient information from which this figure can be calculated and, secondly, that the billable hours shown in Exhibit 1 to Harmar Township's Petition do

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[9] Indeed, by submitting the affidavit of Attorney Howard Wein with its Response, Harmar Township corrected several gaps in evidence in support of its Petition, such as evidence pertaining to the reasonableness of the rates billed by Attorney Rosen and for work performed by the firm's paralegals.

not accurately reflect the number of hours reasonably related to the litigation of this appeal.

In Save Our Cumberland Mountains, Inc. v. Hodel, 651 F. Supp. 1528 (D.D.C. 1986), which addressed the issue of attorney fees under the Federal SMCRA and which is cited by the Department, the District Court for the District of Columbia stated that a petitioner for an award of attorney fees must document the number of billable hours claimed "with sufficient detail to permit both the court and opposing counsel to conduct an informed appraisal of the merits of the application." *Id.* at 1532. However, the Court also noted that a request for attorney fees should not result in a second major litigation. *Id.* We shall examine each of the Department's specific objections in determining the reasonableness of the billable hours claimed by Harmar Township.

The Department first asserts that any hours billed prior to the filing of the notice of appeal should not be included because the time necessary to perfect an appeal is minimal and because the Board's jurisdiction does not attach until an appeal is filed. This "pre-appeal" period amounts to 9.3 hours billed by Mr. Rosen. In response, Harmar Township argues that this time was necessary for counsel to familiarize himself with the facts and circumstances of the case and to gather the information necessary to perfect the appeal. In his supplemental affidavit, attached as Exhibit B to Harmar Township's Response, Mr. Rosen states that "Harmar Township incurred necessary legal fees and costs incident to investigation and preparation of the notice of appeal and exploration of a wide array of legal issues..." (Response, Exhibit B, paragraph 6)

We find no authority to support the Department's position that hours expended preparing a notice of appeal may not be included in the calculation

of attorney fees, nor does the Department cite us to any specific authority. As Harmar Township points out in its Response, at least some amount of time is necessary prior to filing the notice of appeal for counsel to familiarize himself with the facts of the case, to determine whether an appeal is appropriate, to analyze which issues are involved, and, finally, to prepare and file the notice of appeal. As Harmar Township further points out, counsel for an appellant is limited in the amount of time which can be spent on such preparation by virtue of the Board's 30-day statute of limitations for filing an appeal. We do not find 9.3 hours to be an unreasonable amount of time expended in preparing an appeal to be filed with the Board, and we, accordingly, find that this amount is properly included in Harmar Township's petition for attorney fees.

The Department next contends that 29 hours billed by Attorney Rosen during the discovery stage of the appeal were not reasonably related to the litigation. Specifically, the Department challenges the following: 1.9 hours spent by Mr. Rosen in discussion with counsel for the intervenor, Bauerharmar Coal Corporation ("Bauerharmar"); 12.2 hours relating to Mr. Rosen's review of a different disposal site not connected with this case, review of new regulations, and conferences which the Department claims were unrelated to discovery; and 14.9 hours billed by Attorney Rosen and paralegal Diane McDonough in September 1990, for which no description was provided.

As to the 14.9 hours unaccounted for in September 1990, Harmar Township has provided with its Response a description of the work covered by those hours. (Response, Exhibit C) This work included 8 hours billed by Mr. Rosen for a site visit and conference with Harmar Township's expert, Dr. Streib; 4 hours spent by Mr. Rosen in drafting Harmar Township's pre-hearing memorandum; 2.9 hours spent by Mr. Rosen in completing the drafting of the

pre-hearing memorandum and drafting two motions[10]; and .2 hours spent by Ms. McDonough drafting a letter to the court reporter regarding deposition exhibits. We find this work to be reasonably related to the litigation of this appeal and, therefore, properly included in Harmar Township's petition.

With respect to the 1.9 hours billed by Attorney Rosen for discussions with intervenor Bauerharmar's counsel, the Department argues that because Bauerharmar did not participate in the litigation of this appeal[11] and because the issues presented by Bauerharmar were distinctly different from those of Harmar Township, this time was not reasonably related to the litigation of the appeal. In its Response, Harmar Township argues that discussion of this matter with Bauerharmar's counsel was reasonable and necessary and was a task which a prudent lawyer would undertake to achieve the desired results of the litigation effectively and economically.

Bauerharmar petitioned to intervene in this appeal on February 7, 1990; its petition was granted on March 23, 1990. Attorney Rosen's discussions with Bauerharmar's counsel took place on two occasions, first on January 22, 1990, prior to its petition to intervene, and on April 16, 1990, less than one month after its petition was granted. At that time, it appeared that Bauerharmar would take a more active role in the appeal of the permit issuance and, therefore, it was reasonable and prudent that Harmar Township's counsel should discuss this matter with counsel for Bauerharmar. Moreover,

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[10] The two motions drafted by Mr. Rosen were a Motion for Relief from the Provisions of Pre-Hearing Order No. 1 and Motion for Enlargement of Time Within Which to File Pre-Hearing Memorandum.

[11] Although Bauerharmar petitioned for and was granted leave to intervene in the appeal, it was not represented at the hearing, nor did it file a post-hearing brief. Thus, any issues which could have been raised by Bauerharmar were deemed waived. See Harmar Township, *supra.*, p. 2.

the amount of time spent by Attorney Rosen in discussing this matter with counsel for Bauerharmar was less than two hours. We do not find this amount of time devoted to discussion with Bauerharmar to be excessive. Therefore, we reject the Department's contention that this amount should be excluded from that which Harmar Township may recover.

The Department also challenges 4.8 hours billed by Attorney Rosen on March 17, 1990; March 26, 1990; March 30, 1990; and April 12, 1990; and 1.4 hours billed by Attorney Michael McGreal on March 22, 1990, for work which the Department claims is unrelated to this appeal. These entries reference "Fern Valley", "Duquesne Light", and "Robinson Township case". We agree with the Department that, based solely on what is shown by Mr. Rosen's invoices, this would appear to be a matter unrelated to the Harmar Township appeal. In footnote 7 of its Response, Harmar Township explains the references to "Fern Valley" and "Duquesne Light" in its invoices as follows: "Much of the time complained of by DER involved Harmar's counsel's review of DER documents relative to the Fern Valley facility operated by Duquesne Light Company. The Fern Valley facility was the most recent ash disposal permit approval to be granted by DER and the permit file provided counsel with comparative analysis information vital to the success of this litigation." Harmar Township, however, provides nothing in support of this claim, such as a statement in Attorney Rosen's affidavit that work billed as "Fern Valley" or "Duquesne Light" or "Fern Valley document review" was, in fact, related to the specific appeal in question. Nor is any explanation provided as to the March 26, 1990 entry referring to "Robinson Township case". Without further evidence of such, we cannot include the hours billed for this work in the calculation of Harmar Township's fee award.

This is complicated, however, by the fact that work related to "Fern Valley" and "Robinson Township" is grouped together in the invoices with other matters apparently related to the appeal. Therefore, it is impossible to separate the hours for "Fern Valley"-related work or "Robinson Township"-related work from the remainder of the invoice entry. Because we are unable to determine which portion of an invoice entry relates to Fern Valley or Robinson Township and which portion to Harmar Township's appeal, and because the burden is on Harmar Township to demonstrate the fees to which it is entitled, we have no choice but to exclude the entire entry from our calculation of the fees to be awarded to Harmar Township.

Next the Department challenges an entry made on March 29, 1990 by Mr. Rosen for "Legal Research - existing and old regulations". The Department asserts that because no new regulations were applicable to the site in question in 1990, Mr. Rosen could not have reviewed "existing and old regulations". No clarification of this is provided in Harmar Township's Response. It is true that the regulations governing the disposal of ash at a coal processing site changed dramatically in July 1992,[12] following the parties' submission of post-hearing briefs and prior to our adjudication of this matter. However, the entry in Mr. Rosen's invoice is for March 29, 1990. Because questions remain regarding this particular entry which Harmar Township failed to clarify in its Response, we cannot include it in the calculation of Harmar Township's fee award. Again, this work is grouped together with other work relating to the appeal. However, as explained earlier, the burden is on Harmar Township to demonstrate that is is entitled to the amount which it is seeking. It had the opportunity to clarify confusion surrounding this entry

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[12] See explanation in footnote 1 herein.

in its Response and failed to do so. Therefore, we must exclude the entire entry, consisting of 3.9 hours, in our calculation of the fee award.

Finally, the Department challenges two entries made on April 24, 1990 and October 8, 1990 for conferences billed by Mr. Rosen which the Department contends are unrelated to discovery. The April 24, 1990 entry consists of 2.5 hours billed by Mr. Rosen for preparation for and conference with "C. Means". The October 8, 1990 entry consists of 1 hour billed by Mr. Rosen for a conference with "Supervisors". We understand the latter to refer to the Harmar Township Board of Supervisors since this is the entity to whom the invoices are addressed. As the Supervisors represent Harmar Township, the appellant in this matter, a conference between Mr. Rosen and the representatives of his client is clearly a recoverable expense. We find this amount to be properly included in Harmar Township's petition. However, as to the April 24, 1990 entry, no explanation is provided as to the identity of "C. Means" or his or her relationship to the appeal, if any. Harmar Township does not address this objection in its Response. Without any further explanation, we cannot find this entry, consisting of 2.5 hours, to be reasonably related to the litigation of this appeal.

The Department next challenges hours billed during what it terms the "trial preparation" phase of the litigation. Specifically, the Department challenges 8 hours billed by Mr. Rosen for attending a township meeting on February 11, 1991. The Department contends that Mr. Rosen's attendance at the township meeting amounts to public relations which is not a recoverable expense. Harmar Township rejects the Department's labeling of this task as "public relations" and asserts that, since its client is a township and not an individual, it is necessary to address its client at a township meeting. We agree with Harmar Township's characterization of this matter. Where the

"Seth's ditch"), and had a sump pump installed in his basement. (N.T. 60, 64-66, 74, 432)

15. Evelyn Cowder's husband was sick during the late 1980s and he died in 1989. She did not complain to DER about the condition at her property until 1991 because her husband's medical problems were of greater concern to her. (N.T. 59, 84, 103)

16. As of one week prior to the merits hearing, Evelyn Cowder's basement contained two to three feet of foul-smelling standing water which had a thick red scum and was hard in places. (N.T. 47, 53, 97) Each time Seth Cowder attempts to unplug his mother's drain, it clogs again with more red muck. (N.T. 53-54, 95-97, 115) This red muck has destroyed two outside basement doors and the basement steps. The door area is blocked off with insulation. (N.T. 97-99) Because she has no central heating, she has lived in only three rooms of her home and has not been able to use the basement for eight years. (N.T. 54-55)

17. Outside of Evelyn Cowder's home, there is red water running in her yard, the vegetation on her yard and surrounding property has been burned out, and the ground's surface is barren and covered with red muck. (N.T. 48, 99)

DER's Investigation of Evelyn Cowder's Complaint

18. Scott Barnes is a hydrogeologist employed by DER's Bureau of Mining and Reclamation, Hawk Run District Office. (N.T. 120) Barnes received a bachelor of science degree in geophysics from the Pennsylvania State University in 1982. (N.T. 121, 126) Barnes was hired by DER in September of 1986, where he first functioned as a mining specialist. In 1988, he became a hydrogeologist. (N. T. 124, 125)

19. Barnes completed a hydrogeology training course at Penn State in 1988, and he has taken additional hydrogeology training courses at DER. (N.T.

126) He has conducted more than thirty hydrogeologic investigations for DER. (N.T. 130) This matter is the first which has resulted in his recommending DER issue a groundwater study order, however. (N.T. 137)

20. Barnes was admitted as an expert in hydrogeology over Hamilton's objection. (N.T. 140)

21. After Evelyn Cowder complained to DER in August of 1991, DER assigned Barnes to investigate her complaint in September of 1991. Barnes met with DER's mine conservation inspector, Dave Butler, who showed him the Little Beth site, Evelyn Cowder's home, and the strip mines in the area. (N.T. 142, Vol. IV 18, 30)

22. In January of 1992, Barnes examined the geological literature for the area, the Little Beth site, and old strippings in the area. He also collected some water samples from springs and seeps in the area. (N.T. 143)

Pollutional Condition at Evelyn Cowder's Property

23. On January 6, 1992, Barnes began collecting water samples from the basement overflow in the four inch plastic pipe at Evelyn Cowder's home. He also collected samples there on April 5, 1993. DER's Butler collected samples of the basement overflow on August 26, 1991. (N.T. 204-206; C-7B) Exhibit C-7B shows the results of sampling on water collected by Barnes and Butler from the seepage at Evelyn Cowder's basement. (N.T. 257-258) These sample analyses results have a pH of 3, are high in acidity, high in metals concentration, especially with respect to iron, and are high in sulfate concentration. (N.T. 258)

24. Exhibit C-7 includes two samples collected November 16, 1992 from the basement overflow discharge at Evelyn Cowder's home. (N.T. 258; C-7)

25. DER's sample analyses results indicate to Barnes that the water is of a quality which is typical of acid mine drainage (AMD).[2] In particular, he notes that the sulfate and iron levels are very high. (N.T. 207, 258)

26. Evelyn Cowder's basement overflow does not meet the discharge parameters contained at 25 Pa. Code §87.102. (N.T. 207)

27. In Barnes' expert opinion, there exists a pollutional condition at the Evelyn Cowder residence. He bases this conclusion on water samples collected at the drainage outflow from her basement and the hard orange precipitate which has built up in the basement drain. This precipitate indicates to Barnes a discharge which is high in iron and is related to AMD. (N.T. 257-259; C-7)

Some Nexus Between Little Beth and Evelyn Cowder's Pollutional Condition

28. It is Barnes' expert opinion that there is a probable connection between the pollutional condition at Evelyn Cowder's basement and the mining on Hamilton's Little Beth mine site. He bases this conclusion on the topography of the area and the coal seam crop lines, proximity and timing of mining, direction of groundwater flow, the T-605 culvert discharge, water quality samples, Seth's ditch, and monitoring data for monitoring point CAH-4.[3]

29. In his hydrogeological investigation, Barnes reviewed and considered: the Pennsylvania Geological Survey Atlas' geological map for the Little Beth area; United States Government Survey (USGS) topographic maps

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2 AMD is typified by low pH, high acidity, high sulfates, high iron, high manganese, and high aluminum concentrations. (N.T. 207)

3 The outcrop or crop line of a coal seam is defined as "[t]he exposing of ... strata projecting through the overlying cover of detrius and soil." Environmental Engineering Dictionary, C.C. Lee, Ph.D.

revised in 1959, and 1960s, 1970s and 1980s; aerial photographs; the Little Beth SMP application and data contained therein; and mine drainage permit (MDP) and SMP applications for nearby mines. This gave him an indication of the progression of mining from 1958 to 1990. (N.T. 145)

Topography and Geological Setting

30. Exhibit C-2 is an enlargement of a USGS topographic map which was based on aerial photography taken in the late 1970s and was photo revised in 1981. (N.T. 146-147; C-2)

31. The Cowders' properties are indicated by an "E" for Evelyn and an "S" for Seth on Exhibit C-2. (N.T. 62-63, 156)

32. Exhibit C-2 depicts a synclinal structure known as the Clearfield Syncline.[4] The Little Beth mine site is on the southeast limb of the synclinal structure. (N.T. 158) This indicates the regional dip[5] is to the northwest in this area. (N.T. 159)

33. Barnes calculated the strike and dip on the Little Beth Mine site using test hole information from the Little Beth SMP application. (N.T. 158-159) Barnes' strike and dip agree with the regional structure; it is west northwest. (N.T. 159-160)

34. I-80, which was constructed in the mid-1960s, is indicated on Exhibit C-2 by solid black lines north of the Little Beth SMP running approximately west to east. T-605 is indicated on Exhibit C-2 in black pen running west to east south of I-80. T-605 forms the northern boundary of the

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4 A "syncline" is a geological structural feature which is analogous to a trough of a strata. (N.T. 493) It is a folded rock structure in which the sides dip toward a common line or axis. Penn Maryland Coals, Inc. v. DER, 1992 EHB 12, at n.7.

5 Dip refers to the direction and angle at which the rock bedding is inclined. Strike is perpendicular to the dip. See C&K Coal Company v. DER, 1992 EHB 1261, notes 5 and 7.

Little Beth SMP. (N.T. 73, 154) The yellow line on Exhibit C-2 indicates the Little Beth SMP boundary. (N.T. 148)

35. In determining the location of the Lower Kittanning coal seam crop line on Exhibit C-2, Barnes relied on the Pennsylvania Geological Survey map, the drill hole data in the Little Beth SMP and the Brookhart and Tyo Engineering Subsurface Investigation Profile and Report (Brookhart Report), and the date of the Brookhart Report. The Brookhart Report was provided by Hamilton to DER in September of 1992. (N.T. 155) He also relied on old mining in the area, and Pennsylvania Department of Transportation (PennDOT) maps for the area along I-80 generated from 1961 aerial photography. (N.T. 169-170)

36. Exhibit C-4A is Sheet No. 5 of the PennDOT topographic map; it shows in greater detail the topographic contours of the northern portion of the Little Beth SMP area. (N.T. 170)

37. Exhibit C-4A shows that a cut was excavated on the Middle Kittanning seam prior to 1961. It also shows a tailings[6] pile at its western end, which Barnes believes might be from a deep mine, at an elevation of 1,635 feet. (N.T. 170)

38. Exhibit C-4B, which adjoins Exhibit C-4A Sheet No. 5 on its western edge, indicates some surface mining spoils and cuts on the Lower Kittanning coal seam. None of this mining extended south of T-605. (N.T. 171)

39. Exhibit C-4C, which adjoins Exhibit C-4B, shows the Lower

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6 "Tailings" are residue of raw materials or waste separated out during the processing of the coal. See Environmental Engineering Dictionary, C.C. Lee, Ph.D.

Kittanning strippings and the current Lower Kittanning highwall. It also shows the Middle Kittanning strippings which approach 1,800 feet at the eastern portion of the map. (N.T. 174)

40. Exhibit C-5 is a reduction of Exhibits C-4, C-4B, and C-4C. (N.T. 175) It shows the area in the northwest of the Little Beth SMP and Evelyn Cowder's property. (N.T. 177)

41. Barnes concludes the Middle Kittanning coal seam crop line is at an elevation of 1,660 to 1,670 feet and rising toward the east. He concludes the crop of the Lower Kittanning coal seam is at an elevation 1,610 feet. (N.T. 173)

42. Using the Brookhart Report's drill holes into the Lower Kittanning coal seam north of Little Beth and its inferred surface on the pit floor of the Lower Kittanning spoil, Barnes made a determination of where the Lower Kittanning crop line lies north of the Little Beth permit. (N.T. 162-163) He also relied on the general strike and dip of the strata in the area in generating the Lower Kittanning coal seam crop line. (N.T. 347)

43. The dashed line on Exhibit C-2 indicates the original location of old T-605 before I-80 was constructed in that area. (N.T. 155) Barnes took the location of old T-605 from the Brookhart Report and old USGS topographical maps. (N.T. 155, 237)

44. The Lower Kittanning coal seam crops to the north of the T-605 relocation area and down slope from it. (N.T. 174)

45. I-80's embankment has been built on top of the Lower Kittanning seam's crop line. (N.T. 180-181)

46. The Cowder homes are at an elevation of approximately 1,580 and 1,600 feet. The Lower Kittanning coal seam crop line is at an elevation just above the Cowder Homes. (N.T. 180-181)

47. Barnes opines Evelyn Cowder's home is topographically downgradient and structurally down dip from the Little Beth mine site. (N.T. 202)

Proximity and Timing of Mining

48. Aerial photography taken in 1958 or 1959 shows mining occurred north of the Little Beth SMP area in the 1950s, including mining on the Lower Kittanning coal seam north of the Little Beth SMP area, and mining on the Middle Kittanning coal seam on the top of a hill northeast of the Little Beth SMP area. The spoils from this mining are indicated on a more detailed PennDOT topographic map. The map, based on aerial photography taken in 1961, shows that south of I-80, almost directly south of the Cowder properties, there is an old mining cut, establishing that this mining was conducted prior to 1961. (N.T. 164-165)

49. The aerial photographs also show surface mining on the Middle Kittanning seam, west of the bonded area of the Little Beth SMP, in the late 1950s. (N.T. 164-165)

50. Additional mining occurred in the vicinity of Test Holes (THs) 1A, 6, and 7 in the 1960s on the Middle Kittanning seam. (N.T. 165)

51. There was an old mining cut in the area just north of TH 5A on the Lower Kittanning seam which was from mining conducted in the 1940s. (N.T. 165)

52. Below T-605 is unmined strata which separates mining on the Little Beth SMP from old mining to the north which occurred in the 1950s. The area beyond where old T-605 used to run to the northwest was also unmined, so that the entire area to the southeast of the Evelyn and Seth Cowder properties is unmined strata. (N.T. 180) The Cowder property is undisturbed by mining. (N.T. 427)

53. Hamilton's Little Beth SMP application contained a map which showed some highwalls and indicated the direction and advance of Hamilton's mining. (N.T. 166) The dated highwalls are indicated on Exhibit C-2. (N.T. 167)

54. In the central portion of the Little Beth SMP bonded area is a highwall indicating that by 1979, Hamilton had advanced its mining northward to there. (N.T. 167) Approximately 300 feet north of that highwall is another highwall dated 1980, showing Hamilton's advance was still to the north. (N.T. 167) The "extent of highwall 1980" is indicated in the hill in the northwestern portion of the Little Beth bonded area in 1980. (N.T. 167)

55. From Hamilton's cut in the northwestern corner of the SMP in 1980, it advanced its mining from west to east. (N.T. 167)

56. Near the completion of that mining on the Little Beth SMP, there is a highwall labeled 1983. (N.T. 167-168)

57. Barnes opines the most important aspect of the geological setting on the Little Beth SMP area is that the Lower Kittanning coal seam crops to the north of T-605. (N.T. 178)

58. Barnes opines that when Hamilton reached the northwestern corner in 1979 and 1980, its mining made a boxcut. (N.T. 179)

59. Barnes' theory is that when Hamilton began mining in 1979 or 1980 on the Little Beth SMP in the northwestern corner of the area bonded for mining, Hamilton was mining the Lower Kittanning seam below the elevation of T-605. He believes the highwall extent 1980 on Exhibit C-2 was the highwall into the hill on the Lower Kittanning seam. Hamilton then mined the Lower Kittanning coal seam eastward below the elevation of T-605 along its length to the northeastern extent of the SMP. (N.T. 179) Barnes opines this mining would have produced a low wall along T-605 in the northern corner of the SMP

in the area where Hess and Fisher indicated a buried highwall in their Hydrologic Evaluation (Hess & Fisher Report). (N.T. 179)

60. Hess and Fisher's buried highwall is marked "H&F buried highwall" on Exhibit C-2. (N.T. 168) The Hess & Fisher Report was submitted by Hamilton to DER after October 16, 1992. (Stip.)

Direction of Groundwater Flow

61. Barnes opines that the groundwater flowing on the pit floor of the Little Beth mine site would be directed to the northwestern corner of the mine site in accordance with the regional dip. (N.T. 182-183)

62. Barnes opines that as the vegetation became established on the Little Beth mine site, there was a "fair percentage" of infiltration of precipitation which would recharge to the spoils and the pit floor of the Little Beth mine site. (N.T. 181)

63. Barnes opines the spoil material on the Little Beth mine site would be more conducive to groundwater flow than the unmined strata, although the unmined strata would not be impermeable. (N.T. 182) He opines that the unmined strata beneath T-605 acts as a relative barrier to groundwater flow in the north and northeastern portions of the Little Beth SMP. (N.T. 182)

64. It is Barnes' opinion that with additional groundwater recharge, the elevation of the water would rise and there would be an accumulation of groundwater in the boxcut area. (N.T. 182-183)

65. Barnes opines that as the water accumulates, the spoils saturate, and the water table rises, there is leakage in the adjacent unmined strata from the boxcut area. (N.T. 183)

66. Barnes opines that the area only gradually accumulated groundwater, and that no significant leakage would have occurred until after 1983. (N.T. 188)

67. Barnes opines the most likely avenue of leakage is a tributary to the Valley Fork Run, which lies within a swale or hollow Barnes called the Cowder Tributary Hollow, circled in red on Exhibit C-2. (N.T. 183, 209-210)

68. The old stream channel from the Cowder Tributary Hollow ran southeast from the Cowder homes, parallel to old T-605 and is now covered by the I-80 embankment, south of I-80 and T-605 onto the northwestern portion of the Little Beth SMP area. (N.T. 183-184) Hamilton mined the upper portions of this tributary and filled the remainder of the tributary with fill where the highwall ended. (N.T. 186)

69. Barnes opines this leakage from the boxcut area does not travel directly down the Cowder Tributary Hollow but spreads out in a northwesterly direction. (N.T. 186, 189)

T-605 Culvert Discharge

70. There is a discharge from a culvert ditch running beneath T-605 (T-605 culvert discharge). (N.T. 190-191)[7]

71. The T-605 culvert ditch runs along the eastbound lane of I-80. (N.T. 192)

72. The T-605 culvert, which is in the area of the old stream channel, is now buried by fill for the relocated section of T-605 and by fill from the northwestern portion of the Little Beth SMP site. (N.T. 189-190)

73. The T-605 culvert ditch is above the elevation of the Lower Kittanning coal seam crop line at the original ground surface elevation where it abuts the I-80 embankment. (N.T. 193)

74. The T-605 discharge flows a couple of feet below the T-605 culvert pipe through a bed of limestone and gravel. (N.T. 496)

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7 The T-605 discharge is the subject of another DER order appealed by Hamilton at Docket No. 92-468-E.

75. The T-605 discharge follows the T-605 culvert ditch to the west then enters the 40-inch culvert pipe which passes beneath both lanes of I-80 and which is located just south of the Cowder properties. The flow then enters the original stream channel of the Cowder Tributary. (N.T. 191)

76. Barnes opines groundwater emanating from the T-605 culvert discharge is overflow from saturated spoil in the northwestern corner of the Little Beth SMP area. He believes it is emanating there because it is where the stream channel would have been and is the natural low point in the area. (N.T. 193) Barnes theorizes that the groundwater at the level of the Lower Kittanning coal seam and below that level migrates from Little Beth. This groundwater flows from the northern portion of Little Beth beneath the original ground's elevation and T-605. It flows beneath the I-80 embankment and toward the northwest. (N.T. 195) The path of this expected flow is indicated on Exhibit C-2 by a red arrow toward the northwest. Barnes opines this groundwater spreads out in a fan-like configuration. (N.T. 195)

77. Exhibit C-6 is a cross-section which Barnes prepared of the area northwest of in the Little Beth mine site and the Cowder properties using Exhibit C-4B. (N.T. 197) This cross-section indicates the Lower Kittanning coal seam's horizon, the original ground surface, the Hess and Fisher buried highwall, I-80, T-605, and Evelyn Cowder's home. (N.T. 201-202, 342-343, 345, 347)

78. The Exhibit C-6 cross-section illustrates from a profile viewpoint the mining on the northwest part of the Little Beth mine site, the Lower Kittanning coal seam beneath T-605 and beneath a portion of I-80, and Evelyn Cowder's home which is topographically below the Lower Kittanning coal horizon. (N.T. 202)

79. Barnes opines the waters in the northwestern corner of the Little Beth mine site would be flowing toward the northwest at or near the Lower Kittanning coal seam elevation, and he would expect to see some leakage beneath the Lower Kittanning coal seam. (N.T. 194)

80. Barnes opines that groundwater leakage that has accumulated in the spoil on the Little Beth mine site would generally flow in the direction of this cross-section line on Exhibit C-6 toward the northwest along the Lower Kittanning coal horizon and also below the Lower Kittanning coal horizon. (N.T. 202)

81. In Barnes' opinion, Evelyn Cowder's home is hydrologically downgradient from the Little Beth mine Site. (N.T. 203)

DER's Water Quality Sampling

82. Barnes also collected water quality samples in January of 1992 from areas east of the Cowders' property, which he called the Eastern Tributary Hollow, in response to Hamilton's assertion that the mining conducted in the 1950s on the Lower Kittanning seam just east of the Cowder homes is the cause of the pollution in Evelyn Cowder's basement. (N.T. 208-209) The Eastern Tributary hollow is a tributary to Valley Fork Run and is circled in blue on Exhibit C-2. (N.T. 209-210)

83. Exhibit C-7 contains the results of sampling Barnes conducted in January of 1992, June of 1992, and in October and November of 1992; Exhibit C-7A is a tabulation of this water sampling data that Barnes collected north of the Little Beth SMP. (N.T. 211, 217-219)

84. Barnes indicated the levels of acidity and iron on the water quality maps because in his previous sampling of the Cowder properties, he noticed that the acidity and iron in the water was extremely high. (N.T. 223)

85. Barnes concludes from his water quality mapping that the water quality in the Cowder tributary hollow compared to the water quality in the Eastern Tributary Hollow is very different; the acid concentrations in the Cowder Tributary Hollow are much higher overall than in the Eastern Tributary Hollow. (N.T. 224-226)

86. Located beneath the Lower Kittanning coal horizon are sample points Nos. 10 and 11 (drainage into John Mayes' pond), No. 3 (Evelyn Cowder's basement discharge), No. 2 (a ditch to the southeast of Evelyn Cowder's home), and No. 7 (an orange iron mound seepage to the northwest of Evelyn Cowder's house). (N.T. 227; C-7A) These sampling points all show very high concentrations of iron. (N.T. 227) From them, Barnes concludes the pollutional plume fans out but does not extend eastward beyond John Mayes' pond. (N.T. 227)

87. Based on his water quality sampling, Barnes concludes that waters from the Little Beth mine site have a higher overall concentration of iron and acidity and that it is migrating toward the northwest in the Cowder Tributary Hollow. (N.T. 227)

88. Barnes opines that the Eastern Tributary Hollow is receiving drainage from the old 1950s strippings on the Lower Kittanning and Middle Kittanning and is not receiving any drainage from the Little Beth mine site. (N.T. 228)

89. Because of the dip and groundwater flow direction, Barnes would not expect groundwater to migrate from the northern and northeastern portions of the Little Beth site across T-605 and commingle with flow from strippings from the 1950s mining in the Eastern Tributary Hollow. (N.T. 224)

90. Barnes concludes that the Eastern Tributary Hollow sampling results are indicative of the quality of the groundwater and surface water

in the Cowder Tributary Hollow prior to Hamilton's mining on the Little Beth site. (N.T. 229)

91. Barnes believes the Cowder Tributary Hollow shows the pollutional effects of old 1950s strippings as well as additional mine drainage from the northwestern corner of the Little Beth mine site. (N.T. 229) He opines that the quality of the groundwater and surface water at the Cowder Tributary Hollow was formerly AMD, but has been degraded by Hamilton's mining. (N.T. 229-230)

92. Exhibit A-1 is the Abatement Area Q portion of Skelly & Loy Operation Scarlift Report submitted to DER by Hamilton after October of 1992 to support Hamilton's position that the pollution in the Cowder Tributary Hollow and Evelyn Cowder's basement was caused by the old mining. (N.T. 230-231)

93. Abatement area Q of Operation Scarlift includes strip mines mined in the 1950s and 1960s on the Lower Kittanning and Middle Kittanning coal seams to the west of the northern portion of the Little Beth bonded area, and to the northeast of the Little Beth SMP and north of I-80. (N.T. 233)

94. Barnes opines the conditions outlined in Abatement Area Q would not have any effect on the water quality at Evelyn Cowder's house because that mining occurred in the 1950s, whereas the problem that occurred at the Cowder Tributary Hollow was in the 1980s. He also bases this opinion on his water sampling. (N.T. 231-233)

Seth's Ditch

95. Exhibit A-5 is the Hess and Fisher Report which Barnes reviewed in early November of 1992. (N.T. 237-238) This report concludes that the mining to the east of the Cowder homes is contributing to the pollution at the Evelyn Cowder property. (N.T. 238-239)

regulations and, therefore, MTI is not without fault. However, as noted in Jay Township, it is the Department's duty to scrutinize every permit application to ensure that it complies with the applicable regulations before making the decision to issue a permit. The Department's failure to do so in this matter is what led to this appeal.

The Board in Jay Township further noted that courts have traditionally been reluctant to award fees against nongovernmental adversaries. Jay Township, 1987 EHB at 49 (citing Delaware Valley Citizens' Council for Clean Air v. Pennsylvania, 762 F.2d 272 (3rd Cir. 1985). Therefore, the Board held that the burden of paying the award of attorney fees and costs should fall entirely on the Department.

Like the circumstances in Jay Township, the Department's abuse of discretion in issuing the permit led to the filing of this appeal and, ultimately, to the reversal of the permit issuance. MTI's degree of fault was minor compared to that of the Department. Therefore, based on the reasoning in Jay Township, we hold that the Department is responsible for the payment of the award of attorney fees and costs in this matter in the amount of $32,632.05.

O R D E R

AND NOW, this 9th day of August, 1994, pursuant to the authority granted to the Environmental Hearing Board under §4(b) of SMCRA, 52 P.S. §1396.4(b), it is hereby ordered that Harmar Township is awarded $32,632.05 for costs and attorney fees associated with the litigation of this appeal. It is further ordered that this award is to be paid by the Commonwealth of Pennsylvania, Department of Environmental Resources.

EHB Docket No. 90-003-MJ

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: August 9, 1994

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M. DIANE SMITH
SECRETARY TO THE BOARD

AL HAMILTON CONTRACTING CO., INC.	:	
	:	
v.	:	EHB Docket No. 92-468-E
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: August 10, 1994

ADJUDICATION

By: Richard S. Ehmann, Member

Synopsis:

The Board dismisses appellant/coal mine operator's appeal challenging the Department of Environmental Resources' (DER) issuance to it of an order, *inter alia*, directing it to treat acid mine drainage flowing out of a limestone underdrain located beneath a culvert pipe which runs horizontally under Township Road 605 (T-605). T-605 runs along the northern border of the mine site, and the acid mine drainage is flowing out of the limestone underdrain on the side of T-605 opposite the mine site. DER has sustained its burden of proving the mine site is producing and discharging the acid mine drainage which is flowing out of the limestone underdrain and that this discharge exceeds the effluent limitations at 25 Pa. Code §87.102. DER's order was properly issued pursuant to §§4.2 and 4.3 of the Surface Mining Conservation and Reclamation Act, 52 P.S. §§1396.4b and 1396.4c, and DER regulations promulgated pursuant to that act.

The Board does not strike the expert testimony of DER's expert hydrogeologist, as we find his testimony was sufficiently based on facts of

record, and the evidence of record tends to establish his assumptions. The Board also does not draw the inference asserted by the appellant, that the water discharging from the horizontal culvert pipe has been of poor quality since before 1982, from DER's failure to call its inspector concerning a May 24, 1982 inspection report or to introduce that report into evidence where appellant has not shown its inability to call the inspector as a witness and has introduced this inspection report into evidence as an exhibit. Further, it does not appear that this inspection report would properly have been part of DER's case in this matter.

BACKGROUND

Al Hamilton Contracting, Inc. (Hamilton) commenced this appeal on October 14, 1992 challenging DER's issuance to it of an order, dated September 24, 1992, *inter alia*, directing Hamilton to treat water flowing from an underdrain which was located below a culvert pipe running horizontally beneath T-605 (horizontal culvert pipe) in Bradford Township, Clearfield County. This discharge was flowing out of the underdrain on the northern side of T-605. Hamilton's Surface Mining Permit (SMP) No. 17723164 (Little Beth Operation) is located along the southern side of T-605. DER's order asserts that the discharge is hydrologically connected to Hamilton's Little Beth Operation and, as originally identified by DER, was located on the south side of T-605 but has resurfaced on the northern side of T-605 because of actions taken by Hamilton.

DER's order was issued pursuant to §§5, 316, 402, 601, and 610 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, (Clean Streams Law), 35 P.S. §§691.5, 691.316, 691.402, 691.601, and 691.610; §§4.2 and 4.3 of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945 P.L. 1198 as amended, (SMCRA), 52 P.S. §§1396.4b and 1396.4c; §1917-A of the Administrative

Code, Act of April 19, 1929, P.L. 177, as amended, (Administrative Code), 71 P.S. §510-17; and DER's rules and regulations at 25 Pa. Code Chapters 86 and 87.

Hamilton filed a petition for supersedeas along with its notice of appeal. In a conference telephone call with then Board Member Joseph N. Mack[1] (to whom this matter was originally assigned for primary handling) on November 3, 1992, Hamilton indicated it would treat the discharge to DER's satisfaction on an interim basis and that there was no need for a hearing on its petition. This matter was then reassigned for primary handling to Board Member Richard S. Ehmann on April 14, 1993. A hearing on the merits of the appeal was held before Board Member Ehmann on June 22-23, 1993. After receiving the transcript of the merits hearing on July 13, 1993, we directed the parties to file their post-hearing briefs. We received DER's post-hearing brief on August 23, 1993 and Hamilton's post-hearing brief on September 13, 1993. Any arguments not raised in the parties' post-hearing briefs are deemed waived. Lucky Strike Coal Co. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988). Upon our review of the parties' post-hearing briefs, it was apparent that their briefs addressed Hamilton's liability under §315(a) of the Clean Streams Law, 35 P.S. §691.315(a), which was not cited in DER's order.[2] We accordingly issued an order to the

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[1]Board Member Mack resigned from this Board effective August 1, 1994.

[2]Inexplicably, DER's technical staff issued the challenged order citing Section 316 of the Clean Streams Law as a basis for the order, but, when DER presented its case to us and filed its post-hearing brief, it cited section 315 of the Clean Streams Law and advanced evidence in an attempt to have us find Hamilton liable for treating the discharge pursuant to section 315. We have warned DER of the peril involved in changing its legal theory without amending its order in our past decisions. In Ganzer Sand & Gravel, Inc. v. DER, 1993 EHB 1142, 1172, we stressed that we discourage a practice where DER provides on reason when it takes its action and then propounds an entirely different reason for it after the appeal has been filed. In Lawrence Blumenthal v. DER, 1993 EHB 1552, we emphasized that where DER waits until the filing of its post-hearing brief to advance the legal theory recited therein as support for its position in the appeal and has failed to earlier raise this theory, the Board will not

parties on March 9, 1994 directing them to file briefs specifically addressing Hamilton's liability for the discharge under the sections set forth in DER's order. We received DER's brief on March 25, 1994 and Hamilton's brief on March 28, 1994.

The record in this matter consists of the transcript of the merits hearing of 338 pages and a number of exhibits. After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. Appellant is Hamilton, a Pennsylvania corporation with its principal place of business at R.D. 1, Woodland, Clearfield County, Pennsylvania. (B-1; Notice of Appeal)[3]

2. DER is the agency of the Commonwealth with the duty and authority to administer and enforce the Clean Streams Law; SMCRA; §1917-A of the Administrative Code; and the rules and regulations promulgated thereunder.

3. Hamilton's principal business is the mining and removal of coal by the surface mining method. (B-1)

4. Hamilton has been the permittee and operator of a bituminous surface coal mine located in Bradford Township, Clearfield County under SMP No. 17723164 known as the Little Beth Operation. (B-1)

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consider that theory in preparing its adjudication. We further warned in Blumenthal that where DER's administrative order is based on a legal theory which is subsequently abandoned in DER's post-hearing brief, an appeal from such an order will be sustained. Where DER's technical staff and its counsel are incapable of better coordination of their actions and the theories supporting same, they should not seriously expect to prevail.

[3]"B-1" is a reference to Board Exhibit 1, which is the parties' joint stipulation. "AH-" represents a reference to one of Hamilton's exhibits, while "C-" represents a reference to one of DER's exhibits. "N.T." indicates a reference to the transcript of the merits hearing.

The Little Beth Site

5. As shown on Exhibit C-1 (which is a copy of Hamilton's operations map), the northern Little Beth site boundary is a wavy line running adjacent to the south side of T-605. (N.T. 555-557, 861; C-1)[4] T-605 is shown on Exhibit C-1 by a dashed line just south of the eastbound lane of Interstate 80 (I-80). (N.T. 556, 861; C-1)

6. T-605 has a 33 foot right-of-way, which would measure 16-1/2 feet from the center line to the southern side of the road. (N.T. 825)

7. The northern boundary of the Little Beth SMP was the southern right-of-way of T-605. (N.T. 823)

8. Hamilton obtained a variance from Bradford Township to conduct its mining activities within the 100 foot area outside the T-605 southern right-of-way. (N.T. 823)

9. Hamilton constructed earthen material barriers along the southern T-605 right-of-way which were 4 feet high and were 16 feet wide measured at the toe of the outslope to the berm of T-605. (N.T. 828, 834) Hamilton proceeded to extract coal south of these barriers. (N.T. 835)

10. An old stream channel which formerly ran from the northwest portion of the Little Beth SMP through an area identified as the Cowder Tributary Hollow is shown on an enlargement of a United States Geological Survey (USGS) topographical map (Exhibit C-2) in green. This map shows a horizontal culvert pipe under T-605 by two parallel black lines at the intersection of T-605 and the old stream channel. (N.T. 699-703; C-2) The Pennsylvania Department of Transportation (PennDot) map for the mine site area at the time I-80 was proposed also shows

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[4]The merits hearing transcripts were numbered by the court reporter beginning with page 543, not page 1.

this old stream channel on sheet 4. (N.T. 700-701; C-3)

11. The horizontal culvert pipe beneath T-605 is a conduit for surface water collected through ditching along the southern side of T-605. (N.T. 586, 595, 624-625)

12. T-605 has been relocated from its original location. (N.T. 728-729)

13. Before Hamilton conducted mining in the area, surface water runoff flowed into the horizontal culvert pipe at its inlet on the south side of T-605, at the base of the southern embankment of T-605, and then flowed out the northern side of the horizontal culvert pipe. (N.T. 734) The culvert ditching system conveyed any flow into the old stream channel. (N.T. 734)

14. After Hamilton mined and backfilled the northern Little Beth SMP area, fill was placed there up to the elevation of T-605. (N.T. 734, 874-875) Since this fill covered the inlet to the horizontal culvert pipe south of T-605, another section of culvert pipe was buried vertically on the south side of T-605 (vertical culvert pipe). One end of this vertical culvert pipe was at the surface of the ground and the other end was connected to the horizontal culvert pipe below the ground's surface. The vertical culvert pipe was installed in order to convey surface runoff at the height of the road surface and reclaimed area into the horizontal culvert pipe and then out of the horizontal culvert pipe northward. (N.T. 734)

15. The old stream channel south of T-605 was covered by mine spoils backfilled from Hamilton's mining. (N.T. 728-729)

<u>DER's Discovery of the Culvert Discharge</u>

16. David Butler ("Butler") is a surface mine conservation inspector (MCI) employed by DER who has been responsible for inspecting the Little Beth SMP site since May of 1991 (except for a six week period in the summer of 1992 when he was

hospitalized). (N.T. 554, 565, 584, 601)

17. James Forcey was the DER inspector assigned to the Little Beth site prior to Butler. (N.T. 578)

18. Butler preliminarily inspected the Little Beth site in May of 1991 and observed a large red stained seep area just north of T-605. (N.T. 555) No water was discharging in that area, but the red staining indicated to Butler that water of "questionable" quality had been flowing in the area. (N.T. 557)

19. All of the vegetation and soil in the 100 square foot area had a red cast to it and there was a large area of dead vegetation. (N.T. 558)

20. Based on his ten years' experience with field observations and water sampling, Butler concluded this red staining was iron precipitate. (N.T. 558)

21. Butler continued to monitor this area. (N.T. 558) No water flowed there during 1991, nor was any surface water located below that location. (N.T. 557, 578)

22. In an inspection on May 7, 1992, Butler observed water flowing from the south side of T-605 into the vertical culvert pipe through a hole located midway down it on the south side of the pipe (toward Little Beth). (N.T. 558-559, 593) The water ultimately discharged from the horizontal culvert pipe on the north side of T-605 (marked in blue on Exhibit C-1) where Butler noticed the red staining. (N.T. 559, 657)

23. There was an iron grate across the top of the vertical culvert pipe on May 7, 1992 when Butler visited this area. (N.T. 559, 593) Butler could not remove this grate. (N.T. 595) The vertical culvert pipe on which the grate was located was a few inches higher than the surface of the ground. (N.T. 595)

24. The flow out of the horizontal culvert pipe on May 7, 1992 was forceful, as though it was gushing from a faucet. (N.T. 593-594) Butler

estimated the flow coming out of the hole in the vertical culvert pipe to be the same as the flow discharging on the north side of T-605 from the horizontal pipe. (N.T. 595) He did not observe any other flow going into the vertical culvert pipe and he did not observe any evidence of artesian effects. (N.T. 593-595)

25. The first point where Butler was able to collect a sample of the discharge on May 7, 1992 was on the north side of T-605 because he could not remove the grate over the vertical culvert pipe. (N.T. 570, 585, 595)

26. The laboratory analyses for Butler's sample no. 4419201 "toe of spoil discharge," which Butler collected from the discharge coming out of the horizontal culvert pipe on the north side of T-605 on May 7, 1992, is Exhibit C-4. (N.T. 560, 591)

27. Butler concluded the discharge in the vertical culvert pipe was located within the Little Beth SMP because it was south of T-605, which was shown as the northern permit boundary on the permit application map. He also based his conclusion on the continuity of the vegetation which had been planted over Hamilton's mined area up to the vertical culvert pipe. (N.T. 559, 583)

28. After discussing his May 7, 1992 discharge sample with his supervisors at DER, Butler was instructed to sample the discharge on a weekly basis. (N.T. 560, 581, 653)

29. Butler observed on his inspections that water would flow into the vertical culvert pipe when there was a large amount of water in Hamilton's backfill. (N.T. 593)

33. DER hydrogeologist Scott Barnes ("Barnes") videotaped the T-605 discharge on June 4, 1992, showing the vertical culvert pipe hooked into the horizontal culvert pipe, water on the surface of the ground on the north side of T-605 where the horizontal culvert pipe comes out beneath the road, the water

flowing toward the old stream channel, and the red stained vegetative kill area. No water was seen on the surface of the south side of T-605 and none was flowing into the top of the vertical culvert pipe. It is a fair and accurate representation of Butler's observations. (N.T. 569, 653, 696-697; C-19)

31. The flow of the discharge was between 2 and 4 gallons per minute (gpm) on June 17, 1992. (N.T. 564) Butler flagged the area where he collected the sample of the discharge, using his May 7, 1992 sampling location. (N.T. 564-566) The laboratory analysis report for this sample no. 4419227 is reflected in Exhibit C-6. (N.T. 561, 564, 591)

32. On June 24, 1992, the flow at the discharge was between 1 and 2 gpm. (N.T. 565) Butler collected a sample of the discharge using his May 7, 1992 sampling location; exhibit C-7 is the laboratory analysis report (no. 4419238). (N.T. 565, 591)

33. In June of 1992, Butler observed an artesian discharge bubbling up through the bottom of the vertical culvert pipe, which was corroded and full of holes. (N.T. 586)

34. James Fetterman ("Fetterman") is a surface MCI who had been employed by DER for a year and a half at the time of the merits hearing. He first accompanied Butler to Little Beth because he was the MCI assigned to inspect the site while Butler was hospitalized. (N.T. 565, 606-608, 610)

35. On his first visit to Little Beth in the summer of 1992, Fetterman observed the vertical culvert pipe on the south side of T-605 and the water discharge from the north end of the horizontal culvert pipe on the north side of T-605. (N.T. 610)

Hamilton's Filling of the Culvert with Concrete

36. In June of 1992, representatives of DER held an informal meeting with

Hamilton and the existence of the T-605 discharge and possible compliance issues were discussed. (N.T. 580, 655)

37. A second meeting was held between DER and Hamilton on July 17, 1992 to discuss compliance issues relating to the T-605 culvert discharge. (N.T. 654) Allan Walker, Dave Crula, and Ken Maney were present on behalf of Hamilton, and Michael Smith represented DER. (N.T. 655)

38. Michael Smith ("Smith") is the District Mining Manager at DER's Hawk Run District Office. Smith testified as an expert in hydrogeology on behalf of DER. (N.T. 647-651; C-20)

39. At the July 17, 1992 meeting, Hamilton indicated that it had filled the vertical culvert pipe with concrete and that this would abate the discharge. (N.T. 655) The discharge was not flowing at the time of this meeting. (N.T. 658)

40. Smith indicated to Hamilton that if the discharge should resurface, Hamilton was responsible for treating it since it was an "on-permit" discharge; Hamilton agreed to do so. (N.T. 655)

41. Hamilton indicated at the July 17, 1992 meeting that it believed the source of the T-605 discharge was mine drainage entering Hamilton's backfill from off-site mine spoils on the north side of T-605 left from previous mining there. Hamilton proposed construction of a "grout curtain" parallel to T-605 to prevent this water flow from infiltrating Hamilton's site. (N.T. 656-657)

42. DER indicated to Hamilton that DER would have to approve any proposed grout curtain. (N.T. 657-658)

43. On approximately July 20, 1992, Fetterman observed the vertical culvert pipe had been filled with concrete on its end and the horizontal culvert pipe beneath T-605 was also filled in with concrete. (N.T. 613) Water was flowing out onto the surface from below the concrete which had been poured into the

horizontal culvert pipe's end on the north side of T-605. (N.T. 613-614) On a prior visit on July 15, 1992, Fetterman observed that the vertical culvert pipe had not been filled in with concrete. (N.T. 611-612)

44. Smith sent Hamilton a letter, dated July 21, 1992, stating that if the discharge were to resurface, Hamilton would treat it based on their agreement at the July 17, 1992 meeting. (N.T. 655-656)

45. Hamilton's Dave Crula responded a month later, stating that it was Hamilton's understanding that it would treat or abate the discharge if it resurfaced. (N.T. 655-656)

46. Fetterman collected a sample of the discharge ten feet beyond the cement at the northern end of the horizontal culvert pipe on July 24, 1992 ("toe of spoil discharge #1"). The sample analysis report and laboratory analyses for this sample (no. 4454103) is Exhibit C-8. (N.T. 608; C-8)

Hamilton's Construction of the "New Culvert"

47. On July 30, 1992, Fetterman observed Hamilton employees removing the concrete-filled culvert pipes with heavy equipment, starting north of T-605 and working southward. (N.T. 615) When this removal stopped because Hamilton encountered and broke a "city water" line, Fetterman left. When he returned, he observed that Hamilton had completely removed the horizontal culvert pipe. He then observed Hamilton dig out the vertical culvert pipe, clean the drain out, and install a limestone underdrain approximately two feet thick. Hamilton then installed a new horizontal culvert pipe across this limestone underdrain and filled in the paved road. (N.T. 615-618)

48. The original horizontal culvert pipe was made of steel, while the new horizontal culvert pipe is approximately two feet in diameter and is plastic. (N.T. 600)

49. As seen from north of T-605, the new horizontal culvert pipe runs approximately three feet below the surface of T-605, whereas the original horizontal culvert pipe ran approximately four feet below the road's surface. (N.T. 599, 635, 735, 749)

50. When Hamilton was installing the new horizontal culvert pipe, Fetterman observed water flowing from the south side of T-605 toward the north side of T-605. This water was coming from the direction of the vertical culvert pipe, and Fetterman observed it was coming from the backfill there. (N.T. 624, 635-639)

51. After Hamilton placed this new horizontal culvert pipe beneath T-605, water began to emanate from the limestone underdrain on the north side of T-605. (N.T. 618)

52. Fetterman continued to sample this discharge from the limestone underdrain on the north side of T-605. (N.T. 618) The sample analyses reports and accompanying laboratory results for his sampling are found at Exhibits C-9 (July 31, 1992, sample no. 4454125); C-10 (August 20, 1992, sample no. 4454160); C-11 (August 27, 1992, sample no. 44541267); C-12 (September 3, 1992, sample no. 4454194); C-13 (September 17, 1992, sample no. 4454200); and C-14 (September 23, 1992, sample no. 4454218). (N.T. 629-634) Each of these samples (except Exhibit C-9) exceeded the parameter for iron at 25 Pa. Code §87.102. (N.T. 640) Sample no. 4454125 (Exhibit C-9) indicates treated acid mine drainage. (N.T. 679, 688)

53. Between July 24, 1992 and September 23, 1992, the only flow Fetterman observed was coming out of the limestone underdrain and was pooled at the end of the new culvert pipe; it then flowed through the red stained area. (N.T. 619-620)

54. The portion of the videotape Exhibit C-19 taken by Butler on September 23, 1992 shows the T-605 discharge area and the area of dead vegetation after

Hamilton had installed the new limestone underdrain beneath T-605. (N.T. 571, 618; C-19) On September 23, 1992, water flowed out of the limestone underdrain below T-605 to a channel made by previous flow, then northward to I-80. (N.T. 572-573, 576-577, 589) No water was flowing through the new horizontal culvert pipe itself, however. (N.T. 576) This September 23, 1992 portion of Exhibit C-19 is a fair and accurate representation of Butler's observations at the site that day. (N.T. 577)

Hamilton's Plan For Treating the Discharge

55. DER advised Hamilton that the T-605 culvert discharge had begun to flow again and advised Hamilton that it must submit to DER a plan for treating the discharge. (N.T. 659)

56. DER received Hamilton's plan on September 4, 1992. This plan contained two elements. The first element was for collection of the discharge, using a sump excavated on the south side of T-605, and for treatment through a conventional acid mine drainage treatment system. The second element was for construction of a grout curtain in the backfill to abate the discharge before installing the treatment system, and if this was unsuccessful, then to treat the discharge. (N.T. 659-660)

57. Hamilton's plan proposed a grout curtain which would run perpendicular to T-605. (N.T. 660-661)

58. Smith did not agree with Hamilton's theory that the source of the discharge was old spoils off Hamilton's SMP site on the north side of T-605. (N.T. 661-663)

59. Smith concluded the proposed grout curtain would not serve the intended purpose of preventing off-site water from entering Hamilton's backfill and would only redistribute the groundwater that was already in the backfill. (N.T. 661)

60. Smith informed Hamilton's Mr. Maney that DER was rejecting Hamilton's grout curtain plan but approving its treatment proposal. (N.T. 666-667)

61. Smith concluded that the T-605 culvert discharge was an on-permit discharge as to the Little Beth SMP based on the initial discharge which flowed into the vertical and horizontal culvert pipes which conveyed surface water from Little Beth. (N.T. 668, 671, 682)

62. Smith first became aware of the T-605 culvert discharge in May of 1992 by Butler's May 7, 1992 inspection and also through Barnes, who was investigating the seepage problem at the basement of Evelyn Cowder's residence near the Little Beth SMP. (N.T. 651-653)[5]

63. Barnes was reviewing the Cowder seepage problem and investigating the general hydrogeology of the Little Beth SMP, reporting directly to Smith, while investigation of the T-605 culvert discharge was taking place simultaneously. (N.T. 662-664)

64. Smith concluded that the original discharge flowed to the vertical culvert pipe on the south side of T-605, within Hamilton's SMP area. Although the discharge is now coming out on the north side of T-605 and off the Little Beth SMP site, Smith concluded it is the same discharge as the original discharge which has moved because of Hamilton's culvert restoration work. He also opined the discharge emanating on the north side of T-605 is hydrologically connected to the area Hamilton mined. (N.T. 668, 670)

DER's Order to Hamilton

65. DER's September 24, 1992 order requires Hamilton to treat the discharge

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[5]The Evelyn Cowder basement seepage problem is the subject of a separate appeal, Al Hamilton Contracting Co., Inc. v. DER, EHB Docket No. 92-471-E, in which Hamilton challenged DER's issuance of a groundwater study order to it relating to Little Beth and Evelyn Cowder's seepage problem.

emanating from the limestone underdrain beneath the horizontal culvert pipe. (B-1) It rejects Hamilton's abatement plan (which proposed using a grout curtain), and approves a portion of Hamilton's treatment plan while disapproving a portion of the treatment plan which pertains to Hamilton's proposed grout curtain. (N.T. 667; order attached to notice of appeal)

66. Hamilton can submit a new grout curtain proposal to DER if Hamilton believes it will aid in permanently abating the discharge or reducing the amount of water Hamilton will have to treat. (N.T. 667; order attached to notice of appeal)

Hydrologic Connection Between Little Beth and Culvert Discharge

67. Barnes testified as an expert in hydrogeology on behalf of DER. (N.T. 692; C-21)

68. Barnes first investigated the T-605 culvert discharge when he was investigating the basement seepage problem at Evelyn Cowder's property. Evelyn Cowder's property is located in the same hollow (Cowder Tributary Hollow) through which the T-605 culvert discharge runs, farther northwest. (N.T. 698, 700)

69. The hydrogeology in both this matter and the Evelyn Cowder seepage problem investigation is the same, since both involve the hydrogeology of the Little Beth SMP. (N.T. 694)

70. Barnes reviewed the T-605 culvert discharge in order to understand what had occurred on the northwestern portion of the Little Beth mine site (south of the culvert discharge) in connection with the Evelyn Cowder seepage problem. (N.T. 707-708)

71. Barnes performed a field review and a review of all local geologic information to determine where the coal seams were located on Little Beth. (N.T. 710) Barnes also reviewed Hamilton's mining on the Little Beth SMP. (N.T. 720-

721)

72. Barnes reviewed the Pennsylvania Geological Survey Atlas for the area of the Little Beth site; this included a stratigraphic section for this area. (N.T. 716) He also reviewed the Operation Scarlift report for the area. (N.T. 717)

73. The two coal seams Hamilton mined on Little Beth were the Lower Kittanning and the Middle Kittanning. (N.T. 711)

74. Surface mining by an undisclosed party took place north of T-605 (represented on Exhibit C-2 as stippled areas) on the Lower Kittanning coal seam during the 1950s and did not extend south of T-605. (N.T. 719) Additional surface mining by an undisclosed party occurred prior to 1961 south of the culvert discharge and during the 1960s on the hill south of the culvert discharge, at the elevation of the Middle Kittanning coal seam. This area south of the T-605 culvert discharge was stratigraphically higher than the T-605 culvert discharge. (N.T. 717, 720)

75. No mining occurred beneath T-605; that area is intact strata. (N.T. 723)

76. The outcrop[6] of the Lower Kittanning coal seam, which is indicated in blue on Exhibit C-2, is near the T-605 culvert. (N.T. 711) The outcrop of the Middle Kittanning coal seam is south of T-605 on the Little Beth SMP and is indicated in pink on Exhibit C-2. Its outcrop is at an elevation approximately 50 feet higher than the Lower Kittanning coal seam. (N.T. 713)

77. The drill hole information from the Little Beth permit application and the drill hole information collected when construction of I-80 was proposed

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[6]The outcrop or crop line of a coal seam is defined as "[t]he exposing of ... strata projecting through the overlying cover of detritus and soil." Environmental Engineering Dictionary, C.C. Lee, Ph.D.

indicates that the coal seam mined north of T-605 (on which I-80 is built) is the same seam which Hamilton mined in the northern portion of Little Beth below the elevation of T-605 (the Lower Kittanning). (N.T. 710)

78. Based on the information submitted by Hamilton which indicated highwalls in the northern portion of the Little Beth SMP (N.T. 709-710) and his field investigation, Barnes concluded Hamilton mined below the original ground surface to reach the Lower Kittanning coal seam. (N.T. 709-710, 717-718)

79. Hamilton's highwall on the Lower Kittanning coal seam would have been toward the south, into a hill. The "highwall" indication on Exhibit C-2 indicates this highwall, while Hamilton's lowwall lies against T-605, toward the north. (N.T. 723)

80. Hamilton's mining formed a triangular boxcut,[7] upgradient of the T-605 discharge, with its northern boundary running west to east and its southwest boundary running northwest to southeast. (N.T. 709, 721, 726)

81. The Brookhart Report, submitted by Hamilton to DER in September of 1992, contained detailed geologic information concerning the section of T-605 that was proposed to be relocated, the proposed gradeline of the relocated T-605, the survey of the original ground surface along that grade line, the proposed locations of culverts, a cross section of the proposed relocation of T-605, and a planned view of the area where the T-605 culvert discharge is located. (N.T. 703, 715, 729)

82. Based on the road construction plans in the Brookhart Report, there was an eight foot difference in elevation between the original ground surface and the surface of T-605. (N.T. 732-733) These plans show the T-605 horizontal culvert

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[7]A boxcut is a mining cut confined by a low wall, side walls, and a high wall. (N.T. 798)

was to be located at the old stream channel. (N.T. 732-734)

83. According to the Pennsylvania Geological Survey maps and the Brookhart Report, the regional dip of the Little Beth SMP area is to the northwest. (N.T. 718) The orientation of the pit floor of the area of the Lower Kittanning coal seam Hamilton mined on the northern portion of Little Beth would be in the west, northwest direction of the dip.[8] (N.T. 711, 726)

84. The direction of the groundwater flow on the mine site would be in the direction of the dip, toward the west, northwest, and toward the boxcut. (N.T. 722, 797)

85. It is Barnes' theory that as water migrates along the pit floor to the west, northwest, it travels to the boxcut, which has no free outlet. This water saturates the spoil there. In periods of great precipitation, the boxcut forms an underground dam, with the groundwater eventually developing a head and overflowing. This overflow travels to the lowpoint in original ground surface in northwestern corner of Little Beth, which is the area of the old stream channel. (N.T. 726-728)

86. Since the T-605 culvert discharge is located where the old stream channel intersects the relocated portion of T-605, Barnes' theory is consistent with the T-605 culvert discharge's existence. (N.T. 728-729)

87. There is a hydrologic connection between the T-605 culvert discharge and Hamilton's mining on Little Beth. (N.T. 730)

88. If the Lower Kittanning coal seam's outcrop is to the south of T-605 and southwest of the old stream, although there would be no boxcut dam, the discharge would be drainage directly from the coal seam's cropline. (N.T. 772-

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[8]Strike and dip show the orientation of the bottom of the geological strata. (N.T. 797)

774, 795-796) Any drainage from mine spoil upgradient of the old stream channel would flow to the low point or the old stream channel, beneath the fill and along the original ground surface where the culvert discharge is located. (N.T. 795-796) This flow would be intermittent, and would flow during periods where there is great precipitation or snow melt. (N.T. 796)

89. The discharge as it existed prior to Hamilton's filling of the old culvert system with cement and installation of the new T-605 culvert, and the culvert restoration work has caused that discharge to flow below the horizontal culvert pipe, at the elevation of the original ground surface, rather than through the horizontal culvert pipe. (N.T. 730-731)

90. Barnes collected a sample of the discharge from the horizontal culvert pipe (sample no. 4402526) on June 4, 1992, prior to the culvert restoration work. (N.T. 705; C-5) He also collected samples of the discharge as it flowed across the limestone bed underdrain in October of 1992 and April of 1993. (N.T. 705-706; C-15, C-16, C-17)

91. The laboratory analyses of Barnes' samples collected after the culvert restoration project was completed show the discharge did not comply with the parameters contained in 25 Pa. Code §87.102. (N.T. 793-794; C-15, C-16, C-17). The sample of discharge collected by Fetterman immediately after installation of the horizontal culvert pipe on July 31, 1992 (with a limestone underdrain beneath it) was the only sample which complied with the parameters at 25 Pa. Code §87.102. (N.T. 640-641, 738-740; C-9)

92. The laboratory analyses of the sampling conducted by Butler and Fetterman prior to installation of the new horizontal culvert pipe and Barnes' June 4, 1992 sample indicate the water quality was acidic, the iron concentration was very high, and the manganese and sulfate concentrations were high. (N.T.

738-739)

93. The laboratory analyses for the samples collected after the limestone underdrain and new horizontal culvert pipe were installed show that the alkalinity went from zero to a significant level and that the iron concentration went down, which indicates that at first, the limestone in the underdrain was treating the discharge. (N.T. 739) The rising iron concentrations and dropping alkalinity levels exhibited in the more recent sample analyses show that the limestone underdrain is no longer effective in treating the discharge because the limestone has become armored with iron precipitate. (N.T. 740-741)

94. The T-605 discharge was acid mine drainage both before the vertical culvert pipe was filled with concrete and after it was removed. (N.T. 740)

DISCUSSION

There is no question that where DER has issued an order to Hamilton to take affirmative action to abate water pollution, DER bears the burden of proving it did not abuse its discretion or commit an error of law in issuing this order. See Al Hamilton Contracting Co. v. DER, et al., EHB Docket No. 84-187-W (Consolidated Docket) (Adjudication issued November 24, 1993); 25 Pa. Code §21.101(b)(3). Hamilton bears the burden of proving any affirmative defenses it raises. Davis Coal v. DER, 1991 EHB 1908; 25 Pa. Code §21.101(a). The Board's scope of review is *de novo* in cases in which DER has acted within its discretionary authority. Our duty is to determine whether DER's action is supported by the evidence before us, not the evidence DER had before it at the time it made its decision. Al Hamilton, *supra*; Warren Sand and Gravel Co., Inc. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975).

Hamilton's Liability Under SMCRA

Section 4.2 of the SMCRA, 52 P.S. §1396.4b(a), provides DER with the

authority to enforce the provisions of the SMCRA and the rules and regulations promulgated thereunder. Section 4.3 of the SMCRA, 52 P.S. §1396.4c, also provides that DER may issue such orders as are necessary to aid in the enforcement of the provisions of the SMCRA. Likewise, DER is authorized by 25 Pa. Code §86.213 to issue such orders as are necessary to aid in the enforcement of SMCRA or regulations promulgated pursuant thereto. Further, section 87.102 of 25 Pa. Code states that a person may not allow a discharge of water from an area disturbed by coal mining activities, including areas disturbed by mineral preparation, processing or handling facilities, which exceeds the effluent limitations set forth in that regulation. A mine operator is required to comply with section 87.102. See 25 Pa. Code §87.207.

The evidence establishes that Hamiltons' mining on its Little Beth SMP site is producing and discharging acid mine drainage which is flowing to the north side of T-605 and emanating as the T-605 culvert discharge, and that this discharge does not comply with the parameters at 25 Pa. Code §87.102.

Scott Barnes testified as an expert in hydrogeology on behalf of DER. He investigated the hydrogeology of the northwestern area of the Little Beth SMP area in connection with a seepage problem at the nearby Evelyn Cowder residence which is the subject of an appeal at Docket No. 92-471-E. Barnes opined that the hydrogeology in both this matter and the Evelyn Cowder seepage matter is the same, since both involve the hydrogeology of the northwestern area of the Little Beth SMP. Hamilton has introduced no evidence to establish that Barnes' opinion is not sound as to this conclusion.

DER's MCI David Butler first observed water flowing in the vertical culvert pipe on the south side of T-605 on May 7, 1992. Water was flowing into the vertical culvert pipe on its south side (or Little Beth side) through a hole

located midway down it. The bottom of the vertical culvert pipe was linked to a steel horizontal culvert pipe which ran beneath T-605 to the north side of T-605. Water then discharged from the horizontal pipe on the north side of T-605 where Butler had previously noticed red staining on the ground and the dead vegetation. Butler did not observe any other flow going into the vertical culvert pipe nor did he observe any artesian effects in the vertical culvert pipe that day. Because he was unable to remove the grate over the vertical culvert pipe, the first place Butler was able to collect a sample of the discharge was on the north side of T-605. He continued to collect samples there on a weekly basis. On June 24, 1992, when Butler sampled the T-605 discharge, he noted an artesian effect bubbling up through the bottom of the vertical culvert pipe, which was corroded and full of holes.

DER's MCI Fetterman, who assumed Butler's inspection duties for Little Beth in the summer of 1992, observed that the vertical culvert pipe had been filled with concrete on both ends and that the horizontal pipe beneath T-605 was also filled in with concrete on his July 20, 1992 inspection, but had not been filled in on his July 15, 1992 inspection. Hamilton indicated to DER at a July 17, 1992 meeting that it had filled the vertical culvert pipe with concrete. On July 20, 1992, Fetterman observed that water was flowing below the concrete poured on the north side of T-605. Fetterman collected a sample of the discharge ten feet beyond the cement at the northern end of the horizontal culvert pipe on July 24, 1992.

On July 30, 1992, Fetterman observed Hamilton employees removing the concrete from the culvert and the horizontal and vertical culvert pipes. He also observed Hamilton installing a two-foot limestone underdrain in the culvert beneath T-605 on which the new two foot diameter plastic horizontal culvert pipe

was laid. The new horizontal culvert pipe runs approximately three feet below the road surface, whereas the old pipe ran four feet below the road surface. Fetterman observed water flowing from the south side of T-605 toward the north side of T-605 when Hamilton was installing the new culvert. This water was coming from the backfill in the direction of the vertical culvert pipe. After Hamilton placed the new culvert beneath T-605, water flowed from the limestone underdrain on the north side of T-605; Fetterman continued to sample the discharge at this point. After this sampling point, the discharge flowed through the same red stained area. As shown on the videotape taken on September 23, 1992, the water then flowed north to the eastbound lane of I-80.

Based on the Brookhart Report submitted to DER by Hamilton, Barnes opines that the culvert was placed in the area where an old stream channel, which formerly ran from the northwest portion of the Little Beth SMP toward Valley Fork Run, crossed T-605. Barnes reviewed geologic information for the area, the Pennsylvania Geologic Survey Atlas, Hamilton's SMP application for Little Beth, previous mining in the area, and information submitted to DER by Hamilton (including the Brookhart Report) in September of 1992. He also conducted a field review, and reviewed topographical maps and aerial photographs for the area. He concluded that some strip mining had taken place in the 1960s on the Middle Kittanning coal seam to the south of the T-605 culvert discharge and that no mining had occurred beneath T-605, as that area is intact strata. Barnes also concluded that mining occurred north of T-605 on the Lower Kittanning seam during the 1950s and did not extend south of T-605. Barnes concluded Hamilton had mined on Little Beth the same coal seam which had previously been mined to the north of T-605 and on which I-80 was later built.

The drill hole information from the Little Beth SMP application and the

Brookhart Report led Barnes and now this Board to conclude that the coal seam mined north of T-605 is located below the elevation of T-605 in the area south of T-605. This information also showed the proposed grade line of T-605 (as relocated) and the original ground surface and proposed culverts. Barnes determined that Hamilton mined below the elevation of T-605 and below the surface of the original ground to reach the first coal seam south of T-605 on its Little Beth SMP, which lies south of T-605. Barnes further determined that Hamilton's highwall would have been to the south, into the hill just south of the T-605 culvert discharge, on the Lower Kittanning coal seam. He opines that Hamilton's lowwall would have been against T-605, toward the north. He thus concluded that Hamilton's mining formed a triangular-shaped boxcut upgradient of the T-605 discharge which was confined to the north and southwest. We find this logic sound. Clearly, if Hamilton went below the surface to mine the coal but did not mine to the coal's cropline north of T-605, the mining created a lowwall (with the mine's high wall at the point of highest elevation into the hillside to the south on Little Beth as shown on Exhibit C-2).

It is Barnes' opinion that the orientation of the pit floor of the lowest coal seam Hamilton mined on the northern portion of Little Beth would be in the west, northwest dip direction there. He opines that water leaks in this area to the Lower Kittanning seam and the pit floor. Barnes concludes that precipitation reaching the pit floor would provide recharge to the groundwater system, and that the flow of groundwater along the pit floor is toward the west, northwest toward the boxcut area in the northwestern portion of the Little Beth permit area. He opines that the groundwater travels to the boxcut, which has no free outlet, it forms an underground dam, and that this groundwater saturates the spoil and eventually accumulates and develops a head. He further opines that if the amount

of flow reaching the northwestern corner is significant, it would overflow and discharge along the original ground surface, which is presently covered by spoil and fill. Barnes then reasons that as and when the boxcut overflows, the discharge travels to the lowpoint in the area, which is the old stream channel which is presently covered by backfill. Since the T-605 discharge was located where the old stream channel intersects the relocated portion of T-605, Barnes believes his theory is consistent with the T-605 culvert discharge's existence. We agree.

Based on the plans in the Brookhart Report, Barnes determined that the T-605 culvert was to be placed at the old stream channel's elevation and that there was an eight foot difference between the higher elevation of the original ground surface and the higher elevation of the surface of T-605. He concluded that before any mining was conducted in the area, surface water runoff traveled directly to the culvert's inlet at the south side of T-605, at the base of the southern embankment of T-605, and then out the other side of the culvert. The culvert was located at the approximate location where the old stream channel had crossed T-605; thus, Barnes believes it would have conveyed any flow into the original stream channel. Barnes concluded that after Hamilton mined and backfilled the area, fill was placed up to the elevation of T-605 and the vertical riser pipe was installed in order to convey surface runoff northward through the culvert. It is Barnes' expert opinion that a hydrogeologic connection existed between the T-605 culvert discharge (as it existed prior to the T-605 culvert restoration work in the summer of 1992) and Hamilton's Little Beth mine site, and that the discharge has simply re-established itself on the north side of T-605 because of this culvert restoration work. DER's District Mining Manager Michael Smith, who formerly was a DER hydrogeologist and who

testified as an expert in hydrogeology on behalf of DER, agrees with Barnes' opinion.

Barnes' review of the laboratory analyses of the sampling of the water discharging from the T-605 culvert discharge conducted by Butler and Fetterman indicates that the discharge was acid mine drainage both before the culvert pipe was filled with concrete and after it was removed. The results of the laboratory analyses of the water quality sampling of the T-605 discharge collected immediately after the limestone underdrain and new culvert were installed showed a rise in the alkalinity to a significant level and a decrease in the iron level, indicating that at first, the limestone in the underdrain was treating the discharge. The sample of the discharge collected immediately after the culvert restoration work is the only sample which complied with the parameters at 25 Pa. Code §87.102; the remainder of the samples collected after the culvert restoration project was completed show the discharge did not comply with the parameters at §87.102. Barnes opines that the rising iron concentrations and dropping alkalinity levels exhibited in the more recent sample analyses show that the limestone has become encrusted with iron precipitate and is no longer effective in treating the discharge. We were offered no evidence to rebut this conclusion and find the reasoning behind it to be sound.

Hamilton argues that Barnes' expert hydrogeologic opinions should be stricken from the record because they are based on factual matters not in evidence. Specifically, Hamilton asserts that Barnes relied on the PennDOT map sections for the relocation of T-605 (marked as Exh. A-3 but not introduced); PennDOT construction maps for I-80 (marked as Exh. A-4 but not introduced); the Brookhart Report; and the Operation Scarlift Report for the Abatement Area Q of the Clearfield Creek watershed and a map attached thereto (marked as Exh. A-1 and

A-2 but not introduced). Hamilton then claims that Barnes relied on the Brookhart Report to determine the coal seams mined and the geology of the area, and for the location of the tributary hollow where he says the culvert is located. Hamilton asserts that the Brookhart Report was also the basis for Barnes' opinion regarding the boxcut forming an underground dam with overflow to the old stream channel and that the culvert is located in the old tributary hollow. Hamilton then re-raises its motion to strike Barnes' expert opinions which Board Member Ehmann denied at the merits hearing (N.T. 818). In its post-hearing brief, Hamilton, *inter alia*, cites Collins v. Hand, 431 Pa. 378, 246 A.2d 398 (1968), for the proposition that an expert will not be permitted to guess or state a judgment based on mere conjecture.

With regard to the necessity for an expert to base his opinion on facts of record, the Superior Court stated in In Re Glosser Bros., Inc., 382 Pa. Super. 177, 555 A.2d 129 (1989):

> The rule that restricts the basis for an expert's opinion to facts properly of record is grounded in the view that while an expert may have a particular expertise in judging the consequences attendant upon a certain factual matrix, or the causes therefor, or the significance thereof, he cannot base this expert judgment on conjecture concerning those facts. Collins v. Hand, *supra*. However, courts have now begun to recognize that there are situations where the source of factual material relied upon by an expert is not admitted and/or admissible in evidence but is nevertheless not the product of mere conjecture by the expert. It is rather the type of source material the expert reasonably would rely on in forming his expert opinion. Thus, many courts have begun to liberalize their view as to the permissible underpinnings of expert testimony.

Id. at ____, 555 A.2d at 140.

The Commonwealth Court, in Milan v. Commonwealth, DOT, 153 Pa. Cmwlth. 276,

620 A.2d 721 (1993), addressed the question of when an expert may rely on reports of others which are not admitted into evidence. The Milan Court stated:

> [O]ur courts have held that experts, by necessity, may rely on the reports of others, not admitted into evidence. See Commonwealth v. Thomas, 444 Pa. 436, 282 A.2d 693 (1971) (a psychiatrist may base his opinion on reports which were not in evidence prepared by psychologists); Steinhauer v. Wilson, 336 Pa. Super. 155, 485 A.2d 477 (1984) (expert testified as to construction costs, basing his opinion, in part, on estimates not in evidence, which were provided by contractors); B.P. Oil Co., Inc. v. Delaware County Board of Assessment Appeals, 114 Pa. Commonwealth Ct. 549, 539 A.2d 473 (1988) (in appeals from tax assessment, valuation experts could rely upon information not offered in evidence); In re: Glosser Brothers, 382 Pa. Super. 177, 555 A.2d 129 (1989) (expert testimony on value of stock could be based on appraisals not admissible in evidence).

Id. at ____, 620 A.2d at 721. Further, the facts assumed by an expert need not be conclusively proven; it is sufficient if the evidence of record tends to establish these assumptions. Vernon v. Stash, 367 Pa. Super. 36, ____, 532 A.2d 441, 449 (1987).

We find Barnes' testimony and any assumptions he made regarding the coal seams mined by Hamilton, the geology of the area at and near the Little Beth mine site, the boxcut, and the existence of the old stream channel at T-605 were sufficiently based on facts of record. While the Brookhart Report and the Operation Scarlift Report were not admitted as exhibits, Barnes testified as to their contents in his testimony, and Hamilton had an opportunity to cross-examine him as to their contents. Further, it was Hamilton which submitted the Brookhart Report and the Operation Scarlift Report, as well as T-605 relocation information, to DER. The Brookhart Report, as well as the Operation Scarlift Report and the PennDOT maps were the type of information upon which a hydrogeologist would rely in forming his opinion. Finally, he also based his

conclusions on his own observations of this situation at T-605. We thus reject Hamilton's argument that we should strike Barnes' expert opinions as being without basis in facts of record.

Citing the "missing witness inference rule", Hamilton next contends that the failure of DER to call as a witness James Forcey, who was the DER inspector assigned to Little Beth prior to Butler, and DER's failure to introduce Forcey's May 24, 1982 inspection report (Exhibit AH-1) for the Little Beth mine site entitles Hamilton to an inference that the water discharging from the T-605 horizontal culvert pipe has been of poor quality since 1982 and that Hamilton is not responsible for the discharge. Forcey's inspection report indicates that in 1982, there was a leak (as opposed to a discharge) from Hamilton's treatment ponds to the roadside sewer and that he was suggesting that the ponds be checked for such leaks before they would be used again. (Exhibit AH-1)

The missing witness inference rule provides:

> When a potential witness is available to only one of the parties to a trial, and it appears this witness has special information material to the issue, and this person's testimony would not be merely cumulative, then if such party does not produce the testimony of this witness, the [factfinder] may draw an inference that it would have been unfavorable.

Commonwealth v. Carey, 295 Pa. Super. 293, 459 A.2d 389 (1983) (quoting Commonwealth v. Jones, 455 Pa. 488, 317 A.2d 233 (1974)).

In the present matter, Hamilton produced no evidence that Forcey was available only to DER. See Richardson v. La Buz, 81 Pa. Cmwlth. 436, 474 A.2d 1181 (1984) (if party wishes to benefit from negative inference, that party has burden to show clearcut inability to obtain the testimony of the witness). The negative inference is only permitted where the uncalled witness is peculiarly within the reach and knowledge of only one of the parties. Oweida v. Tribune-

Review Pub. Co., 410 Pa. Super. 112, 599 A.2d 230 (1991), appeal denied, 529 Pa. 670, 605 A.2d 334 (1992). Hamilton has failed to sustain its burden of showing Forcey was peculiarly within the reach and knowledge of DER. Clearly, Hamilton knew of his inspection report since it was introduced as an exhibit on behalf of Hamilton, yet Hamilton has not shown that it made any attempt to call Forcey as a witness and that he was available to DER but not Hamilton. Thus, on the basis of the foregoing case law, Hamilton is not entitled to any negative inference from DER's failure to call Forcey.

As to DER's failure to introduce Forcey's May 24, 1982 inspection report into evidence, the rule in Pennsylvania is: "where evidence which would properly be part of a case is within the control of the party whose interest would naturally be to produce it, and, without satisfactory explanation he fails to do so, the [factfinder] may draw on inference that it would be unfavorable to him." Beers v. Muth, 395 Pa. 624, 151 A.2d 465 (1959); Pagnotti Enterprises, Inc. d/b/a Tri-County Sanitation Co. v. DER, et al., EHB Docket No. 92-039-E (Adjudication issued July 7, 1993). Hamilton has not shown us that Forcey's inspection report would properly be part of DER's case here, as it deals with leakage in 1982, from Hamilton's treatment ponds (which Hamilton removed in 1984 because they did not have the volume required by the Little Beth SMP). (N.T. 837-838, 840-843) Thus, we will not draw the inference that DER did not introduce Forcey's inspection report because it would have been unfavorable to DER.[9] Accordingly, we reject Hamilton's argument that we should draw an inference that the water discharging from the culvert has been of poor quality since before 1982.

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[9]We note that in making this ruling, we are not passing on what Exhibit AH-1 establishes insofar as the series of inferences Hamilton is asking us to draw from that document.

Hamilton also contends that DER has failed to establish a hydrologic link between the Little Beth site and the culvert discharge.[10] Hamilton attacks Barnes' opinion because it is based on the hydrogeologic study he did in connection with the Evelyn Cowder basement seepage problem, contending that his use of the same study for both problems is an unscientific approach. Hamilton asserts that testimony by Butler, Barnes, and James McNeil (who testified on behalf of Hamilton), and Forcey's inspection report all indicated there were times when water flowed in the culvert and times when it did not, but "no one tied the flow to rain events which is what is necessary to support either theory put forth by Mr. Barnes." Hamilton then contends that McNeil's testimony, that there was flow in the culvert when it was not raining and which was not associated with stormwater flow (N.T. 876), eliminates Barnes' theories as to the source of the water in the culvert. Hamilton argues, "[I]t is an equally well believed proposition that the culvert discharge has existed from before 1982; has exhibited poor water quality; is not solely responsive to precipitation events, and is, therefore, not connected to the Little Beth Mine Site." (Post-Hearing Brief of Hamilton at p.17)

Barnes testified that he first investigated the T-605 culvert discharge when he was investigating the basement seepage problem at Evelyn Cowder's property, which is located in the same hollow through which the culvert discharge runs but at a point farther northwest. It is Barnes' opinion that the hydrogeology in both this matter and the Evelyn Cowder Seepage problem

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[10]To the extent that Hamilton argues DER's order must be supported by "substantial evidence," citing A.H. Grove, *supra*, 452 A.2d at 588, we point out that DER's order must be supported by a preponderance of the evidence according to 25 Pa. Code §21.101(a) In Grove, it was the Board's findings which had to be supported by substantial evidence. See Department of Environmental Resources v. Borough of Carlisle, 16 Pa. Cmwlth. 341, 330 A.2d 293 (1974).

investigation is the same, since both involve the hydrogeology of the Little Beth SMP. Hamilton produced no evidence to support its assertion that Barnes' reasoning is illogical and unscientific on this point. Further, as it is Hamilton which is attempting to dispel Barnes' theories and is asserting that other possibilities as sources exist for the culvert discharge aside from the Little Beth SMP site, it is Hamilton which bears the burden of proving these other possible sources exists and are responsible for the discharge and not Little Beth. 25 Pa. Code §21.101(a). It presented no expert testimony of its own, however, to explain how the assertion Hamilton makes in its brief, that if there were discharges from the culvert at times when it was not raining and there was no stormwater flow, destroys Barnes' expert opinion.

Even without Barnes' conclusions, however, we would still have concluded that the culvert discharge is coming from the area Hamilton affected by its mining. The evidence shows that the northern boundary of the Little Beth SMP was the southern right-of-way of T-605. T-605 has a 33 foot right-of-way, which would measure 16½ feet from the center line to the southern side of the road. Hamilton obtained a variance from Bradford Township to conduct its mining activities within the 100 foot road barrier area outside the T-605 southern right-of-way. The evidence before us shows that Hamilton conducted mining activities on Little Beth at least as close to the paved portion of T-605 as the T-605 right-of-way. Hamilton constructed barriers along the southern T-605 right-of-way which remained in place while it mined southward of these barriers and until it reclaimed the actual mine site.

Before Hamilton conducted mining in the area, surface water runoff flowed into the horizontal culvert pipe at its inlet on the south side of T-605, at the base of the southern embankment of T-605, and then flowed out the northern side

of the culvert pipe. The culvert ditching system conveyed any flow into a stream channel formed by a stream which formerly ran from the northwest portion of the Little Beth SMP toward Valley Fork Run. After Hamilton mined and backfilled the northern Little Beth area, fill was placed there which covered the inlet to the horizontal culvert pipe south of T-605. The vertical culvert pipe was installed in order to convey surface runoff into the horizontal culvert pipe then out of the pipe northward. The old stream channel south of T-605 was covered by backfill from Hamilton's mining. The evidence further shows that Hamilton filled the horizontal and vertical culvert pipes with concrete in late July of 1992, and on July 30, 1992, Hamilton removed the vertical and horizontal culvert pipes and installed a new horizontal culvert pipe and a limestone underdrain beneath T-605. The videotape which is Exhibit C-19 shows Hamilton conducted reclamation activities in the form of revegetating the area up to T-605 (and thus, prior to planting, backfilled and graded this area).

Our review of the videotape exhibit (C-19) shows the lay of the land, with the south side of T-605 at a substantially higher elevation than the area north of T-605. The flow which MCI Butler observed entered the vertical culvert pipe from a hole in its south side or its Little Beth operation side. There was no evidence of anything located between the mining activities connected with Little Beth mining operations and T-605 except the unpaved backfilled and revegetated portion of the right-of-way. Moreover, DER's MCI Fetterman observed the flow coming from the mine's backfill and traveling northward across T-605 from the vertical culvert pipe area when Hamilton was restoring the culvert. This observation is important evidence that the surface water flowed in the north direction from Little Beth to the area north of T-605. The fact that Fetterman observed this was backfill material also suggests mining activities were

conducted up to the edge of T-605. Hamilton presented no evidence the show that anything other than its Little Beth operation could be the cause of the T-605 discharge. We thus have no trouble concluding from the evidence that the acid mine drainage is flowing from an area disturbed by Hamilton's mining activities to the T-605 culvert discharge.

As we have found that the evidence in this matter shows that the water at the culvert discharge originates at Hamilton's Little Beth mine site, and exceeds the effluent criteria at 25 Pa. Code §87.102, Hamilton has failed to comply with sections 87.102, and 87.207 of 25 Pa. Code. DER's issuance of the order to Hamilton, thus, was authorized by §§4.2 and 4.3 of the SMCRA, and 25 Pa. Code §86.213. See North Cambria Fuel Company v. DER, 1992 EHB 394, aff'd, 153 Pa. Cmwlth. 489, 621 A.2d 1155 (1993), allocatur granted; Yenzi v. DER, 1988 EHB 643.[11] We accordingly make the following conclusions of law and issue the following order.

CONCLUSIONS OF LAW

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

2. DER bears the burden of proving it did not abuse its discretion or commit an error of law in issuing the order to Hamilton to take affirmative action to treat the culvert discharge. Al Hamilton Contracting, *supra*; 25 Pa. Code §21.101(b)(3).

3. Hamilton bears the burden of proving any affirmative defense it raises. Davis Coal, *supra*; 25 Pa. Code §21.101(a).

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[11]Where we find DER's order was appropriately issued pursuant to one of the bases in its order, we need not address its other bases for its order. Willowbrook Mining Company v. DER, 1992 EHB 303.

4. The Board's scope of review is *de novo*. Our duty is to determine whether DER's action is supported by the evidence before us, not the evidence DER had before it at the time it made its decision. Franklin Plastics, Warren Sand and Gravel, Inc., *supra*.

5. The Board does not strike the expert opinion of DER's expert hydrogeologist Scott Barnes, as we find his testimony was sufficiently based on facts of record. In Re Glosser Bros., Inc., *supra*; Milan, *supra*. The evidence of record tends to establish Barnes' assumptions. Vernon v. Stash, 367 Pa. Super. 36, ____, 532 A.2d 441, 449 (1987).

6. Hamilton failed to sustain its burden of showing its inability to obtain the testimony of DER inspector James Forcey. Commonwealth v. Carey, supra; Richardson, *supra*. Further, there was no showing that Forcey was peculiarly within the reach and knowledge of only DER. Oweida, *supra*. Thus, the Board does not apply the missing witness inference rule.

7. The Board does not draw a negative inference from DER's failure to introduce into evidence Forcey's May 24, 1982 inspection report that this report would be unfavorable to DER, as it has not been shown to properly be part of DER's case in this matter. Beers, *supra*; Pagnotti Enterprises. Thus, the Board does not draw an inference that the water discharging from the culvert has been of poor quality since before 1982.

8. DER has sustained its burden of proving that Hamilton's Little Beth mine site is producing and discharging acid mine drainage which is flowing to the culvert.

9. Hamilton failed to sustain its burden of proving there are sources for the polluted groundwater flowing to the culvert discharge area other than the Little Beth mine site.

10. DER's order was authorized by §§4.2 and 4.3 of the SMCRA, 52 P.S. §§1396.4b and 1396.4c, and §86.213 of 25 Pa. Code, which provide DER with the authority to enforce the SMCRA and the rules and regulations promulgated thereunder, as DER's evidence establishes that the water flowing from Little Beth to the culvert discharge exceeds the effluent criteria at 25 Pa. Code §87.102. North Cambria Fuel Company, *supra*; Yenzi, *supra*.

ORDER

AND NOW, this 10th day of August, 1994 it is ordered that the appeal by Al Hamilton Contracting Company at Docket No. 92-468-E is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: August 10, 1994

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

RICHARD P. BUTLER	:	
v.	:	EHB Docket No. 94-029-E
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and KERRY COAL COMPANY, Permittee	:	Issued: August 16, 1994

OPINION AND ORDER
SUR MOTION FOR SANCTIONS

By: Richard S. Ehmann, Member

Synopsis

Where a *pro se* appellant waits until six weeks before the merits hearing date to answer permittee's interrogatories as to his expert witnesses, fails to fully answer the interrogatories, and proposes in answers to interrogatories to call nine expert witnesses, a motion for sanctions will be granted. Where the appellant fails to answer the permittee's interrogatories as to disclosure of fact witnesses and the subject matter of their testimony until six weeks before trial, a motion for sanctions will be granted to the extent of requiring the interrogatories to be promptly reanswered.

OPINION

This appeal by Richard P. Butler ("Butler") challenges the Department of Environmental Resources ("DER") issuance of Surface Mining Permit No. 10930103 to Kerry Coal Company ("Kerry") for a mine site in Jackson Township, Butler County. In his Notice Of Appeal, Butler asks the Board to ignore his

procedural defects because he lacks counsel, and this we have done to some degree in the past. However, as we have stated before, *pro se* parties must be held to the same standards as parties represented by counsel where a party's lack of counsel impacts on the rights of the other parties. Roland Spivak v. DER, et al., 1992 EHB 1704; Rescue Wyoming, et al. v. DER, et al., 1993 EHB 772. Here, that is the case.

On March 2, 1994, Kerry filed interrogatories in this appeal which were addressed to Butler. They sought the identity of each expert Butler would call. As to each identified expert, the interrogatories sought the subject matter of the testimony (with identity of the studies, facts or reports relied upon), the substance of the facts the expert is expected to testify upon, and the substance of the expert opinions to be offered. Kerry's interrogatories also sought the identity of all fact witnesses to be called by Butler and the substance of each identified witness' testimony.

Butler filed an answer to these interrogatories indicating that he had not selected his experts yet. His March 28, 1994 response also identified 12 witnesses by address and phone number but summarized their testimony with brief statements like "road and bridge safety," "wetlands preservation issues and other conservation and environmental concerns," and "environmental issues." On June 24, 1994 when he was deposed, he again indicated he had not selected his experts, and though he desired to offer expert testimony at the merits hearing, none of his potential experts had agreed to testify in this capacity as yet.[1] Thereafter, the period in which the parties were to conduct discovery as spelled out in Pre-Hearing Order No. 1 and as extended

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[1]A copy of a portion of Butler's deposition is attached to DER's Response to Kerry's Motion For Sanctions. DER's Response supports the Motion.

several times ended, and on July 5, 1994, Butler filed his Pre-Hearing Memorandum.

Pre-Hearing Order No. 1 directs that each party's Pre-Hearing Memorandum is to contain the identity of his experts, a summary of their testimony and a list of the witnesses to be called in that party's case-in-chief.

Butler's Pre-Hearing Memorandum lists a State Representative as an expert, names 15 fact witnesses and adds 10 more persons who will be both fact and expert witnesses. A one sentence brief summary of the testimony of each expert is provided but these summaries are extremely general. For example, it is stated that Robert H. Burr will testify as to the soils types and proper surface mining activities. Clearly, this Pre-Hearing Memorandum fails to provide the substance of each expert's opinions and the sum of the facts and studies relied upon to form same as sought in the interrogatories. It also fails to specify what the fact witnesses will talk about in their testimony.

After the Board issued its Order directing that the merits hearing would begin on September 19, 1994 and Kerry filed its Motion For Sanctions, Butler responded to Kerry's Motion on August 12, 1994. Butler's response was a Supplemental Answer To Permittee's Interrogatories. These Supplemental Answers still fail to provide the substance of the experts' opinions and the facts and studies relied upon in forming them. In fact these Supplemental Answers are identical or virtually identical to the individual summaries of expert testimony in Butler's Pre-Hearing Memorandum. While an opinion expressed by each of four of Butler's nine experts are also provided, the opinions are only conclusory stated and we know not if these are their sole expert opinions. As to the fact witnesses, the Supplemental Answers identify

seven of them, but a summary of these individual's fact testimony is not included; rather, they are grouped as testifying about "mining operations" or "effect of mining operations, inability to hear blast siren."

Butler does not argue that Kerry is not entitled to answers to its interrogatories; instead he provides these supplemental answers as if they are adequate answers. These answers are inadequate. Kerry may ask, as it did, as to the substance of the facts relied upon or studies undertaken by Butler's experts to form the basis for their conclusions and also the substance of each conclusion which will be offered. When Butler is asked for this information, he must provide it on a witness-by-witness basis, just as he must summarize the fact testimony he expects to develop on a witness-by-witness basis. Clearly, Butler's Supplemental Answers fail to do this.

In his Supplemental Answers, Butler says he has no reports from his experts. However, it is no defense for Butler to say, "I cannot provide expert reports because my experts have not prepared them." Either he provides such reports when asked, in lieu of answering these interrogatories, or he answers the interrogatories in much greater detail. To require less allows Butler to control how much of this information Kerry may have access to, contrary to our rules on discovery.

In his letter dated August 10, 1994 sending us his Supplemental Answers, Butler urges that we ignore this situation and exercise our discretion under 25 Pa. Code §21.107(a) to hear "relevant and material evidence [these experts] of reasonable and probative value." This assertion misses the point. We may elect to hear such evidence, but that decision comes after discovery is completed so that Butler's opponents can apprise themselves of it and prepare rebuttal thereto. Here, Butler has thwarted discovery by

Kerry of the proofs he will offer to support his factual and legal assertions. It is that act which must be sanctioned by granting Kerry's Motion.

ORDER

AND NOW, this 16th day of August, 1994, it is ordered that Kerry's Motion For Sanctions is granted, and Butler is ordered by **September 2, 1994** to file reanswers to Kerry's interrogatories summarizing in substantially greater detail the fact testimony of each witness Butler will call. It is also ordered that by this same date Butler shall either file a complete expert's report for each individual expert witness he will call (which report shall be prepared by that expert) or shall (with the assistance of each of his proposed expert witnesses) prepare and file detailed answers to each of Kerry's interrogatories dealing with expert witnesses. It is further ordered that simultaneously with the filing of these reanswers and expert reports or new answers to the expert witness interrogatories, he must serve copies thereof in counsel for Kerry and DER. Butler is advised that upon his failure to comply with this order, if asked to do so by Kerry or DER, this Board will bar testimony from any expert or fact witness for whom Butler has not complied herewith.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: August 16, 1994

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M. DIANE SMITH
SECRETARY TO THE BOARD

SENECA LANDFILL, INC.	:	
v.	:	**EHB Docket No. 93-236-E**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 2, 1994**

ADJUDICATION

By: Richard S. Ehmann, Member

Synopsis:

An appeal from the Department of Environmental Resources' ("DER") insertion of a permit condition purportedly implementing Act 101 is sustained. Where DER, after enactment of Act 101 and regulations designed to implement this statute but prior to adoption of its policy on how to interpret these regulations, inserts a condition in a landfill permit limiting the wastes the operator may accept to a specific tonnage from three Pennsylvania counties but fails to impose a similarly restrictive condition on other landfill permits issued in this same period, imposition of this condition is arbitrary.

Background

On August 19, 1993, Seneca Landfill, Inc. ("Seneca") filed an appeal with this Board from the issuance, on July 20, 1993, by DER of Solid Waste Disposal and Processing Permit No. 100403 to Seneca to operate a landfill to be located in Jackson and Lancaster Townships in Butler County, Pennsylvania. Initially, Seneca challenged numerous portions of its permit. However, by the time the merits of this appeal came to be heard, agreements between DER and Seneca had reduced the issues remaining to Seneca's challenges to the inclusion of Condition

7 in the permit. (T-6)[1] These settled issues were addressed in part by the Partial Consent Adjudication approved by this Board's Order of November 30, 1993. We held a hearing on the merits of Seneca's appeal on January 25 and 26, 1994. Thereafter, the parties filed their Post-Hearing Briefs. With Seneca's Post-Hearing Reply Brief was its Motion To Strike, which is addressed below.

After that Reply Brief's filing on April 13, 1994 by Seneca, but before the adjudication of the merits of this appeal, Seneca sent the Board a copy of C & A Carbone, Inc. v. Town of Clarkstown, New York, 511 U.S. ___, 114 S.Ct. 1677 (1994) ("Carbone"). In response, we ordered the parties to advise us by June 8, 1994 as to how, if at all, this opinion modifies the positions adopted in their Post-Hearing Briefs. Both DER and Seneca filed responses to our Order in which each maintained that the Supreme Court's decision changed nothing as to their contentions.

The record in this appeal consists of a hearing transcript of 406 pages and 84 Exhibits (including the deposition of Mr. Keith Kerns and the parties' joint stipulation). After a review of this complete record, the Board makes the following Findings of Fact.

FINDINGS OF FACT

1. The Appellant is Seneca, a Pennsylvania Corporation with an address of P.O. Box 847, Mars, Pennsylvania 16046. (Seneca's Notice Of Appeal; B-1)

2. The Appellee is DER. It is the agency with the duty and authority to administer and enforce the Solid Waste Management Act, Act of July 7, 1980, P.L.

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[1](T-___) is a citation to the page in this hearing's transcript where a fact may be found. References to JS-__ are references to jointly stipulated documentary exhibits, while references to DER-__ are references to a DER offered document, references to SL-___ are references to a Seneca exhibit, and B-1 is a reference to Board Exhibit No. 1, which is the parties' factual stipulation.

380, as amended, 35 P.S. §6018.101 *et seq.* ("SWMA"); the Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, P.L. 566, 53 P.S. §4000.101 *et seq.* ("Act 101"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and the rules and regulations promulgated thereunder. (B-1)

3. Seneca operates the Seneca Landfill in Jackson and Lancaster Townships in Butler County. (B-1)

4. Edward R. Vogel ("Vogel") is vice-president of Seneca and responsible for its day-to-day activities. (B-1)

5. Seneca is a wholly owned subsidiary of Vogel Disposal Service Inc., a Pennsylvania corporation which previously operated Seneca Landfill pursuant to a permit issued by DER. (B-1; T-78-79)

6. The Vogel family has been in the solid waste business for 35 years. (T-35)

7. Vogel Disposal Service, Inc. is owned by Vogel, Inc., which serves as a holding company. (Exh. JS-20; T-47-48) Vogel, Inc. also owns Tri-County Industries, Inc., which is a Grove City-based waste hauler, and in turn owns Tri-County Landfill, Inc. (Exh. JS-20; T-47, 79) Tri-County Landfill, Inc. operates a transfer station and has pending before DER an application for a permit for a landfill. (T-79-80) Vogel is a vice-president of all of these companies and is currently the general manager of Tri-County Industries, Inc. (T-47)

8. This group of Vogel family businesses has as a unified business plan the idea that they will haul waste and be able to bring it to their own landfills for disposal to remain both self-sufficient and price competitive within this industry. (T-80) These companies also wish to avoid hauling to disposal sites

owned and operated by others to avoid potential liability for any environmental problems arising there. (T-81)

9. On December 14, 1990, Seneca submitted a repermitting application for Seneca Landfill to DER, which DER subsequently denied. Seneca appealed this denial to this Board, and Seneca and DER then settled that appeal on October 1, 1992. As part of the settlement, DER agreed to resume its review of Seneca's application. On July 20, 1993, DER issued Seneca Solid Waste Permit No. 100403 for Seneca Landfill. (B-1)

10. While DER was reviewing Seneca's application and on October 10, 1992, regulations were published in the Pennsylvania Bulletin which purported to implement Act 101. These regulations are found in 25 Pa. Code Chapters 271 to 285. (B-1)

11. The sole remaining issue in this appeal concerns DER's insertion of a portion of Condition 7 of Seneca's permit. (T-6) The disputed portion of this condition provides:

> Of the 409 tons average daily volume set for solid wastes received at the landfill, municipal solid waste shall be received only from Crawford, Butler, and Allegheny Counties.

(B-1)

12. The Department has also included the following condition (or a substantially similar condition) in the vast majority of the solid waste disposal permits issued since Act 101 was enacted:

> This permit is hereby conditioned to prohibit the facility's receipt and disposal of municipal waste from any municipality whose Department approved solid waste management plan designates another facility for the current receipt and disposal of its municipal waste; provided, however, that such condition shall not apply in those instances in which the plan designated facility is unable to accept such municipal waste in a manner that is consistent with the Rules and Regulations of the Department.

In some cases, the condition further states:

> Nothing in this paragraph shall be construed to restrict acceptance of source-separated recyclable materials at this facility for the purpose of recycling those materials.

At least 24 landfills have this condition in their permits. (B-1; Exh. SL-9(a))

13. The Condition set forth in Finding Of Fact 12 appears as Condition 12 in Seneca's Permit. (Exh. SL-9(a); T-88-89) With it, but not Condition 7, in its permit, Seneca could take wastes from Armstrong and Beaver Counties now, have no trouble negotiating amendments to county Act 101 plans and dispose of solid wastes generated outside of Pennsylvania. (Exh. SL-9(a); T-88-89)

14. DER has not put a condition identical to Condition No. 7 of Seneca's Permit in any other landfill permits.

15. Seneca Landfill is included as a primary disposal facility in the Act 101 plans for the following counties: Allegheny, Armstrong, Beaver, Butler and Crawford. (B-1)

16. Vogel Disposal Service, Inc. entered into a contract with Allegheny County on January 16, 1990 to accept waste at the Seneca Landfill pursuant to Allegheny County's Act 101 plan. (B-1)

17. Vogel, Inc. entered into a contract with Crawford County on May 21, 1992 to accept waste at the Seneca Landfill pursuant to the Crawford County Act 101 Plan. (B-1)

18. Vogel, Inc. entered into a contract with Butler County on January 6, 1993 to accept waste at the Seneca Landfill pursuant to the Butler County Act 101 Plan. (B-1)

19. Seneca entered into a contract with Armstrong County on August 5, 1993 to accept waste at the Seneca Landfill pursuant to the Armstrong County Act 101 Plan. (B-1)

20. Vogel, Inc. entered into a contract with Beaver County on October 14, 1993 to accept waste at the Seneca Landfill pursuant to the Beaver County Act 101 Plan. (B-1)

21. Seneca received its permit on June 20, 1993, so its contracts with Armstrong and Beaver Counties were entered into thereafter. (T-99)

22. At the time DER issued Seneca this permit, while Seneca had signed the contracts with Armstrong and Beaver, they had not been executed by these counties and returned to Seneca. (T-141, 148-149, 156)

23. Seneca has never submitted a written request to DER to add Armstrong and Beaver Counties to those listed in Condition 7, but it has talked to DER about it. (T-159)

24. Condition No. 7 limits the Vogel family businesses' ability to bring waste into Seneca Landfill for disposal from counties within Pennsylvania where they are waste haulers but which counties are not listed in Condition No. 7, and thus negatively impacts the Vogel family businesses' ability to finance various portions of their businesses. (T-81)

25. The Vogel family businesses are currently in the process of issuing $15,000,000 in bonds to finance future business operations, and they need guaranteed waste flow to their operations to pay off this debt. (T-84)

26. Based on the inclusion of Condition 7 in the permit, Vogel believes that the Vogel family businesses will not be able to fulfill a contract to haul waste with each of Armstrong and Beaver Counties because neither county is listed in Condition 7, despite the fact that Seneca landfill is listed in each of these counties' Act 101 Plans. (T-82)

27. Vogel's efforts to get Seneca listed in the county Act 101 Plans of other counties where the Vogel family businesses do waste hauling have been

stymied because the counties do not want to negotiate contracts until the counties are listed in the landfill's permits. (T-86) Further, DER has told Vogel it must get a county's Act 101 Plan modified before it can seek a change in Condition No. 7, and counties do not want to go to this effort if there is no prior approval of use of this landfill by the county evident in Condition No. 7. (T-83)

28. DER's document entitled "Policy and Procedure: Needs Analysis," dated February 21, 1992, was never fully adopted as a policy of DER and was never implemented. (B-1)

29. In order for Seneca to receive waste from any county, Seneca understands that under Act 101 it must be designated to do so in that county's DER approved Act 101 Plan. (T-103-104) As Seneca understands Act 101, all approved county Act 101 Plans must be implemented with the implementing documents, which include contracts between a landfill and a county, filed with DER. (T-107)

30. As part of the application for its Permit, Seneca submitted to DER a DER form known as Form 1. (T-112-113) Exh. JS-12 is Seneca's Form 1 as revised and submitted to DER in February 1993. (T-113-114) It shows that the municipal waste coming to Seneca would originate in Allegheny, Armstrong, Butler, Beaver, Clarion, Crawford, Lawrence, McKean, Mercer, Venango and Warren counties. In it, Seneca says the average daily volume of waste to be received at this landfill is 409 tons per day. (Exh. JS-12)

31. Vogel says this 409 tons per day figure was chosen by Seneca because use of that tonnage meant the landfill had a ten year life and thus would qualify for the posting of bonds in stages. (T-115)

32. DER's Form-46 was also part of Seneca's application for permit. It was prepared in December of 1992 and is Exhibit JS-14A and JS-14B. It shows wastes will be received at the landfill only from Allegheny, Armstrong, Beaver, Clarion, Crawford and Venango Counties. (Exh. JS-14(a)) However, the daily volume of municipal waste for disposal at Seneca landfill according to Exhibits JS-14A and 14B is 592 tons per day. (Exh. JS-14(a))

33. Seneca is specified as a landfill for disposal of municipal waste in the approved Act 101 Plans of Allegheny, Armstrong, Beaver, Butler and Crawford Counties. (T-122, 123, 128, 144-146) It is listed at least as a backup facility in the Clarion and Venango Plans in the event waste from there could not go to a Tri-County Industries' landfill. (T-124-126, 137-138)

34. Keith Kerns ("Kerns") is Chief of Waste Minimization and Planning for DER. (T-199) He helped draft Act 101 for passage by the legislature and is responsible for implementing the county planning portion of Act 101. (T-199, 201)

35. According to Kerns, DER interprets Act 101 to require all counties to develop plans for 10 years of waste disposal capacity and secure DER's approval thereof. Each county then has a year to submit to DER the documents (contracts between landfills and counties, local ordinances, etc.) which implement this plan. (T-208-209) These County Plans had to be submitted to DER by March of 1991 and the implementing documents submitted by mid 1992. (T-209-211)

36. DER says that in its plan each county is to select landfills for waste disposal based on environmental, economic, and transportation factors. (T-212)

37. DER included only Allegheny, Butler, and Crawford Counties in Condition 7 of Seneca's permit because, though Seneca told DER that Seneca would take wastes from these three counties plus Armstrong and Beaver Counties, DER's review

of the implementing documents submitted by Seneca showed adequate implementing documents for only these three counties. (T-322-323)

38. Seneca's landfill competitors within the portion of Pennsylvania serviced by DER's Meadville Office do not have a condition similar to Condition 7 in their permits. (T-93) Thus, all other things being equal, they can negotiate changes in various counties' Act 101 Plans and then negotiate terms of a contract with that county. (T-96-97)

39. In DER's Meadville Region there are 6 permitted landfills, but only Seneca currently has a condition in its permit limiting where wastes may come from for disposal. The other 5 landfills are not limited with regard to the geographic source from which they may receive solid waste for disposal. (T-328)

40. The other permitted landfills in the DER's Meadville Region will not have such a condition added to their permits by DER unless they seek to increase their capacity, i.e., the total volume of solid waste they may dispose of at the site. Thus, DER will not impose a condition like Condition 7 on them absent that circumstance. (T-348)

41. Condition 7 was placed in Seneca's permit by the DER Meadville office's staff prior to the promulgation of DER's policy on how to interpret these regulations on instruction of James Snyder, who is the director of DER's Bureau of Waste Management. (T-352)

42. All of the regional DER staffs were instructed to place conditions in permits issued by those regions which would implement DER's regulations promulgated under Act 101 before DER promulgated its policy on the interpretation and implementation thereof. (T-333)

43. In drafting Condition 7, DER's staff did not consult any written DER policies. (T-351)

44. The DER staff was given no guidance or guidelines by its central Bureau staff as to what to put into conditions of this type when directed by that central unit to insert such conditions. (T-353)

45. DER has a policy to use up existing landfill capacity and, as to proposed new landfills or increases in volume at existing landfills, DER requires the permit applicant to show the landfill is actually needed and going to be used. (T-355-356)

46. To add a new county as a source for waste to be disposed of at its landfill, Seneca must now show DER not only that it is a designated landfill in that county's Act 101 plan and its implementing documents, but also that there is a need for Seneca to dispose of wastes from any county other than its host county. Thus, to take wastes from Beaver County, Seneca must show that the wastes it proposes to take from that county can not be disposed of by a landfill located in that county, and having a signed contract with Beaver County (plus appearing in its plan) is not a sufficient showing in this regard. (T-380-385)

47. DER's "Policy and Procedure: Municipal Waste Planning/Permitting Relationship Analysis Under Act 101 and Municipal Waste Regulations" was adopted by DER on September 29, 1993 and applies only to permits issued after that date for additional capacity at existing facilities or for new facilities. (B-1)

48. DER's "Policy and Procedure Municipal Waste Planning/Permitting Relationship Analysis Under Act 101 and Municipal Waste Regulations" is Exhibit JS-16. It includes permit conditions to be used as models of the type of conditions to be inserted in landfill permits when implementing this policy and these regulations. These model permit conditions also limit the wastes a landfill may take to wastes from specific counties or other delineated sources and bar acceptance of waste from sources not approved in the permit. (Exh. JS-16)

49. While DER informed Seneca of its intent to put an Act 101 condition in its Permit, DER did not tell Vogel or Seneca that it intended to put a condition like Condition 7 in Seneca's Permit and did not inform Seneca that any contract it had signed with a county but which was still unexecuted by the county, was insufficient from DER's perspective to include in Condition 7. (T-97, 339-340)

50. After the promulgation of DER's policy in September of 1993, DER began issuing landfill permits containing a condition similar to Seneca's Condition 7. (T-217)

51. Kerns also believes DER issued permits with similar conditions to RCC, BFI-New Morgan and Pioneer Crossing (formerly FR&S) prior to this policy's promulgation but after the regulations were adopted. (T-242-243) There is also one resource recovery facility in Pennsylvania which is limited by its permit as to the wastes it may accept. (T-243)

52. DER Exhibit 3 is the permit for Pioneer Crossing Landfill ("Pioneer"), and the condition Kerns believes to be the same as Condition 7 in Seneca's permit is Condition No. 3. (T-252)

53. Condition 3 of Pioneer's permit states:

> 3. Waste for disposal at the Pioneer Crossing landfill may be accepted under the following contracts:
>
> Borough of Jim Thorpe, Carbon County, executed on December 4, 1989 and terminating on January 31, 1995.
>
> Borough of Fountain Hill, Lehigh County, executed on April 22, 1991 and terminating on October 30, 2001.
>
> Borough of Northhampton, Northhampton County, executed on September 28, 1990 and terminating on December 31, 1995.
>
> Interval Management Inc., Shawnee-on-Delaware, Monroe County, executed on July 22, 1991 and terminating on December 31, 1994.

Borough of Roseto, Northampton County, executed on May 31, 1991 and terminating on June 6, 1996.

.... Amendments and renewals of the above contracts will not be considered valid.

Waste may also be accepted under contract from the following:

Tioga County, New York State
Orange County, New York State
OBI Sanitation, Union County, New Jersey
Pecaro of East Brunswick, Inc., Union County, New Jersey

(DER Exh. 3)

54. Exhibit JS-10 is an agreement between DER and Browning-Ferris Industries, Inc. ("BFI"), as to BFI's New Morgan Landfill which settles litigation between them over permit conditions. (T-215) In it, the parties agree to new conditions for that landfill's permit. Condition 23 is the condition DER contends is the same as Seneca's Condition 7. (T-245)

55. Condition 23 states:

23. The average daily volume (ADV) of solid waste, calculated for each calendar quarter that may be accepted at this Facility for disposal may not exceed 5,210 tons per day (tpd) for solid waste. This volume includes:

a. An ADV for each calendar of 1,000 tpd of municipal waste from Berks County in accordance with the provisions of its County Municipal Waste Management Plan approved by the Department pursuant to Section 505 of the Municipal Waste Planning, Recycling and Waste Reduction Act (Act 101).

b. Until the contract between the City of Philadelphia and TRC, Inc., dated March 12, 1992, (the Contract) commences as per Section 3.03 thereof (Commencement Date), and after the Contract expires, the Facility may received an ADV calculated for each calendar quarter of 3,510 tpd of solid waste from any source, so long as the receipt of this waste by the Facility is consistent with the municipal, county, state or regional solid waste plan, if any, in effect where the waste is generated. Within fifteen (15) calendar

days of the Commencement Date the permittee shall notify the Department thereof.

c. As of the Commencement Date and during the life of the Contract, this facility may receive an ADV of 2,210 tpd of residentially generated, municipal waste from the City of Philadelphia which has been directed to this Facility pursuant to contracts between the City of Philadelphia and TRC, Inc. and TRC, Inc. and the Facility.

d. As of the Commencement Date and during the life of the Contract, the Facility may receive an ADV of 1,300 tpd of solid waste, so long as the receipt of this waste by the Facility is consistent with the municipal, county, state or regional solid waste plan, if any, in effect where the waste is generated.

(Exh. JS-10)

56. Condition 25 in Exhibit JS-10 provides:

> 25. In the event a county's municipal waste management plan has been amended pursuant to Section 505 of Act 101 to include this Facility as a designated disposal site, this Facility may accept no more that an additional 700 tpd of municipal waste from such county in addition to the volumes permitted by Condition 23, a. - d. above. This increase in ADV shall be subject to written Department approval following submission of a written request by the Facility.

(Exh. JS-10)

57. Condition 26 in Exh. JS-10 provides:

> 26. Any existing contracts for the acceptance of municipal waste originating in Pennsylvania counties which do not designate the Facility as the disposal site may not be extended or be renegotiated beyond their current end dates if such renewal or such new contract fails to conform to the applicable provisions of Act 101 or interferes with the implementation of a Department-approved municipal waste management plan.

(Exh. JS-10)

58. The Permit issued to Resource Conservation Corporation ("RCC") is Exh. SL-52. DER contends Condition 19 thereof is the equivalent of Seneca's Condition 7. (T-244-245) Condition 19 provides:

> This permit is conditioned to prohibit the facility's receipt and processing or disposal of municipal wastes from any municipality whose Department approved and implemented solid waste management plan designates another facility for the current receipt and processing or disposal of its municipal wastes. However, this condition shall not apply in those instances in which the plan designated facility is unable to accept such municipal wastes in a manner that is consistent with the rules and regulations of the Department. This permit authorizes acceptance of municipal waste from Blair, Cambria, and Somerset Counties or any other county if this site becomes a designated facility in an approved county municipal waste plan.

(Exh. SL-52)

59. Kerns is not sure that Condition 19 complies with DER's policy as to implementation of these Act 101 regulations even though he feels it is similar to Condition 7. (T-283-284)

60. In May of 1990, DER issued Joseph J. Brunner, Inc. a permit for its municipal waste landfill located in New Sewickly Township, Beaver County. (Exh. SL-43)

61. On December 22, 1993, DER issued Joseph J. Brunner, Inc. a "major permit modification" for this landfill permit. (Exh. SL-56)

62. This modification increased the average daily tons of waste acceptable for disposal from 300 tons to 425 tons per day and increased the maximum tons per day from 325 tons to 525 tons. (Exh. SL-43, Exh. SL-56)

63. The major permit modification for the Joseph J. Brunner, Inc. Landfill does not contain any condition similar to Seneca's Condition 7 and neither does that landfill's initial permit. (Exh. SL-43, Exh. SL-56)

Discussion

Seneca and DER began the matter now before us with a series of issues between them. Commendably they were able to resolve all of them with but one exception.

The sole remaining issue is Seneca's challenge, as permittee, to DER's inclusion in Seneca's permit of the last sentence in Condition 7. That condition states that Seneca may accept municipal solid waste for disposal from Crawford, Butler and Allegheny Counties only. As Seneca is challenging DER's placement of this limitation in its permit, Seneca bears the burden of proof of facts to support its legal contentions pursuant to 25 Pa. Code §21.101(a).

Seneca's first assertion as to the disputed portion of Condition 7 is that it is arbitrary, capricious and an abuse of DER's discretion. Seneca draws this conclusion from the record which, it suggests, shows that DER has failed to impose this condition on any other landfill operator either before or after issuing Seneca its permit containing it. Seneca also argues the imposition on it of Condition 7 is a denial of its right to equal protection of the law as guaranteed by the Fourteenth Amendment of the United States Constitution. Seneca next asserts that DER is not empowered to impose Condition 7 on Seneca either by Act 101 or the SWMA. The next argument in Seneca's Brief is that Condition 7 violates the Commerce Clause of the United States Constitution because: (1) it is a protection act measure; (2) it discriminates against interstate commerce when less discriminatory options are available to meet its ends, and; (3) because it fails the balancing test in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). Finally, Seneca asserts that Condition 7 is not a valid exercise of the Police Power. DER's Brief in response addresses and offers rebuttal to each separate segment of Seneca's arguments.

Arbitrariness Of This Condition

In December of 1990, Seneca filed an application with DER to repermit the Seneca Landfill. After DER denied this application and Seneca challenged that denial by an appeal to this Board, the parties settled that appeal, and, as part of the settlement, DER agreed to resume review of Seneca's application. At the time of this settlement, the permit application's review was governed by the SWMA and regulations promulgated thereunder. It was also governed by Act 101, but there had been no regulations promulgated under it.

Nine days after this settlement on October 10, 1992, regulations were published in the Pennsylvania Bulletin which purport to implement Act 101. As stipulated by the parties, these regulations are found at 25 Pa. Code Chapters 271 to 285. At the time these regulations were promulgated and published in the Pennsylvania Bulletin, DER had no policy on how they were to be interpreted and implemented by its staff in the course of their review of applications for permits like Seneca's. DER's policy on interpretation and implementation of these regulations came into existence in September of 1993. Importantly, this was several months after DER had issued this permit to Seneca.

Even though DER had no set policy on how to implement and interpret these new chapters of regulations to insure that they were interpreted and implemented in a consistent fashion during the drafting of permit conditions, DER's solid waste staff was ordered by the Director of the Bureau of Waste Management to insert conditions in landfill permits which the staff felt would implement these regulations. This circumstance produced Condition 7, which Seneca suggests is unreasonable, arbitrary and capricious.

To prove its contention, Seneca points first to Condition 12 in its permit (see Finding of Fact No. 12). The parties stipulated that this condition, or one

nearly identical to it, was placed in the vast majority of landfill permits issued by DER after Act 101 became law. According to the testimony of Mr. Kerns, who was involved in getting Condition 12 type conditions placed in DER's permits, Condition 12 appears in permits:

> A. To ensure that the facilities knew that they had to comply with the county planning process.
>
> Q. Other than that is there any other purpose for that condition?
>
> A. It also allows the Department to enforce the county planning process in terms of what waste [a] facility is taking. (T-216-217)

Kerns further admitted this Condition 12 type condition was the only such Act 101 condition routinely placed in landfill permits until after the promulgation of the regulations and DER's policy thereon. (T-217) However, Kerns approved Condition 7 while he was drafting DER's subsequently adopted policy and it is consistent with the subsequently adopted policy. (T-219, 232)

In this period after adoption of these chapters of regulations and before promulgation of DER's policy regarding them, Kerns mentioned several permits DER issued to landfills. In each of them is not only a condition like Condition 12 but also one which DER contends is similar to Condition 7 though not like it exactly. To address the "arbitrary" assertion we must examine each identified permit. We do this because there can be no question that where a party asserts that DER has acted unreasonably, arbitrarily and capriciously, we must compare DER actions in seemingly similar situations to see if a party is treated similarly, and where that does not appear to be so, we must find arbitrary action by DER. Fossil Fuels, Inc. v. DER, 1981 EHB 125; City of Harrisburg v. DER, 1990 EHB 442 (and the cases cited therein). Where DER does not act similarly, it acts

arbitrarily, and we cannot sustain it. Hepburnia Coal Company v. DER, 1992 EHB 1315.

The permit issued to RCC is one of the three landfill permits identified by Kerns as having a similar condition. It was mailed to RCC under DER's letter dated August 26, 1991 (this letter is a part of Exhibit SL-52). Thus, it precedes Seneca's permit by two years and was issued before the regulations' promulgation. This fact alone makes it incomparable to Seneca's permit, since the condition was not written to implement these regulations. A comparative review of Condition 19 and Condition 7 reveals that another difference between Condition 19 and Condition 7 is that Kearns says that Condition 7 complies with DER's current policy, but he is not sure Condition 19 does. (T-283) A third difference is that Kerns admits Condition 7 bars the importation of out-of-state wastes for disposal at Seneca; but again, Kerns is unsure that Condition 19 does that. (T-275) Moreover, the wording of the two conditions is obviously different. Kerns says that the last sentence in Condition 19 is similar to Condition 7; however, that sentence, while limiting RCC's acceptance of municipal waste to that from Blair, Cambria and Somerset counties, does not set a tonnage limit based on RCC's projections of average daily tonnages from those counties. Moreover, and more importantly, under Condition 19, RCC may add additional counties to the three already mentioned in Condition 19, merely by showing DER that a County has amended its municipal waste plan, making RCC's site a designated facility, and that DER has approved this amended plan. No such provision exists in Condition 7. This distinction as to adding counties is significant because DER's Arthur Provost made it clear for Seneca to ever get a county listed initially in Condition 7, Seneca not only had to show up as a landfill in a DER approved county plan, but in addition had to have signed

contracts with the county, i.e., documents implementing that plan. In fact, it was precisely because Seneca lacked these signed contracts from Armstrong and Beaver Counties (even though Seneca had executed such contracts but they were not executed by the counties until after the permit's issuance) that Condition 7 did not include these two counties, since Armstrong and Beaver Counties both listed Seneca in their DER-approved municipal waste plans. Moreover, as to adding counties, Seneca must have an approved plan, implementing documents and a need for that county to use Seneca Landfill for disposal as opposed to other landfills already in that County's plan. (T-380-385) Thus RCC's permit Condition 19 is markedly dissimilar from Condition 7.

Another of the landfill permits mentioned by DER's witnesses is that pertaining to BFI's New Morgan Landfill. There, the condition alleged to be similar to Condition 7 is Condition 23. This condition was negotiated in an agreement between DER and BFI to settle litigation between them concerning permit conditions. (T-245) The agreement is dated July 29, 1993, so it falls within the time period with which we are concerned (after regulation promulgation, but before issuance of DER's policy). Like Condition 7, BFI's condition specifies an average daily tonnage for disposal at this landfill and then says of this 5210 tons per day ("tpd") that 1,000 will be from Berks County.

Next, it provides that 3,510 tpd will come to BFI from any source up until a contract for Philadelphia's waste begins and may again come from any source after that contract expires, providing that sending it to BFI is consistent with the solid waste plans in effect where the waste is generated, if any such plans exist. Importantly, even while the contract with Philadelphia is in effect and the condition mandates that 2,210 tpd of the 3,510 tpd come from Philadelphia, the remaining 1,300 tpd may come into the New Morgan Landfill from anywhere

(again as long as sending it to BFI is consistent with the solid waste plans, if any exist, for the area generating this waste). As is obvious, this condition does not prevent BFI from accepting out-of-state wastes so long as disposal at BFI's landfill complies with the solid waste plans existing at the generating location, assuming there are such plans there. Obviously, under this condition, BFI also need only comply with a county's Act 101 Plan to take waste from elsewhere within Pennsylvania, unlike the obligations imposed on Seneca as recited above. Finally, this Condition is more like RCC's condition than that of Seneca in terms of DER's subsequent policy. Accordingly, we can conclude it too is not like Condition 7 in important ways.

The final landfill permit condition mentioned by DER's witnesses is Condition 3 of Pioneer's permit. In it Pioneer is limited to wastes from two counties in New York, two sanitation companies in New Jersey, four boroughs (in three counties of Pennsylvania), and one corporation (located in a fourth county in Pennsylvania). Thus, Condition 3 of Pioneer's permit is just like Seneca's Condition 7 except that under Pioneer's permit it may accept out-of-state wastes. A review of Pioneer's permit (DER Exhibit 3), however, discloses one other major reason why its Condition 3 is so like Condition 7 and conforms to DER's policy. The first page of DER Exhibit 3 is DER's letter transmitting this permit to Pioneer. The letter is dated December 17, 1993. This is a point in time approximately three months after DER's policy was promulgated. Thus, DER asks us to compare the similarity of a permit issued before the policy's promulgation with one after its promulgation. They are, by the nature of the time of the policy's promulgation, different animals and, as a result, not comparable. Clearly, since DER had its policy on implementing and interpreting these regulations as of September of 1993, permits like that issued to Pioneer issued

after September of 1993 had to be issued in conformance therewith or run the risk of being successfully challenged as arbitrary.[2]

Kerns also mentioned the existence of a "similar" condition in a permit issued to a resource recovery facility but, as he said: "I don't know exactly what the condition says but I know we limited the amount of waste they could take based on planning." (T-243) However, that permit was never offered into the record by either party. In its Post-Hearing Brief (Pages 29 and 30), DER argues for consideration of this permit's condition and also a condition referenced in passing in this Board's Opinion in SCA Services of Pennsylvania, Inc. v. DER, EHB Docket No. 92-247-W (Opinion and Order issued January 24, 1994) ("SCA").

We decline DER's invitation to consider either condition. Neither condition is in the record before us. DER's witness made reference to the one condition's existence but nothing more. Was it worded like Condition 7 or was it a copy of Condition 19? We do not know, and, since DER could have offered it into evidence at the hearing but did not, we will not presume to state it is Condition 7's twin. As to the Condition in SCA, all we know is stated in that opinion rather than the record before us. Importantly, all of Condition 11 of the permit in SCA is not reproduced in SCA. Prior to quoting the portion of that Condition which is set forth on pages 10 and 11 of SCA opinion, that opinion says:

> Condition No. 11 of the permit imposes a number of limits on the average daily volume of waste SCA may accept from various sources. The condition provides, in pertinent part.. ..

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[2]Exh. SL-56 is a major modification of Brunner's Landfill permit dated December 22, 1993. It contains no Condition No. 7 even though this modification increases the average tpd allowed for disposal. DER says this is because the total volume of the landfill was not increased, which is the only time DER modifies a permit with addition of a Condition No. 7.

SCA, *supra* at 10 (emphasis added).[3]

Thus, what was true with the permit condition for the resource recovery facility is also true as to SCA's permit, i.e., we do not know what the condition says. Accordingly, we cannot compare either of them to Condition 7 and, importantly, Seneca cannot cross examine DER's witnesses with regard thereto as it did the conditions already of record before us. Under these circumstances we will not consider them in judging the degree to which Condition 7 is or is not unique.

Our conclusion based on our analysis of the three identified permit conditions is that in the period from when Act 101 regulations were promulgated up until the establishment of DER's policy in September of 1993, Condition 7 is unique. We end our review at the point in time of the policy's promulgation because, as stated above, after the policy's promulgation with its model permit conditions, all permits issued by DER would appear to us to have to be in conformance with this policy and these regulations.

However, our conclusion that this condition is unique does not end our inquiry as to the assertion that DER acted arbitrarily. While DER agreed to the admission of Exhibits SL-10 through SL-51 and SL-53 through SL-55, with the stipulation that they are all the permits issued by DER's Meadville and Pittsburgh offices for waste processing and/or waste disposal facilities and they all have a condition like Seneca's Condition 12 but none has a condition like Condition 7 (T-164-166), that does not alone show arbitrariness. DER may not be arbitrary if this condition is needed for specific reasons dealing with the peculiarities of this landfill or if there has been some change in solid waste

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[3]In SCA several arguments are raised which are similar to those now before us. However, that SCA opinion is in response to cross-motions for partial summary judgment and, as to the issues before us, the cross-motions in SCA were denied. Thus that opinion is not dispositive of the issues here.

disposal regulation which in turn creates a change in how DER conditions landfill permits and this is merely the first permit to bear such a new condition.

DER has offered us no evidence of either type. It carefully documented when the act and regulations came into existence and when its policy took effect, but it showed no other change in administration or direction of its waste flow control or landfill operation regulatory programs which would make this the first permit of a series of permits issued to landfills, all of which would bear this condition.

DER offered evidence to show that this condition was not identical to Condition 12 and was to accomplish a different purpose. According to Kerns, Condition 12 was put in all DER permits for several years. It was used to insure a landfill knew it had to comply with the County plans and to allow DER to enforce the planning process in terms of the wastes any specific landfill or waste processing facility could accept. (T-216) Kerns went on to say this was the only Act 101 permit condition prior to the regulations and other Act 101 conditions were developed after promulgation of DER's policy. (T-217) Standard Condition 12 was only changed after the regulations' promulgation and prior to DER's policy in some cases (Seneca being one of them). (T-218) DER never offered evidence as to when the decision was made to add a condition like Condition 7 as a supplement to Condition 12 or how it would decide when this change should be made and when merely using a Condition 12 condition would suffice. Thus, it failed to show a reasoned or rational basis based on the existence of these regulations for Condition 7's insertion in any permits prior to DER's policy coming into existence.

We know from Provost's testimony that his office inserted this condition in this permit prior to promulgation of DER's policy because of directions to do

so from the director of DER's Bureau of Waste Management. We have no evidence as to why the Bureau's director ordered this to be done here, a mere three months prior to DER's publishing its policy. Provost said this condition came about because: "[t]hat was the way we were developing our policies." (T-332) He was instructed to put some type of condition in the permit to reflect these regulations. (T-333) It is obvious that while Provost was given orders to march from his Bureau's central office, the direction of march was left unspecified. It is this lack of direction, rather than the Meadville staff's efforts taken to comply with the general order, which we condemn here.

DER also offered no evidence showing conditions specific to this landfill mandated insertion of this condition in Seneca's permit. Provost told us why he felt that the condition would aid DER in administering these regulations (T-305) and how it would aid DER's inspectors of this landfill in conducting their inspections (T-306), but those reasons are not site specific and deal with any landfill as opposed to circumstances particular to Seneca's site.[4]

DER's Brief cites us to no case law on this issue to rebut Seneca's contention as to the arbitrariness of the insertion of Condition 7 in this permit. DER's Brief argues about the permit conditions at the other landfills and waste processing facilities addressed above. In addition, it's Brief asserts Seneca received the first new permit or permit for increased capacity after the Act 101 regulations took effect, so its permit could reasonably differ from the prior permits. The problem with this argument is that there is no evidence in

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[4]Provost did say that in the past Seneca had taken in waste for disposal that it was not authorized to accept, so Condition 7 was also needed for this reason. (T-354) However, when Seneca offered rebuttal testimony on this point, DER agreed Provost's testimony could be stricken, and the presiding Board Member granted Seneca's motion to strike it (T-359-362), so Provost's testimony on this point cannot be considered.

the record that Seneca's permit was the first such permit as DER contends, and DER's proposed Findings Of Fact cite us to none. Moreover, DER candidly admits at its proposed Finding Of Fact No. 68 that the permit it issued to the City of Bethlehem for its landfill (Exhibit SL-40) does not contain a Condition No. 7 (even though issued after promulgation of DER's policy). Moreover, DER shuts its eyes to the comparatively less restrictive language in the BFI permit, for example, in drawing this conclusion.[5] Based on the record before us and the parties' briefs, we can come to only one conclusion. This condition is arbitrary, and, since Seneca has challenged it on this basis, it must be stricken from Seneca's permit.

Having found Condition 7 to be arbitrary we do not reach the merits of Seneca's other arguments.[6] Accordingly, we make the following conclusions of law and enter our order reflecting same.

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[5]Exactly how difficult it will be for Seneca to add more counties under Condition 7 is clear in the record. Despite assertions that all Seneca had to do is submit a "minor modification" proposal to DER (T-326-327), Provost stated that DER's policy is to impose an extra burden on new landfills (like Seneca) to show they are actually going to be used and are actually needed. Thus, to add counties, DER has told Seneca it must show: (1) it is a designated landfill under the county's plan and in implementing documents; (2) it must identify the need for that county to dispose of wastes at Seneca as opposed to elsewhere (i.e., instead of the waste going to a landfill in that county if one exists); and (3) there must be a balancing test on environmental harm from the landfill versus need. (T-381-384; Exh. JS-16)

[6]However, in light of Carbone, the Commonwealth Court's decision in Empire Sanitary Landfill, Inc., et al. v. Commonwealth, DER, et al., No. 265 M.D. 1992 (Opinion issued June 30, 1994) and the District Court's opinion in Southcentral Pennsylvania Waste Haulers Association, et al. v. Bedford-Fulton-Huntingdon Solid Waste Authority, et al., Civil Action No. 1:CV-93-1318 (M.D.Pa.) (Opinion filed June 24, 1994) we have some reservations as to the constitutional validity of Condition 7 to the extent it influences interstate commerce in the disposal of solid waste.

Conclusions Of Law

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

2. In an appeal from DER's imposition of conditions in a permit sought by Seneca, it is Seneca which generally bears the burden of proof.

3. Where, after enactment of Act 101 and promulgation of regulations pursuant thereto, DER issues permits for landfills which allow the disposal of solid waste from specific named counties and allow the disposal of other municipal solid waste from other sources as well, but issues a permit to Seneca, restricting it to disposal of municipal solid waste of a specific total tonnage solely from three named counties within Pennsylvania, DER has been arbitrarily restrictive in imposing such a condition on Seneca and the condition must be overturned.

ORDER

AND NOW, this 2nd day of September, 1994, it is ordered that the appeal of Seneca is sustained and Condition 7 is stricken from its permit.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

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Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: September 2, 1994

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v.	:	EHB Docket No. 94-102-E
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and GREENE COUNTY	:	Issued: September 6, 1994

OPINION AND ORDER
SUR APPELLANT'S MOTION REQUESTING A HEARING

By: Richard S. Ehmann

Synopsis

A request contained in a party's Memorandum Of Law filed in opposition To a Motion To Dismiss, that it be allowed to appeal *nunc pro tunc*, must be denied, where it is based on allegations of abuse of DER's discretion in approving Greene County's Act 101 Plan, because even if it assumed that there is truth in these allegations, they fail to establish our jurisdiction over an otherwise untimely appeal.

A party requesting leave to appeal *nunc pro tunc* must do so in a fashion other than by filing a document captioned Memorandum Contra To Department Of Environmental Resources' Motion To Dismiss, in which it asks for

an appeal *nunc pro tunc* and a Motion seeking a hearing thereon. A Memorandum of this type making a series of factual assertions without a verification or affidavit in support thereof cannot take the place of a verified Petition For Leave To Appeal Nunc Pro Tunc containing specific factual assertions supporting the allegations of fraud as to each petitioner. Because fraud by a party's attorney is grounds for legal action against that attorney but creates no grounds for an appeal *nunc pro tunc* according to Hentz v. Civil Service Commission of Philadelphia, 85 Pa.Cmwlth. 358, 481 A.2d 998 (1984) ("Hentz"), general allegations of fraud by this attorney are not sufficiently specific to establish such fraud as to each potential appellant seeking leave to appeal *nunc pro tunc*, especially where only some of the appellants were represented by this attorney.

OPINION

The instant appeal's history before this Board began when it was transferred to us by the Prothonotary of the Common Pleas Court of Greene County on May 5, 1994 pursuant to the order of the Commonwealth Court dated January 12, 1994 in Greene County Citizens United, et al. v. Green County Solid Waste Authority, et al., ___ Pa.Cmwlth. ____, 636 A.2d 1278 (1994). Thereafter, on July 8, 1994, DER filed a Motion To Dismiss this appeal, asserting it was untimely filed under 25 Pa. Code §21.52(a) and thus we lacked jurisdiction to consider same according to Roy and Marcia Cummings, et al. v. DER, 1992 EHB 691.

On August 5, 1994, in response to DER's Motion, the appellants filed their Motion Requesting A Hearing and a Memorandum Contra To Department Of

Environmental Resources' Motion To Dismiss.[1] Thereafter on August 18, 1994 we received DER's Response To Appellants' Motion Requesting Hearing.

The appellants' Motion seeks a hearing for the purposes of introducing evidence to support the claim of a right of appeal *nunc pro tunc* set forth in their Memorandum. The accompanying eight page Memorandum contains over four pages of factual assertions followed by a section captioned Argument. In this section, appellants assert that DER is correct that an appeal must be filed within thirty days under 25 Pa. Code §21.52, but assert an exception thereto in the form of a *nunc pro tunc* appeal. Appellants then argue that a fraud upon them all has created a condition which should allow all of them to appeal *nunc pro tunc*. The fraud which appellants suggest exists was the fact that a lawyer in Greene County simultaneously represented both a group of Greene County municipalities (including five of the appellants) as to their concerns surrounding the preparation of the Greene County Solid Waste Management Plan pursuant to the Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, P.L. 556, 53 P.S. §4000.101 ("Act 101"), and, after the plan's adoption, Greene County to the extent the County authorized this attorney to formulate and then provide legal representation to the Greene County Solid Waste Authority which was to implement this Act 101 plan. This dual representation allegedly occurred from late 1990 through late 1992, when the lawyer ceased representing the

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[1] The appellants are represented by four different lawyers, each of whom represents a different group of them, but this Motion and Memorandum is filed jointly by all four groups.

Authority, and during this period, the County's Act 101 plan was submitted to DER for approval, was approved by DER on May 16, 1991 and measures to implement it were put in place by the County. Appellants' Memorandum alleges it was not until the lawyer's resignation on November 24, 1992, that they had sufficient information to challenge DER's approval of the plan based upon his conflict of interest which they contend was a fraud on these appellants, the citizens of the county, the Authority, and the County itself. Appellants allege their appeal to have been timely filed when measured from the resignation date because the appellants sought an injunction in the Common Pleas Court on December 21, 1994. Appellants then conclude that neither DER nor Greene County disputes these facts so there is no reason not to grant them an appeal *nunc pro tunc*.

Next, appellants' Memorandum asserts that though DER has wide discretion under Act 101 in approving this Greene County Act 101 plan, it flagrantly abused its discretion in approving this plan without inquiry into possible conflicts of interest of the type alleged to have occurred here.

DER's Abuse Of Discretion

Appellants second argument is the easiest to address, so we will start with it. Appellants assert this DER plan approval was a manifest and flagrant abuse of DER's discretion. Assuming this is true (and we emphasize this is an assumption since appellants fail to reference any concurrence therein by Greene County and DER's Response to their motion clearly asserts this is not so), appellants fail to point out how this gives rise to any discretion in this Board to grant them leave to file an appeal *nunc pro tunc*.

As pointed out in the opinions cited by appellants, an allowance of an appeal *nunc pro tunc* can only occur where extraordinary circumstances occur, and nearly always these must involve fraud or breakdown in the Board's operation. Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976); Loretta Fisher v. DER, 1993 EHB 425; Evergreen Association, et al. v. DER, 1993 EHB 443. This argument based on alleged DER abuse of discretion simply does not show a meeting of this standard and thus forms no basis on which to grant the appellants the relief they seek.

A Nunc Pro Tunc Appeal Based On Fraud

In addressing the issue of extending the deadline for filing appeals, 16 Standard Pennsylvania Practice 2d §85.28 summarizes the law in this area by stating:

> [T]he courts are generally without power to enlarge the time provided for the taking of an appeal, or for the filing of a notice of appeal, to grant leave to appeal nunc pro tunc. Equitable principles cannot justify extending the time for an appeal as a matter of grace or indulgence, or merely to prevent hardship, or to remedy the mistake or neglect of the attorney for the party desiring to appeal. [Footnotes omitted.]

Indeed, the courts have gone beyond this summary and held that since the negligent failure of a lawyer to appeal is actionable, it offers no grounds for appeal *nunc pro tunc*. Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979) ("Bass"). Using the Bass rationale, the Hentz, *supra*, court even has found fraud by a party's own lawyer is not grounds for appeal. Further, in Appeal of James E. McCoy and Patricia M. McCoy, 153 Pa.Cmwlth. 504, 621 A.2d 1163 (1993), the appellants' suggestions that their counsel's failure to

timely file preliminary objections and a conflict of interest created grounds for a *nunc pro tunc* appeal, were rejected. Thus, as to those municipal appellants who were represented by the lawyer accused of this conflict of interest, this alleged fraud apparently does not constitute grounds to allow such an appeal.

Importantly, none of the appellants' allegations of fraud are supported by affidavits or verifications attached to a Petition For Leave To Appeal. Indeed, no such Petition has been filed. Instead, all we have is a Memorandum by these parties' lawyers stating all these allegations as if they are facts. These allegations are, at this point, merely that. Even a review of the Second Amended Complaint filed in the Court in Greene County does not cure this deficiency. It contains no allegations of fraud as to these appellants and, while it is factually verified and alleges many of the same facts, it is verified only on behalf of one of these four groups of our current appellants.

Further, Pa.R.C.P. 1019(b) mandates averments of fraud must be made with particularity. If this standard is applied to appellants' Memorandum, it requires the conclusion that the Memorandum's general allegation of fraud is deficient.

In summary, each of these points leads to the conclusion that no case for an appeal *nunc pro tunc* has been stated by these appellants. DER's Response take this same position and asserts that Appellants' Memorandum fails to show how Attorney Hook's alleged conduct compromised a timely filing of an appeal. This is not an unreasonable observation by DER considering the

appellants' ability to file a protective appeal and engage in discovery, if they were unsure whether their rights might be in danger from adoption of this plan.

Our conclusion leads us to two alternatives. We must either grant DER's Motion as to all of these appellants or allow them a single further opportunity to prepare and file the type of document which makes the kind of presentation on their behalf meeting such minimum requirements. We cannot ignore the standards for appeals *nunc pro tunc* solely because of the hardship it will cause to these appellants or because their attorneys made the mistake of not timely appealing here. Because of the allegation that fraud barred a timely appeal, justice is better served if we allow one final chance to make a coherent claim in this regard. It may be that a proper appeal *nunc pro tunc* based on "fraud" can be stated by at least some appellants. If this is so, we should not dismiss this appeal merely because they were unable to deal with these allegations properly the first time. However, since DER and Greene County have the right to a prompt adjudication of this jurisdictional issue, we cannot ignore their rights while appellants are given multiple attempts to plead this issue properly. Accordingly, we caution each of the appellants that this Board grants DER's motion subject to the filing of a minimally adequate petition within the time frames set forth below in our Order.[2]

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[2] We further caution the appellants that we currently do not see how any of them who were represented by counsel during this period and became aware of this dual representation before November 24, 1992, can claim this prevented them from a timely appeal to this Board. Every appellant should address this issue in any Petition that it may elect to file.

ORDER

AND NOW, this 6th day of September, 1994, it is ordered that the appellants' Motion For Hearing is denied. It is ordered that any appellant in this proceeding wishing to file a Petition For Leave To Appeal Nunc Pro Tunc based on the allegations of fraud contained in the above referenced Memorandum shall do so by **September 26, 1994**. Further, it is ordered that any such petition shall conform to the general standards therefor and shall be consistent with the opinion above. Additionally, it is ordered that each such petition shall be accompanied by a legal brief in support thereof which sets forth in detail that petitioner's legal contentions as to how the dual representation alleged here constitutes fraud and how that appellant was defrauded thereby to the extent it constitutes grounds for an appeal *nunc pro tunc* from Greene County's adoption of its Act 101 Plan. Further, it is ordered that as to each appellant who fails to timely file a Petition For Leave To Appeal Nunc Pro Tunc, DER's Motion To Dismiss is granted but a decision on this Motion's merit is stayed as to any appellant timely filing such a Petition. The parties are advised that it is the Board's intent upon receipt of any such Petition to rule upon its merits only after allowing DER and Greene County the opportunity to respond thereto. Finally, it is ordered that the parties' obligations under Pre-Hearing Order No. 1 as to the filing of Pre-Hearing Memoranda is suspended pending disposition of any Petitions filed by appellants pursuant hereto.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
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Administrative Law Judge
Member

DATE: September 6, 1994

For Commonwealth, DER:
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Kathy S. Dunlop, Esq.
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Waynesburg, PA

For Greene County Citizens United:
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For Greene County Haulers Association:
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M. DIANE SMITH
SECRETARY TO THE BOARD

FURNLEY H. FRISCH d/b/a FURNLEY H. FRISCH & SONS	:	
v.	:	**EHB Docket No. 92-053-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 7, 1994**

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

By Robert D. Myers, Member

Synopsis

An appeal of an order issued pursuant to the Clean Streams Law, the Act of June 25, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* (CSL) is dismissed. The Department of Environmental Resources' (DER) issuance of an order directing Appellant to cease any and all earthmoving activity, except that necessary to comply with the order, to submit revisions to the erosion and sedimentation control plan and to implement an approved plan to achieve interim stabilization as well as effective minimization of accelerated erosion and sedimentation was not an abuse of discretion where the Appellant failed to implement effective erosion control measures and those conditions created potential pollution to a water of the Commonwealth. Appellant's argument that he cannot be held accountable for those violations on the basis that he did not have access to his property is without merit.

Procedural Background

This matter was initiated with the January 31, 1992, filing of a Notice of Appeal (perfected on March 30, 1992), by Furnley H. Frisch d/b/a/ Furnley H. Frisch & Sons (Appellant) seeking review of a January 3, 1992, Compliance Order

(C.O.) from the Department of Environmental Resources (DER). The C.O., issued pursuant to the CSL 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), directed Appellant to cease and desist from any and all earthmoving activity, except that necessary to comply with the C.O., on his property located on Barnett Drive Extension in Penn Township, Perry County, known as Cove Mountain Estates or Development (the Site), to submit revisions to the erosion and sediment pollution control plan, to effectively minimize accelerated erosion and sedimentation and to achieve interim stabilization at the Site.

A hearing was held in Harrisburg before Administrative Law Judge Robert D. Myers, a Member of the Board, on August 10, 11 and 12, 1993. Both parties were represented by legal counsel and presented evidence in support of their positions. DER filed its post-hearing brief on October 27, 1993, and Appellant filed his post-hearing brief on December 7, 1993. Any issues not raised in the post-hearing briefs are deemed waived. Lucky Strike Coal Co. and Louis J. Beltrami v. DER, 119 Pa. Cmwlth. 440, 546 A.2d 447 (1988).

The record consists of the pleadings, a Joint Stipulation, a transcript of 624 pages and 77 exhibits. After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. Appellant is president of Furnley H. Frisch and Sons. (N.T. 468)

2. Furnley H. Frisch and Sons is a business which conducts earthmoving activities and which maintains a business address of R. R. 3, Box 468, Duncannon, Pennsylvania 17020. (Stip. No. 2)[1]

[1]The Joint Stipulation.

3. DER is the agency charged with the duty and authority to administer and enforce the provisions of the CSL, the rules and regulations promulgated thereunder, and §1917-A of the Administrative Code.

4. Pursuant to 25 Pa. Code §102.41, DER delegated its authority on erosion control in Perry County to Perry Conservation District. (N.T. 20)

5. Perry Conservation District personnel have the authority to investigate complaints and write up inspection reports listing erosion control violations. (N.T. 20)

6. On November 29, 1989, Appellant became owner of a 35-acre tract of land in Penn Township, Perry County, known as Cove Mountain Estates. (Stip. No. 3)

7. Cove Mountain Estates is a planned development for residential homes. (Stip. No. 4)

8. Access to Cove Mountain Estates is over a Township road (Barnett Drive). Barnett Drive Extension is a road cut through Cove Mountain Estates, running from the terminus of Barnett Drive about 2600 feet to a cul-de-sac. (Jt. Ex. 1; N.T. 471, 476, 529-530)

9. In January, 1990, Appellant started to regrade Barnett Drive Extension. (N.T. 503)

10. On May 11, 1990, an adjoining landowner filed a complaint with Perry Conservation District that there was a lot of erosion and sediment coming from Cove Mountain Estates. (N.T. 18 and 19)

11. On May 11, 1990, Todd Brajkovich, manager of the Perry Conservation District, visited Cove Mountain Estates to investigate the complaint. (N.T. 19)

12. On May 11, 1990, Brajkovich saw that Barnett Drive Extension had a sand/gravel base, that the road banks were unstabilized, that there was a large

unstabilized area of approximately 1 acre, that there were no interim erosion controls, that there was evidence of severe gullying, and that silt, sand, sediment and rocks had been carried down the mountain onto adjacent property. (N.T. 20)

13. On May 13, 1990, Brajkovich again inspected Cove Mountain Estates and filed an official Earth Disturbance Inspection Report. (N.T. 20; Ex. C-1)

14. The May 13, 1990, Report set forth the following observations - no erosion control plan had been developed, implemented and maintained; there was no stabilization of roadside swales and banks; the runoff from the project was not treated for sediment; sediment was discharged into waters of the Commonwealth; the velocity of off-site discharge was greater than 3 ft/sec; and there was no evidence of silt fences, straw bales or sediment basins or traps to treat runoff. (N.T. 22; Ex. C-1)

15. Brajkovich notified Appellant of the violations by sending a copy of the Inspection Report. (Ex. C-2)

16. On or about May 16, 1990, Brajkovich met with Appellant on the Site to review the Inspection Report, stressed that he felt the situation was critical because there was an unstabilized road base going up the side of the mountain and stressed that something had to be done immediately. (N.T. 25)

17. Brajkovich and Appellant decided that some temporary water bars should be cut in to try to control the water and make sure the velocity did not increase from top to bottom. (N.T. 25)

18. Appellant agreed to install the bars. (N.T. 25)

19. Shortly after the meeting and throughout the summer, Appellant periodically cut in various water bars. (N.T. 25-26)

20. Most of the time throughout the summer Appellant did not maintain the water bars. (N.T. 26)

21. When the water bars were not maintained, they would fail. Since the water bars are in a series, as each one fails, the next one is subject to washing out and consequently all of the water bars, down the entire road length, could wash out. (N.T. 26)

22. As a result of the failure of the water bars, Perry Conservation District would receive a complaint and notify Appellant who then would clean out the water bars. (N.T. 26)

23. On June 6, 1990, Appellant told Brajkovich that he had received an order from Penn Township to stop work on the mountain and that he was worried that he would not be able to maintain the water bars. (N.T. 27)

24. Brajkovich spoke to Penn Township solicitor, Richard Wagner, who told him that it would be no problem for Appellant to do the erosion controls as needed for what earth moving had been done to date. (N.T. 27)

25. Throughout the summer of 1990, Appellant was able to work on the existing erosion controls, water bars, as needed. When Brajkovich would get a complaint as the result of the water bars' failure, he would call Appellant who would go out and make the requisite maintenance in order for the water bars to be effective. (N.T. 26)

26. On August 9, 1990, Brajkovich found water bars had been cut in, but an Erosion Control Plan was needed to stabilize the Site in a better manner and none had been submitted. (N.T. 27)

27. On August 30, 1990, Brajkovich visited the Site with Kenneth Murin, program specialist with DER's Bureau of Land and Water Conservation as well as

acting chief of the Permits and Compliance Section, and met with Appellant. (N.T. 28, 306)

28. The conditions on this visit were an unstabilized road base of sand, an unstabilized cross ditch, and unstabilized road banks. (N.T. 34, 309; Ex. C-3)

29. Because of the absence of controls and stabilization, rainfall creates excess runoff from Cove Mountain Estates. (N.T. 35)

30. Based on this visit, another Inspection Report was issued in which DER set forth what Appellant was requested to do on the Site, such as: submission of an interim erosion and sedimentation control plan detailing interim stabilization for all slopes, ditches or other disturbed areas; velocity control for ditches and outlets; collection of runoff; separation of solids from the water; and maintenance of the water bars. (Ex. C-3A)

31. On September 26, 1990, Brajkovich again visited the Site, did another inspection and submitted another Inspection Report. (N.T. 37-38)

32. During the September 26, 1990, inspection, Brajkovich determined that the water bars needed to be maintained on a very regular basis, and that interim stabilization controls were not evident and not implemented. (N.T. 38; Ex. C-4)

33. On October 1, 1990, Brajkovich sent Appellant a Notice of Violation and forwarded a copy to DER. (N.T. 39; Ex. C-5)

34. On November 7, 1990, DER sent Appellant a Notice of Violation. (N.T. 311; Ex. C-61)

35. On November 20, 1990, Murin and Brajkovich held an enforcement conference with Appellant at which he was told the Site had numerous violations. (N.T. 41, 313)

36. At the same meeting, Murin and Brajkovich and Appellant decided an interim plan to control what earthmoving had been done was needed. (N.T. 41)

37. Appellant agreed to try to stabilize the disturbed areas by seeding, to maintain the water bars and to develop a complete interim Erosion Control Plan. (N.T. 41)

38. On December 11, 1990, Brajkovich did another inspection and found that Appellant had done temporary seeding and mulching on the disturbed areas and had recut and maintained deteriorating water bars. (N.T. 42; Ex. C-6)

39. Brajkovich also stated in that Report that Appellant still needed to submit an Erosion Control Plan. (N.T. 42; Ex. C-6)

40. On March 1, 1991, Edward Lesny, Appellant's engineering consultant, submitted an Erosion Control Plan to provide interim stabilization with respect to earthmoving done by Appellant in May, 1990. (N.T. 43-44; Ex. C-8, C-8)

41. Lesny revised the plan by replacing the water bars with open-top cross culverts, a more permanent structure. (N.T. 46)

42. Brajkovich gave approval to the plan only if energy dissipators were installed at the outflow of each water bar and only for existing earthmoving activity stabilization. Any additional earthmoving activities would require additional erosion control measures to be designed and installed. (N.T. 46-48; Ex. C-9)

43. On May 24, 1991, Brajkovich did another inspection at which time he found that the road was not stabilized, that the disturbed areas were not stabilized, and that the existing water bars were not large enough and were unstable to flow conditions. He stated that the following be installed: stone on the road; seed, fertilizer and lime on the disturbed areas; cross culverts, stone-lined cross ditches as well as energy dissipators. (N.T. 57-58; Ex. C-15)

44. On May 24, 1991, Brajkovich sent Appellant another Notice of Violation. (N.T. 58; Ex. C-16)

45. Penn Township closed Barnett Drive in March, 1991, due to concerns over excessive road damage. (N.T. 59, 153; Ex. C-13)

46. In order to use Barnett Drive for other than private vehicles, a party had to obtain a temporary road use permit. (N.T. 59; Ex. C-16)

47. Penn Township assured Brajkovich that it would issue a temporary road use permit to allow Appellant to implement his Erosion Control Plan. (N.T. 59; Ex. C-16)

48. Appellant was told of the need to obtain a temporary road use permit to implement his erosion control plan in a May 24, 1991, Notice of Violation. (Ex. C-16)

49. Brajkovich agreed that the Township could contact him to verify whether Appellant needed those types of equipment or materials to implement the interim control plan. (N.T. 60)

50. During the summer of 1991, Appellant laid eight inches of compacted 3A modified stone on the road base; installed three lower cross culverts and a stone-lined roadside ditch. However, he did not install the water dissipator outlets or seed or stabilize the road banks and other disturbed areas. (N.T. 49-50, 61-62)

51. On June 17, 1991, Brajkovich inspected the Site and found the following violations: water bars and cross culverts were not installed, some energy dissipators were partially installed, as well as disturbed areas had not been seeded. (N.T. 63; Ex. C-17)

52. Brajkovich sent Appellant a copy of this report with a cover letter advising that the violations should be corrected. (N.T. 64; Ex. C-18)

53. On July 12, 1991, Appellant was working on installing cross culverts when Brajkovich met with him. (N.T. 66)

54. On July 17, 1991, Brajkovich visited the Site and found the stone road base had been installed, but there were unstabilized road bank areas, the water bar was inadequate to handle water flow, there was a partially stabilized bank and an improperly designed swale. (N.T. 67-72; Ex. C-19)

55. At a July 25, 1991, meeting with Appellant, Brajkovich and Murin stressed that Appellant should be implementing the interim plan and not doing additional work at the Site. (N.T. 72-73, 319)

56. On July 25, 1991, and August 8, 1991, Brajkovich performed Site inspections and found that conditions had not changed. (N.T. 75-76; Ex. C-20)

57. On August 20, 1991, Brajkovich inspected the Site and made the following observations: the road base itself was not eroding but the road water was creating erosion problems in the road ditches, unstabilized bank areas were still eroding, upper cross ditches and culverts had been improperly installed, energy dissipators were not installed and there was sparse vegetation on the Site. (N.T. 77-81; Ex. C-21, C-22)

58. On August 26, 1991, Brajkovich issued another Notice of Violation to Appellant based on this August 20, 1991, visit. (N.T. 81; Ex. C-23)

59. In November, 1991, Appellant submitted another Erosion Control Plan in which he indicated he wanted to do additional land development activity on the Site, i.e. to add additional fill areas along either side of the road. (N.T. 52-53; Ex. C-13)

60. Brajkovich determined the plan to be inadequate and informed Lesny of the reasons in a letter dated November 22, 1991. (N.T. 52)

61. The plan contained no temporary or interim erosion control measures, such as sediment basins or traps, silt fences, or straw bales, or a detailed sequence of construction indicating that the erosion controls would be put in prior to the actual fill being put in. (N.T. 55; Ex. C-14)

62. On December 12, 1991, Brajkovich inspected the Site and found the disturbed areas were unstabilized as well as the road shoulders and road ditches were still eroding. (N.T. 84; Ex. C-24)

63. Brajkovich estimated 20 percent of the runoff from the Site came from land upgradient from the Site while 80 percent came from the Site itself. (N.t. 169-170)

64. There was no excessive runoff from other property, so no action was taken against the owners. (N.T. 171)

65. There was logging activity upgradient from the Site in the 1980s. (N.T. 386-390, 411-415)

66. DER never received any complaints about the logging operation. (N.T. 364)

67. Runoff from a tract of land eventually makes its way to a stream. Unless controlled, the runoff will carry sediments that will be deposited in the stream. (N.T. 370)

68. Two unnamed tributaries to Cove Creek exist about 300 feet from Cove Mountain Estates. (N.T. 24, 25, 333, 342, 355, 368-373)

69. On January 3, 1992, DER issued the C.O. to Appellant to cease and desist from additional earthmoving activities on the Site, to submit revisions to his Erosion Control Plan he was proposing, and then within twenty days of approval to start implementing that plan. This is the C.O. from which the appeal was taken. (N.T. 85)

DISCUSSION

In this appeal of DER's C.O., the burden of proof rests with DER to show by a preponderance of the evidence that the C.O. was lawful and not an abuse of discretion. 25 Pa. Code §21.101(b)(3)

DER contends in its post-hearing brief that Appellant violated 25 Pa. Code §§102.4 and 102.5 by not having an erosion and sedimentation control plan at the Site from May, 1990, through April, 1991. While the evidence supports that contention, the C.O. charges Appellant only with the failure to utilize control measures (§102.4) and the failure to provide interim stabilization (§102.12(e)), resulting in a danger of pollution (CSL §402). Failure to have an erosion and sedimentation control plan (§102.5) is not mentioned in the C.O. That being the case, it did not form the basis for DER's action and cannot be a part of our review. We will limit ourselves to the charges set forth in the C.O.

Curiously, Appellant does not address these charges in his post-hearing brief, arguing instead (1) that DER lacks jurisdiction to issue the C.O., (2) that DER failed to prove that accelerated erosion is coming from Cove Mountain Estates, and (3) that the C.O. is unreasonable. Issues not addressed in a post-hearing brief are deemed to be waived. Lucky Strike, *supra*.[2]

In order to carry its burden of proof, DER must produce evidence that will lead the Board to conclude that it is more probable than not that Appellant violated the CSL as well as the regulations and that the measures prescribed in the C.O. are appropriate. Richard A. Merry II v. DER, 1993 EHB 1746; South Hills

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[2]This includes Appellant's objection to Judge Myers' ruling on the admissibility of certain evidence regarding problems at the Site which occurred after issuance of the C. O. Judge Myers explicitly instructed Appellant to address the issue in his post-hearing brief but Appellant failed to do so.

Health System v. Commonwealth, Department of Public Welfare, 98 Pa. Cmwlth. 183, 510 A.2d 934 (1986).

The evidence clearly shows that, from May, 1990, on, Appellant (a person engaged in earthmoving activities) failed to conduct his operations in such a way as to prevent accelerated erosion[3] and sedimentation. This is a violation of 25 Pa. Code §102.4. The evidence is just as clear that Appellant did not employ and effectively maintain either interim or permanent stabilization measures as required by 25 Pa. Code §102.12(e). Appellant does not challenge these conclusions, but does raise some excuses.

The first relates to runoff coming onto Cove Mountain Estates from upgradient land, runoff that Appellant claims is excessive. DER's witness testified, however, that the runoff from Cove Mountain Estates consists, only to the extent of 20 percent, of water from upgradient land. The remaining 80 percent comes from the development itself. Clearly, the contribution made by upgradient land in this mountainside setting cannot be considered excessive. Appellant had the burden of proof on this affirmative defense: 25 Pa. Code §21.101(a), and failed to carry it.

The second excuse is raised in the proposed findings of fact but not in the discussion portion of Appellant's post-hearing brief. Although the point could be deemed to have been waived we will discuss it. It concerns Appellant's alleged inability to install and maintain erosion control measures because of interference from the Township. The initial instance was in June, 1990, when the Township ordered Appellant to stop work on the land development. The Township's order was soon clarified by the Township Solicitor who acknowledged that

[3]Accelerated erosion is the removal of the surface of the land through the combined action of man's activities and the natural processes at a rate greater than would occur because of the natural process alone. 25 Pa. Code §102.1.

Appellant could work on erosion control measures. Any interference caused by this event was shortlived and cannot form the basis for an excuse.

The next alleged interference was the closure of Barnett Drive in March, 1991. The full extent of this action was not immediately apparent but was soon clarified. Appellant was informed that he could obtain temporary permits to use the road for equipment and materials necessary to do the erosion control work. Again, the interference was slight and does not excuse Appellant's failures.

Besides, interference in June, 1990, and March, 1991, does not explain the failure to install and maintain erosion controls during the other months from May, 1990, until the C.O. was issued in January, 1992. Again, Appellant has failed to carry his burden of proof on this affirmative defense.

Appellant contends that, even if he failed to control accelerated erosion on Cove Mountain Estates and allowed sediment to leave his property, DER presented no evidence that it resulted in pollution entering the waters of the Commonwealth. It is true that DER presented no evidence tracing a sediment fragment from Cove Mountain Estates into any stream or other body of surface or subsurface water. Proof to that degree was not required, however, under the section of the CSL charged in the C.O. That section (35 P.S. §691.402) provides that whenever DER finds that any activity "creates a danger of pollution" to waters of the Commonwealth, DER may issue an order regulating the activity.

"Pollution" is defined in §1 of the CSL, 35 P.S. §691.1, to include the discharge of solid materials that are likely to render waters of the Commonwealth harmful to public health, safety or welfare, or to recreational use, or to fish and other aquatic life. Runoff from land with its accompanying sediment falls squarely within this definition. Community College of Delaware County et al. v. Fox et al., 20 Pa. Cmwlth. 335, 342 A.2d 468 (1975). The dynamics of runoff, as

DER's witness explained, carries soil particles from the highest elevations to the lowest and eventually into bodies of water where they, in time, will reach the ocean.

Because of these factors, sediment runoff from Cove Mountain Estates has a potentially detrimental effect on the entire watershed - down Cove Creek to the Susquehanna River and down the Susquehanna to Chesapeake Bay. The absence of evidence showing that any of this sediment actually has reached a body of water at this point is immaterial. Accelerated erosion created by Appellant on a mountainside not far from tributaries to Cove Creek is sufficient to show the potential for sediment to reach the waters of the Commonwealth.

Most of Appellant's post-hearing brief is devoted to the argument that the C.O. is an abuse of discretion. As noted above, the C.O. required Appellant (1) to cease all earthmoving activities at the Site except those necessary to comply with the C.O., (2) within 20 days to submit revisions to the erosion and sedimentation control plan addressing the deficiencies noted in Brajkovich's letter of November 22, 1991, to Lesny, and (3) within 20 days after approval of the revised plan, to implement it so as to achieve interim stabilization and minimize accelerated erosion.

Appellant argues that DER has no authority to compel the filing of another erosion and sedimentation control plan. He argues that DER has not shown that the existing plan is deficient. The evidence is to the contrary. While an initial plan was approved in the spring of 1991, Appellant filed another plan in November. It is this plan that Brajkovich found to be deficient and the deficiencies were set forth in his letter to Lesny. DER was clearly empowered to require Appellant to file a revised plan addressing those deficiencies.

Appellant also argues that the C.O. is impossible to obey, since it requires him to implement control measures after ordering him to cease earthmoving activities at the Site. The argument is ridiculous. The cease and desist portion of the C.O. specifically excepts "those actions necessary to comply with the terms and condition" of the C.O. The impossibility Appellant sees here perhaps explains why he repeatedly failed to install and maintain erosion controls at the Site for a year and a half prior to issuance of the C.O.

CONCLUSIONS OF LAW

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

2. DER has the burden of proving by a preponderance of the evidence that violations of the CSL and its regulations were committed and the remedial measures set forth in its order were proper and were not an abuse of discretion.

3. Appellant bears the burden of proving any affirmative defense.

4. Appellant violated 25 Pa. Code §§102.4 and 102.12(e) by failing to implement effective erosion and sedimentation control measures on his property from May, 1990, to December, 1991, resulting in a danger of pollution to waters of the Commonwealth under §402 of the CSL, 35 P.S. §691.402.

5. DER has the authority to issue the C.O.

6. The remedial measures set forth in the C.O. were not an abuse of discretion.

O R D E R

AND NOW, this 7th day of September, 1994, it is ordered that the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: September 7, 1994

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

QC, INC.	:
v.	: **EHB Docket No. 93-199-MR**
COMMONWEALTH OF PENNSYLVANIA	:
DEPARTMENT OF ENVIRONMENTAL RESOURCES	: **Issued: September 7, 1994**

OPINION AND ORDER SUR
REQUEST TO APPEAL NUNC PRO TUNC
AND MOTION TO QUASH

By: Robert D. Myers, Member

Synopsis

The Board denies a request to appeal *nunc pro tunc* and quashes the appeal. Appellant's misimpression that DER's action was not appealable is not adequate grounds for allowing its appeal to be filed *nunc pro tunc*.

Background

Appellant QC, Inc. (QC), which operates an independent testing laboratory in Southampton, Bucks County, initially filed a notice of appeal with this Board on July 22, 1993 through its vice president Thomas J. Hines. QC's notice of appeal objected to DER's action in downgrading the certification of QC's laboratory under the Safe Drinking Water Act, Act of May 1, 1984, P.L. 206, 35 P.S. §721.1 *et seq.*, from certified to provisionally certified with regard to testing water samples for volatile organic compound (VOC) parameters for a six month period. By a letter dated November 10, 1993, DER advised QC that its laboratory was restored to full certification for

analysis of VOC parameters. A number of motions have been filed in this matter. We stayed all proceedings by an order issued February 15, 1994, so we could determine whether we have jurisdiction over QC's appeal.

The Board has jurisdiction over DER actions only if they are "adjudications" within the meaning of the Administrative Agency Law, 2 Pa.C.S. §101, or "actions" as defined at 25 Pa. Code §21.2(a). See Middle Creek Bible Conference, Inc. v. Department of Environmental Resources, No. 2023 C.D. 1993 (Opinion issued June 20, 1994); Quehanna-Covington-Karthaus Area Authority v. DER, EHB Docket No. 93-121-W (Opinion issued April 26, 1994). An "adjudication" is defined as "[a]ny 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 parties to the proceeding in which the adjudication is made." 2 Pa.C.S. §101. An "action" is similarly defined.

QC's notice of appeal reflects that, *inter alia*, two DER letters were received by QC. Attachment 1 to QC's notice of appeal is a letter dated May 7, 1993 from DER's P. Ted Lyter, Chief of DER's Laboratory Certification Section, to QC. It states:

> Thank you for your prompt response to my concern of data inaccurately being reported to DER. The corrective action that you have submitted appears to eliminate the probability of further occurrences. Because of your complete cooperation and response, I do not see any need for decertification. However, your laboratory will be downgraded to Provisionally Certified for VOCs for a six month period. If no other instances of incorrect reporting occurs [sic] between now and November 11, 1993, your laboratory's VOC status will be upgraded. Of course, performance evaluation sample results and on-site inspections may also affect your laboratory's status.

Attachment 4 to QC's notice of appeal is a letter dated June 21, 1993 from DER to QC. It states, in pertinent part:

> I received your letter requesting a hearing to appeal the decision to downgrade your VOC certification from "Certified" to "provisional." As I explained to you in our telephone conversation after you received notification of the downgrade, appeals are not filed with me but with the Environmental Hearing Board. I have included the procedure for a formal appeal to the Board. I also want to take exception with your statement in your letter that "In this case, no prior problems existed" in reference to your laboratory's reporting procedures. I have on file a copy of a signed Consent Assessment of Civil Penalty from April 14, 1992. This was the result of your laboratory's reporting procedures for MCL violations for microbiology. The downgrade of status is not normally based on one isolated instance although the significance of the incident is considered.

DER's June 21, 1993 letter then set forth the procedure for filing an appeal of DER's action with the Board. (See Exhibit B to QC's response to DER's motion to dismiss.)

In QC's notice of appeal, QC admits that the appeal was filed more than thirty days after QC's receipt of DER's May 7, 1993 letter. As our jurisdiction does not attach to an appeal unless it is filed within thirty days after a party appellant receives written notice of DER's action (Rostosky v. Commonwealth, DER, 26 Pa.Cmwlth. 478, 364 A.2d 761 (1976), Hornezes v. DER, 1993 EHB 1838), DER argues that we lack jurisdiction over QC's appeal. QC responds by arguing that it was unclear from DER's May 7, 1993 letter as to whether DER's action was final and appealable to the Board, and that this was not made clear until after it received DER's June 21, 1993 letter. In an affidavit filed July 28, 1994, QC's president states that DER's June 21, 1993

letter was delivered by the United States Postal Service to QC's offices on or after June 22, 1993. QC thus contends that its appeal was timely filed within thirty days after its receipt of DER's June 21, 1993 letter.

We find that it was DER's May 7, 1993 letter which gave QC written notice of DER's action here. This letter set forth DER's decision to downgrade QC's certification status as to VOCs and possibly affected QC's personal or property rights, privileges, immunities, duties, and obligations. It further advised QC that DER's decision was to "provisionally certify" QC as to VOC parameter testing for a six month period, setting forth the date upon which upgrading to full certification status was to be restored if no other instance of incorrect reporting were to occur. This information was sufficient to apprise QC of the finality of DER's action, although the word "final" did not appear in the letter, and the letter did not include a statement of appeal rights. See Quaker State Oil v. Commonwealth, DER, 108 Pa.Cmwlth. 610, 530 A.2d 942 (1987). The Commonwealth Court has stated in Quaker State Oil, citing Commonwealth v. Derry Township, 10 Pa.Cmwlth. 619, 314 A.2d 868 (1973), that a statement of appeal rights is not necessary where the procedure for taking an appeal is set forth by regulation, as it is here at 25 Pa. Code §§21.51-21.53. While the inclusion of a statement of appeal rights by DER in the May 7, 1993 letter would have served to clarify the appeal procedure for QC, the absence of such a statement does not determine the appealability of the May 7 letter.

QC obviously read the May 7, 1993 letter as being final because it requested a hearing to challenge the action. The June 21, 1993 letter from DER simply advised QC to file an appeal with this Board in order to get a hearing. This letter did not change the *status quo ante* from DER's May

7, 1993 letter as to DER's decision, nor did it impose any new obligations on QC. It set forth DER's response to QC's request for a hearing to challenge DER's action, stating that this same information had previously been explained to QC over the telephone. We thus conclude that, if the action was appealable, it was the May 7, 1993 letter which contained it, not the June 21, 1993 letter and QC's appeal is untimely. See Louis Costanza, t/d/b/a Elephant Septic Tank Service v. DER, 1991 EHB 1132.

QC asserts, however, that a *nunc pro tunc* appeal is warranted pursuant to 25 Pa. Code §21.53. A *nunc pro tunc* appeal is allowed "only where there is a showing of fraud, breakdown in the administrative process or unique and compelling factual circumstances establishing a non-negligent failure to file a timely appeal." Grimaud v. Department of Environmental Resources, ___Pa.Cmwlth. ___, ___, 638 A.2d 299, 303 (1994) (quoting Falcon Oil v. Department of Environmental Resources, 148 Pa.Cmwlth. 90, 94, 609 A.2d 876, 878 (1992)). QC contends that DER's action was *ultra vires*, that Lyter misled QC by indicating that no appeal was possible from a downgrade to a "provisionally certified" classification, and that QC had no reasonable means to assess whether DER's action was proper and could be appealed. QC argues that together, these amount to unique and compelling circumstance. In support of its argument, QC cites a number of cases including Fisher v. DER, 1993 EHB 425.

As we pointed out in Fisher, "the Board and the appellate courts have had little sympathy for litigants who disavowed knowledge of the applicable statutory requirements, or expected [DER] to advise them of appeal rights and procedures." Fisher at 428 (citing Cadogan Township Board of Supervisors v. Department of Environmental Resources, 121 Pa.Cmwlth. 18, 549 A.2d 1363

(1988); Quaker State Oil Refining, *supra*). We concluded in Fisher, however, that where DER, by confusing language in its mine subsidence insurance agreement, misled the appellant into believing she had two years to appeal DER's denial of her claim (which was erroneous), her failure to file her appeal with this Board within the thirty day period was not negligent and resulted from unique and compelling circumstances, warranting an appeal *nunc pro tunc* (citing Tarlo v. University of Pittsburgh, 66 Pa.Cmwlth. 149, 443 A.2d 879 (1982)). Similarly, in Comly v. DER, 18 D&C 3d (1981), upon which QC relies, the Board allowed an appellant to proceed *nunc pro tunc* where the facts established that DER had unintentionally misled her into believing that no action had been taken by DER on the NPDES permit about which she expressed concern to DER, where the NPDES permit had in fact already been issued by DER.

In Sharon Steel Corporation v. DER, 1978 EHB 205, the Board found that the appellant, which untimely filed an appeal from the terms and conditions contained in DER's certification of its NPDES permit application, did not establish good cause for an appeal *nunc pro tunc*. Citing Derry Township, the Board reasoned that the appeal procedure for appeals of actions of DER was set forth at 25 Pa. Code Chapter 21, and that the absence of a statement of appeal rights in the certification was not sufficient to give rise to an appeal *nunc pro tunc*. The Board further reasoned that although a DER employee had given advice to the appellant regarding its appeal rights, the advice could not have been misleading as to the proper forum, and the appellant should have investigated its appeal rights and attempted to protect itself by filing an appeal with the Board within the thirty day period. The Board in Sharon Steel concluded that we lacked jurisdiction over the appeal.

We find the instant matter to be similar to the situation in Sharon Steel. Lyter states in DER's June 21, 1993 letter that he had explained to QC's Hines in a telephone conversation that an appeal of DER's action should be filed with the Board, not DER. Thus, there is no question that DER did not mislead QC as to the proper forum for filing its appeal. QC suggests that Lyter led it to believe that DER's action here could not be appealed. In DER's answer to QC's request for appeal *nunc pro tunc*, which is verified by Lyter, DER states that Lyter told Hines in the telephone conversation that "since the downgrade did not preclude QC in any way from carrying out its business as a laboratory, he did not know whether it could be appealed or not...." DER further points us to paragraph 2 of QC's notice of appeal, in which QC states that Lyter told Hines that "he was not sure whether an appeal could be made for a status change to Provisional, that only Decertification was a valid reason for an appeal." The facts, thus, do not establish that Lyter affirmatively stated to QC that no appeal was possible. Cf. Flynn v. Unemployment Compensation Board of Review, 192 Pa.Super. 251, 159 A.2d 579 (1960) (appellant was advised by Commonwealth employee that "she did not have a leg to stand on.") We accordingly find no unique and compelling circumstances here for which we should allow QC to appeal *nunc pro tunc*, and we quash QC's appeal as we lack jurisdiction over it.[1]

---

[1] QC cites no case law, nor could we find any case law, supporting its allegation that an allegation of *ultra vires* action is a ground for a *nunc pro tunc* appeal. We do not read the Commonwealth Court's decision in Guat Gnoh Ho v. Unemployment Compensation Board, 106 Pa.Cmwlth. 154, 525 A.2d 874 (1987), as making any allowance for such a ground.

ORDER

AND NOW, this 7th day of September, 1994, it is ordered that: 1) QC's request for an appeal *nunc pro tunc* is denied; and 2) DER's motion to dismiss for lack of jurisdiction, treated as a motion to quash, is granted.

ENVIRONMENTAL HEARING BOARD

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MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: September 7, 1994

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

MRS. PEGGY ANN GARDNER, MRS. BARBARA JUDGE and MRS. MARY JANE ECKERT	:	
v.	:	EHB Docket No. 93-381-E
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: September 7, 1994

OPINION AND ORDER SUR
MOTION FOR RECONSIDERATION

By: Robert D. Myers, Member

Synopsis

DER's Motion for Reconsideration *en banc* of the Board's Opinion and Order denying its Motion to Dismiss the Appeal for lack of jurisdiction is granted. On reconsideration, the Motion to Dismiss the Appeal is granted and the appeal is dismissed for lack of jurisdiction.

OPINION

In an Opinion and Order Sur Motion to Dismiss issued on April 14, 1994, Judge Ehmann denied the Motion to Dismiss the Appeal for lack of jurisdiction filed by the Department of Environmental Resources (DER). DER then filed a Motion for Reconsideration *en banc* to which Appellants filed Objections. We have interpreted our rules at 25 Pa. Code §21.122 as providing for reconsideration, but where, as here, an interlocutory decision is involved, we have required the presence of extraordinary circumstances: *City of Harrisburg v. DER*, 1991 EHB 87; *Baumgardner v. DER*, 1989 EHB 400. Lack of jurisdiction, which can be raised at any time, is an extraordinary circumstance justifying our reconsideration of this

interlocutory decision.

Appellants own the right to surface mine certain coal deposits in Moraine State Park. Concluding that current statutory law prohibited them from exercising their right, they began eminent domain proceedings in the Court of Common Pleas of Butler County, claiming a *de facto* taking giving rise to damages. DER's preliminary objections, contending that Appellants had an administrative remedy by way of seeking a variance from DER, were sustained by Common Pleas and affirmed by Commonwealth Court: *Gardner v. Commonwealth, Department of Environmental Resources*, 145 Pa. Cmwlth. 345, 603 A.2d 279 (1992).

Appellants thereupon requested from DER a determination as to whether Appellants could obtain a variance. In a series of three letters during October and November 1992, DER advised Appellants that specified additional information would have to be filed before DER could make a decision. Appellants filed Notices of Appeal with the Board from these letters and the appeals were consolidated at Board Docket No. 92-508-E. These consolidated appeals were terminated by a Consent Adjudication, dated March 10, 1993, executed on behalf of the parties by their legal counsel (who are well qualified individuals) and approved by the Board on March 17, 1993.

The Consent Adjudication contains findings of fact to which the parties agreed and stipulations reached after "full and complete negotiation." The first three stipulations read as follows:

> 1. [DER] and [Appellants] agree that the information presently available to [DER] is sufficient for [DER] to rule upon a variance to conduct surface coal mining activity in Moraine State park.
>
> 2. [DER] hereby denies the variance.
>
> 3. [Appellants] may appeal this denial to the Environmental Hearing Board as a final action of [DER].

Other stipulations deal, *inter alia*, with DER's commitment to "undertake a program of geophysical testing and drilling" in the area of Appellants' surface coal mining rights and to share the results with Appellants.

Appellants gained a great deal by this Consent Adjudication. In settlement of their consolidated appeals from DER's insistence on more information, they succeeded in getting DER to back off that position and to act on the variance request on the basis of the information already in DER's hands. They also secured a denial of the request and a stipulated right to appeal the denial to this Board as a final action of DER.

In addition, they succeeded in getting DER to spend government resources in exploring the coal deposits and other subsurface features in the area. While the Consent Adjudication is silent about what would happen, if anything, after the testing and drilling were completed, Appellants allegedly assumed that DER would offer them a sum of money. That is not stated in the Consent Adjudication, however, and would necessarily have depended upon a conclusion from the testing and drilling that Appellants had a compensable injury in not being able to surface mine the coal.

Despite these uncertainties, Appellants did not file an appeal with this Board from DER's denial of a variance. Instead, they placed all their eggs in the shaky basket that DER would offer them money after exploration. When DER refused to offer the money, Appellants brought the current appeal to this Board.

In their Notice of Appeal, Appellants make it clear that the only DER action they are contesting is the "denial that a compensable taking has occurred with respect to surface mineable coal reserves owned by Appellants...and refusal to compensate Appellants for the value of their surface mineable coal reserves."

In their factual and legal objections to DER's action, Appellants state the following:

> 41. The Consent Adjudication also provided Appellants could appeal from DER's determination that the C.W. House did not qualify for a variance under 25 Pa. Code §86.102(4). Appellants did not appeal from this determination because it is the determination which they were seeking from DER and because the drilling and testing which DER agreed to conduct under the Consent Adjudication was intended to identify whether there were surface mineable coal reserves on the C.W. House tract and, if so, the extent of such coal reserves. Also, Appellants believed that DER was willing to negotiate payment for their surface rights after the extent and quality of the reserves was established.
>
> (emphasis added)
>
> *****
>
> 46. Appellants appeal from DER's determination that Appellants are not entitled to compensation for the coal reserves on the C.W. House Tract. Appellants believe that the proper forum for a determination of whether Appellants are entitled to compensation is before a Board of Viewers appointed by the Court of Common Pleas of Butler County, pursuant to §502(e) of the Eminent Domain Code, 26 P.S. §1-502(e). However, in consideration of the Commonwealth Court decision in *Beltrami Enterprises, Inc. v. DER*, No. 2128 C.D. 1992 (Opinion issued September 15, 1993), Appellants are filing this precautionary appeal. Commonwealth Court already determined in *Gardner v. DER, supra*, that a taking would exist if the C.W. House Tract did not qualify for a variance under 25 Pa. Code §86.102(4). The Board is bound by Commonwealth Court's holding. Therefore, the current issue is the amount of damages to which Appellants are entitled; an issue which is properly determined by a Board of Viewers.
>
> (emphasis added)

Appellants have admitted by these statements in the Notice of Appeal (a) that the only DER action complained of is the refusal to pay money damages, (b) that an appeal was not filed from DER's denial of the variance because that is the very result Appellants wanted, (c) that the only remaining issue is the amount of damages, (d) that the proper forum for determining that issue is a

Board of Viewers, and (e) that this appeal to the Board is cautionary. In their Brief in Opposition to DER's Motion for Reconsideration, Appellants advise the Board that they have filed a Petition for Appointment of Viewers with the Court of Common Pleas of Butler County at Docket No. A.D. No. 93-11010, that the Court has made a finding that a taking has occurred and that the Court has appointed a Board of Viewers to determine just compensation.

Given the circumstances recited above, the question occurs "what is before us in this appeal?" Clearly not DER's denial of the variance. Appellants have made it plain in the Notice of Appeal that their appeal does not challenge that denial and have candidly admitted that denial of the variance is precisely what they wanted. Aside from these admissions, it is obvious that their appeal is untimely as far as the variance denial is concerned. That denial became effective on March 17, 1993. The Notice of Appeal filed December 23, 1993 is well beyond the appeal period set by our procedural rules.

When DER filed its Motion to Dismiss the Appeal on the basis that the Board lacked jurisdiction, Appellants began to vacillate. While continuing to admit that the variance denial was precisely what they wanted, they injected the novel argument that they could not have appealed the denial to this Board in any event. They argued that the Board's approval of the Consent Adjudication amounted to a ruling that the denial was lawful and an appropriate exercise of DER's discretion. The only forum to which an appeal could have been taken, the argument goes, was Commonwealth Court.

This argument is utter nonsense. Our approval was limited to the terms of the Consent Adjudication. We approved the parties' agreement (a) that DER had enough information to act on the variance request, (b) that the request was denied, and (c) that the denial could be appealed to this Board as a final action

of DER. To argue that our approval of this agreement constituted a ruling on the merits of the denial, without Appellants even taking an appeal, does violence to the language of the Consent Adjudication and, even more troublesome, places a new and expanded interpretation on our approval of Consent Adjudications.

It must be borne in mind that the Consent Adjudication settled appeals challenging DER's insistence that it needed much more detailed information before it could act on the variance request. The parties, by their negotiations, moved the process forward by agreeing that DER had enough information to act and denied the variance, a final action which Appellants could appeal to this Board. This is a perfectly acceptable result and one the parties obviously desired to achieve. An appeal to this Board from the variance denial would not have been an appeal <u>from</u> the Consent Adjudication itself but an appeal <u>allowed</u> by the terms of the Consent Adjudication. This distinction was evident in the concluding paragraph of the Consent Adjudication which stated, *inter alia*, that Appellants "knowingly waive any right to <u>appeal the Consent Adjudication itself</u>." (emphasis added)

If our approval of the Consent Adjudication was, in and of itself, to constitute our ruling on the merits of the variance denial, then we would have insisted that the language be changed to provide for appeal to Commonwealth Court rather than to this Board. Moreover, if our approvals are to be interpreted as Appellants argue here, we either should cease approving settlements or should require the parties to satisfy us on the record that we would reach the same result after a hearing on the merits. For obvious reasons, we are not prepared to do that.

Appellants also argue that an appeal of the variance denial would have been premature prior to the completion of the drilling and testing and DER's decision

not to offer any money. Not only does this fly in the face of the specific language of the Consent Adjudication (giving Appellants the right of appeal to the Board from a final action of DER), it represents an attempt by Appellants to confuse the distinction between what relates to a taking and what relates to damages for a taking. Finally, the argument conflicts with the Notice of Appeal which makes it clear that the appeal does not challenge the variance denial. Appellants are bound by the Notice of Appeal and cannot belatedly inject an issue not raised there and, in fact, specifically excluded there.

For all of these reasons, we conclude that the issue of variance denial is not before us in this appeal.

It has been the law of the land for a long time that governmental regulation, valid on its face as an exercise of the police power, can go too far and become a taking of property requiring the payment of compensation under either the Fifth or Fourteenth Amendments to the U.S. Constitution: *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Pennsylvania constitutional provisions have generally produced identical rulings: *Andress v. Zoning Board of Adjustment of the City of Philadelphia*, 410 Pa. 77, 188 A.2d 709 (1963).

Property owners who consider their property to have been taken by a government regulation cannot simply seek compensation under laws and procedures governing *de facto* takings. They must first invoke whatever administrative avenues are open to them to challenge the impact of the regulation. Their claim for compensation is not ripe until the relevant governmental agency has reached a final decision: *Hodel v. Virginia Surface Mining and Reclamation Assn., Inc.*, 452 U.S. 264 (1981). Pursuant to that principle, this Board has jurisdiction to consider whether a regulatory taking has occurred by action of DER: *Mock v. Department of Environmental Resources*, 154 Pa. Cmwlth. 380, 623 A.2d 940 (1993),

and property owners cannot seek compensation until this Board has rendered a final decision: *Gardner v. Commonwealth, Department of Environmental Resources*, 145 Pa. Cmwlth. 345, 603 A.2d 279 (1992). But our jurisdiction extends only to determining whether a taking has occurred; the Courts of Common Pleas have the exclusive jurisdiction to determine and award damages: *Beltrami Enterprises, Inc. v. Commonwealth, Department of Environmental Resources* (Pa. Cmwlth.), 632 A.2d 989 (1993).

If a timely appeal of the variance denial had been filed with us, we would have entered upon the type of analysis used in *Mock v. DER*, 1992 EHB 537, and affirmed by Commonwealth Court, *supra*. We would have examined first whether DER's denial of the variance was supported by statute and regulation and was an appropriate exercise of discretion. Obviously, if we had reached a negative conclusion on this point, we would either have remanded it to DER or would have directed the variance to be granted.[1]

Assuming we reached a positive conclusion, we next would have considered whether this particular exercise of the Commonwealth's police power passed constitutional muster under the three-prong test articulated in *Lawton v. Steele*, 154 U.S. 133 (1894). We would have determined (1) whether the public interest requires it, (2) whether the means chosen are reasonably necessary for the accomplishment of the purpose, and (3) whether the means chosen are unduly oppressive upon Appellants. If we had answered prongs (1) or (2) or both in the negative, we again would either have remanded it to DER or would have directed

[1]Since Appellants admit they did not want the variance, the possibility that this Board, on appeal, might have directed the issuance of the variance may further explain their failure to appeal the denial.

the variance to be granted.[2]

Prong (3) mandates a consideration of the specific impact of the regulation upon Appellants. To be unduly oppressive, the regulation must deprive Appellants of <u>any</u> reasonable use of their property. If it does not go that far, the regulation is constitutional even though it prevents the most profitable use of the property: *Andrus v. Allard*, 444 U.S. 51 (1979), or results in a significant reduction in value: *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).[3]

While there could be some argument to the contrary, it appears that DER's denial of a variance unquestioningly deprived Appellants of any reasonable use of the property. The right to surface mine coal deposits can only be exercised, for all intents and purposes, by mining the coal. If DER refuses to permit the mining, the right has no use. Thus, we probably would have ruled that the regulation is unduly oppressive upon Appellants and, as such, was an unconstitutional exercise of the police power as to Appellants. DER then would have been faced with the decision whether to grant the variance[4] or to condemn the property.[5]

Note that, throughout this analysis, there is no mention at all of the extent of the coal deposits, the quality of the mineral, the ease of mining, or any other factor relating to costs or proceeds. Those subjects are absent because they have no bearing on whether there has been a taking; they relate

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[2]See footnote 1, *supra*.

[3]A ruling of this nature, which would have deprived Appellants of any right to claim compensation, was also a risk they probably wanted to avoid by not appealing the variance denial.

[4]See footnote 1, *supra*.

[5]The foregoing, extensive analysis is what Appellants claim was miraculously telescoped into our 9-line approval of the Consent Adjudication.

solely to damages, if any, that might be assessed when, and if, the controversy reaches the Common Pleas. There are cases, of course, where investment-backed expectations are relevant (the regulation at issue does not interfere with the historical use of property but only its prospective use) and require some consideration of relative values, but the present case is not in that category. DER has interfered with the historic use of the mining rights and has effectively destroyed them.

Appellants have argued that a taking is not unconstitutional until damages have been determined, assessed and unpaid by the governmental body. Thus, damages are an essential element in determining whether an unconstitutional taking has occurred. This argument is based upon a misreading of *Williamson County Regional Planning Commission et al. v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). That case involved the application of zoning regulations which, a developer claimed, deprived him of property without just compensation. As a result, he filed a claim in the Federal District Court pursuant to 42 U.S.C. §1983 (providing for damages for the deprivation of civil rights under color of state regulation). The Supreme Court ruled that the action was not ripe. Before the developer could seek damages for deprivation of his constitutional rights he first had to exhaust the state procedures for (a) determining whether a taking has occurred and (b) assessing damages. Since those procedures existed and the developer had not used them, he could not seek damages under §1983 for deprivation of constitutional rights.

While the Supreme Court stated that the constitution proscribes only the taking of property without just compensation, it clearly held that a claimant seeking damages for that type of constitutional violation must first exhaust state procedures for determining whether a taking has occurred and, if so, what

the damages are. Only when that has been done and the damages remain unpaid may the claimant proceed under §1983.

This decision in no way changes the traditional analysis of what constitutes a taking - an analysis that in the present case does not even need a consideration of investment-backed expectations. The evidence that would come before us, if we entertained this appeal, would relate to DER's drilling and testing and the opinions based thereon. That evidence will neither prove nor disprove a taking of the coal rights; it will only prove or disprove the claim for compensation. That is the exclusive province of the Common Pleas. Appellants said as much in their Notice of Appeal and are pursuing that claim in Butler County.

Since Appellants stated that their appeal to this Board is cautionary, we would have been inclined to simply stay the proceedings pending termination of the case in Butler County. However, Appellants have not requested us to do that and have actively opposed on the merits DER's Motion to Dismiss the Appeal. Accordingly, since we have no jurisdiction to entertain the appeal, we will dismiss it.

ORDER

AND NOW, this 7th day of September, 1994, it is ordered as follows:

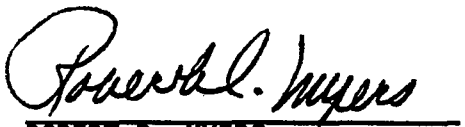
1. DER's Motion for Reconsideration *en banc* is granted.

2. Upon reconsideration, DER's Motion to Dismiss the Appeal is granted and the appeal is dismissed.

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Member

EHB Docket No. 93-381-E



ROBERT D. MYERS
Administrative Law Judge
Member

Board Member Richard S. Ehmann does not concur in this opinion; his dissenting opinion is attached.

DATED: September 7, 1994

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

MRS. PEGGY ANN GARDNER, MRS. BARBARA JUDGE and MRS. MARY JANE ECKERT	:	
v.	:	EHB Docket No. 93-381-E
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	

Dissenting Opinion
Board Member Richard S. Ehmann

While much of the majority's opinion appears sound, it has been said that even the Devil may quote scriptures for his purposes. Unlike the majority, I am unwilling to rush into reversal of my initial decision and to throw these appellants "out of court" based on a conclusion that we lack jurisdiction.

The basis for this reluctance stems from two decisions by the United States Supreme Court. The earlier of the two is Williamson County Regional Planning Commission, et al. v. Hamilton Bank Of Jackson City, 473 U.S. 172 (1985) ("Williamson"). In it, the Court held the taking claim to be unripe because the respondent had not sought compensation through the procedures the state had for doing so. The Court noted that exhaustion of planning commission review procedures was not mandatory for the claim to arise, but that since the Fifth Amendment only proscribes takings without just compensation, the constitutional violation only occurs if just compensation is denied. The logic of the Supreme Court is hard to fault, since, if in this appeal, DER denied the variance to mine but agreed to a compensable amount, there would be neither an appeal to this Board nor a proceeding in the Court of Common Pleas of Butler County. As the Williamson Court pointed out, the Constitution does not require pre-taking

compensation; rather, it is satisfied "by a reasonable and adequate compensation after the taking, the State's action here is not 'complete' until the State fails to provide adequate compensation for taking." Williamson 473 U.S. at 196.

In reviewing this decision and Appellants' argument thereon, the majority dismisses it as in no way changing the traditional analysis of what constitutes a taking and suggesting that the compensation issue is the province of the Common Pleas Court rather than this Board. I agree that compensation is not a Board issue but not that there is no change to takings case analysis. The majority mischaracterizes Appellants' argument as "a taking is not unconstitutional until damages have been determined, assessed and unpaid" by DER. This is not the Appellants' argument. Rather, Appellants assert that until DER rejects the obligation to pay for what it has taken, they cannot assert their rights in an appeal to us as to DER's taking of their coal.

In First English Evangelical Lutheran Church Of Glendale v. County Of Los Angeles, 482 U.S. 304 (1987) ("First English"), which the majority opinion fails to address, this same issue is specifically addressed. In First English, however, the matter arises not as a 42 U.S.C. §1983 claim (which the majority seized upon to try to distinguish away Williamson) but in an appeal of a *de facto* taking in California. There, a takings claim was asserted because an ordinance forbade construction of buildings on the church's land to replace those it lost during a flood. In footnote 6, the court stated in relevant part:

> "Our cases also required that one seeking compensation must seek compensation through the procedures the State has provided for doing so before the claim is ripe for review. [Citing Williamson.]

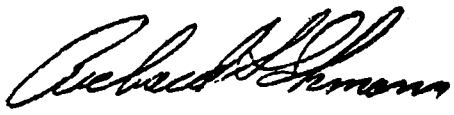
First English at 482 U.S. 313 at n.6.

If the "unconstitutional taking" claim cannot arise until a request or demand for compensation has been made and rejected, then it follows that the

first ability to challenge DER's action before us cannot arise until DER says "We will not pay compensation." Within thirty days of DER doing that as to these appellants, this "unconstitutional taking" appeal was filed. I see no problem with this Board concluding as to the small number of appeals dealing with takings compared to all of the appeals coming before us, that these two opinions and simple logic compel the conclusion that in such appeals the thirty day clock within 25 Pa. Code §21.52(a) did not begin to run until DER's "no compensation" decision was verbalized.

Further, the Gardners state in their notice of appeal, and DER does not dispute, that DER had suggested to the Gardners on various occasions since April of 1989 that DER would compensate them for the surface minable coal on their property, and that after years of litigation and negotiations, DER has now refused to do so. It offends any reasonable notion of fair play that DER argued before the Commonwealth Court that the Gardners' petition for the appointment of viewers was not ripe because they had failed to exhaust their administrative remedies by seeking a variance from DER, and DER led the Gardners to believe compensation might be forthcoming, yet now, after the Gardners have unsuccessfully sought that variance and exhausted their administrative remedy with DER, DER contends that Gardners are barred from review of their takings claim by the Board because they are raising it at too late a point in time. Though the majority may be willing to ignore this occurrence, and by doing so, approve this DER conduct, I am not and see ample reason why we need not do so. Accordingly, I dissent.

ENVIRONMENTAL HEARING BOARD



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: September 7, 1994

cc: **Commonwealth, DER:**
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Bureau of Legal Services
For Appellant:
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med

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M. DIANE SMITH
SECRETARY TO THE BOARD

PERRY E. AND JEANNE E. PHILLIPS	:	
v.	:	**EHB Docket No. 91-071-W**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** September 9, 1994

ADJUDICATION

By: Maxine Woelfling, Chairman

Synopsis:

The Department of Environmental Resources (Department) abused its discretion in assessing a $21,000 civil penalty for three days of violations of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* (SWMA), because two of the violations were the result of negligent, rather than reckless, conduct and none of the violations resulted in adverse environmental impacts. The Board substitutes its discretion for the Department's and reduces the penalty to $6,500.

INTRODUCTION

This matter comes before us on an appeal of a civil penalty assessment issued by the Department to Perry and Jeanne Phillips (Phillips) for violations of various provisions of the SWMA and the regulations promulgated thereunder, 25 Pa. Code Chapters 271 and 277. Pursuant to its authority under §605 of the SWMA, 35 P.S. §6018.605, on January 24, 1991, the Department issued the Phillips a civil penalty assessment in the amount of $21,000 for violations that it alleged had occurred on May 10 and November 13, 1989, and January 3,

1990. The Phillips filed a timely notice of appeal from this assessment on February 21, 1991, which we docketed at No. 91-071-F.

The Department filed a motion for partial summary judgment on March 15, 1991. Based on the Commonwealth Court's April 9, 1990, memorandum and order granting the Department's petition to preliminarily enjoin the Phillips from further violating the SWMA, we found that the Phillips' liability for these violations had already been established. We granted the Department's motion in an October 19, 1992, order and limited the issues in this appeal to the amount of the civil penalty assessed against the Phillips.

Following the resignation of Board Member Terrance J. Fitzpatrick on September 11, 1992, this matter was reassigned to Board Member Joseph N. Mack on October 19, 1992, and then to Board Chairman Maxine Woelfling on August 6, 1993. A hearing on the merits was held before Chairman Woelfling at the Chester County Bar Association in West Chester on September 24, 1993. The Department and the Phillips filed their post-hearing briefs on November 12 and December 13, 1993, respectively, and the Department filed a reply brief on December 27, 1993. Any issue not raised in the post-hearing briefs has been waived. Lucky Strike Coal Co. and Louis J. Beltrami v. Cmwlth., Dept. of Environmental Resources, 119 Pa. Cmwlth. 440, ___, 547 A.2d 447, 449 (1988).

The record in this matter consists of a transcript of 69 pages and 8 exhibits. After a full and complete review of this record, we make the following findings of fact.

FINDINGS OF FACT

1. Appellants are Perry E. Phillips and Jeanne E. Phillips, husband and wife, who own a farm on Old Wilmington Road in West Fallowfield Township, Chester County (Farm). (Notice of Appeal; N.T. 55)[1]

2. Appellee is the Department, the agency of the Commonwealth with the power and duty to enforce the provisions of the SWMA and the regulations promulgated thereunder.

3. The Department issued the Phillips notices of violations (NOVs) on December 9, 1987, May 25, 1989, and November 21, 1989. (Exs. D-7, D-8, D-9)

4. The December 9, 1987, NOV notified Perry Phillips that the Department observed municipal waste being disposed of at the farm on October 29, 1987, in violation of §§201 and 610 of the SWMA. (Ex. D-7)

5. The May 25, 1989, NOV notified Perry Phillips that the Department observed several piles of municipal waste and evidence of recent burning at the farm on May 10, 1989, in violation of §§201 and 610 of the SWMA. (Ex. D-8)

6. The November 21, 1989, NOV notified Perry Phillips that the Department observed truckloads of demolition or construction waste on the ground, municipal waste mixed with ash from open burning, and drywall incorporated into the soil at the farm on November 13, 1989, in violation of §§201, 501, and 610 of the SWMA. (Ex. D-9)

7. On January 24, 1991, the Department issued the Phillips a $21,000 civil penalty assessment for their May 10, 1989, November 13, 1989, and January 3, 1990, violations of the SWMA. (Notice of Appeal)

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[1]References to the transcript will be cited as "N.T.___." References to the parties' exhibits will be cited as "Ex. D-___" for the Department's exhibits and "Ex. P-___" for the Phillips' exhibits.

8. The amount of the civil penalty was determined by Nancy Roncetti, a compliance specialist in the Department's Waste Management Program between 1986 and 1991. (N.T. 10, 16)

9. Ms. Roncetti used the Bureau of Waste Management's "Civil Penalty Worksheet" and guidance document entitled *Calculation of Waste Management Civil Penalties* to calculate the amount of civil penalty. (N.T. 16-17; Exs. D-2, D-3)

10. Ms. Roncetti determined that the Phillips would be assessed a $6,000 penalty for their May 10, 1989, SWMA violation.[2] (N.T. 20-21; Exs. D-1, D-2)

11. Ms. Roncetti determined that the Phillips would be assessed a $7,000 penalty for their November 13, 1989, SWMA violation. (N.T. 25; Exs. D-1, D-2)

12. Ms. Roncetti determined that the Phillips would be assessed an $8,000 penalty for their January 3, 1990, SWMA violation. (N.T. 26-27; Exs. D-1, D-2)

13. Ms. Roncetti characterized the Phillips' SWMA violations as reckless because she believed, as a result of the NOVs, that the Phillips knew their conduct was unlawful. (N.T. 20, 22, 25, 27; Ex. D-2)

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[2]Although it appears from the NOVs and the Department's complaint in Commonwealth Court that the Phillips committed multiple violations of the SWMA on each of the days cited, in determining the amount of the civil penalty assessment, Ms. Roncetti erroneously treated each day as one violation of the SWMA. *See*, 35 P.S. §6018.605 ("[E]ach violation of any provision of this act, any rule or regulation under this act, any order of the department, or any term or condition of a permit shall constitute a separate and distinct offense under this section."); Delaware Valley Scrap Co., Inc. and Jack Snyder v. DER, 1993 EHB 1113, 1133-1134.

14. Ms. Roncetti characterized the Phillips' SWMA violations as being of a low degree of severity because they caused no measurable environmental impacts. (N.T. 19, 24, 26; Ex. D-2)

15. Ms. Roncetti increased the amount of penalty for the November 13, 1989, and January 3, 1990, SWMA violations because the Phillips had increasingly more notice, as a result of the NOVs, that their conduct was unlawful. (N.T. 25, 27)

16. The Department detected no long-term, measurable environmental impacts from the solid waste on the surface of the ground or the open burning at the farm. (N.T. 19, 24, 26, 43)

17. The Department introduced no evidence that it incurred costs in abating or remediating the SWMA violations at the farm. (N.T. 43; Ex. P-2)

18. The Department introduced no evidence that it took any action to abate or remediate the SWMA violations at the farm.

19. The Department introduced no evidence that the Phillips saved any money as a result of their SWMA violations. (Ex. D-2)

20. The Department introduced no evidence that the Phillips' SWMA violations caused any property damage.

21. The Department introduced no evidence that the Phillips' SWMA violations interfered with anyone's right to use or enjoy their property.

22. The Department introduced no evidence that the Phillips' SWMA violations created a hazard or potential hazard to the health or safety of the public.

23. The Department did not issue Jeanne Phillips an NOV.

24. The Department introduced no evidence describing the municipal waste present at the farm on October 9, 1987, May 10, 1989, November 13, 1989, or January 3, 1990.

25. Perry Phillips has a seventh grade education. (N.T. 54)

26. Perry Phillips lacks the education and sophistication to fully understand the requirements of the SWMA. (N.T. 50-63)

27. Perry Phillips was confused by the Department's advice that he could burn farm-related material. (N.T. 62-63)

DISCUSSION

In an appeal of a civil penalty assessment, the Department bears the burden of proof. 25 Pa. Code §21.101(b)(1). Because the Phillips' liability for violating the SWMA and the regulations thereunder has already been established, the only issue remaining to be decided is whether there is a "reasonable fit" between the violations and the amount of the penalty assessed. *See*, Delaware Valley Scrap Co., Inc. and Jack Snyder v. DER, 1993 EHB 1113. In reviewing the amount of a civil penalty assessment, our role is not to determine what penalty we would have imposed, but rather whether the Department abused its discretion in setting that amount. Gerald E. Booher v. DER, 1991 EHB 987, 1005, *aff'd*, 149 Pa. Cmwlth. 48, 612 A.2d 1098 (1992). Where we find that the Department abused its discretion, we may substitute our discretion and modify the amount. *Id.*

The Department is authorized under §605 to assess a civil penalty for each and every violation of the SWMA. 35 P.S. §6018.605; Booher, 149 Pa. Cmwlth. at ___, 612 A.2d at 1103. In determining the amount of the penalty, the Department must consider:

> the wilfulness of the violation, damage to air, water, land or other natural resources of the Commonwealth or their uses, cost of restoration and abatement, savings

> resulting to the person in consequence of such violation, and other relevant factors.

35 P.S. §6018.605. Under the Department's regulations, the Department must also consider "the seriousness of the violation." 25 Pa. Code §271.412(b)(1).[3]

In their post-hearing brief, the Phillips contend there is not a reasonable fit between their SWMA violations and the $21,000 civil penalty. The Phillips point out that the Department introduced no evidence concerning: the costs of restoration and abatement; savings to the Phillips as a result of their violations; or damage to the air, water, land, or other natural resources of the Commonwealth. As a result, the Phillips argue that no civil penalty should be assessed or, in the alternative, that the civil penalty should be reduced to a nominal amount. The Department, on the other hand, relies on the Phillips' wilfulness in committing their violations of the SWMA, as well as the severity of those violations, in arguing that the $21,000 civil penalty is reasonable. The Department contends that although the violations were of a low degree of severity, they were also "reckless," or, in other words, committed in conscious disregard of the requirements of the SWMA.

Before we determine whether this civil penalty was reasonable, we must first disagree with the Department's assertion in its post-hearing brief that its civil penalty assessment is somehow entitled to a presumption of reasonableness because it was calculated in accordance with the guidelines set forth in the Bureau of Waste Management's Civil Penalty Worksheet and

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[3]The considerations that go into determining the seriousness of a violation are: damage to the land or waters of the Commonwealth; the cost of restoration; hazards or potential hazards to the public's health or safety; property damage; interference with a person's right to the use or enjoyment of property; and other relevant factors. 25 Pa. Code §271.412(b)(1)(i)-(vi).

accompanying instruction book, *Calculation of Waste Management Civil Penalties.* (*See*, Exs. D-2, D-3). Contrary to the Department's belief:

> An unpublished DER policy does not enjoy the presumption of validity to which properly promulgated regulations are entitled.... [citation omitted] DER must establish that its assessment of the civil penalty based upon its policy guidelines was a proper exercise of its discretion.

Refiner's Transport and Terminal Corp. v. DER, 1986 EHB 400, 436. In other words, the Department must show that $21,000 is a reasonable civil penalty for the Phillips' violations of the SWMA, not that it was calculated in accordance with the Department's guidance documents.

In arguing that its civil penalty assessment is entitled to a presumption of reasonableness, the Department cites our adjudication in Robert K. Goetz v. DER, 1993 EHB 1401, which states, among other things, that the amount of a civil penalty is reasonable when it is determined in accordance with the Department's guidance documents. *See also*, Joseph Blosenski, Jr. v. DER, 1992 EHB 1716, 1733. In Goetz and Blosenski, however, we were merely asserting that the Department's civil penalty assessments, which in both cases were determined using the guidance document, were reasonable. We did not in any way limit the rule in Refiner's Transport that the Department may not merely show it complied with its guidance documents in determining the amount of a civil penalty. The Department, therefore, must still prove the amount of a civil penalty is reasonable.

To determine whether a civil penalty is reasonable, we normally evaluate each SWMA violation in light of the factors listed in §605 of the SWMA or 25 Pa. Code §271.412(b)(1). *See*, Delaware Valley Scrap Co., *supra*. In this case, however, because of the order granting the Department's motion for partial summary judgment, the Department introduced no testimony describing the Phillips'

SWMA violations. We are left, instead, with the findings of the Commonwealth Court, which stated, in relevant part:

> The Court finds that the testimony and evidence presented by DER at hearing were sufficient to establish past violation of the Solid Waste Management Act by Perry E. Phillips and Jeanne E. Phillips in connection with dumping and disposal of municipal and construction waste on their West Fallowfield Township, Chester County, property....

The "dumping and disposal of municipal and construction waste" to which the court referred include: municipal waste deposited in a pit on May 10, 1989; truckloads of construction waste deposited on the ground, municipal waste mixed with ash left over from open burning, and drywall or plasterboard incorporated into the soil on November 13, 1989; and the open burning of trash, including full plastic trash bags and cardboard, on January 3, 1990.[4]

Using the Bureau of Waste Management's guidance documents, Compliance Specialist Nancy Roncetti determined that the Phillips should be assessed a total civil penalty of $21,000: $6,000 for the May 10, 1989, violation; $7,000 for the November 13, 1989, violation; and $8,000 for the January 3, 1990, violation (N.T. 16-17, 20-21, 24-25, 26-27; Exs. D-2, D-3). Based on the factors for the assessment of civil penalties under §605 and 25 Pa. Code §271.412(b)(1), we find that this amount was an abuse of the Department's discretion.

As the Phillips correctly assert, the Department introduced no evidence that the violations caused damage to the air, water, land, or other natural resources of the Commonwealth. To the contrary, Ms. Roncetti testified that the Department detected no groundwater or soil impacts or any other measurable environmental impacts (N.T. 19, 20, 24, 26). The Department also

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[4]We derived these descriptions of the Phillips' SWMA violations from the Department's February 7, 1990, complaint in equity to Commonwealth Court, which was attached to the Department's motion for partial summary judgment.

introduced no evidence that there were any costs of restoration or abatement (N.T. 43) or any savings to the Phillips as a result of their SWMA violations (N.T. 43). There is also no evidence in the record that the violations resulted in any property damage or interfered with any person's right to the use or enjoyment of property, or that they created a hazard or potential hazard to the health or safety of the public.

Under §605 and the Department's regulations, the only factor left to be considered is the Phillips' wilfulness in violating the SWMA. The Board has looked to criminal and tort law to analyze the wilfulness of violations. We noted in DER v. Rushton Mining Company, 1976 EHB 117, 132-133, that:

> ... In criminal law an act is performed with wilfulness if a "person acts knowingly with respect to the material elements of the offense..." 18 [Pa.C.S.] §302 (g). Without binding the Board absolutely to tort law (where the law has developed to deal with direct injuries to the person rather than the environment), that law does provide an analysis of degrees of knowing or wilful conduct that is useful in considering this element for purposes of civil penalties. For instance, there is clearly a difference between deliberate, intentional acts, which are the most "wilful", see, e.g. *Evans v. Philadelphia Transit Company*, 418 Pa. 567, 573-74 (1965); and accidental, unintentional, unknowing negligence, which is in no sense wilful. See, Restatement of Torts, 2nd Vol. 2, §282. In between, are degrees of negligence or misconduct with varying degrees of knowledge attached, which may make an act more or less wilful, although not amounting to "wilful misconduct" in tort law. Thus, although an act may not be wilful in the deliberate or intentional sense, there may be a degree of wilfulness evident from knowledge that certain consequences are likely to result if that act is done in this manner or from failure to take the care that is required to avoid likely injurious consequences from that act....

In Refiner's Transport, we further explained that the term "wilfulness" encompasses a broad spectrum of mental states and is determined by looking at "the violator's recognition (or lack thereof) of the fact that its conduct may

cause a violation of law." 1986 EHB at 438, 441. The term wilfulness includes intentional violations of the law, reckless violations, and negligent violations. *Id.* at 440-41.

> [A]n intentional or deliberate violation of law constitutes the highest degree of wilfulness and is characterized by a conscious choice on the part of the violator to engage in certain conduct with knowledge that a violation will result. Recklessness is demonstrated by a conscious disregard of the fact that one's conduct may result in a violation of law. Negligent conduct is conduct which results in a violation which reasonably could have been foreseen and prevented through the exercise of reasonable care.

Southwest Equipment Rental, Inc. v. DER, 1986 EHB 465, 475.

The Department contends the Phillips' violations were reckless because Perry Phillips was issued NOVs on December 9, 1987, May 25, 1989, and November 21, 1989, informing him that depositing and burning municipal waste at the farm were both violations of the SWMA (*See*, Exs. D-7, D-8, D-9). As a result of these NOVs, the Department argues, the Phillips knew or should have known that their conduct would result in violations of the SWMA.[5]

Despite the three NOVs from the Department, we are reluctant to characterize all of the conduct at issue here as reckless. This case comes nowhere near the level of wilfulness demonstrated by the appellant in Refiner's Transport, *supra*, which we characterized as reckless. 1986 EHB at 443. In that case, the appellant was a transportation company licensed to haul certain types of hazardous waste in the Commonwealth. *Id.* at 404-405. The appellant violated

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[5]Contrary to the Department's assertion, the NOVs were issued only to Perry Phillips. Jeanne Phillips was given no notice that this conduct violated the SWMA. Although Jeanne Phillips' liability for these violations was established by Commonwealth Court, we remind the Department that "[l]iability for violation of the SWMA does not attach simply by reason of ownership of the land on which the violations took place." Joseph Blosenski, Jr., v. DER, 1992 EHB 1716, 1729.

the SWMA by hauling types of hazardous waste for which it was not licensed. *Id.* at 431. We found those violations to be reckless because the Department issued the appellant an NOV which "clearly and unequivocally informed appellant that transport of types of waste which appellant's license did not authorize was a violation of SWMA." *Id.* at 442.

In contrast to the level of wilfulness in Refiner's Transport, Perry Phillips has a seventh grade education. His level of sophistication regarding the SWMA is nowhere near that of Refiner's Transport and Terminal Corp. Moreover, it appears that he was under some misapprehension as to what was permissible in the view of the Department.

With respect to the open burning of solid waste, Perry Phillips testified he was told by Department personnel that it was permissible to burn farm-related material (N.T. 63). The Department offered no evidence to the contrary. He further testified that he stopped burning when he was no longer sure what, or even if, he was allowed to burn (N.T. 62-63). Given Perry Phillips' state of mind concerning open burning, we cannot conclude the Phillips engaged in open burning on May 10 and November 13, 1989, in conscious disregard of the fact that it might have resulted in a violation of the SWMA. Rather, we find that those violations were negligent. But, we believe that the January 3, 1990, violation is a different matter. By that time Perry Phillips had received three NOVs from the Department and it should have been apparent to him, confusion and lack of sophistication aside, that burning municipal waste would result in problems with the Department. Instead, he ignored the warnings from the Department and, again, burned municipal waste. That conduct on January 3, 1990, must be regarded as reckless.

Having concluded that the Department abused its discretion in calculating these penalties on the basis that all three violations constituted reckless conduct, we will substitute our discretion. While calculating the penalty for negligent violations of the SWMA in May and November, 1989, will result in a reduction of the penalty for those violations, some consideration must be given to the deterrent value of the penalty assessment, given two instances of the same or similar unlawful conduct in a six month period. Therefore, we will assess a penalty of $500 for the May 10, 1989, violation, and a penalty of $1,000 for the November 13, 1989, violation. As for the January 3, 1990, violation, having determined that it was reckless conduct, we will assess a penalty of $5,000 for that violation,[6] for a total assessment of $6,500.

CONCLUSIONS OF LAW

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

2. The Department bears the burden of proving that it did not abuse its discretion in setting the amount of a civil penalty.

3. When the Department abuses its discretion in setting the amount of a civil penalty, the Board may substitute its discretion for that of the Department and reduce the amount of the penalty.

4. If the Department relies on unpublished policies in setting the amount of a civil penalty, it must prove that the amount of the penalty was a proper exercise of its discretion, not that the amount was determined in accordance with the unpublished policies.

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[6]This is at the low end of the range for reckless conduct in the Department's civil penalty policy.

5. The Department is authorized to assess a civil penalty under §605 of the SWMA for every violation of the SWMA.

6. In determining the amount of a civil penalty, the Department must consider the factors set forth in §605 of the SWMA: the wilfulness of the violation; damage to air, water, land or other natural resources of the Commonwealth or their uses; cost of restoration and abatement; savings resulting to the person in consequence of such violation, and other relevant factors.

7. Under the Department's regulations at 25 Pa. Code §271.412(b)(1), it must also consider the seriousness of the violation.

8. The phrase "wilfulness of the violation" includes intentional violations of the law, reckless violations, and negligent violations.

9. Reckless conduct is demonstrated by a conscious disregard of the fact that one's conduct may result in a violation of law.

10. Negligent conduct is conduct that results in a violation which reasonably could have been foreseen and prevented through the exercise of reasonable care.

11. The Phillips' May 10 and November 13, 1989, violations of the SWMA were the result of negligent conduct.

12. The Phillips' January 3, 1990, violation of the SWMA resulted from reckless conduct.

13. The Department abused its discretion in setting the amount of civil penalty at $6,000 for May 10, 1989, $7,000 for November 13, 1989, and $8,000 for January 3, 1990, for a total of $21,000.

14. The Board will substitute its discretion for that of the Department and assess a civil penalty of $500 for the May 10, 1989, violation,

$1,000 for the November 13, 1989, violation, and $5,000 for the January 3, 1990, violation, for a total of $6,500.

O R D E R

AND NOW, this 9th day of September, 1994, it is ordered that:

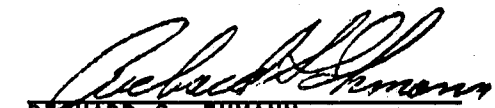
1) The Phillips' appeal is dismissed in part and sustained in part; and

2) The amount of the civil penalty is reduced to $6,500.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: September 9, 1994

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M. DIANE SMITH
SECRETARY TO THE BOAR

TED BABICH	:	
v.	:	**EHB Docket No. 94-002-E**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 9, 1994**

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

By Richard S. Ehmann, Member

Synopsis

Where an applicant for a certification as a storage tank installer is denied certification under the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, No. 32, 35 P.S. §6021.101 *et seq.* ("STA"), and regulations promulgated thereunder, he bears the burden of proof in his *pro se* appeal therefrom.

This Board is not legislatively authorized to declare this Act to be facially unconstitutional, but we may make such a declaration as to regulations promulgated pursuant thereto. The regulations as to certification of storage tank installers are facially constitutional and do not constitute a regulatory taking of the appellant's property under either a Lawton v. Steele analysis or a Lucas v. South Carolina Coastal Council analysis based upon the record in this appeal. The omission from these regulations of a provision to "grandfather" into certification all "long-time" tank installers does not render the regulations unconstitutional. The regulatory provision limiting the age of past experience in tank installations to be counted in qualifying for a certification to that

experience obtained in the last seven years does not render the regulations unconstitutional either.

Background

This appeal was commenced on January 5, 1994 when Ted Babich ("Babich") filed his Notice of Appeal with this Board. Babich appealed from two Department of Environmental Resources' ("DER") letters to him, both dated September 7, 1993. One of these letters granted Babich a temporary certification as a storage tank and storage facility installer in categories UMX and UMR under Section 107(d) of the STA and 25 Pa. Code §§245.111 and 245.113. The second DER letter denied Babich a certification in categories UMeX, UCvl and IUM because he failed to demonstrate compliance with 25 Pa. Code §§245.102(a)(1) and 245.102(b)(1) as to these categories. Babich's Notice of Appeal recited five challenges to DER's action. They are:

> 1. I have previously installed tanks prior to the new regulations.
>
> 2. Experience prior to seven years is not accepted by the DER for certification. I feel that limiting an applicant to seven years is unconstitutional.
>
> 3. I have experience installing tanks and have installed tanks at job sites prior to the seven year limit.
>
> 4. The Commonwealth has had regulations for many years prior to the seven year limit for underground storage tanks and it is now only being revised.
>
> 5. I had installed tanks under the regulations previously and therefore should be permitted to continue installing tanks with the previous experience and knowledge I acquired throughout the years. (I should be permitted under the Grandfather clause).

Thereafter, Babich, who appeared *pro se* throughout this appeal despite the urging by this Board to retain counsel, filed his Pre-Hearing Memorandum. DER

responded with its own Pre-Hearing Memorandum and a Motion For Summary Judgment based in part on the concept of *res judicata* and in part on the absence of a regulatory provision authorizing DER to grant Babich a certification under a "grandfathering" concept. After receipt of Babich's response thereto, we issued an Opinion and Order dated April 21, 1994. It granted DER's Motion in full as to the first four objections set forth in Babich's Notice of Appeal. It also granted the motion to the extent Babich's fifth objection asserted a "grandfather clause" exists and that as a result DER erred in failing to certify him pursuant thereto. However, insofar as Babich's fifth objection might have been construed to be a frontal assault on the statute and regulations for lacking a grandfather clause or it "might cover more than merely the areas of certification in which Babich was issued only a temporary certificate," we allowed the appeal to go forward. Finally, we left open for adjudication any challenge by Babich to DER's issuance of a temporary certification because it appeared he was challenging the reasonableness of these regulations as applied to him by DER and the constitutionality of that application to him.

On May 9, 1994, a hearing was held for the gathering of evidence on the remaining issues. It produced a record of 16 exhibits and a transcript of 104 pages. Thereafter, each party filed a post-hearing brief, the content of which is addressed below.

After a complete review of this record, the Board makes the following findings of fact.[1]

---

[1]References to "Bd-1" are references to Board Exhibit No. 1, which is the parties' Joint Stipulation in which they stipulate to certain facts. "T-__" is a reference to a page of the hearing's transcript, while "B-__" is a reference to one of the exhibits offered by Babich and admitted into the record. DER offered no exhibits.

FINDINGS OF FACT

1. DER is the agency with the duty and authority to administer and enforce the STA; 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 of the Environmental Quality Board ("rules and regulations") promulgated thereunder. (Bd-I)

2. Babich is an individual with an address of Box 352, Glenwillard, PA 15046, in Crescent Township, Allegheny County. (Bd-1)

3. Babich is the owner of Babich Plumbing. (T-62)

4. Babich Plumbing has a company certificate under the regulations promulgated pursuant to the STA, and this means that if it is hired to install, remove or repair a storage tank, it may hire a certified installer and undertake that work. (T-63)

5. In January of 1993 Babich submitted an application for personal certification as an installer under the STA and the certification regulations to DER. In that application he requested certification in all categories, but submitted a completed application only for the UMX, ULvl [sic] and UMR categories. (Bd-1)

6. The Department denied Babich's application by letter dated February 23, 1993. The basis for the Department's denial was:

i) Babich failed to submit a complete application by failing to submit an "Attachment A" for each of the nineteen categories for which Babich sought certification.

ii) Babich did not document the necessary number of "tank handling activities" to qualify for the UMX category, the UCvl category, and the UMR category. (Bd-1)

7. Babich appealed from the Department's denial of certification to this Board. (Bd-1)

8. The Department and Babich discussed his appeal in June 1993, and agreed that Babich would withdraw his appeal and resubmit an application for certification. (Bd-1)

9. Babich withdrew his appeal by letter dated June 30, 1993. (Bd-1)

10. By Order dated July 13, 1993 the Board marked Babich's appeal at Docket number 93-067-E closed and discontinued because the appeal had been withdrawn. (Bd-1)

11. Babich submitted a new application for certification to DER on or about August 3, 1993. In that application, Babich requested certification in nineteen ("19") categories, but submitted a complete application for only the UMX and UMR categories. (Bd-1)

12. After discussing the August 3, 1993 application with DER's staff, Babich agreed to apply for only three ("3") categories - UMX, UMR, and UCvl; to submit additional information for the "Attachment As" for the UMX and UMR categories; and submit an "Attachment A" for the UCvl category. (Bd-1)

13. At least since 1958, Babich has installed storage tanks. (B-9) He has installed them for the City of Pittsburgh (B-1; T-19, 58), Ringgold School District (T-58), Clarion University (B-3; T-23), and for Nick Babich (B-9). In the past when installing such tanks, he secured the approval thereof from the State Fire Marshall as required. (B-9)

14. Babich has attended courses on tank installation given by Owens-Corning and Highland Tank. (B-6, B-7; T-29, 30)

15. The State Fire Marshall deals with storage tanks as to fire safety issues. (T-87) Prior to enactment of the STA, storage tanks were regulated

under state law only by the Fire Marshall (except in Allegheny and Philadelphia Counties) and local municipalities might optionally address them in their codes. (T-90)

16. Babich has also removed tanks in the past, with his most recent removal being the tank he removed for the National Weather Service. (B-5; T-28)

17. EPA also regulates storage tanks, but nothing in the federal program deals with certification (licensing) of storage tank installers. (T-59, 86)

18. Prior to January 1987, there was no state statute on storage tanks, but EPA required landowners to notify DER of their tank's existence. (T-68, 69)

19. Lori Showers ("Showers") is employed by DER. (T-67) In her employment she has worked in DER's storage tank program. (T-68)

20. After passage of the STA by the Legislature, Showers and another DER employee developed draft regulations on certification of storage tank installers. (T-69)

21. On September 21, 1991 regulations promulgated under the STA were published in the Pennsylvania Bulletin and they took effect immediately. (T-70, 80)

22. Under the program as set up by DER under the STA and accompanying regulations, certification occurred in stages. First there was an interim certification for all installers which, if applied for and received, was a valid certification up until DER acted on that interim certificate holder's application for temporary certification under the STA regulations. (T-77, 78, 89-90) In turn, a temporary certification is valid until either the permanent certification applicant takes and passes the test for permanent certification or September 21, 1994. (T-81, 84) All temporary certificate holders must have passed the test for permanent certification by September 21, 1994 to remain certified. (T-84)

23. In order to be issued a temporary certification for a specific category of storage tanks, an applicant has to demonstrate to DER a specific number of activities relating to tanks or tank equipment in one or more of the 24 different categories of tanks and tank equipment and tank activities in which the applicant desired certification. Such a showing is a demonstration of the applicant's experience in that category. (T-81, 85)

24. These activities demonstrating experience must have occurred within the past seven years. (T-82) The seven year period was selected because the regulation drafters believed that technology was changing quickly so any valid prior experience had to be in the recent past. (T-82)

25. In preparing regulations on certification, DER's staff did consider a grandfathering concept but rejected it because there were no prior standards against which to measure this experience. (T-74)

26. DER's regulatory certification program may have force out of business some installers who installed tanks before the STA's enactment, if they have not installed tanks frequently in the last seven years. (T-93 to 95) The only way such a person can avoid this result is to undertake sufficient work on tank installations to obtain his own certifications under a person already certified by DER. (T-102-103) DER's program does not address this impact on such installers except in this fashion. (T-93 to 95)

DISCUSSION

Because Babich is challenging the denial of his certification and asserting what amounts to a right to permanent certification in all of the twenty-four certification categories, he bears the burden of proof and proceeding under 25 Pa. Code §21.101(a) and (c)(1).

Babich, representing himself instead of retaining counsel for this purpose, failed to meet these burdens. His evidence consisted of a series of exhibits and a brief statement explaining his belief as to why he should be allowed to go forward with his business and be "grandfathered" into a certification in each of the categories under these regulations. He concluded it with his conclusion that this DER program deprives him of his living. (T-59)

DER's evidence unfortunately was only marginally better. DER offered testimony from Lori Showers about her work in drafting a proposed set of regulations on DER's behalf for presentation to the Environmental Quality Board ("EQB"). These regulations represented DER's estimate of how to implement this statute. Unfortunately we were offered no evidence as to whether the EQB modified DER's proposals or whether it merely "rubber stamped" them. DER also offered us the testimony of Beverly Saylor who reviewed and rejected Babich's application because of its non-compliance with the regulations promulgated by the EQB. DER's evidence on the application's review failed to delineate the deficiencies in the application. However, the deficiencies in DER's evidence do not outweigh those of Babich's evidence, and it is he who bears the burden of proof.

Babich's post-hearing brief is two pages in length and consists of twenty numbered statements. The first eleven are purely factual statements. Babich then asserts that DER should have created a grandfathering concept for experienced installers within these regulations and should also have provided for installers who lack significant installation experience. Babich's brief also asserts he will be deprived of his livelihood. Next it asserts there is a federal underground storage tank program which does not require certification of installers and that previously under state law the State Police had full control

over tank installations with but one category for installations and removals of storage tanks. From this prior practice Babich concludes that he should be certified in all categories. Finally Babich asserts that he has installed tanks for fifteen years and that knowledge gained throughout that period should be taken into account in DER certification decisions rather than limiting experience for certification purposes to that obtained within the last seven years.

Insofar as these are Babich's challenges, we cannot hear them to the extent they constitute a challenge to the facial constitutionality of the STA. The Commonwealth Court has instructed that this Board is not legislatively empowered to declare statutes facially unconstitutional. See St. Joe Minerals Corporation v. Goddard, 14 Pa. Cmwlth. 624, 324 A.2d 800 (1974). To the extent Babich's arguments raise such a challenge, he must pursue it before the proper judicial forum rather than this Board.

To the extent Babich is asserting the unconstitutionality of these regulations, this Board may review that challenge. However, regulations promulgated pursuant to a grant of legislative power are presumed to be reasonable and will generally not be overturned absent a showing that the agency acted arbitrarily and unreasonably when it exercised the police power. Commonwealth, DER v. Locust Point Quarries, Inc., 483 Pa. 350, 396 A.2d 1205 (1979). Moreover, according to Commonwealth v. Parker White Metal Co., 512 Pa. 74, 515 A.2d 1358 (1986), one who challenges the constitutionality of a statute must show that the statute clearly, plainly and palpably violates some constitutional mandate or prohibition. Because neither DER nor Babich cites us to any other definitional test for the type of showing Babich must make in challenging the constitutionality of these regulations, we will apply this standard as to the extent of the proof which Babich must produce in this appeal

when determining whether Babich has shown that DER's actions or regulations are unconstitutional.

Babich asserts a loss of his livelihood but the record does not support him on this contention. Other than this statement, Babich offered no additional evidence to support it. It is clear he is the sole owner of the plumbing business bearing his name but we know nothing about how much of his plumbing business deals with storage tanks. We know that the most recent tank removal he performed occurred in December of 1993 and the hearing occurred in May of 1994. (B-5; T-1,28) His application (Exhibits B-17 and B-15) shows he installed tanks in 1986, 1987, 1990, 1991 and 1992 and that he also removed existing storage tanks in both 1986 and 1991.[2] However, on this record there are also years in which Babich neither removed or installed tanks, and this suggests that the installation and removal of tanks is not his sole business.

Babich has also not offered any information as to the scope and extent of the storage tank work he performs except to list tanks installed and removed. The significance of this omission is made clear by the fact that DER did not deny him all certifications but granted him two temporary certifications in the two categories for which he showed that he had the requisite experience to meet the standards for certification found in 25 Pa. Code Chapter 245. Thus, as to these areas which are a significant part of his work as evidenced by his level of experience, he has also not lost his livelihood.

Finally, Babich admitted on cross-examination that while he does not have a personal certification under these regulations to install tanks, his company is so certified. (T-63) Further, he admitted if the company was hired for a

---

[2]The record also shows tanks removed and installed in 1958, 1970, 1979, and 1983. (Exhibits B-9 and B-14)

storage tank job, that it could do that job merely by hiring a certified installer to work with it thereon. (T-63) Thus, the most that can be said is that there is a portion of Babich Plumbing's work dealing with storage tanks, and, of that portion, Babich is certified for an apparently significant part of it and for the remainder, Babich Plumbing must retain another certified tank installer on a case-by-case basis. Only on this last portion of all of Babich Plumbing's business does it incur any added cost at all (the cost of hiring a certified installer). Solely to this extent does Babich appear to suffer any economic impact. And even here he does not lose his entire livelihood but incurs some increased costs. Moreover, it is clear that this is not necessarily a permanent situation since Showers' testimony makes it clear that someone inexperienced in a particular category under these regulations can gain the experience necessary to meet the experience portion of that category's certification requirements by working under previously certified individuals. (T-102)

Having reached this conclusion, we turn next to whether the legislature's enactment of the STA and the promulgation of regulations pursuant thereto constitute an unconstitutional "taking" of Babich's property without just compensation under the Fifth Amendment of the U.S. Constitution and Article I Section 10 of the Pennsylvania Constitution. As they are interpreted similarly, we pursue only one path of analysis as to this issue. Mock v. DER, 154 Pa. Cmwlth. 380, 623 A.2d 940 (1993) ("Mock").

Clearly enactment of this statute and promulgation of these regulations do not run Babich out of business completely based on the analysis above. Accordingly there has not been a total "taking" and the analysis used in Lucas v. South Carolina Coastal Council, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed 2d 798

(1992) ("Lucas") does not apply. However, since these regulations and this statute are clearly exercises of Pennsylvania's police power to enact and enforce laws for the promotion of the public good, according to Mock, we must also analyze what has occurred here using the three prong test set forth in Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed 385 (1894). Under this test we look to see:

1. Does the public interest require the interference with Babich's livelihood?

2. Are the means chosen reasonably necessary for the accomplishment of the purpose?

3. Are the means chosen unduly oppressive on individuals?

Babich does not assert that these regulations are not tailored to meet a legitimate state interest. Section 102(a) of the STA (35 P.S. §6021.102(a)) sets forth legislative findings which provide:

> **(a) Findings enumerated.**--The General Assembly of the Commonwealth finds and declares that:
> (1) The lands and waters of this Commonwealth constitute a unique and irreplaceable resource from which the well-being of the public health and economic vitality of this Commonwealth is assured.
> (2) These resources have been contaminated by releases and ruptures of regulated substances from both active and abandoned storage tanks.
> (3) Once contaminated, the quality of the affected resources may not be completely restored to their original state.
> (4) When remedial action is required or undertaken, the cost is extremely high.
> (5) Contamination of groundwater supplies caused by releases from storage tanks constitutes a grave threat to the health of affected residents.
> (6) Contamination of these resources must be prevented through improved safeguards on the installation and construction of storage tanks.

Section 102(b) then goes on to declare:

> **(b) Declaration.**--The General Assembly declares these storage tank releases to be a threat to the public health and safety of this Commonwealth and hereby exercises the power of the Commonwealth to prevent the occurrence of these releases through the establishment of a regulatory scheme for the storage of regulated substances in new and existing storage tanks and to provide liability for damages sustained within this Commonwealth as a result of a release and to require prompt cleanup and removal of such pollution and released regulated substance.

To the extent the regulations implement both these findings and the Legislature's declared policy, and the Legislature directs their promulgation by DER, as it does in Sections 107(d) and 108 of the STA (35 P.S. §§6021.107(d) and 6021.108), there can be no question the first prong is met.

Lawton's second prong raises the reasonableness of the methodology chosen. In Section 108 of the STA (35 P.S. §6021.108), the Legislature created an interim certification program for storage tank installers and inspectors which sets standards applicable to persons in these fields for the period up until DER promulgated the regulations for a more permanent regulatory program as to these fields of endeavor. DER's regulations on this subject were promulgated on September 21, 1991 and were effective on that date.

Subchapter B of 25 Pa. Code Chapter 245 contains these certification regulations. They set forth a program to phase in certification of tank installers over a three year period from September 21, 1991 until September 21, 1994. As statutory interim certifications under Section 108 of the STA (35 P.S. §6021.108) run out, a person may apply for a temporary certification under 25 Pa. Code §245.103. This certification is easier to obtain than permanent certification but requires a demonstration of experience of the same type required for permanent certification. Permanent certifications are all that is authorized by the regulations after September 21, 1994. To obtain one an

applicant must not only demonstrate to DER the requisite degree of experience as set forth in 25 Pa. Code §§245.111 and 245.113 but must also pass a certification examination pursuant to 25 Pa. Code §245.105.

On its face, this program to certify tank installers gives no suggestion it is unreasonable. We next turn to the program's application to Babich. Babich does not offer evidence showing he has the experience in each category of possible certification to warrant an across-the-board certification; however, he argues that his years of experience entitle him to certification in all categories. He further asserts he should be "grandfathered" into such a certification, and we interpret this to be his attempt to raise the issue of a defect in these regulations because they lack such a provision.[3] Babich also believes he should be exempt from taking certification tests and that the regulations should provide for those with little experience. Finally, he challenges the concept in the regulations that installer experience within the last seven years is all that is counted by DER in determining whether an applicant has adequate experience under the regulations.

To successfully challenge these regulations, Babich must do more than disagree with them. He has the burden of proving his contentions, and though he may have a basis for disagreement with the position on certification taken in the regulations, if that position is equally reasonable he fails to meet his burden. Clearly, a blanket assertion that he should be exempted from testing

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[3]Babich's post-hearing brief also asserts a right to certification because UST (which we read as underground storage tank) is a federal law which does not require certification so he should be certified under state law. Since we know of no preemption of this field by federal law and Babich has failed to demonstrate any, we assume this argument to be an attack on the STA based on it being an unconstitutional expansion of the federal program. As stated above, we lack the authority to address such a constitutional attack on the statute according to St. Joe Mineral v. Goddard, *supra*.

requirements, without any evidence or argument as to why, cannot even be said to be reasonably based where it is unexplained and the regulations mandate such testing for all applicants for permanent certification.

Moreover, as discussed above, Showers testified that a person can gain sufficient experience to become certified by working on tank installations under a certified installer. Thus, DER has provided a means for those with little experience to gain enough that they may themselves become certified. While Babich may feel DER should do more or adopt another method to address this point, this approach is not shown to be unreasonable merely by Babich asserting that DER should provide for the inexperienced installer. DER has complied with the Legislature's mandate to it to develop these regulations. It could do nothing else, and, in light of these legislative directions, would have been negligent in its duties if it ignored experience as a factor in determining who should be certified as an installer.

We also reject Babich's "grandfathering" argument. Babich wants to be permanently certified without demonstrating compliance with the experience requirements of the regulations because of what he claims to be his years of experience in this field. He believes "long time" installers should be certified without taking exams or demonstrating a specific degree of experience with different types of tanks and tankage equipment. DER's witness testified that in developing proposed regulations DER evaluated this concept but rejected it. She testified:

> Q. During that development process, was a grandfather clause considered?
>
> A. Yes.
>
> Q. And what was the decision as to a grandfather clause?

A. We didn't feel it was appropriate.

Q. And why not?

A. Several reasons. There's no standard existing now that we felt matched what we would consider for temporary or permanent certification. We had no yardstick to judge the performance of the people out there in the business now.

Q. Weren't there other certification programs or regulations?

A. No, nothing that approached what we were doing.

Q. Are there any other State programs that set up a certification process like the certification regs?

A. Within this state?

Q. Yes.

A. No.

(T-74 and 75)

This conclusion by DER's regulation drafters reflects a reasoned basis for the lack of a "grandfather" clause and the record reflects no rebuttal by Babich of the reasonableness of DER's reasoning.

DER's conclusions as to a time limit on the past experience to be credited a certification seeker to that gained only in the last seven years are also unrebutted by Babich. Again, Showers was testifying and indicated:

Q. And over what period of time are those activities required?

A. No more than seven years.

Q. And why is the seven-year requirement on the regulations.

A. The technology changes. It's fairly fast moving in the changes, and we don't want old experience. We want recent experience.

(T-82)

If this Act and regulations under it are to prevent future releases from storage tanks which cause ground and water contamination as suggested in Section 102 of the STA, it is hardly unreasonable for DER to want a prospective installer's "countable" experience to be with modern technology where technology is changing fairly fast. Absent more than Babich's verbalization of a complaint therewith, we cannot overturn this conclusion.

As a result of this analysis we conclude that there is sufficient evidence supporting these regulations for this Board to find that the second prong of the Lawton test has been satisfied. The evidence compels the conclusion that these regulations are rationally based and are reasonably necessary to accomplish the statute's purposes. Indeed, Babich does not contend that is not so. He never addresses Lawton. Rather, his arguments focus more on why the regulations should not apply to him.

The last question under Lawton is whether the means chosen is unduly oppressive on individuals. Based upon the evidence addressed above and the conclusions there we cannot conclude on this record that it is unduly oppressive. Like any licensing statute, it imposes limitations on who may possess that license but we see no evidence of record that it overreaches reasonable licensing restrictions and license application procedures. By analogy, we observe that there are different types of driver's licenses, and a license to operate a motorcycle does not qualify one to drive a school bus filled with students. Accordingly, we conclude that all three Lawton prongs are met and the regulations are constitutionally sound.

We also must conclude from the record that we lack any evidence that DER's application of these regulations to Babich was incorrect or produced an incorrect result as to his application.

Babich offered no evidence to show that, if the regulations are valid, nevertheless DER applied them incorrectly. As a result, we make the following conclusions of law and enter the appropriate order.

CONCLUSIONS OF LAW

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

2. Where an applicant for a temporary certification as a tank installer under the STA and 25 Pa. Code Chapter 245 is issued a temporary certification in some categories and denied it in others, the applicant bears the burden of proof under 25 Pa. Code §21.101(a) and (c)(1) in his appeal from DER's decision.

3. This Board is not legislatively empowered to declare statutes to be facially unconstitutional.

4. Because the regulations promulgated under the STA are presumed to be reasonable, this Board will not overthrow them when there was no showing they are arbitrary or an unreasonable exercise of the police power.

5. Appellant's proof must rise to the level of showing clear, plain, palpable violation of a constitutional mandate or prohibition before we will declare a regulation unconstitutional.

6. Babich failed to show a loss of his livelihood from enactment of the STA and the promulgation of certification regulations thereunder since he may still practice his profession as a plumber, is temporarily certified to install some categories of storage tanks and his company is certified to install tanks as long as it hires a certified installer when doing so.

7. The adoption of the STA, promulgation of these regulations and application of the same to Babich do not work a total regulatory taking of Babich's property under Lucas.

8. The STA and the regulations promulgated pursuant thereto are clearly exercises of Pennsylvania's power to enact and enforce laws for the promotion of the public good.

9. Analyzing DER's STA regulations and their application to Babich under Lawton, it is clear that the regulations as to certification of tank installers are constitutionally sound.

10. DER's application of these regulations to Babich was reasonable and proper. It did not act unreasonably, arbitrarily or capriciously in doing so.

ORDER

AND NOW, this 9th day of September, 1994, it is ordered that the appeal of Ted Babich is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: September 9, 1994

cc: DER Bureau of Litigation:
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Barbara Grabowski, Esq.
Southwest Region
For Appellant:
Ted Babich, pro se
Glenwillard, PA

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M. DIANE SMITH
SECRETARY TO THE BOARD

RONALD S. KELL AND EDITH M. KELL	:	
	:	
v.	:	**EHB Docket No. 94-128-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 9, 1994**

OPINION AND ORDER
SUR
MOTION for SUMMARY DISPOSITION

Robert D. Myers, Chairman

Synopsis

The Board enters summary judgment in favor of an individual named in the Order from which the appeal was taken but who was deleted from an Amended Order issued subsequently. While DER opposed the Motion for Summary Disposition (treated by the Board as a Motion for Summary Judgment), it acknowledged that the Order no longer applied to her.

OPINION

Ronald S. Kell and Edith M. Kell filed a joint Notice of Appeal on June 2, 1994, amended on June 3, 1994, seeking review of an Order issued by the Department of Environmental Resources (DER) on May 2, 1994. The Order concerned an alleged discharge of petroleum products at or in the vicinity of underground storage tanks owned by Ronald S. Kell in the village of Alinda, Spring Township, Perry County. The Order named Edith M. Kell as joint owner

of the real estate with Ronald S. Kell and charged her with joint responsibility for the alleged discharge.

On August 8, 1944, Edith M. Kell filed a Motion for Summary Disposition,[1] alleging that Jean M. Kell is joint owner of the real estate with her husband, Ronald S. Kell; that Edith, Ronald's mother, has no relationship to the real estate or the underground storage tanks; that, after being informed of these facts, DER issued an Amended Order on June 16, 1994, substituting Jean's name for Edith's, but making no other substantive changes; and that DER refuses to withdraw the Order as to Edith. In its Answer filed on August 9, 1994, DER admits the essence of these allegations and, most important to our disposition of this Motion, states the following: "... the order no longer remains in effect as to Edith M. Kell who has been deleted from the order." Curiously, DER then requests the Board to deny the Motion for Summary Disposition.

While we appreciate DER's concern (based on Archie Joyner v. Commonwealth, DER *et al.*, 152 Pa. Cmwlth. 441, 619 A.2d 406 (1992)), we can not fathom its opposition to a motion to enter summary disposition in favor of an individual to whom the Order no longer applies. On the basis of DER's acknowledgment that the Order no longer has any effect on Edith, we will grant the Motion.

O R D E R

AND NOW, this 9th day of September, 1994, it is ordered as follows:

1. Edith M. Kell's Motion for Summary Disposition, treated as a Motion for Summary Judgment, is granted.

2. Summary Judgment is entered in favor of Edith M. Kell.

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[1] We shall treat this Motion as a Motion for Summary Judgment.

3. Outstanding orders issued in this proceeding shall have no effect on Edith M. Kell but shall remain in effect as to all other parties.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: September 9, 1994

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M. DIANE SMITH
SECRETARY TO THE BOARD

RESCUE WYOMING, *et al.*	:	
	:	
v.	:	**EHB Docket No. 91-503-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and WYOMING SAND AND STONE COMPANY, Permittee	:	**Issued:** September 13, 1994

OPINION AND ORDER
SUR MOTION FOR SANCTIONS

By Maxine Woelfling, Chairman

Synopsis:

Where appellants fail to adhere to the rules of discovery by not requesting permission to enter on property for the purpose of obtaining soil samples, the Board will grant a motion for sanctions and preclude evidence obtained during the unauthorized entry. The Board will not impose sanctions on appellants for their alleged improper *ex parte* contacts with the Department of Environmental Resources (Department) where the moving party has failed to provide any authority for the imposition of sanctions.

OPINION

This litigation has a protracted procedural history which is not germane to the disposition of the motion for sanctions which is presently before the Board. The motion, filed by the permittee, Wyoming Sand and Stone Company (Wyoming Sand), seeks sanctions against RESCUE Wyoming, *et al.* (Appellants) for their alleged continuing violations of the applicable discovery rules, as well as a December 3, 1993, order of the Board denying Appellants' petition to reopen

discovery. More specifically, Wyoming Sand argues that Appellants entered upon Wyoming Sand's property for the purpose of obtaining soil samples after the discovery period had closed and without adherence to the provisions of Pa.R.C.P. 4009. In addition, Wyoming Sand contends that Appellants engaged in numerous *ex parte* contacts with the Department and seeks dismissal of the appeal and other alternative sanctions.

Appellants, predictably, assert that they obeyed the "spirit" of the rules of discovery and did not disregard the Board's December 3, 1993, order.

The Board may impose sanctions on a party for failure to abide by a Board order or a Board rule of practice or procedure. 25 Pa. Code §21.124. Such sanctions may include dismissal of the appeal or other sanctions permitted in similar situations, such as exclusion of evidence. 25 Pa. Code §21.124; William Ramagosa, Sr., *et al.* v. DER, 1991 EHB 1427.

We will first address Appellants' alleged unauthorized entry on the property of Wyoming Sand to obtain soil samples. Rule 4009(a)(2) of the Pa.R.C.P. provides that:

> Any party may serve on any other party a request to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of...sampling the property....

This discovery rule is incorporated into the Board's rules of practice and procedure. 25 Pa. Code §21.111(d).

It is clear that Appellants sought to engage in discovery pursuant to Pa.R.C.P. 4009, both after the discovery period had closed and in contravention of the process set forth in the rule. Appellants did not serve a request to enter the site for the sampling. Rather, Appellants came to the site on June 27, 1994, the day the Department was taking soil samples, and entered the

site without Wyoming Sand's permission. (Affidavit of William Earnshaw, Reply to Appellants' Response to Wyoming Sand and Stone's Motion for Sanctions, Exhibit A). Even after being advised by Wyoming Sand's representative that they would be trespassing (Affidavit of Russell Banta, Permittee's Motion for Sanctions, Exhibit J), Appellants still proceeded to enter the property and take soil samples.

Although Appellants' actions have previously been the subject of motions to compel and for sanctions, the sanctions of dismissal of their appeal and exclusion of any evidence relating to the issues of groundwater and sludge, to which the soil sampling is relevant, are too severe under the circumstances. It appears that correspondence and communications between Appellants and the Department relating to the sludge which Proctor and Gamble applied to the site (Motion for Sanctions, Exhibits F, G, H, I, and K; Appellants' Response, Exhibits B, C, and D) led to the Department's sampling of the site and that Appellants were under some misapprehension as to what role they were to play in that sampling, despite admonitions from the Department's counsel about contacts with the Department's staff.[1] Therefore, as a sanction, we will preclude the admission of any evidence relating to the soil samples.

Wyoming Sand also seeks the imposition of sanctions as a penalty for Appellants' repeated *ex parte* contacts with Department staff. The crux of Wyoming Sand's contention is contained in the following passage from page 9 of its memorandum of law in support of its motion:

---

[1]It appears that various program areas of the Department were involved on issues relating to the site and that they failed to communicate with each other and counsel. Moreover, Appellants also believed they were entitled to information under the Act of June 21, 1957, P.L. 390, as amended, 65 P.S. §66.1 *et seq.*, commonly referred to as the Right to Know Law.

> ... Appellants' contact with DER officials outside this litigation has deprived DER of the right to have benefit of counsel. Wyoming Sand has repeatedly been subjected to Appellants' ex parte lobbying efforts, designed to bolster their position in this litigation, without the opportunity to respond or to take part in Appellants' numerous discussions with DER officials. Clearly, the Appellants sought to gain the upper hand with respect to the remaining issues by pressuring DER officials and field personnel who are outside of the litigation to gather additional evidence for them. Wyoming Sand is further prejudiced by having to expend resources to respond to Appellant' uncontrolled actions in this litigation by resort to the Board. The only procedural rudder on Appellants' case has come from Wyoming Sand's motions.

Wyoming Sand's implied frustration with the Department's traditional posture in third-party appeals, as well as its express frustration with the difficulties of having a *pro se* adversary, do not provide the Board with grounds for the imposition of sanctions. Wyoming Sand has provided us with no authority for imposing sanctions under these circumstances, and it is not our task to find it. Accordingly, this portion of the motion for sanctions will be denied.

ORDER

AND NOW, this 13th day of September, 1994, it is ordered that:

1) Wyoming Sand's motion for sanctions against Appellants regarding the June 27, 1994, soil samples is granted. Appellants are precluded from introducing any evidence relating to those samples; and

2) Wyoming Sand's motion for sanctions against Appellants regarding the information obtained from *ex parte* contact with Department officials is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: September 13, 1994

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M. DIANE SMITH
SECRETARY TO THE BOARD

CITY OF HARRISBURG	:	
v.	:	**EHB Docket No. 93-205-W**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES AND CUMBERLAND COUNTY, Permittee	:	**Issued:** September 16, 1994

OPINION AND ORDER SUR
CROSS-MOTIONS FOR SUMMARY JUDGMENT

By Maxine Woelfling, Chairman

Synopsis:

Appellant's motion for summary judgment is granted, and the Department of Environmental Resources' (Department) cross-motion for summary judgment is denied. 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), contains no authority, either express or implied, which would allow the Department to award counties grants for implementing their municipal waste management plans. As a result, where the Department contends that a grant for defense of a municipal waste management plan is a grant for plan implementation, that grant is an abuse of the Department's discretion.

OPINION

This matter was initiated by the July 26, 1993, filing of a notice of appeal by the City of Harrisburg (City) contesting the Department's award of a $25,000 grant to Cumberland County (County) to defray the County's expenses in defending against legal challenges to its municipal waste management plan (Plan). Notice of the Department's award of the grant was published in the Pennsylvania

Bulletin on June 26, 1993.

The City filed a motion for summary judgment and a supporting memorandum of law on March 4, 1994. In response, the Department filed a cross-motion for summary judgment, along with a supporting memorandum of law, on March 30, 1994. The Solid Waste Authority of Cumberland County filed its response on April 15, 1994, in which it elected to defer to the Department.

The Standard for Summary Judgment

The Board may grant summary judgment if 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 judgment as a matter of law." Pa.R.C.P. 1035(b); Robert L. Snyder, *et al.* v. Department of Environmental Resources, 138 Pa.Cmwlth. 534, 588 A.2d 1001 (1991), *appeal dismissed*, ___ Pa. ___, 632 A.2d 308 (1993).

The uncontested material facts follow. The City operates a resource recovery facility that incinerates municipal waste to generate steam and electricity (Affidavit of John A. Lukens, Director of the City's Department of Incineration and Steam Generation). In 1991, the City filed a notice of appeal challenging the Department's approval of the County's Plan[1] (Lukens Affidavit, ¶10). That appeal was docketed at No. 91-345-W and is still pending before the Board (*Id.*)[2]

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[1]Section 501(a) of Act 101, 53 P.S. §4000.501(a), required counties to submit to the Department an officially adopted municipal waste management plan for municipal waste generated within their boundaries.

[2]In the 1991 appeal, the City alleged that the Plan violated various provisions of Act 101 and improperly excluded its resource recovery facility. The 1991 appeal is currently stayed as a result of settlement negotiations and a petition for *allocatur* pending before the Supreme Court in a related appeal, City of Harrisburg v. DER and Dauphin County, *et al.* Docket No. 91-250-MJ (Lukens Affidavit, ¶11).

On September 26, 1992, the Department published notice in the Pennsylvania Bulletin that grants of up to $25,000 per year would be available to counties to assist in offsetting the legal expenses they incurred in defending their approved municipal waste management plans (Affidavit of Keith Kerns, Chief of the Division of Waste Minimization and Planning in the Department's Bureau of Waste Management). *See*, 22 Pa.Bull. 4831. The Department implemented the plan defense grant program in a November 4, 1992, "Addendum to Act 101 - Section 901 Planning Grant Application Packet" (Kerns Affidavit).[3]

The Department received the County's application for a plan defense grant on January 29, 1993. The County claimed it had incurred legal expenses in excess of $25,000 in defending the Plan against the City's appeal. The Department subsequently approved the application on June 18, 1993, and published notice of the award in the Pennsylvania Bulletin on June 26, 1993 (Kerns Affidavit).[4]

---

[3]The Department's November 4, 1992, "Addendum to Act 101 - Section 901 Planning Grant Application Packet" notified "Prospective Applicants" that:

> The Department will accept applications for funding consideration requesting up to $25,000 per year per County for the defrayment of outside legal expenses incurred in defending against third party appeals and suits of the basic provisions and recommendations contained in Department approved municipal waste management plans and revisions, thereto.... Any grant so provided to a county, under this need, will be considered part of each county's maximum 901 grant allotment for each fiscal year, as provided in Section 904(b) of the Act. For FY 92-93 this is $100,000....

(Lukens Affidavit, Ex. A).

[4]The Department's notice in the Pennsylvania Bulletin stated, in relevant part:

> The Department of Environmental Resources, hereby, announces the following grants to counties under the Municipal Waste Planning, Recycling and Waste Reduction Act (Act 101) (53 P.S. §4000.901). The awards are based

The Parties' Positions

The City contends that Act 101 does not authorize the Department to award a plan defense grant to the County. In support, the City cites the language of §901, which states, in relevant part:

> The department shall, upon application from a county, award grants for the cost of preparing municipal waste management plans in accordance with this act; for carrying out related studies, surveys, investigations, inquiries, research and analyses, including those related by siting; and for environmental mediation. The department may also award grants under this section for feasibility studies and project development for municipal waste processing or disposal facilities, except for facilities for the combustion of municipal waste that are not proposed to be operated for the recovery of energy....

53 P.S. §4000.901. Given this express language, the City argues the General Assembly did not empower the Department to award plan defense grants, and, accordingly, the Department exceeded the scope of its authority in awarding the County a grant for that purpose.

While the Department agrees that the express language of §901 does not authorize it to award plan defense grants, it contends that such authority is found in 25 Pa. Code §272.321(1), which states:

> upon applications received by the Department in 1992 and 1993.
>
> Planning grants are awarded to counties for 80% of approved costs for preparing and implementing municipal waste management plans as required by Act 101... All grant awards are predicated on the receipt of recycling fees required by Sections 701 and 702 of Act 101, and the availability of monies in the Recycling Fund.

23 Pa.Bull. 3043. In a chart entitled "Act 101 Section 901 Planning Grants," the Department listed Cumberland County as having been awarded a $25,000 grant for "Plan defense." *Id.*

Although the grant was approved, it has not been awarded to the County (Solid Waste Authority of Cumberland County's Answer to Interrogatories, No. 8).

> The Department will, upon application from a county, award grants for one or more of the following:
>
> > (1) The cost of preparing and implementing municipal waste management plans in accordance with Subchapter C (relating to municipal waste planning)....

The Department interprets implementing a municipal waste management plan as necessarily involving defending the validity of that plan.[5]

The Validity of Plan Defense Grants

Before we undertake an analysis of the parties' legal positions, it should be noted that the City, in its response to the Department's cross-motion for summary judgment, argues that 25 Pa. Code §272.321(1) is invalid to the extent it allows the Department to award grants for the cost of implementing municipal waste management plans, and, even if the regulation is valid, it does not authorize the award of plan defense grants. Although the City has not challenged any other type of grant for implementing municipal waste management plans,[6] the Department's legal position is such that we cannot separate plan defense grants from other implementing grants. Thus, our ruling as to plan

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[5]In his affidavit, Keith Kerns, Chief of the Division of Waste Minimization and Planning in the Department's Bureau of Waste Management, stated:

> The Department is permitted, pursuant to 25 Pa. Code §272.321(1), to award grants for the cost of implementing municipal waste management plans. The Department has interpreted "implementation" to include the costs of defending a county plan against any possible legal actions. The Department believes that for a county municipal waste management plan to be implemented, the plan must necessarily be in existence. Therefore, legal defense of a county municipal waste management plan is one element of implementation.

(Kerns Affidavit).

[6]It cannot be determined from the parties' filings if there are other types of grants for the costs of plan implementation.

defense grants will extend to all implementing grants awarded pursuant to 25 Pa. Code §272.321(1).

There is no dispute that the Department has been given the authority to promulgate regulations to accomplish the purposes of and to carry out the provisions of Act 101. *See*, 53 P.S. §§4000.301(1) and 4000.302. This authority is limited, however, to those powers that have been conferred upon the Department by the legislature in clear and unmistakable language. *See*, Pennsylvania Medical Society v. Cmwlth., State Board of Medicine, 118 Pa.Cmwlth. 635, ___, 546 A.2d 720, 722 (1988). *See also*, Costanza v. Dept. of Environmental Resources, 146 Pa. Cmwlth. 588, 606 A.2d 645 (1992). ("Any power exercised by an administrative agency must be conferred by statute; such powers can be expressly conferred or necessarily implied"). In other words, 25 Pa. Code §272.321 must be "within the bounds of [Act 101]." *See*, Pennsylvania Medical Society, 118 Pa.Cmwlth. at ___, 546 A.2d at 722.

Our analysis of the parties' positions must also be guided by another tenet of administrative law. "[T]he construction given a statute by those charged with its execution and application is entitled to great weight and should not be disregarded...." Starr v. Dept. of Environmental Resources, 147 Pa.Cmwlth. 196, ___, 607 A.2d 321, 323 (1992). *See also*, Smith, *et al.* v. DER, *et al.*, 1993 EHB 336, 340 (a duly promulgated regulatory scheme is presumed to meet the objectives of the underlying statute). The rule that tribunals defer to an agency's interpretation of a statute does not apply, however, where the interpretation is clearly erroneous. *See*, Cmwlth., Dept. of Environmental Resources v. Washington County, 157 Pa.Cmwlth. 1, 629 A.2d 172, *appeal denied*, ___ Pa. ___, 631 A.2d 1011 (1993); Starr, 147 Pa.Cmwlth. at ___, 607 A.2d at 323; Community Refuse Ltd., *et al.* v. DER, 1992 EHB 1653, 1662.

Despite the absence of express language in §901 or anywhere else in Act 101 authorizing the Department to award plan defense grants, the Department contends the General Assembly intended to give it such authority in its enumeration of the purposes of the statute and the powers and duties of the Department. The "purposes" of Act 101 are, *inter alia*, to:

> (1) Establish and maintain a cooperative State and local program of planning and technical and financial assistance for comprehensive municipal waste management.
>
> * * *
>
> (10) Shift the primary responsibility for developing and implementing municipal waste management plans from municipalities to counties.
>
> * * *

53 P.S. §4000.102(b)(1) and (10). The Department's powers and duties include:

> * * *
>
> (5) Regulate municipal waste planning, including, but not limited to, the development and implementation of county municipal waste management plans.
>
> * * *
>
> (7) Serve as the agency of the Commonwealth for the receipt of moneys from the Federal Government or other public agencies or private agencies and expend such moneys for studies and research with respect to, and for the enforcement and administration of, the provisions and purposes of this act and the regulations promulgated pursuant thereto.
>
> * * *
>
> (13) Administer and distribute moneys in the Recycling Fund for any public educational programs on recycling and waste reduction that the department believes to be appropriate, for technical assistance to counties in the preparation of municipal waste management plans, for technical assistance to municipalities concerning recycling and waste reduction, to conduct research, and for other purposes consistent with this act.
>
> * * *
>
> (15) Do any and all other acts and things, not inconsistent with any provision of this act, which it may deem necessary or proper for the effective enforcement of this act and the regulations promulgated pursuant thereto after consulting with the Department of Health regarding matters of public health significance.

53 P.S. §4000.301(5), (7), (13), and (15). Given the powers and duties of the Department and the purposes of Act 101, the Department contends "implementation of county municipal waste management plans is a clear goal of Act 101" (Department's brief at 4).

In further support of its position, the Department refers to §513(a), which states, in relevant part:

> Within one year following approval of a plan by the department, including plans approved pursuant to section 501(b), the county shall cause to be submitted to the department copies of all executed ordinances, contracts or other requirements to implement its approved plan and that will be used to ensure sufficient available capacity to properly dispose or process all municipal waste that is expected to be generated within the county for the next ten years.

53 P.S. §4000.513(a). Because county plans include these §513(a) implementation documents and a county plan is not "whole" until these implementation documents are submitted, the Department contends "[t]he relation[ship] between the plan, the implementing documents, and implementation are intertwined to the point that preparation of the plan, by the operation of Section 513 is dependent on implementation of the plan for the plan to be complete" (Department's brief at 5). Based on the purposes of Act 101, the Department's powers and duties thereunder, and the relationship between plan preparation and plan implementation, the Department argues it has the power, pursuant to 25 Pa. Code §272.321(1), to award grants for the cost of Act 101 plans.[7] We disagree. In

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[7]In the *Pennsylvania Code*, Act 101 is not listed as authority for this regulation. Listed instead are: the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §6018.101 *et seq.* (SWMA); the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1 *et seq.*; and §§1917-A and 1920-A of the Administrative Code, the Act of April 7, 1929, P.L. 177, *as amended*, 71 P.S. §§510-17 and 510-20. We find this interesting because 25 Pa. Code §272.321 is clearly intended to implement the requirements of Act 101 and because the Department clearly had the authority to promulgate it under Act 101. *See*, 53 P.S. §§4000.301(1) and 302. Furthermore,

reaching this conclusion, the Department has overlooked the plain language of Act 101.

"When construing a statute, the starting point is the language therein; absent any evidence to the contrary, a statute's plain meaning must prevail." O'Boyle's Ice Cream Island, Inc. v. Commonwealth, 146 Pa.Cmwlth. 374, ___, 605 A.2d 1301, 1302. Where the language of a statute is clear and free from ambiguity, we may not disregard the plain meaning of that language to pursue the legislature's intent. 1 Pa.C.S. §1921(b); Big "B" Mining Co. v. Dept. of Environmental Resources, 142 Pa.Cmwlth. 215, ___, 597 A.2d 202, 203 (1991), *allocatur denied*, ___ Pa. ___, 602 A.2d 862 (1992).

Under §901, the Department has the authority to award grants: 1) for the cost of preparing municipal waste management plans; 2) for carrying out related studies, surveys, investigations, inquiries, research and analyses; 3) for environmental mediation; and 4) for feasibility studies and project development for municipal waste processing or disposal facilities. 53 P.S. §4000.901. Given this plain language, it is clear that §901 does not specifically authorize the Department to award grants for the cost of implementing Act 101 plans. This lack of specific authority is fatal to the Department's position.

Although the General Assembly only gave the Department the authority to "award grants for the cost of *preparing* municipal waste management plans," 53 P.S. §4000.901 (emphasis added), the Department nevertheless contends the legislature intended to give it the authority to award grants for the cost of *implementing* municipal waste management plans as well. We disagree. "It is a

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in neither its cross-motion nor memorandum in support did the Department cite any of these other statutes as authority for its ability to award grants for the costs of implementing Act 101 plans.

well-settled principle of statutory construction that where the legislature includes specific language in one section of a statute and excludes it from another, it should not be implied where excluded." Pennsylvania State Police v. Prekop, ___, Pa.Cmwlth. ___, ___, 627 A.2d 223, 226 (1993). In enacting Act 101, the General Assembly demonstrated it was clearly aware of the difference between preparing, developing, or establishing a plan or program, and implementing that plan or program. Under §902(a), for example, "[t]he department shall award grants for development and implementation of municipal recycling programs, upon application from any municipality which meets the requirements of this section." 53 P.S. §4000.902(a). The General Assembly's use of the phrase "development and implementation" clearly indicates it intended these terms to have different meanings. Otherwise, one or the other would be mere surplusage, in violation of a fundamental rule of statutory construction. *See*, §1921(b); O'Boyle's Ice Cream Island, 146 Pa.Cmwlth. at ___, 605 A.2d at 1302. The legislature indicated it was aware of this distinction in several other provisions as well. *See*, 53 P.S. §§4000.1501 (municipalities of a certain size shall establish and implement a source-separation and collection program for recyclable materials), and 4000.1503 (Commonwealth agencies shall establish and implement a waste reduction program and a source-separation and collection program for recyclable materials). Since the General Assembly distinguished between preparing, developing, or establishing a plan or program, and implementing that plan or program, where the legislature chose to not authorize the Department to award grants for the cost of *implementing* an Act 101 plan, we cannot imply it intended to do so. *See also*, City of Harrisburg v. DER, 1993 EHB 96, 104 (because the legislature referred separately to processing and disposal in several paragraphs, it was fully aware of the distinction between those terms).

In addition to clearly distinguishing between plan preparation and plan implementation, the General Assembly was also very specific in authorizing the Department to award grants and disburse funds. Act 101 specifically authorizes the Department to award grants: for the development and implementation of municipal recycling programs; to reimburse counties for costs incurred for the salary and expenses of recycling coordinators; to municipalities based on their population and the type and weight of source-separated recyclable materials they recycled in the previous calendar year; and to municipalities for the establishment and operation of household hazardous waste collection programs. *See*, 53 P.S. §§4000.902, 4000.903, 4000.904, and 4000.1512. The Department is also specifically authorized: to establish and conduct a training program to certify host municipality inspectors; to pay 50% of the cost of employing a host municipality inspector for a period of up to five years; and to reimburse a host municipality for the cost of independently reviewing an application for a permit under the SWMA. *See*, 53 P.S. §§4000.1102(a)(1) and (3), and 4000.1110. Because the General Assembly specifically authorized the Department to award various grants and to disburse funds for a number of other purposes, we cannot imply that the Department has the authority to award grants for the cost of implementing Act 101 plans where the legislature has not specifically given it that authority.

The Department attempts to get around the lack of specific language supporting its position by arguing that a court may not resort to the express language of a statute where doing so would thwart the legislature's intent. This exception, however, is not absolute. It may be applied only in those rare circumstances where execution of a statute as written will produce a result clearly at odds with the legislature's intent. Community Refuse, 1992 EHB at 1658. *See also*, Consumers Education and Protective Association v. Nolan, 470 Pa.

372, ___, 368 A.2d 675, 684 (1977) (acknowledging this narrow exception but refusing to follow it because the legislature was deemed to be aware of the meaning of the language it employed). In Community Refuse, the Department similarly argued that the legislature's alleged intent should prevail over the plain meaning of §701(a) of Act 101. 1992 EHB at 1658. We disagreed, noting that there was no ambiguity in the language of §701(a) and the legislature's intent. *Id.* at 1659. We further explained that because the words of Act 101, including those of §701(a), are clear and unambiguous, any inquiry into the purpose of the Act was unnecessary. *Id* at 1660 (citing Modern Trash Removal of York, Inc. v. Dept. of Environmental Resources, 150 Pa.Cmwlth. 101, 615 A.2d 824 (1992)).

In light of the result reached in Community Refuse, we reject the Department's request to ignore the express language of Act 101 in favor of the legislature's alleged intent. Despite the fact that the General Assembly clearly distinguished between plan preparation and plan implementation, and specifically gave the Department the authority to award grants and disburse funds, it did not specifically give the Department the authority to award grants for the cost of implementing county plans. If the legislature had intended to give the Department this authority, it could easily have drafted §901 to express this intent. The General Assembly, however, did not adopt this language and we may not redraft the statute to read this intent into §901 or elsewhere.[8] *See*, Community Refuse, 1992 EHB at 1661.

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[8]The provisions of Act 101 have been reviewed by this Board and Commonwealth Court on several occasions. *See*, *e.g.*, Washington County, *supra*; Modern Trash, *supra*; City of Harrisburg v. DER *et al.*, 1993 EHB 96; and Community Refuse, *supra*. In each of these cases, because Commonwealth Court or the Board found the language of Act 101 to be clear and unambiguous, the Department's authority was limited to that expressed by the clear and unambiguous language of the statute. We make a similar finding here.

In another attempt to get around the lack of express authority to award grants for the cost of implementing Act 101 plans, the Department contends it has been given broad powers under §706(c)(3), which states:

> The department shall, to the extent practicable, allocate the moneys received by the Recycling Fund, including all interest generated thereon, in the following manner over the life of the fund:
>
> * * *
>
> (3) Up to 30% may be expended by the department for public information, public education and technical assistance programs concerning litter control, recycling and waste reduction, including technical assistance programs for counties and other municipalities, for research and demonstration projects, for planning grants as set forth in section 901, for the host inspector training program as set forth in section 1102, and for other purposes consistent with this act.

53 P.S. §4000.706(c)(3). The Department argues the phrase "for other purposes consistent with this act" gives it the authority to award grants for the cost of implementing Act 101 plans. We disagree.

What the Department fails to realize is that §706 does not authorize the Department to award grants. It merely instructs the Department how to allocate the money in the Recycling Fund. The Department's authority to disburse money for programs such as public information, public education, and technical assistance programs concerning litter control, recycling, and waste reduction, does not come from §706(c)(3), but is instead derived elsewhere. *See*, 53 P.S. §§4000.301(3), (13), and (14), 4000.508(a), (c), and (e), 4000.901, and 4000.1102. The same is true for the Department's authority to award planning grants under §901 and to establish and conduct host inspector training programs under §1102. The Department's power to spend money "for other purposes," therefore, is limited to the powers expressly set forth in other provisions of Act 101. Because Act 101 does not otherwise specifically authorize the

Department to award grants for the cost of implementing Act 101 plans, we cannot find the authority to do so under §706(c)(3).

To the extent 25 Pa. Code §272.321(1) gives the Department the authority to award grants for the cost of implementing county plans, it exceeds the scope of the Department's authority under Act 101, and is, therefore, invalid. *See*, Pennsylvania Medical Society, 118 Pa.Cmwlth. at ___, 546 A.2d at 722. Consequently, the Department abused its discretion in awarding the County the June 18, 1993, plan defense grant in the amount of $25,000.

O R D E R

AND NOW, this 16th day of September, 1994, it is ordered that:

1) The City's motion for summary judgment is granted;

2) The Department's cross-motion for summary judgment is denied; and

3) The City's appeal is sustained.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

RICHARD S. EHMANN
Administrative Law Judge
Member

Board Member Robert D. Myers did not participate in this decision.

DATED: September 16, 1994

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M. DIANE SMITH
SECRETARY TO THE BOARD

RESCUE WYOMING, *et al.*	:	
	:	
v.	:	**EHB Docket No. 91-503-W**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and WYOMING SAND AND STONE COMPANY,	:	
Permittee	:	**Issued: September 20, 1994**

OPINION AND ORDER
SUR PERMITTEE'S MOTION IN LIMINE

By Maxine Woelfling, Chairman

Synopsis:

Permittee's motion *in limine* to exclude documents as evidence is granted in part and denied in part. Documents which would constitute inadmissible hearsay are excluded where appellants will present no witnesses who could establish that the documents could be admitted into evidence as an exception to the hearsay rule. The motion is granted in part with regard to a document containing expert opinions, as it could be admitted into evidence for an otherwise proper purpose. The motion is denied with regard to three documents which appellants have not indicated they will be presenting at hearing.

OPINION

This is the latest in a series of motions[1] filed by the permittee Wyoming Sand and Stone Company (Wyoming Sand), in order to limit the scope of the appeal of RESCUE Wyoming *et al.* (Appellants). Appellants are appearing *pro se*

[1]The Board has issued four opinions dealing with Wyoming Sand's motions for partial summary judgment and motions for sanctions, as well as numerous orders dealing with discovery motions.

and experiencing the difficulties faced by those unfamiliar with the legal process. In particular, as the hearing on the merits in this appeal draws near,[2] they have been presented with a number of motions seeking to impose sanctions and limit the evidence that can be introduced at the hearing. The Board has cautioned Appellants about the problems faced by those who proceed without benefit of legal counsel, and the motion presently before us for disposition is an example of why such advice was given by the Board to Appellants.

Wyoming Sand has filed a motion *in limine* seeking to exclude as evidence a number of documents either listed as exhibits in Appellants' pre-hearing memorandum or otherwise cited in Appellants' filings with the Board. It argues that one of the documents is irrelevant and that the remainder of the documents constitute inadmissible hearsay in light of the witnesses Appellants will be presenting at the hearing. Appellants have opposed the motion, contending that the Board should disregard alleged procedural deficiencies and decide the merits of their appeal.[3]

The purpose of a motion *in limine* is to exclude evidence which is, *inter alia*, irrelevant or without probative value prior to the hearing. The judge has wide discretion in granting or denying such motions. Frank Greenwood v. DER and New Warwick Mining Co., 1993 EHB 342. Put another way, the motion is designed to exclude evidence which would, at hearing, be excluded after a proper

---

[2]It is scheduled to commence on September 27, 1994.

[3]Appellants misapprehend the nature of proceedings before the Board. Unlike the hearings conducted by the Department of Environmental Resources (Department) or the General Assembly, the Board's hearings are judicial in nature. The litigants must adhere to rules of evidence and procedure, rules which are designed to safeguard the rights guaranteed by our legal system to everyone, no matter their views.

objection. Ianelli and Ianelli, First Handbook for Pennsylvania Lawyers, §2.15 (2d ed. 1990).

To dispose of Wyoming Sand's motion it is necessary to examine the documents sought to be excluded, the issues remaining in the appeal, and the witnesses Appellants intend to present at the hearing. As a result of motions for summary judgment,[4] the issues remaining for hearing have been narrowed to two: the effect on groundwater of Wyoming Sand's proposed noncoal mining operation and the impacts of sludge disposed by Proctor and Gamble on soils which will ultimately be used in reclamation. As for witnesses, Appellants listed a number of fact and expert witnesses in their June 2, 1992, pre-hearing memorandum and its October 2, 1992, supplement. But, the number of witnesses has been reduced by virtue of the narrowing of the issues and a June 4, 1993, order precluding Appellants from presenting expert testimony as a sanction for failure to comply with the Board's discovery orders. In particular, Appellants failed to comply with a September 16, 1992, Board order to supplement their responses to certain of Wyoming Sand's interrogatories relating to the identity, education, experience, and proposed testimony of witnesses identified in their pre-hearing memorandum. *See* 1993 EHB 772. Wyoming Sand reasons that since Appellants cannot present expert testimony as a result of sanctions and their fact witnesses cannot present the necessary testimony to have the subject documents admitted into evidence on their own or as an exception to the hearsay rules, the Board must exclude the documents.

The relevant filing for purposes of untangling this morass is Appellants' October 2, 1992, "Amended Order of Witnesses." That filing was in response to a Board order directing Appellants to file a more specific pre-

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[4]*See* 1993 EHB 839 and the Board's opinion of March 30, 1994.

hearing memorandum by, *inter alia*, identifying which of their listed witnesses would testify as fact witnesses and which as expert witnesses. Focusing on the issues which remain in this appeal, namely groundwater and sludge impacts, Appellants listed James Charters and Norman Fitzgerald as fact witnesses on "water" and Bernard Sweeney, Ph.D and Brian Redmond, Ph.D, as expert witnesses. Dr. Sweeney's testimony was precluded by the Board's June 4, 1993, order. There is nothing in the October 2, 1992, order of witnesses relating to sludge impacts; there is a portion of Appellants' pre-hearing memorandum (p.38) which states, "Two appellants, Marilyn Robinson and Norman Fitzgerald, can testify as to locations where the sludge was 'dumped' rather than 'spread' according to permit requirements."

We are unable to fathom the reasoning underlying Wyoming Sand's assertions that the only witnesses who can testify at the hearing on the merits are Marilyn Robinson, Charles Stonier, and Norman Fitzgerald, and Appellants have not responded to this assertion. But, it is clear that no proposed witness on the remaining issues, whether or not his testimony has been excluded, can provide testimony which would lead to the admission of Prehearing Memorandum Exhibits (Exhibits) 46-48, 51-53, 58, and 59,[5] either independently or as exceptions to

---

[5]- October 17, 1990, Department laboratory report for Sample H9058515 (Exhibit 46);

- Laboratory report for samples taken by the Department on October 30, 1990, at Proctor and Gamble sludge disposal facility on the Earnshaw Farm (Exhibit 47);

- Lancaster Laboratories' analysis report of soil samples taken on October 30, 1990, at the Earnshaw Farm (Exhibit 48);

- August 14, 1981, Penn Environmental Consultants, Inc. laboratory analysis report (Exhibit 51);

- Report of April 30, 1982, inspection of the Earnshaw Farm by the Department (Exhibit 52);

the hearsay rule. All of these exhibits deal with laboratory analyses of soil, water, or wastes which were conducted by the Department, Lancaster Laboratories, or other private laboratories. In order to have the results admitted into evidence, Appellants must present the testimony of the individuals who collected and analyzed the samples. Or, Appellants must present evidence sufficient to establish that the reports fall under the business records exception to the hearsay rule. Al Hamilton Contracting Company v. DER and Houtzdale Municipal Authority, 1993 EHB 1651, 1686-1702. Appellants have identified no witnesses who can present such testimony, and, therefore, these exhibits must be excluded as evidence.

Exhibit 60 is a letter from Sara Willoughby, Chairperson of RESCUE Wyoming, to Edward R. Shoener, then Regional Director of the Department's Northeast Regional Office. The letter sets forth a number of questions and concerns regarding sludge disposal on the Earnshaw Farm, which is the site of Wyoming Sand's proposed noncoal operation, and makes recommendations to the Department as to sampling and appropriate enforcement action against the owner of the farm. The exhibit cannot be admitted for the truth of all of the matters asserted therein, but it can be admitted for the purpose of showing that RESCUE Wyoming expressed concerns about sludge disposal on the Earnshaw Farm and its potential impact on Wyoming Sand's proposed operations.

- May 26, 1981, Penn Environmental Consultants, Inc. laboratory analysis report (Exhibit 53);
- April 24, 1992, laboratory analysis report from Northeastern Environmental Association, Inc. (Exhibit 58); and
- Analytical Laboratories, Inc. analysis of a May 10, 1992, sample Exhibit 59).

The remaining three documents[6] covered by Wyoming Sand's motion have not been listed as exhibits in Appellants' pre-hearing memorandum and we have no other indication that Appellants intend to introduce them as evidence at the hearing on the merits. Any ruling as to their admissibility would be premature.

O R D E R

AND NOW, this 20th day of September, 1994, it is ordered that:

1) Wyoming Sand's motion *in limine* is granted with respect to Appellants' Exhibits 46-48, 51-53, 58, and 59;

2) Wyoming Sand's motion *in limine* is granted in part with respect to Appellants' Exhibit 60, consistent with the foregoing opinion; and

3) Wyoming Sand's motion is denied in all other respects.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: September 20, 1994

See next page for service list

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[6]- September 8, 1989, letter from William Eberhardt of Proctor and Gamble to Daniel Drawbaugh of the Department and attachment, "Mehoopany Plant Analysis";

- October 20, 1993, letter to Edward R. Schoener from RESCUE Wyoming;

- Natural Resources Defense Council's "Petition to Prohibit the Discharge of 2, 3, 7, 8 Tetrachlorodibenzo-p-dioxin By Pulp and Paper Mills."

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M. DIANE SMITH
SECRETARY TO THE BOARD

THE HARRIMAN COAL CORPORATION	:	
	:	
v.	:	EHB Docket No. 93-356-MR
	:	(consolidated with 94-019-MR)
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: September 20, 1994

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

By Robert D. Myers, Member

Synopsis

In consolidated appeals challenging civil penalties assessed under the Surface Mining Act, the Board enters summary judgment for DER on the basis of affidavits and admissions establishing that there are no genuine issues as to material facts and that DER is entitled to judgment as a matter of law.

OPINION

On November 24, 1993, The Harriman Coal Corporation (Appellant) filed a Notice of Appeal from a $1,750 Assessment of Civil Penalty issued by the Department of Environmental Resources (DER) on October 28, 1993 (October Assessment). On January 24, 1994 Appellant filed another Notice of Appeal (Board Docket No. 94-019-MR) from a $2,950 Assessment of Civil Penalties issued by DER on December 23, 1993 (December Assessment). The two appeals were consolidated on March 11, 1994 at Board Docket No. 93-356-MR.

On April 21, 1994 DER filed a Motion for Summary Judgment supported by two sworn affidavits and a legal memorandum. Appellant filed nothing in response. We can render summary judgment if the pleadings, 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 judgment as a matter of law: Pa. R.C.P. 1035(b). We must view the Motion in the light most favorable to Appellant, the non-moving party: Robert C. Penoyer v. DER, 1987 EHB 131. Since Appellant filed nothing in response to the Motion, we are left to consider only the sufficiency of DER's filings, giving the benefit of any doubt to Appellant.

DER's Motion alleges that it served a First Request for Admissions and Interrogatories upon Appellant, separate for each appeal, on February 7, 1994. Appellant failed to answer these Requests for Admissions and, on March 11, 1994, DER sent a letter to Appellant advising that the Requests were deemed admitted in accordance with Pa. R.C.P. 4014. True and correct copies of the Requests and the letter are attached to the Motion.

DER claims that the deemed admissions are sufficient to show that there are no genuine issues of material facts and that DER is entitled to judgment as a matter of law. Despite that claim, DER submitted affidavits of Walter Dieterle (Monitoring and Compliance Manager in the Pottsville Office of DER's Bureau of Mining and Reclamation) with respect to the October Assessment and Gregory P. Szumlanski (Surface Mine Conservation Inspector in the same office) with respect to the December Assessment. These affidavits, according to DER, are sufficient in and of themselves to show that there are no genuine issues of material fact and that DER is entitled to judgment as a matter of law.

Pa. R.C.P. 4014 provides that a Request for Admission is deemed admitted unless, within 30 days after service, the party to whom the Request was directed answers or objects to it. The Requests here were served on February 7, 1994. The 30 days expired on March 9, 1994, and the Requests were deemed admitted after that date. DER so advised Appellant on March 11, 1994 and

Appellant has not challenged or in any other way sought to avoid the legal effect of the admissions.

With respect to the October Assessment, Appellant has admitted, *inter alia*, (1) its identity and its involvement in the surface mining of anthracite coal, (2) its possession of Surface Mining Permit (SMP) No. 54920103 for the Tremont Township Operation #3 in Tremont Township, Schuylkill County, (3) its storing and repairing of equipment on an unbonded area for which no permit had been issued, (4) that such activity violates Section 4(d) of the Surface Mining Conservation and Reclamation Act (SMCRA), Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. §1396.4, and 25 Pa. Code §§86.11 and 86.13, (5) that DER issued Compliance Order (C.O.) 93-5-142-S on August 26, 1993, ordering Appellant to cease such activities, and (6) that DER issued the October Assessment because of such activities.

With respect to the December Assessment, Appellant admitted, *inter alia*, items (1) and (2) above and, in addition, (3) its storage of spoil on an unbonded area for which no permit had been issued, (4) that such activity violates Section 4(d) of SMCRA, 52 P.S. §1396.4, and 25 Pa. Code §§86.11 and 86.13, (5) that DER issued C.O. 93-5-103-S on June 17, 1993, ordering Appellant to cease such activities, (6) that on or before June 16, 1993 Appellant failed to clearly and accurately mark the perimeter of the permit area, (7) that such failure violates 25 Pa. Code §86.13 and Additional Special Condition #1 of SMP No. 54920103, and (8) that DER issued the December Assessment because of these activities and failures.

Section 18.4 of SMCRA, 52 P.S. §1396.18d, authorizes DER to assess civil penalties for violations of SMCRA, the regulations and permits issued under SMCRA. If the violation results in a cessation order, assessment is

mandatory. Mandatory penalties are dealt with in the regulations at 25 Pa. Code §§86.191-86.194. According to Szumlanski's affidavit, the October Assessment, which assesses $1,000 for storing and repairing equipment on an unbonded area and $750 for the cessation order, adopts the mandatory amounts in Section 18.4 of SMCRA, 52 P.S. §1386.18d, and in 25 Pa. Code §86.193(f). According to Dieterle's affidavit, the December Assessment, which assesses $2,000 for storing spoil on an unbonded area and $750 for the cessation order, adopts the mandatory amounts in Section 18.4 of SMCRA, 52 P.S. §1396.18d, and in 25 Pa. Code §86.193(e). The remaining part of the December Assessment, $200 for failure to mark the permit area, is not a mandatory penalty. It is a discretionary penalty assessed pursuant to the system set forth in 25 Pa. Code §86.194 and is the minimum amount used in that system. Appellant does not take issue with these facts and we find the affidavits to be credible evidence to support them.

Accordingly, we conclude that there are no genuine issues as to material facts. We conclude further that: Appellant committed the violations, that DER was either authorized or compelled to assess civil penalties for them, that the penalties either represent the mandatory amounts set forth in SMCRA or the regulations or represent the minimum penalty provided for in DER's system of computing discretionary penalties. Therefore, we conclude that DER is entitled to judgment as a matter of law.

O R D E R

AND NOW, this 20th day of September, 1994, it is ordered as follows:

1. DER's Motion for Summary Judgment is granted.

2. Summary judgment is entered in each of these consolidated appeals and the appeals are dismissed.

EHB Docket No. 93-356-MR
(consolidated with 94-019-MR)

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: September 20, 1994

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M. DIANE SMITH
SECRETARY TO THE BOARD

NEW CASTLE TOWNSHIP BOARD OF SUPERVISORS	:	
v.	:	EHB Docket No. 92-540-W
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and READING ANTHRACITE COMPANY, Permittee	:	Issued: September 22, 1994

OPINION AND ORDER SUR
SECOND MOTION FOR SUMMARY JUDGMENT
OR, IN THE ALTERNATIVE
MOTION TO LIMIT ISSUES

By Maxine Woelfling, Chairman

Synopsis

A permittee's motion for summary judgment in a third-party appeal of the renewal of a surface mining permit is granted.

The Department of Environmental Resources ("Department") has no obligation to provide copies of a permit and its supporting maps and plans to a municipality nor must it offer technical assistance to the municipality. Permittee is entitled to summary judgment on the municipality's objections that the Department failed to provide information and technical assistance.

There is no dispute that the renewal of the permit does not involve changes in the surface mining operation or its boundaries. The appellant is precluded from raising issues relating to buffer zones, adequacy of the underlying maps and plans, noise, dust, blasting, and ownership of the lands on which surface mining is to take place, since these issues are properly raised in an appeal of the issuance of the original permit for the operation, and appellant, admittedly, did not challenge that issuance.

OPINION

The procedural history of this matter is recounted in the Board's October 29, 1993, opinion at 1993 EHB 1541 regarding Reading Anthracite Company's ("Reading Anthracite") motion for summary judgment and the Board's July 7, 1994, opinion regarding Reading Anthracite's motion to limit issues. Presently before the Board for disposition is Reading Anthracite's second motion for summary judgment.

Citing deemed admissions by the New Castle Township Board of Supervisors ("New Castle"), as well as depositions, affidavits, and other documents, Reading Anthracite argues it is entitled to summary judgment regarding the nine objections in New Castle's notice of appeal. On the other hand, New Castle contends that *res judicata* bars Reading Anthracite's motion, as Reading Anthracite's motion for summary judgment addressed by the Board at 1993 EHB 1541 raised the same issues.[1] The Department did not respond to the motion.

The Board will grant summary judgment if the pleadings, depositions, answers to interrogatories, responses to requests for admissions, and affidavits show 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. No. 1035(b); Robert L. Snyder, et al. v. Dept. of Environmental Resources, 138 Pa. Cmwlth. 534, 588 A.2d 1001 (1991), appeal dismissed, ___ Pa. ____, 632 A.2d 308 (1993). In deciding a motion for summary judgment the Board will view the facts in a light most favorable to the non-moving party. New Hanover Corp. v. DER, 1993 EHB 656. For

[1] New Castle provided no legal basis for its assertion. However, there is no judgment here to which *res judicata* applies, for, in our previous opinion on Reading Anthracite's first motion for summary judgment, we held that material issues of fact precluded judgment in Reading Anthracite's favor. We did not resolve any factual issues - we only found that they existed.

the reasons set forth below, Reading Anthracite's second motion for summary judgment is granted.

In analyzing Reading Anthracite's motion we will divide New Castle's objections into two groups - those dealing with alleged procedural deficiencies in the Department's processing of the renewal permit application and those dealing with substantive deficiencies in the issuance of the renewal permits.

The first two objections in New Castle's notice of appeal state:

> 1. New Castle Township was never supplied with a copy of the permits, maps, etc. so that the township is not fully aware of the exact location, nature and scope of permitted mining activities.
>
> 2. DER did not supply New Castle Township with any help or technical assistance in reviewing the file in question.

Put another way, New Castle asserts that the Department was obligated to provide it with the permit and the supporting application, as well as assist it in reviewing these materials.

The following undisputed facts emerge from the depositions and affidavits accompanying Reading Anthracite's motion and the admissions resulting from New Castle's failure to respond to Reading Anthracite's request for admissions. It is the Department's practice to notify municipalities of applications for operations within their boundaries, to transmit copies of the application review letters to municipalities, and to advise the municipalities of final action on the applications. The permit application and supporting documentation are available for review at the Department's offices. (Deposition of Roger Hornberger, pp. 16-18 (Exhibit 6 to Reading Anthracite's motion)). Moreover, New Castle was not denied access to the permit application file, never was refused assistance in reviewing the file, and did not seek an informal conference with the Department. (Hornberger deposition, p. 18; Affidavit of Keith A. Laslow

(Exhibit I to Reading Anthracite's motion); and Request for Admissions 7). Having established these undisputed material facts, we next consider whether Reading Anthracite is entitled to judgment as a matter of law.

Neither the applicable statutes nor the regulations promulgated thereunder require the Department to supply a copy of the permit(s) or map(s) to a third party or to provide any technical assistance in reviewing a permit application file. The Department is obligated to make the permit application file available for inspection and copying, 25 Pa. Code §86.35, and, upon request, to hold an informal conference on issues related to the permit application, 25 Pa. Code §86.34.[2] The Department did not refuse New Castle access to the permit application file, and no informal conference was ever requested by New Castle. Therefore, Reading Anthracite is entitled to summary judgment on the first two objections in New Castle's notice of appeal.

The remaining objections in New Castle's notice of appeal are substantive challenges to the Department's renewal of Reading Anthracite's permits. The rules and regulations governing surface mining permits provide that a permit "shall be issued for a fixed term not to exceed 5 years..." 25 Pa. Code §86.40. However, 25 Pa. Code §86.55(a) also authorizes renewal of permits:

> A valid, existing permit issued by the Department will carry with it the presumption of successive renewals upon expiration of the term of the permit. Successive renewals will be available only for areas which were specifically approved by the Department on the application for the existing permit.

Renewal of a permit is not as complex a process as the issuance of the original permit:

---

[2] To some extent, this regulation could be interpreted as imposing an obligation on the Department to explain how it handled various issues, provided that a third party raised the issues and requested the informal conference.

> Applications for renewal shall be subject to the requirements of public notification and participation of §86.31 (relating to public notices of filing of permit applications), the ownership and control information of §86.62 (relating to identification of interests) and submission of a compliance history under §86.63 (relating to compliance information). If there are no changes, updates or corrections to the information required under §§86.62 and 86.63, the operator need only submit a statement indicating that no change has occurred in the information previously submitted.

25 Pa. Code §86.55(d).

And, the standards by which the Department evaluates renewal applications are less extensive than those used in considering the original permit application:

> A permit will not be renewed if the Department finds one of the following:
>
> (1) The terms and conditions of the existing permit are not being satisfactorily met.
>
> (2) The present mining activities are not in compliance with the environmental protection standards of the Department.
>
> (3) The requested renewal substantially jeopardizes the operator's continuing ability to comply with the acts, this title and the regulatory program on existing permit areas.
>
> (4) The operator has failed to provide evidence that a bond required to be in effect for the activities will continue in full force and effect for the proposed period of renewal, as well as an additional bond the Department might require.
>
> (5) Revised or updated information required by the Department has not been provided by the applicant.

25 Pa. Code §86.55(g).

Finally, permit renewals are not

> ...available for extending the acreage of the operation beyond the boundaries of the permit area approved under the existing permit. Addition of acreage to the operation will be considered a new application. A request for permit revision may accompany a request for

> renewal and shall be supported with the information required for application as described in this chapter.

With this regulatory framework, we will now examine Reading Anthracite's motion for summary judgment on the remaining seven objections in New Castle's notice of appeal.

Reading Anthracite has also argued that it is entitled to summary judgment on the remainder of New Castle's objections as a result of New Castle's failure to challenge the 1985 issuance of the original permit. It reasons that this operates to preclude New Castle from attacking the renewal permit, since, with the exception of an 0.6 acre incidental boundary correction in 1988, the boundaries of the original and renewal permits are identical.[3]

Generally, a party which fails to appeal a Department action is precluded from challenging that action in a subsequent proceeding. Dept. of Environmental Resources v. Wheeling-Pittsburgh Steel Corp., 473 Pa. 432, 375 A.2d 320 (1977), cert. denied, 434 U.S. 969 (1977). Where renewal of a surface mining permit is at issue, however, a party is not completely barred from challenging the renewal by its failure to challenge the original permit issuance, for there may be differences between the permit as originally issued and the permit as renewed. Arthur and Carolyn Richards v. DER and Willowbrook Mining Company, 1990 EHB 382.

These uncontradicted, material facts emerge from the depositions, requests for admissions, and other materials filed with the Board. The renewal permit in dispute here was originally issued by the Department on September 20, 1985 (Exhibit A to Laslow affidavit to Reading Anthracite motion for summary judgment;

---

[3] The exact amount of acreage involved in the correction is unclear. The 1988 surface mining permit states that the incidental boundary correction was 6 acres, while the 1992 renewal permit notes the correction was 0.6 acres. However, the exact amount of acreage is not germane to the disposition of this motion.

Request for Admissions 5). The 1985 permit issuance was not appealed by New Castle (Hornberger deposition, pp. 11-12; Request for Admissions 6). The boundaries of the renewal permit are identical to those of the original 1985 permit with the exception of an incidental boundary correction for support which was approved by the Department on February 1, 1988 (Laslow deposition, pp. 9-10; Request for Admissions 10). The maps, plans and cross-sections submitted with the original permit application and approved by the Department accurately depict the surface facilities and structures at the Wadesville site for purposes of the renewal permit application (Exhibit 2 to Hornberger deposition). And, the renewal permit application does not involve revisions to the existing operation (Laslow deposition, pp. 7-8).

Because there are no changes to the renewal permit, the Department's issuance of it, and, therefore, New Castle's objections to it must be evaluated in light of 25 Pa. Code §86.55. If objections three through nine in New Castle's notice of appeal are outside the scope of §86.55, then Reading Anthracite is entitled to judgment as a matter of law on these objections. After examining each of these seven objections, we must conclude that Reading Anthracite is entitled to summary judgment, for all of them relate to the original issuance of Reading Anthracite's permit.

Objections three, seven, and nine all relate to the issue of mining within 300 feet of an occupied dwelling:

> 3. From an examination of DER's file by New Castle Township officials, it appears that the permits for which this appeal is filed encompass mining activities within three hundred feet (300') of occupied dwellings.
>
> * * * *
>
> 7. Houses are not adequately shown on the map, nor is the 300' buffer zone shown.

* * * *

> 9. The location of the mining boundaries presupposes that Reading Anthracite will be able to secure 300' buffer zone waivers from affected homeowners or acquire and remove said homes.

A mining permit cannot be issued where mining is proposed within 300 feet of an occupied dwelling unless the owner of the dwelling provides a written waiver. 25 Pa. Code §§86.37(a)(5) and 86.102(9). Any objections relating to the 300 feet limitation should have been raised in an appeal from the 1985 issuance of the permit. Since New Castle did not file such an appeal, it cannot now raise these issues, and Reading Anthracite is entitled to summary judgment on objections three, seven, and nine.

Objections four and five in New Castle's notice of appeal relate to the adequacy of descriptions and maps of mining and related activities:

> 4. The exact areas where mining is to take place and overburden deposited are unknown. The map and information in permit file are too vague and general.
>
> 5. New Castle Township does not know the impact on homeowners because said areas of activity are not described with sufficient detail.

The content of maps and plans is prescribed in 25 Pa. Code §§87.65, 88.31, and 88.44, regulations which relate to applications for the original permit. New Castle's objections to the adequacy of such information are not properly before the Board in this appeal because they should have been raised in an appeal of the 1985 issuance of the permit. Therefore, Reading Anthracite's motion must be granted with respect to objections four and five.

Objection six in the notice of appeal concerns noise, dust, and blasting:

> 6. New Castle is concerned regarding the adverse impact on homeowners caused by noise, dust, and vibration from blasting and mining activities.

This objection can be interpreted in two ways. To the extent that New Castle challenges whether Reading Anthracite's permit application met the requirements regarding blasting, noise, and dust control in 25 Pa. Code §§87.64, 87.66, 87.124-87.129, 88.45, and 88.48, its objections should have been raised when the permit was issued by the Department in 1985. To the extent the objection questions whether Reading Anthracite is complying with the terms and conditions of its permit relating to dust control, noise and blasting, it is an issue of enforcement of the permit which, again, is not properly before the Board at this time. Either way, Reading Anthracite is entitled to summary judgment on objection six.

Finally, the eighth objection in New Castle's notice of appeal asserts:

> 8. The permitted area encompasses areas which the applicant, Reading Anthracite, either does not own, and/or the ownership of which is presently in dispute.

Issues regarding ownership of the land on which surface mining activities are to take place are considered during the permitting process, 25 Pa. Code §86.64, and not during the renewal process. As a result, Reading Anthracite is entitled to summary judgment on this objection of New Castle's.

O R D E R

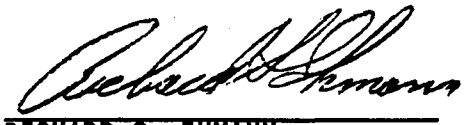
AND NOW, this 22nd day of September, 1994, it is ordered that Reading Anthracite Company's motion for summary judgment is granted, and the appeal of the New Castle Township Board of Supervisors is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: September 22, 1994

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

GEORGE M. LUCCHINO	:	
	:	
v.	:	**EHB Docket No. 94-178-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES and	:	
ROBINSON COAL COMPANY, Permittee	:	**Issued: September 23, 1994**

OPINION AND ORDER SUR
MOTION TO DISMISS FOR LACK OF JURISDICTION

By: Richard S. Ehmann, Member

Synopsis

The Department of Environmental Resources' ("DER") motion to dismiss a landowner's appeal from a DER letter to him is sustained. DER's letter to George M. Lucchino ("Lucchino") and Robinson Coal Company ("Robinson"), dated May 19, 1994, modified Robinson's permit by revoking the portion thereof which applied to Lucchino's land and thus was appealable by both Robinson and Lucchino. Neither filed a timely appeal, however. DER's subsequent letter of June 8, 1994, responding to a letter from Lucchino and pointing out that its revocation of this portion of Robinson's permit does not affect Robinson's right to mine coal pursuant to other permits, is not an appealable action. It does not change the *status quo ante* for either Lucchino or Robinson in any fashion.

OPINION

This appeal is linked inextricably with the appeal by Lucchino which we adjudicated on March 16, 1994 in George M. Lucchino v. DER, et al., EHB

Docket No. 91-117-MJ ("Lucchino I")[1] . At that adjudication's conclusion, we issued an Order that the portion of Robinson's Surface Mining Permit covering Lucchino's property was suspended. The Order went on to remand Surface Mining Permit No. 02890106 to DER for a determination of whether Robinson held a valid right-of-entry to Lucchino's property so that it might be properly included within the permit's boundary. Finally, our order also required Lucchino and Robinson to submit evidence to DER on this issue.

Thereafter, according to DER's motion (and not disputed by Lucchino), DER solicited data on this issue from Robinson and Lucchino. Lucchino made a submission of evidence to support his claim that Robinson had no valid right-of-entry for use of his property in its mine operations under this permit. Interestingly, DER's Motion says that Robinson made no submission. Thereafter, DER says it reviewed the evidence available to it and concluded that Robinson had no valid right-of-entry for Lucchino's property. As a result, DER sent a letter dated May 19, 1994 to Lucchino and Robinson (Exhibit C to DER's Motion) advising that based upon Lucchino's evidence, it revoked the portion of Robinson's Surface Mining Permit No. 02890106 dealing with Lucchino's property. This letter contains a notice of the recipients' rights to appeal to this Board from DER's action.

On June 7, 1994 DER received a letter from Lucchino dated June 3, 1994, asking two questions of DER. The letter's body reads:

> This letter is in reference to your letter dated May 19, 1994. I would like you to clarify some points:
>
> 1. What evidence did the Coal Company submit?

---

[1] That appeal is still pending only insofar as Lucchino has filed a request to be reimbursed for his attorneys fees and costs and the merit of that request has not been decided. That aspect of that appeal is not addressed further here.

2. What criteria did the Department use in determining Robinson Coal does not have legal rights to use my property in conjunction with other mining operations in the area?

Thank you for your attention in this matter.

In response by letter dated June 8, 1994, DER wrote back. Its letter stated:

> This is in response to the questions raised in your June 3, 1994 letter.
>
> 1. Robinson did not submit any documentation or evidence in response to the Environmental Hearing Board decision.
>
> 2. The March 16, 1994 Order of the Environmental Hearing Board suspended "that portion of the Blatz permit" covering your property pending a determination by the Department as to whether Robinson holds a Valid Right-of-Entry. In that Robinson did not submit any evidence, it was not necessary to evaluate criteria relative to the validity of your lease. By letter dated May 19, 1994, that portion of the Blatz permit referenced in the Board's Adjudication was revoked. I'd like to make it clear that the Board's Adjudication and the Department's revocation action do not affect Robinson's activities or rights to mine on the McWreath or the remainder of the Blatz permit areas.

From DER's June 8, 1994 letter Lucchino appealed to this Board, and it is in connection therewith that DER has filed its instant motion.[2] Lucchino has timely filed a response in opposition thereto.

DER's Motion and supporting Memorandum Of Law take the position that to the extent that Lucchino's appeal challenges DER's first letter, which revoked a portion of the Blatz mine's permit, the appeal is untimely. It then states that DER's June 8, 1994 letter is not appealable because it did not

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2 Robinson advised the Board by letter dated August 30, 1994, that it joined in DER's Motion.

affect Lucchino's personal or property rights, privileges, immunities, duties, liabilities or obligations and did not change the *status quo ante*.

In response, Lucchino's one-page letter of August 28, 1994 asserts that DER's letter did impact on his personal rights, his property and his immunities. He asserts that twenty of the paragraphs in his Notice Of Appeal detail how this has occurred. Next, Lucchino asserts DER is seeking dismissal of his appeal "to discount their accountability for which they are responsible." Finally, after suggesting that he has submitted sufficient documentation supporting his appeal, he asserts Article I, Section 27 of the Pennsylvania Constitution has been violated by DER and he intends to prove DER's negligence.

To the extent Lucchino's appeal is a challenge to the merits of DER's decision to revoke the portion of the Blatz permit which purported to cover Lucchino's property, the appeal is untimely. DER's action was announced in its letter of May 19, 1994. That Lucchino got the copy thereof mailed to him by DER is evidenced by his letter of June 3, 1994 to DER concerning the decision to revoke that portion of the permit. Lucchino had only thirty days to file a timely appeal of that letter under 25 Pa. Code §21.52(a).

His appeal was received by the Board on July 6, 1994. Thus, even if he did not receive his copy of DER's May 19, 1994 letter until June 3, 1994, when he wrote to DER, this appeal is still untimely. Because the appeal is untimely as to that letter, even if every argument in Lucchino's Notice Of Appeal has merit as to the decision reflected in that letter, it cannot now be attacked. It is final. Rostosky v. Commonwealth, DER, 26 Pa.Cmwlth. 478, 364 A.2d 761 (1976).

Of course Lucchino's Notice Of Appeal says it is appealing from DER's letter dated June 8, 1994 rather than the prior letter. The problem with that scenario, as DER points out, is that DER's June 8, 1994 letter changed nothing.

There is a long line of decisions from this Board which stand for the premise that not every letter DER writes is appealable. Westtown Sewer Company, et al. v. Commonwealth of Pennsylvania, DER, 1992 EHB 82; Kephart Trucking Company v. DER, 1992 EHB 162; Louis Costanza, t/d/b/a Elephant Septic Tank Service v. DER, 1991 EHB 1132; Sandy Creek Forest, Inc. v. Department of Environmental Resources, 95 Pa.Cmwlth. 457, 505 A.2d 1091 (1986). ("Sandy Creek"). These cases hold that only a DER action which affects Lucchino's rights, privileges, immunities, duties, liabilities or obligations is appealable. Those actions somehow change the *status quo* for a prospective appellant from what it was prior to the letter's issuance, and it is that change which gives rise to a right to appeal, i.e., a right to challenge the change.

DER's letter stated that only Lucchino submitted documentation on the issue of Robinson's right to be on his land in connection with activities in connection with the Blatz mine's operation. It further stated that because of this, there was no need to evaluate conflicting claims as to the validity of the lease between Lucchino and Robinson (to see if it allowed Robinson to use Lucchino's land during the Blatz mine's operation). Thus, DER said that Mr. Lucchino won since the evidence was all in his favor and left no conflicting claims to evaluate. It then closed saying that DER's conclusion only applied to the portion of the Blatz mine's permit applicable to Lucchino's land rather than Robinson's activities at other mine sites (or other lands within this

permit's boundary). This letter did not change either Robinson's or Lucchino's positions one iota. Since Lucchino had successfully appealed as to the Blatz mine's permit in Lucchino I, only that mine's permit was subject to the Board's Order of March 16, 1994. No other permits for other Robinson surface mines were before us in that appeal. The Order issued in Lucchino I suspended the portion of Robinson's permit covering Lucchino's land and directed DER to reevaluate it in terms of whether Robinson had a right to be on Lucchino's land in connection with that mine. DER did this using information supplied solely by Lucchino. DER's revocation of the Blatz mine's permit based on Lucchino's information was contained in DER's unappealed letter of May 19, 1994. DER's subsequent letter of June 8, 1994 did not change that decision. The fact that DER's letter says that the revocation does not impact on Robinson's activities or rights to mine at other permitted mines or other portions of the Blatz mine also does not adversely affect Lucchino or change the *status quo*. If Lucchino has rights as to other Robinson mines, this statement neither expands on them nor restricts them. When, and if, DER takes further actions as to the Blatz mine or Robinson's McWreath II mine (the other Robinson mine mentioned in Lucchino I[3]), Lucchino may file a timely appeal therefrom.

Since this letter is not appealable, we lack jurisdiction to hear an appeal from it under Sandy Creek and the other cases cited by DER and listed above.

Accordingly, we enter the following Order.

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3 This is according to Finding of Facts Nos. 4 and 5 in Lucchino I.

ORDER

AND NOW, this 23rd day of September, 1994, it is ordered that DER's Motion to Dismiss is granted and this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: September 23, 1994

cc: **Bureau of Litigation**
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Western Region

For Appellant:
George Lucchino, *pro se*
McDonald, PA
For Permittee:
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M. DIANE SMITH
SECRETARY TO THE BOARD

NEW HANOVER CORPORATION	:	
v.	:	**EHB Docket No. 90-225-W**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, NEW HANOVER TOWNSHIP, COUNTY OF MONTGOMERY, and PARADISE WATCH DOGS	:	**Issued: September 27, 1994**

OPINION AND ORDER SUR MONTGOMERY COUNTY'S SUPPLEMENT TO MOTION FOR PARTIAL SUMMARY JUDGMENT

By: Maxine Woelfling, Chairman

Synopsis:

A motion for summary judgment is granted in part and denied in part. If a permit applicant does not appeal from the Department of Environmental Resources' (Department) interim approval of a county's solid waste management plan under §501(b) of the Municipal Waste Planning, Recycling and Waste Reduction Act, the Act of July 26, 1988, P.L. 556, 53 P.S. §4000.501(b) (Act 101), within the time allowed for such appeals, it is prohibited from challenging the validity of that plan in an appeal from the Department's denial of its application to repermit its municipal waste landfill.

OPINION

This appeal arose out of the Department's May 7, 1990, denial of New Hanover Corporation's (Corporation) application to repermit the New Hanover Landfill (Landfill) in New Hanover Township, Montgomery County under

the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. (Act 97 or SWMA), and the regulations promulgated thereunder, which took effect on April 9, 1988. The procedural history of this appeal was fully explained in earlier opinions and will not be repeated here. *See*, New Hanover Corp. v. DER, *et al.*, 1991 EHB 440.

In this appeal, the Corporation challenges, among other things, the validity of Montgomery County's (County) Grandfathered Act 97 Plan, which the Department used as a basis for denying the Corporation's repermitting application.[1] Currently before the Board for disposition is the County's December 23, 1993, supplement to its July 31, 1991, motion for partial summary judgment, which we have already granted in part and denied in part. New Hanover Corp. v. DER, *et al.*, 1993 EHB 656.

In its earlier motion for summary judgment, the County argued that the Corporation's challenges to the validity of the Grandfathered Act 97 Plan were untimely because the Corporation had notice of the Department's approval of the Grandfathered Act 97 Plan on November 16, 1989, yet waited until June 5, 1990, over six months later, to file this appeal. *Id.* at 658.[2] Because these challenges were untimely, the County maintained that we lacked jurisdiction to entertain them. Although we agreed that our jurisdiction was limited to timely appeals, i.e. those filed within 30 days of the Department's action, *see*, 25 Pa.Code §21.52(a), we explained that the period for filing an

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[1]To alleviate any confusion, the "Act 97 Plan" refers to the County's original solid waste management plan adopted pursuant to Act 97, while the "Grandfathered Act 97 Plan" refers to the Department's May 15, 1989, interim approval of the County's Act 97 Plan under §501(b) of Act 101. Section 501(b) allows counties to gain interim approval of their Act 97 plans before preparing a solid waste management plan that complies with the more stringent requirements of Act 101. *See*, 53 P.S. §4000.501.

[2]The County raised other objections to the Corporation's notice of appeal that are not relevant here. *See*, New Hanover, 1993 EHB at 660, 661, 662, and 664.

appeal depends upon how the appellant was notified of the Department's action.

> In the case of a third party appeal, the 30 day appeal period begins to run upon publication of the Department's action in the Pennsylvania Bulletin, even if the third party appellant has actual notice of the Department's action before publication of the notice in the Bulletin. Lower Allen Citizens Action Group, Inc. v. DER, 119 Pa.Cmwlth. 236, 538 A.2d 130, *aff'd on reconsideration*, ___ Pa.Cmwlth. ___, 546 A.2d 1330 (1988). Only when the Department fails to publish notice of its action does the appeal period run from the date the third party receives actual or constructive notice of that action. Paradise Township Citizens Action Committee, Inc., *et al* v. DER and Paradise Township, [1992 EHB 668].

New Hanover, 1993 EHB at 659. The County, however, offered no evidence to show that the Department did not publish notice of its approval of the Grandfathered Act 97 Plan. *Id.* at 660. Without that information, we could not find the Corporation's challenges to the validity of the Grandfathered Act 97 Plan to be untimely. *Id.*

With this supplement, the County once again moves for summary judgment on paragraphs 3.4.2, 3.4.4, 3.4.5, and 3.4.8 of the Corporation's notice of appeal.[3] In response to our earlier opinion, the County has submitted the affidavit of Keith C. Kerns, Chief of the Division of Waste Minimization in the Department's Bureau of Waste Management, which states the Department did not publish notice that it had approved the County's Grandfathered Act 97 Plan. Based on Kerns' affidavit, the County again

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[3]In ¶3.4.2, the Corporation alleges the County's Act 97 Plan only governs the eastern portion of the county (districts one and two), not the district in which the Corporation's facility is located or the districts from which the Corporation proposes to receive waste. In ¶¶3.4.4 and 3.4.5, the Corporation alleges the County's Grandfathered Act 97 Plan "is a nullity and without force and effect" and provides several bases for that position. And finally, in ¶3.4.8, the Corporation alleges the County has not complied with the requirements of §513 of Act 101, which it claims are a condition precedent to the application of §507.

requests that we find the Corporation's challenges to the Grandfathered Act 97 Plan to be untimely.

In its January 24, 1994, response to the County's supplement, the Corporation argues that even if Mr. Kerns is correct, its challenge to the validity of the Grandfathered Act 97 Plan is still timely. Since the Landfill is located in a waste management district not covered by the Grandfathered Act 97 Plan, the Corporation contends it lacked standing to appeal the Department's approval until May 7, 1990, when the Department relied on the Grandfathered Act 97 Plan to deny the Corporation's application for repermitting.[4]

In its February 1, 1994, reply to the Corporation's response, the County argued that this motion is controlled by the Commonwealth Court's recent decision in Greene County Citizens United, *et al.* v. Greene County Solid Waste Auth., *et al.*, ___ Pa.Cmwlth. ___, 636 A.2d 1299 (1994). The Corporation replied on February 22, 1994, that Greene County merely decided the proper forum for challenges to Act 101 plans.

The Board may grant summary judgment if 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 judgment as a matter of law." Pa.R.C.P. 1035(b); Robert L. Snyder, *et al.* v. Department of Environmental Resources, 138 Pa.Cmwlth. 534, 588 A.2d 1001 (1991), *appeal dismissed*, ___ Pa.

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[4]In response to requests from various municipalities which wanted the County to plan its municipal waste management needs on a regional basis, the County divided itself into six waste management districts. The Corporation's landfill is located in New Hanover Township, which is one of the municipalities comprising district five. NHC Exh. 30, p. I-3.

"NHC Exh. __" refers to the exhibits submitted with the Corporation's June 11, 1991, motion for summary judgment.

___, 632 A.2d 308 (1993).

Looking first at the County's argument concerning the Commonwealth Court's decision in Greene County, we do not find that decision to be dispositive here. In Greene County, the court stated:

> Any challenge based on an alleged impropriety relating to the adoption process must be regarded as a collateral attack on DER's approval of the plan, which the citizen-group parties should have challenged by bringing a timely appeal of the department's action to the EHB.

___ Pa.Cmwlth. at ___, 636 A.2d at 1302. The court then ordered the citizen-groups' challenges to the Department's approval to be transferred to the Board. ___ Pa.Cmwlth. at ___, 636 A.2d at 1303. Because Greene County merely determined the proper forum for challenging the Department's approval of a county's municipal waste management plan, an issue not before us, it is of no assistance in resolving the Corporation's standing defense.

Nevertheless, we find that the Corporation's standing defense is misplaced. The issue currently before the Board is whether the Corporation timely challenged the Department's approval of the Grandfathered Act 97 Plan. If the Department's conduct amounts to an "action" or "adjudication" under the Board's Rules of Practice and Procedure, 25 Pa.Code §21.2(a), or the Administrative Agency Law, 2 Pa.C.S. §101, it is considered to be an "appealable action." Lobolito, Inc. v. DER, 1993 EHB 477, 485-486. Review of an appealable action must be sought from the Board within 30 days, 25 Pa.Code §21.52(a), or else the action becomes final and may no longer be appealed.

See, §4(c) of the Environmental Hearing Board Act, the Act of July 31, 1988, P.L. 530, 35 P.S. §7514(c); Michael Strongosky v. DER, 1993 EHB 412, 414.[5]

The Corporation's alleged lack of standing is a separate issue to be decided apart from whether the Department's action is appealable or when the 30 day appeal period begins to run. While an appealable action and, therefore, the appeal period, are determined on the basis of the Department's conduct, standing is based on the relationship of a party to that conduct. Sequa Corp. v. DER, 1993 EHB 1589, 1594.[6] Even if we were to decide the Corporation lacked standing when the Department approved the Grandfathered Act 97 Plan, that approval would still be an appealable action and our appeal period would still begin to run when a party received notice of the Department's action.[7]

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[5]Strongosky was decided on the basis of administrative finality, which provides another reason for dismissing the Corporation's challenges to the Department's approval of the Grandfathered Act 97 Plan. *See also*, Cmwlth., Dept. of Environmental Resources v. Wheeling-Pittsburgh Steel Corp., 22 Pa.Cmwlth. 280, 348 A.2d 765 (1975), *aff'd*, 473 Pa. 432, 375 A.2d 320 (1977), *cert. denied*, 434 U.S. 969 (1977).

Because the Corporation's argument could potentially affect the validity of every county plan in the Commonwealth, accepting it would "postpone indefinitely the vitality of administrative order and frustrate the orderly operation of administrative law." Wheeling-Pittsburgh, 22 Pa.Cmwlth. at ___, 348 A.2d at 767.

[6]An appellant has standing if it has a direct, immediate, and substantial interest in the litigation challenging the Department's action. Sequa, 1993 EHB at 1594. The Corporation contends it lacked standing to challenge the Department's approval because it did not have a direct interest in that approval. We disagree. For an interest to be direct, it must have been adversely affected by the matter complained of. *Id.* The Corporation's interests were adversely affected because the Grandfathered Act 97 Plan was intended to govern the entire County, including the district in which the Corporation's landfill was located. *See*, 53 P.S. §4000.501(b); NHC Exh. 29.

[7]The Corporation cites our decision in James Buffy and Harry K. Landis, Jr. v. DER and PBS Coals, Inc., 1990 EHB 1665, as support for its assertion that it was not aggrieved by the Department's approval of the Grandfathered Act 97 Plan until its permitting application was denied on the basis, *inter alia*, of the plan. In Buffy and Landis, we held that a third party appellant was not

Returning our attention to the Corporation's challenges to the validity of the Grandfathered Act 97 Plan, we find that they were untimely filed. Given Kerns' affidavit, it is now undisputed that the Department did not publish notice of its approval of the Grandfathered Act 97 Plan in the *Pennsylvania Bulletin* (Affidavit of Keith C. Kerns, 6). Furthermore, it is also undisputed that the Corporation had notice of the Department's approval of the Grandfathered Act 97 Plan on November 16, 1989 (NHC Exh. 10, 3(j)) (the Corporation stated in its November 16, 1989, application to the Commonwealth Court for special relief: "DER approved Montgomery County's waste management plan by letter dated May 15, 1989"). Accordingly, the appeal period began to run on November 16, 1989, not May 7, 1990, as the Corporation claims. We find, therefore, that the Corporation's June 5, 1990, challenges to the validity of the County's Grandfathered Act 97 Plan were untimely.

Since the Corporation specifically challenges the validity of the Grandfathered Act 97 Plan in paragraphs 3.4.4 and 3.4.5 of its notice of appeal, the County is entitled to summary judgment on those paragraphs. The County is not, however, entitled to summary judgment on paragraphs 3.4.2 and 3.4.8 of the Corporation's notice of appeal. Paragraph 3.4.2 is merely a statement of fact, alleging that the County's Act 97 Plan only covered the eastern region of Montgomery County (districts one and two). Paragraph 3.4.2,

---

precluded from challenging the adequacy of a water supply replacement in his appeal of the Department's approval of a bonding increment. Although the appellant had failed to appeal the issuance of the surface mining permit underlying the bonding increment, we held that he could challenge the adequacy of the water supply replacement because he was not aggrieved until the Department approved the bonding increment. While the term "aggrieved" implies that the decision turned on the issue of standing, it is apparent from a closer examination that the Board considered the approval of the bonding increment to be the appealable action with regard to the adequacy of the water supply replacement. Here, the appealable action regarding the validity of the Grandfathered Act 97 Plan is the Department's 1989 approval of that plan.

therefore, does not challenge the validity of the Act 97 Plan or otherwise collaterally attack it. Paragraph 3.4.8, meanwhile, merely states that the County has not fully complied with §513 of Act 101, which requires a county to prove it has arranged for ten years of disposal capacity for all of the municipal waste generated within its borders. *See*, 53 P.S. §4000.513(a). Paragraph 3.4.8, therefore, also does not challenge the validity of the County's Grandfathered Act 97 Plan.

O R D E R

AND NOW, this 27th day of September, 1994, it is ordered that:

1) The County's supplement to motion for partial summary judgment on paragraphs 3.4.4 and 3.4.5 of the Corporation's notice of appeal is granted; and

2) The County's supplement to motion for partial summary judgment on paragraphs 3.4.2 and 3.4.8 of the Corporation's notice of appeal is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: September 27, 1994

EHB Docket No. 90-225-W
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M. DIANE SMITH
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
v.	:	**EHB Docket No. 93-376-CP-W**
	:	
DOYLESTOWN FEDERAL SAVINGS AND LOAN	:	**Issued: September 28, 1994**

OPINION AND ORDER SUR
PETITION FOR DETERMINATION OF FINALITY
PURSUANT TO PA.R.A.P. 341(c)

By Maxine Woelfling, Chairman

Synopsis:

When more than 30 days have elapsed since the Board issued a non-final order, the Board lacks the authority to amend that order, pursuant to Pa.R.A.P. 341(c), to include a determination of finality.

OPINION

This matter arose as a result of the December 15, 1993, filing of a complaint for assessment of civil penalties by the Department of Environmental Resources (Department). The complaint sought civil penalties from Doylestown Federal Savings and Loan, Division of Third Federal Savings (Doylestown) for alleged violations of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, stemming from earthmoving activities at the Fox Hunt Development in Plumstead Township, Bucks County. Doylestown, through the filing of a third party complaint, sought to add Ivymor Contractors, Inc. (Ivymor) and Gilmore & Associates, Inc. (Gilmore) as defendants, but the third party complaint was dismissed by the Board in a May 6, 1994, opinion and order. Doylestown filed a petition for review with the Commonwealth Court on May 26,

1994, and, on September 7, 1994, the Commonwealth Court quashed Doylestown's petition for review as being from a non-final order.[1]

Thereafter, on September 16, 1994, Doylestown filed a petition requesting the Board to amend its May 6 order to include a determination of finality pursuant to Pa.R.A.P. 341(c).[2] The Department opposed the request in its September 21, 1994, response to the petition, contending that the request was untimely and, therefore, the Board no longer has the authority to amend its order to include a determination of finality.[3]

In general, final orders of lower courts or administrative agencies may be appealed as a right. A "final order" is defined in Pa.R.A.P. 341(b) to include an order which:

> (1) disposes of all claims or of all parties; or
>
> (2) any order that is expressly defined as a final order by statute; or
>
> (3) any order entered as a final order pursuant to subsection (c) of this rule.

Subsection (c) provides, in relevant part:

> When more than one claim for relief is presented in an action...or when multiple parties are involved, the trial court or other governmental unit may enter a final order as to one or more but fewer than all of the claims or parties only upon an express determination that an immediate appeal would facilitate resolution of the entire case....
>
> (1) An order may be amended to include the determination of finality within 30 days of entry of the order. A notice of appeal or a petition for review may be filed

---

[1]In its order, Commonwealth Court stated that the Board's May 6 order did not dismiss all of the defendants from the lawsuit and, therefore, was not final under Pa.R.A.P. 341.

[2]Presumably to enable Doylestown to file a petition for review of the Board's May 6 order pursuant to Pa.R.A.P. Chapter 15.

[3]Ivymor and Gilmore, although they are not parties to this action, also filed responses in opposition to Doylestown's petition.

> within 30 days after entry of an order as amended, unless a shorter time period is provided in Rules 903(c) or 1512(b).
>
> * * * * *

Under Pa.R.A.P. 341(c)(1), therefore, an order may be amended to include a determination of finality only within 30 days of its entry. Because more than 30 days have passed since the entry of the Board's May 6 order dismissing Doylestown's third party complaint, the Board lacks the authority to amend that order to include a determination of finality. Accordingly, Doylestown's petition must be denied.

O R D E R

AND NOW, this 28th day of September, 1994, it is ordered that Doylestown's Petition for a Determination of Finality is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: September 28, 1994

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

EMPIRE SANITARY LANDFILL, INC.	:	
	:	
v.	:	**EHB Docket No. 94-114-W**
	:	**(Consolidated Docket)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 30, 1994**
and BOROUGHS OF OLD FORGE AND TAYLOR	:	
AND CITY OF SCRANTON, Intervenors	:	

OPINION AND ORDER SUR
MOTION TO DISMISS FOR LACK OF STANDING
OR TO ADD A NECESSARY AND INDISPENSABLE PARTY

By: Maxine Woelfling, Chairman

Synopsis

A landfill permittee has standing to appeal from orders directed to it by the Department of Environmental Resources (Department). The Board has no authority to add a customer of the landfill as a party to the appeal.

OPINION

The appeals consolidated at this docket arose out of the Department's actions[1] with regard to Empire Sanitary Landfill's (Empire) attempts to dispose of incinerator ash from the Union County Utilities Authority (UCUA) municipal waste incinerator in Rahway, New Jersey, at Empire's landfill in the Boroughs of Old Forge and Taylor, Lackawanna County.

[1]These actions include the Department's disapproval of Empire's testing protocol for municipal incinerator ash; the Department's May 5, 1994, order directing Empire to cease accepting incinerator ash from UCUA; and the Department's May 12, 1994, order suspending Empire's permit modification authorizing it to dispose of incinerator ash.

Presently before the Board for disposition is Intervenor Borough of Taylor's (Taylor) June 14, 1994, motion to dismiss Empire's consolidated appeals or for summary judgment or to add a necessary and indispensable party.[2]

The Parties' Positions

Taylor contends Empire's appeals should be dismissed because UCUA, not Empire, owns the real property affected by the Department's actions and Empire has not established any standing to maintain these appeals on UCUA's behalf. In the alternative, Taylor requests that the Board postpone this matter to allow UCUA to be added as a necessary and indispensable party to this litigation, because UCUA's, and not Empire's, rights were affected by the Department's actions.[3] Intervenors City of Scranton (Scranton) and Borough of Old Forge (Old Forge) filed a joint response in support of Taylor's motion on July 13, 1994.

The Department also responded to Taylor's motion on July 13. Although the Department does not oppose adding UCUA as a party to these appeals, it believes Empire actually owns the real property at issue, while UCUA merely holds an interest in that property. The Department further believes that Empire

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[2]Because Taylor never discusses in its motion or brief the standards applicable to summary judgment, we will treat this matter as a motion to dismiss or, in the alternative, to add a necessary and indispensable party.

[3]Taylor also contends Empire's appeals should be dismissed because Empire's permit modification, which authorizes Empire to accept and dispose of ash from UCUA, is void since UCUA is not the permit holder. Taylor believes the permit and permit modification should have been issued to UCUA, because UCUA, not Empire, owns the real property where the ash is to be disposed of. We will not address this claim here, however, because it goes to the validity of the permit modification and Empire's authority to dispose of ash at the landfill, both of which are more appropriately addressed in Taylor's appeal from the Department's issuance of the permit modification, which is docketed at No. 94-060-W (consolidated).

must comply with the terms of its permit, regardless of UCUA's interest, because Empire is the permittee of record.

Empire also filed its response on July 13. Empire contends it has standing because it has not conveyed ownership of the air space above the landfill and because the permitting requirements of the SWMA only apply to the operation of solid waste landfills, not their ownership. Empire believes that since it operates the landfill, it has standing to challenge the Department's actions with respect to the landfill. In addition, Empire contends Taylor's request to add UCUA as a necessary and indispensable party should be denied because neither the Environmental Hearing Board Act, the Act of July 31, 1988, P.L. 530, 35 P.S. §7511 *et seq.* (EHB Act), nor the Board's rules of practice and procedure, 25 Pa. Code §21.1 *et seq.*, authorize the Board to join an allegedly indispensable party.

We begin with Taylor's motion to dismiss for lack of standing.

Standing

"In order to have standing to challenge a Department action, the appellant must be 'aggrieved' by that action. A party is 'aggrieved' by an action if it has a direct, immediate, and substantial interest in the litigation challenging that action." Sequa Corp. v. DER, *et al.*, 1993 EHB 1589, 1594; *see also*, William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, ____, 346 A.2d 269, 280 (1975). For an interest to be "direct," it must have been adversely affected by the matter complained of, South Whitehall Twsp. Police Service v. South Whitehall Twsp., 521 Pa. 82, ____, 555 A.2d 793, 795 (1989), while a "substantial" interest is "an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law." *Id.*; Press-Enterprise, Inc. v. Benton Area School District, 146 Pa.

Cmwlth. 203 _____, 604 A.2d 1221, 1223 (1992). An "immediate" interest, meanwhile, is one with a sufficiently close causal connection between the challenged action and the asserted injury, or one within the zone of interests protected by the statute at issue. Sequa Corp., 1993 EHB at 1595-1597.

Empire has standing under these well-established tests to maintain these appeals. Empire is the permittee of record for the landfill and is, therefore, legally responsible for assuring that the operation of the landfill is in compliance with the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, the rules and regulations promulgated thereunder, and the terms and conditions of its permit. The Department actions which Empire appealed from were all directed to Empire, as permittee of the landfill. It is difficult to imagine a more immediate, substantial, and direct interest.

Instead of arguing that Empire does not have standing because it lacks a direct, immediate, and substantial interest in these appeals, Taylor asserts Empire does not have standing because it does not own the real property affected by the Department's orders. Taylor believes UCUA should be maintaining these appeals since UCUA owns the air space above the Landfill. Taylor further believes Empire does not have standing to maintain these appeals on UCUA's behalf.

Taylor's argument is without merit for two reasons. First, as we explained above, Empire is not maintaining these appeals on UCUA's behalf. Because the Department ordered Empire to act or not act in a certain manner, Empire has standing to maintain these appeals on its own behalf. Furthermore, Taylor's claim that the Department should have directed these orders to UCUA, as the alleged owner of the air space above the Landfill, is a challenge to the

Department's exercise of its enforcement discretion under the SWMA. Taylor is, in essence, contending that the Department should have also directed its actions to UCUA, an issue which we cannot adjudicate, since our statutory responsibility is to adjudicate appeals from actions taken by the Department. Ralph Edney v. DER, 1989 EHB 1356.

Necessary and Indispensable Party

In addition to its motion to dismiss, Taylor request that the Board stay these proceedings until UCUA is added as an indispensable party.[4] Taylor believes UCUA is indispensable because UCUA generates the ash, UCUA transports the ash to the landfill, and UCUA owns the real property where the ash will be stored and disposed. Whether or not UCUA is an indispensable party, the Board lacks authority to join it as a party to these appeals.

Neither the EHB Act nor the Board's Rules of Practice and Procedure, 25 Pa. Code §21.1 *et seq.*, authorize the Board to join a necessary and indispensable party. See, DER v. Doylestown Federal Savings & Loan, EHB Docket No. 93-376-CP-W (Opinion issued May 6, 1994) (dismissing Doylestown's complaint against additional defendants); Al Hamilton Contracting Co. v. DER, 1989 EHB 383, 385-386.

In Al Hamilton, the Board dismissed an appellant's complaint to join additional defendants, noting that the Pennsylvania Rules of Civil Procedure governing joinder were not applicable to the Board and that because the Board's jurisdiction is limited to appeals from Department actions, it may not inject itself into the regulatory process and review what the Department might have or

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[4]"A party is indispensable when his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights." Sprague v. Casey, 520 Pa. 37, ____, 550 A.2d 184, 189 (1988). See also CRY, Inc. v. Mill Service, Inc., ____ Pa. ____, 640 A.2d 372 (1994).

should have done in a particular situation. 1989 EHB at 385-386. By seeking to have UCUA added as an indispensable party, Taylor would like the Board to review what the Department should have done, i.e. direct these orders towards UCUA. That is not the Board's statutory responsibility. Accordingly, Taylor's motion to add UCUA as a necessary and indispensable party is denied.

ORDER

AND NOW, this 30th day of September, 1994, it is ordered that Taylor's motion to dismiss, for summary judgment, or to add a necessary and indispensable party is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: September 30, 1994

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M. DIANE
SECRETARY TO

BETHLEHEM STEEL CORPORATION	:	
v.	:	EHB Docket No. 90-328-E
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: October 6, 1994

ADJUDICATION

By: The Board

Synopsis

The Board denies the Department of Environmental Resources' ("DER") motion to dismiss this appeal. We have jurisdiction to review DER's imposition of conditions in appellant's Solid Waste Disposal Permit ("SWDP") for its proposed landfill facility, although the appellant commenced this appeal as a skeleton appeal pursuant to our rules at 25 Pa. Code §21.52(c) without specifying any objections and later separately filed its objections to DER's action.

The Board dismisses the appellant's challenge to Condition 5 of its SWDP. The appellant has failed to sustain its burden of proving that DER's imposition of Condition 5 was arbitrary, capricious and an abuse of DER's discretion. Moreover, the appellant has failed to sustain its burden of proving that DER should be equitably estopped from imposing Condition 5.

Appellant has accepted DER's stipulation that Condition 3 is limited to the 37-acre proposed landfill site. Thus, we can no longer grant relief as to Appellant's contention that Condition 3 is overly broad in that it could be interpreted as allowing DER access to areas other than the 37-acre site, and we find this issue to be moot.

Background

Appellant Bethlehem Steel Corporation ("BSC") initiated this appeal on August 3, 1990 seeking our review of its permit for its proposed Area 2 North residual waste landfill, Solid Waste Disposal Permit ("SWDP") No. 300822, issued by DER. BSC's proposed landfill is to be located in the City of Bethlehem and Lower Saucon Township, Northampton County. BSC's appeal purportedly was filed as a skeleton appeal pursuant to 25 Pa. Code §21.52(c), without setting forth objections to DER's action. On August 17, 1990, BSC filed its Notice of Appeal Objections, challenging, *inter alia*, Conditions 3 and 5 of its permit.

The appeal was initially assigned to former Board Member Terrance J. Fitzpatrick, and, upon his resignation from the Board, was reassigned to Board Member Richard S. Ehmann on September 16, 1992.

DER filed a motion to dismiss for lack of jurisdiction on January 22, 1993, which we denied by an order issued January 28, 1993, without prejudice to DER's right to re-raise the motion based on its having been filed too close to the scheduled merits hearing. A hearing on the merits was held on February 18, 19, 22, and 23, 1993 before Board Member Ehmann. At this merits hearing, DER raised its motion to dismiss, and Board Member Ehmann advised that he could not rule on this motion, but that it could be re-raised in DER's post-hearing brief. See 25 Pa. Code §21.86. (N.T. I 14-16)[1]

In response to our order to file post-hearing briefs, BSC filed its post-hearing brief on April 12, 1993, and DER filed its post-hearing brief on

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[1]"N.T." indicates a reference to the notes of testimony. "N.T. I" refers to February 18, 1993; "N.T. II" refers to February 19, 1993; "N.T. III" refers to February 22, 1993; and "N.T. IV" refers to February 23, 1993.

May 7, 1993, along with its motion to dismiss and supporting memorandum. BSC filed its response to DER's motion and its reply brief on May 17, 1993. On May 18, 1993, DER filed attachments A and B to its motion to dismiss. In addressing this motion, the majority of the Board has decided to deny it and to adjudicate the matter on its merits. Board Member Ehmann has filed a separate opinion concurring in part and dissenting in part. It is attached to this Adjudication. He dissents because he believes the motion should be granted and the matter dismissed for lack of jurisdiction.

Upon the Board's review of this matter in preparing an adjudication, Board Member Ehmann raised with the parties the matter of which exhibits were admitted into evidence. BSC then filed its Motion to Redact Proposed Findings of Fact, Brief, and Proposed Conclusions of Law of Appellant Bethlehem Steel Corporation on March 16, 1994. This motion was unopposed by DER. DER also filed a Motion to Amend Proposed Findings of Fact, Brief and Conclusions of Law on March 16, 1994, which was unopposed by BSC. We granted these motions in an order issued April 4, 1994.

The record before us consists of a transcript of four volumes and numerous exhibits. Any arguments not raised in the parties' respective post-hearing briefs are deemed waived. Lucky Strike Coal Co. 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. BSC is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, with its principal place of business in

Bethlehem. (B Ex. 1)[2] It is located at 4th and Emery Streets, Bethlehem, PA, 18016. (Notice of appeal)

2. DER is the agency of the Commonwealth with the authority and duty to administer and enforce the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* (SWMA); Section 1917-A of the Administrative Code 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.

<u>BSC's SWMP Application</u>

3. BSC submitted to DER on November 14, 1980 a Phase I permit application for a solid waste management permit to construct and operate a residual waste landfill for the Bethlehem Steel plant in the City of Bethlehem and Lower Saucon Township, Northampton County. (N.T. I 81; B Ex. 1; BSC Ex. 7) This application proposed several disposal areas including Area 2 North. (N.T. I 46)

4. Area 2 North is approximately 37 acres and is located in the far northeast corner of BSC's property. It is bounded on the north and west by Applebutter Road, on the east by a tributary of Laubachs Creek running parallel to Ringhoffer Road, and on the south by property which belongs to BSC. The south bank of the proposed landfill would overlap with the north bank of an existing unlined BSC landfill. (N.T. I 103-104; B Ex. 1)

5. BSC's Phase I application, as revised February 10, 1982, included a Module 2 and a Module 9, which both addressed the underlying limestone

---

[2]"B Ex. 1" indicates the board exhibit which is the joint stipulation of the parties. "BSC Ex." indicates an exhibit of BSC, while "C Ex." indicates a DER exhibit.

formations at the proposed site. (N.T. I 35, 47; BSC Exs. 1, 17)

6. Sinkholes can develop where there is surface water runoff into a valley underlain by carbonate. If surface water runoff begins to dissolve the rock at depth, the ground will collapse. (N.T. II 162-163)

7. There was a sinkhole indicated in BSC's Phase I application located approximately 2,800 feet south of the proposed landfill. (N.T. I 111; N.T. III 41)

8. DER was concerned about the stability of the sub-base[3] for the proposed landfill and discussed these concerns with BSC. (N.T. I 156)

9. In a letter dated September 2, 1982, DER approved BSC's Module 9 of Phase I permit application. (N.T. IV 140, 155-156; BSC Ex. 2)

10. DER approved BSC's Phase I application on February 9, 1983. (N.T. I 40; BSC Ex. 8)

11. BSC subsequently submitted supplemental Phase I information to DER. (N.T. I 154-155)

12. When DER representatives met with representatives of BSC in 1983, DER asked BSC to include a liner in its design for the landfill to address DER's concern about carbonate underlying the proposed landfill. (N.T. I 45-46)

13. DER advised BSC, in a letter dated February 22, 1985, that BSC's Phase II application should include a design indicating a lined waste disposal facility with leachate collection and treatment because the site possibly was underlain by a limestone formation. (C Ex. 9)

14. BSC submitted its revised Phase II application to DER on July 28, 1989. (N.T. I 67)

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[3]The sub-base is the lithology underlying the landfill. (N.T. I 61)

15. DER never promised BSC that it would approve the Phase II application. (N.T. I 128-129)

16. During DER's review of BSC's Phase II application, DER was concerned about the possibility of sinkhole development on the landfill site and whether the carbonate geology could support the landfill, even if it were designed with a double liner system. (N.T. IV 112-113)

17. DER notified BSC by letter dated January 24, 1990, that it had completed technical review of BSC's revised Phase II application and requested supplemental information. DER further directed BSC to conduct a study at the proposed landfill site to determine if solution voids or cavities exist beneath the site because of the potential for karst[4] development, and to document the competency of the underlying limestone/dolostone by either seismic or resistivity methods and to send the results to DER. (N.T. I 69, 140; B Ex. 1; BSC Ex. 4)

18. At a meeting held in April of 1989, Leonard Lunsk, who was DER's facilities manager for its Southeast Regional office's Waste Management Permit Program, indicated to BSC's Thomas Kreichelt, who was BSC's superintendent of Environmental Safety and Health, that there was no need for DER to reevaluate BSC's Phase I application. (N.T. I 26, 66, 135-137; N.T. IV 107, 138-139)

19. Under Lunsk's interpretation of DER's regulations, Phase I of the permit application is the applicant's conceptual development of the landfill site, while Phase II is the detailed design plan. (N.T. IV 107-108) Under Lunsk's interpretation of DER's regulations, geological information can be presented in Phase I and Phase II. (N.T. IV 108-109)

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[4]"Karst" is an area which has features at the surface and subsurface associated with soluble rock. (N.T. III 68)

20. Representatives of DER met with representatives of BSC on March 19, 1990. At this meeting, Lunsk indicated to Kreichelt that the Phase I issues were resolved. (N.T. I 136)

21. BSC submitted to DER its revised Phase II application, which proposed to use a double liner system for the landfill. (N.T. I 137)

22. In a document from BSC to DER dated March 23, 1990, at paragraph 21, BSC indicated that it would be supportive of a permit condition to ensure the integrity of the liner as discussed during the March 19, 1990 meeting. (N.T. I 153; B Ex. 1; BSC Ex. 5) BSC then set forth a proposed permit condition. This document is attachment 1 to BSC's revised Phase II application. (N.T. I 76, 113, 130; BSC Ex. 5)

23. After discussions with DER representatives, BSC submitted an attachment 2 to its revised Phase II application again proposing a permit condition. (N.T. I 76, 113; BSC Ex. 22 at page 9)

24. BSC submitted to DER a revised attachment 2 to its revised Phase II application and revised drawings to be included as an addendum to BSC's Phase II application on April 11, 1990. (B Ex. 1)

25. On April 30, 1990, DER gave BSC comments on the revised Phase II application (BSC Ex. 5) and requested further information. (N.T. I 79, 153; B Ex. 1; BSC Ex. 6)

26. By a letter dated May 21, 1990, BSC responded to DER's April 30, 1990 letter, submitting attachment 3 as an addendum to BSC's Phase II application. (N.T. I 80, 114; BSC Ex. 23)

27. In reliance on DER's approval of the Phase I application, BSC spent $1.5 million preparing its Phase II application. (N.T. I 102)

DER's SWDP Issuance

28. On June 29, 1990, DER issued SWDP No. 300822 to BSC. (N.T. I 81; B Ex. 1; BSC Ex. 7)

29. Condition 3 of BSC's permit provides in relevant part:

> 3. As a condition of this permit, and of the permittee's authority to conduct the activities authorized by this permit, the permittee hereby authorizes and consents to allow authorized employees or agents of the [DER], without advanced notice or a search warrant, upon presentation of appropriate credentials, and without delay, to have access to and to inspect all areas on which solid waste management activities are being or will be conducted.

(BSC Ex. 7)

30. Condition 5 of the BSC SWDP provides:

> 5. Subsequent to the final sub-base excavation grade for each cell a geophysical survey using electromagnetic or seismic refraction methods must be submitted to the Regional Office for approval. Any modifications to the plans resulting from the geophysical survey must be approved in writing by [DER].

(BSC Ex. 7)

<u>BSC's Expert Testimony</u>

31. Gianni Chieruzzi is a senior hydrogeologist and geotechnical engineer employed by Chester Environmental (formerly Keystone), which performed a site investigation for BSC after DER issued BSC's permit. (N.T. I 158, 176, 195-196; BSC Ex. 35) He holds a master of arts degree in hydrogeology, a master of science in civil engineering, and a bachelor of science in civil engineering, and is a licensed professional engineer in Pennsylvania in the area of geotechnical engineering. (N.T. I 159, 174; BSC Ex. 35) He was admitted as an expert on behalf of BSC in the areas of hydrogeology, sinkholes, and stability of the sub-base in terms of its ability

to support the proposed landfill. (N.T. I 194)

32. Douglas Rudenko received a bachelor of science degree in geophysics from the Pennsylvania State University in 1984. He is a senior geophysicist employed by Vibra-Tech. (N.T. II 93; BSC Ex. 37) Rudenko testified as an expert in geophysics on behalf of BSC. (N.T. II 92; B Ex. 1)

33. Vibra-Tech performed an electromagnetic conductivity survey of the proposed landfill site on behalf of BSC in August of 1990 under the direction of Rudenko. (N.T. I 87; N.T. II 93) The intent of this electromagnetic conductivity study was to locate any significant voids beneath the proposed landfill that had the potential for endangering its liner and to engineer a solution. (N.T. I 82-83)

34. Keystone contacted Richard Parizek to aid Keystone in locating any "problem areas" at the proposed landfill site. (N.T. I 221, 223)

35. Richard Parizek holds a bachelor of arts, master of science, and Ph.D. degrees in geology. He has been a professor at the Pennsylvania State University since 1961 and was a professor of hydrogeology at the time of the merits hearing. He also does private consulting work. Parizek testified as a stipulated expert in the areas of carbonate geology, hydrogeology, and the suitability of the site as a residual waste landfill on behalf of BSC. (N.T. II 140-144; B Ex. 1; BSC Ex. 36)

36. Parizek designed an investigation plan (workplan) dated June 1991 for collecting any data on the stability of the proposed landfill site. (N.T. II 146, 159-160; N.T. III 106; BSC Ex. 38)

37. In view of the data available prior to 1990, Parizek believes it was reasonable for DER to include Condition 5 in BSC's SWDP and that it was

useful for BSC to have additional data about the proposed landfill site. (N.T. III 72)

38. In Parizek's expert opinion, an adequate amount of data has been obtained, including investigative work done to fulfill Condition 5 after the issuance of the permit in the summer of 1991, to address the question of whether the proposed landfill site is stable and will be stable in order to accommodate an engineered landfill. (N.T. II 198-202) Based on all of this information, he believes the proposed site has been geologically stable for 130,000 years. (N.T. II 204, 214)

<u>DER's Expert Testimony</u>

39. William Kochanov has been employed as a geologist by DER's Bureau of Topographic and Geologic Survey's mapping section since 1985 and is responsible for mapping geological features in Pennsylvania, particularly karst features. (N.T. III 80-83)

40. Kochanov holds both a bachelor of science and a master of science degree in geology. He has authored several articles concerning sinkholes and karst-related features and has prepared reports for the Pennsylvania Geological Survey on sinkholes and karst-related features in Northampton and Lehigh Counties. (C Ex. 6)

41. Kochanov testified as a stipulated expert on behalf of DER in the area of carbonate geology. (N.T. III 82)

42. It is Kochanov's expert opinion that there is a lack of information from BSC for this proposed landfill site for him to predict whether subsidence, causing sagging of the ground's surface, will occur at the site. (N.T. III 105, 137-138)

43. Parizek testified that he and Kochanov have both looked at the same data concerning the proposed landfill site and are both reaching reasonable conclusions, although Parizek is more comfortable with his own conclusion that the site has been geologically stable for 130,000 years. (N.T. III 73-74)

DISCUSSION

Motion to Dismiss

Initially, we address DER's contention that we lack jurisdiction over this appeal. As the motion to dismiss is DER's, we construe it in the light most favorable to BSC, as the non-moving party. See Snyder v. DER, 1988 EHB 1084.

BSC filed its notice of appeal on the form provided by the Board, filling in its name, address, telephone number, and the subject of its appeal. In the "objections" portion of the appeal form, BSC indicated:

> This is a "skeleton appeal" filed in accordance with 25 Pa. Code §21.52(c). The objections of Bethlehem Steel Corporation will be filed at such time as the Environmental Hearing Board prescribes, in accordance with the requirements of the Board's Practice and Procedure Manual.

On August 17, 1990, BSC filed its "Notice of Appeal Objections", listing at five numbered paragraphs its objections to DER's permit issuance.

Section 21.51(a) of 25 Pa. Code provides that an appeal from an action of DER shall commence with the filing of a written notice of appeal with the Board. Subsection (b) of §21.51 sets forth the caption to be used on the appeal, while subsection (c) of §21.51 requires that the appeal shall set forth the name, address and telephone number of the appellant, and subsection (d) of §21.51 requires that written notification of DER's action (where

received by the appellant) shall be attached to the notice of appeal. Section 21.51(e) of 25 Pa. Code provides:

> e) The appeal shall set forth in separate numbered paragraphs the specific objections to the action of [DER]. The objections may be factual or legal. An objection not raised by the appeal shall be deemed waived, provided that, upon good cause shown, the Board may agree to hear the objection.

Timeliness and perfection of an appeal are addressed at §21.52(a) and (b). Our rules at 25 Pa. Code §21.52(c) then provide:

> c) An appeal which is perfected under this section but does not otherwise comply with the form and content requirements of §21.51 will be docketed by the Board as a skeleton appeal. The appellants shall, upon request from the Board, file the required information or suffer dismissal of the appeal.

As we explained in Raymark Industries, Inc., et al. v. DER, 1991 EHB 186, 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.

In Raymond Proffitt v. DER, et al., 1990 EHB 267, the appellants sought to enumerate specific objections seven months after their skeleton appeal was filed. Their skeleton appeal did not set forth any specific objections. We concluded that once a skeleton appeal is docketed, specific objections and other information are untimely only if they are not filed upon request by the Board.

In Bridgeview, Inc., et al. v. DER, 1991 EHB 1949, the appellants initially filed a document which contained no specific objections to DER's action but stated it was a skeleton appeal pursuant to 25 Pa. Code §21.52(c) and any information lacking would be supplied upon request of the Board. Without any request from the Board for additional information, Bridgeview then

filed its objections to DER's action. Board Chairman Woelfling distinguished the Commonwealth Court's decisions in 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), and Fuller v. Commonwealth, DER, 143 Pa. Cmwlth. 392, 599 A.2d 248 (1991), pointing out that in Game Commission and Fuller, no skeleton notice of appeal pursuant to §21.52(c) was filed; rather, the notices of appeal in those matters complied with the requirements of §21.51(e). On this basis, she found the Bridgeview scenario to be closer to that in Proffitt, and the motion to dismiss was denied.

We disagree with DER's contention that our skeleton appeal rule has been invalidated by the Commonwealth Court decisions it cites and that Bridgeview was wrongly decided. An appeal filed within the thirty-day period and docketed as a skeleton appeal is timely filed and within the Board's jurisdiction under Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976), and is not an appeal *nunc pro tunc*. The skeleton appeal rule specifically creates an exception to the thirty-day appeal period for the filing of the missing information which is required to be contained in the appeal. See Proffitt; McCutcheon, et al. v. DER, et al., 1988 EHB 114.

The Commonwealth Court in Ferri Contracting v. Commonwealth, DER, 96 Pa. Cmwlth. 30, 506 A.2d 981 (1986), has stated that our interpretation of our regulations is controlling unless it is clearly erroneous or inconsistent with the regulation or the regulation itself is inconsistent with the underlying legislative scheme. DER objects that our interpretation of our regulations in Bridgeview is unreasonable and that we have adopted anomalous standards, because in Proffitt and Bridgeview we have upheld the skeletal appeals filed

without specific objections while indicating we do not endorse or condone the failure to file objections with the appeal.

As we stated in Bridgeview, the intent behind the skeleton appeal rule at §21.52(c) is to allow *pro se* appellants, those who fail to promptly consult legal counsel regarding instituting an appeal, and those who wish to appeal a DER action, the reasons for which are not set forth in the written notice, from losing their right to appeal to this Board because of their failure to file a complete notice of appeal which comports with the requirements for form and content at §21.51. Although BSC did not adhere to the preferred practice when it filed its notice of appeal, we will not dismiss its appeal on that ground. We will deny DER's motion and proceed to review the merits of the appeal.

Merits Arguments

DER issued SWDP No. 300822 to BSC on June 29, 1990 for its proposed landfill, imposing a number of conditions, including Conditions 5 and 3 to which BSC objects in this appeal. BSC bears the burden of proof in this matter. 25 Pa. Code §21.101(a); Gemstar Corporation v. DER, 1993 EHB 1260. BSC must show by a preponderance of the evidence that DER's action was arbitrary, capricious, contrary to law, or a manifest abuse of discretion. Warren Sand and Gravel Co., Inc. v. Commonwealth, DER, et al., 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975); Franklin Township Board of Supervisors v. DER, et al., 1992 EHB 266. BSC also bears the burden of proof as to any affirmative defenses it raises to DER's action. Davis Coal v. DER, 1991 EHB 1908; 25 Pa. Code §21.101(a).

As we explained in Al Hamilton Contracting Co. v. DER, 1992 EHB 1458, the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35

P.S. §7511 *et seq.*, empowers the Board to conduct a *de novo* review of DER's challenged actions. The Commonwealth Court in Warren Sand and Gravel interpreted our *de novo* review power as imposing a duty on the Board to determine whether DER's action can be sustained or supported by the evidence taken by the Board.

Condition 5

In its post-hearing brief, BSC contends that DER's insertion of Condition 5 in its permit was arbitrary, capricious, and an abuse of DER's discretion. It further contends that the design of the proposed landfill is adequate for geologic conditions now known to exist at the site. BSC also asserts that DER should be equitably estopped from imposing Condition 5 in it permit.

At the merits hearing, BSC offered the testimony of three experts to show the suitability of the proposed site for the landfill. Gianni Chieruzzi was admitted as an expert on behalf of BSC in the areas of hydrogeology, sinkholes, and stability of the sub-base in terms of its ability to support the proposed landfill. Chieruzzi is a senior hydrogeologist and geotechnical engineer employed by Chester Environmental, formerly Keystone Environmental Resources, which performed a site investigation for BSC after DER issued BSC's permit. Douglas Rudenko also testified as an expert in geophysics on behalf of BSC. Rudenko is a senior geophysicist employed by Vibra-Tech, which performed an electromagnetic conductivity survey of the proposed landfill site on behalf of BSC in August of 1990 under Rudenko's direction. This electromagnetic conductivity study was intended to locate any significant voids beneath the proposed landfill that had the potential for endangering its liner and to engineer a solution. Keystone contacted Richard Parizek to aid

Keystone in locating any "problem areas" at the proposed landfill site, and Parizek designed an investigation plan in June of 1991 for collecting data on the stability of the proposed landfill site. Parizek is a professor of hydrogeology who does private consulting work. Parizek testified as a stipulated expert on behalf of BSC in the areas of carbonate geology, hydrogeology, and the suitability of the site as a residual waste landfill.

At the merits hearing, BSC attempted to make a showing that the investigatory work undertaken by BSC, through the activities of Keystone, Vibra-Tech, and Parizek, shows that the proposed landfill site is suitable for the landfill and that its design plans are adequate. During BSC's examination of Chieruzzi, DER objected to the relevancy of his testimony concerning steps taken by BSC after it received its permit with Condition 5 to meet the requirements of that condition by developing additional data about the proposed site. Board Member Ehmann sustained the objection, admonishing BSC that the issue before the Board in this appeal is whether DER abused its discretion in imposing Condition 5, and that BSC will have to await a decision by DER on the adequacy of any information BSC submitted to DER in an effort to meet the requirements of Condition 5 before it can have the Board rule on the adequacy of its submissions. (N.T. I 92-95, 193) As Board Member Ehmann explained, the Board cannot grant a party such as BSC declaratory relief; we cannot advise BSC on how DER should act on its information submitted for DER's approval pursuant to Condition 5. Elephant Septic Tank Service and Louis J. Costanza v. DER, 1993 EHB 590; Costanza v. Commonwealth, DER, 146 Pa. Cmwlth. 588, 606 A.2d 645 (1992). Accordingly, we find Parizek's testimony dealing with his investigative work plan and his investigatory work for the proposed landfill site after BSC received its permit to be irrelevant to the issue

before us. Likewise, we find the testimony of Chieruzzi and Rudenko dealing with the investigative work performed at the site by Keystone and Vibra-Tech pursuant to Parizek's work plan and in response to the requirements of Condition 5 to be irrelevant.

Addressing the issue of whether DER abused its discretion here, Parizek testified that given what was known about the proposed landfill site prior to 1990, when DER issued BSC's permit, it was reasonable for DER to include Condition 5 in BSC's permit because it was useful to have the additional data required by that condition in assessing the suitability of the proposed site. (N.T. III 72) At the same time, DER's expert in the area of carbonate geology, William Kochanov, opines that there was a lack of information from BSC about the proposed landfill for him to predict whether subsidence will occur at the site. Parizek also testified that he believed that he and DER's expert had drawn different views from the data, but he was comfortable with the data and the work that has been done at the site and his conclusion that from what is now known about the site, it has been stable for 130,000 years.

As we have stated in previous opinions:

> [a] mere difference of opinion, or even a demonstrable error in judgment, is insufficient under Pennsylvania decisional law to constitute an abuse of discretion; such abuse comes about only where manifestly unreasonable judgment, partiality, prejudice, bias, ill-will, misapplication or overriding of the law, or similarly egregious transgressions on the part of DER or other decision-making body can be shown to have occurred. (Garrett's Estate, 335 Pa. 287, [6 A.2d 858] (1939)).

Sussex, Inc. v. DER, 1984 EHB 355, 366. See also Lower Towamensing Township v. DER, 1993 EHB 1442.

We find no abuse of DER's discretion in imposing Condition 5 in BSC's SWDP, based on DER's knowledge of the site suitability when it reviewed BSC's

permit application. It is not clear that DER's decision to include the condition in BSC's permit was the result of manifestly unreasonable judgment, partiality, prejudice, bias, ill-will, or misapplication or overriding of the law. Sussex, Inc., *supra*. We find no abuse of DER's discretion in requiring more information about the geologic conditions at the site.

BSC contends, however, that Condition 5 is vague and ambiguous and should be stricken, citing Barr Township v. DER, 1974 EHB 205. In Barr, the ambiguity identified in the challenged order was the language requiring a joint agreement between Barr Township and other municipalities "to finance and prepare a proposal for waste treatment facilities as may be required by this order..." Barr, *supra* at 210 (emphasis in original). The Board determined that this language offered no guidance to the township as to what DER was requiring of it, and, moreover, that the language appeared to be superfluous.

In the instant matter, Condition 5 requires BSC to submit to DER's Regional Office for approval a geophysical survey using the electromagnetic or seismic refraction methods. The ambiguity which BSC contends exists in Condition 5 is that the condition does not provide BSC with a clear and unambiguous explanation of the scope of its responsibilities and duties, and, as a result, although BSC has submitted the electromagnetic survey required by the condition as well as voluminous geophysical and geologic studies to DER, BSC has no clear understanding of how to gain DER's approval or how to gauge when such approval is unreasonably being withheld by DER.

The matter of whether BSC has gathered sufficient data to satisfy Condition 5 cannot be used by BSC to show that the condition is vague and ambiguous. A document is ambiguous when it is reasonably capable of two different interpretations. Merriam v. Cedarbrook Realty, Inc., 266 Pa. Super.

252, 404 A.2d 398 (1978). BSC has not shown us how Condition 5 is reasonably capable of two different interpretations. We cannot rule on whether the data which BSC has submitted to DER pursuant to Condition 5 is adequate until that issue is properly brought before us after DER takes some action as to approving BSC's submission. If BSC desires to force DER to make its decision on the adequacy of the submissions by BSC in terms of satisfying Condition 5, it can refuse to provide added data and demand a decision. If that does not produce a DER decision, it may bring an action in mandamus in Common Pleas Court to compel DER to take action.[5] Thus, we find that BSC has failed to prove by a preponderance of the evidence that Condition 5 is vague and ambiguous so that DER's insertion of that condition in its permit was an abuse of discretion.

BSC further asserts that DER should be equitably estopped from imposing Condition 5 in its permit. The doctrine of equitable estoppel was recently explained by the Commonwealth Court as:

> a doctrine of fundamental fairness designed to preclude a party of depriving another of the fruits of a reasonable expectation when the party inducing the expectation knew, or should have known, that the other would rely. Equitable estoppel can be applied to a governmental agency. The doctrine of equitable estoppel prevents one from doing an act differently from the manner in which another one was induced by work or deed to expect.

Department of Commerce v. Casey, 154 Pa. Cmwlth. 505, 624 A.2d 247 (1993) (citations omitted). See also Altoona City Authority v. DER, 1993 EHB 1782.

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[5]As a Board with limited jurisdiction under the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7511 *et seq.*, we have no authority to issue a *writ of mandamus* to DER to compel it to act on BSC's submissions. See Rescue Wyoming and Jaynes Bend Task Force v. DER, et al., 1993 EHB 621; Albert J. Marinari v. Commonwealth, DER, 129 Pa. Cmwlth. 569, 566 A.2d 385 (1989).

BSC must make out these elements by clear, precise, and unequivocal evidence. Foster v. Westmoreland County Casualty Co., 145 Pa. Cmwlth. 638, 604 A.2d 1131 (1992). An estoppel is based on misrepresentation and cannot be claimed where both parties had equal knowledge of the facts. Culbertson v. Cook, 308 Pa. 557, 162 A.803 (1932). Further, an estoppel will not lie when there is no evidence to indicate that the party invoking the equitable estoppel doctrine acted any differently from how he otherwise would have acted. Blofsen v. Cutaiar, 460 Pa. 411, 333 A.2d 841 (1975).

It is BSC's contention that DER knew or should have known that BSC would rely on its receiving Phase I approval and proceed to the design phase of the application process, since proceeding to Phase II was contemplated by DER's regulations. BSC asserts that DER's representatives stated at an April 27, 1989 meeting with BSC that Phase I issues would not be reevaluated and that the focus then was on design. Moreover, BSC argues that DER was aware of BSC's interpretation of the Phase I approval and DER's representations to BSC. BSC urges that in reasonably relying on the Phase I approval and DER's representations, it spent approximately $1.5 million in preparing its Phase II application and submitting it to DER.

When DER reviewed and issued BSC's SWDP, DER was authorized by §104(7) of the SWMA, 35 P.S. §6018.104(7), to issue permits and to specify the terms and conditions thereof to implement the provisions of the SWMA and the rules, regulations, and standards adopted pursuant to the SWMA. Section 502(a) of the SWMA, 35 P.S. §6018.502(a), provided that an application for any permit was required to be in writing, made on forms provided by DER, and accompanied by such plans, designs, and relevant data as DER may require. Section 502(f) of the SWMA, 35 P.S. §6018.502(f), provides that DER may require such other

information, and impose such other terms and conditions, as it deems necessa or proper to achieve the goals and purposes of the SWMA. As we have previously explained, the regulations which were in effect at the time DER took its permitting action are applicable to our review. Harmar Township, et al. v. DER, et al., 1993 EHB 1856; Fiore v. DER, 1986 EHB 744; Doraville Enterprises v. DER, 1980 EHB 489. The regulations in effect when DER reviewe and issued BSC's SWDP were 25 Pa. Code §§75.21-75.24 (regarding applications for a residual waste landfill).[6]

Section 75.23(a) of 25 Pa. Code set forth the general requirements for Phase I plans for solid waste facilities, including the anticipated environmental effects of the facility on the physical characteristics of the site and the adjacent properties. Section 75.23(b) provided the general requirements for Phase II, stating:

> Upon notification by [DER] of approval of the Phase I portion of the application, the applicant may proceed with Phase II, the preparation and submission to [DER] of design plans and specifications. The design plans shall include but not be limited to the following data and information:
>
> . . .
>
> 3) Further information required by [DER] to insure that the proposed solid waste processing or disposal facility or area complies with this chapter.

25 Pa. Code §75.23(b).

Section 75.24 of 25 Pa. Code addressed the general standards for sanitary landfills, and provided at subsection (a) that sanitary landfill operations were required to conform to the standards listed in Chapter 75 of 25 Pa. Code and to the specific standards for sanitary landfill operations

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[6]We note that 25 Pa. Code §§75.21-75.24 have been repealed subsequent to DER's approval of and issuance of BSC's permit in this matter. See 22 Pa. Bulletin 3389.

contained in that subchapter. As part of the general standards for Phase I applications, §75.24(b)(3)(v) required the location of geologic and hydrogeologic features, while §75.24(b)(4) required a soils, geologic and groundwater report of the characteristics of the site. Subsection 5 of §75.24(b) stated that when DER had determined that the information required under §75.24 was verified and complete, the applicant was to be notified in writing that Phase I site approval was granted. This subsection further stated that this approval was granted to the applicant for the purpose of developing the detailed design and operational plans required in Phase II. Section 75.24(c) set forth the general standards for Phase II design requirements. Upon DER's determination that the application was complete and that the proposed design met all of the requirements, DER was to issue the permit. 25 Pa. Code §75.22(d).

It is within DER's power to interpret its regulations and, once it has done so, that interpretation is entitled to controlling authority unless it is plainly erroneous or inconsistent with the authorizing statute. Ferri Contracting, *supra*. DER's regional facilities manager Leonard Lunsk interpreted the DER regulations as providing that Phase I is the concept of what the applicant desires to do as to developing a landfill site, and that Phase II is the detailed design. According to Lunsk's interpretation of these regulations, the geological information can be presented in both Phase I and Phase II, depending on the nature of the site, the type of waste to be landfilled, and applicant's design concept. Lunsk's interpretation of the regulations is that Phase II addresses the geology of the site as it relates to the engineering design of the landfill, the types of waste to be

landfilled, and whether the landfill can properly be monitored from a groundwater monitoring standpoint.

BSC has not shown us that DER's interpretation of its regulations is plainly erroneous or inconsistent with the regulations' authorizing statute. Ferri Contracting, *supra*. During Phase I of the application process, the regulations required the applicant to submit to DER information regarding the general operational concept of disposal or processing at the landfill facility and the soils, geologic, and groundwater report of the characteristics of the site. DER's Phase I approval was granted for the purpose of determining that the site was conceptually suitable for locating a landfill facility there. It was not until the design details and operational plans were submitted to DER during Phase II of the permit application process that DER could make a determination whether the site was suitable for the landfill facility as designed.

We find no misrepresentation here by DER which induced BSC to submit its Phase II application. Both parties in this matter were aware of the criteria against which DER was reviewing BSC's permit application. DER's Lunsk indicated to BSC's Kreichelt that the Phase I issues were resolved, and BSC chose to go forward with submitting its Phase II application to DER. DER's approval of BSC's Phase I application did not amount to a guarantee that the site was suitable for the landfill as designed, since DER had not yet received BSC's designs until its Phase II application was submitted. DER never promised BSC that it would approve BSC's Phase II application. There is no evidence that BSC would not have gone forward with its submission of its Phase II application had it known DER would impose a condition in its permit to require the geophysical survey described in Condition 5. Moreover, BSC's

preparation of its Phase II application and submission of this phase of the permit application to DER, at great expense to BSC, could not have been with the reasonable expectation that DER would not impose a condition in its permit so that DER could be certain that the landfill's subbase would be stable. DER had the authority to impose Condition 5 in BSC's permit. See Bethayres Reclamation Corporation v. DER, 1990 EHB 570. We accordingly reject BSC's estoppel argument.[7]

Condition 3

BSC initially asserted that DER abused its discretion in imposing Condition 3 in its permit because the condition is overly broad and could be interpreted as allowing DER access to areas on BSC's facility other than the 37-acre proposed landfill site. However, DER stated in its post-hearing brief that Condition 3 pertains solely to the proposed 37-acre landfill site, and BSC's reply brief states that BSC accepts this stipulated limitation on Condition 3. Thus, we find we can no longer grant relief on BSC's objection to Condition 3, and that condition is moot. Giorgio Foods, Inc. v. DER, 1989 EHB 331.

As we find no abuse of DER's discretion in imposing Condition 5 of BSC's SWDP, we make the following conclusions of law and enter the following order dismissing BSC's appeal.

CONCLUSIONS OF LAW

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

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[7]Having reached this conclusion, we do not address DER's arguments responding to BSC's equitable estoppel defense, that BSC has admitted DER's authority to impose Condition 5 by including proposed versions of that condition in its submission of its Phase II application to DER, and that BSC is precluded from establishing an equitable estoppel by the doctrine of unclean hands.

2. DER has not shown that the Board's interpretation of our skeleton appeal regulation should not be controlling; it has not shown this interpretation is clearly erroneous or inconsistent with the regulation or the regulation itself is inconsistent with the underlying legislative scheme. Ferri Contracting, *supra*.

3. The Board has jurisdiction to review this appeal although the appellant commenced this appeal as a skeleton appeal pursuant to 25 Pa. Code §21.52(c) without specifying any objections and later separately filed its objections to DER's action. Bridgeview, *supra*.

4. BSC bears the burden of proving, by a preponderance of the evidence, that DER's insertion of Conditions 5 and 3 in its SWDP was arbitrary, capricious, contrary to law, or a manifest abuse of discretion. Warren Sand and Gravel Co., *supra*; Franklin Township Board of Supervisors, *supra*; 25 Pa. Code §21.101(a).

5. BSC bears the burden of proving its affirmative defenses. Davis Coal, *supra*; 25 Pa. Code §21.101(a).

6. The Board, in its *de novo* review, considers whether DER's action can be sustained or supported based on the evidence taken by the Board. Warren Sand and Gravel, *supra*; Al Hamilton Contracting Co., *supra*.

7. The Board cannot advise BSC on how DER should act on the information it submitted for DER's approval pursuant to Condition 5, as that would amount to declaratory relief, which the Board is not authorized to render. Elephant Septic Tank Service, *supra*; Costanza, *supra*.

8. BSC failed to sustain its burden of proving DER's imposition of Condition 5 in its SWDP was the result of manifestly unreasonable judgment,

partiality, prejudice, bias, ill-will, or misapplication or overriding of the law. Sussex, Inc., *supra*; Lower Towamensing Township, *supra*.

9. BSC failed to sustain its burden of proving that Condition 5 is ambiguous and unreasonably vague. Barr Township, *supra*; Merriam v. Cedarbrook Realty, Inc., *supra*.

10. The regulations which were in effect at the time DER took its permitting action are applicable to our review. Harmar Township, *supra*; Fiore, *supra*; Doraville Enterprises, *supra*.

11. DER's interpretation of its regulations here regarding Phase I and Phase II permit applications is controlling, as BSC has not shown this interpretation to be plainly erroneous or inconsistent with the authorizing statute. Ferri Contracting, *supra*.

12. BSC failed to establish the elements of an equitable estoppel against DER by clear, precise, and unequivocal evidence, and failed to sustain its burden of proving this affirmative defense. Department of Commerce, *supra*; Altoona City Authority, *supra*; Foster, *supra*.

13. BSC's objection to DER's imposition of Condition 3 in its permit is moot, since the Board can no longer afford BSC effective relief regarding that condition where BSC accepts DER's stipulation that the condition is limited to the 37-acre proposed landfill site. Giorgio Foods, Inc., *supra*.

ORDER

AND NOW, this 6th day of October, 1994, it is ordered that Bethlehem Steel Corporation's appeal at EHB Docket No. 90-328-E is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Board Member Richard S. Ehmann's separate dissenting opinion is attached.

DATED: October 6, 1994

cc: DER Bureau of Litigation:
(Library: Brenda Houck)
For the Commonwealth, DER:
John H. Herman, Esq.
Northeast Region
For Appellant:
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M. DIANE SMITH
SECRETARY TO THE BOARD

BETHLEHEM STEEL CORPORATION	:	
v.	:	EHB Docket No. 90-328-E
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: October 6, 1994

SEPARATE OPINION CONCURRING IN PART AND DISSENTING IN PART

By: Richard S. Ehmann, Member

While I agree in full with my fellow Boardmembers as to their conclusions regarding the merits of this appeal, I disagree with their decision to decide this appeal on its merits and thus to reject DER's Motion To Dismiss. I would grant this motion based on the discussion below.

On August 3, 1990, this Board received a letter from counsel for Bethlehem Steel Corporation ("BSC") transmitting BSC's Notice Of Appeal from DER's issuance of Solid Waste Disposal Permit No. 300822 to BSC on June 29, 1990. The first paragraph of BSC's letter states:

> Enclosed for filing with the Board is a "Skeleton Appeal" from the issuance of a Solid Waste Permit to Bethlehem Steel Corporation. This appeal is a "protective" appeal and it is unlikely that this matter will proceed to hearing in that there are ongoing discussions between DER and Bethlehem regarding the wording of one of the permit conditions.

Enclosed with this letter was this Board's standard Notice Of Appeal form. It listed who was appealing by name, address and phone number. It stated what was appealed, which DER official took the challenged action, where the

permitted facility is located and the date on which BSC received notice of the permit's issuance. At No. 3 on this form appears:

> 3. Objections to the Department of Environmental Resources action in separate numbered paragraphs. The objections may be factual or legal and must be specific. Attach additional sheets, if necessary.

Below this BSC typed:

> This is a "skeleton appeal" filed in accordance with 25 Pa. Code Section 21.52(c). The objections of Bethlehem Steel Corporation will be filed at such time as the Environmental Hearing Board prescribes, in accordance with the requirements of the Board's Practice and Procedure Manual.

The Notice Of Appeal also specified who counsel for BSC would be, with his address and phone number at the appropriate location. Finally, on its last page is the signature of BSC's counsel on the Certificate Of Service showing service of the Notice Of Appeal on the appropriate DER officials.

There is no dispute this Notice Of Appeal was filed timely.

On August 17, 1990, BSC filed a document captioned Notice Of Appeal Objections enumerating four objections to the Permit. At the first objection BSC says the permit and its conditions are arbitrary, capricious, an abuse of discretion, unreasonable, not in accordance with the applicable statutory, regulatory or policy requirements, beyond the scope of DER's regulatory and statutory authority, and a denial of BSC's constitutional rights. These objections also state that DER is barred from imposing these conditions by the doctrines of laches, waiver, estoppel, res judicata and acquiescence. Its second objection challenges the third paragraph of the permit as being overly broad, vague, and allowing DER untrammeled access to portions of BSC facilities for non-consensual searches and seizures. Objection No. 3 challenges paragraph 5 of the permit as lacking a standard for DER approval of

the geophysical survey. Finally, BSC's fourth objection challenges this same fifth paragraph's requirement for DER's approval of each waste cell in the disposal site on a cell-by-cell basis.

On January 22, 1993, DER filed a Motion To Dismiss For Lack Of Jurisdiction and a supporting memorandum. By Order of January 28, 1993, the Board denied the motion because DER had waited until less than a month before the merits hearing's commencement date to file same and thus there was insufficient time before that hearing date for this Board to adjudicate the motion's merits. This order stated that the motion's denial was without prejudice to DER's reraising these issues after the merits hearing.

As a result, after the merits hearing and on May 7, 1993, DER refiled its Motion To Dismiss. It asserts that in light of Pennsylvania Game Commission v. Commonwealth, DER, 19 Pa. Cmwlth. 78, 509 A.2d 877 (1986), *aff'd* on other grounds, 521 Pa. 121, 555 A.2d 812 (1989) ("Game Commission"), and Fuller v. DER, 143 Pa. Cmwlth. 392, 599 A.2d 248 (1991) ("Fuller"), which held that an appellant is not allowed to specify new objections to DER's actions after the thirty day appeal period's expiration absent showing good cause, the skeleton appeal rule (25 Pa. Code §21.52(c)) has been invalidated. DER asserts that Section 21.52(c) cannot be used to bootstrap BSC's August 17, 1993 objections over the thirty day cut-off line for timely appeals. It then concludes BSC's failure to timely specify objections to the permit is a defect going to our jurisdiction to hear this appeal. DER asserts that Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976), holds that we are not empowered to expand the scope of our limited jurisdiction. It further asserts our decisions on skeleton appeals in Bridgeview, Inc., et al. v. DER, 1991 EHB 1949 ("Bridgeview"), which discusses Section 21.52(c), Game Commission and

Fuller create unreasonable distinctions as to skeleton appeals not recognized by the Commonwealth Court and must be reversed. In this regard, DER argues allowing the skeleton appeal rule to be used to untimely add new grounds for appeal creates a double standard. It says the Game Commission standard bars an appellant who files timely specific objections from untimely adding others but Bridgeview allows an appellant who is not timely as to any specific grounds for appeal to state his grounds in an untimely fashion and without a sanction for doing so. DER then asserts that through 1 Pa. Code §1.7 and 1 Pa. C.S. 1901, we are required to interpret our rules in a way which produces a reasonable result. DER then concludes the only reasonable result is to interpret Sections 21.51 and 21.52 to require objections be specified in a timely fashion or be time barred.[1]

On May 17, 1993, BSC filed its response to DER's Motion. BSC asserts it filed a timely Notice Of Appeal meeting all of this Board's requirements other than specification of its objections to the permit, but instead, it indicated this was a skeletal appeal. It then says that on August 16, 1990, it followed established Board practice by filing its specification of objections and DER did not object thereto. BSC asserts we should reject this DER frontal assault on our rules. It interprets Section 21.52(c) as allowing a party to acquire Board jurisdiction over an appeal without fulfilling the requirements of Section 21.51 until later. BSC asserts there is a long line of Board opinions which reject DER's argument that an appeal must be filed and timely perfected. BSC says it is these opinions which should be followed and that filing and

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[1]DER also argues that since BSC's appeal was on our Notice Of Appeal form, which directs specification of objections (25 Pa. Code §21.51(e)), BSC could not ignore this mandate and opt for the procedure used. This Opinion does not reach this argument.

Recognizing that this Board's proceedings are not like suits where amendment is liberally allowed, the Court states:

> Instead, the failure to file specific grounds for appeal within the thirty-day period is a defect going to jurisdiction, and the time period cannot be extended *nunc pro tunc* in the absence of a showing of fraud or breakdown in the court's operation.

Game Commission, *supra*, 17 Pa. Cmwlth., at ___, 509 A.2d 886.

In part, however, DER wisely does not ask us to overturn our long line of skeleton appeal cases based solely on the result in Game Commission. Instead, DER correctly points out that Bridgeview is the sole skeleton appeal decision which addresses Game Commission. In Bridgeview this Board followed its precedent as to attacks on skeleton appeals and held that that line of cases does not conflict with Game Commission. We drew the distinction between timely appeals which state grounds for appeal where the appellant seeks to set forth additional objections and timely skeleton notices of appeals which did not state grounds for appeal. We held this to be the crucial distinction. DER's argument seizes on that attempted distinction to raise an argument we have not addressed before in any of our prior decisions.

DER points out that our reasoning in Bridgeview creates the anomalous result that an appellant who timely appeals reciting grounds for appeal is penalized if he tries to add further previously unspecified grounds for appeal, while the timely appellant who states no grounds for appeal is allowed to state his grounds for appeal at a subsequent untimely point without being penalized. Stated in this way, DER is correct. Moreover, skeleton appeals, which we noted in Bridgeview[2] to be infrequent, will not remain infrequent,

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[2]See Bridgeview at n. 3.

which this Board refused to dismiss timely filed appeals because they failed to contain all of the information mandated for a Notice of Appeal by our rules. If it were not for the Commonwealth Court's decisions in Game Commission and Fuller, there is no question I would agree with BSC that we would follow these decisions in the routine appeal where this issue appears.

Here, the circumstances surrounding this appeal, DER's argument and Game Commission and Fuller compel a different result.

The circumstances surrounding this appeal are not in dispute. BSC's initial Notice Of Appeal was timely filed but contained no specification of objections to DER's conditioned issuance of the permit. BSC filed its four numbered objections after expiration of the thirty day period for timely appeals. Had BSC's August 17, 1990 objections been its first filing, there is no question we would lack the jurisdiction to hear them under Rostosky. It is also clear that BSC has not petitioned to amend its Notice Of Appeal to add these objections, not has it petitioned this Board for leave to appeal *nunc pro tunc*, so questions of amendment for good cause are not before us.

Obviously we would deny DER's Motion if it asserted the appeal's dismissal is required by the language in Game Commission and Fuller, which affirms it. This is because neither Game Commission nor Fuller addresses 25 Pa. Code §21.52(c) directly, as BSC points out. Game Commission does speak broadly about 25 Pa. Codes §§21.51 and 21.52; however, it recognizes that under Section 21.51(e), any objection not raised is deemed waived and that this waiver language was explicitly upheld in Ohio Farmers Insurance Company v. DER, 73 Pa. Cmwlth. 18, 457 A.2d 1004 (1983). It then states that under 25 Pa. Code §21.52, jurisdiction does not attach to untimely appeals.

subsequent perfection is all that is required. Contrary to DER's assertion, BSC argues that Bridgeview is good law based on Proffitt v. DER, 1990 EHB 267, and the contention that a timely skeleton appeal can only be dismissed where the skeleton appeal's appellant fails to specify grounds for appeal when asked for them by this Board. BSC then argues that we read Game Commission very narrowly, saying it merely holds that this Board did not abuse its discretion in failing to allow appellants to brief the issue of whether grounds for appeal must be specified within thirty days absent a showing of good cause. Similarly, BSC asserts that Fuller is also not a jurisdiction opinion but an abuse of discretion opinion. BSC then asserts that these two decisions are not contrary to its position because they deal with enlarging the scope of appeals after grounds for appeal have been stated and the exercise of judicial discretion rather than timely perfection of an appeal. Moreover, it says we held in Bridgeview that our decision there was consistent with Game Commission. Finally, BSC asserts that there is no reason for this Board to alter Section 21.51(c), but, if we should decide to do so, we should do it prospectively via an amendment to our rule, not by a decision on this DER motion.

The issue presented squarely by DER's motion is whether or not, in light of Game Commission and Fuller, it is time for this Board to recognize a limitation on 25 Pa. Code §21.52(c) as interpreted in Bridgeview. Milan Melvin Sabock, et al. v. DER, et al., 1979 EHB 229 ("Sabock") is the first case to address skeleton appeals after the skeleton appeal concept was first recognized by the formal Board rule promulgated on June 12, 1979. The opinion notes the prior Board practice as to skeleton appeals was first codified in this rule. Sabock at 236. It is the first of a long line of opinions in

but will become the tail wagging the dog, as attorneys realize they can extend their time to formulate grounds for appeal beyond thirty days by intentionally perverting a subsection of §21.52 which is designed primarily to assist unsophisticated *pro se* appellants and appellants who either fail to promptly consult counsel or who face a DER decision which is silent as to the reasons therefor.

Importantly DER's unrebutted argument then cites us to 1 Pa. Code §1.7 which provides:

> Section 1502(a)(2) of 1 Pa C.S. (relating to application of part) provides that, except as otherwise provided by statute or the agency adopting the document, 1 Pa.C.S. Part V (relating to Statutory Construction Act of 1972) applies to a document codified in the Code except legislative, judicial and home rule charter documents, that is, except documents codified in 101 Pa. Code--365 Pa. Code.

DER then cites us to 1 Pa.C.S. §1922(1) for the proposition that in interpreting legislative intent as to a statute, the legislature does not intend an unreasonable result.[3] It concludes that the distinction drawn in Bridgeview as to Section 21.52(c), when seen in this light under these rules of interpretation, produces an unreasonable result. I concur and to that extent believe this Board should reverse itself on this issue.

Moreover, I have alluded above to my other chief concern with what has occurred in this appeal. 25 Pa. Code §21.52(c) is meant to address circumstances where the uninitiated or unsophisticated appellant tries to file a timely appeal, but in so doing, fails to dot a legal "i" or cross a legal "t". It prevents an appellant, stymied by a lack of DER specified reasons for

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[3]The Commonwealth Court has applied the Statutory Construction Act to regulatory interpretation pursuant to 1 Pa. Code §1.7. See Bush v. Commonwealth of Pennsylvania Horse Racing Commission, 77 Pa. Cmwlth. 444, 466 A.2d 254 (1983).

its action from clearly and precisely setting forth grounds for appeal, from having his appeal prematurely terminated[4] and allows even sophisticated environmental practitioners to save an appeal for clients who fail to promptly consult them. It was designed to help the unfortunate, unsophisticated or uninformed appellant avoid being tripped up by the first hurdle in this quasi-judicial appellate process.

The basis for BSC's use of Section 21.52(c) is a perversion of the intent of this rule. Based on the evidence in the record, the letter transmitting BSC's appeal and the language typed on the Notice Of Appeal itself, it is clear that BSC had received its permit from DER and was in the midst of continuing negotiations as to changes to conditions Nos. 3 and 5 of its permit. There thus can be no question that it was well aware of the portions of this permit to which it objected and why those portions were objectionable. This leads me in turn to the conclusion BSC could have timely filed objections to this DER action. My conclusion seems especially valid since BSC's objections recited above, as filed on August 17, 1990, are so broad as to be generic. Under such circumstances BSC's actions constitute a blatant attempt to manipulate our rule to accomplish a purpose never intended in its adoption. No prior skeleton appeal opinion cited to us springs from such a circumstance.

It is on this basis, too, that all of those opinions are properly distinguishable from the instant appeal. For example, in Raymond Proffitt v. DER, 1990 EHB 267 (a Board opinion referenced repeatedly by BSC), Mr. Proffitt timely filed his appeal, in which he adopted grounds for appeal stated in a

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[4]Such an appellant is still protected under Game Commission if he indicates his need to use discovery to determine his objections on a timely Notice Of Appeal.

parallel appeal, and stated he would file more specific objections after conducting discovery as to the challenged DER action. Under those circumstances, we denied a motion to dismiss his appeal. In Bridgeview we stated that we did not wish to endorse or condone the actions of the appellant in adding grounds for appeal in this fashion utilized there, but we allowed the appeal to stand. Here, we should go further. We should not sanction BSC's conduct by denying this Motion.

In reaching this conclusion I would not be amending 25 Pa. Code §21.52(c), as suggested by BSC. The rule remains as stated. All I would do is reinterpret it in light of current events. Such interpretation actions are the stuff that proceedings before quasi-judicial Boards, such as this Board, and the Courts are frequently made of because the principles of law which govern proceedings before this Board are not static.

In reinterpreting Section 21.52(c) as outlined above, however, I would make it clear that Section 21.52(c) would not be dead or meaningless. In the future we would still not sustain Motions To Dismiss because an appellant fails to list his telephone number or to indicate he served one of the two DER offices which are to receive a copy of the appeal. We would simply hold that, as DER's Brief suggests, Section 21.52(c) deals with the untimely corrections of minor errors in Notices Of Appeal (and, as not mentioned by DER, timely amendments of timely Notices Of Appeal). Section 21.52(c) would not be read to permit the specification of grounds for appeal after expiration of the thirty day appeal period set forth in 25 Pa. Code §21.51.

Having come to this conclusion with BSC's Notice Of Appeal lacking any timely statement of grounds for appeal, I would grant DER's Motion and dismiss this appeal.

ENVIRONMENTAL HEARING BOARD

Richard S. Ehmann
Administrative Law Judge
Member

DATED: October 6, 1994

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M. DIANE SMITH
SECRETARY TO THE BOARD

FURNLEY H. FRISCH d/b/a FURNLEY H. FRISCH & SONS	:	
v.	:	**EHB Docket No. 92-053-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 6, 1994**

OPINION AND ORDER
SUR
APPLICATION FOR RECONSIDERATION AND REARGUMENT

By Robert D. Myers, Member

Synopsis:

The Board denies an Application seeking reconsideration of an Adjudication because it does not qualify under the provisions of the Board's procedural rules at 25 Pa. Code §21.122.

OPINION

On September 7, 1994, the Board issued an Adjudication dismissing this appeal. On September 26, 1994 Appellant filed an Application for Reconsideration and Reargument, contending that the Board's findings regarding Appellant's earthmoving activities did not support our conclusion that the Department of Environmental Resources' order was not an abuse of discretion and that we failed to articulate which arguments were waived in Appellant's post-hearing brief. The Department of Environmental Resources (DER) filed its Response on October 3, 1994.

Our rules of procedure at 25 Pa. Code §21.122 provide for reconsideration where compelling and persuasive reasons exist. Generally, reconsideration is

granted only for one of two reasons: either because the decision rested on legal grounds not considered by any party or because the crucial facts on which the decision was based are not as stated in the decision. In his Application, Appellant makes it clear that he disagrees with our findings and conclusions but that is not enough to warrant reconsideration. We are satisfied that our findings are supported by the evidence and that our conclusions rest on legal grounds which all parties considered or, with the exercise of diligence, could have considered. As for our alleged failure to state which arguments Appellant waived, paragraph 3 on page 11 of our adjudication enumerates which arguments Appellant raised in his post-hearing brief; by implication, all others are waived.

ORDER

AND NOW, this 6th day of October, 1994, it is ordered that the Application for Reconsideration and Reargument is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 92-053-MR

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: October 6, 1994

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M. DIANE SMITH
SECRETARY TO THE BOARD

ELVA WICKIZER, TIMMY PAUL WICKIZER and VICTORIA WICKIZER	:	
v.	:	**EHB Docket No. 94-149-W**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 13, 1994**

OPINION AND ORDER SUR
RULE TO SHOW CAUSE

By: Maxine Woelfling, Chairman

Synopsis

The Board lacks jurisdiction over a petition to revoke a noncoal surface mining permit (noncoal SMP) and landowner consent.

OPINION

This matter arose with the June 20, 1994, filing of a "Petition to Revoke Mining Permit and Consent of Landowner" by Elva Wickizer, her son, Timmy Paul Wickizer, and his wife, Victoria Wickizer (hereafter collectively referred to as "Appellants"). Upon docketing the petition, the Board, on July 8, 1994, issued a rule to Appellants to show cause why the Board had jurisdiction over this matter.

The facts leading up to Appellants' Petition are summarized below. Elva Wickizer possesses a life estate in the use of and income from a stone quarry on property in Forest Lake Township, Susquehanna County, which is owned by her son, Timmy Paul Wickizer and his wife, Victoria. Appellants' Ex. A. In April, 1989, Elva entered into a lease with Neil Lee Gamble, which authorized Gamble to remove stone from the quarry in exchange for a 15% commission to Elva.

Appellants' Ex. B. This lease had a term of one year and was renewed on April 12, 1990, and April 20, 1991. Appellants' Exs. B, C, and D. Elva has not renewed Gamble's lease since it expired in April, 1992. Appellants' Petition.

On March 16, 1992, Elva signed a landowner consent form, giving Gamble the right to enter her quarry to conduct surface mining operations. Appellants' Ex. E. Despite the lack of a current lease, Gamble was able to acquire noncoal SMP No. 58920810 from the Department on September 1, 1992. *Id.* Gamble has not conducted any surface mining pursuant to the noncoal SMP, however, because he no longer has a lease authorizing him to remove stone from the quarry. *Id.*

Since Elva apparently does not intend to renew Gamble's lease, Appellants now request that the Board revoke both the noncoal SMP and the landowner consent. Otherwise, they claim, Elva will not be able to benefit from her interest in the quarry.

In their July 21, 1994, reply to the rule, Appellants contend the Board has jurisdiction over the petition to revoke the noncoal SMP because 5(f) of the Noncoal Surface Mining Conservation and Reclamation Act, the Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. 3305(f), provides an opportunity for an informal hearing before a license is revoked. Appellants contend the Board has jurisdiction over the petition to revoke the landowner consent because the form was provided by the Department and is a condition precedent to the issuance of a mining permit.

The Department filed objections to Appellants' reply on August 4, 1994. The Department first asserts the Board lacks jurisdiction to revoke the SMP because Appellants' petition is nothing more than an untimely attempt to appeal the Department's September, 1992, issuance of the noncoal SMP. In

addition, the Department asserts the Board lacks jurisdiction to revoke the landowner consent because it is a private contract entered into by the Appellants, not a final Department action.

In their August 11, 1994, response to the Department's objections, Appellants argue they are not appealing the Department's issuance of the noncoal SMP, but are, instead, merely requesting that the Board revoke it. In support, Appellants again cite to 5(f) of the Noncoal Surface Mining Act as conferring jurisdiction upon the Board.

The Board's jurisdiction only extends to appeals from Department "actions" and "adjudications." City of Harrisburg v. DER, *et al.*, EHB Docket No. 93-206-MJ (Opinion issued February 16, 1994). An "action" is defined by the Board's rules of practice and procedure as:

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

25 Pa.Code 21.2(a). An "adjudication" is similarly defined in 101 of the Administrative Agency Law, the Act of April 28, 1978, P.L. 202, 2 Pa.C.S. 101. *See*, City of Harrisburg, *supra*.

The Board, therefore, does not have jurisdiction in instances where the Department has not finally affected personal or property rights, privileges, immunities, duties, liabilities, or obligations. Marinari v. Cmwlth., Dept. of Environmental Resources, 129 Pa.Cmwlth. 569, ___, 566 A.2d 385, 387 (1989); David C. Palmer v. DER, *et al.*, 1993 EHB 1247, 1248. In Marinari, the petitioners had

filed a petition for review in the nature of a complaint in mandamus in Commonwealth Court, which sought to have the court order the Department to process their application for a solid waste management permit and render a decision. 129 Pa.Cmwlth. at ___, 566 A.2d at 388. In denying the Department's preliminary objections, which claimed petitioners' remedy was an appeal to the Board, the court found that the Department had not yet taken an appealable action with respect to the permit modification. The court then explained:

> The EHB is not statutorily authorized to exercise judicial powers in equity. Its power and duty are to hold hearings and issue adjudications on DER's orders, permits, licenses or decisions. Because DER has done none of those things, Petitioners' remedy does not lie with the EHB . . . .

129 Pa.Cmwlth. at ___, 566 A.2d at 387. *See also*, Palmer, *supra*. (because the Department had not yet taken a final action with regard to a solid waste permit renewal application, there was no appealable action for the Board to review).

Appellants acknowledge, at least with respect to the noncoal SMP, that they are not appealing from a Department action or adjudication. They claim, instead, that the Board has jurisdiction over their petition to revoke the noncoal SMP because 5(f) of the Noncoal Surface Mining Act provides for an informal hearing before a permit is suspended or revoked. This position is without merit. Contrary to Appellants' belief, 5(f) of the Noncoal Surface Mining Act applies to operator's licenses, not mining permits, and the hearing provided for is before the Department, not the Board.[1] Mining permits are,

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[1]Section 5(f) states, in relevant part: "If the department intends to revoke or suspend a license, it shall provide an opportunity for an informal hearing before suspending or revoking the license." 52 P.S. 3305(f).

instead, governed by §7.[2] Because Appellants admit they are not appealing from a Department action or adjudication and nothing in the Noncoal Surface Mining Act or any other relevant statute authorizes the Board to revoke an SMP in the absence of initial action by the Department, the Board does not have jurisdiction over Appellants' petition to revoke Gamble's noncoal SMP.

Appellants also contend the Department's position in this matter will lead to the anomalous result that neither the Department nor the Board will have the authority to revoke a noncoal SMP more than 30 days after it is issued. The Board, therefore, must have jurisdiction over Appellants' petition. This position is also without merit. Again, the Board has no independent authority to revoke a noncoal SMP. Moreover, under §11(b) of the Noncoal Surface Mining Act, the Department has the power to "issue such orders as are necessary to aid in the enforcement of the provisions of this act. The orders shall include, but shall not be limited to, orders modifying, suspending or revoking permits or licenses and orders requiring persons to cease operations immediately." 52 P.S. §3311(b). The Department, therefore, has the authority to revoke Gamble's noncoal SMP, if necessary to enforce the Noncoal Surface Mining Act.

With respect to their petition to revoke the landowner consent, Appellants claim the Board has jurisdiction because the consent form is provided by the Department and landowner consent is required, under §7(c)(7) of the Noncoal Surface Mining Act, before the Department may issue a permit. As stated above, for the Department's conduct to amount to an action or adjudication, it must have affected Appellants' personal or property rights, privileges,

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[2]Section 7(a) states, in relevant part: "Except as provided in section 24 [concerning existing permits and licenses], no person shall operate a surface mine or allow a discharge from a surface mine unless the person has first obtained a permit from the department ...." 52 P.S. §3307(a).

immunities, duties, liabilities, or obligations. *See*, Quehanna-Covington-Karthaus Area Auth. v. DER, EHB Docket No. 93-039-MJ (Opinion issued April 26, 1994) (a letter from the Department, which merely interpreted the requirements of a statute, was not an action or adjudication because it did not affect the appellant's rights). By merely providing a landowner consent form, the Department's conduct did not give rise to an action reviewable by the Board.[3]

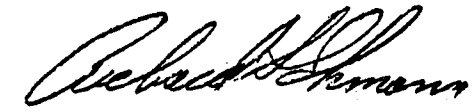
ORDER

AND NOW, this 13th day of October, 1994, it is ordered that Appellants' Petition to Revoke Mining Permit and Consent of Landowner is denied and the matter docketed at No. 94-149-W 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

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[3]We have previously recognized that the landowner consent form has both regulatory and private property aspects, contrary to the Department's assertion that the form is merely a "private contract." The issuance of a noncoal SMP based on an allegedly deficient landowner consent is an action reviewable by the Board. But in reviewing such Department action, the Board does not have the jurisdiction to resolve disputes between private parties concerning landowner consents. Croner, Inc. and Frank Popovich v. DER, 1993 EHB 271.

DATED: October 13, 1994

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M. DIANE SMITH
SECRETARY TO THE BOARD

EMPIRE SANITARY LANDFILL, INC.	:	
	:	
v.	:	**EHB Docket No. 94-126-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 14, 1994**

OPINION SUR APPLICATION TO AMEND A BOARD ORDER TO INCLUDE THE STATEMENT REQUIRED BY 42 Pa. C.S. §702(b)

Maxine Woelfling, Chairman

Synopsis

A petition to amend a Board order to include a statement that it involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal therefrom may materially advance the ultimate resolution of the appeal is denied. There is no substantial ground for difference of opinion as to when the use of scientific tests is required to establish violations of 25 Pa. Code §123.31(b), and, even if there were, the factual record concerning the issue is so incomplete that an interlocutory appeal would delay disposition of the appeal. With regard to whether community discomfort must be proved to establish a violation of 25 Pa. Code §123.31(b), there is no substantial ground for a difference of opinion, given the clear language of the regulation. Whether the Department mistook approved odor-masking agents for alleged malodors is not a legal issue, but rather a factual one concerning the source and nature of the alleged malodors. Therefore, certification for interlocutory appeal is unwarranted. Finally, an

immediate interlocutory appeal as to any of these issues would only delay the resolution of the appeal because the Department's issuance of the challenged order and civil penalty assessment was based on multiple legal theories.

OPINION

The application to certify for interlocutory appeal that is now before the Board arises out of the Department's April 28, 1994, issuance of an order and civil penalty assessment to Empire Sanitary Landfill, Inc. (Empire). The order alleged that malodors emanating from Empire's solid waste disposal facility in Taylor Borough and Ransom Township, Lackawanna County were violations of the Air Pollution Control Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 *et seq.* (APCA); the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*; the rules and regulations adopted thereunder; and the terms and conditions of Empire's solid waste disposal permit. The order directed Empire to submit an application for permit modifications to address the alleged malodor problems and assessed it a civil penalty in the amount of $31,250.

Empire's notice of appeal was accompanied by a petition for supersedeas, and the parties advised the Board that the May 23-24, 1994, hearing on Empire's petition for supersedeas at Docket No. 94-114-W[1] would constitute the supersedeas hearing in this matter. The parties filed memoranda of law in support of their respective positions, and the Board, in an August 19, 1994, memorandum opinion, denied Empire's petition for

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[1] Empire's appeals consolidated at this docket related to the Department's efforts to prohibit Empire from disposing of municipal incinerator ash generated by the Union County (New Jersey) Utility Authority. Alleged malodor incidents at Empire's facility were one of the bases for the Department's suspension of Empire's solid waste disposal permit.

supersedeas as a result of Empire's failure to demonstrate that it was likely to succeed on the merits of its appeal and to establish that it would suffer irreparable harm as a result of the Department's order and civil penalty assessment.

Empire's September 16, 1994, application to amend the Board's August 19, 1994, order to include the statement prescribed by 42 Pa. C.S. §702(b) is concerned with whether sensory evidence of malodors is sufficient to support a Department order. More specifically, Empire contends in Paragraph 4 of its application that

> The issue of whether Pennsylvania law or due process require validation of sensory observations of alleged malodors by reliable scientific methods of detection and analysis, proof of community discomfort, and proof that DER did not attribute malodors to the use of authorized odor-masking agents present controlling questions of law ....

It also asserts a substantial grounds for difference of opinion regarding these issues exists and that an immediate appeal would advance the ultimate resolution of this matter.

The Department opposes Empire's application for amendment of the Board's order, arguing that the issues for which Empire is seeking immediate appellate review are not ripe. Because Empire had the burden of proof at the supersedeas hearing and the Department was not obligated to put on any case, the Department contends that the record regarding malodors has not been fully developed. The Department also asserts that the resolution of Empire's appeal does not rest solely on the issues for which Empire is seeking certification and that immediate appellate review would not advance the ultimate disposition of the appeal.

Section 702(b) of the Judicial Code allows a party to seek permission to file an interlocutory appeal, provided that the lower tribunal includes a statement in its order that the order

> involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter ....

The appellate courts have granted permission to file interlocutory appeals in circumstances where the law is unsettled and judicial economy would be served by allowing the appeal. R. Darlington *et al.*, Pennsylvania Appellate Practice §1312.7(1986).

A number of the Board's opinions on requests to amend orders to include the statement required by §702(b) of the Judicial Code have focused on the issue of whether an interlocutory appeal would delay or hasten the ultimate resolution of the matter and, in doing so, have examined the relationship between the issue raised for interlocutory appeal and the ultimate issues for resolution in the appeal. The Board has certified an issue for interlocutory appeal where it related to the Board's jurisdiction and there was a potential conflict between two statutes, Ronald Burr *et al.* v. DER, 1988 EHB 1129. It has also certified an issue for interlocutory appeal where it was one of first impression and the only legal issue in an appeal. Carol Rannels v. DER, 1991 EHB 1523. However, it has not granted requests to amend its orders for interlocutory appeal where they would delay the resolution of an appeal, as in a circumstance where the request to certify was filed shortly before a hearing on the merits. Spang & Company v. DER, 1992 EHB 896. Nor has it amended its orders to certify a question which would have no effect on the ultimate disposition of an appeal, Concord Resources Group of Pennsylvania, Inc. v. DER and County of Clarion, 1993 EHB 156. It also has

denied a request to certify a question over which there was no substantial grounds for difference of opinion, Chester Residents Concerned for Quality Living v. DER and Thermal Pure Systems, Inc., 1993 EHB 1645.

The first issue in Paragraph 4 of Empire's application - whether sensory observations of malodors must be validated by reliable scientific methods - is potentially a controlling question of law in this appeal. However, there is not a substantial ground for difference of opinion, nor would an immediate appeal materially advance the ultimate disposition of the appeal.

We have recently held in Empire Sanitary Landfill, Inc. v. DER, EHB Docket No. 90-158-E (adjudication issued February 1, 1994) and DER v. Franklin Plastics Corporation, EHB Docket No. 90-316-CP-E (adjudication issued February 11, 1994) that nasal determinations of malodors were sufficient to establish violations of 25 Pa. Code §§123.31(b) and 273.217(a), given the standards articulated in those regulations and the absence of evidence concerning a reliable scientific methodology for detection of malodors. Empire's alleged violations of those very same regulations are at issue here, as is the means used by the Department to establish the existence of malodors. Although both of these adjudications are the subject of petitions for review before the Commonwealth Court (at Nos. 514 and 579 C.D. 1994, respectively), the Board's conclusions regarding the means to establish malodor violations are consistent with established precedents.[2]

Moreover, even if there were substantial grounds for a difference of opinion regarding the necessity for scientific testing, the ultimate termination of this appeal would not be materially advanced by an immediate

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[2] Cited at pages 36-36 of the Empire adjudication.

interlocutory appeal because of the state of the record. To conclude that scientific analysis of alleged malodors must be conducted there must be evidence that reliable scientific methodology is available to identify malodors.

There was extensive testimony in the supersedeas hearing by Robert Kramer Lewis, Jr., a Solid Waste Supervisor, regarding the Department's response to malodor complaints in the vicinity of Empire's landfill. He was asked by counsel for Empire whether he used any scientific test to determine the presence of malodors, and he responded negatively (N.T. 477). He was also asked if he had any training in the detection of malodors, and he described that training (N.T. 478-480). There is no testimony regarding available scientific methodology for detection of malodors,[3] and, as a result, an immediate interlocutory appeal would not hasten any final resolution of this issue.

With regard to Empire's contentions regarding proof of community discomfort to establish malodors, the Board has addressed such contentions in Empire, Franklin Plastics, and the cases cited therein. In addition, the language of 25 Pa. Code §123.31(b) makes no reference to any public or community discomfort; it prohibits malodors beyond the property on which an

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[3] The absence of such testimony is attributable, in part, to the truncated nature of a supersedeas hearing. Parties are not to prove their cases on the merits. The party seeking the supersedeas must establish the elements required by 25 Pa. Code §21.78 for grant of a supersedeas, including likelihood of success on the merits. Likelihood of success on the merits is a *prima facie* case of showing a reasonable probability of success. Houtzdale Municipal Authority v. DER, 1987 EHB 1. Furthermore, where the Board decides that a petitioner has or has not met this particular element of the supersedeas test, it does not necessarily follow that the Board will ultimately hold in favor of the petitioner.

air contaminant source is situate. Given the clear language of the regulation, there is no substantial ground for a difference of opinion on this issue.

Empire's third issue in Paragraph 4 concerns whether there must be proof that the Department did not attribute malodors to approved odor-masking agents employed by Empire at the landfill. Rather than this being a legal issue, it is more a factual issue regarding the source and nature of alleged malodors. Therefore, certification of this issue for immediate interlocutory appeal is not warranted.

There is a final reason for denying Empire's application to amend the August 19, 1994, order. The Department's civil penalty assessment and order are not based solely on the issues cited in Empire's application. A number of other alleged violations by Empire are set forth in the Department's order and civil penalty assessment which, if proven, are sufficient to sustain the issuance of the order and assessment.[4] Thus, an immediate interlocutory appeal of the malodor contentions in Empire's application would not serve the purposes of judicial economy, as the order and assessment could still be sustained by the Board on other grounds.

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[4] These include violations of the terms and conditions of Empire's solid waste management permit, 25 Pa. Code §273.201(c)(1) and (2), and various provisions of the APCA and the SWMA. Both of these statutes authorize the Department to issue orders and civil penalty assessments for violations of the acts, the rules and regulations adopted thereunder, or the terms of and conditions of permits. See §§9.1 and 10.1 of the APCA and §§602(a) and 605 of the SWMA.

O R D E R

AND NOW, this 14th day of October, 1994, it is ordered that Empire Sanitary Landfill's application to amend the Board's August 19, 1994, order to include the statement prescribed by 42 Pa. C.S. §702(b) is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: October 14, 1994

cc: **Bureau of Litigation**
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Harrisburg, PA
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Lance H. Zeyher, Esq.
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For the Appellant:
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M. DIANE SMITH
SECRETARY TO THE BOARD

DELAWARE ENVIRONMENTAL ACTION COALITION and DR. JAMES E. WOOD	:	
v.	:	**EHB Docket No. 91-430-MR (Consolidated with 91-445-MR)**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and M&S SANITARY SEWAGE DISPOSAL, INC. Permittee	:	**Issued: October 18, 1994**

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

By Robert D. Myers, Member

Synopsis

In appeals from the Department of Environmental Resources' (DER) issuance of a water quality management permit, under the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* (CSL), the Permittee's motion for nonsuit is denied since it introduced evidence at the conclusion of Appellants' case-in-chief, before making its motion. However, the Board dismisses the appeals based on an adjudication on the merits as Appellants failed to carry their burden of proof.

PROCEDURAL HISTORY

Delaware Environmental Action Coalition (DEAC) filed a Notice of Appeal on October 17 1991, contesting the September 18, 1991, issuance by DER of Water Quality Management Permit No. 5290406 to M&S Sanitary Sewage Disposal, Inc. (M&S) for the construction of a septage treatment facility at the former Darling-Delaware treatment plant in Westfall Township, Pike County. This appeal was docketed at 91-430-MR. Dr. James E. Wood (Wood) filed a

Notice of Appeal on October 21, 1991, contesting the issuance of the same Permit. This appeal was docketed at 91-445-MR. On January 6, 1992, the appeals were consolidated at Docket No. 91-430-MR.

A hearing was convened in Harrisburg on October 12, 1993, by Administrative Law Judge Robert D. Myers, a Member of the Board. DEAC and Dr. Wood, the Appellants, appeared *pro se*, while M&S Sanitary Sewage, Inc., the Permittee, and DER were represented by legal counsel. At the close of Appellants' case-in-chief, M&S moved for a nonsuit or a directed adjudication on the basis that the Appellants had not made out a *prima facie* case. Reminding the parties that granting such a motion required the concurrence of a majority of Board Members, Judge Myers took the motion under advisement and gave M&S and DER the option of presenting evidence or resting their cases. Both chose to rest but M&S offered two of its exhibits into evidence. They were admitted and the record was closed.

DEAC and Dr. Wood filed their post-hearing briefs on December 6, 1993, and December 7, 1993, respectively. M&S filed its brief on January 5, 1994. DER did not file a brief. The record consists of a hearing transcript of 196 pages and 7 exhibits. In its post-hearing brief, M&S renewed its motion for directed adjudication or in the alternative, moved for a motion to dismiss.

FINDINGS OF FACT

In addition to the Water Quality Management Permit, DER also issued M&S a NPDES Permit and a solid waste disposal permit. While Dr. Wood filed an appeal from the NPDES Permit, neither Appellant filed an appeal from the solid waste management permit. Prior to the hearing, it was apparent that many of

the issues Appellants sought to litigate in this proceeding pertained to the NPDES Permit. Upon motion by M&S, the Board issued an Opinion and Order on June 15, 1993 (1993 EHB 792), striking those issues.

At the hearing, Appellants made it absolutely clear that most of their objections pertained either to the NPDES Permit or the solid waste management permit. To the extent their evidence dealt with the Water Quality Management Permit, it concerned post-issuance enforcement matters rather than the terms of the Permit itself or consisted of inadmissable hearsay. Because of this, there was no evidence presented by Appellants relevant to the issues properly raised in these appeals and we can make no findings of fact.

DISCUSSION

Under 25 Pa. Code §21.101(c)(3), DEAC and Dr. Wood have the burden of proof since they are third parties appealing the issuance of a permit. To carry their burden, DEAC and Dr. Wood must prove by a preponderance of the evidence that the Permit was issued contrary to law or was an abuse of DER's discretion. 25 Pa. Code §21.101. Our review of the matter is limited, however, to those issues raised by DEAC and Dr. Wood in their post-hearing briefs. Any issues not raised in post-hearing briefs are deemed waived. *Lucky Strike Coal Co. and Louis J. Beltrami v. DER*, 119 Pa. Cmwlth. 440, 546 A.2d 447 (1988).

Since DEAC only argued matters relating to the conduct of the hearing in its post-hearing brief, it waived the issue raised in its appeal-DER's issuance of the Permit was an abuse of discretion. Dr. Wood, in his post-hearing brief, makes a number of statements and assertions, *inter alia*, that DER personnel issuing the permits are unqualified and lacking in knowledge necessary to protect public health; that air and effluent discharges from the plant will be injurious to health; other issues pertaining to the

discharge and the location of the plant; and criticisms of the Board's rules of procedure. None of these issues is pertinent to the appeal before us; and even considering those that could have some marginal relevance, there is no admissable evidence to support them. M&S argues, *inter alia*, that the Appellants failed to establish a *prima facie* case and reiterates its motion for a directed adjudication as well as makes a motion to dismiss.[1] We will treat M&S's motions for a nonsuit or for a directed adjudication or a motion to dismiss as a motion for nonsuit.

A motion for a nonsuit provides a defendant with the opportunity to test the sufficiency of a plaintiff's evidence. *Atlantic Richfield Co. v. Razunic*, 480 Pa. 366, 390 A.2d 736 (1978). The Board has held that it may enter a nonsuit if a plaintiff fails "to prove a *prima facie* case." *Welteroth v. DER and Clinton Township Board of Supervisors*, 1989 EHB 1017, 1022. The entering of a nonsuit is limited to clear cases of insufficiency of appellant's case, *Id.*, and allowed only after a plaintiff presents its case and before a defendant has introduced evidence into the record. *City of Harrisburg v. DER and Pennsylvania Fish and Boat Commission*, 1993 EHB 90. Consequently, only the plaintiff's evidence is examined. *See*, *Highland Tank and Manufacturing Co. v. Duerr*, 423 Pa. 487, 489, 225 A.2d 83, 84, (1966). Commonwealth Court has applied this standard to the rule of civil procedure governing the motion for nonsuit, Pa. R.C.P. 230.1.[2] *See*, *Robinson v. City*

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1 M&S also argued that the Appellants did not have standing to file their appeals. Since the Board is deciding this matter on the basis of the sufficiency of the evidence, it is unnecessary to address M&S's other arguments.

2 Pa. R.C.P. 230.1 states: "In a case involving only one defendant, at the close of plaintiff's case on liability and before any evidence on behalf of the defendant has been introduced, the court, on the oral motion of a footnote continued

of Philadelphia, 149 Pa. Cmwlth. 163, 612 A.2d 630, 633 (1992). Under Pa. R.C.P. 230.1, a nonsuit may be entered only if the party moving for nonsuit has not yet introduced any evidence into the record.

Generally, proceedings before the Board are governed by the Administrative Agency Law. 2 Pa. C.S. Ch. 5, Subch. A, the General Rules of Administrative Practice and Procedure, 1 Pa. Code Part II, and the Board's own rules of practice and procedure, 25 Pa. Code Ch. 21. However, when these rules do not cover a certain procedural issue, such as compulsory nonsuits, the Board looks to the Pennsylvania Rules of Civil Procedure for guidance. *See*, *Welteroth*, *supra* (employing the standards of the Pennsylvania Rules of Civil Procedure to determine whether an order of nonsuit is appropriate).[3]

Here, M&S chose to introduce evidence, Permittee's Exhibits 1 and 2 - the Water Quality Management Permit, including the permit application and all amendments, as well as DER's Internal Review and Recommendations, respectively, into the record at the conclusion of Appellants' case-in-chief. Consequently, M&S's motion is denied and we will decide these appeals on the merits.

We have no hesitancy in ruling that Appellants failed to establish by a preponderance of the evidence that they have a legitimate objection to DER's action. There is no competent evidence in the record to show that DER violated the law or abused its discretion in issuing the Permit. Therefore, Appellants' appeal is dismissed.

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continued footnote
party, may enter a nonsuit if the plaintiff has failed to establish a right to relief ...."

3 Although the powers of the Board, as an independent tribunal, allow it to look to the Pennsylvania Rules of Civil Procedure for guidance, the rules are in no way binding on the Board.

CONCLUSIONS OF LAW

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

2. Appellants have the burden of proving by a preponderance of the evidence that the issuance of the Permit was arbitrary and an abuse of DER's discretion.

3. Permittee's motion for nonsuit is denied as it introduced evidence at the conclusion of Appellants' case-in-chief.

4. Appellants failed to establish by a preponderance of the evidence that DER violated the law or abused its discretion by issuing the Permit.

O R D E R

AND NOW, this 18th day of October, 1994, it is ordered that these consolidated appeals are dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: October 18, 1994

cc: See next page for service list

EHB Docket No. 91-430-MR (consolidated)

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William J. Wolfe
Delaware Environmental Action Coalition
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Appellant *Pro se*:
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M. DIANE SMITH
SECRETARY TO THE BOARD

GEORGE M. LUCCHINO	:	
v.	:	**EHB Docket No. 91-117-E**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and ROBINSON COAL COMPANY, Permittee	:	**Issued: October 19, 1994**

OPINION AND ORDER SUR
REQUEST FOR ATTORNEY FEE AND COSTS

By: Richard S. Ehmann, Member

Synopsis

Appellant's Petition under Section 4(b) of SMCRA for reimbursement of attorneys fees and costs is granted to the extent that Appellant has proven entitlement thereto. Where the Appellant fails to show that his counsel's fees are reasonable based on comparable fees in the legal market place, reimbursement of attorneys fees will be denied.

Reimbursement of Appellant for costs of separate parallel litigation in the Court of Common Pleas is denied because we lack jurisdiction to grant such fees and they are not authorized as reimbursable under Section 4(b) of SMCRA. Reimbursement of costs of a copy of the merits hearing's transcript, and for mileage to personally serve documents on the opposing party's counsel is awarded. Lost wages incurred by virtue of the attendance of the Appellant at the merits hearing are not a type of financial cost to a party which are reimbursable under Section 4(b) of SMCRA. Photocopying charges, postage and long distance telephone call charges are rejected as reimbursable where the proofs thereof are inadequate.

OPINION

On March 16, 1994, this Board issued its Adjudication of the merits of this appeal. In our Order which was a part of this adjudication, we sustained the appeal by suspending the portion of Surface Mining Permit 02890106 issued to Robinson Coal Company ("Robinson") which covered George M. Lucchino's ("Lucchino") property. We remanded this suspended portion of the permit to the Department of Environmental Resources ("DER") to determine whether or not Robinson held a valid right of entry to Lucchino's property so as to include it within this permit.[1]

Thereafter, on June 23, 1994, we received a letter from Lucchino asking for reimbursement for his "funds" ... under 1396 18C(E)". This letter also requests additional time to submit further bills and has attached to it Exhibits I, II, III and IV. In response, former Board Member Joseph N. Mack advised DER and Robinson to file their responses, if any. DER and Robinson both responded in opposition to Lucchino's request and Robinson also filed a further separate response to DER's claim that Robinson, rather than DER, should be responsible for payment of any fees and costs awarded to Lucchino.

With Judge Mack's resignation from this Board on August 2, 1994, the appeal was reassigned to Board Member Ehmann, who directed that Lucchino was to finalize the amount he was seeking by August 19, 1994. Lucchino's *pro se* finalization was received by the Board on August 16, 1994. It is a one page letter with Exhibits A through J attached thereto. Responses thereto were received on September 1,

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[1]On May 19, 1994, DER announced that it was revoking this permit to the extent it covered Lucchino's land. See Lucchino v. DER, et al., EHB Docket No. 94-178-E (Opinion issued September 23, 1994) ("Lucchino II").

1994. Under a third letter to us dated August 31, 1994, Lucchino forwarded us an affidavit that the allegations "in the Petitions of Reimbursement of Attorney's Fee and Costs are true and correct", and a letter from a local law firm apparently submitted by Lucchino to support the reasonableness of the fees his attorney charged Lucchino in this appeal.

At no time has Lucchino actually filed a formal Petition for payment of these fees and, as to reimbursement, he is proceeding *pro se*. For clarity's sake in this opinion, we will hereafter refer to his first letter as his Petition. His second letter on this issue will be referred to as his First Supplement, and his final letter is referred to as his Second Supplement. All of them were considered by this Board in this opinion, as were each of the opposing parties' filings on this issue.

Lucchino's Petition and First Supplement make it clear he seeks reimbursement for the following:

1.	Copy of transcript of merits hearing of March 11, 1992.	$ 138.34
2.	Bill for services from Attorney J. Phillip Bromberg for period of December 1991 to May 1, 1992, plus xeroxing costs of Attorney Bromberg	1,765.60
3.	Long Distance telephone calls by Lucchino	14.21
4.	Postage by Lucchino	19.53
5.	Xerox copying by Lucchino	17.81
6.	Wages lost to attend hearing	135.76
7.	Mileage for travel to hearing	10.00
8.	July 18, 1991, Filing Pro. Office	55.50
9.	Traveling For Case No. 91-3856	15.00
10.	Travel 60 miles at .25 per mile	15.00
11.	Travel 40 miles at .25 per mile	10.00
	TOTAL	$2,181.15

DER and Robinson offer a series of arguments as to why Lucchino should not receive any recompension. We start with these arguments.

DER asserts that there is a four-prong test for payment of attorneys fees and costs under Section 4(b) of the Surface Mining Conservation and Reclamation

Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.4(b) ("Section 4(b) of SMCRA"). It asserts, citing Big B Mining Company v. DER, 155 Pa. Cmwlth. 16, 624 A.2d 713 (1993), allocatur denied ___ Pa. ___, 633 A.2d 153 (1993) ("Big B"), that to receive fees, Lucchino must show:

> 1) A final order has been issued;
> 2) Lucchino is the prevailing party;
> 3) Lucchino has achieved some degree of success on the merits; and
> 4) Lucchino made a substantial contribution to a full and final determination of the issue.

DER then asserts Lucchino did not prevail on any issue he raised, so he is not a prevailing party.

Our adjudication in this appeal was a final order. The decision set forth therein was in Lucchino's favor. Without Lucchino having pursued this appeal we would have rendered no judgment in his favor thereon, so we can conclude that his participation with counsel in the merits hearing, coupled with pursuit of the appeal, demonstrates that he substantially contributed to the final decision on the issues adjudicated.

We also conclude the final Big B factor is met in that Lucchino achieved a large measure of success on the merits. In reaching this conclusion, we reject DER's argument that Lucchino failed to prevail on the issues he raised. We look beyond Lucchino's handdrawn Pre-Hearing Memorandum[2] as cited by DER to reach this result. In the opening paragraph of Lucchino's *pro se* Notice Of Appeal, he states in part:

> The Department put my property on the Blatz mining permit. I requested at the 11-15-90 public meeting that my property

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[2]Lucchino appeared *pro se* when this appeal was first filed. He subsequently retained Attorney Phillip Bromberg, who represented him through the merits hearing but apparently died prior to issuance of our adjudication. As to this Section 4(b) of SMCRA issue, Lucchino is again pursuing this matter *pro se*.

> be removed from the Blatz mining permit. Mr. Horell said that he would have it removed at this meeting. Supplement 2A, November 30, 1990 letter to the Department addressing my three concerns: gas line, right-of-way, and the properties listed. Supplement 3A, copy of letter dated 1-8-91 from the Department stating that they cannot have this property removed from the proposed permit because the Robinson Coal Company holds a validated Consent of Land Owner form.

It is unequivocally clear from this language that Lucchino was challenging the inclusion of his land in the mining permit issued to Robinson by DER for the Robinson's Blatz mine. In response to his appeal and after the merits hearing, we remanded this permit to DER to determine if Robinson indeed held a valid right-of-entry for the purposes set forth in this permit application. We also know that after remand DER conducted its own evaluation of the evidence on this point and revoked the portion of Robinson's surface mining permit covering Lucchino's land. [See the DER letter dated June 8, 1994 attached as Exhibit II to Lucchino's Petition.][3] When seen in light of Lucchino's Notice Of Appeal as quoted above, it is obvious his Pre-Hearing Memorandum's challenge that "Supp[lement] C does not give coal operator unlimited access to leased property after mining has been completed...." is indeed the raising of the issue on which this Board decided this appeal, contrary to DER's assertion.

Robinson's challenge to Lucchino's Petition stems from the fact that in it, Lucchino seeks reimbursement under "1396 18C(E)". According to Robinson's interpretation of this reference, with which we agree, Lucchino is citing Section 18.3(e) of SMCRA, 52 P.S. §1396.18(c)(e). Under this section, a court may award "costs of litigation" to any party if it deems it appropriate in a citizens suit type of litigation. As Robinson points out, and we agree, this section is inapplicable to proceedings before this Board. Costs before us are governed by

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[3]See also Lucchino II, where this letter and others are discussed at length.

Section 4(b) of SMCRA. However, while Robinson argues we should dismiss Lucchino's Petition on this basis, we will not do so. Lucchino is a *pro se* here and obviously inexperienced in law. Since fees and costs may be awarded under Section 4(b) of SMCRA, we will exercise our discretion in his behalf to consider this Petition as filed thereunder. It is obvious from Robinson's other arguments against payment of certain fees that it realized we might reach this result, so we see no harm to Robinson in doing so. However, despite our acting in this fashion, we wish to make it clear that petitioners like Lucchino may not expect this Board to react favorably to each and every incoherent or incomprehensible filing by a prevailing party. Where we cannot clearly discern a Petitioner's intent or a Petitioner fails to meet its burden of proof on an item of reimbursement, it will not prevail.

Attorneys Fees

Having reached this conclusion, we turn to the question of whether Lucchino may recover any of the specific fees or costs which he seeks. The largest of these items is attorneys fees in the amount of $1,765.60. To support this fees portion of his claim, Lucchino submitted a bill from Attorney J. Phillip Bromberg dated May 1, 1992 with his Petition. The Responses thereto by DER and Robinson challenge these fees because there was no evidence showing how many hours were worked for this fee, the lawyer's hourly rate or what a reasonable market rate is for the lawyer's services. DER and Robinson point out that Lucchino bears the burden of proof as to all fees and costs sought and say the lack of evidence on these points compels denial of these fees.

Here, Lucchino has the burden of proof according to our decision in Jay Township, et al. v. DER, et al., 1987 EHB 36 ("Jay Township"). This means as to these attorneys fees, he must demonstrate: (1) the fee's amount; (2) the time

expended to earn it; and (3) that the fees charges are reasonable based upon the market. Id. Lucchino must prove these elements because a party has no absolute right to all claimed attorneys fees and costs under Section 4(b) of SMCRA merely because he prevailed. Our authority to award fees and costs under Section 4(b) of SMCRA is "discretionary", and we would abuse that discretionary authority if we were merely to issue a rubber stamped approval of Lucchino's Petition based on his prevailing on the merits.

In his First Supplement, Lucchino includes copy of Bromberg's time account records for client number 2884 (Lucchino) showing 14.9 hours worked and xeroxing expenses of $15.60. The First Supplement indicates that Attorney Bromberg is now deceased. In his Second Supplement Lucchino sent us a copy of his September 1, 1994 affidavit that his allegations as to fees and costs are true and correct and a copy of a "fee letter" from Rose Schmidt Hasley & DeSalle's Edward Gerjuoy, dated November 26, 1991, which letter sets forth what Attorney Gerjuoy proposed as a fee arrangement including hourly billing rates if he undertakes representation of Lucchino in this appeal.

Based upon this evidence, we conclude Lucchino has failed to meet the burden of proof as to these fees. Bromberg's time records show he did not become involved in this matter until December of 1991. This record shows Bromberg's last efforts on Lucchino's behalf occurred on June 2, 1992. Thus, before and after this period, Lucchino has appeared *pro se*.[4]

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[4]When a party elects to appear *pro se*, he runs the real risk that his lack of familiarity with the law will cause him to commit errors or omit crucial information. Recently, in Winpenny v. Winpenny. ___ Pa.Super. ___, 643 A.2d 677 (1994), the Superior Court addressed this point, saying in part:

> Appellant's difficulties in this matter stem from a misunderstanding of court procedure and, in particular, the duties and responsibilities of a court-appointed Master in Partition. While it is

Lucchino's decision to proceed *pro se* to seek fees has worked to his detriment. While, based on his *pro se* status, we may elect to ignore his failure to file a formal Petition for these fees containing averments of fact, and the failure to include in his initial filing all of the information ultimately submitted through both supplements, we cannot ignore omissions of crucial evidence needed to prove the elements of his request.[5] We accept both the bill of $1,765.60 as a genuine copy of the bill submitted to Lucchino by Bromberg and Bromberg's time record reflecting 14.9 hours of Mr. Bromberg's time spent on this matter. If the xeroxing costs are subtracted from this fee and we divide $1,750 by 14.9 hours (the number of hours worked), we find a billing rate of $117.45 per hour. However, it does not provide evidence of the reasonableness of the rate based on what attorneys charge in the market. The "fee letter" for attorney Gerjuoy and Lucchino's affidavit also do not provide this information. Lucchino's affidavit merely says his own allegations are true; it does not and cannot address Gerjuoy's letter and the reasonableness of Bromberg's fees in the legal marketplace because Lucchino has shown no familiarity therewith, so he lacks any ability to make credible sworn assertions thereon. Gerjuoy's fee letter is unsworn. It merely represents what his firm would charge for his

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> by no means a requirement that persons who appear before the courts of this Commonwealth be skilled in the law, the interpretation of its statutes, rules, and regulations is not arbitrary, and requires practice. By the same token, the court system could not and would not be manageable without some reliance on the acquired expertise of practitioners in its processes as dictated by procedural rules.

Winpenny at____, 643 A.2d at 679.

[5]Lucchino also never filed a memorandum of law or otherwise advanced arguments to counter the arguments raised by the attorneys representing DER and Robinson.

services. What was needed as a minimum in terms of proof was an affidavit by Gerjuoy or some other lawyer in the field of environmental law, which affidavit deals with fees charged by similarly experienced practitioners. Without such evidence, we are left with insufficient evidence on this issue to support this portion of Lucchino's claim. See Township of Harmar, et al. v. DER, et al., EHB Docket No. 90-003-MJ (Opinion issued August 9, 1994) ("Township of Harmar").[6]

It might have been argued by Lucchino, had he filed a Petition or Memorandum of Law in this appeal, that he should be entitled to offer evidence on this issue at a hearing on his Petition. However, Lucchino never filed a Petition or Memorandum of Law and never made any request for a hearing. Moreover, as we wrote in Township of Harmar, a hearing on a Petition under Section 4(b) of SMCRA is not mandated by this statute. Further, in Township of Harmar, we addressed this issue at length and concluded that a hearing was not warranted where the Petitioner had been given three chances to make its Petition properly set forth its claims. That is exactly the scenario here as well. Lucchino has a Petition, a First Supplement and a Second Supplement before us, and has proceeded *pro se* as to all three. To now go to a hearing so he has a fourth opportunity, because he is a *pro se*, would be an abuse of our discretion exercised in his favor. Accordingly, we reject that option here.

Transcript Costs

The next item on Lucchino's list of "costs" in his First Supplement is the cost of a copy of the hearing's transcript. Robinson does not oppose payment of this cost, but DER does. Citing Township of Harmar, DER says this Board has held this is not a recoverable cost. DER is in error. Township of Harmar never

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[6]Township of Harmar also makes it clear that Bromberg's xeroxing charges will be treated as his "overhead" and are not recoverable by Lucchino.

addressed costs associated with securing a copy of the hearing's transcript. There, referencing the Act of December 13, 1982, P.L. 1127, 71 P.S. 2031 *et seq.* ("Costs Act") for some guidance, we say a law firm's overhead and those costs associated with a firm's internal operations were not intended to be included in expenses under Section 4(b) of SMCRA. This cost is not such a cost item; rather, it is specific to this appeal, as were the travel expenses or use of a process server allowed in Township of Harmar. Since every serious litigant/party before us has secured a copy of the merits hearing's transcript to use in writing proposed Findings Of Fact for its Post-Hearing Brief, we cannot conceive of a potentially more "case specific" item of cost except attorneys fees. Further, since a transcript is an essential prerequisite for a coherent Post-Hearing Brief, it fits easily within the concept of the reasonable cost of any study analysis ... or project which is found by the adjudicative officer to be necessary for the preparation of the party's case, which is a portion of the definition of allowable fees and expenses allowable under the Costs Act as cited favorably in Township of Harmar. Since Lucchino's bill for the transcript is attached to this First Supplement and not otherwise challenged, we will award him this transcript's cost.

Court Costs

Next, we turn to Lucchino's Exhibit H, to his First Supplement and his request to be reimbursed $15 for 60 miles of travel in connection with "Case 91-3856" on July 18, 1991. We consider it simultaneously with his request for reimbursement of the $55 filing fee in the "Pro Office". According to attachments to Lucchino's Petition, in the Court of Common Pleas of Washington County, there is a civil action at No. 91-3856 captioned "Luzerne Land Corporation and Robinson Coal Company v. George M. Lucchino", which involved

these parties and claims arising from the facts underlying and surrounding the instant appeal and whether Robinson could mine Lucchino's land. We cannot reimburse Lucchino for his costs in that proceeding or milage incurred in driving to Washington to file his Answer To Complaint In Equity and Counterclaim In Equity with that court's prothonotary. That matter may be related to this appeal factually, but we are a Board with limited jurisdiction according to the provisions of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, No. 94, 35 P.S. §7511 *et seq.* We have jurisdiction over this appeal and may award costs and fees incurred by Lucchino in regard thereto under Section 4(b) of SMCRA, but nothing in Section 4(b) of SMCRA or the Environmental Hearing Board Act cited above authorizes us to assess as costs here, expenses Lucchino incurs there.[7] We lack jurisdiction over that proceeding, so the Petition must be rejected in regard thereto.

Telephone Charges

We held in Township of Harmar that a law firm's long distance telephone calls were in the nature of overhead and, thus, were not compensable as a party's costs. Here, Lucchino does not seek reimbursement of costs of telephone calls made by his counsel, but rather costs of telephone calls which Lucchino made to his counsel and others. This being true, we reject the suggestion by DER and Robinson that all of his telephonic charges are barred under Township of Harmar. We hold that Lucchino's calls may be recoverable, and look to what the evidence shows in regard thereto.

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[7]Lucchino's First Supplement references Exhibit G for this mileage/cost figure however there was no Exhibit G attached to this First Supplement as filed with this Board. We assume the Exhibit G does not exist since the First Supplement also says in part"...Mr. Bromberg has since passed away and the documents I submitted are the only ones I could obtain".

Lucchino's First Supplement lists calls to his lawyers, unidentified phone numbers in Lansdale and Harrisburg, an "Attorney Ging", DER, and this Board. However, we lack even one averment from Lucchino showing that these calls relate to this appeal. Clearly, in the circumstances before us, where Lucchino seeks reimbursement for costs from a parallel judicial proceeding some tie to this appeal is needed. How is the phone in Lansdale, Pennsylvania related to this suit? Since Attorney Ging is neither counsel nor a witness herein, calls to him make no sense as to this appeal, either. It is this lack of any attempt at connection of these calls to this appeal, as much as the common pleas court proceeding referenced above, which leads to rejection of these phone charges. Mere attachment of his personal phone bill and silence is too little, so, this petition is denied in regard thereto.

Postage Costs

Exhibit D to Lucchino's First Supplement is a group of postage receipts totaling $19.53. DER and Robinson both argue that reimbursement thereof is precluded under Township of Harmar for the same reason DER argued the transcript's costs were ineligible. We do not need to address this argument here because we deny Lucchino's Petition in regard to these costs for another reasons. We do not know if these mailings were made in this appeal or in the civil action in the Washington County Court of Common Pleas. Since Lucchino is seeking reimbursement here of costs incurred there, this is a legitimate area of inquiry as to reimbursement of these costs. Undoubtedly, at least some were incurred in this appeal, but were all of them? We do not know because of the lack of any information thereon from Lucchino. Since it is he who has the burden of proof on these costs, we reject them because he has failed to meet that burden.

Xeroxing Costs

Lucchino's Exhibit E to his First Supplement deals with his xeroxing costs, rather than xeroxing by his counsel, so it is a cost not addressed by Township of Harmar. However, again as with the postage receipts, we only have receipts without allegations. Lucchino's burden of proof is unmet and the Petition is denied in regard thereto.

Lost Wages

Next, Lucchino seeks reimbursement for eight hours of lost wages. Exhibit F to Lucchino's First Supplement is a statement from Nabisco that in March of 1992, Lucchino was paid $16.72 per hour.

As to the eight hours of lost wages, Robinson and DER make the same Township of Harmar argument rejected above as to transcripts' cost. Here, this argument has merit. The cost of a party's participation in a hearing is not intended to be reimbursable under Section 4(b) of SMCRA. Such lost wages are like the loss in profits a business may suffer if its employees spent time defending it in litigation, as opposed to their roles in conducting the profit generating aspects of the business. Such costs are costs each litigant/party assumes by electing to participate in proceedings before this Board; they are not legal or technical services rendered to a party by others and thus are not covered by Section 4(b) of SMCRA. However, we do recognize the merit of Lucchino's claim for $10 for mileage in traveling to and from the hearing that day. Travel expenses connected with an appeal are explicitly recognized as properly reimbursable cost under Township of Harmar.

Mileage For Personal Service

Finally, in cost items the First Supplement's Exhibits I and J seek $.25 per mile for a 60 mile trip and a 40 mile trip. Exhibit I is a certificate of

personal service of amendments to a Joint Pre-Hearing Stipulation on former Board Member Mack and the attorneys for Robinson and DER. Exhibit J is a certificate of personal service of Lucchino's Pre-Hearing Memorandum on DER's counsel. 25 Pa. Code §21.32(e) requires service on the Board at its Harrisburg office's address. Because of subsection 21.32(e), Lucchino is entitled to no reimbursement for service on Judge Mack in Pittsburgh, since he sent the same document to the Board in Harrisburg.[8] Since Lucchino has not averred an Order exists directing service of this document on Judge Mack and our docket reveals none, we cannot conclude Lucchino is entitled to any mileage in connection with delivering the "Amendments To The Joint Pre-Hearing Stipulation" to this Board's Pittsburgh office.

Our rules do not require personal service of such documents. 25 Pa. Code §21.32(a), however, provides that personal service is one of two methods of service. Since we held that use of a process server is a legitimately reimbursable cost in Township of Harmar, it follows the cost of personal service also is reimbursable. In this regard, $10 for each service is awarded. Since Lucchino has not shown why he is entitled to 60 miles for personal service on one occasion and only 40 on the second, we have intentionally reduced the amount awarded as to the cost of service of the Amendment To The Joint Pre-Hearing Stipulation to $10. In so doing, we reject DER's suggestion that $.07 per mile, the amount given subpoenaed witnesses, should apply. The $.07 per mile figure is an artificially low figure, out of date in terms of modern costs. It is in need of being brought into line with transportation costs in the 1990's. Moreover, this Board's Members are currently reimbursed expenses by the

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[8]Indeed, in November of 1991, Judge Mack's office was located in Indiana, Pennsylvania, not Pittsburgh.

Commonwealth of Pennsylvania for personal auto usage in regard to business of this Board at a rate similar to that sought by Lucchino (we suspect DER's counsel is too). As a result we conclude Lucchino's $.25 per mile figure is reasonable.

Thus, we further conclude that Lucchino's supplemental Petition must be granted in the amount of $168.34. We arrive at this figure by adding $138.34, $10.00, and $20.00.

Apportionment Of Cost Payment Responsibility

The last issue before us is who must pay this figure. DER's Response To Appellant's Petition For Reimbursement Of Attorneys Fees and Costs argues that Robinson Coal, rather than DER, should pay these fees because it withheld information as to its lack of authority to be on Lucchino's land for surface mining from DER. Of course, Robinson asserts there should be no shift of responsibility to pay these reimbursable costs away from DER. While we do not disagree with DER to the extent it is possible that in the "right" appeal the burden of payment of costs could shift to the permittee, the Board needs to decide this issue here. In this appeal DER knew that Lucchino asserted that his land should not be included within the permit for the Blatz mine before DER issued the Blatz mine's permit to Robinson. According to Finding of Fact No. 17 in our adjudication, Lucchino objected to his land being within this proposed permit's boundaries at the public meeting DER held on the permit application on November 15, 1990. Finding of Fact No. 11 says the permit was not issued to Robinson until February 22, 1991. Moreover, Finding of Fact 21 indicated DER told Lucchino at the November meeting that his property could be removed from this permit. These Findings of Fact and others evidence clear knowledge at DER of the dispute between Robinson and Lucchino, and a DER decision in issuing this permit not to explore the dispute further by seeking a copy of the

Lucchino/Robinson lease from either Robinson or Lucchino but rather to rely upon the Supplement C forms submitted by Robinson. There is no evidence showing Robinson withheld lease information from DER since DER does not allege it ever asked Robinson for the information but was refused it. DER cannot make such a withholding-the-evidence argument now, where it failed to request this information from Robinson before the permit was issued. Accordingly, we reject this argument here and enter the following order.

ORDER

AND NOW, this 19th day of October, 1994, it is ordered that Lucchino's Petition seeking reimbursement of attorneys fees and costs is granted to the extent that Lucchino is awarded $168.34 pursuant to Section 4(b) of SMCRA. It is further ordered that this award is to be paid by DER.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: October 19, 1994

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

BLUE MARSH LABORATORIES INC.	:	
	:	
v.	:	**EHB Docket No. 93-352-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	**Issued: October 19, 1994**
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	

OPINION AND ORDER SUR
MOTION TO DISMISS AS MOOT

By Maxine Woelfling, Chairman

Synopsis

An appeal of a Department of Environmental Resources (Department) letter informing appellant that the Department would not process its application for renewal of its laboratory certification under the Pennsylvania Safe Drinking Water Act, the Act of May 1, 1984, P.L. 206, 35 P.S. §721.1 et seq. (Safe Drinking Water Act), is dismissed as moot where the Department subsequently renews appellant's laboratory certification.

OPINION

This matter was initiated with the December 13, 1993, filing of a notice of appeal by Blue Marsh Laboratories, Inc. (Blue Marsh) challenging a November 9, 1993, letter sent by the Department to Blue Marsh. The letter informed Blue Marsh that it would have to submit an application for laboratory certification under the Safe Drinking Water Act, because the laboratory had failed to submit an application for renewal of its previous certificate before November 1, 1993, when that certificate expired. In its notice of appeal, Blue Marsh asserted

that the Department received the renewal application and fee on November 2, 1993, and that they were late because the Department reminded Blue Marsh that its certification was to expire when only six days of certification remained--not 90 days before the expiration date, as is the Department's usual practice.

On March 18, 1994, the Department sent Blue Marsh a letter informing the laboratory that the Department would consider the permit renewal Blue Marsh had submitted, rather than requiring a new certification application. The Department granted the renewal on March 29, 1994. Shortly thereafter, on April 5, 1994, the Department filed the motion before us now, asking the Board to dismiss Blue Marsh's appeal as moot because the Board could no longer grant Blue Marsh meaningful relief.

Blue Marsh filed an answer and new matter to the Department's motion on April 26, 1994. Blue Marsh conceded that the appeal is moot, but argued that it, not the Department, should get the technical credit for prevailing on the appeal. Accordingly, Blue Marsh, requested that the Board either sustain the appeal or dismiss it with prejudice in Blue Marsh's favor. The Department filed an answer to Blue Marsh's new matter on May 10, 1994. Neither party filed memoranda supporting their positions.

There is no justiciable controversy here. A matter before the Board becomes moot when an event occurs which deprives the Board of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome. In re Gross, 476 Pa. 203, 382 A.2d 1000 (1980); New Hanover Corporation v. DER, 1991 EHB 1127. Both parties here agree that Blue Marsh has since obtained the renewal it sought when it filed the appeal and that the appeal is now moot. Both ask that the appeal be dismissed. There is nothing more for the Board to do but dismiss the appeal as moot.

O R D E R

AND NOW, this 19th day of October, 1994, it is ordered that the Department's motion to dismiss is granted and Blue Marsh's appeal is dismissed as moot.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
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DATED: October 19, 1994

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M. DIANE SMITH
SECRETARY TO THE BOARD

Commonwealth of Pennsylvania, Department of Environmental Resources	:	
v.	:	**EHB Docket No. 94-196-CP-E**
East Penn Manufacturing Company, Inc.	:	**Issued: October 21, 1994**

OPINION AND ORDER
SUR PRELIMINARY OBJECTION

By: Richard S. Ehmann, Member

Synopsis

The Board dismisses the appellant/permittee's Preliminary Objection to the Department of Environmental Resources' (DER) Complaint for Assessment of Civil Penalties pursuant to section 605 of the Clean Streams Law. Appellant has not established that DER's complaint fails to state a claim upon which relief can be granted.

OPINION

This matter was commenced on July 15, 1994 by DER filing with us a complaint seeking civil penalties against East Penn Manufacturing Co., Inc., (East Penn) pursuant to section 605 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605 (Clean Streams Law).[1]

According to the Complaint, East Penn manufactures lead acid storage batteries, battery cables, and wholesale automobile parts at its Deka Road

[1]Simultaneously with the filing of its Complaint, DER filed a Motion For Partial Summary Judgment. By Order dated July 22, 1994, we stayed East Penn's obligation to reply thereto until further order of this Board.

facility in Lyon Station, Pennsylvania. DER issued East Penn Water Quality Management (WQM) Permit No. 0675206 on October 26, 1976 pursuant to the Clean Streams Law. This 1976 WQM permit authorized East Penn's discharge of treated industrial waste to the ore pit located on its Deka Road facility. DER's complaint alleges discharges from East Penn's facility which were violations of East Penn's WQM permit and sections 301, 307(a) and (c), and 611 of the Clean Streams Law, 35 P.S. §§691.301, 307(a) and (c), and 611. DER claims that these alleged violations by East Penn constitute grounds for our assessment of a civil penalty against East Penn pursuant to section 605(a) of the Clean Streams Law, 35 P.S. §691.605(a), for each violation from July 17, 1989 through June 2, 1993. Additionally, DER asserts in the complaint that it entered into a Consent Order and Adjudication (COA) with East Penn on June 3, 1993, and that this COA was designed to address future discharges of industrial waste at the Deka Road facility. DER claims that this COA did not address or resolve the issue of a civil penalty assessment for East Penn's past violations.

East Penn filed an Answer and New Matter (including a Preliminary Objection) to Complaint for Civil Penalties on August 8, 1994. DER filed its Reply to New Matter and Answer to Preliminary Objection on August 31, 1994. Subsequently, East Penn filed a memorandum of law in support of its preliminary objections on September 14, 1994, and DER filed a supporting memorandum to its answer to preliminary objections on September 14, 1994.

In its preliminary objection, East Penn asserts that the effluent limits in its 1976 WQM permit were superseded, rescinded, and revoked by the 1993 COA, and that DER can thus no longer rely on their violation as a basis for its civil penalty complaint. On this basis, East Penn avers that DER's complaint fails to state a cause of action upon which relief can be granted.

We treat a preliminary objection that a complaint fails to state a cause

of action as a preliminary objection in the nature of a demurrer under Pa.R.C.P. 1028(a)(4). See DER v. CBS, Inc., 1993 EHB 1610. The test for whether a demurrer should be sustained is "whether it is clear and free from doubt from the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish his right to relief." DER v. Monessen, Inc., 1991 EHB 568 (quoting Lewin v. Commonwealth, Board of Medicine, 112 Pa. Cmwlth. 109, 535 A.2d 243 (1987)). In making this determination, we must accept "as true all well-pleaded, material and relevant facts, and every inference fairly deduced from these facts." CBS at 1616 (quoting County of Allegheny v. Commonwealth, 507 Pa. 360, ____ , 490 A.2d 402, 408 (1985)). The Board "may not, however, accept 'conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion' contained in the challenged pleading, nor may it accept facts averred by the demurring party that are not apparent from the face of that pleading." CBS at 1616 (quoting Martin v. Cmwlth., Department of Transportation, 124 Pa. Cmwlth. 625, ____, 556 A.2d 969, 971 (1989)).

It appears from the facts pleaded in DER's complaint and the inferences from those facts that DER has established its claim to assessment of civil penalties against East Penn. We reach this conclusion based on DER's allegations that East Penn repeatedly discharged industrial wastewater from its facility to the ore pit (and ultimately to the groundwater) which did not meet the effluent limits of East Penn's permit. Such discharges are violations of sections 301 and 307 of the Clean Streams Law, which prohibit the discharge of pollutants into waters of the Commonwealth, without regard to the willfulness of the discharge, other than pursuant to a permit or prior authorization of DER. See DER v. Monessen, Inc., 1992 EHB 247, 253. Pursuant to section 605 of the Clean Streams Law, an assessment of civil penalties is appropriately made for a violation of

a provision of the Clean Streams Law or a condition of any permit issued pursuant to the Clean Streams Law. Thus, it appears that if everything alleged in DER's complaint is true, DER has stated a claim against East Penn.

DER has attached a copy of the 1993 COA to its Reply to New Matter and Answer to Preliminary Objection as Exhibit A. DER points to paragraphs 6, 7, and 13 of the 1993 COA as supporting its argument that the 1993 COA did not supersede, rescind, or revoke the effluent limits in the 1976 WQM permit. East Penn, on the other hand, contends that paragraph G of the COA, when read in conjunction with paragraph 13, shows that DER did not reserve a right to institute the instant complaint against East Penn.

Paragraph 6 of the COA provides:

> 6. Upon approval of this [COA] by the [Board], NPDES Permit No. PA 0055310, the CO&A and the Administrative Order issued by [DER] to East Penn on November 26, 1990 shall be deemed revoked and rescinded.

Paragraph 7 of the COA provides:

> 7. East Penn shall continue its discharge of treated industrial waste into the Ore Pit in accordance with the WQM Permit and with the revised effluent limitations set forth below until such time as East Penn has completed implementation of the selected option pursuant to Paragraphs 2 and 5 herein, whichever completion date comes first. Such revised effluent limitations are as follows...

Paragraph 13 of the COA provides:

> 13. <u>Reservation of Rights.</u> With regard to matters not addressed by this [COA], [DER] specifically reserves all rights to institute equitable, administrative, civil and criminal actions, for any past, present or future violations of any statute, regulation, permits or order and East Penn reserves all defenses to such actions otherwise available at law.

Paragraph G of the 1993 COA states:

> G. Analyses of East Penn's industrial waste discharge to the ore pit from October, 1976 to the present and examination of industrial waste operation reports submitted by East Penn from October, 1976 to the present indicate that East Penn has failed to consistently meet all effluent limitations contained in the CO&A and the WQM Permit.

We reject East Penn's interpretation of paragraphs G and 13 as resulting in the COA's having addressed the civil penalty assessments which DER now seeks. The 1993 COA does not address civil penalties for East Penn's past violations of effluent limitations discussed at paragraph G. Thus, DER has reserved its right to seek these civil penalty assessments pursuant to paragraph 13 of the 1993 COA.

East Penn cites Nazareth Borough v. DER, 1988 EHB 1148, arguing that the Board has held that permit appeals must be dismissed where DER has acted to amend, supersede, or revise the permit. This decision is not on point. In Nazareth, the appellant was challenging the effluent limitations in its National Pollutant Elimination System (NPDES) permit. After the appeal was filed, the contested effluent limitations were superseded by a COA entered into by the appellant and the issuance of a revised permit. We thus concluded in Nazareth that we were precluded by these changed circumstances from being able to afford the appellant any effective relief. Our holding in Nazareth does not mean that past violations of effluent limitations in a revoked permit are not actionable by DER.

East Penn further cites Public Interest Research Group v. Carter-Wallace, Inc., 684 F.Supp. 115 (D.N.J. 1988), arguing that the district court's reasoning in that case supports East Penn's contention that a permittee such as East Penn "should not have to look back over its shoulder for the possibility of an enforcement action based upon the conditions of a permit which are no longer in effect." In Carter-Wallace, a citizens' group brought suit against Carter-

Wallace, which manufactured consumer products, alleging Carter-Wallace had violated its 1975 and 1985 NPDES permits and seeking an assessment of civil penalties on Carter-Wallace pursuant to the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§1319(c) an 1365(a). The federal district court addressed the question of the proper scope of citizens' suits under the federal Clean Water Act, as Carter-Wallace was arguing that it should be granted summary judgment as to violations of its 1985 permit that pre-dated the filing of the complaint and all violations of the expired 1975 permit. The district court rejected Carter-Wallace's reading of the citizens' suit provision of the Clean Water Act as allowing only civil penalties for post-complaint violations, and instead concluded that a citizen suit may seek penalties for violations of an expired permit only on the basis of those conditions of the expired permit which have been carried over to the current permit and which, therefore, are presently in force.

This proceeding is not a citizens' suit but one brought by the regulatory agency. It is not brought under the Federal Clean Water Act but the Clean Streams Law, which pre-dates and is not merely coextensive with the Clean Water Act. Moreover, this Complaint appears to deal with violations of effluent limitations in a state permit rather than an NPDES permit. Thus, we see no basis for application of a Carter-Wallace rationale here and reject East Penn's assertion we should apply it.

East Penn's further argument, based on Carter-Wallace, that the 1993 COA did not carry forward the 1976 permit's effluent limitations for lead, antimony, arsenic, zinc, copper and nickel requires the making of an evidentiary record to support it. Thus, even if we put aside the above rejection of Carter-Wallace, at the preliminary objection stage in this proceeding we cannot consider whether

this argument has any merit. DER v. Sharon Steel Corporation, 1976 EHB 316, 325.

Finally, insofar as East Penn's preliminary objection incorporates the equitable defenses raised in its New Matter, these defenses are not raisable as preliminary objections. See Pa.R.C.P. 1028(a). Moreover, proof thereof again requires an evidentiary record, so these arguments also run afoul of Sharon Steel, *supra*.

Accordingly, we deny East Penn's Preliminary Objection.

ORDER

AND NOW, this 21st day of October, 1994, it is ordered that East Penn's preliminary objection is denied. It is further ordered that the stay of East Penn's obligation to respond to DER's Motion For Partial Summary Judgment is lifted and East Penn shall file its response to DER's Motion with this Board on or before **November 10, 1994**.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: October 21, 1994

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