

Environmental Hearing Board

Adjudications and Opinions



1994

Volume IV

COMMONWEALTH OF PENNSYLVANIA

Maxine Woelfling, *Chairman*

MEMBERS
OF THE
ENVIRONMENTAL HEARING BOARD

1994

Chairman.....MAXINE WOELFLING
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(Resigned August 1, 1994)

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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.

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
 2nd FLOOR - MARKET STREET STATE OFFICE BUILDING
 400 MARKET STREET, P.O. BOX 8457
 HARRISBURG, PA 17105-8457

M. DIANE SMITH
 SECRETARY TO THE BOARD

EDMUND WIKOSKI

v.

COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL RESOURCES

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EHB Docket No. 91-183-MR

Issued: October 25, 1994

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

By Robert D. Myers, Member

Syllabus:

The Board holds that the removal of sandstone from a bluestone quarry for use in the construction of parking lots requires a permit under the Noncoal Act. The sandstone is a marketable mineral, for the removal of which Appellant received money's worth in the exposure of bluestone he wanted to mine. Since more than 2,000 tons of sandstone were removed, Appellant needed a large noncoal mining license. DER was justified in issuing a Compliance Order requiring Appellant to obtain a large noncoal mining permit and a large noncoal mining license.

Procedural History

Edmund Wikoski (Appellant) filed a Notice of Appeal on May 7, 1991 seeking review of Compliance Order (C.O.) 91-5-070-N issued on March 29, 1991 by the Department of Environmental Resources (DER). The C.O. charged Appellant with violating the Noncoal Surface Mining Conservation and Reclamation Act (Noncoal Act), Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. §3301 *et seq*, by mining without a proper license and by failing to comply with C.O. 91-5-046(A) at a site in Windham Township, Wyoming County. The C.O. directed Appellant to

cease mining and to obtain a large noncoal mining license and a large noncoal mining permit.

In an Opinion and Order dated May 13, 1992 (1992 EHB 642), the Board, *inter alia*, ordered Appellant to supplement his pre-hearing memorandum by identifying expert witnesses and setting forth summaries of their testimony. Failure to do so by May 29, 1992 would result in an order prohibiting the calling of such witnesses. On June 10, 1992 the Board issued an Order stating that, since Appellant had failed to supplement his pre-hearing memorandum as directed, he was prohibited from calling expert witnesses.

A hearing was held in Harrisburg on October 26, 1993 before Administrative Law Judge Robert D. Myers, a Member of the Board, at which both parties were represented by legal counsel and presented evidence in support of their legal positions. DER filed its post-hearing brief on January 12, 1994. Appellant filed no post-hearing brief. The record consists of the pleadings, a partial stipulation of facts, a transcript of 195 pages, 2 depositions and 21 exhibits. After a full and complete review of the record, we make the following:

Findings of Fact

1. Appellant is an individual with an address of R.D. #7, Box 78, Tunkhannock, PA 18657 (Stip.).¹

2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Noncoal Act; the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*; 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 adopted pursuant to these statutes.

¹The partial stipulation of facts.

3. Appellant has been in the bluestone (a type of flagstone) surface mining business since 1963, operating a surface mine in Windham Township, Wyoming County (Site), for most of that time (N.T. 124-125; Stip.)

4. Appellant has never obtained a noncoal surface mining permit for the Site from DER pursuant to the Noncoal Act (Stip.).

5. James P. McKenna, a Surface Mine Conservation Inspector for DER whose area includes Appellant's Site, inspected the Site in late spring or early summer of 1990. He informed Appellant that, based on his observations of the size of the operation, Appellant was required to have a "small" noncoal mining license and a "small" noncoal mining permit to operate the Site (N.T. 59-60; Stip.).

6. The terms "small" noncoal mining license and "small" noncoal mining permit arise from distinctions in the Noncoal Act and the regulations at 25 Pa. Code Chapter 77 between operators mining 2,000 tons or less of marketable minerals per year and operators mining more than 2,000 tons of marketable minerals per year. The former are referred to as "small" and the latter as "large" (N.T. 12).

7. Appellant applied for a small noncoal mining license and received it during the summer of 1990 (N.T. 61).

8. On or about September 17, 1990 Appellant submitted to DER's Pottsville District Mining Office application number 401112-66900801-01-0 for a small noncoal surface mining permit applicable to the Site. McKenna had assisted Appellant in completing and submitting the application (N.T. 61-62; Stip.; Exhibit C-1).

9. Appellant conducted noncoal surface mining activities on the Site while the permit application was under review by DER (Stip.).

10. On December 5, 1990 DER requested Appellant to submit a reclamation bond

for the Site in the amount of \$2,000 (2 acres x \$1,000/acre). A bond request occurs when a permit application is administratively and technically in compliance with the Noncoal Act and the regulations and when the permit is otherwise ready to issue (Stip.; Exhibit C-2).

11. Appellant did not submit the bond (Stip.).

12. On March 8, 1991, after observing trucks leaving the Site, McKenna inspected the Site and found that overburden (predominantly sandstone) was being stripped and hauled away. Since Appellant had not yet submitted the bond required for issuance of the permit, McKenna issued C.O. 91-5-046-N on March 8, 1991² citing Appellant for violating the Noncoal Act by mining without a permit and ordering him to cease operations immediately and to submit a reclamation bond by March 28, 1991 (N.T. 64-66; Stip; Exhibits C-5, C-6 and C-7).

13. Appellant filed no appeal with the Board, challenging C.O. 91-5-046-N or C.O. 91-5-046-N amended, and did not petition the Board for a supersedeas (Stip.).

14. On March 14, 1991 DER sent a letter to Appellant reminding him that he was overdue in submitting the reclamation bond requested in DER's letter of December 5, 1990, and notifying him that the application would be returned as incomplete if the bond was not submitted by March 29, 1991 (N.T. 64; Stip.; Exhibits C-3 and C-3A).

15. Later in March 1991 McKenna observed an unusual number of trucks coming into and going out of the Site hauling sandstone to two different projects where it was used in the construction of parking lots. Based on his observations at the Site on March 22, 1991, the number of trucks involved and the size of the

²As issued, C.O. 91-5-046-N contained incorrect dates for the inspection, the date of the order, and the date of service. These dates were corrected on C.O. 91-5-046-N amended which was issued on March 12, 1991.

lots being constructed, McKenna concluded that the sandstone exceeded 2,000 tons (N.T. 66-70; Stip.).

16. On March 29, 1991, McKenna issued C.O. 91-5-070-N, charging Appellant with violating the Noncoal Act by mining without a proper license, and by failing to cease operations and to submit a reclamation bond as required by C.O. 91-5-046-N amended. The C.O. ordered Appellant to cease operations, to apply for a large noncoal mining license, and to apply for and submit a bond for a large noncoal mining permit (N.T. 67-68; Stip.; Exhibits C-8 and C-9).

17. C.O. 91-5-070-N is the subject of the appeal pending before the Board (Stip.).

18. By an undated letter received by Appellant on April 4, 1991, DER returned his permit application as incomplete and advised him that he must cease all mining activities at the Site and to begin reclamation (N.T. 64; Stip.; Exhibits C-4 and C-4A).

19. Appellant had no ownership interest or leasehold interest in either of the two sites to which the sandstone was taken (N.T. 71, 122).

20. Appellant continued to allow the sandstone to be removed because he wanted to expose the bluestone that lay beneath it (N.T. 72).

21. McKenna inspected the Site on April 24, 1991 and on April 29, 1991, taking photographs on the latter date that show the extent of sandstone removed from the Site and used in construction of the parking lots (N.T. 73-80; Exhibits C-11(a) - (i)).

22. About 4,000 to 5,000 tons of sandstone were removed from the Site during March and April, 1991 and used in construction of the parking lots (Stip.).

23. Appellant did not charge a fee for removal of the sandstone (Stip.).

24. Appellant's small noncoal mining license expired on July 31, 1991 and

has not been renewed (Stip.).

25. Appellant has not applied for a large noncoal mining license or a large noncoal mining permit.

DISCUSSION

DER has the burden of proof: 25 Pa. Code §21.101(b)(3). To carry the burden DER must show by a preponderance of the evidence that C.O. 91-5-070-N was issued in accordance with law and was an appropriate exercise of DER's discretion: 25 Pa. Code §21.101(a).

There is no dispute about the fact that sandstone was removed from Appellant's Site and used in the construction of parking lots. While there is some uncertainty about the quantity, it ranged from 4,000 to 5,000 tons. The parties spent much time and energy arguing whether the sandstone constituted overburden or marketable minerals. While this distinction (if there is one) may have some relevance in determining whether Appellant needed a small noncoal mining license or a large noncoal mining license, it has no bearing on the fact that a noncoal mining permit was needed in order for the operation to be legal.

The Noncoal Act in Section 7(a), 52 P.S. §3307(a), states that "...no person shall operate a surface mine...unless the person has first obtained a permit from [DER] in accordance with this act...." "Surface mining" is defined in Section 3, 52 P.S. §3303, as the "extraction of minerals." "Minerals" is defined in the same Section as including "sand and gravel, rock and stone, earth, fill" etc. It is clear, therefore, that the removal of sandstone from Appellant's Site for use in the construction of parking lots amounted to "surface mining" and required a permit. This is true regardless of the fact that Appellant was operating the Site as a bluestone quarry.

The exemptions set forth in the definition of "surface mining" do not

apply. The first (extraction of minerals by a landowner for his own noncommercial use from land owned or leased by him) pertains to a situation where the landowner uses the minerals himself for a noncommercial purpose. Here the minerals were used by a third person to build parking areas or sites unconnected to Appellant. The second (extraction of sand, gravel, rock, stone, earth or fill from borrow pits for PennDOT highway construction) does not apply either since PennDOT was not involved.³ The third (handling of slag on a manufacturing site as part of the process) and fourth (dredging operations in rivers and streams) need no further discussion. The fifth (extraction, etc. of minerals from a building construction excavation on the construction site) requires the minerals to be obtained from the excavation for a building on the construction site. There is no claim here that Appellant's quarry is a building construction site. Nor is there a claim that it is a retail outlet as required for the sixth exemption.

Since a permit was needed to authorize what was done here, DER was fully justified in issuing C.O. 91-5-046-N amended and the permit portion of C.O. 91-5-070-N.

The license portion of C.O. 91-5-070-N cites Section 5(a) of the Noncoal Act, 52 P.S. §3305(a), which provides that "no person shall conduct a surface mining operation unless the person has first applied for and obtained a license from [DER]." Here, Appellant had a license during the time the sandstone was removed. The problem, according to DER, lies in the fact that he had a small noncoal mining license rather than a large noncoal mining license. The distinction, as noted, arises from the size of the operation. Section 5(b) of

³This exemption does make it clear that other borrow operations, such as the one involved here, fall within the definition and require a permit. See also Section 6, 52 P.S. §3306, regarding the supplying of fill for construction projects.

the Noncoal Act, 52 P.S. §3305(b), provides for a reduced license fee for persons mining 2,000 tons or less of marketable minerals per year. Appellant's license was a small noncoal mining license; yet the sandstone removal amounted to much more than 2,000 tons. If the sandstone constituted "marketable minerals," DER was justified in issuing the license portion of C.O. 91-5-070-N.

There is no doubt that the sandstone came within the definition of "minerals" in Section 3 of the Noncoal Act, 52 P.S. §3303, but it is less certain that it is a "marketable" mineral within the intendment of the statute. "Marketable," unfortunately, is not defined in this legislation. Its common meaning, according to *Webster's Third New International Dictionary* (1986), is "fit to be offered for sale in a market"; "wanted by purchasers." On the basis of this definition, all minerals actually removed from a site and transferred to another for money or money's worth would be considered marketable.

Here, the sandstone was removed and hauled to another location where it was used in construction of parking lots. Appellant received no money for it but did receive a benefit from the exposure of the bluestone he wanted to mine. The value assigned to it by Appellant is evident from the fact that, despite receipt of orders from DER to cease operations, he allowed the sandstone removal to continue so that the bluestone would be uncovered. Although Appellant may have considered the sandstone to be useless overburden which had to be removed in order to get to the more valuable bluestone, others saw value in it and were willing to bear the cost of mining it and hauling it away. Appellant was saved that cost. As a result, he received money's worth for the sandstone.

Since Appellant mined more than 2,000 tons of marketable minerals, his small noncoal mining license no longer was valid. He needed a large noncoal

mining license. Accordingly, DER was justified in issuing the license portion of C.O. 91-5-070-N.

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 C.O. 91-5-070-N was lawfully issued and not an abuse of discretion.

3. The removal of sandstone from Appellant's Site for use in construction of parking lots was "surface mining" under the Noncoal Act, requiring a permit.

4. The sandstone was a "marketable mineral" for the removal of which Appellant received money's worth in the exposure of the bluestone.

5. Appellant was required to have a large noncoal mining license for the removal of more than 2,000 tons of sandstone.

6. DER was justified in issuing C.O. 91-5-070-N.

O R D E R

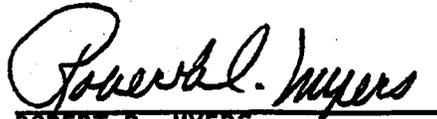
AND NOW, this 25th day of October, 1994, it is ordered that the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

EHB Docket No. 91-183-MR



ROBERT D. MYERS
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: October 25, 1994

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M. DIANE SMITH
 SECRETARY TO THE BOARD

ERIC JOSEPH EPSTEIN

v.

COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL RESOURCES
 and THE HARRISBURG AUTHORITY, Permittee

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EHB Docket No. 94-030-W

Issued: October 27, 1994

**OPINION AND ORDER SUR
 MOTION TO DISMISS OR
TO ALLOW APPEAL NUNC PRO TUNC**

By: Maxine Woelfling, Chairman

Synopsis

A determination by the Department of Environmental Resources (Department) that an application to modify a solid waste disposal permit is "administratively complete" is not an appealable action, and, therefore, the Board has no jurisdiction over an appeal from that determination.

OPINION

This matter arose from the Department's January 1, 1994, notice in the *Pennsylvania Bulletin* that it had received an application from The Harrisburg Authority (Authority) for the modification of Solid Waste Disposal Permits Nos. 100992 and 100759 and that this application was administratively complete. See, 24 Pa.B. 35. With this application, the Authority was seeking permission to transfer ownership of two ash disposal areas at the Harrisburg Steam Generating Facility (facility)¹ from the current owner, the City of Harrisburg, to the

¹The facility is a resource recovery facility that incinerates household municipal waste and nonhazardous industrial solid waste.

Authority. Eric Joseph Epstein (Epstein) filed this appeal on February 2, 1994, requesting that the Board hold in abeyance the Authority's application until several issues concerning operation of the facility were resolved.²

Currently before the Board for resolution is the Authority's July 1, 1994, motion to dismiss Epstein's appeal. The Authority contends the Board lacks jurisdiction over this matter because the Department's January 1 notice, in which the Department merely stated it had received an application for permit modification, was not an appealable action. In the alternative, the Authority contends the Board lacks jurisdiction because Epstein's appeal from that notice was untimely.

The Department filed a motion to dismiss and motion *in limine* also on July 1. In its motion to dismiss, the Department simply joined in the Authority's motion to dismiss. In its motion *in limine*, the Department requested, in the event the appeal was not dismissed, that the Board determine which party bears the burden of proof in this appeal.

Epstein filed his opposition to the motion to dismiss, as well as a motion to allow appeal *nunc pro tunc*, on July 26, 1994. In his opposition to the Authority's motion, Epstein contends he is appealing from the Department's determination that the Authority's application was administratively complete, not from its receipt of the application. Epstein argues that because the Department routinely approves such applications, its determination of administrative completeness was really a *de facto* approval of the application and, therefore, an appealable action. In addition, in his motion to allow appeal *nunc pro tunc*, Epstein admits his appeal from the Department's determination of administrative

²The Department issued the requested permit modifications on March 23, 1994. See, 24 Pa.B. 1883.

completeness was untimely, but contends the delay was caused by the Department's wrongful and negligent actions. Accordingly, Epstein argues he has shown the good cause required for the Board to allow an appeal *nunc pro tunc*.

On August 15, 1994, both the Authority and the Department filed responses to Epstein's motion to allow appeal *nunc pro tunc*, in which they both argue that Epstein's delay in filing a notice of appeal was due to his own personal preoccupation and unavailability, not the Department's wrongful and negligent conduct. Accordingly, they both contend Epstein may not file this appeal *nunc pro tunc*. Surprisingly, neither party addressed Epstein's assertion that he is appealing from the Department's determination of administrative completeness and not from the Department's receipt of the application.

To be appealable, the Department's conduct must amount to either an "action" or an "adjudication." County of Clarion v. DER, et al., 1993 EHB 573, 575; Environmental Neighbors United Front, et al. v. DER and Mill Service, Inc., 1992 EHB 1247, 1250, affirmed, ___ Pa.Cmwlth. ___, 632 A.2d 1097 (1993). An "action" is defined in the Board's rules of practice and procedure as:

Any order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations

25 Pa.Code §21.2(a). An "adjudication" is similarly defined. See, §1 of the Administrative Agency Law, 2 Pa.C.S. §101. The Board has interpreted these two provisions to give it jurisdiction to review any Department decision that is final and affects personal or property rights, privileges, immunities, duties, liabilities, or obligations. County of Clarion, 1993 EHB at 575.

Using these provisions as a guide, the Board has twice held the Department's determination that an application is administratively complete not to be an appealable action. In County of Clarion, supra, and Board of

Commissioners of Union County v. DER, et al., 1992 EHB 1439, affirmed, ___ Pa. Cmwlth. ___, 632 A.2d 1097 (1993), the Board emphasized that the Department does not issue a permit when it makes such a determination. In neither of those cases, therefore, could the Board find that a determination of administrative completeness affected the appellant's personal or property rights, privileges, or obligations. Accordingly, the Board dismissed both of those appeals.

Similarly here, the Department has merely determined that the Authority's application for a permit modification was administratively complete. This determination, alone, does not mean the Department will issue the permit modification. It means, instead, that the Department will proceed to evaluate the merits of the application. Even if the Department, after evaluating the merits, always issues such modifications, Epstein's personal or property rights, privileges, or obligations will not be affected until the Department actually issues the permit modification. The Department's determination is, therefore, not an appealable action.

Epstein contends the Board must find the Department's determination to be an appealable action under the criteria outlined in the Board's decision in Environmental Neighbors United Front, et al. v. DER and Mill Service, Inc., 1992 EHB 1247, 1254. There, the Board stated that the criteria for an appealable action under the Supreme Court's decision in Man O'War Racing Assn. v. State Horse Racing Comm., 433 Pa. 432, 250 A.2d 172 (1969), and the Commonwealth Court's decision in Bethlehem Steel Corp. v. Cmwlth., Dept. of Env. Res., 37 Pa.Cmwlth. 479, 390 A.2d 1383 (1978), could be summarized as follows: 1) the decision-making power and the manner in which it functions is judicial; 2) public policy requires that the action in question be deemed appealable; and 3) the action substantially affects property rights. Environmental Neighbors, 1992 EHB

at 1254. The Board further explained that all three criteria must be satisfied before the agency's conduct can be found to be appealable. *Id.* at 1255.

Looking first at public policy, the Board finds in this instance that it requires the Department's determination to be not appealable. As explained in Phoenix Resources, Inc. v. DER, 1991 EHB 1681, 1684:

[I]t was never intended that the Board would have jurisdiction to review the many provisional, interlocutory 'decisions' made by DER during the processing of an application. It is not that these 'decisions' can have no effect on personal or property rights, privileges, immunities, duties, liabilities or obligations; it is that they are transitory in nature, often undefined, frequently unwritten. Board review of these matters would open the door to a proliferation of appeals challenging every step of DER's permit process before final action has been taken. Such appeals would bring inevitable delay to the system and involve the Board in piecemeal adjudication of complex, integrated issues.

Because the Department's determination of administrative completeness has not affected Epstein's rights, public policy requires that it be not appealable. Otherwise, the Board's dockets would become clogged with appeals from meaningless Department actions, while personal or property rights languished as a result of the delay. *See also, Environmental Neighbors United Front, et al. v. Dept. of Env. Res.*, ___ Pa.Cmwth. ___, 632 A.2d 1097 (1993) (public policy disfavors piecemeal appeals, which create unnecessary delay and confusion). Since public policy does not support Epstein's position, there is no need to determine whether the other criteria are satisfied. *See, Environmental Neighbors*, 1992 EHB at 1255.

Accordingly, the Board finds the Department's determination that the Authority's application for permit modification was administratively complete was not an appealable action. The Authority's motion is granted and Epstein's appeal is dismissed. *See, County of Clarion*, 1993 EHB at 576.

Because the Board has found the Department's determination was not an appealable action, there is no need to resolve Epstein's motion to allow his appeal from that determination *nunc pro tunc*. The Board lacks jurisdiction over an appeal from that determination whether or not Epstein's untimely filing was the result of the Department's negligent and wrongful conduct. Similarly, there is no need to dispose of the Department's motion *in limine*.

With respect to Epstein's request that the Board allow him to file an appeal *nunc pro tunc* from the Department's March 23, 1994, issuance of the permit modification, the Board finds he has not yet filed any appeal from that action. Without a notice of appeal and a formal motion to allow appeal *nunc pro tunc*, it would be premature to determine whether Epstein had good cause for failure to file a timely appeal from that action. Accordingly, the Board declines to rule on Epstein's request.

ORDER

AND NOW, this 27th day of October, 1994, it is ordered that the Authority's motion to dismiss is granted, and Epstein's 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: October 27, 1994

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M. DIANE SMITH
 SECRETARY TO THE BOARD

ELECTRIC MOTOR AND SUPPLY, INC.

v.

**COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL RESOURCES**

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EHB Docket No. 92-152-W

Issued: October 31, 1994

**OPINION AND ORDER SUR
 RULE TO SHOW CAUSE**

By: Maxine Woelfling, Chairman

Synopsis

When an appellant fails to respond to a rule from the Board and indicates in status reports and correspondence that it no longer objects to an order of the Department of Environmental Resources (Department) and that it is making every effort to comply with the order, its appeal will be dismissed as moot.

OPINION

This matter arose from the Department's March 9, 1992, Order to Electric Motor & Supply, Inc. (EM&S) concerning groundwater contamination and the unpermitted disposal of hazardous and industrial waste at EM&S' electric motor repair and manufacturing facility in East Petersburg, Lancaster County (Notice of Appeal). EM&S filed a timely notice of appeal from this Order on April 13, 1992.

Currently before the Board for disposition is the July 21, 1994, rule to show cause why EM&S' appeal should not be dismissed as moot. The Board issued this rule because it appeared from EM&S' status reports that EM&S

no longer challenged or objected to the Order, but was, instead, attempting to fully comply with that Order.

The Department filed a response to the rule on August 12, 1994, in which it, surprisingly, objected to the Board dismissing this appeal as moot. The Department contends the Board may still grant EM&S effective relief by affirming its appeal, which would relieve EM&S of its obligation to complete groundwater remediation. The Department notes that EM&S has not completed the groundwater remediation required by the Order, nor has it agreed to do so.

Even more surprising, however, was EM&S' failure to respond to the rule to show cause. The Board has repeatedly ruled that failure to comply with a Board order is a ground for dismissal, particularly when it ignores a deadline set forth in a rule to show cause. See, James A. Lazarchik v. DER, 1993 EHB 796, 798-799. Therefore, dismissal of the appeal on this basis is warranted. However, even if the Board treats EM&S' failure to respond as an admission that its appeal is moot, dismissal still is appropriate. In addition to this admission, EM&S' conduct also indicates that its appeal is moot. In its last status report to the Board, dated July 15, 1994, counsel for EM&S wrote:

I have checked with Mountain Research, Inc., the environmental specialist my client has hired to abate the problem and work with DER. It is my understanding that my client is now in the process of taking affirmative action to correct the situation. How long it will be before the situation is totally corrected I do not know, however I will keep you advised of the status of this matter.

EM&S' seven previous status reports and letters to the Board similarly indicated that it was working to identify and correct all of the problems at

the facility.¹ In none of these reports did EM&S indicate that it objected to the Order. Based on these status reports and letters, it appears to the Board that EM&S is no longer challenging the Order but is, instead, only attempting to satisfy its obligations thereunder.

An appeal becomes moot when the Board can no longer grant the relief requested. Solar Fuel Co., Inc. v. DER, EHB Docket No. 93-353-E (Opinion issued May 16, 1994). Because the Board's role in this appeal is merely to determine whether the Order was contrary to law or an abuse of the Department's discretion, see, Al Hamilton Contracting Company, Inc. v. DER, EHB Docket No. 88-113-W (Adjudication issued July 27, 1994), and EM&S no longer objects to that Order, there is nothing left for the Board to decide. Furthermore, because EM&S originally sought to be relieved of its obligation to comply with the terms of the Order, but no longer appears to be seeking that relief, there is no relief for the Board to grant. This appeal is, therefore, moot.

The Department objects to dismissing this appeal because EM&S has not completed its remediation work, nor has it agreed to do so. Apparently, the Department believes the Board should maintain jurisdiction over this appeal in order to assure that EM&S satisfies its obligations under the Order. Supervision of EM&S' compliance with the Order is outside the scope of the Board's jurisdiction. Even if the Board does not dismiss this appeal, it lacks the authority to compel EM&S to comply with the terms of the Order. See, Clark R. Ingram, et al. v. DER, 1993 EHB 1849 (the Board lacks the authority to enforce an order of the Commonwealth Court requiring appellants

¹EM&S' seven earlier status reports were filed with the Board on June 11, October 6, and December 28, 1992, February 25, April 19, and October 15, 1993, and April 11, 1994.

to comply with an earlier Department order). This authority lies, instead, with Commonwealth Court and the courts of common pleas. See, 35 P.S. §§691.601(a), §8502(a), 6018.603, and 6018.604, and 42 Pa.C.S. §8502(a).

O R D E R

AND NOW, this 31st day of October, 1994, it is ordered that:

- 1) The rule is made absolute; and
- 2) EM&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. Ehmman

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: October 31, 1994

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M. DIANE SMITH
 SECRETARY TO THE BOARD

ADAMS SANITATION COMPANY, INC.

v.

COMMONWEALTH OF PENNSYLVANIA
 DEPARTMENT OF ENVIRONMENTAL RESOURCES

:
 : EHB Docket No. 90-375-W
 : (Consolidated Docket)
 :
 : Issued: November 1, 1994
 :

**OPINION AND ORDER SUR
 MOTION FOR RECONSIDERATION**

By Maxine Woelfling, Chairman

Synopsis

A Department of Environmental Resources (Department) motion for reconsideration of an opinion and order granting in part and denying in part a motion for summary judgment is denied. Reconsideration of an interlocutory order is inappropriate where there are no exceptional circumstances.

A defect in a motion for summary judgment cannot be cured through a motion for reconsideration.

OPINION

This matter was initiated with the filing of notices of appeal by Adams Sanitation Company, Inc. (Adams) seeking review of two actions of the Department concerning a municipal waste landfill owned by Adams and located in Tyrone Township, Adams County. Adams filed the first notice of appeal on September 11, 1990, challenging an August 21, 1990, letter Adams received from the Department which directed Adams to replace the water supply of a residence on a plot adjacent to the landfill. Adams filed the second notice of appeal on November 8, 1990, contesting an October 22, 1990, order issued by the Department which

directed Adams to abate groundwater and surface water contamination emanating from the landfill.

Upon the joint request of the parties, the Board consolidated both appeals at Docket No. 90-375-W on December 4, 1990.

The current controversy involves a Department motion and supporting memorandum, filed on April 11, 1994, requesting that the Board reconsider its April 5, 1994, opinion and order granting in part, and denying in part, a Department motion for summary judgment. See, Adams Sanitation Company, Inc. v. DER, EHB Docket No. 90-375-W (Consolidated Docket) (opinion issued April 6, 1994). As noted in that opinion, the Department's motion for summary judgment failed to address a number of the issues raised in Adams' notices of appeal. In its notices of appeal to both actions, Adams asserted, among other things, that the Department had acted outside the scope of its authority, had engaged in an unconstitutional "taking" without just compensation, had deprived Adams of due process of law, and had acted in an arbitrary and capricious manner. The only issues the Department addressed in its motion for summary judgment were: (1) whether the letter was authorized under §1104(a) of the Municipal Waste Planning, Recycling, and Waste Reduction Act (Act 101), the Act of July 28, 1988, P.L. 556, 53 P.S. §4000.1104(a), or under 25 Pa. Code §273.245(c); (2) whether the order was authorized under §316 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.316 (Clean Streams Law); (3) whether the order and letter violated due process because they involved retroactive applications of law; and (4) whether the order and letter violated due process because they were unduly burdensome. We held that the Department was entitled to summary judgment only with regard to the first three of these issues.

In its motion for reconsideration, the Department argues that when the Board determined which matters were at issue in the appeal, it should have looked to the listing of issues in the pre-hearing stipulations, not the issues raised in the notices of appeal. According to the Department, the motion for summary judgment addressed all of the issues listed in the pre-hearing stipulations, and Adams waived any other issues it raised previously. The Department, therefore, asks that the Board: (a) reconsider its opinion and order on the motion for summary judgment; (b) modify the opinion so that it notes that the parties stipulated to the issues pending before the Board; and, (c) change paragraph two of the order, which currently denies the Department's motion with respect "all other issues," to make it clear that there is only one issue remaining before the Board: whether the order and letter violated due process because they were unduly burdensome.

Adams filed a letter with the Board on May 2, 1994, indicating that it did not intend to file a response to the motion for reconsideration.

In the case of an interlocutory order, such as the one involved here,¹ reconsideration will be granted only where "exceptional circumstances" are present. Cambria Coal Co. v. DER, 1991 EHB 361, 363; City of Harrisburg v. DER, 1993 EHB 220, 222. The Department does not assert that any exceptional circumstances are present here, but rather contends that reconsideration is warranted under 25 Pa. Code §21.122(a), a provision of our rules of practice and procedure which applies to final orders. There are no exceptional circumstances which would justify reconsideration of an interlocutory order, and, the Department's motion must be denied.

¹The Department is seeking reconsideration of that portion of the order which denies its motion for summary judgment.

The Board cannot grant summary judgment on the basis of intentions not expressly articulated in writing by the parties. All that the motion for summary judgment said concerning which issues were involved in the appeal was that "The only issues relevant to this Motion...are the purely legal issues of whether...the Department has the authority to require Adams to restore or replace the...water supply and to require Adams to submit and implement a groundwater pollution abatement plan that addresses the entire...[1]andfill, and whether these requirements violate Adams' right to substantive due process." The Department's motion for summary judgment, p. 12, ¶60. The motion did not refer to the pre-hearing stipulations or identify any other authority in support of this proposition. Nor did the Department file a separate motion to limit the issues in the appeal to those listed in the response to Pre-Hearing Order No. 2. Instead, the Department seems to have assumed just what it assumes in its motion and memorandum for reconsideration: that parties waive any issues they fail to include in their response to Pre-Hearing Order No. 2.

That assumption is incorrect. While the Board has held that issues not included in response to Pre-Hearing Order No. 1 may be deemed waived, see e.g., James E. Wood v. DER, 1993 EHB 299, and Beltrami Enterprises, Inc. v. DER, 1988 EHB 348, there is good reason to distinguish between issues omitted from the pre-hearing memorandum, submitted in response to Pre-Hearing Order No. 1, and those omitted from a response to Pre-Hearing Order No. 2. Pre-Hearing Order No. 1 contains language expressly warning parties that they may be deemed to have waived issues omitted from their pre-hearing memorandum. Pre-Hearing Order No. 1, ¶5. Indeed, we have frequently pointed to that language where we have held that parties have waived those issues. See, e.g., Beltrami Enterprises, 1988 EHB at 355, and Western Hickory Coal Co. v. DER, 1983 EHB 89, at 96, aff'd, 86

Pa. Cmwlth. 562, 485 A.2d 877 (1984). Pre-Hearing Order No. 2 contains no comparable provision. It merely states that parties must submit a stipulation containing, among other things, a "statement of the legal issues upon which the matter turns." Pre-Hearing Order No. 2, ¶1(g).

While the Board has noted on previous occasions that its pre-hearing procedure operates as a "winnowing process" to narrow and refine the issues for hearing, Wood, 1993 EHB at 302, we have also stated that it is in the pre-hearing memorandum that the theories a party may raise at hearing are finalized. Midway Sewerage Authority v. DER, 1991 EHB 1445, 1473.² Furthermore, even where a party does omit an issue from its pre-hearing memorandum, the Board is reluctant to deem that issue waived unless necessary to prevent prejudice to the opposing party. See, e.g., Kenneth P. Koretsky v. DER, EHB Docket No. 93-357-W (Opinion issued July 1, 1994) at p. 5, and Max Funk, et al., v. DER, et al., 1988 EHB 1242. Given the fact that the issues involved in a hearing are finalized in the pre-hearing memorandum and that Pre-Hearing Order No. 2 contains no warning about waiver, the Board will not deem issues omitted from the response to Pre-Hearing Order No. 2 to be waived absent either 1) clear language in the parties' response to Pre-Hearing Order No. 2, or 2) a motion from a party, with a showing that the party will suffer prejudice if the issues are not waived.

Even the relief requested in the Department's motion for reconsideration does not support a conclusion that there are exceptional circumstances here. We held that the Department was entitled to summary judgment on all but one of the issues it specifically addressed in its motion and memorandum, but we denied

²Adams' pre-hearing memorandum raised a number of issues which were not listed in Adams' response to Pre-Hearing Order No. 2 nor addressed in the Department's motion for summary judgment.

summary judgment with respect to "all other issues." Adams Sanitation Company, p. 19. The Department's motion for reconsideration asks that we amend the opinion and order to make it clear that those issues were the only ones remaining in the appeal at the time the Department moved for summary judgment and that the only issue remaining now is whether the Department's letter and order were unduly burdensome, depriving Adams of its right to due process. This we will not do. Our decision on the motion for summary judgment did not hold that there were issues remaining in the appeal other than whether the Department's letter and order were unduly burdensome. We simply concluded that the Department had not established that this was the only issue remaining in the appeal. The order stated that the Department's motion was denied with respect to "all other issues"--as opposed to "the issue of whether the letter and order were unduly burdensome." The simple fact that this language can be interpreted as applying to more than the issues listed by the parties in response to Pre-Hearing Order No. 2 does not constitute "exceptional circumstances" justifying reconsideration of an interlocutory order. If the Department wanted to ensure that issues omitted from the response to Pre-Hearing Order No. 2 were no longer at issue in the appeal, it should have addressed that question in its motion for summary judgment or in a motion to limit issues. It cannot cure a defect in its motion for summary judgment through a motion for reconsideration.

O R D E R

AND NOW, this 1st day of November, 1994, it is ordered that the Department's motion for reconsideration is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: November 1, 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. 94-120-W
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and BOROUGHES OF OLD FORGE AND TAYLOR	:	Issued: November 1, 1994
AND CITY OF SCRANTON, Intervenors	:	

ADJUDICATION

By: Maxine Woelfling, Chairman

Synopsis

An appeal from the Department of Environmental Resources' (Department) disapproval of information submitted pursuant to a solid waste disposal permit modification is sustained. The appellant has shown by a preponderance of the evidence that the Department's disapproval was an abuse of discretion. Because the appellant has also shown it is clearly entitled to the Department's approval, we substitute our discretion for that of the Department and approve the appellant's submission as satisfying the requirements of the permit modification.

INTRODUCTION

Presently before the Board for adjudication on the merits is the May 19, 1994, Notice of Appeal filed by Empire Sanitary Landfill, Inc. (Empire) from the Department's May 12, 1994, disapproval of Empire's April 29,

1994, request for approval of ash¹ sample results from the Union County Utilities Authority's (UCUA) Resource Recovery Facility (UCUA facility) in Rahway, Union County, New Jersey. This adjudication resolves just one of several appeals currently before the Board concerning Empire's authority to dispose of ash from the UCUA facility at the Empire Sanitary Landfill (Landfill) in Taylor Borough and Ransom Township, Lackawanna County.

On February 25, 1994, the Department issued Empire a Modification to its solid waste disposal permit (Permit Modification), authorizing Empire to dispose of ash from the UCUA facility. Pursuant to the terms of this Permit Modification, on April 29, 1994, Empire submitted to the Department, for the Department's approval, the following documents: an "Ash Residue Test Protocol," outlining how Empire proposed to analyze the ash it received for disposal; the laboratory results from 10 days worth of ash samples from the UCUA facility; and the Department's Form 41 "Municipal Incinerator Ash Residue Monitoring Report" (April 29 submission).

Empire accepted ash from UCUA on May 5, 1994. The Department, apparently believing that Empire was not authorized to accept any ash until its April 29 submission was approved, issued Empire a compliance order (C.O.) that same day. The C.O. cited Empire for accepting ash without prior approval of its submission and ordered Empire to cease accepting ash from UCUA. Empire filed a Notice of Appeal from this C.O., as well as a petition for supersedeas on May 13, 1994. Empire's appeal was docketed at No. 94-114-W.

On May 12, 1994, the Department notified Empire that it would not approve Empire's April 29 submission because: Empire's testing protocol did

¹All references to "ash" in this opinion are to ash from a municipal waste incinerator/resource recovery facility.

not conform with the Toxicity Characteristics Leaching Procedure (TCLP) described in EPA Method 1311; the Department had to re-evaluate its policy concerning the disposal of ash at municipal waste landfills in light of the United States Supreme Court's May 2, 1994, decision in City of Chicago v. Environmental Defense Fund, ___ U.S. ___, 114 S.Ct. 1588, ___ L.Ed.2d ___ (1994); Empire had failed to respond to the Department's April 28, 1994, order and civil penalty assessment regarding malodors and the current active area of the Landfill; and Empire had accepted waste in violation of the terms of the Permit Modification, resulting in the May 5 C.O.² Empire filed a notice of appeal from this disapproval on May 19, 1994, which was docketed at No. 94-120-W.

The Department also issued Empire an order (Suspension Order) on May 12, 1994, which: suspended Empire's Permit Modification; prohibited Empire from disposing of the UCUA ash already at the Landfill; required Empire to manage and remove that ash; required Empire to reduce the size of the current active area of the Landfill; and required Empire to submit a testing protocol that conforms with federal and state law for generators of potentially hazardous solid waste. Empire filed a notice of appeal from this suspension order and a consolidated petition for supersedeas on May 20, 1994. This appeal was docketed at No. 94-121-W. In its consolidated petition for supersedeas, Empire requested a supersedeas of both of the Department's May 12 actions and further requested that its consolidated petition be considered

²The Department has since withdrawn the third and fourth reasons for disapproving Empire's testing protocol and sample results (June 14 N.T. 38). References to the transcript will be as follows: "N.T. ___" refers to testimony taken at the supersedeas hearing on May 23 and 24, 1994; and "June 14 N.T. ___" refers to testimony taken at the merits hearing on June 14, 1994.

along with its petition for supersedeas of the May 5 C.O., which was already scheduled to be heard on May 23, 1994.

On May 20, 1994, we issued an order granting the petitions to intervene filed by the City of Scranton and the Boroughs of Taylor and Old Forge, and consolidated all three of Empire's appeals at Docket No. 94-114-W.

A supersedeas hearing was held on May 23 and 24, 1994, before Chairman Woelfling at the Board's offices in Harrisburg. After receiving the parties' briefs on the matter, the Board issued an order on June 3, 1994, denying Empire's petition to supersede the May 5 C.O. and granting Empire's petition to supersede the May 12 Suspension Order. With respect to Empire's petition to supersede the May 12 disapproval of its testing protocol, the Board found that Empire had satisfied the requirements for supersedeas in 25 Pa.Code §21.78(a), but could not issue a supersedeas because it would alter the *status quo*.³

An expedited hearing on the merits of Empire's appeal from the Department's disapproval of Empire's April 29 submission was held on June 14, 1994, before Chairman Woelfling at the Board's offices in Harrisburg. Because Empire and the Department elected to have this matter adjudicated on the basis of the record produced at the supersedeas hearing, only the Intervenors introduced additional evidence into the record. The parties submitted their post-hearing briefs on June 27 and 28, 1994. Any issue not raised in the post-hearing briefs is deemed to have been waived. Lucky Strike Coal Co. v. Cmwlth., Dept. of Environmental Resources, 119 Pa.Cmwlth. 440, ___, 547 A.2d 447, 449 (1988).

³Empire also sought, *inter alia*, a preliminary injunction from the Commonwealth Court at No. 216 M.D. 1994. The Department's C.O. and Suspension Order were enjoined in an August 8, 1994 order.

The record in this matter consists of 743 pages of testimony and 23 exhibits from the supersedeas hearing on May 23 and 24, 1994, and the merits hearing on June 14, 1994. After a full and complete review of this record, we make the following findings of fact.

FINDINGS OF FACT

1. Appellant is Empire, a business corporation incorporated and organized under the laws of the Commonwealth of Pennsylvania with its principal place of business at 398 South Keyser Avenue, Taylor, Pennsylvania 18517 (Notice of Appeal).

2. Appellee is the Department, the agency of the Commonwealth with the power and duty 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 Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §6018.101 *et seq.*; the Municipal Waste Planning, Recycling and Waste Reduction Act of 1988, the Act of July 28, 1988, P.L. 556, *as amended*, 53 P.S. §4000.101 *et seq.*; Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §510-17; and the rules and regulations promulgated thereunder.

3. Intervenors are the City of Scranton, a political subdivision with its principal offices at 340 North Washington Avenue, Scranton, Pennsylvania; the Borough of Taylor, a political subdivision with its principal offices at 122 Union Street, Taylor, Pennsylvania; and the Borough of Old Forge, a political subdivision with its principal offices at 310 South Main Street, Old Forge, Pennsylvania (Petitions to Intervene).

4. Empire operates the Landfill pursuant to Solid Waste Disposal Permit (Permit) No. 100933, which was originally issued on March 14, 1986 (Ex. A-3).⁴

The Permit Modification

5. Using the Department's Form 36, Empire applied for authorization to dispose of ash from the UCUA facility on December 26, 1992 (Ex. A-4).

6. Empire and the Department entered into a Memorandum of Understanding on February 25, 1994, which required the Department to issue Empire a Permit modification authorizing Empire to accept ash from the UCUA facility (Ex. C-C).

7. The Department issued Empire the Permit Modification on February 25, 1994, authorizing Empire to accept and dispose of ash from the UCUA facility (Ex. A-1).

8. In the Permit Modification, the ash was described as follows:

The waste is lime-stabilized ash residue (bottom ash and fly ash combined) from burning mixed municipal waste. The ash is a result of the incineration of municipal solid waste, animal and food processing wastes, vegetable waste, and NJ DEPE type 27 dry industrial wastes. The lime stabilization sets up in a monolithic formation similar to low strength concrete and minimizes permeability, mobility, leachability, and airborne particulate matter associated with the combined ash.

(Ex. A-1).

9. Under §3(a) of the Permit Modification, Empire could only accept ash that satisfied the following limits:

⁴References to the parties' exhibits will be as follows: "Ex. A-" refers to Empire's exhibits; and "Ex. C-" refers to the Department's exhibits.

<u>Constituent</u>	<u>Concentration</u>
Lead (Pb)	< 5.0 ppm
Chromium (Cr)	< 5.0 ppm
Cadmium (Cd)	< 1.0 ppm

(Ex. A-1).

10. The characteristics of the ash were to be determined using the Toxicity Characteristic Leaching Procedure (TCLP) as applied to the mean concentration of ash sampled, analyzed, aggregated, and evaluated to the 90% confidence level pursuant to the most recent edition of EPA Manual SW-846 (Ex. A-1).

11. The TCLP is a test designed to simulate the leaching effect of weak organic acids that are present in a landfill (N.T. 490).

12. The TCLP is also known as EPA Method 1311 (Method 1311) (N.T. 133, 205; Exs. A-6, §8, A-7, and A-9).

13. The TCLP is one of two testing methods found in Chapter 8.4 of EPA Publication SW-846, Third Edition, Update I, "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods" (58 F.R. 46040, 46043).

14. Under §3(c)(i) of the Permit Modification, before Empire could accept ash from UCUA it had to either: a) submit ash sampling data analyzing 15 days of operation of the UCUA facility; or b) submit for the Department's approval the information required by Section IIB of Form 36 (Ex. A-1).

15. Section IIB of Form 36, entitled "Chemical Analyses" requires the applicant to attach: 1) the results of the total analyses of the waste as specified in the instructions;⁵ 2) the results of the leaching tests as described in the instructions, including the leaching methods; 3) the range

⁵The instructions for Form 36 were not introduced into evidence.

of concentrations of constituents based on knowledge or past analyses; and 4) a description of the composite sampling method and test protocol for meeting the requirements of §283.403⁶ (Ex. A-4).

16. The Department was required to complete its review of Empire's submission under §3(c)(i)(b) within three working days of receipt (Ex. A-1).

Empire's April 29 Submission

17. Pursuant to §3(c)(i)(b) of the Permit Modification, on April 29, 1994, Empire submitted: "Sampling Protocol for Ash Being Received at Empire Sanitary Landfill;" "Documentation of PADER's Past Acceptance of Laboratory-Data Adjustments to Account for Moisture and Non-Crushable Fractions in Bulk Ash;" "Statistical Tests for Compliance of Union County Ash with Regulated Limits;" and "PADER Form 41" (April 29 submission) (N.T. 131; Ex. A-7).

18. Empire's sampling protocol consisted of two documents entitled "Field Sample Procedures for Combined Ash Residue at the Union County Resource Recovery Facility" (Field Sample Procedures) and "Waste Energy Residue Sample Preparation Procedure for Union County Resource Recovery Facility" (Sample Preparation Procedures) (Ex. A-7, Attachment A).

19. Empire's documentation of the Department's past acceptance of laboratory-data adjustments consisted of the testing protocol of the Lancaster County Solid Waste Management Authority (Lancaster Protocol) and a copy of a letter indicating the Department's approval of that protocol (Ex. A-7, Attachment B).

⁶25 Pa.Code §283.403(a) and (b) require the operator of a municipal waste incinerator to submit to the Department the results of chemical analyses done on composite samples of the ash produced.

20. The statistical tests indicated, based on testing performed on 60 samples of ash collected from the UCUA facility between March 31 and April 11, 1994, that the concentrations of Pb, Cd, and Cr in the ash were less than the regulatory limit at the 90% confidence level (Ex. A-7).

21. The Department's Form 41 listed the concentrations of 14 different elements in the ash (Ex. A-7).⁷

22. On April 29, 1994, the Department informed Empire that its submission was incomplete because it lacked the raw laboratory data (N.T. 168).

23. Empire faxed the missing information to the Department on Sunday, May 1, 1994 (N.T. 168).

24. On May 3, 1994, Empire's Operations Manager, Alan Stephens, spoke with William McDonnell, Program Manager for the Waste Management Program in the Department's Northeast Field Office, and Robert Lewis, a Solid Waste Supervisor in the same office, about the status of Empire's testing protocol (N.T. 155, 330).

25. During the May 3 conversation, both Mr. McDonnell and Mr. Lewis informed Mr. Stephens that the Department could not reach a decision about Empire's testing protocol until the Department determined the impact of the U.S. Supreme Court's decision in City of Chicago (N.T. 155, 330).

26. The Department informed Empire on May 12, 1994, that it would not approve Empire's April 29 submission because: the testing protocol did not conform with the methodology required by Method 1311; the Department had to re-evaluate its policy regarding the disposal of ash at municipal waste

⁷The analytes listed on Form 41 include aluminum (Al), antimony (Sb), arsenic (As), barium (Ba), Cd, Cr, Copper (Cu), Pb, mercury (Hg), molybdenum (Mo), nickel (Ni), selenium (Se), silver (Ag), and zinc (Zn).

landfills in light of the Supreme Court's decision in City of Chicago; Empire had failed to respond to the Department's April 28, 1994, Order and Civil Penalty Assessment regarding malodors and the current active area of the Landfill; and Empire had accepted waste in violation of the terms of the Permit Modification, resulting in the C.O. (Notice of Appeal).

Empire's Sampling Protocol

27. The Field Sample Procedures are Empire's general requirements for sampling and sample preparation (hereafter referred to as the Empire Protocol) (Ex. A-7).

28. The Sample Preparation Procedures are The Angeline Elizabeth Kirby Memorial Health Center's specific methodology for complying with the sample preparation requirements contained in the Empire Protocol (hereafter referred to as the Kirby Protocol) (Ex. A-7).

29. The results listed on Form 41 are from analyses performed at Kirby, using the Empire and Kirby Protocols, on ash samples from the UCUA facility (N.T. 142, 246-247; Ex. A-7).

30. The Empire Protocol and the Kirby Protocol are not mutually exclusive (Ex. A-7).

31. Sections one and two of the Empire Protocol contain a brief outline of its purpose and the schedule to be followed for sampling ash at the UCUA facility (Ex. A-7).

32. Section three of the Empire Protocol requires that sampling be performed downstream from the ferrous recovery equipment so the samples will represent the ash to be delivered to the Landfill (Ex. A-7).

33. Section three further expressly states how samples are to be taken, combined into composite samples, divided, and delivered to an independent laboratory (Ex. A-7).

34. The Kirby Protocol is silent about the sampling schedule, the location of sampling, the method used for sampling, the creation of composite samples, the division of composite samples, and the delivery of the composite samples (Ex. A-7).

35. Both the Empire Protocol and the Kirby Protocol require the entire sample to be weighed and the weight recorded (Ex. A-7).⁸

36. The Empire/Kirby Protocol requires the following fractions of the sample to be measured and recorded: ferrous and noncrushable materials larger than two inches; sample moisture content; ferrous and noncrushable materials larger than 3/8 inch; crushable material larger than 3/8 inch; and material naturally less than 3/8 inch (Ex. A-7).

37. The Kirby Protocol further describes "ferrous and noncrushable materials" as "metal fragments including cans, nails, wires, etc." (Ex. A-7).

38. The Empire/Kirby Protocol requires the sample to be dried to determine the percentage of moisture in the sample (Ex. A-7).

39. The Kirby Protocol further specifies that the sample is to be dried at 110°C for 18 ± 2 hours (Ex. A-7).

40. The Empire/Kirby Protocol requires the TCLP extraction to be performed on the dried sample (Ex. A-7).

⁸Where the Empire Protocol and the Kirby Protocol require the same procedure to be followed, they will be referred to collectively as the Empire/Kirby Protocol.

41. The Empire/Kirby Protocol states that the TCLP extraction will be performed on the portion of the sample that was originally either a crushable material larger than 3/8 inch or a material smaller than 3/8 inch (Ex. A-7).

42. The Kirby Protocol further specifies that all crushable materials larger than 3/8 inch will be reduced in size by either crushing or grinding (Ex. A-7).

43. The Kirby Protocol explains that metal fragments including cans, nails, wires, etc. can cause damage to the crusher in the particle size reduction step (Ex. A-7)

44. The Empire/Kirby Protocol states that the TCLP extraction will be performed in accordance with the requirements of Method 1311 (Ex. A-7).

45. The Empire Protocol explains that the laboratory results will represent the ash residue on a dry basis, without the ferrous and noncrushable components, and further states that the moisture and ferrous/noncrushable materials removed from the sample will be used to establish the TCLP results that represent the ash as it would be deposited at a landfill (Ex. A-7).

46. Attachment A to Form 41 explains that the values listed "are adjusted to account for moisture and non-crushable fractions which were not subjected to the TCLP procedure," and describes how those adjustments were made (Ex. A-7).

The Parties' Experts

47. Gary Manczka has been Chief of the Department's Soil and Waste Testing Laboratory for eight years (N.T. 484; Ex. A-9).

48. Mr. Manczka supervises the daily operations of the Laboratory's staff (N.T. 486).

49. Mr. Manczka's responsibilities include evaluating how the laboratory's staff applies SW-846 and Method 1311 in the preparation and analysis of samples (N.T. 486).

50. Before becoming Chief of the Soil and Waste Testing Laboratory, Mr. Manczka was an environmental chemist with the Department for two years, where he was also involved in the application of Method 1311 (N.T. 487).

51. Before he was an environmental chemist, Mr. Manczka was an analytical chemist with the Department for 14 years (N.T. 487).

52. Mr. Manczka compared the protocols submitted by Empire with SW-846 and Method 1311 (N.T. 489).

53. Thomas Pullar is a Professional Engineer licensed in the Commonwealth of Pennsylvania and State of New Jersey and is currently a Vice President and Director of Environmental Engineering at American Resource Consultants (June 14 N.T. 45).

54. Prior to his current employment, Mr. Pullar worked for the Department's Bureau of Water Quality Management and AGES Corp., which is an environmental consulting firm (June 14 N.T. 45).

55. Mr. Pullar was offered by Intervenors as an expert in the solid waste management field to explain why the Empire/Kirby Protocol does not comply with the requirements of Method 1311 (June 14 N.T. 46, 63).

56. Mr. Pullar has written approximately six sampling protocols (June 14 N.T. 98).

57. Mr. Pullar admitted that a sampling protocol is limited to how a sample is collected (June 14 N.T. 112).
58. Mr. Pullar has not written any testing protocols (June 14 N.T. 98).
59. Mr. Pullar has never conducted a TCLP analysis (June 14 N.T. 104).
60. Mr. Pullar offered testimony on the differences between the Lancaster Protocol and Method 1311 (June 14 N.T. 66, 67).
61. Mr. Pullar offered no testimony expressly concerning the Empire/Kirby Protocol.
62. Dr. Leonard Bongers has a small business in environmental testing (N.T. 201).
63. Dr. Bongers has a Ph.D. in Biochemical Physiology (N.T. 201, 209).
64. Dr. Bongers has been involved in the management of environmental affairs since 1972 (N.T. 202).
65. Dr. Bongers has been involved with RCRA⁹ regulations, particularly as they concern hazardous waste generated by industry, since they were first proposed in 1978 (N.T. 203).
66. Dr. Bongers has analyzed waste and evaluated the data obtained from such analyses (N.T. 203).
67. In 1988, Dr. Bongers was involved in a comprehensive EPA study concerning the testing of ash generated by five incinerator facilities across the United States (N.T. 204).

⁹The Resource Conservation and Recovery Act, the Act of October 31, 1976, P.L. 94-580, as amended, 42 U.S.C. §6901 *et seq.*

68. Dr. Bongers' role in the study included preparing and analyzing samples of ash (N.T. 204).

69. EPA published a report on the study in 1990 (N.T. 204).

Method 1311

70. Method 1311 does not govern the removal of moisture and ferrous/noncrushable materials, which is required by the Empire/Kirby Protocol (N.T. 212).

71. Method 1311 only governs the analysis of representative samples (N.T. 213).

72. The preparation of a representative sample is governed by 40 C.F.R. Part 261, Appendix I (N.T. 213).

73. Under 40 C.F.R. Part 261, Appendix I, the methods and equipment used for sampling waste materials will vary with the form and consistency of the waste material to be sampled (N.T. 213).

74. It is necessary to develop a specific sample preparation method for each waste being analyzed (N.T. 213).

75. Ash is a completely heterogeneous material, which can be composed of powders, bricks, brake shoes, filings, etc. (N.T. 216).

76. A heterogeneous material may be characterized only by performing a statistical analysis on a series of chemical analyses (N.T. 219).

77. Because ash is completely heterogeneous, it must be analyzed statistically to determine its contents (N.T. 217).

78. The purpose of the Empire/Kirby Protocol is to derive raw laboratory data that can be statistically analyzed (N.T. 214).

79. Because ash is completely heterogeneous, one small sample cannot possibly represent the whole material in a pile or truckload of ash (N.T. 219).
80. Under the standards set forth in SW-846, a representative sample may be a series of samples (N.T. 216).
81. The accuracy of a statistical evaluation increases when more samples are analyzed (N.T. 219).
82. To acquire multiple samples, a single sample of ash is split into a number of subsamples (N.T. 216-217).
83. To split a sample it may be necessary to remove unsuitable materials (those not crushable to less than 3/8 inch) and moisture from the sample (N.T. 214).
84. Larger materials are removed because it may not be possible to crush or cut them to less than 3/8 inch (N.T. 216).
85. Moisture is removed so that materials can be crushed and put through a sample splitter (N.T. 216).
86. Under the Empire/Kirby protocol, each 10 pound sample of ash is split into six 125 gram aliquots and one 500 gram aliquot (Ex. A-7).
87. Each subsample is chemically analyzed to determine its contents (N.T. 216-217)
88. A statistical analysis is performed on the results of the individual chemical analyses (N.T. 217).
89. A statistical analysis yields an average and a standard deviation, from which a confidence interval can be calculated (N.T. 217).
90. Using the confidence interval, it is possible to determine whether waste must be treated as hazardous, or whether specific compounds,

such as Pb, Cr, and Cd, are present in concentrations that exceed the regulatory limits (N.T. 217).

91. If the average of a series of analyses falls within a certain range, it is possible to predict what the next sample series will be and what the ash pile contains (N.T. 217).

Adjusting for the Removal of Moisture and Ferrous/Noncrushables

92. Adjusting laboratory-derived data to account for the pre-analysis removal of moisture and ferrous/noncrushable materials is not governed by Method 1311 (N.T. 214).

93. There is no noncrushable material larger than 3/8 inch that will leach and contribute significantly to the results achieved by a TCLP analysis (N.T. 223, 225, 241).

94. Ash from the UCUA facility goes through a quenching process where it is sprayed with water, dumped into a quenching pit, and remains wet until it is landfilled (N.T. 507).

95. Some chemical changes may occur in the ash during the drying process, but they will be insignificant since the ash is the byproduct of incineration at approximately 2,000 degrees in the UCUA facility (N.T. 226).

96. Some elements become leachable only after the ash has been oven-dried, and will not leach during a TCLP extraction if the ash is not dried (N.T. 226).

97. The laboratory results provided by Empire indicate that adjusting for the removal of moisture and ferrous/noncrushable materials reduces the reported concentrations of almost every analyte (Ex. A-7).

98. The laboratory results provided by Empire, as adjusted for the removal of moisture and ferrous/noncrushable materials, correctly characterize the ash (N.T. 229).

DISCUSSION

The burden of proof in this appeal is on Empire to prove by a preponderance of the evidence that the Department's denial of Empire's April 29 submission was arbitrary, capricious, contrary to law, or an abuse of discretion. 25 Pa.Code §21.101(c)(1); Al Hamilton Contracting Co. v. DER, 1992 EHB 1458, 1486. Where the Board has found that the Department abused its discretion, the Board is authorized, based on the record before it, to substitute its discretion for that of the Department. Warren Sand & Gravel Co. v. Cmwlth., Dept. of Environmental Resources, 20 Pa.Cmwlth. 186, ___, 341 A.2d 556, 565 (1975); Perry E. and Jeanne E. Phillips v. DER, EHB Docket No. 91-071-W (Adjudication issued September 9, 1994). Before the Board will substitute its discretion for that of the Department and approve Empire's April 29 submission, Empire must show it is clearly entitled to that approval. Al Hamilton, 1992 EHB at 1486.

In its post-hearing brief, the Department claims it did not approve Empire's April 29 submission because Empire's testing protocol did not comply with the requirements of Method 1311 and new waste characterization requirements were needed in light of the Supreme Court's decision in City of Chicago, (Notice of Appeal; June 14 N.T. 38). With respect to Empire's testing protocol, the Department specifically contends: Empire submitted three separate protocols and gave no indication which one would be used; Empire provided no information about which laboratory performed which protocol; the three protocols are internally ambiguous, which would allow

different technicians to follow different procedures; the protocols exclude oversize material without performing the size reduction procedures specified in SW-846; the protocols require the sample to be dried, contrary to SW-846; and the protocols allow for the mathematical correction of test results for moisture and oversize materials that were previously removed.¹⁰

In their post-hearing brief, Intervenors attempt to add several additional reasons why Empire's April 29 submission should not be approved. Intervenors claim that Empire has submitted four protocols to the Department but not explained which one will be used, and that under all of these protocols Empire is free to disregard the results which exceed the concentration limits expressed in the Permit Modification and the regulations. Intervenors also claim that the testing required by the protocols is insufficient because it does not comply with the requirements of federal law, as interpreted by the Supreme Court in City of Chicago.

In its post-hearing brief, Empire raises a host of reasons why its appeal should be affirmed, including: the Department has no authority under the SWMA or the regulations thereunder to disapprove Empire's protocol; the Department's disapproval constitutes an adoption of new regulations in violation of the Commonwealth Documents Law, the Act of July 31, 1968, P.L. 769, *as amended*, 45 P.S. §1102 *et seq.*; the Department's disapproval was an abuse of discretion; the Department was equitably estopped from disapproving

¹⁰Throughout these proceedings, counsel for the Department erroneously used the terms "Method 1311," "TCLP," and "SW-846" interchangeably. As we stated in Finding of Fact 13, SW-846 refers to an EPA Publication, No. SW-846, Third Edition, Update I, which is entitled "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods." See, 58 F.R. 46040. Method 1311, which is the TCLP, is merely one of two testing methods found in Chapter 8.4 of SW-846, both of which are used to determine whether a material exhibits the toxicity characteristic (*see*, footnote 11, *infra*).

Empire's protocol; the Department violated Empire's vested rights in the Permit Modification; and Empire's protocol contained, at most, *de minimis* variations from the methodology outlined in Method 1311. In addition, Empire contends the Department's disapproval violated Empire's constitutional rights because it: deprived Empire of its property interest in the Permit Modification as well as its occupational liberty interest, in violation of the 14th Amendment of the United States Constitution and Article I, §1 of the Pennsylvania Constitution; discriminated against Empire without a rational basis or for illegitimate reasons, in violation of the 14th Amendment and Article I, §§1 and 26; deprived Empire of all economically viable use of its property, in violation of the Takings Clauses of the 14th Amendment and Article I, §1; substantially impaired Empire's rights under pre-existing contracts, in violation of Article 1, §10 of the United States Constitution and Article I, §17 of the Pennsylvania Constitution; was a violation of the Commerce Clause of the United States Constitution; and retaliated against Empire because Empire attempted to exercise its constitutional rights.

The Supreme Court's Decision in *City of Chicago*

The first issue we will dispose of is the Department's and Intervenors' claim that the Supreme Court's decision in *City of Chicago* required the Department to disapprove Empire's April 29 submission. In our June 3, 1994, order denying Empire's petition to supersede the Department's disapproval of its submission, we offered a brief glimpse of our position concerning the validity of this argument, stating:

In fashioning this order, little credence has been given to the Department's so-called policy of withholding approvals to dispose of municipal waste incinerator ash until it evaluates the impact of the U.S. Supreme Court's recent decision in *City of Chicago v. EDF.*

After reviewing the Supreme Court's decision, the additional evidence offered by Intervenor, and applicable Pennsylvania law, we see no reason to alter our position.

In City of Chicago, the issue before the Supreme Court was whether the ash generated by the incineration of municipal solid waste is exempt, under §3001(i) of RCRA, 42 U.S.C. §6921(i), from regulation as a hazardous waste. 114 S.Ct. at 1589. Prior to the Court's decision, the U.S. EPA had determined that ash was governed by the "household waste exclusion" in §3001(i) and, therefore, exempt from regulation as a hazardous waste. *Id.* at 1591. The Court disagreed and found that the household waste exclusion only applies to a resource recovery facility, not to the ash it produces. *Id.* As a result, ash, like all other substances not expressly exempted from regulation as a hazardous waste, will be treated as a hazardous waste if it possesses the characteristics of a hazardous waste under 42 U.S.C. §§6903(5) and 6921(a) and 40 C.F.R. §261.3. *Id.* at 1592 (while a resource recovery facility's management activities are excluded from Subtitle C regulation, its generation of "toxic ash" is not).

We can find no plausible reason for the Department to have relied on the Supreme Court's decision in City of Chicago to disapprove Empire's testing protocol. While the Department contends it was necessary to re-evaluate its policy concerning the disposal of ash because ash was no longer automatically exempt from being regulated as a hazardous waste, we find that Empire was never authorized to accept ash that possessed the characteristics of a hazardous waste. Under §3(a) of the Permit Modification, Empire may not accept any ash that contains concentrations of Pb, Cr, or Cd in excess of the regulatory levels for those contaminants. See, 25 Pa.Code §261.24(b), Table I

(listing the maximum concentration of contaminants for the toxicity characteristic).¹¹ Furthermore, under 25 Pa.Code §273.514(a), which sets forth the standards applicable to municipal waste landfills accepting special handling wastes, a municipal waste landfill may only dispose of "[n]onhazardous ash residue from municipal waste incineration."¹² In addition, under 25 Pa.Code §283.403(c), which applies to municipal waste incinerators, ash residue that is hazardous under Chs. 260-265 and 270 must be managed under the applicable laws pertaining to hazardous waste. The Department's position on the effects of the Supreme Court's decision is, therefore, without merit. Regardless of the effect of the Supreme Court's decision on EPA's policies, under applicable Pennsylvania law, Empire is not and never was authorized to accept hazardous ash from the UCUA facility.¹³ Accordingly, the Department abused its discretion in disapproving Empire's testing protocol on the basis of the Supreme Court's decision in City of Chicago.

¹¹The characteristic of toxicity is one of the characteristics used to determine whether a solid waste is hazardous. The other characteristics are ignitability, corrosivity, and reactivity. See, 25 Pa.Code §§261.20 - 261.24. If a solid waste exhibits any of the characteristics described above, it is considered to be hazardous unless it is excluded as a hazardous waste in 25 Pa.Code §261.4. 25 Pa.Code §261.20(a).

¹²Under 25 Pa.Code §271.1, ash residue from a solid waste incineration facility is a "special handling waste."

¹³Commonwealth Court reached the same conclusion in an unreported memorandum opinion that accompanied its order granting Empire's application for preliminary injunction. See, Empire Sanitary Landfill, Inc. v. Cmwlth., Dept. of Environmental Resources, No. 216 M.D. 1994 (Opinion filed August 17, 1994). There, the court found that the decision in City of Chicago should not have had any impact on Empire's acceptance of ash from UCUA because, under Pennsylvania law, if the ash tested hazardous it had to be treated as a hazardous waste.

The Empire/Kirby Protocol

Having resolved the Department's and Intervenors' argument concerning the effects of the Supreme Court's decision in City of Chicago, we now turn to the merits of Empire's April 29 submission. In their post-hearing briefs, the Department and Intervenors focus their attention solely on the adequacy of Empire's testing protocol and do not raise any claims concerning the other information submitted on April 29. Accordingly, in determining whether the Department's disapproval was arbitrary, capricious, contrary to law, or an abuse of discretion, we also limit our focus to the adequacy of Empire's testing protocol.

Under §3(c)(i) of the Permit Modification, Empire is authorized to accept ash pursuant to "Phase I procedures" if:

- (a) Empire has submitted ash sampling data analyzing 15 days of operation at the incinerator, or
- (b) submission by Empire and approval by the Department of Section IIB: Chemical Analysis of the Form 36 "Request for Approval to Dispose of Municipal Incinerator Ash Residue." The Department shall complete its review within 3 working days.

(Ex. A-1). Subsection (b), in other words, requires Empire to submit the information requested in Section IIB of Form 36. That section, entitled "Chemical Analyses," requires the following to be attached to a Form 36 application:

1. The results of the total analysis of the waste as specified in the instructions.
2. The results of the leaching tests as described in the instructions, including the leaching methods.
3. The range of concentrations of constituents based on knowledge or past analyses.

4. A description of the composite sampling method and test protocols for meeting the requirements of Section 283.403.

(Ex. A-4). Under §IIB, therefore, Empire must report the concentrations of the constituents in the ash and describe the sampling method and testing protocol used to determine those concentrations. Section 283.403, which is referenced in subsection 4, states, in relevant part:

(a) If the facility incinerates waste other than infectious waste, the operator shall submit to the Department a chemical analysis of composite samples of the ash residue on forms provided by the Department:

(1) Prior to the disposal of ash or residue from a facility.

(2) At a minimum, monthly for the first 6 months of incineration operations at the facility, and quarterly during the remaining life of the facility.

(b) Ash residue from municipal waste incineration shall be sampled and analyzed as follows:

(1) If fly ash and bottom ash are generated separately, they shall be sampled and analyzed separately.

(2) If fly ash and bottom ash are combined as part of the incineration process, or mixed as part of a totally enclosed treatment system which is an integral part of the facility, fly ash and bottom ash may be sampled and analyzed as combined.

25 Pa.Code §283.403(a) and (b).¹⁴

¹⁴The testing requirements of 25 Pa.Code §283.403(a) have been incorporated into Empire's Permit Modification. Under §4 of that modification, for the first six months of accepting UCUA ash, Empire must test a monthly composite sample of ash from the UCUA facility for the parameters listed on Form 41. Under §5, after six months, Empire must perform the same testing on a quarterly basis.

In addition, under Phase I Procedures, Empire must test three day composite samples of ash for Pb, Cr, Cd, and pH, "pursuant to SW-846." After Empire has disposed of ash for 45 consecutive days under Phase I Procedures, it may then dispose of ash under Phase II Procedures, which require Empire to test six day composite samples for Pb, Cr, and Cd. After Empire has disposed of ash for 135 days under Phase II Procedures, it may then dispose of ash under Phase III Procedures, which require Empire to test weekly composite samples for Pb, Cr, and Cd. Under §6, a copy of all sampling and analyses must be sent to the Department every week for the first 45 days and every month thereafter.

Although nothing in any of these provisions expressly states that Empire's testing protocol shall conform to the methodology set forth in Method 1311, both the Department and Empire nevertheless believe it must. This belief is apparently based on the requirements in §3(a) of the Permit Modification, which states:

Empire is authorized by this amendment only to accept and/or dispose of UCUA ash at the landfill consistent with the following permit limits determined by Toxicity Characteristic Leaching Procedure (TCLP):

Lead	(Pb)	< 5.0 ppm
Chromium	(Cr)	< 5.0 ppm
Cadmium	(Cd)	< 1.0 ppm

(hereinafter "permit limits") as applied to the mean concentration of ash sampled, analyzed, aggregated and evaluated to the 90% confidence level, pursuant to the most recent edition of EPA Manual SW-846; Test Methods for Evaluating Solid Waste; Volume II: Field Manual Physical/Chemical Methods (hereinafter "statistical evaluation"); and the provision of this paragraph.

(Ex. A-1). Although §3(a) only refers to the TCLP, it is commonly understood that Method 1311 is the TCLP (N.T. 133, 205; Exs. A-6, §8, A-7, and A-9). Furthermore, the TCLP is the test method required by the Department's regulations to determine whether a solid waste exhibits the characteristic of toxicity. See, 25 Pa.Code §§261.24(a) and 261.34(b). Because the purpose of Section IIB of Form 36 is to characterize the ash a landfill proposes to accept, it is reasonable to assume that the ash is to be tested using the method specified in the regulations. We agree, therefore, with both the Department and Empire that Empire's testing protocol, submitted pursuant to §3(c)(i)(b), must conform with the requirements of Method 1311.

The Department and Intervenors first claim that Empire submitted multiple, conflicting protocols, and did not explain when each protocol would be applied. We disagree and find, instead, that Empire has submitted two

documents that must be read together. The first document, entitled "Field Sample Procedures for Combined Ash Residue at the Union County Resource Recovery Facility" ("Empire Protocol," see, Finding of Fact 27), is Empire's general description of the procedures to be followed in sampling UCUA ash and preparing that ash for TCLP extraction (Ex. A-7). The other document, entitled "Waste Energy Ash Residue Sample Preparation Procedure for Union County Resource Recovery Facility" ("Kirby Protocol," see, Finding of Fact 28), is the Angeline Elizabeth Kirby Memorial Health Center's (Kirby) specific description of how it will satisfy the general standards outlined in the Empire Protocol (Ex. A-7). Read together, the Empire/Kirby Protocol describes in both general and specific terms how ash from the UCUA facility was collected and prepared for TCLP extraction. See, Findings of Fact 30-46.

The other protocols to which the Department and Intervenors referred were submitted for informational purposes only. On the cover sheet attached to the protocol from the Lancaster County Solid Waste Management Authority (Lancaster Protocol), Empire expressly stated that the Lancaster Protocol was submitted only to prove the Department had previously accepted a protocol requiring mathematical adjustments to account for moisture and non-crushable fractions in bulk ash (Ex. A-7, Attachment B). Empire never attempted to represent the Lancaster Protocol as its own.¹⁵ Furthermore,

¹⁵The Department claims that its earlier approval of statistical adjustments in the Lancaster protocol is irrelevant because §3(a) of the Permit Modification requires Empire to comply with the standards of SW-846. See, Department's Brief at 20. Although not essential to the decision the Board reaches in this adjudication, this claim is so preposterous it cannot go unchallenged.

Implicit in the Department's position is that the Lancaster protocol was not required to comply with Method 1311. This implication, however, is simply incorrect. When the Lancaster protocol was submitted, both the Department's policy concerning ash, "Policy and Procedure for the Management of Municipal Waste Incinerator Ash Residue" (Ex. A-6), and the Department's regulations concerning the toxicity characteristic, 25 Pa.Code §§261.3(a)(2)(i), 261.24(a),

with respect to the protocol submitted in its Form 36 application, Empire clearly explained that the protocol was for the UCUA facility and that the enclosed testing results were from ash produced by resource recovery facilities in New York and Oregon, both of which were similar to the UCUA facility (Ex. A-4, Attachment A). The Department's and Intervenors' arguments concerning the submission of multiple, conflicting protocols are, therefore, without merit. There is no reason to believe that anyone other than the Department and Intervenors could not understand the cover sheet attached to the Lancaster Protocol or the explanation in Attachment A concerning the UCUA Protocol.

The Department claims the Empire/Kirby Protocol does not conform with the requirements of Method 1311 because: the Empire/Kirby Protocol excludes oversize material without performing the size reduction procedures specified in SW-846; the Empire/Kirby Protocol requires the sample to be dried, contrary to SW-846; and the Empire/Kirby Protocol allows for the mathematical correction of test results for moisture and oversize materials that were previously removed.¹⁶ Empire disagrees, and argues that the removal of moisture and oversize materials, as well as the adjustment of the raw laboratory data to account for their removal, are not governed by Method

and 261.34(b), required samples to be tested pursuant to Method 1311. In addition, the Lancaster protocol itself expressly states "[w]here appropriate, sampling and analytical methods will be performed in accordance with the EPA document . . . SW-846" (Ex. A-7), indicating that the Lancaster protocol was intended to comply with all of the requirements of SW-846, including Method 1311.

Regardless of the contents of the permit or permit modification authorizing the Lancaster County Solid Waste Management Authority to dispose of ash, the Lancaster protocol was supposed to comply with Method 1311. The Department, therefore, has at least on occasion considered a statistical adjustment to comply with the standards of SW-846, including Method 1311.

¹⁶We discuss the Department's careless use of the terms "Method 1311," "TCLP," and "SW-846" in footnote 10, *supra*.

1311. Empire contends, instead, that these procedures are governed by standards applicable to sampling methodology, which are contained in 40 C.F.R. Part 261, Appendix I. Empire further argues it is necessary to remove moisture and oversize materials in order to obtain a representative sample, which is required for the TCLP extraction, and notes that removing moisture and oversize materials does not significantly affect the laboratory results.

In support of its position that the Empire/Kirby Protocol does not conform with Method 1311, the Department offered the testimony of Gary Manczka, Chief of the Department's Soil and Waste Testing Laboratory in Erie (N.T. 484; Ex. A-9). According to Mr. Manczka, Method 1311 requires all particles to be reduced to less than 3/8 inch by cutting, crushing, or grinding, and further requires only a portion of a sample to be dried to calculate the percentage of moisture in the sample (N.T. 494-495, 504-505). In addition, Mr. Manczka explained that Method 1311 requires the extraction to proceed with a fresh portion of a sample that has not been dried (N.T. 505). Mr. Manczka explained that the Empire/Kirby Protocol does not conform with Method 1311 because: the Empire/Kirby Protocol requires the removal of all ferrous/noncrushable materials larger than 3/8 inch, instead of requiring all materials larger than 3/8 inch to be reduced (N.T. 495, 502-503); and the Empire/Kirby Protocol requires an entire sample to be dried and the TCLP extraction to be performed on the dried sample, instead of only drying a subsample and proceeding with the remainder that has not been dried (N.T. 506).

In support of its position that the Empire/Kirby Protocol conforms with Method 1311, Empire offered Dr. Leonard Bongers, a private consultant who was involved in a comprehensive EPA study concerning the testing and analysis

of ash generated by five facilities across the United States (N.T. 204). Not surprisingly, it was Dr. Bongers' opinion that Mr. Manczka's conclusions concerning Method 1311 and the Empire/Kirby protocol were "totally wrong" (N.T. 212). The purpose of the Empire/Kirby protocol is merely to generate representative samples to be tested pursuant to Method 1311 (N.T. 214, 216-217).

According to Dr. Bongers, Method 1311 only governs the testing of representative samples (*Id.*). The preparation of a representative sample, on the other hand, is governed by 40 C.F.R. Part 261, Appendix I (N.T. 213). Under Appendix I, Dr. Bongers explained, the methods and equipment used for sampling and preparing waste materials will vary with the form and consistency of the waste material to be sampled, and may even require the removal of moisture and ferrous/noncrushable materials (*Id.*). Larger ferrous/noncrushable materials are removed, Dr. Bongers testified, because it may not be possible to crush or cut them to less than 3/8 inch (N.T. 216).¹⁷ Moisture is removed, Dr. Bongers further testified, so that materials larger than 3/8 inch can be crushed and put through a sample splitter (N.T. 216). Under the Empire/Kirby protocol, each 10 pound sample of ash is split into six 125 gram aliquots and one 500 gram aliquot (Ex. A-7).

Looking at both Method 1311 and Appendix I to Part 261, we find support for Dr. Bongers' position. With respect to sampling, Method 1311 merely requires that "[a]ll samples shall be collected using an appropriate sampling plan." Method 1311 does not otherwise establish any standards for a sampling plan. As Dr. Bongers testified, the standards for an appropriate

¹⁷The Kirby protocol expressly states that metal fragments including cans, nails, wires, etc. can cause damage to the crusher in the particle size reduction step (Ex. A-7).

sampling plan are found, instead, in Appendix I, which states, in relevant part:

The methods and equipment used for sampling waste materials will vary with the form and consistency of the waste materials to be sampled. Samples collected using the sampling protocols listed below, for sampling waste with properties similar to the indicated materials, will be considered by the Agency to be representative of the waste.

* * * * *

Fly Ash-like material - ASTM Standard D2234-76 [ASTM Standards are available from ASTM, 1916 Race St., Philadelphia, PA 19103]

40 C.F.R. Part 261, Appendix I.¹⁸

In resolving this dispute between two well-qualified experts, we give more weight to the testimony of Dr. Bongers.¹⁹ Although Mr. Manczka has worked with SW-846 and Method 1311 for several years, Dr. Bongers has had experience with the RCRA regulations since they were promulgated, has analyzed waste and evaluated the data obtained from those analyses, and, most

¹⁸In further support of Dr. Bongers' testimony is the definition in ASTM Standard D2234-76 of the phrase "sample preparation" as:

the process that may include air drying, crushing, division, and mixing of a gross or divided sample for the purpose of obtaining a representative analysis sample.

ASTM Standard D2234-76, §4.18. Although this standard is for the "Collection of a Gross Sample of Coal," and, therefore, of limited applicability to municipal waste incinerator ash, the definition of "sample preparation" indicates that it may require a sample to be dried, divided, etc.

¹⁹In deciding the relative weight of the experts who testified before the Board, we give little or no weight to Intervenors' expert, Thomas Pullar. Although Mr. Pullar is a licensed Professional Engineer in both Pennsylvania and New Jersey (June 14 N.T. 45), he has never written a testing protocol, has never performed a TCLP analysis, and incorrectly testified on direct examination that "SW-846" is a test method for the examination of solid waste (June 14 N.T. 66, 98, 104). In addition, Mr. Pullar explained how the Lancaster protocol, not the Empire/Kirby protocol, failed to comply with Method 1311. Furthermore, Mr. Pullar, erroneously testified that Empire submitted four separate protocols to the Department, three with its April 29 submission, and one with its application for the permit modification.

importantly, has participated in an EPA study of the ash generated by five incinerators across the country. Accordingly, we find that Method 1311 does not govern the removal of moisture and nonferrous materials.

Mr. Manczka also claims that factoring the removed moisture and ferrous/noncrushable materials back into the raw laboratory data violates the procedures outlined in Method 1311 and could affect the final results (N.T. 495, 510; Ex. A-9). According to Mr. Manczka, Method 1311 contains no provisions for allowing raw laboratory data to be so revised, nor should it, because the materials removed from the sample may contain one or more of the target analytes (Pb, Cd, or Cr) (N.T. 495-496; Ex. A-9). Examples of such materials include nickel-cadmium batteries, lead-acid batteries, and silver batteries (*Id.*). Mr. Manczka also believes that drying a sample in an oven could alter the leachability of metals in the ash because it could lead to the formation of insoluble inorganic compounds, such as silicates, carbonates, and sulfates (N.T. 507). He further believes that oven-drying a sample could alter the equilibrium processes the ash may undergo before being disposed of at the landfill (N.T. 507-510).

Dr. Bongers, of course, disagrees. He testified that adjusting raw laboratory data for the removal of moisture and ferrous/noncrushable materials is not and has never been governed by Method 1311 (N.T. 214). Dr. Bongers further testified that the removal of moisture and ferrous/noncrushable materials larger than 3/8 inch will not significantly affect the results. According to Dr. Bongers, there are no noncrushable materials larger than 3/8 inch that will leach and contribute significantly to the results achieved by a TCLP analysis (N.T. 223). As an example, Dr. Bongers explained that a piece of steel normally contains some Cr, but the

TCLP extraction will not cause the Cr in the steel to leach (N.T. 225). He also explained that the solder or Cd on the surface of a piece of metal will evaporate or melt in the incinerator (N.T. 223). The surface substances will, therefore, end up in either the fly ash or the bottom ash, both of which are subject to the TCLP extraction (N.T. 223, 241).

With respect to removing moisture from a sample by oven drying, Dr. Bongers admits it may result in some chemical changes, but contends those changes would be insignificant, since the material in the ash had already been heated to approximately 2,000 degrees in the UCUA facility (N.T. 226). Dr. Bongers also contends that some elements become leachable only after the ash has been oven dried, and that these elements would not leach during a TCLP extraction if the ash was not dried (N.T. 226).

For the same reasons as expressed above, we again give more weight to Dr. Bongers' testimony concerning the requirements of Method 1311. Accordingly, we find that adjusting laboratory-derived data to account for the removal of moisture and ferrous/noncrushable materials larger than 3/8 inch is not governed by Method 1311 (N.T. 214). Because Method 1311 also does not govern the removal of moisture and large ferrous/noncrushable materials in the preparation of a representative sample, we find that the Department abused its discretion in disapproving Empire's April 29 submission on the basis of the Empire/Kirby Protocol.

Although we have found the Department abused its discretion in disapproving Empire's submission, we will not substitute our discretion for that of the Department and approve the submission unless Empire has clearly shown it satisfied the requirements of the Permit Modification. See, AI Hamilton Contracting Co. v. DER, 1992 EHB at 1487. Under §3(c)(i)(b) of the

Permit Modification, Empire must submit the information required by §IIB of Form 36, which includes: an analysis of the waste; the results of leaching tests; the range of concentrations of constituents; and a description of the composite sampling method. Empire's April 29 submission contained: a completed Form 41 and a test for compliance with regulated limits, both of which analyzed the waste and listed the results of leaching tests and the concentrations of constituents; and a description of Empire's composite sampling method. Empire faxed the raw laboratory data to the Department on Sunday, May 1, 1994 (N.T. 168).

In addition, although Mr. Manczka claims that Empire's testing data is inaccurate because moisture and ferrous/noncrushable materials were removed from the samples, we give more weight to the testimony of Dr. Bongers, who explained it is possible to remove moisture and large ferrous/noncrushable materials without significantly affecting the results of a TCLP extraction.²⁰ The Board finds, therefore, that Empire has satisfied the requirements of §3(c)(i)(b) of the Permit Modification. Accordingly, the Board substitutes its discretion for the Department's and approves Empire's April 29 submission as satisfying the requirements of §3(c)(i)(b) of the Permit Modification.

In their post hearing brief, Intervenors claim that the Empire/Kirby protocol is inadequate because it only requires three elements to be tested on a quarterly basis. We do not address this argument here, however, because Empire's testing requirements are expressly set forth in the terms of

²⁰In reaching this result, we acknowledge Empire's own testing results, which indicate that adjustments for moisture and large ferrous/noncrushable materials reduced the reported concentrations of almost every analyte tested (See, Ex. A-7) (test results on 60 samples of UCUA ash, as well as Form 41). For the reasons offered by Dr. Bongers, we nevertheless accept the reduced concentrations as correct.

the Permit Modification.²¹ Intervenors, therefore, may only challenge the testing requirements in their appeal from the Department's issuance of that Permit Modification, which is docketed at No. 94-060-W. Any attempt to do so here amounts to a collateral attack on the Permit Modification, which we will not entertain. See, Dept. of Environmental Resources v. Wheeling-Pittsburgh Steel Corp., 473 Pa. 432, 375 A.2d 320, *cert. denied*, 434 U.S. 969 (1977).

Given the results reached here, we need not address the remainder of Empire's arguments concerning its constitutional rights, equitable estoppel, vested rights, the Commonwealth Documents Law, and *de minimis* variations.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter of this appeal.
2. The burden of proof in this appeal is on Empire to prove by a preponderance of the evidence that the Department's disapproval of Empire's April 29 submission was arbitrary, capricious, contrary to law, or an abuse of discretion.
3. If the Department abused its discretion, the Board may, based on the evidence before it, substitute its discretion for that of the Department.
4. Before the Board will approve Empire's April 29 submission, Empire must also prove it is clearly entitled to that approval.

²¹Under §3(a) of the Permit Modification, Empire may not accept ash with concentrations of Pb, Cr, and Cd above the regulatory limits (Ex. A-1). Furthermore, under §§4 and 5 of the Permit Modification, Empire must test for all of the parameters listed on Form 41. See, footnote 14.

5. The Department abused its discretion by relying on the Supreme Court's decision in City of Chicago to disapprove Empire's April 29 submission.

6. The Department abused its discretion by relying on the Empire/Kirby Protocol as a basis for disapproving Empire's April 29 submission.

7. The Department abused its discretion in disapproving Empire's April 29 submission.

8. Empire's April 29 submission satisfies the requirements of §3(c)(i)(b) of the Permit Modification.

9. The Board substitutes its discretion for that of the Department and approves Empire's April 29 submission as satisfying the requirements of §3(c)(i)(b) of the Permit Modification.

O R D E R

AND NOW, this 1st day of November, 1994, it is ordered that:

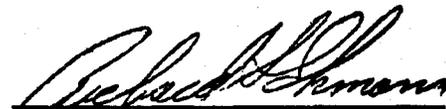
- 1) Empire's appeal originally docketed at No. 94-120-W is unconsolidated from Docket No. 94-114-W;
- 2) Empire's appeal at Docket No. 94-120-W is sustained; and

3) Empire's April 29 submission is approved as satisfying the requirements of §3(c)(i)(b) of the Permit Modification.

ENVIRONMENTAL HEARING BOARD


MAXINE WOELFLING
Administrative Law Judge
Chairman


ROBERT D. MYERS
Administrative Law Judge
Member


RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: November 1, 1994

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M. DIANE SMITH
 SECRETARY TO THE BOARD

CONCERNED CITIZENS OF EARL TOWNSHIP :
 :
 v. : EHB Docket No. 88-516-MR
 : (Consolidated with 88-514-MR,
 : 88-515-MR, 88-518-MR, 91-049-MR)
 COMMONWEALTH OF PENNSYLVANIA, :
 DEPARTMENT OF ENVIRONMENTAL RESOURCES :
 and DELAWARE COUNTY SOLID WASTE AUTHORITY, :
 PERMITTEE : Dated: November 2, 1994

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

By Robert D. Myers, Member

Syllabus

The Board sustains in part and dismisses in part appeals filed by Dr. Frank J. Szarko challenging DER's issuance of two solid waste disposal permits, an earth disturbance permit and a dams and encroachments waterway abandonment permit pertaining to the Colebrookdale Landfill in Earl Township, Berks County, owned and operated by the Delaware County Solid Waste Authority. In sustaining the appeals, the Board holds that NPDES permits should have been required. In dismissing the appeals, the Board upholds the permits on issues related to the 8-foot separation between the liner system and the regional groundwater; pumping tests; fractures; exclusionary criteria; the ramifications of overtopping previously deposited waste; groundwater and surface water contamination; witness systems; monitoring systems; erosion and sedimentation controls; DCSWA's compliance history; and Article I, Section 27 of the Constitution of Pennsylvania.

Procedural History

On December 15, 1988 four Berks County municipalities (Township of Earl, Borough of Boyertown, Township of Colebrookdale and Township of Oley), as well as the County of Berks and the Berks County Commissioners, filed a joint Notice of Appeal (docketed at 88-516-MR) seeking review of the issuance by the Department of Environmental Resources (DER) on November 16, 1988 of two permits - Permit No. 100345 for a solid waste disposal and/or processing facility and NPDES Permit No. PA-0040860 for discharges from the facility. Both permits were issued to Delaware County Solid Waste Authority (DCSWA) and pertained to the Colebrookdale Landfill in Earl Township, Berks County. Challenges to the same two permits were filed on December 16, 1988 by Concerned Citizens of Earl Township (docket nos. 88-514-MR and 88-515-MR) and by Dr. Frank J. Szarko (docket no. 88-518-MR). These appeals were all consolidated at docket no. 88-516-MR on April 11, 1989.

Berks County Commissioners and County of Berks withdrew as appellants on October 20, 1989. Township of Earl, Borough of Boyertown, Township of Colebrookdale and Township of Oley withdrew as appellants on November 9, 1989. The remaining appellants, Concerned Citizens of Earl Township and Dr. Frank J. Szarko, continued the discovery activities initiated previously by the governmental appellants.

Dr. Frank J. Szarko filed an Amendment to his appeal on December 5, 1989. DCSWA's Motion to Dismiss Szarko's appeal for lack of standing was denied in an Opinion and Order issued January 26, 1990 (1990 EHB 83). The parties engaged in extensive discovery and document production - not without controversy. Board decisions on discovery matters appear at 1990 EHB 69, 1990 EHB 629, 1990 EHB 1255, 1991 EHB 18 and 1991 EHB 1167.

On February 4, 1991 Dr. Frank J. Szarko filed a Notice of Appeal at docket no. 91-049-MR seeking review of DER's issuance on December 17, 1990 of Permit No. 100345 for a solid waste disposal and/or processing facility, Dams and Encroachments Waterway Abandonment Permit No. D06-476A and Earth Disturbance Permit No. 0689802. These Permits, all issued to DCSWA, pertained to an expansion of the Colebrookdale landfill and related matters. Szarko's Motion to Consolidate the appeal at docket no. 91-049-MR with the consolidated appeals at docket no. 88-516-MR was denied on June 3, 1991 because the earlier appeals appeared to be closer to hearing.

On November 20, 1991 DCSWA filed a Motion for Partial Summary Judgment and a Motion to Limit Issues in the consolidated appeals at docket no. 88-516-MR. These Motions were challenged by both appellants. In an Opinion and Order dated May 21, 1992 (1992 EHB 645) the Board granted the Motions with respect to 5 issues and denied them with respect to 25 issues. Since the appeal at docket no. 91-049-MR had, by that time, proceeded to the point that it was ready for hearing, the Opinion and Order consolidated that appeal into those previously consolidated at docket no. 88-516-MR.

On September 30, 1992 Szarko withdrew his appeal of NPDES Permit No. PA-0040860. On October 5, 1992 Concerned Citizens of Earl Township withdrew their appeals originally docketed at nos. 88-514-MR and 88-515-MR.

Hearings began in Harrisburg on October 5, 1992 before Administrative Law Judge Robert D. Myers, a Member of the Board, and occupied 25 days between that date and May 28, 1993. All parties were represented by legal counsel and, except for DER,¹ offered evidence in support of their legal positions. At the outset

¹As is customary in third-party appeals of permit issuances, DER deferred to DCSWA, the permittee, to defend the actions. DER legal counsel attended the hearings, however, and participated to a limited extent.

of the hearings, the parties presented a partial stipulation of facts and a list of 21 stipulated issues.

Szarko filed his post-hearing brief and proposed findings of fact and conclusions of law on September 27, 1993. DCSWA filed its post-hearing brief and proposed findings of fact and conclusions of law on November 8, 1993. DER filed a post-hearing brief on November 19, 1993. Szarko filed a reply brief on December 8, 1993. The record consists of the pleadings, a partial stipulation of facts (Stip.), a hearing transcript of 4,483 pages, 13 depositions (in whole or in part, including one on videotape) and 560 exhibits (including a physical model). After a full and complete review of this voluminous record, aided measurably by the proposed findings of fact filed by Szarko and DCSWA (each numbering over 700), we make the following:

FINDINGS OF FACT

A. Identity of parties

1. Dr. Frank J. Szarko (Szarko) is an individual who owns land, and resides, along Spangsville Road, Oley Township, Berks County, and has a mailing address of RD #1, Box 200, Oley, PA 19547 (N.T. 11).

2. DCSWA is a municipal authority of the County of Delaware which, at the time of the appeal, had its office at Delaware County Court House, Media, PA 19063.

3. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*; the Clean Streams law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*; the Dam Safety and Encroachments Act (DSEA), Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 *et seq.*; and the rules and

regulations adopted pursuant to said statutes.

B. Geographic setting

4. The Colebrookdale landfill is located in the western portion of the Township of Earl, Berks County, near its border with the Township of Oley, Berks County. The village of Shanesville lies about 1 mile to the northeast and the village of Spangsville lies about the same distance to the west (Exhibits A-1 and DCSWA-1).

5. Furnace Run, flowing generally east to west, is immediately south of the landfill. It empties into Manatawny Creek less than a mile downstream from the landfill. Manatawny Creek, which flows generally north to south, is a tributary of the Schuylkill River (Exhibits A-1 and DCSWA-1).

6. Furnace Run Road parallels Furnace Run. Shenkel Hill Road begins at Furnace Run Road, extends in a northeast direction through the landfill and ends at Longview Road in the vicinity of Shanesville (Exhibits A-1 and DCSWA-1).

7. The landfill is situated in a steep-sided valley drained primarily by an unnamed tributary of Furnace Run that flows northeast to southwest. Shenkel Hill lies to the west and northwest and Furnace Hill lies to the south across Furnace Run. An unnamed hill lies to the east-southeast. The area west of the landfill in the Township of Oley is about 500 feet lower in elevation than the intervening hills (Exhibits A-1 and DCSWA-1).

8. Szarko's land lies on both sides (east and west) of Spangsville Road. The portion on the east side extends across Manatawny Creek at two locations, one of which includes the area where Furnace Run enters Manatawny Creek. Szarko's residence is within the portion of the land west of Spangsville road. The residence is about 3/4 mile from the landfill. The easternmost portion of the land is about 1/4 mile closer (N.T. 12-14; Exhibits A-1 and DCSWA-1).

C. History of the landfill

9. The Souder dump opened at the present site of the landfill in the early 1950s. The site was an open dump where refuse was periodically burned. The name was changed to the Souder-Snavely Refuse Disposal (Stip.).

10. In 1973 Colebrookdale Builders, Inc. purchased the site and changed the name to Colebrookdale Landfill. After the filing of an application, DER issued Solid Waste Permit No. 100345 to Colebrookdale Builders, Inc. on June 23, 1978 (1978 SWP) (Stip.).

11. No part of the site had been equipped with liners, leachate collection devices or erosion and sedimentation (E & S) controls prior to issuance of the 1978 SWP. The 1978 SWP required (a) the installation of a double liner system (20 mil polyvinyl chloride (PVC) sheeting as a primary liner and a bituminous spray called MC-30 as a secondary liner), (b) the removal of all previously deposited waste from unlined areas to lined area; (c) the treatment of leachate, and (d) the installation of E & S controls (Stip.; N.T. 1227, 1986-1999; Exhibit DCSWA-114).

12. The 1978 SWP also permitted the installation of a 36-inch reinforced concrete pipe (36" RCP) to convey the unnamed tributary through the landfill site (N.T. 1995-1999; Exhibit DCSWA-114).

13. The unlined area of the landfill consisted of about 27 acres at this point, running along the southeast side of Shenkel Hill Road. The 1978 SWP allowed the landfill to expand to 59 acres by occupying areas east and southeast of the unlined area. The 59-acre area east and southeast of Shenkel Hill Road is referred to by the parties as the berm area (N.T. 1224-1225; Exhibits DCSWA-1 and 114).

14. The design approved in the 1978 SWP also called for the installation

of underdrains (piping with holes in it) below the double liners in order to drain away groundwater (N.T. 810-811; Exhibits DCSWA-1 and 114).

15. Colebrookdale Builders, Inc. continued to operate the landfill until 1981 when it was sold to RRM Corporation (Stip.; N.T. 2000-2001).

16. Although required by the 1978 SWP, liners were not in place and a leachate treatment system was not in operation until 1982. The 36" RCP was not installed until 1983 (N.T. 621-623, 1988-1992, 2004-2009).

17. On October 8, 1982 DER reissued Solid Waste Permit No. 100345 to RRM Corporation. RRM Corporation updated the E & S control and leachate collection systems and began relocating previously deposited waste from the unlined area to the lined areas of the landfill. RRM agreed to relocate one cubic yard of previously deposited waste for every eight cubic yards of new waste received for disposal. The relocation, however, proceeded slowly (Stip.).

18. Disposal pads 1 through 18 were installed under the 1978 SWP between 1981 and 1989. Pads 1 and 2 used MC-30 as the secondary liner and 20 mil PVC as the primary liner. Pads 3 through 8 used MC-30 as the secondary liner and 30 mil PVC as the primary liner. Pads 9 through 12 used 20 mil PVC as the secondary liner and 30 mil PVC as the primary liner. Pads 13 through 16 used 30 mil PVC as both secondary and primary. Pads 17 and 18 used either 20 mil or 30 mil PVC as the secondary liner and either 30 mil or 50 mil PVC as the primary liner (N.T. 1227, 1234, 1734-1735; Exhibits A-7 and DCSWA-157 through 178).

19. As-built drawings for each pad were prepared and submitted to DER (N.T. 2012-2024; Exhibits DCSWA-157 through 178).

20. The typical liner section represented on some of the as-built drawings showed

(a) a 4-inch perforated PVC pipe wrapped in filter fabric and placed

in filter stone in a trench, 1 foot wide and 4 feet deep, to act as an underdrain;

(b) a secondary liner covered with filter fabric installed on compacted soil above the underdrain;

(c) a 4-inch perforated PVC pipe wrapped in filter fabric and placed in filter stone in a trench, 1 foot wide and 8 inches deep, above the secondary liner, to act as a witness drain;

(d) 12 inches of soil topped by 3 inches of sand around and above the witness drain trench;

(e) a primary liner covered with filter fabric installed on top of the sand layer;

(f) a total of 14 inches of soil installed on top of the primary liner;

(g) 2 feet of selected refuse, free of bulky items or items larger than 3 feet, placed on top of the soil layer; and

(h) a 4-inch perforated PVC pipe surrounded by filter stone in a trench, 1 foot wide and 3 feet deep at the bottom but widening at the top, all covered with filter fabric, installed about 1 foot into the soil layer and about 2 feet into the selected refuse, to act as a leachate drain (N.T. 1233-1235; Exhibits A-187 and DCSWA-168).

21. The underdrains were all interconnected and piped to two trunk lines, placed one on either side of the 36" RCP and referred to by the parties as the northwest underdrain and southeast underdrain, respectively (N.T. 806-816, 1276-1285, 1320, 2058; Exhibit A-55).

22. The witness drains, intended to monitor flows in the area between the two liners so that leaks can be detected quickly, were all interconnected and piped to three 55-gallon drums (witness tanks) that were relocated as pad

construction proceeded (N.T. 2020-2023, 2058,2202).

23. Because of the interconnection, it is not possible to determine the precise source of contaminants appearing in the witness tanks (N.T. 2203, 2272-2274).

24. During the early 1980s, municipal solid waste generated in Delaware County was disposed of at the landfill on a contract basis (Stip.).

25. Delaware County Incinerator Authority purchased the stock of RRM Corporation on March 26, 1985 and thereby acquired ownership of the landfill. On May 7, 1985 Delaware County Incinerator Authority changed its name to Delaware County Solid Waste Authority (Stip.).

26. On June 21, 1985 DCSWA applied to DER for a permit to operate and maintain the existing waterway enclosure, the 36" RCP authorized by the 1978 SWP, conveying the unnamed tributary to Furnace Run. DER issued Permit D06-476 to DCSWA on May 8, 1986 (Stip.).

27. On May 7, 1985, DCSWA amended an earlier application under the name of Delaware County Incinerator Authority for reissuance of Solid Waste Permit No. 100345. DER reissued the Permit to DCSWA on April 10, 1986 (1986 SWP). As a predicate to reissuance of the permit, DER required DCSWA to enter into a Consent Order and Agreement dated April 4, 1986 (1986 CO&A). The CO&A required DCSWA, *inter alia*, to do the following:

(a) accelerate relocation of the previously deposited waste to lined areas;

(b) study the groundwater in the area of the landfill and the effect of the previously deposited waste on that groundwater; and

(c) study and plan for E&S control at the landfill and install a new E&S Control System

(Stip.).

28. DCSWA accelerated the relocation of previously deposited waste to lined areas. While the relocation was underway, DCSWA discovered that the amount of waste and contaminated soil to be removed totaled, not the 250,000 cubic yards which had been anticipated, but approximately 1,200,000 cubic yards. DCSWA notified DER on April 30, 1988 that the waste had been relocated, except for that under Shenkel Hill Road (Stip.).

29. An amount of previously deposited waste located along and under Shenkel Hill Road was not relocated as of November 16, 1988. This waste (in excess of 20,000 cubic yards) has since been relocated to lined areas, other than a small area remaining to be relocated as described in the report entitled "Removal of Solid Waste and Contaminated Soil from Shenkel Road Right-of-Way, Status Report No. 2, May 29, 1992" by AGES Corporation (Exhibit DCSWA-511(a)). The waste was not relocated previously because Shenkel Hill Road was a public road owned by the Township of Earl which refused permission to relocate the waste (Stip.).

30. DCSWA retained Dr. Thomas A. Earl, (a hydrogeologist who had been providing services to the landfill since 1984) of Meiser & Earl (M&E), to perform a study of groundwater contamination in the area of the landfill and the effect of previously deposited waste on that groundwater, as required by the 1986 CO&A (Stip.).

31. After submitting a work plan to DER and securing DER's approval on June 9, 1986, Dr. Earl began the study. In conducting it, he

(a) utilized wells TW-1, TW-3, TW-9, MW-4 and MW-5, all of which had been drilled previously, to gain information on groundwater quality, flow directions, and bedrock geology;

(b) drilled wells TW-11, TW-12, TW-20 and TW-21 to obtain additional

information;

(c) performed short-term pumping tests on each well, measuring drawdown, pumping rate, temperature, and specific conductance;

(d) obtained water samples from each well at the conclusion of the pumping test;

(e) obtained additional water samples at the outlet ends of the 36" RCP, the northwest underdrain and the southeast underdrain;

(f) mapped fracture traces on two aerial photographs (October 1979 and May 1984);

(g) determined the nature of the soils and bedrock; and

(h) considered historic water quality data

(N.T. 377, 2030-2032, 2479-2480, 2482-2502; Exhibits DCSWA - 430, 431, 435 and 443).

32. Dr. Earl's written report entitled "Hydrogeologic Investigation of the Unlined Refuse Area," dated August 4, 1986, was forwarded to DER on August 8, 1986 (N.T. 2573-2574; Exhibit DCSWA-444).

33. Pursuant to requirements of the 1986 CO&A, DCSWA continued the services of Dr. Richard C. Warner to study and plan for E&S controls at the landfill. Dr. Warner had prepared a plan which had been submitted to DER on December 6, 1984 and had been revised or supplemented on March 18, 1985, and October 15, 1985. Additional revisions were submitted in May 1986 and September 1986. DER approved the plan on September 22, 1986 and DCSWA proceeded to implement it (Stip.; N.T. 3559-3571; Exhibit DCSWA-608).

34. In August 1986 DCSWA submitted to DER an application for a permit to expand the landfill (Stip.).

35. On April 5, 1988 DCSWA instituted actions against DER in the

Commonwealth Court of Pennsylvania (docket nos. 809 and 810 C.D. 1988), one purpose of which was to compel final action on the application (Stip.).

36. On May 11, 1988 DER denied the application because it did not comply with the revised regulations effective April 9, 1988. DCSWA filed appeals to this Board at docket nos. 88-186-F and 88-232-F, one purpose of which was to challenge the denial (Stip.).

37. DER and DCSWA reached an agreement to resolve the Commonwealth Court actions and the appeals to this Board. Under the agreement, DCSWA would apply for two, rather than one, expansion permits, the applications to comply with requirements of the new regulations (Stip.).

38. On July 1, 1988 DCSWA submitted phases 1 and 2 of the first application. The application was reviewed by DER and, after several rounds of comments, responses and revisions, Permit No. 100345 was issued to DCSWA on November 16, 1988 (1988 SWP). The 1988 SWP is the subject of Szarko's appeal to this board consolidated at docket no. 88-516-MR (Stip.).

39. The 1988 SWP refers to a Stipulation of Settlement, dated November 16, 1988, which, *inter alia*, provides for terminating the Commonwealth Court actions and the appeals to this Board. All of these proceedings were subsequently terminated (Exhibit DCSWA-1).

40. Also on November 16, 1988 DER issued to DCSWA NPDES Permit No. PA-0040860 (1988 NPDES) setting effluent limits for the discharge from a planned waste water treatment plant to treat leachate generated by the landfill. The 1988 NPDES also was the subject of Szarko's appeal to the Board consolidated at docket no. 88-516-MR, but Szarko withdrew his appeal of the 1988 NPDES prior to commencement of the hearings (Stip.).

41. Prior to issuance of the 1988 SWP and the 1988 NPDES, DER held a public

hearing to receive comments on the applications. DER's report responding to the comments was issued on November 16, 1988 concurrent with issuance of the 1988 SWP and 1988 NPDES (N.T. 2097-2098; Exhibit DCSWA-150).

42. The 1988 SWP was issued in conformance with the Delaware County Solid Waste Management Plan which designates the landfill to receive all trash and ash from Delaware County for the next 25 years (N.T. 1774-1798, 1820-1822; Exhibits DCSWA - 6, 7 and 15).

43. The 1988 SWP authorized expansion of the landfill by about 32 acres. This included expansion onto the southeast flank of Shenkel Hill (30 acres) and expansion in the berm area (2 acres). In addition, the 1988 SWP authorized overtopping of 31 acres of the existing landfill in the berm area (Exhibit DCSWA-1).

44. The design approved by DER in the 1988 SWP provided for a double liner system to be installed over the 32 acres of new disposal area. The typical liner section showed

- (a) no underdrains;
- (b) a 6-inch layer of compacted soil;
- (c) a 30-mil PVC secondary liner sandwiched in cushioning fabric above the compacted soil;
- (d) a 4-inch perforated PVC pipe wrapped in filter fabric and placed in filter stone in a trench, 18 inches wide and 12 inches deep, above the secondary liner, to act as a witness drain;
- (e) 12 inches of sand around the witness drain trench;
- (f) a 50-mil PVC primary liner sandwiched in cushioning fabric installed on top of the sand layer;
- (g) 18 inches of sand installed on top of the primary liner;

(h) 8 feet of selected refuse, free of bulky items or items capable of penetrating protective covers, placed on top of the sand layer; and

(i) a 6-inch perforated PVC pipe surrounded by filter stone in a trench, 18 inches wide and 3 feet deep at the bottom but widening to 4 feet at the top, all covered with filter fabric, installed about 14 inches into the sand layer and about 22 inches into the selected refuse, to act as a leachate drain (Exhibit DCSWA-1).

45. The design approved by DER in the 1988 SWP provided for a single liner system to be installed over the 31 acres of the existing landfill prior to overtopping. The typical liner section showed

(a) 12 inches of interim cover over existing waste;

(b) a 50 mil PVC liner sandwiched in cushioning fabric installed over the interim cover;

(c) 12 inches of protective cover over the liner; and

(d) leachate drain pipes installed within the protective cover

(Exhibit DCSWA-1).

46. After issuance of the 1988 SWP, DCSWA began construction of pads S-1 through S-4 on Shenkel Hill. S-1 was completed by June 1989 and waste was being deposited both on S-1 and S-2 by January 1990. At the time of the hearing, all four pads had been constructed and filled (Stip.; N.T. 2104-2109; Exhibits DCSWA-101(h) and 101(i)).

47. DER placed numerous special conditions in the 1988 SWP to address issues raised in the public comment period and issues raised in DER's review of the application. Among these special conditions were Condition 6 (requiring weekly monitoring of the witness drains), Condition 7 (requiring increased groundwater and surface water monitoring), Condition 12 (requiring employment of

a full time engineer to work at the landfill), and Condition 24 (requiring a study of the discharges from the 36" RCP and the underdrains) (N.T. 614-652; Exhibit DCSWA-1).

48. Condition 24 of the 1988 SWP, mentioned above, required DCSWA, within 30 days after issuance of the permit, to submit a hydrogeologic study work plan regarding infiltration of contaminated groundwater or surface water into the 36" RCP and contaminated groundwater in monitoring wells. DCSWA retained Applied Geotechnical and Environmental Service Corp. (AGES) to do the work. A work plan was submitted and approved and a 3-volume report was prepared by AGES, dated April 16, 1990 (N.T. 3286; Exhibit DCSWA-2).

49. On September 23, 1988 DCSWA submitted phases 1 and 2 of the second permit application contemplated by the agreement referred to in Finding of Fact No. 37. After several rounds of comments, responses and revisions (including the filing of the 3-volume AGES report), DER issued Permit No. 100345 to DCSWA on December 17, 1990 (1990 SWP). The 1990 SWP is the subject of Szarko's appeal at docket no. 91-049-MR (now consolidated at docket no. 88-516-MR) (Stip.; Exhibit DCSWA-2).

50. Prior to issuance of the 1990 SWP, DER required DCSWA to apply for a separate Earth Disturbance Permit pursuant to the DSEA. Earth Disturbance Permit No. 0689802 was issued to DCSWA on December 17, 1990 and was listed in Szarko's Notice of Appeal at docket no. 91-049-MR (now consolidated at docket no. 88-516-MR) (Stip.).

51. Also on December 17, 1990 DER issued to DCSWA Permit No. D06-476A, authorizing abandonment of the 36" RCP. This permit also is listed in Szarko's Notice of Appeal at docket no. 91-049-MR (now consolidated at docket no. 88-516-MR) (Stip.).

52. Prior to issuance of these permits, DER held a public hearing in October 1989 to receive comments on the applications (N.T. 3290).

53. The 1990 SWP was issued in conformance with the Delaware County Solid Waste Management Plan (see Finding of Fact No. 42) (N.T. 1818-1893).

54. The 1990 SWP authorized expansion of the landfill by 63 acres and the overtopping of about 19 acres of existing landfill. The overtopping acreage and a considerable portion of the expansion acreage is located south, east and northeast of the berm area. The remainder of the expansion acreage is on the northern end of Shenkel Hill (Exhibit DCSWA-2).

55. As in the 1988 SWP, DER placed numerous special conditions in the 1990 SWP to address issues raised in the public comment period and issues raised in DER's review of the application. Among these were Condition 4 (requiring double liners for overtopping in the berm area), Condition 6 (requiring the presence of a quality assurance inspector during construction), Condition 16 (requiring continued weekly monitoring of all witness drains), Conditions 20 and 21 (requiring increased monitoring of surface water), and Conditions 22 and 23 (requiring annual macroinvertebrate and other samplings) (N.T. 640-641, 652-653; Exhibit DCSWA-2).

56. Condition 4 of the 1990 SWP, mentioned above, prohibited any overtopping in the berm area until plans were revised to include double liners instead of the single liner initially approved in the 1988 SWP (Stip.; Exhibit DCSWA-2).

57. The typical liner section approved as part of the 1990 SWP shows

(a) 6 inches of prepared subgrade topped by two layers of geonet reinforcing fabric over areas of existing waste;

(b) 6 inches of prepared subbase;

(c) a 30 mil PVC secondary liner sandwiched in cushioning fabric above the subbase;

(d) a 4-inch perforated PVC pipe wrapped in filter fabric and surrounded by filter stone in a trench, about 2 feet wide and 10 inches deep, above the secondary liner, to act as a witness drain;

(e) 12 inches of sand around the witness drain trench;

(f) a 50 mil PVC primary liner sandwiched in cushioning fabric installed above the sand layer;

(g) a 6-inch perforated PVC pipe surrounded by filter stone in a trench, all covered with filter fabric, to act as a leachate drain;

(h) 18 inches of sand around the leachate drain trench; and

(i) selected refuse, free from any material capable of puncturing the primary liner and not over 15 inches in diameter, above the sand layer

(N.T. 3354-3357; Exhibit DCSWA-2).

58. Earth Disturbance Permit No. 0689802, issued on December 17, 1990, authorized additional stormwater and sediment control basins to those authorized under the 1988 SWP. Basin 2 was to remain as part of the system and be supplemented by basins 4, 5 and 6. Basins 1 and 3 were to be eliminated (Exhibit DCSWA-3).

59. Basin 1 had drained into the 36" RCP which extended beneath the landfill to an outlet structure near Furnace Run. Permit No. D06-476A, issued on December 17, 1990, authorized abandonment of the 36" RCP and diversion of an unnamed drainageway into an enclosure to be constructed along Shenkel Hill Road to the base of the landfill and then in an easterly direction to the existing outlet structure. The enclosure will be an 18" RCP at the upgradient end, enlarging to a 27" RCP to accept discharges from basin 5 and enlarging further

to a 36" RCP to accept discharges from basin 4 (Exhibit DCSWA-4).

60. From November 16, 1988 until December 17, 1990, landfill activities proceeded pursuant to the 1988 SWP. Since December 17, 1990, landfilling activities have proceeded pursuant to the permits issued on that date (Stip.).

61. Pads 101 and 102, authorized by the 1990 SWP for the north portion of Shenkel Hill, had been constructed and were in use during the hearings. Pad 103 was under construction (N.T. 2380, 3763-3765).

62. On March 4, 1991 DCSWA and the Township of Earl entered into a Host Community Agreement providing, *inter alia*, for transfer of the ownership of Shenkel Hill Road to DCSWA. By the time of the hearings, the previously deposited waste along and beneath the road has been relocated to lined areas. A small amount of previously deposited waste remains to be relocated as referenced in Finding of Fact No. 29 (Stip.).

D. Geologic setting

63. The landfill site is underlain predominantly by Precambrian Age Byram gneiss with some injected Pochuck gneiss. Cambrian Age Hardyston quartzite caps the ridges and crops out to the west, south and southeast of the site. The Byram gneiss is predominantly granitic gneiss with associated varieties of migmatites. The Pochuck gneiss is comprised of hornblende gneiss and gabbroic gneiss. The Cambrian Age Hardyston quartzite present on the site consists of the Lower Hardyston and Middle Hardyston (N.T. 459-460, 2450-2457; Exhibits A-25, DCSWA-1 and 442).

64. West of the site in the Oley Valley the bedrock is primarily limestone (N.T. 459-460; Exhibit A-25).

E. 8 foot isolation distance

65. In order to obtain the 1988 SWP and the 1990 SWP, DCSWA had to

demonstrate compliance with 25 Pa. Code §273.252(b) requiring at least 8 feet of separation between the bottom of the subbase for the liner systems and the regional groundwater table (N.T. 400-401; Pounds deposition, pp 11 *et seq.*; Lusk deposition, May 9, 1990, pp 94-96).

66. The purpose of this requirement is to make certain that the regional groundwater does not make contact with the liner systems. The 8 foot distance is to account for fluctuations in the regional groundwater table that may bring the level higher than that shown in the application (Pounds deposition, pp 11 *et seq.*).

67. Dr. Earl prepared Forms 2, 6, 7, 8, 11, 12 and 13 of phase 1 of the application leading to issuance of the 1988 SWP. In doing so he used data compiled in performing hydrogeologic services for the landfill since 1984, including that gained from the 1986 hydrogeologic investigation (see Findings of Fact 30-32) (N.T. 2551; Exhibit DCSWA-1).

68. Plate 2, which is part of Forms 6 and 7, is entitled "Water Table Configuration, June 10, 1988." Using water level measurements from 20 test/monitoring wells, taken on June 10, 1988, Dr. Earl contoured the water table elevations using linear interpolation and geologic judgment. These contours were then superimposed on a topographic map prepared about two years earlier (N.T. 2556-2557, 2672-2673, 2755-2758; Exhibit DCSWA-1).

69. Because of heavy rains during the month of May 1988, Dr. Earl expected the June 10, 1988 measurements to represent probably the highest practical expected position of the regional groundwater table but not necessarily the highest level ever reached historically (N.T. 2550, 2761-2766).

70. Since preparation of Plate 2 required the use of linear interpolation and geologic judgment, it is open to attack by other hydrogeologists whose

interpolation and judgment reach different conclusions (Exhibit A-93).

71. Plate 2 was used together with other data to make certain that the landfill design maintained the 8 foot separation (N.T. 2748).

72. As mentioned in Finding of Fact 66, the 8 foot separation allows for some fluctuation in the regional groundwater table. Additional separation tends to come about from a lowering of the regional groundwater table after liners are placed over recharge areas (N.T. 2748-2750).

73. In designing the subbase for the liner systems built pursuant to the 1988 SWP, Richard M. Bodner, an engineer with Martin and Martin, Incorporated, took into account (a) the water table contours on Plate 2, (b) the allowable subbase grades, and (c) the necessity to tie in the liner systems to the existing land surface elevations at the outside perimeters of the lined areas. The latter two factors often were more controlling than the 8 foot separation requirement (N.T. 2128-2132).

74. Included in the application for the 1988 SWP was a drawing showing the excavation grades for the subbase of the liner system on Shenkel Hill with the water table contours superimposed on it. That drawing shows that the 8 foot separation was met or exceeded at all places (N.T. 3167-3168; Exhibits A-58 and DCSWA-1).

75. Making certain that the 8 foot separation was observed in the design on which the 1988 SWP was based was a main concern of the DER hydrogeologist who reviewed the application (Marcucci-Kennedy deposition, p. 125).

76. While water table contours generally mimic surface topography, disturbance of the surface can alter this. Areas within the landfill boundaries, including Shenkel Hill, have been significantly disturbed by excavation and mining of soil and rock to the point where recharge and runoff characteristics

have been changed (N.T. 2614-2617, 2671-2677; Exhibits A-93 and A-197).

77. During construction of the Shenkel Hill pads authorized by the 1988 SWP, DCSWA's resident engineer made certain that an 8 foot separation was maintained by strict adherence to the subbase elevations shown on the design drawings. When water was encountered during construction, which happened on one occasion, he conferred with one of the consultants (Keates deposition, April 6, 1990, pp. 122-123; Keates deposition, March 12, 1993, p. 18).

78. In April 1989, while construction of pad S-2 on Shenkel Hill was in progress, water was encountered at an elevation higher than the water table elevation contoured for that area. Dr. Earl was called in to investigate (N.T. 2581; Keates deposition, April 6, 1990, pp. 123-125).

79. Dr. Earl

(a) went to the landfill on April 13, 1989 and observed two seeps on pad S-2 at the top of an excavated slope (seep A on the east and seep B about 20 feet to the west), water running down the slope from those seeps and puddling at the bottom;

(b) suspected that the seeps were perched groundwater because, if they were the regional groundwater, they would have extended along the entire face of the excavated slope;

(c) had 9 testholes drilled (3 inches in diameter and 10-1/2 feet deep) - 1, 2, 3 and 4 north of the seeps by about 15 feet, 5 and 6 east of the seeps by 25 to 50 feet, 7 and 8 west of the seeps by 60 to 80 feet, and 9 south of the seeps by 125 feet - to determine whether an unsaturated zone (necessary for a perched aquifer to exist) was present below the level of the seeps;

(d) measured water levels in the testholes later on April 13, 1989 and found water only in testholes 3, 4 and 7;

(e) determined that the water levels in testholes 3 and 4 (just north of seep B - elevation 621.2 feet above sea level) were at 622 feet and 621 feet above sea level, respectively, while testholes 1 and 2 (just north of seep A - elevation 619.5 feet above sea level) were dry at bottom elevations of 620 feet and 619.2 feet above sea level, respectively;

(f) determined that testholes 5 and 6 (east of seep A) were dry at bottom elevations of 606.4 feet and 600.9 feet above sea level, respectively;

(g) determined that the water in testhole 7 (west of seep B) was at 601.1 feet above sea level, while testhole 8 (further to the west of seep B) was dry at a bottom elevation of 596.7 feet above sea level;

(h) determined that testhole 9 (south of the seeps) was dry at a bottom elevation of 587.9 feet above sea level;

(i) had the seeps and testholes surveyed on April 14, 1989; and

(j) returned to the landfill on April 20, 1989, measured water levels in the testholes and found water only in the same three - 3, 4 and 7 - as a week earlier

(N.T. 2581-2598; 2924-2927, Exhibits A-197, DCSWA-456).

80. Dr. Earl concluded

(a) that the face of the excavated slope below the seeps was dry and the testholes drilled down below that face also were dry, establishing the presence of an unsaturated zone below the seeps;

(b) that the water in testhole 7, which is at a lower elevation, probably was the regional groundwater; and

(c) that the seeps represent a perched phenomenon rather than the regional groundwater

(N.T. 2589-2590, 2592-2596, 2929-2933).

81. The material through which the testholes were drilled, as observed by Dr. Earl, was not rock per se but a deeply weathered material with porosity and permeability (N.T. 2587-2588, 2926).

82. DCSWA informed DER of the S-2 seeps and showed them to four DER representatives during a site inspection on April 20, 1989 (N.T. 3171-3173; Exhibit DCSWA-456).

83. The DER representatives agreed with Dr. Earl's conclusion that the seeps represented perched groundwater rather than regional groundwater and authorized the installation of a pipe to drain the water away (N.T. 818-820; Keates deposition April 6, 1990, p. 128).

84. DCSWA installed a ten-inch diameter perforated PVC pipe in a stone-lined trench and extended it from the seeps to a concrete gutter along Shenkel Hill Road. Flows from the seeps diminished to the point that very little was coming out of the pipe in April 1990 and flows had ceased completely by March 1991 (N.T. 2331-2342; Keates deposition, April 6, 1990, pp. 125-134; Exhibit MON-191).

85. Dr. Earl's conclusion (agreed to by DER personnel) that the S-2 seeps were perched groundwater did not conflict with his representations in the application leading to the 1988 SWP that there was no perched groundwater on the site. That representation was based on information gathered previously in soil test pits dug on Shenkel Hill in 1984. No perched water was encountered at that time but a layer of fragipan was found in some pits. This tight clay-rich layer impedes downward infiltration and, at some seasons of the year, can cause perched groundwater to accumulate above it (N.T. 2433-2437; Exhibits DCSWA-1 and DCSWA-419).

86. Appellant's expert hydrogeologist, Dr. John K. Adams of Eastern

Geotechnical Services, criticized Dr. Earl's hydrogeologic evaluation for the 1988 SWP for the following reasons, among others:

(a) The regional groundwater contours shown on Plate 2 contain numerous errors and do not represent the highest levels recorded;

(b) precipitation and evapotranspiration were not properly evaluated with respect to groundwater elevations;

(c) hydrographs and storage coefficients were lacking; and

(d) critical test wells were shut too quickly and the wells were not properly evaluated

(N.T. 402-514; Exhibit A-93).

87. Dr. Earl prepared Forms 2, 6, 7, 11, 12 and 13 of phase 1 of the application leading to issuance of the 1990 SWP, using data submitted with the application for the 1988 SWP as supplemented by later revisions (N.T. 2609-2611; Exhibit DCSWA-2).

88. Plate 2, which is part of Forms 6 and 7, is entitled "Water Table Configuration, June 10/11, 1986 and June 10, 1988." The last revision is dated June 26, 1990. Except for supplementary information, the groundwater contours shown on Plate 2 are the same as, or similar to, the Plate 2 submitted with the application leading to the 1988 SWP (Exhibit DCSWA-2).

89. Plate 2 was used together with other data to make certain that the landfill design maintained the 8 foot separation (N.T. 3366-3367).

90. In designing the subbase for the liner systems built pursuant to the 1990 SWP, George H. Barstar, of AGES (the consultant that prepared the application for the 1990 SWP), considered the factors referred to in Finding of Fact 73, as well as setbacks, the presence of rock and the requirements of the E&S control systems. The 8 foot separation was the controlling factor in limited

portions of the area covered by the 1990 SWP (N.T. 3363-3371; Exhibit DCSWA-2).

91. The drawing showing the excavation grades for the subbase of the liner systems to be constructed under the 1990 SWP shows that the 8 foot separation was met or exceeded at all places, even at those points where water level data obtained since 1988 are higher than that contoured by Dr. Earl (N.T. 2630-2631; Exhibit DCSWA-2).

92. In constructing disposal areas under the 1990 SWP, AGES provides the quality assurance/quality control services required by the permit by constant inspection of construction. Where the 8 foot separation is concerned, these services involve the digging of test pits and installation of piezometers to determine the exact location of the regional groundwater (N.T. 3384-3388; Exhibit DCSWA-2).

93. For pad 103 (which covers a former soil stockpile area where seeps or springs formerly existed), AGES dug about 42 test pits and installed about 15 piezometers, concluding that the regional groundwater level was slightly lower than that shown on the excavation drawing (N.T. 731-741, 2114-2127, 2354-2357, 3388, 3909-3922, 4660-4661).

94. If the test pits and piezometers would indicate that an 8 foot separation does not exist, AGES would notify DER to discuss what changes would be appropriate to achieve the 8 foot separation. Most likely, this would involve raising the liner elevation (N.T. 3392-3393).

95. Dr. Adams criticized Dr. Earl's hydrogeologic evaluation for the 1990 SWP, incorporating but expanding the reasons cited in connection with the 1988 SWP (N.T. 423-514; Exhibit A-94).

96. The errors pointed out by Dr. Adams on Plate 2

(a) related, for the most part, to control points outside of the areas

to be lined and, therefore, not subject to the 8 foot separation requirements;

(b) were not errors at all, in some instances, since the discrepancies were within the margin or error inherent in a water table contour map using a 10-foot contour interval;

(c) are based, in part, on Dr. Earl's rejection of certain data which were anomalies or which reflected artificial conditions; and

(d) were insignificant because the design drawings reflect that the 8 foot separation was met or exceeded despite the errors

(N.T. 2315-2323, 2533-2548, 2619-2630, 2641-2643, 2690-2692, 2769-2775).

97. Installation of liners over groundwater recharge areas reduces or eliminates the recharge, lowering the groundwater table (N.T. 2679-2680).

98. Since virtually the entire watershed for the landfill will be lined, groundwater levels will drop. This is already apparent in some of the wells (N.T. 2681-2688, 3150-3159).

99. The use of hydrographs, which continuously record groundwater levels in wells, to determine the regional groundwater level was unnecessary since DCSWA had over 300 groundwater level measurements from 47 wells taken between October 1984 and November 1990 during all seasons of the year (N.T. 2686-2689; Exhibit DCSWA-472).

100. A hydrologic budget, which considers the effects of precipitation and evapotranspiration on a site, also was not necessary to determine the regional groundwater level because of the historic data available. Moreover, a hydrologic budget has little significance with respect to a dynamic site like a landfill where construction and excavation are going on constantly (N.T. 2678-2686).

101. Closing the 36" RCP will not cause the groundwater level to rise because only the upper end of the pipe will be plugged. The remainder of the

pipe (which is loosely-jointed) and the gravel bed surrounding it will continue to convey groundwater from beneath the landfill (N.T. 2652-2653).

F. Pumping tests

102. As noted in Finding of Fact 31, Dr. Earl had performed short-term pumping tests on nine wells in conjunction with the 1986 hydrogeologic investigation. This data was later used to describe hydraulic characteristics of the aquifer in the application leading to the 1988 SWP (N.T. 2482-2485).

103. The 1986 pumping tests lasted between 14 minutes and a little over an hour - long enough to allow plotting of some data (drawdown, pumping rate, temperature and specific conductance) so that a survey of the range of hydraulic characteristics could be obtained (N.T. 2484).

104. Plots and calculations from the 1986 pumping tests were used to determine transmissivity (permeability of the bedrock) despite the fact that pumping tests in geologic settings like the landfill (fractured rock with strong directional characteristics) deviate significantly from assumptions used in equations developed to analyze them (N.T. 2485, 2490-2491; Exhibits DCSWA-437 and 438).

105. The 1986 pumping tests and the calculations based on them established two families of wells - one with low transmissivity that includes most of the wells and another with high transmissivity that includes 2 wells. These 2 wells were drilled into highly fractured and weathered material (N.T. 2485-2490).

106. On August 17-18, 1989 Dr. Earl performed 60-minute pumping tests on the five monitoring wells drilled pursuant to the 1988 SWP to satisfy DER's as-built requirements. He calculated specific capacity values for these wells and, again, found that they fell into two families - one of lower capacity (3 of the wells)

and one of higher capacity (2 of the wells) (N.T. 2598-2600; Exhibit DCSWA-458).

107. On August 24-25, 1989 Dr. Earl performed a 24-hour multiple-well pumping test using MW-10 as the pumping well and MW-4, MW-5 and MW-9 as the observation wells. MW-4 and MW-5 were equipped with automated recording devices; manual recording was done in MW-9 (N.T. 2601-2602).

108. The wells used in the test, chosen jointly by Dr. Earl and DER hydrogeologist Susan Marcucci-Kennedy, were in the south part of the site and were expected to have the greatest yield potential (N.T. 2602-2603).

109. The transmissivity and storage coefficients calculated from data obtained during the 24-hour pumping test was furnished to DER as part of the application leading to the 1990 SWP (N.T. 2605-2606; Exhibits DCSWA-2, 459 and 460).

110. Dr. Adams criticized the pumping tests because

(a) they were not conducted in the manner necessary to perform the calculations;

(b) hydraulic conductivity and transmissivity were only estimated and storage coefficient was ignored entirely; and, as a result

(c) they could not describe the hydraulic characteristics of the aquifer

(N.T. 471-500, 599-610, 662-667; Exhibits A-93 and A-94).

111. While Dr. Earl recognized that geologic conditions at the landfill would not permit highly accurate calculations, he believed that the pumping tests he conducted would produce data to a level of accuracy that would be sufficient for regulatory purposes (N.T. 2484, 2601-2603, 2659-2660).

G. Fractures

112. A fracture trace map is a vertical aerial photograph of a site on which

a geologist marks linear features that may or may not be underlain by fracture zones in the bedrock. Because they often turn out to be trails, fence lines, property lines, utility lines, etc. that have no relevance to locating fractures, they must be confirmed on the ground (N.T. 2437-2440).

113. Where landfills are concerned, fracture trace maps are used primarily to locate high yield monitoring wells (N.T. 2440-2441).

114. As required by DER, DCSWA filed fracture trace maps with each application, focusing on the specific area included within that application (N.T. 2437-2438, 2495-2497, 2610-2612; Exhibits DCSWA-2, 419 and 442).

115. Some or all of these fracture trace maps showed one or more fracture traces across Shenkel Hill. Dr. Adams asserted that these traces establish a hydraulic connection between the landfill and the Oley Valley (N.T. 501-503; Exhibit A-93).

116. Dr. Earl concluded that there is no such hydraulic connection because (a) the traces have not been confirmed on the ground to be actual fractures, and (b) even if they are fractures, the hydraulic gradients on Shenkel Hill (which Dr. Adams acknowledges as being correctly determined) would prevent groundwater from flowing in the direction of the Oley Valley (N.T. 1090-1091, 1095-1097, 1107-1116, 2667-2671, 2693-2697, 2710-2712).

117. Extensive excavation and mining of cover soil at the landfill has exposed bedrock over a large portion of the site. Dr. Earl, who has observed this exposed bedrock over the years, found no fracture zones which were critical or unusual (N.T. 2707-2709).

118. DER's hydrogeologist, Marcucci-Kennedy, who was aware of the fracture traces on Shenkel Hill, agreed with Dr. Earl's conclusion that they could not provide a pathway for groundwater to get from the landfill to Oley Valley (N.T.

845-847).

H. Groundwater divide on Shenkel Hill

119. In order to comply with isolation distances from nearby domestic water supplies, DCSWA drilled a series of wells along the perimeter of the landfill to locate groundwater divides (N.T. 2632-2633).

120. The divide on Shenkel Hill was located along the ridge top (as expected) on the basis of test wells drilled in 1984 on Shenkel Hill (three of which were on the northwestern flank) and test holes drilled in 1984 near the crest of the ridge (N.T. 2635-2639; Exhibits DCSWA-407 and 419).

121. The location of the groundwater divide on Shenkel Hill has not been influenced either by a highly permeable or highly impermeable layer of material (N.T. 2633-2636, 2639-2641).

122. Installation of liners on the southeast side of Shenkel Hill will cause the groundwater divide to shift away from the lined area. The groundwatershed will enlarge somewhat in the direction of the Oley Valley, providing additional isolation (N.T. 3184-3193; Exhibit DCSWA-1008).

I. Exclusionary criteria

123. DER's William Pounds testified that, when DER adopted regulations at 25 Pa. Code §273.202 relating to exclusionary criteria, it intended to exempt areas that were permitted prior to April 9, 1988, the date of the 1988 regulations (Pounds deposition, pp. 60-63).

124. As of April 9, 1988 the permitted areas at the landfill included the 1978 disposal area and considerable support area used for soil stockpiles and borrow, haul roads, sediment basins, etc. (N.T. 2072-2086, 2120-2123; Exhibits DCSWA-1, mounted sheets LF-1A and 1B, and 101(m)).

125. Included within the pre-1988 permitted area were wetlands, springs and

seeps that formed the source of the unnamed tributary which was piped through the landfill in the 36" RCP beginning in 1983 (N.T. 740-741, 2004-2012; Exhibits DCSWA-114, 117, 122 and 156).

126. The unnamed tributary is a perennial stream (N.T. 586-588, 740; Exhibit A-132).

127. As noted in Findings of Fact 12 and 26, DCSWA had pre-1988 permits to channel the unnamed tributary through the landfill in the 36" RCP. As noted in Finding of Fact 51, DCSWA received approval in 1990 to plug the upgradient end of the 36" RCP and rechannel the unnamed tributary into a new piping system. These permits, which were issued under the provisions of Chapter 105 of 25 Pa. Code, were viewed by DER as exempting the unnamed tributary from the exclusionary provisions of 25 Pa. Code §273.202(a)(4) (Pounds deposition, pp. 63-65).

128. Even though the source of the unnamed tributary was within the pre-1988 permitted area, DCSWA located the 1988 and 1990 permit areas more than 100 feet from those sources and the undisturbed channel of the tributary (N.T. 2114-2127, 3294-3299, 3826-3832; Exhibits DCSWA-1 and 2).

J. Ramifications of overtopping

129. As noted in Findings of Fact 43 and 54, the 1988 SWP and the 1990 SWP authorized overtopping of previously deposited waste. Some of the overtopping is above areas where underdrains were installed, above areas where MC-30 was placed as a secondary liner and above areas where the 36" RCP is located (N.T. 1376-1379; Exhibits DCSWA-1 and 2).

130. In formulating the design approved in the 1988 SWP, DCSWA's engineering consultant, Richard M. Bodner, evaluated the effect of overtopping on the liner systems installed under the 1978 SWP, the piping systems installed under the 1978 SWP and the 36" RCP (N.T. 2132-2135).

131. With respect to the liner systems, Mr. Bodner

(a) determined that there either are no limiting weights or heights of trash applicable to PVC liners such as the primary liner installed pursuant to the 1978 SWP or, if applicable, come into play only at heights hundreds of feet higher than the maximum of 220 feet allowed at the landfill;

(b) observed that the PVC liner joints are lapped (overlapped like a roof shingle) and solvent welded;

(c) concluded that the placing of additional weight on the PVC liner would help to seal the joints;

(d) concluded that the placing of additional weight on the PVC liner would tend to squeeze shut any defects or injuries to the PVC sheeting;

(e) concluded that, when the secondary liner is PVC sheeting, it will act the same as the primary liner; and

(f) concluded that, where the secondary liner is MC-30, the placing of additional weight will help to consolidate that zone and make it less permeable

(N.T. 2136-2144).

132. With respect to the piping systems, Mr. Bodner

(a) assessed the load carrying capacity of 4-inch and 6-inch Schedule 40 and Schedule 80 PVC pipe used as underdrains, witness drains or leachate drains under the 1978 SWP;

(b) found that the weakest of these pipes can withstand the weight of at least 800 feet of trash, far in excess of the maximum allowed at the landfill;

(c) concluded that the pipes will not collapse;

(d) had Dr. Warner assess the situation that would occur if the pipes should fail; and

(e) forwarded to DER Dr. Warner's conclusion that the stone-lined trenches in which the pipes were installed had adequate capacity to carry the flows

(N.T. 2134-2136, 2143, 2159-2161; Exhibit DCSWA-1).

133. With respect to the 36" RCP, Mr. Bodner

(a) determined that the 36" RCP was designed to accommodate over 350 feet of trash, far in excess of the maximum allowed at the landfill; and

(b) concluded that the 36" RCP would not be adversely affected by the overtopping

(N.T. 2133-2134; Exhibit DCSWA-117).

134. In formulating the design approved in the 1990 SWP, DCSWA's engineering consultant, George H. Barstar, evaluated the effect of overtopping on the liner systems and the piping systems installed both under the 1978 SWP and 1988 SWP (N.T. 3344-3345).

135. With respect to the liner systems, Mr. Barstar

(a) evaluated the possibility of failure of the 1978 and 1988 liner systems along the systems (sliding of the geomembranes), above, below and through them;

(b) concluded that the liner systems would not be adversely affected by the overtopping; and

(c) furnished the calculations to DER

(N.T. 3346, 3352-3354; Exhibit DCSWA-2).

136. With respect to the piping systems, Mr. Barstar

(a) performed pipe crush calculations for 6-inch and 12-inch Schedule 40 PVC pipe;

(b) determined that the 6-inch Schedule 40 PVC pipe could handle the

weight of more than 800 feet of landfill and that the 12-inch Schedule 40 PVC pipe could handle the weight of 275 feet of landfill;

(c) concluded that the piping systems would not be adversely affected by overtopping; and

(d) furnished the calculations to DER (N.T. 3345-3352, 3354; Exhibit DCSWA-2).

137. We adopt the foregoing conclusions as our findings of fact on this issue.

138. The effect of overtopping on leachate generation is uncertain. The additional weight will cause some consolidation of previously deposited waste but the extent is unknown. The consolidation will squeeze out additional leachate but the amount is unknown. Appellant's experts predict a strong surge of leachate while DCSWA's experts predict very little. Whatever is generated will flow into the leachate collection system installed under the 1978 SWP or the leachate collection system installed under the 1988 SWP (N.T. 1380, 1382, 1424, 1450, 1529, 2183-2194, 3809-3817, 3937, 3939).

K. Closure of TW-88-6

139. Dr. Earl and DER's Marcucci-Kennedy agreed during the spring of 1988 that 7 specific monitoring wells would be used to provide the "one full year" of water quality data to be used for background purposes in the application for the 1988 SWP (N.T. 2576-2577).

140. In addition to the 7 monitoring wells selected, there were 5 other monitoring wells which had been sampled since 1983 which could have been used for background purposes (N.T. 2577).

141. One of the 7 monitoring wells chosen in Finding of Fact 139 was TW-88-6 on Shenkel Hill. Construction activities were nearing that well before four

quarters of data had been obtained. Dr. Earl requested, and Marcucci-Kennedy consented, to abandoning the well at that point (N.T. 2578).

142. The abandonment of TW-88-6 before one full year of monitoring was completed was insignificant because of the location of the well and the availability of other background data (N.T. 2578).

L. Groundwater and surface water contamination

143. As noted in Findings of Fact 12 and 14, the 1978 SWP authorized the construction of the 36" RCP to channel the unnamed tributary through the landfill and the construction of underdrains to drain away groundwater. The use of underdrains for this purpose was acceptable landfill design at the time but now is prohibited (N.T. 626-627, 2531).

144. Underdrains were installed under all of the disposal pads (1 through 18) permitted under the 1978 SWP. This included pads both northwest and southeast of the 36" RCP. As noted in Finding of Fact 21, the underdrains were all interconnected and piped to trunk lines paralleling the 36" RCP - the northwest underdrain and the southeast underdrain (N.T. 806-816, 1276-1285, 1320, 2012-2024, 2058; Exhibits DCSWA-157 through 178).

145. By 1984 both the northwest underdrain and southeast underdrain were showing signs of contamination (Exhibit MON-197).

146. As noted in Findings of Fact 27, 30, 31 and 32, Dr. Earl Conducted a "Hydrogeologic Investigation of the Unlined Refuse Area" during June and July 1986 in order to study the groundwater in the area of the landfill and the effect on the groundwater of the previously deposited waste on unlined areas. Dr. Earl concluded:

(a) the unlined portion of the landfill has caused contamination of the groundwater immediately beneath and downgradient from the unlined areas;

(b) the contaminants are primarily volatile organic compounds (VOCs), chlorides, total organic carbon (TOC), chemical oxygen demand (COD) and sodium;

(c) groundwater beneath the unlined portion of the landfill flows south at rates of 0.4 to 1.7 feet per day, while groundwater beneath the remainder of the landfill area flows southwest at rates of 0.5 to 10 feet per day (because of more densely-fractured bedrock);

(d) there are no domestic wells immediately downgradient from the unlined portion of the landfill and no water supplies have been adversely affected; and

(e) removal of the waste from the unlined portion of the landfill, coupled with the placement of a liner system over that area, will eventually reduce the level of contamination in the groundwater, although a temporary increase can be expected during the removal process (N.T. 2502-2503, 2508-2520; Exhibit DCSWA-443).

147. Dr. Earl also concluded that the unlined portion of the landfill was the source of the contamination found in the 36" RCP, the northwest underdrain and the southeast underdrain (N.T. 2515).

148. The 1988 SWP required that Quarterly and Annual Water Quality Analysis Reports be submitted for the 36" RCP, the northwest underdrain and the southeast underdrain (Exhibit DCSWA-1).

149. Flows in these pipes have continued to show the presence of contaminants (Exhibit MON-197).

150. Witness drains installed under the 1978 SWP flow to witness tanks 1, 2 and 3; but, because the system is interconnected, it is not possible to determine the source of flows into any one of these tanks (N.T. 2201-2204).

151. In 1988, while construction of pad 14 under the 1978 SWP was taking

place, leachate from pad 13 (which was being filled with waste) drained into the pad 14 witness system and showed up in witness tank 2. DCSWA notified DER of the occurrence, connected witness tank 2 to the leachate collection system and began chemical monitoring and analysis of the flows (N.T. 2088-2091; Exhibits DCSWA-142, 144 and 145).

152. Measurements of the flows into the witness tanks were done weekly by observing and recording the changing depth of fluid in the tanks. No quantification of flow rates was done (N.T. 1346).

153. The 1988 SWP approved a witness system design for the berm area that provided for drains to interconnect with those from areas permitted by the 1978 SWP (N.T. 2148-2149).

154. The 1990 SWP was issued before any of the 1988 SWP berm area disposal pads had been built. As noted in Finding of Fact 56, the 1990 SWP mandated a double liner system for overtopping in the berm area rather than the single liner system permitted by the 1988 SWP. This redesign also involved a redesign of the witness system in these berm area pads, as a result of which there is no interconnection of lines between the 1978 SWP disposal areas, the 1988 SWP disposal areas and the 1990 SWP disposal areas (N.T. 2149-2151).

155. The 1988 SWP and the regulations on which it was based required weekly monitoring of the witness system to determine flow rates and quarterly analysis of the flows for certain constituents (Exhibit DCSWA-1).

156. After issuance of the 1988 SWP, DCSWA personnel began measuring flows into the witness tanks by filling a bucket at the influent pipe, timing it and calculating ounces per minute (N.T. 1347; Exhibit MON-119).

157. The design approved in the 1990 SWP includes the installation of five witness tanks to handle the flows from the witness system to be installed

pursuant to that Permit. A post-issuance design change approved by DER substitutes two submersible pumps for three of the tanks. The liquid will flow from the pumps through flow meters where it will be measured. Liquid entering the remaining two witness tanks will be measured manually on a weekly basis (N.T. 3426-3432; Exhibit DCSWA-2).

158. The witness tanks for the 1978 SWP disposal areas have continued to show the presence of contaminants (N.T. 1461).

159. MW-4 and MW-5 are groundwater monitoring wells downgradient from the landfill disposal areas and have been in place for many years. Chemical analytical records show that these wells have been contaminated as far back as 1978 (MW-4) and 1983 (MW-5). Dr. Earl used the records from these two wells, *inter alia*, in measuring the extent of groundwater contamination from the previously deposited waste on unlined areas in his 1986 "Hydrologic Investigation of the Unlined Refuse Area." See Findings of Fact 27, 30, 31 and 32 (Exhibit DCSWA-443).

160. MW-4 and MW-5 are part of the monitoring well network established in the 1988 SWP and 1990 SWP which involves a total of 13 wells - 5 upgradient, 5 downgradient and 3 immediately downgradient of Shenkel Hill but upgradient of the remainder of the landfill (N.T. 2644-2648, 2720-2725).

161. As noted in Finding of Fact 48, AGES performed the study required by Condition 24 of the 1988 SWP and submitted to DER a 3-volume report entitled "Surface Water Impact Study of Colebrookdale Landfill on Furnace Run," dated April 16, 1990. In performing the study, AGES, *inter alia*,

(a) selected 6 sampling points - the inlet to the 36" RCP, the outlet of the 36" RCP, the outlet of the northwest underdrain, the outlet of the southeast underdrain, and two points in Furnace Run, one 50 feet above, and

another 50 feet below, the point where the flows from the underdrains and the 36" RCP reach Furnace Run;

(b) Sampled these 6 points once a week for 31 consecutive weeks between December 1, 1988 and June 30, 1989;

(c) analyzed the samples for a number of inorganic and organic parameters on a weekly basis and for an expanded number of parameters on a monthly basis;

(d) estimated the flow rates at the 6 sampling points; and

(e) analyzed the sampling results in accordance with the EPA guideline "Statistical Analysis of Ground-Water Monitoring Data at RCRA Facilities - Final Interim Guidance," dated April 1989 (N.T. 3768-3781; Exhibit DCSWA-2).

162. AGES concluded, *inter alia*,

(a) that there is a potential adverse impact on Furnace Run from inorganics, organics and VOCs present in the discharges from the 36" RCP and the underdrains;

(b) that the source of these contaminants is the waste from the unlined areas of the landfill which has since been removed and placed on liners;

(c) that the residual contaminants in the groundwater have influenced the quality of the surface water discharging from the pipes; but

(d) the impact on Furnace Run is not statistically significant at the present time

(N.T. 3778-3782; Exhibit DCSWA-2).

163. Appellant's engineering consultant, Thomas H. Cahill of Cahill Associates, criticized the AGES study, *inter alia*, for the following reasons:

(a) flow measurements were not taken at the time the discharges were

sampled; flows were estimated about a year later;

(b) the interior of the 36" RCP was not examined with a television camera as proposed in the approved work plan;

(c) AGES personnel had little knowledge of the underdrain system;

(d) the sampling points in Furnace Run were too close to each other;

(e) the study did not take into account the volatilization of VOCs within the 36" RCP and the underdrains; and

(f) the conclusions about the source and impact of the contaminants were not supported by the data

(N.T. 1389-1412).

164. DCSWA's consultants answered these criticisms by stating that

(a) flow measurements were not essential since the study only concerned the nature and concentration of contaminants in the discharges;

(b) the interior of the 36" RCP was not examined because a contractor could not be found to do the work, a decision was made to abandon the 36" RCP, and the 36" RCP was constructed initially with loose joints;

(c) AGES had a drawing of the underdrain system;

(d) the sampling points in Furnace Run were located close to each other because the purpose of the study was to measure the impact on Furnace Run of the discharges from the 36" RCP and the underdrains;

(e) while some volatilization of VOCs would take place in the 36" RCP and the underdrains, the study was focused on the amount of contaminants entering Furnace Run as part of the discharges; and

(f) the conclusions all were adequately supported by the data
(N.T. 3394-3403, 3774-3789; Exhibit DCSWA-501).

165. DER accepted the AGES study, agreed with the conclusions, and

considered it to be a satisfactory compliance with Condition 24 of the 1988 SWP (N.T. 3967-3979).

166. Although DER personnel considered requiring DCSWA to apply for and obtain a "monitor-only" NPDES permit for the discharges from the 36" RCP and the underdrains, they ultimately decided that the monitoring requirements of the 1988 SWP and 1990 SWP were adequate protection for Furnace Run (N.T. 3975-3979).

167. Based on the presence of contaminants in the groundwater, in the 1978 SWP underdrain system, in the 36" RCP, and in the 1978 SWP witness system, Cahill concluded that

(a) there is a leak in the primary liner placed in connection with the 1978 SWP;

(b) leachate is passing through this liner into the 1978 witness system;

(c) some leachate is escaping the witness lines and reaching the 1978 secondary liner, especially the MC-30;

(d) leachate is penetrating the secondary liner into the 1978 underdrain system;

(e) Some leachate is escaping the underdrain lines and entering the groundwater;

(f) groundwater, at times, is rising past the underdrain system and penetrating as far as the witness system; and

(g) the contamination of the groundwater is not residual contamination from the previously unlined portions of the landfill but solely a new and continuing replenishment of contamination produced by failure of the 1978 liner system

(N.T. 1311-1351, 1442, 1462-1467).

168. DCSWA's Bodner reviewed Cahill's conclusions and disagreed, reaching his own conclusions that

(a) the path of least resistance for leachate in the 1978 disposal area is into the leachate drains and stone-lined trenches surrounding them, from which it flows to collection tanks;

(b) if any leachate penetrates the primary liner, the path of least resistance is into the witness drains and stone-lined trenches surrounding them, from which it flows to the witness tanks;

(c) any leachate escaping the witness drains would still have to penetrate the secondary liner before it could come into contact with groundwater;

(d) before groundwater rising beneath the 1978 disposal area could enter the waste itself, it would have to avoid the underdrains and the stone-lined trenches surrounding them, penetrate the secondary liner, avoid the witness drains and the stone-lined trenches surrounding them, and penetrate the primary liner; and

(e) even if the groundwater were able to rise to that level and come into contact with the 1978 waste, the path of least resistance would still be the leachate drains

(N.T. 2176-2183; Exhibit DCSWA-172(a)).

169. Bodner also concluded that

(a) Although the landfill is not a hazardous waste facility, it has design elements similar to what is required by EPA for hazardous waste facilities;

(b) EPA guidelines for hazardous waste facilities recognize that no system is absolutely impermeable and that flows in witness drains are to be expected;

(c) according to the EPA guidelines, witness drain flows in the range of 5 to 20 gallons per day (gpd) per acre only require periodic pumping of the tanks, that flows from 21 to 250 gpd per acre require more frequent flow monitoring, chemical analysis and routing of the flows to the leachate management system, and that flows in excess of 250 gpd per acre require remediation;

(d) flows in the 1978 witness drains amount only to about 8 gpd per acre;

(e) even if Cahill's calculation of flows (based on the erroneous assumption that witness tank 2 receives flows only from pad 14) were accepted as correct, the flows would range from 40 to 50 gpd per acre, well below the level where EPA requires remediation; and

(f) even if the flows were at the remediation rate, the EPA recommendation is to cap the affected area, exactly what is being done to the 1978 disposal areas by the overtopping permitted in the 1988 SWP and 1990 SWP (N.T. 2196-2212; Exhibit DCSWA-153).

170. Dr. A. Alexander Fungaroli, an engineer with AGES, also disagreed with Cahill and concluded that

(a) if groundwater was rising beneath the 1978 disposal areas to the point of overcoming the underdrain system, the northwest underdrain, the southeast underdrain and the 36" RCP should be running full instead of having only a few inches of liquid at the bottom;

(b) if the groundwater was rising into the 1978 witness system, the witness drains should be exhibiting flows much higher than have been measured; and

(c) if the groundwater was rising into the 1978 waste, the amount of leachate generated by that waste would be much higher rather than what is typical

for disposal areas open only to precipitation

(N.T. 3821-3824).

171. Based on the conclusions of DCSWA's consultants, which we find to be more persuasive, we find that

(a) the 1978 liner systems have not failed;

(b) the flows in the 1978 witness system represent leachate-contaminated liquid that has found its way through the 1978 primary liner in amounts within the range of expectability for PCV liners;

(c) the flows in the northwest underdrain, the southeast underdrain and the 36" RCP include groundwater which, like all the groundwater beneath the landfill, has been contaminated by the prior disposal of waste on unlined areas; and

(d) the groundwater is not rising beneath the 1978 disposal areas to the point where it is penetrating either of the 1978 liner systems (see Findings of Fact 129-138, 143-162, 164-166, 168-170).

172. The fact that the groundwater beneath the landfill has been, and continues to be, contaminated by the waste previously placed on unlined areas does not render the site unusable for the additional landfilling authorized by the 1988 SWP and 1990 SWP, because

(a) DER can adjust groundwater background concentrations to reflect conditions which actually exist at the site;

(b) a fresh leak can be identified by examining the entire spectrum of parameters applicable to that leachate (its "fingerprint") rather than just looking at some of them;

(c) a leak in the liner systems installed pursuant to the 1988 SWP or the 1990 SWP would first show up in the witness system applicable to that liner

system; and

(d) the historical record of groundwater analysis at the landfill is so extensive that statistical procedures can be used to evaluate variations in concentrations

(N.T. 2648-2650, 3801-3804; Pounds deposition, pp. 67-70).

173. As part of its continued monitoring of groundwater quality, DCSWA retains the services of RMC Environmental Services (RMC) to do the sampling and analysis. At DCSWA's request, RMC compiled Exhibit MON-197 and Exhibit MON-201. MON-197 is a compilation of the available data for ammonia, COD and 1,1 dichloroethane extending from 1983 to September 1991. MON-201 is a compilation of the available data for VOCs in downgradient monitoring points at the landfill (including MW-4, MW-5, the 36" RCP and the underdrains) extending from 1983 to September 1991 (N.T. 3406-3407, 4013-4027; (Exhibits MON-197 and MON-201).

174. Dr. John W. Washington, a geochemist for M & E, evaluated MON-197 and MON-201 for DCSWA. Dr. Washington uses statistics to determine whether differences exist between upgradient and downgradient monitoring locations and whether trend-type changes have occurred in downgradient monitoring locations (N.T. 4040-4052).

175. With respect to VOCs, Dr. Washington evaluated the data in connection with two hypotheses: (a) that the downgradient contamination results from the previously deposited waste on unlined areas, and (b) that the downgradient contamination results from ongoing leaks from the lined portions of the landfill. If the first hypothesis is correct, the downgradient concentrations should trend lower after May 1988 when most of the trash had been relocated to lined areas. If the second hypothesis is correct, the downgradient concentrations of at least some VOCs should increase to a plateau and remain there (N.T. 4057-4062; Exhibit

DCSWA-701).

176. After performing his statistical evaluations for VOCs, Dr. Washington confirmed a general downward trend in concentration for most VOCs in the downgradient sampling locations since May 1988, supporting the first hypothesis (N.T. 4063-4112; Exhibit DCSWA-701).

177. With respect to ammonia, Dr. Washington

(a) observed that the concentrations at the upgradient sampling points had a great deal of variability;

(b) conducted a statistical evaluation that indicated that no downgradient point (other than MW-10) is statistically higher than the average concentration in the upgradient wells;

(c) stated that the low concentrations found at the site may be the result of natural processes such as precipitation, or such human activity as the application of fertilizer; and

(d) concluded that the concentrations do not support the hypothesis of ongoing leaks from the lined portion of the landfill (N.T. 4119-4142; Exhibit DCSWA-701).

178. With respect to COD, Dr. Washington

(a) observed that the concentrations are low;

(b) found a good deal of overlap in concentrations between upgradient and downgradient sampling points;

(c) concluded that any statistical difference would be so small that it could not be relied on to show contamination;

(d) stated that the low concentrations found at the site may be the result of natural processes; and

(e) concluded that the concentrations do not support the hypotheses

of ongoing leaks from the lined portion of the landfill (N.T. 4143-4150; Exhibit DCSWA-701).

179. DCSWA also retains RMC to conduct the aquatic biological investigations of Furnace Run required by the 1988 regulations. Robert W. Blye, Jr., an aquatic biologist with RMC, has supervised these investigations which have been conducted annually since 1988 (N.T. 4292-4297).

180. The investigations focus on macroinvertebrates, small forms of aquatic life that are pollution-sensitive and relatively sedentary (N.T. 4296-4297).

181. The 1988 investigation (conducted as part of the application for the 1988 SWP) involved three stations in Furnace Run - one upstream of the landfill and two downstream of the landfill. Subsequent investigations involved two stations - one 40 feet above the outflow from the 36" RCP and one 50 feet below this point (N.T. 4302-4304, 4306).

182. Blye concluded from the 1988 investigation that all of the stations in Furnace Run imply fairly good water quality and an absence of significant environmental stress or degradation (N.T. 4309; Exhibit DCSWA-1).

183. Blye reached the same conclusion on the basis of the investigations conducted in November 1989, November 1990 and November 1991 (N.T. 4310-4321).

184. Groundwater contamination at the landfill is trending lower since the relocation of the previously deposited waste and the landfill is not adversely affecting the aquatic community in Furnace Run (N.T. 4321-4323).

M. Erosion and Sedimentation

185. As noted above, there were no effective E&S control systems in place at the landfill until September 1986 when DCSWA began implementing a plan developed by Dr. Warner and approved by DER (N.T. 3559-3571).

186. When Dr. Warner first visited the landfill in 1984, he found that

sediment had entered Furnace Run to such an extent that the original stream channel had been completely filled for a distance of about 400 feet (N.T. 3557-3558).

187. The 1986 E&S plan, prepared in fulfillment of the 1986 CO&A, was based on field investigations, soils and hydrology analyses, computer modeling and discussions with DER. The plan

(a) Involved 6 new percolation or dewatering (sediment) basins and 4,000 feet of additional diversions and interceptors;

(b) was designed to control stormwater entering the landfill by intercepting it and diverting it from disturbed areas to vegetated areas to keep it free of sediment;

(c) was designed to control stormwater from disturbed areas of the landfill through the use of benches, terraces, diversions, interceptors and passive dewatering (sediment) basins equipped with dams, perforated risers and spillways, to reduce peak velocity and increase sediment trap efficiency;

(d) used the 100-year, 24-hour, storm frequency (rather than the 25-year frequency) and used a hydrograph curve number which assumed the entire landfill was devoid of vegetation, thereby increasing peak flow assumptions by 25% and resulting in additional channels, additional interceptors and enlarged basins;

(e) considered the slopes on the landfill;

(f) provided protection for Furnace Run and its banks; and

(g) provided for the establishment of vegetation, both temporary and permanent, on side slopes of the disposal areas as filling occurs

(N.T. 3451-3455, 3559-3576, 3586-3597, 3605; Exhibits DCSWA-126, 512, 601-604, 607 and 608).

188. During September 1987, when sedimentation basin 3 was under construction, a storm dropped about 11 inches of rain on the landfill. This storm, which exceeded the 100-year, 24-hour, storm in severity, overtopped the outslopes of 4 sedimentation basins and 1 diversion structure, resulting in the diversion of Furnace Run from the high-flow, rock-lined channel created pursuant to the 1986 E&S plan (N.T. 3608-3613, 3617-3619; Exhibit DCSWA-609).

189. As a result of this storm, Dr. Warner made revisions to the approved E&S plan (N.T. 3616-3617; Exhibit DCSWA-609).

190. The Pennsylvania Fish Commission inspected Furnace Run after the September 1987 storm event and persuaded DCSWA and DER to create a pool and riffle environment in Furnace Run that would be more beneficial to aquatic life. Approval was granted by DER on February 19, 1988 and the work was completed by the summer of 1988 to the satisfaction of the Commission (N.T. 3617-3630; Exhibits DCSWA-610 to 615, 617 to 620).

191. Dr. Warner designed the E&S plan for the application leading to the 1988 SWP. AGES, with Dr. Warner providing peer review, designed the E&S plan for the application leading to the 1990 SWP and the 1990 Earth Disturbance Permit. These plans were integrated with each other and with the 1986 E&S plan (N.T. 3584-3585).

192. E&S control is an ongoing activity at a landfill. Gullies form as a matter of course until vegetation becomes established. Properly designed E&S control systems will divert the gully-forming runoff into sediment basins where the sediment will be trapped (N.T. 794-795).

193. There were E&S problems at the landfill prior to the issuance of the 1988 SWP and DCSWA received civil penalty assessments for discharges of sediment to Furnace Run in 1986 and 1987 (Exhibit A-44, tab 8).

194. Despite these assessments, DER officials were satisfied that DCSWA had met the requirements of the 1986 CO&A and that adequate E&S control systems were in place by the time the 1988 SWP was issued (N.T. 2993-2995, 3006).

195. The Compliance History Screening Panel, set up by DER in advance of issuing the 1988 SWP, was apprised of the E&S problems at the landfill, carefully considered them, and recommended issuance of the 1988 SWP because DCSWA was addressing the problems (Exhibits A-33, A-35 and A-39).

196. The Compliance History Screening Panel, convinced that the slopes at the landfill made E&S controls particularly difficult, recommended that a condition be inserted in the 1988 SWP requiring implementation of the approved E&S control plan (Exhibit A-33).

197. One member of the Panel went further and recommended that DCSWA be required to develop and implement a quality control plan that would involve an on-site quality control officer (with an engineering or scientific background and with construction experience) whose primary duty would be to assure the proper construction and operation of E&S facilities (Exhibit A-33).

198. Condition 12 of the 1988 SWP required DCSWA to hire a full-time professional engineer to supervise construction and daily operations at the landfill. The engineer was to make inspections twice each day and to report to DER on the operation and maintenance of E&S control systems, including maintenance and repair of ditches and silt removal from sedimentation basins (Exhibit DCSWA-1).

199. Condition 19 of the 1988 SWP required DCSWA to retain a firm to provide hydroseeding services on a monthly basis (Exhibit DCSWA-1).

200. The E&S control systems are designed, as noted above, to handle a 100-year, 24-hour, storm. If a storm of greater magnitude occurs, such as in

September 1987, sedimentation may be discharged to Furnace Run (N.T. 3646-3648).

201. While regular hydroseeding was an important factor in the E&S plan, the diversion structures and sedimentation basins were sized to handle runoff from a site barren of vegetation. Thus, runoff from an unvegetated area of the landfill would go to the sedimentation basins where the sediment would be trapped (N.T. 3653-3656).

202. When the sediment basins are dewatered, some colloidal materials pass through the openings in the perforated risers and discharge to Furnace Run (N.T. 3661, 3669-3671).

203. Some DER and Berks County Conservation District inspections subsequent to issuance of the 1988 SWP and prior to issuance of the 1990 SWP and 1990 Earth Disturbance Permit found inadequate vegetation at some locations and damaged risers in sedimentation basins (Exhibits A-222 to A-224, DCSWA-2, Form C).

204. On August 7, 1990 (either during or immediately after a rainstorm), a representative of the Pennsylvania Fish Commission took water samples near the outlet of the 36" RCP and at two locations in Furnace Run - one upstream from the 36" RCP and one downstream from the 36" RCP. David E. Spotts, a Fisheries Biologist for the Commission, wrote a memorandum in which he gave his opinion that

(a) the landfill has E & S problems during storm events; and
(b) the discharge of total solids and suspended solids, in concentrations measured in the water samples, are deleterious to aquatic biota (N.T. 3689-3692).

205. Dr. Warner took issue with Spotts' memorandum on the grounds that

(a) the water samples (one grab sample at each location) were not taken in a proper manner to measure total solids and suspended solids in Furnace

Run;

(b) the concentrations in the water samples are within the expected range of concentrations for Furnace Run; and

(c) the concentrations are not deleterious to aquatic life (N.T. 3692-3694, 3702, 3712-3724, 3740-3743).

206. The 1990 Earth Disturbance Permit

(a) describes the E&S control plan for each phase of construction, including temporary and permanent controls and revegetation;

(b) provides for E&S control structures for each phase of construction to be in place and operable before earthmoving activities on that phase begin;

(c) includes temporary E&S control devices such as silt fences and straw bale dikes during construction of E&S control facilities;

(d) involves 6 sedimentation basins, to be installed during different phases of construction;

(e) requires daily and weekly inspections of the E&S control facilities by AGES personnel and the completion of daily and weekly engineer's checklists; and

(f) provides for monthly inspections of E&S control facilities by Berks County Conservation District

(N.T. 3408-3419; Exhibit DCSWA-3).

207. Condition 21 of the 1990 SWP requires DCSWA to take samples at the outlets of sedimentation basins 2 and 3 after each rain event and to analyze them for specific chemical parameters (N.T. 3419-3420; Exhibit DCSWA-2).

208. As a result of the E&S control facilities, peak flows and peak velocities of surface runoff from the landfill are lower than pre-development levels (N.T. 3601-3608; Exhibit DCSWA-607).

209. During the mid-1980s Szarko observed the growth of a delta along the east bank of Manatawny Creek just downstream of the mouth of Furnace Run. This delta continued to grow toward the west, constricting the channel of Manatawny Creek which eroded away a portion of the west bank (N.T. 14-21).

210. The growth of the delta has caused Szarko's meadows on both sides of Manatawny Creek upstream of the mouth of Furnace Run to flood more frequently, interfering with his use of the area, and has taken away 10 to 15 feet of his land along the west bank (N.T. 20-24).

211. Dr. Adams, at Szarko's request, studied the delta area from April 1990 to July 1992 and prepared a report entitled "Report on the Growth and Development of the Delta at the Mouth of Furnace Run" (N.T. 667-668; Exhibit A-95).

212. Dr. Adams made field observations, did an analysis of lithic fragments along with textural analyses and heavy mineral analyses, concluding, *inter alia*, as follows:

(a) the delta is formed by eroded material being transported down Furnace Run and being deposited at the mouth because of a decrease in current velocity;

(b) the delta encompasses about 4,000 square feet and the configuration is constantly changing;

(c) floods on Manatawny Creek carry the finer sediments on the delta downstream, leaving the pebbles and cobbles behind;

(d) lithic fragments pebble-sized or larger, for the most part, are quartzite and gneiss (rock types common to the Furnace Run watershed) while limestone fragments are completely absent;

(e) lithic fragments in the flood plain of Manatawny Creek upstream of Furnace Run are limestone and quartzite in nearly equal proportions;

(f) heavy minerals from the delta samples showed higher concentrations than the upstream samples; and

(g) textural analyses showed the soils downstream of the confluence to be more coarse-grained than those above the confluence

(N.T. 668-682, 700-710; Exhibits A-95, A-133 (a), (b), (c), (d), (e), (g) and (h)).

213. Dr. Adams was of the opinion that

(a) the growth of the delta is the direct result of erosion and sedimentation coming from the landfill and being washed down Furnace Run; and

(b) because of the growth of the delta, Manatawny Creek has been eroding the west bank opposite the delta and will continue to do so for several years in the future

(Exhibit A-95).

214. A delta has existed at the mouth of Furnace Run at least since 1979 (Exhibit DCSWA-101(1)).

215. As of 1992, part of the delta had deciduous trees on it, some of which were 40 to 50 feet high (N.T. 2734-2740; Exhibits DCSWA-514(b) and (h)).

216. Dr. Adams admitted that

(a) he did not consider past farming practices on lands adjacent to Manatawny Creek and Furnace Run when he concluded that 90% of the material in the delta came from the landfill;

(b) he did not consider sources of quartzite and gneiss other than the landfill despite the fact that these are the dominant rock types in all the watersheds contributing flow to Manatawny Creek from the east, upstream of the Furnace Run confluence; and

(c) he did not consider the E&S control systems placed in operation

at the landfill

(N.T. 913-930).

N. Compliance History

217. DCSWA's application for the 1988 SWP included Module 10 which, at the time of filing, contained compliance history information. This information was supplemented before issuance of the 1988 SWP by the filing of a Form C which replaced Module 10 (N.T. 2998-3000; Exhibit DCSWA-1).

218. The compliance information reported in Module 10 and Form C was complete and accurate as of September 29, 1988, with respect to (a) DCSWA and RRM Corporation and the landfill, and (b) Delaware County and the transfer stations (Exhibit DCSWA-1).

219. Wayne Lynn, the Solid Waste Manager for DER's Southeast Region, was satisfied with DCSWA's completion of the requirements of the 1986 CO&A and found nothing at the landfill or in his review of DCSWA's compliance history that was an automatic bar to permit issuance. Nonetheless, because of opposition to the landfill by Berks County and Earl Township, he sought the recommendations of the Compliance History Screening Panel (N.T. 2995-3002).

220. The Compliance History Screening Panel was formed in 1981 to provide consistency in decisions regarding permit action under the SWMA in the face of past violations. In 1988 it was composed of three DER officials. The Panel, upon request of a Regional Manager, reviews the compliance history of an applicant and makes a recommendation to the Regional Manager who may accept it or reject it, the final decision resting in the Regional Manager's hands (Orwan deposition, pp. 10-12, 29-30; Exhibit A-31).

221. In reviewing DCSWA's compliance history in October 1988, the Compliance History Screening Panel

(a) had Module 10 in its possession but did not have the Form C supplement which remained at the Southeast Regional Office;

(b) had a memorandum from the Southeast Regional Office detailing compliance issues raised during the public hearing on the application, including leachate seeps, sedimentation, compliance history, removal of the previously deposited waste, groundwater contamination and impacts on Furnace Run; and

(c) considered the matters raised in these documents and spoke by telephone with Southeast Region personnel to obtain updates on conditions at the landfill

(Orwan deposition, pp. 9-10, 40-43, 100-102; Okorn deposition, pp. 8, 27-31, 49, 53-54; Exhibits A-33, 35, 38, 42 and 43).

222. The Compliance History Screening Panel, having found nothing that counted significantly against DCSWA and being convinced that DCSWA was capable of exercising the necessary degree of care, recommended that the permit be issued (Orwan deposition, p. 15; Okorn deposition, pp. 12, 21 and 41; Exhibit A-33).

223. The Compliance History Screening Panel's recommendation, as noted in Findings of Fact 196 to 199, included certain conditions that later were made a part of the 1988 SWP (Exhibits A-33, 35 and 39, DCSWA-1).

224. The Compliance History Screening Panel's recommendation, agreed to by Bureau Director James Snyder, was forwarded to Lynn at the Southeast Regional Office, who made the final decision to issue the 1988 SWP (N.T. 3002-3003; Orwan deposition, p. 10; Okorn deposition, pp. 31-32; Exhibits A-31 and 34).

225. Prior to issuance of the 1988 SWP, DER personnel also determined that DCSWA's actions with respect to removal of previously deposited waste from unlined areas, E&S controls, and groundwater contamination were satisfactory to the point where they would not bar permit issuance (N.T. 645-646, 2995, 3004-

3006; Exhibit A-35).

226. Conditions were placed in the 1988 SWP requiring DCSWA to take additional steps to address the issues referred to in Finding of Fact 225 (N.T. 639-640, 3007-3014; Exhibit DCSWA-1).

227. DCSWA's application leading to the 1990 SWP contained a Form C setting forth the compliance history. The Compliance History Screening Panel, composed of the same individuals as in 1988, was again requested to review the compliance history and make a recommendation (N.T. 3305; Exhibit DCSWA-2).

228. The Form C included each inspection report, each Notice of Violation (NOV) and each DCSWA response to an NOV (N.T. 788-790).

229. As part of its review of DCSWA's compliance history, DER required DCSWA to demonstrate how it had complied with all the conditions in the 1988 SWP. DCSWA's response is in Appendix J of Phase II of the permit application (N.T. 3305-3306; Exhibit DCSWA-2).

230. Being satisfied with DCSWA's actions and with the favorable recommendation of the Compliance History Screening Panel, DER issued the 1990 SWP (N.T. 788-790, 3305).

231. A condition was placed in the 1990 SWP requiring DCSWA to avoid major violations or continuing minor violations for a period of 18 months after issuance of the Permit. DER determined subsequently that DCSWA had met the terms of the condition and removed it (N.T. 3306-3307).

232. As noted In Findings of Fact 27 to 29, DCSWA relocated 1,200,000 cubic yards of previously deposited waste, substantially more than the 250,000 cubic yards anticipated (Stip.).

233. In order to relocate this waste, DCSWA worked continuously from 1985 to April 1988, using its own personnel at first but eventually hiring two

contractors to assist in the relocation. The work was carried on around the clock, using lights at night (N.T. 1927-1929).

234. During 1987 DCSWA requested DER to use its influence to gain the consent of Earl Township to the relocation of previously deposited waste under Shenkel Hill Road. DER did so but Earl Township declined (Stip.; N.T. 2035-2039).

235. By April 1988 all of the previously deposited waste had been relocated except for that under Shenkel Hill Road. That was the state of affairs in November 1988 when the 1988 SWP was issued (Stip.).

236. Conditions 21 (a) and (b) of the 1988 SWP required DCSWA to submit a plan and schedule for relocating the remaining waste under Shenkel Hill Road, contingent upon receiving the consent of Earl Township (N.T. 648-650, 2112-2114, 2098-2099; Exhibit DCSWA-1).

237. In 1991, after ownership of Shenkel Hill Road was acquired by DCSWA, the remaining waste (about 22,000 cubic yards) was relocated (Stip.).

238. DCSWA has acted diligently and to the satisfaction of DER in the relocation of previously deposited waste (N.T. 2995).

239. As noted in Findings of Fact 185 *et seq.*, E&S control has been a major concern at the landfill since 1984, at least, when Dr. Warner first began working on the problem.

240. Although DCSWA committed violations in connection with E&S controls, it cooperated with DER in correcting the violations and improving the E&S control systems (Findings of Fact 187, 189-192, 194-199, 206-208).

241. Groundwater contamination, caused primarily by previously deposited waste on unlined areas, existed at the landfill many years prior to DCSWA's ownership (Finding of Fact 159).

242. Relocation of the previously deposited waste was expected to increase groundwater contamination temporarily but ultimately to bring about a decline in contamination (Finding of Fact 146).

243. Since DCSWA contributed to the groundwater contamination only through its relocation of previously deposited waste, action mandated by DER, it could not be considered a violation.

244. DCSWA's actions have demonstrated that it has the ability and intention to comply with the statutes, regulations and permit conditions to which it is subject. All violations have been corrected to the satisfaction of DER (N.T. 1826-1828, 1933-1938, 1957, 3003-3006).

0. Article I, Section 27

245. Delaware County began planning for and managing solid waste disposal in the early 1950s. It has completed four separate solid waste management plans and, in the process, evaluated numerous alternatives to safely and reliably handle the 400,000 tons of municipal waste generated annually by Delaware County's 550,000 residents (N.T. 1774-1780).

246. Delaware County analyzed the disposal of municipal waste and the selection of alternatives, under provisions of the SWMA, in connection with the preparation of a Solid Waste Management Plan in 1985 (1985 SWM Plan), a Plan which was approved by the County and its municipalities and by DER (N.T. 1780-1781, 1792-1796, 1879-1882; Exhibits DCSWA-6, 9 and 10).

247. The 1985 SWM Plan set up an integrated municipal waste management system consisting of two county-owned transfer stations, the Westinghouse resource recovery facility and the landfill (N.T. 1774-1788; Exhibits DCSWA-6, 7 and 8).

248. The 1985 SWM Plan complied with all requirements of the Municipal Waste

Planning, Recycling and Waste Reduction Act (Act 101), Act of July 28, 1988, P.L. 556, 53 P.S. 4000.101 *et seq.*, even though it predated Act 101 and was for that reason "grandfathered" as an approved Plan (N.T. 1880-1882).

249. Delaware County reconsidered the disposal of municipal waste and the selection of alternatives, under provisions of Act 101, in connection with the preparation of a Solid Waste Management Plan in 1990 (1990 SWM Plan), a Plan which was approved by the County and its municipalities and by DER (N.T. 1818-1820, 1882-1885; Exhibits DCSWA-15 and 16).

250. The 1990 SWM Plan, which was prepared consistent with DER's interim guidelines,

(a) took into account the projected volume of municipal waste over a 10-year period;

(b) described existing facilities for managing the waste;

(c) examined the disposal capacity within the County;

(d) considered recycling within the County over a 10-year period; and

(e) designated facilities the County would rely on for waste management over a 10-year period

(N.T. 1861-1863; Exhibit DCSWA-24).

251. The County determined that existing facilities (including the landfill) had sufficient capacity to manage the projected volume of waste over a 10-year period (N.T. 1871-1872).

252. The 1990 SWM Plan designated two transfer stations for the receipt of all municipal waste in Delaware County, incineration at the Westinghouse Resource Recovery Facility, and disposal of all ash and bypass waste at the landfill (N.T. 1818-1822, 1874; Exhibit DCSWA-15).

253. Since the Westinghouse Resource Recovery Facility was not on-line when

the 1990 SWM Plan was prepared, the Plan designated the landfill as the interim disposal area for unprocessed waste (N.T. 1874).

254. The landfill also was designated in the 1990 SWM Plan as the disposal area for bulk waste, construction and demolition waste, and sludge (N.T. 1876, 1888-1890; Exhibit DCSWA-15).

255. Since the landfill is a critical element in operations under both the 1985 SWM Plan and the 1990 SWM Plan, the inability to use it would cause a major disruption of the entire waste management system, forcing the County to find a place to dispose of 279,000 tons annually of ash residue, as well as bulk waste, construction and demolition waste, and sewage and septic sludge (N.T. 1891-1893).

256. The landfill is also the designated facility for the receipt of municipal waste pursuant to the Berks County Solid Waste Management Plan, which has been approved by DER. DCSWA also has a disposal agreement with Berks County providing host fees and providing for a county inspector funded partially by Delaware County (N.T. 1834-1837; Exhibits DCSWA-11, 13 and 14).

257. DCSWA also has a Host Community Agreement with Earl Township providing for limitations on the ultimate size of the landfill, the abandonment of Shenkel Hill Road, the payment by DCSWA of the cost of an Earl Township landfill inspector, and the acceptance by DCSWA of Earl Township municipal waste free of charge (N.T. 1837-1840; Exhibit DCSWA-17).

258. DCSWA's inability to use the landfill would have a serious adverse impact upon Berks County and Earl Township (N.T. 1842).

259. Closing the landfill, excavating all the waste deposited there and transporting it to a different site, as recommended by Dr. Adams, would have severe environmental and public health consequences (N.T. 1131-1134, 2660-2661).

DISCUSSION

Szarko, as a third party challenging the issuance of permits, has the burden of proof: 25 Pa. Code §21.101(c)(3). To carry the burden, Szarko must show by a preponderance of the evidence that DER acted unlawfully or abused its discretion in issuing the 1988 SWP, the 1990 SWP, Earth Disturbance Permit No. 0689802 and Permit No. D06-476A:25 Pa. Code §21.101(a).

As noted in the Procedural History, the parties stipulated to 21 issues. We have grouped these issues under general subject headings in the Findings of Fact and will use those same headings in the Discussion.

A. 8-foot isolation

Issue 6: Whether the 1988 Permit and the 1990 Permit authorized DCSWA to construct liner systems where at least 8 feet cannot be maintained between the bottom of the subbase of the liner system and the regional groundwater table and whether DER thereby violated 25 Pa. Code §273.252(b).

25 Pa. Code §273.252(b) provides that a liner system cannot be constructed "unless at least 8 feet can be maintained between the bottom of the subbase of the liner system and the regional groundwater table. The regional groundwater table may not be artificially manipulated." There is no doubt that the 1978 liner system would have violated this provision because underdrains were used to drain away the groundwater beneath the liner system. That was perfectly legal in 1978. The 8 foot separation requirement did not exist then; it was adopted in 1988 and was applicable to the liner systems approved in the 1988 SWP and the 1990 SWP.

One difficulty in complying with the separation requirement stems from the fact that the regional groundwater table is not static. It is always fluctuating (see definition in 25 Pa. Code §271.1). For this reason, a graphic description of the water table must, of necessity, be no more than a snapshot of the

elevations measured on a specific date. According to DER witnesses, 8 feet of separation was chosen to allow for variations in the water table. That being the case, it is not essential for the regional groundwater table to be shown with finite precision. Indeed, it is questionable if that can be done under any circumstances. What is essential for purposes of an application (in our judgment) is a depiction of the regional groundwater table that fairly reflects normal or above normal levels.

Another difficulty in complying with the separation requirement arises out of the practical impossibility of honeycombing the ground with borings. As a result, the hydrogeologist must work from a limited number of wells where actual elevations have been determined and interpolate between them. This requires the use of geologic judgment based on education and experience. A groundwater contour map, therefore, attempts to present a snapshot of the water table on a particular day by using a limited number of measurements and a great deal of judgment. Such a map, for obvious reasons, can be attacked on many fronts. Its acceptability must depend, not on fine points of accuracy, but on its overall reasonableness as a depiction of the regional groundwater table.

Dr. Earl drew Plate 2, the water table configuration map for the 1988 SWP application, using water level measurements from 20 wells on June 10, 1988. He believed that these measurements would reflect about the highest practical levels of the regional groundwater table because the above-average precipitation that fell during May should have recharged the groundwater by the 10th of June. This was an exercise of hydrogeologic judgment. Another exercise was the drawing of contour lines between the 20 points of measurement in order to give a visual representation of the water table surface. This same data with some supplements formed the basis for the Plate 2 for the 1990 SWP application.

Szarko's hydrogeologist, Dr. Adams, found fault with both versions of Plate 2. He pointed out a number of errors, demonstrated water table contours that were not a subdued reflection of the surface contours, mentioned instances where the highest recorded water levels in particular wells were not used, and indicated other situations where water level measurements were rejected for one reason or another. These problems, for the most part, related to control points outside of the areas to be lined and, therefore, not subject to the separation requirement. Other discrepancies were within the margin of error for a map with 10-foot contour intervals. Still others pertained to data rejected by Dr. Earl because, in his professional opinion, they were anomalies or the result of artificial conditions.

Even if we discount these factors and give full credence to Dr. Adams' criticisms, they lead only to a conclusion that the water table is at a somewhat higher elevation than shown on the Plate 2s. But that conclusion does not, in turn, mandate the conclusion that the 8 foot separation was not achieved. The evidence shows that the engineers for the 1988 SWP and the 1990 SWP used Plate 2 only as one of many references in designing the subbase of the liner systems. The design elevations were governed largely by factors other than the elevation of the water table. As a result, the design drawings show that, even giving credence to the errors discussed by Dr. Adams, the 8 foot separation requirement was met or exceeded throughout the areas to be lined. Dr. Adams was unable to prove otherwise.

The evidence also shows that, during construction of the pads authorized by the 1988 SWP, the on-site engineer strictly adhered to the subbase elevations shown on the design drawings. When water was encountered, during construction of pad S-2, at an elevation higher than the water table elevation shown on Plate

2, the engineer notified Dr. Earl and DER. Dr. Earl undertook an extensive investigation, using 9 testholes, that led to the conclusion that the water was perched groundwater and not regional groundwater. DER personnel agreed with this conclusion and with Dr. Earl's proposed method of draining the water away.

Dr. Adams takes issue with Dr. Earl's conclusion, maintaining that the water was regional groundwater and that its location is proof that Plate 2 was seriously inaccurate. He did not observe the water, however, and speculated on the basis of what other persons reported. In addition, he had no answer to why, if it truly was the regional groundwater, it ceased to flow after awhile. The preponderance of the evidence convinces us that the water was perched groundwater.

The quality assurance/quality control of construction under the 1990 SWP was even more involved. AGES dug test pits and installed piezometers to verify the elevation of the regional groundwater table. If this investigation would have revealed that the 8 foot separation could not be achieved, AGES would have consulted with DER and, most likely, would have raised the elevation of the subbase of the liner system. For pad 103, where a soil stockpile had existed and where water seeps had been observed, AGES dug 42 test pits and installed 15 piezometers, all of which demonstrated that the regional groundwater table was slightly lower than shown on Plate 2.

We are satisfied that the 8 foot separation requirement was adhered to in constructing lined areas pursuant to the 1988 SWP and the 1990 SWP. Accordingly, we dismiss Dr. Adams' contentions regarding the need for hydrographs and a hydrologic budget. These tools might enable a hydrogeologist to make a more accurate determination of fluctuations in the regional groundwater table, but data of that refinement is not commonly required in landfill design and is not

called for by DER. As noted above, the 8 foot separation already factors in a good deal of fluctuation. This reality, coupled with the fact that subbase elevations are generally controlled by other factors and the fact that pre-construction investigations are done to verify the location of the groundwater table, gives adequate assurance that the groundwater will remain well below the liners.

An additional factor, especially applicable to this site, is the lowering of the water table by the placement of liners over recharge areas. Since virtually the entire watershed will be lined at this landfill, the water table will drop, a phenomenon already apparent at some points. The likelihood of its ever being able to reach its former levels is slim.

B. Pumping Tests

Issue 16: Whether "pump tests were conducted in a manner that would not allow for a known accurate determination of the data required by the section included but not limited to hydraulic conductivity, transmissivity, storativity, groundwater hydraulic gradient and velocity" and, if so, whether the application for the 1988 Permit and the 1990 Permit thereby did not meet the requirements of 25 Pa. Code §273.115(a).

25 Pa. Code §273.115(a) requires an application to contain a "description of the geology and groundwater...down to and including the lowest aquifer that may be affected" by the landfill. Then follow seven items that are to be included in the description. Items (3) and (6) read as follows:

(3) The hydrologic characteristics of each aquifer..., including field test data for hydraulic conductivity, storage co-efficient and transmissivity, groundwater hydraulic gradient and velocity. The description of these characteristics shall be based on multiple well aquifer tests. The application shall include the procedures and calculations used to determine these characteristics.

* * * *

(6) Aquifer characteristics necessary to accurately describe three dimensional groundwater flow through the proposed permit area and adjacent area, including storage and discharge characteristics.

Szarko contends that the pumping tests done in connection with the 1988 SWP and 1990 SWP applications were not proper and could not accurately measure the aquifer characteristics. DCSWA counters that §273.115(a) does not define "multiple well aquifer tests", leaving DER free to use its own interpretation. We believe that the term "aquifer test" is generally understood to mean a test in which one well is pumped while one or more observation wells are monitored for changes in head.² Given this meaning to the term, we conclude that the 1988 SWP application was not supported by "multiple well aquifer tests." The tests used were, for the most part, conducted in 1986. While they included a number of different wells, the tests were run on each well separately. Drawdown, pumping rate, etc. were measured in the well being pumped rather than in observation wells.

While this evidence clearly shows that multiple well aquifer tests were not conducted in connection with the 1988 SWP application, the evidence is far from clear whether such tests are of any practical use at the site of this landfill. Dr. Earl testified that hydraulic conductivity, storage coefficient and transmissivity have little relevance to the design of a landfill. Their value lies in helping to determine the proper location of monitoring wells and in formulating remediation plans if future contamination makes that necessary.

He also testified that geologic conditions at the landfill are such that the only wells capable of sustaining long-term pumping are in the downgradient

²Environmental Engineering Dictionary, C. C. Lee, Government Institutes, Inc. (1989), p. 33.

part of the site where the bedrock is highly weathered. Further upgradient, the bedrock is fractured with strong directional characteristics. In Dr. Earl's opinion, short-term pumping of a number of wells in an area as variable as this is more informative than microscopic measurement of characteristics in one or several wells that are not likely to be representative of the larger rock mass. The short-term pumping tests submitted with the 1988 SWP application, in his opinion, were adequate to enable him and DER's hydrogeologist to get a rough estimate of transmissivity, all that was necessary.

While Dr. Adams disagreed with the last statement, he did not dispute Dr. Earl's contentions about the practicality of multiple well aquifer tests at this site.

The 1990 SWP application contained the same pumping tests submitted for the 1988 SWP plus two other pumping tests. The first of these, conducted on August 17-18, 1989, were done on the five additional monitoring wells constructed pursuant to the 1988 SWP - an as-built requirement. These tests were longer - an hour - but otherwise were similar to the 1986 pumping tests, i.e. drawdown was measured in the well being pumped but not in observation wells. The next pumping test was done a week later on August 24-25, 1989. This was a 24-hour test using MW-10 as a pumping well and MW-4, MW-5 and MW-9 as observation wells. MW-4 and MW-5 were equipped with automatic recording devices; MW-9 was hand-monitored.

There is no doubt that this last test was a multiple well aquifer test within the meaning of §273.115(a). In fact, it was done precisely to satisfy that requirement - Dr. Earl and DER's hydrogeologist, Marcucci-Kennedy, agreeing on the wells to be used and on other details of the testing. Dr. Adams maintains that the test still was not adequate to determine storativity and points to the coefficient of storage calculated for MW-5. Even Dr. Earl discounted the figure,

reporting to DER that it was at odds with the material into which the observation well was drilled.

What is not clear from the testimony is whether the calculation was so far afield because of some fault with the pumping test or whether it confirms Dr. Earl's opinion that multiple well aquifer tests are not suitable for the bedrock conditions at the landfill. Since Szarko has the burden of proof, we must conclude that he failed to show that the multiple well aquifer test of August 24-25, 1989 was improperly conducted. The 1990 SWP application, as a result, was supported by multiple well aquifer tests within the meaning of §273.115(a). While the 1988 SWP application was not so supported at the time the 1988 SWP was issued, a violation of the regulations, the deficiency was made good 8 months later when the August 24-25, 1989 pumping test was done. Ordinarily, we criticize such after-the-fact compliance; but it appears here that DER had a good deal of data characterizing the aquifer, enough to support issuance of the 1988 SWP.

C. Fractures

Issue 15: Whether DCSWA "failed to evaluate, even though the data identified, fracture zones that act as accelerated paths for groundwater" and, if so, whether the applications for both the 1988 Permit and the 1990 Permit thereby did not meet the requirements of 25 Pa. Code §273.115(a).

Although this issue was included within the scope of Szarko's proposed findings of fact and proposed conclusions of law, it was absent from the discussion in Szarko's post-hearing brief. When DCSWA argued in its post-hearing brief that Szarko waived the issue, Szarko put it in his reply post-hearing brief. Once again we caution legal counsel that, to avoid the waiver of an issue under *Lucky Strike Coal Co. and Louis J. Beltrami v. Commonwealth, Dept. of Environmental Resources*, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988), the issue must

be discussed. Simply inserting it in the proposed findings and conclusions without discussing how the application of the facts leads to those legal results is insufficient. We are going to overlook it here because Szarko's legal counsel has stated that the omission was inadvertent. Given the voluminous record and the plethora of issues, we can understand how that could have happened.

25 Pa. Code §273.115(a) has been quoted partially in connection with the issue of pumping tests. Szarko raises this same regulatory section with respect to alleged fracture zones on the landfill site, but fails to specify which provision is violated. We will limit our discussion to item (4) because it seems to be the item most appropriate to this issue. Item (4) requires the applicant for a permit to describe, "The geologic structure within the proposed permit area and adjacent area, and its relation to the regional geological structure."

Szarko argues that fracture trace maps submitted by DCSWA in the applications for the 1988 SWP and 1990 SWP showed fractures running through Shenkel Hill providing a potential hydraulic connection between the landfill and Oley Valley through which contaminants could move at a rapid rate. As noted in the Findings of Fact, a fracture trace map (in and of itself) proves nothing; it merely suggests the possibility that fractures may exist - a possibility that needs confirmation by studies in the field. DCSWA filed the fracture trace maps as required by DER, but DCSWA's description of the geologic structure relied on an extensive amount of other data gained over the years from the actual exposure of bedrock on the site. No critical or unusual fracture zones were found. This evidence, based on actual field observations, carries more weight than theoretical lines traced on an aerial photograph.

DCSWA also contends that, even if the traces on Shenkel Hill actually were fractures, they still could not serve as pathways for groundwater to flow from

the landfill to Oley Valley. The hydraulic gradient (which Szarko's expert, Dr. Adams, acknowledged as being correctly determined) prevents groundwater from flowing in the direction of the Oley Valley. Szarko's evidence did not convince us to the contrary.

D. Groundwater Divide on Shenkel Hill

Szarko claims that this issue is a subordinate dispute to Issue 15 (Fractures) and Issue 16 (Pumping tests), quoted above. A fair reading of those stipulated issues limits them to the subjects of fractures and pumping tests, not to hydrogeological data in general. Szarko has not explained how the groundwater divide on Shenkel Hill is related to either of these subjects. It is true that test wells were constructed in order to determine the location of the groundwater divide, but Szarko does not challenge that technique or the results. He criticizes, instead, DCSWA's failure to "take the results of the field work into consideration in determining the direction of groundwater flow" (Szarko's post-hearing brief, p. 53).

Clearly, this is not a subordinate issue to the manner in which pumping tests were done. Nor is it an integral part of the issue concerning fractures. Szarko is not concerned about fractures creating a preferred pathway for groundwater at this point in his post-hearing brief. He is concerned about the groundwater divide on Shenkel Hill being displaced toward the southeast allowing groundwater to flow along the bedding planes toward the northwest and the Oley Valley. We conclude, therefore, that this issue is not a part of Issue 15 or Issue 16 and is an improper attempt to inject a new issue into the proceedings.³

³We have made Findings of Fact on this issue so that, in the event an appeal is taken from our Adjudication, the record will reflect that the preponderance of the evidence on this issue favors DCSWA and DER.

E. Exclusionary criteria

Issue 4: Whether the 1988 Permit or the 1990 Permit authorize a landfill to be operated within 100 feet of a perennial stream, namely, the unnamed tributary to Furnace Run, and whether DER thereby committed an error of law pursuant to 25 Pa. Code §273.202(a)(7).

Issue 5: Whether the 1990 Permit authorized a landfill to be operated "in a valley, ravine or head of hollow where the operation would result in the elimination, pollution or destruction of a perennial stream," whether rechanneling was allowed as provided in Chapter 105, and whether DER by issuing the 1990 Permit committed an error of law pursuant to 25 Pa. Code §273.202(a)(4).

25 Pa. Code §273.202(a) provides that, "except for areas permitted prior to April 9, 1988," a municipal waste landfill may not be located within 13 specific exclusionary zones. Zones (4) and (7), cited in Issues 4 and 5, are as follows:

(4) In a valley, ravine or head of hollow where the operation would result in the elimination, pollution or destruction of a portion of a perennial stream, except that rechanneling may be allowed as provided in Chapter 105 (relating to dam safety and waterway management).

* * * *

(7) Within 100 feet of a perennial stream.

Szarko claims that the unnamed tributary which was piped through the landfill in the 36" RCP is a perennial stream. As such, DER was required to protect it by prohibiting the disposal of municipal waste within 100 feet of the unnamed tributary. Since the 1988 SWP authorized overtopping in the berm area, within 100 feet of the unnamed tributary, DER violated the provisions of §273.202(a)(7). Permit No. D06-476A, issued on December 17, 1990, authorized abandonment of the 36" RCP and the diversion of the unnamed tributary through another piping system. Szarko maintains that some of the flow will continue to be conveyed through the 36" RCP by infiltration. The remainder, being conveyed

through the new system, is still a perennial stream entitled to protection. Since DER, in the 1990 SWP, allowed the disposal of municipal waste within 100 feet of this new piping system, DER violated §273.202(a)(7). Szarko also contends that the 1990 SWP, which allows DCSWA to bury a portion of the headwaters of the unnamed tributary, violates §273.202(a)(4) by occupying a valley or head of hollow and eliminating a portion of a perennial stream.

DCSWA raises numerous defenses to these claims, the chief of which relies on the opening words of §273.202(a) - "Except for areas that were permitted prior to April 9, 1988." According to DCSWA, any area covered by a permit issued before April 9, 1988 is "grandfathered," i.e. exempt from the exclusions set forth in this section of the regulations. Szarko counters with two arguments: (1) the areas permitted in the 1988 SWP and the 1990 SWP were new areas and, therefore, subject to the exclusion; and (2) only disposal areas permitted prior to April 9, 1988 are exempt. We'll deal with the second argument first.

By referring to "areas that were permitted," the provisions of §273.202(a) are presumed to agree with the definition of "Permit area" in §271.1. That definition includes the areas "which are or will be affected by the municipal waste processing or disposal facility." The latter term is also defined in §271.1 to include "land affected during the lifetime of operations, including, but not limited to, areas where disposal or processing activities actually occur, support facilities, borrow areas, offices, equipment sheds, air and water pollution control and treatment systems, access roads, associated onsite or contiguous collection, transportation and storage facilities...." There can be no doubt that permit area includes, not just the disposal area, but all the support areas as well: *Lower Windsor Township et al. v. DER et al.*, 1993 EHB 1305 at 1364. This is clear also from the definition of "disposal area" in

§271.1, which means the "part of the site where disposal is occurring or will occur."

We conclude that areas that were part of a permitted municipal waste landfill prior to April 9, 1988 (not simply disposal areas but all support areas too), are exempt from the exclusionary criteria of §273.202(a). The evidence in this proceeding is clear that all of the areas affected by the 1988 SWP and the 1990 SWP were within the areas covered by the 1978 SWP and the landfill operations conducted pursuant to it. As such, they are exempt.

Szarko, in his first argument, contends that the portions of the 1988 SWP and 1990 SWP disposal areas that overtopped the 1978 SWP are new areas because they extend vertically to higher elevations than those permitted in the 1978 SWP. So even though they may fall within the pre-1988 permitted area in a two-dimensional sense, they are beyond it when the third dimension is considered. We can give the argument credit for originality but nothing else. "Permit Area" is defined in §271.1 to be the "area of land and water within the boundaries of the permit." Air space is notably absent. As a result, the exemption from §273.202(a) applies when the land or water was permitted prior to April 9, 1988, regardless of the air space occupied. Accordingly, our conclusion that areas to be affected under the 1988 SWP and the 1990 SWP are exempt from the exclusionary criteria in §273.202(a) holds.

Having reached this conclusion, we find it unnecessary to discuss DCSWA's argument that the unnamed tributary is not a perennial stream. We have found the preponderance of the evidence to show that it is a perennial stream (Finding of Fact 126). Nor do we find it necessary to deal with the contention that DCSWA's possession of a Chapter 105 permit overcomes the exclusion in §273.202(a)(4) in any event.

F. Ramifications of Overtopping

Issue 9: Whether the weight of additional fill placed pursuant to landfill operations authorized by the 1988 Permit and the 1990 Permit will cause failure of the 1978 Permit primary liner and whether DER thereby abused

its discretion in issuing the 1988 Permit and the 1990 Permit.

Issue 12: Whether failure of the underdrain system installed pursuant to the 1978 Permit will occur, whether such failure will allow intrusion of groundwater into trash placed in areas permitted pursuant to the 1978 Permit, whether such intrusion will cause surface or ground water pollution, and whether DER's approval of the 1988 Permit and the 1990 Permit thereby violated 25 Pa. Code §271.201(a)(2), (3) and (4)⁴ or was an abuse of discretion.

Szarko is convinced that the weight of additional fill placed as part of the overtopping approved in the 1988 SWP and 1990 SWP will cause the primary liner placed pursuant to the 1978 SWP to fail. He also is convinced that the underdrains placed pursuant to the 1978 SWP will fail because of clogging or being crushed by the weight of overtopping. Once this occurs, according to Szarko, leachate in the waste placed pursuant to the 1978 SWP will drain through the primary liner and reach the groundwater, contaminating it. Moreover, groundwater which will no longer be carried away by the underdrains will be able to rise, eventually penetrating the waste placed pursuant to the 1978 SWP. Thus, a constant intermixing of leachate and groundwater will occur beneath the landfill. Szarko claims this is already occurring.

We will deal with groundwater contamination later. The issue now before us is whether the overtopping will cause the 1978 SWP primary liner to fail,

⁴The citation in the list of stipulated issues omitted (a) - an obvious typographical error.

cause the 1978 SWP underdrains to fail, and generate an increased flow of leachate from the waste deposited pursuant to the 1978 SWP.

Szarko's argument overlooks the facts. In designing the expansion areas approved in the 1988 SWP and the 1990 SWP, DCSWA's engineers evaluated the effect of overtopping on the 1978 SWP liners and piping systems as well as the 36" RCP. Using different techniques and resources, they reached the same conclusions: (1) the liners will not fail (the overtopping, if anything, will make them less permeable), (2) the PVC pipe used as underdrains, witness drains and leachate drains will not collapse under the load, (3) the 36" RCP will not collapse under the load, and (4) even if the pipes collapsed, the stonelined trenches in which they are placed will handle the flows. Szarko presented no evidence to show that any of these evaluations and conclusions was wrong.

The effect of overtopping on leachate generation in the waste placed under the 1978 SWP is less apparent. Evidence presented by Szarko and DCSWA conflicted to the point that a preponderance cannot be found on either side. Since Szarko has the burden of proof, he has failed to carry the point. Whatever leachate is generated, however, will be captured by the leachate collection systems. As a result, we conclude that there will be no adverse impacts from the overtopping approved in the 1988 SWP and the 1990 SWP.

G. Closure of TW-88-6

Issue 18: Whether the application for the 1988 Permit was required to include "at least one full year of groundwater monitoring data" prior to November 16, 1988, whether such data was included, and whether the application thereby did not meet the requirements of 25 Pa. Code §273.116 and §§273.281 - 273.285.

Szarko devoted one of his 751 proposed findings of fact to this issue but none of his 17 proposed conclusions of law. Nor did he argue the point in his post-hearing brief. DCSWA claimed in its post-hearing brief that Szarko had

waived this issue. Szarko did not dispute that claim or otherwise deal with the issue in his reply post-hearing brief. Accordingly, we conclude that the issue has been waived and we will not deal with it.⁵

H. Groundwater and surface water contamination

Issue 8: Whether municipal waste deposited pursuant to landfill operations under the 1978 Permit or residual contamination from the old, unlined landfill (since removed) caused surface water pollution or groundwater pollution, and whether DCSWA failed to affirmatively demonstrate in accordance with 25 Pa. Code §271.201(a)(4)⁶ prior to the issuance of the 1988 Permit and the 1990 Permit that municipal waste operations under the 1988 Permit and under the 1990 Permit would not cause surface water pollution or groundwater pollution.

Issue 10: Whether the leachate detection zones authorized to be installed pursuant to the 1988 Permit are affected by residual contamination from the unlined facility (now removed), whether such effect prevents rapid detection and collection of liquid entering the leachate detection zone, and whether DER's issuance of the 1988 Permit thereby violated 25 Pa. Code §273.255 and was an abuse of discretion.

Issue 11: Whether the leachate detection zones authorized to be installed pursuant to the 1990 Permit are of such design as to preclude compliance by DCSWA with 25 Pa. Code §273.255(c) and whether DER's approval of that design therefore was an abuse of discretion.

Issue 17: Whether the applications for the 1988 Permit and the 1990 Permit did not provide for an adequate groundwater sampling and analysis plan and thereby did not meet the requirements of 25 Pa. Code §§273.152(b)(1) and 273.282(d).

(The surface water and groundwater pollution portion of Issue 12, quoted above under the subject heading - Ramifications of overtopping).

⁵We have made Findings of Fact on this issue so that, in the event an appeal is taken from our Adjudication, the record will reflect that the preponderance of the evidence on this issue favors DCSWA and DER.

⁶The citation in the list of stipulated issues omitted the (a) - an obvious typographical error.

Groundwater at the landfill has been contaminated for a long time. It is not surprising then that the northwest and southeast underdrains reflected contamination soon after installation, since their purpose was to drain away groundwater from beneath the landfill. Given the location and loose-jointed nature of the 36" RCP, it is not surprising that contaminants showed up there either, even though its purpose was to convey surface water - the unnamed tributary - through the landfill.

Dr. Earl was commissioned in 1986 to study the groundwater and, especially, the effect on the groundwater of the previously deposited waste on unlined areas. He concluded that this previously deposited waste was the cause of the contamination immediately beneath, and downgradient from, the landfill. Removing this waste to lined areas eventually would reduce the contaminant level, according to Dr. Earl, but a temporary increase could be expected while removal activities were occurring. He also concluded that this previously deposited waste was the source of the contaminants in the 36" RCP, the northwest underdrain and the southeast underdrain. Contaminants appeared in 1988 in the witness system installed pursuant to the 1978 SWP. DCSWA began regular monitoring and chemical analysis of the flows in this system. Contaminants have continued to show up.

Szarko maintains that contamination in the 36" RCP, the underdrains and the 1978 witness system are solely the result of breaches in the 1978 SWP liner system. These breaches allow leachate to enter the witness zone, pass through the MC-30 secondary liner, reach the underdrains and the 36" RCP (where much is drained away) and enter the regional groundwater. Moreover, as groundwater rises beneath the landfill, it is capable of passing through these same layers and entering the waste deposited under the 1978 SWP. As a result, there is an

ongoing interchange of contaminated liquid between the landfill and the regional groundwater.

The ramifications, according to Szarko, are numerous. The contamination of the groundwater will continue rather than diminish because the contaminants will be constantly replenished. This will also be true with respect to the 36" RCP and the underdrains where the contamination will likely increase also because of the weight of overtopping. As a result, the monitoring systems set up under the 1988 SWP and the 1990 SWP will be unable to detect any discharges of contaminants stemming from breaches in their liner systems; and the contaminated discharges from the 36" RCP and the underdrains will continue to pollute Furnace Run. These facts, according to Szarko, make it impossible for the designs approved in the 1988 SWP and the 1990 SWP to comply fully with 25 Pa. Code §273.255 (witness systems) and §273.282(d) and §273.152(b)(1) (monitoring plans). DCSWA, therefore, cannot satisfy the criteria of §271.201(a)(4), requiring an applicant to affirmatively show that its operations will not cause surface or groundwater contamination.

Szarko, as noted, attributes all the contaminants in the 36" RCP, the underdrains and the 1978 witness system to breaches in the 1978 liner system. Although he contends that groundwater can rise into the 1978 waste - passing the 36" RCP, the underdrains and the 1978 witness system along the way - he declines to attribute any of the contaminated groundwater to the previously deposited waste. It is essential to Szarko's position to prove that the 1978 liner system has been breached. If that liner system is intact, Szarko's whole scenario collapses.

There is no direct evidence that either the 1978 primary liner or the 1978 secondary liner has been breached - circumstantial evidence must suffice. If a

breach has occurred in the primary liner, it would show up first in the 1978 witness system sandwiched between the primary liner above and the secondary liner below. There is no dispute about the fact that contaminated flows are in the 1978 witness system and show up in the 1978 witness tanks. Because the 1978 witness drains are interconnected, there is no way to determine the exact source of flows into any of the witness tanks. Taking the 1978 disposal area as a whole, the combined flows in the witness tanks amount to about 8 gallons per day (gpd) per acre.

EPA, recognizing that no liner system is truly impermeable, has established recommended action levels for witness system flows. While these apply only to hazardous waste landfills, they are instructive for our purposes. Flows ranging from 5 to 20 gpd per acre require only periodic pumping of the witness tanks. Flows ranging from 21 to 250 gpd per acre require more frequent monitoring, chemical analysis and treatment. Flows in excess of 250 gpd per acre require remediation - typically capping of the affected area. The flows at the landfill fall within the lowest action level, requiring only the occasional pumping of the witness tanks. They are within the range of expectability.

Szarko argues, however, that the calculation of flows on a landfill-wide basis may hide the fact that a liner breach of significance has occurred. This, of course, may be true; but that is an obstacle faced by a litigant trying to prove a liner breach by consideration of flows in the witness system. Even if we accept Szarko's calculation (based on the false assumption that witness tank 2 receives flows only from pad 14), the flow levels in that witness tank would range from 40 to 50 gpd per acre. While that exceeds the lowest category, it still represents an unexceptional flow level for impermeable liners, especially in a municipal waste landfill as contrasted to a hazardous waste landfill.

Szarko raises the possibility that some of the leachate passing through the 1978 primary liner is avoiding the witness drains, passing through the secondary liner and reaching the underdrains. This, of course, is possible but not likely. Leachate will follow the path of least resistance - the leachate collection lines and the trenches in which they are installed. The amount of leachate likely to pass through a breach in the primary liner, therefore, is minimal. Leachate that penetrates the primary liner must avoid not only the witness drains but the foot-wide trenches in which they are placed. It must then penetrate 12 inches of soil to reach the secondary liner. This liner is made of sheet vinyl in all areas but pads 1 through 8 where it consists of MC-30, a sprayed bituminous material. The difficulties of leachate getting through the secondary liner are not as great as they are with respect to the primary liner. Nonetheless, this liner is a barrier either of sheet vinyl or blacktop-like material that is not readily penetrated.

We are unwilling, on the basis of this evidence, to conclude that the 1978 liner system has been breached. Another factor that undermines Szarko's scenario is the decline in contaminant levels in the groundwater. DCSWA's evidence found a statistically significant decline in some parameters of contamination after the previously deposited waste had been relocated. If the groundwater contaminants were being constantly replenished from leachate penetrating the 1978 liner system, the parameters would rise or remain the same. The downward trend, thus, is additional evidence supporting the integrity of the 1978 liners.

Szarko next asserts that the contaminated groundwater and the contaminated flows in the 36" RCP and the underdrains render the site unsuitable for the additional landfilling authorized by the 1988 SWP and 1990 SWP. The existing contamination is so extensive, Szarko argues, it will be impossible to detect new discharges of leachate-contaminated liquid whether from the 1978 waste, 1988

waste or 1990 waste. Szarko's argument seems to suggest that the only suitable site would be one where the groundwater is uncontaminated. As DCSWA points out, such a policy would limit landfills to the most pristine areas of the Commonwealth. If this truly is Szarko's position, it conflicts with arguments he has made elsewhere that the landfill should not be allowed to exist so close to the Oley Valley, because of its pristine character.

In any event, the contaminated groundwater at the landfill does not render the site unsuitable. DER, on a daily basis, establishes background levels of contaminated groundwater, at sites throughout the Commonwealth, as part of its vast program of permit issuance and enforcement. That has been done at the landfill too. A fresh discharge of leachate will have its own fingerprint, discernible by examining the entire spectrum of parameters. In addition, the extensive historical record of groundwater analysis at the landfill makes practical the use of statistics to evaluate changes in concentration. And the first place a fresh discharge will show up is in one of the witness systems. These systems - one for the 1978 liners, one for the 1988 liners and one for the 1990 liners - are independent, each draining its own area and flowing to its own set of witness tanks.

These witness systems, contrary to Szarko's representation, have not been contaminated by the previously deposited waste on unlined areas. They are discrete systems isolated between the liners and closed to outside contaminants. They are fully capable of detecting future leachate contamination by weekly monitoring of flows into the tanks, complying with the requirements of 25 pa. Code §273.255. Szarko's contention that the 1990 design prevents weekly monitoring is unsupported by the evidence. Three of the witness tanks will be equipped with flow meters; the other two will be measured by hand. Szarko's

concern that the measurements done by hand will not be accurate enough does not automatically prove an abuse of discretion. It was necessary for him to go further and prove that a higher degree of accuracy is necessary. Without such evidence, his argument falls.

Monitoring at the landfill is extensive. In addition to weekly and quarterly monitoring of flows in each of the 3 witness systems, DCSWA is required to monitor the groundwater at 13 locations on a quarterly and an annual basis for a whole list of parameters; to monitor surface water (including Furnace Run) at 9 locations quarterly and annually under the 1988 SWP, monthly under the 1990 SWP, for a whole list of parameters; and to monitor aquatic life conditions in Furnace Run, annually under the 1988 SWP, semi-annually for some parameters under the 1990 SWP. Certainly, if a fresh discharge of contaminants occurs, one of these monitoring points will pick it up.

The monitoring system satisfies the regulations. 25 Pa. Code §273.152(b)(1) requires the groundwater monitoring plan to be able to accurately measure groundwater quality upgradient, beneath and downgradient of the proposed disposal area. 25 Pa. Code §273.282 requires, at a minimum, 1 upgradient monitoring well and 3 downgradient monitoring wells. Subsection (d) requires the downgradient wells to be located so that they will provide early detection of pollution from the disposal area. Of the 13 groundwater monitoring wells at the landfill, 5 are upgradient, 5 are downgradient and 3 are in between (downgradient of Shenkel Hill but upgradient of the rest of the landfill). Szarko's criticism does not go so much to the number and location of the wells; it goes instead to the fact that these wells are already contaminated and, as a result, cannot "accurately measure groundwater quality" or provide "early detection" of pollution. We have already rejected this argument and are satisfied that the

monitoring plan is adequate to detect changes in groundwater quality and capable of early detection of pollution: *Larry D. Heasley v. DER and County Landfill, Inc.*, EHB Docket No. 90-311-MJ, Adjudication issued May 13, 1994.

Contaminated groundwater in underdrains and the 36" RCP discharges as surface water and flows overland into Furnace Run. Szarko claims that these discharges are unlawful without the issuance of an NPDES permit. Since no NPDES permit was issued for these discharges,⁷ the 1988 SWP and 1990 SWP were unlawfully issued.

Condition 24 of the 1988 SWP required DCSWA to study the contaminants in the water discharging from the underdrains and the 36" RCP and evaluate their impact on Furnace Run. The AGES study, which fulfilled this condition, concluded that the source of the contaminants was the previously deposited waste on unlined areas. While the contaminants presented a potential adverse threat to Furnace Run, no statistically significant impact had been found. Szarko criticized this study on numerous grounds, overlooking the narrow focus of the undertaking.⁸

DER accepted the AGES study and 3-volume report as a fulfillment of Condition 24. DER personnel debated whether to require DCSWA to apply for and obtain a "monitor only" NPDES permit.⁹ They ultimately decided against it, concluding that the monitoring requirements of the 1988 SWP and 1990 SWP were

⁷The 1988 NPDES only covers discharges from a planned wastewater treatment plant for leachate.

⁸A prime example is the criticism that VOCs were not totally calculated because some of them would have volatilized inside the 36" RCP and the underdrains. Since the study was to measure the impact of the discharges on Furnace Run, only those VOCs still contained in the liquid discharges were relevant.

⁹Unlike typical NPDES permits which set forth allowable concentrations that cannot be exceeded, a "monitor only" NPDES permit sets no limits but requires monitoring of the discharge for specified parameters.

adequate to protect Furnace Run. While this may be true, we are not prepared to hold that a NPDES permit is, therefore, not necessary: *Delaware Unlimited, Inc. et al. v. DER*, 1984 EHB 178, affirmed, 96 Pa. Cmwlth 361, 508 A.2d 348 (1986), allocatur denied, 523 A.2d 1132 1986).

The 36" RCP and the underdrains were facilities designed as integral parts of the landfill approved by the 1978 SWP. While the 36" RCP was used initially simply as a conveyance structure for the unnamed tributary, the intention was to use it also as a drainageway for one of the sedimentation basins. This ultimately occurred. The underdrains were designed to carry away groundwater present beneath the landfill. Together, these systems were to channel surface water and groundwater into discrete conveyances discharging eventually near the north bank of Furnace Run. We are satisfied that they are "point sources" within the scope of the Clean Water Act, Public Law 92-500, 86 Stat. 816, 33 U.S.C.A. §1251 *et seq.*, at §1362, and Pennsylvania's implementing regulations at 25 Pa. Code §92.1.

DER should have required the issuance of NPDES permits for these pipelines at the time they were authorized to be built - 1978. DER's failure to do so would have been an appropriate subject of an appeal from the issuance of the 1978 SWP. See *Delaware Unlimited, supra*. Szarko took no such appeal (nor did anyone else). A Dams and Encroachment Permit (D06-476) was issued to DCSWA on May 8, 1986 reauthorizing the 36" RCP. Again, DER should have required the issuance of a NPDES permit but did not. Again, no one filed an appeal. Under the doctrine of administrative finality, DER's approval of these facilities without a NPDES permit is final and binding on all parties: *Commonwealth v. Derry Tp.*, 466 Pa 31, 351 A.2d 606 (1976); *Commonwealth, Dept. of Environmental Resources v. Wheeling-*

Pittsburgh Steel Corp., 473 Pa. 432, 375 A.2d 320 (1977), cert. denied, 434 U.S. 969.

DER considered these discharges during its review of the 1988 SWP application and debated whether to require the issuance of NPDES permits, deciding ultimately to require DCSWA to study the extent of contamination (Condition 24). DER considered them again during its review of the 1990 SWP application, having the 3-volume AGES study before it. The final decision was to require continued monitoring (Condition 20). DER also should have considered the discharge from the 36" RCP in 1990 when reviewing DCSWA's application for Permit No. D06-476A, authorizing abandonment and relocation. Szarko included all three of these permits in his Notices of Appeal. While he failed to assign any specific objections to Permit No. D06-476A, he clearly challenged the 1988 SWP and 1990 SWP on the basis of 25 Pa. Code §271.201(a)(3) and (4). These regulatory provisions require an applicant for a municipal waste disposal facility to "affirmatively demonstrate" that the requirements of the "environmental protection acts" have been complied with and that operations under the permit will not cause surface water pollution or groundwater pollution.

Szarko's objections to the discharges fall primarily within the latter. His thesis is that the contamination in the discharges is coming from the lined portions of the landfill and the overtopping will aggravate it. We have rejected these arguments on the facts and also reject the argument that §271.201(a)(4) mandates issuance of NPDES permits. The evidence is clear that the landfill operations authorized by the 1988 SWP and 1990 SWP will have no impact on, and will make no use of, the 36" RCP and the underdrains. These facilities exist beneath the landfill, were previously permitted, and are functional only with respect to the 1978 SWP disposal areas. The 1988 SWP and 1990 SWP involve

different disposal areas and distinct facilities to serve them. DCSWA's obligation under §271.201(a)(4) was to show that operations under the 1988 SWP and 1990 SWP would not cause pollution. This encompasses a showing that operations will not aggravate existing pollution¹⁰.

DCSWA's obligations under §271.201(a)(3) appear to be broader in scope. They focus on past operations, not on future operations as does §271.201(a)(4). DCSWA had to "affirmatively demonstrate" that "environmental protection acts" have been complied with. According to the definition in §271.1, that term includes the CSL and its requirements for NPDES permits. Because of the provisions of §271.201(a)(3) and the fact that DER reopened the subject of the discharges by inserting Condition 24 in the 1988 SWP and Condition 20 in the 1990 SWP, we hold that Szarko properly could, and properly did, challenge the lack of NPDES permits in his appeals from the 1988 SWP and the 1990 SWP.

DCSWA argues that "monitor only" NPDES permits were in fact issued for the pipelines in the 1988 SMP and 1990 SWP. We agree that what DER did reached the same result, but we reject the notion that such action is satisfactory compliance with the CSL and its regulations. Aside from certain differences in the public notices and public hearing requirements between the SWMA regulations and the CSL regulations, there is a fundamental unfairness in granting a NPDES permit without specifically identifying it. While we have not examined the public notices applicable to the 1988 SWP or the 1990 SWP, we seriously doubt that they made any mention of these pipelines, their discharges or the subject of NPDES permits in connection with them. The 1988 SWP and 1990 SWP refer only to the SWMA and not to the CSL. We must say, in passing, that we are disappointed with DER's

¹⁰DCSWA did this by showing that overtopping would not affect the integrity of the liners and the pipes.

adoption of DCSWA's argument. Being charged with the administration of the NPDES program, DER personnel should have been the first to condemn the concept of de facto permits.

We conclude that DER should have required DCSWA to apply for and obtain NPDES permits for the discharges from the 36" RCP and the underdrains. This could have been done in connection with the 1988 SWP, the 1990 SWP, or Permit No. D06-476A; or it could have been done independent of any of these permits because of DER's powers under the CSL. Ordinarily, we would suspend all these permits and remand them to DER. We choose not to do that with the 1988 SWP and the 1990 SWP for the following reasons: (1) operations under these two permits have absolutely no impact on the pipes and the discharges, (2) the discharges are not an environmental threat at this point, (3) suspending landfilling operations under these circumstances could pose a much greater environmental threat than the discharges.

As noted earlier, all of the non-recyclable municipal waste generated in Delaware County finds its way to the landfill either directly (bulk waste, construction and demolition waste and sewage and septic sludge) or indirectly (279,000 tons annually of ash residue from the Westinghouse Resource Recovery Facility). Berks County waste, especially from Earl Township, also is deposited there. Finding other suitable facilities for this waste would be difficult and would very likely involve longer hauls with their associated risks of leakage and spillage. Because of these unique circumstances we are departing from our normal practice of suspending these solid waste permits. Instead, we are ordering DER to require DCSWA to apply for and obtain NPDES permits for all three discharges. DER and other parties, actual or potential, should not expect us to follow this practice in the future except under the most exceptional conditions.

Permit No. D06-476A will be suspended, however, because it does impact the discharges. Suspending it and remanding it to DER for the issuance of a NPDES permit may cause some inconvenience for DCSWA but the impact will be minimal compared to what it would be if we suspended the solid waste permits.

The final point on this subject is whether DER, given the contamination already present at this site, could have or (in the exercise of sound discretion) should have, issued the 1988 SWP and 1990 SWP for additional landfilling at the site. While it is clear that waste disposal operations at this site contaminated the groundwater, the operative factors producing that contamination occurred long before modern landfilling regulations were adopted and long before DCSWA acquired the landfill. In 1978 when the application leading to the 1978 SWP was pending, DER could have ordered the abandonment of the site and refused to allow any more waste disposal activities to occur there. If DER had done that, the previously deposited waste on unlined areas (making up the entire landfill at that time) would have remained in place until some remediation occurred, probably at public expense. In the meantime, the uncapped landfill, open to precipitation, would have released a steady stream of leachate contamination into the groundwater.

On the other hand, DER could have allowed further landfilling at the site on condition that the previously deposited waste was relocated to lined areas. This would have removed the source of the groundwater contamination without adding to the problem, and eventually the groundwater quality would improve. This was the course DER chose in 1978. Since Szarko did not appeal the issuance of the 1978 SWP, he cannot now challenge DER's action: *Michael Strongosky v. DER* 1993 EHB 412.

Ten years later when the application leading to the 1988 SWP was pending, not all of the previously deposited waste had been relocated (the 250,000 cubic

yards estimated originally turned out to be 1,200,000 cubic yards); but having chosen this relocation effort, DER could hardly abandon it at this point. So, DER chose to allow additional landfilling (based on updated designs and updated regulations) in order to achieve the goal of relocation.

Relocation of the previously deposited waste was almost complete when the 1990 SWP was issued. Again DER elected to allow additional landfilling at the site (based on current designs and regulations). While completion of relocation may have been one of DER's motives, it was also motivated by the fact that the landfilling authorized in 1978 and 1988 had not contaminated the groundwater or had an adverse impact on Furnace Run. In fact, the groundwater contamination appeared to be decreasing. Szarko has striven mightily to show that the 1978 and 1988 facilities are contaminating the groundwater and surface water and to show that the 1988 and 1990 facilities are inadequate to prevent or detect future contamination of these waters of the Commonwealth. He has failed - strong evidence that DER not only followed the law and regulations but employed sound discretion in permitting landfilling to continue at this site.

I. Erosion and sedimentation

Issue 14: Whether landfill operations under the 1990 Permit and the 1990 Earth Disturbance Permit will cause erosion and sedimentation problems, and, for that reason, whether DER abused its discretion by issuing those permits, even though those permits and corresponding applications may meet all of the requirements of the statutes and regulations relating to erosion and sedimentation control.

Despite the language used in this issue, the parties stipulated that the E & S control plan submitted to DER and approved in the 1990 SWP and the 1990 Earth Disturbance Permit satisfied all DER rules and regulations (N.T. 7-8). In addition, Szarko conceded that he was not challenging the regulations at 25 Pa. Code Chapter 102, Erosion Control, as failing to meet the requirements of the CSL

or other environmental statutes (N.T. 3667). Giving effect to this stipulation and concession, it is difficult to see what is left to argue: Szarko's post-hearing brief and reply post-hearing brief do little to clear up the confusion.

Szarko argues that there has been a long history of E & S problems at the landfill, that these problems have not been solved despite the computer-generated E & S plans developed by DCSWA's engineering consultants, and that the strongest evidence of ongoing E & S problems is the continued existence and growth of the delta at the mouth of Furnace Run. In addition, Szarko claims that surface runoff from the landfill is contaminated with VOCs which the sediment basins are unable to remove before discharging to Furnace Run. He concludes with the statement that discharges such as those at the landfill to the waters of the Commonwealth are violations of the CSL.

If Szarko agrees that the E & S plan approved in 1990 met the requirements of the regulations and if Szarko is not challenging the validity of the regulations within the context of the CSL or other statutes, we fail to see how the discharges from these approved facilities can violate the statutes - unless, of course, they are different in some manner from what were contemplated in the approved E & S plan. Szarko has not made that claim, however, and there is no evidence to support it.

Szarko appears to be focusing on the difficulties in fashioning and maintaining E & S controls on a site with slopes as steep as those at the landfill. Pointing to the history of E & S problems and the alleged failure of the E & S systems to correct them, Szarko appears to take the position that the site cannot be controlled. As a result, even if the E & S plans and facilities fully comply with the regulations and statutes, the 1990 permits should not have been issued.

Obviously, Szarko cites no authority for this proposition and we know of none. If the E & S plans comply with the regulations and if the regulations validly implement the environmental statutes, DCSWA was entitled to the 1990 SWP and 1990 Earth Disturbance Permit.

All of the E & S problems cited by Szarko predate issuance of the 1990 SWP and 1990 Earth Disturbance Permits. Activities under the 1990 permits have not been brought before us and Szarko has not shown how past violations bear upon these later activities. As far as VOCs are concerned, we note that Condition 21 of the 1990 SWP requires DCSWA to take samples after each rain event at the outlets of sedimentation basins 2 and 3 and to analyze them for specific chemical parameters, including VOCs.

The delta at the mouth of Furnace Run generated a lot of controversy in this litigation. A delta has existed at that location for many years - at least since 1979 and probably much longer, considering the size of some of the trees. Just when the delta began to form and what mechanisms combined to engender it is not in the record. We know that during the 1980s the delta continued to grow, constricting the channel of Manatawny Creek and undercutting the opposite (west) bank. Dr. Adams is convinced that this growth is attributable at least to the extent of 90% to activities at the landfill which place sediment and larger bedrock fragments into Furnace Run where they are transported eventually to the mouth.

There is no doubt that Furnace Run received a steady infusion of sediment from the landfill at least until 1984 when the first E & S controls were engineered. At that time Furnace Run was knee-deep in sediment for about 400 feet downstream of the landfill. Control systems that evolved over the following

years undoubtedly reduced the input of sediment at least to the point of satisfying DER.

We have no difficulty attributing the growth of the delta primarily to past landfill activities but are not persuaded that DCSWA's activities have made more than a minor contribution. While Dr. Adams adequately traced lithic fragments to the Furnace Run watershed and, most likely, to the landfill, he gave no indication of how recently the fragments were deposited. The science of sediment transport has formulas for calculating the speed at which particles of various sizes are carried downstream but Dr. Adams did not mention them or indicate that he considered them. Given the amount of sediment in Furnace Run at the landfill in 1984 and the distance from there to the mouth of Furnace Run (about 1 mile), it is conceivable that the growth of the delta was attributable primarily to this material.

Other factors point to this end. The size of some of the lithic fragments discussed by Dr. Adams makes it highly unlikely that they could have come from the landfill after the sedimentation basins had been built. These basins contain dams, traps and risers capable of settling out silt. Larger materials obviously would be captured as well. Another factor is the condition of Furnace Run at the landfill. Aquatic studies conducted there since 1988 have found good water quality and an absence of significant environmental stress. These conditions could not exist if a steady load of sediment, sufficient to form a 4,000 square foot delta, was being deposited into the stream.

The growth of the delta undoubtedly has had an adverse impact on Szarko's land but it has not been shown, to our satisfaction, to be the fault of DCSWA's activities at the landfill.

J. Compliance history

Issue 1: Whether the incomplete transfer of trash from the portions of the unlined facility along and under Shenkel Road to the lined areas was a violation precluding issuance of the 1988 Permit and the 1990 Permit pursuant to §503(d) of the SWMA.

Issue 2: Whether erosion and sedimentation violations were violations precluding issuance of the 1988 Permit pursuant to §503(d) of the SWMA.

Issue 3: Whether residual contamination remaining from the old, unlined landfill, since removed, or contamination from trash disposed under the 1978 Permit entered the waters of the Commonwealth and whether issuance of the 1988 Permit or the 1990 Permit was thereby precluded pursuant to §503(d) of the SWMA or pursuant to 25 Pa. Code §271.201(a)(4).¹¹

Issue 13: Whether DER abused its discretion pursuant to §503(c) of the Solid Waste Management Act in issuing the 1988 Permit and the 1990 Permit because of DCSWA's compliance history.

Section 503(c) and (d) of the SWMA, 35 P.S. §6018.503(c) and (d), referred to above, read as follows:

(c) In carrying out the provisions of this act, the department may deny, suspend, modify, or revoke any permit or license if it finds that the applicant, permittee or licensee has failed or continues to fail to comply with any provision of this act, the act of June 22, 1937 (P.L. 1987, No. 394), known as "The Clean Streams Law," the act of January 8, 1960 (1959 P.L. 2119, No. 787), known as the "Air Pollution Control Act," and the act of November 26, 1978 (P.L. 1375, No. 325), known as the "Dam Safety and Encroachments Act," or any other state or Federal statute relating to environmental protection or to the protection of the public health, safety and welfare; or any rule or regulation of the department; or any order of the department; or any condition of any permit or license issued by the department; or if the department finds that the applicant, permittee or licensee has shown a

¹¹The stipulated issues as presented by the parties cited §271.204(4). Since no such section appears in the regulations and since §271.201(a)(4) has been cited by both parties in their post-hearing briefs, it is the latter section that was intended.

lack of ability or intention to comply with any provision of this act or any of the acts referred to in this subsection or any rule or regulation of the department or order of the department, or any condition of any permit or license issued by the department as indicated by past or continuing violations. In the case of a corporate applicant, permittee or licensee, the department may deny the issuance of a license or permit if it finds that a principal of the corporation was a principal of another corporation which committed past violations of this act.

(d) Any person or municipality which has engaged in unlawful conduct as defined in this act, or whose partner, associate, officer, parent corporation, subsidiary corporation, contractor, subcontractor or agent has engaged in such unlawful conduct, shall be denied any permit or license required by this act unless the permit or license application demonstrates to the satisfaction of the department that the unlawful conduct has been corrected. Independent contractors and agents who are to operate under any permit shall be subject to the provisions of this act. Such independent contractors, agents and the permittee shall be jointly and severally liable, without regard to fault, for violations of this act which occur during the contractor's or agent's involvement in the course of operations.

These statutory provisions give DER the vital power to screen out persons or entities with a history of uncorrected violations whose actions have demonstrated a lack of ability or intention to comply with the statutes, regulations and permit conditions applicable to them. The importance of this power to securing compliance with environmental laws and regulations should not be underestimated. Nor should its potential for mischief in the hands of a tyrannical regulator. As with all of its actions, DER must exercise this power in accordance with the language of §503(c) and (d) and with a sound discretion.

We can dispose of Issues 1 and 3 without much discussion because they do not amount to unlawful conduct on the part of DCSWA. We previously have found that the groundwater contamination and the surface water contamination present in the 36" RCP and the underdrains stem solely from the previously deposited

waste on unlined areas of the landfill. DCSWA did not bring about the contamination and, to the extent relocation of the waste increased it, DCSWA was not legally responsible because it was operating under a mandate from DER embodied in the 1978 SWP and the 1986 CO & A. In addition, it was DER's decision not to require issuance of NPDES permits for the discharges from the 36" RCP and the underdrains. While we have overturned that decision, we attribute no fault to DCSWA.

The previously deposited waste under Shenkel Hill Road also is not unlawful conduct chargeable to DCSWA because Earl Township, the owner of the road, denied DCSWA permission to relocate it. Even DER was unable to persuade the Township to cooperate. It was not until ownership of the road was transferred to DCSWA on March 4, 1991 that relocation became legally possible. The work was completed soon after that date. The only way DCSWA could have acted sooner than March 4, 1991 was to commit a trespass and appropriate material belonging to Earl Township. Compliance with environmental laws, regulations and permit conditions cannot force a permittee to violate other statutes, especially those involving criminal penalties. And DCSWA cannot be charged with failure to accomplish what even DER could not achieve - Earl Township's permission.

There were E & S control violations, constituting unlawful conduct under §503(d) of the SWMA, prior to issuance of the 1988 SWP. Accordingly, the Permit could only be issued upon a showing by DCSWA, to the satisfaction of DER, that the unlawful conduct had been corrected. The record clearly shows that DER officials gave careful consideration to this matter. The Compliance History Screening Panel was asked for its advice. After reviewing the E & S violations in detail, the Panel recommended issuing the Permit. Other responsible DER

officials agreed, satisfied that DCSWA had corrected the violations satisfactorily.

Szarko argues that the Panel's recommendation was of no significance because it did not have the most up-to-date information on DCSWA's compliance status. While the written information before the Panel was not up-to-date, the Panel was briefed orally by DER enforcement personnel on the current status of violations prior to the Panel's recommendation in October 1988. Even so, Szarko contends, the Panel could not have been aware of the NOV dated October 28, 1988 relating to an October 24, 1988 inspection of the landfill during which E & S control violations were noted.

Szarko overlooks the decision-making process under §503(d) of the SWMA. The Compliance History Screening Panel only recommends; the final decision rests with DER's Southeast Regional Manager - Wayne Lynn. Before making the final decision, Lynn conferred with the region's inspectors and compliance specialists and had the most up-to-date information at his disposal. Besides, DCSWA responded to the October 28, 1988 NOV in a letter dated November 11, 1988 setting forth how DCSWA corrected the deficiencies noted in the NOV. The letter reflects that all of the items had been addressed. This letter, which very likely was in DER's hands on or before November 16, 1988 when the 1988 SWP was issued, demonstrates that DCSWA's unlawful conduct had been corrected to DER's satisfaction. Accordingly, DER would have had no legal basis to deny issuance of the Permit under §503(d): *Concerned Residents of the Yough, Inc. v. Department of Environmental Resources*, _____ Pa. Cmwlth _____, 639 A.2d 1265 (1994).

DCSWA's compliance history was again carefully reviewed prior to issuance of the 1990 SWP. DER, as part of its review, required DCSWA to document in

writing how it complied with the numerous conditions contained in the 1988 SWP. Some NOV's issued to DCSWA between November 16, 1988 and December 17, 1990 related to E & S violations which the 1990 SWP application demonstrated had been corrected to DER's satisfaction. Most of these violations, it should be noted, concerned interim control measures required to be implemented as landfilling progresses. While DCSWA's failure to implement these interim measures may have caused or allowed erosion to occur, the E & S control systems were designed to capture the eroded material in sedimentation basins. There is no evidence that any of these violations involved the depositing of sediment in Furnace Run. DER's Compliance History Screening Panel, composed of the same individuals as in 1988, recommended issuance of the Permit. Southeast Regional officials agreed and the 1990 SWP was issued. There was no basis to deny the permit under §503(d).

Szarko takes the position that, regardless of whether DCSWA's unlawful conduct had been corrected to the satisfaction of DER under §503(d), DER should have exercised its discretion under §503(c) to deny the 1988 SWP and 1990 SWP. There has been a pattern of repeated violations at the landfill, Szarko asserts, demonstrating that DCSWA cannot properly manage it or, at the least, that the site itself is unmanageable.

The problems that Szarko cites, for the most part, have been found to be the fault of the unregulated dump which existed at the site for about 30 years. Those problems have not been exacerbated by issuance of the 1978 SWP, the 1988 SWP and the 1990 SWP; they have been alleviated, in the short term, and will be substantially eliminated, in the long term. We cannot agree that DER abused its discretion by allowing this landfill to continue to exist under DCSWA's ownership and operation.

The site has difficulties, to be sure, especially where E & S controls are concerned. But DCSWA has demonstrated its ability to manage the facility, including the E & S controls. For one thing, Furnace Run is not polluted; it supports a viable aquatic population of pollution-sensitive organisms - proof that whatever erosion takes place on the site is intercepted before it reaches the stream. Secondly, DCSWA demonstrated its ability to operate the site without violations when it satisfied Condition 41 of the 1990 SWP. That Condition required DCSWA to operate the landfill for a period of 18 months without significant violations and without a pattern of continuing minor violations. DCSWA fulfilled the condition and DER rescinded it. This performance fully justified DER's confidence in DCSWA's ability and intention to manage the landfill according to law. We find no abuse of discretion here.

K. Article I, Section 27

Issue 7: Whether DER acted in accordance with Article I, §27 of the Pennsylvania Constitution in issuing the 1988 Permit and the 1990 Permit.

As both parties recognize in their post-hearing briefs, this issue is limited to a consideration of whether DER complied with the SWMA¹² and its regulations in issuing the permits. "The balancing of environmental and societal concerns...mandated by Article I, Section 27, was achieved through the legislative process which enacted [the SWMA]...and which promulgated the applicable regulations." *National Solid Wastes Management Association v. Casey*, 143 Pa. Cmwlth. 577, 600 A.2d 260 at 265 (1991), aff'd per curiam, 533 Pa. 97, 619 A.2d 1063 (1993).

¹²Szarko raises the issue in his post-hearing brief only with respect to the SWMA. Its applicability to other relevant statutes, thus, has been waived: *Lucky Strike, supra*.

Szarko, of course, contends that DER failed to comply with the SWMA and its regulations, as discussed in other sections of the post-hearing brief. We have concurred in that assessment only with respect to the need for NPDES permits. DCSWA introduced evidence concerning the public benefits of the landfill and we have made findings of fact concerning them. Thus, even under the test enunciated in *Payne v. Kassab*, 11 Pa. Cmwlth. 14, 312 A.2d 86 (1973), affirmed on other grounds, 468 Pa. 226, 361 A.2d 263 (1976), we hold that the benefits outweigh the environmental harm.

L. Issues raised by DCSWA

Issue 19: Whether Appellant Dr. Szarko has standing to raise each of the issues stated above.

Issue 20: Whether each of the issues stated above are preserved in the notices of appeal and pre-hearing memoranda.

Issue 21: Whether any of the issues stated above is barred by the Doctrine of Exhaustion of Administrative Remedies or Statute of Limitations.¹³

These issues, for the most part, were raised previously by DCSWA and rejected by the Board in an Opinion and Order dated May 21, 1992 (1992 EHB 645). To the extent that the issues were not raised previously, we reject them without discussion on the same basis laid down in our previous ruling.

CONCLUSIONS OF LAW

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

2. Szarko has the burden of proof. To carry the burden, he must show by a preponderance of the evidence that DER's issuance of the 1988 SWP, the 1990 SWP, the 1990 Earth Disturbance Permit, and Dams and Encroachments Waterway

¹³While DCSWA takes the position that this issue has been properly raised, Szarko takes the position that this issue has not been properly raised.

Abandonment Permit No. D06-476A issued December 17, 1990 violated the law or was an abuse of discretion.

3. The 1988 SWP and 1990 SWP did not approve construction of liner systems where 8 feet of separation could not be maintained between the bottom of the subbase of the liner system and the regional groundwater table and no construction occurred in violation of 25 Pa. Code §273.252(b).

4. Pumping tests conducted as part of the application for the 1988 SWP did not constitute multiple well aquifer tests as required by 25 Pa. Code §273.115(a)(3) but the deficiency was corrected soon after permit issuance.

5. Pumping tests conducted as part of the application for the 1990 SWP did constitute multiple well aquifer tests as required by 25 Pa. Code §273.115(a)(3).

6. Although DCSWA did no field verification of fracture traces, it satisfied the requirements of 25 Pa. Code §273.115(a)(4) by presenting an extensive amount of data from the actual exposure of bedrock on the site which uncovered no critical or unusual fracture zones.

7. The issue raised by Szarko concerning the location of the groundwater divide on Shenkel Hill is not a stipulated issue and is beyond the scope of the appeal.

8. The 1988 SWP and 1990 SWP did not violate the exclusionary criteria in 25 Pa. Code §273.202(a)(4) and (7) because the entire landfill site is specifically exempt from these requirements.

9. The weight of the additional fill placed as part of the overtopping authorized by the 1988 SWP and 1990 SWP will not cause a failure of the 1978 SWP liner system, 36" RCP or underdrains, but may cause an increase in leachate generated by the waste disposed under the 1978 SWP. Any increase will flow to the leachate collection system.

10. Issue 18, dealing with the one full year of groundwater monitoring data required by 25 Pa. Code §273.116 and §§273.281-273.285, has been waived by Szarko.

11. Groundwater and the water flowing in the 36" RCP and the underdrains have been contaminated by the previously deposited waste on unlined areas at the landfill.

12. A preponderance of the evidence establishes that the 1978 SWP liner system has not been breached.

13. The witness systems and groundwater and surface water monitoring systems are such that a fresh discharge of leachate will be readily detected. They comply with 25 Pa. Code §273.255, §273.152(b)(1), and §273.282.

14. DER should have required the issuance of NPDES permits for the discharges from the 36" RCP and the underdrains.

15. DCSWA affirmatively demonstrated, in accordance with 25 Pa. Code §271.201(a)(4), that operations under the 1988 SWP and 1990 SWP would not cause surface water or groundwater contamination.

16. DER did not abuse its discretion in allowing landfilling to continue at this site despite existing surface water and groundwater contamination.

17. Operations under the 1990 SWP and 1990 Earth Disturbance Permits will not cause E & S problems.

18. There is no evidence to attribute the growth of the delta at the mouth of Furnace Run to DCSWA's activities at the landfill.

19. The contaminated surface water and groundwater at the landfill predated DCSWA's ownership and has not been added to by DCSWA's activities. Therefore, it does not constitute unlawful conduct under §503(d) of the SWMA.

20. The inability of DCSWA to relocate the previously deposited waste under Shenkel Hill Road was caused by Earl Township's refusal to permit entry and removal, thereby raising a legal impediment to DCSWA's desire to relocate the waste. As such, the failure cannot be considered unlawful conduct under §503(d) of the SWMA.

21. E & S violations occurring prior to issuance of the 1988 SWP and 1990 SWP constituted unlawful conduct under §503(d) of the SWMA but were corrected to DER's satisfaction prior to permit issuance.

22. DCSWA has demonstrated that it has the ability and intention to comply with the environmental statutes, regulations and permit conditions. Therefore, DER did not abuse its discretion under §503(c) of the SWMA in issuing the 1988 SWP and 1990 SWP.

23. DCSWA complied with the SWMA and its regulations in all respects except for the issuance of NPDES permits. In that respect, the benefits of the landfill outweigh the environmental harm, satisfying Article I, Section 27, of the Constitution of Pennsylvania.

25. Issues 19, 20 and 21, raised by DCSWA, were rejected in an Opinion and Order at 1992 EHB 645.

O R D E R

AND NOW, this 2nd day of November, 1994, it is ordered as follows:

1. The consolidated appeals are sustained in part and dismissed in part in accordance with the foregoing adjudication.

2. DER shall order DCSWA to promptly apply for NPDES permits for the discharges from the 36" RCP and the underdrains.

3. Permit No. D06-476A is suspended and remanded to DER with directions to order DCSWA to promptly apply for a NPDES permit for the discharge.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmman

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: November 2, 1994

cc: DER Bureau of Litigation:
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Central Region
For the Appellant:
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M. DIANE SMITH
 SECRETARY TO THE BOAF

WILLIAM FIORE, d/b/a MUNICIPAL	:	
AND INDUSTRIAL DISPOSAL COMPANY	:	
	:	
v.	:	EHB Docket No. 91-063-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: November 2, 1994

**OPINION AND ORDER SUR
 MOTION FOR SUMMARY JUDGMENT**

Maxine Woelfling, Chairman

Synopsis

The Department of Environmental Resources' (Department) motion for summary judgment regarding an appeal of its revocation of water quality management (WQM) permits is denied. It is not necessary to determine whether there are any material facts at issue as a result of the operation of the doctrine of collateral estoppel, for the Department is not clearly entitled to judgment as a matter of law.

OPINION

The procedural history of this appeal is recounted in the Board's February 2, 1994, opinion regarding the Department's motion for summary judgment and will not be recounted here. That opinion granted the Department's motion with regard to the appeal by William Fiore, d/b/a Municipal and Industrial Disposal Company (Fiore), of the Department's denial of Fiore's application to renew a National Pollutant Discharge Elimination System (NPDES) permit for a solid waste disposal facility in Elizabeth Township, Allegheny County. In doing so, the Board held that Fiore had

committed numerous violations of 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), which violations were established by reason of collateral estoppel, and that the Department's denial of the renewal application was justified under §609 of the Clean Streams Law. The Department's motion made no reference to its revocation of Fiore's WQM permits, which was also the subject of Fiore's appeal, and, as a result, the Board did not - and could not - dismiss Fiore's appeal in its entirety.

The Department has now filed a motion for summary judgment regarding Fiore's appeal of the revocation of the WQM permits. The motion alleges that there are no material facts at issue since Fiore's violations of the Clean Streams Law have been established in numerous administrative and judicial proceedings. It further argues that the Department is entitled to judgment as a matter of law since the WQM permit revocations were authorized by §609 of the Clean Streams Law and §4(c) of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7514(c)¹ (EHB Act). Fiore has opposed the motion, asserting that the Board's decision on the Department's earlier motion for summary judgment precludes the filing of this second motion.

It is unnecessary to determine whether there are any material issues of fact, as the Department is not clearly entitled to judgment as a matter of law. The Department's January 25, 1991, letter revoking Fiore's WQM permits states:

Pursuant to Sections 5 and 610 of the Clean Streams Law, 35 P.S. §§691.5 and 691.610, Water

¹ This section of the EHB Act provides that no action of the Department's shall be final until the recipient of the action has had an opportunity to appeal it to the Board.

Quality Management Permits 0278203 and 0278204
also are hereby revoked for the reasons that were
set forth above for denying the renewal permit
and because you no longer have an NPDES permit.

(emphasis added)

The Department's motion makes no mention of §§5 or 610 of the Clean Streams
Law nor does it make any attempt to relate its action to the issues raised in
Fiore's notice of appeal. As the moving party, the burden rests on the
Department to demonstrate it is entitled to judgment as a matter of law.
Estate of Charles Peters et al. v. DER et al., 1992 EHB 358, 370. It has not
done so here, and its motion must be denied.

O R D E R

AND NOW, this 2nd day of November, 1994, it is ordered that the
Department's motion for summary judgment is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: November 2, 1994

cc: Bureau of Litigation
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For the Appellant:
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M. DIANE SMITH
 SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL RESOURCES

v.

DOYLESTOWN FEDERAL SAVINGS & LOAN

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:

EHB Docket No. 93-376-CP-W

Issued: November 2, 1994

**OPINION AND ORDER SUR
REQUEST FOR RECONSIDERATION**

By: Maxine Woelfling, Chairman

Synopsis

The Board denies a petition for reconsideration of an interlocutory order that does not present any exceptional or extraordinary reasons why the interlocutory order should be reconsidered.

OPINION

This matter arose with the December 15, 1993, filing of a Complaint for the Assessment of Civil Penalty by the Department of Environmental Resources (Department) against 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.*, which resulted from earthmoving activities at the Fox Hunt Development in Plumstead Township, Bucks County.

After receiving the Department's complaint, Doylestown attempted to file a third party complaint against Gilmore & Associates, Inc. and Ivymore Contractors, Inc., which Doylestown alleged were responsible for the alleged violations. The Board dismissed this third party complaint for lack of

jurisdiction, see, DER v. Doylestown Federal Savings and Loan, EHB Docket No. 93-376-CP-W (Opinion issued May 6, 1994), and Doylestown filed a petition for review with Commonwealth Court. Commonwealth Court eventually quashed Doylestown's appeal as being from an interlocutory order in violation of Pa.R.A.P. 341. Doylestown then requested that the Board amend its order dismissing the third party complaint to include a statement of finality pursuant to Pa.R.A.P. 341(c)(1). The Board denied Doylestown's request as untimely. See, DER v. Doylestown Federal Savings and Loan, EHB Docket No. 93-376-CP-W (Opinion issued September 28, 1994). Currently before the Board is Doylestown's petition for reconsideration of the September 28 order.

The Board has repeatedly held that it will only reconsider an interlocutory decision for "exceptional" or "extraordinary" reasons. Mrs. Peggy Ann Gardner, et al. v. DER, EHB Docket No. 93-381-E (Opinion issued September 7, 1994); Pagnotti Enterprises, Inc. v. DER, et al., 1992 EHB 467, 469. Doylestown contends the Board should reconsider its September 28 order because Doylestown's original petition was meritorious, this case is too important to be denied review, and an immediate appeal would facilitate this case's resolution. None of these reasons can be considered exceptional, especially where the reason for denial of Doylestown's request was untimeliness. See, Gardner, supra; City of Harrisburg v. DER, et al., 1991 EHB 87.¹ Accordingly, Doylestown's petition for reconsideration must be denied. See, Chester Residents Concerned for Quality Living v. DER, et al., 1993 EHB 1645.

¹In both Gardner and City of Harrisburg, the reasons for reconsideration were considered exceptional because, in addition to presenting very unusual factual situations, they related to the merits of the Board's decisions. Doylestown has, to the contrary, offered no reasons, exceptional or otherwise, that relate to the merits of the Board's decision.

ORDER

AND NOW, this 2nd day of November, 1994, it is ordered that Doylestown's petition for reconsideration is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: November 2, 1994

cc: DER Bureau of Litigation:
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 WASHINGTON TOWNSHIP, CUMBERLAND TOWNSHIP, :
 MONONGAHELA TOWNSHIP, and MORGAN TOWNSHIP :

v. :

COMMONWEALTH OF PENNSYLVANIA, :
 DEPARTMENT OF ENVIRONMENTAL RESOURCES :
 and GREENE COUNTY :

EHB Docket No. 94-102-E

Issued: November 2, 1994

**OPINION AND ORDER SUR
 PETITION FOR ALLOWANCE OF APPEAL
NUNC PRO TUNC**

By Richard S. Ehmman, Member

Synopsis

A Petition seeking leave to appeal *nunc pro tunc*, based upon allegations that fraud by the appellants' attorney on the appellants prevented a timely appeal, must be denied since such allegations do not constitute good cause for a *nunc pro tunc* appeal according to Hentz v. Civil Service Commission, 85 Pa. Cmwlth. 358, 481 A.2d 998 (1984), in that allowance of an appeal *nunc pro tunc* based on such attorney fraud would have the negative effect of encouraging such abuses by attorneys.

OPINION

On September 6, 1994 this Board issued an opinion concerning a Motion Requesting A Hearing which had been filed by these appellants and others in response to the Department of Environmental Resources' ("DER") Motion To Dismiss the instant appeal based on its untimeliness and our concomitant loss of jurisdiction thereover. That opinion recites the prior history of this appeal which is not repeated here.

In that opinion, the Board concluded that DER's motion had merit and that the appellants' motion failed to conform to the minimum requirements for a Petition For Allowance Of Appeal *Nunc Pro Tunc*. Accordingly, we granted DER's motion but gave those appellants the opportunity, if they so desired, to file a petition for leave to appeal *nunc pro tunc*.¹ Only the parties listed as appellants in the caption of this opinion filed petitions, so we have modified the appeal caption to reflect that fact.

Turning to the petition on behalf of Dunkard Township, Greene Township, Washington Township, Cumberland Township, Monongahela Township and Morgan Township (collectively "the Townships"), they allege that they are municipalities subject to the Greene County Solid Waste Plan as submitted by Greene County to DER and approved by DER pursuant to provisions of the Municipal Waste Planning, Recycling and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, 53 P.S. §4000.101 ("Act 101"). The Townships aver that throughout the period in which the plan was being put together, adopted locally (or rejected as is true of several municipalities), submitted to DER by Greene County and approved by DER, their attorney represented not only the Townships, but also Greene County's Greene County Solid Waste Authority which was to implement this Act 101 plan. The Townships assert that they could not timely appeal DER's approval, on May 16, 1991, of Greene County's Act 101 plan because of the dual representation conflict of interest engaged in by their

¹In DER's Response to the instant petition it says that since the other appellants did not file petitions, we must now grant its Motion to Dismiss as to these non-petitioners. This we did on September 6, 1994. Our September 6, 1994 Order stated that the motion was granted except as to the appellants who timely filed petitions for leave to appeal. Since only the petitioners currently in this appeal's caption filed such petitions, our prior order stands as to these remaining non-petitioning former appellants.

solicitor. They claim their solicitor represented opposing interests, i.e., the Authority which was to implement the plan and municipalities who oppose it. This dual representation is claimed by the Townships to be fraudulent and the direct cause of their failure to timely appeal.

In the brief in support of their petition, the Townships aver their counsel violated the Pennsylvania Rules of Professional Conduct.² After asserting that fraud may exist in dual representation situations the Townships admit that fraud by an attorney is generally insufficient as a ground for allowance of an appeal *nunc pro tunc*. However, the Townships argue that an appeal *nunc pro tunc* should be allowed because here a malpractice action against this lawyer is not a sufficient remedy since the subject matter appealed affects all of the citizens of the county, substantial tax revenues, and impacts on local citizens and businesses while causing hardships to local municipalities. The Townships assert further that no recovery in such a suit could ever be adequate, so the appeal should not be dismissed on a procedural technicality.

In response DER advances five arguments as to why the Townships' Petition should be rejected. DER argues that the Townships' Petition is not sufficiently specific in pleading fraud as required by Pa. R.C.P. 1019(b). DER also asserts the petition is defective because the Townships fail to attach to it the writings relied upon. Next, DER asserts that no fraud exists because the municipalities were made aware by their lawyer of this lawyer's

²This Board is one of limited jurisdiction under the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7511, and has no authority to address these allegations. Discipline of lawyers is governed by the Pennsylvania Rules of Disciplinary Enforcement as promulgated by the Supreme Court. Violations of these rules should be pursued pursuant thereto.

dual representation more than six months before DER approved this Act 101 Plan so they were not prevented by his dual representation situation from a timely appeal. DER also avers that since Monongahela, Cumberland and Morgan Townships all voted to reject this plan, these three municipalities cannot establish undue influence on their actions by their solicitor. Finally, DER avers that even if fraud by their lawyer does exist, it is not a sufficient basis to grant a petition for a *nunc pro tunc* appeal.³

In our prior opinion in this appeal, we quoted 16 Standard Pennsylvania Practice 2d §85.28 as providing in relevant part:

[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.]

The same concept applies to appeals here, where the time frame for appealing from DER's actions is established at 25 Pa. Code §21.52(a). Because of this rule, if these Townships were merely filing a Notice Of Appeal now, their appeal would be untimely and we would lack jurisdiction over it. Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976).

However, in judicial appeals, the time limit for taking appeals may be extended because of the occurrence of exceptional circumstances. Thus, such circumstances create an exception to the general rule's time limitations. So

³On October 20, 1994 we also received a response to this petition from Greene County ("Greene"). Greene opposes the petition because it lacks sufficient specificity as to the alleged fraud by the attorney. Because we have disposed of this petition under one of the theories advanced by DER, we do not address Greene's petition further herein.

too this Board's rule found at 25 Pa. Code §21.53(a) allows for appeals *nunc pro tunc* upon a showing of good cause, and good cause is specifically equated therein to the standards applicable to analogous cases in the courts of Pennsylvania. However, good cause is limited to "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." Falcon Oil Co. v. Commonwealth, DER, 148 Pa. Cmwlth. 90, ___, 609 A.2d 876, 878 (1992).

The Townships' only claim to good cause is their allegations of fraud. However, the Townships recognize that allegations of fraudulent conduct on the part of their solicitor do not constitute grounds for granting their petition. They cite Hentz v. Civil Service Commission, 85 Pa. Cmwlth. 358, 481 A.2d 998 (1984); Appeal of McCoy, 153 Pa. Cmwlth. 504, 621 A.2d 1163 (1993); Hughes v. Pennsylvania State Police, 152 Pa. Cmwlth. 409, 619 A.2d 390 (1992), as supporting this position, and our review of these opinions shows that they do indeed support it. Nevertheless, the Townships say the impact of this result is too harsh to too many people to allow it to apply and, in addition, a suit against the lawyer for malpractice cannot recover enough money to make whole all who will suffer if this appeal is not allowed. The Townships thus ask us either to close our eyes to the holdings of the very cases they cite or for us to create a further exception on their behalf. If we do as they seek, we would have a general rule requiring timely appeals, with an exception allowing untimely appeals for good cause, followed by a general rule saying fraud by an attorney as to his clients is not good cause and a further exception where there are a large number of people impacted or there cannot be a sufficient financial recovery from that lawyer.

We decline to create the further exception sought by the Townships. The case law is clear that good cause cannot be shown by a petitioner whose allegations deal with alleged fraud upon him by his own counsel. The Townships have not pointed out one decision by a court in Pennsylvania which allows creation of the exception they seek here. They also fail to offer a rationale which rebuts the position taken in Hentz that creating such an exception would tend to encourage such attorney misconduct. Accordingly the Petition cannot be granted and we enter the following Order.⁴

ORDER

AND NOW, this 2nd day of November, 1994, it is ordered that the Townships' Petition For Allowance Of Appeal *Nunc Pro Tunc* is denied and their 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. Ehmman

RICHARD S. EHMANN
Administrative Law Judge
Member

⁴In reaching this conclusion, it is unnecessary for us to address the merits of any of the other arguments advanced by DER in opposition to this Petition.

DATED: November 2, 1994

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 SECRETARY TO THE BOARD

FOSTER R. COLLEGE

v.

COMMONWEALTH OF PENNSYLVANIA
 DEPARTMENT OF ENVIRONMENTAL RESOURCES

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EHB Docket No. 91-429-MJ

Issued: November 3, 1994

**OPINION AND ORDER SUR
 APPLICATION FOR AWARD OF
COUNSEL FEES AND EXPENSES**

By the Board

Synopsis

Having determined that the appellant was the prevailing party and that the Department's action was not substantially justified, the Board awards the appellant \$10,000 in attorney fees and expenses under the Costs Act. Contrary to the Department's assertion, the Costs Act does not require an applicant to submit a detailed financial audit to establish his net worth. The information submitted here by the appellant is sufficient to determine his eligibility as a "party" under the Act. Where the record contains no evidence in support of the Department's Order and Assessment of Civil Penalty, which was the subject of the appeal for which the appellant is seeking reimbursement of fees and expenses, the Department's action clearly was not "substantially justified". The requirement that a copy of the application for attorney fees and expenses must be submitted to the Department within thirty days following disposition of the appeal is met where the application is placed in the mail to the Department within the thirty day period.

OPINION

This matter initially arose when the Department of Environmental Resources ("Department") issued to the Appellant, Foster R. College, an Order and Assessment of Civil Penalty ("Order") on September 13, 1994. The Order alleged that Mr. College had disposed of solid waste, in the form of discarded tires, on his property without a permit in violation of, *inter alia*, certain provisions of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, and the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* The Department assessed a penalty of \$27,500 against Mr. College for the alleged violations. Mr. College appealed the Order on October 15, 1991, arguing that he had sold the property in question in July 1990, prior to the issuance of the Order.

On June 29, 1992, Mr. College served on the Department a set of interrogatories. Shortly thereafter, proceedings in this matter were stayed due to settlement negotiations, and no response was filed by the Department to the discovery request. On August 28, 1992, Mr. College filed a motion for discovery, a request for production of documents, and a second set of interrogatories. Proceedings were again stayed, and no response was submitted by the Department to the second discovery request.

By letter of September 28, 1993, Mr. College advised the Board that he would not accept the terms of the Department's proposed settlement and that the Board should schedule the matter for hearing. Mr. College also requested the Board to issue a ruling on his motion for discovery. On October 1, 1993, the Board notified the Department that any objections it had to the discovery motion should be filed on or before October 21, 1993. By letter dated October 21, 1993, the Department requested thirty days for responding to the discovery requests. The Board granted the Department an extension to

November 24, 1993. This deadline passed, and the Department still had not responded to Mr. College's request for discovery.

On January 7, 1994, the Department filed its pre-hearing memorandum and advised the Board that it would answer Mr. College's discovery requests within thirty days. On March 11, 1994, this matter was scheduled for hearing, to be held on April 27 and 28, 1994. Thereafter, on March 23, 1994, Mr. College filed a motion for sanctions against the Department for failure to respond to his discovery requests. On March 23, 1994, the Department vacated its Order and on March 25, 1994, filed a motion to dismiss this matter as moot. By Order dated May 5, 1994, the Board dismissed the appeal as moot.

On June 6, 1994, Mr. College filed an application for award of attorney fees and expenses pursuant to the Costs Act, Act of December 13, 1982, P.L. 1127, 71 P.S. §2031 *et seq.* The application was accompanied by a brief in support, an affidavit of Mr. College's net worth (Exhibit "A") and an itemized statement of Mr. College's legal fees and expenses in this matter (Exhibit "B"). On June 23, 1994, the Department filed an answer to the application for attorney fees and expenses.¹ Mr. College filed a reply to the Department's answer on August 2, 1994. His reply included a supplemental affidavit as to his net worth.

We first address the Department's argument that the application is untimely. Section 3(b) of the Costs Act states as follows:

A party seeking an award of fees and expenses shall submit an application for such award to the adjudicative officer and a copy to the Commonwealth

¹ The Board's letter of June 8, 1994 instructed the Department to file with the Board any objections it had to Mr. College's application and a brief in support of any such objections. The Department merely filed an answer and supporting affidavit.

agency within 30 days after the final disposition of the adversary adjudication.

71 P.S. §2033(b).

Although the Board received Mr. College's application within the thirty-day timeframe imposed by §3(b), the Department did not receive its copy until one day later. Because it did not receive its copy of the application within the thirty-day timeframe of §3(b), the Department argues that the application must be dismissed as being untimely.

This issue has been considered by the Board on only one other occasion, in the appeal of Dunkard Creek Coal, Inc. v. DER, 1993 EHB 1193, which involved a similar set of circumstances. In a decision issued on August 6, 1993, the Board evenly split over the question of whether it had jurisdiction to consider a Costs Act application which had not been received by the Department within the thirty-day timeframe, and issued two separate opinions addressing this issue. See Dunkard Creek, 1993 EHB at 1193 and Dunkard Creek, 1993 EHB at 1200. Because the burden was on Dunkard Creek to convince a majority of the Board that it had jurisdiction over the application, the result was that the application was denied. Dunkard Creek, 1993 EHB at 1204.

The Commonwealth Court reversed the Board in an unreported opinion. While we cannot cite an unpublished memorandum opinion of the Commonwealth Court as precedent, 210 Pa. Code §67.55;² Allied Services for the Handicapped, Inc. v. Commonwealth, Department of Public Welfare, 107 Pa. Cmwlth. 515, ___, 528 A.2d 702, 704, n. 6 (1987); 1 Pennsylvania Appellate Practice §2133, n. 2, nevertheless, we adopt the reasoning of the Commonwealth

² According to the internal operating rules of the Commonwealth Court, there is one exception to this general rule: An unpublished opinion filed in the same case may be cited as representing the law of the case. 210 Pa. Code §67.55.

Court and hold that an application for award of fees and expenses under the Costs Act is timely if it is received by the Board within thirty days of the disposition of the appeal and is placed in the mail to the Department within the thirty-day timeframe.

The Department has not alleged, much less demonstrated, that Mr. College's application was not mailed to the Department within thirty days of the dismissal of his appeal. Rather, the Department's only contention is that the application was not received by the Department within thirty days. Given our holding above, we find Mr. College's application to be timely.

Eligibility as a "Party"

We turn now to the question of whether Mr. College is entitled to an award of attorney fees and costs under the Costs Act. Section 3(a) of the Act states as follows:

Except as otherwise provided or prohibited by law, a Commonwealth agency that initiates an adversary adjudication shall award to a prevailing party, other than the Commonwealth, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer finds that the position of the agency, as a party to the proceeding, was substantially justified or that special circumstances made an award unjust.

71 P.S. §2033(a).

The Department argues that Mr. College fails to meet the criteria of a "party" as defined by the Costs Act. Excluded from the Costs Act's coverage are "[a]ny individual[s] whose net worth exceeded \$500,000 at the time the adversary adjudication was initiated..." and "[a]ny sole owner of an unincorporated business...partnership, corporation, association or organization having more than 250 employees at the time the adversary adjudication was initiated." 71 P.S. §2032 (Definition of "party"). The Department argues that Mr. College's affidavit is insufficient both as a

matter of law and from an accounting standpoint to establish his net worth for purposes of determining whether he is eligible as a "party" under the Costs Act.

The Costs Act itself provides no guidance as to the specific information an applicant must provide as evidence of his net worth. In James E. Martin v. DER, 1990 EHB 724, the Board examined the question of what evidence is necessary to establish an applicant's net worth for purposes of determining his eligibility to recover an award under the Costs Act. The appellant in Martin had submitted a notarized statement listing his assets and liabilities, held both jointly and individually. The Department argued that it was not possible to determine the appellant's net worth solely from his statement, but that further documentation was required, including his tax return for the year in question, a copy or face value of investment instruments, a valuation of his personal residence, the value of partnership shares which he held, and a valuation of his personal property and business and personal vehicles. The Board rejected the Department's argument, holding that it was not the intent of the Costs Act to require the applicant to submit a detailed financial audit for purposes of establishing his net worth. *Id.* at 731. Rather, the Board concluded that the information required by the Costs Act was simple and straightforward, and it accepted Martin's notarized statement as providing sufficient evidence of his net worth.

Like the appellant in Martin, Mr. College has submitted with his application a notarized statement of his net worth, listing his assets and liabilities. As in Martin, the Department contends that Mr. College's statement is insufficient to establish his net worth. In support of its answer, the Department has submitted the affidavit of James C. Bixby, a Certified Public Accountant and Financial Investigator in the Department's

Bureau of Investigations, Office of Chief Counsel. The Department argues that Mr. College should be required to submit to a full accounting of his assets and liabilities and to provide more detailed information, much the same as that asserted by the Department in Martin.

We reject the Department's argument for the reasons which have already been set forth in Martin. The Costs Act does not require the Board to perform a detailed financial audit in order to establish an applicant's eligibility under the Costs Act. Rather, we may assess an applicant's eligibility on the basis of his statement of net worth. *Id.* at 732, n. 7; Carl Oermann v. DER, 1992 EHB 1555, 1557.³

We, therefore, turn to Mr. College's statement of net worth to determine his eligibility as a "party" under the Costs Act. We note that Mr. College has submitted two affidavits as to his net worth - one with his original application and one with his reply. Footnote 1 of the reply states that the affidavit accompanying the application lists his assets and liabilities as of the date of his application, whereas the supplemental affidavit accompanying the reply lists his assets and liabilities as of September 13, 1991, the date of the Department's Order. For purposes of determining eligibility under the Costs Act, an applicant's net worth is to be calculated as of the date of the adversary action. Martin, *supra* at 728, n. 2. The adversary action is the Department's action which gave rise to the appeal, in this case the Department's Order of September 13, 1991. Therefore, we shall consider the affidavit accompanying Mr. College's reply, as this

³ On page 5 of its answer, the Department asserts that 4 Pa. Code §2.6(c) requires a "full disclosure of assets and liabilities". Although the proposed version of 4 Pa. Code §2.6(c) would have required a full accounting of assets and liabilities, this proposal was disapproved by the Independent Regulatory Review Commission, and the final version of the regulation eliminated detailed requirements relating to net worth. Martin, *supra* at 731-732.

pertains to his net worth as of the date of the Department's Order. According to the affidavit, Mr. College's assets on September 13, 1991 totalled \$204,060, while his liabilities were in the amount of \$43,000. This results in a net worth of \$161,060, well below the \$500,000 limit for individuals.

In its answer, the Department argues that the affidavit accompanying the application did not appear to list assets held jointly by Mr. College and his wife. This has been corrected in the supplemental affidavit, which identifies the assets which are jointly-held. These have been included in Mr. College's statement of net worth at one-half their value, in accordance with the Board's ruling in Edward P. McDaniels v. DER, 1993 EHB 849.

The Department also alleges that Mr. College owns property not listed in his affidavit. Attached to the Department's answer are copies of nine deeds describing various parcels of property allegedly owned by Mr. College at the time this action was initiated.

Mr. College responds to this allegation in his reply by identifying each of the properties in question in his supplemental affidavit. According to Mr. College, five of the deeds pertain to properties included by Mr. College in his statement of net worth. Of the four remaining deeds, two pertain to property which Mr. College sold under an April 26, 1986 installment agreement, a copy of which is attached to Mr. College's reply. The deeds for the property were not transferred, however, until January 6, 1992 and April 7, 1992. According to Mr. College's supplemental affidavit, the value of this property on September 13, 1991 was \$4,000. The other two deeds pertain to property which Mr. College sold under a July 24, 1990 installment agreement, a copy of which is also attached to the reply. Again, the deeds were not transferred until much later: May 23, 1992 and October 2, 1992. According to Mr. College's supplemental affidavit, the value of this property on September

13, 1991 was \$5,000. Thus, each of the four properties in question was subject to an installment agreement of sale as of the date of the Department's Order, with the deeds to the properties not being transferred until after the date of the Department's Order. More importantly, even if we include these properties in Mr. College's listing of assets, his net worth still does not come close to the \$500,000 limit of the Costs Act. Therefore, we need not address the question of who was the owner of the properties in question on September 13, 1991 since their inclusion in Mr. College's net worth would not render him ineligible to recover under the Costs Act.

Based on the above, we find that Mr. College qualifies as a "party" for purposes of recovering an award under the Costs Act.

Prevailing Party

The second criterion which must be met by Mr. College for an award under the Costs Act is that he must be a "prevailing party". This is defined as follows:

A party in whose favor an adjudication is rendered on the merits of the case or who prevails due to withdrawal or termination of charges by the Commonwealth Agency or who obtains a favorable settlement approved by the Commonwealth Agency initiating the case.

71 P.S. §2032.

The Department does not dispute that Mr. College is a prevailing party in this matter, and, therefore, this criterion has been met.

Substantial Justification

An award may not be made to a prevailing party under the Costs Act where the position of the Department was "substantially justified". 71 P.S. §2033(a). The Department's position will be found to be substantially justified where it "has a reasonable basis in law and fact". 71 P.S. §2032.

The Department's response to the question of whether its action was substantially justified is as follows:

This allegation is a conclusion of law to which no response is required. To the extent it is deemed factual it is denied. Admitted however that there is no evidence or record before the Board which supports the Department's September 13, 1991 Order and Assessment of Civil Penalty.

(Department's Answer, paragraph 41)

Indeed, there is no evidence before the Board which supports the Department's Order. If the Department had any evidence in support of the allegations set forth in its Order, it refused to provide it in response to Mr. College's repeated discovery requests. It is not clear whether this was due to a simple lack of diligence on the part of the Department, or due to a sheer lack of evidence in support of its Order. In either case, there clearly is no evidence in the record to indicate that the position of the Department was substantially justified. Thus, we have no trouble finding that this requirement of the Costs Act has been met.

Special Circumstances

Finally, costs will not be awarded where "special circumstances ma[k]e an award unjust." 71 P.S. §2033(a). The Department has alleged no such special circumstances, nor do we find any to be present.

Amount of Award

Pursuant to §2 of the Costs Act, no award may be made in excess of \$10,000. 71 P.S. §2032. In addition, attorney fees may not be awarded at a rate exceeding \$75 per hour "unless an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceeding, justifies a higher fee." *Id.*

In Exhibit B of his application, Mr. College itemizes the attorney fees and expenses which he is claiming in this action. Exhibit B shows attorney fees in the amount of \$30,118.50 and expenses in the amount of \$2,433.13, for a total of \$32,551.63, in excess of the \$10,000 limit.

The hourly rate billed by Mr. College's attorneys exceeds the \$75 limit set forth in the Costs Act. Mr. College argues that an increase in the \$75 hourly rate is justified due to an increase in the cost of living since July 1, 1983, when the Costs Act became effective. However, even if we apply an hourly rate of \$75 to the number of hours billed by Mr. College's attorneys in this matter, the total attorney fees exceed the \$10,000 limit. Two attorneys billed a total of 191.9 hours in this matter. At an hourly rate of \$75, this results in total fees of \$14,392. Since even at an hourly rate of \$75 Mr. College's fees exceed \$10,000, we need not address his contention that he is entitled to reimbursement of his attorney fees at a rate in excess of \$75.

The Department, in its answer, denies that all items listed in Exhibit B are properly the subject of this litigation; however, it provides us with nothing further in support of this allegation. The Department does not make any specific objections to the itemization of fees and expenses provided by Mr. College, nor does it provide us with any argument in support of its allegation. Because we are unable to determine what objection, if any, the Department has with respect to Mr. College's itemization of attorney fees, we find that Mr. College is entitled to the maximum award of \$10,000 under the Costs Act.⁴

⁴ Mr. College lists certain expenses in Exhibit B, such as photocopying, postage, LEXIS and Westlaw research, express mail, and telecopying. However, footnote continued

FINDINGS

1. The Board has jurisdiction over the Application for Award of Counsel Fees and Expenses filed by Foster College at EHB Docket No. 91-429-MJ.
2. Mr. College is the prevailing party in this matter.
3. The position of the Department in issuing the order in question was not substantially justified.
4. Mr. College's net worth did not exceed \$500,000 at the time the Department issued the order which is the subject of this appeal.
5. Mr. College's counsel devoted 191.9 hours to this matter and billed at a rate in excess of \$75 per hour.
6. Pursuant to §2 of the Costs Act, fees may not be awarded at a rate exceeding \$75 per hour unless an increase in the cost of living or a special factor justifies a higher fee. 71 P.S. §2032.
7. At a rate of \$75 per hour, Mr. College's attorney fees total \$14,392.
8. No award under the Costs Act may exceed \$10,000. 71 P.S. §2032.
9. Therefore, Mr. College is entitled to an award of \$10,000.

ORDER

AND NOW, this 3rd day of November, 1994, it is ordered that Foster College's Application for Award of Counsel Fees and Expenses is granted, and

continued footnote
because Mr. College's attorney fees exceed the \$10,000 limit, we need not address these expenses.

the Department of Environmental Resources is ordered to pay \$10,000 to Mr. College within 30 days of the date of this Order.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmman

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: November 3, 1994

cc: Bureau of Litigation
Library: Brenda Houck
For the Commonwealth, DER:
Dennis A. Whitaker, Esq.
Central Region
For Appellant:
Kenneth L. Sable, Esq.
Matthew Chabal III, Esq.
DUANE, MORRIS & HECKSCHER
Harrisburg, PA

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allegations admitted. Carlisle Electric, Inc. v. Department of Labor and Industry, 101 Pa. Cmwlth. 359, 516 A.2d 437 (1986) ("Carlisle"), requires a hearing to allow evidence to be taken on fact issues disputed by the parties in order for the Board to make the necessary findings thereon.

However, where the applicant seeks fees and costs in excess of the \$10,000 cap thereon, the application will be limited to a maximum of that amount. Reimbursement of expert witness fees will also be limited, as provided by statute, to an amount not to exceed the hourly rate DER pays its own expert, and no reimbursement of attorney fees incurred for other legal proceedings will be awarded, as such time is ineligible for consideration in this proceeding. Where the evidence fails to establish that a higher hourly rate for attorneys services is warranted, attorneys fees are recoverable only at a rate of \$75 per hour. While the preferred method of accounting for the attorneys fees charged appellant was not followed in this application and the evidence offered on these fees is barely adequate, it is nevertheless sufficiently detailed to satisfy this Board in this appeal.

Opinion

Much of the history of this appeal predates the filing of this appeal by Dunkard Creek Coal, Inc. ("Dunkard"). The alleged conditions which first triggered administrative action by DER relate back at least to 1986. This Board sustained a group of appeals by Dunkard consolidated at Docket No. 90-308-E on March 29, 1991, as a sanction for DER's failure to file a Pre-Hearing Memorandum or to respond to our Rule To Show Cause. Thereafter, DER issued a new series of administrative orders to Dunkard for the same factual conditions which gave rise to its first group of actions. Those appeals are consolidated at the instant docket number.

In the instant consolidated appeals, Dunkard moved for summary judgment and DER responded in opposition thereto. In our Opinion and Order dated April 21, 1993, we granted Dunkard's Motion on the theory of *res judicata*. This opinion is reported at 1993 EHB 536. Thereafter, on May 21, 1993, Dunkard filed the instant application which seeks \$11,659.56 for attorneys fees and expert witness fees pursuant to the Act of December 13, 1982, P.L. 1127, No. 257, as amended, 71 P.S. §2031 *et seq.*, commonly and hereafter referred to as the Costs Act. DER responded in opposition to Dunkard's application. One of its arguments was that this Board lacked jurisdiction over this appeal because Dunkard failed to timely comply with Section 3(b) of the Costs Act (71 P.S. §2033(b)). Two of the Board Members agreed with DER on this argument and, the Board having a vacancy at that time, an equal number of the Board Members disagreed with DER's argument. As a result, the evenly split Board issued an Order on August 6, 1993 denying Dunkard's application because it failed to convince a majority of this Board that we had jurisdiction over its application. This opinion is reported at 1993 EHB 1193.

As was expected by this Board, its Order of August 6, 1993 was appealed by Dunkard to the Commonwealth Court. In an unreported Opinion issued April 21, 1994 at No. 2084 C.D. 1993, the Commonwealth Court sustained Dunkard's appeal and found that the Board did have jurisdiction over Dunkard's application. On September 9, 1994, when the record was released to us from the Commonwealth Court, we issued an Order authorizing the parties to file their Brief as to any Costs Act issues still before this Board. This Order provided that the filing of such Briefs was not mandatory. On September 20, 1994 we received Dunkard's Brief. DER did not file a Brief.

Substantial Justification

In addition to the jurisdictional challenge raised above in response to Dunkard's application, DER's original response also asserts that DER's position in response to Dunkard's Motion For Summary Judgment was substantially justified, so an award under the Costs Act is unwarranted. DER also argues its legal position was a novel but credible extension and interpretation of the law, so it had a reasonable basis in law and this negates any award to Dunkard under the Costs Act.

DER is correct that if this Board finds that DER position is substantially justified, then under Section 3(a) of the Costs Act (71 P.S. §2033(a)) we cannot grant Dunkard's application. Substantial justification is defined as an agency's position being reasonably based in both law and fact. See 71 P.S. §2032 and Carlisle.

In its response to Dunkard's Motion For Summary Judgment, DER asserted that when Dunkard's initial appeals (those filed with us in 1990) were sustained, what occurred was not a judgment on the merits but the Board's equivalent of a judgment of *non pros*. In our opinion granting summary judgment to Dunkard in this proceeding we rejected this argument absolutely, but here, DER argues its conclusion that we had entered a judgment of *non pros* was the basis for its decision to issue new administrative orders to Dunkard concerning the same factual issues on which we had sustained Dunkard's prior appeals. It asserts this conclusion was reasonable based on the concept of a *non pros*. DER contends this concept provides that a plaintiff in a civil action who is unprepared at time of trial suffers a *non pros* but a *non pros* does not bar that plaintiff from commencing another action on the same cause.

Of course the first problem with DER's argument is its attempt to equate practice before this Board with practice before a Court of Common Pleas where the *non pros* concept exists. While this Board is an independent quasi-judicial administrative tribunal under the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7511, it is not a court of general jurisdiction as are Courts of Common Pleas. Louis Costanza v. DER, 146 Pa. Cmwlth. 588, 606 A.2d 645 (1992); Al Hamilton Contracting Co. v. DER, 1989 EHB 383. Empire Sanitary Landfill, Inc. v. DER, et al., EHB Docket No. 94-114-W (Opinion issued September 30, 1994). With some limited exceptions our Board does not conduct its proceedings pursuant to Pennsylvania's Rules of Civil Procedure, either. Rather, we proceed pursuant to 25 Pa. Code Chapter 21 and the General Rules of Administrative Practice and Procedure. Robert F. Snyder, et al. v. DER, 138 Pa. Cmwlth. 534, 588 A.2d 1001 (1991), appeal dismissed, ___ Pa. ___ 632 A.2d 308 (1993); New Hanover Township, et al. v. DER, 1988 EHB 812; DER v. Doylestown Federal Savings & Loan, EHB Docket No. 93-376-CP-W (Opinion issued May 6, 1994). Thus, reliance on procedures in a Court of Common Pleas to justify positions before this Board is unwarranted. Further, if any party in proceedings before this Board should be aware that such reliance is unwarranted, it is DER, which as an agency is represented by counsel and appears as party in every proceeding before us.

The second problem we see with DER's argument is the lack of evidence to support it. DER asserts that after we sustained Dunkard's consolidated appeals at Docket No. 90-308-E, it analyzed what had occurred, concluded the Board's order was like a *non pros* and, based on this conclusion, decided it could issue new administrative orders to Dunkard based on the same factual circumstances. This analytical and decision making process suggests no "snap" decision but a

reasoned intellectual procedure. But where is the evidence to support the suggestion that this occurred? DER's Answer contains no affidavit addressed to this point or even a certification that the Answer's allegations are true and correct. At the hearing on the merits on Dunkard's Application, which we held on June 29, 1993, DER offered evidence on certain Costs Act issues but not on this point. Finally, there is no affidavit on this issue attached to DER's Answer to Dunkard's Motion For Summary Judgment. Thus, since under 25 Pa. Code §21.101(a) DER clearly has the burden of proving the facts supporting its assertion that its position was substantially justified, and, there is no evidence to support it, we cannot give serious weight to this argument.

Our last problem with DER's argument comes from the nature of practice before this Board. There is not now and never has been a *non pros* concept before this Board; rather, the exact reverse is true. Any appellant who fails to timely appeal is out of luck in challenging DER's action, and the Board will enter an order dismissing the untimely appeal which Order makes DER's action final and enforceable by DER. So too, when an appeal is dismissed by this Board as a sanction, such dismissals are final and the appellant may not commence a new appeal from the same DER action. Lastly, same is true with final decisions of this Board, whether we sustain an appeal or dismiss it. These decisions, too, are final and dispositive of the appeal they are made in unless such a final decision is reversed on appeal to the Commonwealth Court. Thus, it is clear that there is no second type of "final" Board Order in which an appeal is sustained (as was the case as to the appeals consolidated at Docket No. 90-308-E), but, despite that result, DER may start over on the same fact pattern as if there was no final decision. Were this not so, every successful appellant would be faced with a never ending appeals process where winning on appeal to this Board was

only a Sisyphean exercise. That is not what this process is meant to be. Accordingly, we reject DER's substantial justification argument.

Having concluded that DER's position lacked substantial justification, we also reject its suggestion that its *non pros* argument was a novel but credible extension and interpretation of the law sufficient to sustain a reasonable basis in law under the Costs Act. As we pointed out above, there is no evidence before us to show DER arrived at its *non pros* theory any time prior to issuance of its orders appealed by Dunkard in the instant proceeding. Thus, this empty record is just as demonstrative of this DER assertion as it is of an assertion that DER's *non pros* theory is a last minute bootstrap argument advanced after the appeal was filed and DER was faced with Dunkard's Motion For Summary Judgment.

Of even more importance, while we agree with DER that DER's attorneys must be free to make arguments that have a reasonable basis in law, that does not mean that every argument advanced by DER's attorneys has a reasonable basis in law just because it is advanced by DER. Based on the discussion above, we can see no basis on which to conclude that this *non pros* argument is reasonable. If credible is definable as "reliable, trustworthy or entitled to commendation," this *non pros* argument may be novel but it is not credible.

DER's Motion In Limine

After DER filed its Answer, this Board ordered a hearing on the factual disputes raised by DER. In turn, on June 22, 1993, DER filed a Motion in Limine seeking to block all testimony on Dunkard's behalf not squarely within the allegations set forth within the four corners of Dunkard's Application. Of course, on June 25, 1993, Dunkard replied in opposition thereto. We advised the parties we would not decide this Motion before the hearing was held but would

take all evidence and decide the Motion's merit when we adjudicated the Application's merit. (T-5-6)¹

DER's motion contends that Dunkard's Application had to contain within it all of the evidence necessary to support it and that no "additional or supplementary submissions or augmentation" of the application after 30 days are permitted under the Costs Act, so at the hearing Dunkard's evidence could not augment or supplement what was set forth in or attached to its Application to overcome the deficiencies which DER contends exist therein.

Dunkard obviously, but we believe correctly, takes a contrary position, and this is why we deny DER's Motion in Limine. Section 3(b) of the Costs Act, 71 P.S. §2033(b), requires that Dunkard's Application be submitted to us within 30 days and is to include:

- (1) A showing that the applicant is a prevailing party and is eligible to receive an award under this section.
- (2) A clear statement of the total amount sought, including:
 - (i) an itemized list of fees from any attorney, agent or expert witness representing or appearing in behalf of the party;
 - (ii) the actual time expended by such agent or expert witness; and
 - (iii) the rate at which the fees and other expenses were computed.
- (3) An allegation that the position of the Commonwealth agency was not substantially justified.

Contrary to DER's suggestion, however, there is nothing in the statute barring a hearing where there are disputes as to an application's allegations or allegations of omissions therefrom. Indeed, hearings on Costs Act factual disputes are recognized as appropriate by the Commonwealth Court in Joyner v. DER, 152 Pa. Cmwlth. 441, 619 A.2d 406 (1992), and Carlisle. Reviewing Carlisle

¹The "T-" reference is a citation to a page of the transcript of the aforementioned hearing.

closely, it appears to require a hearing where there are factual issues which are disputed because a hearing on them is necessary to gather the evidence on which to make a finding. Carlisle provides that where the Commonwealth contended the amount of attorney time was unreasonably great:

[T]he adjudicating officer is required to determine the number of hours petitioner's attorney actually spent on the preparation and presentation of this case. While an itemized list of such hours is contained in the record, that list proves no more than the audit summaries attached to the notice of hearing. By deciding the question of attorney's fees without a hearing, the adjudicating officer prevented the petitioner from presenting the necessary competent evidence. For that reason, a remand is required so that a hearing may be held and an appropriate award made thereafter. (footnote omitted.)

Id. at ___, 516 A.2d at 4.

Here, Dunkard appears to have made sufficient general allegations, but some of them are disputed by DER. Thus, for this Board to make the requisite findings on which to decide these issues, a hearing is necessary. While we reluctantly recognize the consequence of this conclusion is the need for a hearing in virtually every appeal when there is a factual dispute on a Costs Act claim, the purposes of this statute will be thwarted many times if DER's position is sustained. There will not be as much of a diminishment of the deterrent effect of seeking review of DER actions or defending against such actions, nor will there be deterrence of initiation of unwarranted actions, as occurred here, if DER's Motion is sustained and each Costs Act Application must contain on its face all specifics (meeting every potential DER challenge) or be rejected because we cannot consider an applicant's evidence in support thereof.

Specific Challenges By DER

In its Answer, DER next attacks Dunkard's Application for what DER asserts are a series of inadequacies therein, which individually and together are sufficient to enable the Board to deny it. Specifically, DER challenges the statement of net worth and the affidavit of Henry Bartony as adequate pursuant to Section 2 of the Costs Act (71 P.S. §2032). Because only assets and not assets and liabilities are disclosed, the net worth of affiliates is not included in its filing, and "other assets" are not identified, DER asserts that Dunkard's true net worth is not disclosed. DER's Answer also alleges that Dunkard's Application seeks recovery of attorneys fees billed to Dunkard by its attorneys for matters other than the instant appeal and seeks to recover attorneys fees at a rate higher than that allowed by the Costs Act without evidence sufficient to justify the higher fee. DER also challenges the Application to the extent it seeks fees and costs totalling more than \$10,000. Finally, DER's Answer challenges the Application because it seeks to recover expert witness fees at a rate in excess of that which is statutorily authorized.

Several of these DER contentions as to Dunkard's application have merit. The first is that the maximum allowable award under the Costs Act is \$10,000. See Wood Processors, Inc., et al. v. DER, EHB Docket No. 90-442-E (Opinion issued May 6, 1994), and the Board decisions cited therein. Thus, we reject the Application to the extent it exceeds that amount.

Secondly, DER is correct that expert witness fees awardable as to costs are limited by Section 2 of the Costs Act to compensation at a rate not greater than the highest rate paid by DER for a similar expert. Here, Dunkard's Application says it paid expert witness Michael Nawrocki's bill for expert witness efforts in the amount of \$1,472.57. DER's Answer to Dunkard's Application says DER pays

senior hydrogeologists \$33.87 per hour including benefits. Exhibit D thereto is an affidavit to that effect. In partial response to DER's Answer, Dunkard's counsel wrote to this Board, by letter dated June 22, 1993, agreeing that the maximum which Dunkard was entitled to for Nawrocki's professional services had to adjust downward to \$609.66 from \$1,170.00 because of the hourly rate difference (Nawrocki bills his time at \$65.00 not the \$33.87 DER pays.) However, his bill also includes a typist's costs of \$221.00, plus postage, photocopying and telephone charges, so a total bill which was \$1,472.57 is reduced to \$912.23. As to this bill, DER offered no further direct objection.

The same letter from Dunkard's counsel also concedes that there were hours included in Exhibit B to Dunkard's Application (as to attorneys fees) which improperly included attorneys fees and costs associated with another Dunkard/DER matter, as suggested by DER. This letter agreed that these items should be omitted, and this results in a reduction of \$623.25 from the original amount of \$11,659.56 sought for attorneys fees and costs. Thus DER prevails on this issue, too.

With the downward adjustment made above, Dunkard is seeking recovery for 96.4 (T-98) hours of attorney time billed with added internal law firm costs for a total amount of \$9,334.70. (T-121) This is conceded by Dunkard to be at a rate in excess of the \$75.00 per hour figure set forth in Section 2 of the Costs Act. DER objects to payment in excess of the \$75.00 per hour limit set in Section 2 of the Costs Act and we sustain DER. Dunkard attempts to justify a higher hourly rate for its lawyers under the portion of Section 2 of the Costs Act which allows this if a "special factor, such as the limited availability of qualified attorneys for the proceeding, justifies the higher fee." To support this claim, Dunkard offered two pieces of testimony. The first is from Henry Bartony

("Bartony") who is president and sole shareholder of Dunkard. (T-56-57, 80) He testified that he hired the firm of Meyer, Darragh, Buckner, Bebenek & Eck (Dunkard's current counsel) to represent Dunkard because they "were always reasonable to deal with." (T-60) Dunkard stipulated that this firm has represented it in the numerous proceedings before this Board concerning Dunkard's Althea No. 2 and Althea No. 3 mines since they first arose. (T-91-92)

Dunkard also offered the testimony of Attorney Marshall J. Tindall ("Tindall") of this firm as to the rates charged by various firm members in their work on this appeal. However, Tindall was also questioned about rates charged by attorneys in Western Pennsylvania for legal advice in the environmental field. His testimony was based on readings including an article on charges by the top 500 law firms in the United States and discussions with other lawyers as to their fees. DER objected to testimony as to fees generally charged for legal services in the environmental area by lawyers in this portion of the country as being based on hearsay and the objection was sustained.

We also refused to accept Tindall's testimony insofar as Dunkard offered him as an expert in billing rates of firms in Western Pennsylvania. (T-110-116) Thus, there is no evidence before us which established either a "going rate" for environmental lawyers in Western Pennsylvania, nor is there evidence of a limited availability of qualified lawyers to represent Dunkard in this appeal.

Dunkard's latest brief also argues that since rates of \$100 per hour and \$125 per hour were allowed in Jay Township v. DER, 1987 EHB 36, and Township of Harmar, et al. v. DER, et al., EHB Docket No. 90-003-MJ (Opinion issued August 9, 1994), we can allow higher rates here. Both of these decisions arise 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), rather than the Costs Act.

The two Acts are not coextensive. Moreover, those rates were allowed in those opinions because they were proven there. They were not proven here. Thus for this firm's work the maximum we can award is $\$75 \times 96.4$ hours or $\$7,230.00$. When this is added to Nawrocki's bill, the total is $\$8,142.23$.

We will award this amount to Dunkard because we find DER's other challenges to an award to be meritless.

To the extent DER asserts that Dunkard is not a party eligible for an award under the Costs Act because its application fails to show it qualifies financially, we reject DER's argument. DER is correct that Dunkard's application failed to list both its assets and liabilities for purposes of establishing its net worth and its ability to be a party. Dunkard's application only listed its net assets. DER pointed out this omission and it was cured at the hearing on this application. At the hearing Elmer Smith, a CPA who is Dunkard's accountant, testified that he prepared the Accountant's Compilation Report attached to Dunkard's application as Exhibit A, and that as originally prepared, it stated both Dunkard's assets and its liabilities (T-18) (a complete copy is Exhibit B admitted at the hearing). This complete Compilation Report shows assets of $\$234,307.16$ and liabilities in excess of one million dollars (T-25-26), not to mention an unpaid United Mine Workers of America pension plan assessment of $\$700,000$. (T-27) Clearly there are not assets in excess of liabilities, let alone assets sufficient to produce a net worth in Dunkard in excess of the $\$2,000,000$ (the figure needed to make Dunkard ineligible for an award.) We hold that this evidence was sufficient to cure the Application's omissions and conclude that the fact of the Application's omission of a list of Dunkard's liabilities as curable by evidence showing these liabilities at the hearing. The evidence at the hearing established a full disclosure of the company's assets and

liabilities as required by 4 Pa. Code §2.6(b) of the regulations propounded under this statute.

We also reject DER's contention concerning the adequacy of the asset disclosure to the extent it lists \$2,500 in "other assets". At the hearing Smith testified this item is a light plant Dunkard sold and then repossessed when the purchaser defaulted. (T-24) His testimony is unchallenged and adequately explains this figure and how it was arrived at. We treat it as we did the failure to list liabilities in Dunkard's application.

DER's next challenge to Dunkard's application is the contention that there are possible affiliates of Dunkard, the assets of which must be added to those of Dunkard under 4 Pa. Code §2.15 to determine if their combined assets exceed the \$2,000,000 asset cap on maximum net worth of a party which seeks to be eligible for an award under of the Costs Act. In 4 Pa. Code §2.15 affiliates are defined to be businesses directly or indirectly controlled by Dunkard through ownership of a majority of the affiliate's shares or through control of the businesses' board of directors or managers. DER suggests that Bartony's positions with Marcorp, Inc. or Hemako Engineering, Inc. may make them affiliates of Dunkard and Dunkard failed to account for them in its Costs Act application.

The record before us establishes more than ample evidence to reject DER's argument. Dunkard neither owns stock in other corporations nor controls other corporations. (T-58) Marcorp, Inc. was an entity whose incorporation was never completed. (T-59) Hemako Engineering, Inc. is a company which was dissolved in 1986. Thus these entities do not exist and there is no evidence Dunkard had any affiliated businesses within the context of 4 Pa. Code §2.15.² In reaching this

²In reaching these conclusions, we reject the testimony of James Bixby on behalf of DER as to financial disclosure deficiencies in Dunkard's application. (T-129-148) His testimony only has impact if we were to subscribe to DER's

conclusion we expressly do not address the question of whether 4 Pa. Code §2.15 is valid or whether an interest held by Bartony in another business could ever make that business an affiliate of Dunkard, when it is Dunkard not Bartony which is the appellant who has applied for reimbursement under the Costs Act.

Finally, we reject DER's argument that the bill for Dunkard's legal fees is inadequately detailed. The ten page Exhibit B to Dunkard's Application contains a month by month statement of what work was done on each date in that month and the total hours worked that month by each attorney. DER is correct that it does not contain a statement as to the hours worked each day by each lawyer and we agree with DER that this is much preferred. However, Tindall, who was assigned to work on this matter for his firm from beginning to end (T-96), appeared and testified as to the billing rates of each attorney who worked on this matter for this firm. (T-99-100) Exhibit B coupled with this testimony may be only barely adequate to withstand DER attack, but it is nevertheless an adequate "detailed explanation" of the fees and how they came to be charged.

Accordingly, we enter the following Order.

theory that all evidence to support Dunkard's Application must be set forth in it. We have rejected that theory and thus ignore this testimony.

ORDER

AND NOW, this 3rd day of November, 1994, it is ordered that Dunkard's Application For Award Of Fees and Expenses is granted in the amount of \$8,142.23 and, within thirty days hereof, DER shall pay this amount to Dunkard.

ENVIRONMENTAL HEARING BOARD

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MAXINE WOELFLING
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Robert D. Myers
ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmman
RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: November 3, 1994

cc: DER Bureau of Litigation:
(Library: Brenda Houck)
For the Commonwealth, DER:
Dennis A. Whitaker, Esq.
Central Region
For Appellant:
Marshall J. Tindall, Esq.
Pittsburgh, PA

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M. DIANE SMITH
 SECRETARY TO THE BOARD

UNIVERSITY AREA JOINT AUTHORITY, *et al.* :
 :
 v. : EHB Docket No. 91-121-MR
 : (Consolidated Docket)
 COMMONWEALTH OF PENNSYLVANIA :
 DEPARTMENT OF ENVIRONMENTAL RESOURCES, : Issued: November 4, 1994
et al. :

**OPINION AND ORDER
 SUR
MOTION TO STRIKE NEW MATTER**

Robert D. Myers, Member

Synopsis

Where a party responding to a motion for summary judgment raises new matter accompanied by a notice to plead, the moving party has no duty to reply to the new matter and will suffer no sanctions as a result. Rules applicable to pleadings do not govern motions for summary judgment.

OPINION

Spring Creek Chapter of Trout Unlimited (SCCTU) filed a Motion for Summary Judgment on May 13, 1994. On September 16, 1994¹ University Area Joint Authority (UAJA) filed an Answer with New Matter, accompanied by a Notice to Plead that references our procedural rule at 25 Pa. Code §21.64(d). SCCTU filed a Motion to Strike New Matter on October 4, 1994; UAJA filed an Answer on October 25, 1994.

¹ A stay was in effect from June 10, 1994 to September 13, 1994.

In its Motion to Strike, SCCTU asserts that summary judgment procedures before the Board track those at R.C.P. 1035, that R.C.P. 1035 makes no allowance for new matter and imposes no requirement to respond to new matter. We agree. New matter, pursuant to R.C.P. 1035, is to be used to raise affirmative defenses in a responsive pleading. A Motion for Summary Judgment, however, is not a pleading: *Goodrich-Amran 2d* §1035(b):1. No response at all need be filed to it, and the failure to respond carries with it no automatic sanction. That being true, it would be anomalous to allow the responding party to raise new matter and require the moving party to reply to it.

Our procedural rule at 25 Pa. Code §21.64 relates to pleadings and tracks the Rules of Civil Procedure. Since, as noted, a Motion for Summary Judgment is not a pleading, §21.64 does not apply.

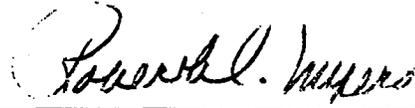
We will not strike UAJA's new matter. Affirmative defenses raised there are proper responses to the Motion for Summary Judgment. The Notice to Plead will be stricken, however, and SCCTU will have no duty to reply to the new matter and will suffer no sanctions as a result.

ORDER

AND NOW, this 4th day of November, 1994, it is ordered as follows:

1. SCCTU's Motion to Strike New Matter is granted in part and denied in part.
2. The New Matter in UAJA's Answer with New Matter is not stricken.
3. The Notice to Plead accompanying UAJA's Answer with New Matter is stricken. SCCTU has no duty to reply to the New Matter and will suffer no sanctions by choosing not to reply.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: November 4, 1994

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M. DIANE SMITH
 SECRETARY TO THE BOARD

BUTLER TOWNSHIP AREA WATER AND SEWER AUTHORITY :
 :
 v. : EHB Docket No. 93-041-E
 : Consolidated with:
 COMMONWEALTH OF PENNSYLVANIA, : 93-111-E
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: November 4, 1994

ADJUDICATION

By: Richard S. Ehmann, Member

Synopsis

The Board dismisses in part and sustains in part appellant/municipal water authority's appeal, which challenges the Department of Environmental Resources' (DER) imposition of a condition in its subsidiary water allocation permit directing appellant to install measuring and recording instruments at its water distribution system's interconnection points with the public utility from whom appellant purchases water in bulk to supply to its customers. The Board has jurisdiction over this appeal pursuant to our authority under Section 4 of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7514. We do not lack jurisdiction because of any "irreconcilable conflict" between the Water Rights Act, 32 P.S. §§631-641, pursuant to which DER issued the appellant's permit, and Section 306 B(h) of the Municipality Authorities Act, 53 P.S. §306 B(h), which the appellant has not even shown to be applicable in this matter. See Cedarbrook Realty, Inc.

v. Nahill, 35 Pa. Cmwlth. 352, 387 A.2d 127 (1978), affirmed, 484 Pa. 441, 399 A.2d 374 (1979).

The appellant has failed to show the presiding Board Member erred in allowing DER to introduce testimony, upon reopening of the record by agreement of the parties, concerning the impact on this appeal of a consent order and adjudication which concluded another matter before the Board.

The Board concludes it is reasonable for DER to require appellant to install flow monitoring meters at its system's interconnection points so DER can know how much water is flowing into the appellant's system, how much water is being lost from the appellant's system by leakage and loss, and whether the appellant is complying with its drought contingency plans during drought conditions. We conclude that it is unreasonable for DER to require the appellant, rather than the public utility, to bear the responsibility for installing meters where water leaves the appellant's lines and then runs through the utility's lines for use by the utility's customers.

BACKGROUND

The instant matter involves two consolidated appeals. The Butler Township Area Water and Sewer Authority (Authority) commenced an appeal with us on March 1, 1993, at Docket No. 93-041-E, challenging Water Allocation Permit No. WA-904, issued by DER to the Authority on February 1, 1993. After DER issued an order modifying the Authority's permit on May 6, 1993, the Authority filed an appeal with us at Docket No. 93-111-E raising the same objections it had raised at Docket No. 93-041-E. Both appeals were ordered consolidated at Docket No. 93-041-E.

DER filed motions in limine to preclude evidence and testimony on August 26, 1993. At the start of the merits hearing on September 1 and 2, 1993, Board Member Richard S. Ehmann, to whom this matter was assigned for primary

handling, ruled on DER's motions. We subsequently received the merits hearing transcript from the court reporter and directed the parties to file post-hearing briefs. The Authority filed its post-hearing brief on October 25, 1993, and DER filed its post-hearing brief on December 13, 1993.

Subsequently, the parties filed cross-motions to reopen the record. Board Member Ehmann ordered the record in this matter reopened. At a reopened merits hearing held on March 31, 1994, the parties agreed to the admission into evidence, as Exhibit R-1, of the Board-approved Consent Order and Adjudication (COA) in Pennsylvania-American Water Company [PAWC], et al. v. DER, EHB Docket No. 92-411-E (Consolidated), dated February 22, 1994, concluding a dispute between PAWC and DER (PAWC appeals).¹ After the admission of Exhibit R-1, the Authority rested its case, but DER sought to examine its Thomas Denslinger concerning the impact of the COA on the instant appeal. Upon the Authority's objection to Denslinger's testimony, based on the best evidence rule and the parol evidence rule, the reopened merits hearing was adjourned so the parties could brief the issue and the Authority could conduct discovery by taking Denslinger's deposition.

Board Member Ehmann issued an opinion on April 29, 1994, finding the best evidence rule and the parol evidence rule inapplicable, and directing that DER would be allowed to offer this testimony by Denslinger. We also granted, by an order issued on May 2, 1994, DER's Supplemental Motion to Introduce Testimony of Denslinger at the reopened merits hearing as to the American Waterworks Association (AWWA) revised policy on metering. The Authority did not raise any timely objection to this DER motion. The reopened

¹This COA was entered with regard to DER's issuance of PAWC's water allocation permit for its Butler water treatment and distribution facilities from which PAWC supplies water in bulk to the Authority.

merits hearing reconvened on May 18, 1994, and Denslinger was allowed to testify, over objection by the Authority, concerning the impact of the COA and the AWWA's revised policy.

DER filed its Supplemental Post-Hearing Brief on June 7, 1994, and the Authority filed its Response to DER's Supplemental Post-Hearing Brief on June 13, 1994. 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).

The record in this matter consists of the transcript of the merits hearing and the reopened merits hearing, 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. The appellant is the Authority, which was established by Butler Township, Butler County, in 1970 as a municipal authority to provide water and sewer service to portions of Butler Township. (B Ex. 1) Its sewer lines were subsequently transferred to the Butler Area Sewer Authority. (B Ex. 1)²

2. The appellee is DER, which is the agency of the Commonwealth authorized to administer and enforce the Water Rights Act, Act of June 24, 1939, P.L. 842, as amended, 32 P.S. §§631-641; the Clean Streams Law, Act of

²"B Ex. 1" indicates a reference to the joint stipulation of the parties, which is Board Exhibit 1. "B Ex." references other than to B Ex. 1 are to exhibits which the parties jointly agreed to have admitted into evidence. "N.T. I" designates the notes of testimony from the merits hearing on September 1, 1993; "N.T. II" designates the notes of testimony from the merits hearing on September 2, 1993; "N.T. III" designates the notes of testimony from the reopened merits hearing on March 31, 1994; and "N.T. IV" designates the notes of testimony from the reopened merits hearing on May 18, 1994. "T" represents an exhibit offered by the Authority during rebuttal at the merits hearing. "R-" designates an exhibit from the March 31, 1994 reopened merits hearing.

June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq.; and the rules and regulations promulgated thereunder. (B Ex. 1)

3. PAWC is a public utility under the Public Utility Code, Act of July 1, 1978, P.L. 598, as amended, 66 Pa.C.S. §§101-3314. PAWC is a corporation organized and existing under the laws of Pennsylvania, with a registered office at 800 Hersheypark Drive, Hershey, PA 17033. (B Ex. 1)

PAWC's Water Distribution System

4. PAWC possesses its own water allocation permit No. WA-153-F, issued on July 30, 1992, which expires on June 24, 1996. (B Ex. 1) PAWC's water allocation permit contains leakage and loss requirements and requires PAWC to maintain its unaccounted-for water loss below 20 percent. (N.T. I 206)

5. PAWC directly provides water to users in the City of Butler, the Borough of East Butler, and the Townships of Butler, Center, Summit, Oakland, and Connoquenessing. (B Ex. 1)

6. PAWC's Oneida Valley Water Treatment Plant, with a rated capacity of 12 million gallons per day (mgd), provides treated water for PAWC's Butler District. (B Ex. 1) It is circled in pencil on B Ex. 1C-14. (N.T. I 79) The raw water sources for the treatment plant are the Boydstown and Lake Oneida Reservoirs and the Connoquenessing Creek, Thorn Run Reservoir on a tributary to Connoquenessing Creek, and, indirectly, the Allegheny River. (B Ex. 1) PAWC meters the water leaving the Oneida Valley Treatment Plant. (N.T. I 85)

7. PAWC sells water in bulk to four municipal water authorities which are connected to PAWC's Butler system, and which distribute the water to their respective customers. These authorities include the Authority,

Connoquenessing Borough Authority, Summit Township Authority, and Center Township Authority. (N.T. I 80; B Ex. 1)

8. The Connoquenessing system is west of the City of Butler. A meter located at the boundary between Butler Township and Connoquenessing Township, which is hooked into Connoquenessing Township and Connoquenessing Borough lines, measures all of the water going into the Connoquenessing system. (N.T. I 82)

9. The Connoquenessing Borough Authority system is an extension of PAWC's lines. The Connoquenessing Borough Authority water system is a closed system, which means that the water cannot leave the system and travel back into the PAWC system. (N.T. I 81-82)

10. Center Township is located north of the City of Butler. (N.T. I 80; B Ex. 1C-14) Water is pumped from PAWC's distribution system directly to Center Township. (N.T. I 81) There are two connections in Center Township before the water travels from PAWC lines to the Center Township Authority, and meters are located at these two connections. It is a closed system, meaning water in the Center Township Authority's lines cannot flow back to PAWC. (N.T. I 81, 86)

11. The Summit Township Authority is located northeast of the City of Butler. There is only one connection point and meter measuring the water going from PAWC to the Summit Township Authority. It also is a closed system. (N.T. I 81-82; B Ex. 1C-14)

The Authority's Water Distribution System

12. The Authority supplies water to three general areas in Butler Township: Mercer Road, Oak Hills, and Meridian. (N.T. I 78; B Ex. 1C-14)

The Authority's water lines are indicated in red on the map which is B Ex. 1C-14. (N.T. I 79)

13. The Authority purchases all of the potable water it provides to its customers from PAWC. (B Ex. 1)

14. The Authority's water distribution system is tied in with PAWC's system. (N.T. I 83-84, 112; N.T. II 467) There are nine interconnections between the Authority's system and PAWC's lines. (N.T. I 112)

15. The Authority owns its water lines, hydrants, water tanks, and other water service facilities. (B Ex. 1)

16. Eight of the nine interconnection points have bi-directional flow, which means the water can flow from PAWC's lines to the Authority's lines and from the Authority's lines back to PAWC at any time. (N.T. I 116-122)

17. As a result of the bi-directional flow, there are areas where water from the Authority "feeds" PAWC's customers if there is backflow from the Authority's lines to PAWC's lines. (N.T. I 116-122)

18. PAWC's lines going to Connoquenessing Township are attached to the Authority's lines pursuant to an agreement. (N.T. I 75; B Ex. 1C-10)

19. In the Connoquenessing area, water travels from the treatment plant, through PAWC's lines, through the Authority's lines at Meridian, then back through PAWC lines to a number of residences and a National Guard Armory which are PAWC customers. (N.T. I 84-85; B Ex. 1C-14)

20. There are a total of three areas, including Connoquenessing, where water leaves the Authority's lines and flows to PAWC customers. (N.T. I 118-119, 129-130, 155-156) Although PAWC individually meters all of its users and the Authority meters all of its users, there are no meters to determine the

amount of water flowing into PAWC's lines from the Authority's lines at these three locations. (N.T. I 156)

The Authority's Subsidiary Water Allocation Permit

21. DER requires water suppliers which purchase water from a surface water-supplied system (subsidiary water purchaser) such as the Authority to obtain a subsidiary water allocation permit from DER. (N.T. II 204-214)

22. DER requires a measurement of the water withdrawn from the water supplier's source as well as measurement of the amount of water used at the customer connection. (N.T. I 193)

23. DER requested the Authority to seek a water allocation permit, as a subsidiary water supplier with relation to PAWC, in June or July of 1991. (N.T. II 333-334)

24. The Authority submitted a subsidiary water allocation permit in December of 1991. (B Ex. 1)

25. Thomas Denslinger is DER's Chief of the Ohio River Basin Section, Division of Water Planning and Allocations. (N.T. II 322) Denslinger testified as a stipulated expert on behalf of DER in the areas of water allocation permitting and hydraulics. (N.T. II 326)

26. PAWC has an inadequate water supply source. (N.T. II 363, N.T. IV 24, 17)

27. During drought periods, PAWC can barely provide enough water to meet all of its subsidiary water suppliers' needs. (N.T. I 202, N.T. II 408) The Authority's use of water is potentially in conflict with rights to water held by other public water suppliers. (N.T. I 202)

28. The Authority and PAWC must follow a drought contingency plan during drought conditions. (N.T. II 363; N.T. IV 24, 39)

29. The Authority adopted the PAWC drought contingency plan in 1991, satisfying the requirement in permit No. WA-904 that the Authority submit a drought contingency plan to DER. (N.T. II 410; B Ex. 1)

30. Denslinger reviewed the Authority's permit application. (N.T. II 333) Denslinger recommended that a condition requiring the Authority to install flow monitoring metering devices be inserted in the Authority's permit. (N.T. II 358-363) His reason for this recommendation was: 1) to determine how much water is actually being used by the Authority on a daily basis; 2) to determine how much water is going into the Authority's system in order to have an accurate accounting for water leakage and loss in the system; and 3) to determine whether the drought contingency plan's calls for cutbacks in water use during drought conditions are effective. (N.T. II 362-363; N.T. IV 40)

31. DER would like separate information for the losses from the Authority's system and PAWC's system. DER wants to have the metered amount of water going into the PAWC system, the metered amount of water leaving the PAWC system, and the metered amount of water going into the Authority's system and leaving the Authority's system. (N.T. II 421)

32. William Gast is DER's Chief of its Division of Water Planning and Allocations in its Bureau of Water Supply. (N.T. I 177) He is Denslinger's immediate supervisor. (N.T. I 178)

33. Gast approved permit condition 3 in the Authority's permit. (N.T. II 359)

34. DER issued water allocation permit No. WA-904 to the Authority on February 1, 1993. The permit is to expire on June 24, 1996, which coincides with the expiration date of PAWC's water allocation permit. (B Ex. 1) It

authorizes the Authority to obtain up to 356,000 gallons per day (gpd) average annual, and 504,000 gpd peak month, from PAWC. (B Ex. 1) Condition 3 of permit No. WA-904 provides:

The permittee shall install accurate measuring and recording instruments or devices to determine the amount of water purchased from [PAWC]. The design and layout of said measuring devices shall be submitted to and be approved by [DER's] Division of Water Planning and Allocations before installation. Records of daily flow readings shall be submitted to the State Water Plan Division monthly, and the original field records shall be available at all times for inspection by representatives of [DER]... (B Ex. 1)

35. Pursuant to Condition 3, DER is requiring the Authority to meter the amount of water the Authority is taking in at its interconnection points with PAWC and the amount of water the Authority is giving back to the PAWC system. (N.T. I 208) These interconnection points are yellow circles outlined in green on B Ex. 1C-14. (N.T. I 112) DER would require the Authority to install meters at the three locations where the water is flowing through the Authority's lines to PAWC customers. (N.T. I 208-210)

Installation of Meters

36. Leo O'Neil, who is a professional engineer (P.E.), is employed by R.B. Shannon and Associates, Inc., and has been the engineer for the Authority since 1977, working through his company. (N.T. I 71)

37. O'Neil works closely with PAWC, as the Authority's engineer, to ensure that PAWC is carrying out its contractual duties to the Authority. (N.T. 71)

38. O'Neil calculates the loss from the combined PAWC/Authority system to be 8.89 percent (including the four authorities and PAWC in his calculation), and 9.35 percent (excluding the amount of water metered as going

into the Center Township Authority, Summit Township Authority, and the Connoquenessing Borough Authority). (N.T. I 107-108; N.T. II 464)

39. Leak detection surveys are conducted yearly on the Authority's entire distribution system. (N.T. I 168)

40. Two leaks were detected in the Authority's service line running from its main distribution line to houses in 1992. (N.T. I 122)

41. O'Neil is not certain how much leakage and loss is attributable to the Authority and how much is attributable to PAWC, and he "would have to be a wizard" to make such a determination without meters on the Authority's system to show how much water is coming into the Authority's system and how much water the Authority's system is losing. (N.T. I 135, 143; N.T. II 466-467)

42. Bi-directional flow meters can be obtained and could measure the back and forth flow at the PAWC\Authority interconnection points. (N.T. I 132)

43. At two of the proposed meter locations, the meters would be just off the road edge at Route 356 and Whitestown Road, and large meter pits would have to be constructed and rights-of-way obtained by the Authority at considerable expense. (N.T. I 147)

Fire-Fighting Considerations

44. John Stokes is the fire marshal\code official\officer for Butler Township. Stokes has studied fire science and administration at both Butler County and Allegheny County Community Colleges. (N.T. 236, 284)

45. Stokes has studied at the Pennsylvania Fire Academy in the areas of basic and advanced hydraulics (the study of liquids in motion). He has also been an instructor in the areas of fire service hydraulics and fire service administration. (N.T. II 240)

46. Stokes is responsible for administering the building and fire prevention codes in Butler Township. He also applies the Building Officials Code Association (BOCA) code. (N.T. I 162; N.T. II 236-237) The BOCA code is used as a reference with regard to building construction, electrical, and mechanical considerations. (N.T. I 162)

47. Stokes was permitted to testify as an expert for the Authority on the effect of metering on fire systems and water lines. (N.T. II 241, 291)

48. As fire marshal for Butler Township, Stokes calculates flow restrictions in water lines, caused by the installation of interconnection meters, to determine if there is adequate flow for both sprinkler systems and fire hydrants. (N.T. II 280-281)

49. The National Fire Protection Association has a recognized standard minimum water flow for residential fire flow of 500 gallons per minute (gpm). (N.T. II 292)

50. Stokes calculates that the flow at the Links residential development, indicated by a circled "x" near the border of Butler and Center Townships on B Ex. 1C-14 near Mercer Road, would drop to 420 gpm after installation of the flow monitoring meter required by the Authority's permit. (N.T. II 292-294)

51. A residential fire cannot effectively be fought where water pressure is 420 gpm. (N.T. II 308)

52. The recognized minimum flow for commercial structures is not the same as that for residences. (N.T. II 301)

53. Stokes calculates that installation of the meters required by the Authority's permit at the Moraine Pointe Plaza shopping center, indicated by a circled "x" near Route 422 on B Ex. 1C-14, will bring the flow rate to

"borderline" as far as meeting the minimum flow for commercial structures.
(N.T. II 301-302)

54. Stokes opines that placing a fire pump on the system to increase the flow would contaminate the potable water. (N.T. II 308-309)

55. It is possible to obtain and install meters which would not result in lower water pressure and would not interfere with fire-fighting abilities. (N.T. II 330-333) Such meters could be clamped onto the outside of the water main and would not disturb the water flow. (N.T. II 333)

56. George Hart is a P.E. and is a consulting engineer for a municipality and several municipal authorities. (N.T. II 473; T-4) Hart testified as a rebuttal witness on the Authority's behalf. (N.T. II 473)

57. Hart believes that meters would help determine the loss and leakage in the Authority's system. (N.T. II 481-482)

58. Hart believes that it would be impractical to determine water loss on a daily basis by metering because every customer's meter would have to be read on a daily basis. (N.T. II 481)

DISCUSSION

Does the Board Have Jurisdiction?

The first issue the Authority raises in its post-hearing brief is that we lack jurisdiction over the subject matter and the parties in this appeal. The Authority contends that under section 306 B(h) of the Municipality Authorities Act of 1945, Act of May 2, 1945, P.L. 382, as amended, 53 P.S. §306 B(h), the Authority may determine by itself exclusively all services and improvements required to provide adequate, safe, and reasonable services. The Authority further contends that under section 306 B(h) of the Municipality Authorities Act, the Court of Common Pleas has exclusive jurisdiction to

determine all questions of service by a municipal authority. The Authority then asserts that pursuant to Section 1936 of the Statutory Construction Act, 1 Pa. C.S. §1936, the "exclusive jurisdiction" provision of section 306 B(h) of the Municipality Authorities Act, 53 P.S. §306 B(h), prevails over the Water Rights Act with regard to our jurisdiction and that jurisdiction over this matter lies with the Common Pleas Court.³

In Western Pennsylvania Water Co. (WPWC), et al. v. DER, 1991 EHB 287, we cited Commonwealth, DER v. Philadelphia Suburban Water Co., 135 Pa. Cmwlth. 283, 581 A.2d 984 (1990), and concluded that we had jurisdiction over the parties and the subject matter where, *inter alia*, the permittee filed an appeal with us challenging DER's imposition of specific conditions in its water allocation permit. In WPWC, we ruled that DER is empowered by the Water Rights Act to impose appropriate conditions in a water allocation permit issued pursuant to the Water Rights Act.⁴ Under our decision in WPWC, we have jurisdiction over the subject matter and parties here unless the Authority can show us otherwise.

Section 1936 of the Statutory Construction Act, 1 Pa. C.S. §1936, provides:

Whenever the provisions of two or more statutes enacted finally by different General Assemblies are irreconcilable, the statute latest in date of final enactment shall prevail.

³As we pointed out in Newtown Land Limited Partnership v. DER, et al., EHB Docket No. 93-299-E (Opinion issued June 15, 1994), jurisdiction is not a waivable issue but may be raised at any time. See Charles Friday v. DER, 1976 EHB 218.

⁴We acknowledged in WPWC, that the Commonwealth Court has held in Commonwealth, DER v. Philadelphia Suburban Water Co., 135 Pa. Cmwlth. 283, 581 A.2d 984 (1990), that DER is authorized by the Water Rights Act to issue subsidiary water allocation permits.

The Commonwealth Court has instructed, with regard to Section 1936 of the Statutory Construction Act, that the party making the contention that the two statutes contain provisions which are irreconcilable bears a heavy burden, as repeals of statutes by implication are not favored and there is a presumption against the implied repeal of a statute. Cedarbrook Realty, Inc. v. Nahill, 35 Pa. Cmwlth. 352, 387 A.2d 127 (1978), affirmed, 484 Pa. 441, 399 A.2d 374 (1979). The Authority has failed to explain in what way it is asserting that the Water Rights Act and the Municipality Authorities Act are irreconcilable as to our jurisdiction.

The only cases cited by the Authority are Glennon's Milk Service, Inc. v. West Chester Area Municipal Authority, 114 Pa. Cmwlth. 88, 538 A.2d 138 (1988), and Windber Area Authority v. Lasky Landfill, Inc., 145 Pa. Cmwlth. 1, 602 A.2d 418 (1992). Neither of these cases addresses any conflict between the Water Rights Act and the Municipality Authorities Act with regard to our jurisdiction, and neither case even involved any action by DER. Rather, these cases involved Section 306 B(h) of the Municipality Authorities Act with regard to the jurisdiction of the common pleas court. We thus find that the Authority has failed to sustain its burden of showing us that the Water Rights Act and the Municipality Authorities Act contain irreconcilable provisions as to our jurisdiction, and we conclude we have jurisdiction over the parties and subject matter of this appeal pursuant to our authority under the Environmental Hearing Board Act.⁵

⁵To the extent that the Authority suggests in its brief that we lack jurisdiction over the parties to this appeal, we point out that by filing its appeal and appearing before us, the Authority has submitted itself to our jurisdiction. See Levin v. Barish, 505 Pa. 514, 481 A.2d 1183 (1984).

Merits Arguments

The Authority contends that DER's imposition of Condition 3 in its water allocation permit was an abuse of discretion because the condition was based on an unpromulgated regulation, citing Department of Environmental Resources v. Rushton Mining Co., 139 Pa. Cmwlt. 648, 591 A.2d 1168 (1991). It further asserts DER abused its discretion in inserting this condition because:

- A. [DER] has no power [or] legal authority to issue subsidiary water permits.
- B. The Authority more than meets the acceptable water loss standard.
- C. The Authority's water system is merely an extension of PAWC's water system, the same being integrated and considered as one system.
- D. [DER] cannot interfere with the contractual arrangements between PAWC and the Authority.

DER responds by arguing that the unpromulgated regulation objection and issues A and D, *supra*, were not raised by the Authority's notice of appeal and accordingly have been waived pursuant to the Board's rules at 25 Pa. Code §21.51(e), and Commonwealth, Pennsylvania Game Commission v. Commonwealth, Department of Environmental Resources, 97 Pa. Cmwlt. 78, 509 A.2d 877 (1986), aff'd on other grounds, 521 Pa. 121, 555 A.2d 812 (1989). We agree with DER that these issues were not raised in the Authority's notice of appeal, nor can they be found to have been raised in a general fashion under the Commonwealth Court's decision in Croner, Inc. v. Commonwealth, Department of Environmental Resources, 139 Pa. Cmwlt. 43, 589 A.2d 1183 (1991). Accordingly, we cannot consider these issues. See Newtown Land Limited Partnership v. DER, et al., EHB Docket No. 93-299-E (Opinion issued June 15, 1994).

As the Authority is challenging DER's imposition of Condition 3 in its water allocation permit, the Authority bears the burden of proving by a preponderance of the evidence that DER abused its discretion by imposing Condition 3 in its permit. WPWC, *supra*; 25 Pa. Code §21.101(a). The parties have stipulated that the only permit requirement which is challenged in this appeal is the requirement that the Authority install flow monitoring meters. (N.T. I 50)

It is DER's policy to require in all water allocation permits that the permittee monitor the amount of water taken pursuant to its water allocation permit in order to ensure the permittee's compliance with the limited amount of water allowed to the permittee and to address DER concerns about water system leakage, loss, and unaccounted-for water. DER requires measurement of the water withdrawn from the source and measurement of the water used at the customer connection.

DER inserted Condition 3 in the Authority's permit, requiring the installation of flow monitoring meters at the points where the Authority's water distribution system interconnects with that of PAWC, in order to determine how much water is actually being taken by the Authority; to have an accurate accounting for water leakage and loss in the system; and to be able to provide for a timely implementation of phases of a drought contingency plan during drought conditions because PAWC has an inadequate water supply source.

The Authority contends it is "physically unrealistic" for DER to require the Authority to install these flow monitoring devices because the Authority's lines are interconnected with PAWC's lines and are an extension of PAWC's lines; because water losses are presently being detected through a combination of metering and leak detection surveys on the Authority's lines; and because

the Authority has adopted PAWC's drought contingency plan. Additionally, it contends that installation of the meters at the interconnection points will interfere with fire-fighting abilities at these locations. Moreover, pointing to the COA entered into in the PAWC appeals at EHB Docket No. 92-411-E (Consolidated) after the conclusion of the merits hearing in this matter, the Authority asserts that DER has now concluded in the COA that PAWC's water supply will be adequate, so there is no need for metering.

At the merits hearing on September 1 and 2, 1993, the Authority presented the testimony of Leo O'Neil, John Stokes, and, as a rebuttal witness, George Hart.

Leo O'Neil, who is the engineer for the Authority, testified that although it is possible for the required meters to be installed, it is "physically unrealistic" for DER to require the Authority to install them because the PAWC and the Authority systems are interconnected and there is bi-directional flow between the two systems at eight of the nine locations where the meters would be installed. O'Neil further testified that water losses are presently being detected through the combination of metering and the leak detection surveys annually conducted on the Authority's system, which showed only two leaks in the Authority's service lines in 1992. O'Neil calculated the amount of water loss in the combined PAWC/Authority system to be 8.89 percent. He arrived at this figure by taking the amount of water metered as leaving PAWC's water treatment facility and subtracting from it the water metered as used by the Center Township Authority, Connoquenessing Borough Authority, Summit Township Authority, the Authority, and by PAWC's customers. The difference in these amounts was O'Neil's unaccounted-for water loss figure. O'Neil also testified that the installation of meters would require

the Authority to acquire rights-of-way and construct meter pits along roadways at great cost to the Authority. O'Neil opines that since the Authority's system is much smaller in length than the PAWC's system (20 percent the length of the PAWC system), and the Authority's lines are less than twenty years old, whereas PAWC's lines are old, more of the unaccounted-for water is leaking from PAWC's system as compared to the Authority's system. (N.T. I 121, 144-145) Without any flow monitoring meters on the Authority's interconnections with PAWC, O'Neil cannot know how much water the Authority's system is losing as opposed to PAWC's system.

John Stokes, the Butler Township fire marshal/code official/officer, testified as an expert on behalf of the Authority in the areas of the effect of metering on fire systems and water lines. Stokes testified that the flow of water would not be in compliance with the standard for fire-fighting purposes in the Links residential development if the required meter is installed in that area, nor will the flow be sufficient for fire-fighting purposes at the Moraine Pointe Plaza shopping center if the required meter is placed in the area.⁶ Stokes also testified that placing a pump on the system to increase the rate of flow would contaminate the potable water, since it is a combined system.

Thomas Denslinger, who is DER's Chief of the Ohio River Basin Section, Division of Water Planning and Allocations, testified as a stipulated expert on behalf of DER in the areas of water allocation permitting and hydraulics.

⁶Stokes was admitted as an expert in these areas over the objection of DER, which is re-raised in its post-hearing brief. We point out that the standard for admission of expert testimony in Pennsylvania is liberal. Dambacher by Dambacher v. Mallis, 336 Pa. Super. 22, 485 A.2d 408, 418 (1984) (where the scope of witness's experience and education embraces the subject in question in a logical or fundamental sense, the witness is qualified to testify even though he has no particularized knowledge of the subject).

Denslinger testified that it would be possible to obtain and install meters which would not result in lower water pressure and would not interfere with fire-fighting abilities. Denslinger testified that such meters could be clamped onto the outside of the water main and would not disturb the water's rate of flow. (N.T. II 333) Stokes recognized under cross-examination by DER that meters with minimal friction loss are available (N.T. II 309-310), and that adequate fire hydrant flow can be maintained using an interconnecting meter rated at 3.5 pounds per square inch (psi) friction loss. (N.T. II 317)

Denslinger further testified that PAWC has an inadequate water supply source and needs to follow a drought contingency plan during droughts, and that meters are needed to determine whether cutbacks are effective during drought conditions. Denslinger criticizes O'Neil's water loss calculation because it does not indicate how much water is coming into the Authority's system and is being used in the system on a daily basis and how much leakage and loss is occurring in the Authority's system. (N.T. II 371-372) On cross-examination by the Authority, Denslinger testified DER could, on an annual basis, calculate the amount of unaccounted-for water loss by taking the total amount of water flowing from the PAWC treatment plant and subtracting from it the water used as recorded by metering. (N.T. II 420, 430) As the Authority's customer meters are read only every three months, DER can only know the amount of water used by the Authority's customers on a quarterly basis. (N.T. II 430)

Denslinger further testified on cross-examination that DER requires a leak detection survey program in water allocation permits so that the water supplier monitors its system to determine whether it has any excess leakage

and loss. This leak detection program is not more accurate than metering, however, for detecting water loss. (N.T. II 440)

Denslinger also testified on cross-examination by the Authority that the Authority adopted the PAWC drought contingency plan in 1991. (N.T. II 410; B Ex. 1) This satisfied the requirement in permit No. WA-904 that the Authority submit a drought contingency plan to DER. (B Ex. 1) DER is requiring the Authority to install the flow monitoring meters so they can be used to determine its compliance with the drought contingency plan. (N.T. II 410)

Moreover, Denslinger testified on cross-examination that DER looks at the AWWA standard for acceptable water loss (15 percent) in arriving at permit conditions for large water systems, and that for the combined PAWC/Authority system, 9 percent water loss would be acceptable to DER. (N.T. II 435)

O'Neil then testified, in rebuttal to Denslinger's testimony, that if the Center Township, Summit Township, and Connoquenessing Borough authorities were excluded from his calculation, the percentage of water loss would be 9.35 percent. (N.T. II 464) He admitted on cross-examination on rebuttal that this 9.35 percent figure represents water loss in the combined PAWC/Authority system, and that he cannot determine the percentage of loss in the Authority's system. (N.T. II 466-467)

George Hart is a P.E. who also testified as an expert on behalf of the Authority on rebuttal. Hart testified that to determine water loss on a daily basis, every customer's meter would have to be read on a daily basis, which is impractical. Hart agreed, however, that meters would help determine the loss and leakage in the Authority's system.

After the merits hearing on September 1 and 2, 1993 was concluded but before the Board issued an adjudication, both parties agreed that the record

should be reopened to admit into evidence the Board-approved COA in the PAWC appeals (Exhibit R-1). Exhibit R-1 was admitted into evidence at the reopened merits hearing on March 31, 1994.⁷

Denslinger subsequently testified at the reconvened reopened merits hearing on May 18, 1994, that Paragraph 2 of the COA⁸ does not affect his testimony at the merits hearing regarding the need for metering the Authority's interconnections with PAWC. (N.T. IV 24, 27, 29, 39-40)⁹

Did DER Abuse Its Discretion?

As we have stated in previous opinions,

⁷We are not persuaded that Board Member Ehmann erred in rejecting the Authority's best evidence rule and parol evidence rule arguments. As the best evidence rule pertains to the presentation of a writing by the original writing, and the parties here have stipulated to the admissibility of Exhibit R-1, the best evidence rule is not called into play. Al Hamilton Contracting Co. v. DER, 1992 EHB 1366. Likewise, the Authority's citation to Starr v. O-I Brockway Glass, Inc., ___ Pa. Super. ___, 637 A.2d 1371 (1994), published after the April 29, 1994 opinion, says nothing to show Board Member Ehmann erroneously concluded that the parol evidence rule is inapplicable. Since Denslinger's testimony was not offered by DER to vary the terms of the COA, but to explain the adequacy of PAWC's water supply as discussed in the COA as it bears on the need for flow monitoring meters on the Authority's system, we agree with Board Member Ehmann's conclusion. In re Estate of Hall, 517 Pa. 115, 535 A.2d 47 (1987).

⁸Paragraph 2 of the COA stated that PAWC's added pumping capacity fulfills a requirement of PAWC's water allocation permit that PAWC develop an additional source of water supply so that a reduction of conservation releases would not be required during drought periods. (A conservation release is made from PAWC's dams to the streams whose flow is reduced by these dams for purposes of maintaining sufficient flow in the streams for the stream uses, while still allowing their use as water supplies.)

⁹The Authority objects, in its post-hearing brief, that Board Member Ehmann should not have allowed Denslinger to testify as to the revised AWWA policy on metering. Denslinger, who is a member of the AWWA, discovered when reading the March 1994 issue of AWWA Mainstream that the AWWA had issued a revised policy on metering in 1993. (N.T. IV 41) We note that Board Member Ehmann granted DER's request to add this testimony after receiving no objection thereto from the Authority. However, after reviewing the revised policy (admitted as Exhibit R-3), we find it does not add anything to the issues raised in this appeal. Thus, we do not explore whether its admission was error, as we have not considered it in arriving at our decision in this Adjudication.

[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.

Here, DER's rationale for imposing Condition 3 in the Authority's water allocation permit is that DER wants to know how much water is being used by the Authority's system on a daily basis, to determine whether cutbacks are effective during drought conditions, and to determine the amount of water leakage and loss in the Authority's system. DER's reason for needing this information is because PAWC, which supplies the Authority's water, has an inadequate supply source. DER may reasonably require monitoring to ensure the Authority's compliance with the water allocation requirements in its permit. The evidence proves a need by DER (and PAWC) to know this information on a basis which is more frequent than the quarterly meter reading which is now conducted on the Authority's system. DER also may reasonably require information from the Authority as to water leakage and loss so that it knows about the water needs and usage in the entire water distribution system. The Authority argues that the amount of loss from its system, as calculated by O'Neil, is around 9 percent, which it urges should be acceptable to DER. This figure represents the amount of loss from the combined PAWC/Authority system, however, and O'Neil admittedly has no way of knowing the amount of water loss from the Authority's system alone without meters being installed on the Authority's system. Hart likewise conceded that meters would help to

determine the amount of loss and leakage in the Authority's system. It is reasonable of DER to seek to know the amount of water coming into the Authority's system from PAWC, and, in times of drought conditions, to know where the water in the Authority's system is flowing. The fact that DER wants several individual interconnection meters to be installed on the Authority's system does not make the Condition 3 arbitrary and unreasonable where the systems are connected at multiple points. Further, the evidence shows that meters could be installed which would not cause a loss in pressure for fire-fighting purposes and could be clamped on the outside of the line. Additionally, insofar as the Authority contends that DER's requirement of installation of the meters is unreasonable because there is bi-directional flow at eight of the nine interconnection points, we reject this argument. Bi-directional flow meters can be obtained and installed.

We reach a different conclusion, however, as to the Authority's argument that DER abused its discretion in inserting Condition 3 insofar as the water is transported through the Authority's lines then back into PAWC lines to PAWC customers.

The evidence shows PAWC's lines are attached to the Authority's lines going into Connoquenessing Township pursuant to an agreement. In order for PAWC to provide water to the Connoquenessing Borough Authority and for Connoquenessing Township, the water must travel from the Oneida Valley water treatment plant, through PAWC's lines, then through one of the Authority's lines in Meridian, then back into PAWC lines. A meter located at the boundary between Butler Township and Connoquenessing Township, which is hooked into the Connoquenessing Township and Connoquenessing Borough lines, measures all of the water going into the Connoquenessing system, which is a closed system.

Including the Connoquenessing system, water travels through the Authority's lines to PAWC customers in three areas of the Authority's system.

DER suggests in its post-hearing brief that the water "transported" through the Authority's lines then into PAWC's Connoquenessing lines for delivery to PAWC's customers there can be accounted for by subtracting the amount of water metered as re-entering the Connoquenessing system from the Authority's metered intake. DER offers no suggestion for the remaining locations.

We believe DER does commit an abuse of discretion here in placing the burden on the Authority to install meters on both ends of its system so that the amount of water flowing into PAWC's other customers lines can be measured. This burden should rest with PAWC, not the Authority. DER offers no regulatory basis for why the Authority should bear the entire financial burden of installing these meters, resulting in higher rates for its customers when PAWC is using the Authority's lines solely for PAWC's benefit.

While we see no abuse of discretion in DER's requiring the Authority to install meters for monitoring water coming into the Authority's lines, we find it unreasonable for DER to require that meters be installed on the Authority's lines to monitor the amount of flow traveling to other customers of PAWC. DER must seek that flow information from PAWC or other PAWC customers who obtain water after its shipment through the Authority's system. We accordingly sustain the Authority's appeal in part, insofar as it challenges DER's requiring the Authority to install meters for monitoring water traveling from the Authority's lines to other customers of PAWC, and we dismiss the Authority's challenge to Condition 3 of its permit insofar as DER is requiring the Authority to install meters for monitoring water coming into the

Authority's lines. We make the following Conclusions of Law and enter the following Order in accordance with the foregoing Adjudication.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the subject matter and parties to this appeal. WPWC, *supra*; Section 4 of the Environmental Hearing Board Act, 35 P.S. §7514. The Authority has failed to sustain its burden of proving that Section 306 B(h) of the Municipality Authorities Act, 53 P.S. §306 B(h), works an implied repeal of the Water Rights Act, 32 P.S. §§631-641, as to our jurisdiction. Cedarbrook Realty, *supra*.

2. The Authority has waived its arguments that DER's imposition of Condition 3 in its water allocation permit was an abuse of DER's discretion because: it was based on an unpromulgated regulation; DER has no power or legal authority to issue subsidiary water permits; and DER cannot interfere with the contractual arrangements between PAWC and the Authority. Game Commission, *supra*.

3. The Authority bears the burden of proving by a preponderance of the evidence that DER abused its discretion by imposing Condition 3 in its permit. WPWC, *supra*.

4. John Stokes was properly admitted as an expert in the areas of the effect of metering on fire systems and water lines on behalf of the Authority. Dambacher by Dambacher v. Mallis, *supra*.

5. The decision in Starr, *supra*, did not alter anything considered in Board Member Ehmann's April 29, 1994 Opinion in which he ruled that Thomas Denslinger's testimony about the impact of the COA in the PAWC appeals was not barred by the parol evidence rule or the best evidence rule.

6. The Authority has failed to sustain its burden of proving it was unreasonable of DER to require installation of interconnection flow monitoring meters. It is reasonable of DER to require information from the Authority concerning the amount of water flowing into the Authority's lines and leakage and loss from its system so DER can know about the Authority's water needs and usage and its ability to comply with drought contingency plans. Sussex, *supra*; Lower Towamensing Township, *supra*.

7. The Authority has met its burden of proving its objection that DER abused its discretion in requiring interconnection meters insofar as DER is imposing the burden on the Authority to meter water leaving its system and going to PAWC's lines and, ultimately, PAWC's customers. It is unreasonable for DER to require the Authority, rather than PAWC, to install meters so that the amount of water leaving the Authority's lines and flowing into PAWC's lines to PAWC's customers can be monitored. Sussex, *supra*; Lower Towamensing, *supra*.

ORDER

AND NOW, this 4th day of November, 1994, it is ordered that the Authority's appeal at EHB Docket No. 93-041-E (Consolidated) is dismissed, in part, as to DER's requiring Condition 3 of water allocation permit No. WA-904 that the Authority install meters for monitoring the flow of water coming into the Authority's lines. It is further ordered that the Authority's appeal is sustained, in part, insofar as by imposing Condition 3, DER is requiring the Authority to install meters to monitor the flow of water traveling from the Authority's lines to PAWC lines and, ultimately, to other customers of PAWC.

ENVIRONMENTAL HEARING BOARD

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MAXINE WOELFLING
Administrative Law Judge
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Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmman

RICHARD S. EHMANN
Administrative Law Judge
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DATED: November 4, 1994

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M. DIANE SMITH
 SECRETARY TO THE BOARD

SNYDER BROTHERS, INC.

v.

**COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL RESOURCES
 and O'DONNELL COAL COMPANY and KEYSTONE
 COAL MINING CORPORATION, Intervenors**

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EHB Docket No. 94-219-MR

Issued: November 4, 1994

**OPINION AND ORDER SUR
 PETITION FOR ALLOWANCE TO FILE
 AMENDED NOTICE OF APPEAL AND
FOR EXTENSION OF TIME**

Robert D. Myers, Member

Synopsis

The Board denies a Petition for Allowance to File Amended Notice of Appeal. The Petition, filed after expiration of the appeal period, is based on a reservation in the Notice of Appeal to add additional factual or legal objections if and when legal counsel is retained. This is not an adequate reservation and, as a result, new objections cannot be filed now. Even if the proposed amendment merely restates the original objections in a more concise manner, the Petition cannot be granted because it is unnecessary. The request for extension of time is granted.

OPINION

Snyder Brothers, Inc. (Appellant) filed a Notice of Appeal on August 11, 1994 seeking Board review of the denial by the Department of Environmental Resources (DER) on July 14, 1994 of Appellant's application for a gas well permit. The Notice of Appeal, signed on behalf of Appellant by David C.

O'Hara, Director of Exploration & Acquisitions, listed two objections to DER's action and stated the following:

We are not, at this time, represented by Counsel.
Therefore, we reserve the right to raise any
other factual and legal objections that we may
have at a later date.

Having retained legal counsel (who entered an appearance on September 22, 1994), Appellant filed on October 5, 1994 a Petition for Allowance to File Amended Notice of Appeal and for Extension of Time. The Petition, alleging that the original Notice of Appeal, prepared without the assistance of counsel, does not state all of the objections "in a clear and concise manner," seeks Board permission to amend the Notice of Appeal to restate the objections in the manner set forth in an Attachment to the Petition. DER and the Intervenors filed Responses to the Petition on October 25, 1994.

Ever since *Commonwealth, Pennsylvania Game Commission v. Commonwealth, Department of Environmental Resources*, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), affirmed on other grounds, 521 Pa. 121, 555 A.2d 812 (1989), was finally decided we have consistently held that objections in a Notice of Appeal cannot be amended, after expiration of the appeal period, without good cause. Good cause is generally limited to fraud or a breakdown in the administrative process, but it also includes the necessity for engaging in discovery in order to elucidate the grounds for appeal, if a statement to that effect is included in the Notice of Appeal. Appellant does not allege either of the first two elements but does claim that the right to amend was reserved in the Notice of Appeal.

While such a right was reserved, it makes no mention of discovery or of the necessity to explore DER's reasons for denying the permit application. The reservation, instead, attempts to hold the objection door open so that

additional factual and legal objections can be made if and when legal counsel is retained. A reservation of this nature is too open-ended, too undefined to meet the standard of unique and compelling circumstances set by our precedents.

Since good cause for allowing amendment has not been shown, the objections set forth in the proposed amendment cannot be raised if they are new objections. The parties disagree on this point. In our view, it is irrelevant. If the objections are new, they cannot be raised. If they are merely a restatement of the original objections, they are unnecessary: *University Area Joint Authority v. DER*, 1991 EHB 893; *Raymark Industries, Inc. et. al. v. DER*, 1990 EHB 1775. Accordingly, the Petition for Allowance to File Amended Notice of Appeal will be denied.

Since no objection was raised to the Petition for Extension of Time, it will be granted.

ORDER

AND NOW, this 4th day of November, 1994, it is ordered that:

1. Appellant's Petition for Allowance to File Amended Notice of Appeal is denied.
2. Appellant's Petition for Extension of Time is granted.
3. Discovery shall be completed on or before December 1, 1994.
4. Appellant shall file its pre-hearing memorandum on or before December 1, 1994.
5. All other provisions of Pre-Hearing Order No. 1, issued August 18, 1994, shall remain in effect.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Members

DATED: November 4, 1994

cc: Bureau of Litigation
Library: Brenda Houck
Harrisburg, PA
For the Commonwealth, DER:
Gail A. Myers, Esq.
Southwest Region
For the Appellant:
Al Lander, Esq.
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M. DIANE SMITH
 SECRETARY TO THE BOARD

CITY OF HARRISBURG

v.

COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL RESOURCES
 and PENNSYLVANIA FISH AND BOAT
 COMMISSION, Intervenor

EHB Docket No. 88-120-W

Issued: November 7, 1994

**OPINION AND ORDER SUR
 MOTION FOR RECONSIDERATION**

By: Maxine Woelfling, Chairman

Synopsis

A request for reconsideration of an order denying a petition to intervene must be denied if it is untimely filed. Even if the petition were timely, it does not provide any compelling and persuasive reasons for reconsideration.

A request by a non-party to file a memorandum in support of a new hearing must also be denied because a non-party may not, under the General Rules of Administrative Practice and Procedure, petition the Board to reopen the record after the hearing has adjourned.

OPINION

This matter arose from the Department of Environmental Resources' (Department) March 2, 1988, denial of the City of Harrisburg's (City) request for water quality certification under §401 of the federal Clean Water Act, 33 U.S.C. §1341 (Clean Water Act), for the City's proposed hydroelectric dam across the Susquehanna River. The scope of this project and the procedural history of this

appeal have already been outlined in sufficient detail and will not be repeated here. See, e.g., City of Harrisburg v. DER, 1988 EHB 925. Currently before the Board for disposition is the Pennsylvania Environmental Defense Foundation's (PEDF) July 7, 1994, petition for reconsideration of the Board's order denying PEDF's request to intervene in these proceedings and/or petition for permission to file a memorandum in support of a new hearing.

PEDF filed its original petition to intervene along with four other environmental groups on June 2, 1988.¹ In an opinion and order dated October 6, 1988, the Board denied the environmental groups' petition to intervene because the issues they sought to raise were beyond the scope of this appeal and their interests would be adequately represented by the Department and the Fish and Boat Commission. City of Harrisburg v. DER, 1988 EHB 946, 951-952. The environmental groups filed a request for reconsideration on October 26, 1988. In their request, the groups argued the Department could not adequately represent their interests because the Department may be forced by political pressures to settle this appeal and because they disagreed with the Department over the requirements of EPA's anti-degradation policy, 40 C.F.R. §131.12. In an opinion and order dated March 29, 1989, the Board denied the groups' request for reconsideration because they had not presented any "compelling and persuasive reasons" for doing so, as required by the Board's rules of practice and procedure. City of Harrisburg v. DER, et al., 1989 EHB 373, 376.

Despite the fact that the merits hearing in this matter concluded on July 27, 1993, and the parties have filed their post-hearing briefs, PEDF now

¹The four other environmental groups, which have not joined in PEDF's current petition, were: the Natural Resources Defense Council; the Governor Pinchot Group of the Sierra Club; the Appalachian Audubon Society; and the Pennsylvania Federation of Sportsmen's Clubs. See, City of Harrisburg v. DER, 1988 EHB 946, 947.

requests that the Board again revisit the order denying PEDF's petition to intervene.² In support of its request, PEDF cites the U.S. Supreme Court's recent decision in PUD No.1 of Jefferson County v. Washington Department of Ecology, ___ U.S. ___, 114 S.Ct. 1900, ___ L.Ed.2d ___ (1994) (Jefferson County), which held that a state could, in providing a water quality certificate under §401 of the Clean Water Act, 33 U.S.C. §1341, impose conditions other than water quality. PEDF also relies on a letter from EPA Region III to the Department, which states that portions of the Department's anti-degradation policy do not comply with federal standards. See, PEDF Ex. E. Based on this new information, PEDF contends the Board should now grant its petition to intervene because the issues it intends to raise are within the scope of the Department's review of the City's application and, therefore, within the scope of this appeal, and because the Department cannot, with its insufficient antidegradation policy, adequately represent PEDF's interests.³

In addition to its petition for reconsideration, PEDF also requests permission to file a memorandum in support of a new hearing in this appeal. PEDF

²For this reason alone PEDF's request for reconsideration should be denied. Even if the Board were to find that PEDF had presented compelling and persuasive reasons to reconsider its order, intervention at such a late stage in the proceedings is inappropriate. In fact, to prevent untimely (i.e. late) intervention, the Board's rules prohibit the filing of a petition to intervene after the merits hearing has commenced. See, 25 Pa.Code §21.62(a). Furthermore, the Pennsylvania Rules of Civil Procedure allow a court to deny a petition to intervene if intervention "will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties." Pa.R.C.P. 2329(3).

³Although PEDF never states in its petition which order it seeks to have reconsidered (i.e. the order denying its petition to intervene or the order denying its request to reconsider that order), the Board will treat this as PEDF's second request to reconsider the October 6, 1988, order denying PEDF's petition to intervene. On page 2 of its petition, PEDF states that the issues raised in the Supreme Court's decision are the same as the issues PEDF raised in its petition to intervene. PEDF, therefore, is attempting to provide the Board with a reason to reconsider the order denying intervention.

argues that as a result of the Department's recent addition of its wetlands protection program to its water quality standards, the Board now must also consider the effect of the City's proposed dam on wetlands in the area.

The City filed its objections to PEDF's request for reconsideration on July 27, 1994. The City contends PEDF's request is untimely under 25 Pa.Code §21.122(a) and does not present the exceptional circumstances required for reconsideration of an interlocutory order. As a result, the City argues PEDF's request for reconsideration should be denied. In addition, the City contends PEDF's request to file a memorandum in support of a new hearing is nothing more than an application to reopen the record. The City argues this request is premature because only a party may make such a request and no party has yet done so.

The Department filed its response to PEDF's request also on July 27, 1994. The Department contends there is no need for a new hearing in this appeal because the City has failed to meet its burden of proof and judgment for the Department is warranted. The Department also contends that if the City wants to pursue this project it should file a new request for water quality certification.

The Board's rules provide that a party seeking reconsideration of a decision may file a petition within 20 days after the decision has been rendered. 25 Pa.Code §21.122(a); Michael Strongosky v. DER, et al., 1993 EHB 758, 762. The Board issued its initial order denying PEDF's petition to intervene on October 6, 1988. PEDF did not file the present (i.e. second) request for reconsideration until July 7, 1994, almost six years later and well beyond the 20 day period in which the Board may grant reconsideration. Obviously, PEDF's request for reconsideration was untimely and the Board lacks jurisdiction to consider it. See, Howard D. Will v. DER, 1987 EHB 335, 336. PEDF's current request must be

denied. See, Michael Strongosky, 1993 EHB at 762.⁴

Furthermore, even if PEDF's request for reconsideration were timely, it would still have to be denied. The Board's rules provide that a decision will be reconsidered only for "compelling and persuasive reasons," which are generally limited to instances where:

(1) The decision rests on a legal ground not considered by any party to the proceeding and that the parties in good faith should have had an opportunity to brief such question.

(2) The crucial facts set forth in the application are not as stated in the decision and are such as would justify a reversal of the decision. In such a case reconsideration would only be granted if the evidence sought to be offered by the party requesting the reconsideration could not with due diligence have offered the evidence at the time of the hearing.

25 Pa.Code §21.122(a); Furnley H. Frisch v. DER, EHB Docket No. 92-053-MR (Opinion issued October 6, 1994). The Board will reconsider an interlocutory decision only for "exceptional" or "extraordinary" reasons. Mrs. Peggy Ann Gardner, et al. v. DER, EHB Docket No. 93-381-E (Opinion issued September 7, 1994); Pagnotti Enterprises, Inc. v. DER, et al., 1992 EHB 467, 469. The standard applied in reviewing a petition for reconsideration differs, therefore, depending on the nature of the order in question.

The City contends the Board's order denying PEDF's petition to intervene was interlocutory and may not be reconsidered absent exceptional

⁴Although not addressed by any of the parties, the Board notes that an intervening change in law does not alter the date from which the Board determines whether PEDF's request was timely. See, Berry v. Cmwlth., Unemployment Compensation Bd. of Review, 33 Pa.Cmwlth. 565, ___, 382 A.2d 487, 488 (1978); Mayer v. Unemployment Compensation Bd. of Review, 27 Pa.Cmwlth. 244, ___, 366 A.2d 605, 606 (1976) (although a petition for reconsideration was filed with the Unemployment Compensation Board as a result of a change in law, the Board properly denied the petition because it was not timely filed). Furthermore, even if the Board were to find that May 31, 1994, (the date on which the Supreme Court decided Jefferson County) is the proper date from which to determine timeliness, PEDF's request for reconsideration was not filed until 37 days later.

circumstances. This position is without merit. "As a general rule, a 'final order' is one which usually ends litigation, or alternatively, disposes of the entire case." Pennsylvania Assoc. of Rural and Small Schools v. Casey, 531 Pa. 439, ___, 613 A.2d 1198, 1199 (1992). An order denying a petition to intervene, the practical consequence of which is to end the litigation for the petitioning party, is, therefore, a final order. *See, Id.*⁵ Accordingly, the Board's order denying PEDF's petition to intervene was a final order.

Applying the standards for reconsideration of a final order to PEDF's current request, the Board finds they have not been met. PEDF has failed to show that the order denying its petition to intervene rested on grounds not previously considered by the parties or that the facts on which the denial of intervention was based were erroneous. *See*, 25 Pa.Code §21.122(a)(1) & (2). Although the Supreme Court's decision in Jefferson County potentially expands the scope of §401 water quality certification, the Board has already ordered the parties to file briefs on the effects of that decision. Furthermore, while the letter from EPA Region III to the Department, *see*, PEDF Ex. E, supports PEDF's position concerning the Department's anti-degradation policies, it does not alter the Board's position that those objections should be addressed to EPA and the federal courts. *See, City of Harrisburg*, 1989 EHB at 377, 381. PEDF's request for reconsideration does not, therefore, present any compelling and persuasive reasons for the Board to reconsider its order denying PEDF's petition to intervene. Accordingly, even if it were timely, PEDF's request for

⁵In Rural and Small Schools, the Court noted that an order denying a petition to intervene would now be considered interlocutory, given the 1992 amendments to Pa.R.A.P. 341. However, since Pa.R.A.P. 341 is not retroactive, the court declined to apply Pa.R.A.P. 341 to the case before it. 531 Pa. at ___, 613 A.2d at 1199, note 2. Because the Board denied PEDF's petition to intervene prior to 1992, the Board likewise declines to apply Pa.R.A.P. 341 here.

reconsideration would still have to be denied. See, Furnley H. Frisch, supra.

The Board also denies PEDF's request to file a memorandum in support of a new hearing. As the City correctly suggests, PEDF's proposed memorandum will be nothing more than a request to have the Board reopen the record. Petitions to reopen a record after the hearing has been adjourned, but before the adjudication is issued, are governed by the General Rules of Administrative Practice and Procedure, 1 Pa.Code §35.231(a), which states, in relevant part:

After the conclusion of a hearing or 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.

See, Spang & Co. v. Dept. of Environmental Resources, 140 Pa.Cmwlth. 306, ___, 592 A.2d 815, 819, *allocatur denied*, ___, Pa. ___, 600 A.2d 543 (1991). Because PEDF is not a participant in these proceedings, see, 1 Pa.Code §31.3, it cannot file a petition to reopen the record. Accordingly, PEDF's request to file a memorandum in support of a new hearing is denied. See, Clements Waste Services, Inc., et al. v. DER, et al., 1992 EHB 484 (request by a non-party to reopen a closed docket and decide the non-party's request to intervene was denied).

O R D E R

AND NOW, this 7th day of November, 1994, it is ordered that PEDF's petition for reconsideration and petition for permission to file memorandum in support of new hearing are denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Richard S. Ehmman

RICHARD S. EHMANN
Administrative Law Judge
Member

Board Member Robert D. Myers did not participate in this decision.

DATED: November 7, 1994

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

ENVYROBALE CORPORATION

v.

COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL RESOURCES

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EHB Docket No. 94-148-E

Issued: November 7, 1994

**OPINION AND ORDER SUR
MOTION FOR SUMMARY JUDGMENT**

By: Richard S. Ehmann, Member

Synopsis

The Board grants the Department of Environmental Resources' (DER) motion for summary judgment. Appellant admits material facts set forth in DER's motion and has not filed any affidavits to dispute additional facts set forth in DER's affidavits in support of its motion. There thus are no genuine issues of material fact as to the appellant's objections to DER's order, issued under the Solid Waste Management Act, directing him to take action regarding over one million waste tires at his property, and DER is entitled to summary judgment as a matter of law.

OPINION

Appellant Donald W. Duerring commenced this appeal on June 20, 1994, challenging DER's order, dated May 17, 1994, issued to Duerring pursuant to sections 104 and 602 of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.104 and §6018.602, and section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17. In his Notice of Appeal, he lists himself as President of Envirobale Corporation, hence the caption of this appeal. DER's order alleged that Duerring

operated, without a permit, a residual waste transfer and processing facility on his property in Lancaster Township, Butler County (the site); that Duerring stored and disposed of waste tires on his property in a way that created a potential fire hazard and a public nuisance; and that Duerring stored and disposed of waste tires in a way that caused or contributed to the attraction, harborage, or breeding of vectors. DER's order directed Duerring to immediately cease bringing waste tires to the site; to submit to DER a schedule for storage, removal, and disposal of all tires or tire bales presently stored on the site; to provide for proper storage of the tires until removed for disposal; and to control and eliminate the conditions conducive to harborage, breeding, or attraction of vectors.

Presently before us is DER's motion for summary judgment, which we received on September 22, 1994, along with DER's supporting legal memorandum, excerpts of Duerring's August 8, 1994 deposition, and an affidavit of John Mead dated September 20, 1994. We received Duerring's response to DER's motion on October 12, 1994. Duerring did not file any legal memorandum in support of his response, nor did he file any affidavits in support thereof. On October 25, 1994, DER filed a reply brief in support of its motion and an affidavit by John Mead dated October 18, 1994.

The Board is empowered to grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material facts and the moving party is entitled to judgment as a matter of law. Robert L. Snyder, et al. v. Department of Environmental Resources, 138 Pa. Cmwlth. 534, 588 A.2d 1001 (1991); Pa.R.C.P. 1035(b). Summary judgment may only be entered in cases which are clear and free of doubt. Hayward v. Medical Center of Beaver County, 530 Pa. 320, 608 A.2d 1040 (1992). In deciding a motion for summary

judgment, the Board will view the facts in a light most favorable to the non-moving party. New Castle Township Board of Supervisors v. DER and Reading Anthracite Company, 1993 EHB 1541. "A fact is material if it directly affects the disposition of a case." Fulmer v. White Oak Borough, 146 Pa. Cmwlth. 473, ___, 606 A.2d 589, 590 (1992).

DER's motion makes the following allegations, which are admitted in Duerring's response.¹ Duerring is president of Envyrobale, a company which Duerring is seeking to incorporate. Duerring and Envyrobale have a business address of 592 Perry Highway, Harmony, PA 16037. Duerring entered an agreement of sale on October 25, 1993, pursuant to which he obtained the site from A&R Development Company. At the time of the real estate transfer, the site contained numerous waste tires which had been disposed of on various piles. The exact number of tires disposed of on the site prior to Duerring's ownership is uncertain; Duerring originally estimated that the site contained between 1.2 and 1.5 million tires. DER had issued an order to A&R Development to remove the tires from the site, and Duerring was aware of this order when he acquired the site. In consideration of A&R Development Company's transfer of the title of property to Duerring, he paid \$1.00 and agreed to remove all tires from the site within a period of three years or to have A&R Development otherwise relieved of the DER order to remove the tires. Duerring estimates that the site is worth \$250,000 with the tires removed. Duerring has brought or allowed more used tires to be brought onto the site since he acquired it. He has been paid to dispose of these used tires by commercial tire dealers.

¹For some inexplicable reason, Duerring's response fails to address Paragraphs 22 through 25 of DER's motion.

It is further undisputed that Duerring has operated a machine on the site which cuts and bales tires (baler). Duerring has used the baler to process some of the tires he has brought onto the site. Duerring bales only steel belted tires; he does not bale bias tires. Duerring has been producing bales on the site since February of 1994. As of August 8, 1994, the date of Duerring's deposition, there were approximately 200 bales on the site. Each bale consists of approximately 120 to 130 tires. The only bales Duerring has removed from the site have gone to the Northwest Landfill. Duerring has temporarily stored bias tires he has brought onto the site prior to selling them for further processing.

Duerring's notice of appeal first asserts that DER's order illegally requires him to cease bringing tires to his site, because the tires brought to his property are a product, not a waste, and are exempt from DER's regulations.

The SWMA and the regulations promulgated thereunder require that a person obtain a permit from DER before operating a residual waste processing or disposal facility. 35 P.S. §6018.301; 25 Pa. Code §§287.101, 287.201. Duerring admits in his response that he lacks such a permit. Section 287.2(c)(3) of 25 Pa. Code provides that management of, inter alia, waste tires is subject to Article IX of 25 Pa. Code (instead of Article VIII), and shall be regulated as if the waste is a residual waste. "Residual waste" is defined at 25 Pa. Code §287.1 as garbage, refuse, other discarded material, or other waste. "Waste", in turn, is defined by 25 Pa. Code §287.1 as including a material that is abandoned or disposed.

Citing Max L. Starr v. DER, 1991 EHB 494, aff'd 147 Pa. Cmwlth. 196, 607 A.2d 321 (1992), and Gerald E. Booher v. DER, 1991 EHB 987, aff'd 149 Pa. Cmwlth. 48, 612 A.2d 1098 (1992), DER asserts that we have ruled that discarded tires are a waste material, even if there is a potential value in the tires.

In Starr, DER issued an order to the appellant Starr, pursuant to the SWMA,

concerning millions of tires which had accumulated on his site. Starr had been paid to take the tires by commercial tire dealers. At the time DER issued its order to Starr in 1987, the residual waste management regulations at Article IX of 25 Pa. Code had not yet been promulgated, as they were not promulgated until July of 1992. See 22 Pa. Bulletin 3389. The issue in Starr was whether the tires on Starr's property fell outside the definition of solid waste under the SWMA because they had economic value or whether the tires were municipal waste. We ruled that since there was no question that Starr had obtained the tires from tire dealers, the tires were waste materials resulting from the operation of a commercial establishment and fell within the definition of municipal waste. We concluded that it was irrelevant whether Starr attributed any value to the tires, as the tires were waste when the commercial tire dealers discarded them as worthless and paid Starr to take them to his site. We further ruled that Starr was storing the tires and that a portion of them were disposed, within the meaning of section 103 of the SWMA, 35 P.S. §6018.103. We concluded that Starr was not excused from his obligation to obtain a permit from DER under §501 of the SWMA, 35 P.S. §6018.501, by any future plans for the tires. On appeal by Starr to the Commonwealth Court, the Court affirmed the Board's decision.

In Booher, the Board upheld DER's assessment of a civil penalty pursuant to the SWMA on the appellant Booher in connection with used tires on his property and his failure to comply with a DER order, issued under the SWMA, requiring him to cease storing and disposing of waste tires on his property and to submit a plan for removal of the tires to DER. Citing Starr, we ruled that the tires on Booher's property, which had been placed there without Booher having obtained any permit from DER and with Booher's consent, were waste subject to the terms and

conditions of the SWMA and the regulations, even if there were a market for the waste tires as a recycled fuel source.

We agree with DER that as a matter of law, under our decisions in Starr and Booher, as affirmed by the Commonwealth Court, the tires on Duerring's site are residual waste within the meaning of DER's regulations. They have been disposed of by the commercial tire dealers from whom Duerring admittedly takes them. Duerring's plans for reusing the tires are not relevant to whether DER's order correctly found they were waste.

Section 287.1 of 25 Pa. Code defines "processing" as including one or more of the following:

(A) A method or technology used for the purpose of reducing the volume or bulk of municipal or residual waste or a method or technology used to convert part or all of the waste materials for offsite reuse.

(B) Transfer facilities, composting facilities, and resource recovery facilities.

"Transfer facility" is defined by this section of the regulations as:

A facility which receives and processes or temporarily stores municipal or residual waste at a location other than the generation site, and which facilitates the transportation or transfer of municipal or residual waste to a processing or disposal facility. The term includes a facility that uses a method or technology to convert part or all of the waste materials for offsite reuse.

Duerring is operating a transfer facility since he is temporarily storing the tires at the site, see Starr, supra, at 1991 EHB 500-501, and has facilitated the transfer of at least some of the residual waste to the Northwest Landfill for disposal. As the definition of processing in DER's regulations includes a transfer facility, he is also operating a processing facility. Thus, Duerring was required to obtain a permit from DER under section 301 of the SWMA and

§§287.101 and 287.201. There is, thus, no genuine issue of material fact and DER is entitled to summary judgment as a matter of law as to Duerring's first objection to DER's order.

Duerring's second objection to DER's order is that his facility is eligible for "permit by rule" under DER's regulations.

Section 287.102 of 25 Pa. Code provides that a facility that is subject to permit by rule under that section is not required to apply for a permit under Article IX of 25 Pa. Code or to comply with the operating requirements of that article, if the facility operates in accordance with the requirements of section 287.102. Section 287.102(a)(3)(i) directs that a facility cannot be eligible to operate pursuant to permit by rule under section 287.102 unless the operator maintains a copy of the DER-approved Preparedness, Prevention and Contingency (PPC) plan. Duerring admits in his response to DER's motion that at the time of his deposition, he did not maintain a DER-approved PPC plan.² Additionally, pursuant to 25 Pa. Code §287.102(h), a facility for the processing of residual waste only by mechanical or manual sizing or separation for prompt offsite reuse shall be deemed to have a residual waste processing permit by rule if it meets the requirements of §287.102(a) and submits a written notice to DER which meets the requirements of §287.102(h). Duerring's response asserts that a letter dated February 3, 1994 from him to DER met this notification requirement. No affidavit on this issue was submitted by Duerring. According to the September 20, 1994 affidavit of DER's Meadville office solid waste supervisor, DER had not received any such notice from Duerring up through August 8, 1994. Mead further states in

²DER's motion asserts that Duerring admitted at his deposition that he had not filed a PPC plan with DER (citing page 131 of Duerring's deposition transcript, which is Exhibit A to DER's motion). Page 131 is not included with Exhibit A, however.

his affidavit that the letter dated February 3, 1994, which is Exhibit 6 to Duerring's pre-hearing memorandum and was presented to DER at Duerring's deposition, was never received by DER's Meadville office, to whom it was addressed.

Pursuant to Pa. R.C.P. 1035(d), the Superior Court in Knecht v. Citizens & Northern Bank, 364 Pa. Super. 370, 528 A.2d 203 (1987), pointed out:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading but his response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Duerring has not controverted Mead's September 20, 1994 affidavit. We thus find there is no genuine issue of material fact that Duerring is not operating under permit by rule, because he did not submit the required notice to DER. Since he is not so operating, DER is entitled to summary judgment on this issue.

Duerring's final issue is that pursuant to 25 Pa. Code §287.113(c), he had six months from DER's order or until July 4, 1995 to apply for a permit.

Section 287.113(c) deals with the transition system for existing unpermitted processing or disposal facilities. This section provides that within 6 months after receiving written notification from [DER], or by July 4, 1995 (if [DER] does not provide written notification), a person or municipality that operates a residual waste disposal or processing facility that is subject to [section 287.113] shall file a complete permit application consistent with Article IX of 25 Pa. Code. As DER points out, however, 25 Pa. Code §287.111 required each operator of a residual waste storage or disposal processing facility which was not authorized by a permit issued by DER under the SWMA on

July 4, 1992, and which received waste for processing or disposal after July 4, 1992 (regardless of whether the facility is currently accepting waste), to submit certain information to DER by January 4, 1993. This information is called "notice" by subsection (b) of §287.111 and is required to be on a form prepared by DER. Subsection (c) of §287.111(c) requires a person operating a facility subject to section 287.111 that has not filed the notice required by that section by January 4, 1993 to immediately cease accepting waste or processing or disposing of waste at the facility, and to file a closure plan with DER by July 5, 1993.

Thus, in order for Duerring's argument to succeed, he would have to show that he gave this section 287.111(b) notice to DER. His response denies DER's allegation that he did not give DER the section 287.111 notice. Mead's October 18, 1994 affidavit, however, states that DER has not received notice from either Duerring or Envirobale pursuant to section 287.111, and that insofar as Duerring and Envirobale did not own or operate the site until October of 1993, DER also did not receive section 287.111 notice from A&R Development. Mead's affidavit is uncontroverted by Duerring. With Mead's affidavit establishing that DER did not receive the required section 287.111 notice, Duerring's argument that he is eligible for section 287.113(c)'s time period for submitting a permit application to DER for the site cannot succeed. We find there is no genuine issue of material fact on this argument, and that summary judgment in DER's favor on this issue also is appropriate.

As we are granting summary judgment as to all of the objections raised in Duerring's notice of appeal, we accordingly enter the following order dismissing Duerring's appeal.

ORDER

AND NOW, this 7th day of November, 1994, it is ordered that DER's motion for summary judgment is granted, and Duerring's 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. Ehmman

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: November 7, 1994

cc: DER Bureau of Litigation:
(Library: Brenda Houck)
For the Commonwealth, DER:
Jody Rosenberg, Esq.
Southwest Region
For Appellant:
Gregory Barton Abeln, Esq.
Carlisle, PA

ar



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ENVIRONMENTAL HEARING BOARD
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 HARRISBURG, PA 17105-8457

M. DIANE SMITH
 SECRETARY TO THE BOARD

JAY TOWNSHIP, et al.

v.

COMMONWEALTH OF PENNSYLVANIA
 DEPARTMENT OF ENVIRONMENTAL RESOURCES
 and ENVIRITE CORPORATION and MT. ZION
 LANDFILL DEVELOPMENT CORPORATION,
 Permittee

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EHB Docket No. 91-401-MR
 (Consolidated with 91-402-MR
 91-407-MR and 92-057-MR)

Issued: November 8, 1994

ADJUDICATION

By Robert D. Myers,

Synopsis

The Board sustains in part an appeal of a solid waste permit and dismisses appeals of a National Pollution Discharge Elimination System (NPDES) permit and a settlement agreement.

The Board has jurisdiction to determine whether a solid waste permit authorizes conduct which requires a separate surface mining permit, plan approval, or air quality permit.

The Department of Environmental Resources (Department) has the discretion under 25 Pa. Code §75.38(c)(vii) to authorize side slopes which exceed the 33% maximum set forth in 25 Pa. Code §75.25(j) and to authorize the use of a liner without a warranty. The Department does not abuse its discretion by authorizing a side slope exceeding 33% where that side slope would be more stable than one which was 33% or less. Where waste stored in a residual waste landfill is not putrescible and need not be protected from excess water infiltration, the Department has the discretion to determine what type of daily cover it will

require, if any. The Board will not deem the Department to have abused its discretion by authorizing the use of a synthetic membrane, rather than soil, where the only evidence indicates that the membrane is more likely to prevent the emission of dust. An appellant cannot show that the Department abused its discretion by approving a liner without a warranty unless he can show that liners with warranties are available which are no more likely to leak than the liner approved.

Issues omitted from a pre-hearing memorandum are waived. Issues omitted from a response to Pre-Hearing Order No. 2, however, are not waived where they were raised in the pre-hearing memorandum and the opposing party did not raise the waiver issue until after the hearing on the merits.

A solid waste permit does not authorize the emission of fugitive air contaminants or the construction or operation of an air contamination source if the permit does not authorize the emission of air contaminants.

A coal refuse disposal permit is required to remove coal spoil containing an underclay to a site outside an active mine.

The requirement in 25 Pa. Code §105.17, that work within 300 feet of important wetlands must be necessary to realize public benefits and that the benefits outweigh any damage to the wetlands, applies only to permits issued under Chapter 105.

A solid waste permit complies with Article I, §27, of the Pennsylvania Constitution so long as the permit complies with the Solid Waste Management Act and the regulations promulgated pursuant to it.

INTRODUCTION

These consolidated appeals were initiated with the September 27, 1991, filing of a notice of appeal by Jay Township, Robert R. Coppolo (Coppolo),

Christine Gavazzi (Gavazzi), and Bennets Valley Citizens for a Safe Environment (CASE), (collectively, the Appellants) to the issuance of a solid waste permit to Envirite Corporation (Envirite). The permit, issued on August 30, 1991, pursuant to the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. (Solid Waste Management Act), authorized Envirite to construct and operate a residual waste landfill on the site of an unreclaimed strip mine in Jay Township, Elk County. The Appellants' notice of appeal, docketed at EHB Docket No. 91-401-MR, asserted that the issuance of the permit was an abuse of discretion and contrary to law because, among other things, the permit authorized conduct which required separate permits under the Coal Refuse Disposal Control Act, the Act of September 24, 1968, P.L. 1040, as amended, 52 P.S. §30.51 et seq. (Coal Refuse Disposal Control Act), the Air Pollution Control Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35P.S. §4001 et seq. (Air Pollution Control Act), and the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. (Surface Mining Conservation and Reclamation Act); (2) the landfill would lie within 300 feet of important wetlands; and (3) the Department failed to adequately consider the effect of traffic to and from the landfill on traffic safety and other adverse effects of the landfill on Appellants, the citizens of Jay Township, and the local environment.

The Appellants' notice of appeal pertaining to the solid waste permit was just one of several notices of appeal filed with respect to the landfill. On September 27, 1991, the Appellants filed a notice of appeal challenging the Department's issuance of a NPDES permit authorizing a discharge from the landfill. That appeal, docketed at EHB Docket No. 91-402-MR, asserted that the NPDES permit violated the Department's water quality regulations and that the

Department had failed to adequately consider the harm the discharge would cause to the environment. On September 30, 1991, Envirite and Mt. Zion Landfill Development Corporation (Mt. Zion) filed their own notice of appeal to the solid waste permit. That appeal, docketed at EHB Docket No. 91-407-MR, asserted that the Department should have issued the solid waste permit to Mt. Zion--not to Envirite--and that the permit should not have required that the leachate treatment facility be operational within one year of leachate appearing in the collection system.

On January 3, 1992, the Department and Envirite and Mt. Zion submitted a settlement agreement substituting Mt. Zion for Envirite as the permittee and extending the deadline for the leachate treatment facility from one to three years.¹ The Board approved the settlement agreement on January 8, 1992, but shortly thereafter, on February 11, 1992, the Appellants filed a notice of appeal challenging the terms of the agreement. That appeal, docketed at EHB Docket No. 92-057-MR, asserted that the Department had abused its discretion and acted contrary to law by extending the deadline for the leachate treatment facility.

The Appellants' appeals of the NPDES permit and the settlement agreement were consolidated with their appeal of the solid waste permit here at EHB Docket No. 91-401-MR on November 13, 1991, and May 19, 1992, respectively. The Board issued an Opinion and Order on August 26, 1992, denying a motion for summary judgment filed by the Appellants. See Jay Township, et al. v. DER, 1992 EHB 1112. A hearing was held in Harrisburg on June 28-30, 1993, before

¹To avoid any confusion which might otherwise result from the substitution of Mt. Zion for Envirite, we shall use the word "permittee" to refer to the party authorized to construct and operate the landfill, rather than referring specifically to either Envirite or Mt. Zion.

Administrative Law Judge Robert D. Myers, a Member of the Board, at which the parties were represented by legal counsel.²

The Appellants filed their post-hearing memorandum on September 28, 1993. They argued that the Department abused its discretion and acted contrary to law by issuing the solid waste permit because: (1) the permit authorized conduct which required separate permits under the Coal Refuse Disposal Control Act, the Air Pollution Control Act, and the Surface Mining Conservation and Reclamation Act; (2) the permit did not comply with §105.17 of the Department's dam safety regulations, 25 Pa. Code §105.17; (3) the permit did not comply with the Department's regulations under the Solid Waste Management Act; (4) the Department violated Article I, §27, of the Pennsylvania Constitution by failing to adequately assess the impact of increased truck traffic on the roads to the landfill; and (5) the Department failed to balance the potential environmental harm against the accompanying benefits, as required by Article I, §27. With regard to the appeal of the settlement agreement, the Appellants argued that the Department acted unreasonably by agreeing to modify the permit to extend the deadline for the on-site leachate treatment facility.

Permittee filed its post-hearing memorandum on November 12, 1993, arguing: (1) that the Appellants did not have standing to challenge the issuance of the solid waste permit; (2) that the Appellants had waived issues raised in their post-hearing memorandum by failing to include them in either their notice of appeal, or their pre-hearing memorandum, or their response to Pre-Hearing Order No. 2; and (3) that the Appellants could not assert that the Department should have required air quality and surface mining permits for the landfill because

²In accord with its long-standing practice with regard to third-party appeals of permits it has issued, the Department took no formal position on these appeals.

the Department's decision not to require those permits did not constitute an appealable action. Apart from arguing that the issue was waived, Permittee failed to respond to the Appellants' assertions that the landfill requires a permit under the Coal Refuse Disposal Control Act. Permittee did respond to the other substantive issues raised in the Appellants' post-hearing memorandum, however. The Appellants filed a reply memorandum on December 1, 1993, which took issue with all but one of the standing, waiver, and appealable action arguments raised in Permittee's post-hearing memorandum.

Neither the Appellants nor Permittee addressed the issuance of the NPDES permit in the hearing or their post-hearing briefs.

Any issues not raised in the post-hearing memoranda are deemed waived. Lucky Strike Coal Co. and Louis J. Beltrami v. Department of Environmental Resources, 119 Pa. Cmwlth. 440, 546 A. 2d 447 (1988).

The record consists of a transcript of 468 pages, a joint stipulation of facts, and 33 exhibits. After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. Appellant Jay Township is a township of the second class located in Elk County, Pennsylvania. (Stip., p. 9, Para. 7)
2. Appellant CASE is an unincorporated association of approximately 296 citizens in the Bennets Valley area concerned with the local environment. (Stip., p. 9, Para. 8; N.T. 286-87)
3. Appellant Coppolo is a citizen of Jay Township with a mailing address of R.D. 2, Box 304, Weedville, PA 15868. (Stip., p. 9, Para. 9)
4. Appellant Gavazzi is a citizen of Jay Township with a mailing address of P.O. Box 133, Weedville, PA 15868. (Stip., p. 9, Para. 12)

5. Appellee is the Department, the agency with the authority to administer and enforce the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., the Solid Waste Management Act, the Coal Refuse Disposal Control Act, the Air Pollution Control Act, and the Surface Mining Conservation and Reclamation Act.

6. On August 30, 1991, the Department issued a solid waste permit (Permit No. 301196) to Envirite to construct and operate a residual waste disposal facility in Jay Township, Elk County, Pennsylvania. (Stip., p. pp. 8-9, Para. 3; Ex. P-1, p. 00006)

7. Envirite is a Pennsylvania corporation with a business address of 620 West Germantown Pike, Plymouth Meeting, PA 19462. (Stip., p. 8, Para. 1)³

8. The solid waste permit authorizes the landfill to accept de-listed residual waste resulting from the treatment of metal-bearing wastes generated at an Envirite facility in York, PA. (Ex. P-1, P. 00011)

9. The landfill site is an unreclaimed contour coal strip mine. (Ex. P-2, p. 00394)

10. The landfill has three distinct disposal areas comprising approximately 42 acres. (Stip., p. 10, Para. 16)

11. On September 27, 1991, the Appellants filed a notice of appeal with respect to the solid waste permit. (Stip., p. 9, Para. 5)

12. On December 23, 1991, Envirite, Mt. Zion, and the Department entered into a settlement agreement concerning the solid waste permit which provided, among other things, that the permittee would be changed from Envirite to Mt. Zion. (Stip., p. 9, Para. 6)

³The Appellants' exhibits are designated as "Ex. A-___," those of the Permittee as "Ex. P-___," the notes of testimony as "N.T. ___," and the joint stipulation as "Stip. ___."

13. Mt. Zion is a Pennsylvania corporation which is a wholly-owned subsidiary of Envirite, and its business address is also 620 West Germantown Pike, Plymouth Meeting, PA 19462. (Stip., p. 8, Para. 2)

14. On February 11, 1992, Appellants filed a notice of appeal challenging the settlement agreement. (Notice of Appeal, consolidated at 91-401-MR, from 92-057-MR)

side slopes

15. The solid waste permit authorizes side slopes to the landfill which are vertical. (Ex. P-1, p.00006; Ex. P-12, p. II-24)

16. The vertical side slope will not present a problem with this landfill because the waste will not rest on the sides of the liner. (N.T. 62)

17. The slopes at the landfill will be stable under their own weight. (Ex. P-9, p. 01896)

18. Had the Department imposed the 33% slope requirement, the liner would have extended up over the highwall and above deep mines, increasing the potential for stability problems. (N.T. 62)

liner warranty

19. The liner authorized for use at the landfill does not have a warranty. (N.T. 56)

20. The permit authorizes a liner which utilizes two liner designs. (N.T. 57-59, Ex. P-9, pp. 01941-43)

21. Waste in the landfill will be stored atop a double composite liner--two layers of liners, each of which consists of a synthetic membrane placed on top of earthen material specifically selected for size and moisture content. (N.T. 57, 85; Ex. P-9, pp. 01941-43)

22. Where the disposal area will abut the highwall of the mine, the two

will be separated by a single-layer liner--a single synthetic membrane. (N.T. 58-59)

23. Waste will only lie to the side of the single-layer liner, not above it. (N.T. 58-59)

24. William Bruck, a geologist retained by the Appellants, testified that a double composite liner would be preferable to a single-layer design because the second membrane would prevent the release of materials which somehow passed through the first. (N.T. 101-102)

25. The Appellants adduced no evidence showing that any double composite liners had warranties or that other liners with warranties would prevent leaks as well as the single-layer liner approved for use between the highwall and the disposal area.

26. The Appellants failed to present evidence which would indicate that other types of liners with warranties would prove as effective at preventing leaks as the double composite design approved by the Department.

daily cover

27. The solid waste permit authorizes the use of a synthetic membrane as daily cover. (Ex. P-1, p.00007; Ex. P-7, p. 1692)

28. The waste in the landfill will not become putrefied. (N.T. 35-36, 93-94, 190)

29. No evidence was introduced concerning the issue of whether the waste had to be protected from excess water infiltration.

30. Daily cover consisting of a synthetic membrane is more likely than a cover of soil to prevent dust from becoming windborne. (N.T. 36)

power supply

31. The landfill will utilize electrically-powered pumps to pump leachate

from the collection system to the treatment facility. (N.T. 70)

32. The only evidence adduced concerning possible outages consisted of the testimony of Coppolo.

33. Coppolo lives approximately three miles from the landfill. (N.T. 277)

34. Coppolo testified power outages at his residence occurred "on occasion" and that they could be momentary or, in some instances, last eight hours or more. (N.T. 283)

35. Appellants never presented evidence to show either that Coppolo's residence draws its electrical power from the same source that will be used to supply the landfill or that the power systems supplying the landfill and residence are so similar that one would expect them to share the same types of problems.

36. Permittee has not yet determined whether the pumps will utilize a single-phase or three-phase power source. (N.T. 454-455)

37. The only evidence introduced with respect to the availability of generators to power the pumps consisted of testimony from Coppolo and John Blazosky.

38. Coppolo testified that single-phase generators were available for rent within twenty miles of the landfill and perhaps significantly closer. (N.T. 285-286)

39. Blazosky testified that single-phase generators were available for rent at a True Value hardware store approximately six miles from the landfill. (N.T. 454)

40. Coppolo testified that it was necessary to go to Erie or Pittsburgh to rent a three-phase generator. (N.T. 286)

41. Coppolo based his testimony on a conversation he had with an associate of his who had once worked in the area and needed a three-phase generator. (N.T. 300)

42. Blazosky testified that three-phase generators were available from the same True Value store which rented single-phase generators, about six miles away from the landfill. (N.T. 454)

43. Blazosky based his testimony on a phone call he made to that store. (N.T. 454)

coal refuse disposal

44. Permittee does not have a coal refuse disposal permit. (N.T. 77-78)

45. The solid waste permit provides that spoil on the disposal sites will be excavated to provide an intermediate and final cover for the landfill and that any excavated material which fails to meet the criteria for cover will be used to develop the sub-base, hauled to other areas as fill, or used for roadway construction. (Ex. P-2, at p. 00939-00941, Ex. P-1, p.00006)

46. Design drawings and maps incorporated into the solid waste permit provide that the access road to the landfill will be constructed upon a base consisting of 10 inches of mine spoil. (Ex. P-12, p. 02148, Ex. P-1, p. 00007)

47. The design drawings and maps provide that the access road to the landfill will intersect with Township Road 416 southwest of the landfill. (Ex. P-12, pp. 02147, 02150)

48. At no point is Township Road 416 closer than 1000 feet to the mine proposed as the site for the landfill in this appeal. (Ex. A-16)

49. Before the site was mined for coal, an underclay lay between the coal seam and the bedrock everywhere on the site. (N.T. 440)

50. The underclay was excavated when the site was mined. (N.T. 440)

51. The geological features excavated in connection with mining the coal seam were left on site, not removed with the coal. (N.T. 435)

emission of air contaminants

52. Three witnesses testified regarding the Appellants' assertion that the landfill would emit dust: Anthony Talak, regional engineer for the Department's northwest regional office; Larry Wonders, regional air quality manager for that office; and, Donald Richner, a chemist retained by the Appellants. (N.T. 16-17, 209-211; Ex. A-7, A-13)

53. Talak testified that the waste material would not become airborne because it was moist and sludge-like. (N.T. 36-37)

54. Wonders testified that the waste would generate little or no dust, since it was moist and the waste would be covered daily. (N.T. 175, 197)

55. Richner testified that he did not know whether the facility would emit dust. (N.T. 222)

56. The permit application described the odor of the waste as "none to earthy." (Ex. P-2, p. 00083)

57. Only Talak and Richner testified regarding the odor of the waste.

58. Talak determined that the waste itself had no meaningful odor by visiting the site where the waste is generated. (N.T. 35)

59. Although he never had an opportunity to smell the leachate, Talak testified that, based on its constituents, he did not anticipate that it would emit an odor. (N.T. 73)

60. Richner was unsure whether the waste would produce an odor. (N.T. 219)

61. The most Richner could say about the leachate was that it "may or may not produce an odor." (N.T. 212-213)

62. Neither Richner nor Wonders, the only two witnesses who testified on the subject of methylene chloride emissions, testified that the landfill would actually emit methylene chloride.

63. Richner testified that, because the concentration of methylene chloride varied in the waste, "there is a potential there for release" and that "there may be a direct route from the solid to the air." (N.T. 213, 215; emphasis added)

64. Richner testified that "it is possible" to remove volatile organic compounds from contaminated water by spraying and that he thought Wonders' calculation of methylene chloride emissions seemed reasonable "assuming it [the methylene chloride] was all released." (N.T. 214-215)

65. Methylene chloride is a volatile organic compound. (N.T. 172-3)

66. Richner admitted during the course of cross-examination that, when he gave his opinion on methylene chloride emission from leachate recirculation, he believed leachate recirculation was to be the primary method of leachate disposal and that the leachate would be sprayed onto the waste material. (N.T. 212-214, 219-220)

67. The permit authorizes leachate recirculation only as a backup system in an emergency and provides that the leachate must be applied "as close to the waste surface as possible" and that there can be no over-spraying. (Ex. P-7, p. 01702, Ex. P-1, p. 00006)

68. Richner conceded that applying the leachate close to the surface of the waste would reduce the potential for contaminants to escape from the leachate into the air. (N.T. 220)

69. Wonders testified that, even if all the methylene chloride in the leachate were vaporized, that it would amount to the emission of no more than

.005 lbs/day of the compound. (N.T. 173, 192-92)

70. Wonders testified that the landfill would only emit water vapor. (N.T. 172)

71. Richner testified that non-volatile solids may be emitted into the atmosphere in the form of an aerosol if they are suspended or dissolved in a liquid which is sprayed. (N.T. 212)

72. Wonders testified that, when leachate containing dissolved or suspended non-volatile solids evaporates, the solids remain as deposits; they do not escape into the atmosphere. (N.T. 196, 207)

surface mining

73. Condition No. 7 of the permit provides:

"In the event that there are extractable or minable mineral deposits beneath this site, it shall be the permittee's responsibility to obtain and provide adequate surface support prior to the extraction of said mineral deposits. This support must be sufficient to maintain the integrity of the disposal site and its associated facilities." (Ex. P-1, Para. 7, p. 00009)

74. Condition No. 7 is a standard provision in solid waste permits where the permittee owns the mineral rights to the land covered by the permit. (N.T. 29-30)

75. The only other provision in the permit relating to mining consists of the notation "remove coal to here" found in some of the design drawings. (Ex. P-12, pp. 02135, 02139)

76. Two witnesses testified as to the meaning of the notation: William Bruck, a geologist retained by the Appellants; and Matthew Kenealy, a hydrogeologist who testified for Permittee. (N.T. 101-2, 427; Ex. A-12)

77. Bruck testified that, based on this notation, he believed that coal was present on the site. (N.T. 119)

78. Kenealy assisted in the preparation of the design diagrams and dug

six to ten test pits at the site. (N.T. 431, 433)

79. Because none of the test pits encountered coal, and because spoil in many of the pits lay just above the bedrock, it is unlikely that any coal remained on the site. (N.T. 431-440)

80. According to Kenealy, the notation "remove coal to here" was included on the diagrams just in case coal happened to be encountered on the site, not because they expected to encounter coal there. (N.T. 432)

§105.17(b) of the Department's dam safety regulations, 25 Pa. Code §105.17(b)

81. Between August of 1989 and June of 1992, Kenneth Reisinger was chief of education and technical assistance for the Department's Division of Wetlands Protection. (N.T. 381-2)

82. As part of his job as chief of education and technical assistance, Reisinger assisted in the interpretation of existing regulations. (N.T. 382)

83. Reisinger testified that the Department interprets the word "permit" in §105.17(b) as referring only to Chapter 105 permits, not to all permits issued by the Department. (N.T. 385)

provision in settlement agreement allowing Permittee three years to have leachate treatment facility constructed and operational

84. When the Department originally issued the solid waste permit, Condition No. 26 of the permit provided: "The leachate treatment facility shall be constructed and operational within one (1) year of the commencement of disposal of waste." (Ex. P-1, p. 00015)

85. The Department imposed the one-year deadline because it was under the false impression that Permittee had proposed to have the facility constructed and operational within that time-frame. (N.T. 43)

86. After Envirite and Mt. Zion filed a notice of appeal challenging the

one-year deadline, the Department agreed to a settlement agreement extending the deadline for the leachate treatment facility from one year to three. (Ex. P-14; N.T. 43)

87. The Department acceded to the three-year deadline because revisions to the regulations governing municipal waste, pending at the time of the settlement agreement, gave landfills three years before leachate treatment facilities had to be operational. (N.T. 43)

88. When asked to list the health and safety concerns associated with trucking leachate from the landfill over an extended period of time, Talak testified: "It's really hard to generalize, but the big concern would be the traffic safety issue, and you want to make sure there's a place for the leachate to go." (N.T. 44)

89. The permit provides that, until the leachate treatment facility is operational, leachate will be taken by truck to an Envirote Corporation facility in York, Pennsylvania, or to a back-up facility owned by Envirote in Canton, Ohio. (Ex. P-2, p. 01218)

90. Both the York and the Canton facilities have contracted to accept the leachate for up to three years. (Ex. P-2, pp. 01278-01279)

91. Joseph Lichty, Permittee's traffic expert, conducted a study examining the effect of truck traffic travelling to and from the landfill which the Department considered as part of the permit review process. (Ex. P-16, N.T. 328)

92. In the study, Lichty assumed that the landfill would accept 50 truckloads of waste per day and concluded that the landfill would not result in a significant increase in the amount of truck traffic. (N.T. 395, 418; Ex. P-16)

93. The maximum amount of waste the landfill can accept in a day--1,000 cubic yards--only amounts to 30 to 35 truckloads of waste. (N.T. 42)

94. The amount of leachate the landfill will generate in a day will only fill one tank truck. (N.T. 450)

DISCUSSION

The Appellants bear the burden of proof with respect to their challenges to the solid waste and NPDES permits and to the settlement agreement. Under 25 Pa. Code §21.101(c)(3) of the Board's rules of practice and procedure, a third-party appellant has the burden of proof where he appeals the issuance of a Department permit. Snyder Township Residents for Adequate Water Supplies v. DER and Doan Mining Company, 1988 EHB 1208. Under 25 Pa. Code §21.101(c)(4) of the Board's rules, meanwhile, an appellant bears the burden of proof where he appeals a settlement agreement entered into by the Department. Bethlehem Mines Corporation v. DER, 1984 EHB 62. The scope of the Board's review is to determine whether the Department's action was an abuse of discretion or an arbitrary exercise of its duties. Warren Sand and Gravel v. DER, 20 Pa. Cmwlth. 186, 34 A.2d 556 (1975). Our review is de novo and, where we determine that the Department has abused its discretion, we may substitute our discretion. Residents Opposed to Black Bridge Incinerator v. DER, 1993 EHB 675, Rochez Bros., Inc. v. DER, 18 Pa. Cmwlth. 137, 334 A.2d 790 (1975).

Since neither the Appellants nor Permittee addressed the issuance of the NPDES permit in the hearing or in the post-hearing memoranda, the Appellants have not sustained their burden of proof with respect to their appeal of that permit.

We shall address the arguments raised in the post-hearing memoranda individually below.

I. Do the Appellants have standing to contest the issuance of the solid waste permit?

Permittee argues that the Appellants failed to demonstrate that they had standing to contest the solid waste permit because they never established that they had a direct, immediate, and substantial interest in the appeal. In addition, Permittee contends that the Appellants cannot raise the issue of compliance with the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 et seq. (Dam Safety and Encroachments Act), the Surface Mining Conservation and Reclamation Act, and the Air Pollution Control Act, because none of those acts expressly confers standing upon the Appellants to act as private attorneys-general. The Appellants contend that each Appellant has standing because each has a direct, immediate, and substantial interest in the outcome of the appeal.

Although standing is sometimes conferred by statute, see, e.g., Philadelphia Community Cable Coalition Assoc. v. Telesystems Corp., 461 Pa. 471, 336 A.2d 883 (1975), where it is not, a private party has standing so long as he has a direct, immediate, and substantial interest in an appeal. William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). Even assuming the Dam Safety and Encroachments Act, the Surface Mining Conservation and Reclamation Act, and the Air Pollution Control Act do not authorize the Appellants to act as private attorneys-general, therefore, the Appellants will still have standing so long as they have a direct, immediate, and substantial interest in the appeal. In light of the Supreme Court's decision in Franklin Township v. Commonwealth, Department of Environmental Resources, 500 Pa. 1, 452 A.2d 718 (1982), at least one of the Appellants, Jay Township, clearly has such an interest here.

In Franklin Township, the Pennsylvania Supreme Court held that a township had a substantial, direct, and immediate interest within the meaning of William Penn Parking Garage in the issuance of a permit to construct and operate a landfill within the township's boundaries. Although Franklin Township involved a toxic waste landfill--not a residual waste landfill, as here--the Commonwealth Court's resolution of the standing issue did not turn on the specific characteristics of the landfill or the township involved. It is clear from the court's analysis of the township's interest that the township had standing simply by virtue of the fact that the permit authorized the construction and operation of a landfill within the township's limits. The same rationale dictates that Jay Township has standing to appeal the issuance of a permit to construct and operate a residual waste landfill within its borders and to appeal a settlement agreement which affects the terms of that permit.⁴

Since Jay Township has standing and all of the Appellants raised the same issues and ask for the same relief, we need not determine whether the other Appellants have standing. Even if they do not, that would not affect the outcome in this appeal.

II. Does the Board have jurisdiction over the Appellants' claims that the solid waste permit authorized conduct which required separate permits under the Air Pollution Control Act or Surface Mining Conservation and Reclamation Act?

Permittee argues that the Appellants cannot raise the issues of whether the solid waste permit authorized activity which required separate permits under

⁴This result is consistent with the Board's decision in Multilee, Inc., v. DER, EHB Docket No. 94-047-MJ (Opinion issued, July 15, 1994) which held, in the context of ruling upon a petition to intervene, that host municipalities of proposed municipal waste landfills have a "direct, substantial, and immediate interest," within the meaning of William Penn Parking Garage, in the Department's denial of a solid waste management permits for those facilities.

the Air Pollution Control Act or the Surface Mining Conservation and Reclamation Act because the Board does not have jurisdiction where the Department fails to act. The Appellants respond that they are appealing a Department action--the issuance of the solid waste permit--and that the Solid Waste Management Act specifically provides that the Department will not approve solid waste permits which authorize violations of the Air Pollution Control Act or Surface Mining Conservation and Reclamation Act.

The Board has jurisdiction over the issues of whether the solid waste permit authorizes violations of the Air Pollution Control Act and the Surface Mining Conservation and Reclamation Act. As the Appellants correctly note, this is not a case where the Department has failed to act. The Department has acted: it issued the solid waste permit. Whether that permit authorizes activity which requires separate permits under the Air Pollution Control Act or the Surface Mining Conservation and Reclamation Act is germane to the issuance of the permit because the Solid Waste Management Act requires that solid waste permits must comply with the Air Pollution Control Act or the Surface Mining Conservation and Reclamation Act. Section 502(d) of the Solid Waste Management Act provides:

The application for a permit shall set forth the manner in which the operator plans to comply with the requirements of the..."Surface Mining Conservation and Reclamation Act"...[and] the "Air Pollution Control Act...." No approval shall be granted unless the plan provides for compliance with the statutes hereinabove enumerated. 35 P.S. §6018.502(d).

Inasmuch as the issuance of the solid waste permit was an appealable action and the Department was required to issue a permit which complied with the Air Pollution Control Act and the Surface Mining Conservation and Reclamation Act, the Board has jurisdiction where a third-party appellant asserts that a solid waste permit authorized activity which required separate permits under those statutes.

III. Did the Appellants waive the arguments that the solid waste permit failed to comply with solid waste management regulations regarding the side slopes, liner warranty, daily cover, and power supply by failing to list those issues in the notice of appeal?

The Appellants assert that provisions in the solid waste permit which govern side slopes, the liner warranty, and daily cover do not comply with the Department's solid waste management regulations at 25 Pa. Code Chapter 75, and that the permit failed to require adequate backup power for the leachate handling equipment as required by those regulations.⁵ Permittee contends that the Appellants waived these issues by failing to raise them in their notice of appeal.⁶ The Appellants maintain that the issues Permittee objects to are within the scope of the issues raised in the notice of appeal.

We need not decide whether the arguments the Appellants raise in their post-hearing memorandum are within the scope of those raised in their notice of appeal. Even if they were, the Appellants would not prevail on the merits of those issues.

A. side slopes

The permit authorizes side slopes to the landfill which are vertical. (Ex. P-1, p.00006; Ex. P-12, p. II-24) The Appellants argue that the permit

⁵The solid waste management regulations have since been substantially amended, and Chapter 75 eliminated. As the Board noted in its decision denying the Appellant's motion for summary judgment, the residual waste management regulations added in 1992 at chapters 287, 288, 289, 291, 293, 297, and 299 are not applicable. See, Jay Township v. DER, 1992 EHB 1112, 1116.

⁶Although both parties refer only to "the notice of appeal" without specifying which of the notices of appeal they are referring to, it is clear from the context that both parties are referring to the Appellants' notice of appeal with respect to the issuance of the solid waste permit, initially docketed at 91-401-MR.

does not comply with 25 Pa. Code §75.25(j) because the side slopes exceed 33%.⁷ Permittee argues that the Department has discretion under 25 Pa. Code §75.38(c)(vii), to authorize side slopes in excess of those listed in §75.25(j), and that the Department did not abuse its discretion by authorizing the side-slope here.

There is no question that the solid waste management regulations give the Department the discretion to waive the side slope requirement. Section 75.38(c)(vii) provides: "All disposal sites required to use leachate collection and treatment shall comply with 75.25 or as otherwise required by the Department." 25 Pa. Code §75.38(c)(vii) (emphasis added). Section 75.25(j) of the regulations provides, in pertinent part, "The maximum side slope for manufactured membranes shall be thirty-three percent (33%) or the manufacturer's recommendation, whichever is lesser." 25 Pa. Code §75.25(j). The import of the phrase "or as otherwise required by the Department" in §75.38(c)(vii) is unmistakable. It authorizes the Department to use its discretion and impose requirements less--or more--stringent than those dictated by §75.25(j).

The Department did not abuse its discretion by authorizing a vertical side slope here. Although the Appellants assert in their post-hearing memorandum that a vertical side slope would compromise the stability of the landfill, they

⁷The details of the Appellants' argument are discombobulated. The Appellants assert matter-of-factly that §75.25 applies to the landfill because §75.38(c)(vii) of the regulations provides that industrial waste disposal sites must use leachate collection and treatment which comply with §75.25. (The Appellants' post-hearing memorandum, p. 33) At the same time, however, the Appellants insist that the Department cannot invoke §75.38(c)(vii) to substitute its discretion for the maximum side slope listed under §75.25 because §75.38(c)(vii) applies only to industrial waste disposal sites and the landfill is not an industrial waste disposal site. (The Appellants' post-hearing memorandum, pp. 35-36.) Inasmuch as we determined in our previous summary judgment decision that §75.38(c)(vii) applies to the landfill, see, Jay Township v. DER, 1992 EHB 1112, 1118, we will not revisit that issue here.

failed to elicit any evidence in support of this proposition at the hearing. Instead, the evidence they adduced tended to show that a vertical side slope would be more stable than one with a slope of 33% or less. A vertical side slope will not present a problem with this landfill because the waste will not rest on the sides of the liner and the slopes at the landfill will be stable under their own weight. (N.T. 62, Ex. P-9, p. 01896) Had the Department imposed the 33% slope requirement, the liner would have extended up over the highwall and above deep mines, increasing the potential for stability problems. (N.T. 62)

B. liner warranty

The arguments raised concerning the liner warranty track those raised with respect to the side slope. The Appellants argue that the permit authorizes the use of a liner which does not have a warranty which fulfills the criteria for liner warranties set forth at §75.25(b). Permittee does not challenge that assertion but contends that, under §75.38(c)(vii), the Department has the discretion to depart from the provisions at §75.25 and that the Department did not abuse its discretion by departing from the liner warranty criteria in this instance.

The permit authorizes the landfill to utilize two liner designs. Waste in the landfill will be stored atop a double composite liner--two layers of liners, each of which consists of a synthetic membrane placed on top of earthen material specially selected for size and moisture content. (N.T. 57, 85; Ex. P-9, pp. 01941-43) Where the disposal area will abut the highwall of the mine, the disposal area and highwall will be separated by a single-layer liner. (N.T. 58-59) Waste will only lie to the side of the single-layer liner, not above it. (N.T. 58-59)

Section 75.25(b) provides, in pertinent part: "Manufactured membranes...shall have a manufacturer's warranty that the membrane is capable of preventing leachate from reaching the soil under the membrane." We determined above, during the course of our discussion of the side slope, that §75.38(c)(vii) authorizes the Department to use its discretion and impose requirements which are less or more stringent than those provided for under §75.25. The only issue here, therefore, is whether the Department abused its discretion by departing from the warranty requirements at §75.25(b) in this particular instance. We conclude it did not.

The purpose of §75.25(b), obviously, is to minimize the possibility of leachate contaminating soil beneath the liner. To show that the Department abused its discretion by approving the use of a liner without a warranty, therefore, an appellant must prove at a minimum that liners with warranties are available which are no more likely to leak than the liner approved by the Department. The Appellants have failed to do so here.

The Appellants elicited no evidence in support of the proposition that liners with warranties are available which will prevent leaks as well as the single-layer portion of the liner approved by the Department. William Bruck, a geologist retained by the Appellants, testified that a double composite liner would be preferable because the second membrane would prevent the release of materials which somehow passed through the first. (N.T. 101-102, 126) But the Appellants never adduced evidence showing that any double composite liners had warranties or that other liners with warranties would prevent leaks as well as the single-layer liner approved for use between the highwall and the disposal area.

Nor did the Appellants elicit any evidence to support the proposition that

liners with warranties are available which will prevent leaks as well as the double composite portion of the liner approved by the Department. As noted above, the Appellants never presented evidence showing that any double composite liners had warranties. The Appellants also failed to present evidence which would indicate that other types of liners with warranties would prove as effective at preventing leaks as the double composite design approved by the Department.

C. daily cover

The solid waste permit authorizes the use of a synthetic membrane as daily cover. (Ex. P-7, at 1692) While the Appellants concede that the Department has the discretion, under 25 Pa. Code §75.38(c)(1), to determine whether a daily cover is required, they argue that where it is required, the cover must comply with §75.26(1), which requires a uniform, 6-inch layer of cover soil. Permittee argues that the regulations require 6-inches of cover soil only where the waste is putrescible or must be protected from excess water infiltration. In all other circumstances, according to Permittee, the choice of cover is a matter for the Department's discretion.

We held in our decision on the Appellants' motion for summary judgment that "daily cover consisting of 6-inches of soil is required when putrescible waste or wastes that must be protected from excess water infiltration are involved," and that "[i]n all other circumstances daily cover will consist of what [the Department] determines to be appropriate." 1992 EHB at 1119. If the permit authorizes the Appellants to store waste which is putrescible or which must be protected from excess water infiltration, then the Department erred by not requiring 6-inches of soil as cover. If the permit does not authorize the storage of such waste, we will not disturb the Department's determination unless

the Appellants show the Department abused its discretion.

The Appellants failed to establish that the waste at the landfill would be putrescible or would have to be protected from excess water infiltration. The only evidence introduced with respect to whether the waste was putrescible consisted of the testimony of Talak and Larry Wonders, the Department's regional air quality manager, both of whom testified that the waste would not become putrefied. (N.T. 35-36, 93-94, 190) No evidence at all was introduced concerning the issue of whether the waste had to be protected from excess water infiltration.

Nor did the Appellants show that the Department abused its discretion by approving the synthetic membrane. The only evidence concerning the relative merits of the soil and synthetic covers consisted of testimony that the synthetic membrane was more likely to prevent dust from becoming windborne. (N.T. 36)

D. power supply

The landfill will utilize electrically-powered pumps to pump leachate from the collection system to the treatment facility. (N.T. 70) The Appellants argue that the solid waste permit violates 25 Pa. Code §75.38(c)(8)(i) and (iii) because there is not a reliable power supply for those pumps. According to the Appellants, the landfill will be subject to frequent power outages and generators to supply backup power are not readily available in the area. Permittee did not respond to the Appellants' argument with respect to §75.38(c)(8)(i), but argued that the Appellants failed to establish that the permit violated §75.38(c)(8)(iii) because they never proved that the area in which the landfill will be located is subject to frequent power outages and because generators which can supply backup power are readily available.

The Appellants have failed to prove that the permit violates either §75.38(c)(8)(i) or §75.38(c)(8)(iii). Section 75.38(c)(8)(i) provides, "Equipment shall be in operable condition and adequate in size and performance capability to continuously conduct the disposal operation." Section 75.38(c)(8)(iii), meanwhile, provides, "Standby equipment shall be onsite or readily available for major equipment breakdown." Even assuming that equipment could be inadequate under §75.38(c)(8)(i) simply by virtue of being electrically powered, and that an electrical outage constitutes a "major equipment breakdown" under §75.38(c)(8)(iii), the Appellants have still failed to show that the permit violated either regulatory provision.

The Appellants' arguments with respect to both provisions rest on the premise that the landfill will be prone to power outages. The Appellants, however, failed to present any evidence to support that proposition. The only evidence adduced concerning possible outages consisted of the testimony of Coppolo, who lives approximately three miles from the landfill. (N.T. 274-277). He testified power outages at his residence occurred "on occasion" and that they could be momentary or, in some instances, last eight hours or more. (N.T. 283) The problem with Coppolo's testimony is that it is impossible to tell from the record how power outages at his residence are relevant to potential power outages at the landfill. The Appellants never presented evidence to show either that Coppolo's residence draws its electrical power from the same source that will be used to supply the landfill or that the power systems supplying the landfill and residence are so similar that one would expect them to share the same types of problems.

Furthermore, even assuming the landfill would experience significant power outages, it is clear from the evidence that generators capable of powering the

pumps during an outage are readily available.

Permittee has not yet determined whether those pumps will utilize a single-phase or three-phase power source. (N.T. 454-455) The only evidence introduced with respect to the availability of generators to power the pumps consisted of testimony from Coppolo and John Blazosky.

Both witnesses agreed that single-phase generators were readily available in the area. Coppolo testified that those generators were available for rent within twenty miles of the landfill and perhaps significantly closer. (N.T. 285-286) Blazosky testified that single-phase generators were available for rent at a True Value hardware store approximately six miles from the landfill. (N.T. 454)

The witnesses disagreed on the availability of three-phase generators, however. Coppolo testified that it was necessary to go to Erie or Pittsburgh to rent one. (N.T. 286) He based his testimony on a conversation he had with an associate of his who had once worked in the area and needed a three-phase generator. (N.T. 300) Blazosky testified that they were available from the same True Value store which rented single-phase generators, about six miles away from the landfill. (N.T. 454) He based his testimony on a phone call he made to that store. (N.T. 454)

We find Blazosky's testimony to be more persuasive. Although both his testimony and Coppolo's rely upon hearsay, the hardware store is in a better position to determine what equipment it has available for rent than are those upon whom Coppolo relies.

IV. Did the Appellants waive the issue of whether the Department should have considered the impact of noise generated by trucks travelling to and from the facility by failing to raise that issue in their pre-hearing memorandum?

The Appellants assert in their post-hearing memorandum that the Department should not have issued the solid waste permit because it did not consider the noise trucks travelling to and from the landfill would create. Permittee argues that the Appellants failed to establish that they would be affected by any noise the trucks might create and that, in any event, the Appellants had waived the issue by not raising it in their pre-hearing memorandum. The Appellants failed to address the issue in their reply brief.

There is no question that the Appellants failed to raise the issue of the noise generated by trucks travelling to and from the landfill in their pre-hearing memorandum. By failing to raise the issue there and by not raising it again prior to their post-hearing brief, the Appellants have waived it. Pre-Hearing Order No. 1 contains language expressly warning parties that they may be deemed to have waived any issues not included in their pre-hearing memorandum. Pre-Hearing Order No. 1, Para. 5. If the Appellants had sought to amend their pre-hearing memorandum and add the issue before the hearing, we might have refrained from deeming the issue waived. See, e.g., Kenneth P. Koretsky v. DER, EHB Docket No. 93-357-W (Opinion issued July 7, 1994). Exceptional circumstances must be present, however, before the Board will permit a party to raise an issue in post-hearing memoranda where the party omitted the issue from his pre-hearing memorandum. How a party presents his case at hearing depends upon the issues he believes are involved. If the Board accedes to one party's request to add issues after the hearing on the merits, the Board would have to either reopen the record or deprive the opposing party of the opportunity to present evidence on that issue. Inasmuch as the Appellants failed even to address the waiver issue in their reply memorandum, they have failed to show that the requisite exceptional circumstances exist here.

V. Did the Appellants waive the issue of whether the solid waste permit authorized conduct which required a separate permit under the Coal Refuse Disposal Control Act by failing to list that issue in their response to Pre-Hearing Order No. 2?

Permittee argues in its post-hearing brief that the Appellants waived the issue of whether a separate permit was required for the facility under the Coal Refuse Disposal Control Act because they failed to include that issue in their response to Pre-Hearing Order No. 2. The Appellants contend that they preserved that issue because (1) their pre-hearing memorandum averred that a Coal Refuse Disposal Control Act permit was required, and their response to Pre-Hearing Order No.2 expressly stated that it supplemented the pre-hearing memorandum; and (2) the Appellants averred in their response to Pre-Hearing Order No. 2 that "the Department had not required compliance with all laws designed to protect public resources." The Appellants' response to Pre-Hearing Order No. 2, at Para. 2.

We need not decide the whether the Appellants raised the issue of whether a separate permit was required under the Coal Refuse Disposal Control Act. Even assuming the Appellants' response did not raise that issue, it would not be waived.

The Board has never held that issues omitted from a response to Pre-Hearing Order No. 2 are deemed waived. In support of its position that those issues are waived, Permittee points to our decisions in James E. Wood v. DER, 1993 EHB 299, and Beltrami Enterprises, Inc. v. DER, 1988 EHB 348. Wood and Beltrami Enterprises, however, involved situations distinctly different from the one presented here. In both of those cases, the Board held that parties waive any issues they fail to include in their pre-hearing memorandum.

There is good reason to distinguish between issues omitted from the pre-hearing memorandum, which is submitted in response to Pre-Hearing Order No. 1, and those omitted from a response to Pre-Hearing Order No. 2. As noted above, Pre-Hearing Order No. 1 contains language expressly warning parties that they may be deemed to have waived issues not included in their pre-hearing memorandum. Pre-Hearing Order No. 1, Para. 5. Indeed, we have frequently pointed to that language where we have held that parties waived issues omitted from their pre-hearing memorandum. See, e.g., Beltrami Enterprises, 1988 EHB at 355, and Western Hickory Coal Co. v. DER, 1983 EHB 89, at 96, aff'd, 86 Pa. Cmwlth. 562, 485 A. 2d 877 (1984). Pre-Hearing Order No. 2 contains no comparable provision. It merely states that parties must submit a stipulation containing, among other things, a "statement of the legal issues upon which the matter turns." Pre-Hearing Order No. 2, Para. 1(g).

While the Board has noted on previous occasions that its pre-hearing procedure operates as a "winnowing process" to narrow and refine the issues for hearing, Wood, 1993 EHB at 302, we have also stated that it is in the pre-hearing memorandum that the theories a party may raise at hearing are finalized. Midway Sewerage Authority v. DER, 1991 EHB 1445, 1473. Significantly, the Appellants' pre-hearing memorandum averred that the solid waste permit issued to Permittee authorized conduct which requires a separate permit under the Coal Refuse Disposal Control Act. (Appellants' pre-hearing memorandum, Para. 67.)

Finally, even where a party does omit an issue from its pre-hearing memorandum, the Board is reluctant to deem that issue waived unless necessary to prevent prejudice to the opposing party. See, e.g., Kenneth P. Koretsky v. DER, EHB Docket No. 93-357-W (Opinion issued, July 1, 1994), at p. 5, and Max Funk, et al., v. DER, et al., 1988 EHB 1242. Given the fact that Pre-Hearing

Order No. 2 contains no waiver provision, that language in that order can be construed as not requiring an exhaustive list of the issues remaining in the appeal, that the Appellants listed whether a Coal Refuse Disposal Control Act permit was required as one of the issues in their pre-hearing memorandum, and that Permittee never objected to the issue prior to submitting its post-hearing memorandum, we will not deem the issue waived simply because it was omitted from the Appellants' response to Pre-Hearing Order No. 2.

VI. Does the solid waste permit authorize conduct which requires a separate permit under the Coal Refuse Disposal Control Act?

The Appellants argue that the solid waste permit authorizes conduct which requires a separate permit under the Coal Refuse Disposal Control Act. According to the Appellants, the permit authorizes the removal of spoil from the abandoned mine, the spoil contains materials which fall within the definition of "coal refuse" once they are removed from the mine, and the permit authorizes Permittee to deposit the spoils on land outside of the mine--conduct which the Appellants contend amounts to operation of a coal refuse disposal area and requires a coal refuse disposal permit. Although, as noted earlier in this adjudication, Permittee argued that the Appellants waived this issue, Permittee failed to respond to the substance of the Appellants' argument. Permittee does not have a coal refuse disposal permit. (N.T. 77-78)

Section 4(a) of the Coal Refuse Disposal Control Act, 52 P.S. §30.54(a), requires that persons who "establish or operate a coal refuse disposal area" have a coal refuse disposal permit. The solid waste permit here authorizes the operation of a coal refuse disposal area because: (1) the permit authorizes Permittee to remove spoil from the mine; (2) the spoil contains an underclay which is "coal refuse"; and, (3) the permit authorizes Permittee to dump the

spoil in a place other than an active mine.

(A) The solid waste permit authorizes Permittee to remove spoil from the mine.

The permit authorizes Permittee to remove spoil from the mine because it authorizes the use of mine spoil excavated at the site in the construction of an access road which extends beyond the limits of the mine. The permit provides that spoil on the disposal sites will be excavated to provide an intermediate and final cover for the landfill and that any excavated material which fails to meet the criteria for cover will be used to develop the sub-base, hauled to other areas as fill, or used for roadway construction. (Ex. P-2, at pp. 00939-00941, Ex. P-1, p.00006) Design drawings and maps incorporated into the permit provide that the access road to the landfill will be constructed upon a base consisting of 10 inches of mine spoil. (Ex. P-12, p. 02148, Ex. P-1, p. 00007) Those same design drawings and maps provide that the access road to the landfill will intersect with Township Road 416 southwest of the landfill. (Ex. P-12, pp. 02147, 02150) At no point, however, is Township Road 416 closer than 1000 feet to the mine proposed as the site for the landfill in this appeal. (Ex. A-16) Inasmuch as the permit authorizes Permittee to use mine spoil in the construction of the access road and authorizes the construction of the access road beyond the limits of the mine, the permit authorizes the removal of spoil from the mine.

(B) The spoil contains an underclay which is coal refuse.

The spoil on the site consists, in part, of coal refuse because the spoil contains an underclay which lay between the coal seam and the bedrock on the site. Before the site was mined for coal, an underclay lay between the coal seam and the bedrock everywhere on the site. (N.T. 440) The underclay was excavated when the site was mined, but was left at the site, not removed with

the coal. (N.T. 435, 440)

The underclay is coal refuse. Section 3 of the Coal Refuse Disposal Control Act, 52 P.S. §30.53, provides that "coal refuse" includes "any...clay...associated with or near a coal seam, which [is] either brought aboveground...or which [is] separated from coal during the cleaning or preparation operations," but does not refer to "overburden from surface mining operations." Since the underclay was excavated as part of the surface mining operation and then left on the site with the other spoil when the coal was removed, it is "coal refuse" unless it falls within the exception for "overburden." The Department's coal refuse disposal regulations define "overburden" as the "strata or material overlying a coal deposit or between coal deposits in its natural state...." 25 Pa. Code §90.1. Since the underclay here lay directly between the coal seam and the bedrock--as opposed to above the coal or between coal seams--it is coal refuse, not overburden.

(C) By authorizing the dumping of spoil in a place other than an active mine, the permit authorizes Permittee to operate a coal refuse disposal area.

Section 3 of Coal Refuse Disposal Control Act, 52 P.S. §30.53, defines a "coal refuse disposal area" as "any general area or plot of land used as a place for disposing, dumping or storage of coal refuse...but not including coal refuse deposited within an active mine itself or coal refuse never removed from a mine...." The same section of the act defines "operate" as "to enter upon a coal refuse disposal area for the purpose of disposing, storage, or dumping of coal refuse...." 52 P.S. §30.53 One "operates a coal refuse disposal area," within the meaning of the Coal Refuse Disposal Control Act, therefore, if he disposes, dumps, or stores coal refuse which has been removed from a mine, on land which is not within an active mine. Since we have already established here

that the mine spoil contains coal refuse and that the permit authorizes Permittee to remove the spoil from the mine, the only remaining issue is whether the permit authorizes Permittee to dispose of, dump, or store the spoil someplace other than an active mine. The permit clearly does just that. The spoil must be dumped along the path of the access road if it is to be used in the construction of the base for that road, and there is nothing in the record to indicate that there will be an active mine on site. Even assuming that an active mine did exist on the site, it is inconceivable that the entire access road could lie within that mine and yet intersect with Township Road 416.

VII. Does the solid waste permit authorize the emission of fugitive air contaminants or the construction and operation of an air contamination source in violation of the Air Pollution Control Act?

The Appellants argue that the solid waste permit violates the Air Pollution Control Act because the permit authorizes the emission of "fugitive air contaminants" and the construction and operation of an "air contamination source" without a plan approval or permit. Permittee contends that the landfill will not emit fugitive air contaminants and that it is not an air contamination source requiring a plan approval or air quality permit.

To show that the solid waste permit authorizes either the emission of fugitive air contaminants or the construction and operation of an air contamination source without a plan approval or permit, the Appellants must prove, among other things, that the landfill will emit "air contaminants." The Department's regulations define a "fugitive air contaminant" as "an air contaminant of the outdoor atmosphere not emitted through a flue." 25 Pa. Code §121.1 (emphasis added). Section 3 of the Air Pollution Control Act, meanwhile,

defines an "air contamination source" as "any place, facility, or equipment...at, from, or by reason of which there is emitted into an outdoor environment, any air contaminant." 35 P.S. §4003 (emphasis added).

The Appellants have failed, however, to demonstrate that the landfill will emit air contaminants. Section 3 of the Act defines an "air contaminant" as "smoke, dust, fume, gas, odor, mist, radioactive substance, vapor, pollen or any combination thereof." 35 P.S. §4003. Although the Appellants aver that the landfill would emit dust, odors, and methylene chloride and other chemicals, they failed to elicit evidence sufficient to support these assertions.

Three witnesses testified regarding the Appellants' assertion that the landfill would emit dust: Talak, Wonders, and, Donald Richner, a chemist retained by the Appellants. (N.T. 209-211; Ex. A-13) None of the witnesses testified that the landfill would actually emit dust. Talak testified that the waste material would not become airborne because it was moist and sludge-like. (N.T. 36-37) Wonders testified that the waste would generate little or no dust, since it was moist and the waste would be covered daily. (N.T. 175, 197) Richner testified that he did not know whether the facility would emit dust. (N.T. 222)

Nor did the Appellants establish that the landfill would emit an odor. The test for whether an air contaminant in the form of an odor is being emitted is found at 25 Pa. Code §123.31(b), which states: "[a] person may not permit the emission into the outdoor atmosphere of any malodorous air contaminants from any source, in such a manner that malodors are detectable outside the property of the person on whose land the source is being operated." See, e.g., Lower Windsor Township v. DER, 1993 EHB 1305, 1332-1333. The permit application described the odor of the waste as "none to earthy." (Ex. P-2, p. 00083) Only

Talak and Richner testified regarding the odor of the waste. Talak determined that the waste itself had no meaningful odor by visiting the site where the waste is generated. (N.T. 35) Although he never had an opportunity to smell the leachate, he testified that, based on its constituents, he did not anticipate that it would emit an odor. (N.T. 73) Richner, meanwhile, was unsure whether the waste would produce an odor. (N.T. 219) As for the leachate, the most he could say was that it "may or may not produce an odor." (N.T. 212-213)

The Appellants also failed to prove that the landfill would emit methylene chloride. The Appellants argue that methylene chloride would be emitted into the atmosphere directly from the waste itself and from the recirculation of the leachate. They failed to elicit evidence sufficient to support either assertion, however.

In support of the proposition that methylene chloride would be emitted from the landfill, the Appellants point to the testimony of Richner. Richner, however, never actually testified that the waste would emit methylene chloride. He merely testified that, because the concentration of methylene chloride varied in the waste, "there is a potential there for release" and that "there may be a direct route from the solid to the air." (N.T. 213, 215; emphasis added) Nor did Richner ever actually testify that recirculation of the leachate would result in the emission of methylene chloride. He simply testified that "it is possible" to remove volatile organic compounds from contaminated water by spraying and that he thought Wonders' calculation of methylene chloride emissions seemed reasonable "assuming it [the methylene chloride] was all released."⁸ (N.T. 214-215)

⁸Methylene chloride is a volatile organic compound. (N.T. 172-173))

There are a number of other problems with Richner's testimony. Richner admitted during the course of cross-examination that, when he gave his opinion on methylene chloride emission from leachate recirculation, he believed leachate recirculation was to be the primary method of leachate disposal and that the leachate would be sprayed onto the waste material. (N.T. 212-214, 219-220) The permit, however, authorizes leachate recirculation only as a backup system in an emergency and provides that the leachate must be applied "as close to the waste surface as possible" and that there can be no over-spraying. (Ex. P-7, p. 01702, Ex. P-1, p. 00006) Richner himself conceded that applying the leachate close to the surface of the waste would reduce the potential for contaminants to escape from the leachate into the air. (N.T. 220)

The proposition that methylene chloride would be emitted into the atmosphere is also at loggerheads with the testimony of Wonders. Wonders did testify that, even if all the methylene chloride in the leachate were vaporized, that it would amount to the emission of no more than .005 lbs/day of the compound. (N.T. 173, 192-92) He never testified, however, that any of the methylene chloride in the leachate would actually escape from the leachate. Indeed, he testified that the landfill would only emit water vapor. (N.T. 172)

The Appellants also failed to prove their assertion that recirculation of the leachate would result in the emission of non-volatile contaminants suspended or dissolved in the leachate. The only evidence the Appellants cite in support of that proposition is Richner's testimony that non-volatile solids may be emitted into the atmosphere in the form of an aerosol if they are suspended or dissolved in a liquid which is sprayed. (N.T. 212) As we noted above with respect to his testimony about the emission of methylene chloride from the leachate, however, Richner's testimony about emissions from recirculation of the

leachate is problematic because his testimony was based on a mistaken assumption about how and when leachate was to be applied to the waste, and Richner himself conceded that how the leachate was applied to the waste affected the potential for contaminants to escape from the leachate into the air. Furthermore, Richner's testimony is inconsistent with the testimony of Wonders. As noted previously, Wonders testified that the landfill would emit only water vapor. Explaining why recirculation would not result in the emission of non-volatile solids suspended or dissolved in the leachate, Wonders testified that, when leachate containing such compounds evaporates, the solids remain as deposits; they do not escape into the atmosphere. (N.T. 196, 207)

VIII. Does the solid waste permit authorize conduct which requires a separate permit under the Surface Mining Conservation and Reclamation Act?

The Appellants maintain that the Department violated the Surface Mining Conservation and Reclamation Act because the solid waste permit authorizes reclamation of the mine site. According to the Appellants, reclamation constitutes "surface coal mining activity" requiring a separate permit under the Surface Mining Conservation and Reclamation Act. Permittee argues that it does not need a surface mining permit under the act because there is no coal present on the site and it will not be engaged in the extraction of coal or other minerals. At the time that the Department issued the solid waste permit at issue here, the Surface Mining Conservation and Reclamation Act provided that a surface mining permit was required to "mine minerals by the surface mining method."⁹ 52 P.S. §1396.4(a).

⁹The General Assembly amended the Surface Mining Conservation and Reclamation Act in 1992--after the Department issued the solid waste permit at issue here--substituting the word "coal" for "minerals." When reviewing the propriety of Department permitting decisions, however, the Board looks to the law in effect at the time of the permitting decision. See, e.g., Fiore v. DER, 1986

As we held in our decision on the Appellants' motion for summary judgment, a permit under the Surface Mining Conservation and Reclamation Act is required only for activities involving the extraction of coal or other minerals. Jay Township v. DER, 1992 EHB 1112. The solid waste permit here does not violate the Surface Mining Conservation and Reclamation Act because the permit does not authorize the extraction of coal or other minerals.

Only two provisions of the solid waste permit refer to mining. The first appears at Condition No. 7 of the permit and is a standard provision in solid waste permits where the permittee owns the mineral rights to the land covered by the permit. (N.T. 29-30) That condition provides:

"In the event that there are extractable or minable mineral deposits beneath this site, it shall be the permittee's responsibility to obtain and provide adequate surface support prior to the extraction of said mineral deposits. This support must be sufficient to maintain the integrity of the disposal site and its associated facilities." (Ex. P-1, Para. 7, p. 00009))

This provision of the permit does not give Permittee the authority to mine the site without a separate mining permit; it simply provides that, if the site is mined, Permittee must take any additional measures necessary to safeguard the integrity of the disposal facilities.

The only other provision in the permit relating to mining consists of the notation "remove coal to here" found in some of the design drawings. (Ex. P-12, pp. 02135, 02139) Two witnesses testified as to the meaning of the notation: William Bruck, a geologist retained by the Appellants; and Matthew Kenealy, a hydrogeologist who testified for Permittee. (N.T. 101-2, 427; Ex. A-12) Bruck testified that, based on this notation, he believed that coal was present on the site. (N.T. 119) We find the testimony of Kenealy more credible, however.

EHB 744, and Harmar Township and Bauerharmer Coal Corp. v. DER and Minerals Technology, Inc., EHB Docket No. 90-003-MJ (Opinion issued, March 8, 1994).

Kenealy not only assisted in the preparation of the design diagrams, he also dug six to ten test pits at the site. (N.T. 431, 433) Because none of the test pits encountered coal, and because spoil in many of the pits lay just above the bedrock, it is unlikely that any coal remained on the site. (N.T. 431-440) According to Kenealy, the notation "remove coal to here" was included on the diagrams just in case coal happened to be encountered on the site, not because they expected to encounter coal there. (N.T. 432)

IX. Did the Department violate 25 Pa. Code §105.17 by authorizing work within 300 feet of important wetlands without first determining whether the project was necessary to realize public benefits and whether those benefits outweighed any resulting damage to the wetlands?

The Appellants argue that, by issuing the solid waste permit, the Department violated 25 Pa. Code §105.17(b) because the permit authorized work within 300 feet of "important wetlands" and the Department had not determined beforehand that the project was necessary to realize public benefits or that those benefits outweighed any resulting damage to the wetlands. Permittee counters by arguing that the 300-foot limitation in §105.17(b) applies only to permits issued under the Department's dam safety regulations--not to permits issued under the Solid Waste Management Act.

At the time the solid waste permit was issued, 25 Pa. Code §105.17(b) provided:

No permit will be granted for work in or within 300 feet of an important wetland or otherwise affecting any important wetlands unless the applicant demonstrates and the Department concludes, that the public benefits of the project outweigh the damage to the wetlands resource and that the project is necessary to realize

public benefits.¹⁰

It is a cardinal rule of administrative law that an agency's interpretation of its own regulations is controlling unless clearly erroneous. Orth v. Department of Labor and Industry, 138 Pa. Cmwlth. 443, 588 A.2d 113 (1991), allocatur denied, 596 A.2d 801 (1991), Morton Kise, et al. v. DER, 1992 EHB 1580. The evidence presented at the hearing showed that the Department interpreted §105.17(b) as applying only to permits issued under Chapter 105. Kenneth Reisinger was chief of education and technical assistance in the Department's Division of Wetlands Protection when the solid waste permit here was issued, and, as part of that job, he assisted in the interpretation of the wetlands regulations. (N.T. 382-383) He testified that the Department interpreted the word "permit" in §105.17(b) to refer only to Chapter 105 permits, not to all permits issued by the Department. (N.T. 385)

The Department's construction of §105.17(b) is not clearly erroneous. The word "permit" also appeared, unmodified, in §105.11(a) of the then-existing dam safety regulations. Section 105.11 provided: "No person may construct, operate, maintain, modify, enlarge, or abandon a dam, water obstruction, or encroachment without first obtaining a written permit from the Department."

The word "permit" in §105.11 clearly refers to a permit issued pursuant to the Department's dam safety regulations, at 25 Pa. Code Chapter 105, not to any permit the Department issues. Presumably, "permit" would have been modified in some way in §105.17(b) if the word were meant to have a more expansive definition under that provision than in §105.11.

¹⁰Section 105.17(b) was subsequently amended on October 12, 1991. See 21 Pa.B. 4911-4934.

X. Did the Department violate Article I, §27, of the Pennsylvania Constitution by failing to balance the benefits of the landfill against the environmental harm when it issued the solid waste permit?

The Appellants argue that the Department did not comply with Article I, §27, of the Pennsylvania Constitution because the construction and operation of the landfill would harm the environment yet the Department had never balanced the potential benefits of the project against the potential environmental harm. According to the Appellants, the Department must balance the benefits against the environmental harm to satisfy the three-part test for compliance with Article I, §27, enunciated in Payne v. Kassab, 11 Pa. Cmwlth. 14, 312 A.2d 86 (1973), aff'd, 468 Pa. 226, 361 A. 2d 263 (1976). Permittee does not challenge the Appellants' assertions that the Department did not conduct the balancing test. Instead, Permittee argues that the Department complied with Article I, §27, because there is no environmental harm to balance against the benefits associated with the landfill.

Although both the Appellants and Permittee seem to be under the impression that whether the Department complied with Article I, §27, in issuing this permit turns upon test for compliance with Article I, §27, set forth in Payne v. Kassab, they are mistaken. The Commonwealth Court held in National Solid Wastes Management Association v. Casey and DER, 143 Pa.Cmwlth 577, 600 A.2d 260 (1991), aff'd, ___ Pa. ___, 619 A.2d 1063 (1993), that, where the Department acts pursuant to the Solid Waste Management Act or other legislation which expressly states that one of its purposes is to implement Article I, §27, the Payne v. Kassab test is not the standard for determining compliance with Article I,

§27.¹¹ In Concerned Residents of the Yough, Inc. v. Commonwealth, DER, ___ Pa.Cmwlth ___, 639 A.2d 1265 (1994) ("CRY"), the court explained that the Solid Waste Management Act and the regulations promulgated thereunder indicate an intent by the General Assembly "to regulate in plenary fashion every aspect of the disposal of solid waste, [and] consequently, the balancing of environmental concerns mandated by Article I, Section 27 has been achieved through the legislative process." CRY, 639 A.2d at 1275. So long as a solid waste permit complies with the Solid Waste Management Act and the regulations promulgated pursuant to it, therefore, the permit complies with Article I, §27.

The Appellants have failed to show that the solid waste permit here fails to comply with either the Solid Waste Management Act or the regulations promulgated pursuant to it. The only violations of either which the Appellants allege are those that Permittee argued were waived because the Appellants failed to raise them in their notice of appeal--namely, whether the Department complied with 25 Pa. Code §75.25(j) by authorizing a vertical side slope; whether the Department has the discretion under 25 Pa. Code §75.38(c)(vii) to authorize the use of a liner without a warranty and, if so, whether the Department abused that discretion here; whether the Department abused its discretion by authorizing the use of a synthetic membrane as daily cover; and, whether the Department violated subsections (i) and (iii) of 25 Pa. Code §75.38(c)(8) by not requiring an adequate backup power supply for the pumps. We explained earlier in this opinion that even assuming these issues were not waived, the Appellants would not prevail on any of them. Having failed to prove any of the alleged

¹¹Section 102 of the Solid Waste Management Act, 35 P.S. §6018.102, provides:

It is the purpose of this act to...(10) implement Art. I, Section 27 of the Pennsylvania constitution.

violations of the Solid Waste Management Act or its associated regulations, the Appellants cannot have proven a violation of Article I, §27.

XI. Did the Department violate Article I, §27, by failing to assess the effect of increased traffic on the roads to the landfill?

The Appellants contend that the Department did not assess the effect of increased traffic on the roads used to access the landfill and that, therefore, the Department failed to comply with Article I, §27, of the Pennsylvania Constitution by issuing the solid waste permit. Permittee counters that the increase in traffic will have no significant effect on traffic safety.

As noted above, the test for determining whether Department action taken pursuant to the Solid Waste Management Act complies with Article I, §27, is whether the Department complied with the Solid Waste Management Act and the regulations promulgated thereunder. The Appellants never even assert, however, that the Department's review of the traffic issues failed to comply with any provisions of the Solid Waste Management Act or the Department's regulations. The Appellants evidently make the same mistake they did with respect to the preceding Article I, §27, issue and assume that the standard enunciated in Payne v. Kassab is still the test which applies to actions taken under the Solid Waste Management Act.

The Board will not independently comb through the Solid Waste Management Act and the Department's regulations, identifying those provisions possibly relevant to the traffic issues and then analyzing whether the Department complied with those provisions here. The burden is on the Appellants, not the Board, to make their best case. Having failed to even allege how the Department failed to comply with the Solid Waste Management Act or the associated regulations by failing to assess the effect of increased traffic on the roads

to the landfill, the Appellants have failed to prove that the Department violated Article I, §27.

XII. Did the Department abuse its discretion by assenting in the settlement agreement to allow Permittee three years to construct the leachate treatment facility instead of only one?

When the Department originally issued the solid waste permit, Condition No. 26 of the permit provided: "The leachate treatment facility shall be constructed and operational within one (1) year of the commencement of disposal of waste." (Ex. P-1, p. 00015) Although the solid waste regulations at 25 Pa. Code Chapter 75 did not impose a time-limit upon the construction of leachate treatment facilities, the Department imposed the one-year deadline because it was under the false impression that Permittee had proposed to have the facility constructed and operational within that time-frame.¹² (N.T. 43) After Envirite and Mt. Zion filed a notice of appeal challenging the one-year deadline, the Department agreed to a settlement agreement extending the deadline for the leachate treatment facility from one year to three. (Ex. P-14, N.T. 43) The Department acceded to the three-year deadline because revisions to the regulations governing municipal waste, pending at the time of the settlement agreement, gave landfills three years before leachate treatment facilities had to be operational. (N.T. 43)

The Appellants argue that the Department acted unreasonably by agreeing to modify the solid waste permit to allow Permittee three years to construct the leachate treatment facility, instead of only one year as provided in the permit as originally issued. According to the Appellants, the extension constitutes

¹²As noted earlier in this decision (at footnote 1), the residual waste management regulations added in 1992 at chapters 287, 288, 289, 291, 293, 297, and 299 are not applicable here.

an abuse of the Department's discretion because: (1) the leachate treatment facility has not yet been designed and, therefore, it is unclear whether the facility will be technically and economically feasible; (2) the Department anticipates extending the three-year provision year by year after the initial three-year period expires; and, (3) the Department failed to consider the health and safety concerns associated with trucking the leachate from the site for two additional years. Permittee contends that the Department did not abuse its discretion because: (a) transporting the leachate from the site will not pose a significant risk to the public; (b) the solid waste regulations contained in Chapter 75 did not impose any deadline for the construction of a leachate treatment facility; and, (c) even under the regulations governing leachate management which have gone into effect since the settlement agreement, a permittee would have at least three years to construct a leachate treatment facility.

The Appellants have failed to show that the Department abused its discretion.

The Appellants argue that the Department abused its discretion by agreeing to extend the deadline because the leachate treatment facility has not yet been designed and, therefore, the Department cannot have determined whether the facility will be technically and economically feasible. The logic behind this argument is problematic. The settlement agreement did not change the Department's position on whether or how the leachate treatment facility had to be designed; it simply extended the deadline for construction and operation of the facility from one year to three. To sustain their burden of proof, therefore, the Appellants must show at a minimum that the construction and operation of the facility was made less feasible by extending the deadline two

years. They failed to adduce any evidence in support of that proposition.

The logic behind the Appellants' next argument, that the Department abused its discretion because it anticipates extending the deadline year by year after the initial three year period expires, is also perplexing. If the Appellants mean to challenge the Department's alleged intention to extend the deadline beyond the three years provided for in the settlement agreement, than they are jumping the gun; modifications to the permit become ripe for review only when they are made, not when they are considered. See, Giorgio Foods, Inc. v. DER, 1989 EHB 331. On the other hand, if the Appellants mean to challenge the propriety of the three-year deadline itself, than it is difficult to fathom how the Department's intentions with respect to any further extensions are relevant.

That leaves only the argument that the Department abused its discretion because it failed to consider the health and safety concerns associated with trucking the leachate from the site for an additional two years. The only evidence the Appellants elicited identifying potential health and safety problems associated with the transportation of leachate from the landfill consisted of the testimony of Talak. When asked to list the health and safety concerns associated with trucking leachate from the landfill over an extended period of time, Talak testified: "It's really hard to generalize, but the big concern would be the traffic safety issue, and you want to make sure there's a place for the leachate to go." (N.T. 44)

While the Department does not appear to have considered either the traffic safety issue or the destination of the leachate specifically when it agreed to the settlement agreement, it is clear from the record that the Department addressed both concerns in its initial permit review. The permit itself provides that, until the leachate treatment facility is operational, leachate

will be taken by truck to an Envirite Corporation facility in York, Pennsylvania, or to a back-up facility owned by Envirite in Canton, Ohio. (Ex. P-2, p. 01218) Both the York and the Canton facilities have contracted to accept the waste for up to three years. (Ex. P-2, pp. 01278-01279)

As for the traffic safety issue, concerns about the effect of the landfill on traffic safety were adequately addressed in the review of the permit. The Appellants never assert that the type of truck used to remove the leachate will have a different effect on traffic safety than the type used to deliver waste. We are concerned, therefore, only with the narrow question of whether the increase in the number of trucks attributable to treating the leachate off-site will exert a significant effect on traffic safety.

Joseph Lichty, Permittee's traffic expert, conducted a study examining the effect of truck traffic travelling to and from the landfill which the Department considered as part of the permit review process. (Ex. P-16, N.T. 328) That study assumed that the landfill would accept 50 truckloads of waste per day and concluded that the landfill would not result in a significant increase in the amount of truck traffic. (N.T. 395, 418; Ex. P-16) In actuality, however, the landfill will receive significantly less than 50 trucks dropping off waste on any day; the maximum amount of waste the landfill can accept in a day--1,000 cubic yards--only amounts to 30 to 35 truckloads of waste. (N.T. 42) The amount of leachate the landfill will generate in a day, meanwhile, will only fill one tank truck. (N.T. 450) Since only one truck a day is required for the leachate, even if the leachate were treated offsite the amount of truck traffic to the landfill would still be well within the margin Lichty used in his study and concluded would amount to an insignificant increase.

CONCLUSIONS OF LAW

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

2. A party appealing the issuance of a permit by the Department bears the burden of proof. 25 Pa. Code §21.101(c)(3); Snyder Township Residents for Adequate Water Supplies v. DER and Doan Mining Company, 1988 EHB 1208.

3. A party appealing a settlement agreement entered into by the Department bears the burden of proof. 25 Pa. Code §21.101(c)(4); Bethlehem Mines Corporation v. DER, 1984 EHB 62.

4. A private party has standing if he has a direct, immediate, and a substantial interest in the appeal. William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975).

5. Jay Township has a direct, immediate, and substantial interest in its appeal of the Department's issuance of the solid waste permit.

6. The Board has jurisdiction over the Appellants' claims that the solid waste permit authorized conduct which required separate permits under the Air Pollution Control Act or Surface Mining Conservation and Reclamation Act.

7. The Department did not violate §75.25(j) of the solid waste management regulations, 25 Pa. Code §75.25(j), or abuse its discretion under §75.38(c)(vii) of those regulations, 25 Pa. Code §75.38(c)(vii) by authorizing a landfill with a vertical side slope.

8. The Department has the discretion under §75.38(c)(vii) to authorize the use of a liner without a warranty in an industrial waste landfill.

9. The Department did not abuse its discretion under §75.38(c)(vii) by authorizing the use of a liner without a warranty in the solid waste permit here.

10. The Department has the discretion, under 25 Pa. Code §75.38(c)(1), to authorize the use of a synthetic membrane as daily cover--rather than a uniform, 6-inch layer of cover soil--where the waste in the landfill is not putrescible and need not be protected from excess water infiltration.

11. The Department did not abuse its discretion under §75.38(c)(1) by authorizing the use of a liner without a warranty in the solid waste permit here.

12. The power supply for the leachate pumps does not violate §75.38(c)(8)(i) or §75.38(c)(8)(iii) of the solid waste regulations, 25 Pa. Code §75.38(c)(8)(i) or §75.38(c)(8)(iii).

13. The Appellants waived the issue of whether the Department should have considered the impact of noise generated by trucks travelling to the landfill when it issued the solid waste permit.

14. The Appellants did not waive the issue of whether the solid waste permit authorized conduct which required a separate permit under the Coal Refuse Disposal Control Act.

15. Persons who establish or operate a coal refuse disposal area must have a coal refuse disposal permit. 52 P.S. §30.54(a).

16. The solid waste permit authorizes the operation of a coal refuse disposal area.

17. To prove that a solid waste permit authorizes either the emission of fugitive air contaminants or the construction or operation of an air contamination source without a plan approval or permit, one must prove, among other things, that the landfill will emit air contaminants.

18. The Appellants have not proven that the solid waste permit here authorizes the emission of air contaminants.

19. A permit under the Surface Mining Conservation and Reclamation Act is required only for activities involving the extraction of coal or other minerals. Jay Township v. DER, 1992 EHB 1112.

20. The requirement in §105.17 of the dam safety regulations, 25 Pa. Code §105.17, that work within 300 feet of important wetlands must be necessary to realize public benefits and that those benefits outweigh any resulting damage to the wetlands, applies only to permits issued under 25 Pa. Code Chapter 105.

21. So long as a solid waste permit complies with the Solid Waste Management Act and the regulations promulgated pursuant to it, therefore, the permit complies with Article I, §27. National Solid Wastes Management Association v. Casey and DER, 143 Pa. Cmwlth. 577, 600 A.2d 260 (1991), aff'd, ___ Pa. ___, 619 A.2d 1063 (1993).

22. The Appellants have failed to show that the solid waste permit fails to comply with either the Solid Waste Management Act or the regulations promulgated pursuant to that act.

23. The Department did not abuse its discretion by assenting in the settlement agreement to allow Permittee three years to construct the leachate treatment facility.

O R D E R

AND NOW, this 7th day of November, 1994, it is ordered that:

1) the Appellants' appeal of the solid waste permit is sustained in part and the permit is suspended to the extent that it allows mine spoil to be placed on lands outside the mine.

- 2) the appeal of the NPDES permit is dismissed.
- 3) the appeal of the settlement agreement is dismissed.

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Richard S. Ehmman

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: November 8, 1994

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ALVIN AND LOIS LAMPENFELD

v.

**COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL RESOURCES**

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EHB Docket No. 94-268-E

Issued: November 9, 1994

**OPINION AND ORDER SUR
 TIMELINESS OF APPEAL**

By: Richard S. Ehmman, Member

Synopsis

Where appellants fail to timely file their appeal to this Board, the Board is deprived of jurisdiction to consider the merits of the appeal. Since the Board's jurisdiction cannot attach to an untimely appeal, the fact that the other potential parties to such an appeal were timely served copies of Appellants' Notice Of Appeal does not eliminate the time bar to our jurisdiction over this appeal.

Opinion

On October 5, 1994, this Board received a Notice Of Appeal on behalf of Alvin and Lois Lampenfeld ("Lampenfelds"). The Notice Of Appeal seeks to challenge Department of Environmental Resources' ("DER") decisions reflected in two letters from DER's Lawrence Busack, who is Chief of DER's Soils and Waterways Section office in Pittsburgh. The letters are dated July 5, 1994 and July 20, 1994. The letter of July 5, 1994 concerns the propriety of a DER permit issued to Raymond C. Seitz ("Seitz") for marina-type docks pursuant to the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, No. 325, as amended, 32 P.S. §693.1, and the apparent failure of the permittee to disclose riparian

right ownership interests in a third party during the permit application process. DER's letter of July 20, 1994 returns to Lampenfolds two permit applications which sought permits for encroachments in the same area already permitted to Seitz. Attached to the Notice Of Appeal are copies of postal receipts showing that copies of the Notice Of Appeal were served on DER and Seitz in August and September.

Because 25 Pa. Code §21.52 requires appeals to this Board, from DER's acts, to be filed here within thirty days of an appellant's receipt of notice of DER's action, and our date of receipt of these appeals appeared to exceed this period, we issued Lampenfolds a Rule To Show Cause why this appeal should not be dismissed as untimely filed.

On October 31, 1994, we received Lampenfolds' Response To Rule To Show Cause. It recites that Lampenfolds prepared and filed their Notice Of Appeal, serving DER on August 18 (Pittsburgh) and August 19 (Harrisburg). It says by inadvertence and clerical error, Lampenfolds served the Notice Of Appeal on DER's Harrisburg office in August rather than this Board. Lampenfolds' Response concludes that no parties were prejudiced by this inadvertent failure to file this appeal with this Board until October.

The only party injured by Lampenfolds failure to timely file their appeal with this Board is Lampenfolds, because an untimely filing deprives the Board of jurisdiction over that appeal. See 25 Pa. Code §21.52(a); Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976); Lebanon County Sewage Council v. DER, 34 Pa. Cmwlth. 244, 382 A.2d 1310 (1978); R.E.M. Coal Company v. DER, 1992 EHB 74. Here, even if Lampenfolds failed to receive copies of DER's letters until some date in August, the end of the period for filing a timely

appeal therefrom expired long before the October 5, 1994 date on which we received this appeal.

Lampenfelds' Response to our Rule implicitly admits their appeal was untimely but avers a lack of prejudice to others therefrom. This alleged lack of prejudice, even if it is true, is not sufficient to overcome this appeal's untimeliness. Rostosky v. DER, supra.

According to Lampenfelds' Response, their failure to file a timely appeal was due to clerical error or inadvertence. To the extent this is a request for leave to appeal in an untimely fashion, it must be denied. Clerical error or inadvertence does not constitute grounds for allowance of appeal *nunc pro tunc* either. Petromax, Ltd. v. DER, 1992 EHB 507. An appeal *nunc pro tunc* is allowable for fraud or a breakdown in the operation of this Board. Evergreen Association, et al. v. DER, 1993 EHB 443; Falcon Oil Co. v. Commonwealth, DER, 148 Pa. Cmwlth. 90, 609 A.2d 876 (1992).

Accordingly, there can be only one Order which can be entered in this appeal.¹ It is set forth below.

ORDER

AND NOW, this 9th day of November, 1994, it is ordered that this Board's Rule To Show Cause dated October 12, 1994 is made absolute and this appeal is dismissed.

¹We do not rule herein on the issue of the appealability of the DER letter, which Lampenfelds say is a refusal to revoke the permit issued to Seitz. However, if that is what Lampenfelds believe the July 5, 1994 letter does, then there is also a serious issue as to whether it is appealable to this Board. See Ralph D. Edney v. DER, 1989 EHB 1356.

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Administrative Law Judge
Member

DATED: November 9, 1994

cc: DER Bureau of Litigation:
(Library: Brenda Houck)
For the Commonwealth, DER:
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M. DIANE SMITH
 SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL RESOURCES

v.

HAROLD S. LANDIS

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 :
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 : EHB Docket No. 91-575-CP-MR
 :
 : Issued: November 15, 1994

ADJUDICATION

By: Robert D. Myers, Member

Synopsis

The Board issues an adjudication determining the amount of civil penalties where the issue of liability has already been established in a partial default adjudication. Where the defendant was not permitted to offer any evidence at the merits hearing on the amount of penalties to be assessed, as a sanction for his failure to comply with the Board's orders, and where the defendant fails to file any post-hearing brief, the Board has before it only the Department of Environmental Resources' (DER) evidence. DER's calculations and rationale are advisory only, however, and are neither accepted nor rejected. We conclude on the basis of the evidence that a total assessment of \$10,000 against the defendant is reasonable. We accordingly assess that total amount of civil penalties.

INTRODUCTION

This matter was initiated on December 19, 1991 by DER's filing of a complaint for civil penalties pursuant to the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. The complaint alleged

that Harold S. Landis (Landis) violated the Clean Streams Law and rules and regulations promulgated thereunder. This Board issued an Opinion and Order on September 10, 1992, entering a partial default adjudication which established Landis' liability for the violations alleged in the complaint. See DER v. Harold Landis, 1992 EHB 1174.

The Board held a hearing on November 30, 1993 to determine the amount of penalties to be assessed. Landis was barred, by a Board order issued March 23, 1993, from presenting any evidence at this hearing as a sanction pursuant to 25 Pa. Code §21.124 for his failure to comply with the Board's prior orders to him. By order issued January 12, 1994, the Board ordered each party to file its respective post-hearing brief. DER filed its post-hearing brief on February 9, 1994; Landis failed to file any post-hearing brief.

Any arguments not raised by the parties' 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. Plaintiff is DER, which instituted Counts I through III of its complaint pursuant to Section 605 of the Clean Streams Law, 35 P.S. §691.605. (Paragraph 1 of DER's complaint)

2. Defendant is Landis, whose address is 415 Rawlinsville Road, Willow Street, PA 17584. (Paragraph 3 of DER's complaint)

3. At the time of the incidents addressed in DER's complaint, Landis was the owner and operator of a farm located in Pequea Township, Lancaster County, on which he conducted a dairy and poultry operation. (Paragraph 4 of DER's complaint)

4. DER Water Quality Specialist Randy King inspected Landis' farm in July of 1985 in connection with manure run-off from the farm. (N.T. 11; C Ex. 1)¹

5. DER's Bureau of Water Quality Management sent Landis a follow-up letter, dated October 24, 1985, which stated that Landis was having a problem with manure run-off from his fields "due to over application and leakage during transport." This letter warned Landis that his improper manure handling would subject him to being fined pursuant to the Clean Streams Law, if any discharge of manure occurred into waters of the Commonwealth, and advised him to contact DER if he had any questions. (N.T. 11; C Ex. 1) Landis did not subsequently contact DER. (N.T. 11)

6. Water Quality Specialist King's June 26, 1986 inspection of Landis' farm revealed that the chicken manure storage lagoon had breached, causing 6,000 to 7,000 gallons of manure to discharge into Good's Run resulting in a fish kill and adversely affecting the stream for approximately three miles. (N.T. 11; C Ex. 3; Paragraph E of Exhibit B to DER's complaint)

7. DER requested Landis, by a letter dated July 8, 1986, to develop a manure management plan addressing his poultry and dairy operations and to submit a report to DER describing the steps Landis planned to take to prevent any future discharges of manure. (N.T. 11-12; C Ex. 3)

8. Landis failed to submit a manure management plan to DER in response to DER's July 8, 1986 letter. (N.T. 27)

9. Landis' chicken manure storage lagoon overflowed on or about October 7, 1989, resulting in a discharge of 2,000 gallons of manure into Goods Run, causing a fish kill and adversely affecting the stream for a distance of

¹"N.T." is a reference to the notes of testimony of the merits hearing held on November 30, 1993. "C Ex." is a reference to one of the Commonwealth's exhibits.

approximately three miles. (N.T. 13; paragraph 7 of DER's complaint; C Ex. 6)

10. DER, by a letter dated March 1, 1990, requested Landis to attend an administrative conference scheduled for March 9, 1990 to discuss a resolution of his manure management problems, and requested that he submit and implement a manure management plan. (N.T. 13; C Ex. 4)

11. Landis failed to appear at the DER conference and mistakenly appeared at the Lancaster County Conservation District Office on March 9, 1990. (N.T. 13-14; C Ex. 5)

12. DER rescheduled its meeting with Landis for March 16, 1990, by a letter dated March 13, 1990 which included directions to DER's office. (N.T. 14; C Ex. 5)

13. Landis failed to appear at the March 16, 1990 meeting. (N.T. 14)

14. DER issued an order to Landis on June 5, 1990, requiring Landis, inter alia, to prepare, submit to DER for approval, and implement a manure management plan. (N.T. 14; C Ex. 6) This DER order imposed requirements as to both Landis' chicken manure storage lagoon and his dairy manure storage pit. (N.T. 16; C Ex. 6)

15. Landis responded to DER's June 5, 1990 order with a hand-written note on the original cover letter of DER's June 5, 1990 order stating that the chicken house no longer existed. (N.T. 15)

16. Landis failed to appeal DER's June 5, 1990 order to this Board. (C Ex. 10)

17. Lee A. Yohn is a compliance specialist in DER's Bureau of Water Quality Management. Yohn drafted DER's complaint for civil penalties and calculated DER's civil penalty assessment request. (N.T. 7-8)

18. Yohn considered the severity of the discharge, the damage it caused, Landis' willfulness, and the site history pursuant to DER's guidance document entitled Civil Penalty Assessment Procedure for Pollution Incidents, and §605 of the Clean Streams Law. (N.T. 18-22; C Ex. 9)

19. As of the time of DER's complaint, Landis had neither developed any manure management plan nor taken any other measure necessary to manage the storage and disposal of manure generated on his farm, as required by DER's letter dated July 8, 1986 and DER's order issued June 5, 1990. (Paragraph 15 of DER's complaint)

DISCUSSION

The September 10, 1992 Opinion by the Board (1992 EHB 1174) established Landis' violations of the Clean Streams Law and his liability for civil penalties under §605 of that statute (35 P.S. §691.605), as alleged in DER's complaint. Based on that ruling, it is now our duty to consider the evidence offered by the parties at the merits hearing and exercise our discretion to determine the appropriate amount of such a penalty. DER v. Allegro Oil and Gas Company, 1991 EHB 821. Landis has abandoned any legal contentions regarding the relief sought by DER's complaint as he has failed to file a post-hearing brief. Lucky Strike, supra.

Under §605 of the Clean Streams Law, we may assess a maximum penalty of \$10,000 per day per violation of the Clean Streams Law. Section 605 also directs us to consider the willfulness of the violation, the damage or injury to the waters or the use of the waters of the Commonwealth, the costs of restoration, and other relevant factors. DER v. Canada-PA, Ltd., 1989 EHB 319.

Count I of DER's complaint seeks an assessment of civil penalties in the amount of \$4,500 for the October 7, 1989 overflow of the chicken manure storage

lagoon which resulted in a discharge of approximately 2,000 gallons of manure into Goods Run, causing a fish kill and adversely affecting the stream for a distance of approximately three miles. DER alleges this incident was a violation of §§201, 202, and 611 of the Clean Streams Law, 35 P.S. §§691.201, 202, and 611. Count II of DER's complaint seeks an assessment of civil penalties in the amount of \$500 against Landis for his failure to notify DER of the pollution incident on October 7, 1989. DER's complaint asserts Landis' failure to notify DER of this incident was a violation of 25 Pa. Code §101.2(a) and §611 of the Clean Streams Law, 35 P.S. §691.611. Count III of DER's complaint seeks an assessment of \$5,000 in civil penalties against Landis. In Count III, DER alleges that since July 8, 1986, Landis has failed to develop plans and take other measures necessary to manage the storage and disposal of the manure generated on the Landis farm in a manner so as to prevent the manure from reaching the waters of the Commonwealth, as required by DER's July 8, 1986 letter and DER's June 5, 1990 order. DER further alleges at Count III that Landis' prolonged failure to take all necessary measures to prevent polluting substances from reaching waters of the Commonwealth constituted a violation of 25 Pa. Code §101.3(a), and that Landis' failure to comply with a DER order constituted unlawful conduct under §611 of the Clean Streams Law, 35 P.S. §691.611.

Lee A. Yohn, who is a compliance specialist in DER's Bureau of Water Quality Management, drafted DER's complaint in this matter and calculated DER's civil penalty assessment request. In arriving at the proposed civil penalty assessment amounts, Yohn followed DER's guidance document entitled Civil Penalty Assessment Procedure for Pollution Incidents. He considered the severity of the discharge, the damage it caused, Landis' willfulness, and the site history pursuant to this guidance document and §605 of the Clean Streams Law. Following

this procedure, Yohn came up with a proposed penalty of \$4,500 for Count I, \$500 for Count II and \$5,000 for Count III, a total of \$10,000.

In proceedings like this, where the Board has the statutory power to assess the civil penalties in the first instance, DER's calculations and claims for relief are advisory only. As a result, we will not discuss DER's rationale or consider its applicability to this proceeding. We agree, nonetheless, that a civil penalty assessment in the amount of \$10,000 is fair and reasonable. Landis was, at least, reckless in connection with the October 7, 1989 spill incident. As we have explained in past decisions, recklessness is demonstrated by a conscious disregard of the fact that one's conduct may result in a violation of the law. See Canada-PA, 1989 EHB at 324. Landis was warned by DER prior to the 1989 incident, in 1985 and 1986, that his improper handling of his farm manure could lead to a violation of the Clean Streams Law and prior spills had occurred in 1985 and 1986, yet Landis failed to address the problem. DER's evidence also shows that there was harm to the waters of the Commonwealth from the October 7, 1989 spill. This incident involved a large amount of polluting substance being discharged from Landis' farm, causing a fish kill and adverse impact to over three miles of stream. Section 605 of the Clean Streams Law allows us to assess a maximum civil penalty of \$10,000 per day per violation. We believe that a total civil penalty assessment of \$10,000 is appropriate according to the evidence.

A total civil penalty of \$10,000 is accordingly assessed against Landis for his violations of the Clean Streams Law.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter of this complaint for civil penalties.

2. The Board has the authority to assess civil penalties under Section 605 of the Clean Streams Law, 35 P.S. §691.605.

3. The discharge from Landis' chicken manure storage lagoon of over 2,000 gallons of manure into Goods Run on October 7, 1989 was a violation of the Clean Streams Law. See 1992 EHB 1174.

4. A total civil penalty in the amount of \$10,000 is reasonable under §605 of the Clean Streams Law.

ORDER

AND NOW, this 15th day of November, 1994, it is ordered that civil penalties are assessed against Harold S. Landis in the total amount of \$10,000 for violations of the Clean Streams Law. This amount is due and payable immediately into the Clean Water Fund. The Prothonotary of Lancaster County is ordered to enter the full amount of the civil penalty as a lien against any property of Harold S. Landis, together with interest at a rate of 6% per annum from the date hereof. No costs may be assessed upon the Commonwealth for entry of the lien on the docket.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member


RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: November 15, 1994

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present controversy originated with the April 19, 1994, notice of appeal filed by Mountain View Reclamation, a Division of Community Refuse, Limited (Mountain View) and Geological Reclamation Operations and Waste Systems, Inc. (GROWS) from the Department's March 18, 1994, refusal to refund the §701(a) recycling fees paid by Mountain View and GROWS for ash from a resource recovery facility in Camden, New Jersey (Camden incinerator).

GROWS filed a motion for partial summary judgment and supporting memorandum of law on August 3, 1994. After several extensions of time, the Department filed its response, as well as a memorandum of law in opposition to partial summary judgment, on October 21, 1994. GROWS filed a memorandum in reply to the Department's response on October 31, 1994.

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. Dept. of Environmental Resources, 138 Pa.Cmwlth. 534, 588 A.2d 1001 (1991), *appeal dismissed*, ___ Pa. ___, 632 A.2d 308 (1993).

The following material facts are not in dispute. Mountain View and GROWS both operate landfills which dispose of ash from the Camden incinerator. On January 20, 1993, Mountain View paid the Department a recycling fee for 15,152.29 tons of Camden incinerator ash it accepted between October 12 and December 31, 1992, and GROWS paid a fee for 11,934.68 tons of Camden incinerator ash it accepted during the month of December, 1992. GROWS paid an additional fee on April 20, 1993, for 27,927.22 tons of Camden incinerator ash it accepted between January 1 and March 31, 1993 (Notice of Appeal; Parties' July 22, 1994,

Joint Stipulation of Facts).

Pursuant to §702(e) of Act 101,¹ on October 19, 1993, Mountain View and GROWS petitioned the Department for a refund of these fees (*Id.*). Citing the Board's decision in Community Refuse, Ltd., et al. v. DER, 1992 EHB 1653, which held that §701(a) does not impose a recycling fee on ash from an out-of-state resource recovery facility, Mountain View and GROWS argued the Department lacked the authority under §701(a) to collect a recycling fee for the Camden incinerator ash (Notice of Appeal). The Department disagreed and denied their petition in a letter dated March 18, 1994. The Department asserted, first, that the petition was untimely with respect to the January 20 payments and, second, that the Department had the authority under 25 Pa.Code §273.315(d), Community Refuse notwithstanding, to assess a recycling fee (*Id.*). This timely appeal followed.

The Parties' Positions

In this motion for partial summary judgment, GROWS requests that the Board declare 25 Pa.Code §273.315(d) to be invalid and order the Department to refund the recycling fee paid by GROWS for the 27,927.22 tons of Camden incinerator ash it accepted between January 1 and March 31, 1993.² GROWS believes this issue is controlled by §701(a) of Act 101, which states, in

¹Section 702(e) states: "Any operator that believes he has overpaid the recycling fee may file a petition for refund to the department. If the department determines that the operator has overpaid the fee, the department shall refund to the operator the amount due him, together with interest at a rate established pursuant to section 806.1 of the act of April 9, 1929 (P.L. 343, No. 176), known as The Fiscal Code, from the date of overpayment. No refund of the recycling fee shall be made unless the petition for the refund is filed with the department within six months of the date of the overpayment."

²GROWS has only moved for summary judgment with respect to its request for a refund of the recycling fee it paid on March 31, 1993, for the ash it accepted in the beginning of 1993. The Board, therefore, is not resolving the remainder of GROWS' and Mountain View's appeal concerning their request for a refund of the recycling fees they paid on January 20, 1993, for the ash they accepted at the end of 1992.

relevant part:

There is imposed a recycling fee of \$2 per ton for all solid waste processed at resource recovery facilities and for all solid waste except process residue and nonprocessable waste from a resource recovery facility that is disposed of at municipal waste landfills.

35 P.S. §4000.701(a). Given the Board's decision in Community Refuse, as well as the plain language of §701(a), GROWS argues the Department has no authority to impose a recycling fee on ash disposed of in a municipal waste landfill, regardless of the ash's origin. As a result, 25 Pa.Code §273.315(d), which imposes a recycling fee on ash from a resource recovery facility that did not pay a recycling fee on the solid waste it processed, is outside the scope of §701(a) and, therefore, invalid. Because the Department lacks the authority to collect a recycling fee for the Camden incinerator ash, GROWS contends it is entitled to a refund of the fee paid to the Department and its motion for partial summary judgment must be granted.

Despite the Board's decision in Community Refuse, the Department nevertheless believes that it has the authority to impose a recycling fee on the Camden incinerator ash. In support, the Department cites its own regulation, 25 Pa.Code §273.315(d), which states, in relevant part:

The recycling fee is not applicable to process residues from resource recovery facilities which have paid or will pay, in the next calendar quarter, the recycling fee on the waste from which that process residue is derived.

25 Pa.Code §273.315(d). The Department contends the Board's decision in Community Refuse was in error and should now be reconsidered. According to the Department, the purpose of the process residue exemption in §701(a) is merely to ensure that the recycling fee is not paid twice for the same solid waste: once when the solid waste is processed by a resource recovery facility; and once when

the ash from the resource recovery facility is disposed of in a municipal waste landfill. If a resource recovery facility did not pay the recycling fee on the solid waste it processed, the Department argues, there is no reason to exempt that process residue from the recycling fee. Because §701(a) imposes a recycling fee on ash from a resource recovery facility that did not pay the recycling fee on the solid waste from which the ash was derived, §273.315(d) is within the scope of §701(a) and, therefore, valid. Accordingly, the Department contends GROWS' is not entitled to a refund and its motion for partial summary judgment must be denied.

The Validity of 25 Pa.Code §273.315(d)

Because 25 Pa.Code §273.315(d) clearly imposes a recycling fee on ash from a resource recovery facility, such as the Camden incinerator, that did not pay a recycling fee on the solid waste from which the ash was derived, the primary question raised by this motion is whether §273.315(d) is a valid regulation.³

There is no dispute that the Department is authorized to adopt all regulations necessary to accomplish the purposes and carry out the provisions of Act 101. See, 52 P.S. §§4000.301(1) and 302. The Department's regulations under Act 101 are, therefore, legislative in nature. See, Pennsylvania Human Relations Commission v. Uniontown Area School District, 455 Pa. 52, ___, 313 A.2d 156, 169-170 (1973). Because they are legislative in nature, the Department's regulations under Act 101 are valid as long as they are: within the powers granted the

³GROWS correctly pointed out in its memorandum of law that Act 101 is not listed in the *Pennsylvania Code* as authority for §273.315(d). The Department responds that this information was inadvertently deleted during publication and supplied a copy of the final rulemaking, which was submitted to the *Pennsylvania Code*, as support. For purposes of this motion, the Board accepts the Department's response and will treat §273.315(d) as if it was adopted pursuant to the Department's authority under Act 101.

Department under Act 101; issued pursuant to proper procedure; and reasonable. *See, Id.* Since GROWS does not assert that 25 Pa.Code §273.315(d) was improperly issued or is unreasonable, the Board will focus its attention on the powers granted the Department under Act 101.

It is axiomatic that an administrative agency's powers are not unlimited. An agency may only exercise those powers that have been conferred upon it by the legislature in clear and unmistakable language or that must be necessarily implied. *See, Pennsylvania Medical Society v. Cmwlth., State Bd. of Medicine, 118 Pa.Cmwlth. 635, ___, 546 A.2d 720, 722 (1988); Costanza v. Dept. of Environmental Resources, 146 Pa.Cmwlth. 588, 606 A.2d 645 (1992).*

In the present matter, both parties concede that the recycling fee at issue here is imposed by §701(a) of Act 101. This section clearly and succinctly imposes a recycling fee on: all solid waste processed at resource recovery facilities; and all solid waste received for disposal at municipal waste landfills, except for process residue and nonprocessable waste received from a resource recovery facility. 53 P.S. §4000.701(a). Because the language of §701(a) is clear and unambiguous, the Board has already decided that it does not impose a recycling fee on ash from a resource recovery facility that did not pay a recycling fee on the solid waste from which the ash was derived. Community Refuse, 1992 EHB at 1660.

In Community Refuse, the issue before the Board was whether §701(a) imposed a recycling fee on ash from the Camden incinerator. 1992 EHB at 1654. In deciding that §701(a) did not impose such a fee, the Board relied on a fundamental rule of statutory construction: when the words of a statute are clear and unambiguous, it is not necessary to inquire into its purposes or the legislature's intent. 1992 EHB at 1657. *See also*, 1 Pa.C.S. §1921(b); Modern

Trash Removal of York, Inc. v. Dept. of Environmental Resources, 150 Pa.Cmwlth. 101, ___, 615 A.2d 824, 826 (1992). Because §701(a) clearly does not impose a recycling fee on ash from a resource recovery facility, the Board found that there was no distinction in §701(a) between ash from an in-state resource recovery facility, which pays the recycling fee on the solid waste it processes, and ash from an out-of-state facility, which does not pay the recycling fee on the solid waste it processes. 1992 EHB at 1660. The Board also considered and rejected the Department's argument that such a construction of §701(a) does not give effect to the legislature's intent.

If, as the Department asserts, the intention of the legislature in drafting §701(a) was to avoid having the recycling fee imposed on the same waste twice, it could easily have worded §701(a) to exclude from payment any waste for which the fee had already been paid. However, the legislature did not adopt this language, and we may not redraft the statute to read this intent into §701(a).

1992 EHB at 1661. Accordingly, the Board entered summary judgment in favor of the appellant and ordered the Department to refund the recycling fee the appellant paid for the Camden incinerator ash. 1992 EHB at 1664.

The Department, however, argues that the decision in Community Refuse was in error and should be reconsidered.⁴ In support, the Department offers no new legal principles or precedent, but instead merely raises the same arguments the Board has already considered and rejected. Because the Board is convinced that the reasoning in Community Refuse was sound and the scope of §701(a) was correctly decided, the Board refuses to revisit this issue. Although the Department's interpretation of a statute it enforces is generally entitled to deference, the Board may not defer to that interpretation where, as here, the

⁴To the extent the Department is asking the Board to reconsider its decision in Community Refuse, this request is untimely. See, 25 Pa.Code §21.122.

statute is clear. Cmwlth., Dept. of Environmental Resources v. Washington County, 157 Pa.Cmwlth. 1, __, 629 A.2d 172, 175, *appeal denied*, __ Pa. __, 631 A.2d 1011 (1993).

The recycling fee authorized by §701(a) is imposed on the disposal of all solid waste at a municipal waste landfill except for ash or nonprocessable waste from a resource recovery facility. Community Refuse, 1992 EHB at 1660. Because §701(a) does not impose a recycling fee on ash from a resource recovery facility that did not pay the recycling fee for the solid waste from which the ash was derived, 25 Pa.Code §273.315(d), which imposes such a fee, is outside the scope of Act 101. The Board finds, therefore, that §273.315(d) is invalid. See, Pennsylvania Medical Society, 118 Pa.Cmwlth. at __, 546 A.2d at 722.

As a result, the Department abused its discretion in denying GROWS's request for a refund of the recycling fee it paid for the 27,927.22 tons of Camden incinerator ash accepted for disposal at its municipal waste landfill between January 1 and March 31, 1993. See, City of Harrisburg, *supra*. The Department, therefore, is ordered to refund the recycling fee GROWS paid for that 27,927.22 tons of Camden incinerator ash. See, Community Refuse, 1992 EHB at 1664.

Since there is no genuine issue as to any material fact and GROWS is entitled to judgment as a matter of law, GROWS' motion for partial summary judgment is granted.

O R D E R

AND NOW, this 22nd day of November, 1994, it is ordered that:

1) GROWS' motion for partial summary judgment is granted;
and

2) The Department shall refund to GROWS the recycling fee GROWS paid for the 27,927.22 tons of Camden incinerator ash it accepted between January 1 and March 31, 1993.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmman

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: November 22, 1994

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M. DIANE SMITH
 SECRETARY TO THE BOARD

THOMAS KILMER

v.

COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL RESOURCES

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EHB Docket No. 91-355-W
 (Consolidated with 92-122-W)

Issued: November 23, 1994

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

By Maxine Woelfling, Chairman

Synopsis

A Department of Environmental Resources' (Department) letter notifying appellant that the Department had determined he was a large noncoal operator due to his direct business relationship with relatives is an appealable action, and appellant's failure to appeal that decision within 30 days of notification renders the Department's determination final.

The Department did not abuse its discretion in issuing a compliance order where appellant violated the Noncoal Surface Mining Conservation and Reclamation Act, the Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. §3301 *et seq.* (NSMCRA), as well as the terms and conditions of his permit.

The Board dismisses an appeal of a civil penalty assessment for lack of jurisdiction where the appellant does not present evidence to support his allegations that he is unable to prepay the assessment or post the security.

Appellant failed to sustain his burden of demonstrating that the noncoal regulations and the Department's actions resulted in a taking of his

property or a deprivation of due process.

INTRODUCTION

This matter was initiated by the August 27, 1991, filing of a notice of appeal by Thomas Kilmer (Kilmer). That appeal, which was docketed at No. 91-355-W, sought review of a July 31, 1991, compliance order (CO) in which the Department alleged that Kilmer violated conditions of his noncoal surface mining permit, as well as §§5(a) and 7(a) of the NSMCRA. On March 26, 1992, Kilmer filed a second notice of appeal at Docket No. 92-122-W, seeking review of a March 9, 1992, civil penalty assessed for the violations set forth in the CO. At the same time, Kilmer filed a motion to consolidate the appeals, as well as a motion to dispense with security. The Board consolidated the appeals at Docket No. 91-355-W in a May 27, 1992, order.

A hearing on the merits and Kilmer's motion to dispense with security was held on February 22, 1994, and the parties duly filed their post-hearing briefs. The Department also, as part of its post-hearing brief, filed a motion to dismiss Kilmer's appeal of the civil penalty assessment because of his failure to prepay the penalty or post security.

FINDINGS OF FACT

1. Appellant is Kilmer, an individual with an address of R.D.1, Nicholson, PA 18446. (Stip. No. 2)¹

2. Appellee Department is the agency with the duty to administer and enforce the provisions of NSMCRA, the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17, and the rules and

¹References to the transcript of the hearing on the merits are indicated by "N.T.____," to the Department's exhibits by "Ex.C____," and to the joint stipulation of the parties, filed on February 22, 1994, as "Stip. No.____."

regulations promulgated thereunder.

3. Kilmer operates a flagstone surface mine in Liberty Township, Susquehanna County, known as the Marcy Quarry, pursuant to small noncoal permit No. 58832501 (permit), which was issued by the Department on August 30, 1983. (Stip No. 4 and 5; Ex. C-9)

4. Kilmer held a small noncoal license, No. 4-00820. (Stip. No. 5)

5. By letter dated August 29, 1990, Michael Terretti, Chief, Compliance Section, Division of Monitoring and Compliance, Bureau of Mining and Reclamation, notified Kilmer that as a result of his direct business relationship with Jeff, Jacquelin, and Herbert Kilmer, the Department, pursuant to 25 Pa. Code §77.108(h), had determined he was a large noncoal operator and was, therefore, returning his application to renew his small noncoal operator's license. (Stip. No. 13; Ex. C-5; N.T. 26)

6. Kilmer received the Department's August 29, 1990, letter via certified mail on September 4, 1990. (Stip. No. 13; Ex. C-6)

7. Kilmer did not appeal the Department's August 29, 1990, letter to the Environmental Hearing Board. (Stip. No. 14; Ex. C-12; N.T. 26)

8. Kilmer's small noncoal license expired on October 31, 1990. (Stip. No. 17)

9. Kilmer did not apply for a large noncoal license. (Stip. No. 18)

10. On July 30, 1991, James McKenna, a Department Mine Conservation Inspector, conducted an inspection of the Marcy Quarry. (Stip. No. 19; N.T. 52)

11. Kilmer had a small noncoal permit but was mining over 2000 tons per year. (Ex. C-5)

12. Condition No. 3 of Kilmer's permit required that the operating face of the Marcy Quarry not exceed a height of 25 feet and that multiple benching be developed, as necessary. (Ex. C-9)

13. The July 30, 1991, inspection revealed that the height of the operating face exceeded 25 feet and there was no benching. (N.T. 64-65, 84, 88, 94; Ex. C-15, C-18(f)).

14. Kilmer's permit was for two acres. (N.T. 59, 86; Deposition of McKenna,² Ex. C-22, pp. 17 and 20)

15. McKenna and Stutzman found that approximately 15 acres were affected at the Marcy Quarry; the acreage affected included the spoil dumping area, the highwall area, and the area where the final cutting and placing of flagstone onto pallets took place. (N.T. 62, 84, 87 and 88; Deposition of McKenna, Ex. C-22, p.18)

16. Condition No. 4 of Kilmer's permit required reclamation to be conducted concurrent with mining--*i.e.*, one acre reclaimed for each acre affected. (Ex. C-9)

17. On the day of the inspection there was no evidence of reclamation being conducted, much less on an acre reclaimed per acre affected basis. (N.T. 65, 88; Deposition of McKenna, Ex. C-22, p.20)

18. As a result of the inspection, the Department issued a CO to Kilmer on July 31, 1991, citing him for the following violations: highwall exceeding 25 feet, failure to develop multiple benching, mining off permit, mining without a license, mining without a proper permit, and failure to keep reclamation current with mining. (Ex. C-15)

²The parties agreed that Mr. McKenna's deposition testimony could be entered into the record in lieu of his testifying at the hearing.

19. On August 2, 1991, the Department calculated a proposed civil penalty assessment of \$12,500 for the violations set forth in the CO. (Stip. No. 33)

20. On February 13, 1992, Department representatives and Kilmer attended a civil penalty assessment conference held pursuant to 25 Pa. Code §77.301(b). (Stip. No. 42)

21. An assessment conference is held either upon written request of the recipient of the proposed assessment or on the Department's own motion for the purpose of discussing the proposed assessment. (25 Pa. Code §77.301(b))

22. The Department did not modify the proposed assessment as a result of the conference, and, on March 9, 1992, issued a final civil penalty assessment of \$12,500 to Kilmer. (Stip Nos. 43-45; Ex. C-21)

23. Kilmer neither prepaid the assessment nor posted the security as required by NSMCRA, but he did file an application to dispense with security and to accept real estate for the appeal bond. (Stip. No. 77; N.T. 97)

24. Kilmer presented no evidence regarding his ability to prepay the civil penalty assessment or post security in accordance with NSMCRA and the regulations adopted thereunder.

DISCUSSION

This appeal does not present complex legal issues. The Board must determine whether the Department abused its discretion in issuing the CO to Kilmer, whether the Board has jurisdiction over Kilmer's appeal of the civil penalty assessment; and, if it has jurisdiction, whether the civil penalty assessment was an abuse of the Department's discretion. The Department bears the burden of proof regarding both the propriety of the CO, Al Hamilton Contracting Company v. DER, 1993 EHB 1651, and the propriety of the civil penalty assessment,

Delaware Valley Scrap Company, Inc. and Jack Snyder v. DER, 1993 EHB 1113.

Before addressing the CO and the civil penalty assessment we must consider the threshold issue of whether Kilmer is precluded from attacking the Department's determination, expressed in its August 27, 1990, letter returning Kilmer's application to renew his small noncoal operator's license, that Kilmer was a large noncoal operator. If that determination is final, Kilmer cannot contest the violations in the CO relating to his status as a large noncoal operator by asserting that he is not a large noncoal operator.

The Department's letter explains to Kilmer that because of his "direct business link" with Jeff, Herbert and Jacquelin Kilmer, all minerals produced by the four Kilmers will be added together to determine the total amount of annual mineral production. Having determined that the amount of mineral production by the Kilmers exceeded 2000 tons per year, the Department notified Kilmer that he must obtain a large noncoal operator's license and that his small noncoal operator's license renewal application was being returned. This letter of the Department's was an action, as defined in 25 Pa.Code §21.2(a), as it affected Kilmer's "personal or property rights, privileges, immunities, duties, liabilities or obligations." National Forge Company v. DER, 1993 EHB 1639. The Department's determination regarding Kilmer's status as a large noncoal operator became final when Kilmer did not appeal it to the Board (Finding of Fact 7) and, thus, Kilmer cannot now challenge that determination. New Hanover Corporation v. DER et al., EHB Docket No. 90-225-W (Opinion issued September 27, 1994).

Having disposed of this preliminary issue, we turn now to the CO. The Department contends that it has established the violations enumerated in the CO and, therefore, the issuance of the CO was not an abuse of discretion. Kilmer, on the other hand, argues that he did not commit any of the violations.

Under the NSMCRA and the regulations promulgated thereunder, a party must obtain a license and permit in order to conduct a noncoal surface mining operation in Pennsylvania. 52 P.S. §§3305(a) and 3307(a); 25 Pa. Code §§77.51, 77.101, and 77.108. Whether the license and permit should be "large" or "small" is determined by the amount of marketable minerals mined annually--small (2000 tons or less) and large (more than 2000 tons).³

Here, the Department has charged in the CO that Kilmer was mining without a license, much less the proper large noncoal license, and that he was mining without the requisite large noncoal permit. It has already been established that Kilmer, because of his relationship with Jeff, Herbert, and Jacquelin Kilmer, mined more than 2000 tons of marketable minerals per year. Therefore, he could only mine if he possessed a valid large noncoal license and large noncoal permit. Since he had no operator's license and a small noncoal permit, he was operating in violation of the licensing and permitting requirements of NSMCRA. The Department, then, was authorized to issue this portion of the CO by §11(b) of NSMCRA.

The remaining three violations in the CO pertain to violations of the terms and conditions of Kilmer's small noncoal permit. Section 7(a) of NSMCRA requires the operator of a noncoal surface mine to conduct his operations in accordance with the terms and conditions of his permit. Small noncoal permits have the conditions in 25 Pa. Code §77.108(e) incorporated by reference and also contain such other conditions as are necessary to assure compliance with NSMCRA and the implementing regulations, 25 Pa. Code §77.108(e)(11).

³The only differences between the small noncoal operator's license and the large noncoal operator's license are the application fee (52 P.S. §§3305(b)) and the public liability insurance requirements. Small noncoal operators are governed by the general permit requirements in 25 Pa. Code §77.108.

The Department asserts that Kilmer was mining off his permit. Kilmer's permit was limited to two acres (Ex. C-22), but the Department's inspection found that Kilmer had affected an area of approximately 15 acres (Finding of Fact 15).⁴ Kilmer had violated this condition of his permit and the Department's issuance of the CO on this basis was not an abuse of discretion.

The remaining two violations alleged by the Department are of standard conditions articulated at 25 Pa. Code §77.108(e)(3) and (4) and incorporated in all small noncoal permits. These conditions limit the operating face of a bench to a height of 25 feet, with multiple benching to be developed as necessary, and require concurrent reclamation. On July 30, 1991, the date of the inspection, the operating face was estimated by the Department's inspectors to exceed 40 feet (N.T. 65, 84, 88). Furthermore, there was no evidence of any reclamation, much less on an acre-per-acre basis (N.T. 65; Deposition of McKenna, p.20, Ex. C-18(a)-(f)). Therefore, Kilmer violated these terms and conditions of his permit, as well as 25 Pa. Code §77.108(e)(3) and (4), and issuance of the CO for these violations was not an abuse of discretion.

Before we address the propriety of the Department's March 9, 1992, civil penalty assessment for the violations cited in the CO, we must consider whether the Board has jurisdiction over Kilmer's appeal of the assessment. Section 21(b) of NSMCRA provides that anyone who wishes to contest a civil penalty assessment must either forward the amount of the penalty for placement in an escrow account during the pendency of the appeal or post an appeal bond. See *also*, 25 Pa. Code §77.302.

⁴The definition of "surface mining" in §3 of NSMCRA includes all activity connected with noncoal surface mining and would encompass Kilmer's spoil dumping and highwall areas, as well as that area where the flagstone is cut and placed on pallets.

Kilmer did not prepay the assessment or post a bond when he filed his appeal of the civil penalty assessment. He instead filed a motion to dispense with security, alleging that he could not submit the full amount of the assessment and did not have sufficient funds to obtain an appeal bond. He requested that the Board, pursuant to Pa.R.A.P. 1733(A) and 1737(1), either dispense with security or allow real estate in lieu of cash or a corporate surety bond. While the Pennsylvania appellate courts have not interpreted §22(b)(1) of NSMCRA, they have considered comparable provisions in the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.*, and concluded that where an appellant does not prepay a civil penalty assessment because of his alleged inability to do so, the Board must make findings⁵ regarding this issue before it can resolve the question of whether it has jurisdiction over the appeal of the assessment. Twelve Vein Coal Company v. Department of Environmental Resources, 127 Pa.Cmwlth. 430, 561 A.2d 1317 (1989), *allocatur denied*, ___ Pa. ___, 578 A.2d 416 (1990).

Kilmer was given the opportunity to present evidence regarding his ability to prepay the assessment or post a surety bond and did not present any evidence. Our only available course of action is to dismiss his appeal of the civil penalty assessment for lack of jurisdiction, as Kilmer waived all rights to contest the assessment.⁶ 52 P.S. §3222(b)(1).

Finally, before entering our order, we will address a number of constitutional challenges in Kilmer's post-hearing brief. Kilmer has contended that NSMCRA and its implementing regulations have taken his property without just

⁵This may require a hearing.

⁶As a result, we need not consider Kilmer's arguments concerning the validity of the assessment.

compensation and are violative of the Fourteenth Amendment. While the Board has no authority to decide the constitutionality of a statute, St. Joe Minerals Corporation v. Goddard, 14 Pa.Cmwlth. 624, 324 A.2d 800 (1974), it does possess the power to decide the constitutionality of a regulation. Croner Inc. v. Department of Environmental Resources, 139 Pa.Cmwlth. 43, 580 A.2d 1183 (1991). Moreover, regulations are presumed to be constitutional and the party challenging their constitutionality bears the heavy burden of rebutting that presumption by a clear, palpable, and plain demonstration. Ted Babich v. DER, EHB Docket No. 94-002-E (Adjudication issued September 9, 1994).

We have no difficulty in concluding that Kilmer has not met that burden here. There is a lengthy discussion in Kilmer's post-hearing brief of the bluestone quarrying industry and its economics; a comparison of Pennsylvania regulatory program with that of New York; and an abstract discussion of the takings issue. There is no attempt to apply the abstract constitutional principles to the Department's issuance of the compliance order to Kilmer and its assessment of civil penalties. Indeed, that would be difficult, for Kilmer presented no evidence in support of his taking assertions. As for his allegations that he was deprived of due process, he has not clearly articulated his argument, and it is not our task to do so for him. We do point out that Kilmer had the opportunity to contest the Department's determination that he is a large noncoal operator, and he did not avail himself of it. Although he did file a motion to dispense with the filing of security, he presented no evidence at the hearing on the issue to substantiate his claims of financial inability. Thus, we must enter the following order.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject

matter of this appeal.

2. In an appeal from a CO issued pursuant to NSMCRA the Department bears the burden of proving by a preponderance of the evidence that the CO was not an abuse of discretion. 25 Pa. Code §21.101(b)(3).

3. The Department's August 29, 1990, letter to Kilmer returning his application to renew his small noncoal operator's license and advising him that he was a large noncoal operator was a final, appealable action.

4. Because he did not appeal the Department's August 29, 1990, letter, Kilmer cannot collaterally attack the Department's determination that he was a large noncoal operator.

5. The Department sustained its burden of proving that Kilmer had violated NSMCRA, the rules and regulations adopted thereunder, and his noncoal permit.

6. The Department's issuance of the CO to Kilmer was not an abuse of discretion.

7. Kilmer failed to prepay the civil penalty assessment or post an appeal bond and presented no evidence to substantiate his allegations that he was unable to do so.

8. Kilmer waived his right to contest the civil penalty assessment, and the Board has no jurisdiction to hear his appeal of the assessment.

9. Kilmer failed to sustain his burden of demonstrating that the regulations implementing NSMCRA and the Department's actions were an unconstitutional taking or a deprivation of due process of law.

O R D E R

AND NOW, this 23rd day of November, 1994, it is ordered that the appeals of Thomas Kilmer 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. Ehmman

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: November 23, 1994

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M. DIANE SMITH
 SECRETARY TO THE BOARD

GEORGE LECK & SON, INC. :
 :
 v. : EHB Docket No. 93-150-MR
 :
 COMMONWEALTH OF PENNSYLVANIA :
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: November 23, 1994

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

By Robert D. Myers, Member

Synopsis

The Board upholds the assessment of a \$300 civil penalty under the Solid Waste Management Act for the transportation of municipal solid waste without a waterproof cover as required by the regulations. Although fabricated of waterproof materials (polyvinyl chloride coating), a cover is not waterproof unless it prevents permeation by water. The cover in question was of a mesh size that water would pass through it.

Procedural History

Appellant, George Leck & Son, Inc., filed a Notice of Appeal on June 11, 1993 seeking Board review of a Civil Penalty Assessment in the amount of \$300 issued by the Department of Environmental Resources (DER) for alleged violations 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 Municipal Waste Planning, Recycling and Waste Reduction Act (Act 101), Act of July 28, 1988, P.L. 556, 53 P.S. §4000.101 *et seq.*

A hearing was held in Harrisburg on February 1, 1994 before Administrative Law Judge Robert D. Myers, a Member of the Board, at which both parties were represented by legal counsel and presented evidence in support of their positions. DER filed its post-hearing brief on March 28, 1994. Appellant filed its post-hearing brief on April 27, 1994. The record consists of the pleadings, a partial stipulation of facts (Stip.), a transcript of 51 pages and 4 exhibits. After a full and complete review of the record, we make the following.

FINDINGS OF FACT

1. Appellant is a corporation doing business in Pennsylvania and having its principal place of business at 210 Durham Road, Newtown (Bucks County), PA 18940 (Stip.; Notice of Appeal).
2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the SWMA, Act 101 and the rules and regulations adopted pursuant to these statutes at 25 Pa. Code Chapter 285 (Stip.).
3. Appellant is a "person," as defined in Section 103 of the SWMA, 35 P.S. §6018.103, and in Section 103 of Act 101, 53 P.S. §4000.103, engaged in the transportation of solid waste within the Commonwealth of Pennsylvania (Stip.).
4. On September 2, 1992 Appellant's employee, Joseph P. Zenobio, transported municipal solid waste (construction/demolition waste) to the Tullytown Landfill, Bucks County, Pennsylvania, in a vehicle bearing Pennsylvania license plate YA66002 and owned by Appellant (Stip.; N.T. 10, 32).
5. On that date, as part of an ongoing program to monitor compliance with the Commonwealth's laws and regulations dealing with the transportation of municipal waste, DER inspected the said vehicle at the Tullytown Landfill (Stip.; N.T. 7-10).

6. The inspection disclosed, *inter alia*, that the municipal solid waste on said vehicle was covered with a tarp having a mesh size that, in the opinion of the inspector, would allow precipitation to pass through and enter the waste (N.T. 11-14).

7. The inspector issued a Notice of Violation (NOV) after concluding the inspection, citing Appellant for the improper tarp (Stip; N.T. 10-13; Exhibit C-1).

8. DER subsequently issued a Civil Penalty Assessment against Appellant, assessing \$300 for the improper tarp (Stip.; N.T. 15-16; Exhibit C-2).

9. The tarp used on Appellant's vehicle on the date in question, while coated with polyvinyl chloride, would allow water to pass through (N.T. 47-49; Exhibit A-1).

10. DER has not specified a mesh size that would be considered waterproof (N.T. 20).

11. The only tarp Appellant has found that is completely waterproof and yet strong enough to withstand hard use is too heavy for the driver to handle and too difficult to secure adequately (N.T. 43-46).

12. The \$300 civil penalty was appropriately and accurately calculated in accordance with DER's regulations and policies (Stip.).

DISCUSSION

DER has the burden of proof: 25 Pa. Code §21.101(b). To carry the burden DER must show by a preponderance of the evidence that the Civil Penalty Assessment was lawful and an appropriate exercise of its discretion: 25 Pa. Code §21.101(a). Since the amount of the penalty is not in dispute, our inquiry is limited solely to whether a violation has occurred for which a penalty can be assessed.

Section 610(4) of the SWMA, 35 P.S. §6018.610(4), makes it unlawful to transport solid waste contrary to the rules and regulations adopted pursuant to the SWMA. The transportation of municipal waste is governed by Subchapter B of Chapter 285 of DER's regulations at 25 Pa. Code. Section 285.211(a) requires that municipal waste "shall be completely covered during transportation and parking with a cover" that, *inter alia*, is "waterproof." This term is not defined, so its usual and accepted meaning applies. According to *Websters' Third New International Dictionary (1986)*, "waterproof" is "impervious to water: as covered or treated with a material ... to prevent permeation by water"

Appellant does not challenge the regulations and their requirement of a waterproof cover. Instead, it contends that the tarp in use on the day in question was waterproof, because it was fabricated from waterproof material (a coating of polyvinyl chloride). While the material used undoubtedly is important, the effectiveness of the material in preventing "permeation by water" is controlling. DER's inspector testified that water could pass through the tarp. Appellant's witness agreed, testifying on cross-examination that "it is like a screen door" (N.T. 48) and that "water would get through it" (N.T. 49). That being the case, the tarp violated the waterproof cover requirements of 25 Pa. Code §285.211(a) and Section 610(4) of the SWMA, 35 P.S. §6018.610(4).¹

The fact that DER has not specified a mesh size that would be acceptable is immaterial since the requirements of the regulations are clear and unambiguous. Likewise, the difficulties encountered by Appellant in using the only waterproof tarp it could find are immaterial because the evidence

¹Since the violation is clearly established under the regulations, DER's guidance document entitled Policy on Trashnet III and its validity are immaterial. Consequently, we will not discuss the issue.

goes to the reasonableness of the waterproof requirement, something Appellant did not challenge.

Section 605 of the SWMA, 35 P.S. §6018.605, authorizes DER to assess civil penalties up to a maximum of \$25,000 per offense for violations of the SWMA or the regulations. Clearly, DER had the statutory authority to assess the \$300 civil penalty involved here and did not abuse its discretion in doing so.

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 its assessment of a \$300 civil penalty against Appellant was lawful and an appropriate exercise of its discretion.

3. Appellant violated 25 Pa. Code §285.211(a) by transporting municipal solid waste with a cover that was not waterproof.

4. In violating 25 Pa. Code §285.211(a), Appellant violated §610(4) of the SWMA, 35 P.S. §6018.610(4).

5. In violating §610(4) of the SWMA, 35 P.S. §6018.610(4), Appellant became subject to the assessment of civil penalties under §605 of the SWMA, 35 P.S. §6018.605.

6. DER was legally authorized to assess the \$300 civil penalty and did not abuse its discretion in doing so.

ORDER

AND NOW, this 23rd day of November, 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. Ehmman

RICHARD S. EHMANN
Administrative Law Judge
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DATED: November 23, 1994

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M. DIANE SMITH
 SECRETARY TO THE BOARD

DAVID A. MURDOCH

v.

COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL RESOURCES
 and WARWICK TOWNSHIP, PERMITTEE

:
 :
 : EHB Docket No. 93-189-MR
 :
 :
 : Issued: November 29, 1994
 :

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

By Robert D. Myers, Member

Synopsis:

The Board upholds the issuance of a Permit under the Dam Safety and Encroachments Act, the Clean Streams Law, the Flood Plain Management Act and the Administrative Code for a municipally-owned linear park along the banks of a creek, involving minor regrading to facilitate construction of athletic fields, passive recreation areas and a parking lot but no structures. The Board holds that the Permit was properly processed and issued under the Small Projects provisions of 25 Pa. Code Chapter 105, that a permit was not required under Chapter 106, and that the surface of the parking lot was immaterial to DER's decision to issue the permit. The Board refuses to deal with an issue raised for the first time in a post-hearing brief.

Procedural History

David A. Murdoch (Appellant) filed a Notice of Appeal on July 16, 1993 seeking Board review of Water Obstruction and Encroachment Permit No. E36-532 (Permit) issued by the Department of Environmental Resources (DER) on June 21, 1993 to Warwick Township, Lancaster County (Permittee).

A hearing was held in Harrisburg on March 8, 1994 before Administrative Law Judge Robert D. Myers, a Member of the Board, at which all parties were represented by legal counsel¹ and presented evidence in support of their positions. Appellant filed his post-hearing brief on April 28, 1994. Permittee filed its post-hearing brief on May 27, 1994. DER filed its post-hearing brief on June 3, 1994. The record consists of the pleadings, a partial stipulation of facts (Stip.), a transcript of 203 pages and 16 exhibits. After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. Appellant is an individual residing at 220 East Market Street in the Borough of Lititz, Lancaster County (Notice of Appeal).
2. Permittee is a Township of the Second Class in Lancaster County and has its municipal office at 315 Clay Road, Lititz, PA 17543-0308 (Permit).
3. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Dam Safety and Encroachments Act (DSEA), Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 *et seq.*; the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*; the Flood Plain Management Act, Act of October 4, 1978, P.L. 851, as amended, 32 P.S. §679.101 *et seq.*; 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 adopted pursuant to these statutes.
4. On April 16, 1993 permittee filed with DER a "Small Project Permit" Application for the Construction of the Warwick Township Linear Park along Santo Domingo Creek (Exhibits T-1 and T-3).

¹Appellant, although appearing *pro se*, is an attorney.

5. The Application was submitted on a form specifically designed for Small Projects, as defined in 25 Pa. Code §105.1, and pursuant to a Small Projects procedure set forth in 25 Pa. Code §105.13(e) (N.T. 125-126; Exhibit T-1).

6. The proposed project involves the conversion of existing agricultural land (most recently planted in corn) into a linear park along Santo Domingo Creek and an unnamed tributary. Included are three soccer fields, a baseball field, a softball field, walking trails, a 76-car parking area and backstops. All of these facilities will be located within the 100-year floodplain along the east side of the Creek and some minor regrading will be necessary to construct them (Stip.; N.T. 23-24, 42-44; Exhibit T-1 and T-3).

7. The proposed project, which involves 10-12 acres, is part of a Master Plan for a 40-acre park to be developed jointly by Permittee and the Borough of Lititz (Stip.; N.T. 45-46).

8. Permittee's intention was simply to level the area by regrading, cutting the high points and filling the low points without adding any fill from off-site (Exhibit T-2).

9. With respect to the 76-car parking area, Permittee's intention was to provide a gravel surface, removing from the site an amount of soil equal to the amount of gravel (Stip.; Exhibit T-2).

10. The parking area, proposed to be placed within the 100-year floodplain, will not be within the floodway or the watercourse or a body of water (N.T. 104-105; Exhibit A-39).

11. No dams or impoundment structures are proposed (N.T. 105).

12. The proposed project is the type of project intended to be processed under the Small Projects provisions of Chapter 105 of 25 Pa. Code (N.T. 123-128; Exhibit A-41).

13. DER's Edward C. Rettinger, who reviewed the Application, concluded that the proposed project involved only a minor encroachment that would entail an insignificant impact on safety and protection of life, health, property and the environment (N.T. 77-78; Exhibit C-1).

14. Although there was no hydraulic study done or submitted, Rettinger concluded that the proposed project would not impact flood flows (N.T. 106; Exhibit C-1).

15. Based on Rettinger's conclusions, DER issued the Permit on June 21, 1993 as a Small Project pursuant to 25 Pa. Code §105.13(e) (Stip.; Exhibit T-3).

16. Subsequent to issuance of the Permit, the Zoning Hearing Board of the Borough of Lititz² rendered a decision granting certain special exceptions but imposing conditions that, *inter alia*, required the parking area to be paved (N.T. 35, 38-39).

17. Although DER issued the Permit on the representation of Permittee that the parking area would be gravel, the surface of the parking area was irrelevant to its decision. The Permit would still have been issued if the representations had been that the parking area would be paved (N.T. 90, 179).

18. Appellant presented no evidence to show that Rettinger's conclusions were unjustified.

DISCUSSION

Appellant has the burden of proof: 25 Pa. Code §21.101(c)(3). To carry the burden, Appellant must show by a preponderance of the evidence that DER acted

²Most of the proposed parking area is in the Borough.

unlawfully or abused its discretion in issuing the Permit: 25 Pa. Code §21.101(a). Issues not raised in post-hearing briefs are deemed waived: *Lucky Strike Coal Co. and Louis J. Beltrami v. Commonwealth, Dept. of Environmental Resources*, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988). This includes, in this appeal, Appellant's exceptions to certain rulings of the Administrative Law Judge during the hearing. None of them were raised in Appellant's post-hearing brief and, accordingly, will not be reviewed.

Small Projects, according to 25 Pa. Code §105.1, are "water obstructions or encroachments located in a stream or floodplain which will have an insignificant impact on safety and protection of life, health, property and the environment." What is proposed by the project involved here would not qualify as a "water obstruction" but would qualify as an "encroachment", using again the definitions in §105.1. DER concluded that the project's impact on safety and the protection of life, health, property and the environment would, indeed, be insignificant. This conclusion was based upon the minimal regrading proposed, the absence of any structures and the small size of the project in comparison to the entire watershed. Appellant, himself, presented this testimony through his own witness and did not contradict it by any other evidence. He is bound by it and the conclusion that flows from it - that the project was truly eligible for Small Project processing.

Appellant claims that, regardless of what was done pursuant to Chapter 105 of DER's regulations, a permit was required under Chapter 106. This Chapter is entitled Flood Plain Management whereas Chapter 105 is labeled Dam Safety and Waterway Management. There is some overlap since both Chapters seek to regulate activities and structures in or adjacent to bodies of water. Chapter 105 derives

its authority from the DSEA, the CSL and the Flood Plain Management Act. Chapter 106 cites the latter two statutes but not the DSEA.

Permits are required under §106.11 for highway obstructions or obstructions in a floodplain. These two terms are defined in §106.1 to include structures or activities "which might impede, retard, or change flood flows." DER's Rettinger concluded that there was nothing in the proposed project that would impact flood flows. That being the case, there was no basis on which to invoke Chapter 106. Appellant contends that Rettinger could not have reached this conclusion without a hydraulic study as required by §106.12(d)(4). DER and Permittee take the position that sound engineering judgment is all that is needed in a project like this where the changes to the floodplain are so minor. Permittee's engineering witness, Grant W. Hummer, went further and testified that nothing would be gained by a hydraulic study. It would probably show no change. Appellant did not present any evidence to counter this testimony and Rettinger's conclusion stands.³

Appellant attacks the Permit on the ground that DER thought the parking lot would be gravel but now it must be paved in order to comply with the decision of the Lititz Zoning Hearing Board. While the parties disagreed about the finality

³The evidence is unclear whether separate permits are required when Chapter 105 and Chapter 106 both apply. The Permit involved here was issued under the authority of the DSEA, the CSL, the Flood Plain Management Act and the Administrative Code of 1929, *supra*, indicating that the provisions of Chapters 105 and 106 of the regulations were both satisfied. 25 Pa. Code §105.21(b) provides that a permit issued under Chapter 105 "shall be subject to the general and special conditions...that [DER] may deem necessary to assure compliance with the requirements and purposes of...the Flood Plain Management Act...." 25 Pa. Code §106.24 requires DER to "establish a system to coordinate the application for and issuance of permits under [Chapter 106] with permit processes conducted under other statutes and regulations administered by [DER]....", developing joint application forms where possible. Since the parties did not discuss whether the Permit incorporates the provisions of both Chapter 105 and Chapter 106, we will not decide the issue. As noted in the text, the evidence is clear that a Chapter 106 permit was not required.

of the Zoning Hearing Board's decision, it is immaterial in the final analysis. Rettinger testified that the surface of the parking lot had no bearing on his decision. He would have issued the Permit regardless of whether the parking lot was going to be paved or left unpaved. Appellant did not counter this evidence.

Finally, Appellant argues that issuance of the Permit violated Article I, Section 27, of the Pennsylvania Constitution. This issue was not raised in the Notice of Appeal, in Appellant's Pre-hearing Memorandum or during the hearing. It first appears in Appellant's post-hearing brief. We have repeatedly held that issues raised in this manner will not be considered: See, e.g. *C&K Coal Company v. DER*, 1992 EHB 1261 at 1292-1293. We see no reason for departing from that principle here.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of the appeal.
2. Appellant has the burden of proving by a preponderance of the evidence that DER acted unlawfully or abused its discretion in issuing the Permit.
3. Appellant has waived exceptions to certain rulings during the hearing by not arguing them in his post-hearing brief.
4. The Board will not consider Appellant's argument that issuance of the Permit violated Article I, Section 27, of the Pennsylvania Constitution since it was raised for the first time in his post-hearing brief.
5. The project proposed by Permittee was properly processed by DER as a Small Project under Chapter 105 of 25 Pa. Code.
6. No permit was required for the proposed project under Chapter 106 of 25 Pa. Code.

7. The surface of the parking lot was immaterial to DER's decision to issue the Permit.

8. Appellant has failed to show that DER acted unlawfully or abused its discretion in issuing the Permit.

O R D E R

AND NOW, this 29th day of November, 1994, it is ordered that the appeal 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

DATED: November 29, 1994

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M. DIANE SMITH
 SECRETARY TO THE BOARD

LOWER PAXTON TOWNSHIP AUTHORITY, APPELLANT, :
 AND PAXTOWNE LIMITED PARTNERSHIP, et al., :
 INTERVENORS :

v. :

EHB Docket No. 94-167-MR

COMMONWEALTH OF PENNSYLVANIA, :
 DEPARTMENT OF ENVIRONMENTAL RESOURCES, :
 APPELLEE, AND SWATARA TOWNSHIP AUTHORITY, :
 INTERVENOR :

NORMAN DESOUZA et al. :

v. :

EHB Docket No. 94-291-MR

COMMONWEALTH OF PENNSYLVANIA, :
 DEPARTMENT OF ENVIRONMENTAL RESOURCES :

Issued: December 1, 1994

**OPINION AND ORDER SUR
 PETITIONS FOR SUPERSEDEAS**

By Robert D. Myers, Member

Synopsis:

Where DER approves a plan and schedule to eliminate excess flows in a hydraulically overloaded sewer system and, in the process, modifies the total prohibition on connections by allowing 90 connections during a seven-month period, developers who claim irreparable harm by reason of the ban are not entitled to a supersedeas. The purpose of a supersedeas is to preserve the lawful *status quo* existing prior to the contested action; it cannot be used to obtain affirmative, corrective action such as an increase in the number of connections. Since no appeal was taken from DER's original action determining that a hydraulic overload existed, that determination is final and binding on the parties and cannot be collaterally attacked in these appeals. As such, that

action created the lawful *status quo* that existed prior to the approval of the plan and schedule.

DECISION

Lower Paxton Township Authority (LPTA) filed a Notice of Appeal on June 30, 1994 challenging the conditions of a May 31, 1994 letter of the Department of Environmental Resources (DER) approving LPTA's Plan and Schedule to Reduce Hydraulic Overloading of the Beaver Creek Interceptor. The Plan and Schedule, dated April 18, 1994 with supplements dated May 15 and May 24, 1994, were submitted in response to DER's letter of April 8, 1994 stating that the hydraulic carrying capacity of the Beaver Creek Interceptor was being exceeded and that LPTA should take action pursuant to 25 Pa. Code §94.21. That action included a prohibition on new connections to the Interceptor and the submission of a plan and schedule for correcting the condition.

On July 1, 1994 Paxtowne Limited Partnership, Locust Lane Limited Partnership, Fine Line Homes, Inc., Kings Crossing, Inc. and Stratford Homes, Inc. (Developers) petitioned to intervene as parties Appellant, alleging substantial economic harm and denial of constitutional rights by DER's action. On July 27, 1994 Swatara Township Authority (STA) petitioned to intervene as a party Appellee, alleging that LPTA's exceedances were causing violations of an Intermunicipal Agreement and of STA's NPDES permit for a sewage treatment plant handling flows from the Borough of Hummelstown and from portions of Swatara Township and portions of Lower Paxton Township. Both the Developers and STA were permitted to intervene by a Board Order issued August 30, 1994.

On October 28, 1994 the Developers filed a combined Motion for Leave to Join Lower Paxton Township and Motion for Supersedeas. The first Motion is being handled separately; the second is the subject of this Opinion and Order.

Also on October 28, 1994 Norman DeSouza, Paxtowne Limited Partnership and Locust Lane Limited Partnership; John L. Schilling, Fine Line Homes, Inc.; and John E. Glise, Kings Crossing, Inc. and Stratford Homes, Inc. (the Developers and a principal of each) filed a Notice of Appeal at Board Docket No. 94-291-MR, challenging DER's refusal (orally on October 17, 1994 and confirming letter on October 25, 1994) to authorize Lower Paxton Township to issue 90 additional connection permits immediately. In their Notice of Appeal, these Appellants (collectively referred to in both appeals as the Developers) requested consolidation with this proceeding (Board Docket No. 94-167-MR) and accelerated supersedeas disposition. While the consolidation request has been handled separately (and is still pending), the request for supersedeas disposition was treated in conjunction with the pending Motion for Supersedeas at Board Docket No. 94-167-MR. A hearing on both was scheduled for November 16, 1994.

Prior to the hearing, STA filed on November 3, 1994 a Response to the Motion for Supersedeas and a Motion for Denial of Supersedeas Without a Hearing. DER filed a similar Motion the following day and an Answer to the Motion for Supersedeas on November 15, 1994. Also on November 15, 1994 the Developers and LPTA filed Responses to STA's and DER's Motions for Denial of Supersedeas Without a Hearing. DER, also on November 15, 1994, filed a Motion to Limit Issues at Supersedeas Hearing.

The Supersedeas hearing was held in Harrisburg on November 16, 1994 before Administrative Law Judge Robert D. Myers, a Member of the Board, at which all parties appeared by legal counsel and presented evidence in support of their positions. Because Judge Myers had not had time prior to the hearing to consider fully the host of documents filed on the previous day, he denied the Motions for Denial of Supersedeas Without a Hearing and denied DER's Motion to Limit Issues

at Supersedeas Hearing, agreeing, however, to consider these Motions as part of the decision on the Supersedeas.

Post-hearing briefs were filed on November 23, 1994 by DER, STA and LPTA. The Developers filed their post-hearing brief on November 28, 1994, beyond the deadline set by the Board. Although this brief should not be considered in fairness to the other parties who filed on time, we have excused the tardiness and have considered the brief.

Chapter 94 of DER's regulations at 25 Pa. Code is entitled Municipal Wasteload Management. The purpose of Chapter 94, as stated in §94.2, is to require owners and operators of sewerage facilities to manage wasteloads in order, *inter alia*, to "prevent the occurrence of overloaded sewerage facilities" and to "limit additional extensions and connections to an overloaded sewer system or a sewer system tributary to an overloaded plant." An annual report is required by §94.12 to enable DER to review "the load on sewerage facilities." This comprehensive report includes hydraulic loading and organic loading data and projections, along with a plethora of other information.

If the annual report shows or if DER determines that an overload currently exists or is projected to occur within 5 years, §94.21 and §94.22 impose important duties upon the permittee. In addition to planning for additional capacity, the permittee must prohibit new connections to currently overloaded facilities (§94.21(a)(1)) and limit new connections to projected overloaded facilities (§94.22(2)). If the permittee fails to take these steps, DER may impose a ban on connections (§94.31).

On April 8, 1994 DER sent a letter to LPTA stating that, based upon observations of DER personnel, discussions with LPTA officials and entries in the 1993 annual report, it is apparent that the Beaver Creek Interceptor is

hydraulically overloaded currently. The letter then listed LPTA's duties under 25 Pa. Code §94.21 - (1) prohibit new connections, and (2) submit (within 90 days) a plan and schedule to reduce the overload and provide additional capacity. No appeals were filed with the Board from the issuance of this letter.

LPTA took the steps mandated by §94.21 and promptly submitted the Plan and Schedule for reducing Infiltration/Inflow¹ to its system. DER reviewed the Plan and Schedule and on May 31, 1994 issued the approval letter (the letter from which the appeal was taken). This letter, authorized by §94.21(b), modified the prohibition on new connections by allowing 90 EDUs² to be connected to the system during the period from May 31 to December 31, 1994. Connections beyond that number were to depend on documented evidence of LPTA's performance in eliminating excess flows.

It is clear that LPTA and the Developers were greatly distressed that DER made what to them seemed like such a minor modification to the connection prohibition. Apparently, they expected the prohibition to be lifted entirely or, at least, to the point where continued development would not be adversely affected. To them, the 90 EDUs represented only a fraction of what was needed to allow current developments to proceed. And since additional connections beyond the 90 EDUs were to depend on documented evidence that the Infiltration/Inflow abatement program was actually reducing excess flows, it could take a year or more to accomplish that. To the Developers, DER's partial

¹This term generally means the quantity of water entering a sewer system, Infiltration meaning entry through such sources as pipe joints and connections and Inflow meaning entry through service connections from devices such as cellar drains, storm drains, etc. See definition in *Environmental Engineering Dictionary*, Government Institutes, Inc. 1989.

²Equivalent Dwelling Units - a term used in the planning and design of sewage facilities, defined in 25 Pa. Code §71.1 to mean flows equal to 400 gallons per day.

modification of the prohibition raised the threat of economic disaster. That is why they sought to intervene and that is why they sought a supersedeas.

We have no doubt that the Developers will be adversely affected, to some degree, by the limitations on new connections. Whether they will suffer the dire consequences testified to at the hearing is far from certain. But even assuming that they will, what relief can we give them at this stage of the proceedings? What can we supersede? The only answer to this latter question is the action of DER forming the basis of the appeal. That action was the May 31, 1994 approval of LPTA's Plan and Schedule. If we supersede that action, we will leave the parties in the situation they were in prior to the approval - a total prohibition on connections pending approval of the Plan and Schedule. Even if we supersede only the portion of the approval action modifying the prohibition, we again leave the parties in a situation where the Plan and Schedule is approved but the total prohibition remains in effect.

LPTA and the Developers want us to revise the modification either to remove the prohibition entirely or to increase the number of EDUs to a much greater number. While we, in the exercise of our discretion, could do that as part of our final disposition of the appeal, we have no power to do it at the supersedeas stage. Consistent with long standing principles of law, we have held repeatedly that the purpose of a supersedeas is to preserve the lawful *status quo* while the appeal is proceeding to final disposition: *William Fiore, t/d/b/a Municipal and Industrial Disposal Company v. DER*, 1985 EHB 412; *Hepburnia Coal Company v. DER*, 1985 EHB 713; *Raymark Industries, Inc. v. DER*, 1986 EHB 176; *Joseph R. Amity, t/d/b/a Amity Sanitary Landfill v. DER*, 1988 EHB 766; *Empire Sanitary Landfill, Inc. v. DER*, 1991 EHB 102; *Neville Chemical Company v. DER*, 1992 EHB 926. As we noted in *Hepburnia Coal Company, supra*, quoting C.J.S.

Supersedeas §1, "The remedy...is usually regarded as injunctive or prohibitive in character, and not corrective; and it will not function as a writ of...mandamus." (1985 EHB 713 at 719)

The lawful *status quo* that existed before issuance of DER's May 31, 1994 letter was a total prohibition on connections, as noted earlier. We cannot alter that *status quo*, through the medium of a supersedeas, by removing or modifying the prohibition. That would constitute affirmative, corrective action beyond the scope of a supersedeas.

The Developers argue that DER's initial action on April 8, 1994, which brought about the prohibition, was not lawful (citing a variety of reasons) and that, therefore, the last lawful *status quo* was the position of the parties prior to issuance of the April 8, 1994 letter - unlimited connections. The argument fails principally because it constitutes a collateral attack on the April 8, 1994 action, an appealable action³ that is final and binding because it was not challenged by a timely appeal: *Commonwealth, Dept. of Environmental Resources v. Wheeling-Pittsburgh Steel Corporation*, 22 Pa. Cmwlth. 250, 348 A.2d 765 (1975), aff'd, 473 Pa. 432, 375 A.2d 320 (1977), cert. denied, 434 U.S. 969 (1977). Since it is final and binding, it is clearly lawful.

The alleged DER action in the second appeal (94-291-MR) was DER's refusal to approve 90 additional connections in October 1994. Here again, the lawful *status quo* that existed prior to that alleged action was that established by the May 31, 1994 letter - authorization to allow 90 EDUs to connect during the last seven months of 1994. We cannot, by virtue of a supersedeas, increase that number by the 90 additional connections the Developers sought and DER denied. To do so would amount to affirmative, corrective action which, as already noted,

³See *Westtown Sewer Company v. DER et al.*, 1992 EHB 979.

is beyond the scope of a supersedeas.

We appreciate the financial difficulties that the Developers may face because of their inability to connect to the system. We must point out, however, that those difficulties originated with the total prohibition which LPTA imposed upon receipt of DER's April 8, 1994 letter. Any harm which these businesses are faced with stems solely from that action. The May 31, 1994 action, if anything, alleviated some of that harm by allowing a limited number of connections to be made.

For the foregoing reasons, LPTA and the Developers are not entitled to a supersedeas. Because of our disposition of their supersedeas requests, we find it unnecessary to rule on other issues, substantive and procedural, raised by the parties.

O R D E R

AND NOW, this 1st day of December, 1994, it is ordered that the Petitions for Supersedeas are denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: December 1, 1994

cc: See next page for service list

EHB Docket Nos. 94-167-MR, 94-291-MR

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M. DIANE SMITH
 SECRETARY TO THE BOARD

JOSEPH F. CAPPELLI & SONS, INC.

v.

COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL RESOURCES

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EHB Docket No. 94-150-W

Issued: December 2, 1994

**OPINION AND ORDER SUR
 MOTION FOR PARTIAL JUDGMENT
ON THE PLEADINGS**

By: Maxine Woelfling, Chairman

Synopsis:

A motion for partial judgment on the pleadings is denied where the appellant raises valid objections in its notice of appeal and material issues of fact remain in dispute.

OPINION

This matter arose from two civil penalty assessments issued by the Department of Environmental Resources (Department) on June 1, 1994, to Joseph F. Cappelli & Sons, Inc. (Cappelli) for alleged violations of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §6018.101 *et seq.* (SWMA), the Municipal Waste Planning, Recycling and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, *as amended*, 53 P.S. §4000.101 *et seq.* (Municipal Waste Act), and the Department's regulations thereunder. Cappelli filed a timely appeal from these assessments on June 22, 1994, which it perfected on July 8, 1994.

Both civil penalty assessments allege that on May 5, 1994, Department inspectors observed Cappelli committing the following violations at the GROWS

Landfill in Bucks County and the Delaware County Resource Recovery Facility in Delaware County:

1. Failed to have proper identification with letters at least six (6) inches in height in violation of Section 1101(e) of the [Municipal Waste Act] and/or
2. Failed to have proper fire extinguishing equipment in violation of 25 PA Code Section 285.213 of the Rules and Regulations of the Department and/or
3. Failed to manage municipal waste during transportation, including parking, to prevent roadside littering, dust, leakage, attraction or harboring of vectors and the creation of other nuisances in violation of 25 PA Code Section 285.211(a).

(Notice of Appeal). The Department issued separate civil penalty assessments for the violations observed at each location. For the violations observed at the GROWS Landfill, the Department assessed a civil penalty of \$4,500, and for the violations observed at the Delaware County facility, the Department assessed a civil penalty of \$1,800 (Notice of Appeal).

Cappelli contends in its notice of appeal that the Department erred and abused its discretion in assessing a \$4,500 civil penalty for the violations observed at the GROWS Landfill. In support, Cappelli asserts that its trucks were properly identified, that its fire extinguishers were discharged only because of vibrations on the trucks, and that the leaking trailers resulted from excessive rain the day before, May 4, 1994.¹ Cappelli also contends the Department erred and abused its discretion in assessing a \$1,800 civil penalty

¹Of the \$4,500 total civil penalty, Cappelli alleges the Department assessed a civil penalty of \$2,400 for improper identification, \$600 for discharged fire extinguishers, and \$1,500 for leaking wastes. Nothing in the assessment suggests, however, that the Department broke down the civil penalty in this manner. The assessment merely states that of the \$4,500 total civil penalty, \$2,400 is for violations of the SWMA and \$2,100 is for violations of the Municipal Waste Act.

for the violations observed at the Delaware County facility. In support, Cappelli asserts that the trucks were owned and maintained by Waste Management of PA, Inc. and that the fire extinguishers were discharged only because of vibrations on the trucks.²

Currently before the Board is the Department's October 21, 1994, motion for judgment on the pleadings with respect to Cappelli's objections to the civil penalties assessed for the discharged fire extinguishers and the leaking trailers. The Department contends it is entitled to judgment on the pleadings because Cappelli admitted these violations in its notice of appeal and was only assessed a "*de minimis*" civil penalty of \$300 per violation. Since Cappelli admitted these violations, the Department argues that liability has already been established. Further, since Cappelli was only assessed a *de minimis* civil penalty for each violation, the Department argues a hearing on the merits would be "pointless." Cappelli has not filed a response to the Department's motion.

A motion for judgment on the pleadings is in the nature of a demurrer and is used to determine whether a cause of action, as pleaded, exists at law. Bensalem Twsp. School District v. Commonwealth, 518 Pa. 581, ___, 544 A.2d 1318, 1321 (1988); *see also*, Kerr v. Borough of Union City, 150 Pa.Cmwlth. 21, 614 A.2d 338 (1992), *appeal denied*, ___ Pa. ___, 627 A.2d 181 (1993). In resolving such a motion, the Board must accept as true all of the well-pleaded facts contained in the notice of appeal, and may not consider any facts not contained in the notice of appeal. Bensalem Twsp., 518 Pa. at ___, 544 A.2d at 1321; Winton

²In its notice of appeal, Cappelli suggests the \$1,800 total civil penalty comes from a civil penalty of \$600 for improperly identifying the trailer, \$900 for discharged fire extinguishers, and \$300 for leaking trailers. Again, there is no indication in the assessment that the Department broke down the civil penalties in this manner. The assessment merely states that of this amount, \$600 is for violations of the Municipal Waste Act and \$1,200 is for violations of the SWMA. *See*, note 1.

Consolidated Cos. v. DER, 1990 EHB 860, 864.³ The Board will enter judgment on the pleadings only if there are no material facts in dispute and a hearing is pointless because the law on the issue is clear. Winton, 1990 EHB at 864; see also, Kerr, 150 Pa.Cmwlth. at ___, 614 A.2d at 339. Since Cappelli's notice of appeal raises valid objections, and material facts remain in dispute, the Department's motion must be denied.

Fire Extinguisher Violations

Under 25 Pa.Code §285.213(a)(1)(i), the equipment used to collect and transport municipal waste must have a fire extinguisher that is: labeled or marked with a U.L. rating; securely mounted and readily accessible; and designed, constructed, and maintained to permit a visual determination of whether it is fully charged. With respect to the civil penalties for the discharged fire extinguishers, Cappelli asserts in the notice of appeal:

The \$600.00 assessment for failure to have proper fire extinguishing equipment is correct. The extinguishers were discharged. The discharged reading is caused by the vibrations of the truck and not by use. We have an active program to keep these extinguishers charged but it remains a problem. Per Company Rules and Regulations these fines are the responsibility of the driver of the truck and I am petitioning on behalf of these drivers for relief from these fines.

The \$900.00 assessment for failure to have proper fire extinguishing equipment is correct and I am petitioning on behalf of our drivers as outlined above.

(Notice of Appeal). Accepting the facts averred by Cappelli as true, and construing the allegations broadly, see, Croner, Inc. v. Cmwlth., Dept. of Environmental Resources, ___ Pa.Cmwlth. ___, ___, 589 A.2d 1183, ___, (1991), it is clear that Cappelli has admitted the extinguishers were discharged as alleged

³Although a notice of appeal is technically not a "pleading" under Pa.R.C.P. 1019(a), the Board treats it as such for purposes of a motion for judgment on the pleadings. Huntingdon Valley Hunt v. DER, 1993 EHB 1533, 1538, note 4.

in the civil penalty assessment. It is also clear, however, that Cappelli does not believe the amount of civil penalty was correct, since the vibrations of the truck made it difficult to keep the extinguishers fully charged. In other words, the Board finds, Cappelli is arguing that the Department abused its discretion in setting the amount of civil penalty for the discharged extinguishers.

The Department responds to this argument by claiming it could not have abused its discretion in setting the amount of civil penalty, since that amount was "*de minimis*." In raising this argument, however, the Department relied on the worksheet it uses to calculate civil penalties. Because this worksheet is not contained in the notice of appeal, it may not be considered in resolving this motion. See, Bensalem Twp., 518 Pa. at ___, 544 A.2d at 1321.⁴ The Board finds, therefore, that Cappelli raised a valid objection to the civil penalties assessed for the discharged fire extinguishers.

Leaking Trailer Violations

Under 25 Pa.Code §285.211(a), municipal waste must be completely covered during transportation and parking with a cover that is: waterproof; securely fastened; and eliminates the potential for roadside littering, dust, leakage, discharge, attraction or harboring of vectors, and other nuisances. With respect to the civil penalties for leaking trailers observed at the GROWS Landfill, Cappelli asserts in the notice of appeal:

The \$1,500.00 assessment for leaking loads is a result of the timing of these inspections. It rained the day

⁴In raising this argument, the Department appears to be moving for summary judgment instead of for judgment on the pleadings. Although both result in summary disposition, when resolving a motion for judgment on the pleadings a tribunal is limited to what is contained on the face of the pleadings. Summary judgment, on the other hand, allows a tribunal to consider additional evidence, contained in deposition testimony, admissions, affidavits, etc., to determine whether any issues of fact exist even though the pleadings were sufficient on their face. See, Huntingdon Valley Hunt, 1993 EHB at 1539.

before the inspection. This significantly increases the moisture of the waste being hauled and results in excess water draining from the trailer. We petition for a reduction in this assessment.

(Notice of Appeal). Assuming the facts set forth in the notice of appeal are true, the waste was wet before it was collected and the leakage resulted from that moisture. Although Cappelli does admit the trailer was leaking, it argues that the Department abused its discretion in setting the amount of civil penalty, since the moisture in the waste did not occur as a result of a violation of 25 Pa.Code §283.211(a). The Board finds, therefore, that Cappelli has also raised a valid objection to the civil penalties assessed for the leaking trailers observed at the GROWS Landfill.

With respect to the civil penalty for the leaking trailer at the Delaware County facility, Cappelli asserts:

The \$300.00 assessment for leaking loads was issued to Joseph F. Cappelli & Sons, Inc. in error. This trailer is owned and maintained by Waste Management of PA, Inc.

(Notice of Appeal). The Department contends this objection is not valid because 25 Pa.Code §285.211(a) applies to the transportation of municipal waste, not the ownership or maintenance of trailers. The Board agrees.⁵ Nevertheless, the Department is still not entitled to judgment on the pleadings with respect to this objection because nothing in the civil penalty assessment states that Cappelli was assessed a \$300 penalty for the leaking trailer at the Delaware County facility. Instead, the assessment merely states that a civil penalty in the amount of \$1,800 is assessed against Cappelli and that of this amount, \$600 is for violations of the Municipal Waste Act and \$1,200 is for violations of the

⁵This is not to say the Board agrees that a leaking trailer necessarily violates 25 Pa.Code §285.211(a), since that subsection merely establishes the requirements for the cover used on the trailer. The Board merely agrees with the Department's characterization of the scope of §285.211(a).

SWMA. See, note 2, *supra*. Because the Board cannot determine how much the Department assessed for the leaking trailer, that amount remains at issue. A judgment on the pleadings, therefore, may not be entered. See, Huntingdon Valley Hunt, 1993 EHB at 1539.

O R D E R

AND NOW, this 2nd day of December, 1994, it is ordered that the Department's motion for partial judgment on the pleadings is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: December 2, 1994

cc: DER Bureau of Litigation:
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For Appellant:
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ECKELL, SPARKS, LEVY, AUERBACH,
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Media, PA

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motion for summary judgment and ordered the appeal dismissed. Envyrobale's motion seeks reconsideration mainly for two reasons. First, it argues a material factual dispute exists based upon its pleadings, which it contends contradicts an affidavit submitted in support of DER's motion, and thus we should not have granted the motion. It also argues that reconsideration is appropriate because the facts are not as recited in our opinion on DER's motion. DER's timely response opposes reconsideration.¹

The Board's rules of practice and procedure at 25 Pa. Code §21.122 provide that reconsideration may be granted "only for compelling and persuasive reasons" and will generally be limited to the following instances:

- (1) The decision rests on a legal ground not considered by any party to the proceedings and that the parties in good faith should have had an opportunity to brief such question.
- (2) The crucial facts set forth in the application are not as stated in the decision and would justify a reversal of the decision. In such a case reconsideration would only be granted if the evidence sought to be offered by the party requesting the reconsideration could not with due diligence have offered the evidence at the time of the hearing.

After reviewing Envyrobale's motion against this standard, we have determined that its denial is appropriate.

Envyrobale objected to DER's order, *inter alia*, on the basis that his facility is eligible for "permit by rule" under DER's regulations at 25 Pa. Code §287.102. Section 287.102(a)(3)(i) provides that a facility cannot be eligible to operate pursuant to permit by rule unless the operator maintains a copy of the DER-approved Preparedness, Prevention and Contingency (PPC) plan.

¹At the same time DER's attorney filed its response and provided a complimentary copy thereof to this Board, Envyrobale's counsel delivered a copy of its brief to the presiding Board Member and subsequently filed a copy with the Board's Harrisburg office.

Section §287.102(h) provides that to be deemed to have a residual waste processing permit by rule, a facility must meet the requirements of §287.102(a) and submit written notice to DER which meets the requirements of §287.102(h).

In our November 7, 1994 opinion, we applied the standard for the grant of summary judgment set forth in Pa.R.C.P. 1035 in ruling on DER's motion. We found no issue of material fact existed as to whether Envirobale maintained a DER-approved PPC plan because Envirobale admitted in its response to DER's motion that as of the time of Duerring's deposition in this matter on August 8, 1994, Envirobale did not maintain a DER-approved PPC plan. Further, we found no §287.102(h) notice had been filed by Envirobale. We based this finding on the uncontroverted affidavit of DER's Meadville District Office solid waste supervisor, John Mead, filed in support of DER's motion, that DER never received any notification from Envirobale and that the letter, dated February 3, 1994 addressed to DER in Meadville but unsigned by Duering which Envirobale had attached to its pre-hearing memorandum as Exhibit 6, had not been received by DER. We concluded that there existed no genuine issue of material fact that Envirobale was not operating pursuant to permit-by-rule.

We reject Envirobale's contention that the pleadings contradict Mead's affidavit as to whether it gave the required notice to DER and that we violated the rule in Nanty-Glo v. American Surety Co., 309 Pa. 236, 163 A. 523 (1932), by accepting Mead's affidavit statement. While we have treated a notice of appeal as a "pleading" in the past for purposes of ruling on a motion for judgment on the pleadings, a pre-hearing memorandum is not treated as a pleading before the Board. See North American Oil & Gas Drilling Company, Inc. v. DER, 1991 EHB 22. Rather, a pre-hearing memorandum is the

filed after discovery has been completed, which results from the winnowing process before the Board and in which the theories a party may raise at hearing are finalized. Adams Sanitation Company, Inc. v. DER, EHB Docket No. 90-375-W (Consolidated Docket) (Opinion issued November 1, 1994). In the pre-hearing memorandum, the party details how it will make its case at the merits hearing, listing all of the facts it will prove, and the documents and witnesses it will introduce, and the legal conclusions supporting its notice of appeal/pleading. It is a pre-trial statement. Thus, that the February 3, 1994 letter addressed to DER was attached as an exhibit to Envyrobale's pre-hearing memorandum did not mean there was an issue of material fact set forth in the pleadings before the Board.

Moreover, the Commonwealth Court has rejected the argument that the Nanty-Glo rule has application to proceedings before this Board. See Snyder v. Department of Environmental Resources, 138 Pa. Cmwlth. 534, 588 A.2d 1001 (1991).² The Snyder Court explained that uncontradicted testimonial affidavits may be considered by the Board in ruling on a motion for summary judgment. Thus, we reject Envyrobale's assertion that the Nanty-Glo rule should have been applied in our review of DER's motion.

We recognize that summary judgment proceedings are not intended to be a battle by affidavit. Commonwealth v. Diamond Shamrock Chemical Co., 38 Pa. Cmwlth. 89, 391 A.2d 1333 (1978). Where DER's motion for summary judgment was made and was properly supported, however, Envyrobale, as the party seeking to avoid the imposition of summary judgment, had to show by specific facts in its depositions, answers to interrogatories, admissions or affidavits that there

² Envyrobale's brief cites this opinion and then continues to argue Nanty-Glo's application.

was a genuine issue for trial. Marks v. Tasman, 527 Pa. 132, 589 A.2d 205 (1991). Envirobale failed to do so.³ Envirobale has attached an affidavit to its motion for reconsideration in which Duerring states that he mailed, through the U.S. mail, the February 3, 1994 letter, properly addressed to the DER Meadville District Office and with the proper amount of postage affixed to it. Envirobale argues this creates a presumption that this letter was received by DER. In order to have avoided the entry of summary judgment against it, however, Envirobale had to have filed this affidavit prior to our ruling on DER's motion. It is not a ground for us to reconsider our opinion.

Envirobale also argues we should reconsider our opinion because the facts regarding the PPC plan are not as they are stated in our decision. It points to the Duerring affidavit attached to its motion for reconsideration as establishing facts which it says show that it did not prepare a PPC plan in reliance upon representations made to Duerring by DER. On this basis, Envirobale contends DER should be equitably estopped from obtaining summary judgment for its failure to maintain a PPC plan.

The facts alleged in Duerring's affidavit were not before the Board when we ruled on DER's motion for summary judgment. Envirobale did not argue in its response to DER's motion that the facts in this matter established the equitable estoppel argument it is now raising, nor was it apparent from the facts before us in considering DER's motion that the elements of an equitable estoppel were present. See McKees Rocks Forging, Inc. v. DER, EHB Docket No. 90-310-MJ (Consolidated) (Adjudication issued March 2, 1994); Chester

³Although Envirobale states at footnote 1 of its motion for reconsideration that Duerring confirmed at his deposition that he forwarded the February 3, 1994 letter to DER's Meadville District Office, this statement is not part of the deposition transcript provided to the Board in ruling on DER's motion, and Envirobale did not put this portion of the deposition before the Board.

Extended Care Center v. Commonwealth, Dept. of Public Welfare, 526 Pa. 350, 586 A.2d 379 (1991). Again, Envyrobale should have raised the equitable estoppel argument in its response to DER's motion. See Power Operating Co., Inc. v. DER, 1992 EHB 1129. We do not find this argument to be a ground for us to reconsider our opinion under 25 Pa. Code §21.122. Envyrobale cannot select a tactic for avoiding a motion for summary judgment and, after having summary judgment entered against it, retain new counsel to try to avoid the summary judgment grant by way of a request for reconsideration.⁴

At the end of Envyrobale's motion, it asserts that its former counsel failed to timely notify it of our decision on DER'S motion, that its current counsel is newly retained, and that new counsel has not had ready access to the former counsel's file of the documents filed by the parties in this appeal. Based thereon, Envyrobale asks the Board to order that Envyrobale may file a supplement to its motion up until December 9, 1994 (three days after expiration of the period for filing an appeal to Commonwealth Court), and that we issue an order granting reconsideration to toll the appeal period so it may file a supplement. While we do not condone the alleged failure of Envyrobale's original counsel to timely communicate our decision to it, we will not accede to this request. Current counsel's office is located within the City of Pittsburgh, as is the presiding Board Member's office. As a result, current counsel for Envyrobale could have had access to copies of all filings in this appeal on any business day by contacting the Board's Pittsburgh office. This was not done. Thus, this "hardship" is not a ground to grant these requests. Moreover, our rules mandate that the grounds for a

⁴ We observe the local newspaper at the site of appellant's facility reported our decision on November 22, 1994.

request for reconsideration be stated within 20 days and make no provision for a supplement. See 25 Pa. Code §21.122 and Strongosky v. DER, ("Strongosky") 1993 EHB 758.

Finally, in Envirobale's brief but not in its motion, it asserts that we should reconsider our grant of summary judgment in favor of DER on the issue of whether Duerring, under 25 Pa. Code §287.113(c), had six months from DER's order or until July 4, 1995 to apply for a permit. This argument comes too late for us to reconsider the §287.113(c) issue. Strongosky. We accordingly issue the following order denying Envirobale's motion for reconsideration and this request for an extension of time.⁵

ORDER

AND NOW, this 6th day of December, 1994, it is ordered that Envirobale's request for an extension of time to supplement this motion for reconsideration is denied, and further, that Envirobale's motion for reconsideration is denied.

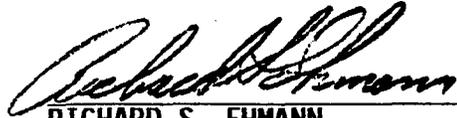
Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

⁵We reject Duerring's assertion that justice requires reconsideration on the basis of Lower Windsor Township v. DER, 1993 EHB 1761. In Lower Windsor, we found compelling and persuasive reasons existed for us to reconsider our order under the unique circumstances presented in that case. We find no such unique circumstances present in this matter.



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: December 6, 1994

cc: DER Bureau of Litigation:
(Library: Brenda Houck)
For the Commonwealth, DER:
Jody Rosenberg, Esq.
Western Region
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M. DIANE SMITH
 SECRETARY TO THE BOARD

DANIEL WEIMER

v.

COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL RESOURCES

:
 :
 : EHB Docket No. 92-024-E
 : Consolidated with
 : 93-078-MJ
 : Issued: December 13, 1994

ADJUDICATION

By: Richard S. Ehmman, Member

Synopsis

The Board finds that the appellant's unpermitted disposal or prolonged storage of thousands of waste tires on property owned by his mother (which he operates) constitutes a violation of the Solid Waste Management Act and the regulations promulgated thereunder. The Department of Environmental Resources (DER) sustained its burden of proving that the appellant violated the Solid Waste Management Act and that the orders it issued to the appellant pursuant to the Solid Waste Management Act and the regulations thereunder, directing him to take certain actions with regard to these waste tires, were authorized by law and were not an abuse of DER's discretion. Finding no timely challenge to the amount of the penalty assessed by DER or the methodology used to calculate the amount thereof, we affirm DER's assessment of a civil penalty against the appellant.

BACKGROUND

Presently before the Board for adjudication are two appeals consolidated at EHB Docket No. 92-024-E. Appellant Daniel Weimer (Weimer) filed an appeal (initially assigned Docket No. 92-024-MJ) on January 17, 1992. This appeal challenged DER's issuance to Weimer of a compliance order, dated December 18,

1991, and a notice of violation (NOV), dated December 27, 1991, concerning tires on the Marie Weimer farm property located in Ligonier Township, Westmoreland County (the site), which Weimer manages. In this order, DER found that tires on the site were disposal of solid waste without a DER-issued permit, in violation of sections 501(a) and 610 of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §§6018.501(a) and 6018.610. DER's order directed Weimer to "immediately cease dumping or depositing any solid waste, specifically tires, onto the surface of the ground or into the waters of the Commonwealth." DER's NOV, *inter alia*, directed Weimer to remove all used tires from this property and dispose of them at a DER-approved disposal facility within thirty days of his receipt of the NOV.¹

In the appeal filed March 25, 1993 and initially docketed at EHB Docket No. 93-078-MJ, Weimer challenged an order and civil penalty assessment issued to him on March 3, 1993, in which DER found that he deposited or allowed to be deposited between 10,000 and 15,000 waste tires on and about the site without a DER permit authorizing their disposal there. DER further found Weimer had caused or assisted in a violation of sections 501(a), 610(1), and 610(9) of the SWMA, 35 P.S. §§6018.501(a), 6018.610(1), and 6018.610(9), by depositing or allowing the deposition of waste tires on the site. Pursuant to sections 104(7), 602, and 608 of the SWMA, 35 P.S. §§6018.104(7), 6018.602, and 6018.608, and section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17, DER ordered Weimer, *inter alia*, to transport the waste tires from the site to a properly permitted disposal or recycling facility and to complete this

¹ We note that while an NOV is not necessarily appealable, where the NOV directs or mandates certain conduct by the recipient, it is not an NOV but an order, and is appealable. This is the circumstance here. See Adams County Sanitation Company v. DER, 1989 EHB 258.

removal process within 180 days of the order's date. DER further assessed a civil penalty on Weimer in the total amount of \$12,000 pursuant to section 605 of the SWMA, 35 P.S. §6018.605.

Former Board Member Joseph N. Mack, to whom this matter was initially assigned for primary handling, issued this Board's Pre-Hearing Order No. 2 on July 29, 1992. The parties failed to comply with this Board's order.

We received from Weimer, *pro se*, a document captioned "Supplemental Motion To Dismiss For Lack of Jurisdiction" on December 31, 1992. In response to an inquiry by former Board Member Mack, we then received a letter from Weimer on January 12, 1993, stating that he was not seeking to have the Board dismiss his appeal but to challenge DER's authority to issue orders to him.

The two appeals were consolidated at the instant docket number by an order issued August 26, 1993. The Board subsequently, on August 31, 1993, received an entry of appearance from counsel for Weimer. Weimer filed a document captioned "Amended Statement of Reasons in Support of Appeal of Weimer" on September 14, 1993, which former Board Member Mack treated as a motion to amend appeal and denied, citing Howard Barr v. DER, 1992 EHB 1453.²

The Board then issued a second Pre-Hearing Order No. 2 on January 14, 1994, along with a notice of hearing. After cancelling the scheduled merits hearing, the Board, on March 22, 1994, issued a notice rescheduling the hearing

² We hereby affirm former Board Member Mack's treatment of Weimer's September 14, 1993 document as a motion to amend appeal and his denial thereof. As former Board Member Mack explained in his October 20, 1993 order, pursuant to our rules at 25 Pa. Code §21.52, an appellant must file his appeal together with his reasons therefor within thirty days of receipt of the order under appeal. The Board may, upon written request and for good cause shown, allow an appellant to appeal *nunc pro tunc*. 25 Pa. Code §21.53(a) "Good cause" requires a showing of fraud or breakdown in the operation of the Board, which is not present here. Howard Barr v. DER, 1992 EHB 1453.

to occur on May 12, 1994, and setting forth the time and place for the hearing.

When the merits hearing convened at the scheduled time and place on May 12, 1994, Weimer was not present. (N.T. 5)³ DER presented its case, and the hearing was concluded. Former Board Member Mack then issued an order directing Weimer to file his post-hearing brief by June 2, 1994. When Weimer failed to do so, on June 6, 1994, former Board Member Mack issued him a rule to show cause why his appeals should not be dismissed. Counsel for Weimer subsequently wrote the Board on June 7, 1994, stating that the appellant had believed from correspondence that the hearing had been cancelled because of problems on the part of counsel for DER with the hearing dates in the middle of May, and that appellant had not known when the hearing was to be held, or else he would have been present. This letter further requested a rescheduling of the hearing.

Responding to a Rule to Show Cause issued by former Board Member Mack, DER filed its post-hearing brief on June 27, 1994. Weimer filed a reply brief on July 5, 1994.

Upon the resignation of former Board Member Mack, this matter was reassigned for primary handling to Board Member Richard S. Ehmann,⁴ who issued an order on August 11, 1994, scheduling a further hearing on the merits for September 27, 1994, and directing the parties to take certain other actions. On September 16, 1994, we received DER's motion for sanctions, seeking the imposition of sanctions on Weimer for his failure to comply with the Board's August 11, 1994 order. Board Member Ehmann granted DER's motion, in part,

³ "N.T." is a reference to the notes of testimony from the merits hearing held on May 12, 1994. "C Ex. " is a reference to one of the Commonwealth's exhibits admitted at this merits hearing.

⁴ The docket number was changed to 92-024-E to reflect that reassignment.

precluding Weimer from cross-examining DER's witnesses who testified at the May 12, 1994 merits hearing as a sanction pursuant to 25 Pa. Code §21.124. Board Member Ehmann denied DER's motion for sanctions in all other respects.

On September 23, 1994, we received a joint stipulation from the parties stipulating to certain additional facts in lieu of any further merits hearing. Thus, pursuant to an order issued September 26, 1994, the merits hearing scheduled for September 27, 1994 was cancelled, and the parties' Stipulation of Facts was admitted into evidence as Joint Exhibit No. 1 (Jt. Ex. 1). This September 26, 1994 order further authorized the parties to file any additional post-hearing briefs, and set forth a briefing schedule. Neither party filed any additional post-hearing brief.

DER filed a motion for sanctions on October 13, 1994, requesting us to impose sanctions on Weimer in the form of dismissing his appeal for his failure to comply with our September 26, 1994 order. Board Member Ehmann denied DER's motion by an order issued October 17, 1994, on the basis that our order had not mandated that Weimer file any additional brief.

Any arguments not raised by the parties' 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 Weimer, whose address is R.D. #5, Box 54, Ligonier, PA 15658. (Notices of appeal at Dockets Nos. 92-024-E and 93-078-E)
2. Appellee is DER, the agency of the Commonwealth authorized to administer and enforce the SWMA; Section 1917-A of the Administrative Code; and the rules and regulations promulgated thereunder.

Weimer's Violations of the SWMA

3. Weimer controls operation of a farm owned by his mother, Marie Weimer, located in Ligonier Township, Westmoreland County. (N.T. 10, 22, 53; C Ex. 5) At all times relevant to these appeals, neither Weimer nor Marie Weimer had held a DER permit to store or dispose of waste tires on the Weimer farm. (N.T. 51) Neither Weimer nor Marie Weimer had DER authorization for beneficial use of the tires, or to recycle or reuse tires on the Weimer farm. (N.T. 42)

4. Gerald Tripoli is a solid waste specialist employed by DER's Bureau of Waste Management in the Greensburg District Office. Tripoli's duties include conducting inspections, investigating complaints, and initiating and assisting in enforcement actions regarding municipal, residual, and hazardous wastes. (N.T. 6-7)

5. Tripoli met with Weimer in October of 1990 and told Weimer that he could beneficially use tires, but that he could do so only after sending a letter to DER describing the beneficial use. (Jt. Ex. 1) Tripoli received an inquiry from Weimer on November 9, 1990 regarding use of tires but did not speak with Weimer on that date. (N.T. 8)

6. On November 14, 1990, Tripoli received a complaint from Audrey Fulcomer regarding tires which Weimer was dumping at his farming operation on the site adjacent to her property boundary, and regarding a mosquito and odor problem with the tires which was increasing. (N.T. 8-9)

7. Tripoli responded to both Weimer's inquiry and Fulcomer's complaint on November 14, 1990. (N.T. 9) Tripoli observed old tires stacked in sporadic piles along the edge of the fence line of the site, and he took a photograph of the tires. (N.T. 10-12, 44; C Ex. 7) These tires contained water. (N.T. 12)

8. When Weimer met with Tripoli on November 14, 1990, he stated to Tripoli

that he intended to use the tires to grow vegetables, to keep his animals on the site, and to keep deer from entering the site. Weimer stated that he had 6,500 tires, which Tripoli estimated to be correct. (N.T. 10-12)

9. The tires Tripoli observed would not be reusable as tires. (N.T. 13)

10. On October 30, 1991, Tripoli received a second complaint from Fulcomer regarding additional tires being dumped at the site. (N.T. 13-15)

11. Tripoli observed, on November 21, 1991, a large stake bed truck filled with waste tires parked outside the Westmoreland Tire Company. The license number of the truck showed it belonged to Weimer. (N.T. 15-17)

12. During deer hunting season in 1991, Homer Weimer, who is Weimer's brother, saw Weimer dumping tires onto the site from the same truck Tripoli observed. (N.T. 53-56)

13. Tripoli inspected the site on December 5, 1991, and observed that additional tires had been brought to the property. Tripoli also observed that no tires had been removed from a pile containing approximately 2,000 tires. (N.T. 17-19) The photographs he took of the site during his inspection show tires piled in a fence-like configuration. (N.T. 44; C Ex. 7)

14. Tripoli issued DER's December 18, 1991 order, directing Weimer to cease disposing of tires on the site. Since Weimer was not present at the site, Tripoli delivered the order to Marie Weimer. (N.T. 21-22)

15. Weimer then contacted Tripoli about the order, and Tripoli arranged for a meeting between Weimer and Tripoli's supervisor at DER. (N.T. 22-23)

16. Tripoli issued the December 27, 1991 NOV to Weimer to identify that the dumping of the tires constituted disposal and to add the requirement that Weimer remove the tires to a DER-approved disposal site. (N.T. 23-24)

17. Weimer filed the appeal of DER's December 18, 1991 order and December

27, 1991 NOV on January 17, 1992. (Notice of appeal at Docket No. 92-024-E)

18. Weimer met with Tripoli and his supervisor, Stan Whitsel, who is a regional operations supervisor of DER's waste management program, at DER's Greensburg District Office on January 21, 1992. Weimer explained that he wanted to use the tires as a fence and to grow tomatoes. (N.T. 24-26, 33, 42)

19. Tripoli inspected the site on March 31, 1992. He observed the same tires which had been on the site in 1990 and 1991, but he did not observe any additional tires. (N.T. 27)

20. In response to complaints to DER by Robert Shaw about mosquitoes at his property boundary during the summer of 1992, Tripoli inspected the site on August 5, 1992. (N.T. 27-28) On this inspection, which was during dry conditions, Tripoli observed tires with water in them on the site. (N.T. 28-29)

21. Tripoli has been trained in identifying mosquito larvae in its various stages. He has also studied the potential health hazards to humans and animals caused by mosquito breeding and diseases borne by mosquitoes. (N.T. 29-30) On his August 5, 1992 inspection of the site, Tripoli observed mosquito larvae in the water in the tires and mosquitoes flying above the tires. (N.T.28-29)

22. Robert Shaw, who has owned property adjacent to the Marie Weimer farm for thirty years, has been unable to use his backyard for residential purposes for the past three years because of the mosquito problem, which lasts between June and September. (N.T. 57-60)

23. Tripoli estimated in 1992 that there were at least 10,000 to 20,000 tires on the site, and this was a conservative estimate. (N.T. 31)

24. DER issued an abatement order and civil penalty assessment to Weimer on March 3, 1993. (N.T. 36; C Ex. 6) Whitsel drafted this order, which, *inter alia*, directed Weimer to begin transporting waste tires from the site to a

disposal or recycling facility authorized to accept the waste and to complete the removal and proper disposal of all waste tires on the site within six months of the order. (N.T. 36-38; C Ex. 6) Whitset was also involved in calculating DER's civil penalty assessment amount. (N.T. 38)

25. Whitset is a volunteer fireman and has fought fires involving tires. He is familiar with the potential for a tire fire to generate thick clouds of smoke and to contaminate the groundwater and surface water with waste oils and liquids. He is also aware of potential mosquito problems caused by tires. (N.T. 40)

DER's Civil Penalty Assessment

26. Robert Musser, who is employed by DER as a compliance specialist, calculated DER's March 3, 1993 civil penalty assessment. (N.T. 38, 46-47)

27. In determining the amount of the assessment, Musser followed DER's civil penalty guidelines for violations of the SWMA. (N.T. 47)

28. Under DER's guidelines, Musser first addressed the degree of severity of the violation, which measures the effect on the environment or public health and safety or any potential effects that occurred or could occur as a result of the violation. He determined that it was low severity in that it involved a mosquito problem and a potential for the tires to burn, and it was in a rural area where few people would be impacted by these hazards. (N.T. 47-48) The range in the guidelines under the low category is \$1,000 to \$5,000. Musser assessed \$1,000 since that was the low end of the penalty amount. (N.T. 48)

29. Musser then considered, according to DER's guidelines, the cost to the Commonwealth. He did not assess any amount for this category, although the Commonwealth incurred considerable costs in investigating and enforcing these violations. (N.T. 48)

30. Pursuant to DER's guidelines, Musser then considered the savings to the violator. Using Tripoli's estimate of a minimum of 10,000 tires on the site and multiplying that number by the cost of proper disposal (at the time) of approximately \$1.00 per tire, DER assessed an amount of \$10,000 for this category. Musser determined that Weimer saved this \$10,000 amount by disposing of the tires at the site instead of at a proper disposal site. (N.T. 49)

31. Musser then addressed the willfulness of the violation, or the measure of the violator's conduct, with respect to his regard for the DER regulations and statutes, pursuant to DER's guidelines. Musser determined that Weimer's degree of willfulness was negligence. He did not believe Weimer's conduct was reckless, the next greater category beyond negligence, since Weimer had no prior notice from DER when Tripoli first observed over 6,500 tires at the site in 1990. (N.T. 50)

32. Under DER's guidelines, Musser could have assessed between \$500 and \$5,000 for the negligence category. He assessed \$1,000, which was near the low end of the category. (N.T. 50)

33. The total amount of the civil penalty assessed by DER was \$12,000. (N.T. 47-50)

34. There is no evidence that Weimer has removed and properly disposed of the tires.

DISCUSSION

Does The Board Have Jurisdiction?

Weimer contends that the Board lacks jurisdiction over these matters which involve DER's issuance of orders to Weimer pursuant to the SWMA concerning thousands of tires located on his mother's farm, which Weimer operates, and DER's assessment of a civil penalty against Weimer pursuant to the SWMA for his alleged

violations of the SWMA as to these tires. Weimer's post-hearing reply brief does not support this lack of jurisdiction contention with any explanation of why Weimer believes we lack jurisdiction. As we pointed out in Newtown Land Limited Partnership v. DER, et al., EHB Docket No. 93-299-E (Opinion issued June 15, 1994), jurisdiction is not a waivable issue but may be raised at any time.

We have concluded in the past that we have jurisdiction over the subject matter and the parties to appeals of DER orders issued under the SWMA concerning tires accumulating on property without a DER-issued permit and concerning DER's assessment of civil penalties against a property owner who allowed thousands of tires to accumulate on his property. See Max L. Starr v. DER, 1991 EHB 494, aff'd 147 Pa. Cmwlth. 196, 607 A.2d 321 (1992), and Gerald E. Booher v. DER, 1991 EHB 987, aff'd 149 Pa. Cmwlth. 48, 612 A.2d 1098 (1992). Weimer has shown us no reason why we should not follow those decisions here. We thus conclude that we have jurisdiction over the parties and the subject matter of these appeals.

Were DER's Orders An Abuse Of Discretion?

Under 25 Pa. Code §21.101(b)(3), DER bears the burden of proof in an appeal of a DER order. Starr, supra. In reviewing the action of DER, it is our duty to determine whether DER's action is supported by a preponderance of the evidence and whether it is arbitrary, capricious or unreasonable. Id. Should we find that DER committed an abuse of discretion, we may substitute our discretion for that of DER. Id.

Section 501(a) of the SWMA, 35 P.S. §6018.501(a), prohibits any person from using or continuing to use his land or the land of another person as a solid waste processing, storage or disposal area without first obtaining a permit from DER. Section 610(1) of the SWMA, 35 P.S. §6018.610(1), similarly makes it unlawful for any person to dump or deposit, or permit the dumping or depositing,

of any solid waste onto the surface of the ground unless a permit has first been obtained from DER. Neither Weimer nor his mother held a DER-issued permit to store or dispose of waste tires on the site, nor did either of them hold DER authorization to make beneficial use of, recycle or reuse tires on the site.⁵

Pursuant to section 610(9) of the SWMA, 35 P.S. §6018.610(9), it is unlawful for a person to cause or assist in the violation of any provision of the SWMA, any DER rule or regulation, or any DER order. Weimer admits, in his post-hearing reply brief, that he caused or allowed the activity regarding the tires on the site but he argues this activity is not a cognizable violation of law. Weimer contends that the tires on the site are not solid waste because they are being used for crop growth and fencing purposes. Weimer further contends that the tires are not being stored or disposed but are being used for a purpose different from their original use.

Are the Tires Solid Waste?

We previously have addressed the question of whether a DER permit is required under the SWMA before tires can accumulate on a site, as they have done in the instant case. In Starr, *supra*, DER issued an order to appellant Starr, pursuant to the SWMA, concerning millions of tires which had accumulated on his site. Starr had been paid to take the tires by commercial tire dealers. The issue in Starr was whether the tires on Starr's property fell outside the

⁵ We note that there is no evidence to support Weimer's suggestion that DER's Tripoli condoned Weimer's construction of a tire fence. The evidence shows that Tripoli advised Weimer, prior to his construction of the tire fence, that if he had a beneficial use for tires, he would have to submit that use in writing to DER for approval. There is no evidence that Weimer sought DER's approval of any written beneficial use suggestion, but there is evidence that DER never approved any such beneficial use as to Weimer. Further, to the extent that the Ligonier Township Zoning Board issued Weimer a permit to build a fence, the township permit did not specifically authorize him to construct a tire fence. (Jt. Ex. 1)

definition of solid waste under the SWMA because they had economic value or whether the tires were municipal waste pursuant to the definition set forth at section 103 of the SWMA, 35 P.S. §6018.103.⁶ We ruled that since there was no question that Starr had obtained the tires from tire dealers, the tires were waste materials resulting from the operation of a commercial tire establishment and fell within the definition of municipal waste. We concluded it was irrelevant whether Starr attributed any value to the tires, as the tires were waste when the commercial tire dealers discarded them as worthless and paid Starr to take them to his site. We further ruled that Starr was storing the tires and that a portion of them were disposed, within the meaning of section 103 of the SWMA, 35 P.S. §6018.103. We concluded that Starr was not excused from his obligation to obtain a permit from DER under §501 of the SWMA, 35 P.S. §6018.501, by any future plans for the tires. On appeal by Starr to the Commonwealth Court, the Court affirmed the Board's decision.

In Booher, *supra*, the Board upheld DER's July 6, 1989 assessment of a civil penalty pursuant to the SWMA on the appellant Booher in connection with used tires on his property and his failure to comply with a DER order, issued under the SWMA, requiring him to cease storing and disposing of waste tires on his property and to submit a plan for removal of the tires. Booher claimed to be using these tires as a temporary fence. Citing Starr, we ruled that the tires on Booher's property, which had been placed there without a permit from DER and with Booher's consent, were municipal waste subject to the terms and conditions of the SWMA and the regulations, even if there were a market for the waste tires

⁶ Section 103 of the SWMA, 35 P.S. §6018.103, defines "solid waste" as "[a]ny waste, including but not limited to, municipal, residual or hazardous wastes, including solid, liquid, semisolid or contained gaseous materials."

as a recycled fuel source. The Commonwealth Court affirmed our decision.

Additionally, we recently granted summary judgment in DER's favor in Envyrobale Corporation v. DER, EHB Docket No. 94-148-E (Opinion issued November 7, 1994), which was an appeal of an order issued by DER to the appellant pursuant to the SWMA directing him to take action regarding over one million waste tires at his property. In that decision, we relied on Starr and Booher, as affirmed by the Commonwealth Court, and concluded that the tires on the site were residual waste within the meaning of DER's regulations at Chapter 287 of 25 Pa. Code.⁷ We pointed out that the tires had been disposed of by the commercial tire dealers from whom they were taken and that the appellant's plans for the tires were not relevant to whether they were solid waste.

The testimony in the instant matters establishes that Weimer obtained at least some of the tires he dumped onto the site from a commercial tire dealer and that the tires were not reusable as tires. Based on our prior decisions in Starr, Booher, and Envyrobale, we conclude DER was correct in finding the tires on the site are solid waste within the meaning of the SWMA and, thus, that Weimer was required to obtain a permit from DER prior to depositing them on his property.⁸

⁷ Section 287.2(c)(3) of 25 Pa. Code provides that management of, *inter alia*, waste tires is subject to Article IX of 25 Pa. Code (instead of Article VIII), and shall be regulated as if the waste is a residual waste. "Residual waste" is defined at 25 Pa. Code §287.1 as garbage, refuse, other discarded material, or other waste. "Waste", in turn, is defined by 25 Pa. Code §287.1 as including a material that is abandoned or disposed.

⁸ Chapter 287 of Article IX, 25 Pa. Code, was adopted July 2, 1992, and became effective July 4, 1992. 22 Pa. Bulletin 3389. As we review DER's actions against the regulations which were in effect at the time DER took its action, Harmar Township, et al. v. DER, et al., 1993 EHB 1856, we review only DER's March 3, 1993 order against the regulations at Chapter 287. DER's orders issued in 1991 are reviewed against DER's regulations which were in effect at that time. This does not affect our conclusion that the tires were solid waste pursuant to section 103 of the SWMA, based on Starr, Booher, and Envyrobale, however.

Did Weimer Unlawfully Dispose of or Store Solid Waste?

We further conclude that Weimer's depositing the tires on the site amounted to Weimer's unlawful storage and disposal of these tires. In Booher, we addressed the argument that the tires on Booher's property were not being stored or disposed of there within the meaning of §103 of the SWMA, 35 P.S. §6018.103, but were serving as a temporary fence around Booher's property.

Section 103 of the SWMA defines "disposal" as:

The incineration, deposition, injection, dumping, spilling, leaking, or placing of solid waste into or on the land or water in a manner that the solid waste or a constituent of the solid waste enters the environment...

"Storage" is defined as :

The containment of any waste on a temporary basis in a manner as not to constitute disposal of such waste. It shall be presumed that the containment of any waste in excess of one year constitutes disposal. This presumption can be overcome by clear and convincing evidence to the contrary.

Section 103 of the SWMA, 35 P.S. §6018.103.

We find that all of the tires were stored on the site in these matters. We further find that at least some of the tires fell under the statutory presumption of disposal because DER's Tripoli observed when DER took its challenged actions that the same tires were on the site as had been there on his November 14, 1990 site inspection. Since neither Weimer nor Marie Weimer had a permit for the disposal of the tires on the site and we have determined that the tires were solid waste under the SWMA and the regulations thereunder, Weimer was in violation of the provisions of the SWMA which prohibit using the property of another person as a solid waste storage or disposal area without a permit.

Was DER Authorized to Issue the Orders to Weimer?

DER is authorized by section 104(7) of the SWMA to issue orders and abate

public nuisances to implement the purposes and provisions of the SWMA and the rules, regulations, and standards adopted pursuant to the SWMA. 35 P.S. §6018.104(7). Section 601 of the SWMA provides that any violation of the SWMA, any rule or regulation of DER, or any DER order, constitutes a public nuisance. 35 P.S. §6018.601. Further, pursuant to section 602 of the SWMA, DER is authorized to issue orders to persons as it deems necessary to aid in the enforcement of the SWMA, including orders requiring persons to cease unlawful activities or operations of a solid waste facility which in the course of its operation is in violation of the SWMA, any rule or regulation of DER.

As the Commonwealth Court pointed out in Starr, the legislative policy stated in the SWMA at §102 is to correct "improper and inadequate solid waste practices [which] create public health hazards, environmental pollution. . ." 35 P.S. §6018.102. Here, as in Starr, the testimony showed that the tires pose a fire danger and harbor mosquitoes, thus constituting a public health hazard. We accordingly find that DER did not abuse its discretion in issuing its challenged orders to Weimer, as the orders implement the legislative purpose of the SWMA and abate a public nuisance, and require Weimer to cease his unlawful activity. 35 P.S. §§6018.104(7), 6018.602.

We reject Weimer's suggestion that DER's order to remove the tires from the site is unreasonable because it encroaches on his occupation as a farmer, which he argues is protected by the Act of June 10, 1982, P.L. 454, §33, 3 P.S. §951. This act has as its purpose reducing the loss to the Commonwealth of its agricultural resources by limiting the circumstances under which agricultural operations may be the subject matter of nuisance suits and ordinances. The act at section 4, 3 P.S. §954, explicitly states that its provisions shall not "in any way restrict or impede the authority of this State from protecting the

health, safety, and welfare..." Further, the savings clause of the act at section 6, 3 P.S. §956, provides that the provisions of the act shall not affect or defeat the intent of any federal, state or local statute, or governmental regulation (except nuisance ordinances as they apply to any normal agricultural operations). This act's prohibition on nuisance suits, 3 P.S. §954, thus is inapplicable to the present DER actions.

Based on the record before us, we find that DER has sustained its burden of proving DER did not abuse its discretion or act contrary to law in issuing the challenged orders to Weimer.

Is DER's Civil Penalty Assessment A Reasonable Fit?

Section 605 of the SWMA authorizes DER to assess a civil penalty for each and every violation of the SWMA. 35 P.S. §6018.605; Booher, *supra* at ___, 612 A.2d at 1103. In determining the amount of the penalty, DER must consider:

the willfulness of the violation, damage to air, water, land or other natural resources of the Commonwealth or their uses, cost of restoration and abatement, savings resulting to the person in consequence of such violation, and other relevant factors.

35 P.S. §6018.605. DER must also consider the seriousness of the violation. 25 Pa. Code §271.412(b)(1).⁹ The maximum civil penalty which DER may assess under §605 of the SWMA is \$25,000 per day per violation. 35 P.S. §6018.605.

In an appeal of a civil penalty assessment, DER bears the burden of proof. 25 Pa. Code §21.101(b)(1). Delaware Valley Scrap Co., Inc. and Jack Snyder v. DER, 1993 EHB 1113, *aff'd* ___ Pa. Cmwlth. ___, 645 A.2d 947 (1994). Since

⁹ We pointed out in Phillips v. DER, EHB Docket No. 91-071-W (Adjudication issued September 9, 1994), at note 3, that the considerations that go into determining the seriousness of the 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 use or enjoyment of property; and other relevant factors. 25 Pa. Code §271.412(b)(1)(i)-(vi).

Weimer's liability for violating the SWMA and the regulations thereunder has been established in this adjudication, the only remaining issue to be decided is whether there is a "reasonable fit" between the violations and the amount of the penalty assessed. Id. In reviewing the amount of the civil penalty assessment, our role is not to determine what penalty we would have imposed, but rather whether DER has abused its discretion in setting that amount. Phillips v. DER, EHB Docket No. 91-071-W (Opinion issued September 9, 1994); Booher, *supra*. Where we find DER has abused its discretion, we may substitute our discretion and modify the amount. Id.¹⁰

DER's compliance specialist Musser calculated the amount of DER's March 3, 1993 civil penalty assessment following DER's Bureau of Waste Management's civil penalty guidelines for calculating civil penalties for violations of the SWMA. As DER points out in its brief, Musser's assessment treats the violation as occurring on only one day for purposes of the calculation. Musser determined that Weimer should be assessed a total civil penalty of \$12,000: \$1,000 for the severity of the violation; \$10,000 for the savings to the violator; and \$1,000 for the willfulness of the violation. As we explained in Phillips, *supra*, DER must show that \$12,000 is a reasonable civil penalty for Weimer's violations of

¹⁰In his reply brief, Weimer challenges the reasonableness of DER's \$12,000 civil penalty assessment, asserting that this civil penalty is a "fine" which violates his right to trial by jury guaranteed by the United States Constitution; that "the fine is unpayable by the indigent farmer"; and that "the fine is not related to the de minimus damage." Even if we construe the objections set forth in Weimer's notice of appeal at Docket No. 93-078-E broadly, Weimer did not challenge the reasonableness of DER's civil penalty assessment or its amount in his notice of appeal as he was required to do by 25 Pa. Code §21.51(e). Thus, these challenges have been waived. See Cmwlth., Pennsylvania Game Comm. v. Cmwlth., Dept of Environmental Resources, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), aff'd on other grounds, 521 Pa. 121, 555 A.2d 812 (1989); Croner, Inc. v. Cmwlth., Dept of Environmental Resources, 139 Pa. Cmwlth. 43, 589 A.2d 1183, 1187 (1991); Wikoski v. DER, 1992 EHB 642.

the SWMA, not that it was calculated in accordance with DER's guidance documents. In determining whether the civil penalty amount is reasonable, we evaluate each SWMA violation in light of the factors listed in §605 of the SWMA or 25 Pa. Code §271.412(b)(1). Phillips, supra.

Musser first addressed the degree of the severity of the violation in this matter, measuring the effect on the environment or public health and safety or any potential effects that occurred as a result of the violation. Musser assessed \$1,000 for this factor since that was at the low end of the range set forth in DER's guidance document for this factor. The evidence clearly shows the tires on the site are creating a mosquito problem at the site, as Tripoli observed, and this mosquito problem is carrying over to the neighboring properties and affecting these property owner's use of their property. Further, DER's Whitsel, who is a volunteer fireman and has fought fires involving tires, testified to the potential for a tire fire to generate thick clouds of smoke and to contaminate the groundwater and surface water with waste oils and liquids. The Commonwealth Court in Starr recognized the public health hazard from fire danger and mosquitoes posed by an accumulation of tires. Id. at ____, 607 A.2d at 323-324. In view of these hazards, we find the amount assessed by DER for this factor appears to be low. There is not enough evidence in the record, however, for us to say DER's assessment is not a reasonable fit and for us to instead assess some higher amount. Thus, we affirm DER's assessment of \$1,000 for the severity of the violation.

Musser also addressed the willfulness of the violation according to DER's guidance document. This willfulness factor was discussed in Phillips, supra, where we explained that the term "willfulness" 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." Id. at 10-11. We further explained:

The term willfulness includes intentional violations of the law, reckless violations, and negligent violations. (Quotation omitted.)

[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 for 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.

Phillips, *supra* at 11 (quotation omitted).

We see no abuse of DER's discretion in concluding that Weimer's conduct here was negligent. DER's Tripoli had informed Weimer that if he wanted to propose a beneficial use of the tires, he would have to submit his use to DER in writing for approval. DER never gave Weimer any such approval, yet Weimer continued to bring tires to the site without first obtaining a permit from DER to store or dispose of them at the site. We agree with DER's conclusion that Weimer's violation could reasonably have been foreseen and prevented through Weimer's exercise of reasonable care. See Booher, *supra*, 1991 EHB at 1003. We thus conclude that DER's assessment of \$1,000 for this factor was a reasonable fit and was not an abuse of DER's discretion.

Musser next considered the cost to the Commonwealth pursuant to §605 of the SWMA, but he decided not to assess any amount for this factor, although he testified that the Commonwealth incurred considerable costs in investigating and enforcing these violations. DER introduced no evidence as to what these costs amounted to, and DER is not seeking to assess any amount for this category. With this lack of any evidence on this issue before us, we cannot question DER's

decision. DER also introduced no evidence that the violations caused damage to the air, water, land or other natural resources of the Commonwealth. Again, if DER chooses to assess no penalties on these points, we cannot elect to assess penalties thereon, even where it is obvious from the testimony of adjacent property owners that Weimer's tires contributed to the degradation in their use of their property.

Finally, Musser considered savings to Weimer by violating the law rather than properly complying with it. Musser determined that Weimer saved \$10,000 by disposing of the tires at the site rather than at a proper disposal site. He reached this determination by using an estimate of 10,000 tires on the site and multiplying that amount by the cost of proper disposal of approximately \$1.00 per tire.

Weimer offered no challenge to this aspect of the penalty assessment except as to the arguments addressed above which apply both to the order's validity and the assessment of any penalty against him. He neither challenged the factual aspects of this portion of DER's assessment nor raised legal challenges thereto. While the Board sees an interesting argument which could be raised as to the elements which must be shown for DER to advance any assessment based on savings-to-the-violator where the violator is not the generator of these waste tires and, as a non-generator, did not take the tires for disposal but for use in building a fence, in light of Weimer's failure to challenge this civil penalty's assessment except as outlined above, we need not deal with this issue now. Accordingly, we affirm this aspect of this civil penalty assessment.

According to DER's evidence it mechanically followed its guidelines on the proceedings for penalty assessments. It offered little evidence of serious evaluation regarding penalty factors set forth above such as the costs to the

Commonwealth in investigating and enforcing the violations, damage to the land, air or waters of the Commonwealth in the form of vector harborage, interference with a person's right to use and enjoy his property, and deterrence. Had such a sound case been made, it would have made an argument for an assessment of a higher penalty. Since this was not done, and there was no timely challenge to this assessment's amount, we find that an assessment in the total amount of \$12,000 on Weimer for his violations of the SWMA is appropriate. In accordance with the foregoing discussion, we enter the following order dismissing Weimer's appeals at Docket No. 92-024-E and Docket No. 93-078-E.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of the appeals. Starr, supra; Booher, supra.

2. DER has the burden of proving by a preponderance of the evidence that violations of the SWMA were committed and that the amount of the civil penalty assessed is reasonable and an appropriate exercise of DER's discretion. 21.101(b)(1) and (b)(3); Starr, supra; Delaware Valley Scrap, supra.

3. Section 501(a) of the SWMA prohibits a person from using the land of any other person as a solid waste disposal or storage area without a permit from DER. 35 P.S. §6018.501(a).

4. It is unlawful for any person to dump or deposit any solid waste onto the surface of the ground unless a permit has first been obtained from DER. 35 P.S. §6018.610(1).

5. Discarded, used tires constitute solid waste under the SWMA and DER's regulations. Starr, supra; Booher, supra; Envyrobale Corporation, supra.

6. The storage of waste for more than one year creates the presumption that the person storing the waste is disposing of it. 35 P.S. §6018.103.

7. Weimer violated section 501(a) of the SWMA by disposing of waste tires on his mother's property, which he operated, without a permit.

8. DER met its burden of proving its orders challenged in these appeals were authorized by law and not an abuse of discretion.

9. In reviewing DER's civil penalty assessment, the Board's role is to determine whether DER acted arbitrarily or abused its discretion. Booher, *supra*. DER bears the burden of proof. 25 Pa. Code §21.101(b)(1); Delaware Valley Scrap Co., *supra*.

10. When DER abuses its discretion in setting the amount of the civil penalty, the Board may substitute its discretion for that of DER and reduce the amount of the penalty. Booher, *supra*.

11. If DER relies on unpublished policies in setting the amount of the 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. Phillips, *supra*.

12. DER is authorized to assess a civil penalty under §605 of the SWMA of up to \$25,000 per day for every violation of the SWMA. In determining the amount of the civil penalty, DER must consider the factors set forth in §605 of the SWMA: the willfulness of the violation; damage to air, water, land or other natural resources of the Commonwealth or their uses; cost of restoration or abatement; savings resulting to the person in consequence of such violation; and other relevant factors. Phillips, *supra*.

13. Under DER's regulations at 25 Pa. Code §271.412(b)(1), it must also consider the seriousness of the violation. Phillips, *supra*.

14. DER did not abuse its discretion in assessing an amount for the severity of the violation. The Board affirms DER's assessment of \$1,000 for this

factor.

15. The phrase "willfulness of the violation" includes intentional violations of the law, reckless violations, and negligent violations. Phillips, supra.

16. Reckless conduct is demonstrated by a conscious disregard of the fact that one's conduct may result in a violation of the law. Negligent conduct is conduct which results in a violation which could reasonably have been foreseen and prevented through the exercise of reasonable care. Phillips, supra.

17. Weimer's violations of the SWMA were the result of negligent conduct. The Board affirms DER's assessment of \$1,000 for the willfulness of Weimer's violations.

18. As Weimer failed to challenge the penalty amount or how it was calculated by DER, we have no cause for modifying the portion of this assessment based on savings to the violator.

ORDER

AND NOW, this 13th day of December, 1994, it is ordered that Weimer's appeals at Docket Nos. 92-024-E and 93-078-E are dismissed.

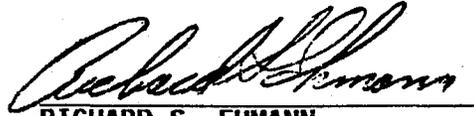
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Administrative Law Judge
Member

DATED: December 13, 1994

cc: DER Bureau of Litigation:
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med



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M. DIANE SMITH
 SECRETARY TO THE BOARD

P.A.S.S., INC. :
 :
 v. : EHB Docket No. 94-012-MR
 :
 COMMONWEALTH OF PENNSYLVANIA, :
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: December 22, 1994
 and BIO-GRO SYSTEMS, INC., PERMITTEE :

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

By Robert D. Myers, Member

Synopsis:

The Board upholds the issuance of a permit for the agricultural utilization of sewage sludge on 14 non-contiguous sites in Ringgold Township and Timblin Borough, Jefferson County, dismissing claims by a citizen group that operations will pollute the groundwater and adversely affect the food chain, principally through the addition of lead. In reaching its conclusion, the Board relies on substantial evidence showing that the land application of sewage sludge has produced no adverse effects on the environment or on human and animal health.

Since the evidence suggests that slopes on some of the 14 sites may exceed limits set by the regulations, the Board imposes a requirement that slopes be verified by field survey before application of sewage sludge.

Procedural History

P.A.S.S., Inc. (which stands for People Against Sewage Sludge), Appellant, filed a Notice of Appeal on January 18, 1994 seeking Board review of Permit No. 603340 for the Agricultural Utilization, Land Reclamation and/or Land Disposal of Sludge (Permit) issued by the Department of Environmental Resources

(DER) on December 16, 1993 to Bio-Gro Systems, Inc. (Permittee). The Permit authorized the land application of sewage sludge generated at the ALCOSAN Woods Run Treatment Facility on the J.C. Enterprises Farm in Ringgold Township and Timblin Borough, Jefferson County.

On March 7, 1994 Appellant filed a Petition for Supersedeas to which Permittee filed an Answer on March 24, 1994. On that date, a hearing was held on the Petition in Harrisburg before Administrative Law Judge Robert D. Myers, a Member of the Board. On April 7, 1994 the Board issued an Opinion and Order denying the Petition for Supersedeas.

In its pre-hearing memorandum, filed on April 29, 1994, Appellant stated its intention to submit its case based solely upon the record established at the Supersedeas hearing. As a result, Permittee filed on July 11, 1994 a Motion for Summary Judgment and in the alternative Motion for Nonsuit, together with two affidavits and a legal memorandum. DER reported its joinder in Permittee's Motions by a letter dated July 28, 1994. Appellant's letter of the same date informed the Board that it would not file a response to the Motions.

After reviewing the posture of the appeal, the Board informed the parties by a letter dated September 2, 1994 that the appeal could not be properly disposed of by the pending Motions but could be disposed of on the basis of a stipulated record. Accordingly, the parties requested the Board to adjudicate the appeal on the basis of a stipulated record consisting of the record of the Supersedeas hearing and the two affidavits attached to Permittee's Motions. Appellant relied on its post-hearing memorandum submitted subsequent to the Supersedeas hearing. Permittee supplemented its prior post-hearing brief by the legal memorandum accompanying its Motions. DER elected not to file any memorandum of law.

The record consists of the pleadings, a transcript of 230 pages, 24 exhibits and 2 affidavits. After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. Appellant is a Pennsylvania Nonprofit Corporation with a mailing address of R.D. #2, Box 141, Mayport, PA 16240 (Notice of Appeal).

2. Permittee is a corporation with a business office at 180 Admiral Cochrane Drive, Suite 305, Annapolis, MD 21401 (Permit).

3. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*; and the regulations adopted pursuant to that statute.

4. On April 22, 1992 Enviro-Gro Technologies¹ filed with DER an Application for the Permit. After extensive review (including a public hearing, receipt of written comments and consideration of responses and revisions), DER issued the Permit on December 16, 1993 (Permit; Exhibit A-22; Regina Schweinsberg Affidavit).

5. The Permit authorized Permittee to utilize for agricultural purposes sewage sludge generated at the ALCOSAN Woods Run Treatment Facility on 14 noncontiguous sites on the J.C. Enterprises Farm in Ringgold Township and Timblin Borough, Jefferson County (Permit).

6. The sludge sites, spread out over a 5 square mile area, range in size from 3 acres to 41 acres (Exhibits A-11 through A-20).

7. Coal deposits (the Lower Kittanning and, at 2 sites, the Lower

¹Enviro-Gro Technologies was acquired by Permittee in December 1992 while the Application for the Permit was still pending (Exhibit A-22).

Freeport) beneath 10 of the sludge sites have been deep-mined and the voids have filled with water creating mine pools (N.T. 38-46, 56; Exhibits A-6 through A-10).

8. The remaining overburden ranges from 100 feet to 400 feet in thickness. Very likely, this overburden is fractured naturally and as a result of the deep mining (N.T. 30-31, 46-49; Exhibit A-8).

9. Surface mining (principally of the Lower Freeport) also has been conducted in the area. One or more of the sludge sites are located on reclaimed land from previous surface mining (N.T. 76-79, 94).

10. Members of Appellant live adjacent to some or all of the sludge sites. They derive their domestic water from wells or springs. No public water system exists in the area (N.T. 124; Exhibits A-4 & A-5).

11. Appellant's concern is that contaminants present in the sludge may leach out and percolate down through the overburden to the mine pools or other groundwater, possibly affecting the domestic water supplies of Appellant's members and other area residents (N.T. 56-58).

12. The contaminant of chief concern to Appellant's members is lead (N.T. 108).

13. The sludge generated at the ALCOSAN Woods Run Treatment Facility, called Alcosoil, is a lime-stabilized sewage sludge with a pH of 11 to 12. It is a mixture of primary and waste-activated sludge from a treatment plant where 95% of the flows come from domestic and commercial customers and less than 5% from industrial customers. The industrial flows are all pretreated (Exhibit A-22, Form 29).

14. Sludge from a treatment plant that handles industrial waste, such as ALCOSAN's Woods Run Treatment Facility, will contain heavy metals in varying concentrations (N.T. 182-184).

15. The Alcosoil authorized by the Permit was analyzed on 30 occasions between December 4, 1990 and February 28, 1992. Lead concentrations ranged from 83 ppm to 205 ppm and averaged 126 ppm (Exhibit A-22, Form 29).

16. Dr. William E. Sopper of Pennsylvania State University has spent 30 years researching the use of sewage sludge in reclaiming mining sites. He personally supervised the application of sludge on more than 35 sites and monitored them for a minimum of two years, some for five years and several for twelve years. The monitoring involved the groundwater, soil, vegetation and, in some cases, animals such as rabbits and moles (N.T. 132-135; Exhibit BG-1).

17. This research

(a) applied the sludge only once at the rate of 60 dry tons per acre, ten times the application rate allowed by the Permit;

(b) found that it takes 3 to 5 years for the sludge to be completely mineralized (organic matter converted to nitrate-nitrogen which can be taken up by vegetation);

(c) found that trace metals are released from the sludge gradually as it mineralizes, slightly raising concentrations in the top 12 inches of soil but not below that depth;

(d) found that concentrations of trace metals in the top 12 inches of soil at the end of the 3 to 5-year period decline thereafter as the metals leach away naturally;

(e) found that trace metals do not show up in significant concentrations in groundwater and that concentrations soon decline;

(f) found no increase in lead concentrations in animals spending their entire lives on a sludge field; and

(g) found no documented health problems in humans related to the land application of sludge

(N.T. 141-149, 160-166, 172-179, 184-185).

18. The U.S. Environmental Protection Agency (EPA), in performing a risk analysis of contamination generated by the land application of sewage sludge, hired Dr. Sopper as a consultant to analyze and summarize over 80 projects in the United States, England, Scotland and Germany where sewage sludge was used on mining lands. Dr. Sopper concluded that properly stabilized and treated sludge can be used in an environmentally safe manner to revegetate mining lands without any adverse effects on vegetation, soil or groundwater quality and pose very little risk to animal and human health (N.T. 134-135, 149-151).

19. EPA's risk analysis resulted in EPA's adoption of a regulation at 40 CFR §503, effective February 19, 1993, providing that the lead content of sewage sludge cannot exceed 300 ppm and that 268 pounds of lead per acre is the maximum that can be applied in a lifetime (N.T. 134, 151-154).

20. This regulation was adopted at the same time that EPA was considering reducing the allowable lead concentration in drinking water to zero, a step that now has been taken: 40 CFR §141.51 (N.T. 110-113, 180-181).

21. The lead content of Alcosoil is well below the 300 ppm EPA limit. The application rates ranging from 2.5 tons/acre/year to 6.3 tons/acre/year approved in the Permit, coupled with the low lead content, will result in very little lead being placed on the sludge sites in terms of pounds per acre (N.T. 154; Exhibit A-22, Form 29).

22. In formulating regulations governing the land application of

sewage sludge (adopted April 8, 1988 and found at 25 Pa. Code Chapter 275), DER examined all research data available and then established what it considered to be conservative application rates. Then, in case the application rates were not conservative enough, DER imposed a number of regulatory requirements to eliminate any potential adverse effect on human health or the environment. These include regular chemical analysis of the sludge; limitations on suitable soils; isolation distances from bodies of water, bedrock outcrops, property lines and dwellings; limitations on times and methods of application; limitations on slopes; limitations on land use; and others (N.T. 186-190, 192).

23. Sites where sludge is applied for agricultural use must also have a nutrient management plan. This plan determines the nitrate-nitrogen requirements of the operation, which in turn dictate the application rates for the sludge. This requirement tends to keep down the amount of lead and other metals placed on the land (N.T. 148-149, 190).

24. Since the late 1970s when sludge application permits began to be issued, DER has permitted over 1,250 agricultural utilization sites and about 50 land reclamation sites. These sites have been monitored and no problems have been found (N.T. 190-191, 196).

25. Success with these permitted sites convinced DER to make groundwater monitoring optional in the regulations adopted April 8, 1988 (N.T. 191).

26. DER is not aware of any environmental incursion caused by violations of the sewage sludge land application regulations (N.T. 196-198).

27. In the Permit, DER imposed a number of conditions, some of which go beyond the requirements of the regulations. Because of the concerns of Appellant, DER also required Permittee to monitor the groundwater, although that

is optional under the regulations (Regina Schweinsberg Affidavit).

28. DER regulations do not concern themselves with the presence of underground mines beneath the site because other isolation distances (such as depth to groundwater table) would come into play before sludge constituents could reach deep mine pools (N.T. 192, 194).

29. While map measurements indicate that a small portion of some of the sludge sites have slopes exceeding that allowed by the regulations, Permittee will survey the sites before applying sludge and excessive slopes will be eliminated from the application areas (N.T. 58-60, 84-89, 202-204; Exhibits A-11 through A-20).

30. The evidence presented by Permittee, which Appellant did not refute, is more compelling than that presented by Appellant and leads to the conclusion that the activities authorized by the Permit do not present a threat to the environment or to human and animal health.

DISCUSSION

Appellant has the burden of proof: 25 Pa. Code §21.101(c)(3). To carry the burden, Appellant must show by a preponderance of the evidence that DER acted unlawfully or abused its discretion in issuing the Permit: 25 Pa. Code §21.101(a). Issues not raised in the briefs are deemed waived: *Lucky Strike Coal Co. and Louis J. Beltrami v. Commonwealth, Dept. of Environmental Resources*, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988).

Appellant's major contention is that contaminants in the sewage sludge, particularly lead, will be released from the sludge and find their way into the groundwater within a short period of time, adversely affecting plant and animal life and posing a dire threat to human health, especially that of children. As a result, Appellants claim, DER's issuance of the permit violated

25 Pa. Code §271.201(a)(4), §275.203(b), and Article I, Section 27, of the Pennsylvania Constitution.

The first cited regulation (§271.201(a)(4)) provides that a permit application will not be approved unless the applicant "affirmatively demonstrates" that operations under the permit "will not cause surface water pollution or groundwater pollution." This provision applies to applications for the land application of sewage sludge by virtue of 25 Pa. Code §275.1. The second cited regulation (§275.203(b)), which also is relevant to the Permit involved here, provides that no sewage sludge may be applied "so as to adversely affect the food chain." Finally, the Constitutional provision entitles residents to "clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment." According to *National Solid Wastes Management Association v. Casey*, 143 Pa. Cmwlth. 577, 600 A.2d 260 at 265 (1991), aff'd per curiam, 533 Pa. 97, 619 A.2d 1063 (1993), our handling of the constitutional issue is limited to a consideration of whether DER complied with the SWMA and its regulations in issuing the Permit.

Appellant's argument is premised, of necessity, on its view of the facts - that lead will reach the groundwater in detectable quantities. We have rejected this view, however, on the strength of substantial evidence to the contrary. Dr. Sopper's research on mining sites, where sludge is applied at 10 times the rate allowed in the Permit, establishes that lead concentrations rise in the top 12 inches of soil during the 3 to 5 year period following application. Concentrations deeper than that remain constant. After this initial period, concentrations in the top 12 inches of soil begin to decline gradually as the lead leaches naturally from the soil. While some of the lead undoubtedly reaches the groundwater eventually, it does not impact the groundwater in any significant

way. Adverse effects on animal and human health have not been detected.

The benign effects of sewage sludge applied to mining lands are clearly reinforced by the regulations governing agricultural use. The application rate is perhaps the most apparent control, but it is only one of many which, taken together, create an acceptable risk. Isolation distances, limitations on times and methods of application, soil and land use limitations, etc. all serve to protect the environment and health. On agricultural sites, where application rates are derived from the nutrient needs of grasses or field crops, additional limits come into play. The success of 1,250 agricultural utilization sites permitted by DER in the past 15 years attests to the effectiveness of the regulatory program.

EPA's risk assessment, which paralleled its reduction of the lead content in drinking water to zero, allowed regulated quantities of lead to be applied to land as a component of sewage sludge. While Appellant claims that EPA ignored some of the available evidence, it is more reasonable to conclude that EPA was convinced that regulated quantities of lead in sewage sludge posed no risk to the groundwater. Certainly, the evidence before us leads to that conclusion.

We are satisfied that Permittee's application demonstrated that its operations will not cause the pollution of surface water or groundwater by contaminants, such as lead. We are also satisfied that the application of sewage sludge authorized by the Permit will not adversely affect the food chain. Having fulfilled these regulations raised by Appellant, we are also satisfied that the Permit complied with Article I, Section 27, of the Pennsylvania Constitution.

Appellant's secondary argument is that the Permit authorizes the application of sewage sludge on slopes exceeding the limits contained in 25 Pa.

Code §275.312(4). While the evidence supports that argument to a point, it is based solely on measurements of contour intervals on maps. Such measurements, in and of themselves, are not as reliable as surveyed data. Permittee claims that it must show DER by actual field survey, prior to application of any sludge, that the slopes are within the limitations of §275.312(4). Any permitted areas that exceed the limits will not be used.

This may very well be DER's policy, but we find nothing in the Permit concerning this. Rather than remand it to DER, however, we will exercise our own discretion to place such a condition in the Permit.

CONCLUSIONS OF LAW

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

2. Appellant has the burden of proving by a preponderance of the evidence that DER acted unlawfully or abused its discretion in issuing the Permit.

3. Permittee's application affirmatively demonstrated that operations under the Permit will not cause the pollution of surface water or groundwater, as required by 25 Pa. Code §271.201(a)(4).

4. Permittee's operations under the Permit will not adversely affect the food chain, thereby complying with 25 Pa. Code §275.203(b).

5. Issuance of the permit did not violate Article I, Section 27, of the Pennsylvania Constitution.

6. Because some of the slopes may exceed the limits set by 25 Pa. Code §275.312(4), the Board will exercise its discretion by conditioning the Permit so as to require slope verification by field survey prior to sludge application.

7. Except to a limited extent with respect to slopes, Appellant has failed to carry its burden of proof.

O R D E R

AND NOW, this 22nd day of December, 1994, it is ordered as follows:

1. The appeal is sustained in part and dismissed in part.
2. The Permit is conditioned on verification by field survey that the slopes are in compliance with 25 Pa. Code §275.312(4) before application of sewage sludge on any of the sites.
3. The Appeal is dismissed in all other respects.

ENVIRONMENTAL HEARING BOARD

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MAXINE WOELFLING
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Administrative Law Judge
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RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: December 22, 1994

cc: See next page for service list

EHB Docket No. 94-012-MR

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("Janco"), the Southwestern Pennsylvania Regional Manager of DER's Oil and Gas Management program.

Janco's October letter recites that DER denied this permit application by its letter of July 14, 1994 ("July letter"), and that Snyder offered DER a casing design as a means of resolving objections to Snyder's application, but that this Snyder proposal was independent of its permit application. Janco's October letter then advises that the "Possible Casing Design" does not resolve the prior objections to Snyder's permit application because it fails to provide support and protection equal to or greater than that provided by a 100' x 100' coal pillar, and, as a result, it cannot substitute therefor. The October letter ends with DER's standard notice of the right to appeal DER's decision to this Board.

In response to Snyder's Notice Of Appeal, DER has filed the Motion now before us. The Motion avers that there are two separate appeals by Snyder of the denial of its permit application. DER avers that Snyder's instant Notice Of Appeal objects to the initial unmodified application's denial, rather than DER's denial of the modified permit application, and fails to state a valid claim for relief relating to the modification permit application.¹ DER, citing Snyder Brothers, Inc. v. DER, et al., EHB Docket No. 94-219-MR (Opinion issued November 4, 1994), then asserts that the objections to the unmodified application's denial in Snyder's first appeal may not be amended absent a showing of good cause, that Snyder's instant Notice Of Appeal fails to state a reason to amend its Notice Of

¹Of course a Notice Of Appeal need only state objections to DER's actions and need not spell out the form of relief it is seeking. Lower Windsor Township v. DER, et al., 1993 EHB 1761. Thus, so long as objections are stated, an allegation that Snyder fails to state a specific prayer for relief is of no moment.

Appeal from the unmodified application's denial (found at Docket No. 94-219-E)², and that judgment on the pleadings is appropriate where Snyder's instant Notice Of Appeal fails to state a valid cause of action as to the modified application. DER's Motion concludes that if Snyder's instant appeal is an attempt to add grounds to challenge DER's denial of the unmodified application, it is untimely, and, if it is challenging the denial of the modified permit, it fails to state a valid cause of action.

In response to DER's Motion, Snyder argues it has filed two distinct appeals from two distinct DER actions. Snyder claims no basis in law or regulation for DER's bifurcation of its decision (i.e., separately rejecting first, the unmodified application, and secondly, the modified application containing the "Proposed Casing Design"), so DER should not be heard to object to the existence of two separate appeals.

Our analysis of what has occurred here starts with the conclusion that DER has taken two separate actions of a type appealable to this Board. Neither DER nor Snyder really disputes this conclusion. Clearly, Snyder's unmodified permit application's denial in July is appealable to us under 25 Pa. Code §21.2(a) and was appealed. The docket at No. 94-219-E is ample evidence this is so. Just as clearly, DER intended in that denial to have decided only the question of permit issuance/permit denial raised by Snyder's original unmodified application absent the "Possible Casing Design" rather than the adequacy of that application as modified by Snyder's "Possible Casing Design". This is evident from DER's letter of October 25, 1994. It provides in relevant part:

We have completed the evaluation of the "Possible

²The unmodified permit's appeal was originally assigned to Board Member Robert D. Myers and bore Docket No. 94-219-MR. On December 22, 1994, it was reassigned to the writer and now bears Docket No. 94-219-E.

Casing Design" which you submitted in connection with the subject well permit application at our conference held on June 1, 1994. As you know, by letter dated July 14, 1994, the Department denied the permit application as submitted on May 24, 1994 on the basis of objections filed by O'Donnell Coal Company to the location of the proposed well. These objections remained unresolved even after the meetings between the parties were held to discuss them. You offered the casing design as a means of resolving those objections but requested that the Department also complete its review of your permit application and render a decision on the application independent of the review of this "Possible Casing Design".

In reviewing the design, the Department has determined that the "Possible Casing Design" does not resolve the O'Donnell Coal Company objections because the design does not provide the support and/or protection equal to or greater than that provided by a 100' x 100' coal pillar. Therefore, the design is not an acceptable substitute for the 100' x 100' coal pillar.

Moreover, after giving this recitation, the letter goes on to provide Snyder may appeal DER's conclusion to this Board. Moreover, as pointed out by Snyder, had DER approved Snyder's "Possible Casing Design", the effect would have been that DER would have approved Snyder's permit application as modified by this "Possible Casing Design", thus apparently mooting that appeal.

As to the denial of Snyder's unmodified application and Snyder's appeal at Docket No. 94-219-E, it is clear Snyder's Notice Of Appeal lists only three general grounds for appeal (that Notice Of Appeal is attached to DER's Motion). There, Snyder alleged that in denying its permit application, DER failed to follow the guidelines "... of (1) Act 233, Oil and Gas Act; (2) Act 214, Coal and Gas Resource Coordination Act; and (3) Chapter 78, Oil and Gas Wells". In that appeal, Snyder then petitioned for an allowance to amend its objections to the unmodified application's denial. In an opinion dated November 14, 1994 in the first appeal, Board Member Myers denied Snyder's Petition. He found that to the extent this Petition would add new grounds for appeal, it was barred by the

decision in Commonwealth, Pennsylvania Game Commission v. Commonwealth, Department of Environmental Resources, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), affirmed on other grounds, 521 Pa. 121, 555 A.2d 812 (1989) ("Game Commission"). He also found that to the extent the full page of proposed Snyder objections was to be a "concise" restatement of the several lines quoted above, it was unnecessary.

That sound opinion cannot be and will not be disturbed here. To the extent that it barred that Petition, it also bars this second appeal to the extent Snyder seeks to use it to supplement the grounds for appeal in the unmodified permit appeal's challenge to DER's denial thereof.

On the question of what may be raised and when, we have faced a somewhat analogous situation previously. In Arthur Richards, Jr. V.M.D., et al. v. DER, et al., 1990 EHB 382 ("Richards"), appellants failed to timely appeal DER's initial issuance of a surface mining permit or that permit's subsequent transfer to another miner but did appeal from DER's subsequent renewal of the permit. In rejecting the miner's motion for summary judgment, we held that the appellants could challenge the decision to approve permit renewal only, but in doing so were limited to timely challenges regarding same and could not challenge the validity of DER's initial decision on the original application for permit. So too in James Buffy and Harry K. Landis, Jr. v. DER, et al., 1990 EHB 1665, we allowed the Appellants to challenge a bonding increment authorized by DER, where they had failed to timely appeal from the original mining permit's issuance because they were uninjured until the bonding increment authorized the mining of the recharge area for their residential water supplies. By analogy Snyder's unmodified permit application, as amended or supplemented by the "Possible Casing Design", was rejected by DER and was appealable by Snyder to this Board. In the instant

appeal from rejection of the modified application, Snyder may not challenge the underlying permit's initial denial. If we allowed that here we would be ignoring Game Commission and Richards. However, Snyder may now challenge rejection of the modified application containing the "Possible Casing Design."

Having reached the conclusions set forth above, we reject DER's Motion. The standard applied to judge the merit of motions of this type is that if the facts are not in dispute and the law is clear, the motion may be granted. Huntingdon Valley Hunt v. DER, 1993 EHB 1533. Here, the law is not clear so DER as movant, cannot prevail. In so concluding, we are not ruling on whether any of these objections could only apply to the initial permit's rejection but are only concluding that it is not clear that none of the objections could apply to the denial of the permit application as modified by the "Possible Casing Design". We might wish that in the instant appeal's Notice Of Appeal Snyder had not simply repeated verbatim the objections attached to its earlier rejected Petition and we do not condone its counsel's failure to specify with clarity that these challenges apply only to the rejection of this modified application. But, we believe that with this appeal limited as above, we should not dismiss this appeal based upon the lack of clarity in or omissions from the Notice Of Appeal.

ORDER

AND NOW, this 29th day of December, 1994, it is ordered that DER's Motion For Judgment On the Pleadings is denied.

ENVIRONMENTAL HEARING BOARD


RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: December 29, 1994

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