Environmental Hearing Board

Adjudications
and
Opinions

1996

Volume II

COMMONWEALTH OF PENNSYLVANIA
George J. Miller, Chairman

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

1996

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1996.

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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M. DIANE SMITH
SECRETARY TO THE BOARD

SHE-NAT, INC.	:	
	:	
v.	:	**EHB Docket No. 95-145-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 7, 1996**

OPINION AND ORDER ON MOTION TO DISMISS

By Michelle A. Coleman, Member

Synopsis:

The Department of Environmental Protection files a motion to dismiss the appeal of She-Nat, Inc. which sought review of an order of the Department which assessed civil penalties pursuant to Section 1307 of the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. §6021.1307. We grant the Department's motion to dismiss because She-Nat failed to pre-pay the proposed penalty as required by the Act.

Opinion

The Department issued an administrative order and assessment of civil penalties to She-Nat on June 21, 1995. On July 17, 1995, She-Nat filed a timely notice of appeal with the Board. It is

undisputed[1] that it did not pre-pay the proposed penalty or post an appeal bond as required by Section 1307 of the Act, which provides:

> The person charged with the penalty shall then have 30 days to pay the proposed penalty in full or, if the person wishes to contest the amount of the penalty or the fact of the violation, forward the proposed amount of the penalty to the department within the 30-day period . . . . Failure to forward the money or the appeal bond shall result in a waiver of all legal rights to contest the violation or the amount of penalty.

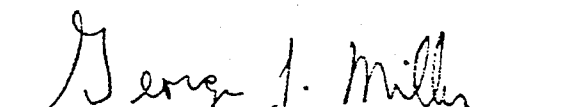
35 P.S. §6021.1307(b). Thus failure to pre-pay the proposed penalty deprives this Board of jurisdiction over this matter. *See Kilmer v. DER*, 1994 EHB 1799 (failure to pre-pay a penalty assessment under a similar provision of the Noncoal Surface Mining Act deprives the Board of jurisdiction).

Accordingly, we enter the following:

ORDER

AND NOW, this 7th day of May, 1996, the appeal of She-Nat, Inc. in the above-captioned matter is hereby dismissed.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

[1] She-Nat did not file a response to the Department's motion to dismiss, and the record is devoid of any evidence that it paid the proposed penalty.

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: **May 7, 1996**

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M. DIANE SMITH
SECRETARY TO THE BOARD

DARLENE K. THOMAS, et al.	:	
	:	
v.	:	**EHB Docket No. 95-206-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LAMAR TOWNSHIP BOARD OF SUPERVISORS	:	**Issued: May 9, 1996**

OPINION AND ORDER ON MOTION TO COMPEL

By Michelle A. Coleman, Member

Synopsis:

Before the Board is the motion to compel answers to interrogatories by Darlene K. Thomas (Appellant) which seeks to require the Department to produce a copy of the Act 537[1] Plan Revision and to provide more specific answers to several interrogatories.

OPINION

Appellant first contends that the Department should supply her with a copy of the Act 537 Plan because it was referenced in several answers to interrogatories directed to the Department, and the Department has indicated that it intends to introduce portions of the Plan at the hearing. The Department responds that pursuant to Pa. R.C. P. No. 4006(b), it should not have to produce the plan because the document is as accessible to Appellant as it is to the Department.

While the Plan is arguably accessible inasmuch as it is a public document, it does not appear

[1]An Act 537 Plan is the official plan required of municipalities by the Sewage Facilities Act, Act of January 24, 1966, P.L. 1535 (1965), as amended, 35 P.S. § 750.1- .20a. This Act requires every municipality in Pennsylvania to have in place a current, comprehensive sewage facilities plan, and to implement the plan.

that it is overly burdensome or vexatious for the Department to produce it. Appellant alleges that she had tried unsuccessfully to obtain it from other sources. The Department has not stated in its response that the Plan is so voluminous that it would be too costly to reproduce. Accordingly, we will require the Department to supply Appellant with a copy of the Act 537 Plan which it used to answer Appellant's interrogatories.

Appellant raises additional interrogatories which she alleges have been inadequately answered by the Department. However, she has failed to attach copies of those interrogatories which she alleges are incomplete as exhibits to her motion, and we are therefore unable to review her allegations. Section 1021.111 of the Boards rules provides that

> Copies of requests for discovery or responses to requests are not to be filed with the Board unless they are necessary for the resolution of a discovery dispute or disposition of a motion pending before the Board.

25 Pa. Code §1021.111. Since Appellant is the party who has put certain discovery requests at issue, it is incumbent upon her to supply us with adequate materials to resolve the dispute.

Accordingly we enter the following:

ORDER

AND NOW, this 9th day of May, 1996, the motion of Darlene M. Thomas to compel answers to interrogatories and production of documents is GRANTED as to her request that the Department provide her with a copy of the Act 537 Plan at issue in this appeal. The motion is denied in all other respects.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: **May 9, 1996**

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M. DIANE SMITH
SECRETARY TO THE BOARD

V. R. PATTERSON & KAREN A. PATTERSON AND COUNTY OF ADAMS, INTERVENOR	:	
v.	:	**EHB Docket No. 94-347-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND FREEDOM TOWNSHIP AND LIBERTY TOWNSHIP, PERMITTEES, AND MIDDLE CREEK BIBLE CONFERENCE, INC., INTERVENOR	:	**Issued: May 14, 1996**

OPINION AND ORDER SUR MOTION AND CROSS MOTION FOR SUMMARY JUDGMENT

By: Robert D. Myers, Member

Synopsis:

In disposing of a Motion and Cross Motion for Summary Judgment, the Board grants the former and denies the latter. In doing so, the Board rules that DEP did not violate the law or abuse its discretion in (1) allowing a developer to submit its Act 537 planning modules on the old forms so long as they satisfied subtantive requirements of the regulations, or in (2) refusing to require the developer to conduct and submit a socio-economic justification study. The Board also holds that DEP was not required to disapprove the Act 537 Plan Revisions because of lack of consistency with comprehensive plans. Finally, the Board dismisses an objection that the planning module failed to document a method of sponsorship and an objection that DEP failed to hold a

promised public hearing. The posting of bonds was deemed to satisfy the first objection. With respect to the second, the Board found that the only promise of a public hearing related to the permitting stage and not the Act 537 planning stage, during which DEP is not required to hold public hearings.

OPINION

A plan to construct a conference center by Middle Creek Bible Conference, Inc. (Middle Creek) in Freedom and Liberty Townships, Adams County, has generated a good deal of controversy in those political subdivisions, appeals to this Board (88-221-MR, 90-466-MR, 92-246-MR and the instant appeal), an appeal to Commonwealth Court (No. 2023 C.D. 1993), and a proceeding in the U.S. District Court for the Middle District of Pennsylvania (M.D. No. 1: CV-94-317). A reference to these dockets and reported opinions at 1989 EHB 44 and 1097; 1993 EHB 1008; and 645 A.2d 295 (Pa. Cmwlth. 1994), will provide detailed facts of the history of this controversy. We will repeat here only what is necessary to dispose of the Motions before us.

This Board dismissed the appeal at Board Docket No. 92-246-MR as having been taken from an unappealable action of the Department of Environmental Resources (now known as the Department of Environmental Protection (DEP)), and dismissed the appeal at Board Docket No. 90-466-MR as moot (1993 EHB 1008). Those actions were reversed by Commonwealth Court on June 20, 1994 and the dockets were remanded to us for further proceedings (645 A.2d 295 (Pa. Cmwlth. 1994)). The two appeals were withdrawn on February 8, 1995 without further proceedings because the parties had reached a comprehensive settlement whereby Freedom Township and Liberty

Township approved Middle Creek's Planning Modules for New Land Development as revisions to their Official Plans.[1] DEP also approved on November 22, 1994.

DEP's approval is the subject of the present appeal before the Board, having been filed on December 19, 1994 by V.R. Patterson and Karen A. Patterson (Appellants). Adams County was permitted to intervene as a party appellant on March 30, 1995, but was expressly limited to litigating the issues raised by Appellants in their Notice of Appeal.

On August 16, 1995, Middle Creek filed a Motion for Summary Judgment with supporting documents and legal memorandum. On September 5, 1995, Adams County filed a Cross-Motion for Summary Judgment with supporting documents and legal memorandum. Middle Creek and DEP filed responses to Adams County's Cross-Motion on September 25, 1995; Adams County filed a reply brief on October 13, 1995. While this Opinion and Order was being written, Adams County filed an Amended Motion for Summary Judgment and brief on March 1, 1996. Middle Creek moved to strike the Amended Motion on March 25, 1996 and Adams County responded to Middle Creek's motion on April 9, 1996. The motion to strike will be disposed of as part of this Opinion and Order. Appellants have neither filed, joined in, nor responded to any of these Motions.

We can 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. We must view the Motion in the light most favorable to the non-moving party: *Robert C. Penoyer v. DER*, 1987 EHB 131.

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[1]Also known as "Act 537 Plans" because they are governed by Act No. 537 of 1965 (Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 *et seq*).

In its Motion, Middle Creek contends that it is entitled to summary judgment on each of the five objections to DEP's action set forth in paragraph 3 of Appellants' Notice of Appeal. There is no genuine issue as to any material fact on any of these issues, Middle Creek asserts, and Middle Creek is entitled to judgment as a matter of law on each of them. We will deal with them *seriatim*.

"1. The application was made on old forms with DER approval."

Middle Creek submits the June 16, 1995 deposition of Charles D. Ferree, Jr. in support of its Motion on this point. Ferree is the Water Quality Specialist Supervisor for DEP's Region 3, having held that position since 1986. He has been particularly active in Act 537 Plan regulation since 1980 and has been involved with the processing of Middle Creek's Planning Modules from the beginning. Ferree testified that, after DEP's regulations dealing with Act 537 Plans[2] had been substantially revised (effective June 10, 1989), Middle Creek requested DEP to waive any requirement to refile the Planning Modules on the new forms adopted by DEP. DEP, according to Ferree, acquiesced so long as the documents satisfied the new substantive requirements of Chapter 71.

Ferree didn't mention it in his deposition, but DEP initially took the position that Middle Creek *had* to resubmit the Planning Modules on the new forms. Middle Creek filed an appeal from this September 28, 1990 letter of DEP at Board Docket No. 90-466-MR. This appeal was dismissed as moot by the Board's Opinion and Order of July 28, 1993 (1993 EHB 1008), an action which was reversed by Commonwealth Court, as previously noted. Thus, the old forms/new

[2]25 Pa. Code Chapter 71.

forms issue was never litigated on the merits. At some point, however (according to Ferree), DEP relented and agreed to process the Planning Modules on the old forms, so long as the substantive provisions of revised Chapter 71 were met.

Ferree testified that the old forms actually contained more information than the new forms require; the Planning Modules finally approved met all of the substantive provisions of revised Chapter 71, and particularly those in Subchapter C, New Land Development Plan Revisions.

Middle Creek also relies on the deposition of V.R. Patterson (one of the Appellants) who testified that he had no idea what differences there may be between the old forms and the new forms and no idea whether any such differences are substantive in nature.

Adams County's response is somewhat indirect. It did not file a specific paragraph-by-paragraph answer to Middle Creek's Motion but filed its own Cross-Motion. That Cross-Motion focuses solely on allegations that the Planning Modules conflict with Adams County's Comprehensive Plan and Freedom Township's Comprehensive Plan. The Amended Motion deals with the same subject. No mention is made of the forms (whether old or new) but there is an allegation that the Planning Modules did not contain relevant comments submitted by the Adams County Office of Planning and Development. The County expands on this point in its "Brief in Support of its Motion for Summary Judgment and in Opposition to Middle Creek Bible Conferences, Inc.'s Motion for Summary Judgment," referring to the Planning Modules to support the allegation. The Planning Modules have not been filed with us (despite Adams County's assertion that it was filed as a separate volume of Middle Creek's appendix); nonetheless, we are satisfied from the depositions that the Planning Modules as approved contained Adams County's May 6, 1987 letter but did not contain Adams County's September 4, 1991 letter. The former found no conflict with

the County's Comprehensive Plan; the latter did.

Even though we are willing to accept the allegation as undisputed, we are left to guess what relevance it has to the use of the old forms rather than the new. Obviously, the old forms required the inclusion of the County's comments just as the new forms do. The fault, if any, was not with the forms used but with the choice of letter. Middle Creek probably should have submitted both. We say "probably" because we are not sure it was required. Unlike the 1987 letter that was addressed, as it should have been, to the Townships, the 1991 letter was addressed to DEP's Ferree with copies to the Townships. While Middle Creek was obligated to provide DEP with County comment letters received by the Townships during their processing of the Planning Modules, we fail to see any duty to provide to DEP County comment letters directed to DEP and already in DEP's possession.

In any event, Ferree's deposition makes clear that DEP had the 1991 letter, was aware of its contents and was otherwise informed of the County's opposition. Adams County does not dispute this fact but argues that it is immaterial. The County contends that unless the 1991 letter was sent to DEP as part of the Planning Modules, the Planning Modules were incomplete under 25 Pa. Code §71.53(d)(2), the County contends. We have never been persuaded to adopt such a pedantic approach to environmental regulation and will not do so now.

Adams County argues that the old forms/new forms issue is broader than the specific pieces of paper used and refers us to its Pre-Hearing Memorandum where under Contentions of Law it argues that the Planning Modules were incomplete for six omissions in addition to the 1991 letter. Middle Creek filed a Motion in Limine with respect to these contentions on the ground that they are the County's attempt to litigate issues not raised by Appellants in their Notice of Appeal - a violation

of the terms of the County's intervention. Even if we were to consider these six omissions to be properly raised, we would be unable to deny Middle Creek's Motion for Summary Judgment on the basis of them. They are raised in the Pre-Hearing Memorandum as legal contentions; and, while they are referenced in Adams county's brief, they are unsupported.

Pa. R.C.P. 1035 provides that, when a motion for summary judgment is made and supported as provided in this rule (i.e. by the pleadings, depositions, answers to interrogatories, admissions on file or affidavits), the adverse party "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in 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."

Adams County's appendix, filed in support of its own Cross-Motion and in opposition to Middle Creek's Motion, contains excerpts from six depositions and a number of documents; but none of it is cited to support the County's argument. In the face of Ferree's deposition statements that Middle Creek's Planning Modules (on the old forms but supplemented with additional documentation) satisfied the substantive requirements of Chapter 71, the County had to respond, by affidavit or deposition, for example, to show either that an issue of fact existed on this point or that Middle Creek was not entitled to judgment on it. It has not done so.

Accordingly, we find no dispute as to any material fact and conclude that Middle Creek is entitled to judgment as a matter of law on issue 1.

> "2. The module does not comply with Pennsylvania Code Title 25, Chapter 71, Paragraph 71.53(h) dealing with Municipal Comprehensive Plans."

> 25 Pa. Code §71.53(h), which is part of Subchapter C, states as follows:
>
> A municipality may not adopt a proposed revision to the official plan, conditionally or otherwise, until it determines that the proposal complies with applicable municipal zoning, land use or other municipal comprehensive plans. If changes to the proposed revision or the applicable plan, regulation or ordinance are necessary, the changes shall be completed prior to adoption of the revision by the municipality.

Middle Creek again relies on Feree's deposition to establish the point that a municipal comprehensive plan, in and of itself, is nonbinding. Inconsistency with such a plan is not sufficient basis for rejecting a plan revision. In addition, DEP interprets "municipal comprehensive plans" in the quoted regulation to exclude county plans.

We must first determine which municipal comprehensive plan or plans Appellants intend to raise in this issue, since the possibilities are numerous. Freedom Township and Liberty Township each has its own comprehensive plan and Adams County also has one. In deposition excerpts included in Middle Creek's Appendix, V.R. Patterson clearly stated that he meant the Adams County Comprehensive Plan (Tab "B", p. 72, l. 20). Karen A. Patterson was not as direct but referred to features of the Adams County Comprehensive Plan (Tab "C", p. 25, l. 14 to p. 26, l. 5). This is confirmed by deposition excerpts of the same individuals included in Adams County's Appendix (Tab 27, p. 15, l. 1 to p. 21, l. 11; Tab 28, p. 25, l. 14 to p. 26, l. 5).

Our scrutiny then focuses on the legal effect of Adams County's Comprehensive Plan with respect to Middle Creek's Planning Modules. As noted, DEP contends that the County's Comprehensive Plan has no bearing on the case because it is not technically a "municipal comprehensive plan." That contention is based on the definition of "municipality" in section 2 of

Act 537, 35 P.S. §750.2, which limits the term to city, town, township or borough. While counties are thus excluded from the term with respect to Act 537 Plans, the meaning of "municipal zoning, land use or other municipal comprehensive plans" is more properly determined by the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, as reenacted and amended by the Act of December 21, 1988, P.L. 1329, 53 P.S. §10101 *et seq*. That statute, which deals in great detail with planning and zoning, defines "municipality" to include counties, (53 P.S. §10107). Counties are required to adopt comprehensive plans and other types of municipalities within the county are required to make certain that their own comprehensive plans are "generally consistent" with the county plan. (53 P.S. §10301.4). Thus, when 25 Pa. Code §71.53(h) refers to "municipal zoning, land use or other municipal comprehensive plans," we conclude that it encompasses county enactments as well as those of other municipalities within the county.

Before approving Middle Creek's Planning Modules, Liberty Township and Freedom Township had to determine whether they complied with "applicable" zoning, land use or other comprehensive plans. Applicable zoning regulations would be those of the townships, if any, or if not, those of the county, if any existed (53 P.S. §10602). Since zoning regulations have the force of law in governing land use, *Morelli v. Borough of Saint Mary's*, 275 A.2d 889 (Pa. Cmwlth. 1971), they are clearly important factors to be considered in Act 537 Plan adoptions. 25 Pa. Code §71.53(h) properly requires consistency between Act 537 Plan revisions and local zoning. There is no claim here that such consistency was not achieved.

What about consistency between the Act 537 Plan revisions and applicable comprehensive plans? The language of §71.53(h) appears to require such consistency just as it does with respect to zoning enactments. In its Amended Motion, Adams County goes through the maze

of other provisions of 25 Pa. Code Chapter 71 pointing out repeated instances where absolute consistency supposedly is mandated. Among them are §71.21(a)(4) and (5) which require the identity of sewage facilities alternatives, the evaluation of each alternative for, *inter alia*, consistency with comprehensive plans, and the resolution of any inconsistencies. These provisions are incorporated by reference into the regulations in Subchapter C. They are also incorporated by reference into §71.31 and §71.32 which, in turn, are incorporated by reference into Subchapter C.

Middle Creek moved to strike the Amended Motion because the arguments do not fall within the scope of §71.53(h), the only provision raised by Appellants. We disagree. Appellants did not refer to the many other sections raised by Adams County in the Amended Motion, but they clearly raised the issue of consistency with the County's Comprehensive Plan. The Amended Motion merely enlarges upon that issue, in our judgment, and is not objectionable.

We are satisfied that the language of the additional sections cited by Adams County, like that of §71.53(h), appears to mandate consistency between the Planning Modules and the applicable municipal comprehensive plans. As noted previously, the Townships and Adams County were all required to adopt comprehensive plans and the Township plans were supposed to be "generally consistent" with the Adams County plan (53 P.S. §10301.4). Regardless of which plans are found to be "applicable", we are faced with the fact that the status of comprehensive plans is much different from that of zoning regulations.

Once a comprehensive plan is adopted, municipal action is expected to be consistent with it (53 P.S. §10303(a) and (b)), but

> "no [municipal] action...shall be invalid nor shall the same be subject to challenge or appeal on the basis that such action is inconsistent with, or fails to comply with, the provisions of the comprehensive plan."
>
> (53 P.S. §10303(c)).

This legislative declaration that comprehensive plans are not paramount was prompted by the courts. In *Saenger v. Planning Commission of Berks County et al.*, 308 A.2d 175 (Pa. Cmwlth. 1973), Commonwealth Court quoted extensively from earlier decisions. From *Morelli v. Borough of Saint Mary's*, *supra*, the court borrowed the following language which it found controlling:

> A comprehensive plan is provided for in Article III of the 1968 Planning Code, *infra* (53 P.S. §§10301 through 10306). It is an overall plan or guide to land utilization and to meeting the needs and desires of the community. As Section 301 provides, it must contain certain basic elements, statutorily described in general terms, and in addition may contain many other elements, such as studies, treatises, newspaper articles, and any other item the planning commission believes adds flavor to its objectives. This overall plan or any amendment thereto is given a governmental imprimatur of approval by the passing of a resolution by a majority of the "governing body." The comprehensive plan does not have the legal effect of a zoning ordinance, which actually regulates the land use as may be recommended by the comprehensive plan. The planning commission may recommend all kinds of desirable approaches to land utilization and development. Not all of these may become eventually legally enforceable in a zoning ordinance. In other words, a comprehensive plan is abstract and recommendatory; whereas the zoning ordinance is specific and regulatory. 275 A.2d at 891-892

From *Penny v. Board of Supervisors of Warrington Township*, 53 Pa. D & C 2d 329, 332 (1971), the court borrowed the following:

> It is inherent in the recommendatory nature of the comprehensive planning concept that it neither can nor does have any specific or litigable impact such as to provide any practical or realistic occasion for judicial intervention. The formulation and adoption of a comprehensive plan are but intermediate and inconclusive steps in the

> planning process, and in themselves are legally ineffective. No one's rights, pro or con, are affected thereby unless and until the recommendations thereof be implemented.

Appellants and Adams County would interpret the language of §71.53(h) and the other cited sections as elevating comprehensive plans from the "abstract and recommendatory" level to that of zoning ordinances, giving them binding effect. We do not know the intent of the drafters of Chapter 71, but we find it difficult to believe that they consciously sought to endow comprehensive plans with more authority than they are given in the MPC, the statute that creates them. In any event, these regulations must be reasonable and not in conflict with the intent of the legislature: *Commonwealth v. Harmar Coal Company*, 452 Pa. 77, 306 A.2d 308 at 319 (1973). While the decided cases deal with conflicts between regulations and the statute under which they are promulgated, we believe the principle also applies when the regulations conflict with another statute, especially a clear declaration of legislative intent such as 53 P.S. §10303(c). This Board also has the power to nullify regulations that are unreasonable even if they do not conflict with the statute authorizing them: *Croner, Inc. v. Department of Environmental Resources*, 589 A.2d 1183 (Pa. Cmwlth. 1991), on remand, 618 A.2d 1135 (Pa. Cmwlth 1992). The regulations of Chapter 71 are unreasonable, in our judgment, to the extent that they attempt to give binding effect to comprehensive plans adopted pursuant to the MPC.

Besides, even if comprehensive plans had some binding effect, Adams County's plan would not be controlling. While the Townships are supposed to tailor their comprehensive plans so that they are "generally consistent" with the County plan (53 P.S. §10301.4), absolute consistency is not required. The County and Townships are to give mutual consideration to each other's plans so that the objectives of each plan can be achieved "to the greatest extent possible." (53 P.S. §10306(a)).

This language contains no inference that one plan is preferred over another. Nor is there any other provision in the MPC giving a county comprehensive plan supremacy over the plans of constituent municipalities.

The record shows that the Townships and DEP were aware of, and considered, Adams County's Comprehensive Plan. That is all that is required. We find no dispute as to any material fact and conclude that Middle Creek is entitled to judgment as a matter of law on issue 2.

> "3. The first letter in the module under Modules and Related Data from DER and dated May 13, 1986 page 2 paragraph 11 requires complete documentation of the method of sponsorship. This is missing from the module."

Adams County does not address this objection. Middle Creek contends that it is entitled to summary judgment because the record discloses that the Pattersons' concerns have been satisfied. The depositions of V.R. Patterson and Karen A. Patterson, included in Middle Creek's Appendix (Tab "B", p. 22, l. 21, to p. 29, l. 19; Tab "C", p. 26, l. 6, to p 27, l. 17), make it clear that they understand that Middle Creek will be responsible for construction, operation and maintenance of the sewage facilities. Their concern is whether Middle Creek has the financial resources to do so. Apparently, they were unaware that the Townships conditioned their approval on the posting of bonds to cover these costs. Middle Creek relies on the depositions of Richard E. Varish (Tab "F", p. 74, l. 5 to p. 75, l.2) and Ferree (Tab "A", p. 36, l. 18 to p. 38, l. 23) to establish this point and to show that the Townships and DEP were satisfied on the sponsorship issue.

Since the Pattersons have made no effort to counter this evidence and since Adams County has not addressed the issue, we conclude that there is no dispute as to any material fact.

Since the Pattersons' monetary concerns will be satisfied by the posting of bonds, we conclude that Middle Creek is entitled to judgment as a matter of law on issue 3.

> "4. The 3rd page of this same DER letter [May 13, 1986] specifies the reasons why a socio-economic justification study is required. No such study was done."

The May 13, 1986 letter, attached as an exhibit to V.R. Patterson's deposition in Middle Creek's Appendix (Tab "B"), mentions the possible need for a socio-economic justification study for the discharge from the proposed sewage treatment plant. Later, despite numerous requests from citizens to mandate such a study, DEP refused to do so. Ferree testified (Middle Creek Appendix, Tab "A", pp 39-43) that, when the May 13, 1986 letter was sent, the details of the project were still conceptual and DEP was pointing out elements that might have to be dealt with. At that time, DEP was aware that the discharge was to go to Middle Creek but was not certain of the exact location. The headwaters of Middle Creek are designated "High Quality - Cold Water Fishery" by DEP regulations at 25 Pa. Code §93.9Z. Such waters are required to be maintained at their existing quality unless a proposed discharger affirmatively demonstrates, *inter alia*, that the proposed discharge has social or economic justification (25 Pa. Code §95.1(b)).

After DEP learned that the proposed discharge point was in a portion of Middle Creek designated "Warm Water Fishery,"[3] it saw no need for a socio-economic justification study, according to Ferree. Moreover, DEP began to limit those studies to the permit review stage rather than the Act 537 Plan stage. Certainly, the impact of a proposed discharge upon high quality waters

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[3]This portion of Middle Creek is now designated "Cold Water Fishery" in §93.9Z. However, this upgrading of water quality does not affect our resolution of the socio-economic justification study issue.

may have to be addressed at the permitting stage: *Lehigh Township, Lackawanna County et al. v. DEP et al.*, Board Docket No. 95-070-MG (Opinion and Order issued October 20, 1995), but is also a relevant matter at the Act 537 planning stage, especially when the module being considered is for a specific project. We conclude, therefore, that the need for a socio-economic justification study was a proper subject to be raised during the planning stage for Middle Creek's proposed project.

Neither Appellants nor Adams County dispute DEP's determination that the designated water quality of Middle Creek at the proposed discharge point is less than high quality. Since a socio-economic justification study is required only where high quality waters are concerned, there was no mandate on DEP to order Middle Creek to provide one here. Despite this conclusion, Adams County argues that DEP had the discretion to order such a study and should have done so because of the natural setting of the proposed discharge point.

Quite aside from whether or not DEP has such discretion, Adams County has given us no basis for measuring its exercise. At the very least, there should be some record evidence to show that the proposed discharge will, in fact, degrade the waters of Middle Creek at the point of discharge. If there is no degradation, there is no basis for employing anti-degradation regulations. Nor can we assume that the proposed discharge will degrade the waters: *Concerned Citizens for Orderly Progress v. Commonwealth, Department of Environmental Resources*, 387 A.2d 987 (Pa. Cmwlth., 1978). As we noted earlier in this Opinion, Adams County had to allege facts, supported by affidavits or other documents allowed by Pa. R.C.P. 1035, undergirding its legal contentions or showing genuine issues for trial, in order to avoid the entry of summary judgment.

In the absence of any evidence that the proposed discharge will degrade the waters of Middle Creek, we cannot agree that DEP abused its discretion by not ordering a socio-economic

justification study. We find no disputes as to any material facts and conclude that Middle Creek is entitled to judgment as a matter of law on issue 4.

> "5. DER promised the citizens they would hold a public meeting in the local area in the evening before an approval was given. This was not done."

Like issue 3, Adams County does not address this issue. Since the Pattersons have not responded in any way, we are ignorant of the legal basis for their objection. Ferree testified (Middle Creek Appendix, Tab "A", pp 43-45) that the only promise of a public meeting he was aware of was made in connection with the issuance of permits, not the approval of planning modules. Apparently, the Pattersons do not understand that this project is only in the Act 537 planning stage and that no public hearings are required of DEP during that stage. Since Adams County has not addressed the issue, we assume that the distinction is understood by that entity. In any event, we find no disputes as to any material facts and conclude that Middle Creek is entitled to judgment as a matter of law on issue 5.

ORDER

AND NOW, this 14th day of May, 1996, it is ordered as follows:

1. Middle Creek's Motion to Strike is denied.
2. Middle Creek's Motion for Summary Judgment is granted.
3. Adams County's Motion and Amended Motion for Summary Judgment are denied.
4. The appeal is dismissed.

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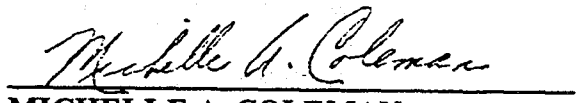

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: May 14, 1996

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MICHAEL W. FARMER	:	
	:	
v.	:	**EHB Docket No. 95-039-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 14, 1996**

ADJUDICATION

By: Robert D. Myers, Member

Syllabus:

The DEP's January 15, 1995 order suspending appellant's certification in all categories as a storage tank installer and inspector under the Storage Tank Act and regulations thereto is sustained as proper and not an abuse of discretion. Appellant performed an inspection outside the scope of his certification constituting an unauthorized activity warranting the suspension.

PROCEDURAL HISTORY

On February 10, 1995, Michael W. Farmer (Farmer) filed a Notice of Appeal at Board Docket No. 95-039-MR, seeking Board review of a January 19, 1995 Administrative Order issued by the Department of Environmental Resources (now the Department of Environmental Protection) (DEP) which suspended Farmer's certification in categories of inspector and installer of storage tank systems and storage tank facilities. The Order was issued pursuant to the Storage Tank and Spill Prevention Act (Storage Tank Act), Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. § 6021.101 *et seq*. and the corresponding regulations at 25 Pa. Code Chapter 245.

Also on February 10, 1995, Farmer filed a Petition for Supersedeas. Although a Hearing had been scheduled, the Petition was later withdrawn on March 1, 1995.

A hearing on the appeal was held in Harrisburg before Administrative Law Judge Robert D. Myers, a Member of the Board, on October 3, 1995. Both parties were represented by legal counsel and presented evidence in support of their respective legal positions.

The record consists of the pleadings, a joint stipulation of facts (Stip.) filed pursuant to Pre-hearing Order No. 2, a transcript of 232 pages with 16 exhibits and post-hearing memoranda.

After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. DEP is an administrative agency responsible for administering and enforcing the requirements of the Storage Tank Act; the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 691.1 *et seq.*; the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. § 6018.101 *et seq.*; 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. (Stip.).

2. M.W. Farmer Co. is a Pennsylvania corporation with a business address of 13 Fleming Street, Williamsport, PA 17701. M.W. Farmer Co. is certified by DEP pursuant to the Storage Tank Act program for installers and inspectors of storage tank systems and facilities. Michael W. Farmer is the chief-executive-officer of M.W. Farmer., Co. He is also certified in certain categories pursuant to the program and he is identified in the program by Certification Identification No. 15. (Stip.).

3. In 1989 DEP instituted an interim certification program regulating underground storage tank work pursuant to Section 108 of the Storage Tank Act. (35 P.S. § 6021.108; N.T. 153-4).

4. On September 1, 1989, Farmer filed with DEP an application for interim certification for several underground and aboveground installer categories and as an aboveground and underground inspector. (Stip.).

5. By letter dated November 8, 1989, DEP approved Farmer's interim certification. (Stip.). This interim certification included what is now known as IUM. (N.T. 24).

6. On September 21, 1991, regulations promulgated under the Storage Tank Act setting forth the certification program for inspectors of storage tanks and storage tank facilities became effective. (Stip.; N.T. 18).

7. The temporary certification program, set up by DEP pursuant to these regulations, required applicants to submit a complete application demonstrating their experience and qualifications for temporary certification. (25 Pa. Code § 245.102; N.T. 16-7).

8. On January 24, 1992, Farmer applied for an "initial" temporary installer and inspector certification, in a number of installer categories and in the inspector category of IUM, "[u]nderground manufactured storage tank system and storage tank facility." (Stip.; Exhibit C-2; N.T 156; 25 Pa. Code § 245.112).

9. Under the temporary certification program, IUM certification required individuals to either: (1) complete ten installations and ten modifications, have four years of experience or two years of experience with a college degree, and possess certification for installer category UTT, underground storage tank -- tank tightness tester, or (2) have UTT certification and IUF certification,

inspector underground field constructed storage tank system and facility. (N.T. 69; 25 Pa. Code § 245.113(a) (1991)).

10. Farmer's application for category IUM indicated he had completed thirty-one years of experience and had performed the required number of installations and modifications. (Exhibit C-2). Verification of Petro-Tite Testing for UTT was not attached to the application as it indicated, but rather an International Association of Tank Testing Professionals' certification of membership was attached. (N.T. 66; Exhibit C-2).

11. On November 12, 1992, DEP returned Farmer's temporary certification application citing certain deficiencies and requested resubmission by January 11, 1993. (Stip.; Exhibit AP-1).

12. On December 22, 1992, DEP received Farmer's resubmission of the temporary certification application. (Stip.).

13. On January 20, 1993, Farmer's application was accepted for review. (N.T 65; Exhibit C-2).

14. Once an individual was temporarily certified in one category, the individual's interim certification became invalid. (N.T.43).

15. Farmer's previously issued interim certification categories remained valid until DEP acted on the temporary certification application. (Stip.; Exhibit AP-1).

16. DEP issued a series of letters to Farmer on February 1, 1993,

(a) providing him with temporary certification (certification number 15) in certain categories;[1]

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[1] Those categories included: UM_X, UM_R, UCv1, AM_R and ACv1.

(b) informing him that he was denied temporary certification in category IUM[2] for failing "to meet Section 245.102(a)(1) or Section 245.102(b)(1) requirements" because Farmer had not submitted proof of UTT certification by showing successful completion of a training course; and

(c) revoking his interim certification indicating that temporary certification may or may not be issued, and notifying Farmer of his rights to appeal the decision to the Board. (N.T. 37, 87, 161; Exhibits C-3, C-4 and C-5).

17. Until February 1, 1993, Farmer maintained interim certification in the category of IUM. (Stip.).

18. On May 24, 1993 Farmer's temporary installer/inspector certification was extended in all categories from September 21, 1993 to September 21, 1994. (N.T. 163; Exhibit AP-3).

19. Under the regulatory scheme, temporary certification was valid through September 21, 1994, by which time individuals had to be permanently certified. (N.T. 16-7, 27; 25 Pa. Code § 245.103(c)).

20. By letter of August 24, 1993, DEP notified Farmer that he was certified as an installer in category UTT, among other categories. (N.T. 166, 173; Exhibit AP-4). This certification was issued on the basis of Farmer's August 9, 1993 application for UTT certification, Application No. 5017. (N.T. 210, 212, 215; Exhibit C-14).

21. On August 5, 1994, Farmer inspected the underground manufactured tank system at Klines Service Station (Klines). To perform the inspection legally, Farmer had to have temporary certification in category IUM.

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[2] This letter also denied Farmer certification in the category AMMX.

22. On August 17, 1994, DEP received a completed "Underground Storage Tank Facility Operations Inspection" report form signed by Farmer in regard to an inspection at Klines. (Stip.; Exhibit C-11).

23. Philip M. Zechman, a Storage Tank Section Chief in Environmental Cleanup Program with the DEP, testified that Farmer had acknowledged on August 31, 1994 that he did not have IUM certification, but Farmer believed he was generally authorized to perform facility inspections because he was a Registered Professional Petroleum Operations Engineer. (N.T. 102-5).

24. At this time according to DEP files and records, nothing indicated that Farmer was temporarily certified in the category of IUM. (N.T. 40, 44, 106).

25. Farmer testified that he did not have documentation showing that he was temporarily certified in the category of IUM. (N.T. 195).

26. On September 8, 1994, DEP received Farmer's Installer and Inspector Certification Application Form for the category of IUM. (Stip.; Exhibit C-8).

27. On September 20, 1994, DEP approved his application for temporary certification in the category of IUM. However, because the temporary certification program expired on September 21, 1994, the purpose of this letter was to inform Farmer that he was eligible to sit for the certification exam for category IUM permanent certification and to admonish him that he was not permitted to perform tank inspection activities until he received permanent certification documents from DEP. (Stip.; Exhibit C-9).

28. On January 19, 1995, DEP issued an Administrative Order under the Storage Tank Act to Farmer for violations of that act and the regulations promulgated thereunder, immediately suspending his certification in all categories of inspector and installer. This is the Order forming the basis of the appeal. (Exhibit C-12).

DISCUSSION

Since this appeal arose from an Order of DEP suspending Farmer's certification in categories of inspector and installer for storage tank systems and facilities, DEP has the burden of proof. 25 Pa. Code § 1021.101(b). To carry the burden, DEP must show by a preponderance of the evidence that the Order was a lawful and appropriate exercise of its discretion. 25 Pa. Code § 1021.101(a). Accordingly, the issue becomes whether DEP has presented sufficient evidence to support its Order.

Before addressing the substantive issues the Board will first consider DEP's motion raised at hearing. That motion sought to exclude "any testimony or evidence that addresses the basis for [DEP's] decision in February of 1993." (N.T. 8). The motion was taken under advisement at that time and the presiding Board member did not limit the testimony presented. (N.T. 11). In its post-hearing memorandum, DEP narrows its motion to exclude only the February 1, 1993 letter from DEP to Farmer which, *inter alia*, denied his application for temporary certification in the category of IUM.[3] Since the Board finds that DEP successfully carried its burden, regardless of whether this

[3] DEP asserts the letter's content and validity are now beyond challenge on the basis of administrative finality, because when Farmer failed to take an appeal from the letter, it became final. In response, Farmer argues that the doctrine can not apply to preclude the letter because the letter provided him an option to "reapply for certification in a denied category by correcting the deficiencies noted and submitting a complete application" as well as the standard language for appealing the action to the Board. (Exhibit C-4).

February 1, 1993 letter is admitted, it need not arrive at the merits of these arguments.

Section 108 of the Storage Tank Act set forth statutory "interim" certification requirements and procedures for installers and inspectors of aboveground and underground storage tank systems and facilities. 35 P.S. § 6021.108. On September 21, 1991, regulations promulgated pursuant to the Storage Tank Act became effective and set forth a "temporary" certification program in Subchapter B of 25 Pa. Code Chapter 245. This program phased in interim certified tank installers and inspectors over a three year period from September 21, 1991 to September 21, 1994, so individuals could apply for temporary certification as their interim certifications ran out. 25 Pa. Code § 245.103. Prior to the phase-in program's expiration, temporarily certified individuals had to apply for permanent certification, and be granted permanent certification, to remain certified. *Id.* at § 245.103(c).

In 1989, Farmer applied for and was granted interim certification from DEP for several underground and aboveground installer and inspector categories for storage tank work pursuant to the Storage Tank Act. This interim certification allowed Farmer to perform, among other things, storage tank inspection activities now categorized as IUM.

In accordance with the regulations, on January 24, 1992 Farmer applied for an "initial" temporary installer and inspector certification, requesting to be certified in a number of installer categories and in the inspector category of IUM. 25 Pa. Code § 245.112. On November 12, 1992, DEP returned Farmer's application due to certain deficiencies and requested submission of additional information or corrections. Farmer complied.

Specifically in regard to category IUM, Farmer's application indicated he had completed thirty-one years of experience and performed the required number of installations and

modifications. The application indicated that verification of Petro-Tite Testing for UTT was attached, but in fact no such UTT certification was attached. Instead, an International Association of Tank Testing Professionals' certification of membership was attached thereto. Nevertheless, Farmer's application was accepted for review on January 20, 1993.

Three letters each dated February 1, 1993, notified Farmer of the outcome of his temporary certification application. One provided Farmer with temporary certification in various storage tank installer categories, other than the inspector category of IUM. A second informed Farmer he was denied certification in the category of IUM, and also AMMX. This letter stated that IUM was denied for failing "to meet Section 245.102(a)(1) or Section 245.102(b)(1) requirements" of the Storage Tank Act regulations because Farmer had not shown proof of successful completion of a training course. He had not submitted proof of UTT certification. A third revoked Farmer's interim certification in all categories.

Evidence establishes that Farmer inspected the underground manufactured tank system at Klines Service Station (Klines) on August 5, 1994. DEP concluded that at that time Farmer did not possess a temporary inspector certification in the category of IUM, and therefore, he had performed an unauthorized inspection. As a result, DEP issued the Order suspending Farmer's certification in all categories of installer and inspector.

In his Notice of Appeal, Farmer argues that DEP's Order was legally insufficient, and therefore, an abuse of discretion and unenforceable. Although Farmer provided numerous reasons in support of his appeal, the Board's review of the Order and Farmer's challenge thereto is limited to the issues raised in his post-hearing memorandum because issues not so raised are deemed to have

been waived. *Lucky Strike Coal Co. and Louis J. Beltrami v. DER*, 547 A.2d 447 (Pa. Cmwlth. 1988); *Gemstar Corporation v. DER*, 1993 EHB1260.

In his post-hearing memorandum Farmer asserts that he was certified in the category of IUM when he conducted the inspection at Klines on August 5, 1994. The Storage Tank Act clearly defines a certified inspector as a "person certified by the department to conduct environmental audits and inspections of tanks or tank facilities..." 35 P.S. § 6021.103. The regulations promulgated pursuant thereto require that a "person may not conduct inspection activities at a storage tank system or storage tank facility. . . unless that person holds a current inspector certification issued by the [DEP] for the applicable certification category." 25 Pa. Code § 245.102(b). Farmer had applied for certification in certain categories but did not hold current inspector certification documentation for the category of activities at issue here. Nevertheless, Farmer provides several reasons for his belief that he was a certified inspector in category IUM for the August 5, 1994 inspection.

While Farmer had held interim certification in the category now known as IUM, this certification expired on February 1, 1993. No evidence established that Farmer thereafter received from DEP temporary certification in the category of IUM such that he would have been appropriately certified in that category on August 5, 1994. Even Farmer himself was uncertain as to his certification status at the time he conducted the inspection at Klines.

Farmer claims he resubmitted his application to DEP,[4] and therefore, he was certified in IUM. According to Farmer, he resubmitted his application by way of a letter dated February 12, 1993 addressing the deficiencies noted in DEP's February 1, 1993 letter, which had denied him temporary certification in IUM. (N.T. 162-4; Exhibit AP-2). Farmer admits that he did not receive a response from DEP but assumed his letter sufficed. (N.T. 163-5). Although Farmer's anger with DEP's lack of response to his correspondence and allegations that DEP had not taken the time and effort to properly review his file may be justified,[5] the Board lacks jurisdiction over a claim based on DEP's inaction. *Robert and Sharon Royer, et al. v. DER*, 1992 EHB 611.

Farmer then adds that DEP's May 24, 1993 letter extending his temporary installer/inspector certification by one year, following the resubmission of his application, reasonably lead him to believe he had authority from DEP to continue activities in the category of IUM. But, at the time this letter issued, Farmer's interim IUM certification had expired (on February 1, 1993) and he otherwise had no category IUM certification which could thereby be extended. The May 24, 1993 letter regarding "Extension of Temporary Certification #15" specifies its intent to extend just those categories of certification in which Farmer was actually certified on that date, i.e. the categories contained in the February 1, 1993 letter.

Moreover, the fact that Farmer applied for and received certification for category

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[4] DEP contends it never received from Farmer a resubmitted application of the remaining information required for IUM. No evidence established that Farmer had properly addressed, prepaid and mailed his resubmission to create a rebuttable presumption that it was received by the DEP. Farmer's only suggestion to the effect surrounds a DEP witness' testimony that she generally recalled receiving correspondence from him.

[5] We do not reach a conclusion on this point.

UTT prior to his inspection of Klines is insufficient to establish certification in category IUM. The mere fact that certification in UTT would satisfy a requirement necessary for IUM certification, and was the specific deficiency for which Farmer was denied IUM certification on February 1, 1993, does not substitute for actual DEP certification. The Storage Tank Act mandates inspectors of storage tanks hold "current inspector certification" to conduct inspection activities. Even those inspectors certified in a foreign state must submit to DEP an application and receive a certificate to install or inspect storage tanks pursuant to the Storage Tank Act. 25 Pa. Code § 245.107. Regardless of whether Farmer had submitted additional information following denial of his application for IUM, had satisfied the regulatory requirements for temporary certification in category IUM, or DEP had possessed sufficient documentation to establish Farmer's qualification for IUM certification, Farmer presented no evidence of actual certification in this category. In fact, the record demonstrates Farmer's uncertainty regarding his certification status and Farmer testified that he did not have documentation showing that he was temporarily certified in the category of IUM. (N.T. 195). Qualification alone is insufficient. Individuals must be certified to conduct inspections and certification requires individuals to possess the certificate.[6] Accordingly, because Farmer was not certified in the category of work he performed, sufficient evidence supports DEP's Order was issued appropriately.

Farmer next alleges DEP acted unreasonably when it ordered suspension of all of his certifications in the storage tank program. He bases his argument on the allegation that the Order

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[6] Farmer's belief that he could perform the inspection at Klines without IUM certification and without certainty as to his certification status raises doubts about his fitness to operate under the Storage Tank Act and its regulations.

"could not afford the basis for suspension of all of Farmer's certifications." The regulations state otherwise. Section 245.108 provides DEP with the authority to suspend the certification of an installer or inspector for working as a certified installer or inspector in a certification category for which he has failed to obtain certification. 25 Pa. Code § 245.108(a)(6). Moreover, the "suspension of a certification in a single category shall prevent the person from engaging in activities in all categories of certification." 25 Pa. Code § 245.108(b). Since, as the Board found above, Farmer conducted an unauthorized inspection, the Board holds that it was appropriate and in accordance with the Storage Tank Act for DEP to suspend all of Farmer's certifications in the tank program.

CONCLUSIONS OF LAW

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

2. DEP has the burden of showing by a preponderance of the evidence that the issuance of the Order suspending Farmer's certification in categories of inspector and installer for storage tank systems and facilities was a lawful and appropriate exercise of its discretion

3. Farmer was not certified in category IUM when he conducted the inspection at Klines on August 5, 1994.

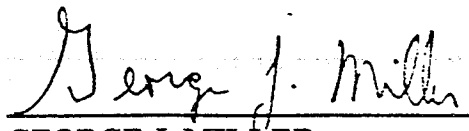
4. Farmer's inspection activities conducted at Klines on August 5, 1994 required certification in the inspector category of IUM under the Storage Tank Act.

5. DEP's January 19, 1995 Order suspending Farmer's certification in all categories of inspector and installer was a reasonable and appropriate sanction for performing an unauthorized inspection at Klines.

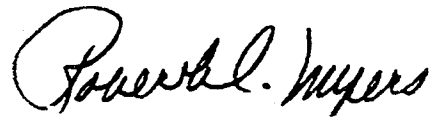
ORDER

AND NOW, this 14th day of May, 1996, it is ordered that the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman



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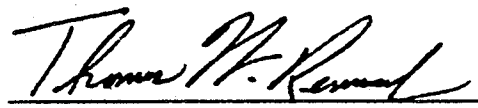

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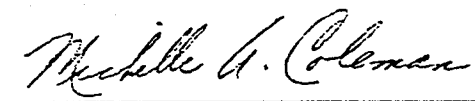

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: May 14, 1996

See next page for service list

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GEORGE M. LUCCHINO	:	
	:	
v.	:	**EHB Docket No. 95-185-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROBINSON COAL COMPANY, Permittee	:	**Issued: May 17, 1996**

OPINION AND ORDER SUR
PERMITTEE'S CORRECTED MOTION TO LIMIT ISSUES

By: Thomas W. Renwand, Member

Synopsis:

Permittee's Motion To Limit Issues, treated as a motion for partial summary judgment, is granted in part based on the following principles. In an appeal of a bond release decision, Appellant may not raise issues dealing with mine sites other than that on which the bond was released. The Board has no power to grant the relief requested to the extent the Appellant seeks an injunction, a mandamus of DEP to enforce SMCRA based regulations, the award of damages, the issuance of a reprimand to DEP, or the appointment of counsel to represent Appellant. Objections to bond release based on DEP's exercise of its prosecutorial discretion not to bring actions against a mining company for violations of SMCRA alleged by Appellant is not reviewable by this Board. Violations arising outside of the area for which the bonds are posted are not material to whether the bonds may be released.

The alleged failure to return topsoil to the bonded property, is a Stage II bond release issue under the regulations which may be challenged only after DEP makes a decision to grant a Stage

II release.

The Motion is denied as to other grounds of the appeal because, among other things, there is an inadequate record on which a motion for summary judgment on these issues could be granted.

Opinion

By letter dated July 27, 1995, the Department of Environmental Protection ("DEP") wrote to George M. Lucchino ("Lucchino") advising him that over his objections, DEP was approving Robinson Coal Company's request for Stage I Bond release at its McWreath II Surface mine in Robinson Township, Washington County. Attached to DEP's letter is a two page point-by-point response to the objections to this Bond Release which Lucchino voiced to DEP prior to DEP's decision to release this Bond.

On August 28, 1995, the Board received Lucchino's Notice Of Appeal of DEP's Bond Release decision. Under the segment captioned "Objections to the [DEP's] actions in separate numbered paragraphs" Lucchino has listed 27 separate objections. Robinson Coal Company has filed a motion to limit issues with which DEP concurs.

For the most part Robinson Coal Company's motion to limit issues is really a motion for summary judgment. Robinson Coal Company's Motion is principally based upon the premise that DEP may release bonds when a site qualifies for Stage I release, that under 25 Pa. Code §86.174(a) a site qualifies for release when it has been backfilled, regraded, and drainage controlled in accordance with the DEP approved reclamation plan. Next, Robinson Coal Company contends the Board does not have jurisdiction to address issues beyond the scope of the DEP bond release which is under appeal and then it asserts that, as a result, in this appeal the

Board may look only at whether there is compliance with 25 Pa. Code §§86.171 and 86.174(a). Thus, the sole issues according to Robinson Coal Company, are whether backfilling, regrading, and drainage control pursuant to the miner's reclamation plan have been completed. Lucchino takes the broader view. Lucchino asserts generally that where Robinson Coal Company has failed to comply with any of the various regulations listed in his Reply, it is ineligible for release of any bond. Lucchino states that to be eligible for bond release Robinson Coal Company must comply with all portions of Sections 86.171 and 86.172 and if it has failed to comply with all applicable statutes and regulations then Robinson Coal Company has failed to comply with 25 Pa. Code 86.171(f) "(1) and (ii)."[1] Lucchino then goes on to list sections of the regulations and statutes dealing with everything from right-of-entry to drainage control which he claims Robinson Coal Company has failed to comply with during coal removal and site reclamation, before concluding that Robinson Coal Company's non-compliance bars bond release.

Robinson Coal Company's Motion is also a motion for summary judgment to the extent it asserts that this Board lacks jurisdiction over some of Appellant's objections. Accordingly, we judge Robinson Coal Company's Motion using the standards for judging the merits of motions for summary judgment. The Florence Mining Company v. DER, 1991 EHB 1301.

Objection 3.1.

In paragraph 3.1 of Appellant's Notice of Appeal Lucchino asserts a DEP failure to enforce 25 Pa. Code §88.64 dealing with Robinson Coal Company's right-of-entry onto and use of his lands in conjunction with other mining activities. Robinson Coal Company's Motion asserts

[1]We read this as meaning Section 86.171 (f)(1)(ii).

that assuming, but not admitting this use occurs, it is not relevant to whether backfilling, regrading, and drainage control have been completed in accordance with the approved reclamation plan. It also asserts a lack of Board jurisdiction over this Lucchino complaint in the context of this appeal.

Lucchino seems to argue that if Robinson Coal Company is using a piece of his land as a right-of-way to haul coal from various permitted mine sites without his permission, it is violating 25 Pa. Code §86.64 as to a right-of-entry and Robinson Coal Company is trespassing on his property. In turn the violation of this regulation by Robinson Coal Company means, according to Lucchino, that Robinson Coal Company is also violating Sections 86.171(f)(1)((ii) and 86.172(c) and thus bond release is improper. Section 86.171(f)(1)(ii) appears to require that DEP determine that Robinson Coal Company is not violating these regulations prior to bond release, while Section 86.172(c) appears to require DEP to retain sufficient bond to achieve compliance with these regulations before releasing or adjusting the amount of bond posted.

Lucchino's argument is flawed. It is premised on the idea that if Lucchino's land is used as a right-of-way/access to other mine sites without his permission, Robinson Coal Company has violated Section 86.64 as to the McWreath II mine. We disagree. Not every trespass by a mining company on private property is covered by this regulation. Rather, as to this appeal, Section 86.64 deals with a mining company's right-of-entry to the lands within the boundaries of the DEP permit under which bond release is sought. Thus, if to get to mine X a mining company trespasses across adjacent lands that trespass is unaddressed by Section 86.64 or the Supplement C forms submitted to DEP by the company for mine X, which apply only to lands within the permit boundaries for mine X. As a result, if Robinson Coal Company continuously trespasses

across Lucchino's land to reach the lands covered by various other mine permits, that fact does not preclude bond release as to the McWreath II mine.

Objection 3.2

Lucchino's objection 3.2 to bond release is that Robinson Coal Company is presently in litigation with Lucchino. Robinson Coal Company's Motion asserts that even if this is true, it is not relevant to whether Robinson Coal Company has complied with its approved reclamation plan as to the McWreath II. Lucchino's Reply asserts a suit in equity exists in the Common Pleas Court of Washington County, which was brought by Robinson Coal Company against Lucchino.[2] Lucchino's Reply also asserts various ways in which he contends Robinson Coal Company's use of his land has damaged him and says Robinson Coal Company has violated Condition 10 of the permit for its McWreath mine. Condition 10 states that the permit does not authorize any injury to private property or invasion of personal rights. Lucchino then concludes that until Condition 10 issues are resolved, it is an abuse of DEP's discretion under Section 86.171(f)(1)(ii) and Section 86.172(c) to release this bond. Next, Lucchino argues he needs a written opinion from this Board that these issues are not before DEP or this Board for use in the litigation in the Common Pleas Court.

Condition 10 does not create any issues for litigation before us. It states it creates no right to injured private property. That means only that if injuries occur from action taken under the permit and suit is brought to recover damages, the permittee cannot defend on the theory that the permit authorized those actions. Condition 10 creates no new right for landowners to sue a mining

[2]It also references a group of exhibits identified as D-1,. D-2, D-3, D-4, involving that litigation which are not attached to Lucchino's Reply.

company (for damages before this Board).

Finally, the litigation which Lucchino references is admitted by Lucchino to concern Robinson Coal Company's McWreath mine rather than the McWreath II mine, which is the mine on which bond release is challenged in this appeal. Bonds posted as to the McWreath II site address conditions at that mine not conditions at the McWreath mine. As pointed out in Section 3(d) of SMCRA (52 P.S. §1396.4(d)) bonds are posted for the land affected under a specific permit. Al Hamilton Contracting Company v. DER, EHB Docket No. 94-151-E (Adjudication issued August 16, 1995). Further under Section 3(h), 52 P.S. §1396.4(h), when, but only when, the mining company fails or refuses to comply with that bond's terms can DEP forfeit same, and DEP is required to return it on application and a demonstration of compliance with the applicable regulations at the site for which it is posted. Thus, even if it is true that there are serious violations of SMCRA in regard to the McWreath mine, DEP may not withhold bond release at the McWreath II mine based thereon. Where violations occur outside of the physical area covered by a bond those violations are not grounds for bond forfeiture. Coal Hill Contracting Company, Inc. v. DER, 1984 EHB 374; James E. Martin, et al. v. DER, 1989 EHB 86. We conclude that the same rule applies as to bond releases.

Objection 3.3

Lucchino's third objection is that Robinson Coal Company is in litigation with the Robinson Township Zoning Board. Robinson Coal Company's Motion states this litigation is not within the scope of the appeal and it is irrelevant to whether backfilling, regrading, and drainage control have been completed according to Robinson Coal Company's approved reclamation plan. Robinson Coal Company says compliance with 25 Pa. Code §86.171 on bond release procedures

and §§86.172 and 86.174 with regard to release criteria for Stage I releases is all that matters and since Lucchino does not challenge the actual release procedures, the only issue is whether the McWreath II site meets the criteria for release. Lucchino's Reply argues that Robinson Coal Company must prove compliance with Conditions 9 and 11 in order to show zoning compliance and secure bond release. He then asserts Exhibits C-1 through C-8[3] show non-compliance with 25 Pa. Code §§86.171(f)(1)(ii) and 86.172(c). Lastly, Lucchino asserts Robinson Coal Company must comply with Condition 5.

Condition 9 of the McWreath II permit requires Robinson Coal Company to comply with the Municipalities Planning Code, Act of July 31, 1968, P.L. 805 , as amended, 53 P.S. §10001 *et seq.* ("MPC"). Condition 11 is a disclaimer as to the permit not being DEP approval of any acts which are not otherwise lawful.

Assuming Lucchino's Reply on this point is limited to litigation with the Zoning Hearing Board as to allegations of non-compliance with the zoning law at the McWreath II mine, the Board must deny Robinson Coal Company's Motion as it pertains to Objection 3.3. In doing so, we do not rule in favor of Lucchino on the merits of this contention or even find that his legal theory, as we interpret his articulation of it, has merit (and thus that Robinson Coal Company's theories lack merit). In order to grant summary judgment on this "issue" to Robinson Coal Company, the Motion must meet the standards set forth in Pennsylvania Rule of Civil Procedure 1035. That means the undisputed material facts must demonstrate that as a matter of law Robinson Coal Company is entitled to judgment on this issue. Denzil Bailey v. DER, EHB Docket No. 94-327-R

[3]C-1 to C-8 are not attached to his Reply.

(Opinion issued December 1, 1995). We lack material facts on which to make a judgment on this issue in favor of Robinson Coal Company as movant. The parties agree there is litigation with the Zoning Hearing Board but what is it over and how does it relate to the McWreath II mine and bond release? Neither party has told us. Since we do not know that it is irrelevant to bond release, Robinson Coal Company cannot prevail on this part of its Motion.

Objection 3.4

This Lucchino objection states that Robinson Coal Company mined coal in the township for eight months before getting a Conditional Use permit. It then says: "All three cases are clear violations of 86.64(a)". Which three cases are intended to be referenced here is undisclosed in the Notice of Appeal, Motion, or Reply. To the extent any or all of them may concern mines other than the McWreath II mine, we would grant the Motion. However, we do not know if any of them do concern this mine or how they concern it and what was stated above as to Objection 3.3 as to the standards for granting a motion for summary judgment applies here. We deny this part of the Motion because we simply lack sufficient information to rule on it.

Objection 3.5

Robinson Coal Company makes no arguments as to objection 3.5 within the body of its Motion, although the wherefore clause of its Motion asks that the Board order dismissal of this paragraph. Since the Motion states no grounds for such relief, the Motion must be denied concerning objection 3.5.

Objection 3.6

Objection 3.6 deals with mud allegedly polluting Lucchino's well in separate incidents occurring in March, April and June of 1991. First, Robinson Coal Company says there is no

suggestion of a current problem with Lucchino's well. Next, Robinson Coal Company's Motion avers that the Notice Of Appeal fails to show a linkage between what occurred in 1991 and the criteria for Stage I Bond release at the present time. Robinson Coal Company is correct that the Notice Of Appeal does not link well pollution to bond release or state that the well is currently polluted but the conclusion which it reaches on that basis is flawed because it is premised on the idea that this has to occur in the Notice of Appeal. It does not. The Notice Of Appeal is not like a Complaint in a suit in a Common Pleas Court and it is not subject to the Rules of Civil Procedure as to content. All an appellant is required to do in a Notice Of Appeal is to state his objections and, while Lucchino's objections could be stated in a much clearer and more lucid fashion, his inability or failure to do so is not grounds to throw out his appeal as a sanction for this omission. Huntington Valley Hunt v. DER, 1993 EHB 1533. Moreover, we observe that while Lucchino's Reply talks of past pollution of his well, it can be read to also talk of current pollution. If the McWreath II mine is now polluting that well such evidence may relate to the propriety of bond release. Al Hamilton Contracting Co. v. DER, EHB Docket No. 94-151-E (Adjudication issued August 16, 1995).

Objections 3.7, 3.8, 3.9, and 3.12

These four objections deal with water which Lucchino says was trapped on Lucchino's land and how Robinson Coal Company has dealt with it (Objection 3.7), the accuracy of reports of the quality of water in Lucchino's well based on samples taken from other sources (Objection 3.8), DEP's alleged attempt to shift responsibility to Robinson Township to regulate mud and dirt deposited on township roads by equipment leaving Robinson Coal Company's mine sites (Objection 3.9) and the removal of or destruction of Lucchino's survey markers and fences which

he contends render his survey maps obsolete (Objection 3.12). As Robinson Coal Company's Motion addresses all of these objections as a group, we address the Motion in the same fashion. As to each of these objections Lucchino's Reply contends that proof of his contentions will prove Robinson Coal Company's ineligibility for bond release under 25 Pa. Code §86.171(f)(I)(ii) or Section 86.172(c). Robinson Coal Company's Motion is based solely on its theory that these issues do not relate to Robinson Coal Company's obligation to backfill, regrade, and provide drainage control on the permitted area. Thus, as to these allegations Robinson Coal Company's Motion fails for the same reasons outlined above as to Lucchino's Objection 3.3

Objection 3.10

Robinson Coal Company's Motion challenges Objection 3.10, which relates to Robinson Coal Company's failure to return topsoil to Lucchino's land, for the same reason it challenged Lucchino's objections at Nos. 3.7, 3.8 and 3.9 with the same result. As to that challenge the Motion is rejected. In addition, it asserts that since topsoil replacement is not a pre-condition of Stage I Bond release but is covered under 25 Pa. Code §86.174(b)(2) as a Stage II release issue, this Lucchino objection is beyond the scope of this appeal.

There is no question that Stage II Bond release is addressed under 25 Pa. Code §86.174(b)(1) which provides in part that when the following standards have been met:

> ...Stage II reclamation has been achieved:
>
> > 1. Topsoil has been replaced and revegetation has been established in accordance with the approved reclamation plan and the standards for the success of revegetation are met.

DEP has only approved Stage I bond release. Lucchino has appealed that DEP decision. There

is no evidence that Robinson Coal Company has even sought Stage II bond release. When, and if it is sought, DEP will have to determine whether to approve it or not. After DEP makes that determination, if either party is unsatisfied, it may file an appeal to this Board. Thus as to Lucchino's topsoil issue DEP has yet to act. Until DEP acts, this objection is premature and outside the scope of this appeal.

Objection 3.11

Lucchino's eleventh objection deals with environmental damage to his lands and lands of others. Robinson Coal Company asserts Lucchino is presenting a private damage claim which the Board may not address in reviewing a Stage I Bond release decision. Robinson Coal Company also alleges the 50 foot buffers referred to by Lucchino arise under a Township Zoning Ordinance and not a DEP regulation. Robinson Coal Company includes Nile Linburg's Affidavit on this point with its Motion. Robinson Coal Company then concludes that all of this objection is beyond the scope of this appeal.

In his Reply Lucchino never responds to Robinson Coal Company's factual assertion that these 50 foot buffer zones are Township Zoning Ordinance issues rather than DEP regulations. He merely refers to the prior portions of his Reply dealing with Objections 3.1, 3.2, 3.3, and 3.4 and asserts Robinson Coal Company does not comply with Sections 86.171(f)(1)(ii) and 86.172(c), so DEP abused its discretion in agreeing to Bond release. Which segments of the portions of his Reply on these Objections Lucchino wants the Board to focus on he does not say. Nor does he set forth in any fashion why reference to them should somehow respond to Robinson Coal Company's Motion as it pertains to Objection 3.11. A party appearing before this Board has a duty to set forth its position on the issues in a clear concise fashion. As a party, Lucchino is not

excused from this duty by virtue of his election to pursue his appeal *pro se*. This Board cannot hazard a guess as to Lucchino's position on this issue when it has afforded him an opportunity to make a clear response and he has failed to do so. To place the Board in such a "guessing game" scenario requires it to try to concoct an argument on Lucchino's behalf in opposition to this Motion and thus requires it to abandon its role of adjudicator and assume the role of advocate. This is not a burden which this Board will undertake. Lucchino fails to specify his legal theory and we will not guess on his behalf. Since Lucchino fails to specify a regulation or statute violation based on this alleged damage to his land but at most asserts a zoning ordinance issue, the Board must agree with Robinson Coal Company that Lucchino's objection is beyond even the scope of his interpretation of Sections 86.171(f)(1)(ii) and 86.172(c).

Objection 3.14

Objection 3.14 is a Lucchino claim that coal from other properties is hauled through his land by Robinson Coal Company. Neither this objection nor Lucchino's Reply differentiate this objection from Objection 3.1 which is dealt with at length above. The Reply again generally refers the Board to Lucchino's "answers to paragraphs 3.1, 3.2, 3.3, and 3.4." As we granted Robinson Coal Company's motion as to Objection 3.1 we must also grant it as to Objection 3.14.

Objection 3.15

Here, Lucchino requests that "the Board reprimand [DEP] and reimburses me for lost revenue due to absence of a right-of-way agreement and damage to my property...". Robinson Coal Company's Motion correctly asserts a lack of Board jurisdiction over these two issues based upon Section 4(a) of the Environmental Hearing Board Act. (35 P.S. §7514(a)).

This Board sustains Robinson Coal Company's Motion to the extent it addresses

Lucchino's request that this Board reprimand DEP because we have no authority to do so. This Board has limited jurisdiction under the Environmental Hearing Board Act. *Supra*. We are not empowered to issue advisory opinions, Boyle Land & Fuel Co. v. DER, 1982 EHB 326. We cannot grant Lucchino declaratory relief, Costanza v. DER 606 A.2d 645 (Pa. Cmwlth. 1992). The Board is empowered to hold hearings judging the propriety of DER's actions as measured against the state and federal Constitutions, various statutes, and applicable regulations but not to issue reprimands.

What is true as to reprimands is also true as to Lucchino's reimbursement claim. Lucchino says his property was damaged by Robinson Coal Company's mining, by use of his property by Robinson Coal Company to dump rubbish, and by trespass on it by Robinson Coal Company. For each injury he seeks "lost revenue" and "damages". This Board is not aware of any statute authorizing it to award lost revenue or damages to Lucchino from DEP or Robinson Coal Company. Lucchino's Reply offers no clues as to any such legislative authority. Accordingly, we grant Robinson Coal Company's Motion as to this objection.

Objection 3.16

This objection states that DEP has allowed Robinson to mine through two township roads and that the Zoning Hearing Board is the "governing body with jurisdiction with respect to mining within 100 feet of the outside line of [the] road." Robinson Coal Company's Motion and attached affidavit admits the mining through two roads but states it was with the permission of DEP and Robinson Township. It goes on to say, again supported by the Linburg Affidavit, that mining occurred pursuant to other permits issued by DEP and that this did not occur within the McWreath II permit's boundaries.

In his Reply Lucchino fails to assert any dispute as to the fact that mining was not within the McWreath II permit area. Instead, he says the roads are not within DEP's jurisdiction but within the Zoning Board's jurisdiction and DEP overrode the Zoning Board's denial of approval for Robinson Coal Company to undertake this mining contrary to 25 Pa. Code Section 86.102(7)(ii). Even if all that Lucchino states is true these facts only created a right to challenge DEP's decision to approve this mining in regard to the mines on which it occurred. As a result, if this mining occurred on Robinson Coal Company's Blatz mine site there may be a right to timely appeal from DEP's decision to approve it in regard to the Blatz mine. However, before us is a DEP decision to release bonds as to the McWreath II mine. As pointed out above as to Objection 3.2, if Robinson Coal Company violated SMCRA or 25 Pa. Code §86.102(7)(ii) at another permitted mine DEP may not deny a bond release request on the McWreath II site based thereon.

Objections 3.17 and 3.18

These objections are read together because they appear to address a common incident which occurred on Lucchino's land during Robinson Coal Company's mining. According to Objection 17, an erosion and sedimentation control ditch installed by Robinson Coal Company on another permitted area was improperly designed, filled with sediment, and broke. The breaking of the ditch deposited sediment on Lucchino's driveway and drained into "the creek." Lucchino says he reported this to DEP but it took no action on the violation. Objection 18 says Lucchino wants his driveway repaired "with the same road material."

Robinson Coal Company's Motion says the ditch and driveway were repaired, the incident occurred several years ago, and it was not on the McWreath II site. In his Reply, Lucchino

disputes the idea that the driveway was not on the McWreath II site. He then asserts that as to his driveway, Robinson Coal Company has violated 25 Pa. Code §§86.102.4(a), 102.12(f), 102.12(g), 87.105(b)(d)(e), and 87.106(1)(4), so DEP has failed to comply with 25 Pa. Code §§86.171(f)(1)(ii) and 86.172(c) in approving this bond release. Lucchino also states there is non-compliance with Permit Conditions 5 and 10.

Of course, to the extent this driveway is not on the McWreath II site the Board cannot deal with it here. The same is true to the extent Lucchino seeks an order from this Board compelling driveway repair. We lack jurisdiction authority to issue the latter and lack subject matter jurisdiction over the former. We cannot grant Robinson Coal Company's Motion in full however because there is a material factual dispute over whether or not the driveway is on the McWreath II mine. Linburg's affidavit on behalf of Robinson Coal Company says it is not while Lucchino's Reply (to which is attached his affidavit that the facts in it are true) creates a factual dispute. Therefore, granting Robinson Coal Company's Motion at this time as to Objection 17 would be in error. However, we grant it as to Objection 18 which seeks a specific type of driveway repair. This is beyond our authority to order.

Objection 3.19

This objection states: "Mining below (E&S) controlson [sic] McWreath and McWreath II mining permits." Robinson Coal Company's Motion correctly points out that the McWreath mine site is not before this Board so we lack jurisdiction over Lucchino's claims in this regard as previously outlined. As to the McWreath II site Robinson Coal Company argues this claim is not related to Stage I Bond release issues. We have earlier held that we cannot grant the Motion on this theory at this time based on the lack of sufficient undisputed material facts. We affirm this

conclusion as to this portion of this objection. In so doing however, we also reject Lucchino's assertion that he will be seeking bond forfeiture and will hear no evidence in this regard. We lack jurisdiction over such a claim until DEP acts in regard thereto.

Objection 3.20

In this objection Lucchino says DEP approved the discharge to an unnamed tributary of millions of gallons of untreated water from the McWreath and McWreath II permitted area. Robinson Coal Company's Motion says DEP denies this and it happened years ago so it does not relate to Stage I Bond release issues. However, Lucchino asserts violation of Section 87.102(a) and 87.106(1) and then, sets forth his Section 86.171(f)(1)(ii) and Section 86.172(c) arguments. Based thereon, to the extent this is a McWreath II permit issue (but not as to other mine sites), we deny this Motion again without ruling on the merits of Lucchino's legal contentions or the facts he asserts.

Objection 3.25

Objection 3.25[4] purports that Lucchino's appeal covers Robinson Coal Company mines bearing the following names: Putt, McWreath, McWreath II, Ann Pershina, Frank Pershina, Beagle Club and Blatz. It also asserts that the appeal covers Robinson Coal Company mining through the two township roads. Robinson Coal Company's Motion challenges the Board's jurisdiction in this appeal over Lucchino's complaints as to any mine site other than McWreath II or Robinson Coal Company's mining through either road. In his Reply Lucchino asserts the

[4]Objection 3.22 says Lucchino seeks reimbursement of all funds associated with litigation pursuant to Section 1396 18c(E) (assumed to be Section 1396.18c(e) of SMCRA found at 52 P.S. §1396.18(c)) Objection 3.23 is a request from Lucchino for a view and Objection 3.24 purports to be a request for two subpoenas which fails to specify for whom they were to be issued. None of them constitute grounds for appeal or reversal of the DEP action under appeal. We assume this is the reason that Robinson Coal Company elected not to respond to these.

mines are all contiguous tracts and he will be referring to them in conjunction to the McWreath II permit.

Even assuming these mines are contiguous and that there is a past history on Robinson Coal Company's part of non-compliance with DEP's regulations, that does not change whether this Board will entertain issues as to these mine sites and roads within this bond release appeal. We have set forth our reasoning for refusing to do so above and the allegations from this portion of Lucchino's Reply do not change our conclusions. In so ruling the Board is not saying evidence as to the McWreath II site and this bond release will not be admitted but, absent a better showing, that evidence of conditions elsewhere is not relevant to this appeal.

Objection 3.26

This is Lucchino's request that this Board delegate someone to provide him legal representation in the appeal and any litigation against him brought by Robinson Coal Company. Robinson Coal Company's Motion argues we have neither jurisdiction nor authority to do so. Lucchino's Reply fails to point out any statutory or regulatory authority for this Board to do as he asks and this Board is not aware of any. Moreover, this request constitutes no independent ground for this appeal from the bond release decision. Accordingly, we grant Robinson Coal Company's Motion in regard to same.

Objection 3.27

Lucchino's final Objection states: "Fuel spill on Ann Wayne's property." Robinson Coal Company asserts that whatever Lucchino's objections to a fuel spill are, the spill is not within the scope of this action. According to Lucchino's Reply this spill occurred within the McWreath II permit area, is serious and DEP refused to disclose information on it to Lucchino when he sought

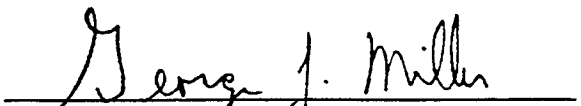
it. Therefore, he contends DEP is covering up which shows that DEP cannot be trusted as to bond release. Lucchino's Reply fails to state how this fuel spill relates to the mine, reclamation and bond release. Earlier in the opinion the Board has stated it will not guess Lucchino's position on a portion of an issue and we refuse to do so here. As an appellant who is responding to a Motion seeking to strike off his objections to DEP's actions where these objections are only in the form of a sentence fragment, Lucchino had the obligation to clarify how he contends that this alleged fuel spill relates to the issues now before us. He has not met this obligation and thus we must sustain the Motion in this regard.

Based on the above the Board enters the following Order.

ORDER

AND NOW, this 17th day of May, 1996, it is ordered that Robinson Coal Company's Motion is granted as to Lucchino's Objections Nos. 3.1, 3.2, 3.10, 3.11, 3.14, 3.15, 3.16, 3.18, 3.19, 3.25, 3.26, and 3.27 but is otherwise denied.

ENVIRONMENTAL HEARING BOARD



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Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
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DATED: May 17, 1996

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M. DIANE SMITH
SECRETARY TO THE BOAR

PICKELNER FUEL OIL, INC.	:	
	:	
v.	:	**EHB Docket No. 94-238-MG**
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 28, 1996**

ADJUDICATION

By George J. Miller, Chairman

Synopsis

The Department of Environmental Protection's assessment of a civil penalty under the Storage Tank and Spill Prevention Act in the amount of $33,800 for failure to submit a site characterization report over a period of 169 days as required by a Department order is affirmed by the Board.

PROCEDURAL HISTORY

This matter was initiated with the September 6, 1994, filing of a notice of appeal by, Appellant, Pickelner Fuel Co. (Picklener) seeking review of an August 5, 1994, assessment of civil penalty[1] from the Department of Environmental Resources, now the Department of

[1] On December 5, 1995, the Board granted the Department's motion for partial summary judgment against Pickelner for failure to file a site characterization report within the required sixty days set forth in the Department's order as well as for failure to file the site characterization

Environmental Protection (DEP). The assessment, issued pursuant to §1307 of the Storage Tank and Spill Prevention Act, the Act of July 6, 1989, P.L. 169, as amended, 35 P.S. §6021.101 *et seq*. (STSPA), cites Pickelner for unlawful conduct and public nuisance under §§1304, 1309 & 1310 of the STASPA because of his failure to submit an acceptable site characterization report within 60 days as required by the Department's November 10, 1993 Order. The Order charged Pickelner with cleanup responsibility for a release of gasoline from underground storage tanks on a property owned and operated by Pickelner at the corner of Walnut and High Streets in the City of Williamsport, Lycoming County. Pickelner contested his liability for this incident by first appealing the order contesting its validity[2] and secondly by denying any liability for a penalty.[3] After the Department moved for summary judgment in each appeal and the Board granted the motion against Pickelner as to the validity of the order and dismissed the first appeal ("Pickelner I") and also granted the Department's motion for summary judgment in this appeal as to Pickelner's liability for a penalty ("Pickelner II"), Pickelner decided not to dispute his liability for the spill. (Appellant's Post-Hearing Brief, p. 9) That concession is well taken. Therefore, the only issue which must be resolved is whether the amount of the Department's civil penalty assessment is appropriate.

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report assessing the vertical and horizontal extent of soil and water contamination at, and emanating from, the site.

[2] In an appeal from that order, the Board granted the Department's motion for summary judgment against Pickelner as to the validity of the order and dismissed the appeal. *William Pickelner v. DER*, EHB Docket No. 93-363-MR, (Opinion & Order issued March 21, 1995). No appeal was taken from the Board's opinion and order.

[3] *William Pickelner v. DER*, EHB Docket No. 94-238-MG, (Opinion and Order issued December 5, 1995). No appeal was taken from the Board's opinion and order.

A hearing on the assessment of penalty was held before Chairman George J. Miller on January 17, 1996. The Department and Pickelner filed their post-hearing briefs on February 26, 1996.[4]

The record in this matter consists of a transcript of 146 pages and 14 exhibits.

After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. The Department is an administrative department of the Commonwealth of Pennsylvania and the agency charged with the duty to administer and enforce the provisions of the STSPA and the rules and regulations adopted pursuant to said statute. (Pickelner I and II)

2. Pickelner Fuel Oil, Inc. is a corporation with a business address of 210 Locust Street, Williamsport, Lycoming County, PA 17701 (App. Ex. 4, p. ii; Appellant's Post-Hearing Brief, p. 2)[5].

3. Pickelner owns and operates a gasoline station and storage tank facilities located at the corner of Walnut and High Streets in the City of Williamsport, Lycoming County, PA. (Pickelner I, p. 1; Appellant's Post-Hearing Brief, p.2; Cmwlth. Exs. 21 & 25)

4. On February 21, 1990, the Department conducted an investigation in response

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[4] Pickelner's Post-Hearing Brief suggests that he was required to file his brief without the benefit of a transcript. (PH Brief, p. 2) At the hearing on the assessment of a penalty in this appeal Pickelner's counsel said he did not need a transcript to prepare his brief. (N.T. 143) Correspondence received by the Board since that hearing indicates that Pickelner's counsel did not order a copy of the transcript. The Department and the Board, which did order the transcript, received it well before Appellant was required to prepare its Post-Hearing Brief.

[5] References to Appellant's exhibits are denoted by "App. Ex. ___." The Department's exhibits are denoted by "Cmwlth. Ex. ___ ." The transcript of the hearing is referred to as "N.T. ____ ."

to reports of gasoline odors in the vicinity of the service station and storage tank facilities. (Appellant's Post-Hearing Brief, p.2; Cmwlth. Exs. 24 & 25; N.T. 15-16)

5. While investigating, a Department representative encountered strong gasoline vapors in the vicinity of the site and inside a private residence adjacent to the site, as well as the presence of free gasoline product in storm sewers adjacent to the site. (Cmwlth. Exs. 24 & 25; N.T. 15-16)

6. The Department's representative determined that these vapors came from Pickelner's property. (Cmwlth. Ex.23)

7. On February 23, 1990, Pickelner excavated and removed three 4,000 gallon capacity underground gasoline storage tanks at the site at which time it was confirmed that at least one of the tanks had been leaking product from holes in the tank wall. (App. Ex. 4; Pickelner I, p.3; ¶D Cmwlth. Ex. 4[6])

8. Soil samples collected from the walls of the excavated pit were analyzed and found to contain appreciable quantities of benzene, toluene, ethylene and xylenes ("BTEX"), constitutents of gasoline. (App. Ex. 4; Pickelner I, p. 3)

9. On February 26, 1990, the Department conducted a follow up inspection which resulted in the detection that soil/broken rock in the excavation pit were soaked with gasoline to a depth of approximately 2 feet below the bottom of the tanks. (Cmwlth. Ex.23; ¶E Cmwlth. Ex. 4)

10. From February 26 through March 2, 1990, approximately 280 tons of gasoline

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[6] Cmwlth. Ex. 4 is the Department's November 10, 1993, order. Pickelner is foreclosed from contesting these facts by virtue of collateral estoppel.

contaminated soil which had been excavated from the site during the tank removal were disposed of at the Clinton County Landfill. (App. Ex. 4, pp.1-2; Pickelner I, p.3; ¶F Cmwlth. Ex. 4)

11. The Department in a June 12, 1990 letter requested Pickelner to, among other things, prepare an initial site characterization to define the aerial and vertical extent of soil and groundwater contamination caused by the release in accordance with the federal regulations. The letter also requested Pickelner to submit a corrective action plan to the Department by August 17, 1990 pursuant to federal regulations. (Cmwlth. Ex. 21; ¶I Cmwlth. Ex. 4).

12. A site characterization report is an important first step in successful remediation activity in that it details the environmental condition of affected soil and ground-water including offsite impacts on surrounding properties. (N.T. 81-82)

13. Instead of directing an environmental consultant to prepare the required site assessment in June, 1990, Pickelner:

a. Put his Controller in charge of dealing with the requests of the DEP even though he had no environmental expertise (N.T. 115-117);

b. Hired a consultant, Bob Bassett, in May of 1993, who only advised that the site characterization report be put on hold even after the DEP issued its November, 1993 order requiring a site characterization report (N.T. 125-127; Cmwlth Ex. 4);

c. Finally, in February 18, 1994 hired Storb Environmental exclusively as a consultant to respond to the Department. (Appellant's Request for Finding of Fact No. 16)

14. During this three and one half year time period, the DEP made at least 12 communications to Pickelner indicating the requested site assessment was essential to his compliance, including a notice of violation issued on April 28, 1993 and the November 10, 1993

order requiring the submission of a site characterization report within 60 days encompassing the vertical and horizontal extent of contamination of both soil and groundwater. (Cmwlth. Ex. 19, 16, 10, 8, 4; N.T. 118-122, 109-111, 124)

15. These contacts included the following:

a. The Department's August 1, 1991 letter informed Pickelner that his limited actions to assess contamination and perform remediation at the site were not acceptable. (Cmwlth. Ex. 19; ¶J Cmwlth. Ex. 4).

b. On September 13, 1991, the Department received from Pickelner documents identified as an "Update and Corrective Action Plan" for the site which proposed the continuation of operation of the soil ventilation system and monitoring the existing wells for at least one (1) year before a remediation plan would be developed (¶K Cmwlth. Ex. 4).

c. After reviewing these documents the Department notified Pickelner by a November 13, 1991 letter that the proposal was not acceptable and that the high levels of BTEX contamination present at the site warranted more aggressive remediation (Cmwlth. Ex. 16).

d. On June 7, 1993, Department representatives met with Pickelner at the site to review the history of the site and to discuss the current status of site assessment and remediation work (¶L Cmwlth. Ex. 4; Cmwlth. Ex. 8; N.T.23).

e. In a June 16, 1993, follow-up letter to Pickelner, the Department once again pointed out the need for Pickelner to perform the required site assessment and remediation activities (¶L Cmwlth. Ex. 4; Cmwlth. Ex. 8; N.T. 23).

16. On November 10, 1993 the Department issued Pickelner an administrative order which required Pickelner to, within sixty days of receipt of the order, among other things, submit a report detailing the results of investigations, characterizations, and assessments conducted at the site to determine the vertical and horizontal extent of groundwater and soil contamination at, and emanating from, the site. (Cmwlth. Ex.4)

17. On May 9, 1994 DEP received from Storb Environmental a purported site characterization report which related only to groundwater and did not meet the requirements of the DEP order. (Pickelner II, pp.2-5)

18. As of August 5, 1994, the date of the Assessment of Civil Penalty, the Department had not received an acceptable site characterization report from Pickelner. (N.T. 31-33)

19. Pickelner does not now dispute the issue of liability for the violations alleged in the assessment of civil penalty. (Appellant's Post-Hearing Brief, p. 9)

20. In calculating the civil penalty amount for the violations that occurred, the Department considered the willfulness, duration, and the seriousness of the violation as well as deterrence, cooperation, environmental damage, savings and profit, and the cost of restoration. (N.T. 9-12)

21. The number of days of violation considered by the Department in assessing the penalty are the approximately 169 days which passed from January 12, 1994 when the Department's order required the report to be submitted and the issuance of the penalty assessment on June 30, 1994. (N.T. 26)

22. The Department's initial analysis of applicable penalty factors resulted in a possible total penalty figure for the violations of $128,000. (N.T. 28)

23. The Department assessed a final penalty figure of $33,800 so the penalty would fit and be a reasonable response to the ongoing violations. (N.T. 28)

DISCUSSION

The only issue before the Board is whether the Department's assessing Pickelner civil penalties of $33,800 for the violations is reasonable. Pickelner does not contest its liability, but it strenuously disputes the monetary amount. The burden here is on the Department to show that the imposition of the penalty was not an abuse of discretion and that the amount of the penalty was proper as a reasonable and appropriate exercise of discretion. 25 Pa. Code §21.101(b)(1); *Carlos R. Leffler, Inc., et al v. DER*, 1993 EHB 864; *Joseph Blosenski, et al. v. DER*, 1992 EHB 192. In appeals of civil penalty assessments under the STSPA, the Board's role is not to determine the amount of penalty we would have imposed, but, rather, whether the Department abused its discretion in assessing a civil penalty. *Ronald E. Johnson t/a Indiana Fuel Co. v. DER*, 1992 EHB 914. Where the Department has abused its discretion, we may substitute our discretion for that of the Department and modify a civil penalty assessment. *Ronald E. Johnson t/a Indiana Fuel Co. v. DER*, 1992 EHB 914.

It is clear from the facts of this case that the Department did not abuse its discretion in imposing a penalty against Pickelner. Under the STSPA, section 1310 makes it "unlawful to fail to comply with, or to cause or assist in the violation of, any of the provisions of this act or rules and regulations adopted hereunder; or to fail to comply with any order, ... of the department." 35 P.S. §6021.1310. The Department has the authority to assess a civil penalty for any violation of the STSPA. 35 P.S. §6021.1307.

The Board's December 5, 1995, partial summary judgment order established that Pickelner failed to file the site characterization report within sixty days as required by the order as well as failed to file the site characterization report assessing the vertical and horizontal extent of soil and

water contamination at, and emanating from, the site as required by the order.

Having established that Pickelner failed to obey the Department's order, we now turn to the issue of determining the appropriate penalty amount.

Under the STSPA the Department may assess a maximum penalty of $10,000 per day for each violation of the STSPA. 35 P.S. §6021.1307. This section of the Act directs the Department to 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 the violation; deterrence of future violations; and other relevant factors.[7] 35 P.S. §6021.1307.

Here, the evidence presented by the Department related to the factors of willfulness, duration, seriousness, deterrence, and lack of cooperation. While the Department considered these factors, it did not consider the factors of environmental damage, savings and profit made as a result of the violations, or the cost of restoration. Originally, the Department determined the penalty to be higher ($128,000). However, the Department reduced that amount to $33,800 because it wanted the penalty to fit the violation and to be a reasonable response to the ongoing violation. (N.T. 28)

With respect to the factor of willfulness, the Department reasonably based the assessment on negligent conduct.[8] The Department initially settled on the reckless category because Pickelner failed to respond properly to eleven different requests for the information over a period of

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[7] The Department uses the following formula to determine violations of the STSPA: willfulness x duration x seriousness x deterrence - cooperation + environmental damage + savings and profit + cost of restoration = penalty. (N.T. 12-13)

[8] Under the Department's guidelines, there are three categories within willfulness: $100-200 for negligence, $200-500 for recklessness, and $500-1,000 for willfulness. (N.T. 9)

approximately five years even when he was aware of the legal requirements and why the law required it. However, the calculation based on recklessness resulted in a very high fine, which the Department considered too high when it considered the figure in relation to other conduct considered to be a violation under the STSPA. Subsequently, the Department recalculated the penalty assessment using the lowest factor of negligence. The Department properly asserts that negligence is appropriate because Pickelner's failure to file the site characterization report in response to the order could have been foreseen and prevented through the exercise of reasonable care.

Pickelner argues that the failure to abide by the order was not willful, reckless or negligent because there were numerous attempts to comply with the order and submission of reports by several different consultants hired by the company but none of the reports satisfied the Department. Furthermore, Pickelner asserts that based on the advice of consultants, good or bad, the characterization reports were deemed to be unacceptable and untimely. Pickelner asks the Board to take its reliance on its consultants into consideration.

The Board finds, however, that Pickelner's attempts to comply have fallen short of what it clearly knew was being required by the Department but accepted the advice of a consultant to put the site assessment "on hold." Pickelner could have foreseen that in failing to comply with the order, even if he relied on consultants for guidance, was a violation of the Department's order.

The next factor considered is the duration factor. The Department used the figure of 169 days as the duration which was based on the time frame set forth in the November 10, 1993, order. The order required compliance within 60 days upon receipt of the order which was January 12, 1994. The Department derived the 169 days by counting each day that it did not receive the site characterization report from January 12, 1994 to and including the date of issuance of the civil

penalty assessment - June 30, 1994. The Department argues that the 169 day figure is conservative as the initial request for the report was received by Pickelner on February 26, 1990 and it was not until December of 1995 that an adequate response to the request was received.

Pickelner argues that for the Department to calculate a violation period during the time of the appeal is unwarranted, that the matter was appealed within the proper 30 day appeal period, and that further negotiations for compliance were ongoing during this whole time. Furthermore, Pickelner argues that the duration factor should be a factor of one because he filed a timely appeal. In the alternative he says that the duration should be from the date of assessment, November 10 to the date of the appeal, December 2, for a factor of only 22 days.

The Board believes that the 169 days for the duration factor is reasonable. The order which was issued on November 10, 1993 and received by Pickelner on November 12, 1993 required compliance within 60 days, which would have been January 12, 1994. The Department's use of January 12, 1994 is reasonable as it is only after this date that Pickelner is in violation of the order. The Board notes that the Board's order is effective unless the recipient of the order receives a supersedeas from the Board. No such supersedeas was sought by the Appellant and his appeal of the order was dismissed on a motion for summary judgment. (Pickelner I)

A more extended period might have been used by the Department. Each day after January 12, 1994 until Pickelner complied with the order is a violation for noncompliance. R. Curtis White, an environmental protection compliance specialist with the Department's Storage Tank Section and Environmental Cleanup Section, testified that the Department received "Just this last fall, September, ... a batch of information that can .. be characterized as being more comprehensive than we had in the past. Then we had just received additional information, I believe in December, with respect to

groundwater elevations that finally completed the picture of the site characterization report." (N.T. 32-33) While the Department could have calculated the penalty for a period up to December, 1995, it decided not to.

The next factor considered by the Department was seriousness. The Department applied a medium degree of seriousness (with a factor of 2) because that category encompasses violations associated with a release of a regulated substance or a failure on the violator's part to correct a violation that results in a continuing or an escalated threat to human health and the environment. The Department alleges that the facts reveal that the release of gasoline had been an emergency, that there had been gasoline fumes in an adjacent private residence, that gasoline had spilled into the environment and that the threat to the environment created by the February, 1990 spill was ongoing. The full extent of the hazard could not have been known as a result of Pickelner's failure to provide the required site assessment study. Pickelner asserts the Department provided little or no evidence of harm or threat of harm to the environment by the tardy filing of an acceptable report. Furthermore, the Department presented little or no information as to how they arrived at the determination that this should be considered a medium risk violation. In fact, White testified that they usually considered administrative violations to be in the low category with a factor of 1.

The Board believes that the Department's use of medium as the appropriate degree of seriousness is proper. Under the Department's guidelines, seriousness has three different degrees of risk associated with violations - low, medium, and high. The parameters are:

Low - typically find administrative type of violations in this category, where there is no threat or resulting harm to the environment or to human health or the public safety.

Medium - usually associated with a release or in cases where the failure on the

violator's part to correct the violation may result in a continuing or escalated threat to human health and the environment.

High - usually associated with a definite impact on human health, the environment, and public safety.

(N.T. 9-10) The evidence shows that there was more than a failure to comply with an administrative order because there was a release of gasoline into the environment. Initially, it was considered such an emergency situation that the initial response was done by the local fire department. (N.T. 27) In fact, the Department's reports list the Inspector of the Williamsport Fire Department as the complainant/notifier of the problem. (Com. Exs. 24 & 25) Both of the reports note that there were petroleum fumes in the storm sewer as far down as the Department checked and about 1 block from Walnut Street as well as in a local residence. (Com. Exs. 24 & 25) Mr. White testified that approximately 280 tons of contaminated soil was removed and disposed of at a landfill and that was not all the contamination present at the site. (N.T. 38) Furthermore, Mr. White agreed that the Department was concerned that the petroleum products had entered the groundwater. (N.T. 39) Since there was a release which resulted in harm to the environment the category of medium seriousness is the appropriate category.

The next factor the Department considered was deterrence. The Department considered this matter to be a first time violation and used the factor of one. Pickelner did not dispute this factor.

The Board believes the factor of one was correct. Curtis White testified that the deterrence factor is, "built into the penalty matrix that allows an escalation of a penalty amount based on a violator's history. For each subsequent violation, the matrix in this category allows us (the Department) to increase the penalty 25% for each continued violation (1st time violation - 1, 2nd violation - 1.25, 3rd violation - 1.5,...)." (N.T. 10-11) Since this was the first time for this type of

violation, the Department correctly used the figure of one in the calculation.

The final factor the Department took into consideration was cooperation, for which it gave no credit. The Department alleges the only influence this factor has on the penalty calculation is to decrease the assessment where there has been appreciable cooperation with respect to the violation in question. The Department properly states that Pickelner did not cooperate with respect to the site characterization report in a way that would warrant a further reduction in the penalty. To the contrary it had to pursue Pickelner for five years. It received enough information to be characterized as being in compliance with the order only in December, 1995 after numerous letters as well as issuance of a notice of violation, an administrative order and a civil penalty assessment. Further, Pickelner's first response to the November, 1993 order, which did not satisfy the requirements, was not submitted until May, 1994.

Pickelner properly states that they took responsibility for the tanks, immediately removing them, and disposing of the contaminated soil within days of the incident discovery. That conduct is commendable. However, none of these acts can be deemed to be cooperation in relation to the compliance with the Department's order and therefore cannot be credited as cooperation for purposes of this penalty assessment.

CONCLUSIONS OF LAW

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

2. The Department has the burden of proving by a preponderance of the evidence that the civil penalties are appropriate.

3. The Department has met that burden by the evidence submitted at the hearing on the assessment of the penalty.

4. Pickelner violated §1310 of the STASPA by failing to file a site characterization report as required by a Department order.

5. Pickelner's continued failure to submit an acceptable site characterization to the Department in violation of an order of the Department, constitutes unlawful conduct and a public nuisance as defined in §§ 1304, 1309 and 1310 of the STASPA.

6. The Board has the authority to review Department actions, such as assessment of civil penalties.

7. The Department is authorized by the Storage Tank and Spill Prevention Act to assess a penalty of up to $10,000 for each day of violation of the Act. In assessing a penalty the Act directs the Department to consider the following in calculating the amount of the civil penalties sought: the wilfulness of the violation; damage to air, water, land or other natural resources of the Commonwealth or their uses; cost of restoration and abatement; savings resulting to the person in consequence of the violation; deterrence of future violations; and other relevant factors. (Storage Tank Spill and Prevention Act, 35 P.S. §6021.1307).

8. The Department's initial analysis showed a penalty amount for the violation of $128,000 but the Department reduced it to $33,800 so that it would fit the violation.

9. The penalty is appropriate for Pickelner's extended violations of the Department's order.

10. The evidence presented by Pickelner to justify its actions do not warrant reduction of the penalty.

11. Having reviewed the evidence, we approve a penalty against Pickelner of $33,800.

ORDER

AND NOW, this 28th day of May, 1996, it is ordered that civil penalties assessed against Pickelner Fuel Company, Inc. in the total amount of $33,800 are appropriate and that the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

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DATED: May 28, 1996

See following page for service list.

EHB Docket No. 94-238-MG
Service List

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Libbrary: Brenda Houck)
For the Commonwealth, DEP:
Geoffrey J. Ayers
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SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 95-208-CP-MG**
EDWARD SILBERSTEIN	:	**Issued: May 31, 1996**

ADJUDICATION

By George J. Miller, Chairman

Synopsis:

Before the Board is a complaint for $13,100 in civil penalties by the Department of Environmental Protection against Edward Silberstein arising out of earthmoving activities conducted on his property which caused sediment pollution to a wetland. We assess $12,100 as a justified and reasonable penalty for violations of the Clean Streams Law and Dam Safety and Encroachments Act.

BACKGROUND

This matter was initiated on October 4, 1995, by complaint which alleges that Silberstein had violated the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1 *et seq.*, and the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §693.1 *et seq.*, and the rules and regulations promulgated under those statutes. The Department requests the Board to assess civil penalties in the amount of $13,100. The Board

held a hearing on February 20, 1996, to determine the amount of penalties to be assessed. After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. The plaintiff is the Department of Environmental Protection, the agency of the Commonwealth charged with the duty and the responsibility to enforce the Clean Streams Law, the Dam Safety and Encroachments Act, and the regulations promulgated thereunder.

2. The defendant is Edward Silberstein, an individual who resides at 6 Carriage Lane, Landsdowne, Upper Darby Township, Delaware County. (Silberstein, N.T. 99)[1]

3. Silberstein owned at all times relevant to this matter, a parcel of property located at the north end of Maine Avenue in Upper Darby Township, Delaware County ("site"). (Silberstein, N.T. 99)

Inspection I - April 18, 1994

4. Edward M. Magargee, the Conservation District Manager for the Delaware County Conservation District inspected the site on April 18, 1994, in response to complaints received by the District. (N.T. 10)

a. The Delaware County Conservation District, by delegation agreement with the Department, is authorized to investigate complaints and inspect earthmoving activities to determine compliance with regulations governing erosion control under the Clean Streams Law. (Magargee, N.T. 8-9)

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[1]Reference to the notes of testimony of the hearing held on February 20, 1996, are cited at "N.T.___." The Department's Exhibits will be cited as "DEP Ex. ____"; Silberstein's exhibits as "D Ex.___;" the Board's exhibits as "B Ex.___".

b. These regulations require that earthmoving activities be conducted in such a way as to prevent accelerated erosion and sedimentation. Such measures must be set forth in an erosion and sedimentation control plan.

5. In the course of his inspection, Mr. Magargee observed that fill had been dumped at the north end of Maine Avenue. The loose fill, which had been graded and leveled off, had eroded due to the steep slope and caused sediment to be deposited in an area which Mr. Margargee believed to be wetlands. He tracked the drainage channel to Lobbs Run, a tributary of Darby Creek, where he noted that sediment had entered Lobbs Run. A silt fence was lying on the ground between the foot of the slope and the tributary. (Magargee, N.T. 12-17)

6. Mr. Magargee took photographs of the site during his inspection. The photographs portrayed:

a. the gully erosion which formed through the steep slope created by the fill;

b. a stockpile of earth which encroached upon a wetland area;

c. sediment deposits around the root area of skunk cabbage in the wetland area; and

d. the broken silt fence.

(Magargee, N.T. 15-17; DEP Ex. 8(a)-(e))

7. On April 19, 1994, Mr. Margargee mailed an inspection report and a notice of violation to Silberstein, which:

a. notified Silberstein that earthmoving activities on the property were a violation of the Clean Streams Law and Chapter 102 of the regulations concerning erosion control;

b. required Silberstein to file an erosion and sedimentation control plan with the District by April 25, 1994; and

c. required that violations at the site be corrected by April 29, 1994.

(Margargee, N.T. 17-19; DEP Ex. 9)

8. Silberstein acknowledged that he dumped the fill material but attempted to justify his conduct by testifying that in April 1994 a tree fell on the site which he felt created a dangerous condition. He said that he brought a backhoe from an adjacent property to knock the trunk over, because he did not have a saw large enough to cut it down. He claimed he did not return the backhoe the way he came because it took him three hours to bring it to the site through the woods. He could not get the backhoe off the site because there was a cavity at the end of Maine Avenue which could not be "jumped" by the backhoe. Therefore he dumped five or six truck loads of stone, gravel, and concrete at the end of Maine Avenue to fill the cavity so that the backhoe could be removed via the street. (N.T. 102-107)

9. Silberstein submitted an erosion and sedimentation control plan on May 18, 1994. (DEP Ex. 2; Margargee, N.T. 23)

10. The District mailed notice of its approval of the erosion and sedimentation plan on May 25, 1994. (DEP Ex. 3; Margargee, N.T. 23)

11. The approved plan required Silberstein to properly construct and maintain

a. a sediment trap;

b. a twelve inch storm sewer;

c. a reinforced silt fence;

d. a riprap lined swale;

e. an asphalt deflector berm; and

f. a construction entrance.

(DEP Ex. 2; Magargee, N.T. 25-26)

12. The plan also required the site to be stabilized with lime fertilizer and seeding. (Magargee, N.T. 26)

Inspection II - June 23, 1994

13. Mr. Magargee inspected the site on June 23, 1994. He testified that the site had remained unchanged in terms of activity from the April 18 inspection. (N.T. 29-30)

14. He observed that the erosion and sedimentation plan had not been implemented. Specifically:

a. no effective erosion and sedimentation control measures were implemented, a violation of 25 Pa. Code §102.4, such as reinstallation of the silt fence, creation of a sediment trap and slope pipe;

b. no erosion and sedimentation control measures were incorporated into earthmoving activities in violation of 25 Pa. Code §§102.12 and 102.13; and

c. site conditions created a potential for pollution to waters of the Commonwealth in violation of Section 402 of the Clean Streams Law because erosion and the resulting sedimentation was continuing.

(DEP Ex. 10; Magargee, N.T. 28-29)

15. The inspection report was mailed to Silberstein. (Magargee, N.T. 30)

16. As a result of this inspection, the matter was referred to the Department for further action. (Magargee, N.T. 30)

Inspection III - July 19, 1994

17. On July 19, 1994, Alan C. Everett inspected the site. Mr. Everett is a Water Pollution Biologist employed by the Department. His duties involve administration of the Dam Safety and Encroachments Act and the regulations at 25 Pa. Code Chapter 105 by, among other things, performing field inspections. (Everett, N.T. 62)

18. Jesse Goldberg, a Compliance Specialist employed by the Department accompanied Mr. Everett on the inspection. (Everett, N.T. 66)

19. The purpose of the inspection was to determine whether or not there had been wetland encroachment. (Everett, N.T. 66)

20. As a result of his inspection, Mr. Everett noted that there were erosion gullies along the steep slope which indicated that erosion had taken place along the slope. (N.T. 66)

21. The area at the base of the slope had been disturbed by land clearing and earthmoving activity. (Everett, N.T. 66)

22. Using the 1989 Federal Manual for identifying and delineating jurisdictional wetlands, Mr. Everett determined that there was an area of wetlands that extended from the base of the slope down to the creek. (N.T. 67)

23. From his delineation, he concluded that

a. earthmoving activity had encroached on the wetland area; and

b. sedimentation had reached the creek.

(Everett, N.T. 68; DEP Ex. 12)

24. Sedimentation was occurring along the entire length of the delineated wetland, throughout the drainage patterns leading down to the creek and in the wetland area adjacent to the creek. (Everett, N.T. 68)

25. From the color and depth of the sediment, Mr. Everett concluded that the sedimentation had been deposited recently. (N.T. 72)

26. By letter dated August 2, 1994, the Department informed Silberstein that the site had been inspected and that the earthmoving activities had caused extensive sediment pollution and that he was in violation of the Clean Streams Law and the Dam Safety and Encroachments Act. The letter also requested Silberstein to contact the Department to arrange a conference to settle the violation. (DEP Ex. 13)

27. Silberstein did not respond to this letter. (Goldberg, N.T. 78)

Inspection IV - October 28, 1994

28. On October 25, 1994, Mr. Magargee inspected the site. He observed that the erosion and sedimentation plan had not been fully implemented. Specifically

a. there was no implementation of erosion and sedimentation control measures provided for in the plan such as creation of a sediment trap and installation of the asphalt deflector, in violation of 25 Pa. Code §102.4;

b. the culvert was installed, but was blocked with leaves and not maintained; and

c. site conditions created a potential for pollution to waters of the Commonwealth in violation of Section 402 of the Clean Streams Law because erosion was continuing.

(Magargee, N.T. 34-35; DEP Ex. 14; DEP Ex. 15(a) and (b))

29. Gullies were forming throughout the fill areas and sediment pollution continued. (Magargee, N.T. 35)

30. A copy of this report was mailed to Silberstein. (Magargee, N.T. 35)

31. On October 28, 1994, Mr. Everett also inspected the site and determined that the condition of the wetland area was unchanged from his July 19, 1994 inspection. He determined that damage to the wetlands had occurred but that full restoration of the wetland area would only cause further damage because of the steepness of the slope which had been created by the fill. (N.T. 69-70; DEP Ex. 16)

Civil Penalty Assessment

32. The Department filed a complaint for civil penalties in the amount of $13,100, for violations of the Clean Streams Law and the Dam Safety and Encroachments Act.

33. Mr. Goldberg detailed the manner in which the amount of penalty was calculated, pursuant to the Erosion and Sedimentation Pollution Control Program Civil Penalty Assessment Policy. (N.T. 84; DEP Ex. 19)

34. The first section of the policy requires the Department to gather background information by determining whether there were technical violations of the applicable laws and regulations, and to assess sediment discharge to waters of the Commonwealth. Mr. Goldberg determined, among other things, that

a. complaints had been filed about the site;

b. sedimentation had resulted from negligent maintenance of erosion control measures;

c. approximately five inspections had been conducted at the site; and

d. the violator was aware of the violations, was uncooperative, and that violation was wilful.

(DEP Ex. 19; N.T. 85)

35. Next, Mr. Goldberg determined that the violations were moderate because violations were not corrected after two inspections, and complaints had been filed about the site. (DEP Ex. 19; N.T. 86)

36. Mr. Goldberg also determined that the violation was negligent or willful because Mr. Silberstein had an erosion and sedimentation plan that was never implemented. Even though this is an element of a "severe" violation, he determined that a moderate designation was adequate for the purpose of determining penalties. (N.T. 86)

37. The number of days of violation was determined by the number of times each violation was listed on inspection reports completed by Mr. Magargee. (Goldberg, N.T. 86)

38. Count I of the complaint seeks an assessment of $1,000 for Silberstein's failure to develop a site specific erosion and sedimentation control plan as a "moderate" violation of 25 Pa. Code §102.4. This violation was based on

a. Mr. Magargee's April 18, 1994 inspection when he determined that earthmoving activities had occurred without an erosion and sedimentation control plan;

b. the April 19, 1994 notice of violation which required a plan to be submitted by April 29, 1994; and

c. Silberstein's failure to submit a plan until May 18, 1994, twenty days past the deadline.

39. Count II of the complaint seeks an assessment of $3,000 for three days of violation of 25 Pa. Code §102.4 by failing to implement or maintain erosion and sediment control measures. The violation was based on

a. the April 18, 1994 inspection when Mr. Margargee observed that fill had been dumped at the end of Maine Avenue and the steep slope and been graded, and the only sedimentation control measure was an improperly entrenched silt fence;

b. the June 23, 1994 inspection when he observed that conditions had remained the same since April 24, 1994, even though an erosion and sedimentation control plan had been submitted in May 1994; and

c. the October 25, 1994 inspection when he observed that certain aspects of the submitted plan had not been implemented, such as the sediment trap and the asphalt deflector, and that other aspects of the plan had not been maintained such as the culvert and the silt fence.

40. Count III of the complaint seeks an assessment of $1,000 for two days of violation of 25 Pa. Code § 102.11, which requires incorporation of control measures into all earthmoving activities in accordance with 25 Pa. Code §§ 102.12 and 102.13. These violations were based on Mr. Magargee's inspections of April 18, 1994, and June 23, 1994.

41. Count IV of the complaint seeks an assessment of $3,000 for one day of violation of Section 401 of the Clean Streams Law, 35 P.S. §691.401, which prohibits the discharge of sediment into waters of the Commonwealth. This violation was based on earthmoving activity which caused sediment to pollute the wetlands and Lobbs Run and Darby Creek which run at the base of the steep slope. Even though Mr. Magargee noted a violation of Section 401 in all three of his inspections, Mr. Goldberg viewed this violation as a one-time occurrence. (Goldberg, N.T. 88)

42. Count IV of the complaint also seeks an assessment of $3,000 for three days of violation of Section 402 of the Clean Streams Law, 35 P.S. §691.402 which prohibits the creation of a danger of sediment pollution to waters of the Commonwealth. This penalty was based on the April 14, 1994, June 23, 1994, and October 25, 1994 inspections of Mr. Magargee. He concluded that there was a danger of sediment pollution into Lobbs Run, a tributary of Darby Creek as a result of Silberstein's earthmoving activities.

43. Count V of the complaint seeks an assessment of $2,110 for an unauthorized encroachment of wetlands, in violation of Sections 6 and 18 of the Dam Safety and Encroachments Act, 32 P.S. §§ 693.6 and 693.18. This violation was based on the inspections of Alan Everett. He determined that

a. wetlands existed on the site;

b. Silberstein's earthmoving activities encroached upon the wetlands at the site;

c. as a result of Silberstein's land clearing operation, a large stockpile of earth encroached upon the wetlands located at the base of the steep slope;

d. sedimentation had occurred into the wetlands as a result of the fill dumped at the site; and

e. Silberstein did not have a permit or authorization by the Department to encroach upon the wetlands.

44. Mr. Goldberg determined that the pollution severity for the wetland encroachment was moderate, which carries a maximum base penalty of $3,000-$7,000. Mr. Goldberg chose the median penalty of $5,000 for the base penalty. (N.T. 90)

45. He then considered the various components of civil penalty.

a. Up to fifty percent, or $2,500, of the base penalty can be attributed to the damage component of the penalty. Since the damage was moderate, he charged $1,250.

b. Up to forty percent of the base penalty can be attributed to the willfulness of the violation. Silberstein was considered to be negligent because he had an approved erosion and sedimentation plan which was not implemented. Therefore $660 was imposed as the willfulness component.

c. The violation history component can amount to ten percent of the maximum penalty. No penalty was assessed for this component.

d. The last component, for the cost to the Department to enforce the Dam Safety and Encroachments Act, was calculated by multiplying the hourly wages of Mr. Goldberg, Mr. Everett, and Mr. Magargee by the time spent investigating the site, which amounted to $200. (N.T. 90-92)

46. The testimony of Mr. Magargee, Mr. Everett, and Mr. Goldberg is credible and convincing. Their testimony as described above is adopted as findings of fact. The testimony of Mr. Silberstein is not credible or convincing to the extent it conflicts with that of Messrs. Magargee, Everett, and Goldberg.

DISCUSSION

In a complaint for civil penalties, the Department bears the burden of proving by a preponderance of evidence that civil penalties should be assessed. 25 Pa. Code §1021.101(b)(1). However, Silberstein bears the burden of proving any affirmative defenses, such as establishing other factors which may have caused the violations at issue. Frisch v. DER, 1994 EHB 1226, affirmed, 2543 C.D. 1994 (Pa. Cmwlth. filed May 23, 1995).

In his post hearing brief, Silberstein does not challenge the fact of the violations, although he does provide some excuses for why he failed to comply with the Department's regulations. His only other challenge is to the Department's conclusion that the infractions were in the range of penalties for "moderate" violations rather than "minimal" violations.

We first turn to the issue of whether the Department sustained its burden of proving the violations of the relevant laws arising from Silberstein's failure to submit an erosion and sedimentation plan and providing erosion and sedimentation controls prior to dumping fill on his property. Both the Clean Streams Law and the Dam Safety and Encroachments Act provide that failure to comply with any part of the statute or any of the regulations promulgated thereunder is unlawful, and subjects the violator to sanctions including the assessment of civil penalties. Section 611 of the Clean Streams Law, 35 P.S. §691.611, and Section 18 of the Dam Safety and Encroachments Act, 32 P.S. §693.18.

The Department contends that a steep slope was created by Silberstein at the end of Maine Avenue without sufficient erosion controls. Silberstein does not contest these facts but admits that he dumped five or six truckloads of fill in order to create an exit for a backhoe that he brought on to the property from an adjacent parcel owned by him. (Finding of Fact No. 8)

Count I of the Department's complaint seeks a penalty for violation of 25 Pa. Code §102.4, because Silberstein failed to develop a site specific erosion and sedimentation control plan before depositing fill at the end of Maine Avenue. We find that the Department established this violation.

Chapter 102 of the Department's regulations pertain to erosion control. Specifically, Section 102.4 provides that

> Earthmoving activities within this Commonwealth shall be conducted in such a way as to prevent accelerated erosion and the resulting sedimentation. To accomplish this . . . a landowner, person or municipality engaged in earthmoving activities shall develop, implement and maintain erosion and sedimentation control measures which effectively minimize accelerated erosion and sedimentation. These erosion and sedimentation measures shall be set forth in a plan as set forth in § 102.5 (relating to erosion and sedimentation control plan) and be available at all times at the site of the activity. The Department or its designee may, at its discretion, require this plan to be filed with the Department or its designee.

25 Pa. Code § 102.4(a). "Earthmoving activity" is an activity "which disturbs the surface of the land, including but not limited to . . . the moving, depositing, or storing of soil, rock or earth. " 25 Pa. Code § 102.1.

Silberstein admits to depositing fill, which is an earthmoving activity as defined by Section 102.1. He also admits in his brief that he performed some regrading. (Silberstein Posthearing Brief at 4) There is also no dispute that no plan was filed before he embarked on this activity. Silberstein contends, however, that his activity was justified because a tree fell on the site which created a dangerous condition. In order to protect children who he alleged played in the area, he brought a backhoe to knock the trunk down, since he did not have a saw. He was then forced to dump the fill because he could not retrieve the backhoe because of the drop off at the end of Maine Avenue. (Finding of Fact No. 8)

This excuse, even if believed, does not justify Silberstein's unlawful activity. He presented no evidence, beyond his own self-serving testimony, that the alleged tree created such a treacherous situation that emergency action was required, which would arguably mitigate his responsibility to act lawfully. Because other means for dealing with the tree were available to Silberstein to address this situation (such as a simple saw) which would not have damaged streams or wetlands, there is no justification or excuse for his activity. We therefore find that the Department sustained its burden

of proving a violation of Section 102.4 of the Code because Silberstein engaged in earthmoving activity without justification for not submitting an erosion and sedimentation control plan.

Count II of the complaint seeks a penalty for failing to implement or maintain erosion controls as required by Section 102.4 of the regulations. This violation was based on Edward Magargee's inspection of the site on April 19, 1994. He observed that fill had been dumped, graded and leveled off causing sediment to be deposited in the area at the base of the slope. The only sediment control that he noted was a silt fence that was improperly installed and lying on the ground. (Finding of Fact No. 5)

Mr. Magargee visited the site again on June 23, 1994, after Silberstein had submitted his erosion and sedimentation control plan. The silt fence had still not been repaired or replaced, and the erosion control measures required by the plan had not been implemented. There were no erosion controls evident at the site. (Finding of Fact No. 14)

Finally, Mr. Magargee visited the site on October 28, 1994. Although a culvert had been constructed as required by the plan, it was not maintained, and was blocked by leaves. Also, there was no sediment trap or asphalt deflector installed as required by the plan. (Finding of Fact No. 28)

Silberstein argues that he only completed portions of his erosion plan because the plan incorporated controls for more extensive construction on the property than the activity which actually took place. He determined not to perform further construction. However, this does not provide an adequate excuse for failing to fully implement the plan that Silberstein himself[2] submitted

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[2] It is not relevant that Silberstein's engineer is the person who actually submitted the plan to the District Office. Obviously the engineer was acting as Silberstein's agent, and Silberstein bears responsibility for his actions.

to the District Office. Instead of proposing an amended plan, he failed to complete the plan which was submitted and approved, and now must suffer the consequences of that decision.[3]

We find that the Department sustained its burden of proving that Silberstein violated Section 102.4 of the Code because he failed to construct and maintain erosion and sedimentation controls at the site.

Count III charges that Silberstein failed to properly incorporate erosion control measures into his earthmoving activities in accordance with 25 Pa. Code §§ 102.12 and 102.13. Section 102.11 requires that the measures enumerated in these sections be incorporated into all earthmoving activity. These violations are predicated on Mr. Margargee's inspections on April 18, 1994, and June 23, 1994, when he observed that earthmoving activity had occurred and that no erosion and sedimentation control measures were in place. Mr. Margargee testified that the site had remained unchanged between his April 18 inspection and his June 23 inspection in terms of activity at the site, and work that had been done. (Finding of Fact No. 13) [4] Since there were no erosion control devices or facilities in use at the site, the Department sustained its burden of proving that Silberstein violated Sections 102.11-102.13 of the Code.

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[3] Silberstein contends in his posthearing brief that his efforts to maintain the erosion and sedimentation controls at the site were hampered by neighboring property owners. However, he presented no credible evidence on this point.

[4] Although the Department does not specifically explain this in its brief, we note that Section 102.1 of the Code includes the storing of soil, rock or earth in its definition of earthmoving activity. Therefore, even though Silberstein did not move or deposit additional soil, rock or earth after the April 18 inspection, he nevertheless continued to engage in earthmoving activities into which certain controls and facilities must be incorporated. See 25 Pa. Code §102.1 and § 102.11-102.13.

Count IV of the Department's complaint alleges that Silberstein allowed sediment to discharge into waters of the Commonwealth and created a danger of sediment pollution to waters of the Commonwealth in violation of Sections 401 and 402 of the Clean Streams Law, 35 P.S. §§ 691.401 and 691.402. Mr. Magargee testified he observed that sediment from the graded slope had discharged into the wetlands and into Lobbs Run. (Finding of Fact Nos. 5, 14, 28) Alan Everett, a DEP Pollution Biologist also testified that he witnessed sediment entering the wetlands and creek. (Finding of Fact No. 23)[5] He concluded that the sedimentation was a result of Silberstein's earthmoving activity because there was no sedimentation outside the drainage area of the land disturbed by Silberstein, and based on the amount and color of the sediment which indicated that it had been deposited relatively recently. This sedimentation was two inches thick in some areas and extended all the way to Lobbs Run. (Finding of Fact No. 24-25)

Section 401 of the Clean Streams Law proscribes the discharge of pollution into "waters of the Commonwealth." 35 P.S. §691.401. Wetlands and creeks are waters of the Commonwealth as defined by Section 1 of the Clean Streams Law, 35 P.S. §691.1. Runoff from land with sediment is "pollution." 35 P.S. §691.1; Frisch v. DER, 1994 EHB 1226, affirmed, 2543 C.D. 1994 (Pa. Cmwlth. filed May 23, 1995).

Section 402 of the Clean Streams Law authorizes the Department to regulate activities which create a danger of pollution to waters of the Commonwealth. Conducting such activity contrary to the rules and regulations of the Department is unlawful. Section 402(b) of the Clean Streams Law,

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[5]The purpose of Everett's July 1994 inspection was to determine which areas were wetland areas, and to determine the amount of encroachment on those areas. (Finding of Fact No. 19)

35 P.S. §691.402(b). By engaging in earthmoving activities in contravention of the regulations which were promulgated to prevent erosion and sedimentation, Silberstein violated Section 402. See 25 Pa. Code § 102.3 (providing that "[t]his chapter controls accelerated erosion and the resulting sedimentation of waters of this Commonwealth thereby preventing the pollution of these waters from sediment . . . and other polluting substances carried by sediment.")

Finally, Count V of the Department's complaint charges that Silberstein encroached on wetlands without authorization in violation of Section 6 of the Dam Safety and Encroachments Act, 32 P.S. §693.6. That section provides that "[n]o person shall construct, operate, maintain, modify, enlarge or abandon any water obstruction or encroachment without the prior written permit of the Department." 32 P.S. §693.6(a). It is uncontested that Silberstein did not have a permit to encroach upon wetlands. The definition of "construct" includes the act of depositing fill, and "encroachment" is any "activity which in any manner changes, expands or diminishes the course, current or cross-section of any watercourse, floodway or body of water." Section 3 of the Dam Safety and Encroachments Act, 32 P.S. §693.3.

Mr. Magargee testified that he observed earth deposited in an area where wetlands existed, which included a pile of fill which was stockpiled in the wetlands at the base of the steep slope. (Finding of Fact No. 6; DEP Ex. 8(b)) Mr. Everett confirmed the location of the wetlands and the encroachment during his inspection. (Finding of Fact No. 22) Again, Silberstein does not deny that he deposited this fill, nor does he present any evidence to refute the location and size of the wetland area. Accordingly, we hold that the Department sustained its burden of proving that Silberstein violated the Dam Safety and Encroachments Act.

We turn now to the amount of penalty proposed by the Department for each of these violations. The Board is the government body authorized to assess civil penalties pursuant to the Clean Streams Law. E.M.S. Resource Group, Inc. v. DER, EHB Docket 93-171-CP-MR (Adjudication issued July 11, 1995); DER v. Allegro Oil & Gas Co., 1991 EHB 34.[6]

Section 605 of the Clean Streams Law, 35 P.S. §691.605, directs our assessment of penalties for violations of the statute and its regulations:

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

35 P.S. §691.605(a). The Department's calculation of a civil penalty is advisory only. E.M.S. Resource Group, Inc. v. DER, EHB Docket 93-171-CP-MR (Adjudication issued July 11, 1995).

In determining the appropriate penalty for the Clean Streams Law violations the Department utilized its Erosion and Sedimentation Pollution Control Program Civil Penalty Assessment Policy. (DEP Ex. 19) First, the Department determined that the violations were negligent rather than wilful violations. We have held that

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[6] The Board in DER v. Allegro Oil & Gas Co., 1991 EHB 34, 39, observed that

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

The Board has recognized the existence of different degrees of wilfulness. At one end of the spectrum is the deliberate, intentional violation of the law and at the other end of the spectrum is a negligent violation of the law. This Board has held that,

> An intentional or deliberate violation of law constitutes the highest degree of wilfulness and is characterized by a conscious choice on the part of the violator to engage in certain conduct with knowledge that a violation will result. Recklessness is demonstrated by a conscious disregard of the fact that one's conduct may result in a violation of the law. Negligent conduct is conduct which results in a violation which reasonably could have been foreseen and prevented through the exercise of reasonable care.

DER v. Canada-Pa. Ltd., 1989 EHB 319, 324-25 (quoting Southwest Equipment Rental, Inc. v. DER, 1986 EHB 465, 475). Because Silberstein had an erosion plan but he never implemented it, the Department determined that his conduct was negligent. We agree and adopt the Department's conclusion.

Next, the Department determined that the violations were "moderate" because complaints were filed about the site, and the violations at the site were not corrected after two inspections. Although the Department's determination that Silberstein's conduct was negligent could have classified the violations as "severe," the Department determined that the "moderate" classification would be adequate given the circumstances of the case. (Finding of Fact No. 36)

Silberstein argues that the severity of the violations was "minor" rather than "moderate" because the impact of the unlawful activity was minimal inasmuch as only a small area was affected. We find that the Department presented ample testimony which detailed the damage to the wetland area which was caused by Silberstein's activity. Both Mr. Magargee and Mr. Everett testified that from the time of the first inspection in April and until the last inspection in October, the erosion and sedimentation was a continuing problem. Sediment that was two inches deep in some places

collected around the roots of some of the plants in the area. Sediment pollution was entering Lobbs Run. (Finding of Fact Nos. 5, 14, 23, 28)

Moreover, Silberstein had ample opportunity to correct these violations. We are unwilling to hold that the severity of the violations was minimal simply because the amount of area affected by the unlawful activity was small and Silberstein did make some efforts to remediate the situation.

Having established the severity classification for the violations of the Clean Streams Law as moderate, the Department proposed a penalty for each day of a particular violation. A day was any day that Mr. Magargee inspected the site and noted a particular violation on his reports.[7] The total suggested penalty for violations of the Clean Streams Law was $11,000.

We find the penalties proposed for violations of the Clean Streams Law and violations of Chapter 102 of the Code reasonable except for the penalties charged for two days of violation of 25 Pa. Code §§102.12 and 102.13. As explained above, this violation was based on Silberstein's failure to incorporate erosion control measures into his earthmoving activities. The facts relied on by the Department are identical to those relied on to determine the penalty for violation of 25 Pa. Code §102.4 for failing to implement or maintain erosion control measures. Under these circumstances it is not appropriate to assess separate penalties for these violations. This Board has held:

> The doctrine of merger of offenses, although generally applicable to criminal offenses, must, we believe, be considered administratively as we seek fairness as well as reasonableness in exercising our civil penalty discretion. The settled law

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[7] The only exception to this formulation was the penalty for the violation of Section 401 of the Clean Streams Law, 35 P.S. §691.401, for discharging sediment into waters of the Commonwealth. The Department viewed this as a one-time violation and therefore assessed a penalty for one day of violation. (Finding of Fact No. 41) We find no abuse of discretion in this logic.

> regarding when merger occurs of two offenses . . . is determined by whether each offense requires proof of facts additional to those involved in the other.

DER v. Trevorton Anthracite Co., 1978 EHB 8, 14, affirmed, 400 A.2d 240 (Pa. Cmwlth. 1979) (citations omitted); see also Empire Sanitary Landfill v. DER, 1994 EHB 30; Goetz v. DER, 1991 EHB 1433. Since there is no discernable difference in this case between "implementing" erosion control measures pursuant to Section 102.4, and "incorporating" erosion controls pursuant to Sections 102.12 and 102.13, we find that it is unreasonable to assess a separate penalty for these violations, and we therefore reduce the proposed penalty by $1,000, the amount requested for violation of 25 Pa. Code §§102.12 and 102.13.

The Department also proposed a penalty of $2,110 for Silberstein's violations of the Dam Safety and Encroachments Act. This Board also has authority to assess this penalty pursuant to Section 21 of the Dam Safety and Encroachments Act, 32 P.S. §693.21, which provides:

> In addition to proceeding under any other remedy available at law or equity . . . the hearing board, in an action instituted before it by the department, may assess a civil penalty upon any person for such violation [of the Act] or unlawful conduct. Such a penalty may be assessed whether or not the violation was willful. The civil penalty so assessed shall not exceed $10,000, plus $500 for each day of continued violation. In determining the amount of the civil penalty, the board shall consider the willfulness of the violation, the damage or injury to the stream regimen and downstream areas of the Commonwealth, the cost of restoration, the cost to the Commonwealth of enforcing the provisions of the act against such person, and other relevant factors. . . .

32 P.S. §693.21(a).

The Department considered the wilfulness of the violation, damage to the environment, and the cost to the Department for enforcing the the act in arriving at the proposed figure of $2,110. Ample evidence was presented to support the various components of the $2,100, which Silberstein

failed to rebut. Accordingly, we find that the penalty amount proposed for violation of the Dam Safety and Encroachments Act is appropriate.

Accordingly, we make the following

CONCLUSIONS OF LAW

1. The Department has the burden of proof in this matter and must establish that the assessment of civil penalties is authorized by law.

2. Silberstein failed to develop a site specific erosion and sedimentation plan prior to conducting earthmoving activities in violation of 25 Pa. Code §102.4.

3. Silberstein failed to implement and maintain erosion and sedimentation pollution control measures to effectively minimize accelerated erosion and sedimentation in violation of 25 Pa. Code §102.4.

4. Silberstein conducted earthmoving activities that caused a danger of sediment pollution in violation of Section 402 of the Clean Streams Law, 35 P.S. §691.402.

5. Silberstein discharged sediment pollution into waters of the Commonwealth in violation of Section 401 of the Clean Streams Law, 35 P.S. §691.401.

6. Silberstein encroached upon the wetlands on the site during his activity and caused sediment pollution in violation of Section 6 of the Dam Safety and Encroachments Act, 32 P.S. § 693.6.

7. By violating the Cleans Streams Law and its regulations and the Dam Safety and Encroachments Act, Silberstein engaged in unlawful conduct as defined by Section 611 of the Clean Streams Law, 35 P.S. §691.611 and Section 18 of the Dam Safety and Encroachments Act, 32 P.S. §693.18.

8. Silberstein failed to present any credible evidence which provided a justification for his unlawful activity.

9. A $1,000 penalty is assessed for Count I of the complaint for civil penalties for failing to develop an erosion and sedimentation control plan in contravention of 25 Pa. Code §102.4.

10. A $3,000 penalty is assessed for Count II of the complaint for failing to implement or maintain erosion and sedimentation controls in contravention of 25 Pa. Code §102.4.

11. No penalty is assessed for Count III of the complaint for failing to incorporate erosion controls into earthmoving activity in violation of 25 Pa. Code §§102.12 and 102.13, because it is duplicative of the penalty assessed in Count II of the complaint.

12. A $3,000 penalty is assessed for violation of Section 401 of the Clean Streams Law, 35 P.S. §691.401, and a $3,000 penalty is assessed for violation of Section 402 of the Clean Streams Law, 35 P.S. §691.402, for Count IV of the complaint.

13. A $2,110 penalty is assessed for violation of Section 6 of the Dam Safety and Encroachments Act, 32 P.S. § 693.6.

ORDER

AND NOW, this 31st day of May, 1996, it is ordered that civil penalties are assessed against Edward Silberstein in the total amount of $12,110. Of this penalty, $10,000 is assessed for violations of the Clean Streams Law; this amount is due and payable immediately into the Clean Water Fund. The remaining $2,110 is assessed for violation of the Dam Safety and Encroachments Act; this amount is due and payable into the Dams and Encroachments Fund. The Prothonotary of Delaware County is ordered to enter the full amount of the civil penalty as a lien against any property of Edward Silberstein, together with interest at the rate of 6% per annum from the date hereof. No costs may be assessed upon the Commonwealth for entry of the lien on the docket.

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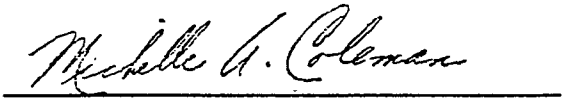

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: **May 31, 1996**

c: **Bureau of Litigation:**
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For the Commonwealth, DEP:
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SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
	:	**EHB Docket No. 90-316-CP-E**
v.	:	**(Consolidated with 90-361-E)**
FRANKLIN PLASTICS CORPORATION	:	**Issued: June 19, 1996**

ADJUDICATION

By: George J. Miller, Chairman

Synopsis

Upon review of the entire record on remand from the Commonwealth Court, the Board finds that the Department failed to bear its burden of proof with respect to odor violations by reason of its failure to call more than one witness from the public to testify that the odors from the appellant's facility caused annoyance and discomfort to the public. The Board's previous adjudication with respect to the malodor violations is vacated; the Board's previous adjudication with respect to the fugitive emission violation is reaffirmed.

BACKGROUND

This adjudication is issued in response to the mandate of the Commonwealth Court to conduct a further hearing to permit Appellant ("Franklin") an opportunity to further cross-examine a Department witness, Francine Carlini, and to consider Franklin's appeal based on a supplemented record. 657 A.2d 100 (Pa. Cmwlth 1995) The Commonwealth Court held that

Appellant's counsel was improperly prevented from presenting testimony to prove that the Department's witnesses could not distinguish the source of the claimed malodors because of the presence of odors emitted from other nearby facilities. The required hearing was held on August 15, 1995 by Board Member Richard S. Ehmann at which time full cross-examination of Ms. Carlini was permitted.

These consolidated appeals involve the Department's complaint for the assessment of civil penalties against Franklin and Franklin's appeal from an abatement order issued by the Department relating to alleged malodors in violation of 25 Pa. Code §123.31(b) and fugitive emissions in violation of 25 Pa. Code §121.1(a) from Franklin's Vy-Cal Plastics manufacturing facility located in Conshohocken, Pennsylvania under the provisions of the Air Pollution Control Act, Act of January 8, 1960, PL. (1959) 2119, as amended, 35 P.S. §4001 et seq., ("APCA"). The Board's adjudication of February 11, 1994, 1994 EHB 100, found that the Department had borne its burden of proof with respect to the fugitive emission violation and with respect to two of three claimed odor violations which occurred on May 14, 1990 and November 16, 1990. The Board assessed penalties of $4,750 for three violations of the Air Pollution Control Act. The Board also upheld the Department's abatement order relating to those emissions. 1994 EHB 100.

Because Board Member Ehmann resigned from the Board in February of this year before he could draft the adjudication, and because only one of the current members of the Board participated in the original adjudication, the Board as presently constituted has reviewed the

entire five volumes of the notes of testimony consisting of 1115 pages and all the exhibits introduced at both the original hearings and at the hearing on remand.[1]

We have interpreted the Court's mandate to require reconsideration of the Board's prior rulings on issues raised before the Commonwealth Court in addition to considering the impact of the further testimony on cross-examination of Ms. Carlini. The Court did not reach substantial issues raised by appellant in its appeal before the Commonwealth Court, but the Court appears to have directed a full reconsideration of those issues by the Board.

The Board does not believe that the further testimony of Ms. Carlini provides any basis for a change in the Board's decision. However, the Board as presently constituted believes that the Department did not bear its burden of proof with respect to the malodor violations by reason of its failure to call more than one witness from the public to show that the odor from Franklin's facility resulted in annoyance and discomfort to the *public* as distinguished from the one individual complainant who testified to her annoyance and discomfort. Her testimony was confirmed only by the testimony of the Department employees who investigated her complaints. The Board regrets this change of position. However, the requirements of the proof of a "malodor" has become an issue of increasing importance in litigation before the Board. Accordingly, it is important that the Board's views on this issue be set forth fully now.

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[1]This adjudication has been prepared from a cold record because Judge Ehmann left the Board prior to the issuance of an adjudication in this matter. Lucky Strike Coal Co. v. DER, 547 A.2d 447 (Pa. Cmwlth. 1988).

After a full and complete review of the record, we reaffirm the Board's prior findings of fact except for finding No. 34[2] and make the following supplemental or repeated findings of fact:

SUPPLEMENTAL OR REPEATED FINDINGS OF FACT

The Department's Use of the MAU.

1. The mobile analytic unit ("MAU") that was a primary subject of the hearing on remand was brought into the Conshohocken area by the Department in October of 1991 to experiment with using it to differentiate between odors from different facilities in the community. (N.T. 932-933, 937)

2. Francine Carlini's specific use of the MAU was to see if it could differentiate between the smells emanating from the Reilly-Whiteman facility and the Quaker Chemical facility in Conshohocken because she believed they both emitted acrolein, but could not determine which facility emitted an odor consisting of this material. (N.T. 937-938)

3. To conduct this study, the MAU attempted to obtain a clean background sample from a ball field on 15th avenue in Conshohocken because no odor complaints had been received from this location, but the sample obtained contained "dirty" or "busy" air. (N.T. 946-948, 1060-61)

4. In planning the use of the MAU, the Department targeted various industries in the Franklin Plastics vicinity, including Quaker Chemical, Reilly-Whiteman, Hale Pump, the sewage treatment plant, and Franklin Plastics, all of which are located within one square mile radius of one another at the base of a valley. (N.T. 943-944)

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[2]The present members of the Board believe that this finding that the citizen complaints characterized the odor from Vy-Cal as a "plastic-type" odor was inadmissible hearsay properly objected to by Franklin. (N.T. 134)

5. The MAU was unable to distinguish between the Quaker Chemical and Reilly-Whiteman facilities as the possible source of acrolein because the background sample was not of clean air and because the MAU did not have a standard for acrolein which was necessary for a successful use of the MAU's gas chromatograph mass spectrometer. (N.T. 961-966, 1062-63)

6. The Department's failure to detect and differentiate odors through use of the MAU is entitled to little weight against the specific testimony of the Department's witnesses with respect to the odors emanating from the Vy-Cal facility.

7. The testimony of the Department personnel who investigated the complaints of Melissa Cahill of odors from Vy-Cal was that the odor at the Vy-Cal facility and at the residence of the complainant was a very strong, plastically or "shower curtain" type odor similar to the odor inside the Vy-Cal facility. (N.T. 160-164, 197-98)

8. In addition, Francine Carlini testified that the MAU would never be used as a basis for enforcing a malodor violation because of the subjective nature of this violation. (N.T. 1078)

The Malodor Definition.

9. The Department's interpretation of its malodor regulation is that if the Department receives complaints from the public of a malodor from a particular source which causes them annoyance or discomfort, and the Department's investigation confirms that such odor outside the property line of the source is objectionable to most of the general public, the Department need not call numerous witnesses from the public to testify to their annoyance and discomfort. (N. T. 1093-1095; Department's Supplemental Post-Hearing Brief, 25-26)

10. The Department's odor logs and testimony show that it received numerous complaints from members of the public of odors from the Vy-Cal facility during the period of

February 13, 1989 to August 17, 1990 and August 22, 1990 and November 16, 1990, but there is no way of measuring the accuracy of the log and no direct contact in terms of somebody verbalizing a complaint about malodor. (N.T. 1108-1112; Board Ex. S-1)

11. In the case of the May 14, 1990 violation, Richard Breitenstein testified that he smelled a new shower curtain type of odor outside the Vy-Cal building and across the street as well as at the Cahill's residence which was a couple of hundred yards north of the Vy-Cal facility. He determined that the odor he detected had an effect on the public by talking to the Cahills. He did not find the odor irritating in the sense of physical irritation, but said it was a nuisance. (FP Ex 32; N.T. 160-161, 174-177)

12. On November 16, 1990, Karen Gee testified that she detected a plastically, very strong odor inside the plant and that the same odor was smelled outside the Vy-Cal facility in front of the plant and into the community . The odor outside gave her a scratchy feeling in her throat. (N.T. 198-99, DEP Ex. 15)

13. The inspections done by these Department employees were as a result of the complaints of Melissa Cahill. (N.T. 278-279) She was the sole witness from the public to testify that the odors from Vy-Cal were a malodor, and her testimony is summarized in Findings of Fact 24-31 in the Board's February 11, 1994 Adjudication.

14. There were only two other witnesses to testify from the public. Lucius Carter, an employee of the Vy-Cal plant, lived two blocks from the Vy-Cal facility until 1990. He testified that neither he nor his brother and niece who lived next to him ever smelled a plastics odor from the Vy-Cal facility, and as a shop steward at Vy-Cal, he received no odor complaints from employees. (N. T. 759-787)

15. Mr. Carter also testified that as a councilman for the Third Ward in Conshohocken (which is to the north and west of the Vy-Cal plant) he received no complaints of odors from the Vy-Cal plant in the time period from 1980 to the early part of 1991 other than incidents described in reports of the Air Pollution Control Board when Melissa Cahill lived in town. (N.T. 773-781)

16. Lawrence Williamson, also an employee of the Vy-Cal plant, testified that he lived near the Vy-Cal plant until 1990 but never noticed a vinyl odor from the plant outside the facility. (N.T. 783-786)

DISCUSSION

We are convinced that the Department bore its burden of proving that Franklin permitted the emission of odorous contaminants on May 14, 1990 and November 16, 1990 which were detectable outside Franklin's property. The testimony of the Department's witnesses Richard Breitenstein and Karen Gee was definitive that the Vy-Cal facility was the source of the odor they smelled in the community on those dates. The testimony of Melissa Cahill was equally definite that the odors were annoying and discomforting to her. Neither the cross-examination of these witnesses nor the testimony with respect to the Department's attempts to use the MAU to differentiate sources of odors was sufficient to discredit their testimony.

Did the Odor Come from Vy-Cal?

We accept Franklin's evidence that the Borough of Conshohocken may be subject to odor emissions from a number of industrial sources there, and the area in which the Vy-Cal plant is located may be subject to atmospheric inversions which may make the detection of the precise source of an odor difficult at those times. However, we find the time-specific testimony of the

Department's witnesses and of Melissa Cahill as to the source of this odor to be credible for the reasons set forth on pages 137-38 of our prior adjudication, DER v. Franklin Plastics Corp., 1994 EHB 100. While we have considered the testimony of plant employees with respect to the presence of a slight plastic odor inside the plant which they have never experienced outside the plant, we do not give as much credit to their testimony in view of their economic circumstance as employees and the time-specific testimony of the Department's witnesses. Our reasons for this are set forth fully at 1994 EHB 100, 133-34.

The two other residents of the area to testify that they had not detected a plastics odor in their house appear to have given up their residences there by 1990 prior to the time of the violations charged. Accordingly, we assign little weight to their testimony in determining the testimony of the Department and of Melissa Cahill as to the source of the odor to be credible.

We have also considered the Franklin's testimony that odors were not detected by others outside the facility at other times and that its process would not produce such an odor under normal circumstances. However, we do not credit that testimony against the time specific testimony of the Department's witnesses for the reasons set forth at pages 134-35 and 138 of our prior adjudication. As pointed out in our prior adjudication, the heating of materials or the supply of a bad batch of materials may well have been responsible for the particular events testified to by the Department's witnesses.

Proof of a Malodor

In view of this determination, the central issue of the case is what quantum of proof from the public is required for the Department to bear its burden of proof as to whether or not the odor was a "malodorous contaminant" within the meaning of the Air Pollution Control Act and the

Department's regulations thereunder. Section 3 of the Air Pollution Control Act defines "Air Pollution" as "The presence in the outdoor atmosphere of any form of contaminant, including, but not limited to the discharging ...of...noxious or obnoxious....odors...which may be inimical to the public health, safety or welfare...or which unreasonably interferes with the comfortable enjoyment of life or property." *(emphasis supplied)* 35 P.S. §4003.

The Department's regulations implemented this definition in 1972 by defining a "malodor" at 25 Pa. Code §121.1 as "an odor which causes annoyance or discomfort to the public and which the Department determines to be objectionable to the public." *(emphasis supplied)* 2 Pa. Bull. 383 Franklin says this means that the Department must call many witnesses from the public to prove that the odor causes annoyance or discomfort to them and also call Departmental witnesses to prove that the Department determined that the odor is objectionable to the public. Franklin points to the testimony of Francine Carlini that the "public" means more than one or two persons (N.T. 1098, 1100-01, 1105) and to a previous odor case in which a large spectrum of the community testified to the presence of malodors. See Lehigh Dying and Finishing, Inc. v. DER, 1980 EHB 165.

The Department counters that it interprets the regulation to mean that if the Department has verified complaints from the public of an objectionable odor, the "public" requirement of the regulation has been met without calling any witness from the public. The Department then needs only to present Department employees who testify convincingly that the odor complained of is of such a nature as to be objectionable to the public. (Department's Supplemental Post-Hearing Brief at pages 25-26). This interpretation is supported by the testimony of Francine Carlini that if the Department determines that the odor is objectionable as a result of investigations made as a

result of complaints from the public it need not call numerous witnesses from the public to testify. (N. T. 1093-95)

The Supreme Court has instructed us that the Department's interpretations of its regulations and regulatory scheme is entitled to great deference and should not be disregarded unless shown to be clearly erroneous. Concerned Citizens of the Yough, Inc., Pa. , 670 A.2d 1120 (1995). See also, Hatchard v. DER, 612 A.2d 621 (Pa. Cmwlth. 1992), petition for allowance of appeal denied, 533 Pa. 647, 622 A.2d 1378 (1993); Mathies Coal v. DER, 552 Pa. 7, 559 A.2d 506, 512 (1989).

We do not believe that we are bound by the Department's interpretation of this regulation because it is contrary to the intent of section 3 of the Air Pollution Control Act, as well as the language and the evident purpose of the Department's regulatory definition of a "malodor". In addition, this interpretation is contrary to the history of malodor enforcement requiring proof of a public nuisance and appears to be an interpretation developed solely for the purpose of this litigation.

Section 3 of the Air Pollution Control Act requires proof of a noxious or obnoxious odor which may be inimical to the public health, safety or welfare or which unreasonably interferes with the comfortable enjoyment of life or property. The statutory definition's emphasis on the "public health, safety or welfare" and the requirement that the odor "unreasonably" interfere with the comfortable enjoyment of life or property clearly implies that there must be a public interest sufficiently strong enough to require a lawful business to invest in odor control equipment.[3] In

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[3]When this regulation was adopted in 1985 at 13 Pa. Bull. 2478, the Department properly exempted from this requirement odor emissions arising from the production of agricultural

the case of 25 Pa. Code §123.31(b) the presumptive remedy for the emission of malodors is incineration. This may well be an extremely expensive remedy which should not be required by the Department if the odor amounts to no more than a private nuisance.

The Department's definition of "malodor" complies with this obvious intent by requiring proof that the odor be "an odor which causes annoyance or discomfort to the public and which the Department determines to be objectionable to the public." The Department's interpretation of this regulation, however, departs from this intent by eliminating the requirement that there be proof of a public interest which makes it reasonable to impose a regulatory requirement of a remedy. If only one witness testifies that the odor causes annoyance or discomfort, even if the Department finds the odor to be objectionable, the Department may well find that it is requiring a remedy which is not reasonable because it can be justified only as a remedy for a private nuisance. The fact that the record contains indications of complaints from a number of members of the public cannot be considered as proof of a public nuisance because that would permit the proof of an essential part of the Department's case through inadmissible hearsay. Both the Board and the Commonwealth Court have held that use of inadmissible hearsay to prove an essential element of the Department's case is impermissible. Franklin Plastics Corp. v. DER, 657 A.2d 100, 103 (Pa. Cmwlth. 1995)

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commodities in their unmanufactured state on the premises of the farm operation presumably because such a requirement would be unreasonable. As the Pennsylvania Dutch farmer said to his daughter: "Don't complain about the smell of fertilizer, it's the smell of money."

The history of the Department's definition of a "malodor" and the general history of odor enforcement in other states indicates clearly that the Department is bound to present proof of the equivalent of a public nuisance to bear its burden that the emission is a "malodor." The Department's regulation defining a "malodor" in 25 Pa. Code §121.1 was first adopted in 1972. At that time, the generally accepted approach to odor regulation was to regulate it as a nuisance which would require the testimony of a number of witnesses from the public to establish an odor violation because of the plainly subjective nature of a community's perception of odors. That perception may vary from person to person and from community to community. For example, in Department of Health v. Owens-Corning Fiberglas Corp., 100 N.J. Super. 366, 242 A.2d (1968), aff'd, 53 N.J. 240, 250 A.2d 11 (1969), eleven neighbors were called to testify about the fumes, smoke, blue haze and phenol and formaldehyde odors coming from roof vents at the Owens-Corning facility. An inspector from the New Jersey Department of Environmental Protection also testified that he detected strong formaldehyde odors and other odors coming from the plant in various of the plant's operations. The New Jersey court upheld the charged violations based on this testimony and found that the New Jersey Act was constitutional.

By contrast, well before the adoption of the Pennsylvania regulation, the New Jersey courts held that one complaint by a public witness is insufficient to establish an odor violation because the odors "must be a public as distinguished from a merely private nuisance; that is it must affect a considerable number of persons." State v. Sommers Rendering Co., 66 N.J. Super. 334 (App. Div. 1961).

The law of Illinois appears to be the same. In Mystic Tape v. Illinois Pollution Control Board, 16 Ill. App. 3d 788, 306 N.E. 2d 574 (1973), the Illinois Appellate Court set aside a plant

closure order issued by the Illinois Pollution Control Board which assessed a penalty against the manufacturer and required it to submit a program resulting in complete abatement of odor pollution. The Board's findings were set aside because there was no public testimony to support the finding that the odors were "noxious" or resulted in any injury to life or health in any form.

There is nothing to indicate in any way that the Department of Environmental Resources in adopting the definition of a "malodor" in 1972 intended to change this established law as to how a malodor was to be proved in any way. Indeed, the regulation appears to have a two-fold requirement of an odor "which causes annoyance or discomfort to the public" and "which the Department determines to be objectionable to the public." This two-fold standard appears only to codify what the New Jersey court held in the Somers Rendering and Owens Corning Fiberglas cases and what the Illinois Court was to require in the Mystic Tape case.

The same rule is applied in many other states and for good reason. In 1977, the EPA commissioned a study by the National Research Council to investigate whether a national air quality criteria should be established for objectionable odor under the federal Clean Air Act. In concluding that this should be left to the states, the EPA submitted a report to Congress in 1979 based on this study entitled "Regulatory Options for the Control of Odors." In that report, the EPA concluded that because odor perception is quite subjective, nuisance law appears to be the appropriate mechanism for dealing with odor problems. The EPA report said with respect to the use of quantified approaches to odor regulation:

> "The irony of the situation is that, efforts to establish quantified acceptability or annoyance threshold levels for any particular odorant are fraught with subjective evaluations. Subjective reactions to odor differ from individuals and

> between communities. Indeed this factor is a major reason for the view that nuisance law is an appropriate mechanism for addressing odor problems. Despite all of its substantive, procedural and evidentiary shortcomings, the nuisance approach is the only odor regulation strategy now in use that is tied directly to the basic criteria of an unreasonable interference with public or private rights. As in other areas of nuisance law, odor nuisance disputes are resolved on the basis of lay testimony concerning the reasonableness of the defendant's behavior. The level of private or public annoyance is balanced against defendant's interest in continuing to operate." EPA Report to Congress "Regulatory Options for Control of Odors (1979), page 14.

Prior to this case, the Department understood its regulation to require calling a number of public witnesses. In the case of Lehigh Drying and Finishing v. DER, 1980 EHB 165, for example, the Department called a significant number of witnesses to testify to the discomfort of the public including the Mayor of Allentown. While the number of how many witnesses have to be called to prove an annoyance or discomfort to the public is a matter of judgment, the Department's approach to the Lehigh Drying case is clearly inconsistent with its present belief that the regulation should be interpreted to require only testimony that the Department found the odor to be objectionable in an investigation following complaints from the public.

When the Department adopted 25 Pa. Code §123.31(b) in its present form in 1983, the Department made no attempt to amend the definition of a "malodor" to eliminate the need for a finding of public annoyance or discomfort. Other changes were made in the regulation by making incineration the presumptive remedy and exempting farm operations from the requirement. 38 Pa.Bull. 2478 (1983). This was after the Lehigh Drying case and the EPA report

to Congress which endorsed the public nuisance approach to odor regulation.

The Department's present interpretation of its "malodor" definition also is unreasonable because it is contrary to the generally accepted principle that the Department may only enforce a public as distinguished from a private nuisance. See Plumstead Township v. DER, et al, 1995 EHB 741; Santus v. DER, et al, 1995 EHB 897. In both cases we rejected the appellants' claims that the noise produced by mining activity was not properly considered by the Department because appellants were unable to prove that the noise level amounted to a public nuisance. A public nuisance must involve an inconvenience or troublesome offense that annoys the whole community in general, and not merely some particular person. Feeley v. Borough of Ridley Park, 551 A.2d 373 (Pa. Cmwlth. 1988). An action to restrain a private nuisance may be maintained, but there must be extremely clear proof of unquestionable injurious conduct or interference which has been unnecessarily created in the operation of an activity which is of little or any benefit to the public. Kembel v. Schlegel, 329 Pa. Super. 159, 478 A.2d 11 (1984).

The Department in this case clearly failed to present evidence that the odor involved caused annoyance or discomfort to the public. The only admissible evidence on the subject from the public came from Melissa Cahill, an organizer of a community group formed to stop all odors in Conshohocken. She acknowledged that she considered an odor from a nearby restaurant to cause annoyance and discomfort but said the Department failed to agree with her on that.[4]

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[4]The New York Appellate Division, Fourth Department, struck down a City of Buffalo Municipal ordinance as unconstitutionally vague that defined a malodor as the "minimum concentration of odor required to give the first sensation of fetid or noisom [sic] odor to a person of average odor sensitivity." The Court wrote: "The ordinance's imprecise definition of noxious or offensive odors would permit the termination of a business because of the presence of any odor which annoys any person who owns property in the 'impact area,' since its application

Testimony offered by Franklin tended to prove that other residents in the neighborhood did not detect the odor outside the plant and, in the case of Lucius Carter, a Councilman for the Third Ward in Conshohocken, there was testimony that he had not heard of complaints of odors in the area other than incidents described in reports of the Air Pollution Control Board at a time when Melissa Cahill lived in town. (N.T. 773-781) While Franklin's testimony failed to establish that a public nuisance did not exist, the burden was on the Department to prove that the odor caused annoyance and discomfort to the public. The evidence presented by Melissa Cahill would support the conclusion that a private nuisance existed but is insufficient to establish that it caused annoyance or discomfort to the public. Indeed, in a prior adjudication the Board concluded that the Department's proof was insufficient to establish a public nuisance. DER v. Franklin Plastics Corp., 1994 EHB 100, 152.

In view of this history, it is fairly clear that the Department's current interpretation of the regulation is oriented to this litigation, rather than to the language or the history of the regulation. The Department's interpretation first became clear in the redirect examination of Francine Carlini at the supplemental hearing in which she acknowledged that "public" means more than one or two persons. (N.T. 1098, 1100-01, 1105) In addition, this interpretation of the regulation was advanced by counsel for the Department only in the Department's posthearing brief following the hearing on remand from the Commonwealth Court. While litigation interpretations of regulations by the Department may be binding on us, we find this interpretation of the regulation to be unreasonable and not founded on the language of APCA or of the regulation.

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could rest on the 'malice or animosity of a contankerous neighbor.' " Bakery Salvage v. City of Buffalo, 206 New York Law Journal, No. 12l, July 17, 1991)

The regulation itself requires a finding of discomfort or annoyance to the public. That determination cannot be made on the basis of only one witness from the public and one witness from the Department. Where the Department's interpretation flies in the face of the language of the governing statute and of the regulation and is contrary to the history of enforcement of odor violations, we are not bound by that interpretation because it is clearly erroneous and unreasonable.[5]

Accordingly, we find that the Department has failed to meet its burden of proof by not calling additional witnesses from the public to provide evidence as to whether or not the odor from the Vy-Cal plant was causing discomfort and annoyance to the public in Conshohocken. While the number of witnesses which have to be called from the public in order to bear the Department's burden of proof that the odor causes annoyance or discomfort to the public will depend on the circumstances, we hold that in the absence of some other means of proof, the Department has a duty to call more than one member of the public to testify subject to cross-examination that the odor caused annoyance or discomfort to them. This proof is required even

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[5]Commonwealth v. Hamar Coal Company, 452 Pa. 77, 306 A.2d 308 at 319 (1973) (Department guidelines not binding where contrary to the governing statutes under which they are promulgated); Croner, Inc. v. DER, 589 A.2d 1183 (Pa. Cmwlth. 1991), on remand, 618 A.2d 1135 (Pa. Cmwlth. 1992); V. R. Patterson, et al. v. DEP, et al., EHB Docket No. 94-347MR, issued May 14, 1996 (the Board has power to nullify regulations that are unreasonable even if they do not conflict with the statute creating them); City of Harrisburg v. DER, 1994 EHB 1309, 1314-1320 (the Board not bound by Department interpretation based on intent of legislature to grant it authority where the statute gave no such authority). See also, City of Chicago v. Environmental Defense Fund, ___ U.S. ___, 114 S. Ct. 1588 (1994) in which the United States Supreme Court flatly rejected EPA's interpretation of its RCRA regulations to mean that ash resulting from the combustion and non-hazardous waste was exempt from RCRA's subtitle C regulation under RCRA household waste exclusion because that interpretation was contrary to the provisions of the RCRA statute.

though a violation of a Department regulation is involved. While the violation of a Department regulation would normally be enough to prove a public nuisance, this will not suffice where the regulation itself requires a finding of annoyance or discomfort to the public.

Our opinion in Empire Sanitary Landfill, Inc., 1994 EHB 30, also required proof of public annoyance or discomfort as a part of the Department's evidence. This element in that case was provided by the testimony of two residents and the unobjected-to hearsay testimony of Department inspectors as to how the odors were bothering other residents who had complained of the odors. The Board determined in that case that it could consider this evidence as part of the proof of the required public component of the evidence because it had been admitted without objection even though it was clearly objectionable hearsay testimony. 1994 EHB at 57. In this case, by contrast, the evidence of community complaints was admitted only as evidence of the background of the Department's investigation.

Constitutionality

Franklin also raised in its post-hearing briefs for the first time that the terms "annoyance or discomfort" under the regulation were unconstitutionally vague and that the subjective interpretation invited by this phrase violates due process rights. We reaffirm the Board's previous findings that Franklin waived this claim by its failure to raise these issues in its appeal for the reasons set forth at 1994 EHB 127-128. In this connection, we note that the Board previously has upheld the constitutionality of this regulation. Empire Sanitary Landfill, Inc. v. DER, 1994 EHB 30, 73-77. The same conclusion was reached by the United States District Court for the Eastern District of Pennsylvania in Chester Residents Concerned For Quality Living v. Delcora Sewage Treatment Plant, No. 94-5639 (E.D. Pa. 1994). In addition, even more

vague standards have been upheld as constitutional in other states. See, e.g., State v. Owens-Corning Fiberglas Corp., N.J. Super. 366 (App. Div. 1968), aff'd. 53 N.J. 240 (1969). That court decision is still the law of New Jersey. See Casale, Defending Odor Lawsuits Takes A Nose For Nuance, New Jersey Law Journal, June 28, 1993.

Assessment of the Civil Penalty

With respect to the amount of the civil penalty, we assess a civil penalty only of $1,250 for the fugitive emission violation on June 20, 1990 for the reasons set forth in our prior adjudication.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this action.

2. The Department bears the burden of proof regarding its Complaint for Civil Penalty Assessment. DER v. U.S. Wrecking, Inc., 1992 EHB 829; 25 Pa. Code §21.101(b)(I).

3. To sustain this burden, the Department must prove by a preponderance of the evidence that Franklin violated the applicable statutes and regulations and that there is a basis for the Board to assess civil penalties against Franklin. 25 Pa. Code §21.101(a).

4. As the Department ordered Franklin to take affirmative action to abate air pollution, or another condition or nuisance, the Department bears the burden of proof. 25 Pa. Code §21.101(b)(3).

5. To sustain this burden, the Department must prove its July 25, 1990 order was a

lawful and appropriate exercise of the Department's discretion. Reading Co., et al. v. DER, 1992 EHB 195; 25 Pa. Code §21.101(a).

6. The Board's review is *de novo*, and thus the Board may substitute its discretion for that of the Department where we find the Department has abused its discretion.

7. Franklin has waived its constitutional challenges to 25 Pa. Code §123.31(b).

8. The sitting Board Member did not abuse his discretion in admitting the Department's offered evidence of a history of citizen complaints. Franklin Plastics Corp. v. DER, 657 A.2d 102-103 (Pa. Cmwlth. 1995).

9. The Department sustained its burden of proving that Franklin violated 25 Pa. Code §123.1 (regarding the emission of fugitive emissions from a non-exempt source) on June 20, 1990.

10. The sitting Board Member did not err in refusing to admit into evidence photographs taken by Karen Gee on June 20, 1990, offered by Franklin, which did not fairly and accurately represent the fugitive emissions which she observed. Franklin Plastics Corp. v. DER, 657 A.2d 100, 103 (Pa. Cmwlth. 1995).

11. The fugitive emission proved by the Department was not a trifle with which the law ought not to concern itself, but was a substantial violation of the Department's regulation.

12. The Department established that Franklin committed unlawful conduct pursuant to Section 8 of the APCA 35 P.S. 4008 and a statutory nuisance pursuant to Section 13 of the APCA, 35 P.S. 4013, only with respect to the charged fugitive emission.

13. The Department failed to establish that Franklin committed unlawful conduct under the Air Pollution Control Act by virtue of the charged odor emissions because of its failure to

present additional evidence from the public that the odors were malodorous in the sense that they caused annoyance and discomfort to the public.

14. The Department's abatement order was an abuse of the Department's discretion as to the odor violations cited therein, but not as to the fugitive emission violation.

15. Section 9.1 of the APCA authorizes the Board to impose civil penalties of up to $10,000 for a first violation and up to $2,500 per day of continuing violation.

16. Relevant factors to be considered by the Board in assessing a civil penalty include the willfulness of the violation, damage or injury to the outside environment of the Commonwealth, any detriment to public health and welfare, and the deterrent effect of the civil penalty. Section 9.1 of the APCA and DER v. U.S. Wrecking, Inc., 1992 EHB 829.

17. Franklin's violations of 25 Pa. Code §123.1(a) was knowing and willful.

18. A civil penalty assessment for Franklin's violations of §123.1(a) of 25 Pa. Code will serve as a deterrent to future violations.

19. A civil penalty of $1,250 for Franklin's June 20, 1990 fugitive emission violation is appropriate.

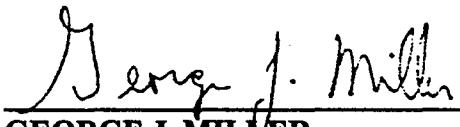
ORDER

AND NOW this 19th day of June, 1996, IT IS HEREBY ORDERED:

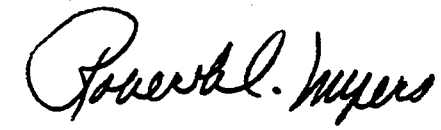
1. Franklin's appeal at Docket No. 90-361-E is sustained as to the May 15, 1989, May 14, 1990 and the November 16, 1990 alleged violations of 25 Pa. Code §123.31(b), but the appeal as to the fugitive emission is dismissed;

2. Civil penalties in the amount of $1,250 are assessed against Franklin at Docket No. 93-316-CP-E, for the fugitive emission violation of the APCA. This amount is due and payable immediately into the Clean Air Fund. The prothonotary of Montgomery County is ordered to enter the full amount of the civil penalty as a lien against any property of Franklin, together with interest at the rate of 6% per annum from the date hereof. No costs may be assessed upon the Commonwealth for entry of the lien on the docket.

ENVIRONMENTAL HEARING BOARD

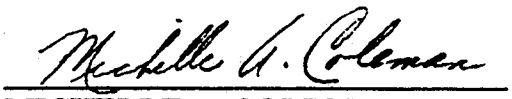


GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

Dated: June 19, 1996

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M. DIANE SMITH
SECRETARY TO THE BOARD

NEW HANOVER TOWNSHIP AND PARADISE WATCH DOGS	:	
v.	:	**EHB Docket No. 88-119-MR (Consolidated with 88-126-W, 88-127-W, 88-128-W, 89-017-W and 89-020-W)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND NEW HANOVER CORPORATION, PERMITTEE	:	**Issued: June 25, 1996**

ADJUDICATION

By: Robert D. Myers, Member

Syllabus:

DEP's issuance of a Solid Waste Management Act Permit containing conditions requiring a major redesign of the facility before it can be placed in operation is an abuse of discretion because the Permit is not based on a final, approvable design as required by Section 503(a) of the Solid Waste Management Act, 35 P.S. § 6018.503(a). While DEP has the power to place conditions in permits and is entitled to deference in its interpretation of the regulations, it cannot rely on these legal principles to justify an abuse of discretion.

PROCEDURAL HISTORY

These consolidated appeals originated with separate appeals seeking review of the Department of Environmental Resources' (now the Department of Environmental Protection) (DEP)'s March 1, 1988 issuance of two permits and one certification: Solid Waste Permit No. 101385; Industrial Waste NPDES Permit PA 0052345; and Section 401 Certification, File Code 4-

3.3, by three parties: New Hanover Township, on March 29, 1988 at Board Docket No. 88-119-W; Paradise Watch Dogs, on March 30, 1988 at Board Docket No. 88-126-W, 88-127-W, and 88-128-W; and the Boyertown Area School District, on March 31, 1988 at Board Docket No. 88-129-W. On April 28, 1988, the Board consolidated the appeals at Board Docket No. 88-119-W. On December 5, 1988, Boyertown Area School District withdrew its appeal.

Paradise Watch Dogs filed another Notice of Appeal (Board Docket No. 89-017-W) on January 23, 1989, from DEP's December 23, 1988 issuance of a Section 401 Certification. New Hanover Township filed a Notice of Appeal (Board Docket No. 89-020-W) from the same action on the following day. These two appeals were initially consolidated at Board Docket No. 89-017-W and then on March 20, 1989 were consolidated with the other appeals at 88-119-W. Prior opinions of the Board concerning these consolidated appeals appear at 1988 EHB 812, 830, 845 and 1168; 1989 EHB 31 and 138; 1990 EHB 1570; 1991 EHB 1234; and 1992 EHB 1739. All but the 1990 and 1991 opinions concern discovery and procedural matters.

Hearings on the appeals were held in Harrisburg before Maxine Woelfling, Chairman of the Board, beginning January 19, 1993 and spanning forty days until concluding on June 30, 1994. All parties were represented by legal counsel and, with the exception of DEP (who limited its participation to issues with potential significance beyond the case), presented evidence in support of their respective legal positions.

The record consists of the pleadings, a transcript of 6846 pages with numerous exhibits and post-hearing briefs.

This Adjudication is rendered upon a full and complete review of a cold record. *Lucky Strike Coal Co. v. DER*, 547 A.2d 447 (Pa.Cmwlth. 1988). We make the following:

FINDINGS OF FACT

1. New Hanover Township is a municipality located in Montgomery County, Pennsylvania.

2. Paradise Watch Dogs is a corporation under the laws of Pennsylvania located in New Hanover Township with a mailing address of P.O. Box 445, Frederick, PA 19435. Paradise Watchdogs consists of approximately 150 citizens concerned about the destruction of wetlands by the proposed municipal waste landfill.

3. New Hanover Corporation (Permittee) is a corporation with a mailing address of P.O. Box 95, Conshohocken, Montgomery County, Pennsylvania 19428, and a principal place of business at 9 Colwell Lane, Conshohocken, Montgomery County, Pennsylvania 19428. The shareholders include James Marinari, John Marinari, Albert Marinari and Marc Jonas. (N.T. 3490)

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

5. On November 16, 1984, Permittee applied to DEP for a permit to construct and operate a municipal solid waste landfill in New Hanover Township. The application lists James Marinari, John Marinari and Albert Marinari as property owners of the site. (Exhibits A-26 and A-28)

6. New Hanover Township encompasses twenty-two square miles, two-thirds of which is primarily rural. (N.T. 72)

7. The proposed landfill site (Site) consists of 107 acres and is more or less rectangular in shape, its longer sides running east-west.[1] TR 73 runs along the southern border and intersects with Church Road, which runs along the eastern border, at the southeastern corner of the Site. Hoffmansville Road runs parallel to the northern border several hundred feet from the Site. (N.T. 73, 571; Exhibits A-299, NHC-91 and NHC-299)

8. The surface of the Site slopes generally from the north to the south, dropping as much as 60 feet in elevation. A stream that rises on, or just north of the Site, flows through the Site in a north-south direction about 500 feet in from Church Road. Another, and apparently smaller, stream flows across the northwestern portion of the Site in a northeast-southwest direction.[2] Between these streams is a plateau-like area occupying nearly one-half of the site. It is this area that Permittee intends to use for the disposal of municipal waste. (N.T. 571, 3746-3749; Exhibits A-7, A-26, NHC-86 and NHC-91)

9. Presently occupying the center of the Site is an operating incinerator facility and related structures permitted to receive and dispose of medical waste. An access road to this facility runs about 800 feet in from Church Road. (N.T. 3763; Exhibits A-26 and A-299)

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[1] Actually, the Site is oriented one-half quadrant east of north and its longer sides run northwest-southeast. For simplicity sake and because the drawings are so oriented, we will treat the Site as though the longer sides run east-west.

[2] These streams are unnamed tributaries to Swamp Creek, about ½-mile south of the Site.

10. Dwellings occupy the east side of Church Road across from, and the entire way along, the Site; and occupy the space between the Site and Hoffmansville Road. Three individual dwellings abut the Site - one at the northeast corner and two near the southwest corner - one along TR 73 and the other about 600 feet north of TR 73. All dwellings obtain their domestic water supplies from private on-site wells. (N.T.74, 208, 571; Exhibits A-299 and A-388)

11. New Hanover Upper Frederick Elementary School is 3,300 feet east of the Site and the Boyerstown Area Junior High School is 4,300 feet west of the Site. Each school obtains its water supplies from on-site wells. (N.T. 207, 246-247, 3386-3393)

12. On-site wells serve nearly all the dwellings in New Hanover Township. (N.T. 74, 208)

13. New Hanover Township is within the Groundwater Protection Zone established by the Delaware River Basin Commission (DRBC). Because groundwater resources are deemed to be limited in this Zone, withdrawals of groundwater in excess of 10,000 gallons per day require a permit from DRBC. (18 C.F.R. §§ 430.7(b) and 430.13; N.T. 126-127, 681-682, 3011-3012)

14. According to the final version of the application and plans

a. The 56.6-acre disposal area is to be divided into 13 pads, ranging in size from 2.7 acres to 5.8 acres, to be developed in numerical sequence;

b. Nearly all of the disposal area is to be excavated - to a depth of 20 feet in some places - in order to install the secondary liner on competent bedrock;[3]

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[3] This probably would be done on a pad by pad basis or some similar basis rather than the entire disposal area at once.

c. In much of the disposal area, this excavation is to go below the level of the regional groundwater table;

d. to drain away the groundwater, soil drains are to be installed, by cutting into the bedrock, beneath each pad and running to the stream on the eastern portion of the Site;

e. about 1 million cubic yards of material is to be excavated on the Site and used in the preparation of pads, construction of roads and other facilities, and as cover material;

f. additional material is going to be brought onto the Site from off-site borrow areas, specifically Martin Stone Quarry;

g. after the secondary liner is installed above the soil drains, witness drains are to be installed, then the primary liner, and then the leachate drains, before the disposal of any waste;

h. the pads are to be filled to a final elevation as high as 425 feet above sea level at the highest points with external slopes of 33% at the maximum;

i. about 1,400 feet of the channel of the stream running through the eastern portion of the Site is to be relocated farther east;

j. about 400 feet of the channel of the stream running through the northwestern portion of the Site is to be relocated farther west;

k. erosion and sedimentation controls are to be installed around the perimeter of the disposal area leading to sedimentation basins on the east and west sides of the Site, respectively;

l. leachate is to be treated on Site and conveyed through a transmission line to a discharge point in Swamp Creek; and

m. another access road is to be constructed, entering the Site from TR 73 at a point about 500 feet west of the TR 73/Church Road intersection.

(N.T. 608-618, 644-654, 850-852, 2827-2828, 3721-3722, 5149-5155; Exhibits A-26, A-35, A-299, A-300, A-301, A-302, A-303, A-335 and A-366)

15. At the time when DEP evaluated Permittee's SWMA application, the governing regulations were those at 25 Pa. Code Chapter 75 adopted in 1977. (N.T. 3335, 3925, 4265)

16. New regulations (now found at 25 Pa. Code Chapter 271 *et seq.*), substantially revising the existing ones, had been adopted by the Environmental Quality Board (EQB) on December 15, 1987, but had not yet become effective on March 1, 1988.

17. DEP personnel were instructed to continue processing applications under Chapter 75 despite the pending proposed regulations. (N.T.3250-3253)

18. William Pounds, Chief of DEP's Division of Permits during the time when Permittee's SWMA application was being evaluated, was of the opinion that the application fulfilled the requirements of Chapter 75. (N.T. 3165, 3272-3273, 3293, 3318-3322)

19. Despite this opinion, Pounds was not satisfied with that part of the application which called for excavation below the regional groundwater table and the installation of soil drains to drain the groundwater from beneath the disposal area, a proposal Pounds characterized as "drastic." Such a proposal was allowed by the existing regulations but not by the proposed regulations. (N.T.3173-3174, 3240-3241, 3272-3273)

20. DEP personnel were also concerned about wetlands on the Site, the proximity of dwellings to the Site and the potential impact on private on-site water wells serving those dwellings. Chapter 75 contained virtually no site limitations protecting environmental resources and nearby properties; the proposed regulations contained a number of such limitations. (N.T. 644-646, 674-675, 3173, 3195-3209, 3258-3261, 3663, 3949-3954)

21. The SWMA Permit was issued on March 1, 1988. A number of conditions were inserted in the Permit in order to satisfy DEP's concerns. Because these conditions went beyond the requirements of Chapter 75, DEP obtained from Permittee a written waiver of its appeal rights in connection with the SWMA Permit. (N.T. 3189-3190, 3232-3234, 3250-3253, 3260-3261; Exhibit A-165)

22. Condition No. 4 of the SWMA Permit read as follows:

> No waste may be disposed at this facility until the Department has approved a complete application for permit modification under Section 271.111 of the municipal waste management regulations that were approved by the Environmental Quality Board on December 15, 1987. The operator may not construct the liner system for this facility, including any aspect of the soil drain or underdrain system set forth in the application, until the Department has approved a complete application for permit modification under Section 271.111 of the municipal waste management regulations that were approved by the Environmental Quality Board on December 15, 1987.

23. Pounds realized that, because of this Condition, Permittee would not be able to construct the landfill as proposed in the plans but would have to redesign it to comply with those provisions of the proposed regulations requiring an 8-foot separation between the base of the landfill and the regional groundwater table, and prohibiting the manipulation of the groundwater table by the use of soil drains. (N.T. 3189-3190, 3250-3253, 3270-3273, 3302-3303)

24. Pounds realized that, because of this Condition, Permittee would not be able to excavate the disposal area to the extent shown on the plans and would, therefore, require more material to be brought in from off-site borrow pits. Permittee was advised of this consequence by the following language in Condition No. 13:

> Any contract for the purchase of off-site cover material to operate this landfill will have to be modified based upon Condition No. 4 of this permit due to the fact that the depth of excavation to prepare the landfill site will be decreased.

(N.T. 3179-3183)

25. Condition No. 5 of the SWMA Permit read as follows:

> No municipal waste disposal or leachate treatment activity may take place within 100 feet of a property line unless a waiver is received from the adjacent landowner.

26. This Condition was intended by DEP to impose a limitation similar to that contained in the proposed regulations at 25 Pa. Code § 273.202(a)(8). (N.T. 3277-3279, 3329)

27. Condition No. 6 of the SWMA Permit read as follows:

> No municipal waste disposal or leachate treatment activity may take place within 300 feet of any occupied dwelling in existence on February 1, 1988 unless a waiver is received from the dwelling's owner.

28. This Condition was intended by DEP to impose a limitation similar, in some respects, to that contained in the proposed regulations at 25 Pa. Code § 273.202(a)(6). (N.T. 3278-3280, 3329)

29. Condition No. 7 of the SWMA Permit read as follows:

> This facility is subject to all applicable laws regulating wetlands, including 25 Pa. Code Chapter 105 and the Dam Safety and Encroachments Act, 32 P.S. Secs. 691.1 et seq. This permit is subject to all wetlands protection provisions in the Federal Clean Water Act and the regulations promulgated thereunder. The operator shall

replace any affected wetland on the property described in the application.

30. This Condition may have been intended by DEP to impose a limitation similar, in some respects, to that contained in the proposed regulations at 25 Pa. Code § 273.202(a)(2). (N.T. 3250, 3260-3261)

31. Condition No. 9 of the SWMA Permit read as follows:

> All private water supplies within one-quarter mile of this landfill site are to be tested initially prior to the start of construction activities for all parameters specified in permit condition 16. New Hanover Corp. must provide written documentation to the Department for any private well owners who do not consent to this initial monitoring.
>
> This condition shall not apply to properties whose owners do not consent to initial testing, but failure to consent shall not act as a waiver of that property owner's rights under applicable law. Starting one year after landfilling activity begins all private wells tested initially (prior to construction activities) must be sampled for all parameters specified in permit condition 10 on an annual basis until further notice.
>
> If there are any statistically significant deviations in water quality over the initial background (as determined by the use of the student T-Test at the 0.01 level of significance), the well(s) are to be resampled within thirty (30) days. If the resampling confirms a statistically significant change in water quality, New Hanover Corporation is to supply a temporary source of water of at least equal quality and quantity within 24 hours. If the temporary supply is purchased from a drinking water purveyor, the purveyor shall be licensed by and be in good standing with the Commonwealth of Pa. The permittee shall continue to provide the temporary supply until the quantity and quality of the original supply has been restored or a permanent alternate water supply is provided.
>
> A permanent replacement well of at least equal quality, quantity and convenience of use must be installed within 14 days after the resampling event confirms a statistically significant change in water quality.

> Prior to disposal of any waste at the facility, the operator shall provide the owner of each private existing water supply located within one-quarter mile of the boundary of the disposal area, or any ancillary solid waste management activities including impoundments and leachate treatment facilities, an opportunity to have the water supply immediately replaced with a permanent supply of like quantity and quality to the existing water supply.
>
> If the permittee creates a private water company for the purpose of supplying water to residents whose water supply has been adversely impacted by this landfill site, a permit from the Department will have to be obtained in accordance with the Pennsylvania Safe Drinking Water Act requirements. All water supplied to residents from the subject water company is to be supplied permanently to affected parties at no cost.

32. While Pounds stated this condition was not intended to impose limitations similar to those contained in the proposed regulations at 25 Pa. Code § 273.202(a)(13) and § 273.202(d), it is clear that the limitations are similar in some respects. (N.T. 3306-3307)

33. DEP did not insert conditions into the SWMA Permit imposing limitations the same as, or similar to, those contained in the proposed regulations at 25 Pa. Code § 273.202(a)(1), (3), (4), (5), (7), (9), (10), (11) and (12), and (b)(1), (2) and (3).

34. Condition No. 22 of the SWMA Permit read as follows:

> The operator shall make a bonafide offer, no later than 30 days after repermitting, to purchase properties with homes that are contiguous (those properties sharing a common property line not separated by a public road) to the facility or within 500 feet from the boundaries of the disposal area. The proposed purchase price shall be established by two independent appraisals of property value (assuming no landfill exits) as of the date of the offer or November 16, 1984, whichever is higher. Refusal by the owner(s) to sell to the operator in accordance with the bonafide offer shall relieve the operator of responsibility for compliance with this permit condition.

35. DEP's intent in inserting this condition is unknown except for its general intent to satisfy the nearby residents. (N.T. 3250, 3260-3261, 3295-3296)

36. DEP personnel plotted onto a plan sheet of the landfill all of the site limitations contained in the proposed regulations and found that they significantly reduced the size of the disposal area. (N.T. 3195-3207)

37. Because of Condition No. 4, the design of the landfill, as it existed on the date of SWMA Permit issuance, will have to be materially changed. Among the charges are the following:

a. excavation of the disposal area will be significantly reduced in most areas, completely eliminated in some areas and replaced by fill in other areas, resulting in base elevations more than 20 feet higher than those shown on the plans;

b. as a result, the grading elevations shown on the plans, the cross-sections of the disposal area pads, and perhaps other contours of the landfill will have to be changed; and

c. the plan for soil drains will have to be eliminated.

(N.T. 847-862, 1396-1399, 3189-3190; Exhibits A-300, A-301, A-302 and A-303)

38. Other design changes may come about because of other conditions inserted into the Permit. Permittee may elect to shrink or change the configuration of the disposal area, or may elect to relocate some facilities, in order to minimize or avoid the impact of these conditions. (N.T. 1396-1399, 3304)

39. Changes in design of the landfill could affect its capacity and leachate generation, forcing recalculations and new considerations. (N.T. 853-862, 1396-1399)

40. DEP had no way of knowing, on the date of SWMA Permit issuance, the design of the landfill it was permitting. Veteran DEP officials could not recall another instance where a permit was issued without knowing the design of the facility authorized by the permit. (N.T. 1478-1480, 3980, 4140)

41. Pounds acknowledged that the SWMA Permit as issued essentially gave Permittee a permit it could not use and allowed Permittee to come back to DEP to reapply for a permit. Since Permittee could not construct the landfill prior to the new regulations becoming effective it would be required to wait and to construct the landfill after the Site was repermitted under the April 9, 1988 regulations. (N.T. 3252-3272, 3770-3774)

42. Appellants appealed the issuance of the SWMA Permit on March 29 and 30, 1988, respectively.

43. DEP also issued to Permittee on March 1, 1988, Industrial Waste NPDES Permit PA 0052345 (NPDES Permit), authorizing the discharge of treated leachate into Swamp Creek. Appellants appealed the issuance of the NPDES Permit on March 29 and 30, 1988, respectively.

44. DEP also issued to Permittee on March 1, 1988, Section 401 Certification, File Code 4-3.3, with respect to water quality standards of Swamp Creek. Appellants appealed the issuance of this Section 401 Certification on March 29 and March 30, 1988, respectively.

45. DEP issued to Permittee on December 24, 1988, another Section 401 Certification which Appellants appealed on January 23 and 24, 1989, respectively.

DISCUSSION

Appellants have the burden of proof: 25 Pa. Code § 1021.101(c)(2). To carry the burden, Appellants must show by a preponderance of the evidence that DEP acted unlawfully or abused its discretion in issuing the Permits. 25 Pa. Code § 1021.101(a).

Appellants' major argument, concerning issuance of the SWMA Permit, asserts that it had to be based on an approved design meeting the requirements of the regulations. DEP maintains that Permittee's design did so. That may be true, but it is obvious that DEP was not satisfied with that design and was unwilling to approve it by the issuance of a permit. DEP had great concern about the elevation of the regional groundwater table under the Site and Permittee's plan to excavate below that level over much of the disposal area and to install soil drains to carry the groundwater away. That type of design was allowed by the existing regulations but not by the new ones.

This concern over what Pounds characterized as a "drastic" step was the prime reason why DEP inserted Condition No. 4 into the SWMA Permit. With that condition in place, Permittee was prevented from implementing its design and blocked from any meaningful construction until the new regulations were in force and a redesign approved by a new permit. DEP knew that the redesign would require an 8-foot separation between the regional groundwater table and the subbase of the liner system and would prohibit any type of groundwater manipulation such as soil drains.

DEP knew that, because of Condition No. 4, Permittee would not be able to excavate the disposal area to the extent called for in its design. As a result, Permittee would have less on-site material for use as intermediate and final cover and would have to bring in additional amounts of suitable material from off-site borrow areas. Condition No. 13 addresses that matter, reminding

Permittee that existing borrow contracts would have to be modified because of Condition No. 4 and that DEP must approve any additional off-site borrow areas.

Condition No. 13 reflects a clear recognition by DEP that the cross-sections of the disposal area shown on the plans, the grading elevations shown on the plans, the soil drain system shown on the plans, and many other features of the design all would have to be changed before any construction or disposal could take place. What then was approved?

DEP was not entirely satisfied with the location of the landfill Site either and was unwilling to approve it by the issuance of a permit. Conditions Nos. 5,6, 7, 9 and 22 reflect DEP's concerns about nearby dwellings and domestic water supplies as well as wetlands on the site. The only specific site limitation in the existing regulations was at 25 Pa. Code § 75.21(s) where a 25-foot zone was established along perimeter property lines where no waste could be deposited. The new regulations contained a number of site limitations at section 273.202, but landfills permitted prior to the effective date of those regulations would not be bound by them. DEP was not willing to grant "grandfather" status to Permittee's landfill on all of these limitations. Condition No. 5 imposed the limitation at section 273.202(a)(8). Conditions Nos. 6, 7, 9 and 22 dealt with some of the other site limitations in a more complicated manner.

Condition No. 6 prohibited disposal or leachate treatment within 300 feet of an occupied dwelling unless waived by the owner. Section 273.202(a)(6), however, prohibits *any* operations within 300 feet, and prohibits disposal within 500 feet, of an occupied dwelling unless waived. Permittee was given, at a minimum, a 200 foot reprieve on the disposal limitation. Condition No. 22 may have been added because of this reprieve. It required Permittee to make a

bonafide offer to buy properties with dwellings either contiguous to the landfill boundary or within 500 feet of the disposal area - after the landfill is repermitted under the new regulations.

Condition No. 7 made the landfill subject to state and federal laws on wetlands and required affected wetlands to be replaced. Section 273.202(a)(2) prohibits landfill operations in or within 300 feet of an important wetland as defined in 25 Pa. Code § 105.17. At the time when the SWMA Permit was issued, wetlands were regulated by Chapter 105. The term was defined in section 105.1 and the subject was dealt with in section 105.17. No permit could be granted for work in or within 300 feet of an important wetland or otherwise affecting an important wetland unless the public benefits outweighed the harm and mitigation was provided in a manner approved by DEP. Since section 273.202(a)(2) is an absolute prohibition and does not provide for any exceptions based on a weighing of benefits versus harm and does not allow wetlands to be replaced, Condition No. 7 gave Permittee a great deal more leeway in dealing with wetlands on the Site.

Condition No. 9 focused on private water supplies within 1/4 mile of the landfill. They were to be tested (if the owners consented) for a host of parameters prior to the start of construction and annually after commencement of landfilling. If a statistically significant deviation in water quality occurred, a replacement supply was to be furnished by Permittee. The owner of a private water supply located within 1/4 mile of the "boundary of the disposal area, or any ancillary solid waste management activities including impoundments and leachate treatment facilities" could elect, prior to the disposal of any waste, to have a permanent replacement supply immediately provided.

Section 273.202(a)(13) prohibits a landfill to be operated within 1/4 mile upgradient, and within 300 feet downgradient, of a private or public water source. DEP can waive or modify

this limitation if the owner consents, if permittee and the owner agree to a permanent replacement supply when pollution occurs, and if providing a permanent replacement supply is technically and economically feasible. 25 Pa. Code § 273.202(d).

Under Condition No. 9, Permittee did not have to show the feasibility of providing a permanent replacement supply but did have to extend its replacement liability beyond the 300 feet downgradient limit to 1/4 mile, a difference of about 1,000 feet. In addition, Permittee had to provide immediate permanent replacement supplies to any electing owners qualifying for it. All in all, it appears that Permittee assumed burdens in Condition No. 9 greater than those that would have been imposed by section 273.202(a)(13) and (d).

Other limitations in section 273.202 that DEP did not impose on Permittee were (a)(1) 100-year floodplain, (a)(3) coal bearing lands, (a)(4) valley, ravine or head of hollow, (a)(5) limestone lands, (a)(7) 100 feet of perennial stream, (a)(9), (10) and (11) runways and flight paths, (a)(12) 25 feet of coal seam, (b)(1) 300 yards of a school, (b)(2) 300 yards of a park, and (b)(3) 300 yards of a playground. DEP was willing to grant grandfather status to Permittee where these limitations were concerned.

DEP personnel took a plan sheet of the proposed landfill, plotted on it all the site limitations in the new regulations, and found that they significantly reduced the size of the disposal area. Apparently, they then chose those site limitations that DEP thought were most important to the neighbors, and that Permittee was willing to live with, and placed them in the SWMA Permit conditions. They took the uncommon step of getting Permittee's written acceptance of these conditions and waiver of its appeal rights before the SWMA Permit was issued.

Anyone familiar with DEP practices would have to be amazed by the exceptional circumstances surrounding this SWMA Permit issuance. Veteran officials of DEP could not recall another instance where a permit was issued without having before them the final, approvable design. What was approved here was only half-developed and theoretical - the sort of transitory, interlocutory subject matter referred to in *Phoenix Resources, Inc. v. DER*, 1991 EHB 1681, as being provisional in nature and unappealable - yet presented here as being final and appealable.

DEP officials were well aware that they were trying to ride two horses at once - a stunt rarely successful in public affairs - and were likely to be dismounted if challenged. Why else did they seek Permittee's waiver of its appeal rights? Unfortunately for the success of their performance, they obtained no waivers from Appellants. DEP had a statutory duty to issue a SWMA Permit based upon the design proposed in the application. Section 503(a) SWMA, 35 P.S. § 6018.503(a); 25 Pa. Code § 75.22(d) (now repealed). If that was not possible because of legitimate DEP concerns, DEP officials had a duty to withhold the SWMA Permit until design changes satisfying those concerns were actually made and filed by Permittee and then reviewed and approved by DEP. They failed in that duty.

DEP argues, by way of attempted justification, that it has the power under the SWMA to place conditions in permits and that its interpretation of the regulations is entitled to deference. Both contentions are legally sound and we agree with them. However, they cannot be used as a convenient broom to sweep illegalities and abuses of discretion under an administrative rug. Conditions in a permit, including many of those in the SWMA Permit, are generally appropriate exercises of DEP's discretion, addressing specific matters of interest concerning the permitted facility and its operation. DEP's interpretations of the regulations likewise are usually suitable,

reflecting the intention of the framers. But where the effect of the conditions and the interpretations is to produce an illegal action, as in this case, they cannot be sanctioned. *County of Schuylkill et al. v. DER et al.*, 1989 EHB 1241, 1267.

Appellants have assailed other aspects of the proposed landfill and have presented considerable evidence in support of these issues. However, we view all of them as speculative until a final design is approved by DEP. Until then, everything is conceptual and subject to change on repermitting. Forcing Appellants to challenge these aspects at present requires them to shoot at moving targets. Any decision we would make could easily be mooted by a design change. We will, therefore, refrain from any consideration of these issues.

Ordinarily, we would remand the SWMA Permit, the NPDES Permit and the Section 401 Certifications to DEP for action in accordance with this Adjudication. However, since the SWMA Permit cannot be sustained on the basis of the regulations existing at the time of issuance and since those regulations have since been significantly changed, we believe the best policy is to void the SWMA Permit and let Permittee reapply, if it elects to do so, under the current regulations.[4] Since the NPDES Permit and the Section 401 Certifications depend upon the SWMA Permit, we will void them also. Finally, the motions to strike certain expert testimony are denied because our Adjudication did not rely on any of it.

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[4] We take judicial notice of the fact that on May 7, 1990, DEP denied Permittee's application for repermitting filed by Permittee in compliance with Condition No. 4 of the SWMA Permit, which denial is the subject of Permittee's appeal at Board Docket No. 90-225-W. That appeal has been stayed pending disposition of these consolidated appeals. Our action here is not to be construed as prejudging any of the merits of that appeal.

CONCLUSIONS OF LAW

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

2. Appellants have the burden of proving by a preponderance of the evidence that DEP acted unlawfully or abused its discretion in issuing the Permits and Certifications.

3. DEP may impose conditions in a permit pursuant to the SWMA so long as the Conditions do not produce illegal effects.

4. DEP's interpretations of the regulations are entitled to deference so long as its interpretations do not produce illegal effects.

5. DEP acted unlawfully and abused its discretion in issuing the Permits and Certifications without adequate information as to the final design of the proposed landfill or knowledge of the potential resultant environmental effects therefrom.

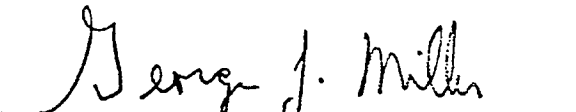
ORDER

AND NOW, this 25th day of June, 1996, it is ordered as follows:

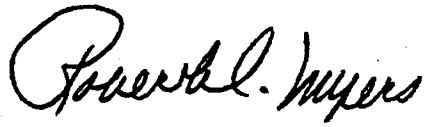
1. These consolidated appeals are sustained.

2. Solid Waste Permit No. 101385, Industrial Waste NPDES Permit PA 0052345, Section 401 Certification, File Code 4-3.3 and Section 401 Certification dated December 23, 1988 are voided.

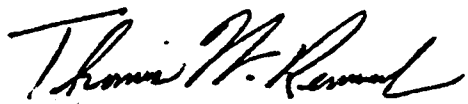
ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member



THOMAS W. RENWAND
Administrative Law Judge
Member

Board Member Michelle Coleman is recused from this decision.

DATED: June 25, 1996

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M. DIANE SMITH
SECRETARY TO THE BOARD

CPM ENERGY SYSTEMS, INC.	:	
	:	
v.	:	**EHB Docket No. 88-162-M**
	:	**(consolidated with 89-109-M)**
COMMONWEALTH OF PENNSYLVANIA,	:	**and**
DEPARTMENT OF ENVIRONMENTAL	:	**EHB Docket No. 89-155-M**
PROTECTION	:	
	:	**Issued: June 25, 1996**

OPINION AND ORDER SUR MOTION TO DISMISS

By: Robert D. Myers, Member

Synopsis:

Consolidated appeals from two enforcement orders are rendered moot because the permit upon which the appeals are based has since expired by operation of law therefore depriving the Board of the ability to grant appellant any meaningful or effective relief.

An appeal of the denial of an application to operate a municipal waste transfer station must also be dismissed as moot because, since appellant lacks any legal interest in the proposed transfer station property, the Board can no longer grant appellant any meaningful or effective relief.

OPINION

CPM Energy Systems Corporation (CPM) operated the Easton Energy Products Solid Waste Recycling Facility (processing facility) in Williams Township, Northampton County,

Pennsylvania[1] for manufacturing fuel pellets -- which included processing municipal waste into refuse-derived fuel (RDF) and then compressing the RDF into fuel pellets. The processing facility operated pursuant to Permit No. 101263 (permit) issued by the Department of Environmental Resources (now the Department of Environmental Protection) (DEP) on June 24, 1987 under the Solid Waste Management Act (SWMA), the Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. § 6018.101 *et seq*. On November 6, 1987, CPM submitted an application to amend the permit to allow for the construction and operation of a municipal waste transfer station facility (municipal waste transfer station application).[2]

In early 1988 CPM began experiencing financial difficulties. As a result, CPM's environmental compliance admittedly suffered. On February 22, 1989, CPM filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (Bk. No. 89-103) which was later converted into a Chapter 7 liquidation.

On March 25, 1988, DEP issued an Order (1988 Order) pursuant to the SWMA suspending CPM's permit for specified violations[3] and directing CPM to cease accepting municipal waste and take corrective actions to remove municipal waste from the processing facility as well as

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[1] The processing facility, located in a building at 840 Line Street, operated for approximately ten months from June 1987 to March 1988.

[2] Apparently the municipal waste transfer station application was later revised on August 31, 1988, to meet the requirements of the new Municipal Waste Management Rules and Regulations.

[3] Violations included, among other things, unpermitted storage of refuse-derived fuel, fires occurring in the refuse-derived fuel stored in the warehouse, contaminated runoff from firefighting, odors emitting from the processing facility, harborage and breeding of rodents and creation of a potential insect vector problem.

the excess RDF that it had stored in a warehouse. CPM appealed the 1988 Order on April 25, 1988 arguing DEP had abused its discretion and acted arbitrarily in issuing it. This appeal was docketed at EHB Docket No. 88-162-M.

On March 24, 1989, DEP issued a second Order (1989 Order) to CPM revoking the permit for continued violations and directing CPM to take essentially the same corrective action mandated by the 1988 Order. CPM appealed the 1989 Order on April 24, 1989 alleging DEP had again abused its discretion, this time by arbitrarily issuing the 1989 Order despite the fact that CPM had ceased accepting or processing solid waste since March 25, 1988, the date of the 1988 Order. This appeal was docketed at EHB Docket No. 89-109-M and consolidated with the first appeal at EHB Docket No. 88-162-M at CPM's request on May 23, 1989.

DEP then denied CPM's municipal waste transfer station application on May 9, 1989, stating it was administratively incomplete. CPM contested this denial by filing an appeal docketed at EHB Docket No. 89-155-M. While this last appeal has not been consolidated with the appeals consolidated at EHB Docket No. 88-162-M, it has proceeded along parallel lines. All three appeals will be dealt with here.

After both parties had filed pre-hearing memoranda for the respective appeals and the appeals were about to be listed for hearing, CPM filed a Petition for Supersedeas. A hearing on the Petition was held in Harrisburg on March 15, 1990 by Administrative Law Judge Robert D. Myers, a Board Member. The Petition was denied by Board Opinion and Order issued April 5, 1990.[4]

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[4] The Opinion and Order is reported at *CPM Energy Systems, Inc. v. DER*, 1990 EHB 366. The primary reason for denying the Petition was CPM showed no likelihood of prevailing on the merits. The Board found that the evidence presented at that time demonstrated DEP had ample justification to suspend the permit for CPM's admitted violations and later to revoke it when CPM

The appeals were subsequently scheduled for hearing on the merits on three occasions.[5] They were canceled twice at CPM's request, first, as a result of counsel's withdrawal of appearance and hopes that the appeals would be resolved as part of its reorganization plan in Bankruptcy Court; second, because of CPM's claims then pending in the Superior Court of the State of Delaware;[6] and thereafter, as a result of liquidation and financial limitations to proceed with hearing. During this time the appeals were continued with the submission of status reports.

On January 11, 1996, the appeals were scheduled for hearing the third time.[7] Appellant filed Appellant's Stipulation Response[8] on April 2, 1996, in response to the Board's January 11, 1996 Pre-hearing Order No. 2, and filed Appellant's Second Stipulation Response on April 5, 1996. On April 3, 1996, DEP responded to the Pre-hearing Order seeking a three day extension in which to submit its stipulations. Also on that date, DEP filed the Motion to Dismiss

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failed to properly dispose of several thousand tons of end product stored in the warehouse in the form of both pellets and RDF. Storage of these materials was beyond the scope of the permit but not exempt from regulation. During the year since the 1988 Order, the stored product created increasingly intolerable conditions at the warehouse causing fires of nearly one per week as CPM did little if anything to expedite its removal. Classifying the waste as either municipal or residual waste under the SWMA, or under section 1917-A of the Administrative Code, Act of April 19, 1929, P.L. 177, *as amended*, §§ 510-17, the Board concluded both legal authority and factual justification existed for the issuance of the orders.

[5] Hearings had been scheduled for September 18-20, 1990; April 23-25, 1991; and April 16-18, 1996.

[6] CPM's claims in part sought fifty million dollars as damages from First Federal Savings Bank for alleged misconduct (C.A. No. 88 C-MY-249-1-CV).

[7] Although counsel had re-entered an appearance on behalf of CPM, December 18, 1995, Robert D. Osborne, President and majority owner of CPM continued to act as its sole representative.

[8] Appellant's Stipulation Response incorporated several documents including DEP letters dated March 5 and 13, 1996, and CPM's letter dated March 12, 1996.

and supporting Memorandum of Law presently before the Board. The hearing was canceled and matters were stayed pending disposition of this Motion by Board Order dated April 4, 1996.

DEP's Motion to Dismiss asserts the appeals are now moot since no further abatement or clean-up obligation exists, the permit expired by operation of law, CPM lacks an interest in the property for which the permit and municipal waste transfer station application were applicable, and for these reasons no effective relief can be granted. CPM did not file a response to this Motion. Accordingly, CPM is deemed to have admitted all properly-pleaded facts therein. 25 Pa. Code § 1021.70(f).

The Board must dismiss an action pending before it when an event occurs which deprives the Board of the ability to provide meaningful or effective relief, or when the appellant has been deprived of a stake in the outcome. *Pequea Township, et al. v. DER*, 1994 EHB 755; *New Hanover Corporation v. DER*, 1991 EHB 1127.

Assessing the matter in the appeals consolidated at 88-162-M, there no longer exists any meaningful relief which the Board can grant CPM when, as here, the permit upon which the appeals of the two enforcement orders are based has expired by operation of law. *See Del-aware Unlimited, Inc. v. DER, et al.*, 1994 EHB 983. While the permit did not impose a date of expiration, the subsequent Municipal Waste Regulations did. Effective since April 9, 1988, section 271.211(f) of the Municipal Waste Regulations provides "[a] municipal waste management facility without a permit term that was permitted by the [DEP] prior to April 9, 1988 shall have a permit term that expires April 9, 1993." 25 Pa. Code § 271.211(f). CPM's permit, issued prior to April 9, 1988 (on June 24, 1987), is therefore subject to this regulation. CPM's concern that it lacked notice of this change does not alter the outcome. A company possessing authority to process municipal solid

waste is presumed to be aware of the State's extensive regulatory role and must keep abreast of any such changes. Since the permit expired by operation of law, and CPM did not apply for a renewal or a modification of the permit,[9] the basis of the consolidated appeals is eliminated and the appeals consolidated at 88-162-M are rendered moot.

The appeal at 89-155-M concerns the denial of a municipal waste transfer station application for certain operations that would be conducted on the same property as CPM's processing facility. During the pendency of the appeal, CPM relinquished all interest in that property. An essential element of permit applications pursuant to the SWMA regulations includes a "legal right to enter and operate a municipal waste or disposal facility within the proposed permit area." 25 Pa. Code § 271.123(a). Because CPM lacks any legal interest in the proposed transfer station property, the Board can no longer grant CPM any effective relief, even if it could prevail on the merits of its appeal. Accordingly, the matter at 89-155-M has also been rendered moot.

---

[9] CPM's municipal waste transfer station application can not be construed as a renewal or a modification as CPM asserted. Authorization to operate a processing facility is unlike that to operate a transfer facility. Both facilities require compliance with Chapter 271 of the SWMA regulations, but processing facilities must also satisfy Chapter 283 whereas transfer facilities must satisfy Chapter 279 of the SWMA regulations. Therefore, an application to operate a transfer facility can not simply be filed in the guise of a renewal or modification of the solid waste processing permit because it requests permission to operate a different type of facility.

ORDER

AND NOW, this 25th day of June, 1996, it is ordered that the appeals of CPM Energy Systems, Inc. are dismissed.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: June 25, 1996

See next page for service list.

EHB Docket Nos. 88-162-M(consolidated with 89-109-M) and 89-155-M

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HAROLD WEISS, et. al.	:	
	:	
v.	:	**EHB Docket No. 94-283-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARTIN STONE QUARRIES, INC.	:	**Issued: June 26, 1996**

OPINION AND ORDER ON MOTION TO COMPEL

By George J. Miller, Chairman

Synopsis

Before the Board is the motion to compel answers to interrogatories and production of documents filed by Concerned Citizens of Washington Township. Also before the Board is Martin Stone Quarry's (MSQ) objection to the motion. The Board grants the motion to compel in part and denies the motion in part. MSQ's objection and request for dismissal of the motion is denied.

OPINION

On June 7, 1996, Concerned Citizens of Washington Township (Appellants) filed a motion to compel answers to certain interrogatories which had been served on MSQ. MSQ responded to the motion on June 24, 1996, by objecting on the grounds that the motion fails to conform with the Board's rule relating to discovery motions. Its answer does not address the substantive grounds of Appellants' motion, but urges the Board to dismiss the motion for failure to conform to the rules.[1]

---

1. The objections to the interrogatories noted in this opinion are those in the answers to interrogatories submitted by MSQ to Appellants.

The Board declines to dismiss the motion to compel as a sanction for failure to comply with 25 Pa. Code §1021.72. First, Appellants' motion sets for adequate grounds for their objections to MSQ's answers to interrogatories, in compliance with 25 Pa. Code §1021.70(d). Second, we decline to dismiss the motion simply because it failed to contain as exhibits the discovery request and answers which gave rise to the dispute. 25 Pa. Code § 1021.72(b). This material was obviously in the possession of MSQ, such that it was possible for it to answer the motion. Also, Appellants did submit this material to the Board under separate cover. The omission of the materials did not in any way prejudice MSQ, and certainly is not the type of failure to comply with the rules that merits dismissal of the motion as a sanction. *Weiss v. DEP*, EHB Docket No. 94-293-MG (Opinion issued March 6, 1996).

The Board turns now to the specific objections to answers to interrogatories in the motion to compel. Appellants have objected to MSQ's answers to Interrogatories 1, 2, 4, 5, 6, 11-13a, 14-15, 16, 17, 20, 22, 23, 24. Appellants also seek to compel production of documents for requests 1-4.

Interrogatory No. 1 and Document Request 1 seek the identity and curriculum vitae for the expert witnesses which MSQ will call at the hearing. Interrogatory No. 5 seeks expert information regarding the hydrogeological sufficiency of the permit application. MSQ answered that it has not yet determined who they will call as experts, and will supplement their response when they make this decision. The motion to compel these items is denied.

Interrogatory No. 2 seeks the identity of all parties affiliated or retained by MSQ who evaluated the permit application. MSQ did not answer this interrogatory because it was overly broad and seeks information pertaining to non-testifying experts. Appellants counter that the information is relevant because the validity of the permit application is at issue. We agree that the interrogatory

is too broad, and unlikely to lead to relevant information. Appellants have their own experts to evaluate the validity of the permit application.

Interrogatory No. 4 seeks information from Panel Home Center, Inc. In its general objection to Appellant's interrogatories filed with its answer, MSQ states that Panel Home Center is no longer an intervenor in this matter. Accordingly, the motion to compel this answer is denied.

Interrogatory No. 6 seeks the identity of home owners whose dwellings are located within 300 feet of the present haul road to the quarry site. MSQ objected to this question because the information is equally available to Appellants. Since Appellants are all individuals who live in the proximity of the quarry site, we agree. The motion to compel this interrogatory is denied.

Interrogatories 11-13a pertain to wetland delineation for the area adjacent to the area covered by the permit. Document Request No. 3 requests a copy of any map or graphic design indicating the presence of these adjacent wetlands which was submitted to Washington Township or any other reviewing agencies. MSQ objected because the information is overly broad and not reasonably calculated to lead to discoverable evidence. Appellants argue that they are entitled to this information because it concerns the methodology and information used by MSQ in completing the permit application.

We agree that the interrogatories are too broad, and unlikely to lead to *relevant* information. Appellants have their own experts to evaluate the validity of the permit application that is at issue in this appeal. Information submitted to Washington Township is not relevant to the adequacy of the permit application submitted to the Department. Also, maps submitted to the Department are contained in the permit application.

Interrogatory No. 14 asks if MSQ ever performed an Environmental Impact Statement for

this site, and Interrogatory No. 15 seeks the identity of the concern that performed the study and what government and local authorities were apprised of the study. MSQ did not answer this interrogatories but stated that the information is contained in the permit application on file with the Department. Appellants have not stated that they are not in possession of the permit application. Thus the information is at least as available to Appellants as to MSQ. However, to refer to the application rather than answering the question, MSQ must at least direct Appellants to the section of the application where the information is to be found. Pa. R.C.P. No. 4006(b). The motion to compel these answers is granted.

Interrogatory Nos. 16 and 17 ask if a map or graphic design indicating the presence of wetlands in the area adjacent to the permit area was submitted to Washington Township or to other governmental agencies. MSQ objected, noting that the information was contained in the public files of Washington Township and the Department. Appellants argue that they are simply looking for a "yes/no" answer and a date and that the interrogatories are therefore not unduly burdensome. Since Interrogatory No. 16 only seeks a yes/no answer and a date, and No. 17 only seeks the governmental entities who were copied on any submissions, we do not believe that it is an undue burden upon MSQ to provide this limited information. The motion to compel is granted.

Interrogatory No. 20 seeks information concerning any malfunction of a retention pond and resulting damage to adjacent properties. This information was contingent upon MSQ's answer to Interrogatory No. 19, which MSQ answered to Appellants' satisfaction. MSQ's response to Interrogatory No. 19 make response to No. 20 unnecessary. The motion to compel is denied.

Interrogatory No. 22 seeks the manner in which interrupted and contaminated water supplies on adjacent property will be corrected as called for in the permit application. MSQ referred to the

module of the application which contained this information. Appellants argue that the module does not fully answer their question. The motion to compel is denied. If the permit application fails to contain information that it should, this matter can be litigated at the hearing on this matter.

Interrogatory No. 23 asks if MSQ "ever entered into an Agreement with a Municipal Authority or any other provider of public water to bring water lines to supply properties adjacent to the Quarry Site?" Interrogatory No. 24 asks for the agency with whom this agreement was made. Document Request No. 2 requests a copy of such agreement. MSQ answered the interrogatory by referring to an affidavit of Paul Prince and a sewer agreement which it had previously provided to Appellants. Appellants charge that these documents do not answer the question which seeks on a "yes/no" response. If MSQ believes that the affidavit and sewer agreement constitute agreements to provide public water to adjacent property owners, we must find this answer to be adequate. It is not our purpose in resolving discovery disputes to evaluate the weight or value of information. The motion to compel these items is denied.

Finally, Document Request No. 4 seeks sources in the possession of MSQ used to establish past mining activities in Washington Township. MSQ answered that the information was available for review in the offices of its counsel. Where materials are voluminous, such an answer is adequate. Pa. R.C.P. No.4006(b). The motion to compel is denied.

ORDER

AND NOW, this 26th day of June, 1996, it is ordered as follows:

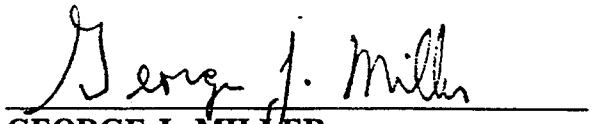
1. The motion to compel answers to Interrogatory Nos. 1, 2, 4, 5, 6, 11-13a, 20, 22, 23, and 24 and Request for Document Nos. 1, 2, 3, and 4, is hereby denied.

2. The motion to compel answers to Interrogatory Nos. 14, 15, 16, 17 is granted consistent with

the foregoing opinion. These responses are to be made prior to the termination of discovery on July 15, 1996.

3. The motion to dismiss the motion to compel is denied.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: June 26, 1996

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OLEY TOWNSHIP, ET AL.	:	
	:	
v.	:	**EHB Docket No. 95-101-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WISSAHICKON SPRING WATER, INC. Permittee	:	**Issued: June 26, 1996**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Chairman

Synopsis:

The Department of Environmental Protection moves for summary judgment against Appellants on the grounds that the issues raised in the notice of appeal concern matters exclusively within the jurisdiction of the Delaware River Basin Commission. The Board concludes that the authority of the Commission is concurrent with the authority of the Department and does not necessarily divest the Department of authority to assure compliance with state environmental laws that do not conflict with the Delaware River Basin Compact. The Department's motion is denied.

OPINION

The present motion arises from a notice of appeal filed by Oley Township, Pine Creek Valley Watershed Assoc., Oley Valley Youth League, Inc., Pike Oley District Preservation Coalition, J. Scot Williams and Bruce Littlefield (collectively, Appellants) challenging the Department's issuance of a public water supply permit to Wissahickon Spring Water, Inc. The permit is part of a project

which involves construction of a facility to process groundwater pumped from the Sterling Spring Well. The Department has filed a motion for summary judgement to dismiss the appeal on the grounds that the arguments that the permit will result in environmental damage are based on the withdrawal of groundwater, not construction of the facility, and therefore the Department has no jurisdiction. Rather, the Department contends, such jurisdiction is vested solely in the Delaware River Basin Commission. Appellants do not dispute that the withdrawal of the groundwater requires approval of the Commission, but they argue that the Commission's jurisdiction in this case is not exclusive, and the Department retains the authority to enforce Pennsylvania's environmental protection statutes.

In sum, the narrow issue raised by the Department's motion is whether or not the authority of the Commission divests the Department of authority to consider issues related to groundwater when it reviews a Safe Drinking Water Act permit. We conclude that the Department is not deprived of the authority to enforce Pennsylvania environmental laws simply because a project also requires the approval of the Commission.[1] The Commission's authority is governed by the Delaware River

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1. Our review of this motion is governed by Pa. R.C.P. No. 1035, which provides, in relevant part, that

> The judgment sought shall be rendered if the pleadings, depositions, and 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.

The Department has argued that Appellant's response should be dismissed because it does not include affidavits detailing controverted facts. However, the current motion rests substantially on a controlling issue of law, and as the hearing in this case is scheduled to commence on July 15, 1996, we decline to dismiss the response.

Basin Compact, Act of July 7, 1961, P.L. 518, *as amended*, 32 P.S. § 815.101,[2] which explicitly allows the signatory states' agencies to enforce state laws that do not conflict with the Compact.

The Delaware River Basin Commission was formed by agreement among Delaware, New Jersey, New York and Pennsylvania and approved by the United States Congress. Its purpose is to "develop and effectuate plans, policies and projects relating to the water resources of the [Delaware River Basin]" and to "adopt and promote uniform and coordinated policies for water conservation, control, use and management in the basin." Compact, Section 3.1. To effectuate this purpose the Commission has adopted a comprehensive plan for the "immediate and long range development and uses of the water resources of the basin . . . ." Compact, Section 3.2(a). Projects which have a "substantial effect on the water resources of the basin" are subject to review and approval by the Commission. Compact, Section 3.8.[3] The purpose of this review is to determine whether or not the project will impair or conflict with the comprehensive plan. *Id.*

Review of a project by the Commission is more limited than the Department's review responsibilities to assure compliance with environmental laws before issuance of a Safe Drinking Water Act permit. The Commission only determines whether or not a project is consistent with the comprehensive plan for the allocation of water resources in the Delaware River Basin; it does not specifically concern itself with the protection of water quality.[4] 18 C.F.R. § 401.34. There is nothing

---

2. Hereinafter cited as "Compact."

3. Wissahickon's withdrawal of groundwater is in excess of 100,000 gallons per day, and was therefore subject to review by the Commission. 18 C.F.R. § 401.35(a)(2). The Commission's approval of the withdrawal is currently in litigation before that agency.

4. The Commission does, however, have some limited authority to control pollution of water in the basin when required by the comprehensive plan. Compact, Article 5. Even this

in the Compact which automatically precludes the Department from reviewing projects for compliance with state laws which protect water quality. In fact, the Compact provides that

> It is the purpose of the signatory parties to preserve and utilize the functions, powers and duties of existing offices and agencies of government to the extent not inconsistent with this compact . . . .

Compact, Section 1.5. More specifically, Section 5.5 of the Compact reserves the state's right to preserve water quality:

> Nothing in this compact shall be construed to repeal, modify or qualify the authority of any signatory party to enact any legislation or enforce any additional conditions and restrictions to lessen or prevent the pollution of waters within its jurisdiction.

In fact, the Board addressed this issue in *Del-Aware Unlimited, Inc. v. DER*, 1983 EHB 427:

> We do recognize that the DRBC, as a creature of the federal government and each signatory state, has overall responsibility for the management and control of the Delaware River Basin's water resources and to this end we acknowledge that the DRBC compact provides *inter alia* that no water related project or facility can be constructed in the basin unless it has been first included in the DRBC's comprehensive plan. However, . . . this language merely gives DRBC a veto over water related projects; *their inclusion in the comprehensive plan does not mandate the construction of these projects nor does it obviate any functions, powers and duties of the signatory states.* Indeed, §1.5 of the Compact expressly preserves these functions, 32 P.S. §815.101. Section 1.5.

Id. at 430 (emphasis added).

The Department has not argued that any section of the Pennsylvania Safe Drinking Water Act, Act of May 1, 1984, P.L. 206, *as amended*, 35 P.S. §§ 721.1- .17, Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1 691.1-.1001, or any other law *conflicts* with the provisions of the Compact. Absent such a conflict we hold that in this case, the jurisdiction of

---

authority is *supplemental* to state authority to pursue environmental protection. Compact, Section 5.5.

the Commission does not divest the Department of jurisdiction to enforce Pennsylvania environmental protection laws where necessary. The Department's authority to issue a permit under the Safe Drinking Water Act is predicated on the condition that the project "complies with the provisions of this act, the regulations adopted hereunder, and all other applicable laws administered by the department." 35 P.S. § 721.7(j); *see also* 25 Pa. Code §109.503(d)(6)(ii)(consideration of compliance with other applicable laws by the Department); 25 Pa. Code §109.503(d)(6)(iii)(consistency of permit with the rights and values secured by Art. I, § 27). Further, the regulations of the Safe Drinking Water Act require the Department to evaluate both water quality and water quantity even from groundwater sources. 25 Pa. Code § 109.503(a)(1)(iii)(B)(water quality); 25 Pa. Code § 109.503(a)(1)(iii)(C)(defining safe water yield as "the amount of water that can be withdrawn from an aquifer without causing an undesired result, such as adverse dewatering of an aquifer, induced potential health threats or impacts upon stream uses."). Accordingly, the Department's motion for summary judgment is denied.

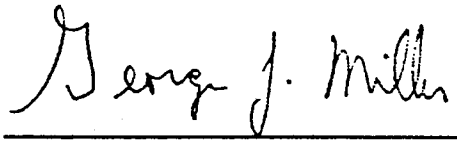
Our decision does not conflict with another decision of this Board, *Sequa Corp. v. DER*, 1993 EHB 1589, relied upon by the Department. That case did not directly address the issue of whether the invocation of jurisdiction of the Commission divests the Department of authority to enforce state environmental laws, but noted that in that particular case the withdrawal of groundwater was "governed" by the Commission, because the well was in a "protected area" under the Compact, and therefore required a permit approval. Compact, Section 10.2. The Board did not state that the permitting requirements, which assure adequate water supply in areas where supplies are limited, in any way precluded the Department from requiring a project's compliance with Pennsylvania law.

Accordingly, we enter the following

ORDER

AND NOW, the 26th day of June, 1996, the motion of the Department of Environmental Protection for summary judgement in the above-captioned matter is hereby denied.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: June 26, 1996

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CITY OF HARRISBURG	:	
	:	
v.	:	**EHB Docket No. 88-120-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and PENNSYLVANIA FISH AND BOAT COMMISSION, Intervenor	:	**Issued: June 28, 1996**

ADJUDICATION

By Thomas W. Renwand, Member

Synopsis:

The Board sustains an appeal by the City of Harrisburg from the denial of its application for water quality certification under Section 401(a) of the federal Clean Water Act for the construction and operation of a hydroelectric project. The City met its burden of demonstrating that increased groundwater levels due to the Project will not cause a discharge of pollutants to either the Susquehanna River or Conodoguinet Creek. The City further demonstrated that the Project will not have an adverse impact on surface water elevation or dissolved oxygen levels. Finally, the Department acted outside the scope of its authority under Section 401(a) when it denied certification based on sediment deposition on the bottom of the river since this does not constitute a discharge of pollutants to navigable waters under Section 401(a) of the Clean Water Act. The Board remands this matter to the Department to issue water quality certification to the City in accordance with Sections 401(a) and (d) of the Clean Water Act.

Pursuant to its de novo review power, the Board may consider evidence which was not presented to the Department when it issued its denial of certification. This includes new design features of the Project, newly proposed mitigation measures, and studies conducted after the Department's denial.

Finally, the Department failed to demonstrate that the expert testimony presented by the City in this matter should not have been considered. The fact that some of the actual modeling work and data gathering were performed by individuals other than the expert witnesses who testified as to the results of the modeling does not render the conclusions reached by the experts or the data itself inadmissible. In addition, the Department failed to demonstrate that tests not admitted into evidence but which were relied upon by the experts in their testimony were not of the type commonly relied upon by experts in the field.

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Background

This appeal involves a proposal by the City of Harrisburg ("City") to construct and operate the Harrisburg Hydroelectric Project (the "Project"), a hydroelectric dam, along the Susquehanna River in the City of Harrisburg. The licensing of hydroelectric projects is administered by the Federal Energy Regulatory Commission ("FERC"). Before an applicant may receive a license from FERC, it must first obtain certification from its state permitting agency that the proposed project will comply with applicable provisions of the federal Clean Water Act, 33 U.S.C.A. § 1251 et seq. Of the sections cited in Section 401(a), the only one which is relevant to this proceeding is Section 303, dealing with state-adopted water quality standards.

In accordance with Section 401(a), the City submitted a copy of its draft FERC application to the Department of Environmental Protection (formerly the Department of Environmental Resources) ("Department") in February 1987 and, in March 1987, requested Section 401 certification from the Department. In December 1987, the City filed a supplement to its FERC application based on a deficiency notice and request for additional information from FERC. A copy of the supplement was provided to the Department. By letter and Notice of Final Action dated March 2, 1988, the Department denied the City's request for certification. The reasons given by the Department for its denial were as follows: (1) The construction and operation of the Project will result in the significant loss of wetlands and related aquatic habitat and acreage; (2) The City failed to demonstrate that there

will be no adverse water quality impacts from increased groundwater levels resulting from the Project; (3) The City failed to demonstrate that the Project will not cause violations of dissolved oxygen levels; (4) The Project will create a backwater on the lower three miles of the Conodoguinet Creek, which is adversely affected by nutrient problems; (5) The City failed to demonstrate that there will not be an adverse water quality impact resulting from combined sewer overflows; (6) The City failed to demonstrate that there will not be an adverse water quality impact to the 150 acre area downstream of the proposed dam and upstream from the existing Dock Street Dam; (7) The City failed to demonstrate that the construction and operation of the proposed dam will not have an adverse impact on upstream aquatic resources, particularly smallmouth bass; (8) Construction of the dam will have an adverse impact on the migration of fish; (9) The City failed to demonstrate that there will not be an adverse water quality impact related to sedimentation within the pool area. The City appealed the Department's denial on March 31, 1988. The Fish and Boat Commission ("Fish Commission") was granted leave to intervene on October 6, 1988. However, its participation in the proceeding was limited to demonstrating that the Project will cause discharges of pollutants and the effect of these discharges on fisheries and aquatic habitat. City of Harrisburg v. DER, 1988 EHB 946.

In an Opinion and Order issued on October 6, 1988, former Board Member, Administrative Law Judge Terrence J. Fitzpatrick, ruled that the Department had exceeded its authority under Section 401 by considering the effect of the Project on wetlands, fish migration, and aquatic resources to the extent these resources would be affected solely by physical changes in the river. Based on this reasoning, Judge Fitzpatrick ruled that the Department was precluded from presenting evidence on these issues at the hearing. See, City of Harrisburg v. DER, 1988 EHB 925. This ruling

was affirmed by the Commonwealth Court in DER v. City of Harrisburg, 578 A. 2d 563 (Pa. Cmwlth. 1990).

Twenty-two days of hearings were held, beginning on March 31, 1992 and concluding on July 27, 1993.[1] Due to length of the proceeding and the extensive amount of cross-examination being conducted by the Department, Judge Fitzpatrick limited the amount of time which the Department was permitted to spend on cross-examination of the City's expert witnesses, within his discretion. The Department challenged this ruling, claiming that it prejudiced the Department's case. Subsequent to the hearing, on July 21, 1995, the Board issued an order providing the parties with an opportunity to file a motion to reopen the record for the purpose of conducting additional cross-examination. All three parties, including the Department, indicated that they did not intend to seek to reopen the record. Therefore, any claim by the Department that it was prejudiced by the imposition of time limitations on its cross-examination of the City's expert witnesses is waived.

The City filed its Post-Hearing Brief on November 1, 1993. The Fish Commission and the Department filed their Post-Hearing Briefs on February 14 and 15, 1994, respectively. In addition, the Chesapeake Bay Foundation filed an Amicus Curiae Brief on February 14, 1994. The City filed a Reply Brief on May 13, 1994.

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[1]Due to Judge Fitzpatrick's resignation from the Board on September 11, 1992, this appeal was reassigned to former Board Chairman, Judge Maxine Woelfling on August 25, 1992. Judge Woelfling presided over the remainder of the hearing until its conclusion on July 27, 1993. Following Judge Woelfling's resignation from the Board on February 17, 1995, this appeal was reassigned to Judge Thomas W. Renwand in June 1995. Pursuant to Lucky Strike Coal Co. v. DER, 547 A.2d 447, 449 (Pa. Cmwlth. 1988), the Board is empowered to adjudicate the merits of this appeal based on a cold record.

Before setting forth our findings of fact, we must first consider two preliminary matters raised by the Department in its Post-Hearing Brief. These involve the expert testimony presented by the City and the scope of the Board's review.

Expert Testimony

At the hearing and in its second Motion in Limine, the Department objected to the admission of the City's expert testimony.[2] Judge Fitzpatrick overruled the Department's objection and admitted the testimony. The Department renews its objection in its Post-Hearing Brief. The basis for the objection is threefold: First, the Department asserts that the opinions offered by the City's experts were not expressed to a reasonable degree of scientific certainty. Second, the Department contends that the testimony rested on facts not in the record. Third, the Department challenges the fact that some of the data gathering and modeling was done by individuals other than the experts called to testify by the City.

The Department argues, first, that because the written direct testimony for the City's experts does not state that the opinions expressed therein are held to a reasonable degree of scientific certainty, they must be discounted. We disagree. It is well-settled that in order to be competent, expert testimony must be stated with reasonable certainty. Al Hamilton Contracting Co. v. DER, 659 A.2d 31 (Pa. Cmwlth. 1995). However, an expert's failure to recite the words "to a reasonable degree of scientific certainty" does not render his testimony inadmissible so long as his testimony is expressed with reasonable certainty. Id. at 36-37. See also, Kravinsky v. Glover, 263 Pa. Super.

[2]The direct testimony of the City's experts was submitted in written form.

8, 396 A.2d 1349, 1356 (1979) (An expert need not express his opinion in precisely the same language as we use to enunciate the legal standard.)

Here, the City's witnesses clearly explained the bases for their opinions, had extensive knowledge and experience in the field in question, and demonstrated a thorough familiarity with the Project and the studies surrounding it. Based on this, we find that the written direct testimony of the City's expert witnesses was expressed to a reasonable degree of scientific certainty.

We also disagree with the Department's second argument that the testimony of the City's experts should be discounted because they did not base their opinions on facts in the record. In Pennsylvania, an expert is permitted to express opinions which are based, in part, on reports which are not in evidence, but which are customarily relied upon by experts in the field. Al Hamilton Contracting Co. v. DER, 659 A.2d 31, 36 (Pa. Cmwlth. 1995); Primavera v. Celotex Corporation, 415 Pa. Super. 41, 608 A.2d 515, 518, n. 4 (1992). Some of the research conducted by the City's consultant on water quality and groundwater modeling was not offered into evidence. However, the Department has given us no reason to believe that this information is not of the type customarily relied on by experts in the field.

Finally, the Department challenges the fact that some of the data gathering and modeling work was done by individuals other than the expert witnesses called by the City to testify about the results of the modeling. However, as the City points out in its Reply Brief, a similar challenge was addressed and rejected by the Superior Court in Commonwealth v. Al Hamilton Contracting Co., 383 Pa. Super. 429, 557 A.2d 15 (1989), alloc. denied, __ Pa. __, 565 A.2d 1165 (1989). In that case, the court held, "An expert's opinion may be based on tests performed by others and on information the expert gains from the testimony of other witnesses. These facts need not be gained

by the expert's personal knowledge or observations alone." 557 A.2d at 17. Moreover, in the present case, much of the data gathering or modeling work was performed by personnel directly under the supervision of the expert testifying to the results of the work.

On February 2, 1996, the Department submitted to the Board a copy of the Commonwealth Court's decision in Hatalski v. Department of Transportation, 666 A.2d 386 (Pa. Cmwlth. 1995), which was handed down after the parties had filed their Post-Hearing Briefs. Hatalski deals with the admission of written expert evidence. In its cover letter, the Department stated this constituted a post-hearing submission pursuant to Rule 2501 of the Pennsylvania Rules of Appellate Procedure. The City challenged the Department's submission of the Hatalski decision since Appellate Rule 2501 allows a post-hearing submission only when directed or permitted by the court or when an authority relied upon by a party has been expressly reversed, modified, or otherwise materially affected.

We find that the Department's submission of the Hatalski decision was appropriate since Rule 2501, dealing with post-submission communications to an appellate court, does not apply to the Board. Moreover, the Board encourages counsel to advise it of material court decisions issued after the close of the record. However, even accepting the Department's submission, we do not find Hatalski to be applicable to this proceeding. The Hatalski decision involved a motorist who was unable to perform a breathalyzer test allegedly due to a medical condition. The only piece of medical evidence submitted at the hearing was a physician's written report concerning Hatalski's medical condition. The trial court admitted the report over the objection of the Department of Transportation that it constituted hearsay. On appeal, the Commonwealth Court reversed the ruling of the trial court admitting the report. The Commonwealth Court held that the report constituted

hearsay since the Department of Transportation had no opportunity to cross-examine the physician.

In Hatalski the Department of Transportation had no opportunity to cross-examine the physician since only his report was admitted into evidence. In the present proceeding the Department had the opportunity to conduct an extensive and lengthy cross-examination of each expert witness whose written testimony is in dispute. Had the testimony of the City's expert witnesses been submitted in written form and the Department had no opportunity to cross-examine them, then we would find Hatalski to be controlling. However, under the circumstances of this case, we do not find Hatalski to be applicable to this proceeding.

For the reasons set forth above, we find no merit to the Department's objections regarding the admissibility of the written direct testimony of the City's expert witnesses. For this reason, we affirm the ruling of Judge Fitzpatrick admitting the written direct testimony of the City's expert witnesses.

De Novo Review

It is well-established that the scope of the Board's review is de novo. That is, the Board's review is not limited solely to the evidence which was considered by the Department at the time of its action, but includes evidence which may not have been available to the Department. Warren Sand & Gravel, Inc. v. DER, 341 A.2d 556 (Pa. Cmwlth. 1975) Both the Department and the City recognize that the Board has de novo review power. However, each side disagrees as to the extent of that review power when the evidence presented at the hearing is substantially different than that reviewed by the Department.

As submitted to the Department, the Project was to include a structure with steel gates. At the time of the hearing, the City had revised the Project to include moveable rubber gates along with

immoveable steel gates. The purpose of the moveable rubber gates was to prevent flooding. David Burgoine, Manager of the Power Division for Acres International ("Acres"), the City's consultant, testified that the rubber gates will not change the overall operation of the Project (City Statement No. 2, p. 13). However, he noted there are operational differences between the rubber gates and steel gates (T. 644). In addition to the change in design of the Project, the City has also proposed various mitigation measures which were not submitted with its original application. For instance, the City now proposes the construction of a cutoff wall, the implementation of a drainage system, and the reconstruction of an existing retaining wall to prevent flooding and groundwater infiltration in the area around the Project. These were proposed subsequent to the Department's denial of the certification request. Finally, much of the testimony of the City's experts centered on studies and modeling which were performed after the Department's denial of the certification request.

Based on the new design, new mitigation measures, and new studies, the Department argues that the City has, in fact, submitted a new application for certification. It is the Department's contention that the Board should uphold the Department's denial and require the City to submit a new application for certification based on the new information. The City, on the other hand, argues that the Board should review all the evidence in the record made at the hearing and, if the evidence demonstrates that the Project will not cause a violation of Pennsylvania's water quality standards, order issuance of Section 401 certification to the City.

The leading case addressing the Board's de novo review power is Warren Sand & Gravel, Inc. v. DER, 341 A.2d 556 (Pa. Cmwlth. 1975). There the Commonwealth Court held,

> [T]he Board is not an appellate body with a limited scope of review attempting to determine if DER's action can be supported by the evidence received at

> DER's factfinding hearing. The Board's duty is to determine if DER's action can be sustained or supported by the evidence taken by the Board. If DER acts pursuant to a mandatory provision of a statute or regulation, then the only question before the Board is whether to uphold or vacate DER's action. If, however, DER acts with discretionary authority, then the Board, based upon the record made before it, may substitute its discretion for that of DER.

Id. at 565. Thus, the Board's de novo review power allows it to consider evidence which was not before the Department when it made its decision. See also, Lower Towanensing Township v. DER, 1993 EHB 1442, 1482 (The Board may consider evidence not reviewed by the Department when it took its action); Al Hamilton Contracting Co. v. DER, 1992 EHB 1458, 1487-88 (The Board may consider after-acquired evidence when reviewing a Department action); Willowbrook Mining Co. v. DER, 1992 EHB 303, 316-17 (The Board has "wide latitude" in hearing evidence in a de novo proceeding, although that evidence was not previously made available to DER.)

The extent of the Board's de novo review power was further examined in Hrivnak Motor Co. v. DER, 1993 EHB 432, which involved an order by the Department directing a landowner to take remedial action to abate groundwater contamination. The Department's order was based on groundwater sampling which the Department had conducted in 1987. At the hearing, the appellant introduced the results of groundwater sampling which had been conducted in 1990 which showed no off-site contamination. The Board allowed the introduction of the 1990 sampling results into evidence and considered this data in reaching its decision as to the propriety of the Department's order. In considering this evidence, the Board noted that "we cannot consider DER's action in a 'snapshot', based only on the circumstances as they existed when DER took its action." Id. at 437. The Board further noted as follows:

> Where there is a long delay between the initiation of DER's action and a hearing on the merits as we had in this matter, it is not surprising that evidence arises showing a change in circumstances more favorable to the appellant than the data upon which DER based its decision to act in the first place...When we are adjudicating an appeal, it is our responsibility to review DER's action based on the evidence put before the Board.

Id. at 438. Although Hrivnak involved a remedial order issued by the Department, rather than a denial of certification as in the present case, the same reasoning may be applied here.

The Department argues that the new evidence presented by the City in this case amounts to "evidence concerning a new request for Certification for a new project, not new evidence concerning the certification which the Department denied." (Department's Post-Hearing Brief, p. 18) After a thorough review of all of the evidence before us, we must conclude that the Department is incorrect in its assessment. Although it is true that the design of the Project has been altered from the design originally submitted to the Department and the City has presented additional mitigation measures to address certain concerns voiced by FERC, the Department, and the Fish Commission, the changes are not so fundamentally and significantly different as to amount to an entirely new Project proposal. As for the new studies conducted by the City's consultants, these, too, may be considered by the Board within the scope of its de novo review power. See, e.g., Harmar Township v. DER, 1993 EHB 1856, 1892-93 (The Board admitted evidence of calculations done by the permittee's consultant, even though these calculations were not done prior to the submission of the permit application and were not reviewed by the Department.)

The Department's argument that the Board should not consider the new evidence concerning the proposed Project is further undermined by the Department's own failure to request additional

information with respect to the City's application. Pursuant to Section 401(a)(1) of the Clean Water Act, the Department must act on a request for certification within one year of the date of its submission. Failure to do so results in a waiver of the certification requirement under Section 401(a). 33 U.S.C.A. §1341(a). The City submitted its request for certification in March 1987. The Department admitted that it did not even begin its review of substantial portions of the City's request for certification until January or February 1988. (F.F. 16)[3] Yet, the Department further admitted that it began to prepare its denial of the certification request in January 1988. (F.F. 17) Moreover, the record indicates that, although one of the primary grounds for the Department's denial was that it did not have enough information to determine the Project's effect on water quality and other conditions, it never requested further information from the City or its consultants. (F.F. 12) In fact, sometime prior to February 15, 1988, Leon Oberdick, the Department's Water Quality Program Manager, instructed the individual within the Department responsible for coordinating the City's certification request to have no further conversations with the City or its consultants regarding the certification request. (F.F. 18) Therefore, the City had no opportunity to correct any alleged deficiencies the Department found in the application.

Much of the new evidence submitted by the City at the hearing addresses the issues raised by the Department in its denial letter. Had the City been given an opportunity to submit this information to the Department in response to the Department's concerns regarding the request for certification, much of this information could have been available to the Department when it made its decision regarding the certification request. However, where the Department fails to notify an

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[3]"F.F." refers to findings of fact which are set forth later in this Adjudication.

applicant that it requires further information to act upon an application and, instead, simply denies the application based on insufficient information, this provides even stronger support for the Board to exercise de novo review.

Therefore, based on a full and complete review of the record, we make the following findings of fact:

FINDINGS OF FACT

1. The Appellant is the City of Harrisburg, a city of the third class. (Notice of Appeal)

2. The Appellee is the Department of Environmental Protection (formerly the Department of Environmental Resources), the agency of the Commonwealth charged with administering and enforcing the Commonwealth's environmental statutes and regulations, including the state water quality regulations at 25 Pa. Code Chapter 93.

3. The Intervenor is the Pennsylvania Fish and Boat Commission, an independent administrative commission of the Commonwealth.

4. In May 1987, the City filed with the Federal Energy Regulatory Commission an application for a license to operate a hydroelectric dam on the Susquehanna River in the City of Harrisburg. (City Statement No. 1, p. 9, 24; City Statement No. 2, p. 5, 21)

5. By letter dated February 24, 1987, the City sent copies of the City's draft license application to the Department and the Fish Commission, as well as other Commonwealth agencies. (City Statement No. 1, p.24, 27, 28)

6. In March 1987, the City requested Section 401 certification from the Department based on the information contained in its draft license application. (City Statement No. 1, p. 32; City Statement No. 6, p. 16)

7. By letter dated April 9, 1987, the Department acknowledged receipt of the request for certification (City Ex. 54) and published notice of the request for certification in the April 25, 1987 issue of the Pennsylvania Bulletin. 17 Pa. Bulletin 1692-93.

8. In response to requests for additional information by the FERC, the City filed supplements to its FERC license application in December 1987 and September 1988. (City Statement No. 2, p. 24-25; T. 567, 662, 667)[4]

9. Copies of the City's responses to FERC's requests for additional information were also provided to the Department. (City Statement No. 2, p. 25)

10. By letter and Notice of Final Action dated March 2, 1988, the Department denied the City's request for certification. (City Statement No. 1, p. 39; City Ex. 6)

11. Acres International ("Acres")[5] is the consulting firm retained by the City to provide overall management services for the Project, including engineering, environmental management, and preparation of the FERC license application. (City Statement No. 2, p. 9)

12. Prior to the denial, neither the City nor Acres received any request from the Department for additional information. (City Statement No. 1, p. 39; City Statement No. 6, p. 21)

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[4]"T." refers to a page in the transcript of the hearing.

[5]The Canadian division of Acres International was also involved in the work discussed herein. This division of Acres International is included within the reference to "Acres".

13. Letters from Department officials to David Burgoine, Acres' Manager of Power Division, dated October 1986 and April 1987, expressed that the Department had concerns that the Project would present problems with respect to dissolved oxygen levels, water quality, and raised groundwater levels. (T. 109-10; Commonwealth Exhibits 7, 8)

14. The Department's Water Quality Management Program was responsible for the review of the City's request for Section 401 certification. (T.2406) Leon Oberdick is the Department's Water Quality Program Manager. (T. 2399)

15. Mr. Oberdick had no direct or significant involvement in the review of the City's certification request prior to December 1987. (T. 2437)

16. The Department did not begin its evaluation of the City's water quality modeling or the effect of raised groundwater on sewer laterals until January or February 1988. (T. 2446-47)

17. The Department began to prepare its denial of the Section 401 certification request in January 1988. (T. 2448)

18. Sometime prior to February 15, 1988, Mr. Oberdick instructed James Miller, a sanitary engineer in the Bureau of Water Quality and the individual within the Department responsible for coordinating the City's certification request, to have no further conversations with the City or its consultants regarding the certification request. (T. 2489)

19. To apply for a FERC license, the applicant must submit only a conceptual design and basic parameters for the Project. The final design need not be completed until a license is awarded. (City Statement No. 2, p. 41-42)

20. The Project will include a hydroelectric generating station which will produce 148 gigawatts of electricity annually. (City Statement No., p. 9)

21. The Project will consist of a 16.5 feet high gated spillway structure at the south end of City Island in the Susquehanna River. The Project, as proposed, will have a total of fourteen inflatable rubber gates and four bottom-hinged steel gates. (City Statement No. 1, p. 9)

22. In the original draft application submitted to the Department, the City had proposed a structure which consisted of immoveable steel gates. (T. 123) A structure which included moveable rubber gates was subsequently proposed to address the concern of flooding. (City Statement No. 1, p. 11)

23. There are operational differences between the rubber gates and the steel gates. Acres' Project Manager David Burgoine was not aware of any document submitted to the Department which described the differences. (T. 644) However, the rubber gates will not change the overall operation of the Project. (City Statement No. 2, p. 13)

24. During times of high flow, the gates will be lowered, allowing water to pass through the structure. (City Statement No. 1, p. 10)

25. The Project is designed to allow the free passage of fish. (T. 2562)

26. The Project will create an eight mile impoundment in the Susquehanna River. (City Ex. 31A) The impoundment will extend to the lower three miles of the Conodoguinet Creek, a tributary to the Susquehanna River. (City Statement No. 1, p. 12)

27. The Project will be operated as a "run of the river" facility. This means that the quantity of water entering the impoundment will be the same as the quantity of water exiting. (City Statement No. 1, p. 9, 10)

28. During high flow conditions, exceeding approximately 150,000 cubic feet per second ("cfs"), the powerhouse units will be shut off and will not generate power. (City Statement No. 2, p. 15)

29. During low flow conditions, less than approximately 2000 cfs, the powerhouse units will be shut off and water will flow over the gated spillway or water will be discharged by lowering the inflatable gates. (City Statement No. 2, 14)

30. During periods of moderately low flow, between 2000 and 5000 cfs, the powerhouse units on each side of the structure will be operated sequentially to insure reasonably uniform flow distribution on each side of the river. (City Statement No. 2, p. 13)

31. The Project will not increase the amount of sediment entering the Susquehanna River and the Conodoguinet Creek. (T. 210; City Statement No. 1, p. 58)

32. The City plans to install riprap and other bank stabilization materials along the river and creek banks to prevent sediment from entering the river and creek. (T. 3334)

33. A certain amount of sediment exists in the river and creek unrelated to the Project. (T. 210-12; City Statement No. 1, p. 58)

34. During periods of reduced velocity of flow, the sediment drops out of the water column and settles on the bottom of the river and creek. (T. 210-12; City Statement No. 1, p. 58)

35. When the velocity of flow increases, the sediment becomes resuspended in the water and is flushed downstream. (T. 210-12; City Statement No. 1, p. 58)

36. Because the Project will cause slower velocities of flow to occur at certain times, it will cause an increase in the amount of sediment which drops out of the water column and temporarily settles on the river and creek bottom. (T. 210)

37. The Project will not result in a net increase in the amount of sediment deposited on the river or creek bed since higher flows will cause the sediment to become resuspended and flushed downstream. (T. 210; City Statement No. 1, p. 58)

38. Sediment will be temporarily deposited on the floor of the Susquehanna River at the following rates as a result of the Project: approximately .2 inches per year in the month of April and approximately .9 inches per year in the month of May. A temporary increase in the deposition of sediment will also occur in the month of June, but the record does not quantify the increase. (T. 1166-67, 3605-07)

39. Temporary sediment deposition will occur in the Conodoguinet Creek primarily in the summer months. The record does not quantify the rate by which it will occur. (T. 1166-67)

40. Smallmouth bass are able to live in areas of sediment deposition. (T. 2735-37)

41. Sedimentation can have a deleterious effect on spawning fish, eggs, macroinvertebrates, and benthic organisms, depending on the degree of sedimentation. (2735-37, 3591)

42. Increased sediment build-up on the substrate of the river or stream can create an environment which is optimal for the growth of macrophytes, or plant life. (T. 2705-06, 2719) Increased plant growth adds to the oxygen demand of the river (T. 2718-20) and may result in violations of dissolved oxygen levels. (T. 2705-06)

43. A study performed by Acres in 1986 revealed that very little sediment build-up had occurred as a result of an existing dam located downstream of the proposed Project area. The results of this study were included in the FERC license application. (T. 3531) Studies in 1987 and 1988 confirmed the results of the 1986 study. (T. 3534)

44. The frequent flushing action of the Susquehanna River prevents sediment build-up. (T. 3531)

45. The same result has been found at other dams in the area: Reports of York Haven Dam, ten miles downstream of Harrisburg, and Conowingo Dam, eighty miles downstream of Harrisburg, both on the Susquehanna River, showed very little sediment build-up. (T. 3532) Photographs of Sunbury Dam, sixty miles upstream of Harrisburg on the Susquehanna River, also showed little sediment build-up. (T. 3532)

46. Violations of dissolved oxygen levels have been measured in the Conodoguinet Creek, both in impounded areas along the creek and in non-impounded areas. (T. 2684-88, 3388)

47. The violations of dissolved oxygen levels in the Conodoguinet Creek are largely attributable to discharges from sewage treatment plants located along the creek. (City Statement No. 10, p. 51)

48. Discharges from the sewage treatment plants contain phosphorous which is a nutrient for plant growth. (City Statement No. 10, 51)

49. Plant growth places an increased demand on dissolved oxygen levels. During respiration, which occurs at night, plants take in oxygen. (T. 2673) When the plants utilize more oxygen than the water is holding, this results in violations of dissolved oxygen levels. (T. 2707)

50. The most critical period for dissolved oxygen levels is in the early morning hours during the summer. (T. 2673, 2707)

51. Adequate levels of dissolved oxygen are necessary for the survival of aquatic life. (T. 2673-74)

52. Acres used the QUAL2E model to predict dissolved oxygen levels in the Conodoguinet Creek. (City Statement No. 1, p. 18-19, 61; T. 1371, 1750)

53. The QUAL2E model was developed for the U.S. Environmental Protection Agency (EPA). Its primary purpose is to study the impact of wasteloads on receiving streams. (City Statement No. 10, p. 21-22)

54. Acres' modeling covered an 8.6 mile reach of the lower Conodoguinet Creek. (City Statement No. 9, p. 24-25)

55. Acres' modeling of the Conodoguinet Creek determined that there would be post-Project dissolved oxygen violations in the impounded area of the creek if the existing dissolved oxygen problems were not corrected. (City Statement No. 9, p. 24-25)

56. Acres' modeling further determined that no post-Project dissolved oxygen violations would occur in the impounded area of the creek if the existing dissolved oxygen violations in the creek were corrected. (T. 2148)

57. Following the Department's denial of certification, the City retained Dr. Dennis Ford of FTN Associates to review the modeling done by Acres. (City Statement No. 10, p. 10-11)

58. Dr. Ford also conducted modeling of the Conodoguinet Creek. His modeling further refined the modeling done by Acres and extended further upstream on the Conodoguinet Creek. (City Statement No. 10, p. 31)

59. Dr. Ford's modeling covered a 26 mile stretch of the Conodoguinet Creek. (City Statement No. 10, p. 27-28)

60. Dr. Ford's modeling reached the same conclusion as did Acres' modeling, that is, that if water quality standards are met in the Conodoguinet Creek, then there will be no dissolved oxygen violations in the Project area. (City Statement No. 10, p. 63)

61. Robert Schott, a water pollution biologist with the Department, agreed that if the Conodoguinet Creek were currently in compliance with state water quality standards, the Project would not result in any water quality violations. (T. 2909)

62. Violations of dissolved oxygen levels have also been measured along the West Shore of the Susquehanna River just below its confluence with the Conodoguinet Creek. (T. 2845) These violations are the result of water entering the river from the Conodoguinet Creek. (T. 2845-46)

63. Acres used the Streeter-Phelps model to predict post-Project dissolved oxygen levels in the Susquehanna River. The Streeter-Phelps model is an equation which allows one to predict dissolved oxygen levels by taking into account various parameters which affect the level of dissolved oxygen. (City Statement No. 1, p. 12-13)

64. At a meeting between representatives of Acres and the Department, the Department advised using the Streeter-Phelps model for waste assimilation, but did not instruct Acres to use this particular model for analyzing impacts on dissolved oxygen from hydraulic changes. (T. 1508, 1763)

65. Acres' modeling of the Susquehanna River predicted no violations of dissolved oxygen levels as a result of the Project. (City Statement No. 6, p. 12)

66. Acres' modeling of the Susquehanna River did not factor in the dissolved oxygen violations in the Conodoguinet Creek because it assumed that these violations would be corrected by mitigation measures which it proposed. (2085-86)

67. Dr. Ford did incorporate the Conodoguinet Creek's dissolved oxygen violations in his analysis of the Susquehanna River. Dr. Ford concluded that dissolved oxygen violations would occur along the West Shore of the Susquehanna River if dissolved oxygen problems were not corrected in the Conodoguinet Creek. (T. 3322)

68. Acres did not include discharges from combined sewer overflows in its original modeling of the Susquehanna River, even though Kevin Young, Acres' former Director of Environmental Resources and Manager of Hydrowater Resource Projects, agreed that these constitute point source discharges to the river. (T. 1472, 1515)

69. Acres did not include combined sewer overflow discharges in its modeling because it was determined these discharges would not have a big impact on water quality. This is because the combined sewer overflows discharge to the river only during a heavy rain event and would, therefore, be diluted. (T. 1472, 1515, 1517; City Statement No. 9, p. 33)

70. Modeling of the Susquehanna River done by Acres following the Department's denial of certification included discharges from combined sewer overflows. (T. 1516; City Statement No. 9, p. 31-33) The modeling concluded there would be compliance with the dissolved oxygen standards. (City Statement No. 9, p. 34-35)

71. John Arway of the Fish Commission reviewed Acres' dissolved oxygen modeling. In reviewing the modeling, Mr. Arway applied a more stringent standard for dissolved oxygen than that which is set forth in the regulations. (Fish Commission Statement No. 2, p. 8, 11)

72. The Fish Commission has never petitioned the Department to raise the dissolved oxygen standards set forth in the regulations. (T. 2620-21)

73. A good comparison to the impoundment which will be created on the Susquehanna River is the impoundment created by the York Haven Dam, located on the Susquehanna River ten miles downstream of the proposed Project. (City Statement No. 8, p. 9; City Statement No. 10, p. 13; T. 3532)

74. York Haven Dam is a good analogy to the proposed dam because it is located immediately downstream on the same river and, therefore, has similar flow patterns, meteorological characteristics, water quality, and nutrient and organic loadings. (City Statement No. 10, p. 13)

75. York Haven Dam is also a conservative prototype because of the following: (1)York Haven is slightly deeper. (City Statement No. 10, p. 13) (2)York Haven is an overflow dam, instead of a gated dam. Overflow enhances stratification during low flow and does not receive flushing flows during the winter. (City Statement No. 10, p. 14) (3) York Haven receives thermal discharges from Three Mile Island, which cause greater stratification. (City Statement No. 10, p. 14)

76. Sampling done at York Haven Dam from 1974 to 1988 revealed that, of the 3015 samples taken, only six showed violations of Pennsylvania's water quality standards for dissolved oxygen. These six violations occurred in 1974 and 1977 when sewage treatment plants along the Susquehanna River were upgrading their treatment. (City Statement No. 9, p. 7-8)

77. One of the mitigation measures proposed by the City to correct existing dissolved oxygen violations in the Conodoguinet Creek is for the Department to lower the phosphorous limits in the NPDES permits held by the sewage treatment plants located along the Conodoguinet Creek. (City Statement No. 10, p. 53)

78. The sewage treatment plants along the Conodoguinet Creek generally discharge between only 40 to 75 % of their permit limits for phosphorous. (T. 3377)

79. Other mitigation measures proposed by the City to prevent dissolved oxygen violations in the Conodoguinet Creek are the following: (a) Best management practices to control non-point sources of phosphorous-containing discharges, such as sediment and fertilizers. These best management practices include buffer strips along the stream bank to collect sediment and the application of fertilizers at times when their impact will be minimized. (City Statement No. 10, p. 55); (b) Flow augmentation to dilute the water; (c) Artificial aeration under critical low flow periods; (d) Modifying the habitat of certain sections of the creek to curtail plant growth; and (e) Diversion of the discharge from the East Pennsboro Township sewage treatment plant from the Conodoguinet Creek to the Susquehanna River. (City Statement No. 10, p. 57-62)

80. The HEC II model is a surface water profile computer program developed by the U.S. Army Corps of Engineers. (City Statement No. 8, p. 2) It is used to make predictions about surface water elevations in an open channel at a given flow. (T. 1925)

81. Initial HEC II modeling was conducted along the Susquehanna River in 1986 and 1987 by the Federal Emergency Management Agency ("FEMA") to calculate surface water elevations in the event of a 100-year flood. (City Statement No. 8, p. 1-2; T. 1928)

82. HEC II modeling was also conducted by Acres in 1987. The results were included in the City's FERC application. (City Statement No. 8, p. 4-5)

83. Acres' 1987 modeling results were sent to FEMA, which concluded in November 1987 that the Project would not increase surface water elevations along the Susquehanna River. (City Statement No. 8, p. 5)

84. FEMA approved Acres' calibration of the model to the 100-year flood flow. (City Statement No. 8, p. 7)

85. A limitation on the HEC II model is that it is one-dimensional and assumes a constant velocity of flow in one direction downstream. (T. 1937-38)

86. The Project will cause groundwater levels to rise in the Project area. (City Statement No. 5, p. 22)

87. Acres conducted groundwater modeling of the West Shore in 1986 and 1987 and of the East Shore in 1986, 1987, and 1988. (T. 931-32, 954-58; City Exhibits 31C, 31D, 33)

88. Acres used an analytical model for the West Shore. (City Statement No. 5, p. 11) An analytical model is a simplified equation which can be used when the properties and geometry of an aquifer are uniform. (City Statement No. 5, p. 5)

89. The aquifer on the West Shore is only 800 feet in width. (City Statement No. 5, p. 20) The properties of the aquifer are fairly uniform. (City Statement No. 5, p. 20; T. 3496, 3502)

90. Although the soil on the West Shore is not uniform, the degree of difference would not produce a significant change in the modeling results. (City Statement No. 5, p. 20)

91. Although the West Shore model did not include weathered bedrock in the model, this did not significantly affect the results. (T. 1683)

92. Although the original calculations for the West Shore were performed by a former employee of Acres and could not be located for this proceeding, Acres' senior hydrogeologist, Bruce Bennett, was able to reproduce the results. (T. 1684-85, 1710-11)

93. The rise in groundwater levels on the West Shore as a result of the Project will not significantly impact any existing facilities. (City Statement No. 5, p. 22; T. 1683-84)

94. Acres used a numerical model to predict the rise in groundwater levels on the East Shore of the Susquehanna River as a result of the Project. (City Statement No. 5, p. 10-12) The

numerical model employed by Acres for the East Shore is called "Modflow" and is used by the U.S. Geologic Survey. (City Statement No. 5, p. 10-12)

95. A numerical model is a more complex model which involves algebraic equations which must be solved through the use of a computer. (City Statement No. 5, p. 5)

96. A numerical model is required for more complex aquifers, such as that on the East Shore, where properties and geometry are not uniform and conditions are varied. (City Statement No. 5, p. 5)

97. Acres' 1987 modeling for the East Shore contained a number of errors. This led to the 1989 modeling. (City Statement No. 5, p. 15-18)

98. Acres' 1987 East Shore model assumed that no groundwater was present in the bedrock; however, borehole data revealed that groundwater was, in fact, present. (T. 3141-43)

99. Acres included the presence of groundwater in bedrock in its 1989 model. This addition resulted in no significant difference in the modeling results. (T. 3141-43)

100. Hydraulic conductivity values in the 1987 East Shore model were found to be inconsistent with the actual measured data. (T. 3144)

101. "Hydraulic conductivity" refers to the ability of a material to transmit groundwater. The higher the hydraulic conductivity, the less resistance to groundwater flow. (City Statement No. 5, p. 15)

102. Hydraulic conductivity values were corrected in the 1989 model. (City Statement No. 5, p. 15-18) The changes produced no appreciable difference in the results. (City Statement No. 5, p. 34)

103. The 1987 East Shore modeling did not include a sensitivity analysis. (T. 3150-51)

104. A "sensitivity analysis" involves changing the values for certain parameters of a model one parameter at a time and recalibrating the model through an adjustment of the other parameters. This allows one to examine whether the model results are sensitive to a particular parameter. (City Statement No. 5, p. 24)

105. The 1989 model included a sensitivity analysis, but it did not alter the results. (City Statement No. 5, p. 26)

106. The 1987 East Shore model did not include a transient analysis. (T. 3141, 3152, 3154)

107. A "transient analysis" takes into account the impact of transient events, such as heavy rainfall or floods, on the groundwater system. (City Statement No. 5, 38)

108. The decision to conduct a transient analysis was "deferred" by Acres. (City Statement No. 5, p. 39)

109. A groundwater model should include a transient analysis. (City Statement No. 5, p. 38-39)

110. The 1987 East Shore model assumed a constant recharge rate of 2%. The rate of 2% was selected based on hydraulic conductivity values and the results of calibration. (T. 3485)

111. After the hydraulic conductivity values were adjusted in the 1989 model, 2% was still found to be a representative recharge rate. (T. 3485)

112. The 1989 model was also run with a recharge rate of 4%, but it did not significantly alter the results. (T. 3486-87)

113. The East Shore model was calibrated to low flow conditions. The model could not be calibrated to high flow conditions because there was no steady period of high flow where the groundwater was in equilibrium with the river. (T. 3146-47, 3482-83)

114. Acres' modeling for the East Shore predicted that the rise in groundwater levels caused by the Project will impact certain structures unless mitigated. (City Ex. 33)

115. In order to mitigate the impact of raised groundwater levels on the East Shore, the City intends to construct a subsurface cutoff wall along Front Street and Maclay Street in the City of Harrisburg. (City Statement No. 4, p. 33-35)

116. In conjunction with the cutoff wall, the City intends to install a subsurface drainage system behind the cutoff wall. (City Statement No. 4, p. 34-35) In addition, the City intends to reconstruct an existing retaining wall which runs along Front Street. (City Statement No. 4, p. 38)

117. The purpose of the cutoff wall is to prevent the introduction of water from the river into the groundwater system and thereby prevent groundwater levels from rising in the City. (City Statement No. 4, p. 33-34)

118. A properly designed cutoff wall will effectively minimize groundwater flow. (City Statement No. 4, p. 37; T. 3243)

119. The City of Harrisburg has a combined sewer system, in which stormwater and sewage flows are combined in one system. (City Statement No. 1, p. 51; City Statement No. 7, p. 13)

120. When the capacity of the sewer system is exceeded due to heavy precipitation, "combined sewer overflows" discharge excess flow from the City's combined sewer system into the Susquehanna River. (City Statement No. 4, p. 43-44; T. 340-41)

121. The normal constituents of a discharge from a combined sewer overflow contain pollutants. (T. 346)

122. The outfalls of twelve combined sewer overflows will be either fully or partially submerged as a result of increased groundwater levels from the Project. (City Statement No. 4, p. 44)

123. To mitigate this condition, the City has proposed consolidating eleven of the affected overflows into five pump stations to lift the water above the surface elevation and pump the discharges into the river during periods of heavy rainfall. (City Statement No. 4, p. 45) The twelfth overflow will be re-routed to discharge below the dam. (City Statement No. 4, p. 45; City Statement No. 7, p. 24)

124. The consolidation of the eleven combined sewer overflows into five pump stations will not increase the amount of flow which currently occurs with the separate overflows. (City Statement No. 7, p. 34-35)

125. Bar screens will be placed on the pump stations to reduce the amount of debris entering the river. (City Statement No. 7, p. 33)

126. Raised groundwater levels from the Project will impact certain sewers and sewage infrastructure in nearby municipalities. (City Statement No. 4, p. 41-43)

127. Raised groundwater levels could result in sewer lines being submerged in water. If the sewer lines are infiltrated by water, this could cause the capacity of the system to be exceeded, resulting in sewage backing up into basements, flowing out of manholes, or spilling directly into waters of the Commonwealth. (T. 2958)

128. To insure that sewer lines are not infiltrated by groundwater, the City intends to line the sewer pipes with a procedure known as "Insituform". This involves lining the pipes with a material which hardens to form a new pipe within an existing one. (City Statement No. 1, p. 44; City Statement No. 4, p. 29-30; City Statement No. 7, p. 15-16)

129. Yves Pollart of Brinjac, Kambic & Associates, who testified as an expert in civil engineering with expertise in sewage systems, has worked with Insituform and has found it to be impermeable. (T. 1772, 1789, 1846-47)

130. Sewer pipes which cannot be lined with Insituform because of excessive leaks will be replaced. (City Statement No. 7, p. 16)

131. In order to prevent groundwater infiltration through manholes, the City proposed applying urethane grout to the manholes. (City Statement No. 7, p. 37-38)

132. An area of subsurface contamination exists at the site of railyards operated by Conrail in the township of Enola on the West Shore of the Susquehanna River. (City Ex. 29; City Statement No. 5, p. 47; City Ex. 30; T. 997)

133. The Enola Railyards contain three closed lagoons which had formerly been used to store waste oil. Two of the lagoons were drained before closing; the third lagoon was capped without being drained. (City Ex. 25)

134. There is some seepage of oil from the capped lagoon. (City Ex. 25; City Ex. 35A, p. E.2-16)

135. The area of contamination at the Enola Railyards will not be impacted by the rise in groundwater levels because the area of contamination is located at a higher elevation than the

elevation to which groundwater levels will rise due to the Project. (City Statement No. 4, p. 49; City Ex. 25)

136. A six foot arch at the Enola Railyards acts as a storm sewer, carrying water from East Pennsboro Township and the Railyards into an open channel which leads into the Susquehanna River. (T. 3079, 3081)

137. An impoundment at the bottom of the arch traps any oil which flows through the arch. (T. 3079-80)

138. In order to insure that oil traveling through the arch is contained after construction of the Project and the expected rise in groundwater levels, the City plans to extend the existing impoundment. (T. 3520)

139. The City evaluated storm drains which would be impacted by the rise in groundwater levels in the vicinity of the Enola Railyards. The impacted drains and proposed mitigation measures are set forth in a report prepared by the City's consultant, Brinjac, Kambic & Associates. (City Ex. 25)

140. The proposed dam will be located approximately 2000 feet upstream of an existing dam known as the "Dock Street Dam". (City Ex. 31A, p. B.4-9)

141. As part of the construction of the Project, the existing Dock Street Dam will be lowered. (City Ex. 31A)

142. During periods of low flow, the City will operate the Project by alternating one powerhouse unit on each side of the river to insure reasonably uniform flow distribution. This will insure that the area downstream of the proposed dam will remain wetted during low flows even after

lowering of the Dock Street Dam. (City Statement No. 2, p. 13-14; City Ex. 31A, p. B.4-9 to B.4-10)

143. High levels of reaeration occur in the area downstream of the proposed dam. High levels of reaeration aid in preventing water quality violations from occurring. (T. 2147)

DISCUSSION

The City bears the burden of proving by a preponderance of the evidence that the Department did not exercise proper discretion or did not act in accordance with the law when it denied the City's request for certification under Section 401(a) of the Clean Water Act, 33 U.S.C.A. §1341. 25 Pa. Code §1021.101(c)(1).

Scope of Section 401(a) of the Clean Water Act

Section 401(a)(1) of the Clean Water Act provides as follows:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate...that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this Act [33 U.S.C.A. §1311, 1312, 1313, 1316, and 1317]...

33 U.S.C.A. §1341(a)(1). The parties agree that, of the provisions set forth in Section 401(a), the only one relevant to this proceeding is Section 303, 33 U.S.C.A. §1313, dealing with state-adopted water quality standards. Thus, pursuant to Section 401(a), the state regulatory agency may deny

certification to an applicant if the proposed project will cause a discharge which will not comply with the state's water quality standards.

The state regulatory agency is provided with further authority under Section 401(d). That section states in relevant part as follows:

> Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations...[under certain provisions of the Clean Water Act]...and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

33 U.S.C.A. §1341(d) (Emphasis added). Thus, pursuant to Section 401(d), the state regulatory agency may condition its grant of certification on the applicant complying with "any appropriate requirement of State law".

Following the submission of the parties' Post-Hearing Briefs, the Department sought leave to supplement its brief to address the impact of a case which had been recently decided by the U.S. Supreme Court: PUD No.1of Jefferson County v. Washington Department of Ecology, __ U.S. __, 114 S. Ct. 1900, 128 L. Ed. 2d 716 (1994), which dealt with certification under Section 401 of the Clean Water Act. By order of June 20, 1994, the Board granted leave to all of the parties to file memoranda of law discussing the impact of the PUD decision.

The Department and the Fish Commission argue that the PUD decision expands the scope of the state's review under Section 401(a) by allowing the state to consider not only numerical water quality standards, but also such factors as the designated use of a stream and physical and biological

changes. Based on this interpretation, the Department and the Fish Commission argue that the Board erred in its October 6, 1988 Opinion, 1988 EHB 925, when it ruled that physical and biological changes were outside the scope of the Department's review under Section 401(a). The City argues that PUD is not applicable to this proceeding since it dealt with a state's authority to condition its grant of certification under Section 401(d).

In PUD, the State of Washington's Department of Ecology issued Section 401 certification to the petitioner for the construction of a hydroelectric dam. In issuing the certification, the state imposed a minimum stream flow requirement. The petitioner argued that the minimum stream flow requirement was unrelated to the two possible discharges that might result from the project and, therefore, the state lacked the authority under Section 401 to condition its certification on the maintenance of stream flows. The Washington Supreme Court held that Section 401(d) authorized the stream flow condition, and the U.S. Supreme Court affirmed. In responding to the petitioner's argument regarding the scope of the state's authority, the U.S. Supreme Court stated as follows:

> If §401 consisted solely of subsection (a), which refers to a state certification that a "discharge" will comply with certain provisions of the [Clean Water] Act, petitioners' assessment of the scope of the State's certification authority would have considerable force. Section 401, however, also contains subsection (d), which expands the State's authority to impose conditions on the certification of a project.

114 S. Ct. at 1908-09. The Court further held that the language of Section 401(d) contradicted the petitioner's claim that a state may impose only conditions which are specifically related to a discharge. Rather, a state may impose any limitations which are necessary to assure compliance with various provisions of the Clean Water Act and any appropriate requirement of state law. Id at 1909.

In imposing such limitations, the state may consider the designated use of the stream and act to maintain the chemical, physical, and biological integrity of the stream. Id. at 1910.

Therefore, under Section 401(d), a state may impose conditions on its certification which are aimed at protecting the designated use of a stream and maintaining its chemical, physical, and biological integrity. However, subsection (d) of Section 401 only comes into play once a state has granted certification. There is no authority for the Department and Fish Commission's position that these factors may provide a basis for denying certification to an applicant under Section 401(a). This was recognized by the Supreme Court in PUD when it confirmed that the petitioner's restrictive view of the state's scope of authority was applicable under subsection (a) of Section 401, but that the state's role was more expansive under subsection (d). Id. at 1908-09. Had the Department granted certification to the City under Section 401(a), then it would have been free to impose restrictions under Section 401(d) to maintain the physical and biological integrity of the stream. However, it had no authority under Section 401(a) to deny certification on these grounds.[6]

Pennsylvania's Water Quality Standards

Pennsylvania's water quality standards are promulgated at 25 Pa. Code Chapter 93. The parties agree that the Susquehanna River and the Conodoguinet Creek are protected by both general water quality criteria, found at 25 Pa. Code §93.6, and specific water quality criteria, found at 25 Pa.Code §93.7. Section 93.6, dealing with general water quality criteria, provides as follows:

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[6]The City also submitted to the Board a copy of a decision by the Court of Appeals of the State of New York in Niagara Mohawk Power Corp. v. New York State Department of Environmental Conservation, 82 N.Y.2d 191, 604 N.Y.S.2d 18, 624 N.E.2d 146 (1993), which addresses the question of the state's power under Section 401 of the Clean Water Act. However, because this decision was handed down prior to the U.S. Supreme Court's ruling in PUD, we do not find it to be controlling.

> (a) Water may not contain substances attributable to point or nonpoint source waste discharges in concentration or amounts sufficient to be inimical or harmful to the water uses to be protected or to human, animal, plant or aquatic life.
>
> (b) In addition to other substances listed within or addressed by this chapter, specific substances to be controlled include, but are not limited to, floating materials, oil, grease, scum and substances which produce color, tastes, odors, turbidity or settle to form deposits.

25 Pa. Code §93.6.

Specific water quality criteria are set forth at 25 Pa. Code §93.7. Because the Susquehanna River and the Conodoguinet Creek are designated as warm water fisheries, they are subject to the statewide list of protected criteria found at Section 93.7(d), as well as dissolved oxygen and temperature. 25 Pa. Code §93.7(d) and (e). In addition, 25 Pa. Code §93.8a provides that the waters of the Commonwealth shall not contain toxic substances attributable to point or nonpoint source waste discharges in concentrations or amounts that are inimical to the water uses to be protected.

In addition to the water quality standards codified at 25 Pa. Code Chapter 93, the Fish Commission argues that the Board must also consider the standards set forth in the Fish and Boat Code, Act of October 16, 1980, P.L. 996, as amended, 30 Pa. C.S.A. §101 et seq. The Fish and Boat Code states in relevant part:

> No person, regardless of intent, shall:
>
> (1) Put or place in any waters within or on the boundaries of this Commonwealth any electricity, explosives or any poisonous substances...
>
> (2) Allow any substance, deleterious, destructive or poisonous to fish, to be turned into or allowed to run,

> flow, wash or be emptied into any waters within or bordering on this Commonwealth.

Id. at §2504(a).

The City argues in its Reply Brief that the standards set forth in the Fish and Boat Code are not relevant to this proceeding based on the following language contained in the Code: "This section does not repeal or supersede any of the provisions of the...Clean Streams Law." Id. at §2504(c). The City also points to the case of Concerned Citizens for Orderly Progress v. DER, 1977 EHB 38, aff'd, 387 A.2d 989 (Pa. Cmwlth. 1978), in which the Board held that where there is no violation of the Clean Streams Law, then the Fish Law[7] could not supersede the Clean Streams Law or restrict any permit issued thereunder. However, in affirming the Board's decision in Concerned Citizens, the Commonwealth Court left this question unanswered, noting that the Fish Law was not applicable since there was no population of fish to be protected in that case. The Court also noted that the Department did not concur in the Board's interpretation of the relationship between the Clean Streams Law and the Fish Law but determined that "another set of circumstances might better serve the resolution of this issue." 387 A.2d at 994. Because this issue has not been conclusively resolved, we cannot agree with the City's assertion that the Fish and Boat Code is to be disregarded in this proceeding.

Moreover, this matter was addressed by Judge Fitzpatrick in this proceeding. In the Opinion and Order Sur Motion to Limit Issues, issued on October 6, 1988, Judge Fitzpatrick held that "Section 401 authorizes [the Department] to apply state law requirements to this project other than

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[7]This case was decided under the Fish Law of 1959, Act of December 15, 1959, P.L. 1779, as amended, 30 P.S. §1 et seq., the predecessor to the Fish and Boat Code of 1980.

those found at 25 Pa. Code Ch. 93...[However], these state law requirements must relate to point or non-point source discharges of pollutants. 1988 EHB at 936.

Therefore, we find that the Fish and Boat Code is relevant to this proceeding and must be read in conjunction with the water quality standards set forth at 25 Pa. Code Chapter 93.

Discharge of Pollutant

As noted earlier, Section 401(a) grants the Department the authority to determine whether the proposed Project will cause a discharge in violation of Pennsylvania's water quality standards. If such a discharge will result from the Project, the Department is authorized to withhold certification.

An area of contention among the parties is the question of what constitutes a "discharge". This question was thoroughly examined by Judge Fitzpatrick in his October 6, 1988 Opinion and Order Sur Motion to Limit Issues. See 1988 EHB at 936-44.[8] There, Judge Fitzpatrick defined "discharge" as referring to any discharge of a pollutant which is caused by the Project, including both point source and non-point source discharges. Id. This analysis was upheld by the Commonwealth Court at City of Harrisburg, 578 A.2d at 566-67 (affirming the Board's interpretation of the Department's scope of analysis under Section 401). Thus, we are not limited to examining only discharges of water coming directly from the dam, as asserted by the City. Nor, however, does the term "discharge" extend to physical or biological alterations caused by the Project, as the Department asserts.

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[8]In examining this issue, Judge Fitzpatrick discussed and adopted the reasoning of the D.C. Circuit Court of Appeals in National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982).

The bases upon which the Department denied the City's request for certification may be summarized into the following categories:

1) Adverse water quality impacts from sedimentation.

2) Adverse water quality impacts resulting from violations of dissolved oxygen standards.

3) Adverse water quality effects from raised groundwater levels. This includes impact on subsurface contamination, sewer systems, and combined sewer overflows.

4) Adverse water quality impacts from surface flooding.

5) Adverse water quality impacts to the 150 acre area downstream of the proposed dam and upstream of the existing dam.

6) Adverse impacts to fish and other aquatic life due to sedimentation and lowered dissolved oxygen levels.[9]

We shall examine each of these issues below.

Sedimentation

Both the Susquehanna River and the Conodoguinet Creek contain a certain amount of sediment which enters the river and creek. Although the sediment primarily remains suspended in the water and is carried along with the flow, during low flows it drops out of the water column and settles on the substrate of the river and creek. When flows increase, the sediment is again picked up by the water and flushed away.

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[9]In its denial letter, the Department also raised concerns regarding the impact of the Project on wetlands, fish migration, and aquatic resources. However, this issue was found to be outside the scope of the Department's review under Section 401(a) of the Clean Water Act. City of Harrisburg, 1988 EHB at 944, aff'd, 578 A.2d at 567.

The Project will not increase the amount of sediment in the river and creek. (F.F. 31) Mitigation measures have been proposed by the City to prevent the deposition of sediment into the river and creek. These include bank stabilization and riprap along the shores to prevent the inflow of sediment into the river and creek. (F.F. 32)

The Project will, however, increase the amount of sediment dropping out of the water column onto the substrate of the river and creek. This is due to the fact that the Project will cause slower velocities of flow to occur at certain times of the year. (F.F. 36) This will not result in a net increase in the amount of sediment deposited in the river and creek, since higher flows will again cause the sediment to become resuspended and flushed away. It will, however, result in a temporary increase in the amount of sediment deposited on the bottom of the creek and river. (F.F. 36)

We find that sediment constitutes a "pollutant" since the constituents of sediment fall within the definition of a "pollutant". According to the sedimentation study prepared by Acres, the sediment entering the Susquehanna River and the Conodoguinet Creek consists of sand and rock in the form of gravel. (City Ex. 31I) These are included within the definition of "pollutant" in the Clean Water Act. 33 U.S.C.A. §1362(6). Moreover, sediment is regulated as a pollutant in Chapter 102 of Pennsylvania's regulations dealing with erosion and sedimentation control. Section 102.3 states that the purpose of that chapter of the regulations is to "control...accelerated erosion and the resulting sedimentation of waters of this Commonwealth thereby preventing the pollution of these waters from sediment and...other polluting substances carried by sediment." 25 Pa. Code §102.3.

Thus, we conclude that sediment does, indeed, constitute a "pollutant" within the scope of the Clean Water Act.[10]

However, the temporary increase in sedimentation caused by the Project does not constitute a "discharge" within the meaning of Section 401(a) of the Clean Water Act. The City properly argues that this temporary increase in sedimentation is not a discharge but a "physical change," which is outside the scope of the Department's review under Section 401(a). See City of Harrisburg, 578 A.2d at 567 (The Department may not examine the impact of "physical changes" on the river as a result of the Project.) The City bases its argument on two grounds: first, the Project is not adding sediment to the river and creek and, second, the act of sediment dropping out of the water column already occurs naturally in the river and creek. The Department argues that a discharge will occur when the sediment which has built-up temporarily becomes resuspended and is released downstream in greater quantities than would otherwise occur.

Section 401(a) refers to a "discharge into the navigable waters." 33 U.S.C.A. §1341(a). The Clean Water Act defines "discharge" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C.A. §1362(12) and (16). Thus, the discharges contemplated by Section 401(a) of the Clean Water Act are discharges into the bodies of water involved. In this case, the record shows that the sediment already exists in the river and creek and that the Project will not cause any additional sediment to enter the river and creek. The release of sediment from the water

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[10]The City points out that Pennsylvania's water quality regulations contain no numeric standards for suspended solids. While this is true, Section 93.6, relating to general water quality criteria, lists the following as substances which are to be controlled under the state's water quality regulations: "floating materials...and substances which produce color, tastes, odors, turbidity or settle to form deposits." 25 Pa. Code §93.6. Under this definition, sediment is a substance to be controlled under Pennsylvania's water quality standards.

column onto the floor of the river and creek does not constitute a "discharge into the navigable waters" of the Susquehanna River and Conodoguinet Creek. Rather, this is a physical change in the pattern of sedimentation which now occurs in the river and creek. Therefore, we find that this condition is outside the scope of the Department's authority under Section 401(a) of the Clean Water Act.

The record also shows that the temporary increase in sedimentation is not likely to cause a violation of Pennsylvania's water quality standards. Because Chapter 93 contains no numeric standards for suspended solids, we must look to the general water quality criteria set forth in Section 93.6. Paragraph (a) of that section states as follows:

> Water may not contain substances attributable to point or nonpoint source waste discharges in concentration or amounts sufficient to be inimical or harmful to the water uses to be protected or to human, animal, plant or aquatic life.

25 Pa. Code §93.6(b). In addition, the Fish and Boat Code, which we have held is applicable to this proceeding, provides as follows:

> No person, regardless of intent, shall...
>
> (2) Allow any substance, deleterious, destructive or poisonous to fish, to be turned into or allowed to run, flow, wash or be emptied into any waters within or bordering on this Commonwealth.

30 Pa. C.S.A. §2504.

Sediment deposition already occurs on the bottom of the Susquehanna River and the Conodoguinet Creek, and neither the Fish Commission nor the Department produced evidence that the small increase in temporary sediment deposition attributable to the Project will be deleterious

to fish and other aquatic life. Rickalon Hoopes, a fisheries biologist, presented testimony on behalf of the Fish Commission. Although Mr. Hoopes was of the opinion that increased sedimentation would be harmful to fish, and particularly smallmouth bass, in the area of the Project, his opinions were of a general nature and indicated an unfamiliarity with the actual Project design and proposed mitigation measures. Mr. Hoopes had done no quantified studies to support his conclusions that increased sedimentation from the Project would be harmful to fish in the Susquehanna River or Conodoguinet Creek. For these reasons, we find Mr. Hoopes' testimony to be of little help in determining the impact of sedimentation on fish as a result of the Project.

Robert Schott, a water pollution biologist with the Department, also presented testimony regarding the impact of sedimentation on the aquatic community in the Conodoguinet Creek and Susquehanna River. Mr. Schott testified that it was his opinion to a reasonable degree of scientific certainty that sediment being deposited on the substrate "will smother the substrate, filling in the substrate," producing a "less than desirable habitat for macroinvertebrates colonization." (T. 2712) Moreover, sedimentation can have a deleterious effect on spawning fish and eggs, macroinvertebrates, and benthic organisms. However, this depends on the degree of sedimentation. (F.F. 41) The Department produced no evidence that the small increase in temporary sediment deposition which will occur as a result of the Project will result in the condition described by Mr. Schott or be to such a degree as to be deleterious to spawning fish, eggs, and other aquatic life.

In contrast, the City produced evidence that little sediment build-up would occur as a result of the Project. A study performed by Acres in 1986 showed that very little sediment had built up as a result of an existing dam located downstream of the proposed dam. The report found that the frequent flushing action of the Susquehanna River prevented sediment build-up. (F.F. 44) The

results of this study were included in the City's FERC application. Additional studies in 1987 and 1988 confirmed the results of the 1986 study. (F.F. 43)

In addition, the same result has been found at other dams in the vicinity of the proposed Project. York Haven Dam, ten miles downstream of Harrisburg, and Conowingo Dam, eighty miles downstream of Harrisburg, both on the Susquehanna River, have experienced very little sediment build-up. Photographs of Sunbury Dam, sixty miles upstream of Harrisburg on the Susquehanna River, also show little sediment build-up. (F.F. 45)

Based on the evidence in the record, we find that the temporary increase in sediment deposition on the floor of the Susquehanna River and Conodoguinet Creek which will occur as a result of the Project will not be harmful or deleterious to fish or other aquatic life.

Dissolved Oxygen

A second reason given by the Department for denying the City's certification request was that the City failed to demonstrate that the Project would not cause violations of dissolved oxygen levels in the Susquehanna River and Conodoguinet Creek. Pursuant to Pennsylvania's water quality standards, dissolved oxygen levels may not go below a minimum daily average of 5 milligrams per liter ("mg/l") and an instantaneous minimum of 4 mg/l. 25 Pa. Code §93.7. Adequate levels of dissolved oxygen are necessary for the maintenance of aquatic life. (F.F. 51)

Violations of dissolved oxygen levels currently occur in the Conodoguinet Creek. The record indicates that these violations are the result of organic loadings and nutrient enrichment caused primarily by discharges from sewage treatment plants located along the Conodoguinet Creek upstream of its confluence with the Susquehanna River. (F. F. 47) The discharges from the sewage treatment plants contain phosphorous, a nutrient which contributes to excessive plant growth.

Excessive plant growth places a higher oxygen demand on the river and creek. The most critical period for dissolved oxygen occurs early in the morning during the summer months. (F.F. 50)

In its Post-Hearing Brief, the Department argues that the dissolved oxygen violations in the Conodoguinet Creek are the result of impoundments along the creek. However, the City's dissolved oxygen measurements revealed low dissolved oxygen levels to be occurring in areas of the creek other than just the impounded areas. (T. 3388) Moreover, the testimony of the Department's water pollution biologist Robert Schott confirmed that discharges from the sewage treatment plants contribute to the dissolved oxygen problem in the Conodoguinet Creek. (T. 2776, 2836) In fact, Mr. Schott had recommended lowering the phosphorous limits for two sewage treatment plants along the creek and stated that all of the sewage treatment plants discharging into the Conodoguinet Creek contributed phosphorous loads which should be subject to stricter controls. (T. 2923-24)

Acres conducted modeling of the Conodoguinet Creek to predict post-Project dissolved oxygen levels. For this task, Acres selected the QUAL2E model, which is a model developed for the U.S. Environmental Protection Agency to study the impact of wasteloads on receiving streams. (F.F. 53) Acres' modeling concluded as follows: (1) With the existing dissolved oxygen violations in the Conodoguinet Creek, there are likely to be violations of dissolved oxygen levels in the Conodoguinet Creek after construction of the Project; (2) If the existing dissolved oxygen violations in the Conodoguinet Creek are corrected, the Project will not result in any violations of dissolved oxygen standards. (F.F. 55, 56) To correct the existing dissolved oxygen problems in the Conodoguinet Creek, the City has proposed a number of mitigation measures. These include lowering the phosphorous limits for the sewage treatment plants located along the Conodoguinet Creek, placing buffer strips along the stream bank to collect sediment and fertilizers which may

contain phosphorous, artificial aeration of the water during low flow conditions, flow augmentation to dilute the water, diversion of one sewage treatment plant's discharges from the Conodoguinet Creek to the Susquehanna River, and modification of habitat in certain sections of the creek to prevent plant growth. (F.F. 77, 79)

The Department's Robert Schott also measured violations of dissolved oxygen levels along the West Shore of the Susquehanna River just below its confluence with the Conodoguinet Creek. (T. 2845) Mr. Schott admitted that these violations were the result of water entering the river from the Conodoguinet Creek. (T. 2845-46) Acres also conducted modeling to predict post-Project dissolved oxygen levels in the Susquehanna River. For this, Acres used the Streeter-Phelps model, an equation which allows one to predict dissolved oxygen levels by taking into account various parameters which affect the level of dissolved oxygen.[11] Acres' modeling predicted no violations of dissolved oxygen levels as a result of the Project. (F.F. 65) However, in conducting this modeling for the Susquehanna River, Acres acted upon the assumption that existing dissolved oxygen violations in the Conodoguinet Creek would be corrected. Therefore, Acres' analysis did not consider the effect of the Conodoguinet Creek, with its existing dissolved oxygen deficiencies, flowing into the Susquehanna River. Dr. Dennis Ford, who reviewed Acres' modeling for the City following the Department's denial of certification and who conducted further modeling on behalf of the City, admitted that dissolved oxygen violations would occur in the Susquehanna River,

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[11]The City asserts that it was the Department's idea to use this model for predicting dissolved oxygen levels. However, the evidence indicates that, while the Department recommended using the Streeter-Phelps model for analyzing waste assimilation, it did not instruct the City to use any particular model for analyzing the effects on dissolved oxygen from hydraulic changes. (F.F. 64)

particularly along the West Shore of the river, if dissolved oxygen problems continue to exist in the Conodoguinet Creek. (T. 3322)

The final conclusion reached by the City as a result of the modeling is that no dissolved oxygen violations will occur in either the Conodoguinet Creek or Susquehanna River following construction of the Project if the mitigation measures proposed by the City are implemented.

Both the Fish Commission and the Department challenge the conclusions reached by the City with respect to the Project's impact on dissolved oxygen levels. To challenge the City's findings, the Fish Commission presented the testimony of John Arway, a fisheries biologist. In Mr. Arway's opinion, the Project will cause violations of dissolved oxygen standards which will be deleterious to fish. However, Mr. Arway testified that he did not consider the standards for dissolved oxygen set forth in 25 Pa. Code Chapter 93 to be sufficiently stringent. His basis for finding the City's modeling to be faulty was because it did not apply a standard for dissolved oxygen more stringent than the one in the regulations. (F.F. 71) Mr. Arway could not state whether it was the position of the Fish Commission that higher dissolved oxygen standards were necessary for the protection of fish and other aquatic life. (Fish Commission Statement No. 2, p. 2625) He admitted that the Fish Commission has never petitioned the Department to raise the dissolved oxygen standards set forth in the regulations. Nor has the Fish Commission challenged the existing dissolved oxygen standard in this appeal. Because the Fish Commission has not demonstrated that the City's Project should be subject to a higher standard for dissolved oxygen than that set forth in the regulations, we assign little weight to Mr. Arway's testimony.

The Department raises two challenges to the City's findings and proposed mitigation plan. First the Department disputes the City's dissolved oxygen modeling. Second, the Department

challenges the City's proposal to lower the phosphorous limits in the permits held by the sewage treatment plants.

The Department contends that the City's modeling was faulty and, therefore, any conclusions drawn therefrom are unreliable. The Department contends that the City's modeling was faulty for the following reasons: (1) The City did not demonstrate that water passing through the dam at critical summer low flow periods will not have lower dissolved oxygen levels than under existing conditions; (2) The City's modeling did not account for loss of reaeration due to the lowering of the existing Dock Street Dam; (3) The City's modeling utilized improper assumptions about water velocity; (4) The City's modeling did not consider the impact of combined sewer overflow discharges on dissolved oxygen. We find each of these allegations to be without merit for the reasons set forth below.

First, the Department contends that the City's predictions for dissolved oxygen levels upstream of the dam in the Conodoguinet Creek are incorrect and, therefore, this affects the accuracy of its dissolved oxygen modeling in the Susquehanna River downstream of the dam. The basis for the Department's position is its contention that the data relied upon by the City for its upstream modeling is inaccurate. Specifically, the Department disputes the data relied upon by Dr. Ford . The Department argues that Dr. Ford relied on data which was unrepresentative, that his modeling predictions were inconsistent with actual measurements taken by the Department, and that his assumptions regarding light penetration were not accurate.

Before addressing the Department's challenges to Dr. Ford's modeling, we note that the Department did not challenge the modeling done by Acres for the Conodoguinet Creek. (Department's Post-Hearing Brief, p. 67) The Department states that the Acres study was consistent

with the analysis and conclusions reached by the Department's water pollution biologist Robert Schott. (Id.) It is this study, and not Dr. Ford's study, which was reviewed by the Department prior to its denial of certification. Secondly, although the Department contends that Dr. Ford's study disagreed with the Acres study, we do not reach this conclusion based on the record. Rather, while Dr. Ford's study extended further upstream than Acres', the two studies reached similar conclusions with respect to dissolved oxygen violations in the Conodoguinet Creek. Because the two studies reach similar conclusions and the Department has acknowledged that the Acres study is consistent with the analysis and conclusions of the Department's own water pollution biologist, we ascribe little weight to the Department's argument that Dr. Ford's modeling was inaccurate.

The Department argues that the data relied on by Dr. Ford was not representative of critical conditions in the Conodoguinet Creek. The data relied upon by Dr. Ford came from a July 1988 survey. (T. 3388)[12] Flow in the Conodoguinet Creek during this time was approximately 120 to 125 cfs. (T. 3312) Flows below 2000 cfs are considered to constitute "low flow conditions". (City Statement No. 2, p. 14) Because the flow in July 1988 was substantially lower than 2000 cfs, we do not agree with the Department's contention that the data is not representative of critical low flow conditions.

The Department also argues that Dr. Ford's modeling failed to accurately portray actual conditions in the Conodoguinet Creek. The basis for the Department's argument is that measurements taken by Robert Schott on July 28 and 29, 1987 actually showed higher levels of

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[12]City Exhibit No. 58 is a table prepared under Dr. Ford's direction which summarizes the dissolved oxygen measurements from surveys conducted in July 1988, September 1989, and December 1989. However, Dr. Ford testified on cross-examination that he did not use the data from the September and December 1989 studies for his modeling. (T. 3345, 3348)

dissolved oxygen than what was predicted by Dr. Ford's modeling. However, we do not see this as a basis for discounting all of Dr. Ford's modeling. In fact, this provides support for the argument that Dr. Ford's analysis provided a conservative prediction of conditions in the Conodoguinet Creek during critical low flow periods.

The third basis on which the Department disputes Dr. Ford's modeling concerns Dr. Ford's assumptions regarding light penetration. The Department contends that Dr. Ford underestimated the amount of light which will penetrate the lower three mile stretch of the Conodoguinet Creek which will become impounded as a result of the Project. The amount of light penetration is an important factor since it affects plant growth, which places a demand on dissolved oxygen levels. Whereas Dr. Ford concluded that light penetration in the impounded area would be limited, the Department's Robert Schott determined that there would be adequate sunlight to promote plant growth. The basis for their difference of opinion concerns the depth they predict the impounded area to be. We note, first of all, that Dr. Ford testified, not that the depth of the impounded area would preclude light penetration, but only that it would limit the amount of light penetrating the water. (T. 2316-17) Therefore, his modeling did not assume there would be zero light penetration. Second, the difference in each witness' prediction regarding the depth of the impounded area is not that great: Mr. Schott estimated the depth will be no more than ten to eleven feet, while Dr. Ford estimated it to be fourteen feet. (T. 2710, 3388) The Department has not demonstrated that this is a great enough difference in depth to cause Dr. Ford's modeling to be inaccurate. Moreover, we must accept Dr. Ford's estimate as being the more accurate of the two. Mr. Schott's estimate was based on a general principle taken from a book on limnology, which is the study of lakes. (T. 2896) In contrast, Dr. Ford's estimate was based on reservoir data. (T. 3325) Based on Dr. Ford's experience, reservoirs

generally do not follow classical lake limnology. (T. 3325) Furthermore, whereas Mr. Schott discussed the method by which photic zone depth is measured through use of an instrument known as a "Secchi disk," he admitted that he had not done such a measurement in the Conodoguinet Creek. (T. 2897-98) For these reasons, we do not agree with the Department's criticisms of Dr. Ford's modeling.

The second criticism which the Department stated with respect to the City's dissolved oxygen modeling was that it failed to account for the loss of reaeration which would occur as a result of lowering the existing Dock Street Dam. The record does not support this argument . Rex Tolman, Acres' senior water resources environmental engineer, testified that Acres' modeling assumed there would be no reaeration from the existing Dock Street Dam. (T. 2029-30) Therefore, we find no merit to the Department's assertion that Acres failed to account for the loss of reaeration.

The third criticism voiced by the Department with respect to the City's modeling is that the downstream modeling utilized improper assumptions concerning water velocity. The basis for the Department's criticism is its contention that the City's use of a model known as the "HEC II model" was improper. The HEC II model is discussed under "Surface Water" because this is the model used by the City to predict the rise in surface elevation resulting from the Project. The Department points out the limitations of the HEC II model and asserts there is no basis in the record for its reliability. As discussed subsequently, the HEC II model is subject to certain limitations, namely that it is a one-dimensional model and assumes a constant velocity of flow. However, based on the testimony of the City's experts, whom we find to be extremely qualified to evaluate the accuracy of the HEC II model, we accept it as being a reasonably reliable model. The Department presented no compelling

evidence to conclude otherwise. Therefore, we do not accept the Department's criticism of the HEC II model as being unreliable.

One final criticism made by the Department with respect to the City's modeling is that it did not account for the effect of discharges from combined sewer overflows into the Susquehanna River.[13] Acres' former Director of Environmental Resources and Manager of Hydrowater Resource Projects, Kevin Young, admitted that its modeling prior to the denial of certification did not include discharges from combined sewer overflows. (T. 1515) This was due to the fact that these discharges were not expected to have a large impact on water quality since combined sewer overflows discharge to the river only during heavy rain events and would, therefore, be diluted. (City Statement No. 9, p. 33; T. 1472, 1515, 1517) However, discharges from combined sewer overflows were incorporated into Acres' modeling conducted after the Department's denial of certification. (T. 1516; City Statement No. 9, p. 31-33) This modeling concluded that there would be compliance with the dissolved oxygen standards. (City Statement No. 9, 34-35)

Based on the above, we find that any inaccuracies in the City's earlier modeling were corrected in subsequent modeling. Therefore, we accept the results of the City's dissolved oxygen modeling as being an accurate representation of what will occur following construction of the Project.

The next question we must address is whether the Project itself will cause dissolved oxygen violations to occur either in the impounded areas upstream of the dam or in the Susquehanna River

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[13]"Combined sewer overflows" discharge stormwater and sewer water from the City's combined sewer system to the Susquehanna River during heavy flow events when the capacity of the sewer lines is exceeded. Discharges from the combined sewer overflows are discussed in more detail later in this Adjudication.

downstream of the dam. The Department and Fish Commission assert that the Project will result in such violations, whereas the City contends that it is the currently existing dissolved oxygen violations in the Conodoguinet Creek which are the problem and not the Project. After an exhaustive search of the record, we find there is insufficient evidence to support a conclusion that the Project will cause dissolved oxygen violations to occur.

The Fish Commission's John Arway testified that the Project will cause violations of dissolved oxygen standards which will be deleterious to fish. (Fish Commission Statement No. 2, p. 6) We have already noted above that Mr. Arway applied a more stringent standard for dissolved oxygen than that which is set forth in the regulations and, therefore, his testimony is of limited value. However, it is the opinion of both Mr. Arway and the Department's Robert Schott that slower velocities of flow in impoundments can result in lowered dissolved oxygen levels. (Fish Commission Statement No.2, p. 7; T. 2684) This is because slower, deeper water allows sediment to discharge onto the substrate, producing an optimal condition for plant growth. (T. 2684) As noted earlier in this discussion, plant growth places an increased demand on dissolved oxygen.

However, Mr. Schott agreed that if the Conodoguinet Creek were currently in compliance with the dissolved oxygen standards, the Project would not cause any dissolved oxygen violations to occur. (T. 2148, 2909)[14] This is further evidence that it is not the Project which will result in dissolved oxygen violations in the Susquehanna River but the current condition of the Conodoguinet

[14]The record contains no testimony from the Fish Commission in response to this issue. However, Mr. Arway acknowledged that mitigation measures played a role in whether dissolved oxygen violations were likely to occur. (Fish Commission Statement No. 2, p. 6-7)

Creek which is the major contributor to any dissolved oxygen violations which may occur in the river.

A comparison of the proposed Project with the York Haven Dam provides further support for the conclusion that the Project will not cause dissolved oxygen violations to occur. The York Haven Dam is located on the Susquehanna River ten miles downstream of the site of the proposed Harrisburg dam. Because of its location immediately downstream of the proposed dam, York Haven experiences similar flow patterns, water quality conditions, nutrient and organic loadings, and meteorological conditions as would the proposed Harrisburg dam and, therefore, provides a good analogy for conditions which are likely to occur with the proposed dam. York Haven also serves as a conservative analogy because it is affected by certain conditions which would not affect the Harrisburg dam. First, because it is slightly deeper than the proposed dam would be and is an overflow dam, as opposed to a gated dam, it has a tendency to experience more stratification and less flushing than would the Harrisburg dam. Second, York Haven receives thermal discharges from Three Mile Island. These factors would tend to contribute to dissolved oxygen violations. However, sampling done at York Haven from 1974 to 1988 revealed that, of 3015 samples taken, only six showed violations of dissolved oxygen levels, and these six violations occurred in 1974 and 1977 when sewage treatment plants along the river were upgrading their treatment system. (F.F. 76) Based on this data, it is unlikely that operation of the proposed Harrisburg Project will result in dissolved oxygen violations.

However, because the impounded area upstream of the Project will be subject to the same water quality conditions which currently exist in the Conodoguinet Creek, the question arises as to whether this water constitutes a discharge by virtue of its passing through the dam. The Clean Water

Act defines a "discharge" as "any addition of any pollutant to navigable waters from a point source." 33 U.S.C.A. §1362(12) and (16). The federal Environmental Protection Agency ("EPA") has interpreted this language to mean that there is such an addition only if the point source itself physically introduces a pollutant into the water from the outside world. The Court of Appeals for the District of Columbia Circuit has held that this interpretation is binding so that the release of polluted water to another stream over a dam is not a discharge because the dam does nothing to introduce the pollutant into water from the outside world. National Wildlife Federation v. Gorsuch, 693 F.2d 156, 175 (D.C. Cir. 1982).[15]

In the present case, dissolved oxygen violations currently exist in the Conodoguinet Creek. Water from the Conodoguinet Creek currently flows into the Susquehanna River and has resulted in dissolved oxygen violations occurring in the Susquehanna River. Polluted water is not being diverted from the Conodoguinet Creek to the Susquehanna River since this water already enters the river. Therefore, based on the EPA's interpretation of "discharge," as affirmed by the Court of Appeals for the District of Columbia Circuit, the passage of this water through the Project does not constitute a discharge of a pollutant.

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[15]In Del-Aware Unlimited, Inc. et al. v DER et al., 1984 EHB 178, former Board Member, Administrative Law Judge Edward Gerjuoy, addressed the question of whether the diversion of water from a polluted river to two unpolluted streams constituted a "discharge of a pollutant" within the meaning of the Clean Water Act. Judge Gerjuoy concluded that this action did constitute a discharge of pollutants since the diverted water would potentially add pollutants to the two streams and since this water would not otherwise reach the streams without the act of diverting it. The Del-Aware opinion may be distinguished from the present case since in Del-Aware the stream diversion created a point source which physically introduced pollutants from the outside world.

Based on the evidence in the record, we find that the Project will not cause a "discharge" which would provide a basis for denying certification and, further, that the Project will not cause a violation of dissolved oxygen standards. Therefore, we find that the Department did not act within its authority under Section 401(a) of the Clean Water Act in denying certification to the City based on dissolved oxygen violations in the Conodoguinet Creek and the Susquehanna River.

As a final note with respect to dissolved oxygen levels, we must address the mitigation measures proposed by the City. One of the measures proposed by the City to correct the existing dissolved oxygen problems in the Conodoguinet Creek is the lowering of the phosphorous limits in the NPDES permits of the sewage treatment plants which discharge to the creek. While the evidence indicates that these limits should be lowered in order to correct existing problems in the creek, that is not something which we may order in this proceeding. First and foremost, these permits are final actions of the Department which may not be challenged in this proceeding. Grimaud, et al. v. DER, 1994 EHB 303, 310-11 (Where a final permit has been issued and no timely appeal has been taken therefrom, the doctrine of administrative finality bars subsequent collateral attacks on the permit.) Secondly, it is not within the scope of the Board's authority to order the Department to revise permit conditions where the permits in question are not the subject of the appeal. Therefore, we reject this proposal as being a feasible method to limit the extent of dissolved oxygen violations in the Conodoguinet Creek. However, the remaining mitigation measures proposed by the City should be adopted in conjunction with operation of the Project.

Surface Water

While the Department raised a concern regarding flooding in its letter denying the requested certification, we find that the record does not demonstrate that flooding will occur as a result of the Project and that this concern is not a proper basis for rejecting the City's request.

To predict the impact of the Project on surface water elevation, the City's consultants conducted surface water modeling, using the HEC II model. The HEC II model is a surface water profile computer program developed by the U.S. Army Corps of Engineers. It is used to make predictions about surface water elevations in an open channel at a given flow. (F.F. 80)

Initial HEC II modeling was conducted along the Susquehanna River in 1986 and 1987 for the Federal Emergency Management Agency ("FEMA"). The purpose of the modeling was to calculate surface water elevations in the event of a 100-year flood. (F.F. 81) Acres used the FEMA information to make a comparison of pre and post-Project conditions. In addition, Acres conducted its own HEC II modeling, the results of which were included in its license application. The results of Acres' April 1987 modeling were sent to FEMA. FEMA reviewed the results and, in November 1987, concluded that the Project would not increase surface water elevations along the Susquehanna River. (F.F. 83)

The Department disputes Acres' use of the HEC II model because it is a one-dimensional model which assumes a constant velocity of flow in one direction downstream. The Department also challenges Acres' calibration of the model to the 100-year flood flows. However, the results of Acres' HEC II modeling were accepted by FEMA as representing predicted post-Project surface water elevations. In addition, FEMA approved Acres' calibration of the model to the 100-year flood flows. Moreover, while the Department was critical of the HEC II model for the above-stated

reasons, it did not suggest a model which it believed would provide more accurate results. Nor did it demonstrate that, despite the limitations of the HEC II model, this model did not provide results which are reasonably representative of expected surface water elevations following construction of the Project.

In conclusion, because the record does not demonstrate that flooding will occur as a result of the Project, we find that the Department did not exercise proper discretion when it denied Section 401 certification to the City on the basis of the Project's impact on surface water elevation.

Raised Groundwater Levels

Another basis on which the Department denied certification was the impact which the Project will have on groundwater levels. The Department contends that a rise in groundwater levels will impact sewage infrastructure and subsurface sites of contamination which could result in a discharge of pollutants to the Susquehanna River. The Department points particularly to the possibility of a discharge from the City's combined sewer flow facilities, the City's sewage infrastructure, and contamination from the Enola railyards as being "discharges" caused by the proposed facility as a result of rising water levels.

It is not disputed that the Project will result in raised groundwater levels in the City of Harrisburg and surrounding communities. (F.F. 86) The testimony of the City's experts is, however, that any such rise in groundwater levels will not result in a "discharge" because the groundwater modeling indicates that the rise in water levels will not significantly affect existing facilities and that if any such facilities were affected so as to result in a discharge, the mitigation measures proposed by the City would prevent any such discharge.

Our review of the evidence concerning the effect of rising groundwater levels based on the City's groundwater modeling and the City's proposed mitigation measures leads the Board to conclude that any such discharge is preventable if those mitigation measures are properly conceived and properly implemented as a result of the final design. Section 401(a) requires a certification with respect to any discharge which may result from the construction or operation of the Project but requires a certification that "any such discharge" will comply with the specified provisions of the Clean Water Act. While discharges from the facilities pointed to by the Department as a result of rising water levels may be prevented by the City's proposed mitigation measures, the City's groundwater modeling may not be sufficiently predictive of the increase in water levels, and the City's mitigation measures, even when finally designed, may not prevent all discharges as a result of the rise in groundwater levels which will result from the Project.

However, the courts have recognized that every licensing or permitting decision may not involve perfect information. As the Court of Appeals for the District of Columbia Circuit held in Department of Interior v. FERC, 952 F.2d 538 (D.C. Cir. 1992), "Virtually every [permitting or licensing] decision must be made under some uncertainty; the question is whether [the agency's] response, given uncertainty, is supported by substantial evidence and not arbitrary and capricious." Id. at 546[16] In addition, the District Court for the Northern District of Indiana has noted that the regulations which govern the issuance of a permit for the discharge of dredged or fill material into navigable waters under Section 404 of the Clean Water Act, 33 U.S.C.A. §1344, state, "The decision

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[16]In Department of Interior, the Court upheld FERC's issuance of licenses for hydroelectric power projects over petitioners' protest that additional studies were necessary to assess dissolved oxygen levels and fish migration. In so holding, the Court stated that FERC is not required "to have perfect information before it takes any action." 952 F.2d at 546.

whether to issue a permit will be based on an evaluation of the probable impacts...of the proposed activity" and the expected benefits should be weighed against the "reasonably foreseeable detriments." O'Connor v. U.S. Army Corps of Engineers, 801 F. Supp. 185, 190 (N.D. Ind. 1992) (citing 33 C.F.R. §320.4(a)) (Emphasis added)[17] Finally, in Bangor Hydro-Electric Co. v. FERC, 78 F.3d 659 (D.C. Cir. 1996), the Court of Appeals for the District of Columbia Circuit refused to uphold a condition which the U.S. Department of Interior had sought to impose in a FERC license for a hydroelectric power project, where the Department's determination of the need for the condition was based merely on a prediction and not on substantial evidence.

Based on the evidence in the record, we believe that the expected rise in groundwater levels from the Project is not likely to result in a discharge. However, if the Department believes that such a discharge is probable, it may address this in its conditions to the certification, as discussed subsequently in this Adjudication.

To predict the Project's impact on groundwater levels, Acres conducted studies, which included groundwater modeling, in each of the following years: 1986, 1987, and 1988. The 1986 and 1987 studies examined both the West Shore and East Shore of the Susquehanna River. The 1989 study, released in 1990, addressed only the East Shore.

Acres' West Shore modeling concluded that the predicted rise in groundwater levels on the West Shore would not significantly impact any existing facilities. (F.F. 93) The Department is critical of Acres' West Shore modeling for a number of reasons. First, the Department challenges

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[17]Section 404 of the Clean Water Act authorizes the U.S. Army Corps of Engineers to issue permits for the discharge of dredged or fill material into navigable waters at specific disposal sites. As with licensing for hydroelectric power projects, Section 404 permits require state certification under Section 401(a).

Acres' use of an analytical model for the West Shore. There are two types of models which may be used to describe a groundwater flow system: analytical model and numerical model. An analytical model is a more simplified equation, in which calculations can be done manually. An analytical model is used where the properties and geometry of an aquifer are uniform. (City Statement No. 5, p. 5) For more complex aquifers in which the properties and geometry are not uniform and where conditions are more varied, a numerical model is required to predict groundwater flow. A numerical model involves a set of algebraic equations which must be solved through the use of a computer. (City Statement No. 5, p. 5)

The Department argues that the City presented no justification for use of the analytical model for the West Shore. Based on this, the Department asserts that the City's West Shore modeling does not meet the test for the admission of scientific evidence set forth in Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923). Under the Frye standard, scientific evidence is admissible if the process by which the evidence was developed is accepted within the scientific field in which it belongs. See Commonwealth v. Nazarovitch, 496 Pa. 97, 101, 436 A.2d 170, 172 (1981).[18] However, the Department's assertion that the City presented no basis for use of the analytical model for the West Shore modeling simply has no merit. Bruce Bennett, a senior hydrogeologist with Acres, presented clear and detailed testimony regarding the differences between the two modeling approaches, descriptions of the groundwater systems on the East and West Shore, and the reasons one model was

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[18]The U.S. Supreme Court overturned Frye in Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993), holding that the admissibility of scientific evidence in a federal trial is governed by Rules 402 and 702 of the Federal Rules of Evidence. However, Frye remains the standard for the admissibility of scientific evidence in this Commonwealth. See Commonwealth v. Crews, 536 Pa. 508, 640 A.2d 395 (1994); Al Hamilton Contracting Co. v. DER, 1993 EHB 1651, 1694, n. 11.

selected over the other for each system. Mr. Bennett was accepted by the Board as having particular expertise in groundwater modeling (T. 1590), and his educational and employment background indicates an extensive knowledge of groundwater flow models and their use. Mr. Bennett presented clear and convincing testimony that an analytical model was the appropriate model for the West Shore groundwater system and the Department has presented no basis for reaching a different conclusion. Therefore, we reject the Department's argument that the City's use of an analytical model for the West Shore modeling fails to meet the Frye test.

The Department next asserts that the use of a single cross-section to predict groundwater increases along the eight-mile impoundment for the West Shore was inappropriate. It is the Department's assertion that "[t]he City used a cross-section at [borehole] well locations 4A, 4B, and 4C in Wormleysburg, less than 1 mile from the proposed dam, applied the analytical solution to that cross-section, and extrapolated those results for the full eight-mile impounded reach of the Susquehanna River." (Department Post-Hearing Brief, p. 141) In support of its assertion, the Department cites to City Exhibit 31C, Appendix A, Table 4, which is a portion of the City's license application. While Table 4 lists results of analytical modeling for the West Shore, what the Department asserts regarding the extrapolation of results from a single cross-section is not apparent from this table.

Mr. Bennett, however, did testify that Acres chose to study one cross-section as being representative of other cross-sections along the West Shore. The cross-section which was chosen was the section located along the alignment of borehole wells 4A, 4B, and 4C. Acres used the borehole information from these wells, in addition to other geologic and topographic information, to define the extent of the aquifer in this area. (City Statement No. 5, p. 21) Mr. Bennett explained

that due to the small width of the aquifer along the West Shore (800 feet), one could make the assumption that the aquifer properties within this narrow zone were fairly uniform. (City Statement No. 5, p. 20; T. 3496, 3502) The Department challenges this assumption on the basis that the underlying geology of the West Shore is not uniform. The Department points to the testimony of Charles Cravotta of the U.S. Geologic Survey ("USGS"), who stated the geologic conditions on the West Shore are not uniform. (T. 3167) However, Mr. Cravotta did not explain the extent or degree of difference in the geologic conditions for the West Shore or whether this would make a difference in the modeling results. The Department also points to the testimony of Thomas Gwozdek of Acres that the borehole data did not show the soil to be uniform. (T. 1101) Again, however, there is no explanation of the degree of difference or whether it would affect the results of the modeling. In fact, Mr. Bennett testified that the aquifer properties along the West Shore may, in actuality, vary somewhat. However, in his opinion, modeling the aquifer numerically by dividing it into more individual units and assigning those units more discrete values would not produce any significant change in the results. (City Statement No. 5, p. 20) Again, we accept Mr. Bennett's testimony as being credible and convincing. He demonstrated a thorough understanding of the process of groundwater modeling and the factors which affect it. The Department presented no evidence which leads us to conclude otherwise.[19]

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[19]The Department makes much of the fact that Mr. Bennett's conclusion regarding the predicted rise in groundwater levels for the West Shore was based on an assessment performed by Thomas Gwozdek and his team at Acres, and not by Mr. Bennett. (T. 1683-84) However, it is clear from Mr. Bennett's testimony that he reviewed the work done by Mr. Gwozdek and other individuals at Acres and had a thorough understanding of it. Moroever, as noted earlier, an expert's opinion may be based on tests performed by others and on information the expert gains from the testimony of other witnesses. Commonwealth v. Al Hamilton Contracting Co., 383 Pa. Super. 429, 557 A.2d 15, 17 (1989), alloc. denied, __ Pa. __, 565 A.2d 1165 (1989).

Moreover, although Acres chose the cross-section along the well 4A, B, and C cluster as being representative of the aquifer for the entire West Shore, this does not mean that Acres ignored data for the rest of the West Shore. When asked what information was used to model the West Shore, Mr. Bennett responded that it consisted of "borehole information [Acres] obtained from a number of wells drilled along the West Shore" and "regional geologic and topographic information for the area." (City Statement No. 5, p. 20)

The Department also challenges the City's modeling for the West Shore because it did not include weathered bedrock as a factor. There is no dispute that weathered bedrock does exist on the West Shore. Mr. Bennett testified that Acres could have included it as a factor, but it would not have produced a "big change" in the final result. (T. 1683) Although the Department raised this as an issue, it did not demonstrate that the City's failure to include weathered bedrock in its modeling for the West Shore would have made a significant difference in the modeling results. Therefore, we cannot conclude that the failure of the model to include weathered bedrock as a factor results in the model being faulty.

The Department also contends that the City failed to calibrate the West Shore model. A model is calibrated when it is able to replicate existing conditions at the site. (City Statement No. 5, p. 5-6) This involves trial and error and adjustment of the parameters of the model until it is able to reproduce existing conditions. (City Statement No. 5, p. 6-7) The purpose of calibration is to insure that the model will produce accurate results.

Mr. Bennett testified regarding Acres' calibration of the modeling for both shores of the Susquehanna River. Once the models were calibrated, Acres changed the conditions for the model in order to predict groundwater flow under post-Project conditions. (City Statement No. 5, p. 15)

Charles Cravotta of the USGS also reviewed Acres' West Shore modeling. Mr. Cravotta was critical of Acres' report of the modeling because it did not contain all of the assumptions on which the model was based. As a result, when Mr. Cravotta used the equation and input values contained in Acres' report, he was unable to reproduce the results contained in the report. Mr. Bennett of Acres agreed that what Acres had produced in its report was difficult for anyone outside Acres to interpret. (T. 1685) While we understand that Acres' report of its West Shore modeling may not have been as clear as it should have been, the evidence in the record demonstrates that the modeling itself was calibrated and reviewed for accuracy.

We also note that the original calculations for the 1987 West Shore modeling were performed by a former employee of Acres and could not be located by Acres for this proceeding. However, by taking the data for the 1987 study and inserting it into the model, Mr. Bennett was able to reproduce the same results which were contained in the 1987 report. (T. 1684-85, 1710-11)

A final criticism voiced by the Department with respect to the West Shore modeling is that there is no evidence that any groundwater modeling was performed for the Conodoguinet Creek. The City does not respond to this argument in its Reply Brief. Nor is there any testimony in the record as to whether groundwater modeling was done for the areas adjacent to the Conodoguinet Creek or, for that matter, whether the Department required further modeling for this area. The record does indicate that the consulting firm of Brinjac, Kambic and Associates conducted an analysis of the effects of raised groundwater on sewage structures along the Conodoguinet and that this analysis was based on groundwater predictions made by Acres.[20] From this, we can infer that Acres'

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[20]The impact of raised groundwater levels on sewage structures is discussed in detail later in this Adjudication.

modeling did include the areas along the Conodoguinet Creek in its analysis. Therefore, we do not agree with the Department's assertion that Acres conducted no groundwater analysis of the impact of the Project on areas adjacent to the Conodoguinet Creek.

The City, through its consultant Acres, also conducted groundwater modeling for the East Shore of the Susquehanna River. Because the East Shore is a more complex system, Acres selected a numerical model, Modflow, which is used by the USGS.

The Department is critical of Acres' East Shore modeling for a number of reasons. First, the Department asserts that the modeling contains a number of errors and false assumptions. The Department's assertion is based on a review of the East Shore modeling by Charles Cravotta of the USGS. The City does not dispute that the 1987 modeling did contain a number of errors. The discovery of these errors led to the 1989 modeling effort. Based on our review of the record, we find that Acres' 1989 modeling addresses each of the errors alleged by the Department in the 1987 model, with one exception.

The first error which Mr. Cravotta found in the 1987 model was that discrepancies existed between the conceptual model and the actual data. Whereas Acres' model showed no groundwater to be present in the bedrock, actual borehole data showed that groundwater was, in fact, present. In order to correct this error, Acres' 1989 modeling included the presence of groundwater in the bedrock. However, this addition resulted in no significant difference in the predicted groundwater level. (F.F. 99)

A second error in the 1987 model was that the values for hydraulic conductivity were too high. The term "hydraulic conductivity" refers to the ability of a material to transmit groundwater. The higher the value of hydraulic conductivity, the less resistance there is to the flow of

groundwater. (F.F. 101) In the 1989 model, the values for hydraulic conductivity were corrected. Again, there was no appreciable difference between the 1987 and 1989 results. (F.F. 102)

A third criticism which Mr. Cravotta had of the groundwater modeling was that it was not calibrated at high flow conditions but only low flow conditions. The City admits that the model was not calibrated to high flow conditions. Mr. Bennett testified that a problem with trying to calibrate a steady state model, such as Modflow, with a higher river condition is that groundwater and the river are not in equilibrium with one another. According to Mr. Bennett, Acres did attempt to calibrate the model under high flow conditions to address Mr. Cravotta's concern but did not find the calibration results to be satisfactory. (T. 3482-83) The Department presented no argument on this alleged deficiency in its Post-Hearing Brief. Based on this and Mr. Bennett's explanation of why the model was calibrated in the manner it was, we conclude that the calibration of the East Shore model was proper.

The next criticism which Mr. Cravotta had of the model was that it used a constant recharge rate of 2%. The problem with assuming a constant recharge rate is that the rate of recharge is not likely to be constant under actual conditions. (T. 3148) Moreover, the 1987 model did not provide any basis for why this rate was selected. (T. 3141) In Mr. Cravotta's opinion, the recharge rate is likely to be higher than 2%. (T. 3149) On rebuttal, Mr. Bennett explained that the rate of 2% was selected based on hydraulic conductivity values and the results of calibration. (T. 3485) As noted earlier, however, the hydraulic conductivity values for the 1987 model were subsequently determined to be incorrect. Therefore, any parameters based on those incorrect values must be discounted. However, the 1989 model, which corrected the values for hydraulic conductivity, was again run with a recharge rate of 2% and no appreciable difference was found between the results

of the 1987 and 1989 models. Moreover, the corrected hydraulic conductivity values used in the 1989 model also led to the selection of 2% as the appropriate recharge rate. (F.F. 111) Mr. Bennett also explained that 2% was a reasonable rate of recharge to assume for an area which is largely urban. However, in order to address Mr. Cravotta's concern that the recharge rate should be higher, the 1989 model was also run with a recharge rate of 4%. However, changing the value for the recharge rate from 2% to 4% continued to produce very similar results. (F.F. 112) Moreover, according to Mr. Bennett's analysis, although a variable recharge rate could have been used, it would not have made a significant difference. (T. 3486) Based on this and the Department's lack of any evidence to the contrary, we find that the City did not err in using a recharge rate of 2% in its East Shore modeling.

Another fault which Mr. Cravotta found with the City's 1987 East Shore modeling was that it did not contain a sensitivity analysis. A "sensitivity analysis" involves changing the values for certain parameters of a model, one parameter at a time, and then recalibrating the model through a an adjustment of the other parameters. By changing the various parameters one at a time, one is able to examine whether the model results are sensitive to a particular parameter. (F.F. 104) In order to address this concern, Acres performed a sensitivity analysis in the 1989 modeling effort. (City Statement No. 5, p. 24) Even after performing the sensitivity analysis, the modeling still produced the same results. (F.F. 105) Because the sensitivity analysis was addressed in the 1989 modeling and produced no significant changes, we find that the City properly addressed this concern.

Another criticism which Mr. Cravotta found with the 1987 modeling was that it did not include a transient analysis. With this type of analysis, transient events, such as heavy rainfall and flood waves, are incorporated into the model. (F.F. 107) Such events can have an impact on the

groundwater system. (City Statement No. 5, p. 38) In contrast, the type of model which was used by Acres for the East Shore was a steady state model. Steady state modeling predicts what is expected over the long term and reflects long-term changes in groundwater levels as a result of the proposed project. (City Statement No. 5, p 38) Mr. Bennett initially recommended to Project Manager Thomas Gwozdek that a transient analysis be performed. (City Statement No. 5, p. 39) However, according to Mr. Bennett, the decision as to whether to undertake transient modeling had been deferred as of the time of the hearing. (F.F. 108) Mr. Bennett admitted that, as a modeler, he would feel more comfortable with the modeling if it contained a transient analysis. (T. 1671)

It is the Department's contention that two types of transient events will cause an impact on groundwater levels and that these should have been factored into the modeling. The first transient event which the Department asserts will cause an impact is percolation. This involves rainfall entering the soil and the groundwater system. Because the groundwater levels will already be elevated due to the Project, the Department argues that any additional increase caused by rainfall may result both in additional impact to sewage infrastructure and in surface runoff due to reduced storage capacity of the groundwater system. The second transient event identified by the Department is the impact of increased river flow on groundwater. The Department points to the City's 1989 groundwater study which states that the elevation of the groundwater increases during times of high river flow. The City counters that Acres does not expect any significant impact on structures as a result of transient effects. (City Statement No. 5, p. 39)

Based on the testimony of both Mr. Cravotta and Mr. Bennett, we find that the City's failure to conduct a transient analysis to assess the impact of rainfall on groundwater levels in connection with the Project was in error. Although Mr. Bennett testified that Acres did not expect any

significant impact on structures as a result of transient effects, he, himself, admitted that Acres "could do some transient work" and that he would feel more comfortable with the modeling if it included a transient analysis. (T. 1671) The only reason given by Acres for not conducting a transient analysis is that the decision had "been deferred." (City Statement No. 5, p. 39)

However, we find that even though the City erred in failing to include a transient analysis in its modeling for the East Shore, this error should not have resulted in a denial of §401 certification. As noted above, Acres' modeling predicted that groundwater levels will rise as a result of the Project. Acres also predicted that increased groundwater levels would impact various structures and, therefore, proposed mitigation measures to address this situation. These measures include the lining of sewer lines to prevent infiltration and the construction of a cutoff wall.[21] The City has also proposed measures to prevent flooding. Each of these is discussed in more detail later in this Adjudication. Because the City has already proposed measures to deal with the rise in groundwater levels, its failure to incorporate a transient analysis in its modeling amounted to harmless error. Were we to remand this matter to the Department to require the City to undergo a transient analysis at this stage, it would be a fruitless exercise since the City has already proposed measures to address the effect of raised groundwater levels, whether due to rainfall or other factors. Therefore, we conclude that the failure to conduct a transient analysis does not provide a basis for denying certification to the City.

In addition to the concerns expressed by Mr. Cravotta, the Department argues that the Board should reject Mr. Bennett's testimony with respect to Acres' groundwater modeling since he was

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[21]The Department has also challenged the effectiveness of the proposed cutoff wall. This is addressed later in this Adjudication.

not the individual at Acres who actually conducted the modeling. The actual individuals who performed the modeling are no longer employed by Acres. We disagree with the Department and find that Mr. Bennett was qualified to testify with respect to the modeling done by Acres. First, although Mr. Bennett admittedly was not involved in the actual day-to-day work of the modeling, he did oversee the actual undertaking of the model and assisted and advised as necessary. In addition, he was involved in reviewing the final product. (T. 1593-94) Mr. Bennett also has an extensive background in groundwater modeling and his testimony exhibited a thorough knowledge and understanding of the process of the modeling. Moreover, Mr. Bennett performed the actual work to reproduce the West Shore calculations made by Mr. Winfield after these calculations were lost. Finally, Mr. Bennett is at least as familiar with the modeling work as Charles Cravotta, who testified for the Department. Therefore, we find Mr. Bennett to be qualified to testify as to the modeling work conducted by Acres.

We conclude from the foregoing discussion that rising groundwater levels may require that adequate mitigation measures be designed and implemented to assure that there will not be a resulting discharge from certain City and railyard facilities as described below.

Cutoff Wall

A cutoff wall and related drainage system were proposed by the City to address the effects of raised groundwater levels as a result of the Project. It is the Department's contention that the cutoff wall will not be entirely effective.

In the original plans for the Project, a cutoff wall had been planned to be in line with the axis of the dam on the East Shore of the Susquehanna River. In the 1989 study, Acres proposed extending the cutoff wall along Front Street for two to two and one-half miles upstream to Maclay

Street and then along Maclay Street. The 1989 proposal was planned in conjunction with the reconstruction of a retaining wall which currently exists along Front Street. The retaining wall supports the lower walkway and steps which exist along Front Street. The cutoff wall will be constructed below the surface of the ground. The purpose of the cutoff wall is to prevent the introduction of water from the river, due to raised water levels, into the groundwater system in the City and thereby prevent groundwater levels from rising in the City. (City Statement No. 4, p. 33-34) The City contends that the net effect of both the cutoff wall and the retaining wall will be to provide a hydraulic barrier to the flow of groundwater in order to prevent any change in post-Project groundwater elevations. (City Statement No. 4, p. 34-35) In conjunction with these proposals, the City plans to install a large subdrain behind the cutoff wall. The purpose of the subdrain is to carry groundwater from the City and convey it downstream to discharge beyond the spillway gates of the dam. (City Statement No. 4, p. 38)

The proposal for the cutoff wall and drainage system was developed by Acres. Thomas Gwozdek, Acres' Project Manager, testified as to the design, construction, and effectiveness of the proposed cutoff wall. Mr. Gwozdek holds a bachelor's degree in civil engineering and is a registered professional engineer. (City Statement No. 4, p. 1-2) The method which Acres has selected for constructing the cutoff wall involves drilling grout holes, pumping grout into the ground, and creating a "grout curtain". (City Statement No. 4, p. 37) This method has been used in dam construction since the early 1900's and has been successfully applied. (City Statement No. 4, p. 36, 37) Mr. Gwozdek worked on a dam project undertaken for American Electric Power where a grout curtain was installed, and that system showed very little sign of seepage. (City Statement No. 4, p. 36-37) In addition, this design technique has been identified and explained in numerous publications

issued by the Army Corps of Engineers and the U.S. Department of the Interior. (City Statement No. 4, p. 36) Based on Mr. Gwozdek's experience, he concluded that the installation of a cutoff wall along Front Street and Maclay Street will prevent groundwater from moving from the river to the City. (City Statement No. 4, p. 37-38)

Joseph Ellam provided expert testimony for the Department with respect to the effectiveness of the cutoff wall proposed by the City. Mr. Ellam is the director of the Department's Bureau of Dams and Waterway Management. (T. 3217) He holds a bachelor's degree in civil engineering. During the course of his career, he has reviewed a minimum of fifty cutoff wall designs. (T. 3225) However, he admitted that he has limited experience in the type of installation proposed by the City. (T. 3227) Based on his experience, it is his opinion that a cutoff wall does not completely prevent seepage or groundwater movement. (T. 3227-28) It is also his opinion that one cannot make a valid appraisal of a cutoff wall system unless there had been a very detailed investigation of the subsurface area where the wall was proposed to be built. He was aware of no such investigation having been done by the City. (T. 3228-29) Based on Mr. Ellam's testimony, the Department argues that the City's assumptions as to the effectiveness of the cutoff wall are in error.

We disagree with the Department's position. Mr. Ellam admitted that he had only limited experience with the type of cutoff wall proposed by the City. Further, he admitted on cross-examination that a properly designed and constructed cutoff wall will effectively minimize seepage. (T. 3243) In addition, Mr. Gwozdek, who has had experience with the type of cutoff wall proposed in this case, testified as to its effectiveness. Based on the evidence in the record, we conclude that the City has met its burden of demonstrating that the proposed cutoff wall is an effective means of minimizing groundwater flow.

Therefore, based on the results of the City's groundwater modeling, which incorporates the implementation of the cutoff wall and drainage system, we accept the City's predictions with respect to post-Project groundwater levels. We now turn to the various subsurface structures and areas of contamination which may be impacted by the predicted rise in groundwater levels.

Combined Sewer Overflow

The City of Harrisburg has a combined sewer system, in which stormwater and sewage flows are combined into one system. When the capacity of the sewer system is exceeded due to heavy precipitation, "combined sewer overflows" discharge the excess flow from the sewer system into the Susquehanna River. (F.F. 120) The constituents of a discharge from a combined sewer overflow will normally include pollutants. (F.F. 121)

Due to raised groundwater levels resulting from the Project, the outfalls of twelve combined sewer overflows will be either fully or partially submerged. (F.F. 122) These twelve combined sewer overflows are located on the East Shore along Front Street. The mitigation measure which the City proposes is to consolidate eleven of the affected overflows into five pump stations to lift the water above the surface elevation and pump the discharges into the river during periods of heavy rainfall. (F.F. 123) The twelfth overflow will be re-routed to discharge below the dam. (F.F. 123) In addition, bar screens will be installed on the pump stations to minimize the amount of debris entering the river. (F.F. 125) The bar screens will be cleaned and maintained by the City, which already performs such work on other pump stations currently in operation. (City Statement No. 7, 34)

Yves Pollart provided testimony on behalf of the City with respect to the mitigation measures proposed for the combined sewer overflows. Mr. Pollart is Department Manager for the

Civil/Environmental Group at Brinjac, Kambic and Associates ("Brinjac Kambic"), an engineering firm which was responsible for much of the sewer system analysis work performed for the City with respect to the Project. Mr. Pollart holds a bachelor's degree in civil engineering and a master's degree in environmental pollution control. Mr. Pollart testified that even with the consolidation of the eleven combined sewer overflows, there will be no increase in the amount of flow over that which normally occurs now with the separate overflows. Nor will the quality of the discharge change except that the bar screens could reduce the amount of debris which now flows into the river. (City Statement No. 7, p. 34-35)

Based on the evidence before us, we conclude that the City has demonstrated that the Project will cause no adverse water quality impacts from combined sewer overflows. Because the overflows currently discharge to the river during heavy rainfall events, the combination of eleven of the overflows into five pump stations which will pump to the river and the re-routing of the twelfth overflow to discharge below the dam will not result in any additional discharge to the river. Nor is there any evidence in the record that the Project will cause additional discharges from the combined sewer overflows to occur. Mr. Pollart testified that the quantity of the discharges will remain the same and there is no evidence that the Project will cause the discharges to occur under circumstances when they would not have occurred prior to the Project. Because there is no evidence that the Project will impact the quantity or quality of the discharges, we find that this does not constitute a basis for denying certification for the Project.

Sewage Infrastructure

The City admits that the raised groundwater levels associated with the Project will cause certain sewers and sewage infrastructure to be impacted. (F.F. 126) The sewage systems in the

municipalities impacted by the Project consist of the following makeup: Sewer laterals run from individual customers to sewer mains in the street. The sewer mains connect to collection sewers. These collections run to a larger collection sewer, called the interceptor, which generally runs along the river. The interceptor leads to a sewage treatment plant. (City Statement No. 7, p. 14) Brinjac Kambic determined that as a result of the Project portions of the sewer systems would be submerged by raised river levels, raised groundwater levels, or a combination of both. This could result in submerged sewer lines being infiltrated by groundwater, causing the capacity of the system to be exceeded. An overloading of the system may result in sewage backing up into basements, flowing out of manholes, or spilling directly into waters of the Commonwealth. (F.F. 127) In addition, if the sewage treatment plant is exposed to overload, this can result in discharges which exceed the permit limitations of the plant. (T. 2960)

As a result of the problems which could result from the potential for overload to the sewage systems as a result of the Project, the City proposed mitigation measures to address this concern. Brinjac Kambic proposed a combination of two measures to address the potential for infiltration of water into the sewer system. One method is the replacement of pipes. This has been proposed in the township of West Fairview, where a section of new pipe will be installed to prevent inundation by the Conodoguinet Creek. (City Statement No. 7, p. 16) For the majority of cases, Brinjac Kambic has proposed the Insituform process. This process involves lining the pipes with a material which hardens to form a brand new pipe within the existing one. (F.F. 128) Mr. Pollart described his familiarity with Insituform, which Brinjac Kambic has used on several projects.

Edward J. Corriveau provided testimony for the Department with respect to the effectiveness of the City's proposed mitigation measures for sewage infrastructure. Mr. Corriveau holds a

bachelor's degree in civil and environmental engineering and is a licensed professional engineer with a specialty in sanitary engineering. Mr. Corriveau administers the sewage program for the Department's Southcentral region. In the course of his career, he has reviewed hundreds of sewage collection system designs. In Mr. Corriveau's opinion, the effectiveness of the City's proposal to line existing sewer lines with Insituform cannot be fully evaluated because the plan does not provide specific details about the condition of the sewer systems. Mr. Corriveau's criticisms of the City's proposal may be summarized into the following categories: (1) Certain sewer lines were not televised.[22] (2) Not all manholes were inspected. (3) Insufficient structural analysis was provided for pump stations. (4) Reports and maps did not contain sufficient details. (5) The City's upstream improvement reports do not address the Project's impact on residential on-lot sewage systems. (6) The reports do not indicate whether the impacted municipalities were provided with an opportunity to comment on the City's proposals.

We do not find Mr. Corriveau's criticisms to be a basis for denying certification for the Project. First and foremost, Mr. Corriveau's criticisms about the City's proposal being without sufficient detail were, themselves, vague and general. Moreover, the Department's own hydropower coordinator testified that detailed designs for all aspects of a hydropower project are not completed until after issuance of the FERC license. (T. 2479) As for televising the sewer lines, Mr. Corriveau testified on cross-examination that it is normal practice to televise the lines prior to actually performing the Insituform process. (T. 3021) Mr. Pollart agreed that the lines will be televised prior

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[22]Although not defined or explained by Mr. Corriveau, Mr. Pollart defined "televising" or "tv" as the act of passing a television camera through a sewer line to gather information regarding the size of the line and to identify cracks. (T. 3402)

to their being lined with the Insituform. He further testified that if televising reveals that it would not be effective to line the pipes with Insituform, they will be replaced. (T. 3462) In order to prevent the potential for any overflow to occur in residents' homes, the City proposes to encase the connection of the sewer lateral to the sewer main as well as the first five feet of the sewer lateral in concrete. (City Statement No. 7, p. 18) After the sewer lines have been lined with the Insituform, they will subjected to water pressure to see if there are any leaks. (T. 3411) Finally, in order to insure that heat or chemicals in the wastewater will not cause damage to the Insituform, the company which manufactures the Insituform material provides different forms of resins to line the pipes depending on the type of chemicals and heat to which they will be exposed. (T. 3412-13)

Mr. Corriveau also raised a concern regarding the infiltration of groundwater into manholes. To address this concern, the City proposes to mitigate impacts to manholes by applying urethane grout to the manholes to prevent groundwater infiltration. (F.F. 131) The grouting consists of a cement-type material which will fill cracks and voids. (City Statement No. 7, p. 38)

The Department also contends that the City failed to evaluate or propose mitigation for the impact of the Project on on-lot residential sewage disposal systems in the Borough of Marysville and East Pennsboro Township. The Department points to the upstream improvement reports for these municipalities prepared in connection with the City's FERC application. The Marysville report identifies five properties where on-lot sewage disposal systems were being used, while the East Pennsboro report identifies twenty such properties. (T. 3425; City Ex. 38, p. 4-5; City Ex. 42, p. 4) The reports say that further study will be necessary to assess the extent of the impact, if any, on the facilities. (City Ex. 38, p.5; City Ex. 42, p. 4) Although not addressed in the upstream improvement reports, Yves Pollart testified that the mitigation measure proposed by the City is to provide these

residences with public sewer service. (T. 3426)[23] The Department argues that this is not enough since the City has provided no discussion of the details of the connections or evaluation of whether the existing sewage treatment plants and sewer lines have sufficient capacity to accomodate the additional wastewater. The City does not respond to this argument in its Reply Brief.

We do not agree with the Department that this is a basis for denying Section 401 certification. Yves Pollart testified that the City will provide public sewer service to the twenty-five lots which will be affected. Therefore, any groundwater impact to these properties will be mitigated. Details as to the procedure for connecting the twenty-five properties to the public sewer system are not necessary at this stage of the process. The fact that the City's upstream improvement reports did not contain these details is not a basis for denying certification.

We reach the same conclusion with respect to the City's analysis of the impact of the Project on the East Pennsboro sewage treatment plant. The City's upstream improvement report for East Pennsboro concluded that the control building/pump station will be affected by raised groundwater levels resulting from the Project. (City Ex. 42, p. 5) The control building/pump station distributes raw sewage to two wastewater treatment units. (City Ex. 42, p. 5) Under the section entitled "Proposed Mitigation," the report states, "Upon determining the influence of the Dock Street Dam and Lake Project on the existing structure, a recommended solution will be submitted as an addendum to this report." (City Ex. 42, p. 5) The record does not indicate whether an addendum to the report was ever prepared or submitted. However, at the hearing Mr. Pollart testified that the

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[23]The Department argues that this was not proper rebuttal testimony and should have been a part of the City's case in chief. We disagree, since this testimony was offered in direct rebuttal to Mr. Corriveau's testimony that the City's upstream improvement reports did not address the Project's impact on on-lot sewage disposal systems.

control building/pump station will require structural stiffening. Based on Mr. Pollart's testimony, we find that the City has sufficiently addressed the mitigation of groundwater impacts to the control building/pump station. Details as to the exact manner in which the City will perform the structural stiffening are not necessary at this stage of the process. The fact that such details were not included in the City's upstream improvement reports does not provide a basis for denying certification.

The Department also challenges the effectiveness of mitigation measures proposed by the City for wastewater pumping stations in the Borough of Wormleysburg and Susquehanna Township which will be impacted by the rise in groundwater levels caused by the Project. According to the upstream improvement report for Susquehanna Township, prepared by Brinjac Kambic, Susquehanna Township has two wastewater pumping stations located within an area where groundwater levels will rise as a result of the Project. The report states that a structural analysis was performed to evaluate the impact of the expected increase in groundwater elevation, and it was determined that the structural integrity of one of the pumping stations will not be affected by the rise in groundwater levels. The report goes on to state that the other pumping station will require a stiffening of its base slab, which will be accomplished by constructing a reinforced concrete wall. (City Ex. 40, p. 4-5) In Wormleysburg, two wastewater pumping stations are also located in an area which will be affected by a rise in groundwater levels due to the Project. Based on Brinjac Kambic's evaluation, both of the pumping stations will be impacted by the Project. According to Brinjac Kambic's upstream improvement report for Wormleysburg, one of the pumping stations will be unable to withstand the increase in hydrostatic load placed upon it by the groundwater, and without extensive modification, collapse of its walls is likely. Brinjac Kambic has, therefore, proposed replacing this station with a new reinforced concrete structure designed to withstand the

increased hydrostatic load. The other pumping station will simply require stiffening of its base slab with a reinforced concrete wall. (City Ex. 41, p. 7-8)

The Department argues that the upstream improvement reports fail to contain sufficient detail by which to evaluate the effectiveness of the mitigation measures proposed by Brinjac Kambic. The Department contends that the reports simply contain conclusory statements without any supporting analysis. We agree that the reports do not detail the process by which Brinjac Kambic conducted its analysis of the structural integrity of the pumping stations and do not provide detailed specifications for the mitigation measures proposed therein. However, we find that the reports contained sufficient information for the Department to evaluate the City's proposal. The reports indicate that the City, through Brinjac Kambic, conducted an analysis of the sewage infrastructure which could be affected by the Project and developed proposals to mitigate the effects of the Project on these structures. The fact that the reports do not contain the step-by-step analysis conducted by Brinjac Kambic or do not contain detailed blueprints for the reinforcement or replacement of the impacted pumping stations does not render the plan insufficient as the Department asserts. We find that the City has properly addressed the question of infrastructure which may be affected in Wormleysburg and Susquehanna Township and proposed mitigation measures to address the Project's impact on these structures.

The Department argues, however, that there is no guarantee that any of the mitigation measures proposed by the City can be implemented since the City has not secured agreements with the homeowners, businesses, and municipalities which will be affected. Daniel Lispi, the City's Project Director for the Harrisburg Hydroelectric Project, testified that the City intends to approach the municipalities and affected landowners and businesses prior to the time the actual work will be

done in order to negotiate an agreement with respect to the type of work to be done, access to the property where the work is to be done, and the timing of the work. (T. 3562-63) Any easements which may be necessary will also be negotiated at that time. (T. 3563)

We disagree with the Department that the City's failure to secure these agreements prior to its application for Section 401 certification was a basis for denying certification. The City would have no basis for negotiating such agreements prior to its receiving certification for the Project. The City did, however, hold public meetings in each of the municipalities which would be affected by the Project. At these meetings, the City presented information about the Project, and citizens and officials of the affected municipalities were provided an opportunity to ask questions and to comment on the City's proposals. (T. 3561-62) In addition, the affected municipalities were consulted by the City during the process of preparing the application. (T. 3561)

Based on the above, we find that the City acted properly in developing the measures which it has proposed for mitigating the impact of the Project on sewage infrastructure in the affected municipalities. The City's failure to secure fully negotiated agreements with the affected municipalities, landowners, and businesses prior to the receipt of certification from the Department was not a proper basis for denying certification under Section 401.

Finally, the Department contends that all of the upstream improvement reports prepared by Brinjac Kambic for the municipalities which will be affected by the rise in groundwater levels are incomplete because they do not contain cost information for the proposed mitigation measures. The Department argues that this information is necessary to insure that the City has adequate funds to implement, operate, and maintain the mitigation measures proposed in the reports. We disagree with the Department's contention that the reports are faulty because they do not contain cost information.

As noted earlier, the Department may condition its grant of certification on the City complying with certain conditions. This may include implementation of the mitigation measures proposed by the City. Therefore, we do not find that the City's failure to provide the Department with information concerning the cost of implementing and operating the mitigation measures proposed by the City was a basis for denying Section 401 certification.

Enola Railyards

An area of subsurface contamination exists at the site of railyards operated by Conrail in Enola on the West Shore of the Susquehanna River ("Enola Railyards"). (F.F. 132) The site contains three lagoons which had formerly been used by Conrail to store waste oil. Soil samples taken by the Department in 1980 revealed that the soils were contaminated with polychlorinated biphenyls ("PCB"). However, the concentration of PCB was below a level considered to be hazardous. (City Ex. 25) The lagoons were closed in 1985 to 1986. Oil was drained from two of the lagoons; the third lagoon was capped without being drained. There is currently some seepage from the capped lagoon. (F.F. 134)

Acres conducted a study to assess the impact of raised groundwater levels on the area of subsurface contamination at the Enola Railyards. The results of the study are contained in a report entitled "Assessment of Proposed Project on Conrail Sludge Storage Lagoons." This report was included in Volume 12 of the City's FERC application in response to a request for additional information from FERC. (City Statement No. 4, p. 48) The conclusion reached by Acres as a result of its investigation was that the raised groundwater levels in the area of the Enola Railyards would not adversely impact the area of contamination because the area of contamination is located at a higher elevation than that to which groundwater levels will rise. (F.F. 135) The Project is expected

to raise groundwater to an elevation of approximately 306.5 feet mean sea level ("msl") in the area of the Enola Railyards. (T. 1259, 1265) The lagoons are located at a much higher elevation, approximately 350 feet msl. (T. 1265-66) The Department argues that the City did not adequately evaluate the impact of groundwater inundation on the existing seeps and the potential impact on water quality which would result from a discharge of the seeps from the Railyards to the river. The City, for its part, says that any materials or contaminants from the lagoons at the Railyards which may be entering the river constitute an existing discharge which will not be increased by the Project. The Department argues, however, that raised groundwater levels from the Project may cause the mobilization of some pollutants at the Railyards which would otherwise remain in situ. In particular, the Department points to an area of oil seeps which exist along the bank of the Susquehanna River. (T. 3093-94) These seeps are currently being controlled by Conrail at the direction of the Department. (T. 3095) The Department asserts that if the Project is constructed, these seeps will be constantly inundated by six feet of water and the existing system to control them will become dysfunctional. (Department Post-Hearing Brief, p. 160) As support for its contention that these seeps will become inundated by six feet of water if the Project were constructed, the Department points to the testimony of Acres Project Manager, Thomas Gwozdek, that the elevation of the Susquehanna River will rise approximately six feet as a result of the Project. (T. 1259) However, Mr. Gwozdek's testimony does not indicate the elevation of the seeps or that they will be inundated by the rise in the river's elevation. Nor does the Department point to any part of the record which sets forth this information. To support its contention that inundation of the seeps will cause the current system for controlling the seeps to become dysfunctional, the Department points to the testimony of James Flesher, Section Chief of the

Storage Tank Section in the Department's Southcentral Region Environmental Cleanup Program. When asked by counsel for the Department what he would expect to happen if the seeps were inundated due to the rise in river elevation, Mr. Flesher replied that he thought collection of the oil "would be much more difficult and, in fact, may not be possible." (T. 3097) However, following the voir dire of Mr. Flesher, Judge Woelfling ruled that the Department had not established that Mr. Flesher was qualified to testify as an expert in environmental cleanup and subsurface contamination. (T. 3066, 3073) Judge Woelfling further ruled that Mr. Flesher could not testify as an expert on the impacts of the discharges. (T. 3073) Based on this, we cannot rely on Mr. Flesher's testimony as to the impacts of inundation on the oil seeps in question. Because the Department has presented no testimony to support its claim that the Project will cause the oil seeps along the bank of the Susquehanna River to become inundated and unable to be contained by Conrail, we must reject this argument.

Another area of contamination related to the Enola Railyards is the area which is adjacent to the "arch", a six-foot masonry arch located near the Railyards. (T. 3079) The arch acts as a storm sewer, carrying storm water from East Pennsboro Township and from the Enola Railyards. (F.F. 136) The arch exits near the bottom of the river bank and discharges into an open channel to the river. (T. 3079) On occasion, oil from the Railyards enters the arch. (T. 3081) Conrail has constructed an impoundment at the bottom of the arch to trap any oil which might travel through the arch while allowing the normal passage of storm water to the river. (T. 3079-80) Acres' Project Manager Thomas Gwozdek testified as to the measures proposed by the City to insure the containment of the oil after the Project is constructed. Mr. Gwozdek testified that the

existing impoundment can simply be extended to insure containment of the oil after the Project is completed. (T. 3520)

The Department raises two objections to the City's proposal. First, the Department objects to Mr. Gwozdek's testimony regarding the proposal to extend the Conrail impoundment because this testimony was presented in rebuttal and not as part of the City's case in chief. This objection was raised at the hearing and was addressed by Judge Woelfling. At the hearing, the City argued that Mr. Gwozdek's testimony was proper rebuttal because this issue was not raised until Mr. Flesher's testimony. The Department responded that the record would show that the issue of the arch was raised in the discovery process and, therefore, the City had prior knowledge of this issue. Judge Woelfling overruled the Department's objection and allowed the testimony into evidence. (T. 3520-25) In its Post-Hearing Brief, the Department again objects to this testimony being presented as rebuttal. However, other than the bald statement by the Department that "[t]he City did not address this issue until rebuttal", the Department provides no basis for finding that this testimony was not proper rebuttal. (Department Post-Hearing Brief, p. 161) Based on Judge Woelfling's ruling and the Department's failure to offer any argument in support of its contention, we find no merit to the Department's contention that this testimony was not proper rebuttal by the City.

The Department also argues that the City provided no data or analysis on the feasibility of the proposal to extend the Conrail impoundment. We disagree. As noted above, Mr. Gwozdek, a civil engineer, testified as to the feasibility of extending the impoundment. According to Mr. Gwozdek, the process involves a "routine engineering structure." (T. 3525) The Department presented no evidence to the contrary.

Finally, the Department lists a number of factors which it asserts the City should have considered in its evaluation of the proposal to extend the Conrail impoundment. First, Mr. Flesher testified that at times when the oil flows more heavily through the arch, it may be necessary to use a tank truck equipped with a vacuum system to suction the oil off the top of the water. (T. 3080) The Department points to the fact that the City offered no testimony as to whether the area would still be accessible for vehicles after extending the impoundment. However, Mr. Flesher testified that, although years ago this area was not very accessible, today the area is "fairly accessible. You can get equipment right down to the river." (T. 3089) The Department has offered no evidence which would tend to indicate that the area will become inaccessible as a result of extending the impoundment.

Next, Mr. Flesher testified that he has personally observed times when the oil, instead of being trapped by the impoundment, flowed directly into an area of backwater which exists between the arch and the river proper. (T. 3088) The Department states that this occurs when the existing impoundment has run out of sufficient storage space. Mr. Flesher testified that when the Project is constructed the backwater area will be inundated, and oil overflow from the impoundment will flow directly into the river. (T. 3091, 3093) We agree that if the Project causes the oil to overflow from the impoundment into the river, that constitutes a discharge of pollutants caused by the Project. However, the City has presented evidence that it intends to extend the existing impoundment to prevent the escape of oil from the impoundment into the river. As long as this measure is implemented by the City, we find that the Project will not result in a discharge of oil to the river. Therefore, we reject the Department's contention that the City has failed to insure that the Project will not cause a discharge of oil from the impoundment to the river.

Finally, the Department asserts that the City failed to identify and evaluate storm drains in the area of the Enola Railyards. The City admits that although it did not include the Railyard storm drains in its initial studies, the storm drains were evaluated and assessed in a subsequent report. This report, entitled "Proposed Upstream Improvements for Conrail Enola Yards," was admitted into evidence as City Exhibit 26. The report was prepared by Brinjac Kambic in April 1990. A review of the report reveals that Brinjac Kambic conducted an investigation of the sewage infrastructure in the vicinity of the Enola Railyards which would be impacted by the Project. This includes stormwater outfalls, a wastewater pumping station, and a wastewater treatment plant. (City Ex. 26) The report also details the mitigation measures proposed for the impacted structures. The Department makes no reference to the report in its Post-Hearing Brief, but simply asserts that the City ignored these facilities in its evaluation of the structures which would be impacted by the Project. Because the report contains a detailed explanation of Brinjac Kambic's investigation and mitigation proposals for the storm drains and other infrastructure in the vicinity of the Enola Railyards which would be impacted by the Project, we find that the Department's argument has no merit.

Based on the evidence in the record, we find that the City has adequately demonstrated that the Project will not cause a discharge of pollutants from the Enola Railyards. The record indicates that the City, through its consultants, conducted a thorough investigation of the contamination at the site of the Enola Railyards and the effect of the Project on this area. The report prepared by Acres, entered into evidence as City Exhibit 25, details the investigation conducted by Acres and contains the bases for its final conclusion that the contamination at the Railyards will not be impacted by the Project. The Department argues that the City should have

evaluated the impact on water quality should the Project cause a discharge from the area of contamination. However, there is no evidence in the record that such a discharge is likely to occur. Therefore, we find no merit to the Department's argument that the City failed to properly evaluate the impact of the Project on the area of contamination at the Enola Railyards.

150 Acre Area Downstream of Dam

The proposed dam will be located approximately 2000 feet upstream of the existing Dock Street Dam. (F.F. 140) As part of the construction of the Project, the existing Dock Street Dam will be lowered. (F.F. 141) The Department raises a concern that the lowering of the existing dam will pose a water quality problem. As support for its concern, the Department points to the following language in the City's license application: "[T]he lowering of the crest level of the existing dam has potential environmental impacts in exposing hitherto flooded riverbed at low flows." (City Ex. 31A, p. B.4-4) The Department argues that exposing the riverbed will "certainly affect both the designated uses and water quality criteria." (Department Post-Hearing Brief, p. 167)

The Department presented no evidence at the hearing on this matter. Instead, the Department states that it did not have an opportunity to pursue this matter on cross-examination because its "cross-examination of the City's three primary witnesses was arbitrarily limited" by Judge Fitzpatrick. (Department Post-Hearing Brief, p. 167) We disagree with this assertion, since it is clear from the record that Judge Fitzpatrick provided the Department with ample time in which to conduct cross-examination. Moreover, the Department was subsequently given an opportunity to reopen the record for the purpose of conducting additional cross-examination. The Department informed the Board that it did not wish to do so. Therefore, it may not assert that

it was prejudiced by its inability to conduct additional cross-examination of the City's witnesses on this issue.

Moreover, the record on this issue disputes the Department's contention that the lowering of the existing Dock Street Dam will result in water quality violations in the backwater area. Modeling done by Acres shows that water quality standards will not be affected in this area, primarily due to the high reaeration which occurs here. (F.F. 143) To insure that the downstream area will remain wetted during low flow conditions, the Project will be operated by alternating one powerhouse unit on each side of the river during low flows. (City Ex. 31A, p. B.4-9 to B.4-10) This will insure a reasonably uniform flow distribution. (City Statement No. 2, p. 13-14) During times when flow is so low that power generation cannot occur, the units will be turned off and, in some cases, water will be discharged to either the East or West Shore by lowering the inflatable gates. (City Statement No. 2, p. 14)

The Department has offered nothing which disputes these findings. Therefore, we find that the City has demonstrated that the Project will not result in water quality violations in the 150 acre area downstream of the proposed dam.

Section 401 Certification

Based on each of the findings above, we conclude that the City has met its burden of proving that it is entitled to water quality certification under Section 401(a) of the Clean Water Act. The record demonstrates that, so long as the City implements the mitigation measures which it has proposed, the Project will not result in a discharge in violation of Pennsylvania's water quality standards. Of course, if the City does not implement adequate mitigation measures, there "may", in the language of Section 401(a), be a discharge which may result in a violation of water

quality standards. As part of its certification, the Department is free to raise this possibility. However, in the case of these possible discharges there appears to be no applicable effluent limitation under Sections 301(b), 302, 306, or 307 of the Clean Water Act. Accordingly, if the Department believes that these discharges may result in a violation of water quality standards in the absence of the proposed mitigation measures, Section 401 requires the Department to certify that no such limitation applies to these possible discharges. Therefore, we shall remand this matter to the Department to issue water quality certification to the City in accordance with Section 401(a) of the Clean Water Act, 33 U.S.C.A. §1341(a).

Once a determination has been made under Section 401(a) that water quality certification should be granted, Section 401(d) authorizes the state to impose "effluent limitations and other limitations, and monitoring requirements" as are necessary to assure that the applicant will comply with any "appropriate requirement of State law." 33 U.S.C.A. §1341(d). Therefore, we remand this matter to the Department to determine whether "any effluent limitations and other limitations, and monitoring requirements" should be made a condition of the certification in order to assure that the Project will comply with any "appropriate requirement of State law." We leave open the question of what conditions may be appropriate requirements of state law with respect to the construction and operation of the Project. However, in conducting this evaluation, the Department may be guided by the U.S. Supreme Court's decision in PUD No. 1 v. Washington Department of Ecology, __ U.S. __ , 114 S.Ct. 1900, 128 L. Ed. 2d 716 (1994).[24]

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[24]While the Supreme Court in PUD did not specifically enumerate what may or may not constitute an "appropriate requirement of state law," it recognized that a state's power to condition certification under Section 401(d) is broader than its power to grant or deny certification under Section 401(a) and that a state may impose conditions on a grant of

In consideration of the fact that nine years have elapsed since the Project was first proposed and the mitigation measures differ from those submitted with the application for certification, the Department may determine that additional public comment is necessary. Such public comment shall be limited to addressing the conditions which may be imposed on the water quality certification.

Our order does not mean that the City may proceed to construct the Project. Whether the Project is to be constructed after the Department issues its certification is to be determined by FERC under the Federal Power Act, 16 U.S.C.A. § 791a et seq. Under the provisions of that Act, FERC is required to consider, among other things, the effect of the Project on fish and wildlife. Approval of a license may require FERC to comply with the National Environmental Policy Act, 42 U.S.C.A. §4321 et seq., by preparing an environmental impact statement if the adverse consequences foreseen by the Department are found by FERC to significantly affect the environment. If so, all significant environmental impacts of the Project must be considered before the license is issued. Even if the license is issued, interested persons may pursue judicial remedies at that time. PUD No. 1 v. Washington Department of Ecology, __ U.S. __, 114 S.Ct. 1900, 1901 (1994). Our order means only that the Department is to issue the certification subject to such conditions it may choose to impose as to water quality so that the City can pursue its application before FERC.

We, therefore, make the following:

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certification which seek to preserve the physical and biological integrity of the stream in question.

CONCLUSIONS OF LAW

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

2. The City bears the burden of proving by a preponderance of the evidence that the Department did not exercise proper discretion or did not act in accordance with the law when it denied the City's request for certification under Section 401(a) of the Clean Water Act, 33 U.S.C.A. §1341(a). 25 Pa. Code §1021.101(c)(1).

3. The Board's review in this matter is de novo. Warren Sand & Gravel, supra.

4. The testimony of the City's expert witnesses was properly admitted.

5. Pennsylvania's water quality standards are contained at 25 Pa. Code §§93.6, 93.7, 93.8a, and at 30 Pa.C.S.A. §2504(a).

6. Within the meaning of the Clean Water Act, a "discharge" is any discharge of a pollutant which is caused by the Project, including both point and non-point source discharges. 33 U.S.C. §1362(12) and (16); City of Harrisburg, 1988 EHB at 936-44, aff'd, 578 A.2d at 566-67.

7. The temporary increase in sediment deposition to the bottom of the river and creek which will occur at certain times of the year as a result of the Project does not constitute a discharge within the meaning of the Clean Water Act.

8. Moreover, this temporary increase in sedimentation will not violate Pennsylvania's water quality standards.

9. The Department abused its discretion in denying certification to the City based on the temporary increase in sediment deposition.

10. The Project will not cause a discharge resulting in dissolved oxygen violations in the Susquehanna River and Conodoguinet Creek.

11. The Department abused its discretion in denying certification to the City based on dissolved oxygen violations.

12. The Department abused its discretion in denying certification to the City based on the Project's effect on surface water elevation.

13. The City's use of an analytical model to predict the rise in groundwater levels on the West Shore of the Susquehanna River as a result of the Project meets the Frye test for admission of scientific evidence. Frye, 293 F. 1013.

14. The Department abused its discretion in denying certification to the City based on increased groundwater levels resulting from the Project.

15. The Department abused its discretion in denying certification to the City based on the impact of the Project on combined sewer overflows in the City of Harrisburg.

16. The Department abused its discretion in denying certification to the City based on the impact of the Project on sewage systems and infrastructure in surrounding municipalities.

17. The Department abused its discretion in denying certification to the City based on the Project's impact on contamination at the site of the Enola Railyards.

18. Lowering of the existing Dock Street Dam as a result of the Project will not result in water quality violations in the area downstream of the proposed dam.

19. The Department abused its discretion in denying certification to the City based on the impact of the Project on the 150 acre area downstream of the proposed dam.

20. Section 401(d) of the Clean Water Act, 33 U.S.C.A. §1341(d), provides that a state may impose "effluent limitations and other limitations, and monitoring requirements" on a grant of certification in order to assure that the applicant complies with "applicable requirements of state law."

CITY OF HARRISBURG	:	
	:	
v.	:	**EHB Docket No. 88-120-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and PENNSYLVANIA FISH AND BOAT COMMISSION, Intervenor	:	

ORDER

AND NOW, this 28th day of June, 1996, it is hereby ordered that the appeal of the City of Harrisburg is sustained. The Department is hereby directed to issue the certification requested by the City of Harrisburg for the construction of the Project involved in this appeal subject to the following:

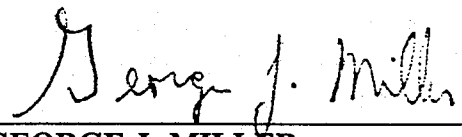
1. The Department is to certify that the Project will not result in any discharge into navigable waters within the meaning of Section 401(a) of the Clean Water Act which will result in a violation of water quality standards as to which there is an applicable effluent limitation under Sections 301(b), 302, 303, 306, or 307 of the Clean Water Act;

2. The Department may impose limitations and monitoring requirements on its certification in accordance with Section 401(d) of the Clean Water Act, giving recognition to material events subsequent to the close of the record, to assure that the Project will meet appropriate requirements of state law not inconsistent with the determinations made in the Board's Adjudication of this date;

3. The requested certification is to be issued within six months of the date of this order;

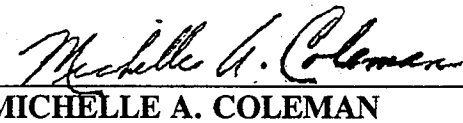
4. Jurisdiction is retained only to consider any necessary applications for clarification of the Board's Adjudication; jurisdiction is otherwise relinquished.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

Judge Robert D. Myers is recused from participating in this decision.

DATED: June 28, 1996

cc: **DEP Litigation Library:**
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M. DIANE SMITH
SECRETARY TO THE BOARD

PENNSYLVANIA MINES CORPORATION	:	
	:	
v.	:	**EHB Docket No. 95-157-R**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	
	:	**Issued: July 1, 1996**

OPINION AND ORDER ON APPELLANT'S PETITION FOR SUPERSEDEAS

By: Thomas W. Renwand, Administrative Law Judge

Synopsis

A Petition for Supersedeas is denied for failure to demonstrate the likelihood of prevailing on the merits of the underlying appeal. Where the Department has ordered a mining company to pump and treat alleged discharges from its mine the mining company failed to show by a preponderance of the evidence that the discharges were not hydrogeologically connected to its mine water. In addition, the mining company failed to convince the Board that its remedy was a viable alternative to the remedy ordered by the Department. The mining company also failed to negate the Department's evidence that the granting of the supersedeas would not result in injury to the public. The expenditures of large amounts of money which could not be recovered if successful on the merits may constitute irreparable harm. However, since the mining company failed to prevail on two of the prongs of the three-prong test a supersedeas will not be issued in this appeal.

OPINION

Presently before the Board is the Petition for Supersedeas filed by Pennsylvania Mines Corporation ("PMC"). PMC operated a coal mine in Indiana County until 1992. In February 1994 discharges of alkaline water appeared on the South Branch of Two Lick Creek and Repine Run. The Department of Environmental Protection ("the Department") investigated the discharges and determined that they were alkaline discharges from the PMC coal mine. On June 26, 1995 the Department issued an administrative order directing PMC to lower the mine pool and pump and treat the water ("the Order"). The Department asserts that the lowering of the mine pool will result in the elimination of the discharges.

PMC contends that the discharges are not emanating from the mine pool but instead are coming from groundwater not affected by its mine pool. PMC argues that the treatment program ordered by the Department is costly and will not result in the elimination of the discharges because it believes there is no hydrogeologic connection between the water in its mine and the discharges. In the alternative, it argues that the Department's pump and treat remedy will result in an overload of iron in the streams. It proposes to passively treat the discharges essentially through a series of small wetlands.

PMC timely appealed the Order. After the conclusion of discovery, trial in this case commenced on April 17, 1996.[1] In March 1996, the Department filed a Petition in Commonwealth Court to enforce its June 26, 1995 Order. Subsequently, on May 1, 1996, PMC

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[1] The trial on the merits of this appeal has taken twenty-two days with the final two trial days scheduled on July 2 and 3, 1996.

filed its Petition for Supersedeas. The Board conducted a supersedeas hearing on May 9-10, 1996. On May 14, 1996 the Board issued an Order denying PMC's Petition for Supersedeas. This Opinion is issued in support of that Order.

In order to obtain a supersedeas, PMC was required to prove by a preponderance of the evidence (1) it will suffer irreparable harm if the supersedeas is not granted; (2) it is likely to prevail on the merits of its appeal; and (3) there is no or little chance of injury to the public or other parties if the supersedeas is granted. Kephart Trucking Company v. DER, 1993 EHB 314, 317; Hopewell Township v. DER, 1995 EHB 680; Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. Section 7514(d); 25 Pa. Code Section 1021.78. The Board must balance these factors collectively to determine if a supersedeas should be issued. Pennsylvania Fish Commission v. DER, 1989 EHB 619.

In order for PMC to prevail and win a supersedeas, it is required to make a credible showing on each of the above three factors. Moreover, PMC must make a strong showing that it is likely to succeed on the merits. Lower Providence Township v. DER, 1986 EHB 395, 397.

Irreparable harm is essentially an equity concept. The Board precedent is based on equity cases dealing with preliminary injunctions where the test focuses on whether the party has an adequate remedy at law, i.e., money damages. *See* Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921 (D.C. Cir. 1958); Pennsylvania Public Utility Commission v. Process Gas Consumers Group, 467 A.2d 805, 808-10 (Pa. 1983). Perhaps because the Board has no equity powers the test has been somewhat strained in its application to cases before the Board. See Raymark Industries, Inc. v. DER, 1986 EHB 176.

The Board's cases on whether economic loss can be considered irreparable harm spin

off in two very different directions. First, one line of cases holds that the cost of compliance with a lawful order of the Department can never constitute irreparable harm. *See* C&L Enterprises, Inc. v. DER, 1987 EHB 67; Tenth Street Building Corporation v. DER, 1985 EHB 829; and Fiore v. DER, 1983 EHB 528. A second line of cases clearly stands for the proposition that significant economic expense incurred by a party in complying with a Department order may indeed constitute irreparable harm. McDonald Land & Mining Company, Inc. v. DER, 1991 EHB 129, 133-134 ("McDonald I"); McDonald Land & Mining Company , Inc. v. DER, 1991 EHB 1610; ("McDonald II"); Baumgardner v. DER, 1988 EHB 786; Silverbrook Anthracite, Inc. v. DER, 1988 EHB 365; Globe Disposal Company v. DER, 1986 EHB 891.

The Department argues that under McDonald I the mere expenditure of money could not constitute irreparable harm. According to the Department, PMC would have to show that it would go bankrupt or at least be placed in severe financial distress by the outlay of the funds required to comply with the Department's Order. It asserts that PMC and its parent, Pennsylvania Power & Light Company, are wealthy companies. As such, the costs of complying with the Department's order would not put them in financial jeopardy.

We disagree with the Department's interpretation of the law. We do agree with PMC's point that the Department's position sets an impossible standard for a well-run company to meet. Moreover, it is not the correct legal standard for a supersedeas. If the Department's view ever was the law, it certainly is outdated and violative of basic concepts of equal protection and fundamental fairness. This Board will not penalize well-run companies merely because they can take a "financial hit." There are not two standards of justice in this Commonwealth--one for the rich and one for the poor.

PMC could not recover these compliance costs if it is successful on the merits at trial so that the amounts it is required to pay would constitute irreparable harm if the outlay of funds in this case is significant.

Under the facts of this case, the Board finds that the initial outlay of $250,000 to comply with the Department's proposed pump and treat remedy and $166,000 per year thereafter is certainly significant. Such expenditures would thus constitute irreparable harm.[2]

We now turn to the second factor of the test. In support of its contention that it would prevail on the merits PMC called the Chairman of the Mineralogy Department of West Virginia University, Dr. Syn Peng. Dr. Peng was qualified as an expert and testified that the layers of the overburden strata over the mine were composed of a significant amount of claystone. In Dr. Peng's view when the fractures caused by the mining occurred they would have sealed when water came in contact with the clay. The clay would dissolve and seal the fractures, according to Dr. Peng. In his report Dr. Peng indicated that there was so much clay in the overburden that all of the fractures should have been sealed. At the supersedeas hearing, Dr. Peng retreated somewhat from this position but still contended that most of the fractures caused by the mining would naturally seal within three to six months after completion of mining activities in that area. He testified unequivocally that the subsidence fractures would be sealed at the level of the Mahoning Coal Seam. It was Dr. Peng's opinion that none of the discharges could possibly be coming from the PMC's mine pool.

---

[2]We hasten to add that the standard we are enunciating does not stand for the proposition that the cost of compliance alone is sufficient to show irreparable harm. However, where the petitioner presents evidence showing that the costs to comply would be significant, as shown by PMC here, the requisite showing has been made.

On cross-examination, Dr. Peng could not explain the mechanics of the filling of the fractures. He basically stated that he did not know why the fractures healed but that they did:

> Q. Would you explain for us your theory about how these fractures are filled with clay?
>
> A. I think if you want me to say, guess in part. My observation, my work, is really based on observation based on engineering practice. So, we really don't look into what is the mechanism of this. We just use engineering practice to do it. So, that is just my guess work. (N.T. 70-71)

PMC's other expert who testified about this subject was hydrogeologist Robert Pody. Mr. Pody testified that the discharges derived essentially from the rock strata below the valley floors which are sealed off from the mine pool. He based this opinion on various tests which lead him to conclude that the clays above the mine pool were relatively tight and that the chemical signature of the discharges was much different from that in the mine pool. (N.T. 208-209)

The Department called Keith Brady, who was qualified as an expert in overburden analysis and acid mine drainage. Mr. Brady contradicted the conclusions of Dr. Peng and Mr. Pody. He argued that the only zone that could produce water with the chemical characteristics exhibited in the discharges was found in the Lower Freeport Zone, which is where the mine is located. He also called into question the methodology and explanations of Dr. Peng and Mr. Pody.

In comparing the testimony, we found Mr. Brady's testimony to be more credible than the testimony of Dr. Peng and Mr. Pody. We were not persuaded by Dr. Peng's testimony about healing as he could not explain how the clay would seal the fractures or even how the process

was accomplished. Since much of Mr. Pody's testimony was dependent on Dr. Peng's conclusions we found that Mr. Pody's conclusion lacked a proper foundation.

PMC has the burden of proof in this supersedeas hearing and, therefore, the burden of showing it will likely prevail on the merits. PMC failed to meet its burden.

PMC also introduced expert testimony concerning the costs of the Department's proposed pump and treat remedy. However, PMC's experts failed to advance a credible alternative. Its experts admitted that more field work would be required before it could concretely set forth its alternative wetlands remedy. PMC's consultant also admitted that some pumping might be required. PMC did not meet its burden on this issue either.

Concerning the third factor of the test, the issue of harm to the public, the Department called Mr. Russell Greene of the Pennsylvania Fish and Boat Commission. Mr. Greene is a fisheries biologist who coordinates the state's trout program. He testified that, because of the current mine water pollution problem, the Fish and Boat Commission is not stocking the South Branch of Two Lick Creek with trout. Mr. Kepler of the Fish and Boat Commission testified that the iron sediment is now consolidating with the stream substrate, and that the trout's food source, the benthic communities, have been degraded. He further testified that the effects of this degradation were clearly visible in the trout population. The Board finds this testimony to be credible and, therefore, concludes that the granting of the supersedeas would result in the further degradation of the streams.

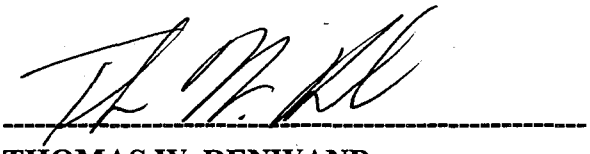
After balancing the three factors required for granting a supersedeas we find that the first factor of irreparable harm, which would be suffered by PMC in carrying out the Department's Order, does not outweigh the other two factors. We find that PMC has not met its burden of

proving that it will likely prevail on the merits. We also find there is a continuing harm to the public by the discharges. Consequently, we will not issue a supersedeas.

ORDER

AND NOW, this 1st day of July, 1996, we affirm our Order of May 14, 1996 denying Pennsylvania Mines Corporation's Petition for Supersedeas.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: July 1, 1996

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M. DIANE SMITH
SECRETARY TO THE BOARD

TINICUM TOWNSHIP and ECO, INC.	:	
	:	
v.	:	**EHB Docket No. 95-266-MG**
	:	**(Consolidated with 95-268-MG)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and TRI-STATE	:	
TRANSFER COMPANY, INC., Permittee	:	**Issued: July 3, 1996**

OPINION AND ORDER ON MOTIONS TO DISMISS OR TO LIMIT ISSUES

By George J. Miller, Chairman

Synopsis

The Board grants in part and denies in part the Department of Environmental Protection's and permittee's motions to dismiss, or to limit issues. The Department's motion to dismiss is granted concerning the allegation of the Department's motivation for its action. The Department's motion to limit issues is granted concerning its approval of the inclusion of a proposed waste transfer station in the county waste plan as well as issues that could have been raised concerning an earlier permit or the resolution of an earlier appeal. Consequently, appellants are precluded from raising these issues. Permittee's motion to dismiss or to limit issues is denied to the extent it seeks broader relief than the Board has granted in response to the Department's motion.

BACKGROUND

These appeals of Tinicum Township (Tinicum) and of ECO, Inc. (ECO) arise from the Department's issuance of a renewal permit on November 20, 1995 to Tri-State Transfer Co., Inc. (Tri-State) for the operation of a municipal waste transfer station under the Solid Waste Management Act, Act of July 7, 1980, PL. 380, as amended, 35 P.S. §6018.101, *et seq.* to be located near Route 611 in Tinicum Township, Bucks County, Pennsylvania. The history of the permitting of this proposed facility, drawn from the materials filed by the parties, goes back to May 18, 1976 when a permit was initially issued to T.R.A.S.H., Inc. for a transfer station. The permit was transferred to Thomas L. Treadway in February, 1979 and was reissued to Tri-State in August of 1982.

This facility was included as a proposed facility in the Bucks County Municipal Waste Management Plan developed in compliance with the requirements of the Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, PL. 556, 53 P.S. §4001.101 et seq. (Act 101). That plan was approved by the Department on March 28, 1991 and a notice of that approval was published in the Pennsylvania Bulletin on April 21, 1991.

Prior to the Department's approval of the Bucks County Plan, there were two significant disputes with respect to this permit. In August, 1982, the permit was transferred to Tri-State. That action was appealed to the Board by Sophie Halla, the Tinicum Township Zoning Officer. This "Halla" appeal was settled by a stipulation on June 8, 1983 in which an agreement was reached as to the "footprint" and the overall location of the facility. Thereafter, on September 24, 1990, the Department issued a modification of Tri-State's permit to prohibit operation until a permit modification was obtained which would meet the requirements of new regulations. Tri-

State appealed that modification to the Board and, on February 3, 1992, entered into an agreement with the Department which required only the submission of an application for a major modification and a renewal of the permit for the transfer station.

Pursuant to that agreement, on August 18, 1992, an operating permit was issued to Tri-State which was conditioned, among other things, on the filing of a certificate of design and an amended application in the event of any design changes. Following the filing of the certificate of design and a public hearing on Tri-State's application for the renewal of the permit, the renewed permit appealed from was issued on November 20, 1995.

The appeal of Tinicum claims, among other things, that the permit was improperly renewed because the facility's application could not meet the requirements applicable to a transfer facility under the current law and regulations. Tinicum claims that the facility will be located in a floodplain and on wetlands, that requirements of the Clean Streams Law cannot be met because of the failure to issue an NPDES permit, and that there was a failure to coordinate water quality matters in its solid waste actions. The appeal also claims that the Department erred in concluding that the facility was consistent with the county's solid waste plan, that the Department failed to require adequate bond coverage, failed to give adequate public notice, and failed to require a proper application. The appeal also incorporates by reference the objections of appellant ECO.

The appeal of ECO, a community organization located in Ottsville, PA, objects to the issuance of the renewal permit based on claimed violations of Pennsylvania constitutional environmental rights, an inconsistency of the permit with the Commonwealth Environmental Master Plan and on violations of public notice and participation regulatory requirements. This

appeal also raises objections to the Department's action based on violations of other regulatory requirements in 23 different respects and claims that the facility does not conform with the Bucks County Municipal Waste Plan as an "existing facility" for purposes of Act 101. Finally, the appeal raises objections which relate to the acceptance of residual waste at the facility.

Both the Department and Tri-State filed motions to dismiss portions of these appeals, or in the alternative, to limit issues on the theory that many of the grounds for the appeal are barred by the doctrine of administrative finality. The Department's motion asks that the appeals be dismissed insofar as they are based on challenges to the Bucks County Act 101 Plan because they were not filed within 30 days of April 20, 1991 when that Act 101 Plan was approved by the DEP. Secondly, the Department asks that the appeals be dismissed with respect to all issues which could have been addressed by appeal of the permit issued in 1982 which was subsequently the subject of a settlement in June 1983 between Tri-State and Tinicum's zoning officer in the "Halla" appeal. That settlement related to the location and design of the transfer station building including the handling of matters relating to a "channel cut" in the southwest corner of the site. In addition, the Department's motion asks that paragraph eight of the Township's Notice of Appeal be dismissed because it impermissibly attacks the Department's alleged motivation for reissuing the permit in 1995.

Tri-State filed a much broader Motion To Dismiss and Motion to Limit Issues without bothering to meet the requirements of the Board's Rules of Practice and Procedure which require that the motion set forth in numbered paragraphs the facts in support of the motion and the relief

requested. Rule 1021.70[1]. Tri-State's legal memorandum filed in support of its motion claims that the appeals should be dismissed or limited to issues which could not have been raised in the earlier permit actions. It also claims that the appellant should not be permitted to collaterally attack the Solid Waste Regulations under the Solid Waste Management Act, the Municipal Waste Management Act, or the Bucks County Solid Waste Plan.

The response of Tinicum to the Department's Motion to Dismiss contends that its claims concerning the Bucks County Solid Waste Plan are proper because its appeal does not challenge the Department's approval of the Bucks County Waste Management Plan, but challenges only whether the Department's permitting action complies with the Bucks County plan. With respect to the "Halla" appeal before the Board which was settled in June, 1983, Tinicum asserts that the "Halla" appeal involved different issues, parties and law than those involved in this proceeding so that the appellant is not precluded from challenging any aspect of the 1995 permit renewal. Finally, Tinicum takes the position that the motivation of the Department is relevant in determining whether the action by the Department was arbitrary or an abuse of discretion.

The response of Tinicum to Tri-State's Motion to Dismiss or Motion to Limit Issues is contained in Tinicum's consolidated memorandum of law which also responds to the Department's motion. In that memorandum of law, Tinicum takes the position that this appeal is not limited in any respect by any legally applicable doctrine, that the permit renewal was not proper because the facility could not now comply with regulatory requirements applicable to a new application and significant changes in the project since 1983 require consideration now with

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[1]The Board's Rules of Procedure may be found at 25 Pa. Code §1021.1-1021.124.

respect to the reissued permit in 1995. Finally, Tinicum asserts that there is no "collateral attack" on any relevant regulation because a proper interpretation of the applicable regulations requires the conclusion that the permit could not be renewed but had to be passed on as a new application. Tinicum also contends that it is entitled to seek the Board's review of the validity of any Department regulation which is relevant to the issuance of the permit in 1995.

ECO's response to the motion contends that both motions should be summarily denied because they fail to conform to the Board's Rules of Practice and Procedure relating to motions. In the case of ECO's motion, the contentions of the moving parties are not set forth in separately numbered paragraphs. While the Department's motion does set forth its contention in separately lettered paragraphs, ECO contends that its motion violates Board Rule 1021.70 because it necessarily relies on facts outside the record which are not set forth in the motion with clarity. In addition, ECO says that the motion should be denied because it is premised on an erroneous view of the law relating to issue preclusion and is premature at this time because of the need for further discovery.

By leave of the Board, Tinicum filed a supplemental brief and surreply in which it argued that based on recent evidence no issues are foreclosed at this time because the facts have changed, the law has changed and the permit has changed. While a dispute has arisen as to whether the supplemental brief and surreply filed by Tinicum is beyond the scope of what the Board authorized, nothing in that surreply affects the Board's opinion as set forth below.

DISCUSSION

We must assess the motion to dismiss in a light most favorable to the non-moving party. *Solar Fuel Co., Inc. v. DER*, 1994 EHB 737. The Board treats motions to dismiss the same way

as it treats motions for judgments on the pleadings: we will dismiss the appeal only where there are no material factual disputes and the law is clear so that the moving party is clearly entitled to a judgment as a matter of law. *City of Scranton v. DER,* 1995 EHB 104; *Snyder Brothers, Inc. v. DER,* 1994 EHB 1888. The same rule applies in the case of motions to limit issues. A motion to limit issues generally seeks to exclude a particular issue's consideration because of a procedural or evidentiary defect in its assertion. *Koretsky v. DER*, 1994 EHB 905.

Under the doctrine of administrative finality, "one who fails to exhaust his statutory remedies may not thereafter raise an issue which could have and should have been raised in the proceeding afforded by his statutory remedy." *DER v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765 (Pa. Cmwlth. 1975), *aff'd,* 375 A.2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977). This Board has stated that where a party aggrieved by an administrative action of the Department and fails to pursue its statutory appeal rights, neither the content nor the validity of either the Department's action or the regulations underlying it may be attacked in a subsequent administrative or judicial proceeding. *Kennametal, Inc v. DER*, 1990 EHB 1453. Furthermore, the Board has consistently held that in accordance with the principles of administrative finality, "the factual and legal bases of unappealed administrative orders are final and unassailable" unless an exception applies. *Ingram Coal Co. v. DER*, 1988 EHB 800.

The policy behind the principle of administrative finality is to permit the Department to go about its business without having to accept new challengers with new grounds for appeal which are brought more than 30 days after the Department's action has taken place. The principle is simply a subpart of the law of *res judicata* except that the principle of estoppel applies to all of those interested members of the public who might have filed a timely appeal

from the Department's action and applies to all the grounds for appeal that might have been raised by those parties at that time.

The Bucks County Municipal Waste Plan

Both notices of appeal claim the Department erred in issuing the 1995 renewal permit as being consistent with or conforming to the Bucks County Municipal Waste Plan which the Department views as a collateral attack on its approval of that municipal waste plan in 1991. Paragraph 9 of Tinicum's Notice of Appeal states as follows:

> 9. The Department erred in finding the facility to be consistent with the County Solid Waste Plan, which included the facility only as an existing facility, and did not include the facility as part of any plan of the county; and indeed, is inconsistent with the plan and contrary to appropriate procedures, and is not needed or even desirable, and was included merely because it was allegedly a grandfathered facility, and the County erroneously concluded the Country [*sic*] was to include it.

ECO's Notice of Appeal sets forth substantially the same claim in paragraph 30. It states:

> 30. The Department erred in issuing the permit inasmuch as the facility does not conform with the Bucks County Municipal Waste Plan and is not an "existing facility" for purposes of the Municipal Waste Planning, Recycling Waste Reduction Act (53 P.S. § 4001.101, et seq.)

The significance of these allegations is that under Act 101 a facility that is provided for in the host county plan need not provide an environmental siting analysis demonstrating that the proposed location of the facility is at least, as suitable as alternative locations than the generating county. 25 Pa. Code §273.139. An applicant whose facility is included in the plan is relieved of this requirement because in the course of municipal waste planning under Act 101 each county is

required to consider environmental factors and existing plans affecting the development, use and protection of air, water, land or other natural resources in the development of the plan. 53 P.S. §4000.502. The critical language of Act 101 is that the Department is barred from issuing a permit unless "the facility is provided for in the plan for the county or meets alternate environmental public health and safety requirements." 53 P.S. §4000.507(a)(2)(iv). The Department's review draft of the Bucks County Municipal Waste Plan submitted by the parties includes as a proposed transfer station the following:

> Tri-State Transfer, Inc. is proposing to develop a 1000 ton per day transfer station on Route 611 in Tinicum Township.

Table 2 of that draft plan provides for the same proposed transfer station. The draft of the Bucks County plan defines "proposed" as not being operational but currently has submitted a permit application to the Department.

While the Department views the allegations of the appeals with respect to the Bucks County Municipal Waste Plan as a collateral attack on its approval of that plan, the central question appears to be whether or not the Tri-State facility was "provided for in the plan for the county" within the meaning of Section 507 of Act 101. Appellants contend they are not attacking the approval of the Bucks County Municipal Waste Plan but claim only that Tri-State's transfer facility was not included in the Bucks County plan for this purpose.

It is clear that appellants cannot now attack the Department's approval of the Bucks County Municipal Waste Plan in 1991. In addition, we hold that appellants cannot now challenge the inclusion of the Tri-State facility in the Bucks County plan because it was "provided for in the plan for the county" within the meaning of Act 101. Section 507 of Act 101

provides:

> ... the department shall not issue any permit, or any permit that results in additional capacity, for a municipal waste landfill or resource recovery facility ..., in the county unless the applicant demonstrates to the department's satisfaction that the proposed facility:
> (1) is provided for in the plan for the county; ....

Section 502(f) of Act 101, which describes the required contents of the plans, specifically directs the inclusion of "proposed" facilities in the county plan for the processing and disposal of municipal waste to be generated in the county's boundaries during the next ten years. While the Bucks County plan approved in 1991 does not appear to meet the "discussion" requirements of section 502(f), that is a matter that could have been raised in an appeal from the Department's 1991 approval, but appellants chose not to take such an appeal then.

The statute's implementing regulations, 25 Pa. Code §§272.221- 272.233, also clearly provide for the plan to include proposed facilities. Specifically, the plan must identify and describe the following: facilities where the county's municipal waste is currently being disposed or processed as well as facilities located within the county whether the waste is currently being disposed of there or not. A county may consider a proposed or operating municipal waste processing or disposal facility that is not required by section 272.224(a) to be described in developing its plan under this subchapter. Sections 272.227 and 272.228 describe the requirements for the inclusion of either existing or proposed facilities in the plan. Section 272.241 of the regulations requires a public notice of the plan "including at a minimum a description of the type and location of existing and <u>proposed</u> processing and disposal facilities that will be used ...." (Emphasis supplied) The obvious purpose of this requirement is to permit

public comment on the plan so that those desiring to oppose the inclusion of facilities in the plan will have an opportunity to do so.

The Bucks County Municipal Waste Management Plan, complies with these requirements to the extent that it addresses both existing facilities and those facilities which were not operational at the time of the submission of the county plan but which were the subject of permit applications submitted to the Department. (Memorandum of Appellant ECO, Inc. in Opposition to Motions to Dismiss/Motion to Limit Issues Filed by Tri-State Transfer Co., Inc., Permittee and By the Department of Environmental Protection, Exhibit B) The Tri-State transfer station clearly qualifies as a processing facility simply by being a transfer station for municipal waste. Consequently, Tri-State's "proposed" transfer station was included in the Bucks County Municipal Waste Plan and the Department's approval of that inclusion in 1991 cannot now be challenged.

The Prior Permitting and the Halla Appeal

We conclude that the principle of administrative finality applies at least to the location and "footprint" of the facility as defined in the settlement of the Halla appeal from the issuance of the permit to Tri-State on August 18, 1992. That permit as well as the previous permits refer to the same Permit Application No. 100972 so that the issues settled in that case with respect to the handling of the channel cut and the "footprint" of the transfer station at the site appear to form the baseline of information from which any subsequent appeal from an action of the Department may be taken.

However, appellants are free to raise new developments since that time as the basis for this appeal. Under the law of administrative finality, there is no issue preclusion if the action

being appealed from is substantially different from the Department's previous action. *Bethlehem Steel Corp. v. DER*, 308 A.2d 1383 (Pa. Cmwlth. 1978). When a permit renewal occurs, the Department's decision on renewal may be challenged by an appeal to the Board in which the appellant may raise issues which had arisen between the time the permit was issued and the time it was renewed. Such issues would include changes in statutes or resolutions, changes in permit conditions or the development of previously unavailable evidence. In addition, an appellant can raise a challenge to the renewal based on the discovery of previously unavailable evidence.

However, an appellant cannot raise a challenge to the renewal based on arguments which were available to the appellant when the initial permit was issued, nor can the appellant challenge the renewal with evidence which arose and was available to the appellant prior to the permit's issuance. *Speciality Waste Services, Inc. v. EHB*, 1992 EHB 382. In *Blevins v. DER*, 1986 EHB 1003, the Board held that the appellants could raise issues not previously considered at the time of the issuance of the permit such as the operator's compliance history as well as new information requirements relating to the Department's constitutional duty and evidence with respect to groundwater pollution not available to the Department in the original issuance of the permit. However, the Board's scope of review is limited to the issues evaluated by the Department during reissuance, but not considered during the initial permit issuance. *See also*, *Stein, Downunder G.F.B., Inc. v. DER*, 1993 EHB 1381, where the Board held that a challenge could be raised to a renewal permit where it would permit the disposal of a different kind of waste than was originally contemplated by the permit application.

The Department's Motion To Limit Issues is therefore granted to the extent that appellants may not now challenge the Department's 1991 approval of the Bucks County

Municipal Waste Plan or the "footprint" and general location of the facility called for in the permit issued in August, 1982, as amended by the settlement of the "Halla" appeal, by virtue of the failure of these appellants to appeal that permit issuance.

The motion of Tri-State, however, seeks a much broader application of the rule of issue preclusion which cannot be granted now on the basis of Tri-State's motion because its right to relief as to those other matters is not free from doubt.

The Department's motion also seeks relief with respect to Paragraph eight of the Township's Notice of Appeal which states as follows:

> 8. The Department erred in reversing itself and agreeing to grandfather the facility as a political accommodation, rather than by exercise of administrative discretion.

The Board has held that where the Department's actions are in accordance with applicable law, its motives for taking the action are irrelevant. *Westtown Sewer Co. v. DER*, 1992 EHB 979. The exception to whether the Board can consider Department motives is if there is an allegation of discriminatory enforcement, but no such allegation has been made here. Accordingly, the Department's motion to dismiss paragraph eight of Tinicum Township's appeal is hereby granted.

ORDER

AND NOW this 3rd day of July, 1996, upon consideration of the motions of the Department and of Tri-State Transfer Co., Inc. to limit issues, IT IS HEREBY ORDERED that:

1. The Department's motion is granted as follows:

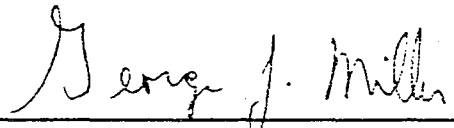
a. Appellants are prohibited from challenging the Department's 1991 approval of the Bucks County Act 101 Plan's inclusion of the Tri-State facility as a proposed transfer station;

b. Appellants are precluded from raising issues which could have been raised in connection with the 1982 permit or the resolution of the Halla appeal; and

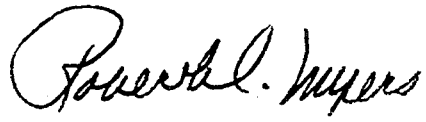
c. Paragraph eight of the appeal of Tinicum Township is hereby dismissed.

2. The Motion of Tri-State Transfer Co., Inc. To Dismiss or To Limit Issues is denied to the extent that it asked for broader relief than is granted as a result of the Department's motion as set forth above.

ENVIRONMENTAL HEARING BOARD

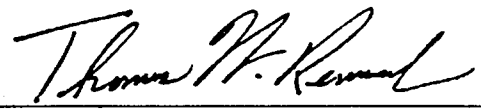


GEORGE J. MILLER
Administrative Law Judge
Chairman

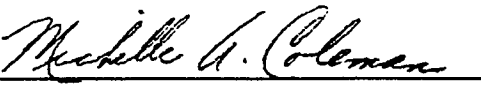


ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 95-266-MG
(Consolidated with 95-268-MG)



THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: **July 3, 1996**

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SECRETARY TO THE BOARD

GRAND CENTRAL SANITARY LANDFILL, INC.	:	
v.	:	**EHB Docket No. 96-012-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 3, 1996**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Chairman

Synopsis

The Board grants the Department of Environmental Protection's motion for summary judgment regarding appellant's challenge of a "waste flow control" condition and its challenge of a condition pertaining to the quarterly measurements of the average daily volume set forth in a modification of a solid waste disposal and/or processing permit. The challenges are precluded by the doctrine of administrative finality because both claims could have been raised with respect to substantially the same conditions in the 1990 permit modifications. The appeal may be continued as to appellant's objections which were not addressed by the Department's motion.

OPINION

This appeal was filed by Grand Central Sanitary Landfill, Inc. (Grand Central) on January 16, 1996 from the Department's issuance of a December 18, 1995 permit modification for a solid waste disposal and/or processing facility located in Plainfield Township, Northampton County.

The challenged paragraphs 4 and 6 of the 1995 permit modification relate to required waste flow control and quarterly limitations on the receipt of waste which are substantially the same as those contained in a permit modification issued on September 21, 1990.

Grand Central's notice of appeal asserts the Department's issuance of this permit modification was an abuse of discretion because:

- Paragraph 4 of the modification requiring flow control violates §506 of the (Municipal Waste Planning, Recycling and Waste Reduction Act) Act,the Act of July 28, 1988, P.L. 556 (Notice of Appeal ¶5), amounts to the promulgation of a regulation which reaches beyond the Department's statutory powers and fails to comply with the Commonwealth Documents Law (Notice of Appeal ¶6), violates Article I, Sections 8 and 10 as well as the Fourteenth Amendment of the U.S. Constitution (Notice of Appeal ¶¶7, 8 and 9), and violates Article I, Sections 1 and 17 of Pennsylvania's Constitution (Notice of Appeal ¶¶ 8 and 9).

- Paragraph 6 of the modification violates Act 101 by requiring the calculation of waste on a quarterly basis rather than an annual average which is consistent with Act 101 (Notice of Appeal ¶12).

The Department's motion for summary judgment asserts that Grand Central is barred from appealing these conditions under the doctrine of administrative finality because it had an opportunity to raise these issues in connection with the 1990 permit modification and failed to do so. Grand Central filed its response arguing that administrative finality does not apply to Paragraph 4 because arguments regarding flow control conditions were not available when the 1990 permit modification was issued. The definitive federal decision on flow control, *C&A Carbone, Inc. v. Town of Clarkstown,* 114 S. Ct. 1677 (1994), was issued in 1994. In the case of the quarterly volume limitation in paragraph 6, Grand Central argues that administrative finality does not apply because it only recently discovered that the Department has arbitrarily permitted other landfills to escape the condition regarding quarterly measurements of average daily

volume.

When ruling upon a motion for summary judgment, the Board is authorized to render summary judgment if the pleadings, depositions, answers to interrogatories and the admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035(b). The Board must read the motion for summary judgment in the light most favorable to the non-moving party. *Township of Doylestown v. DEP, et al*, EHB Docket No. 95-198-MG (Opinion issued April 17, 1996).

The undisputed facts are that the Department issued a solid waste permit, Permit Number 100265, on November 13, 1980 to Grand Central authorizing the disposal of municipal waste on land located in Plainfield Township, Northampton County, Pennsylvania. (Department's motion for summary judgment, ¶1; Grand Central's answer, ¶1). Subsequently, on September 21, 1990, the Department issued a permit modification ("1990 Modification") that, *inter alia*, authorized the expansion of the disposal area and property. The 1990 modification contained the following two conditions:

1. A condition prohibiting Grand Central's acceptance of waste designated for another facility under the planning laws of the Pennsylvania municipality where the waste originated ("flow control"). Condition 5 thereof provided as follows:

> This permit is, hereby, conditioned to prohibit the facility's receipt and (processing/disposal) of municipal waste from any municipality whose Department-approved municipal waste management plan designates another facility for such (processing/disposal) of its municipal wastes. However, this condition shall not apply in those instances when a plan-designated facility is unable to accept wastes in a manner that is consistent with the rules and regulations of the Department.

> Nothing in this paragraph shall be construed to restrict acceptance of source-separated recyclable materials at this facility for the purpose of recycling those materials.

2. A condition which set the average daily volume of waste which Grand Central may receive during any calendar quarter. Condition 20 thereof provided as follows:

> No more than 1500 tons of solid waste may be received at this facility for disposal, on an average daily volume basis over the standard calendar year quarter. This figure represents the average daily volume of the facility, pursuant to Section 1112 of the Municipal Waste Planning, Recycling and Waste Reduction Act, 53 P.S. §4000.1112, and has been set after consideration of weather, seasonal variation, community clean-up days, and other factors. Section 1112 provides that a mandatory civil penalty of $100 per ton applies to any excess waste received for disposal at this facility for any reason. Any penalty shall be calculated by the Department after determining the total tonnage of solid waste received for disposal at this facility during the calendar year quarter, divided by the number of permitted operating days that the facility is permitted to accept waste for disposal during that quarter.

(Department's motion for summary judgment, ¶2; Grand Central's answer ¶2; Department's September 21, 1990 letter to Grand Central Sanitary Landfill, Inc., Department's Exhibit A).

Grand Central did not appeal Condition 5 or Condition 20 of the 1990 modification. (Department's motion for summary judgment, ¶3; Grand Central's answer ¶3). Both Condition 5 and Condition 20 of the 1990 modification remained in continuous effect between the date of issuance of the 1990 modification and the issuance of the December 18, 1995 modification. (Department's motion for summary judgment, ¶4; Grand Central's answer, ¶4) On December 18, 1995, the Department issued a permit modification ("1995 Modification"), that amended the November 13, 1980 permit and the 1990 modification. Although the 1995 modification altered certain terms and conditions of the 1990 modification, it restated without substantive change

Condition 5 relating to flow control. The 1995 modification also restated Condition 20 of the 1990 modification, changing only the amount of average daily volume Grand Central may receive. The prior condition was restated without any change, including any change in the quarterly method of calculating average daily volume. In fact, Grand Central's application for permit modification requested only a change in the numerical limit for average daily volume, and made no request for any other change in this condition. (Department's motion for summary judgment, ¶5; Grand Central's answer, ¶5).

Paragraph 4 of the 1995 permit modification

The Board grants the Department's motion because the municipal waste planning or flow control condition (Paragraph 4, 1995 permit modification) is clearly the same condition that was set forth in paragraph 4 of the previous 1990 permit modification set forth above and could have been challenged by Grand Central in 1990.

Paragraph 4 of the 1995 modification reads as follows:

> This permit is, hereby, conditioned to prohibit the facility's receipt and disposal of municipal waste from any municipality whose Department-approved municipal waste management plan designates another facility for such disposal of its municipal wastes. However, this condition shall not apply in those instances when the plan-designated facility is unable to accept wastes in a manner that is consistent with the rules and regulations of the Department. Nothing in this paragraph shall be construed to restrict acceptance of source-separated recyclable materials at this facility for the purpose of recycling those materials.

Both the 1990 and 1995 modifications have almost the same language. The only difference is the substitution of "disposal" for "processing/disposal" from the 1995 modification. Such an omission is de minimis and does not alter the condition in such a manner as to render it a

condition which can now be raised with respect to the 1995 modification. Therefore, we believe that Paragraph 4 was not a new condition but rather remained continuously in effect from the 1990 modification until the 1995 modification.

Under the doctrine of administrative finality, "one who fails to exhaust his statutory remedies may not thereafter raise an issue which could have and should have been raised in the proceeding afforded by his statutory remedy." *DER v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977). This Board has stated that where a party aggrieved by an administrative action of the Department fails to pursue its statutory appeal rights, neither the content nor the validity of either the Department's action or the regulations underlying it may be attacked in a subsequent administrative or judicial proceeding. *Kennametal, Inc. v. DER*, 1990 EHB 1453. Furthermore, the Board has consistently held that in accordance with the principles of administrative finality, "the factual and legal bases of unappealed administrative orders are final and unassailable" unless an exception applies. *Ingram Coal Co. v. DER*, 1988 EHB 800.

Grand Central asserts, however, that the principal of administrative finality should not be applied because the argument that flow control restrictions violated the Commerce Clause of the United States Constitution was not simply available when the initial permit modification of 1990 was issued. Thus, it is an intervening change in legal context which justifies an exception to the general principles of issue preclusion. Grand Central's argument is misplaced. While it is true that this was not definitively settled by the federal courts until *C&A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994) and *Atlantic Coast Demolition and Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, (3rd Cir. Feb. 14, 1994), the basis for that argument

was well known in 1990 and should have been raised then. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531 (1978). However, Grand Central failed to timely raise any such challenge and is now barred from raising this argument. *Kennametal, Inc. v. DER*, 1990 EHB 1453.

The motion does not dispose of the entire appeal. Paragraph 6 of the appeal claims that the flow control condition is beyond the statutory powers of the Department of Environmental Protection and that the condition fails to comply with the Commonwealth Documents Law. The Department's motion does not address these claims even though they too may be barred by the doctrine of administrative finality. Accordingly, the appeal may be continued as to these claims.

Paragraph 6 of the 1995 permit modification

We also grant the Department's motion for summary judgment on the issue of the quarterly measurements of average daily volume because Grand Central could have challenged this condition in 1990 and in its application for modification.

Grand Central again argues that the doctrine of administrative finality does not apply as it did not know until recently that the Department has permitted other landfills to escape the condition regarding quarterly measurements of average daily volume. However, Grand Central does not claim that it requested the Department to modify this condition of the permit based on this recently acquired information.

We find Grand Central's argument also to be misplaced in the absence of such a request of the Department. In its response to the Department's motion Grand Central admitted the following:

- that the 1995 modification restated Condition 20 of the 1990 modification,

changing only the amount of the average daily volume Grand Central may receive.
- the prior condition was restated without any other change, including any change in the quarterly method of calculating average daily volume.
- its application for permit modification requested only a change in the numerical limit for average daily volume, and made no request for any other change in this condition.

(Grand Central's Response, ¶5) In addition, Grand Central admits that it did not appeal Condition 20 of the 1990 modification. (Grand Central's Response, ¶3) As stated earlier in this opinion where a party aggrieved by an administrative action of the Department fails to pursue its statutory appeal rights, neither the content nor the validity of the Department's action or the regulations underlying it may be attacked in a subsequent administrative or judicial proceeding. *Kennametal, Inc. v. DER*, 1990 EHB 1453. Based on these admissions Grand Central is precluded from raising the issue of the quarterly measurements in this appeal because it could have and should have been raised in 1990 or in Grand Central's application for the 1995 permit modification.

A different picture might be presented if Grand Central had asked for relief from the quarterly limitation in its application and set forth for the Department's consideration the claim that the Department had given similar relief to other parties. That claim appears to be based on new information which could not have been presented in 1991 so that the Department would be required to act on Grand Central's request. *Bethlehem Steel Corp. v. DER*, 308 A.2d 1383 (Pa. Cmwlth. 1978). Of course, a denial of such a request would be appealable. However, Grand Central has made no such request of the Department so that there is no action now before the Board relating to the quarterly limitations that is not barred by the doctrine of administrative finality.

ORDER

AND NOW this 3rd day of July, 1996, it is ordered that the Department's motion for summary judgment is granted with respect to appellant's objections set forth in Paragraphs 5, 7, 8 , 9 and 12 of appellant's notice of appeal.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
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MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: July 3, 1996

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M. DIANE SMITH
SECRETARY TO THE BOARD

SPORTSMAN'S CLUB 2000	:	
	:	
v.	:	**EHB Docket No. 95-092-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 16, 1996**

OPINION AND ORDER SUR MOTIONS FOR SUMMARY JUDGMENT

By: Robert D. Myers, Member

Synopsis:

The Board grants summary judgment in favor of the Department of Environmental Protection (DEP) and denies summary judgment for Appellant in an appeal from the issuance of an Administrative Order requesting Appellant cease storing, processing or disposing of waste tires on her property in violation of the Solid Waste Management Act and provide DEP an agreement executed between Appellant and a third party to allow the third party access to her property for the purpose of removing the tires. In reaching this result, and on the basis of the parties' stipulated facts, the Board finds there are no genuine disputes of material fact and that DEP is entitled to judgment as a matter of law.

OPINION

Sportsman's Club 2000 (Appellant) commenced this matter on May 31, 1995, challenging a May 1, 1995 Administrative Order issued by DEP to Appellant and Mrs. Elda C.

Myers (Myers)[1] pursuant to the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. § 6018.101 *et seq.* (SWMA) and Section 1917-A of the Administrative Code, Act of April 19, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17. The Order requested Appellant (1) to cease illegally storing, processing or disposing of waste tires on Appellant's property in Cromwell Township, Huntingdon County, and (2) to submit to DEP an agreement which, *inter alia*, would provide Gerald E. Booher and Janice B. Booher (Mr. Booher or Boohers) access to the waste tires stored on Appellant's property.

The approximately 200,000 waste tires at issue in this matter have been the focus of DEP enforcement since February 12, 1988. On that date, DEP had issued Mr. Booher a notice of violation for unpermitted storage, processing or disposal of waste tires on the Boohers' Cromwell Township property. Thereafter the Boohers were issued an administrative order to cease these illegal activities. DEP assessed the Boohers with civil penalties for those actions as violations of the SWMA, which were then appealed to the Board. In an Adjudication reported at 1991 EHB 987, the Board concluded the discarded tires constituted a "waste" and the placement of the tires constituted an "unlawful disposal or storage of waste" under the SWMA.[2] These tires prompted the May 1,

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[1] Since Sportsman's Club 2000 is a fictitious name used by Myers (Stip. 5), there is only one party Appellant.

[2] The issue has since been affirmed by the Commonwealth Court of Pennsylvania which has, several times, ordered the Boohers to comply with DEP orders and assessed Mr. Booher with additional penalties, including fines for continued and willful contempt of Court Orders and incarceration for his continued noncompliance. The Commonwealth Court has since stayed another of its Orders, dated November 14, 1994, which assessed Mr. Booher with a fine of $100 per day of violation, until access to the tires, stored on the property now owned by Appellant, could be arranged by DEP.

Another Board opinion related to the background of the present appeal issued at 1992 EHB 1638.

1995 Order that formed the basis of the present appeal.

Appellant and DEP submitted pre-hearing memoranda on November 20, 1995 and December 6, 1995 respectively. Having been scheduled and rescheduled, hearings were finally set for March 28 and 29, 1996. However, rather than proceed to hearing, at the parties' request, a conference call was held among the parties' counsel and Robert D. Myers, the presiding Administrative Law Judge. As a result of those discussions, the hearing was canceled and the parties were ordered to submit joint stipulations of fact and motions for summary judgment with supporting briefs.

On April 12, 1996, the parties filed a Stipulations of Counsel (Stipulations or Stip.). Motions for summary judgment and memoranda of law were timely submitted by both parties on April 26, 1996. DEP also filed a response to Appellant's motion for summary judgment on May 10, 1996.

The Board can 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; *Snyder et al. v. DER*, 588 A.2d 1001 (Pa. Cmwlth. 1991).

Here the parties agree to the facts. Appellant acquired the Boohers' property in Cromwell Township by deed dated January 26, 1994. (Stip. 3) In the deed, Appellant acknowledged that "a laced deer control fence" located on the parcel was subject to DEP proceedings for its removal. (Stip. 8) The approximately 200,000 waste tires that were transferred with this deed were the same tires at the center of litigation between the Boohers and DEP, mentioned *supra*, and remain disposed there on Appellant's property today. (Stip. 6 and 10) Neither the Boohers nor Appellant

ever applied for or received a permit from DEP to operate a disposal facility on the property. (Stip. 20)

In their Stipulations, the parties further agree that the "issues involved in this matter, other than access, have been fully adjudicated before [the] Board or Commonwealth Court." (Stip. 21) The only remaining issue for the Board is a question of law as to whether DEP has the authority to issue Appellant the May 1, 1995 Order. (Stip. 23)

From what can be ascertained from Appellant's motion for summary judgment,[3] Appellant proclaims it is beyond DEP's authority to issue her the Order on the basis that she was not provided with notice, nor was she joined as a party to DEP's litigation involving the Boohers, nor had the deed transaction transferring her the property been set aside as illegal. Appellant's motion asserts these grounds for summary judgment are based upon the Stipulations. However, she fails to specify which of the incorporated facts are supportive of her position. Mere general citation to all of the facts and failure to specify with adequate particularity the basis for the motion can be fatal. *Cambria Cogen Co. v. DER*, 1995 EHB 191; *Barkman et al. v. DER*, 1993 EHB 738.

In its motion for summary judgment, DEP argues, on the basis of particularly stated facts, it is entitled to summary judgment because the SWMA and Administrative Code authorize DEP "to issue orders which require terms and conditions to abate nuisances."

The Pennsylvania Legislature has by way of the SWMA empowered DEP to issue "orders requiring persons. . .to cease unlawful activities or operations of a solid waste facility which . . . is in violation of any provision of this act. . ." 35 P.S. § 6018.602(a). In the present

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[3] Appellant's motion, drafted essentially in three sentences, presents three possible arguments in one eleven line run-on sentence.

matter, it is undisputed that the waste tires on Appellant's property constitute a public nuisance and a violation of the SWMA. (Stip. 11 and 22) On the basis of statutory authority DEP can and should order Appellant to cease such unlawful activities. This was done in the Order.

DEP must also, as a function of its departmental duties, "issue permits, licenses and orders, and specify the terms and conditions thereof, and conduct inspections and abate public nuisances to implement the purposes and provisions of [the SWMA] and the rules, regulations and standards adopted pursuant to [the SWMA]." 35 P.S. § 6018.104(7). It shall "order such nuisances including those detrimental to the public health to be abated and removed." 71 P.S. § 510-17(3). In an effort to abate the public nuisances on Appellant's property, DEP ordered Appellant to execute an agreement with the Boohers to permit them access to remove the waste tires on Appellant's property. Under the circumstances, this appears to be an appropriate exercise of DEP's authority.

Appellant fails to explain how Article I of the Pennsylvania Constitution protects Appellant from obeying the Order to allow others upon her property and exempts her from the State's environmental regulatory scheme. Neither Appellant's motion nor brief provide authority for the proposition that DEP was required to do anything else before issuing her the Order. Appellant purchased the property knowing, as the deed language specifically stated, that the waste tires deposited on that property were the subject of DEP proceedings for their removal. (Stip. 8) In fact, the property was granted to her by Mr. Booher, her son, whose involvement with DEP, resulting from his failure to remove those waste tires, certainly was not unnoticed by Appellant. (Stip. 4) She stipulated the waste tires "are the same tires that have been the subject of litigation between the Boohers and [DEP] since January 10, 1989." (Stip. 10) Moreover, Appellant conceded that the waste tires illegally disposed on the property constitute a public nuisance pursuant to the

Administrative Code and SWMA. (Stip. 22)

The Order issued by DEP provided Appellant with adequate notice that her actions constituted unlawful conduct and a public nuisance pursuant to the SWMA. The Order set forth the pertinent facts upon which the violation was drawn and directed she allow Mr. Booher access to take corrective action. In filing the present appeal Appellant has acknowledged she received this notice. Her appeal has presented her with the opportunity to be heard by the Board. Her due process entitlements, thus, have been fully satisfied.

Based on the foregoing, the Board concludes DEP's issuance of the Order was an appropriate exercise of its authority and therefore DEP is entitled to judgment as a matter of law.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

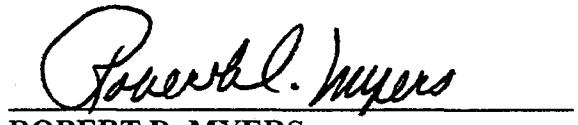
SPORTSMAN'S CLUB 2000	:	
	:	
v.	:	**EHB Docket No. 95-092-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 16th day of July, 1996, it is ordered that the Department of Environmental Protection's motion for summary judgment is granted and Sportsman's Club 2000 motion for summary judgment is denied.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 95-092-MR

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
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DATED: July 16, 1996

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M. DIANE SMITH
SECRETARY TO THE BOARD

DONALD W. BARSHINGER, et al.	:	
	:	
v.	:	**EHB Docket No. 96-027-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and ROBERT HANKIN, EXECUTOR OF ESTATE OF BERNARD HANKIN, Permittee	:	**Issued: July 16, 1996**

OPINION AND ORDER ON
CROSS MOTIONS TO DISMISS
AND FOR SUMMARY JUDGMENT

By George J. Miller, Chairman

Synopsis:

The Department's action in extending the time for construction and transferring a permit for the removal of an existing stream crossing and the construction of a box culvert in connection with a new stream crossing is an appealable action to the extent that the extension and transfer permits construction which adversely affects neighboring landowners. Neighboring landowners whose land will be affected by the permitted construction by flooding and whose recreational use of the land also will be adversely affected and have standing to appeal. A conservancy organization of which they are members also has standing to appeal where the purposes of that organization are to promote the development and conservation of natural and scenic resources in the area involved. The motions of the Permittee and the Department to dismiss are therefore denied.

The Board's review of this appeal is limited to issues which could not have been raised in

the original permit issuance proceeding. Questions relating to the qualifications of the transferee and changes material to the Department's actions which have occurred between the time of the original permitting and the Department's actions appealed from may be considered as proper objections. These include the question of whether the permit is property which may be transferred following the death of the original permittee and whether the Department had good cause to transfer the permit.

Appellants' motion for summary judgment is also denied because the permit relates to both an existing crossing and a proposed crossing of a stream located on property apparently owned by the decedent and now by the new developer. Under these circumstances, the proper interpretation of the Dam Safety and Encroachments Act and the Department's regulations thereunder may well involve disputed issues of fact relating, among other things, to the investment backed expectations of the new developer and the Department's interests in administrative finality.

DISCUSSION

This appeal requires a resolution of the competing interests of wetlands, neighboring landowners and sportsmen, commercial real estate developers and the Department of Environmental Protection's environmental regulators in determining whether a permit to remove an existing stream crossing and to construct a new stream crossing was properly transferred to a new real estate developer with an extension of the time for construction years after the permit was originally issued. The need for the transfer was created by the death of the original permit holder.

The Department and the representatives of the real estate developers believe that this resolution can be made as a matter of law and have therefore moved to dismiss the appeal. The neighboring landowners have seized on principles of the law of property and of decedent's estates to contend that they are entitled to summary judgment on the theory that the permit lapsed on the

death of the original permit holder so that it could not be transferred to another by the Department. We conclude that a proper resolution of these competing interests requires a hearing on the merits and therefore deny both motions to dismiss and Appellants' motion for summary judgment.

Background Facts[1]

On October 24, 1989, the Department issued a water obstruction and encroachment permit pursuant to the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1- .27, and the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- .1001, to Bernard Hankin, an individual.[2] This permit authorized him to remove an existing structure and to construct and maintain a 14 foot by 6 foot box culvert in a tributary to Ridley Creek and adjacent wetlands as part of a subdivision plan. A special condition to the permit provided that where crossings or disturbances of wetlands cannot be avoided, original grades through wetlands must be restored and that excess fill material must be removed from the wetland and not special on site. (Permittee Motion, Exhibit A). There is nothing in the record before the Board to indicate whether the planned construction will involve an extensive or an insignificant alteration of existing wetlands. Although Mr. Hankin was granted two construction extensions to the permit, he never commenced construction of the new crossing. Mr. Hankin died in April, 1994.

After Mr. Hankin's death, his estate applied for a third extension to the permit. Shortly thereafter, the estate also applied for the transfer of the permit to Clocktower Woods, Ltd.

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[1] These facts are taken from the Appellant's notice of appeal and are stated for the purposes of this motion only.

[2] The Permittee in this appeal is represented by Robert Hankin, the executor of the estate.

("Clocktower"). The Department granted both the extension and the transfer of the permit by two letters dated December 18, 1995. Clocktower apparently needs the permit to facilitate the development of a subdivision project because it will provide a secondary access route to Bow Tree Section IV as well as to an existing adjacent development, Hunt Country.

Appellants filed a timely notice of appeal of both the extension and the transfer of the permit. They are individual neighboring landowners and the Brandywine Conservancy. The individuals live near the subdivision project and allege that they "use and enjoy the natural resources in the area that would be affected by the fill activity covered by [the permit.]" (Notice of Appeal at 5). The Brandywine Conservancy is a non-profit charitable corporation dedicated to preserving open space and the environment. Several of the individual Appellants are members of the Conservancy, and it holds conservation easements on neighboring, downstream properties.

The Permittee filed a motion to dismiss the appeal of Appellants which first challenges the standing of the individuals and the Conservancy to appeal the extension and the transfer of the obstruction permit by the Department and the appealability of the Department's action in extending the term of the permit and its transfer to Clocktower. The Department joined this motion, and also moves for dismissal of the appeal on this basis.[3] The Appellants have also filed a motion for summary judgment on the ground that the permit lapsed upon the death of Mr. Hankin as a matter of law. We will address each of these motions in order.

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[3] The Permittee and the Department are collectively referred to as "Movants."

THE MOTION TO DISMISS[4]

I. Standing

A. Legal Standard

Movants argue that the mere act of substituting one entity for another as a permittee and extending the time for construction does not affect Appellants sufficiently to give them standing. We believe that Movants' analysis of the impact of the Department's actions on Appellant's interests is too narrow for the purpose of assessing their standing to appeal.

The three element test for standing as enunciated by the Supreme Court of Pennsylvania in *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975), has oft been repeated in the opinions of this Board:

> In order to have standing to challenge a Department action, the appellant must be "aggrieved" by that action, that is, a party must have a direct, immediate and substantial interest in the litigation challenging that action. A "substantial" interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law. For an interest to be "direct," it must have been adversely affected by the matter complained of. An "immediate" interest means one with a sufficiently close causal connection to the challenged action, or one withing the zone of interests protected by the statute at issue.

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[4] At this stage of the these proceedings, well before the close of discovery, the Board treats motions to dismiss the same way as it treats motions for judgement on the pleadings:

> [W]e will dismiss the appeal only where there are no material factual disputes and the moving party is clearly entitled to judgment as a matter of law. The facts for purposes of the motion are those framed in the notice of appeal. All of the factual averments in the notice of appeal are viewed as true, and only those facts specifically admitted in the notice of appeal may be considered against the appellant.

Tessitor v. DER, 1995 EHB 603, 605-06 (quoting *City of Scranton v. DER*, 1995 EHB 104, 108). Judgement will be entered because a hearing is pointless if the law on the issue is clear. *Florence Township v. DEP*, EHB Docket 95-121-MG (consolidated docket)(Opinion issued March 6, 1996). We must assess the motion in a light most favorable to the non-moving party. *Id.*

McCutcheon v. DER, 1995 EHB 6, 7 (citations and quotations omitted). In sum, we must look at the outcome of the Department's decision to determine whether Appellants have "alleged such a *personal stake in the outcome* of the controversy as to assure the concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult questions." *Parents United for Better Schools, Inc. v. School District of Philadelphia*, 646 A.2d 689, 691 (Pa. Cmwlth. 1994)(emphasis added)(quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

The essence of Movants' argument is that Appellants can not be aggrieved by the mere act of transferring and extending the permit, because such decisions do not change the status quo. Any allegations of standing put forth by Appellants are relevant only as to the issuance of the permit, not to its transfer and extension. We disagree. The fact is that an extension of the time for permitted construction does alter the status quo in a way which affects Appellants' interests because it enables a new developer to carry on for the deceased Mr. Hankin when the construction would not otherwise take place.

The Commonwealth Court has suggested that standing to contest the extension of a permit is not different from standing to contest the permit itself:

> PECO and North Penn/North Wales maintain that the riparian property owners otherwise affected by the construction permits have not demonstrated a substantial, direct and immediate interest in the mere *extension* of construction deadlines. . . . We would simply note that the affected property owners, who concededly have standing to challenge the underlying permits as originally issued, are not deprived of such standing when those permits are extended or modified. The effects of continued construction activities are no less existent than the initiation of such activities.

Del-Aware Unlimited, Inc. v. Department of Environmental Resources, 551 A.2d 1117, 1124 (Pa. Cmwlth. 1988)(emphasis in original). In this case, the extension relates to the initiation of

construction which is certainly no different from the grant of the initial permit in terms of its impact on neighboring landowners.

B. Interests of the Individual Appellants

Movants argue that the various Appellants have failed to demonstrate an adequate connection with the property affected by the permit so as to be adversely affected by the extension of the permit, relying principally on *Tessitor v. DER*, 1995 EHB 603, and *Anthony v. DER*, 1976 EHB 334. Movants also contend that none of the Appellants have standing to challenge the transfer of the permit because the entity holding the permit is a "factor insignificant to the permit's object and purpose and has no effect on open space or natural resources." (Hankin Memorandum of Law at 7)

The principal difficulty with this contention is that whether or not the construction authorized by the transfer of the permit will affect open spaces or natural resources appears to be a contested issue of fact. The Appellants have submitted affidavits with their response to the motion to dismiss which states that they use and enjoy natural resources which will be adversely affected by the permitted construction. Several are downstream property owners whose land will be affected by the project. Although none specify the exact location of the natural resources which will be affected, each contends that the area they use for activities ranging from birdwatching and hiking to meditation are adjacent to the area which will be affected by the construction of the new stream crossing, and therefore their use will be restricted. Some affidavits imply that this construction will cause flooding and that general degradation to water quality will cause wildlife to relocate. (*E.g.*, Affidavit of Donald W. Barshinger).

Appellant Barshinger owns property contiguous to an area which will be affected by the project. He states that increased flooding resulting from the permitted work will damage 200 year

old beech trees on his property and cause wildlife that he enjoys observing to relocate. Appellants Howard and Strawbridge own property downstream from the project. Both are concerned with increased flooding on their properties, and the effect it will have on property which they use recreationally. Appellants Bennett, Wilking, and Moran state that property they use recreationally will be affected by the project, and that they own property nearby. Through discovery the Appellants may be able to further specify the location and manner in which their recreational and aesthetic interests will be affected by the project. *See Krivonak v. DEP*, 1995 EHB 1058 (deferring a ruling on standing until the appellant establish the relationship of his property to a challenged quarry site). We can not say at this juncture that they will never be able to do so. *S.T.O.P., Inc. v. DER*, 1992 EHB 207 (dismissal is inappropriate where litigants established a potential for direct, immediate and substantial harm). When all the evidence is discovered, it may be that the extent of the destruction of wetlands and claimed flooding may be so insignificant that the injuries claimed by Appellants will be illusory. At the present time, however, we have no evidence as to the extent of the destruction of wetlands or of flooding which construction will cause and the only evidence as to the harm feared by the Appellants is in their affidavits. Accordingly discovery is needed, at the very least, before a proper resolution of the standing issue can be made.

These claims by Appellants make it clear that the Movants' reliance on *Anthony v. DER*, 1976 EHB 334, and *Tessitor v. DER*, 1995 EHB 603, is misplaced. The appellant in *Anthony* alleged only that he lived two miles from the challenged activity, and that he enjoyed creeks and streams in the area. He did not allege that his own property would be affected by the project, even though he lived nearby. He also did not specify how far from the project the parks and streams he used were located; the stream he used was Ridley Creek, and not the tributary which would be affected by the

development. Taking all of these factors into consideration, the Board held that the appellant did not have standing. *See also Environmental Outreach v. DER*, 1992 EHB 904 (at the close of discovery, members of a citizens group did not demonstrate with any particularity how they will be affected by the appealed landfill, and therefore did not have standing).

Tessitor v. DER, 1995 EHB 603, is similarly distinguishable. In that case, the Appellants challenged the issuance of a water obstruction permit as part of a project to construct and maintain a bridge and interchange ramp for buses. Although the Appellants alleged that they lived near the project and used streams recreationally, the essence of their claim was that they would be affected by the degraded air quality from the buses using the ramp, not from degradation of the streams and air quality from construction. The Board held that this harm was too tenuously connected to the issuance of the water obstruction permit, and that air degradation was not within the zone of interests to be protected by the Dam Safety and Encroachments Act and the Clean Streams Law, which governed the issuance of the permit. By contrast the harm feared by Appellants in the destruction of wetlands and flooding of their properties is clearly within the zone of interests protected by these acts.

We turn next to Movants' argument that transfer of the permit is not connected to Appellants' interest in protecting natural resources and open spaces. Again we disagree. Appellants contend in their notice of appeal that there was no viable permit which could be transferred by the Department. If there were no permit, Appellants claim that Clocktower would have to apply for a new permit under revised regulations. Any such requirement would make it uncertain that construction could ever proceed. Accordingly, Appellants have made an allegation of harm which is connected to the action of transferring the permit.

The Board's decision in *Beitel v. DER*, 1993 EHB 232, relied upon by Movants, is quite distinguishable because the harm claimed by the Appellants as a result of the transfer was in fact a benefit to them. The appellants alleged that the permitted activity was polluting their wells, and that the permittee was attempting to avoid liability by affecting the transfer. The Board held that the mining activity which occurred prior to the permit transfer caused the degradation of their wells, and that the transfer did not allow the permittee to escape liability for permit violations, and in fact increased the number of parties who were liable. In short, the harm alleged by the Appellants was in no way caused by the transfer, and, in fact, the transfer potentially provided them with a benefit by providing an additional responsible entity. In contrast, the transfer here is more connected to the harm alleged by Appellants because but for the transfer the construction of the new crossing could not have continued.

C. Standing of the Conservancy

It is well-settled that an organization can have standing in its own right, or derivatively through the standing of its members. *RESCUE Wyoming v, DER* , 1993 EHB 839; *Del-Aware Unlimited, Inc. v. DER*, 1987 EHB 351 (*Del-Aware III*). Since Appellants Strawbridge and Moran are members of the Conservancy (Affidavit of R. Scott Schroeder), the Conservancy will have standing if either of these individuals are able to demonstrate their standing. Appellant Strawbridge claims in an affidavit that the permitted construction is likely to cause flooding in her property and that it will interfere with her outdoor recreational activities. Appellant Moran discloses in her affidavit that the permitted activity will interfere with her use of her property for grouping houses as part of her business and will also interfere with her outdoor recreational activities.

Appellants also contend that the Conservancy has standing in its own right for two reasons.

First, the Conservancy has standing because it holds conservation easements on properties adjacent to and within close proximity of the area directly affected by the activity authorized by the permit. These properties are alleged to be located downstream from the proposed culvert. (*See* Response to Motion for Summary Judgment Ex. 8(D)). The easements restrict the use of the property pursuant to the Conservancy's mission to protect natural resources in the Brandywine region. Because the Appellants do not specify how the downstream property will be adversely affected by the project in a way which will impinge on the Conservancy's interests, proof of these matters will be required if the Conservancy is to base its standing on this claim.

Second, the Conservancy says it has an interest in these proceedings unique from the public at large. It is dedicated to preserving natural and scenic resources in the Wilmington-Philadelphia region:

> The purpose of the Brandywine Conservancy is to preserve, protect, interpret, utilize, and display American artistic, natural, and historic resources, principally of the Brandywine region, for the benefit of present and future generations. . . .

(Response to Motion to Dismiss, Exhibit 8(A)). In *RESCUE Wyoming v. DER*, 1993 EHB 839, we held that a similar mission statement was sufficient to confer standing upon an organization. There the Society of Pennsylvania Archaeology had standing to challenge a mining permit because it stated in its answers to interrogatories that it had an interest in preservation and conservation of archaeological sites. Its statement of interest in the litigation was further bolstered by its constitution and by-laws which stated its dedication to preservation of archeological sites and artifacts. Denying the motion to dismiss, we concluded that "SPA has an interest, other than the abstract interest of all citizens, in at least archeological issues." *Id.* at 843.

II. Appealability of the Department's Actions

A. Appealability of the Permit Transfer

Movants contend that the transfer is not an appealable action because the object and purpose of the permit have remained the same. However, the extension and transfer of the permit alters the status quo by permitting construction beyond the original term of the permit by a different developer. Changes in the status quo made by the Department's actions enable persons who are adversely affected by the change to appeal.[5]

An action of the Department is not immune from appeal simply because the object and purpose of the permit does not change. To the contrary, we have held that actions of the Department are appealable where the Department is required to exercise its discretion in accordance with its regulations. *Keystone Cement Co. v. DER*, 1993 EHB 524. In order to transfer a permit, 25 Pa. Code § 105.25 must be complied with, and the Department must use its discretion to determine that compliance.

B. Violation of Chapter 105 of the Regulations

Appellants also object to the transfer of the permit on the grounds that there were violations of Chapter 105 of the Department's regulations which precluded the transfer under 25 Pa. Code

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[5] Our research has revealed no case that directly discussed the appealability of a permit transfer. However, dicta in several cases has indicated that it is. For example, in *Strasburg Associates v. Newlin Township,* 415 A.2d 1014 (Pa. Cmwlth. 1980), the Commonwealth Court said that it did not find error in the Board's assertion of jurisdiction over the claim that on permit transfer the change in ownership provisions of the Department's regulations should have been complied with. The Board's opinion in *Richards v. DER,* 1990 EHB 382, also noted that the Appellants could have challenged a permit transfer which occurred prior to the permit renewal under review.

§ 105.25(c).[6] (Notice of Appeal ¶ 3) Movants argue that this objection should be dismissed because there are no violations of Chapter 105. We deny the motion to dismiss this allegation as there are questions of fact outstanding and Movants have not demonstrated that they are entitled to judgment as a matter of law.

C. Appealability of the Extension

Movants assert that this appeal should be dismissed because the extension of a permit is not an appealable action. This Board has held otherwise in *Del-Aware Unlimited, Inc. v. DER*, 1986 EHB 919, 925-26 (*Del-Aware II*).

> [W]e believe these permit extensions do affect "property rights, immunities, duties, liabilities or objections," in the language of 2 Pa. C.S. § 101 and 25 Pa. Code § 21.2.[7] It is true . . . that whether any particular type of final DER decision should be regarded as appealable is a matter of public policy. *Man O' War Racing Association v. State Horse Racing Commission*, 433 Pa. 432, 250 A.2d 172 (1969); *Bethlehem Steel Corp. v. DER*, 37 Pa. Cmwlth. 479, 390 A.2d 1383 (1978); *James E. Martin v. DER*, Docket No. 83-120-G, 1984 EHB 736; *Consolidation Coal Company v. DER*, Docket No. 85-220-G (Opinion and Order, September 18, 1985). In *Martin* we analyzed the implications of *Man O'War* and *Bethlehem*, and concluded that the mere fact that a DER action maintained the status quo (as, e.g., extending the time for completion of construction arguably can be said to do) did not *per se* make the action unappealable. . . .
>
> [W]e do not believe it is sound public policy to give the impression that DER can avoid review of any decision to extend the life of a permit, no matter how egregious that decision seems. It well may be that these permit extensions are quite legitimate and that these appeals should be dismissed, but the dismissals should be on the merits, not on the general principle that permit extension are never reviewable. . . . These permit extensions are appealable actions of DER.

Movants' argument that *Del-Aware II* is distinguishable because the project under review in that

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[6] This section provides that "[a] permit may not be transferred if a violation of this chapter exists at the time of application for transfer unless the transfer will expedite correction of the violation."

[7] This section is now found at 25 Pa. Code § 1025.2.

case is much larger than the project here is unconvincing. The size of a project in no way dictates reviewability. The motion to dismiss on the basis that the extension is not an appealable action is therefore denied.

IV. Motion to Dismiss or Limit the Issues

A. Objections Based on Preclusion

Movants argue that certain issues raised by Appellants must be precluded because they could have been raised at the time the permit was issued and are therefore not relevant to the present appeal.

Movants are clearly right in contending that Appellants may not now raise issues which they could have raised at the time of the initial issuance of the permit. This principle is necessary to serve the Department's interests in administrative finality. *DER v. Wheeling-Pittsburgh Steel Corp.*, 375 A.2d 320 (Pa. 1977). The transfer and extension, however, are different matters from the original issue of the permit so that new, material matters arising since the issuance of the permit may serve as grounds for appeal. *Bethlehem Steel Corp. v. DER*, 309 A.2d 1383 (Pa. Cmwlth. 1978); *see also Del-Aware Unlimited, Inc. v. DER*, 1986 EHB 919 (*Del-Aware II*)(applying the doctrine of issue preclusion and noting that the "thing sued for" in a permit appeal (revocation of the permit) is not the same as the "thing sued for" in an appeal from an extension (overturn of the extension)). We find the Board's statement of the law in *Specialty Waste Services, Inc. v. DER*, 1992 EHB 382, on this issue a persuasive general description of what is relevant to appeals of subsequent actions of the Department relating to permits:

> [T]he appellant may raise issues which have arisen between the time the permit was first issued and the time it was renewed. Such issues could include changes in statutes or regulations, changed permit condition[s] or be based on the development

> of previously unavailable evidence. At the same time, an appellant can not raise as a challenge to the renewal arguments which were available to the appellant when the initial permit was issued, nor can he or she challenge the renewal with evidence which arose and was available to the appellant prior to the initial permit's issuance.

Id. at 384-85.[8]

B. Good Cause to Extend the Permit

Appellants object to the extension of the permit because the Department did not have "good cause" to approve the extension as articulated in our decision in *Del-Aware Unlimited, Inc. v. DER*, 1986 EHB 919 (*Del-Aware II*), and *Inquiring Voices Unlimited, Inc. v. DER*, 1990 EHB 798. Movants argue that this objection should be dismissed because the Department had good cause to grant the extension, but Appellants say there was no good cause as a result of the developer's failure to promptly proceed to construction and changes in circumstances which have occurred since the permit was issued. We deny the motion to dismiss this allegation as there are questions of fact outstanding and Movants have not demonstrated that they are entitled to judgment as a matter of law.

C. Miscellaneous Objections

Movants attempt to strike certain specific issues raised by Appellants in their notice of appeal. In Paragraph 3.3 of the notice of appeal, Appellants charge that one reason that the Department erred in transferring and extending the permit is because such action violated the terms

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[8] This decision amplified a single judge decision in *Richards v. DER*, 1990 EHB 382. In that case appellants were challenging a renewal of a mining permit where they had not challenged the permit issuance or a subsequent transfer of the permit. On a motion for summary judgment/motion to limit the issues, appellants were precluded from using evidence available prior to the transfer of the permit or evidence which related to why the permit should never have been issued in the first place. Appellants were permitted to use pre-transfer evidence only if "it is used for legitimate purposes in the current appeal such as showing a baseline of data against which to measure current conditions." *Id.* at 386.

of General Permit BDWM-PG-7. At this juncture, we decline to find that this objection is barred by a failure to raise it by appealing the original issuance of the permit. *Cf. Starr v. DEP*, EHB Docket 95-143-C (Opinion issued March 13, 1996)(holding that relevance during discovery is not the same as relevance during trial, and declining to rule on the ultimate relevance of an issue). As Movants have failed to show that there are no facts in dispute and that they are entitled to judgment as a matter of law, their motion to dismiss this objection is denied.

Movants also urge us to dismiss Appellants' allegation in Paragraph 4 of their notice of appeal charging that the Department erred in not considering the cumulative impact on wetlands as required by 25 Pa. Code § 105.14(e)(14). Again, we decline to rule categorically that this objection is only relevant to the issuance of the permit and not to the transfer and extension of the permit. We will allow the Appellants to develop this argument through discovery, in a manner consistent with this opinion.

Finally, Movants argue that Appellants' allegations that the original permit application was incomplete and inaccurate should be dismissed. Because Appellants claim that this objection goes only to whether or not the permit was properly transferred under 25 Pa. Code § 105.25 (Appellants' Memorandum of Law at 36), this claim is not barred as a matter of law. Although Paragraph 6 of the notice of appeal charges that the Department's file does not contain a signed copy of the permit, Appellants have withdrawn this objection in their answer to the motion to dismiss filed on April 16, 1996. Accordingly this basis for dismissal is moot.

Movants argue that Paragraph 8 of the notice of appeal which contends that the Department's transfer and extension of the permit violated Article I, § 27 of the Pennsylvania Constitution should be dismissed because the mandates of that article have been legislatively achieved through the

statutes pertinent to this appeal. Appellants counter that their argument is that the Department failed to carry out its duties under Article I, § 27 because it did not comply with the appropriate statutes and regulations in deciding to transfer the permit and extend the time for construction. This is clearly stated in Paragraph 8:

> The Department violated Article I, Section 27 of the Pennsylvania Constitution by failing to comply with the provisions of the Clean Streams Law, the Dam Safety Act and Encroachment[s] Act and other applicable laws and regulations.

Movants have cited no case which precludes Appellants from pursuing this issue as a matter of law based on the claim that the Department should have, but did not, consider reducing environmental incursions to a minimum at the time it approved the extension and transfer of the permit. Accordingly, the motion to dismiss this objection is denied.

VI. Issues Related to a Single Notice of Appeal

Movants argue that the notice of appeal improperly consolidated appeals of two distinct actions of the Department which are claimed to have the same adverse effects on Appellants.[9] Movants have provided no authority, nor did our research reveal, any case or statute which *precludes* Appellants from challenging simultaneous, related Department actions in a single notice of appeal. We note that the Rules of Civil Procedure allow plaintiffs to state more than one cause of action in a complaint. Pa. R.C.P. Nos. 1020 and 1508. Under certain circumstances appeals to the Commonwealth Court can challenge more than one action of a government agency. *See Department*

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[9] Movants argue in their memorandum of law that the allegations of Appellants are too vague to provide notice of their objections to the Department's action. This issue was not raised in Movants' motion to dismiss; the Board will not consider arguments raised for the first time in a legal memorandum. *See North American Oil & Gas Drilling Co. v. DER*, 1991 EHB 22. We note, however, that the notice of appeal is specific enough under the Commonwealth Court decision in *Croner, Inc. v. Department of Environmental Resources*, 589 A.2d 1183 (Pa. Cmwlth. 1991).

of Transportation, Bureau of Driver Licensing v. Perruso, 634 A.2d 692 (Pa. Cmwlth. 1993). Movants have not argued that they are in any way prejudiced by our concurrent consideration of the transfer and extension of the permit which are claimed to adversely affect Appellants in the same way. We will deny the motion because and we believe that there are common issues of fact and law, and consideration of the transfer and extension in one proceeding promotes judicial economy and administrative efficiency. *See Columbia Gas of Pennsylvania, Inc. v. DEP*, EHB Docket 95-231-R (consolidated docket) (Opinion issued January 12, 1996).[10]

MOTION FOR SUMMARY JUDGMENT[11]

Appellants' motion for summary judgment contends that as a matter of law that the permit lapsed on the death of Mr. Hankin, the original developer. Appellants appear to concede, however, that there would have been no such lapse if Mr. Hankin had, in fact, constructed the new crossing so that he would be entitled to a transfer of the permit under the provisions of the Dam Safety and Encroachments Act and 25 Pa. Code § 105.25 of the Department's regulations.[12] This regulation

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[10]Also, this Board has authority to consolidate cases *sua sponte*. 25 Pa. Code § 1021.80. Given the facts of this case, it seems appropriate for it to be consolidated even if two separate appeals had been filed.

[11] Our review of this motion is governed by Pa. R.C.P. No. 1035, which provides, in relevant part, that

> The judgment sought shall be rendered if the pleadings, depositions, and 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.

[12] Movants have also moved to dismiss Paragraph 1 of Appellants notice of appeal which objects to the Department's action on this basis that the permit lapsed as a matter of law. Because of our disposition of the motion for summary judgment, it is unnecessary to address the issue in the context of a motion to dismiss.

provides in pertinent part that "[a] permit may be transferred to a new owner if there is a change of ownership of the dam, water obstruction or encroachment." The principal basis for the argument that the permit was not property which could be transferred is that permits under the Dam Safety and Encroachments Act state that the permit does not convey any property rights. Appellants rely on our recent decision in *Bernie Enterprises, Inc. v. DEP,* EHB Docket No. 95-100-MR (Opinion issued March 5, 1996), which upheld this principle with respect to the rights the permit gave concerning the land on which the culvert was to be built which was the property of a third party. Appellants also point to the previously existing law relating to a liquor license which, until a recent amendment by the General Assembly, did not permit the inheritance of liquor licenses. Reliance on this authority is misplaced.

While Appellants' contention that the permit lapsed on Mr. Hankin's death masquerades as a clear issue of law, it bristles with disputed material facts. As the Permittee points out, the reservation of the transfer of any property rights of permits issued under the Dam Safety and Encroachments Act is there to assure that no property rights are given to a permittee in another's property on which the encroachment is to be constructed. That is precisely the fact pattern in our recent decision in *Bernie Enterprises, Inc.* Our decision in that case was limited to the question of whether the permit gave a property interest in the neighbor's property where the culvert was to be installed, and is not dispositive of Appellants' contention here.

The Appellants' reliance on the provisions of 25 Pa. Code § 105.25 is also misplaced. The permit granted in this case is to remove an existing structure and to construct a new crossing and culvert in its place. Accordingly, the permit relates to property in which both Mr. Hankin and Clocktower have some property interest and that interest may be the relevant property interest for

purposes of transfer of a permit under the Dam Safety and Encroachments Act. Other factual issues may include the Department's purpose in limiting the right to transfer as presently provided for in its regulations, the Department's interest in not having to review a new permit application simply because the previous holder of the permit has died, and the investment backed expectations of the new developer/transferee. The latter interest may include issues as to the inter-relationship between the crossing and the new development.

These possible issues of material fact create questions which bar the issuance of a summary judgment at this time.[13] We find that the precedent under the liquor laws to be unpersuasive as to how the applicable environmental law should be interpreted. Accordingly, the Appellants' Motion for Summary Judgment is denied.

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[13] Of course, there may be other material facts which will be developed during the course of discovery or in a hearing.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DONALD W. BARSHINGER, et al.	:	
	:	
v.	:	**EHB Docket No. 96-027-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROBERT HANKIN, EXECUTOR OF ESTATE OF BERNARD HANKIN, Permittee	:	

ORDER

AND NOW, this 16th day of July, 1996, IT IS HEREBY ORDERED as follows:

1. The Motions to Dismiss of the Estate of Bernard Hankin and the Department of Environmental Protection in the above-captioned matter are hereby DENIED.

2. The Motion of Donald W. Barshinger, et al. for Summary Judgment is hereby DENIED.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: July 16, 1996

See following page for service list.

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M. DIANE SMITH
SECRETARY TO THE BOARD

TOWNSHIP OF FLORENCE	:	
	:	
v.	:	**EHB Docket No. 96-045-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASTE MANAGEMENT OF PENNSYLVANIA, INC., Permittee	:	**Issued: July 18, 1996**

OPINION AND ORDER ON MOTION TO DISMISS OR IN THE ALTERNATIVE FOR JUDGMENT ON THE PLEADINGS

By George J. Miller, Administrative Law Judge

Synopsis:

A motion to dismiss the notice of appeal of the Township of Florence is granted in part and denied in part. The motion is denied as to those issues which require the determination of the "potential to emit" volatile organic compounds of an expansion of a municipal waste landfill, for the purpose of state and federal new source review requirements, as the permittee, Waste Management of Pennsylvania, Inc., is not clearly entitled to judgment as a matter of law. However, the motion is granted on those issues concerning the applicability of operation permit requirements and reasonably available control technology (RACT) proposal requirements which the Board determines are beyond the scope of this appeal because they relate to the operation of the existing landfill.

OPINION

Before the Board is a motion to dismiss the notice of appeal of the Township of Florence (Appellant) by Waste Management of Pennsylvania, Inc. (Permittee). For the reasons set forth below this motion is denied in part and granted in part.

This appeal was filed in response to the issuance of Air Quality Plan Approval Permit No. 09-322-005 to the Permittee on February 1, 1996. This permit was issued to Tullytown Resource Recovery Facility, operated by Permittee, for the construction of an expansion to the existing landfill known as the Southern Expansion. Appellant, a New Jersey township directly adjacent to the landfill property, filed a timely appeal of the issuance of this permit.[1] The notice of appeal challenged the permit as being in violation of various provisions of the Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671q, and the Air Pollution Control Act (APCA), Act of January 8, 1960, P.L. (1959) 2119, *as amended,* 35 P.S. §§ 4001-4106. In its motion to dismiss, Permittee argues that each objection to the permit raised by Appellant is deficient as a matter of law, and should therefore be dismissed. Appellant's answer to the motion raises a number of "disputed issues of material facts" and reasons why the motion should not be granted. The motion and Appellant's claims that the motion should not be granted are discussed in detail below.

In ruling on this motion the Board must consider as pleadings the appeal, the motion to dismiss and Appellant's answer to the motion. Board Rule 1021.70(e), 25 Pa. Code § 1021.70(e), now requires an appellant to respond to a motion to dismiss or to a motion for judgment on the

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[1] Appellant also filed an appeal from the issuance of the solid waste permit which was issued for the Southern Expansion. This appeal, consolidated with the appeals of two other appellants, is currently before the Board at EHB Docket No. 95-121-MG (consolidated). *See Florence Township v. DEP*, EHB Docket 95-121-MG (consolidated)(Opinion issued March 6, 1996).

pleadings with an answer that sets forth "all factual disputes and the reason the opposing party objects to the motion." If there are no disputed issues of material fact or the reasons the party objects to the motion are legally insufficient, the motion can be granted. This is a change from practice existing before the adoption of this rule on September 9, 1995 under which only the notice of appeal could be considered as a pleading. *See Florence Township v. DEP,* EHB Docket 95-121-MG (consolidated) (Opinion issued March 6, 1996) slip op. at 20-22.

I. Federal and State New Source Review Requirements

The Permittee argues that Appellant's allegations in Paragraphs 3(1) and 3(3) of the notice of appeal, that the permit does not comply with state and federal new source review requirements are baseless as a matter of law.[2] Permittee specifically contends that since the permit for the Southern Expansion requires Permittee to keep the expansion's volatile organic compound (VOC) emission rate to less than 25 tons per year, the expansion is not a new major source subject to either state or federal new source review provisions. The Permittee relies largely upon the recent federal court decision of *Ogden Projects, Inc. v. New Morgan Landfill Co.*, 911 F. Supp. 863 (E.D. Pa. 1996).

Appellant, on the other hand, contends in its answer that the new source provisions do apply, because the expansion increases the emissions of the facility as a whole above the major source threshold. Appellant further contends that whether the permit condition limiting VOC emissions is

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[2] Appellants also alleged in Paragraph 3(1) of their notice of appeal that the permit failed to comply with the preconstruction review requirements of Title I Part C of the Clean Air Act, 42 U.S.C. §§ 7470-7492. The Permittee moved to dismiss this allegation on the grounds that Part C only applies to sources located in areas of attainment. Appellants in their brief in opposition to the motion to dismiss have conceded this point, and withdrawn that particular ground for objection to the issuance of the permit.

practically enforceable is a factual issue which is in dispute.

Both parties agree that the facility is located in an area designated as "severe nonattainment" for ozone. Section 172(c)(5) of the CAA, 42 U.S.C. § 7502(c)(5), requires states in which nonattainment areas are located to include, as part of the state implementation plan (SIP), provisions for the permitting of construction and operation of new or modified major stationary sources in accordance with the provisions of Section 173 of the CAA, 42 U.S.C. § 7503. The permitting procedures outlined by Section 173 are commonly referred to as "new source review." These requirements have been implemented by the Department in Chapter 127 of the Pennsylvania Code, 25 Pa. Code §§ 127.201-.217, which provides that a proposed source that has the "potential to emit" VOCs in excess of the established threshold of 25 tons per year must comply with Part D permitting requirements, as implemented in Pennsylvania's SIP.

Permittee argues that the permit prohibits the expansion from emitting more than 25 tons per year of VOCs, and that this permit condition is sufficient to establish that the new source review requirements do not apply because emissions from the expansion cannot by law exceed the threshold level of emissions for major source classification. Appellant contends that emissions from the existing facility must be taken into consideration in determining the expansion's potential to emit and also that the practical enforceability of the permit condition limiting VOC emissions is a question of fact in dispute. The Board declines to hold that as a matter of law the expansion is not subject to new source review.

First, the regulations may require the Department to consider emissions from the existing facility in determining the potential to emit of the Southern Expansion. New source review requirements apply to "any stationary source or *group of sources located within a contiguous area*

and under common control that emits, or has the potential to emit, at least 25 tons per year of volatile organic compounds." 42 U.S.C. § 7511a(d)(emphasis added). The Department's regulations similarly provide that the review provisions apply to

> A modification to an existing facility with the potential to emit 25 tons or more per year of . . . VOC, or a new source at an existing facility resulting in an increase in the potential to emit . . . VOC . . . which, *when aggregated with the other emissions increases* determined in accordance with subsection (c)(1), results in an increase of 25 tons per year or 1,000 pounds per day or 100 pounds per hour of VOC . . . , or more, whichever is more restrictive.

25 Pa. Code § 127.203(b)(3)(ii)(emphasis added). If emissions are below this standard, such emissions are considered *de minimis* and the "modification" is not subject to new source review. Accordingly, under both the CAA and the Department's regulations the potential emissions of the Southern Expansion are not necessarily viewed separately from the emissions from the existing landfill for the purpose of determining the applicability of the new source review requirements if the expansion is a "modification" of the existing landfill. Since there is currently no evidence of record concerning the emissions from the existing facility, nor facts which determine whether or not the expansion is a "modification," Appellant's contention that the expansion is a modification not excepted by the *de minimis* rule makes judgment on the pleadings improper.

Permittee's reliance on *Ogden Projects, Inc. v. New Morgan Landfill*, 911 F. Supp. 863 (E.D. Pa. 1996), in support of its argument that the new source review requirements do not apply because of the permit condition limiting emissions is misplaced. *Ogden Projects* analyzed the "potential to emit" requirement to determine whether or not a landfill itself qualified as a "major source" within the meaning of the CAA. Specifically, the court determined that operational or physical controls which are "demonstrably effective" and "stem from state or local government regulation" may be

considered when determining a facility's potential to emit VOCs. *Id.* at 876. The court concluded that the landfill did not qualify as a major source because the permit required the landfill to achieve 99 percent efficiency in controlling emissions *and* the data in the permit application demonstrated the adequacy of the pollution control equipment. The Board only has information concerning the emission limitation contained in the permit, which only arguably satisfies one prong of the *Ogden Projects* inquiry. There is no evidence which the Board can consider in the context of this motion which demonstrates the effectiveness of the pollution control equipment for the expansion. Furthermore, the case did not address the effect of a landfill expansion on an existing landfill's potential to emit, and the effect of operational limits that apply only to the expansion.

Permittee's reliance on the *de minimis* rule is also misplaced. The *de minimis* rule provides an exception to the new source review requirements when "the increase in net emissions of such air pollutant from such source does not exceed 25 tons . . . ." 42 U.S.C. § 7511a(c)(6). However, that section goes on to provide that the increase in emissions may not exceed 25 tons "when aggregated with all other net increases in emission from the source . . . ." *Id.* As stated above, there are no facts of record for us to determine as a matter of law that the Southern Expansion is a source which can be considered separately from the existing landfill when evaluating its potential to emit, and is arguably exempted from the state and federal new source review requirements. Accordingly, the motion to dismiss these objections is denied.

II. Federal and State Operating Permit Requirements

Permittee argues that Paragraph 3(2) of the notice of appeal which charges that the permit does not comply with preoperation requirements of Title V of CAA should be dismissed as a matter of law, because this section of the CAA, relating to the operation of sources, does not apply to the

Southern Expansion. Permittee also urges dismissal of Paragraph 3(5) of the notice of appeal because the state operating permit regulations do not apply. Appellant charges in these paragraphs that the provisions of the permit which allow temporary operation of the expansion are a violation of state and federal law because the existing landfill has been in operation since 1988 and should have an operating permit.

The Board is inclined to grant Permittee's motion to dismiss Paragraph 3(2) and Paragraph 3(5) of the notice of appeal, because the temporary operation of the expansion authorized by the construction permit does not violate the provisions of the CAA or APCA.

First, Title V of CAA explicitly provides that its provisions do not apply until the state permitting program, or an interim or partial program for that section of the CAA is approved by the EPA. 42 U.S.C. §§ 7661a, 7661b. At the time the permit subject to this appeal was issued, Pennsylvania's Title V permitting program had not yet been approved. *But see* 61 Fed. Reg. 9125 (1996)(proposing full approval of Pennsylvania's Title V program). Thus there is no federal requirement for a Title V operating permit in Pennsylvania. Since Appellants cannot prevail on this issue as a matter of law, Paragraph 3(2) is dismissed.

Second, the Department's regulations clearly permit the temporary operation of a new source or modification prior to the issuance of an operating permit. The regulations envision a sequential process in the permitting of an air contamination source. First, the construction of the source is permitted, pursuant to the plan approval regulations at 25 Pa. Code §§ 127.11-.52.[3] Second, the

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[3] Specifically, Section 127.11 provides that "a person may not cause or permit the construction or modification of an air contamination source . . . unless the construction, [or] modification . . . has been approved by the Department.

operation of the source is permitted pursuant to 25 Pa. Code §§ 127.401 - .464 (operating permits) and 25 Pa. Code §§ 127.501 - .543 (Title V operating permits). [4]

The plan approval clearly allows a permittee to begin construction of a source or a modification before the final operating permit is issued. Section 127.12b(d) allows temporary short-term operation of a new source or modification to facilitate shakedown of sources and air cleaning devices and to permit the evaluation of the air contamination aspects of a source. 25 Pa. Code § 127.12b(d). Such information is obviously necessary for the purposes of the operating permit which will set limits on the emissions and other operational restrictions. *See* 25 Pa. Code §§ 127.411 (contents of operating permit applications). There is nothing in the plain language of the regulations which prohibits temporary operation of a modification where the existing source is in operation, since the plan approval provisions clearly apply to both new sources *and* modifications of existing sources.

In sum, there is nothing in APCA or CAA which prohibits a temporary short-term operating period for new sources or modifications, as part of the construction permit. The question of whether or not the existing landfill requires a Title V or other operating permit is beyond the scope of the appeal of the construction permit for the expansion. Accordingly, Paragraphs 3(2) and 3(5) of the notice of appeal are dismissed, because Appellants cannot prevail on these issues as a matter of law.

In reaching this conclusion, we are concerned with Appellant's claim in paragraphs 20 and 21 of its answer to the motion that the permit will allow the landfill to operate as a source of VOC emissions for a period in excess of five years. Because we believe that this is impossible under the

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[4] *See generally* M. Dukes Pepper, Jr., *The Air Pollution Control Act,* in *Pennsylvania Environmental Law and Practice* § 9-8.4 (Terry R. Bossert, Joel R. Burcat eds. 1994).

law and regulations with respect to the permit for the Southern Expansion, we are interpreting this claim to relate to the operation of the existing landfill rather than the permit for the Southern Expansion from which the appeal has been taken. If this interpretation is correct, we believe that the contention with respect to the existing landfill is legally irrelevant to the permit for the Southern Expansion.[5]

III. RACT and BAT Requirements

Paragraph 3(4) of the notice of appeal objects to the permit issuance on the grounds that the facility is a major emitting source and is subject to the requirements of 25 Pa. Code §§129.91-.95 These regulations require certain major VOC emitting facilities to submit a proposal for RACT (reasonably available control technology) for each source at a facility. Permittee contends that this issue should be dismissed because the Southern Expansion is required to utilize BAT (best available technology), which Appellant admits is more stringent that RACT.[6] Appellants contend that the Department should have conditioned the permit on the submission of a RACT proposal for the existing facility.

It may very well be that the existing landfill is required to provide a RACT proposal, but this issue is not relevant to the present appeal, which is whether the Department abused its discretion in issuing a construction permit for the expansion. Emission controls for the existing landfill are beyond the scope of this appeal. Accordingly, Paragraph 3(4) of the notice of appeal is dismissed as a matter of law.

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[5] If we have misinterpreted Appellant's claim, the Appellant is free to file a motion for reconsideration and be prepared to delineate this claim with specificity in its prehearing memorandum so as to avoid unnecessary time at the hearing on the merits over an irrelevant issue.

[6] Appellant's Memorandum of Law at 9.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

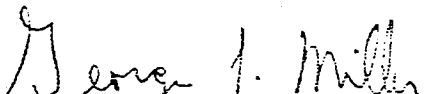
TOWNSHIP OF FLORENCE	:	
	:	
v.	:	**EHB Docket No. 96-045-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASTE MANAGEMENT OF PENNSYLVANIA, Permittee	:	

ORDER

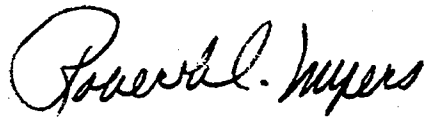
AND NOW, this 18th day of July, 1996, the motion to dismiss Paragraph 3(1) of the Notice of Appeal of Florence Township as it pertains to Part D of the Clean Air Act, and Paragraph 3(3) is hereby DENIED.

The motion to dismiss Paragraphs 3(2), 3(4) and 3(5) is GRANTED.

ENVIRONMENTAL HEARING BOARD

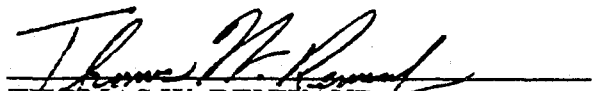


GEORGE J. MILLER
Administrative Law Judge
Chairman

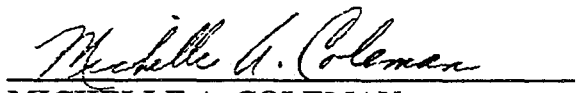


ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 96-045-MG



THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: July 18, 1996

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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M. DIANE SMITH
SECRETARY TO THE BOARD

STANLEY T. PILAWA and DISPOSAL, INC.	:	
	:	
v.	:	**EHB Docket No. 96-108-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 18, 1996**

OPINION AND ORDER ON MOTION TO DISMISS

By: Robert D. Myers, Administrative Law Judge

Synopsis:

A motion to dismiss an appeal from a civil penalty assessment for Appellants' failure to pre-pay the amount of the assessment or to post an appeal bond as required by section 1307 of the Storage Tank and Spill Prevention Act is granted, although Appellants have alleged a financial inability to comply with this statutory appeal procedure. The Board holds that, in order to be timely, the allegations of financial inability must be made during the appeal period.

OPINION

On May 17, 1996, Stanley T. Pilawa and Disposal, Inc. (Pilawa, Disposal, Inc. or Appellants) commenced this matter to contest the assessment of a civil penalty issued to them by the Department of Environmental Protection (DEP). DEP assessed Appellants for their alleged violations of the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S.

§§ 6021.101-6021.2104 (Storage Tank Act) and the corresponding regulations, in regard to certain underground storage tank handling activities conducted in Montaindale, Cambria County.

On June 4, 1996, DEP filed the present motion to dismiss, with supporting brief and affidavit, for lack of jurisdiction because Appellants did not pre-pay the proposed penalty assessment or post an appeal bond as required by section 1307 of the Storage Tank Act which provides:

> The person charged with the penalty shall then have 30 days to pay the proposed penalty in full or, if the person wishes to contest the amount of the penalty or the fact of the violation, forward the proposed amount of the penalty to the department within the 30-day period. . . , or post an appeal bond to [DEP] within the 30 days in the amount of the proposed penalty . . . Failure to forward the money or the appeal bond shall result in a waiver of all legal rights to contest the violation or the amount of penalty.

35 P.S. § 6021.1307(b).

Appellants filed a timely memorandum opposing DEP's motion on June 25, 1996, arguing they did not provide prepayment or post bond because they lacked present financial resources to meet those requirements. Their memorandum is supported by an affidavit of Pilawa. The affidavit provides information regarding Disposal's financial situation for 1995 and 1996, and indicates Pilawa's own salary was minimal during that time. Pilawa also alleges in the affidavit that he was unsuccessful in securing a bond to perfect the appeal; and he attached a letter from a surety bond broker that, *inter alia*, declined to provide Appellants an appeal bond.

On July 10, 1996, DEP replied to this opposition.

As the Storage Tank Act clearly provides, failure to provide security for the appeal by pre-paying the proposed penalty or posting an appeal bond deprives this Board of jurisdiction over an appeal from a civil penalty assessment. 35 P.S. § 6021.1307(b). *She-Nat, Inc. v. DEP*, EHB Docket

No. 95-145-C (Opinion issued May 7, 1996).[1] This Board has the power to excuse the security requirement if impecunity will deprive an appellant of his constitutional due process opportunity to have his challenge heard. *Twelve Vein Coal Co. v. DER*, 561 A.2d 1317 (Pa. Cmwlth. 1989) (*Twelve Vein*). If an appellant makes such an allegation, the Board must hold a hearing (if necessary) and make findings on appellant's ability to provide security for the appeal before it can decide whether or not it has jurisdiction. *Twelve Vein*; *Kilmer v. DER*, 1994 EHB 1799; *Diamond Fuel Co. v. DER*, 1991 EHB 897; *Martin v. DER*, 1984 EHB 821.

The question in this appeal is when must the allegation be made. DEP argues that, since it relates to jurisdiction, the allegation must be made during the 30-day appeal period. That was the situation in *Martin*, *Diamond Fuel* and *Kilmer*. In *Black Rock Exploration Company, Inc. v. DER*, 1993 EHB 1390, however, the allegation was not made until the appellant filed its brief in opposition to DEP's motion to dismiss. The Board held that this was not "timely" and dismissed the appeal without considering the merits of the allegation.

We are persuaded to accept DEP's argument. Certainly, an appellant must act diligently to do everything required in order to invoke our jurisdiction. The Legislature, in its discretion, has determined that, in order to invoke our jurisdiction under the Storage Tank Act, an appellant must file an appeal within 30 days (35 P.S. § 6021.1313) and, where a civil penalty assessment is involved, post security within the same 30-day period (35 P.S. § 6021.1307(b)).

If, because of impecunity, an appellant is unable to post the security (some or all), we believe

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[1] Both Pennsylvania and Federal Courts have concluded bond requirements are a reasonable condition on one's right to appeal an assessment. It "ensures the underlying validity of appeals and serves to protect the public interest in a safe and clean environment." *Boyle Land and Fuel Co. v. EHB*, 475 A.2d 928, 930 (Pa. Cmwlth. 1984).

it is reasonable to require him to make that allegation in writing[2] within the 30-day period. If he makes the allegation within that period, he then has done everything in his power to invoke our jurisdiction. We see no hardship in this requirement since the appellant will be aware of his financial situation and will know whether he can provide security.

We realize that in *Twelve Vein,* the seminal Commonwealth Court decision on this subject, the allegation of impecunity was not made until the appellant responded to a motion to dismiss. The timeliness of the allegation was never raised, however, and never considered either by the Board or Commonwealth Court. Accordingly, we do not view *Twelve Vein* as controlling on the issue.

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[2] It can be done in the notice of appeal or in a separate document, whichever the appellant prefers.

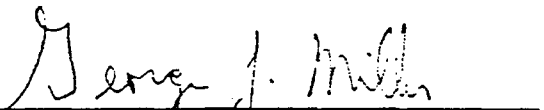
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STANLEY T. PILAWA and DISPOSAL, INC.	:	
	:	
v.	:	EHB Docket No. 96-108-MR
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

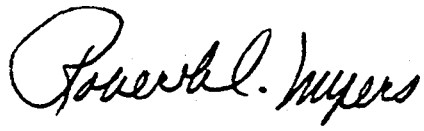
ORDER

AND NOW, this 18th day of July, 1996, it is hereby ordered that the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

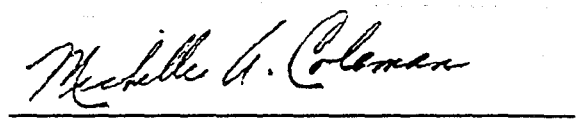


GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

Dated: July 18, 1996

cc: **For the Commonwealth:**
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Southwest Region
For the Appellant:
Michael W. Mogil, Esq.
Hilton Head Island, SC

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TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOA

BRADFORD COAL COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 95-141-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 19, 1996**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Section 3.1(d) of the Surface Mining Act, 52 P.S. §1396.3a(d), and 25 Pa. Code §86.37(a)(8) of the regulations authorize the Department to condition surface mining permits on compliance by an applicant or an entity related to the applicant through common ownership or control. Partial summary judgment is granted to the Department on the issue of whether it had the authority to impose conditions in a surface mining permit which required compliance by entities other than the permit applicant with outstanding Department orders. The Department demonstrated that these entities are related to the applicant through ownership or control.

Although the Department can condition a permit on compliance by an applicant or related entity, once a permittee has completed the requisite corrective action and has achieved full

compliance, the Department must have some procedure for removing the condition from the permit or designating that the condition has been fulfilled. Once full compliance is reached, the condition is null and void.

The Department is not entitled to summary judgment when one of the conditions imposed in the permit requires compliance with a Department order which was subsequently overturned by the Board in another proceeding. Nor is the Department entitled to summary judgment when it has failed to demonstrate that the applicant is related to the entity which is the subject of the condition.

A party's failure to file counter-affidavits in response to a motion for summary judgment does not automatically entitle the moving party to summary judgment where the moving party has not met its burden of demonstrating that no genuine issue of material fact exists.

OPINION

This matter was initiated with the filing of a notice of appeal on July 14, 1995 by Bradford Coal Company, Inc. ("Bradford Coal"). Bradford Coal challenges the inclusion of certain conditions in a coal refuse permit ("the permit") reissued to it by the Department of Environmental Protection ("Department") on June 14, 1995. The permit covers a coal refuse site in Bradford Township, Clearfield County ("the Bradford site"). Each of the disputed conditions deals with mine sites and entities other than the Bradford site and Bradford Coal.

Bradford Coal specifically objects to conditions 12 through 17. Condition 12 states that the permit is conditionally issued based on the outcome of an appeal of a penalty assessment issued by the Department to Al Hamilton Contracting Company ("Al Hamilton") on November 14, 1994. Conditions 13 through 15 state that the permit is conditionally issued based on Al Hamilton's

continued satisfactory progress with respect to certain compliance orders issued by the Department on September 17, 1992; September 29, 1992; and October 26, 1994. Condition 16 states that the permit is conditionally issued based on the continued satisfactory progress by Manor Mining and Contracting Corporation ("Manor Mining") with respect to a compliance order issued by the Department on May 16, 1995. Finally, Condition 17 states that the permit is conditionally issued based on the continued satisfactory progress of Thompson Brothers Coal Company, Inc. ("Thompson Brothers") with respect to a Consent Order and Agreement signed on August 4, 1994. The Department contends that Al Hamilton and Manor Mining are related parties to Bradford Coal and that Thompson Brothers is a related party to Al Hamilton. By virtue of these alleged relationships, the Department argues that it may condition Bradford Coal's permit on compliance by the above-named entities with outstanding Departmental orders.

The matter now before the Board is a Motion for Summary Judgment filed by the Department on November 14, 1995. Bradford Coal filed a Response on December 11, 1995, and the Department filed a Reply on December 28, 1995. Summary judgment may be granted where the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035(b); Snyder v. Department of Environmental Resources, 588 A.2d 1001 (Pa. Cmwlth. 1991), appeal dismissed, 632 A.2d 308 (Pa. 1993). In ruling on a motion for summary judgment, we must view the facts in a light most favorable to the non-moving party. RESCUE Wyoming v. DER, 1994 EHB 425, 428.

The Department bases its Motion on §3.1(d) of the Surface Mining Conservation and Reclamation Act ("Surface Mining Act"), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq., at §1396.3a(d), and 25 Pa. Code §86.37(a)(8) of the mining regulations.

Section 3.1(d) of the Surface Mining Act reads in relevant part as follows:

> The department shall not issue any surface mining permit or renew or amend any permit if it finds, after investigation and an opportunity for an informal hearing, that (1) the applicant has failed and continues to fail to comply with any provisions of this act or of any of the acts repealed or amended hereby or (2) the applicant has shown a lack of ability or intention to comply with any provision of this act or of any of the acts repealed or amended hereby as indicated by past or continuing violations. Any person, partnership, association or corporation which has engaged in unlawful conduct as defined in section 18.6 [52 P.S. §1396. 24], which has a partner, associate, officer, parent corporation, subsidiary corporation, contractor or subcontractor which has engaged in such unlawful conduct or which controls or has controlled mining operations with a demonstrated pattern of wilful violations of any provisions of this act or the [federal Surface Mining Act] shall be denied any permit required by this act unless the permit application demonstrates that the unlawful conduct is being corrected to the satisfaction of the department...

52 P.S. §1396.3a(d).

In addition, §86.37(a)(8) of the mining regulations states that a permit application will not be approved unless the applicant demonstrates that a violation related to the mining of coal by the applicant, a person owned or controlled by the applicant, a person who owns or controls the applicant, or a related party has been corrected or is in the process of being corrected to the

satisfaction of the Department. That section further states that a permit issued thereunder may be issued conditionally on the basis that the violation will be corrected. 25 Pa. Code §86.37(a)(8).

Section 86.1 of the regulations states that the following relationships are presumed to constitute "ownership" or "control" unless it can be demonstrated that the person subject to the presumption lacks either direct or indirect authority to determine the manner in which the relevant coal mining is conducted: (1) Being an officer or director of an entity or (2) Being the operator or contractor of a coal mining activity. 25 Pa. Code §86.1. In addition, §86.1 defines "related party" as "[a] partner, associate, officer, director, shareholder, parent corporation, subsidiary corporation, affiliate or persons under common control with the applicant, contractor or subcontractor." Id.

Along with its Motion for Summary Judgment, the Department has provided the affidavits of Joseph Leone, Permit Section Chief at the Department's McMurray District Mining Office; Michael Terretti, Compliance Section Chief with the Department's Bureau of Mining and Reclamation; and Mario Carrello, Mining Permit and Compliance Specialist with the Department's Hawk Run District Mining Office. The Department has also provided copies of the following documents: Module 3 of Bradford Coal's permit application, dated September 1994 (Exhibit A to Leone Affidavit), which lists ownership interests in the company; Module 3 of Manor Mining's renewal application for a coal mining activity permit, submitted to the Department in March 1991 (Exhibit B to Leone Affidavit); Bradford Coal's application for a mine operator's license, dated February 23, 1995 (Exhibit A to Terretti Affidavit); Al Hamilton's Contract Operator Approval Certificate (Exhibit H to Carrello Affidavit); a Consent Order and Agreement between Al Hamilton and Thompson Brothers (Exhibit I to Carrello Affidavit); and copies of the administrative orders and penalty assessment on which Bradford Coal's permit is conditioned. The Department contends that

these documents demonstrate that Bradford Coal is a related party to Al Hamilton and Manor Mining and that these entities were not in full compliance with Departmental orders at the time Bradford Coal's permit was issued.

Before examining the evidence presented by the Department in support of its Motion, we must address the Department's argument that Bradford Coal is precluded from challenging its relationship with the entities named above. The Department asserts that this issue was not raised in Bradford Coal's notice of appeal and, therefore, is untimely. Pursuant to Pennsylvania Game Commission v. Department of Environmental Resources, 509 A.2d 877 (Pa. Cmwlth. 1986), an issue not raised by a party in its notice of appeal is untimely unless good cause can be shown for raising it at a later date. In determining whether a party has raised an issue in its notice of appeal, we must broadly construe the party's grounds for appeal. Croner, Inc. v. Department of Environmental Resources, 589 A.2d 1183 (Pa. Cmwlth. 1991). However, as the Department correctly notes in its Reply, the mere filing of an appeal is not enough to allow the addition of new grounds for appeal, as the Croner exception would then swallow the rule in Game Commission. Newtown Land Limited Partnership v. DER, 1994 EHB 856, 864.

In reviewing Bradford Coal's notice of appeal, we find that it does sufficiently raise the issue of Bradford Coal's relationship with the other entities. Paragraph 3.h of the appeal states that "the special conditions as contained [i]n the permit reissuance impose conditions and criteria upon the permittee which are other than those contained at 25 Pa. Code §86.37 et seq." Since §86.37(a)(8) of the regulations deals with the Department's right to condition a permit on compliance by related parties, we find that paragraph 3.h sufficiently raises the issue of Bradford Coal's relationship with Manor Mining, Al Hamilton, and Thompson Brothers in accordance with the rule set forth in Croner.

Manor Mining

Bradford Coal's application for a mine operator's license names Manor Mining as a subsidiary of Bradford Coal and lists Bradford Coal as "owner" of Manor Mining. The mine operator's license application also reveals that the two companies share four officers in common. (Exhibit A to Terretti Affidavit) In addition, Bradford Coal's license application and permit application and Manor Mining's mining permit application name C. Alan Walker as president, director, and shareholder of Bradford Coal and as president and director of Manor Mining. (Exhibit A and B to Leone Affidavit; Exhibit A to Terretti Affidavit)

In its Response, Bradford Coal denies that it is related to Manor Mining through common ownership or common corporate officers. Rather than setting forth the basis for this assertion, Bradford Coal simply refers us to the section of Manor Mining's Module 3 which addresses ownership interest. That section sets forth Manor Mining's (and apparently Bradford Coal's) belief that a principal shareholder need not be listed as an "operator" under the section of the Module dealing with ownership interest because "[t]he definition of operator is keyed to a person who is engaged in coal mining activities as a principal, not as a principal shareholder." (Emphasis in original)

We find Bradford Coal's "response" to be wholly unresponsive to the question at hand. Whether Bradford Coal considers itself to be an "operator" of Manor Mining's coal mining operation is not the issue. What is relevant is whether Bradford Coal exercises any ownership or control over Manor Mining. Clearly it does since Bradford Coal names itself as the owner of Manor Mining in its application for a mine operator's license. Moreover, this is exactly the type of situation which §86.37(a)(8) of the regulations was designed to address. That is, where an applicant for a mining

permit owns and controls or is owned and controlled by another mining company which is not in full compliance with the mining statutes and regulations, the Department may condition the applicant's permit on that company achieving full compliance. Based on the evidence before us, we find that Bradford Coal does indeed exercise ownership and control over Manor Mining and, thus, comes within the purview of §86.37(a)(8) and §3.1(d) of the Surface Mining Act.

Having established that Bradford Coal exercises ownership and control over Manor Mining, we now turn to the condition in Bradford Coal's permit dealing with Manor Mining's compliance with an outstanding Department order. Condition 16 of Bradford Coal's permit states that the permit is conditionally issued based on Manor Mining's continued satisfactory progress with respect to Compliance Order 954032, issued on May 16, 1995. A copy of this compliance order is attached to the affidavit of Mario Carrello as Exhibit G. The compliance order cites Manor Mining for acid mine discharges at its permit site in Girard, Clearfield County, and directs it to treat the discharges. According to Mr. Carrello's affidavit, as of June 14, 1995 , the date of issuance of Bradford Coal's permit, the Department considered Manor Mining "to be in satisfactory progress toward compliance with Order #954032 through its preliminary treatment of the discharge, but was not considered by the Department to have achieved full compliance." (Carrello Affidavit, para. 24)

In its Response, Bradford Coal denies that Manor Mining was not in full compliance with the Department's order at the time of the permit issuance. Bradford Coal contends that, as a result of an inspection made by the Department on May 31, 1995, a determination was made by the Department that Manor Mining was in full compliance with the order. The Department argues that the issue of compliance status may not be raised at this time since it was not raised in Bradford Coal's notice of appeal and, therefore, is waived in accordance with Game Commission, supra.

We agree with the Department that Bradford Coal did not raise the issue of compliance status in its notice of appeal and, therefore, this issue is untimely.[1] Moreover, Bradford Coal has provided no evidence to support its assertion that Manor Mining was in compliance with the order as of the date of the permit issuance. A copy of the May 31, 1995 inspection report, referred to by Bradford Coal, is attached to the Response as Exhibit I. The report does not state that the Department considered Manor Mining to be in full compliance with the order as of that date but, rather, that the Department considered Manor Mining to be "in satisfactory progress" under the compliance order, as stated by Mr. Carrello. Therefore, we find that Manor Mining was not in full compliance with the order as of the date of Bradford Coal's permit issuance.

The Board has previously held that the Department may condition a permit on the applicant's satisfactory progress toward compliance with outstanding Departmental orders. Al Hamilton Contracting Co. v. DEP, EHB Docket No. 95-124-R (Consolidated) (Opinion and Order Sur Motion for Summary Judgment issued April 19, 1996) Likewise, under §3.1(d) of the Surface Mining Act and §86.37(a)(8) of the regulations, the Department may condition a permit on compliance by a person which exercises ownership or control over the applicant, a person over which the applicant exercises ownership or control, or a related party to the applicant, as these terms are defined in the

---

[1] Although we determined that paragraph 3.h of the notice of appeal was sufficient to raise the issue of Bradford Coal's relationship with the other entities in question, we find that the issue of compliance status is not sufficiently raised by paragraph 3.h. Paragraph 3.h states that "the special conditions as contained [i]n the permit reissuance impose conditions and criteria upon the permittee which are other than those contained at 25 Pa. Code §86.37 et seq." Section 86.37 deals with, *inter alia*, the Department's right to condition a permit on compliance by related parties. Whereas the question of a permittee's relationship with another entity is generally addressed under Section 86.37, whether or not that entity has achieved compliance status with a Department order falls outside the scope of this section, even under the general standard enunciated in *Croner*, *supra*.

regulations. Based on our finding that Bradford Coal exercises ownership and control over Manor Mining, we find that the Department acted in accordance with the Surface Mining Act and the regulations in conditioning Bradford Coal's permit on Manor Mining's compliance with Compliance Order 954032.

Al Hamilton

There is no dispute that Bradford Coal is related to Al Hamilton. Bradford Coal admits this in its Response. (Response, p. 3) However, Bradford Coal challenges the Department's authority to place conditions in its permit related to Al Hamilton's compliance with certain compliance orders and a penalty assessment.

Conditions 12 through 15 of Bradford Coal's permit read as follows:

> 12. This permit is conditionally issued based upon the outcome of the appeal of the formal assessment to Al Hamilton Contracting Company on November 14, 1994.
>
> 13. This permit is conditionally issued based on Al Hamilton Contracting Company's continued satisfactory progress of Administrative Order #924104 issued on 9/29/92 on Permit #17723164.
>
> 14. This permit is conditionally issued based on Al Hamilton Contracting Company's continued satisfactory progress of Compliance Order #944092 issued 10/26/94 on Permit #17793169.
>
> 15. This permit is conditionally issued based on Al Hamilton Contracting Company's continued satisfactory progress of Administrative Order #924096 issued 9/17/92 on Permit #4770BSM9.

Conditions 12 and 13

Administrative Order #924104 was issued to Al Hamilton on September 29, 1992. This order directed Al Hamilton to conduct a study to determine the geology and hydrogeology of its Little Beth mine site relative to the property of a nearby resident known as the "Cowder property." (Carrello Affidavit, para. 3, Exhibit A) This order was upheld by both the Environmental Hearing Board and the Commonwealth Court. Al Hamilton Contracting Co. v. DER, 1994 EHB 1027, aff'd, 659 A.2d 31 (Pa. Cmwlth. 1995). On November 14, 1994, Al Hamilton was assessed a $30,000 civil penalty for failing to comply with the Cowder study order. (Carrello Affidavit, para. 7, Exhibit C) The parties agreed to a settlement which reduced the amount of the penalty to $750 and which provided Al Hamilton an extended schedule for completing the study. (Carrello Affidavit, para. 9)

In its Response, Bradford Coal states that Al Hamilton has fully complied with the order, and, therefore, there is no factual or legal basis for the conditions to be in the permit. As noted earlier, the Department argues that the issue of compliance status is untimely since Bradford Coal failed to raise this issue in its notice of appeal. Again, we agree with the Department that Bradford Coal did not raise the issue of compliance status in its notice of appeal. However, even if Bradford Coal had raised this argument in a timely fashion, it has provided no evidence to support its claim that Al Hamilton was in full compliance with the Cowder study order at the time of the permit issuance. According to the affidavit of Mario Carrello, Al Hamilton was placed in compliance with the order on September 1, 1995. (Carrello Affidavit, para. 11, Exhibit D) As of the date of the issuance of Bradford Coal's permit on June 14, 1995, Al Hamilton was considered by the Department to be in satisfactory progress toward compliance with the Cowder study order, but not in full compliance. (Carrello Affidavit, para. 10) Bradford Coal has neither asserted nor

demonstrated that Al Hamilton was in full compliance with the Cowder study order at the time of the permit issuance. Therefore, we find that the Department acted in accordance with §3.1(d) of the Surface Mining Act, 52 P.S. §1396.3a(d), and 25 Pa. Code §86.37(a)(8) in including Conditions 12 and 13 in Bradford Coal's permit.

However, as we noted in our earlier decision in Al Hamilton, EHB Docket No. 95-124-R (Opinion and Order issued April 19, 1996), "once a permittee has completed the requisite corrective action and has achieved full compliance, as in the case of the Cowder study order, [the Department] must have some provision for removing the condition in question from the permit or designating that the condition has been fulfilled." Slip op. at p. 9. Therefore, although the Deparment acted within its discretion in including Conditions 12 and 13 in Bradford Coal's permit, because full compliance has been achieved, those conditions are now null and void and should be removed from the permit.

Condition 15

Condition 15 refers to Administrative Order #924096 issued to Al Hamilton on September 17, 1992. This order cited Al Hamilton for a discharge emanating from its Brenda Gayle #1 mine site in Rush Township, Centre County, and directed Al Hamilton to submit a plan for treatment or abatement of the discharge. (Carrello Affidavit, para. 13, Exhibit E) In an Adjudication issued on April 29, 1996, the Board sustained Al Hamilton's appeal of the order on the basis that the Department had not demonstrated a hydrogeologic connection between the mine site and the discharge. Al Hamilton Contracting Co. v. DEP, EHB Docket No. 92-467-R (Adjudication issued April 29, 1996). Because this order has been overturned by the Board, Bradford Coal's permit may not be conditioned on Al Hamilton's compliance with the order. Therefore, the Department is directed to remove Condition 15 from the permit.

Condition 14

Condition 14 refers to Compliance Order #944092 issued to Al Hamilton on October 26, 1994. This order directed Al Hamilton to treat or abate a discharge of acid mine drainage from its Caledonia Pike #3 mine site. (Carrello Affidavit, para. 18, Exhibit F) According to the affidavit of Mario Carrello, Al Hamilton was not in full compliance with the order as of June 14, 1995, the date on which Bradford Coal's permit was issued. (Carrello Affidavit, para. 20)

Bradford Coal argues that Al Hamilton was in full compliance with the order well before June 14, 1995 but that the Department was reluctant to acknowledge this. Attached to Al Hamilton's Response are copies of inspection reports covering the Caledonia Pike #3 mine site from December 1, 1994 through July 31, 1995. (Response, Exhibits B through H) The July 31, 1995 inspection report states that Al Hamilton was placed in compliance with the order on July 17, 1995. (Response, Exhibit H) The four prior inspection reports (March 6, 1995; April 27, 1995; May 30, 1995; and June 16, 1995) state that Al Hamilton was in satisfactory progress under the compliance order. Bradford Coal points out that during each of these inspections, the discharge was dry and no violations were cited. As a result, Bradford Coal argues that Al Hamilton was, in fact, in compliance as of the March 6, 1995 inspection report.

As noted earlier, Bradford Coal did not raise the issue of compliance status in its notice of appeal and, therefore, this issue is untimely. Game Commission, supra. However, even if Bradford Coal had raised this issue in a timely manner, we find that the evidence does not support its contention that Al Hamilton was in full compliance as of the permit issuance. Both §3.1(d) of the Surface Mining Act and 25 Pa. Code §86.37(a)(8) state that the violating condition must be corrected "to the satisfaction of the Department." According to the Department's inspection report of January

31, 1995, Al Hamilton had begun construction of its treatment facility at that time. (Response, Exhibit B) The next inspection report, dated March 6, 1995, stated that Al Hamilton was in satisfactory progress and that the discharge was dry. The next three inspection reports also found that the discharge was dry. Thereafter, on July 17, 1995, the Department placed Al Hamilton in full compliance with the order. Bradford Coal argues that the Department should have placed Al Hamilton in full compliance on March 6, 1995, the first occasion on which the discharge was found to be dry. However, in order for the Department to be satisfied that Al Hamilton's abatement efforts would be effective and that the discharge would remain dry, it is certainly conceivable that the Department would require several inspections showing that the discharge was dry before it placed Al Hamilton in full compliance status. Once the Department was satisfied that the discharge had been corrected, it placed Al Hamilton in full compliance status. Because Al Hamilton was not considered to be in full compliance status at the time of the permit issuance, the Department acted within the scope of its authority in placing Condition 14 in the permit.

However, as with Conditions 12 and 13, full compliance has now been achieved. Therefore, Condition 14 is rendered null and void and should be removed from the permit.

Thompson Brothers

Condition 17 of the permit states that the permit is conditionally issued based on Thompson Brothers' "continued satisfactory progress of Consent Order and Agreement #934097 issued 8/4/94 on Permit #17813055." The Consent Order and Agreement pertains to a mine site operated by Thompson Brothers in Morris Township, Clearfield County, known as the "Morris-Emigh mine." (Carrello Affidavit, Exhibit I) Al Hamilton was a contract operator for Thompson Brothers at the Morris-Emigh mine during the time period covered by the Agreement. (Carrello Affidavit, para. 25,

Exhibit I) A copy of Al Hamilton's Contract Operator Approval Certificate and Relationship Inquiry is attached to Mr. Carrello's Affidavit as Exhibit H. (Carrello Affidavit, para. 25, Exhibit H) The Contract Operator Approval Certificate covers the period from August 18, 1995 to July 31, 1996. (Carrello Affidavit, Exhibit H) Al Hamilton is not a party to the Consent Order and Agreement. (Carrello Affidavit, Exhibit I) Based on Al Hamilton's status as contract operator for Thompson Brothers, it is the Department's contention that it may condition Bradford Coal's permit on the successful completion of the terms of the Consent Order and Agreement.

In Response, Bradford Coal argues as follows: (1) The Contract Operator Approval Certificate covers a time period other than that involved in this appeal and, therefore, provides no support for the factual averments in the Department's Motion; (2) Although Al Hamilton was at one time a contract operator for Thompson Brothers, the mining license of Thompson Brothers was suspended and no further coal was removed by Al Hamilton pursuant to this arrangement; (3) Bradford Coal believes Thompson Brothers' surface mining permit for the Morris-Emigh mine site has lapsed and may have been invalid; and (4) Neither Al Hamilton nor Bradford Coal are parties to the Consent Order and Agreement.

The Department in its Reply argues that these issues are untimely because Bradford Coal did not raise them in its notice of appeal. However, like the issue of Bradford Coal's relationship with Manor Mining, we find that the issue of Bradford Coal's relationship with Thompson Brothers was raised generally in paragraph 3.h of the notice of appeal. Therefore, we turn to the question of whether the Department has established that Bradford Coal and Thompson Brothers are related entities under §3.1(d) of the Surface Mining Act and 25 Pa. Code §86.37(a)(8).

Based on the evidence before us, we conclude that the Department has not demonstrated that Bradford Coal and Thompson Brothers are related entities. The Department asserts that the two are related by virtue of Al Hamilton's status as a contract operator for Thompson Brothers. However, the certificate of contract operator approval provided by the Departement in support of its Motion was issued on August 18, 1995, after the issuance of Bradford Coal's permit. (Carrello Affidavit, Exhibit H) Therefore, it cannot form the basis for the Department's contention that Bradford Coal, through Al Hamilton, exercised ownership or control over Thompson Brothers at the time of the permit issuance. Furthermore, neither Bradford Coal nor Al Hamilton are parties to the very agreement which the Department has, in effect, charged them with enforcing. Although the Consent Order and Agreement mentions Al Hamilton, it does not require Al Hamilton to take any action. (Carrello Affidavit, Exhibit I) Nor is there any indication that a separate compliance order was issued to Al Hamilton with respect to this site. Based on this, we cannot find that the Department has demonstrated that Bradford Coal exercises ownership or control over Thompson Brothers with respect to the Consent Order and Agreement.

In its Reply, the Department argues that because Bradford Coal provided no counter-affidavits to refute the Department's averment that Al Hamilton was a contract operator on the Morris-Emigh site, the averment is admitted and must be taken as true for purposes of the Department's Motion. In support of this argument, the Department cites the Commonwealth Court's decision in O.S.C. Co. v. Lackawanna River Basin Sewer Authority, 551 A.2d 376 (Pa. Cmwlth. 1988), and the Board's decision in Pickelner v. DER, 1995 EHB 359. Although both of these decisions address the failure of a party to file counter-affidavits in response to a motion for summary judgment, they do not provide support for the Department in this instance. In Lackawanna River

Basin, the Commonwealth Court noted that, although the responding party had failed to file a counter-affidavit, the burden was still on the moving party to demonstrate that no genuine issues of material fact existed. Likewise, in Pickelner, the Board held that "when a motion for summary judgment is made and properly supported," the opposing party may not rest upon the mere allegations or denials of his pleading but must demonstrate, by affidavit or otherwise, that a genuine issue of material fact exists. 1995 EHB at 364-65 (Emphasis added.)

In the present case, Bradford Coal's failure to file a counter-affidavit in response to the Department's Motion does not, per se, entitle the Department to summary judgment on this issue. The Department must first meet its burden of proving that no genuine issue of material fact remains with respect to the question of whether Bradford Coal and Al Hamilton are entities related to Thompson Brothers. The Department has failed to present sufficient evidence to meet this burden, and, therefore, is not entitled to summary judgment on this issue.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

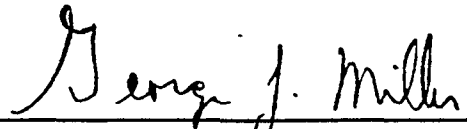
BRADFORD COAL COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 95-141-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

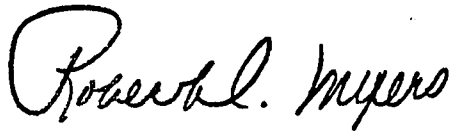
AND NOW, this 8th day of July 1996, the Department's Motion for Summary Judgment is granted in part and denied in part. Summary judgment is **granted** to the Department on the issue of the Department's authority to impose Conditions 12, 13, 14, and 16 in Bradford Coal's permit. However, because full compliance has been achieved with respect to Conditions 12, 13, and 14, these conditions are no longer in effect. The Department is **denied** summary judgment on the issue of its authority to impose Conditions 15 and 17 in the permit.

EHB Docket No. 95-141-R

ENVIRONMENTAL HEARING BOARD

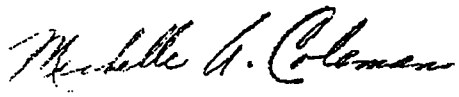


GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: July 19, 1996

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M. DIANE SMITH
SECRETARY TO THE BOARD

HILLTOWN TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 96-016-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GEORGE J. BAKER, JR., Intervenor	:	**Issued: July 19, 1996**

OPINION AND ORDER ON
MOTION TO COMPEL AND MOTION FOR SANCTIONS

By George J. Miller, Administrative Law Judge

Synopsis:

Before the Board are a motion to compel answers to questions pertaining to documents and a motion for sanctions. Both motions were filed by Hilltown Township. The Board grants the motion to compel, but denies the motion for sanctions.

OPINION

The motion to compel[1] currently before the Board arises from the Department's issuance of an order for a revision to Hilltown Township's (Township) Official Sewage Facilities Plan that will provide for adequate sewage facilities for a proposed subdivision on land owned by George J. Baker, Jr., intervenor, and located along State Route 113 in Hilltown Township, Bucks County. In 1988, Mr. Baker submitted a plan revision to the Township for the extension of public sewers for this

[1] Although the motion is titled Motion for Sanction, the Board will consider it as a motion to compel and a motion for sanctions as those are the items stated in the Township's prayer for relief.

project. On January 9, 1989 the Hilltown Township Board of Supervisors voted not to amend its plan for the Baker project. Subsequently on November 3, 1989, Mr. Baker filed a private request for the revision of Hilltown Township's Official Sewage Facilities Plan with the Department. The Department notified the Township of the request for the revision. The Township responded by stating the project was inconsistent with its comprehensive plan, zoning ordinance and sewage facilities plan. Upon review the Department found, among other things, that the Township's current plan indicated that the Baker parcel is located in the Hilltown Township Water and Service area and that existing sewers extend to the boundaries of the parcel, and that the Township's official sewage facilities plan did not provide adequate sewage facilities for the parcel. Based on these findings the Department issued an order directing the Township to submit a revision to the Township's official plan that would provide for adequate sewage facilities for the Baker parcel.

On January 19, 1996, the Township filed an appeal concerning the Department's order alleging, among other items, that the analysis of alternatives submitted with the private request erroneously failed to discuss and consider the viability of service to the site through Telford Borough Authority (TBA) as well as the Department erred in finding that the site is located within Hilltown Township Water and Sewer Authority's (HTWSA) permitted service area. To the contrary, the Township contends that it is located within the Telford Borough Authority's permitted service area.

Motion to Compel

On July 2, 1996, the Township filed a motion to compel Charles Feindler, Manager of Telford Borough Authority to answers questions about two documents, a water and sewer service agreement between the Township, HTWSA and TBA, and a letter from the TBA signed by Mr. Feindler. TBA responded to the motion on July 8, 1996 by contending that Hilltown is aware of the

facts it seeks to illicit from Mr. Feindler regarding the service agreement as it is a party to that agreement as well as that each of the documents speaks for itself.

The Board grants the motion to compel Mr. Feindler to answer questions pertaining to the documents. One of the purposes of discovery is to allow one side in litigation to discover the factual basis for the assertions made by his opponent. This includes learning of factual underpinnings of the allegations through depositions taken before and, where necessary, after the opponent has engaged in review of files of third persons (whether or not those persons are parties). Discovery before the Board is governed by the Pennsylvania Rules of Civil Procedure. 25 Pa. Code §1021.111 Pursuant to Pa. R.C.P. 4003.1, parties may obtain discovery of any matter which is not privileged and which is relevant to the subject matter of the pending action. Relevancy is to be broadly construed for the purpose of discovery. *City of Harrisburg v. DER, et al.*, 1992 EHB 170.

Information regarding the service agreement and letter was requested in the deposition of a third party, TBA. TBA objected to providing the necessity of deposition by Mr. Feindler at the outset of the proceedings, claiming that all verification of factual issues were identically in the possession and knowledge of Appellant and that the documents speak for themselves.

A review of the notice of appeal indicates that one of Appellant's objections to the Department's order for Appellant to revise its sewage facilities plan based on the intervenor's private request is that the request's analysis of alternatives submitted to the Department for review failed to discuss and consider viability of service to the site through the TBA (paragraph 9 of the appeal). Furthermore, Appellant alleged the Department erred in finding that the site is located within the Authority's permitted service area as the site is located within the TBA permitted service area (paragraph 10 of the appeal). Mr. Feindler is being asked to answer questions about documents

which pertain to the service areas of the respective organizations. Because Appellant's appeal raises the issue of whether the parcel in question is in the service area of the TBA or that of Hilltown, this matter is within the scope of discovery. Therefore, we grant Appellant's motion to compel Mr. Feindler to answer questions pertaining to these documents.

Motion for Sanctions

The Board denies Appellant's motion for sanctions for reasonable expenses and attorney fees incurred in obtaining its motion because the request is premature as this is Appellant's first request for a motion to compel. While upon a motion, the rules of civil procedure authorize the court to issue an order, imposing sanctions for noncompliance with discovery requests under Pa. R.C.P. 4019(a)(i), the courts have held that sanctions for noncompliance with discovery requests are generally not imposed until there has been a refusal to comply with a court order compelling compliance. *William v. Southeastern Pennsylvania Transportation Authority*, 574 A.2d 1175 (Pa. Cmwlth. 1990), *alloc. granted*, _____Pa. _____, 597 A.2d 1155 (1991), *aff'd*, 534 Pa. 467, 633 A.2d 1090 (1993). This Board has adhered to the requirement of having a failure to comply with an order compelling compliance before imposing sanctions. *New Castle Township Board of Supervisors v. DER, et al*, 1994 EHB 919. Appellant's motion must be denied since Mr. Feindler has not failed to comply with an order of the Board in this instance as the Board is just issuing its first order to compel on this discovery matter in this opinion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HILLTOWN TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 96-016-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GEORGE J. BAKER, JR., Intervenor	:	

ORDER

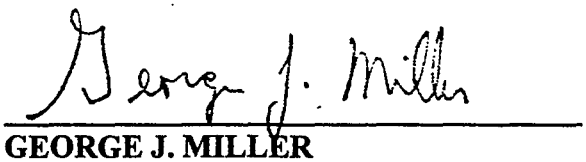
AND NOW this 19th day of July, 1996, it is hereby ordered that Hilltown Township's:

1. Motion to Compel Charles Feindler to answer questions pertaining to a water and sewer service agreement between Hilltown Township, HTWSA and TBA and a TBA letter signed by him as manager of the TBA is granted.

2. Motion for Sanctions is denied.

3. Discovery is extended for 30 days to permit compliance with this order.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: July 19, 1996

See the following page for service list

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kh/bl

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TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOA

LAUREL RUN RECLAMATION COMPANY, INC.	:	
v.	:	**EHB Docket No. 95-168-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 23, 1996**

OPINION AND ORDER SUR MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Section 3.1(d) of the Surface Mining Act, 52 P.S. § 1396.3a(d), and 25 Pa. Code § 86.37(a)(8) of the regulations authorize the Department to condition surface mining permits on compliance by an entity related to the applicant through common ownership or control. Partial summary judgment is granted to the Department on the issue of whether it had the authority to impose conditions in Laurel Run's mining permit which required entities related to Laurel Run to comply with certain orders issued by the Department. However, once the related entity has completed the requisite corrective action and has achieved full compliance, the Department must have some procedure for removing the condition from the permit or designating that the condition has been fulfilled. Once full compliance is reached, the condition is null and void.

The Department is not entitled to summary judgment when one of the conditions imposed

in the permit requires compliance with a Department order which was subsequently overturned by the Board in another proceeding. Nor is the Department entitled to summary judgment when it has failed to demonstrate that the applicant is related to the entity which is the subject of the condition. Finally, the Department is not entitled to summary judgment when the evidence indicates that compliance with a Department order had been achieved at the time of the permit issuance.

A party's failure to file counter-affidavits in response to a motion for summary judgment does not automatically entitle the moving party to summary judgment where the moving party has not met its burden of demonstrating that no genuine issue of material fact exists.

OPINION

This matter stems from an appeal filed on August 7, 1995 by Laurel Run Reclamation Company, Inc. ("Laurel Run"). Laurel Run objects to certain conditions included in a mining permit issued to it on July 18, 1995 by the Department of Environmental Protection ("Department"). The permit authorizes Laurel Run to conduct mining activities at the Laurel Ridge Mine in Union Township, Clearfield County. Each of the disputed conditions pertains to mine sites other than the Laurel Ridge Mine and requires compliance with orders of the Department by entities which the Department claims are related to Laurel Run.

Specifically, Laurel Run objects to Conditions 7 through 13. Condition 7 states the permit is conditionally issued based upon the outcome of an appeal of a penalty assessment issued to Al Hamilton Contracting Company ("Al Hamilton") on November 14, 1994. Condition 8 states the permit is conditionally issued based upon the "continued satisfactory progress" by Bradford Coal Company ("Bradford Coal") with a compliance order issued by the Department on June 15, 1995. Conditions 9 through 12 state the permit is conditionally issued based upon the continued

satisfactory progress by Al Hamilton with certain compliance orders issued by the Department in September 1992, October 1994, and June 27, 1995. Finally, Condition 13 states the permit is conditionally issued based on the satisfactory progress by Thompson Brothers Coal Company ("Thompson Brothers") with a Consent Order and Agreement entered into with the Department on August 4, 1994.

The matter now before the Board is a Motion for Summary Judgment filed by the Department on November 21, 1995. Laurel Run filed a Response to the Department's Motion on December 15, 1995. The Department filed a Reply on January 3, 1996. Summary judgment may be granted where the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035(b); *Snyder v. Department of Environmental Resources*, 588 A.2d 1001 (Pa. Cmwlth. 1991), *appeal dismissed*, 632 A.2d 308 (Pa. 1993). In ruling on a motion for summary judgment, we must view the facts in a light most favorable to the non-moving party. *RESCUE Wyoming v. DER*, 1994 EHB 425, 428.

The Board has previously held that, pursuant to Section 3.1(d) of the Surface Mining Conservation and Reclamation Act ("Surface Mining Act"), Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §1396.1 *et seq.*, at §1396.3a(d), and Section 86.37(a)(8) of the mining regulations, 25 Pa. Code §86.37(a)(8), the Department may issue a permit conditionally based upon compliance by the applicant or a related party to the applicant with an outstanding Department order. *Al Hamilton Contracting Co. v. DEP*, EHB Docket No. 95-124-R (Consolidated) (Opinion issued April 19, 1996); *Bradford Coal Co., Inc. v. DEP*, EHB Docket No. 95-141-R (Opinion issued July 19, 1996).

The Department argues that Al Hamilton, Bradford Coal, and Thompson Brothers are entities which are related to Laurel Run and, therefore, Laurel Run's permit may be conditioned on their compliance with outstanding Department orders. In support of its Motion, the Department has provided the affidavits of Joseph Leone, Permit Section Chief for the Department's McMurray District Mining Office; Michael Terretti, Compliance Section Chief for the Department's Bureau of Mining and Reclamation; and Mario Carrello, Mining Permit and Compliance Specialist for the Department's Hawk Run District Mining Office. We shall examine each of the conditions below.

Conditions 7, 9, 10, 11, and 12 - Al Hamilton

Laurel Run admits in its Response that it is related to Al Hamilton. It argues, however, that its permit may not be conditionally issued based on Al Hamilton's compliance with the orders and penalty assessment in question because (1) the Department lacked the authority to condition Laurel Run's permit in this manner and (2) Al Hamilton was in full compliance with the orders in question at the time Laurel Run's permit was issued.

Conditions 7 and 9 relate to surface mining conducted by Al Hamilton at its Little Beth operation. On September 29, 1992, the Department issued Administrative Order No. 924104 requiring Al Hamilton to conduct a study to determine the geology and hydrogeology of the Little Beth operation in relation to the property of a nearby resident known as the "Cowder site." (Carrello Affidavit, para. 3, Exhibit A) The order was upheld by both the Environmental Hearing Board and the Commonwealth Court. *Al Hamilton Contracting Co. v. DER*, 1994 EHB 1027, *aff'd*, 659 A.2d 31 (Pa. Cmwlth. 1995). On November 14, 1994, Al Hamilton was assessed a $30,000 civil penalty for failing to comply with the Cowder study order. (Carrello Affidavit, para.7, Exhibit C) The

parties agreed to a settlement which reduced the amount of the penalty to $750 and which provided Al Hamilton an extended schedule for completing the study. (Carrello Affidavit, para. 9)

In its Response, Laurel Run states that Al Hamilton has fully complied with the order, and, therefore, there is no factual or legal basis for the conditions to be in the permit. In its Reply, the Department argues that the issue of Al Hamilton's compliance status is untimely since Laurel Run did not raise it in its notice of appeal.

Pursuant to *Pennsylvania Game Commission v. Department of Environmental Resources*, 509 A.2d 877 (Pa. Cmwlth. 1986), any issue not raised by a party in its notice of appeal is untimely unless good cause can be shown for raising it at a later date. In determining whether a party has raised an issue in its notice of appeal, we must broadly construe the party's grounds for appeal. *Croner, Inc. v. Department of Environmental Resources*, 589 A.2d 1183 (Pa. Cmwlth. 1991). However, as the Department correctly notes in its Reply, the mere filing of an appeal is not enough to allow the addition of new grounds for appeal, as the *Croner* exception would then swallow the rule in *Game Commission*. *See Newtown Land Limited Partnership v. DER*, 1994 EHB 856, 864.

Based on our review, we find that Laurel Run did not raise the issue of Al Hamilton's compliance status in its notice of appeal and, therefore, it is untimely. The closest Laurel Run comes to addressing the issue of compliance is in paragraph 3.i of its notice of appeal, which states that "the special conditions as contained [i]n the permit reissuance impose conditions and criteria upon the permittee which are other than those contained at 25 Pa. Code § 86.37 *et seq*." Section 86.37 deals with, *inter alia*, the Department's right to condition a permit on compliance by related parties. Whereas the question of a permittee's relationship with another entity is generally addressed under Section 86.37, whether or not that entity has achieved compliance status with a Department order

falls outside the scope of this section, even under the general standard enunciated in *Croner, supra.*

Moreover, even if Laurel Run had raised this argument in a timely manner, it has provided no evidence to support its claim that Al Hamilton was in full compliance with the Cowder study order at the time Laurel Run's permit was issued. According to the affidavit of Mario Carrello, Al Hamilton was placed in full compliance with the order on September 1, 1995. (Carrello Affidavit, para. 11, Exhibit D) As of the date of the permit issuance on July 18, 1995, Al Hamilton was considered by the Department to be in "satisfactory progress toward compliance" with the Cowder study order, but not in full compliance. (Carrello Affidavit, para. 10) Therefore, we find that the Department acted in accordance with Section 3.1(d) of the Surface Mining Act, 52 P.S. § 1396.3a(d), and 25 Pa. Code § 86.37(a)(8) in including Conditions 7 and 9 in Laurel Run's permit.

However, as we noted in our earlier decision in *Al Hamilton*, EHB Docket No. 95-124-R (Opinion issued April 19, 1996), "once a permittee has completed the requisite corrective action and has achieved full compliance, as in the case of the Cowder study order, [the Department] must have some provision for removing the condition in question from the permit or designating that the condition has been fulfilled." *Slip op.* at p. 9. Therefore, although the Department acted within its discretion in including Conditions 7 and 9 in Laurel Run's permit, because full compliance has been achieved, those conditions are now null and void and should be removed from the permit.

Condition 10 refers to Compliance Order No. 944092 issued to Al Hamilton on October 26, 1994. This order directed Al Hamilton to treat or abate a discharge of acid mine drainage from its Caledonia Pike No. 3 mine site. (Carrello Affidavit, para. 18, Exhibit F) According to the affidavit of Mario Carrello, Al Hamilton was not in full compliance with the order as of July 18, 1995, the date on which Laurel Run's permit was issued. (Carrello Affidavit, para. 20)

Laurel Run argues that Al Hamilton was placed in full compliance with the order on July 17, 1995, one day prior to the issuance of Laurel Run's permit. In support of its argument, Al Hamilton has attached to its Response a copy of an inspection report for the Caledonia Pike No. 3 site which states that Al Hamilton was "placed in compliance with [Compliance Order No.] 944092 on July 17, 1995." (Response, Exhibit A) (Emphasis in original)

In its Reply, the Department argues, first, that the issue of Al Hamilton's compliance status with Compliance Order No. 944092 is untimely since Laurel Run failed to raise it in its notice of appeal and, second, that Laurel Run's response is insufficient to defeat the Department's Motion since it fails to contain a counter-affidavit.

Although we have noted that Laurel Run did not raise the issue of Al Hamilton's compliance status in its notice of appeal, it nonetheless did raise the issue of the Department's authority to impose the conditions in question in Laurel Run's permit. (Notice of Appeal, para. 3.j) It further raised the issue of whether the conditions in question were outside the scope of 25 Pa. Code § 86.37. (Notice of Appeal, para. 3.i) Based on these provisions of the notice of appeal, we find that we may examine the issue of whether Condition 10 was properly included in Laurel Run's permit.

As for the Department's second argument, that Laurel Run failed to provide a counter-affidavit in support of its Response, the lack of a counter-affidavit does not automatically entitle the Department to summary judgment on this issue. As we noted in *Bradford Coal*, EHB Docket No. 95-141-R (Opinion issued July 19, 1996), a responding party's failure to submit a counter-affidavit in response to a motion for summary judgment does not *per se* entitle the moving party to summary judgment. *Slip op.* at 17. The burden falls on the moving party to demonstrate that no genuine issues of material fact exist. *Id. See also, O.S.C. Co. v. Lackawanna River Basin Sewer Authority*,

551 A.2d 376 (Pa. Cmwlth. 1988). Here, there is an inspection report by the Department which states that Al Hamilton was in full compliance with Compliance Order No. 944092 on the date of Laurel Run's permit issuance. In that case, the Department had no authority under Section 3.1(d) of the Surface Mining Act or Section 86.37(a)(8) of the regulations to condition Laurel Run's permit on Al Hamilton attaining full compliance with the Compliance Order. Therefore, the Department has not demonstrated that it is entitled to summary judgment with regard to Condition 10 of the permit. Moreover, because full compliance has been achieved with respect to Compliance Order 944092, this condition should now be removed from the permit.

Condition 11 refers to Administrative Order No. 924096 issued to Al Hamilton on September 17, 1992. This order cited Al Hamilton for a discharge emanating from its Brenda Gayle No. 1 mine site in Rush Township, Centre County, and directed Al Hamilton to submit a plan for treatment or abatement of the discharge. (Carrello Affidavit, para. 13, Exhibit E) In an Adjudication issued on April 29, 1996, the Board sustained Al Hamilton's appeal of the order on the basis that the Department had not demonstrated a hydrogeologic connection between the mine site and the discharge. *Al Hamilton Contracting Co. v. DEP*, EHB Docket No. 92-467-R (Adjudication issued April 29, 1996). Because this order has been overturned by the Board, Laurel Run's permit may not be conditioned on Al Hamilton's compliance with the order. Therefore, the Department is directed to remove Condition 11 from the permit.

Condition 12 refers to Compliance Order No. 954044 issued on June 25, 1995. This order directed Al Hamilton to treat a discharge of acid mine drainage at its Lezzer operation in Pike Township, Clearfield County. (Carrello Affidavit, para. 26, Exhibit H) According to the affidavit of Mario Carrello, on July 18, 1995 the Department considered Al Hamilton to be in satisfactory

progress toward compliance but not in full compliance with the order. (Carrello Affidavit, para. 28)

In its Response, Laurel Run argues that Al Hamilton was in full compliance with Compliance Order No. 954044 as of the date of the permit issuance. In support of its argument, Laurel Run has attached a copy of an inspection report for the Lezzer operation dated July 20, 1995. (Response, Exhibit C) The report states that the compliance order "shall be totally lifted as of this date." Thus, contrary to Laurel Run's Response, Al Hamilton was not placed in full compliance with Compliance Order No. 954044 until two days after the permit was issued. Based on this, we find that the Department had proper authority to include Condition No. 12 in the permit.

Laurel Run argues, however, that the condition should be vacated since there no longer appears to be any basis for continuing the condition. We agree. As noted earlier, once full compliance has been achieved, the Department must have some mechanism for removing the permit condition or designating that compliance has been achieved. Therefore, although the Department acted within the proper scope of its authority in including Condition 12 in the permit, because full compliance has been attained, the condition is now null and void and should be removed from the permit.

Condition 8 - Bradford Coal

Laurel Run does not dispute that it is related to Bradford Coal. It does, however, question the Department's authority to include a condition in its permit requiring compliance by Bradford Coal with an order of the Department.

Condition 8 refers to Compliance Order No. 954040 issued to Bradford Coal on June 15, 1995. The order directs Bradford Coal to treat a discharge of acid mine drainage at its Bear Hill mine site in Bradford, Clearfield County. (Carrello Affidavit, para. 22, Exhibit G) According to the

affidavit of Mario Carrello, on July 18, 1995 the Department considered Bradford Coal to be in satisfactory progress toward compliance with the order, but not in full compliance. (Carrello Affidavit, para. 24)

In its Response, Laurel Run argues that Bradford Coal was in full compliance with Compliance Order No. 954040 as of the date of the permit issuance. In support of its argument, Laurel Run has provided a copy of a Department inspection report dated July 17, 1995. The report states that the violation has been corrected and that "Compliance Order No. 954040 should be totally lifted as of this date." (Response, Exhibit B) Thus, according to the inspection report, Bradford Coal had achieved compliance with Compliance Order No. 954040 one day prior to the issuance of Laurel Run's permit.

Because the July 17, 1995 inspection report indicates that Bradford Coal was in compliance with Compliance Order No. 954040 at the time of the permit issuance to Laurel Run, we find that the Department is not entitled to summary judgment on this issue and that Condition 8 should be removed from the permit.

Condition 13 - Thompson Brothers

Condition 13 states that the permit is conditionally issued based on Thompson Brothers' continued satisfactory progress with Consent Order and Agreement No. 934097 ("Agreement") signed by Thompson Brothers and the Department on August 4, 1994. The Agreement pertains to a mine site operated by Thompson Brothers in Morris Township, Clearfield County, known as the "Morris-Emigh mine." (Carrello Affidavit, Exhibit J) Pursuant to the Agreement, Thompson Brothers was assessed a civil penalty for certain violations at the mine site and was directed to complete reclamation at the site. (Carrello Affidavit, Exhibit J)

During the time period covered by the Agreement, Al Hamilton was a contract operator for Thompson Brothers at the Morris-Emigh mine. A copy of Al Hamilton's Contract Operator Approval Certificate and Relationship Inquiry is attached to Mr. Carrello's Affidavit as Exhibit I. The Contract Operator Approval Certificate covers the period from August 18, 1995 to July 31, 1996. (Carrello Affidavit, Exhibit I) Al Hamilton is mentioned in the aforesaid Agreement as being a contract operator for Thompson Brothers; however, it is not a party to the Agreement.

Based on Al Hamilton's status as a contract operator for Thompson Brothers and Al Hamilton's relationship to Laurel Run, it is the Department's contention that it may condition Laurel Run's permit on Thompson Brothers' compliance with the Agreement. In response, Laurel Run argues as follows: (1) The Contract Operator Approval Certificate covers a time period other than that involved in this appeal and, therefore, provides no support for the factual averments in the Department's Motion. (2) Although Al Hamilton was at one time a contract operator for Thompson Brothers, the mining license of Thompson Brothers was suspended and no further coal was removed by Al Hamilton pursuant to this arrangement. (3) Laurel Run believes Thompson Brothers' surface mining permit for the Morris-Emigh mine site has lapsed and may have been invalid. (4) Neither Al Hamilton nor Laurel Run are parties to the Agreement.

In its Reply, the Department argues that these issues are untimely because Laurel Run did not raise them in its notice of appeal. However, we find that the issue of Al Hamilton's (and, through Al Hamilton, Laurel Run's) relationship with Thompson Brothers was raised generally in paragraph 3.i of the notice of appeal. Paragraph 3.i reads: "[T]he special conditions as contained [i]n the permit reissuance impose conditions and criteria upon the permittee which are other than those contained at 25 Pa. Code § 86.37 *et seq.*" Since § 86.37(a)(8) of the regulations deals with the

Department's right to condition a permit on compliance by a related party, we find that paragraph 3.i sufficiently raises the issue of Al Hamilton and Laurel Run's relationship with Thompson Brothers.

Based on the evidence before us, we conclude that the Department has not demonstrated that Laurel Run and Thompson Brothers are related entities. The Department asserts that the two are related by virtue of Al Hamilton's status as a contract operator for Thompson Brothers. However, the Certificate of Contract Operator Approval provided by the Department in support of its Motion was issued on August 18, 1995, after the issuance of Laurel Run's permit. Therefore, it cannot form the basis for the Department's contention that Laurel Run, through Al Hamilton, exercised ownership or control over Thompson Brothers at the time of the permit issuance. Furthermore, neither Laurel Run nor Al Hamilton are parties to the very Agreement which the Department has, in effect, charged them with enforcing. Although the Agreement mentions Al Hamilton, it does not require Al Hamilton to take any action. (Carrello Affidavit, Exhibit J) Nor is there any indication that a separate compliance order was issued to Al Hamilton with respect to this site. Based on this, we cannot find that the Department has demonstrated that Laurel Run exercises ownership or control over Thompson Brothers with respect to the Agreement. Therefore, we find that the Department has not demonstrated that it is entitled to summary judgment on this issue.

Accordingly we enter the following order:

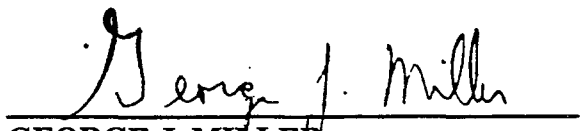
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LAUREL RUN RECLAMATION COMPANY, INC.	:	
v.	:	**EHB Docket No. 95-168-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

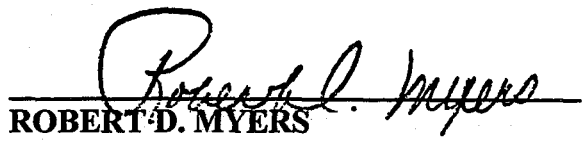
AND NOW, this 23rd day of July, 1996, it is ordered that the Motion for Summary Judgment filed by the Department of Environmental Protection is granted in part and denied in part. Summary judgment is **granted** to the Department on the issue of the Department's authority to impose **Conditions 7, 9, and 12**, in Laurel Run's permit.The Department is **denied** summary judgment on the issue of its authority to impose **Conditions 8, 10, 11, and 13** in the permit. Because full compliance has been achieved with respect to **Conditions 7, 8, 9, 10, and 12**, they are no longer in effect and should be removed from the permit. Further, because **Condition 11** is based on a Compliance Order which was subsequently overturned by the Board, it is invalid and should be removed from the permit.

ENVIRONMENTAL HEARING BOARD

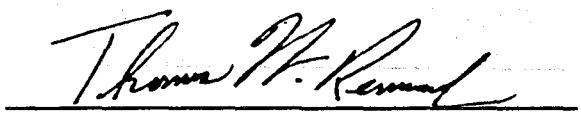


GEORGE J. MILLER
Administrative Law Judge
Chairman

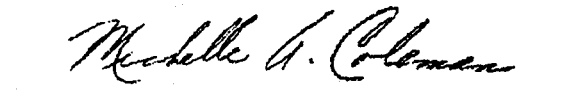
EHB Docket No. 95-168-R



ROBERT D. MYERS
Administrative Law Judge
Member



THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: **July 23, 1996**

c: **Bureau of Litigation:**
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For Appellant:
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M. DIANE SMITH
SECRETARY TO THE BOAI

MARY RIDENOUR	:	
	:	
v.	:	**EHB Docket No. 95-180-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 24, 1996**

OPINION AND ORDER ON MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

An appeal which challenges the Department's refusal to order a mining company to take remedial action with respect to the Appellant's well water is dismissed. The Department's exercise of its prosecutorial discretion is not an action which is reviewable by the Board.

OPINION

This matter stems from an appeal filed by Mary Ridenour on August 21, 1995 and perfected on October 12, 1995. Ms. Ridenour is a resident of Jackson Township in Butler County. On April 24, 1995, Ms. Ridenour filed a complaint with the Department of Environmental Protection (formerly the Department of Environmental Resources) ("the Department") concerning the quality of the water in her well. It is Ms. Ridenour's belief that mining conducted by Kerry Coal Company in the vicinity of her property had adversely affected the quality of her well water. An investigation

into the matter was conducted by a Department mine inspector and a hydrogeologist who concluded that Ms. Ridenour's well was located too far from the mine site to have been affected by the mining and that the chemistry of her water did not show a change which could be related to mining. These findings were conveyed to Ms. Ridenour in a letter from the Department dated July 24, 1995. Ms. Ridenour then filed this appeal with the Board. In her perfected notice of appeal, Ms. Ridenour states, "The subject of this Appeal is the refusal of the [Department] to order Kerry Coal Company to remedy the degradation of the Appellant's water supply that has resulted from mining operations at the Burr Mine, under CSMP #10930103."

On November 27, 1995, the Department filed a Motion to Dismiss the appeal. The Department argues that its refusal to order Kerry Coal Company to remedy Ms. Ridenour's water supply is an act of prosecutorial discretion, which is not a reviewable action. Ms. Ridenour filed no response to the Motion. For the reasons set forth below, we find that the Department's July 24, 1995 letter is not an action which is reviewable by the Board and we, therefore, grant the Department's Motion to Dismiss.

To be appealable to the Board, a decision by the Department must constitute an "action" which affects the appellant's "personal or property rights, privileges, immunities, duties, liabilities or obligations..." 25 Pa. Code § 1021.2; *Medusa Aggregates Company*, 1995 EHB 414, 418. An agency's exercise of "prosecutorial discretion involves a determination of whether or not to pursue enforcement actions against those it regulates." *McKees Rocks Forging, Inc. v. DER*, 1994 EHB 220, 268-69. It is well-established in prior Board decisions that the Department's exercise of its prosecutorial discretion is not an action and, thus, is not reviewable by this Board. *Id.*; *North*

Pocono Taxpayers' Association v. DER, 1994 EHB 449, 480; *Washington Township Concerned Citizens v. DER*, 1991 EHB 205, 206-07.

In *Washington Township, supra,* a citizens group filed an appeal with the Board, asserting that the Department had failed to enforce the conditions of a non-coal mining permit. The Board dismissed the appeal, holding "even if DER had refused a request by the Appellants to initiate an enforcement action, exercises of prosecutorial discretion are not adjudicatory in nature and are not subject to review by the Board or by the Courts." 1991 EHB at 206-07.

This issue has also been addressed by the Commonwealth Court in *In re Frawley*, 364 A.2d 748 (Pa. Cmwlth. 1976), *cert. denied,* 436 U.S. 910. In that case, the plaintiff had filed a complaint demanding revocation of the professional licenses of a doctor and medical staff. The Medical Education and Licensure Board and State Board of Nurse Examiners found that the evidence did not warrant further proceedings against any of the licensees. On appeal to the Commonwealth Court, the Court held that the Board's decision whether or not to press charges was an exercise of prosecutorial discretion, which was not a reviewable action.

In the instant appeal, the Department conducted an investigation into Ms. Ridenour's complaint and determined that the evidence did not support a conclusion that mining by Kerry Coal Company had degraded Ms. Ridenour's well. Based on that determination, the Department did not order Kerry Coal Company to take action to remedy the alleged degradation of Ms. Ridenour's well. This determination by the Department constitutes an act of prosecutorial discretion, which is not reviewable by this Board. Because the Department's July 24, 1995 letter is not a reviewable action, we shall enter an order granting the Department's Motion to Dismiss.

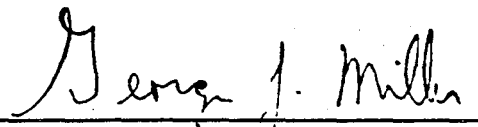
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARY RIDENOUR	:	
	:	
v.	:	**EHB Docket No. 95-180-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

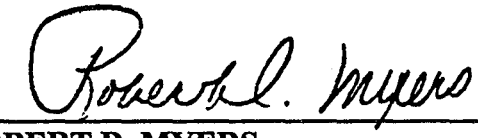
ORDER

AND NOW, this 24th day of July, 1996, it is ordered that the Motion to Dismiss filed by the Department of Environmental Protection is **granted** and the appeal of Mary Ridenour docketed at EHB Docket No. 95-180-R is **dismissed**.

ENVIRONMENTAL HEARING BOARD

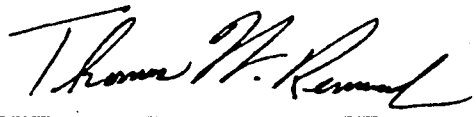


GEORGE J. MILLER
Administrative Law Judge
Chairman

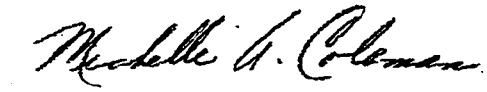


ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 95-180-R



THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: July 24, 1996

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Mary Ridenour, *pro se*
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M. DIANE SMITH
SECRETARY TO THE BOARD

R. DOUGLAS HAHN	:	
	:	
v.	:	**EHB Docket No. 94-293-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DELAWARE VALLEY CONCRETE COMPANY, Permittee	:	**Issued: July 26, 1996**

ADJUDICATION

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The mining of shale in order to channel water to the sump area and more efficiently mine sand and gravel at a quarry does not require a permit revision but rather a permit correction where the mining will not go deeper than allowed by the original permit, change the mine configuration, involve blasting, or otherwise trigger one of the criteria set forth at 25 Pa. Code Section 77.142.

INTRODUCTION

This third party appeal by R. Douglas Hahn, M.D. ("Dr. Hahn") challenges the issuance of a permit correction to Delaware Valley Concrete Company, Inc. ("Delaware Valley") to mine shale at its quarry located in Bucks County, Pennsylvania. Dr. Hahn contends that the Pennsylvania Department of Environmental Protection(the "Department") erred in issuing a permit correction. Instead, he argues that the request of Delaware Valley to mine shale requires a permit revision and thus public notice.

A hearing on the merits of this appeal was held in Harrisburg on August 15, 1995 before Administrative Law Judge, Thomas W. Renwand, a Member of the Board. Following the conclusion of the hearing and the transcription of the testimony, the parties submitted post-hearing briefs. Issues not raised in post-hearing briefs are deemed waived. *Lucky Strike Coal Company v. DER*, 547 A.2d 1988 (Pa. Cmwlth. 1988), allocatur denied, 521 A.2d 607 (Pa. 1988).

After a full and complete review of the record we make the following:

Findings of Fact

1. The Department is the agency with the duty and authority to administer and enforce the Noncoal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. Section 3301 *et seq.* ("Noncoal Surface Mining Act"); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. Section 691.1 *et seq.* ("Clean Streams Law"); Section 1917-A; of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. Section 510-17 ("Administrative Code") and the rules and regulations promulgated thereunder.

2. Appellant is R. Douglas Hahn, M.D., an individual residing on Old Canal Lane, Upper Black Eddy, Pennsylvania.

3. Permittee is Delaware Valley which operates a quarry in Tinicum Township, Bucks County, Pennsylvania pursuant to a lawful permit issued by the Department.

4. On September 21, 1994, Delaware Valley, through its engineering consultant, requested a clarification of its permit so it could excavate shale, as well as sand and gravel. (Board Exhibit No. 1)

5. On September 26, 1994, the Department "corrected" the permit and advised Delaware Valley that shale was a mineral authorized to be mined on the area subject to the permit. (Board Exhibit No. 4)

6. The Department requires that all minerals mined and sold be identified in the permit. (N.T. 214)

7. All applications requesting a change in mining activities are evaluated by the Department against the specific criteria set forth in the regulations at 25 Pa. Code Section 77.142(1)(i) through (v). (N.T. 87, 217-218)

8. None of the criteria set forth in the regulations was triggered by Delaware Valley's request. (N.T. 218)

9. The deepest area of the quarry is the sump area. (N.T. 97)

10. Delaware Valley is authorized to mine sand, gravel, and shale as long as it does not go below the sump area. (N.T. 99)

11. Delaware Valley's main business is the making of concrete. (N.T. 167)

12. The quarry employs approximately four workers. (N.T. 143)

13. In order to effectively mine the quarry it is necessary to dig channels so that the water will properly drain to the sump area. Otherwise water will collect in small ponds in pockets on the quarry floor. (N.T. 101, 140)

14. The sand and gravel undulates through shale. (N.T. 101)

15. The correction was made to the permit because it was necessary to remove the shale to mine some of the sand and gravel and to create channels to drain the water. (N.T. 101)

16. Delaware Valley does not use the shale in the manufacture of concrete. (N.T. 164)

17. Delaware Valley crushes the shale and sells it as decorative rocks used in landscaping. (N.T. 165)

18. It was necessary to excavate some of the shale to get the equipment down to mine the sand and gravel. (N.T. 101)

19. Permit corrections are common at the Department. (N.T. 102)

20. Removing shale is a necessary part of the mining process. (N.T. 115)

21. Shale is a permitted mineral to be extracted under the Tinicum Township zoning code. (N.T. 137)

22. The Department inspects the mining at the quarry on a regular basis. (N.T. 111)

23. The original application listed sand, gravel and red shale. (Board Exhibit No. 2; N.T. 215) However, shale was not listed in the original permit.

24. There will be no change in the slope, configuration, or depth of the mine as a result of the shale mining. (N.T. 234)

Discussion

Dr. Hahn filed a notice of appeal to the Department's correction of Delaware Valley's non coal mining permit. As such, Dr. Hahn had the burden of proving by a preponderance of the evidence, that the Department's correction to Delaware Valley's permit was an abuse of discretion, arbitrary or contrary to law. See *Warren Sand and Gravel Company v. DER*, 341 A.2d 56 (Pa. Cmwlth. 1975). The applicable regulation, 25 Pa. Code Section 77.142, requires a permit revision, and thereby public notice, under the following circumstances:

§ 77.142 Public notice of permit revision.

A permit revision request is subject to the notice requirements

of § 77.121 (relating to public notices of filing of permit applications) under the following circumstances:

(1) For surface mining activities:

(i) Discharging to a different watershed not previously receiving a discharge from the operation or a change in water handling procedure. Water handling includes, but is not limited to, treatment facility design and additional discharge points.

(ii) The change of postmining land use.

(iii) A major change in reclamation plan including, but not limited to, changes in the final reclamation slopes or means to achieve the final slopes.

(iv) A proposed physical change in the mine configuration. Physical changes include, but are not limited to, stream diversion structures, new or expanded haul roads and elimination of public highways.

(v) The addition of blasting to the operation.

None of the witnesses called by Dr. Hahn testified that any of the criteria was triggered by the correction allowing Delaware Valley to mine shale. One of the two witnesses called by Dr. Hahn testified that a permit correction was proper in this case. (N.T. 94)

Delaware Valley is not permitted to mine any deeper than the sump area. (F.F. 10) This is the deepest part of the pit. (F.F. 9) Although there was some confusion initially about the actual depth of the sump, it was resolved once Delaware Valley and the Department presented their cases. The corrected permit does not allow Delaware Valley to mine any deeper than it was allowed to mine previously.

The witnesses called by Delaware Valley and the Department strongly supported the Department's action in issuing a permit correction. Mr. Wescavage, a supervisor in the mining permit section of the Department's Pottsville district office, testified at length regarding the review he undertook after receipt of Delaware Valley's request. Based on this review, he rightly determined that a correction rather than a revision should be issued. The President of Delaware

Valley requested the correction because of the need to remove the shale to properly mine the quarry. (F.F. 18) There will be no change in the slope, configuration, or depth of the mine as a result of the shale mining. (F.F. 24)

Not all applications for changes to mining activities require revisions. (N.T. 86) If, as in this case, a revision is not required, the Department may make the proper correction. Corrections are needed when the changes made do not rise to the level required to revise the permit. Moreover, the Department's interpretation of its own regulations is entitled to controlling weight unless it is plainly erroneous or inconsistent with the regulation. *Wiley House v. Scanlon*, 456 A.2d 995 (Pa. 1983). In this case, the evidence supports the Department's interpretation of the applicable regulation.

In Dr. Hahn's post-hearing brief he argues that the original mining permit was improperly issued. This issue was not raised in his notice of appeal, in any of his previous filings, or in the trial of this appeal. However, even if Dr. Hahn had raised this issue from the inception of his appeal we still could not consider it because of the doctrine of administrative finality. This doctrine holds that "one who fails to exhaust his statutory remedies may not thereafter raise an issue which could have and should have been raised in the proceeding afforded by his statutory remedy." *DER v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977). Where a party is aggrieved by an administrative action of the Department and fails to pursue his statutory appeal rights, under the doctrine of administrative finality neither the content nor the validity of either the Department's action or the regulations underlying it may be attacked in a subsequent administrative or judicial proceeding. *Kennametal, Inc. v. DER*, 1990 EHB 1453. As most recently pointed out by Judge Miller in *Tinicum Township v. DEP*, EHB Docket No. 95-266-MG (Opinion & Order issued July 3, 1996), "the factual and legal

bases of unappealed administrative orders are final and unassailable unless an exception applies." *Id.* at 7. No exception applies here so the issue pertaining to the issuance of the original mining permit is waived.

Although the Department acted properly in this matter, Dr. Hahn's prosecution of this case has illustrated the rather gray area of permit corrections versus permit revisions. In some instances, the distinctions are not clear and conceivably could lead to an abuse of discretion. However, this is not one of those cases. The Department clearly did not abuse its discretion in this case. In fact, the evidence affirmatively shows that the Department acted in accordance with the regulation. The permit correction issued in this case does not, despite Dr. Hahn's contentions, allow unlimited shale mining contrary to Pennsylvania law.[1]

CONCLUSIONS OF LAW

1. Dr. Hahn failed to prove by a preponderance of the evidence that the Department's correction of the permit was an abuse of discretion, arbitrary, or contrary to law.

2. The September 26, 1994, correction was lawfully issued.

3. Permit corrections are a valid exercise of the Department's authority.

4. The Department's interpretation of 25 Pa. Code Section 77.142 is entitled to controlling weight in this case.

5. Permit revisions are only necessary when a mining activity triggers one of the listed provisions in 25 Pa. Code Section 77.142.

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[1] In their post-hearing briefs, both the Department and Delaware Valley renewed their motions for a directed adjudication, made initially at the conclusion of Dr. Hahn's case-in-chief. In view of our disposition of the appeal, the motions are now moot and will not be discussed.

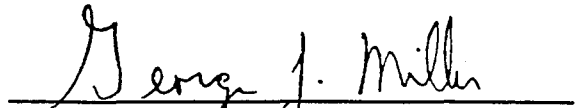
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

R. DOUGLAS HAHN	:	
	:	
v.	:	**EHB Docket No. 94-239-R**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and DELAWARE VALLEY CONCRETE COMPANY, Permittee	:	

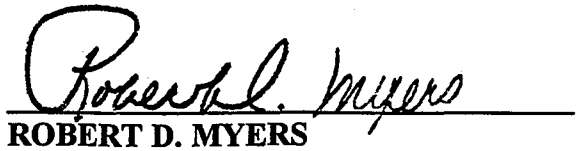
ORDER

AND NOW, this 26th day of July, 1996, the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

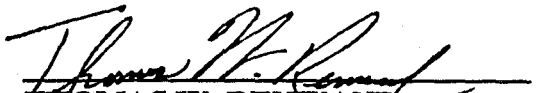


GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 94-239-R



THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: July 26, 1996

c: **DEP Litigation Library:**
Attention: Brenda Houck

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Upper Black Eddy, PA

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BARBIN, LAUFFER & O'CONNELL
Rocklege, PA

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M. DIANE SMITH
SECRETARY TO THE BOAR

FRANKLIN TOWNSHIP MUNICIPAL SANITARY AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 95-201-R**
	:	**(Consolidated with 96-010-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	**Issued: July 26, 1996**

OPINION AND ORDER ON MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

A letter from the Department which merely reaffirms and refuses to reconsider a decision set forth in an earlier letter is not an appealable action. Because the Appellant failed to file an appeal of the Department's earlier decision within 30 days of receiving the decision, its appeal is untimely and must be dismissed.

OPINION

This matter stems from two appeals filed by the Franklin Township Municipal Sanitary Authority ("Franklin Township") with regard to its 1993 and 1994 applications for a state subsidy under Act 339, Act of August 20, 1953, P.L. 1217, *as amended*, 35 P.S. § 701 *et seq*. Pursuant to Act 339, municipal authorities may recover a percentage of costs and expenses related to the operation, maintenance, repair, and replacement of sewage treatment plants. The first appeal, docketed at EHB Docket No. 95-201-R, challenges the denial by the Department of Environmental

Protection ("Department") of certain items contained in Franklin Township's Act 339 application for 1993. The second appeal, docketed at EHB Docket No. 96-010-R, challenges the Department's denial of certain items contained in Franklin Township's 1994 application. The two appeals have been consolidated at the earlier docket number.

On December 11, 1995, the Department filed a Motion to Dismiss the earlier appeal docketed at EHB Docket No. 95-201-R on the basis that the appeal was untimely. The Motion was denied in an Order dated February 13, 1996. The matter now before the Board is a second Motion to Dismiss filed by the Department on March 26, 1996, pertaining to the appeal originally docketed at EHB Docket No. 96-010-R. Franklin Township filed a Reply to the Motion on May 8, 1996, to which the Department filed a Response on May 20, 1996.

The facts surrounding the Department's Motion are as follows. By letter dated November 13, 1995, the Department notified Franklin Township of the total amount for which it was eligible under Act 339. In addition, the letter specifically listed the costs which the Department had determined were not eligible for reimbursement under Act 339. The letter concluded with the following language: "This is the Department's final decision regarding your Act 339 application for 1994." (Department's Motion, Exhibit A) On December 5, 1995, Franklin Township wrote to the Department questioning some of the items which the Department had determined were ineligible for reimbursement. The Department responded to Franklin Township's letter on December 22, 1995, stating in relevant part as follows:

> We reviewed our letter of November 13, 1995 and the decisions made on the items listed as not eligible for Act 339 subsidy. Regarding the decisions made on the ineligible items and associated costs that were discussed in our letter, we believe we have applied the

> Act 339 program regulations appropriately in the review of the items and costs claimed. No new information was presented in your letter of December 5, 1995 and our decision on these items will not be reconsidered.

(Department's Motion, Exhibit D) Thereafter, on January 12, 1996, Franklin Township filed an appeal of both the November 13, 1995 and December 22, 1995 letters.

The Department seeks dismissal of the appeal on the grounds that it is untimely. Pursuant to the Board's rules at 25 Pa. Code § 1021.52, in order to be timely an appeal must be received by the Board within 30 days after the appellant has received written notice of the Department's action. The Department argues that Franklin Township's appeal is untimely since it was filed more than 30 days after receipt of the Department's November 13, 1995 letter. In the notice of appeal, Franklin Township states that it received the Department's November 13, 1995 letter by regular mail. Even allowing several days for the Department's letter to reach Franklin Township by mail, the notice of appeal clearly was filed more than 30 days after FranklinTownship would have received the letter. As such, the appeal of the November 13, 1995 letter is untimely.

In its Reply, Franklin Township argues that its appeal is timely since it covers not just the Department's November 13, 1995 letter but also the December 22, 1995 letter. In response, the Department asserts that the November 13, 1995 letter was a final action and that the December 22, 1995 letter merely reaffirmed the Department's earlier position. As such, the Department argues, the December 22, 1995 letter was not appealable.

For the reasons which follow, we conclude that the December 22, 1995 letter is not an appealable action. In order for a letter of the Department to be appealable, it must constitute an "action," as defined at 25 Pa. Code § 1021.2(a), or an "adjudication," as defined at 2 Pa. C.S.A. §

101. *County of Clarion v. DER*, 1993 EHB 573, 575. Each of these involves a final decision which affects personal or property rights, privileges, immunities, duties, liabilities, or obligations of a person. *Id.* Department correspondence which neither changes the *status quo ante* nor imposes new obligations on the appellant is not an appealable action. *Id.* In particular, a letter from the Department which merely reaffirms or refuses to reconsider an earlier decision does not constitute an appealable action. *Conshohocken Borough Authority v. DER*, 1992 EHB 615; *Lansdale Borough v. DER*, 1986 EHB 654, 668; *Borough of Lewistown v. DER*, 1985 EHB 903, 913-14. As stated in *Borough of Lewistown*, "To hold otherwise would mean that [Department] decisions are never actually final in that a party who fails to timely appeal a [Department] decision can still challenge that decision by requesting [the Department] to reconsider that decision, and then appealing to this Board [the Department's] refusal to reconsider the decision." 1985 EHB at 913.

This case may be distinguished from that of *Lehigh Township v. Department of Environmental Resources*, 624 A.2d 693 (Pa. Cmwlth. 1993), where the Commonwealth Court held that a letter from the Department seeking reimbursement of expenses awarded to Lehigh Township ("the Township") under the Sewage Facilities Act was not a final, appealable action. In that case, by letter dated April 24, 1990, the Department notified the Township that an audit had been conducted of the Township's records of activity and expenses associated with administration and enforcement of the Sewage Facilities Act. The audit report recommended that the funds paid to the Township in connection with its 1987 application be refunded to the Commonwealth and that no funds be granted to the Township for its 1988 application. The Department's letter stated that it agreed with the recommendations of the audit and requested the Township to reimburse the 1987 payment within 30 days. The letter concluded by advising the Township of the name of the

individual within the Department whom it should contact if it had any questions. Over the course of the next ten months, a series of letters passed between the Department and the Township regarding the matter. Nearly one year after the Department's original letter had been sent, the Township filed a notice of appeal. The Board dismissed the appeal on the basis that the Department's April 1990 letter had been a final, appealable action and, therefore, the Township's appeal was untimely. On appeal, the Commonwealth Court reversed, holding that the April 1990 letter did not constitute a final action of the Department. The Court based its finding on the fact that the letter contained no language notifying the Township of its appeal rights *coupled with* the equivocal language of the letter's closing. The Court found that because the letter ended by advising the Township to direct questions to a Department staff member, that indicated that the Department's determination could be questioned.

In the present case, the Department's November 1995 letter contains no such equivocal language as did the letter in *Lehigh Township*.[1] The letter clearly ends with the statement that it is the final action of the Department with regard to this matter. The issuance of the December 1995 letter, which simply reiterated the position set forth in the November 1995 letter in response to Franklin Township's inquiry, makes the November 1995 letter no less final.

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[1] It is true that the Department's November 1995 letter contains no language notifying Franklin Township of its right to appeal. However, the Court in *Lehigh Township* made it clear that it was not merely the lack of any language notifying the Township of its appeal rights, but the absence of such language coupled with the letter's conditional language, which prevented the letter from being a final action of the Department. Moreover, it is well-established that the lack of specific language advising a person of his right to appeal does not, *per se*, prevent a Department letter from being a final, appealable action; rather, it is the content of the letter which determines whether it is an appealable action. *Quaker State Oil Refining v. Department of Environmental Resources*, 530 A.2d 942, 944-45 (Pa. Cmwlth. 1987); *Medusa Aggregates Co. v. DER*, 1995 EHB 414, 420-21.

Franklin Township, however, points to the Board's earlier order denying the Department's Motion to Dismiss the appeal originally docketed at EHB Docket No. 95-201-R, i.e. the appeal of the 1993 Act 339 application. That appeal involves a similar series of events as those in the appeal of the 1994 Act 339 application. In the earlier appeal, the Department notified Franklin Township, by letter dated June 13, 1995, that certain items in its 1993 application were determined to be ineligible for funding under Act 339. By letter dated July 25, 1995, Franklin Township questioned the Department's determination that these items were ineligible for funding. On August 22, 1995, the Department responded to Franklin Township's inquiry. However, rather than simply reaffirming its earlier decision, the Department reconsidered its decision and determined that certain items listed in its June 13, 1995 letter as ineligible for funding were, in fact, eligible. It concluded, however, that the remaining items were still ineligible. Franklin Township appealed the Department's decision on September 15, 1995. In ruling on the Department's Motion to Dismiss the appeal for untimeliness, Administrative Law Judge Thomas Renwand held that the Department's August 22, 1995 letter was an appealable action since it reversed a portion of the June 13, 1995 letter and, therefore, Franklin Township's appeal was timely.

Franklin Township argues that the same ruling should apply with respect to the Department's present Motion to Dismiss. However, unlike the facts of the earlier appeal, where the Department reconsidered and reversed its earlier decision, in this case the Department merely reaffirmed its earlier decision. As noted above, where the Department merely reaffirms or refuses to reconsider an earlier decision, that reaffirmation or refusal does not constitute an appealable action. Since the Department's December 22, 1995 letter merely reaffirms the decision set forth in its November 13, 1995 letter, it does not constitute an appealable action. Because Franklin Township failed to appeal

the November 13, 1995 letter in a timely manner and because the December 22, 1995 letter does not constitute an appealable action, we find that Franklin Township's appeal of the 1994 Act 339 application, originally docketed at EHB Docket No. 96-010-R, must be dismissed.[2]

Accordingly, we enter the following order:

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[2] Franklin Township also argues that its appeal should not be dismissed since some of the items rejected by the Department for reimbursement in its 1994 application had been approved by the Department in the 1993 application. Had Franklin Township's appeal been timely, we would have considered this argument. However, where an appeal has not been timely filed, the Board is deprived of jurisdiction to hear the appeal, regardless of whether the appeal holds merit. 25 Pa. Code § 1021.52 (Jurisdiction of the Board will not attach to an appeal unless it has been filed with the Board within 30 days of the appellant's receipt of notice of the action.)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRANKLIN TOWNSHIP MUNICIPAL SANITARY AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 95-201-R**
	:	**(Consolidated with 96-010-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 26th day of July, 1996, it is ordered that the Department's Motion to Dismiss is **granted**. It is further ordered that the appeals of Franklin Township Municipal Sanitary Authority consolidated at EHB Docket No. 95-201-R are unconsolidated and the appeal originally docketed at EHB Docket No. 96-010-R is **dismissed**.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 95-201-R

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: **July 26, 1996**

c: **Bureau of Litigation:**
(Library: Attn: Brenda Houck)

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M. DIANE SMITH
SECRETARY TO THE BOARD

MIDDLEPORT MATERIALS, INC.	:	
	:	
v.	:	**EHB Docket No. 96-004-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND W & W CONSTRUCTION COMPANY, PERMITTEE	:	**Issued: August 12, 1996**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By: Robert D. Myers, Administrative Law Judge

Synopsis:

A motion for summary judgment is held in abeyance until after a hearing is held to determine whether the Board has jurisdiction to hear the appeal since a genuine issue of material fact exists concerning whether the appeal was timely filed.

OPINION

Appellant, Middleport Materials, Inc., filed a Notice of Appeal on January 10, 1996 seeking Board review of the December 7, 1995 issuance by the Department of Environmental Protection (DEP) of Coal Surface Mining Permit No. 54950102 to W & W Construction Company (Permittee). The Permit, issued under the provisions of the Surface Mining Conservation and Reclamation Act (SMCRA), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §§ 1396.1-1396.19a, authorized Permittee to surface mine anthracite coal on a tract in Schuylkill and Walker Townships, Schuylkill County.

In its Notice of Appeal, Appellant claims to be the owner of the subject tract pursuant to an October 1993 deed and gave its consent to Permittee's coal mining operation only on condition that Permittee execute an appropriate lease, which Permittee refused to do. This was brought to DEP's attention prior to Permit issuance but disregarded. As a result, Appellant's signed consent was ineffective and DEP's issuance of the Permit was a violation of SMCRA and the regulations.

Appellant also claimed in its Notice of Appeal that White Pine Coal Co. began coal mining operations on the subject tract on December 29, 1995, as a contractor for Permittee, contrary to the provisions of the Permit. Appellant requested the Board (1) to "revoke" the Permit because of the absence of an effective consent, (2) to find that Permittee violated the Permit by allowing a contractor to operate under it, and (3) to take appropriate action against White Pine Coal Co. for mining without a permit.

On May 22, 1996 Permittee filed a Motion for Summary Judgment with exhibits and supporting Brief. Appellant filed a Response, Affidavit with exhibits and Brief on June 28, 1996. This Motion is now ready for disposition. We can 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)[1] We must review the Motion in the light most favorable to the non-moving party. *Penoyer v. DER*, 1987 EHB 131.

Permittee contends that it is entitled to summary judgment because (1) a properly executed and irrevocable consent of Appellant was filed with the application, (2) the Board has no power to

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[1]The revisions to this rule, at Pa. R.C.P. 1035.1 - 1035.5, did not become effective until July 1, 1996, after the Motion and Response were filed.

revoke or take appropriate action to enforce the Permit, and (3) the appeal was not timely filed. Attached to the Motion are documents allegedly supporting the averments of the Motion.

In its Response, Appellant argues that genuine issues of material fact exist with respect to Permittee's right to enter and mine, issues that were raised with DEP before Permit issuance. Issues of material fact also surround the timeliness of the filing of the Notice of Appeal; but, on that issue, Appellant also argues that it could not be raised in a motion for summary judgment. With respect to the Board's power to revoke and take enforcement action, Appellant's Response is muddled but appears to concede that Permittee may have a point as far as enforcement actions are concerned.

We must deal first with the timeliness issue, because it controls whether we have jurisdiction to consider the other two issues. Permittee alleges that the copy of DEP's Permit issuance letter sent to Appellant's legal counsel and attached to the Notice of Appeal contains handwritten notations indicating that the letter was actually received on December 8, 1995 and not December 11, 1995 as stated in the Notice of Appeal. Consequently, the appeal had to be filed within thirty days of that date. The 30th day, of course, was January 7, 1996, a Sunday. But even if a Monday filing is considered legally sufficient (which it is), the actual filing on January 10, 1996 is tardy.

Appellant denies that the DEP letter was received prior to December 11, 1995 and challenges Permittee's right to raise the issue by the Motion for Summary Judgment. Since the timeliness of the filing is a jurisdictional matter, it may be raised at any time and is never waived. *Simpkins v. Disney*, 610 A.2d 1062 (Pa. Super. 1992). It is obvious, however, that genuine issues of material fact exist concerning when the notification letter was received. These issues must be resolved before we can determine whether we have jurisdiction to consider this appeal.

We will schedule a hearing for this purpose and hold the Motion in abeyance.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MIDDLEPORT MATERIALS, INC.	:	
	:	
v.	:	**EHB Docket No. 96-004-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND W & W CONSTRUCTION COMPANY, PERMITTEE	:	

ORDER

AND NOW, this 12th day of August, 1996, it is ordered as follows:

1. Action on the Motion for Summary Judgment is continued until after the hearing scheduled in paragraph 2.

2. A hearing in the above matter will be held before the Honorable Robert D. Myers at 10:00 a.m., September 17, 1996 in Hearing Room 2 at the offices of the Environmental Hearing Board, 2nd Floor, Rachel Carson State office Building, 400 Market Street, Harrisburg, PA.

ENVIRONMENTAL HEARING BOARD

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: August 12, 1996

See next page for service list

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

HOPEWELL TOWNSHIP AND RONALD E. CHAMBERLIN	:	
v.	:	**EHB Docket No. 95-005-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND SNOKE'S EXCAVATING AND PAVING INC., PERMITTEE	:	**Issued: August 13, 1996**

ADJUDICATION

By Robert D. Myers, Administrative Law Judge

Synopsis:

The Board dismisses an appeal from DEP's issuance of a noncoal surface mining permit and authorization to mine on a site where a shale pit has been in operation under a DEP permit since 1978. The Board holds that (1) since Appellants had actual knowledge that the permit application was pending before DEP, they were not harmed by any alleged deficiencies in the giving of public notice, (2) DEP considered dust and noise and properly concluded that, based on conditions in the permit, they would not be a public nuisance, (3) DEP has no jurisdiction over dust and noise on a township road, (4) the failure of the applicant to show the presence of wetlands near to the mining site and the failure of DEP to consider the wetlands were immaterial because the mining site will have no significant adverse impact upon them.

PROCEDURAL HISTORY

On January 10, 1995 Hopewell Township, Cumberland County (Township), and Ronald E. Chamberlin (Chamberlin), jointly referred to as Appellants, filed a Notice of Appeal seeking Board review of the December 8, 1994 issuance by the Department of Environmental Resources, now the Department of Environmental Protection (DEP), of Noncoal Surface Mining Permit No. 21940301 and Authorization to Mine No. 301453-21940301-01. The Permit and Authorization were issued to Snoke's Excavating and Paving, Inc. (Permittee) for a site in the Township known as Martin's Shale Pit.

While discovery was in process, Appellants on March 28, 1995 filed a Petition for Supersedeas which, after several postponements, was heard on May 9, 1995 by Administrative Law Judge Robert D. Myers, a Member of the Board. In an Opinion and Order issued May 26, 1995 (1995 EHB 680) Judge Myers denied the Petition for Supersedeas because Appellants had failed to show a likelihood of prevailing on the merits and had failed to present evidence of irreparable harm.

A hearing on the merits of the appeal was convened in Harrisburg on December 12, 1995 by Judge Myers. All parties were represented by legal counsel and presented evidence in support of their respective legal positions. At the outset of the hearing, the parties presented a Joint Partial Stipulation of Facts (Stip.) and agreed to make the entire record of the Supersedeas hearing a part of the record of the merits hearing. As a result, the numbering of the pages of the transcript and of the exhibits follow consecutively from one hearing to the next. Appellants filed their post-hearing brief on January 24, 1996. DEP and Permittee filed theirs on February 22 and 23, 1996 respectively. The record consists of the pleadings, the briefs, a transcript of 443 pages and 56 exhibits.

After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. The Township is a Pennsylvania municipality located in the northwestern corner of Cumberland County (Notice of Appeal).

2. Chamberlin is an individual who resides in the Township at 100 Chamberlin Road (Notice of Appeal).

3. DEP is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Noncoal Surface Mining Conservation and Reclamation Act (Noncoal Act), Act of December 19, 1984, PL. 1093, as amended, 52 P.S. §3301 *et seq.*; 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 (Stip.)

4. Permittee is a corporation with an office at Box 247, 33 East main Street, Walnut Bottom (Cumberland County), PA 17266 (Exhibit P-9).

5. DEP issued Noncoal Surface Mining permit No. 6478NC1A1C (1978 Permit) to Permittee for Martin's Shale Pit on March 20, 1978. This permit was a so-called "large" permit without tonnage limitations (Stip).

6. Martin's Shale Pit is located in the southwest corner of the Township on a 51.39-acre tract of land owned by Henry W. Nolt and Mary P. Nolt, husband and wife (Nolts) (Exhibits A-5, P-5 and P-9).

7. Permittee has conducted surface mining activities at Martin's Shale Pit since issuance of the 1978 Permit, affecting approximately 4.6 acres by 1994. This affected area is in the northeast portion of the Nolts' farm (Stip.; Exhibits P-9 and P-20).

8. DEP has inspected Permittee's surface mining activities at Martin's Shale Pit at least twice a year since they began. DEP has never issued a compliance order with respect to these activities (Stip.).

9. In 1986 Appellant Chamberlin and his wife, Frances, purchased approximately 65 acres of land in the Township. Ten acres were located immediately to the east of the Nolts' farm and 55 acres were located immediately to the south of the Nolts' farm[1] (Stip.; N.T. 23, 54; Exhibit P-4).

10. An unimproved portion of Township Road T-315 (33 feet wide) runs in an east-west direction and forms the dividing line between the two Chamberlin tracts and between the Nolts' farm and the 55-acre Chamberlin tract for about 500 feet. West of that point T-315 is within the confines of the Nolts' farm (Exhibits P- 4 and P-20).

11. In 1989 the Chamberlins built a substantial dwelling on their 10-acre tract about 350 feet north of T-315 and about 75 feet east of the Nolts' farm (N.T. 14-16, 54; Exhibits P-9 and P-20).

12. At the time the Chamberlins purchased the two tracts, at the time they constructed their dwelling and at all times in between, Permittee was actively operating Martin's Shale Pit under the 1978 Permit and using an unimproved haul road running along the Nolt/Chamberlin boundary line from T-315 to the Shale Pit (Stip.; N.T. 54; Exhibits P-4 and P-20).

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[1] The Chamberlins' decided to acquire the land because of its connection with Chamberlin's family and because of its idyllic setting (N.T. 17-18).

13. The location of the Chamberlins' dwelling was within 250 feet of the Shale Pit and within 75 feet of the haul road (Exhibits P-4 and P-20).

14. The Chamberlins located their dwelling where they did under the impression that Permittee was closing down its surface mining activities in Martin's Shale Pit. However, they made no inquiries concerning future activities or intentions to Permittee, DEP, the Township or any other person or entity (Stip.; N.T. 14, 66).

15. Both before and after they constructed their dwelling, the Chamberlins experienced problems with Permittee's activities related to Martin's Shale Pit, especially dust and noise raised by truck traffic on the haul road and the unimproved portion of T-315[2] (N.T. 31, 35, and 42).

16. During one summer large tandem axle dump trucks were traveling in and out of the Shale Pit at roughly 5 to 7 minute intervals all day long, five days a week and occasionally on Saturdays[3] (N.T. 31-32).

17. Chamberlin brought the dust problems to the attention of DEP's mining inspector but never received any response (N.T. 42-43).

18. During 1993 the Chamberlins became concerned that the surface mining activities in Martin's Shale Pit were not going to cease, as they had supposed, but were going to expand. Chamberlin sent a letter dated November 7, 1993 to Roger Hornberger, District Mining Manager in DEP's Pottsville office requesting denial of any application for a variety of reasons. On November

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[2] T-315 is also used by milk trucks, garbage trucks, feed trucks and farm equipment (Exhibit P-17).

[3] Permittee has not operated Martin's Shale Pit at night or on Sundays (N.T. 32, 74-75).

15, 1993, he wrote a similar letter to the Honorable Albert Masland, Representative from the 199th District, which includes the Township (N.T. 18, 20-22, 62; Exhibits A-1 and P-1).

19. Chamberlin claims that he never got a response either from DEP or Representative Masland; yet a November 18, 1993 letter which Masland sent to DEP on Chamberlin's behalf notes a copy as going to Chamberlin (N.T. 21, 62-63; Exhibit P-2).

20. On December 7, 1993 DEP's Gregg E. Robertson responded to Representative Masland's November 18, 1993 letter, notifying him that no application concerning Martin's Shale Pit had as yet been filed with DEP. Chamberlin claims that this information was never conveyed to him (N.T. 63-64; Exhibit P-3).

21. Permittee did file an application with DEP on June 1, 1994 seeking to expand its noncoal surface mining activities on the Nolts' farm. As part of its review process, DEP sent copies of the application face sheet, *inter alia*, to the Pennsylvania Game Commission, the Pennsylvania Fish Commission and the Pennsylvania Department of Transportation (PennDOT) (Stip.; N.T. 181-183, 190, 192, 196; Exhibits P-9, C-8(a), C-9(a), and C-10(a)).

22. By letter dated June 6, 1994 DEP advised the Township of the filing of the application, attached a copy of the face sheet, and informed the Township where questions or comments should be directed (Stip.; N.T. 142-144, 195; Exhibit C-11).

23. Notice of the filing of the application was published by Permittee in *The Sentinel*, a newspaper of general circulation in Carlisle, Cumberland County, on June 3, 10, 17 and 24, 1994 (Stip.; N.T. 200; Exhibit P-10).

24. We take official notice of the fact that DEP published a notice of the filing of the application in the June 25, 1994 edition of the *Pennsylvania Bulletin*, Vol. 24, page 3151.

25. The Chamberlins claim not to have seen these published notices, but stipulate that they had actual knowledge of the application while it was pending before DEP (Stip.; N.T. 48).

26. Neither the Township nor the Chamberlins made any objection or other comments to the application, or requested a public hearing on it, while it was pending before DEP (N.T. 48-49, 145, 195).

27. The Pennsylvania Game Commission and PennDOT had no objection to Permittee's application. The Pennsylvania Fish Commission's response, not received until six weeks after it was due, advised against approval until a field review was conducted with Commission staff to identify any perennial streams (N.T. 191-192, 193, 197; Exhibits C-8(b), C-9(b) and C-10(b)).

28. Because the Fish Commission's response was received so late, there was no time for a joint field review. After a telephone conversation between DEP's Ignacy F. Nasilowski (the lead reviewer for the application) and the Fish Commission's Steve Kepler, during which Nasilowski described the Nolts' farm and its drainage characteristics, Kepler agreed that there was no need for a joint field review (N.T. 191-192).

29. During review of the application, DEP considered erosion and sedimentation issues, siltation and runoff issues, dust control issues, surface and groundwater issues, and other potential adverse impacts on the environment (Stip.).

30. Nasilowski was aware of, and considered, the issues raised by Chamberlin in his November 7, 1993 letter to Roger Hornberger. See Finding of Fact No. 18 (Stip.; N.T. 189, 206; Exhibit A-1).

31. Nasilowski visited the Nolts' farm twice during review of the application. On one of the visits, in the company of DEP's James R. Leigey (the mining inspector assigned to the

Martin's Shale Pit operation since November 1988), he spoke with Mrs. Chamberlin (N.T. 148-149, 206-207).

32. Module 7 of the application concerns hydrology. Section 7.6 calls for a hydrologic assessment, including "effects on any adjacent wetlands." In response, Permittee stated the following:

> There are no wetlands on the permit site or adjacent area according to the National Wetlands Inventory Map, Shippensburg, Pa., quadrangle; of which a copy of the related area is following on next page.

A photocopy of the map was attached.
(Exhibits A-16 and P-9).

33. Because of this notation and because of DEP's deference to the Pennsylvania Game Commission on wetlands matters, Nasilowski did not look specifically for wetlands during his visits to the Nolts' farm (N.T. 210-212).

34. There is a wetland on the Chamberlins' 55-acre parcel, bordering T-315 on the south and T-362 on the east. It is about 100 feet wide and about 1,000 feet long. The wetland flows into an unnamed intermittent tributary that runs parallel to T-315 until it empties into Middle Spring Creek just beyond the southwestern corner of the Nolts' farm (N.T. 295-297, 409, 420-421; Exhibit P-20).

35. This wetland was not shown on the National Wetlands Inventory Map, Shippensburg, PA quadrangle at the time the application was filed (N.T. 74, 298-300, 318-319; Exhibit P-5).

36. Leigey testified that he pointed out this wetland to Nasilowski at the time of their joint site visit. Nasilowski had no recollection of receiving this information and, accordingly, did not convey it either to the Pennsylvania Game Commission or the Pennsylvania Fish Commission.

As part of his review, however, Nasilowski considered possible impacts of the mining activity on areas within 1,000 feet of the perimeter of the proposed permit area, including the area occupied by the wetlands (N.T. 170, 212-216, 353-356).

37. After completing its review of the application and determining that the proposal complied with the Noncoal Act and the regulations, and after weighing the benefits to be derived from the activity against the potential for environmental harm and finding that the benefits were dominant, DEP issued the Permit and Authorization on December 8, 1994 (Stip.; N.T. 184-187, 193-194, 198-200, 203-204, 217, 225, 243-248, 253-257; Exhibits P-4, P-9 and P-11).

38. On January 10, 1995 Appellants filed the instant appeal; and on March 28, 1995 filed a Petition for Supersedeas, which was denied by the Board in an Opinion and Order issued May 26, 1995 (1995 EHB 680) (Stip.).

39. While the application was pending, Permittee continued to operate Martin's Shale Pit, but at a reduced volume - 95 tons in 1994 versus over 4,000 tons in 1993 (N.T. 266-269).

40. Substantial quantities of shale remain to be mined in Martin's Shale Pit (N.T. 165).

41. The surface mining of shale is by nature an intermittent type of operation dependent upon job requirements. Heavy activity may occur for a limited period followed by months of idleness (N.T. 171-172).

42. There is no evidence that Permittee ceased operating Martin's Shale Pit to the point where reclamation would have been required (N.T. 152-165, 171-174, 370; Exhibits C-1 through C-7).

43. According to the Permit,

(a) 44.84 acres (including the 4.6 acres covered by the 1978 Permit) of the Nolts' farm will be affected by surface mining;

(b) the mining will be conducted in four stages: Phase I, Stages 1 and 2 and Phase II, Stages 1 and 2;

(c) Phase I includes the 4.6 acres affected under the 1978 Permit (which lie between two forks of a natural storm water drainage course which merge just southwest of the affected area and flow in general southwest direction off the Nolts' farm to Middle Spring Creek) and the land lying north and west of the drainage course;

(d) Phase I also includes the haul road, which begins at T-315 at the same point as the previous haul road but sweeps to the west in a gentle arc in order to leave a 300 foot buffer zone between the haul road and the Chamberlins' dwelling;

(e) Phase I is divided into two stages - Stage 1 (14.56 acres) which encompasses the relocated haul road, the previously-affected 4.6 acres and an area immediately adjacent to the drainage course; and Stage 2 which encompasses the northwestern third of the permitted area;

(f) initial authorization to mine is given only for Phase I, Stage 1, the only portion of which borders the Chamberlin property being the 4.6 acres previously affected;

(g) Phase II occupies the southern third of the permitted area, south and east of the drainage course and north of T-315;

(h) Phase II also has two stages - Stage 1 encompassing little more than 1 acre at the western edge of Phase II; and Stage 2 encompassing the remainder;

(i) Phase II, Stage 2 (the last segment of the Nolts' farm to be mined) is the closest to the Chamberlins' property, except for the relocated haul road and the 4.6 acres previously affected;

(j) in addition to the 300 foot buffer zone adjacent to the Chamberlins' dwelling, there is a 100 foot buffer zone along the north side of T-315;

(k) because of these buffer zones, no mining activities (except use of the haul road) will occur within at least 150 feet of the wetland or the unnamed intermittent tributary that flows out of the wetland;

(l) surface water running onto the Nolts' farm will continue to flow in the natural storm water drainage course protected by a 25 foot buffer zone;

(m) surface water generated on the Nolts' farm also will be directed to this drainage course, through the use of interceptor channels and berms;

(n) a sediment storage basin with a perforated c.m.p. riser and an emergency spillway will be constructed in the natural storm water drainage course near where it exits the Nolts' farm;

(o) because of the proposed diversion of surface water, the quantity of surface water presently flowing off of the southern portion of the Nolts' farm into the wetland will be reduced;

(p) reclamation will be concurrent with mining with no more than 4 to 5 acres stripped of overburden at any one time;

(q) no blasting or processing will be done on the Nolts' farm;

(r) mining can only go to a depth of 510 feet to 600 feet above mean sea level and will not interfere with groundwater bearing zones;

(s) the haul road will have a shale or stone aggregate surface, will be treated with water spray as necessary to control dust, and will have maximum vehicle speeds of 10 mph[4] (Stip. N.T. 76, 127, 225, 374-382; Exhibits P-4, P-8, P-9, P-11 and P-20).

44. Permittee plans to use equipment and trucks similar to those used in previous operations (N.T. 381).

45. Permittee projects that, based upon current activity, Phase I, Stage 1 will take 10 years to complete and Phase I, Stage 2 will take 15 years to complete (N.T. 382).

46. Farming will continue to be done on areas not affected by mining and will be resumed after reclamation is complete. Farming is done on most of the land in the vicinity and, indeed, on most of the land in the Township (N.T. 52-54, 125, 128, 380; Exhibit P-9).

47. The Township never informed DEP that T-315 was inadequate to handle the truck traffic generated and to be generated by the mining activity (N.T. 195).

48. Water flowing into the wetland comes primarily from 245 upslope acres north and east of the wetland. This includes the southern portion of the Chamberlins' 10-acre tract (including their dwelling), a large segment of the farm to the east of that tract, and about 3 acres of the Nolts' farm (N.T. 342-345, 409-411, 414-415, 417-418; Exhibits P-4 and P-20).

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[4] Since the new haul road had been constructed prior to the hearings, Chamberlin was in a position to say that the area between the new haul road and the property line had been reclaimed and was being farmed and that the new haul road should generate less dust and noise. He was still concerned about noise and dust from truck traffic on T-315 (N.T. 33, 43, 68-72; Exhibits P-12 through P-15).

49. The farm east of the Chamberlins' 10-acre tract produces a considerable amount of sedimentation which is deposited in the eastern portion of the wetland (N.T. 343, 347-348, 415-416).

50. Two drainage pipes carry surface water beneath T-315 into the wetland - one on the Chamberlins' 10-acre tract near the eastern limit of the wetland; and one on the Nolts' farm, where the haul road intersects T-315, near the midpoint of the wetland.[5] There is no evidence that sediment is discharged into the wetland through either of these pipes (N.T. 332-334, 339-341, 373-374, 378-379, 412-414; Exhibit P-20).

51. There is no indication that Permittee's past mining activities, including the use of roads only 10 feet away from the wetland, have had a negative impact on the wetland (N.T. 111, 297-298, 329-332).

52. Because of the topography and hydrology, the proposed surface water controls and the other requirements of the Permit, Permittee's surface mining activities on the Nolts' farm

(a) will not accelerate erosion and sedimentation into the wetland;

(b) will have no significant adverse impact on the wetland;

(c) will create no problems of dust and noise; and

(d) will cause no injury to the public or surrounding property

(N.T. 200-202, 317, 421-422).

53. Permittee's surface mining activities on Phase II, Stage 2, will result in the diversion of some surface water that presently flows into the wetland, sending it instead to the sediment

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[5] Permittee installed this pipe, at the Township's request, when it relocated the haul road. Another pipe had been there before that time (N.T. 373-374).

storage basin and from there into Middle Spring Creek. However, this surface water is such a minor portion of the total inflow into the wetland that the diversion will have little adverse effect (N.T. 307, 356).

54. Permittee's surface mining activities on the Nolts' farm will have no adverse impact on the Chamberlins' well (N.T. 357, 365-367).

55. Even though Nasilowski was not aware of the wetland when reviewing the application and did not specifically evaluate potential adverse effects on the wetland, he was aware of the unnamed intermittent tributary that flows out of the wetland into Middle Spring Creek and did consider the potential adverse effects on this tributary of the proposed mining activity. More of the permit area is near to this tributary than is near to the wetland. He found no adverse effects on any of the land south of, and within 1,000 feet of, the permit area (N.T. 355-360).

56. The Chamberlins' have put their 10-acre tract and their dwelling up for sale but had not found a buyer as of the date of the Supersedeas hearing (N.T. 45-47).

DISCUSSION

Appellants have the burden of proof: 25 Pa. Code §1021.101(c)(2). To carry the burden, Appellants must show by a preponderance of the evidence that DEP's issuance of the Permit and Authorization was unlawful or an abuse of discretion: 25 Pa. Code §1021.101(a). Issues not raised in the post-hearing briefs are deemed waived: *Lucky Strike Coal Co. and Louis J. Beltrami v. Commonwealth, Dept. of Environmental Resources*, 547 A.2d 447 (Pa. Cmwlth. 1988).

Since Appellants' Brief in Support of Appeal, filed after the hearing on the merits, deals only with the wetland issue, Permittee and DEP urge us to rule that they waived the other issues raised in their Memorandum in Support of their Petition for Supersedeas - dust, noise and public notice.

We are hesitant to do so, however, for several reasons. First, the record of the Supersedeas hearing was incorporated into the record of the merits hearing; second, the contentions of law stipulated to by the parties and filed with the Board just prior to the merits hearing are not limited to the wetland but include other issues; and third, we have no clear indication that Appellants intended to waive those other issues. Accordingly, we will consider the four issues raised in Appellants' two briefs.

Public Notice

The public notice issue (whether the filing of the application was published in the proper newspaper) is disposed of quickly because both the Township and the Chamberlins had *actual* knowledge of the application before the Permit and Authorization were issued: *Borough of Bridgewater v. Pennsylvania Public Utility Commission*, 124 A.2d 165 (Pa. Super. 1956). Thus, they have not shown that they were harmed by this alleged violation of the regulations.

Dust and Noise

Dust and noise, as noted in the Supersedeas Opinion and Order (1995 EHB 680 at 685), were raised initially by Appellants on the basis of erroneous information. When they learned that the old haul road, which generated a good deal of noise and dust, was going to be replaced by a new one, their concerns fell and seemed to shift to T-315.

DEP is required to consider dust and noise when reviewing a surface mining application: *Kwalwasser v. Commonwealth, Dept. of Environmental Resources,* 569 A.2d 422 (Pa. Cmwlth. 1990). An abuse of discretion is shown if DEP has failed to consider these problems or if the problems rise to the level of a public nuisance: *Plumstead Township v. DER*, 1995 EHB 741 at 789-790; *Santus v. DER*, 1995 EHB 897 at 928. The evidence here clearly shows that DEP considered

the dust and noise likely to be generated by the surface mining activity. No abuse of discretion has been shown in this respect.

DEP concluded that, based on the conditions in the Permit, dust and noise would not be a public nuisance. Appellants have not shown that they will be. The primary source of the problem - the haul road - has been moved to 300 feet away from the Chamberlins' dwelling, has been constructed and will be maintained with a shale or stone aggregate surface and will be treated, as necessary, with dust control spraying. The speed limit on this road and elsewhere on the mining site will be 10 mph - another dust and noise abatement measure.

The mining operation itself will not be much different from what went on before. The same or similar equipment will be used; the same or similar level of activity will be maintained; and the same or similar amount of land surface will be exposed. Even though the total permitted acreage is about 10 times the amount covered by the 1978 Permit, the actual land area in active operation at any one time will be similar to that under the 1978 Permit. No blasting will be done; no processing will take place on the mining site. Except for excavating the shale that remains in the 1978 Permit area, the mining operations will be farther away from the Chamberlins' dwelling.[6] Even if we were to conclude that dust and noise were public nuisances under the 1978 Permit,[7] we also would have

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[6] Phase I (except for the 1978 Permit area) is from 800 to 1,400 feet from the Chamberlins' dwelling with an intervening ridge that should muffle noise and help to contain dust. Phase II is from 350 to 1,500 feet from the Chamberlins' dwelling. Since the direction of mining on Phase II is from northwest to southeast, the intervening ridge will continue to mask the mining operation from the Chamberlins' dwelling for about one-half of the Phase (Exhibits P-4 and P-20).

[7] We have some difficulty accepting the Chamberlins' testimony at face value. We confess to some difficulty believing that rational persons would locate next to problems such as they described and put up with them even if they thought the mining was going to cease.

to conclude that the changes in operations and locations brought about by the new permit will abate them.

Appellants claim, however, that DEP did not go far enough but should have required Permittee to monitor the dust levels. Section 77.455 of 25 Pa. Code requires an applicant for a noncoal surface mining permit to include in the application an air pollution control plan, including a plan for the control of fugitive dust. "If requested by the Department," a monitoring program is to be a part of the plan. Module 14 of Permittee's application was submitted for the purpose of satisfying the regulatory requirement. No monitoring program was included because DEP did not request it. According to Nasilowski, the fugitive dust control plan that was submitted satisfied the regulations. He believed that, if implemented as required by the Permit, fugitive dust would not be a problem. He saw no need for monitoring.

While Appellants contend that this was an abuse of discretion, calling the fugitive dust control program a "*de minimus*" attempt to comply with the regulations, they point to no evidence to support their contention. Nor has our reading of the record found any. Since Appellants have the burden of proof, this lack of evidence is fatal to their claim on this point. We agree with Nasilowski that the changes in operations and locations brought about by the Permit are enough to reduce fugitive dust to a minor problem *if* the control plan is faithfully implemented. That is an enforcement matter, however, and not a permitting matter. We feel certain that the Chamberlins will themselves be vigilant monitors of the situation.

Dust and noise generated by traffic on T-315 are not problems that DEP must consider. Local roads - their condition and uses - are municipal concerns solely within the province of local governments: *Township of Salford et al. v. DER*, 1978 EHB 62 at 89; *Kwalwasser v. DER*, 1986

EHB 24 at 59-61. The local government responsible for T-315 is the Township, one of the Appellants. Yet, no objection was made by the Township concerning the use or condition of T-315 while the application was pending.

Harold Bender, one of the Township Supervisors who testified at the Supersedeas hearing, said nothing about T-315. The other two Supervisors, Lewis D. Swartz and George Hoover (whose depositions were admitted into the record of the Supersedeas hearing), testified affirmatively that they had no concerns about Permittee's use of T-315. Hoover, in fact, pointed out that the road is also used by milk trucks, garbage trucks, feed trucks and farm equipment. Certainly, if dust and noise from T-315 were problems of public nuisance magnitude, these local government officials would be aware of them and would, at least, comment on them with respect to Permittee's operations.

Under the Noncoal Act regulations, an applicant for a permit must satisfy the Environmental Protection Performance Standards in Subchapter I of 25 Pa. Code Chapter 77: §77.501. Section 77.575(2) states that fugitive dust control measures must demonstrate compliance with Chapters 121, 123, 127 and 129 of the regulations (Air Resources). The most relevant provisions of those chapters are found in 25 Pa. Code §123.1, dealing with fugitive emissions of air contaminants.

Such emissions are prohibited from any source other than the 9 listed in subparagraph (a) of that section. Two of the nine involve "grading, paving and maintenance of streets" and "use of roads and streets." While "roads" and "streets" are not defined, it is obvious that they are meant to be "public" as opposed to "private" thoroughfares. The "person responsible" for any of these exempt sources is required by subsection (c) to "take all reasonable actions to prevent particulate matter from

becoming airborne," including the use of water or chemicals to control dust and the paving and maintenance of the roadways.

Where T-315 is concerned, the Township is the "person responsible" to prevent particulate matter from becoming airborne. Permittee's responsibility ends where the haul road enters T-315. Accordingly, DEP could not deny the Permit on the basis of the condition of T-315 and could not impose conditions upon Permittee with respect to it.[8]

At the end of the Supersedeas hearing, we concluded that Appellants had not shown a likelihood of prevailing on the merits with respect to dust and noise. They presented no additional evidence on these issues at the merits hearing. After reconsidering the earlier evidence, we conclude that Appellants have not carried their burden of proof with respect to these issues.

Wetland

The merits hearing and the post-hearing briefs focused entirely on this issue. There is no doubt about the fact that, when reviewing the application, Nasilowski was ignorant of the presence of the wetland.[9] This is immaterial, he maintains, because he was aware of the unnamed intermittent tributary that flows through the wetland and into Middle Spring Creek, running along the entire

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[8] The Noncoal Act and its regulations must be distinguished from the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, and its regulations. 25 Pa. Code §271.126 and §271.127 of the latter regulations require an environmental assessment for a municipal waste disposal or processing facility, including a "detailed analysis" of the potential impact of the proposed facility on, *inter alia*, "traffic". To satisfy the requirement, DEP must consider the adequacy and condition of public roads serving the facility. No such requirement is imposed by the Noncoal Act and its regulations.

[9] We do not resolve the credibility question between Nasilowski and Leigey by this statement, because it is clear to us that, whether informed of the wetland or not, Nasilowski was not conscious of its presence when he did his final review.

southern boundary of the permit area. Since this tributary is within 1,000 feet of the perimeter of the permit area and is entitled to protection as a watercourse, Nasilowski considered what impact (if any) the mining operation might have on it. He found none and contends that the same result would have followed even if he had been specifically aware of the wetland.

The regulations require the applicant for a permit to describe the hydrology of the mining site and area within 1,000 feet of the mining site: 25 Pa. Code §77.403. This includes both groundwater (§77.405) and surface water (§77.406). Maps are to be filed with the application, covering the same area and reflecting, *inter alia*, the location of wetlands: §77.410(a)(10). The application must contain a determination of the hydrologic consequences of the proposed surface mining and a description of steps to be taken to ensure the protection of the quality and quantity of surface water and groundwater on the mining site and within 1,000 feet of its perimeter: §77.457.

To implement these regulations, DEP's application form includes Module 7: Hydrology. Section 7.6 of that Module calls for a hydrologic assessment involving, *inter alia*, a description of the probable hydrologic consequences of the proposed surface mining on the hydrologic system and the impact on water quality. Section 7.6(d) states

> Identify any effects on any adjacent wetlands.

Permittee responded to the request for a hydrologic assessment, finding no adverse impact on the hydrologic system. In response to Section 7.6(d), Permittee said

> There are no wetlands on the permit site or adjacent area according to the National Wetlands Inventory Map, Shippensburg, PA, quadrangle; of which a copy of the related area is following on next page.

The next page was a photocopy of the relevant portion of the cited map showing no wetlands to be within the area.

Permittee's response was accurate at the time it was made and remained so until Appellants took steps in 1995 to have the wetland included as jurisdictional wetlands by the U.S. Army Corps of Engineers (COE). There is no evidence to suggest that Permittee framed its response for the purpose of misleading DEP. There is no evidence that Permittee or its professional consultants (Dennis E. Black Engineering, Inc.) were aware of the wetland prior to issuance of the Permit. Certainly, not every wet spot in a field qualifies as a wetland; and the tests used by DEP and the COE are so scientific that we refuse to allow non-expert persons to testify on the subject.

It would not be surprising, under these circumstances, for a consulting engineer to rely on official wetland determinations such as those depicted on the National Wetlands Inventory Map. Nor is it surprising that DEP's application review team would accept such reliance.

Besides, Black did not hide the fact that a body of surface water existed south and east of the Nolts' farm. Identified as an unnamed intermittent tributary, the maps and plans (Exhibit P-4) show the stream to flow from its source on the farm east of the Chamberlins' and then south of, and parallel to, T-315 until it empties into Middle Spring Creek. For about one-half of the total distance (the final 1,700 feet) the tributary is depicted as flowing in an established channel surrounded by trees. The upstream one-half is depicted as a smaller stream flowing through open country. Black, thus, clearly showed an intermittent stream running parallel to T-315 along the entire southern boundary of the permitted area (about 1,650 feet). What he did not show was that the easternmost 425 feet of that stream flowed through a wetland.

How significant was this omission? Nasilowski, as noted above, claims that it was not significant because he still considered the impact of the proposed surface mine upon surface water - the unnamed intermittent tributary. How would his consideration have differed if he had been dealing with a wetland rather than an intermittent tributary? He says it would not have differed because the potential runoff from the Nolts' farm into the subject area is so small. Thus, whether it was a wetland within 10 feet of T-315 or an intermittent tributary 75 feet away, the impact was negligible, according to Nasilowski.

Appellants' expert, Aqua-Niche, represented by F. Stephen Goodyear, a biologist and the Managing Partner, reported that the "potential impacts," from Permittee's proposed surface mining include "the introduction of additional sediment from the exposed land surfaces upslope of the wetland, removal or degradation of existing buffer vegetation on the edge of the wetland and alteration of the existing hydrology feeding the wetland from the north." On direct and cross examination it became clear that "potential impacts," in Mr. Goodyear's usage, are "possible impacts." He exhibited only a passing knowledge of the site and of Permittee's proposed mining operations, and was uncertain about the impact of past mining practices. When asked whether he could state, to a reasonable degree of scientific certainty, that the proposed surface mining will have a negative impact on the wetland, he stated that he could not (N.T. 317).

Permittee's expert, Thomas R. Johnston, Jr., a biologist and Assistant Vice President for National Resources for Skelly and Loy, Inc., testified to the contrary. He reached the following opinions which he held to a reasonable degree of scientific certainty: (a) there will be no negative impact associated with Phase II, Stage 2 (the mining phase closest to the wetland) in terms of accelerated erosion or sedimentation to the wetland, and (b) there will be no significant adverse

physical or functional impact to the intermittent tributary or the wetland if the proposed surface mining is conducted in accordance with the Permit conditions.

Johnston reached his conclusions on the basis of the wetland hydrology and the Permit documents. He determined that the source of water entering the wetland is a 245-acre upslope area, only 3 acres of which are within the boundaries of the proposed mining site. Phase II, Stage 2 (the mining phase closest to the wetland) constitutes less than one-half of 1% of the total drainage area. This is a minuscule figure. When active mining takes place on those 3 acres, water from exposed areas will be diverted through erosion and sedimentation control devices away from the wetland. While this will alter the hydrology somewhat, again the impact is minimal because the amount of runoff contributed to the wetland from the 3-acre area is so small.

Goodyear agreed generally with the source of water flowing into the wetland. Both he and Dr. Jay F. Davidson, Professor of Biology at Shippensburg University, who testified on Appellants' behalf at the Supersedeas hearing, agreed that there is no visible impact on the wetland from past mining activities. Goodyear also agreed that a significant amount of sediment is generated on the farm east of the Chamberlins', stating "It's pretty bad up there, yes, sir." (N.T. 348).

Taking the evidence as a whole, we are convinced that, because so little of the proposed mining site is within the drainage area of the wetland, runoff from the proposed mining site will have no significant adverse impact on the wetland. This conclusion is reinforced, in our minds, by the erosion and sedimentation controls which will divert runoff away from the wetland when surface areas are exposed during actual mining operations. It is true that this diversion will alter the hydrology of the wetland system, but the extent of alteration will be necessarily minor. Whatever the impact, it cannot be significant.

We agree with Nasilowski that the omission of the wetland from the plans was not significant, and further agree that it had no effect on Nasilowski's consideration of the impacts of the proposed surface mining on the area where the wetland is located. The issuance of the Permit and Authorization cannot be viewed as an abuse of DEP's discretion.

CONCLUSIONS OF LAW

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

2. Appellants have the burden of proving by a preponderance of the evidence that DEP's issuance of the Permit and Authorization was unlawful or an abuse of discretion.

3. Appellants did not waive issues raised in their Memorandum in Support of their Petition for Supersedeas by not including them in their Brief in Support of Appeal filed after the merits hearing.

4. Since Appellants had actual knowledge that Permittee's application was pending before DEP, they were not harmed by any alleged deficiencies in the giving of public notice.

5. DEP considered dust and noise when reviewing Permittee's application and properly concluded that, based on conditions in the Permit, they would not be a public nuisance.

6. DEP did not abuse its discretion for not requiring the monitoring of fugitive dust.

7. DEP has no control over the use and condition of T-315 and, consequently, cannot control dust and noise generated by traffic on that Township road.

8. Since the mining site is such a small part of the watershed serving the wetland, Permittee's surface mining operations will not have a significant impact upon it, especially when the erosion and sedimentation controls are in place.

9. For this reason, DEP's consideration of mining impacts upon the intermittent tributary rather than the wetland was not an abuse of discretion.

10. DEP's issuance of the Permit and Authorization was lawful and appropriate.

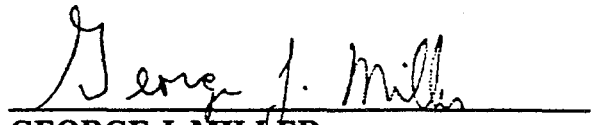
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HOPEWELL TOWNSHIP AND RONALD E. CHAMBERLIN	:	
v.	:	EHB Docket No. 95-005-MR
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND SNOKE'S EXCAVATING AND PAVING, INC., PERMITTEE	:	

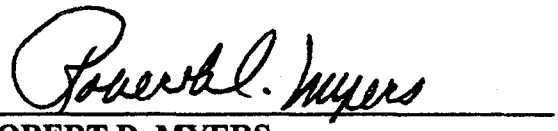
ORDER

AND NOW, this 13th day of August, 1996, it is ordered that the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 95-005-MR

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: August 13, 1996

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

ALICE WATER PROTECTION ASSOCIATION	:	
v.	:	**EHB Docket No. 96-019-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMERIKOHL MINING, INC., Permittee	:	
ALICE WATER PROTECTION ASSOCIATION	:	
v.	:	**EHB Docket No. 96-020-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMERIKOHL MINING, INC., Permittee	:	**Issued: August 15, 1996**

OPINION AND ORDER ON
MOTIONS FOR PERMISSION TO AMEND APPEALS

By: Thomas W. Renwand, Administrative Law Judge

Synopsis:

Where an appellant has not demonstrated good cause for amending its notice of appeal, its motion for permission to amend its appeal is denied. Based on case law and the Board's rule at 25 Pa. Code § 1021.51(e), good cause is limited to fraud, a breakdown in the Board's operation, or a showing that the information could not have been obtained except through discovery.

OPINION

On January 19, 1996, Alice Water Protection Association ("the Appellant") filed a notice of

appeal, challenging the Department of Environmental Protection's ("the Department") issuance of Surface Mining Permit No. 65950108 to Amerikohl Mining, Inc. ("Amerikohl"). The permit authorizes Amerikohl to conduct surface mining at a mine site known as the "Aultman Strip" in Mount Pleasant Township, Westmoreland County. This appeal was docketed at EHB Docket No. 96-019-R. On the same date, the Appellant filed a notice of appeal from the Department's revision of Surface Mining Permit No. 65773019, which authorizes Amerikohl to conduct surface mining at the "Leon Strip" in Mount Pleasant Township, Westmoreland County. This appeal was docketed at EHB Docket No. 96-020-R.

On June 3, 1996, the Department filed a Motion for Summary Judgment/Motion to Dismiss in each of the appeals, asserting that portions of the notice of appeal were untimely, moot, or lacked specificity and that the notice of appeal failed to demonstrate that the Appellant had the necessary standing. On June 21, 1996, in response to the Department's Motion, the Appellant filed a Motion for Permission to Amend Appeal, which is the subject of this Opinion. The Appellant's Motion seeks to add a number of new objections to its appeals. The Department filed Objections to the Appellant's Motion on or about June 27, 1996. In addition, Amerikohl filed a Response in opposition to the Appellant's Motion on July 8, 1996 and July 22, 1996.

The standard for amending a notice of appeal filed with the Environmental Hearing Board was set forth by the Commonwealth Court in *Pennsylvania Game Commission v. Department of Environmental Resources*, 509 A.2d 877 (Pa. Cmwlth. 1986). In that case, the appellant had sought leave to amend its appeal to add new legal grounds. The Court held that, after the 30-day appeal period has ended, a notice of appeal may be amended only for good cause. *Id.* at 886. *See also* 25 Pa. Code § 1021.51(e) (Any objection not raised in the notice of appeal shall be deemed waived,

except that upon good cause shown, the Board may agree to hear the objection.) Good cause is limited to a showing of fraud or breakdown in the court's operation or a showing that the new grounds for appeal could not have been obtained except through discovery. *See* 25 Pa. Code § 1021.51(e); *Game Commission, supra* at 886; *City of Scranton v. DER*, 1995 EHB 623, at 624-25.

The Appellant has alleged neither fraud nor breakdown in the Board's operation or that the information sought to be added to the appeals could not have been obtained except through discovery. Moreover, many of the new objections which the Appellant seeks to add deal with the transfer of the Leon permit to Amerikohl, which is a separate permitting action and the subject of a separate appeal brought by the Appellant at EHB Docket No. 95-112-R. As such, these objections are outside the scope of the present appeals. Of the remaining objections which the Appellant seeks to add, the Appellant has neither alleged nor demonstrated that this information was obtained only as a result of the discovery process and that this information could not have been obtained with due diligence at the time the Appellant filed its appeals. Because the Appellant has not demonstrated good cause for amending its appeals, as set forth in *Game Commission, supra,* and the Board's rule at 25 Pa. Code § 1021.51(e), its Motion for Permission to Amend Appeal must be denied.[1] We,

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[1]New rules affecting amendments to an appeal are expected to go into effect in September 1996. Under the new rules, an appeal may be amended as of right within 20 days after its filing. After the 20 day amendment period, the Board may grant leave for further amendment if the appellant demonstrates one of the following: (1) the amendment is based upon specific facts revealed during discovery of hostile witnesses or Department employees; (2) the amendment is based upon facts discovered during preparation of the appellant's case that the appellant, exercising due diligence, could not have previously discovered; or (3) the amendment includes alternate or supplemental legal issues, the addition of which will cause no prejudice to any other party. The new rules will not allow leave to amend an appeal after the Board has decided any dispositive motions or the case has been assigned for hearing. The new rules will become effective upon their publication in the *Pennsylvania Bulletin.*

therefore, enter the following order:

ALICE WATER PROTECTION ASSOCIATION	:	
v.	:	**EHB Docket No. 96-019-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMERIKOHL MINING, INC., Permittee	:	
ALICE WATER PROTECTION ASSOCIATION	:	
v.	:	**EHB Docket No. 96-020-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMERIKOHL MINING, INC., Permittee	:	

ORDER

AND NOW, this 15th day of August, 1996, it is ordered that the Motions for Permission to Amend Appeal filed by the Appellants in the above-captioned matters are **denied**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: August 15, 1996

See following page for service list.

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M. DIANE SMITH
SECRETARY TO THE BOAR

RICHARD SOLOMON and SOLOMON INDUSTRIES, INC.	:	
v.	:	**EHB Docket No. 96-138-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 15, 1996**

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

Where the Department of Environmental Protection denies appellants' permit application for renewal and orders closure of their solid waste transfer facility, appellants who claim irreparable harm by reason of the actions 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 reopening a facility which is operating without a permit or having the Board issue a permit.

OPINION

Before the Board is Richard Solomon and Solomon Industries, Inc.'s (Appellants) June 26, 1996 Petition for Supersedeas[1] seeking a stay of the Department of Environmental Protection's (Department) June 21, 1996 denial of permit renewal and closure order.

Richard Solomon and Solomon Industries, Inc. filed a Notice of Appeal on June 25, 1996 seeking review of the Department's June 21, 1996 denial of permit renewal and closure order of Solid Waste Permit No. 101268 for Solomon Industries, Inc.'s solid waste transfer facility located in Wilkes-Barre, Luzerne County. Richard Solomon, who is the owner, President and Secretary-Treasurer of Solomon Industries, Inc., has operated the transfer facility since 1983 pursuant to SWP No. 101268. The permit limited the transfer facility's operations to the processing and transfer of municipal waste generated within the City of Wilkes-Barre and to the processing and transfer of certain residual wastes such as insulation, paper waste and shoe and garment trimmings. The Department reissued the permit in January, 1985.[2] On April 11, 1989, Appellants submitted an application for permit modification to the Department in order to bring the transfer facility into

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[1] Appellants simultaneously filed an "Application for Special Relief (In the Nature of a Temporary Restraining Order/Preliminary Injunction)" and a "Petition for review in the Nature of a Complaint for Specific Performance, Declaratory & Injunctive Relief and for Damages Under Common Law and Pursuant to Title 42 U.S.C. §1983 with Commonwealth Court. By its June 26, 1996 order Commonwealth Court denied Appellants' application for a temporary restraining order. By its July 2, 1996 order Commonwealth Court stayed the scheduled hearing on Appellants' request for a preliminary injunction pending the Board's supersedeas hearing.

[2] The Department's expiration term set forth in the permit was unclear. Based on the language it appears that the permit expired on December 31, 1985.

compliance with the newly revised Municipal Waste Regulations.[3] The Department denied the application in its June 21, 1996 letter.

On June 26, 1996 Appellants filed their Petition for Supersedeas pending the outcome of the appeal to the Board. The Department filed its response on July 9, 1996. A supersedeas hearing was held in Harrisburg on July 10, 1996 before Administrative Law Judge Michelle A. Coleman, a member of the Board. All parties were represented by counsel and presented evidence in support of their legal positions. The parties filed their post-hearing briefs on July 17, 1996. On July 23, 1996 the Board issued an Order denying Appellants' Petition for Supersedeas. This Opinion is issued in support of the Order.

The narrative that follows is based upon the pleadings, testimony and exhibits that make up the record at this point.

In July, 1989, Solomon entered into a Consent Order and Agreement (CO&A) with the Department to address numerous operational violations which had occurred from April, 1985 through December, 1988 at the transfer facility. Subsequently, the Department found new violations, including violations of the July, 1989 CO&A, at the facility. Solomon acknowledged the July, 1989 violations and agreed to pay a penalty on some of them. Department inspections from September, 1989 through March, 1991 revealed that Solomon again violated the terms of the July, 1989 CO&A and acknowledged such violations by paying a penalty. The Department again charged appellants with violations in early 1995 and early 1996.

The basis of this appeal is the Department's June 21, 1996, letter to Appellants in which the

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[3] A comprehensive set of revised regulations imposing more stringent permitting design and operational standards for municipal waste management facilities became effective in April, 1988.

Department denied Appellants' permit modification application, informed Appellants that their permit expired upon receipt of the letter, and ordered the closure of the facility. Appellants are appealing the closure of their facility and the denial of their permit modification application.

If the Board were to grant supersedeas as to the permit denial and closure order we would be authorizing conduct by Solomon not previously approved by the Department. Consistent with long standing principles of law, the Board has repeatedly held that the purpose of a supersedeas is to preserve the lawful *status quo* while the appeal is proceeding to final disposition and, therefore, we will deny a supersedeas which alters the *status quo*. *Lower Paxton Authority, et al v. DER, et al.*, 1994 EHB 1826; *Neville Chemical Company v. DER*, 1992 EHB 926; *Empire Sanitary Landfill, Inc. v. DER*, 1991 EHB 102.

Closure order

The first issue on appeal is the Department's order to Appellants to close the facility. The lawful *status quo* that existed before the issuance of the Department's June 21, 1996 letter was that the original permit had expired by operation of law. Appellants had not acquired a renewal permit allowing them to operate beyond the expiration date.

In their appeal of the closure order, Appellants are essentially asking this Board to reopen their solid waste transfer facility. We cannot grant supersedeas on this matter. It is unlawful for a person to operate a municipal or solid waste processing facility without first obtaining a permit. The Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* (SWMA) states:

> It shall be unlawful for any person ... to use, or continue to use, their land ... as a solid waste processing, storage, treatment or disposal area without first obtaining a permit from the department as required by

> this act: ....

35 P.S. §6018.501(a). The SWMA's implementing regulations reiterate the requirement. Section 271.101 of the regulations requires:

> ..., a person or municipality may not own or operate a municipal waste disposal or processing facility unless the person or municipality has first applied for and obtained a permit for the facility from the Department under the requirements of this article.

25 Pa. Code §271.101. Originally a permit was issued in July, 1983 with an expiration date of December 31, 1984. (Appellants' Exhibit 3, ¶C) The Department then reissued that permit in January, 1985. Under the terms of the reissued permit

> The Authorization to process municipal waste granted by this Permit shall expire on December 31, 1984, or on such date as Solomon's existing contract with the City of Wilkes-Barre to process municipal waste expires, whichever is later. Solomon shall immediately notify the Department of any extension of the expiration date of the Solomon\City of Wilkes-Barre contract beyond December 31, 1985.

(Appellants' Exhibit 2, ¶17) As stated in its language, the permit terminated on December 31, 1985. Although it required Solomon to notify the Department of an extension of the contract with the City of Wilkes-Barre, there is no specific language that the permit would remain in effect beyond December 31, 1985 even if the Department received a request for extension. If we were to grant Appellants' request for supersedeas on the closure we would be in effect reopening a facility that does not have a permit to operate. We cannot not grant such a remedy under the law.

This Board has granted a supersedeas where the petitioner was denied a renewal permit. *Parker Sand and Gravel*, 1983 EHB 557. In *Parker*, petitioner's renewal application for a surface mining license was denied after he had been operating for approximately 6 months without a permit while waiting for the Department's decision on the renewal application. The Board first considered

the issue of whether it could stay a refusal of a license renewal. The Board noted that the purpose of a supersedeas is to preserve the lawful *status quo* and usually granting a supersedeas which would allow a party to operate without a permit, which is unlawful conduct, would be an abuse of the Board's discretion because that is unlawful conduct. However, in this case the Department itself allowed the party to operate without a license therefore it, presumably, granted an automatic extension, and regarded the operation as lawful. The Board granted the supersedeas on the grounds that the Department abused its discretion since the operation had never been the subject of a cease and desist order issued by the Department nor had the Department assessed a fine or penalty against petitioner.

Although the Department also allowed Appellants to unlawfully operate without a permit, this case is distinguishable from *Parker*. Here, Appellants have had numerous statutory and regulatory violations, violations of consent order and adjudications and have been assessed civil penalties as a result of those violations. Therefore, the Department was justified in denying the permit renewal. The Department is the agency which has the responsibility for enforcement of the environmental laws of the Commonwealth. Even though the Department has failed to fulfill its enforcement responsibility by allowing Appellants to operate without a permit for approximately 8 years, the Board will not condone unlawful conduct by granting a supersedeas which will allow Appellants to continue that unlawful conduct.

In another case where the petitioner was operating without a permit, the Board granted the supersedeas because petitioner demonstrated that the cessation order was likely to cause him irreparable harm, to injure the public and he was likely to prevail on the merits. *Baumgardner, et al v. DER*, 1988 EHB 786. The Board noted that petitioners would likely prevail on the merits on

the issue that the Department abused its discretion by ordering the immediate cessation of all aspects of a used oil recycling facility because the Department failed to give the affected parties a reasonable opportunity to react to another Department action, the Department's new interpretation of the definition of solid waste, before threatening to put them out of business.

Here, there was no abuse of discretion. The Department's decision to deny the permit modification application was proper. Under the SWMA, the Department may deny a permit if it finds that the applicant has violated the provisions of the SWMA, any rule or regulation of the Department or any condition of an issued permit or license. 35 P.S. §6018.503 Since the Appellants have a significant history of violations, the Department did not abuse its discretion in denying the renewal even though it took 8 years to reach that decision.

Permit modification application

The second basis for appeal is the Department's denial of Appellants' permit modification application. Here again, the lawful *status quo* is the issue on supersedeas. In this instance the *status quo* which existed prior to the issuance of the Department's June 26, 1996 letter was Appellants' submission of a permit modification application as required by the Solid Waste Management Act and its accompanying regulations. The Board's jurisdiction does not include issuing permits, only the Department has that capability. Therefore, we cannot alter the *status quo* by a supersedeas approving or denying the permit modification. That would constitute affirmative, corrective action beyond the scope of a supersedeas. For the foregoing reasons, Appellants are not entitled to a supersedeas. Because of our disposition of the supersedeas on these reasons, we find it unnecessary to rule on other issues, substantive and procedural, raised by the parties.

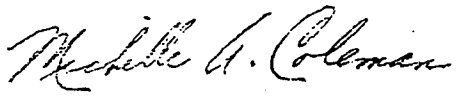
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RICHARD SOLOMON and SOLOMON INDUSTRIES	:	
v.	:	**EHB Docket No. 96-138-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 15th day of August, 1996, it is ordered that the Petition for Supersedeas is denied.

ENVIRONMENTAL HEARING BOARD



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: August 15, 1996

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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M. DIANE SMITH
SECRETARY TO THE BOARD

JEFFERSON COUNTY COMMISSIONERS, et al., PINECREEK TOWNSHIP	:	
v.	:	**EHB Docket No. 95-097-C (Consolidated with 95-102)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and LEATHERWOOD, INC. Permittee	:	**Issued: August 21, 1996**

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

Before the Board are two motions for summary judgement filed by Appellants, and a crossmotion for summary judgement filed by Permittee. The Board denies Appellants' motion for summary judgement on the issue of whether the Department was required to consider detailed air plan approval information required by the Air Pollution Control Act simultaneously with its consideration of the solid waste permit application filed by Permittee. Permittee's crossmotion on this issue is granted as a matter of law. The remaining issues raised by the motions, namely the issue of the Department's review of a hazard to airport traffic created by birds and the siting of the landfill in proximity to the airport are denied, as there are material facts in dispute which must be resolved at the hearing.

OPINION

Before the Board are two motions for summary judgement filed by Jefferson County, the Jefferson County Solid Waste Authority, Clearfield-Jefferson Counties Regional Airport Authority, and Pinecreek Township (collectively, Appellants). Also before the Board is a crossmotion for summary judgement on the air and bird mitigation issues raised by Appellants' first motion for summary judgment.[1]

On May 12, 1995, DEP issued Solid Waste Permit No.101604 to Leatherwood, Inc. (Permittee) for a landfill to be located in Pinecreek Township, Jefferson County. On June 8, 1995 Jefferson County, the Jefferson County Solid Waste Authority and the Clearfield-Jefferson Counties Regional Airport Authority appealed that action to this Board. Shortly thereafter Pinecreek Township also filed an appeal. These two separate appeals were consolidated by Board Order dated July 27, 1995. The notices of appeal, which are virtually identical, raise 48 objections to the permit, arising in large part, from the proximity of the proposed landfill to the DuBois-Jefferson County Airport.

I. MOTION FOR SUMMARY JUDGMENT (FIRST) AND CROSSMOTION FOR SUMMARY JUDGMENT

A. Section 502(d) of the Solid Waste Management Act

The first basis of Appellants' motion for summary judgment is that the permit application failed to address the requirements of the Air Pollution Control Act (APCA), Act of January 8, 1960,

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[1] Appellants have filed a motion to strike the crossmotion on the basis that it is in fact an untimely response to Appellants' motion for summary judgment. Because Permittee did file a response to Appellants' motion, and the crossmotion can stand on its own, we will deny the motion to strike.

P.L. (1959) 2119, *as amended,* 35 P.S. §§ 4001-4106, as required by Section 502(d) of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §6018.502(d).[2] Appellants' motion specifically alleges that the Department failed to require information to determine the potential impact of the landfill on air quality prior to the issuance of the permit. Rather, Condition 6 of the permit requires Permittee to complete Forms G(A) and G(B) entitled "Dust Emission Estimate and Control Plan" and "NMOC Emission Estimate and Control Plan" respectively. These forms were required to be submitted to the Department within 90 days of issuance of the permit.

It is unclear from Appellants' motion and briefs whether they are arguing that the Department erred in issuing the SWMA permit before it had considered Permittee's air plan approval application pursuant to APCA or whether they are arguing that the Department failed to consider air quality factors which are explicitly required by SWMA and its regulations. *See, e.g.*, 25 Pa. Code § 273.171 (relating to gas management). For the sake of expediency, we will address both of these arguments.

Permittee's crossmotion argues that Condition 6, requiring submission of information after the issuance of the permit was not an abuse of discretion as a matter of law. Specifically, Permittee

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[2] Our review of this motion is governed by Pa. R.C.P. No. 1035, which provides, in relevant part, that

> The judgment sought shall be rendered if the pleadings, depositions, and 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.

We note that effective July 1, 1996, Pa. R.C.P. No. 1035 has been rescinded and replaced by Pa. R.C.P. Nos. 1035.1-1035.5. Since these motions were filed before that date, we will apply the old rule.

contends that its application addressed the manner in which it intends to comply with APCA, and that nothing in the SWMA requires the Department to perform a more detailed evaluation of the air pollution control plan than what was contained in the application, relying on *Lower Windsor Township v. DER*, 1993 EHB 1305.

First, to the extent that Appellant's motion alleges that complete information necessary for air plan approval and operating permits under APCA must be submitted prior to issuance of the solid waste permit, the motion is denied as a matter of law. This Board has held on several occasions that there is nothing in SWMA which requires the Department to approve APCA permits before issuing the solid waste permit. *E.g.,County Commissioners v. DEP*, EHB Docket 95-031-MG (Adjudication issued April 4, 1996); *Florence Township v. DEP*, EHB Docket 95-121-MG (Opinion issued March 6, 1996); *Lower Windsor Township v. DER*, 1993 EHB 1305. Section 502(d) of SWMA only requires that the application "shall set forth the manner in which the operator plans to comply with the requirements of the . . . 'Air Pollution Control Act' . . . ." 35 P.S. § 6018.502(d). This language does not require the information to be as detailed as the information required by APCA, but suggests that an applicant must provide such information which would allow the Department to conclude that the applicant has considered the provisions of APCA and has some reasonable likelihood of securing necessary air plan approvals.[3] Thus, to the extent Appellants seem to argue that the Department must consider air quality factors under SWMA and APCA at the same time, their motion is denied, and Permittee's crossmotion on this issue is granted.

However, the operator is required to submit *some* information which the Department is

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[3] Section 502(d) also provides the Department with the remedy of revocation and other sanctions if an operator subsequently fails to comply with APCA.

required to review in accordance with Section 502(d) of SWMA. Permittee has submitted many exhibits with its crossmotion which include forms submitted with the landfill application, and contends that the information was sufficient under SWMA. We are reluctant to hold that the permit application was adequate as a matter of law. The adequacy of the Department's review is more appropriately resolved after a hearing on this matter. Therefore, to the extent that Appellants' motion alleges that the air quality information submitted to the Department was inadequate because it did not comply with the explicit application requirements of the solid waste regulations , the motion is denied as there are material facts in dispute.

B. Bird Hazard Evaluation

The second basis for Appellants' motion for summary judgement is that the permit application is incomplete because it fails to adequately address air safety issues related to the hazard created by birds at the landfill to aircraft utilizing the nearby airport. Appellants argue that this analysis is required as part of the environmental assessment provisions of the Department's regulations at 25 Pa. Code § 271.127. Permittee contends, on the other hand, that the permit application contained all the information required by Section 271.127, and that it was not an abuse of the Department's discretion to allow Permittee to submit a bird mitigation plan subsequent to the issuance of the permit, but prior to acceptance of waste pursuant to Condition 40 of the permit. It is also Permittee's position that bird strike mitigation is not required by the environmental assessment.

Section 271.127 requires a permit application to include an environmental assessment which provides "a detailed analysis of the potential impact of the proposed facility on the environment, public health and safety, including traffic, aesthetics, air quality, water quality, stream flow, fish and wildlife, plants, aquatic habitat, threatened or endangered species, water uses and land use." 25 Pa.

Code §271.127(a). Where the Department determines that a harm exists created by the operation of the proposed landfill, the applicant must provide the Department with plans to mitigate this potential harm. This regulation fulfills the Department's duty to implement Article I, § 27 of the Pennsylvania Constitution. *See Pennsylvania Environmental Management Services, Inc. v. Department of Environmental Resources*, 503 A.2d 477 (Pa. Cmwlth. 1986).

We believe that an analysis of the hazard potentially created by birds to nearby airport traffic is within the ambit of 25 Pa. Code § 271.127. The regulation specifically mentions impacts on public safety, traffic, and wildlife. Birds attracted to the landfill are certainly implicated in each of these considerations, since they arguably create a potential hazard to members of the public traveling in aircraft, aircraft flying in the area create air traffic, and the birds themselves qualify as wildlife.

Appellants' argue that the Department breached its statutory duty to consider air traffic issues as a matter of law by allowing Permittee to submit is bird mitigation plan subsequent to the issuance of the permit. Permittee, on the other hand, analogizes the Department's consideration of the bird mitigation plan to an air plan approval, and argues that the Department is not required to approve the bird plan simultaneously with approval of the solid waste permit. We disagree with Permittee.

The analogy suggested by Permittee is not a perfect fit. While it is true that nothing in SWMA requires the Department to simultaneously fulfill its duties under other acts, such as APCA, it must nevertheless comply with all of its statutory duties under SWMA when reviewing solid waste permits. The Department cannot avoid its duty to balance environmental harm caused by the operation of the landfill against the benefit created by the landfill by placing conditions in the permit. Rather, the Department must determine whether or not a permit applicant can mitigate a potential nuisance *before* it issues the permit. *Korgeski v. DER*, 1991 EHB 935, *aff'd*, 1482 C.D. 1991 (Pa.

Cmwlth., filed February 3, 1992).

The Board's recent decision in *New Hanover Township v. DEP*, EHB Docket 88-119-MR(consolidated) (Adjudication issued June 25, 1996), is instructive. There, the Department issued a permit under SWMA without having a final approveable design. Instead it placed numerous conditions in the permit requiring subsequent changes by the applicant. We held that although the Department has significant authority to place conditions in permits, it could not use this authority to contravene SWMA. Similarly, in *Korgeski v. DER*, 1991 EHB 935, *aff'd*, 1482 C.D. 1991 (Pa. Cmwlth., filed February 3, 1992), the Board held that the feasibility of an approach route should have been resolved prior to the issuance of a solid waste permit in accordance with the Department's regulations.

However, the adequacy and/or the existence of the Department's consideration of hazards presented by birds as presented in the application presents issues which are better resolved at the hearing on this matter. Accordingly, both of the motions for summary judgement are denied.[4]

II. MOTION FOR SUMMARY JUDGMENT (SECOND)

Appellants second motion for summary judgment challenges the Department's consideration of the siting of the landfill in proximity to the airport runway. Specifically, Appellants contend that 25 Pa. Code § 273.202(a)(11), proscribes the location of the proposed landfill within a certain

[4] Appellants have raised additional specific arguments on this issue in their brief and supplemental brief on this motion. The Board notes that the purpose of a supporting memorandum is to explain the motion, not to augment it, therefore we have not addressed these arguments. *See Barkman v. DER*, 1993 EHB 738, 745.

"conical area," for runway flight paths,[5] and that the Department did not consider this specific exclusion. In the alternative Appellants argue that the conical area was improperly calculated. Accordingly, Appellants aver, the landfill is sited too close to the airport runway. Permittee contends that this issue was not preserved in Appellants' notice of appeal. Permittee also argues that the Department did consider and properly calculate the conical area. In the alternative, Permittee suggests that even if the Department failed to consider the conical area exclusion, there are sufficient facts for this Board to exercise its de novo review authority to determine that the proposed landfill is outside the proscribed area, and therefore summary judgment should be denied.

First, we find that the issue of the siting of the landfill in proximity with the airport was adequately raised by Appellants in their notices of appeal even though the specific statutory provisions were not noted.[6] Paragraph 13 of the notices of appeal provides:

> The construction and operation of the permitted landfill creates or establishes an obstruction and has the potential of being a public nuisance and may injure the regions served by the DuBois-Jefferson County Airport; and it is necessary in the

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[5] Specifically, this regulation provides:

(a) [A] municipal waste landfill may not be operated as follows:

. . . .

(11) Within the conical area at 14 CFR Part 77 (relating to objects affecting navigable airspace) for runway flight paths that are or will be used by turbine-powered or piston-type aircraft during the life of disposal operations under the permit. . . .

25 Pa. Code § 273.202(a)(11).

[6] The notices of appeal originally filed by Pine Creek Township at Docket No. 95-102 and Jefferson County Commissioners, Jefferson County Solid Waste Authority, and Clearfield-Jefferson Counties Regional Airport Authority at Docket 95-097 are identical.

> interest of public health, safety, morals and general welfare that the creation or establishment of such obstructions that are a hazard to air navigation be prevented . . . .

Further, Paragraph 48 avers that:

> The Permit, as issued, and the application in support thereof failed to demonstrate that the application complied with all statutes and regulations relevant to the disposal of solid waste, including, but not limited to the Pennsylvania Solid Waste Management Act . . . .

As stated in *Croner, Inc. v. Department of Environmental Resources*, 589 A.2d 1183 (Pa. Cmwlth. 1991), it is not necessary for a notice of appeal to enumerate every statutory basis of objection to an action of the Department, so long as the issue is raised generally. The general allegations of Appellants are sufficient to provide notice that the site of the proposed landfill is at issue.

Second, the Board finds that there are clearly issues of material fact relating to the issue of the Department's consideration of the siting prohibition of 25 Pa. Code § 273.202(a)(11), and that Appellants, as the moving party, have failed in their burden of proving the absence of facts in controversy. For example, Appellants cite deposition testimony of Arthur F. Provost, Regional Solid Waste Facilities Manager, in support of its position that subsection (a)(11) was not considered by the Department. Permittee cites to other deposition testimony of Mr. Provost which supports its contention that the Department *did* calculate and consider the conical area in which a landfill must be excluded by subsection (a)(11), in accordance with information supplied by the permit application and correspondence from the Federal Aviation Administration and the Department of Transportation, Bureau of Aviation. It is not appropriate for the Board to determine what portions of Mr. Provost's testimony are credible on a motion for summary judgment. Accordingly, we find that the fact of

whether or not the Department considered this issue is not undisputed, and summary judgment is improper.

Further, it is not clear the extent to which the FAA and Department of Transportation analyses address the siting prohibition of Section 273.202(a)(11), since the correspondence from these agencies appears to address whether or not the landfill is an aviation obstruction under federal rules, instead of whether it should be excluded under the criteria defined by subsection (a)(11); this analysis may or may not be significantly different. The propriety of the Department's reliance on these agencies is therefore an additional question of fact which must be resolved at hearing.

Appellants' motion for summary judgment (second) is denied.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

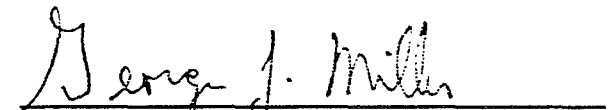
JEFFERSON COUNTY COMMISSIONERS, et al., PINECREEK TOWNSHIP	:	
v.	:	**EHB Docket No. 95-097-C (Consolidated with 95-102)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and LEATHERWOOD, INC. Permittee	:	

ORDER

AND NOW, this 21st day of August, 1996, it is hereby ordered that the motion for summary judgement (first) and the motion for summary judgment (second) filed by Appellants in the above-captioned matter are hereby DENIED.

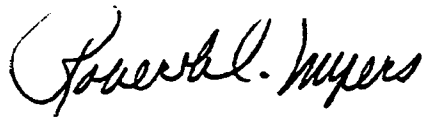
The crossmotion for summary judgment filed by Leatherwood, Inc., Permittee, in the above-captioned matter is GRANTED to the extent that it seeks judgment on the issue that the Department of Environmental Protection is not required to consider permit information related to the Air Pollution Control Act simultaneously with information required under the Solid Waste Management Act. The crossmotion is DENIED in all other respects.

ENVIRONMENTAL HEARING BOARD

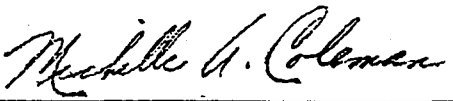


GEORGE J. MILLER
Administrative Law Judge
Chairman

EHB Docket No. 95-097-C
(consolidated with 95-102)



ROBERT D. MYERS
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

Administrative Law Judge Thomas W. Renwand is recused.

DATED: August 21, 1996

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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EHB Docket No. 95-097-C
(consolidated with 95-102)

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M. DIANE SMITH
SECRETARY TO THE BOARD

TINICUM TOWNSHIP and ECO, INC.	:	
	:	
v.	:	**EHB Docket No. 95-266-MG**
	:	**(Consolidated with 95-268-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-STATE TRANSFER COMPANY., INC., Permittee	:	**Issued: August 21, 1996**

OPINION AND ORDER ON MOTION FOR SANCTIONS

By George J. Miller, Administrative Law Judge

Synopsis:

The Board denies appellant's motion for sanctions for failure to produce documents where permittee offers the documents for review citing 25 years worth of files which had to be reviewed and arranged as well as separating privileged documentation from discoverable documentation contained in those files as the reasons for permittee's tardiness in complying with Board orders.

OPINION

The motion for sanctions presently before the Board arises from the appeals of Tinicum Township (Tinicum) and of ECO, Inc. (ECO) of the Department's issuance of a renewal permit on November 20, 1995 to Tri-State Transfer Co., Inc. (Tri-State) for the operation of a municipal waste transfer station under the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*,. 35 P.S. §6018.101, *et seq.* to be located near Route 611 in Tinicum Township, Bucks County,

Pennsylvania. The complete history of this proposed facility was set forth in our July 3, 1996 Opinion and Order on Motions to Dismiss or to Limit Issues and will not be repeated here.

On February 9, 1996, ECO, Inc., served Tri-State Transfer Co., Inc., with its "Appellants First Request Directed to Permittee, Tri-State Transfer Co., Inc. to Produce Documents and Things." Tri-State responded with objections and answers to ECO, Inc's request. On April 12, 1996, ECO, Inc. filed its Motion to Compel Discovery from Tri-State with the Board. By the Board's May 21, 1996 order Tri-State was ordered to "respond as promptly as possible and before June 3, 1996 to the request for production of documents" and its objections "were overruled except that no document need be produced which required disclosure of documents which may be protected by the attorney-client or attorney work product privilege." The Board granted an extension for compliance until June 14, 1996 by a June 3, 1996 order. On August 12, 1996, Tri-State delivered by facsimile and regular United States mail to ECO, Inc. a letter requesting that a meeting be scheduled for a representative of ECO, Inc. to review the Tri-State's records which are responsive to ECO, Inc.'s Document Request.

ECO, Inc. filed a motion for sanctions requesting the Board impose sanctions on Tri-State for failure to produce documents in response to ECO, Inc.'s "First Request Directed to Permittee Tri-State Transfer Co., Inc. to Produce Documents and Things" as the Board had previously ordered.

Tri-State filed a response in which it request the Board deny the motion because it had been diligently working to comply with the Board's orders. Tri-State contends it had review and arrange its files which had accrued over the 25 year life of the transfer station project to separate privileged documentation from discoverable documentation. By an August 12, 1995 letter, Tri-State proposed

the parties schedule a mutually convenient time when ECO, Inc. could review the documents, which would be available for review by 10:00 a.m. August 13, 1996.

We deny the motion. The Board has the power to impose sanctions on parties for failure to abide by Board orders or a Board rule of practice and procedure. 25 Pa. Code 1021.124. The sanctions may include precluding introduction of evidence or documents not disclosed in compliance with an order. *Id.* Although Tri-State's August 12, 1996 letter apprises ECO, Inc's counsel of the availability of the documents approximately two months beyond the June 14, 1996 compliance deadline set forth in the Board's June 3, 1996 order, the Board will not impose sanctions at this time.

We will give Tri-State the benefit of the doubt that it took two months to review and arrange its files as well as to separate privileged documentation from discoverable documentation regarding this appeal. We believe Tri-State is finally going to comply with our order since the letter proposes the parties schedule a mutually convenient time for ECO, Inc. to review the documents. Consequently, at this point, we will defer the imposition of sanctions and will simply order the parties to arrange for the review of the documents, which became available on August 13, 1996 at 10:00 a.m., at a mutually convenient time within 10 days of the date of this order. However, we warn the parties that failure to comply with this order will result in sanctions.

Counsel for Tri-State are admonished that failure to comply with Board orders will result in sanctions. The proper method of dealing with any difficulty in complying with the Board's discovery schedule is to apply for an extension of time.

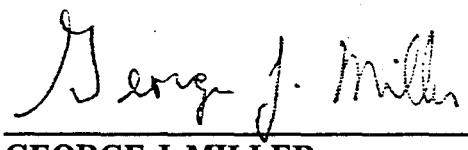
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TINICUM TOWNSHIP and ECO, INC.	:	
	:	
v.	:	**EHB Docket No. 95-266-MG**
	:	**(Consolidated with 95-268-MG)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION, and TRI-STATE TRANSFER	:	
CO., INC., Permittee	:	

ORDER

AND NOW, the 21st day of August, 1996 it is ordered that ECO, Inc., and Tri-State Transfer, Co. Inc. schedule a mutually convenient time for ECO, Inc. to review documents it requested pertaining to this appeal within 10 days of the date of this opinion.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: August 21, 1996

See next page for service list

EHB Docket No. 95-266-MG
(Consolidated with 95-268-MG)

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

DONALD W. BARSHINGER, et al.	:	
	:	
v.	:	**EHB Docket No. 96-027-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and ROBERT HANKIN, EXECUTOR OF ESTATE OF BERNARD HANKIN, Permittee	:	**Issued: August 22, 1996**

OPINION AND ORDER ON MOTION TO COMPEL

By George J. Miller, Administrative Law Judge

Synopsis:

Before the Board is a motion to compel answers to interrogatories filed by the Estate of Bernard Hankin (Permittee). A portion of the motion is now moot as Appellants[1] have filed supplemental answers to contested interrogatories. The remainder of the motion is denied as the information sought by the Permittee is irrelevant or the Permittee has failed to adequately specify the deficiency of the answers provided by Appellants.

OPINION

The motion to compel is filed in connection with two appeals of the transfer and the extension of Permit No. E15-224 which authorize the removal of an existing stream crossing and the

[1] Appellants are several individuals and the Brandywine Conservancy.

construction of a box culvert in connection with a new stream crossing.[2] On April 23, 1996, Permittee served Appellants with interrogatories and request for production of documents. Appellants served their responses and general objections on May 23, 1996, and supplemented their responses on June 18, 1996. Permittee's motion to compel generally charges that the answers filed by Appellants do not adequately answer the interrogatories.

Interrogatories 4-6 and 29-36

Permittee sought to compel answers to Interrogatories 4-6 and 29-36 on the basis that Appellants failed to adequately identify witnesses and information concerning contentions made in the notice of appeal. Appellants, concurrent with their response to the motion to compel, have served supplemental answers to these interrogatories. Accordingly, the motion to compel these answers is moot. Permittee is free to renew its motion to compel in the event that the supplemental responses remain inadequate. *See Nothstein v. DER*, 1990 EHB 1633.

Interrogatories 7-14 and 28

In Interrogatories 7-14 Permittee seeks information concerning a letter sent to Richard J. Guarini of the Hankin Group by Sarah Solmssen, one of the individual Appellants in this matter. Interrogatory 28 seeks the amount of dues required for membership in the Brandywine Conservancy. Permittee argues that this information is relevant to the motive and bias of Appellants in filing these appeals. Appellants respond that this information is not relevant. We agree.

The motive of Appellants in filing appeals from the permit transfer and extension is completely irrelevant to the ultimate issue in this case: Whether the Department abused its discretion

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[2] For a complete description of this case *see Barshinger v. DEP*, EHB Docket No. 96-027-MG (opinion issued July 16, 1996).

or violated the law. Activity of the Appellants leading up to the filing of these appeals is beyond the scope of this inquiry. *Starr v. DEP*, EHB Docket 95-143-C (opinion issued March 16, 1996). Any person or organization adversely affected decisions of the Department are entitled to file appeals for any reason; their motives for doing so are not relevant, and have no place in this type of proceeding. Accordingly, the motion to compel these interrogatories is denied.

Interrogatories 17-27

Interrogatories 17-27 are broadly framed questions which generally seek the basis for contentions made in the affidavits executed by the individual Appellants which were included in the motions for summary judgment. These affidavits supported contentions of the adverse effects of the filling of wetlands in support of Appellants' position that they had standing to challenge the transfer and extension of the permit.[3] Permittee argues that Appellants' answers to these interrogatories are inadequate, but, with the exception of Interrogatories 17 and 21, does not specifically delineate why each answer is not acceptable.

We are constrained to deny Permittee's motion to compel because we find ourselves unable to determine what specific relief is necessary to remedy the alleged inadequacy of Appellants' answers to the contested interrogatories. *See Nothstein v. DER*, 1990 EHB 1633 (each moving party must demonstrate its entitlement to relief). Permittee has not pointed out why answers to Interrogatories 18-20 and 22-27 are insufficient.[4]

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[3] *See Barshinger v. DEP*, EHB Docket 96-027-MG (Opinion issued July 16, 1996).

[4] We note that Permittee is of course free to pose additional, more specific interrogatories which are more likely to elicit the specific information it contends is necessary to defend the transfer and extension of the permit.

Further, Permittee has charged that the answers to Interrogatories 17 and 21 are vague. Yet, as the interrogatories were broadly crafted, the response of Appellants was adequate. Interrogatory 17 sought the basis for Appellant Roger Bennett's contention that the permitted activity will cause degraded water quality and restrict his recreational activities in the area. The answer was that since the Dam Safety and Encroachments Act and the regulations were not properly adhered to, this *per se* causes adverse impacts. Mr. Bennet further answered that he will be affected because fox habitat will be destroyed by the filling of the wetlands, asphalt paving will result in drainage problems, and road construction related to the project will make use of the remaining open areas more difficult.

Although Interrogatory 21 is more direct, the question was nevertheless adequately answered. This interrogatory seeks a detailed statement of how the installation of the culvert will increase stormwater flow, and whether Appellants have performed any calculations to determine the increase in stormwater. Although this question was not directed to a specific individual Appellant, Appellant Evelyn Howard answered that she believes that it is reasonable to expect increased runoff will result from "the construction of impervious areas in connection with the placement of fill, [which will] result in substantial changes to the flow of stormwater and runoff in the area. . . . " The answer further notes that no specific calculations have been performed. Permittee does not charge that this answer was not truthful or made in good faith. Accordingly, we find this answer to be adequate, with the expectation that Appellants will supplement their answer in the event that they do perform flow calculations, or receive information from their experts concerning the likelihood of an increase in runoff from the fill activity. The motion to compel answers to Interrogatories 17 and 21 is denied.

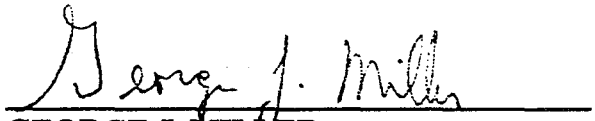
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DONALD W. BARSHINGER, et.al.	:	
	:	
v.	:	**EHB Docket No. 96-027-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and ROBERT HANKIN, EXECUTOR OF ESTATE OF BERNARD HANKIN, Permitee	:	

ORDER

AND NOW, this 22nd day of August, 1996, the motion to compel answers to interrogatories of Robert Hankin, Executor of Estate of Bernard Hankin is hereby DENIED.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: August 22, 1996

See next page for service list

EHB Docket No. 96-027-MG

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
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Southeast Region

For Appellants:
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MORGAN, LEWIS & BOCKIUS
Philadelphia, PA

For the Permittee:
Mary Ann Rossi, Esq.
FOX, ROTHCHILD, FRANKEL & O'BRIEN
Exton, PA

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M. DIANE SMITH
SECRETARY TO THE BOAR

DONALD W. BARSHINGER, et al.	:	
	:	
v.	:	**EHB Docket No. 96-132-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CLOCKTOWER WOODS, LTD, Permittee	:	**Issued: August 23, 1996**

OPINION AND ORDER ON MOTION TO CONSOLIDATE

By George J. Miller, Administrative Law Judge

Synopsis:

The Board denies a motion to consolidate the appeal of a Department of Environmental Resources approval of an environmental assessment and water quality certification with another appeal filed by the same appellants because there is not a sufficient similarity of legal and factual issues between the two appeals.

OPINION

This appeal, filed on June 17, 1996, challenges the approval of Environmental Assessment EA15-002SE and issuance of a water quality certification. These approvals allow the filling of wetlands on Jamestown Way in a residential project known as Bow Tree Section IV (Appeal II). Appellants[1] also filed an appeal on January 25, 1996, which challenges the transfer and extension

[1] Appellants are several individuals: Donald W. Barshinger, Roger A. Bennett, Evelyn Howard, Elizabeth Moran, Sarah E.M. Solmssen, Bruner Strawbridge, and Jacqueline K. Wilking.

of a permit for the replacement of a box culvert near Line Road in the same project (Appeal I). Appellants seek to consolidate these two appeals, arguing that both appeals "make similar allegations concerning the Department's compliance with applicable laws and regulations pertaining to wetlands in connection with issuing permits and approvals for wetlands activities at the Bow Tree/Clocktower Development . . . ." (Motion ¶ 8) Clocktower Woods Ltd. (Permittee) and the Department object to consolidation because the appeals do not raise common issues of law and fact. Most notably, the issues in Appeal I are limited by the doctrine of administrative finality, since Appellants are foreclosed from raising arguments that could have been raised in an appeal of the original permit.[2]

This Board is empowered to consolidate cases "involving common questions of law or fact . . . ." 25 Pa. Code § 1021.80. The decision to consolidate rests within the sound discretion of the Board. *Columbia Gas of Pennsylvania Inc. v. DEP*, EHB Docket 95-231-R (opinion issued January 12, 1996). Consolidation should promote judicial economy and administrative efficiency, and act to reduce or limit unnecessary cost and delay to the parties and to the Board. *Id.*

In reviewing the issues raised by Appellants in Appeal I and Appeal II, there are not sufficient common issues of law and fact such that consolidation would promote judicial economy and administrative efficiency. First, Appellants are limited in Appeal I to issues which could not have been raised when the original permit was issued. The litigation could become confusing where certain issues can be raised for Appeal II, but are precluded in Appeal I. Second, Appeal I also raises an issue of first impression concerning the transferability of a permit after the death of the original permittee. This question does not apply to Appeal II. Finally, since the two permits involve

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[2] For a complete discussion of the issues raised in Appeal I, *see Barshinger v. DEP,* EHB Docket 96-027-MG (opinion issued July 16, 1996).

different physical areas within the residential development, the adverse impacts on Appellants relative to their standing could be different in the two appeals.

The Board is also cognizant of the fact that Appeal I was filed approximately six months before Appeal II, and is nearly ready to be scheduled for hearing. The proceedings in Appeal II are in the middle of discovery. Since the issues in Appeal I are unlikely to determine the outcome of Appeal II, it does not further the goal of administrative efficiency to delay disposition of Appeal I.

In sum, since there are different and more complex issues of law and fact raised by Appellants in Appeal I, and the litigation in Appeal I has progressed much further than Appeal II, consolidation will not promote judicial economy or administrative efficiency. Appellants' motion to consolidate is denied.

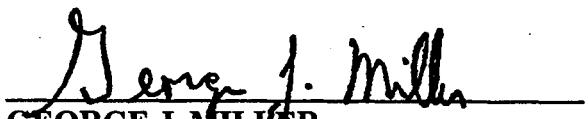
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DONALD W. BARSHINGER, et al.	:	
	:	
v.	:	**EHB Docket No. 96-132-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CLOCKTOWER WOODS, LTD., Permittee	:	

ORDER

AND NOW, this 23rd day of August, 1996, the motion of Donald W. Barshinger, et. al. to consolidate the above captioned appeal with EHB docket 96-027-MG is DENIED.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: August 23, 1996

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
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Southeast Region

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For the Permittee:
Mary Ann Rossi, Esq.
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M. DIANE SMITH
SECRETARY TO THE BOARD

TINICUM TOWNSHIP and ECO, INC.	:	
	:	
v.	:	**EHB Docket No. 95-266-MG**
	:	**(Consolidated with 95-268-MG)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: September 3, 1996**
PROTECTION and TRI-STATE TRANSFER	:	
COMPANY, INC., Permittee	:	

OPINION AND ORDER ON MOTION FOR SANCTIONS

By George J. Miller, Administrative Law Judge

Synopsis:

The Board denies appellant's motion for sanctions for failure to answer interrogatories where there was a change of counsel during the discovery period and where permittee responded to the interrogatories within a reasonable period after the entry of appearance of new counsel for the permittee.

OPINION

The motion for sanctions presently before the Board arises from the appeals of Tinicum Township (Tinicum) and of ECO, Inc. (ECO) of the Department's issuance of a renewal permit on November 20, 1995 to Tri-State Transfer Co., Inc. (Tri-State) for the operation of a municipal waste transfer station under the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended,* 35 P.S. §6018.101, *et seq.* to be located near Route 611 in Tinicum Township, Bucks County, Pennsylvania. The complete history of this proposed facility was set forth in our July 3, 1996

Opinion and Order on Motions to Dismiss or to Limit Issues and will not be repeated here.

On March 15, 1996 Tri-State served interrogatories on Tinicum. On April 4, 1996 Tinicum served Interrogatories on Tri-State. Tinicum's counsel contends that Tri-State's then counsel agreed to answer the respective interrogatories. Subsequently, on May 6, 1996,Tri-State's counsel filed a motion to withdraw. On May 10, 1996 the Board granted the motion to withdraw. On June 3, 1996 the Board entered an order requiring Tri-State to respond to all outstanding discovery requests by June 14, 1996 and that all discovery was to be completed by July 31, 1996. Tri-State did not answer the Interrogatories by June 14, 1996. On June 17, 1996, Tri-State's current co-counsel filed their notice of appearance.

Tinicum filed a motion for sanctions requesting the Board to impose sanctions on Tri-State for failure to respond to the Interrogatories as the Board had previously ordered even though it was unrepresented at the time the response to the interrogatories were due.

Tri-State filed a response to Tinicum's motion for sanctions which it requests the Board deny the motion because Tinicum improperly served the Interrogatories on April 4,1996 as Tinicum only delivered a set to the President of Tri-State and not its counsel and that it has delivered its responses to Interrogatories on August 20, 1996.

We deny the motion. The Board has the power to impose sanctions on parties for failure to abide by Board orders or a Board rule of practice and procedure. 25 Pa. Code §1021.124. The sanctions may include precluding introduction of evidence or documents not disclosed in compliance with an order. *Id.* Although Tri-State initially failed to respond to a Board order to answer the interrogatories, the Board will not impose sanctions at this time.

We believe that the delay for answering the interrogatories was due to the change of counsel

for Tri-State during the discovery period and due to a lack of communication between a client and his attorney. Tri-State's counsel contends it delivered its responses to Tinicum on August 20, 1996. We will give Tri-State the benefit of the doubt and permit the late filing of Tri-State's responses. However, if the delivery has not occurred we will impose sanctions.

Counsel for Tri-State is admonished that the proper method for dealing with the filing of a late response to discovery which their new client has not dealt with properly is to promptly seek leave from the Board for an extension of time in which to file the responses. If the responses are inadequate, counsel for Tinicum should initiate a conference call with Judge Miller to seek guidance for resolution on the matter.

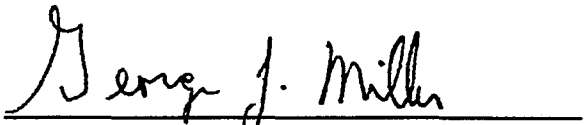
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TINICUM TOWNSHIP and ECO, INC.	:	
	:	
v.	:	**EHB Docket No. 95-266-MG**
	:	**(Consolidated with 95-268-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-STATE TRANSFER COMPANY, INC., Permittee	:	

ORDER

AND NOW, the 3rd day of September, 1996, it is ordered that Tinicum Township's motion for sanctions is denied.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: September 3, 1996

EHB Docket No. 95-266-MG
(Consolidated with 95-268-MG)

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
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Southeast Region

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and
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For the Permittee:
Philip Hinerman, Esq.
FOX, ROTHSCHILD, O'BRIEN AND FRANKEL
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bl

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M. DIANE SMITH
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INDIAN LAKE BOROUGH	:	
	:	
v.	:	**EHB Docket No. 95-071-R**
	:	**(Consolidated with 95-096-R)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION, PBS COALS, INC., Permittee,	:	**Issued: September 4, 1996**
and ROXCOAL, INC., Permittee	:	

OPINION AND ORDER ON MOTION TO DISMISS PETITION FOR SUPERSEDEAS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Department of Environmental Protection's Motion to Dismiss a Petition for Supersedeas filed by the Appellant is denied where the Appellant's Petition meets the requirements for this matter to proceed to a supersedeas hearing. First, the Department is incorrect in its assertion that the Board may not review any evidence which occurred subsequent to the issuance of the permit which is the subject of this appeal. Contrary to the Department's assertion, the Board's *de novo* review power allows it to consider evidence which was acquired after the Department's permitting action. The Department misreads the Commonwealth Court's decision in *Concerned Residents of the Yough, Inc. v. Department of Environmental Resources*, 639 A.2d 1265 (Pa. Cmwlth. 1994) as holding that such evidence is not admissible. Second, the Department's assertion that the Board lacks the power to fashion the remedy requested by the

Appellant in its Petition is rendered moot by the Appellant's filing of an amended request for relief. Third, contrary to the Department's contention, the Petition contains an allegation of irreparable harm, as required by the Board's rule at 25 Pa. Code § 1021.78(a)(1). Fourth, the affidavit attached to the Petition is sufficient on its face and meets the requirements for an "affidavit" as set forth in both the Board's rules and the Rules of Civil Procedure. The affidavit demonstrates that it is based on the personal knowledge of the affiant. Fifth, contrary to the Department's assertion, the Petition adequately sets forth the legal basis for the claims made in the Petition. Finally, the Appellant has not waived any issues related to the Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. § 1406.1 *et seq.* since this issue was sufficiently raised in the notice of appeal, pursuant to the Commonwealth Court's holding in *Croner, Inc. v. Department of Environmental Resources*, 589 A.2d 1183 (Pa. Cmwlth. 1991).

OPINION

This matter involves two appeals brought by Indian Lake Borough ("Appellant") challenging the Department of Environmental Protection's ("Department") issuance of mining permit revisions to PBS Coals, Inc. and RoxCoal, Inc. (collectively referred to herein as the "Permittee").

On August 20, 1996, the Appellant filed a Petition for Supersedeas alleging that mining by the Permittee has upset the hydrologic balance in the vicinity of Indian Lake and threatens to dewater the lake. On August 27, 1996, the Department filed a Motion to Dismiss the Petition, or in the alternative, a Motion in Limine, setting forth six grounds as to why the Petition or portions thereof should be dismissed. After reviewing the Department's Motion, the undersigned Administrative Law Judge determined that the Motion should not be granted. Because the

supersedeas hearing was scheduled to begin in two business days, an Order without an Opinion was issued on August 30, 1996 denying the Motion. This Opinion addresses the basis for that Order.

The first ground on which the Department attacks the Petition is that it is based on inadmissible evidence. To support its claim that mining has affected the hydrologic balance of the area, the Appellant relies on pumping records and static water levels taken after the issuance of the permit revisions which are the subject of this appeal. The Department argues that evidence of events which occur after the issuance of a permit are not admissible in an appeal challenging that permit. This is clearly contrary to long-standing precedent which holds that the Board exercises *de novo* review power and may consider evidence which was acquired after the Department's action. *See Warren Sand & Gravel, Inc. v. DER*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975); *City of Harrisburg v. DER*, EHB Docket No. 88-120-R (Adjudication issued June 28, 1996); *Lower Towamensing Township v. DER*, 1993 EHB 1442, 1482; *Al Hamilton Contracting Co. v. DER*, 1992 EHB 1458, 1487-88.

In support of its argument, the Department cites the Commonwealth Court's holding in *Concerned Residents of the Yough, Inc. v. Department of Environmental Resources*, 639 A.2d 1265 (Pa. Cmwlth. 1994) ("*CRY*"). However, the Department is incorrect in its assertion that the *CRY* decision stands for this proposition.

The *CRY* case involved an appeal by an environmental group from the Department's issuance of a permit for the construction and operation of a landfill. One of the appellant's challenges to the permit issuance was that the Department had abused its discretion in approving the landfill's liner, which the appellant contended had a high probability for leakage due to its

permeability. On February 1, 1993, the Board issued an adjudication sustaining the Department's grant of the permit. The Board determined that even though the primary liner was highly permeable and, therefore, had a high potential for leakage, the liner system was designed in recognition of this fact and in a manner to prevent the migration of leachate through the system into the groundwater.

Following the close of the hearing but prior to issuance of an adjudication, the appellant filed a motion to reopen testimony to allow the appellant to introduce evidence of ongoing leakage from the landfill due to the liner being torn during its installation. This motion was denied by the Administrative Law Judge who heard the appeal.

On appeal to the Commonwealth Court, the appellant argued that the Board erred in refusing to allow it to reopen testimony to introduce this evidence. The Court affirmed the Board, holding that evidence of damage to the liner during construction of the landfill was not relevant to the question of whether the Department acted properly in approving the permit. The Court did not hold, as the Department contends, that the Board may not hear evidence which is acquired after the Department's action has taken place. In fact, the Court reiterated its earlier holding in *Warren Sand & Gravel, supra,* in stating as follows:

> [W]hen an appeal is taken from a decision of the DER to the EHB, the EHB is required to conduct a hearing *de novo* and is not limited to a review of the evidence received at the DER's fact-finding hearings: when reviewing a discretionary action by the DER the EHB is permitted to substitute its discretion for that of the DER based upon the record before it.

639 A.2d at 1274. The Court's decision rested not on the fact that the evidence was acquired after

issuance of the permit; rather, its decision rested on the fact that evidence that the liner was torn during construction was not relevant to the question of whether the permit was properly issued in the first instance. Therefore, we reject the Department's contention that *CRY* precludes the Board from hearing evidence which was acquired after the Department's permitting action.

The second argument of the Department's Motion is that the Board lacks jurisdiction to grant the relief requested by the Petition. In its Petition, the Appellant requested that the Board order the Permittee to cease mining in the the areas delineated on a map accompanying the Petition and to submit amended mining maps to the Department. The Petition further requested the Board to order the Department to undertake an investigation to determine whether continued mining will adversely affect the hydrologic balance and, upon completion of the study, to prepare findings of fact regarding protection of the hydrologic balance. The Department asserts that the relief requested by the Appellant falls outside the Board's jurisdictional power. The Department contends that the Board is limited to either suspending or upholding the action of the Department and may not order the parties to take affirmative steps. We need not address this question since the Appellant has subsequently filed an amended request for relief asking solely that the Board suspend the permits in question. Therefore, this issue is rendered moot.

The third argument made by the Department is that the Petition fails to allege irreparable harm, as required by 25 Pa. Code § 1021.78(a)(1) of the Board's rules. We find no merit to this argument since the Petition alleges that irreparable harm will result from adverse impacts to the hydrologic balance. In particular, the Appellant contends that "the hydrologic balance has been upset to the point where the water table levels in the area immediately adjacent to Indian Lake and the mine has [sic] been so lowered that a reversal of the hydraulic gradient has occurred, creating

a condition by which de-watering of the lake is likely to occur." (Petition, p. 4) The Appellant further states, "In addition to the irreparable harm caused by the reversal of the hydraulic gradient, and the negative impacts on the hydrologic balance, Appellant believes that it can demonstrate irreparable harm by demonstrating that the Department failed to require the information in the application required by its own regulations." (Petition, p. 5) We find that these allegations in the Petition meet the requirement for a showing of irreparable harm.

The fourth argument propounded by the Department is that the affidavit of Dr. Milena Bucek is defective in that it fails to comply with either the Board's rule at 25 Pa. Code § 1021.77 (a)(1) or Pa. R.C.P. 1035.4. Section 1021.77(a)(1) states that a petition for supersedeas shall be supported by an affidavit, in accordance with Pa. R.C.P. 76 and 1035.4, setting forth facts upon which issuance of the supersedeas may depend. As defined in Pa. R.C.P. 76, an "affidavit", when unsworn, must contain a statement that it is made subject to the penalties of 18 Pa. C.S. § 4904. This requirement was met by the affidavit provided by Dr. Bucek. Pursuant to Pa. R.C.P. 1035.4, an "affidavit" shall be made on personal knowledge and shall show affirmatively that the signer is competent to testify to the matters stated therein. The Department contends that Dr. Bucek's affidavit is not made on personal knowledge because it says that the statements made therein are true and correct "to the best of my knowledge, information, and belief." It is the Department's contention that "knowledge, information, and belief" do not constitute "personal knowledge."

We disagree with the Department's contention since we can think of nothing which more clearly satisfies the definition of "personal knowledge" than knowledge, information, and belief. The Department cites *E.P. Bender Coal Co. v. DER*, 1990 EHB 1624, as holding that an affidavit

which states that the statements therein are true and correct to the best of the person's knowledge is not adequate. This is an incorrect reading of the holding in *Bender*. Rather, in *Bender*, the petition contained a verification which simply stated that the signer had read the petition and that the statements contained in the petition were true and correct to the best of her knowledge. The verification did not set forth any facts upon which the petition was based, nor was it clearly indicated who the affiant was. These facts are markedly different from those of the present case, in which Dr. Bucek's affidavit clearly sets forth the facts upon which the Petition is based and her qualifications.

The Department also argues that because some of the data and exhibits upon which the Petition is based were prepared by Dr. Bucek's staff, this indicates that Dr. Bucek does not have personal knowledge of this information. We clearly do not expect a petition for supersedeas to be accompanied by affidavits from every member of an expert's staff who may have been involved in the preparation of certain data or exhibits. Certainly this would be impractical and unnecessary. If these individuals work in connection with or under the direction of the expert witness - affiant, and the data or exhibits have been reviewed by her, the requirement of personal knowledge has been met. It is well-established that an expert may testify based on tests performed or data collected by her staff. *Commonwealth v. Al Hamilton Contracting Co.*, 557 A.2d 15 (Pa. Super. 1989); *City of Harrisburg v. DER*, *supra* at 8. If an expert may testify based on such information, it follows that she may base her affidavit on such information.

We, therefore, reject the Department's argument that Dr. Bucek's affidavit is defective.

Next, the Department contends that the Petition fails to state with particularity the legal authority upon which it is based, but rather, includes a "laundry list" of regulations and statutes

which it alleges have been violated. The Board's rules at 25 Pa. Code § 1021.77(b) require that a petition for supersedeas state with particularity the citations of legal authority which the petitioner believes form the basis for the grant of supersedeas. It is true, as the Department points out, that in some instances the Petition refers generally to entire chapters of the Department's regulations, to entire statutes without reference to a particular section, and, in two instances simply to "environmental statutes." However, the Petition, as a whole, cites to specific sections of the regulations and statutes which the Appellant alleges have been violated and which it believes form the basis for grant of supersedeas. Therefore, we find that the Petition complies with the requirement of § 1021.77(b).

Finally, the Department asserts that the allegations raised in paragraph 16 of the Petition, regarding the Bituminous Mine Subsidence and Land Conservation Act, Act of April 27, 1966, P.L. 31, as amended, 52 P.S. § 1406.1 *et seq*, ("Mine Subsidence Act"), should be dismissed, since the Appellant did not raise any issues regarding this Act in its notices of appeal. It is true that the notices of appeal do not specifically cite the Mine Subsidence Act. However, pursuant to the holding of the Commonwealth Court in *Croner, Inc. v. DER*, 589 A.2d 1183 (Pa. Cmwlth. 1991), an issue may be raised generally in a notice of appeal. Although the Mine Subsidence Act was not specifically cited by the Appellant, we find that this issue was sufficiently raised in paragraph 21 of the notices of appeal, which reads, "The Application, taken as a whole, fails to demonstrate compliance with other relevant Pennsylvania and Federal environmental statutes and regulations." As Judge Coleman noted in *Jefferson County Commissioners v. DEP*, EHB Docket No. 95-097-C (Opinion issued August 21, 1996), "it is not necessary for a notice of appeal to enumerate every statutory basis of objection to an action of the Department, so long as the issue

is raised generally." *Id.* at 9.

However, we caution that an appellant may not avoid the doctrine of issue preclusion by simply including in his notice of appeal a general statement that "other relevant statutes and regulations" have been violated, and then assert that he is protected under *Croner*. As noted in *Jefferson County*, the general allegations of the appellant must be sufficient to provide notice to the other parties of the issue in dispute. Here, the notices of appeal raised the issue of contamination and dimunition of water supplies by underground mining. It is reasonable to assume that the Department and the Permittee could envision the Mine Subsidence Act being included in the language of paragraph 21 of the notices of appeal. It is under the specific circumstances of this case that we find the language of paragraph 21 of the Appellant's notices of appeal to meet the requirement of *Croner*.

For the reasons outlined above, the Department's Motion is denied.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

INDIAN LAKE BOROUGH	:	
	:	
v.	:	**EHB Docket No. 95-071-R**
	:	**(Consolidated with 95-096-R)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION, PBS COALS, INC., Permittee,	:	
and ROXCOAL, INC., Permittee	:	

ORDER

AND NOW, this 4th day of September, 1996, the order of August 30, 1996 is affirmed.

The Motion to Dismiss Petition for Supersedeas filed by the Department is dismissed.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: September 4, 1996

EHB Docket No. 95-071-R (Consolidated with 95-096-R)

c: **For the Commonwealth, DEP:**
Michael J. Heilman, Esq.
Barbara J. Grabowski, Esq.
Southwest Region

For Appellant:
Robert P. Ging, Esq.

For Permittee:
Vincent J. Barbera, Esq.

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TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

R & A BENDER, INC.	:	
	:	
v.	:	**EHB Docket No. 95-260-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, CITY OF HARRISBURG, Intervenor and CUMBERLAND COUNTY SOLID WASTE AUTHORITY, Permittee	:	**Issued: September 4, 1996**

OPINION AND ORDER ON MOTION TO DISMISS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board will grant a motion to dismiss an appeal of an approved Department of Environmental Protection Consent Order and Adjudication when the action has not affected appellant's personal or property rights, privileges, immunities, duties, liabilities or obligations and has not resulted in a change of the *status quo ante*.

OPINION

Before the Board is the City of Harrisburg's (City) motion to dismiss R&A Bender's (Bender) notice of appeal challenging an approved Consent Order and Adjudication (CO&A). The Cumberland County Solid Waste Authority (Permittee) and the Department joined in the City's motion.

Background

On December 15, 1995, Bender filed this appeal challenging the approved CO&A entered into by the City, the Department, and the Permittee in order to settle the City's 1991 appeal of the Department's approval of the Cumberland County Solid Waste Management Plan (Plan). Bender operates a landfill which has an existing waste disposal contract with the Permittee that expires by its terms on November 18, 1996. Under the terms of the contested CO&A, the Harrisburg Material, Energy, Recycling and Resource Recovery Facility (Harrisburg Facility) is included in the Plan as a designated long-term provider of resource recovery capacity to Cumberland County for 25 % of the municipal solid waste generated within the County. On November 7, 1995, the Board approved the CO&A and it was subsequently published in the *Pennsylvania Bulletin* on November 25, 1995.

The terms of the CO&A state:

- that it does not interfere with existing contracts that Cumberland County or the Authority have entered into and shall not be construed to prevent the County or Authority from negotiating or entering into further contracts with other processing or disposal facilities designated in the approved Plan; and

- as a precondition to the Harrisburg Facility providing resource recovery capacity to the County, the City and Authority must first negotiate and enter into a written disposal contract.

The City and the Authority have not entered into a waste disposal contract.

The current contract between Bender Landfill and the Authority contains the following terms:

- it expires on November 18, 1996;

- it does not provide Bender with any contractual right or privilege to extend the contractual term of the agreement or its ability to receive Cumberland County-generated municipal

solid waste beyond the expiration date; and

- the Authority has the sole discretion to renew or extend the term of the contract.

The Authority has not notified Bender of any renewal or extension of the contract nor conversely has the Authority notified Bender that the contract will not be extended or renewed. Bender contends, among other reasons, that the designation of the Harrisburg Facility (a) was not based on a fair, open and competitive process, (b) was accomplished without due consideration of existing facilities, (c) will cause unspecified harm to existing facilities, (d) circumvented certain planning objectives, and (e) violated Bender's due process rights and was a taking without just compensation.

On February 20, 1996, the City filed its motion to dismiss. The Permittee and the Department joined in the motion on February 23, 1996 and March 13, 1996, respectively. The City contends, among other things, that the CO&A does not constitute an appealable action and the issues raised by Bender are not ripe and therefore the Board lacks jurisdiction. On March 13, 1996, Bender filed its response. Bender argues that the Department's entering into the CO&A is an appealable action and that issues raised in the appeal are ripe.

DISCUSSION

The City argues the issues are not ripe, and, therefore, unappealable, because the CO&A has not affected Bender's personal or property rights, privileges, immunities, duties, liabilities or obligations and has not resulted in a change of the *status quo ante* of Bender's contract or its status as a designated facility. Therefore, Bender continues to have the same rights, privileges, immunities, duties or obligations as it did prior to the CO&A. The Permittee and the Department join in these arguments.

Bender claims that the CO&A is an appealable action in that it constitutes an approval of a modification to the Cumberland County Plan and the issues are ripe. Bender argues that the Department's action of entering into the CO&A and its approval of the Plan revision embodied in the CO&A constitutes an "appealable action" because it states that it is an adjudication in its title and it affected the personal and property rights of the City and Authority. Bender argues that under either the definition of an "action" or an "adjudication" the Department action need only affect the personal or property rights of "a person" and not the rights of the person asserting an appeal.

We must reject Bender's argument. In reviewing the City's motion, the Board must view the motion in the light most favorable to Bender, as it is the non-moving party. *Township of Doylestown v. DEP, et al*, EHB Docket No. 95-198-MG (Opinion issued April 17, 1996). For this CO&A to be appealable it must either be an "adjudication" within the meaning of the Administrative Agency Law, 2 Pa.C.S. § 101, or an "action" as defined in 25 Pa. Code § 1021.(2)(a)(1). The definition of action is found at 25 Pa. Code § 1021.(a). It is:

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

"Adjudications" are defined as those actions which affect the personal or property rights, privileges, immunities, duties, liabilities or obligations of the party. *Elephant Septic Tank Service, et al. v.*

DER, 1993 EHB 590. To fall within either of these categories, the Department's action must have some impact on appellant's rights and duties. *Id.* The Board has noted that where the Department's action does not change the *status quo ante*, an appellant cannot appeal. *Id.*; *Lobolito, Inc. v. DER, et al*, 1993 EHB 477; *Keystone Castings Corp. v. DER*, 1993 EHB 263.

In order for the CO&A to be an appealable action it must have had some impact on Bender's existing rights and duties. It had no such impact. The CO&A did not alter any of Bender's duties or rights. Nothing in the CO&A states that Bender's contract for waste from Cumberland County is altered in any way at this time. Bender's contract for waste is still in force and the right to renewal of the contract still exists. Thus, there has been no change in the *status quo ante* that occurred as a result of the approved CO&A.

Accordingly, we enter the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

R & A BENDER, INC.	:	
	:	
v.	:	**EHB Docket No. 95-260-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, CITY OF HARRISBURG, Intervenor and CUMBERLAND COUNTY SOLID WASTE AUTHORITY, Permittee	:	

ORDER

AND NOW, this 4th day of September, 1996, City of Harrisburg's motion to dismiss is granted and the appeal of R&A Bender, Inc. is dismissed.

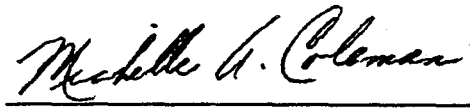
ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 95-260-C



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: September 4, 1996

c: **DEP Litigation Library**
Attention: Brenda Houck

For the Commonwealth, DEP:
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TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

EAGLE ENTERPRISES, INC.	:	
	:	
v.	:	**EHB Docket No. 96-133-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 5, 1996**

OPINION AND ORDER ON MOTION TO DISMISS

By George J. Miller, Administrative Law Judge

Synopsis:

Before the Board is the motion to dismiss the petition for supersedeas and the underlying appeal of Eagle Enterprises, Inc. filed by the Department of Environmental Protection. As Eagle Enterprises has failed to respond to this motion, and the Board lacks jurisdiction over the appeal, the Department's motion is granted.

OPINION

On June 19, 1996, Eagle Enterprises, Inc. (Appellant) filed an appeal and petition for supersedeas from letters dated June 12 and June 17, 1996, from the Department which informed Appellant that their proposed waste management operation would require a permit under the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. § 6018.101- .1003. Appellant was informed that its petition for supersedeas was incomplete pursuant to 25 Pa. Code §§ 1021.76-.79, and was provided an opportunity to provide additional information, which it did on June 24, 1996. After a conference call on June 25, 1996, the Board issued an order declining to

schedule a supersedeas hearing until such time as Appellant demonstrated that the letters from the Department constituted appealable orders over which the Board had jurisdiction.

The Board received no further filings from either party until July 10, 1996, when the Department filed its response to the petition for supersedeas and motion to dismiss the supersedeas petition. This motion also seeks dismissal of the underlying appeal. Appellant to date has filed no response to this motion.[1]

The Department argues that the petition for supersedeas should be dismissed because the Board lacks jurisdiction over the underlying appeal, and the supersedeas petition fails to verify Appellant's allegation of financial hardship. We will dismiss both the supersedeas petition and the underlying appeal because it is clear that this Board lacks jurisdiction over this matter, as the letters which form the basis of the appeal are clearly not final appealable actions of the Department.

The Board and the Commonwealth Court have long held that letters from the Department which require no specific action on the part of appellants are not final actions over which the Board has jurisdiction. For example, in *Sandy Creek Forest v. Department of Environmental Resources*, 505 A.2d 1091 (Pa. Cmwlth. 1986), the court reviewed a decision of the Board quashing an appeal from a letter from the Department which informed the appellant that it would be unable to make a determination concerning the necessity of a revision in the township official sewage plan unless the applicant submitted further materials required by the regulations. The court, among other things, held that a letter from the Department stating what the law requires is not a final action or an

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[1] We note also that no counsel has entered an appearance on behalf of Appellant, a corporation, as required by 25 Pa. Code § 1021.22(a). The petition for supersedeas and notice of appeal were filed by Appellant's New York counsel who is not admitted to practice in Pennsylvania and has not filed a *pro hac vice* petition before this Board.

adjudication.

More recently, in *M.W. Farmer Co. v. DER*, 1995 EHB 29, the Board considered an appeal from a notice of violation. The Board noted that the appealability of a Departmental communication is dictated by the language of the letter or notice, and not by the title. Moreover, the Board held that "[a]n NOV containing a listing of violations, the mention of the possibility of future enforcement action, or the procedures necessary to achieve compliance is not an appealable action." *Id.* at 30.[2] In this case the nature of the language of the notice was advisory rather than imperative and the appeal was dismissed for lack of jurisdiction.

These cases are clearly dispositive on the issue of jurisdiction. The first letter dated June 12, 1996, from James Wentzel, the Department's Chief of Engineering Services, states that "it is our opinion that the proposed operation for the on-going transfer of municipal waste would require a transfer station permit . . . ." and notes a meeting sceduled for the following day. The second letter dated June 17, 1996, apparently follows up what occurred at that meeting. It also provides that "it is the Department's position" that the operation needs a permit, and that unpermitted conduct "would be a great concern to the Department." Because neither letter requires any specific action on the part of Appellant, neither is an appealable final action of the Department, and the Board lacks jurisdiction to hear this appeal.

Accordingly, the petition for supersedeas and the underlying appeal of Appellant is hereby dismissed for lack of jurisdiction.[3]

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[2] However, where a letter orders specific action it is appealable. *See, e.g., Medusa Aggregates v. DER*, 1995 EHB 414.

[3] We do not address the technical deficiencies of the petition for supersedeas which would provide grounds to dismiss that petition pursuant to 25 Pa. Code § 1021.77(c), because the Board has authority to dismiss an appeal over which it lacks jurisdiction at any time, *sua sponte*.

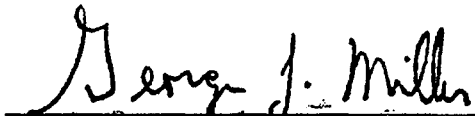
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EAGLE ENTERPRISES, INC.	:	
	:	
v.	:	**EHB Docket No. 96-133-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

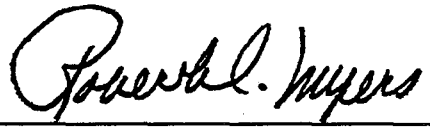
ORDER

AND NOW, this 5th day of September, 1996, the petition for supersedeas and notice of appeal filed by Eagle Enterprises, Inc. in the above-captioned matter is hereby DISMISSED.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 96-133-MG

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: September 5, 1996

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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ml/bl

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717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

LCA LEASING, INC.	:	
	:	
v.	:	**EHB Docket No. 95-203-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 6, 1996**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis:

Before the Board is a motion for summary judgement filed by the Department of Environmental Protection. The Department argues that it is entitled to judgement in its favor because it properly relied on representations made by the consultants of LCA Leasing, Inc. (Appellant) in returning its repermit application and revoking its permit in exchange for issuing a permit for a related facility. Because we find there are material facts in dispute as to whether or not the representations made by Appellant's consultants were conditioned on a prompt issuance of a permit for the related facility, we will deny the Department's motion.

OPINION

The basic background facts of this appeal are not in dispute. Appellant was issued Solid Waste Permit No. 101469, authorizing the operation of a facility known as Chester Solid Waste Transfer Station. Appellant operated this transfer station until February, 1992, during which time

all of its operations were located in a building known as Building 10.

Appellant is owned by Chester Solid Waste Associates and is located on a 52 acre site. Chester Solid Waste also operates other solid waste facilities on the site. Recognizing that additional activities would increase truck traffic, Chester Solid Waste Associates expressed a willingness to relinquish portions of Appellant's permitted tonnage, 1,600 tons per day (TPD), to allow for permitting of other facilities. For example, Appellant agreed to relinquish approximately 400 TPD to allow the permitting of Thermal Pure Systems, Inc., a related corporate entity also located on the Chester Solid Waste site.

This appeal revolves around Appellant's role in the permitting of Soil Remediation Systems, Inc. (SRS), also a related corporate entity of Appellant, located on the Chester Solid Waste site. The Department contends, and Appellant does not dispute that, it was the Department's understanding through the permitting process of SRS that Appellant would relinquish portions of its permitted tonnage.

The original permit application of SRS, submitted in 1992, sought approval to accept and process 1,200 TPD of waste. This tonnage was ultimately revised to reflect a capacity of 900 TPD. Appellant believed that, after the application for SRS was revised to reflect the 900 TPD limit, there would be 300 TPD of available capacity remaining to allocate to Appellant.

By letter dated April 29, 1994, the Department informed SRS that the facility had the potential to cause environmental harm, and requested a mitigation plan pursuant to 25 Pa. Code § 287.127(c). By letter dated August 16, 1994, the Department again requested a mitigation plan, as its concerns remained unaddressed. SRS and the Department met to discuss these concerns on August 29, 1994, and the possibility of Appellant relinquishing tonnage was discussed. The

Department contends that Appellant was willing to relinquish tonnage in order to address the Department's environmental concerns. Appellant, on the other hand, contends that this topic was discussed as a possible way of expediting a prompt decision on the SRS permit application.

On September 30, 1994, SRS provided a written response to the Department addressing the issues raised in its August 16, 1994 letter. This letter stated that "[a]s had been the case all along, once a permit is issued to SRS, the permit for the LCA transfer station (1200 TPD) will be surrendered . . . ." (Department Exhibit T) Nearly nine months later, in June 1995, the Department approved SRS' permit application, allowing SRS to accept and process 900 TPD of waste. The surrender of Appellant's permit is not noted in SRS' permit as a condition of its operation. However, the approved site plan of SRS includes Building 10, the building from which Appellant conducted all of its operations, and the site of Appellant's operations as proposed in the repermitting application.

Shortly after the issuance of the SRS permit, in August 1995, the Department returned Appellant's permit application, and revoked Permit No. 101469 for operation of the transfer facility. The revocation letter refers to the September 30, 1994 correspondence from SRS indicating that Appellant would relinquish its entire permit. Appellant filed a timely appeal from this letter. Extensive discovery has been completed, and the Department now moves for summary judgment.

The Department contends that (1) it was entitled to rely on the September 30, 1994 letter when it revoked Appellant's permit in June 1995, and (2) the area which Appellant seeks to have approved as the permitted area is already part of the approved permitted area for SRS.

The Department's contention that it was entitled to require Appellant to surrender its permit is based on its representation in the September 30, 1994 letter. The Department contends that this

letter is clear on its face, and given the intertwined corporate structures of SRS and Appellant, and the Department's experience with the permitting of Thermal Pure, reliance on the representations in the letter was justified. In support of its argument the Department cites deposition testimony of Edward Prout, President of American Resource Consultants Inc., the consultant for SRS and Appellant, Donald Rea, an officer of Appellant and SRS, Edward Bistany, and officer of Appellant, and the affidavit of Ronald Furlan, the Department's Program Manager for Waste Management.[1]

Appellant, in its response to the motion for summary judgement, contends that the offer to surrender Appellant's capacity was conditional upon the Department's issuing the SRS permit within 30 days after the September 30, 1994 letter, and not solely to address the Department's concerns of environmental harm. Since the Department did not expedite consideration of the permit, and in fact, did not issue it by October 1994, Appellant considered the offer rejected and/or withdrawn. Moreover, Appellant argues that the language of the letter is not clear given the history of correspondence and negotiation between SRS and the Department. Appellant, like the Department, cites deposition testimony of Messrs. Prout, Rea, and Bistany, and points out that information in the Furlan affidavit arguably conflicts with his deposition testimony.[2]

We find that the Department has failed in its burden of proving that there are no material

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[1] Appellant argues that we must disregard the Furlan affidavit because it is a testimonial affidavit. This rule, commonly referred to as the *Nanty-Glo* rule, (*see Nanty-Glo v. American Surety Co.*, 163 A. 523 (Pa. 1932)), does not apply to administrative proceedings. *Snyder. v. Department of Environmental Resources*, 588 A.2d 1001 (Pa. Cmwlth. 1991). However, the Board must still determine upon examination of the whole record whether movant has satisfied its burden to establish there are no material issues of fact and it is entitled to judgment as a matter of law. *Id.*

[2] Mr. Furlan, for example, did not appear to have a clear recollection of events at the August meeting in his deposition.

facts in dispute concerning the commitment of the September 30 letter to withdraw LCA's permit application upon the issuance of the SRS permit. Appellant's witnesses at the very least have different recollections of the events leading up to the September 30 letter, and the duration and purpose of the offer to surrender its permit in its entirety or only a portion of its capacity. We believe that the deposition testimony of Messrs. Prout, Rea and Bistany supports the contention that the Appellant's offer was conditioned on the issuance of the SRS permit in 30 days. Indeed, the testimony of Donald Rea in response to a question said that the agreement to give up a portion of Appellant's transfer station's capacity was conditioned on the SRS permit being issued in 30 days. (Rea Dep., pp. 20-21). By contrast, nothing in the letter commitment indicates that there was such a condition other than the following statement at the very end of the 12 page letter and response to the Department's comments:

> We trust that the information provided herein will allow you to finalize your review. Based on statements made by Mr. Jim Rue at our August 29, 1994, meeting, it is our understanding that the Department will render a decision on the SRS permit application within thirty (30) days of receipt of this response.

While Mr. Rue, who was then a Regional Director of the Department, could not recall any specific conversation about a 30 day commitment, he testified that he could not imagine making such a statement. (Rue Dep., p. 98). Mark McClelland, a consultant for Appellant, testified definitively that Mr. Rue committed that he would make a permit decision within 30 days of receipt of the response to the technical review letter. (McClelland Dep., p. 17). He also testified that Mr. Rue was noncommittal on this point. (McClelland Dep., pp. 15, 17).

It is not appropriate for the Board to make credibility determinations on a motion for summary judgement. *Jefferson County Commissioners v. Department of Environmental Protection,*

EHB Docket 95-097-C (consolidated) (opinion issued August 21, 1996). Such conclusions are only proper after a hearing on the matter. Further, the record is unclear concerning events between the September 30, 1994 letter and the revocation of Appellant's permit in June 1995.

The Department also argues that it is undisputed that Appellant's repermitting application site plan includes Building 10, which is already included in the approved site of SRS so it could not issue a permit to Appellant for the same physical location. An affirmative response to both the SRS application and Appellant's application would require a modification of Appellant's site plan and the SRS permit. Appellant does not dispute this fact.[3] Appellant argues that the Department's denial was a violation of its model permitting process embodied in a 1993 memorandum by Gregg E. Robertson, the Deputy Secretary for Field Operations. This document describes a process whereby after an application is administratively complete, the Department will issue one technical deficiency letter, followed, if necessary, by a pre-denial letter, which will explicitly state the specific deficiency and allow the applicant an opportunity to remedy the shortcoming. (Appellant Exhibit LL) There is nothing in the record which indicates that either of these letters were issued for Appellant's application. Of course, if the commitment contained in the September 30, 1994 letter was not conditioned on a commitment that the Department make a permit decision in 30 days, Appellant's letter must be viewed as a waiver of these procedural steps.

Even if the September 30th letter was not a waiver of these procedural steps, it is not clear that the Department's failure to follow these procedures was an abuse of discretion. Certain policy documents of the Department are enforceable as regulations where they constitute a "binding norm."

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[3] Appellant also points out that this was not the basis upon which its permit was revoked according to the August 1995 letter.

Department of Environmental Resources v. Rushton Mining Company, 591 A.2d 1168, 1173 (Pa. Cmwlth. 1991). Under the "binding norm test," the distinction between an agency rule and a mere policy statement is that a properly adopted "rule" establishes a standard of conduct which has the force of law, while a "policy statement" merely announces the agency's tentative intentions for the future. *Id.* In reviewing the record presently before us, it is not possible to conclude as a matter of law that the 1993 memorandum is enforceable as a regulation. As it is possible that, in the overall context of the negotiations, the Department may have abused its discretion in failing to provide Appellant with an opportunity to revise its site plan, if the Department was not entitled to rely on the Appellant's commitment in the September 30th letter. Accordingly, the Department's motion for summary judgment is denied.

Appellant also argues that the language of the September 30th letter is ambiguous given the history of correspondence and negotiation between SRS and the Department. The Board has a good deal of difficulty in understanding this contention because the commitment in the letter appears to be without qualification. Appellant apparently argues that because the commitment was prefaced with the language "[a]s has been the case all along . . . ", the Department should have asked for a clarification of the commitment because Appellant had taken the position in previous negotiations that it intended to retain any residual capacity for its permit. While the Board does not fully understand this contention, it may be that complete testimony on the course of the previous negotiations will make the commitment appear to be ambiguous. Accordingly, the Board will not foreclose a hearing on this issue.

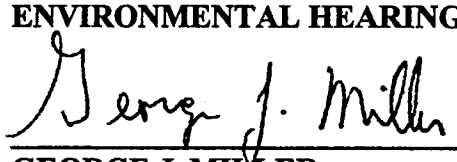
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LCA LEASING, INC.	:	
	:	
v.	:	**EHB Docket No. 95-203-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 6th day of September, 1996, the motion for summary judgment of the Department of Environmental Protection is hereby DENIED.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: September 6, 1996

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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M. DIANE SMITH
SECRETARY TO THE BOAF

DAVID L. LEBER d/b/a ARCTIC CONTRACTORS	:	
v.	:	**EHB Docket No. 96-048-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 11, 1996**

OPINION AND ORDER
ON MOTION FOR PROTECTIVE ORDER

By Robert D. Myers, Administrative Law Judge

Synopsis:

A motion for a protective order seeking relief from attending a deposition and submitting certain business documents on the basis that compliance may tend to incriminate is denied because the privilege to withhold evidence is limited to specific inquires reasonably warranting protection and may only be asserted by individuals for documents held in personal capacity.

OPINION

This matter arises out of an appeal filed on February 27, 1996, by David L. Leber, individually, and doing business as Arctic Contractors (Appellant), from an Order issued by the Department of Environmental Protection (DEP) pursuant to the Storage Tank and Spill Prevention Act, the Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. §§ 6021.101-6021.2104 (Storage Tank Act) and the Administrative Code, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §§ 510-17

and 510-210. The Order revoked Appellant's underground storage tank certifications[1] in six categories on the basis of DEP's conclusion that falsified laboratory reports had been submitted with certain tank closure reports.

Presently before the Board for disposition is Appellant's motion for protective order which was filed on August 23, 1996, seeking relief from DEP's discovery requests. Appellant asserts that his compliance may tend to incriminate him. On August 30, 1996, DEP filed its objection.

DEP seems to have pioneered the discovery proceedings in this matter. Upon its motions, the parties have been provided several extensions of the deadlines set for completing discovery, and submission of dispositive motions. Following Appellant's failure to answer or object to DEP interrogatories, produce requested documents or attend a scheduled deposition during this extended time, DEP filed on July, 18, 1996, a motion to compel. That motion was granted by Board Order on July 30, 1996, finding Appellant's refusal to respond, at his insistence that he was privileged from doing so, insufficient. The Order provided "Appellant can exercise his rights against self incrimination, if appropriate, in responding to specific discovery requests."

In response, Appellant did answer DEP's interrogatories and then filed the present motion to protect it from otherwise complying. On August 30, 1996, DEP filed an answer in objection to the motion.

Appellant first seeks relief from DEP's request for a deposition because the matters inquired into may tend to incriminate him; he desires to say nothing more beyond his name and address. We find Appellant's assertion of the privilege here improper for no conditions yet justify his silence at

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[1] David L. Leber, individual, possesses certification number 2881. Arctic, Inc. (also known as Arctic Contractors and Arctic Contractors, Inc.) possesses certification number 751.

this point.[2] The privilege provided by both Federal and State Constitutions to withhold evidence which may tend to incriminate in future criminal proceedings is confined to specific instances where there is reasonable cause to apprehend a danger of self-incrimination by providing a direct response. *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *Commonwealth v. Cavanaugh*, 46 A.2d 579 (Pa. Super. 1946). It may be asserted only when those conditions actually exist. *Cavanaugh.* An individual "is not exonerated from answering merely because he declares that in so doing he would incriminate himself -- his say-so does not of itself establish the hazard of incrimination." *Hoffman,* 341 U.S. at 486. Rather, the risk of injurious disclosure must be apparent from the specific inquiry, such that the disclosure may support a conviction or furnish a necessary evidentiary link. *Id.* Here, Appellant may not simply refuse to attend a deposition or curtail the questions that may be asked there, but may assert this privilege upon any specific inquiry that reasonably warrants the protection.

Appellant next seeks protection from DEP's discovery request for various business documents. He argues that production of the documents, other than documents previously revealed to third parties, may tend to incriminate him. We find Appellant's concern is an inappropriate basis for avoiding document production.

The privilege against self-incrimination is purely personal in nature; it does not extend to business entities. *Commonwealth v. L.E. Wilson Co., Inc.*, 328 A.2d 502 (Pa. 1974); *Kerry Coal Co. v. DER*, 1990 EHB 1359. Business entities have no privilege against the production of business

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[2] Among other things, the purpose of discovery is to provide the parties in litigation the opportunity to discover the factual basis for allegations made by their opponents. The scope of discovery is broad, affording inquest into any relevant nonprivileged matter which relates to the pending matter even if the material would not be admissible at hearing. Pa.R.C.P. No. 4003.1. Appellant risks losing his appeal if he chooses to remain silent. *E.g., Herberg v. State Board of Medical Education and Licensure*, 442 A.2d 411 (Pa. Cmwlth. 1982).

records. *Braswell v. United States*, 487 U.S. 99 (1988). Moreover, an individual holding documents of a business entity must produce them even though the contents might incriminate him or her personally or are sought by the other party for the purpose of detecting abuses committed. *Wilson v. United States*, 221 U.S. 361, 382 (1911); *see Bellis v. United States*, 417 U.S. 85 (1974).

DEP's discovery request asked Appellant to produce records kept by him and Arctic Contractors concerning business activities between them and Eastern Laboratory Services Associates, Enviro-Lab, Inc. and DEP. The request also seeks reports of laboratory analyses and chain of custody records provided by the two laboratory companies. These documents are of a purely business nature, and not of personal capacity. For this reason, Appellant's request for protection is an inappropriate basis for avoiding document production.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAVID L. LEBER d/b/a ARCTIC CONTRACTORS	:	
v.	:	**EHB Docket No. 96-048-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 11th day of September, 1996, it is hereby ordered as follows:

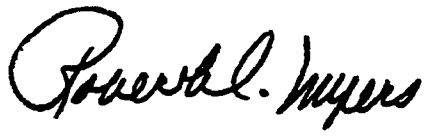
1. Appellant's motion for protective order is denied.

2. Appellant shall be available for deposition at a convenient time and place designated by DEP.

3. No later than the date of deposition, Appellant shall produce to DEP the documents identified in Exhibit "A" to DEP's Notice of Deposition dated August 12, 1996.

4. At the conclusion of the deposition, the parties shall suggest to the Board revised dates for completion of discovery and filing of dispositive motions.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: September 11, 1996

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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York, PA

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M. DIANE SMITH
SECRETARY TO THE BOARD

COLUMBIA GAS OF PENNSYLVANIA, INC., PEOPLE UNITED TO SAVE HOMES, and PENNSYLVANIA AMERICAN WATER COMPANY	:	
v.	:	**EHB Docket No. 95-231-R (Consolidated with 95-232-R, 95-233-R, and 95-235-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY-FOUR MINING COMPANY	:	**Issued: September 17, 1996**

OPINION AND ORDER ON MOTIONS TO DEFER ACTION ON WITHDRAWAL OF APPEAL AND TO REOPEN DISCOVERY

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Motions to defer action on an appellant's withdrawal of appeal and to reopen discovery are denied. An appellant is free to withdraw its appeal at any time prior to the hearing. An appeal which has been settled may simply be withdrawn without the necessity of seeking Board approval of the settlement agreement. The Board wishes to encourage the amicable resolution of disputes and will not order an appellant, prior to a hearing, to continue with an appeal where the appellant no longer wishes to pursue the action. If Board approval is desired, the settlement agreement must be submitted to the Board for approval and the parties must comply with the terms

of 25 Pa. Code § 1021.120 regarding publication of the settlement agreement in the *Pennsylvania Bulletin*.

The Board's jurisdiction attaches to all matters within an appeal, not only to those involving the Department of Environmental Protection.

OPINION

On September 22, 1995, the Department of Environmental Protection ("Department") approved a revision to Mining Activity Permit No. 63831302 ("the permit") held by Eighty-Four Mining Company ("Eighty-Four Mining"). The following four parties filed appeals from the revision approval: Columbia Gas of Pennsylvania, Inc. ("Columbia Gas"), People United to Save Homes ("PUSH"), Pennsylvania American Water Company ("PAWC"), and the Township of South Strabane.[1] In addition, Eighty-Four Mining filed an appeal from certain special conditions inserted in the revision.[2] The five appeals were consolidated at EHB Docket No. 95-231-R.

On July 29, 1996, Columbia Gas filed a notice with the Board that it was withdrawing its appeal. Prior to acting on the withdrawal, the Board received from PUSH and PAWC two separate motions to defer action on the withdrawal of Columbia Gas and to reopen discovery. The Board held oral argument on the motions on August 21, 1996. Both PUSH and PAWC state that it is their belief that Columbia Gas' withdrawal was precipitated by a settlement agreement

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[1]By letter dated August 22, 1996, the Township of South Strabane filed a withdrawal of appeal with the Board. By order of September 11, 1996, the appeal was closed and discontinued.

[2]On August 1, 1996, Eighty-Four Mining and the Department submitted to the Board for its approval a Consent Adjudication. The Board approved the Consent Adjudication by order dated September ___, 1996.

reached between Columbia Gas and Eighty-Four Mining. It is the further belief of PUSH and PAWC that the agreement constitutes a *de facto* amendment to Eighty-Four Mining's subsidence control plan. Both PUSH and PAWC have raised objections to Eighty-Four Mining's subsidence control plan in their appeals. PUSH and PAWC contend that if they are not given the opportunity to conduct discovery regarding the facts surrounding Columbia Gas' withdrawal and the agreement entered into between Columbia Gas and Eighty-Four Mining, they will be prejudiced. In addition, PAWC asserts that Columbia Gas' withdrawal is an attempt to circumvent the Board's rules on settlement procedures at 25 Pa. Code § 1021.120 and is a violation of the rule on withdrawal of an administrative appeal set forth at 1 Pa. Code § 35.51.

First, we address the argument made by the Department at the oral argument with respect to the Board's jurisdiction. At the oral argument, the Department asserted that the Board had no jurisdiction over the settlement agreement entered into between Eighty-Four Mining and Columbia Gas because the Board's jurisdiction attaches only to actions by the Department. It is true that the Board's jurisdiction over a matter **initially** attaches only when there has been an "action" by the Department, as defined at 25 Pa. Code § 1021.2(a). 35 P.S. § 7514; *Borough of Ford City v. DER*, 1991 EHB 169. However, once that initial action has been taken by the Department and the Board's jurisdiction has attached, the Board's jurisdiction then extends to all parties to the appeal and all matters in connection with the appeal. The "action" of the Department here was its issuance of the permit to Eighty-Four Mining which was timely appealed by Columbia Gas. Our jurisdiction thus attached to the appeal, and as an independent, quasi-judicial agency under the Environmental Hearing Board Act, 35 P.S. § 7511 *et seq.*, we are empowered to resolve all issues between the parties raised during the appeal. Under the Department's reasoning, the Board

would have no jurisdiction over any matters in the appeal which do not involve "actions" of the Department, such as a discovery dispute between a permittee (such as Eighty-Four Mining) and a third-party appellant (such as Columbia Gas). Obviously, this is an incorrect interpretation of the Board's jurisdictional power and, therefore, we summarily reject the Department's argument.

Next, we examine PAWC's contention that Columbia Gas' withdrawal violates 1 Pa. Code § 35.51 and circumvents 25 Pa. Code § 1021.120. For the reasons which follow, we find that the withdrawal violates neither of these two provisions. Section 35.51 of the rules of administrative practice and procedure provides as follows:

> A participant desiring to withdraw a pleading filed with an agency may file a notice of withdrawal thereof with the agency. The notice shall set forth the reasons for the withdrawal...

1 Pa. Code § 35.51.

PAWC argues that Columbia Gas' withdrawal does not comply with 1 Pa. Code § 35.51 because it fails to set forth a reason for the withdrawal. In support of its argument, PAWC cites the Board's decision in *Clements Waste Services, v. DER*, 1992 EHB 484. However, *Clements Waste Services* does not provide support for PAWC's position. In *Clements Waste Services*, a petition to intervene was filed with the Board. Prior to the Board acting on the petition, the appellant filed a praecipe to withdraw its case with prejudice. In response to the praecipe for withdrawal, the Board closed and discontinued the appeal. The party seeking to intervene in the matter filed a motion to reopen the docket, citing, *inter alia*, the appellant's failure to provide a reason for its withdrawal in accordance with 1 Pa. Code § 35.51. In its decision dismissing the motion to reopen the proceeding, the Board found that the appellant's praecipe to withdraw

complied with 1 Pa. Code § 35.51 because the praecipe "implicitly states [the appellant] no longer desires to prosecute its appeal, which is a reason to end same..." 1992 EHB at 490.

We find that the same reasoning applies to the withdrawal of appeal filed by Columbia Gas. Implicit in its notice of withdrawal is the statement that it no longer wishes to prosecute this appeal. It is not the Board's intention to impose restrictions on an appellant's right to withdraw its appeal at any time prior to the hearing on the matter.[3] Therefore, we reject PAWC's argument that Columbia Gas' withdrawal of its appeal fails to comply with 1 Pa. Code § 35.51.

PAWC's second argument is that Columbia Gas' withdrawal is simply a circumvention of the Board's rule on settlement at 25 Pa. Code § 1021.120. That rule states in relevant part as follows:

> In cases where a proceeding is sought to be terminated by the parties as a result of a settlement agreement, the terms of the settlement shall be submitted to the Board for approval and the major substantive provision thereof shall simultaneously be published in the *Pennsylvania Bulletin*.

25 Pa. Code § 1021.120(a).

Both PAWC and PUSH contend that Columbia Gas and Eighty-Four Mining have entered into an agreement in settlement of the Columbia Gas appeal. In support of its contention, PAWC has attached to its motion a copy of an article which appeared in the July 26, 1996 issue of the *Washington County Observer - Reporter* which reported that Columbia Gas and Eighty-Four Mining had reached an agreement which addressed safety issues that had been raised by Columbia

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[3]Pursuant to 1 Pa. Code § 35.51, express permission of the agency is required for withdrawal of an appeal once a hearing has been held or convened.

Gas in its appeal. Moreover, at oral argument on the motions, counsel for Eighty-Four Mining advised the Board that an agreement existed between Columbia Gas and Eighty-Four Mining resolving their differences. It is PAWC's contention that this undisclosed and unpublished agreement fails to comply with 25 Pa. Code § 1021.120(a).

Although § 1021.120(a) speaks of "settlement agreement," the Board has interpreted § 1021.120(a) as applying only to Consent Orders and Consent Adjudications between an appellant and the Department which are filed with the Board in settlement of an appeal. An appeal which has been settled otherwise may simply be withdrawn without the necessity of seeking Board approval of the settlement agreement. If Board approval is desired, however, the settlement agreement must be submitted to the Board and the requirements of § 1021.120 must be followed.

The purpose of § 1021.120(a), requiring publication of a settlement agreement in the *Pennsylvania Bulletin*, is to provide the public with an opportunity to review the terms of the Department's agreement to allow aggrieved parties to appeal the agreement within twenty days of its publication. Moreover, if the agreement is published, the parties receive the benefit of a limited period of twenty days in which the agreement may be challenged before it becomes administratively final.

Here, Columbia Gas and Eighty-Four Mining have chosen not to submit their settlement agreement to the Board for its approval. Rather, Columbia Gas has simply notified the Board that it is withdrawing its appeal with prejudice. As noted above, prior to a hearing, an appellant is free to withdraw its appeal at any time. If an appellant chooses to withdraw its appeal as a result of an agreement which it believes resolves the issues being appealed, it is free to do so. The Board wishes to encourage the amicable resolution of disputes and will not order an appellant to

continue with an appeal where the appellant no longer wishes to pursue the action.

Both PAWC and PUSH assert, however, that the agreement in this case constitutes a *de facto* amendment to Eighty-Four Mining's subsidence control plan. Both PAWC and PUSH have appealed the terms of the subsidence control plan. In their motions, PUSH and PAWC ask the Board to allow further discovery into this matter. At the oral argument held on August 21, 1996, counsel for Eighty-Four Mining stated that the settlement agreement did not amend the company's subsidence control plan. This was affirmed by counsel for the Department, who stated that the Department was not a party to the agreement and that this would have been required had there been an amendment to the subsidence control plan.

Based on the representations of the Department and Eighty-Four Mining at the oral argument that the subsidence control plan has not been amended, we find that there is no basis for allowing PAWC and PUSH to reopen discovery into this matter.

In conclusion, we find that there is no basis for precluding Columbia Gas from withdrawing its appeal or for reopening discovery into the matter of Eighty-Four Mining's subsidence control plan. Accordingly, we enter the following order:

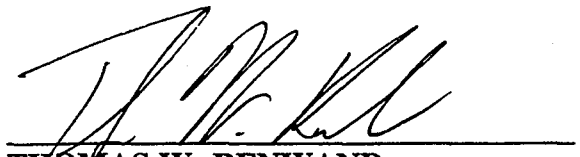
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COLUMBIA GAS OF PENNSYLVANIA, INC., PEOPLE UNITED TO SAVE HOMES, PENNSYLVANIA AMERICAN WATER COMPANY, and THE TOWNSHIP OF SOUTH STRABANE	:	
v.	:	**EHB Docket No. 95-231-R (Consolidated with 95-232-R, 95-233-R, 95-235-R, and 95-250-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY-FOUR MINING COMPANY	:	

ORDER

AND NOW, this 17th day of September, 1996, the Motions of Pennsylvania American Water Company and People United to Save Homes to Defer Action on Withdrawal of Columbia Gas and to Reopen Discovery are **denied**.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: September 17, 1996

See next page for service list.

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M. DIANE SMITH
SECRETARY TO THE BOAR

C. WILLIAM MARTIN, et al., CHESAPEAKE ESTATES OF GRANTVILLE MOBILE HOME PARK	:	
v.	:	**EHB Docket No. 95-190-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EAST HANOVER TOWNSHIP	:	**Issued: September 24, 1996**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board grants in part and denies in part the Department of Environmental Protection's motion for summary judgment. The motion is granted regarding appellants' challenge of the inclusion of a private sewage system in the supplement of a township's official Act 537 Plan. The challenges concerning the inclusion are precluded by the doctrine of administrative finality because the claims could have been raised in prior permit issuances. The motion is denied regarding appellants' objections which were not addressed by the Department's motion.

OPINION

The present motion arises from a notice of appeal filed by C. William Martin, owner of the Chesapeake Estates of Grantville Mobile Home Park (Chesapeake Estates), and residential tenants

of Chesapeake Estates (collectively, Appellants) challenging the Department of Environmental Protection's (Department) approval of a township's supplement to its official Act 537 Plan for sewage services. The plan provides for construction of a sewage collection system and wastewater treatment plant which includes in its service area the area where Chesapeake Estates is situated in East Hanover Township (Township), Dauphin County.[1] Appellants contend the Department's approval of East Hanover Township's Act 537 Plan was arbitrary because it failed to consider various aspects of the existence of the Community Sewage System which was licensed and permitted by the Department and servicing the Chesapeake Estates (Notice of Appeal ¶¶3.1.a., parts of b, c, d, e, f, g, h, i, and part of j), failed to address the appropriate original inclusion of the Holiday Inn-West Grantville within the Township's proposed sewage treatment service area and failed to demonstrate that the Township's entry into a private agreement with the Holiday Inn from which the latter was excluded was not discriminatory (Notice of Appeal ¶3.1.b), failed to take into consideration all interests of health, safety and economics (Notice of Appeal ¶3.1.j.) and failed to consider the overall impact of the planned municipal sanitary sewage system on all Township residents (Notice of Appeal ¶3.1.j.). The Department has filed a motion for summary judgment on the grounds that no genuine issues of material fact exist and that it is entitled to judgment as a matter of law. Appellants did not file a response.

When ruling upon a motion for summary judgment, the Board is authorized to render summary judgment if the pleadings, depositions, answers to interrogatories and the admissions on

[1] Chesapeake Estates has been permitted to operate its own sewage collection system since 1985. The privately owned Community Sewage System is licensed and permitted to service the Chesapeake Estates.

file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035(b). The Board must read the motion for summary judgment in the light most favorable to the non-moving party. *Township of Doylestown, v. DEP, et al*, EHB Docket No. 95-198-MG (Opinion issued April 17, 1996).

We will first determine if any material facts are in dispute. The Department argues that no material facts are in dispute because Appellants admitted all of the facts by failing to answer the request for admissions.

A party is deemed to have admitted facts set forth in a request for admissions by failing to file timely responses. Pa.R.C.P. 4014(b); *Kerry Coal Co. v. DER*, 1991 EHB 73; *C&K Coal Co. v. DER*, 1991 EHB 1484. On January 12, 1996, the Department served Appellants with its request for admissions and interrogatories. Pursuant to Pa.R.C.P. 4014 Appellants' responses were due on or before February 12, 1996. To date Appellants have failed to respond to the Department's request. Therefore, the facts stated in the admissions are deemed admitted.

The following facts are undisputed. C. William Martin is owner of the Chesapeake Estates of Grantville Mobile Home Park, located in East Hanover Township, Dauphin County. Mr. Martin and residential tenants of Chesapeake Estates of Grantville Mobile Home Park appealed the Department's approval of East Hanover Township's official plan supplement for the construction of a sewage collection system and waste water treatment plant. On January 12, 1996, Chesapeake Estates was served with the Department's First Request for Admissions and Interrogatories. Chesapeake Estates failed to answer the Department's discovery requests on or before the requisite date of February 12, 1996. Chesapeake Estates' failure to respond to the admissions request deems the following facts admitted:

- The Department approved the East Hanover Township Act 537 Plan (Supplement) for construction of a sewage collection system and wastewater treatment plant.

- The East Hanover Township Act 537 Plan (Supplement) included within its service area Chesapeake Estates of Grantville Mobile Home Park.

- The Department issued Water Quality Management Part II Permit No. 2286403 to Chesapeake Estates in August, 1986.

- Water Quality Management Part II Permit No. 2286403 authorized the construction and operation of a package sewage treatment plant to serve Chesapeake Estates.

- Standard Condition No. 15 of Water Quality Management Part II Permit No. 2286403 states the following:

> FIFTEEN: This permit authorizes the construction and operation of the proposed sewerage facilities until such time as facilities for conveyance and treatment at a more suitable location are installed and are capable of receiving and treating the permittee's sewage. Such facilities must be in accordance with either the applicable municipal official plan adopted pursuant to Section 5 of the Pennsylvania Sewage Facilities Act, the Act of January 24, 1956, P.L. 1535, as amended, or a comprehensive Water Quality Management Plan as set forth in Section 91.31 of the Rules and Regulations of the Department. When such municipal sewerage facilities become available, the permittee shall provide for the conveyance of the sewage to these sewerage facilities, abandon the use of the herein-approved facilities and notify the Department accordingly. This permit shall then, upon notice from the Department, terminate and become null and void, shall be relinquished to the Department.

- The Department originally issued Part I NPDES Permit No. 0082317 to Chesapeake Estates in August, 1986.

- Part I NPDES Permit No. 0082317 authorized Chesapeake Estates' package sewage treatment plant's discharge into Bow Creek.

- Condition G of Part I NPDES Permit No. 0082317, which was renewed in February, 1992 states the following:

> This permit authorizes the treated sewage discharge until such time as the East Hanover municipal sewerage facilities are capable of receiving and treating the permittee's sewage. At that time, the

> permittee shall provide for the conveyance of the sewage to these sewerage facilities, abandon the use of the private facilities, and notify the Department accordingly. This permit shall then, upon notice from the Department, terminate and become null and void, and shall be relinquished to the Department.(Emphasis added)

- Chesapeake Estates did not file an appeal regarding either Water Quality Management Part II Permit No. 2286403 or Part I NPDES Permit No. 0082317.

- The Department's July 1, 1994 letter explicitly informed Chesapeake Estates that its NPDES permit would "terminate and become null and void" with the implementation of East Hanover Township's plans to provide public sewers.

Having determined that there are no material facts in dispute, we will next consider whether the Department is entitled to judgment as a matter of law.

Inclusion of a private sewage system in a supplement of an Act 537 Plan

The first issue before the Board is whether Appellants are barred by the doctrine of administrative finality from contesting the township's inclusion of the mobile home park in the sewer service area of the township's collection system.

The Department's motion for summary judgment asserts that Appellants are barred from appealing the permit conditions of its water quality and NPDES permits, including the condition that the Chesapeake Estates abandon its facilities when a more suitable facility is operating, because they had the opportunity to raise these issues at the time those permits were issued in 1986 and 1992. The Department argues that it is entitled to judgment as a matter of law on this issue under the doctrine of administrative finality.

Under the doctrine of administrative finality, "one who fails to exhaust his statutory remedies may not thereafter raise an issue which could have and should have been raised in the proceeding afforded by his statutory remedy." *DER v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765 (Pa.

Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977). This Board has stated that where a party aggrieved by an administrative action of the Department fails to pursue its statutory appeal rights, neither the content nor the validity of either the Department's action or the regulations underlying it may be attacked in a subsequent administrative or judicial proceeding. *Kennametal, Inc. v. DER*, 1990 EHB 1453. Furthermore, the Board has consistently held that in accordance with the principles of administrative finality, "the factual and legal bases of unappealed administrative orders are final and unassailable," unless an exception applies. *Ingram Coal Co. v. DER*, 1988 EHB 800.

The Board grants the Department's motion because Appellants had an opportunity to challenge the inclusion of the private sewage system in the municipal sewage plan through conditions set forth in previously issued permits. As noted earlier Appellants admitted that Paragraph 15 of the 1986 Water Quality Management Part II and Condition G of the renewed Part I NPDES originally issued in 1986 and renewed in 1992 specifically stated that when the municipal sewage facilities became available the sewage from the private system was to be conveyed to the municipal facilities and the private system abandoned. Since the permits were issued to Chesapeake Estates of Grantville, Appellants were clearly aware of the fact that the sewage treatment facility for the mobile home park would be eliminated once the municipal facilities had the capacity to receive and treat sewage from Chesapeake Estates. The permits were final actions and Appellants had the opportunity to file an appeal regarding any aspect of the permit at the time of original issuance or renewal. Since Appellants failed to appeal these conditions of the permits when they were originally issued or renewed, they are precluded from raising the issue of the inclusion of the mobile home park within the sewer service area of the township's collection system because it could have and should have

been raised in 1986 or 1992.

Other issues

Appellants also raised the following objections regarding the supplement to the Township's Act 537 Plan:

> - the Plan failed to meet the requirements of the Sewage Facilities Act because the Plan failed to address the original inclusion of the Holiday Inn West - Grantville within the Township's proposed sewage treatment service area and the discriminatory action taken by the Township when it entered into a private agreement with the Holiday Inn West - Grantville by which the latter was excluded (Notice of Appeal ¶3.1.b.);
>
> - the Department failed to take into consideration all interests of health, safety and economics (Notice of Appeal ¶3.1.j.); and
>
> - the Department failed to consider the overall impact of the planned municipal sanitary sewage system on all of the residents of East Hanover Township, including, but not limited to, the residents of the Chesapeake Estates.

The Department did not address these issues in its motion for summary judgment. Therefore, we must deny their motion on these issues as the Department failed to demonstrate that there are no material facts in dispute and that it is entitled to judgment as a matter of law.

Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

C. WILLIAM MARTIN, et al., CHESAPEAKE ESTATES OF GRANTVILLE MOBILE HOME PARK	:	
v.	:	**EHB Docket No. 95-190-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EAST HANOVER TOWNSHIP	:	

ORDER

AND NOW this 24th day of September, 1996, it is ordered the Department's motion for summary judgment is:

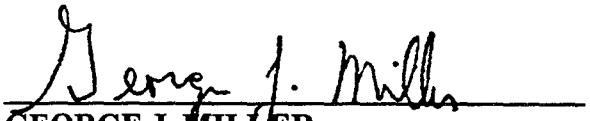
1. granted for Paragraphs 3.1.a., parts of 3.1.b. (except for the part denied below), 3.1.c., 3.1.d., 3.1.e., 3.1.f., 3.1.g., 3.1.h., 3.1.i., and 3.1.j. (except for the part denied below).

2. The motion is denied regarding:

- Parts of Paragraph 3.1.b. - the portions concerning the original inclusion of Holiday Inn - West and the agreement which excluded it from the service area;

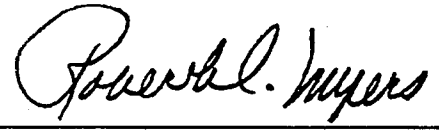
- Parts of Paragraph 3.1.j. - the portions concerning the consideration of all interests of health, safety and economics and the consideration of the overall impact of the planned municipal sanitary sewage system on all residents of the Township.

ENVIRONMENTAL HEARING BOARD

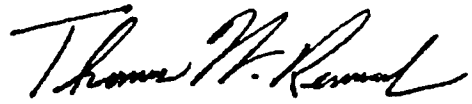


GEORGE J. MILLER
Administrative Law Judge
Chairman

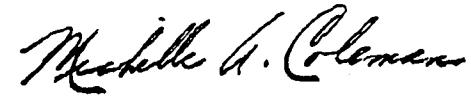
EHB Docket No. 95-190-C



ROBERT D. MYERS
Administrative Law Judge
Member



THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: September 24, 1996

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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Southcentral Region

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Harrisburg, PA

For the Township:
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WIX, WENGER, & WEIDNER
Harrisburg, PA

kh/bl

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

STANLEY GRAZIS	:	
	:	
v.	:	**EHB Docket No. 95 - 181- C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 25, 1996**

OPINION AND ORDER ON
CROSS MOTIONS FOR SUMMARY JUDGMENT

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

Cross motions for summary judgment regarding the Department of Environmental Protection's revocation of oil and gas wells' inactive status are denied where a material issue of fact concerning the termination of a lease for the rights to the wells is disputed by the parties.

OPINION

The cross motions for summary judgment currently before the Board are based on Stanley Grazis' August 23, 1995 appeal of the Department of Environmental Protection's (Department) July 21, 1995 letter revoking the inactive status of his oil and gas wells[1] located on state forest and park land in Abbott and Eulalia Townships, Potter County.

[1] The wells include: Wells 1 and 2 on Commonwealth of Pennsylvania Tract 364 and Wells 1,2,3,4,6,10 and 11 on Tract 365.

BACKGROUND FACTS

Stanley Grazis (Appellant) is the operator of wells located on state forest and park lands under a lease agreement with the Department which was entered into on June 22, 1981. Under the terms:

> ... this lease shall remain in force for a term of ten years from the date first written above (June 22, 1981), subject to the conditions hereinafter set forth and shall continue from year to year thereafter so long as oil or gas is produced in paying quantities from the leased premises hereunder or as Lessee is engaged in bona fide attempts to secure or restore the production of oil or gas by conducting drilling, or reworking operations on the leased premises hereunder, or engaged in the abandonment, or plugging of wells or removal of equipment therefrom.

Since September 13, 1989 the wells have been on inactive status. On February 3, 1995, Appellant requested an additional year extension. By letter dated March 1, 1995, the Department granted Appellant's request for inactive status for the wells and reminded Appellant that the Department requires him to monitor the wells for mechanical integrity on an annual basis and to report the results by March 31st of the following year. In early April, 1995, Appellant requested by telephone additional time to submit the annual report of mechanical integrity due by March 31, 1995 because weather conditions prevented him from reaching the wells until later in the spring. This had been Appellant's practice since 1991 because weather conditions always prevented him from reaching the wells during the latter part of the preceding year and the Department routinely had extended the time. On April 14, 1995, the Department requested by telephone that Appellant perform the annual mechanical tests and submit the report "right away." The Department representative from Oil & Gas Management informed him that the Bureau of Forestry took the position that Appellant did not have access rights to the wells. By letter dated May 4, 1995, the Department stated that it had not received the reports it requested on April 14, 1995 and made another request for the mechanical

integrity test results for 1994. Appellant's May 15, 1995 letter requested an extension to submit the reports as the Bureau of Forestry had denied his authorized representative the access necessary to perform the mechanical integrity tests. On May 25, 1995, the Department informed Appellant that it was reiterating that the oil and gas leases had terminated on June 22, 1993 due to lessee's failure to comply with the lease extension requirements of the lease as he had been so advised by the State Forester in a letter dated August 30, 1993. By letter dated July 21, 1995, the Department revoked the wells' inactive status.

OPINION

On August 23, 1995, Appellant filed this appeal in which he alleges the Department abused its discretion and violated his Constitutional rights in revoking the inactive status of the wells. On April 1, 1996, the parties filed their motions for summary judgment and supporting memoranda. Appellant and the Department filed their responses on April 22, 1996 and April 26, 1996, respectively. On May 10, 1996 and May 16, 1996, the Department and Appellant, respectively, filed their replies to the responses.

Appellant contends the Department's revocation of the inactive status regarding the test reports and the future utility of the wells was an abuse of discretion as a matter of law. Appellant argues the sole reason he did not submit the reports was because the Department's own unlawful conduct of denying him access prevented performance of the required mechanical integrity tests and that the Department's denial of access to his wells, without legally establishing that the leases had been breached or terminated, violated state and federal constitutional provisions against taking of private property for public use. Appellant also argues the Department abused its discretion regarding the future utility of the wells because it did not specify why the information given was insufficient

and the failure to state a reason violated his due process right to adequate notice and an opportunity to be heard.

The Department in its response contends that both arguments are without merit. First, the Department argues that Appellant's argument that the Department's revocation of inactive status was an abuse of discretion as a matter of law should be rejected because summary judgment is inappropriate when Appellant acknowledges that the Department has the discretion to revoke the inactive status under provisions in the Oil and Gas Act. Furthermore, Appellant is obligated to ensure that the wells comply with the requirements of the Act. The Department disputes Appellant's argument regarding the future utility of wells. The Department argues that it did specify the reasons for revoking the inactive status in its correspondence. Furthermore, the Department argues that Appellant's due process rights are protected by the clear request for specific information in the letter and by this appeal proceeding.

Appellant in his reply to the Department's response reiterates his earlier arguments. He argues that the Department unlawfully denied him access to the wells and all subsequent action is fatally tainted by this conduct. Furthermore, he rejects the Department's argument that he has to affirmatively show any facts regarding the condition of the wells when such a showing is prevented by unlawful governmental activity. Appellant also reiterates his argument that the Department's requiring him to respond to vague charges about the future utility of the wells, especially with information which is already on file is a violation of his due process rights to notice, confrontation and cross-examination. Furthermore, that as a matter of law the Department cannot arbitrarily require a permit owner to resubmit information already on file at the risk of loss of inactive well status.

The Department contends in its motion that its revoking the inactive status was appropriate. The Department argues there are no disputed facts since Appellant admitted that he did not perform the required testing for 1994 and that it is entitled to judgment as a matter of law because the Department can revoke the active status under the statute and regulations. The Department argues that disputed facts may exist concerning why Appellant failed to perform the required testing however, they are immaterial to the resolution of the pending appeal because the Oil and Gas Act does not provide any defenses for not submitting annual well integrity tests.

Appellant disputes the Department's argument that the Oil and Gas Act does not provide any defenses for not submitting annual well integrity tests.

When ruling upon a motion for summary judgment, the Board is authorized to render summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035(b). The Board must read the motion for summary judgment in the light most favorable to the non-moving party. *Township of Doylestown v. DEP, et al*, EHB Docket No. 95-198-MG (Opinion issued April 17, 1996).

We reject the argument that there is no genuine issue of material fact. The documents presented by the parties indicate that a genuine issue of material fact does exist. The parties dispute the status of the oil and gas lease and thus who has the right to drill for oil and gas and who can access the land. Under the terms of the lease, it was to run for 10 years from the date of signing (June 22, 1981) and then on a year-by-year basis provided certain conditions were satisfied.[2]

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[2] The conditions are that oil or gas is produced in paying quantities or lessee is engaged in bona fide attempts to secure or restore the production of oil or gas by conducting drilling or

According to the documents submitted by the parties the issue of the lease termination first arose in the Department's May 25, 1995 letter, at which time it noted that Appellant was denied access to the wells because his lease terminated on June 22, 1993. According to the May 25, 1995 letter, in a letter dated August 30, 1993 the State Forester had advised Appellant that the lease had terminated on June 22, 1993. Neither party has submitted a copy of this 1993 letter exhibit to verify that Appellant was so notified. The Board is more concerned that the Department claims it notified Appellant of the lease termination in August, 1995 yet granted Appellant an extension of inactive status for 1995 in March 1995. (Appellant's Motion for Summary Judgment, Ex. E) Since the term went to a year-by-year basis after June 22, 1993, it would appear from the Department's March, 1995 action that the Department not only granted an extension for 1995 but it must also have granted Appellant an extension of inactive status in 1994.

If we assume arguendo, that the lease terminated in June, 1993, then any activity or use of the wells by Appellant would have been illegal and the Department should have taken some legal action to establish that Appellant had no legal rights to the property. The Department has given conflicting responses to statements set forth in Appellant's initial request for admission and in his second request for admissions, interrogatories, and production of documents regarding the legal action the Department has taken concerning Appellant's rights to the property. Both of Appellant's requests contain the language, "The Department has not conducted a quiet title action, action in ejectment or any other such legal process to establish that the LEASES have terminated." While in one response the Department admitted this statement (Appellant's Motion for Summary Judgment

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reworking operations on leased premises or engaged in the abandonment or plugging of wells or removal of equipment.

Ex. C No. 12), in another the Department objected to this request for admissions on the grounds that it is not relevant to the subject matter of this action and answering it would not lead to discovery of admissible evidence (Appellant's Motion for Summary Judgment Ex. F No. 12). Consequently, the Board does not know if the Department has taken such an action. Furthermore, there is no documentation currently before the Board which would indicate that the Department has or has not taken such an action.

Since the record does not clearly demonstrate who has the privilege of using the subsurface rights to the property, we are unable to grant summary judgment to either Appellant or the Department on issues of whether the Department abused its discretion in revoking the inactive status of the wells and whether that action deprived Appellant of any rights. Therefore, both motions for summary judgment are denied. Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STANLEY L. GRAZIS	:	
	:	
v.	:	**EHB Docket No. 95-181-C**
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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

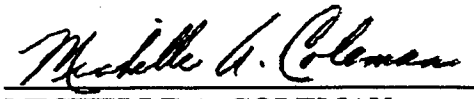
ORDER

AND NOW, this 25th day of September, 1996, it is ordered that:

1) Stanley L. Grazis' Motion for Summary Judgment is denied; and

2) The Department of Environmental Protection's Motion for Summary Judgment is denied.

ENVIRONMENTAL HEARING BOARD



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: September 25, 1996

c: **DEP Bureau of Litigation**
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