Environmental Hearing Board

# Adjudications and Opinions

2000
Volume II

COMMONWEALTH OF PENNSYLVANIA
George J. Miller, Chairman

**MEMBERS**

**OF THE**

**ENVIRONMENTAL HEARING BOARD**

**2000**

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## FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 2000.

The Environmental Hearing Board was originally created as a departmental administrative board within the Department of Environmental Resources (now the Department of Environmental Protection) 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 Board was empowered "to hold hearings and issue adjudications...on orders, permits, licenses or decisions" of the Department. While 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 remains unchanged

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SECRETARY TO THE BO.

| | | |
|---|---|---|
| **BENJAMIN A. STEVENS and JUDITH E. STEVENS** | : | |
| **v.** | : | **EHB Docket No. 2000-030-L** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASHINGTON TOWNSHIP MUNICIPAL AUTHORITY** | : | **Issued:** April 11, 2000 |

**OPINION AND ORDER ON**
**MOTION TO DISMISS**

**By Bernard A. Labuskes, Jr., Administrative Law Judge**

**Synopsis:**

An appeal by neighboring landowners from a general permit coverage approval that is filed within 30 days of when the neighbors were first notified that sludge will be applied on adjacent property will not be dismissed on jurisdictional grounds.

## OPINION

The Department of Environmental Protection (the "Department") issued the General Permit for Beneficial Use and Non-Exceptional Quality Sewage Sludge (General Permit PAG-8) on May 24, 1997. The General Permit is about 60 pages long and contains requirements for persons who prepare sewage sludge and wish to apply the sludge to land. The General Permit does not automatically apply to any particular party. Persons seeking approval for coverage under the General Permit must obtain a "coverage approval" from the Department. 25 Pa. Code §§ 271.902 and 92.81-92.83.

The Washington Township Municipal Authority in Waynesboro, Franklin County, (the "Authority") applied for approval for coverage under the General Permit. On or about June 3, 1999, the Department granted the Authority approval. The document that embodies the approval is captioned "Permit No. PAG-08-3538." The Department published notice of the coverage approval in the June 26, 1999 *Pennsylvania Bulletin.*

The coverage approval does not relate to any particular land application site. Rather, before the Authority can actually apply sludge at a site, it is required by its permit (Section B.1.g) and the applicable regulations (25 Pa. Code § 271.913(g)) to notify the Department, the county conservation district, and adjacent landowners 30 days in advance that it intends to use a particular site. In accordance with this requirement, the Authority sent a letter to Benjamin and Judith Stevens on January 24, 2000 informing them of the Authority's intent to apply sludge on land bordering the Stevenses' property. The Department advises that the Authority has not yet notified the Department of its intent. The Stevenses filed a notice of appeal and petition for supersedeas with this Board on February 23.

It was not entirely clear from the notice of appeal whether the Stevenses, who are proceeding *pro se*, are appealing from the general permit, the coverage determination, or the Authority's January 24 letter. The Department has moved to dismiss on jurisdictional grounds. The Stevenses' response to the Department's motion states that the Stevenses did not intend to appeal from the January 24 letter itself. Rather, the Stevenses explain that they are appealing from the approval of Permit PAG-08-3538, i.e, the coverage determination. The Stevenses' arguments, however, also seem to include challenges that relate to the general permit itself and, of course, the application of the sludge to the neighboring site. The Stevenses emphasize that they are not appealing from the Township letter

itself; that letter was merely the Stevenses' first written notice of the coverage approval.

The Department argues that the Stevenses cannot appeal from the coverage determination because it does not yet affect them. It is only if and when the Department approves the use of the neighboring site that the Department would concede that the Stevenses can appeal. To its credit, and quite correctly, the Department does not argue that the Stevenses needed to appeal on or before July 26, 1999, 30 days after the coverage determination was published in the *Pennsylvania Bulletin*. As the Stevenses point out, requiring adjacent property owners to appeal before they receive the notice mandated by the permit and the regulations would require them "to be clairvoyant in regards to whether a person will some day decide to spread sewage sludge on property adjacent to theirs and appeal every general permit the Department issues for land application of sewage sludge."

Section 4(c) of the Environmental Hearing Board Act provides that no action of the Department adversely affecting a person shall be final **as to that person** until the person has had the opportunity to appeal the action to this Board. 35 P.S. § 7514(c). *See also* 35 P.S. § 691.7(a) (any person having an interest which is or may be adversely affected by an action of the Department may appeal). *See generally Martin v. DER*, 548 A.2d 675, 679 (Pa. Cmwlth. 1988) (persons must have opportunity to be heard); *Commonwealth v. Derry Township*, 314 A.2d 868, 872 (Pa. Cmwlth. 1973), *modified*, 351 A.2d 606 (Pa. 1976) (same). In this appeal, the Stevenses were not adversely affected by the general permit or the coverage approval when they were issued. Neither the general permit nor the coverage approval applied to any particular land-application site. The permit and coverage approval confer the right to produce the sludge, conclude that the sludge is suitable for land application generically speaking, and create operational and managerial requirements for sludge application, but they do not relate to any particular site. *See* General Permit PAG-08-3538. In fact,

25 Pa. Code § 271.902(e) provides that the site-specific review and approval requirements that would ordinarily apply to NPDES general permits do not apply to General Permit PAG-8.

Therefore, we are quite certain that any attempt by the Stevenses to have appealed those actions at the time of publication would have failed for lack of standing. Again, the Department concedes this point. The Stevenses could not possibly have shown that they were aggrieved in any way merely by the issuance of the general permit or the coverage determination. The Stevenses had no opportunity to be heard at the time those actions were taken. Preventing the Stevenses from challenging those actions at some later point would mean that they could never be heard. Under the terms of the Environmental Hearing Board Act, the coverage determination may have been final as to the Authority soon after it was made, but it was not final as to the Stevenses because they had no ability to appeal that action at that time. The Environmental Hearing Board Act makes it clear that an action may be final as to one person but not as to another.

This result is not inconsistent with the Board's regulation governing the timeliness of appeals, 25 Pa. Code § 1021.52(a)(2). That regulation reads in the pertinent part as follows:

> [J]urisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board in a timely manner, as follows, unless a different time is provided by statute:
>
> * * *
>
> (2) Any other person **aggrieved by an action of the Department** shall file its appeal with the Board within one of the following:
>
> (i) Thirty days after the notice of the action has been published in the *Pennsylvania Bulletin*;
>
> (ii) Thirty days after actual notice of the action if a notice of the action is not published in the *Pennsylvania Bulletin*. (emphasis added)

Although notice of the general permit issuance and the coverage determination were published in the

*Pennsylvania Bulletin*, as previously noted, the Stevenses were not persons who were aggrieved at those times.

The factual situation that gave rise to *Belitskus v. DEP*, 1997 EHB 939, is similar in some respects to the situation that is presented here. In *Belitskus* the Department had issued general permits for storm water discharges from industrial activities and from construction activities in 1992. In 1994, the Department issued a coverage approval under the general permit for construction activities to Willamette Industries for a plant in McKean County. In 1996, the Department issued Willamette a coverage approval under the general permit for industrial activities for the same plant. Belitskus and others appealed from the coverage determinations. Willamette moved to dismiss on jurisdictional grounds. It argued that the coverage determinations were not appealable actions. We rejected that argument, stating as follows:

> Willamette's suggestion that Appellants' only opportunities to challenge DEP's actions were the filing of timely appeals from the adoptions of the general NPDES permits in October and November 1992 is without merit. At that point, neither Appellants nor anyone else could foresee the instances where DEP would approve coverage in the future. The general NPDES permits at the time of adoption were executory in nature, creating frameworks within which specific applications for coverage would be considered. It was only when those applications were filed by Willamette, seeking coverage for specific discharges to specific streams from specific sites and when those applications were approved by DEP with specific conditions that final, appealable actions occurred. It was only at that point that Appellants or other persons or entities could have been adversely affected.

1997 EHB at 957-958. *Belitskus* supports our conclusion that the Stevenses can appeal the coverage approval (which the Department has not questioned). Although the Board in *Belitskus* was not perfectly clear on this point, the spirit if not the language of the opinion indicates that challenges to

the general permit as well as the coverage determination were within the Board's jurisdiction.

The Board in *Belitskus* went on to hold that the appellants were required to appeal within 30 days after the approvals of coverage were published in the *Pennsylvania Bulletin*. 1997 EHB at 958. That meant that the appeal from the 1994 coverage determination was untimely, but the appeal from the 1996 determination, which was filed within 30 days of publication, was timely. This holding at first blush would seem to suggest that the Stevenses' appeal is untimely. There is, however, a critical distinction between this case and the *Belitskus* holding. In *Belitskus*, the coverage determinations were site-specific. They related to a particular site—Willamette's McKean County plant. Indeed, using the language of the opinion, the coverage determination authorized specific discharges to specific streams from specific sites. *Id.* Here, the Authority's coverage determination is not site-specific. It does not authorize land application at any particular site. Paraphrasing *Belitskus*, it is only at the point that a given site is selected that Mr. and Mrs. Stevens (or any other nearby landowners for that matter) could face the possibility of being adversely affected.

We are left, then, to determine when the Stevenses may appeal. As previously noted, under the regulatory framework for the land application of sludge, a party who wishes to apply the sludge to a particular site is required to give written notification to adjacent landowners, the county conservation district, and the Department at least 30 days prior to the first application of sludge at that location. 25 Pa. Code § 271.913(g). Interestingly, neither the general permit nor the applicable regulations expressly give the Department the authority to review and/or approve or disapprove the use of a particular site. The Department has supplied us with affidavits that state that the Department in fact conducts such a review pursuant to a "Program Directive." Although the Department considers its regional personnel to be bound by the "Program Directive," that directive is not a

regulation but a policy. A policy, by definition, is not binding. *DER v. Rushton Mining Company*, 591 A.2d 1168, 1173 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 600 A.2d 541 (Pa. 1991). If a Departmental employee failed to abide by the policy in a given case, that employee might be subject to internal discipline, but there is nothing to indicate that he or she would have acted illegally simply by virtue of having failed to follow a policy in a given case. Furthermore, there is no evidence that this policy requirement is in any way binding upon the would-be land appliers. We see nothing in the permit (which could very well have clarified this issue) or the regulations themselves that legally prevents a land applier from proceeding with the sludge application once it has given notice and followed a few other prerequisites that **do not** include obtaining Departmental approval (e.g. taking soil samples). Therefore, the Stevenses cannot be made to await the possibility of a Departmental ruling that may never materialize. Indeed, we question whether the Stevenses would even know about such a ruling if it did materialize. (Because there is no regulation requiring a ruling in the first place, there is obviously no regulation requiring notification or publication of such a ruling.) While we expect that the Stevens **could** appeal from such a ruling, we do not believe that they **must** await such a ruling.

The only notification that is certain is the 30-day notice mandated by 25 Pa. Code § 271.913(g). The Stevenses cannot count upon receiving anything else. Unless the Stevenses can appeal from the general permit coverage when they receive their 30-day notice, they could very well be left with no other opportunity to appeal. That would be inconsistent with the statutory provisions that guarantee them a right to be heard. We, therefore, conclude that we have jurisdiction to proceed with the Stevenses' appeal.

Normally, a notification requirement such as that set forth in 25 Pa. Code § 271.913(g) is

intended to alert interested persons to ongoing or future regulatory developments that may be of concern. Here, however, the notice relates to past actions (the coverage determination), and there may be no further regulatory actions. Thus, this appeal has forced us to analyze an very unusual regulatory framework that does not square well with the principles of administrative process, review, and finality that we might typically apply. Our result is driven by the rare combination of a general permit, a coverage determination that is not site-specific, and the absence of a regulatory or permit provision that requires a land applier to obtain approval before utilizing a particular site..

Accordingly, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **BENJAMIN A. STEVENS and JUDITH E. STEVENS** | : | |
| **v.** | : | **EHB Docket No. 2000-030-L** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASHINGTON TOWNSHIP MUNICIPAL AUTHORITY** | : | |

**ORDER**

AND NOW, this 11th day of April, 2000, the Department's motion to dismiss is **DENIED**.

**ENVIRONMENTAL HEARING BOARD**

**BERNARD A. LABUSKES, JR.**
**Administrative Law Judge**
**Member**

**DATED:** April 11, 2000

See following page for service list.

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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SECRETARY TO THE BOA

| | | |
|---|---|---|
| **GREENVIEW DEVELOPMENT, INC.** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 99-126-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: April 12, 2000** |

## OPINION AND ORDER
## ON MOTION TO DISQUALIFY COUNSEL

**By Bernard A. Labuskes, Jr., Administrative Law Judge**

**Synopsis:**

A nonparty's motion to disqualify an appellant's counsel is denied. There is no indication that any party to this appeal is being prejudiced by the appellant's counsel's representation, or that the representation is interfering with the Board's proceedings.

## OPINION

Greenview Development, Inc. ("Greenview") filed an appeal from an order of the Department of Environmental Protection (the "Department") directing Greenview to undertake certain remedial action at its sewage facilities. The Borough of Taylor (the "Borough"), who is not a party in this matter, has filed a motion to disqualify Greenview's attorney, William J. Rinaldi, based on his firm's association with Johanna L. Gelb, Esquire. Attorney Gelb is currently listed as "Of Counsel" with Attorney Rinaldi's law firm. Prior to her association with Attorney Rinaldi, Attorney Gelb worked for a different firm where she represented the Borough in a civil action in which Greenview was a co-defendant. Based on Attorney Gelb's prior representation, the Borough

seeks to disqualify Attorney Rinaldi from representing Greenview. Specifically, the Borough asserts that Pa. R.P.C. 1.10 requires this Board to impute Attorney Gelb's inability to represent Greenview in this matter to Attorney Rinaldi. We deny the Borough's motion.

The Board recently declared in *DEP v. Whitemarsh Disposal Corp.*, 1999 EHB 588, 590, that it has the authority to disqualify counsel in a particular case, not for purposes of imposing discipline or even necessarily for purposes of protecting the interests of a represented party, but rather, for purposes of protecting the interests of the opposing party in the litigation and ensuring the orderly and just conduct and disposition of proceedings that are before it. Pursuant to this declaration, the issue currently before us is whether the association between Attorney Rinaldi and Attorney Gelb could prejudice any party to this appeal or otherwise interfere with the orderly and just disposition of this matter. There is no indication whatsoever that any party to this proceeding is being prejudicially affected by Attorney Rinaldi's representation or that his representation is interfering with the Board's disposition of this matter. Nor has the Department expressed an objection to Attorney Rinaldi's continued representation.

Although we appreciate its concerns, the confidentiality and adverse interest issues raised by the Borough relate solely to its prior relationship with Attorney Gelb rather than a party to this action. The Borough may have a claim in another forum, but it cannot find relief here.[1] We express no opinion on the merits of the Borough's position.

Accordingly, we issue the following order:

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[1] The "Scope" section of the Pennsylvania Rules of Professional Conduct declares in part:

> The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing counsel as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences for violating such a duty.

Rules of Professional Conduct p. 7.

**COMMONWEALTH OF PENNSYLVANIA**

**ENVIRONMENTAL HEARING BOARD**

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|---|---|---|
| **GREENVIEW DEVELOPMENT, INC.** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 99-126-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**ORDER**

AND NOW, this of 12th day of April, 2000, the Borough of Taylor's motion to disqualify counsel is DENIED.

**ENVIRONMENTAL HEARING BOARD**

**BERNARD A. LABUSKES, JR.**
**Administrative Law Judge**
**Member**

**DATED: April 12, 2000**

See service list on next page.

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Northeastern Regional Counsel

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| | | |
|---|---|---|
| **DARLENE K. THOMAS, et al.** | : | |
| | : | |
| **v.** | : | |
| | : | **EHB Docket No. 98-150-C** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, EAST NITTANY VALLEY JOINT MUNICIPAL AUTHORITY, LAMAR TOWNSHIP BOARD OF SUPERVISORS, PORTER TOWNSHIP BOARD OF SUPERVISORS, WALKER TOWNSHIP BOARD OF SUPERVISORS, BOROUGH OF MILL HALL, and CITY OF LOCK HAVEN** | : | **Issued:** April 18, 2000 |

## OPINION AND ORDER ON EAST NITTANY VALLEY JOINT MUNICIPAL AUTHORITY'S MOTION TO DISMISS

**By Michelle A. Coleman, Administrative Law Judge**

**Synopsis:**

An appeal of the Department's approval of an official sewage facilities plan revision is dismissed with respect to a joint municipal authority appellee. Appellee is entitled to dismissal of appellants' claim concerning it where (1) appellee did not request the plan revision; (2) appellee's plan was not the subject of the approved revision; and (3) appellee was added as an appellee by the Board, without prompting by appellants.

## OPINION

This matter was initiated with the August 17, 1998, filing of a notice of appeal by Darlene Thomas and certain other individuals (Appellants) challenging an July 22, 1998, letter

sent from the Department of Environmental Protection (Department) to the East Nittany Valley Joint Municipal Authority (ENVJMA), a joint municipal authority formed by Lamar, Porter, and Walker Townships to revise their sewage collection systems. The letter informed ENVJMA that the Department approved a proposed update revision to the official sewage facilities plans of Mill Hall Borough, the City of Lock Haven, and Lamar, Porter, and Walker Townships, under the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, *as amended,* 35 P.S. §§ 750.1-750.20a (Sewage Facilities Act). The revised plan calls for ENVJMA to construct a regional collection system to serve portions of Lamar, Porter, and Walker Townships. Wastewater would be piped to the City of Lock Haven for treatment at its existing sewage treatment plant with the aid of upgrades to Mill Hall's main interceptor and pump station.

When Appellants filed their notice of appeal, they indicated that they served the recipient of the Department's action, and they sent a copy of their notice of appeal to ENVJMA. However, Appellants did not serve copies of the notice of appeal at that time on Mill Hall Borough; the City of Lock Haven; or Lamar, Porter, or Walker Townships.[1]

On November 6, 1998, ENVJMA filed a motion to dismiss Appellants' appeal. It also filed two supplemental memoranda of law to the motion: the first filed February 26, 1999, and the second filed May 14, 1999. The Department filed supplemental memoranda of law on the same days. Appellants filed a response to the motion to dismiss on November 20, 1998, and a response to the second supplemental memoranda on June 7, 1999.

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[1] Appellants did serve those municipalities subsequently, in accordance with the Board's order of December 23, 1998.

In its motion and supporting memoranda, ENVJMA argues that the Board should dismiss it as a named appellee because the municipalities, and not ENVJMA, were the recipients of the Department's action. According to ENVJMA, it cannot be a party because the Board's rules make only the recipient of a Department action an automatic party to an appeal, and, outside the context of automatic parties, the Board's rules do not allow for involuntary joinder. Alternatively, ENVJMA argues that the Board should dismiss the entire appeal because Appellants' failed to name indispensable parties as appellees in their appeal. Specifically, ENVJMA contends that the municipalities—Mill Hall Borough; the City of Lock Haven; and Lamar, Porter, and Walker Townships—were indispensable parties because they were the actual recipients of the Department's action, not ENVJMA. Although Appellants served copies of the notice of appeal on the municipalities after ENVJMA filed its motion, and the municipalities have been added as appellees, ENVJMA continues to argue that dismissal of the entire appeal is appropriate because the municipalities are indispensable parties and the Board did not have jurisdiction to add them as appellees after the 30-day appeal period expired.

In its supplemental memoranda, the Department also argues that we should dismiss Appellants' appeal in its entirety because the municipalities were not properly made parties to this appeal, they cannot be made parties now, and yet, they are indispensable. In addition, the Department argues that ENVJMA could not be an automatic party to the appeal because it was not the recipient of the Department action being appealed.

In their response to the motion and second supplemental memoranda, Appellants argue that ENVJMA is a proper party in this appeal because the Department's letter approving the plan revision was sent to ENVJMA and because ENVJMA has the power to make decisions on behalf

of the municipalities. In addition, Appellants argue that the Board has the power to involuntarily join parties.

We need not rule on whether the municipalities were properly added as appellees in this appeal because we agree with ENVJMA that, even assuming the municipalities were properly made parties, dismissal of ENVJMA as an appellee would be appropriate. ENVJMA is not an automatic party to the action, nor is it appropriate to join ENVJMA as a party.

The letter Appellants challenge refers to the proposed plan revision concerning the official sewage facilities plans for the municipalities and states, "This plan is hereby approved as an update revision of the Act 537 Official Sewage Facilities Plans of Lamar, Porter and Walker Townships, Mill Hall Borough and the City of Lock Haven." While the letter presumes to be the instrument by which the Department approves the municipalities' proposed revisions to their sewage facilities plans, the letter was not actually addressed to the municipalities. Instead, the Department addressed the letter to ENVJMA. However, the letter indicates that 14 other individuals and entities were copied, among them the municipalities.

When asked to identify the Department action they appealed, in their notice of appeal, Appellants wrote, "7/22/98 Letter of approval of Act 537 Plan sent to East Nittany Joint Municipal Authority [sic]." On August 19, 1998, when the Board issued pre-hearing order number one, the Board listed only the Department as an appellee. However, the following day—with no apparent prompting from Appellants or any of the other parties—the Board issued an amended pre-hearing order adding ENVJMA as an appellee. The order did not explain why the Board added ENVJMA or why the Board failed to also add the municipalities that were served copies of the notice of appeal.

Section 1021.51(g) of the Board's Rules of Practice and Procedure, 25 Pa. Code § 1021.51(g), provides:

> Concurrent with or prior to the filing of a notice of appeal, the appellant shall serve a copy thereof on each of the following:
>
> ...
>
> (3) In a third-party appeal, the recipient of the action. The service shall be made at the address set forth in the document evidencing the action by the Department or at the chief place of business in this Commonwealth of the recipient.

Section 1021.51(h), 25 Pa. Code § 1021.51(h), provides, "The service upon the recipient of an action as required by this section shall subject the recipient to the jurisdiction of the Board as a party."

The recipients of the Department action at issue here—the approval of the municipalities' proposed plan revisions—were the municipalities, not ENVJMA. The plans that are the subject of the revision belong to the municipalities, not ENVJMA. (Motion ¶¶ 25-26.) The proposed revisions were approved and submitted to the Department by the municipalities, not ENVJMA. Furthermore, while the Department's letter concerning the approval was addressed to ENVJMA, the letter never asserts that ENVJMA itself received the approval. Instead, the letter simply says, "Our staff has completed the review of a proposed update revision to the ... official sewage facilities plans *of your member municipalities and of Mill Hall Borough and the City of Lock Haven....* This plan is hereby approved as an update revision of the ... Official Sewage Facilities Plans *of Lamar, Porter and Walker Townships, Mill Hall Borough and the City of Lock Haven.*" (Notice of appeal, p. 9 (emphasis added).) Since ENVJMA was not the recipient of the Department's action, Appellants had no duty to serve ENVJMA with a copy of their notice of appeal under section 1021.51(g)(3) of the Board's rules.

Nor could Appellants make ENVJMA a party under section 1021.51(h) of the Board's rules. In *Thomas v. DEP,* 1997 EHB 495, the Board rejected the argument that an entity could be made an automatic party where it was not the recipient of the Department's action. That appeal, like the instant appeal, challenged the Department's approval of official sewage facilities plans and involved many of the same appellants and municipalities. In the earlier *Thomas* appeal, the appellants did not identify ENVJMA as the recipient of the Department's action when they filed their notice of appeal. Subsequently, however, the appellants and the Department requested that ENVJMA be made a party to the proceedings. They argued that language in section 1021.51(g) of the Board's rules at that time—language virtually identical to that in section 1021.51(h) of the Board's present rules—made ENVJMA a party to the proceedings once it was served, whether ENVJMA was the recipient of the Department's action or not.[2] The Board rejected that proposition, writing,

> Even assuming Appellants otherwise complied with the service requirements under [25 Pa. Code § 1021.51], service of the notice of appeal on ENVJMA would not subject that entity to the jurisdiction of the Board. Subsection (g), by its terms, applies only to "the *recipient* of a permit, license, approval, or certification".... ENVJMA was not the recipient of either of the approvals mentioned in the letter that Appellants challenge in their appeal. Consequently, [subsection] (g) cannot have made ENVJMA a party appellee."

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[2] Section 1021.51(g) provided, in pertinent part:

> The service upon the recipient of *a permit, license, approval, or certification* as required by this section, shall subject the recipient to the jurisdiction of the Board as a party *appellee*.

(Emphasis added.)

By contrast, section 1021.51(h) provides:

> The service upon the recipient of *an action* as required by this section shall subject the recipient to the jurisdiction of the Board as a party.

(Emphasis added.)

1997 EHB at 498-99. The same reasoning controls here: ENVJMA is not a proper automatic party in an appeal where it was not the recipient of the action being appealed. The Board also held in *Thomas* that we do not have the power to order involuntary joinder. 1997 EHB at 498.

Accordingly, ENVJMA's motion to have the Board dismiss it as an appellee is granted.

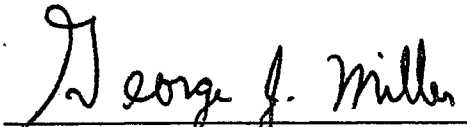
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **DARLENE K. THOMAS, et al.** | : | |
| | : | |
| **v.** | : | |
| | : | **EHB Docket No. 98-150-C** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, EAST NITTANY VALLEY JOINT MUNICIPAL AUTHORITY, LAMAR TOWNSHIP BOARD OF SUPERVISORS, PORTER TOWNSHIP BOARD OF SUPERVISORS, WALKER TOWNSHIP BOARD OF SUPERVISORS, BOROUGH OF MILL HALL, and CITY OF LOCK HAVEN** | : | |

**ORDER**

AND NOW, this 18th day of April, 2000, it is ordered that ENVJMA's motion to dismiss is granted, and ENVJMA is to be removed as an appellee in this appeal.

**ENVIRONMENTAL HEARING BOARD**



**GEORGE J. MILLER**
**Administrative Law Judge**
**Chairman**

**THOMAS W. RENWAND**
**Administrative Law Judge**
**Member**

**MICHELLE A. COLEMAN**
**Administrative Law Judge**
**Member**

**BERNARD A. LABUSKES, JR.**
**Administrative Law Judge**
**Member**

**MICHAEL L. KRANCER**
**Administrative Law Judge**
**Member**

**DATED:** April 18, 2000

See following page for service list.

**EHB Docket No. 98-150-C**

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|---|---|---|
| **FRED E. WEST** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 98-114-R** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: April 18, 2000** |

## OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

**By Thomas W. Renwand, Administrative Law Judge**

**Synopsis:**

An appeal from a compliance order the Department has withdrawn is dismissed as moot. The Board cannot grant any meaningful relief regarding an order that no longer exists.

## OPINION

This matter involves an appeal from a compliance order issued by the Department of Environmental Protection (Department) to Fred E. West on June 4, 1998. The order cited Mr. West for dumping or depositing or permitting the dumping or depositing of solid waste on property located in Reade Township, Cambria County. The order directed Mr. West to cease dumping or depositing solid waste on the property and to remove and dispose of all solid waste at a facility permitted for such disposal. Mr. West appealed the order on June 29, 1998.

The matter currently before the Board is a Motion to Dismiss for Mootness filed by the

Department on February 22, 2000. In support of its motion, the Department has provided the affidavit of Anthony Orlando, Regional Manager of Solid Waste in the Department's Southwest Regional Office. Mr. West filed no response to the motion.

The undisputed facts are as follows. On March 24, 1999, the Court of Common Pleas of Cambria County issued an order in the case of *Commonwealth v. West*, No. 2145-1998, ordering Mr. West to remove all recyclable items from his property and authorizing the Commonwealth to enter upon the West property to remove all remaining items and dispose of them. The court further ordered Mr. West to refrain from interfering with or preventing the removal of waste on his property. (Appendix A to Orlando Affidavit) Following issuance of the court's order, the Cambria County Redevelopment Authority, working with the Department, contracted to have the solid waste removed from the property. Because this property included the property which was the subject of the Department's compliance order of June 4, 1998, the Department withdrew its order. (Orlando Affidavit, paragraph 5)

Based on the withdrawal of its order which was the subject of this appeal, the Department asserts that this case is now moot. In reviewing the Department's motion, we must view it in the light most favorable to the non-moving party. *Florence Township v. DEP*, 1996 EHB 282.

A matter becomes moot when an event occurs which deprives the Board of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome. *Buddies Nursery, Inc. v. DEP*, EHB Docket No. 98-165-MG (Opinion on Motion to Dismiss issued November 4, 1999), p. 2. Here, the order which is the subject of the appeal has been withdrawn. Because the order no longer exists, the Board cannot provide any meaningful relief with regard to it. Further, a vacated order cannot serve as the basis for any future civil penalties or be considered in permit or license reviews. *Kilmer v. DEP*, EHB Docket No. 98-102-L

(Opinion on Motion to Dismiss issued October 19, 1999), p. 3. As Judge Labuskes, writing for the Board, stated in *Kilmer*, "[The appellant] obviously has no liability or obligations regarding a nonexistent order. Ruling on the validity of an order that does not exist would be [a] useless exercise, a matter of, at best, academic, historical interest. There is no case or controversy, and the Board's ruling would be merely advisory." *Id.* Further, as noted above, Mr. West has not challenged the Department's motion.

Because the Department's withdrawal of the appealed-from order renders this matter moot, we hereby enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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|---|---|---|
| **FRED E. WEST** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 98-114-R** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**ORDER**

AND NOW, this 18th day of April, 2000, the Department's Motion to Dismiss for Mootness is granted and the appeal of Fred E. West at Docket No. 98-114-R is dismissed.

**ENVIRONMENTAL HEARING BOARD**

**GEORGE J. MILLER**
**Administrative Law Judge**
**Chairman**

**THOMAS W. RENWAND**
**Administrative Law Judge**
**Member**

**MICHELLE A. COLEMAN**
**Administrative Law Judge**
**Member**

**EHB Docket No. 98-114-R**

**BERNARD A. LABUSKES, JR.**
**Administrative Law Judge**
**Member**

**MICHAEL L. KRANCER**
**Administrative Law Judge**
**Member**

**DATED:** **April 18, 2000**

**c:** **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

**For the Commonwealth, DEP:**
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Southwest Region

**For Appellant:**
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Fallentimber, PA

mw

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|---|---|---|
| **ROBERT J. LIVINGSTON** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 97-130-R** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: April 19, 2000** |

# ADJUDICATION

**By Thomas W. Renwand, Administrative Law Judge**

**Synopsis:**

Appellant had earlier obtained two permits from the Pennsylvania Department of Environmental Protection (Department) authorizing the construction of a boat dock and marina on property owned by the Appellant on the banks of the Youghiogheny River. Unable to gain access to the river, Appellant began constructing a road to access the site over nearby property owned by a third party of which he was a trustee. Appellant applied for a permit from the United States Army Corps of Engineers but never applied for a permit through the proper agency, the Department of Environmental Protection. Moreover, he proceeded to construct the road without securing any of the necessary permits. Appellant filled in a wetland, grubbed and cleared over five acres on the adjoining property, drained the wetland, and failed to implement erosion and sedimentation controls. He ignored verbal and written orders to stop his construction activities. Consequently, the Department was justified in issuing the Compliance Order to Appellant and

revoking his earlier permits.

## INTRODUCTION

Appellant Robert J. Livingston (Mr. Livingston or Appellant) owns property located along the Youghiogheny River upstream from the Boston Bridge in Elizabeth Township, Allegheny County, Pennsylvania (Site or the Livingston I Site). For over a decade, Mr. Livingston has been attempting to develop a marina and boat dock on the Site. The Pennsylvania Department of Environmental Protection (Department) issued two permits authorizing such a development. However, Mr. Livingston has been unable to gain access to the Site. There is no road to the Site. Subsequently, he began constructing a roadway over property adjacent to the Livingston I Site owned by the Tube City Athletic Association (Livingston II Site).[1] Although Mr. Livingston applied through the United States Army Corps of Engineers for a permit he began constructing the road prior to any permit being issued. In fact, he continued construction activities even after being ordered by the Department to stop.

On May 14, 1997, the Department issued a Compliance Order to Mr. Livingston revoking his earlier permits authorizing him to develop the marina and boat dock and further ordering him to take corrective action by immediately ceasing all earthmoving activities on the Livingston II Site, and to remove, fill, regrade and reseed the area to its previous condition. Mr. Livingston filed a timely appeal to the Department's Compliance Order.

The Board conducted a site view on July 16, 1999. A hearing was held in Pittsburgh on June 24, June 25, and August 16, 1999. Mr. Livingston filed his post-hearing brief on October 25, 1999 while the Department filed its post-hearing brief on November 1, 1999. Neither party

[1] Mr. Livingston is a trustee of the Tube City Athletic Association.

filed a reply brief. After a full and complete review of the record, we make the following:

## FINDINGS OF FACT

1. The Pennsylvania Department of Environmental Protection (Department) is the agency with the duty and authority to administer and enforce the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 - 691.1001 (Clean Streams Law); the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§693.1 - 693.27 (Encroachments Act); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §510 -17 (Administrative Code); and the rules and regulations promulgated thereunder.

2. Appellant is Mr. Robert J. Livingston (Mr. Livingston or Appellant). Mr. Livingston resides in McKeesport, Pennsylvania. (N.T. 22)[2]

3. Mr. Livingston owns property located in and along a portion of the Youghiogheny River at river mile 4.25, approximately 1,200 feet upstream of the Boston Bridge in Elizabeth Township, Allegheny County, Pennsylvania (the Site or the Livingston I Site).

4. Tube City Athletic Association (Tube City), an unincorporated association, owns property adjacent to the Site along the Youghiogheny River. Tube City purchased the property on October 29, 1996. Mr. Livingston is a trustee of Tube City. (N.T. 30-31; Cmwlth. Exs. 1, 4)

5. Mr. Livingston intended to construct a marina and boat dock on the Site. (N.T. 23)

6. On June 21, 1990, the Department issued to Mr. Livingston Water Obstruction

[2] References to transcript page citations are referred to as "N.T. ___." References to exhibits introduced by the Department are referred to as "Cmwlth. Ex. ___."

and Encroachment Permit (Permit) E02-878. (Cmwlth. Ex.2)

7. The Permit authorized Mr. Livingston to construct and maintain a marina and launching ramp along the left bank of the Youghiogheny River approximately 1,200 feet upstream from the Boston Bridge. (N.T. 24)

8. Mr. Livingston was unable to access the area where he would build the dock and marina so the facility has not yet been constructed. (N.T. 26)

9. On September 8, 1994, the Department issued to Mr. Livingston Water Obstruction and Encroachment Permit No. E01-878-A1, which allowed him access to the facilities through a "paper street," also known as the Walter Street Extension. (Cmwlth. Ex.3)

10. According to Mr. Livingston, Elizabeth Township never accepted the Walter Street Extension. Thus, he was unable to access the Site. (N.T. 28-29)

11. Neither of the two permits issued by the Department authorized any work or activity on the parcel of property purchased by Tube City on October 29, 1996. (Livingston II Site) (N.T. 30)

12. It was Mr. Livingston's intent to construct a roadway over the Tube City property to access the Site. (N.T. 32)

13. It was Mr. Livingston's intent to obtain a permit from the United States Army Corps Engineers (Army Corps of Engineers) to construct the roadway. (N.T. 33)

14. On March 10, 1997, Mr. Livingston submitted an application to the Army Corps of Engineers. (Cmwlth. Ex.5)

15. Mr. Livingston never received a permit from the Army Corps of Engineers to construct a roadway. (N.T. 40)

16. Dr. Bernard G. Swegman is the Chief of the Surveillance Section for the Pittsburgh District of the Army Corps of Engineers. (N.T. 42)

17. Swegman received a Bachelor of Arts degree from the University of Pittsburgh. In 1980 he received a Ph.D. in Biology from the University of Pittsburgh with a specialty in aquatic ecology. (N.T. 47)

18. Dr. Swegman began work for the Army Corps of Engineers in 1982. Between 1985 and 1987 he worked for a private consulting firm before returning to government employment. (N.T. 42-43)

19. In 1987, the Army Corps of Engineers published a manual for identifying and quantifying wetlands. The manual is generally accepted in the Commonwealth of Pennsylvania as an authorized source. (N.T. 45)

20. Dr. Swegman has both academic and Army Corps of Engineers training in the identification and delineation of wetlands. (N.T. 48)

21. Dr. Swegman is qualified and is recognized by the Board as an expert in wetland identification, determination, and delineation. (N.T. 49)

22. There are three components to identifying a wetland dealing with vegetation, hydrology and soils. (N.T. 46) Vegetation concerns hydrophytic vegetation which is associated with wetlands. Hydrology concerns whether there is a source of water sufficient to establish a wetland community. Soils indicate whether there are hydric or reduced soils due to lack of oxygen by inundation of water for extended periods. (N.T. 46)

23. Dr. Swegman's responsibilities at the Army Corps of Engineers include investigating and resolving violations of the Federal Clean Water Act. (N.T. 50)

24. It is his Section's responsibility to determine whether a wetland exists on a site prior to issuing a permit. The Section employs ten people in the Pittsburgh District. (N.T. 51)

25. The Pittsburgh District includes parts of Pennsylvania, Ohio and West Virginia. The Site and the Livingston II Site are under the jurisdiction of the Pittsburgh District of the Army Corps of Engineers. (N.T. 52)

26. Wetlands provide many useful functions that better the environment, such as flood storage, sedimentation retention and wildlife habitats. (N.T. 55)

27. Dr. Swegman has been to the Site several times since 1992. (N.T. 56)

28. Dr. Swegman found wetlands on the Livingston II Site, which is the property purchased by Tube City in 1996. Dr. Swegman estimated the size of the wetlands was between one-fifth of an acre to a quarter of an acre. (N.T. 57)

29. The vegetation in these wetlands was that found in traditional wetlands including cattails, sedges, rushes, willows, and irises. (N.T. 58)

30. The site was inundated and impounded with water. (N.T. 58)

31. Dr. Swegman returned to the Livingston II Site in 1996 and observed the same conditions. (N.T. 60)

32. In late 1996 or 1997 the Army Corps of Engineers began receiving reports that Mr. Livingston was filling in the wetlands by constructing a road on the Livingston II Site. (N.T. 62)

33. The Army Corps of Engineers dispatched its inspector, Mr. John Rossella, to investigate. It is estimated that Mr. Rossella made four visits to the Livingston II Site from January through March 1997. (N.T. 63)

34. On January 9, 1997 the Army Corps of Engineers sent Mr. Livingston a warning letter advising him that jurisdictional wetlands exist on the property and that fills or earth disturbances within these wetlands would require authorization from the Army Corps of Engineers. (N.T. 65)

35. The January 9, 1997 letter further advised Mr. Livingston that he could apply for both Federal and State authorizations through the Department. (N.T. 68)

36. Mr. Livingston did not obtain a permit from the Army Corps of Engineers but continued filling the wetlands between January and March of 1997. (N.T. 67)

37. Mr. Livingston submitted an application to the Army Corps of Engineers that he dated March 10, 1997. (Cmwlth. Ex.5)

38. Dr. Swegman sent another letter to Mr. Livingston on March 19, 1997. This letter again informed him that there were wetlands on the Livingston II Site which required authorization from both the Army Corps of Engineers and the Department before fill or earth could be disturbed. It advised him that the Army Corps of Engineers was forwarding his application to the Department for processing and that he should contact the Department to determine if there were any additional requirements he would be required to meet. (N.T. 69)

39. Dr. Swegman remembered two telephone conversations with Mr. Livingston during this period when he informed him that it should not be difficult to obtain a permit to build his access road but that it was important that he obtain the permit *before* he constructed the road. (N.T. 69-70)

40. In the spring of 1997 Mr. Livingston grubbed and cleaned areas on the Livingston II Site. (N.T. 71)

41. Dr. Swegman told Mr. Livingston that some of the fill already placed on the Livingston II Site might have to be removed and that he should not place any more fill on the Livingston II Site until he received his permit. (N.T. 72-73)

42. Dr. Swegman visited the Livingston II Site again in April 1997 and saw where areas of the wetland had been filled in since his 1996 visit. (N.T. 73)

43. Dr. Swegman again visited the site in May 1997. (N.T. 74)

44. Dr. Swegman was last at the Livingston II Site in May 1999. He testified that the road was wider and higher and the wetlands had been filled in more than it was in May 1997. (N.T. 75)

45. Substantial fill was placed in the wetlands in the construction of the proposed access road. (N.T. 78-79)

46. Constructing the roadway and placing fill in wetlands on the Livingston II Site was not authorized by the Army Corps of Engineers. (N.T. 80)

47. A nationwide permit is a type of general permit issued by the Army Corps of Engineers for small projects. (N.T. 81)

48. Nationwide permits have now generally been replaced with State Programmatic General Permits. (N.T. 81-82)

49. To obtain a State Programmatic General Permit, an application is filed with the state environmental agency. If the state agency issues a general permit, then the federal government notifies five agencies of the application. If, after a five day wait, there are no objections, the state can attach the federal permit. (N.T.82)

50. Mr. Livingston filled in approximately ⅓ of what is identified in the exhibits as

Wetland A which is located on the Livingston II Site. (N.T. 90)

51. Dr. Swegman advised Mr. Livingston that he would have to apply for a permit from the Department to build a roadway and impact a wetland. He also advised him that if he did additional work he might need to apply for additional permits. (N.T. 104)

52. Donald Brown is a Compliance Specialist with the Soil and Waterways Section of the Department. (N.T. 130)

53. Mr. Brown has a Bachelor of Science degree in Biology and a Master's in Public Administration, both from the University of Pittsburgh. (N.T. 131)

54. As a Compliance Specialist he coordinates enforcement actions in both erosion and sedimentation controls that are referred to the Department by either its own inspectors or inspectors from the Conservation Districts. (N.T. 131-132)

55. Over the past five years Mr. Brown has performed between 400-500 site inspections. (N.T. 133)

56. He became involved in this matter when the Department received a complaint. He and Mr. Joseph Storey from the Allegheny County Conservation District performed a site inspection at the Livingston I and II Sites on April 10, 1997. (N.T. 137)

57. Mr. Brown observed fill material being placed in what was identified as Wetland A. Mr. Livingston told Mr. Brown that he was building an access road to the site of his future marina. (N.T. 138)

58. The fill being used to construct the road consisted of demolition waste consisting of concrete with rebar, plasterboard, brick, wood and other demolition waste. (N.T. 141)

59. It also appeared that there was a channel dug out deliberately from the lower area

of the wetland to the river. (N.T. 141; Cmwlth. Ex.8)

60. At the time of his inspection, Mr. Brown did not have the permits for the site physically with him. After he returned to his office he reviewed the permits and discovered that the filling in of the wetland and construction of the access road was not authorized by the Department. (N.T. 142)

61. Mr. Brown testified that placing fill material in a wetland without a permit was a violation of the Department's Regulations. (N.T. 143)

62. Mr. Brown observed two channels that had been constructed in the wetland area. He surmised that the purpose of both channels was to drain the wetland. (N.T. 147-149)

63. Mr. Livingston did not have a permit to construct the channels to drain the wetland. (N.T. 149)

64. The Livingston I and Livingston II Sites also showed no indication of any erosion and sedimentation control facilities. (N.T. 151-152)

65. Mr. Brown testified that Mr. Livingston had no Erosion Control Plan nor did he have an NPDES permit for storm water discharges for construction activities. (N.T. 154-155)

66. As a result of Mr. Brown's investigation, the Department issued an Administrative Order on May 14, 1997. (N.T. 160; Cmwlth. Ex.12)

67. The Order, *inter alia*, required Mr. Livingston to immediately cease all earthmoving activities, seed and mulch the site, install silt fencing, remove all fill within thirty days, regrade to original grade any disturbed areas and seed and mulch those areas within forty-five days. (N.T. 160; Cmwlth. Ex.12)

68. Mr. Brown performed a second site inspection on May 25, 1997. (N.T. 161)

69. Mr. Brown testified that additional fill had been placed in the wetland between April 10, 1997 and May 25, 1997. Additional construction of the access road had also taken place. (N.T. 163)

70. Mr. Brown took numerous pictures at the site on May 25, 1997 to document his findings. (N.T. 162-163)

71. Mr. Brown believes that Mr. Livingston extended the access road 60-80 feet between April 10, 1997 and May 25, 1997. (N.T. 164)

72. On April 19, 1999 Mr. Brown performed another site inspection. (N.T. 164)

73. He estimated that fill placed in the wetland measured approximately 250 feet by 70-90 feet and was approximately 12-15 feet deep. (N.T. 165)

74. On June 11, 1999 he again performed a site inspection and photographed a dump truck dumping asphalt material on the site. (N.T. 166; Cmwlth. Ex. 16)

75. Mr. Brown believed Mr. Livingston did not cease activities on the site as ordered in May of 1997. (N.T. 167)

76. Mr. Livingston has added considerable fill to the site since the Department issued its cease and desist Order in May of 1997. (N.T. 167)

77. Mr. Joseph Storey is a Soil Erosion Technician employed by the Allegheny County Conservation District. (N.T. 189)

78. Mr. Storey received a Bachelor of Science degree in Environmental Resource Management from Penn State University in December, 1993. He began work with the Allegheny County Conservation District in June, 1994. (N.T. 190)

79. His duties and responsibilities as a Soil Erosion Technician include implementing

the Chapter 102 Erosion Control Program and enforcing the Clean Water Act and the Clean Streams Law. (N.T. 190)

80. Implementing the Chapter 102 Erosion Control Program involves reviewing Erosion and Sedimentation Control Plans, issuing NPDES general permits for the discharge of storm water associated with construction activities, and inspecting sites to ensure compliance. (N.T. 190-191)

81. Mr. Storey does not take any enforcement actions. Instead, any matters that he thinks require enforcement are referred to the Department. (N.T. 191)

82. Mr. Storey has performed approximately 1,000 site inspections. (N.T. 191)

83. The County Conservation District is delegated by the Department the authority to implement the Chapter 102 program and the NPDES general permit program for storm water discharge. (N.T. 192)

84. Mr. Storey inspected the Livingston I Site to determine whether work had started on the marina in June of 1994. (N.T. 193)

85. He performed a site inspection of the Livingston II Site on April 10, 1997 with Mr. Brown. (N.T. 194)

86. He observed that much of the Livingston II Site had been cleared and grubbed, exposing bare soil and roots. (N.T. 194)

87. He observed violations of the law that included lack of erosion controls, lack of stabilization for the disturbed areas, failure to have an Erosion Control Plan on site, and failure to have an NPDES general permit. (N.T. 199)

88. Mr. Livingston was familiar with erosion control plans because in April of 1994

there was an Erosion Control Plan submitted covering the marina area on the Livingston I Site. (N.T. 199)

89. Mr. Jerry Harn is the building inspector and zoning officer for Elizabeth Township. As the building inspector, Mr. Harn issues building permits and inspects buildings to make sure they are in compliance with the BOCA Code. As the zoning officer he also issues grading permits. (N.T. 223-224)

90. The Township requires a grading permit if 500 cubic yards or more of soil is involved. (N.T. 225)

91. He inspected the Livingston II Site around December 1996. He had received calls that building debris was being dumped on the property. (N.T. 227)

92. He made frequent visits to the Livingston II Site; sometimes he visited the Livingston II Site four times per week. He observed broken up asphalt, concrete, and concrete with rebar. (N.T. 227)

93. On April 10, 1997 he accompanied Mr. Brown and Mr. Storey to the Livingston II Site. (N.T. 228)

94. Mr. Harn testified that Mr. Livingston had ignored his letters and had not signed for the letter Mr. Harn sent him by certified mail. (N.T. 228)

95. The record owner of the property identified in the exhibits as the Livingston II Site is the Tube City Athletic Association. (N.T. 229)

96. The Elizabeth Township Tax Board further lists the acreage of the Livingston II Site as 7.65 acres. (N.T. 230; Cmwlth. Ex. 17)

97. Mr. Harn estimated that 80% to 90% of the Livingston II Site was cleared and

grubbed. (N.T. 232)

98. Mr. Tim Dreier is the Manager of the Water Management Program in the Department's Southwest Regional Office. Mr. Dreier has been the Manager for approximately ten years. (N.T. 257-258)

99. Mr. Dreier reports to Mr. Charles Duritsa, the Regional Director of the Department's Southwest Region. (N.T. 259)

100. Mr. Dreier supervises a staff of approximately sixty people who carry out the requirements and obligations of the Pennsylvania Clean Streams Law, the Pennsylvania Dam Safety and Encroachment Act, and the federal NPDES permitting program. (N.T. 259)

101. The Soils and Waterways Section administers the permitting requirements of the Dam Safety and Water Obstruction Act as it relates to water obstruction. (N.T. 260)

102. In January of 1997 a joint application procedure was in place with the Army Corps of Engineers. (N.T. 264)

103. Mr. Dreier is also involved with enforcement and compliance issues. (N.T. 267)

104. The field staff of the Department's Water Management Program brought violations by Mr. Livingston to Mr. Dreier's attention. (N.T. 269)

105. Neither the original permit issued in 1990 nor the amendment issued in 1994 authorized any activity on the Livingston II Site. (N.T. 271)

106. The Department of Environmental Protection has not issued any permits to Mr. Livingston authorizing any work or activity on the Livingston II Site. (N.T. 272)

107. Mr. Brown informed Mr. Dreier of the violations on the Livingston II Site in April 1997. (N.T. 273)

108. Mr. Dreier believed that Mr. Livingston's actions were in flagrant disregard of the Commonwealth's statutes and regulations and issued an order which included the revocation of the Site I permit. Mr. Drier took this action for several reasons:

1.) Work was being done on the site without a permit.

2.) There was no Erosion and Sedimentation Control Plan.

3.) There were no Erosion and Sedimentation Controls.

4.) There was no NPDES permit.

5.) There was the filling in of a wetland.

6.) Material was placed in the floodway of a river.

7.) He was certain that Mr. Livingston knew he needed a permit to do this type of work and so his actions were intentional rather than negligent. (N.T. 274-275)

109. Mr. Dreier also revoked the permit because it would serve no beneficial purpose to allow Mr. Livingston to move his non-complying operation onto a permitted site. (N.T. 276)

110. Mr. Dreier described Mr. Livingston's application dated March 10, 1997 which was submitted to the Army Corps of Engineers and forwarded to the Department as "woefully inadequate." (N.T. 279)

111. When the Department received Mr. Livingston's application that was forwarded

from the Army Corps of Engineers it started to process it. However, its review was curtailed because of the numerous violations on the Livingston Site II. (N.T. 296)

112. If Mr. Livingston would have contacted the Department as directed by the Army Corps of Engineers he would have received a full application package from the Department. (N.T. 308)

113. Mr. Livingston had gone through the Department's application process in 1994 so he was aware, independent of what the Army Corps of Engineers told him, that the Department would require more than the application Mr. Livingston had submitted to the Army Corps of Engineers. (N.T. 308)

114. Mr. Livingston's response to the above was that "We didn't have to write another book." (N.T. 308)

115. Mr. John Rossella is a waterways inspector employed by the Army Corps of Engineers. He has been employed by the Army Corps of Engineers for thirty-five years. (N.T. 340)

116. Mr. Rossella is aware of the location of the Livingston I and II Sites. (N.T. 341)

117. Mr. Rossella indicated in some instances, depending on the circumstances, that the Army Corps of Engineers would issue a nationwide permit. (N.T. 361)

118. There was no testimony or evidence which established that the only permit Mr. Livingston needed to construct his access road over the Livingston II Site was the nationwide permit issued by the Army Corps of Engineers.

119. Mr. Rossella further indicated that the Army Corps of Engineers would require Mr. Livingston to obtain a state permit before he could construct his access road. (N.T. 362)

120. Mr. Rossella, as part of his job duties, does not process or issue permits on behalf of the Army Corps of Engineers. (N.T. 363)

121. We find by a preponderance of the evidence through the uncontradicted testimony of Dr. Swegman, Mr. Brown, Mr. Storey, and Mr. Harn, that Appellant constructed a road through a wetland, filled a large portion of the wetland, cleared and grubbed more than five acres of land, all without obtaining the necessary permits or complying with regulatory requirements including the implementation of erosion and sedimentation controls. (N.T. 56-65, 71, 78-79, 90, 138, 147-149, 163, 165, 167, 193-194, 199, 227-229; Cmwlth. Exs. 8, 16-17)

122. Appellant's construction of the road, filling of the wetland, and clearing and grubbing more than five acres of land was in intentional violation of the law as set forth in the Dam Safety and Encroachments Act and the Clean Streams Law. The Department's cancellation of the permits for the Livingston I Site was necessary to aid in the enforcement of these Acts and the Department's supporting regulations.

## DISCUSSION

Mr. Livingston advances several points in arguing that the Department should not have issued a Compliance Order revoking his earlier permit and requiring him to perform remediation steps at the Livingston II Site. His arguments can be summarized as follows:

1) The work that was done was performed on Tube City's Property (Livingston II Site). Since Appellant does not own this property the Department should not have rescinded his permit for the Livingston I Site.

2) The work that was performed on the Livingston II Site was too

small to trigger any regulatory response from either the Department or the Army Corps of Engineers.

3) Neither governmental agency adequately defined what a wetland is here and Mr. Livingston contends that the area in question is not a wetland.

4) The road that Mr. Livingston constructed will greatly benefit the environment because it will "shore up" the property and prevent shore-line erosion.

5) An earlier owner of the Livingston I Site was a large coal company which allegedly used the area for fifty years to unload coal barges. In Mr. Livingston's opinion, the land is "no worse for wear."

6) The Department has never ruled on his request to build the road and fill in part of the land on the Livingston II Site.

7) Mr. Livingston was confused as to whether one or two permits were required and whether it should be issued by the Department or the Army Corps of Engineers.

8) The action of the Department in revoking his earlier permit has resulted in an unlawful taking of his property.

9) The Department's action is not supported by scientific evidence.

10) The Department revoked his permit even though the Department's official revoking the permit has never inspected either the Livingston I or Livingston II Sites.

The Department, which bears the burden of proof in this proceeding, contends that it did not abuse its discretion in issuing the Compliance Order. The Department contends that by constructing a road through a wetland without prior written permission of the Department, Mr. Livingston violated Section 6 of the Encroachments Act, 32 P.S. § 693.6, and Section 105.11 of the Department's regulations, 25 Pa. Code § 105.11. In addition, by placing fill material in a wetland without authorization or prior written permission of the Department, Livingston violated these same sections. The Department also contends that Mr. Livingston violated Sections 402 and 611 of the Clean Streams Law, 35 P.S. §§ 691.402 and 691.611, and the Department's regulations at 25 Pa. Code § 92.3 because he did not obtain an NPDES Permit for Stormwater Discharges from Construction Activities which is required for earthmoving activities in an area greater than five acres. Moreover, any person engaged in earthmoving activities must develop an Erosion and Sedimentation control Plan and implement erosion and sedimentation controls. This requirement applies irrespective of acreage. The Department contends that Mr. Livingston's failure to use appropriate erosion and sedimentation control facilities during earthmoving activities on the site constitutes a violation of Section 611 of the Clean Streams Law, 35 P.S. § 691.611, and 25 Pa. Code §§ 102.11 and 102.13.

Finally, the Department argues that these violations of the various environmental statutes and regulations were knowing violations. In fact, both the Department and the Army Corps of Engineers contend they warned Mr. Livingston numerous times that he could not perform such operations on the Livingston I and Livingston II Sites without first obtaining the necessary governmental permits. Instead, by his flagrant abuse of numerous laws the Department contends it was completely justified in revoking his earlier Permits. We agree. The Department's action

was lawful and fully supported by the evidence presented at the hearing.

The case seems to turn on Mr. Livingston's frustration caused by the fact that he was unable to access the Livingston I Site by either of the two methods allowed under his permit with the Department. Despite the fact that both the Department and the Army Corps of Engineers informed him on various occasions that he would need a permit to access the Livingston I Site by means of a road over the Livingston II Site, he made a half-hearted attempt, at best to obtain the permit. The Army Corps of Engineers even forwarded his application to the Department as a courtesy to him. Nevertheless, Mr. Livingston, rather than contact the Department or wait until the Department ruled on his permit application, simply continued constructing the road. In the course of the construction, he ignored requests and warnings from the Department to cease such activity. More importantly, he filled and drained a wetlands area without obtaining a permit to do so or filing any of the required plans, such as one dealing with erosion and sedimentation.

The evidence presented at the hearing also shows that Mr. Livingston was well aware that a permit was required to do what he did. Simply because he felt that such permits were "perfunctory" and "routinely issued" can not excuse his unilateral actions in plowing forward with his project without the necessary Department approval. Ironically, his actions, at a minimum, have delayed his project. Moreover, now that the Department has revoked his permit his project may be completely derailed. Where before, he had a valid permit with a need for access, today he has neither access nor a permit to develop and operate his proposed dock and marina.

Mr. Livingston contends that the area he filled in was not a wetland. He offers no scientific support for this position and we find none. The Department introduced the testimony

of various expert witnesses, who all testified that what was identified at the hearing as Wetland A, was present at the site. Dr. Swegman, for reasons unrelated to this case, had determined the existence of wetlands on the Livingston II Site in 1992. (N.T. at 56, 57, 60; Cmwlth. Ex. 1) Prior to the purchase of the Livingston II Site by Tube City, Dr. Swegman went to the site in 1996 and found that wetlands still existed on the property. (N.T. at 59). Both in 1992 and 1996 Dr. Swegman found hydrophytic plants and vegetation on the Livingston II Site. These plants and vegetation consisted of cattails, sedges, rushes, lots of willows, irises and sweetflag. (N.T. at 57-58)

Dr. Swegman, who was recognized as an expert in the identification and delineation of wetlands by the Board at the hearing in this matter, testified within a reasonable degree of scientific certainty that what was identified on Commonwealth Exhibit I as Wetland A existed on the Livingston II Site. (N.T. at 62; Cmwlth. Ex. 1) Dr. Swegman estimated the size of the wetland as approximately 1/5 of an acre to ¼ of an acre. (N.T. at 57)

Dr. Swegman's testimony was buttressed by Mr. Don Brown and Mr. Joseph Storey. Mr. Brown is a compliance specialist in the Soils and Waterways Section, Water Management Program of the Department. (N.T. at 130) Mr. Brown coordinates enforcement actions in both erosion and sedimentation control cases and for the Dam Safety and Encroachment Permitting Program. His duties and responsibilities fall under the Clean Streams Law, the Encroachments Act, the Chapter 102 Erosion Control Regulations and the Chapter 105 Dam Safety and Encroachments Regulations. (N.T. at 132, 135-136) Mr. Brown has performed between 400 and 500 site inspections. He inspected the Livingston II Site several times. His first visit to the Livingston II Site was in response to a complaint the Department received in April 1997. (N.T. at

137-138)

Mr. Joseph Storey is a soil erosion technician with the Allegheny County Conservation District. Mr. Storey, a graduate of Penn State University, has been a soil erosion technician for more than five years. His duties and responsibilities include implementing the Chapter 102 Erosion Control Program and enforcing the provisions of the Clean Water Act and the Clean Streams Law. Implementation of the Chapter 102 Erosion Control Plan involves reviewing erosion and sedimentation control plans, issuing NPDES General Permits for the discharge of storm water associated with construction activities, and inspecting sites to ensure compliance, i.e., making sure they are implementing the controls identified in the plan. Mr. Storey has performed over 100 site inspections. He refers enforcement matters to the Department. Moreover, he sometimes conducts site inspections with Department inspectors, such as in this case with Mr. Brown.

Mr. Brown and Mr. Storey conducted a site inspection of the Livingston II Site on April 10, 1997. (N.T. at 137) Mr. Brown testified that he saw fill placed in a portion of Wetland A. He described the fill as demolition waste consisting of concrete with rebar, plasterboard, brick and wood. (N.T. at 141) He observed that Mr. Livingston had filled and constructed a twenty to thirty foot section of his unpermitted access road through Wetland A starting at Hart Avenue and extending toward the Youghiogheny River. (N.T. at 140-141; Cmwlth. Ex. 1) Mr. Storey and Mr. Brown described and photographed two channels, one obviously manmade, dug from the lower area of Wetland A on the Livingston II site towards the river. Based on their training and experience, they testified that the purpose of the channels was to drain the wetlands.

They also observed that the entire Livingston II Site, which they later determined

encompassed more than seven acres, had been cleared and grubbed. The site was denuded of vegetation; the soil was bare, unprotected and unstabilized. (N.T. at 150, 194-196; Cmwlth. Exs. 10 & 11) Mr. Livingston had neither an NPDES permit for Stormwater Discharges from Construction Activities nor an erosion and sedimentation control plan before clearing and grubbing the Livingston II Site. (N.T. at 154-156, 199-200, 276)

We find by a preponderance of the evidence through the uncontradicted testimony of Dr. Swegman, Mr. Brown, and Mr. Storey that Mr. Livingston constructed a roadway through a wetland, filled a large portion of the wetland, cleared and grubbed more than five acres of land, without obtaining the necessary permits or complying with regulatory requirements including the required erosion and sedimentation controls. Mr. Livingston never implemented any erosion and sedimentation controls at the Livingston II Site. Mr. Livingston never obtained an NPDES permit for the Livingston II Site. (N.T. at 150-156, 200) Instead, he carried on extended earthmoving activities in complete and callous disregard for the law.

The evidence is clear that Mr. Livingston did not comply with various legal requirements in performing work at the Livingston II Site. The fact that the Livingston II Sites is owned by Tube City can not insulate Mr. Livingston from the consequences of his unlawful actions. The evidence shows that he knowingly proceeded to fill in the wetlands and constructed the road even after the Department ordered him to stop. He filled the wetland to construct access to his proposed dock and marina; he dumped fill in the wetland destroying an area 250 feet long, 70 to 90 feet wide and 12 to 15 feet deep; and, he excavated channels in the wetland in an attempt to dewater it, all without benefit of the necessary permits. (N.T. at 33, 73-76, 138-142, 146-148, 151-154, 166; Commonwealth Exs. 8, 9, 13, 14, 15, 16, 18, 19 and 20) Mr. Livingston offered

no evidence to the contrary.

Sections 5 and 610 of the Clean Streams Law and Section 20 of the Encroachments Act all authorize the Department to revoke an individual's permit if that person has failed to comply with the law. 35 P.S. §§ 691.5 and 691.610 and 32 P.S. § 693.20. Specifically, Section 20(a) of the Encroachments Act states as follows:

> The department may issue such orders as are necessary to aid in the enforcement of the provisions of this Act. Such orders shall include ...revoking permits....Such an order may be issued if the department finds that a person is in violation of any provision of this Act, or of any rule or regulation issued hereunder.

32 P.S. § 693.20(a).

Section 610 of the Clean Streams Law also authorizes the Department to issue orders necessary to aid in the enforcement of the Act, including orders revoking a permit, where it finds "that the permittee, or any person or municipality is in violation of any relevant provision of this Act, or of any relevant rule, regulation or order of the board or relevant order of the department." 35 P.S. § 691.610. The Clean Streams Law contains a further provision that an order affecting an operation not directly related to the condition or violation in question may be issued only if the Department finds that other enforcement procedures, penalties or remedies would probably be inadequate to effect prompt or effective correction of the condition or violation.

Though the unlawful activities described herein did not occur within the boundaries of the permit site (Livingston I), we find that they are directly related to Mr. Livingston's operation on the permit site. The permits in question authorized Mr. Livingston to construct a boat dock and marina on the Livingston I Site. Finding that he was unable to access that portion of the site where he intended to build the boat dock and marina, Mr. Livingston began to construct an

access road on adjacent property (the Livingston II Site). The unlawful activities engaged in by Mr. Livingston, described herein, were done in furtherance of the operation covered by his permit for the Livingston I Site. We also are persuaded that this is the right result based on Mr. Dreier's testimony. Mr. Dreier took this action for several well-thought out reasons: work was being done on the site without a permit, there was no erosion and sedimentation controls, there was no NPDES permit, there was the destruction of a wetland, and it was clear that Mr. Livingston was intentionally ignoring the requirements of the law. (N.T. 274-275) We find that the Department was authorized under both Section 20 of the Dam Safety and Encroachments Act and Section 610 of the Clean Streams Law to revoke Mr. Livingston's permits for unlawful activities undertaken in connection with the operation covered thereby.[3] Furthermore, since Mr. Livingston's construction of the road was in intentional violation of both the Dam Safety and Encroachments Act and the Clean Streams Law, the Department's revocation of the permits for the Livingston I Site was necessary to aid in the enforcement of those Acts and the Department's regulations thereunder.

The work performed on the Livingston II Site, which was devoid of any permission from the Department, was significant. Mr. Livingston's assertion is without merit that these activities, as we have earlier described them, do not rise to such a level as to trigger a regulatory response from the Department. The Department, as part of its statutory responsibilities, is mandated to investigate activities such as those performed by Mr. Livingston. Moreover, Mr.

[3] Our holding today is mandated by the law as it applies to the unique facts in this case. We do not decide the question that violations on Site A unconnected to permitted Site B would allow the Department to revoke the permit on Site B. That issue is for another day. In this case, the conduct on the contiguous unpermitted site benefits the permitted site and authorizes the Department, pursuant to the statutory provisions of the Dam Safety and Encroachments Act and the Clean Streams Law, to revoke the permits.

Livingston's argument that the road he constructed will benefit the environment is also without merit. He did not have permission to construct such a road and in doing so he destroyed a wetland. This hardly benefits the environment.

The fact that a large coal company allegedly unloaded barges on the site years earlier has no bearing on the regulatory requirements now applicable to the site and which Mr. Livingston knowingly ignored. The Department also did not need to rule on Mr. Livingston's application because he never completed the application process by contacting the Department and detailing his plans. The Board finds by a preponderance of the evidence that Mr. Livingston never attempted to comply with the requirements of the law in constructing the road over the Livingston II Site.

Mr. Livingston's confusion as to whether one or two permits were required was not caused by the Department or the Army Corps of Engineering. Both agencies contacted him several times and advised him exactly what he would have to apply for to proceed with his project. For whatever reasons, Mr. Livingston ignored the requests and then the warning of the agencies and simply proceeded to build the road.

Appellant contends that the Department's actions in denying a permit to him to construct a roadway to access his proposed boat dock and marina and revoking his earlier permits constitutes a taking under our Constitution. There is no merit to Appellant's argument. First, Appellant never even formally applied with the Department or followed up with it after submitting an application to the Army Corps of Engineers. This is despite the fact that he was directed to do so on numerous occasions. Moreover, the holding of his permits is a privilege. See *Tri-State Transfer Company v. DEP*, 722 A.2d 1129, 1132 (Pa. Cmwlth. 1999). He abused

the privilege by his actions and the Department committed no abuse of discretion by revoking the permits. The Department was authorized to revoke the permits under the law.

Mr. Livingston's final argument that the Department should not have revoked his permit because the Department official who signed the revocation Order, Mr. Drier, had never been to the Site, is also without merit. There is no requirement that the Department official who signs a revocation order must first personally visit a site. The Department thoroughly investigated Mr. Livingston's egregious conduct prior to taking any action. First, Department Inspector Brown investigated with Conservation District Inspector Storey. They not only observed what was being done but they spoke to Mr. Livingston and took pictures. Mr. Brown reviewed the matter thoroughly with Mr. Drier. The violations were clear. There was no ambiguity here. And there certainly was no need for Mr. Drier to visit the sites before revoking Mr. Livingston's permit.

We therefore enter an Order dismissing the Appeal.

## CONCLUSIONS OF LAW

1. By constructing a roadway through a wetland without a prior written permit of the Department, Mr. Livingston violated Section 6 of the Encroachments Act, 32 P.S. § 693.6, and Section 105.11 of the Department's regulations, 25 Pa. Code § 105.11. Both violations constitute unlawful conduct under Section 18 of the Encroachments Act, 32 P.S. § 693.18.

2. By placing fill material in a wetland without authorization of the Department, Mr. Livingston violated Section 6 of the Encroachments Act, 32 P.S. § 693.6, and Section 105.11 of the Department's regulations, 25 Pa. Code § 105.11. Both violations constitute unlawful conduct under Section 18 of the Encroachments Act, 32 P.S. § 693.18.

3. By excavating a channel in a wetland without authorization or prior written permit

of the Department, Mr. Livingston violated Section 6 of the Encroachments Act, 32 P.S. § 693.6, and Section 105.11 of the Department's regulations, 25 Pa. Code § 105.11. Both violations constitute unlawful conduct under Section 18 of the Encroachments Act, 35 P.S. § 693.18.

4. Appellant's failure to develop, implement and maintain erosion and sedimentation controls during earthmoving activities on the Livingston II Site constitutes a violation of Sections 102.4 and 102.11 of the Department's Chapter 102 Regulations, 25 Pa. Code §§ 102.4 and 102.11, and constitutes a public nuisance under section 402(b) of the Clean Streams Law, 35 P.S. § 691.402(b) and unlawful conduct under Section 611 of the Clean Streams Law, 35 P.S. § 691.611.

5. Mr. Livingston's failure to set forth erosion and sedimentation control measures for the Livingston II Site in a plan as set forth in Section 102.5, is a violation of Section 102.4 of the Department's Chapter 102 Regulations, 25 Pa. Code § 102.4, constitutes a public nuisance under Section 402(b) of the Clean Streams Law, 35 P.S. § 691.402(b), and constitutes unlawful conduct under Section 611 of the Clean Streams Law, 35 P. S. § 691.611.

6. By conducting earthmoving activity on an area of the Livingston II Site exceeding five acres without authorization of an NPDES permit for stormwater discharges from construction activities, Mr. Livingston violated Sections 92.3 and 102.31 of the Department's regulations, 25 Pa. Code §§ 92.3 and 102.31. Both violations constitute unlawful conduct under Section 611 of the Clean Streams Law, 35 P.S. § 691.611.

7. Based on the above actions of Appellant, the Department acted reasonably and in accordance with law in issuing its May 14, 1997 Revocation and Compliance Order. The Department was authorized to revoke Appellant's Permits for Site I since the unpermitted work

done on Site II was closely related to Site I.

8. The Department's revocation of the Appellant's permits was necessary to aid in the enforcement of the Clean Streams Law and the Dam Safety and Encroachments Act.

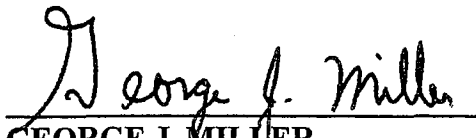
**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

| | | |
|---|---|---|
| **ROBERT J. LIVINGSTON** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 97-130-R** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF EVIRONMENTAL PROTECTION** | : | |

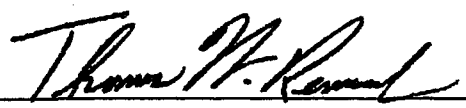
## ORDER

AND NOW this 19th day of April, 2000, Appellant's Appeal is **dismissed**.

**ENVIRONMENTAL HEARING BOARD**

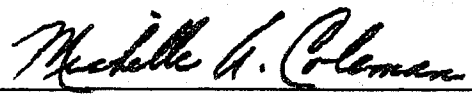


**GEORGE J. MILLER**
**Administrative Law Judge**
**Chairman**



**THOMAS W. RENWAND**
**Administrative Law Judge**
**Member**

**EHB Docket No. 97-130-R**



**MICHELLE A. COLEMAN**
**Administrative Law Judge**
**Member**

**BERNARD A. LABUSKES, JR.**
**Administrative Law Judge**
**Member**

**MCHAEL L. KRANCER**
**Administrative Law Judge**
**Member**

**DATED:** **April 19, 2000**

**c:** **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

**For the Commonwealth, DEP:**
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Southwestern Region

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WILLIAM T. PHILLIPY II
SECRETARY TO THE BOA

| | | |
|---|---|---|
| **JOHN M. RIDDLE, JR.** | : | |
| | : | |
| **v.** | : | **EHB Docket Nos. 99-226-C** |
| | : | **99-227-C** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued:** April 20, 2000 |

## OPINION AND ORDER ON MOTIONS TO DISMISS

**By Michelle A. Coleman, Administrative Law Judge**

**Synopsis:**

The Board denies Department motions to dismiss two appeals challenging the Department's refusal to order a mining company to restore a water supply. Dismissal would be inappropriate where (1) the standard for determining whether the Department's refusal is an appealable action differs depending on whether a surface mine or underground mine is involved; (2) it is unclear whether the instant appeals involve surface or underground mines; (3) the legislation concerning underground mines could plausibly be construed as affording water supply owners a right to appeal; (4) whether the Department's refusal to order the owner of an underground mine to replace a water supply would be a case of first impression with the Board; and (5) neither of the parties addressed that issue in their filings.

## OPINION

These appeals challenge Department letters sent to John M. Riddle, Jr. (Appellant) in October, 1999, responding to Appellant's requests that the Department compel Hepburnia Coal

Company (Hepburnia) to take certain measures to improve his well water. In September of 1998, Appellant contacted the Department, asserting that Hepburnia's mining activity had compromised his water supply. (Motions and responses, ¶¶ 3 and 4.) After investigating Appellant's complaint and finding that Hepburnia's mining had harmed Appellant's well, the Department directed Hepburnia to clean the well. (Motions and responses, ¶¶ 5; Miller affidavit ¶ 5.) Hepburnia did so in April of 1999, removing over 20 feet of sediment from the well. (Motions and responses, ¶¶ 5; Miller affidavit ¶ 5.) Afterwards, however, Riddle again contacted the Department and complained that the quantity and quality of his well water remained inadequate. (Motions and responses, ¶¶ 6; Miller affidavit, ¶ 6.) The Department investigated Appellant's complaint—among other things inspecting the well on September 21, 1999—but ultimately determined that Hepburnia had restored the well to its premining condition. (Motions and responses, ¶¶ 7 and 8; Miller affidavit, ¶¶ 7 and 8.) Accordingly, on October 14, 1999, Charles E. Miller (Miller), a hydrogeologist with the Department, sent Appellant a letter stating that the Department would not direct Hepburnia to take any further action concerning his well. (Motions and responses, ¶¶ 8; Miller affidavit, ¶ 8.) The letter also informed Appellant that he could request an informal review of the Department's decision, and laid out the procedure for making such a request. (Motions and responses,. ¶¶ 9; Miller affidavit, ¶ 9.) Appellant failed to request an informal review. (Motions and responses, ¶¶ 10; Miller affidavit, ¶ 10.) On November 8, 1999, however, Appellant filed an appeal of the Department's October 14, 1999, letter. The Board docketed that appeal at EHB Docket No. 99-226-C.

On November 10, 1999, Appellant filed another appeal with the Board. It challenged an October 19, 1999, letter from Michael W. Smith (Smith), the Department's District Mining Manager. Like Miller's letter before it, Smith's letter explained that the Department concluded

that Hepburnia had restored Appellant's well to its premining condition, and therefore the Department would not direct Hepburnia to take any further action concerning the well. The Board docketed Appellant's appeal of this letter at EHB Docket No. 99-227-C.

On January 7, 2000, the Department filed motions to dismiss both appeals, together with supporting memoranda of law. Appellant filed responses and memoranda in opposition on February 1, 2000. The Department filed replies to the responses on February 16, 2000.

The motion, memoranda, and replies filed by the Department in each of the two appeals are virtually identical. The same is true of Appellant's responses and memoranda in opposition. The Department contends that this appeal is virtually identical to the one that we dismissed in *Ridenour v. DEP,* 1996 EHB 928, and argues that the letters are not appealable actions because (1) the Department's refusal to order the mining company to improve the well falls within the Department's prosecutorial discretion; and (2) the letters did not direct Appellant to take specific action. Appellant argues that the letters are appealable actions and, consequently, that the Board has jurisdiction over his appeals.

The Board will grant a motion to dismiss where there are no material issues of fact in dispute and the moving party is entitled to judgment as a matter of law. *See Smedley v. DEP,* 1998 EHB 1281, 1282. We will not grant the Department's motions because, for the reasons that follow, it is unclear that the Department met this standard.

The legislation governing the replacement of water supplies compromised by mining activities sets forth different standards for what constitutes an appealable action, depending on whether a surface mine or underground mine is involved. Section 4.2(f)(4) of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, *as amended*, 52

P.S. §§ 1396.1-1396.19a. (Surface Mining Act), 52 P.S. § 1396.4b(f)(4), contains the standard for surface mines. It provides:

> An *operator or owner aggrieved by the secretary's order* [that it replace a water supply pursuant to section 4.2(f) of the Surface Mining Act] shall have the right ... to appeal to the Environmental Hearing Board.

(Emphasis added.) Section 5.2(k) of the Bituminous Mine Subsidence and Land Conservation Act, Act of April 27, 1966 (1st Sp. Sess.), P.L. 31, *as amended*, 52 P.S. §§ 1406.1-1406.20a (Bituminous Mine Subsidence Act), 52 P.S. § 1406.5b(k), which applies to underground mines, allows a wider array of appeals:

> Any *landowner, water user* or mine operator aggrieved by an order *or determination* of the department issued under this section [§ 5.2(k) of the Act, regarding the restoration of water supplies under the Bituminous Mine Subsidence Act] shall have the right to appeal such order to the Environmental Hearing Board....

(Emphasis added.)

It is unclear from the record whether Hepburnia's mine—the mine alleged to have compromised Riddle's well—is a surface or underground mine. Therefore, when determining whether the letters Riddle challenges are appealable actions, we do not know whether to employ the standard relating to surface mines or the one relating to underground mines.

We could, perhaps, simply assume that the mine is an underground mine for purposes of ruling on the Department's motion (since the criteria for appealable actions are broader for underground mines, and all doubts in a motion to dismiss must be resolved against the moving party). We are reluctant to do so here, however, for two reasons. First, the Board has not previously construed what constitutes an appealable action for purposes of section 5.2(k) of the Bituminous Mine Subsidence Act. Second, the parties did not address this issue in their filings,

so the Board would be forced to resolve the question without the benefit of well developed arguments on both sides of the issue.

Therefore, rather than resolving the precise issue of whether the Department's refusal is an appealable action under section 5.2(k) of the Bituminous Mine Subsidence Act, and creating precedent on that issue in a case that may well involve a surface mine, we think that it is sufficient here to note that section 5.2(k) could *plausibly be construed* as affording a water supply owner a right to appeal a Department refusal to order a mining company to restore a supply allegedly compromised by underground mining. Section 5.2(k) provides a "water user" can appeal a "determination" of the Department if he is aggrieved by it. It is difficult to conceive of how a water user could be aggrieved by the Department's determination regarding a water supply restoration decision unless he could assert that the Department should have taken some action that it did not.

Furthermore, the reference in section 5.2(k) to appeals of a "determination" of the Department is important. The Department argues that the letter cannot be an appealable action because it did not require Appellant to take specific action. However, a "determination" of the Department does not necessarily require that an individual undertake specific action. In all of the various acts authorizing appeals to the Board, only one other provision refers to appeals of a Department "determination." That reference appears in section 1(b)(2) of the Run-of-the-River Dam Act, Act of June 18, 1998, P.L. 702, 30 Pa. C.S.A. §§ 3510-3512 (Run-of-the-River Dam Act), 30 Pa. C.S.A. § 3510(b)(2). Significantly, "determination" is used there to refer to Department letters informing persons that the Department considers their dam to be a run-of-the-river dam. There is no requirement that the letters require the recipients to take any action for the Board to have jurisdiction should the dam owner appeal the Department's classification.

We also disagree with the Department that *Ridenour v. DEP,* 1996 EHB 928, is controlling here. In *Ridenour*, a well owner complained to the Department that a company's mining activities had compromised her water supply. *Id.* She asked the Department to direct the company to restore her well, and when the Department sent her a letter refusing her request, she appealed the letter to the Board. *Id.* at 929. The Board granted a Department motion to dismiss, holding that the Department's refusal to direct the company to restore the well was not an appealable action. *Id.* at 929-30.

It is unclear whether *Ridenour* is controlling here for two reasons. First, the underlying facts here differ from those in *Ridenour*. In *Ridenour,* the Department never ordered the mining company to take any remedial action regarding the appellant's well. The Department just issued her a letter stating that it would not require the company to take any remedial action. Here, by contrast, the Department did order the mining company to take remedial measures. Appellant simply contends that the mining company's remediation did not go far enough, and he is appealing the Department's letter informing him that it would not require the Hepburnia to take any further remedial measures.

Second, it is not clear that the instant appeal involves the same type of mine as that involved in *Ridenour*. Since the standard for what constitutes an appealable action turns on the type of mine involved, and it is not clear that the mine involved in the instant appeal is the same type as that involved in *Ridenour*, it is unclear whether the standard applied in *Ridenour* should also apply here. That doubt must be resolved in favor of Appellant, since he is the non-moving party. As noted previously in this opinion, when ruling upon a motion to dismiss we must resolve all doubts in favor of the non-moving party.

Accordingly, we enter the following order:

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

| | | |
|---|---|---|
| **JOHN M. RIDDLE, JR.** | : | |
| | : | |
| **v.** | : | **EHB Docket Nos. 99-226-C** |
| | : | **99-227-C** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**ORDER**

AND NOW, this 20th day of April, 2000, it is ordered that the Department's motions are **denied**.

**ENVIRONMENTAL HEARING BOARD**

**MICHELLE A. COLEMAN**
**Administrative Law Judge**
**Member**

**DATED:** April 20, 2000

**c:** **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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Southcentral Regional Counsel

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SECRETARY TO THE BOAR

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| **AINJAR TRUST, JOHN O. VARTAN, TRUSTEE** | : | |
| **v.** | : | **EHB Docket No. 99-248-K** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MCNAUGHTON COMPANY** | : | **Issued: April 27, 2000** |

## OPINION AND ORDER ON MOTION TO DISMISS

**By Michael L. Krancer, Administrative Law Judge**

**Synopsis:**

The Board denies Intervenor Appellee's Motion to Dismiss for lack of jurisdiction. This is a third party appeal filed on December 13, 2000 by Ainjar Trust from DEP's granting of a Sewage Facilities Plan Revision to Susquehanna Township to accommodate a prospective residential development of Intervenor McNaughton Company. Susquehanna Township was served by Ainjar Trust with the Notice of Appeal on February 3, 2000. Intervenor McNaughton moved to dismiss arguing that the Board does not have jurisdiction over this appeal because Appellant Ainjar did not serve the recipient of the Department's action, Susquehanna Township, with the Notice of Appeal concurrent with or prior to the filing of the Notice of Appeal as stated in Board Rule 1021.51(g)(3). Board Rule 1021.51(g)(3), requiring a third party appellant to serve its Notice of Appeal on the recipient of the Department's action concurrent with or prior to filing its Notice of Appeal with the Board, is not jurisdictional. Lack of service of the Notice of

Appeal prior to or concurrently with the filing of the Notice with the Board does not preclude the Board's jurisdiction.

## OPINION

### I. Factual and Procedural Background

This matter was initiated with the December 13, 1999 timely filing of a Notice of Appeal by the Ainjar Trust, John O. Vartan Trustee (Ainjar). Ainjar challenged the Department of Environmental Protection's ("Department" or "DEP") November 15, 1999, approval of Susquehanna Township's proposed Official Sewage Plan revision. *See* 35 P.S. §750.5, the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1-750.20a, § 750.5 (Sewage Facilities Act). Under Board Rule 1021.51(g)(3), Susquehanna Township was the "recipient of the [Department's] action." *See* 25 Pa. Code § 1021.51(g)(3).

The McNaughton Company ("McNaughton") is the owner and developer of a prospective residential development to be located in Susquehanna Township known as Margaret Grove. Margaret Grove is the subject of the Official Plan revision at issue in this case. The background of this matter is discussed in more detail in our January 31, 2000 opinion and order granting McNaughton's petition to intervene. *Ainjar Trust v. DEP*, EHB Docket No. 99-248-K slip op. (opinion issued January 31, 2000).

On February 2, 2000, the Board conducted a status conference call with the parties, DEP, Ainjar and McNaughton. It was noted that Ainjar had not served its Notice of Appeal on Susquehanna Township. The next day, February 3, 2000, Ainjar served its Notice of Appeal, as well as all other filings and orders in the case as of that date, on Gary Myers, Township Manager for Susquehanna Township. On March 3, 2000, the Board issued a Rule to Show Cause why the

caption of the appeal should not be amended to add Susquehanna Township as a party. The Rule was returnable in writing to the Board on or before March 10, 2000. Ainjar did not file a response to the Rule. On March 7, 2000, DEP filed its Response to the Rule stating that the "Department does not object to the issuance of such a rule." On March 10, 2000, McNaughton filed simultaneously its response to the Rule and a Motion to Dismiss. The Motion to Dismiss and brief in support thereof argues that the Board lacks jurisdiction over this appeal because of Ainjar's failure to have served Susquehanna Township in a timely manner. In particular, McNaughton argues that that the Board lacks jurisdiction over Ainjar's appeal because Ainjar failed to comply with Board Rules 1021.51(g)(3) and (i). 25 Pa. Code §§ 1021.51(g)(3) and (i). McNaughton' s Response to the Rule states that if the Board denies McNaughton's Motion to Dismiss, then it would have no objection to adding Susquehanna Township as a party. Both Ainjar and DEP filed a brief in response to the McNaughton filing. Ainjar opposes the Motion and DEP's short response states that it does not oppose McNaughton's Motion to Dismiss. McNaughton filed a reply brief and the matter is now ripe for disposition.

## II. Legal Analysis

### A. Motion to Dismiss Standard

"The Board evaluates Motions to Dismiss in the light most favorable to the non-moving party." *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925 (citing *Tinicum Township v. DEP*, 1996 EHB 816, 821; *Solar Fuel Co., Inc. v. DER*, 1994 EHB 737, 741). "Moreover, the Board will grant a Motion to Dismiss only when there are no material factual disputes and the moving party is entitled to judgment as a matter of law." *Borough of Chambersburg*, 1999 EHB at 925 (citing *Wheeling and Lake Erie Railway v. DEP*, 1999 EHB 293, 295 (citing *Smedley v. DEP*, 1998 EHB 1281, 1282)).

B. **McNaughton's Arguments for Dismissing Ainjar's Appeal**

McNaughton reads the rule regarding the timing of service of the Notice of Appeal on the recipient of DEP's action as operating the very same way as the rule requiring the appellant to file the Notice of Appeal within the 30 day time frame from receipt of notice of the DEP action. The essence of McNaughton's argument is that Board Rules 1021.51(g)(3) and (i) are jurisdictional and that any failure to adhere to those rules in any respect renders this Board without jurisdiction. Board Rules 1021.51(g)(3) and (i) provide as follows:

> **§ 1021.51. Commencement of Appeal**
>
> (g) Concurrent with or prior to the filing of a notice of appeal, the appellant shall serve a copy thereof on each of the following:
>
> * * *
>
> (3) In a third party appeal, the recipient of the action. The service shall be made at the address set forth in the document evidencing the action by the Department or at the chief place of business in this Commonwealth of the recipient.
>
> * * *
>
> (i) Appellant shall provide satisfactory proof that service has been made as required by this section.

25 Pa. Code §§ 1021.51(g)(3) and (i). McNaughton's view is that despite the fact that Ainjar did file its Notice of Appeal with the Board in a timely manner this Board has no jurisdiction over this appeal because Ainjar did not serve its Notice of Appeal on the recipient of the DEP action, Susquehanna Township, concurrently with or prior to filing the Notice of Appeal with the Board. McNaughton supports its reading of the Rules and its view that the Board, under the circumstances here, has no jurisdiction with five bases or theories. Its supporting theories or rationales can be capsulized as follows: (1) all of the requirements of Board Rule 1021.51 are mandatory for jurisdiction to attach; (2) Board Rule 1021.51(h) renders Rule 1021.51(g)(3)

jurisdictional[1]; (3) the commentary in the *Pennsylvania Bulletin* to the 1998 amendments to Board Rule 1051 reveal that the rule regarding the timing of service on the recipient of the DEP action is intended to be jurisdictional; (4) Ainjar's failure to amend its Notice of Appeal pursuant to Board Rule 1021.53 prevents jurisdiction from attaching; and (5) Ainjar's late service of its Notice of Appeal on Susquehanna Township has prejudiced McNaughton's interest.

C. **Disposition of McNaughton's Arguments**

Our review of Board precedent in conjunction with the recent amendments to Rule 1021.51 convince us that the Rule regarding service on the recipient of the DEP action is not jurisdictional in the same sense as the Rule requiring the appeal to be filed within 30 days of the appellant's notice of the DEP action under appeal. The Board has held under a closely related prior version of its Rules that the Rule relating to Appellant's service of the Notice of Appeal on the recipient of DEP's action is not a jurisdictional matter in the sense McNaughton urges upon us now. *See Czambel v. DER*, 1980 EHB 508, 511; *Sheesley v. DER*, 1981 EHB 588, 589; *Kemerer v. DER*, 1983 EHB 276, 279-80; *McCutcheon v. DER*, 1988 EHB 1114, 1116-17. Moreover, our review of the amendments to the Rules and the commentary thereon convince us that the amendments to the Rules did not effectuate a change in that regard.

The case which forms the starting point on the development of this issue is actually supportive of McNaughton's point of view. In *Allegheny River Protective Association, Inc v. DER*, 1975 EHB 253, the Board held that failure to serve the recipient of the DEP action under the Rules in effect at that time was jurisdictional. There, Allegheny River Association (ARPA) appealed DER's reinstatement of Elmerton Lime Stone Company's (ELSC) suspended permit. *See id.* ARPA failed to serve the permittee ELSC with its Notice of Appeal. *See id.* The Board

[1] Board Rule 1021.51(h) provides: "[t]he service upon the recipient of an action as required by this section, shall subject the recipient to the jurisdiction of the Board as a party." 25 Pa. Code § 1021.51(h).

held that under the Board's Rules, service of the Notice of Appeal by ARPA on the permittee within 48 hours was jurisdictional and ARPA's failure to do so required the Board to quash and dismiss the appeal for lack of jurisdiction. *See id.* at 258, 260. The Board's rules regarding service on the permittee were codified at 25 Pa. Code §§ 21.21(b) and (d), and provided in pertinent part as follows:

> (b) The Appeal shall be filed in duplicate with the Environmental Hearing Board.
>
> The Appellant shall, within 48 hours after filing an Appeal, serve a copy of the appeal [sic] on the officer of the Department or the local agency issuing the Order and on the Bureau of Administrative Enforcement . . . . Where the Appeal is from the granting of a permit, an additional copy shall be served upon the recipient of the permit.
>
> * * *
>
> (d) Failure to comply with this section shall be a sufficient basis for dismissing the Appeal. The action of the Department or local agency shall be final as to any person who fails to file an appeal or to perfect an appeal pursuant to this section.

The Board placed significant emphasis on subsection (d) in reaching its holding: "By distinguishing between filing and perfection, it is clear beyond doubt that the second sentence in §21.21(d) [sic] of the rules requires compliance with all provisions of §21.21 [sic]." *See id.* at 258.

However, by the time the Board dealt with the issue again in *Czambel v. DER*, 1980 EHB 508, the Rules had changed and so did the outcome. In *Czambel*, the appellant filed a skeleton appeal on September 8, 1980 of DEP's granting to Independent Enterprises, Inc. of a permit to construct and maintain a culvert in a stream.[2] *Id.* at 508. The appeal was filed with the Board safely within the 30 day window for appeal. The appellant, however, did not serve Enterprise

[2] A "skeleton appeal" is an appeal that is filed on time, i.e., within the 30 day time period for appeal but is not perfected meaning that a particular piece or pieces of information are missing from the filed papers. The amendments to the Board's Rules in 1998 did away with the concept of a "skeleton appeal". *See* 28 Pa. Bull. 807-808. We will have more to say about the 1998 Rules amendments later.

with a copy of the Notice of Appeal until October 4, 1980. Enterprise moved to quash the appeal on several grounds including the fact that the Notice of Appeal was served on Enterprise more than 10 days after the Board had received the Notice of Appeal. *Id.* at 508-09.

Importantly, Rule 21.21(d) which had been central to the Board's analysis in *Allegheny River Protective Association* was no longer in effect. The *Czambel* Board's analysis focused on Rules 21.51(f) and 21.52(a) and (b). Rule 21.51 provided in pertinent part:

> (f) Within 10 days after filing the notice of appeal, the appellant shall serve a copy thereof on each of the following:
> (1) The office of the Department issuing the notice of Departmental action.
> (2) The Bureau of Litigation . . . .
> (3) Where the appeal is from the granting of a permit, license, approval or certification, the recipient thereof.
> (g) The service upon the recipient of a permit, license, approval, or certification as required by this section, shall subject such recipient to the jurisdiction of the Board as a party appellee.

25 Pa. Code § 21.51. Rule 21.52(a) provided:

> Except as specifically provided in §21.53 [sic] of this title (relating to appeals *nunc pro tunc*), jurisdiction of the Board shall not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within the 30 days after the party appellant has received written notice of such action or within 30 days after notice of such action has been published in the *Pennsylvania Bulletin* unless a different time is provided by statute, and is perfected in accordance with subsection (b) of this section.

Under subsection 21.52(b), no third party appeal was perfected until the recipient had been served with the Notice of Appeal in accordance with Rule 21.51. The Board noted that "the Rules do not specify any fixed time period (akin to the 30-day time period for filing) within which an appeal must be perfected in order that jurisdiction may attach." *Id.* at 510.

The Board reasoned that Board Rule 21.52(a) in conjunction with the other Rules instructed that Czambel's not serving the Notice of Appeal on Enterprise within the 10 day

period referenced in Rule 21.51(f) did not result in the Board's not having jurisdiction over the appeal. In other words, while filing the appeal within the 30 day window was jurisdictional, serving the recipient of the action within the 10 day period was not. Commenting on Enterprise's argument, the Board stated that :

> The language of Section 21.21(d) of the former Rules has been dropped from the present Rules, however. Consequently, it is the plain meaning of the present Rule 21.52(a) that failure to perfect the appeal within ten days after filing the appeal, by serving a notice of appeal on permittee, does not have the board's jurisdiction over the appeal (sic).

*See* id. at 511. [3]

The central holding of the *Czambel* decision regarding service on the recipient of the DEP action as not being jurisdictional has been reaffirmed by this Board in subsequent cases. *See Sheesley v. DER*, 1981 EHB 588, 589 (holding "With regard to DER's first argument, we hold our opinion in . . .*Czambel* . . .to be controlling. As we stated in that matter, the requirements of 25 Pa. Code 21.51(f)(3) are not jurisdictional. Once an appeal has been filed

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[3] Once the Board determined that it had jurisdiction over the appeal it next determined whether it "should" take jurisdiction. *See id.* The Board stated that whether it should take jurisdiction:

> depends on whether the interval between filing of the appeal and its perfection has been unreasonably long. This standard, applicable in circumstances when (as in the Board's present Rules) there is no fixed time limit within which the appeal must be perfected, has been articulated by our Supreme Court in several analogous cases.

*Id.* at 511-12 (citations omitted). The *Czambel* Board held that the appellant's service of his Notice of Appeal 16 days after it filed its appeal with the Board was not unreasonable and it therefore denied the permittee's Motion to Quash the appeal. *See id.* at 512. Importantly, this "prejudice" analysis is a different question from whether the Board has jurisdiction in the first place. This analysis focuses on whether the delay by the Appellant in effectuating service creates such prejudice that, even though the Board has jurisdiction over the case, it would be unfair to allow the case to continue. As we discuss at the end of this opinion, that is not an issue which is involved in our disposition of this case.

with this board within the 30-day limit set forth in 25 Pa. [sic] 21.51(a) the jurisdiction of this board attaches."); *Kemerer v. DER*, 1983 EHB 276, 279-80 (holding "[T]his board has ruled in the past the ten day requirement of 25 Pa. Code §21.51(f)(3) [sic] is not a requisite for perfecting the appeal; the only essential requirement for perfection of the appeal is service of the notice of appeal on the permittee. [citing] [*Czambel v. DER*]; *McCutcheon v. DER*, 1988 EHB 1116-17 (holding "[*Czambel*]. . .held that the 10-day provision for serving the permittee is no longer jurisdictional. The Board ruled that, while 25 Pa. Code §21.52(a) [sic] requires the appeal to be filed within 30 days and to be perfected in order to invoke the Board's jurisdiction, the perfection will be sufficient if it occurs within a reasonable time after the filing.")

McNaughton points out that the Board's Rules have been amended again since *Czambel* and the subsequent cases which have cited *Czambel*. McNaughton's brief states that Rule 1021.52(b) was amended in 1998 to remove the requirement that the appeal be "perfected." The requirement for perfection, states McNaughton, was removed in lieu of provisions permitting amendment of an appeal and allowing the appellant to remedy any failure to meet the formal requirements for the content of appeals in response to a written demand by the Board. Rule 1021.52(b) now provides that, "the appellant shall, within 20 days of the mailing of a request from the Board, file any missing information required by § 1021.51(c), (d) and (i) or suffer dismissal of the appeal." 25 Pa. Code § 1021.52(b). 1021.51(c) states that the appeal shall set forth the name, address, and telephone number of the appellant; 1021.51(d) provides that if the appellant has received written notification of the DEP action being appealed that a copy of the action is to be attached to the appeal; and 1021.51(i) provides that the appellant shall provide satisfactory proof that service has been made as required by this section. McNaughton cites to the commentary to this aspect of the Rules amendments as follows:

> In the event the appeal should fail to meet some formal requirement of § 1021.51, the appellant may remedy any such failure upon notice from the Board or as a result of a motion filed by an opposing party. Of course, failure to effect or provide proof of service on the Department would be ground for dismissal of the appeal.

28 Pa. Bull. 808.

McNaughton argues that the Rules changes and the commentary cited compel the conclusion that failure to serve the recipient of the DEP action within the 20 days is jurisdictional. McNaughton also argues that from the Rules changes and the cited commentary thereon "[i]t follows that, in third-party actions, failure to effect or provide proof of service on the recipient of the Department action would be ground for dismissal of the appeal." We disagree with both points.

We find it quite significant that the commentary did not state that the Rules amendment reversed the *Czambel* line of cases. Indeed, no commentary to any of our Rules changes which have in any way related to service of third party appeals on the recipient of the DEP action has mentioned that a change in the status of *Czambel* is being accomplished.[4] Thus, we will not conclude that the Rules changes effectuated such a reversal. As to the second point, we do not find that McNaughton's argument compels the conclusion that the Board has no jurisdiction in this case. The commentary treats service on DEP, not service on the recipient of the DEP

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[4] By this reference we mean the following changes to our Rules. The changes effectuated on September 9, 1995 which made no changes to the substance of the relevant rules but moved them from 25 Pa. Code §§ 21.51 and 21.52 to 25 Pa. Code §§ 1021.51 and 021.52. *See* 24 Pa. Bull. 4354 (proposed) and 25 Pa. Bull. 3823-3835 (final). The Rules changes of September 19, 1998 to which McNaughton makes reference which, among other things, changed the 10 day requirement for service of the Notice of Appeal by the Appellant on the recipient of the DEP action to the current requirement that the service be accomplished "[c]oncurrent with or prior to the filing of the notice of appeal" now in 25 Pa. Code § 1021.51(g)(3). *See* 28 Pa. Bull. 807-816 (proposed) and 28 Pa. Bull. 4714-4723 (final). Finally, the Rules changes promulgated on September 4, 1999 which, among other things, provided for where service was to be accomplished on the recipient of DEP's action and providing that an appellant shall within 20 days of the mailing of a request from the Board to do so to file any missing information. *See* 29 Pa. Bull. 1074-1085 (proposed) and 29 Pa. Bull. 4683-4694 (final).

action. Also, even granting the possibility that the theme of the commentary can be extended to include service on a recipient of the DEP action as well as service on DEP itself as urged by McNaughton, the cited commentary deals with cases in which there is a *failure* to provide proof of service; here there has been service and proof thereof provided. Moreover, the reference to dismissal in both the Rule and the commentary are not specifically denoted as meaning that the dismissal in such a case is a function of the Board's not having jurisdiction.[5]

We believe that we could conclude here but since McNaughton has argued a few other points we will briefly discuss them. McNaughton argues that the "requirements of Board Rule 1021.51 are *mandatory* requirements for properly commencing an appeal before the Board and have repeatedly and consistently been held to be necessary for Board jurisdiction to attach." (McNaughton's Brief at 4). McNaughton's argument seems to be that since some sections of Rule 1021.51 are jurisdictional then so are all of its subsections. McNaughton specifically references subsections 1021.51(a) and (f) as two subsections that are jurisdictional and therefore render the entire section 1021.51 jurisdictional. Those Board Rules provide:

> **§ 1021.51. Commencement form and content.**
>
> * * *
>
> (a) An appeal from an action of the Department shall commence with the filing of a written notice of appeal with the Board.
>
> * * *
>
> (f) When the appeal is from an assessment of a civil penalty for which the statute requires an appellant to prepay the penalty or

[5] We also note that Judge Coleman is issuing this very day her opinion in *Thomas v. DEP,* EHB Docket No. 98-150-C (slip op. April 26, 2000), which also deals with the issue of whether the "concurrent with or prior to" language of 25 Pa. Code § 1021.51(g)(3), regarding service on the recipient of the DEP action, is jurisdictional such that if service is not accomplished "concurrent with or prior to" the filing of the Notice of Appeal the Board is thus without jurisdiction over the appeal. Judge Coleman's conclusion, like ours, is that service on the recipient of the DEP action "concurrent with or prior to" the filing of the Notice of Appeal is not a *sine qua non* to the Board's jurisdiction.

> post a bond, the appellant shall submit to the Board with the appeal a check in the amount of the penalty or appropriate bond securing payment of the penalty or a verified statement that the appellant is unable to pay.

25 Pa. Code §§ 1021.51(a) and (f).

For the reasons already discussed, we decline to adopt this approach to the interpretation of the Rule. This is not the place to engage in an extended discussion of subsections (a) and (f). Suffice it to say that even granting McNaughton's argument that these subsections are jurisdictional this does not compel the conclusion that all of the other subsections are too. This argument is reminiscent of the parable about the census taker. A census taker is assigned to work a certain village. He knocks on his first door and the person who answers relates that his name is John Jones. The census taker records this information and then goes to the next house. At the second house the person there tells the census taker that his name is John Jones. The census taker thus concludes that everyone in the town is named John Jones and so he goes home. Indeed our analysis undertaken already in this opinion demonstrates that the conclusion McNaughton posits does not necessarily follow from the premise.

McNaughton also argues that Board Rule 1021.51(h) compels the conclusion that Rule 1021.51(g)(3) is jurisdictional. Rule 1021.51(h) reads: "The service upon the recipient of the action as required by this section, shall subject the recipient to the jurisdiction of the Board." This rule defines the affirmative cause and effect relationship between service upon the recipient of the DEP action the recipient thereby becoming subject to the jurisdiction of the Board. Rule 1021.51(h) on its face does not reference Rule 1021(g)(3). Moreover, Rule 1021.51(h) does not on its face affirmatively dictate its related converse that failure to serve the recipient of the DEP action within a 20 day time frame deprives the Board of jurisdiction over either that party or the case as a whole. We say "related" converse because as noted before, McNaughton has been

served and proof of service has been provided. Thus in light of the standards for granting a Motion to Dismiss, we choose not to read Section 1021.51(h) to command the effect on Section 1021.51(g)(3) propounded by McNaughton.

McNaughton also argues Ainjar's failure to correct the lack of service within the 20 days period outlined in Board Rule 1021.53(a) or to proceed to do so after that time period by motion to the Board under Rule 1021.53(b) renders the Board without jurisdiction. Board Rules 1021.53(a) and (b) provide in relevant part: "(a) An appeal may be amended as of right within 20 days after filing thereof; (b) After the 20 day period for amendment as of right, the Board upon motion by appellant, may grant leave for further amendment of the appeal." It appears to us that Board Rule 1021.53 deals with substantive amendments to an appeal and not with service of process.

Finally, in McNaughton's initial brief it seems to argue that it was prejudiced by the late service upon Susquehanna Township. In its reply brief, however, McNaughton states that "[w]hile the issue of whether McNaughton has been prejudiced by Appellant's procedural error is irrelevant, the fact is that McNaughton has been prejudiced". McNaughton then states that the discovery process has been retarded because Susquehanna Township which perhaps should have been a party from the beginning of the case via service of the Notice of Appeal has not been a party. We take McNaughton's reply brief to be a recognition on its part that the issue of prejudice is beside the point of the question as McNaughton has presented it to us, i.e., whether this Board has jurisdiction. The Board either has or does not have jurisdiction over this particular appeal. The outcome of that question is resolved by inquiry into such matters as, for example, was the appeal filed with the Board within the prescribed period of time for appeal or is

the action of DEP an appealable action. As McNaughton recognizes in its reply brief, prejudice is not directly implicated in questions of whether the Board has jurisdiction.[6]

Accordingly, we enter the following order:

[6] Thus, we are not called upon to analyze whether dilatory service has caused a degree of prejudice such that the appeal, despite the Board having jurisdiction, should not be allowed to be maintained. That question is different from whether the Board has jurisdiction. We do not view McNaughton as claiming this to be such a case. While, as mentioned, the initial brief mentions "prejudice" and the reply brief makes reference in a footnote to "prejudice" which really amounts to no more than some inconvenience and difficulty, we do not view McNaughton as attempting to argue that the dilatory service in this case has rendered such prejudice that the appeal should not be allowed to continue.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

| | | |
|---|---|---|
| **AINJAR TRUST,** | : | |
| **JOHN O. VARTAN, TRUSTEE** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 99-248-K** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA,** | : | |
| **DEPARTMENT OF ENVIRONMENTAL** | : | |
| **PROTECTION and McNAUGHTON** | : | |
| **COMPANY** | : | |

**ORDER DENYING MCNAUGHTON'S MOTION TO DISMISS AND**
**AMENDING THE CAPTION**

AND NOW, this 27th day of April, 2000 it is hereby **ORDERED THAT**:

(1) McNaughton's Motion to Dismiss is **DENIED**; and

(2) The caption of this matter is hereby amended as follows, which should be reflected on all future filings with the Board:

| | | |
|---|---|---|
| **AINJAR TRUST,** | : | |
| **JOHN O. VARTAN, TRUSTEE** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 99-248-K** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA,** | : | |
| **DEPARTMENT OF ENVIRONMENTAL** | : | |
| **PROTECTION and SUSQUEHANNA** | : | |
| **TOWNSHIP, Permittee and** | : | |
| **MCNAUGHTON COMPANY, Intervenor** | : | |

**ENVIRONMENTAL HEARING BOARD**

**MICHAEL L. KRANCER**
**Administrative Law Judge**
**Member**

**DATED: April 27, 2000**

**c: DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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SECRETARY TO THE BOA

| | | |
|---|---|---|
| **DAUPHIN MEADOWS, INC.** | : | |
| **v.** | : | **EHB Docket No. 99-190-L** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and UPPER DAUPHIN AREA CITIZENS' ACTION COMMITTEE and SENATOR JEFFREY E. PICCOLA, Intervenors** | : | **Issued: April 27, 2000** |

## OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

**By Bernard A. Labuskes, Jr., Administrative Law Judge**

**Synopsis:**

A guidance document that requires a landfill permittee to prove that the benefits of a landfill expansion clearly outweigh the harms of the expansion constitutes a procedurally defective regulation, not a valid statement of policy. The Department's reliance on the balancing test set forth in the guidance document was improper, thereby necessitating a remand of the permit application for further review that does not rely on the document's balancing test.

## OPINION

This appeal arises from the Department of Environmental Protection's (the "Department's") denial of Dauphin Meadows, Inc.'s ("Dauphin Meadows'") application for a permit to expand its landfill in Upper Paxton Township, Dauphin County. The Department's denial letter states: "The benefits presented in your application do not clearly outweigh the cumulative effect of the known

and potential environmental harms. Therefore, your application is denied, pursuant to Section 102(4) and (10) of the Solid Waste Management Act, 35 P.S. § 6018.102(4) and (10), and 25 Pa. Code §§ 271.127 and 271.201(a)(3)." Although the Department's letter cites statutory and regulatory provisions, it is undisputed that the Department in fact relied upon its "Environmental Assessment Process, Phase I Review" Guidance Document No. 254-2100-101 dated February 7, 1997 (the "Guidance Document"). (*See, e.g.*, Department of Memorandum of Law, pp. 10, 20, 39.) Indeed, the denial letter itself so states. (The letter is attached to the notice of appeal.) Departmental witnesses also testified to that effect. (*See, e.g.*, Permittee Motion, Tab 4, p. 42.) The Guidance Document provides as follows:

> A permit application [for a new or expanded municipal waste facility] will not be approved unless the applicant affirmatively demonstrates that the expected benefit from the facility clearly outweighs the anticipated harm or potential harm.

Because the Department found that Dauphin Meadows had failed the balancing test mandated by the Guidance Document, it did not conduct a technical review of Dauphin Meadows' application.

Both the Department and Dauphin Meadows have filed motions for summary judgment. The Upper Dauphin Area Citizens' Action Committee ("UDACAC") also filed a response to Dauphin Meadows' motion. The parties have raised many issues, but the one that we find to be dispositive is Dauphin Meadows' argument that the Department improperly relied upon the Guidance Document because it is actually an invalid regulation that cannot serve as the basis for the Department's action. The Department counters that it was entirely appropriate for it to rely on the Guidance Document, which it characterizes as a legitimate statement of policy. We grant Dauphin Meadows' motion for summary judgment and remand the permit application to the Department for further review that does

not rely upon what is in effect an invalid regulation.

The Board may grant a motion for summary judgment where the pleadings, depositions, answers to interrogatories, and admissions, together with any affidavits submitted in support, 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. 25 Pa. Code § 1021.73; Pa.R.C.P. 1035.2; *County of Adams v. Department of Environmental Protection*, 687 A.2d 1222 (Pa. Cmwlth. 1997). The record must be viewed in the light most favorable to the nonmoving party. *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995).

If an agency's pronouncement is a regulation, it must be promulgated in accordance with the notice and comment procedures set forth in the Commonwealth Documents Law, 45 P.S. §§ 1102-1602. *R.M. v. Pennsylvania Housing Finance Agency,* 740 A.2d 302, 306 (Pa. Cmwlth. 1999) ("*R.M.*"); *Department of Environmental Resources v. Rushton Mining Co.*, 591 A.2d 1168, 1170-1171 (Pa. Cmwlth.), *allocatur denied*, 600 A.2d 541 (Pa. 1991)("*Rushton Mining*"). The Commonwealth Documents Law establishes a process for issuing regulations that includes public notice of a proposed rule, receiving comments from interested parties, and holding hearings when appropriate. An agency is not required to comply with those procedures, however, when it prepares a statement of policy. *R.M.*, 740 A.2d at 306. It is undisputed that the Guidance Document at issue in this appeal was not promulgated in accordance with the requirements of the Commonwealth Documents Law. Therefore, if the Guidance Document is in reality a regulation, it is invalid.

Another reason why we must determine whether the Guidance Document is a regulation is that the Department does not have the authority to promulgate regulations under the Solid Waste

Management Act. Only the Environmental Quality Board has that authority. 35 P.S. § 6018.105(a). *See generally Concerned Citizens v. Department of Environmental Resources*, 632 A.2d 1, 4 (Pa. Cmwlth. 1993), *petition for allowance of appeal denied*, 642 A.2d 488 (Pa. 1994). It is undisputed that the Department, not the Environmental Quality Board, issued the Guidance Document. Therefore, if the Guidance Document is a regulation, it is invalid for this reason as well.

The issue is dispositive in this appeal. Where, as here, an agency places significant reliance upon a pronouncement in taking a particular action, and the pronouncement proves to be a regulation that was not promulgated by an agency with the authority to do so and consistently with the Commonwealth Documents Law, the agency's action must be overturned. *See Giant Food Stores, Inc. v. Department of Health*, 713 A.2d 177, 181 (Pa. Cmwlth. 1998); *Hillcrest Home v. Department of Welfare*, 553 A.2d 1037, 1042 (Pa. Cmwlth. 1989), *petition for allowance of appeal denied*, 563 A.2d 500 (Pa. 1989); *Newport Homes, Inc. v. Kassab*, 332 A.2d 568, 575 (Pa. Cmwlth. 1975). In other words, an invalid regulation cannot form the basis for the Department's actions.

Insisting that the Department rely upon duly promulgated regulations is not a mere procedural technicality. Aside from the obvious and fundamental importance of ensuring that agencies do not act beyond their authority, it is equally important to mandate compliance with the Commonwealth Documents Law:

> The process by which regulations are issued provides an important safeguard for potentially affected parties against the unwise or improper exercise of discretionary administrative power. This process, which includes public notice of a proposed rule, making a request for written comments by any interested party, giving due consideration to such comments, and holding hearings as appropriate, affords the affected parties a democratic process for participation in the formulation of standards which govern their conduct and

> increases the likelihood of administrative responsivness to their needs and concerns. Moreover, it gives the administrative agency facts and information relevant to the proposed rule, as well as opens up the agency to alternatives, detrimental effects, criticism and advice, thereby contributing to the soundness of the proposed regulation. [citations omitted] Not only is sound regulation promoted by this process, but it increases the likelihood of administrative responsiveness to the needs and concerns of those affected, because it promotes acquiescence in the result, even when the objections of those affected remain the same as to substance.

*Rushton Mining*, 591 A.2d at 1171.

Pennsylvania follows the "binding norm test" in assessing whether an agency's pronouncement is a regulation or a statement of policy. Put simply, if a pronouncement is binding upon the Agency, it is a regulation. *Pennsylvania Human Relations Commission v. Norristown Area School*, 374 A.2d 671, 679 (Pa. 1977), *quoting Pacific Gas & Electric Co. v. F.P.C.*, 506 F.2d 33, 41 (D.C. Cir. 1974). A policy statement merely announces the agency's "tentative intentions for the future." *Id.* The key is the extent to which the challenged pronouncement leaves the agency free to exercise discretion to follow or not follow the announced policy in an individual case. *Rushton Mining*, 591 A.2d at 1173.

In determining whether the pronouncement restricts the agency's discretion, the various Commonwealth Court cases instruct us to consider several factors, including the agency's own characterization of the pronouncement, the pronouncement's plain language, and the manner in which the pronouncement has been implemented by the agency. We may also consider how the agency has treated the requirement in related contexts and the importance of the pronouncement to a particular program. Finally, we consider whether the pronouncement tracks a statute or regulation and explains how that independent legal requirement is to be implemented, or whether the

pronouncement actually imposes an entirely new substantive requirement. *R.M.*, 740 A.2d at 306-307; *Giant Food Stores*, 713 A.2d at 180; *Rushton Mining*, 591 A.2d at 1173; *Hillcrest Home*, 553 A.2d at 1041. The goal of applying these factors is to assess whether the pronouncement is a binding norm. We are not limited to the four corners of the document containing the pronouncement in applying the binding norm test. Rather, we also look to how the agency has conducted itself generally with respect to the pronouncement, and if helpful, similar pronouncements.

With regard to the Department's characterization, the Guidance Document itself includes a disclaimer that reads as follows:

> The policies and procedures outlined in this guidance document are intended to supplement existing requirements. Nothing in the policies or procedures shall affect regulatory requirements.
>
> The policies and procedures herein are not an adjudication or a regulation. There is no intent on the part of the Department to give these rules that weight or deference. This document establishes the framework within which DEP will exercise its administrative discretion in the future. DEP reserves the discretion to deviate from this policy statement if circumstances warrant.

This disclaimer certainly characterizes the Guidance Document as a policy. This characterization is entitled to limited weight. The Department obviously believes that it has created a valid statement of policy, and the disclaimer merely expresses that belief. In cases of this nature, we doubt that we will see many instances where the agency openly characterizes a statement that has not undergone regulatory review as a regulation.

The Department's actions in characterizing the harms-versus-benefits balancing test speak more loudly than its words. The Department itself, working under the auspice of the Environmental

Quality Board, has recognized that such a significant requirement should be a regulation. In 1987, it proposed the requirement as a regulation. 17 *Pennsylvania Bulletin* 2303 (June 13, 1987) (Section 271.201(9) (proposed): "No permit application shall be approved unless the applicant affirmatively demonstrates that [t]he benefits which will result from the proposed activity clearly outweigh the environmental harm which will result from the activity.") The language was deleted from the final regulation, but the very same balancing test has now been reproposed as a regulation. 28 *Pennsylvania Bulletin* 4319 (August 19, 1998). Thus, the Department has recognized at least twice that the balancing test is and should be a regulation.

UDACAC points out that there is nothing wrong with issuing a policy statement that presages formal rulemaking or announces the course which the agency intends to follow. That is quite true. But the agency cannot issue a statement of policy and treat it as a binding norm the moment it is issued simply because the same pronouncement will eventually be contained in a properly promulgated regulation. That is what the Department did here.

Even more significantly, a very similar balancing test is in fact currently included in the regulations. 25 Pa. Code § 271.201(a)(3) states that the need for a solid waste facility must clearly outweigh the potential harm before a permit will be granted. William Pounds, Chief of the Division of Municipal and Residual Waste within the Bureau of Land Recycling and Waste Management, testified at his deposition that the need-versus-harm test was "not working." (Permittee Motion, Tab 2, p. 27-28.) What the Department has unilaterally done, in effect, is revise a regulation that was duly promulgated by the Environmental Quality Board by issuing a policy. "Need versus harm" has been replaced by "benefits versus harm." Here, the Department has not simply issued a regulation where none existing before, it has amended and materially changed an existing regulation without

authority and without undergoing legislatively mandated regulatory review, while at the same time proposing the test as a regulation. This is clearly unacceptable. *See Hillcrest Home*, 553 A.2d 1037, 1041 (attempt to make a substantive change to a regulation via a "clarification" is improper).

The Environmental Quality Board has determined that the harm-versus-benefit test should be a regulation in at least one other context. *See, e.g.*, 25 Pa. Code § 105.16(b)(encroachment with adverse impact on environment not to be approved unless applicant demonstrates benefits outweigh harms). There is no reason apparent to us for treating the balancing test as a regulation in other settings but as mere policy statement for permitting solid waste facilities. In short, while the disclaimer included in the Guidance Document itself characterizes the document as a policy statement, in reality, the Department and the Environmental Quality Board have repeatedly concluded that the balancing test should be a regulation.

The Commonwealth Court also instructs us to review the plain language of the Guidance Document. *R.M.*, 740 A.2d at 317. In applying this factor, we look to the substantive language of the pronouncement as opposed to language that simply characterizes the pronouncement. We find that the Guidance Document is replete with mandatory language when its sets forth the balancing test itself. While some discretionary language regarding the specifics of **how** the test is to be applied is sprinkled throughout the Document, the language addressed to **whether** the test is to be applied allows for no discretion. The Document provides in no uncertain terms that "a permit application **will not** be approved" unless an applicant affirmatively demonstrates that benefits clearly outweigh harms (emphasis added). One will search the Document in vain for any language that tempers the mandatory, nondiscretionary nature of this requirement. In marked contrast, the document does allow for some discretion in how the balancing test is actually applied to a given set of facts. (*E.g.*,

"Need **may be** considered as one kind of benefit (emphasis added).") The imposition of the test itself in all permit reviews, however, is not optional.

The Commonwealth Court also instructs us to review the manner in which the agency's pronouncement is implemented in practice. *R.M.*, 740 A.2d at 307. Here, Mr. Pounds, Keith Kearns, Waste Manager of the Southcentral Regional Office, and Don Korzeniewski, an Environmental Protection Specialist who actually reviewed the permit application, all testified that they viewed the application of the balancing test as mandatory. (Permittee Motion, Tab 2, p. 38, Tab 4 pp. 120-121, Tab 5, pp. 91-92.) Again, the testimony demonstrates that, while there is certainly room for discretion in how the test is implemented and the final result of applying the test, agency personnel are left with no discretion on whether the test must be applied. As such, it is a binding rule of law.

In fact, if this appeal involved a guidance document that merely advised agency personnel how to implement a harm-versus-benefit test contained in a statute or another regulation, our holding could well have been quite different. For example, in *R.M.*, 740 A.2d 302, the Housing Finance Agency Law, 35 P.S. § 1680.404c(a)(5), provided that no emergency mortgage assistance could be granted unless the Pennsylvania Housing Finance Agency (PHFA) determined that there was a reasonable prospect that a mortgager could resume full mortgage payments within 36 months. PHFA adopted a policy statement that listed factors it would consider in determining whether there was a reasonable prospect that the mortgager would be able to resume payments. The court held that the statement was a valid statement of policy, not an invalid regulation, based upon the criteria already discussed throughout this opinion. We believe that it was significant to the Court that PHFA's statement merely instructed its personnel on how to implement a statutory requirement. A

different case would have been presented if PHFA had issued a statement that it would not award relief to persons with no prospect of recovery. Such a fundamentally important, determinative requirement would have needed to be embodied in a statute or regulation. *See also Giant Food Stores*, 713 A.2d at 180 (a legitimate statement of policy **tracks a statute** and does not expand upon its plain meaning). The Guidance Document balancing test is not an interpretive rule; it is an entirely new requirement. As such, it must be set forth in a regulation.

The Department argues that the Guidance Document does not establish a binding norm beyond that which is already contained in the Pennsylvania Constitution and applicable statutes and regulations. First, the Department asserts that the Guidance Documents is merely intended to help its personnel implement Arcticle I, Section 27 of the Pennsylvania Constitution, which reads as follows:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

In *National Solid Wastes Management Association v. Casey*, 600 A.2d 260 (Pa. Cmwlth. 1991), *aff'd per curiam*, 619 A.2d 1063 (Pa. 1993), the Court held that the Governor lacked the authority under Article I, Section 27 to issue an executive order imposing restrictions on municipal waste landfills. 600 A.2d at 265. The executive order essentially constituted legislation that had not undergone the proper procedures. *Id.* To the extent the order might have been considered a regulation, it was not adopted using required rulemaking procedures. The court rejected the Commonwealth argument that the executive order was merely a statement of policy, which would

not have needed to undergo legislative or regulatory procedures. *Id.*

The situation now before us is directly analogous. If Article I, Section 27 does not authorize the Governor to create new waste facility requirements with an executive order, it certainly does not authorize the Department to create a new permitting requirement with a statement of policy. Just as the Governor could not bypass the legislative process by denominating important new requirements as an executive order, the Department cannot bypass the regulatory process by denominating important new requirements as a guidance document.

Article I, Section 27 announces substantive principles; it might possibly serve as the basis or foundation for a statute or a rule, but it does not in any way excuse procedural irregularities in the passage of legislation or the promulgation of rules. Whether Article I, Section 27 would serve as the proper foundation for a harm-versus-benefits balancing test set forth in a duly promulgated regulation is a question whose resolution must await another day.

The Department also cites 25 Pa. Code §§ 271.127 and 271.201(a)(3) as support for the Guidance Document. The Guidance Document, however, goes materially beyond the requirements in these two regulations. Section 271.127 does require an analysis of harms and of benefits, but it does not require a permittee to affirmatively demonstrate that benefits clearly outweigh harms. Indeed, it does not enunciate any balancing test, let alone the stringent showing mandated by the Guidance Document.

As previously noted, Section 271.201(a)(3) contains a different balancing test altogether, which compares the need for a facility with the harm it might cause. The Guidance Document balancing test is a significant expansion, not interpretation, of the § 271.201(a)(3) balancing test. UDACAC points out in its brief that the Guidance Document allowed the Department to consider "a

broader set of 'benefits' than the regulations authorize." (UDACAC Brief p.2, n.1.) The Guidance Document itself lists benefits that go well beyond the consideration of need for the facility (e.g. increased employment, anticipated tax revenues, landfill mining, a new wastewater treatment plant). Need is specifically identified as only "one kind of benefit." In fact, the Department also went so far as to consider the free waste disposal being provided to the local township, Dauphin Meadows' charitable contributions, and its purchase of supplies from local vendors. (Dauphin Meadows Motion, Tab 9.) We are not at this juncture saying this was wrong of the Department; we are simply saying that balancing that considers all benefits is unquestionably broader than balancing that only considers need.

Finally, the Solid Waste Management Act, 35 P.S. § 6018.101 *et seq.*, does not set forth a balancing test that the Guidance Document tracks. We do not accept the Department's argument that the act implicitly contains a balancing test because it was passed after the Commonwealth Court created its own balancing test in assessing whether Departmental actions violate Article I, Section 27 in *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Cmwlth. 1973), *aff'd,* 361 A.2d 263 (Pa. 1976). This connection is too remote and strained to support a conclusion that the Guidance Document tracks a statutory requirement. If this argument were correct, then every judicial decision that predated passage of the act could be used to justify creating binding norms in statements of policy. As with Article I, Section 27, the fact that a policy may help agency personnel implement general principles and may be consistent with a statute does not excuse a detour around the legislatively mandated rulemaking process.

The Department also argues that its interpretation of the Environmental Quality Board's regulations is entitled to "controlling weight." Even in the unlikely event that we were to accept this

proposition as true, it would be irrelevant. We are not questioning the Department's interpretation of a regulation in this opinion. As we have now repeatedly stated, the Guidance Document's balancing test is not an interpretation, it is an entirely new requirement. Furthermore, we are not holding that the balancing test can never be applied. We are simply holding that, if it is to be incorporated into a binding pronouncement, it must be in a published regulation.

Here, the harm-versus-benefit test is not embodied in any statute or in a regulation. The Department has not simply listed factors to be considered when implementing a regulatory requirement; it has actually imposed a new requirement. The appeal before us demonstrates that the requirement is not only fundamentally important in the review process, it can be determinative. *See Metro Transportation Co. v. PUC*, 525 A.2d 24, 27 (describing a determinative pronouncement as a regulation). Such a binding, potentially determinative mandate should undergo proper regulatory review after promulgation by the proper authorities.

We have no way of knowing whether the Department would have made the same decision in this case had it not relied upon the Guidance Document. The Department does not argue that it would have reached the same conclusion even without the Guidance Document, and even if it had, the current record does not allow for anything more than speculation on that point. We are unable to proceed any further in the appeal without a remand to determine how the Department would have acted had it only relied upon proper authorities.

Dauphin Meadows asks us to remand for a technical review that bypasses any further balancing analysis. That relief does not necessarily follow from our ruling. As only a sample of the scenarios that might follow our ruling, the Department may decide to shepard a balancing test through appropriate regulatory procedures. The Department must still conduct an environmental

assessment, 25 Pa. Code §§ 271.126 and 271.127, that considers the need for the expansion, 25 Pa. Code § 271.201(a)(3). The Department may believe that other authorities independently justify the use of a harms-versus-benefits balancing test without the interposition of the Guidance Document. We do not care to hazard a guess what other actions may follow our holding and whether those actions will be consistent with the law. Our only holding at this stage is that the Department's future actions may not rely upon the Guidance Document balancing test.

One might hypothesize that, if the department believed that all of the benefits of the landfill expansion do not outweigh its harms, then it will conclude that the need for the facility, which is only one benefit, will not outweigh the harms. Once again, we are not willing to proceed in a case based upon such hypothesis. Further, it is possible that such a revised finding could reverberate through all of the other arguments that have been posed in the appeal.

It is unnecessary to address the other issues raised in the parties' motions for summary judgment at this time. Some of the issues raised by the parties might at first blush appear to be independent of and unrelated to the regulatory issue discussed in this opinion. This appearance quickly fades. In truth, all of the other issues are related to the central action of the balancing of harms-versus-benefits that took place here. For example, Dauphin Meadows argues that the Department impermissibly mixed the prosecutorial and adjudicatory functions, but it allegedly did so in applying the balancing test. The parties argue about whether the exercise of the balancing test resulted in a taking. Dauphin Meadows argues that it was deprived of due process when it was deprived of the right to participate more fully in a traffic study which formed an integral part of the balancing test. It can readily be seen that even these seemingly unrelated contentions are all wrapped up in the balancing test.

In conclusion, we hold that the Guidance Document constitutes an invalid regulation. The Department improperly relied upon that document in denying Dauphin Meadows' application. We remand the application to the Department for further review and consideration that does not include reliance upon the procedurally defective regulation.

Accordingly, we issue the following Order:

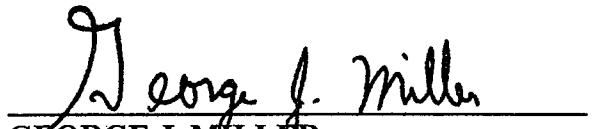
**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

| | | |
|---|---|---|
| **DAUPHIN MEADOWS, INC.** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 99-190-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and UPPER DAUPHIN AREA CITIZENS' ACTION COMMITTEE and SENATOR JEFFREY E. PICCOLA, Intervenors** | : | |

**ORDER**

AND NOW, this 27th day of April, 2000, Dauphin Meadows, Inc.'s motion for summary judgment is GRANTED for the reasons set forth in the foregoing Opinion. Dauphin Meadows' permit application is remanded to the Department for further review that does not rely upon the balancing test set forth in Guidance Document No. 254-2100-101. Jurisdiction is retained.

**ENVIRONMENTAL HEARING BOARD**



**GEORGE J. MILLER**
**Administrative Law Judge**
**Chairman**

**THOMAS W. RENWAND**
**Administrative Law Judge**
**Member**

**MICHELLE A. COLEMAN**
**Administrative Law Judge**
**Member**

**BERNARD A. LABUSKES, JR.**
**Administrative Law Judge**
**Member**

**MICHAEL L. KRANCER**
**Administrative Law Judge**
**Member**

**DATED:** April 27, 2000

**c:** **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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SECRETARY TO THE BOARD

| | | |
|---|---|---|
| **NICKIFOR N. GROMICKO, JR.** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 98-199-MG** |
| | : | **(consolidated with 99-128-MG)** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: April 27, 2000** |

# ADJUDICATION

**By George J. Miller, Administrative Law Judge**

**Synopsis:**

The Board affirms the Department's denial of the Appellant's application for a radon testing certification based on violations in his conduct in performing mitigation services which demonstrate a lack of ability or intention to comply with the Radon Certification Act[1] and its regulations. The Board affirms the Department's civil penalty assessment amount of $14,576 for 30 violations in the installation of mitigation systems at 12 residences based upon the number and seriousness of violations found, the Appellant's negligence in permitting these violations, the potential adverse health consequences to the public resulting from these violations and the Appellant's failure to investigate or correct the violations.

## BACKGROUND

In January of 1998, the Department of Environmental Protection's (Department) Radon

Division received an application from Mr. Nickifor Gromicko, Jr. to become certified to perform radon testing. From 1989 through 1996, Mr. Gromicko and his company, Sunn Radon, had been certified to perform radon testing and radon mitigation work in Pennsylvania. Past complaints and unsatisfactory inspections regarding Mr. Gromicko's work caused the Department to undertake an investigation into Mr. Gromicko's compliance status and compliance history following receipt of Mr. Gromicko's radon testing application. On September 23, 1998, the Department sent to Mr. Gromicko a letter denying his testing certification application (Denial of Certification). The Department's action was based upon, among other things, a determination that Mr. Gromicko had failed to affirmatively demonstrate that he was in compliance with the Radon Certification Act and Chapter 240 of the Department's regulations pursuant to 25 Pa. Code § 240.201(a), and that Mr. Gromicko had shown an inability or unwillingness to comply in accordance with the Act or the Department's regulations at 25 Pa. Code § 240.201(b).

On May 20, 1999, the Department sent to Mr. Gromicko a Proposed Civil Penalty Assessment. On June 1, 1999, following Mr. Gromicko's refusal to discuss or negotiate the Proposed Civil Penalty, the Department issued to Mr. Gromicko a Civil Penalty Assessment. (N.T. 194-195; Ex. C-16) The assessment was issued pursuant to Section 2012(a) of the Radon Certification Act, 63 P.S. § 2012(a), Section 308 of the Radiation Protection Act, 35 P.S. § 7110.308(e) and Section 240.402 of the Department's regulations. 25 Pa. Code § 240.402. (Ex. C-17) The Department originally assessed a $17,662 civil penalty for 30 violations at 12 residences.

These proceedings consolidate both the *pro se* appeal from the denial by the Department of the Appellant's application for renewal of his radon testing certificate and an enforcement

[1] Act of 1987, July 9, P.L. 238, 63 P.S. § 2001-2014.

action brought by the Department against the Appellant involving a penalty assessment of $17,662 for improper installation of radon mitigation equipment at residences serviced by the Appellant.[2] At the hearing on the merits held before Administrative Law Judge George J. Miller on October 26, 1999, the Department informed the Board that it had recalculated its civil penalties and requested an affirmance of $14,576.

The record consists of post-hearing and reply briefs filed by both parties, a transcript totaling 291 pages and an excess of 90 exhibits.[3] After a full and complete review of the record, we make the following:

## FINDINGS OF FACT

1. The Department is an agency with the duty and authority to administer and enforce the Radon Certification Act, 1987, July 9, P.L. 238, No. 43, 63 P.S. §§ 2001-2014; the Radiation Protection Act, 1984, July 10, P.L. 688, No. 147, 35 P.S. §§ 7110.101-7110.703; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §§ 510-517 (Administrative Code); and the rules and regulations (rules and regulations) promulgated thereunder. (Board Exhibit 1, Stipulation of the Parties, ¶ 1)[4]

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[2] In this case, the Board has previously granted the Department's motion to compel discovery and to strike the Appellant's response to the motion. *Gromicko v. DEP*, EHB Docket No. 98-199-MG (Opinion issued August 10, 1999).

[3] In its post-hearing reply brief, the Department contends that the Appellant's post-hearing brief fails to comport with 25 Pa. Code § 1021.116 in that the brief fails to include any suggested findings of fact with references to exhibits and transcript pages, citation to legal authority, or conclusions of law. While this may be true, and despite the fact that the Board has supplied Mr. Gromicko with copies of sample post-hearing briefs, we decline to deny the Appellant's appeal as a sanction for these deficiencies so that we may rule on merits of his claims as authorized by 25 Pa. Code § 1021.4.

[4] Stipulations contained in Board Exhibit 1 are referred to as "Stipulation No. __." References to transcript page citations are referred to as "N.T. __." In light of transcript problems in this appeal, references are to the revised version of the transcript received by the Department's Pittsburgh Office on December 9, 1999. The Board has also been provided with this transcript

2. Appellant Nickifor N. Gromicko, Jr. is an individual with a business address of 501 Eland Avenue, c/o Peach Home Inspections, Phoenixville, Pennsylvania 19460.

The Radon Certification Program

3. In 1987, the General Assembly determined that radon levels in public and private buildings can present a significant health risk to occupants, and passed the Radon Certification Act (63 P.S. § 2001-2014. (Stipulation No. 2) Exposure to radon gas can cause lung cancer in human beings. (Stipulation No. 3)

4. The Radon Certification Act, and regulations promulgated thereunder, 25 Pa. Code Chapter 240, mandates a certification program for individuals and firms engaging in:

a. radon testing services (the examination of buildings for the presence of radon such as the radioactive gas Radon-222 and the short-lived radio nuclides which are products of Radon-222 decay);

b. radon laboratory analyses (the testing of radon concentrations in air, water or soil); and

c. radon mitigation services (the repair or alteration of a building to reduce indoor radon concentrations). (Stipulation No. 5)

5. Firms may become certified to perform radon services so long as radon services performed by the firm are performed under a certified individual's supervision. 25 Pa. Code §§ 240.102(b) (testing) and 240.112(b) (mitigation). The certified individual remains responsible for the proper performance of services by all persons working under his or her supervision. *Id.* (Stipulation No. 6; N.T. 158)

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and the court reporting service has represented that Appellant Gromicko has not ordered a copy of the transcript.

6. The term "radon services" is generally understood to include testing for radon, laboratory analysis of testing devices, and mitigation of radon. Generally, a person may not perform commercial radon services within Pennsylvania unless he/she or the firm for which he/she works has a current certification from the Department. 63 P.S. § 2006. (Stipulation No. 4)

Radon Mitigation

7. Radon gas can migrate into a home from soils beneath the home through spaces or cracks in the foundation. Generally, radon mitigation is recommended where radon levels inside a home exceed EPA guidelines. Radon mitigation typically involves the installation of equipment such as a fan and piping to reduce radon concentrations inside a structure. (Stipulation No. 7; N.T. 127-132)

8. Most commonly, residential radon mitigation systems consist of installed basement piping which draws radon gas from beneath the structure's foundation to an outdoor vent by means of a fan. Such a system is referred to as a "depressurized" system because the fan creates negative pressure or suction beneath the foundation. (Stipulation No. 8)

9. The concentration of radon gas collected from beneath a structure and exhausted through a depressurization system vent is much higher than the concentration of radon gas inside the structure. (Stipulation No. 9) Human health is put at risk when radon gas drawn from beneath a structure is allowed to re-enter the structure through a door or window, or when vented near the ground level. (N.T. 59)

10. In some cases a mitigation system can be a "pressurized" system in which fresh outdoor air is piped to beneath the foundation. (Stipulation No. 10) It is simple to determine whether a residential radon mitigation system is a depressurized or pressurized system when the

fan is operating by feeling the outside vent. If air is being blown out of the vent, the system is a depressurized system, which creates a suction beneath the foundation. If air is being sucked into the vent, the system is a pressurized system, which forces fresh air beneath the foundation. (Stipulation No. 11)

11. Mitigation systems installed in Pennsylvania residences after December 15, 1991 were required by law to conform with detailed installation specifications. 25 Pa. Code § 240.208. From December 15, 1991 through November 30, 1997, mitigation installations were required to conform with the "Radon Contractor Proficiency Program Interim Radon Mitigation Standard" (Mitigation Protocols). (Stipulation No. 12; N.T. 58) Mitigation systems are required by law to be installed in a manner following the Mitigation Protocols even if the homeowner objects to one or more of the installation specifications. (N.T. 59)

12. The Mitigation Protocols specified, among other things, that mitigation systems must be installed:

a. With a monitor or warning device attached and plainly visible to the occupants which would notify the occupants in the event that the system ceased to operate correctly.

b. With labels attached and plainly visible which would identify the equipment as a radon mitigation system, identify the installer by name and telephone number, and identify the power shut-off switch to prevent inadvertent disconnection of the system by the occupant.

c. With discharge vents for depressurized systems located more than a specified distance from the ground, walkways, or re-entry points, such as doors and windows in the mitigated structure or surrounding structures. (Stipulation No. 13)

13. Radon mitigation systems installed in violation of Section 5.4 of the Mitigation Protocols which require a plainly visible mechanism to monitor system performance, present a heightened risk of health dangers to individuals because without a visible monitor, persons inhabiting the structure will be less likely to realize and take corrective action in the event that the mitigation system ceases to function properly. (Stipulation No. 14; N.T. 59, 133-134)

14. Radon mitigation systems installed in violation of Section 5.5 of the Mitigation Protocols, which require placement of an identifying label on the system power or disconnect switch, present a heightened risk of health danger to individuals because without a label, persons inhabiting the structure will be more likely to inadvertently turn off the system, thereby allowing an increase in the levels of radon gas. (Stipulation No. 15) Without proper labeling, a plumber or contractor could mistake radon pipe for plumbing pipe and inadvertently impair the functioning of the system. (N.T. 60-61)

15. Radon mitigation systems installed in violation of Section 5.7 of the Mitigation Protocols which require exhaust vents from depressurization system fans to be ten feet or more above ground level from any window, door or other opening in the structure and from any public or private access present an increased risk of health dangers to individuals because at a lesser distance, elevated concentrations of radon gas are more likely to be breathed by persons on the ground or in the structure. (Stipulation Nos. 16-18; N.T. 59)

Gromicko's Previous Radon Certifications

16. On February 17, 1989, in response to applications, the Department issued to Mr. Gromicko and his company, Sunn Radon Company (also known as Sunn Corporation and hereinafter referred to as Sunn Radon), an individual and firm certification (respectively) to perform radon mitigation services. Mr. Gromicko was the certified individual responsible for

Sunn Radon's radon mitigation services. On or around the same date, a certification to perform radon testing services was issued to Mr. Gromicko as an individual. (Stipulation No. 19)

17. On September 25, 1989, in response to an application, the Department issued to Sunn Radon a firm certification to perform radon testing services. Mr. Gromicko was the certified individual responsible for Sunn Radon's radon testing services. (Stipulation No. 20)

18. On February 3, 1993, in response to applications, the Department issued to Mr. Gromicko and Sunn Radon both individual and firm renewal certifications to perform radon testing and mitigation services in Pennsylvania. (Stipulation No. 21) On March 8, 1995, in response to applications, the Department issued to Mr. Gromicko and Sunn Radon both individual and firm renewal certifications to perform radon testing and mitigation services. (Stipulation No. 22)

19. In each of these applications, Mr. Gromicko represented to the Department that he would be the certified individual responsible for Sunn Radon's proper performance of radon testing and mitigation services, and that such services would be performed in accordance with required standards and protocols. (Stipulation No. 23)

20. Mr. Gromicko's individual testing and mitigation certifications were in effect until March 8, 1997, pursuant to 25 Pa. Code § 240.202. (Stipulation No. 24)

21. Mr. Gromicko was responsible for the proper installation of all radon mitigation systems installed by Sunn Radon and was the sole certified radon mitigation installer in responsible charge of mitigation activities for Sunn Radon from at least December 15, 1991 through at least March 5, 1996. (Stipulation No. 25; N.T. 57-58)

22. On January 8, 1998, Mr. Gromicko submitted an application to the Department's Radon Division to again become certified to perform radon testing. At the time of this

application, Mr. Gromicko was not certified to perform any radon services. (Stipulation No. 26)

23. Because Mr. Gromicko's application represented that he had never received any notices of violation from the Department, and Department personnel knew of some violations, the Department determined that a careful review of Mr. Gromicko's compliance history was appropriate in its review of Mr. Gromicko's 1998 application for certification to perform radon testing. (N.T. 168-176)

24. In a review of a certification application, the Department evaluates the applicant's competency, experience, quality assurance/quality control programs, worker safety programs, compliance status and compliance history. (N.T. 158-159)

25. In its administration of the radon certification program, the Department interprets 25 Pa. Code § 240.201 as:

a. requiring the Department to deny any radon certification application unless the applicant affirmatively demonstrates a satisfactory compliance status in that the applicant has no current and uncorrected violations of the Radon Certification Act or Chapter 240 of the Department's regulations (N.T. 190-192);

b. authorizing the Department to deny certification to a person who has shown an unsatisfactory compliance history, meaning a lack of ability or intention to comply with the Radon Certification Act or Chapter 240 of the Department's regulations based upon the seriousness and repetition of violations, even if all such violations have been previously corrected (N.T. 162, 191-192); and

c. requiring the Department to consider an applicant's compliance status and history with regard to radon mitigation services, even when the application requests certification for radon testing. (N.T. 187-188)

26. Mr. Gromicko admitted that persons who repeatedly install radon mitigation systems in violation of specifications required by law should not be certified by the Department to perform any radon services. (Ex. C-6, Request for Admissions, ¶ 16) The term "radon services" is understood by Mr. Gromicko to refer to both radon testing and radon mitigation services. (N.T. 56)

27. Following Mr. Gromicko's 1998 application for certification for radon testing only, the Department could not as a practical matter evaluate Mr. Gromicko's past compliance with the Radon Certification Act and its regulations by examination of his prior testing services. After a radon test, little physical evidence remains from which to evaluate a tester's compliance with proper procedures. (N.T. 163-164)

28. Mitigation systems previously installed by Mr. Gromicko, however, could be later evaluated for compliance with the radon regulations and mandated Mitigation Protocols in effect at the time of installation by examining the installations made by Mr. Gromicko. The Department therefore began an evaluation of Mr. Gromicko's compliance status and history with the Radon Certification Act and Chapter 240 of the Department's regulations by evaluating his prior radon mitigation work. (N.T. 176-177)

29. Mr. Gromicko was responsible for the proper installation of all radon mitigation systems installed by Sunn Radon, not only between December 25, 1991 and March 5, 1996 (as stipulated by Mr. Gromicko), but also through at least October 10, 1996. Mr. Gromicko confirmed this to Department representative, Mr. Dwight Shearer, at a meeting on October 10, 1996 and never advised the Department that he was no longer in responsible charge for Sunn Radon. (N.T. 387-388, 447) Between March 6 and October 10, 1996, Sunn Radon installed three of the systems listed in the Department's Amended Denial Letter: 121 Avery's Way, 207

Autumn Hill Drive and 716 Reiser Court. (Ex. C-15) The Department did not assess a civil penalty for these systems. (Ex. C-17)

30. Mr. Gromicko's company, Sunn Radon, submitted reports to the Department for residences mitigated by Sunn Radon during its years of certification. In accordance with the Department's regulations, certified mitigators are required to submit data to the Department whenever radon mitigation services are provided. (25 Pa. Code § 240.303; N.T. 177-178) Department clerical staff entered data from the submitted reports in a computer database, pursuant to their employment duties to accurately enter radon service reports and verify the accuracy of the data following entry. After one year, the paper records are recycled. (N.T. 178-180)

31. Using data from mitigation records submitted to the Department by Mr. Gromicko/Sunn Radon as entered in their database, the Department sent a letter to the current occupants of 1,677 homes at which Mr. Gromicko/Sunn Radon had performed mitigation services in Pennsylvania. (N.T. 74-75, 177-183; Ex. C-40) The letter asked the current occupants to answer a few simple questions about the mitigation system in their homes based upon the Mitigation Protocols (*e.g.,* Is the exhaust vent at least ten feet from the ground, doors and windows?) (Ex. C-41)

32. The Department received 453 responses to its questionnaire (a response rate of approximately 25%). (N.T. 184; Ex. C-42) Of these, the majority of the responses indicated that at least some discrepancy existed between their systems and the Mitigation Protocols. Of the 453 responses, 313 (or approximately 70%) documented that their system deviated from the vent, fan or monitor requirements of the Mitigation Protocols, indicating a more serious deficiency than the failure to apply required labels. (N.T. 185)

33. The Department began contacting homeowners whose questionnaire response had indicated a system problem and in June and July of 1998, inspected 29 of these residences. (N.T. 186) These inspections revealed that 28 of the systems installed by Mr. Gromicko/Sunn Radon failed to meet the Mitigation Protocols. (N.T. 187)

34. On September 23, 1998, the Department sent to Mr. Gromicko a letter denying his testing certification application (Denial of Certification). The Department's action was based upon, among other things, a determination that Mr. Gromicko had failed to demonstrate affirmatively that he was in compliance with the Radon Certification Act and Chapter 240 of the Department's regulations pursuant to 25 Pa. Code § 240.201(a), and that Mr. Gromicko had shown an inability or unwillingness to comply pursuant to 25 Pa. Code § 240.201(b). (N.T. 189-192; Ex. C-14)

35. The denial of Mr. Gromicko's application was directed by Michael Pyles, Chief of the Department's Radon Division, and was the first application ever denied by the Radon Division for compliance deficiencies. (N.T. 150, 159)

36. Mr. Pyles' radon work for the Department began in 1984 when the first reported naturally occurring residential radon hazard was brought to the attention of his office and thereby to national prominence. (N.T. 152-155) Mr. Pyles has assisted the U.S. Environmental Protection Agency in the development of the Mitigation Protocols and has headed the Department's Radon Division since 1991. (N.T. 151, 155)

37. On December 16, 1998, Mr. Gromicko testified in deposition that any mitigation system vents observed by the Department which were located less than ten feet from the ground, doors, or windows, were actually fresh air intake vents for pressurized systems rather than discharge vents for depressurized systems, and were therefore exempt from the ten foot set-back

requirements; and that non-compliant monitors, labels and vents had been altered by homeowners between the dates of installation and Department inspection. (Ex. C-4a, p. 243)

38. In January of 1999, Department representatives reinspected and videotaped several homes and confirmed that the vents were discharge vents. This directly contradicts Mr. Gromicko's assertion that the mitigation system vents were intake vents and as such were exempt from the set-back requirement. (Ex. 44) The Department also inspected an additional ten residences from the list of questionnaire respondents. The Department confirmed that systems installed by Sunn Radon at the additional homes were also in violation of the Mitigation Protocols. (N.T. 194-195)

39. On February 12, 1999, the Department issued an Amended Denial of Radon Testing Certificate (Amended Denial) adding violations of the Mitigation Protocols at ten more residences to its basis for the denial action. (Ex. 15) The Department also removed seven homes from the list of violations set forth in the Denial of Certification because it turned out that the systems in these homes had been installed prior to December 15, 1991 when the specifications in the Mitigation Protocols were merely advisory and not mandatory. (N.T. 193-195) The Department's denial of Mr. Gromicko's application was based on 58 separate violations at 31 residences. (Ex. 15)

40. On May 20, 1999, the Department sent to Mr. Gromicko a Proposed Civil Penalty Assessment. On June 1, 1999, following Mr. Gromicko's refusal to discuss or negotiate the Proposed Civil Penalty, the Department issued to Mr. Gromicko a Civil Penalty Assessment. (N.T. 194-195; Ex. C-16) The assessment was issued pursuant to Section 2012(a) of the Radon Certification Act, 63 P.S. § 2012(a), Section 308 of the Radiation Protection Act, 35 P.S. § 7110.308(e) and Section 240.402 of the Department's regulations. 25 Pa. Code § 240.402. (Ex.

C-17) The Department assessed a $17,662 civil penalty for 30 violations at 12 residences.

41. Neither Mr. Gromicko's Notice of Appeal of the Civil Penalty Assessment nor his Pre-Hearing Memorandum raise any challenge to the reasonableness of the amount of the Civil Penalty Assessment.

Gromicko's Responsibility for 58 Violations at the 31 Residences

42. Sunn Radon installed the radon mitigation systems in the 31 residences listed in the Department's Amended Denial Letter, including the 12 residences also listed in the Department's Civil Penalty Assessment.

43. Owners of nine of these systems testified in deposition that they either recognized photographs of Mr. Gromicko (Ex. C-48, C-60) or had kept invoices and/or promotional materials from Sunn Radon. (Ex. C-43, C-50, C-52, C-62, C-64, C-79, C-91)

44. On the day the homes listed in the Amended Denial letter were inspected by Department representatives (in 1998 and 1999), the radon mitigation systems in these homes were not in compliance with the Mitigation Protocols. The aspects of non-compliance are accurately described in the Department's Amended Denial Letter. (Stipulation No. 29)

45. The systems at all 31 residences were sub-slab suction systems when originally installed by Sunn Radon for which discharge vents must by law be more than ten feet from doors, windows or the ground. Data submitted to the Department by Sunn Radon establishes that these systems were suction systems when originally installed by Sunn Radon. (Ex. C-40)

46. In April and May, 1999, following notice to Mr. Gromicko and an opportunity to attend, the Department deposed homeowners from the 12 residences set forth in the Civil Penalty Assessment. All of these homeowners testified under oath that no alterations of the radon mitigation systems in the residences had been made during their occupancy of the homes

between the date of system installation and the date of Department inspection. (Ex. C-45, C-47, C-48, C-50, C-54, C-56, C-58, C-60, C-62, C-64, C-65, C-79 and C-80)

47. Mr. Howard Sher, a Radiation Health Physicist 2 with the Department who has inspected approximately 300 mitigation systems in his seven years with the Department, was qualified as an expert witness in the field of the evaluation of radon mitigation systems for compliance with the Mitigation Protocols. (N.T. 227-229)

48. Mr. Dwight Shearer, also a Radiation Health Physicist 2 with the Department who has inspected more than 100 radon mitigation systems and has a degree in Environmental Engineering, was qualified as an expert witness in the field of the evaluation of radon mitigation systems for compliance with the Mitigation Protocols. (N.T. 362-364)

49. In their inspections, Mr. Sher and Mr. Shearer consistently looked but found no signs that Sunn Radon's systems had been altered since the date of installation. In their opinions, no alterations to the systems had been made. (N.T. 232-249, 282, 371-372)

50. All of the mitigation systems located in the 31 residences listed in the Department's Amended Denial Letter had been originally installed with the same deviations from the Mitigation Protocols which existed at the time of the Department inspections. (N.T. 282, 371-372)

51. Mr. Gromicko has not contacted the owners of the residence listed in the Amended Denial Letter, nor inspected the radon mitigation systems in said residences, nor caused the systems to have been repaired. (Stipulation No. 33; N.T. 79-80) The increased risks to the health of the occupants of these residences caused by the non-compliant mitigation systems may have continued even at the time of the hearing. (N.T. 82)

52. Mr. Gromicko's actions in causing or allowing these violations constituted at least

negligent conduct because Mr. Gromicko was well aware of the installation requirements (N.T. 39), of his obligation to comply with them (N.T. 59), of the potential adverse health consequences to the public for violating them (N.T. 59-60), and had represented to the Department in his applications that he would comply with them. (N.T. 62-63)

53. Mr. Gromicko has demonstrated a lack of ability or intention to comply with the Act and its regulations based upon the number and seriousness of violations found, his responsibility for these violations, the potential adverse health consequences to the public resulting from these violations and Mr. Gromicko's failure to investigate or correct the violations.

54. The Appellant's lack of ability or intention to comply with the law relating to radon mitigation services is relevant and material to the Department's determination that it should not approve his application to perform radon testing services.

55. The Department must rely on a certified person's intention and ability to comply with the law because it is unable to inspect more than a small percentage of the results of radon protection services performed by certified persons. The results of a failure to perform those services properly present significant risks to the public health.

56. Mr. Larry Ryan, Chief of the Department's Radon Certification Section, prepared the initial calculations for penalty assessment. (N.T. 399, 401) Using the Bureau of Radiation Protection's Civil Penalty Assessment Procedure, he characterized the violations as those which have the potential to result in a radiation exposure, designated as Level 2 violations. (N.T. 402-403; Ex. C-96) Mr. Ryan initially characterized Mr. Gromicko's conduct as reckless, but ultimately used a more conservative approach and characterized the violations as negligent. (N.T. 404-405) The Bureau's penalty matrix provides for a penalty between $3,125 and $6,250 for a negligent Level 2 violation, times 30 violations, resulting in a suggested penalty of at least

$93,000. (N.T. 405-407) The Bureau's procedure also permits adding the Department's investigation costs. (N.T. 408)

57. In preparing its assessment, the Department calculated a total base penalty of $11,150 (not including Department costs) by assessing $150 for failing to affix required labeling, $300 for failing to install a warning monitor, and between $350 and $750 for each vent discharge violation, depending upon the severity of the violation. (N.T. 409-411; Ex. 97)

58. The Department calculated its costs for the investigations to be $3,426.28. This calculation was made by adding the number of hours spent by the inspectors evaluating the systems, multiplying this by the inspectors' gross hourly pay, (N.T. 136-137, 282-283, 359-360, 378-379), and taking 36% of that figure, plus expenses and deposition costs.

59. The Department only assessed a penalty for violations at 12 residences, which represents 36% of the 31 residences listed in the Amended Denial Letter. (N.T. 413-414) The Department used conservative calculations and did not consider supervisory time or attorneys' time which would have been appropriate and allowable under the Department's penalty guidelines. (N.T. 414) The Department's current total penalty assessment amount is $14,576.

## DISCUSSION

Mr. Gromicko has the burden of proof to demonstrate that the Department erred in the denial of his certification application.[5] 25 Pa. Code § 1021.101(c)(1). The Department has the burden of proof in the assessment of the civil penalty. 25 Pa. Code § 1021.101(b)(1). The Department's evidence tended to show that: (1) Mr. Gromicko was in responsible charge for Sunn Radon's work from December 15, 1991 through October 10, 1996; (2) Sunn Radon

[5] We have often warned parties that they assume the risk of their lack of legal expertise when they elect to proceed in a matter before the Board without representation by an attorney. *Wurth*

installed the radon mitigation systems at all of the 31 residences listed in the Amended Denial Letter; and (3) the systems inspected by the Department were installed in violation of the Mitigation Protocols. Mr. Gromicko's primary contention is that the Department should not have denied his application for radon testing certification based on prior radon mitigation services. (Notice of Appeal, ¶ 1; Appellant's post-hearing brief, ¶ 1) He also asserts that the systems were installed by his assistant, Mr. Dan Mills, who allegedly stole customers from him. His assertion that the installations occurred too long ago to be the basis for any violation and his claim that the homeowners caused the deficiencies will be discussed in more detail below.

**The Need for Protection from Radon**

Exposure to radon gas can cause lung cancer in human beings. (Stipulation No. 3) In 1987, the General Assembly determined that radon levels in public and private buildings can present a significant health risk to occupants, and passed the Radon Certification Act, Act of 1987, July 9, P.L. 238, 63 P.S. § 2001-2014. (Stipulation No. 2) The stated intent of the legislature in adopting the Radon Certification Act was "to protect property owners from unqualified or unscrupulous consultants and firms . . . ." 63 P.S. § 2002(b). The Radon Certification Act and regulations promulgated thereunder, 25 Pa. Code Chapter 240, mandate a certification program for individuals and firms engaging in radon testing services (the examination of buildings for the presence of radon such as the radioactive gas Radon-222 and the short-lived radio nuclides which are products of Radon-222 decay), radon laboratory analyses (the testing of radon concentrations in air, water or soil), and radon mitigation services (the repair or alteration of a building to reduce indoor radon concentrations). (Stipulation No. 5)

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*v. DEP*, EHB Docket No. 98-179-MG (Opinion issued February 29, 2000), *slip op.* at n.2.

Radon gas can migrate into a home from soils beneath the home through spaces or cracks in the foundation. Generally, radon mitigation is recommended where radon levels inside a home exceed Environmental Protection Agency guidelines. Radon mitigation typically involves the installation of equipment such as a fan and piping to reduce radon concentrations inside a structure. (Stipulation No. 7; N.T. 127-132) Most commonly, residential radon mitigation systems consist of installed basement piping which draws radon gas from beneath the structure's foundation to an outdoor vent by means of a fan, referred to as a "depressurized" system because the fan creates negative pressure or suction beneath the foundation. (Stipulation No. 8) The concentration of radon gas collected from beneath a structure and exhausted through a depressurization system vent is much higher than the concentration of radon gas inside the structure. (Stipulation No. 9) Human health is put at risk when radon gas drawn from beneath a structure is allowed to re-enter the structure through a door or window, or when vented near the ground level. (N.T. 59).

**1. Mr. Gromicko's responsibility for Sunn Radon's work continued through October 10, 1996**

Mr. Gromicko claims that the variances from the requirements of the regulations relied upon by the Department as violations for purposes of denying his application and for purposes of assessing a penalty cannot be attributed to him. He claims that the systems involved in these violations were installed by others at Sunn Radon, in some cases by his principal assistant at Sunn Radon, Mr. Dan Mills. (N.T. 448-450). Indeed, he testified that Mr. Mills had stolen potential customers from him by intercepting telephone calls from potential customers who called Mr. Gromicko. (N.T. 450-451) He also maintains that none of the claimed violations can be attributed to him after March 7, 1996--the date he claims he sold the business of Sunn Radon

to Mr. Mills. (N.T. 69-71) This contention ignores Mr. Gromicko's responsibility as the one certified installer at Sunn Radon until at least October 10, 1996.

Firms may become certified to perform radon services so long as radon services performed by the firm are performed under a certified individual's supervision. 25 Pa. Code §§ 240.102(b) (testing) and 240.112(b) (mitigation). The certified individual remains responsible for the proper performance of services by all persons working under his or her supervision. *Id.* (Stipulation No. 6; N.T. 158) The term "radon services" is generally understood to include testing for radon, laboratory analysis of testing devices, and mitigation of radon. Generally, a person may not perform commercial radon services within Pennsylvania unless he/she or the firm for which he/she works has a current certification from the Department. 63 P.S. § 2006. (Stipulation No. 4)

On February 17, 1989, in response to applications, the Department issued to Mr. Gromicko and his company, Sunn Radon Company (also known as Sunn Corporation and hereinafter referred to as Sunn Radon), an individual and firm certification (respectively) to perform radon mitigation services. Mr. Gromicko was the certified individual responsible for Sunn Radon's radon mitigation services. On or around the same date, a certification to perform radon testing services was issued to Mr. Gromicko as an individual. (Stipulation No. 19) On September 25, 1989, in response to an application, the Department issued to Sunn Radon a firm certification to perform radon testing services. Mr. Gromicko was the certified individual responsible for Sunn Radon's radon testing services. (Stipulation No. 20) On February 3, 1993, in response to applications, the Department issued to Mr. Gromicko and Sunn Radon both individual and firm renewal certifications to perform radon testing and mitigation services in Pennsylvania. (Stipulation No. 21) On March 8, 1995, in response to applications, the

Department issued to Mr. Gromicko and Sunn Radon both individual and firm renewal certifications to perform radon testing and mitigation services. (Stipulation No. 22)

In each of these applications, Mr. Gromicko represented to the Department that he would be the certified individual responsible for Sunn Radon's proper performance of radon testing and mitigation services, and that such services would be performed in accordance with required standards and protocols. (Stipulation No. 23) Mr. Gromicko's individual testing and mitigation certifications were in effect until March 8, 1997, pursuant to 25 Pa. Code § 240.202. (Stipulation No. 24)

We therefore reject Mr. Gromicko's contention that he cannot be held responsible for these violations. Mr. Gromicko's testimony and the Stipulation of facts establish that Mr. Gromicko was legally responsible for the proper installation of all radon mitigation systems installed by Sunn Radon as the sole certified radon mitigation installer in responsible charge of mitigation activities for Sunn Radon from at least December 15, 1991, the date when the Mitigation Protocols became mandatory, through at least March 6, 1996, the day before he closed on the sale of the business to Mr. Mills according to his testimony. (Stipulation No. 25; N.T. 57-58)

The Department's evidence also establishes that Mr. Gromicko remained in responsible charge for the mitigation work through at least October 10, 1996. October 10, 1996 is the date when Mr. Dwight Shearer, a Department inspector, testified that he met with Mr. Gromicko along with Department inspector Mr. Howard Sher and Mr. Mills at the offices of Sunn Radon. This was supported by an entry in Mr. Shearer's 1996 calendar. (N.T. 387-388) Mr. Shearer testified that Mr. Gromicko explicitly stated that he was going to remain the certified individual in charge of Sunn Radon's mitigation work until another Sunn employee gained their own

mitigation certification. (N.T. 388-389) Mr. Sher confirmed Mr. Shearer's testimony that the two inspectors met with Mr. Gromicko and Mr. Mills at the offices of Sunn Radon in October of 1996. (N.T. 287) In light of credible testimony from two of the Department's inspectors and in absence of any evidence refuting this testimony, Mr. Gromicko remained in responsible charge for the mitigation activities performed by Sunn Radon from December 15, 1991 through at least October 10, 1996. Three of the systems listed in the Department's Amended Denial Letter were installed by Sunn Radon between March 6, 1996 and October 10, 1996; however, the Department did not assess a civil penalty for these systems. (Ex. C-15, C-17)

At one point during the hearing, Mr. Gromicko testified that he recognized his own handiwork for at least 10 of the 12 mitigation systems depicted on a videotape, meaning that those systems were in fact installed by Mr. Gromicko. (N.T. 80-82; Ex. 44) Mr. Gromicko later changed his testimony, suggesting that the work might have been performed outside of Sunn Radon's employment by Sunn Radon's employee, Mr. Mills, who knew and used Mr. Gromicko's installation methods. (N.T. 448; *see also* Notice of Appeal, ¶ 2; Appellant's post-hearing brief, ¶¶ 13, 15)) We find this to be extremely unlikely. For each of the 31 residences, the Department received notification from the mitigator, Sunn Radon, that Sunn Radon had installed a system at the residence. If one of Sunn Radon's employees had installed a mitigation system outside the scope of his employment, it is doubtful that Sunn Radon would have submitted data about that residence to the Department. Moreover, owners of nine of these systems testified in deposition that they either recognized photographs of Mr. Gromicko (Ex. C-48, C-60) or had kept invoices and/or promotional materials from Sunn Radon. (Ex. C-43, C-50, C-52, C-62, C-64, C-79, C-91)

Mr. Gromicko failed to present any documentary evidence that might confirm his claim

that he was not in responsible charge after March of 1996. Mr. Gromicko admitted that he never advised the Department that he was no longer the person responsible for Sunn Radon's radon activities. (N.T. 447) During the hearing, Mr. Gromicko failed to introduce any documentation of the sale of his business or any evidence which indicates that he was not the responsible person in charge of Sunn Radon after March of 1996.

**2. Mr. Gromicko is responsible for at least 58 separate violations of the Mitigation Protocols in the 31 residences listed in the Amended Denial Letter.**

Mitigation systems installed in Pennsylvania residences after December 15, 1991 were required by law to conform with detailed installation specifications. 25 Pa. Code § 240.208. From December 15, 1991 through November 30, 1997, mitigation installations were required to conform with the "Radon Contractor Proficiency Program Interim Radon Mitigation Standard" (Mitigation Protocols). (Stipulation No. 12; N.T. 58) Mitigation systems are required by law to be installed in a manner following the Mitigation Protocols even if the homeowner objects to one or more of the installation specifications. (N.T. 59)

The Mitigation Protocols specify, among other things, how mitigation systems must be installed. A monitor or warning device must be attached and plainly visible to the occupants in order to notify the occupants in the event that the system ceased to operate correctly. Labels must be attached and plainly visible which would identify the equipment as a radon mitigation system, identify the installer by name and telephone number, and identify the power shut-off switch to prevent inadvertent disconnection of the system by the occupant. Discharge vents for depressurized systems must be located more than a specified distance from the ground, walkways, or re-entry points, such as doors and windows in the mitigated structure or surrounding structures. (Stipulation No. 13) In some cases a mitigation system can be a

"pressurized" system in which fresh outdoor air is piped to beneath the foundation. (Stipulation No. 10) It is simple to determine whether a residential radon mitigation system is a depressurized or pressurized system when the fan is operating by feeling the outside vent. If air is being blown out of the vent, the system is a depressurized system, which creates a suction beneath the foundation. If air is being sucked into the vent, the system is a pressurized system, which forces fresh air beneath the foundation. (Stipulation No. 11)

The Department's regulations require certified mitigators to submit data to the Department whenever radon mitigation services are provided. (25 Pa. Code § 240.303; N.T. 177-178). Mr. Gromicko testified that Sunn Radon submitted the reports to the Department for residences mitigated by Sunn Radon during its years of certification. The data from the reports was entered into the Department's computer database and the accuracy of the data was verified following input. (N.T. 178-180) The information from the Department's computerized database for each of the 31 residences listed in the Department's Amended Denial Letter was therefore supplied by Sunn Radon itself. The Department later used this data to identify mitigation systems installed by Sunn Radon. (Ex. 40)

We reject Mr. Gromicko's testimony that the systems were installed correctly but altered prior to the Department's inspections as well as his contention that some of the violations were not really violations because they involved inactive radon systems. (Appellant's post-hearing brief, ¶¶ 11, 12, 14) On December 16, 1998, Mr. Gromicko testified in deposition that any mitigation system vents observed by the Department which were located less than ten feet from the ground, doors, or windows, were actually fresh air intake vents for pressurized systems rather than discharge vents for depressurized systems, and were therefore exempt from the ten foot set-back requirements; and that non-compliant monitors, labels and vents had been altered by

homeowners between the dates of installation and Department inspection. (Ex. C-4a, p. 243) Mr. Gromicko offered no documentation, witnesses, photographs or personal testimony to demonstrate that these systems were in fact inactive systems or ever altered between the date of installation and the date of Department inspection.

The Department presented compelling evidence that the deficiencies in the systems existed at the time of installation and were not the result of a subsequent alteration. Mr. Sher and Mr. Shearer, Radiation Health Physicists with the Department who have inspected a combined total of approximately 400 radon mitigation systems during their years with the Department, were qualified as expert witnesses in the field of the evaluation of radon mitigation systems for compliance with the Mitigation Protocols. (N.T. 227-229, 362-364) In their inspections, Mr. Sher and Mr. Shearer consistently looked but found no signs that Sunn Radon's systems had been altered since the date of installation. The removal of a monitor/warning device will leave holes in the mitigation piping where the device had been initially installed. (N.T. 115-116) Both inspectors testified that none of the systems which lacked the required monitor/warning device had holes which would indicate that the device had been installed and later removed. (N.T. 230-231, 370) Testimony was introduced suggesting that radon mitigation labels leave a paper and glue residue when peeled off a mitigation system. (N.T. 116-117, 135, 370-371) Both inspectors testified that they looked for and observed no label remnants on any of the systems they inspected where required labeling was missing. (N.T. 241-242, 370-371) Similarly, if exterior piping for the discharge vent located on the side of a house were removed by a homeowner following proper installation, the removal would likely leave signs along the housing material. (N.T. 231, 234-235, 370) The inspectors testified that in their professional opinions, the radon mitigation systems at the 31 residences listed in the amended Denial Letter had not

been altered between the date of system installation and the date of their inspections. (N.T. 232-249, 282, 371-372)

Moreover, 12 of the homeowners testified under oath that no alterations of the radon mitigation systems in the residences had been made during their occupancy of the homes between the date of system installation and the date of Department inspection. (Ex. C-45, C-47, C-48, C-50, C-54, C-56, C-58, C-60, C-62, C-64, C-65, C-79, C-80) All of the mitigation systems located in the 31 residences listed in the Department's Amended Denial Letter had been originally installed with the same deviations from the Mitigation Protocols which existed at the time of the Department inspections. (N.T. 282, 371-372) In addition, in January of 1999, Department representatives reinspected and videotaped several homes and confirmed that the vents were discharge vents, contrary to Mr. Gromicko's assertion that the mitigation system vents were intake vents and as such were exempt from the set-back requirement. (Ex. 44) Mr. Gromicko's unsupported assertions have been refuted by the evidence presented at the hearing and the sworn depositions of homeowners for the 12 residences listed in the Civil Penalty Assessment.

**3. The Department properly denied Mr. Gromicko's application for radon testing certification.**

The Department's Denial of Certification was based upon, among other things, a determination that Mr. Gromicko had failed to comply with 25 Pa. Code §§ 240.201(a) and 240.201(b) in connection with his performing mitigation services. (N.T. 189-192; Ex. C-14) Section 240.201(a) states that a radon certification application will not be approved unless the applicant affirmatively demonstrates to the Department's satisfaction that the applicant is not in violation of the Radon Certification Act or Chapter 240 of the regulations. 25 Pa. Code §

240.201(a)(1). The Department may also deny certification to a person who has shown a lack of ability or intention to comply with the Radon Certification Act, the Radiation Protection Act, or Chapter 240 of the regulations, as indicated by past or continuous conduct. 25 Pa. Code § 240.201(b).

We agree with the Department that although Mr. Gromicko's 1998 application sought certification for radon testing only, the Department could not as a practical matter evaluate Mr. Gromicko's past compliance with the Radon Certification Act and its regulations by examination of his prior testing services. After a radon test, little physical evidence remains from which to evaluate a tester's compliance with proper procedures. (N.T. 163-164) Mr. Gromicko's compliance status and history as a radon mitigator could not be accurately assessed from the Department's inspections during the period of time that Mr. Gromicko was certified because, due to resource constraints, routine Department monitoring of mitigators covers less than 1% of the mitigation systems installed. (N.T. 165-167) Mitigation systems previously installed by Mr. Gromicko, however, could be later evaluated for compliance with the radon regulations and mandated Mitigation Protocols in effect at the time of installation. Mr. Gromicko admitted that persons who repeatedly install radon mitigation systems in violation of specifications required by law should not be certified by the Department to perform any radon services. (Ex. C-6, Request for Admissions, ¶ 16) The term "radon services" is understood by Mr. Gromicko to refer to both radon testing and radon mitigation services. (N.T. 56)

Mr. Gromicko presents three reasons why the Department's denial of his application for radon testing certification was erroneous. He argues first that his conduct in performing mitigation services is not relevant to whether he should be certified to perform radon testing services. We reject this contention because the Department has shown that Mr. Gromicko has

demonstrated a lack of either intention or ability to comply with the requirements of the Radon Certification Act and the Department's regulations. In administering the Act and its accompanying regulations, the Department is able to inspect less than 1% of the installed mitigation systems. (N.T. 165-167) An after-the-fact-inspection of testing services by the Department is all but impracticable because there is little or no physical evidence to inspect which might determine whether the testing service was properly performed or not. Accordingly, a person who cannot comply with the law in performing mitigation services, which can be the subject of a Department inspection, can hardly be relied upon to comply with the law in doing testing when the Department is unable to determine from an inspection whether the service has been performed properly or not. In addition, Mr. Gromicko has acknowledged that both aspects of radon services are closely connected so that a failure to perform one properly should result in being unable to perform either type of service. (N.T. 56)

Mr. Gromicko also claims that the Department's investigation was statistically flawed, in that a representative sample of Mr. Gromicko's customers should have been contacted by the Department. (Appellant's post-hearing brief, ¶¶ 8-10) He points to the number and high quality of the mitigation systems that he has installed compared to the very few installations at which violations were found. (Appellant's post-hearing brief, ¶¶ 9, 10) His contention misses the Department's point that the discovered uncorrected violations are continuing violations which increase the adverse health risks to the building occupants. *See* Findings of Fact Nos. 13-15. Because Mr. Gromicko's conduct has resulted in serious violations, it is irrelevant whether the violation is typical or atypical of the applicant's conduct because of the risks which these violations entail. In addition, such an applicant must correct any existing violations before the application will be approved. 25 Pa. Code § 1021.101(c)(1). Mr. Gromicko has not contacted

the owners of the residence listed in the Amended Denial Letter, nor inspected the radon mitigation systems in those residences, nor caused the systems to have been repaired. (Stipulation No. 33; N.T. 79-80) There is no reason not to believe that the increased risks to the health of the occupants of these residences caused by the non-compliant mitigation systems continues today. (N.T. 82) That many have benefited from correct installations does not excuse that others have been subjected to unnecessary and serious health risks by incorrect installations.

Mr. Gromicko's third contention is that the instances which served the basis for the Department's decision occurred "too long ago." (Appellant's post-hearing brief, ¶ 3, 7) However, there is no evidence that the Department had any knowledge of any of these violations until it began investigation Mr. Gromicko's compliance record in 1998, pursuant to the processing of the certification application at issue. The passage of time has not relieved Mr. Gromicko of responsibility for the violations. When the violations were discovered, the Department acted promptly in denying Mr. Gromicko's application and assessing the civil penalty. Mr. Gromicko asserts that the Department should have issued a notice of violation before taking issuing its Denial of Certification. (Notice of Appeal, ¶ 3; Appellant's post-hearing brief, ¶ 6) The Department is under no legal obligation to issue a notice of violation before initiating an enforcement action unless required to do so by statute or regulation, which is not the case here. *Farmer v. DEP*, 1998 EHB 1292, 1302. The Department could not have provided Mr. Gromicko with notice of the violations during the time Mr. Gromicko was still certified because it did not learn of the violations until the investigation of Mr. Gromicko's compliance record after his last certification had expired. The violations were listed in the Department's Denial Letter on September 23, 1998 and the Amended Denial Letter on February 12, 1999.

We also reject Mr. Gromicko's contention that he was treated unfairly because the

Department ordered him to transfer his records to the new owner of the firm. He claims that as a result, the Department is punishing him for failing to produce evidence found in those records. (Appellant's post-hearing brief, ¶¶ 4, 5) Upon the sale of Sunn Radon by Mr. Gromicko to Mr. Mills, Mr. Gromicko requested guidance from the Department as to the proper custodian for the company's mitigation records. (N.T. 389-390) Department representatives suggested that the company and its new owner should retain the records since customers would most likely contact Sunn Radon rather than Mr. Gromicko as an individual if problems arose. (N.T. 23-24, 27-29) Nothing prevented Mr. Gromicko from retaining copies of his records or subpoenaing Mr. Mills to attend the hearing before the Board. There is no evidence to suggest that the Department either issued him an order to surrender custody of the records or threatened to sanction Mr. Gromicko with respect to the documents or that the Department took custody of the records. (N.T. 24, 88-89)

**4. The Department has not abused its discretion in assessing the civil penalty amount.**

The Department has the burden of proof in the assessment of the civil penalty. 25 Pa. Code § 1021.101(b)(1). The assessment of a civil penalty is an exercise of the Department's discretion. *Goetz v. DER*, 1993 EHB 1401, *aff'd*, No. 2612 C.D. 1993 (Pa. Cmwlth. filed October 17, 1994). Thus it must prove by a preponderance of the evidence that Mr. Gromicko violated the applicable statutes and regulations, and the amount of the penalty assessed for the violations reflects an appropriate exercise of discretion. *Shay v. DEP*, 1996 EHB 1583, *aff'd*, No. 175 C.D. 1997 (Pa. Cmwlth. filed November 17, 1997). We will not consider whether we would assess the same penalty in the same amount as the Department did, but will only determine whether the penalty is reasonable and appropriate for each violation. Only where we find that the Department

abused its discretion will we substitute our own to modify an assessment. *Id.*

The Department may assess a civil penalty for a violation of the Radon Certification Act, the Radiation Protection Act[6] or Chapter 240 of its regulations. 25 Pa. Code § 240.402(a). Section 308 of the Radiation Protection Act authorizes the Department to assess a civil penalty not exceeding $25,000 per violation. 35 P.S. § 7110.308(e). On May 20, 1999, the Department sent to Mr. Gromicko a Proposed Civil Penalty Assessment. On June 1, 1999, following Mr. Gromicko's refusal to discuss or negotiate the Proposed Civil Penalty, the Department issued to Mr. Gromicko a Civil Penalty Assessment. (N.T. 194-195; Ex. C-16) The assessment was issued pursuant to Section 2012(a) of the Radon Certification Act, 63 P.S. § 2012(a), Section 308 of the Radiation Protection Act, 35 P.S. § 7110.308(e), and Section 240.402 of the Department's regulations, 25 Pa. Code § 240.402. (Ex. C-17)

The Chief of the Radon Certification Section, Mr. Larry Ryan, is in charge of approving or denying radon certification applications. (N.T. 99) Part of his duties include preparing calculations and recommendations for civil penalty assessments. (N.T. 400) In recommending a civil penalty amount in this case, he consulted the Bureau of Radiation Protection Civil Penalty Assessment Procedure. (N.T. 401-402; Ex. C-96) Mr. Ryan determined that violations of the radon mitigation protocols constitutes a Level 2 violation because of the potential to cause radiation exposure to people. (N.T. 402-403) Initially, Mr. Ryan characterized Mr. Gromicko's violations as being reckless because Mr. Gromicko had submitted an application which represented to the Department that he would follow the protocols in performing radon services, he was aware of the mitigation standards and had an understanding of them, and was aware of the health risks to the public in not following the protocols. (N.T. 404) However, Mr. Ryan

conservatively categorized Mr. Gromicko's conduct as negligent. (N.T. 405)

A total of 30 violations at 12 residences served as the basis for calculating the civil penalty because the Department had proof beyond a reasonable doubt that they were Mr. Gromicko's violations due to the depositions of the 12 homeowners. (N.T. 405-406) In multiplying the lowest amount in the matrix, $3,125, by the 30 violations, the base penalty amount would have amounted to a suggested penalty of at least $93,000. (N.T. 406-407) Mr. Ryan developed an alternative base penalty assessment scale that was more applicable to this particular case. (N.T. 409) For each of the 12 residences, the Department assessed a base penalty of $150 for each failure to properly label the mitigation system, $300 for failure to install a monitor/warning device in each system, and between $350 and $750, depending on the magnitude of the deficiency, for failure to comply with the Mitigation Protocols' vent location requirements. (N.T. 409-411; Ex. C-97) In addition to the base penalty amount of $11,150, Mr. Ryan calculated the costs incurred by the Department in investigating the violations. (N.T. 412) This was done by calculating the number of hours the inspectors expended times their gross pay, plus expenses incurred and deposition costs.

The Department originally assessed a $17,662 civil penalty for 30 violations at 12 residences. At the hearing, the Department informed the Board that it had recalculated its civil penalties, and requested and affirmance of $14,576. Mr. Ryan added only 36% of the total costs incurred by the Department, totaling $3,426, to the base penalty amount in order to cover just the 12 of the 31 residences listed in the Amended Denial Letter, for a total civil penalty of $14,576. (N.T. 413-414) The penalty policy suggests that the penalty might be lowered on the good faith of the violator in correcting the violations (N.T. 407), but as of the dates of the hearing on the

[6] Act of July 10, 1984, P.L. 688, No. 147, §§ 7110.101-7110.703.

merits, Mr. Gromicko has failed to take corrective action regarding the deficient systems that he installed. Although Mr. Gromicko correctly points out that he cannot correct deficient systems since he is not certified to do so (Notice of Appeal ¶ 4), he could have viewed the systems, determined the repairs necessary, and retained the services of a certified mitigator to repair the systems.

Neither Mr. Gromicko's Notice of Appeal of the Civil Penalty Assessment nor his Pre-Hearing Memorandum raise any challenge to the reasonableness of the amount of the Civil Penalty Assessment. He has consequently waived any claim that the Department abused its discretion in assessing this penalty amount. *Gasbarro v. DEP*, 1998 EHB 1264. Taking into account the seriousness of the violations, Mr. Gromicko's culpability, and health and safety risks to members of the public, the Department has demonstrated the reasonableness of the civil penalty amount. Accordingly, we affirm the Department's Civil Penalty Assessment of $14,576 and find the following:

## CONCLUSIONS OF LAW

1. The burden of proof in an appeal of the Department's denial of an application for radon testing certification rests with the Appellant. 25 Pa. Code § 1021.101(c)(1).

2. An individual who is certified to perform radon mitigation services by the Department, and agrees to be the sole certified individual pursuant to a firm's certification application, is responsible for mitigation violations of the Radon Certification Act and 25 Pa. Code Chapter 240 committed by the firm. 25 Pa. Code § 240.112(b).

3. A radon certification application will not be approved unless the applicant affirmatively demonstrates to the Department's satisfaction that the applicant is not in violation of the Radon Certification Act or Chapter 240 of the regulations. 25 Pa. Code § 240.201(a)(1).

4. Certification may also be denied to a person who has shown a lack of ability or intention to comply with the Radon Certification Act, the Radiation Protection Act, or Chapter 240 of the regulations, as indicated by past or continuous conduct. 25 Pa. Code § 240.201(b).

5. The Department's action in denying a radon certification application will be upheld where, as here, the Department has reasonably determined that the applicant has shown an unwillingness or inability to comply with the Radon Certification Act and 25 Pa. Code Chapter 240 through repeated violations of mitigation systems specifications despite the applicant's knowledge of the specifications. 25 Pa. Code § 240.201(b).

6. The burden of proof in an appeal of the Department's Civil Penalty Assessment rests with the Department. 25 Pa. Code § 1021.101(b)(1).

7. The Appellant failed to assert any challenge to the reasonableness of the amount of the Civil Penalty Assessment in either his Notice of Appeal or Pre-hearing Memoranda. *Gasbarro v. DEP*, 1998 EHB 1264.

8. Considering the Department's evidence of the number and nature of the Appellant's violations of the Mitigation Protocols and of the Radon Certification Act and its regulations, the Department has sufficiently met its burden of demonstrating that the Civil Penalty Assessment of $14,576 is reasonable.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **NICKIFOR N. GROMICKO, JR.** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 98-199-MG** |
| | : | **(consolidated with 99-128-MG)** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

## ORDER

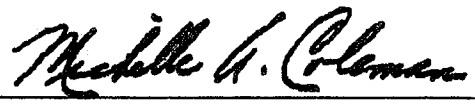
AND NOW, this 27th day of April, 2000, it is hereby ordered that the Appellant's appeal is DISMISSED. It is further ordered that the Appellant shall pay civil penalties in the amount of $14,576.

**ENVIRONMENTAL HEARING BOARD**

**GEORGE J. MILLER**
**Administrative Law Judge**
**Chairman**

**THOMAS W. RENWAND**
**Administrative Law Judge**
**Member**

**EHB Docket No. 98-199-MG (consolidated with 99-128-MG)**



**MICHELLE A. COLEMAN**
**Administrative Law Judge**
**Member**

**BERNARD A. LABUSKES, JR.**
**Administrative Law Judge**
**Member**

**MICHAEL L. KRANCER**
**Administrative Law Judge**
**Member**

**DATED:** **April 27, 2000**

**c:** **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

**For the Commonwealth, DEP:**
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Southeast Region
and
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

| | | |
|---|---|---|
| **JEFFERY A. SEDER** | : | |
| **v.** | : | **EHB Docket No. 98-058-MG** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DONALD AND JOAN SILKNITTER, Permittees** | : | **Issued: April 27, 2000** |

# ADJUDICATION

**By George J. Miller, Administrative Law Judge**

**Synopsis:**

The Board dismisses a third party appeal of a permit issued pursuant to the Dam Safety and Encroachments Act and the Limited Power Act for the operation and maintenance of a small dam and hydroelectric generating station. The appellant failed to demonstrate that as a downstream landowner of the lower portion of the dam, his signature was a necessary prerequisite for the issuance of the permit. Additionally, the Department properly did not require the permittees to secure a flowage easement for the downstream property nor does the permit condition requiring the permittees to maintain the millrace infringe upon the property rights of the appellant.

## Background

This is an appeal by Jeffrey A. Seder (Appellant), which was filed by his predecessor in interest, on March 30, 1998, challenging the issuance of a Limited Power Permit, Minor Water

Power Project, L.P. 15-064B, issued to Donald and Joan Silknitter on December 9, 1997, by the Department of Environmental Protection. A hearing on the merits was held for two days on November 30 and December 1, 1999, before Administrative Law Judge George J. Miller. Following the hearing, the parties filed requests for findings of fact and conclusions of law and supporting legal memoranda.[1] The record consists of the notice of appeal, a transcript of 372 pages and 42 exhibits. After a full and complete review of the record we make the following:

## FINDINGS OF FACT[2]

1. The Commonwealth of Pennsylvania, Department of Environmental Protection (Department) is the agency with the authority to administer and enforce the Dam Safety and Encroachments Act (Dam Safety Act), Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1 – 693.27, the Limited Power Act, Act of June 14, 1923, P.L. 704, *as amended*, 32 P.S. §§ 591-625, and the regulations promulgated thereunder at 25 Pa. Code Chapter 105.

2. Jeffery A. Seder (Appellant) is an individual who lives at Houyhnhnm Farm, 1055 Doe Run Road, Coatesville, Pennsylvania 19320. (Seder, N.T. 201)

3. Donald and Joan Silknitter (Permittees) are individuals who live at 1212 Doe Run Road, Coatesville, Pennsylvania 19320. (Silknitter, N.T. 260; Ex. A-11)

4. The Appellant is appealing the Department's issuance of Limited Power Permit Minor Water Power Project, L.P. 15-064B issued to the Permittees on December 9, 1997. (the permit). (Ex. A-11)

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[1] The Department also filed a motion to strike the testimony of a witness and certain court opinions referenced in the Appellant's post-hearing brief. We granted the motion to strike the testimony of the witness, but denied the motion to strike the court opinions. For a full explanation of our ruling on this motion, *see Seder v. DEP*, EHB Docket No. 98-058-MG (Opinion issued February 24, 2000).

[2] The notes of testimony are designated as "N.T. __"; the exhibits of the Appellant are

5. This permit authorizes the Permittees to operate and maintain an existing dam and a hydroelectric generating plant on Buck Run in West Marlborough Township, Chester County. (Ex. A-11)

6. The physical layout of, and process for, the Permittees' power generation is:

a. the impounded water is admitted into the power system by opening of a metal valve known as the "headgate;"

b. the water travels through the headgate into a cylindrical pipe called a "penstock;"

c. having gone through the penstock, the water enters a millhouse where it turns the power turbines;

d. after power generation, the water travels eastward into a preexisting channel or millrace which roughly parallels Buck Run;

e. The millrace reaches a property line at Pennsylvania Route 82, passes through a culvert of the Pennsylvania Department of Transportation, and then continues eastward onto property now owned by the Appellant in the "lower millrace;"

f. Buck Run and the water in the lower millrace rejoin at the "confluence," about one-third of a mile east of the millhouse; and

g. Buck Run is fed by a perpendicular tributary, running southward, located just west of Route 82 and some two to three hundred feet southeast of the impoundment.

(N.T. 82-84, 87-88; Exs. B-1, A-19, A-23, A-28)

7. The basic dam structure, including the stone spillway, penstock and headgate, have existed on the property now owned by the Permittees for many years prior to the Permittees'

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designated as "Ex. A-__"; the Department's as "Ex. C-__"; and the Permittees' as "Ex. P-__."

permit application. (Martino, N.T. 75)

8. The Permittees own the earthen embankment, the hydroelectric generating station, the portion of the dam's millrace located west of Route 82 and the southern half of the stone masonry spillway. (Martino, N.T. 82; Exs. A-1, A-11)

9. The Appellant owns the portion of the dam's lower millrace, approximately 1300 feet in length, located east of Route 82. (Exs. A-1, A-4)

10. A third party, the Coldrens,[3] now own the northern half of the stone masonry spillway. (Ex. A-1 (parcel D))

11. In June 1985 the Department issued to the Silknitters a Limited Power Permit for installation and operation of a 15 Kw hydroelectric generator at the dam. *Bentley v. DER and Silknitter*, 1989 EHB 960 (N.T. 289-90). The issuance was shortly thereafter duly published in the *Pennsylvania Bulletin*. (Ex. A-9, p. 3)

12. The application for this permit was not signed by either the Bentleys,[4] who then owned the northern half of the stone masonry spillway, nor by the Appellant, who then owned the property containing the lower millrace east of Route 82. Prior to the acceptance of the application for this permit, the Department had advised the Permittees that the Department's regulations required the signature of all co-owners of the dam. (Martino, N.T. 29-34)

13. After receiving the initial permit in 1985, the Permittees constructed the hydroelectric project as it currently exists today. (Martino, N.T. 34)

14. The 1985 permit was revoked by the Department pursuant to a federal court order

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[3] The Coldrens have not appealed the permit themselves or participated in the Appellant's appeal.

[4] By order of the Board the Appellant was substituted for the Bentleys. See discussion below and *Seder v. DEP*, 1999 EHB 782.

issued in a proceeding brought by the Bentleys who claimed that the permit was improperly issued based on an application which was required to be signed by them as owners of the northern portion of the dam's spillway. (Martino, N.T. 35)

15. At the Permittees' request, the Board superseded the Department's revocation of the permit by order dated October 29, 1992, pending final disposition of the federal court proceeding. *Silknitter v. DER*, EHB Docket No. 92-226-W.

16. Thereafter, at the Permittees' request the federal court modified its order to require or permit that:

a. the Permittees may file another permit application with the Department without regard to the refusal of the Bentleys to sign the application;

b. that the application be acted on in accordance with state law and that the Bentleys be given notice of the application and opportunity to be heard on it;

c. the Department accept the Permittees' application "without regard to any refusal by the Bentleys to sign the application. . . ;" and

d. that the Department rescind the 1985 limited power permit if the Permittees failed to make the other permit application by April 19, 1993.

*Bentley v. Ellam,* Civil Action No. 3:CV-90-1138 (M.D. Pa. filed March 22, 1993). This order was affirmed without published opinion. 19 F.3rd 640 (3rd Cir. 1994). (*See* Ex. C-2)

17. In April 1993, the Permittees filed an application (1993 application) with the Department seeking a permit to operate and maintain the existing dam and the hydroelectric generating plant in accordance with the federal court order as modified. (Martino, N.T. 36; Ex. A-16)

18. The project is the same project that was subject to the 1985 permit, except that the

hydroelectric generating plant had already been constructed at the dam. The Permittees had installed two turbines, one 25 Kw and one historic 7 Kw, and the Permittees deepened the channel of the millrace to provide an outlet for the turbines. (Martino, N.T. 41-44; Ex. A-4)

19. At the time the permit was issued in 1997 the Project had been in operation for 10 years. (Martino, N.T. 76)

20. Donald Martino has been Chief of the Division of Dam Safety in the Department's Bureau of Waterways & Engineering since 1994. He was responsible for reviewing and approving the permit application for the Project. (N.T. 27)

21. Mr. Martino, a civil engineer by training, has reviewed or approved every application to construct or modify a dam in Pennsylvania since 1979. There have been approximately 1200 applications for dams or modifications to dams during that time. (Martino, N.T. 79-80)

22. Mr. Martino was aware that the Appellant's predecessor, the Bentleys, owned the millrace east of Route 82 and the northern half of the stone masonry spillway at the time of the 1993 application and at the time the Permit was issued. (Martino, N.T. 46)

23. The 1993 application submitted by the Permittees was not signed by the Coldrens,[5] the Appellant or the Appellant's predecessors in interest, the Bentleys. (Ex. A-16)

24. Mr. Martino was ultimately responsible for determining who needed to sign the permit application. He testified that he did not require any signatures other than the Permittees' because he thought the federal court order required him to process the application without any consideration of the failure of the Bentleys to sign the application. (Martino, N.T. 67, 68)

25. Additionally, Mr. Martino did not require other signatures because the project would

[5] The Coldrens purchased the property which includes the northern half of the stone masonry spillway in 1997. (G. Bentley, N.T. 155-56)

not involve any upstream changes nor enlarge the dam or millrace. (N.T. 94; 115-116)

26. All of the mechanical operation of the dam which relates to the generation of power occurs solely on the Permittees' property. (Martino, N.T. 70)

27. The Permittees are persons exercising primary responsibility for the dam as referenced in 25 Pa. Code §§ 105.13(g) and 105.13(h), because they own the principal features of it, including the headgate, the penstock, the power house, the turbines and the portion of the millrace down to Route 82. (Martino, N.T. 96-97)

28. The Permittees do not have permission to use or access the 1300 feet of the lower millrace on property owned by the Appellant. (Seder, N.T. 234-235; Ex. A-14)

29. The 1993 application did not include documentation demonstrating the Permittees' rights or consent to modify, access or use the lower millrace on the Appellant's property as part of the project. (Martino, N.T. 55-56; Ex. A-16; *see also* Seder, N.T. 234-235; Stipulation of the Parties, N.T. 165; Ex. A-34 at 64-66)

30. The 1993 application did not and was not required to include proof of title or flowage easement described in 25 Pa. Code § 105.82(a)(10) because this regulation requires proof of title or flowage easement only for property upstream from a dam that is subject to inundation due to the impoundment of water. In this case, the area downstream from the dam would only be inundated during a catastrophic collapse of the dam. (Martino, N.T. 98-99)

31. Even if there was a catastrophic breach of the dam which resulted in all of the impounded water rushing down the millrace toward Route 82, there may not even be enough water to go over the road even if the culvert under the road were blocked. Further, it is unlikely that the water would cause Buck Run to leave its banks. (Martino, N.T. 87)

32. Mr. Martino did acknowledge that there have been occasions when the Department

has required an applicant to show proof of an easement on the downstream side of a dam. (N.T. 58)

33. Mr. Martino gave proper consideration to the effect of the project on the riparian owners as required by 25 Pa. Code § 105.14(b)(3). He determined that there would be no significant effect on riparian property because there was no significant change in the project in that the dam would not be raised, the elevation of the spillway would not change, and the size of the headgate would remain the same. (N.T. 102-103)

34. The Department imposed special operating conditions in the permit to address the concerns of the downstream owners of the lower millrace. For example, the permit restricts operation of the turbines when the water is low and proscribes "peaking and pulsing" as a method of running the turbines in low water. (Martino, N.T. 75; Ex. A-11 at 6 ¶ B)

35. The permit also contained a condition which required the Permittees to maintain the lower millrace keeping the channel free of trees and brush. (Ex. A-11, p. 3 Condition 13)

36. Mr. Martino also considered the fact that, if the headgate were closed there would be somewhat more flow in Buck Run and significantly reduced flow in the millrace. There would likely be inadequate flow in the millrace to maintain aquatic life which was a concern of the Pennsylvania Fish and Boat Commission. (Martino, N.T. 139)

37. Mr. Martino testified that conditions in the area are aesthetically and hydraulically improved from the conditions in the 1980s. Specifically, the millrace is clear and maintained, and the area is safer because the culvert under Rt. 82 is kept open. (N.T. 76)

38. The Permittees' project has not and will not have significant impacts on the environment and will adequately protect public health and safety. (Martino, N.T. 119)

39. In December, 1997, the Department granted the Silknitters' application and issued

the Limited Power Permit.

## DISCUSSION

This dispute over a small hydroelectric project in a small tributary stream in a bucolic area of Chester County has been fought in various forums for nearly 20 years, perhaps rivaling the legendary feud between the Hatfields and the McCoys. Sometime in 1984 Donald and Joan Silknitter (Permittees) first approached the Department with plans to use water diverted from Buck Run by an existing dam to generate electricity.[6] The Department took the position that the permit application would require the signatures of other owners of the dam, who, at that time, were Gregory and Caroline Bentley. The Bentleys owned an adjacent parcel of property which included a portion of the stone masonry spillway of the dam.[7] They were not provided with notice of the permit application, although the grant of the permit in 1985 was published in the *Pennsylvania Bulletin.*

The Bentleys appealed the Department's action in 1989 to the Environmental Hearing Board. The Board dismissed the appeal on August 15, 1989 as untimely. *Bentley v.* DER, 1989 EHB 960, *aff'd,* 273 M.D. 1989 (Pa. Cmwlth. June 27, 1990). The Bentleys also commenced an action in federal court in July, 1989. On June 4, 1992, they succeeded in securing the revocation of the permit. *See Bentley v. Ellam,* Civil Action No. 3:CV-90-1138 (M.D. Pa. filed June 4, 1992). The Permittees appealed the Department's action to this Board and the Board, by order,

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[6] Many of these facts taken from court opinions in prior proceedings are offered simply as background and were not considered in reaching our decision in this matter. *See Seder v. DEP,* EHB Docket No. 98-058-MG (Opinion issued February 24, 2000).

[7] At the time the permit was issued their ownership interest was subject to a legal dispute.

superseded the Department's revocation of the permit on October 29, 1992. *Silknitter v. DER,* EHB Docket No. 92-226-W. Thereafter, at the Permittees' request, however, the federal district court modified its order to permit them to file a permit application without regard to the failure of the Bentleys to sign the application and authorized the Department to process that application in accordance with the requirements of Pennsylvania law and to provide the Bentleys with notice and an opportunity to be heard. The decision of that court was largely affirmed on appeal to the Third Circuit. *Bentley v. Ellam,* 19 F.3d 640 (3d Cir. 1994)[8]

The Permittees resubmitted an application for the small hydroelectric project in April 1993. Thereafter, the Bentleys sold that portion of the land containing the northern portion of the spillway adjoining the Permittees' parcel, but retained ownership of the property containing the lower millrace. In considering this application, the Department changed its position concerning the necessity for signatures of other owners of the dam, and on December 9, 1997, reissued the permit for the project, based on an application signed solely by the Permittees. At that point the project had been in operation for ten years.

The Bentleys filed a timely appeal of the Department's issuance of the permit on March 30, 1998. In July, 1999, the Bentleys sold their adjoining parcel containing the lower millrace to Jeffrey A. Seder. The Board granted Mr. Seder's motion to be substituted as the Appellant in this matter. *Seder v. DEP*, 1999 EHB 782. He has adopted the objections of the Bentleys to the permit. We will address each of his arguments below.

**Standard of Review**

As a third party, the Appellant bears the burden of proof in this matter. 25 Pa. Code §

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*See Seder*, N.T. 207-08.

[8] For a brief discussion concerning the legal issues of the federal proceedings, *see Bentley*

1021.101(c)(2). Therefore, he must show by a preponderance of the evidence that the Department improperly issued the permit.

Our review is *de novo* so that the Board is not limited to considering the evidence the Department actually had before it at the time it acted but considers all of the evidence presented before the Board. *Warren Sand and Gravel Co., Inc. v. Department of Environmental Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975). Where the Department acts pursuant to mandatory authority of a statute or regulation the only question for the Board is whether to uphold or vacate the Department's action. On the other hand, where the Department exercises its discretionary authority the Board may substitute its discretion for the Department's. *Id. See also Pequea Township v. Herr,* 716 A.2d 678 (Pa. Cmwlth. 1998).

**Necessity of Other Signatures**

The Appellant first argues that the permit should be revoked because it was illegally issued without his signature as a "co-owner" of the dam. The Department argues in its post-hearing submissions that the Appellant is not a "co-owner" because his portion of the millrace is not part of the dam as defined by the regulations.

Throughout these proceedings the Department has operated on the assumption that the millrace is part of the dam. (*See, e.g.,* Martino, N.T. 114-15; Department's Pre-Hearing Memorandum at Section II. ¶ 5; Department's Memorandum of Law in Response to the Appellant's Motion for Summary Judgment at 14). No evidence was presented at the hearing which suggested that the millrace was *not* properly considered part of the "dam" as defined by Section 105.1 of the regulations.[9] Accordingly, for the purposes of this adjudication the Board

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*v. DEP*, 1999 EHB 447.

[9] Section 105.1 defines a "dam" as:

will assume without deciding that the entire millrace is part of the dam.[10]

The Appellant argues that the permit was issued in contravention of the Department's regulation at 25 Pa. Code § 105.13 (h).[11] Section 105.13(h) provides that:

> An application shall be signed by the owners of the dam or reservoir, water obstruction or encroachment, or the persons exercising primary responsibility for the dam or reservoir, water obstruction or encroachment. . . .

25 Pa. Code § 105.13(h). As an owner of the property containing the lower millrace the Appellant contends that his signature was a necessary prerequisite to issuance of the permit because he was an owner of this portion of the dam.

The Appellant has misinterpreted this regulation. It provides that the application shall be signed by the "owner of the dam" ***or*** the "person exercising primary responsibility for the dam."

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> An artificial barrier, together with its appurtenant works, constructed for the purpose of impounding or storing water . . . .

25 Pa. Code § 105.1. "Appurtenant works" is also a defined term in the regulations:

> Structures or material incident to or annexed to dams or water obstructions which are built or maintained in connection with the dams or water obstructions and are essential to their proper functioning. For dams, the term includes, but is not limited to:
>
> (i) Structures such a spillways, either in the dam or separate therefrom.
>
> (ii) Low level outlet works.
>
> (iii) Conduits such as tunnels, pipelines or penstocks through the dam or its abutments.

25 Pa. Code § 105.1. Mr. Martino testified that the millrace is necessary for the operation of the dam in order to generate electricity. (N.T. 46)

[10] Obviously, if the millrace is not part of the dam, the Appellant's signature on the permit application is not required.

[11] The Appellant cites Section 105.13(f) and (g), but quotes Section 105.13 (g) and (h). The Department has agreed to consider the Appellant's argument to refer to Sections 105.13(g)

The Department properly considered the Permittees to be the persons with primary responsibility for the dam since they own the principal operational elements of it, including the powerhouse, the turbines, the penstock and the headgate. (Martino, N.T. 96-97) The Appellant owns only the lower portion of the millrace, which is only a part of the dam in the sense that water from the dam flows through it. The Department determined that there would be no significant change to the millrace because of the operation of the dam, nor would the Appellant's responsibilities concerning the millrace be adversely impacted. The Department contends it is therefore reasonable to require solely the signature of the Permittees as the persons exercising primary responsibility for the dam on the permit application. We agree.

This interpretation of § 105.13(h) is also consistent with the prior subsection, 105.13(g), which states that:

> An application shall be submitted by the person who owns or has primary responsibility for the proposed dam . . . . If an application is submitted by a person with primary responsibility for the structure or activity, the owner of the dam . . . . will not thereby be relieved of legal duties or responsibilities for the structure or activity as imposed by the act or this chapter.

25 Pa. Code § 105.13(g).

Assuming the lower millrace is a portion of the dam, the Appellant's duty to maintain it by keeping his portion of the millrace clear is not affected by the permit even though the permit application was not signed by him or the Bentleys. Under 25 Pa. Code § 105.51 relating to maintenance obligations of dam owners, the "permittee or owner" of the dam have continuing obligations in the operation and maintenance of the "facility and appurtenant structures." It provides as follows:

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and (h), and we shall do the same. See Department's Brief at 38.

> The permittee or owner of a dam, water obstruction or encroachment shall operate and maintain the facility and appurtenant structures in a safe condition in accordance with permit terms and conditions and the provisions of this chapter so that the facility cannot imperil life, health, safety or property located above or below the facility.

25 Pa. Code § 105.51.

In accordance with this regulation, both the Permittees as a dam owner, independent of the duty imposed by their permit, and Appellant as owners of the lower millrace, have responsibility for the maintenance of the dam, including the lower millrace.

The Appellant complains that the Department changed its position concerning the need for other signatures between the time of the original permit in 1985, and the current 1997 permit. Yet, the Appellant fails to explain how the Department or the Board is bound by a position the Department took on a permit that was issued 12 years before the permit which is currently under review. We find that the regulations fully support the Department's issuance of the current permit based on an application signed solely by the Permittees as the persons primarily responsible for the dam and the hydroelectric project.[12] Whatever action the Department took concerning the 1985 permit is not before us now and is irrelevant to the question of whether the Department properly issued the 1997 permit in accordance with all requirements of applicable

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[12] We are not unsympathetic to the Appellant's frustration with the Department's changing position on its legal basis for issuing the permit. Although the Department offered additional justification at the hearing for its action other than its erroneous interpretation of the federal court order, it is clear it felt compelled to issue the permit based upon that order. *See Bentley v. DEP,* 1999 EHB 447(holding that as a matter of law the order of the federal court only requires the Department to accept the permit application for processing and did not require the Department to issue the permit). However, as explained above, we believe that the regulations support the Department's decision to issue the permit without the signatures of the Bentleys, and therefore affirm the decision on that basis. *See Eagle Environmental, L.P. v. DEP*, 1998 EHB 896, *aff'd*, 2704 C.D. 1998 (Pa. Cmwlth. January 19, 2000)(upholding a permit suspension even though the basis of the Department's decision was an erroneous interpretation of the law).

law.[13]

**Proof of Flowage Easement**

The Appellant next argues that the Department abused its discretion in issuing the permit absent proof of title or flowage easement from the Appellant pursuant to 25 Pa. Code § 105.82(a)(10). That regulation requires that an application for the operation and maintenance of an existing dam provide "[p]roof of title or flowage easements for land areas below the top of the dam elevation that is subject to inundation."[14]

The Appellant once again argues that it should prevail because the Department took the position when considering the 1985 permit, that the Permittees would either need the signature of the other owner of the dam, at the time the Bentleys, or would need an easement from them. As we explained above, this position is not directly relevant to our consideration of the 1997 permit.[15] Further, we conclude that 25 Pa. Code § 105.82(a)(10) requires only obtaining title or an easement to property upstream of the dam which would be flooded by reason of the construction of, or any modification to, the dam. Mr. Martino testified that the Department only applies Section 105.82(a)(10) to land areas upstream from the dam which may be subject to flooding due to the impoundment of water as part of the regular course of operation of a dam.

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[13] For the purposes of preserving the issue for appeal, the Department has also taken issue with the Board's ruling that the federal court order did not require the Department to issue the permit as a matter of law. The Board's reasoning was fully explained in our opinion and order denying summary judgment and we will not repeat it here. *Bentley v. DEP*, 1999 EHB 447, 452-53.

[14] The Appellants have also cited 25 Pa. Code § 105.81(a)(1), which relates to the modification of existing dams. The language of this regulation is identical to Section 105.82(a)(10) and the same analysis would apply.

[15] For one thing, the parcel of property owned by the Appellant in the current situation is not the same parcel that was owned by the Bentleys in 1985. (G. Bentley, N.T. 155-56) That parcel is currently owned by the Coldrens and includes a portion of the masonry spillway. The

(Martino, N.T. 98-99)[16] This is a proper interpretation of this regulation because easements ordinarily need not be obtained for totally unexpected events. We think it would be unreasonable for the Department to require that an applicant also obtain an easement or title to property downstream of the dam to cover an unexpected, catastrophic failure of a dam. In any event, the Appellant presented no evidence that his parcel of land is subject to any sort of flooding because of the normal operating activities of the Permittees' project.[17] In fact, Mr. Martino testified that if there was a catastrophic breach of the dam which resulted in all of the impounded water rushing down the millrace toward Route 82, there may not even be enough water to go over that road if the culvert were blocked. Further, it is unlikely that the water would cause Buck Run to leave its banks. (Martino, N.T. 87) Mr. Martino did acknowledge that the Department has from time to time required an applicant to obtain an easement from downstream owners. However, we are not bound by this past interpretation or practice by the Department. *Tri-State Transfer Company v. Department of Environmental Protection,* 732 A.2d 1129 (Pa. Cmwlth. 1998).

Accordingly, the Department properly issued the permit without proof of a flowage easement from Appellant.[18]

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parcel owned by the Appellant is only a portion of the millrace. See Ex. A-1.

[16] The Appellant did elicit testimony from Mr. Martino that the Department has on occasion required an applicant to "show proof of easement on the downstream side of a dam . . . ." (N.T. 58) However, the witness did not elucidate the circumstances under which he would require an applicant to provide proof of an easement and whether it would be an easement as described in Section 105.81(a)(10) of the regulations.

[17] The Appellant suggests that the millrace will become "inundated" with water discharged from the turbines. Obviously, the millrace is not a land area and the fact that water runs through it does not mean it is "inundated" within the meaning of this regulation. *Webster's* defines the term as meaning "to cover with water, esp. flood water; to overwhelm as if with a flood." *Webster's II New College* Dictionary, 582 (1995)

[18] The Appellant, in a footnote, implies that the Department may have violated 25 Pa. Code § 105.231(a)(vii). That regulation relates to permits issued for the construction or modification of channel changes and dredging for facility construction and maintenance.

**Consideration of the Property Interests of Others**

The Appellant next argues that the Department abused its discretion in failing to properly consider his property rights as required by the regulations. Specifically, the Appellant argues that since the operation of the dam results in a different amount of flow in Buck Run and the millrace, his rights were not taken into account by the Department. We believe that the Department did appropriately balance the property interests related to the downstream parcel.

Section 105.14(b) requires the Department to consider, among other things, the "effect of the dam, water obstruction or encroachment on the property or riparian rights of owners above, below or adjacent to the project." 25 Pa. Code § 105.14(b)(3). The Department contends that it did consider the rights of the downstream owners and in fact imposed additional operating conditions in the permit to protect those rights.

First, Mr. Martino testified that the Department determined that there would be very little effect on the downstream property. He reached this conclusion because the dam wasn't being raised, the spillway elevation wasn't changing and the size of the headgate remained the same. (Martino, N.T. 103) We believe this to be a proper conclusion. The Appellant did provide general testimony that the water level in the lower millrace on his property was higher than it was before Permittees' small power project began operating. (*E.g.,* N.T. 217-18, 221) He presented no testimony, however, which would tie this change to the operation of Permittees'

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Although there was a suggestion in the testimony that the Permittees altered the channel of the millrace on their property at some point, there is no indication that the activity was relevant to the permit under review here. In fact, Mr. Martino testified that in 20 years he has never applied this subsection. (N.T. 96) Furthermore, the Appellant has not explained how this regulation is implicated and we will not try and guess what its significance is. *Cf. Collins v. Cooper*, 746 A.2d 615 (Pa. Super. 2000) (the court will not address an allegation where the litigant failed to cite any authority in support of the claim.)

project or to indicate that the increase of water level was a significantly adverse condition.

Second, it is clear that the Department did consider the rights of downstream landowners because it imposed special operating conditions in the permit to address the concerns of the downstream owner of the lower millrace. (Martino, N.T. 75) For example, the permit restricts operation of the turbines when the water is low and prohibits "peaking and pulsing" as a method of running the turbines in low water.[19] (Ex. A-11 at 6 ¶ B)

Third, there is no requirement in the regulations or in the Dam Safety Act which absolutely precludes the Department from issuing a permit for a dam because there may be moderate changes in flow on impacted streams. The Dam Safety Act only seeks to prevent "*unreasonable* interference with waterflow. . . ." 32 P.S. § 693.2(4)(emphasis added). There is *no* evidence in the record that there are significant changes in the water flow of either the millrace or Buck Run which are caused solely by the operation of the Permittees' dam. There is no evidence that whatever changes in flow which may have occurred are due to the operation of the dam and has unreasonably interfered with water flow.[20]

In sum, Section 105.14 (b)(3) does not require the Department to determine that there will be *no* impact upon the property of downstream landowners. Instead it simply requires it to take

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[19] "Peaking and pulsing" disrupts the evenness of the flow in the millrace. (Martino, N.T. 90-91)

[20] The Appellant did provide testimony that he has difficulty persuading some of his young race horses to cross the millrace because of the allegedly increased flow. However, the Appellant was substituted for the Bentleys in this matter, and therefore "stepped into their shoes." *Seder v. DEP*, 1999 EHB 782, 784-86. He may not add new allegations that he could have raised as an appellant or an intervener in his own right. He has been using the land previously owned by the Bentleys for the training of his race horses for many years prior to this appeal (Seder, N.T. 211, 213-15) and could have raised the objection that the Department should have considered the effect of flow changes in the millrace on his ability to use the property for young race horses by appealing the Department's issuance of the permit on his own and not as the substituted Appellant for the Bentleys.

downstream property rights into consideration and balance it among the other 14 factors which the Department is required to consider when reviewing permit applications. It is clear in this case that the Department was aware of the concerns of the Appellant as the downstream landowner and made efforts to address those concerns with the special operating conditions placed in the permit. The Appellant has not carried its burden of proving that the Department's action in issuing the permit to the Permittees was improper in any way.

**Operation and Maintenance Requirement**

The Appellant finally argues that the condition in the permit which requires the Permittees to keep the "outlet channel" free of all trees, shrubs and woody vines imposes a duty upon the Appellant because the Department knew that it was impossible for the Permittees to ever be able to comply because the Appellant will never grant them permission to come on to his property to clear the millrace in the event it is necessary to do so. This argument lacks merit.

As we fully explained in our prior opinion, the permit does not and can not authorize the Permittees to trespass upon the Appellant's property. "The right to enter or use the land of another must be independently established by the permittee and disputes regarding such use must be resolved in the courts of common pleas." *Bentley v. DEP*, 1999 EHB 447, 450. Furthermore, if the lower millrace is, as the Appellant contends, a part of the dam, then he has a duty to maintain it independent of the permit, which is imposed by the regulations. *See* 25 Pa. Code § 105.51 and discussion above. If he does not wish the Permittees to maintain the lower millrace, then he must do so himself, as provided by the regulations.

**Conclusion**

For the foregoing reasons, we find that the Department did not abuse its discretion in

issuing the permit for the modification and operation of the dam to the Permittees. We therefore make the following:

## CONCLUSIONS OF LAW

1. The burden of proof in this appeal of the Department's action on a permit application rests with the Appellant. 25 Pa. Code § 1021.101(c)(2).

2. Although the construction of the hydroelectric project is a modification of the dam, the Permittees have primary responsibility for the operation of the dam and this hydroelectric project within the meaning of 25 Pa. Code § 105.13(g) and (h).

3. The signatures of the other property owners on the application for a permit for this project were unnecessary to enable the Department to issue the permit. 25 Pa. Code § 105.13(g) and (h).

4. It was unnecessary for the Department to require the Permittees to demonstrate proof of a flowage easement from the Appellant before issuing the permit since this requirement applies only to landowners upstream of the dam and there is no evidence that any lands of the Appellant are subject to inundation. 25 Pa. Code § 105.81(a)(10); 25 Pa. Code § 105.82(a)(10).

5. The Department appropriately considered the property rights of the Appellant as a downstream landowner as required by 25 Pa. Code § 105.14(b)(3).

6. The Department properly included a permit condition which requires the Permittees to keep the millrace clear of trees, shrubs and woody vines.

7. The Department issued Limited Power Permit No. L.P. 15-064B to the Permittees in full compliance with the requirements of the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1-693.27, the Limited Power Act,

Act of June 14, 1923, P.L. 704, *as amended*, 32 P.S. §§ 591-625 and the Department's regulations at 25 Pa. Code Chapter 105.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| JEFFERY A. SEDER | : | |
| | : | |
| v. | : | EHB Docket No. 98-058-MG |
| | : | |
| COMMONWEALTH OF PENNSYLVANIA, | : | |
| DEPARTMENT OF ENVIRONMENTAL | : | |
| PROTECTION and DONALD AND JOAN | : | |
| SILKNITTER : | | |

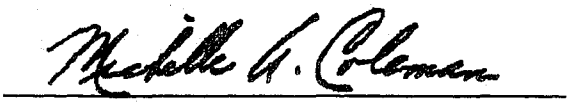
**ORDER**

AND NOW, this 27th day of April, 2000, the appeal of Jeffrey A. Seder is hereby **DISMISSED**.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member



**MICHELLE A. COLEMAN**
**Administrative Law Judge**
**Member**

**BERNARD A. LABUSKES, JR.**
**Administrative Law Judge**
**Member**

**MICHAEL L. KRANCER**
**Administrative Law Judge**
**Member**

**DATED:** **April 27, 2000**

**c:** **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

| | | |
|---|---|---|
| **DARLENE K. THOMAS, et al.** | : | |
| **v.** | : | **EHB Docket No. 98-150-C** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, LAMAR TOWNSHIP BOARD OF SUPERVISORS, PORTER TOWNSHIP BOARD OF SUPERVISORS, WALKER TOWNSHIP BOARD OF SUPERVISORS, BOROUGH OF MILL HALL, and CITY OF LOCK HAVEN** | : | **Issued:** April 27, 2000 |

## OPINION AND ORDER ON MOTIONS TO DISMISS

**By Michelle A. Coleman, Administrative Law Judge**

**Synopsis:**

The Board denies motions to dismiss an appeal for failing to timely serve a copy of the notice of appeal on the recipients of the Department's action. Failure to timely serve the notice of appeal on the recipients is not required for the Board to have jurisdiction where (1) the failure to effect timely service resulted from a breakdown in Department of Environmental Protection and Board procedures; and (2) the appellants subsequently served copies of the notice of appeal on the recipients.

## OPINION

This matter was initiated with the August 17, 1998, filing of a notice of appeal by Darlene Thomas and certain other individuals (Appellants) challenging an July 22, 1998, letter sent from the Department of Environmental Protection (Department) to the East Nittany Valley

Joint Municipal Authority (ENVJMA), a joint municipal authority formed by Lamar, Porter, and Walker Townships to revise their sewage collection systems. The letter informed ENVJMA that the Department approved a proposed update revision to the official sewage facilities plans of Mill Hall Borough; the City of Lock Haven; and Lamar, Porter, and Walker Townships, under the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, *as amended,* 35 P.S. §§ 750.1-750.20a (Sewage Facilities Act). The revised plan calls for ENVJMA to construct a regional collection system to serve portions of Lamar, Porter, and Walker Townships. Wastewater would be piped to the City of Lock Haven for treatment at its existing sewage treatment plant with the aid of upgrades to Mill Hall's main interceptor and pump station.

The Board has issued one previous opinion and order in this appeal. On April 18, 2000, we granted an ENVJMA motion to dismiss itself as an appellee. We held that ENVJMA was not an automatic party to the appeal because it was not the recipient of the Department's action and that the Board could not make it a party through involuntary joinder.

The current controversy involves three motions to dismiss filed on May 14, 1999: one filed by Mill Hall Borough; the second filed by the City of Lock Haven; and the third filed by Lamar, Porter, and Walker Townships. Only the first two motions were accompanied by supporting memoranda of law. Mill Hall's motion asserts that the Board must dismiss Appellants' appeal with respect to it because (1) Appellants failed to serve the notice of appeal on it in a timely manner, (2) Appellants neither submitted a written request nor showed "good cause" to appeal *nunc pro tunc*, (3) the Board cannot involuntarily join parties, and (4) therefore, the Board lacks jurisdiction over Mill Hall. Accordingly, Mill Hall requests that the Board dismiss Appellants' appeal in its entirety or, alternatively, that we dismiss Mill Hall as a named

appellee. Although the other municipalities filed separate motions to dismiss, all three motions raise essentially the same issues.

On June 7, 1999, Appellants filed responses to each of the three motions to dismiss. They argue that dismissal would be inappropriate because (1) they timely served a copy of the notice of appeal at the address set forth in the Department's July 22, 1998, and they should not be penalized for the Department's failure to send that letter to the correct entities; (2) ENVJMA is intimately related to the municipalities, so that Appellants' timely service on ENVJMA should be imputed to the municipalities;[1] (3) Appellants have subsequently served copies of the notice of appeal on the municipalities, so that the municipalities are now proper parties to the appeal; and (4) Appellants are entitled to appeal *nunc pro tunc*. In addition to filing the responses, Appellants filed a motion to appeal *nunc pro tunc*.

The Board will grant a motion to dismiss where there are no material issues of fact in dispute and the moving party is entitled to judgment as a matter of law. *See Smedley v. DEP*, 1998 EHB 1281, 1282. We will not grant the municipalities' motions to dismiss because the municipalities have failed to show that timely service of the notice of appeal is a jurisdictional requirement, and, even if they had, the circumstances here would warrant granting Appellants' petition to appeal *nunc pro tunc* on June 7, 1999.

Section 1021.51 of the Board's rules of practice and procedure, 25 Pa. Code § 1021.51 contains the commencement, form, and content requirements for notice of appeal. It provides, in pertinent part:

---

[1] For instance, Appellants aver that, when they attempted to serve a copy of their notice of appeal on Mill Hall Borough, Mill Hall's Secretary informed Appellants that Mill Hall did not want to be part of the appeal and ENVJMA "would handle it." (Appellants' response to motion of Mill Hall Borough, ¶ 3.)

> (a) An appeal from an action of the Department shall commence with the filing of a written notice of appeal with the Board.
>
> ...
>
> (g) Concurrent with or prior to the filing of a notice of appeal, the appellant shall serve a copy thereof on each of the following:
>
> (1) The office of the Department issuing the notice of Departmental action.
>
> (2) The Office of Chief Counsel of the Department or agency taking the action appealed.
>
> (3) In a third party appeal, the recipient of the action. The service shall be made at the address set forth in the document evidencing the action by the Department....
>
> (h) The service upon the recipient of an action as required by this section shall subject the recipient of the Board as a party.

When Appellants filed their notice of appeal, they checked the box on the notice of appeal indicating that they served "the recipient of the ... approval." However, they sent the copy of the notice of appeal to ENVJMA, rather than to Mill Hall Borough; the City of Lock Haven; or Lamar, Porter, or Walker Townships (collectively, the municipalities). Appellants did serve the municipalities later, in accordance with the Board's January 6, 1999, and January 29, 1999, orders.

There is no question that Appellants failed to timely serve a copy of the notice of appeal on the recipients of the Department's action. We have previously held that the recipients of the Department's action were the municipalities—not ENVJMA. *Thomas v. DEP,* EHB Docket No. 98-150-C (opinion issued April 18, 2000) p. 5. And, although Appellants served ENVJMA with a copy of their notice of appeal at the same time they filed the appeal with the Board, the municipalities were not served until early 1999.

It is well established that an appeal must be timely *filed* for the Board to have jurisdiction. *See, e.g., Rostosky v. Department of Environmental Resources*, 364 A.2d 761 (Pa. Cmwlth. 1976). However, the municipalities do not allege that Appellants failed to file a timely

notice of appeal with the Board. They aver that the Board lacks jurisdiction over them because Appellants failed to *serve* them at the same time they filed their notice of appeal. Significantly, while the municipalities correctly note that simultaneous service is required by 25 Pa. Code § 1021.51(g), they fail to cite any authority to support their assertions that failure to comply with the timeliness requirement deprives the Board of jurisdiction over the entity served.

The Board has not previously ruled on whether timely service upon the recipient of a Department action is a jurisdictional requirement under the current version of section 1021.51 of our rules, nor under its immediate predecessor.[2] However, the Board did address the issue under two previous incarnations of the service requirement in its rules.

The Board first ruled on whether timely service of the recipient of a Department action is a jurisdictional requirement in *Allegheny River Protective Association, Inc. v. DER,* 1975 EHB 253. In that appeal, a third-part appellant challenged the Department's decision to reinstate a suspended mine drainage permit. The permittee filed a motion to dismiss because the appellant failed to serve it with a copy of the notice of appeal. At the time, section 21.21 of the Board's rules, 25 Pa. Code § 21.21, provided, in pertinent part:

> (b) The Appeal ... shall be filed with the Environmental Hearing Board....
> The Appellant shall, within 48 hours after filing an Appeal, serve a copy of the appeal [sic] on the officer or the Department of the local agency issuing the Order and on the Bureau of Administrative Enforcement.... Where the Appeal is from the granting of a permit, an additional copy shall be served upon the recipient of the permit.
>
> ...

[2] While the Board has not *previously* addressed whether timely service is a jurisdictional requirement under the current version of 25 Pa. Code § 1021.51, Judge Krancer is issuing another decision on that issue simultaneously with this one. Like the instant decision, that opinion holds that timely service upon the recipient of a Department action is not a jurisdictional requirement. *See Ainjar v. DEP,* EHB Docket No. 99-248-K (opinion issued April 27, 2000).

> (d) Failure to comply with this section shall be sufficient basis for dismissing the Appeal. The action of the Department or local agency shall be final as to any person who fails to file an appeal or to perfect an appeal pursuant to this section.

The Board found in *Allegheny River Protective Association* that the appellant never served the permittee, 1975 EHB at 255, and held that its failure to serve the permittee within 48 hours deprived the Board of jurisdiction. 1975 EHB at 256-259. The Board explained that the second sentence of section 21.21(d) required that an appellant comply with all the provisions of section 21.21 for the Board to have jurisdiction over his appeal, and that the Department's action became final once appellant failed to comply with the service requirement in subsection (b). 1975 EHB at 258.

The Board next addressed whether timely service of the recipient of a Department action is a jurisdictional requirement in *Czambel v. DEP*, 1980 EHB 508. In *Czambel*, a permittee moved for the Board to dismiss an appeal where the appellant failed to serve permittee with a copy of his notice of appeal within 10 days of filing the appeal with the Board.

The Board had amended its rules of practice and procedure in the interim between *Allegheny River Protective Association* and *Czambel*. The new version of the Board's rules concerning the commencement and form of appeals deleted the language that previously appeared at section 21.21(d) (that failure to conform with any of the requirements in section 21.21 would render the Department's action final as to that appellant) and replaced it with the following jurisdictional statement at section 21.52(a):

> Except [in the case of appeals *nunc pro tunc*], jurisdiction of the Board shall not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days....

The Department also moved the service requirement from section 21.21 to section 21.51 and amended it to read as follows:

(f) Within 10 days after filing the notice of appeal, the appellant shall serve a copy thereof on each of the following:

(1) The office of the Department issuing the notice of Departmental action

(2) The Bureau of Litigation....

(3) Where the appeal is from the granting of a permit, license, approval or certification, the recipient thereof.

(g) The service upon the recipient of a permit, license, approval, or certification as required by this section, shall subject such recipient to the jurisdiction of the Board as a party appellee.

Section 21.52 of the Board rules, 25 Pa. Code § 21.52, meanwhile, provided that, except in the case of appeals *nunc pro tunc*, jurisdiction of the Board would attach to an appeal only if it was filed with the Board within 30 days of the Department's action. 25 Pa. Code § 21.52(a). Section 21.52 also provided that no third-party appeal would be "perfected" until the appellant served the recipient of the Department's action with a copy of the notice of appeal in accordance with § 21.51. 25 Pa. Code § 21.52(b).

Applying sections 21.51 and 21.52 to the facts in *Czambel*, the Board held that the 10-day deadline for serving the notice of appeal upon the permittee was not jurisdictional, and it denied the permittee's motion to dismiss. Although the Board noted that it had held in *Allegheny River Protective Association* that the service requirement was jurisdictional, because of the language in section 21.21(d) of the previous version of the rules, the Board explained:

> The language of Section 21.21(d) of the former Rules has been dropped from the present rules.... Consequently, it is the plain meaning of the present Rule 21.52(a) that failure to perfect the appeal within 10 days after filing the appeal, by serving a notice of appeal on the permittee, does not have the board's jurisdiction over the appeal. The board's jurisdiction cannot attach until the appeal is perfected by service of the notice of appeal, but once the appeal has been perfected the board can take jurisdiction *if* the appeal has been filed within the 30-day period specified in Rule 21.52(a).

1980 EHB at 511 (emphasis in original).

Despite *Czambel*, at least five other permittees in the 1980s and early 1990s persisted in arguing that timely service of the notice of appeal upon the recipient of the Department's action was a jurisdictional requirement under sections 21.51 and 21.52 of the Board's rules. The Board rejected that proposition each time.[3] The only time after *Czambel* that the Board has dismissed an appeal for failure to serve the recipient of a Department action with a copy of the notice of appeal was where the appellant not only failed to serve the recipient a timely copy of the notice, as required by 25 Pa. Code § 21.51(f)(3), but also failed to respond to two separate Board orders directing it to show that it had served a copy of the notice of appeal on the recipient of the action within 10 days of the issuance of the order. *See Norwesco Development Corporation v. DER,* 1986 EHB 1089, 1089-1090. Given the Board's decisions on the issue, it is clear that the Board did not regard the 10-day deadline for service of the notice of appeal to be a jurisdictional requirement in 25 Pa. Code § 21.51(f)(3).

The Board has amended its rules of practice and procedure several times since last ruling on the whether the deadline for service of the notice of appeal is jurisdictional. Three of this series of amendments affected the provisions regarding the service requirement. The first of

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[3] *See Sheesley v. DER,* 1981 EHB 588, 589 ("[T]he requirements of 25 Pa. Code 21.51(f)(3) are not jurisdictional. Once an appeal has been filed with this board within the 30-day limit set forth in 25 Pa. [Code] 21.52(a), the jurisdiction of this board attach[e]s."); *Kemerer v. DER,* 1983 EHB 276, 280 ("[T]he ten day requirement of 25 Pa. Code § 21.51(f)(3) is not a requisite for perfecting the appeal; the only essential requirement for perfection of the appeal is service of the notice of appeal on the permittee."); *Ferri Contracting Company v. DER,* 1984 EHB 675, 676-677 (holding that Board would not dismiss an appeal for lack of jurisdiction where the appellant served a copy of the notice of appeal on the Department, but failed to do so within 10 days, as required by 25 Pa. Code § 21.51(f)(3)); *McCutcheon v. DER,* 1988 EHB 1114, 1116-1117 (holding that the Board would not dismiss an appeal for lack of jurisdiction simply because the appellant failed to serve a copy of the notice of appeal on permittee within 10 days); and *Washington Township v. DER,* 1995 EHB 403, 405-406 (declining to dismiss an appeal despite the appellants' failure to serve a copy of the notice of appeal upon a permittee within 10 days, as required by 25 Pa. Code § 25 Pa. Code § 21.51).

these, promulgated on September 9, 1995, made no substantive changes to the service requirement provisions, but switched the location of 25 Pa. Code §§ 21.51 and 21.52, to 25 Pa. Code §§ 1021.51 and 1021.52, respectively. 25 Pa. Bull. 3828. While some individuals commenting on this set of amendments requested that the Board make the timely service requirement jurisdictional, the Board expressly declined to do so. *See* 25 Pa. Bull. 3823.

The second set of amendments, promulgated on September 19, 1998, made major revisions to a number of aspects of the service requirement provisions. Among other things, the amendments required that recipients of Department actions be served a copy of the notice of appeal on or before the date appellant filed his notice of appeal—not within 10 days of filing, as before. [4] The amendments also eliminated the distinction between skeletal and perfected appeals.[5] The Board explained that it shortened the deadline for service of the notice of appeal because it wanted to streamline the appeal process and that the burden to appellants of having to serve the recipient of a Department action at the same time that it filed its notice of appeal with the Board was minimal. 28 Pa. Bull. 4714. As for the elimination of the provisions regarding skeleton appeals, the Board wrote:

> The Procedural Rules Committee and the Board believe these provisions to be unnecessary in view of the provisions of [25 Pa. Code] § 1021.53 which now permit the filing of amendments to the appeal under certain conditions and time limitations. Those provisions should govern the right to make a substantive change to the appeal. In the event the appeal should fail to meet some formal requirement of § 1021.51, the appellant may remedy any such failure upon notice from the Board or as a result of a motion filed by an opposing party.

25 Pa. Bull. 808.

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[4] The September 19, 1998, amendments to 25 Pa. Code §§ 1021.51 and 1021.52, are set forth in detail in the appendix to this opinion.

[5] The Board sometimes referred to appeals that had been filed but not yet perfected as "skeleton" appeals. *See, e.g., McCutcheon v. DER,* 1988 EHB 1114, 1116.

The third set of amendments, promulgated on September 4, 1999, also made substantive revisions to the service provisions at sections 1021.51 and 1021.52.[6] Among other things, in section 1021.51's requirement that recipients of Department actions be served with a copy of a notice of appeal in third-party appeals, the Board added language clarifying that "The service shall be made at the address set forth in the document evidencing the action by the Department or at the chief place of business in this Commonwealth of the recipient." *See* § 1021.51(g)(3) at 29 Pa. Bull. 4690. The Board also added a provision to section 1021.52, providing that "The appellant shall, within 20 days of the mailing of a request from the Board, file any missing information required by § 1021.51(c), (d) and (i) (relating to commencement, form and content) or suffer dismissal of the appeal." *See* § 1021.52(b) at 29 Pa. Bull. 4690.

After a careful review of the current language in sections 1021.51 and 1021.52, the Board's case law on whether timely service is a jurisdictional requirement, and the amendments to the service provisions in the Board's rules since those cases were decided, we are convinced that dismissal would be inappropriate here.

The current version of sections 1021.51 and 1021.52 never state that timely service of the notice of appeal is a jurisdictional requirement. The rules simply say that appellants shall serve the recipient of a Department action "concurrent with or prior to the filing of a notice of appeal." 25 Pa. Code § 1021.51(g). Yet the fact that the rules require timely service does not necessarily mean that failure to effect timely service deprives the Board of jurisdiction. While § 1021.51(h) provides that "service upon the recipient of an action as required by this section shall subject the recipient to the jurisdiction of the Board"—and the phrase "as required by the section" could be

[6] The September 4, 1999, amendments to 25 Pa. Code §§ 1021.51 and 1021.52, are set forth in detail in the appendix to this opinion.

argued to incorporate the timeliness requirement, in addition to the general service requirement—the same phrase was in the earlier versions of the service provisions, which the Board repeatedly held did not make timely service a jurisdictional requirement. Significantly, as noted above, when the Board was asked to amend its rules to make timely service a jurisdictional requirement, the Board expressly declined to do so. *See* 25 Pa. Bull. 3823.

Furthermore, dismissing Appellants' appeal would be particularly troublesome here because Appellants' failure to serve the municipalities is attributable, in large part, not to Appellants' negligence, but to a breakdown in Department and Board procedure. Although the municipalities were the recipients of the plan approval, the Department did not address its letter approving the plan revisions to them. Instead, the Department addressed the letter to ENVJMA and simply copied the municipalities. When Appellants filed their notice of appeal, they served a copy of the notice of appeal on ENVJMA rather than the municipalities, presumably assuming that ENVJMA was the recipient of the Department's action (thus, Appellants checked the box on their notice of appeal indicating that they had served the recipient of the Department's action with a copy of the notice of appeal). Indeed, by serving a copy of the notice of appeal on ENVJMA, Appellants complied with the letter of the law set forth in § 1021.51(g)(3). Section 1021.51(g)(3) not only requires that recipients of Department actions be served with a copy of a notice of appeal in third-party appeals, it also provides, "The service shall be made *at the address set forth in the document evidencing the action by the Department* or at the chief place of business in this Commonwealth of the recipient." (Emphasis added.) Because the Department mistakenly addressed the letter to ENVJMA, Appellants served a copy of the notice of appeal at the address set forth in the document evidencing the Department's action when they served ENVMJA.

The confusion resulting from the breakdown in Department procedure was further exacerbated by a breakdown in Board procedure. Ordinarily, the clerical staff at the Board (staff) reviews notices of appeal as they are docketed. When a notice of appeal omits required information, the staff issues an order that identifies the missing information and directs the appellant to submit it within 20 days. However, in this appeal, the staff made the same mistake as Appellants based on the Department's letter: they mistakenly assumed that ENVJMA—not the municipalities—was the recipient of the Department's action. Therefore, when docketing Appellants' notice of appeal, the Board did not issue an order requiring that Appellants submit proof that the municipalities were served. After ENVJMA and the municipalities filed their motions to dismiss, and the oversight became apparent to the Board, we ordered Appellants to serve a copy of their notice of appeal upon the municipalities. Appellants did so in accordance with our January 6, 1999, and January 29, 1999, orders.

In light of the breakdown in Department and Board procedure, dismissal would be inappropriate here even if timely service of the notice of appeal were ordinarily a jurisdictional requirement. As noted previously in this opinion, in addition to filing a response to the motions to dismiss, Appellants have filed a petition to appeal *nunc pro tunc*. The Board may grant a petition to appeal *nunc pro tunc* "where there is a showing of fraud, breakdown in the administrative process, or unique and compelling factual circumstances establishing a non-negligent failure to file a timely appeal." *Falcon Oil v. DER*, 609 A.2d 876, 878 (Pa. Cmwlth. 1992). The circumstances here would clearly warrant granting Appellants' petition.

Accordingly, the municipalities' motions to dismiss are denied.[7]

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[7] Since we are denying the motions to dismiss, we need not rule separately on Appellants' petition to appeal *nunc pro tunc*.

# APPENDIX

## I. SEPTEMBER 19, 1998, REVISIONS TO THE BOARD'S RULES OF PRACTICE AND PROCEDURE

On September 19, 1998, the Board revised its rules of practice and procedure as follows:

§ 1021.51. Commencement, form and content.

(a) An appeal from an action of the Department shall commence with the filing of a written notice of appeal with the Board.

(b) The caption of an appeal shall be in the following form:

ENVIRONMENTAL HEARING BOARD
2nd Floor, Rachel Carson State Office Building
400 Market Street, Post Office Box 8457
Harrisburg, Pennsylvania 17105-8457

JOHN DOE, Appellant
234 Main Street, Smithtown,
Jones County, Pennsylvania 15555
(Telephone (123) 456-7890)
v. Docket No.--------
Commonwealth of Pennsylvania
Department of Environmental Protection, Appellee

(c) The appeal shall set forth the name, address and telephone number of the appellant.

(d) If the appellant has received written notification of an action of the Department, **[the notification] a copy of the action** shall be attached to the appeal.

(e) The appeal shall set forth in separate numbered paragraphs the specific objections to the action of the Department. The objections may be factual or legal. An objection not raised by the appeal or an amendment thereto under § 1021.53 (relating to amendments to appeal; nunc pro tunc appeals) shall be deemed waived, provided that, upon good cause shown, the Board may agree to hear the objection. For the purpose of this subsection, good cause shall include the necessity for determining through discovery the basis of the action from which the appeal is taken.

(f) **[Within 10 days after] Concurrent with** the filing of a notice of appeal, the appellant shall serve a copy thereof on each of the following:

(1) The office of the Department issuing the notice of Departmental action.

(2) The Department's Bureau of Litigation, 9th Floor, Rachel Carson State Office Building, 400 Market Street, Post Office Box 8467, Harrisburg, Pennsylvania 17105- 8467.

(3) **[Where the appeal is from the granting of a permit, license, approval or certification, the recipient thereof] In a third party appeal, the recipient of the action.**

(g) The service upon the recipient of **[a permit, license, approval or certification] an action** as required by this section, shall subject the recipient to the jurisdiction of the Board as a party **[appellee].**

(h) Upon order of the Board, the appellant shall provide satisfactory proof that service has been made as required by this section.

(i) Subsections (a)-(h) supersede 1 Pa. Code §§ 35.5-35.7 and 35.9-35.11 (relating to informal complaints; and formal complaints).

§ 1021.52. Timeliness **[and perfection] of appeal.**

(a) Except as specifically provided in § 1021.53 (relating to appeal nunc pro tunc), jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board **[within 30 days after the party appellant has received written notice of the action or within 30 days after notice of the action has been published in the *Pennsylvania Bulletin* unless a different time is provided by statute, and is perfected in subsection (b).] in a timely manner, as follows, unless a different time is provided by statute:**

**(1) The person to whom the action of the Department is directed or issued shall file its appeal with the Board within 30 days after it has received written notice of the action.**

**(2) Any other person aggrieved by an action of the Department shall file its appeal with the Board within the following:**

**(i) Thirty days after the notice of the action has been published in the *Pennsylvania Bulletin*:**

**(ii) Thirty days after actual notice of the action if a notice of the action is not published in the *Pennsylvania Bulletin*.**

(b) **[An appeal from the granting of a permit, license, approval or certification will not be deemed to be perfected until the recipient of the permit, license, approval or certification is served with a notice of appeal in accordance with § 1021.51 (relating to commencement, form and content).**

**(c) An appeal which is perfected under this section but does not otherwise comply with the form and content requirements of § 1021.51 will be docketed by the Board as a skeleton appeal. The appellant shall, upon request from the Board, file the required information or suffer dismissal of the appeal.**

**(d) Subsections a--c supersede] Subsection (a) supersedes** 1 Pa. Code §§ 35.5--35.7 and 35.9--35.11 (relating to informal complaints; and formal complaints).

**Comment: The language "person to whom the action of the Department is issued or directed" is intended to include, but not be limited to, the recipient of: an order, a permit or license issuance or denial, a civil penalty assessment, or certification. See Sections 4(a) and (c) of the act (35 P. S. § 7514(a) and (c)).**

28 Pa. Bull. 810-811, 4717.

## II. SEPTEMBER 4, 1999, REVISIONS TO THE BOARD'S RULES OF PRACTICE AND PROCEDURE

On September 4, 1999, the Board revised its rules of practice and procedure as follows:

§ 1021.51. Commencement, form and content.

(a) An appeal from an action of the Department shall commence with the filing of a written notice of appeal with the Board.

(b) The caption of an appeal shall be in the following form:

ENVIRONMENTAL HEARING BOARD
2nd Floor, Rachel Carson State Office Building
400 Market Street, Post Office Box 8457
Harrisburg, Pennsylvania 17105-8457

JOHN DOE, Appellant
234 Main Street, Smithtown,
Jones County, Pennsylvania 15555
(Telephone (123) 456-7890)

v. Docket No.--------
Commonwealth of Pennsylvania
Department of Environmental Protection, Appellee

(c) The appeal shall set forth the name, address and telephone number of the appellant.

(d) If the appellant has received written notification of an action of the Department, a copy of the action shall be attached to the appeal.

(e) The appeal shall set forth in separate numbered paragraphs the specific objections to the action of the Department. The objections may be factual or legal. An objection not raised by the appeal or an amendment thereto under § 1021.53 (relating to amendments to appeal; nunc pro tunc appeals) shall be deemed waived, provided that, upon good cause shown, the Board may agree to hear the objection. For the purpose of this subsection, good cause shall include the necessity for determining through discovery the basis of the action from which the appeal is taken.

(f) **When the appeal is from an assessment of a civil penalty for which the statute requires an appellant to prepay the penalty or post a bond, the appellant shall submit to the Board with the appeal a check in the amount of the penalty or an appropriate bond securing payment of the penalty or a verified statement that the appellant is unable to pay.**

**(g)** Concurrent with the filing of a notice of appeal, the appellant shall serve a copy thereof on each of the following:

(1) The office of the Department issuing the notice of Departmental action.

(2) The Department's Bureau of Litigation, 9th Floor, Rachel Carson State Office Building, 400 Market Street, Post Office Box 8467, Harrisburg, Pennsylvania 17105- 8467.

(3) In a third party appeal, the recipient of the action. **The service shall be made at the address set forth in the document evidencing the action by the Department or at the chief place of business in this Commonwealth of the recipient.**

**[(g)] (h)** The service upon the recipient of an action as required by this section, shall subject the recipient to the jurisdiction of the Board as a party.

**[(h)] (i)** Upon order of the Board, the appellant shall provide satisfactory proof that service has been made as required by this section.

**[(i)] (j)** Subsections (a)-**[(h)](i)** supersede 1 Pa. Code §§ 35.5--35.7 and **[§§] 35.9--35.11 (relating to informal complaints; and formal complaints)..**

§ 1021.52. Timeliness of appeal.

(a) Except as specifically provided in § 1021.53 (relating to appeal nunc pro tunc), jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board in a timely manner, as follows, unless a different time is provided by statute:

(1) The person to whom the action of the Department is directed or issued shall file its appeal with the Board within 30 days after it has received written notice of the action.

(2) Any other person aggrieved by an action of the Department shall file its appeal with the Board within the following:

(i) Thirty days after the notice of the action has been published in the *Pennsylvania Bulletin*:

(ii) Thirty days after actual notice of the action if a notice of the action is not published in the *Pennsylvania Bulletin*.

(b) **The appellant shall, within 20 days of the mailing of a request from the Board, file any missing information required by § 1021.51(c),(d) and (i) (relating to commencement, form and content) or suffer dismissal of the appeal.**

**(c) [Subsection] Subsections** (a) **[supersedes] and (b) supersede** 1 Pa. Code §§ 35.5--35.7 and 35.9--35.11 (relating to informal complaints; and formal complaints).

Comment: The language "person to whom the action of the Department is issued or directed" is intended to include, but not be limited to, the recipient of: an order, a permit or license issuance or denial, a civil penalty assessment, or certification. See Sections 4(a) and (c) of the act (35 P. S. § 7514(a) and (c)).

29 Pa. Bull. 1082-1083, 4690-4691.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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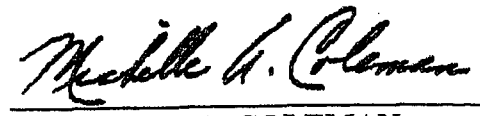
|---|---|---|
| **DARLENE K. THOMAS, et al.** | : | |
| | : | |
| **v.** | : | |
| | : | **EHB Docket No. 98-150-C** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, LAMAR TOWNSHIP BOARD OF SUPERVISORS, PORTER TOWNSHIP BOARD OF SUPERVISORS, WALKER TOWNSHIP BOARD OF SUPERVISORS, BOROUGH OF MILL HALL, and CITY OF LOCK HAVEN** | : | |

**ORDER**

AND NOW, this 27th day of April, 2000, it is ordered that the municipalities' motions to dismiss are denied.

**ENVIRONMENTAL HEARING BOARD**



**MICHELLE A. COLEMAN**
**Administrative Law Judge**
**Member**

**DATED:** April 27, 2000

**(See following page for service list.)**

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SECRETARY TO THE BOARD

| | | |
|---|---|---|
| **BERNARD J. ZIELINSKI** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 99-200-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued:** April 27, 2000 |

## OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

**By Bernard A. Labuskes, Jr., Administrative Law Judge**

**Synopsis:**

An appeal from an order requiring a party to remove a fence that he installed in a floodway without a permit, where the party refuses to apply for a permit, is dismissed.

## OPINION

The following factual narrative is based solely on Bernard J. Zielinski's ("Zielinski's") sworn answers to the Department of Environmental Protection's (the "Department's") request for admissions. Zielinski built a wooden, L-shaped privacy fence that is 30 feet long and 6 feet high on his property in Dupont Borough, Luzerne County. (Responses to Request for Admission Number [hereinafter "Adm."] 1-4, 8.) The fence is within 10 feet of Lidy Creek, which is well within the floodway of that creek. (Adm. 9, 18.) Zielinski did not obtain a permit from the Department. (Adm. 3.) The Department has had site meetings with Zielinski and sent him notices of violation, repeatedly directing him to either apply for a permit for the fence or remove it. (Adm. 7, 10-11, 19-23.) When Zielinski refused to do either, the Department sent him the

order under appeal, which directed him to remove the fence in accordance with a plan approved by the Department. (Adm. 12, 13.) Zielinski steadfastly refuses to comply with the order. (Adm. 24, 25.)

The Department has filed a motion for summary judgment. Zielinski did not file a response. Based upon his notice of appeal and his responses to the request for admissions, however, it appears that Zielinski's only points of contention are (1) that the stream will not in fact flood, and if it does, (2) the fence will not present a hazard, and (3) his permit from Dupont Borough is the only permit that he needs. (Adm. 24.) With regard to the first point, Zielinski also asserts that there are some inaccuracies in the floodway map prepared by the Federal Emergency Management Agency ("FEMA") that was relied upon by the Department in delineating the Lidy Creek floodway (Adm. 15), but he admits that the fence is within the floodway depicted on that map (Adm. 18).

The applicable regulations define a "floodway" as follows.

> *Floodway*--The channel of the watercourse and portions of the adjoining floodplains which are reasonably required to carry and discharge the 100-year frequency flood. Unless otherwise specified, the boundary of the floodway is as indicated on maps and flood insurance studies provided by FEMA. In an area where no FEMA maps or studies have defined the boundary of the 100-year frequency floodway, it is assumed, absent evidence to the contrary, that the floodway extends from the stream to 50 feet from the top of the bank of the stream.

25 Pa. Code § 105.1. The Environmental Quality Board has apparently determined that there is no need for the Department to delineate floodway boundaries on a case-by-case basis for the thousands of projects that might encroach upon such floodways, but instead, the Department may rely upon the extensive studies already performed by FEMA. The regulation unequivocally provides that the FEMA map is controlling, and therefore, Zielinski's argument that the stream will not in fact flood does not matter.

Zielinski's contention that the FEMA map is inaccurate[1] is also inconsistent with the applicable regulation. Unless otherwise specified—a qualifier that is not cited as relevant here—the FEMA maps define floodways. 25 Pa. Code § 105.1. The regulation does not refer to the FEMA maps as guidelines, or as presumptively accurate; it states that they are controlling. Zielinski has not challenged the legality of the regulation itself.

Similarly, the Department is not required to prove that a water obstruction will actually cause a specific hazard in the event of a flood in order to require a permit. Section 3 of the Dam Safety and Encroachments Act (the "Encroachments Act"), 32 P.S. § 693.3, defines a "water obstruction" to include any structure located in a floodway. *See also Gaster v. DER*, 1990 EHB 1391, 1416 (brush, stumps, fill material constitute "water obstruction"). The point of a permitting requirement is to provide the Department with a mechanism for making site-specific determinations regarding the hazard presented by a particular obstruction. Zielinski has not disputed that his fence is a water obstruction.

Thus, based upon Zielinski's own admissions,[2] there is no dispute that Zielinski has installed an obstruction in a floodway and has refused to apply for a permit. Section 6 of the Encroachments Act provides that no person may construct a water obstruction "without the prior

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[1] In fact, Zielinski does not expressly contend that the floodway depicted on the map is inaccurate. His response to the request for admission merely states that two roads are not depicted and a filled area of land is missing on the FEMA map. (Adm. 15.)

[2] Where a motion for summary judgment is supported by a record which contains admissions with respect to a particular matter, the adverse party cannot establish a genuine issue of material fact with respect to that matter by further discovery or expert report. *CNG Transmissions Corp. et al. v. DEP*, 1998 EHB 713, 717; *see also* Note to Pa. R.C.P. 1035.2. It is important to clarify that the "admissions" set forth in this standard are judicial admissions as opposed to evidentiary admissions. Judicial admissions are formal admissions which have the effect of withdrawing a fact from issue and dispensing it without need for proof of the fact. *Duquesne Light v. Woodland Hills School District*, 700 A.2d 1038, 1054 (Pa. Cmwlth. 1997), *petition for allowance of appeal denied*, 724 A.2d 936 (Pa. 1998); *see also Leonard Packel and Anne Poplin*, Pennsylvania Evidence, § 127 (1999). Judicial admissions are conclusive, whereas evidentiary admissions may always be contradicted or explained. *Id.* Generally, statements made by a party in the pleadings, requests for admissions and stipulations of fact are treated as judicial admissions. *Id.*

written permit of the department." 32 P.S. § 693.6 Zielinski's satisfaction of an obligation to obtain locally required permits does not excuse his need to obtain a state permit. Zielinski's conduct in violation of the Encroachments Act justified issuance of the Department's removal order. Based upon the undisputed facts, the Department is entitled to judgment as a matter of law.

Accordingly, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA

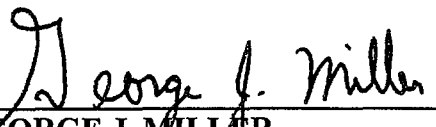
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **BERNARD J. ZIELINSKI** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 99-200-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**ORDER**

AND NOW, this 27th day of April, 2000, the Department of Environmental Protection's Motion for Summary Judgment is GRANTED and this appeal is DISMISSED.

**ENVIRONMENTAL HEARING BOARD**

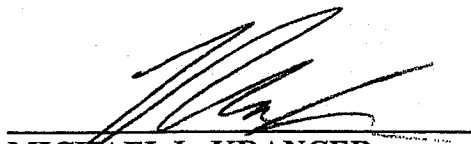


**GEORGE J. MILLER**
**Administrative Law Judge**
**Chairman**

**THOMAS W. RENWAND**
**Administrative Law Judge**
**Member**

**MICHELLE A. COLEMAN**
**Administrative Law Judge**
**Member**

**BERNARD A. LABUSKES, JR.**
**Administrative Law Judge**
**Member**



**MICHAEL L. KRANCER**
**Administrative Law Judge**
**Member**

**DATED:** April 27, 2000

**c:** **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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| **MARY LEE ONG and JOHN ONG INDIAN CREEK LAND & CATTLE COMPANY and MOUNTAIN WATERSHED ASSOCIATION** | : | |
| **v.** | : | **EHB Docket No. 2000-016-R** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW ENTERPRISE STONE AND LIME CO., INC., Permittee** | : | **Issued: April 28, 2000** |

## OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

**By Thomas W. Renwand, Administrative Law Judge**

**Synopsis:**

A single clerical error on the cover sheet of a seventeen page Noncoal Surface Mining Permit does not void the permit. All other references in the permit are to the correct statutory and regulatory citations. The error occurred during a change in the Department's word processing computer software at the Greensburg District Mining office.

## OPINION

Appellants, Mary Lee Ong, John Ong, the Indian Creek Land & Cattle Company, and the Mountain Watershed Association, Inc., filed a third party appeal to Pennsylvania Department of Environmental Protection's (Department) issuance of a Noncoal Surface Mining Permit to New

Enterprise Stone & Lime Company, Inc. (New Enterprise or Permittee). (Notice of Appeal) The permit authorizes New Enterprise to operate a noncoal surface mine in Donegal Township, Westmoreland County, Pennsylvania. (Department's Answer to Motion for Summary Judgment, ¶8) The operation of the noncoal surface mine includes the mining of Loyalhanna limestone, a mineral processing plant, and the discharge of treated waste water into two tributaries of Indian Creek. (Department's Answer to Motion for Summary Judgment, ¶11; Ex. 4)

Presently before the Board is Appellants' Motion for Summary Judgment filed on March 13, 2000. The Permittee and Department filed responses and briefs on April 4, 2000 and April 6, 2000, respectively. Appellants filed a reply brief on April 17, 2000.

Appellants contend that they are entitled to summary judgment because "[a]ccording to the cover sheet of the permit, the Department issued the permit pursuant to its authority under the Surface Mining Conservation and Reclamation Act (Surface Mining Act), 53 P.S. 1396.1 *et. seq.*" (Appellants' Motion for Summary Judgment, ¶8) The Surface Mining Act only applies to the mining of bituminous coal. Appellants argue that the single citation to the Surface Mining Act on the cover sheet of the seventeen page permit indicates that the Department issued the permit pursuant to the provisions of the Surface Mining Act rather than the Noncoal Surface Mining Conservation and Reclamation Act (Noncoal Surface Mining Act), 52 P.S. § 3301 *et. seq.* Appellants thereby conclude that the permit is void *ab initio* and that the Board should vacate and revoke New Enterprise's permit.

The Board may grant a motion for summary judgment where the pleadings, depositions, answers to interrogatories and admissions, together with any supporting 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. 25 Pa. Code § 1021.73; Pa. R. Civ. P. 1035.2; *County of Adams v.*

*Department of Environmental Protection,* 687 A.2d 1222 (Pa. Cmwlth. 1997); *Domiano v. DEP,* 1999 EHB 408, 412; and *Farmer v. DEP,* 1998 EHB 1292, 1296. The record must be viewed in the light most favorable to the non-moving party, and all doubts as to the existence of material facts must be resolved against the moving party. *Ducjai v. Dennis,* 656 A.2d 102 (Pa. 1995); *Wayne v. DEP,* 1999 EHB 395, 397. If judgment is denied or not rendered upon the entire case, the Board may enter judgment as to one or more of the claims asserted, or may issue an order specifying the facts that are without controversy and those which remain. Pa. R. Civ. P. 1035.5; *Boyerstown Oil Company v. Osan Mfg. Company,* 514 A.2d 938 (Pa. Super. 1986), *petition for allowance of appeal denied,* 531 A.2d 426 (Pa. 1987); *Domiano v. DEP,* 1999 EHB at 412.

Applying this standard we must deny the Appellants' Motion for Summary Judgment. A review of the facts leads to the inescapable conclusion that New Enterprise's permit was not issued pursuant to the Surface Mining Act but instead was issued pursuant to the Noncoal Surface Mining Act. The single reference to the Surface Mining Act on the cover sheet of the multi-page permit is simply and without doubt a clerical error. It does not result in the permit being issued pursuant to the Surface Mining Act.

The permit totals seventeen pages. On the cover page is entitled in bold capital letters "NONCOAL SURFACE MINING PERMIT NO. 65980401." Various other references on the cover sheet make reference to the noncoal mining authorized under the permit. There is a single citation to the Surface Mining Act. In addition, each section of the permit clearly and unequivocally identifies the permit as a Noncoal Surface Mining permit.

The sixteen pages following the cover sheet set forth specific conditions and requirements mandated by the Noncoal Surface Mining Act and the Department's supporting regulations. By way of example, on page 3 of the permit the type of operation is listed as a

"Noncoal Surface Mine." The last page of the permit is entitled "Noncoal Authorization to Mine." It states that New Enterprise may conduct noncoal mining activities by operating its noncoal surface mine at the Henderson Quarry.

All of the public notices concerning this permit identified it as a limestone mine governed by the provisions of the Noncoal Surface Mining Act. (Department's Answer to Motion for Summary Judgment, ¶¶6, 11; Exs. 2, 3, 4, 5) In further opposition to the Appellants' Motion, the Department filed verifications of the lead Department reviewer of the permit and the clerical supervisor of the Department's Greensburg District Mining Office. The lead Department reviewer indicated that New Enterprise's applications were submitted, reviewed, and issued pursuant to the provisions of the Noncoal Surface Mining Act and the supporting regulations.

Ms. Whitsel, the clerical supervisor, set forth in her verification that the Greensburg District Mining Office converted its word processing system from CPT to Microsoft Word. (Department's Answer to Motion for Summary Judgment, Ex.1, ¶3) The first form the Department converted to its new word processing system was the form used in issuing a Coal Surface Mining Permit. The Coal Surface Mining Permit became the "form" for the Noncoal Surface Mining Permit which was created by "cutting and pasting" from the Coal Surface Mining Permit. An incorrect statute citation on the cover sheet of the Noncoal Surface Mining Permit was not discovered by the Department until March 24, 2000. (Department's Answer to Motion for Summary Judgment, Ex. 1, ¶11)

The evidence is overwhelming that the permit was issued under the Noncoal Surface Mining Act and the citation to the Surface Mining Act was simply a clerical error. Permits, even in this age of computers, still involve mounds of paper. Unfortunately, mistakes of this kind will occur. Nevertheless, a clerical error of this sort should not void the entire process and force the

parties to start the procedure again. This would be a monumental waste of the resources of all parties, including the Appellants.

As the Board has said before, appeals should be decided on their merits. The law is not so harsh that a clearly clerical error requires the revocation of a permit at a cost of perhaps thousands of dollars. In this case, to grant Appellants' motion would be a drastic and punitive step not warranted by the facts or the law. As we have stated in a slightly different context, *see concurring opinion in Glenn O. Hawbacker, Inc. v. DEP*, 1966 EHB 230, 237, to severely penalize a party for a single mistake such as a clerical error or a citation to an incorrect statute brutalizes the practice of law and turns the search for justice and truth into a game. Such a harsh penalty is not conducive to the administration of justice. *PUSH v. DEP & Eighty-Four Mining Co.*, 1998 EHB 250, 256.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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|---|---|---|
| **MARY LEE ONG and JOHN ONG INDIAN CREEK LAND & CATTLE COMPANY and MOUNTAIN WATERSHED ASSOCIATION** | : | |
| **v.** | : | **EHB Docket No. 2000-016-R** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW ENTERPRISE STONE AND LIME CO., INC., Permittee** | : | |

**ORDER**

AND NOW, this 28th day of April, 2000, Appellants' Motion for Summary Judgment is **denied.**

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Administrative Law Judge**
**Member**

**DATED: April 28, 2000**

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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Southwest Regional Counsel

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| **EXETER TOWNSHIP, BERKS COUNTY, AUTHORITY** | : | |
| **v.** | : | **EHB Docket No. 98-154-C** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued:** May 1, 2000 |

## OPINION AND ORDER ON PETITION FOR RECONSIDERATION

**By Michelle A. Coleman, Administrative Law Judge**

**Synopsis:**

The Board will reconsider a final order sustaining an appeal where the appellant had not filed a motion for summary judgment or motion to sustain the appeal. Upon reconsideration, the Board will vacate the order, since the order is essentially a summary judgment, and the Board cannot enter summary judgment on behalf of a party who did not move for summary judgment.

## OPINION

This appeal concerns a subsidy the Department awarded on August 12, 1998, to Exeter Township Authority (Appellant), of Berks County, under Act 339, Act of August 20, 1953, P.L. 1217, *as amended*, 35 P.S. §§ 701-703 (Act 339). Pursuant to section 1 of Act 339, 35 P.S. § 701, and 25 Pa. Code § 103.24a, the Department provides an annual subsidy in an amount equal to two percent of the costs incurred for the "acquisition and construction" of publicly-owned sewage treatment plants. Whether interest paid on funds borrowed for the "acquisition and construction" of plants is eligible for the subsidy has been disputed in the past. The Department

used to take the position that only 1.5 % of such interest was eligible for the subsidy. However, on February 13, 1996, the Board ruled that the entire interest paid was eligible for the subsidy—not merely 1.5 % of it. *See City of Philadelphia v. DEP,* 1996 EHB 47. The Commonwealth Court affirmed that decision on April 7, 1997, in *Department of Environmental Resources v. City of Philadelphia,* 692 A.2d 598 (Pa. Cmwlth. 1997).

In keeping with the Department's practice at the time, the subsidies that the Department awarded to Appellant before 1998 were calculated based on 1.5% of Appellant's interest costs. However, in 1998, when Appellant submitted its application for the subsidy for costs from the 1997 calendar year, Appellant also requested that Department award it a subsidy for the difference between the 1.5 percent of interest costs which the Department had included in the subsidy calculations for previous years and the total amount of the interest expended in those years. Despite Appellant's request, the subsidy that the Department awarded Appellant on August 12, 1998, did not reflect the difference between the 1.5 percent of interest costs that the Department had included in the subsidy calculations for previous years and the total amount of the interest expended in those years.

On August 27, 1998, Appellant filed a notice of appeal challenging the subsidy for failing to include a component for difference between the 1.5 percent of interest costs which the Department had included in its subsidy calculations for previous years and the total amount of the interest Appellant had expended in those years. Appellant asserted, among other things, that the Department erred by denying a subsidy for these interest costs because the Department required that applicants for the subsidies use forms provided by the Department, but, prior to 1998, the Department's forms only allowed applicants to request a subsidy for 1.5 % of their interest costs, not the total eligible amount.

The Board has issued one previous decision in this appeal. On March 23, 2000, we issued an opinion and order denying a Department motion to dismiss the appeal on the basis of administrative finality. *See Exeter Township Authority v. DEP*, and *Peters Township Sanitary Authority v. DEP*, EHB Docket Nos. 98-154-C and 98-189-R (opinion issued March 23, 2000). That decision not only involved a motion to dismiss Appellant's appeal; it was a joint decision in two appeals, both of which concerned whether applicants for Act 339 subsidies could request the difference between the subsidies the Department awarded for interest costs in previous years and subsidies that the applicants were eligible for concerning those costs. The Department had filed motions to dismiss based on administrative finality in both appeals. However, while the appellant in *Peters Township Sanitary Authority* had filed a motion for summary judgment, the appellant in the instant appeal did not. The Board denied the Department's motions to dismiss in both appeals, and it granted the appellant's motion to summary judgment in *Peters Township Sanitary Authority*. However, the Board did not dispose of the *Exeter Township Authority* appeal.

On April 5, 2000, Administrative Law Judge Coleman issued an order clarifying the Board's March 23, 2000, opinion and order. That order (April 5, 2000, order) provided, in pertinent part:

> [U]pon consideration of the similar issues present in this matter and that of *Peters Township Sanitary Authority* docketed at 98-189-R, and the fact that these matters were considered jointly after March 16, 1999, the Opinion and Order issued on March 23, 2000, applies to both Exeter and Peters Townships so that Exeter Township benefits from the granting of Peters Township Sanitary Authority's Motion for Summary Judgment and, therefore, this matter is closed.

On April 17, 2000, the Department filed a petition for reconsideration of the April 5, 2000, order. Among other things, the Department argues that we erred by issuing the order

closing the appeal because Appellant had not filed a motion to sustain its appeal or a motion for summary judgment. The Department also argues that we erred by closing the appeal because the Board's March 23, 2000, opinion and order did not address the Department's defenses that the subsidy award was not appealable and that Appellant's notice of appeal was not timely, and because we stated in the March 23, 2000, joint decision that "The Department is free to raise additional issues identified in the Exeter Township Appeal which may now be ripe for decision." Slip. opinion at 9.

Appellant filed its response to the petition for reconsideration on April 27, 2000. It argues, among other things, that Appellant need not have filed a dispositive motion for the Board to enter judgment on its behalf. It also argues that the timeliness of the appeal and the appealability of the Department's action are not jurisdictional issues, and, therefore, the Department was not harmed by Board's failure to consider those issues.

After a careful consideration of the Department's petition, Appellant's response, and section 1021.124(a) of the Board's rules, we agree with the Department that reconsideration is appropriate here and that we should vacate our April 5, 2000, order. Section 1021.124(a) of the Board's rules of practice and procedure, 25 Pa. Code § 1021.124 (a), sets forth the criteria for reconsideration of final orders such as our April 5 order sustaining Appellant's appeal. Section 1021.124(a) provides, in pertinent part:

> Reconsideration is within the discretion of the Board and will be granted only for compelling and persuasive reasons. These reasons may include...:
>
> (1) The final order rests on a legal ground or a factual finding which has not been proposed by either party.
>
> (2) The crucial facts set forth in the petition
>
> (i) Are inconsistent with the findings of the Board
>
> (ii) Are such as would justify a reversal of the Board's decision

(iii) Could not have been presented earlier to the Board with the exercise of due diligence.

By issuing an order sustaining Appellant's appeal without Appellant having first filed a motion to sustain its appeal or a motion for summary judgment, we issued a final order that rested on a legal ground not proposed by either party. Therefore, reconsideration of the order is appropriate under section 1021.124(a)(1).

Upon reconsideration, we also believe that we erred by issuing the order sustaining the appeal without Appellant having filed a motion for summary judgment or a motion to sustain its appeal. This appeal involves certain material issues of fact.[1] Therefore, by sustaining Appellant's appeal, the Board effectively granted Appellant summary judgment—despite the fact that Appellant never filed a motion for summary judgment with the Board. By doing so, we erred. As the Supreme Court made clear in *Bensalem Township School District v. Commonwealth,* 544 A.2d 1318 (Pa. 1988), it is improper for tribunals to enter summary judgment on behalf of a non-moving party.

*Bensalem* involved an appeal from a constitutional challenge to a statutory plan for funding Commonwealth public schools. The challenge was filed in the Commonwealth Court's original jurisdiction, and the individuals challenging the plan filed a motion for summary judgment asserting that the statutory provisions were unconstitutional. The Commonwealth

[1] For instance, Appellant insists that it is entitled to Act 339 subsidies for certain amounts it spent on interest costs over and above the 1.5 % of those costs that the Department considered for calculation of the subsidies on the annual subsidy forms submitted prior to 1998. Since the Department has not stipulated to the amount of the interest costs that Appellant incurred, Appellant presumably bears the burden of establishing that it expended the costs alleged on interest for funds borrowed for the acquisition and construction of a publicly-owned sewage treatment plant.

Court refused to grant them summary judgment on the issue. Instead, it granted the *defendants* summary judgment—although the defendants had never moved for summary judgment.

When the persons challenging the funding plan appealed to the Supreme Court, the Supreme Court reversed the Commonwealth Court, holding that the Court had erred by granting a non-moving party's motion summary judgment. The Supreme Court explained:

> Nothing in this rule [Pa. R.C.P. 1035] intimates that a court may grant summary judgment in favor of a non-moving party. In fact, the rule expressly limits the courts' power to grant summary judgment to those situations where "the moving party is entitled to judgment as a matter of law." Pa. R.C.P. 1035(b) (emphasis added).[2] Additionally, no decision of this Court has ever authorized the entry of summary judgment in favor of the non-moving party under rule 1035.[3]

544 A.2d 1318, 1320.

Appellant argues that *Bensalem* does not apply here because *Bensalem* involved the entry of summary judgment on behalf of a party adverse to the one submitting the motion for summary judgment, while Appellant's interest in the instant appeal is virtually identical to the party that submitted the motion for summary judgment in *Peters Township.* We disagree, however. As the excerpts from *Bensalem* quoted above illustrate, the Supreme Court's reasoning in *Bensalem* turned, not on the adversarial relationship present between the parties in that appeal, but on the limitations imposed by the Rules of Civil Procedure upon tribunals' power to grant summary judgment.[4] The limitations upon tribunals' power to grant summary judgment exist regardless

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[2] Pa. R.C.P. 1035 has since been rescinded and replaced by Pa. R.C.P. 1035.1-1035.5. The new rules concerning summary judgment do not contain the language from Pa. R.C.P. 1035(b) referring to "the moving party [being] entitled to judgment as a matter of law." However, there is no indication in Pa. R.C.P. 1035.1-1035.5, or the comments accompanying the new rules, that the omission was meant to allow tribunals to summary judgment on behalf of a non-moving party.

[3] Nor are we aware of any decision since *Bensalem* that holds that it is appropriate for a tribunal to enter summary judgment on behalf of a non-moving party.

[4] The Board's rules concerning summary judgment mirror those in the Pa. R.C.P. Section

of whether an adversarial relationship exists between the party moving for summary judgment and the party for whom summary judgment is entered. Furthermore, were we to allow the April 5, 2000, order to stand, we would deprive the Department of the opportunity to litigate the timeliness and appealability issues—issues that the Department is entitled to raise to defend its action, and issues that we assured the Department that it could raise in our March 23, 2000, opinion and order.

Accordingly, the Board enters the following order:

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1021.73(b) of the Board's rules, 25 Pa. Code § 1021.73(b) provides, "Motions for summary judgment or partial summary judgment and responses shall conform to Pa. R.C.P. 1035.1-1035.5 (relating to motion for summary judgment) except for the provision of the 30 day period in which to file a response." The Board has previously held that *Bensalem* precludes it from granting summary judgment to a party that did not file a motion for summary judgment. *See, e.g., Cambria CoGen Company v. DEP,* 1995 EHB 191, 222.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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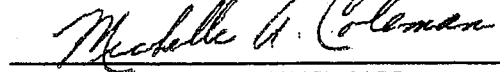
|---|---|---|
| **EXETER TOWNSHIP, BERKS COUNTY, AUTHORITY** | : | |
| **v.** | : | **EHB Docket No. 98-154-C** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**ORDER**

AND NOW, this 1st of May, 2000, IT IS ORDERED that the Department's Petition for Reconsideration is granted, and the Board's April 5, 2000 Order sustaining Appellant's appeal is vacated.

**ENVIRONMENTAL HEARING BOARD**



**MICHELLE A. COLEMAN**
**Administrative Law Judge**
**Member**

**DATED:** May 1, 2000

**c:** **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

**Via Fax and First Class Mail**
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|---|---|
| **TANKNOLOGY-NDE INTERNATIONAL, INC.** | : |
| | : |
| | : |
| **v.** | : **Docket No. 2000-027-K** |
| | : **(Consolidated with 2000-020-K)** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : |
| | : **Issued: May 3, 2000** |
| | : |

## OPINION AND ORDER ON MOTION IN LIMINE

**By Michael L. Krancer, Administrative Law Judge**

**Synopsis:**

The Board denies a Motion In Limine to preclude DEP's evidence of Tanknology's supplying of false tank tightness testing reports to facility owners. The Department's original Revocation Order dated January 11, 2000, revoking Tanknology's certification to perform tank tightness testing made no reference to Tanknology's allegedly providing of false reports to the owners. The subsequently issued Amended Revocation Order, dated February 16, 2000, included the allegation of false reports as to 10 facilities. Pursuant to a stipulated expedited discovery and trial schedule, fact discovery was open through April 7, 2000 and expert discovery through April 28, 2000, pre-hearing memoranda were to be exchanged on May 4, 2000, and trial was set for May 8, 2000 through May 12, 2000. The schedule was later changed for other reasons such that pre-hearing memoranda are to be exchanged on May 18th and trial starts on

May 22nd. On March 21, 2000 DEP made known to Tanknology that it had discovered 19 additional facilities, other than the 10 specified in the Amended Revocation Order, for which it intended to allege that false reports were filed. Tanknology's Motion In Limine to bar evidence regarding the additional 19 facilities is denied. The Board's scope of review is *de novo* and the evidence to be proffered is to be considered in fulfilling our duty to conduct a *de novo* review. Tanknology is not prejudiced because there is enough time between its learning of DEP's intention to introduce the challenged evidence and the trial date for it to meet DEP's charges. Also, as the parties, including Tanknology, requested that this matter be subject to an expedited trial schedule, Tanknology's perceived difficulty is, at least in part, a result of its own creation. To the extent that Tanknology continues to maintain its perception that it is prejudiced it could seek relief by requesting further additional time.

## BACKGROUND

Before the Board is the Motion In Limine of Appellant Tanknology-NDE International, Inc. ("Tanknology") filed on April 24, 2000, to preclude DEP from presenting certain evidence relating to Tanknology's allegedly supplying of false reports of its performance of tank tightness testing to facility owners. DEP filed an Answer to the Tanknology Motion and brief in opposition to the Motion. In addition, the Board, at the request of the parties, heard oral arguments on May 2, 2000. The oral arguments were transcribed and are a part of the record. The factual background necessary to dispense with the Motion which is gleaned from the Motion, DEP's response, and the oral arguments is as follows.

On January 11, 2000 DEP issued a "Revocation Order" to Tanknology which revoked its Company Certification under the Pennsylvania Storage Tank and Spill Prevention Act, the Act of

July 6, 1989, P.L. (1989) 169, *as amended*, 35 P. S. §§ 6021.101- 6021.2104 (the "Tank Act"), and the regulations promulgated thereunder, to perform tank tightness testing in the Commonwealth of Pennsylvania. Until the Revocation Order, Tanknology was engaged in the commercial performance of tank tightness testing in the Commonwealth of Pennsylvania. Tanknology used a particular method of testing which is known as the "VacuTect" test method. The "VacuTest" method is a non-volumetric tank tightness testing method performed only by Tanknology which functions by placing a vacuum on an underground storage tank which creates negative pressure. A leak is then detected when: (1) a sonic emission of air ingress is detected in the ullage area; or (2) sonic emission of bubbles formed by air ingress is detected in the product-filled portion of the tank; or (3) water ingress is detected at the bottom of the tank.

The Order alleges that Tanknology had failed, in its practice, to follow various specific substantive requirements governing the performance tank tightness testing at 485 separate facilities over a time frame of September, 1996 to March, 1999. Specifically, DEP alleges that Tanknology failed to perform a required measurement of the location of the groundwater table in the location of the tank being tested just prior to performing the test. DEP alleges that the groundwater measurement must be done by following certain specific procedures involving the physical measurement, in inches, of the groundwater level by use of a monitoring well or a point well. The specific procedures which DEP alleges that Tanknology failed to adhere to are not directly set forth in detail in the regulations as such but are, instead, allegedly outlined in various industry codes and standards applicable to the performance of tank tightness testing promulgated by entities such as the "National Work Group", the American Society of Nondestructive Testing, the American Petroleum Institute and other entities. *See* 25 Pa. Code § 245.132 and 25 Pa. Code § 245.444. A major premise of the DEP Revocation Order and thus of DEP's case is the legal

thesis that these various industry codes and standards prescribing specific procedures for performing tank tightness testing have the force and effect of regulation by virtue of their being incorporated by reference in the regulations.

Tanknology filed a Notice of Appeal on February 2, 2000 in which it vigorously denies both the legal and factual bases of DEP's Revocation Order. That appeal bears Docket No. 2000-020-K. Tanknology alleges, among other things, that the regulations cited by DEP are not meant to apply to the "VacuTest" method. In addition, Tanknology challenges DEP's preeminent legal thesis that the industry standards and protocols at issue, which Tanknology supposedly deviated from, have the force of regulation. Tanknology asserts that the authors of the industry standards specifically recognized that they had no authority to promulgate legally binding regulations and that such standards and protocols cannot have the force of regulation because none of the standards or procedures were promulgated pursuant to the Commonwealth Documents Law. Also, Tanknology argues that, in any event, it did account for the location of the water table in an appropriate fashion at each of the sites at which it performed tank tightness.

On or about February 9, 2000 DEP informed Tanknology that in addition to the specific allegations set forth in the Revocation Order, DEP had discovered in its ongoing review of Tanknology documents in tandem with DEP's own inspection of various sites at which Tanknology had performed tank tightness testing that DEP had determined that Tanknology had submitted false testing reports to various facility owners. On that day, DEP provided Tanknology with copies of six tank tightness test results reports for six facilities which DEP told Tanknology it thought were false. On that day also, this new information was discussed in a conference call with counsel for the parties and the Board. DEP's counsel advised during the conference call that DEP would be issuing an Amended Revocation Order very shortly which

would include the new allegations regarding allegedly false reports.

DEP's Answer states that it did not have the information about the alleged false reports before it issued the original Revocation Order on January 11, 2000. DEP only reached the conclusion that Tanknology had filed false reports by comparing the hundreds of test reports with actual physical inspections of the various facilities for which Tanknology had submitted reports which reported measurement of the groundwater level in inches and seeing that the sites involved did not have either a monitoring well or point well. DEP Water Quality Supervisor, Mr. Corey Giles was primarily responsible for reviewing Tanknology's test reports. His review of the test reports commenced in 1997. However, his process of conducting actual physical inspections of numerous facilities started in December, 1999 and was continuing through the end of February, 2000. By early February, Mr. Giles had performed inspections or reinspections of various sites and came to the conclusion that Tanknology had allegedly filed false reports as to 10 sites.

On this basis DEP's Storage Tank Section Chief, Ms. Anna Marie Tempero, decided that DEP would issue an Amended Revocation Order including the allegation that Tanknology filed false reports with respect to 10 sites. On February 16, 2000 DEP issued the amended "Amended Revocation Order". In the Amended Order DEP alleges the same allegedly improper practices of Tanknology outlined in the original order as well a various other deficient practices at other facilities over a broader time frame. The Amended Order also adds the allegations about the allegedly false reports. The Amended Revocation Order alleges that Tanknology supplied false reports of tank tightness testing to 10 facilities at which it performed such services.[1]

The alleged falsity is described in the Amended Revocation Order as follows. DEP

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[1] At oral argument we were told that the 10 sites outlined in the Amended Revocation Order includes the six sites originally identified to Tanknology plus 4 others.

alleges that the test report form "calls for information to be provided by the tester [in this case Tanknology] regarding water table depth in inches and how that depth was determined. On each of the 10 test reports Tanknology provided groundwater data to the owner and/or operator by recording a water table depth in inches and by recording the means of determining that depth either by a monitoring well or a point well." Amended Revocation Order ¶ AF. However, "[a] Department inspection of each of the 10 facilities found neither a monitoring well nor a point well at the facilities." *Id.* ¶ AG. Therefore, states the DEP's Amended Revocation Order, "Tanknology provided false information on the Test Report [and][t]hat false information was reported to the owner and/or operator." *Id.* ¶ AI.

Exhibit "E" to the Amended Revocation Order is a spreadsheet which sets forth the following specific information as to each of the 10 facilities in separate columns: (1) the Tanknology work order number; (2) the number of tanks tested; (3) the date of the test; (4) the name of the Tanknology employee who conducted the test; and (5) the facility identification number. Tanknology's Motion states that although Appendix "E" to the Amended Revocation Order sets forth 10 alleged false reports and it had been provided with only 6 allegedly false reports that "Tanknology did not object because it recognized that at the time the Department informed Tanknology that six sites were at issue, the Department may not have been certain of the specific sites which would be included in the Amended Revocation Order. Tanknology Motion ¶ 14.

Tanknology immediately filed an appeal of the Amended Revocation Order on February 18, 2000. That appeal bears Docket No. 2000-027-K. At the May 2, 2000 oral argument of the instant Motion both parties agreed that the two cases could be consolidated for hearing purposes

and a consolidation order was issued that day.

Tanknology chose not to file a Petition For Supersedeas in either appeal. Instead, just after the January 11, 2000 first Revocation Order was issued and even before the appeal thereof was filed, the parties agreed that the pre-trial and trial procedure should be conducted on an expedited basis. Indeed, in a very unusual step, counsel for DEP directed a letter to the Board dated February 1, 2000, a day before the appeal was actually filed, providing the Board with the general background of the matter, stating that an appeal would be filed any day, and outlining the request of both parties that the Board hold a conference call when the appeal was filed for the purpose of setting an expedited discovery, pre-trial submission and trial schedule. After discussions between themselves, the parties submitted an agreed to schedule by letter to the Board on February 22, 2000. On February 29, 2000, the Board entered an "Order Scheduling Pre-Trial Proceedings and Trial" in Docket No. 2000-020-K which memorialized the parties' agreed to schedule. The Order provided for discovery to be completed by March 27, 2000, DEP to serve its expert materials on April 7, 2000 and Tanknology on April 14, 2000, expert depositions were to be completed by April 28, 2000, a mutual exchange of pre-hearing memoranda was scheduled for May 4, 2000, and the trial was set for May 8, 2000 through May 12, 2000.[2]

As noted previously, Mr. Giles's inspection of sites was continued through the end of February, 2000. On March 21, 2000, DEP faxed to Tanknology's counsel a letter which attached

[2] The parties have been engaged in discussions regarding a possible resolution of the case and, at their mutual request, the trial has been rescheduled. Per a conference call with the Board and counsel for the parties of Friday, April 28, 2000, an Order dated Monday, May 1, 2000 was issued setting the trial to commence on May 22, 2000 with a mutual exchange of Pre-Hearing Memoranda to take place on May 18, 2000.

a spreadsheet list of 19 additional sites which it stated falsely reflect that groundwater elevations were checked by monitoring wells, point well or observation port but that DEP's investigation found no monitoring well, point well or observation port.[3] According to DEP's theory of the case, these reports would also be false on the same grounds as the ones specified in the Amended Revocation Order are false. The spreadsheet information includes: (1) the facility identification number; (2) the facility name; (3) the facility location; and (4) the Tanknology Work Order number. It is these additional 19 sites outlined in DEP's letter to Tanknology of March 21, 2000 and accompanying spreadsheet to which this Motion is specifically directed.

**DISCUSSION**

Appellant argues that the evidence regarding the 19 additional sites should be precluded on two grounds, which are different but related. The first point, which has more general applicability, is best summarized by the statement in Tanknology's brief that "[j]ust as notices of appeal from Department actions must include all bases of appeal, Department orders must stand or fall on the findings on which they are based". The second point, which we take to be more fact specific to this particular matter, is that, under the circumstances here, Appellant is "severely prejudiced" and it would be violative of "fundamental fairness" if the new evidence regarding the additional 19 sites were allowed in that we are facing trial in this matter very shortly. The second point is related to the first since Tanknology's argument is phrased in terms of alleged

[3] This letter is attached as Exhibit "D" to DEP's Answer in Opposition to Tanknology's Motion. We note that the language of this letter is different from the language in the Amended Revocation Order. The Amended Revocation Order states that DEP did not find a "monitoring well nor a point well at the facilities" while the letter referring to the list of the 19 additional facilities states that DEP's investigation found no "monitoring well, point well or observation port." We do not know the significance, if any, of the added reference an "observation port." This point, however, is not material to our disposition of this Motion In Limine.

unfairness and alleged prejudice to it of allowing DEP to do what it characterizes as adding "new justifications" for the revocation order after the issuance thereof.

Viewed either way or both, we reject Appellant's arguments.

Appellants contend that Section 1309 of the Tank Act, 35 P.S. § 6021.1309, which provides that the Department may revoke certification "if [the department] finds that the [certification holder] is in violation of this any provision of this act" establishes the rule of preclusion they assert. Appellants cite no authority for this interpretation. At oral argument counsel for Appellant acknowledged that if we read the Tank Act this way that we would be the first Board or Court to do so. Indeed, as counsel also stated at argument, we would be the first to apply that interpretation to any of the host of Pennsylvania environmental statutes with similar "permit revocation" provisions.

Based on our review of the statute and the case law, which is discussed in more detail below, we disagree that the statutory provision Appellant cites has the preclusionary effect Appellants contend. As eluded to before, there is no case law which supports Appellant's position. In addition, the rule Appellant would have us follow is contrary to our statutory duty and role to hold *de novo* hearings. The principle of *Warren Sand & Gravel v. DER*, 341 A.2d 556 (Pa. Cmwlth. 1975), is not beside the point as Appellants argue in their brief but it is, instead, at the heart of the point. *Warren Sand and Gravel* instructs that the Board is to conduct a *de novo* review. The Court said in this regard that:

> [W]hen an appeal is taken from DER to the Board, the Board is required to conduct a hearing de novo in accordance with the provisions of the Administrative Agency Law. In cases such as this, the 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 evidence taken by the Board.

*Id.* at 565. This statement is not to be considered, as Appellants proffer, as a parenthetical statement of procedural or evidentiary protocol but it is, instead, an elucidation of the essence of the Board's statutory role, charge and function. To treat the matter before us as Appellant would suggest would be to turn our back on that.

In this case we are dealing with whether the Appellant has engaged in malfeasance that would render it unfit under the dictates of the Tank Act to maintain the privileges and rights to continue to do business in this Commonwealth. This is an area where it is particularly appropriate to not shut our eyes to evidence regarding the issues involved in such a determination which may have been discovered after the date of the issuance of the revocation order during the hearing preparation process.

We focus now on Appellant's more case specific claim that, under the circumstances here, to allow the evidence of the additional 19 sites would be severely prejudicial to Appellant and would be contrary to fundamental fairness. We think not on both counts.

This is not a case where DEP has attempted to bring in a surprise witness during the trial with previously undisclosed evidence. There is no ambush here. Tanknology first was put on notice about the "false reports" issue by February 9, 2000 when DEP telecopied the list of 6 sites at which it contended that Tanknology had provided a false report. Tanknology was placed on notice then that DEP intended to issue an Amended Revocation Order incorporating the charges of providing false reports. The Amended Revocation Order was issued on February 16, 2000. On March 21, 2000 when Tanknology received the telecopy from DEP setting forth the particular information about the additional 19 sites, discovery was still open, Appellant's expert report was not due for another 17 days and DEP's not for another 24 days, expert depositions

were still open for nearly six weeks, both parties' pre-hearing memoranda were not due for another six and half weeks, and trial was still seven weeks away. As of this date, the Pre-Hearing Memoranda and trial dates have been pushed back even further with Pre-Hearing Memoranda to be exchanged on May 18th and trial to commence on May 22nd. This is sufficient time for Tanknology to prepare a defense to DEP's charges relating to the additional 19 incidences of alleged false reports. This is especially so here since access to rebuttal evidence, both documentary and testimonial, is open to Tanknology. The documentation regarding the site activities is Tanknology's and the reports at issue were done by Appellant's employees. In addition, DEP's Answer informs us that on April 13, 2000, Tanknology deposed Mr. Giles, the DEP employee who reviewed all of Tanknology's reports, who performed the site inspections of the 10 sites listed in Exhibit "E" to the Amended Revocation Order and the 19 sites listed in DEP's letter dated March 21, 2000 and accompanying spreadsheet and who is the DEP person who is primarily responsible for DEP's conclusion that Tanknology filed false reports. Thus, we do not agree with Appellant's pessimistic view that it has been irreparably injured in its case preparation or presentation.

What happened here does not seem atypical in litigation, especially litigation on an expedited and compressed schedule. During the course of discovery and case preparation, things are discovered. That is the nature of the process. In this sense, litigation is like what is said about war: "no plan survives contact with the enemy".[4]

Tanknology makes particular complaint that DEP's responses to interrogatories that were provided to Tanknology on April 7, 2000 did not fully respond to certain specific inquiries

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[4] Count Helmuth Karl von Moltke, 1800-1891.

relating to the additional 19 sites.[5] At oral argument, Tanknology explained that DEP had not provided certain information in responses to a multi-part interrogatory about the additional 19 sites, including: (1) the identity of all DEP personnel who attended any site inspection; (2) when each site was inspected; (3) the duration of the DEP inspection; (4) the conditions observed at each site; (5) whether DEP personnel spoke to anyone during the site inspections; (6) whether any internal DEP documents were generated about the inspections; and (7) how the 19 sites in question were selected to be included in the universe of sites for which DEP was leveling the allegation that Tanknology filed a false report. We do not believe that the supposed shortcomings in DEP's responses to interrogatories result in the prejudice that Appellant perceives. Tanknology had already been provided, on March 21, 2000, with the letter and spreadsheet setting forth the identification and information about the 19 additional sites. DEP informed Tanknology on April 11, 2000 that it intended to amend its answers to Tanknology's interrogatories to add the information regarding the additional 19 test reports for the additional 19 sites. In addition, Tanknology has now spent 2 days deposing Mr. Giles, the DEP employee who reviewed the Tanknology testing reports, performed the coincident site inspections and who is the individual primarily responsible for DEP's theory that Tanknology filed false reports.[6]

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[5] Tanknology's Motion tells us that the parties agreed between themselves to allow each other to April 7th to provide answers to interrogatories rather than the March 27th deadline for same in the Board's scheduling order.

[6] At oral argument, we were told that Tanknology apparently decided not to question Mr. Giles about the additional 19 sites on the supposed basis that DEP's interrogatory responses relating to sites other than those mentioned in the February 16, 2000 Order were not complete at that time and/or that the additional 19 sites should not be part of the proceedings of this trial. Tanknology had the opportunity, however, to have asked Mr. Giles about those sites and could have asked questions about the type of information which it said was lacking in DEP's interrogatory responses. We disagree with the argument of Tanknology's counsel at oral argument that Tanknology could not have asked deposition questions regarding the 19 sites

Moreover, at oral argument, counsel for Tanknology informed the Board that it had indeed been undertaking its own investigation of the situation regarding the additional 19 sites and that it would be ready to present rebuttal evidence about those sites.

We also note that Appellant's current perception that it would be prejudiced without the exclusion of the evidence, a perception which we do not share, is due to some extent to its own decision to aggressively pursue and proceed with the truncated and compressed pre-trial and trial schedule. To the extent that Appellant persists in its insistence that presentation of the evidence regarding the 19 additional sites at the upcoming trial would be prejudicial or unfair the perception can be eliminated by a request for a postponement of the trial.[7]

The cases cited by Appellant do not support its arguments. Both *Gemstar v. DEP*, 1998 EHB 53 and *F.R. & S., Inc. v DEP*, 1998 EHB 1288 were civil penalty cases. In a civil penalty case, the inquiry is naturally focused on the conduct enumerated in the Civil Penalty Assessment

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because it did not have the information it requested from the interrogatories. The litany of questions outlined, as well as many others, very well could have been asked of Mr. Giles at his deposition.

[7] We are sensitive to Appellants keen interest in having the trial as soon as possible in light of its inability to conduct business in the Commonwealth of Pennsylvania due to the Revocation Order and Amended Revocation Order. However, Appellants cannot have it both ways. If it continues to persist in its perception of prejudice then it has to decide whether it views the prejudice as so great that it must petition for even a short continuation of the trial date because of the 19 sites situation. These are the tough decisions that litigants and litigators have to face all the time.

On a slightly different but related topic, we have considered and reject Appellant's point that "[i]n agreeing to forgo pursuing supersedeas, and in agreeing to the parameters of the expedited pre-hearing schedule, Tanknology relied on the Department's representation as to the quantum of test reports at issue relating to the Department's 'false' report claim". Tanknology Motion, ¶ 11. There is no hint let alone documentation that DEP had any such limiting proviso in its mind or of its agreement to what would amount to a very significant limiting Stipulation. For the reasons just stated, we also doubt that any such "reliance" would have been reasonable.

and the resultant dollar amount calculated as to each discreet alleged violation. The very structure of a Civil Penalty case leads to that method of analysis. Neither of those cases in any way undermines the principle of *Warren Sand and Gravel* that we discussed earlier as it applies to this case. *Gemstar* and *F.R. & S* do come into play here insofar as the seminal question in both of those cases was whether the appellant was provided with an adequate "notice and opportunity to be heard" with respect to the allegations brought by DEP. We have already answered that question in the affirmative as it applies in the circumstances here.[8]

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[8] In this regard we have also looked to *Reiner v. DER*, 1982 EHB 183 and *Richter v. DER*, 1984 EHB 43. Both of these cases dealt with bond forfeitures. In both cases, the evidence DEP presented at trial to support the bond forfeiture action was not on all fours with the grounds for forfeiture provided in either the Notices of Forfeiture or Notice of Violation. In *Reiner*, DER's pre-hearing memorandum, filed three months before trial, had set forth the violations DEP intended to prove at trial. *Reiner v. DER*, 1982 EHB at 198-199. In *Richter*, DER's pre-hearing memorandum was filed 8 months before the hearing and it outlined the nature of the matters DER intended to prove. *Richter v. DER,* 1984 EHB at 51. In both cases, the Board held that the constitutional requirements of "notice and opportunity to be heard" had been satisfied. *Reiner v. DER*, 1982 EHB at 199; *Richter v. DER,* 1984 EHB at 49-51. The *Reiner* Board, by the way, also noted that its decision was supported by the fact that hearings before the Board are *de novo* under *Warren Sand and Gravel v. DER,* 341 A.2d 556 (1975). *Reiner*, 1982 EHB at 199. As we have already discussed, our decision in this case is strongly influenced by *Warren Sand and Gravel.*

Another case which follows and relies upon *Reiner* and *Richter* is *Ganzer Sand & Gravel v. DEP*, 1994 EHB 1142. In *Ganzer*, the Board was dealing with DEP's revocation of Ganzer's solid waste permit. The issue there, as posited by the Board was "whether the Department may base its case on grounds which were not stated in its letter of revocation...but which were later raised in its pre-hearing memorandum and amendment thereto." *Id.* at 1170. Based on the particular facts presented, the Board held that DER could do so. The Board relied heavily upon *Reiner* and *Richter*. Id. at 1170-71. While we think *Ganzer* is instructive, we are mindful that Ganzer cannot be read to go beyond its specific limitations. The sources of its limitations are its particular facts and the Board's own caveat. The Board found that Ganzer had been aware of the substance of the grounds not stated in the revocation letter from very early on in the case. Indeed, it had included a paragraph in its Notice of Appeal addressing the supposed new grounds. Also, the new grounds were outlined in DER's pre-hearing memorandum, Ganzer had apparently presented evidence regarding the supposed new grounds at trial, and Ganzer had fully addressed the supposed new grounds in its post-hearing brief. Finally, Ganzer had withdrawn a pre-trial Motion which had specifically sought an Order from the Board precluding DEP from

Accordingly, we enter the following Order:

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relying on the grounds for revocation not outlined in the revocation letter. The Board's caveat reads as follows:

> In reaching this conclusion [to allow DEP to rely on grounds for revocation not stated in the revocation letter], however, we do not wish to say that the Department is free, at any time during a proceeding, to raise new grounds as the basis for its action. In particular, we strongly discourage a practice in which the Department provides one reason when it takes an action and then propounds an entirely different reason for it after an appeal has been filed. If during the course of a proceeding, the Department becomes aware of additional bases for a particular action, it is always free to raise them through and amendment to its earlier action. However, we highly discourage the method employed in the present case, in which the Department has, without any explanation, completely abandoned the reason given for the permit revocation in the first place and has, instead, based its case upon an entirely new theory, which evolved throughout the course of the proceeding. It is only because we have clearly determined that Ganzer will suffer no undue prejudice as a result of the Department's action that we will allow the Department to abandon its original basis for the revocation and to rely on new grounds in support thereof.

*Id.* at 1172-73 (footnote omitted). In a footnote, the Board stated that parties appearing before the Board in the future should be on notice of the Board's "condemnation of eleventh hour amendments to pre-hearing memoranda especially the type...which adds new grounds for a party's position." *Id.* at 1173 n. 8. Far from being within the conduct outlined as troublesome by the *Ganzer* Board, DEP here did exactly what the Board suggested; it amended the original Revocation Order at least insofar as to include 10 sites at which it alleges false reports were rendered. Also, as we have discussed, we do not think that allowing the evidence regarding the 19 additional sites would deprive Tanknology of notice and opportunity to be heard on the challenged evidence nor do we think that Tanknology will be unduly prejudiced by the DEP's offering and our considering the evidence. In that respect we do not classify DEP's intention to rely on the additional 19 site reports as being an "eleventh hour" pronouncement.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **TANKNOLOGY-NDE INTERNATIONAL, INC.** | : |
| | : |
| | : |
| **v.** | : **Docket No. 2000-027-K** |
| | : **(Consolidated with 2000-020-K)** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : |
| | : |
| | : |

**ORDER**

AND NOW, this 3rd day of May, 2000, the Motion in Limine of Appellant, Tanknology-NDE, Inc., is **denied**.

**ENVIRONMENTAL HEARING BOARD**

**MICHAEL L. KRANCER**
**Administrative Law Judge**
**Member**

**Via Telecopy and Regular Mail**
**DATED:** **May 3, 2000**

**c:** **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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SECRETARY TO THE BOA

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| **GEORGE M. LUCCHINO** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 98-166-R** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROBINSON COAL COMPANY, Permittee** | : | **Issued: May 9, 2000** |

## ADJUDICATION

**By Thomas W. Renwand, Administrative Law Judge**

**Synopsis:**

The appeal of the Department's release of Stage II and Stage III mining bonds is dismissed since the permittee has met the statutory and regulatory standards for reclamation of the mined land. In order to satisfy the standards for Stage II bond release, the coal company must replace the topsoil, revegetate the site in accordance with the approved reclamation plan and make certain the reclaimed lands are not contributing suspended solids to stream flow or runoff outside the permit area in excess of the acts, regulations, or permit. Stage III reclamation standards are satisfied when the coal company has achieved compliance with the applicable statutes, regulations and permit conditions; the site is capable of supporting the approved postmining use; and the applicable liability period has expired.

## BACKGROUND

Appellant George M. Lucchino appealed the Department of Environmental Protection's

(Department) approval of bond releases for two surface mines operated by Robinson Coal Company (Robinson Coal) in Washington County, Pennsylvania. The Department approved Stage II and Stage III bond release for the McWreath I mine site and Stage III bond release for the McWreath II mine site.

In an earlier appeal at EHB Docket No. 95-185-R (consolidated with EHB Docket No. 96-222-R), Mr. Lucchino challenged the Department's release of Stage I and Stage II bonds for the McWreath II mine site. Following a hearing which spanned several weeks and two site visits to Mr. Lucchino's property, the Board issued an adjudication finding no merit to Mr. Lucchino's appeal. *Lucchino v. DEP*, 1998 EHB 473. Mr. Lucchino appealed the Board's decision to the Commonwealth Court and the Court affirmed the Board's decision. *Lucchino v. Department of Environmental Protection*, No. 1730 C.D. 1998 (Pa. Cmwlth. filed December 4, 1998).

In the present appeal, the Board earlier dismissed some of Mr. Lucchino's objections in granting partial summary judgment in favor of the Department. *See Lucchino v. DEP*, 1999 EHB 214. The Board also granted in part the Department's motion in limine. *See Lucchino v. DEP*, 1999 EHB 759. A hearing on the merits was held before Administrative Law Judge Thomas W. Renwand. 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 Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 (Clean Streams Law); the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§ 1396.1-1396.31 (Surface Mining Act); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177 *as amended*, 71 P.S. § 510-17 (Administrative Code) and the rules and regulations promulgated thereunder.

2. George M. Lucchino is the surface owner of two adjoining parcels of property located in Robinson Township, Washington County, Pennsylvania. He purchased one of the parcels in 1968 and the second parcel in the 1990s. (N.T. 93-94)[1]

3. Robinson Coal Company (Robinson Coal) is the permittee of a surface coal mine located in Robinson Township, Washington County, commonly known as the McWreath I mine. The McWreath I mine is covered by Surface Mining Permit (SMP) No. 63860101. (Ex. C-2)

4. Robinson Coal is also the permittee of a surface coal mine located in Robinson Township, Washington County, and North Fayette Township, Allegheny County, commonly known as the McWreath II mine. (*Lucchino v. DEP*, 1998 EHB 473, FoF No. 3) The McWreath II mine is covered by SMP No. 63890101. (Ex. C-5)

**Procedural History**

5. The McWreath II mine was the subject of previous appeals filed by Mr. Lucchino and docketed at EHB Nos. 95-185-R and 96-122-R.

6. The previous appeals filed by Mr. Lucchino challenged the Department's release of the Stage I bond release for the McWreath II mine (EHB Docket No. 95-185-R) and the Stage II bond release for the McWreath II mine (EHB Docket No. 96-222-R). The appeals were consolidated by the Board's Order dated December 30, 1996.

7. On August 31, 1998, Mr. Lucchino filed a timely appeal of the Department's release of the Stage II and Stage III bonds for the McWreath I mine and of the release of the Stage III bond for the McWreath II mine. (Notice of Appeal)

8. On January 6, 1999, the Department filed a Motion for Summary Judgment,

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[1] References to the transcript from the hearing on the merits held on September 28, 1999 are denoted as (N.T. __); (Ex. C-__) refers to a Department exhibit and (FoF No. __) denotes a

seeking dismissal of Mr. Lucchino's appeal of the Stage II and Stage III bond release for the McWreath I mine and the Stage III bond release for the McWreath II mine.

9. The Board granted the Department's Motion with respect to Mr. Lucchino's objections Nos. 3(k) (area that Robinson Coal reclaimed is filled with numerous depressions) and 3(m) (seep near driveway) in his Notice of Appeal of the bond release for McWreath I. The Board also granted the Department's Motion with respect to Mr. Lucchino's objections Nos. 3(k) (area that Robinson Coal reclaimed is filled with numerous depressions) and 3(m) (seep near driveway) in his Notice of Appeal of the bond release for McWreath I. The Board also granted the Department's Motion with respect to Mr. Lucchino's objections Nos. 3(i) (Robinson Coal trespassed on Lucchino's property); 3(j) (mined off permitted and bonded area); 3(k) (area reclaimed is too rough to mow); 3(l) (area reclaimed has numerous depressions); 3(n) (seep near driveway); and 3(o) (washout near Pershina's property) for Lucchino's appeal of the Stage III bond release for the McWreath II mine. *Lucchino v. DEP*, 1999 EHB 214.

10. The Board also granted the Department's Motion with respect to Mr. Lucchino's objections based on alleged violations of the mining regulations or permit conditions which occurred during mining. *Lucchino v. DEP*, 1999 EHB 214.

11. The Department filed a Motion in Limine in response to Mr. Lucchino's pre-hearing memorandum.

12. The Board granted the Department's Motion with respect to those objections in Mr. Lucchino's Notice of Appeal that the Board had previously determined were barred by collateral estoppel, administrative finality or relevancy. The Board also held that Mr. Lucchino had waived his objections based on numerous regulations, statutory provisions, permit provisions

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Finding of Fact.

and permit conditions by failing to provide a detailed explanation as to the basis for those objections, as directed by the Board in its Pre-Hearing Order No. 2. The Board further held that the Department should prepare its case based on the regulations cited in Mr. Lucchino's pre-hearing memorandum, namely 25 Pa. Code §§ 86.174 and 87.159. *Lucchino v. DEP*, 1999 EHB 759.

13. Based on the Board's Orders dated May 10, 1999 and September 10, 1999, Mr. Lucchino's appeal was limited to Objections Nos. 3(a)-(h) and 3(j) for the McWreath I mine and to Objections Nos. 3(a)-(h) for the McWreath II mine.

14. Robinson Coal submitted its Completion Report for the McWreath I mine in late 1997. The Completion Report is submitted after the planting and reclamation work at the site has been completed and topsoil has been replaced. It is the beginning of the process for determining bond release and the Department's review of Robinson Coal's bond release request. (N.T. 114, 119, 121; Ex. C-2)

15. Larry A. Jadyk is a mining specialist with the Department. As part of his job duties, he reviews the bond release requests for Stage II and Stage III bond releases. He has been a mining specialist for six years. (N.T. 102)

16. Mr. Jadyk testified as a reclamation expert in Mr. Lucchino's prior appeals. *See Lucchino,* 1998 EHB 473, FoF No. 24. The Board recognized Mr. Jadyk as an expert in the area of reclamation as a reclamation specialist. (N.T. 104, 109)

17. As part of his review of the Stage II and Stage III bond release requests, he determines the postmining land use; evaluates the reclamation plan; inspects the mine site to determine the type and extent of vegetation which has been established at the site, compares the reclamation plan with the conditions at the mine site; makes observations as to whether the

property is being mowed or maintained consistent with the reclamation plan and the postmining land use; and performs field reviews. (N.T. 107-108)

18. Mr. Jadyk has performed approximately 500 bond release request reviews during his time with the Department. (N.T. 103) Of those inspections, more than 50% of the Stage III bond release inspections were at sites with a postmining land use of pasture and land occasionally cut for hay. (N.T. 152)

19. Mr. Jadyk had on-the-job training with Department foresters, and the forester that he replaced, regarding reclamation of pastureland and land occasionally cut for hay. Mr. Jadyk has also received training from the Office of Surface Mining in the areas of reclamation. (N.T. 109) That training included training as to the types of vegetation that should be established on sites where the postmining land use is pasture and land occasionally cut for hay. (N.T. 152)

20. Mr. Jadyk reviewed the Completion Report submitted by Robinson Coal for Stage II and Stage III bond release for the McWreath I mine site. (N.T. 113)

21. In response to Robinson Coal's request for Stage II and Stage II bond release for the McWreath I mine site, Mr. Jadyk conducted four inspections of the site. (N.T. 127-128)

22. The Completion Report indicates the topsoil was replaced and revegetation was established at the site. (Ex. C-2)

23. The Department's inspectors would have also noted topsoil replacement and the adequacy of vegetation as part of the routine inspections of the McWreath I mine site. Mr. Jadyk reviewed those inspection reports as part of his bond release review. (N.T. 115-117)

24. The Completion Report also identifies the plant species that were planted at the site during reclamation and shows that planting was completed at the site by September 22, 1992. ( N.T. 122; Ex. C-2)

25. The site was planted with a grass and legume mixture. (Ex. C-2)

26. The postmining land use for the McWreath I mine is pasture and land occasionally cut for hay. (N.T. 117; Ex. C-3)

27. There is no regulatory standard for the particular plant species required to achieve the postmining land use of pasture and land occasionally cut for hay. Operators may choose from a variety of plant mixtures in deciding how to establish vegetation at the site. (N.T. 122)

28. The Department recommends a grass and legume mixture which will assure a diverse mix of vegetation which will mature at different times and at different rates during the growing season. The goal of revegetation is to avoid a monoculture of plant species, to control erosion and to establish vegetation which support livestock. (N.T. 123-124)

29. The vegetation at the McWreath I mine site is consistent with the type of vegetation at other mine sites which have been reclaimed and is consistent with the type of vegetation at mine sites where the postmining land use is pasture and land occasionally cut for hay. (N.T. 125, 139)

30. The vegetation identified in the Completion Report is the same or similar to the vegetation that has been established on the McWreath I mine site. (N.T. 139; Ex. C-2)

31. Mr. Jadyk conducted four inspections of the McWreath I site between November of 1997 and January of 1998 as part of his review of the bond release request and prepared a Reclamation Status Report for both Stage II and Stage III bond release based on his observations made during those inspections. (N.T. 127-128; Ex. C-4)

32. During his inspections, he observed the vegetation at the site and determined that the site and Mr. Lucchino's property meets or exceeds the requirement for 70% ground cover of permanent species. (N.T. 128-129, 133; 25 Pa. Code § 87.155(b)(2))

33. Mr. Jadyk also determined that the McWreath I mine was not contributing suspended solids to streams or runoff outside the permit area. (N.T. 128)

34. Most of the McWreath I mine site and portions of Mr. Lucchino's property have been mowed and hay has been cut and baled on the McWreath I permit area. (N.T. 131, 133, 142)

35. Mr. Jadyk testified that the fence lines on Mr. Lucchino's property had been mowed. (N.T. 133) Fences are a good indication that the land is used for pasture. (N.T. 160)

36. Other areas of the McWreath I mine site which were reclaimed at the same time by the same methods as Mr. Lucchino's property have been mowed and hay has been baled. (N.T. 134)

37. The five year liability period began at the initial seeding and planting in September of 1992. (N. T. 130; Ex. C-2)

38. The Lucchino property on the McWreath I permit area is capable of supporting the long-term production of domesticated forage plants. (N.T. 154)

39. The Lucchino property on the McWreath I permit area is capable of and suitable for grazing and could support grazing or any kind of livestock that would graze. (N.T. 154)

40. The Lucchino property on the McWreath I permit area is capable of and suitable for having hay cut and baled. (N.T. 154-155)

41. C. R. Greene is employed by the Department as an inspector supervisor in the Greensburg District Mining Office. Mr. Greene has been a employee of the Department for approximately 20 years. He has been an inspector supervisor for approximately 17 years, and was a mine conservation inspector for 3 years prior to becoming a supervisor. (N.T. 189-191)

42. As an inspector supervisor, Mr. Greene is responsible for the oversight of the

mine conservation inspectors based in the Greensburg District Mining Office. (N.T. 190)

43. Those inspectors are responsible for the inspection of surface coal mines and the surface effects of underground coal mines to ensure their compliance with the rules and regulations and the laws of Pennsylvania. (N.T. 191)

44. Mr. Greene has been at the McWreath I mine site three or four times since 1997. (N.T. 192)

45. In addition, Mr. Greene inspected and discussed the site on numerous occasions with Jim Fletcher, the mine conservation inspector responsible for inspecting the McWreath I mine site. (N.T. at 192)

46. Mr. Fletcher inspected the McWreath I mine site on November 4, 1997, November 6, 1997, and November 13, 1997 as part of his routine inspection duties. (N.T. 193; Ex. C-7)

47. The Inspection Report indicates that a large depression remained on the Lucchino property. (Ex. C-7)

48. Mr. Greene observed the depression area. (N.T. 195)

49. The depression was lower than the surrounding terrain which could allow water to drain into the deep mine system below the surface. (N.T. 196)

50. Mr. Greene told Mr. Fletcher that the depression area needed to be regraded to establish positive drainage. (N.T. 198-199)

51. In his Reclamation Status Report, Mr. Jadyk also noted the depression area, and stated that the operator must establish positive drainage from the area. (Ex. C-4)

52. The Inspection Report also notes that there was an area on the Lucchino property which had deep ridges that were reportedly from the chisel plow when the site was planted. (N.T.

197; Ex. C-7)

53. Mr. Fletcher made a follow-up inspection of the McWreath I mine site on November 20, 1997. (N.T. 198; Ex. C-8)

54. Mr. Greene determined that although the area was rough, the chisel plowed area met the minimum criteria for the postmining land use of pasture and land occasionally cut for hay. (N.T. 199; Ex. C-8)

55. Mr. Fletcher inspected the McWreath I mine site again on June 18, 1998 and prepared an inspection report. Mr. Greene discussed the June 18, 1998 Inspection Report with Mr. Fletcher. (N.T. 200; Ex. C-9)

56. The June 18, 1998 Inspection Report indicates that the depression on the Lucchino property had been drained, regraded, seeded and mulched. (Ex. C-9)

57. The depression area was the only deficiency which required correction before the Stage II and III bonds could be released for the McWreath I mine site. (N.T. 201)

58. Mr. Greene took into account the recommendations of Mr. Jadyk and Mr. Fletcher in making his recommendation for bond release. (N.T. 201-202)

59. Mr. Greene concurred with Mr. Jadyk's conclusion that the McWreath I mine site had achieved the postmining land use and concurred with Mr. Fletcher's determination that all deficiencies had been corrected on the McWreath I mine site. (N.T. 202)

60. Mr. Greene recommended that Stage II and Stage III bond release for the McWreath I mine site be granted. (N.T. 201-202)

61. On the McWreath I mine site, Robinson Coal has replaced the topsoil; revegetation has been established in accordance with the approved reclamation plan and the standards for the success of revegetation have been met; and the reclaimed lands are not

contributing suspended solids to stream flow or runoff outside the permit area in excess of the requirements of the acts, regulations or the permit. In addition, Robinson Coal has achieved compliance with the applicable statutes, regulations and permit conditions; the site is capable of supporting the approved postmining use; and the applicable liability period has expired.

**McWreath II Mine**

62. Mr. Lucchino owns two out of a number of properties that are covered by the McWreath II permit. (N.T. 140-141)

63. Portions of the Lucchino property on the McWreath II mine site were previously mined. The conditions of the Lucchino property after the previous mining and before Robinson Coal mined the property included areas with little or no topsoil, highwalls, flumes and diversion ditches. (N.T. 148)

64. The Lucchino property is in better condition now than it was before Robinson Coal conducted its mining operation. (N.T. 148; *Lucchino v. DEP*, 1998 EHB 473, FoF No. 49)

65. Robinson Coal submitted the Completion Report for the Stage III bond release for the McWreath II mine site in October of 1997. (N.T. 141; Ex. C-5)

66. The Completion Report indicated that the area was capable of supporting the postmining land use. ( N.T. 142; Ex. C-5)

67. The postmining land use for the McWreath II mine site is pasture and land occasionally cut for hay. (N.T. 144)

68. The topsoil was replaced on Mr. Lucchino's property and the property was planted during the spring of 1992. (*Lucchino v. DEP*, 1998 EHB 473, FoF No. 7)

69. Mr. Lucchino's property can be mowed. Mr. Lucchino has been mowing the property line, the fence line, an area behind his house and other areas on his property. Mr.

Lucchino was observed mowing his property in August of 1997. (*Lucchino v. DEP*, 1998 EHB 473, FoF No. 40)

70. Mr. Jadyk inspected the McWreath II mine site three times between November and December of 1997 as part of his review of the Stage III bond release request. (N.T. 145; Ex. C-6)

71. Mr. Jadyk determined that the McWreath II mine site met the postmining land use. (N.T. 143-144)

72. Mr. Lucchino's property and fence lines have been mowed. (N.T. 144)

73. Other properties on the McWreath II mine site have been mowed, and hay has been cut and bailed. (N.T. 144, 156)

74. The Lucchino property on the McWreath II mine site is capable of supporting the long-term production of domesticated forage plants. (N. T. 155)

75. The Lucchino property is capable of being grazed by livestock. (N.T. 155-156)

76. Mr. Jadyk did not identify any deficiencies on the Lucchino property which required correction before the Stage III bond release could be granted. (N.T. 146; Ex. C-6)

77. Mr. Jadyk recommended that Stage III bond release be granted upon completion of the work which needed to be done to correct deficiencies on other portions of the McWreath II permit area. (N.T. 147)

78. The Department's mine conservation inspector, Mr. James Fletcher, inspected the McWreath II mine site three times in November of 1997. (N.T. 202; Ex. C-10)

79. Inspector supervisor Greene discussed the McWreath II mine site with Mr. Fletcher and inspected the McWreath II mine site three or four times. (N.T. 203)

80. During one of his inspections, Mr. Greene walked the entire Lucchino property.

He observed birds-foot trefoil, clover, red top and timothy. The vegetation he observed is acceptable vegetation on lands that are reclaimed for a postmining land use of pastureland and land occasionally cut for hay. (N.T. 205-206)

81. During his inspections, Mr. Greene did not notice any difference in the roughness of the surface between Mr. Lucchino's property and other properties on the McWreath I and McWreath II mine sites. (N.T. 206-207)

82. Mr. Fletcher did not identify any deficiencies that required correction for the Lucchino property. (N.T. 203-204)

83. Mr. Greene concurred with Mr. Jadyk's determination that the McWreath II mine site met the postmining land use. (N.T. 204)

84. Mr. Greene recommended that Stage III bond release for the McWreath II mine site be granted. (N.T. 204-205)

85. On the McWreath II mine site, Robinson Coal has achieved compliance with the applicable statutes, regulations and permit conditions; the site is capable of supporting the approved postmining use; and the applicable liability period has expired.

**DISCUSSION**

Under the Board's rules at 25 Pa. Code § 1021.101, Mr. Lucchino has the burden of proof to show that the Department erred in determining that the mine sites met the bond release criteria set forth at 25 Pa. Code §§ 86.175 and 87.159. Mr. Lucchino's primary argument in support of his appeal is that the portions of his properties covered by the McWreath I and McWreath II permit areas do not satisfy the Stage II and Stage III bond release criteria because his properties allegedly are not capable of supporting the approved postmining land use of pastureland or land occasionally cut for hay. At the hearing on the merits and in his post-hearing briefs, Mr.

Lucchino based his arguments on his allegations that his property is too rough to mow and the vegetation on his property is not suitable for grazing or for hay.[2]

Mr. Lucchino offered the testimony of two expert, Robert Goodall and John Scott, to support his assertion that the areas on Mr. Lucchino's property which were chisel plowed are too rough for his mowing equipment and that the vegetation on the site does not support livestock grazing. Mr. Goodall testified that the ground on Mr. Lucchino's property on both the McWreath I and II mine sites which had been chisel plowed during reclamation has a rough surface. (N.T. 21, 30) Mr. Scott testified that based on his experience as a farmer, the ground should be smooth enough to drive a light truck at 20 miles per hour. (N.T. 56, 60, 61) Mr. Scott also testified that he would not let his cows eat the vegetation on Mr. Lucchino's reclaimed property. (N.T. 52, 72)

We do not find the testimony from Mr. Lucchino's witnesses to be persuasive regarding Stage II and Stage III bond release. Despite their assertions and as discussed in more detail below, the areas on Mr. Lucchino's property which were mined by Robinson Coal support a good growth of vegetation and the areas have been mowed.

**Postmining land use**

Prior to release of a bond, the property must be reclaimed so that it is capable of supporting the premining land use, unless a higher or better postmining land use is approved by the Department. 25 Pa. Code § 87.159(a). The particular postmining land identified in the permit for a surface coal mine is chosen by the landowner and the permittee. (N.T. 148) The

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[2] Because Mr. Lucchino raises several objections in his post-hearing briefs that the Board has previously dismissed, those objections will not be considered in this Adjudication. *See Lucchino v. DEP*, 1999 EHB 214 (Opinion and Order on the Department's Motion for Summary Judgment) and *Lucchino v. DEP*, 1999 EHB 759 (Opinion and Order on the Department's

postmining land use for the McWreath I and McWreath II mine sites is pasture and land occasionally cut for hay. (N.T. 117, 143-144; Ex. C-3) Postmining land used as pastureland or land occasionally cut for hay is defined as:

> Land used primarily for the long-term production of adapted, domesticated forage plants to be [grazed] by livestock or occasionally cut and cured for livestock feed. Land used for facilities in support of [pastureland] or land occasionally cut for hay which is adjacent to or an integral part of these operations is also included.

25 Pa. Code § 87.1.

Section 159(a) allows for the permittee to choose to restore the land either to the postmining land use or, in the alternative, to a high or better use. 25 Pa. Code § 87.159(a). The regulation does not require that the land be restored to a higher and better use. (N.T. 149-150) Mr. Lucchino's properties meet the definition of the postmining land use of pastureland or land occasionally cut for hay. The Completion Report for the McWreath I permit area identifies the plant species that were planted at the site during reclamation. (Ex. C-2) A mixture of legumes and permanent grass, including timothy, red top, fescue, clover and trefoil, were planted on the Lucchino properties and had been growing for over five years. (N.T. 154, 168) These grasses and legumes are typical for pastureland and land occasionally cut for hay according to agronomy guides from Pennsylvania State University and the mining guides from the Office of Surface Mining. (N.T. 123-124, 153) That type of vegetation is acceptable to the Department for pastureland or land occasionally cut for hay. (N.T. 206) Most of the McWreath I mine site and portions of Mr. Lucchino's property have been mowed and hay has been cut and baled on the McWreath I permit area. (N.T. 131, 133, 142)

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Motion in Limine).

Additionally, the Completion Report for the McWreath II permit area indicates that the area was capable of supporting the postmining land use of pastureland or land occasionally cut for hay. (N.T. 142; Ex. C-5) Portions of the Lucchino property on the McWreath II mine site were previously mined. The conditions of the Lucchino property after the previous mining and prior to Robinson Coal mining the property included areas with little or no topsoil, highwalls, flumes and diversion ditches. (N.T. 147-148) Topsoil was replaced on the Lucchino property and the property was planted during the spring of 1992. *Lucchino v. DEP*, 1998 EHB 473, FoF No. 7. Mr. Lucchino was observed mowing his property on the McWreath II permit area in August of 1997 and other properties on the McWreath II mine site have been mowed and hay has been cut and bailed. (N.T. 144, 156; *Lucchino v. DEP*, 1998 EHB 473, FoF No. 40) The Lucchino property is in better condition now than it was before Robinson Coal conducted its mining operation. (N.T. 148; *Lucchino v. DEP*, 1998 EHB 473, FoF No. 49)

**Bond release criteria**

The criteria for Stage II and Stage III bond release are set forth in Sections 1396.4(g)(2) and (3) of the Surface Mining Conservation and Reclamation Act[3] (Surface Mining Act or Act) and in 25 Pa. Code §§ 86.174(b) and (c). The statute provides that if the Department is satisfied the reclamation has been accomplished in compliance with the Surface Mining Act, it may release the bond according to the following schedule:

> . . .
> (2) At Stage II, when revegetation has been successfully established on the affected area in accordance with the approved reclamation plan, the department shall retain that amount of bond for the revegetated area which would be sufficient for the cost to the Commonwealth of reestablished vegetation. Such retention of bond shall be for the duration of liability under the bond as

[3] Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§ 1396.1-1396.31.

prescribed in subsection (d). No part of the bond shall be released under this subsection so long as the lands to which the release would be applicable are contributing suspended solids to streamflow or runoff outside the permit area in excess of the requirements of law or until soil productivity for prime farmlands has returned to equivalent level of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices as determined from the soil survey performed pursuant to subsection (a)(2)I. . . .

(3) At Stage III, when the operator has completed successfully all mining and reclamation activities and has made provisions with the department for the sound future treatment of pollutional discharges, if any, the release of the remaining portion of the bond, but not before the expiration of the period specified for operator responsibility in subsection (d). . . .

52 P.S. §§ 1396.4(g)(2) and (3).

The regulatory provisions provide as follows:

. . .

(b) When the entire permit area or a portion of the permit area meets the following standards, Stage 2 reclamation has been achieved:

(1) Topsoil has been replaced and revegetation has been successfully established in accordance with the approved reclamation plan.

(2) The reclaimed lands are not contributing suspended solids to stream flow or runoff outside the permit area in excess of the requirements of the acts, regulations thereunder or the permit.

(3) If prime farmlands are present, the soil productivity has been returned to the required level when compared with nonmined prime farmland in the surrounding area, to be determined from the soil survey performed under the reclamation plan approved in Chapters 87-90.

. . .

(c) When the entire permit area or a portion of the permit area meets the following performance standards, [Stage] 3 reclamation has been achieved:

(1) The permittee has successfully completed mining and reclamation operations in accordance with the approved reclamation plan so that the land is capable of supporting postmining land use approved under §§ 87.159, 88.133, 89.88 and 90.166.

> (2) The permittee has achieved compliance with the requirements of the acts, regulations thereunder, the conditions of the permit and the applicable liability period under § 86.151 (relating to period of liability) has expired.
>
> . . .

25 Pa. Code §§ 86.174(b) and (c).

**McWreath I mine site**

Mr. Lucchino argues that Robinson Coal did not properly replace the topsoil or revegetate the site and therefore the Department should not have approved Stage II and Stage III bond release for the site. This allegation is not supported by the evidence. The Completion Report for the McWreath I mine site indicates that topsoil was replaced and revegetation was established at the site. (Ex. C-2) The mining inspector testified that he noted topsoil replacement and the adequacy of the vegetation during routine inspections of the mine site. (N.T. 115-116)

The postmining land use for the McWreath I mine was pasture and land occasionally cut for hay. (N.T. 117; Ex. C-3) There is no regulatory standard for the particular plant species required for achieving the postmining land use of pasture and land occasionally cut for hay, so operators may choose from a variety of plant mixtures. (N.T. 122) The Completion Report identifies the plant species that were planted at the site during reclamation as a grass and legume mixture and shows that planting was completed at the site by September 22, 1992. (N.T. 122; Ex. C-2) During field inspections, the mining inspector observed the vegetation at the site and determined that the site and Mr. Lucchino's property meets or exceeds the requirement for 70% ground cover of permanent species. (N.T. 128-129, 133; 25 Pa. Code § 87.155(b)(2)). The evidence presented at the hearing indicates that the Lucchino property on the McWreath I permit area is capable of supporting the long-term production of domesticated forage plants and is suitable for grazing and could support grazing or any kind of livestock that would graze. (N.T.

154) The Lucchino property is clearly capable of and suitable for cutting and baling hay. (N.T. 154-155)

The only deficiency that required correction before the bonds could be released for the McWreath I mine site was a depression that existed on the Lucchino property which needed to be regraded because the area was lower than the surrounding terrain and it collected water. (N.T. 193-197, 199, 201; Exs. C-4, C-7) The inspector supervisor testified that the depression was eliminated and a Department inspection report indicates that the depression was drained, regraded, seeded and mulched and that "grass and legumes have sprouted thickly." (N.T. 200; Ex. C-9) In fact, one of Mr. Lucchino's witnesses testified that Robinson Coal had done a good job filling in and repairing the depression area on the Lucchino property on the McWreath I permit. (N.T. 40-41)

The final requirement for Stage II bond release is that the reclaimed property must not contribute suspended solids to stream flow or runoff outside the permit area in excess of the acts, regulations or permit. The mining inspector testified that the McWreath I mine was not contributing suspended solids to streams or runoff outside the permit area. (N.T. 128)

Mr. Lucchino also asserts that his property is too rough to mow. The evidence in this appeal establishes that Mr. Lucchino's property on the McWreath I permit area is no rougher than the area of his property on the McWreath II permit area, which the Board has previously held is not too rough to mow. The evidence also establishes that both of Mr. Lucchino's properties were reclaimed the same way. (N.T. 94-97, 156; *Lucchino v. DEP*, 1998 EHB 473, FoF No. 40-42) A Department Inspection Report notes that there was an area on the Lucchino property which had deep ridges that were reportedly from the chisel plow used for planting at the site. (N.T.197; Ex. C-7) During a follow-up inspection of the McWreath I mine site, the mine

conservation inspector made the determination that although the area was rough, the area met the minimum criteria for the postmining land use of pasture and land occasionally cut for hay. (N.T. 197-199) While Mr. Lucchino may wish for a more smooth land surface, the mining regulations only require the coal company to meet a basic standard, and the reclamation of the McWreath I site meets this standard.

Stage III bond release may occur only after the permittee has successfully completed mining and reclamation such that the area in question is capable of supporting postmining land use and the permittee has achieved compliance with the requirements of the applicable statutes and regulations, permit conditions, and the applicable period of liability. *Gates v. DEP*, 1992 EHB 793. Under 25 Pa. Code § 86.151(a), liability under bonds posted for a coal surface mining activity continues for five years after the planting is completed. Since the Completion Report states that planting was completed in September of 1992, the liability period expired in September of 1997, prior to the time the Department approved the bond release for the site. (N.T. 130; Ex. C-2) Due to the fact that the McWreath I mine site has achieved the postmining land use and any deficiencies have been corrected, Robinson Coal has met the statutory and regulatory standards to obtain Stage II and Stage III bond release for the McWreath I mine site.

**McWreath II mine site**

Topsoil was replaced on the Lucchino property and the property was planted during the spring of 1992. *Lucchino v. DEP*, 1998 EHB 473, FoF No. 7. The postmining land use for the McWreath II mine site was also pasture and land occasionally cut for hay. (N.T. 143-144) The Department determined that the site met the postmining land use due to the mining inspector's observations that Mr. Lucchino's property and fence lines have been mowed and that other properties on the McWreath II mine site have been mowed and hay has been cut and bailed.

(N.T. 144, 156) This Board has previously observed Mr. Lucchino's property being mowed. *Lucchino v. DEP*, 1998 EHB 473, FoF No. 40.

The mining inspector also testified that the Lucchino property on the McWreath II mine site is capable of supporting the long-term production of domesticated forage plants and it is capable of being grazed by livestock. (N.T. 155-156) The inspector supervisor observed birds-foot trefoil, clover, red top and timothy on the Lucchino property. The vegetation observed is acceptable vegetation on lands that are reclaimed for a postmining land use of pastureland and land occasionally cut for hay. (N.T. 205-206)

Moreover, no deficiencies were identified on the Lucchino property which required corrective action before the Stage III bond release could be granted. Under 25 Pa. Code § 86.151(a), the five-year liability period for the McWreath II mine site began in the spring of 1992, when planting was completed at the site, and ended in the spring of 1997.

Mr. Lucchino failed to meet his burden to show that Robinson Coal failed to reclaim the sites to the postmining land use of pastureland or land occasionally cut for hay or that the land has not been mowed and does not support vegetation. The Department's witnesses offered credible testimony to demonstrate that the Department did not err in granting Stage II and Stage III bond release for the McWreath I site and Stage III bond release for the McWreath II site. Accordingly, we dismiss the appeal.

## CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and over Mr. Lucchino's appeal of the Stage II and Stage III bond release for the McWreath I permit and the Stage III bond release for the McWreath II permit.

2. Mr. Lucchino has the burden of proof and proceeding in this appeal and must

prove that the Department erred in granting the bond release for the McWreath I and McWreath II mine sites. 25 Pa. Code § 1021.101; *Lucchino v. DEP*, 1998 EHB 437.

3. Stage II reclamation standards are satisfied when topsoil has been replaced, revegetation has been established in accordance with the approved reclamation plan and the standards for the success of revegetation are met, and the reclaimed lands are not contributing suspended solids to stream flow or runoff outside the permit area in excess of the requirements of the acts, regulations or the permit. 25 Pa. Code § 86.174(b).

4. Stage III reclamation standards are satisfied when the site is capable of supporting the approved postmining use; the permittee has achieved compliance with the applicable statutes, regulations and permit conditions; and the applicable liability period has expired. 25 Pa. Code § 86.174(c).

5. The Department did not act contrary to law or otherwise err when it approved Stage II and Stage III bond release for the McWreath I permit area since Robinson Coal met all applicable statutory and regulatory requirements.

6. The Department did not act contrary to law or otherwise err when it approved Stage III bond release for the McWreath II permit area since Robinson Coal met all applicable statutory and regulatory requirements.

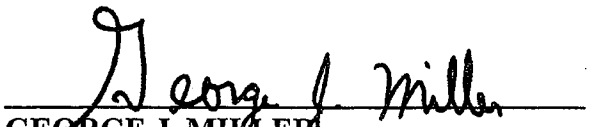
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **GEORGE M. LUCCHINO** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 98-166-R** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROBINSON COAL COMPANY, Permittee** | : | |

## ORDER

AND NOW, this 9th day of May, 2000, it is ordered that the above-captioned appeal is **dismissed.**

**ENVIRONMENTAL HEARING BOARD**



**GEORGE J. MILLER**
**Administrative Law Judge**
**Chairman**

**THOMAS W. RENWAND**
**Administrative Law Judge**
**Member**

**MICHELLE A. COLEMAN**
**Administrative Law Judge**
**Member**

**BERNARD A. LABUSKES, JR.**
**Administrative Law Judge**
**Member**

**MICHAEL L. KRANCER**
**Administrative Law Judge**
**Member**

**DATED:** **May 9, 2000**

**c:** **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

**For the Commonwealth, DEP:**
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Southwestern Region

**For Appellant:**
George M. Lucchino
McDonald, PA

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| | | |
|---|---|---|
| **202 ISLAND CAR WASH, L.P., EMCO CAR WASH, L.P. and CAR WASH OPERATING COMPANY, INC.** | : | **EHB Docket No. 98-023-MG (consolidated with 98-202-MG and EHB Docket No. 99-008-MG)** |
| **v.** | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: May 19, 2000** |

# ADJUDICATION

**By George J. Miller, Administrative Law Judge**

**Synopsis:**

The Board affirms the assessment of a civil penalty in the amount of $54,900, against a retail gasoline station operator for offenses arising from violations of the Storage Tank Act and the Department's regulations. This is a reduction of the original $152,100 penalty. The penalty was reduced because (1) the Department assessed two separate penalties where the conduct giving rise to one violation was included in conduct which gave rise to another violation, therefore only one penalty was appropriate, and (2) the evidence as to whether or not the violations caused environmental damage was equivocal. However, a substantial penalty in the amount of $36,000 for a failure to perform leak detection as required by the Department's regulations and for a failure to produce leak detection records is required as an example of the importance of proper leak detection.

## BACKGROUND

These are appeals by 202 Island Car Wash, L.P., EMCO Car Wash, L.P. and Car Wash Operating Company, Inc. (collectively, Appellant) from a series of administrative orders and a

penalty assessment by the Department of Environmental Protection. These enforcement actions by the Department arise from an investigation of groundwater contamination in a residential neighborhood located near the Appellant's retail gasoline facility. During the course of its investigation the Department determined that the facility was operating in violation of the Storage Tank Act and its regulations.

Many of the issues related to the enforcement actions have been resolved by the parties. Prior to the hearing the parties entered into an extensive stipulation wherein they agreed on which issues from the Department orders issued on February 5, 1998 (EHB Docket No. 98-023-MG) and January 19, 1999 (EHB Docket No. 99-008-MG), and a September 17, 1998 (EHB Docket No. 98-202-MG), remained for our consideration. A remaining issue concerning the abatement from a discharge from a storm water drain in a nearby residential neighborhood has not been resolved and was severed from this proceeding by order dated February 16, 2000. The purpose of this adjudication is to resolve the issues surrounding the civil penalties assessed by the Department on January 19, 1999.[1]

The civil penalties being appealed were assessed in the amount of $152,100 for violations of 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 - 6021.2104, arising from the operation of 202 Island Car Wash located in Concord Township, Delaware County. A hearing on the merits was held for three days on February 14-16, 2000, before Administrative Law Judge George J. Miller. The parties filed an extensive stipulation of facts which was entered into evidence as Exhibit B-1.

[1] Our earlier decisions in this case may be found at 1998 EHB 443 (granting in part and denying in part a petition for supersedeas); 1998 EHB 1325 (granting in part a motion for summary judgment); 1999 EHB 10 (granting in part and denying in part a motion to dismiss). Additionally, a supersedeas of the Department's January 19, 1999 order which, among other things, required closure of the Facility, was granted by order dated March 4, 1999.

Following the hearing the parties filed requests for findings of fact and conclusions of law and supporting legal memoranda. The record consists of a transcript of 453 pages and 19 exhibits as well as the transcripts and exhibits of the earlier supersedeas hearings.

## FINDINGS OF FACT[2]

1. The Department is the agency with the duty and authority to administer and enforce the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. §§ 6021.101 - 6021.2104; the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 – 691.1001; the Land Recycling and Environmental Remediation Standards Act, Act of May 19, 1995, P.L. 4, 35 P.S. §§ 6026.101 – 6026.908 (Act 2); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17 (Administrative Code) and the rules and regulations promulgated thereunder.

2. The Appellant is the owner and operator of 202 Island Carwash, a retail gasoline station and car wash located at 245 Wilmington Pike, Concord Township, Delaware County (hereinafter Facility). This Facility is registered with the Pennsylvania Storage Tank Program under the name of "202 Island Carwash" with the Facility Identification Number 23-46397. The Facility sells Mobil petroleum products. (Ex. B-1, ¶2)

3. Until February 3, 1997, the Facility was owned by 202 Island Car Wash, L.P., a Pennsylvania Limited Partnership with a business address of 223 Wilmington – West Chester Pike, Chadds Ford, Pennsylvania 19317. The General Partner of 202 Island Car Wash, L.P. is 202 Island Car Wash, Inc. which is a Pennsylvania corporation with a business address of 223 Wilmington – West Chester Pike, Chadds Ford, Pennsylvania 19317. The chief executive officer of 202 Island Carwash, L.P. is Mr. Thomas V. Spano. (Ex. B-1, ¶3)

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[2] The exhibits of the Department are designated as "Ex. C-__" and the Appellant's as

4. Since February 3, 1997, the Facility has been owned by EMCO Car Wash, L.P., a Pennsylvania Limited Partnership with a business address of 334 Memorial Park Drive, Springfield, Pennsylvania 19064. The Chief Executive Officer is Mr. Edward Maul. (Ex. B-1, ¶4)

5. The current operator of the Facility is Car Wash Operating Company, Incorporated, with a business address of 245 Wilmington - West Chester Pike, Chadds Ford, Pennsylvania 19317. The Chief Executive Officer is Mr. Thomas V. Spano. (Ex. B-1, ¶5)

6. Construction of the Facility began in October 1995. Three 10,000 gallon regulated gasoline underground storage tanks (hereinafter USTs) were installed and retail operations began in November 1995. (Ex. B-1, ¶7)

7. Michael Grether, the project manager for the construction, had never built a gas station before and was not aware of all the regulatory requirements at the time he started the project. (Grether, March 2, 1998 Supersedeas, N.T. 65-66)

8. On May 16, 1997, Sarah Albert,[3] a compliance specialist with the Department, conducted a site inspection at the Facility as part of the investigation of the groundwater contamination at 37 Ruby Road, a home in the nearby residential neighborhood known as Conestoga Farms.[4] During the inspection, the Department determined that the UST systems were not properly registered and leak detection was not being conducted as required by the Department's rules and regulations. (Ex. B-1, ¶9; Albert, N.T. 25-28)

9. A copy of the Department's inspection report was provided to the operator at the time

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"Ex. A-__." The notes of testimony are designated as "N.T. __."

[3] At the time Ms. Albert went by the last name of Tubbs. We will refer to her throughout this adjudication by her current name, Albert.

[4] For a more detailed discussion of the contamination at Conestoga Farms, see our prior opinions at *202 Island Car Wash, L.P. v. DEP*, 1998 EHB 443 (petition for supersedeas), and

of the inspection. This notice stated that the registration was "not posted or accessible to the attendant." (Ex. C-3(a))

10. On June 24, 1997, the Department mailed a Notice of Violation to Mr. Spano for failure to register the UST systems and failure to conduct leak detection. (Ex. B-1, ¶ 11)

11. At the hearing, Michael Grether testified that he did not learn that the tanks were not registered until June 1997. In his initial conversations with Ms. Albert she did not tell him that the tanks were not registered, but asked him to produce the tank registrations. (N.T. 279)

12. Mr. Grether searched through the Appellant's files and contacted Monridge Construction, the tank installer, which informed him that the tanks had been registered. (Grether, N.T. 279-80)

13. When it became evident that the tanks had not in fact been registered, Mr. Grether completed new paperwork and applied for tank registration in July 1997. (Grether, N.T. 281)

14. The registration fees were paid retroactively to 1995. (N.T. 282)

15. On August 11, 1997, 22 months after the installation of the USTs, the Facility and associated USTs were initially formally registered as required by Section 503(a) of the Tank Act (35 P.S. § 6021.503(a)). The three USTs were registered as Nos. 143620 (001), 143621 (002), and 143622 (003) (Ex. B-1, ¶28)

16. During the May 1997 inspection, the attendant was unable to produce records indicating that appropriate leak detection was being performed for the tanks and piping at the Facility. (Albert, N.T. 26)

17. The attendant was only able to show that he used the automatic tank gauging system (ATG) to measure the level of product in the tanks. (Albert, N.T. 26, 77)

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*202 Island Car Wash, L.P. v. DEP*, 1998 EHB 1325 (motion for summary judgment).

18. In April 1997 an automobile knocked off one of the dispensers at the Facility. A service contractor named Gateway Petroleum was called in to make repairs. (Stipulation, March 2, 1998, N.T. 41; Exs. C-8; A-4; see also Albert, March 2, 1998 Supersedeas, N.T. 146-47)

19. During the repairs following the car accident, lines going to the dispensers were switched and had to be repaired. (Albert, March 2, 1998 Supersedeas, N.T. 147; Ex. C-9)

20. In July 1997 a contractor for the Appellant, Crompco, performed a tightness test on the lines at the Facility. The Facility did not pass the test. (Grether, March 2, 1998 Supersedeas, N.T. 44)

21. It was discovered that another dispenser line was dripping due to a faulty O-ring. (Grether, March 2, 1998 Supersedeas, N.T. 44-45; Albert, March 2, 1998 Supersedeas, N.T. 138; 144; Ex. C-7)

22. It is unknown how much, if any, petroleum was released as a result of these incidents. (See, e.g. Grether, March 2, 1998 Supersedeas, N.T. 71)

23. In July 1997 while observing a tank tightness test the Department discovered that the incorrect interstitial probe had been installed on the tanks. (Albert, N.T. 82; Ex. C-8; see also White, N.T. 332)

24. At the supersedeas hearing on March 2, 1998, Ms. Albert testified that she and others met with Mr. Grether on September 8, 1997, to discuss the situation at the Facility. She testified that at that time the Department knew that the Facility had interstitial monitoring and an ATG system, but that the Appellant was not using those systems. (Albert, March 2, 1998 Supersedeas, N.T. 147; Ex. C-9)

25. After that meeting, at the Department's request Mr. Grether began writing a leak detection protocol for the Facility. He testified that he "thought that it was probably a better

method for leak detection to take the human element more out of daily record-keeping by using the ATG." (Grether, March 2, 1998 Supersedeas, N.T. 57)

26. At that time he discovered that "simply taking a reading at one-thirty in the morning and at five-thirty in the morning and if the volumes in the tanks hadn't changed during those hours, then there was no leak, but that was not third-party certified . . . ." (Grether, March 2, 1998 Supersedeas, N.T. 58, 62)

27. He also discovered that the ATG required a different module to automatically take readings from the tanks. (Grether, March 2, 1998 Supersedeas, N.T. 58; see also Albert, N.T. 86-87)

28. George Wilson, an employee of the Appellant, testified that he would assist the Facility Manager in performing leak detection. Prior to February 1997, it was the Facility's practice to print out the product level in the tanks at the close of business, and again first thing in the morning, and compare the two printouts. (Wilson, N.T. 256, 259-60)

29. Mr. Wilson testified that these records would be turned over to a woman named Nancy who worked with Mr. Spano. (N.T. 268)

30. Mr. Wilson's ex-wife Kathleen, who was then one of the managers employed by the station, told him that she retained some of these records in the hope that she would not be fired. He did not know which records she took or what she ultimately did with these records. (Wilson, N.T. 261-62, 267, 269

31. The Appellant failed to produce documentary evidence that the Facility was conducting proper leak detection during the 12 months preceding the Department's May 1997 inspection. (Albert, N.T. 28, 89)

32. One reason the Department commenced a suspected release investigation relating to

the contaminated drinking water wells was due to the inability of the Appellant to provide verification that it was doing leak detection according to the regulations.

33. On January 19, 1999, the Department issued an order conditionally suspending the operating permit of the Facility, assessing penalties and requesting additional information. (Ex. B-1, ¶34)

34. Sarah Albert of the Department calculated the civil penalty using a penalty matrix which was developed to assist the Department's compliance specialists in calculating penalties. The matrix requires the Department to assign values for seriousness, duration and the degree of willfulness for each violation. (Albert, N.T. 29)

a. Seriousness provides the base penalty and is assessed on one of three ranges. The low range is $100-$1,500; medium is $1,000–$3,000; and high is $2,000-$5,000. (Albert, N.T. 35; Exs. C-46; C-47)

b. The degree of willfulness is assessed using a multiplier of one, two or three. One is for "basic liability" where no level of willfulness need be established. Two is for negligent or reckless conduct. Three is for deliberate conduct. (Albert, N.T. 33-34; Ex. C-46)

c. Duration is also a multiplier and is determined on a case-by-case basis, depending on what is appropriate for a particular violation. (Albert, N.T. 32)

35. The matrix also allows the Department to add additional factors, such as savings to or profit realized by the violator and damage to or costs of restoration of the environment. These amounts would be added to the total penalty. (Albert, N.T. 34-35; Ex. C-46)

36. In this case, the Department only used the basic three values from the matrix:

seriousness, duration and willfulness. The formula used was seriousness x duration x willfulness. (Albert, N.T. 34-35; Ex. C-47)

37. Ms. Albert first considered the appropriate penalty for the failure to register the tanks at the Facility. (N.T. 38)

a. She assigned this violation a seriousness rating of "low" and assessed a base penalty of $100, the lowest possible figure under the matrix. (N.T. 38-39; Ex. C-47)

b. She assigned a duration factor based on the number of billing cycles. (N.T. 42)

c. Ms. Albert then examined the willfulness factor. She attributed two different levels of willfulness to this violation. She assigned a willfulness factor of two for the period preceding her May 16, 1997 inspection, and a three thereafter. (N.T. 40-41)

d. The total assessment for this violation was $2,100. (Ex. C-47)

38. In determining that a violation occurred due to the failure to register tanks, Ms. Albert did not consider that the Appellant registered the tanks in July, 1997 and, paid prior annual registration fees. (Albert, N.T. 60-63; Grether, N.T. 282)

39. In assessing a penalty, Ms. Albert did not consider that Appellant had paid $3,400 in "throughput" fees to the Pennsylvania Underground Storage Tank Indemnification Fund (USTIF) from the date of first operation until full registration in 1997. (Albert, N.T. 60-63)

40. The next penalty calculation was for the failure to meet the financial responsibility requirements. Ms. Albert concluded that the failure to register the storage tanks made the Facility ineligible for USTIF reimbursement. She based this conclusion on the fact that USTIF

did not provide funds for corrective action related to the replacement of residential water supplies. (N.T. 43-45, 70-72)

a. Ms. Albert gave this violation a "low" seriousness classification, but at a higher value than the simple failure to register, because she believed that the violation had the potential to affect the Facility's ability to perform corrective action. (N.T. 44)

b. As with the initial registration violation, she assigned it a willfulness factor of two, and a duration factor based on an annual cycle. (Albert. N.T. 44-45)

c. The total assessment for this penalty was $10,500. (Ex. C-47)

41. Ms. Albert did not consider that there may not have been a failure of the tanks or lines causing a release as defined by USTIF, a required element for reimbursement. (Albert, N.T. 106; *see also* Sinding, N.T. 134)

42. The third penalty element was illegal operation of storage tanks. This penalty was grounded upon the last sentence in Section 503(a) of the Storage Tank Act which states: "It shall be unlawful for any owner or operator to operate or use in any way any underground storage tank that has not been registered, as required by this section." 35 P.S. § 6021.503(a). (Albert, N.T. 47)

a. The seriousness value was $1,500, in the lower end of the medium range, because she believed that operating an unregistered tank posed a threat to the environment. (Albert, N.T. 50)

b. The duration factor was calculated on a monthly basis. (Ex. C-47)

c. Ms. Albert chose a monthly period rather than a billing cycle like the

penalty for failing to register the tanks because she viewed this as an operational violation rather than simply an administrative one. (N.T. 107-108)

d. The willfulness factor was set at two for the first 18 months, and three for the period following the May 16, 1997 inspection. (Albert, N.T. 50-51)

e. The penalty was calculated for the entire station as a whole, rather than on a per-tank basis. (Albert, N.T. 52)

f. The total assessment for this violation was $67,500. (Ex. C-47)

43. The fourth penalty element was for the failure to perform leak detection during the 12-month period prior to the May 16, 1997 inspection. (Albert, N.T. 48; Ex. C-47)

a. Ms. Albert assigned a seriousness rating of medium, but chose the highest dollar value in that range, because proper performance of leak detection is "very important to determine whether or not a storage tank is leaking." (N.T. 48)

b. The duration factor was 12, based on the fact that leak detection is a monthly obligation. (Albert, N.T. 48)

c. Willfulness was assigned a value of two, on the theory that the Facility should have known the regulatory requirements. (N.T. 49)

d. The dollar value assessed for this penalty element totaled $72,000.

44. Despite the fact that the facility did not successfully perform leak detection in accordance with the regulations for almost a year after the initial inspection, no penalty was assessed for this period, and this failure was not directly considered in assessing the penalty. (Albert, N.T. 49-50)

45. Based on this failure, Ms. Albert assumed that the Facility was not performing leak detection during the period for which the penalty was assessed. (N.T. 116-17)

46. Frank Phillips, the Chief Financial Officer of Car Wash Operating Co. presented testimony concerning the financial statements which present the income and loss of the businesses involved in the Facility. (N.T. 300-302; Ex. A-105)

47. Mr. Phillips was not able to conclude that the losses sustained by the Appellant from 1997 and 1998 were directly attributable to the closure of the facility. (N.T.304)

48. The financial statements showed that the Facility sustained losses in 1997 even though it remained opened continuously in 1997, and only sustained a "bit of legal" costs associated with action by the Department. (N.T. 308-309; Ex. A-105)

**DISCUSSION**

In an appeal from a civil penalty assessment, the Department bears the burden of proof. 25 Pa. Code § 1021.101(b). It must prove by a preponderance of the evidence that the Appellant (1) violated the applicable statute or regulation, and (2) the amount of the penalty assessed for the violation reflects an appropriate exercise of discretion. *F.R. & S., Inc. v. DEP*, 1999 EHB 241. Our role is not to determine what penalty the Board would assess for a given violation, but rather it is to determine whether the penalty is reasonable and appropriate for each violation, and modify an assessment which we find unreasonable. *Id.*

The Department assessed three penalties for violations of the Storage Tank Act and its regulations which derive from its failure to register its underground storage tanks. Specifically, the Department assessed $2,100 for failing to register the tanks, $10,500 for failing to maintain financial responsibility and $ 67,500 for operating the unregistered storage tanks. The Appellant argues that these penalties are duplicative and are therefore an abuse of the Department's

discretion. We agree that failing to register the tanks and the penalties for the failure to maintain financial responsibility are duplicative. However, the penalty for operating the unregistered tanks is a wholly separate violation of the Storage Tank Act. We will deal with the first two penalties first.

Section 701 of the Storage Tank Act provides that "Every owner or operator shall meet the financial responsibility requirements established by the department." 35 P.S. § 6021.701(a). In order to meet financial responsibility requirements the Department's regulations provide that, unless a particular tank is exempt, "An owner or operator of an underground storage tank shall continuously participate in the USTIF."[5] 25 Pa. Code § 245.704. A prerequisite for participating in the USTIF is the registration of the tanks pursuant to Section 503 of the Storage Tank Act, 35 P.S. § 6021.503. *See* 35 P.S. § 6021.706.

It is clear from the testimony of Department witnesses that the reason the Appellant failed to meet its financial responsibility obligation was based on its failure to register its tanks. Since this failure to register is an element of the violation of failing to maintain financial responsibility, we do not believe it is appropriate to assess two separate civil penalties. In this case, there is no conduct involved in failing to register the tanks that is not included in failing to maintain financial responsibility.

We are guided by a recent decision of the Commonwealth Court in *Commonwealth v. Ted Sopko Auto Sales and Locator*, 719 A.2d 1111 (Pa. Cmwlth. 1998). The court analyzed civil penalties assessed for violations of the Vehicle Code and the Consumer Protection Law arising from the sale of a vehicle with an incorrect odometer reading. The trial court assessed civil

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[5] The "USTIF" is the Underground Storage Tank Indemnification Fund, which is established to provide funds for tank owners who incur liability for corrective action caused by certain releases from underground storage tanks. *See generally* Section 704 of the Storage Tank

penalties under Sections 7133, 7134 , 7135 and 7137 of the Vehicle Code. 75 Pa. C.S. §§ 7133, 7134, 7135, 7137. Sections 7133 through 7135, all relate to failing to provide the correct odometer notices and paperwork for the sale of a vehicle. Section 7137 provides that a violation of any of these sections results in a violation of the Consumer Protection Law. The Commonwealth Court held that it was only appropriate to assess a civil penalty pursuant to Section 7137, since it included the violations under the other sections. 719 A.2d at 1115.

Similarly, we believe that the failure to register the storage tanks is included in failing to maintain financial responsibility by not maintaining participation in the USTIF. Therefore it was not proper to assess a separate penalty for failing to register the tanks, and we reduce the civil penalty assessment by $2,100, the amount assessed for failing to register the tanks.

We turn now to the amount that was assessed for the failure to maintain financial responsibility. Ms. Albert predicated this penalty on her belief that the Appellant's failure to maintain USTIF coverage delayed the provision of potable water to area residents when the contamination was discovered.[6] The Appellant argues that this penalty is too high because there is no evidence to support the position that USTIF funds would have been available to the Appellant for the provision of potable water since there has been no proof that a release from the facility caused the contamination.

We agree that there is no direct evidence to support the Department's position that USTIF coverage would have been available to address the contamination of the drinking water wells but for the Appellant's failure to participate in the USTIF. No representative of USTIF was called to testify as to why coverage was denied. However, Ms. Albert also testified that this violation had

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Act, 35 P.S. § 6021.704.

[6] N.T. 43-45; 70-72; Ex. C-47.

the potential to affect the Appellant's ability to perform corrective action.[7] We also agree that failing to maintain financial responsibility creates a potentially serious situation because it puts the operator at a financial risk in the event that there is a release from its facility, which could cost millions of dollars to remediate. Accordingly, we believe that the $10,500 penalty assessed by the Department for this violation is reasonable.[8]

The Appellant also argues that the civil penalty for the illegal operation of the unregistered tanks is a duplicative penalty. We disagree. Section 503 of the Storage Tank Act provides that "it shall be unlawful for any owner or operator to operate or use, in any way, any underground storage tank that has not been registered as required by this section." 35 P.S. § 6021.503(a). This violation clearly has an additional element over and above failing to register a tank, namely using or operating the unregistered tank. Therefore, it was not an abuse to charge a separate civil penalty.

However, we agree with the Appellant that a penalty of $67,500 is excessive for this violation. Two elements of the penalty are too high. First, unlike the penalty for failing to meet financial responsibility requirements, the Department determined that the illegal operation violation was serious at a "medium" level rather than a "low" level. The explanation for the increase was that operating the unregistered tanks posed a potential for a release.[9] However, no evidence was presented which indicates that there was an intrinsic problem with the Appellant's

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[7] N.T. 44.

[8] The Appellant also implies that the penalty is too high because it paid $3,400 in "throughput" fees to the USTIF. Yet, the Appellant fails to explain the significance of these fees or explain why, as a matter of law, the Department should have taken them into account in assessing the penalty. Additionally, the fact remains that for nearly two years the Appellant remained vulnerable to not having the financial resources to perform corrective action in the event a release occurred. The Department did not abuse its discretion in failing to consider the payment of the throughput fees in its civil penalty assessment.

[9] N.T. 50.

tanks which created a risk that would have been remedied by registering them. Indeed, the evidence indicated that the tanks and lines were double-walled fiberglass with pressurized piping.[10] In the absence of evidence that harm to the environment occurred as a result of this violation, we believe that the Department overstated the seriousness of the violation. Since Section 1307 of the Storage Tank Act, 35 P.S. § 6021.1307, requires consideration of environmental damage in the assessment of any penalty, the violation was more appropriately considered at a low level of seriousness.

Second, the Department increased the willfulness multiplier for the period following the Department's initial inspection until the time the tanks were registered, a period of three months. The Department reasoned that the Appellant's conduct was negligent from November 1995 until the May 1997 inspection, but was deliberate conduct thereafter because the Appellant knew the tanks were not registered yet willfully failed to register them. We do not believe the evidence supports this conclusion.

We have defined the various levels of culpability in the context of civil penalty assessments:

> An intentional or deliberate violation of law constitutes the highest degree of willfulness 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 with results in a violation which reasonably could have been foreseen and prevented through the exercise of reasonable care.

*Phillips v. DER*, 1994 EHB 1266, *aff'd*, 2651 C.D. 1994 (filed June 16, 1995 Pa. Cmwlth.)(quoting *Southwest Equipment Rental, Inc. v. DER*, 1986 EHB 465, 475). First, the

[10] N.T. 285.

notice of violation issued to the Facility at the time of the inspection only noted that the registration "was not posted or accessible to the attendant."[11] At the hearing, Michael Grether, a project manager for the Appellant, testified that he did not learn that the tanks were not registered until late June 1997.[12] In his initial conversations with Ms. Albert she did not tell him that the tanks were not registered, but asked him to produce the tank registrations.[13] Mr. Grether searched through the Appellant's files and contacted Monridge Construction, the tank installer who informed him that the tanks had been registered.[14] In late June or early July, when it became evident that the tanks had not in fact been registered, Mr. Grether completed new paperwork and applied for tank registration in July 1997.[15]

As an operator of a retail gasoline facility the Appellant clearly should have followed up with its tank installer to ensure that the tanks had in fact been registered as required by the Storage Tank Act. However, we believe that Mr. Grether acted with reasonable promptness to locate the registration and to submit the application when it became clear that the tanks had not been registered. Accordingly, we find the Appellant's conduct to be no more than negligent for the entire period and reduce the civil penalty for operating unregistered storage tanks assessed by the Department to $8,400.[16]

We next turn our consideration to the penalty for the alleged failure to perform leak detection at the Facility. The Department assessed a penalty for failing to perform leak detection in the amount of $72,000 for the 12 month period preceding the May 1997 inspection. The

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[11] Ex. C-3(a).
[12] N.T. 278-79.
[13] N.T. 279.
[14] N.T. 279-80.
[15] N.T. 281.
[16] Using the Department's figures, we derived this amount by multiplying $200 for a low level of seriousness x 21 months, the duration of the violation x 2 for negligent conduct, for a

Appellant argues that the violation is really a failure to produce documentation of the performance of leak detection and that $72,000 is unreasonable for a mere failure to produce records.

We do not view this violation to be merely a failure to produce records. Although there is no direct evidence concerning the leak detection activities of the Appellant, there is abundant circumstantial evidence that it was not performing leak detection in conformance with the Department's regulations. We base this conclusion on the testimony that was provided concerning leak detection, the evidence regarding the ATG system at the Facility, the total lack of records of leak detection and the inability of the Appellant to rule out a release from its Facility as a cause of the contamination in Conestoga Farms.

First, the testimony of Michael Grether and George Wilson reveals that the Appellant was performing some activity in an effort to detect leaks from the lines and tanks. However, it is also evident that the activities described are not proper methods of leak detection pursuant to the Department's regulations. George Wilson, an employee of the Appellant, testified that he assisted the manager in performing what he described as leak detection on a monthly basis.[17] Specifically it was the Facility's practice to print out the product level in the tanks at the close of business, and again first thing in the morning, and compare the two printouts.[18] This is consistent with Mr. Grether's testimony that while he was composing a protocol for leak detection, he was aware of this practice but discovered, evidently for the first time, that this method was not a regulatory method of leak detection.[19]

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total of $8,400.

[17] N.T. 256.

[18] N.T. 256, 259-60.

[19] N.T. 58, 62 (March 2, 1998 Supersedeas). It can also be inferred from this testimony that the Appellant did not have a written protocol for leak detection prior to 1998.

Leak detection methods for underground storage tanks and lines are found in the Department's regulations at 25 Pa. Code §§ 245.441-245.446.[20] Comparing two tank readings taken overnight is not a method described in these regulations. This type of leak detection is similar to a method known as "manual tank gauging." But the use of this method for leak detection requires measurements to be taken during a *36-hour* period of time during which no liquid is added to or removed from the tank. 25 Pa. Code § 245.444(2). Clearly taking readings overnight does not comply with this regulation. Thus to the extent the Appellant was conducting leak detection activities, they were not conducted properly according to the Department's regulations.

Second, the evidence is undisputed that the Appellant failed to produce leak detection records when requested to do so.[21] The Department's argument that these records are essential is well taken, and we agree that failure to maintain these records is a serious violation of the regulations. Early detection of a release of petroleum products is critical to the protection of the environment from pollution. The Appellant argues that its failure to produce the records should be excused because it alleges that they were stolen by an ex-employee. However, the only evidence which was presented concerning these records was the testimony of George Wilson. He testified that his ex-wife told him that she had taken these records to protect herself in the event she were fired.[22] This hearsay evidence is woefully inadequate to support the defense that the records and all the copies of these records were unavailable to the Appellant through no fault of its own.

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[20] Prior to October 11, 1997, the Department incorporated by reference federal regulations for leak detection found at 40 C.F.R. Part 280, Subpart D. Thereafter the Department adopted its own regulations, which for our purposes here, are not different in any significant way. *See* 27 Pa. Bull. 5341 (October 11, 1997).

[21] N.T. 28, 89.

Third, until encouraged to do so by the Department, the Appellant was not using the automatic leak detection systems which were in place at the Facility.[23] Even if they had been, the equipment was not properly installed to detect leaks from the system. The system had an incorrect interstitial probe to detect leaks between the walls of the tanks and the ATG system did not have a computer module to automatically take readings from the tanks.[24]

Fourth, the evidence as to whether the contamination in Conestoga Farms was caused by the tanks or lines at the Facility is uncertain. Proper leak detection was particularly important in this case where the circumstances are equivocal as to whether or not the contamination in the wells of neighboring homes was a result of leaks from the tanks or lines at the Appellant's facility or was the result of other causes. There have been several incidents at the Facility which may have resulted in a release of petroleum products into the groundwater. The volume of the loss of gasoline as a result of the O-ring failure and the accident causing a spill from one of the pumps at the station is unknown.[25] While the Appellant's evidence tends to indicate that the loss was minimal, leak detection in accordance with the Department's regulations may have shown the likely amount of these losses. The Appellant contends that the contamination under the Facility was most likely caused by the existence of a previous gasoline station at this site. Proper leak detection might have been decisive in assessing this contention. Another possible source of the contamination in the neighboring wells may have been solely from a storm water line which discharges water containing some gasoline components in the area of the neighboring wells. Whether the source of that contamination is from a line or tank leak from the Appellant's facility or from other sources, as the Appellant argues, might well be determined if appropriate leak

[22] N.T. 261-62, 267, 269.
[23] N.T. 57; 147 (March 2, 1998 Supersedeas).
[24] N.T. 82; 332; 86-87; N.T. 58 (March 2, 1998 Supersedeas).

detection facilities were installed and used. The Appellant argues that it might well not have been able to obtain USTIF financing for remediation only because there was no evidence that a leak had occurred from the tanks or lines at the Appellant's facility. However, the absence of evidence on that point may be due solely to the inadequacy of required leak detection at the Appellant's facility.

Yet, due to the lack of direct evidence concerning the Appellant's leak detection activities, we believe that $72,000 is too high a civil penalty. However, in view of the fact that the leak detection activities which were performed by the Appellant violated the Department's leak detection regulations, the failure of the Appellant to produce leak detection records, the fact that the ATG system was installed with inadequate equipment to properly perform automatic leak detection and the fact that the source of the contamination of the drinking water wells is equivocal, a civil penalty of $36,000 is reasonable for the Appellant's failure to perform adequate leak detection from May 1996 through May 1997.[26]

Finally, the Appellant argues that in assessing all of these penalties, the Department failed to take into consideration financial losses which the Appellant has incurred which it alleges were caused by the enforcement action of the Department, and failed to take into account its expenditures relative to the remediation of the contaminated drinking water supplies in the Conestoga Farms neighborhood.

We do not believe that the Department erred in not taking into consideration the amounts expended for the investigation and remediation of the drinking water wells. First, as the Appellant has pointed out, there is no direct evidence which links the Appellant's failure to meet

[25] See Finding of Fact Nos. 18-22.

[26] This figure was derived by multiplying $1,500 for medium seriousness x 12 months, the duration of the violation, x 2 for negligent conduct, for a total of $36,000.

its financial responsibility requirements, operation of unregistered tanks, or failure to produce leak detection records to the contamination of Conestoga Farms. Therefore the Appellant's remediation costs are not relevant to the violations and assessed civil penalties, and there is no reason why the Department should have taken them into account.

The Appellant suggests that the Commonwealth Court's recent *Westinghouse Electric Corp. v. Department of Environmental Protection*, 745 A.2d 1277 (Pa. Cmwlth. 2000), decision is distinguishable because, unlike the remediation performed in *Westinghouse*, it characterizes its replacement of water supplies as voluntary and conducted a site investigation which it felt was more comprehensive than necessary. This argument is not persuasive. The Commonwealth Court considered that the regulations of the Clean Streams Law precluded a credit for remediation costs. But the court also clearly stated that "[r]emediation costs that a violator would be required to expend *in any event* may not be used to offset penalties properly assessed. 745 A.2d at 1281 (emphasis added). That is, regardless of the regulatory language at issue in *Westinghouse,* remediation costs are not an appropriate offset for civil penalties, particularly where the environmental harm which requires remediation is not an element of the civil penalty in the first instance. Therefore, the Department did not err in failing to reduce the civil penalties because of expenses incurred in the remediation and site characterization at Conestoga Farms.

The Appellant next contends that the civil penalty should be reduced because it incurred losses which it alleges were caused by the closure of the facility. The evidence presented at the hearing does not support this claim.

In support of its contention that the losses suffered by the company were due to the Department's enforcement action, it presented the testimony of Frank Phillips, the Chief Financial Officer of Car Wash Operating Co. Mr. Phillips presented financial statements

showing the income and loss of the businesses involved in the Facility. While it is clear that the company did sustain losses, Mr. Phillips was not able to conclude that they were directly attributable to the closure of the facility:

> Q Do you have any feeling as to whether or not there would have been a profit shown had it not been for the various environmental costs that were incurred?
>
> A . . .I could not answer that, but I would say there would be a good chance.[27]

Additionally, the financial statements showed that the Facility sustained losses in 1997 even though it remained opened continuously in 1997, and only sustained a "bit of legal" costs associated with action by the Department.[28] The evidence, therefore, can not be viewed to show that it is more likely than not that the losses sustained by the Appellant were attributable to its regulatory woes and not some other business reason. *See Al Hamilton Contracting Co. v. Department of Environmental Resources*, 659 A.2d 31 (Pa. Cmwlth. 1995) (to prove causation an expert must testify with reasonable certainty that in his professional opinion the result in question did come from the cause alleged.) Accordingly, the Department did not err in failing to take these losses into consideration in assessing the civil penalty in this matter.[29]

## CONCLUSIONS OF LAW

1. The Department has the burden of proof in this matter and must prove by a preponderance of the evidence that the Appellant violated the applicable statutes and regulations and the amount of the penalty assessed for the violation reflect an appropriate exercise of discretion.

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[27] N.T. 304.

[28] N.T. 308-309.

[29] We save for another day the question of whether the Department is *required* by the Storage Tank Act to take losses sustained by a violator into consideration when assessing a civil penalty.

2. The Appellant failed to properly register its underground storage tanks as required by Section 503 of the Storage Tank Act. 35 P.S. § 6021.503.

3. By failing to register its underground storage tanks the Appellant failed to continuously participate in the Underground Storage Tank Indemnity Fund as required by the Department's regulations. 25 Pa. Code § 245.704.

4. Because the failure to register the storage tanks, in this case, is an element of failing to continuously participate in the USTIF, the Department erred in assessing a civil penalty for both violations. It was not reasonable to assess a civil penalty for $2,100 for failing to register the tanks and to also assess a further penalty for failure to maintain financial responsibility.

5. A civil penalty of $10,500 is a reasonable penalty for failing to meet the Department's financial responsibility requirement by continuously participating in the USTIF.

6. The Appellant violated Section 503(a) of the Storage Tank Act, 35 P.S. § 6021.503(a), by operating unregistered underground storage tanks. A civil penalty in the amount of $8,400 is reasonable for this violation.

7. The Department sustained its burden of proving that the Appellant failed to properly perform leak detection at its Facility from May 1996 to May 1997, in accordance with the Department's regulations.

8. The Appellant failed to produce documentary evidence of leak detection for the period of May 1996 to May 1997.

9. A penalty of $36,000 is appropriate for the Appellant's failure to perform its duty to perform leak detection.

10. The Department did not err in failing to consider remediation costs incurred by

the Appellant by replacing drinking water supplies and performing a site characterization to address contamination in Conestoga Farms.

11. The Appellant failed to prove that it sustained losses directly caused by the enforcement action taken by the Department.

Accordingly, we enter the following order:

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

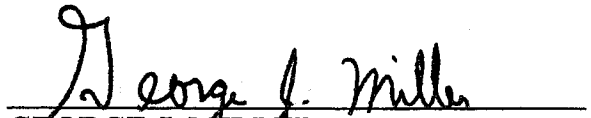
| | | |
|---|---|---|
| **202 ISLAND CAR WASH, L.P.,** | : | |
| **EMCO CAR WASH, L.P. and** | : | |
| **CAR WASH OPERATING COMPANY, INC.** | : | **EHB Docket No. 98-023-MG** |
| | : | **(consolidated with 98-202-MG)** |
| **v.** | : | **and EHB Docket No. 99-008-MG** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA,** | : | |
| **DEPARTMENT OF ENVIRONMENTAL** | : | |
| **PROTECTION** | : | |

## ORDER

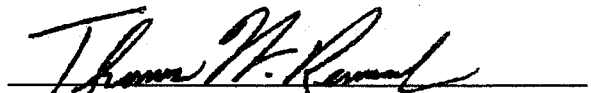
AND NOW, this 19th day of May, 2000, IT IS HEREBY ORDERED that 202 Island Car Wash, L.P., EMCO Car Wash, L.P. and Car Wash Operating Company, Inc.'s appeal of the Department's $152,100 civil penalty assessment is sustained in part with respect to the amount of the civil penalties assessed, consistent with the foregoing opinion. 202 Island Car Wash, L.P., EMCO Car Wash, L.P. and Car Wash Operating Company, Inc.'s appeal of the civil penalty assessment is dismissed in all other respects.

202 Island Car Wash, L.P., EMCO Car Wash, L.P. and Car Wash Operating Company, Inc. shall pay civil penalties in the amount of $54,900. The amount is due and payable immediately to the Storage Tank Fund. The Prothonotary of Delaware County is ordered to enter the full amount of the civil penalty as a lien against any property of 202 Car Wash Operating Company, EMCO Car Wash, L.P. and Car Wash Operating Company, Inc, 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



THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

**DATED:** **May 19, 2000**

**c:** **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

**For the Commonwealth, DEP:**
Stanley Sneath, Esquire
Southeast Region

**EHB Docket No. 98-023-MG**
**(Consolidated with 98-202-MG and**
**EHB Docket No. 99-008-MG)**

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| | | |
|---|---|---|
| **NORTH AMERICAN REFRACTORIES COMPANY** | : | |
| **v.** | : | **EHB Docket No. 99-199-MG** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: May 23, 2000** |

## OPINION AND ORDER DENYING CROSS-MOTIONS FOR SUMMARY JUDGMENT

**By George J. Miller, Administrative Law Judge**

**Synopsis:**

Cross-motions for summary judgment with respect to the Department's denial of the registration of emission reduction credits (ERCs) under the Air Pollution Control Act and the Department's regulations thereunder are denied because the proper interpretation to be given to these regulations is not entirely free from doubt. In addition, disputed issues of material fact are raised by the appellant's claims that (1) the Department's interpretation of the regulation so as to require registration of the ERC within a year after an emission source is no longer operated is so unreasonable as to be an abuse of discretion, and (2) that this interpretation is more stringent than required by the Clean Air Act.

## BACKGROUND

This appeal requires the Board to consider important provisions of the Department's New Source Review program under the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959)

2119, *as amended*, 35 P.S. §§ 4001-4106 (APCA). As a vast over simplification, this program applies to major sources of air pollution such as manufacturing facilities.[1] The program is designed to ensure that operation of new or expansions of existing manufacturing facilities will not result in marked increases in emissions of air pollutants without appropriate permits from the Department. This program is required by the federal Clean Air Act, 42 U.S.C.S. § 7401, *et. seq.*, and EPA's regulations thereunder so that states ultimately may achieve EPA's National Ambient Air Quality Standards (NAAQS) by achieving an overall reduction of emissions of air pollutants. These health-based standards limit the acceptable level of "criteria" pollutants that may be permitted to exist in any given air quality control region.

A major source may avoid the complexities and cost of new source review if it has registered with the Department emission reduction credits (ERCs) sufficient to offset the increases in air emissions from the new or modified facility at the required offset ratios. These ratios insure that the ERCs used as offsets are larger than the increased emissions so that reasonable progress can be made toward achievement of NAAQS in the air quality control region where the facility is located. ERCs are "generated" or created as a result of permanent, quantifiable emission reductions such as a shutdown of an existing air emission source or facility.

The interest of the manufacturing facility to meet its business needs without required new source review by the Department frequently conflicts with the Department's need to protect the health of the Commonwealth's citizens and assure that air quality regions in Pennsylvania make

[1] A major source is generally defined as a source that emits or has the "potential to emit" more than 100 tons a year of the criteria pollutants or their precursors. Other special definitions may apply depending on the nature of the pollutant and the attainment status of the air quality control region in which the source is located. E.g., 25 Pa. Code § 127.203.

reasonable progress toward complying with EPA's health-based air quality standards. The Department wants to keep the use of ERCs as emission offset credits to a reasonable minimum so as to achieve a greater overall reduction of emissions of pollutants. The facility wants as many ERCs available to it as possible so it may avoid the necessity of new source review as it revises its production methods or facilities in the future by offsetting emission increases with ERCs.

This case involves the attempted registration by the North American Refractories Company (NARCO or Appellant) of an ERC that the Appellant claims was generated by a decision to no longer operate the No. 2 tunnel kiln at its refractory brick manufacturing facility in Womelsdorf, Millcreek Township, Lebanon County. The parties agree that the Appellant shut down this kiln for a planned rebuild in March, 1997. Notice of Appeal, Section III (A)(5); Department Motion, par.11. They also agree that some aspects of the rebuilding were commenced in April 1997, but that all repair work was stopped in July 1997 to evaluate whether products produced by its tunnel kilns in Pennsylvania might be partially or totally produced by the Appellant's facility in Quebec. The No. 2 kiln has not been operated or utilized for production of refractory bricks since March 1997. Department Motion par. 12-14; Appellant's Cross- Motion and Response, par. 39. They also agree that on October 16, 1998, the Appellant submitted to the Department an application for registration of an ERC relating to closure of the kiln. Department Motion par. 17; Appellant Cross-Motion and Response, par. 42.

The Department's disapproval of the registration dated August 26, 1999 states: "The reason for this action is that NARCO did not submit its ERC registry application within one year of the initiation of emissions reduction as required by 25 Pa. Code § 127.207(2)." See attachment to the Notice of Appeal and Exhibit 7 to the affidavit of Ronald Davis.

**DISCUSSION**

The grant of summary judgment is proper whenever (1) there is no genuine issue of material fact that could be established by additional discovery or expert reports, or (2) after completion of discovery, relevant to the motion, the party opposing the motion who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury. Pa. R.C.P. No. 1035.2. However, the grant of summary judgment is warranted only in a clear case and the record must be viewed in a light most favorable to the non-moving party resolving all doubts regarding the existence of a genuine issue of material fact against the grant of summary judgment. *Young v. Department of Transportation*, 744 A.2d 1276 (Pa. 2000); *Kee v. Pennsylvania Turnpike Commission*, 743 A.2d 546 (Pa. Cmwlth. 1999). It is the burden of the moving party to prove entitlement to summary judgment by proving a non-existence of any genuine issue of material fact. *East Lampeter Township v. County of Lancaster*, 744 A.2d 359, 363 n. 7 (Pa. Cmwlth. 2000). Furthermore, in ruling on a summary judgment motion, the role of the Board is not to resolve factual issues but only to determine if there are any material factual issues to be resolved. *Valley Creek Coalition v. DEP*, 1999 EHB 935; *New Hanover Corporation v. DER*, 1993 EHB 510.

The substance of the dispute raised by the cross motions for summary judgment is governed primarily by the following language of 25 Pa. Code § 127.207(2):

> For facilities subject to this subchapter, an ERC registry application shall be submitted to the Department within 1 year of the initiation of an emission reduction used to generate ERCs.

Counsel for the Department says that the emission reduction was "initiated" in March 1997 because that was when the kiln was shut down and that the purpose of the shutdown is irrelevant to the question as to when the registry application had to be filed. Accordingly, the Department claims that the registration application came too late in that it was not filed until October 16, 1998.

The Appellant claims that the reduction was not "initiated" to generate ERCs until October 1998 when the Appellant decided to permanently shut down the kiln so that the registration application was timely. According to the Appellant, we must imply an element of intent in interpreting the phrase "initiation of an emission reduction used to generate ERCs", and the Appellant did not intend to close the facility until it made that decision in October 1998. Affidavit of Kim A. Nelson. Since the shutdown of the kiln was not originally for the purpose of generating an ERC, the Appellant argues that its application was timely because the initiation of the emission reduction for the purpose of generating an ERC did not occur until October 1998.

While the language used in section 127.207(2) may be subject to some interpretation, the Department's interpretation seems to be strongly supported by the language of 25 Pa. Code § 127.215, relating to reactivation of a source. This provision permits the reactivation of a facility which is out of operation or production for one year or more during the term of its operating permit. It permits reactivation of the source without new source review assuming that certain conditions are met. These conditions include, among other things, that a reactivation plan be submitted 30 days prior to the proposed date of reactivation and that the operator submit a notice

to the Department within one year of deactivation requesting preservation of the emissions in the inventory and indicating the intent to reactivate the facility. 25 Pa. Code § 127.215(a). In addition, subsection (c) of section 127.215 specifically provides as follows:

> For a facility which is deactivated in accordance with subsection (a), ERCs may be created only if an ERC registry application is filed within 1 year of the deactivation.

25 Pa. Code § 127.125(c). This regulation appears to define "deactivation" simply as being out of operation or production for more than one year so that one might conclude that the Appellant's kiln was deactivated in March 1997. If we were to read these two regulations together, we might conclude that the Department's interest in having a very current emissions inventory in order to meet the requirements of its EPA-approved plan for emission reductions to meet the requirements of NAAQS is so strong as to require us to adopt the Department's interpretation of these regulations.[2]

However, the Appellant points out that this interpretation would be inconsistent with the requirements of 25 Pa. Code § 127.207(1), that the emission reduction be permanent. The Appellant argues that the shutdown of the kiln in 1997 was only temporary pending a decision to rebuild the kiln. Appellant further argues that the reduction in emissions did not become permanent until October 1998 when the decision was made to permanently close the kiln and file an ERC application.

These conflicting approaches to the interpretation of the Department's regulations means that a summary judgment for either party is inappropriate. We decline to grant a summary

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[2] We note that we give great weight to the Department's interpretation of its regulations unless its interpretation is clearly erroneous. *Hatchard v. Department of Environmental Resources*, 612 A.2d 621 (Pa. Cmwlth.1992), *petition for allowance of appeal denied,* 622 A.2d 1378 (Pa. 1993).

judgment to the Appellant by interpreting section 127.207(2) to mean, as a matter of law, that an emission reduction is not initiated until a decision is made to permanently shut down a facility for the purpose of registering an ERC. It is far from clear that this is what the regulation means. For this purpose we accept the statements in the affidavit of Kim A. Nelson, the Area Manager, Safety, Health and Environment for the Appellant's parent company, that the decision to permanently deactivate the No. 2 kiln was not made until October 1998 and that the Appellant did not intend to shut down this unit until then. We have also considered his statements with respect to how economic conditions affect industrial production and the use of particular production facilities. Appellant's Cross-Motion for Summary Judgment, Ex. A.

We also decline to adopt the Department's interpretation as a basis for summary judgment at this early stage of the proceeding for several reasons. First of all, the proper interpretation of these regulations is not so free from doubt that we feel confident in issuing a judgment without hearing testimony, subject to cross-examination, from the Department on its interpretation of these regulations. Secondly, the Appellant points to one instance where the Department has not enforced what counsel says is the Department's interpretation by registering an ERC for the close of a facility more than a year after the facility ceased operations. Appellant's Cross-Motion for Summary Judgment, Ex. (B)(1)i. ERC Approval No. 36-1000 for Leggett & Platt, Inc., May 22, 1997. Further discovery by the parties may develop further evidence as to how the Department has interpreted these regulations. The consistency of an agency's application of its regulations is an important element in assessing what weight is to be given to the Department's interpretation of the regulations. *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 407 (1993). *See also Emerald Mines Corporation v. DER*, 1986 EHB 605, 609-610.

We are also concerned by the Appellant's claim that the Department's interpretation of the regulations is unreasonable and is invalid under the APCA as exceeding federal requirements under the Clean Air Act.[3] Section 4.2 of the Air Pollution Control Act, 35 P.S. § 4004.2, places some limitations on the extent to which the Environmental Quality Board may adopt regulations that are more stringent than those required to achieve the ambient air quality standards or to satisfy related Clean Air Act requirements. Section 4.2(b), for example, provides:

> (b) Control measures or other requirements adopted under subsection (a) of this section shall be no more stringent than those required by the Clean Air Act unless authorized or required by this act or specifically required by the Clean Air Act. This requirement shall not apply if the board determines that it is reasonably necessary for a control measure or other requirements to exceed minimum Clean Air Act requirements in order for the Commonwealth:
>
> (1) To achieve or maintain ambient air quality standards;
> (2) To satisfy related Clean Air Act requirements as they specifically relate to the Commonwealth;
> (3) To prevent an assessment or imposition of Clean Air Act sanctions; or
> (4) To comply with a final decree of a Federal court.

35 P.S. § 4004.2(b).

Indeed, section 4.2(d) specifically authorizes a challenge to the Department's regulations on this basis by placing the burden of proof on the person challenging the regulation. Section 4.2(d) provides:

> (d) In any challenge to the enforcement of regulations adopted to achieve and maintain the ambient air quality standards or to satisfy related Clean Air Act requirements, the person challenging the regulation shall have the burden to demonstrate that the control

[3] The Board need not defer to the Department's construction of its own regulation where the Department's interpretation conflicts with the language of a statute. *Tri-State Transfer v. Department* of *Environmental Protection*, 722 A.2d 1129 (Pa. Cmwlth.1999).

> measure or other requirement or the stringency of the control measure or requirement is not reasonably required to achieve or maintain the standard or to satisfy related Clean Air Act requirements.

35 P.S. § 4004.2(d) Whether such a challenge can be meaningful after the EPA has approved the EQB regulations as part of the Pennsylvania SIP[4] is another question.[5]

The Appellant clearly claims that the one-year deadline provided for in the Department's regulations is unduly stringent because no similar requirement exists at the federal level. Appellant's Cross-Motion, pars. 28-29. Indeed, the Department acknowledges that there is no such requirement in the Clean Air Act or in EPA's regulations. Department's Memorandum in Support of Motion for Summary Judgment, p. 12.

The Department's contention that the one-year requirement is now a federal requirement because EPA has approved these regulations as part of the Department's SIP, may not be sufficient to meet the Appellant's claim. While the EPA approval makes provisions of the SIP federally enforceable, the EPA approval merely refers to the fact that Pennsylvania permits ERCs for shutdowns made before the application for registration. It does not refer at all to a one-year limitation on such a registration or attempt to interpret what is meant by the language of 25 Pa. Code § 127.207(2). Indeed, it gives only a conditional approval to the Department's SIP contingent on certain proposed liberalizations of EPA's requirements for ERCs. Affidavit of Ronald Davis, Ex. 11. Whether any of these proposed changes have been adopted by EPA or the effect of any of those proposals is not a matter of record.

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[4] "State Implementation Plan" proposed by Pennsylvania, including the Air Pollution Control Act and the Department's regulations, stating how it intends to achieve EPA's National Ambient Air Quality Standard. Approval of such a plan by EPA renders it federally enforceable.

[5] The Third Circuit has held that the stringency of Pennsylvania's air quality requirements cannot be adjudicated in an appeal of the EPA's approval of Pennsylvania's SIP in federal court. *Duquesne Light Co. v. United States Environmental Protection Agency*, 166 F.3d

Whether the Department's interpretation of the regulations is so unreasonable as to constitute an abuse of discretion must be left to a decision on the merits of the Appellant's claim following a hearing. Such an interpretation does impose a regulatory burden on an industrial facility in having to meet protective filing requirements every time it ceases to operate equipment to preserve its right to register an ERC within one year of the beginning of an emission reduction even though the equipment may well be reactivated. The net result may well be only to involve the applicant and the Department in needless paperwork. However, this burden may be more than balanced by the need to achieve health based ambient air quality standards.

In this connection, we have noted the Appellant's attempt to challenge the reasonableness of the regulation is based in part on DEP memoranda suggesting that there might be some change in the regulation. While those materials may be admissible in evidence at the hearing, their existence hardly presents a basis for the entry of summary judgment.

For all of these reasons we conclude that neither the Department nor the Appellant have presented a basis for the entry of summary judgment at this time. Accordingly, we enter the following:

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609 (3d Cir. 1999).

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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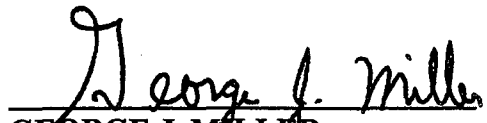
| **NORTH AMERICAN REFRACTORIES COMPANY** | : | |
| **v.** | : | **EHB Docket No. 99-199-MG** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**ORDER**

AND NOW, this 23rd day of May, 2000, IT IS HEREBY ORDERED that the Cross-Motions for Summary Judgment filed by the Department of environmental Protection and North American Refractories Company are **denied**.

**ENVIRONMENTAL HEARING BOARD**



**GEORGE J. MILLER**
**Administrative Law Judge**
**Chairman**

**DATED:** May 23, 2000

**c:** **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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WILLIAM T. PHILLIPY
SECRETARY TO THE BO/

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| **HAZEL AND GLENN RETTIG** | ; | |
| | : | |
| **v.** | : | **EHB Docket No. 2000-064-R** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and B&B COAL MINING, INC., Permittee** | : | **Issued: May 23, 2000** |

## OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

**By Thomas W. Renwand Administrative Law Judge**

**Synopsis:**

In order to obtain Stage I bond release, the coal company must send letters of notification to adjoining property owners prior to filing its application for bond release. Since this was not done, the Appellants are entitled to summary judgment.

## DISCUSSION

Appellants, Hazel and Glenn Rettig, filed an Appeal on March 13, 2000 of the Pennsylvania Department of Environmental Protection's (Department) approval of Stage I bond release to the operator of a surface coal mine, B & B Coal Mining, Inc. (B&B Coal). (Notice of Appeal) B&B Coal operated the Hedrick Mine site in Armstrong County. The mine site is immediately northwest and adjacent to property owned by Appellants. (Amended Notice of Appeal, ¶5) The Appellants' major substantive objection to Stage I bond release seems to be

storm water runoff onto their property allegedly from the mine site. (Notice of Appeal, ¶¶12, 13, 15)

On April 21, 2000 Appellants filed a Motion for Summary Judgment. Appellants contend that the application for Stage I bond release is fatally deficient because B&B Coal did not provide notice to them pursuant to the Department's regulations at 25 Pa. Code §§ 86.171(a)(2), 86.171(g), and 86.175(a). (Motion for Summary Judgment, ¶7) On May 2, 2000 the Department filed its Response to Appellants' Motion for Summary Judgment. The Response indicates that the Department admits the relevant facts regarding the notice issue raised in Appellants' Amended Notice of Appeal. The Department further admits that the Rettigs did not receive notice of the prepared bond release as required by the regulations. (Department's Response to Appellants' Motion for Summary Judgment, ¶2) Finally, the Department "does not object or oppose the Board granting Appellants' Motion and the relief sought in the Motion." (Department's Response to Appellants' Motion for Summary Judgment, ¶3) B&B Coal did not file a response to the Appellants' Motion for Summary Judgment.

The Board may grant a motion for summary judgment where the pleadings, depositions, answers to interrogatories, together with any supporting 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. 25 Pa. Code § 1021.73; Pa. R. C. P. No. 1035.2; *County of Adams v. Department of Environmental Protection*, 687 A.2d 1222 (Pa. Cmwlth. 1997); *Domiano v. DEP*, 1999 EHB 408, 412; and *Farmer v. DEP*, 1998 EHB 1292, 1296. The record must be viewed in the light most favorable to the non-moving party, and all doubts as to the existence of material facts must be resolved against the moving party. *Ducjai v. Dennis*, 656 A.2d 102(Pa. 1995); *Wayne v. DEP*, 1999 EHB 395, 397. If judgment is denied or not rendered upon the entire case, the

Board may enter judgment as to one or more of the claims asserted, or may issue an order specifying the facts that are without controversy and those which remain. Pa. R. C. P. No. 1035.5; *Boyerstown Oil Company v. Osan Mfg. Company*; 514 A.2d 938 (Pa. Super. 1986), *petition for allowance of appeal denied*, 531 A.2d 426 (Pa. 1987); *Domiano v. DEP*, 199 EHB at 412.

Applying this standard we must grant the Appellants' Motion for Summary Judgment. The Department admits the relevant facts in the Appellants' Motion for Summary Judgment. By its failure to file any response to the motion, the Board may enter summary judgment against B&B Coal. Pa. R. C. P. No.1035.3(d). In order to obtain a Stage I bond release, the coal company must send letters of notification to adjoining property owners priors to filing its application for bond release. 25 Pa. Code § 86.171(a)(2). In fact, the application "shall include copies of letters sent to...adjoining property owners...notifying them of the permittee's intention to seek release of bond. These letters shall be sent before the permittee files the application for release." 25 Pa. Code § 86.171. Section 86.175(a) of the Department's regulations further provides that "[t]he Department will not release any portion of the liability under bonds applicable to a permit area or designated phase of a permit area until it finds that the permittee has complied with §§ 86.171, 86.172, and 86.174." 25 Pa. Code § 86.175(a).

Accordingly, the Appellants are entitled to Summary Judgment as a matter of law.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **HAZEL AND GLENN RETTIG** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2000-064-R** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and B&B COAL MINING, INC., Permittee** | : | |

## ORDER

AND NOW, this 23rd day of May, 2000, Appellants' Motion for Summary Judgment is **granted**. The Department approval of Appellant's application for Stage I bond is rescinded.

**ENVIRONMENTAL HEARING BOARD**

**GEORGE J. MILLER**
**Administrative Law Judge**
**Chairman**

**THOMAS W. RENWAND**
**Administrative Law Judge**
**Member**

**MICHELLE A. COLEMAN**
**Administrative Law Judge**
**Member**

**EHB Docket No. 2000-064-R**

**BERNARD A. LABUSKES, JR.**
**Administrative Law Judge**
**Member**

**MICHAEL L. KRANCER**
**Administrative Law Judge**
**Member**

**DATED:** **May 23, 2000**

**c:** **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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|---|---|---|
| **PHILIP O'REILLY** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 99-166-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JDN DEVELOPMENT COMPANY, INC., Permittee** | : | **Issued:** May 24, 2000 |

## OPINION AND ORDER ON MOTION TO DISMISS

**By Bernard A. Labuskes, Jr., Administrative Law Judge**

**Synopsis:**

A third-party appellant has standing where he credibly avers that the permittee's conduct will potentially pollute a stream that the appellant enjoys and uses for fishing.

## OPINION

Philip O'Reilly ("O'Reilly") has filed this *pro se* appeal from the Department of Environmental Protection's (the "Department's") issuance of an NPDES permit to JDN Development Company, Inc. ("JDN") for storm water discharges resulting from the development of a shopping center. JDN, with the concurrence of the Department, has moved to dismiss O'Reilly's appeal because O'Reilly lacks standing.

Ordinarily, we review a motion to dismiss in the light most favorable to the nonmoving party. *Enterprise Tire Recycling v. DEP*, 1999 EHB 900, 901. On the other hand, where an

appellant's standing is challenged in a motion for summary judgment filed after the close of discovery, the appellant must adduce admissible evidence from the record demonstrating the bases for its standing or the appeal could be dismissed. *Wurth v. DEP*, EHB Docket No. 98-179-MG (Opinion issued February 29, 2000). How the movant captions the standing challenge should not be dispositive. It certainly is not here, because whether we view the motion in the light most favorable to O'Reilly or assess whether admissible record evidence has been adduced, we conclude that O'Reilly survives JDN's standing challenge.

We recently summarized the law of standing in *Wurth*, *supra*, as follows:

> The purpose of the standing doctrine in the context of proceedings before the Board is to determine whether an appellant is the appropriate party to seek relief from an action of the Department. *Valley Creek Coalition v. DEP*, EHB Docket No. 98-228-MG (Opinion issued December 15, 1999). In order to have standing to challenge a Department action, an appellant must be "aggrieved." *Florence Township v. DEP*, 1996 EHB 282. Accordingly, an appellant must show that he has a "substantial" interest in the subject matter of the particular litigation which surpasses the common interest of all citizens in seeking compliance with the law; a "direct" interest that was harmed by the challenged action; and an "immediate" interest that establishes a causal connection between the action complained of and the injury he suffered. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975).

Slip. op. at 16-17.

We also find the United States Supreme Court's recent decision in *Friends of the Earth, Incorporated v. Laidlaw Environmental Services (TOC), Inc.*, 120 S. Ct. 693 (2000), to be very helpful. In that case, the Court held that environmental plaintiffs adequately allege injury in fact if they aver that (1) they use the affected area and (2) the defendant's conduct has (or will) adversely affect that use by lessening the aesthetic and recreational values of the area. *Id.*, 120 S. Ct. at 705, *quoting Sierra Club v. Morton*, 92 S. Ct. at 1361 (1972).

This Board has repeatedly held that an aesthetic appreciation or enjoyment of an environmental resource, such as using a stream for fishing, can confer standing. *Valley Creek*

*Coalition v. DEP*, 1999 EHB 935, 944 n. 5; *Blose v. DEP*, 1998 EHB 635, 638; *Belitskus v. DEP*, 1997 EHB 939, 951.

Here, O'Reilly testified at his deposition that he has used the receiving stream for fishing. (JDN Motion, Ex. A, p. 46.) The fact that O'Reilly lives less than one mile from the site and the stream adds credibility to that testimony. (JDN Motion, Ex. A, p. 46; Ex. B, pp. 24-25.) Thus, his interest is substantial. In response to interrogatories, O'Reilly expressed his objectively reasonable concern that discharges from the development of the site will increase the potential for pollution of the stream that he enjoys and fishes. (JDN Motion, Ex. B, p. 24.) The averment is sufficient to establish at least for present purposes the direct and proximate causative link between the permittee's conduct and O'Reilly's injury that is necessary to support standing. Keeping in mind that O'Reilly is proceeding *pro se* and his standing has been challenged in the context of a prehearing motion, we conclude that he has standing to continue to pursue this appeal.

Accordingly, we issue the following Order:

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **PHILIP O'REILLY** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 99-166-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JDN DEVELOPMENT COMPANY, INC., Permittee** | : | |

## ORDER

AND NOW, this 24th day of May, 2000, JDN Development Company's Motion to Dismiss Based on Lack of Standing is DENIED.

**ENVIRONMENTAL HEARING BOARD**

**BERNARD A. LABUSKES, JR.**
**Administrative Law Judge**
**Member**

**DATED:** May 24, 2000

See following page for service list.

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SECRETARY TO THE BOARD

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| **DARLENE K. THOMAS, et al.** | : | |
| | : | |
| **v.** | : | |
| | : | **EHB Docket No. 98-150-C** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, LAMAR TOWNSHIP BOARD OF SUPERVISORS, PORTER TOWNSHIP BOARD OF SUPERVISORS, WALKER TOWNSHIP BOARD OF SUPERVISORS, BOROUGH OF MILL HALL, and CITY OF LOCK HAVEN** | : | **Issued:** May 30, 2000 |

## OPINION AND ORDER ON PETITION FOR RECONSIDERATION

**By Michelle A. Coleman, Administrative Law Judge**

**Synopsis:**

The Board grants a petition for reconsideration of an opinion and order denying motions to dismiss where the Board failed to consider a memorandum that was filed in support of one of the motions but was not listed in the docket. In reconsidering its ruling on the motion associated with the memorandum, the Board will consider those arguments raised in the supporting memorandum that were not addressed in the decision denying the motions to dismiss. While the Board itself lacks the authority to involuntarily join parties, recipients of the Department action under appeal become parties by operation of 25 Pa. Code § 1021.51(h) once an appellant serves them with a copy of the notice of appeal.

## OPINION

This matter was initiated with the August 17, 1998, filing of a notice of appeal by Darlene Thomas and certain other individuals (Appellants) challenging an July 22, 1998, letter sent from the Department of Environmental Protection (Department) to the East Nittany Valley Joint Municipal Authority (ENVJMA), a joint municipal authority formed by Lamar, Porter, and Walker Townships (collectively, Townships) to revise their sewage collection systems. The letter informed ENVJMA that the Department approved a proposed update revision to the official sewage facilities plans of Mill Hall Borough; the City of Lock Haven; and Townships, under the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, *as amended,* 35 P.S. §§ 750.1-750.20a (Sewage Facilities Act). The revised plan calls for ENVJMA to construct a regional collection system to serve portions of Townships. Wastewater would be piped to the City of Lock Haven for treatment at its existing sewage treatment plant with the aid of upgrades to Mill Hall's main interceptor and pump station.

The Board has issued two previous opinions in this appeal. On April 18, 2000, we granted an ENVJMA motion to dismiss itself as an appellee. We held that ENVJMA was not an automatic party to the appeal because it was not the recipient of the Department's action and that the Board could not make it a party through involuntary joinder. On April 27, 2000, we denied three motions to dismiss: one filed by Mill Hall Borough, one filed by the City of Lock Haven, and one filed by Townships. The motions asserted that the Board lacked jurisdiction over the appeal because Appellants failed to timely serve a copy of the notice of appeal on the recipients of the Department's action. However, we held that failure to timely serve the notice of appeal on the recipients was not required for the Board to have jurisdiction since the failure to effect timely service resulted from a breakdown in Department of Environmental Protection and Board

procedures, and Appellants had subsequently served copies of the notice of appeal on the recipients.

On May 10, 2000, Townships filed a petition for reconsideration of the Board's April 27, 2000, opinion, together with a supporting memorandum of law. In their petition and supporting memorandum, Townships argue that the Board should reconsider its opinion on Townships' motion to dismiss because (1) Townships filed a memorandum supporting the motion to dismiss with the motion, on May 14, 1999; (2) the Board failed to add the memorandum to the docket; (3) the Board's opinion on the motions to dismiss stated that Townships failed to file a supporting memorandum; and, (4) the Board's failure to consider the Township's memorandum constitutes "extraordinary circumstances" justifying reconsideration. Appellants failed to respond to Townships' petition for reconsideration.

## I. THE STANDARD FOR RECONSIDERATION

Section 1021.123 of the Board's rules, 25 Pa. Code § 1021.123, governs reconsideration of interlocutory orders. It states that the Board will grant reconsideration only where the petition demonstrates that "extraordinary circumstances" exist. 25 Pa. Code § 1021.123(a). To show that "extraordinary circumstances" exist, petitioners must show that they meet the criteria for reconsideration of a final order, listed at 25 Pa. Code § 1021.124, and, in addition, that special circumstances exist that warrant the Board taking the extraordinary step of revisiting an interlocutory order. *Miller v. DEP,* 1997 EHB 335, 339. Section 1021.124 of the Board's rules provides that "[r]econsideration is within the sound discretion of the Board and will be granted only for compelling and persuasive reasons," 25 Pa. Code § 1021.124(a), and that those reasons may include:

(1) The final order rests on a legal ground of a factual finding which has not been proposed by any party.

(2) The crucial facts set forth in the petition
   (a) Are inconsistent with the findings of the Board.
   (b) Are such as would justify a reversal of the Board's decision.
   (c) Could not have been presented earlier to the Board with the exercise of due diligence.

25 Pa. Code § 1021.124(a) (1)-(2).

## II. IS RECONSIDERATION APPROPRIATE HERE?

There is no question that Townships filed the memorandum in support of their motion to dismiss on May 14, 1999, as they assert. After receiving Townships' petition for reconsideration, the Board reviewed the file and docket in this appeal. The file contained Townships' memorandum in support of the motion to dismiss, filed on May 14, 1999, but the docket contained no indication that the memorandum was filed. The Board can take judicial notice of its own records. *See, e.g., Pagnotti Enterprises, Inc. v. Department of Environmental Protection*, 1993 EHB 919 n. 3, and *Allegro Oil & Gas, Inc. v. DEP*, 1998 EHB 1162, 1165. Therefore, when we received Townships' motion to amend the notice of appeal to show that the memorandum was filed on May 14, 1999, we granted the Townships' motion and amended the docket accordingly. *See* Board's order granting Townships' motion to amend (issued May 25, 2000).

Townships argue that the failure of the Board to consider their memorandum when ruling on their motion to dismiss constitutes "exceptional circumstances," warranting reconsideration of an interlocutory order, because the Board's oversight in failing to docket the memorandum compromised Townships' opportunity to be heard. We agree that our failure to consider the memorandum warrants reconsideration of our decision denying Township's motion to dismiss.

As the Board has noted elsewhere, the purpose of a supporting memorandum is to explain the accompanying motion, not augment it. *See, e.g., Barkman v. DER*, 1993 EHB 738, 745; *North American Oil and Gas Drilling Company, Inc. v. DER*, 1991 EHB 22, 26; *County of Schuylkill v. DER*, 1990 EHB 1370, 1373. Nevertheless, supporting memoranda play an important role when the Board rules on dispositive motions. Thus, the Board's rules of practice and procedure *require* that parties submit supporting memoranda with dispositive motions; they do not merely allow parties to do so. *See* 25 Pa. Code § 1021.73(c). The Board's rules even provide that the Board may deny a dispositive motion if the movant fails to submit a memorandum in support. *Id.*

Although the Board failed to consider Townships' memorandum in support, the Board did consider some of the arguments raised in the memorandum. Some of the grounds for Townships' motion were evident from the motion itself, for instance. In addition, the motion to dismiss that Townships filed was similar to the two other motions to dismiss that the Board ruled on in its opinion and order, and many of the arguments raised in Townships' memorandum match those raised in the other parties' memoranda—arguments which the Board considered and rejected in its opinion and order. However, in their petition for reconsideration, Townships assert that their memorandum supporting their motion to dismiss raised an argument that the other movants did not raise: that the Board should dismiss Appellants' appeal because we lack the authority to involuntarily join or otherwise make Townships parties to the appeal, yet Townships are indispensable parties. *See* petition for reconsideration, ¶¶ 11-14. Since Townships were entitled to have the Board consider this argument when we ruled on its motion

to dismiss, we shall reconsider the motion and address Townships' argument to the extent that we failed to do so in our original opinion.[1]

## III. THE MOTION TO DISMISS

Townships argue that the Board should dismiss Appellants' appeal because we lack the authority to involuntarily join or otherwise make Townships parties to the appeal yet Townships are indispensable parties. We agree that the Board ordinarily lacks the power to involuntarily join parties. *See Thomas v. DEP,* 1997 EHB 495, 498. However, the fact that the Board itself cannot ordinarily add parties to an appeal without their assent does not necessarily mean that an indispensable party must willingly join an appeal for the Board to have jurisdiction over it. The Board itself did not add Townships as parties to the appeal; the Townships became parties by operation of law at the moment Appellants served them with a copy of the notice of appeal.

As we explained in our decision on the motions to dismiss, Townships were recipients of the action at issue in this appeal, *Thomas v. DEP,* EHB Docket No. 98-150-C (opinion issued April 27, 2000) *slip op.* 4;[2] Appellants served a copy of their notice of appeal on Townships and the other recipients, albeit in an untimely manner, *id.*; and Appellants' failure to timely serve a copy of the notice of appeal on the recipients did not deprive the Board of jurisdiction over the appeal, since Appellants had timely filed the notice of appeal with the Board. *Id.,* 4-11. We also noted that, under section 1021.51(h) of the Board's rules, 25 Pa. Code § 1021.51(h), "service upon the recipient of an action ... shall subject the recipient to the jurisdiction of the Board."

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[1] Significantly, in ruling on the motions to dismiss, the Board did expressly consider Appellee Mill Hall Borough's argument that the Board could not involuntarily join it as a party, and, therefore, the Board lacked jurisdiction over it.

[2] *See also Thomas v. DEP*, EHB Docket No. 98-150-C (opinion issued April 18, 2000).

Therefore, as recipients of the Department's action, Townships became parties by operation of section 1021.51(h) once Appellants served them with a copy of the notice of appeal.

Accordingly, Townships' motion to dismiss is denied.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **DARLENE K. THOMAS, et al.** | : | |
| | : | |
| **v.** | : | |
| | : | **EHB Docket No. 98-150-C** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, LAMAR TOWNSHIP BOARD OF SUPERVISORS, PORTER TOWNSHIP BOARD OF SUPERVISORS, WALKER TOWNSHIP BOARD OF SUPERVISORS, BOROUGH OF MILL HALL, and CITY OF LOCK HAVEN** | : | |

**ORDER**

AND NOW, this 30th day of May, 2000, it is ordered that Townships' petition for reconsideration is granted and their motion to dismiss is denied.

**ENVIRONMENTAL HEARING BOARD**

**MICHELLE A. COLEMAN**
**Administrative Law Judge**
**Member**

**DATED:** May 30, 2000

**(See following page for service list.)**

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

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|---|---|---|
| **PETER BLOSE** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 98-034-R** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SEVEN SISTERS MINING COMPANY, Permittee** | : | **Issued: June 12, 2000** |

# OPINION AND ORDER ON THE DEPARTMENT'S MOTION TO STAY FURTHER PROCEEDINGS ON APPELLANT'S APPLICATION FOR COSTS AND FEES

**By Thomas W. Renwand, Administrative Law Judge**

**Synopsis:**

While a Petition for Review of a Board adjudication is pending before the Commonwealth Court, the Appellant filed an Application for Costs and Fees with the Board. Rule 1701(a) of the Rules of Appellate Procedure, Pa.R.A.P. 1701(a), generally prohibits the lower tribunal from conducting further proceedings on a matter which has been appealed. Since ruling on an Application for Costs and Fees is not covered by any of the several exceptions to the general rule, we grant the Department's Motion to Stay.

## OPINION

The Board's adjudication in the underlying case was appealed on April 5, 2000 by the Appellant (Mr. Blose) to the Commonwealth Court at Docket No. 834 C.D. 2000. On April 18,

2000, Seven Sisters Mining Company, Inc. (Seven Sisters) filed a cross-petition for review with the Commonwealth Court at Docket No. 911 C.D. 2000. On April 5, 2000, Mr. Blose filed an Application for Costs and Fees with the Board. The Department of Environmental Protection (Department) and Seven Sisters filed responses in opposition.

On April 21, 2000, the Department filed a Motion to Stay further proceedings on Mr. Blose's Application for Costs and Fees and Mr. Blose in turn filed a response.[1] On May 12, 2000, the Department filed a Motion for Leave to respond to Mr. Blose's response to the Department's Motion to Stay, which the Board granted. The Department filed a reply to Mr. Blose's response on May 24, 2000.

In its motion, the Department asserts that Rule 1701(a) of the Rules of Appellate Procedure, Pa.R.A.P. 1701(a), generally prohibits an administrative tribunal from conducting further proceedings on a matter which has been appealed.

> **(a) General Rule**. Except as otherwise prescribed by these rules, after an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may no longer process further in the matter.

Pa. R.A.P. 1701(a).

In some instances, the trial court or agency is permitted to act after an appeal is taken:

> After an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may:
> (1) Take such action as may be necessary to preserve the status quo, correct formal errors in papers relating to the matter, cause the record to be transcribed, approved, filed and transmitted, grant leave to appeal in forma pauperis, grant supersedeas, and take other action permitted or required by these rules or otherwise ancillary to the appeal or petition for review proceeding.

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[1] Although the Appellant failed to respond to the Department's Motion to Stay in correspondingly-numbered paragraphs in accordance with 25 Pa. Code 1021.70(e), we find the error to be *de minimus*. *See Wayne v. DEP*, 1999 EHB 395.

Pa. R.A.P. 1701(b)(1).

Mr. Blose argues that his Application for Costs and Fees is ancillary to the Petition for Review and as such, the Board should not grant the Department's motion. We disagree. In *Commonwealth v. Pearson*, 685 A.2d 551, 558 (Pa. Super. 1996), the Superior Court held that "ancillary activities", as mentioned in Pa.R.A.P. 1701(b)(1), refers to "ministerial actions" by the lower tribunal. The rule provides examples of what is ancillary to an appeal--namely the clarification of orders and the correction of formal errors in docket entries and transcription of the record. Considering and ruling on an Application for Costs and Fees is not a ministerial activity over which the Board may take further action in accordance with Pa.R.A.P. 1701(b)(1) after an appeal is filed. We therefore grant the Department's Motion to Stay.

Staying the matter at this point also serves the interests of judicial economy. The Commonwealth Court's decision on Mr. Blose's Petition for Review and Seven Sisters' cross-petition may affect arguments raised in response to the Application for Costs and Fees or Mr. Blose's entitlement to costs and fees may be affected.[2] Therefore, we enter the following:

[2] In a prior decision, the Board deferred action on an application for attorney fees until the final disposition of the underlying appeal pending in Commonwealth Court. *Kwalwasser v. Department of Environmental Resources*, 1998 EHB 1308, 1309.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
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| **PETE BLOSE** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 98-034-R** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SEVEN SISTERS MINING COMPANY, Permittee** | : | |

## ORDER

AND NOW, this 12th day of June, 2000, the Department's Motion to Stay Further Proceedings On Appellant's Application for Costs and Fees is **granted**.

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Administrative Law Judge**
**Member**

**DATED:** June 12, 2000

**See service listing on the following page**

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WILLIAM T. PHILLIPY I
SECRETARY TO THE BOA

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|---|---|---|
| **LEEWARD CONSTRUCTION, INC.** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 98-048-L** |
| | : | **(Consolidated with 98-100-L** |
| **COMMONWEALTH OF PENNSYLVANIA,** | : | **and 98-101-L)** |
| **DEPARTMENT OF ENVIRONMENTAL** | : | |
| **PROTECTION** | : | **Issued:** June 13, 2000 |

# ADJUDICATION

**By Bernard A. Labuskes, Jr., Administrative Law Judge**

**Synopsis:**

The Department issued three orders to an earthmoving contractor because its project was causing actual and potential excess sedimentation of the receiving streams in violation of the contractor's storm water NPDES permit. The Board dismisses the appeals from the orders because the Department had the authority to issue the orders and they were necessary to aid in enforcement of the Clean Streams Law. The project was causing pollutional discharges and the contractor failed to implement and maintain all necessary erosion and sedimentation controls. The contractor also failed to comply with a previous, unappealed order.

## I. FINDINGS OF FACT

1. The Department of Environmental Protection (the "Department") is the executive agency of the Commonwealth with the duty and authority to administer and enforce the provisions of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §

691.1 *et seq.* (the "Clean Streams Law"), and the rules and regulations promulgated at Title 25 of the Pennsylvania Code. (Joint Stipulation [hereinafter "Stip."] 1.)

2. Leeward Construction, Inc. ("Leeward") is an excavating contractor based in Honesdale, Wayne County, Pennsylvania. (Stip. 2.)

3. On July 17, 1996, the Department issued National Pollutant Discharge Elimination System ("NPDES") Permit No. PAS107413 to Wal-Mart, which authorized the discharge of storm water from construction activities at a parcel located northeast of the intersection of SR 0006 and T 405 (Old Willow Avenue) in Texas Township, Wayne County (the "Wal-Mart Site"). (Stip. 4.)

4. The Wal-Mart Site was being developed for the construction of a Wal-Mart store. (Stip. 5.)

5. NPDES Permit No. PAS107413 required the implementation of an approved, site-specific erosion and sedimentation ("E&S") pollution control plan, which included maps, plans, profiles, specifications, and any approved amendments thereto. (Stip. 6.)

6. The E&S plan that was approved for the Wal-Mart Site required the construction and maintenance of numerous E&S controls throughout the site. (C. Ex. 5.)

7. On March 10, 1997, the Department approved a major modification to NPDES Permit No. PAS107413, which added Phillip Goyette ("Goyette"), the property owner, and Linde Enterprises, Inc. as permittees, and authorized the discharge of storm water from construction activities at the adjacent parcel of approximately 23 acres located due west from and contiguous to the Wal-Mart Site (the "Waste Site"). The major permit modification was identified as NPDES Permit No. PAS107413-01. The Waste Site was developed for the deposition of excess soil related to development of the Wal-Mart Site. (Stip. 10.)

8. NPDES Permit No. PAS107413-01 also required the implementation of an approved site-specific E&S pollution control plan which included maps, plans, profiles, specifications, and any approved amendments thereto. (Stip. 11.)

9. The approved E&S plan for the Waste Site required the construction and maintenance of numerous E&S controls throughout the site. (C. Ex. 5.)

10. Part C, Paragraph 2 of NPDES Permit Nos. PAS107413 and PAS107413-01 stated the following:

> Feasibility of the E&S Plan, structural design and proper construction methods are the responsibility of the permittee. Failure of the control measures and facilities to achieve their intended purpose may require additional or modified control measures and facilities to be designed and constructed. Any changes to the approved E&S Plan, including changes to control measures and facilities or the points of discharge, must be submitted to the processing entity for review and approval prior to initiating the activity.

(Commonwealth Exhibit [hereinafter "C. Ex."] 1, 2.)

11. Part C, Paragraph 2 of NPDES Permit Nos. PAS107413 and PAS107413-01 also stated the following:

> Prior to the start of operations at any spoil, borrow or other work area not detailed on the approved E&S Plan, whether located within or outside of the indicated construction limits, the permittee shall develop and have approved by the processing entity, a separate E&S Plan for each site.

(C. Ex. 1, 2.)

12. Part B, Paragraph 1(f) of NPDES Permit Nos. PAS107413 and PAS107413-01 stated the following:

> The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee as efficiently as possible to achieve compliance with the conditions of

> this permit and with the requirements of erosion and sedimentation control plans. Proper operation and maintenance includes, but is not limited to, effective performance based on designed facilities capabilities, adequate staffing and training, and adequate laboratory controls and appropriate quality assurance procedures. Proper operation and maintenance requires the operation of backup or auxiliary facilities or similar systems, installed by a permittee only when necessary to achieve compliance with the conditions of the permit.

(C. Ex. 1, 2.)

13. Part B, Paragraph 1(g) of NPDES Permit Nos. PAS107413 and PAS107413-01 stated the following:

> Upon reduction, loss or failure of any BMP [Best Management Practice] or treatment facility, in order to maintain compliance with its permit, the permittee shall control the construction activities and any associated discharges to ensure that there is no pollution discharged to surface waters of the Commonwealth until the BMP or treatment facility is rebuilt or repaired, or an alternative BMP or treatment facility is provided. This requirement is applicable in situations where the BMP or treatment facility is rendered ineffective, whether the cause or source of the reduction, loss or failure is within or beyond the control of the permittee.

(C. Ex. 1, 2.)

14. Part C, Paragraph 7(e) of the NPDES permits provided as follows:

> Sediment shall at no time accumulate in control measures or facilities to a depth sufficient to limit storage capacity or interfere with the settling efficiency or functioning of the device. Sediment shall be removed and stabilized in a manner that will not create pollution.

15. Wal-Mart secured the services of Milnes Construction Co. as general contractor to develop the Wal-Mart Site. (Stip. 7.)

16. Milnes secured the services of Leeward to conduct earthmoving work at the Wal-Mart Site, Waste Site, and a third site west of the Waste Site from which Leeward extracted

earthen materials for use on the Wal-Mart Site (the "Borrow Site"). (Stip. 8, 14.)

17. Leeward executed a copermittee application for NPDES Permit No. PAS107413 on or about July 22, 1997. (Stip. 9.)

18. Leeward also executed a copermittee application for NPDES Permit No. PAS107413-01 on or about July 22, 1997. (Stip. 12.)

19. Leeward certified on the copermittee applications as follows:

> "I certify, under the penalty of law that this transfer agreement was prepared by me or under my direction and supervision. I also acknowledge and agree that the Best Management Practices (BMPs), including the Erosion and Sedimentation (E&S) Control Plan, the Preparedness, Prevention and Contingency (PPC) Plan, and other storm water pollution prevention and minimization strategies already installed for or on behalf of the current permittee will continue to be implemented and maintained. I further acknowledge, under penalty of law, that I have read, understand, and agree to abide by the terms and conditions of the Individual or General NPDES Permit requirements, as applicable, to ensure that water quality standards and effluent limits are attained. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for known violations."

(C. Ex. 7, 8.)

20. Leeward also executed and submitted Copermittee Agreements, which provided in the pertinent part as follows:

> LEEWARD CONSTRUCTION, INC., HONESDALE, PA. hereby assumes, joint and severable responsibility, coverage, and liability under the permit for any obligations, duties, responsibilities and violations under said permit.

(C. Ex. 9, 10.)

21. The Department has delegated nonexclusive authority to the Wayne County Conservation District (the "Conservation District") to implement the erosion and sedimentation control program in Wayne County. (Notes of Transcript page [hereinafter "T."] 16.)

22. A Department and Conservation District inspection of the Wal-Mart Site on January 7, 1998 revealed that Leeward had begun earthmoving activities at the Wal-Mart and Waste Sites, but there were numerous ineffective E&S controls at the sites. The sites were discharging sediment laden water to waters of the Commonwealth. (T. 50-51; C. Ex. 15.) The Department advised Leeward that a failure to resolve the E&S problems would result in the issuance of a compliance order. (C. Ex. 15.)

23. The Department issued a compliance order (Compliance Order 649801) to Leeward and Wal-Mart on January 16, 1998. (Stip. 25; C. Ex. 13.) Leeward did not appeal the order. (Stip. 13.)

24. As of January 16, Leeward failed to fully implement an E&S plan that prevented accelerated erosion and sedimentation on the Wal-Mart Site, the result of which was potential and actual pollution of Holbert Creek and a tributary to Holbert Creek. (C. Ex. 13.)

25. The January 16 order directed Leeward to implement numerous immediate and more long-term measures to stop the site from polluting the receiving streams, and to submit plan revisions to account for changes at the site. (C. Ex. 13.)

26. The Department also issued a compliance order (Compliance Order 649802) to Leeward and Goyette on January 16, 1998 regarding the Waste Site. (Stip. 26; C. Ex. 14.) Leeward did not appeal the order. (Stip. 13.)

27. The January 16 Waste Site order found that Leeward's failure to implement an E&S plan that prevented accelerated erosion and sedimentation on the Waste Site resulted in potential and actual pollution of the tributary of Holbert Creek. (C. Ex. 14.)

28. The Waste Site order directed Leeward to implement several interim and more permanent measures to stop the site from polluting the stream, and submit E&S plan revisions to

account for changes at the site. (C. Ex. 14.)

29. Neither of the January 16 orders contained a stop-work order. (C. Ex. 13, 14.)

30. Additional inspections of the Wal-Mart and the Waste Sites by Department and Conservation District personnel between January 16 and February 18 revealed that Leeward's continuing failure to implement effective E&S controls was resulting in potential and actual sediment pollution of Holbert Creek and its tributary. (T. 345-356; C. Ex. 51, 52, 53.)

31. Leeward failed to perform several of the corrective measures mandated by the January 16 orders. (T. 351; C. Ex. 52.)

**Condition of Wal-Mart Site Between February 18 and 20, 1998**

32. Leeward failed to prevent accelerated erosion and excess sedimentation from occurring at the Wal-Mart Site on February 18, 1998. There were several reasons for this off-site sedimentation, the first of which is that the banks of the Holbert Creek tributary were not sufficiently stabilized with rock, vegetation, or mulch in accordance with the site's approved E&S plan. There were no other controls in place to prevent accelerated erosion and excess sedimentation of the tributary from the majority of its banks. (T. 56-59, 196, 197, 298, 299, 466-467; C. Ex. 4, 17, 18.) Such accelerated erosion and excess sedimentation was in fact occurring in this area. (T. 58-59; C. Ex. 18; Leeward Exhibit [hereinafter "L. Ex."] 77B.)

33. Although some earthmoving work still needed to be done in the vicinity of the culverts, there was not enough to allow the tributary banks to remain without sufficient stabilization. (T. 318, 460; C. Ex, 3, 4.) The E&S plan required an immediate seeding, and if, as here, seeding was not possible due to the season, the disturbed area was to be mulched, and remulched, as necessary. (C. Ex. 3, 4.)

34. The tributary was an intermittent stream that, although relocated, had preexisted

site development. It drained not only portions of the sites, but undisturbed areas as well. (T. 188, 462, 463, 466-467, 612.)

35. Leeward failed to place the size and type of stone aggregate around an inlet located at Old Willow Road that was required by the approved E&S plan and the January 16 order. (T. 60-64, 205, 300, 736; C. Ex. 3, 19.) As a result, excess sedimentation of the Holbert Creek tributary was occurring in the area. (T. 61-64, 212, 213, 300; C. Ex. 19, 21.)

36. Leeward failed to maintain silt fencing in the area of Swale No. 2, to the point that earthen materials overtopped the fence at some locations. (T. 75, 232; C. Ex. 23, 24.)

37. Sediment trap No. 1 was not constructed with adequately sized stone as required by the E & S plan for the site and the January 16 order. (T. 81-86; C. Ex. 13, 17, 25.)

38. Sediment basin No. 1 was intended to be the primary control facility for the majority of the Wal-Mart project. (T. 86, 481.) The purpose of the basin was to allow sediment to settle out before storm water was discharged to the receiving stream. (T. 87.)

39. Sediment basin No. 1 was filled with an excessive amount of silt. (L. Ex. 62B, 62C, 62D.)

40. Brown, sediment laden water was discharging from the basin. (T. 92, 687; C. Ex. 27; L. Ex. 62C.) The basin was not effective in preventing sediment laden water from leaving the site. (T. 687, 692; L. Ex. 62C.)

41. Leeward built a large soil stockpile near a site entrance that was not accounted for in the E&S plan and did not have E&S controls in place. (T.93-94; C. Ex. 26.)

42. Leeward allowed significant amounts of sediment to accumulate on and adjacent to Old Willow Road, a township road immediately to the south of the site. (T. 94-96; C. Ex. 17.)

43. Leeward constructed a construction entrance onto the site without installing adequate appurtenant E&S controls. (T. 98.)

44. Leeward allowed substantial amounts of sediment to accumulate in and around swales to the east of earthmoving activities at the site (Swales E-1, E-2, D-1, and D-2). (T. 99-101, 105-106, 108; C. Ex. 17, 28-31; L. Ex. 63B, 63C.)

45. As a result, the swales were not functioning effectively as required by the E&S plan. (T. 100-101, 105, 108, 111, 506; C. Ex. 28, 29.)

46. Access to these eastern swales was difficult, but not impossible. (T. 238, 304-305, 329.) Leeward was in fact able to access the area to perform maintenance using a "good old fashion bucket brigade." (T. 458, 459, 695-696, 700, 766.)

47. Silt fences in the area of Swale E-2 were not being properly maintained. (T. 106, 108; C. Ex. 29.)

48. Leeward allowed significant amounts of sediment to bypass controls and accumulate in wetlands to the east of earthmoving activities and immediately adjacent to Holbert Creek. (T. 112, 116; C. Ex. 17.)

49. Sediment trap No. 3, near the northeast corner of the site, was filled with sediment to the point that it was not able to function properly in accordance with the E&S plan. (T. 118-123, 255-256, 527, 743; C. Ex. 34, 35; compare L. Ex. 67A.)

50. As a direct result of the absence of effective E&S controls, brown, sediment laden water was discharging from the site to Holbert Creek. (T. 123, 257, 262, 743, 744.) Photographic evidence clearly shows very muddy water flowing into the tributary to Holbert Creek and Holbert Creek itself. (C. Ex. 35, 61.)

51. The conditions that prevailed on the Wal-Mart Site on February 18 continued

through at least February 20, including the off-site discharge of sediment laden water. (T. 147; C. Ex. 43.)

52. Leeward built an additional pond known as the "Rite Aid trap" due to its proximity to a Rite Aid store. The trap was, in effect, downstream of the majority of the Wal-Mart Site, the Waste Site, and the Holbert Creek tributary. (T. 488, 502, 612-614, 708.)

53. The Rite-Aid trap, although helpful, was not adequate to prevent excess sedimentation from discharging from the sites to waters of the Commonwealth. (T. 709, 770, 785-788; C. Ex. 61; L.Ex. 64A.)

54. Leeward built the Rite-Aid trap, but never calculated whether it was adequately sized. (T. 616.) In fact, it was far too small for the drainage area that it served. (T. 786-788, 794.)

**Condition of the Waste Site on February 18-20, 1998**

55. Leeward failed to prevent accelerated erosion and excess sedimentation from occurring at the Waste Site in several respects on February 18, 1998. There were several reasons for this off-site sedimentation, the first of which was that an inadequately sized and installed sediment basin was built on the Waste Site. (T. 127, 278, 281-282; C. Ex. 37.)

56. Leeward did not construct or properly maintain the ditches and swales called for in the E&S plan for the Waste Site. (T. 127-128; 141-145; 273-274; C. Ex. 5, 6, 37.)

57. Rock filters were not installed in accordance with E&S plan. (T. 127-128.)

58. Leeward did not install necessary and appropriate E&S controls in connection with the access road on the Waste Site. (T. 132-133, 137, 274; C. Ex. 38.) Those controls that were installed were inadequate, improperly maintained, and generally not in accordance with the approved E&S plan. (T. 135, 138-141; C. Ex. 38.)

59. The Waste Site was discharging sediment laden water to a wetland area and a tributary of Holbert Creek. (T. 146.)

60. The conditions that prevailed on the Waste Site on February 18 continued through at least February 20. (T. 146; C. Ex. 43.)

**The Orders on the Wal-Mart and Waste Sites**

61. On February 20, 1998, the Department issued Compliance Order No. 649703 to Leeward and Wal-Mart for the Wal-Mart Site. (Stip. 27; C. Ex. 11.) This order is the subject of this appeal.

62. The order cited Leeward and Wal-Mart for failing to implement E&S controls that prevented actual and potential sediment pollution. It ordered Leeward to immediately cease all earthmoving activities until written authorization was given by the Department to resume such activities, immediately implement interim and more long-term control measures, and revise the E&S plan for the site. (C. Ex. 11.)

63. Specifically, the order directed Leeward to address the following items:

> 1. Stabilize stream banks of tributary to Holbert Creek in the area of culvert nos. C-1, C-2, C-3. Seed and mulch surrounding disturbed areas.
> 2. Aggregate size around storm inlets located on Old Willow Road is incorrect. Plans call for AASHTO No. 57.
> 3. Clean water diversion (swale #2) currently discharging sediment laden water.
> 4. Sediment trap #1 not constructed according to plans.
> 5. Sediment basin is not functioning adequately. Additional measures need to be implemented.
> 6. Sediment accumulations on and adjacent to Old Willow Road need to be removed and disposed of properly. Exposed earth areas adjacent to Old Willow Road need to be seeded and mulched.
> 7. Stockpile area adjacent to "Rock construction entrance No. 1" (as shown on plans) needs silt fence to be placed along down stream toe and seeded and mulched.

> 8. Swales E-1, E-2, D-1, and D-2 must be cleaned out. Material to be hauled to upland waste area, seeded and mulched.
>
> 9. Sediment discharged into wetlands along eastern boundary needs to be removed and disposed of in upland waste area.
>
> 10. All silt fence along entire length of swales E-1, E-2, D-1, D-2 must be repaired, maintained and installed correctly. Sediment removed must be disposed in upland waste area.
>
> 11. Prepare and submit plans to stabilize failing fill slope along eastern and southern side of project. Stabilize immediately as per approved plan.
>
> 12. Sediment trap #3 must be cleaned. Sediment removed must be disposed of in upland waste area.
>
> 13. Access road north and west of sediment trap #3 must be stabilized. This road is <u>not</u> shown on plans.
>
> 14. Berm adjacent to Swale 1-2 north of project needs to be stabilized (seeded & mulched).
>
> 15. Cut slope below swale #2 needs to be seeded and mulched.
>
> 16. Both road crossings from Wal-Mart site to waste site across swale #2 are not shown on the plans. Remove these or indicate on plans with adequate E&S control measures.
>
> 17. Swale 2 downslope of waste area has failed in sections and water flowing under geotextile fabric – failed sections in swale 2 need to be reconstructed properly.
>
> 18. Swale 2 outlet needs to be stabilized.

(C. Ex. 11, 17.)

64. The order also directed Leeward to address the following items noted in the January 16, 1998 Order:

> Submit plan revisions for the following: a) the access road to the west of the storm water/surge basin including adequate E&S controls. b) an alternate design to handle the drainage area that was to discharge to sediment trap #1. c.) the change to the embankment at the southeast corner where the dry stone masonry wall exists.

(C. Ex. 11,13.)

65. In addition, the Department issued an order (Compliance Order 649704) to Leeward and Goyette on February 20, 1998 for violations on the Waste Site. (Stip. 28; C. Ex.

12.) This order is also the subject of this appeal.

66. The order cited Leeward and Goyette for failing to implement E&S controls that prevented actual and potential pollution, included a stop-work order, directed Leeward and Goyette to implement interim and more long-term control measures, and revise the E&S plan for the site. (C. Ex. 12.)

67. Specifically, the order directed Leeward to address the following items listed in the Department's inspection report of February 18, 1998 for the Waste Site:

> 1. Sediment laden water entering swale #2 along the eastern side of the waste area.
> 2. Sediment basin is <u>not</u> constructed as per approved plans.
> 3. Access road shown along the western side of the waste area is <u>not</u> shown on the plans.
> 4. Sediment trap adjacent to road crossing of swale #2 (from Wal-Mart to waste site) is not functioning properly.
> 5. Earth disturbance along the western boundary is beyond the permitted limit of disturbance.
> 6. Repair and maintain silt fence around stockpile areas.
> 7. Seed and mulch all stockpile areas.
> 8. Site conditions must conform to the approved plans or revised plans must be submitted for review and approval.

(C. Ex. 12.)

**The Borrow Site and the April 15, 1998 Order**

68. Leeward extracted earthen material from the Borrow Site. (Stip. 14.) (This site was also at times referred to as the "Goyette Borrow Area" and the "Motel Site.") (C. Ex. 44, 49.)

69. The Borrow Site was developed in furtherance of the construction activities occurring on the Wal-Mart Site. (Stip. 15.)

70. As of April 14, 1998, Leeward had an E&S plan available at the Borrow Site that

called for the installation of sediment traps, silt fencing, and swales and channels prior to commencing earthmoving. (T. 343-345; C. Ex. 49.)

71. As of April 14, 1998, Leeward had begun earthmoving activities at the Borrow Site, but it had failed to install most of the E&S control measures called for in its plan. (T. 152, 345; C. Ex. 45-49.) Only some silt fencing had been installed. (T. 152; C. Ex. 45.)

72. Leeward's permit and E&S plan for the Wal-Mart Site required it to submit an E&S plan to the Conservation District for approval prior to the start of operations at any borrow site. (C. Ex. 1, 3.)

73. As of April 15, Leeward had not submitted the Borrow Site E&S plan to the Wayne County Conservation District for approval. (T. 156, 344, 578-580; C. Ex. 45.)

74. On April 15, 1998, the Department issued the third compliance order that is the subject of this appeal to Leeward and Goyette for the Borrow Site (Compliance Order 649805). (Stip. 29; T. 149-151; C. Ex. 44.) The order found that Leeward had failed to implement an E&S plan for the site and directed Leeward to take certain interim stabilization measures and submit a plan to the Conservation District for approval. (C. Ex. 44.)

75. The Department also issued a field order on April 15 requiring Leeward to stop work at the site until an E&S plan was approved by the Conservation District. (T. 376; C. Ex. 45.)

76. Leeward's activities on the Borrow Site were creating a danger of pollution. (C. Ex. 44, 45; F.F. 71.)

77. The Wal-Mart store is built, the construction project is finished, and Leeward no longer has any presence on the site. (L. Ex. 87.)

## II. DISCUSSION

### A. The Wal-Mart and Waste Site Orders

The Clean Streams Law provides that the Department has the power and the duty to issue such orders as may be necessary to implement the provisions of the act and the rules and regulations of the Department. 35 P.S. § 691.5(b)(7). The statute also provides as follows:

> The department may issue such orders as are necessary to aid in the enforcement of the provisions of this act. Such orders shall include, but shall not be limited to, orders modifying, suspending or revoking permits and orders requiring persons or municipalities to cease operations of an establishment which, in the course of its operation, has a discharge which is in violation of any provision of this act. Such an order may be issued if the department finds that a condition existing in or on the operation involved is causing or is creating a danger of pollution of the waters of the Commonwealth, or if it finds that the permittee, or any person or municipality is in violation of any relevant provision of this act, or of any relevant rule, regulation or order of the board or relevant order of the department. . . The department may, in its order, require compliance with such conditions as are necessary to prevent or abate pollution or effect the purposes of this act.

35 P.S. § 691.610.

Thus, in addition to being necessary to aid in the enforcement of the act, an order must satisfy one of the following prerequisites:

> (a) A condition at the operation is causing pollution or creating a danger of pollution of the waters of the Commonwealth; or
>
> (b) The order recipient is in violation of the Clean Streams Law, a rule or regulation, or an order of this Board or of the Department.

The order may include a stop-work order at the operation at issue if the "establishment" has a pollutional discharge ("a discharge which is in violation of any provision of this act [the Clean Streams Law].") *See also* Sections 401, 402, and 611 of the Clean Streams Law, 35 P.S. §§ 691.401 (prohibiting pollution), 691.402 (authorizing orders where there is potential pollution),

and 691.611 (describing pollution as unlawful conduct). *See generally Livingston v. DEP*, EHB Docket No. 97-130-R (Adjudication issued April 19, 2000), *slip op.* at 25 and 29 (order upheld where it was necessary to aid in the enforcement of the Clean Streams Law and the Dam Safety and Encroachments Act and the Department's regulations). *Cf. Wagner v. DEP*, 1999 EHB 52, 59 (orders under Storage Tank and Spill Prevention Act authorized where necessary to aid in enforcement of the act); *202 Island Car Wash, L.P. v. DEP*, 1998 EHB 1325, 1329 ( storage tank act order upheld because it "was clearly necessary to assure that pollution from the facility would not continue.") A construction site constitutes an "establishment" for purposes of Section 610 of the Clean Streams Law. *See* 35 P.S. § 691.1. The Department bears the burden of proving these statutory criteria for the issuance of an order by a preponderance of the evidence. 25 Pa. Code § 1021.101 (b)(4).[1]

Our first task is to determine whether one of the prerequisites to the issuance of the orders has been satisfied. In other words, we must determine whether the Department correctly concluded that Leeward's activities were causing actual or potential pollution *or* whether Leeward was otherwise violating the law. With regard to the Wal-Mart and Waste Site orders, it happens that both of the prerequisites were satisfied.

It is now well established that sediment laden runoff constitutes pollution. *Community*

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[1] The Department correctly cites the Clean Streams Law provision that authorizes compliance orders (Section 610), but it also argues that the orders should be upheld unless this Board finds that the Department abused its discretion. Leeward also refers to an abuse-of-discretion standard of review. There is no statute that directs us to apply this deferential standard. The Administrative Agency Law, 2 Pa. C.S. §§ 501-508, is frequently cited in support of the standard, but no such standard appears in that statute. It is not entirely clear how or why this Board adopted that standard, which is normally applied when a court of more general jurisdiction reviews the record that has been generated by a specialized administrative agency. In contrast, this Board's review is *de novo*. The use of an appellate standard may do little to advance a meaningful analysis. Nevertheless, in that neither party has questioned the use of the standard here, and it has been repeated many times by this Board, and because our findings make it abundantly clear that the Department did not in fact abuse its discretion here, *see* Conclusion of Law 10, we leave the clarification of this matter for another day. In any event, determining whether the Department correctly concluded that an order was "necessary to aid in the enforcement of the law" and whether its issuance was an "abuse of discretion" are similar tasks that entail the exercise of reasoned judgment.

*College of Delaware County v. Fox*, 342 A.2d 468, 479 (Pa. Cmwlth. 1975) (pollution includes siltation during the construction process); *Power Operating Company, Inc. v. DEP*, 1997 EHB 1186, 1193 (sediment laden water constitutes pollution); *DEP v. Carbro Construction Corp.*, 1997 EHB 1204, 1229 (same); *DEP v. Silberstein*, 1996 EHB 619, 635-36 (same); *Furnley H. Frish v. DER*, 1994 EHB 1226, 1238 (same). Leeward correctly points out that there are no numeric criteria for sediment discharges that define what exactly constitutes unacceptable pollution. This lack of criteria, however, did not prevent a finding of pollution in the just-cited cases. Although the lack of specific criteria requires a judgment call on the part of the Department and then (in the event of an appeal) this Board, excess sedimentation can nevertheless constitute pollution. *See* 35 P.S. § 691.1 (defining pollution very broadly); 25 Pa. Code 93.6 (prohibiting pollution in general terms).

There may, someday, come a case where we are forced to define the outer limits of what it means to "prevent" or "minimize" "excess" sedimentation and specify the threshold of how much sedimentation can reasonably be considered to be pollution. This appeal does not present that case. Photographs of the project taken on or about the dates at issue, some of which were introduced by Leeward, graphically depict opaque, brown water leaving the project site at various locations and flowing into the receiving streams. (*See, e.g.*, F.F. 32, 35, 40, 50, 53.) Leeward's own witnesses contended that the site was a difficult one to handle, but conceded the ineffectiveness of the E&S controls as built and maintained. (*See, e.g.*, F.F. 40.) The Department and Conservation District witnesses confirmed the sediment laden nature of the project's runoff in testimony that we find to be credible. (*See, e.g.*, F.F. 32, 33, 35, 40, 48, 50, 53, 55, 59.) Leeward makes no attempt in its post-hearing brief to argue or point to any evidence showing that excess sedimentation was not occurring. Our review of the record leaves

no doubt that severe accelerated erosion and sedimentation of the receiving streams were occurring at the project, thereby supporting the issuance of the Wal-Mart and Waste-Site orders.

We also conclude that, in addition to allowing pollution to occur, which was itself a violation of the law, 35 P.S. §§ 691.401, 691.611, Leeward was otherwise in violation of the law as well. Leeward had an independent legal obligation to implement and maintain the E&S controls called for in the approved plans for the Wal-Mart and Waste Sites, regardless of whether pollution was actually occurring. 25 Pa. Code §§ 102.4 and 102.11. Leeward had a duty to comply with its permit, 35 P.S. § 691.611, which expressly required Leeward to properly operate and maintain the E&S controls. (F.F. 10, 12, 13, 14.) *See Carbro Construction Corp.* 1997 EHB at 1230 (failure to implement and maintain controls violates the law); *Silberstein*, 1996 EHB at 634 (same); *Furnley H. Frisch*, 1994 EHB at 1237 (same). To the extent the controls were not working, Leeward had an obligation to install controls that did work. (F.F. 10-14.) To the extent actual site development did not conform to plans that were based upon anticipated developments, Leeward had an obligation to modify the plans accordingly. (F.F. 10.)

Leeward has focused much of its effort on demonstrating that not all of the Department's detailed findings in the orders regarding specific E&S controls (see F.F. 63, 64, 67) were accurate. Indeed, Leeward was successful in preventing the Department from meeting its burden of proving that there were problems with every one of the controls cited in the Department's orders. For example, we are not convinced that Swale No. 2 was properly considered to be a clean-water swale that was inadequately maintained throughout its length. We are not convinced that the crossings of that swale were unauthorized or inadequately controlled. Item 13 on the Wal-Mart order referred to a road which we conclude did not exist. We are not convinced that Leeward was properly directed to redesign a failed slope on the Wal-

Mart Site. Item 5 on the Waste Site order concerned off-permit activity that was not proven.

For the most part, however, as outlined in detail in the findings of fact, the Department was successful in proving by a preponderance of the evidence that Leeward was not sufficiently diligent in implementing and maintaining controls at the project. (F.F. 22, 27, 32-60.) Accordingly, the Department was authorized to issue the Wal-Mart and Waste Site compliance orders.

Still further, as of the issuance of the February 20, 1998 orders, Leeward had failed to comply with the unappealed, unsuperseded orders of January 16, 1998 by failing to submit plan revisions to reflect changes at the project. (*See, e.g.*, F.F. 65.) This failure also justified issuance of the February 20 orders under Sections 610 and 611 of the Clean Streams Law, 35 P.S. § 691.610, 691.611.

Our next task is to assess whether the orders were necessary to aid in enforcement of the law. We have no hesitation in holding that they were. Again, although a handful of the detailed corrective actions specified in the orders might not have been necessary, the significant majority of the measures were needed to arrest the ongoing, severe discharge of sediment from the project.

More fundamentally, it is easy to lose sight of the fact that the orders first and foremost mandated that Leeward get the site under control and stop it from discharging excessive amounts of sediment into waters of the Commonwealth. The basic directives of the orders were that Leeward was to "begin interim stabilization at the site," "begin implementing erosion control measures and facilities...including but not limited to" the items specified in the orders, and submit plan revisions to address the many problems at the sites and bring the plans into conformance with actual site conditions. These directives were all ultimately designed to stop

pollution both actual and potential. Differences in the precise details of *how* these directives were to have been accomplished on particular E&S controls did not detract from the fundamental necessity of the basic directives in aiding in the enforcement of the law. In the final analysis, we conclude that the Department has proven by a preponderance of the evidence that the corrective action portions of the orders were necessary to obtain Leeward's compliance with the Clean Streams Law.

The final point that the Department needed to prove was that the stop-work portions of the orders were authorized and necessary. The Department was successful in doing so. With regard to authorization, the statutory prerequisite for such orders was satisfied for the Wal-Mart and Waste Site orders because those portions of the project had unauthorized pollutional discharges. 35 P.S. § 691.610 (orders may require persons to cease operations of an establishment which, in the course of its operation, has a discharge which is in violation of any provision of the Clean Streams Law).

The cease-work mandates were also necessary to aid in enforcement of the law because the Department had issued compliance orders without stop-work orders on January 16, 1998 that Leeward all but ignored. We agree with the Department's conclusion that the additional measure of a cease-work order was necessary for the orders to get the attention that they deserved. There were numerous problems scattered throughout the project. Some of the problems, such as allowing major sediment collection devices to fill with silt, were quite serious. Leeward's failure to control runoff at the site was resulting in pollution of the receiving streams. As high-quality, cold water fishery, and migratory fishery waters, the receiving streams were special protection waters. 25 Pa. Code § 93.9b. Without the cease-work orders, it was highly unlikely that Leeward would divert the resources needed to correct the E&S controls from those

earthmoving activities that were the object of its primary focus and financial interest. Finally and perhaps most basically, it was eminently sensible to require Leeward to stop further earthmoving that by its very scope and nature was likely to exacerbate the continuing sedimentation problem. In short, allowing Leeward to continue earthmoving would have been the equivalent of authorizing uncontrolled, unregulated activity on a project that involved the movement of almost 900,000 cubic yards (T. 411) of silty soils (T. 172, 469-470, 709) in close proximity to special protection waters of the Commonwealth.

Leeward, of course, argues that the orders should not have been issued. One theme of Leeward's case has been that its only obligation was to comply with the approved E&S plans, and if those plans did not work, so be it. Leeward's permits provided no such safe harbor. To the contrary, recognizing that controls do not always work as predicted and that earthmoving activities frequently vary from what was originally anticipated, the permits stated that additional or modified controls needed to be implemented if the original plans did not work. (F.F. 10, 12, 13, 14.) In any event, as previously discussed, Leeward did not, in fact, comply with the approved plans. (*See, e.g.*, F.F. 32, 33, 35, 37, 39, 40-43, 45, 49, 55-58.)

Leeward argues that it had a difficult site with silty soils and a great deal of water with which to contend. It argues that it tried very hard to control the site. It argues that it tried to work cooperatively with the Conservation District. It points out that it did not design the original E&S control plans. It states that it subsequently complied with certain requirements of the orders. It suggests that it was subject to close scrutiny because of the seemingly inherently controversial nature of Wal-Mart developments. Even if we accepted all of these arguments as true, it does not follow from any of them that the Department acted improperly in issuing the orders. When Leeward decided to undertake this project, it assumed the responsibility of

developing the site in accordance with approved E&S plans and a way that prevented excess sediment pollution of the receiving streams. (F.F. 10-14, 19, 20.) Leeward's contentions might have some relevance in related civil penalty litigation between the parties now pending before the Board, but they are simply not relevant to the issue of whether Leeward should have been ordered to do what was necessary to stop polluting the streams.

Leeward argues that extraordinary precipitation excused the condition of the sites at and around the time the orders were issued. First, the weather conditions do not in any way excuse the pattern of neglect that Leeward exhibited regarding the E&S controls. Secondly, the evidence does not support Leeward's contention. Leeward's exhibit describing weather conditions in the winter of 1997-1998 in nearby Hawley, Pennsylvania included the following statistics (in inches):

| | Average Precipitation | Actual Precipitation | Snowfall |
|---|---|---|---|
| Dec. | 3.08 | 3.93 | 15.8 |
| Jan. | 2.72 | 3.23 | 8.4 |
| Feb. | 2.57 | 4.32 | 6.5 |

(L. Ex. 58.) We do not view these amounts as particularly extraordinary. E&S controls are supposed to be designed to handle significant precipitation events. Such controls would not ordinarily be necessary if significant precipitation never occurred. Leeward has fallen far short of showing that weather conditions made it impossible to properly control this site, even if we assume the theoretical viability of such a defense.

**B. The Borrow Site Order**

Although the Borrow Site was not causing actual pollution on or about April 15, 1998 when the Borrow Site order was issued, Leeward was conducting earthmoving activities on the

site with virtually no controls in place. (F.F. 71.) We find that such conduct was creating a danger of pollution of the waters of the Commonwealth. *See Silberstein*, 1996 EHB at 635-36 (conducting earthmoving activities without controls constituted a violation of Section 402 of the Clean Streams Law, which authorizes orders to prevent potential pollution). It, therefore, justified the issuance of the corrective action portion of the order under Section 610 of the Clean Streams Law, 35 P.S. § 691.610, as discussed above. Alternatively, Leeward's failure to submit its E&S plan for the site to the Conservation District for approval constituted a violation of its permit (F.F. 11 [any borrow site must have an approved plan]), and, therefore, the law. 35 P.S. § 691.611. This violation also justified the corrective action portion of the order.

The corrective action requirements of the order were not only authorized, they were necessary to aid in enforcement of the act. The order simply required Leeward to do what it unquestionably had a legal obligation to do anyway, which was obtain an approved E&S plan for the site. Due to the almost total lack of controls in place, it was also necessary and appropriate to direct Leeward to take interim stabilization measures to prevent actual pollution from occurring during the pendency of its plan review.

Whether the Department had the authority to cease work at the site is more problematic due to the lack of a pollutional discharge at the site. Section 610 of the Clean Streams Law only authorizes an order requiring a person to cease operations of an establishment which, in the course of its operation, has a pollutional discharge. 35 P.S. § 691.610. Leeward, however, does not raise this issue in its post-hearing brief as a basis for its challenge, presumably because it viewed this project as an integrated whole as opposed to three separate sites, so we need not resolve the issue here. *See* 25 Pa. Code § 1021.116(c); *Patti v. DEP*, 1999 EHB 610, 616

(issues not included in post-hearing brief are waived).[2]

## III. CONCLUSIONS OF LAW

1. The Department may issue a compliance order under the Clean Streams Law if (1) a condition at the operation is causing pollution or creating a danger of pollution *or* the order recipient is violating the statute, a regulation, or an order, *and* (2) the compliance order is necessary to aid in enforcement of the Clean Streams Law. 35 P.S. §§ 691.5 and 691.610.

2. The Department bears the burden of proving the statutory criteria for the issuance of the order by a preponderance of the evidence. 25 Pa. Code § 1021.101(b)(4). The Department satisfied its burden of proof in this case.

3. The Department may order a person to cease operation of an establishment if the establishment, in the course of its operation, has a pollutional discharge. 35 P.S. § 691.610.

4. A construction site is an "establishment" as that term is used in Section 610 of the Clean Streams Law. 35 P.S. § 691.1.

5. Sediment laden runoff constitutes pollution. *Community College of Delaware County v. Fox*, 342 A.2d at 479 (Pa. Cmwlth. 1975); *Power Operating Company, Inc. v. DEP*, 1997 EHB at 1193.

6. The Department satisfied its burden of proving that the Wal-Mart and Waste Site orders were properly issued pursuant to Section 610 of the Clean Streams Law because it showed the following by a preponderance of the evidence:

   a. Conditions at Leeward's operation were causing pollution and were creating a danger of continuing pollution of the waters of the Commonwealth;

   b. Leeward was in violation of its permit and the Clean Streams Law (35 P.S.

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[2] Leeward's notices of appeal also included challenges to notices of violation. Those challenges were not pursued in Leeward's post-hearing brief and are, therefore, also waived.

§§ 691.401, 691.402, and 691.611), the regulations promulgated thereunder (25 Pa. Code §§ 102.4 and 102.11), and a prior order of the Department (issued January 16, 1998), not only because it was causing and allowing excess sedimentation, but because it failed to implement and maintain necessary E&S controls and submit necessary E&S plan revisions as well; and

c. Both the corrective-action and cease-work portions of the orders were necessary to aid in enforcement of the Clean Streams Law.

7. The Department satisfied its burden of proving that the Borrow Site order was properly issued pursuant to Section 610 of the Clean Streams Law because it showed the following by a preponderance of the evidence:

a. Conditions at Leeward's operation were creating a danger of pollution of waters of the Commonwealth;

b. Leeward was in violation of its permit and the Clean Streams Law (35 P.S. §§ 691.401, 691.402, and 691.611) and the regulations promulgated thereunder (25 Pa. Code §§ 102.4 and 102.11), because it not only created a danger of pollution, but because it failed to implement necessary E&S controls and obtain an approved E&S plan; and

c. The corrective-action portions of the order were necessary to aid in enforcement of the Clean Stream Law, and Leeward has not challenged the stop-work portion of the order.

8. The Department did not err in issuing the orders for any of the following reasons alleged by Leeward:

a. The sites were large and difficult to control, due in part to the nature of soils at the sites;

b. Leeward made substantial, but unsuccessful efforts to prevent the pollutional discharges;

c. Leeward did not prepare the E&S plans;

d. Abnormal weather conditions intervened;

e. Wal-Mart projects are controversial and, therefore, subject to undue scrutiny; or

f. Leeward subsequently complied with portions of the orders.

9. The Department may pursue enforcement action against one, some, or all of the copermittees who assume joint and severable responsibility for compliance with the Clean Streams Law as a term or condition of a NPDES permit. 35 P.S. §§ 691.610, 691.611.

10. Accepting for purposes of this appeal that we review the issuance of compliance orders for an abuse of discretion, the Department did not abuse its discretion in issuing the subject orders.

11. Issues that Leeward failed to raise in its post-hearing brief are waived. 25 Pa. Code 1021.116(c); *Patti v. DEP*, 1999 EHB at 616.

**COMMONWEALTH OF PENNSYLVANIA**

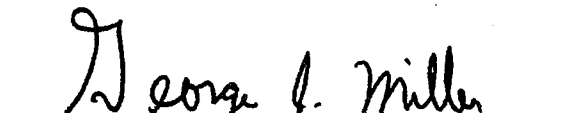
**ENVIRONMENTAL HEARING BOARD**

| | | |
|---|---|---|
| **LEEWARD CONSTRUCTION, INC.** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 98-048-L** |
| | : | **(Consolidated with 98-100-L** |
| | : | **and 98-101-L)** |
| **COMMONWEALTH OF PENNSYLVANIA,** | : | |
| **DEPARTMENT OF ENVIRONMENTAL** | : | |
| **PROTECTION** | : | |

**ORDER**

AND NOW, this 13th day of June, 2000, Leeward's consolidated appeals are DISMISSED.

**ENVIRONMENTAL HEARING BOARD**



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**Administrative Law Judge**
**Chairman**

**THOMAS W. RENWAND**
**Administrative Law Judge**
**Member**

**MICHELLE A. COLEMAN**
**Administrative Law Judge**
**Member**

**BERNARD A. LABUSKES, JR.**
**Administrative Law Judge**
**Member**

**MICHAEL L. KRANCER**
**Administrative Law Judge**
**Member**

**DATED:** June 13, 2000

**c:** **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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SECRETARY TO THE BC

| | | |
|---|---|---|
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **EHB Docket No. 98-239-CP-K** |
| **v.** | : | **Issued:** June 14, 2000 |
| **TESSA LTD.** | : | |

# ADJUDICATION

**By Michael L. Krancer, Administrative Law Judge**

**Synopsis:**

The Board finds that Tessa, Ltd. violated its NPDES permit condition which required the sumbmission of a Part II permit application for the construction of a leachate treatment system, failed to commence or complete construction of the leachate treatment stystem and failed to achieve compliance with effluent limits set in the Permit. The Board approves DEP's recommended penalty of $100 per day of violation from the first day of violation, December 12, 1996, through the day the Complaint was filed, December 21, 1998, a total of 739 days, and, in addition, grants DEP's request made at trial that the $100 per day penalty amount be carried forward from the date after the Complaint was filed through the date of the hearing, April 7, 2000. The total penalty assessed is $121,000.

## INTRODUCTION

The Department of Environmental Protection (DEP) initiated this matter on December 23, 1998, by filing a Complaint for Assessment of Civil Penalties against Tessa Ltd. (Tessa) pursuant to sections 605 and 611 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.605 - 691.611 (Clean Streams Law), §§ 691.605, 691.611. DEP's Complaint alleges that Tessa failed to follow specific provisions of its National Pollution Discharge Elimination System (NPDES) Permit to discharge treated leachate from the Miquon Landfill to an unnamed tributary of the Schuylkill River known locally as Manor Creek. The 15 paragraph Complaint culminates in a prayer for the Board to assess a civil penalty pursuant to Section 605(a), 35 P.S. § 691.605(a), of the Clean Streams Law in the amount of $73,900 against Tessa. This amount is the total of a penalty of $100 per day of violation for 739 days of violation. The 739 days run from December 12, 1996, the alleged first day Tessa was in violation of its Permit, through December 21, 1998, the date DEP filed the Complaint.

On February 2, 1999, Tessa filed an Answer Containing New Matter to Complaint For Assessment of Civil Penalties. Generally, the Answer denied that Tessa had violated the Permit conditions or that Tessa had committed any unlawful conduct.

A complete discussion of the procedural background of this case as well as an in depth discussion of the allegations contained in DEP's Complaint, Tessa's Answer and New Matter and DEP's Reply to Tessa's Answer and New Matter is contained in the Board's Opinion and Order Denying DEP's Motion For Partial Default Adjudication As To Liability, Scheduling Hearing And Imposing Sanction Upon Defendant Tessa, dated March 15, 2000. *See DEP v. Tessa Ltd.*, EHB Docket No. 98-239-CP-K (Opinion issued March 15, 2000). In that Opinion and Order, the Board denied DEP's Motion for Default Adjudication. The Board also imposed a

sanction upon Tessa for its failure to file its pre-hearing memorandum as required by Board Order. The sanction was an order barring Tessa from presenting any evidence on liability or on the amount of penalty at the hearing. *See id.* However, the Order specifically permitted Tessa and/or its counsel to appear at the hearing and, through counsel, to cross-examine DEP witnesses, challenge the admissibility of evidence, and present legal argument. *See id.* Finally, the Order set April 7, 2000 as the date for the hearing on Tessa's liability and, if liable, the amount, if any, of the penalty which should be imposed by the Board.

Tessa declined the opportunity to appear at the hearing held on April 7, 2000. Neither its representative nor its counsel was present. DEP presented two witnesses at the hearing: Jesse Goldberg an Environmental Compliance Specialist, and Michael Boyer, a Water Pollution Biologist Supervisor. The hearing produced a transcript of 95 pages and three exhibits which, together with the pleadings in the case, constitutes the record in this case.

After the hearing, the Board established the post-hearing briefing schedule. DEP's post-hearing brief was due on April 28, 2000, Tessa's, if it wished to file one, on May 12, 2000, and DEP's reply, if any, by May 19, 2000. DEP filed its post-hearing brief on April 27, 2000. Tessa did not file a post-hearing memorandum.

DEP argues in its post-hearing brief that the evidence at the trial proves the allegations in the Complaint that Tessa violated its NPDES permit by failing to comply with Other Requirement 13, Parts 1-4 of its NPDES permit. DEP's brief requests the Board to enter a civil penalty against Tessa in the amount of $119,300. This is $45,400 greater than the amount of civil penalty recommended in the Complaint. Both at trial and in its Post-Hearing Brief, DEP requested that the Board carry through the $100 per day penalty amount from the first day after the Complaint was filed, December 22, 1998, through the date of the hearing, April 7, 2000.

DEP's Post-Hearing Brief states that the total number of days Tessa was out of compliance from December 12, 1996 through April 7, 2000 is 1193 days and thus it requests the Board to assess a penalty of $119,300. We note, however, that we calculate that there are a total of 1,211 days, not 1,119 days, between December 12, 1996 to April 7, 2000.[1] Thus, we will assume that DEP made a calculation error in its Post-Hearing Brief and, on that basis, we treat DEP as having requested that a penalty of $121,100 be assessed which would be $100 per day of violation.

## FINDINGS OF FACT

1. Plaintiff is the Department of Environmental Protection, the executive agency of the Commonwealth charged with the responsibility of administering and enforcing the provisions of the Clean Streams Law, 35 P.S. §§691.1- 691.1001 and the rules and regulations thereunder.

2. Defendant is Tessa Ltd., a corporation doing business in the Commonwealth of Pennsylvania, with a business address of 425 Lewis Lane, Ambler, PA 19002.[2] (A. 3)

3. Tessa owns a tract of land located in Whitemarsh Township, Montgomery County, PA that is boarded by Manor Road to the north and Hagys Mill Road to the west (the "Site"). (Ex. C-1, N.T. 10)

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[1] There are 739 days from December 12, 1996 to December 21, 1998, the period covered in the Complaint. Hence, DEP recommended an assessment amount of $73,900 in the Complaint which was filed on December 21, 1998. The period of December 22, 1998, the day after the Complaint was filed, until April 7, 2000, the date of the hearing and the date the record was closed, is 472 days. Thus, the total would be 739 days plus 472 days which is 1,211 days. DEP miscalculated the number of days in the second time period, between December 22, 1998 and April 7, 2000, as being 454 days instead of 472 days.

[2] Tessa's Answer and New Matter is cited as "A.- __" (with the numeral reference following the "A" being the particular paragraph of the Answer and New Matter); DEP's Complaint is cited as "C. __" (with the numeral reference after the "C" being the particular paragraph in the Complaint); DEP's Exhibits are cited as "Ex. C- __"; Notes of the Transcript are cited as "N.T. __".

4. The Site is 80.48 acres and is wooded and heavily vegetated. (Ex. C-1)

5. Tessa purchased the Site in January of 1990 from the Miquon Development Corporation. (N.T. 10-11)

6. Miquon Development Corporation purchased the Site in the late 1960s. (N.T. 11)

7. Tessa had planned to build a residential development on the Site. (N.T. 11)

8. From the 1940s until the late 1960s, 25.3 of the interior 80.48 acres of the Site was used as a construction /demolition and municipal waste landfill. (Ex. C-1, N.T. 11)

9. In the 1980s, DEP investigated the waste management aspect of the landfill. (N.T. 11)

10. During the 1980s DEP inspection personnel from the DEP Waste Management Program noticed a seep of leachate discharging from the Miquon Landfill into Manor Creek. (N.T. 11-12)

11. Manor Creek is a tributary of the Schuylkill River, and is designated as a Warm Water Fishery under the Chapter 93 Water Quality Standards. (Ex. C-3, N.T. 6)

12. Once DEP detected the seep of leachate discharging from the Miquon Landfill into Manor Creek, the DEP Waste Management Program referred the matter to the DEP Water Program. (N.T. 11-12)

13. At some time after Tessa purchased the Site, but before Tessa submitted its NPDES permit application to DEP, DEP contacted Tessa concerning the leachate seep. (N.T. 12)

14. As a result of this contact, on December 6, 1994, Tessa submitted an NPDES permit application to DEP. (Ex. C-1, N.T. 12)

15. The permit application provided for the construction of a treatment plant, to be used to treat a contaminated groundwater seep from the Miquon Landfill located on the Tessa property. (Ex. C-1, N.T. 12)

16. The NPDES permit application specifically provides that:

> This NPDES Part I Permit Application is being submitted for authorization to discharge the seep emanating from the fill to Commonwealth Waters. Following receipt of the Part I Permit, a Part II Permit Application will be submitted for authorization to construct and operate the proposed treatment facility.

(Ex. C-1)

17. The permit application contains a general description of and a schematic drawing of the intended and contemplated waste-water treatment facility to be constructed under the Part II permit process. (Ex. C-1)

18. The Tessa NPDES Part I permit application was admitted into evidence as Exhibit C-1. (N.T. 13)

19. The permit was very complicated to write. (N. T. 40-41)

20. During the permit drafting process, Tessa petitioned DEP to relent on some requirements and parameters that would normally be in an NPDES permit of this nature, primarily citing economic reasons. (N.T. 40-41)

21. DEP agreed to some concessions in this regard in response to Tessa's requests. (N.T. 40-41).

22. For example, usually in an industrial waste case, like this one is with an old landfill, DEP requires the permittee to monitor groundwater around the site. (N.T. 41)

23. Tessa had requested that DEP not require groundwater monitoring and DEP agreed to not require groundwater monitoring. (N.T. 41)

24. Also, DEP agreed to reduce the frequency of sampling required. (N.T. 41)

25. DEP also reduced the number of parameters required to be sampled. (N.T. 41)

26. After the permit drafting process which included input from Tessa, on June 12, 1996, DEP issued Tessa Industrial NPDES Permit No. 0056367. (Ex. C-2, N.T. 15, 40-41)

27. Tessa did not appeal the issuance of the NPDES permit. (N.T. 16)

28. Tessa's NPDES Permit was admitted into evidence as Exhibit C-2. (N.T. 16)

29. Other Requirements paragraph 13 of Tessa's permit states as follows:

> OTHER REQUIREMENTS (Continued)
>
> 13. The permittee shall construct treatment facilities in order to achieve compliance with the effluent limits contained in this permit. This work shall be accomplished in accordance with the following schedule:

PDI = Permit Issuance Date

| **Milestone Event** | **Milestone Date** |
|---|---|
| 1. Submit Part II Water Management Permit Application | Within 6 months of NPDES PDI |
| 2. Start construction of Treatment facilities | Within 3 months of Part II Water Quality Management PDI |
| 3. Complete Construction of treatment facilities | Within 12 months of Part II WQM PDI |
| 4. Achieve Compliance with effluent limitations | Within 24 months of NPDES Permit PDI |

(Ex. C-2, N.T. 17-18)

30. Jesse Goldberg, who testified for DEP at the hearing, is a Environmental Protection Compliance Specialist with DEP's Southeast Regional Office. (N.T. 9)

31. Mr. Goldberg has been in his current position with DEP since June, 1988. (N.T. 9)

32. His duties include enforcement activities under the Clean Streams Law including initiation of enforcement actions and conducting inspections of facilities and sites. (N.T. 9-10)

33. Mr. Goldberg is the DEP official who was assigned primary responsibility for enforcement activities with respect to the Tessa NPDES permit. (N.T. 10)

34. Mr. Goldberg has extensive knowledge of the history and background of the Tessa property and the Tessa permit application through reviewing the files regarding the matter as part of his duties as the DEP official responsible for enforcement activities relating to this permit. (N.T. 10)

35. Mr. Goldberg has been personally involved in enforcement activities relating to the Tessa NPDES permit since DEP issued the permit. (N.T. 10 and *passim*)

36. Mr. Goldberg received an undergraduate degree in Environmental Engineering from Penn State University, Main Campus in 1988. (N.T. 37)

37. Mr. Goldberg received a Masters Degree in Environmental Engineering Science from Penn State, Great Valley Campus in 1998. (N.T. 37)

38. Under Milestone Event No. 1, Tessa was to have submitted a Part II Water Quality Management Application to DEP within 6 months of the NPDES PID, which was December 12, 1996.

39. Tessa did not submit a Part II Water Quality Management Application on December 12, 1996 as required by Milestone 1 of Condition 13 and further, as of the date of the hearing, Tessa had not submitted the Application. (N.T. 17)

40. As of the date of the hearing, Tessa had failed to meet Milestone 2 of Condition 13 in that it had not began construction of the leachate treatment facilities. (N.T. 17)

41. As of the date of the hearing, Tessa had failed to meet Milestone 3 of Condition 13 in that it had not completed construction of the treatment facility. (N.T. 18)

42. As of the date of the hearing, Tessa had failed to meet Milestone 4 of Condition 13 in that it had failed to achieve compliance with the NPDES permit effluent limits. (N.T. 18)

43. After DEP issued Tessa's NPDES permit and Tessa was in violation of its permit, DEP met on several occasions with Tessa to discuss the permit, Tessa's alleged violations, and how Tessa would come into compliance. (N.T. 18, 38-39, 43)

44. Present at some or all of the meetings between DEP and Tessa were: (1) Mr. Jesse Goldberg, (2) Janet Amacher, Tessa's counsel, (2) Paul Rettinger, DEP's counsel, (3) Steve O'Neil, DEP employee, (4) Curtis Lever, DEP employee, and (5) Ed Prout of ARC Consultants, Tessa's environmental consultant. (N.T. 9-10, 39-40)

45. DEP tried to work with Tessa to resolve Tessa's noncompliance on many occasions, but Tessa never made a significant effort to comply. (N.T. 38-39, 43)

46. At one meeting between representatives of Tessa and DEP, Tessa's attorney represented that, for financial reasons, Tessa never intended to comply with the NPDES permit. (N.T. 39)

47. Mr. Goldberg has been to the Site and his most recent visit to the Site to observe conditions there was on March 31, 2000. (Ex. C-3, N.T. 25)

48. Mr. Goldberg testified about his observations and conclusions from his observations of his March 31, 2000 visit. (N.T. 22-37)

49. Iron hydroxide does not naturally occur in Manor Creek. (N.T. 33)

50. Iron hydroxide is present in Manor Creek and enters the Creek from the Miquon Landfill in at least four discrete locations:

a. The main leachate seep of the Miquon Landfill; (N.T. 22, 28)

b. The minor leachate seep of the Miquon Landfill; (N.T. 22, 28)

c. Discharging from the banks of the Creek between the main and minor leachate seeps; (N.T. 30)

d. Discharging from the banks of the Creek upstream of the main and minor leachate seeps. (N.T. 30-31)

51. Leachate from the two seeps discharges iron hydroxide into Manor Creek coating the creek's substrate from the Landfill leachate seeps, downstream, continuing to the mouth of the Schuylkill River. (N.T. 75)

52. Iron hydroxide coats Manor Creek as far as an eighth of a mile downstream from the main seep flowing from the Miquon Landfill. (N.T. 29)

53. Manor Creek also has the presence of "iron bacteria," evident by an orange "cotton candy" like appearance, which is another indication that iron hydroxide is present in Manor Creek. (N.T. 32-33)

54. Leachate from the main seep of the former Miquon Landfill flows into a wetland area located at the toe of the slope of the Landfill. (N.T. 22)

55. Iron hydroxide precipitate has contaminated a large portion of the wetland located at the toe of the slope of the landfill. (N.T. 22)

56. The iron hydroxide present in the wetland is apparent by the orange color of the water, which evidences oxidation of iron, and the results of DEP's tests establish that the iron composition of the leachate is drastically greater than the iron composition of the creek water. (N.T. 22-23)

57. The wetland located at the toe of the slope of the landfill discharges iron hydroxide into Manor Creek. (N.T. 22)

58. Upstream from the main seep, where the minor seep flows into Manor Creek, iron precipitate coats the bottom of the creek and the rocks that are present in the creek. (N.T. 28)

59. The iron hydroxide, which was observed to be present in Manor Creek at areas where the main and minor seeps of the Miquon Landfill enter the Creek as well as leaching along the banks of the Creek upstream of either seep and between the main and minor seep (see finding of fact 50), is generated in the following manner:

a. Rain water soaks through the ground of the former landfill and comes into physical contact with the buried waste that is in the landfill; (N.T 33-34)

b. This water that comes into contact with the buried waste in the landfill becomes contaminated with chemical constituents of materials buried in the landfill including iron; (N.T. 34)

c. This water that has been mixed with constituents of the landfill and has thus become contaminated with some of the chemical constituents present in the buried waste in the landfill is referred to as leachate; (N.T. 34)

d. The rain also causes the water table to rise and leachate from the landfill flows up to the surface of the ground where it is exposed to the air; (N.T. 34)

e. From the surface of the ground the leachate flows to a low point, which is Manor Creek; (N.T. 34)

f. The iron in the leachate undergoes a process of oxidation as a result of contact with the air; (N.T. 34)

g. This process of oxidation results in the formation of a visible precipitate; (N.T. 34)

h. The precipitate is orange in color and it forms as it settles out of the water; (N.T. 34)

i. This orange precipitate was visible where the two seeps from the Miquon Landfill entered the Creek, continuing downstream of the seeps to the mouth of the Schuylkill River, and along the Creek's banks where the leachate from the Miquon Landfill escaped into the Creek. (N.T. 22-23, 26, 28-33, 75)

60. DEP Water Pollution Biologist Supervisor, Michael Boyer has been employed with DEP in his current position since January, 1989. (N.T. 65)

61. Mr. Boyer received a Bachelor of Science degree in biology from Albright College in 1972. (N.T. 65).

62. He has taken graduate level courses in Fisheries Biology at Frostburg University from 1982 to 1987 and at Villanova University from 1988 to 1989. (N.T. 65)

63. Mr. Boyer worked as a Fisheries Technician for the Pennsylvania Fish and Boat Commission from 1974 to 1987. (N.T. 65)

64. His duties included performing fish population surveys, pollution investigations, stream surveys, lake surveys and similar activities. (N.T. 66)

65. His duties for the Fish and Boat Commission were performed in southwestern Pennsylvania. (N.T. 65)

66. As a Biologist Supervisor for DEP, Mr. Boyer is responsible for surface water assessment in the five County area around Philadelphia. (N.T. 66)

67. Mr. Boyer, in the course of his duties with DEP, normally and routinely performs effect surveys, fish tissue analyses, chemical surveys and similar activities. (N.T. 66)

68. Mr. Boyer supervises four other biologists. (N.T. 66)

69. Mr. Boyer was qualified as an expert in the field of aquatic biology. (N.T. 66)

70. In February 1995, two months after Tessa submitted its NPDES permit application, Boyer performed a point of first use survey on Manor Creek. (N.T. 68)

71. A point of first use survey determines whether a stream is perennial or intermittent. (N.T. 68-69)

72. A perennial stream flows most of the year and has permanent aquatic life and fish existing in the stream while an intermittent stream only flows during wet weather. (N.T. 77)

73. If a stream is determined to be perennial, DEP sets limits in a permit to protect the aquatic life in the stream (N.T. 69)

74. Boyer concluded from the February, 1995 point of first use survey that Manor Creek was a perennial stream. (N.T. 68-69)

75. Based on Mr. Boyer's testimony, the Board finds that Manor Creek is a perennial stream.

76. In December of 1997, Boyer performed an aquatic biology investigation on the Site and Manor Creek in the vicinity of the Site. (Ex. C-3, N.T. 69)

77. The purpose of the aquatic biology investigation was to assess the impacts of the former Miquon Landfill on Manor Creek. (Ex. C-3)

78. Boyer drafted a report summarizing the findings of his aquatic biology investigation. (Ex. C-3, N.T. 69-70)

79. The written report of the aquatic biology investigation was admitted into evidence as Exhibit C-3. (N.T. 70)

80. As part of the aquatic biology investigation, DEP collected samples from three stations on Manor Creek and performed laboratory analyses at each of the three stations for each of the following parameters: (1) standard inorganic parameters, (2) nutrients, (3) metals, and (4) aquatic invertebrates. (Ex. C- 3, N.T. 71)

81. Station 1 was upstream of any leachate seep, station 2 was downstream from the leachate seeps, and station 3 was even further downstream from the leachate seeps than station 2.[3] (Ex. C-3, N.T. 73-74)

82. Also, DEP recorded physical characteristics as well as field chemistries on pH, dissolved oxygen, water temperature, and specific conductance. (Ex. C-3)

83. A qualitative benthic sample using 800 x 900 um-mesh kick screen and rock picks was collected at each station, according to standard USEPA operating procedures. (Ex. C-3)

84. DEP laboratory analysis of water samples collected downstream of the former Miquon Landfill revealed high levels of iron and manganese. (Ex. C-3, N.T. 71)

85. DEP laboratory analysis of water samples collected downstream of the former Miquon Landfill revealed levels of iron to be approaching toxicity. (Ex. C-3, N.T. 71)

86. Iron hydroxide affects the more sensitive aquatic invertebrates by suffocating them because of the hydroxide coating, which either covers the aquatic invertebrates or the substrate that they live on, or both. (N.T. 71-72)

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[3] The testimony about exactly where each station is located on Manor Creek is confusing. However, after reviewing the testimony and Exhibit C-3 together, it is apparent that moving from upstream to downstream station 1 is at river mile 0.96, station 2 is at river mile 0.65, and station 3 is at river mile 0.14.

87. The nearly toxic levels of iron eliminated the more sensitive aquatic invertebrates downstream of the leachate seeps for approximately 50 to 100 yards. (Ex. C-3, N.T. 71, 75)

88. Invertebrate sensitivity is measured on a 0 to 10 scale, with 0 being the most sensitive. (N.T. 73)

89. *Dolophilodes* is a mayfly with a 0 sensitivity rating. It was present at station 1, not present at station 2, and again present at station 3. (Ex. C-3, N.T. 73-74)

90. *Ameletus* is a mayfly that was abundant at station 1 and not present at stations 2 and 3. (Ex. C-3, N.T. 73)

91. The results of the aquatic biology survey found, and the Board finds based thereon and the testimony of Mr. Boyer, that there was a deleterious impact to Manor Creek from the Miquon Landfill seeps as manifested by the iron hydroxide coating and elevated metals levels at stations 2 and 3 and that there was a negative impact to the invertebrate community, mainly an elimination of the more sensitive genera at station 2.

92. In its Compliant, DEP stated that it had determined that "a civil penalty of one hundred dollars ($100) per day is appropriate" and that "as of December 21, 1998, Tessa had been in violation of the conditions of the Permit for seven hundred thirty nine days, since December 12, 1996, resulting in a total civil penalty of seventy three thousand, nine hundred dollars ($73,900)" under 35 P.S. §§ 691.605, 691.611 of the Clean Streams Law. (Ex. C-15, N.T. 19-20)

93. As a general matter, DEP calculates a recommended civil penalty by starting with a $100 per day minimum penalty and then, if appropriate and if applicable, it may increase the recommended daily penalty amount based on a number of factors. (N.T. 54-55)

94. In this case Mr. Goldberg calculated the recommended civil penalty outlined in DEP's Complaint. (N.T. 19)

95. Mr. Goldberg considered the following factors when making DEP's recommended assessment of civil penalty in this case: 1) Tessa's intentional and knowing violation of the law (N.T. 45); (2) deterrence (N.T. 51); (3) the economic benefit which accrued to Tessa by its failure to meet its NPDES permit conditions, if any at all (N.T. 52); (4) DEP's enforcement costs (N.T. 53); and (5) the damage done to Manor Creek as a result of Tessa's failure to comply with its NPDES Permit. (N.T. 56)

96. DEP did not increase the recommended daily penalty above the $100 minimum after considering all the factors because, at the time it filed the Complaint, DEP sought to not discourage the possibility that Tessa may still take some action to address the seep problem. (N.T. 59)

## DISCUSSION

### I. Liability/Violating the NPDES Permit

Section 611 of the Clean Streams Law provides that failure to comply with any permit issued by DEP is unlawful conduct. 35 P.S. § 691.611. DEP bears the burden of proof in a civil penalty assessment case before the Board to establish, by a preponderance of the evidence that the Permittee engaged in unlawful conduct. *See* 25 Pa. Code § 1021.101(a), (b)(1). In this case, therefore, DEP has the burden of proof to establish by preponderance of the evidence that Tessa violated its NPDES permit. DEP has satisfied that burden here.

DEP presented evidence at the hearing on the merits that Tessa violated four separate provisions of its NPDES permit, namely Parts 1 through 4 of paragraph 13 of the "Other Requirements" part of the permit. These provisions outline milestones for completion of certain

tasks and compliance with certain standards. In its entirety, the Other Requirements paragraph 13 of Tessa's permit states as follows:

> OTHER REQUIREMENTS (Continued)
>
> 13. The permittee shall construct treatment facilities in order to achieve compliance with the effluent limits contained in this permit. This work shall be accomplished in accordance with the following schedule:

PDI = Permit Issuance Date

| **Milestone Event** | **Milestone Date** |
|---|---|
| 1. Submit Part II Water Management Permit Application | Within 6 months of NPDES PDI |
| 2. Start construction of Treatment facilities | Within 3 months of Part II Water Quality Management PDI |
| 3. Complete Construction of treatment facilities | Within 12 months of Part II WQM PDI |
| 4. Achieve Compliance with effluent limitations | Within 24 months of NPDES Permit PDI |

Tessa had a legal duty under its permit to achieve these milestones as outlined in Parts 1-4. DEP Environmental Compliance Protection Specialist Jesse Goldberg testified as to each one of these requirements in the permit and Tessa's failure to comply therewith. Specifically, Mr. Goldberg testified that: (1) Tessa did not submit the Part II Water Quality Management Permit Application within 6 months from the issuance of the permit, which would have been by December 12, 1996, and, indeed, had never done so even as of the date of the hearing, (2) Tessa had never started construction on the leachate treatment facilities, (3) Tessa had never finished construction of the leachate treatment facilities; and (4) Tessa had never achieved compliance with the NPDES effluent limitations outlined in the permit. (Ex. C- 2, N.T. 16-18).

DEP's evidence on these matters, both documentary and testimonial, went unchallenged as Tessa declined the opportunity to appear at the hearing even to cross-examine Mr. Goldberg.

In any event, we credit Mr. Goldberg's testimony on these subjects entirely as we found him to be an extremely credible and knowledgeable witness.[4]

Having determined that Tessa violated its NPDES permit, we next consider what civil penalty warrants Tessa's violation.

## II. Civil Penalty Assessment Amount

Section 605 of the Clean Streams Law provides for a civil penalty of up to $10,000 per day per violation to be assessed for unlawful conduct, which, as we have discussed, includes a violation of an NPDES permit. "The Board, not the Department, assesses civil penalties under the Clean Streams Law." *Whitemarsh Disposal Corporation Inc., v. DEP*, EHB Docket No. 99-099-L, slip op. at 46-47 (citing *Westinghouse Electric Corporation v. DEP* (*Westinghouse II*), 1999 EHB 98, 109, *aff'd*, 745 A.2d 1277 (Pa. Cmwlth. 2000) (citing *Westinghouse Electric Corporation v. DEP* (*Westinghouse I*), 1996 EHB 1144, 1284 n. 49, *remanded on other grounds*, 705 A.2d 1349 (Pa. Cmwlth. 1998))). Nonetheless, the Board may consider, for advisory purposes only, DEP's recommendation for a civil penalty. *See Whitemarsh Disposal*

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[4] Tessa's Answer and New Matter asserts that its failure to comply with Other Requirement 13, Parts 1-4 does not mean that it violated its permit. Its specific allegations and a flavor of its putative theory of the case is set forth in its Answer and New Matter which is discussed in detail in our previous Opinion and Order. However, Tessa has not provided any factual or legal support for its contentions or its theories despite every opportunity to do so. In fact, as discussed in our previous Opinion and Order, Tessa has intentionally abandoned its defense of this matter. Tessa's abandonment of the case was also exhibited in its declination to appear at the hearing to cross-examine DEP's witnesses, present legal argument and by its later declination to submit a post-hearing brief. In any event, we have read Tessa's Answer and considered the apparent rationale of the excuse offered for the unlawful conduct and we reject any notion that Tessa's unlawful conduct is somehow excused or avoided by the circumstances therein described. Our analysis of the permit and our consideration of the evidence of record, both testimonial and documentary leads us to the conclusion solidly that Tessa was required to fulfill Other Requirement 13, Parts 1-4, that it failed to do so and that its failure constitutes unlawful conduct as defined by the Clean Streams Law.

*Corporation Inc.*, EHB Docket No. 99-099-L, slip op. at 47 (citing *Westinghouse I*, 1996 EHB at 1258; *E.M.S. Resource Group, Inc., v. DER*, 1995 EHB 834, 840); *DEP v. Carbro Construction Corporation*, 1997 EHB 1204, 1228 (citations omitted).

Our assessment is based on DEP's recommended civil penalty and the specific evidence presented at the hearing on the merits.

DEP's Complaint for Civil Penalties recommended a civil penalty in the amount of $73,900. (C. 15) DEP calculated the total civil penalty of $73,900 by assessing a $100 per day penalty for each day Tessa was out of compliance with its NPDES permit until the date the Compliant was filed.[5] At the hearing on the merits, DEP Environmental Compliance Protection Specialist, Jesse Goldberg, testified that he was responsible for setting the amount of the penalty assessment. (N.T. 19) Mr. Goldberg testified that when DEP calculates a recommended civil penalty, its policy is to begin with a minimum $100 per day violation and then increase the penalty based on the evaluation of a number of factors. (N.T. 54-55) When calculating Tessa's recommended civil penalty, DEP considered the following factors: (1) Tessa's intentional and knowing violation of the law (N.T. 45); (2) deterrence (N.T. 51); (3) the economic benefit which accrued to Tessa by its failure to meet it NPDES permit conditions (N.T. 52); (4) DEP's enforcement costs (N.T. 53); and (5) the damage done to Manor Creek as a result of Tessa's failure to comply with its NPDES Permit (N.T. 56). However, DEP did not use any of these factors to increase Tessa's penalty above DEP's $100 per day minimum because, at the time it filed the Complaint, DEP still had some hope that Tessa might comply with its NPDES, or take

[5] Tessa first went into violation of its NPDES permit on December 12, 1996 when it failed to submit the Part II permit application, and DEP filed its complaint on December 21, 1998. This is a total of 739 days of noncompliance by Tessa.

some other action to satisfactorily address the seep problem. Therefore, DEP sought not to set the penalty amount too high so as to totally discourage any remaining inclination that Tessa may have had in that regard. (N.T. 59) In addition, DEP pointed out that in similar cases it has assessed a comparable civil penalty. (N.T. 91)

At the hearing on the merits, DEP requested that the $100 per day penalty be carried forward from the date the Complaint was filed, December 21, 1998, through the date of the hearing, April 7, 2000. This was based on Tessa's continued non-compliance with any of the milestone permit conditions from the date the Complaint was filed up through the date of the hearing on the merits. This is 472 days in addition to the 739 days of non-compliance originally noted as of the date the Complaint was filed. Thus, the total amount of DEP's recommended penalty assessment as of the close of evidence is $121,100.[6] (N.T. 91-92)

We think this assessment is appropriate under the circumstances and the Board assesses a civil penalty against Tessa in the amount of $121,100.[7] The Board agrees with DEP's rational

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[6] As noted in footnote 1, DEP miscalculated the number of days between December 21, 1998 and April 7, 200 as 454 days instead of the correct 472 days. Nonetheless, DEP's recommendation to the Board was to assess Tessa a $100 per day civil penalty from December 12, 1996 until April 7, 2000 and therefore, we assume DEP intended to recommend a $121,100 civil penalty instead of its miscalculated $119,300 civil penalty.

[7] We see no problem with including in our penalty assessment the additional 472 days of violation between the filing of the Complaint and the close of the record at the hearing. Although the Complaint does not contain, and perhaps it should have, an explicit prayer that the $100 per day amount to be carried through to the eventual date of a hearing, we do not think that under the particular facts of this case, this omission is fatal to DEP's request. DEP's Complaint, although it could have been better drafted on this subject, put Tessa on notice as of the date of filing, that DEP's recommended penalty assessment was $100 per day of violation regarding the failure to hit the four enumerated milestones. Thus, this does not involve an assessment for qualitatively different conduct than that which is alleged in the Complaint and about which the defendant was on full notice. It should come as no surprise, especially to Tessa whose intentionally violative conduct, of the exact same nature as set forth in the Complaint, continued unabated through the date of the hearing, that this $100 per day penalty amount could possibly be

for its recommended civil penalty of $100 per day starting on December 12, 1996, and ending on April 7, 2000, for a total of $121,100. While it is within the Board's authority to assess a higher or lower civil penalty than DEP has recommended, we will not do so here, especially since DEP did not suggest that we do so even when asked by the Board.[8]

We find that this penalty amount is not only reasonable based on the evidence but, indeed, temperate. The amount assessed is the minimum amount per day that DEP assesses for any violation. Moreover, the calculation was based on Tessa's singularly being in violation of the permit even though it could be argued that Tessa committed multiple violations in that it was in violation of multiple temporal milestones of the permit over different periods with it being in violation of all four milestones for an appreciable time.

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assessed through the date of the hearing. As set forth more fully in the Adjudication, the assessment for the 472 days of violative conduct through the date of the hearing is completely warranted based on the evidence presented at the hearing on the merits. The evidence established that the violations had continued unabated up through the date of the hearing. Moreover, a Clean Streams Law civil penalty assessment defendant is on notice that the DEP's Complaint only proposes a penalty assessment while the Board, after considering the evidence at the trial on the merits, sets the penalty amount. 35 P.S. §§ 691.605(a), 691.1; *DER v. Allegro Oil and Gas Co.,* 1991 EHB 34, 39. Thus, there is the foreknowledge that the penalty that the Board assesses could possibly be higher than the amount of penalty the DEP assesses in its Complaint. The fact that Tessa was not present at trial to argue against the application of the penalty for the period between the date of the filing of the Complaint and the close of the record at the hearing was its own choice. Moreover, Tessa did not respond to DEP's Post-Hearing Brief which addressed the subject of the assessment of the $100 per day penalty through to the date of the hearing. Tessa did not respond to that argument in that it failed to file a Post-Hearing brief at all even though it was given every opportunity to do so. Under our Rule, Tessa's failure to respond to DEP's argument in this regard is a waiver by it of any counter-position on that issue. 25 Pa. Code § 1021.116(c). For all of these reasons, the assessment of the $100 per day for the same conduct for the 472 days through hearing is appropriate.

[8] We are, of course, limited on the higher end by the statutory maximum of $10,000 per day per violation. 35 P.S. § 691.605. In this case there is clearly a significant amount of room to move the penalty to a higher amount if we were so inclined.

Tessa's conduct with respect to its violation situation was certainly intentional and even slightly belligerent. Mr. Goldberg testified that DEP had tried to work with Tessa to resolve Tessa's noncompliance on many occasions but that Tessa never made any significant effort to comply. (N.T. 38-39, 43) Tessa's negative attitude about the situation is demonstrated by its counsel's statement to DEP that, for financial reasons, Tessa had no intention of complying with its permit as issued. (N.T. 39)

Also, Manor Creek has clearly been adversely affected by the violative conduct. That the seeps caused a deleterious impact was clear from the testimony of Mr. Goldberg, Mr. Boyer and the aquatic biology survey, Exhibit C-3. DEP Water Pollution Biologist Supervisor Michael Boyer testified that, in his expert opinion, the leachate from the former Miquon Landfill has:

> an aesthetic effect in that it coats the substrate for the entire length of [Manor Creek] from the leachate seep downstream to the mouth of the Schuylkill River. The leachate also eliminated the sensitive invertebrates directly below the landfill for a distance of about 50 to 100 yards.

(N.T. 75) This expert opinion is based on sampling from the aquatic biology investigation of Manor Creek performed by Mr. Boyer in 1997. (Ex. C-3, N.T. 69) DEP collected samples from three different points on Manor Creek. (Ex. C-3, N.T. 73-74) The first point, station 1, was upstream from the leachate seeps. (Ex. C-3, N.T. 73) At that sample point, DEP did not find any evidence of aquatic life damage or high concentrations of metals such as magnesium or iron. (Ex. C-3, N.T. 71, 73) However, at stations 2 and 3, which were downstream from the leachate seeps, DEP did discover high concentrations of magnesium and iron, and that some of the most sensitive aquatic invertebrates present at station 1 were no longer present at station 2 or either stations 2 and 3. (Ex. C-3, N.T. 71, 73-74) The investigation found that:

> There was a deleterious impact to Manor Creek from the Miquon Landfill seeps. This was manifested in the iron hydroxide coating and elevated metals level at Stations Two and Three. There was a slight negative impact to the invertebrate community, mainly an elimination of the more sensitive genera at Station Two.

(Ex. C-3).

At the hearing, DEP witness Jesse Goldberg testified about the conditions he observed at the Site on March 31, 2000. Among other things, Goldberg testified that there was a visible presence of iron hydroxide in the creek. (N.T. 22, 25) He explained that the orange discoloration visibly present in the creek waters and on the creek rocks found specifically at areas where the main and minor seeps of the Miquon Landfill enter the Creek, as well as continuing downstream to the mouth of the Schuylkill River, evidenced the presence of iron hydroxide in the stream. (N.T. 22-23, 26, 28-33,) The iron hydroxide observed by DEP in Manor Creek is generated by the interaction of precipitation and the contents of the Miquon Landfill and is conveyed into Manor Creek via the seeps.

This deleterious impact of the seeps is precisely what the Part II Permit application process was meant to address and ameliorate via the contemplated treatment plant. Tessa's violative conduct in failing to take the steps to comply with the permit requiring implementation of the treatment facility thus resulted in continuing adverse impact to Manor Creek.

The Board believes that, under the circumstances, therefore, the penalty assessment is well in order both because of the violative conduct in itself and also to deter Tessa, as well as others, from violating their NPDES permits and damaging the waters of the Commonwealth in the future. *See Westinghouse Electric Corporation v. DEP*, 745 A.2d 1277, 1280 (holding "[T]he Board's penalty calculation on remand was not improperly based upon implementing a policy of deterrence without a factual foundation.")

Therefore, the Board assesses a civil penalty in the amount of $121,000 against Tessa for violating its NPDES permit from December 12, 1996 through April 7, 2000 and thereby causing continued adverse impacts on Manor Creek.

## CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and subject matter of this assessment of civil penalty. *See* 35 P.S. §§ 691.605, 691.611; 35 P.S. §7514.

2. DEP bears the burden of proof in civil penalty assessment case before the Board. *See* 25 Pa. Code § 1021.101(b)(1); *Brake v. DEP*, 1999 EHB 965, 975.

3. DEP's burden of proof requires it to prove by a preponderance of the evidence that Tessa violated its NPDES Permit. *See* 25 Pa. Code 1021.101(a).

4. Tessa had a legal duty to comply with its NPDES permit.

5. DEP proved that by a preponderance of the evidence that Tessa violated its NPDES permit by failing to comply with Other Requirement 13, Parts 1-4 of its NPDES permit.

6. Tessa's violation of its NPDES permit is unlawful conduct under 35 P.S. § 691.611 of the Clean Streams Law.

8. Tessa's violation of its NPDES permit subjects Tessa to civil penalties under 35 P.S. § 691.605 of the Clean Streams Law.

9. The Board assesses a civil penalty in the amount of $121,100 against Tessa for violating its NPDES permit.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **EHB Docket No. 98-239-CP-K** |
| **v.** | : | |
| **TESSA LTD.** | : | |

## ORDER

AND NOW, this 14th day of June, 2000, upon consideration of Tessa Ltd.'s violation of its Industrial NPDES Permit No. 0056367 and pollution of the waters of the Commonwealth, it is hereby **ORDERED THAT: within 30 days, Tessa Ltd.** shall pay the Commonwealth of Pennsylvania, Department of Environmental Protection, a civil penalty of $121,100.

**ENVIRONMENTAL HEARING BOARD**

**GEORGE J. MILLER**
**Administrative Law Judge**
**Chairman**

**THOMAS W. RENWAND**
**Administrative Law Judge**
**Member**

MICHELLE A. COLEMAN
**Administrative Law Judge**
**Member**

BERNARD A. LABUSKES, JR.
**Administrative Law Judge**
**Member**

MICHAEL L. KRANCER
**Administrative Law Judge**
**Member**

**DATED:** June 14, 2000

**c:** **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

**For the Commonwealth, DEP:**
Paul Rettinger, Esquire
Southeast Region

**For Defendant:**
Janet E. Amacher, Esquire
TRUEBLOOD & AMACHER
One Montgomery Plaza, Suite 902
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WILLIAM T. PHILLIP
SECRETARY TO THE B

| | | |
|---|---|---|
| **WAYNE D. HOLBERT d/b/a HOLBERT BROS. BLUESTONE CO.** | : | |
| **v.** | : | **EHB Docket No. 99-230-K** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: June 15, 2000** |

## OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

**By Michael L. Krancer, Administrative Law Judge**

**Synopsis:**

The Board grants DEP's Motion for Summary Judgment and denies Holbert's where the only legal issue is whether Holbert is engaged in non-coal surface mining activity under the Non-Coal SMCRA. Holbert's admissions on the record establish that his "picking" of bluestone from old bluestone piles is within the Act's definition of "surface mining". Holbert's contention that unless there is physical removal of covering strata above the bluestone the activity is not "surface mining" is incorrect as a matter of law since the statute includes within its definition of mining activity "extraction of minerals from the earth, from waste or stockpiles by removing strata or material that overlies or is above or between them or otherwise exposing and retrieving them." As the Commonwealth Court held in connection with the definition of "surface mining" under the Coal SMCRA, the statutory language means that "the earth itself need not be disturbed or exposed so long as materials are removed from waste or stock piles." *Ginter Coal Company v.*

*Environmental Hearing Board*, 306 A.2d 416, 418 (Pa. Cmwlth. 1973). Since the definition of "surface mining" at issue here under the Non-Coal SMCRA is in all material respects identical to the definition in the Coal SMCRA interpreted by the Commonwealth Court in *Ginter*, the Board will read the Non-Coal SMCRA definition consistent with the Commonwealth Court's reading of the analog provision in the Coal SMCRA.

**Procedural Background**

Before the Board is DEP's Motion for Summary Judgment and Appellant, Wayne D. Holbert's letter, designated as "Dispositive motion summary judgment to dismiss compliance order".[1] The relevant procedural posture of this matter is set forth below.

Wayne D. Holbert (Holbert) initiated this matter on November 11, 1999 by the timely filing of a Notice of Appeal with the Board regarding the Department of Environmental Protection's (DEP) October 18, 1999 Compliance Order (CO) for mining bluestone without a permit. Holbert Notice of Appeal (Mr. Holbert's Notice of Appeal is hereinafter cited as NOA).[2] The CO was issued by Surface Mining Conservation Inspector Gary Harper to "Wayne D. Holbert for Holbert Brothers Bluestone Co." DEP Motion, Exhibit A (DEP's Motion is hereinafter cited as D.M.). The CO alleges that Holbert was engaged in surface mining activities at a site in Shohola Township, Pike County without a license or permit. D.M. Ex. A. Such activity is unlawful under the Noncoal Surface Mining Conservation and Reclamation Act, the

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[1] DEP argues, in its Response to Holbert's Motion for Summary Judgment, that the Holbert letter is not really before us in the sense of being before us as a dispositive motion since the "letter" fails in virtually every respect to conform to the Board Rules relating to Summary Judgment filings. See Board Rules 1021.2, 1021.73. We discuss this point in more detail on pages 13-16 of this Opinion and Order.

[2] The Notice of Appeal is also attached to the Department's Motion for Summary Judgment as Exhibit D. ¶

Act of December 19, 1984, P.L. 1093, *as amended*, 52 P. S. §§ 3301-3326 (Noncoal SMCRA) and the regulations promulgated thereunder codified at 25 Pa. Code §§ 77.51 and 77.101(a). D.M. Ex. A. The CO directs Holbert to cease all mining activities immediately and by on or before 8:00 a.m. November 15, 1999, the operator is to either reclaim the affected area or obtain a mining permit to mine the site subject to the CO.[3] D.M. Ex. A.

Holbert filed his Notice of Appeal *pro se*. The narrative attached to the Notice of Appeal is not easy to follow but it seems to allege that at one time DEP's enforcement agent told Holbert that he did not need a mining license and permit for his activities but that a different enforcement agent, Mr. Harper, has now taken a different position. In addition, the Notice of Appeal argues that the activities of Mr. Holbert are not within the definition of surface mining under the law. This later notion has become the preeminent issue in the proceedings. NOA.[4]

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[3] The operative provision of the CO regarding cessation of operations is not as clear as it could be. Agent Harper writes, "[a]ll mining activities are ceased immediately". DEP Motion, Exhibit A. Although this is not a model of clarity, we will take this to mean that Agent Harper ordered that all mining activities shall cease immediately. This matter, however, is not critical to our further disposition of the case.

[4] The narrative in its entirety states as follows:

> Dear Environmental Hearing Board;
>
> This appeal is before you in response to a DEP field agent accusing me of mining activity on the property of a neighbor.
>
> I assume that your board is sick and tired of hostile landowners writing irate letters or citizens such as myself pretending to talk in legalese. I will attempt to do neither. I ask your indulgence at the way my narrative is laid out. I know not what facts, circumstances, laws, regulations, political realities or current interpretations you are interested in hearing. Therefore, I will mention every fact and circumstance that I feel will bolster my case. I thank you in advance for being the kinder, gentler DEP Governor Ridge promised us.
>
> My family has inhabited the counties of Pike and Wayne since before the

*(footnote continued)*

revolution. We have lived continuously on the same land in Lackawaxen Township since 1803. My ancestors timbered, mined bluestone and farmed this land. My father was the last Holbert to farm here and has managed to hold on to the old homestead and pass it on to my brother and myself. I love this land and consider myself a life caretaker of it. We actually feed the deer and turkeys and allow limited public access to fish and hunt.

Six years ago I quit my teaching job of eight years, sold my house to raise capital and started selling the loose broken pieces of bluestone laying in the woods on my property. The Pike County area is littered with old bluestone quarries that were abandoned about 1900 when concrete was perfected. My first year I grossed 60K and got to keep about 7K. All done with no employees. After a couple of years I started to purchase some loose stone from my neighbors. My gross is up, my neighbors are happy and my business supports 4 local families, two of which receive health care benefits. All this was accomplished without any help from the government. No streams were fouled, no spotted owls massacred. People are making money, we are pumping thousands of dollars into the local economy. We are working hand in hand with the local municipalities and conservation district to be good neighbors. I never fed the deer and turkeys before I started working in the woods. Now I am acutely aware of their needs.

About four years ago a DEP representative by the name of John Ermlick started stopping by for a short visit to my Lackawaxen site. He did not even speak to me the first or second time he visited. About three years ago John finally introduced himself to me. We spoke briefly. I'm sure I was less than friendly. He told me that what I was doing was close to bordering on mining; and that when he sees evidence that I am drilling and blasting I would have to get a mining permit from him and bond some of my land. I asked John directly if I was not to drill and blast would he leave me alone. His reply was, "Wayne, as long as you are only picking from the old quarry dumps the DEP has no interest in you".

Gentlemen of the appeals board, here it is 1999 and John Ermlick, a young man, is dead. His replacement Gary Harper, has decided that the very same activity I have been legally engaged in, is now illegal. An Order of Compliance has been issued and a threat of crippling fines hangs over my head. Sirs, the only difference between John Ermlick and Gary Harper is their interpretation of PA Code Title 25. John interprets it to my advantage and Gary interprets it to the advantage of a large growing bureaucracy that like any good bureaucracy wants to collect more fees by defining more activity as being subject to it's authority. My contention, is that this compliance order is a thinly veiled attempt to generate fees for the DEP. No one has accused me of environmental damage. The township, the property owners, the conservation district are all content with my activity. Sirs, the PA Code can be as restrictive as you want to make it, or vice versa. As a citizen I believe that judges must consider the intent of the PA Code and also the

*(footnote continued)*

outcome of interpreting it one way or another.

If you decide that I am mining when I buy old quarried stone from my neighbors, I am a crook, who can become not a crook, for a price. For Gods sake, every rock I take was mined almost 100 years ago. How many times can you mine the same rock? How does me, paying you, an outrageous amount of money to watch me, going to help the people or animals of Pike county? The answer is that probably every one will lose. My activities outside by own property will be severely curtailed. My business gross will drop, I will have to lay off one or two workers, I will pay less payroll taxes, I will require less health insurance, I will buy less goods and services, neighbors will have less discretionary income to pay taxes or save, the water won't be cleaner and animal habitat won't improve. I am a conservationist, I think that regulations can be good or bad, and that a wealthier society is a healthier society, and those who own resources need freedom and incentives to implement their efficient use. In other words if the township needs your help in protecting its resources, they will call you.

Let us get very specific to the site that the compliance order is written for:

Panther Creek Rod & Gun Club in Shohola Township has 10 absentee owners of 550 acres of rugged hemlock covered property. Hemlock trees so thick that ground cover doesn't exist. No food for the deer, therefore hunting has been getting poor. Solution: open up the forest. Sell some previously mined bluestone, plant clover fields. Gentlemen, the few acres that I removed the trees from to get to the rock will be lush with ground cover a few years from now. The haul roads I built will give the aging hunters access to areas that might never be hunted. I keep a crew of 3 men employed for a season. A couple of culverts are installed with the approval of the Pike County Conservation District. There is more food for the deer, the water is not disturbed. Everybody wins. Now insert the DEP into the above equation and maybe none of the above occurs because of the up front DEP money requirements. So now maybe the land owner sells out to a real estate developer who has plans for a new 100 home development.

Myself, a landowner and the town fathers got together and something positive for the environment and the people caretaking the land has occurred. Now you want to punish me for it? Gentlemen the government cannot tax its' people into prosperity. The intent of the law cannot be to prevent good things from happening. I honestly don't know what your job actually is; but I am aware the activist judges and law makers try to right wrongs judicially when the force of the law falls short. Right this wrong.

People no longer accept the saying that "justice is blind", and the letter of the law is the letter of the law. Every thing is written with a little wiggle room. I am not asking for the emasculation of the DEP field agents or for carte blanche to rape

*(footnote continued)*

The Board held a routine status conference call on January 12, 2000. Among the subjects discussed was the fact that Mr. Holbert was proceeding, as of then, without counsel. Mr. Holbert represented that Holbert Brothers Bluestone Company was not incorporated as a legal matter. He further represented that he was the sole owner of the "company" and that there were no persons who ran it besides himself. Thus, Board Rule 1021.22(b) which requires that corporations be represented by counsel was not applicable. Likewise Board Rule 1021.22(c) which requires that groups of individuals acting in concert, whether formally or informally, be represented by counsel was not applicable. Instead, Board Rule 1021.22(d), which provides: "Individuals may appear in person on their own behalf; *however, they are encouraged to appear*

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and pillage the environment. I am asking for a ruling that says "Governor Ridge we heard you and the DEP is a kinder, gentler more citizen responsive organization and is not out to stifle legitimate economic activity. At the risk of repeating myself, my business and employees would all be harmed by the requirement for up front money to work on neighbors property. My business has already been harmed by loss of faith my workers have in me that I can provide for them. Agent Harper has created a hostile working environment for them by leading them to conclude that soon they will lose their employment. I need to show them something official that says that this is not so. Having Agent Harper speak to them would be good. I will meet with agent Harper and get a mining license so that I can drill and blast on my own property.

Lastly, reclamation has occurred according to the wishes of the Panther Creek owners. (25-5 gal buckets of acorns were sown across all areas that I scraped or disturbed with my machines.) I humbly ask the board to let me keep the money I legally earn by declaring what I do to be legal.

Sincerely,

Wayne D. Holbert
/s/ Wayne D. Holbert

P.S. Sirs;
Agent Harper has granted me a 30 day extension to the compliance order. Several more documents will follow this initial appeal packet.

*through counsel*" was applicable. 25 Pa. Code § 1021.22(d)(emphasis added). During the conference call the Board emphasized to Mr. Holbert that, even if he fell outside the Rule which requires a party to be represented by counsel, the Board was a legal tribunal and that a trained lawyer would be best equipped to advance Mr. Holbert's case.[5] The Board directed a letter dated January 13, 2000 to Mr. Holbert which, again, reminded Mr. Holbert that the Board is a legal tribunal in which matters are heard and that his being represented by legal counsel would be beneficial to him in proceedings before the Board.[6]

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[5] The possibility was left open that discovery may disclose facts which demonstrated that Mr. Holbert's situation was within Board Rule 1021.22(b) or (c).

[6] The relevant portions of the text of the Board's letter dated January 13, 2000 to Mr. Holbert read as follows:

> Pursuing an appeal from a Department order in environmental matters is a highly technical matter in which the development of the merits of the case, if any, depends on the employment of an able environmental attorney who in turn can retain appropriate expert witnesses to provide evidence in support of your objections to the Department's action at the hearing on the merits. Pre-hearing discovery of information important to processing the appeals is governed by the technical rules of Pennsylvania Statutes and Pennsylvania Rules of Civil Procedure. The hearing on the merits will be a formal hearing, very similar to non-jury civil trials before Common Pleas Courts or Federal District Courts. Pennsylvania Statutes, the Pennsylvania Rules of Evidence, the Rules of this Board and case precedent will govern and be applied to the testimony and documents which you may wish to offer at the hearing.
>
> Our experience is that people not trained in the law or experienced in environmental litigation rarely succeed in appeals before the Board without the services of these professionals. While we realize that if you fall outside of the rule requiring representation by an attorney that you have the Constitutional right to represent yourself in this appeal, you may find that you will become very frustrated by spending the amount of time and money required to pursue your appeal without a significant promise of success as you continue to represent yourself.

Notwithstanding the dual caveats and recitations of encouragement to proceed via counsel, Mr. Holbert decided to continue to prosecute the appeal pro se. [7]

Also on January 13, 2000, the Board entered an Order which, among other things, directed the parties to submit periodic status reports commencing on January 26, 2000. On March 20, 2000, Holbert filed his periodic status report as required. Item D to the status report recites that, "Dispositive Motion enclosed". Attached to the status report is a letter dated March 16, 2000 on Holbert Bros. Bluestone Co. Inc. letterhead designated in the subject header as "Dispositive motion summary judgment to dismiss compliance order." This letter states in full as follows:

> Basis: The definition of non-coal surface mining is ambiguous and because it is a one size Fits (sic) all definition I ask the board to substitute its discretion for that of the Department of Environmental Protection (*Pequea Twp. v. Herr*, 716 A.2d 678, Pa. Cmwlth. 1998); (*Conners v. DEP*, EHB Docket No. 99-138L, opinion issued Aug. 20, 1999).
>
> Argument: Section 3 of noncoal SMCRA defines "Surface mining as inter alia", "the extraction of minerals...from waste or stockpiles...by removing the strata or material that overlies or is above or between them or otherwise exposing and retrieving them from the surface. 25 Pa. Code § 77.1

[7] In response to DEP's written interrogatory No. 15 to Mr. Holbert which asked "[i]s Holbert Bros. Bluestone Co. a corporation", Mr. Holbert responded, "no". DEP Motion, Exhibit B. Also, DEP's interrogatory No. 16 asks, "[h]ave the activities in which you have engaged at the Site been undertaken in concert with other individuals?" Mr. Holbert responds that, "many people are involved but not as individuals but as companies." He goes on to specifically list: (1) the 10 owners of the property on which the alleged mining activities have taken place; (2) the Supervisors of Shohola Township which issued Mr. Holbert a permit to remove loose stone from the property; (3) the Pike County Conservation District which inspected the Site and which issued permits for culverts; and (4) "the list goes on". Mr. Holbert further answers that, "if the actual question is was another Stone Company allowed to remove broken Blue from the Site?—the answer is no". *Id.* Based on the record as of this date, the Board is satisfied that Holbert Brothers Bluestone Company is not a corporation but a sole proprietorship. In addition, Mr. Holbert and his company do not fall within the Rule which requires counsel for either a corporate party or "groups of individuals acting in concert, whether formally or informally" and that he is entitled, under Board Rule 1021.22(d), to proceed in this matter on a *pro se* basis. See Board Rules 1021.22 (b), (c), (d); 25 Pa. Code § 1021.22 (b), (c), (d).

Although I do pick rocks from 100 year old waste piles, I do not remove any strata or material that overlies or is above or between. Also, I do not have to retrieve them to the surface as they are already at the surface. If they are not on the surface I would not know they were there. Your Honor, I assert that maybe my argument is nit picking but it is at least as valid as "that depends upon what the definition of "is" is. Picking rocks is my living, I ask for your discretion based upon all reasons stated in my initial written appeal. If you see fit to grant it I will seek no monetary damages from the DEP and further more I will willingly cooperate with my local agent on true mining activities I might undertake.

Respectfully,

/s/ Wayne D. Holbert

Wayne D. Holbert

The Department filed its Motion for Summary Judgment and Memorandum in support thereof on April 18, 2000. DEP also filed a Response to Holbert's Motion For Summary Judgment and memorandum of law in support thereof on April 21, 2000. DEP's Motion attaches Exhibits A through D which are: (A) the affidavit of Gary Harper together with the CO of October 14, 1999; (B) Holbert's responses to DEP's Interrogatories; (C) Holbert's responses to DEP's Requests for Admission; (D) Holbert's Notice of Appeal.[8] Mr. Holbert filed a document entitled "Response to Department's Motion For Summary Judgment To Dismiss My Appeal" on May 24, 2000. DEP filed its Reply to Holbert's Response to DEP's Motion for Summary Judgment on June 12, 2000.

**Factual Background**

There is no dispute about any of the material facts in this case. The record for summary judgment review in this case is derived entirely from Mr. Holbert's Notice of Appeal, his

[8] Mr. Holbert's executed verifications of his responses to DEP's interrogatories and DEP's Requests for Admission were filed by DEP with the Board on April 21, 2000.

interrogatory responses, and his responses to requests for admission and the affidavit of Gary Harper. Pa. R.C.P. 1035.1.[9]

The Site in question consists of a series of small undisturbed areas that are approximately one-third acre each and that are connected by haul roads. Harper Aff. ¶ 3. In the past, bluestone was either mined or the site was otherwise left in a condition such that old piles of bluestone exist on the site. NOA, Holbert Response to Interrogatory No. 1 (Holbert's responses to interrogatories are hereinafter cited as "HRI"). Mr. Holbert recounts that he scouted the site in 1997 at the request of the site owners (the Panther Creek Road Gun Club) and that he made an offer to the Club that was accepted in 1997. HRI No. 1. Holbert states that he was "empowered to remove old piles of broken bluestone, construct roads and remove trees as necessary to gain access". HRI No. 1. Mr. Holbert states that, "[t]he [Gun] Club was allowed to terminate our agreement if they were unhappy with any aspect of my operation for instance if I was found to be mining. Only previously mined bluestone was to leave the property." HRI No. 1. In 1998 Mr. Holbert applied to the Township for a permit to remove loose bluestone and the permit was granted. HRI No. 1. He then hired a tree removal company to remove trees from access roads and dump areas on the site. HRI No. 1. From April 1998 to November, 1999 Mr. Holbert states that he had many trees removed, indeed "[h]undreds would not be an unreal estimate." HRI No. 3. The reason the trees were removed was so that Mr. Holbert could gain access to stone. Holbert Response to Request for Admission No. 3 (Holbert's responses to Requests For Admission are hereinafter cited as "HRFA"). As he puts it, "[t]he trees were a nuisance. They

[9] The "record" for purposes of motions for summary judgment, consists of the pleadings, depositions, answers to interrogatories, admissions, affidavits, and certain expert reports, if any. Pa. R.C.P. 1035.1.

grew in the access roads and right up through the old piles of bluestone." HRI No. 4.

Next, he moved an excavator and a material separator to the site and installed culverts. HRI No. 1. In about April, 1998 he started separating old piles of broken bluestone using the material separator. HRI No. 1. Small rocks were used to "firm up" haul roads and larger pieces of rock are "loaded out" and sold by the truckload. HRI No. 1. Mr. Holbert states that he progresses from one old pile to the next, trimming and removing trees, separating rocks, firming up the roads and selling the larger pieces of stone and leaving the smaller pieces unless they are needed for road firming. HRI No. 1. In about June of 1999 his operation changed to the extent that as of that time 99% of the rock separation was done by hand, not by using the mechanical material separator. HRI No. 1. Holbert admits that on or before October 14, 1999 he "removed bluestone from waste piles located on the site". HRFA No. 1.

As alluded to, Mr. Holbert improved existing access roads at the site.[10] He states that placement of access roads at the site were, "naturally from pile to pile to pile to pile". HRI No. 5. The term "pile" of course means pile of old bluestone. Mr. Holbert describes his purpose for improving the access roads at that site as "to gain access to individual piles of bluestone". HRI No. 6.

Mr. Holbert had removed copious amounts of stone from the site at a productive rate. He states that from September 21, 2000 through October 15, 2000, 35 loads were "picked and shipped". From October 18, 2000 to November 11, 2000, 31 loads were "picked and shipped".

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[10] The record shows that Mr. Holbert improved existing access roads as opposed to building new ones. Mr. Holbert states in his response to Interrogatory No. 5 that he built (improved) roads from April, 1998 to October, 1999. Moreover, he carefully qualifies his response to Request For Admission No. 4 which asks Holbert to admit that he built access roads at the site by stating that the "[s]tatement needs to be qualified. Is improving building? Seeing as how picking up is mining according to the DEP. Get back to me". (emphasis in the original).

HRI No. 14. He provides this information in response to an interrogatory which requests him to show how Agent Harper's actions have served to reduce morale of Mr. Holbert's workforce and has resulted in lower productivity. Thus, the comparison to the 19 working day period just before Agent Harper conducted his site inspection which resulted in the October 18th CO where 35 loads were "picked and shipped" to the 19 working day period after Agent Harper conducted his site visit where only 31 loads were "picked and shipped".[11]

In addition, Mr. Holbert's Notice of Appeal provides insight into the relatively modest but, nevertheless measurable, commercial extent of his bluestone operation. He states that the result of the CO will be that "my activities outside my own property will be severely curtailed". NOA. Furthermore, "my business gross will drop, I will have to lay off one or two workers, I will pay less payroll taxes, I will require less health insurance, I will buy less goods and services, neighbors will have less discretionary income to pay taxes or save". NOA.

**Summary Judgment Standard**

Under the Pennsylvania Rules of Civil Procedure, a party may move for summary judgment "after the relevant pleadings are closed, but within such time as not to unreasonably delay trial." Pa. R.C.P. 1035.2. When a motion for summary judgment is timely filed, the Board will assess it and "grant summary judgment only when the record, which is defined as the pleadings, depositions, answers to interrogatories, admissions, affidavits, and certain expert reports, show that there is no genuine issue of material fact in dispute and the moving party is,

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[11] We note the fact that the October 18, 2000 CO orders Mr. Holbert to cease all mining activities immediately. Mr. Holbert's Notice of Appeal states that his wife signed for the certified mail copy of the Order on or about October 20, 1999. DEP Motion, Exhibit D. Nevertheless, Mr. Holbert states that mining activities continued after October 14th and until at least November 11, 1999. Holbert Response to Interrogatory No. 14.

therefore, entitled to judgment as a matter of law." *County of Adams v. DEP*, 687 A.2d 1222, 1224 n. 4. (Pa. Cmwlth. 1997). *See* Pa. R.C.P. 1035.1. In order to reach this standard and prevail on a motion for summary judgment, the movant must meet the burden of setting forth "with adequate particularity the reasons for summary judgment [and, such] reasons must be apparent from the face of the motion." *Barkman v. DEP*, 1993 EHB 738, 745. Further, the Board cannot speculate or supply the legal or factual arguments lacking in the movant's motion. *See id.*, *Gambler v. DEP*, 1997 EHB 751, 754. Rather, when evaluating a motion for summary judgment, the Board must "view the record in a light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." *Pappas v. Asbel*, 724 A.2d 889, 891 (1999); (citing *Pennsylvania State University v. County of Centre*, 615 A.2d 303, 304 (1992)); *see Wayne v. DEP*, 1999 EBH 395, 397; *Bentley v. DEP*, 1999 EBH 447, 449.

**The Scope of What is Before Us For Review on the Merits.**

Before we delve into the legal analysis on the merits of this matter we first discuss briefly what we perceive is before us for review on the merits. This is necessary because DEP's Response to Holbert's Summary Judgment Motion argues that Holbert's "motion" should be summarily denied, without consideration of the merits, because it fails to comply in any respect with the Board's rules regarding summary judgment filings. The Board's Rules require that "[m]otions for summary judgment or partial summary judgment and responses shall conform to Pennsylvania Rules of Civil Procedure 1035.1—1035.5 (relating to motion for summary judgment) except for the provision of the 30-day period in which to file a response." 25 Pa. Code §1021.73(b). There is no question that Holbert's letter does fail in virtually every respect to comport to the rules regarding summary judgment filings. DEP's point is correct and in light

of the facts that Mr. Holbert was twice warned about the pitfalls of proceeding without legal counsel in a legal tribunal, was twice exhorted to obtain counsel but, nevertheless, decided to continue *pro se*, it is also well taken.

It is clear from his filings that while Mr. Holbert, to his credit, is gifted with a high degree of intelligence and rhetorical ability, he is not trained in the law. The Board, as well as our appellate courts, have repeatedly said that a party who proceeds *pro se* in a legal proceeding assumes the risk that their lack of knowledge of the law and legal procedure could be their undoing. *See, e.g., Kilmer v. DEP*, 1999 EHB 846, 852 (*citing Santus v. DER*, 1995 EHB 897, 923; *Taylor v. DER*, 1991 EHB 1926; *Welteroth v. DER*, 1989 EHB 1017); *Lucchino v. DEP*, 1998 EHB 1070, 1081; *Murphy v. DEP*, 1997 EHB 1168 n.1.

Our Superior Court has stated in terms applicable to the situation here that,

> Appellant's difficulties in this matter stem from a misunderstanding of court procedure and, in particular, the duties and responsibilities of a court-appointed Master in Partition. While it is by no means a requirement that persons who appear before the courts of this Commonwealth be skilled in the law, the interpretation of its statutes, rules, and regulations is not arbitrary, and requires practice. By the same token, the court system could not and would not be manageable without some reliance on the acquired expertise of practitioners in its processes as dictated by procedural rules.

*Winpenny v. Winpenny*, 643 A.2d 677, 679 (Pa. Super. 1994). *See also* First Union Mortgage Corp. v. Frempong, 744 A.2d 327, 337-38 (Pa. Super 1999).

In *Green v. Harmony House North 15 Street Housing Association, Inc.*, 684 A.2d 1112 (Pa. Cmwlth. 1996), the Commonwealth Court stated that,

> The fact that Green decided to be her own lawyer does not excuse her from failing to follow the rules of civil and/or appellate procedure. "The right of self-representation is not a license ... not to comply with relevant rules of procedure and substantive law." *Faretta v. California*, 422 U.S. 806, 834 n. 6, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975). Our Supreme Court in *Peters Creek Sanitary Authority v. Welch*, 545 Pa. 309, 681 A.2d 167, 170 (1996) n.5, again enunciated its position as to *pro se* litigants *citing Vann v. Unemployment Compensation*

> *Board of Review*, 508 Pa. 139, 494 A.2d 1081 (1985) (*pro se* litigant must to some extent assume the risk that his lack of legal training will prove his undoing); *Commonwealth v. Abu-Jamal*, 521 Pa. 188, 200, 555 A.2d 846, 852 (1989) (*pro se* litigant "is subject to the same rules of procedure as is a counseled defendant; he has no greater right to be heard than he would have if he were represented [*1115] by an attorney" and finally, *Jones v. Rudenstein*, 401 Pa. Super. 400, 585 A.2d 520, *appeal denied*, 529 Pa. 634, 600 A.2d 954 (1991) (*pro se* litigant not absolved of complying with procedural rules).

*Green*, 684 A.2d at 1114-1115. *See also Means v. Housing Authority of the City of Pittsburgh*, 747 A.2d 1286, 1289 (Pa. Cmwlth. 2000)(lay person who chooses to represent himself in a legal proceeding must assume the risk that his lack of legal expertise and legal training may prove to be his undoing *citing Daly v. Unemployment Compensation Board of Review*, 631 A.2d 720, 722 (Pa. Cmwlth. 1993)).

DEP's point that we should ignore the substance of Mr. Holbert's Summary Judgment motion because it is not compliant with the rules, while technically correct, has become, as a practical matter, of less import in this case for the following reasons. DEP has filed a Motion For Summary Judgment. In our consideration of DEP's Motion we have reviewed in detail the entire record and all filings in the case. This review has necessarily involved our focusing on the substantive merits of both DEP's arguments and counter-arguments and support therefore and Mr. Holbert's arguments and counter-arguments and support therefore as set forth in all filings. In doing so we have considered the record in the light most favorable to Mr. Holbert in considering DEP's Motion and we have considered the record in the light most favorable to DEP in considering Mr. Holbert's request that we enter summary judgment in his favor. In essence, DEP's motion has required that we view the light of the record in its entirety and, just like sunshine being cast on a scene, we cannot segregate or exclude the light illuminating Mr. Holbert's viewpoint from the light illuminating DEP's viewpoint. This complete and reciprocal review of the record has convinced us that, the procedural deficiencies with Mr. Holbert's

request for Summary Judgment aside, Mr. Holbert is not entitled to summary judgment and DEP is.

**Legal Analysis**

The definition of "surface mining" under the Non-coal SMCRA provides as follows:

> The extraction of minerals from the earth, from waste or stockpiles or from pits or from banks by removing the strata or material that overlies or is above or between them or otherwise exposing and retrieving them from the surface, including, but not limited to, strip mining, augur mining, dredging, quarrying and leaching and all surface activity connected with surface or underground mining, including, but not limited to, exploration, site preparation, entry, tunnel, drift, slope, shaft and borehole drilling and construction and activities related thereto; but it does not include those mining operations carried out beneath the surface by means of shafts, tunnels or other underground mine openings. The term does not include any of the following: [5 exemptions are listed].

52 P.S. § 3303. As set forth at length in Mr. Holbert's discovery responses, he "picks" bluestone from old bluestone piles at the site in question. Indeed, the operation is quite extensive having involved at least at one time an excavator and material separator. The activity, as Mr. Holbert himself describes it, constitutes, as the statute sets forth, the "extraction of minerals from the earth, from waste or stockpiles...by removing the strata or material that overlies or is above or between them or otherwise exposing and retrieving them from the surface..." 52 P.S. § 3303. [12]

The essence of Holbert's defense in this appeal is the thesis that his activities do not constitute surface mining under the Non-coal SMCRA because, while he "picks" old rocks from old waste piles, he does not "remove the strata or material that overlies [the rocks]". Holbert

[12] Holbert does not contend in any of his filings that his activities are within any of the 5 exemptions from the definition of surface mining set forth in 52 P.S. § 3303. The definition of the operable term "noncoal surface mining activities" which is the regulatory analog to the term "surface mining" in the statute is the same as the set forth in the statute except for a minor difference in punctuation. See 25 Pa. Code § 77.1.

`Response to Interrogatory No. 9. He explains that "I do not remove any strata or overlying material [.] [e]very pile I touch is just sitting there naked before the world and God". *Id.* In short, Holbert's contention is that since the stone he extracts is not overlaid by soil which has to be removed then this in not "surface mining". We do not agree that the definition of "surface mining" is limited in the manner Holbert urges.

Significantly, the definition provides that "surface mining" includes extraction of minerals from the earth, *from waste or stockpiles*...by removing the strata or material that overlies or is above *or between* them or *otherwise exposing and retrieving them.* (emphasis supplied). Thus, Holbert is correct that "surface mining" involves removing overlying strata from minerals but he is incorrect that this is the only situation which admits surface mining. As the definition makes clear, it includes more. Specifically, the definition specifically covers extraction of minerals from waste or stockpiles by either removing a covering layer of soil <u>or</u> by otherwise exposing and retrieving them from the surface. This precisely fits Holbert's own description of his operation.

Case law demonstrates this point and also demonstrates that Holbert's activity of picking the bluestone falls squarely within the statutory definition of "surface mining". *Ginter Coal Company v. DER*, 1972 EHB 166, *aff'd sub nom*, *Ginter Coal Company v. Environmental Hearing Board*, 306 A.2d 416, 418 (Pa. Cmwlth. 1973) is a case on point. *Ginter* was decided under the Coal SMCRA's definition of "surface mining" which is nearly identical to the definition of "surface mining" under the Non-Coal SMCRA.[13] *Ginter* involved extraction of

[13] The definition of "surface mining" under the Coal SMCRA at the time which the Board dealt with in the *Ginter* case was as follows:

*(footnote continued)*

coal from old waste piles left from prior mining operations. These waste piles contained fine coal which had been discarded as unusable by the prior mine operations but which was being extracted by Ginter. *Id.* at 167-68. Unlike coal that exists beneath the surface of the earth, there was very little soil and no natural overlying strata covering the waste piles. *Id.* at 169. *Ginter* pointed out that the piles being worked on were deposited by prior human activity and there was no overburden being removed by its operation on the waste piles. Thus, since there was no removal of strata or material which overlies or is above or between the coal, its activities were not within the definition of "surface mining". The Board rejected this argument with the following rationale:

> The Act states that it covers the extraction of minerals "from earth or from waste stockpiles." Waste or stockpiles are always artificially placed or deposited. We cannot believe that the Legislature intended the Act not to be applicable because waste or stockpiles were not placed underneath some naturally occurring layers, a highly unlikely event to say the least. Furthermore, we cannot believe that the Legislature intended the Act to be applicable only if, for example, a few inches of top soil had been placed on top of the [waste pile] to permit grass to grow when the environmental effect of removal of the [material] is precisely the same for the total operation of the waste pile project, and we do not believe the Legislature could have or did intend to exclude uncovered waste piles from the Act. The definition of surface mining states that it shall mean "otherwise exposing and

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> [t]he extraction of minerals from the earth or from waste or stockpiles or from pits or banks by removing the strata or material which overlies or is above or between them or otherwise exposing and retrieving them from the surface, including but not limited to strip, drift, and augur mining, dredging, quarrying, and leaching, and activities related thereto, but not including those mining operations carried out beneath the surface by means of shafts, tunnels, or other underground mine openings.

*Ginter*, 1972 EHB at 167 n.1. citing 52 P.S. § 1396.1, Act of May 31, 1945, P.L. 1198, as amended, Act 147 of November 30, 1971. The Coal SMCRA has been amended since the *Ginter* case was decided on several occasions. The term "surface mining" has been changed to read "surface mining activities" but the substance of the definition remains the same. 52 P.S. § 1396.3. There is now a definition of "surface coal mining activities" which tracks the language of the definition of "surface mining activities".

> retrieving them (minerals) from the surface." Of course the initial layer of silt was exposed, but Appellant is constantly exposing more.

*Ginter*, 1972 EHB at 170-71. In addition, the Board stated:

> If Appellant's argument were correct, many minerals which occur naturally on the surface of the earth without any other natural covering would not be within the coverage of the Act, even though minerals are defined as being limestone, sand and gravel, rock and stone, fill, slag, clay, and even earth, all of which may be found on the surface of the earth.

*Id.* at 171. (footnote omitted).[14]

On appeal, the Commonwealth Court affirmed the Board. *Ginter Coal Company v. Environmental Hearing Board*, 306 A.2d 416 (Pa. Cmwlth. 1973). The Commonwealth Court said that:

> our reading of the record in this case together with the legislative definition leads us to conclude that Ginter is extracting minerals from a waste pile by removing the material which is above the surface and thereby exposing the surface, or the remaining portions of the [waste pile], after each shovel removal.

*Id. at* 418. The Commonwealth Court also said in this regard that, "the earth itself need not be

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[14] Along these lines, we have noted and we reject Holbert's further argument that his activities are exempt from regulation because bluestone is not specifically listed in the definition of "noncoal minerals." 25 Pa. Code § 77.1. The regulation provides that a "noncoal mineral" is

> an aggregate or mass of mineral matter, whether or not coherent, that is extracted by surface mining. The term includes, <u>but is not limited to</u>, limestone and dolomite, sand and gravel, rock and stone, earth, fill, slag, iron ore, zinc ore, vermiculite and clay. The term does not include peat, anthracite or bituminous coal or coal refuse, except as provided in section 4 of the act (52 P.S. § 3304).

25 Pa. Code § 77.1 (emphasis added). The list is specifically designated as an "including but not limited to" type. Thus, the absence of a specific reference to bluestone is irrelevant. Also, bluestone is not mentioned in the specific exclusions from the term. Several Board cases involving bluestone mining or operations have never placed into question the premise that

*(footnote continued)*

disturbed or exposed so long as materials are removed from waste or stock piles". *Id.* at 419.[15]

Here there is no question that in this case "materials are [being] removed from waste or stock piles." Holbert so admits. Also, it is clear that minerals are being extracted by a repeated process of removing pieces of bluestone which are at the surface, or top, of the old piles which thereby exposes new pieces of bluestone to the surface after each removal. Holbert's "picking" of bluestone, as he refers to it and as he describes it in his discovery responses and other filings, precisely fits the paradigm of activity which both the Board and the Commonwealth Court

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bluestone is a "noncoal mineral" subject to regulation under the Non-coal SMCRA. *See, e.g.*, *Kilmer v. DER*, 1994 EHB 1799; *Wikoski v. DER*, 1994 EHB 1461.

[15] DEP also directs our attention to *Bedford County Stone and Lime Co., Inc. v. DER*, 1987 EHB 91. Even though *Bedford* involved the Non-coal SMCRA we do not believe that *Bedford* is directly on point to the issue presented here. In *Bedford*, the Board was faced with the question whether the removal of minerals from a waste stockpile created as an offshoot of ongoing mining operations at Appellant's mine site required a mining license. *Id.* at 91-92. The Board, referring to the definition of "surface mining activities" at issue in this case, held that a license was required with respect to the activities relating to the waste stockpiles. *Id.* at 95. The Board's rationale, though, focused on the clause in the definition of "surface mining activities" which brings within its terms "all surface activity connected with surface or underground mining" and not on the part of the definition relating to the parameters of the concept of extraction of mineral material. *Id.* at 93. Because New Bedford's activity with respect to the waste piles, although a side activity from its main mining operation, was "connected with [its existing and operating] surface...mining [operation]", that activity was included within the definition. It was the existence of the ongoing surface mining activities in Bedford which made the "connected" activity relating to the waste piles subject to licensure requirements. The Board itself recognized the distinction as it specifically noted that the *Ginter* case dealt with a different issue. *Id.* at 94. As the *Bedford* Board put it, "the *Ginter* case dealt with extraction of mineral material, while the issue before us in this matter is whether activity associated with removing already extracted material from a mine site falls within the definition of surface mining operation." *Id.* Here we are not dealing with the question presented and answered in *New Bedford* of whether an existing mining operation's gravitational force pulls Holbert's activities with respect to waste piles within the regulation because on the basis that the activity relating to the waste pile is "connected with" the main mining operation. We are dealing with the bare question of whether Holbert's activity with respect to the waste piles, in and of itself, constitutes "surface mining activity" within the meaning of the statute. We have concluded that it does.

described in *Ginter* as being within the ambit of regulation as surface mining. It is of no moment, then, that Holbert does not remove topsoil or overburden to "pick" the bluestone.

Holbert's response to DEP's Motion for Summary Judgment argues that *Ginter* does not apply because "coal waste piles are a potentially hazardous material that can catch fire or pollute waterways [whereas] [l]oose piles of broken blue have no pollution potential." However, the Commonwealth Court specifically stated that its conclusion was based on the "legislative definition" of surface mining. Thus, the Commonwealth Court's decision in *Ginter* was grounded in its reading of the plain language of the Coal SMCRA. The language presented in *Ginter* under the Coal SMCRA is exactly the same in all material respects as the language in the Non-Coal SMCRA at issue here. Thus, we reach the same conclusion about the interpretation of language of the "legislative definition" of surface mining activity in the Non-Coal SMCRA as did the Commonwealth Court in *Ginter* about the "legislative definition" of the same term in the Coal SMCRA.

It is also significant in this regard the Legislature passed the Non-Coal SMCRA in 1984 with the definition of "surface mining" virtually identical to the definition of "surface mining" that the Commonwealth Court interpreted in the *Ginter* case in 1973. As the Board has noted, "[w]hen the [Non-Coal SMCRA] was enacted in 1984, the definitions of "mineral" and "surface mining" basically were copied from [the Coal SMCRA]." *Linde Enterprises, Inc. v. DER*, 1996 EHB 382, 406, *aff'd,* 692 A.2d 645 (Pa. Cmwlth. 1997). Thus, the interpretation of term "surface mining" as enunciated in *Ginter* in the Coal SMCRA context was the law of the Commonwealth for 11 years before the Legislature enacted the Non-Coal SMCRA with the very same definition of "surface mining" to be applied in the context of non-coal minerals. Clearly then, the point Holbert tries to make was not one that the Legislature chose to adopt when it passed the Non-

Coal SMCRA even though it clearly could have and, in light of *Ginter*, would have if it desired to make the distinction that Mr. Holbert urges.

Also, we find that the very premise underlying Mr. Holbert's argument in this regard is contradicted by the Non-Coal SMCRA itself. Inherent in Mr. Holbert's notion is that non-coal minerals pose no pollution threat. However, the Legislature in enacting the Non-Coal SMCRA, explicitly recognized that the aim of the statute was to, among other things, "aid in the prevention of pollution of rivers and streams, to protect and maintain water supply, to protect land, to enhance land use management and planning, to prevent and eliminate hazards to health and safety." 33 P.S. § 3302.

We also note that Holbert admits that he has removed trees that were "right up through the old piles of bluestone". HRI No. 4. Thus, there is record evidence that covering flora was indeed removed from the surface of some waste piles.

Before we conclude, we will address one other matter which we have gleaned from Mr. Holbert's papers. Holbert mentions in his papers that about four years ago, the a DEP employee named John Ermlick visited Mr. Holbert at Holbert's home site in Lackawaxen and told Mr. Holbert that, "Wayne, as long as you are only picking from the old quarry dumps the DEP has no interest in you". Holbert says that is was only later, after Mr. Ermlick has passed away that DEP employee, Mr. Harper, came on the scene and that DEP allegedly changed its position. DEP would have a valid point here that this "evidence" is not properly presented to us for summary judgment analysis from a technical legal point of view and that there is not even any confirmation of the allegation that Mr. Ermlick was a DEP employee or, even if he was, that he had any authority to say anything or do anything in a representational capacity for DEP in this instance. We also note that the Notice of Appeal states that Mr. Ermlick made the statement

when he visited Mr. Holbert's Lackawaxen site and that this visit was about four years ago, or in the 1996 or 1997 time frame. The site at issue here is not Holbert's home site in Lackawaxen but the Panther Creek Gun Club site in Shohola Township, Pike County. Also, the record shows that Holbert's activities on the Gun Club site started in April, 1998. Thus, it is not clear that Mr. Ermlick's statement had anything to do with Mr. Holbert's activities at the Panther Creek site.

In any event, for summary judgment purposes, we will look at this issue in the light most favorable to Mr. Holbert. In essence then, Mr. Holbert is making an argument that on account of Mr. Ermlich's statement, DEP is estopped from enforcing the Non-Coal SMCRA in this case. This argument is unavailing even as so viewed.

Whatever role estoppel may have in other types of proceedings involving the Commonwealth, DEP is not estopped from enforcing the law. This is so even where there has been alleged lax enforcement in the past. In *Harbison Walker Refractories v. DER*, 1996 EHB 116 appellant challenged a DEP reclamation order under the Non-Coal SMCRA in part on the basis of estoppel in that in a prior DEP inspection report regarding the site the DEP inspector had written "yes" in the response space next to the inquiry "[h]as reclamation been completed in conformance with approved restoration plan?" *Id.* at 224. The Board noted in this regard that, "prior lax enforcement by a DER inspector does not prevent DER from subsequently enforcing the statutes, regulations, and permit conditions it is charged with enforcing." *Id. citing Lackawanna Refuse Removal, Inc. v. DER*, 442 A.2d 423, 426 (Pa. Cmwlth 1982); *F.A.W. Associates v. DER*, 1990 EHB 1791, 1796. In the *Lackawanna Refuse* case the Commonwealth Court reviewed the propriety of DER's suspension of a landfill permit issued as a result of DER's investigation which had revealed that the site had accepted hazardous and toxic wastes in violation of its permit. *Lackawanna Refuse*, 442 A.2d at 424. The operator asserted DER was

estopped from taking the action on the basis of its alleged earlier authorization to take the waste or its failing to investigate such conduct in the past. *Id.* at 426. The Commonwealth Court noted that there was no evidence of any such approval but that, in any event, "in enforcing [the environmental laws] DER is exercising a governmental function, so that even had its agents been mistakenly indulgent or lax in enforcing the laws, DER cannot now be prevented from performing its duty of enforcing the statutes." *Id.* F.A.W. Associates v. DER, 1990 EHB 1791, is a case quite similar to this one in the "estoppel defense" context. In *F.A.W.*, DEP issued Compliance Orders to F.A.W. alleging that its activities constituted "surface mining" under the Non-Coal SMCRA. *Id.* at 1791. F.A.W. had been excavating at a site at which it allegedly intended to develop an office park. *Id.* The crux of the matter was whether F.A.W.'s excavation activity at a site thus fell within the exclusion from the definition of "surface mining" applicable to activities that are incidental to building construction. *Id.* 1793-94.[16] F.A.W. argued that DEP should be estopped from reviewing the issue of its compliance with the Non-Coal SMCRA based upon a previous written determination of DER that "the area in question was being developed for commercial use." *Id.* at 1794. After a brief discussion of the elements of estoppel the Board held that:

> More fundamentally, FAW has failed to recognize that an estoppel argument will not prevail when asserted against an agency performing its statutory duties and responsibilities. DER is charged with both the administration and enforcement of the [Non-Coal SMCRA]. Even if its agents had been lax or negligent in their initial review of the FAW parcel, DER cannot be prevented from enforcing the law.

*Id.* at 1795-1796.

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[16] The "construction activity" exemption is outlined at 52 P.S. § 3303 within the definition of "surface mining". Of course that exception has no role in this case.

Based on the foregoing analysis, Mr. Holbert's activity constitutes "surface mining" as a matter of law. Accordingly, as there is no genuine issue of material fact and Holbert is not entitled to entry of judgment in his favor as a matter of law while DEP is entitled to the entry of judgment in its favor as a matter of law, the Board enters the following Order:

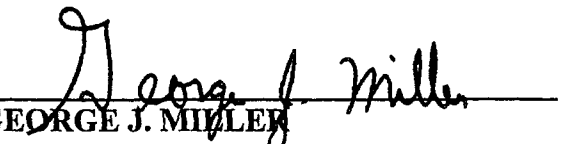
**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

| | | |
|---|---|---|
| **WAYNE D. HOLBERT d/b/a HOLBERT BROS. BLUESTONE CO.** | : | |
| **v.** | : | **EHB Docket No. 99-230-K** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

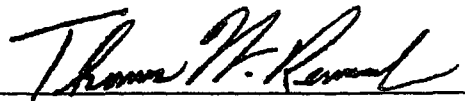
## ORDER

AND NOW, this 15th day of June, 2000, the Motion of Holbert for Summary Judgment is **DENIED** and the Motion of DEP for Summary Judgment is **GRANTED**.

**ENVIRONMENTAL HEARING BOARD**



**GEORGE J. MILLER**
**Administrative Law Judge**
**Chairman**



**THOMAS W. RENWAND**
**Administrative Law Judge**
**Member**

MICHELLE A. COLEMAN
**Administrative Law Judge**
**Member**

BERNARD A. LABUSKES, JR.
**Administrative Law Judge**
**Member**

MICHAEL L. KRANCER
**Administrative Law Judge**
**Member**

**DATED:** **June 15, 2000**

**c:** **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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Southcentral Regional Counsel

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

| | | |
|---|---|---|
| PENNSYLVANIA GAME COMMISSION | : | |
| | : | |
| v. | : | EHB Docket No. 2000-067-R |
| | : | |
| COMMONWEALTH OF PENNSYLVANIA, | : | |
| DEPARTMENT OF ENVIRONMENTAL | : | |
| PROTECTION and CONSOL | : | |
| PENNSYLVANIA COAL COMPANY, | : | |
| Permittee | : | Issued: June 19, 2000 |

## OPINION AND ORDER ON PETITION TO INTERVENE

**By Thomas W. Renwand, Administrative Law Judge**

**Synopsis:**

A government agency is permitted to intervene in another government agency's appeal of the issuance of a revised coal mining permit. The intervenor may introduce evidence and present arguments relating to all of the issues raised in its Petition.

## OPINION

On March 22, 2000, the Pennsylvania Game Commission (Game Commission) filed an appeal of the issuance of revised Coal Mining Activity Permit No. 30841316 (permit) by the Department of Environmental Protection (Department) to Consol Pennsylvania Coal Company (Consol). The permit is for the Bailey Mine, a longwall bituminous coal mine located in Richhill

Township, Greene County. The revision to the permit adds 11,120 acres to the underground permit area and 4,126 acres to the planned subsidence control plan area.

On April 17, 2000, the Pennsylvania Fish and Boat Commission (Fish Commission) filed a Petition to Intervene (Petition). The Department filed an Answer and supporting memorandum pursuant to the Board's rules at 25 Pa. Code § 1021.62 and Consol advised the Board, by letter, that it joined in the Department's Answer and supporting memorandum. The Board granted the Fish Commission's Motion for Leave to File a Reply to the Department's Answer. The Fish Commission filed a Reply and a supporting memorandum on May 12, 2000. By letter, the Game Commission advised the Board that it joined in the Fish Commission's Reply.

The Fish Commission has jurisdiction over the protection, preservation and management of fish and fish habitat in the waters of the Commonwealth. 30 Pa. C.S. §§ 2101, 2102. The Fish Commission seeks intervention in this appeal on the grounds that it has an interest in this matter greater than that of the general public since it is the agency entrusted with protecting and preserving the Commonwealth's fish populations and fish habitat and it participated and commented throughout the Department's review of the application to revise the mining permit. (Petition, ¶¶ 2, 3)

Any interested party may petition the Board to intervene in any pending matter prior to the initial presentation of evidence. *See* 35 P.S. § 7514(e); 25 Pa. Code § 1021.62(a). A party may intervene in a Board proceeding if the party's interests are "substantial, direct, and immediate." *Borough of Glendon v. Department of Environmental Resources*, 603 A.2d 226, 233 (Pa. Cmwlth. 1992). Neither the Department nor the mining company objects to the Fish Commission's intervention in this case and the parties concede that the Fish Commission has

sufficient interest to satisfy the requirements of 25 Pa. Code § 1021.62.[1] (Department Answer, ¶ 2; Department supporting memorandum at 2) The Fish Commission is a sufficiently interested party given its status as a government agency and its participation thus far during the review process; we therefore grant the Petition.

The Department objects to the Fish Commission raising certain concerns that were allegedly not raised and preserved by the Game Commission in its Notice of Appeal. (Department Answer, ¶ 3) The Department argues that the Fish Commission's apparent attempt to expand the scope of the appeal circumvents the requirements that issues which are not raised in a timely notice of appeal are waived and a petitioning intervenor is not permitted to broaden the scope of an appeal. *See* 25 Pa. Code § 1021.52; *Patterson v. DEP*, 1995 EHB 385. In its reply, the Fish Commission points out that the issues raised in its Petition are subsumed within the issues raised and preserved by the Game Commission in the Notice of Appeal. (Reply, ¶ 2)

Contrary to the Department's assertions, the Fish Commission has not attempted to raise issues that were not previously raised and preserved by the Appellant.[2] A notice of appeal need only contain an appellant's objection to a Department action, 25 Pa. Code § 1021.51(e), *Huntingdon Valley Hunt v. DER*, 1993 EHB 1533, n.4, and the objections need only be raised generally. *Croner, Inc. v. Department of Environmental Resources*, 589 A.2d 1183 (Pa. Cmwlth. 1991); *Allegro Oil & Gas, Inc. v. DEP*, 1998 EHB 790. The Department specifically objects to

---

[1] In fact, the Department specifically requests that the Board grant the Fish Commission intervenor status. (Department Answer at 3) Neither the Department nor the mining company raises the issue of whether the Fish Commission is attempting to circumvent the Board's longstanding jurisdictional requirement that third-party appeals must be filed within thirty days from the date of publication of the Department's action in the Pennsylvania Bulletin. *See* 25 Pa. Code 1021.52(a)(2)(i). As a result, we decline to do so *sua sponte*.

[2] The issues which may be raised by an intervenor are not automatically limited by what arguments the appellant has made in its notice of appeal. *See generally Connors v. DEP*, 1999

the Fish Commission's assertion that the permit revision failed to address North Fork Dunkard Fork as a perennial stream. (Department Answer, ¶ 3; Petition, ¶¶ 7, 10) The Game Commission has alleged, as a more general proposition, that it has identified important riparian and wetland habitats throughout the additional permitted area, and despite its expressed concerns with regard to these critical habitats the Department failed to require delineation of them. (Notice of Appeal, ¶¶ 3.4, 3.5) When the Game Commission alleged that the Department failed to require delineation of all riparian habitats, its allegation ostensibly included North Fork Dunkard Fork since all streams have riparian habitats. Furthermore, Exhibits B and D to the Game Commission's Notice of Appeal also support the argument that the appeal raised issues relating to the North Fork Dunkard Fork and its perennial status in that these exhibits specifically refer to the North Fork Dunkard Fork and its perennial status.

The Department also contends that the Fish Commission is attempting to expand the scope of the appeal by raising the failure to address how the operator will minimize adverse impacts on wildlife as required by 25 Pa. Code § 89.65, 89.74 and 89.82. The Game Commission's appeal asserts that the application and permit in question fail to address how the operator will minimize adverse impacts on *wildlife* as required by 25 Pa. Code §§ 89.65, 89.74 and 89.82. (Notice of Appeal, ¶ 3.6) The Fish Commission's Petition focuses on the failure to address how the operator will minimize adverse impacts on *fish* as required by the Department's regulations. (Petition, ¶ 8) Therefore, we will permit the Fish Commission to introduce evidence and present arguments relating to all of its issues in the Petition.

Accordingly, we enter the following:

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EHB 669; *Heidleberg Township v. DEP*, 1999 EHB 791.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **PENNSYLVANIA GAME COMMISSION** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2000-067-R** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOL PENNSYLVANIA COAL COMPANY, Permittee** | : | |

## ORDER

AND NOW, this 19th day of June, 2000, the Pennsylvania Fish and Boat Commission's Petition to Intervene is **granted**. Henceforth, the caption shall read as follows:

| | | |
|---|---|---|
| **PENNSYLVANIA GAME COMMISSION and PENNSYLVANIA FISH AND BOAT COMMISSION, Intervenor** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2000-067-R** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOL PENNSYLVANIA COAL COMPANY, Permittee** | : | |

**EHB Docket No. 2000-067-R**

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Administrative Law Judge**
**Member**

**DATED:** **June 19, 2000**

**c:** **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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|---|---|---|
| **GLOBAL ECO-LOGICAL SERVICES, INC. and ATLANTIC COAST DEMOLITION AND RECYCLING, INC.** | : | |
| **v.** | : | **EHB Docket No. 2000-128-L** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: June 23, 2000** |

## OPINION AND ORDER
## ON PETITION FOR TEMPORARY AND PERMANENT SUPERSEDEAS

**By Bernard A. Labuskes, Jr., Administrative Law Judge**

**Synopsis:**

A petition for temporary and permanent supersedeas is denied where it is clear on the face of the petition that the Petitioners are unlikely to succeed on the merits. The Board is unlikely to be willing to rewrite the terms of an unambiguous consent order and agreement.

## OPINION

The Department of Environmental Protection (the "Department"), Atlantic Coast Demolition & Recycling, Inc. ("Atlantic"), and Global Eco-Logical Services, Inc. ("Global")[1] were previously involved in intense litigation of appeals docketed with the Board at 99-055-L (consolidated with 99-057-L and 99-058-L). The Board granted a petition for supersedeas relating to those appeals in an opinion and order issued on August 4, 1999. *See Global Eco-Logical Services, Inc. v. DEP*, 1999 EHB 649. The order stayed revocation of Atlantic's solid

[1] Global is the parent corporation of Atlantic.

waste permit and forfeiture of its bond, but attached special conditions on Atlantic's operation in order to minimize any potential threat to the environment. The parties ultimately settled the appeals by entering into a Consent Order and Agreement ("CO&A") on February 8, 2000.

Global and Atlantic filed a notice of appeal on June 15, 2000 seeking review of a Department letter dated May 16, 2000. The letter revoked Atlantic's permit and ordered the operations at Atlantic's construction and demolition waste processing and transfer facility (the "facility") to cease. The Department based its revocation of the permit and order to cease operations on Paragraph 4 of the previously mentioned CO&A. In conjunction with the notice of appeal, Global and Atlantic filed the instant petition for temporary and permanent supersedeas, seeking immediate relief from the Department's allegedly overreaching interpretation of the CO&A.

We held a conference call on June 20, 2000, at which the parties argued their respective positions. In response to our questioning, Atlantic was unable to refer to any evidence beyond that set forth in its well drafted petition (including attachments) that it would present regarding its likelihood of success on its CO&A interpretation claim. It indicated that the Department might wish to present evidence, but the Department responded that no such evidence was necessary if the matter was to turn on the contract interpretation issue. Because we agreed to take as a given the substantial harm to Atlantic and the absence of harm to the public, and that the case is likely to turn on the interpretation issue, we saw no point in scheduling an evidentiary hearing. Instead, following the presentations of the parties, we indicated that an order would be issued denying the petition.

Global and Atlantic bear the burden of proof on the petition for supersedeas. *Svonavec, Inc. v. DEP*, 1998 EHB 417, 419; *Kephart Trucking Co. v. DER*, 1993 EHB 314, 317. In order to obtain a supersedeas, Global and Atlantic must sufficiently establish that (1) they are likely to prevail on the merits of their appeal; (2) there is little or no chance of injury to the public or other parties if the supersedeas is granted; and (3) they will suffer irreparable harm if

the supersedeas is not granted. *Svonavec, Inc.*, 1998 EHB at 419-420; Sections 4(d)(1)(i-iii) of the Environmental Hearing Board Act (Act), Act of July 13, 1988, P.L. 530, *as amended*, 35 P.S. §7514(d)(1)(i-iii); 25 Pa. Code §§1021.78(a)(1-3). The Act and the Board's rules of practice and procedure further declare that a supersedeas will not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect. Section 4(d)(2) of the Act, 35 P.S. §7514(d)(2), 25 Pa. Code §1021.78(b).

A supersedeas is an extraordinary remedy which will not be granted absent a clear demonstration of appropriate need. *Oley Township v. DEP*, 1996 EHB 1359, 1361-1362. Where the mandatory prohibition against issuance of a supersedeas does not apply, the Board ordinarily requires that all three statutory criteria be satisfied. *Global Eco-Logical Services, Inc. v. DEP*, 1999 EHB at 651; *Svonavec, Inc.*, 1998 EHB at 420; *Pennsylvania Mines Corporation v. DEP*, 1996 EHB 808, 810; *see also Chambers Development Company, Inc. v. Department of Environmental Resources*, 545 A.2d 404, 407-409 (Pa. Cmwlth. 1988). Although there have been exceptions, in the final analysis, the issuance of a supersedeas is committed to the Board's discretion based upon a balancing of all of the statutory criteria. *Global Eco-Logical Services, Inc.*, 1999 EHB at 651; *Svonavec, Inc.*, 1998 EHB at 420; *see also Pennsylvania PUC v. Process Gas Consumers Group*, 467 A.2d 805, 809 (Pa. 1983).

We have taken it as a given for current purposes that the denial of the supersedeas would cause irreparable financial harm to Atlantic and GES. Without the grant of a supersedeas, Atlantic will be forced to forfeit its permit and cease operations at the facility. We have also assumed (for now) that there would be little or no chance of injury to the public/environment if a supersedeas was issued. Thus, the outcome of the petition hinges solely on whether Atlantic can demonstrate that it is likely to succeed on the merits.

Atlantic's chance of success on the merits must be more than speculative, but it need not establish the claim absolutely. *A&M Composting, Inc. and Solid Waste Services, Inc.*,

*v. DEP*, 1997 EHB 1093, 1098. Rather, the petitioner must set forth a *prima facie* case showing a reasonable probability of success. *Id.* Atlantic has failed to do that here.

Contrary to Atlantic's assertion, the language in Paragraph 4 of the CO&A is not ambiguous. It clearly states in pertinent part as follows:

> 4. **Civil Penalty Asessment.** Atlantic shall pay civil penalties in the amount of $400,000.00 to the Department in settlement of the Department's claim for civil penalties for Atlantic's violations of its Permit conditions and the rules and regulations of the Department at the Facility as specifically set forth in Paragraphs H, J, K, L, N and O above. Said civil penalties shall be payable pursuant to the following schedule:
>
> | | |
> |---|---|
> | March 15, 2000: | $100,000 |
> | May 1, 2000: | $27,500 |
> | August 1, 2000: | $27,500 |
> | November 1, 2000: | $27,500 |
> | February 1, 2001: | $27,500 |
> | May 1, 2001: | $27,500 |
> | August 1, 2001: | $27,500 |
> | November 1, 2001: | $27,500 |
> | February 1, 2002: | $27,500 |
> | May 1, 2002: | $27,500 |
> | August 1, 2002: | $27,500 |
> | October 1, 2002: | $25,000... |
>
> In the event that Atlantic fails to pay said civil penalty payment pursuant to this Paragraph, the Permit shall be deemed revoked by operation of this Consent Order and Agreement. Atlantic shall surrender its Permit to the Department within 2 days of said failure and shall close the facility within 7 days in accordance with Condition 9 of the Permit. In addition, the bond associated with the Permit shall be forfeited to the Department.

It is a fundamental rule of contract law that when the words of a contract are clear, the intent of the parties is to be derived only from the express language of the agreement. *Shovel Transfer & Storage, Inc. v. Pennsylvania Liquor Control Board*, 739 A.2d 133, 139 (Pa. 1999). Thus, in the absence of a legitimate alternative interpretation of Paragraph 4 of the CO&A, we are constrained to accept the unambiguous language of the CO&A as embodying the intention of the parties. As such, we are also precluded from considering extrinsic evidence to determine the intentions of the parties. *See Kelly v. Nationwide Insurance Co.*, 606 A.2d 470, 473 (Pa. Super. 1992) (stating that when the words of a contract are unequivocal, it speaks for

itself and a meaning cannot be given to it other than that expressed, and there is no need to refer to extrinsic aids or evidence to determine the intentions of the parties).

Atlantic's failure to make the required May 1, 2000 civil penalty payment triggered the automatic revocation provision the parties agreed to in Paragraph 4 of the CO&A. Consequently, the Department's issuance of the letter on May 16, 2000, which revoked Atlantic's permit and ordered it to cease operations, was in accordance with the CO&A. Atlantic's contention during the conference call that it needed to miss a "few payments" before the Department could take action cannot be reasonably derived from the language in the CO&A no matter how liberally we construe it. If Atlantic's intention was to have a grace period for making a civil penalty payment, it should have incorporated such a requirement in the CO&A.

Thus, we conclude that Global and Atlantic have failed to sufficiently establish that they are likely to succeed on the merits of the pending appeal. In addition, we currently are not convinced that the other supersedeas criteria, which we have assumed and which admittedly weigh in favor of Global and Atlantic, collectively counterbalance the exceptionally low probability of success on the merits. Although our denial of the petition for temporary and permanent supersedeas produces a harsh result by allowing the Department to close Atlantic for its failure to a make a scheduled civil penalty payment, the clear language of Paragraph 4 of the CO&A embodies what the parties intended the agreement to be after substantial, arms-length negotiations. The Board is not willing to redraft or ignore the consent order and agreement based upon 20-20 hindsight and purely equitable considerations. As indicated during the conference call, we will be receptive to moving this matter forward for full Board resolution on the merits on an expedited basis.

Accordingly, we issue the following order:[2]

---

[2] We have denied the petition of Global and Atlantic based on the standards for a permanent supersedeas. In the absence of the need to schedule a hearing, the request for a temporary supersedeas is rendered moot.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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|---|---|---|
| **GLOBAL ECO-LOGICAL SERVICES, INC. and ATLANTIC COAST DEMOLITION AND RECYCLING, INC.** | : | |
| **v.** | : | **EHB Docket No. 2000-128-L** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

## ORDER

AND NOW, this 23rd day of June, 2000, the Petition for Temporary and Permanent Supersedeas is DENIED.

**ENVIRONMENTAL HEARING BOARD**

**BERNARD A. LABUSKES, JR.**
**Administrative Law Judge**
**Member**

**DATED:** **June 23, 2000**

**c:** **DEP Bureau of Litigation:**
Attention: Brenda Houck, Library

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| **BOROUGH OF EDINBORO and EDINBORO MUNICIPAL AUTHORITY** | : | |
| **v.** | : | **EHB Docket No. 2000-070-L** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued:** June 26, 2000 |

## OPINION AND ORDER ON MOTION TO DISMISS

**By Bernard A. Labuskes, Jr., Administrative Law Judge**

**Synopsis:**

A Department letter that expressly requires a municipality to take three actions is appealable. A second letter that does not withdraw the requirement to take the three actions but attempts to characterize the first letter as nonappealable has no effect on the appealabililty of the first letter.

## OPINION

On March 7, 2000, the Department of Environmental Protection (the "Department") sent a letter to the Borough of Edinboro and the Edinboro Municipal Authority (hereinafter collectively referred to as "Edinboro"). The letter referenced problems with Edinboro's sewerage system and concluded that the system is, at least in part, hydraulically overloaded. The letter continued as follows:

> In accordance with Section 94.21 of the Department's Wastewater Management Regulations, the Department expects the Borough to prohibit new connections in the areas identified and that the 1999 Wasteload Management Report due March 31, 2000 will identify the extent of the

> problems and what steps are planned to correct them.
>
> Furthermore, the Department under Section 71.13 of the Sewage Facilities Planning Regulations is now requiring the full participation by the Borough of Edinboro in the development and submission of a Joint Municipal Official Sewage Plan Update Revision with Washington Township.

Edinboro filed an appeal from the letter on March 27, 2000.

On April 24, 2000, the Department sent a second letter to Edinboro, the substance of which is worth quoting in its entirety:

> This letter is being sent to you in order to clarify the Department's March 7, 2000, letter (hereinafter "Letter") to you. Please be advised that the Department's Letter only intended to inform you of your obligations under Pennsylvania Law.
>
> To the extent that a portion of the Letter can be construed to require anything beyond what Pennsylvania statutes or regulations require, that was not intended and that portion of the Letter is hereby withdrawn.

The Department has moved to dismiss Edinboro's appeal from the March 7 letter, claiming that it is not an appealable action, and, even if it was, that the April 27 letter effectively withdrew any aspect of the March 7 letter which might have been construed as an appealable action. Edinboro has filed a response in opposition to the motion.

We described the basic principles regarding appealable actions in *Felix Dam Preservation Association v. DEP*, EHB Docket No. 2000-009-K (opinion issued April 10, 2000):

> Section 4(a) of the Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511-7514, § 7514(a), provides that the Board has jurisdiction over "orders, permits, licenses, or decisions of the Department." Our jurisdiction attaches over an "adjudication" as defined under the Administrative Agency Law or an "action" as defined under the Board's Rules of Practice and Procedure. Under the Administrative Agency Law an "adjudication" is defined as, "[a]ny final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the

> parties to the proceeding in which the adjudication is made." Administrative Agency Law, Act of April 28, 1978, P.L. 202, as amended, §§ 101-754, 2 Pa. C.S.A. § 101. Under Board Rule 1021.2 an "action" is '[a]n order, decree, decision, determination, or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including but not limited to a permit, a license, approval or certification."
>
> As this Board has said before in analyzing the appealability of DEP actions, we must examine the substance of the DEP's action. *See e.g., Bituminous Processing Co., Inc. v DEP*, Docket No. 99-172-L slip op. at 2 (opinion issued, January 18, 2000)(in determining whether a letter stating DEP's notice of intent to forfeit a bond constitutes an appealable action, the Board will consider the substance of the letter itself) (*citing Central Blair County Sanitary Authority v. DEP*, 1998 EHB 643, 646-47). Thus we approach this question by reviewing the nature of DEP's action in the context of regulatory scheme and the circumstances to determine whether the action is appealable.

Slip op. at 13-14.

A key consideration in determining whether a Departmental letter constitutes an appealable action is whether it requires the recipient to do something that will change the status quo. *Medusa Aggregates Company v. DER*, 1995 EHB 414, 419 (letter stating that mining no longer permitted on previously approved land is tantamount to an order). Here, the letter states that **"the Department expects** the Borough to prohibit new connections (emphasis added)" and that the forthcoming wasteload management report "**will** identify the extent of the problems and what steps are planned to correct them (emphasis added)." The letter goes on to expressly require Edinboro's participation in a certain planning effort. The letter quite clearly imposes new duties and obligations upon Edinboro. Whether the action will eventually be shown to be well supported by and consistent with applicable regulations is irrelevant at this juncture.

The April 24 letter does not withdraw the duties imposed by the March 7 letter. It does not

advise Edinboro that it is no longer required to institute a connection ban, submit a report that describes how overloading will be addressed, or participate in a joint planning effort with Washington Township. It is merely an attempt to **characterize** the earlier letter as a nonappealable action. It is irrelevant.

Accordingly, we issue the following order:

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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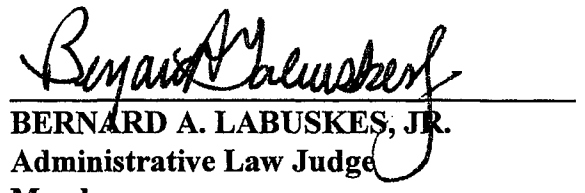
|---|---|---|
| **BOROUGH OF EDINBORO and EDINBORO MUNICIPAL AUTHORITY** | : | |
| **v.** | : | **EHB Docket No. 2000-070-L** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**ORDER**

AND NOW, this 26th day of June, 2000, the Department's motion to dismiss is DENIED.

**ENVIRONMENTAL HEARING BOARD**



**BERNARD A. LABUSKES, JR.**
**Administrative Law Judge**
**Member**

**DATED:** June 26, 2000

**c:** **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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| **ROBERT K. GOETZ, JR.**<br>**d/b/a GOETZ DEMOLITION** | : | **EHB Docket No. 97-226-C**<br>**(Consolidated with 97-147-C,** |
| **v.** | : | **97-224-C, 97-225-C, 98-115-C**<br>**and 98-158-C)** |
| **COMMONWEALTH OF PENNSYLVANIA,**<br>**DEPARTMENT OF ENVIRONMENTAL**<br>**PROTECTION** | : | **Issued:** June 26, 2000 |

## ADJUDICATION

**By Michelle A. Coleman, Administrative Law Judge**

**Synopsis**

An appeal challenging Department inspection reports and compliance orders is dismissed. Inspection reports are ordinarily not appealable actions. However, they are appealable if they require the recipient to take some action in response to them. The Department has the authority under the Noncoal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. §§ 3301-3326 (Noncoal Act), to issue inspection reports and compliance orders directing an individual to cease excavating rock on his property, to reclaim the site, and to allow Department inspectors unimpeded access to the site where the individual is excavating the rock, he lacks a permit and license for noncoal mining, he has not reclaimed the site, and he has interfered with Department personnel seeking to inspect the site. The Department did not authorize his activities at the site by virtue of a letter it sent before the Noncoal Act was issued.

Whether the Department required a warrant to search the site during its previous inspections is irrelevant for purposes of a challenge under the Fourth Amendment of the U.S. Constitution since the exclusionary rule does not require the exclusion of evidence obtained from an unlawful search in civil, administrative proceedings, such as those before the Board.

## INTRODUCTION

This matter was initiated with the October 21, 1997, filing of a notice of appeal by Robert K. Goetz, Jr., (Appellant) challenging a noncoal inspection report the Department of Environmental Protection (Department) issued on September 9, 1997. The report alleged that Appellant violated the Noncoal Act, in Franklin Township, Adams County. Among other things, the notice of appeal asserts that the inspection report is legally insufficient and factually inaccurate.

On December 16, 1997, pursuant to a Department motion, we consolidated Appellant's appeal of the September 9, 1997, noncoal inspection report with three other appeals he had pending before the Board: (1) an appeal challenging a June 6, 1997, noncoal inspection report and a related June 12, 1997, compliance order (docketed at EHB Docket No. 97-147-C); (2) an appeal challenging a September 19, 1997, civil penalty assessment (docketed at EHB Docket No. 97-223-C); (3) an appeal challenging a September 30, 1997, noncoal inspection report (docketed at EHB Docket No. 97-224-C); and, (4) an appeal challenging a September 3, 1997, noncoal inspection report (EHB Docket No. 97-225-C). The Board consolidated all four appeals at the instant docket number, EHB Docket No. 97-226-C. [1]

On May 3, 1999, pursuant to a second Department motion, we consolidated two other appeals Appellant had pending at other Board docket numbers: (1) an appeal challenging a May

[1] The appeal of the September 19, 1997, civil penalty assessment has since been dismissed. *See Goetz v. DEP,* 1999 EHB 65.

26, 1998, noncoal inspection report, and a related June 2, 1998, compliance order (docketed at EHB Docket No. 98-115-C); and (2) an appeal challenging a July 23, 1998, noncoal inspection report, and a related July 23, 1998, compliance order (docketed at EHB Docket No. 98-158-C).

We have issued three previous decisions in this appeal: a February 12, 1999, opinion and order granting a Department motion to dismiss Appellant's challenge to the September 19, 1997, civil penalty assessment; a September 3, 1999, opinion and order denying Appellant's motion for oral argument; and an October 21, 1999, opinion and order denying Appellant's motion for compulsory nonsuit.

Administrative Law Judge Michelle A. Coleman presided over a hearing on the merits on May 18, 19, and 28, 1999; and December 7, 1999. Appellant filed his post-hearing memorandum on February 10, 2000, and the Department filed its post-hearing memorandum on March 10, 2000. Any arguments not raised in post-hearing memoranda are deemed waived. *T.R.A.S.H. v. DER,* 1989 EHB 487.

In his post-hearing memorandum, Appellant argues that he is entitled to prevail in his challenges to the Department's actions because:

> the Department violated the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution by filing civil penalty assessments against him without first providing him with a hearing or other judicial determination;
>
> the Department lacked the authority under the Noncoal Act to issue the inspection reports and compliance orders;
>
> the Department authorized Appellant's activities at the site by virtue of a November 14, 1983, letter it sent to Appellant;
>
> the Department violated the Fourth Amendment of the U.S. Constitution by entering onto his property without a warrant;
>
> the Department violated an agreement it had with Appellant's counsel that it would not use Appellant's deposition testimony to impeach Appellant in the event he took the stand;

In its post-hearing memorandum, the Department argues that we should sustain the actions Appellant appeals because:

> Appellant failed to file appeals to some of the actions he seeks to challenge in his post-hearing memorandum and failed to appeal the Board's dismissal of his appeals to others;
>
> the Department did not violate Appellant's right to due process under the U.S. Constitution by assessing civil penalties against him without first providing him with a hearing;
>
> the inspection reports are not appealable actions;
>
> the Department had the authority under the Noncoal Act to issue the inspection reports and compliance orders;
>
> the Department's November 14, 1983, letter to Appellant does not show that Appellant's activity at the site was authorized because the letter is incomplete, the portion admitted did not authorize Appellant's activity, and the letter was admitted solely for purposes of shedding light on Appellant's state of mind; and,
>
> the Department did not require a warrant to conduct the inspections it did on Appellant's property.

The record consists of the 577-page transcript from the hearing and 29 exhibits. After a full and complete review of the record,[2] 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 authorized to administer and enforce the provisions of the Noncoal Act and the regulations thereunder.

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[2] The Board could not locate one of the Department exhibits it admitted at hearing: Ex. C-28, identified in the Notes of Testimony as a hand-drawn map of Appellant's property. *See* N.T. 200-201.

2. Appellant, Robert K. Goetz, is an individual who resides and operates a business at 649 Bingaman Road (site), Ortanna, Franklin Township, Pennsylvania. (N.T. 64, 394, 405-407.)

3. Appellant started excavating at the site in 1983. (N.T. 422.)

4. In 1983, the Department investigated Appellant's site and met with him concerning his excavation activity. (N.T. 408-409.)

5. Appellant maintains that, in 1983, he planned to construct a 125-foot by 80-foot building on the excavated land, so that he could house his equipment on site. (N.T. 404, 477, 480.)

6. After meeting with the Department, Appellant received a letter addressed to him, dated November 14, 1983, and written on Department of Environmental Resources stationery. (N.T. 409; Ex. A-1.)

7. The copy of the November 14, 1983, letter introduced at hearing was only one page long, and contained no closing or signature or any other indicia of who authored the letter. (Ex. A-1.)

8. The November 14, 1983, letter states, in part:

> This confirms a November 4, 1983, Administrative Conference held with you ... to discuss the August 16, 1983, violations and Cease and Desist Order, as issued at a surface mining site located in Franklin Township, Adams County.
>
> At this meeting it was learned that the removal of material from your land is being done to prepare the site for a[n] 80' by 125' equipment storage building. You indicated that removed material is either transported to other lands owned by you or given free of charge to individuals.
>
> In view of this information and since Inspector Louey could not dispute this information, the Department is immediately rescinding the August 16, 1983, violations and Cease and Desist Order.
>
> If material continues to be removed under the conditions

> described above for purposes of constructing a building, the Department at this time does not view the matter as a surface mining activity. As agreed, please send me a copy of the storage building plan and proposed construction contract.

(Ex. A-1.)

9. Appellant never constructed the building he planned to build in 1983. (N.T. 476.)

10. In 1989, Appellant decided that he would construct a home on the excavated area and construct a storage building 400 feet behind the house. (N.T. 405-407.)

11. Appellant built his house in 1989. (N.T. 422.)

12. Appellant insists that he conducted the excavation at the site to facilitate the construction of a pre-fabricated, metal-frame building that he purchased to store and repair some of his heavy machinery. (N.T. 298, 409-410.)

13. Appellant purchased the pre-fabricated metal building in 1997. (N.T. 409-410.)

14. Appellant proposes to install the pre-fabricated metal building 400 feet behind his house. (N.T. 448.)

15. Appellant blasted to within 40 feet of the back of his house. (N.T. 448.)

16. Appellant did some of the blasting behind his house to create space for parking and a yard. (N.T. 407.)

17. Appellant plans to have the equipment that he would store at the new storage building access the site from Bingaman Road. (N.T. 499-500.)

18. Bingaman Road runs along the west side of Appellant's property. (Ex. A-3.)

19. Appellant plans to place his new building within two feet of the elevation of Bingaman Road. (N.T. 415.)

20. Appellant chose to place his new building within two feet of the elevation of Bingaman Road because he uses a low-boy trailer to haul some of his heavy machinery. (N.T. 415.)

21. A low-boy trailer has a loaded clearance of only six inches. (N.T. 498.)

22. Appellant's low-boy trailer is 50-feet long between the axles. (N.T. 498.)

23. Given its loaded clearance and the length between its axels, Appellant's low-boy trailer cannot operate on a grade that exceeds six inches over 50 feet. (N.T. 498-499.)

24. Given the location he has chosen for the new building, Appellant must remove between 40 and 45 feet of the existing elevation to bring the site for the building within the desired grade, and Appellant plans to do just that. (N.T. 429.)

25. Appellant plans to level the area surrounding the new building so that he can turn the equipment and vehicles around, and park them outside the building. (N.T. 417.)

26. Appellant plans to excavate at least 70 feet below the existing elevation to put in a retention pond to the rear of the proposed building. (N.T. 429; Ex. C-27.)

27. Thomas Flannery is a surface mine conservation inspector supervisor in the Department's Pottsville District Mining Office (N.T. 57)

28. Flannery inspected the site on June 5, 1997; June 6, 1997; July 11, 1997; September 3, 1997; September 9, 1997; September 30, 1997; December 16, 1997; May 26, 1998; and July 23, 1998. (Ex. C-1, C-6, C-9, C-11, C-12, C-14, C-16, and C-19.)

29. When Department personnel arrived at the site on June 5, 1997, and explained that they wanted to inspect it, Appellant demanded a warrant and then struck one of the Department inspectors in the head. (N.T. 69; Ex. C-1, pp. 2-3.)

30. The Department did not have a warrant for the June 5, 1997, inspection. (N.T. 69-71.)

31. The June 6, 1997, inspection report alleges that Appellant was operating a noncoal mining operation on the site, and that he lacked a license and a permit for the activity. (Ex. C-1, pp. 4-5.)

32. The June 6, 1997, inspection report states that Appellant obstructed Department investigators in the course of their official duties. (Ex. C-1, p. 5.)

33. The June 6, 1997, inspection report directed Appellant to "immediately cease all mining and mining related activity and immediately initiate reclamation, [sic] of the area affected by mining and mining related activity.... All reclamation must be completed including a seeding with grasses, to the satisfaction of the Department by 8:00 a.m. by 7/11/97." (Ex. C-1, p. 5.)

34. When Department personnel inspected the site on June 6, 1997, they discovered a large pit cut into the rock underlying the property. (N.T. 72, 74; Ex. C-1, pp. 1, 4; C-2.)

35. On June 6, 1997, unprotected highwalls bordered the pit. (N.T. 72, 74; Ex. C-2.)

36. On June 6, 1997, a front loader and other mining equipment were perched beside the pit. (N.T. 74, Ex. C-2.)

37. On June 6, 1997, the front loader was still running and lay immediately behind a freshly excavated area beside the pit. (N.T. 281-283; Ex. C-1, p.4.)

38. As of June 6, 1997, approximately 1.5 acres of land had been affected by the excavation activity. (N.T. 73; Ex. C-1, p. 1.)

39. The Department had a warrant for the June 6, 1997, inspection. (N.T. 71, 214.)

40. Appellant does not have a permit or license for noncoal surface mining. (N.T. 90-92.)

41. Appellant excavated rock from the site. (N.T. 418-419, 427-428.)

42. Appellant was blasting rock from behind his house as early as 1992. (N.T. 448-449.)

43. Appellant allowed Franklin Township (the township) to remove between 100 and 200 loads of excavated material from the site over the previous 15 years. (N.T. 447.)

44. A "load" consists of approximately 14 cubic yards of material. (N.T. 418.)

45. Appellant allowed Jerry Justus Excavating to remove between 500 and 1,000 loads of excavated material for development associated with Mountainview Ministries. (N.T. 453-454.)

46. Appellant allowed C.E. Williams to remove some of the excavated material from the site in the spring of 1997. (N.T. 453.)

47. Appellant used 30-40 loads of the material for a job he performed for the Township. (N.T. 454.)

48. Appellant used some additional material for some state and federal jobs he had. (N.T. 454.)

49. The June 12, 1997, compliance order arises out of the same allegations identified during the June 6, 1997 inspection. (Ex. C-3, p. 1.)

50. The June 12, 1997, compliance order cites Appellant for mining without a permit, in violation of section 7(a) of the Noncoal Act, 52 P.S. § 3307(a), and 25 Pa. Code § 77.101; mining without a license, in violation of section 5(a) of the Noncoal Act, 52 P.S. § 3305(a), and 25 Pa. Code § 77.51; and obstructing Department investigators in the course of their official

duties, in violation of section 5 of the Clean Streams Law, 35 P.S. § 691.5, sections 14 and 23 of the Noncoal Act, 52 P.S. §§ 3314 and 3323; and 25 Pa. Code § 77.352. (Ex. C-3, pp. 2-3.)

51. The June 12, 1997, compliance order directs Appellant to immediately cease all mining; to initiate backfilling, regrading, and seeding; to have all the reclamation work completed by 8:00 a.m., July 11, 1997; and to allow Department personnel unimpeded access to the site to investigate and inspect for violations of the Noncoal Act. (Ex. C-3, pp. 2-3.)

52. Appellant failed to obtain a supersedeas of the Department's June 12, 1997, compliance order. (N.T. 97.)

53. The Department did not have a warrant for the July 11, 1997, inspection. (N.T. 214.)

54. The September 3, 1997, inspection report states, "All backfilling and regrading and seeding of the affected area should have been completed by 8:00 a.m. 7/11/97.... The operator remains in violation of the original order and ... is to immediately comply to [sic] the reclamation directives of the Department." (Ex. C-9, p. 2.)

55. The September 3, 1997, inspection report alleged that Appellant failed to reclaim and reseed the pit and other affected area as required. (Ex. C-9.)

56. The September 3, 1997, inspection report added, "Only *minimal* backfilling has occurred on the actual pit area. It appears that this backfilling activity had been started within the last few hours." (Ex. C-9, p. 2 (emphasis added).)

57. The September 3, 1997, inspection report directed Appellant "to immediately comply [with] the reclamation directives of the Department." (Ex. C-9, p. 2.)

58. At the time of the September 3, 1997, inspection, the site was still active and an additional 0.5 acres of land had been disturbed by mining activity from the June 6, 1997, inspection. (N.T. 106-108.)

59. Appellant failed to comply with the June 12, 1997, order by the time of the Department's September 3, 1997, inspection. (N.T. 106, 113.)

60. The September 9, 1997, noncoal inspection report contains no language requiring Appellant to undertake specific activity; it simply describes the condition of the site and states which aspects of the site complied with the Department's regulations and its previous orders concerning the site. (Ex. C-11.)

61. The September 30, 1997, inspection report states, "Operator is to immediately backfill to 35° and reseed with ... rye." (Ex. C-12, p. 2.)

62. The September 30, 1997, inspection report alleged that Appellant had still failed to reclaim and reseed the pit and other affected area as required by the June 12, 1997, compliance order, and that "Operator is to immediately backfill to 35° and reseed with ... rye." (Ex. C-12, pp. 1-2.)

63. On September 30, 1997, Appellant had yet to finish backfilling the pit, and regrading and reseeding the site, as required in the June 12, 1997, compliance order. (N.T. 121, 122.)

64. New excavation appeared at the site between the Department's September 30, 1997, inspection and its previous inspection. (N.T. 122.)

65. Appellant had failed to reduce the slope to the rear east highwall to 35 degrees or less by the September 30, 1997, inspection. (N.T. 125.)

66. The first indication of any construction activity Flannery witnessed at the site was not until the December 16, 1997, inspection, when he discovered a building permit posted at the site. (N.T. 125, 152.)

67. Through December 16, 1997, there was no indication of actual construction activity at the site, such as building materials or survey stakes. (N.T. 150-151.)

68. The May 26, 1998, inspection report alleges that Appellant engaged in additional earthmoving activity at the site from the previous inspection; that the newly excavated areas were not included in the June 12, 1997, compliance order; and that the operator failed to grade and reseed the previously affected areas. (Ex. C-16, p. 2.)

69. The May 26, 1998, inspection report states that "the previous orders remain outstanding," and that "operator is to immediately cease all mining and related activity and immediately initiate reclamation, which includes any necessary backfilling and regrading. All backfilling and regrading must be completed by July 1, 1998, to the Department's satisfaction. The newly affected areas must also be reseeded by September 15, 1998." (Ex. C-16, p. 2.)

70. When Department personnel inspected his site on May 26, 1998, they discovered that, since their last inspection, Appellant had excavated an additional 50-foot by 25-foot area northwest of the backfilled pit. (N.T. 168-169, 173; Ex. C-17B.)

71. The June 2, 1998, compliance order arises out of the allegations concerning the newly excavated area identified in the May 26, 1998, inspection report. (Ex. C-16, p. 4.)

72. The June 2, 1998, compliance order cites Appellant for mining without a permit, in violation of section 7 of the Noncoal Act, 52 P.S. § 3307, and 25 Pa. Code § 77.101; and mining without a license, in violation of section 5 of the Noncoal Act, 52 P.S. § 3305, and 25 Pa. Code § 77.51. (Ex. C-16, p. 5.)

73. The June 2, 1998, compliance order also directs Appellant to immediately cease all mining related activity and start reclaiming the area; to complete backfilling and regrading by July 11, 1998; and to reseed the area by September 15, 1998. (Ex. C-16, p. 5.)

74. Appellant did not obtain a supersedeas of the June 2, 1998, compliance order. (N.T. 176, 190.)

75. Appellant failed to cease mining operations and reclaim the site as required by the June 2, 1998, compliance order. (N.T. 176-180, 300; Ex. C-20.)

76. The July 23, 1998, inspection report asserts that—after the May 26, 1998, inspection—an additional 50-foot by 25-foot area was affected on the northwest side of the backfilled pit, and that it appears that Appellant had removed the newly excavated material from the site and was developing a new mining bench that extended the entire distance behind the backfilled pit. (Ex. C-19, p. 2.)

77. The July 23, 1998, compliance order cites Appellant for failing to reclaim the newly affected area identified in the May 26 inspection report, as required by the Department's June 2, 1998, compliance order; and it directs Appellant to immediately cease mining related activity and reclaim the site, and to reseed it by September 15, 1998. (Ex. C-21, p. 2.)

78. The July 23, 1998, inspection report alleges that Appellant failed to comply with the original June 12, 1997, compliance order, or with the June 2, 1998, compliance order requiring that he backfill and regrade the newly affected area identified in the May 26 inspection report. (Ex. C-19, p. 2.)

79. The July 23, 1998, inspection report states, "Operator is to immediately cease all mining and mining related activity and immediately backfill newly affected areas and resod [sic] by 8:00 a.m., Sept[ember] 15, 1998." (Ex. C-19, p. 2.)

80. By July 23, 1998, Appellant had excavated an additional 50-foot by 25-foot area since the last inspection; he was starting a new bench behind the original pit area; and he had removed some of the excavated material from the site. (N.T. 177-180; Ex. C-20.)

81. Appellant affected 3 acres of the site by the Department's July 23, 1998, inspection. (Ex. C-19, p. 1)

82. As of July 23, 1998, Appellant had not excavated within 100 feet of the area where the building permit indicated that the new structure would be located. (N.T. 140, 299; Ex. C-19, p. 3.)

## DISCUSSION

In his post-hearing memorandum, Appellant raises a number of challenges to Department actions that are not properly part of this appeal. For instance, Appellant argues, "Appellant requests this Honorable Board to rule against the [Department]'s assessment of a civil penalty in the amount of $111,000 against the Appellant." (Appellant's post-hearing memorandum, p. 15.) However, Appellant never challenged a civil penalty of $111,000 in these proceedings. The only assessment that Appellant appealed concerning the actions at issue in the instant appeal was the September 18, 1997, assessment of a civil penalty for $56,000.[3] Although that appeal was consolidated with this one for a time, the Board dismissed Appellant's appeal of the September 18, 1997, assessment in a February 12, 1999, opinion and order—after Appellant failed to pre-pay the penalty or post an appeal bond as required by a previous Board order. If Appellant was

[3] The Department asserts in its post-hearing memorandum that it issued Appellant other civil penalty assessments but that Appellant never appealed them. (Department's post-hearing memorandum, p. 25.) This may account for the discrepancy between the figure identified by Appellant and the amount of the September 18, 1997, assessment. Whether the Department issued the other assessments or not, any objections that the Appellant may have to those civil penalties are irrelevant here, because any appeals Appellant may have filed with respect to those civil penalties were not consolidated with the instant appeal.

dissatisfied with that decision, his recourse was to file a petition for reconsideration or appeal to Commonwealth Court. Having failed to do either, he cannot challenge the civil penalty assessments in these proceedings. Therefore, we need not consider Appellant's contention that the Department violated his right to due process by assessing civil penalties against him without providing him with an opportunity to be heard beforehand.

Appellant's post-hearing memorandum also seeks to resuscitate his motion for compulsory nonsuit:

> Appellant requests this Honorable Board to grant Appellant's Motion for Compulsory Nonsuit as a result of [the Department]'s failure to prove the existence of sufficient evidence to maintain this action alleging that the Appellant was in violation of the Noncoal Surface Mining Act. The claims should be dismissed as a result of the [Department]'s failure to prove in their case-in-chief that Appellant has violated the [Noncoal Surface Mining] Act and to further prove that Appellant does not meet any of the exceptions as set forth in the Act.

(Appellant's post-hearing memorandum, p. 15.) However, the Board previously denied Appellant's motion for compulsory nonsuit in an October 21, 1999, opinion and order. *See Goetz v. DEP,* 1999 EHB 856. There, the Board held that the Department had made a *prima facie* case that Appellant engaged in surface mining activity; that the exceptions to the definition of "surface mining" in the Act were affirmative defenses; and that Appellant failed to establish that his conduct fell within one of the exceptions. If Appellant was unhappy with the Board's October 21, 1999, decision, he should have filed a petition for reconsideration or petition to file an interlocutory appeal. He cannot breathe new life into his motion for compulsory nonsuit simply by referring to it in his post-hearing memorandum.

Having delineated the scope of the proceedings, we turn now to the actions that Appellant formally challenged in his notices of appeal:

A. the June 6, 1997, inspection report and related June 12, 1997, compliance order;

B. the September 3, 1997, inspection report;

C. the September 9, 1997, inspection report;

D. the September 30, 1997, inspection report;

E. the May 26, 1998, inspection report and a related June 2, 1998, compliance order; and,

F. the July 23, 1998, inspection report and a related July 23, 1998, compliance order.

The Department argues in its post-hearing memorandum that the Board lacks jurisdiction over Appellant's appeals of the inspection reports because inspection reports are not "actions" under section 1021.2 of the Board's rules, 25 Pa. Code § 1021.2.[4] In support of its position, the Department cites a number of Board cases holding that specific inspection reports were not appealable actions. *See, e.g., Bell Coal Company v. DER,* 1986 EHB 828; *Hapchuk, Inc. v. DER,* 1992 EHB 1134.

While the Board has previously held that inspection reports were not appealable actions in those specific instances where it addressed the issue, the Board has never held that inspection reports *cannot be* appealable actions. Indeed, in a recent appeal challenging inspection reports, the Board held that whether inspection reports were appealable turns on their substance and language—not merely their classification as "inspection reports"—and that the inspection reports involved in that appeal were not appealable actions because their language was "advisory, not imperative." *Malak v. DEP,* 1999 EHB 769, 770.

[4] Section 1021.2 of the Board's rules defines an "action" as "An order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including but not limited to a permit, license, approval or certification."

The language in the inspection reports at issue here varies. The September 9, 1997, noncoal inspection report contains no language requiring Appellant to undertake specific activity. (Ex. C-11.) It simply describes the condition of the Appellant's property at 649 Bingaman Road (site)—where the violations are alleged to have occurred—and states which aspects of the site complied with the Department's regulations and its previous orders concerning the site. (Ex. C-11.)

However, the other inspection reports contain language directing Appellant to take certain actions regarding the site. (For instance, in addition to describing the conditions present at the site, the June 6, 1997, inspection report also contains a mandate: "Operator must immediately cease all mining and mining related activity and immediately initiate reclamation, [sic] of the area affected by mining and mining related activity.... All reclamation must be completed including a seeding with grasses, to the satisfaction of the Department by 8:00 a.m. by 7/11/97." (Ex. C-1, p. 5.)[5]) Since these inspection reports contain mandates, they are commands

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[5] The other inspection reports—apart from the September 9, 1997, inspection report previously discussed—contain similar mandates:

> "All backfilling and regrading and seeding of the affected area should have been completed by 8:00 a.m. 7/11/97.... The operator remains in violation of the original order and ... is to immediately comply to [sic] the reclamation directives of the Department." September 3, 1997, inspection report. (Ex. C-9, p. 2);
>
> "Operator is to immediately backfill to 35° and reseed with ... rye." September 30, 1997, inspection report. (Ex. C-12, p. 2);
>
> "Operator is to immediately cease all mining and mining related activity and immediately initiate reclamation, which includes any necessary backfilling and regrading." May 26, 1998, inspection report. (Ex. C-16, p. 2); and
>
> "Operator is to immediately cease all mining and mining related activity and immediately backfill newly affected areas and resod [sic] by 8:00 a.m., Sept[ember] 15, 1998. July 23, 1998, inspection report. (Ex. C-19, p. 2)

and not simply advisory. Accordingly, they fall within the definition of "actions" under 25 Pa. Code § 1021.2, and we have jurisdiction over Appellant's challenges to them.

The Department has the burden of proof concerning the orders it issued. 25 Pa. Code § 1021.101(b)(4). Since the inspection reports that contain mandates are by their nature orders, the Department also bears the burden of proof with respect to those inspection reports. We shall address the remaining issues that the parties raised in their post-hearing memoranda separately below.

## I. DID THE DEPARTMENT HAVE THE AUTHORITY UNDER THE NONCOAL ACT TO ISSUE THE INSPECTION REPORTS AND COMPLIANCE ORDERS?

### A. The June 6, 1997, Inspection Report and Related June 12, 1997, Compliance Order

The June 6, 1997, inspection report alleges that Appellant was operating a noncoal mining operation on the site, and that he lacked a license and a permit for the activity. (Ex. C-1, pp. 4-5.) The report also states that Appellant obstructed Department investigators in the course of their official duties. (Ex. C-1, p. 5.) Consequently, the report directed Appellant to "immediately cease all mining and mining related activity and immediately initiate reclamation, [sic] of the area affected by mining and mining related activity.... All reclamation must be completed including a seeding with grasses, to the satisfaction of the Department by 8:00 a.m. by 7/11/97." (Ex. C-1, p. 5.)

The June 12, 1997, compliance order arises out of the same allegations identified during the June 6, 1997 inspection. (Ex. C-3, p. 1.) It cites Appellant for mining without a permit, in violation of section 7(a) of the Noncoal Act, 52 P.S. § 3307(a), and 25 Pa. Code § 77.101; mining without a license, in violation of section 5(a) of the Noncoal Act, 52 P.S. § 3305(a), and 25 Pa. Code § 77.51; and obstructing Department investigators in the course of their official

duties, in violation of section 5 of the Clean Streams Law, 35 P.S. § 691.5, sections 14 and 23 of the Noncoal Act, 52 P.S. §§ 3314 and 3323; and 25 Pa. Code § 77.352. (Ex. C-3, pp. 2-3.) The order directed Appellant to immediately cease all mining; to initiate backfilling, regrading, and seeding; to have all the reclamation work completed by 8:00 a.m., July 11, 1997; and to allow Department personnel unimpeded access to the site to investigate and inspect for violations of the Noncoal Act. (Ex. C-3, pp. 2-3.)

1. PROVISIONS REQUIRING APPELLANT TO CEASE ALL MINING AND RECLAIM THE SITE BY JULY 11, 1997

These provisions are appropriate. As set forth below, the Department proved that Appellant engaged in noncoal surface mining without a permit or license, and that he planned to continue the activity. Under the Noncoal Act and the Department's regulations, persons require a permit and license before they can engage in surface mining operations. Therefore, the Department had the authority to order Appellant to cease the activity and reclaim the site under subsections 11(b) and 11(d) of the Noncoal Act, 52 P.S. § 3311(b) and (d).[6]

**a. Mining without a permit or license**

Section 7(a) of the Noncoal Act provides, in pertinent part, "[N]o person shall operate a surface mine ... unless the person has first obtained a permit from the Department in accordance with this act...." Section 77.101 of the Department's regulations contains a similar injunction: "A person may not conduct noncoal mining activities ... without first obtaining a permit."

[6] Subsection (b) of 52 P.S. § 3311 provides, in part, "The Department may issue such orders as are necessary to aid in the enforcement of the provisions of this act. The orders shall include ...orders requiring persons to cease operations immediately." Subsection (d), meanwhile, provides, "Upon the completion of any surface mining operation ... the operator shall remove and clean up all ... materials, property, debris or junk that were used in or resulted from the surface mining operations."

The Noncoal Act and 25 Pa. Code § 77.51(a) contain similar requirements for licenses. Section 5(a) of the Noncoal Act, 52 P.S. § 3305(a), provides, "No person shall conduct a surface mining operation unless the person has first applied for and obtained a license from the Department." Section 77.51(a) of the Department's regulations, meanwhile, provides, "A person who conducts noncoal surface mining as an operator within this Commonwealth shall first obtain a noncoal surface mine operator's license...."

While the precise formulation of the requirements in the Noncoal Act and the regulations varies, one thing is clear from the provisions above: one requires a permit and license to engage in noncoal surface mining. Appellant has neither a permit nor a license. (N.T. 90-92.) Therefore, whether he engaged in the violations alleged turns on whether he engaged in surface mining within the meaning of the Noncoal Act. The Noncoal Act defines "surface mining" as

> The extraction of minerals from the earth ... or from pits or from banks by removing the strata or material that overlies or is above or between them or otherwise exposing and retrieving them from the surface.... The term does not include any of the following:
>
> > (1) The extraction of minerals by a landowner for his own noncommercial use from land owned or leased by him.
> >
> > . . .
> >
> > (5) The extraction, handling, processing or storing of minerals from any building construction excavation on the site of the construction where the minerals removed are incidental to the building construction excavation, regardless of the commercial value of the minerals.

52 P.S. § 3303.

The Department proved that Appellant engaged in activity that falls within the general definition of "surface mining"—the extraction of minerals from the earth or its surface. When Department personnel inspected the site on June 6, 1997, they discovered a large pit cut into the rock underlying the property. (N.T. 72, 74; Ex. C-1, pp. 1, 4; C-2.) Unprotected highwalls

bordered the pit. (N.T. 72, 74; Ex. C-2) A front loader and other mining equipment were perched beside the pit. (N.T. 74, Ex. C-2.) The front loader was still running and lay immediately behind a freshly excavated area beside the pit. (N.T. 281-283; Ex. C-1, p.4.) Altogether, approximately 1.5 acres of land had been affected by the excavation activity. (N.T. 73; Ex. C-1, p. 1.)

Appellant admits that he excavated rock from the site. (N.T. 418-419, 427-428.) He does not defend against the alleged violation by arguing that the Department failed to show that he falls within the general definition of surface mining. Instead, he argues that the Department failed to establish the violation because it failed to prove that his activity fell outside the non-commercial use and building construction exceptions listed in the definition of "surface mining."

We disagree. As we explained at some length in our opinion and order denying Appellant's motion for compulsory nonsuit, the exceptions to the definition of "surface mining" are in the nature of affirmative defenses, and a party—like Appellant—arguing that its conduct falls within one of those exceptions bears the burden of proof on that issue. *See Goetz v. DEP,* 1999 EHB 856, 858-859. Appellant failed to sustain his burden of proving that his activity at the site falls within the non-commercial use or building construction exceptions.

Appellant argues that he falls within the noncommercial use exception because he did not sell any of the rock that he excavated from his property. Yet that is just one of a number of criteria that one must fulfill in order to fall within the noncommercial use exception. The exception provides that the minerals must be extracted by the landowner "for his *own* noncommercial use." 52 P.S. § 3303 (emphasis added). Significantly, Appellant did not use all of the minerals that he extracted from the site for his own use. For instance, he allowed C.E. Williams to remove some of the excavated material from the site in the spring of 1997. (N.T.

453.) He allowed Jerry Justus Excavating to remove between 500 and 1,000 loads of excavated material for development associated with Mountainview Ministries.[7] (N.T. 453-454.) He allowed Franklin Township (the Township) to take between 100 and 200 loads of the material. (N.T. 447.) He used 30-40 loads of the material for a job he performed for the Township. (N.T. 454.) And he used some additional material for some state and federal jobs he had.[8] (N.T. 454.)

Nor did Appellant demonstrate that his activity fell within the building construction exception because it was associated with the construction of a building on site. To fall within this exception, Appellant had to demonstrate that the minerals were removed "incidental" to the construction. 52 P.S. § 3303. According to the definition of "noncoal surface mining activities," at 25 Pa. Code § 77.1,

> the minerals removed are incidental if the excavator demonstrates that:
>
> (A) Extraction, handling, processing or storing are conducted concurrently with construction.[9]
> (B) The area mined is limited to the area necessary to construction.
> (C) The construction is reasonably related to the use proposed for the site.

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[7] Each load consists of approximately 14 cubic yards of material. (N.T. 418.)

[8] In addition to not being for his own use, Appellant's relying on the excavated material to perform jobs for the township, state, and federal governments could conceivably constitute a commercial use of the minerals—even if, as Appellant contends, he did not actually sell the rock itself.

[9] As the Commonwealth Court noted while construing this provision in *Linde Enterprises, Inc. v. Department of Environmental Protection,* 692 A.2d 645 (Pa. Cmwlth. 1997),

> DEP's Program Guidance Manual interprets "concurrent" as follows:
>
> > Concurrent is defined as "running together; acting in conjunction; contemporaneous; or accompanying." The building construction activity should take place as soon after the excavation which is necessary for the construction. On most building construction sites, the pouring of footers and construction of the foundation walls begins very soon after the excavation (usually within a month, unless delayed by weather).

692 A.2d at 650.

Appellant's excavation activity was not "incidental" to the construction because it was not conducted concurrently with the construction of the building, as required by subsection (A). Appellant insists that he conducted the excavation to facilitate the construction of a pre-fabricated, metal-frame building that he purchased to store and repair some of his heavy machinery. (N.T. 298, 409-410.) However, Appellant had been excavating at the site long before he even acquired the structure. He did not purchase the building until May of 1997. (N.T. 409-410.) Yet he allowed the Township to remove between 100 and 200 loads of excavated material from the site over the previous 15 years. (N.T. 447.) Appellant admits that he started excavating at the site in 1983. (N.T. 422) And he was blasting rock from behind his house—at least 360 feet from the building site[10]—as early as 1992. (N.T. 448-449.)

No construction activity occurred at the site until long after the Department's June 6, 1997, inspection. In 1997, Thomas Flannery—a surface mine conservation inspector supervisor in the Department's Pottsville District Mining Office—inspected the site on June 5, June 6, July 11, September 3, September 9, September 30, and December 16. (N.T. 57; Ex. C-1, C-6, C-9, C-11, C-12, C-14.) Yet the first indication of any construction activity at the site was not until the December 16 inspection, when Flannery discovered a building permit posted at the site. (N.T. 125, 152.) Even then, there was no indication of actual construction activity, such as building materials or survey stakes. (N.T. 150-151.)

Appellant also failed to limit the area mined to the amount necessary for the construction of the building, as required by subsection (B) of the incidental use exception to "noncoal surface mining activity" under 25 Pa. Code § 77.1. (N.T. 152, 153, 164, 167.) Appellant had affected

[10] Appellant proposes to construct the building 400 feet behind his house. (N.T. 448.) He blasted to within 40 feet of the back of his house. (N.T. 448.)

1.5 acres of the site by the Department's June 6, 1997, inspection, and 3 acres by its July 23, 1998, inspection. (Ex. C-1, p. 1; C-19, p. 1) Yet, as of July 23, 1998, Appellant had not excavated within 100 feet of the area where the building permit indicated that the new structure would be located. (N.T. 140, 299; Ex. C-19, p. 3.) Moreover, Appellant admitted that he had done some of the blasting behind his house to create space for parking and a yard. (N.T. 407.)

Rather than being required for the actual construction of the new building, much of the excavation is directed at making the building accessible to the equipment and heavy machinery (collectively, equipment) that Appellant plans to store in and around the building. The equipment would enter his property from Bingaman Road, which runs along the west side of Appellant's property. (N.T. 499-500; Ex. A-3). Appellant plans to place his new building within two feet of the elevation of Bingaman Road. (N.T. 415.) He chose that height because he uses a low-boy trailer to haul some of his heavy machinery. (N.T. 415.) Since a low-boy trailer has a loaded clearance of only six inches, and the trailer is 50-feet long between the axles, the low-boy cannot operate on a grade that exceeds six inches over 50 feet. (N.T. 498-499.) Thus, for the new building to be accessible to the low-boy trailer, both the building and entire length of road connecting it to Bingaman Road must fall within this grade.

To accomplish this objective, Appellant has to make drastic changes to the topography on the site. The original topography had grades that were fairly steep. (N.T. 501.) While Appellant has made substantial changes to that topography already, he plans to make still more. Given the location he chose for the new building, Appellant must remove between 40 and 45 feet of the existing elevation to bring the site for the building within the desired grade. (N.T. 429.) Appellant plans to do just that. (N.T. 429.) He also plans to level the area surrounding the new building so that he can turn the equipment and vehicles around, and park them outside the

building. (N.T. 417.) And he plans to excavate at least 70 feet below the existing elevation to put in a retention pond to the rear of the proposed building. (N.T. 429; Ex. C-27.)

Since the Department proved that Appellant extracted minerals from the earth, and Appellant failed to prove that his excavation activity at the site falls within either the noncommercial use or the building construction exceptions to "surface mining activity," as he claimed, the Department has proven that Appellant engaged in surface mining activity without a permit, in violation of section 7(a) of the Noncoal Act, 52 P.S. § 3307(a), and 25 Pa. Code § 77.101; and that he engaged in surface mining activity without a license, in violation of section 5(a) of the Noncoal Act, 52 P.S. § 3305(a), and 25 Pa. Code § 77.51.

**b. Provision requiring Appellant to allow Department personnel unimpeded access to the site**

While the June 6, 1997, inspection report simply directed Appellant to cease operations and reclaim the site, the June 12, 1997, compliance order contained one additional requirement: it directed Appellant to allow Department personnel unimpeded access to the site to investigate and inspect for violations of the Noncoal Act.

This provision of the order was appropriate. As we have explained above, Appellant engaged in surface mining activity on his property. Section 14 of the Noncoal Act, 52 P.S. § 3314, provides that "The department shall have the right to enter and inspect all surface mining operations ... for compliance with the provisions of this act and all rules and regulations promulgated pursuant thereto." Section 23(a) of the Noncoal Act, meanwhile, provides that "It shall be unlawful to ... [h]inder, obstruct, prevent or interfere with the department or its personnel in the performance of any duty hereunder." Significantly, Appellant did interfere with the Department's inspection of his site on June 5, 1997. When Department personnel arrived at the site and explained that they wanted to inspect it, Appellant demanded a warrant and then

struck one of the Department inspectors in the head. (N.T. 69; Ex. C-1, pp. 2-3.) Therefore, the Department was acting well within its authority to order Appellant to desist from any further interference with Department personnel inspecting the site.

**B. The September 3, 1997, Inspection Report**

The September 3, 1997, inspection report alleged that Appellant failed to reclaim and reseed the pit and other affected area as required. (Ex. C-9.) The report added, "Only *minimal* backfilling has occurred on the actual pit area. It appears that this backfilling activity had been started within the last few hours." (Ex. C-9, p. 2 (emphasis added).) Accordingly, the inspection report directed Appellant "to immediately comply [with] the reclamation directives of the Department." (Ex. C-9, p. 2.)

The Department argues that it had the authority to require that Appellant immediately comply with the reclamation directives of the Department because Appellant had violated the Noncoal Act, and he had a preexisting duty to comply with the Department's June 12, 1997, compliance order since he did not obtain a supersedeas of the order. We agree.

Section 4(d)(1) of the Environmental Hearing Board Act provides, "No appeal shall act as an automatic supersedeas." 35 P.S. § 7514(d)(1). Appellant did not obtain a supersedeas of the Department's June 12, 1997, compliance order. (N.T. 97.) Thus, Appellant had a duty to comply with the June 12, 1997, compliance order despite his appeal of the order.

As noted above in our discussion of the June 12, 1997, order, that order directed Appellant to immediately initiate backfilling, regrading, and seeding, and to have all the reclamation work completed by 8:00 a.m. July 11, 1997. (Ex. C-3, pp. 2-3.) Appellant failed to comply with this order. (N.T. 106, 113.) Indeed, at the time of the September 3, 1997,

inspection, the site was still active and an additional 0.5 acres of land had been disturbed by mining activity from the June 6, 1997, inspection. (N.T. 106-108.)

Since Appellant had a duty to complete reclamation of the site by July 11, 1997, (under the June 12, 1997, order) yet he failed to do so, the Department had the authority to order him to immediately comply with the reclamation directives in that order when the Department issued the September 3, 1997, inspection report.

**C. The September 30, 1997, Inspection Report**

The September 30, 1997, inspection report alleged that Appellant had still failed to reclaim and reseed the pit and other affected area as required by the June 12, 1997, compliance order, and that Appellant had failed to backfill the pit so that the slope to the top of the highwall was no more than 35 degrees. (Ex. C-12, pp. 1-2.) Accordingly, the inspection report directed Appellant "to immediately backfill to 35° and reseed with ... rye." (Ex. C-12, p. 2.)

On September 30, 1997, Appellant had yet to finish backfilling the pit, and regrading and reseeding the site, as required in the June 12, 1997, compliance order. (N.T. 121, 122.) In addition, new excavation appeared at the site since the Department's last inspection, and Appellant had failed to reduce the slope to the rear east highwall to 35 degrees or less. (N.T. 122, 125.)

Given the conditions at the site during the September 30, 1997, inspection, together with the June 12, 1997 compliance order, the Department had the authority to require Appellant to immediately backfill the pit until the slope to the highwall was 35° or less, and to direct Appellant to reseed the site. As noted above, the compliance order required that Appellant reclaim, regrade, and revegetate the site by July 11, 1997, to the satisfaction of the Department, and Appellant never sought to supersede that order. While the compliance order never expressly

mentioned the 35° requirement, that requirement was subsumed with the requirement that Appellant reclaim, regrade, and revegetate the site. Section 77.108(c) of the Department's regulations, 25 Pa. Code § 77.108(c), provides that persons who extract noncoal minerals must reseed the site and regrade it so that the slopes are 35° or less:

> The areas affected by the extraction of noncoal minerals shall be graded and restored to a slope not to exceed 35°.... The affected areas will be revegetated to provide a quick germinating, fast-growing, effective and permanent vegetative cover of the same seasonal variety native to the land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area.

### D. The May 26, 1998, Inspection Report and Related June 2, 1998, Compliance Order

The May 26, 1998, inspection report alleges that Appellant engaged in additional earthmoving activity at the site from the previous inspection; that the newly excavated areas were not included in the June 12, 1997, compliance order; and that the operator failed to grade and reseed the previously affected areas. (Ex. C-16, p. 2.) Consequently, the inspection report states that "the previous orders remain outstanding," and that "operator is to immediately cease all mining and related activity and immediately initiate reclamation, which includes any necessary backfilling and regrading. All backfilling and regrading must be completed by July 1, 1998, to the Department's satisfaction. The newly affected areas must also be reseeded by September 15, 1998." (Ex. C-16, p. 2.)

The June 2, 1998, compliance order arises out of the allegations concerning the newly excavated area identified in the May 26, 1998, inspection report. (Ex. C-16, p. 4.) The compliance order cites Appellant for mining without a permit, in violation of section 7 of the Noncoal Act, 52 P.S. § 3307, and 25 Pa. Code § 77.101; and mining without a license, in violation of section 5 of the Noncoal Act, 52 P.S. § 3305, and 25 Pa. Code § 77.51. (Ex. C-16, p.

5.) The compliance order also directs Appellant to immediately cease all mining related activity and start reclaiming the area; to complete backfilling and regrading by July 11, 1998; and to reseed the area by September 15, 1998. (Ex. C-16, p. 5.)

The Department had the authority under the Noncoal Act and its accompanying regulations to direct Appellant to undertake the conduct required by the inspection report and order. As noted earlier in this opinion, the Department had previously ordered Appellant to cease all mining activity at the site and to reclaim affected areas. Yet, when Department personnel inspected his site on May 26, 1998, they discovered that, since his last inspection, Appellant had excavated an additional 50-foot by 25-foot area northwest of the backfilled pit. (N.T. 168-169, 173; Ex. C-17B.)

As noted previously—in our discussion of the June 6, 1997, inspection report and June 12, 1997, compliance order—the extraction of minerals from the earth's surface constitutes "surface mining" under the Noncoal Act; section 7(a) of the Noncoal Act and 25 Pa. Code § 77.101 require that persons have a license to engage in noncoal surface mining; section 5(a) of the Act and 25 Pa. Code § 77.51 require that persons have a permit to engage in noncoal surface mining; and Appellant had neither a license nor permit to mine at the site. Since Appellant's excavation activity in the newly affected area falls within the definition of "surface mining," he would have violated sections 5(a) and 7(a) of the Act, and sections 77.51 and 77.101 of the regulations, unless he could prove that the activity falls within one of the exceptions to the general definition of surface mining. However, despite his claims that his general activity at the site fell within the non-commercial use or building construction exceptions, Appellant failed to elicit any evidence showing that the material excavated from this particular location was either limited to his own noncommercial use or that it was incidental to the construction of the new

structure he plans to erect on site. Therefore, the Department proved that the excavation activity that it discovered on May 26, 1998, violated the Noncoal Act and its accompanying regulations, and the Department had the authority to require Appellant to cease the activity and reclaim the site under subsections 11(b) and 11(d) of the Act, 52 P.S. § 3311(b) and (d).[11]

### E. The July 23, 1998, Inspection Report and Related July 23, 1998, Compliance Order

The July 23, 1998, inspection report alleges that Appellant failed to comply with the original June 12, 1997, compliance order, or with the June 2, 1998, compliance order requiring that he backfill and regrade the newly affected area identified in the May 26 inspection report. (Ex. C-19, p. 2.) In addition, the July 23, 1998, inspection report asserts that—after the May 26, 1998, inspection—an additional 50-foot by 25-foot area was affected on the northwest side of the backfilled pit, and that it appears that Appellant had removed the newly excavated material from the site and was developing a new mining bench that extended the entire distance behind the backfilled pit. (Ex. C-19, p. 2.) Therefore, the July 23, 1998, inspection report directed Appellant to "immediately cease all ... mining related activity and immediately backfill newly affected areas and resod [sic] by 8:00 a.m. Sept[ember] 15, 1998." (Ex. C-19, p. 2.)

The July 23, 1998, compliance order relates to the same allegations identified in the inspection report. It cites Appellant for failing to reclaim the newly affected area identified in the May 26 inspection report, as required by the Department's June 2, 1998, compliance order; and it directs Appellant to immediately cease mining related activity and reclaim the site, and to reseed it by September 15, 1998. (Ex. C-21, p. 2.)

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[11] The relevant portions of subsections (b) and (d) of 52 P.S. § 3311 appear earlier in this opinion, at footnote 6.

The Department had the authority under the Noncoal Act and its accompanying regulations to require Appellant to comply with the June 2, 1998, compliance order. As noted previously in this opinion, section 4(d)(1) of the Environmental Hearing Board Act provides, "No appeal shall act as an automatic supersedeas." 35 P.S. § 7514(d)(1). Appellant did not obtain a supersedeas of the June 2, 1998, compliance order. (N.T. 176, 190.) Therefore, he had a duty to comply with it despite appealing the order. Nevertheless, Appellant failed to cease mining operations and reclaim the site as required by the order. (N.T. 176-180, 300; Ex. C-20.) Under these circumstances, the Department was within its authority to order Appellant to issue a new order directing Appellant to comply with the June 2, 1998, compliance order.

The Department also had the authority to direct Appellant to reclaim and reseed the area affected since the May 26, 1998, inspection. At hearing, the Department elicited testimony supporting the allegations in the inspection report and order: that Appellant excavated an additional 50-foot by 25-foot area since the last inspection; that he was starting a new bench behind the original pit area; and that it appeared that he had removed some of the excavated material from the site. (N.T. 177-180; Ex. C-20.) Like his other excavations at the site, Appellant's earthmoving activity in this area constitutes "surface mining" under the Noncoal Act and the Department's regulations.

Appellant failed to elicit evidence showing that the material excavated from this area was limited to his own noncommercial use, that his activity was incidental to the construction of the new structure he plans to erect on site, or that he falls within one of the other exceptions to the general definition of surface mining in the Noncoal Act. Therefore, the Department proved that the new excavation activity that it discovered during the July 23, 1998, inspection violated the Noncoal Act and its accompanying regulations, and the Department had the authority to require

Appellant to cease the activity and reclaim the site under subsections 11(b) and 11(d) of the Act, 52 P.S. § 3311(b) and (d).

## II. DID THE DEPARTMENT AUTHORIZE APPELLANT'S ACTIVITIES BY VIRTUE OF A NOVEMBER 14, 1983, LETTER SENT TO APPELLANT?

In his post-hearing memorandum, Appellant argues that the Department had authorized his excavation activity at the site by virtue of a November 14, 1983, letter it sent to him. The Department argues that the letter did not authorize Appellant to conduct the excavation activity at the site, that the letter does not show that Appellant's activity was authorized because the letter was incomplete, the portion admitted did not authorize Appellant's activity, and the letter was admitted only for purposes of shedding light on Appellant's state of mind.

The letter at issue was written on Department of Environmental Resources stationery and sent to Appellant. (Ex. A-1.) Although only one page of the letter was introduced at hearing, the letter appears to be a multi-page document, since there is no closing or signature on the exhibit, nor any other indicia of who authored the letter. (Ex. A-1.) The Department objected to the admission of the letter on this basis. (N.T. 570-571.) However, the Board admitted the letter "for the limited purpose of showing Appellant's state of mind." (N.T. 571.)

The letter provides, in pertinent part:

> This confirms a November 4, 1983, Administrative Conference held with you .... to discuss the August 16, 1983, violations and Cease and Desist Order, as issued at a surface mining site located in Franklin Township, Adams County.
>
> At this meeting it was learned that the removal of material from your land is being done to prepare the site for a[n] 80' by 125' equipment storage building. You indicated that removed material is either transported to other lands owned by you or given free of charge to individuals.
>
> In view of this information and since Inspector Louey could not dispute this information, the Department is immediately rescinding the August 16, 1983, violations and Cease and Desist Order.
>
> If material continues to be removed under the conditions described above for purposes of constructing a building, the Department at this time does not view the matter as a surface mining activity. As agreed, please send me a copy of the

storage building plan and proposed construction contract.

(Ex. A-1.)

Based on the evidence admitted at hearing, the facts surrounding the letter are as follows: Appellant began his excavation activity at the site in 1983. (N.T. 422.) During the same year, the Department investigated Appellant's site and met with him concerning his excavation activity. (N.T. 408-409.) Afterwards, he received the November 14, 1983, letter. (N.T. 409.) Appellant maintains that, at the time, he planned to construct a 125-foot by 80-foot building on the excavated land, so that he could house his equipment on site. (N.T. 404, 477, 480.)

However, Appellant never constructed that building. (N.T. 476.) Six years later, in 1989, Appellant decided that he would construct a home on the excavated area and construct a storage building 400 feet behind the house. (N.T. 405-407.) He built the house in 1989. (N.T. 422.) And he was blasting rock from behind his house—at least 360 feet from the proposed site of the new storage building[12]—as early as 1992. (N.T. 448-449.) Yet, as we pointed out in our analysis of whether Appellant fell within the construction exception, the first indication of any construction activity associated with the new building was a building permit posted after September 30, 1997. (N.T. 125, 152.)

There are a number of problems with Appellant's claim that he thought the November 14, 1983, letter authorized his excavation activity at the site. The most obvious concern the deficiencies in the copy of the letter introduced as evidence, which severely limit the weight that we can attribute to the letter, even for the limited purpose of showing Appellant's state of mind. Who wrote the letter? Did he or she have the authority to authorize the activity that Appellant alleges the letter authorized? What sort of qualifications may have appeared on the second page

[12] *See* footnote 10.

of the letter, if there was one? Were there other portions of the letter that ought in fairness to have been considered at the same time?[13] We have no idea, because the only page of the letter that Appellant could produce was the first, and no closing or signature appears on that page.

Even assuming that the letter was authentic and that no additional qualifications appeared on subsequent pages of the letter, Appellant was unreasonable to think that the November 14, 1983, letter authorized all the excavation activity that he subsequently conducted at the site. The author of the letter qualified his opinion on whether Appellant's activity constituted surface mining in several important respects, writing, "If material continues to be removed under the conditions described above *for purposes of constructing a building*, the Department *at this time* does not view the matter as a surface mining activity." (Emphasis added.) As we explained previously in our discussion of Appellant's claim that he fell within the construction exception to "surface mining," much of Appellant's excavation at the site was not incidental to the construction of either his home or the proposed storage building. The fact that the author limited his interpretation with the words "at this time" is also significant. When Appellant received the letter, the Noncoal Act—the act the Department alleges that he violated subsequently—had not even been enacted.[14] Given the time limitation, Appellant was unreasonable to rely on the November 14, 1983, letter for excavation activity that he conducted on the site up to 14 years later.

Furthermore, any misconceptions that Appellant may have harbored concerning whether the Department viewed his activity as "surface mining" should have been resolved in early June

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[13] *See* Pa. R.E. 106: "When a writing ... or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part ... which ought in fairness have been considered contemporaneously with it."

[14] The Noncoal Act was enacted on December 19, 1984—more than a year after the November 14, 1983 letter.

of 1997, when the Department issued him the first inspection report and compliance order, citing Appellant for mining without a permit. Significantly, even after the inspection report and compliance order were issued, Appellant continued to excavate at the site.

## III. DID THE DEPARTMENT VIOLATE THE FOURTH AMENDMENT OF THE U.S. CONSTITUTION BY ENTERING ONTO APPELLANT'S PROPERTY WITHOUT A WARRANT?

As noted previously in this opinion, the Department's allegations that Appellant violated the Noncoal Act arise out of inspections the Department conducted at the site. The Department had a warrant for the June 6, 1997, inspection. (N.T. 71, 214.) However, the Department did not have a warrant for the June 5, 1997, or July 11, 1997, inspections. (N.T. 69-71, 214.) There was no evidence indicating whether the Department had a warrant for the other inspections it conducted at the site.

In his post-hearing memorandum, Appellant argues that the Department violated the Fourth Amendment of the U.S. Constitution because it searched the curtilage of his home without a warrant.[15] The Department argues that it did not require a warrant to search Appellant's site because the search fell within the "open fields" or "plain view" doctrines, and because the search involved a pervasively regulated industry.

Appellant failed to explain how the legality of the Department's searches of his property relates to this proceeding. Presumably, he is arguing that the Board should not consider evidence

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[15] Because Appellant limited his challenge to the search and seizure protections afforded by the U.S. Constitution, we have confined our analysis to whether Appellant is entitled to prevail on his challenge as a matter of Federal law. The outcome would not necessarily have been the same had Appellant raised a similar challenge under Article 1, Section 8 of the Pennsylvania Constitution, since the Pennsylvania Constitution affords greater protections against unreasonable searches and seizures than the U.S. Constitution. *See, e.g., Commonwealth v. Edmunds,* 586 A.2d 887, 897-898 (Pa. 1991) ("Article 1, Section 8 ... may be employed to guard individual privacy rights against unreasonable searches and seizures more zealously than the federal government....").

supporting the Department's allegations if the evidence was derived from an unconstitutional search. However, to the extent that this is Appellant's argument, Appellant is incorrect. The exclusionary rule does not apply to civil, administrative proceedings like this one.

The U.S. Supreme Court recently addressed the issue in *Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357 (1998), where a parolee asserted that the Pennsylvania Board of Probation and Parole (BPP) should have excluded evidence obtained from an illegal search when the BPP decided whether to revoke his parole. The Supreme Court held that the exclusionary rule did not apply, writing:

> The exclusionary rule is ... a judicially created means of deterring illegal searches and seizures. As such, the rule does not "proscribe the introduction of illegally seized evidence in all proceedings or against all persons," but applies only in contexts "where its remedial objectives are thought most efficaciously served." Moreover, because the rule is prudential rather than constitutionally mandated, we have held it to be applicable only where its deterrence benefits outweigh its "substantial social costs."
>
> Recognizing these costs, we have repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials. For example, ... in *United States v. Janis*, [428 U.S. 433, 447 (1976),] we held that the exclusionary rule did not bar the introduction of unconstitutionally obtained evidence in a civil tax proceeding because the costs of excluding relevant and reliable evidence would outweigh the marginal deterrence benefits, which, we noted, would be minimal because the use of the exclusionary rule in criminal trials already deterred illegal searches. Finally, in *INS v. Lopez-Mendoza*, [468 U.S. 1032, 1050 (1984),]we refused to extend the exclusionary rule to civil deportation proceedings, citing the high social costs of allowing an immigrant to remain illegally in this country and noting the incompatibility of the rule with the civil, administrative nature of those proceedings.
>
> As in ... *Janis* and *Lopez-Mendoza*, we are asked to extend the operation of the exclusionary rule beyond the criminal trial context. We again decline to do so. Application of the exclusionary rule would both hinder the functioning of state parole systems and alter the traditionally flexible, administrative nature of parole revocation proceedings. The rule would provide only minimal deterrence benefits in this context, because application of the rule in the criminal trial context already provides significant deterrence of unconstitutional searches. We therefore hold that the federal exclusionary rule does not bar the introduction at parole revocation hearings of evidence seized in violation of parolees' Fourth Amendment rights.

*Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357, 362-364 (1998) (citations omitted).

Based on *Scott*, and the Court's previous decisions analyzed in *Scott*, the exclusionary rule would not preclude us from considering the evidence obtained as a result of the Department's inspections—even assuming the investigations were unlawful because they were done without a warrant. As in *Janis*, the deterrent effect of the exclusionary rule in this setting would be minimal because the use of the exclusionary rule in criminal trials already deters illegal searches regarding alleged violations of the Noncoal Act.[16] Furthermore, as in *Lopez Mendoza* and *Scott*, this is a civil, administrative proceeding. Consequently, whether the Department required a search warrant to conduct the inspections or not, we can consider evidence derived from the inspections.

## IV. DID THE DEPARTMENT VIOLATE AN AGREEMENT IT HAD WITH APPELLANT'S COUNSEL THAT IT WOULD NOT USE APPELLANT'S DEPOSITION TESTIMONY TO IMPEACH APPELLANT IN THE EVENT HE TOOK THE STAND?

Appellant argues in his post-hearing memorandum that the Department agreed during the hearing that, if Appellant testified, the Department would use his deposition only to impeach his testimony. According to Appellant, the Department violated this agreement by relying on Appellant's deposition for other purposes in its response to Appellant's motion for compulsory nonsuit.

Although the Department's post-hearing memorandum did not respond to this argument, we do not find Appellant's argument persuasive. First, the alleged impropriety in the

[16] Section 22(b) of the Noncoal Act, 52 P.S. § 3322(b), referring to criminal penalties, provides, "Any person who violates any provision of this act, any rule or regulation of the department, any order of the department or any condition of any permit issued under the act commits a summary offense...." Thus, each of the alleged violations the Department identified in the inspection reports could conceivably be treated as a summary offense.

Department's response to Appellant's motion for compulsory nonsuit is irrelevant at this point in the proceedings. Appellant raised this issue in its reply concerning the motion for compulsory nonsuit, requesting that we strike references to Appellant's deposition transcript in the Department's response to the motion for compulsory nonsuit. We considered Appellant's argument in our decision on that motion, and explained that we need not decide the issue because the Department was entitled to prevail even if we did not consider the references to Appellant's deposition. *See Goetz v. DEP,* 1999 EHB 856, 860. If Appellant wanted us to revisit the issue, he should have filed a petition reconsideration of that opinion; he cannot resurrect the issue simply by raising it in his post-hearing memorandum.

Second, even assuming the issue were relevant, Appellant would still not prevail on it. He is simply incorrect when he asserts that the Department agreed to limit its use of Appellant's deposition to impeachment if Appellant agreed to testify. Fortunately, the agreement was on the record:

> MR. HAWS: I just asked Mr. Wolfson if he is willing to call Mr. Goetz in this case, then I would intend just simply crossing Mr. Goetz at that time. But I wanted some statement, since he wasn't listed on the pre-hearing memo.
>
> If Mr. Wolfson will give me his assurance that Mr. Goetz is going to testify in this matter, then I will wait for cross examination. Barring that, I would request to call Mr. Goetz as of cross now.
>
> MR. WOLFSON: Your Honor, I think our position is that we will have Mr. Goetz testify....
>
> MR. HAWS: I would be willing to close my case now with the assurance that Mr. Goetz will testify. Now, if anything should happen to Mr. Goetz between now and then, you know—
>
> MR. WOLFSON: You can use his deposition, which is the proper way to use it, I think

MR. HAWS: That is the proper way to use it, if you are looking at [Pa. R.C.P.] 4020, A-3.[17]

(N.T. 357-58, 359.) As is clear from the excerpt above, the Department did not agree to limit its use of Appellant's deposition to impeachment; it simply agreed that it would not call Appellant as a witness in its case-in-chief, provided that it could cross-examine him when his own attorney called him or, if Appellant was unavailable to testify, that it could use his deposition under Pa. R.C.P. 4020(a)(3). The Department never agreed to limit the use of the deposition if Appellant did testify.

## CONCLUSIONS OF LAW

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

2. The Board will not consider challenges to a civil penalty where the Board previously dismissed Appellant's appeal of the civil penalty and Appellant failed to file petition for reconsideration or appeal the decision to Commonwealth Court.

3. The Board will not reconsider a motion for compulsory nonsuit where the Board previously denied the motion, and the movant failed to file a petition for reconsideration or petition to file an interlocutory appeal.

4. Whether an inspection report is an appealable action turns on whether it contains mandates or is simply advisory.

5. The Department bears the burden of proof concerning orders and inspection reports that contain mandates.

6. The Department had the authority under the Noncoal Act to issue the June 6, 1997, inspection report; the June 12, 1997, compliance order; the September 3, 1997, inspection

[17] Pa. R.C.P. 4020(a)(3) provides that the deposition of a witness may be used if the tribunal finds that the witness if unavailable to testify for various reasons.

report; the September 30, 1997, inspection report; the May 20, 1998 inspection report; the June 2, 1998, compliance order; the July 23, 1998, inspection report; and the July 23, 1998, compliance order.

7. The Department did not authorize Appellant's excavation activity at the site by virtue of the November 14, 1983, letter sent to Appellant.

8. The Fourth Amendment of the U.S. Constitution does not require that the Board exclude evidence obtained from an unlawful search in the proceedings before it.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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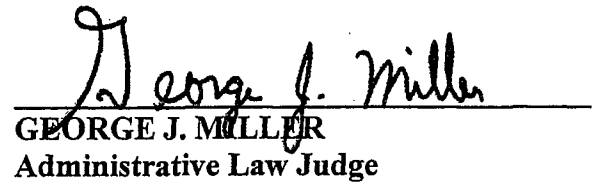
|---|---|---|
| **ROBERT K. GOETZ, JR.**<br>**d/b/a GOETZ DEMOLITION**<br><br>**v.**<br><br>**COMMONWEALTH OF PENNSYLVANIA,**<br>**DEPARTMENT OF ENVIRONMENTAL**<br>**PROTECTION** | :<br>:<br>:<br>:<br>:<br>:<br>:<br>: | **EHB Docket No. 97-226-C**<br>**(Consolidated with 97-147-C,**<br>**97-224-C, 97-225-C, 98-115-C**<br>**and 98-158-C)** |

## ORDER

AND NOW, this 26th day of June, 2000, it is ordered that Appellant's consolidated appeals are dismissed and the following Department actions are sustained: the June 6, 1997, inspection report; the June 12, 1997, compliance order; the September 3, 1997, inspection report; the September 9, 1997, inspection report; the September 30, 1997, inspection report; the May 20, 1998 inspection report; the June 2, 1998, compliance order; the July 23, 1998, inspection report; and the July 23, 1998, compliance order.

**ENVIRONMENTAL HEARING BOARD**



**GEORGE J. MILLER**
**Administrative Law Judge**
**Chairman**

**THOMAS W. RENWAND**
**Administrative Law Judge**
**Member**

**MICHELLE A. COLEMAN**
**Administrative Law Judge**
**Member**

**BERNARD A. LABUSKES, JR.**
**Administrative Law Judge**
**Member**

**MICHAEL L. KRANCER**
**Administrative Law Judge**
**Member**

**DATED:** June 26, 2000

**c:** **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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