

Environmental Hearing Board

Adjudications and Opinions



2009
VOLUME I

COMMONWEALTH OF PENNSYLVANIA
Thomas W. Renwand, Chairman and Chief Judge

**JUDGES
OF THE
ENVIRONMENTAL HEARING BOARD**

2009

Chairman and Chief Judge	Thomas W. Renwand
Judge	George J. Miller (Resigned October 2009)
Judge	Michelle A. Coleman
Judge	Bernard A. Labuskes, Jr.
Judge	Michael L. Krancer
Judge	Richard P. Mather, Sr.
Secretary	William T. Phillipy ^{IV}
Acting Secretary	Maryanne Wesdock, Esquire

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 2009 EHB 1

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 2009.

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 Judges, the jurisdiction of the Board remains unchanged.

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WILLIAM T. PHILLIPY IV
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DENNIS S. SABOT SR.

v.

**COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION**

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EHB Docket No. 2007-158-L

Issued: January 26, 2009

**ADJUDICATION UPON
 RECONSIDERATION**

By Bernard A. Labuskes, Jr., Judge

Synopsis

Upon reconsideration, the Board reissues the portion of its earlier Adjudication and Order as it relates to an appellant’s appeal from a compliance order for violations of the Dam Safety and Encroachments Act. The appellant, among other things, modified an existing seawall and backfilled a small area containing exceptional value wetlands without a permit. The Department ordered the appellant to restore the site. There is nothing unreasonable about the Department’s order.

INTRODUCTION

The Department of Environmental Protection (the “Department”) issued an order to Dennis S. Sabot (“Sabot”) directing him to restore about 0.07 of an acre of wetlands that he had filled on his property on the shore of Canadohta Lake in Bloomfield Township, Crawford County. We docketed Sabot’s appeal from that order at EHB Docket No. 2007-158-L. Thereafter, the Department filed a complaint for civil penalties, which we docketed at EHB Docket No. 2007-255-CP-L. We eventually consolidated the two actions.

We issued an Adjudication and Order in the consolidated matters on September 12, 2008. We upheld the Department's order and assessed a \$10,000 civil penalty in response to the Department's complaint. However, we suspended Sabot's obligation to pay the civil penalty pending his compliance with a schedule set forth in the Board's Order.

The Department filed a petition for reconsideration. Although filed under the consolidated appeals, the Department's petition is aimed exclusively at the portion of our Adjudication and Order that relates to the complaint for civil penalties. (*See* Department's Petition, p. 4.) For the sake of clarity, we *sua sponte* unconsolidated the actions by separate order issued today. This amended Adjudication relates solely to Sabot's appeal from the Department's order filed at EHB Docket No. 2007-158-L. The Department's petition for reconsideration as it relates to the Department's complaint docketed at EHB Docket No. 2007-255-CP-L remains under advisement. A future revised Adjudication and Order regarding the Department's petition for reconsideration of our Order in the complaint case will be issued under that docket number. Our September 12, 2008 Adjudication is withdrawn.

FINDINGS OF FACT

1. The Department is the agency with the duty and authority to administer and enforce the Dam Safety and Encroachments Act, 32 P.S. §§ 693.1-693.27, Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17, and the rules and regulations promulgated pursuant to those statutes. (Complaint Paragraph ("Comp. ¶") 1.)
2. Sabot owns property located on Canadohta Lake in Bloomfield Township, Crawford County (the "Site"). (Comp. ¶¶ 3, 4.)
3. When Sabot purchased the property in 1999, most of the site was composed of

wetlands. (Comp. ¶ 5; Commonwealth Exhibit (“C.Ex.”) 2-A, 2-B, 2-C, 9; Sabot Exhibit (“S.Ex.”) 4, 5; Notes of Transcript page (“T.”) 60-64, 66, 114-16.)

4. In March 2000, Sabot constructed a new seawall off of a pre-existing wall. He used rip-rap rock-type material to build the wall, and he placed driftwood behind it to keep it in place. Sabot did not have a permit for this activity. (Comp. ¶ 6; T. 8, 12, 14; C.Ex. 1, 2.)

5. On April 11, 2000, the Department issued a notice of violation (“NOV”) requesting Sabot to remove the new seawall and restore the Site. (T. 16; C.Ex. 3.)

6. Sabot completed the removal of the expanded seawall and restoration of the Site by Spring 2001. (Comp. ¶ 7; T. 18.)

7. In March 2002, the Crawford County Conservation District issued a general permit to Sabot for a boat dock extending from his property into the lake. (T. 49, 51, 113-13; C.Ex. 7.)

8. On November 22, 2004, the Department responded to a complaint that Sabot was building an addition to the seawall. (T. 40.) The inspection revealed that Sabot had again built up the seawall and again placed fill in the area that was previously restored in 2001. Sabot did not have a permit to perform this work. (Comp. ¶ 8; T. 42, 149, 155; C.Ex. 4-D, 4-F, 4-M, 4-N, 5-A.)

9. On December 9, 2004, the Department issued another NOV to Sabot requesting that he restore the Site. (Comp. ¶ 9; T. 43; C.Ex. 5-B.)

10. The Department inspected the Site again in February 2007 and discovered that Sabot had conducted additional encroachment activity by adding additional stones behind the seawall, and that he had not restored the Site. (Comp. ¶ 11; T. 46-48; C.Ex. 4-D.)

11. The Department returned to the Site on April 2, 2007 and observed additional unpermitted encroachments. (T. 48.) These included a mooring post (I-beam) for Sabot’s boat,

more bricks behind the sea wall, and tires, plastic and a pallet placed under Sabot's dock. (T. 48-49; C.Ex. 4-L, 4-M.)

12. On April 20, 2007, the Department issued its third NOV to Sabot, indicating that he was still encroaching within a wetland without a permit. (Comp. ¶ 12; T. 54; C.Ex. 8-A, 8-B.) The NOV included a suggested restoration plan the Department prepared as a result of the April 2, 2007 inspection. (T. 58.)

13. Sabot did not restore the Site in accordance with the restoration plan. (T. 58.)

14. On May 22, 2007, the Department issued the order that is the subject of this appeal (the "Order") requiring Sabot to restore the Site. (Comp. ¶ 13; T. 58; C.Ex. 9.)

15. The Order required Sabot to cease and desist all filling of the wetlands and construction of water obstructions, submit a site restoration plan (including a revegetation plan), implement the plan upon Departmental approval, and submit a site restoration report and annual monitoring reports until the Site was shown to be successfully revegetated. (T. 59; C.Ex. 9.) As of the date of the hearing, Sabot has not done any restoration work and he has otherwise failed to comply with the Order. (Comp. ¶ 13; T. 59; C.Ex. 4-O, 4-P.)

16. The Site may be substantially restored by removing the unpermitted fill and materials from the Site and revegetating the area with wetland plants. (T. 66-70.)

17. The restoration plans attached to the Department's NOV's are conceptual and suggestive only; Sabot is responsible for submitting his own restoration plan. (T. 43, 58; C.Ex. 9.)

18. It is possible that a restoration plan could be approved that allows continued access to Sabot's dock. (T. 92; C.Ex. 5-A.)

DISCUSSION

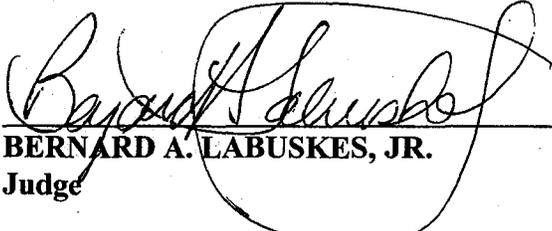
In our Opinion and Order granting the Department's unopposed motion for default judgment, we held that all of the material facts set forth in the complaint for civil penalties were admitted and that Sabot had, based upon those facts, violated the Dam Safety Act. The material facts and the violations of the Dam Safety Act set forth in the complaint include the same material facts and violations that are the basis for the Order. Accordingly, the facts supporting the Order are beyond dispute at this point, and Sabot concedes as much in his post-hearing brief. (Brief pp. 6-10.)

Sabot, however, argues that he retains the ability to contest the *reasonableness* of the Order notwithstanding his default on the facts, and on that point he is entirely correct. In order to prevail in an appeal from an order, the Department bears the burden of proving by a preponderance of the evidence that (1) the facts support the order, (2) the order is authorized by law, and (3) the order constitutes a reasonable exercise of the Department's discretion. *Schaffer v. DEP*, 2006 EHB 1013, 1025; *Rockwood Borough v. DEP*, 2005 EHB 376, 384; *Strubinger v. DEP*, 2003 EHB 247, 252-53. In other words, even if an order is supported by the facts, authorized and otherwise lawful, this Board must still decide whether it embodies a reasonable exercise of discretion.

Here, the Department's Order is entirely reasonable. We fail to see how the Department's action could be considered unreasonable. Sabot complains that the Order necessarily deprives Sabot of all access to his dock, but we do not interpret the Order that way. The so-called restoration plans attached to the Department's NOV's were conceptual and suggestive only. Sabot is responsible for designing his own plan. Walkways and access ramps are not necessarily incompatible with wetlands, and we fail to see why a reasonable accommodation cannot be designed at this Site. We discern nothing unreasonable in the Department's Order.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and subject matter of this appeal. 32 P.S. § 693.24.
2. The modification of the seawall and addition of fill on Sabot's property constitute "water obstructions" as that term is defined in the Dam Safety and Encroachments Act. 32 P.S. § 693.3.
3. No person shall construct, operate, maintain, modify, enlarge or abandon any dam, water obstruction or encroachment without the prior written permit of the Department. 32 P.S. § 693.6.
4. The Department has the authority to issue orders that are necessary to aid in the enforcement of the Dam Safety and Encroachments Act. 32 P.S. § 693.20
5. The Department's May 22, 2007 order was reasonable.



BERNARD A. LABUSKES, JR.
Judge

DATED: January 26, 2009

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WILLIAM T. PHILLIPY IV
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WEST NORRITON TOWNSHIP	:	
	:	
v.	:	EHB Docket No. 2007-101-MG
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NORRISTOWN MUNICIPAL WASTE AUTHORITY, Permittee	:	Issued: February 9, 2009
	:	

**OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT**

By George J. Miller, Judge

Synopsis:

The Board denies a motion for summary judgment filed by the operator of a sewage treatment system prior to the completion of discovery because operator's response to discovery may provide evidence that the claimed sewage overflow did not occur or that the operator's sewage system was responsible in part for the claimed sewage overflow.

BACKGROUND

This appeal is by West Norriton Township (Township) from a Department order directing a sewer ban on connections to a portion of the sewage collection system operated by the Norristown Municipal Waste Authority (NMWA) near Crawford Park. The sewer ban is a result of a surcharging and overflow in the Jackson Street Interceptor that conveys sewage from the Township to the sewage treatment facility operated by NMWA. The order also requires NMWA



to develop sewage facilities necessary to provide required capacities to meet anticipated demands for a reasonable time in the future. According to the Township's notice of appeal, the sewer ban and the failure of NMWA to improve its system will prevent further development in the Township.

Because this apparent surcharge occurred at the point of sewage flow from the Township to NMWA's collection system the Township asked the Board for an Order directing NMWA to enter an appearance in the appeal as a "recipient of the action" pursuant to the Board's Procedural Rules at 25 Pa. Code § 1021.51(j). The Board issued such an order after NMWA failed to respond to the Board's rule to show cause why that relief should not be ordered.¹

NMWA now moves for summary judgment before discovery is closed and without responding to the Township's discovery. The motion is supported by, among other things, the opinion of Joel L. Caves, Ph.D, PE, of the engineering firm of Spotts, Stevens, McCoy. Dr. Caves says that the inflow from the Township was a major contributor to the overflow and that the overflow "probably" would not have occurred without that inflow. This opinion acknowledges that he cannot give an opinion that the inflow from the Township was the sole cause of the overflow.² NMWA's motion also claims that the Township has failed to produce any evidence of fault or wrongdoing of NMWA and that the evidence on record indicates that the sewage overflow incident was directly caused by inflow from the Township.³

The Township's response to the motion contends that there was no such overflow at the Jackson Street Interceptor in the park as claimed by the Department and that NMWA's responses

¹ Order dated July 25, 2007.

² Exhibit B to Motion.

³ Motion, p. 7.

to the Township's discovery requests will "shed important light on this central disputed fact."⁴ In the alternative, the Township claims that it has taken important steps to divert flows to the Jackson Street Interceptor so that no sewage flow will occur there in the future.

OPINION

We conclude that the motion for summary judgment is premature because discovery has not yet been completed. In this situation, the proponent of the motion must establish that there is no issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report.⁵

NMWA's motion clearly does not meet this burden. Instead, it claims that summary judgment must be granted because the Township has produced no proof that the overflow event was caused by NMWA.⁶ To the contrary, the Township, as the party responding to a motion for summary judgment filed prior to the completion of discovery, has no duty to produce such evidence until a properly supported motion for summary judgment is filed after discovery is completed.⁷ Not only has NMWA not responded to the Township's discovery requests, which may produce evidence in support of the Township's claim that the Department's action was unlawful or otherwise inappropriate, but the reports upon which the NMWA bases the contention in its motion are hardly so conclusive that we could appropriately enter judgment in the authority's favor as a matter of law. As the Board has held time and again, even in cases where

⁴ Township Brief in Opposition to Summary Judgment, p.6.

⁵ Rule 1035.2(1) of the Pennsylvania Rules of Civil Procedure provides that any party may move for summary judgment "whenever there is no genuine issue of material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report..."

⁶ NMWA Brief at pp.6-7. This brief has no page numbers which has greatly hampered our review. This reference is derived from counting the number of pages before this statement in the brief.

⁷ See Rule 1035.2(2) of the Pennsylvania Rules of Civil Procedure.

discovery has closed, summary judgment will only be granted in clear cases “when a limited set of material facts are truly undisputed and the appeal presents a clear question of law.”⁸

Accordingly, we enter the following:

⁸ *Citizen Advocates United to Safeguard the Environment, Inc.* 2007 EHB 101, 106. See also *Parks v. DEP*, 2007 EHB 413; *Borough of Ambler v. DEP*, 2007 EHB 364.

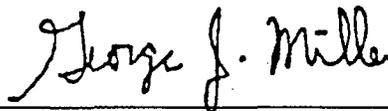
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ENVIRONMENTAL HEARING BOARD

WEST NORRITON TOWNSHIP :
 :
 v. : EHB Docket No. 2007-101-MG
 :
 COMMONWEALTH OF PENNSYLVANIA, :
 DEPARTMENT OF ENVIRONMENTAL :
 PROTECTION and NORRISTOWN :
 MUNICIPAL WASTE AUTHORITY, :
 Permittee :

ORDER

AND NOW, this 9th day of February, the motion of NMWA for summary judgment is hereby **denied**.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Judge

DATED: February 9, 2009

c: Department of Litigation
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WILLIAM T. PHILLIPY IV
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J&D HOLDINGS

v.

**COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION**

:
 :
 : **EHB Docket No. 2008-112-MG**
 :
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 : **Issued: February 11, 2009**
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**OPINION AND ORDER ON
 MOTION FOR SUMMARY JUDGMENT**

By George J. Miller, Judge

Synopsis

The Board grants a motion filed by the Department to dismiss the appeal of a land developer from the Department’s denial of a sewage module for a proposed subdivision. The Appellant failed to file any response and does not evidence an intent to pursue the appeal, therefore the motion is granted in accordance with the Board’s rules of procedure.

OPINION

Before the Board is a motion for summary judgment filed by the Department of Environmental Protection on December 24, 2008. The motion seeks to dismiss the appeal of J&D Holdings (Appellant). The appeal challenges the Department’s denial of a sewage module for the Appellant’s proposed subdivision located in Ross Township, Monroe County. The module proposed four single family residential lots which would utilize on-lot sewage disposal and on-lot drinking water wells. The property, about 18 acres, also includes an existing 36-unit



mobile home park. The Department rejected the sewage module because it found the hydrogeologic report to be inadequate to fully evaluate the impact of the proposed sewage facilities on property. Specifically, the Department concluded that neither the hydrogeologic information submitted with the sewage module, nor the additional hydrogeologic information submitted by the Appellant demonstrated that the drinking water wells would not be adversely impacted by nitrates.

On April 4, 2008, the Appellant filed an appeal, charging that the Department's decision was contrary to 25 Pa. Code § 71.62, because sufficient information had been supplied to the Department at considerable expense to the Appellant. This contention is based upon a claim that at a meeting, the Department told the Appellant specifically what was necessary to supplement the hydrogeologic report and that the requested information had been supplied. Therefore, the Department should be estopped from requiring anything further.

In the motion for summary judgment the Department takes the position that it has the discretion to require further information in order to protect the public health and prevent pollution. The Department further contends that its actions are not only in compliance with the applicable regulations, but are in fact required by the regulations because the studies submitted by the Appellant failed to demonstrate that the drinking water supplies on the property would be protected from nitrate pollution generated by the on-lot sewage facilities. The Appellant has not responded to the Department's motion for summary judgment.

Summary judgment practice before the Board is governed by Rule 1021.94a.¹ That rule requires that a party opposing a motion for summary judgment *shall* file a response within 30 days of the date of service of the motion.² Subsection (h) of the rule specifically provides the

¹ 25 Pa. Code § 1021.94a.

² 25 Pa. Code § 1021.94a(f).

Board with the authority enter judgment against a party who fails to respond to a motion for summary judgment.³ On many occasions the Board has exercised this authority and dismissed appeals or granted judgment when no response has been filed.⁴ The Commonwealth Court has approved this practice and held that the Board has the authority to grant summary judgment where the Appellant has failed to respond, without explanation.⁵

In this case, the Department filed its motion for summary judgment with the Board on December 23, 2008. The certificate of service indicates that the motion was served on the Appellant by both facsimile and first class mail. Accordingly, the Appellant's response was due by January 26, 2009, at the very latest.⁶ To date, we have received neither a response, nor an explanation for the Appellant's failure to respond. Further, the Department's motion is supported, in part, by admissions which were propounded by the Department during discovery to which the Appellant apparently neither objected nor responded to. Accordingly, we must conclude that the Appellant has no desire to pursue this appeal and we will grant the Department's motion and dismiss the Appellant's appeal.

We therefore enter the following:

³ 25 Pa. Code § 1021.94a(h).

⁴ *E.g. Lucas v. DEP*, 2005 EHB 913 (and the cases cited therein).

⁵ *Kochems v. Department of Environmental Protection*, 701 A.2d 281, 283 (Pa. Cmwlth. 1997).

⁶ The Board's rules allow three extra days for documents served by mail. 25 Pa. Code § 1021.35.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

J&D HOLDINGS

v.

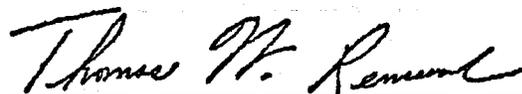
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DEPARTMENT OF ENVIRONMENTAL
PROTECTION

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: EHB Docket No. 2008-112-MG
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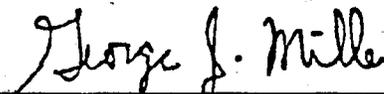
ORDER

AND NOW, this 11th day of February, 2009, the motion for summary judgment filed by the Department of Environmental Protection in the above-captioned matter is hereby **GRANTED** and the appeal of J&D Holdings is **DISMISSED**.

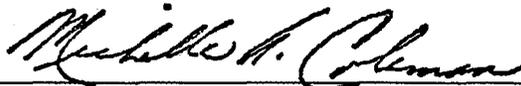
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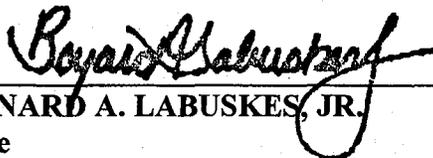
THOMAS W. RENWAND
Acting Chairman and Chief Judge



GEORGE J. MILLER
Judge



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

DATED: February 11, 2009

c: Department of Litigation
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For Appellant:
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informed the Department inspector that he was demolishing a house in Meadville and had taken unsalvageable debris to his property for burning. The Department charged the Burrows with various violations, including operating a municipal waste disposal facility without a permit and transporting waste to the site, in violation of the Solid Waste Management Act and regulations. A notice of violation was issued to the Burrows on February 26, 2008. During a follow up inspection on March 12, 2008, the Department determined that all of the debris had been removed. The civil penalty assessment that is the subject of this appeal was issued on May 20, 2008. It assesses the Burrows in the amount of \$2,000.

In a letter to the Department dated June 12, 2008, the Burrows questioned the amount of the assessment, stating that they had been advised by the Department inspector that it would be in the amount of \$750.

The assessment was sent to the Burrows' residence by certified mail. The Department produced a copy of the return receipt, which was signed by a "Charles Eakin" on May 22, 2008. According to admissions served by the Department on the Burrows, "Mr. Charles Eakin is brother and brother-in-law to Mr. and Mrs. Burrows, and he resides at [the Burrows'] residence/address." (Ex. C to Motion to Dismiss)

The Burrows did not appeal the civil penalty assessment until June 30, 2008. The notice of appeal form states that they received the penalty assessment on June 18, 2008.

The Department has filed a motion to dismiss the Burrows' appeal as being untimely, having been filed more than 30 days after the date of the certified mailing receipt. Pursuant to 25 Pa. Code § 1021.52(a)(1), appeals must be filed with the Environmental Hearing Board within 30 days of receipt of the action being appealed. The Burrows filed no response to the motion, and therefore, we may deem all properly pleaded and supported facts in the motion to be

admitted. 25 Pa. Code § 1021.91(f).

Discussion:

As Judge Coleman held in *Fox v. DEP and Synagro Mid-Atlantic, Inc.*, EHB Docket No. 2007-280-C (Opinion and Order on Motion to Dismiss issued September 17, 2008):

The standard of review for motions to dismiss is well established by the Board. . . .“The Board evaluates motions to dismiss in the light most favorable to the nonmoving party. A motion to dismiss may only be granted where there are *clearly no material factual disputes* and the moving party is entitled to judgment as a matter of law.” *Neville Chemical Co. v. DEP*, 2003 EHB 530, 531 (citations omitted); *see also Cooley v. DEP*, 2004 EHB 554, 558. “As a matter of practice, when a motion to dismiss puts the Board’s jurisdiction at issue the Board has permitted the motion to be determined on undisputed facts outside those stated in the notice of appeal.” *Barra et al. v. DEP*, 2004 EHB 276, 281.

Slip op. at 3 (Emphasis added)

Here, we have a dispute as to when the Burrows received the civil penalty assessment and whether Mr. Eakins was authorized to accept service on their behalf. Based on the standard set forth above, we are unable to grant the Department’s motion.

The Burrows are cautioned, however, that a failure to respond to future pleadings filed by the Department could result in dismissal of their appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RICHARD L. BURROWS and
BETTY LOU BURROWS

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

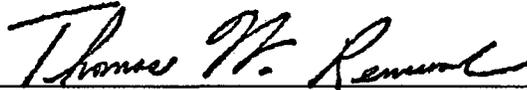
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EHB Docket No. 2008-217-R

ORDER

AND NOW, this 23rd day of February, 2009, the Department of Environmental Protection's Motion to Dismiss is **denied**.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND

Acting Chairman and Chief Judge

DATE: February 23, 2009

c: DEP Bureau of Litigation:
Attention: Brenda K. Morris, Library

For the Commonwealth, DEP:
Stephanie K. Gallogly, Esq.
Northwest Region

For Appellant:
Richard L. and Betty Lou Burrows, *pro se*
829 Milledgeville Road
Hadley, PA 16130



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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

UMCO ENERGY, INC.

v.

COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION and CITIZENS FOR
 PENNSYLVANIA'S FUTURE, Intervenor

:
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 : EHB Docket No. 2004-245-L
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 : Issued: February 23, 2009
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**OPINION AND ORDER ON
PETITION FOR COSTS AND ATTORNEYS' FEES**

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board denies a petition for costs and fees filed pursuant to 27 Pa.C.S. § 7708(c)(1) because the proceeding did not entail the review of an enforcement action. The Department order that was the subject of this appeal modified the operator's permit based not upon a violation or finding of an imminent hazard, but upon new information not previously available to the Department.

OPINION

Background

The Department of Environmental Protection (the "Department") issued a permit to UMCO Energy, Inc. ("UMCO") to operate the High Quality Mine, an underground coal mine utilizing the longwall mining method in Fallowfield Township, Washington County. After

UMCO's mining in its first few panels resulted in a loss of all flow in certain surface waters, the Department modified UMCO's permit by an order dated November 12, 2004. The Department's order was issued pursuant to Sections 5 and 610 of the Clean Streams Law, 35 P.S. §§ 691.5 and 691.610, Section 9 of the Bituminous Mine Subsidence and Land Conservation Act (the "Mine Subsidence Act"), 52 P.S. § 1406.9, and Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17. The Department found that information not previously known to it indicated that longwall mining beneath a small stream known as the 6E Trib would permanently and completely dewater the stream. The Department said that it would not have authorized longwall mining under the stream had it been aware of the perennial nature of the stream and the anticipated effects of longwall mining on the stream. Therefore, the Department ordered as follows:

1. (a) The High Quality Mine Permit, CMAP No. 63921301, is hereby modified to prohibit subsidence beneath the area that was previously designated by UMCO as the projected 6 East Panel, and the 6E Trib. This modification prohibits only underground mining that results in surface subsidence. Any mining methods that will maintain the stability of the surface, and are authorized under the Permit, may be employed UMCO.

- (b) Hereinafter, UMCO shall conduct any underground mining activities in the area previously designated as the projected 6 East Panel in conformance with CMAP No. 63921301 as modified by this Order.

2. On or before, November 30, 2004 UMCO shall submit to the Department's California District Mining Office a "Six Month Map(s)," that reflects the modification the underground mining activities authorized by the High Quality Mine Permit that are described in Paragraph 1, above. ...

3. UMCO shall suspend all underground mining activities in the area of the High Quality Mine that was previously designated by UMCO as the projected 6 East Panel, until the Department accepts the new "Six-Month" Map(s) for this area, submitted pursuant to Paragraph 2, above.

UMCO appealed the order. Citizens for Pennsylvania's Future ("PennFuture") intervened on the side of the Department. After a supersedeas hearing and two hearings on the merits, we rejected UMCO's appeal. *UMCO Energy, Inc. v. DEP*, 2006 EHB 489 and 2007 EHB 215. The Commonwealth Court affirmed, *UMCO Energy, Inc. v. DEP*, 938 A.2d 530 (Pa.Cmwlt. 2007)(*en banc*), the Pennsylvania Supreme Court disallowed an appeal, 938 A.2d 530 (Pa. 2008), and the U.S. Supreme Court denied certiorari, 129 S.Ct. 640 (2008).

Meanwhile, PennFuture on April 18, 2007 filed a petition for an award of attorneys' fees and costs from UMCO pursuant to 27 Pa.C.S. § 7708(c)(1).¹ We asked the parties to brief two issues when we received the petition. First, we asked whether the Board should proceed immediately to address the petition despite the appeal to Commonwealth Court that was pending at the time. Secondly, we asked the parties to brief whether this appeal satisfies the requirement in Section 7708(c)(1)(i) that the appeal must be a "proceeding reviewing enforcement actions upon a finding that a violation of a Commonwealth coal mining act, regulation or permit has occurred or that an imminent hazard existed." 27 Pa.C.S. § 7708(c)(1)(i). All parties agreed that we should hold off ruling on the petition in light of the pending appeal to Commonwealth Court. We issued an order stating: "[T]he Board will refrain from ruling on PennFuture's petition until after all appeals from the Board's Adjudication are resolved. PennFuture's petition will be put on inactive status and the Board will take no action unless and until PennFuture or any other party advises the Board that the petition is ripe for resolution."

PennFuture filed a supplemental petition on December 15, 2008 advising us that all appeals had been exhausted and the petition was ready for review. Given the fact that we never

¹ PennFuture does not seek fees pursuant to the Clean Streams Law, any statute other than 27 Pa.C.S. § 7708, or any section of Section 7708 other than Subsection (c)(1). No party has questioned the applicability of Section 7708 to an appeal involving the surface impacts of deep mining.

addressed the previously briefed issue regarding the applicability of Section 7708(c)(1)(i), and the fact that almost two years had gone by since PennFuture filed its original petition, we gave the parties an option to submit an updated brief on the potentially dispositive issue. The parties have now submitted their updated briefs. We conclude that Section 7708 does not authorize an award of fees from UMCO to PennFuture.

Discussion

As previously noted, PennFuture's fee petition is based solely on 27 Pa.C.S. § 7708(c)(1).

That provision reads as follows:

(c) **Recipients of awards.**—Appropriate costs and fees incurred for a proceeding concerning coal mining activities may be awarded:

(1) To any party from the permittee if:

(i) The party initiates or participates in any proceeding reviewing enforcement actions upon a finding that a violation of a Commonwealth coal mining act, regulation or permit has occurred or that an imminent hazard existed.

(ii) The Environmental Hearing Board determines that the party made a substantial contribution to the full and fair determination of the issues.

except that the contribution of a party who did not initiate a proceeding shall be separate and distinct from the contribution made by a party initiating the proceeding.

27 Pa.Code § 7708(c)(1). Although the statute was effective on December 20, 2000, this appears to be a case of first impression.

When it comes to attorneys' fees under the coal mining statutes, Pennsylvania courts have traditionally divided Departmental actions into "enforcement actions" and "permitting actions." *DEP v. Bethenergy Mines*, 758 A.2d 1168 (Pa. 2000); *McDonald Land & Mining Company v. DER*, 664 A.2d 194 (Pa. Cmwlth. 1995). *Bethenergy* involved a statutory provision

that authorized fee awards in permitting actions, Section 5(g) of the Mine Subsidence Act, 52 P.S. § 1406.5(g). DEP issued a compliance order in that case. The order specifically found that Bethenergy had violated Section 5(e) of the Act, 52 P.S. § 1406.5(e), by failing to minimize changes to the prevailing hydrologic balance in two watersheds. It cited Bethenergy for violating the law by failing to maintain a stream's uses and failing to implement corrective measures. DEP also found that Bethenergy's actions violated the Clean Streams Law. The compliance order directed Bethenergy to, among other things, limit its mining activities beneath the watersheds, submit a plan for restoring the impacted stream, and establish a monitoring program for all watersheds.

This Board sustained Bethenergy's appeal from the compliance order. Bethenergy then petitioned for an award of fees to be paid by DEP. We recognized that the compliance order under appeal was an enforcement action, but we nevertheless awarded fees because DEP specifically referenced the Act's permitting section in the order. The Commonwealth Court affirmed but the Supreme Court reversed. The Court held that we had elevated form over substance by relying on DEP's citation to the permitting section of the Act in the compliance order. 758 A.2d at 1174. It held that the compliance order was "clearly an enforcement action unrelated to the permit and bonding proceedings." *Id.* Therefore, the statutory provision authorizing fees in permitting actions did not permit us to award fees in what was clearly an enforcement action.

The Commonwealth Court in *McDonald Land & Mining* also drew a critical distinction between enforcement actions and permitting/bonding actions. As in *Bethenergy*, the statutory provision at issue in *McDonald*, Section 4(b) of the Surface Mining Conservation and Reclamation Act, ("SMCRA"), 52 P.S. § 1396.4(b), authorized fees only in permitting and

bonding actions, not enforcement actions. The Department in *McDonald* issued compliance orders to operators directing them to treat off-site discharges. After the operators won their appeals, they sought an award of fees. We held that the compliance orders were enforcement actions, not permitting actions, and denied the petition for fees. The Commonwealth Court affirmed. The Court held that the compliance orders were enforcement proceedings and no fees were available under Section 4(b) of SMCRA. *McDonald*, 664 A.2d at 197-98.

In direct contrast to *Bethenergy* and *McDonald Land & Mining*, the case now before us turns on a statute that only authorizes fees in “enforcement actions.” However, the distinction between permitting and enforcement remains. Therefore, fees under Section 7708(c)(1) are not available in permitting actions. The challenge presented in this case is that the Department’s November 12, 2004 permit modification order has elements of both an enforcement action and a permitting action.

The fact that the action is titled an “order” certainly gives it the superficial appearance of an enforcement action. More substantively, the order cites the “enforcement order” provisions of the Clean Streams Law, 35 P.S. § 691.610, and the Mine Subsidence Act, 35 P.S. § 1406.9. The order also directs UMCO to submit a new six-month map and suspend mining in Panel 6E until the Department approved that map.

However, as PennFuture correctly points out, the lesson of *Bethenergy* is that the touchstone for determining whether the Department has taken an enforcement or a permitting action is the *nature* of the action. In the Court’s words, we must be careful not to elevate form over substance, as we mistakenly did in *Bethenergy*. 758 A.2d at 1174. When we look to the true nature and substance of the Department’s November 12 action, we are left with unmistakable conclusion that it is best characterized as a permitting action, not an enforcement

action.

First, although the document is entitled an “order,” its caption reads “Modification to Permit.” This is to be contrasted with, for example, the Department’s May 20, 2004 order to UMCO regarding nearby streams captioned “Stream Damage Repair.” Unlike the enforcement actions in *McDonald* and *Bethenergy*, the November 12 order is not identified as a “compliance order,” much less a cessation order or an order to show cause why a permit should not be suspended or revoked.

When we asked the Department’s counsel at the supersedeas hearing in this matter why the Department labeled its action as an order rather than simply a permit modification, the following dialogue transpired:

ADMINISTRATIVE LAW JUDGE LABUSKES: Can I just have – just while we have a break and I have attorneys engaged anyway, I have an administrative law question. And I said this was laying on my mind at the conference call.

Mr. Heilman, why did the Department issue, in this case, an order to modify the permit? Has the Department ever done that before? What’s – I don’t understand. I’m not – why – what this – you know, the administrative law background of this is.

MR. HEILMAN: Well, then –

ADMINISTRATIVE LAW JUDGE LABUSKES: In other words, to be specific, why not just modify the permit?

MR. HEILMAN: The only – we had a peculiar action available to do that, and the action was issuing an order to modify the permit. That was the remedy that was available to us to do. There was no permit action pending before us from UMCO at this time. UMCO had the – you know, with the – what was said this morning, actually, was right. Up until we took the action, the permit did authorize longwall mining in the panel underneath that stream. When we learned additional things, we were the ones who wanted to change the permit, and protect the stream by limiting longwall mining, and the – and the vehicle to do that and available to us was the administrative order.

ADMINISTRATIVE LAW JUDGE LABUSKES: Why didn't you modify the permit?

MR. HEILMAN: I guess I thought this was the vehicle we had available to us. The Greensleeves Law [sic] authorizes us to issue orders and the Mine Subsidence Act, among other things, as well, issuing permits, and we took what – the action available to us. There is the Board's old case in Carbon Graphite where we issued a permit without an application and treated the permit like an order. That was the remedy available to us. If we're going to change a permit without an application, the thing is to issue an order.

(Supersedeas Transcript ("S.T.") pp. 238-39.) In his opening statement, counsel stated:

In this case, the Department of Environmental Protection learned new information, realized it made a mistake, changed its mind and changed its permit to protect the waters of the Commonwealth. Specifically, the Department has limited a type of mining in the 6E Panel to protect a perennial stream running across that panel from dewatering and a loss of use. I specifically submit that the Department is required to do that by the Clean Streams Law and regulations, and indeed has duty to change its mind in situations and address its mistakes to protect the waters of the Commonwealth.

(S.T. at 14.) In his closing, he said:

Another argument is they gave us a permit, they should live up to the permit. When we took an action, as I said in my opening statements, we recognized that action is going to recognize the protection of water resources of the Commonwealth, was not in compliance with the law, and it was incumbent upon the agency to take an action to change that. We telegraphed that concern to UMCO over the past year. And when we took that action, we had good, solid reasons for it. Making a bad decision doesn't mean you have to stick to it when you learn that it is a bad decision, and the prudent thing to do and what the citizens of the Commonwealth should expect that this agency does is to reevaluate its decisions when it learns – learns new things, when it learns that the resources of this Commonwealth are in jeopardy, and then to take actions to protect them.

(S.T. at 1041.) Correcting a mistake in a permit is part of the permitting process, not an

enforcement action. The Department's stated goal was to modify the permit, i.e., take a permitting action, and it believed that the only administrative vehicle available for doing so in the absence of a pending application was an order.

In any event, the key is to avoid elevating form (*e.g.*, a document's heading) over substance (*e.g.*, modification of a permit). The November 12 permit modification order does not bear any of the hallmarks of a typical enforcement action. Significantly, it does not cite any violations. It is true that Section 7708(c)(1)(i) does not specifically require that the enforcement action itself be based on a violation or imminent hazard. Rather, Section 7708(c)(i) requires that the *Board* must find that there was a violation or an imminent hazard before awarding fees. We suspect the statute is worded this way, however, not to signal that the DEP action under review does not need to be based upon a violation or imminent hazard, but rather, to emphasize that the Board must uphold the finding of a violation or imminent hazard set forth in the underlying action under review. It is difficult to imagine how or why the Board would make a finding of a violation or imminent hazard in the course of reviewing a Departmental action that did not itself make such a finding. The enforcement actions in *Bethenergy* and *McDonald* were based on violations. In any event, if a finding of a violation or imminent hazard giving rise to the order is not a prerequisite, it is certainly a strong factor evidencing the true nature of the action.

Neither the Department nor the Board made a finding of a violation or imminent hazard here. There is no citation in the order to any violation of a statute, regulation, or permit provision. We are unpersuaded by PennFuture and the Department's argument that UMCO's historical violations, located at other panels and forming the basis for prior, distinct enforcement actions not the subject of *this* appeal, formed the legal basis for the November 12 permit modification. The facts and circumstances related to UMCO's prior mining that resulted in prior

violations also provided some of the evidentiary support for the permit modification, but the Department did not restrict UMCO's mining in the 6E Panel because UMCO previously violated the law. Similarly, this Board did not uphold the permit modification because UMCO violated the law in Panels 4E and 5E; it upheld the modification because longwall mining in Panel 6E would have damaged the stream overlying Panel 6E as evidenced in part by expert opinion, which was in turn based in part on the prior effects of UMCO's mining.

We are also not persuaded by PennFuture and DEP's after-the-fact effort to recharacterize the threat to the 6E Stream for the very first time as an "imminent hazard." There was no finding of an "imminent hazard" in the Department's order or our Adjudication. "Imminent hazard" is a term of art that tends to connote (although not necessarily require) a threat of serious injury or death to humans, (*see, e.g.*, DEP Document No. 563-2112-658 (July 31, 1999)(interpreting "imminent hazard" as used in coal mining regulations)), but the important point here is that we do not view it to be appropriate to engage in a revisionist effort at this late juncture of deciding whether the facts giving rise to the Department's action constituted an "imminent hazard." More fundamentally, regardless of whether the facts might now be theoretically characterized as a "violation" or an "imminent hazard," the point remains that the Department was engaged in permitting here, not enforcement.

In addition to the lack of citation to any violations, the November 12 permit modification order does not accuse UMCO of causing pollution or engaging in unlawful conduct. It does not state that UMCO's actions or proposed actions subjected it to civil penalty liability. It did not put UMCO on a compliance docket. (*See* 52 P.S. § 1406.5(b)(1)&(2).)

Unlike a typical compliance order that describes a violation or impending violation and orders the recipient to fix it, the November 12 action does not direct UMCO to do anything.

Instead, the direct object of the order is actually UMCO's permit, not UMCO itself. Of course, having modified the permit, the order required UMCO to submit a new map and wait until that map was approved before mining the 6E Panel, but those directives were merely incidental or secondary to the permit modification. They were simply part of the modification process and do not by themselves convert the November 12 order into an enforcement action.

The truth of the matter is that UMCO on November 12 was merely doing what its permit authorized it to do.² Although certain aspects of that permit turned out to be ill advised, as counsel for the Department aptly pointed out, the problem was the permit, and the Department's action was properly directed at fixing that problem, *i.e.* the permit.³ In contrast to the enforcement action in *Bethenergy* that was "unrelated" to permitting and bonding proceedings, 758 A.2d at 1174, the November 12 action in this case was all about the permitting process. That the Department felt constrained to modify the permit by calling it an "order" does not change the fact that the Department was engaged in a permitting action. Accordingly, we are simply unable to accept that PennFuture initiated or participated in a proceeding reviewing an enforcement action as required by 27 Pa.C.S. § 7708(c)(1)(i) for an award of fees.

We do not think that this is a close case, but if we were to assume for purposes of argument that it was, we believe it would be appropriate to err on the side of circumspection when it comes to awarding fees in this situation. Although Section 7708(c)(1) is obviously designed to encourage citizen efforts to prevent operators from violating the law with impunity,

² It is perhaps worth noting that UMCO's permit authorized planned subsidence. The Department took the position that a certain amount of short-term damage to some surface waters from subsidence is acceptable if mitigation measures are employed. The Department modified UMCO's permit in this case because the mining pursuant to the unmodified permit would have resulted in *permanent* damage to a perennial stream.

³ In fact, unlike the order in *Bethenergy*, the modification was relatively limited in scope in that it only disallowed longwall mining in one of many panels.

we must be wary of creating an undue chilling effect on an operator's due process right to pursue an appeal of Departmental actions before this Board, particularly where, as here, the Department's action is not based upon a finding of a violation or an imminent hazard. In a case where fees are sought by an intervenor from an operator that was merely defending its previously issued permit against a unilateral modification by the Department, we believe that the operator is entitled to the benefit of the doubt.

Accordingly, we issue the Order that follows:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

UMCO ENERGY, INC.

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and CITIZENS FOR
PENNSYLVANIA'S FUTURE, Intervenor

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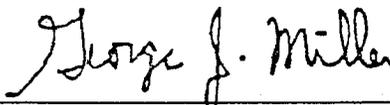
ORDER

AND NOW, this 23rd day of February, 2009, PennFuture's petition for an award of costs and attorneys' fees is denied.

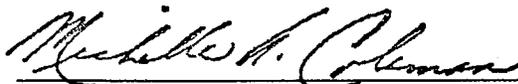
ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Acting Chairman and Chief Judge



GEORGE J. MILLER
Judge



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKIES, JR.
Judge

DATED: February 23, 2009

c: DEP Bureau of Litigation
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

v.

DENNIS S. SABOT, SR.

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EHB Docket No. 2007-255-CP-L

Issued: March 5, 2009

**ADJUDICATION UPON
RECONSIDERATION**

By Bernard A. Labuskes, Jr., Judge

Synopsis

Upon reconsideration, the Board assesses a \$5,000 civil penalty for the Defendant's placing of fill in 0.07 of an acre of wetlands without a permit and failing to comply with a Department order requiring him to restore the site.

INTRODUCTION

This matter concerns the Department of Environmental Protection's (the "Department's") complaint for civil penalties against Dennis S. Sabot ("Sabot") for placing fill in about 0.07 of an acre of wetlands on his property on the shore of Canadohta Lake in Bloomfield Township, Crawford County without a permit and for failing to comply with a Department order to restore the site. For placing fill in this seven hundredths of an acre of wetlands and failing to comply with its order to restore the site, the Department has suggested a penalty of \$45,318.28.

This matter was originally consolidated with Sabot's appeal from the order directing him to



restore the site. (EHB Docket No. 2007-158-L.) We issued an Adjudication and Order in the consolidated matters on September 12, 2008. We upheld the Department's order and assessed a \$10,000 civil penalty in response to the Department's complaint. However, we suspended Sabot's obligation to pay the entire civil penalty if he restored the site.

The Department filed a petition for reconsideration, which we granted. Although filed in the consolidated appeal, the Department's petition is aimed at the portion of our Adjudication and Order that related to the complaint for civil penalties. Although consolidation of related appeals is often helpful and usually promotes efficiency, in this case it apparently led to unnecessary confusion. Therefore, we *sua sponte* unconsolidated the actions on January 26, 2009, and issued an Adjudication Upon Reconsideration that parroted the portion of our earlier Adjudication and Order pertaining to Sabot's appeal from the Department's order. *Sabot v. DEP*, EHB Docket No. 2007-158-L (January 26, 2009). We now return our focus to the Department's complaint. This revised Adjudication and Order relates solely to the Department's complaint filed at EHB Docket No. 2007-255-CP-L.

FINDINGS OF FACT

1. The Findings of Fact set forth in the Board's Adjudication Upon Reconsideration in *Sabot v. DEP*, EHB Docket No. 2007-158-L (January 26, 2009) are incorporated herein as if fully set forth.
2. Sabot's violations of the law have been willful. He has repeatedly and despite warnings caused extensive, long-lasting, albeit repairable, damage to a relatively small area of exceptional wetlands. He has been and remains uncooperative. (T. 121-39.) The Department has incurred considerable costs in enforcing the law against Sabot, and Sabot has enjoyed considerable

cost savings by failing to obtain the necessary permits and/or restoring the site in a timely manner. (T. 135-39; C.Ex. 11, 12.)

DISCUSSION

The Board's role in a civil penalty complaint case is to make an independent assessment of the appropriate penalty amount. *DEP v. Angino*, 2007 EHB 175, 190-91, *aff'd*, No. 664 C.D. 2007 (Pa. Cmwlth., June 26, 2008). Although the Department makes a recommendation as to what it thinks the amount should be, the Department's suggestion is purely advisory. *Id.* at 191; *DEP v. Leeward Construction*, 2001 EHB 870, 885-86, *aff'd*, 821 A.2d 145 (Pa. Cmwlth. 2003). In determining the penalty amount pursuant to the Dam Safety Act, the Board considers the willfulness of the violation, damage or injury to the waters of the Commonwealth, cost of restoration, the cost to the Commonwealth of enforcing the provisions of the Dam Safety Act against such person, and other relevant factors. 32 P.S. § 693.21. The deterrent value of the penalty is also a relevant factor. *DEP v. Angino*, 2007 EHB at 209.

Application of the statutory criteria in this matter could quite easily result in the civil penalty of \$45,318.28 requested by the Department. Sabot has willfully violated the law and steadfastly refused to make things right. Sabot's stubbornness has resulted in cost savings to himself, excessive enforcement costs to the Department, and an unsuccessful end to numerous settlement talks.

Although Sabot's obstinate behavior obviously engenders frustration on the part of all concerned, and the Department cannot be faulted for enforcing the law, a sense of proportionality must ultimately prevail. Sabot affected less than a tenth of an acre of wetlands; seven hundredths of an acre to be precise. The damage caused by Sabot is confined and reparable, and reasonable

accommodation will allow the continued use of both a dock and the restoration of the natural wetlands that existed before Sabot's destructive measures. We believe that a civil penalty of \$2,500 for each violation is appropriate under these circumstances.¹

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and subject matter of this complaint. 32 P.S. § 693.21.
2. Pursuant to Section 21 of the Dam Safety and Encroachments Act, 32 P.S. § 693.21, Sabot's violations, as described herein, subject him to the assessment of civil penalties of up to \$10,000 per violation, plus \$500 for each day of continued violation.
3. A total civil penalty of \$5,000 is appropriate under the circumstances of this case.

¹ We originally assessed a civil penalty of \$10,000 but suspended the entire penalty contingent upon Sabot restoring the site. On reconsideration, the Department has vigorously opposed the suspension of the civil penalty. Sabot, largely proceeding *pro se*, declined the opportunity to brief the issue and has done nothing to advocate the penalty suspension.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

v.

DENNIS S. SABOT, SR.

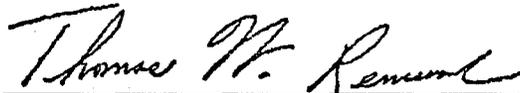
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EHB Docket No. 2007-255-CP-L

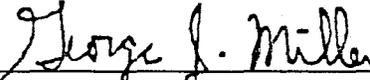
ORDER

AND NOW, this 5th day of March, 2009, Sabot is hereby assessed a civil penalty of \$5,000.

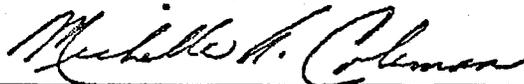
ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Acting Chairman and Chief Judge



GEORGE J. MILLER
Judge



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

DATED: March 5, 2009

c: DEP Bureau of Litigation:
Attention: Brenda K. Morris, Library

For the Commonwealth of PA, DEP:
Stephanie K. Gallogly, Esquire
Northwest Regional Office
Office of Chief Counsel

For Defendant, *pro se*:
Dennis S. Sabot, Sr.
24715 Lake View Drive
Union City, PA 16438



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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

OTTO N. SCHIBERL

v.

COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION

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EHB Docket No. 2008-275-L

Issued: March 6, 2009

**OPINION AND ORDER ON
MOTION FOR PARTIAL SUMMARY JUDGMENT**

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

Synopsis:

The Board grants the Department’s unopposed motion for partial summary judgment and establishes liability for an Appellant’s violations of the Solid Waste Management Act. A hearing on the reasonableness of the civil penalty assessed by the Department will be scheduled.

OPINION

Before the Board is the Department of Environmental Protection’s (the “Department’s”) motion for partial summary judgment that seeks judgment on the issue of liability against Otto Schiberl for violations of the Solid Waste Management Act. Schiberl owns a parcel of real estate in Scrubgrass Township, Venango County (the “Property”). In addition, he was the owner of a beer distributorship, Beer Busters, located adjacent to the Property. Schiberl admits that waste generated by Beer Busters was taken to the Property for disposal. On March 20, 2008 the Department sent Schiberl a Notice of Violation for a large pile and several smaller piles of waste

at the Property. After receiving the Notice of Violation, Schiberl admits that he burned the wood waste and paper waste at the Property. In addition, Schiberl admits that neither he, nor anyone else, has a permit issued by the Department for his disposal of waste or to operate a solid waste disposal facility on the Property. On August 5, 2008, the Department assessed a civil penalty of \$4,824 against Schiberl (and Melvin Schiberl, who did not appeal) for violations of the Solid Waste Management Act. This appeal followed. The sole objection in the appeal is that, because Schiberl corrected the problems at an expense of \$3,176.33, he should not also be required to pay a penalty.

Pursuant to the Solid Waste Management Act, 35 P.S. § 6018.103, Schiberl's actions constitute operation of a waste disposal facility.¹ Section 501 prohibits persons from using their land or continuing to use their land for a solid waste disposal facility without a permit from the Department. 35 P.S. § 6018.501; 25 Pa. Code § 287.101. If a person violates any provision of the Solid Waste Management Act, the Department may assess a civil penalty for the violations pursuant to 35 P.S. § 6018.605.

On January 22, 2009 the Department filed a motion for partial summary judgment asking the Board to establish liability and set a hearing date to determine the reasonableness of the civil penalty. In its motion the Department argues that, based on the notice of appeal filed by Schiberl, as well as his responses to the Department's request for admissions, he is not contesting liability. Schiberl did not file a response to the Department's motion. According to the Board's rules, a

¹ Section 103 defines solid waste as "any waste, including but not limited to, municipal, residual or hazardous wastes, including solid, liquid, semisolid or contained gaseous materials. The term does not include coal ash or drill cuttings." 35 P.S. § 6018.103.

Disposal is defined as "the incineration, deposition, injection, dumping, spilling, leaking, or placing of solid waste into or on the land or water in a manner that the solid waste or a constituent of the solid waste enters the environment, is emitted into the air or is discharged to the waters of the Commonwealth." *Id.*

Facility is defined as "All land, structures and other appurtenances or improvements where municipal or residual waste disposal or processing is permitted or takes place, or where hazardous waste is treated, stored or disposed." *Id.*

failure to respond to a motion for summary judgment is grounds for granting the Department's motion. *See* 25 Pa. Code § 1021.94a(h) ("Summary judgment may be entered against a party who fails to respond to a summary judgment motion."); *DEP v. Pecora*, 2006 EHB 33, 35, *citing Martz v. DEP*, 2006 EHB 988; *Lucas v. DEP*, 2005 EHB 913. Accordingly, we will grant the Department's motion and establish Schiberl's liability under Section 501 of the Solid Waste Management Act.² Because the Department has only moved for summary judgment on liability, we will set a hearing to take evidence on the reasonableness of the civil penalty assessed by the Department.

² We note that Schiberl has not contested liability in any event.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

OTTO N. SCHIBERL

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

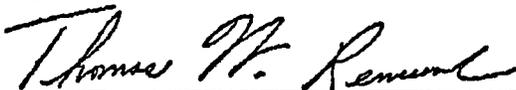
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EHB Docket No. 2008-275-L

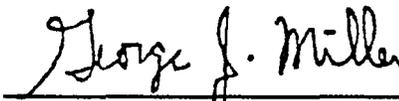
ORDER

AND NOW, this 6th day of March, 2009, the Department's unopposed motion for partial summary judgment is granted. The Appellant violated the Solid Waste Management Act as set forth in the Department's assessment of civil penalty. A hearing will be scheduled to receive evidence regarding the reasonableness of the civil penalty assessed by the Department.

ENVIRONMENTAL HEARING BOARD



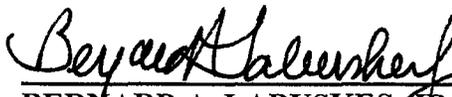
THOMAS W. RENWAND
Acting Chairman and Judge



GEORGE J. MILLER
Judge



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

DATED: March 6, 2009

c: DEP Bureau of Litigation
Attention: Brenda K. Morris, Library

For the Commonwealth of PA, DEP:
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Douglas G. Moorhead, Esquire
Northwest Region – Office of Chief Counsel

For Appellant, *Pro Se*:
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Emlenton, PA 16373



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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

**FOUNDATION COAL RESOURCES :
 CORPORATION and PENNSYLVANIA :
 LAND HOLDINGS CORPORATION, and :
 REALTY COMPANY OF PENNSYLVANIA:**

v.

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**EHB Docket No. 2006-067-R
 (Consolidated with 2006-068-R
 through 2006-070-R;
 2006-190-R and 2007-184-R)**

**COMMONWEALTH OF PENNSYLVANIA :
 DEPARTMENT OF ENVIRONMENTAL :
 PROTECTION and PENNECO OIL :
 COMPANY, INC., Permittee :**

Issued: March 9, 2009

ADJUDICATION

By: Thomas W. Renwand, Acting Chairman and Chief Judge

Synopsis:

The Pennsylvania Environmental Hearing Board dismisses a consolidated appeal brought by a mining company and related entities. The mining company appealed the Pennsylvania Department of Environmental Protection's issuance of seven oil and gas permits because the Department refused to include *verbatim* permit conditions requested by the mining company. Following a hearing and the filing of voluminous briefs, we find that the Appellants did not demonstrate by a preponderance of the evidence that the Department acted unreasonably or violated the law by issuing the well permits with



conditions to the oil and gas company.

The safety considerations at issue here have already been addressed by applicable legislation and regulations. Neither the Pennsylvania Department of Environmental Protection nor the Pennsylvania Environmental Hearing Board may use permit conditions as a vehicle to override state law. Moreover, the Department may not enact what are in effect new regulations through permit conditions.

The three activities in Appellants' proposed permit conditions, obtaining a well log of the coal seam, a deviational survey of the well, and Appellants' preferred well plugging standards are not required by state law nor are they required of well operators. However, the conditions eventually adopted by the Department and included in the permits afford Appellants the opportunity to protect the safety of any future mine and its mine workers. The conditions specifically provide the mining company the opportunity to accomplish all the items identified in their proposed special permit conditions; namely, logging of coal seams, deviational surveys, and plugging by its preferred method.

The Department of Environmental Protection did not act unlawfully or improperly shift duties and costs from the well operator to the mining company. Appellants failed to identify any legal authority for imposing their proposed special permit conditions into the well permits. Oil and gas operators have no duty to perform the items identified in the coal mining company's proposed special permit conditions. Therefore, there are no duties to shift.

The mining company, at all times relevant to this consolidated appeal, did not qualify to file objections under Section 202 of the Oil and Gas Act because they did not meet the regulatory criteria. Namely they had neither an operating coal mine nor a “projected and platted but not yet operating coal mine.” At a minimum, a coal company would have to file a technically complete permit application which would not only contain the projected mine works but would also include the detailed completion of the modules. The Department’s consideration of their objections under Section 202 was harmless error (if error at all) because the Department could also consider their objections via a conference pursuant to Section 501. A Section 501 conference is the vehicle also used to consider objections filed pursuant to Section 202.

Appellants were not unlawfully denied Section 501 conferences for two wells. The objections filed by Appellants and the proposed permit conditions were essentially the same for all of the permits. Moreover, the main remedy afforded by Section 202 objections involves a change in the well location. The mining company in every one of their objections indicated that a change in location alone would not satisfy their complaints. Therefore, it was not necessary for the Department to hold additional conferences on the exact same issues and which they already had resolved by the Department’s permit conditions. In addition, Appellants requested and were granted a conference with the Secretary and the Deputy Secretary for Mineral Rights of the Pennsylvania Department of Environmental Protection where it was able to plead its case.

The issuance of the well permits by the Department constitutes an administrative action. It is well established that well permits have no effect on the mining company's property rights or common law rights.

I. Introduction and Factual Background

This consolidated appeal challenges the Pennsylvania Department of Environmental Protection's (Department) issuance of seven oil and gas well permits to Penneco Oil Company (Penneco or Permittee). The permits were issued pursuant to the Pennsylvania Oil and Gas Act (Act) and regulations promulgated under the Act. The permits authorized Penneco to drill wells in Greene County, Pennsylvania.

Appellants, Foundation Coal Resources Corporation, Pennsylvania Land Holdings Corporation, and Realty Company of Pennsylvania (collectively, Foundation Coal), timely appealed the issuance of each of the permits. Foundation Coal's appeals center on the Department's failure to include certain conditions in the permits issued to Penneco. The Pennsylvania Environmental Hearing Board consolidated all of the appeals at the above docket number.

Foundation Coal is the owner of massive coal reserves in Greene County, Pennsylvania. According to Foundation Coal officials, they plan on eventually mining this coal in a deep mine they are calling the Foundation Mine by using the longwall method of mining. Foundation Coal filed objections to Penneco's oil and gas well drilling permit applications pursuant to Section 202 of the Oil and Gas Act, which states:

- (b) In case any well location referred to in Section 201(b) is made so that the well when drilled will penetrate anywhere within the outside coal boundaries of any operating coal mine or coal mine already projected and platted but not yet being operated or within 1,000 linear feet beyond such boundaries and the well when drilled or the pillar of coal about the well will, in the opinion of the coal owner or operator, unduly interfere with or endanger such mine, then the coal owner or operator affected shall have the right to file objections in accordance with Section 501 to such proposed location within 15 days of the receipt by the coal operator of the plat provided for in Section 201(b).

58 P.S. Section 601.202(b).

Foundation Coal filed its objections claiming that although it did not yet have an operating coal mine (in fact Foundation Coal did not even file its application for a coal mining activity permit until *after* the hearing before the Pennsylvania Environmental Hearing Board in this consolidated appeal) it did have an “already projected and platted but not yet being operated” coal mine. The Department at first considered Foundation Coal’s claim that it had an “already projected and platted but not yet being operated” coal mine too nebulous to qualify to file objections pursuant to Section 202 of the Oil and Gas Act. However, it soon decided that it would consider Foundation Coal’s objections as if the company met the requirements under Section 202.

Section 202(b) provides that the coal company, if possible, should propose an alternative location in order to overcome the objections:

An alternative location at which the proposed well could be drilled to overcome such objections shall, if possible, be indicated.

Id.

In their objections, Foundation Coal asserted that Penneco's oil and gas wells would "unduly interfere with and/or endanger the safety of its future coal mine." Regarding some of the well permit applications, Foundation Coal suggested alternate locations. In other instances no alternate well locations were identified.¹ Moreover, Foundation Coal provided no evidence that the wells proposed to be relocated could be safely drilled at these alternate locations. In fact, after investigation of these alternate locations by both Penneco and the Department, the Department concluded, that because of a variety of reasons, none of the wells could be safely drilled at these alternate locations. In addition and most importantly, Foundation Coal contends in all of its objection letters that "relocation alone" would not resolve the objections.²

Foundation Coal requested that numerous conditions be included in the permits. Although the conditions evolved over the course of this matter, the following are the proposed special conditions Foundation Coal provided to the Pennsylvania Department of Environmental Protection on July 17, 2006.

1. After the well authorized hereby is drilled, the

¹ Surprisingly, Foundation Coal tried to shift the onus to Penneco to identify alternate well locations. In the objection letters where it did not identify alternate well locations it stated: "No alternate well locations can be suggested at this time as none has been provided by Penneco." (Exhibit A-7a and C-12)

² "Regardless, well locations alone will not overcome [Foundation Coal's] objections." (Exhibit A-7b and C-12)

permittee shall promptly conduct a directional deviation survey from the point of penetration at the surface to the target depth so as to locate the well bore precisely at each workable coal seam. Upon completion of the survey, it shall notify in writing each coal owner, operator and lessee that such has been completed. Thereafter it shall promptly provide a copy to the Department and to any coal operator, owner or lessee requesting one.

2. The permittee will obtain a well log (i.e., a standard gamma, density and neutron well log) from the surface to the target depth so as to accurately be able to identify the depth and thickness of potentially workable coal seams. Upon completion of the well log, it shall notify in writing each coal owner, operator and lessee that such has been completed. Thereafter, it shall promptly provide a copy of the well log from the surface to a depth of 1,500 feet to the Department and to any coal operator, owner or lessee requesting one.
3. For purposes of this permit condition 3, the plugging requirement solely addresses the manner of plugging and not the timing of when the well is to be plugged and abandoned. Such timing shall be determined by the permittee, an agreement of the respective parties, court order or by Department action. When the well is plugged and abandoned, and in order to ensure safety and maximum recovery of resources, it will be done in a manner so as to allow the unimpeded and safe mining at a future date of all workable coal seams. For purposes of this permit a "workable" coal seam shall be any coal seam located at a depth above 1,500 feet from the surface, and which is either (1) greater than 36 inches in thickness at the well bore, or (2) determined by the Department after

consultation with the coal operator, owner or lessee to be considered part of a proven (measured) or probable (indicated) recoverable coal reserve. With respect to all such workable coal seams, the plugging and abandonment procedures will result in the removal of all metal from within the well bore for a distance of at least two times the seam thickness. The metal removal area shall extend equal distances above and below the coal seam. Metal may be removed by pulling the casing, milling the casing, or such other procedures as may be available at that time to remove all metal. After all such metal is removed, the well bore will be filled with a solid plug of expanding cement from the total depth to the surface. Notwithstanding the foregoing, the well shall at all times be plugged and abandoned in a manner which will allow unimpeded mining through the well bore in accordance with applicable Commonwealth or federal laws and regulations in force at the time of the plugging and abandonment.

4. After removal of the metal from the workable coal seams, and prior to plugging with cement, the permittee shall obtain a log, video or use another appropriate technique to confirm removal of the metal. Upon completion of the log or other method to confirm removal of the metal from the workable coal seams, it shall notify in writing each coal owner, operator and lessee that such has been completed, and thereafter promptly provide a copy to the Department and to any coal operator, owner or lessee requesting one. The Certificate of Well Plugging (or any other similar form subsequently instituted by the Department) prepared and delivered to the Department shall explain therein (1) the procedures used to remove the metal from the workable coal

seams, and (2) the method used thereafter to confirm such removal.

5. The requirements of the foregoing special conditions are in addition to all other requirements imposed by this Permit and/or applicable current and future statutes and regulations.

See Exhibit A-34.

The Department held four Section 501 conferences to discuss Foundation Coal's objections. Following these Section 501 conferences, Foundation Coal requested and was granted a conference with then Department of Environmental Protection Secretary Kathleen McGinty and Deputy Secretary for Mineral Rights J. Scott Roberts where they were able to plead their case and argue that their proposed special conditions should be included in any permits issued by the Department.³

³ Penneco was not invited to participate in this conference. We note that at least one Department official was troubled by this exclusion. Exhibit A-16 is an email exchange between Ronald Gilius, at the Department of Environmental Protection, and David Janco, at the Department of Environmental Protection:

Just got off the conference call with Katie, Scott, Foundation (Jim Roberts and Jim Bryja) and George Ellis. After much talk, Foundation is going [to] send revisions to the two permit conditions before 4:00. Katie, made it clear that if this can't be resolved, she will direct the permits to be issued. I will send the conditions when they arrive.

Email from Ronald Gilius to David Janco and other Department of Environmental Protection officials sent on Friday, January 20, 2006 at 3:19 p.m.

Ron, Am I the only one who sees the gross unfairness in the Department not including Penneco in these conversations? A Penneco representative just called Susan Banks to ask about the status of the permits in question. What am I supposed to tell Penneco? I believe the right thing to do is call Penneco to tell them what is going on.

The Department eventually issued the oil and gas permits to Penneco. However, the permits when issued contained two conditions which were derived from the proposed conditions requested by Foundation Coal. These conditions are as follows:

1. Penneco shall give the coal owner, operator or lessee five (5) business days notice of when Penneco will conduct well logging. Penneco will provide the coal owner, operator or lessee access to the well to conduct a deviation survey and well logging at the time Penneco is scheduled to conduct well logging.
2. Within five (5) business days of permittee's filing of a Notice of Intent to plug the well and upon written request by the coal owner, operator, or lessee, the permittee shall provide the coal owner, operator or lessee access to the well for the purpose of ensuring compliance with all applicable federal and state mine safety requirements necessary for the safe mining of the well bore.

Exhibits C-13a-13g.

Although Penneco certainly did not seek these conditions it consented to their inclusion by not filing notices of appeal with this Board. By not appealing the conditions, Penneco agreed to arrange for "well-bore deviation surveys" and logs of the coal seams at the expense of Foundation Coal. Penneco also agreed to provide

Email from David Janco to Ronald Gilius sent on Friday, January 20, 2006 at 3:31 p.m. (Exhibit A-16)

There was testimony concerning this conference call by numerous witnesses including Mr. Janco of the Department of Environmental Protection and Mr. Bryja of Foundation Coal. (N.T. 345-346, 366-368)

Foundation Coal with the right to observe plugging procedures followed by Penneco when the wells are plugged. Not satisfied with the conditions, Foundation Coal filed appeals with the Pennsylvania Environmental Hearing Board.

During the discovery phase of the consolidated appeal, Foundation Coal filed a Motion to Limit Issues. Neither Penneco nor the Department objected to the Motion. Subsequently the Board adopted the Motion but modified it prior to hearing to allow Penneco to raise some related issues.

The issues in the case pursuant to our Order dated September 8, 2006 are as follows:

1. Whether the coal reserves (underlying the wells which are the subject of these appeals) and the owners, lessors or sublessors thereof are included within the definition or meaning of the following terminology or phraseology as used in the Oil and Gas Act, 58 P.S. § 601.101 *et seq.*, and 25 Pa. Code chapter 78 for purposes of filing objections under Sections 201 and 202 of the Oil and Gas Act, 58 P.S. 201 and 202:
 - (a) “workable coal seam;”
 - (b) a coal mine “projected and platted” but not yet operating;
 - (c) “coal owner”; and
 - (d) “coal operator.”

 2. Whether the Department had a nondiscretionary duty to hold an informal conference under sections 202 and 501 of the Oil and Gas Act before issuing the Porter Well No. 2 and Gaines Well No. 1 permits for which a timely objection and request for conference had been submitted
-

by Appellants, and if so, the appropriate topics for discussion and resolution.

3. Whether PPL as a party “with an economic interest in a workable coal seam” as set forth in Section 502, 58 P.S. Section 502, has the right to file objections to the Braddock Nos. 1-4 and Porter No. 2 well permit applications. [Although PPL Corporation withdrew as an appellant from this matter, RCP, the coal owner, and a subsidiary of PPL Corporation is an appellant and therefore this issue remains relevant.]
4. As to all the well permits, whether the Department failed to comply with sections 201 and 501 in not resolving objections by the coal owner or coal operator through applicable permit conditions in order to address the purposes of the Oil and Gas Act under Section 102 and 25 Pa. Code 78.28 regarding mine safety, maximizing recovery of all resources, and protection of property rights.
5. Whether it is unreasonable and/or contrary to law for the Department to have issued the permits in the absence of conditions requested by Appellants, or equivalent conditions, which Appellants assert are the minimal conditions necessary to prevent undue interference with the mine, and to insure the safety of the mine workers, protect property rights, and protect natural resources.
6. Whether when imposing permit conditions, the Department unreasonably or unlawfully shifted the cost of compliance with such conditions from the permittee to the objectors, and whether the permit conditions, as included in each of the permits, are otherwise unreasonable and/or contrary to law.

We included the following issues suggested by Penneco after oral argument at which Foundation Coal strongly objected to the addition of these issues. *See Foundation Coal Resources Corporation v. Department of Environmental Protection and Penneco Oil Company, Inc.*, 2006 EHB 771, 776-777.

7. The extent to which a coal operator may be and/or is obligated to conduct mining operations in the vicinity of existing or proposed oil and gas wells by alternate methods to longwall mining, such as by room and pillar mining methods and/or the extent to which the “longwall panels” that have been or will be “projected” by the coal operators can be either “moved” or modified.”
8. The impact and application of the Oil and Gas Act (Act 223), the Coal and Gas Resource Coordination Act (Act 214), the Department regulations found in Chapter 78 of the Pennsylvania Code, MSHA Regulations and the decision of the Commonwealth Court in *Einsig v. Pennsylvania Mines Corporation*, 452 A.2d 558 (Pa. Cmwlth. 1982), as well as other applicable appellate decisions and decisions of the Board, including without limitation, the comprehensive scheme established by the legislation with regard to the “spacing” of oil and gas wells and “coal pillars” to be left in place surrounding oil and gas wells.
9. Whether the coal within the proposed coal mine of the Appellants will “likely” and/or “ever” be mined.

The parties engaged in extensive discovery which was marked with frequent disputes requiring Board intervention. Based upon Foundation Coal's concerns about the possible disclosure of allegedly sensitive business information to the public, the Board entered a protective order shielding much of the information in the discovery phase of the case from public scrutiny. As part of our order, we precluded the parties from using the Board's electronic filing system.⁴

A hearing on the merits was conducted in Pittsburgh. Each of the parties presented witnesses and documentary evidence. The parties filed voluminous and numerous post-hearing briefs. *Amicus Curiae* briefs were also filed by the Pennsylvania Coal Association and the Independent Oil and Gas Association of Pennsylvania.

Following the conclusion of the hearing, the Pennsylvania Environmental Hearing Board and the parties explored settlement. The Board subsequently conducted three settlement sessions in Pittsburgh with top officials of all three parties and their counsel participating. Despite the best and sincere efforts of all involved no settlement was reached. We therefore make the following:

II. Findings of Fact

⁴ In hindsight, we believe it was a mistake to enter such an order. Now that our perspective is enhanced by a full review of the record we fail to understand how much of the information shielded is somehow privileged. The Pennsylvania Environmental Hearing Board is a public tribunal and operates best when its proceedings, including discovery proceedings, are transparent. It is clear to us that many parties, if given the choice, would choose to have their proceedings conducted in private without public scrutiny. The hearing, of course, was open to the public.

A. The Parties

1. The Pennsylvania Department of Environmental Protection is the agency with the duty and authority to administer and enforce the Pennsylvania Oil and Gas Act, Act of December 19, 1984, P.L. 1140, No. 223, *as amended*, 58 P.S. Sections 601.101-601.605 (“Oil and Gas Act”); the Pennsylvania Coal and Gas Resource Coordination Act, Act of December 18, 1984, P.L. 1069, No. 214, *as amended*, 58 P.S. Sections 501-518 (Coal and Gas Resource Coordination Act); the Pennsylvania Bituminous Coal Mine Act, Act of July 17, 1961, P.L. 659, No. 339, *as amended*, 52 P.S. Sections 701-101-791-706 (“Bituminous Coal Mine Act” or “Mine Subsidence Act”); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. Section 510-17 (“Administrative Code”); and the rules and regulations promulgated under these statutes.

2. Appellants are Foundation Coal Resources Corporation (“Foundation Coal”), a Delaware corporation with an address of 158 Portal Road, P.O. Box 1030, Waynesburg, Pennsylvania, 15370; Pennsylvania Land Holdings Corporation (“Pennsylvania Land”), a Delaware corporation with offices at the same address as Foundation Coal; and Realty Company of Pennsylvania (“Realty”), a Pennsylvania corporation with an address of 2 North Ninth Street, Allentown, Pennsylvania 18101 (collectively, “Foundation Coal” or “Appellants”). (Notices of Appeal, 143)

3. Permittee, Penneco Oil Company, Inc., (“Penneco”), is a Pennsylvania corporation engaged in the business of exploration and production of oil and gas

resources in Pennsylvania with an address of 6608 Route 22, Delmont, Pennsylvania, 15626. (N.T. 451-53)

B. The Coal Fields of Western Pennsylvania

4. The Foundation Coal Appellants are the owners of the Greene Manor and CNG coal reserves. (N.T. 191-192, 194)

5. The CNG coal reserves were acquired by Foundation Coal in 1992. (N. T. 323)

The Greene Manor reserve was acquired by Foundation Coal in a lease with a subsidiary of PPL Corporation in 1990. (N.T. 323)

6. The cost of the coal reserves was approximately one hundred million dollars. (N.T. 198)

C. Oil and Gas Wells

7. Penneco Oil Company has approximately 20,000 acres of oil and gas leases in Greene County. A substantial portion of that oil and gas acreage intersect with the CNG and Greene Manor coal reserves. Penneco develops and operates oil and gas wells. (N.T.453)

8. Permit applications were filed from September 2005 until 2007. (N.T. 10)

9. Oil and Gas wells are shown on Commonwealth Exhibit C-6.

10. Oil and gas producing formations are located below coal producing formations so oil and gas operators must drill through coal seams to reach the oil and gas reserves. (N.T. 11)

11. Wells in Greene County can be productive for many years. In fact, there are some oil and gas wells that have been producing for eighty years. (N.T. 538)

12. The Penneco wells at issue in this case likely have a production life of twenty to fifty years. (N.T. 540)

D. Pennsylvania Oil and Gas Act Provisions Regarding Drilling In Coal Fields

13. The Pennsylvania Oil and Gas Act requires well permit applicants to provide all coal owners and lessees of workable coal seams underlying the wells they propose to drill with copies of maps of plats showing the location of the proposed wells. 58 P.S. § 601.201(b).

14. Typically disputes between oil and gas operators and coal mine operators are resolved in one of three ways:

- 1) The coal mine operators mine around the oil and gas wells, or
- 2) The oil and gas well is plugged and the coal mine operator then mines through the plugged oil and gas well, or
- 3) The oil and gas well's location is moved into a coal barrier area out of the path of the coal mining machines. (N.T. 11)

17. Section 202 of the Oil and Gas Act provides that coal owners and operators may submit written objections to a well permit application if the well is proposed to be located in one of three places: 1) within the boundaries of an operating coal mine; 2) within the boundaries of a projected and platted but not yet operating coal mine; and 3) within one thousand linear feet of the boundaries of 1 or 2. (N.T. 12)

18. If the coal operators meet one of the above criteria they are entitled to have a Section 501 conference to discuss their objections and try to resolve them. (N.T. 12)

19. In accordance with 58 P.S. Section 601.201(b), Penneco's Well Permit

Applications identified Appellants as the owners or lessees of two workable coal seams, the Pittsburgh Seam and the Sewickley Seam, underlying the proposed wells, and provided Foundation Coal with copies of maps showing the proposed well locations. (N.T. 30, 144-145; Exhibit C-11(a)-(g).)

E. Foundation Coal's Objections Pursuant to Section 202 of the Oil and Gas Act

20. Foundation Coal objected to the oil and gas permits on two grounds: 1) the proposed wells could jeopardize the safety of miners, and 2) the proposed wells could impose economic burdens on them. They also said the wells locations could be in future longwall mine panels and if they were, that would necessitate mining around the wells. (N.T. 12, 31; Exhibits C-12(a)-(e), C-15, A-34)

21. Appellants asserted in their objections that if drilled without Appellants' proposed special conditions, the wells would "(1) cause a large block of coal to be rendered forever unmineable, thus the Commonwealth's natural resources will not be protected and maximum recovery achieved; (2) impose higher costs on the coal owners; (3) potentially endanger the safety of personnel and facilities employed in the mining of coal, and (4) adversely impact the property rights of the coal owners in the area." (Exhibit C-12(a)-(d))

22. Appellants' Proposed Special Conditions are virtually identical for each well. (N.T. 30-31; Exhibit C-12(a)-(d))

23. Appellants' Proposed Special Conditions addressed the following items:

- a. Directional surveys
- b. Well logs
- c. Plugging wells in coal seam(s) to include milling or grinding to remove all the metal casing in the area of the coal seam. (Exhibit C-12(a)-(d))

24. The Department's authority to impose special conditions is defined in Section 201(e) of the Oil and Gas Act. (N.T.15)
25. The Pittsburgh Coal Seam of the proposed Foundation Mine is 1,000 – 1,200 feet below the surface. The oil and gas producing zones are 3,000 - 4,000 feet below the surface. (N.T. 29, 49, 537)
26. Four of the seven Penneco wells are oil wells- Braddock 1, 2, 3, and 4. Gaines, Porter and Orndoff are gas wells. (N.T 30)
27. When an oil and gas well is "mined around," the Pennsylvania Department of Environmental Protection requires a pillar which is a block of coal of adequate size around the well to protect the well from damage and prevent gas from migrating into the coal mine. (N.T32-33)
28. The size of coal pillars necessary to protect oil and gas wells is set forth in Chapter 78 and is based on a coal pillar study done in 1957. (N.T 33)
29. Appellants further proposed requiring that Penneco plug the wells by removing steel casing from boreholes either by pulling it out or by grinding or milling it. (N.T. 36-37, 405, 414, 428-429; Exhibits C-12(a)-(d), A-34)
30. Plugging involves injecting expandable cement into an oil or gas well to prevent the vertical migration of liquids and gases either to the surface or into any ground water or seams of coal penetrated by the well. Well plugging enhances mine safety because it prevents fluid movement into the coal seams. (N.T. 49-50; 58 P.S. § 601.210 and 25 Pa. Code §§ 78.91-78.98)

31. Foundation Coal's objections were the first objections the Pennsylvania Department of Environmental Protection ever received from a coal company that was neither mining coal nor had even filed a permit to mine coal. (N.T. 34)

32. Penneco has drilled oil and gas wells near the Consolidation Coal Company's Bailey and Enlow Fort Mines. Consolidation Coal did not object to any of Penneco's well permit applications. (N.T. 457-478)

F. Section 501 Conferences

33. The Pennsylvania Department of Environmental Protection scheduled Section 501 conferences to hear Foundation Coal's objections. (N.T. 35)

34. Penneco's President, Mr. Terrence Jacobs, attended a Section 501 conference regarding the Porter No. 2 well that Foundation Coal attended. Foundation Coal exhibited mining maps but would not give copies to either Penneco or the Pennsylvania Department of Environmental Protection. (N.T. 455-456)

35. At one of the Section 501 conferences a Foundation Coal official indicated that he was not certain that all of the coal in their reserves would be mined. The Department of Environmental Protection's inspection of the alternate well locations confirmed that they were not safe for drilling. (N.T. 96, 460)

36. Foundation Coal wanted a deviation survey to be conducted on each of the wells. Foundation Coal requested logging through the coal seams. (N.T. 36)

37. A deviation survey indicates how far off plumb or true vertical the well bore itself is and it would be run from the surface to the bottom of the well to show what the deviation was within that well bore. The logging would be done through the coal seams

and would identify them and indicate their thickness. (N.T. 36)

38. Foundation Coal requested that all the casing be removed and milled out if necessary when the well was plugged. (N.T. 36)

39. The Pennsylvania Oil and Gas Act and the regulations under the Act do not mandate removal of steel casing from the borehole. (N.T. 36-37)

40. In Pennsylvania, the coal protective steel casing in wells constructed after 1985 is required to be cemented in place and cannot be pulled or yanked out. (N.T. 36, 79-81, 153; Exhibit C-7; 25 Pa. Code § 78.92)

41. In wells where the coal protective casing is cemented in place it is not necessary to perforate the casing to allow cement to infiltrate the annular space because the cement is already there. (N.T. 79-81)

42. Underground coal operators may mine through oil wells or gas wells that pass through the coal seam(s) they are mining (“mine through”) or mine around the wells (“mine around”). (N.T. 32-33, 228-229, 362, 469-470)

43. Under a third option, a well can be moved into a barrier area or coal pillar away from areas to be mined. (N.T. 32)

44. Appellants’ objections were unusual because they were filed by entities who owned or controlled coal reserves but had no actual mine and had not submitted a permit application to the Department to authorize mining. (N.T. 33-34, 58)

45. As of December 2005, following several Section 501 conferences, Foundation Coal failed to demonstrate in the eyes of the Pennsylvania Department of Environmental Protection that they had a “projected and platted but not yet being operated” coal mine.

(N.T. 41; Exhibit A-8)

46. Without regard to whether Foundation Coal had failed to demonstrate it had a “projected and platted but not yet being operated” coal mine, the Department considered Appellants’ safety concerns. (N.T. 41-42, 360; Exhibit A-8)

47. In January 2006, Appellants arranged a telephone conference call to discuss their objections with then Pennsylvania Department of Environmental Protection Secretary Kathleen McGinty and Deputy Secretary J. Scott Roberts. (N.T. 99, 345-346, 351-353)

G. Conditions to Well Permits

48. Following the January 2006 conference call and further review of Appellants’ Objections and the Proposed Special Permit Conditions, the Department of Environmental Protection was persuaded that most of the items suggested by Appellants, specifically, well logging, directional surveys and plugging wells for mining through would foster mine safety. (N.T. 37-39, 100, 345-346, 351-353, 366-367)

49. The Department of Environmental Protection ultimately agreed that a deviational survey and well log would foster mine safety. The deviational survey and the well logging would give the coal company a precise location of the well bore in the coal seam they were mining. (N.T. 37)

50. The conditions in Penneco’s oil and gas permits provide that the coal operator would have access or notice when the wells were being drilled so that it could perform the deviation survey and the logging. Another condition also provided that the coal operator have access to the well when the well was plugged so it could make sure that the well plugging met federal and state mine safety standards. There is nothing set forth in

the conditions that would prohibit Foundation Coal from reaching an agreement with Penneco by which Foundation Coal could arrange to have Penneco's wells plugged by milling out the steel casing at Foundation Coal's expense. (N.T. 41)

51. Although the Department of Environmental Protection's position is in a "state of flux" the Department never concluded that Foundation Coal had an already projected and platted but not yet operating coal mine. (N.T. 41)

52. Penneco rejected the proposed alternate well locations suggested by Foundation Coal because the alternate locations were very steep sites and it would be very difficult to construct drill pads. One of the locations was also too close to a township road. These determinations were not contradicted by the evidence at the hearing. (N.T. 43)

53. The Department of Environmental Protection did not hold Section 501 conferences on the second Porter Well objections or the Gaines well objections because the issues were identical to those the Department addressed earlier through the special conditions in each well permit. (N.T. 45)

54. Mr. Janco, who worked in the Department's Southwest Regional oil and gas program for twenty-two years and directed it for fifteen years, believed for the Porter 2 and Gaines objections, the issues had been resolved. (N.T. 47)

55. Five of the Penneco wells have been drilled. (N.T. 47)

56. The Pennsylvania Department of Environmental Protection's special permit conditions are silent as to who pays the costs associated with the activity described in the permit conditions. Mr. Janco did not believe that the Department of Environmental Protection had the authority to specify who will pay these costs. In practice, Foundation

Coal has paid the costs as they requested the conditions which are not required by applicable law. (N.T. 48)

57. The special conditions in the Penneco permit worked because the deviation surveys and logging was conducted. None of these active wells have been plugged and they are still producing wells. (N.T. 48, 71)

58. Mr. Janco saw no substantive difference in whether the Pennsylvania Department of Environmental Protection considered the permit objections under Section 202 or under Section 501. (N.T. 56)

59. There is no benefit or minimal benefit to the oil and gas operator to perform deviation well bore surveys or a well log of the coal seams. Such surveys and well logs greatly benefit the coal company. (N.T. 97)

60. The Pennsylvania Coal and Gas Resource Coordination Act applies to gas wells but not oil wells. Penneco's gas wells met the spacing requirements set forth in the Coal and Gas Resource Coordination Act. (N.T. 97)

61. The oil and gas well operator could potentially gain a benefit from a directional survey or well log as it would know the exact location of the well *vis-à-vis* the coal mine or mine pillar. (N.T.105)

62. Regarding the five Penneco wells that have been drilled, directional surveys and well logs were obtained by Penneco and provided to Foundation Coal. (N.T. 107)

63. Current regulations require that a pillar of coal be left surrounding a well of approximately 220' by 200.' (N.T. 108)

H. Coal Mining Activity Permit

64. Mr. Joseph Leone has been the Chief of the Bituminous Mining Permit Section of the Pennsylvania Department of Environmental Protection since 1985. He has testified many times before the Pennsylvania Environmental Hearing Board. (N.T. 110)

65. He oversees the permitting duties of the Section. He reviews underground mine permit applications, coal refuse disposal facilities as well as coal preparation plant sites. The review pertains to surface features as well as various underground considerations. The reviews require the expertise of various personnel: mining engineers, hydrogeologists, biologists, surface mining engineers, and administrative personnel. (N.T. 110-111)

66. Mr. Leone is a mining engineer with a Bachelor's degree in mining engineering. He has an engineer's license. (N.T. 112)

67. The Pennsylvania Environmental Hearing Board recognized Mr. Leone as an expert in mining engineering and regulations. (N.T. 112)

68. The basic permit to mine coal underground in Pennsylvania is called a Coal Mining Activity Permit. (N.T. 112-113)

69. A typical Pennsylvania longwall underground coal mine encompasses 20,000 to 30,000 acres. (N.T. 113)

70. A Coal Mining Activity Permit (CMAP) does not authorize coal mining throughout the entire CMAP area. Coal extraction is only allowed where a subsidence control plan has been approved by the Pennsylvania Department of Environmental Protection. These subsidence control plan areas usually allow mining in five year periods. Subsidence control plans contain a great deal of required information. (N.T.

113-114)

I. Longwall Coal Mining

71. A longwall coal panel is a large block of coal that is 1,000 to 1,450 feet wide and approximately 15,000 feet in length. The coal company will try to mine nearly all the coal in this block. (N.T. 114)

72. The size and orientation of longwall panels may be limited by both the equipment employed and overlying surface features. For example, the existence of a housing development which may cause high subsidence costs, a geologic fault or a gas well are other examples that could potentially limit mining. (N.T. 115)

73. The size and orientation of longwall panels sometimes change from what a coal company originally proposes. (N.T. 115)

74. Longwall panels even change from the subsidence plan approval map to the six-month mining maps. (N.T. 116)

75. In-panel moves are expensive, time consuming, and sometimes potentially dangerous but are performed on a regular basis safely. (N.T. 119)

76. Mine operators report information regarding in-panel moves to the Pennsylvania Department of Environmental Protection in the six-month mining maps. (N.T. 122)

77. Mr. Leone estimates that roughly one to two percent of the longwall panels end up being cut short or having an in-panel move. (N.T. 123)

78. An in-panel move is where the panel would stop, the longwall face would stop, the equipment would be removed from that face and it would be repositioned and reset up on the other side of barrier pillars, or protective pillars, to start in the same block of coal.

(N.T. 133)

79. Ms. JoAnne Reilly is a gas production senior staff engineer for Pennsylvania Services Corporation; an affiliate of Foundation Coal. She has worked for the company for more than thirty years. (N.T.-43)

80. She has done various drilling including core drilling, gas well drilling and completion, coal bed methane drilling, underground geological surveys and investigations. (N.T. 143)

81. Ms. Reilly is a registered professional geologist in Pennsylvania, a certified mine examiner, and a certified assistant foreman. (N.T. 144)

82. She received the notices regarding the Penneco oil and gas wells and investigated where the wells would be located. (N.T. 145)

83. Her company receives approximately fifteen notices of oil and gas wells a week from various oil and gas producers. This is an enormous increase over past years. (N.T. 145-146)

84. The best time to perform a directional survey is once the well is drilled but before it goes into production. (N.T. 148)

85. The cost of a directional survey is usually between \$2,500 and \$5,000. (N.T. 148)

86. In order for the coal company to use a directional survey they need to know where the coal actually is vertically. This is done by a well log which is a geophysical log. (N.T. 150)

87. Density determines the actual density of the rock. (N.T. 150)

88. A neutron log determines the neutron potential of the rock and the gamma

determines the amount of shale in the particular rock. (N.T. 151)

89. Logging costs are estimated as between \$5,000 and \$11,000. (N.T. 152)

90. The best time to run these logs is after the well is drilled but before any fracking occurs. (N.T. 152)

J. Plugging An Oil And Gas Well

91. In milling, a tool is put down the hole and the steel is essentially cut out of a certain zone. The cuttings are circulated to the surface, and you can determine whether the cuttings are actually coming out by use of a magnet in the pits, and the milling actually takes the steel out of the coal zone that you are interested in mining through. (N.T. 158)

92. Milling is a relatively new process. It's been used since about the early 1990s. (N.T. 154)

93. Mining machines hitting steel could raise safety problems caused by the machines bucking back or steel flying out and hitting someone. It could also cause sparks. (N.T. 156)

94. After the tubing and casing is removed or milled, Foundation Coal wants the well bore to be filled with a solid plug of expanding cement from the target depth to the surface. (N.T. 157)

95. Foundation Coal has found that a solid cement plug is the best way to completely seal off the well base to prevent any fluids from coming from the production zone. (N.T. 157)

96. In wells that were not plugged to mine through standards Foundation Coal has

found where the cement was not where it should have been and materials were dumped down the well bore to get rid of them. (N.T. 157)

97. Costs of non-mine through plugs are between \$35,000 and \$50,000. (N.T. 157)

98. The estimated cost of mine through plugs advocated by Foundation Coal is approximately \$250,000. (N.T. 158)

99. The permit conditions issued by the Pennsylvania Department of Environmental Protection for the Penneco wells required Penneco to give Foundation Coal five business days notice so they can perform a deviation survey and well logging. In the case of the Penneco wells, Foundation Coal made arrangements to have Penneco conduct the logging and directional survey, and Foundation Coal repaid them for the costs. (N.T. 158)

100. The purpose of protecting an oil and gas well with a coal pillar is to keep the well whole so that the casing does not break and gas could then enter the coal mine. (T 171)

101. Of the wells drilled by Penneco the well bores were off of true vertical a minimum of 1.89 feet and a maximum of 5.01 feet. (N.T. 177)

J. History of the Proposed Foundation Mine

102. Mr. William J. Schloemer is the Director of Strategic Mine Projects for Foundation Coal. He has a Bachelor's degree in mining engineering from the University of Kentucky. He has a Bachelor's degree in civil engineering from the University of Kentucky. He has a MBA from Marshall University. (N.T. 197)

103. He manages the development of the Greenfield Mining Projects for the corporation. This involves the initial planning and strategic planning for the projects, all aspects of the project including property acquisition, engineering, underground mine

design, underground mine planning, surface facilities planning, infrastructure development, railroads, prep plants, and conveyances. (N.T. 188)

104. He has been involved from the inception of the Foundation Mine project with its planning and development. (N.T. 189)

105. The Sewickley Coal Seam is a seam of coal that is about 80 to 90 feet above the Pittsburgh Coal Seam. (N.T. 191)

106. Mr. Schloemer and Mr. Mike Ross, senior mine planner for Foundation Coal, are involved in the development of conceptual mine plans for Foundation Coal. (N.T. 193)

107. There are approximately 45,000 acres in Foundation Coal Company's Greene County coal reserves. This represents 416 million tons of coal. (N.T. 193-194)

108. Foundation Coal began its surface acquisition program in 2001. Most of the surface facilities are in Colebrook, Pennsylvania and are shown on exhibit A-4. (N.T. 195)

109. They have spent \$2.2 million on capital costs. (N.T. 199)

110. Over the projected 40 year life of the mine Mr. Schloemer estimated a capital investment of \$2.2 billion. (N.T. 201).

111. Foundation Coal believes there are approximately 650 wells in their mining reserves which are a combination of abandoned, inactive, and operating oil and gas wells. (N.T. 208)

112. The first phase of the mining as set forth in Exhibit A-1 is in Area D. (N.T. 210)

113. The slope is an entry excavated through rock at an angle from the surface down to the coal seam, normally at a 16-degree angle, and it would contain the track and the belt.

The track transports men and materials into the mine while the belt conveys coal out of the mine. (N.T. 211)

114. Mr. Schloemer believes two wells – the Orndoff No.1 and the Porter No. 2 well are within the initial permit area. (N.T. 213)

115. The Braddock wells are within the coal boundary but not within the initial permit area. The Gaines wells are neither in the initial permit area nor within the coal boundary for Foundation Coal's Pittsburgh Seam; but they are within the coal boundary of the Sewickley Seam. (N.T. 213)

116. Foundation Coal's investigation allegedly shows that its Pittsburgh coal seam exists in thickness and in quality and is an economically mineable reserve and is thus demonstrated. (N.T. 214)

117. In its Emerald and Cumberland mines Foundation Coal is now mining panels 1,450 feet wide. It expects to mine panels of this size in its Foundation Mine. (N.T. 219)

118. The continuous mining development is the work required to develop the main entries and the lead and tailgates required to longwall mine. (N.T. 223)

119. Foundation Coal mines in small quantities under permit for both tax and environmental reasons. Although taxes are paid now, the taxes are much higher on a permitted and active operation. (N.T. 225)

120. It is much more efficient and economical for a coal mining company to plug and mine through oil and gas wells than to mine around them. (N.T. 228)

121. Foundation Coal is now considering developing longwall panels for the Foundation Coal Mine that would be 1,500 to 1,550 feet wide. (N.T. 231)

122. Foundation Coal will always plug a well before mining through it. (N.T. 238)

123. On Permittee's Exhibit 2, a mining map prepared by Mr. Mark Ross, the first longwall panel is projected in 2016. (N.T. 240)

124. Exhibit 2 also shows panels that are 1,250 feet wide and Mr. Schloemer believes that the panels will actually be up to 1,550 feet wide. (N.T. 241)

125. Its plans include mining the Sewickley Seam by the longwall mining process. (N.T. 249)

126. Foundation Coal could mine coal through the use of continuous mining. However, it is a longwall mining company and claims that longwall mining is a safer, more efficient, and lower cost method of mining. (N.T. 250)

127. If they mined with continuous mining machines they could simply mine around the oil and gas wells. (N.T. 251)

128. At the time Foundation Coal filed its objections to Penneco's oil and gas well permits, Foundation Coal had not completed any of the modules identified in the application for an underground mining permit. (N.T. 251)

129. Approximately five hundred people will be employed at the mine once it goes into production; four hundred fifty will be miners. (N.T. 252)

130. The company is certain that it will go forward with this mine. It is a continuation and extension of its existing mines. (N.T. 253)

K Safety Issues

131. Mr. David Lauriski is President of Safety Solutions International located in Parker, Colorado. (N.T. 258)

132. Safety Solutions International is primarily a consulting firm that deals in safety management issues. (N.T. 258-259)

133. Mr. Lauriski has been involved with underground coal mining for thirty-seven years. He has been a coal miner, a general manager of a large underground coal operation, a regional safety director, and a human resources manager. (N.T. 259)

134. Mr. Lauriski also served for almost four years from 2001 through 2004 as the United States Assistant Secretary of Labor for Mine Safety and Health. He served for ten years as a Board Member, nine as Chairman, of the Utah Board of Oil, Gas and Mining which is a quasi-judicial board that deals with oil, gas and mining. (N.T. 260)

135. Oil and gas wells pose various threats to a longwall mine. The primary risk is a sudden release of methane gas which could disrupt ventilation or spark an explosion. (N.T. 270)

136. The federal standard calls for leaving a three hundred foot diameter of coal around the oil and gas well. Current law allows smaller diameters. If the well has been plugged, the company can mine through it if certain precautions are taken. (N.T. 271)

137. Mr. James J. Bryja's position is Senior Vice President, Eastern Operations for Foundation Coal. He has a Bachelor's degree in mining engineering from Penn State University and an MBA from West Virginia University. (N.T. 318)

138. He is President of Pennsylvania Land Holdings Corporation. Pennsylvania Land Holdings Corporation owns coal reserves and land parcels in Southwestern Pennsylvania and provides service and management of those assets to the operating entities. (N.T. 319)

139. There is nothing in the permit conditions that would prevent Penneco and

Foundation Coal from creating an agreement about cost sharing or allocating the costs for performing the deviational survey or well logging. (N.T. 360)

140. Mr. John M. Gallick's business address is in Waynesburg, Pennsylvania and he is Vice President of Safety and Health for Foundation Coal Corporation. (N.T. 373)

141. He earned a Bachelor's degree in Political Science and Economics from the University of Pittsburgh and a Masters Degree in safety science from the Indiana University of Pennsylvania. (N.T. 384)

142. He has overall responsibility to provide guidance and assistance to the management team at Foundation Coal regarding safety processes, regulatory activities and other issues involving safety and health. He has worked in the mining industry for thirty-five years. (N.T. 384)

143. Nationally coal production is 52% longwall tons and 48% continuous miner tons Pennsylvania is 75% longwall and 25% continuous miner tons. (N.T. 391)

144. Accidents that occur during in-panel moves involve roof failures, slings breaking, equipment failures, and the general tight quarters. (N.T. 397)

145. An in-panel move is more difficult than an end panel move. The roof risks are the same but the equipment risks are greater. (N.T. 397)

146. C-4 is an exhibit of procedures and safety regulation for mining through a gas or oil well. (N.T. 400)

147. Federal standards require a diligent effort to remove all tubing and casing with the exception of the surface construction. (N.T. 414-415)

148. Pillar lengths of the coal blocks at the Cumberland Mine are 14,000 feet and up to

1,250 feet wide. (N.T. 425)

149. In 2003-2005 Emerald went from panels 1,250 to 1,450 wide and roughly 12,000 feet long. (N.T. 426)

150. Total costs to a coal company including supplies, lost coal production, lost coal reserves, and other costs are approximately \$4.7 million for an in-panel move. (N.T. 436)

151. The Cumberland and Emerald longwall mines are two of the largest and most productive coal mines in the United States. Both mines have safely conducted in-panel moves around gas wells. (N.T. 438)

L. Penneco Oil Company

152. Mr. Terrence S. Jacobs received a B.S. from Duquesne University. He is a Certified Public Accountant. (N.T. 451)

153. After working for the Pittsburgh Steelers from 1969-1972, he worked in his family business, which include coal, oil and gas, aggregates, and construction and real estate development. (N.T. 452)

154. Penneco Oil Company was formed in 1979. He has been President twice of the Independent Oil and Gas Association of Pennsylvania. (N.T. 452)

155. He is President and Chief Executive Officer of Penneco. (N.T. 453)

156. Penneco is operating in excess of 700 oil and gas wells. (N.T. 453)

157. Penneco will fully comply with all plugging requirements when it plugs its wells. (N.T. 472)

158. Penneco responded to the conditions that the coal company wanted and agreed not to object to the conditions issued by the Pennsylvania Department of Environmental

Protection. These permits were unique out of 700 permits issued to Penneco – none of the others had any conditions at all. (N.T. 475)

159. Mr. Jacobs believes that it is implied in the permit that the coal companies will bear the costs of the conditions. (N.T. 476)

160. If a required coal pillar was left surrounding Penneco's wells, any deviations would not impair the integrity of the well. (N.T. 494)

161. Mr. John S. Morgan has a degree in mining engineering from the Royal School of Mining in London and extensive mining experience worldwide. (N.T. 495-496)

162. He was asked by Penneco to review the mine mapping and the mine projections which had been provided by Foundation Coal, to evaluate their adequacy, look at any deficiencies or inconsistencies between those, and basically to advise Penneco as to the location of the panels and the probability of those mines being developed as projected. (N.T. 498)

163. Mr. Morgan characterized and we find the current Foundation Coal proposals as a moving target. (N.T. 500)

164. If Foundation Coal changes their plans for a 1,250 foot wide grid to a 1,450 wide foot grid then everything shifts down and everything becomes realigned. (N.T. 501)

165. Much of the detailed permit application work had not been completed at the time of the hearing. (N.T. 502)

166. The coal industry has seen changes in technology. From the mid-90s to today panel walls have gone from 800 feet to 1,450 feet and 1,600 foot wide panels are expected. (N.T. 503)

167. Mr. Morgan was recognized by the Board as an expert in longwall mining and longwall mining technology. (N.T. 505)
168. Without detailed maps Foundation Coal can not show that Penneco's wells will unduly interfere with Foundation Coal's mine. (N.T. 507)
169. In-panel moves occur in the course of longwall mining and they can be done safely. (N.T. 516)
170. Mr. Morgan's experience has been a mixture of operational overview, financial review, and environmental reviews. (N.T. 518)
171. Mr. Morgan has designed surface mining and a room and pillar mine in association with a surface coal mine. He has also designed underground limestone mines. (N.T. 519)
172. There are a number of encumbrances to the Foundation Coal drawings which preclude it from mining these areas. (N.T. 523)
173. A plat has defined boundaries on it. (N.T. 525)
174. Longwall panel sizes and locations depend on many factors, including: available equipment, geologic and hydrogeologic conditions, depth of cover, the location of protected structures and features above the mine, coal ownership, coal quality and accessibility, existence of fractures and other geologic features, location of structures and water supplies, roof and floor conditions in the mine, the ability to provide adequate ventilation to the mine, the market for coal. (N.T. 155, 310)
175. Appellants have postulated various sizes and orientations of longwall panels in the maps it has created for the possible future mining in the area of the wells. (N.T. 238;

Exhibits A-1 and A-2)

176. If a gas well or oil well is located within a panel, and the well cannot be plugged and mined through in accordance with Pennsylvania and Federal standards and guidelines, it must be mined around. This is accomplished with an in panel move. (N.T. 288)

III. Discussion

Burden of Proof and Standard of Review

The Pennsylvania Environmental Hearing Board, as instructed by the Commonwealth Court in *Warren Sand & Gravel Company v. Department of Environmental Resources*, 341 A.2d 556, 565 (Pa. Cmwlth. 1978) reviews all challenged Pennsylvania Department of Environmental Protection final actions *de novo*. See also *Groce v. Department of Environmental Protection and Wellington Development-WVDT, LLC*, 2006 EHB 856, 893. Former Chief Judge Krancer, in the oft-cited case of *Smedley v. Department of Environmental Protection and International Paper Co.*, 2001 EHB 131, concisely set forth our duty in every case:

We must fully consider the case anew and we are not bound by prior determinations made by the DEP. Indeed, we are charged to “redecide” the case based on our *de novo* scope of review. The Commonwealth Court has stated that “[d]e novo review involves full consideration of the case anew. The [EHB], as a reviewing body, is substituted for the prior decision maker, [the Department], and redecides the case.” *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *O’Reilly v. Department of Environmental Protection*, 2001 EHB 19, 32. Therefore, we make our own findings of fact based solely on the record developed before us.

Smedly, 2001 EHB at 156.

In this third party appeal, Appellants bear the burden of proving by a preponderance of the evidence that the Pennsylvania Department of Environmental Protection abused its discretion by acting unreasonably and/or in violation of the laws of the Commonwealth in issuing the well permits to Penneco Oil Company without including the specific conditions requested by Appellants. 25 Pa. Code § 1021.122(c)(2); *Wellington*, 2006 EHB at 894. Stated another way, the Appellants must prove that the Department's issuance of the well permits to Penneco was an abuse of discretion in the sense that it was unreasonable, inappropriate or not in conformance with law. *Wellington*, 2006 EHB at 894; *Pennsylvania Trout v. Department of Environmental Protection*, 2004 EHB 310, 362; *People United to Save Homes v. Department of Environmental Protection*, 2000 EHB 1309, 1218. We assess whether the issuance of the permits is consistent with the law and is otherwise appropriate. *O'Reilly v. Department of Environmental Protection*, 2001 EHB 19, 32.

Statutory and Regulatory Scheme Enacted By Pennsylvania

It is necessary to first briefly summarize the extensive regulatory framework dealing with coal mining and oil and gas already in place in Pennsylvania before discussing the relevant issues remaining in this consolidated appeal. A knowledge of the history and evolution of the law enacted by the Pennsylvania General Assembly and the implementing regulations is necessary to scrutinize and analyze the positions advocated by the parties. This is especially important in reviewing the proposed special permit conditions so ardently advocated by Foundation Coal. Moreover, an understanding of the

technical differences between longwall mining and continuous mining (often referred to as room and pillar mining) is required to fully comprehend the issues in this consolidated appeal. In other words, we agree with Penneco that “an analysis of the ‘evidence’ submitted by [Foundation Coal] in support of their objections must be undertaken in the context of the comprehensive statutory and regulatory scheme enacted by Pennsylvania in its regulation of both the oil and gas and the coal mining industries.”

More than one hundred years ago in *Chartiers Block Coal Company v. Mellon*, 25 A. 597 (Pa. 1893), the Pennsylvania Supreme Court held that an oil and gas operator is entitled to drill through a coal seam to reach the oil and gas reserves. The decision indicated that a court could step in to prevent “any wanton interference with coal mining.”

Following this decision a tacit good faith understanding was arrived at between the two industries. The oil and gas drillers agreed to drill on 1,000 foot centers and the coal mining industry agreed not to challenge the wells if they were spaced at least 1,000 feet apart. In *Pennsylvania Mines Corporation v. DER and Einsig*, 1982 EHB 407, the tacit agreement was “breached” by an oil and gas operator who applied for oil and gas well permits in a coal area involving well spacings at distances of less than 1,000 feet from existing wells. The Pennsylvania Department of Environmental Protection issued the well permits over the objections of the coal mining company. The Pennsylvania Environmental Hearing Board vacated the decision of the Department.

Subsequently the Commonwealth Court reversed the decision of the Pennsylvania Environmental Hearing Board. *Einsig v. Pennsylvania Mine Corporation*, 452 A.2d 558

(Pa. Cmwlth. 1982). Commonwealth Court held that it was up to the Department to determine where an oil and gas well should be drilled on a tract of land. Pursuant to the relevant statute at that time such determination could not be based on financial considerations but only on safety considerations.⁵ The Court pointed out that the drilling of *any* oil and gas well through a mineable coal seam involves interference with a coal mine. The Court reviewed who under the law should resolve any disputes regarding the location of wells that would be drilled through coal seams. Commonwealth Court pointed out that it was initially up to a Court of Common Pleas to make the decision after the *Chartiers* opinion was announced by the Pennsylvania Supreme Court. However, by operation of statute⁶ the Department of Environmental Resources (Protection) now makes the decision. If the Department's decision is appealed then the Pennsylvania Environmental Hearing Board will conduct a *de novo* review of the Department's decision and reach a conclusion. The Court, in a very scholarly opinion, declared:

The owner of the oil and gas rights, Einsig, has the right to drill through the coal, limited only by (1) any rights and/or duties emanating from his contract of sale, (2) safety considerations, and (3) the power of DER to restrain his "undue" interference with or endangerment of the mine. Both Numbers 2 and 3 above are within the pervue of DER to regulate.

452 A.2d at 568.

Finally, the Court went on to hold as follows:

⁵ The Court also acknowledged that there could be legal rights applicable to the issue based on contracts, etc., which should best be left to a Court of Common Pleas.

⁶ "Chartiers relies on the court of equity. The Act giving the authority to DER is Section 202(b), 52 P.S. Section 2202(b)." 452 A.2d 558, 565. This section is now found in the Oil and Gas Act

We repeat, DER's statutory authority under the Act is limited to ascertainment of whether a well can be safely drilled, and, if so, where on the driller's tract of land it can be located where it will least interfere with or endanger the mine.

Id.

Oil And Gas Act and The Coal And Gas Resource Coordination Act

Following the *Einsig* decision, and with the support of both the oil and gas and the coal mining industries, the Pennsylvania legislature enacted comprehensive legislation passing back-to-back statutes, the Oil and Gas Act (58 P.S. Section 601.101, *et. seq.*) and the Coal and Gas Resource Coordination Act (58 P.S. Section 501, *et. seq.*), dealing with the drilling of oil and gas wells through coal seams. Thereafter, the Environmental Quality Board adopted regulations to fully implement the two statutes. This resulted in a comprehensive legislative and regulatory scheme regarding the drilling of oil and gas wells in coal fields.

The Coal and Gas Resource Coordinative Act codifies the "tacit agreement" reached between the two industries and follows the "extrinsic test" set forth by the Environmental Hearing Board in *Einsig* by prohibiting the drilling of gas wells "unless the proposed gas well is located not less than 1,000 feet from any well" which penetrates a workable coal seam. 58 P.S. Section 507. In addition, Section 513 sets forth detailed requirements for plugging gas wells penetrating workable coal seams. Moreover, the Pennsylvania Oil and Gas Act also sets forth plugging requirements in general and specifically incorporates the provisions of Section 513 of the Coal and Gas Resources

at 58 P.S. Section 202(c).

Coordination Act for wells penetrating mineable coal seams. 58 P.S. Section 601.210.

Importantly, Section 601.214 of the Pennsylvania Oil and Gas Act specifies coal operator responsibilities including leaving a coal pillar of sufficient size surrounding active oil and gas wells. The section sets forth a detailed procedure where the oil and gas well operators can file objections to the coal mining operator's mining plans if they believe that the pillar proposed to be left around the well "is inadequate to protect the integrity of the well or the public health and safety." The section goes on to require that generally "the Department shall not require the coal operator to leave a pillar in excess of 100 feet in radius, except that, if it is established that unusual conditions exist requiring the leaving of a larger pillar, the Department may require a pillar up to but not exceeding 150 feet in radius." 58 P.S. Section 601.214(b). The section also authorizes the coal operator to file an application with the Department to leave a pillar of less size. Moreover, the coal operator is required to receive written approval from the Department before mining through a plugged oil or gas well. 58 P. S. Section 601.214(f).

Coal Mining In Pennsylvania

We now turn to a brief discussion centering on the history of coal mining regulations in Pennsylvania. A cursory knowledge of the history and evolution of mining regulations is helpful in order to place the dispute in this matter in context. Furthermore, an understanding of the technical differences between longwall mining and traditional room and pillar mining (most of Foundation Coal's witnesses refer to this type of mining as "continuous mining") is required to fully comprehend the issues raised by Foundation Coal and our resolution of those issues.

During much of the past sixty years, coal was mined using the traditional room and pillar method which left pillars of coal in the mine for support of the surface. This method of mining involves mining “rooms” off the main entries which are supported during the first phase of the mining by pillars of coal and artificial roof supports. In recent years, the longwall method of mining coal has become increasingly popular; especially in southwestern Pennsylvania. Longwall mining involves the development of panels of coal. These panels of coal are often ten thousand (or more) feet long. They regularly are a thousand feet wide. The exhibits introduced at the hearing by Foundation Coal indicate panels that are 1,250 feet wide. However, Foundation Coal officials testified that once the Foundation Mine was in operation they envisioned that advances in mining technology would allow panel widths of 1,450 feet or even 1,550 feet.

Longwall mining machines move back and forth across the face of the coal and shear the coal directly onto conveyor belts which carry the coal to the surface. As the longwall equipment shears the coal it is protected by moving shields. The equipment slowly moves forward across the face of the coal. As the equipment moves forward the roof of the already mined area collapses into the void. This results in subsidence of the ground over the panel.

Longwall mining, which is strongly embraced by Foundation Coal in southwestern Pennsylvania where it already operates two state-of-the-art longwall mines (Emerald and Cumberland), allows the mining company to mine much greater quantities of coal in a more cost effective manner than traditional mining. However, to be most cost effective, the mining company needs to mine a panel in its entirety. Leaving pillars of coal in the

middle of a longwall panel to protect an oil and gas well can be problematic.⁷ This requires the coal company to make an in-panel move. Although these in-panel moves (or end panel moves) are routinely done by experienced mining companies such as Foundation Coal they are both expensive and require stringent safety measures. Men and equipment must work as a team in close quarters during an in-panel move.

In traditional room and pillar mining it is much easier to either adjust the mining plan to leave a coal pillar around the oil and gas well or arrange for the oil and gas operator to drill a new well in an existing pillar of coal. In a longwall panel there ideally is no coal that will be left in the panel. As shown by the evidence at the hearing, a typical longwall in-panel or end panel move can cost over \$4 million.

The principal Pennsylvania statute regulating the underground mining of coal is the Bituminous Mine Subsidence and Land Conservation Act (Mine Subsidence Act) which was substantially amended in 1994. 52 P.S. Section 1406.1 *et. seq.* It is an important Act which established comprehensive requirements for the safe mining of coal. We note that the Mine Subsidence Act and the implementing regulations make the coal operator primarily responsible for safety in the coal mine.

We now address the issues in this consolidated appeal. It is clear after hearing the evidence and reviewing the comprehensive and excellent post hearing briefs filed in this case that not all of the issues raised by Foundation Coal and Penneco need to be decided. Some of the issues raised would require us to issue an advisory opinion. Of course, we

⁷ The pillars are necessary to protect the integrity of the well from subsidence damage and ensure no leakage of gas into the coal mine.

will not do this. Turning to the first issue:

1. Whether the coal reserves (underlying the wells which are the subject of these appeals) and the owners, lessors or sublessors thereof are included within the definition or meaning of the following terminology or phraseology as used in the Oil and Gas Act, 58 P.S. § 601.101 *et seq.*, and 25 Pa. Code chapter 78 for purposes of filing objections under Sections 201 and 202 of the Oil and Gas Act, 58 P.S. 201 and 202:

- (a) “workable coal seam;”**
- (b) a coal mine “projected and platted” but not yet operating;**
- (c) “coal owner”; and**
- (d) “coal operator.”**

It is neither wise nor necessary for us to parrot the definitions or make lengthy findings concerning “workable coal seams,” “coal owners”, or “coal operators.” These terms are defined in the comprehensive statutory and regulatory framework discussed earlier. There is no dispute that the Sewickley and Pittsburgh Coal Seams are workable coal seams. Nor is there a dispute that Foundation Coal generally is a coal owner and coal operator.

The Department of Environmental Protection urges us to sidestep a decision on whether Foundation Coal’s Foundation Mine is a coal mine “projected and platted but not yet operating” because it considered Foundation Coal’s objections as if Foundation Coal met the requirements to file objections under Section 202 of the Oil and Gas Act. Foundation Coal counters that because the Department’s position on this issue is in a “state of flux” and Foundation Coal will likely file future objections to oil and gas wells

in these same coal fields it is important that we rule on this issue to clarify whether an unpermitted coal mine in the planning stages qualifies as a “projected and platted but not yet operating” coal mine. We believe Foundation Coal has a valid point and we will rule on this issue.

Section 202 of the Pennsylvania Oil and Gas Act provides that coal owners and operators may file written objections to a well permit application if the well is proposed to be located in one of three places: 1) within the boundaries of an operating coal mine; 2) within the boundaries of a projected and platted but not yet operating coal mine; and 3) within one thousand linear feet of the boundaries of 1 or 2 by the Department. *See* 58 P.S. Section 202.

The evidence shows that Foundation Coal’s Foundation Mine is not a projected and platted but not yet operating coal mine as set forth under Section 202. One reason is because it is impossible to establish the boundaries of the proposed Foundation Mine with any type of certainty. Mr. Janco on behalf of the Department did not consider the Foundation Mine to constitute a projected and platted mine because there was neither a mining permit nor even an application for a coal mining activity permit. Although it is true that Foundation Coal introduced some mining maps at the hearing their witnesses undercut those very maps by testifying that the actual mining panels would be much wider than depicted on their own maps. In fact, Mr. Bryja testified that rather than the 1,250 foot wide panels depicted the widths would likely be 1,450 feet wide. Indeed, Mr. Scholemer testified that he foresaw panel widths of 1,550 feet.

Mr. John Spencer Leonard Morgan, Penneco’s eminently qualified and articulate

expert, who we found extremely credible, testified that Foundation Coal's mining plans were "a moving target." He pointed out that even based on the exhibits showing the panel widths of 1,250 feet there are Act 54 structures that could not be mined under currently. Moreover, there are various adverse properties Foundation Coal would have to acquire to mine according to its maps. What Foundation Coal has at the time of the hearing is a representation of what they might wish to mine.

This is further compounded if the panel widths are widened by 200 to 300 feet in each panel. This would completely realign the Foundation Mine. Mr. Morgan indicated that an increase of only one hundred feet in panel width "probably gains about 600,000 tons of coal in that panel." The only way that you can decide if there is going to be any impact of a specific Penneco well on a particular part of the Foundation Mine is to have that detailed knowledge as to where the mine workings of the Foundation Mine are located. This would require not only knowing the length, width and location of the panels but also depicting the gates and tailgates. The mining plans of Foundation Coal introduced at the hearing simply do not contain the necessary detail. The mining maps are a moving target and were not specific enough to constitute a projected and platted coal mine.

Stated simply a plat is a document which has defined boundaries on it and is a fixed document. It should set forth in detail the mine workings. The exhibits of the Foundation Mine introduced into evidence in this case do not set forth the mine workings in the detail required to be considered a projected and platted but not yet operating mine.

Based on the regulations and statutes together with a review of the factual

evidence we find that until Foundation Coal conducts the detailed engineering and geological investigations required by the Department of Environmental Protection to complete the various modules in the coal mining activity permits it does not yet have a projected and platted mine. It is one thing for a mining engineer to sit down and plot a conceptual mining plan on a map. It is quite another to do all the work required to meet the regulatory definition of a “platted and projected but not yet operating” coal mine. Since this detailed work will not be done until the filing of a permit application we hold that in order to qualify as a platted and projected but not yet operating mine in order to file objections under Section 202 of the Oil and Gas Act, a coal company, at a minimum, must have filed a technically complete mine permit application.

The permitting process regarding a longwall mine usually takes one, two or more years to complete. The reasons it takes so long are because not only is a great deal of technical information required but the Department engineers and other professionals closely review all the details. The process involves much give and take. The mining plans undergo numerous changes and revisions. Foundation Coal does own massive coal reserves that they fully expect to mine in the future. However, owning the coal reserves is not enough to meet the very special criteria set forth under Section 202. Therefore, based on all of the evidence the Foundation Mine does not qualify as a projected and platted but not yet operating coal mine.

- 2. Whether the Department had a nondiscretionary duty to hold an informal conference under sections 202 and 501 of the Oil and Gas Act before issuing the Porter Well No. 2 and Gaines Well No. 1 permits for**

which a timely objection and request for conference had been submitted by Appellants, and if so, the appropriate topics for discussion and resolution.

In light of our decision on the first issue, normally no further scrutiny or analysis would be required. However, this is not a normal situation. Thus, the Department of Environmental Protection was correct in considering Foundation Coal's objections to the well permits at issue in this consolidated appeal. This is because even though technically Foundation Coal's Foundation Mine does not fit any of the categories set forth under Section 202 of the Oil and Gas Act to allow it to file objections, under Section 501 of the Oil and Gas Act as Foundation Coal qualifies as it has an interest in the subject matter of the Oil and Gas Act.⁸ As such the Department may convene a conference under Section 501 of the Act. Indeed, the Oil and Gas Act intends that Section 501 conferences may be held for virtually any reason dealing with the subject matter of the Act. Interestingly, Section 501 is the applicable section under which a conference is to be scheduled to resolve objections under Section 202. One slight procedural difference is that a Section 202 conference convened under Section 501 should be held within 15 days of the filing of the objections while a conference requested by a person with a direct interest convened under Section 501 should be scheduled within 90 days.

Under the facts of this case the Department had the discretion not to hold either a

⁸ We acknowledge that Section 202 provides a mechanism to the Department to more easily

Section 202 conference or a Section 501 conference when they had already held four conferences on the same identical objections. It is important to keep in mind that Section 202 is a statute which focuses on the location of the well in the mine. Under the facts of this case, Foundation Coal can not even pinpoint with any certainty where in its mine boundaries any of these wells will be located for the simple reason that it has neither an operating mine nor a projected and platted but not yet operating mine.

It is true that the Department of Environmental Protection did not hold a conference on all of the same objections. This is because the Department had already resolved the objections by its development of the two conditions that allow Foundation Coal to accomplish all of the items it requested in its proposed special permit conditions. To force the Department to convene conferences in such situations elevates form over substance. We agree with the Department that were we to require these conferences in these situations we would be directing the Department to undertake a meaningless exercise by repeating something it has already done. We do not need to require the Department and the parties to reenact the oil and gas version of the movie *Groundhog Day*.⁹

In addition, pursuant to regulation the Department of Environmental Protection is not required to convene a Section 501 conference on all objections to well permit applications that are submitted to it by parties who meet the Section 202 criteria. The

address the issues involved in this appeal.

⁹ *Groundhog Day* was the wildly popular 1993 movie starring Bill Murray as Phil Connors together with Andie McDowell as Rita. In an uproariously funny part of the movie Phil Connors

Department has the authority to forego holding conferences on objections in certain circumstances such as the facts presented in the current consolidated appeal where the Department is addressing the same objections that it has already resolved.

There is a regulation in the Pennsylvania Code directly on point which supports the Department's position that it should not be forced to hold conferences over the same permit objections when they have already fashioned a resolution of those objections.

- (b) The Department may decide not to hold a conference if it determines that the objections are not valid or if the objection is resolved.

25 Pa. Code Section 78.25(b).

Moreover, by declining to hold a conference on the Gaines Permit objections the Department did not undermine the purpose and goals of Section 501 conferences. The purpose of Section 501 conferences is to provide a forum for interested parties to discuss objections and concerns within the parameters of the Oil and Gas Act. There is no dispute that the same objections Foundation Coal raised on the Gaines Permit objections were fully discussed and addressed in several Section 501 conferences between the same interested parties in the context of several other well permit applications; specifically the Porter Well No. 2 conference and the Braddock Well conferences.

A second problem is that Section 202 envisions a process where all the parties,

must live the same day over and over again.

after discussion, can arrive at the best location for the well within the mine workings. If the parties can not reach a compromise then the Department is authorized to resolve the objections by deciding on a location for the drilling of the well. Here, Foundation Coal is not suggesting any viable alternative locations. Even in the instances regarding the Braddock wells where they set forth alternative well locations, they still contended that the relocation of the wells would not satisfy their complaints. Instead, they wanted the Department to attach their proposed special conditions to the permits. Thus, the remedy afforded by Section 202, a change in well location, was specifically rejected by Foundation Coal.

- 3. Whether PPL as a party “with an economic interest in a workable coal seam” as set forth in Section 502, 58 P.S. Section 502, has the right to file objections to the Braddock Nos. 1-4 and Porter No. 2 well permit applications. [Although PPL Corporation withdrew as an appellant from this matter, RCP, the coal owner and a subsidiary of PPL Corporation is an appellant and therefore this issue remains relevant.]**

PPL Corporation withdrew as an appellant in this consolidated appeal. Nevertheless, RCP, the coal owner and a subsidiary of PPL Corporation, is still an appellant so the issue is relevant. Of course, none of the Foundation Coal appellants currently qualify under the requirements of Section 202 of the Oil and Gas Act to file objections because the Foundation Mine is neither an operating coal mine nor a “projected and platted but not yet operating coal mine.” They would qualify under

Section 501 to request a conference as a party with an interest in the Pennsylvania Oil and Gas Act.

4. **As to all the well permits, whether the Department failed to comply with sections 201 and 501 in not resolving objections by the coal owner or coal operator through applicable permit conditions in order to address the purposes of the Oil and Gas Act under Section 102 and 25 Pa. Code 78.28 regarding mine safety, maximizing recovery of all resources, and protection of property rights.**

The short answer is the Pennsylvania Department of Environmental Protection acted completely appropriately in this matter. In fact, the Department did resolve the objections through the permit conditions it issued with the well permits. The statutory and regulatory framework already covers every issue raised by Foundation Coal. The Oil and Gas Act, the Gas and Coal Coordination Act, and the implementing regulations set forth the requirements applicable to the drilling of oil and gas wells in Pennsylvania. The federal requirements also do not mandate a different result. These statutes and regulations do not require any of the special permit conditions proposed by Foundation Coal. They do not even require the conditions that the Department included in the permits.

Foundation Coal is trying to rewrite the Oil and Gas Act under the guise of necessary special permit conditions to ensure safety in its mine. However, the General Assembly, which has enacted far reaching and comprehensive legislation in this area, never found that what Foundation Coal requested was necessary to ensure safe mining.

Moreover, the evidence set forth before this Board at the hearing does not support Foundation Coal's argument that its proposed special permit conditions are necessary to ensure the safe operation of the Foundation Mine.

In addition, just because something is arguably safer,¹⁰ does not mean that either the Department or this Board can simply mandate it. This is especially true when the legislature already has enacted statutes directly on point. Special permit conditions were never meant as vehicles to circumvent the law.

Foundation Coal focuses on general statements of purpose in the various acts and then uses those statements to bootstrap its attempts to enact its own version of the Oil and Gas Act for its Foundation Mine. Thus, the permit conditions in the Penneco permits are simple and merely provide notice and access to Foundation Coal to arrange to complete the tasks, either through their own subcontractors or through Penneco's subcontractors. However, if Foundation Coal does not want to perform these tasks they are not so obligated. Nor is Penneco obligated to do anything other than simply provide notice and access to Foundation Coal. Therefore, the permit conditions in the Penneco permits simply provide Foundation Coal with the ability to undertake the tasks they argue are necessary to ensure the safety of its mine.

5. Whether it is unreasonable and/or contrary to law for the Department to have issued the permits in the absence of conditions requested by Appellants, or equivalent conditions, which Appellants assert are the minimal conditions

¹⁰ As indicated above, the evidence at the hearing does not support Foundation Coal's contentions.

necessary to prevent undue interference with the mine, and to insure the safety of the mine workers, protect property rights, and protect natural resources.

The actions of the Department of Environmental Protection were reasonable and lawful in issuing the permits without Foundation Coal's proposed special conditions or equivalent conditions. Indeed, as we have stated at length earlier in this Adjudication, a discussion we will not repeat again, there is no requirement under either Pennsylvania or Federal law for the conditions requested by Foundation Coal. Foundation Coal as a matter of law failed to show that the drilling by Penneco would cause any undue interference with its mine. Moreover, even Foundation Coal's experts admitted that in-panel and end-panel moves, if they become necessary, can be safely performed. Foundation Coal operates state of the art mines and is well versed in modern and safe mining operations.

The Pennsylvania Department of Environmental Protection acted in full accordance with the law when it refused to adopt Foundation Coal's proposed special permit conditions. Indeed, the Department lacked the legal authority to impose the proposed special permit conditions in the well permits issued to Penneco. As we have discussed in detail there is simply no requirement under existing Pennsylvania or federal law to require Foundation Coal's special permit conditions. Moreover, Foundation Coal failed to demonstrate that their special permit conditions were necessary for the safe operation of its future mine.

The drilling of oil and gas wells is highly regulated in Pennsylvania. Neither the

statutory provisions nor the Pennsylvania Code regulations require that an oil and gas operator provide for well-bore directional and down-hole deviation surveys, nor logs of any coal seam.

The plugging of an oil and gas well is likewise governed under a comprehensive statutory and regulatory scheme. *See* 58 P.S. Section 601.201(b), 58 P.S. Section 513(a), 25 Pa. Code Sections 78.91-78.92. Since the enactment of the Oil and Gas Act in 1984, oil and gas operators have been required to cement all casing installed through any coal seam. This safety feature is also contained in the Coal and Gas Resource Coordination Acts, 58 P.S. Section 513 and Sections 78.90-78.93 of the regulations. The pertinent statutory and regulatory provisions do not require an oil or gas operator to subsequently remove or “mill out” the casing cemented through a coal seam. Nor is this required under federal law. A “mine-through” of an oil and gas well can be safely accomplished without removal of the casing. (N.T. 567-568) Where a string of casing has been cemented through a coal seam, and all wells drilled since 1984 are required to cement the casing in the coal seam, the well is required to be plugged in accordance with 58 P.S. Section 513(a)(1) or (a)(3), and 58 P.S. Section 601.210, and the regulations at Chapter 78.

A comprehensive statutory and regulatory framework has been enacted by the legislature and the Environmental Quality Board to deal with plugging of oil and gas wells that have been drilled through workable coal seams. Section 210 of the Oil and Gas Act provides, at 58 P.S. Section 601.210(b), that an oil and gas operator shall plug

an oil and gas well drilled through a workable coal seam “in the manner as prescribed by regulation of the Department.” In turn, the Department’s regulations at 25 Pa. Code Section 78.92 (dealing with oil and gas wells where the casing has been cemented through the coal seam) provides in great detail how the wells should be plugged. It is noteworthy that the regulation at 25 Pa. Code Section 78.92(c) provides for a different method of plugging where the well was not plugged in accordance with the Oil and Gas Act and a mine operator intends to “mine through” the well. The statutes and regulations already cover circumstances where a “mine through” of the well is subsequently contemplated. Section 210(a) of the Oil and Gas Act, 58 P.S. Section 601.210(a) similarly provides for a different procedure where the well was not plugged in accordance with the Oil and Gas Act and a mine operator intends to “mine through” the well.

It is thus abundantly clear that the Department was not provided with discretion to substitute different methods of plugging not specifically provided by statute or regulation simply because of expediency and cost efficiency in the name of longwall coal mining. The legislative and regulatory framework thus clearly addresses the plugging of oil and gas wells in contemplation of subsequent mine-throughs and anticipates that wells may be “mined through” by a coal operator.

We are not dealing here with any “particular circumstances” that require a different method of plugging to obtain federal approval for a safe mine-through, such as that contemplated by 58 P.S. Section 513(d). There is nothing unusual about the coal

seam Foundation Coal proposes to mine. We find no error in the Department's actions.

Penneco's oil and gas wells are likely to produce for 30 to 50 years and possibly more. We do not know what the prevailing statutes and regulations will require at that time. Penneco, like all oil and gas operators, is required to plug its oil and gas wells in accordance with "prevailing law."

We also reject Foundation Coal's argument that the proposed special permit conditions are necessary to prevent undue interference with its future mine. The evidence in this case is clear. The testimony is concise. In panel moves do not equate to undue interference. As the evidence shows in-panel moves occur on a regular basis and for a variety of reasons. They are a part of mining just like stop lights are a part of driving. They occur in all longwall mines. These mines are still operated safely.

Mr. Joseph Sbaffoni, the hero of Quecreek and a career mine safety professional who is the current director of the Department's Bureau of Mine Safety, testified that wells plugged without removing the steel casing can be safely mined through. He described how mining companies can minimize the issues posed by possible sparking and flying bits of steel. Foundation Coal's mining professionals testified that they were well aware of these safe mining techniques.

The record in this case simply does not establish that Penneco's oil and gas wells would "unduly interfere" with the Foundation Mine. Part of the reason is that Foundation Coal's mining plans are so fluid. Foundation Coal can not say for certain if any of Penneco's gas and oil wells will even go through their coal panels. Therefore,

they make the generic argument that if any of the wells require them to make an in-panel move then the wells unduly interfere with the operation of their mine.

We reject this argument. The legislative and regulatory structure envisions in-panel moves by requiring coal pillars to protect wells. Foundation Coal's position throughout this litigation is that nothing should prevent them from removing all the coal in a longwall panel. The record does not establish that any of Penneco's wells will prevent them from mining their longwall coal panels. But even if once Foundation Coal's mining plans become more certain and a well ends up in a panel there are various options such as plugging, moving the well to a coal pillar outside the panel, or redrilling the well after mining has taken place that would allow Foundation Coal to continue its mining operations as planned. In addition, there is nothing that would prevent Foundation Coal from safely mining by a combination of longwall mining and continuous mining.

6. Whether when imposing permit conditions, the Department unreasonably or unlawfully shifted the cost of compliance with such conditions from the permittee to the objectors, and whether the permit conditions, as included in each of the permits, are otherwise unreasonable and/or contrary to law.

The Pennsylvania Department of Environmental Protection did not unreasonably or unlawfully shift the cost of compliance with the permit conditions they imposed. Those permit conditions are a distillation of the proposed special conditions requested so

vigorously and vociferously by Foundation Coal. The proposed special permit conditions requested by Foundation Coal are not required by Pennsylvania law. Nor are they required by federal law. Therefore, there are no costs to shift as the costs never were the responsibility of Penneco under the law.

There is no indication that the plugging required by state and federal law is any less safe than Foundation Coal's preferred plugging methods. Moreover, although the logging and deviational surveys arguably may have a beneficial effect on safety it is not certain that the benefits will amount to a safer mine. What does seem clear however, is that these deviational surveys and logging will have pronounced economic benefits for Foundation Coal.

This is because Foundation Coal will be able to ascertain important information about its coal seams and their quality from these procedures. Coal companies, including Foundation Coal, often seek this same type of information through developmental coal mining which involves drilling. They drill an exploratory well to conduct the same type of surveys regarding their Pittsburgh coal seam as Penneco will now provide to them. These logs and surveys should yield a plethora of helpful technical information. Moreover, Foundation Coal should be able to obtain this same information through the Penneco wells at a fraction of the cost (and headaches) involved than if they had to do their own independent developmental drilling.¹¹

¹¹ In *Cumberland Coal Resources, L.P. v. Department of Environmental Protection*, EHB Docket No. 2006-234-R, (Adjudication issued November 10, 2008), the coal mining company (owned by Foundation Coal) conducted coal exploration activities by drilling a four inch core hole to a depth of eight hundred fifty-four feet. They also constructed an access road. The

In sum, the simple answer is that the proposed special permit conditions requested by Foundation Coal are not required by either Pennsylvania or federal law. Moreover and most importantly, the conditions in the Penneco permits merely require that Foundation Coal is to be given notice and access to perform the tasks it requested. If it does not wish to pay for these tasks then it does not have to perform them. Therefore, there are no costs to shift.

The next three issues we will dispose of in short order. They all were suggested by Penneco. They are as follows:

- 7. The extent to which a coal operator may be and/or is obligated to conduct mining operations in the vicinity of existing or proposed oil and gas wells by alternate methods to longwall mining, such as by room and pillar mining methods and/or the extent to which the "longwall panels" that have been or will be "projected" by the coal operators can be either "moved" or modified."**
- 8. The impact and application of the Oil and Gas Act (Act 223), the Coal and Gas Resource Coordination Act (Act 214), the Department regulations found in Chapter 78 of the Pennsylvania Code, MSHA Regulations and the decision of the Commonwealth Court in *Einsig v. Pennsylvania Mines Corporation*, 452 A.2d 558 (Pa. Cmwlth. Ct. 1982), as well as**

purpose of these activities was to identify the thickness and quality of the Pittsburgh coal seam.

The landowner claimed his water supply was adversely affected. The Pennsylvania Department of Environmental Protection agreed and ordered the coal company to provide the homeowner with water. Following a hearing, Cumberland Coal proved by a preponderance of the evidence that its coal exploration activities were not the cause of any water loss.

other applicable appellate decisions and decisions of the Board, including without limitation, the comprehensive scheme established by the legislation with regard to the “spacing” of oil and gas wells and “coal pillars” to be left in place surrounding oil and gas wells.

9. Whether the coal within the proposed coal mine of the Appellants will “likely” and/or “ever” be mined.

We will address the ninth issue first. We believe after hearing the testimony and reviewing the evidence that the coal in the future Foundation Mine will be mined. Foundation Coal has already invested millions of dollars in the development of what will likely be a modern state of the art longwall coal mine. Indeed, this litigation shows how serious they are in developing the mine on regulatory terms as favorable as possible. Although we have repeatedly held that their proposed special permit conditions are not required or mandated by applicable law that does not mean that the law could not be changed by the General Assembly. The arguments being made by Foundation Coal should be addressed to those who make the law; not to those who are charged with interpreting the law. It is as simple as that.¹²

It is unnecessary for us to directly decide or discuss in detail the seventh and eighth issues. Our Adjudication already has addressed the statutes, regulations, and major decisions and it is unnecessary for us to repeat those points.

We agree with Penneco that this case is about longwall coal mining in the sense

¹² Of course, we take no position as to the wisdom of whether the General Assembly should

that Foundation Coal would not be seeking most, if not all, of its proposed special permit conditions if it was planning a typical room and pillar mine. Yet, at the same time nothing in the evidence before us prohibits Foundation Coal from operating a safe and economically successful longwall coal mine. Developing a longwall mine where oil and gas drilling is taking place is a challenge but one that is met by every company in Pennsylvania that is operating a longwall coal mine.

IV. Conclusion

There is no indication from the evidence in this case that the legislative and regulatory scheme in place in Pennsylvania is not working. On the contrary, a close review of the evidence shows that the legislation and regulations are doing what they were intended to do. The oil and gas industry and the coal industry are operating in the same coal fields. Most importantly, they are operating safely. In addition, they are operating profitably.

The Department's actions in developing and adopting the two permit conditions unraveled a legal Gordian Knot within the framework of the legislative and regulatory scheme. The Department in effect gave Foundation Coal the ability to obtain everything they requested within the confines of existing law.

V. Conclusions of Law

1. Foundation Coal bears the burden of proof in this third party consolidated action. 25 Pa. Code Section 122.122(c)(2); *Groce v. Department of Environmental Protection*, 2006 EHB 856, 894.

change the law. All sides are well versed in the arguments.

2. As the party bearing the burden of proof, Foundation Coal failed to show by a preponderance of the evidence that the issuance of the well permits without their proposed special conditions was contrary to law or unreasonable. *Pennsylvania Trout v. Department of Environmental Protection*, 2004 EHB 310, 362, *aff'd*, *Pennsylvania Trout v. Department of Environmental Protection*, 863 A.2d 93, 205 (Pa. Cmwlth. 2004); *Browning-Ferris Industries v. Department of Environmental Protection*, 819 A.2d 148, 153 (Pa. Cmwlth. 2003); *Warren Sand and Gravel v. Department of Environmental Resources*, 341 A.2d 556, 565 (Pa. Cmwlth. 1978).

3. The Department of Environmental Protection's interpretation of the laws and regulations in this case that it is authorized to administer are reasonable and consistent with the statutes and regulations. *Tire Jockey Service, Inc. v. Department of Environmental Protection*, 915 A.2d 1165 (Pa. 2007); *North American Refractories Company v. Department of Environmental Protection*, 791 A.2d 461 (Pa. Cmwlth. 2002).

4. The Pennsylvania Environmental Hearing Board has jurisdiction over the subject matter and the parties in this consolidated appeal. 35 P.S. Section 7514.

5. The Pennsylvania Environmental Hearing Board's scope of review in this consolidated appeal is *de novo*. The Board must fully consider the case anew and is not bound by any prior determinations made by the Pennsylvania Department of Environmental Protection. Rather than deferring in any way to findings of fact made by the Department, the Board makes its own factual findings, based solely on the evidence of record in the case before it. *Groce v. Department of Environmental Protection and Wellington Development-WVDT, LLC*, 2006 EHB 856; *Smedley v. Department of*

Environmental Protection and International Paper Co., 2001 EHB 131, 156; *Warren Sand and Gravel v. Department of Environmental Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975).

6. The Pennsylvania Department of Environmental Protection may not enact regulations through permit conditions.

7. The Pennsylvania Department of Environmental Protection acted within its discretion and authority in deciding not to adopt Foundation Coal's proposed special permit conditions in the well permits issued to Penneco.

8. The Pennsylvania Department of Environmental Protection did not act unlawfully or unreasonably, nor did it improperly shift duties and costs regarding the performance of deviational surveys and logging of coal seams and well plugging from the well operator to Appellants. There is no duty under Pennsylvania law to perform these tasks.

9. The Pennsylvania Department of Environmental Protection is authorized to place conditions in oil and gas well permits pursuant to the Oil and Gas Act. 58 P.S. Section 201(e).

10. Foundation Coal failed to prove by a preponderance of the evidence that it owned or operated a projected and platted but not yet operating coal mine as that term is used in Section 202 of the Pennsylvania Oil and Gas Act. 58 P.S. Section 601.202.

11. Legal conclusions are within the purview of the Pennsylvania Environmental Hearing Board, not witnesses. Although it is sometimes necessary for witnesses, including experts, to testify on factual matters underlying regulations or statutes, an opinion of a witness regarding the legal meaning or effect of a regulation or statute is

irrelevant. *Shenango, Inc. v. Department of Environmental Protection*, 2006 EHB 783, 795.

12. The existing statutory and regulatory scheme established under the Oil and Gas Act, the Coal and Gas Resource Coordination Act, and the Chapter 78 regulations of the Pennsylvania Code provide a full and complete regulatory scheme involving the plugging of oil and gas wells through workable coal seams.

13. In order to prove that it had a projected and platted but not yet operating coal mine a coal operator, at a minimum, must have filed a technically complete coal mining application.

14. Penneco by its permit and applicable law is required to follow and fully comply with state and federal law in effect at the time its oil and gas wells are plugged.

15. The Pennsylvania Department of Environmental Protection may decide not to hold a Section 501 conference pursuant to Section 202 regarding objections to a well permit if it has previously considered the same objections and has resolved the issue. 25 Pa. Code Section 78.25(b).

16. The Pennsylvania Department of Environmental Protection acted reasonably and lawfully in issuing well permits with the two permit conditions for the Braddock Wells Nos. 1, 2, 3 and 4, Gaines Well No. 1, Porter Well No.2 and Orndoff Well No. 1.

17. The Pennsylvania Department of Environmental Protection acted reasonably and lawfully in convening four conferences to consider Foundation Coal's objections to Penneco's well permit applications.

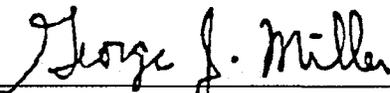
18. Foundation Coal failed to show that holding two additional conferences would

have affected the Pennsylvania Department of Environmental Protection's decision to issue the well permits to Penneco. *Groce v. Department of Environmental Protection and Wellington Development-WVDT, LLC*, 2002 EHB 249; *O'Reilly v. Department of Environmental Protection*, 2001 EHB 19; *Abod v. Department of Environmental Protection*, 1997 EHB 872.

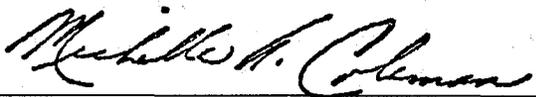
19. The well permits do not affect the parties' property rights or other common law rights. *Bentley v. Department of Environmental Protection*, 1999 EHB 447; *Miller v. Department of Environmental Protection*, 1997 EHB 335.

20. Foundation Coal's coal reserves identified in this consolidated appeal constitute "workable coal seams" as that term is defined in the Pennsylvania Oil and Gas Act.

21. The Foundation Coal Appellants are coal owners and/or coal operators as those terms are defined in the Pennsylvania Oil and Gas Act.

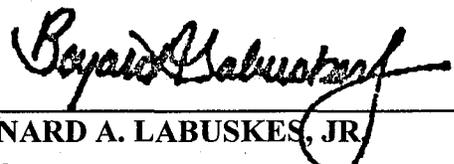


GEORGE J. MILLER
Judge



MICHELLE A. COLEMAN
Judge

Judge Labuskes concurs in the result and concurs with the sections of the Adjudication that address Issues 1 through 4 and 7 through 9, except that the Department has a mandatory duty to hold a conference when Section 202 applies, but Section 202 does not apply here because Foundation does not have a projected and platted mine and Foundation's objections did not go to the location of the wells. On Issues 5 and 6 he fully agrees that the Department acted properly by rejecting Foundation's proposed permit conditions. The Department acted unreasonably and unlawfully, however, by including the special conditions in the permits and he would have stricken those conditions from the permit.



BERNARD A. LABUSKES, JR.
Judge

DATED: March 9, 2009

**c: DEP Bureau of Litigation
Attention: Brenda K. Morris, Library**

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EHB Docket No. 2006-067-R (Consolidated)

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contributing suspended solids to stream flow or runoff outside the permit area in excess of the acts, regulations, or permit.

Background

This is an appeal by Mr. Joseph F. John (Appellant or Mr. John) of the Pennsylvania Department of Environmental Protection's (Department) approval of Stage I and Stage II bond release for a former underground coal mine operated by Duquesne Light Company (Permittee or Duquesne Light). The mine, designated as the Warwick No. 3 Mine, was located in Greene County and was operated from 1965 to 2000. Coal mined at the Warwick No. 3 Mine was transported to a coal preparation plant located approximately four miles away via an overland conveyor that was constructed in 1965. The conveyer traversed numerous private properties, including Mr. John's.

When Duquesne Light commenced mining at the Warwick No. 3 mine, neither the Surface Mining Act nor any other statute, required that surface facilities, such as the overland conveyor be permitted. The main permit required at the time was issued pursuant to the Clean Streams Law, authorizing discharges of mine drainage from the mine. Later amendments to the Surface Mining Act and the Clean Streams Law in the early 1980s imposed for the first time the requirement that all surface facilities of underground mines be permitted. Following the promulgation of regulations, the Department required all existing underground mines to submit re-permitting applications in order to come into compliance with the changes in the law.

In 1986 the Department issued a Coal Mining Activity Permit to Duquesne Light that included a reclamation plan. The reclamation plan required that all affected surface areas would be backfilled, graded and revegetated in accordance with the applicable regulatory requirements. As part of its permit application, Duquesne Light submitted a surety bond in the amount of \$973,137. The majority of the surety bond pertained to its obligation to close and seal numerous mine shafts and boreholes. Approximately \$48,000 of the surety bond pertained to the reclamation of the land on which the overland conveyor was situated.

Following the completion of underground mining activities in approximately 2000, Duquesne Light commenced reclamation of the affected surface area. As part of its reclamation activities, Duquesne Light commenced reclamation of the affected surface area including Mr. John's property. As part of its reclamation activities, Duquesne Light dismantled and disposed of the overland conveyor. Approximately 1400 feet of the overland conveyor traversed the western side of Mr. John's property, extending in a northeastern direction. Duquesne Light regarded and revegetated the affected property.

The Department subsequently determined Duquesne Light satisfied the criteria for Stage I and Stage II bond release set forth in the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, No. 418, *as amended*, 52 P.S. Section 1396.1-1396.19a; and in the mining regulations at 25 Pa. Code Chapter 86, 87 and 89.

In January, 2007, Mr. John filed a timely appeal of the Department's action approving Stage I and Stage II bond release. We conducted a site view prior to holding a merits hearing on October 1-2, 2008 in Pittsburgh. The parties have submitted post hearing briefs. We, therefore, made the following:

II. Findings of Fact

1. The Department of Environmental Protection is the agency with the duty and authority to administer and enforce the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, No. 418, *as amended*, 52 P.S. §§ 1396.1-1369.19a (Surface Mining Act); The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 69.1-691.1001 (Clean Streams Law), and the regulations promulgated under these statutes.
2. Duquesne Light Company is a corporation with a business address of P.O. Box 457, Greensboro, Pennsylvania 15338. (Exhibit C-5)
3. Joseph F. John is an individual who resides in Monongahela Township, Greene County. (N.T. at 68)
4. Commencing in 1965, and continuing to about 2000, Duquesne Light operated an underground coal mine, located in Greene County, known as the Warwick No. 3 Mine. (N.T. at 140-42; Exhibit C-5)
5. Coal produced at Warwick No. 3 Mine was transported from the mouth of the mine to a coal preparation plant located approximately four miles from the mine. (N.T. at 140-42) The coal was transported by an overland conveyor that was elevated above

the ground surface. *Id.* An access road was constructed alongside the conveyor belt. (N.T. at 252-53) The conveyor belt and road together vary in their width. (N.T. at 72-73) The overland conveyor was constructed in 1965 and traversed numerous private properties. (N.T. at 138-40) The total surface area affected by the overland conveyor and the access road amounted to approximately 16 acres. *Id.* at 266.

6. One of the properties which the overland conveyor traversed is currently owned by Joseph F. John. (N.T. at 45; Exhibit C-15) Approximately 1,400 feet of the overland conveyor traverses the western side of Mr. John's property, extending in a northeastern direction. (N.T. at 45; Exhibit C-3)

7. There were numerous other surface facilities associated with the Warwick No. 3 Mine, including mine shafts, bore holes, and access roads. (N.T. at 139, 252-53) The surface areas affected by these other facilities amount to approximately 24.3 acres.

8. When Duquesne Light commenced operation of the Warwick No. 3 Mine in 1965, neither the Surface Mining Act, nor any other statute required that surface facilities such as the overland conveyor be authorized by a permit. (N.T. at 101) The principal permit required for an underground mine was a permit issued pursuant to the Clean Streams Law, authorizing discharges of mine drainage from the mine. *Id.*

9. Amendments to the Surface Mining Act and the Clean Streams Law in the early 1980s imposed for the first time the requirement that all surface facilities of underground mines be authorized by a permit issued pursuant to these statutes. (N.T. at 1010) Following the promulgation of implementing regulations, the Department

required all existing underground mines to submit applications for permits that authorized operation and use of surface facilities in order to continue in operation. *Id.* at 104-06

10. On October 17, 1984, Duquesne Light submitted its repermitting application. (N.T. at 113) On December 15, 1986, the Department issued a Coal Mining Activity Permit to Duquesne Light covering the underground mine and its surface facilities. (Exhibit C-1)

11. As part of its application for a Coal Mining Activity Permit, Duquesne Light submitted a reclamation plan providing that all affected surface areas would be backfilled, graded and revegetated in accordance with the applicable regulatory requirements. (Exhibits C-2, C-3)

12. The Reclamation Plan, at Section 3, Land Use Information, provides that the post-mining land uses for the area affected by the conveyor is pasture, consistent with its pre-mining land use. (N.T. 113-17; Exhibits C-2, C-3)

13. The Reclamation Plan, at Section 6, Topsoil Use, provides:

6) Topsoil Use

There are no existing topsoil or subsoil stock piles in the permit area. During reclamation (after final grading), the existing soil will be tested. If required to meet the proposed post mining land use, soil will be delivered to the site and spread where necessary in accordance with Section 89.85 of the PA Bulletin and in the manner described in Section 802.3 of Penn Dot Form 408 Specifications.

(N.T. 113-117; Exhibits C-2, C-13)¹

14. Section 6 of the Reclamation Plan requires Duquesne Light to bring in topsoil only if the soil material on site was insufficient to achieve the post-mining land use. Section 6 does not automatically require Duquesne Light to bring in topsoil to cover the entirety of all of the surface areas affected by the Warwick No. 3 Mine. (N.T. 117-19; Exhibits C-2, C-13)

15. Also as part of its application for its Coal Mining Activity Permit, Duquesne Light submitted a surety bond written by the Travelers Casualty and Surety Company of America, Bond No. 104379505, in the amount of \$973,137. (Exhibit C-12) Duquesne Light's bond was conditioned on compliance with all requirements of its permit and of the Surface Mining Act, the Clean Streams Law and the Rules and Regulations at Chapters 86, 87 and 89 in the operation of its mine, including all requirements pertaining to reclamation of the surface areas of the mine at the conclusion of coal removal. (N.T. at 104)

16. On or about 2000, Duquesne Light ceased coal extraction at the Warwick No. 3 Mine and commenced reclamation of the affected surface areas. (N.T. at 140-41) As part of its reclamation activities, Duquesne Light dismantled and disposed of the overland conveyor. (N.T. at 142) Duquesne Light also regraded and revegetated the

¹ The Reclamation Plan references Penn DOT Form 408 at various sections. Penn DOT Form 408 Specifications is a standardized set of construction specifications that was published by the Pennsylvania Department of Transportation for use in construction activities. The information was last published as a Form in 1976. In 1983, the information was presented as Publication 408. The Form/Publication is available in the State Library and on Penn DOT's website.

affected surface lands. *Id.* at 143-44. Duquesne Light completed all of its reclamation work on or about 2005. (N.T. at 147-48)

17. In October 2003, Duquesne Light completed the initial grading and revegetation of the overland conveyor area. (N.T. at 144)

18. Subsequent to the completion of the initial grading and revegetation of the overland conveyor area, some erosion and barren areas developed on that portion of the Warwick No. 3 Mine situated on Mr. John's property. (N.T. at 145-46) These areas were located near the top of the hill on Mr. John's property. (N.T. at 145) In February 2005, Surface Mine Conservation Inspector Timothy Hamilton directed Duquesne Light to repair those areas on Mr. John's property. (N.T. at 147)

19. Shortly after February 2005, Duquesne Light repaired the erosion gullies and barren areas on Mr. John's property by bringing in and spreading topsoil on the areas, reseeding them and placing hay bales across the beltway. (N.T. at 146; Exhibit C-8C)

20. In May 2005, Mr. Hamilton conducted another inspection of the beltway and determined that additional erosion had occurred at various locations, including at Mr. John's property. (N.T. at 147) Mr. Hamilton directed Duquesne Light to repair these areas. Duquesne Light performed all of the necessary repairs by the Fall of 2005. (N.T. at 147)

21. On or about November 1, 2005, Duquesne Light submitted to the Department an application for the release of the Stage I and Stage II portions of surety Bond No. 104379595 (Completion Report No. 1-05-075). The Completion Report indicated that

thirty-nine acres of surface land were covered by the Report. (Exhibit C-5)

22. Surface Mine Conservation Inspector Timothy Hamilton was responsible for inspecting the Warwick No. 3 Mine and for making a determination as to whether the reclaimed conditions satisfied the Stage I bond release criteria. (N.T. at 136, 138-139)

23. In evaluating whether a mine site satisfies the Stage I bond release criteria, Mr. Hamilton considers whether the site has been backfilled and graded to approximate original contour. (N.T. at 136-37) In evaluating whether a site meets the approximate original contour standard, Mr. Hamilton compares the site with the land on either side to see if it blends in, and he considers whether the site is stable and has no depressions. (N.T. at 137)

24. There was not a lot of grading and contouring required in the conveyor area to bring it to approximate original contour because the initial disturbance from installing the conveyor was minimal. (N.T. at 143)

25. Duquesne Light did not initially bring in any soil material but instead used the onsite soil materials. (N.T. at 13) In Mr. Hamilton's judgment, the onsite materials were suitable for use as a soil cover because it was able to support vegetative growth. (N.T. at 144)

26. On January 10, 2006, Mr. Hamilton evaluated whether the Appellant's property satisfied the Stage I bond release criteria. He formed an opinion, based on his personal observations and experience, and within a reasonable degree of technical certainty, that the criteria had been met. (N.T. at 149-50) He concluded that no drainage controls

were necessary because the site was narrow, the vegetation was well established and stabilized the site, and no erosion was occurring at the site. (N.T. at 150-53; Exhibits C-8-d, C-8-E, C-8-F)

27. Martin Picklo is a Mining Specialist and a Forester for the Department's Greensburg District Mining Office who had responsibility for making the determination as to whether Duquesne Light satisfied the Stage II bond release criteria at the Warwick No. 3 Mine. (N.T. at 189-90, 203)

28. In evaluating whether a mine site satisfies the State II bond release criteria he considers whether the site is covered with a soil material, has adequate vegetation, and is not contributing suspended solids to streams. (N.T. at 97)

29. The standards for vegetative cover on a mine site vary with and are dependent upon the designated post-mining land use. (N.T. at 197)

30. The standard for the post-mining land use of unmanaged natural habitat is seventy percent growth which means that the plant material has grown enough to cover approximately seventy percent of the total area, with less than one percent of the area having less than thirty percent coverage. The types of vegetation acceptable for unmanaged natural habitat are grasses and legumes. (N.T. at 197)

31. The vegetative standard is the same for pastureland as for unmanaged natural habitat – seventy percent coverage. The type of vegetation acceptable for pastureland is the same as for unmanaged natural habitat --- grasses and legumes. (N.T. at 198)

32. Mr. Picklo evaluated the Appellant's property for compliance with the Stage II

bond release criteria on January 10, 2006. (N.T. at 211) Mr. Picklo walked the entire site on the Appellant's property and made visual observations of the soil materials and vegetation conditions. (N.T. at 210-11)

33. The affected property contained "no prime farm lands" and both the pre-mining and post-mining land use was designated as "pasture." (Exhibit C-2; N.T. at 130)

34. As a result of the regrading undertaken by Duquesne Light, the minimal disturbance on the affected property was contoured so as to blend smoothly with the surrounding terrain and was backfilled to the approximate original contour. (N.T. at 150-51)

35. With regard to the first criteria of Stage II bond release, replacement of topsoil, Mr. Picklo was aware of the fact that topsoil had not been conserved at the Warwick No. 3 Mine and that the Reclamation Plan authorized the use of existing soils so long as they were capable of supporting the required vegetative growth. Therefore, he evaluated whether there was some soil cover on the site that could support plant materials. (N.T. at 212-13)

36. Mr. Picklo concluded on January 10, 2006 that the soil cover on the Appellant's property was adequate to support vegetative growth. (N.T. 214, 228)

37. If Mr. Picklo had concluded that the soil cover could not support the necessary vegetative growth on the Warwick No. 3 Mine he would first have evaluated whether the existing soil simply needed some soil additives and, if addition of additives did not improve the soil's ability to support vegetative growth, he would have required

Duquesne Light to bring in more topsoil. (N.T. at 213-14)

38. On January 10, 2006, Mr. Picklo evaluated the adequacy of the vegetative cover on the Appellant's property. (N.T. at 214) He concluded, based on his visual observations and application of the principles that he had been taught, that greater than seventy percent of the total area was covered with vegetative growth of grasses and legumes. (N.T. at 212-14) He observed a few barren areas at the top of the hill on the Appellant's property that were smaller than one square yard. (N.T. at 214-15) He also noted that there were some repaired erosion areas on the Appellant's property. Soil had been placed in these erosion rills and hay bales had been placed on the hillside to prevent further erosion. (N.T. at 214-16) All of these conditions were reflected in photographs taken by Mr. Picklo on January 10, 2006. (N. T. at 216-18; Exhibits C-8-B, C8-C) Mr. Picklo also observed that the Appellant's property was not contributing suspended solids to stream flow or runoff outside the permit area. (N.T. at 216) Mr. Picklo reflected his observations in an inspection report dated March 23, 2006. (Exhibit C-14)

39. On January 10, 2006, Mr. Picklo formed his opinion, within a reasonable degree of technical certainty, that the conditions on the Appellant's property satisfied the Stage II bond release criteria. (N.T. at 218) He and Mr. Hamilton informed the Appellant of their opinions that day. (N.T. at 150-51)

40. On April 6, 2006, Mr. Hamilton, Mr. Picklo, and Surface Mine Conservation Inspector Supervisor Theodore Pytash met with Mr. John again on his property to

discuss his objections and review the conditions of his property. (N.T. at 151-52)

41. After Duquesne Light completed repair work on other parts of the Warwick No. 3 Mine to the Department's satisfaction, Mr. Picklo prepared a reclamation status report wherein he recommended a release of the Stage I and Stage II bonds for the mine. (N.T. at 219-20; Exhibit C-15)

42. Mr. Picklo's final responsibility with regard to Duquesne Light's bond release application was to evaluate the adequacy of Duquesne Light's calculation of the amount of bond that should remain in place as the Stage III bond. (N.T. at 221)

43. Mr. Picklo did this evaluation and concluded that Duquesne Light's calculations did not match the new conventional bond fee system used by the Department. (N.T. at 221) Therefore, he performed his own calculation using the Department's standard formula. (N.T. at 221)

44. The Department's standard formula is a per acre dollar fee for the acreage that will be subject to the Stage III bond. The per acre fee varies with the type of post-mining land use designated for the mine site. The fee for unmanaged natural habitat is one hundred dollars per acre. The fee for pastureland is five hundred dollars per acre. (N.T. at 201-02)

45. Because Mr. Picklo thought that the designated post-mining land use for the conveyor area was unmanaged natural habitat, he used the one hundred dollar per acre fee and multiplied that by thirty-nine, the number of acres of surface land that would be subject to the Stage III bond, to arrive at the figure of \$9,400. The \$9,400 represents

the portion of the original bond amount that was not released by the Department and remains in place as the Stage III bond. Mr. Picklo reflected his calculations on a clerical copy of the Coal Completion Report. (N.T. 221-22; Exhibit D-10)

46. If Mr. Picklo had understood that the designated post-mining land use was pastureland, he would have used the \$500 per acre fee and would have arrived at the figure of \$15,800. (N.T. at 225-26)

47. In 2007, the Department advised affected property owners by letter the Completion Report 1-05-075 had been approved. (N.T. at 223-24)

48. On or about February 9, 2007, the Department formally approved Duquesne Light's Completion Report No. 1-05-075 and released bond in the amount of \$963,737, leaving a balance of \$9,400 on Bond No. 104379505. (N.T. at 223-24; Exhibits C-12)

49. There are no private contractual obligations associated with or pertaining to the affected property regarding the nature or extent of the reclamation work to be performed with respect to the affected property. (N.T. at 91-92; Permittee's Exhibit - 1)

50. On August 20, 2008, Mr. Picklo and Mr. Hamilton conducted an inspection of the Appellant's property and observed that the site was stable and the vegetative cover had improved so that now ninety percent of the area has vegetative cover. (N.T. at 224-25; Exhibits C-8D, C-8-E and C-8-F)

III. Discussion

A. Burden of Proof

This appeal revolves around whether Duquesne Light satisfied the statutory and regulatory criteria for Stage I and Stage II bond release with respect to the reclamation of Mr. John's property. Mr. John, as the party appealing the Department's action approving Duquesne Light's request for bond release, bears the burden of proof in this Appeal. See 25 Pa. Code Section 1021.122(c); *Wayne v. Department of Environmental Protection*, 2000 EHB 888. Therefore, Mr. John bears the burden of proving by a preponderance of the evidence that the Pennsylvania Department of Environmental Protection abused its discretion in approving Duquesne Light's request for bond release by acting unreasonably and/or in violation of the criteria set forth in Section 4(g) of the Pennsylvania Surface Mining Act, 52 P.S. Section 1396.4(g), and the regulations at 25 Pa. Code Section 86.174. See also *Lucchino v. Department of Environmental Protection*, 2000 EHB 655, 667. Stated another way, Mr. John must prove that the Department's approval of bond release was an abuse of discretion in the sense that it was unreasonable, inappropriate or not in conformance with law. *Foundation Coal Resources v. Department of Environmental Protection and Penneco Oil and Gas Company*, EHB Docket No. 2006-067 (Consolidated) (Adjudication issued on March 9, 2009) *slip opinion* at page 39; *Pennsylvania Trout v. Department of Environmental Protection*, 2004 EHB 310, 362; and *People United to Save Homes v. Department of Environmental Protection*, 2000 EHB 1309, 1318.

B. Standard of Review

The Pennsylvania Environmental Hearing Board, as instructed by the Commonwealth Court of Pennsylvania in *Warren Sand & Gravel v. Department of Environmental Resources*, 341 A.2d 556, 565 (Pa. Cmwlth. 1978) reviews all challenged Pennsylvania Department of Environmental Protection final actions *de novo*. See also *Groce v. Department of Environmental Protection and Wellington Development-WVDT, LLC*, 2006 EHB 856, 893. Former Chief Judge Krancer, in the oft-cited case of *Smedley v. Department of Environmental Protection and International Paper Co.*, 2001 EHB 131, concisely set forth our duty in every case:

We must fully consider the case anew and we are not bound by prior determinations made by the DEP. Indeed, we are charged to “redecide” the case based on our *de novo* scope of review. The Commonwealth Court has stated that “[d]e novo review involves full consideration of the case anew. The [EHB], as a reviewing body, is substituted for the prior decision maker, [the Department], and redecides the case.” *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *O’Reilly v. Department of Environmental Protection*, 2001 EHB 19, 32. Therefore, we make our own findings of fact based solely on the record developed before us.

Smedley, 2001 EHB at 156.

C. The Statutory and Regulatory Requirements for Bond Release

As correctly pointed out by the Department in its comprehensive post hearing brief, Section 4(g) of the Surface Mining Act, establishes a three tiered schedule for bond release. The first tier, Stage I bond release, allows the Department to release up

to sixty percent of the total bond amount where the permittee has completed backfilling, regrading, and drainage control in accordance with the approved reclamation plan.

(a) Subject to the public notice requirements of subsection (b), if the Department is satisfied the reclamation covered by the bond or portion thereof has been accomplished as required by this act, it may upon request by the permittee or any other person having an interest in the bond, including the Department, release in whole or in part the bond or deposit according to the following schedule:

(1) At Stage I, when the operator has completed the backfilling, regrading and drainage control of a bonded area in accordance with his approved reclamation plan, the release of up to sixty percent of the bond for the applicable permit area, so long as provisions for treatment of pollutorial discharges, if any, have been made by the operator.

52 P.S. Section 1396.4(g)(1).

Stage II allows for an additional release of funds when revegetation is successfully established in accordance with the approved reclamation plan, and where the land is not contributing suspended solids to runoff outside the permit area.

(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 could be sufficient for the cost to the Commonwealth of reestablishing revegetation. ... 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.

52 P.S. Section 1396.4(g)(2).

Stage III bond release is appropriate where the permittee has completed mining and reclamation operations and has made provisions for the future treatment of any future polluttional discharges. 52 P. S. Section 1396.4(g)(3).²

In addition to the above statutory requirements, Pennsylvania has promulgated regulations to implement these statutory provisions. The Department's regulations pertaining to Stage I and Stage II bond release provide as follows:

(a) When the entire permit area or a portion of a permit area has been backfilled and regraded to the approximate original contour or approved alternative, and when drainage controls have been installed in accordance with the approved reclamation plan, Stage I reclamation standards have been met:

(b) When the entire permit area or a portion of the permit area meets the following standards, Stage II 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.

25 Pa. Code Section 86.174.

D. Did the Department Err in Granting Stage I Bond Release?

The first issue we need to address is whether Mr. John proved by a preponderance of the evidence that the Department erred in granting Stage I bond

² Of course, this appeal pertains only to Stage I and Stage II bond release.

release. The criteria for the release of Stage I bonds under the Surface Mining Act and the applicable regulations require a determination of whether Duquesne Light appropriately backfilled and regraded the affected area on Mr. John's property and installed drainage controls in accordance with its approved reclamation plan. *See* 52 P.S. Section 1396.4(g); *see also* 25 Pa. Code Section 86.174(a). The regulations also require that the permit area be regraded to its "approximate original contour." 25 Pa. Code Section 86.174(a).

Mr. John failed to prove that the statutory and regulations criteria for Stage I bond release were not met. While we have no doubt that the regrading and revegetation are not up to the personal standard requested by Mr. John the testimony shows that the regrading and revegetation meet the state law requirements. Indeed, the testimony by Appellant and his expert, Mr. James Collins, was limited to what they would have done differently or better. They also testified what might have been done if the pre-mining use of Mr. John's property would have been prime farmland as opposed to pasture.

We find the testimony of Mine Conservation Inspector Tim Hamilton compelling. Mr. Hamilton has been a Mine Conservation Inspector for sixteen years, and for nine years prior to that he held other positions within the Department's water quality and oil and gas programs. He has conducted more than five hundred inspections and has reviewed more than fifty bond release applications. Moreover and most importantly, he has substantial experience in determining whether reclaimed land

has been regraded to approximate original contour. The Board recognized Mr. Hamilton as an expert in the area of mine reclamation.

Mr. Hamilton testified that he evaluated both the affected and unaffected surface areas to compare the pre-mining contour of the surrounding land with the post mining contours of Mr. John's property. Mr. Hamilton indicated that Mr. John's property blended well with the surrounding topography. He further explained that no drainage ditches were required because the beltway area was relatively narrow. Although readily acknowledging that some erosion and barren spots had developed prior to bond release, Duquesne Light repaired these areas at the Department's direction by bringing in topsoil for these areas and installing hay bales to slow the flow of water across the property.

Mr. Hamilton further testified that mainly due to the minimal recontouring required, it was possible to grade and backfill using the existing materials on the site. Numerous photographs were introduced indicating that the affected areas of Mr. John's property blended well with the surrounding terrain and satisfied the requirement to achieve approximate original contour.

Based on all of the evidence, Duquesne Light satisfied the regulatory standards for Stage I bond release. The property has been backfilled and regraded to the approximate original contour. Moreover the "ditch" near the road that Mr. John complains about is actually a channel for an intermittent stream which is part of the property's natural topographic features. Because the stream channel was part of the

pre-mining topography and is a protected water of the Commonwealth, the presence of the ditch is not relevant to the position of the Pennsylvania Department of Environmental Protection that approximate original contour was met.

E. Did the Department Err in Granting Stage II Bond Release?

The criteria for the lease of Stage II bonds under the Surface Mining Act and the applicable regulations require a determination of whether Duquesne Light reestablished vegetation in accordance with the approved reclamation plan and that the property is not contributing suspended solids to the runoff outside the permit area in excess of permissible limits. *Lucchino*, 1998 EHB at 480. In addition, the regulations provide that topsoil shall be replaced in accordance with the approved reclamation plan. 25 Pa. Code Section 86.174(b)(1).

With regard to the requirement to replace topsoil, the regulations contemplate that it may not always be possible or necessary to replace topsoil on a reclaimed mine site and provide for the use of alternative soil cover materials. Indeed, 25 Pa. Code Section 89.22 specifically provides that overburden material may be substituted for topsoil “if the resulting soil medium is suitable for sustaining vegetation.”

Mr. John failed to prove that the statutory and regulatory criteria for Stage II bond release were not met. Moreover, the evidence strongly demonstrates that Duquesne Light satisfied the reclamation standards for Stage II bond release. As noted above, Stage II bond release requires Duquesne Light to revegetate the property, replace topsoil, and ensure that the site is not contributing suspended solids outside the

permit area. *See* 25 Pa. Code Section 86.174(b); 52 P.S. Section 1396.4(g). In addition, Duquesne Light must comply with the terms and conditions of its approved reclamation plan.

Duquesne Light's Reclamation Plan requires it to establish 70 per cent ground cover with not more than 1 per cent of the area having less than 30 per cent cover. Finally, the Reclamation Plan provided that the existing soils would be used as soil cover and that topsoil would be imported only where necessary to achieve the post-mining land use of "pasture."

We find the testimony of the Department's Forester, Martin Picklo, compelling. Based on his testimony and on the visual evidence admitted at the hearing, we find that the vegetative growth on Mr. John's property was greater than the 70 per cent figure required by the Reclamation Plan at the time the Department approved Stage II bond release. Moreover, as testified by Mr. Picklo, following a later inspection, the amount of vegetation has continued to improve as it is most recently over 90 per cent vegetative cover. The Appellant's expert did not opine as to whether the required extent of revegetation had been achieved and there was no credible evidence that any suspended solids contributed to runoff outside the permit area. Instead the evidence strongly supports our finding that Duquesne Light met all applicable statutory and regulatory standards.

Since Duquesne Light satisfied the terms and conditions of the approved Reclamation Plan and the controlling statutory and regulations governing Stage I and

Stage II bond release. Mr. John's appeal will be dismissed.

Conclusion of Law

1. The Pennsylvania Environmental Hearing Board has jurisdiction over the parties and over Mr. John's appeal to the Stage I and Stage II Bond Release on the Warwick No. 3 mine permit.
2. Mr. John failed to prove by a preponderance of the evidence that the Pennsylvania Department of Environmental Protection erred in granting Stage I and Stage II Bond Release to Duquesne Light. *Warren v. Department of Environmental Protection*, 2000 EB 888, 919; 25 Pa. Code Section 1021.122(c).
3. Stage I reclamation standards are met when the permit area has been backfilled and regraded to the approximate original contour, and when drainage controls have been installed in accordance with the approved Reclamation Plan. 25 Pa. Code Section 86.174(a).
4. Stage II reclamation standards are met when topsoil or a soil substitute has been placed as a soil cover, revegetation has been established in accordance with the Reclamation Plan, 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 permit. 25 Pa. Code Section 86.174(b).
5. The Department's approval of Stage I and Stage II Bond Release was appropriate and in accordance with the law.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOSEPH F. JOHN

v.

COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION and DUQUESNE LIGHT :
COMPANY, Permittee :

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EHB Docket No. 2007-047-R

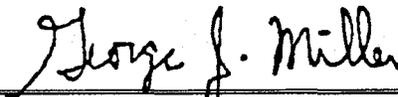
ORDER

AND NOW, this 18th day of March, 2009, the objections to bond release raised in Appellant's Appeal are *denied*. Based on all of the evidence, Duquesne Light satisfied the statutory and regulatory requirements for Stage I and Stage II Bond Release. Appellant's Appeal is *dismissed*.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Acting Chairman and Chief Judge

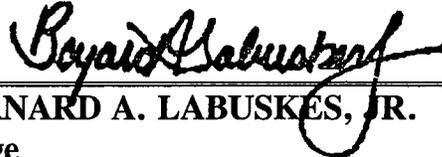


GEORGE J. MILLER
Judge



MICHELLE A. COLEMAN

Judge



BERNARD A. LABUSKÉS, JR.

Judge

DATED: March 18, 2009

**c: DEP Bureau of Litigation
Attention: Brenda K. Morris, Library**

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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

MYSTIC BROOKE DEVELOPMENT, L.P. :
 :
 v. : EHB Docket No. 2007-140-L
 :
 COMMONWEALTH OF PENNSYLVANIA, :
 DEPARTMENT OF ENVIRONMENTAL :
 PROTECTION and HELVETIA COAL :
 COMPANY, Intervenor :
 :

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board upholds the Department’s denial of a water loss complaint because the operator has not interfered with the preexisting industrial uses of the water supply.

FINDINGS OF FACT

1. The Department of Environmental Protection (the “Department”) is the Commonwealth agency with the duty and authority to administer and enforce the Surface Mining Conservation and Reclamation Act, 52 P.S. § 1396.1 *et seq.* (“Surface Mining Act”); the Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. § 1406.1 *et seq.* (“Mine Subsidence Act”); the Coal Refuse Disposal Control Act, 52 P.S. § 30.51 *et seq.*; the Clean Streams Law, 35 P.S. § 691.1 *et seq.*; Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17, and the rules and regulations promulgated under those statutes.

2. Mystic Brooke Development, L.P. (“Mystic Brooke”) is a limited partnership that acquired certain property in 2006 in Center Township, Indiana County (the “Property”). (Notes



of Transcript page (“T.”) 32; Helvetia Exhibit (“H. Ex.”) 1.)

3. Helvetia Coal Company (“Helvetia”) is the owner/operator of the Lucerne No. 6 Mine, which is adjacent to the Property. Helvetia has conducted coal mining activities and coal refuse disposal activities at the site pursuant to two permits: No. 32841303 (Bituminous Coal Mining Activity Permit, issued September 15, 1986) and No. 32747310 (Coal Refuse Disposal Permit, issued April 12, 1985). (H. Ex. 2, 3.)

4. Helvetia completed its mining in the 1970s. (T. 68.) The coal refuse disposal area was developed in the 1960s or early 1970s. (T. 13.) Helvetia currently operates three ponds on the site for the collection and treatment of mine water. (T. 13.)

5. At one time the Property was owned by Penelec. Penelec sold the Property to the Electric Power Research Institute (“EPRI”) in the 1980s, which operated an experimental coal cleaning facility. EPRI sold the Property to CQ, Inc. in the mid-1990s. CQ leased the Property to Indiana County beginning in 1995. CQ sold it to Mystic Brooke in 2006. (T. 30.)

6. There is a water supply on the Property. The water supply has been identified in this appeal as Monitoring Point D-4. The water supply is a spring that is fed by shallow groundwater flow. Water is collected in a cement manhole. A sump inside the manhole pumps water that collects in the manhole via collection lines to a building known as the change house as well as an office building. (T. 14-15, 18-31, 65-66; Appellant’s Exhibit (“A. Ex.”) 2, 5; Commonwealth Exhibit (“C. Ex.”) 4.)

7. The spring was originally developed by EPRI in the 1980s. (T. 29.)

8. EPRI tried but was unable to use the spring as a drinking water supply because the level of sulfates in the water has substantially exceeded secondary drinking water standards at least since 1985. (T. 30-31, 33, 64, 74-76; C. Ex. 4.)

9. Instead, EPRI used bottled water for drinking. The water from the D-4 was used for fire suppression, process water, and washing. (T. 30.)

10. To this day, D-4 is suitable for its original nondrinking water purposes but not for drinking water due to its elevated sulfate levels. (T. 81; C. Ex. 4.)

11. On or about August 29, 2006, a few days after purchasing the Property, Mystic Brooke filed a water supply contamination complaint with the Department alleging that Helvetia was obligated to restore or replace the water supplied by D-4. (C. Ex. 2.)

12. After an investigation, the Department advised Mystic Brooke that Helvetia was not responsible for restoring or replacing the water supply based upon the following:

1. The water supply is not within the rebuttable presumptive area for the mining and based on the date of the mining the presumptive area would not be applicable.
2. The sump/well was tested for water quality after initial installation.
3. The pre-purchase and post-purchase water quality data for the well/sump on the property did not meet drinking water standards.
4. The water supply was not historically used as a potable water source.

(C. Ex. 4.) Mystic Brooke's appeal is from the Department's denial of this water supply loss claim.

13. Although sulfates in D-4 might have increased over time, any increase that has occurred has not had a material adverse effect on the preexisting, continuing, nonpotable, industrial purposes served by D-4. (T. 78, 81.)

DISCUSSION

Mystic Brooke relies upon Section 1406.5a of the Mine Subsidence Act for its water loss

complaint. That section reads as follows:

After the effective date of this section, any mine operator who, as a result of underground mining operations, affects a public or private water supply by contamination, diminution or interruption shall restore or replace the affected supply with an alternate source which adequately services in quantity and quality the premining uses of the supply or any reasonably foreseeable uses of the supply.

52 P.S. § 1406.5a(a)(1). *See also* 25 Pa. Code § 89.145a(b)(same). It is not at all clear that Section 1406.5a(a)(1) applies in this case because Helvetia's active underground mining ended in the 1970s, long before the provision took effect in 1994. Helvetia, however, continues to (among other things) maintain treatment ponds on the site, so we will assume for the moment that the statutory replacement obligation applies.

Mystic Brooke in its post-hearing brief also states that the presumption of liability for pollution and for diminution of water supplies within 1000 feet of surface mines found at 25 Pa. Code § 87.119(b) applies in this case, but it does not explain why. It may be because Helvetia is permitted to conduct coal refuse disposal activities on its site and the refuse disposal regulations contain a water supply replacement obligation similar to that found in Section 1406.5a of the Mine Subsidence Act. *See* 25 Pa. Code § 90.116a (incorporating 25 Pa. Code § 87.119(a)). Again, it is highly doubtful that Section 87.119(b) applies because Helvetia's coal refuse disposal permit was issued in 1985 and Section 87.119(b) does not appear to apply to operations conducted pursuant to permits issued before 1993. *See* 25 Pa. Code § 87.119(k). Furthermore, debating the applicability of the presumption is of little or no value in this case because the presumption relates to causation, and unlike the typical water loss case, causation is not the issue in this case. In any event, we will put these concerns aside for purposes of our immediate discussion. We will assume that Helvetia's site is the source of the sulfate contamination in D-4

simply to advance the discussion to the point that matters in this case.

The point that matters in this case is that Mystic Brooke's claim must fail because Helvetia is only required to restore or replace a water supply if it interfered with the purposes served by the supply, and Helvetia has not interfered with purposes served by D-4. As we stated in *M & M Stone Co. v. DEP*, 2008 EHB 24, 71, *aff'd*, 383 C.D. 2008 (Pa. Cmwlth., October 17, 2008), the requirement to replace or restore water supplies in the mining statutes was not designed to create a windfall: "An operator is not required to replace a Chevy with a Cadillac." From the day that D-4 was developed, it has been contaminated with high levels of sulfates that prevent its use for drinking water. D-4 has from its inception been a source suitable for industrial uses only, it has remained suitable for those uses throughout its existence, and it remains suitable for those uses today. Helvetia has at no point since the spring was developed materially interfered with those uses. Accordingly, it has no obligation to replace the Chevy (a sulfate-laden spring) with a Cadillac (a potable water supply).

The mining statutes require an operator to "restore or replace" an adversely affected water supply. To "restore" is "to put or bring back into a former or original state". WEBSTER'S NEW COLLEGIATE DICTIONARY (1989). To "replace" is to "restore to a former place or position." *Id.* Both of these verbs presuppose a return to a status quo ante. One cannot "restore" or "replace" a water supply to a former or original condition if that condition never existed in the first place. Furthermore, the statute refers to the restoration of "premining uses" and D-4 was developed *after* mining. There were no premining uses here.

An operator's duty of restoration or replacement is limited to supplying an alternate source that adequately serves the premining uses of the supply. If we imagine that Helvetia had a replacement obligation here, what would it do? Helvetia would only be required to supply

water contaminated with high levels of sulfates that is suitable for industrial-type uses. Yet D-4 in its current condition remains suitable for industrial uses. Replacing it with another contaminated source would be pointless and absurd and the Department was well within the bounds of its reasonable discretion when it refused to order restoration or replacement.

The Department in its investigation relied upon the fact that D-4 was contaminated before Mystic Brooke bought the property. (C. Ex. 4.) We do not necessarily agree that the date when property was transferred is a relevant consideration in this context because, as Mystic Brooke points out, there is no prescriptive right to contaminate. The pertinent fact here is that Helvetia has not interfered with the purposes served by D-4 because it has *never* served as a potable water supply.

Mystic Brooke argues that sulfate levels have gone up over time. Even if that is true, there is no evidence that the increase itself has interfered with the purposes served by D-4. Finally, Mystic Brooke argues that it was “reasonably foreseeable” that D-4 would serve as a potable supply. Putting aside our skepticism regarding the foreseeability of a manhole that collects very shallow groundwater flow in a heavily industrialized area serving as a potable supply, the debate about what uses are foreseeable only comes into play *if* restoration or replacement is required. In short, the Department here acted both lawfully and well within the limits of its reasonable discretion in denying Mystic Brooke’s water loss complaint.

CONCLUSIONS OF LAW

1. Mystic Brooke bears the burden of proof to show the Department acted unreasonably or contrary to law. 25 Pa. Code § 1021.122(a).
2. The Department acted reasonably and lawfully in determining that Helvetia is not required to replace water supply D-4 or provide a potable water supply.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MYSTIC BROOKE DEVELOPMENT, L.P. :

v. :

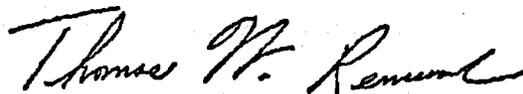
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DEPARTMENT OF ENVIRONMENTAL :
PROTECTION and HELVETIA COAL :
COMPANY, Intervenor :

EHB Docket No. 2007-140-L

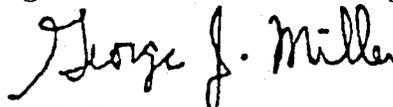
ORDER

AND NOW, this 20th day of March, 2009, it is hereby ordered that Mystic Brooke's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD



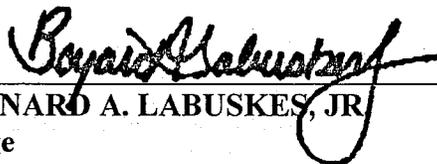
THOMAS W. RENWAND
Acting Chairman and Chief Judge



GEORGE J. MILLER
Judge



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

DATED: March 20, 2009

c: DEP Bureau of Litigation
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

WAMPUM HARDWARE CO.

v.

COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION

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EHB Docket No. 2007-220-R

Issued: March 25, 2009

ADJUDICATION

By Thomas W. Renwand, Acting Chairman and Chief Judge

Synopsis:

The Pennsylvania Environmental Hearing Board upholds an appeal to a compliance order issued by the Pennsylvania Department of Environmental Protection to the Appellant blaster arising from a blast it conducted at a quarry. The Board finds that the Department failed to prove by a preponderance of the evidence that the blast as executed constituted a hazard or danger to persons or property. The applicable regulation specifically provides that “blasting...may not be done or performed in a manner...constituting a hazard or danger or do harm or damage to persons or property in the area of the blasting.” If the blasting does not result in harm or damage to persons or property, there is no violation of the regulation unless persons or property were in the “zone of danger” in the area of the blast. The Appellant safely conducted the blast by providing for a blast area approximately double the size required by the state regulations, no material even came close to going



outside the blast area, and the closest debris to any individuals landed nearly the length of a football field away from their secure position.

INTRODUCTION AND BACKGROUND

This extremely interesting case of first impression involves blasting. Blasting is an activity that has long been recognized as ultra-hazardous in Pennsylvania. *See Federoff v. Harrison Construction Co.*, 66 A.2d 817, 818 (Pa. 1949). The Pennsylvania Department of Environmental Protection issued a Compliance Order to the blaster, Wampum Hardware Company (“Wampum”), arising from a blast that Wampum conducted at the Wampum Quarry on August 29, 2007. The Compliance Order indicated that Wampum had “blasted in a manner which ejected debris into the air...constituting a hazard or danger” in violation of Section 77.564 (g)(6) of the Pennsylvania Noncoal Surface Mining Regulations. *See* 25 Pa. Code Section 77.564 (g)(6).

Wampum timely appealed the Department action and following discovery a one day hearing was conducted in Pittsburgh on Monday, November 3, 2008 by Acting Chairman and Chief Judge Tom Renwand. Counsel submitted comprehensive post hearing briefs which concisely and thoughtfully set forth their respective positions. We, therefore, make the following:

FINDINGS OF FACT

A. The Parties

1. The Department of Environmental Protection is the agency with the duty and authority to administer and enforce the Noncoal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. §§ 3301-3326 (“Noncoal Surface Mining Act”); The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 (“Clean Streams Law”); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929,

P.L. 177, *as amended*, 71 P.S. § 510-17 (“Administrative Code”) and the rules and regulations promulgated thereunder. Stipulation of Facts, hereinafter Board Exhibit 1.

2. Wampum Hardware Company is a corporation authorized to do business in Pennsylvania with a business address of 636 Paden Road, New Galilee, Pennsylvania 16141. Board Exhibit 1.

3. Wampum is engaged in the business of blasting activities as that term is defined under 25 Pa. Code § 211.01. Wampum was hired by Cemex, Inc. to conduct blasting activities at the Wampum Quarry No. 2. The Wampum Quarry No. 2 is a limestone surface mine located in Shenango Township, Lawrence County, Pennsylvania. Board Exhibit 1.

4. Cemex, Inc. is the permittee of the Wampum Quarry No. 2 and conducts noncoal surface mining activities at the Wampum Quarry No. 2 under Noncoal Surface Mining Permit No. 37990302 (“Permit”). Board Exhibit 1.

B. Wampum Quarry No. 2

5. The Wampum Quarry No. 2 (“Wampum Quarry”) permit area is 337 acres in size, of which 219.4 acres are covered by reclamation bonds. Operations began at the Wampum Quarry in October 2003. Board Exhibit 1.

6. Wampum conducts blasting of overburden and of limestone at the Wampum Quarry. Blasting of the overburden is conducted in order to fracture and ultimately remove the overburden and other surface materials above the limestone so that the limestone can be mined. Blasting of the limestone is conducted in order to break the limestone into fragments so that the limestone can be removed. Board Exhibit 1.

7. Special Condition No. 4 of the Permit requires that all blasting at the Wampum Quarry be done in accordance with an approved Blast Plan. The Department approved the Blast Plan for the

Wampum Quarry No. 2 on July 27, 2000, as part of the Permit approval. The Department approved subsequent Blast Plan revisions on December 19, 2005, and April 17, 2007. Board Exhibit 1.

8. Sections 77.561-77.565 of the Noncoal Surface Mining Regulations, 25 Pa. Code §§ 77.561-77.565 govern blasting activities conducted at the Wampum Quarry No. 2. Section 77.564(g)(6) specifically provides that "...blasting, whether of overburden or of mineral, may not be done or performed in a manner and under circumstances or conditions that debris is ejected into the air, constituting a hazard or danger or to do harm or damage to persons or property in the area of the blasting." Board Exhibit 1.

C. Department Witness

9. William Edmiston ("Mr. Edmiston") is employed by the Department, and is assigned to the Knox District Mining Office. Transcript (Hereinafter "T") 6-7.

10. Mr. Edmiston has been employed as a Surface Mine Conservation Inspector since 1992. His primary job responsibilities are to conduct inspections of surface coal mines, limestone mines, and sand and gravel mines, to conduct field reviews of application areas, and to enforce the mining laws and regulations. T. 7; Exhibit C-1.

11. Mr. Edmiston was a Mining Specialist from 1988 to 1992. Mr. Edmiston's job duties as a Mining Specialist included the same duties he now performs as a Surface Mine Conservation Inspector. T. 7.

12. Since 1988, as a Mining Specialist and as a Surface Mine Conservation Inspector, Mr. Edmiston has inspected at least 1,000 mine sites, has reviewed 500 to 1,000 blast reports and has investigated at least 200 blasting complaints. T. 8.

13. Mr. Edmiston received a B.S. degree in Engineering Mechanics from Penn State

University in 1972. T. 8; Exhibit C-1.

14. Mr. Edmiston has taken numerous courses in the area of blasting offered by the Department and the Office of Surface Mining (“OSM”). These courses include Blasters Training, Mine Blasting and Safety, and Surface Blasting. T. 8; Exhibit C-1.

15. Mr. Edmiston has never executed a blast or conducted any blasting activities. T. 42-43

16. Mr. Edmiston has never held a blasting license. T. 42

17. Mr. Edmiston was accepted by the Board as an expert in blasting. T. 9.

D. Wampum Witnesses

Timothy J. Green

18. Timothy J. Green (“Mr. Green”) is an employee of Wampum. He has been employed by Wampum as a blaster since 2001. T. 77.

19. Mr. Green is a licensed blaster in Pennsylvania, Ohio, and West Virginia. T- 77.

20. Mr. Green has conducted blasts at the Wampum Quarry more than 120 times; including seven times during August 2007. T. 79, 96.

21. Mr. Green was the blaster-in-charge of the blast at the Wampum Quarry conducted on August 29, 2007. Board Exhibit 1.

22. The blaster-in-charge is the person responsible for conducting blasting at the Wampum Quarry either for a particular day or for a particular blast. Among other things, the blaster-in-charge is responsible for assessing the risk posed by the planned blast, determining the safety radius for all blasts, and clearing the blast area of people and equipment before the blast is detonated. Board Exhibit 1.

23. Mr. Green conducted a post-blast examination of the Wampum Quarry following the

blast at issue on August 29, 2007. T. 102-103.

John Beatty

24. John Beatty (“Mr. Beatty”) is responsible for technical services at Wampum. He supervises Mr. Green and Phillip Benninghoff (“Mr. Benninghoff”), one of Mr. Green’s assistants. He is a licensed blaster in Pennsylvania and Ohio. T. 159-160.

25. Mr. Beatty conducted an investigation of the blast at the blast site on August 29, 2007, including an examination of the “debris field.” T. 163, 171.

26. Mr. Beatty, as part of his investigation, interviewed the Wampum blasting crew, Mr. Green and Mr. Benninghoff. T. 164.

27. Mr. Beatty was himself interviewed by Wampum Expert Witness Frank Chiappetta prior to preparation of Mr. Chiappetta’s expert report. T. 145.

Frank Chiappetta

28. Frank Chiappetta (“Mr. Chiappetta”) is an explosive applications engineer for Blasting Analysis International, with offices in Allentown, Pennsylvania. T. 117; Wampum Exhibit 3.

29. As part of his job duties, Mr. Chiappetta conducts training in Pennsylvania, West Virginia, and Ohio, and performs diagnostics on shots in order to correct problems with the shot. He has also assisted the federal Mine, Safety and Health Administration (“MSHA”) with its training activities. T. 118-119.

30. Mr. Chiappetta has taught at a number of major universities, including the Massachusetts Institute of Technology, the University of Vienna, Queen’s University of Canada, and the Brazil Institute of Quarrying (while at the same time evidently racking up an impressive array of frequent flyer miles). T. 121; Exhibit W-3.

31. Mr. Chiappetta has provided review services for technical papers at the United States Bureau of Mines. T. 121; Exhibit W-3.

32. Mr. Chiappetta holds a master's degree in Mining Engineering with a specialty in Explosives Applications. He received his master's degree in 1982 from Queen's University, Kingston, Ontario, Canada. T. 122; Wampum Exhibit 3.

33. Mr. Chiappetta received a Bachelor of Science degree in Mining Engineering in 1980 from Queen's University, Kingston, Ontario, Canada. T. 12; Wampum Exhibit 3.

34. Mr. Chiappetta has executed thousands of blasts. Designing blasts is the primary core of his consulting business. T. 118; Exhibit W-3.

35. In preparing his expert report and trial testimony, Mr. Chiappetta examined the blast reports, design, Vibra-Tech report, and interviewed John Beatty, Timothy Green, and Phillip Benninghoff. T. 145, 158.

36. Mr. Chiappetta was accepted by the Board as an expert in blasting. T. 125.

E. August 29, 2007 Blasting Activities at the Wampum Quarry No. 2

37. Wampum conducted blasting activities at the Wampum Quarry at approximately 11:00 a.m. on August 29, 2007. T. 95. Mr. Green was the blaster-in-charge and was assisted by two Wampum employees, Mr. Benninghoff and Ronald Anderson. Board Exhibit 1; T. 81.

38. Wampum was specifically conducting blasting activities within the limestone on August 29, 2007. Board Exhibit 1.

39. Mr. Edmiston conducted an unscheduled "spot" inspection of the Wampum Quarry on August 29, 2007. He was accompanied by Joseph Ferrara, the Compliance Manager for the Department's Knox District Mining Office. Board Exhibit 1; T. 20-21.

Limestone Blasting

40. Limestone is blasted by setting off explosives which have been placed in holes drilled into the limestone. T. 17.

41. The explosive agent is Ammonium Nitrate Fuel Oil (“ANFO”) and a booster. The ANFO and booster are placed in holes and stemming is placed on top of the explosives. The booster initiates the explosion. T. 17, 19.

42. Stemming is the material placed in the hole above the explosives. Stemming confines the blast energy in the hole and prevents material from being ejected through the top of the holes. T. 17, 19.

43. Confinement refers to how much room is left for the explosives to move within the holes when the blast occurs. T. 20.

44. Wampum used both #8 and #9 stemming at the Wampum Quarry. T. 88.

45. Number 8 stemming consists of stone approximately one quarter inch in size. T. 89. Number 8 stemming provides more resistance and more confinement in a blast than #9 stemming. T. 38.

46. Number 9 stemming consists of stone approximately one eighth to one quarter inch in size. The primary difference between #8 and #9 stemming is that the #9 stemming includes sand-like fines. T. 89.

47. A ramp comprised of material from the site which provides access to the pit for trucks was located on one side of the shot. T. 104, 130.

Blaster-in-Charge Responsibilities

48. The blast holes are drilled and set in a particular pattern, determined by the blaster-in-

charge, depending on the material being blasted. T. 18. The blaster-in-charge also determines the timing and sequence in which the blast is set off. T. 16; Exhibit C-3.

49. In addition to setting up the blast, the blaster-in-charge is responsible for establishing and maintaining a safe area around the blast. T. 16.

50. 25 Pa. Code Section 564(g)(8) requires a blaster to suspend work and remove all people within 500 feet of the blast site. T. 46.

51. Mr. Green established a safe area of approximately 950 feet from the blast. T. 79.

52. The blaster-in-charge detonates the shot from a secure location. T. 19.

The Limestone Shot

53. In a properly designed shot, the limestone is broken into small fragments. The limestone that has been blasted should remain in the immediate area of the shot. Rock and debris from the blast should remain close to the blast area. T. 19-20.

54. All “debris” (principal fragments) from this shot remained within the 950 foot blast area delineated by the blaster-in-charge, Mr. Green, and went no farther than 700 feet from the shot. T. 45-47.

55. Mr. Green and Mr. Benninghoff were standing by their truck at the edge of the safe area when Mr. Edmiston and Mr. Ferrara arrived at the Wampum Quarry. Board Exhibit 1; Exhibit C-2; T. 22.

56. After the blast holes were loaded and the blast was ready to be detonated, Mr. Green cleared the area of people, sounded a warning alarm, and detonated the blast. Board Exhibit 1.

Department’s Inspectors’ Observations

57. Mr. Edmiston and Mr. Ferrara remained in their truck to observe the shot. Mr. Edmiston

heard the shot and saw rock ejected by the blast fly up in the air and towards the truck in which he and Mr. Ferrara were watching the blast. Board Exhibit 1; T. 23.

58. The blast ejected enough rock and debris to temporarily darken the sky. T. 23.

59. The rock and debris went above Mr. Edmiston's line of sight. Mr. Edmiston estimated that the rock and debris was thrown about 150 feet in the air. T. 23-24.

60. Mr. Edmiston admitted that the rocks expelled by the blast did not actually pose a hazard to him or others. T. 61.

61. As he watched the rock fly towards him, Mr. Edmiston saw Mr. Benninghoff get under the blaster's truck. T. 24.

62. Mr. Edmiston admitted that there was nothing out of the ordinary with one of the blasting crew taking cover under a truck and nothing should be inferred from such action. T. 63.

63. Mr. Edmiston never questioned Mr. Green or Mr. Benninghoff after the blast to determine if they were concerned that they could have been hit by debris from the blast. T. 71.

64. After the rock settled, Mr. Edmiston looked to see whether Mr. Green or Mr. Benninghoff had been hit by the rock and debris ejected by the blast. T. 24.

65. No one was hit by the rock and debris, and as far as Mr. Edmiston was able to determine, the Department's vehicle and the blaster's truck were not struck by the rock and debris. T. 24-25.

Wampum's Post-Blast Inspection

66. After the blast, Mr. Green drove across the pit from where he was standing with Mr. Benninghoff to inspect the area immediately around the blast area to determine whether any explosives remained undetonated. T. 110.

67. His inspection was limited to the muck pile, which is the limestone on top of the

immediate shot area. T. 110-111, 115. His inspection lasted about one hour. T. 87.

68. Most of the limestone from the section that was blasted stayed within 200 feet of the shot area. T. 102, 110.

69. Mr. Green did not observe a debris field from this blast that would pose a danger to persons or property in the area. T. 80-81.

F. Department's Investigation

70. After watching the blast, Mr. Edmiston drove to another area of the site, by haul road No. 2, and spoke with a Wampum employee. Mr. Edmiston asked the employee to send the blast report to the Department. Board Exhibit 1; T. 25.

Measurements of the Blast Area and Debris Field

71. Mr. Edmiston returned to the quarry around 3:00 p.m. that day to take measurements of the blast area and debris field. T. 26.

72. Mr. Edmiston used a laser range finder to determine the distance from the blast to the debris field and from the debris field to the blaster's truck. T. 26.

73. The debris field from the shot consisted of pieces of limestone, pebble-sized rocks and stemming. T. 26-27.

74. Two of the rocks in the middle of the debris field were approximately 4-5 inches wide. T. 28; Exhibit C-4.

75. The rocks in the middle of the debris field were fresh on one side and stained on the other which indicated to Mr. Edmiston that the rocks had been thrown by the shot that morning. T. 26. The rocks in the middle of the debris field were obvious because they were fresh rock within a weathered pit floor. T. 48, 57.

76. The rocks in the middle of the debris field were thrown approximately 700 feet from the blast, T. 32, and landed approximately 250 feet of where Mr. Green and Mr. Benninghoff were standing when the shot was detonated. T. 31.

77. Mr. Edmiston did not take any photographs or videotape of the “debris field.” T. 44.

78. Mr. Edmiston gathered no conclusive evidence that the two 4-5 inch rocks in the middle of the debris field resulted from the blast in question. T. 49

79. Before the August 29, 2007 blast, Wampum conducted seven previous blasts at the Wampum Quarry during the same month. The most recent blast was conducted on August 23, 2007. T. 96.

80. During the blast, the Department’s truck was located approximately 100 feet from where Mr. Green’s truck was parked. T. 32; Exhibit C-2.

Department’s Inspection Report

81. Mr. Edmiston prepared an Inspection Report and contacted representatives of Wampum and Cemex the next morning to advise them that the Department had determined there was a violation at the Wampum Quarry on August 29, 2007. T. 32-33; Exhibit C-5.

82. Mr. Edmiston discussed the blast with John Beatty, Wampum’s Technical Services Manager, on August 30, 2007. As part of that discussion, Mr. Beatty indicated that “the problem may have resulted from using No. 9 limestone for stemming.” T. 33; Exhibit C-5.

83. When Mr. Beatty made the recommendation above he did not believe there had been a problem with the shot. Even Mr. Edmiston testified that Mr. Beatty “did not admit that there was a problem with the shot.” T. 167.

G. Department’s August 30, 2007 Order

84. On August 30, 2007, the Department issued Compliance Order No. 07-2-017N to Wampum. The August 30, 2007 Compliance Order is the subject of this appeal. Board Exhibit 1; T. 34.

85. In the Compliance Order, the Department cited the following violation: blasting in a manner which ejected debris into the air approximately 700 feet from the shot constituting a hazard or danger which constitutes a violation of Section 77.546(g)(6). Board Exhibit 1; Exhibit C-6; T. 34-35.

86. The Department issued a separate Compliance Order to Cemex, Inc., the permittee, citing Cemex for the same violation, 25 Pa. Code § 77.564(g)(6). Board Exhibit 1; T. 36.

Revised Blast Plan

87. The Order directed Wampum to submit a plan to prevent ejecting debris from blasting operations by September 17, 2007. Board Exhibit 1; Exhibit C-6.

88. Wampum submitted a plan to the Department on September 11, 2007, in the form of a letter which outlined three things which it proposed to do to help confine the blast in an upward movement: stem all holes with No. 8 crushed limestone; lower the stemming in shots in certain areas of the quarry; and delay the shot so that it pulls away from the ramp. Board Exhibit 1; Exhibit C-7; T. 37-39.

89. The Department accepted Wampum's revised plan on September 12, 2007, and determined that Wampum was in compliance with its August 30, 2007 Order. Exhibit C-8; T. 39-40.

DISCUSSION

H. Standard of Review

The Pennsylvania Environmental Hearing Board reviews all challenged Pennsylvania

Department of Environmental Protection final actions *de novo*. *Warren Sand & Gravel Company v. Department of Environmental Resources*, 341 A.2d 556, 565 (Pa. Cmwlth. 1978); *Groce v. Department of Environmental Protection & Wellington Development-WVDT, LLC*, 2006 EHB 856, 893. Former Chief Judge Krancer, in the oft-cited case of *Smedley v. Department of Environmental Protection & International Paper Co.*, 2001 EHB 131, succinctly set forth our duty:

We must fully consider the case anew and we are not bound by prior determinations made by the DEP. Indeed, we are charged to “redecide” the case based on our *de novo* scope of review. The Commonwealth Court has stated that “*de novo* review involves full consideration of the case anew. The EHB, as a reviewing body, is substituted for the prior Decision maker, the Department, and redecides the case.” *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *O’Reilly v. Department of Environmental Protection*, 2001 EHB 19, 32. Therefore, we make our own findings of fact based solely on the record developed before us.

Smedley, 2001 EHB at 156.

I. Burden of Proof

In this appeal challenging the Department’s issuance of a compliance order, the Department of Environmental Protection has the burden of proof. The Department has the burden to establish in this case, by a preponderance of the evidence, that (1) the compliance order is authorized by law, (2) the objective facts support the Order, and (3) the Order constitutes a reasonable exercise of the Department’s discretion. 25 Pa. Code § 102.122 (b)(4); *M & M Stone v. Department of Environmental Protection & Telford Borough Authority*, 2008 EHB 24, 57. In this case, the key issue the Department must show is that the blast resulted in the ejection of debris and rocks which constituted a hazard or danger to persons or property in the area of the blasting.

J. Department's Authority to Issue Compliance Order is Clear

It is clear that the Department has the authority and in fact the duty to issue such compliance orders when warranted. Even Wampum readily concedes this point. See Wampum's Post Hearing Brief at page 19.

K. The Blast

On the date of the blast, August 29, 2007, Mr. Green, as the blaster-in-charge for Wampum, cleared an area of at least 950 feet from the blast site. Mr. Edmiston, the Department Surface Mine Conservation Inspector, together with his supervisor, Mr. Joseph Ferrara, arrived at the Quarry just before the blast. Mr. Edmiston was performing a routine unannounced "spot" inspection. Immediately recognizing that the shot was about to be fired, Mr. Edmiston and Mr. Ferrara positioned their Department vehicle about 100 feet behind Mr. Green and his assistant Mr. Benninghoff. In other words, they were approximately 1050 feet from the blast site.

Around 11:00 a.m. Mr. Green detonated the blast. The testimony is uncontradicted that none of the witnesses or their vehicles were hit or damaged by any debris or rocks from the blast. Indeed, the Department itself contends that two rocks landed within 250 feet--nearly a football field away--from Mr. Green and Mr. Benninghoff. Most of the debris, rocks, and muck were within 200 feet of the blast site, or 750 feet away from the closest witnesses.

Mr. Edmiston did not speak with Mr. Green or his assistant. Instead, he told another employee of Wampum to send him a copy of the blast report. Approximately four hours later Mr. Edmiston returned to the Quarry and took measurements as set forth above. He issued a compliance order the next day. Wampum immediately responded and instituted remedial action. The Department approved the remedial action, which involved three things which Wampum proposed to

do to help confine the blast in an upward movement. First, it would stem all holes with No. 8 crushed limestone. It would also lower the stemming in certain areas of the quarry. Finally, it would delay the shot so that it pulled away from the ramp. Wampum testified that they took these steps not because of what they believed were any defects in their earlier blasting plan but because, until the Department approved their remedial action, they were prohibited from conducting any blasts. Nevertheless, based on the testimony at the hearing, we believe and so find that the institution of these changes to the blasting plan improved the safety of the Wampum operation.

L. Department Fails to Prove a Violation by a Preponderance of the Evidence

Following a review of the evidence, we find that the Department did not prove by a preponderance of the evidence that the facts of record support the Department's issuance of a compliance order to Wampum. We find both Mr. Edmiston and Mr. Chiappetta credible and knowledgeable expert witnesses. However, we agree with Mr. Chiappetta that the blasting was safely performed and did not pose a hazard or danger to any personnel or property.

M. Regulation Establishes a Zone of Danger

Key to our decision is the fact that Mr. Green cordoned off a safety area of nearly double that required by the state regulations. The Department focuses on the danger of rocks and debris that everyone recognizes. However, the Department's analysis is basically that blasting is ultra hazardous and can cause harm or damage. The Department failed to focus on the fact that the regulation requires a consideration of whether the hazard or danger is in the area of the blasting; thus, we focus on the key wording of the regulation which states that "blasting...may not be done or performed in a manner...constituting a hazard or danger or do harm or damage to persons or property in the area of the blasting."

Since it is clear that no damage to persons or property occurred the important question is whether the blast was done or performed in a manner that constituted a hazard or danger *in the area of the blasting*. Therefore, the regulation establishes what we will call a “zone of danger.” It is a violation of the regulation even though no damage occurred to persons or property if they were threatened with harm because they were in the “zone of danger.” This “zone of danger” would vary depending on the facts of each case. It is the physical area where if people and/or property were present they would be in danger of injury or damage.

That danger must be viewed in the context of distance. If Mr. Green had established a buffer of the 500 feet required by the regulations or even 700 feet, then the blast certainly may have caused actual harm and in any event would violate the regulation as constituting a hazard or danger. However, that is not what happened here. Due to Mr. Green’s foresight the rocks and debris fell harmlessly to the ground far from any people or property. We fail to see how two rocks landing nearly a football field away from the closest people, the blaster and his assistant, somehow made the blast hazardous. They were not in the “zone of danger.”

N. Our Holding

In summary, Wampum safely conducted the blast by providing for a blast area approximately double the size required by the state regulations, no material whatsoever even came close to going outside the blast area, and the closest debris to any individuals landed nearly the length of a football field away from their secure position. We will therefore issue an Order sustaining Wampum’s appeal and vacating the Department’s Compliance Order.

While finding no violation of law by Wampum we are in no way critical of the action taken by Mr. Edmiston and the Department in this case. As we indicated earlier in this adjudication, we

find his testimony credible and it is clear that he is a knowledgeable and dedicated professional. If he or other Surface Mining Conservation Inspectors have a “gut feeling” that something went wrong with a blast even though no one was injured or property was damaged and that the blasting plan might pose a danger in the future they should error on the side of caution, which is exactly what Mr. Edmiston did in this case. If the company disagrees, then they can appeal the Department action and the Environmental Hearing Board can eventually sort these issues out later like we did here. The important thing is not who wins or loses these cases but that procedures and regulations are always in place to assure that every blast is safely conducted. The actions of Mr. Edmiston resulted in both Wampum and the Department taking a closer look at blasting and Wampum’s blasting plan. The end result is that even a safer blasting plan is now in place. Just as important is the fact that all involved focused on their practices and procedures and that is a good thing.

CONCLUSIONS OF LAW

1. The Pennsylvania Environmental Hearing Board has jurisdiction of the subject matter and the parties in this case.
2. The Pennsylvania Environmental Hearing Board’s scope of review in this appeal is *de novo*. The Board fully considered the case anew and made its own factual findings, based solely on the testimony and evidence at the hearing on the merits conducted in Pittsburgh on November 3, 2008. *Warren Sand & Gravel v. Department of Environmental Resources*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975); *Groce v. Department of Environmental Protection & Wellington Development-WVDT, LLC*, 2006 EHB 856; *Smedley v. Department of Environmental Protection & International Paper Co.*, 2001 EHB 131, 156.

3. When issuing a compliance Order, the Department has the burden of proof. 25 Pa. Code § 122.122 (b).

4. As the party bearing the burden of proof, the Department of Environmental Protection failed to show by a preponderance of the evidence that the objective facts supported the issuance of a compliance order.

5. Wampum's blasting activities on August 29, 2007 were not in violation of 25 Pa. Code § 77.564(g)(6) as they did not pose a hazard or danger to persons or property. Neither persons nor property was damaged nor were they in the "zone of danger" established by the regulation.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WAMPUM HARDWARE CO.

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

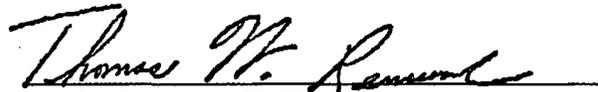
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EHB Docket No. 2007-220-R

ORDER

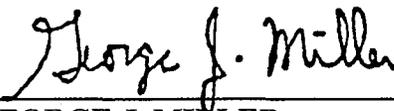
AND NOW, this 25th day of March, 2009, the Appellant's Appeal is **sustained**. The Department of Environmental Protection's Compliance Order is **vacated**.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND

Acting Chairman and Chief Judge



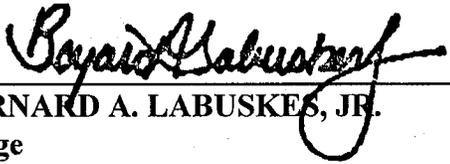
GEORGE J. MILLER

Judge



MICHELLE A. COLEMAN

Judge


BERNARD A. LABUSKES, JR.
Judge

DATED: March 25, 2009

c: DEP Bureau of Litigation:
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

AMERIKOHL MINING, INC.

v.

COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION

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EHB Docket No. 2008-342-L

Issued: March 27, 2009

**OPINION AND ORDER
ON DEPARTMENT'S MOTION TO DISMISS**

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board grants the Department's unopposed motion to dismiss an appeal because the Department withdrew and vacated the letter that is the subject of this appeal thereby rendering the appeal moot.

OPINION

By letter dated November 17, 2008, the Department of Environmental Protection ("Department") denied the permit application for a surface mining permit submitted by Amerikohl Mining, Inc. ("Amerikohl"). Amerikohl filed an appeal of the Department's denial to allow Amerikohl to mine coal on a tract of land located in North Sewickley Township, Beaver County, SMP Application (No. 04070101). On December 5, 2008 the Department sent Amerikohl a letter stating that it withdrew and vacated the November 17, 2008 letter, and no



final action has been taken on the permit application.

The Department filed a motion to dismiss this appeal as moot. Amerikohl did not respond to the motion. In a motion to dismiss the Board will grant the motion where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925. The rescission of the November 17, 2008 letter which is the subject under this appeal renders the appeal moot. See *Blue Marsh Laboratories v. DEP*, 2007 EHB 777 (“The Department’s letter was rescinded leaving the Board no case or controversy to decide.”). *Blue Marsh*, 2007 EHB at 785; see also *Jon C. Gardner v. DEP*, 2008 EHB 110 (“Absent unusual circumstances not present here, the Department’s rescission of an action under appeal renders the appeal moot.”). *Gardner*, 2008 EHB at 111. Therefore, the Board finds that there is no effective relief it could grant Amerikohl once the Department’s action was rescinded.

Accordingly, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

AMERIKOHL MINING, INC.

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

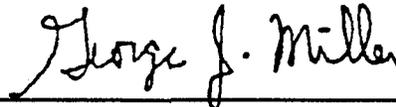
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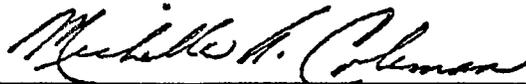
ORDER

AND NOW, this 27th day of March, 2009, the Department's unopposed motion to dismiss is granted and this appeal is dismissed as moot.

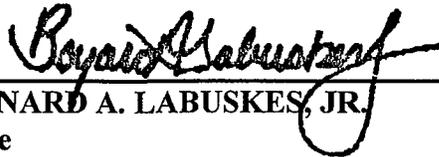
ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Judge



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

Thomas W. Renwand, Acting Chairman and Chief Judge recused himself in this case and took no part in our deliberations.

DATED: March 27, 2009

c: DEP Bureau of Litigation
Attention: Brenda Morris, Library

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Office of Chief Counsel

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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

SIDNEY L. AND DEBRA A. MILES

v.

**COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION**

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EHB Docket No. 2008-136-C

Issued: March 27, 2009

**OPINION AND ORDER
 DISMISSING THE APPEAL**

By Michelle A. Coleman, Judge

Synopsis:

The Board dismisses the Appellants' appeal as a sanction for failure to follow Board rules and orders.

OPINION

The Board dismisses this appeal because the Appellants have failed to comply with Board orders demonstrating a lack of intent to pursue their appeal. The Appellants appealed the Department of Environmental Protection's March 20, 2008 letter declaring forfeit of the bonds posted for five surface coal mines for failure to correct violations and reclaim mine sites operated by Allegheny Milestone, Inc.¹

¹ The Board issued an Order on May 14, 2008 requiring the Appellants to obtain counsel pursuant 25 Pa. Code § 1021.21(b) if this was an appeal by Allegheny Milestone, Inc. Section 1021.21(b) requires corporations to be represented by an attorney. We received a handwritten letter dated May 29, 2008 from Sidney L. Miles stating, "Sidney and Debra Miles are not officers as reported to DEP . . . we will be representing ourselves as individuals in this appeal."



Once the Appellants perfected their appeal the Board issued Pre-hearing Order No. 1 requiring discovery to be completed by November 10, 2008. Subsequently, the Board issued a status report order on June 10, 2008. The Appellants never submitted a status report. During the discovery period the Department served its First Set of Interrogatories, First Request for Production of Documents and Request for Admissions upon Appellants on June 27, 2008. On September 24, 2008 the Board received the Department's motion to compel answers to discovery. The Appellants never filed a response to this motion. As a result, on October 21, 2008 the Board ordered the Appellants to provide discovery responses on or before November 21, 2008. Also on October 21, 2008 the Board issued a rule to show cause why sanctions should not be entered for failure to follow Board Rules. Again, there was no response by the Appellants.

On December 12, 2008, approximately a month after discovery closed in this case the Board sent another status report order to the parties. The Appellants never responded and the Department informed the Board that it still did not receive responses to the outstanding discovery. In addition, the Department stated that Appellants had not sent any discovery requests of their own to the Department.

On January 5, 2009, the Board issued a rule to show cause upon the Appellants to show cause why their appeal should not be dismissed as a sanction for failing to comply with Board orders, returnable by January 26, 2009. To date no response to the rule has been filed. In fact, the Board has received no correspondence from Appellants except for three occasions: the filing of the notice of appeal, the subsequent perfection of the appeal and a letter dated May 29, 2008 informing the Board that Appellants were not pursuing this appeal as Allegheny Milestone, Inc.

It is well established that the Board has the power under its rules, specifically 25 Pa. Code § 1021.161, to impose sanctions for failure to comply with Board rules. The Board has dismissed appeals for failing to comply with Board orders indicating an intent not to pursue an appeal. *RJ Rhodes Transit, Inc.*, 2007 EHB 260; *Swistock v. DEP*, 2006 EHB 398; *Sri Venkateswara Temple v. DEP*, 2005 EHB 54. Here, the Appellants have failed to comply with Board orders demonstrating a lack of interest in pursuing this appeal. Although we are aware that Appellants are representing themselves in this matter they are not excused from following the rules of procedure. *Goetz v. DEP*, 2002 EHB 976. Therefore, the Board dismisses the appeal for failure to comply with a Board order pursuant to 25 Pa. Code § 161, and issues the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SIDNEY L. AND DEBRA A. MILES

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

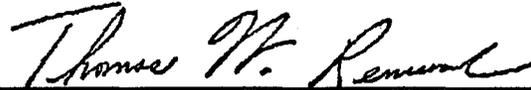
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EHB Docket No. 2008-136-C

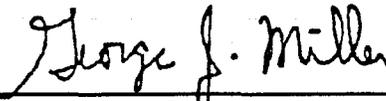
ORDER

AND NOW, this 27th day of March, 2009, it is HEREBY ORDERED that this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD



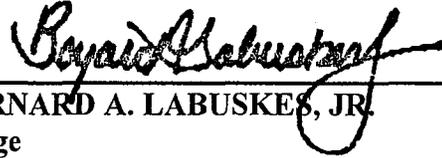
THOMAS W. RENWAND
Acting Chairman and Chief Judge



GEORGE J. MILLER
Judge



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

DATED: March 27, 2009

c: DEP Bureau of Litigation:
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

ANGELA CRES TRUST OF JUNE 25, 1998 :
 :
 v. : EHB Docket No. 2008-092-R
 :
 COMMONWEALTH OF PENNSYLVANIA, :
 DEPARTMENT OF ENVIRONMENTAL :
 PROTECTION and MILLCREEK :
 TOWNSHIP, Permittee :
 :

**OPINION AND ORDER ON
 MOTION FOR EXPEDITED REVIEW
OF A MOTION TO COMPEL**

By Thomas W. Renwand, Acting Chairman and Chief Judge

Synopsis

The Pennsylvania Environmental Hearing Board denies a Motion for Expedited Review of a Motion to Compel. Instead, the Board issues an Order to extend the time the Department of Environmental Protection and the Permittee have to respond to Appellant’s Motion to Add a Party.

OPINION

Presently before the Pennsylvania Environmental Hearing Board are two e-filed motions. The motions were e-filed yesterday afternoon by the Pennsylvania Department of Environmental Protection (Department). The first motion is a Motion to Compel seeking our review of a specific objection served by Appellant on the Department on December 10, 2008. The Request



for Production sought a copy of the trust instrument creating the Appellant Angela Cres Trust of June 15, 1998 (Angela Cres Trust). Angela Cres Trust objected to the production of the trust instrument contending as follows:

Appellant objects to this Request for Production as being beyond the scope of permissible discovery and as not being reasonably calculated to lead to the discovery of any relevant or admissible evidence.

The Department immediately responded in a letter to the objection contending “that the content of the trust instrument was relevant to the Pennsylvania Environmental Hearing Board’s subject matter jurisdiction and the Trust’s capacity to sue in this appeal.” Department’s Motion to Compel, paragraph 5. According to the Department, counsel for the Angela Cres Trust did not respond to the Department’s letter.

However, on or about April 9, 2009, Appellant Angela Cres Trust filed a Motion to Add Party with the Environmental Hearing Board. Appellant seeks to add the Trustee of the Angela Cres Trust, Ms. Laurel Hirt. Appellant’s motion cites the Board’s relatively recent decision of *Hanoverian, Inc. v. DEP*, 2008 EHB 300 as the reason for seeking to add Ms. Hirt as an Appellant in this case.

The Department at the same time filed a Motion for Expedited Review of the Department’s Motion to Compel under Board Rule § 1021.102 (Motion for Expedited Review). The Department filed its Motion for Expedited Review because the time deadline set forth in our Rules of Practice and Procedure to its response to the Motion to Add Party would require the Department to file its response prior to the time Appellant’s response would be due to its Motion to Compel. The Department contends that a review of the trust document is necessary so it can “determine if there is a question of subject matter jurisdiction in the case based upon the Board’s opinion in *Hanoverian*.” Department’s Motion for Expedited Review, paragraph 3. Therefore,

the Department wants the Board to “expeditiously review the Motion to Compel and hear argument and issue an oral ruling by telephone conference.” Department’s Motion for Expedited Review.

We acknowledge the time problem the Department (and we also assume Millcreek Township) are faced with here. However, we believe the more judicious solution to this time intensity legal quagmire facing the parties is not to even tighten the time deadlines further in a rush to judgment on the Department’s Motion to Compel. The Motion to Add Party is a miscellaneous motion under our Rules of Practice and Procedure. As such, just like a procedural motion, responses are required to be filed with the Board within 15 days of the date of service of the motion, “unless otherwise ordered by the Board.” *See* 25 Pa. Code § 1021.95(c).

We think the wise course to alleviate the time problem and to protect all due process rights is to simply enter an order extending the time that the Department and Millcreek Township have to respond to the Motion to Add Party. We will enter an order that they will not have to file their responses to the Motion to Add Party until 15 days after we issue an order on the Department’s Motion to Compel.

Although we certainly have the authority to drastically shorten the time a party has to respond to a discovery motion and conduct argument by telephone filed by an oral ruling, we think what often can be draconian practices should be judiciously employed. The Board’s Rules of Practice and Procedure developed by the Board in close consultation with our Rules Committee insure due process to all litigants. The general time determinations in the Rules have been developed after extensive discussion and in the incubator of years of Board practice. They underscore the simple fact that often times the best decisions of both counsel and the Board are reached after careful and unhurried deliberations. Forcing a party to immediately respond to an

important issue in a case in a hastily arranged telephone oral argument does not strike us as the way we should routinely address these problems. This is especially true here where we can completely obviate the time pressure by entering an order removing the impending deadline issue.

As we have previously lamented, the practice of law today is filled with way too much stress. This does not benefit the Board, counsel and their clients, or the public. Much of this stress is fueled by the speed by which information is delivered. The development of email, cell phones, faxes, and other modern telecommunications has transformed the practice of law in many positive ways. However, it is important to step back and realize that although decisions should be reached in a timely fashion the most important point is that the right decision should always be reached. Many times our decisions are based on the well reasoned arguments of counsel set forth in their written filings. These filings are best developed when counsel have the necessary time to do so. Tribunals and attorneys do not help alleviate this stress when they operate like firemen speeding to an emergency with lights on and sirens blazing. There is no legal fire here requiring such extreme measures. Instead, we should strive for calm well reasoned and fully developed legal argument within the time constraints of our Rules in all but those truly unique and exceedingly rare circumstances where time, indeed, is of the essence. We will issue an appropriate Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ANGELA CRES TRUST OF JUNE 25, 1998 :
 :
 v. : EHB Docket No. 2008-092-R
 :
 COMMONWEALTH OF PENNSYLVANIA, :
 DEPARTMENT OF ENVIRONMENTAL :
 PROTECTION and MILLCREEK :
 TOWNSHIP, Permittee :

ORDER

AND NOW, this day of 15th day of April, 2009, following review of the Pennsylvania Department of Environmental Protection's Motion to Compel and Motion for Expedited Review which were e-filed yesterday afternoon, it is ordered as follows:

1. Pursuant to 25 Pa. Code § 1021.95(c), the Department of Environmental Protection's and Millcreek Township's responses to the Appellant's Motion to Add Party are not due until 15 days after the Board enters an Order on the Department's Motion to Compel.
2. The time deadline underlying the Department's Motion for Expedited Review is thus alleviated so the Motion for Expedited Review is **denied**.
3. The Board does not believe that oral argument is required on the Motion to Compel but may revisit that issue after review of Appellant's written response to the Motion to Compel.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Acting Chairman and Chief Judge

DATED: April 15, 2009

c: **DEP Bureau of Litigation:**
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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

DOUGLASS TOWNSHIP

v.

**COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION and SYNAGRO CENTRAL,
 LLC, Permittee**

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EHB Docket No. 2007-154-L

Issued: April 16, 2009

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board declines a municipality's request to modify a Department letter approving the application of biosolids at a farm. Among other things, the municipality asked that the biosolids applicator be required to give the municipality advance notice when biosolids are to be applied, that the applicator be required to provide the municipality with copies of all reports supplied to the Department, and that the site owner be required to give the municipality access to the site during all biosolids applications. The municipality has not shown that the regulatory standard for adding the proposed special conditions has been met.

FINDINGS OF FACT

1. The Department of Environmental Protection (the "Department") is the agency of the Commonwealth charged with administering the Solid Waste Management Act, 35 P.S. § 6018.101 *et seq.*, and the regulations promulgated thereunder.



2. Douglass Township (the “Township”) is a municipality in Montgomery County.
3. Synagro Central, LLC (“Synagro”), a biosolids and residuals management company, filed on behalf of 33 listed sources of biosolids an “Application for the Agricultural Utilization of Biosolids on Hunsicker Farm” in February 2007. That submission included a document entitled “Notification of First Land Application (30-Day Notice),” on which Synagro was identified as the land applier. (Stipulation of Uncontested Material Facts Number (“Stip.”) 1.)
4. The Hunsicker Farm is located on Congo Niantic Road in Douglass Township (the “Hunsicker Farm”). (Stip. 2.)
5. The Department has issued a general permit entitled “General Permit for Beneficial Use of Exceptional Quality Biosolids,” which has been assigned Permit Number PAG-07 (“PAG-07”). (Stip. 3.)
6. The Department has issued a general permit entitled “General Permit for Beneficial Use of Biosolids by Land Application,” which has been assigned Permit Number PAG-08 (“PAG-08”). (Stip. 4.)
7. PAG-07 governs exceptional quality biosolids and PAG-08 covers nonexceptional quality biosolids. (T. (12/3) 223.)
8. Biosolids are composed of treated sewage sludge from treatment plants that can be applied to land pursuant to general or individual permits. (Notes of Transcript page (“T.”) (12/3) 138.)
9. Representatives of the Department’s Southeast Regional Water Management Program as well as a representative of the Montgomery County Conservation District (“MCCD”) have

inspected the Hunsicker Farm on multiple occasions. (Stip. 5; T. (12/4) 93-94, 96; Commonwealth Exhibit No. (“C. Ex.”) 16; Synagro Exhibit No. (“S. Ex.”) 12-14.)

10. A Department representative attended a public meeting in the Township on March 27, 2007 with regard to the land application of biosolids to the farm. (Stip. 6.)

11. The Department issued a letter on May 24, 2007 authorizing the application of a list of exceptional and nonexceptional biosolids covered by PAG-07 and PAG-08 on the Hunsicker Farm, subject to certain conditions. (Stip. 15.) The Township’s appeal is from that letter.

12. The Department included various special conditions in the approval letter. Among other things, application of biosolids in what was designated as Field No. 1 was not allowed until it was shown that the soil in the field had a higher pH. Biosolids application was prohibited in Field No. 2 due to high preexisting phosphorus levels. No “truck transportation activities” are allowed from midnight to 4:00 a.m. anywhere at the site. (These permit conditions were not challenged.) (S. Ex. 11.)

13. By email dated May 22, 2008, Synagro provided the Department with 24 hour notice that it would be applying exceptional quality biosolids from two sources covered by PAG-07 at the Hunsicker Farm. (Stip. 17.)

14. By letter dated July 11, 2008, the Department acknowledged that, based on the material submitted with a June 25, 2008 email, biosolids could be land applied to Field No. 1. (Stip. 21.)

15. The MCCD by virtue of nonexclusive delegation from the Department assists in regulating biosolids activities at the farm. Among other things, the MCCD reviewed and approved

plans for the site and will share responsibility for inspecting the site. (T. (12/3) 192, 248; T. (12/4) 83, 93; S. Ex. 7, 11; C. Ex. 14.)

16. The Department consulted and cooperated extensively with the Township before approving the Hunsicker Farm. (Stip. 6-15; T. (12/3) 21-23, 32-36, 42-44, 50, 71-72, 93-99, 101-08, 120-21, 251; T. (12/4) 52-55, 92; C. Ex. 6-10, 12, 13.)

17. The various delineated portions of the Hunsicker Farm that the Department has approved for the application of exceptional and nonexceptional quality biosolids are in fact suitable for that purpose. (Stip. 18-21; T. (12/3) 233-39, 246, 260, 274; (12/4) 15, 31-35, 89, 98-99, 104-110; S. Ex. 1, 2, 3, 10, 12-14, 16; C. Ex. 21.)

18. The Department in all respects acted reasonably in approving land application at the Hunsicker Farm. (Findings of Fact (“FOF”) 1-17.)

19. Oversight by Township officials at the Hunsicker Farm has not been shown to be necessary to protect public health or the environment from any adverse effect of a pollutant in sewage sludges approved for application. It has not been shown that Township oversight would add any value. (T. *passim*, (12/3) 50-58, 64; S. Ex. 2.)

DISCUSSION

The Township does not ask us to overturn the Department’s approval of biosolids application at the Hunsicker Farm. Rather, the Township asserts that the Department’s errors require us to modify the approval. The Township’s first request is that we modify the Department’s approval letter to provide that only exceptional quality biosolids may be applied at the Hunsicker Farm. The Township did not present any expert testimony or evidence of any other kind to support this request.

The Township's only support for its position is that Synagro has up to this point applied only exceptional quality biosolids at the farm. This is, of course, a *non sequitor*. It does not follow from the fact that Synagro has to date only applied exceptional quality biosolids that portions of the site are unsuitable for the application of nonexceptional biosolids. Although not necessary to rebut the Township's argument, Synagro explained that it has applied exceptional quality biosolids because the source for the biosolids was close to the farm and the biosolids from that source had a lime content that had a beneficial effect on the Hunsicker soils. (T. (12/4) 8-9, 11-12, 35.) In any event, we credit the expert opinions of Nancy Sansoni testifying on behalf of the Department and Mark Reider testifying on behalf of Synagro that the Hunsicker Farm is in fact suitable for the application of nonexceptional biosolids. (FOF 17.)

The Township next argues that the Department erred by not including certain special conditions in its approval letter and asks that we do so in its stead. The Township argues that the Department erred by failing to include conditions in its approval of land application at the Hunsicker Farm (1) requiring Synagro to give the Township reasonable advance notice that Synagro intends to apply biosolids, (2) requiring the landowner (Hunsicker) to give a designated representative of the Township who is trained in the application of biosolids access to the site at the time of application, and (3) requiring Synagro to give the Township a copy of all documents that Synagro gives the Department regarding the Hunsicker Farm.

The Department's ability to add special conditions to its letters approving biosolids application is not unlimited. In the context of the beneficial use of sewage sludge by land application, the Department's authority is specifically delineated in 25 Pa. Code § 271.904, which

reads as follows:

On a case-by-case basis, the Department may impose requirements in addition to or more stringent than the requirements in this subchapter *when necessary to protect public health and the environment from any adverse effect of a pollutant in the sewage sludge.*

25 Pa. Code § 271.904 (emphasis added). The Department disclaims any authority or discretion to add the conditions requested by the Township unless it can be shown that the conditions are “necessary to protect public health and the environment from any adverse effect of a pollutant in the sewage sludge,” citing Section 271.904. (DEP Brief, p. 16.) The Department points out that the Township has made no such showing in this case.

We agree with the Department. The Department’s authority and discretion are clearly limited by the language of the Section 271.904. That section provides that special conditions are called for on a case-by-case basis only when needed to protect against an “adverse effect of a pollutant in the sewage sludge.” 25 Pa. Code § 271.904. The Township points to no such potential adverse effect. Furthermore, the Township failed to demonstrate that providing it with notice, site access, and simultaneous copies of all documentation is “necessary to protect the public health or environment.”

The Township has failed to show that there is anything unique about the Hunsicker Farm that justifies a “case-by-case” deviation from the detailed conditions and the requirements set forth in Subchapter J, the subchapter regarding biosolids that is referenced in Section 271.904. The Township has not produced any evidence that its joint oversight at the site would add any value, is necessary, or would be anything other than superfluous. The record shows that the Department and MCCD staffs are fully capable and competent to oversee the site and adequately protect the environment. Indeed, DEP staff have already responded to complaints at the site (which turned out

to be groundless – biosolids were not even being applied at this time). (T. (12/4) 101-02.) Mandating three levels of governmental oversight simply does not appear to be necessary. Records supplied by Synagro during the course of its operations are readily available from the Department.¹ In short, the Township has fallen far short of satisfying its burden of proving that the Department erred by refusing to include the Township’s proposed special conditions in the letter approving biosolids application.²

The Township argues that the Department violated its “duty to consult and cooperate with local governmental units” in reviewing permit applications. The Township relies on Section 102 of the Solid Waste Management Act, which declares that one of the purposes of the Act is to “establish and maintain a cooperative state and local program of planning and technical and financial assistance for comprehensive solid waste management.” 35 P.S. § 6018.102. The Township also relies upon Section 504 of the Act, which provides that applications for solid waste permits shall be reviewed by the appropriate county, county planning agency or county health department where they exist and the host municipality, and that those entities may recommend to the Department conditions upon, revisions to, or disapproval of permits in some cases. 35 P.S. § 6018.504. Assuming that these provisions apply, and accepting that the Department obviously should work with municipalities

¹ This case involves the Department’s authority to order *Synagro* to send its records to the Township. We express no opinion on the Department’s obligations vis-à-vis the Township under open-records-law requirements beyond our finding that the records are unquestionably available for review by the Township.

² The Township argues that the fact that the Department included other special conditions in the approval letter that are not expressly authorized by the regulations (e.g. sludge application prohibited from midnight to 4:00 a.m.) proves that the Department may add any special conditions that it deems appropriate. Those conditions were not appealed, however, and we are not in a position to express an opinion on the Department’s authority to add those conditions. For all we know, the conditions fall within the constraints of Section 271.904. Whether they do or not certainly does not pertain to whether the conditions that are at issue here were authorized.

when permitting solid waste facilities, *Franklin Township v. DER*, 452 A.2d 718, 722 (Pa. 1982), the problem with the Township's argument is that a general statutory duty to cooperate with the municipality does not trump a regulation that specifically limits the Department's authority to add special conditions to a land application approval simply because the conditions are requested by a municipality. A duty to cooperate does not equate to a duty to give the Township oversight authority. Furthermore, the record here shows that the Department did in fact satisfy its obligation to consult and cooperate with the Township before approving biosolids application at the Hunsicker Farm. (FOF 16.) Indeed, Synagro gets it exactly right when it says that the Department "went the extra mile" to cooperate with the Township in this case.

The Township next complains that the Department erred by failing to require an individual NPDES permit for the Hunsicker Farm. The Township does not explain how this argument squares with its request that we modify the Department's approval letter. The Township also raises this issue for the first time in its post-hearing brief, which is, of course, too late. *Thomas v. DEP*, 1998 EHB 93. In any event, other than stating that "there are streams in the area of the Hunsicker Farm" and "a clear potential of subsurface water pollution" (Township Brief, p. 16), the Township does not point to any point source discharge from the site that might conceivably necessitate an NPDES permit. *See* 25 Pa. Code § 92.3.

The Township asks us to modify the approval letter to provide that the Department must inspect the site prior to every application of biosolids. The Township has not provided and we are not independently aware of any authority or precedent whatsoever for such a novel mandate. Furthermore, the Township has given us no reason to suppose that a mandatory Department

inspection schedule at the Hunsicker Farm is necessary to protect public health and the environment from any adverse effect of a pollutant in the sewage sludge. (25 Pa. Code § 271.904.)

Finally, the Township suggests that it would like to enact its own ordinance regulating placement of biosolids. It seems to be interested primarily in creating the inspection authority that the Department refused to include in its approval letter. The Township refers us to case law supporting the proposition that municipalities have some ability to pass ordinances regarding sludge application notwithstanding regulations at the state level. *See, e.g., Commonwealth v. East Brunswick Township*, 956 A.2d 1100 (Pa. Cmwlth. 2008). It asks us to “pronounc[e] to what extent the Township can adopt an ordinance and be involved in assuring that DEP regulations are complied with in the application of biosolids.” (Township Brief, p. 26.)

We must decline the Township’s request to issue such a pronouncement for any number of reasons. The first reason that comes to mind is that we do not issue advisory opinions. *Neville Chemical Co. v. DEP*, 2003 EHB 530, 539, *citing Kutztown v. DEP*, 2001 EHB 1115. Second, the request goes beyond our jurisdiction to review actions of the Department. The power to adjudicate disputes over local sludge ordinances appears to have been conferred upon the Commonwealth Court pursuant to Section 315 of the Agricultural Code, 3 Pa.C.S. § 315. Third, we see little or no relevance to the matter at hand. Our focus is on whether the Department erred. Even if we assume *arguendo* that the Township cannot pass an ordinance, it does not follow that the Department erred by not including Township inspection authority in the approval letter to fill that gap, which seems to be the Township’s point. As discussed above, the standard for including special conditions in approval letters is spelled out in 25 Pa. Code § 271.904. The Township’s alleged inability to

promulgate an ordinance does not permit the Department to ignore the limits placed on its authority and/or discretion in Section 271.904. If we consider the relevance of the alleged proposed ordinance at a more fundamental level, we fail to see how the ordinance bears in any way upon the suitability of the Hunsicker Farm for the land application of biosolids.

CONCLUSIONS OF LAW

1. The Township bears the burden of proving by a preponderance of the evidence that the Department acted unreasonably or contrary to law when it approved the application of biosolids at the Hunsicker Farm.

2. The Township failed to prove that the Department acted unlawfully or unreasonably.

3. The Department's authority to add special conditions to a land application approval letter is limited by 25 Pa. Code § 271.904 to situations where a case-by-case review shows that such conditions are necessary to protect public health and environment from an adverse effect of a pollutant in the sewage sludge.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DOUGLASS TOWNSHIP

v.

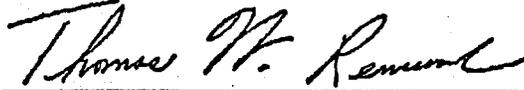
COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and SYNAGRO CENTRAL,
LLC, Permittee

EHB Docket No. 2007-154-L

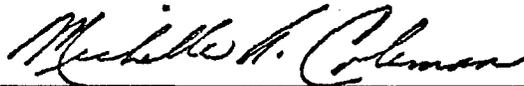
ORDER

AND NOW, this 16th day of April, 2009, it is hereby ordered that the Township's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Acting Chairman and Chief Judge



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

Judge George J. Miller recused himself and did not participate in this matter.

DATED: April 16, 2009

c: DEP Bureau of Litigation:
Attention: Brenda K. Morris, Library

For the Commonwealth of PA, DEP:
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2008 issued an order requiring the Township to implement its plan. That order is the subject of these consolidated appeals. Among other things, the order required the Township to begin construction of certain sewage systems by October 1, 2008. We are informed that the Township has been moving forward in accordance with the order.

This case originally involved three separate appeals filed by the Township, the Northampton, Bucks County, Municipal Authority (the "Authority"), and a citizens' group known as the Northampton Area Residents for Reasonable Sewers ("NARRS"). NARRS filed a petition in its appeal asking the Board to supersede the order. We denied NARRS's petition because it was clear on the face of the petition that NARRS was unlikely to succeed on the merits of its appeal as a matter of law. Although ostensibly an appeal from the Department's April 30 order, NARRS's appeal, and in particular the arguments it made in support of its petition for supersedeas, in reality challenged the 1977 plan itself.

Thereafter, the Department filed a motion to dismiss all three appeals for lack of jurisdiction. We denied the motion, holding that the appeals were appropriate to the extent that they challenged the Department's order mandating compliance with the plan rather than the substance of the plan itself.

Along with the appeal before this Board, NARRS also initiated litigation against the Township and the Authority in the Court of Common Pleas of Bucks County. NARRS's complaint asked the court to enjoin the Township and the Authority from constructing the sewer extension project that was the subject of the Department's order. The court dismissed the litigation, finding that it lacked jurisdiction.

Meanwhile, litigation proceeded apace before this Board. The Authority filed a motion to

compel each member of NARRS's executive committee to submit to a deposition. Before we had an opportunity to rule on the motion, however, NARRS withdrew its appeal. The Board's staff then asked the Authority's counsel whether the Authority would object to our dismissal of the motion to compel as moot. The Authority indicated that it still desired a ruling on the motion. On March 2, 2009, in consideration of NARRS's withdrawal of appeal, we denied the Authority's motion to compel the executive committee members to be deposed as representatives of a party without prejudice to the Authority's right to seek to depose the individuals using procedures applicable to nonparties.

The Authority thereafter served subpoenas on each of the nine members of NARRS's executive committee. Marvin H. Gold, an attorney, was one of those who received a subpoena. Gold contacted the Authority's counsel to question why the depositions were necessary given NARRS's withdrawal of appeal, and to determine whether something short of nine depositions would accommodate the Authority's needs. The Authority's counsel insisted on taking all nine depositions and refused to give Gold a preview of what information he sought. Gold then filed a motion to quash the subpoenas and asked us to issue a protective order protecting the nine NARRS members from further discovery.

Among several other arguments, Gold argues that depositions of the NARRS members is not calculated to elicit information that could lead to the discovery of evidence admissible in the Township's or the Authority's remaining appeals from the Department's enforcement order. He argues that the depositions are instead intended to obtain information preparatory to an abuse-of-process tort action or to otherwise harass the NARRS members.

Gold's motion raises points that have some intuitive appeal. It is far from obvious why the

NARRS members would have information pertinent to the Authority's appeal from the Department's enforcement order. In such a situation, we believe that it was incumbent upon the Authority to explain why it believes it might be helpful to depose the members of the co-appellant citizens' group that has since dropped its own appeal. Instead, the Authority's response to Gold's motion leaves us wanting. The Authority states that NARRS's notice of appeal made numerous factual allegations regarding the Authority and it wants to take the depositions "to clarify allegations made by NARRS in the underlying litigation." It asserts that it will be prejudiced if it cannot take these depositions, but it provides no explanation or basis to support its claim of prejudice.

Discovery in proceedings before this Board is generally governed by the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). A party may obtain discovery regarding any matter, not privileged, which is related to the subject matter of the pending litigation so long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Pa.R.Civ.P. 4003.2. *See Solebury Township v. DEP*, 2007 EHB 325, 327 ("As a general rule, the Board is liberal in allowing discovery which is either directly related to the contentions raised in the appeal or is likely to lead to admissible evidence that is related to the contentions raised in the appeal.") It bears emphasizing in this case that the information sought must be related to the subject matter of *pending* litigation.

The Board is charged with overseeing ongoing discovery between the parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required. *DEP v. Neville Chemical Company*, 2005 EHB 1, 3-4. Among other things, the Board may issue a protective order when appropriate to protect a person from unreasonable annoyance, embarrassment, oppression, burden, or

expense. Pa. R. Civ. P. 4012.

Gold's argument that the Authority is taking advantage of the Board proceedings to intimidate and harass the NARRS membership makes perfect sense. The Authority's argument that the depositions of NARRS members can somehow aid in its own extant appeal of the Department's order makes no sense at all. We cannot even begin to speculate on what could conceivably be gained by deposing the local citizens, and the Authority's vague assertion that it needs to explore allegations in the citizens' now defunct appeal provides no clue. We are concerned not only with the apparent misuse of our procedures, but with the chilling effect such measures might have on the citizens' constitutional right of association as well. *Cf. Hanson Aggregates v. DEP*, 2003 EHB 1, 6 (concerning discovery of advocacy group's membership list). Accordingly, we are compelled to grant Gold's motion. An order to that effect follows.

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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

FALCON COAL & CONSTRUCTION CO. :
 :
 v. : EHB Docket No. 2008-346-L
 : (Consolidated with 2008-349-L)
 COMMONWEALTH OF PENNSYLVANIA, :
 DEPARTMENT OF ENVIRONMENTAL : Issued: April 29, 2009
 PROTECTION :

OPINION AND ORDER

By Bernard A. Labuskes, Jr., Judge

Synopsis

An appeal by a company is dismissed for failure to obtain representation in accordance with the Board’s Rule, 25 Pa. Code § 1021.21(b), which requires all parties other than individuals appealing on their own behalf to be represented by counsel.

OPINION

Falcon Coal & Construction Company (“Falcon”) files these consolidated appeals from two compliance orders issued by the Department of Environmental Protection (the “Department”) regarding a surface coal mining operation in Cherry Township, Sullivan County. No attorney was named on Falcon’s notices of appeal. We advised Falcon by letter dated January 6, 2009 that, as an entity other than an individual appealing on its own behalf, Falcon would need to have an attorney enter an appearance on its behalf under the Board’s rules. The letter provided that counsel needed to enter an appearance on or before February 6, 2009. When no entry of appearance on behalf of Falcon Coal had been filed by February 18, we issued a rule

to show cause why the appeals should not be dismissed. We noted that the rule would be discharged by having legal counsel file an entry of appearance on or before March 9, 2009. The rule also provided that failure to obtain counsel by March 9, 2009 would result in dismissal of the appeal. On March 6, 2009, Jon S. Percival, president of Falcon, requested an additional 30 days to obtain counsel. We granted the request and gave Falcon until April 9, 2009 to obtain counsel. Falcon tried but failed to obtain pro bono counsel. There has been no entry of appearance and no further communication from Falcon to date.

Our rule is clear that “[c]orporations *shall* be represented by an attorney of record admitted to practice before the Supreme Court of Pennsylvania.” 25 Pa. Code § 1021.21(b) (emphasis added). We have consistently held that appeals filed by any entity other than an individual appealing on his or her own behalf may not proceed without legal representation. *R.J. Rhodes Transit, Inc. v. DEP*, 2007 EHB 260, 263; *Gary Berkley Trucking, Inc. v. DEP*, 2006 EHB 330; *DEP v. G&R Excavating and Demolition, Inc.*, 2005 EHB 427; *Mountain Valley Management v. DEP*, 1999 EHB 283. Therefore, Falcon’s failure to obtain counsel compels us to dismiss this consolidated appeal. Accordingly, we issue the order that follows.

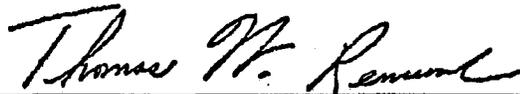
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

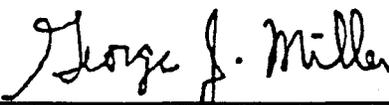
FALCON COAL & CONSTRUCTION CO. :
v. : EHB Docket No. 2008-346-L
COMMONWEALTH OF PENNSYLVANIA, : (Consolidated with 2008-349-L)
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :

ORDER

AND NOW, this 29th day of April, 2009, it is hereby ordered that this consolidated appeal is dismissed.

ENVIRONMENTAL HEARING BOARD


THOMAS W. RENWAND
Acting Chairman and Judge


GEORGE J. MILLER
Judge


MICHELLE A. COLEMAN
Judge


BERNARD A. LABUSKES, JR.
Judge

DATED: April 29, 2009

c: DEP Bureau of Litigation
Attention: Brenda Morris, Library

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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

M & M STONE CO.

v.

COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION and TELFORD BOROUGH
 AUTHORITY, Intervenor

:
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EHB Docket No. 2007-098-L

Issued: May 4, 2009

OPINION ON PREHEARING MOTIONS

By Bernard A. Labuskes, Jr., Judge

Synopsis

In an appeal from the Department’s rescission of a temporary discharge approval that was rescinded because the landowner denied access, the Board limits the evidence to issues directly related to the rescission and excludes evidence relating to the underlying dispute with the landowner that resulted in the denial of access.

OPINION

On October 17, 2006, M&M Stone Co. (“M&M”), through its consultants, Boucher & James, Inc., submitted to the Department of Environmental Protection (the “Department”) a request for a temporary discharge approval (“TDA”). M&M sought approval to discharge waters generated by M&M’s proposed rehabilitation of the Telford Borough Authority’s (“Telford’s”) public drinking water supply well known as Well #4. M&M proposed to discharge the water over a grassy area located near an unnamed tributary to the Perkiomen Creek in West Rockhill

Township, Bucks County. The letter stated that

work should begin *as soon as we receive approval from the Telford Borough Authority* and the PA DEP (two levels of PA DEP approval are required: (1) the Pottsville District Mining Office by virtue of its issuance of Administrative Orders to M&M Stone Co.; and (2) your office by virtue of your NPDES authority.) Work is estimated to occur over a full two month period (emphasis added).

M&M's letter application thus acknowledged that the proposed discharge would depend upon Telford granting M&M's consultants and contractors access to its well.

Telford wrote the Department on November 6, 2006 objecting to M&M's request for a TDA. Telford said that it did not believe that M&M had "the legal standing to request from the Department Temporary Discharge Approval of fluids from facilities owned and operated by [Telford] onto real property owned by [Telford] or into waters of the Commonwealth of Pennsylvania."

Despite Telford's objection, the Department approved M&M's request for a TDA on December 11, 2006. No party, including Telford, appealed the approval. The approval, therefore, is beyond assail in this appeal. The letter approving M&M's request described the Department's understanding of the waters that would be discharged as a result of the proposed rehabilitation project and set certain discharge parameters and conditions. The TDA was good for 180 days from the date of the letter. The Department noted that it would no longer be accepting requests for TDAs, instead advising that this type of discharge would be covered by a general permit for discharges from petroleum product contaminated groundwater remediation systems.

One aspect of the TDA that we believe to be critically important for our immediate purposes is that the TDA did *not* approve M&M's rehabilitation project. Nor did the approval grant M&M legal access to Telford's property. The letter did not authorize M&M to rehabilitate,

test, or otherwise work on the well. M&M's application for a TDA was expressly conditioned upon receiving approval from Telford to access the well, and the Department's authorization was, of course, based upon that conditioned request. The TDA simply authorized M&M to discharge waters *if M&M independently* obtained access to the well.

On March 8, 2007, the Department rescinded the TDA. The letter rescinding the TDA read in the pertinent part as follows:

Upon further review and coordination with the Water Supply Program, we are rescinding the approval. It is the Department's understanding that the proposal for rehabilitation of the well was a component of settlement negotiations, and those negotiations ultimately failed with no agreement reached on the rehabilitation proposal. Telford Borough, the owner of the well and associated property, has not granted permission or access to the property to allow the rehabilitation to occur.

Thus, once it appeared to the Department that Telford would not grant access to either the well or the "associated property," the Department rescinded the approval. This appeal constitutes M&M's challenge to the rescission of the TDA.

Because the TDA did not authorize any work on the well, it necessarily follows that the rescission of the TDA did not rescind any authority to work on the well. The Department could not rescind what it had not authorized in the TDA in the first place. It could only rescind what it had authorized in the TDA; namely, the right to temporarily discharge wastewaters to waters of the Commonwealth.

The only Departmental action at issue in this appeal is the rescission of the TDA. Therefore, our job is to decide whether the rescission was lawful and reasonable. In fact, the issue is even narrower than that because it is undisputed that Telford would not agree to give M&M access to the well, and there was no other reason for the rescission. The Department did not, for example, rescind the TDA based upon a finding that arsenic in the wastewater posed a

threat to the unnamed tributary. The Department has acknowledged that there was no such technical basis for the rescission. M&M does not contend in any of its papers that there was some reason other than Telford's denial of access that caused the rescission. Therefore, the very narrow issue presented in this very narrow appeal is whether the Department acted appropriately in rescinding M&M's conditioned request for a TDA when it became clear that the precondition ("approval from the Telford Borough Authority") would not be forthcoming. Or, in M&M's words, we must decide whether "DEP lacked the legal authority to rescind the approval simply because TBA objected to the approval and rehabilitation in general." (Prehearing memorandum at 4-5, ¶¶ 5-7.)¹

M&M argues that Telford wrongfully denied it access. In other words, it argues that we need to get into *why* Telford denied M&M access to the well. M&M does not explain, however, why Telford's reasons for denying access are relevant. We do not see how Telford's underlying motivation for denying access is relevant in this appeal. We do not see how Telford's motives make it more or less probable that the Department acted unlawfully or unreasonably in rescinding the TDA. Stated another way, we do not see how Telford's motives should factor into our decision whether to reinstate the TDA. Whether DEP erred does not in our view turn on why Telford denied access.

This situation is akin to one where the Department issues an NPDES permit authorizing a discharge from a manufacturing plant. Assume the Department learns that the plant will not be

¹ The parties also dispute whether this Board can award any effective relief even if M&M were to show that the Department acted improperly. Among other things, the Department and Telford contend that this appeal is moot because the TDA expired 180 days after its issuance. More fundamentally, the fact that Telford never has and never will give M&M access to the well for rehabilitation suggests that our reinstatement of the TDA would be a meaningless remedy. The Department has conceded that, if M&M ever succeeds in obtaining access, the Department will not argue that M&M is barred by administrative finality associated with the rescission from reapplying for the necessary approvals to discharge in the future. In any event, it is not necessary for us to resolve these disputed mootness issues in this opinion.

built because of a dispute between the plant's developer and the owner of the building site and the Department, therefore, rescinds the NPDES permit. M&M's view would suggest that the Department and this Board on review should look behind the existence of a dispute and determine whether the landowner was justified in denying access to the site. We think this approach goes too far afield of the matter at hand. Why should it matter why the plant developer and the landowner are at odds? Why should it matter who is "right" and who is "wrong," and how would we even make that determination? What standards would we use? What law applies – real estate law? Torts? These questions have little or nothing to do with deciding whether the Department correctly rescinded the NPDES permit when it became clear that there would be no plant and, therefore, no discharge, particularly where the rescission is without prejudice to the right of this permittee or some other party to reapply should there ever be a plant and a discharge.

M&M tells us that it expects to prove that Telford's "manifest hostility and resistance" and "unreasonable demands" resulting in denial of access were intended to prevent M&M's "competent, thorough and carefully designed" rehabilitation plan from going forward. (Prehearing Memorandum at 3, ¶ 11.) Merely stating this position, we think, shows how far away we would need to stray from the Departmental action under appeal to address M&M's background theories. Delving still deeper into Telford's organizational psyche, M&M asserts that Telford wanted to prevent the rehabilitation from going forward because rehabilitation would not be likely to improve the arsenic concentration of the well water, and/or because Telford "did not want the quarry to operate ever again." (Response to Motion in Limine at 3.) Granting *arguendo* that everything that M&M alleges is true, we still do not see that Telford's purported desire to close the quarry makes it more or less likely that the Department acted

unreasonably or unlawfully when it rescinded the TDA. And whether Telford was justified in purportedly wanting to see the quarry closed goes well beyond our area of inquiry.

In short, we believe that the dispute between M&M and Telford regarding access is completely irrelevant in this appeal. Assuming for purposes of argument that this background and Telford's underlying motivations are less than completely irrelevant, this Board has the discretion to exclude evidence where it lacks "reasonable" probative value. 25 Pa.Code § 1021.123. In addition, the Board generally applies the Pennsylvania Rules of Evidence, and those rules authorize us to exclude evidence where its limited probative value is outweighed by considerations of confusion of the issues, undue delay, waste of time, or needless presentation of cumulative evidence. Pa.R.Ev. 403. M&M's proposed motivation evidence, to the extent we assume that it has any probative value at all, lacks reasonable probative value, and its (assumed) probative value is far outweighed by the negative considerations listed in Rule 403.

It is exceedingly apparent that M&M is attempting to use this appeal to relitigate issues that have already been decided. There is a long and deep backstory to the Department's rescission that consumed our attention in *M&M Stone Co. v. DEP*, 2008 EHB 24, *aff'd*, Docket No. 383 C.D. 2008 (Pa. Cmwlth. October 17, 2008). We have absolutely no intention of revisiting that material in this very narrow appeal from the rescission of a temporary discharge authorization. Yet, M&M's proposed evidence would have us do exactly that. For one thing, we have already specifically determined that the TDA was rescinded because the parties were unable to agree on a rehabilitation plan. *Id.*, 2008 EHB at 56. Beyond that, implicit in M&M's preferred motivation evidence is its view that Telford acted unreasonably or improperly in denying access. In *M&M Stone Co.*, however, we specifically found that Telford's well is not materially compromised by fouling. *Id.* at 66. We specifically rejected M&M's theory that there

was anything wrong with the well that was affecting its quantitative output. *Id.* at 67. We found that the well is not impaired. *Id.* at 33-39, 66-67. Because there was nothing intrinsically wrong with the well's ability to produce, rehabilitation would have been pointless. It follows that Telford was in fact justified in denying M&M access to perform a useless project. Going back over evidence regarding rehabilitation is not only beside the point of this appeal, which relates only to the *discharge* that would have resulted from a defunct rehabilitation project, it would confuse the issues, cause undue delay, waste time and expense, and needlessly present cumulative evidence, exactly the sort of evidence that we can and hereby do exclude under 25 Pa. Code § 1021.123 and Pa.R.Ev. 403.

In this as in many other Board cases, the parties seem to have a strong desire to inform us in detail about the chronology of correspondence, meetings, phone calls, and other events leading up to a final Department decision. Where, as here, purely procedural issues are not involved, we often are left to wonder how evidence going to historical background that does nothing more than describe the interactive process that constitutes Departmental decision-making makes it more or less likely that the Department decision under review is or is not reasonable and lawful in the final analysis. In this case, M&M's proposed evidence regarding the rehabilitation discussions is one step even further removed. M&M does not just propose to explore back-and-forth leading up to the rescission; it wishes to present evidence describing the process leading to the rejection of its rehabilitation proposal. Once again, we see this evidence as lacking any probative value in this appeal, or in the alternative, having so little probative value as to be outweighed by the Rule 403 contraindications for admitting the evidence.

We have been compelled to delineate the boundaries of relevance in this appeal by three motions: (1) the Department's motion in limine asking us to bar M&M from calling as witnesses

W. David Fennimore and Richard Schloesser, (2) a motion filed by Spotts, Stevens, and McCoy, Inc. and Richard Schloesser to quash subpoena, and (3) the Department's motion for a protective order asking us to bar M&M from calling the Department's counsel, Craig S. Lambeth, Esq., as a witness. All three motions, among other things, challenge the relevancy of M&M's proposed testimony and related exhibits. On April 30, 2009, we issued an order granting all three motions. This opinion is issued in support of that order.

The Department argues in its motion in limine that M&M cannot demonstrate that Fennimore and Schloesser's testimony would be relevant where the matter at issue in this appeal involves only the rescission of the TDA: "Neither Mr. Fennimore nor Mr. Schloesser had any role – even remotely – in the Department's actions issuing and then revoking the temporary discharge authorization." Schloesser's motion to quash subpoena is to the same effect. Schloesser's motion adds that the events surrounding the issuance and subsequent rescission of the TDA occurred after his involvement.

Although a motion in limine should not be used as a motion for summary judgment in disguise, it is a proper and even encouraged vehicle for addressing evidentiary matters in advance of the hearing. *Angela Cres Trust v. DEP*, 2007 EHB 595, 596; *Dauphin Meadows v. DEP*, 2002 EHB 235. The Department's use of the motion is appropriate here, as is Schloesser's motion to quash subpoena.

Having heard legitimate objections to the relevance of M&M's proposed testimony, it was incumbent upon M&M to explain the proposed testimony's relevance in response to the motions. With respect to Fennimore, M&M responds as follows:

Likewise, Mr. Fennimore will provide very relevant testimony. By way of example only, during his deposition, Mr. Fennimore testified that DEP geologist Benjamin Greeley, a witness in this case, was involved in the preparation, including seeing drafts, of the November 8 and 13, 2006 letters Mr. Fennimore

authored critiquing M&M's plan to rehabilitate TBA 4. *See* "Exhibit C" hereto. Although the content of those letters is not necessarily relevant, the fact that TBA and DEP were working in close collaboration to prevent the rehabilitation is relevant. Indeed, the evidence will show that DEP rescinded the temporary discharge approval at TBA's direction. As such, the alliance between DEP and TBA is directly relevant.

(Memorandum at 3 (footnote omitted).) This response confirms that M&M seeks to revisit the rehabilitation plan in this appeal. Fennimore is not offered for any other purpose. We will sustain the objection to his testimony on the relevancy grounds discussed above.

With respect to Schloesser, M&M once again refers to evidence regarding the rehabilitation plan. Schloesser apparently discussed with the Department whether rehabilitation would improve the arsenic concentration in the well. "It is relevant to this case that TBA directed DEP to rescind the temporary approval when the Witness, DEP and TBA learned that the rehabilitation would likely not improve the arsenic concentration." M&M would also show that Schloesser discussed Telford "having the Authority purchase the quarry, as a course of public water supply?!" This all shows in M&M's view that Telford's "true motivation was to prevent the proposed rehabilitation because it did not want the quarry to operate ever again." (Memorandum at 4.) Thus, it is clear that Schloesser's testimony relates to Telford's motives and the rehabilitation process, not the TDA. It is irrelevant. If it were not irrelevant, its probative value would certainly be outweighed by the Rule 403 considerations.

Turning to the Department's motion regarding its attorney, Craig Lambeth, M&M claims that it needs to call Lambeth to prove why the Department rescinded the TDA. Although this proffer does not raise the concerns that we discussed above regarding deep background, M&M's claim that it needs Lambeth's testimony to understand why the Department rescinded the TDA is puzzling because M&M throughout its papers recognizes that the Department rescinded the TDA because Telford denied M&M access to the well. M&M has posited various theories as to why

Telford denied the access that in turn led to the rescission, but there is no dispute that the Department rescinded the TDA because that access was denied. M&M wants us to conflate the two issues but we are simply unwilling to do that. As to the matter at hand, the TDA, the rescission on its face lists the reason for the rescission. Other Department witnesses who have been named in both prehearing memoranda testified in depositions that the TDA was cancelled because Telford refused access. In fact, as previously noted, we specifically found in *M&M, supra*, that the TDA was rescinded because the parties were unable to agree on a rehabilitation plan. 2008 EHB at 56. If M&M believes that there is some other reason that it needs Lambeth to testify about, it was obligated to identify that hidden reason in either its prehearing memorandum or in its response to the Department's motion for a protective order. Instead, M&M merely states that Lambeth was "involved in or even made the decision to rescind" and argues that is therefore "entitled to inquire as to his involvement."

The Board does not favor trial by surprise. Nor is the hearing on the merits an opportunity for the parties to conduct discovery. Rather, the parties are required to lay out the facts that they intend to prove and the legal contentions that they intend to advance in their prehearing memoranda.² While M&M is correct that the Board's rules do not require a party to tie specific proposed facts to specific proposed witnesses in the prehearing memorandum, the memorandum must identify the facts to be proven by *some* evidence. If M&M intended to prove that the Department rescinded the TDA for some heretofore undisclosed reason, it was required to identify that reason in advance. It has not done so.

Furthermore, the Board at hearings will almost always require a party to provide an offer of proof before a witness testifies if an offer is requested by the other party or the Board

² M&M's prehearing memorandum, which is written like an answer to a complaint, is notably inadequate in this regard.

otherwise views it as helpful in moving the proceedings along or addressing the admissibility of evidence before it is presented. Under the circumstances of this case, the Department's motion is the functional equivalent of such a request. M&M's vague response might have been appropriate on this question if it had arisen months ago in the context of a request to depose Lambeth, but it is not adequate for purposes of the hearing itself to say simply that the person was "involved" and he may have pertinent information.

Thus, as far as we are able to tell from M&M's filings, it appears that Lambeth's testimony regarding the reason for rescission would be a needless repetition of cumulative evidence. We would, therefore, have some hesitation mandating Lambeth's testimony if he were not the Department's trial counsel. The fact that he is the Department's attorney removes all doubt. We start with the proposition that all litigants, including the Department, are entitled to counsel of their own choosing, and any attempt by an opposing party to compromise that choice must have a very strong justification. There are other Department witnesses who have been listed and who can testify about the Department's reasons for the rescission. M&M's response to the Department's motion does not point to any unique information available from Lambeth and no one else. M&M's citations to deposition testimony of other Department witnesses in its response to the Department's motion do nothing more than support the obvious fact that Lambeth was the DEP attorney who was consulted with respect to the rescission. In fact, the cited testimony causes us to suspect that M&M's true purpose in calling Lambeth is to delve once again into the negotiations leading up to Telford's rejection of M&M's rehabilitation proposal.³

³ M&M quotes the following testimony from Jennifer Fields:

Not specifically, but I know we had conference calls. **I know Craig [Lambeth] was in a conference call** and Sohan was in a conference call, but I don't remember if we were all collectively in the same conference call, but I had talked to Sohan [Garg] in preparation

On the other hand, Lambeth has been the Department's attorney regarding M&M matters for several years. Substituting other counsel so that Lambeth could testify as a witness at this late date would not be an acceptable alternative, even if Lambeth had some truly unique testimony to give. Still further, Lambeth's testimony would inevitably implicate privileged

of this letter about the reason why we were preparing this letter, and somehow, that knowledge came across to me. [M&M's emphasis.]

M&M quotes the following testimony from Sohan Garg:

I don't know the detail about the settlement. I don't know the details of the settlement because the settlement issues were not – I mean, in detail was not told to me. So I don't know about that, but this, you are asking about this letter. This letter [*i.e.*, the 3/8/07 rescission letter] was issued because of the settlement issue.

* * * * *

The problem was that the settlement negotiations were not handled. There was some problem going on in the settlement negotiations. I don't know the detail of those.

* * * * *

Q. You weren't involved in the settlement negotiations?

A. I was not involved.

Q. Was Ms. Fields involve in them?

A. I don't recall that she was involved in the settlement decision, no.

Q. Who told you that the settlement didn't work out?

A. I don't know. I don't know who told me.

* * * * *

Q. Who at DEP, aside from yourself and Jenifer Fields, was involved in the decision to cancel the approval?

A. I don't recall anybody else.

Q. Well, who told you the settlement had fallen apart?

A. I don't remember, other than Jenifer Fields.

* * * * *

Q. Were you involved in a conference call prior to the rescission [sic] of the –

A. I don't recall. I don't recall any conference call. Maybe some conference call. There are so many conference calls coming. I don't recall that. If she [*i.e.*, Ms. Fields] is saying a conference call, it means correct.

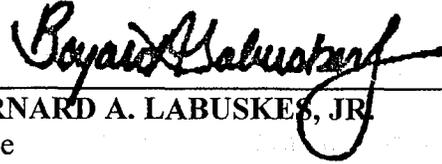
communications and attorney work product, resulting, at a minimum, in further and unnecessary disruption of the proceedings. The attorney-client privilege protects confidences between a client and his or her lawyer. 42 Pa.C.S. § 5928 provides, “[i]n a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon trial by the client.” Additionally, Rule 4003.3 of the Pennsylvania Rules of Civil Procedure protects an attorney’s work product from disclosure to opposing counsel. *Defense Logistics Agency v. DEP*, 2000 EHB 1218, 1219-20. The attorney-client privilege and attorney work product doctrine extend to government agencies and their lawyers. *See Sedat, Inc. v. DEP*, 641 A.2d 1243 (Pa. Cmwlth. 1994; *aff’d*, 701 A.2d 223 (Pa. 1997); *Morris Township Property Owners v. DEP*, 2004 EHB 68. A party who would call an opponent’s trial counsel as a witness has the burden of convincing us that the information sought is unique to counsel and will not violate the attorney-client privilege or the attorney work-product doctrine. *Defense Logistics Agency v. DEP*, 2000 EHB 1218, 1223. M&M has failed to meet that burden.⁴

In summary, any testimony Lambeth might give about the rehabilitation negotiations is irrelevant. His proposed testimony regarding the TDA itself is unspecified, has not been shown to be anything other than cumulative (at best), would be potentially prejudicial to the Department’s right to counsel, would likely be disruptive, and almost certainly would be constricted beyond value by privilege and attorney work product.

For the foregoing reasons, we have granted all three motions. A copy of our April 30, 2009 Order is attached.

⁴ M&M misstates the law when it says that the attorney-client privilege does not apply when an attorney is “involved” in agency decision-making. It takes more than “involvement” for the privilege not to apply to a governmental attorney. *See Sedat*, 641 A.2d at 1245.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: May 4, 2009

c: DEP Bureau of Litigation
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

M & M STONE CO.

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and TELFORD BOROUGH
AUTHORITY, Intervenor

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EHB Docket No. 2007-098-L

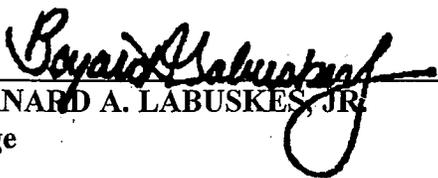
ORDER

AND NOW, this 30th day of April, 2009, it is hereby ordered as follows:

1. The Department's motion in limine is **granted**.
2. The Department's motion for a protective order is **granted**.
3. Schloesser's motion to quash subpoena is **granted**.

An opinion in support of this order will be issued in the next few days.

ENVIRONMENTAL HEARING BOARD


BERNARD A. LABUSKES, JR.
Judge

DATED: April 30, 2009

VIA FAX AND FIRST-CLASS MAIL:

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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

LILLY E. HIRSCH

v.

COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION

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EHB Docket No. 2008-213-MG

Issued: May 11, 2009

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

By George J. Miller, Judge

Synopsis

The Board denies a petition for supersedeas where the appellant homeowner has already complied with the Department's order and the Department has withdrawn that order and intends no further enforcement action. Similarly, the Board grants the Department's motion to dismiss the appeal as moot. Although the appellant clearly has continued concerns regarding the threat to her home from sewage or stormwater from her neighbors' properties, and even if the order had not been rendered a nullity, these concerns are beyond the scope of the appeal of the Department's compliance order and there is no further relief that the Board can offer.

OPINION

Lilly E. Hirsch (Appellant) challenged a compliance order issued to her by the Department on June 2, 2008. The order states that the Appellant had placed a blockage in a sewer lateral which in turn caused a discharge of sewage to the surface of the land. Accordingly,



the Appellant was required to remove the blockage and restore conveyance to the Pottsville Sewer Authority collection system. On June 27, 2008, the Appellant filed an appeal with the Board. Although she admitted that she had placed cement in two pipes, she challenged the Department's assertion that the pipes were sewer laterals and denied causing any discharge of sewage to the land. The remainder of the notice of appeal details the Appellant's struggles to remedy the ongoing sewage and stormwater problems at her home, including a complaint that she says was filed with the Department in August 2007, and other disputes with the Department, the City of Pottsville and the Greater Pottsville Area Sewer Authority. Notably, in her notice of appeal, she states that she removed the cement from the pipes as instructed by the Department's compliance order.¹

On January 22, 2009, the Appellant filed a petition for supersedeas with the Board. The Appellant again disputed that blocking the pipes had caused any back up of sewage and argued that by forcing her to unblock the pipes, the Department had forced her to spend significant funds to attempt to resolve her sewage issues, that stormwater from neighboring properties was now being diverted through the newly installed connection across her property and that forcing her to leave the other "dry" pipe open was a health hazard to her. She also contended that the Department's order had interfered with her ability to collect evidence in a civil suit that she intended to file. Moreover, she complained that her neighbors were dumping stormwater into her sewer pipes which created a threat of flooding. The Department filed a response to her petition stating that a supersedeas was inappropriate because not only had the Appellant complied with Department's order, but that the neighboring properties at issue had been reconnected to new and individual sewage connections. The Department further stated that no

¹ E.g., Notice of Appeal ¶ 21.

further action against the Appellant was contemplated by the Department, therefore there was nothing to supersede.

The Board held a conference call with the parties on January 28, 2009, and both the Appellant and the Department were permitted to argue their respective positions. The Appellant's major concern appeared to be that stormwater for the neighboring residences threatened to flood her basement. Although it did not appear that a supersedeas was appropriate, the presiding judge ordered the Department to contact the City of Pottsville and/or the Greater Pottsville Sewer Authority concerning the stormwater infiltration at the Appellant's residence and file a status report on the situation. The Department did so on February 12, 2009, and on February 19, 2009, the Board held a further conference call. The Appellant again expressed her concern about stormwater infiltration, which in her view, was a consequence of the Department's June order. The presiding judge allowed the Appellant to file a written response to the Department's status report and ordered the Department to formalize its stipulation that no further action would be taken with regard to the June order by formally vacating the order.

The Appellant filed a letter in response to the Department's status report which largely revolved around her concerns about stormwater infiltration and her frustration with the Department's refusal to order the municipality or the neighbors to stop discharging stormwater into pipes that run across her property. It remained her contention that the Board needed to issue a supersedeas to restore the "status quo" and to redress potential harm to her property.

By order dated March 2, 2009, the Department withdrew and vacated the June 2 Compliance order. On March 30, 2009, the Department filed a motion to dismiss on the grounds that the Appellant's appeal is now moot and there is no further relief that can be offered by the Board. The Appellant continues to dispute that the pipes which she blocked were sewage

conveyance pipes and argues that the order was simply a pretext by the Department to force her to install a new pipe which has increased the threat of flooding to her property. The Appellant goes on to describe her perception of the ongoing sewer and stormwater problems in her neighborhood, and her objection to anyone utilizing sewer or stormwater pipes that are located on her property.

It has been held many times that when an event occurs during the appeal process which deprives the Board of the ability to provide effective relief or deprives an appellant of an actual stake in the outcome of a controversy, the appeal should be dismissed as moot.² Generally speaking where the Department rescinds or supplants a permit condition or approval, the Board has found the appeal objecting to that condition moot.³ Similarly, where the Department vacates or rescinds the order that formed the basis of the appeal, that appeal of that order is typically rendered moot.⁴ However, courts have established some narrow exceptions to the mootness doctrine, which include situations where the conduct complained of is capable of repetition but will evade review; where the case involves issues of great public importance; or where one party will suffer a detriment without the court's decision.⁵

² *Horsehead Resource Development v. Department of Environmental Protection*, 780 A.2d 856 (Pa. Cmwlth. 2001), *petition for allowance of appeal denied*, 796 A.2d 987 (Pa. 2002); *see also Morris Township v. DEP*, 2006 EHB 55; *Valley Forge Chapter of Trout Unlimited v. DEP*, 1997 EHB 1160.

³ *E.g.*, *Cooley v. DEP*, EHB Docket No. 2003-246-K (Opinion issued September 15, 2005) (appeal is moot where a subsequent air plan approval superseded the plan approval under appeal); *Solebury Township v. DEP*, 2004 EHB 23 (appeal moot where the Department rescinded a water quality certification); *Valley Forge Chapter of Trout Unlimited v. DEP*, 1997 EHB 1160 (appeal is moot where amended permit superseded permit under appeal.).

⁴ *E.g. Amerikohl Mining, Inc. v. DEP*, EHB Docket No. 2008-342-L (Opinion issued March 27, 2009); *West v. DEP*, 2000 EHB 462; *Kilmer v. DEP*, 1999 EHB 846 (and cases cited therein).

⁵ *Horsehead Resource Development*, 780 A.2d at 858.

We are convinced that this appeal is moot and therefore there is no basis for a supersedeas and the motion to dismiss will be granted. First, the effect of vacating the compliance order is that the order no longer exists.⁶ There is no basis for any future liability or obligation related to the order. Hence “[r]uling 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.”⁷ The Appellant has not only unblocked the terra cotta pipes as she was ordered to do by the Department but has also installed a new pipe. Since the order itself has been rendered a nullity by the Department, we fail to see what relief we can offer. Even if we held that the compliance order was improperly issued, such a ruling would be nothing more than an advisory opinion.

Nor do any of the exceptions to the mootness doctrine apply. An advisory opinion on the propriety of the June 2 order would not prevent a detriment to the Appellant. The essence of many of the Appellant’s arguments seem to be that the consequence of the Department’s order has subjected her to a host harms, including an increased risk of disease, and increased risk of flooding and by “forcing Appellant to install a new combined sewer and stormwater inlet into her property and which forced her to continue to allow wildcat pipes feeding into her sewer line . . .”⁸ have resulting in a taking of property, trespass and unconstitutional cruel and unusual punishment. Even if those allegations were true (and properly raised in her notice of appeal), this Board is not the proper forum to offer the Appellant relief. The order, when it existed, only required the Appellant to unblock pipes. There is nothing in the order that required the

⁶ See *Horsehead Resource Development*, 780 A.2d at 858.

⁷ *Kilmer v. DEP*, 1999 EHB 846, 848.

⁸ Appellant’s Petition for Supersedeas ¶ 10.a. (also incorporated into her Response to the Motion to Dismiss).

Appellant to install a new combined sewer and stormwater inlet. If the Department did issue an order which required her to do so, we are not aware that the Appellant has appealed such an order.⁹ Moreover, any potential harm the Appellant might be exposed to is speculative and at best tangentially related to the Department's June order.¹⁰

The Appellant clearly has significant disputes with her neighbors and the Pottsville sewer authorities. She is clearly frustrated because she does not feel that the Department is addressing her complaints or protecting her from potential harm. We are not unsympathetic to her feelings and concerns. However, the Board in this context can not order the Department to order the municipality to grant the relief the Appellant seems to desire. Her redress, if any, must be found in other forums.

Accordingly, we deny the Appellant's petition for supersedeas and grant the Department's motion to dismiss her appeal as moot. We therefore enter the following:

⁹ See *Kilmer* (holding that an appellant can not use a withdrawn order as a vehicle for attacking a subsequent unappealed order.)

¹⁰ See *Horsehead Resource Development v. Department of Environmental Protection*, 780 A.2d 856 (Pa. Cmwlth. 2001), *petition for allowance of appeal denied*, 796 A.2d 987 (Pa. 2002), where the Commonwealth Court held that the appellant-manufacturers concerns about the marketability of paving material as a result of compliance orders issued to entities which had used the material, but which orders were subsequently withdrawn, were speculative and that the appellant's appeal was properly dismissed.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LILLY E. HIRSCH

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

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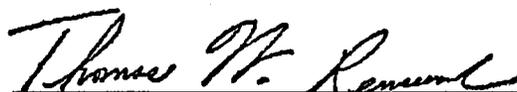
EHB Docket No. 2008-213-MG

ORDER

AND NOW, this 11th day of May, 2009, it is hereby **ORDERED** that:

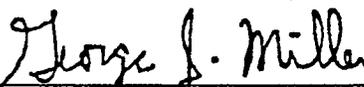
1. The Appellant's petition for supersedeas in the above-captioned matter is **DENIED**.
2. The Department's motion to dismiss the Appellant's appeal as moot is **GRANTED** and the above-captioned appeal is **DISMISSED**.

ENVIRONMENTAL HEARING BOARD



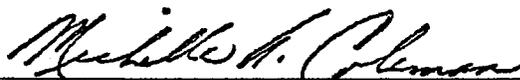
THOMAS W. RENWAND

Acting Chairman and Chief Judge



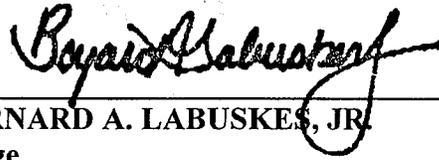
GEORGE J. MILLER

Judge



MICHELLE A. COLEMAN

Judge


BERNARD A. LABUSKES, JR.
Judge

DATED: May 11, 2009

c: DEP Bureau of Litigation:
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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

MICHAEL D. RHODES and VALLEY RUN	:	
WATER COMPANY, LLC	:	
	:	EHB Docket No. 2008-156-L
v.	:	(Consolidated with 2008-258-L,
	:	and 2008-260-L)
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	Issued: May 12, 2009
PROTECTION	:	

**OPINION AND ORDER ON
MOTIONS IN LIMINE**

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

Synopsis

The Board grants in part motions in limine and precludes the testimony of expert witnesses whose testimony will not assist the Board to understand the evidence or determine a fact in issue. Among other things, the Board holds that expert opinions on matters of law are prohibited. The rule against experts giving legal opinion applies to private and Departmental witnesses alike.

OPINION

Michael D. Rhodes ("Rhodes") and Valley Run Water Company, LLC ("Valley Run") (collectively hereinafter referred to as "Rhodes") filed this appeal from the Department of Environmental Protection's (the "Department's") assessment of a \$48,000 civil penalty for alleged violations of the Safe Drinking Water Act ("SDWA"), 35 P.S. § 721.1 *et seq.* The



Department issued a SDWA construction permit to Rhodes authorizing him to build a public water system to serve the Spring Valley housing development in Washington Township, Berks County. A subsequent Department inspection revealed that homes at the development were being served water although no operation permit had been issued. At its most basic level, this case boils down to a dispute over whether this unpermitted service constituted a violation of the SDWA, and if so, whether Rhodes (as opposed to a third party) was responsible for the violations. The hearing after having been postponed several times at the parties' request is now scheduled to begin on May 18.

Testimony of Scott T. Wyland, Esq.

Rhodes listed Scott T. Wyland, Esq., an attorney, as an expert witness in his prehearing memorandum. Rhodes also attached Wyland's expert report to the memorandum. The listing of Wyland as an expert witness has prompted a motion in limine from the Department. The Department argues that testimony by a private attorney on legal principles is unnecessary and inappropriate before the Board, and that the testimony is also irrelevant. Rhodes responds that Wyland's elucidation of such topics as "the process of dedication, the relationship of easement to the ground, the relationship within the real estate industry for 'Water Services Agreements' and 'Builder Extension Agreements'" and the like will aid this Board in understanding the situation with which we are presented.

Initially, it is important to understand that no party has an unfettered right to present expert testimony at a hearing. Whether to accept expert testimony is within the discretion of the Board, and the Board's decision will not be disturbed on appeal unless it is clearly erroneous. *Grady v. Frito-Lay*, 839 A.2d 1038, 1046 (Pa. 2003). The Board will generally only accept expert testimony if the testimony will assist us in understanding the evidence or determining a

fact in issue. Pa.R.Ev. 702. Expert testimony will generally only assist us to understand the evidence or determine a fact in issue if it represents scientific, technical, or other specialized knowledge beyond that possessed by a typical layperson, or for that matter, the Members of this Board. *Id.*

“Necessity is fundamental to the admissibility of opinion evidence.” *Bergman v. United Services Auto Ass’n*, 742 A.2d 1101, 1105 (Pa. Super. 1999). If the facts can be fully and accurately described to the fact-finder, who without special knowledge or training is able to estimate the bearing of those facts on the issues in the case, then the opinion of a witness is not admissible because it is not necessary in the search for truth. *Id.* The Board may not abdicate its responsibility to ascertain and assess the facts. “The primary purpose of the expert testimony must be to assist the trier of fact in understanding complicated matters, not simply to assist one party or another in winning the case.” *Id.*

Therefore, the first question we must ask ourselves when presented with a proffer of expert testimony is whether the expert’s specialized knowledge will aid us in understanding the evidence or determining a fact in issue. We do not believe that Wyland’s legal and factual conclusions will assist us in any way. Wyland’s report constitutes a legal brief, not an expert report. We have no question of Wyland’s competence as an attorney, but if Rhoades wished to benefit from Wyland’s legal skills, he should have hired him to represent him. Reliance upon Wyland’s opinions to even a slight degree would constitute nothing else than a derogation of our duty to independently adjudicate this dispute based upon the evidence of record.

It is black-letter law that experts may not give legal opinions. This is evidenced by the Rules of Evidence themselves, which speak of aiding the *trier of fact* in understanding the evidence or determining a *fact* in issue. Pa.R. Ev. 702. Legal opinions by definition do not aid us

in making findings of fact. Similarly, Rule 703 speaks about the need to use *facts* and *data* as a basis for expert opinion. Pa.R.Ev. 703.

Aside from the rules themselves, the Commonwealth Court recently explained that experts are not permitted to give opinions on question of law:

It is well-settled that an expert is not permitted to give an opinion on a question of law. MCCORMICK ON EVIDENCE § 12 at 62 (6th ed. 2006). This means that an expert witness may not be offered to testify “as to the governing law” or “what the law required.” *United States v. Leo*, 941 F.2d 181, 196-197 (3rd Cir. 2001). *See also Browne v. Department of Transportation*, 843 A.2d 429, 433 (Pa. Cmwlth. 2004) (explaining that an expert’s legal opinion testimony, such as whether a party has violated an ordinance, is not admissible); *Kosey v. City of Washington Police Pension Board*, 73 Pa. Cmwlth. 564, 459 A.2d 432, 434 (1983) (stating that an expert witness may not testify as to issues of law, which are for a court to decide). In short, the testimony of an expert in statutory law, such as Mr. Nast, should not have been allowed. The law is evidence of itself, and it is up to the courts, not a witness, to draw conclusions as to its meaning.

Waters v. SERS, 955 A.2d 466, 471 n. 7 (Pa. Cmwlth. 2008). *See also Murphy v. Dep’t of Education*, 502 A.2d 382, 386 (Pa. Cmwlth. 1986). The legal appropriateness of the Department’s action in an appeal to this Board is a matter that is left solely to the Board to determine. *Shenango Incorporated v. DEP*, 934 A.2d 135, 140 n. 10 (Pa. Cmwlth. 2007); *Foundation Coal Resources v. DEP*, EHB Docket No. 2006-067-R, slip op. at 66 (Adjudication issued March 9, 2009) (an opinion regarding the legal meaning or effect of a statute or regulation is irrelevant). *See generally* OHLBAUM ON PENNSYLVANIA RULES OF EVIDENCE § 704.08 (and cases cited therein) (opinions on matters of law prohibited).

Wyland’s report gives one legal opinion after another. Rhodes claims otherwise but that claim is rather incredible in light of such opinions as the following:

- To the extent that the developer itself connected a well to its water distribution system and supplied water to their homes, the supply of water to such a limited set of customers is outside the scope and jurisdiction of the Safe Drinking Water Act.
- The Department's assessment is based upon an incorrect recitation and understanding of facts and law.
- The Department's assessment offers no valid basis to conclude that Rhodes violated the Safe Drinking Water Act.¹

Rhodes asserts that Wyland can assist us in defining the term "control" as it is used in the SDWA and regulations promulgated thereunder. Defining, interpreting, and construing statutory and regulatory terms, however, is quite obviously a question of law. *Reid v. City of Philadelphia*, 957 A.2d 232, 234 (Pa. 2008). The application of those terms to the facts is also a question of law. *Coleman v. W.C.A.B.*, 842 A.2d 349, 353 (Pa. 2004); *Bergman*, 742 A.2d at 1107. Wyland has no personal knowledge regarding the underlying facts.

We are aware that opinion or inferential testimony *otherwise admissible* is not objectionable because it embraces an ultimate issue to be decided by the Board as a trier of fact. Pa.R.Ev. 704. This rule, however, does not excuse or otherwise require us to allow an expert to offer opinions that do not assist us in understanding evidence or making our own determination of the facts in issue, and it certainly does not condone legal conclusions. *Eways v. Bd. of Commissioners of Berks County*, 717 A.2d 8 (Pa. Cmwlth. 1998) (former); *Taylor v. Fardink*, 331 A.2d 797 (Pa. Super. 1975) (latter). Wyland's opinions are not "otherwise admissible" so Pa.R.Ev. 704 does not apply.

Rhodes adds that Wyland would also make factual conclusions and draw factual influences for our benefit. Here are some examples:

¹ Wyland also opines on various principles of corporate law, contract law, regulatory law, and property law.

- Rhodes did not have possession, ownership, or control of the water distribution system.
- Rhodes did not supply water to any residences during the time in question.
- Rhodes did not own the unpermitted water supply well.
- Rhodes did not own the operating water production equipment at issue.
- The act of supplying water was not an act performed by Rhodes.
- The Department has identified and prosecuted the incorrect parties.

If anything, we find these proffers to be more objectionable than Wyland's proffered legal opinions. Wyland is not testifying from personal knowledge. His proffered factual interpretations impinge upon the role of the Board as fact-finder. *Bergman*, 742 A.2d at 1107-08. They will not assist us in any way in our search for the truth. We are fully capable of drawing our own conclusions and inferences from the evidence without the aid or assistance of Wyland. Although application of the Safe Drinking Water Act is undoubtedly complex, Wyland's professed specialized knowledge in this area is not beyond that which we possess ourselves.

Finally, we agree with the Department that large swatches of Wyland's proposed testimony are irrelevant in this proceeding. As we explained in *DEP v. Kennedy*, 2007 EHB 15,

[i]n an appeal from a civil penalty assessment, we determine whether the underlying violations occurred, and then decide whether the amount assessed is lawful, reasonable, and appropriate. *Farmer v. DEP*, [2001 EHB 271, 283]. Although our review of an assessment is *de novo*, we do not start from scratch by selecting what penalty we might independently believe to be appropriate. Rather, we review the Department's predetermined amount for reasonableness. *Stine Farms and Recycling, Inc., v. DEP*, [2001 EHB 796, 812]; *202 Island Car Wash, L.P. v. DEP*, 2000 EHB 679, 690.

Kennedy, 2007 EHB at 25. Since the amount of the penalty does not appear to be at issue in this case, our only job is straightforward: We must determine whether Rhodes violated the SDWA. Rhodes, however, proffers Wyland to “opine on issues concerning possession, ownership and control over real estate and improvements, including water systems,” discuss conveyance documents and the relationship between the parties and the underlying ground, review and explain easements and how the easements relate to the project, opine whether the easements were utilized by the parties at any time, discuss the nature of the PUC application and its impact upon the Appellants and their ability to serve the subject community, and discuss the dedication process and industry custom and the facts surrounding the conduct of the parties. All of this background is irrelevant to the matter at hand. None of it makes it more or less likely that Rhodes violated his responsibilities as a permittee under the SDWA. This is not a dispute between the various private entities involved with the Spring Valley village water system. This is not a PUC action. We are not concerned with how Rhodes’s conduct would be judged by the standards of the construction or real estate development industries. Assuming that everything that Rhodes did was consistent with ordinary custom and usage in the water supply business, it does not follow that Rhodes did not violate the SDWA or that he is absolved of his violations. The operative question here is whether Rhodes’s conduct violated the applicable environmental statutes and regulations, not whether he violated PUC rules, acted tortuously, or violated any contracts. To the extent the evidence has any relevance at all, we exclude it as superfluous background pursuant to Pa.R.Ev. 403. *See M&M Stone Co. v. DEP*, EHB Docket No. 2007-098-L (Opinion issued May 4, 2009).

Rhodes's Fact Witnesses

The Department in its motion in limine complains that Rhodes failed to disclose the identity of two fact witnesses prior to listing them in his prehearing memorandum, and it asks us to preclude their testimony as a result. Initially, we must correct a common misunderstanding that Rhodes asserts in his response to the motion; namely, that the rules of prehearing disclosure do not apply to the party who does not have the burden of production because that party's witnesses are "rebuttal witnesses." As we explained in *Pennsylvania Trout v. DEP*, 2003 EHB 652, this is simply incorrect. It is only after the party with the burden of production presents its case in chief and after the opposing party presents its case in chief that the rules regarding rebuttal come into play. Rebuttal is the evidence presented by the party who had the initial burden of production and who presented the first case in chief. If either party wishes to have a witness testify in that party's *case in chief*, the rules of prehearing disclosure apply to that witness. It is as simple as that.

One of the rules of prehearing disclosure that applies to *all* parties is that proposed witnesses must be identified in response to proper discovery requests. It is true that interrogatories requesting the identity of persons with knowledge and persons who will be called as witnesses are often served so early in the litigation process that it can be difficult to answer them completely. But the Pennsylvania Rules of Civil Procedure, which apply here (25 Pa. Code § 1021.102(a)), impose an obligation on parties to supplement answers as information becomes known. Pa.R.Civ.P. 4007.4(2). The duty to supplement answers is particularly important regarding proposed witnesses, so important in fact that the Rules provide that "[a] witness whose identity has not been revealed as provided in this chapter shall not be permitted to testify on behalf of the defaulting party at the trial of the action." Pa.R.Civ.P. 4019(i). If the witness's

identity was not disclosed as the result of “extenuating circumstances beyond the control of the defaulting party,” however, we “may grant a continuance or other appropriate relief.” *Id.* Although the Rules provide that an undisclosed witness *shall* not be permitted to testify absent extenuating circumstances beyond the party’s control, the Board has traditionally employed a less Draconian approach that considers, among other things, the prejudice caused to each party by allowing or excluding the testimony and the extent to which the prejudice can be cured. *Pennsylvania Trout, supra*; *ERSI v. DEP*, 2001 EHB 824, 834; *Achenbach v. DEP*, 2006 EHB 218.

The Department complains that Rhodes has identified two factual witnesses for the first time in his prehearing memorandum. The Department claims that Rhodes should have identified the two witnesses earlier, but the Department’s fatal flaw is that it does not explain why. Rhodes had no prior obligation to identify his fact witnesses unless the Department requested that he do so in proper discovery. Although we are generally aware that the parties conducted discovery in this case, the Department has not referred us to any specific discovery that requested the identity of Rhodes’s fact witnesses. The Board does not routinely receive (or want) copies of the parties’ discovery materials, and even if we did, it is not the Board’s responsibility to comb through discovery requests to see whether there were any pertinent requests. Accordingly, the Department’s motion in limine regarding Rhodes’s previously undisclosed fact witnesses is denied.

DEP’s Expert Testimony

Rhodes has filed a motion in limine asking us to preclude expert testimony from three Department employees: Thomas Shaul, P.E., Susan M. Werner, and H. Thomas Fridiricci, P.G. To be clear, Rhodes does not seek to bar the witnesses from providing testimony as *fact*

witnesses. He only seeks to bar them from giving expert opinions. He asserts two grounds for his request: First, the witnesses are proffered to give legal opinions. Second, the Department failed to comply with the rules of discovery regarding prehearing disclosure. The Department responds that the witnesses are being proffered to give technical testimony only, and denies that it failed to comply with prehearing duties regarding disclosure.

Our preceding discussion regarding the prohibition against expert legal opinion testimony applies to private and governmental parties alike. Department witnesses may no more give legal opinions under the cloak of “expert testimony” than may private parties. This Board, however, is required under certain circumstances to defer to the Department’s interpretation of regulatory terms if it is a reasonable interpretation. *DEP v. NARCO*, 791 A.2d 461 (Pa. Cmwlth. 2002). Therefore, both private sector and Department witnesses are permitted to testify from personal knowledge about the *fact* of the Department’s *institutional* interpretation of a regulatory provision. In contrast, a particular employee’s or witness’s interpretation, as distinct from the Department’s official or accepted interpretation, will be irrelevant in most cases. Both private and governmental witnesses may give testimony, otherwise appropriate, regarding how the Department applies a regulation in a given situation and even why it does so. They may testify regarding the consequences of a particular interpretation, the Department’s formulation of an interpretation, or other *facts* regarding an interpretation. But they may not cross the line into providing legal opinions in the guise of expert testimony. They may not opine whether a particular interpretation is legally correct. *See Shenango, supra; Foundation Coal, supra.* Drawing these distinctions is difficult and perhaps even somewhat artificial, but it is necessary if the Board is to avoid reversible error. *Taylor v. Furdink*, 331 A.2d 797 (Pa. Super. 1975).

Although finding the line between objectionable legal opinion and permissible factual testimony can be difficult, part of Shaul's proffered testimony is objectionable to the extent it is offered as legal opinion. The Department has proffered Shaul to testify that

the permittee failed to obtain an amended PWS construction permit for a substantial modification *as required by § 109.501(b)*. Also, the permittee failed to obtain a PWS operation permit *as required by § 109.501(b) and § 109.504*. (Emphasis added.)

Whether Rhodes violated the law is a matter for the attorneys to argue in their briefs and the Board to resolve in its Adjudication. The proffered expert testimony of Werner and Fridiricci is closer to call, but to the extent that they are offered to prove that Rhodes's conduct was legally "improper" or constituted violations of the law, the testimony impinges upon the exclusive responsibility of the Board to make legal conclusions and it will be excluded.

Rhodes complains that Werner and Fridiricci should not be permitted to testify that Rhodes's conduct resulted in an "imminent health risk". While the legal definition of "imminent threat to the public" lies exclusively with the Board, *Reid* 957 A.2d at 234, expert opinion from a scientific and technical angle regarding the safe public supply of drinking water can be both appropriate and, in this case, helpful. Explaining what measures need to be employed to provide safe drinking water is not a legal question or a matter within the ordinary understanding of a layperson. Accordingly, testimony from a technical viewpoint from Werner and Fridiricci on these sorts of factual matters is not objectionable on the ground that it constitutes legal argument. In addition, as discussed above, it may be appropriate to know if the agency has adopted a particular interpretation of the phrase.

Rhodes next avers that he did not receive the Department's expert reports dated December 10 and 11, 2008 until the Department filed its prehearing memorandum in April 2009. In response, the Department answers that it provided the reports at the close of discovery on or

about December 15, 2008. The Department attached a copy of its correspondence covering the expert reports to its response. The Department adds that Rhodes deposed all three witnesses. It is not clear from the parties' filings whether it was clear from the depositions that the witnesses would be offered to give expert opinion testimony. Although these discrepancies and the issue of timely disclosure in general may require further attention at the hearing, our current sense is that there has been no surprise or prejudice here. We will not exclude the witnesses' expert testimony as a discovery sanction at this time.

For all of the foregoing reasons, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MICHAEL D. RHODES and VALLEY RUN :
WATER COMPANY, LLC :
 :
 : EHB Docket No. 2008-156-L
 v. : (Consolidated with 2008-258-L,
 : and 2008-260-L)
 :
 COMMONWEALTH OF PENNSYLVANIA, :
 DEPARTMENT OF ENVIRONMENTAL :
 PROTECTION :

ORDER

AND NOW, this 12th day of May, 2009, it is hereby **ORDERED** that:

1. The Department's motion in limine to exclude the testimony of Scott T. Wyland, Esquire is **granted**.
2. The Department's motion to exclude the testimony of fact witnesses identified for the first time in Rhodes's prehearing memorandum is **denied**.
3. The Appellants' motion to preclude the Department's experts from giving legal opinions is **granted**. Its motion in limine is in all other respects **denied**.

ENVIRONMENTAL HEARING BOARD


BERNARD A. LABUSKES, JR.
Judge

DATED: May 12, 2009

c: DEP Bureau of Litigation:
Attention: Brenda K. Morris, Library

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Lee A. Stivale, Esquire
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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

ADK DEVELOPMENT CORP., INC., et al. :
 :
 v. : EHB Docket No. 2008-133-L
 : (Consolidated with 2008-134-L,
 COMMONWEALTH OF PENNSYLVANIA, : 2008-135-L, and 2008-138-L)
 DEPARTMENT OF ENVIRONMENTAL :
 PROTECTION : Issued: May 19, 2009

**OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT**

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

Synopsis:

The Hazardous Sites Cleanup Act authorizes the Department to issue orders to intervening landowners to investigate and clean up a site where hazardous substances are located in or on the site during the period of their ownership.

OPINION

This case involves the Port Richmond Gate Site (the "Site"), a residential subdivision located along Edgemont Street, Venango Street, and Thompson Street in Philadelphia. The Site was formerly owned by Aldan Industries, which filed for bankruptcy in 2000. While the Site was owned by Aldan and during the Aldan bankruptcy proceeding, Appellants Keith Charlton and Daniel Ryan retained DCR Environmental Services, Inc. ("DCR") to perform an environmental evaluation of the Site for the purpose of determining if they should buy the property through the Aldan bankruptcy proceeding. DCR's Phase II Report concluded that there

were elevated levels of lead and arsenic present at the Site. Later sampling conducted by the Department of Environmental Protection (the “Department”) confirmed that levels of arsenic and lead, which are regulated hazardous substances, can be found at the Site above the residential statewide health standards.

Appellant ADK Development Corp. (“ADK”) purchased the Site. Ryan and Charlton are shareholders of ADK. ADK initially owned all of the property which comprises the Site. ADK sold a portion of the Site to another Appellant, Thompson Street Associates, LLC. (Thompson is not a party to the motion for summary judgment that is the subject of this opinion.) ADK, among others, built homes on the Site. ADK and the other Appellants no longer own the Site. The Site is now largely covered with houses, driveways, walkways, and patios, but it also has areas of uncapped soils.

The Department issued the order that is the subject of these consolidated appeals to the Appellants on March 17, 2008 (the “Order”). The Order directs the Appellants to submit a site sampling plan followed by a site characterization report, cleanup plan, and a Final Report that documents the Appellants’ attainment of standards established pursuant to the Land Recycling and Environmental Remediation Standards Act (“Act 2”), 33 P.S. § 6026.101 *et seq.* The Department issued the Order pursuant to Sections 505 and 1102 of Act 2, 35 P.S. §§ 6020.505 and 6020.1102, Sections 5, 316, 610, and 611 of the Clean Streams Law, 35 P.S. §§ 691.5, 691.316, 691.610, and 691.611, Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17, and the rules and regulations promulgated under those statutes, including 25 Pa. Code § 91.33.

ADK, Ryan, and Charlton (hereinafter collectively referred to as “ADK”) move for summary judgment. They assert that the Department has no basis to assert that they have

violated the Clean Streams Law or HSCA, and therefore, they cannot be required to perform any response actions at the site. They say that the Site “has attracted attention on Channel 10 News based on water supply line failures unrelated to the required response under this appeal. Some of the homeowners in the area have concerns and have filed a lawsuit in Philadelphia Common Pleas Court. Nevertheless, DEP has no authority to issue an order demanding innocent people to take action because the news media has reported unrelated problems.” The Department responds that the Appellants are not entitled to judgment as a matter of law and asks that we deny the Appellants’ motion for summary judgment based upon genuine disputes regarding material facts.

Summary judgment may be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Ehmann v. DEP*, EHB Docket No. 2007-150-L, slip op. at 2 (Opinion, June 19, 2008); *Bertothy v. DEP*, 2007 EHB 254, 255. The granting of summary judgment is most appropriate in appeals before this Board when a limited set of material facts are truly undisputed and the appeal presents a clear questions of law. *Ehmann, supra*; *Bertothy*, 2007 EHB at 255; *CAUSE v. DEP*, 2007 EHB 101, 106.

Although this appeal may as ADK claims raise several important issues, our focus in ruling upon its motion for summary judgment is rather more limited. ADK is asking us to sustain its appeal in its entirety because the Department has no legal grounds for requiring it to investigate or remediate the Site under HSCA or the Clean Streams Law. Where, as here, a motion for summary judgment turns on whether the Department had the legal authority to issue an order, logic suggests that the Department may defeat that challenge so long as any one provision of any one statute or regulation cited in the order provides the necessary authority. *Milco Industries v. DEP*, 2002 EHB 723, 724. The Department does not need to demonstrate that it will eventually win the argument. The Department simply needs to point to enough record

evidence to show that it can make out a *prima facie* case that it had the legal authority to issue the order under at least one provision of one statute or regulation. Under the circumstances presented here, once the Department has made that relatively limited showing, it is clear that the appeal must proceed to full Board consideration based upon post-hearing briefs following a hearing on the merits. *Milco, supra*. Genuine disputes of material fact obviously prevent the issuance of summary judgment.

HSCA

Section 701 of HSCA defines intervening landowners as responsible persons. 35 P.S. § 6020.701. Specifically, Section 701(a) provides in the pertinent part:

- (a) General rule.—Except for releases of hazardous substances expressly and specifically approved under a valid Federal or State permit, a person shall be responsible for a release or threatened release of a hazardous substance from a site when any of the following apply:
 - (1) The person owns or operates the site:
 - (i) when a hazardous substance is placed or comes to be located in or on a site;
 - (ii) when a hazardous substance is located in or on a site, but before it is released; or
 - (iii) during the time of the release or threatened release.

Id. As explained by the U.S. District Court,

HSCA differs from CERCLA in that it recognizes liability for a category of PRPs excluded under CERCLA. Liability attaches under CERCLA to a former owner or operator only if there is evidence that disposal of hazardous substances occurred during that person's tenure of ownership. Potential liability under the HSCA is broader in that the HSCA imposes liability on intervening landowners; that is, any person in the chain of title is subject to liability even in the absence of evidence that it contributed to the current environmental problem.

Degussa Construction Chemicals Operations v. Berwind Corp., 280 F. Supp. 2d 393, 406 (E.D.Pa.

2003) (citations omitted) (applying Pennsylvania Law) (citing *Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.*, 12 F. Supp. 2d 391, 408 (M.D. Pa. 1998)). See also, *DEP v. Delta Chemicals*, 721 A.2d 411, 417 (Pa. Cmlwth. 1998); *DER v. Bryner*, 613 A.2d 43, 47 (Pa. Cmlwth. 1992); PA. ENVIRONMENTAL LAW AND PRACTICE, 5TH § 12-5.1 (there is no question that intervening landowners are liable under HSCA 701; mere ownership in chain of title is sufficient).

Whether or not the Appellants are “operators,”¹ and whether or not they were owners and/or operators during the time of a release or threatened release, there is no dispute that ADK² was an owner when hazardous substances were located on the Site, which gives rise to liability under Section 701(a)(1)(ii). The Department may issue orders to responsible persons such as ADK when it deems it necessary to aid in the enforcement of HSCA. Such orders include orders requiring response actions, studies, and access. 35 P.S. § 6020.505 and § 6020.1102. There does not appear to be any basis for granting summary judgment in ADK’s favor.

Clean Streams Law

We do not see any evidence in the summary judgment record that ADK caused actual pollution of waters of the Commonwealth. The Department, however, has the authority to issue an order to a person if it finds that that person’s activity has created a *danger* of pollution of the waters of the Commonwealth. 35 P.S. § 691.402(a); *Milco*, 2002 EHB at 725; *Leeward Construction v. DEP*, 2000 EHB 742, 764, *aff’d*, 821 A.2d 145 (Pa. Cmlwth. 2003); *DEP v. Silberstein*, 1996 EHB 619, 635-36. Here, as in *Milco*,

Neither party has referred us to any case law elaborating upon exactly what constitutes a “danger” of water pollution. *Milco* argues convincingly that the term should not include every conceivable circumstance in which a creative mind can conjure up

¹ See *Diess & Dies v. PennDOT*, 935 A.2d 895 (Pa. Cmlwth. 2007) (defining “operator” as someone who operated or otherwise controlled activities at the Site).

² The parties have not delved into shareholder liability, and therefore, it would be premature for us to do so.

a set of circumstances that could theoretically cause pollution. At the other extreme, a “danger” is obviously something less than actual, proven pollution. The appropriate definition doubtless lies somewhere between these two extremes, and whether a “danger” exists sufficient to support an order will undoubtedly require a case-by-case analysis. Beyond these truisms, a more refined analysis will need to await an adjudication by the full Board following the hearing on the merits.

Milco, 2002 EHB at 725.

The outer limits of the Department’s authority under Section 402 are not well defined. Among other things, it is not clear whether Section 402 would authorize an order where the danger has passed. Here, however, the Department has pointed to record evidence that would support its position that the presence of arsenic and lead in uncapped soils on the Site presents an ongoing danger of pollution of the groundwater and surface waters of the Commonwealth. This is enough to preclude us from issuing summary judgment in favor of ADK based upon its Clean Streams Law challenge.

Accordingly, for the forgoing reasons, we issue the Order that follows.³

³ The parties discuss other issues such as the applicability of each and every statutory provision cited in the Order, the need to give notice under 25 Pa. Code § 91.33 (incidents causing or threatening pollution), the Department’s Management of Fill Policy, and stormwater permitting issues. Although we may need to address these issues down the road, it is not necessary to do so at this time.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ADK DEVELOPMENT CORP., INC., et al. :
: :
v. : EHB Docket No. 2008-133-L
: (Consolidated with 2008-134-L,
COMMONWEALTH OF PENNSYLVANIA, : 2008-135-L, and 2008-138-L)
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :

ORDER

AND NOW, this 19th day of May, 2009, it is hereby ordered that ADK's motion for summary judgment is **denied**. The Board will proceed to a hearing on the merits.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: May 19, 2009

c: DEP Bureau of Litigation:
Attention: Brenda Morris, Library

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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

ROBERT BISHOP

v.

**COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION**

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EHB Docket No. 2008-325-R

Issued: May 19, 2009

OPINION AND ORDER DISMISSING APPEAL

By Thomas W. Renwand, Acting Chairman and Chief Judge

Synopsis:

The Pennsylvania Environmental Hearing Board dismisses Appellant's appeal for failure to follow Board rules and orders.

OPINION

Once again we are confronted with a situation where an Appellant completely ignores two Board Orders directing that he file needed information in order to perfect his appeal. As we have done in past cases, pursuant to 25 Pa. Code Section 1021.161, we will impose sanctions for failure to follow Board orders and rules.

Appellant filed his appeal in November 2008. We immediately issued a failure to perfect order directing the Appellant to do five things including filing his objections to the

Department action he was appealing. This is required by 25 Pa. Code Section 1021.51.

Appellant ignored our Order. Therefore, on January 5, 2009, we issued a second order directing that he file the necessary information by January 30, 2009. We clearly indicated in our Order that if he did not file this information by that date “such failure may result in the dismissal of his appeal for failure to file Board Orders.” Order of January 30, 2009.

A party is only required to follow a few simple steps to perfect his appeal. These steps are necessary to insure that the Appellant clearly sets forth his specific objections to the Department action. *Mon View Mining Corp. v. DEP*, 2005 EHB 937, 938. The Department is entitled, as a matter of law, to know “what the specific objections to the action of the Department” are in this Appeal. 25 Pa. Code Section 1051(e). Now, months after Mr. Bishop has filed his appeal, he has still not complied with the simplest and most basic requirement of setting forth his objections to the Department’s action. *Perrin v. DEP, Pittsfield Township, and Brokenstraw Valley Area Authority*, 2008 EHB 78, 82.

We hasten to add that we are dismissing this case only after giving Mr. Bishop ample opportunity to comply with our orders and the Board’s rules of Practice and Procedure. As recently pointed out by Judge Coleman in *Miles v. DEP*, 2008-136-C (*Slip Op.* issued March 27, 2009) a failure to comply with Board orders clearly demonstrates a lack of intent to pursue an appeal.

Mr. Bishop has not set forth any reasons whatsoever, either factual or legal, as to why the Department’s action was in error. As Judge Miller so aptly stated in *Swistock v. DEP and*

Amfire Mining Co., 2006 EHB 398, 401:

The integrity of the appeal process before the Pennsylvania Environmental Hearing Board is dependent upon the willingness of the parties to follow the rules of procedure and the orders of the Board. Because of his repeated failure to abide by those rules this Board will dismiss his appeal as a sanction for that failure.

It is well established that the Environmental Hearing Board has the power under its rules, specifically 25 Pa. Code Section 1021.161, to impose sanctions for failure to comply with Board rules and Orders. Although dismissal is a strong sanction Appellant's failure to comply with our rules and orders warrants such a sanction in this case. We will issue an Order accordingly.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT BISHOP

v.

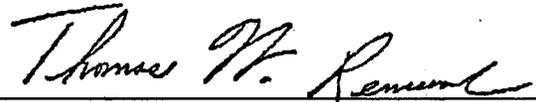
COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

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EHB Docket No. 2008-325-R

AND NOW, this 19th day of May, 2009, pursuant to 25 Pa. Code Section 1021.161 Appellant's appeal is *dismissed* as a sanction for failure to follow two Board Orders and also for failing to follow specific Board rules including 25 Pa. Code Section 1021.51.

ENVIRONMENTAL HEARING BOARD



THOMAS W RENWAND
Acting Chairman and Chief Judge



GEORGE J. MILLER
Judge



MICHELLE A. COLEMAN

Judge



BERNARD A. LABUSKAS, JR.

Judge

DATE: May 19, 2009

**c: DEP Bureau of Litigation:
Attention: Brenda K. Morris, Library**

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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

ANGELA CRES TRUST OF JUNE 25, 1998	:	
	:	
v.	:	EHB Docket No. 2008-092-R
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	Issued: May 20, 2009
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and MILLCREEK	:	
TOWNSHIP, Permittee	:	

**OPINION AND ORDER ON
 MOTION TO COMPEL DISCOVERY**

By Thomas W. Renwand, Acting Chairman and Chief Judge

Synopsis

The Pennsylvania Environmental Hearing Board denies a motion to compel as moot following the Appellant’s production of relevant portions of the requested trust agreement.

OPINION

Presently before the Pennsylvania Environmental Hearing Board (Board) is the motion to compel filed by the Pennsylvania Department of Environmental Protection (Department). The Department served Appellant Angela Cres Trust of June 25, 1998 (Appellant or Angela Cres Trust) with a request for production of documents, seeking, among other things, a copy of the trust instrument for the Angela Cres Trust. Appellant objected to the request for production “as being beyond the scope of permissible discovery and as not being reasonably calculated to lead



to the discovery of any relevant or admissible evidence.” Appellant’s Response to Request for Production No. 1.

After some more unsuccessful attempts to persuade Appellant to produce the document, the Department filed its motion to compel seeking the production of the trust document. In its motion and supporting memorandum of law the Department indicates that it needs a copy of the trust document to ascertain the trustee or trustees of the Angela Cres Trust and explore whether this Board has subject matter jurisdiction.

The Department correctly contends that Board Rule 25 Pa. Code § 1021.102 provides that discovery proceedings are generally governed by the Pennsylvania Rules of Civil Procedure. Rule 4003.1 sets forth the scope of permissible discovery which would certainly seem to include relevant portions of the trust agreement.

In its response to the motion to compel, Appellant, evidently for the first time, produced a redacted copy of the trust agreement as Exhibit A to its memorandum of law in opposition to the Department’s motion to compel. Our review of the redacted copy of the trust agreement leads us to conclude that Appellant has evidently produced the relevant portions of the trust agreement dealing with the issues raised by the Department regarding the authority and identity of the trustees and the legal structure of the trust itself. Since it appears that the Appellant has now produced relevant portions of the trust agreement, we will deny the Department’s motion to compel as moot. Of course, our order is without prejudice to the Department regarding this issue if it contends that there are additional documents requested that have not been produced or that redacted portions of the trust agreement are relevant to its motion or reasonably calculated to lead to admissible evidence. We will issue an order accordingly.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ANGELA CRES TRUST OF JUNE 25, 1998 :
 :
 v. : EHB Docket No. 2008-092-R
 :
 COMMONWEALTH OF PENNSYLVANIA, :
 DEPARTMENT OF ENVIRONMENTAL :
 PROTECTION and MILLCREEK :
 TOWNSHIP, Permittee :

ORDER

AND NOW, this 20th day of May, 2009, following review of the Department's motion to compel and the response filed by Appellant, it is ordered as follows:

- 1) The Department's motion to compel is **denied** as moot.
- 2) Our order is without prejudice to the Department if it later contends that additional documents have not been produced or that the redacted portions of the trust agreement are relevant to its motion or reasonably calculated to lead to admissible evidence.

ENVIRONMENTAL HEARING BOARD


THOMAS W. RENWAND
Acting Chairman and Chief Judge

DATED: May 20, 2009

Service list on following page

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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

PDG LAND DEVELOPMENT, INC. :

v. :

COMMONWEALTH OF PENNSYLVANIA:
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION and CITIZENS FOR :
PENNSYLVANIA’S FUTURE, Intervenor :

EHB Docket No. 2007-041-R

Issued: May 21, 2009

**OPINON AND ORDER ON
 MOTION FOR SUMMARY JUDGMENT**

By Thomas W. Renwand, Acting Chairman and Chief Judge

Synopsis:

The Pennsylvania Environmental Hearing Board grants the Pennsylvania Department of Environmental Protection’s Motion for Summary Judgment where the Appellant proposes to fill with overburden from its mining operations 1.5 miles of streams.

The “stream buffer zone” regulation prohibits such action and none of the criteria for a variance can be proven by Appellants.

Introduction and Background

Presently before the Pennsylvania Environmental Hearing Board are Motions for Summary Judgment filed by the Pennsylvania Department of Environmental Protection and



Citizens for Pennsylvania's Future (PennFuture). Before turning to the summary judgment motions, we will first briefly review this matter. Appellant PDG Land Development, Inc. (PDG) appealed the Department's denial of PDG's surface mining permit application. PDG was seeking the mine permit in order to develop a 613 acre tract that is the largest undeveloped property in the City of Pittsburgh. In PDG's words, it plans "to transform an undeveloped, undermined, unstable, and environmentally contaminated site into an urban mix-use commercial, residential and entertainment district, designed by green architects in accordance with principles of New Urbanism, that will be a showcase for the region." (PDG's Brief in Opposition to the Department's Motion for Summary Judgment, page 1).

The site was partially mined years ago prior to modern mining methods which resulted in mine voids, mine drainage, and gob pits. PDG would not only mine those areas to provide stability but would move massive amounts of dirt and overburden to provide a more level area which would maximize the development of the site.

In the process of the mining and development PDG as set forth in its permit application would fill in four stream valleys with overburden removed during coal mining operations and grading. These valley fills would destroy over 8,000 feet of perennial and intermittent streams.

PDG readily admits that these streams, which it contends are virtually lifeless and not worth saving, would be negatively affected by its operations. However, it argues that

the net environmental impact of its proposed development activities would far outweigh the damage to these streams.

Following a 3½ year review, the Pennsylvania Department of Environmental Protection denied PDG's permit application. PDG filed a timely appeal to the Pennsylvania Environmental Hearing Board. PennFuture intervened in the case and supports the Department's decision to deny the permit.

The parties have engaged in extensive discovery in this case. In addition to the production of thousands of documents, multi-day depositions have been conducted. The Board, at the request of the parties, also conducted a day long site view. In addition, oral argument on the Motions for Summary Judgment was held in Pittsburgh before the entire Pennsylvania Environmental Hearing Board.

Motions for Summary Judgment

The Department and PennFuture raise several issues in their Motions for Summary Judgment. However, it is only necessary for us to decide and discuss one issue. That is the main issue raised by the Department regarding the elimination of approximately 1.5 miles of streams on the site. The Surface Mining Control and Reclamation Act and the supporting regulations prohibit mining within 100 feet of a perennial or intermittent stream unless the operator obtains a variance. In order to obtain a variance, the operator must demonstrate "beyond a reasonable doubt" that there will be no adverse hydrologic or water

quality impacts resulting from the variance. The Department contends that since PDG's mining application proposes to eliminate 1.5 miles of intermittent and perennial streams by burying the streams under the overburden from the mining operation that PDG cannot possibly comply, as a matter of law, with the stream buffer zone requirement. Consequently, the Department contends that the uncontested facts demonstrate that it is entitled to judgment as a matter of law.

Standard for Summary Judgment

The Environmental Hearing Board will only grant summary judgment when there is no issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. See 25 Pa. Code Section 1021.94(b); Pa.R.C.P. 1035.2; *Scalice v. Pennsylvania Benefits Trust Fund*, 883 A.2d 419 (Pa. 2005); *Jones v. Southeastern Pennsylvania Transportation Authority*, 772 A.2d 435 (Pa. 2001); *Martz v. Department of Environmental Protection*, 2006 EHB 988. The record includes the pleadings, depositions, answers to interrogatories, admissions, affidavits and certain expert reports. Pa. R.C.P. 1035.2; *Holbert v. Department of Environmental Protection*, 200 EHB 796, 807-809. Of course, we are required to view the record in the light most favorable to the nonmoving party. *Holbert*, 2000 EHB at 808.

Discussion

The mining regulations strictly prohibit surface mining activities, including the

placement of mine spoil, within 100 feet of a stream bank unless the operator obtains a variance. 25 Pa. Code Section 86.102(12). This case concerns that portion of the regulation that protects perennial and intermittent streams from the adverse effects of surface mining, commonly described as the “stream buffer zone rule.” The regulation prohibits surface mining operations:

- (12) Within 100 feet ... of a perennial or intermittent stream.
The Department may grant a variance from this distance requirement if the operator demonstrates beyond a reasonable doubt that there will be no adverse hydrologic impacts, water quality impacts or other environmental resources impacts as a result of the variance.

25 Pa. Code Section 86.102(12).

We agree with the Department that PDG proposes to conduct mining operations within the stream buffer zone “by filling in thousands of feet of perennial and intermittent streams.” The dumping of rock and other overburden so as to bury these streams clearly prevent PDG from demonstrating “beyond a reasonable doubt” that there will be no “adverse hydrologic impacts, water quality impacts or other environmental resources impacts...” On the contrary, there will be severe hydrologic, water quality, and environmental resources impacts on these streams. Thousands of feet of the streams will be destroyed.

PDG argues that these streams are of poor quality and that the net environmental

impacts of its project are positive. Such a test is not adopted by the law. Such arguments should be made to the General Assembly rather than to this Board. Our duty is to interpret the applicable statutes and implementing regulations and apply the law to the facts of every case before us. When we do that in this case it is clear that there are no issues of material fact which would prevent us from granting summary judgment on this issue in favor of the Department of Environmental Protection.

Moreover, we rejected similar arguments in *UMCO Energy, Inc. v. DEP and Citizens For Pennsylvania's Future*, 2004 EHB 797, 804 where the coal company characterized the stream adversely affected by its mining operations as insignificant and unworthy of protection. Judge Labuskes pointed out that “it is inappropriate to segment watersheds down to components that may appear inconsequential when improperly viewed in isolation.” 2004 at 817. The stream in that case, rather than a “ditch” as characterized by the mining company, was instead an integral part of a larger hydrologic system that included springs, seeps, groundwater flow, and a nearby branch of a tributary to Maple Creek.

We have strictly upheld the buffer zone provisions of the surface mining regulations. In *Blose v. DEP and Seven Sisters Mining Company, Inc.*, 2000 EHB 189, the Board found that Seven Sisters Mining Company had failed to obtain written waivers before obtaining a permit to mine within 300 feet of several occupied dwellings. We,

therefore, held that the Department had improperly issued the permit. 2000 EHB at 215. Likewise, in *Chestnut Ridge Conservancy v. DEP and Tasman Resources, Ltd.*, 1998 EHB 217, we revoked the limestone company's mining permit for its failure to comply with the non-coal mining set-back regulation.

We also reject PDG's contention that we should consider the Department's granting of variances to other coal mine operators allegedly resulting in the filling of streams in the coal fields of Western Pennsylvania as somehow excusing them from the regulations. These cases are not before us. Moreover, it is akin to a person being stopped for speeding on the Pennsylvania Turnpike and arguing that the state police are not as aggressively enforcing the speed limits on some other interstate highway in Pennsylvania. In a perfect world, the law would be enforced uniformly. We can only decide the cases before us and we strive to apply the law uniformly and consistently.

Here, it is clear, that the destruction of 1.5 miles of streams entitles the Department to summary judgment as a matter of law.¹ We will issue an Order accordingly.

¹ Although we are granting the Department's Motion for Summary Judgment we are not without empathy for PDG. We do not know why it took the Department 3½ years to deny PDG's permit application when it was readily apparent that the project would violate the applicable law. Moreover, if the Department would have filed its Motion for Summary Judgment at the beginning of

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PDG LAND DEVELOPMENT, INC. :
 :
 v. : EHB Docket No. 2007-041-R
 :
 COMMONWEALTH OF PENNSYLVANIA :
 DEPARTMENT OF ENVIRONMENTAL :
 PROTECTION and CITIZENS FOR :
 PENNSYLVANIA'S FUTURE, Intervenor :

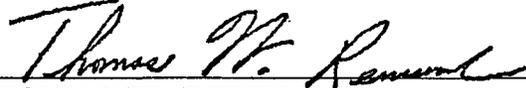
ORDER

AND NOW, this 21st day of May, 2009, following review of the Motion for Summary Judgment and Supporting Brief filed by the Pennsylvania Department of Environmental Protection, the responses and briefs filed by PDG, the written materials filed by Penn Future, and following oral argument before the entire Board, it is ordered as follows:

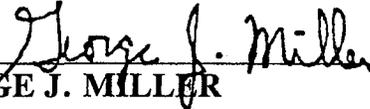
1. The Department's Motion for Summary Judgment on the issue of the stream buffer zone is **granted**.
2. Appellant PDG's Appeal is *dismissed*.

discovery rather than at its conclusion a great deal of time and money would have been saved by all sides.

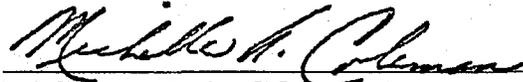
ENVIRONMENTAL HEARING BOARD



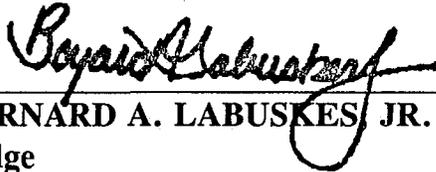
THOMAS W. RENWAND
Acting Chairman and Chief Judge



GEORGE J. MILLER
Judge



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

DATED: May 21, 2009

c: **DEP Bureau of Litigation**
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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION

v.

D.B. ENTERPRISE DEVELOPERS
 AND BUILDERS, INC.

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EHB Docket No. 2008-223-CP-MG

Issued: June 4, 2009

**OPINION AND ORDER ON
DISCOVERY MOTION**

By George J. Miller, Judge

Synopsis:

The Board requires a defendant-homebuilder to file an amended response to the Department's requests for admissions either admitting the requested matters or providing a detailed statement as to why the defendant is unable to either admit or deny the request. The Board also orders that matters set forth in certain of the Department's requests for admissions be deemed admitted.

BACKGROUND

The Department filed this complaint for penalties in amount of \$28,368.20 against the D.B. Enterprise Developers and Builders (Defendant), a housing builder, for disgorgement of profits as a result of claimed violations of the Clean Streams Law¹ resulting from the

¹ Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001 (Clean Streams Law).

Defendant's construction activities at the Springfield Knoll Subdivision, Springfield Township, Delaware County. The complaint alleges that the Defendant failed to implement required sediment and erosion controls and best management practices thereby creating a danger of pollution. The complaint also alleges a failure to implement permanent stabilization measures. In addition to the penalty amount, the complaint seeks recovery of costs incurred by the Delaware County Conservation District in the amount of \$368.20.

The Department's motion before the Board seeks an order from the Board with respect to the sufficiency of the Defendant's response to the Department's requests for admissions requiring the Defendant to file an amended answer to specified requests, or a determination that the requested matter be admitted. The Defendant filed no response to the motion.

OPINION

Rule 4014 of the Pennsylvania Rules of Civil Procedure authorizes the service of requests for admission of the truth of any matter subject to discovery set forth in the request that relate to statements of opinions of fact or of the application of law to fact, including the genuineness of any document described in the request. Subsection (b) of the rule requires that the answer admit or deny the matter or set forth in detail the reasons why the answering party cannot truthfully do so. A denial must fairly meet the substance of the requested admission.² If the court determines that an answer does not comply with the requirements of this rule, it may order that the either matter be admitted or that an amended answer be served.³

Our review of the Department's motion, the requests for admissions and the Defendant's answer to the requests indicates that in many instances the Defendant has not properly responded

² Pa. R.C.P. No. 4014(b).

³ Discovery in proceedings before the Board are governed by the Pennsylvania Rules of Civil Procedure. 25 Pa. Code §1021.102(a).

to the requests. As to some of these requests, we will rule that the matters set forth in the request are admitted. While the Defendant's denial of many of these requests "as a conclusion of law to which no answer is required" may pass under the rules for an answer to the complaint under practice before the courts of common pleas, such a response to requests for admissions is not in compliance with Rule 4014 of the Pennsylvania Rules of Civil procedure. As indicated above, this rule clearly permits requests dealing with legal matters and requires either an admission or a denial or a detailed statement of the reasons why the answering party cannot truthfully do so. In other cases, the Defendant has not fairly dealt with the request by entering a denial, particularly when the request is backed by a document that clearly supports the request. In the case of other requests we will require an amended answer.

For purposes of this action, we will deem admitted the matters set forth in Requests Nos. 1, 7, 8, 15, 16, 19, 25, 38, 46, 74, 75, 76 and 77. These requests relate to matters which should have been admitted. Certainly the Defendant has provided us with no reason why they should not be admitted by its failure to respond to the Department's motion.

We will require the Defendant to file an amended answer to the requests in ten days where it appears from the Department's motion that there is not likely to be a reason for not admitting the matters set forth in the requests. These are requests Nos. 10, 14, 23, 24, 43, 50, 54, 55, 57, 58, 60, 61, 67, 68, 70, and 72.

We will also grant the Department's requests that the time for the filing of dispositive motions be extended appropriately. Accordingly, we enter the following:

**COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD**

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :

v. :

D.B. ENTERPRISE DEVELOPERS :
AND BUILDERS, INC. :

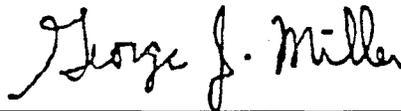
EHB Docket No. 2008-223-CP-MG

ORDER

AND NOW, this 4th day of June, 2009, it is **HEREBY ORDERED** as follows:

1. The matters set forth in the Department's requests for admissions Nos. 1, 7, 8, 15, 16, 19, 25, 38, 46, 74, 75, 76 and 77 are hereby deemed admitted for all purposes of this action.
2. The Defendant shall serve on the Department an amended answer to requests Nos. 10, 14, 23, 24, 43, 50, 54, 55, 57, 58, 60, 61, 67, 68, 70, and 72 on or before **June 15, 2009** providing a full and complete statement as to why the requested matter cannot be admitted or admitting the matters set forth in the request.
3. The time for the filing of dispositive motions is hereby extended to **July 10, 2009**.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Judge

DATED: June 4, 2009

c: DEP Bureau of Litigation:
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 SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, :
 DEPARTMENT OF ENVIRONMENTAL :
 PROTECTION :

v. :

QUAKER HOMES, INC. :

: EHB Docket No. 2008-244-CP-MG

: Issued: June 5, 2009

**OPINION AND ORDER
 IMPOSING SANCTIONS**

By George J. Miller, Judge

Synopsis

The Board enters judgment on liability against a defendant as a sanction for its repeated failure to comply with orders of the Board which required it to answer the Department's interrogatories and requests for production of documents. A hearing will be scheduled on the proper amount of the judgment.

BACKGROUND

The Department instituted a complaint for civil penalties on August 7, 2008, against Quaker Homes, Inc. (Defendant), a real estate developer, in the total amount of \$57,500 and an additional amount for disgorgement of profits resulting from non-compliance with the Department's regulations and order. The complaint alleges violations of the Clean Streams Law¹ and the Department's regulations in connection with its construction of a residential subdivision

¹ Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001 (Clean Streams Law).

known as the Quaker Jacobs site in Elverson Borough, Chester County. The complaint alleges discharges of sediment to the East Branch of the Conestoga River, violations relating to erosion and sediment control, failure to comply with provisions of an NPDES permit for construction activities, failure to install best management practices at the site to control sediment discharges, and failure to implement permanent stabilization measures. The complaint further alleges a failure to comply with the Department's cease and desist order requiring the Defendant to immediately cease all earth disturbance activities and to implement the best management practices contained in its erosion and sedimentation plan and NPDES permit.

The Defendant's response admits the Department's issuance of an order to it, but disputes the remaining claims forming the basis of the complaint.

The Department's initial discovery requests consisting of interrogatories and requests for production of documents were sent to the defendant on September 30, 2008. The Defendant filed no objections to these requests, but failed to respond to them within the required time frame.

Thereafter the Department filed a motion to compel discovery which was granted by the Board. But that did not result in an appropriate response from the Defendant. The Board entered further orders on January 15 and February 19, 2009, requiring the Defendant to comply with the Department's discovery requests. In the conference calls relating to the Department's motion, the Defendant's counsel claimed that the Defendant had no ability to pay such a penalty and, while some documents were coming from his client, he was unable to comply fully with the Department's requests at that time. The Department never received any documentation from the Defendant. Accordingly, the Board issued a rule to show cause why judgment should not be entered against the Defendant for failure to comply with the Department's requests. Those

requests included all tax returns for the past three available years and available audited financial statements for the past three years. These requests also sought documents relating to cash transfers and expenses between the Defendant and related companies.²

The Defendant's response to the rule to show cause gave no promise that the documents would be provided, but attached an unverified report from the Defendant's accountant saying that the Defendant sold no homes in 2008 and consequently had no income for 2008. While the financial statements for 2008 had not yet been prepared, the accountant expected a loss for 2008 of between \$100,000 and \$300,000. The Defendant failed to produce any of the financial information sought by the Department for the three years prior to 2008, and makes no claim that they are not available.

OPINION

The Defendant's response to the rule to show cause is not a proper response to the Department's discovery requests. This response does not even present information that clearly indicates that the Defendant has no ability to pay the penalty. We see no justification at all for the Defendant withholding its tax returns and other requested information for 2006 and 2007. As the Department points out in a responsive letter, the Department and the Board have no way of knowing whether Defendant realized large profits in 2006 and 2007 when the violations alleged in the Department's complaint occurred.

The requested documents appear to be directly relevant to the Defendant's claim of inability to pay the penalty and to the Department's claim that the Defendant may have profited from its claimed non-compliance. Accordingly, we agree with the Department that sanctions are appropriate for the Defendant's continued failure to comply with discovery.

² Document requests 3, 4 and 5.

Section 1021.161 of the Board's Rules of Practice and Procedure authorize the imposition of sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure, including an adjudication against the offending party, or other appropriate discovery sanctions including those permitted under Rule 4019 of the Pennsylvania Rules of Civil Procedure. Sections 4019(a)(1) and (c)(3) of the Pennsylvania Rules of Civil Procedure authorize the entry of judgment against a party failing to make discovery or to obey an order respecting discovery. The Board has exercised this authority to dismiss an appeal when a party fails to comply with discovery obligations under the Board's Rules of Practice and Procedure.³

We think it is appropriate in this case to enter judgment on liability against the Defendant for its failure to comply with the Department's discovery requests and numerous orders of the Board. This failure amounts to a studied refusal to provide the Department with information directly relevant to the Defendant's ability to pay the claimed penalty and the extent to which Defendant has profited from its violations of the Clean Streams Law, the Department's regulations and the order to cease and desist the construction of this project.⁴

Accordingly we will enter judgment against the Defendant on liability and will schedule a hearing on the appropriate amount of the penalty and the amount of economic benefit gained by the Defendant's violations which should be disgorged, if any.⁵ While the Defendant's refusal to comply with the Department's discovery requests may make difficult positive proof of the

³ *Swistock v. DEP* 2006 EHB 398; *Kennedy v. DEP*, 2006 EHB 477 (also ordered defendant to reimburse the Department for the costs of the court reporter); *Potts Contracting v. DEP*, 1999 EHB 958; *Recreation Realty, Inc. v. DEP*, 1999 EHB 697; *Shaulis v. DEP*, 1998 EHB 503.

⁴ We accept the representation of counsel for the Defendant that he has exercised his best efforts to secure from his client the information sought by the Department.

⁵ *Schieberl v. DEP*, EHB Docket No. 2008-275-L (Opinion issued March 6, 2009); *DEP v. Pecora*, 2007 EHB 533.

amount of profits that should be disgorged from the Defendant, the Department may be able to present evidence of the likely profits secured by the Defendant's violations.

Accordingly, we enter the following:

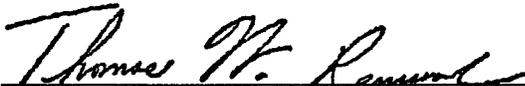
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

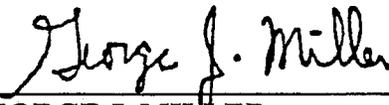
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :
v. : EHB Docket No. 2008-244-CP-MG
QUAKER HOMES, INC. :

ORDER

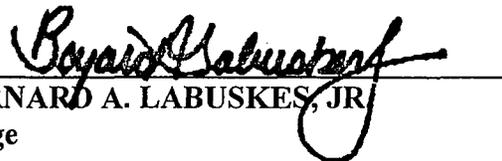
AND NOW, this 5th day of June, 2009, the Board hereby enters judgment on the issue of liability against Quaker Homes, Inc. (Defendant), as a sanction for the Defendant's failure to comply with orders of the Board to answer the Department's discovery requests. The relevant facts in the complaint are deemed admitted and liability is established. A hearing will be scheduled to receive evidence limited to the amount of the civil penalty to be assessed and the amount of Defendant's profit from its noncompliance to be disgorged, if any.

ENVIRONMENTAL HEARING BOARD


THOMAS W. RENWAND
Acting Chairman and Chief Judge


GEORGE J. MILLER
Judge


MICHELLE A. COLEMAN
Judge


BERNARD A. LABUSKES, JR.
Judge

DATED: June 5, 2009

c: DEP Bureau of Litigation:
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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :
 v. : **EHB Docket No. 2008-223-CP-MG**
 :
D.B. ENTERPRISE DEVELOPERS : **Issued: June 9, 2009**
AND BUILDERS, INC. :

**CORRECTED OPINION AND ORDER ON
DISCOVERY MOTION**

By George J. Miller, Judge

Synopsis:

The Board requires a defendant-homebuilder to file an amended response to the Department's requests for admissions either admitting the requested matters or providing a detailed statement as to why the defendant is unable to either admit or deny the request. The Board also orders that matters set forth in certain of the Department's requests for admissions be deemed admitted.

BACKGROUND

The Department filed this complaint for penalties in the amount of \$28,368.20 against D.B. Enterprise Developers and Builders (Defendant), a housing builder, for disgorgement of profits as a result of claimed violations of the Clean Streams Law¹ resulting from the Defendant's construction activities at the Springfield Knoll Subdivision, Springfield Township,

¹ Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001 (Clean Streams Law).



Delaware County. The complaint alleges that the Defendant failed to implement required sediment and erosion controls and best management practices thereby creating a danger of pollution. The complaint also alleges a failure to implement permanent stabilization measures. In addition to the penalty amount, the complaint seeks recovery of costs incurred by the Delaware County Conservation District in the amount of \$368.20.

The Department's motion before the Board seeks an order from the Board with respect to the sufficiency of the Defendant's response to the Department's requests for admissions requiring the Defendant to file an amended answer to specified requests, or a determination that the requested matter be admitted. The Defendant filed no response to the motion.

OPINION

Rule 4014 of the Pennsylvania Rules of Civil Procedure authorizes the service of requests for admission of the truth of any matter subject to discovery set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any document described in the request. Subsection (b) of the rule requires that the answer admit or deny the matter or set forth in detail the reasons why the answering party cannot truthfully do so. A denial must fairly meet the substance of the requested admission.² If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter be admitted or that an amended answer be served.³

Our review of the Department's motion, the requests for admissions and the Defendant's answer to the requests indicates that in many instances the Defendant has not properly responded to the requests. As to some of these requests, we will rule that the matters set forth in the request

² Pa. R.C.P. No. 4014(b).

³ Pa. R.C.P. No. 4104 (c). Discovery in proceedings before the Board are governed by the Pennsylvania Rules of Civil Procedure. 25 Pa. Code §1021.102(a).

are admitted. While the Defendant's denial of many of these requests "as a conclusion of law to which no answer is required" may pass under the rules for an answer to the complaint under practice before the courts of common pleas, such a response to requests for admissions is not in compliance with Rule 4014 of the Pennsylvania Rules of Civil Procedure. As indicated above, this rule clearly permits requests dealing with legal matters and requires either an admission or a denial or a detailed statement of the reasons why the answering party cannot truthfully do so. In other cases, the Defendant has not fairly dealt with the request by entering a denial, particularly when the request is backed by a document that clearly supports the request. In the case of other requests we will require an amended answer.

For purposes of this action, we will deem admitted the matters set forth in Requests Nos. 1, 7, 8, 15, 16, 19, 25, 38, 46, 74, 75, 76 and 77. These requests relate to matters which should have been admitted. Certainly the Defendant has provided us with no reason why they should not be admitted by its failure to respond to the Department's motion.

We will require the Defendant to file an amended answer to the requests in ten days where it appears from the Department's motion that there is not likely to be a reason for not admitting the matters set forth in the requests. These are requests Nos. 10, 14, 23, 24, 43, 50, 54, 55, 57, 58, 60, 61, 67, 68, 70, and 72.

We will also grant the Department's requests that the time for the filing of dispositive motions be extended appropriately. Accordingly, we enter the following:

**COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD**

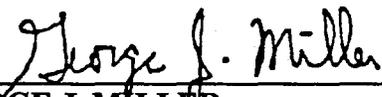
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	EHB Docket No. 2008-223-CP-MG
D.B. ENTERPRISE DEVELOPERS AND BUILDERS, INC.	:	

ORDER

AND NOW, this 9th day of June, 2009, it is **HEREBY ORDERED** as follows:

1. The matters set forth in the Department's requests for admissions Nos. 1, 7, 8, 15, 16, 19, 25, 38, 46, 74, 75, 76 and 77 are hereby deemed admitted for all purposes of this action.
2. The Defendant shall serve on the Department an amended answer to requests Nos. 10, 14, 23, 24, 43, 50, 54, 55, 57, 58, 60, 61, 67, 68, 70, and 72 on or before **June 15, 2009** providing a full and complete statement as to why the requested matter cannot be admitted or admitting the matters set forth in the request.
3. The time for the filing of dispositive motions is hereby extended to **July 10, 2009**.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Judge

DATED: June 9, 2009

c: DEP Bureau of Litigation:
Attention: Brenda K. Morris, Library

For the Commonwealth of PA, DEP:
William H. Gelles, Esquire
Southeast Region – Office of Chief Counsel

For Defendant:
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55 Green Valley Road
Wallingford, PA 19086



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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

v.

WES TATE

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EHB Docket No. 2008-332-CP-C

Issued: June 11, 2009

OPINION AND ORDER
ENTERING DEFAULT JUDGMENT

By Michelle A. Coleman, Judge

Synopsis:

The Board grants the Department’s motion for entry of default where the Defendant failed to file an answer to the Department’s complaint, comply with Board orders and respond to the Department’s motions. The Board also grants in part the Department’s motion for sanctions by establishing liability but allowing the Defendant to introduce evidence at the hearing with respect to the appropriateness of the civil penalty.

OPINION

Before the Board are the Department of Environmental Protection’s (“Department”) Motion for Entry of Judgment by Default and Motion for Sanctions against Wesley A. Tate (“Tate”) for failure to comply with Board rules and orders, including the failure to file an answer to the Department’s complaint. The Department’s complaint for civil penalties was filed on December 2, 2008 against Tate for violations of the Clean Streams Law, the Act of June 22,



1937, P.L. 1087, *as amended*, 35 P.S. § 691.1, *et. seq.* (“Clean Streams Law”); the Dam Safety and Encroachments Act, the Act of December 26, 1978, P.L. 1375, *as amended*, 32 P.S. § 693.1, *et. seq.* (“The Dam Safety & Encroachments Act”); and section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17 (“Administrative Code”).

These violations stem from the Department’s alleged facts that five sets of gabion baskets were installed by Tate along the bank of Mountain Creek, a trout stocked fishery. Complaint, p. 2, ¶5 Tate placed fill material above and behind the baskets creating a levee without a Water Obstruction and Encroachment Permit. *Id.*

On March 10, 2008, the Department contacted Tate via email regarding the levee. The Department requested that a Corrective Action Plan (“CAP”) be submitted by April 1, 2008. Complaint, p. 2, ¶7. The owner of the site, Kathryn Shover, had contracted with Tate to do work at the site. Shover’s counsel requested an extension to submit the CAP on April 8, 2008. Complaint, p. 2, ¶8. On April 8, 2008, Shover’s counsel submitted information received from Tate, but no CAP was submitted. Complaint p. 2, ¶9.

On April 28, 2008, the Department issued an order requiring that Tate remove the gabion baskets and restore the stream within 30 days. Complaint, p. 3, ¶3. Tate filed an appeal of that order, but withdrew the appeal on October 22, 2008. Shover also appealed the Department’s April 28, 2008 order, but later withdrew her appeal. *See* EHB Docket No. 2008-181-C. At the time the Department filed a complaint for civil penalties, Tate had started removing the gabion baskets and restoring the stream, but has not completed the task.

The Department asserts that the construction of the levee without a proper permit violates 25 Pa. Code § 105.11 and 32 P.S. § 693.6, and is unlawful conduct under 32 P.S. § 693.611.

Failure to comply with the Department's order is a violation of 32 P. S. §§ 693.18 and 693.20, as well as 35 P.S. §§ 691.402 and 691.611.

For these above violations, the Department filed a complaint for civil penalties on November 26, 2008 asking the Board to assess a civil penalty in the amount of \$8,590 and \$50 per day for on going violations of The Dam Safety and Encroachments Act, The Clean Streams Law and regulations thereto.

The Department's complaint and notice to defend were mailed to Tate, which he signed for on December 2, 2008. The Board's rules require that "answers to complaints shall be filed with the Board within 30 days after the date of service of the complaint, unless for cause the Board, with or without motion, prescribes a different time." 25 Pa. Code § 1021.74(a). At this time, Tate has never filed an answer.

On February 2, 2009, the Board received the Department's unopposed motion to compel discovery. By order dated March 5, 2009, the Board granted the Department's motion and ordered Tate to provide responses to the Department's discovery within ten days of receiving the order. Tate still has not complied with the order.

Default Judgment

The Department filed a motion for entry of judgment by default on March 24, 2009 against Tate for failure to file an answer to the complaint. Tate has never filed a response to the motion.

According to the Board's rules,

[a] Defendant failing to file an answer within the prescribed time shall be deemed in default and, upon motion made, all relevant facts in the complaint may be deemed admitted. Further, the Board may impose any other sanctions for failure to file an answer in accordance with § 1021.161 (relating to sanctions).

25 Pa Code § 1021.74(d).

We have in the past granted the Department's request for default judgment when a Defendant fails to file an answer pursuant to the Board's rules. The Board, upon entering default judgment against a Defendant, deems the facts in the complaint admitted and establishes liability. A hearing is then scheduled to assess the amount of civil penalties. Specifically, in two recent opinions by the Board, default judgment was granted because the Defendant failed to file an answer to the complaint and failed to respond to the motion for default judgment. *See DEP v. Dennis S. Sabot*, 2007 EHB 255; *DEP v. John P. Pecora et al*, 2007 EHB 125; *See also DER v. Allegro Oil and Gas Co.*, 1991 EHB 34; *DER v. Marileno, Corp.*, 1989 EHB 206; *DER v. Canada-PA, Ltd.*, 1987 EHB 177.

Here, Tate failed to file an answer to the complaint, failed to file a response to the pending motions and did not comply with the Board's order to provide responses to the Department's discovery requests. Tate's lack of interest in defending this matter before the Board leads us to enter judgment by default against Tate pursuant to 25 Pa Code § 1021.74.

Sanctions

The Department's motion for sanctions filed on April 27, 2009 requests the Board to enter an order prohibiting Tate from producing evidence, documents or testimony at the hearing. Tate never filed a response to this motion. The Department argues that the motion should be granted because Tate never responded to the Department's discovery requests, as ordered by the Board. Pursuant to section 1021.161, "[t]he Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include dismissing an appeal. . . ." 25 Pa. Code § 1021.161. We understand the Department's argument and we will grant the Departments unopposed motion in part and not allow Tate to present any

evidence as to his liability. At the hearing, we will only allow Tate to challenge the appropriateness of the civil penalty assessed by the Department. A hearing will be set to assess the amount of civil penalties in this matter.

Therefore, we enter the following order.

**COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD**

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION**

v.

WES TATE

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EHB Docket No. 2008-332-CP-C

ORDER

AND NOW, this 11th day of June, 2009, it is HEREBY ORDERED that the Department's motion for entry of default judgment is granted. The Department's motion for sanctions is granted in part and liability is established. A hearing will be scheduled on the appropriateness of the civil penalty.

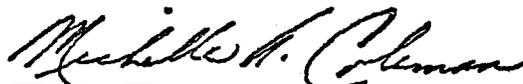
ENVIRONMENTAL HEARING BOARD



**THOMAS W. RENWAND
Acting Chairman and Judge**



**GEORGE J. MILLER
Judge**



**MICHELLE A. COLEMAN
Judge**


BERNARD A. LABUSKES, JR.
Judge

DATED: June 11, 2009

c: DEP Bureau of Litigation:
Attention: Brenda K. Morris, Library

For the Commonwealth of PA, DEP:
M. Dukes Pepper, Jr., Esquire
Southcentral Regional Counsel

For Defendant, Pro Se:
Wesley A. Tate
598 Zion Road
Carlisle, PA 17015



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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

**MYSTIC BROOKE DEVELOPMENT, L.P.
 AND BRITT ENERGIES, INC.**

v.

**COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION**

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EHB Docket No. 2009-016-L

Issued: June 16, 2009

**OPINION AND ORDER ON
MOTION TO DISMISS**

By Bernard A. Labuskes, Judge

Synopsis

The Board dismisses an appeal filed by a neighboring landowner from a Department letter directed to a coal company asking the company to submit a plan of action for collecting and treating acid mine drainage seeps because the letter is not a final appealable action of the Department.

OPINION

There are many facets to the ongoing difficulties between Mystic Brooke Development, L.P. and Britt Energies, Inc. (hereinafter collectively referred to as "Mystic Brooke"), Helvetia Coal Company ("Helvetia"), and the Department of Environmental Protection (the "Department") regarding pollutional discharges alleged to be associated with Helvetia's Lucerne No. 6 underground mine and coal refuse disposal area in Center Township, Indiana County that are emanating on or flowing on to Mystic Brooke's property. Among other things, there has been



litigation in the Court of Common Pleas, litigation before this Board, *Mystic Brooke Development v. DEP*, EHB Docket No. 2007-140-L (Adjudication, March 20, 2009), and an administrative review process conducted by the Department of Interior's Office of Surface Mining ("OSM"). The present matter comes before us as a result of Mystic Brooke's appeal from a letter the Department sent to Helvetia on January 15, 2009, which reads as follows:

The Department received a complaint from Mystic Brooke Development by way of a ten-day notice from the Office of Surface Mining. That complaint alleged that several low flow acid mine drainage seeps have developed on Mystic Brooke property that are linked to Helvetia Coal Company's mining related facilities. The staff at the California District Office conducted a hydrologic investigation of the new seeps, which are located along the northern side of the access road to the Mystic Brooke property. That investigation links the new seeps to Helvetia Coal Company's facilities. I have enclosed a copy of the report from the hydrologic investigation for your review.

Within thirty (30) days, please develop a plan of action for collecting and treating the new seeps and submit that action plan to this office. The plan needs to address the discharges identified as D10, D12, and D13 on the enclosed map. All three discharges are located on the north side of the Mystic Brooke property access road. Your abatement plan may generate the need for a permit revision.

Please submit your action plan to me within the next thirty (30) days. Feel free to contact me if you want to meet and discuss the issue before you submit your plan.

Mystic Brooke has any number of objections regarding the letter, but its primary concern is that the letter only asks Helvetia to address three of what Mystic Brooke alleges is a much larger group of acid mine drainage discharges. Mystic Brooke, among other things, is concerned that the discharges are exposing Mystic Brooke to liability, that they are affecting Mystic Brooke's application for a permit on its site, that they have effected a partial taking of its property, and that they are otherwise illegal and unacceptable. Mystic Brooke says that the letter in effect absolves Helvetia from liability for the discharges not mentioned in the letter. Finally,

Mystic Brooke is worried that its future rights might be constrained by administrative finality if it does not pursue an appeal from the Department's letter.

The Department has filed a motion asking us to dismiss Mystic Brooke's appeal. It argues that the letter is not an appealable action. Mystic Brooke, of course, opposes the motion. We find ourselves in agreement with the Department.

Mystic Brooke repeatedly states that the Department's letter "permits," "absolves," "exempts," and "authorizes" some of the discharges from Helvetia's property that flow on Mystic Brooke's property. We do not agree that the letter either expressly or by implication permits, absolves, exempts, or authorizes anything, let alone off-site pollutional discharges, but even if it did, this Board will not interfere with the Department's exercise of its prosecutorial discretion. *DEP v. Schneiderwind*, 867 A.2d 724 (Pa. Cmwlth. 2005); *Law v. DEP*, 2008 EHB 213, 215, *aff'd*, Docket No. 1071 CD 2008 (Pa. Cmwlth. January 23, 2009). This Board has no authority to order the Department to take enforcement action against Helvetia.

In addition, the letter does not present itself as the type of letter that constitutes a final appealable action of the Department that this Board has jurisdiction to review. See *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121. As previously noted, the letter makes no binding findings, it confers no rights, and it imposes no liability. It appears quite interlocutory in nature and on its face anticipates further action, such as a permit revision. It is part of the back and forth between Mystic Brooke (as the party who has lodged a complaint with OSM), Helvetia, the Department, and OSM. Nothing would be gained by the Board inserting itself in this process at this juncture. There is little or no meaningful relief that this Board could offer. Because the letter is not a final appealable action, there is no danger of the letter (or any failure to appeal

from the letter) limiting any party's future appeal rights or having any preclusive effect.

Accordingly, we issue the Order that follows:

**COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD**

**MYSTIC BROOKE DEVELOPMENT, L.P.
AND BRITT ENERGIES, INC.**

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION**

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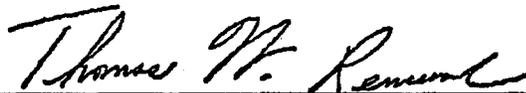
EHB Docket No. 2009-016-L

ORDER

AND NOW, this 16th day of June, 2009, it is hereby ordered that this appeal is **dismissed**.

Mystic Brooke's motion to compel and the Department's motion to stay discovery are denied as moot.

ENVIRONMENTAL HEARING BOARD



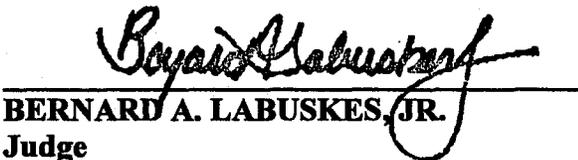
THOMAS W. RENWAND
Acting Chairman and Chief Judge



GEORGE J. MILLER
Judge



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

DATED: June 16, 2009

c: DEP Bureau of Litigation:
Attention: Brenda K. Morris, Library

For the Commonwealth of PA, DEP:
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Southcentral Region – Office of Chief Counsel

For Appellants:
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LAW OFFICE OF ROBERT P. GING, JR., P.C.
2095 Humbert Road
Confluence, PA 15424-2371



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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

**BOROUGH OF WEST CHESTER AND
 WEST GOSHEN SEWER AUTHORITY**

v.

**COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION**

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EHB Docket No. 2008-272-MG

Issued: June 19, 2009

**OPINION AND ORDER ON
MOTION TO DISMISS**

By George J. Miller, Judge

Synopsis

The Board denies a motion to dismiss an appeal because an e-mail by the Environmental Protection Agency advising of its issuance of a TMDL was not sufficient to provide the appellants with notice of an action by the Department. Therefore we can not say that the appellants' appeal is untimely as a matter of law.

OPINION

Before the Board is a motion to dismiss filed by the Department of Environmental Protection. The Department seeks to dismiss the appeal of the Borough of West Chester and West Goshen Sewer Authority (Appellants) by arguing that the Appellants' challenge to a TMDL (Total Maximum Daily Load) for the Goose Creek was not timely filed because it was filed more than 30 days after a July 1, 2008 e-mail which notified the Appellants' current



counsel that the TMDL had been “established” by the U.S. Environmental Protection Agency (EPA). The Appellants argues that this e-mail did not provide notice of an action by the Department which would give rise to an appeal. The Appellants contends that its appeal was filed within the 30-day appeal period based upon notice that the TMDL was not a result of action solely by EPA. As we explain in more detail below, we will deny the Department’s motion.

Background

This appeal, and several others before the Board, has its genesis in the procedural uncertainties created by ongoing efforts by the Department and EPA to impose acceptable daily load limits for phosphorus and other nutrients on discharges from sewage treatment facilities which discharge to allegedly impaired waterways within the Commonwealth. These limits, known as TMDLs, are sometimes issued by EPA, are sometimes issued by the Department, and sometimes it is unclear which agency is primarily responsible for the development of these load limits.¹ Not only is the science used to set these limits a subject of considerable contention, but this Board’s subject-matter jurisdiction to hear challenges to TMDLs prior to their incorporation of the load limits in an NPDES permit is also far from settled. Accordingly, the Appellants’ appeal and several related appeals from TMDLs issued by EPA are scheduled for a hearing on the Board’s jurisdiction in the late summer of 2009.

Discussion

Against this backdrop, the Department has filed a motion to dismiss the Appellants’ appeal as untimely. The Department contends that on July 1, 2008, an e-mail was sent to Attorney John Hall (and many others), which stated that a TMDL for Goose Creek had been established. At that time John Hall represented the so-called “Pennsylvania Periphyton

¹ See e.g., *Lower Salford Township Authority v. DEP*, 2006 EHB 657.

Coalition.” The Appellants were “members” of the Pennsylvania Periphyton Coalition. Accordingly, the Department states the Appellants had notice of the TMDL at that time and their appeal, filed on August 29, 2008, was clearly filed beyond the 30-day appeal period.

According to the Appellants, the July 1, 2008 e-mail is insufficient to put it on notice that the TMDL was in any way an action of the Department and not solely an action of EPA. Specifically, the Appellants contends that they had no reason to know that the Department was involved in the development of this TMDL until later in August 2008, when they received a letter from the Department. The appeal was filed shortly thereafter. Also, although the Appellants admit that Mr. Hall received a copy of the July 1, 2008 e-mail, they deny that Mr. Hall represented them separately at that time.

The standard of review for a motion to dismiss is difficult to achieve.² The Board evaluates motions to dismiss in the light most favorable to the non-moving party. It is only appropriate to grant a motion to dismiss when there are no material factual disputes and the moving party is clearly entitled to judgment as a matter of law.³

The Board’s rules provide an appeal must be filed with the Board within 30 days after the person to whom the action of the Department is directed has received written notice of the action.⁴ Third-party appellants must either appeal within 30 days of publication in the *Pennsylvania Bulletin* or within 30 days of receiving actual notice of the Department action.⁵

In the Department’s view, the July 1, 2009 e-mail from Tom Henry to John Hall, among others, was sufficient to give the Appellants sufficient notice, and that the Appellants should have filed its appeal within 30 days of receiving that e-mail. The Appellants counter that the e-

² *Solebury Township v. DEP*, 2003 EHB 208.

³ *Id.*

⁴ 25 Pa. Code § 1021.52(a)(1).

⁵ 25 Pa. Code § 1021.52(a)(2).

mail gives no notice of an action of the Department, and did not trigger the 30-day appeal period.

We agree.

The July 1, 2009, e-mail, reads:

This is to notify you that, on June 30, 2008, EPA has established the following TMDLs:

nutrient and sediment TMDLs for Southampton Creek

nutrient and sediment TMDLs for Indian Creek

nutrient and sediment TMDLs for Paxton Creek

nutrient TMDLs for Goose Creek

nutrient TMDLs for Sawmill Run

starting Wednesday, July 2, 2008 these reports and the response to comments can be found at the following web site under "What's New"

<http://www.epa.gov/reg3wapd/tmdl/index.htm>

any questions please let me know. thanks⁶

We find this e-mail insufficient to put any prospective appellant on notice that the Department took an action related to the establishment of the TMDL.

First, let us be clear: the only issue that we are deciding here is whether the Appellants' appeal period began with the July 2008 e-mail. We are not offering any opinion on the justiciability of any of the claims raised by the Appellants or the other parties in these appeals. For the purposes of this opinion, we must accept the claims raised by the Appellants at face value. We will decide whether we have jurisdiction to address the substance of the claims raised by the Appellants after a hearing on the record currently scheduled to begin in August, 2009.

As we explained above, both the Department and the U.S. EPA have authority to issue TMDLs.⁷ Any TMDL issued solely by the EPA would not be appealable to the Environmental Hearing Board, but would instead be challenged in a federal venue for which the appeal period is

⁶ DEP Exhibit B.

⁷ Federal Water Pollution Control Act, 33 U.S.C. § 1313.

much longer than the appeal period for Department actions before the Board.⁸ The July 2008 e-mail gives no indication that the Department had any involvement with the Goose Creek TMDL challenged by the Appellants. It was apparently sent by a Mr. Henry, who was associated with EPA in some fashion,⁹ to a list of “interested” individuals, including Mr. Hall, and was again forwarded by yet another person associated with EPA to two Department attorneys.

The Board has held in the past that notices advertising Department actions must provide reasonable information concerning the action taken and “provide an opportunity to present objections, or . . . to appeal to the Board.” Accordingly, in *Solebury Township v. DEP*, the Board held that a *Pennsylvania Bulletin* notice that the Department had approved an “environmental assessment” was not appropriate notice of the approval of a Section 401 Certification, even if the certification was included as part of the assessment. Similarly, publication of a mine drainage permit did not act as notice of the issuance of a mining permit, even though it was not the Department’s procedure at the time to issue separate notices.¹⁰ The Commonwealth Court held that an “advance” notice of a Department action sent by fax to the affected party did not constitute proper notice of the Department’s action for the purpose of the 30-day appeal period.¹¹ Although none of these cases is directly on point, the common underlying theme is the Board’s focus on whether or not *a member of the public* would have sufficient information to file an appeal. In neither case, did the Board consider the sophistication of counsel for the appellant, as a relevant factor in determining the adequacy of the notice:

⁸ See FWPCA, 33 U.S.C. § 1369, and Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*

⁹ The Appellants allege that Mr. Henry was not an employee of EPA, but was a contractor with EPA. The factual question of Mr. Henry’s status with the EPA, to the extent it is relevant, may be disputed.

¹⁰ *P.R.I.D.E. v. DER*, 1986 EHB 905.

¹¹ *Soil Remediation Systems, Inc. v. Department of Environmental Protection*, 703 A.2d 1081 (Pa. Cmwlth. 1997).

Perhaps one who has a law degree *and* who has extensive long-term experience dealing in the field of Section 401 Certifications could come to the conclusion that the approval of an environmental assessment is the same thing as an approval of a Section 401 Certification, but I doubt this could be said about most of the rest of us – this Judge included. As the Board said in a similar case, “[i]t is unreasonable to assume that members of the public are intimately acquainted with the minutiae of the Department’s manner of administering its regulatory programs and that, as a result, they receive notice of the issuance of a mining permit from the issuance of a Mine Drainage Permit.” *P.R.I.D.E. v. DER*, 1986 EHB 905, 907.¹²

Therefore the standard for the adequacy of a notice is whether it clearly identifies an action of the Department such that an ordinary member of the public would have sufficient information to determine that they may be affected by such an action for the purposes of filing an appeal with the Board. The standard is not whether an experienced practitioner of the law should have known to file an appeal on behalf of a client.

Here, where a TMDL may be issued by either EPA or the Department, or perhaps some combination of both, there must be some indication of an action by the Department before an appeal period for an appeal to the Board may begin to run. This e-mail is certainly not sufficient to provide a member of the public notice of an action by the Department.

The Department argues that we should find the Appellants’ appeal untimely because another party did file a notice of appeal within thirty days of the July e-mail. While this may be a credit to the perception of counsel, this fact does nothing to create notice where there is none.

We also reject the notion that the voluminous website content that the e-mail directed the individuals to provided adequate notice of an action of the Department. Just as the Board has not required members of the public to review voluminous permits in the face of an insufficient *Pennsylvania Bulletin* notice, we will not find that the Appellants should have discovered that it

¹² *Solebury Township v. DEP*, 2003 EHB 208, 215.

was aggrieved by an action of the Department by reviewing voluminous content on another agency's website.¹³

We therefore enter the following:

¹³ Since we find that the July 2008 e-mail did not provide adequate notice of an action of the Department, we need not reach the Department's argument that we should impute notice to John Hall, Esq. to the Appellants. We simply observe that such notice would be "constructive" notice on the Appellants, not "actual" notice on the Appellants as is explicitly required by the Board's rules. See *Paradise Township Citizens Committee, Inc. v. DER*, 1992 EHB 668, 673 n. 1. Therefore we question whether current Board rules would even authorize constructive notice for the purposes of calculating an appeal period. But we leave that question for another day.

**COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD**

**BOROUGH OF WEST CHESTER AND
WEST GOSHEN SEWER AUTHORITY**

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION**

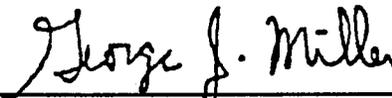
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EHB Docket No. 2008-272-MG

ORDER

AND NOW, this 19th day of June, 2009, the motion to dismiss by the Department of Environmental Protection in the above-captioned matter is **DENIED**.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER

Judge

DATED: June 19, 2009

c: DEP Bureau of Litigation:
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Amicus Curiae:

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acted in any capacity other than in his professional capacity as one of the Department's attorneys in connection with this matter. The Department argues that subjecting Morrison to deposition will inevitably implicate privileged and confidential communications and attorney work product. It argues that his testimony will be at best cumulative, and that Morrison can neither offer relevant evidence nor impart information that might reasonably be calculated to lead to the discovery of admissible evidence. The Department in its motion describes its unsuccessful effort to resolve the issue informally with counsel for PA Waste.

PA Waste's initial response to the Department's motion states that it only wants to depose Morrison "regarding personal knowledge he would have obtained during the August 14, 2007 technical review meeting, and representations he made to representatives of PA Waste, LLC, therein." In a subsequent letter submitted in violation of our rules but intended to supplement its initial response, PA Waste says that it has learned from the depositions of other Department employees that Morrison "was intimately involved in the determinations that the Department based its permit denial letter upon, as to PA Waste's failure to prove suitability under Act 101." It also wishes "to probe into whether it suffered invidious discrimination during the Department's permit review process." Accordingly, it asks us to deny the Department's motion for a protective order and allow Morrison's deposition to go forward.

It hardly bears repeating that the Board tries to avoid trials by ambush. *Pennsylvania Trout v. DEP*, 2003 EHB 652, 657. In order to help avoid that from occurring, we favor and encourage broad discovery, which includes full disclosure of a party's case. *Raven Crest Homeowners Ass'n v. DEP*, 2005 EHB 803, 806; *Pennsylvania Trout, supra*. Discovery provides all parties with an equal opportunity to gather information and evidence so that they are in a better position to explore the strengths and weaknesses of their respective positions, narrow

the issues in dispute, work out a reasonable settlement, or barring settlement, plan a hearing strategy and participate in an efficient and fair hearing on the merits. *DEP v. Neville Chemical Company*, 2004 EHB 744, 746.

Of course, there are limits to everything, including the right to conduct unfettered discovery. One limit that we need to make clear is that we will rarely allow a party to depose or otherwise interrogate another party's attorney. Although there is no absolute prohibition against such a practice, the burden is upon the party who would depose opposing counsel to explain why we should allow such an unusual event to occur. *Defense Logistics Agency v. DEP*, 2000 EHB 1218, 1221 (citing *In re: Investigating Grand Jury of Philadelphia County*, 593 A.2d 402 (Pa. 1991) and *Gould v. City of Aliquippa*, 750 A.2d 934 (Pa. Cmwlth. 2000)); *Daset Mining Corp. v. DER*, 1979 EHB 334. It is not that attorneys enjoy some princely status. Rather, it is that so much of the information an attorney might conceivably provide under interrogation is privileged, protected from disclosure by the work product doctrine, available from less problematic sources, or irrelevant that what little evidence is left to be extracted does not justify the time, burden, and expense of compelling attendance at what is surely bound to be a deposition with little or no incremental value.

Most internal communications between an attorney and his or her client will, of course, be privileged. 42 Pa.C.S. § 5928; *Sedat v. DER*, 641 A.2d 1243, 1245 (Pa. Cmwlth. 1994), *aff'd*, 701 A.2d 223 (Pa. 1997); *Groce v. DEP*, 2005 EHB 951, 953; *Morris Township Property Owners v. DEP*, 2004 EHB 68; *Defense Logistics, supra*. Cf. *M & M Stone Company v. DEP*, EHB Docket No. 2007-098-L (Opinion and Order, May 4, 2008) (hearing testimony of attorney). The attorney work product doctrine is very broad and protects from discovery the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes,

summaries, research, and legal theories. Pa. R. Civ. P. 4003.3. It is difficult to imagine much that an attorney might say that would not implicate his or her “mental impressions.” Furthermore, an attorney’s personal opinion on questions of law or the appropriateness of the Department’s actions is irrelevant. *Rhodes v. DEP*, EHB Docket No. 2008-156-L (Opinion and Order, May 12, 2009). And in most situations, the attorney is only one member of a team of advisors and is not the final decision-maker, which means that any factual information that the attorney might impart is typically obtained indirectly and is more productively available from direct sources with personal knowledge. *Defense Logistics, supra*.

So long as the attorney’s role is limited to providing legal support, it does not matter whether the attorney represents the Department, *Sedat, supra*; *Defense Logistics, supra*, or a private party, *Groce, supra*. Nor do we view it as particularly relevant whether or not the attorney has formally entered an appearance in the appeal to this Board. *See Groce* (in-house counsel providing litigation support). *Cf. Daset Mining, supra* (knowledge “separate and distinct from involvement in the case” might be discoverable).”

Turning to the matter at hand, PA Waste has not shown why it should be permitted to depose the Department’s attorney. In its initial response, PA Waste tells us that it wishes to inquire into the “personal knowledge [Morrison] would have obtained during the August 14, 2007 technical review meeting, and representations he made to representatives of PA Waste, LLC, therein.” This proposed area of inquiry is vague and confusing. The meeting that Morrison “obtained knowledge from” was attended by 14 people including several representatives of PA Waste. If Morrison’s knowledge came from his attendance at the meeting, the other 13 attendees presumably obtained the same knowledge. The Department speculates that PA Waste wishes to inquire about an opinion about Act 101 offered by Morrison at the

meeting, but PA Waste denies that without further explanation. Although we do not intend to set up a Catch 22, we need more than what PA Waste has provided here to support its highly irregular request to depose counsel. Parties who would have this Board guess what they are after in discovery are doomed to failure. *See e.g., Northampton Township v. DEP*, EHB Docket No. 2008-184-L (Opinion and Order, April 28, 2009).

In its supplemental response, PA Waste tells us that Morrison was “intimately involved” in the decision to deny PA Waste’s permit application, and his testimony would shed light on the Department’s interpretation of Act 101. There is nothing in this response that suggests that Morrison acted outside of his role as legal counsel to the Department’s decision-makers. Furthermore, Morrison’s advice regarding the meaning of Act 101 is exactly the sort of communication and mental impression that is protected by the attorney-client privilege and the attorney work product doctrine. Still further, what Morrison personally believes Act 101 means is separate and apart from the Department’s institutional interpretation, and it is only the Department’s interpretation (if there is one) that is relevant in this case. *Rhodes, supra; Joseph J. Brunner v. DEP*, 2004 EHB 170, 174 (counsel’s discourses are argument; the Board need only defer under some circumstances to the Department’s *institutional* interpretation). Therefore, Morrison’s views regarding Act 101 are not only work product, they are irrelevant. If the Department’s decision-makers relied upon an official Departmental interpretation, they are fully capable of saying so in their ongoing depositions. Morrison’s testimony would be merely cumulative. If the Department has no such interpretation, then it is up to the Board to decide without any deference to the Department whether the Department acted in accordance with the law.

We are trying to picture how the deposition of Morrison on this issue would go. If PA

Waste's counsel asks Morrison about his internal discussions with Departmental personnel, it is sure to raise an objection as privileged. If counsel asks what Morrison's view of Act 101 is separate from any advice given to Department employees, it is objectionable because it implicates Morrison's legal theories and mental impressions and it is in any event irrelevant. It is really no different than the Department deposing PA Waste's attorneys and asking them what they think Act 101 says, or inquiring into what advice they have given to corporate personnel. It is simply not helpful to allow parties involved in serious litigation to get into this sort of gamesmanship.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PA WASTE, LLC

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and CLEARFIELD COUNTY,
Intervenor

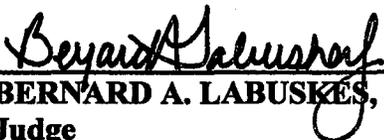
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EHB Docket No. 2008-249-L

ORDER

AND NOW, this 19th day of June, 2009, it is hereby ordered that the Department's motion for a protective order is **granted**.

ENVIRONMENTAL HEARING BOARD


BERNARD A. LABUSKES, JR.
Judge

DATED: June 19, 2009

c: DEP Bureau of Litigation:
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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

**MICHAEL D. RHODES and VALLEY RUN
 WATER COMPANY, LLC**

v.

**COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION**

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**EHB Docket No. 2008-156-L
 (Consolidated with 2008-258-L,
 and 2008-260-L)**

Issued: June 19, 2009

**OPINION ON MOTION
 TO CLARIFY ISSUES OR AMEND**

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denied a last-minute motion to clarify issues or amend the appeal because the Appellants never previously raised the issue of the reasonableness of the civil penalty, and it would have been unduly prejudicial to the Department to allow an amendment two days before the hearing.

OPINION

Michael D. Rhodes and Valley Run Water Company (collectively hereinafter “Rhodes”) filed this appeal from the Department’s assessment of a \$48,000 civil penalty for alleged violations of the Safe Drinking Water Act, 35 P.S. § 721.1 *et seq.* There has been a great deal of litigation activity in this case. In addressing a previous motion in limine filed by the Department,

we noted in our Opinion that “the amount of the penalty does not appear to be at issue in this case.” *Rhodes v. DEP*, EHB Docket No. 2008-156-L (Opinion and Order, May 12, 2009). This apparently prompted Rhodes to file a Motion in Limine to Clarify Issues Raised on Appeal and/or Motion to Amend Notice of Appeal. Rhodes asked us to review the reasonableness of the penalty amount. Rhodes argued that a challenge to the amount was implicit in his appeal. He contended that the reasonableness of the penalty had been the subject of discovery, that “[w]hen the notice of appeal was filed, the objectionable basis for the methods and basis for the proposed civil assessment were not known to the Appellants,” and “the issue of the legality and reasonableness of the penalty is always an issue before the Board.” In the alternative, to the extent we held that the appeal could not be interpreted to include a challenge to the amount of the penalty, Rhodes requested permission to amend his appeal to include a specific challenge to the amount of the penalty.

Rhodes filed his motion on Thursday, May 13, 2009. The hearing on the merits (after several extensions and notice from the Board that no further delays would be permitted) was scheduled to begin on Monday, May 18.

On May 14, the Department responded to Rhodes’s motion. It argued that there was nothing in Rhodes’s notices of appeals or any subsequent filings that could remotely be interpreted as challenging the amount of the penalty. It argued that it would be severely prejudiced if Rhodes was permitted to add an entirely new challenge two days before the hearing. We agreed with the Department, and on May 15, we issued an order that read as follows:

... it is hereby ordered that the Appellants’ motion is denied. It is inappropriate for the Appellants, two business days before the scheduled hearing on the merits, to amend their appeal to include an issue that was never raised until the filing of this motion.

Reviewing all the submissions to the Board, including the notice of appeal through the pre-hearing memorandum, the issue of the reasonableness of the civil penalty assessed by the Department was never raised. Therefore, we will not allow it now. Allowing the Appellants to amend their appeal on the eve of the hearing would result in palpable prejudice to the Department.

Although we did not have an opportunity to issue an Opinion in support of our Order at the time, we do so now in order to make two points clear. First, a party who wishes to challenge the *amount* of a civil penalty must say so. Secondly, leave to amend an appeal will only be granted when the movant can show that no undue prejudice will result to the opposing party.

It is a longstanding rule that allegations not raised in the notice of appeal are waived. *See Fuller v. DER*, 599 A.2d 248 (Pa. Cmwlth. 1991); *Halvard Alexander v. DEP*, 2006 EHB 306; *Chippewa Hazardous Waste, Inc. v. DEP*, 2004 EHB 287, *aff'd*, 971 C.D. 2004 (Pa. Cmwlth., October 28, 2004); *Moosic Lakes Club v. DEP*, 2002 EHB 396. However, given the strict requirement to file a notice of appeal within 30 days of receiving notice of the Department's action and our general distaste for trap-door litigation, we have been relatively indulgent when it comes to interpreting less than precise notices of appeal. So long as an issue falls within the scope of a broadly worded objection found in the notice of appeal, or the "genre of the issue" in question was contained in the notice of appeal, we will not readily conclude that there has been a waiver. *Angela Cres Trust v. DEP*, 2007 EHB 595, 600-01; *Ainjar Trust v. DEP*, 2001 EHB 59, 66, *aff'd*, 806 A.2d 402 (Pa. Cmwlth. 2002); *Jefferson County Board of Commissioners v. DEP*, 1996 EHB 997, 1005. *See also Croner, Inc. v. DER*, 598 A.2d 1183, 1187 (Pa. Cmwlth. 1991).

In the matter before us, after reviewing all of the filings with the Board -- from the multiple notices of appeal through the pre-hearing memoranda -- we find that the Department is correct in saying that Rhodes never raised the issue of the reasonableness of the civil penalty. Rhodes instead based his challenge entirely on whether or not violations occurred and if they did,

whether he was responsible for those violations. In other words, this is a liability case. As we said in *Chippewa Hazardous Waste, supra*, the Board “will not review the lawfulness or reasonableness of the civil penalty amount, where, as here, an Appellant does not challenge the penalty amount in its notice of appeal or at any point throughout the course of the appeal.” 2004 EHB 287, 298, *aff’d*, 971 C.D. 2004 (Pa. Cmwlth. 2004). In short, Rhodes’s statement that “the issue of the legality and reasonableness of the penalty is always an issue” is simply wrong. Nor is it any excuse that he did not have a full understanding of the “objectionable basis” of the penalty at the time of the notices of appeal.

The question, then, becomes whether Rhodes should have been allowed to amend his appeal to include an entirely new challenge at the last minute. In light of the very same considerations that we mentioned above regarding the pressure to file an appeal within 30 days and our preference for deciding cases on the merits rather than based upon procedural pratfalls, the Board revised its rules in 2006 to allow a more liberal standard for amendment of appeals where the Board finds that there will be no undue prejudice to the opposing party. Our rule now provides in the pertinent part as follows:

(b) After the 20 day period for amendment as of right, the Board, upon motion by the appellant or complainant, may grant leave for further amendment of the appeal. This leave may be granted if no undue prejudice will result to the opposing parties. The burden of proving that no undue prejudice will result to the opposing parties is on the party requesting the amendment.

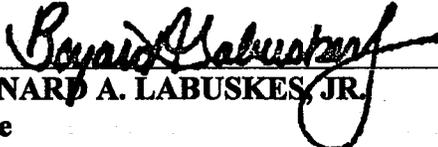
25 Pa. Code § 1021.53(b).

Thus, Rhodes needed to show us that no undue prejudice would have resulted from granting his request. *Groce v. DEP and Wellington Development*, 2006 EHB 289, 291-92. *Achenbach v. DEP*, 2006 EHB 211; *Tapler v. DEP*, 2006 EHB 463. In assessing whether prejudice will result, we consider such factors as the time when amendment is requested relative

to other developments in the litigation (including but not limited to the hearing schedule), the scope and size of the amendment, whether the opposing party had actual notice of the issue (e.g. whether the issue was raised in other filings), the reason for the amendment, and the extent to which the amendment diverges from the original appeal. *Upper Gwynedd Township v. DEP*, 2007 EHB 39, 42; *Angela Cres Trust, supra*; *Robachelle v. DEP*, 2006 EHB 373, 379-80; *Achenbach, supra*; *Tapler, supra*.

Here, Rhodes's request to amend fails under any and all of these criteria. As discussed above, the proposed amendment would have added an entirely new and different objection. The proposed objection was wholly extraneous to the main thrust of Rhodes's case, which consists of an attack on the Department's finding of liability. Rhodes provided no meritorious excuse for the late amendment. The amendment was offered long after all pre-hearing deadlines had passed and two days before the hearing. A review of the other filings in the appeal does not reveal that the penalty amount was ever clearly in contention. Rhodes did not request a continuance of the hearing; nor would such a request have been likely to have been favorably received given multiple reschedulings and the lateness of the request. Under these circumstances, we found that Rhodes had not met his burden of establishing that the Department would not be unduly prejudiced, and we denied the motion in our Order dated May 15, 2009, a copy of which is attached to this Opinion.

ENVIRONMENTAL HEARING BOARD


BERNARD A. LABUSKES, JR.
Judge

DATED: June 19, 2009

c: DEP Bureau of Litigation:
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

MICHAEL D. RHODES and VALLEY RUN :
WATER COMPANY, LLC :

v. :

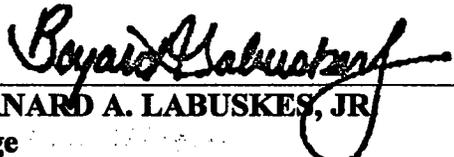
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :

EHB Docket No. 2008-156-L :
(Consolidated with 2008-258-L, :
and 2008-260-L) :

ORDER

AND NOW, this 15th day of May, 2009, in consideration of the Appellants' Motion in Limine to Clarify Issues Raised on Appeal and/or Motion to Amend Notice of Appeal ("motion"), and Department's response in opposition, it is hereby ordered that the Appellants' motion is denied. It is inappropriate for the Appellants, two business days before the scheduled hearing on the merits, to amend their appeal to include an issue that was never raised until the filing of this motion. Reviewing all the submissions to the Board, including the notice of appeal through the pre-hearing memorandum, the issue of the reasonableness of the civil penalty assessed by the Department was never raised. Therefore, we will not allow it now. Allowing the Appellants to amend their appeal on the eve of the hearing would result in palpable prejudice to the Department.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
 Judge

DATED: May 15, 2009

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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

TELFORD BOROUGH AUTHORITY

v.

**COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION**

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EHB Docket No. 2008-265-MG

Issued: June 19, 2009

**OPINION AND ORDER ON
MOTION TO DISMISS**

By George J. Miller, Judge

Synopsis

The Board denies a motion to dismiss an appeal because an e-mail by the Environmental Protection Agency advising of its issuance of a TMDL was not sufficient to provide the appellant-authority with notice of an action by the Department. Therefore we can not say that the authority's appeal is untimely as a matter of law.

OPINION

Before the Board is a motion to dismiss filed by the Department of Environmental Protection. The Department seeks to dismiss the appeal of the Telford Borough Authority (Authority) by arguing that the Authority's challenge to a TMDL (Total Maximum Daily Load) for the Indian Creek was not timely filed because it was filed more than 30 days after a July 1, 2008 e-mail which notified the Authority's current counsel that the TMDL had been "established" by the U.S. Environmental Protection Agency (EPA). The Authority argues that



this e-mail did not provide notice of an action by the Department which would give rise to an appeal. The Authority contends that its appeal was filed within the 30-day appeal period based upon notice that the TMDL was not a result of action solely by EPA. As we explain in more detail below, we will deny the Department's motion.

Background

This appeal, and several others before the Board, has its genesis in the procedural uncertainties created by ongoing efforts by the Department and EPA to impose acceptable daily load limits for phosphorus and other nutrients on discharges from sewage treatment facilities which discharge to allegedly impaired waterways within the Commonwealth. These limits, known as TMDLs, are sometimes issued by EPA, are sometimes issued by DEP, and sometimes it is unclear which agency is primarily responsible for the development of these load limits.¹ Not only is the science used to set these limits a subject of considerable contention, but this Board's subject-matter jurisdiction to hear challenges to TMDLs prior to the incorporation of the load limits in an NPDES permit is also far from settled. Accordingly, the Authority's appeal and several related appeals from TMDLs issued by EPA are scheduled for a hearing on the Board's jurisdiction in the late summer of 2009.

Discussion

Against this backdrop, the Department has filed a motion to dismiss the Authority's appeal as untimely. The Department contends that on July 1, 2008, an e-mail was sent to Attorney John Hall (and many others), which stated that a TMDL for Indian Creek had been established. At that time John Hall represented the so-called "Pennsylvania Periphyton Coalition." The Telford Borough Authority was a "member" of the Pennsylvania Periphyton

¹ See e.g., *Lower Salford Township Authority v. DEP*, 2006 EHB 657.

Coalition. Accordingly, the Department states the Authority had notice of the TMDL at that time and their appeal, filed on August 29, 2008, was clearly filed beyond the 30-day appeal period.

According to the Authority, the July 1, 2008 e-mail is insufficient to put it on notice that the TMDL was in any way an action of the Department and not solely an action of EPA. Specifically, the Authority contends that it had no reason to know that the Department was involved in the development of this TMDL until later in August 2008, when it received a letter from the Department, and its appeal was filed shortly thereafter. Also, although the Authority admits that Mr. Hall received a copy of the July 1, 2008 e-mail and that, the Authority denies that Mr. Hall represented the Authority separately at that time.

The standard of review for a motion to dismiss is difficult to achieve.² The Board evaluates motions to dismiss in the light most favorable to the non-moving party. It is only appropriate to grant a motion to dismiss when there are no material factual disputes and the moving party is clearly entitled to judgment as a matter of law.³

The Board's rules provide an appeal must be filed with the Board within 30 days after the person to whom the action of the Department is directed has received written notice of the action.⁴ Third-party appellants must either appeal within 30 days of publication in the *Pennsylvania Bulletin* or within 30 days of receiving actual notice of the Department action.⁵

In the Department's view, the July 1, 2009 e-mail from Tom Henry to John Hall, among others, was sufficient to give the Authority sufficient notice, and that the Authority should have filed its appeal within 30 days of receiving that e-mail. The Authority counters that the e-mail

² *Solebury Township v. DEP*, 2003 EHB 208.

³ *Id.*

⁴ 25 Pa. Code § 1021.52(a)(1).

⁵ 25 Pa. Code § 1021.52(a)(2).

gives no notice of an action of the Department, and did not trigger the 30-day appeal period. We agree.

The July 1, 2009, e-mail, reads:

This is to notify you that, on June 30, 2008, EPA has established the following TMDLs:

nutrient and sediment TMDLs for Southampton Creek

nutrient and sediment TMDLs for Indian Creek

nutrient and sediment TMDLs for Paxton Creek

nutrient TMDLs for Goose Creek

nutrient TMDLs for Sawmill Run

starting Wednesday, July 2, 2008 these reports and the response to comments can be found at the following web site under "What's New"
<http://www.epa.gov/reg3wapd/tmdl/index.htm>

any questions please let me know. thanks⁶

We find this e-mail insufficient to put any prospective appellant on notice that the Department took an action related to the establishment of the TMDL.

First, let us be clear: the only issue that we are deciding here is whether the Authority's appeal period began with the July 2008 e-mail. We are not offering any opinion on the justiciability of any of the claims raised by the Authority, or the other parties in these appeals. For the purposes of this opinion, we must accept the claims raised by the Authority at face value. We will decide whether we have jurisdiction to address the substance of the claims raised by the Authority after a hearing on the record currently scheduled to begin in August, 2009.

As we explained above, both the Department and the U.S. EPA have authority to issue TMDLs.⁷ Any TMDL issued solely by the EPA would not be appealable to the Environmental Hearing Board, but would instead be challenged in a federal venue for which the appeal period is

⁶ DEP Exhibit B.

⁷ Federal Water Pollution Control Act, 33 U.S.C. § 1313.

much longer than the appeal period for Department actions before the Board.⁸ The July 2008 e-mail gives no indication that the Department had any involvement with the Indian Creek TMDL challenged by the Authority. It was apparently sent by a Mr. Henry, who was associated with EPA in some fashion,⁹ to a list of “interested” individuals, including Mr. Hall, and was again forwarded by yet another person associated with EPA to two Department attorneys.

The Board has held in the past that notices advertising Department actions must provide reasonable information concerning the action taken and “provide an opportunity to present objections, or . . . to appeal to the Board.” Accordingly, in *Solebury Township v. DEP*, the Board held that a *Pennsylvania Bulletin* notice that the Department had approved an “environmental assessment” was not appropriate notice of the approval of a Section 401 Certification, even if the certification was included as part of the assessment. Similarly, publication of a mine drainage permit did not act as notice of the issuance of a mining permit, even though it was not the Department’s procedure at the time to issue separate notices.¹⁰ The Commonwealth Court held that an “advance” notice of a Department action sent by fax to the affected party did not constitute proper notice of the Department’s action for the purpose of the 30-day appeal period.¹¹ Although none of these cases is directly on point, the common underlying theme is the Board’s focus on whether or not *a member of the public* would have sufficient information to file an appeal. In neither case, did the Board consider the sophistication of counsel for the appellant, as a relevant factor in determining the adequacy of the notice:

⁸ See FWPCA, 33 U.S.C. § 1369, and Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*

⁹ The Authority alleges that Mr. Henry was not an employee of EPA, but was a contractor with EPA. The factual question of Mr. Henry’s status with the EPA, to the extent it is relevant, may be disputed.

¹⁰ *P.R.I.D.E. v. DER*, 1986 EHB 905.

¹¹ *Soil Remediation Systems, Inc. v. Department of Environmental Protection*, 703 A.2d 1081 (Pa. Cmwlth. 1997).

Perhaps one who has a law degree *and* who has extensive long-term experience dealing in the field of Section 401 Certifications could come to the conclusion that the approval of an environmental assessment is the same thing as an approval of a Section 401 Certification, but I doubt this could be said about most of the rest of us – this Judge included. As the Board said in a similar case, “[i]t is unreasonable to assume that members of the public are intimately acquainted with the minutiae of the Department’s manner of administering its regulatory programs and that, as a result, they receive notice of the issuance of a mining permit from the issuance of a Mine Drainage Permit.” *P.R.I.D.E. v. DER*, 1986 EHB 905, 907.¹²

Therefore the standard for the adequacy of a notice is whether it clearly identifies an action of the Department such that an ordinary member of the public would have sufficient information to determine that they may be affected by such an action for the purposes of filing an appeal with the Board. The standard is not whether an experienced practitioner of the law should have known to file an appeal on behalf of a client.

Here, where a TMDL may be issued by either EPA or the Department, or perhaps some combination of both, there must be some indication of an action by the Department before an appeal period for an appeal to the Board may begin to run. This e-mail is certainly not sufficient to provide a member of the public notice of an action by the Department.

The Department argues that we should find the Authority’s appeal untimely because another party did file a notice of appeal within thirty days of the July e-mail. While this may be a credit to the perception of counsel, this fact does nothing to create notice where there is none.

We also reject the notion that the voluminous website content that the e-mail directed the individuals to provided adequate notice of an action of the Department. Just as the Board has not required members of the public to review voluminous permits in the face of an insufficient *Pennsylvania Bulletin* notice, we will not find that the Authority should have discovered that it

¹² *Solebury Township v. DEP*, 2003 EHB 208, 215.

was aggrieved by an action of the Department by reviewing voluminous content on another agency's website.¹³

We therefore enter the following:

¹³ Since we find that the July 2008 e-mail did not provide adequate notice of an action of the Department, we need not reach the Department's argument that we should impute notice to John Hall, Esq. to the Authority. We simply observe that such notice would be "constructive" notice on the Authority, not "actual" notice on the Authority as is explicitly required by the Board's rules. *See Paradise Township Citizens Committee, Inc. v. DER*, 1992 EHB 668, 673 n. 1. Therefore we question whether current Board rules would even authorize constructive notice for the purposes of calculating an appeal period. But we leave that question for another day.

**COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD**

TELFORD BOROUGH AUTHORITY

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION**

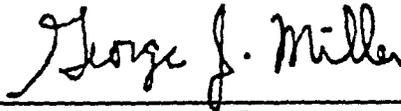
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EHB Docket No. 2008-265-MG

ORDER

AND NOW, this 19th day of June, 2009, the motion to dismiss by the Department of Environmental Protection in the above-captioned matter is **DENIED**.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Judge

DATED: June 19, 2009

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