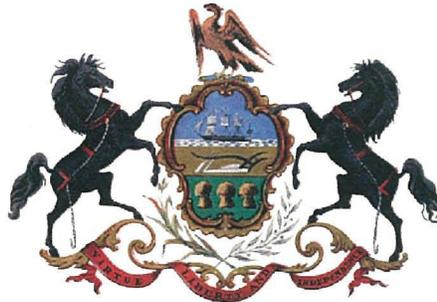


Environmental Hearing Board

Adjudications and Opinions



2012
VOLUME I

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

**JUDGES
OF THE
ENVIRONMENTAL HEARING BOARD**

2012

Chief Judge and Chairman	Thomas W. Renwand
Judge	Michelle A. Coleman
Judge	Bernard A. Labuskes, Jr.
Judge	Richard P. Mather, Sr.
Judge	Steven C. Beckman (Appointed 10-3-12)
Secretary	Vincent F. Gustitus, Jr.

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 2012 EHB 1

The indices and table of cases that precede each printed bound volume and the pagination developed by the Environmental Hearing Board for the publication of these volumes is copyrighted by the publisher, the Commonwealth of Pennsylvania, Environmental Hearing Board, which reserves all rights thereto Copyright 2012.

ISBN NO. 0-8182-0352-8

FOREWORD

This reporter contains the Adjudications and Opinions issued by the Commonwealth of Pennsylvania, Environmental Hearing Board during the calendar year 2012.

The Pennsylvania Environmental Hearing Board is a quasi-judicial agency of the Commonwealth of Pennsylvania charged with holding hearings and issuing adjudications on actions of the Pennsylvania Department of Environmental Protection that are appealed to the Board. *Environmental Hearing Board Act*, Act of July 13, 1988, P.L. 530, No. 94, 35 P.S. §§ 7511 to 7516; and Act of December 3, 1970, P.L. 834, No. 275, which amended the *Administrative Code*, Act of April 9, 1929, P.L. 177.

ADJUDICATIONS

<u>Case</u>	<u>Page</u>
Berks County	404
DEP v. George and Shirley Stambaugh	93
Paul Lynch Investments, Inc.	191
John and Cynthia McGinnis	109
George and Shirley Stambaugh, DEP v.	93
Taylor Land Clearing, Inc., and Robert Taylor	138

OPINIONS

<u>Case</u>	<u>Page</u>
Michael and Debbie Barron	347
James Barton, Karen Barton, Filippo Valenti, Vita Valenti, Robert Hepler and Kathleen Hepler and Cressona Borough Authority, Intervenor	441
Berks County (Motion to Compel)	16
Berks County (Motion in Limine)	7
Berks County (Motion for Reconsideration)	38
Berks County (Motion for Summary Judgment)	23
Kevin Casey	461
Citizens for Pennsylvania's Future	260
Clean Air Council	286
Mary E. Collier and Ronald M. Collier	249
Frank Colombo d/b/a Glenburn Services, DEP v.	370
Bradley Comp and Doris J. Comp, DEP v.	343
Robert Concilus and Leah Humes	60
Consol Pennsylvania Coal Company, LLC and Consol Energy, Inc.	229
Mr. Kirk E. Danfelt, DEP v.	308
DEP v. Frank Colombo d/b/a Glenburn Services	370
DEP v. Bradley Comp and Doris J. Comp	343
DEP v. Mr. Kirk E. Danfelt	308
DEP v. Mieczyslaw Klecha	80
DEP v. Francis Shultz, Jr., and David Friend, d/b/a Shorty and Dave's Used Truck Parts (Motion in Limine)	381

DEP v. Francis Shultz, Jr., and David Friend, d/b/a Shorty and Dave’s Used Truck Parts (Motion for Summary Judgment)	436
DEP v. White Oak Reserve Limited Partnership & ELG Inc. General Partner, Vanguard Development Corporation, Edwin L. Glasgow, President	75
Dean W. Dirian	357
Martin Doctorick	244
Gina Gabriel	1
Greif Packaging, LLC	85
Group Against Smog Pollution	329
Margaret Henry	324
William Hostetter (Individually and for Hopewell Ridge Homeowners Association) and East Nottingham Township (Amended Petition To Intervene)	386
William Hostetter (Individually and for Hopewell Ridge Homeowners Association) and East Nottingham Township (Petition to Intervene)	376
International Asbestos Testing Laboratories	431
Stanley R. Jake	477
KH Real Estate, LLC (Motion to Dismiss)	319
KH Real Estate, LLC (Motion for Sanctions)	155
Loren Kiskadden	171
Mr. Loren Kiskadden (Motion to Enforce/Ensure “Litigation Hold”)	391
Mr. Loren Kiskadden (Motion for Protective Order)	181
Mieczyslaw Klecha, DEP v.	80
Lower Salford Township Authority	160
Robert B. Mayer, MSPE, President American Manufacturing Company, Inc.	400
Norma Sharon McCobin	225

Robert Morris	65
New Hanover Township	44
Joel Palmer	220
Michael Ranuado, Charles Lucchetti, Larry Lamparter, Nick Hetmanski and Roll Rite Tire Center, Inc.	105
Rausch Creek Land, LP	54
Rocky Ridge Motel (Kyong H. Kim)	302
Rosebud Mining Company	70
Rural Area Concerned Citizens	362
Francis Shultz, Jr., and David Friend, d/b/a Shorty and Dave's Used Truck Parts, DEP v. (Motion in Limine)	381
Francis Shultz, Jr., and David Friend, d/b/a Shorty and Dave's Used Truck Parts, DEP v. (Motion for Summary Judgment)	436
Ron Teska and Giulia Mannarino	447
The Delaware Riverkeeper Network and Maya Van Rossum, The Delaware Riverkeeper (Motion to Dismiss)	215
The Delaware Riverkeeper Network and Maya Van Rossum, The Delaware Riverkeeper (Motion to Dismiss Application for Attorneys' Fees)	468
White Oak Reserve Limited Partnership & ELG Inc. General Partner, Vanguard Development Corporation, Edwin L. Glasgow, President, DEP v.	75



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GINA GABRIEL

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and DYNAMIC DRILLING LLC:**

EHB Docket No. 2011-164-C

Issued: January 20, 2012

**OPINION AND ORDER
ON DISMISSING APPEAL AS A SANCTION**

By Michelle A. Coleman, Judge

Synopsis:

The Board dismisses a *pro se* appeal as a sanction wherein Appellant has failed to provide her telephone number, a complete copy of the Department’s action, the date she received notice of the Department’s action, objections to the Department’s action and proof of service of her appeal upon the Department and Permittee pursuant to 25 Pa. Code § 1021.51. Appellant also did not follow Board Orders to provide the missing information.

OPINION

The Appellant in this matter is Gina Gabriel (“Gabriel”) who is appearing *pro se*. On or about November 18, 2011 Gabriel sent a Notice of Appeal (“NOA”) to the Board appealing the Department’s October 17, 2011 issuance of a blasting activity permit to the Permittee, Dynamic Drilling LLC (“Dynamic Drilling”). The NOA does not provide Gabriel’s telephone number, a complete copy of the Department action being appealed, the date she received notice of the Department action, objections to the Department’s action and proof of service of her appeal upon

the Department and Permittee.

To rectify these insufficiencies, the Board sent an Order dated November 18, 2011 to Gabriel requesting that missing information be provided to the parties and the Board on or before December 7, 2011. On December 8, 2011, Gabriel sent a letter to the Board stating that “pursuant to your Order, attached please find proof of actual notice upon the Commonwealth of PA DEP and upon Dynamic Drilling LLC (see Exh. A). Exhibit A is a letter from the Department’s counsel to the Appellant dated November 28, 2011 regarding Gabriel’s appearing as a *pro se* litigant. The Appellant’s December 8, 2011 letter and its contents did not address the Board’s Order requiring that she provide the missing information pursuant to the Board’s rule 25 Pa. Code 1021.51. Having not received the requested information, the Board issued a Rule to Show Cause on December 13, 2011 that was returnable to the Board on January 13, 2012. The Board also sent a letter to Gabriel along with the December 13 Order. The letter stated:

A review of the record in the above appeal indicates that you have not perfected your appeal pursuant to the Board’s order dated November 18, 2011. The Environmental Hearing Board Rules of Practice and Procedure found at 25 Pa. Code Chapter 1021 require appellants to file notices of appeal in accordance with the parameters in 25 Pa. Code § 1021.51. Your appeal does not comply with Section 1021.51. It fails to include your telephone number, a complete copy of the Department action being appealed, the date you received notice of the Department action, objections to the Department’s action and proof of service of your appeal upon the Department and Dynamic Drilling, LLC. The information you provided in a letter faxed to the Board on December 8, 2011 was not the information requested in the November 18, 2011 order. The Board is allowing you another opportunity to provide the missing information no later than **January 13, 2012**. If you have questions regarding this matter you may call the Harrisburg office at 717-787-3483. Failure to provide the information requested may result in dismissal of your appeal.

There was no response made to the Rule or letter sent by the Board.

The Board has the authority to dismiss an appeal as a sanction for failing to comply with

Board orders. 25 Pa. Code § 1021.161; *Martin, et al. v. DEP*, 1997 EHB 158. A sanction resulting in dismissal is justified when a party to the case fails to comply with Board orders and shows a lack of intent to pursue its appeal. *Scottie Walker v. DEP*, EHB Docket No. 2011-032-C (Opinion and Order issued May 12, 2011); *Pearson v. DEP*, 2009 EHB 628, 629, citing *Bishop v. DEP*, 2009 EHB 259; *Miles v. DEP*, 2009 EHB 179, 181; *RJ Rhodes Transit, Inc.*, 2007 EHB 260; *Swistock v. DEP*, 2006 EHB 398; *Sri Venkateswara Temple v. DEP*, 2005 EHB 54.

Gabriel failed to comply with the Board's Orders and the Rule requiring that the appellant provide certain information. Section 1021.51 provides,

(c) The appeal shall set forth the name, address and telephone number of the appellant.

(d) If the appellant has received written notification of the action from the Department, a copy of the action shall be attached to the appeal.

(e) The appeal shall set forth in separate numbered paragraphs the specific objections to the action of the Department. The objections may be factual or legal.

...

(g) Concurrent with or prior to the filing of a notice of appeal, the appellant shall serve a copy thereof on each of the following:

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

(2) The Office of Chief Counsel of the Department or agency taking the appeal.

(3) In a third party appeal, the recipient of the action. The service shall be made at the address set forth in the document evidencing the action by the Department or at the chief place of business in this Commonwealth of the recipient.¹

25 Pa. Code § 1021.51.

Due to Gabriel's failure to comply with 25 Pa. Code § 1021.51 and failure to comply with the Board's Orders issued on November 18, 2011 and December 13, 2011, we dismiss this appeal as a sanction pursuant to 25 Pa. Code § 1021.161.

Accordingly, we issue the Order that follows.

¹ The rules provide that a "recipient of the action" includes, "The recipient of a permit, license, approval or certification." 25 Pa. Code § 1021.51(h)(1).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GINA GABRIEL

v.

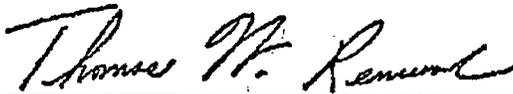
EHB Docket No. 2011-164-C

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and DYNAMIC DRILLING LLC:

ORDER

AND NOW, this 20th day of January 2012, upon consideration that the Appellant failed to comply with the Board's Order of November 18, 2011, requiring that she perfect her appeal in accordance with 25 Pa. Code § 1021.51 by filing with the Board her telephone number, a complete copy of the Department's action, the date she received notice of the Department's action, objections to the Department's action and proof of service of her appeal, and failed to comply with the Board's Order of December 13, 2011 requiring that she provide the requested information by January 13, 2012, it is hereby ordered that the Appellant's appeal is dismissed pursuant to 25 Pa. Code § 1021.161 as a sanction for failure to comply with the Board's orders.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chief Judge and Chairman

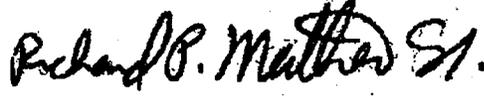


MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKIES, JR.

Judge



RICHARD P. MATHER, SR.

Judge

DATED: January 20, 2012

c: DEP, Bureau of Litigation:
Attention: Glenda Davidson

For the Commonwealth of PA, DEP:
Marianne Mulroy, Esquire
Southwest Regional Office - Office of Chief Counsel

For Appellant, Pro Se:
Gina Gabriel
624 Turnberry Lane
Oakdale, PA 15071

For Permittee:
Dynamic Drilling LLC
10373 Taylor Haws Road
Herron, MI 49744



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BERKS COUNTY

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and EXIDE TECHNOLOGIES,
Permittee**

:
:
:
:
:
:
:
:
:
:
:
:

EHB Docket No. 2010-166-L

Issued: February 23, 2012

**OPINION AND ORDER
ON MOTION IN LIMINE**

By Bernard A. Labuskes, Jr., Judge

Synopsis

In an appeal from the Department’s renewal of a Title V permit for a secondary lead smelter, the Board in response to a motion in limine excludes expert testimony regarding the rulemaking process and the EPA conclusions that led up to the promulgation of National Ambient Air Quality Standards (NAAQS) for lead and sulfur dioxide (SO₂), the merits of the NAAQS, and the legal meaning and applicability of the NAAQS.

OPINION

Berks County filed this appeal from the Department of Environmental Protection’s renewal of Exide Technologies, Inc.’s Title V air permit for Exide’s secondary lead smelter in Muhlenberg Township, which is near Reading, Pennsylvania. The County has identified Dr. Laurie Haws, a licensed toxicologist, as one of its testifying experts. Dr. Haws was hired by the County to present testimony as to (a) the current federal National Ambient Air Quality Standards (“NAAQS”) for lead and sulfur dioxide (SO₂) established by the United States Environmental Protection Agency, (b) the process that EPA follows in establishing or setting a NAAQS, (c) the

process EPA followed in establishing the specific NAAQS for lead and SO₂ in its most recent rulemakings, (d) the fact that the NAAQS represent EPA's best judgment regarding the level that will ensure protection of public health with a margin of safety, and (e) the potential adverse health effects of lead and SO₂ that gave rise to promulgation of the NAAQS. The County emphasizes that it does not offer Haws's testimony to show that (a) any particular individual or population will become ill as a result of NAAQS exceedances, (b) the NAAQS are "correct," or (c) there is an unacceptable health risk to residents near the Exide facility. Ultimately, Haws concludes that ensuring that lead and SO₂ concentrations are consistent with NAAQS is important for protecting public health, and that Exide "should comply with" the lead and SO₂ NAAQS.

Exide has responded in part by proposing expert testimony from Dr. Teresa S. Bowers and Dr. Julie E. Goodman. Bowers proposes to offer the following opinions: (1) the NAAQS level for lead is the result of a EPA policy decision from a scientifically-supported range of values, so exceedances are not an indication that unacceptable health effects will necessarily occur; (2) immediate measures during the time period needed for facilities to come into compliance with the revised NAAQS are not necessary and would not be appropriate; (3) Haws is not able to conclude that there is an unacceptable risk to residents near the facility; and (4) there is no expectation that unacceptable risks will occur during the time frame allowed by EPA for the state and the facility to develop and implement a plan to achieve compliance with the NAAQS.

Goodman summarizes her proposed opinion as follows:

In her expert report, Dr. Haws overestimates the potential for health effects from SO₂ and relies on what are likely significant overestimates of the amounts of SO₂ released from the Exide Reading plant. Also, she suggests that compliance with the SO₂ NAAQS is

necessary to adequately protect public health with an ample margin of safety, which is not the case. Compliance with the SO₂ NAAQS, which is meant to protect against 5-minute exceedances of 200 ppb SO₂, offers *de minimus*, if any, benefit to public health compared to a level that protects against 5-minute exceedances of 400 ppb SO₂.Taken as a whole, the magnitude and number of exceedances of the current SO₂ NAAQS in the vicinity of Exide are highly unlikely to be as great as has been assumed by Dr. Haws, and an appropriate weight of evidence analysis of the SO₂ health effects literature indicates that meeting an SO₂ standard that is appreciably higher than the current level would still be protective of public health.

Exide's expert reports have drawn objections from the County in the form of a motion in limine. The County argues that the experts' testimony should be excluded to the extent that it (1) exceeds the scope of the County's case in chief, and (2) delves into the establishment and appropriateness of the lead and SO₂ NAAQS. We agree with both points, but point out that the second point applies to the County's case as well.

The County says that its case with respect to ambient air quality standards is actually quite limited: "Berks County's case relies on its fundamental assertion that the appealed Title V permit, as issued, does not comply with applicable statutory and regulatory requirements, including the National Ambient Air Quality Standards (NAAQS) for lead and SO₂." (Brief at 2.) Thus, the County has not claimed that health concerns independent of applicable statutory and regulatory requirements compelled the Department to issue a permit with different terms. With respect to air standards, it has not claimed that the Department should have done anything above and beyond what the law requires. It has not challenged the applicable laws themselves, including the lead and SO₂ NAAQS. It will not attempt to put on a case through toxicological evidence that there is an actual unacceptable risk to any residents near the Exide facility (except to the extent that such a risk is present as a matter of law as a result of the violation of applicable laws).

Given these self-described limitations, we are having difficulty understanding what value the opinions of the County's expert, Haws, can contribute toward our resolution of this appeal. The County first proposes to have Haws tell us what the NAAQS are. This is, of course, not necessary. The NAAQS are federal regulations that anyone can read. Secondly, the County says that Haws will tell us about the rulemaking process generally and specifically as it was used to promulgate the lead and SO₂ standards. Again, this is entirely unnecessary. The rulemaking is fully described in public documents subject to our judicial notice. Next, Haws proposes to inform us that the NAAQS represent EPA's best judgment about what levels of pollutants in the air are safe, and the potential adverse health effects that are implicated if NAAQS are exceeded. Yet again, these are matters of public knowledge that do not require expert testimony.

The County seems to believe that we need to be schooled on the background of the law and the risks that the law seeks to reduce, but if this aspect of the County's case is limited as it is to a complaint that Exide's permit "does not comply with applicable statutory and regulatory requirements, including the [NAAQS]," whether the Department has complied with the law does not turn on the merits of the law. We do not see why any exposition regarding the underlying merits of these statutes and regulatory requirements is necessary or appropriate. The law is the law. The law must be applied regardless of any expert's opinion of the merits of the law.

The County asserts that it is not debating the soundness of the law, but our review of Haws's report shows that that is in fact exactly what she is doing. The County criticizes Exide's experts for challenging the merits of the NAAQS in this setting, which is a valid criticism, but the same can be said of the County's own case. There is no material difference between explaining why public health concerns justify and support the NAAQS, and arguing that the NAAQS are appropriate and sound. We like the analogy that the County uses in its brief,

although admittedly it seems to have backfired somewhat. The County argues that Exide's proposed testimony regarding the merits of the NAAQS is like a driver who is caught speeding complaining that the speed limit is too stringent. However, Haws's opinions likewise amount to little more than conclusions that the speed limit underwent extensive study before it was imposed, the limit is designed to save lives, and if the limit is exceeded there is a risk that people will get hurt. All of this background is simply unnecessary and out of place in this appeal. All we need to know is whether the driver was speeding.

Haws ultimately opines that, because they are such a good thing, Exide "should comply with the lead and SO₂ NAAQS." As we have just explained, Exide must comply with the law regardless of whether a witness thinks compliance is a good thing, but in addition to that, the extent to which the NAAQS should be factored into the Department's molding of Exide's Title V permit is an issue of *law*. Expert opinion on questions of law is prohibited. *Waters v. SERS*, 955 A.2d 466, 471 n. 7 (Pa. Cmwlth. 2008); *Shenango v. DEP*, 2006 EHB 783, 795, *aff'd*, 934 A.2d 35 (Pa. Cmwlth. 2007); *Browne v. Commonwealth*, 843 A.2d 429, 434 (Pa. Cmwlth. 2004); *Rhodes v. DER*, 2009 EHB 237.

Furthermore, Haws's conclusion that Exide "should comply with the NAAQS" to some extent confuses apples and oranges. The NAAQS are not self-executing in the sense that they apply directly to any given facility. The NAAQS do not equate to facility-specific emission limits. Rather, a NAAQS is the statement of a goal that applies to all of the air in a given *area*. If a certain *area* is not attaining that goal, the Commonwealth must figure out how the goal will eventually be attained in that *area*. See 42 U.S.C.A. § 7407. Area-wide attainment may, but does not necessarily require, imposing certain emission limits or other control measures on particular sources by way of permits or otherwise. The promulgation of a new NAAQS sets a

federal/state process in motion that transcends any one permit. In any event, assuming for purposes of the current discussion that the Department could have or should have factored the NAAQS into setting emission limits or performance requirements Exide's permit differently, Haws does not proffer testimony on that particular issue. Rather, Haws's proposed testimony relates more generally to the NAAQS and, as such, it is interesting and erudite but ultimately unnecessary here.

Exide's basic response to the County's motion in limine is that Exide's proffered toxicological testimony of Bowers and Goodman is really just a reaction to Haws's proffered testimony: If the County had not proposed testimony that compliance with the NAAQS is important to protect public health, Exide would not have found it necessary to retain experts to say the opposite. Although we do not blame Exide for wanting to be prepared, the same defects that apply to Haws's opinions apply to the opinions of Bowers and Goodman. Goodman's opinion in particular consists of little more than an extensive attack on the SO₂ NAAQS. She complains that the Standard is too conservative and provides "*de minimus*, if any, benefit to the public health." Even if we agreed, the opinion cannot possibly affect our resolution of the County's objection that the permit does not comply with applicable legal requirements. Furthermore, as with Haws's report, Bowers and Goodman's reports are replete with policy statements and legal conclusions that are not only beyond the scope of this appeal, but which intrude upon the exclusive province of the Board to interpret and apply the law based upon the attorneys' arguments. Finally, Exide's experts' opinions touch upon actual health effects or risks to specific individuals resulting from Exide's emissions, but the County has stipulated in its motion that it does not intend to get into that.

We are not sure whether any of the testimony of Haws, Bowers, or Goodman survives

this ruling. Although we do not think that it does, all that we have to go on at this juncture is the expert reports. Rather than necessarily preclude these witnesses from providing *any* testimony, we simply hold at this point that we will not accept any expert opinion testimony regarding the rulemaking process and EPA's conclusions that led up to the promulgation of the lead and SO₂ NAAQS, the merits of the NAAQS, or the legal meaning or applicability of the NAAQS, and we also note for the record that the County has stated that it does not intend to present any evidence of any actual impacts or risks associated with Exide's lead and SO₂ emissions to actual receptors in the vicinity of the plant. Thus, Exide need not present evidence that goes beyond the objections preserved in the County's case in chief.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BERKS COUNTY

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and EXIDE TECHNOLOGIES,
Permittee

:
:
:
:
:
:
:

EHB Docket No. 2010-166-L

ORDER

AND NOW, this 23rd day of February, 2012, it is hereby ordered that the County's motion in limine is **granted** to the extent set forth in the foregoing Opinion.

ENVIRONMENTAL HEARING BOARD


BERNARD A. LABUSKES, JR.
Judge

DATED: February 23, 2012

c: DEP Bureau of Litigation:
Glenda Davidson, Library

For the Commonwealth of PA, DEP:
Craig S. Lambeth, Esquire
Office of Chief Counsel – Southcentral Region

For Appellant:
Alexandra C. Chiaruttini, Esquire
STOCK AND LEADER
221 W. Philadelphia St.
Suite E600
York, PA 17401-2994

For Permittee:

Robert L. Collings, Esquire
SCHNADER HARRISON SEGAL & LEWIS
1600 Market Street, Suite 3600
Philadelphia, PA 19103

Allison R. Brown, Esquire
SCHNADER HARRISON SEGAL & LEWIS
120 Fifth Avenue Place, Suite 2700
Pittsburgh, PA 15222-3001



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BERKS COUNTY

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and EXIDE TECHNOLOGIES,
Permittee**

:
:
:
: **EHB Docket No. 2010-166-L**
:
: **Issued: February 27, 2012**
:
:

**OPINION AND ORDER
ON MOTION TO COMPEL**

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion to compel discovery because, among other things, the discovery rules do not require automatic updating of previously disclosed sampling data, and they do not require an expert to identify and produce all documents relied upon by the expert in forming the expert's opinion.

OPINION

On October 25, 2010, Berks County filed this appeal from the Department of Environmental Protection's renewal of Exide Technologies' Title V operating permit. Fact discovery officially closed in June 2011, but written materials appear to have been exchanged through at least the summer of 2011. Expert reports have now been exchanged, and pre-hearing motions filed. The first pre-hearing memorandum is due on March 19, and the hearing on the merits is scheduled to commence on May 21.

Notwithstanding the late stage of the proceeding, the County has filed a motion to compel more complete responses to the written discovery requests that it served in April 2011. The

County does not explain why its motion is being filed so late in the process. It refers to an air sampler that one of its expert witnesses observed that Exide apparently did not previously identify in its discovery responses, but that observation occurred several months ago in June (Exide says it was April) of 2011. The expert's affidavit filed in support of the County's motion says that he recently reviewed an Exide plan approval application submitted to the Department in January 2012 that "demonstrates that Exide had at least one additional monitoring station from which Exide had ambient data and which was not previously disclosed during discovery in this case." It may be that this revelation prompted the County's motion, but the County's motion and brief do not say that.

Exide complains in its response to the County's motion that the motion is unnecessarily tardy, but it does not cite any rule that prohibits the filing and we are not independently aware of any such rule. Exide has also failed to cite with specificity to any actual prejudice it has suffered as a result of the timing of the motion. Nevertheless, we acknowledge Exide's point that the lull in filing does tend to signal a lack of urgency, or perhaps, importance.

Exide also complains in response to the motion that the County has failed, as it has in the past (see Board Order dated September 19, 2011), to make an adequate good faith attempt to resolve the discovery dispute without Board intervention. The County's view on this is that Exide has consistently given it the run-around and it should not need to work so hard to obtain the information to which it is entitled. We note that the County's attorney has certified that she engaged in a good faith but failed effort to resolve the dispute as required by our rules at 25 Pa. Code § 1021.93(b), and she has attached e-mail correspondence that she exchanged with Exide's counsel regarding the issue. It is not clear whether counsel ever actually talked to each other. Nevertheless, we will not deny the County's motion on this basis.

With respect to more substantive matters, the County complains in its motion to compel that Exide has failed to produce information that the County requested in its discovery relating to all “air monitoring stations maintained or used by Exide.” The County specifically says that Exide has not produced air quality monitoring data from all of its monitoring stations, and that it has failed to supplement the data from those stations that it has identified. Exide responds that the only data it has not produced is data generated from mobile samplers used to sample indoor air in the workplace. It says that it reasonably assumed that the County’s discovery requests regarding Exide’s “air monitoring network,” “air emissions,” and “air monitoring equipment at each air monitoring station in the air monitoring network” did not include indoor air samples generated on an irregular basis by mobile equipment with regard to worker-safety issues. It adds that, if the discovery requests can fairly be interpreted to include such data, they are objectionable as seeking irrelevant information. We tend to agree with both points. Indoor air data is not obviously relevant or calculated to lead to relevant evidence in this appeal regarding Exide’s Title V air permit. It does not appear that the County made any significant effort to clarify and explain its need for this information prior to filing its motion. The County has not made any attempt in its motion to explain why this information, which seems somewhat removed from the issues at hand, might be helpful.

With regard to supplementation, the County could have simply obtained an extension of the discovery deadline and submitted a request for updated data. The duty to supplement to the extent it exists extends beyond the close of discovery, *Township of Paradise v. DEP*, 2001 EHB 1005, 1008; *ERSI v. DEP*, 2001 EHB 824, 828-31, but the duty to supplement is more limited than the County seems to suggest. Rule 4007.4 reads as follows:

A party or an expert witness who has responded to a request for discovery with a response that was complete when made is under

no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to the identity and location of persons having knowledge of discoverable matters and the identity of each person expected to be called as an expert witness at trial, the subject matter on which each person is expected to testify and the substance of each person's testimony as provided in Rule 4003.5(a)(1).

(2) A party or an expert witness is under a duty seasonably to amend a prior response if he or she obtains information upon the basis of which he or she know that

- a) The response was incorrect when made, or
- b) The response though correct when made is no longer true.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests to supplement prior responses.

Pa.R.Civ.P. 4007.4.

Other than a general citation to the rule, the County does not explain why it believes that Exide has a duty to supplement pursuant to the narrowly defined circumstances set forth in the rule. The County has not alleged that Exide has, subsequent to its initial responses, obtained information upon the basis of which it knew or should have known that its earlier responses were inaccurate when made or correct when made but no longer true. Exide has maintained an objection all along to providing data from mobile indoor air samplers, and the County has not overcome that objection. To the extent that the County is suggesting that Exide knew of other undisclosed air monitoring data all along, which might suggest that its prior responses were incorrect in the sense of being incomplete, Exide has denied that there is any such data or that its previous representations were incorrect.

The County also complains that Exide has failed to identify documents considered or relied upon by its experts in forming their opinions. Expert discovery, however, is rather

narrowly constrained by Pa.R.Civ.P. 4003.5. Absent agreement or enough cause shown to justify a Board order, experts are only required to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion in response to written interrogatories. *Id.* Noticeably absent is a requirement to identify or produce documents relied upon by the expert witness as demanded by the County. Rule 4003.5 restricts the scope of *all* discovery from non-party witnesses retained as experts in trial preparation. *Cooper v. Schoffstall*, 905 A.2d 482, 492 (Pa. 2006.) Any request for discovery not covered by Pa.R.Civ.P. 4003.5(a) *must* be channeled through the Rule's "cause shown" criterion. *Id.*, citing Pa.R.Civ.P. 4003.5(a)(2). *Barrick v. Holy Spirit Hospital*, 32 A.3d 800, 809-11 (Pa. Super. 2011). *Contra*, *Municipal Authority of the Borough of St. Marys v. DEP*, 1991 EHB 391, 394.¹ We disagree with the County's contention that a duty to identify and produce documents upon which the expert relied is implicit in the expert's duty to provide "a summary of the grounds for each opinion."

Accordingly, we issue the Order that follows.

¹ Since the County has failed to show that it is entitled to an order compelling discovery, its request for sanctions falls by the wayside.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BERKS COUNTY

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and EXIDE TECHNOLOGIES,
Permittee

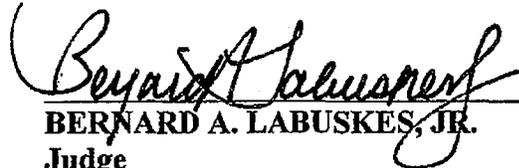
:
:
:
:
:
:
:
:
:
:

EHB Docket No. 2010-166-L

ORDER

AND NOW, this 27th day of February, 2012, it is hereby ordered that the County's motion to compel is **denied**.

ENVIRONMENTAL HEARING BOARD


BERNARD A. LABUSKES, JR.
Judge

DATED: February 27, 2012

c: DEP Bureau of Litigation:
Glenda Davidson, Library

For the Commonwealth of PA, DEP:
Craig S. Lambeth, Esquire
Office of Chief Counsel -- Southcentral Region

For Appellant:
Alexandra C. Chiaruttini, Esquire
STOCK AND LEADER
221 W. Philadelphia St.
Suite E600
York, PA 17401-2994

For Permittee:

Robert L. Collings, Esquire
SCHNADER HARRISON SEGAL & LEWIS
1600 Market Street, Suite 3600
Philadelphia, PA 19103

Allison R. Brown, Esquire
SCHNADER HARRISON SEGAL & LEWIS
120 Fifth Avenue Place, Suite 2700
Pittsburgh, PA 15222-3001



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BERKS COUNTY

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and EXIDE TECHNOLOGIES,
Permittee**

:
:
:
:
:
:
:
:
:
:

EHB Docket No. 2010-166-L

Issued: March 16, 2012

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

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants a motion for summary judgment in part because promulgation of a revised National Ambient Air Quality Standard (NAAQS) does not authorize the Department to set requirements relating to the substances covered by the NAAQS in an operating permit outside the context of state implementation planning (SIP) process absent exceptional circumstances not shown to be present here.

OPINION

This is Berks County's appeal from the Department of Environmental Protection's renewal of Exide Technologies' Title V operating permit for its secondary lead smelter near Reading in Berks County. Exide has filed a motion to dismiss or in the alternative for summary judgment. The Department generally joins in the motion. The County, of course, opposes it.

The Board may grant summary judgment if the record shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Yoskowitz v. DEP*, 2003 EHB 172; *Zlomsowitch v. DEP*, 2003 EHB 636, 641. The Board views the record in a light most favorable to the nonmoving party and resolves all doubts as to the existence of a

genuine issue of material fact against the moving party. *Holbert v. DEP*, 2000 EHB 796.

NAAQS

The list of objections in the County's notice of appeal from the Department's renewal of Exide's Title V permit includes the following objection:

The US EPA and Pennsylvania have designated the area around the facility as "nonattainment" for lead. The final permit will not ensure that Exide's operations will comply with the recently effective revised lead [National Ambient Air Quality Standard]. DEP should revise the permit to require additional controls that will ensure attainment status with the NAAQS. Additional technologies are being utilized by other secondary lead smelting facilities that greatly reduce lead emissions, and the permit should require the installation of such technology.

The County's objection obviously focuses in on lead. Although the County does not mention sulfur dioxide (SO₂) in its notice of appeal, at some point during discovery it apparently added SO₂ as an issue of concern. The County did not amend its notice of appeal. Nevertheless, the County now makes the same argument with respect to the SO₂ NAAQS as it makes with respect to the lead NAAQS; namely, that Exide's permit requirements for lead and SO₂ are not stringent enough in light of the revised NAAQS for those pollutants.

The County's objection refers to a revision of the lead NAAQS that was promulgated in November 2008 and effective starting in January 2009, 73 *Fed. Reg.* 66964, and a revised SO₂ NAAQS that was promulgated on June 22, 2010 and became effective on August 23, 2010, 75 *Fed. Reg.* 35520. A NAAQS is the maximum amount of an air contaminant that is permitted to exist in the ambient air. 25 Pa. Code § 131.1. Pennsylvania has incorporated by reference the NAAQS promulgated by the EPA. 25 Pa. Code § 131.2.

The lead and SO₂ NAAQS revisions triggered a planning process that begins with a determination of whether a particular geographical area is attaining the NAAQS. The area of the

Exide plant has been determined to be nonattainment for lead. The area is as yet undetermined for SO₂. The Commonwealth must prepare and submit to EPA for approval a state implementation plan (SIP) describing how the Commonwealth will implement, maintain, and enforce the ambient air standard, at least for lead. *See* 42 U.S.C. § 7410. Congress and the General Assembly have established statutory procedures for states to develop SIPs which by statute are defined as those “plans or plan revisions that a state is authorized and required to submit under Section 110 of the Clean Air Act (Public Law 95-95 as amended, 42 U.S.C. § 7410) to provide for attainment of the national ambient air quality standards.” 35 P.S. §§ 4003 and 4007.5; 42 U.S.C. § 7410. Pennsylvania has in fact developed numerous SIPs to provide for attainment of various NAAQS over the years that are codified in federal regulations. 40 CFR Part 52, Subpart NN. The Department must follow the procedures established by state and federal statute to develop the SIP required to attain the lead and SO₂ NAAQS. If the SIP is ultimately approved, the Commonwealth will then implement the SIP, which may or may not eventually result in the imposition of new emission limits or other control measures on Exide.

Much has been written about the intricate federal/state process for the attainment of air quality standards, but we have no need to get into most of that here. The important point for our immediate purposes is that EPA’s promulgation of a new ambient air quality standard does not in and of itself require or authorize the Department to impose new emission limits or control measures on a source. Attainment of the ambient air quality standards relates to an area, not any one source within that area. There is no dispute in this case that there are currently no additional requirements for Exide arising under the revised federal NAAQS adopted by EPA.

Thus, the mere promulgation of the federal NAAQS revisions and their automatic incorporation into Pennsylvania law does not constitute a legal basis in and of itself for imposing

more stringent conditions in Exide's permit. The County seems to concede as much in its response to Exide's motion for summary judgment. The problem with the County's case is that it does not cite any *other* legal basis for imposing conditions on Exide that are more stringent than those set forth in the permit. The Department must have the legal authority to do what the County would have it do, and the County has failed to convince us that there is any such authority.

Having basically acknowledged the absence of any new or additional requirement currently arising under the revised federal NAAQS,¹ the County relies on more general state law as the basis for the Department's authority to take immediate steps toward implementing NAAQS attainment outside the context of the regular NAAQS process. The County essentially wants the Department to rely upon general provisions of state law to impose permit requirements on Exide that will ensure that the new federal ambient air quality standards will be met on an accelerated schedule. The County relies on such general provisions as the Department's right to refuse to issue a permit to a source "likely to cause air pollution," 35 P.S. § 4006.1(d), and its right to impose a compliance schedule when repermitting any source operating out of compliance, 35 P.S. §§ 4006.1(b)4 and 4007.2.²

The County's argument must fail. When it comes to imposing permit conditions

¹ It is worth noting that EPA very recently promulgated a new National Emissions Standard for Hazardous Air Pollutants (NESHAP) for secondary lead smelting facilities, which will apply to the Exide facility. 77 Fed. Reg. 556 (January 5, 2012). Unlike the NAAQS program, NESHAPs are self-executing, and it appears that this new standard may require Exide to implement control measures directed at controlling fugitive dust emissions. Although the rule was not adopted to implement the lead NAAQS, EPA believes it will contribute significantly to the attainment of the lead NAAQS. 77 Fed. Reg. 577. It also may go a long way toward addressing some of the concerns that the County has raised in this appeal. In any event, the County does not cite the NESHAP as pertinent to the Department's permitting decision under review.

² A permit applicant may be requested by the Department to demonstrate in an application for an operating permit that it is not preventing or adversely affecting the attainment or maintenance of ambient air quality standards, 25 Pa. Code § 127.411(a)(7), but this requirement does not trump the process that must be followed under the federal Clean Air Act regarding attainment of NAAQS.

designed to ensure that an area achieves compliance with the NAAQS, the Department must normally proceed in accordance with the federal/state SIP process for attaining the NAAQS that is set forth in the federal Clean Air Act. It will generally not be appropriate to attempt to bypass or ignore that process, cherry-pick a standard out of context, and impose permit conditions outside of or in advance of the federally mandated process.

There may be special circumstances that warrant disregard of SIP planning, but if a party would have the Department deviate from otherwise clearly applicable federal and state standards and procedures for setting permit limits for a particular facility, it must carefully explain and justify such a deviation both factually and legally. *Cf. Municipal Authority of Union Township v. DEP*, 2002 EHB 50 (NPDES permitting). Pointedly, the Department does not claim to have any such legal authority here; quite the contrary.³ The County's citation to general statutory provisions in this case is simply not sufficient to supplant specific permit-setting standards and procedures that directly apply. As we said in response to a similar arguments made in the NPDES context in *Municipal Authority of Union Township* "[t]hese general provisions, however, are too far removed from the issue at hand. They do not give the Department the authority to do whatever it chooses in setting effluent limits. If [that] were true,

³ The Department in its Responding Statement to Exide's motion states:

[T]he [Air Pollution Control Act, 35 P.S. § 4001 *et seq.*] specifically contemplates the promulgation of control measures or other regulatory requirements that may be more stringent than federal requirements. Adoption of more stringent requirements, however, is solely the province of the EQB under Section 4.2. Consequently, the Department submits that Section 4.2 of the APCA supports neither Exide's position, nor any position that may be offered by Berks suggesting that Section 4.2 allows the Department to impose requirements more stringent than authorized under the federal CAA. The air quality regulatory standards under which the Department operates are clearly set out in Pa. Code Chapters 121-145. These regulations are adopted by the EQB pursuant to the authority set forth in the APCA. Nothing in Section 4.2 prevents the EQB from adopting more stringent requirements when the EQB makes the necessary findings that those requirements are necessary to meet the objectives stated in Section 4.2(b)(1)-(b)(4). On the other hand, nothing in Section 4.2 allows or even suggests that the Department on its own initiative may bypass the EQB and impose control measures beyond those required under the federal CAA.

the Department could simply bypass the comprehensive regulatory program for establishing permit limits by virtue of generic Clean Streams Law provisions.” 2002 EHB at 61. This reasoning applies to the air program as well. *See also, PPL Generation, LLC v. DEP*, 986 A.2d 48, 50-51. (statutory grant of general regulatory authority is subject to specific limitations).

This is not a case where someone is actually being hurt or at immediate risk of harm such that it might be necessary to proceed independently of the SIP process. The County has repeatedly said that it does not intend to prove actual or potential harm to any particular individuals. The Commonwealth retains authority to address an emergency or an imminent threat, 35 P.S. § 4006.2, but the County has not said that such situation exists here.

The parties debate whether Section 4.2 of the APCA, 35 P.S. § 4004.2, prohibits the Department from imposing limits on lead and SO₂ based on the NAAQS, but we see this debate as beside the point. Section 4.2 describes the limited circumstances wherein the *Environmental Quality Board* may adopt control measures more stringent than those required under federal law. The EQB has not in fact adopted any such measures here. Section 4.2 does not authorize the *Department* to do anything. The debate regarding Section 4.2 would only be pertinent here if the Department were shown to have some authority to act and the question then arose whether Section 4.2 took that authority away.

The County says that the Department should at least have included a compliance schedule in Exide’s permit. If the County is unable to cite any authority for imposing new limits immediately, however, we fail to see how there would be any authority for doing it by way of a delayed but legally enforceable schedule. Compliance schedules are normally reserved for permittees in violation, and as we previously said, Exide is not in violation of any requirement associated with the revised lead and SO₂ NAAQS.

Aside from the County's failure to point to any legal authority to depart from the SIP process in setting Exide's permit limits, we would add that deviating from that process just seems like a bad idea. The County has failed to explain why the Department would want to disrupt the orderly NAAQS planning process for one facility.⁴ The County's references to "complying" with the NAAQS or "violating" the NAAQS are not quite accurate. Strictly speaking, the NAAQS are not designed to guide individual source permitting decisions. Rather, the NAAQS describe the air quality standard to be achieved in a given *area*, and that area may contain pollutants from multiple sources. Rational planning allows for consideration of all of those sources prior to controls being imposed on any one source. Imposing different requirements on Exide now might ultimately prove to be inconsistent with the SIP that the Department will be preparing in the future for submission to EPA for review and approval. Imposing separate requirements now would be disruptive and premature absent exceptional circumstances not shown to be present here. This is true even where one source is likely responsible for nonattainment. Furthermore, a legislative intent to create a level playing field is apparent both in the APCA and the legislative history leading up to that Act. *See, e.g.*, 35 P.S. §§ 4004.2 and 4006. *See also* Pennsylvania Legislative Journal-Senate, June 16, 1992, pp. 2293-95 (debate on SB 1650 on final passage). Accordingly, Exide is entitled to summary judgment on the County's claims to the extent they criticize the Department's failure to immediately implement the NAAQS by not including more stringent limits for lead and SO₂ in Exide's permit.

We emphasize in connection with this part of this Opinion that we are only limiting the County's case to the extent that it has alleged that the Department erred by not imposing more stringent permit controls as a direct result of the promulgation of new NAAQS for lead and SO₂.

⁴ The public, including the County, may participate in the SIP process. 42 USCS § 7410(a).

One of the reasons the air program can be difficult to understand is that there are several parallel groups of requirements that can simultaneously apply to any given source. For example, in addition to ensuring attainment of NAAQS and the NESHAPS, which we have already mentioned, there are technology-based standards that sources must meet. The County has alleged that the Department erred by failing to require Exide to implement best available technology to control its emissions. This is an example of an issue that goes beyond the scope of this Opinion and will need to be addressed following the hearing.

Sensitive Populations

In response to Exide's summary judgment motion, the County says that an outstanding dispute about whether there are "sensitive populations" (children, the elderly, asthmatics) in close proximity to the Exide facility prevents us from issuing summary judgment. This statement is difficult to reconcile with the County's statement in its motion in limine, which we recently granted, that the County does not intend its experts to offer "an opinion that there is an unacceptable risk to residents near the Exide Reading facility." The County said there, correctly, that it would be a waste of judicial resources for us to consider "whether any one person or population will, in fact, become ill from Exide's NAAQS violations, which is a matter for a toxic tort case but not the instant case." Thus, the County has told us in the context of its motion in limine that it does not intend to show that there is actual harm or an unacceptable risk of harm to nearby residents (beyond the harm that is presumed to follow from exceedances of national standards), while alleging in the context of its response to the motion for summary judgment that there are sensitive populations near the plant.

As it happens, it is not necessary to resolve this apparent contradiction. We are perfectly willing to assume that members of sensitive populations are downwind of the Exide facility. The

air program, however, sets uniform standards that are designed to protect the health of all Americans, including members of sensitive populations. 42 USCS § 7409(b). The needs of sensitive populations are taken into account in setting those standards. *See, e.g.*, 40 CFR Part 63 (NESHAP for secondary lead smelting) (final rule published at 77 *Fed. Reg.* 556 (January 5, 2012)). *See generally, Am. Trucking Ass'n v. EPA*, 283 F3d 355, 365, 369 (D.C. Cir. 2002). The County has failed to explain how the presence of sensitive individuals downwind of the Exide plant could possibly affect the Department's drafting of the Title V permit. It has not pointed to any authority for the Department to impose more "protective regulation" than the standards imposed by the CAA, which (to repeat) already consider the special needs of sensitive populations, and we are not independently aware of any such authority. It also has not indicated that it intends to prove that the sensitive populations are at a heightened risk of harm from alleged malodor, fugitive dust, or opacity violations. The County's admonition that this is not a toxic tort case applies with equal force to those issues. Accordingly, summary judgment in favor of Exide is appropriate regarding the County claim that there are sensitive populations near the plant. We will not accept any evidence on that point.

Arsenic and Cadmium

The County says in response to Exide's motion for summary judgment that Exide should have been required to monitor and report arsenic and cadmium emissions. Exide complains in reply that arsenic or cadmium were not included in the County's notice of appeal, that the County—although asked to flush out its general objections—did not identify arsenic or cadmium as an issue in its discovery responses, and that the response to the summary judgment may be the first time arsenic and cadmium were mentioned. The County's position is that its objection regarding these new pollutants is covered by the general objections in its notice of appeal, which

read as follows:

8. The DEP action in issuing the Title V permit to Exide is contrary to applicable Commonwealth regulations relating to air quality.

9. The DEP action in issuing the Title V permit to Exide is contrary to Pennsylvania Statute and DEP rules and regulations.

10. The DEP action in issuing the Title V permit to Exide is contrary to federal law, and regulation referenced in the Commonwealth's program, and recent federal court decisions.

As we explained in *Rhodes v. DEP*, 2009 EHB 325:

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 CD 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).

2009 EHB at 327. There are limits, however, to our indulgence. *Id.*, 2009 EHB at 328-29; *Pa. Trout v. DEP*, 2004 EHB 310, 353; *Lower Mt. Bethel Twp. v. DEP*, 2004 EHB 126, 127. One of the reasons we have historically been willing to construe objections in the notice of appeal broadly was that there was some question in the past whether the Board had jurisdiction to allow amendments to an appeal absent circumstances that would have justified an untimely *nunc pro tunc* appeal. *See Pennsylvania Game Commission v. DER*, 509 A.2d 877 (Pa. Cmwlth. 1986).

However, our rules now make it clear that a notice may be amended as of right within 20 days and the Board may grant leave to amend after that if no undue prejudice will result to the opposing parties. 25 Pa. Code § 1021.53(b).⁵ In this case, the County did not move to amend its notice of appeal.

Another reason we have been tolerant of broadly worded objections is that the Department and/or permittees defending against the appeal have an ample opportunity to flush out an appellant's actual objections in discovery. When Exide attempted to do that in this case, however, the County not only neglected to mention concerns regarding arsenic or cadmium, it objected to the questions as calling for the mental impressions and/or legal theories of Appellant's counsel. (See Interrogatory Responses 23-25.)

In addition to being blindsided, Exide complains that the County has failed to cite a legal requirement or authorization for a requirement for cadmium or arsenic monitoring in its permit. The County has not referred to any applicable standard. It does explain why cadmium or arsenic are of concern or should be of concern.

Exide's objections are well taken. It is simply not enough at this juncture to toss out a vague reference to two apparently random elements and claim they should be monitored with no explanation and no legal support. Although the County's late reference to new elements would be of concern in any setting, it is perhaps particularly problematic in the context of the air program, which tends to be characterized by detailed requirements that relate to specific pollutants based upon years of study, risk assessments, and cost-benefit analyses. Accordingly,

⁵ The comment to Section 1021.53 reads as follows:

In addition to establishing a new standard for assessing requests for leave to amend an appeal, this rule clarifies that a *nunc pro tunc* standard is not the appropriate standard to be applied in determining whether to grant leave for amendment of an appeal, contrary to the apparent holding in *Pennsylvania Game Commission v. Department of Environmental Resources*, 509 A.2d 877 (Pa. Cmwlth. 1986).

summary judgment in favor of Exide is appropriate on the County's arsenic and cadmium claim.

Compliance Status

The County objects that "the permit should not have been issued based upon Exide's compliance status." However, under the air program, a permit may only be denied if the "applicant or a related party has a violation or lack of intention or ability to comply that *is listed on the compliance docket.*" 35 P.S. § 4007.1; 25 Pa. Code § 127.422(5) (emphasis added). The County has not shown that Exide is on the Department's compliance docket. Accordingly, this objection must fail as a matter of law.

The County asserts that "[a]lterations to the Exide facility baghouse control technology should have required a plan approval submission and reassessment of BAT [best available technology], triggering additional monitoring and reporting requirements for other HAPs [hazardous air pollutants], like arsenic in the permit." The County does not develop or support this argument in any way, which makes it difficult to address, but we have several problems with it on its face. This argument appears to go well beyond even the most generous possible reading of the County's notice of appeal. To the extent the claim relates to Exide's compliance status (which is how Exide interprets the claim), nothing pertinent is on the compliance docket. It is also not clear what alterations the County is referring to. The County gives us virtually nothing to go on regarding the facts or the law. Exide seems to know what the County is referring to and points to the fact that the Department determined pursuant to a Request for Determination of Requirement for Plan Approval that no plan approval was required for some baghouse work that was performed after the permit was issued. Finally, we are also not sure that this issue is appropriately included in our review of the Department's issuance of the permit, which was a separate action. Accordingly, Exide is entitled to summary judgment on this claim.

Other Issues

A few issues raised by the County seem to relate in part to the NAAQS, but they may relate to other aspects of the air program as well. These issues include whether Exide is being required to conduct sufficient monitoring, provide “adequate and accurate verification of compliance,” or adequately control fugitive dust emissions. To the extent these issues tie into the revised NAAQS, they are precluded by this ruling. For example, the County may be asking too much of Exide when it comes to ambient air monitoring to the extent its purpose is to support attainment of the new NAAQS. It is generally the *Commonwealth’s* responsibility to measure attainment of NAAQS in a given area. *See* 40 CFR Part 58. We are not aware of any authority to delegate that responsibility to an individual source. Exide’s permit is not proper vehicle for challenging *the Department’s* NAAQS monitoring program. However, there are also source monitoring requirements for sources such as Exide that may have a substantial impact on maintenance of air standards. 25 Pa. Code § 139.51. The County’s claims seem to reference both monitoring programs.

The parties also dispute whether the Department has required Exide to implement sufficient monitoring and/or controls to prevent malodors and opacity levels. The County’s procedural complaint that the Department processed Exide’s permit application in a way that prevented meaningful public review and comment regarding fugitive dust emissions may also benefit from further development of facts material to that issue. The County’s monitoring objections and the other issues not otherwise addressed in this opinion will either need to be explained further or involve genuinely disputed issues of material fact that preclude us from issuing summary judgment in favor of Exide.

For all of the foregoing reasons, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BERKS COUNTY

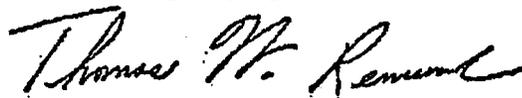
v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and EXIDE TECHNOLOGIES,
Permittee

EHB Docket No. 2010-166-L

ORDER

AND NOW, this 16th day of March, 2012, it is hereby ordered that Exide's motion for summary judgment is granted in part as set forth in the foregoing Opinion.



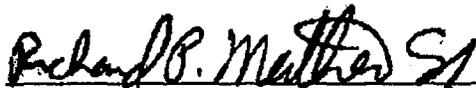
THOMAS W. RENWAND
Chief Judge and Chairman



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge



RICHARD P. MATHER, SR.
Judge

DATED: March 16, 2012

c: DEP Bureau of Litigation:
Glenda Davidson, Library

For the Commonwealth of PA, DEP:
Craig S. Lambeth, Esquire
Office of Chief Counsel – Southcentral Region

For Appellant:
Alexandra C. Chiaruttini, Esquire
STOCK AND LEADER
221 W. Philadelphia St.
Suite E600
York, PA 17401-2994

Paul M. Schmidt, Esquire
ZARWIN BAUM DEVITO KAPLAN
SCHAER & TODDY, PC
1818 Market Street, 13th Floor
Philadelphia, PA 19103

For Permittee:
Robert L. Collings, Esquire
SCHNADER HARRISON SEGAL & LEWIS
1600 Market Street, Suite 3600
Philadelphia, PA 19103

Allison R. Brown, Esquire
SCHNADER HARRISON SEGAL & LEWIS
120 Fifth Avenue Place, Suite 2700
Pittsburgh, PA 15222-3001



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BERKS COUNTY

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and EXIDE TECHNOLOGIES,
Permittee**

:
:
:
:
:
:
:
:
:
:

EHB Docket No. 2010-166-L

Issued: March 20, 2012

**OPINION AND ORDER ON
MOTION FOR RECONSIDERATION**

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies reconsideration of an order that denied a motion to compel because the Board’s inaccurate inference regarding the location where the samples sought in discovery were taken does not constitute an exceptional circumstance justifying reconsideration of an interlocutory order.

OPINION

Berks County filed a motion to compel more complete responses to its written discovery requests in this appeal from the Department of Environmental Protection’s renewal of Exide Technologies’ Title V operating permit. We denied the motion in an Opinion and Order dated February 27, 2012. Among other things, we held that the County had failed to show that it was entitled to “indoor air samples generated on an irregular basis by mobile equipment with regard to worker-safety issues.” (Slip op. at 3.) The County has now filed a motion asking us to reconsider that part of our Opinion and Order. It turns out that the mobile equipment generating the sampling data in question was used on Exide’s property to monitor outdoor air, not indoor

air, and the monitoring was not related to “worker-safety issues.”¹ Exide continues to insist that the information need not be produced.

Petitions for reconsideration of interlocutory orders are unnecessary and disfavored in most cases. *Perano v. DEP*, 2011 EHB 74, 75. Extraordinary circumstances must be present. 25 Pa. Code § 1021.151. Reconsideration is inappropriate for the vast majority of Board interlocutory rulings. *Id.* (citing 25 Pa. Code § 1021.151 (comment)). Parties requesting reconsideration of an interlocutory order such as our ruling on the County’s motion to compel must satisfy the criteria for reconsideration of a final order *and* demonstrate the existence of extraordinary circumstances which merit the Board taking the rare step of reconsidering an interlocutory order. *Id.* Petitions for reconsideration, even of final orders, will only be granted for “compelling and persuasive reasons,” which include the following:

- (1) The final order rests on a legal ground or a factual finding which has not been proposed by any party.
- (2) The crucial facts set forth in the petition:
 - (a) Are inconsistent with the findings of the Board
 - (b) Are such as would justify a reversal of the Board’s decision
 - (c) Could not have been presented earlier to the Board with the exercise of due diligence.

25 Pa. Code § 1021.152.

The County has not met its heavy burden in this case. We mentioned a number of concerns in our Opinion denying the County’s request for an order to compel: First, Exide could not be faulted for not producing the information because the County’s discovery requests did not

¹ The Board’s erroneous inference that the sampler in question was used indoors was based on the County’s motion, which said that the sampler was located “on the interior of Exide’s facility,” and Exide’s response, which said the sampler was used to measure samples “from an area within the workplace.” The Board, however, blames neither party for its mistaken inference.

clearly request the information. Exide served timely objections to the discovery, but the County did not follow up on its request until many months later, long after discovery closed, long after the County became aware of the sampler in question, long after expert reports had been exchanged, and shortly before pre-hearing memoranda were due. Furthermore, the County failed to explain why the sampling results were relevant or might have led to the discovery of relevant information. The County has failed to rectify these problems in its motion for reconsideration.

Initially, we should note that we are disinclined to do anything that will encourage petitions for reconsideration from discovery rulings. Parties need to understand that they are highly unlikely to get more than one chance to make their case on a motion to compel or a similar discovery dispute. Similarly, we want to do everything possible to encourage parties to resolve their discovery disputes without Board intervention whenever possible. It will be the rare case indeed where reconsideration of a discovery ruling will be justified or appropriate.

On an intuitive level we suspect that outdoor air samples, even if taken within the facility's fence line, are more likely to be relevant or at least calculated to lead to the discovery of relevant information than air samples taken indoors. However, Exide points out that the air pollution control program is largely concerned with air quality outside of the facility boundary. *See, e.g.*, 40 CFR § 50.1(e); 40 CFR part 58 App. D; 25 Pa. Code §§ 123.2, 123.31(b). The County does little to explain the possible relevance of the results. Indeed, it does not itself know if the information is relevant. It says that would be in a position to evaluate the data if produced "to determine whether each location may have produced data relevant to the fugitive emissions issue." This does not amount to a showing that the data clearly raises to the level of "crucial facts," as is necessary in the context of a motion for reconsideration.

Of perhaps greater concern, the County has offered no explanation for why it waited until

so late in the process to seek this information. The hearing in this appeal, which was filed in 2010, is now only weeks away. If the data in fact revealed relevant data, presumably the issue would be a matter of expert testimony. The expert reports, however, were exchanged weeks ago. We remain at a loss as to why the County did not pursue this issue in a more timely manner. The County has failed to satisfy the criterion for reconsideration that the facts in question "could not have been presented earlier to the Board with the exercise of due diligence." 25 Pa. Code § 1021.152(2)(c). In short, nothing in the County's motion justifies a reversal of our earlier decision.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BERKS COUNTY

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and EXIDE TECHNOLOGIES,
Permittee

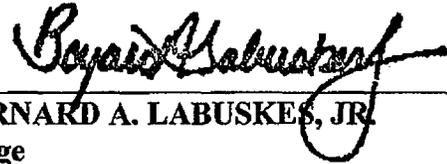
:
:
:
:
:
:
:
:
:
:
:

EHB Docket No. 2010-166-L

ORDER

AND NOW, this 20th day of March, 2012, it is hereby ordered that the County's motion for reconsideration is **denied**.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: March 20, 2012

c: DEP Bureau of Litigation:
Glenda Davidson, Library

For the Commonwealth of PA, DEP:
Craig S. Lambeth, Esquire
Office of Chief Counsel – Southcentral Region

For Appellant:
Alexandra C. Chiaruttini, Esquire
STOCK AND LEADER
221 W. Philadelphia St.
Suite E600
York, PA 17401-2994

Paul M. Schmidt, Esquire
ZARWIN BAUM DEVITO KAPLAN
SCHAER & TODDY, PC
1818 Market Street, 13th Floor
Philadelphia, PA 19103

For Permittee:
Robert L. Collings, Esquire
SCHNADER HARRISON SEGAL & LEWIS
1600 Market Street, Suite 3600
Philadelphia, PA 19103

Allison R. Brown, Esquire
SCHNADER HARRISON SEGAL & LEWIS
120 Fifth Avenue Place, Suite 2700
Pittsburgh, PA 15222-3001

This appeal has arisen out of these other matters. The core dispute between New Hanover Township and Gibraltar Rock is a controversy over whether the Township's zoning ordinance would allow Gibraltar Rock to mine the entire permitted area due to the zoning classification of its property. In light of this local zoning dispute, New Hanover Township brought an earlier appeal to the Board of Gibraltar Rock's NPDES permit renewal, asserting that the Department had a role in making sure that zoning issues are resolved before making such permitting decisions. In finding that New Hanover Township was asking the Board and Department to take a more active role in its dispute with Gibraltar Rock than it is either authorized or able to do, the Board dismissed the appeal. *See New Hanover Twp. v. DEP and Gibraltar Rock, Inc.*, EHB Docket No. 2010-063-M (Adjudication, September 19, 2011). These local zoning disputes have been pursued in other forums, however. Gibraltar Rock sought authorization from New Hanover Township's Zoning Hearing Board to mine the entire permitted site and obtained a special exemption to carry out part of its mining plans on a portion of the permitted site. In the meantime, Gibraltar Rock obtained three extensions from the regulatory deadline to activate its noncoal permit under 25 Pa. Code § 77.128(b). After the Department informed Gibraltar Rock that it would not grant a fourth extension because it had received the special exemption from the Zoning Hearing Board, Gibraltar Rock initiated work on-site to begin activating its permit. Shortly thereafter New Hanover Township obtained an injunction preventing further mining activities at the site from the Court of Common Pleas of Montgomery County. After the injunction was granted blocking Gibraltar Rock's efforts to begin operations, the Department granted Gibraltar Rock's request for a temporary cessation of mining. The Township has moved for summary judgment alleging that the Department exceeded its authority by granting the temporary cessation and the four subsequent renewals of this approval to

temporarily cease operations.

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*, 2008 EHB 325, 326; *Bertothy v. DEP*, 2007 EHB 254, 255. The granting of summary judgment is appropriate when a limited set of material facts are truly undisputed and the appeal presents a clear question of law. *Bertothy v. DEP*, 2007 EHB at 254, 255; *CAUSE v. DEP*, 2007 EHB 101, 106. When deciding summary judgment motions, the Board must view the record in the light most favorable to the nonmoving party and resolve all doubts as to the existence of a genuine issue of fact against the moving party. *Bethenergy Mines, Inc. v. Dept. of Environmental Protection*, 676 A.2d 711, 714 n.7 (Pa. Cmwlth.), *appeal denied*, 546 Pa. 668 (1996); *see also, e.g., Allegro Oil & Gas, Inc. v. DEP*, 1998 EHB 1162.

Before addressing the parties' arguments in detail, it is useful to examine the two provisions of law that the parties cite as dueling authority for the Department's action. The Department has statutory authority under subsection 3313(b) of the Pennsylvania Noncoal Surface Mining and Reclamation Act ("Noncoal Act") to approve a temporary cessation of an operation for a period not exceeding 90 days unless the cessation is due to seasonal shutdown. 52 P.S. § 3313(b); *see* 25 Pa. Code § 77.651 (regulatory authority which mirrors statutory authority). Subsection 3313(b) is however an exception to the "General rule" established in Subsection 3313(a) which requires:

Except with the express written approval of the Department as provided in subsection (b), the operator shall maintain mining and reclamation equipment on the site at all times, shall conduct an active operation and shall conduct surface mining operations on the site on a regular and continuous basis.

52 P.S. § 3313(a). Without a Department approved temporary cessation of operations, a noncoal surface mining operator is required to maintain mining and reclamation equipment on the site at

all times and shall conduct surface mining operations on the site on a regular and continuous basis. This provision, along with others such as the bonding requirements in 52 P.S. § 3309, are designed to prevent the abandonment of mining operations where there are outstanding reclamation obligations which the Commonwealth will be left to perform to avoid public health, safety, welfare and environmental problems. The general requirement to maintain equipment and to conduct operations on a regular and continuous basis helps to ensure that active operations remain active and do not end up abandoned. The authority to grant a limited temporary cessation is an exception that provides limited relief from this general requirement, and the limited or controlled duration of the exception reflects the overall intention to avoid having active mining operations with outstanding reclamation obligations slide into a state of abandonment. Section 3313 is the statutory provision the Township relies upon to support its motion for summary judgment.

The Department identifies a different legal requirement at 25 Pa. Code § 77.128(b). Under this provision a permit, which has terms established by 25 Pa. Code § 77.128(a), will terminate if the permittee has not begun the noncoal activities covered by the permit within 3 years of the date of issuance. This provision also authorizes the Department to grant reasonable extensions to the 3 year deadline for various reasons set forth in the regulation including the existence of litigation which precludes the commencement of operations. This provision requires that a permittee begin operations within a three year period from the date of permit issuance unless the Department allows an extension consistent with the regulatory standards.

To resolve the appeal that is currently before the Board, the Board will need to resolve the dispute between the Township and the Department over the authority the Department used for its action under appeal to either extend the duration of the Permit or to extend the duration of

the temporary cessation.

The Township's motion asserts that the Department's action granting the cessation of mining is directly contrary to law. It points out that the Noncoal Act limits the Department's authority to grant temporary cessations of mining as follows:

(b) APPLICATION FOR TEMPORARY CESSATION. --
Except as provided in subsection (c), the department may not approve the temporary cessation of an operation for a period exceeding 90 days unless the cessation is due to seasonal shutdown or labor strikes.

(c) OPERATIONS PRODUCING HIGHWAY OR
CONSTRUCTION AGGREGATES. --For operations producing highway or construction aggregates, where the temporary cessation is due to the absence of a current regional market for the mineral being mined, temporary cessation may not exceed five years.

52 P.S. § 3313(b) and 25 Pa. Code § 77.651. The parties readily agree that the reason that the Department allowed Gibraltar Rock to terminate its activities does not fall within a reason set out in the above section of the Noncoal Act. Rather, the Department, in November, 2010, granted a cessation of mining citing that it was "cognizant of Gibraltar Rock's current situation regarding an injunction." Exhibit E attached to the Township's Motion for Summary Judgment. Accordingly, the Township would have us grant summary judgment overturning the Department's decisions to grant the temporary cessations as exceeding the Department's authority under the Noncoal Act and its regulations.

The Department believes its action should not be so narrowly construed as an application of the section of the Noncoal Act cited by the Township. It asserts that in granting the "cessations" it was actually applying the criteria laid out in 25 Pa. Code § 77.128(b) which requires a permittee to begin the mining activities within three years of the permit's issuance except that:

[t]he Department may grant reasonable extensions of time for commencement of these activities upon receipt of a written statement showing that the extensions of time are necessary if litigation precludes the commencement or threatens substantial economic loss to the permittee or if there are conditions beyond the control and without the fault or negligence of the permittee.

25 Pa. Code § 77.128. At the same time, the Department readily admits that it has referred to these periods of permissible inactivity as “temporary cessations” and pointed at 52 P.S. § 3313 as the basis for its authority. *See* Exhibit E to Appellant’s motion for summary judgment.

The Department’s apparent confusion over the type of action it took and the legal authority it used further cloud the record before the Board. Before Gibraltar Rock tried to begin its permitted noncoal mining activities the Department previously granted reasonable extensions to Gibraltar Rock from the deadline in section 77.128(b). The Board will need additional evidence to evaluate the Department’s claim that it really used its authority in section 77.128(b) while describing it as an exercise of its authority in section 3313(b).

As a preliminary point, the issue of this appeal is not limited to whether section 3313 authorizes the Department’s action. Because of the nature of our review, the question is whether the Department’s decision to allow Gibraltar Rock to cease activities on its site without forfeiting its permit was lawful and reasonable as supported by the facts. *Wilson v. DEP*, 2010 EHB 827, 833. Our *de novo* review means we consider a case anew and we are not limited to deciding whether the Department followed the correct process in making its decision, rather that it arrived at the right conclusion. *Clean Air Council v. DEP and Markwest Liberty Midstream & Res. LLC*, 2011 EHB 834-35; *Smedley v. DEP*, 2001 EHB 131. As such, we are less concerned with procedural mistakes that the Department may have made on the way to its decision. *Giordano v. DEP*, 2001 EHB 713, 739.

As a consequence, it is appropriate for us to look beyond the question of whether the

Department has erroneously pointed to its authority under section 3313 and look at whether the Department's decision ought to stand under any facet of the Department's authority and discretion. To resolve this appeal the Board will first need to address two questions. First, what authority did the Department exercise in taking the action under appeal? Second, did the Department properly exercise the authority in taking the action under appeal? At this stage of litigation, the Board is unable to resolve the disputes among the parties to resolve either question.

The parties dispute the degree to which Gibraltar Rock has begun its noncoal mining activities. Gibraltar Rock offers, as part of its proposed supplemental statement of facts, that after it was cleared for additional work on the site, it would be able to "resume activating its Noncoal Permit." Permittee's brief in opposition to motion for summary judgment, p. 9, ¶ 18. The Township's reply brief asserts the permit was activated by Gibraltar Rock's efforts in August, 2009, and "[a]ny inference that activation of the Permit has occurred partially and must be 'resumed' is specifically denied." p. 3, ¶ 18. Although Gibraltar Rock and the Township agree that work has occurred on the site, including "installing erosion and sedimentation control measures, installing a driveway into [the] site, excavating the processing area, constructing sediment basins and stormwater management facilities and constructing berms[,]" the record does not contain enough information for the Board to determine the full extent of the work. Permittee's brief in opposition to motion for summary judgment, p. 6, ¶ 5.

To the extent that the question of whether the mining permit had been activated by Gibraltar Rock's efforts would determine the outcome of this appeal, we note that no party has filed legal argument on what standard should be used to determine whether a noncoal permit has been activated. Like all mining permits, Gibraltar Rock's permit requires a number of conditions precedent to the extraction of minerals at its permitted site. The Noncoal Act provides that an

active mine is “An operation where a minimum of 500 tons of minerals for commercial purposes have been removed in the preceding calendar year[,]” but it does not define when *activation* takes place, and we are not independently aware of an appropriate standard in case law. 52 P.S. § 3303. Therefore, even if there were no disputes of fact, the issues in this appeal are not clear as a matter of law at this point in litigation. *See Bertothy, 2007 EHB at 255.*

The two legal requirements under review in this appeal¹ establish the normal flow of the life of a noncoal mining permit. After a permit is issued a mine operator has 3 years to begin operations or the permit terminates. If the permittee begins noncoal mining activities then the operator must maintain equipment on the site and conduct operations on a regular and continuous basis until the mining and reclamation are completed. The Department has legal authority to grant relief from either of the legal requirements, and in most cases it is clear when an operator has begun noncoal mining activities and therefore moved onto the legal requirement where the operator must maintain active operations unless the Department grants a temporary cessation. In this case it is not clear.

In this case Gibraltar Rock tried to begin noncoal mining activities but the Township was successful in obtaining an injunction to stop Gibraltar Rock’s efforts. It appears that no regular and continuous noncoal mining activities are currently occurring on the permitted site, but the record before the Board is not clear about the status of Gibraltar Rock’s enjoined efforts to begin noncoal surface mining activities on the permitted site.

There is one final point to mention. A fundamental problem with the Township’s motion

¹ Section 77.128(b) provides that a permit will terminate if the Permittee has not begun mining activities within 3 years unless the Department grants a reasonable extension from this 3 year deadline. 25 Pa. Code § 77.128(b). Section 3313 provides that an operator must maintain equipment on a site and must conduct operations on a continuous and consistent basis unless the department approves a temporary cessation of operations for a limited period. 52 P.S. § 3313.

and the relief it requests under section 3313 is that if the Board grants its motion and overturns the latest renewal of temporary cessation, Gibraltar will be required by statute to maintain mining equipment on the site and to conduct surface mining operations on the site on a regular and continuous basis. The Board does not believe that this is the result that the Township desires, but it is the result typically mandated by the statutory provision that the Township relies upon. The Board will need a better developed record to determine how to apply this provision in this atypical situation, *if* the Board ultimately decides it is applicable here.

The limited record before the Board does not enable the Board to grant the Township's motion for summary judgment. A hearing will give the parties a full and fair opportunity to present evidence to address the outstanding factual and legal questions.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NEW HANOVER TOWNSHIP

v.

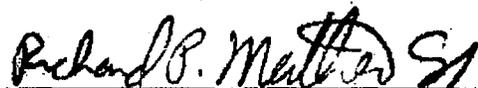
COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and GIBRALTAR ROCK, INC.,
Permittee

EHB Docket No. 2010-185-M
(Consolidated with 2011-083-M,
2011-121-M, 2011-171-M, and
2012-025-M)

ORDER

AND NOW, this 26th day of March, 2012, for the reasons set forth in the preceding opinion, it is hereby ordered that the Township's motion for summary judgment is **denied**.

ENVIRONMENTAL HEARING BOARD



RICHARD P. MATHER, SR.

Judge

DATED: March 26, 2012

c: DEP Bureau of Litigation:
Attn: Glenda Davidson - Library

For the Commonwealth of PA, DEP:
Craig Lambeth, Esquire
Office of Chief Counsel – Southcentral Region

For Appellant:
Wendy F. McKenna, Esquire
Robert L. Brant, Esquire
ROBERT L. BRANT & ASSOCIATES
P.O. Box 26865
Trappe, PA 19426

For Permittee:
Stephen Harris, Esquire
HARRIS AND HARRIS
1760 Bristol Road, P.O. Box 160
Warrington, PA 18976

Rausch Creek petitioned the Board to issue an order superseding the permit renewal, which we did after a two day supersedeas hearing and a view of the premises. Our order granting the supersedeas reads as follows:

1. Rausch Creek's petition for supersedeas is **granted**.
2. No ash may be brought onto the site from any source pending final adjudication of this appeal.
3. The Primrose Pit area may not be affected.
4. This order does not preclude Porter Associates from cleaning out the sediment ponds and sediment traps and ensuring that they are properly sized, maintained, and functioning in accordance with all applicable permit and regulatory requirements. Material removed from the ponds during cleaning may be placed at a location approved by the Department in advance.
5. Although the Board is receptive to moving forward on an expedited schedule, final adjudication may need to await resolution of the lease issue by the Court of Common Pleas.
6. This order does not preclude Porter from reasonably necessary reclamation and maintenance activities in accordance with permit and regulatory requirements as approved by the Department in advance.

(Opinion and Order, October 6, 2011)(emphasis in original).

On January 31, 2012, Rausch Creek filed a motion for contempt against the Department and Porter complaining of numerous alleged violations of the Board's supersedeas order of October 6, 2011. Rausch Creek asserts in its motion that the Department and Porter have taken advantage of the Board's supersedeas order. While our order allowed Porter to clean out and properly size sedimentation controls (§ 4) and otherwise perform reasonably necessary reclamation (§ 6), Rausch Creek asserts that Porter, with the Department's approval, is engaged in a major reconfiguration of the site. Rausch Creek is alarmed, for example, by the length and depth of an excavation on the north side of the site that it claims far exceeds a reasonable

interpretation of our order permitting cleaning out sedimentation controls and performing reasonably necessary reclamation.

The Department has filed a motion to strike Rausch Creek's motion for contempt. The Department argues that Rausch Creek is asking the Board for relief that it simply cannot grant. It says, for example, that the Board does not have contempt authority, we cannot issue a writ of mandamus, and we cannot grant injunctive relief. Porter joins in the motion. Rausch Creek responds that the Board does have the ability to, among other things, limit Paragraphs 4 and 6 of its order.

In consideration of Rausch Creek's motion for contempt and the Department's motion to strike, the Board scheduled a hearing to determine whether the Board should clarify or modify its supersedeas order. Rausch Creek then filed a motion for emergency relief, essentially arguing that Porter was doing so much work on the site in the short term that the hearing would be too late to do any good. Following a conference call held between the parties to discuss Rausch Creek's motion for emergency relief, we scheduled a site view and issued an order temporarily deleting Paragraphs 4 and 6 from our earlier supersedeas order pending the Board's hearing on Rausch Creek's motions.

Although inartfully pled, Rausch Creek's motions do include a request that we modify our supersedeas order. (*See, e.g.*, Rausch Creek's motion for emergency relief, ¶ 30; Rausch Creek's response to the Department's motion to strike, ¶¶ 5, 13.) We see this as a legitimate request, and one that is well within our authority to consider. Both Porter and the Department are relying on the terms of our supersedeas order to legitimize Porter's activities on the site. (*See, e.g.*, Porter's response to Rausch Creek's motion for contempt ¶¶ 4, 6, 7, 8, 10, 12, 25; Department's response to Rausch Creek's motion for emergency relief ¶¶ 4, 6, 8, 12, 15, 16-22,

28, 29, 31-33, 43, 44; Porter's response to Rausch Creek's motion for emergency relief ¶¶ 3, 5-7, 9-28, 31, 34, 37, 41, 42, 47.) We need to assess whether that reliance is appropriate. The extent to which our supersedeas order has caused confusion because the order itself expressly authorizes certain activity is a matter that we not only can address, but events have shown we should address.

To be clear, the point of examining the Department's and Porter's conduct in response to Rausch Creek's motions is not to determine whether they have "complied with" our order. That is a matter for a court to decide if Rausch Creek chooses to bring an enforcement action in a proper forum. Rather, the reason for examining the Department's and Porter's conduct is strictly limited to determining whether that conduct shows that our current order is in need of modification or clarification. To the extent Rausch Creek asks us to go beyond that, the Department's motion to strike is well-taken.¹

Accordingly, we issue the order that follows.

¹ The best solution might be for us to simply eliminate any express authorizations from the supersedeas order, which would leave the parties to argue before a court in an enforcement action what activity the law allows, i.e. make permanent the elimination of Paragraphs 4 and 6 in the order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RAUSCH CREEK LAND, LP

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and PORTER ASSOCIATES,
INC., Permittee

:
:
:
:
:
:
:
:
:
:
:

EHB Docket No. 2011-137-L

ORDER

AND NOW, this 27th day of March, 2012 it is hereby ordered that the Department's motion to strike is granted in part and denied in part in accordance with the foregoing Opinion.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: March 27, 2012

c: **DEP Litigation:**
Glenda Davidson, Library

For the Commonwealth of PA, DEP:
Robyn Katzman Bowman, Esquire
Stevan Kip Portman, Esquire
Office of Chief Counsel – Southcentral Region

For Appellant:
Charles B. Haws, Esquire
BARLEY SNYDER LLC
50 North Fifth Street
P.O. Box 942
Reading, PA 19603-0942

Dirk Berger, Esquire
LIPKIN, MARSHALL, BOHORAD & THORNBURG, P.C.
1940 West Norwegian Street
PO Box 1280
Pottsville, PA 17901

For Permittee:

Michael A. O'Pake, Esquire
409 West Market St.
Pottsville, PA 17901

Timothy Bergere, Esquire
MONTGOMERY, MCCRACKEN, WALKER & RHOADS, LLC
123 S. Broad St.
Avenue of the Arts
Philadelphia, PA 19109



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT CONCILUS AND LEAH HUMES :

v. :

**COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION and CRAWFORD :
RENEWABLE ENERGY, LLC, Permittee :**

EHB Docket No. 2011-167-R

Issued: March 27, 2012

**OPINION AND ORDER ON
MOTION TO DISMISS**

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis: The Pennsylvania Environmental Hearing Board refuses to dismiss a Notice of Appeal as to one of the Appellants where the Notice of Appeal was signed on his behalf by the other Appellant and before they were represented by counsel. The dismissal of the Appeal would be a severe and unjustified penalty unwarranted by the facts and the law. The Board encourages a resolution of cases on their merits.

Background: Presently before the Pennsylvania Environmental Hearing Board is Permittee Crawford Renewable Energy, LLC.'s Motion to Dismiss the Appeal of Appellant Robert Concilus because Mr. Concilus did not individually sign the Notice of Appeal but authorized Appellant Leah Humes to sign the Notice of Appeal for him. The two appellants were not represented by counsel at the time of the filing of the Notice of Appeal but since have retained counsel who has filed papers opposing the Motion on their behalf.

Crawford Renewable Energy argues that because Dr. Concilus did not personally sign the Notice of Appeal the Board lacks jurisdiction over the Appeal and Dr. Concilus should be dismissed as an Appellant. Permittee provides no case law addressing the signature issue and supporting this harsh interpretation of the law. Dr. Concilus' counsel argues that the physical signing of the Notice of Appeal by Ms. Humes at the direction of Dr. Concilus was in substantial compliance with our Rule.

The applicable Rule in question is 25 Pa. Code Section 1021.31 which states in relevant part:

- (a) Every Notice of Appeal, motion, legal document or other paper directed to the Board and every discovery request or response of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, or if a party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number.

25 Pa. Code Section 1021.31 (c) indicates that the Board may impose an appropriate sanction in accordance with Section 1021.161 (relating to sanctions) for a bad faith violation of this section.

Discussion: Our power to sanction a party for failure to abide by our Rules of Practice and Procedure is broad. However, as our Rules and our case law make perfectly clear technical violations of our Rules should be addressed in a way that insures the orderly progression of a case but does not result in the elevation of form over substance. Indeed, 25 Pa. Code Section 1021.4 provides that the Rules should "be liberally construed to secure the just, speedy and inexpensive determination of every appeal or proceeding in which they are applicable. The Board at every stage of an appeal or proceeding may

disregard any error or defect of procedure which does not affect the substantial rights of the parties.” Although the better practice would have been for each Appellant to personally sign the Notice of Appeal we see absolutely no prejudice to Crawford Renewable Energy by Ms. Humes signing on behalf of the other Appellant. Indeed, both Appellants are now represented by counsel who now signs filings on their behalf.

As we have said repeatedly and as recently as August of 2011, *see Consol Pennsylvania Coal Company v. Pennsylvania Department of Environmental Protection, Pennsylvania Department of Conservation & Natural Resources and Center for Coalfield Justice*, 2011 EHB 571, practice before the Pennsylvania Environmental Hearing Board is not a giant game of “gotcha.” Nor is it a legal minefield where a technical error or misstep will destroy a party’s case. We decide cases on their merits after a hearing. These due process protections extend to all parties. 2011 EHB at 576.

We will issue an Order denying Crawford Renewable Energy’s Motion to Dismiss.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT CONCILUS AND LEAH HUMES :

v. :

EHB Docket No. 2011-167-R

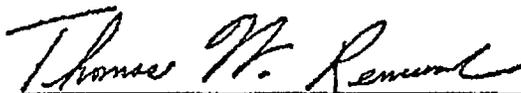
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION and CRAWFORD :
RENEWABLE ENERGY, LLC, Permittee :

ORDER

AND NOW, this 27th day of March, 2012, following review of the Motion to Dismiss and all the papers filed by the parties on this issue, it is ordered as follows:

- 1) The Motion to Dismiss is **denied**.
- 2) Counsel shall file a *joint status report* with the Board on or before **April 13, 2012** setting forth what discovery has occurred, what future discovery is planned, and may discuss any other issues they wish to bring to the Board's attention.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chief Judge and Chairman

DATED: March 27, 2012

c: DEP Bureau of Litigation:
Glenda Davidson, Library

For the Commonwealth of PA, DEP:

Douglas G. Moorhead, Esquire

Wendy Carson, Esquire

Office of Chief Counsel – Northwest Region

For Appellants:

Sanford Kelson, Esquire

8231 South Canal Road

Conneaut Lake, PA 16316

For Permittee:

Matthew L. Wolford, Esquire

638 West 6th Street

Erie, PA 16507



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT MORRIS

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and CUMBERLAND COAL
RESOURCES, L.P., Permittee**

EHB Docket No. 2011-041-R

Issued: April 5, 2012

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

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

Pursuant to 25 Pa. Code § 1021.94a(k) of the Environmental Hearing Board Rules of Practice and Procedure, summary judgment is entered against an appellant for failure to respond to a motion for summary judgment.

OPINION

This matter involves an appeal filed by Robert Morris, challenging a determination by the Department of Environmental Protection (Department) that underground bituminous coal mining activities conducted at the Cumberland Mine in March 1991 were not the cause of damage alleged to have occurred to property owned by Mr. Morris. According to affidavits filed in this matter, Mr. Morris filed a subsidence damage claim with the Department on January 20, 2011 in connection with alleged subsidence damage to property owned by him in Greene County, Pennsylvania. The alleged subsidence damage consists of slips and slides, which Mr. Morris

claims he first observed in July 2010. Mining at the Cumberland Mine took place under Mr. Morris' property in 1991 and concluded in March 1991. Cumberland is the current permittee of the Cumberland Mine, which it acquired in 1993. Cumberland is a successor to U.S. Steel Mining Company which owned and operated the Cumberland Mine prior to 1993. The Department investigated Mr. Morris' subsidence damage claim and issued a report in February 2011 concluding that underground mining was not the cause of the alleged subsidence damage to the Morris property. On March 25, 2011, Mr. Morris filed this appeal with the Pennsylvania Environmental Hearing Board (Board).

Before the Board is a motion for summary judgment filed by Cumberland, in which the Department joins. In its motion, Cumberland argues that, as the party bearing the burden of proof, Mr. Morris will need to present expert testimony to dispute the Department's finding that underground mining did not cause the alleged subsidence damage. Cumberland points out that the discovery period is closed and Mr. Morris has failed to disclose the names of any experts that he intends to have testify in his behalf. Mr. Morris filed no response to the motion.

Section 1021.94a(k) of the Board's Rules of Practice and Procedure states as follows:

(k) *Summary judgment.* When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading or its notice of appeal, but the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing there is a genuine issue for hearing. If the adverse party does not so respond, summary judgment may be entered against the adverse party. **Summary judgment may be entered against a party who fails to respond to a summary judgment motion.**

25 Pa. Code § 1021.94a(k) (emphasis added).

Based on Mr. Morris' failure to respond to the motion for summary judgment and to address the arguments raised by Cumberland, we find that Cumberland's motion should be granted and summary judgment entered against Mr. Morris.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT MORRIS

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and CUMBERLAND COAL
RESOURCES, L.P., Permittee

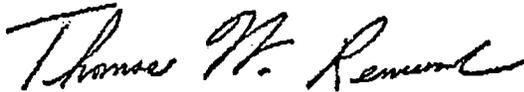
:
:
:
:
:
:
:

EHB Docket No. 2011-041-R

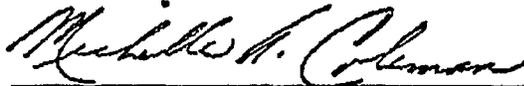
ORDER

AND NOW, this 5th day of April 2012, it is hereby **ORDERED** that the motion for summary judgment filed by Cumberland Coal Resources is granted and summary judgment is entered against the appellant, Robert Morris. This matter is marked closed and discontinued.

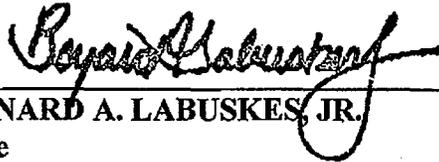
ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chief Judge and Chairman



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge



RICHARD P. MATHER, SR.
Judge

DATED: April 5, 2012

c: DEP, Bureau of Litigation:
Attention: Glenda Davidson, Library

For the Commonwealth of PA, DEP:
Barbara Grabowski, Esquire
Office of Chief Counsel - Southwest Region

For Appellant, *Pro Se*:
Robert Morris
118 Kiger Hill Road
Mt. Morris, PA 15349

For Permittee:
Thomas C. Reed, Esquire
Dinsmore & Shohl, L.L.P.
One Oxford Centre
301 Grant Street, Suite 2800
Pittsburgh, PA 15219



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROSEBUD MINING COMPANY

v.

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

:
:
:
:
:
:
:
:
:
:
:

**EHB Docket No. 2012-036-L
(Consolidated with 2012-038-L)**

Issued: April 6, 2012

**OPINION IN SUPPORT OF
ORDER DENYING SUPERSEDEAS**

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a petition for supersedeas because it is very unlikely that the petitioner will prevail on its theory that used belting constitutes "suitable insulating material" as that phrase is used in Section 304(b) of the Bituminous Coal Mine Safety Act.

OPINION

Rosebud Mining Company filed these consolidated appeals from two nearly identical compliance orders issued by the Department of Environmental Protection, which require Rosebud to replace the used mine belting that it is currently using to protect personnel from electrical shock when operating switches and controls with insulating material that has the proper voltage rating. Due to the short deadlines for compliance set forth in the orders, Rosebud filed a petition for supersedeas. We held a hearing on Rosebud's petition on March 20, 2012. At the conclusion of Rosebud's case in chief, the Department asked us to deny Rosebud's petition for failure to show grounds sufficient for the granting of a supersedeas. We granted the Department's motion and denied Rosebud's petition in a ruling issued from the bench. The

purpose of this opinion is to explain why.

The Department's orders are based on Section 304(b) of the Bituminous Coal Mine Safety Act, 52 P.S. § 690-304(b), which provides in the pertinent part that "[m]ats of rubber, insulated platform or *other suitable insulating materials* shall be provided at all stationary transformers, rectifiers, motors and generators and their controls, except portable and mobile equipment." (Emphasis added.) The issue in this case is whether the used belting material that Rosebud has used for decades at its mines as an insulating material does in fact qualify as "other suitable insulating materials" as that key phrase is used in Section 304(b).

Both Rosebud's experienced maintenance shop superintendent and its well-qualified expert witness on coal mine electrical systems acknowledged that belting material is actually a semiconductor. Therefore, by definition, it is not an "insulating material." The superintendent testified as follows:

- Q. Now, it is possible for conveyor belts to build up static electricity; isn't that right?
- A. Yes, ma'am.
- Q. And if static electricity threw a spark, it could start a fire?
- A. Yes, ma'am.
- Q. So, conveyor belts are, by design, made to dissipate electricity; isn't that right?
- A. Yes.
- Q. They are by definition semiconductive; isn't that right?
- A. Yes.
- Q. And semiconductive means it is not insulating; isn't that right?
- A. Right.
- Q. Further, as a conveyor belt is used, coal fines become embedded in the conveyor belting?
- A. Yes, ma'am.
- Q. And coal fines are conductive, aren't they?
- A. Yes, they are.

(Notes of Transcript page ("T.") 35. Similarly, Rosebud's the expert testified as follows:

- Q. Would you consider belting an insulating material?
- A. Yes and no. Belting is like we stated before is a semiconductor. A

semiconductor is just what it says it is, that sometimes it is a conductor. Sometimes it isn't, okay? And the type – whichever type of semiconductor it could be, it could be either way. In other words, at higher voltages, it may become a conductor okay? At lower voltages, it may be an insulator.

(T. 61-62.) Based upon these very clear concessions, it seems obvious that Rosebud has a very low likelihood of success on the merits.¹ Belting material cannot be a “suitable insulating material” because it is not even an insulating material.

Rosebud argues that it has used belting for this purpose for decades and the Department never complained before. Of course, this proves nothing. Rosebud's expert testified that safety standards for electrical equipment have evolved greatly over the years.² Advancements in miner safety are to be encouraged, not thwarted by assertions that the status quo is good enough. Prior lack of enforcement does not prevent belated enforcement of a clear statutory requirement. *See Chester Extended Care Center v. DPW*, 586 A.2d 379 (Pa. 1991); *DER v. Philadelphia Suburban Water Co.*, 581 A.2d 984, 990 (Pa. Cmwlth. 1990); *Rhodes v. DEP*, 2009 EHB 599, 614 (government may not be estopped by its prior inactivity from enforcing public health and safety laws).

Rosebud also argued that no one as of yet has been shocked or killed at any of its mines due to the use of belting material. This is indeed fortunate, but it is the weakest of arguments in our view. It certainly does not compel us to ignore a clear statutory requirement, even if such an argument had merit.

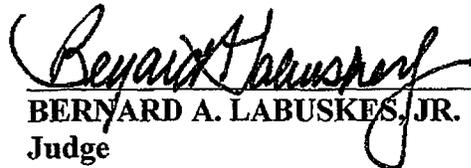
¹ The standards for granting petitions for supersedeas are set forth in Section 4(d)(1) and (2) of the Environmental Hearing Board Act, 35 P.S. § 7514(d)(1) and (2), and Board Rule 1021.63(a), 25 Pa. Code § 1021.63(a). *Tinicum Township v. DEP*, 2002 EHB 822; *Global Eco-Logical Services, Inc. v. DEP*, 1999 EHB 93. Basically, we balance the likelihood of injury to the parties and the public and assess the likelihood of success on the merits. The petitioner bears the burden of proof. *Pennsylvania Fish & Boat Commission v. DEP*, 2004 EHB 473.

² “Q. Electrical safety standards in coal mining have changed over your career, haven't they? A. Oh, my goodness, yes.” (T. 65.)

Rosebud's expert argued that no insulating material should be required at all; that personnel are actually safest when standing on conducting metal plates when in contact with a grounded system. There are two problems with this argument. First, the argument goes to the merit of the law itself and, therefore, needs to be made to the Legislature, not us. The law as written unambiguously requires "insulating material." 52 P.S. § 690-304(b). Furthermore, we cannot help noting that, if the expert is correct, belting would seem to provide the worst of both worlds: it is neither a reliable conductor nor a good insulator.

Finally, Rosebud argues that federal mine inspectors have not required Rosebud to stop using belting as an insulator. Our responsibility is not to compare state and federal laws. *See UMW v. DEP*, 2001 EHB 1040. Rosebud has not drawn our attention to any provision of the Pennsylvania Mine Safety Act that says that the statute is to be implemented in a manner that is no more stringent than comparable federal requirements. It is not uncommon for federal and state mine safety laws to differ somewhat. *See, e.g., ibid.* This Board's responsibility is to apply state law and, in this case, it is highly likely that we will ultimately find that Rosebud is violating that law. Accordingly, we are likely to find that the Department's orders are lawful and reasonable. In light of Rosebud's exceedingly low likelihood of success on the merits, it is not necessary for us to address the other supersedeas criteria.

ENVIRONMENTAL HEARING BOARD


BERNARD A. LABUSKES, JR.
Judge

DATED: April 6, 2012

c: DEP Bureau of Litigation:
Glenda Davidson, Library

For the Commonwealth of PA, DEP:
Mary Martha Truschel, Esquire
Office of Chief Counsel – Southwest Region

For Appellant:
Joseph A. Yuhas, Esquire
Benjamin Stock, Esquire
PO Box 1025
Northern Cambria, PA 15714



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

v.

**WHITE OAK RESERVE LIMITED
PARTNERSHIP & ELG INC.
GENERAL PARTNER, VANGUARD
DEVELOPMENT CORPORATION, EDWIN
L. GLASGOW, PRESIDENT**

EHB Docket No. 2011-060-CP-L

Issued: April 10, 2012

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

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board grants the Department’s motion for default judgment because the Defendants failed to answer the Department’s complaint for civil penalties. The Board assesses a civil penalty in the amount requested in the Department’s complaint.

OPINION

On April 22, 2011, the Department of Environmental Protection (the “Department”) filed a complaint for assessment of civil penalties against the following parties: “White Oak Reserve Limited Partnership & ELG Inc., General Partner, Vanguard Development Corporation, and Edwin L. Glasgow, President” (the “Defendants”) for violations of the Clean Streams Law, 35 P.S. § 691.1 *et seq.*, the Dam Safety and Encroachments Act, 52 P.S. §§ 693.1 *et seq.*, and the regulations promulgated thereunder that are alleged to have occurred at the Granite Ridge

Residential Development located in Fairview Township, York County. There was no activity on the docket of this case after the filing of the initial complaint until June 7, 2011, when the Department filed a revised complaint, which included a notice to defend. Then, on September 19, 2011, again after there had been no docket activity, the Board ordered the Department to file a status report. The Department's October 2011 status report informed the Board that the Department had failed to comply with 25 Pa. Code § 1021.71(b), which required the Department to serve the complaint by personal service, certified mail, or registered mail, and that the Department had also discovered that "the parties moved to a nearby address and the Department was not aware of the change of address." The Department assured the Board that it would correctly serve the Defendants, and the Board ordered the Department to file additional status reports on its progress. On January 5, 2012, the Department filed a status report informing the Board that it had properly served the complaint on October 26, 2011. The Defendants have never filed an answer or any other form of response to the Department's complaint.

On January 12, 2012, the Department filed another status report, this time informing the Board that it served the Defendants with a notice of praecipe of entry of default judgment. The praecipe informed the Defendants that they had failed to take action to defend against the complaint and had ten days to act or judgment might be entered against them. On January 30, 2012, the Department filed a motion for entry of default judgment. Before the Board ruled on its motion, the Department withdrew the motion, and on February 16, 2012, filed a revised motion for entry of default judgment. The Defendants have not filed an answer or any response to the Department's notice or its motion for default judgment.

Our Rules provide that answers to complaints shall be filed with the Board within 30 days after the date of service of the complaint. 25 Pa. Code § 1021.74. Where a defendant fails

to file an answer to a complaint, a plaintiff may file a motion for entry of default judgment with the Board pursuant to 25 Pa. Code § 1021.76a. *DEP v. Wolf*, 2010 EHB 611, 613. Since the adoption of 25 Pa. Code § 1021.76a in October 2009, the Board has been explicitly authorized to “assess civil penalties in the amount of the plaintiff’s claim” when the Board enters default judgment in a matter involving a complaint for civil penalties. *Wolf*, 2010 at 614-15.

The record shows that, although the Department has filed and served its complaint, provided the Defendants with a notice to defend, provided the Defendants with copies of its status reports, provided the Defendants with notice that the Department intended to seek an entry of default judgment, and moved for default judgment, the Defendants have failed to file anything in this case over the course of nearly a year. The Defendants have had numerous opportunities to defend against the complaint and to participate in proceedings before the Board but have chosen not to do so. Therefore, by operation of the rule, the Board grants the Department’s motion and assesses civil penalties in the amount of the Department’s claim as set forth in its complaint¹ of \$16,600.

Accordingly, we enter the Order that follows.

¹ The Department’s motion for entry of default judgment asks us to assess \$19,600, which is \$3,000 more than it asked for in its complaint. It does not explain why. We will limit our assessment to the civil penalties originally sought in the Department’s complaint in accordance with 25 Pa. Code § 1021.76a(d).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :

v. :

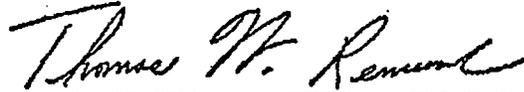
EHB Docket No. 2011-060-CP-L

WHITE OAK RESERVE LIMITED :
PARTNERSHIP & ELG INC. :
GENERAL PARTNER, VANGUARD :
DEVELOPMENT CORPORATION, EDWIN :
L. GLASGOW, PRESIDENT :

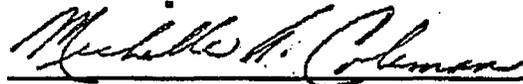
ORDER

AND NOW, this 10th day of April, 2012, it is hereby ordered that the Department's motion for entry of default judgment is **granted**. The Board assesses a civil penalty against the Defendants in the amount of \$16,600.

ENVIRONMENTAL HEARING BOARD



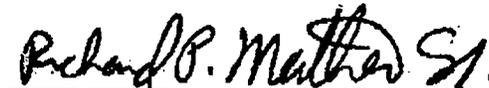
THOMAS W. RENWAND
Chairman and Chief Judge



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge



RICHARD P. MATHER, SR.
Judge

DATED: April 10, 2012

c: DEP, Bureau of Litigation:
Attention: Glenda Davidson, Library

For the Commonwealth of PA, DEP:
Susana Cortina de Cardenas, Esquire
Office of Chief Counsel – Southcentral Region

For Defendants, *Pro Se*:
White Oak Reserve Limited Partnership
ELG, Inc., General Partner
2214 Market Street
Camp Hill, PA 17011-4624

Vanguard Development Corporation
Edwin Glasgow
2214 Market Street
Camp Hill, PA 17011

Interrogatories, First Request for Production of Documents and Expert Interrogatories within 15 days from the date of this Order. . . [and the] statements set forth in the Department's request for admissions served by the Department on October 19, 2011 are deemed admitted.

Order, January 31, 2012. Klecha never responded to the Department's discovery requests as ordered by the Board.

On March 9, 2012 the Department filed this motion to preclude the Defendant from introducing evidence at the hearing that the Department sought in discovery, as well precluding expert testimony on the Defendant's behalf. The Department asserts that it is prejudiced in preparing its case without its requested discovery from Klecha and his basis for defenses. Klecha never filed a response to the motion.

Section 1021.161 of the Board's Rules authorize the imposition of sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. 25 Pa. Code § 1021.161; *Smith v. DEP*, 2010 EHB 547; *DEP v. Tate*, 2009 EHB 295; *Swistock v. DEP*, 2006 EHB 398; *Kennedy v. DEP*, 2006 EHB 477. The sanctions may include "dismissing an appeal, entering adjudication against the offending party, precluding the introduction of evidence or documents not disclosed, barring the use of witnesses not disclosed or other appropriate sanctions including those permitted under Pa. Rule of Civil Procedure 4019 (relating to sanctions regarding discovery matters)." 25 Pa. Code § 1021.161.

The Department cited *Kochems v. DEP*, 1997 EHB 422, in its motion for sanctions. In *Kochems* the Permittee filed a motion for discovery sanctions alleging that interrogatories and notices of depositions were served upon the Appellants and they failed to fully complete the requests within the required time. The Appellants did not respond to the Permittee's discovery motion for sanctions. The Board issued an opinion and order granting sanctions against the

Appellants precluding them from introducing any evidence at the hearing relating to the matters sought in discovery. Specifically, the Board stated:

Appellants' failure to respond to the discovery requests warrants precluding them from introducing evidence on matters covered in those requests. Section 1021.111(a) of the Board's Rules, 25 Pa. Code § 1021.1119a), provides that discovery proceedings before the Board shall be governed by the Pennsylvania Rules of Civil Procedure. Under the Rules of Civil Procedure, parties must respond to interrogatories and requests for the production of documents within 30 days. *See* Pa.R.C.P. 4006 (interrogatories) and 4009 (requests for production of documents). Appellants failed, however, to file response or objections to either of Permittee's discovery requests. Ordinarily, the Board is reluctant to impose discovery sanctions unless a party defies an order compelling discovery. *See, e.g., Griffin v. Tedesco*, 513 A.2d 1020, 1024 (Pa. Super 1986); *DER v. Chapin & Chapin*, 1992 EHB 751; *Eastern Consolidation & Distribution Service v. DEP*, 1996 EHB 1093. However, we have also held that discovery sanctions can be appropriate even absent an order to compel; the sanction need only be reasonable given the severity of the violation. *Weist v. Atlantic Richefield Co.*, 543 A.2d 142 (Pa. Super 1988); *DER v. Chapin & Chapin*, 1992 EHB 751.

Kochems v. DEP, 1997 EHB 422, 424; *aff'd* 701 A.2d 281 (Pa. Cmwlth. 1997); *see also DEP v. D.B. Enterprise Developers & Builders, Inc.*, 2009 EHB 278; *Swistock v. DEP*, 2006 EHB 398; *Kennedy v. DEP*, 2006 EHB 477; *Potts Contracting v. DEP*, 1999 EHB 958; *Recreation Realty, Inc. v. DEP*, 1999 EHB 697.

Under the circumstances of this case, the Board has no difficulty granting the Department's motion. Klecha has completely failed to provide responses to the Department's discovery requests, failed to file a response to the Department's motion to compel, failed to comply with the Board's order to provide the requested information sought in discovery and has failed to respond to the motion for sanctions now before the Board. It is appropriate in this case to grant the Department's motion for sanctions against Klecha who has completely ignored the

Board's rules and orders. His refusal to provide the information the Department requested during discovery prejudices the Department's case, thus pursuant to Section 1021.161 Klecha is precluded from introducing any evidence at hearing regarding the matters the Department sought in discovery and is precluded from providing any expert testimony at the hearing.

We enter the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

v.

MIECZYSLAW KLECHA

EHB Docket No. 2011-021-CP-C

ORDER

AND NOW, this 11th day of April, 2012, it is hereby ordered that the Department's unopposed Motion for Sanctions is **granted** and the Defendant is precluded from introducing any evidence at the hearing regarding matters on which the Department sought discovery including the preclusion of any expert testimony on Defendant's behalf.

ENVIRONMENTAL HEARING BOARD



MICHELLE A. COLEMAN
Judge

DATED: April 11, 2012

c: DEP, Bureau of Litigation:
Attention: Glenda Davidson, Library

For the Commonwealth of PA, DEP:
Joseph S. Cigan, III, Esquire
Office of Chief Counsel – Northeast Region

For Defendant:
Wieslaw T. Niemoczynski, Esquire
752 Main St., PO Box 727
Stroudsburg, PA 18360



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GREIF PACKAGING, LLC

v.

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

:
:
:
:
:
:
:
:
:
:

**EHB Docket No. 2012-023-L
(Consolidated with 2012-042-L)**

Issued: April 12, 2012

**OPINION IN SUPPORT OF ORDER
DENYING PETITION FOR SUPERSEDEAS**

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a petition for supersedeas because a permittee is not likely to prevail on its claim that it should be able to disregard both its existing permit and an order enforcing that permit because it has filed an appeal from an unsuccessful attempt to modify the permit.

OPINION

Greif Packaging, LLC operates a steel drum manufacturing plant in Warminster, Bucks County. Greif manufactures 55-gallon drums from sheet metal. The Department of Environmental Protection issued Plan Approval No. 09-0053 to Greif's predecessor in 1999.

The plan approval included a condition that read as follows:

The volatile organic compound ("VOC") emissions from the spray booth covered under this Plan Approval shall be controlled by the existing Ross Waldron Model R.I. 3000 thermal incinerator. This incinerator shall have a minimum capture and destruction efficiency of 96 percent.

The requirement to have a minimum capture and destruction efficiency of 96 percent for VOCs emitted from the regenerative thermal oxidizer (RTO) at the plant was incorporated into Greif's operating permit. The current permit (Air Quality Synthetic Minor Operating Permit No. 09-

0053), issued on August 18, 2008 and good through August 18, 2013, contains the following condition:

The permittee shall ensure that this RTO achieves a minimum overall VOC control efficiency (i.e. capture efficiency multiplied by destruction efficiency) of 96 percent.

(Section D, Source C05, Condition 003.)

In the summer of 2009, Greif changed its emission capture system. Greif discontinued operating as a permanent total enclosure (PTE) and instead added exhaust hoods and sides to enclose the conveyor system that transports drums throughout the plant. Greif did not seek or obtain a plan approval or permit modification from the Department authorizing the change. Greif did not submit a request for determination (RFD) to the Department asking for a determination of whether a plan approval was required to make the change to its capture system. It did not notify the Department of the change. When the Department found out about the change it issued a Notice of Violation (NOV) to Greif. The change remains in place to this day and has never been approved.

Stack testing has shown that Greif has not met the 96 percent requirement since it made the change to its capture system. Emission testing in September 2009 and April 2011 indicated overall RTO capture/control efficiencies of 88.73 and 87.7 percent, respectively.

In 2010, Greif belatedly submitted a plan approval application for the change that it made to its capture system. After a lengthy series of meetings, discussions, and application revisions, the Department denied the application on January 13, 2012. Greif filed the appeal that is docketed at EHB Docket No. 2012-023-L from the denial of its after-the-fact application for a plan approval. Greif's permit as unmodified remains in effect.

On February 14, 2012, the Department issued an air pollution abatement order to Greif.

The order is rather lengthy, but the key requirement that is central to the dispute for our immediate purpose is the requirement that “[w]ithin sixty (60) calendar days of this Air Pollution Abatement Order, Greif shall comply with a 96 percent overall VOC control efficiency.” Greif appealed the order (EHB Docket No. 2012-042-L), and filed a petition for supersedeas asking us to, among other things, stay the 96 percent requirement reflected in the order pending resolution of its related appeal from the denial of its plan approval. The Department filed a motion asking us to deny the petition without a hearing, which we effectively denied when we held a hearing on the supersedeas petition on April 3 and 4. At the conclusion of the hearing we denied Greif’s petition for supersedeas in a ruling issued from the bench. The purpose of this opinion is to memorialize that ruling.¹

There is no legitimate dispute that Greif is violating its current permit by failing to achieve 96 percent control efficiency. Greif’s defense, boiled down to its essence, is that it should not be required to comply with its permit because it applied for modification of that permit.² To be precise, Greif applied for modification, had the application denied, and filed an appeal before this Board from the denial. That appeal is still pending.

Greif’s argument, of course, lacks merit. It should be obvious that a permittee is required to comply with its permit. 35 P.S. § 4008; 25 Pa. Code § 127.444. A permittee must comply with the permit unless and until it is modified. Merely applying for a modification does not excuse a permittee from compliance unless and until the modification is approved. Filing an

¹ The standards for granting petitions for supersedeas are set forth in Section 4(d)(1) and (2) of the Environmental Hearing Board Act, 35 P.S. § 7514(d)(1) and (2), and Board Rule 1021.63(a), 25 Pa. Code § 1021.63(a). *Tinicum Township v. DEP*, 2002 EHB 822; *Global Eco-Logical Services, Inc. v. DEP*, 1999 EHB 93. Basically, we balance the likelihood of injury to the parties and the public and assess the likelihood of success on the merits. The petitioner bears the burden of proof. *Pennsylvania Fish & Boat Commission v. DEP*, 2004 EHB 473.

² We use the term “modification” to encompass the process of obtaining a plan approval and/or modification authorizing a change in operations.

appeal from the denial of an application for a modification does not change that basic concept. A permittee is not excused from complying with its permit because it has an appeal pending from the denial of its application to modify that permit.

Greif argues that its modification request is meritorious, and it has attempted at length in this proceeding to explain why. It has argued, for example, that the 96 percent requirement in its current permit is unfair and unrealistic given the age of its RTO. It argues that other changes at the facility have overshadowed the 96 percent requirement to the point that the requirement no longer makes sense. It has argued that the Department erred in applying legal requirements such as the New Source Review (NSR) requirements in denying its modification request. However, none of these various iterations of the argument that its permit should have been modified have a place in *this* appeal. The merits of the modification request are entirely irrelevant in this appeal. It does not matter whether the request had merit or not. Even if a modification request is meritorious, the permittee is required to comply with its permit unless and until the meritorious request is approved. And Greif's appeal *from the order* is simply not an appropriate vehicle for mounting a collateral attack against either the existing permit or the Department's denial of Greif's request to modify that permit. *See Carroll Township v. DER*, 409 A.2d 1378 (Pa. Cmwlth. 1980); *Northampton Township v. DEP*, 2010 EHB 707 and 2008 EHB 473 and 563; *Winegardner v. DEP*, 2002 EHB 790.

That is not to say that there is nothing that Greif can appeal regarding the order, as distinct from the underlying permit or the attempt to modify that permit. Greif is entitled to argue in the appeal from the order, and commensurately, Greif's petition for supersedeas, issues specific to the order itself. Greif may challenge, for example, the finding in the order that Greif has violated its permit. As previously noted, however, the supersedeas record does not show that

there is any serious dispute that Greif is violating the 96 percent requirement in its permit. (*See, e.g.,* Pet. Ex. 6.)

The only viable issue that we discern that is specific to the order itself is the Department's 60-day deadline for Greif achieving compliance with the 96 percent requirement. In light of the evidence and argument elicited at the supersedeas hearing, Greif has failed to show that it is likely to succeed on the merits of its claim that the 60-day deadline in the order is unlawful or unreasonable. Arguably, 60 days is too generous given Greif's protracted violation over the course of years of a condition that has been in place since at least 1999. Furthermore, the Department presented credible evidence that Greif would likely be able to return to compliance in one day if it simply returned to a PTE.

Greif contended at the hearing, largely through the testimony of its expert on industrial hygiene, that returning the facility to a PTE would have a detrimental effect on workers in the plant. We find that opinion to be less persuasive than it otherwise might have been because it was largely based on unsubstantiated hearsay. No workers, or for that matter anyone from the plant, testified. There is no evidence of pertinent worker complaints, or complaints from regulatory authorities responsible for worker health or safety. There is no proof that operating as a PTE would result in exceedances of any OSHA permissible exposure limits. Greif operated as a PTE for as many as twenty years using coatings with higher VOC content than the coatings it is using now. The expert also opined that returning to a PTE might actually reduce the RTO's effectiveness, but actual test results have shown that, when Greif operated as a PTE, it complied with its permit; when Greif stopped operating as a PTE, it has consistently failed to comply with its permit.

The Department also presented evidence that other measures, including but not limited to

better operating practices and/or increasing the average exit gas temperature from the RTO, might have helped Greif achieve compliance within the time allotted in the order. Greif's response is basically that such measures probably would not be sufficient. Greif's failure to pursue such options not only goes to its challenge to the 60-day requirement on the merits, it goes to its claim that it faces irreparable harm as a result of the order. We have limited sympathy in the context of a supersedeas petition for parties who do not even try their best to lessen whatever irreparable harm they might otherwise suffer pending a hearing on the merits. *See, e.g., Carter v. DEP*, EHB Docket No. 2011-003-L (December 9, 2011). We would add that any harm being suffered by Greif as a result of the order appears to stem directly from its decision to make significant changes to its capture system in 2009 without seeking a plan approval or at least submitting a request for determination (RFD) seeking a ruling on whether such a plan approval was required. Irreparable harm to a petitioner is much less compelling when it is caused in substantial part by the petitioner itself, in this case as a result of activity that was probably illegal. *See, Ibid; Kennedy v. DEP*, 2008 EHB 423, 425; *UMCO Energy Inc. v. DEP*, 2004 EHB 797, 819.

We also consider likelihood of injury to the public when evaluating a supersedeas petition. Greif says that is emitting less VOCs now because, although it is violating its permit, it is also using lower VOC content coatings. It says its emissions are less than when it used higher VOC content coatings and complied with its permit. We are not sure this is the appropriate comparison to make. Greif does not get to violate its permit because it has changed its coatings. The better comparison would seem to be whether the likelihood of harm to the public will be greater or less *if a supersedeas is issued*. A supersedeas here would entitle Greif to continue to violate its permit and achieve only the 88 percent destruction efficiency that it is currently

achieving. If Greif were to continue to use lower VOC content coatings *and* comply with its permit by achieving 96 percent efficiency because no supersedeas is issued, VOC emissions would presumably be even lower, thereby resulting in a further reduction of injury to the public. All other things being equal, issuance of a supersedeas would do more harm than good.

Greif complains that the Department's unnatural and irrational fixation on the 96 percent requirement is causing it to ignore the fact that the plant's emissions have improved over the years. Of course, this goes to the merits of the 96 percent requirement, which is outside the scope of this appeal. But putting that aside, we cannot disagree that the air program is characterized by often excruciatingly complex, overlapping federal, state, and local rules, regulations, and requirements that can be difficult to comprehend and that may sometimes seem to be divorced from reality. However, some rationality is brought to the process by the permitting requirement. Permits are the linchpin that holds it all together. Compliance with permits is critical. Greif's petition flies in the face of that fundamental principle by asking us to in effect supersede an administratively final permit in the context of an appeal from an order that does nothing more than require compliance with that permit. This we will not do. That, together with our consideration of the other criteria, is why we denied Greif's petition. (Notes of Transcript pp. 381-91.)

ENVIRONMENTAL HEARING BOARD


BERNARD A. LABUSKES, JR.
Judge

DATED: April 12, 2012

**c: DEP Bureau of Litigation:
Glenda Davidson, Library**

For the Commonwealth of PA, DEP:
Douglas White, Esquire
Office of Chief Counsel – Southeast Region

For Appellant:
Philip Hinerman, Esquire
Julie D. Goldstein, Esquire
FOX ROTHSCHILD LLP
2000 Market Street, 20th Floor
Philadelphia, PA 19103-3222

Thomas W. Dimond, Esquire
ICE MILLER LLC
200 W. Madison Street, Suite 3500
Chicago, IL 60606-3417



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

v.

GEORGE AND SHIRLEY STAMBAUGH

:
:
:
:
:
:
:
:

EHB Docket No. 2008-146-CP-C

Issued: April 18, 2012

ADJUDICATION FOLLOWING REMAND

By Michelle A. Coleman, Judge

Synopsis:

The Commonwealth Court has remanded this matter with specific instructions that the Board address the mitigating factors offered by the Appellants on appeal and to reconsider the assessed civil penalties of \$18,197 in light of the reasons proffered. In the Board's original Adjudication it found the Stambaughs reckless in constructing a silo trench on their property without a liner rendering two neighbors' drinking wells unpotable and in need of a replacement water supply. After further review we find the record supports that the Stambaughs were negligent and will reduce the penalty based on their culpability. However, the Board still maintains that the Stambaughs were reckless in failing to remove the silage and repair the trench as ordered by the Department while knowing that their actions were the source of pollution to their neighbors' wells. Lastly, the Board finds that the Stambaughs were late in filing both their nutrient management plan and erosion and sedimentation plan as ordered by the Department. Revised penalties reflect the reduced culpability and sluggish response to the Department's order.

In total, the civil penalty assessed is \$13,884.

ADDITIONAL FINDINGS OF FACT

1. The Stambaughs did not put a liner or concrete floor in the silage trench they constructed on their property 90 feet from neighbors' drinking water wells. (N.T. 30, 106, 134-35)

2. Mr. Stambaugh testified that a contractor dug the trench on the Stambaughs' property. (N.T. 137-38)

3. No evidence was offered by the Stambaughs regarding a contractor that they hired to dig the trench.

4. Mr. Stambaugh testified that he told the Department he would remove the trench within two weeks but delayed the removal because there was bad weather and the trench was located in a field with a natural waterway with no good driveway to access the trench. (N.T.108-09)

5. Mr. Stambaugh testified that they had a house fire three months prior to February 2006 which created difficulty in finding someone to prepare a nutrient management plan as ordered by the Department. (N.T. 110)

6. The Department's suggested civil penalty for the failure to submit a plan and schedule for the temporary and permanent storage of silage, a nutrient management plan and an erosion and sedimentation plan was calculated from November 19, 2005 (plan and schedule for storage of the silage) and December 4, 2005 (nutrient management plan and erosion and sedimentation plan) until the filing of the complaint on April 24, 2008. (N.T. 36-38)

7. Mr. Stambaugh had submitted plans in the past, specifically for the year 2001, and testified that the plans were to be updated every three years and it was time again to update his

plan from 2001. (N.T. 114)

8. The Stambaughs did not submit any plans until July 23, 2007. (N.T. 166-67)

9. Mr. Stambaugh, himself, testified that he did not sign the July 23, 2007 submission knowing it was wrong yet submitted it anyway. (N.T. 166-71)

10. A plan was not submitted and approved until January of 2009. (N.T. 12, 37, 123, 132)

11. The Board issued an Order dated March 20, 2012 providing an opportunity for the parties to file additional briefs in light of the Commonwealth Court's remand. The parties chose not to provide any additional briefing to the Board.

BACKGROUND

Before the Board is a remand from the Commonwealth Court of Pennsylvania of an Adjudication in which the Board assessed a civil penalty in the amount of \$18,197 for violations of the Clean Streams Law against George and Shirley Stambaugh ("Stambaughs"). The violations resulted from the Stambaughs digging an unlined trench on their property and filling it with corn silage. Silage leachate seeped into the ground water and contaminated neighboring wells. Ground water contamination is a violation of the Clean Streams Law, Sections 316, 401 and 611. 35 P.S. §§ 691.316, 691.401, 691.611. The Department of Environmental Protection (the "Department") met with Mr. Stambaugh on October 19, 2005 regarding the pollution from the trench on his property. Mr. Stambaugh informed the Department that he would have the trench removed within two weeks. After the two weeks had passed, the Department issued an Order on November 4, 2005. When there was still no compliance with the order, the Department issued 2 notices of violation on February 1, 2006 and February 27, 2006. When the Stambaughs further failed to comply with the Department's order and notices of violation it calculated a civil

penalty in the amount of \$33,772. The Department filed a complaint for civil penalties with the Board on April 24, 2008. After a hearing on the merits the amount was reduced to \$18,197. *See DEP v. George and Shirley Stambaugh*, 2009 EHB 481. The Stambaughs appealed the Board's Adjudication to the Commonwealth Court. *See George and Shirley Stambaugh v. DEP*, 11 A.3d 30 (Pa. Cmwlth. 2010). The Commonwealth Court found that the Board had not shown that the Stambaughs were reckless in constructing the trench and failure to remove the trench as ordered by the Department. Also, the Court held that the Board had not given the Stambaughs credit for a fire in which records were lost when their home was destroyed or for hiring a contractor and seeking help from professionals to create a plan for his farm. We will address the Commonwealth Court's concerns below.

DISCUSSION

On appeal to the Commonwealth Court the Stambaughs argued that the Department did not meet its burden of proving that they had recklessly caused pollution and contaminated their neighbors' wells because they constructed the earthen trench. The Commonwealth Court agreed and remanded the matter back to the Board, stating that the record lacks evidence to support a finding of recklessness. At the hearing in this matter, the Department used a penalty matrix¹ to propose a penalty for the Stambaughs' violations. In the penalty matrix there are five factors to consider, one being the degree of culpability (or willfulness) of the violator. The degrees of willfulness listed in the matrix are deliberate, reckless, negligent or accidental. The Department suggested the Stambaughs' conduct that resulted in the pollution was reckless and we agreed

¹ We, of course are not bound by the Department's civil penalty matrix, as the Board stated in *Thebes*, "...our task is not to review the Department's civil penalty matrix. The matrix is a guidance document which may be a useful tool to Department personnel, but it is not binding on the Department or the Board. *DEP v. Kennedy*, 2007 EHB 15, 25; *DEP v. Hostetler*, 2006 EHB 359." *DEP v. Thebes*, 2010 EHB 370, 398. We found the Department's use of the penalty matrix in this case helpful in understanding the Department's suggested calculations.

assessing a penalty accordingly. The Board now reassesses that penalty.

The Commonwealth Court defined reckless as “the creation of a substantial and unjustifiable risk of harm to others and . . . conscious disregard for or indifference to that risk” *Stambaugh*, 11 A.3d at 37, citing BLACK’S LAW DICTIONARY 1787 (9th ed. 2009). Mr. Stambaugh stated that he had lived on the site for over 50 years. (N.T. 102) The trench was dug in an area that has, as Mr. Stambaugh testified, a “natural through way for the water”. (N.T. 108) Mr. Stambaugh testified that he would put a concrete floor down if he intended the trench to be more than just a temporary trench. (N.T. 106) And, he constructed the trench within 90 feet of his neighbors’ wells rendering them unpotable for a period of six months. (N.T. 30) Mr. Stambaugh testified that he did not know that digging a trench and dumping corn silage in the ground would cause pollution.

The Commonwealth Court stated that “the record lacks evidence to support a finding that the Stambaughs knew their actions would cause a risk of pollution and did so in wanton disregard of that risk.” *Stambaugh*, 11 A.3d at 38. Upon review we find that there is an insufficient foundation on which to claim that Mr. Stambaugh had knowledge of and a “conscious disregard” that the combination of his actions and other factors would lead to the pollution of his neighbors’ wells. Also we find that this lack of knowledge would inhibit his ability to notify the Department and/or downstream users under 25 Pa. Code § 91.33(a). However, there is certainly adequate support for finding him negligent when his actions caused the pollution that rendered two wells unpotable. Negligence is the “failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm” BLACKS LAW DICTIONARY 1061(8th ed. 2004). Certainly, Mr. Stambaugh has

many years of farming experience and his carelessness in digging a trench in a natural waterway without a liner fell well below the standard of care a reasonable person would have exercised. Therefore, we find him negligent and reduce the penalty for violations of Section 401 of the Clean Streams Law from \$5,750 to \$2,875. For violations of 25 Pa. Code § 91.33(a) we reduce the penalty from \$1,150 to \$0.

The Commonwealth Court also asked the Board to explain why it found the Stambaughs were reckless in delaying the removal of the silage. *Stambaugh*, 11 A.3d 37-38. We found the Stambaughs inaction to be within the definition of reckless (see above) because the delay in cleanup of the pollution took at least 48 days. In addition the implementation of preventive measures took at least 800 days. The Department reported the pollution to the Stambaughs on October 19, 2005. Mr. Stambaugh told the Department that he would have the trench cleaned up and removed within two weeks. When Stambaugh failed to clear the site within the time he stated, the Department issued an Order on November 4, 2005 giving them an additional 30 days. The Stambaughs still did not comply.

Mr. Stambaugh did not provide any defense for not moving and cleaning up the trench other than bad weather and that the location of the trench made it hard to access. Mr. Stambaugh was informed of the pollution in October of 2005. Clearly, at that point he was aware that constructing the trench had caused substantial groundwater pollution and ruined their neighbors' wells, but he disregarded any additional risk by not removing the trench until well beyond the time he said he would remove it and beyond the time ordered by the Department. The neighbors were not able to use their wells for at least six months. Mr. Stambaugh told the Department that he would have it cleaned up in a certain amount of time knowing where the trench was located and the weather at that time. Inclement weather hardly justifies Mr.

Stambaugh's lengthy delay. If the weather within the two weeks created a situation that kept the Stambaughs from complying with the clean-up then they should have contacted the Department asking for an extension of time. Instead, they knew of the damage they were causing and yet chose to ignore their obligation. These defenses of failing to remove the trench on their property knowing all the while it was polluting their neighbors' wells does not mitigate their culpability. It took too long to clear the trench and we continue to believe that the Stambaughs' violation of Section 402 was reckless. The penalty of \$3,500 we assessed remains.

The Commonwealth Court asked the Board why it did not address the Stambaughs' reasons for the late plan filings, "i.e. the fire and the poor economy." *Stambaugh*, 11 A.3d at 36. We did not find Mr. Stambaugh's testimony credible. On direct examination, Mr. Stambaugh was asked by his attorney:

Question: After February of 2006, what steps did you take to obtain a nutrient management plan?

Mr. Stambaugh: A gentleman, Mr. Deeney, had did the one for me before.

Question: Who is Mr. Deeney?

Mr. Stambaugh: Yeah, Jim, James Denney, yes. The phone number that I obtained – it took me awhile to find out because three months before this our house burnt and everything we had in it so we lost all records

N.T. 110. According to Mr. Stambaugh's testimony, the Stambaughs had a house fire that would have occurred three months prior to February 2006. That would put the timing of the fire between the time of the Department's visit to the Stambaughs' home on October 19, 2005 to inform them of the pollution and the time the Department ordered the plans to be submitted. During his testimony he speaks of weather which rendered him incapable of removing the silage in two weeks (November 2). On November 4th the Department gave him an extension until

December 4th. Although there were no specific dates mentioned, the fire, according to the testimony, could not have occurred later than November 30th. If the Stambaughs found themselves in a situation like this, the Board does not understand why the Stambaughs did not contact the Department to inform them of their situation and the need for an extension. The Department was in contact with them. Instead, the Stambaughs chose to ignore the order. Additionally, Mr. Stambaugh testified that he had submitted nutrient management plans in the past in 2001 (N.T. 110) and that they were required to submit such a plan every three years. A new plan was due. He testified on direct examination:

Mr. Stambaugh: Well, it was time anyhow to rewrite the management because they recommend it every three years. Okay?
So that's when on –

Question: To rewrite what?

Mr. Stambaugh: They recommend every three years you update.

Question: Update what?

Mr. Stambaugh: Your nutrient management plan.

N.T. 114. Mr. Stambaugh had submitted plans in the past and testified that the plans were to be updated every three years and it was time again to update his 2001 plan. The Stambaughs were aware that they were obligated to update their existing nutrient management plan. These plans are required under 25 Pa. Code § 91.34 to plan for measures to be taken to prevent incidents such as the well pollution described here. After the pollution leached from their trench, the Department ordered them to provide plans by December 4, 2005. However, the Stambaughs did not submit anything until July of 2007. This is well beyond the date ordered and well beyond the three year required resubmittal of a plan to the Department. We do not find Mr. Stambaugh's testimony credible for his excuse to have been so late in submitting required plans to the

Department. However, the Board's original penalty of \$5,175 under Section 91.34 was based on 90% of the initial discharge calculation under Section 401. (N.T. 34-35) Now, that we have reduced the penalty under Section 401, we will reduce the penalty under Section 91.34 to \$2,587 to reflect 90% of Section 401 penalty (\$2,875).

The Commonwealth Court then turned to the late plan filings.² Specifically, the Court asked why the Board did not stop the daily penalty on July 23, 2007 when the nutrient management plan was first submitted. We found that Mr. Stambaugh knowingly submitted the nutrient management plan knowing that it was erroneous even though he was aware that the Department was attempting to rectify the pollution problems caused by his actions. His answers to questions on this matter were evasive and incoherent (*See* N.T. 166-71). Mr. Stambaugh testified that he submitted the plan knowing it was not going to be approved.

The Board assessed the civil penalty for the late submission of the plans, a violation of 25 Pa. Code § 91.34(b), from the date the plans were due on November 19, 2005 and December 4, 2005, respectively (*See* footnote 2), until the filing of the Department's complaint (April 24, 2008). The order required the "submission" of the plans, not necessarily the "approval" of the

² In our Adjudication we explained the calculation for each late plan filing:

The Order required the Stambaughs to submit a plan and schedule for the temporary and permanent storage of silage . . . due by November 19, 2005. The Department assessed the civil penalty on April 22, 2008, 884 days after the plan and schedule submission were due to the Department. For that violation the Department assessed a penalty of \$884. . . [T]he Stambaughs were also to submit a nutrient management plan on December 4, 2005, however, they never did. The Department assessed the penalty on April 22, 2008 at which time the plan was 869 days late. The Department's assessment is \$869. . . . [T]he Stambaughs were to submit an agricultural erosion and sedimentation plan for all plowing and tilling. This plan was due on December 4, 2005. The Department assessed the penalty of \$869 on April 22, 2008 which was 869 days after the deadline.

plans. The reason we assessed the penalty in that manner was because Mr. Stambaugh, himself, testified that he did not sign the July 23, 2007 submission and knew it would be rejected, yet submitted it anyway. The Department did not get another submittal until after the complaint was filed. The next submittal of the plan was eight months after the complaint was filed with the Board. The plan was approved January 30, 2009. (N.T. 163-64) Since Mr. Stambaugh delayed in his submissions for reasons dubious at best, and he knowingly submitted erroneous information on his first submittal, we find the amount of \$1 a day for the full period to be appropriate.

In conclusion, the Stambaughs are responsible for violations of the Clean Streams Law Sections 316, 401, 402 and 611 and are charged with penalties in the amount of \$13,884.

CONCLUSIONS OF LAW

1. The Stambaughs were negligent in constructing the earthen silage trench on their property resulting in the discharge of silage leachate into two nearby drinking water wells in violation of the Clean Streams Law, 35 P.S. § 691.401, 691.611.
2. The Stambaughs were reckless in not removing the silage trench on their property in violation of the Department's November 4, 2005 order in violation of the Clean Streams Law, 35 P.S. § 691.402, 691.611.
3. The Stambaughs have not presented any credible mitigating factors for failing to submit a plan and schedule for the temporary and permanent storage of silage, a nutrient management plan and an erosion and sedimentation plan in accordance with the Department's order.
4. The Board reduces the civil penalty and assesses the total amount of the civil penalty at \$13,884 for the Stambaughs' violations of the Clean Streams Laws.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :
v. : EHB Docket No. 2008-146-CP-C
GEORGE AND SHIRLEY STAMBAUGH :

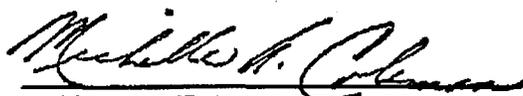
ORDER

AND NOW, this 18th day of April, 2012, it is hereby ORDERED that civil penalties are assessed against George and Shirley Stambaugh in the total amount of \$13,884.

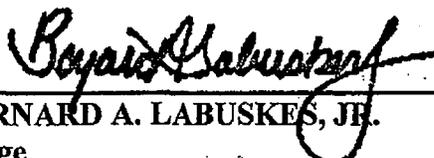
ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chief Judge and Chairman



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge



RICHARD P. MATHER, SR.
Judge

DATED: April 18, 2012

c: DEP Bureau of Litigation
Glenda Davidson, Library

For the Commonwealth of PA, DEP:
Susana Cortina de Cardenas, Esquire
Office of Chief Counsel - Southcentral Region

For Defendants:
Mark F. Bayley, Esquire
BAYLEY & MANGAN
17 West South Street
Carlisle, PA 17013

Gregory H. Knight, Esquire
2 Northfield Way
Mechanicsburg, PA 17050

Lamparter, Nick Hetmanski as individuals acting as owners/operators/principals/employees or representatives for processing tires at the site without a permit. The notice of appeal included signatures of all the named individuals, as well as Mike Ranuado for Roll Rite.

The Board issued an order dated June 29, 2010 requiring that Roll Rite have an attorney enter an appearance on behalf of Roll Rite pursuant to 25 Pa. Code § 1021.21(b) (“Corporations shall be represented by an attorney”). An attorney entered an appearance on behalf of all the Appellants on July 28, 2010. Subsequently, the Appellants’ counsel withdrew his appearance and the Board granted his withdrawal on January 10, 2012. Appellant, Roll Rite Tire Center, Inc. was ordered by the Board on January 10, 2012 to be represented by an attorney and failed to comply with the Board’s order.

The Board has the power to impose sanctions, including dismissal of an appeal for failure to comply with Board orders. 25 Pa. Code § 1021.161; *Martin v. DEP*, 1997 EHB 158. A sanction resulting in dismissal is justified when a party fails to comply with Board orders indicating a lack of intent to pursue its appeal. *Gina Gabriel v. DEP*, Docket No. 2011-164-C (Opinion & Order issued January 20, 2012); *Scottie Walker v. DEP*, 2011 EHB 328, *K H Real Estate, LLC v. DEP*, 2010 EHB 151; *Pearson v. DEP*, 2009 EHB 628, 629, citing *Bishop v. DEP*, 2009 EHB 259; *Miles v. DEP*, 2009 EHB 179, 181; *RJ Rhodes Transit, Inc. v. DEP*, 2007 EHB 260; *Swistock v. DEP*, 2006 EHB 398.

The repeated failure of Roll Rite to comply with the Board’s orders, as well as its failure to follow the Board’s rules, demonstrates a lack of intent to pursue its appeal. In addition, the repeated indifference to the Board’s orders and rules affects the integrity of the appeal process before the Board. *Swistock v. DEP*, 2006 EHB at 401. Therefore, the Board dismisses this appeal pursuant to 25 Pa. Code § 1021.161.

**COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD**

**MICHAEL RANUADO, CHARLES LUCCHETTI:
LARRY LAMPARTER, NICK HETMANSKI :
AND ROLL RITE TIRE CENTER, INC. :**

v. :

EHB Docket No. 2010-098- C

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

ORDER

AND NOW, this 24th day of April, 2012, Roll Rite Tire Center, Inc. is dismissed in the above cited appeal as a sanction pursuant to 25 Pa. Code § 1021.161 for failure to comply with the Board's rules and orders. The new caption, which should be reflected on all future filings with the Board, shall be as follows:

**MICHAEL RANUADO, CHARLES LUCCHETTI:
LARRY LAMPARTER, NICK HETMANSKI :**

v. :

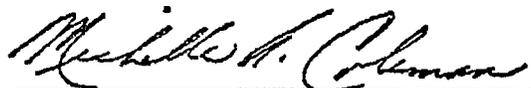
EHB Docket No. 2010-098- C

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

ENVIRONMENTAL HEARING BOARD



**THOMAS W. RENWAND
Chief Judge and Chairman**



**MICHELLE A. COLEMAN
Judge**



BERNARD A. LABUSKES, JR.

Judge



RICHARD P. MATHER, SR.

Judge

DATED: April 24, 2012

c: DEP Bureau of Litigation
Glenda Davidson, Library

For the Commonwealth of PA, DEP:
Susana Cortina de Cardenas, Esquire
Southcentral Region - Office of Chief Counsel

For Appellants, Pro Se:

Larry Lamparter
9303 Madison Ave
Laurel, MD 20723

Charles Luchetti
40 Carlton Ave
Islip, NY 11752

Michael Ranuado
9792 Washington Blvd
Laurel, MD 20723

Nick Hetmanski
1995 Philadelphia Avenue
Chambersburg, PA 17201

Roll Rite Tire Center, Inc.
40 Carlton Ave
Islip, NY 11752



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN AND CYNTHIA MCGINNIS :
 :
 v. : **EHB Docket No. 2007-197-R**
 : **(Consolidated with 2007-228-R**
 : **and 2008-190-R)**
 :
COMMONWEALTH OF :
PENNSYLVANIA, DEPARTMENT :
OF ENVIRONMENTAL PROTECTION : **Issued: April 30, 2012**
and EIGHTY-FOUR MINING, INC., :
Permittee :

ADJUDICATION

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

The Board finds that although underground mining has caused a pond on the appellants' property to shift, the pond is still able to maintain its pre-mining uses. The appellants' main concern is the frequency with which the pond decants and a build-up of algae in the pond. Although we find that the pond may decant somewhat less frequently than it did prior to mining and that there may be some increase in the amount of algae in the pond, we do not find that it warrants the relief requested by the appellants, which includes reconstruction of the pond.

BACKGROUND

This matter involves two appeals filed by John and Cynthia McGinnis (collectively the McGinnises) from a finding by the Pennsylvania Department of

Environmental Protection (Department) that a pond located on their property has not been adversely impacted by underground mining activities conducted by Eighty-Four Mining Company (Eighty-Four). The McGinnises own property in Washington County, Pennsylvania which was undermined by longwall mining activity conducted by Eighty-Four from April to August 2004.

In April 2004, the McGinnises notified Eighty-Four that they believed their property had been damaged by subsidence resulting from Eighty-Four's longwall mining. The McGinnises and Eighty-Four were unable to reach an agreement with respect to repair or compensation for the damage, and on April 21, 2006 the McGinnises filed a subsidence damage claim with the Department. The Department conducted an investigation of the claim and concluded that the structures and septic system on the McGinnis property had been damaged by subsidence caused by Eighty-Four, but further concluded that the McGinnis pond had not been damaged. The order directed Eighty-Four to repair the damage or compensate the McGinnises in the amount of \$506,041. The McGinnises were paid \$506,041, in compliance with the order. The McGinnises also appealed the order to the Environmental Hearing Board, challenging the Department's finding that the pond had not been damaged by subsidence. The appeal was docketed at EHB Docket No. 2007-197-R.

The Department continued to evaluate whether the pond had been affected by mining. On September 17, 2007 the Department notified the McGinnises by letter that it had concluded that the pond still supported its pre-mining uses and that Eighty-Four would not be required to take any action with regard to the pond. The McGinnises appealed the September 17, 2007 letter, and the appeal was docketed at EHB Docket No. 2007-228-R. This appeal was consolidated with the appeal at the earlier docket number.¹

On June 16, 2010 the Environmental Hearing Board (Board) conducted a site view of the McGinnis property. A trial was held on June 23 and 24 and October 21, 2010. Following the filing of post-trial briefs, the Board makes the following:

FINDINGS OF FACT

1. The Appellants are John and Cynthia McGinnis (hereinafter referred to as “the McGinnises.”)

2. The Appellee is the Pennsylvania Department of Environmental Protection (“Department”), the agency of the Commonwealth charged with enforcing the Bituminous Mine Subsidence and Land Conservation Act (“Mine

¹ McGinnis also filed a third appeal related to the replacement of a domestic water well and the increased operation and maintenance costs associated with the well. That appeal was rendered moot by the Department’s recalculation of the operation and maintenance costs and the bond associated therewith.

Subsidence Act”), Act of April 27, 1966, P.L. 31, as amended, 52 P.S. §§ 1406.1 – 1406.21.

3. The Permittee is Eighty-Four Mining Company, Inc. (“Eighty-Four.”)

4. The McGinnises reside at 100 Crile Road, Washington County, Pennsylvania. The property was purchased approximately 22 years ago. (1T. 15)²

5. There is a pond on the McGinnis property. (1T. 16) The pond is approximately one half acre in size and is situated in a valley to the east of the McGinnis home. (2T. 34, 171)

6. At the time the McGinnises purchased the property, the pond was 18 feet deep. (1T 76)

7. The pond has a PVC decant structure. (2T. 34) When the pond is full, water can enter into the decant and discharge to the channel below the pond or to a cattle trough. (2T. 36; Board Ex. 4)

8. Prior to mining, the McGinnises recall the pond decanting regularly year round, but cannot conclusively say it decanted every day. (1T. 77-78, 145-46)

9. Prior to mining, surface water flow to the pond was provided by two headwater drainage areas, or springs, denoted as S2863A and S2863B. (2T. 29, 64) The pond is situated at the confluence of the two headwater drainages. (2T.

²“1T __” refers to a page in Volume 1 of the transcript of the hearing. “2T __” refers to Volume 2 of the transcript.

34) The term “headwater drainage” means the location is near the upper portion of the watershed, i.e., the drainage area coming to the pond. (2T. 34)

10. Pre-mining sampling of the pond was available for only February 2004 and March 2004. (2T. 172)

11. The pre-mining data was inadequate to document the pre-mining conditions of the pond and headwater drainages that fed the pond because there was no data available for the dry months of the year. (2T. 176)

12. The records of Eighty-Four mining show that an attempt was made to conduct a pre-mining survey on the McGinnis property, but it was refused by the homeowner. (1T. 195)

13. In October 2004, Eighty-Four’s consultant, Moody and Associates, sent a certified letter to McGinnis at 100 Crile Road, Washington, Pennsylvania 15301 informing them that Eighty-Four desired to gain access to the property to conduct a pre-mining survey of water supplies. The letter further explained the homeowner could be giving up certain rights by refusing a pre-mining survey. (1T. 195-96; Eighty-Four Ex. 1)

14. The certified letter was returned to Moody marked “Refused.” (Eighty-Four Ex. 1)

15. The McGinnis property was undermined by Eighty-Four by longwall panels 3B and 4B, beginning in April 2004. (1T. 218; 2T. 80-81; App. Ex. C)

16. The McGinnis pond is situated over longwall panel 3B which was undermined in April 2004. (1T. 191; 2T. 80-81, 133)

17. Eighty-Four's mining caused damage to the McGinnis house and to the grading of the land. (1T. 218)

18. In April 2006, the McGinnises filed a subsidence damage claim with the Department, claiming subsidence impacts to their house, outbuildings, land, septic system and pond. (2T. 140)

19. The Department investigated the McGinnis claim and issued an order to Eighty-Four on July 5, 2007, finding that the McGinnis structures and septic system had been damaged by mine subsidence but that the pond had not been damaged. The Department's order contains a finding, in paragraph K, that the pond had not been damaged by subsidence. (Ex. to Notice of Appeal, Docket No. 2007-197-R)

20. The McGinnises filed an appeal with the Environmental Hearing Board, challenging the finding that the pond had not been damaged by subsidence. (Notice of Appeal, Docket No. 2007-197-R)

21. Eighty-Four complied with the July 5, 2007 order by paying the amount directed in the order. (Eighty-Four Ex. 16; 1T. 213)

22. On September 17, 2007, the Department sent the McGinnises a letter stating that the Department had concluded that the pond supported its pre-mining

uses and Eighty-Four was not required to take any further action with regard to the pond. (Ex. to Notice of Appeal, Docket No. 2007-228-R)

23. The McGinnises filed an appeal with the Environmental Hearing Board from the September 17, 2007 letter, claiming their pond was damaged by subsidence caused by Eighty-Four's mining activities and is no longer able to support its pre-mining uses. (Notice of Appeal, Docket No. 2007-228-R)

24. According to Mr. McGinnis' observations, the pond decanted regularly year-round pre-mining. (1T. 77) Mrs. McGinnis only observed the water below the decant pipe in very dry weather during the month of August. (1T. 145-46)

25. Prior to mining, the pond contained bass and blue gill. Mr. McGinnis also used to stock the pond with trout. (1T. 18)

26. Prior to mining, the pond contained "muck and stuff on the bottom," including decaying leaves. (1T. 17) Mr. McGinnis used to add materials to the pond to control the debris. (1T. 17)

27. Prior to mining, algae accumulated on the edges of the pond in the summer. (1T. 28, 143)

28. When they were school-age, the McGinnises' children swam in the pond. They wore water shoes to get through the algae that accumulated around the edge of the pond. (1T. 143)

29. Prior to mining, Mr. McGinnis added UV dye and koi to the pond to control weed growth. (1T. 81-82)

30. At a deposition taken in 2007, Mr. McGinnis stated that he added koi to the pond to control algae. (1T. 82-83)

31. Once or twice, Mr. McGinnis added liquid colorant to the pond prior to mining. (1T. 104)

32. Liquid colorant is a generic term for products placed in a pond or lake to prevent ultra-violet light from penetrating the water, thereby limiting the amount of algae and plant growth. (2T. 200-201)

33. Pre-mining, the McGinnis family used the pond for recreational activities, including fishing, swimming and boating. (1T. 19-23)

34. Pre-mining, the McGinnises used the pond as a water source for cattle (1T. 28-30)

35. Immediately following mining by Eighty-Four, the pond tilted to the north, causing the water to shift away from the decant pipe. (1T. 31-32; 2T. 76-77, 142, 149, 167; Eighty-Four Ex. 4)

36. Following mining, drainage from the springs located on either side of the pond diminished. (1T. 31-32; 2T. 77; Eighty-Four Ex. 4)

37. Eighty-Four's mining activity caused subsidence of the McGinnis pond. (2T. 149, 167)

38. Eighty-Four's mining activity caused the McGinnis pond to tilt. (2T. 149, 167)

39. The Department found that because the McGinnis property was directly over the coal seam, it was within the rebuttable presumption zone, and Eighty-Four filed a prompt replacement plan with the Department addressing subsidence damage to the pond and the water supply. (Commonwealth Ex. 3)

40. In the prompt replacement plan, Eighty-Four proposed to monitor the pond for a period of six months during the dry season. (2T. 159-160; Commonwealth Ex. 3)

41. Post-mining, a representative of Moody and Associates monitored the pond from May 2006 through October 2006. (2T. 43)

42. The monitoring by Moody showed that the water level in the pond varied. The Moody representative did not observe any surface water flow at springs S2863A and S2863B. (2T. 43)

43. The pond did not go dry during the May 2006 through October 2006 monitoring by Moody. (2T. 43)

44. The water level in the pond was higher at the start of monitoring in May 2006 and dropped as monitoring continued to October 2006. (2T. 44)

45. A pond in a headwater setting is likely to have seasonal fluctuations. (2T. 44)

46. Given the size of the McGinnis pond and its dependence on shallow groundwater for a portion of its flow, it is unlikely that the pond decanted all year even pre-mining. (2T. 204-205)

47. Joseph D. Floris is a senior civil engineer with the Department's California, Pennsylvania District Mining Office. (2T. 113)

48. Mr. Floris has extensive experience in the fields of mining engineering, mine subsidence impacts and impoundment stability. (2T. 115-129)

49. Mr. Floris first met with the McGinnises on March 24, 2004, prior to mining, when he was a surface subsidence agent with the Department. The purpose of the meeting was to explain their rights under the law and how mining was going to proceed. (2T. 130)

50. Following the filing of the mine subsidence claim by the McGinnises, Mr. Floris was assigned the responsibility of investigating the claim of damage to the pond. (2T. 140-141) He visited the McGinnis property, on January 23, 2007 and April 24, 2007. (2T. 141) On both of those occasions the pond was full and, to the best of his recollection, it was decanting. (2T. 143)

51. During his post-mining visits, Mr. Floris inspected the embankment of the pond and the ground surface around the pond and observed no cracks. Nor did he observe any leaks. (2T. 146, 148)

52. In April 2007, Eighty-Four submitted a report prepared by Moody following its monitoring. (2T. 161; Appellants' Ex. C) The report concluded that the pre-mining uses of the pond were being maintained. (Appellants' Ex. C)

53. Moody's conclusion that the pre-mining uses of the pond were being maintained was based on the pond's ability to maintain a water pool level; it did not take into consideration algae in the pond. (2T. 88-89)

54. Mr. McGinnis no longer adds any substances to the pond to control weeds. He no longer does any maintenance to the pond. (1T. 82, 96)

55. The McGinnises still fish in the pond. However, they do not catch bass anymore. (1T. 34 – 35, 152)

56. Mr. McGinnis has stocked the pond with trout every year following mining through 2010, except for 2009. In 2010, he stocked the pond with approximately 50-60 trout. (1T. 34, 90-91)

57. The pond can be stocked with trout throughout the spring. One year Mr. McGinnis tried to restock the pond with trout in late summer but the fish died when the pond level dropped below the decant pipe. (1T. 111-114)

58. Following mining, the McGinnises have not used the pond for swimming or boating. (1T. 37) They do not want to swim in the pond because of the algae. (1T. 37, 147-148)

59. In 2007 the McGinnises installed a pool on their property and they now swim in the pool. (1T. 37-38, 89-90)

60. During a visit to the McGinnis property on August 3, 2007, John Kernic observed there was water in the pond, though it was not decanting. The weather on August 3, 2007 was dry and warm. (2T. 181, 203)

61. During his visit to the site on August 3, 2007, Department geologist John Kernic observed bluegills and some bass in the pond. He also observed what he described as a moderate amount of algae in the pond. There was a segment of the pond that was clear and free of algae; that segment of the pond was large enough for swimming, boating and fishing. (2T. 181, 203-204)

62. The Department concluded that the pre-mining uses of the pond, as far as swimming, boating and fishing, were being maintained post-mining. (2T. 185)

63. The Department did not agree that the pre-mining use of the pond for supplying water to the cattle was being maintained post-mining and ordered Eighty-Four to replace the water supply to the cattle trough. (2T. 182-183; Commonwealth Ex. 6)

64. Eighty-Four constructed a second cattle trough which draws from a spring that emerged downgrade after mining activity was conducted. (1T. 42; 2T. 183)

65. The new trough supplies enough water to support animal husbandry uses on the McGinnis property. (2T. 99-100, 185, 194-195)

66. The McGinnises no longer keep cattle on their property due to business reasons, not because of an inadequate water supply. (1T. 39-42, 79-80)

67. There is a small tributary that runs near the McGinnis pond. The tributary did not go dry after mining. (1T. 76)

68. Post-mining, the pond discharges continually during the wet months of January through the spring. During the summer and drier months the water level of the pond and the discharge rate varies. Sometimes during the summer and drier months the pond does not discharge. (1T. 32-34)

69. In the drier months of July to October, the pond fills during a heavy rain. (1T. 33)

70. The Department's Mr. Kernic conducted a second site visit on April 2, 2008. On that day, the weather conditions were dry. Water was not flowing into the pond from the springs located to the east of the pond. Water was flowing into the pond from springs located to the west of the pond. (2T. 186-187)

71. The pond was decanting during Mr. Kernic's April 2, 2008 visit. (2T. 187)

72. On June 16, 2010, the Environmental Hearing Board conducted a site visit to the McGinnis pond. The pond was full and decanting on that date. (2T. 146)

73. The pond has never run dry. (1T. 89)

74. Given that the pond has never run dry and decants except during dry times of the year, it is logical to conclude that that the pond is being fed and maintained post-mining by groundwater infiltration and flow. (2T. 45-48, 197-199)

75. The cost to rebuild a similar pond on the McGinnis property is approximately \$82,035.00. (1T. 130, 214)³

DISCUSSION

Section 5.1(a)(1) of the Bituminous Mine Subsidence and Land Conservation Act (Mine Subsidence Act) provides in relevant part as follows:

. . .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 reasonable foreseeable uses of the supply.

52 P.S. § 1406.5a(a)(1).

³ McGinnis' expert's original estimate was \$94,035.00, but because this total included the cost of repairing land damage covered by a separate agreement, counsel for McGinnis stipulated that the total estimate should be reduced by \$12,000.

Before turning to the substance of this case, we note that the McGinnises made the ill-advised decision to proceed *pro se* throughout much of the pre-trial process in this matter – from the filing of the first appeal in August 2007 to April 16, 2009. We have repeatedly warned that appellants who elect to litigate their case before the Environmental Hearing Board without being represented by counsel run the risk that their lack of legal expertise may prove their undoing. *Eagle Resources Corp. v DEP*, 2003 EHB 597, 599; *Goetz v. DEP*, 2002 EHB 976, 977-79 (citing a letter sent to appellant by then Environmental Hearing Board Judge Krancer detailing the perils of proceeding *pro se*); *Kleissler v. DEP*, 2002 EHB 737, 739; *Van Tassel v. DEP*, 2002 EHB 625, 628; *DEP v. Lentz*, 2002 EHB 440, 441, fn. 1; *Kilmer v. DEP*, 1999 EHB 846. Litigants assume a high risk of failure when they choose to proceed *pro se*. *Belitskus v. DEP*, 1998 EHB 846, 871.

Unfortunately, the perils of proceeding *pro se* are all too evident in this case. By the time the McGinnises elected to retain counsel – nearly two years after the first appeal was filed – discovery had been over for quite some time. During the discovery process, the McGinnises listed Mr. McGinnis as the only fact witness and failed to provide expert reports or complete answers to expert interrogatories for the limited number of expert witnesses they had listed. After retaining counsel, the McGinnises filed a pre-hearing memorandum nearly one year after the close of

discovery. In it they listed 20 fact witnesses and new expert witnesses. They also identified new issues that had not been raised previously. Not surprisingly, the Department and Eighty-Four objected to the new witnesses and issues, arguing that they were severely prejudiced by the addition of new witnesses and issues at the eleventh hour. We agreed, and in a strongly worded opinion granted the Department's motion *in limine*, holding as follows:

As we have stated before and emphasize again now, it is very important to the integrity of the litigation process that the deadlines we set are viewed as meaningful and important. Parties have a right to rely on our Orders and the deadlines they impose. Likewise, and most importantly, they have a right to rely on a party's discovery responses and deposition testimony in preparing for trial. *American Iron Oxide Company v. DEP*, 2005 EHB 779, 784.

McGinnis, supra at 493.

We further held:

Appellants could have easily identified these witnesses years ago if they had not taken such a cavalier attitude toward their discovery obligations. The fact that they chose not to obtain counsel until after discovery was concluded is not a valid excuse for not treating the discovery process with proper attention and diligence. Moreover, by making a mockery of the discovery process, Appellants can not now, at this late date, expect the Board to ignore these serious lapses and penalize the Department and Eighty-Four Mining Company by requiring them to spend thousands of dollars to depose witnesses long known by Appellants but just identified at the eleventh hour.

Id. at 494.

Our June 9, 2010 ruling resulted in the striking of four expert witnesses and nineteen fact witnesses for the appellants. It also resulted in this case being very narrowly limited to the following two issues:

1. Whether the McGinnis pond was damaged by Eighty-Four's mining, and
2. Whether the pond supports its pre-mining uses.⁴

Only Mr. and Mrs. McGinnis were permitted to testify as fact witnesses. They were permitted only one expert witness, Mr. Norman Humes, who testified regarding his estimate to repair the pond. *McGinnis, supra* at 498.⁵

The McGinnises have the burden of proof in this matter, 25 Pa. Code § 1021.122(c)(2), and must demonstrate by a preponderance of the evidence that the Department erred in finding that the pre-mining uses of the McGinnis pond are supported post-mining. *Lang v. DEP and Maple Creek Mining, Inc.*, 2006 EHB 7, 17. "Preponderance of the evidence" has been defined "to mean that the evidence in favor of the proposition must be greater than that opposed to it...." It must be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established." *Bucks County Water and Sewer Authority v. DEP*,

⁴ A third issue – pertaining to calculation of increased operation and maintenance costs – is now moot.

⁵ As we recognized in our June 9, 2010 ruling, counsel for the appellants was not retained until two years after the filing of the first appeal and, as a result, was placed in a very difficult position by her clients. Nonetheless, she did an admirable job of presenting a strong case on behalf of her clients.

2006 EHB 172, 180 (quoting *Bethenergy Mines, Inc. v. DER*, 1994 EHB 925, 975 and *Midway Sewerage Authority v. DER*, 1991 EHB 1445, 1476) In order to meet this burden of proof, the McGinnises must demonstrate by a preponderance of the evidence that Eighty-Four's mining has materially interfered with the pre-mining uses of the pond. *Mystic Brooke Development v. DEP and Helvetia Coal Co.*, 2009 EHB 146, 150.

Has the pond been materially damaged?

There is no dispute among the parties that the McGinnis pond suffered the impact of subsidence caused by Eighty-Four's longwall mining. As a result of being undermined, the pond shifted and now tilts to the north-northeast, away from the decant pipe. A structural assessment of the pond was performed in 2007 by Joseph Floris, a Senior Civil Engineer with the Department's California, Pa District Mining Office. At the time of the hearing, Mr. Floris had been a licensed professional engineer for 32 years and had over 38 years of experience in environmental engineering, mine subsidence and impoundment stability. He was accepted by the Board as an expert in these fields. During his 2007 investigation, Mr. Floris found no cracks, slumps or sumps on the embankment of the pond, no cracks on the ground surface surrounding the pond and no signs of leaking. The same was true when he accompanied the Board on a site view of the pond on June 16, 2010. In his expert opinion, the pond is structurally sound and will remain so.

No evidence or expert testimony was presented to counter Mr. Floris' testimony, and we find his conclusions to be credible.⁶

Does the pond support its pre-mining uses?

The primary focus of the McGinnises' argument concerns the frequency with which the pond decants. It is their contention that the pond decants less frequently post-mining, and that this has adversely affected the pond and its pre-mining uses. Unfortunately, there is a dearth of pre-mining data available to give an accurate picture of the pre-mining hydrology of the pond. The only data available consists of two monitoring events in February 2004 and March 2004, both wet months. In order to have an accurate assessment of the pre-mining hydrology of an area, it is helpful to have monitoring data compiled during various seasons, both wet and dry. This establishes a baseline from which to compare future data, and allows one to see any fluctuations in water level throughout the year. Again, the McGinnises are at least partly to blame for the lack of pre-mining data. The record indicates that Eighty-Four's consultant, Moody and Associates, attempted to gain access to the McGinnis property at least twice to conduct pre-mining monitoring. On the first occasion a representative of Moody showed up in person. He was refused access to the property because Mr. McGinnis was not home. Eighty-Four subsequently sent a certified letter to the McGinnises

⁶ As noted earlier in the discussion, the appellants were limited as to the expert testimony they were permitted to present due to their failure to provide this information during discovery.

requesting access to the property for pre-mining monitoring and the letter was returned, marked "Refused." Although there was some testimony by Mrs. McGinnis at the hearing that the letter may have been sent to another similar address, no evidence was presented to support this allegation.

What the February and March 2004 monitoring does show is that the pond at that time was receiving some flow from two upgradient headwater discharges, or springs. The monitoring data indicated that the combined surface flow from the two discharges was less than the rate at which the pond was decanting, indicating that there was another source of flow to the pond. Experts for both Eighty-Four and the Department concluded this additional source of flow to be groundwater, and we find their conclusion to be credible. Due to the lack of seasonal monitoring data, it is impossible to state what percentage of pre-mining flow to the McGinnis pond was from surface water versus groundwater. (2T. 92)⁷

Post-mining monitoring indicates that surface flow to the pond has diminished and shifted in relation to the pond. However, the pond has never gone dry and it continues to decant regularly, except during the driest part of the year from approximately July to October during which it fills only during heavy rain events.

⁷ Precipitation would also provide a source of water to the McGinnis pond.

It is the testimony of the McGinnises that the pond decanted regularly year-round prior to mining. According to Mr. McGinnis the pond decanted every day, and according to Mrs. McGinnis every day except during dry spells in August. As noted, there is no data available to document the pre-mining conditions of the pond during the summer and drier months of the year. According to the expert testimony provided by the Department and Eighty-Four, it is unlikely that a pond of this size in a headwater setting would decant every day year-round, even prior to mining. A pond in a headwater setting is likely to experience seasonal fluctuation, including diminished surface flow during the drier months of the year. It is not unusual for a pond of this size to experience a lower water level during the drier months of the year, which would prevent it from decanting.

There is no question that the pond does not decant year-round post-mining. These observations are supported by post-mining monitoring conducted by Moody and Associates from May through October 2006. The water level in the pond was higher at the start of monitoring in May 2006 and dropped as monitoring continued to October 2006. This is also supported by visits to the site by Department representatives. When Joseph Floris visited the site in January and April 2007, it is his recollection that the pond was decanting on both occasions. When John Kernic visited the site later in the year, in August 2007, the pond was not decanting. During Mr. Kernic's second visit to the site in April 2008, the pond was decanting.

Finally, during a site visit to the property on June 16, 2010, the pond also was decanting. What we conclude from this anecdotal evidence is that the pond decants regularly most of the year, but does not decant during drier periods of the year from approximately August to October other than during periods of heavy precipitation. What is also clear to us is that the pond does not go dry, even during dry periods of the year, and continues to function as a pond. While we believe the testimony of the McGinnises that the pond may have decanted more frequently during the summer months prior to mining, we do not believe that the pond decanted every day year-round. We find the testimony of the Department's Mr. Kernic to be more credible that the pond would have experienced seasonal fluctuations pre-mining, and it is likely that the pond did not decant regularly during dry periods of the year.

Moreover, even if we accept the McGinnises' argument that the pond decants less frequently than it did prior to mining, we do not agree that the pond no longer supports its pre-mining uses. The pre-mining uses may be divided into two categories: agricultural usage and recreational usage, including fishing, swimming and boating.

Agricultural usage of the pond

Prior to mining, the McGinnises raised cattle on their property. Overflow from the pond was used to fill a trough from which cattle could drink. A valve on

the pond's discharge pipe allowed flow to the trough. Following mining, the Department concluded that the pond did not discharge sufficient flow to provide water to the trough. Therefore, the Department directed Eighty-Four to provide an alternate mechanism for providing water for the cattle. In response, Eighty-Four captured a spring that developed below the pond post-mining and directed it to a new watering trough for the cattle. The McGinnises do not dispute that the action taken by Eighty-Four to provide a second watering trough is sufficient. Moreover, since the development of the new watering trough, Mr. McGinnis has elected not to maintain cattle on his property due to business reasons. If the McGinnises elect to raise cattle on their property at some time in the future, the evidence demonstrates that the second watering trough is sufficient to meet this agricultural need.

Recreational usage of the pond: Fishing

The McGinnises testified that they and their family regularly fished for bass and bluegills in the pond pre-mining. They also fished for trout which Mr. McGinnis stocked in the pond.

Post-mining, the McGinnises still regularly fish in the pond. Mr. McGinnis has continued to stock the pond with trout post-mining, and has done so every year except 2009. In 2010 he stocked the pond with 50-60 trout. Though Mr. McGinnis testified that he no longer catches bass, on a visit to the site in August

2007 John Kernic did observe bass in the pond. Based on the testimony of the McGinnises and the Department, we do not find that the ability to fish the McGinnis pond has been materially affected by mining, and we conclude that the pond continues to support this use.

Recreational usage of the pond: Swimming and Boating

The McGinnises testified that the pond was used by them and their then-school age children for swimming prior to mining. The testimony indicates that Mr. McGinnis also occasionally took a boat out on the pond for fishing. The McGinnises no longer use the pond for swimming or boating. First, the McGinnis children are now grown and no longer live at home. Second, the McGinnises constructed a swimming pool in 2007 which they now use for swimming. However, the McGinnises contend that they no longer use the pond for swimming or boating because it produces more algae than it did pre-mining, which interferes with their ability to enjoy the pond.

The McGinnises argue that the pond did not experience algae growth prior to mining. The Department and Eighty-Four counter that a typical farm pond such as the McGinnises' would most certainly experience algae growth and is likely to be covered with algae during the hot, dry summer months. We suspect that the truth lies somewhere in the middle.

The record establishes that the pond did in fact experience at least some algae even before mining took place. The record further establishes that the McGinnises used the pond when there was algae in it. Mrs. McGinnis testified that their children used to wear water shoes in the pond to walk through the algae that accumulated along the edge. Mr. McGinnis testified that he took measures prior to mining to control the growth of weeds, including the addition of koi and liquid colorant or UV dyes to the pond. When asked on cross examination whether he took these measures to control the growth of algae, he stated he did not. Yet in a deposition taken in 2007, he testified that he had added koi to the pond prior to mining for the purpose of controlling algae. Additionally, Mr. Kernic testified that liquid colorant is used to control algae, as well as weeds. Thus, Mr. McGinnis had taken measures prior to mining to inhibit the growth of algae in the pond. This is further supported by the expert testimony of both the Department's Mr. Kernic and Moody's Mr. Henderson who stated that a pond typical of the McGinnis pond is likely to contain algae especially during the hot, dry summer months.

Based on the testimony as a whole, we find it probable that algae growth did increase to some extent following mining. However, we do not find that it increased to such an extent as to materially interfere with the uses served by the pond. Moreover, it is also probable that at least some of the additional algae growth is due to Mr. McGinnis no longer employing measures to control it. The

evidence demonstrates that the McGinnises no longer maintain the pond in the same manner as they did prior to mining. No measures are being undertaken to control algae growth as was being done pre-mining.

In our opinion the evidence does not support the conclusion that the pond is unable to support its pre-mining uses. As we explained earlier, in order to meet the burden of proving their case by a preponderance of the evidence, the McGinnises must present evidence that is “sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established.” *Bucks County, supra*. The McGinnises’ testimony leaves us unconvinced. Their recollection is of a pond that was perfect prior to mining. While it was, and is, no doubt a beautiful pond, it was not free of algae, nor did it decant 365 days a year. The evidence simply does not support their argument. What we are convinced of is that the McGinnises do not enjoy their pond as much as they did prior to mining. Nonetheless, the record demonstrates that the pond supports its pre-mining uses. The record – including at times the McGinnises’ own testimony – establishes that one may still fish in the pond. One may still take a boat out on the pond. One may still swim in the pond. Even if we accept the McGinnises’ testimony that there is more algae in the pond, we do not find that the increased algae prevents one from using the pond for its pre-mining recreational purposes.

Included in the relief requested by the McGinnises is the replacement of their pond. The McGinnises have not demonstrated that the pond is not currently supporting its pre-mining uses or that they are entitled to the relief requested.

Therefore, we reach the following:

CONCLUSIONS OF LAW

1. The McGinnises bear the burden of proving by a preponderance of the evidence that the pond was damaged by Eighty-Four's longwall mining and that the pond no longer supports its pre-mining uses. 25 Pa. Code § 1021.122(c)(2).
2. Preponderance of the evidence means evidence that is "sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established." *Bucks County, supra*.
3. If underground mining affects a water supply, the mine operator must restore or replace the affected water supply in adequate quantity and quality so that the pre-mining uses can be maintained. 52 P.S. § 1406.5a(a)(1).
4. The McGinnises have not met their burden of proving that the pre-mining uses of the pond are not being met.

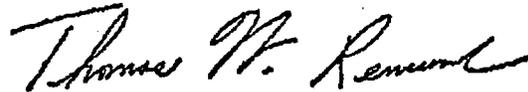
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN AND CYNTHIA MCGINNIS :
 :
 v. : EHB Docket No. 2007-197-R
 : (Consolidated with 2007-228-R
 : and 2008-190-R)
 COMMONWEALTH OF :
 PENNSYLVANIA, DEPARTMENT :
 OF ENVIRONMENTAL PROTECTION :
 and EIGHTY-FOUR MINING, INC., :
 Permittee :

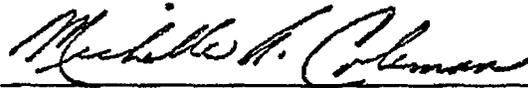
ORDER

AND NOW, this 30th day of April, 2012, the appeal of John and Cynthia McGinnis is dismissed.

ENVIRONMENTAL HEARING
BOARD



THOMAS W. RENWAND
Chief Judge and Chairman



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

Richard P. Mather Sr.

RICHARD P. MATHER, SR.
Judge

DATED: April 30, 2012

c: DEP, Bureau of Litigation:
Attention: Glenda Davidson

For the Commonwealth of PA, DEP:
Barbara J. Grabowski, Esquire
Southwest Region Office of Chief Counsel

For Appellants:
Donna J. McClelland, Esquire
329 West Otterman Street
Greensburg, PA 15601

For Permittee:
Thomas C. Reed, Esquire
Brandon D. Coneby, Esquire
Dinsmore & Shohl, LLP
One Oxford Centre
301 Grant Street, Suite 2800
Pittsburgh, PA 15219



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

**TAYLOR LAND CLEARING, INC.,
AND ROBERT TAYLOR**

v.

:
:
:
:
:
: **EHB Docket No. 2007-188-R**
: **(Consolidated with 2008-039R,**
: **2009-089-R and 2010-017-R)**
:
: **Issued: May 4, 2012**
:
:

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

ADJUDICATION

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

The Pennsylvania Environmental Hearing Board upholds civil penalties under the Pennsylvania Solid Waste Management Act, 35 P.S. Sections 6018.101-6018.1003. The Board finds that the Pennsylvania Department of Environmental Protection met its burden of proof. Appellants violated the provisions of the Solid Waste Management Act numerous times over a period of two and one-half years. They not only caused or allowed illegal dumping to occur but failed to take meaningful steps to clean up the site. The civil penalties assessed by the Department were in accordance with the applicable provisions of the Solid Waste

Management Act and its regulations and were a reasonable fit under the circumstances.

INTRODUCTION

This action involves multiple appeals from 2007 through 2010 and arises from the dumping of solid waste on property located in Beaver County, Pennsylvania. As part of the appeals, the Appellants, Taylor Land Clearing, Inc. (Taylor Land Clearing) and Robert Taylor (Mr. Taylor), appealed a civil penalty assessment of \$42,550 against Taylor Land Clearing and a civil penalty assessment of \$56,300 against Mr. Taylor based on alleged violations of the Solid Waste Management Act, 35 P.S. Sections 6018.101-6018.1003. The Pennsylvania Environmental Hearing Board conducted a full hearing on the merits in the various appeals and the parties have filed post-hearing briefs.

FINDINGS OF FACT

1. Robert Taylor operates Taylor Land Clearing.¹ Trial Transcript 37:12-16; Deposition 10:15-17; 22:6-18.
2. Taylor Land Clearing was hired by the Beaver Initiative for Growth to demolish and clear a site in Beaver Falls, Pennsylvania. This property was known as the Rosenberg Site. Board Exhibit 2 at 1, number 1.

¹ Mr. Robert Taylor's deposition transcript was admitted into evidence at the hearing as "Commonwealth Exhibit 1." Citations to the deposition transcript for clarity purposes however will simply be listed as "Deposition" followed by the page and line numbers rather than as the more cumbersome Commonwealth Exhibit 1. All citations to the hearing transcript will be denoted as "Trial Transcript" followed by the page and line numbers.

3. The Rosenberg Site contained a variety of solid wastes; including scrap metal, drywall, metal fencing and roofing, car parts, discarded tires, junk equipment, and an abandoned wooden building. The wooden building was 40-60 feet wide, and was made of lumber, metal pipes, and a metal roof. Trial Transcript 211:1-4; 234:7-8.

4. The Soterin Property, the site of the violations is an undeveloped property in Big Beaver Township, Pennsylvania. Trial Transcript 37:20-25; 38:1-6.

5. The upper portion of the Soterin Property is a flat area which is adjacent to Route 18. Commonwealth Exhibit 154; Trial Transcript 39:7-14; 40:21-25; 41:1.

6. Motor vehicles enter the Soterin Property by exiting Route 18 and driving onto the flat portion of the property. Trial Transcript 40:24-25; 41:1; 42:1-6.

7. The lower portion of the Soterin Property forms one side of a large stream valley and consists of a long and steep slope which ends near a stream known as Wallace Run. Commonwealth Exhibit 154; Trial Transcript 39:7-10; 45:5-23.

8. Route 18 crosses over Wallace Run. Commonwealth Exhibits 13, 154 & 155; Trial Transcript 40:17-20.

9. The Soterin Property is owned by Ms. Julie Soterin. Ms. Soterin is the daughter of Mr. Taylor. Trial Transcript 223:1-24; 224:1-25; 225:1.

10. Mr. Taylor operates and manages the site. Trial Transcript 223:1-6; 224:9-24; 225:1.

11. For several years, Mr. Taylor gave permission to two companies to deposit fill on the Soterin Property. Trial Transcript 224:12-24.

12. Neither Mr. Taylor nor Taylor Land Clearing secured a solid waste permit from the Pennsylvania Department of Environmental Protection so that they could legally deposit solid waste on the Soterin Property. Board Exhibit 2, number 3.

13. In April 2007 the Beaver Initiative for Growth hired Taylor Land Clearing to demolish and clear the Rosenberg Site, level the land, and seed the properties. Commonwealth Exhibit 98; Board Exhibit 2 at 1, number 1; Trial Transcript 32:10-16, 211:7-12.

14. Mr. Taylor made all the decisions regarding the disposal of solid waste that was removed from the Rosenberg Site. Deposition 65:2-5; Commonwealth Exhibit 10 at Question #20.

15. Beaver Initiative for Growth paid Taylor Land Clearing \$24,600 as payment for the demolition, land clearing, and disposal which check Mr. Taylor

deposited in his personal account. Trial Transcript 211:7-16; Deposition 22:19-24; Commonwealth Exhibits 98 & 101, question 11.

16. On May 1, 2007, Mr. Paul Minor, a Solid Waste Specialist employed by the Pennsylvania Department of Environmental Protection, following a complaint that tires were being dumped and buried on the Soterin Property, conducted an inspection. Commonwealth Exhibit 94; Trial Transcript 37:1-5.

17. During this May 1, 2007 inspection, Mr. Minor observed a large quantity of solid waste on the slope of the Soterin Property, including structural wood, several hundred tires, tree trunks, metal roofing, scrap metal, brick, block, chain link fences, metal pipes, and railroad ties. Commonwealth Exhibits 4, 6, 7, 9, 13 & 94; Trial Transcript 51:25; 52:1-5; 56:24-25; 57:1-16; 58:7-16; 59:6-20.

18. Mr. Minor estimated that five truckloads of solid waste had recently been dumped on the Soterin Property. Commonwealth Exhibit 133; Trial Transcript 167:18-23.

19. Although denying that metal and tires were transported from the Rosenberg Site and dumped on the Soterin Property (which we find not credible based on the physical evidence at the site and the testimony of Mr. Minor), Mr. Taylor admitted that the rest of the material from the Rosenberg Site was transported and dumped on the Soterin Property between April 14, 2007 and April

21, 2007. Trial Transcript 239:10-12; Deposition 51:16-25; 52:1-4; Commonwealth Exhibit 100, Question 23 (b); Trial Transcript 195: 2-14.

20. Mr. Minor testified that the tires on the site were recently put there because they did not have vegetation growing through and around them nor did they show signs of decomposition. Trial Transcript 35:25; 36:1-3; 93:12-25; 94:1-7.

21. In addition, the tires were mixed in with the wood from the demolished building indicating that these materials were dumped at approximately the same time. Trial Transcript 54:15-17; 55:2-11; 60:12-15; 61:1-11; Commonwealth Exhibit 9; Commonwealth Exhibit 13.

22. The tires and wood were also intermingled with logs, pipes, railroad ties, and metal establishing that these materials were dumped at the site at the same time. Trial Transcript 54:15-17; 55:4-11; 60:12-15; 61:7-11; Commonwealth Exhibits 9 & 13.

23. At the time of the First Inspection, the Soterin Property had been recently graded and vegetation had not begun to grow. Commonwealth Exhibits 4 & 94.

24. In addition, the solid wastes deposited on the Soterin Property uprooted a large tree which was still alive. This indicated that the solid wastes had

just been recently deposited on the site. Trial Transcript 59:8-20; Commonwealth Exhibit 4.

25. In 2006 on two separate occasions, Mr. Minor observed the slope of the Soterin Property while he was inspecting a parcel of land on the opposite side of the stream valley. At that time the slope was a grassy hillside and did not contain the solid waste he first observed on May 1, 2007. Trial Transcript, 46:1-21; Commonwealth Exhibit 94.

26. Taylor Land Clearing caused solid waste composed of scrap metal, roofing, railroad ties, chain link fence, metal pipes, structural wood, tree trunks, and tires to be transported from the Rosenberg Site to the Soterin Property in April 2007, where these materials were dumped without a permit. Deposition 51:16-25; 52:1-4; Trial Transcript 195:2-14; 239:10-12.

27. The Department issued Orders to Taylor Land Clearing on June 26, 2007 and to Robert Taylor on May 27, 2009, which, among other things, ordered the Appellants to stop allowing solid waste to be dumped on the Soterin Property without the necessary permits and to clean up the solid waste on the property. Commonwealth Exhibits 102 & 114; Trial Transcript 71:22-25; 72:1-2.

28. Multiple inspections of the property from April 2008 through October 2009 showed additional solid wastes dumped on the Soterin Property. Trial Transcript 81:20-23; 82:15-19; 101:4-18; 102:16-22.

29. Appellants removed 281 tires from the Soterin Property on May 30, 2009. Commonwealth Exhibits 61, 62, 71, 78, 91, 92, 113 & 143; Trial Transcript 156:18-25; 157:1-12; 206:4-13.

30. Approximately 100 tires remained on the site. Trial Transcript 216:20-22.

31. No other solid wastes were removed from the Soterin Property between April 2007 and October 2009. Trial Transcript 81:20-23; 82:15-19; 101:4-18, 102:16-22.

32. On October 6, 2009, the Department issued two Administrative Orders amending the June 2007 and May 2009 Orders directing the Appellants to take additional measures to prevent dumping on the Soterin Property. Board Ex. 2, number 12.

33. Although Mr. Taylor erected two "no trespassing signs" and a metal cable in March and May 2010, the Department inspectors observed the metal cable sagging and lying on the ground and additional loads of solid waste on the Soterin Property. The signs and cable were ineffective in preventing further dumping on the Soterin Property. Commonwealth Exhibits 74 & 153; Trial Transcript 89:19-25; 90:1-6, 23-25; 91:1-25; 92:1-18.

34. Mr. Taylor was personally responsible for the demolition and land clearing activities at the Rosenberg Site. Trial Transcript 229:9-11; 230:1; 235:10-11; Commonwealth Exhibit 98.

35. The local fire department has extinguished fires on the Soterin Property three times: on September 11, 2008, October 7, 2008, and July 1, 2009. Board Ex. 1, number 6; Commonwealth Exhibits 130-132; Trial Transcript 101:1-18.

36. The solid waste on the Soterin property is loose, non compacted, and structurally unstable. Trial Transcript 125:19-25; 126:11-24.

37. Appellants have not put in place necessary erosion and sedimentation controls which has resulted in sediment pollutants entering Wallace Run. Trial Transcript 135:2-11, 15-19; Commonwealth Exhibit 124, page 2.

DISCUSSION

This is not a complicated case. After the presentation of the evidence, the facts are clear. The law is equally clear. The Appellants, beginning in April 2007, caused solid waste to be dumped without a permit on the Soterin Property in Big Beaver Township, Pennsylvania. The Pennsylvania Department of Environmental Protection acted quickly to inspect the property and direct Mr. Taylor and Taylor Land Clearing to remove the waste and to make sure no more waste was deposited on the premises. Over the next two and one-half years the Department made

numerous inspections and unfortunately the dumping continued and except for the removal of 281 tires (after several requests) only minimal clean up occurred. The Appellants obviously dragged their feet in performing any remedial work and their efforts to prevent others from dumping solid waste at the site were not sufficient to prevent further environmental harm. Basically, the site has been operated, at least negligently, as an unpermitted solid waste site in contravention of a host of Pennsylvania statutes and regulations that are in place to protect the environment.

The Department has easily met the applicable burden of proof in this matter. The Department has proven the existence of facts supporting the civil penalty assessments, has shown that the penalties are authorized under the law, and that the penalties are a reasonable and appropriate exercise of the agency's discretion. *Boyertown Sanitary Disposal Company, Inc. v. Pennsylvania Department of Environmental Protection*, 2010 EHB 762, 775; *Gordon v. Pennsylvania Department of Environmental Protection*, 2007 EHB 264, 271; *Clearview Land Development v. Pennsylvania Department of Environmental Protection*, 2003 EHB 398; *Stine Farms & Recycling, Inc. v. Pennsylvania Department of Environmental Protection*, 2001 EHB 796; and *Farmer v. Pennsylvania Department of Environmental Protection*, 2001 EHB 271. See also 25 Pa. Code Section 1021.122(b)(1). In reviewing the reasonableness of civil penalty assessments, the Pennsylvania Environmental Hearing Board must determine whether there is a

“reasonable fit” between each violation and the amount assessed. *See Thebes v. Pennsylvania Department of Environmental Protection*, 2010 EHB 370, 398. Indeed, when reviewing civil penalty assessments, “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.” *Thebes, supra* at 398. There must be a reasonable fit between the violations and the amounts of the civil penalties. *Eureka Stone Quality, Inc. v. Pennsylvania Department of Environmental Protection*, 2007 EHB 419, 449. If we determine that the Department’s calculations are not a reasonable fit, then the Pennsylvania Environmental Hearing Board may substitute its discretion and direct the Department as to the proper assessment. *The Pines at West Penn, LLC v. Pennsylvania Department of Environmental Protection*, 2010 EHB 412, 420; *B & W Disposal Inc. v. Pennsylvania Department of Environmental Protection*, 2003 EHB 456, 468.

The record in this case demonstrates that the penalties were reasonable, lawful, and appropriate. Under 35 P.S. Section 6018.605, the Department may assess a civil penalty for a violation of any provision of the Solid Waste Management Act and any regulation of the Department. The Department may assess a civil penalty of up to \$25,000 per day for each violation. Appellants argue unconvincingly that they were not responsible for the solid waste found on the

property. Their post hearing brief neither cites to the trial transcript nor suggests a single finding of fact or conclusion of law. Instead, Appellants argue that the Department did not prove its case and Appellants should have been given credit for removing 281 discarded tires from the site. Moreover, they do not address their failure to remove a vast majority of the solid waste or their failure to prevent further dumping on the site. So in fact, the Appellants' initial dumping of multiple truckloads of solid waste on the site, their refusal to meaningfully clean up the site coupled with the continued deposit of solid waste at the site without a permit or any of the necessary sedimentation and erosion controls makes the Department's civil penalties of \$42,550 and \$56,300 seem very reasonable.

The Department could have assessed multiple violations per day for more than two years under the law. Instead, it attempted to use the tools in its enforcement arsenal and secure compliance with Pennsylvania law from the Appellants. Appellants enjoyed cost savings in not properly disposing of the solid waste. In fact, Appellants causing waste to be deposited on the site not only resulted in pollution to the waters of the Commonwealth but also resulted in three separate fires which required the local fire department to come and extinguish the fires. The fire on July 1, 2009 required the services of eleven fire fighters and four fire trucks to douse the flames.

The consolidated Appeal of the Appellants is without merit. The Civil Penalties assessed by the Pennsylvania Department of Environmental Protection are legal, proper, and in accordance with the provisions of the Pennsylvania Solid Waste Management Act.

CONCLUSIONS OF LAW

1. Appellants unlawfully caused solid waste to be deposited on the Soterin property without a permit and in violation of the Pennsylvania Solid Waste Management Act. 35 P.S. Section 6018.501(a); 610 (1), (4), (6) and (9).

2. Civil Penalties of up to \$25,000 per day per violation are authorized by the Pennsylvania Solid Waste Management Act. 35 P.S. Section 6018.605.

3. The Department performed numerous inspections over a two and one half year period and found multiple instances of illegal dumping and failure to perform meaningful clean up in violation of Department Orders based on the provisions of the Pennsylvania Solid Waste Management Act.

4. This illegal dumping and failure to perform meaningful clean up constituted substantive and serious violations of the provisions of the Pennsylvania Solid Waste Management Act. 35 P.S. Section 6018.605; 25 Pa. Code Section 271.412.

5. The Department met its burden of proof and the civil penalties of assessed against Taylor Land Clearing and assessed against Robert Taylor are a

reasonable fit and are in accordance with the provisions of the Pennsylvania Solid Waste Management Act. 25 Pa. Code Section 1021.122 (b)(1).

6. Taylor Land Clearing violated the June 2007 Order by failing to remove all solid waste from the Soterin Property and by continuing to accept waste by failing to take adequate measures to prevent waste from being deposited onto the Soterin Property.

7. Mr. Taylor is personally liable for violations of the Solid Waste Management Act as a participant in the illegal transport and disposition of solid waste from the Rosenberg Site to the Soterin Property.

8. Mr. Taylor violated the June 2007 Order and the May 2009 Order by failing to remove all solid waste from the Soterin Property, and by continuing to accept waste by failing to take adequate measures to prevent waste from being deposited on the Soterin Property.

**COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD**

**TAYLOR LAND CLEARING, INC.,
AND ROBERT TAYLOR**

v.

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

:
:
:
:
: **EHB Docket No. 2007-188-R**
: **(Consolidated with 2008-039-R,**
: **2009-089-R and 2010-017-R)**
:
:
:

ORDER

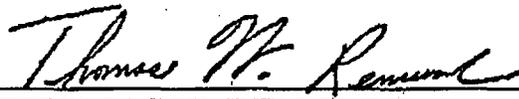
AND NOW, this 4th day of May, 2012, it is ordered as follows:

1) The civil penalty assessment of \$42,000 against Taylor Land Clearing, Inc. is legal, proper, in accordance with the provisions of the Solid Waste Management Act and a reasonable fit based on the violations. Judgment is entered against Taylor Land Clearing, Inc. in the amount of **\$42,500.**

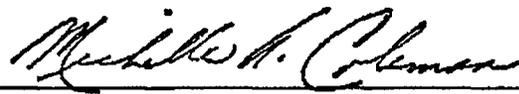
2) The civil penalty assessment of \$56,300 against Mr. Robert Taylor is legal, proper, in accordance with the provisions of the Solid Waste Management Act and a reasonable fit based on the violations. Judgment is entered against Robert Taylor in the amount of **\$56,300.**

3) The objections of the Appellants Taylor Land Clearing, Inc. and Robert Taylor are **dismissed**.

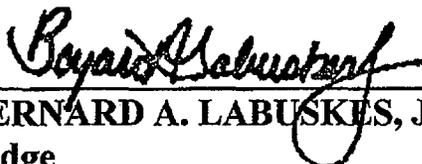
**ENVIRONMENTAL HEARING
BOARD**



THOMAS W. RENWAND
Chief Judge and Chairman



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKIS, JR.
Judge



RICHARD P. MATHER, SR.
Judge

DATED: May 4, 2012

c: DEP Bureau of Litigation:
Glenda Davidson, Library

For the Commonwealth of PA, DEP:
John H. Herman, Esquire
Greg Venbrux, Esquire
Michael J. Heilman, Esquire
Office of Chief Counsel – Southwest Region

For Appellants:
Gregory S. Fox, Esquire
FOX & FOX, PC
323 Sixth Street
Ellwood City, PA 16117



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KH REAL ESTATE, LLC

v.

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

:
:
:
:
:
:
:

EHB Docket No. 2010-189-R

Issued: May 7, 2012

**OPINION AND ORDER ON
MOTION FOR SANCTIONS**

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

The Pennsylvania Environmental Hearing Board grants the Department of Environmental Protection’s Motion for Sanctions in the Form of Dismissal against Appellant corporation for failure to comply with a Board Order to retain counsel and answer discovery. In addition, Appellant has shown a complete lack of intent to pursue its appeal. The appeal is dismissed.

OPINION

The Appellant, K H Real Estate, LLC, appealed an Order issued by the Department of Environmental Protection pursuant to the Pennsylvania Safe Drinking Water Act, 35 P.S. Sections 721.1-721.17. Appellant is a Pennsylvania limited liability company. The Appeal was filed on its behalf by Albert Krick,

who is not an attorney. This is not the first or the last appeal filed by Mr. Krick on behalf of Appellant. On March 4, 2010, the Board dismissed an earlier Appeal of Appellant for failure to retain counsel after so ordered by the Pennsylvania Environmental Hearing Board, *K H Real Estate, LLC v. Pennsylvania Department of Environmental Protection*, 2010 EHB 151. Board Rule 1021.21 requires that “parties, except individuals appearing on their own behalf, shall be represented by an attorney at all stages of proceedings subsequent to the filing of the notice of appeal.” 25 Pa. Code Section 1021.21. Appellant was well aware of this requirement from the Board’s dismissal of its earlier Appeal.

In this case Appellant’s Appeal was filed on December 23, 2010. The Department of Environmental Protection has been forced to file several Motions for Sanctions because of Appellant’s failure to answer discovery, cooperate in discovery, and most importantly, retain counsel as required by law. On September 30, 2011, the Board issued an Order directing Appellant: 1) to obtain counsel to represent it on or before October 17, 2011; and 2) to respond to the Department’s outstanding discovery requests by November 4, 2011. Appellant ignored our Order.

Presently before the Board is the Department’s Motion for Sanctions in the Form of Dismissal. Appellant filed no response to the Motion. The Board has the power to impose sanctions, including dismissal of an appeal, for failure to comply

with its orders. 25 Pa. Code Section 1021.161; *K H Real Estate, LLC v. Pennsylvania Department of Environmental Protection*, 2010 EHB 151, 152. A sanction resulting in dismissal is justified when a party fails to comply with a Board order and shows a lack of intent to pursue its appeal. *Pearson v. Pennsylvania Department of Environmental Protection*, 2009 EHB 628, 629; *Miles v. Pennsylvania Department of Environmental Protection*, 2009 EHB 179, 181; *RJ Rhodes Transit, Inc. v. Pennsylvania Department of Environmental Protection*, 2007 EHB 260; *Sri Venkateswara Temple v. Pennsylvania Department of Environmental Protection*, 2005 EHB 54, 56.

Based on the Appellant's failure to retain counsel pursuant to 25 Pa. Code Section 1021.21 and this Board's Order of September 30, 2011, we will grant the Department's Motion for Sanctions and dismiss the Appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KH REAL ESTATE, LLC

v.

COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT OF
ENVIRONMENTAL PROTECTION

:
:
:
:
:
:
:

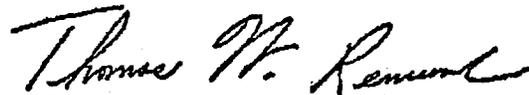
EHB Docket No. 2010-189-R

ORDER

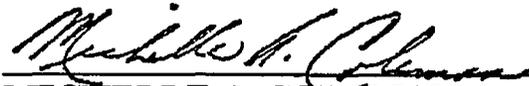
AND NOW, this 7th day of May, 2012, following review of the Department of Environmental Protection's Motion for Sanctions in the Form of Dismissal, it is ordered as follows:

- 1) The Motion for Sanctions in the Form of Dismissal is **granted**.
- 2) The Appeal is **dismissed**.

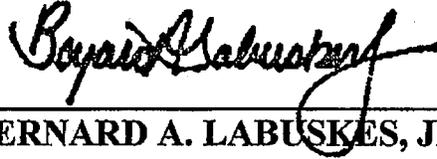
ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chief Judge and Chairman



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge



RICHARD P. MATHER, SR.
Judge

DATED: May 7, 2012

**c: For the Commonwealth of PA,
DEP Litigation:
Glenda Davidson, Library**

**For the Commonwealth of PA, DEP:
Gail Guenther, Esquire
Office of Chief Counsel - Southwest Region**

**For Appellant, *Pro Se*:
Albert Krick
KH Real Estate
PO Box 100
Worthington, PA 16262**



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LOWER SALFORD TOWNSHIP AUTHORITY:

v.

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

EHB Docket No. 2005-100-L

Issued: May 10, 2012

**OPINION AND ORDER ON
REMAND OF ATTORNEYS' FEES APPLICATION**

By Bernard A. Labuskes, Jr., Judge

Synopsis

An application for attorneys' fees is denied because the applicant did not show that some conduct on the part of the Department was a significant factor in the Environmental Protection Agency's decision to withdraw the TMDL that was the subject of the appeal before the Environmental Hearing Board.

OPINION

Lower Salford Township Authority's application for attorneys' fees and costs incurred in its appeal from the Skippack Creek TMDL is back before us following a remand from the Commonwealth Court. *Upper Gwynedd-Towamencin Municipal Authority, et al. v. DEP*, 9 A.3d 255 (Pa. Cmwlth. 2010). A description of the proceedings leading up to this point is set forth in the Commonwealth Court's opinion, *id.*, and in multiple prior opinions of this Board, *Lower Salford Township Auth. v. DEP*, 2005 EHB 854, 2005 EHB 813, 2006 EHB 657, 2009 EHB 379, EHB 633, and 2010 EHB 6. There are 218 entries on the Board's docket spanning seven years of litigation. Rather than repeating all of the background once again here, we will get

straight to the point. The Court has remanded the Authority's application to us to make a factual determination of whether the Authority can establish that some conduct on the part of the Department was a "significant factor" in the Environmental Protection Agency's decision to withdraw the TMDL for nutrients in Skippack Creek. *Id.*, 9 A.3d at 268. Although there is no question that EPA, not the Department, promulgated and withdrew the TMDL, the Court nevertheless held that we "could" conclude that the Authority had met the threshold requirements for an award of fees if the Authority could prove that the Department's conduct played a "significant role in EPA's withdrawal decision." *Id.*

We find following a hearing and post-hearing briefing that there was no conduct on the part of the Department that was a significant factor in EPA's withdrawal decision. The Department did not play a significant role. In fact, as far as we can tell, the Department had very little involvement in EPA's decision-making process.

The Authority bears the burden of proof. *Solebury Twp. v. DEP*, 928 A.2d 990, 1001 (Pa. 2007). By far the best evidence of EPA's decision-making process culminating in the withdrawal of the TMDL is the Agency's Decision Rationale. (Petitioner's Exhibit ("P. Ex.") 6.) Unlike the document setting forth the original TMDL, which acknowledged the contribution of numerous Department employees regarding the promulgation (P. Ex. 2), the Decision Rationale for the withdrawal contains no mention of any contribution by the Department or its employees in EPA's decision-making process regarding the withdrawal. The express acknowledgment of the Department's role in the TMDL document (P. Ex. 2) suggests that the Department would likely have been recognized in the Decision Rationale (P. Ex. 6) if it had also played a part in the withdrawal decision. As a matter of comity and mutual respect, EPA would almost certainly have given the Department credit if credit was due.

The Decision Rationale describes a lengthy and comprehensive investigation and analysis conducted independently by EPA and EPA contractors. The substance of the Decision Rationale is entirely inconsistent with a finding of any significant involvement on the part of the Department. Instead, the Decision Rationale speaks throughout about EPA's independent research and EPA's independent analysis and EPA's independent findings and conclusions. The Decision Rationale lists 103 references, not one of which was generated by the Department.

The only witness called by the Authority was Thomas Henry, a retired TMDL manager from EPA's Region III office. Although we certainly appreciate Mr. Henry's attendance at the hearing pursuant to a subpoena, his testimony had limited value because he repeatedly stated that he was not authorized to speak on behalf of the Agency, and he was otherwise hesitant to provide helpful information because he admitted to having a very poor recollection of events unless he was prompted by documents of record. (*See, e.g.*, Notes of Transcript page ("T.") 12, 13, 14, 16, 17, 18, 26, 29, 31, 33, 34, 47, *passim.*) Nevertheless, Henry had a major role in EPA's decision-making process, and in fact drafted the Decision Rationale. (T. 66.) Henry testified as follows regarding the Department's role with respect to the Decision Rationale:

Q: Was there any discussion with DEP that you had regarding this document before it was released?

A: You know, I don't recall. There may have been discussions in terms of what I planned on putting in but I'm not. I don't recall how significant they may have been.

Q: But those were discussions with DEP?

A: Yes.

Q: Do you know whether there were any discussions with DEP by anyone else within EPA other than you about this document?

A: I can't speak to that. I don't know.

(T. 83.) This vague allusion to “discussions” that may or may not have occurred does not support a finding that the Department played a significant role in EPA’s decision-making process.

Henry also mentioned a meeting in State College attended by Department personnel at which Dr. Hunter Carrick, whose work played a pivotal part in the establishment of the TMDL, said he was no longer comfortable with his underlying work. However, Henry could not remember if the meeting related to the TMDL at issue here. (T. 33.) Henry did not testify that the Department took a position one way or the other with respect to the TMDL at the meeting.

There are undoubtedly cases where a state approaches EPA and asks it to approve a withdrawal of a TMDL, *see, e.g., City of Arcadia v. EPA*, 411 F.3d 1103 (9th Cir. 2005), but this is obviously not such a case. Here, the Department appears to have been little more than an interested, but largely unengaged, bystander. There is no evidence that the Department asked EPA to withdraw the TMDL. There is no evidence that it took a position on the matter. There is no evidence that it submitted comments or criticisms, performed any studies, reviewed any drafts, conducted any analyses, or contributed in any way to the withdrawal decision-making process. There is no evidence that EPA sought the Department’s concurrence or that the Department provided any such concurrence.

The Authority says that, after reviewing the Authority’s reports, “the Department’s conduct changed” because the Department “could no longer represent” that Carrick’s work constituted an acceptable approach. However, the Authority cites to no evidence that EPA received any communication from the Department or that EPA was otherwise made aware that the Department “no longer supported” the Carrick analysis. To the extent that the Authority is contending that the Department’s silence or inactivity is enough to constitute a “change in

conduct,” we reject the contention. Something more than passive indifference, even if compared to prior activity at a higher level, is required for the Department to be said to have played a “significant role.”

The Authority places great weight on the fact that it was the Department who first provided EPA with the Authority’s expert reports, and it was those reports that challenged Dr. Carrick’s original analysis leading up to promulgation of the TMDL. The Authority’s view is that, but for the Department handing over those reports, EPA would not have withdrawn the TMDL. Actually, the record is not clear that EPA learned about potential problems regarding the underlying analysis leading up to the promulgation of the TMDL from the Authority’s expert reports. (Compare P. Ex. 2 and 3 (DEP supplied reports), with T. 19 (Henry learned of problems from the web), 30-32 (don’t remember seeing reports or what they said), 32, 39 (not sure how he came into possession of reports), 50-52 (EPA may have had notice of potential problems *before* expert reports were supplied), 89 (earlier comments received regarding same problems), P. Ex. 7 (earlier comments), and DEP Ex. 1 (other comments regarding problems submitted before EPA saw the Authority’s expert reports).) In any event, Henry testified as follows about the reports:

Q: So the decision to withdraw with Skippack was based on the expert reports that were submitted in the Skippack Creek TMDL litigation?

A: I didn’t say that.

Q: What - -

A: I said there was a whole range of reasons why it was.

Q: Okay. But the reports you reference in your declaration - -

A: Was a part, part of the decision process. It may have been a small part but it was a part of the decision process. There’s a whole range of reasons why it was withdrawn. I went through those reasons previously.

(T. 91-92.)

The record shows that the errors described in the Authority's expert reports (but also described elsewhere) may have contributed to EPA having second thoughts, but EPA's ultimate decision to withdraw the TMDL went well beyond that initial concern and was based on a whole range of issues. The issues of concern are described in great detail in the Decision Rationale and include many factors that have nothing to do with the modeling errors described in the Authority's reports. They include, for example, a decision by EPA that both nitrogen *and* phosphorus need to be considered, that other modeling approaches may be better, that more attention needs to be paid to nonpoint sources, that other factors contribute to algae growth, and potential regulatory changes. (T. 19, 57-63, 65-68, 78, 81, 91-92; P. Ex. 6.)

We believe, however, that the Authority's emphasis on the part played by its expert reports is largely misplaced. The question on remand is not what part the expert reports played in EPA's decision. The Commonwealth Court instructed us to focus on the *Department's* contribution to EPA's decision-making process. The Department's only connection to the reports that the Authority believes were so important is that the Department appears to have turned them over to EPA. To state the obvious, the Department did not prepare the reports. The Department did not endorse the reports. There is no record that it commented on the reports. The Department's role with respect to the reports appears to have been the equivalent of a mailman. Handing over someone else's reports does not amount to a "significant role" in EPA's decision-making process.

Another of the Authority's theories is that that Department played a major role in the promulgation of the original TMDL, so it *must* have played a similar role in the withdrawal. We disagree. Assuming the Department in fact played a major role in the promulgation of the TMDL -- a factual question that we never had a chance to resolve due to the settlement of this

appeal -- the promulgation of the TMDL in 2005 and its subsequent withdrawal in 2007 were two entirely separate administrative actions. It in no way follows that the Department must have participated at the same level in both actions. We could just as easily speculate that, given the problems that surfaced with the TMDL, EPA realized it needed to take greater charge of the reconsideration. In fact, Henry mentioned that EPA wanted to be more consistent with what was happening at the national level as one of the many considerations for the withdrawal. (T. 81.)

Another argument that permeates the Authority's case is that Dr. Carrick's actions in effect constituted "actions of the Department." The record, however, does not support such a conclusion. Carrick, a professor at Penn State, certainly worked with the Department when EPA was promulgating the TMDL (T. 20-28, 80), but there is no evidence that he maintained that relationship at the time of or with respect to the withdrawal. EPA dealt with Carrick directly in connection with the withdrawal, and there is no evidence to suggest that Carrick was acting on behalf of, or as a representative of, the Department. (See, T. 55-56; P. Ex. 2, 3, 6.) There is no evidence that the Department authorized, adopted, endorsed, or advocated Carrick's views in connection with the withdrawal.

In any event, assuming *arguendo* that Carrick and the Department are essentially one and the same, the record does not support a conclusion that Carrick played a significant role in EPA's decision-making process regarding the withdrawal. As previously mentioned, Carrick's second thoughts may have contributed to EPA's initial decision to reexamine whether there was something wrong with the TMDL, but they at most played "a small part" in the actual decision to withdraw. (T. 92.) To the extent there was any causal relationship between Carrick's change in thinking and the withdrawal, it was remote, not proximate. Numerous events intervened between Carrick's comments and EPA's ultimate decision that severely reduced any causation-in-fact

relationship that might otherwise have been said to have existed.

In conclusion, we find that the Authority has failed to satisfy its burden of proving that some conduct on the part of the Department was significant factor in EPA's decision to withdraw the TMDL. In fact, the Authority has not been able to point to *any* conduct on the part of the Department of any real consequence in connection with the withdrawal.

Two side issues raised by the parties deserve brief comment. First, the Commonwealth Court suggested that, if the Department had no power or authority to effectuate or direct EPA to withdraw the TMDL, i.e. "effectuate change on its own," an award of fees would appear to be "unjust." 9 A.3d at 267-68. It is inconceivable to us that the Department could have withdrawn EPA's TMDL "on its own," *see* 33 U.S.C. § 1313, but we need not decide that question of federal law because the Authority has otherwise failed to satisfy the threshold criteria for an award of fees.

Lastly, prior to our evidentiary hearing, the Authority served subpoenas on, among others, Dr. Carrick and two Department employees, Lee McDonnell and William Brown. We granted the Department's motion to quash those three subpoenas. At the beginning of the hearing, the Authority presented offers of proof for the three witnesses in support of a claim that we erred by granted the motion to quash. (T. 4-8.) However, the Authority has not pursued the argument in the its post-hearing brief. Accordingly, it is waived. 25 Pa. Code § 1021.131; *Wilbar Realty v. DER*, 663 A.2d 857 (Pa. Cmwlth. 1995); *Thebes v. DEP*, 2010 EHB 370, 371.¹

¹ Even if the issue had not been waived, we see no reason to revisit our ruling. There was not a hint of evidence from EPA that the Department played a significant role in EPA's decision-making process. Had there been the slightest suggestion of Department involvement in the withdrawal process, there might have been a better case for reopening the record, although we doubt it. The Commonwealth Court's remand order required us to investigate EPA's decision-making process and ultimately decide why EPA did what it did. Neither Dr. Carrick nor the Department employees can tell us why EPA decided to withdraw the TMDL. Furthermore, the Authority's opposition to the Department's motion to quash and its offers of proof show that the witnesses in question would have testified about either deep background

For the foregoing reasons, we issue the Order that follows.

(e.g., the promulgation as opposed to the withdrawal of the TMDL) or undisputed matters (e.g., Carrick's second thoughts contributed to EPA's reconsideration). In other words, even if we assumed that everything set forth in the Authority's offers of proof were true, it would not change our conclusion in this case.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LOWER SALFORD TOWNSHIP AUTHORITY:

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

:
:
:
:
:
:

EHB Docket No. 2005-100-L

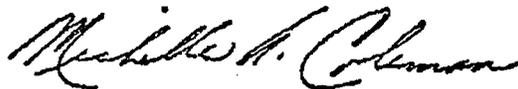
ORDER

AND NOW, this 10th day of May, 2012, the applicant's application for attorneys' fees and costs is denied.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chief Judge and Chairman



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

DATED: May 10, 2012

Judge Richard P. Mather, Sr. did not participate in this matter.

c: DEP, Bureau of Litigation:
Glenda Davidson, Library

For the Commonwealth of PA, DEP:
Martha E. Blasberg, Esquire
William H. Gelles, Esquire
Office of Chief Counsel – Southeast Regional Office

For Appellant:
Steven A. Hann, Esquire
HAMBURG RUBIN MULLIN MAXWELL & LUPIN
PO Box 1479
Lansdale, PA 19446-0773

had not experienced similar problems with his water supply prior to the installation of the Yeager gas well and impoundment operated by Range Resources – Appalachia LLC (Range Resources).

In response to the complaint, the Department conducted an investigation by collecting water samples from Mr. Kiskadden’s property on June 6, 2011. Sampling of the Kiskadden well was conducted by both the Department and Range Resources, and various constituents were found in the well, including dissolved methane gas. Also found were chloroform, butyl alcohol, acetone and high levels of sodium and total dissolved solids (Ex. 1 to Appellant Response). In a letter issued on September 9, 2011, the Department informed Mr. Kiskadden that it had concluded its investigation and had determined that the contaminants in the Kiskadden water supply “are not the result of Range’s actions at the Yeager well site, or any other gas well related activities.” (Ex. 1 to Appellant Response).

The Department’s letter concluded with the following language:

Any person aggrieved by this action may appeal, pursuant to Section 4 of the Environmental Hearing Board Act, 35 P.S. Section 7514, and the Administrative Agency Law, 2 Pa.C.S. Chapter 5A, to the Environmental Hearing Board. . . .

(Ex. 1 to Appellant Response)

Mr. Kiskadden filed an appeal with the Environmental Hearing Board on October 7, 2011. On January 9, 2012, the Department filed a motion to dismiss the appeal, arguing that the September 9, 2011 letter is not an appealable action because it does not direct or require any party to do anything. The Department contends that the letter only reported the findings of its investigation into Mr. Kiskadden’s water supply complaint.

Mr. Kiskadden filed a response objecting to the Department’s motion. He notes that the letter itself states that it is appealable to the Environmental Hearing Board. He also argues that it

is not the letter that is being appealed but the Department's investigation of the water contamination complaint, which he contends was inaccurate and incomplete.

The Department filed a reply in which it argues that the appealability of a written communication from the Department does not turn on whether it contains appeal language. The Department points to a number of decisions by the Environmental Hearing Board in which we have held that the inclusion of appeal language in a letter – or the lack thereof – is not the determining factor as to whether the letter is appealable. The Department further argues that an investigation of an appellant's complaint does not give rise to an action that is reviewable by the Environmental Hearing Board, citing *DEP v. Schneiderwind*, 867 A.2d 724 (Pa. Cmwlth. 2005) in support.

Pursuant to the Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, as amended, 35 P.S. §§ 7511 et seq., the Environmental Hearing Board has the power and duty to hold hearings and issues adjudications “on orders, permits, licenses or decisions of the department.” *Id.* at § 7514(a). The Act further provides that “no action of the department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board. . . .” *Id.* at § 7514(c). The Board's regulations implementing the Environmental Hearing Board Act define “action” as “an order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to a permit, license, approval or certification.” 25 Pa. Code § 1021.2(a).

We agree with the Department that mere inclusion of appeal language in a document does not necessarily render it an appealable action, *Jackson v. DEP*, 2010 EHB 288, 294. *Ballas v. DEP*, 2009 EHB 652, 655, just as the failure to include appeal language in a document also does

not necessarily render it non-appealable. *Eljen Corp. v. DEP*, 2005 EHB 918, 927. As former Chief Judge Krancer pointed out in *Eljen*:

[T]he presence or absence of such words would not in itself make a non-appealable communication appealable. There is no such rule, nor should there be, which makes the presence or absence of such language be the definitive determinate whether an action is appealable or not. On the contrary, as just noted, we have applied a host of factors to determine the question of appealability. The presence or absence of a specific notice of appealability is but one factor in the analysis. [citations omitted]

Id. at 927-28.

And, as Judge Mather further explained in *Jackson, supra*:

A review of the caselaw reveals certain principles which guide the determination of whether a particular Department action is appealable. Although formulation of a strict rule is not possible and the “determination must be made on a case by case basis, “ *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121, the Board has articulated certain factors which should be considered. These include: the specific wording of the communication; its purpose and intent; the practical impact of the communication; its apparent finality; the regulatory context; and, the relief which the Board can provide. See *Borough of Kutztown*, 2001 EHB at 1121-24; *Donny Beaver v. DEP*, 2002 EHB 666, 672-73.

Jackson, supra at 294.

Therefore, we agree with the Department that the presence of appeal language in its September 9, 2011 communication does not by itself make the letter appealable.¹

The Department issued its September 9, 2011 communication pursuant to the Oil and Gas Act. Section 3218 of the recently enacted Oil and Gas Act, Act of February 14, 2012, P.L. 87, 58 Pa.C.S. §§3201 – 3274, provides in relevant part as follows:

A landowner or water purveyor suffering pollution or diminution of a water supply as a result of the drilling, alteration or operation of an oil or gas well may so notify the department and

¹ Although we disagree with Mr. Kiskadden, we do empathize with his position that he simply did what the letter stated, i.e., he appealed it to the Environmental Hearing Board.

request that an investigation be conducted. Within ten days of notification, the department *shall investigate the claim and make a determination within 45 days following notification*. If the department finds that the pollution or diminution was caused by drilling, alteration or operation activities or if it presumes the well operator responsible for pollution under subsection (c), the department shall issue orders to the well operator necessary to assure compliance with subsection (a), including orders requiring temporary replacement of a water supply where it is determined that pollution or diminution may be of limited duration.

58 Pa.C.S. § 3218 (emphasis added)

A previous version of the Oil and Gas Act was in effect when the Department took its action in 2011. The prior statute contains similar language. *See*, 58 P.S. § 601.208, repealed and replaced by the current Act of February 14, 2012, (“Within ten days of such notification, the department shall investigate any such claim and shall, within 45 days following notification, make a determination.”)

The Department conducted an investigation of Mr. Kiskadden’s water supply, as it was required to do under the Oil and Gas Act, and made a determination that the contaminants in the Kiskadden well were not caused by Range Resources’ Yeager operation or any other gas well related activities.

In support of its argument that this matter is not appealable, the Department relies on the Commonwealth Court’s decision in *Schneiderwind v. DEP*, 867 A.2d 724 (Pa. Cmwlth. 2005). In that case, a property owner filed a complaint with the Department asserting that a concrete company’s quarry operation next to his farm had diminished his groundwater supply. The Department investigated the complaint and, based on the results of its investigation, sent a letter to the property owner refusing to prosecute his claim. The property owner appealed the decision to the Board, asserting that the Department should have directed the company to replace or restore his water supply. The Department sought to dismiss, arguing that the Board had no

jurisdiction over the appeal because the Department had unreviewable discretion whether to take enforcement action. The Board disagreed and sustained the appeal after holding a hearing on the merits of the case. On appeal, the Commonwealth Court reversed, finding that “the Department letter refusing to decide Schneiderwind’s claim does not qualify for review by the Board.” *Id.* at 726. In reaching this conclusion, the Court noted that Section 11(g) of the Noncoal Surface Mining Conservation and Reclamation Act (Noncoal Act), Act of December 19, 1984, P.L. 1093, 52 P.S. §§ 3301 - 3326, under which the appeal was brought, stated that “[i]f any operator fails to comply with this subsection [requiring replacement or restoration of an affected water supply], the secretary [of the Department] *may* issue orders to the operator as are necessary to assure compliance.” 867 A.2d at 725 (emphasis in Commonwealth Court’s opinion). In other words, any action on the part of the Department was purely discretionary. The Court further noted that Section 20 of the Noncoal Act authorized the commencement of a civil action to compel compliance with the Act if the Department elected not to proceed on the complaint. The Court held that “[t]he Department’s election not to proceed on Schneiderwind’s complaint opened the door to his commencement of a civil action.” *Id.* at 727. It is also important to note that the Court made much of the fact that the concrete company had not been made a party to the action before the Board and that the Board should not have proceeded without it.

The Department asserts that *Schneiderwind* is nearly identical to the present case since it involved a Department letter reporting the results of a water supply investigation and a discretionary refusal to take further action. We disagree. The current case does not merely involve a letter reporting the results of a water supply investigation. Nor does it involve a discretionary act on the part of the Department. On the contrary, the Oil and Gas Act *requires* the Department to investigate any claim of pollution or diminution of a water supply and,

following that investigation, to make a *determination*. If it finds that the water supply was affected by drilling or other activities of a gas or oil well operator, it *shall* issue an order for the restoration or replacement of the water supply. 58 P.S. § 3218 (Section 208 of the prior statute contained similar language at 52 P.S. § 601.208.) This differs from the language of the Noncoal Act at issue in *Schneiderwind*, which makes the decision whether to conduct an investigation discretionary. In Section 3218 of the Oil and Gas Act, the General Assembly limited the Department's enforcement discretion and imposed a mandatory duty on the Department to take action if it determined that the water supply was affected by oil and gas operations.

This case is more closely akin to *Delores Love v. DEP*, 2010 EHB 523, which involved a refusal by the Department to process a mine subsidence claim filed under the Bituminous Mine Subsidence and Land Conservation Act (Mine Subsidence Act), Act of April 27, 1966, P.L. 31, *as amended*, 52 P.S. §§1406.1 – 1406.21. The Mine Subsidence Act, like the Oil and Gas Act, sets forth a procedure for filing a claim and requires the Department to rule on a claim one way or another. In *Love*, as here, the Department made the argument that its letters to the appellant were unappealable because they did nothing more than notify the appellant of the Department's refusal to take further action. We disagreed and in an opinion authored by Judge Labuskes, held as follows:

The Department's denial or failure to respond to a subsidence claim cannot fairly be characterized as the type of prosecutorial decision that is immune from Board review. . . .The letters denied Love's subsidence claims and clearly and adversely affected her property rights, thereby giving rise to a right to file appeals from the Department's actions.

Love, 2010 EHB at 527.

In the case before us, the Department made a determination that Mr. Kiskadden's water supply was not polluted by the gas well activities of Range Resources or any other gas well

activities. This determination, made pursuant to the Department's duties under the Oil and Gas Act, clearly and adversely affected Mr. Kiskadden's property rights. As such, it is an action of the Department and is, thus, appealable to the Environmental Hearing Board.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LOREN KISKADDEN

v.

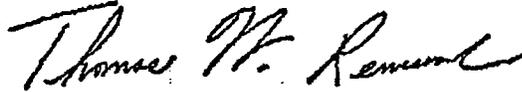
COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and RANGE RESOURCES -
APPALACHIA, LLC, Permittee

EHB Docket No. 2011-149-R

ORDER

AND NOW, this 16th day of May 2012, it is ordered that the Department's motion to dismiss is denied.

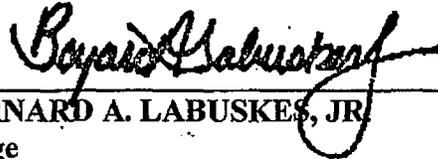
ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chief Judge and Chairman



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge



RICHARD P. MATHER, SR.
Judge

DATED: May 16, 2012

c: DEP, Bureau of Litigation:
Attention: Glenda Davidson

For the Commonwealth of PA, DEP:
Michael J. Heilman, Esquire
Gail A. Myers, Esquire
Richard Watling, Esquire
Office of Chief Counsel – Southwest Region

For Appellant:
Kendra L. Smith, Esquire
SMITH BUTZ, LLC
125 Technology Drive
Bailey Center I, Suite 202
Canonsburg, PA 15317

For Permittee:
Kenneth S. Komoroski, Esquire
Jeremy A. Mercer, Esquire
Megan Smith, Esquire
FULBRIGHT & JAWORSKI, LLP
370 Southpointe Blvd, Suite 100
Canonsburg, PA 15317



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN

v.

**COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT OF
ENVIRONMENTAL PROTECTION
and RANGE RESOURCES-
APPALACHIA, LLC, Permittee**

EHB Docket No. 2011-149-R

Issued: May 17, 2012

**OPINION AND ORDER ON
MOTION FOR PROTECTIVE ORDER**

By: Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

The Pennsylvania Environmental Hearing Board grants a Motion for Protective Order barring the deposition of trial counsel on the basis of the attorney-client privilege and the attorney work product doctrine.

BACKGROUND

Appellant filed a timely appeal of the Pennsylvania Department of Environmental Protection's denial of his claim that his water was contaminated by the Marcellus Shale operations of Permittee Range Resources--Appalachia, LLC (Range Resources). Appellant, Loren Kiskadden, resides in Amwell Township, Washington County, Pennsylvania, down-gradient from the Yeager Impoundment owned and

operated by Range Resources. Mr. Kiskadden contends that prior to the installation of the Yeager Impoundment he had enjoyed the use of his water without problem over a period of decades. Following the installation of the Yeager Impoundment, according to Mr. Kiskadden, his water turned gray and foamed up. Appellant, pursuant to the Pennsylvania Oil and Gas Act, notified the Pennsylvania Department of Environmental Protection of his claim. Following an investigation as required by the provisions of the Pennsylvania Oil and Gas Act, the Department denied the claim and refused to order Range Resources to provide Mr. Kiskadden with an alternative water source.

As part of the discovery process, Appellant has noticed the depositions of five Department of Environmental Protection employees including counsel for the Department in this case, Attorney Gail Myers. Appellant has not only scheduled Attorney Myers' deposition but has scheduled her deposition as the first one. The Notice of Deposition states that the intended purpose of the deposition is to "inquire into all the facts and circumstances involved in this Appeal." The Department has asked the Board to prohibit Appellant from deposing Attorney Myers based on the attorney-client privilege and the attorney work product doctrine.

DISCUSSION

As set forth in the Department's Motion and supported by an accompanying Affidavit, Attorney Myers is an Assistant Counsel of the Office of Chief Counsel of

the Pennsylvania Department of Environmental Protection. She is employed by the Office of General Counsel, and is assigned to the Office of Chief Counsel to provide legal services to the Pennsylvania Department of Environmental Protection. Department's Motion for Protective Order, paragraph 4, Exhibit B (Affidavit of Gail A. Myers, Esquire). Moreover, according to the Motion (which was not directly responded to by Appellant), Attorney Myers represents the Department in this Appeal, and has been advising Department clients on issues related to Mr. Kiskadden prior to the filing of the Appeal and for all times relevant to the Appeal. Department's Motion for Protective Order, paragraph 5, Exhibit B. Finally, and most importantly, the Department contends that "Attorney Myers provided only legal advice and counsel, including work product, to her Department clients, relating to Mr. Kiskadden's water supply complaint. Attorney Myers did not evaluate the water supply claim or determine its merit." Department's Motion for Protective Order, paragraph 7.

The Department argues that it is entitled to a Protective Order prohibiting Appellant from deposing Department counsel because any testimony would be within the attorney work product privilege or the attorney client privilege. *National Rail Road Passenger Corporation v. Fowler*, 788 A.2d 1053, 1066 (Pa. Cmwlth. 2001). Both privileges apply to governmental agencies and their counsel when acting in their professional capacities. *Sedat, Inc. v. Pennsylvania Department of Environmental*

Resources, 641 A.2d 1243, 1244 (Pa. Cmwlth. 1994); *Groce v. Pennsylvania Department of Environmental Protection & Wellington WDYT-LLC*, 2005 EHB 951, 953.

Although not filing a formal Reply to the Department's Motion, Appellant's counsel filed a thought provoking Memorandum of Law in Opposition to Appellee's Motion for Protective Order. In its legal memorandum, Appellant forges an argument which attempts to parse Attorney Myer's knowledge into legal and factual boxes. Appellant contends that we should allow the deposition of Attorney Myers because she has knowledge of facts, which are discoverable, and would not be protected by the attorney client or attorney work product privileges. Appellant's counsel contends in her legal memorandum, that Attorney Myers has issued Notices of Violations to Permittee and that the factual specifics are not available to Appellant through alternative means or witnesses. Appellant also contends that it wishes to question Attorney Myers on any communications she has had with Range Resources including its counsel. Appellant contends that these communications would not be protected by the attorney client privilege.

Nevertheless and most importantly, Mr. Kiskadden fails to cite any facts or documents to support these allegations which is required by our Rules of Practice and Procedure. "A Response to a Motion shall set forth in correspondingly-numbered

paragraphs all factual disputes and the reason the opposing party objects to the Motion.

Material facts set forth in a Motion that are not denied may be deemed admitted for the purposes of deciding the Motion.” 25 Pa. Code Section 1021.91(e).

Following the filing of Appellant's Memorandum of Law in Opposition to Appellee's Motion for Protective Order, the Department requested permission to file a Reply to the Appellant's Memorandum of Law. We denied the request. However, the Department's legal contention is correct. The Board will not consider factual statements alleged in a Memorandum of Law as opposed to a properly drafted Response to a Motion which under our Rules of Practice and Procedure should respond to the Motion paragraph by paragraph. In this way, any factual disputes can be identified and properly addressed by the Board.

We agree with the Pennsylvania Department of Environmental Protection that Attorney Myers should not be deposed. Our decision is supported by case law, statute, and the Pennsylvania Rules of Civil Procedure. First, the attorney-client privilege bars opposing counsel from inquiring into many areas.

In 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.

42 Pa. C.S. Section 5928.

Second, Rule 4003.3 of the Pennsylvania Rules of Civil Procedure protects the attorney's work product from disclosure to opposing counsel. "The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories." Pennsylvania Rule of Civil Procedure 4003.3; *Slater v. Rimar, Inc.*, 338 A.2d 584, 589 (Pa. 1975); *Groce v. Pennsylvania Department of Environmental Protection & Wellington Development, WDYT, LLC*, 2005 EHB 951, 953.

Deposing attorneys who are acting as counsel in a case is usually a terrible idea. Judge Labuskes pointed out many of the legal and policy reasons that support a prohibition of attorney depositions in *PA Waste, LLC v. Pennsylvania Department of Environmental Protection & Clearfield County*, 2009 EHB 317, 319:

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. Pennsylvania Department of Environmental Protection*, 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 which is surely bound to be a deposition with little or no incremental value.

Allowing counsel for a party to be deposed would clearly increase the costs of all parties and add an element of unhealthy gamesmanship to cases. It would inevitably cause the Board to become involved in detailed issues as to whether the information sought from the attorney involved attorney work product or the attorney client privilege. Moreover, much if not all of the information Appellant is seeking is more likely to be within the direct knowledge of the program employees of the Department of Environmental Protection. Those individuals may certainly be deposed.

Accordingly, we will issue an Order in this case granting the Department's Motion for a Protective Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN

v.

COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT OF
ENVIRONMENTAL PROTECTION
and RANGE RESOURCES-
APPALACHIA, LLC, Permittee

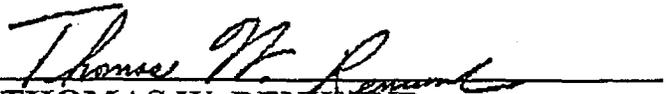
EHB Docket No. 2011-149-R

ORDER

AND NOW, this 17th day of May, 2012, following review of the Motion for a Protective Order and the Memorandum of Law in Opposition to the Motion for Protective Order, it is ordered as follows:

- 1) The Pennsylvania Department of Environmental Protection's Motion for Protective Order is **granted**.
- 2) Appellant is **prohibited** from deposing Attorney Gail Myers.

ENVIRONMENTAL HEARING BOARD


THOMAS W. RENWAND
Chief Judge and Chairman



MICHELLE A. COLEMAN

Judge



BERNARD A. LABUSKES, JR.

Judge



RICHARD P. MATHER, SR.

Judge

DATED: May 17, 2012

**c: For the Commonwealth of PA,
DEP Litigation:
Glenda Davidson, Library**

**For the Commonwealth of PA, DEP:
Michael J. Heilman, Esquire
Gail A. Myers, Esquire
Richard T. Watling, Esquire
Office of Chief Counsel - Southwest Region**

**For Appellant:
Kendra L. Smith, Esquire
SMITH BUTZ, LLC
125 Technology Drive
Bailey Center I, Suite 202
Canonsburg, PA 15317**

For Permittee:

Jeremy A. Mercer, Esquire

Megan E. Smith, Esquire

Kenneth S. Komoroski, Esquire

FULBRIGHT & JAWORSKI, LLP

370 Southpointe Boulevard, Suite 100

Canonsburg, PA 15317



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PAUL LYNCH INVESTMENTS, INC.

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

:
:
:
:
:
:
:

EHB Docket No. 2010-151-M

Issued: May 18, 2012

ADJUDICATION

By Richard P. Mather, Sr., Judge

Synopsis:

The Board upholds the Department’s assessment of civil penalty in the amount of \$5,000 for a property owner’s failure to notify the Department before conducting demolition activities on its property in violation of the Air Pollution Control Act. The Appellant’s activities on the property constituted demolition, and the amount of the penalty was a good fit for the violations that were established.

INTRODUCTION

On the evening of August 28 or the morning of August 29, 2009, the chimney on a building owned by the Appellant, Paul Lynch Investments, Inc. (“Paul Lynch Investments”) fell into the roof of the building’s attached garage causing damage to the attached structure. What followed was a series of events in which Paul Lynch Investments’ through its agent, responded to this situation, and, acted to secure the damaged building and clean up the damage on its property. These actions, according to the Department of Environmental Protection (the “Department”), triggered obligations for Paul Lynch Investments to inspect the building for

asbestos and report to the Department that it was conducting a demolition. The Appellant contests its obligation to report the activities to the Department because it believes it did not conduct a demolition, because there was no asbestos in the building and because it believes the Department provided it with permission to proceed with clean-up activities on the property. We will consider each of the Appellant's objections below, as well as whether its liability, if any, supports the Department's assessment of civil penalty.

FINDINGS OF FACT

1. The Department of Environmental Protection (the "Department") is the agency with the authority to administer and enforce the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, *as amended*, 35 P.S. §§ 4001-4015 ("Air Act") and the regulations promulgated thereunder.

2. Paul Lynch Investments, Inc. ("Paul Lynch Investments") is a corporation that is the owner and operator of a parcel of property containing a building, which was being used as an office building, that is over 100 years old with an attached garage located at 133 Mahoning Avenue, New Castle, Lawrence County, Pennsylvania ("the site"). (Notes of Transcript of Hearing on the Merits ("T.") 19, 57-58.)

3. Paul Lynch is the President and Secretary of Paul Lynch Investments. (Notes of Transcript of Inability to Pre-Pay Civil Penalties Hearing ("TPP.") 8.)

4. Paul Lynch Investments has no other officers. (TPP. 9.)

5. Paul Lynch runs the day-to-day operations of Paul Lynch Investments. (TPP. 9.)

6. Paul Lynch Investments has no employees and Paul Lynch is 100 percent responsible for the operations of Paul Lynch Investments. (TPP. 9.)

7. On the evening of August 28 or the morning of August 29, 2009, the chimney on the main building fell onto the attached garage structure causing damage to the garage. (T. 59.)

8. On August 29 or August 30, after the chimney's collapse, Paul Lynch, an agent of Paul Lynch Investments, operated a John Deere 490 D excavator at the site. Among other things, Mr. Lynch lowered several steel beams that were leaning against walls because Mr. Lynch was worried about the structure and security of the main building. (T. 60-61, 63.)

9. Thereafter, on August 31, 2009, Edson Morrison, a Department employee, photographed the condition of the damaged attached garage and main building on the Property. (T. 19-20; Department Exhibit ("D.Ex.") D.Ex. C1, C2.)

10. The photographs show brick, metal beams and other building materials in a pile in the vicinity of the garage's location. (D.Ex. C1, C2.)

11. The photographs were admitted into evidence at the hearing without objection. (T. 28.)

12. The photographs show a John Deere 490 D excavator, which is a tracked vehicle with a large boom and bucket, at the site. One of the photographs shows the boom and bucket in a doorway with debris on top of the bucket. (D.Ex. C2.)

13. One of the photographs shows the outline of a chimney between two second floor glass block windows. (D.Ex. C1.)

14. Several of the photographs shows the roof outline for the garage which wraps around the side of the main building. (D.Ex. C1, C2.)

15. Two of the photographs show a portion of the wall on either side of the John Deere 490 D excavator still standing when the photographs were taken. (D.Ex. C1, C2.)

16. On September 3, 2009, Lawrence Vogel, Jr., an employee of the Department observed clean-up activities from the road and came onto the site to observe the activity on the site. (T. 50-51.)

17. Mr. Vogel testified about the condition of the site as he observed it on September 3, 2009, compared it to the conditions documented by the Department's photographs on August 31, 2009, and explained that by the time he observed the site, "most of the debris had been cleaned up." (T. 52.)

18. Mr. Vogel observed that the conditions at the site were different than the site conditions shown in the photographs taken on August 31, 2009. The walls standing in the photographs were gone and most of the debris had been cleaned up. (T. 52-53.)

19. Mr. Vogel saw two men working at the site and they were securing the doorway or entrance to the main building and doing cleanup. (T. 52.)

20. Following the collapse of the chimney attached to the main building on August 28 or 29, 2009, Mr. Paul Lynch demolished the damaged garage using the John Deere 490 D excavator. (D.Ex. C1, C2, T. 18-21, 50-53, 60-63.)

21. Paul Lynch Investments did not file an Asbestos Abatement and Demolition/Renovation Notification Form ("Asbestos Notification") or provide the Department with any other notice that it had investigated whether the affected portion of the site contained asbestos or that it intended to conduct any further demolition activities of the affected buildings on the site prior to Mr. Lynch's efforts to clean up and secure the site between August 29, 2009 and September 14, 2009. (T. 22-24.)

22. Through a Notice of Violation dated September 14, 2009, the Department provided Mr. Lynch with notice that the Department believed that a violation had occurred for

failing to inspect the building for asbestos and failing to notify the Department prior to the demolition. (T. 23; D.Ex. A.)

23. The Department provided Mr. Lynch with additional notice that the Department believed that an Asbestos Notification should have been submitted for the activities which occurred on the site through a letter dated November 24, 2009 including a blank copy of the Asbestos Notification. The letter asked Mr. Lynch to complete and return the form within ten days. (A.Ex. 2.)

24. Paul Lynch Investments failed to submit an Asbestos Notification to the Department until at least December 9, 2009. (Appellant Exhibit ("A.Ex.") 1; D.Ex. D.)

25. The Asbestos Notification submitted by Paul Lynch Investments to the Department described the activities at the site as an emergency renovation, necessitated by the fact that the building had caved in. The notification form disclosed that no facility inspection had taken place, but also claimed that there was no asbestos present in the building and that the project was not regulated by NESHAP. (A.Ex. 1.)

26. The Department informed Paul Lynch Investments that it intended to seek a consent assessment for civil penalty on February 8, 2010. (D.Ex. F.)

27. On August 23, 2010, the Department issued an assessment of civil penalty in the amount of \$5,000 against Paul Lynch Investments. (D.Ex. B.)

28. The Department used its discretion to select a civil penalty amount that was based on Paul Lynch Investments' status as a first time violator and penalties assessed to other similar violators. (T. 31-34.)

29. Asbestos is a recognized carcinogen and the inhalation of asbestos may cause numerous health problems. (T. 15-16.)

30. The building with an attached garage at the site was a “facility” as that term is defined in 40 CFR § 61.141.

31. The Asbestos Notification enables the Department to inspect demolition projects to assure that asbestos-containing materials are removed properly to protect the public and the environment. (T. 17.)

32. On September 3, 2009, the Department inspected the site and observed that the garage of the facility located at the site had been removed. (T. 50-53.)

33. On September 14, 2009, the Department issued a Notice of Violation to Paul Lynch for failing to inspect the facility at the site for the presence of asbestos and for failing to notify the Department before any demolition. (D.Ex. A; *see also* T. 22-23.)

34. On December 14, 2009, the Department received an Asbestos Notification from Paul Lynch Investments for the demolition of the garage of the facility, which confirmed that the site was not inspected for asbestos-containing materials before or after the demolition. (D.Ex. D; *see also* T. 23-24.)

35. The Department calculated the assessment of civil penalties for one violation of the Air Act and 40 CFR § 61, 145, (failure to submit an Asbestos Notification to the Department prior to demolition). (D.Ex. E; *see also* T. 25-26.)

36. In determining an appropriate civil penalty amount, the Department considered the importance of the requirement to the scheme for regulating the removal of asbestos-containing materials, substantive compliance, compliance history, and willfulness. (T. 33-34, 46.)

37. An Asbestos Notification is essential to the Department's enforcement of the Asbestos Regulations. Accordingly, the Department determined that the failure to submit the Asbestos Notification was a significant violation. (T. 17.)

38. The Department determined that Paul Lynch Investments did not have a history of noncompliance with the Asbestos Regulations or the Air Act. (T. 26.)

39. The Penalty Matrix Guidance suggests that a civil penalty of \$15,000 be assessed for the failure to submit a timely Asbestos Notification to the Department. (T. 26.)

40. The Department determined that \$15,000 was too high a civil penalty for the circumstances of this case. (T. 26-27.)

41. The Department determined, that based upon the circumstances of this case, the assessment of civil penalties of \$5,000 was warranted for the violation by Paul Lynch Investments. (T. 26-27.)

DISCUSSION

In his opening statement at the hearing Attorney Paul Lynch raised four objections:

1. The “Act” requires a certain amount of friable asbestos type of material before any notification must be given to the Department;
2. The Appellant “detrimentally relied on some of the statements made by” a Department employee;
3. The Appellant was not “involved in any demolition whatsoever, only cleanup; and
4. The \$5,000 is “ridiculously high for such a small garage and all the circumstances surrounding the incident.”

(T. 11-12.) In its post-hearing brief, the Appellant only raised three of the four objections or issues in defense of its appeal.¹ First, the Appellant asserted that the Department had not met its burden of proof to establish that any facility was demolished within the meaning of the air quality requirements to establish a violation of these requirements. Second, the Appellant also asserted that the Department failed to establish that the amount of the penalty was reasonable or appropriate. Finally, the Appellant asserted that the doctrine of equitable estoppel prevents the Department from assessing a civil penalty. The Appellant did not raise and therefore did not preserve any other issues. All issues other than the limited issues set forth above are deemed waived and the Board will not address them in this Adjudication.²

Liability

In an appeal of a civil penalty assessment, the Department must carry the burden of proof

¹ Under the Board’s Rules, issues which are not argued in a post-hearing brief are deemed waived. 25 Pa. Code § 1021.131(c); *Lucky Strike Coal Co. v. DER*, 547 A.2d 447 (Pa. Cmwlth. 1988); *Lower Salford Township Authority v. DEP*, EHB Docket No. 2005-100-L, Slip op. at 8 (Opinion and Order issued May 10, 2012); *Houseinspect v. DEP*, 2009 EHB 414, 422, n. 4; *County of Berks v. DEP and Pioneer Landfill Inc.*, 2005 EHB 233, 275, n. 49.

² For example, the Appellant failed to address the first objection listed in its opening statement that a certain amount of friable asbestos must be present to trigger the requirement for notification.

to show, by a preponderance of the evidence, that the violations underlying the assessment have occurred, and the penalty assessed is a lawful and reasonable exercise of the Department's discretion. 25 Pa. Code § 1021.122; *see e.g. Boyertown Sanitary Disposal Co. v. DEP*, 2010 EHB 762, 775, *Chippewa Hazardous Waste, Inc. v. DEP*, 2004 EHB 287, 289. Our role in reviewing an assessment requires us to examine the Department's predetermined amount for reasonableness, and not, as would be the case of a complaint for civil penalty, select a penalty on the basis of what we might independently find appropriate. *Thebes v. DEP*, 2010 EHB 370, 398 (*citing DEP v. Angino*, 2007 EHB 175, 202, *aff'd*, 664 C.D. 2007 (Pa. Cmwlth., June 26, 2008)). Rather, we must determine whether there is a reasonable fit between each violation and the amount of the penalty assessed. *F.R. & S., Inc. v. DEP*, 761 A.2d. 634, 639 (Pa. Cmwlth. 2000); *Thebes*, 2010 EHB at 775; *Eureka Stone Quarry v. DEP*, 2007 EHB 419, 449, *aff'd*, 1656 C.D. 2007 (Pa. Cmwlth., September 12, 2008).

As such, in this case we begin with the question of whether the conduct of Paul Lynch Investments gives rise to liability under the Air Act for the activities surrounding the removal of the garage structure on the site. Before its dangers were known, asbestos was used widely and in a variety of applications. As a consequence, the Department's asbestos program casts a wide net to ensure that dangers are identified *before* exposure, including inspection and reporting requirements to keep the Department aware of situations where asbestos exposure is possible, and how that risk is mitigated.

Section 61.145(b) of title 40 of the Code of Federal Regulations³ requires owners and operators of a demolition activity to provide the Department with notice that a renovation or

³ Under the Federal Clean Air Act, the federal Environmental Protection Agency (EPA) has delegated the authority to enforce the asbestos regulations of the National Emissions Standards for Hazardous Air Pollutants (NESHAP) to the Department. 42 USC § 7412(d). The Department's regulations have incorporated all of the EPA asbestos regulations by reference. 25 Pa. Code § 124.3.

demolition of a facility is going to occur at least ten working days prior to beginning a demolition. Under the regulations, demolition⁴ and facility⁵ are defined broadly so that most buildings, not specifically exempt from the Air Act (such as many family residences), trigger the requirements of this section where “wrecking or taking out of any load-supporting structural member of a facility” has occurred. 40 CFR § 61.141. The amount, location and type of asbestos material in a facility affects an owner or operator’s obligation. Therefore, “prior to the commencement of the demolition or renovation, [an owner or operator must] thoroughly inspect the affected facility or part of the facility where the demolition or renovation operation will occur for the presence of asbestos.” *Id* at § 61.145(a). When such an inspection results in finding that the facility to be demolished contains little or no asbestos, the regulations trigger a limited set of obligations to report, ten working days before activities begin on the site, to the Department, *inter alia*, information about the owner, operator, contractor and the facility, procedure by which the owner or operator detected the presence and type of asbestos, quantity of asbestos in the affected facility, and procedure to be followed if unexpected asbestos is found. *Id* at §§ 61.145(b)(1)-(3)(i), (3)(iv), (4)(i)-(vii), (4)(ix), and (4)(xvi).

The information in the record supports the Department’s conclusion that the EPA’s asbestos regulations applied to the affected building at Paul Lynch Investment’s site. As a commercial building and storage space, the main building and its attached garage at the site is clearly a facility as defined by the regulations. *See* 40 CFR § 61.141; *See also* (T. 58.) The

4 “Demolition means the wrecking or taking out of any load-supporting structural member of a facility together with any related handling operations or the intentional burning of any facility.” 40 CFR § 61.141.

5 “Facility means any institutional, commercial, public, industrial, or residential structure, installation, or building (including any structure, installation, or building containing condominiums or individual dwelling units operated as a residential cooperative, but excluding residential buildings having four or fewer dwelling units); any ship; and any active or inactive waste disposal site. For purposes of this definition, any building, structure, or installation that contains a loft used as a dwelling is not considered a residential structure, installation, or building. Any structure, installation or building that was previously subject to this subpart is not excluded, regardless of its current use or function.” 40 CFR § 61.141.

Asbestos Notification is normally required to be submitted prior to the demolition of a facility and is required whether or not there is asbestos in the facility. 40 CFR § 61.145(a)(2)(ii).

The evidence produced at the hearing also clearly establishes that the garage attached to the main building, which was initially damaged when the chimney fell on to the roof of the garage, was subsequently demolished by Mr. Paul Lynch using a John Deere 490 D excavator within the meaning of the applicable regulations at 40 CFR § 61.141. Appellant's claim that the fall of the attached chimney caused the garage to collapse entirely, is not credible. Appellant's Post-Hearing Brief, p. 8. The claim is, in fact, incredible and is contradicted by the photographs, the testimony of the Department's witnesses and by Mr. Paul Lynch's own testimony.⁶ Mr. Lynch's admission that he used the John Deere 490 D excavator to lower steel beams in the garage is sufficient to establish that a demolition occurred. Moreover, the mere presence of the John Deere 490 D excavator on the demolition site is physical evidence of the nature and type of activity that occurred.

Although Paul Lynch Investments believes that the demise of the garage, initially damaged by the main building's chimney, was a collapse, and therefore not a demolition, the garage *was* subsequently demolished by Paul Lynch Investments by removing and tearing down the remaining structural elements. *See* 40 CFR § 61.141; *See also* (T. 60-63.) Mr. Lynch's testimony about the actions he took to lower the steel beams, "tramp[e] down the rubble", and take down partial walls, resolve any ambiguity over whether there was a demolition. *Id*; *see also* Appellant's Post-Hearing Brief, p. 9. Any argument claiming that the building was "built entirely of block, brick, steel and glass block" or that the debris from the garage remains on the Appellant's property available for the Department's inspection do not change the fact that no

⁶ Mr. Lynch's testimony that "kids" must have knocked down the remaining walls shown in the photographs is not credible. (T. 62.) Kids did not operate the John Deere 490 D excavator; Mr. Paul Lynch did.

pre-demolition inspection for asbestos occurred or that the Department had no notice that a demolition would be occurring.⁷ Accordingly, Paul Lynch Investments had a duty imposed by § 61.145 to inspect the facility for asbestos and provide the Department of notice ten days in advance of its demolition activity. A violation of that duty constitutes a violation of the Air Act, 35 P.S. § 4008, and subjects the Appellant to civil penalties.

Defense of Equitable Estoppel

In its post-hearing brief, Paul Lynch Investments weakly raises a defense of equitable estoppel, which it believes should prevent the Department from assessing a civil penalty against it. Mr. Lynch testified that he was at the site on Monday August 31, 2012 when an employee of the Department came onto the property and spoke with him about the garage. Mr. Lynch offered that the unidentified employee asked him to stop cleaning up the debris. Mr. Lynch attested that he asked how long he should wait before continuing, to which, Mr. Lynch said the employee replied “if you don’t hear from me in three days, you can continue removing this rubbish”. (T. 65.) In its post-hearing brief, Paul Lynch investments claims it relied on this “misrepresentation” from the unidentified employee when moving forward with the cleanup activities more than three days later.

We recognize that there are situations where a party’s reasonable reliance on the actions of the Department may justly result in the Department being estopped from taking an action. To succeed on such a claim, the party asserting the affirmative defense of estoppel must carry the burden of proof. *Rhodes v. DEP*, 2009 EHB 599, 623; *Bernacci v. DEP*, 2005 EHB 560, 571. “[T]o find estoppel there must be misleading words, conduct, or silence by the government officials, unambiguous proof of reasonable reliance upon the misrepresentation by the party

⁷ We note as well that Paul Lynch Investments has made no effort to conduct a post-demolition inspection to demonstrate that no asbestos had been present in the building.

asserting estoppel, and a lack of a duty to inquire on part of the party asserting the estoppel.” *Rhodes* at 615; *Baehler v. DEP*, 863 A.2d 57, 60 (Pa. Cmwlth. 2004). This burden is not easily met.

The *Rhodes* decision cited by both the Department’s and Paul Lynch Investments’ post-hearing briefs, is particularly instructive in this appeal. Judge Labuskes wrote:

[E]stoppel cases, however, often involve the unauthorized receipt of some benefit that should not have been received rather than violations of public health and safety laws. *See e.g. Chester Extended Care Center v. Department of Public Welfare*, 586 A.2d 379 (Pa. 1991). *Rhodes* has not referred us to any case in which the government has been estopped from taking an enforcement action or assessing civil penalties for violations of law. *See Leeward Construction v. DEP*, 821 A.2d 145, 150-51 (Pa. Cmwlth. 2003) (DEP not estopped from issuing civil penalty by virtue of its approval of permittee’s erosion control plans). Ordinarily, a person who would operate a public water system has a duty to inform himself of the applicable laws and regulations. *See generally Commonwealth v. Packer*, 798 A.2d 192, 199 (Pa. 2002). Even in those cases where a Department employee gives a clear but wrong legal opinion, responsibility for compliance with the law ordinarily rests with the regulated party.

Rhodes at 614-15. Like Mr. Rhodes, Paul Lynch Investments has also pled a defense of equitable estoppel, but has failed to refer us to any precedent which would prevent the Department from taking an enforcement action.⁸

Although undisputed, the Board does not find that Mr. Lynch’s testimony concerning the unidentified or phantom Department employee credible. Mr. Lynch provides the only account of the discussion between him and the mystery employee of the Department who allegedly made the statements that Paul Lynch Investments relied upon when going forward with cleanup

⁸ Even if Paul Lynch Investments were to make a complete and credible showing on each element of equitable estoppel, it is not clear that it would be entitled to the defense as a matter of law. “The Commonwealth or its subdivisions and municipalities cannot be estopped by the acts of its agents and employees if those acts are outside the agents’ powers, in violation of positive law, or acts which require legislative or executive action.” *Central Storage & Transfer Co. v. Kaplan*, 487 Pa. 485, 489 (1979); *Borkey v. Twp. of Center*, 847 A.2d 807, 812 (Pa. Cmwlth. 2004).

activities on the site. The Appellant had ample opportunity to discover the identity of the unidentified employee during discovery, but the Board is not aware that the Appellant took any steps to pursue this defense or issue. Without a meaningful effort to pursue this issue, the Board does not find Mr. Lynch's testimony credible on this point.

Even though we do not find Mr. Lynch's testimony credible on this point, the Board will nevertheless address the merits of the Appellants claim. Assuming, for the sake of argument, that the doctrine of equitable estoppel could apply in this case, the Board, nevertheless, cannot accept it as a defense because Paul Lynch Investments has failed to make a credible showing of evidence that would satisfy the elements. Left with a thin record, we have very little to consider. Assuming that Paul Lynch Investments did wait the requested three days before continuing cleanup activities on the site, it is left to prove the third element of equitable estoppel: that it had no duty to inquire. In its post-hearing brief, Paul Lynch Investments simply raises the following on this point:

Appellant clearly discussed the building collapse with Department's Employee, who informed Appellant to wait three days. Appellant had no specific knowledge of any requirement to file an Asbestos Notification. There was no testimony from any Department Employee stating that he or she informed Appellant of any duty to file an Asbestos Notification during the period of the cleanup. Therefore there is clearly no duty to inquire on the part of the Appellant.

This third element goes to a point raised in the *Rhodes* decision; ordinarily a party has an obligation to make itself aware of applicable laws and regulations. *Rhodes, supra*. Arguing that no one told Mr. Lynch that Paul Lynch Investments had to file an Asbestos Notification is like arguing that ignorance of the law should be a defense. *Cf. Commonwealth of Pennsylvania, Pennsylvania Liquor Control Board v. 302 Chelton, Inc.*, 459 A.2d 893 (Pa. Cmwlth. 1983); *Enterprise Tire Recycling v. DEP*, 1999 EHB 900.

The Board rejects the Appellant's assertion that it had no specific knowledge of any requirement to file an Asbestos Notification. Attorney Paul Lynch, who represented the Appellant at the hearing on October 12, 2011,⁹ is also the President and Secretary of Paul Lynch Investments and he is the only officer of the Appellant corporation. He is 100% percent responsible for all of the operations of the Appellant, which has no employees. In an earlier appeal before the Board, Attorney Paul Lynch represented his brother Gary Lynch¹⁰ and others in an appeal of a \$5,000 civil penalty for failure to submit an Asbestos Notification for the demolition of a facility subject to the NESHAP asbestos requirements. In that appeal of the \$5,000 assessment of civil penalties, the appellants asserted that an Asbestos Notification was not required because the facility in question, which the Department claimed was demolished triggering the Asbestos Notification requirement, was heavily damaged by fire, and that an immediate demolition of the facility was warranted as the building was in an unsafe condition as a result of the fire. *Gary Lynch et. al. v. DEP*, EHB Docket No. 2008-056-R, Appellant's Memorandum of Law in Opposition to Department's Motion for Summary Judgment.¹¹ The parties in that appeal ultimately agreed to a Consent Assessment of Civil Penalties to settle the outstanding appeal and the appellants paid a \$2,500 civil penalty. This earlier appeal establishes that both Lynch brothers, Gary and Paul, had personal specific knowledge of the requirement to file an Asbestos Notification. Paul Lynch knew of the applicable requirements, and the

⁹ Mr. Paul Lynch was Paul Lynch Investments' only witness at both hearing held in this appeal. At the first hearing Gary Lynch appeared as the Appellant's counsel. At the second hearing on the merits, Gary Lynch did not appear, and the Board was forced to allow Paul Lynch to represent the Appellant corporation even though he was the Appellant's only witness. (T. 6-10.)

¹⁰ This is the same Gary Lynch who represented the Appellant in this appeal and who failed to appear at the hearing on the merits.

¹¹ A court can take judicial notice of pleadings and judgments in other proceedings where appropriate. *Krenzel v. Southeastern Pennsylvania Transportation Authority*, 840 A.2d 450 (Pa. Cmwlth. 2003); see also *Darlene K. Thomas v. DEP et al*, 2000 EHB 728, 731; see also *Pagnotti Enterprises, Inc. v. DEP*, 1993 EHB 919, n. 3; *Alleghro Oil & Gas v. DEP*, 1998 EHB 1162, 1165. "This is particularly so where, as here, the other proceedings involve the same parties. *In re Estate of Schulz*, 392 Pa. 117 (1958); *In re McFarland's Estate*, 377 Pa. 290 (1954)." *Lycoming County v. Pennsylvania Labor Relations Board*, 943 A.2d 333, 335, n. 8 (Pa. Cmwlth 2007).

Appellant corporation knew of the requirement because Paul was the corporation's only officer and he was responsible for 100% of its operations.

Finally, as the Department correctly points out in its post-hearing brief, to the extent that there is any merit whatsoever to Paul Lynch Investments' argument that it relied on the unidentified employee's advice, it was not harmed by that reliance. The assessment, and underlying violation of the Air Act, was issued because of the failure to notify the Department *before* the demolition. As we discussed above, the building was demolished no later than August 29 or 30, 2009 when Mr. Lynch operated the excavation equipment to take down the remaining structural elements of the damaged building. It follows that Paul Lynch Investments could not, as a matter of fact, rely to its detriment on advice it received from the Department on August 31, 2009, after the underlying violation had already been committed. Further, any reliance that Paul Lynch Investments took from the Department employee's instructions, was reliance on its ability to move forward on cleanup, *not* advice about its obligations to submit an Asbestos Notification, the violation that is the subject of this appeal.

Penalty Assessment

The Board upholds the amount of the Department's penalty assessment for several reasons. First, we will uphold the Department's penalty assessment because Paul Lynch Investments failed to raise an objection to the amount of the Department's penalty in its Notice of Appeal. In this case the issue of the amount or reasonableness of the penalty should therefore be waived. *Rhodes* at 610; *Chippewa Hazardous Waste, Inc. v. DEP*, 2004 EHB 287, 291. In fact, Paul Lynch Investments does not even use its post-hearing brief as an opportunity to contest the Department's argument that it has failed to appeal the amount of the penalty. The Appellant's failure to contest the penalty amount in its Notice of Appeal is alone sufficient to

dismiss Appellant's arguments.

The Board will nevertheless address the issues Paul Lynch Investments does raise in its post-hearing brief. A review of these issues provides additional reasons to conclude that the penalty is eminently reasonable. The Board's role in reviewing the amount of the Department's penalty is to determine whether the penalty assessed by the Department is lawful and whether it constitutes a reasonable fit to the party's underlying violations. The answer to the first question is simple: the Air Act authorizes the Department to assess a penalty of up to \$25,000 per violation per day. 35 P.S. § 4009.1. The Department's assessment of a penalty of \$5,000 for a violation of the Air Act is therefore lawful. To select a specific penalty, section 4009.1 lays out the following criteria:

the department shall consider the willfulness of the violation; damage to air, soil, water or other natural resources of the Commonwealth or their uses; financial benefit of the person in consequence of the violation; deterrence of future violations; cost to the department; the size of the source or facility; the compliance history of the source; the severity and duration of the violation; degree of cooperation in resolving the violation; the speed with which the compliance is ultimately achieved; whether the violation was voluntarily reported; other factors unique to the owners or operator of the source or facility; and other relevant factors.

Id. For its part, the Department pleads that it considered these factors to determine the amount of the assessment by considering a civil penalty guidance document promulgated by the Department for this purpose.

Lori McNabb, the Department employee who assessed the penalty, testified that she considered assessing a penalty of \$15,000 or \$20,000 based on both violations included in the September 14, 2009 Notice of Violation to Paul Lynch Investments based on the Department's penalty policy. *See* D.Ex. E. The Notice of Violation asserted that Paul Lynch Investments both failed to provide the Department with notice of a demolition ten days before the demolition, and

that it failed to conduct an inspection for asbestos. She, however, selected a lower penalty (for a single violation for failure to provide notification), of \$5,000, based on the fact that Paul Lynch Investments was a first time non-notifier, which is similar to other penalties assessed by the Department in similar situations. *See* (T. 31-33.)

Paul Lynch Investments protests the Department's penalty, in part, because it believes the penalty exceeds what the Department has assessed in similar situations. This is an inaccurate characterization. Paul Lynch Investments draws an inappropriate parallel to the penalty assessed to it by the Department, and the Department's description of some *negotiated* penalties which were assessed through a *consent assessment* of civil penalties.¹² The examples cited were lower because the parties were able to demonstrate substantial compliance through subsequent inspections to show that no asbestos was in the building. In this case, Paul Lynch Investments has centered much of its argument around the fact, as it asserts, that there was no asbestos in the garage structure which was demolished and removed. However, it has made no effort to provide evidence of this.¹³ Neither the Department, nor the Board, is in a position to make a determination that Paul Lynch Investments should be subject to a lower penalty because of substantial compliance. We simply do not know whether regulated material was disturbed during the demolition of the building.

Moreover, we find that Paul Lynch Investments has made very little effort to achieve compliance, even after the fact. Paul Lynch Investments received notice that the Department

¹² Before issuing the assessment for civil penalties that is the subject of this appeal, the Department gave Paul Lynch Investments the opportunity to participate in the consent assessment of civil penalties process. *See* D.Ex. A.

¹³ Mr. Lynch has offered that the debris remains on site in another portion of the property, and he invited the Department to come inspect the debris. This however raises two problems. First, there is still no evidence that Paul Lynch Investments has taken any step to complete its obligation to inspect the structure, even as the pile of debris as it now exists for asbestos. Second, the value of the Department's inspection today would be significantly less because there is no way for the Department to know that it was inspecting all of the material that used to be in the garage.

believed that it was in violation of the Air Act's asbestos notification requirements no later than Mr. Lynch's receipt, on or around September 14, 2009, of a Notice of Violation, albeit incorrectly addressed to Mr. Lynch personally.¹⁴ D.Ex. A. Paul Lynch Investments made no attempt to come into compliance until after the Department sent Mr. Lynch a letter dated November 24, 2009 asking him to return the enclosed notification form within ten days. A.Ex. 2. In a letter dated December 9, 2009, Mr. Lynch responded to the Department's request and enclosed an Asbestos Notification that asserted that there was no demolition and that the building contained no asbestos. A.Ex. 1. The notification confirmed that no inspection for asbestos had taken place. Therefore, even months later, Paul Lynch Investments' notification provided the Department with no information about whether there was an asbestos concern at the site. *Id.*

We believe that the Department has arrived at a civil penalty that reasonably fits the violations according to the factors laid out in the Air Act. Asbestos is a hazardous air pollutant, and one that raises significant environmental and health concerns. As such, the Department's policies have established significant penalties to encourage compliance and deter violations of the Air Act. In this case, we have no reason to believe that any asbestos exposure has taken place, but it easily may have. This is why parties have inspection and disclosure requirements before demolitions and renovations take place. Under the circumstances, and due to no previous violations, the Department wisely used its discretion to assess a smaller civil penalty. Paul Lynch Investments, however, has not given us or the Department any grounds to reduce it further. It did not demonstrate, through evidence, that the building was free of asbestos. It also did not move swiftly to correct its error by filing an asbestos notification soon after the fact

¹⁴ The Board finds that the Department's misaddressed Notice of Violation ("NOV") is harmless error. The Appellant, Paul Lynch Investments only recently obtained the property from its prior owners who were Paul Lynch and his brother David Lynch who owned it for years. (T. 58-59.) Paul Lynch is the sole officer of Paul Lynch Investments and is 100% responsible for all of the Appellant's operations. The Appellant had full knowledge of the Department's issuance of the NOV when it was issued.

(including an inspection).¹⁵

Accordingly, we make the following:

¹⁵ Any argument Paul Lynch Investments might have been able to make that it was unable to comply with the notification requirements ahead of the demolition is eclipsed by the fact that Paul Lynch Investments took no steps to comply with the Department's requirements for months, after receiving multiple notices that it was in violation.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this appeal.
2. The EPA has delegated the authority to enforce the federal asbestos NESHAP regulations to the Department, and the Department has adopted the EPA asbestos regulations by reference. 42 USC § 7412(d); 25 Pa. Code § 124.3.
3. The owner or operator of a regulated facility must inspect the affected portion of that affected facility for the presence of asbestos and provide the Department with notice ten days prior to the commencement of a demolition or renovation of that facility. 40 CFR § 60.145.
4. For the purposes of determining compliance with the Department's asbestos regulations, demolition means wrecking or taking out of any load-supporting structural member of a facility together with any related handling operations or the intentional burning of any facility. 40 CFR § 60.141.
5. For the purposes of determining compliance with the Department's asbestos regulations, facility means any institutional, commercial, public, industrial, or residential structure, installation, or building (including any structure, installation, or building containing condominiums or individual dwelling units operated as a residential cooperative, but excluding residential buildings having four or fewer dwelling units); any ship; and any active or inactive waste disposal site. For purposes of this definition, any building, structure, or installation that contains a loft used as a dwelling is not considered a residential structure, installation, or building. Any structure, installation or building that was previously subject to this subpart is not excluded, regardless of its current use or function. 40 CFR § 60.141.

6. Paul Lynch Investments engaged in demolition activities of a portion of its facility before conducting an inspection for the presence of asbestos and without providing the Department with notice at least ten days prior to commencing with the demolition.

7. A party has the burden of proof when it asserts an affirmative defense like equitable estoppel. *Rhodes v. DEP*, 2009 EHB 599, 623; *Bernacci v. DEP*, 2005 EHB 560, 571.

8. The Board may find equitable estoppel against the Department where there was misleading words, conduct, or silence by the Department officials, unambiguous proof of reasonable reliance upon the misrepresentation by the party asserting estoppel, and a lack of a duty to inquire on part of the party asserting the estoppel. *Rhodes v. DEP*, 2009 EHB 599, 615; *Baehler v. DEP*, 863 A.2d 57, 60 (Pa. Cmwlth. 2004).

9. Paul Lynch Investments did not satisfy its burden of proof to assert its affirmative defense of equitable estoppel.

10. A party who does not raise the amount of a penalty in its notice of appeal waives its right to raise an objection to the amount of penalty at a later point in litigation. *Rhodes v. DEP*, 2009 EHB 599, 610; *Chippewa Hazardous Waste, Inc. v. DEP*, 2004 EHB 287, 291.

11. The Department's assessment of civil penalties was a reasonable fit for the violations.

12. The Department acted lawfully and reasonably in assessing a \$5,000 civil penalty against Paul Lynch Investments.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PAUL LYNCH INVESTMENTS, INC.

v.

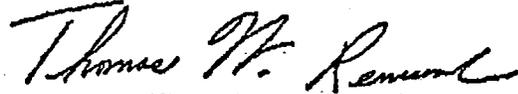
COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

EHB Docket No. 2010-151-M

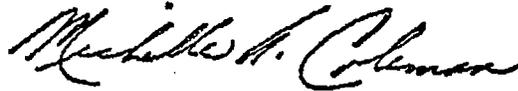
ORDER

AND NOW, this 18th day of May, 2012, it is hereby ordered that Paul Lynch Investments' appeal is **dismissed**. The Board upholds the Department's assessment of civil penalty in the amount of \$5,000.

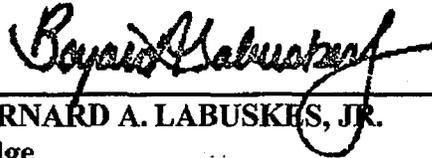
ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chief Judge and Chairman



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKIS, JR.
Judge



RICHARD P. MATHER, SR.
Judge

Dated: May 18, 2012

c: DEP, Bureau of Litigation:
Glenda Davidson, Library

For the Commonwealth of PA, DEP:
Wendy Carson, Esquire
Office of Chief Counsel – Northwest Region

For Appellant:
Gary F. Lynch, Esquire
CARLSON LYNCH LTD
PO Box 7635
36 N. Jefferson Street
New Castle, PA 16107

Paul Lynch, Esquire
Attorney-at-Law
PO Box 5411
2625 Wilmington Road
New Castle, PA 16105



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

**THE DELAWARE RIVERKEEPER NETWORK:
AND MAYA VAN ROSSUM, THE DELAWARE:
RIVERKEEPER**

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and DEPARTMENT OF
TRANSPORTATION (PennDOT),
DISTRICT 6-0, Permittee**

EHB Docket No. 2012-040-M

Issued: May 29, 2012

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

By Richard P. Mather, Sr., Judge

Synopsis:

The Board grants the Department's motion to dismiss an appeal because the Department withdrew and vacated the permit that is the subject of this appeal thereby rendering the appeal moot. The Appellants filed a response in which they indicated that they did not oppose the motion.

OPINION

On March 12, 2012, the Delaware Riverkeeper Network and Maya Van Rossum, The Delaware Riverkeeper ("Appellants") filed an appeal of an individual water obstruction and encroachment permit issued by the Department of Environmental Protection (the "Department") to the Commonwealth of Pennsylvania, Department of Transportation ("PennDOT"). The permit authorized PennDOT to perform water obstruction and encroachment activities associated with the replacement of the Hellertown Road Bridge in Springfield Township, Bucks County

(the “Bridge”) over an unnamed tributary to Cooks Creek, an Exceptional Value and Migratory Fishes waterway. Thereafter, the Department notified PennDOT by letter on March 30, 2012 that it “is revoking [the permit] in order to address deficiencies in the public notice that was provided”. Exhibit A to the Department’s Motion to Dismiss. No party has appealed the Department’s decision to revoke the permit before the Board or any other venue.

The Department filed a motion to dismiss this appeal as moot because it has revoked the permit that was appealed. The Department asserts that under the facts of this appeal the Board lacks the ability to provide the Appellants with meaningful relief. The Appellants responded by letter to inform the Board that they did not oppose the Department’s 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. *Northampton Township et al. v. DEP*, 2008 EHB 563, 570; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925.

A matter is moot when an event occurs that deprives the Board of the ability to grant effective relief or the appellant has been deprived a necessary stake in the outcome. *Horsehead Res. Dev. Co. v. DEP*, 780 A.2d 856, 858 (Pa. Cmwlth. 2001), *appeal denied*, 796 A.2d 987 (Pa. 2002); *Bensalem Township Police Benevolent Assoc., Inc. v. Bensalem Township*, 777 A.2d 1174, 1178 (Pa. Cmwlth. 2001); *Blue Marsh Labs. v. DEP*, 2008 EHB 306, 307-08; *Solebury Township v. DEP*, 2004 EHB 23, 28-29. “Absent unusual circumstances not present here, the Department’s rescission of an action under appeal renders the appeal moot.” *Gardner v. Cumberland County Conservation Dist.*, 2008 EHB 110, 111. It is clearly beyond dispute that the permit is no longer in effect, and PennDOT now lacks the legal authority to perform the water obstruction and encroachment activities associated with the replacement of the Bridge. Therefore, under the facts of this appeal, the Board finds that there is no effective relief it could

grant the Appellants once the Department revoked the permit under appeal.

Accordingly, we enter the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THE DELAWARE RIVERKEEPER NETWORK:
AND MAYA VAN ROSSUM, THE DELAWARE:
RIVERKEEPER

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and DEPARTMENT OF
TRANSPORTATION (PennDOT),
DISTRICT 6-0, Permittee

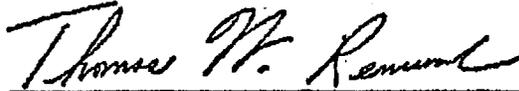
:
:
:
:
:
:
:
:
:
:
:

EHB Docket No. 2012-040-M

ORDER

AND NOW, this 29th day of May, 2012, the Department's unopposed motion to dismiss
is granted.

ENVIRONMENTAL HEARING BOARD



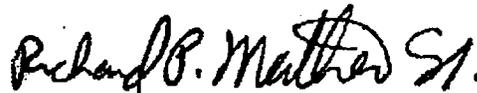
THOMAS W. RENWAND
Chief Judge and Chairman



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKIS, JR.
Judge



RICHARD P. MATHER, SR.
Judge

DATED: May 29, 2012

c: Department Litigation:
Attention: Glenda Davidson

For the Commonwealth of PA, DEP:
William J. Gerlach, Jr.
Office of Chief Counsel – Southeast Region

For Appellant:
Janine G. Bauer, Esquire
SZAFERMAN LAKIND, P.C.
101 Grovers Mill Road, Suite 200
Lawrenceville, NJ 08648

For Permittee:
Kenda M. Gardner, Esquire
Office of Chief Counsel
Commonwealth of Pennsylvania
Department of Transportation (PennDOT)
PO Box 8212
Harrisburg, PA 17105-8212



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOEL PALMER

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and THEO, LLC

:
:
:
:
:
:
:

EHB Docket No. 2012-091-L

Issued: May 31, 2012

**OPINION AND ORDER ON
MOTION TO DISMISS**

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board dismisses an untimely appeal for lack of jurisdiction.

OPINION

On February 28, 2012, the Department of Environmental Protection (the "Department") issued an administrative order to Theo, LLC directing it to take corrective actions at a site in Philadelphia pursuant to the Storage Tank and Spill Prevention Act, 35 P.S. § 6021.101 *et seq.* The appellant, Joel Palmer, received notice of the Department's order on or about March 15, 2012, but he did not file a third-party appeal of the administrative order with the Board until May 1, 2012. On May 18, 2012, the Department filed a motion to dismiss, arguing that the Board lacks jurisdiction to hear the appeal because Palmer had in fact received notice of the order more than 30 days before he filed an appeal. Palmer's letter responding to the Department's motion to dismiss does not contest the Department's assertion that Palmer had received notice of the administrative order more than 30 days before he filed his notice of appeal.

Instead, he asks that the Board allow the appeal on the basis that he had difficulty filing the appeal any sooner because his decision to file the appeal was made in connection with his participation with a citizens group interested in the site and they were unable to meet on short notice.

The Board evaluates motions to dismiss in the light most favorable to the non-moving party and may grant the motion against that party where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *GEC Enterprises v. DEP*, 2010 EHB 305, 308; *Blue Marsh Labs. v. DEP*, 2008 EHB 306, 307; *Michael Butler v. DEP*, 2008 EHB 118, 119.

This appeal must be dismissed as untimely. Palmer acknowledged that he had received notice of the action 47 days before he filed his appeal. Under the Board's rules, the recipient of a Departmental action has 30 days to file an appeal with the Board. 25 Pa. Code § 1021.52(a)(1); *Peckham v. DEP*, 2011 EHB 696, 697; *Greenridge Reclamation LLC v. DEP*, 2005 EHB 390, 391; *Martz v. DEP*, 2005 EHB 349, 350; *Pikitus v. DEP*, 2005 EHB 354, 357. Where an appeal is filed beyond the 30 day deadline, the Board, absent a limited exception for *nunc pro tunc* appeals, is deprived of jurisdiction to hear the appeal. *Rostosky v. DER*, 364 A.2d 761, 763 (Pa. Cmwlth. 1976); *Pikitus*, 2005 EHB at 357; *Burnside Township v. DEP*, 2002 EHB 700, 702; *Sweeney v. DER*, 1995 EHB 544, 546. "It is well established that, in administrative actions, appeals *nunc pro tunc* will be permitted only where there is a showing of fraud, breakdown in the administrative process, or unique and compelling factual circumstances establishing a non-negligent failure to file a timely appeal." *Damascus Citizens for Sustainability, et al. v. DEP*, 2010 EHB 756, 758 (citing *Grimaud v. DER*, 638 A.2d 299, 303-04 (Pa. Cmwlth. 1994); *Weaver v. DEP*, 2002 EHB 273, 277; *Ziccardi v. DEP*, 1997 EHB 1, 6-8). Palmer has not demonstrated

that these circumstances prevented him from filing a timely appeal. As a consequence, the Board, lacking jurisdiction over this appeal, must grant the Department's motion to dismiss. *McKissick Trucking v. DEP*, 2011 EHB 111; *Spencer v. DEP*, 2008 EHB 573, 575; *Pedler v. DEP*, 2004 EHB 852, 854.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOEL PALMER

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and THEO, LLC

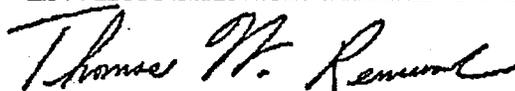
:
:
:
:
:
:
:

EHB Docket No. 2012-091-L

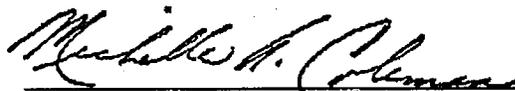
ORDER

AND NOW, this 31st day of May, 2012, it is hereby ordered that the Department's motion to dismiss is **granted**. This appeal is dismissed.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chief Judge and Chairman



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge



RICHARD P. MATHER, SR.
Judge

DATED: May 31, 2012

c: DEP, Bureau of Litigation:
Attention: Glenda Davidson

For the Commonwealth of PA, DEP:
William Stanley Sneath, Esquire
Office of Chief Counsel – Southeast Region

For Appellant, *Pro Se*:
Joel Palmer
701 S. 9th Street
Philadelphia, PA 19147-2005

For Permittee:
THEO, LLC
1008 Colonial Drive
Newtown, PA 18940

the deadline for conducting discovery, especially when the other parties oppose the request, must ordinarily show us either that it has prosecuted the appeal with due diligence or that there are legitimate reasons why it has failed to proceed with due diligence. *See Energy Resources v. DEP*, 2006 EHB 431, 435; *DEP v. Neville Chemical Co.*, 2005 EHB 1, 4-5. The burden is on the movant to show that an extension is warranted.

McCobin's conduct in this appeal is not indicative of due diligence. She has not conducted *any* discovery. She has offered no explanation for why she has not conducted any discovery. Her motion to extend discovery was not filed until twenty days after the deadline had passed and 202 days after she filed her appeal. With the apparent exception of one telephone call on May 16, McCobin has not pursued settlement. In the meantime, the Department and Chesapeake have filed dispositive motions in accordance with the deadline set forth in our prehearing order.

McCobin's request for an extension contains only one substantive sentence. She does not describe what discovery she would propose to take if an extension were granted. She says that she wants an extension because she is "seeking representation by counsel." However, the connection between seeking counsel and the need for a continuation of discovery is not obvious to us. She does not describe what, if any, effort she has made to obtain counsel over the last six months. She does not say that she was unable to conduct discovery absent counsel. A belated, unexplained attempt to obtain counsel is certainly not an automatic basis for postponing prehearing proceedings. *McGinnis v. DEP and Eighty-Four Mining, Inc.*, 2010 EHB 489, 494 (decision not to obtain counsel "until after discovery was concluded is not a valid excuse for not treating the discovery process with proper attention and diligence"). In short, McCobin has not met her burden of showing that an extension is warranted for good cause.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NORMA SHARON MCCOBIN

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and CHESAPEAKE
APPALACHIA, LLC, Permittee

:
:
:
:
:
:
:
:
:

EHB Docket No. 2011-159-L

ORDER

AND NOW, this 11th day of June, 2012 it is hereby ordered that McCobin's motion to extend discovery is **denied**.

ENVIRONMENTAL HEARING BOARD


BERNARD A. LABUSKES, JR.
Judge

DATED: June 11, 2012

c: **DEP Litigation:**
Glenda Davidson, Library

For the Commonwealth of PA, DEP:
Geoffrey James Ayers, Esquire
David M. Chuprinski, Esquire
Office of Chief Counsel – Northcentral Region

For Appellant, Pro Se:
Norma Sharon McCobin
75 Charnwood Road
New Providence, NJ 07974

For Permittee:
Christopher Nestor, Esquire
Craig P. Wilson, Esquire
K & L GATES LLP
17 N. Second St., 18th Floor
Harrisburg, PA 17101



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

**CONSOL PENNSYLVANIA COAL
COMPANY, LLC and CONSOL
ENERGY, INC.**

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and DEPARTMENT OF
CONSERVATION AND NATURAL
RESOURCES and CENTER FOR
COALFIELD JUSTICE, Intervenors**

**EHB Docket No. 2010-030-R
(Consolidated with 2010-184-R,
2011-017-R and 2011-089-R)**

Issued: June 18, 2012

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

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

A motion for summary judgment filed by a mining company that has been ordered to pay compensation and undertake repairs in connection with a state park dam alleged to have been damaged due to subsidence is denied where questions of material fact are in dispute and where it is not clear that one party is entitled to judgment as a matter of law.

OPINION

This matter arises out of a claim of subsidence damage filed by the Pennsylvania Department of Conservation and Natural Resources (DCNR) with the Pennsylvania Department of Environmental Protection (DEP), alleging that longwall mining activities conducted by Consol Pennsylvania Coal Company, LLC and Consol Energy, Inc. (collectively Consol) at the Bailey Mine in Greene County, Pennsylvania caused subsidence damage to a dam located at

Ryerson Station State Park (the Ryerson Dam). The subsidence claim led to the issuance of various orders and written communications by DEP which were appealed by Consol to the Pennsylvania Environmental Hearing Board and consolidated at Docket No. 2010-030-R. DCNR and the Center for Coalfield Justice intervened in the appeals.

A motion for summary judgment was filed by Consol earlier in this matter addressing the viability of one of the DEP's orders. Following oral argument, the motion was denied in an Opinion and Order issued on August 26, 2011. *Consol Pennsylvania Coal Co and Consol Energy, Inc. v. DEP, DCNR and Center for Coalfield Justice*, 2011 EHB 571. The matter now before us is the second motion for summary judgment filed by Consol; this motion challenges the DEP's method of calculating the reasonable cost of repairing or replacing Ryerson Dam.

Factual Background

Following the filing of the subsidence claim by DCNR, DEP conducted an investigation and on February 16, 2010, issued an Interim Report in which it concluded that ground movements caused by Consol's mining had damaged Ryerson Dam. On November 3, 2010, DEP released a Remedy Report, dated September 30, 2010, which stated as follows: "DEP [has] concluded that it is not possible to accurately determine the true cost of repair of the dam at the present or foreseeable future." (Consol's Motion; DEP Response to Undisputed Facts) Also on November 3, 2010, DEP issued an Order directing Consol, *inter alia*, to compensate DCNR for various costs involved in repairing the dam. To arrive at a "reasonable cost of repair," DEP averaged the repair costs submitted by Consol and DCNR. Consol appealed the Interim Report and Order to the Environmental Hearing Board. On December 30, 2010, Consol deposited the sum of \$20,291,340 in escrow in order to perfect its appeals pursuant to the Bituminous Mine Subsidence and Land Conservation Act (Mine Subsidence Act), Act of April 27, 1966, P.L. 31,

as amended, 52 P.S. §§ 1406.1 – 1406.21 Consol appealed the cash deposit. The appeals have been consolidated at EHB Docket No. 2010-030-R.¹

In its motion for summary judgment, Consol makes the following arguments: 1) DEP has not fulfilled its statutory obligation under Section 5.5(c) of the Mine Subsidence Act which requires it to make a determination of the reasonable cost of repairing or replacing the dam; and 2) DEP has exceeded its authority under Section 5.5(c) of the Mine Subsidence Act. DEP and Center for Coalfield Justice filed responses opposing the motion. DCNR was granted leave to file a sur-reply to Consol's reply. We review the motion in the light most favorable to the non-moving parties. *Harriman Coal Corp. v. DEP*, 2000 EHB 1008. Summary judgment may only be granted "in the clearest of cases where the right is clear and free from doubt." *Macyda v. DEP*, 2011 EHB 526, quoting *Lyman v. Boonin*, 635 A.2d 1029, 1032, (Pa. 1993). All doubts as to the presence of a genuine issue of material fact must be resolved against the moving party. *Rozum v. DEP*, 2008 EHB 731, citing *Albright v. Abington Memorial Hospital*, 696 A.2d 1159, 1165 (Pa. 1997). Summary judgment is appropriate only in a case where "a limited set of material facts are truly undisputed and the appeal presents a clear question of law." *C.A.U.S.E. v. DEP*, 2007 EHB 101, 106; *Bertothy v. DEP*, 2007 EHB 254, 255.

Reasonable Cost of Repairing or Replacing the Dam

Section 5.5(c) of the Mine Subsidence Act states as follows:

(c) The department shall make an investigation of a claim within thirty days of receipt of the claim. The department shall, within sixty days following the investigation, make a determination in writing as to whether the damage was caused by subsidence due to underground coal mining and, if so, *the reasonable cost of repairing or replacing the damaged structure*. If the department finds the damage to be caused by the mining, it

¹ Also consolidated at EHB Docket No. 2010-030-R is Consol's appeal of a subsequent order issued by DEP on May 18, 2011.

shall issue a written order directing the operator to compensate or to cause repairs to be made within six months or a longer period if the department finds that occurrence of subsidence or subsequent damage may occur to the same building as a result of mining.

52 P.S. § 1406.5e(c) (emphasis added).

Consol disputes that DEP made a determination of the “reasonable cost of repairing or replacing” the Ryerson Dam as it was required to do by Section 5.5(c). Specifically, it points to the language of DEP’s November 3, 2010 Remedy Report stating, “DEP [has] concluded that it is not possible to accurately determine the true cost of repair of the dam at the present or foreseeable future.” (Remedy Report, p. 3) Consol argues that instead of asking the parties to supplement the data they had submitted to DEP to enable it to make its determination, DEP simply made a guess as to the reasonable cost of repairing or replacing the dam as follows:

[DEP] did nothing more than add the lowest repair estimate provided by Consol to DCNR’s estimated costs to ‘replace the damaged Dam with one of like value and performance,’ and then add on some extra costs DCNR claims it incurred prior to April of 2010, and divide this total by two.

(Consol Memorandum in Support of Summary Judgment, p. 7)

Consol argues that if DEP did not find any of the repair or replacement costs provided by it or DCNR to be sufficient, it should have requested the parties to provide more information. It contends that a decision “based on random or convenient selection or choice rather than on a reasoned factual analysis is arbitrary,” and cites decisions by the Pennsylvania Supreme Court in *Thunberg v. Strause*, 682 A.2d 295, 299 (Pa. 1996) and *Acchione and Caruso, Inc. v. PaDOT*, 461 A.2d 765, 769 (Pa. 1983). It goes on to argue that any action of DEP which is arbitrary is *per se* improper and must be set aside, again citing *Acchione, supra*.

In response, DEP argues that the very nature of Consol’s challenge – i.e. challenging the reasonableness of DEP’s determination of “reasonable cost of repair” – raises questions of

material fact, and when disputed issues of material fact exist, summary judgment may not be granted. DEP also disputes that its determination of a reasonable cost of repair or replacement of the dam was arbitrary or a guess. DEP argues that “it used the best estimates for the cost of Dam repair available, given the preliminary nature of the estimates.” (DEP Memorandum in Support of its Response, p. 13) It received estimates to repair the dam from what it considered to be two competent engineering organizations, Gannett-Fleming and Paul C. Rizzo Associates, Inc. on behalf of DCNR and Consol, respectively, and it averaged the costs. DEP argues that averaging data is an accepted engineering practice and is used to project repair and construction costs. (Motycki Affidavit)

We agree with DEP that the very nature of Consol’s challenge involves questions of material fact. Determining whether DEP’s “reasonable cost of repair” is “reasonable” necessarily involves questions of fact to which all parties do not agree. The question of whether a cost is reasonable is necessarily one of fact. As noted earlier, summary judgment is appropriate only where there are a limited set of facts which are truly undisputed. *C.A.U.S.E., supra.; Bertothy, supra.*

Moreover, Consol is focusing on whether DEP’s methodology for arriving at the cost figure is reasonable. The question is whether the repair figure itself is reasonable. It is quite possible that DEP could use a completely different method for determining the repair cost, yet still arrive at a figure which is reasonable. Although the statute mandates DEP to come up with a reasonable figure, it does not instruct DEP on how that figure must be calculated.

Section 5.5(c) of the Mine Subsidence Act allows for a range of possible cost figures that are “reasonable,” and there is much room for determining what is “reasonable.” The Center for Coalfield Justice states it well:

The word 'reasonable' has the following common and approved uses: 'not conflicting with reason,' 'not absurd,' 'not ridiculous,' 'not extreme,' and 'moderate.' Webster's Third International Dictionary, Unabridged (1993)(online version). For something to be reasonable, it need not be perfect or even precise. Between absurd and not absurd, extreme and not extreme, there is much room for debate. . . .Determining the reasonableness of the cost figure in this context is a question of fact.

(Center for Coalfield Justice Brief in Opposition, p. 5-6)

We also agree with the Center for Coalfield Justice that the cases relied upon by Consol are not persuasive. *Thunberg*, relied upon for the proposition that a decision "based on random or convenient selection or choice rather than on a reasoned factual analysis is arbitrary," dealt with the question of when an award of attorney's fees is appropriate under 42 Pa.C.S. § 2503, the Judicial Code. The Court examined when an opponent's conduct was arbitrary for purposes of determining whether fees were warranted, not the reasonableness of an attorney fee award. Consol also cited *Acchione* for the proposition that an educated guess is arbitrary and, therefore, must be set aside. *Acchione* did involve an educated guess by the Pennsylvania Department of Transportation (PaDOT) regarding the amount of conduit that could be reusable in a construction project. PaDOT's estimate turned out to be incorrect, and the appellant-contractor was entitled to recover. However, in reaching its ruling, the Supreme Court relied on a *factual finding* made by the Board of Claims. Thus, the determination of whether the PaDOT's estimate was proper was considered to be a question of fact for the Board of Claims.

Consol also makes the argument that the Mine Subsidence Act does not authorize DEP to pass on the obligation of calculating a reasonable cost of repair or replacement to the Environmental Hearing Board. We disagree that DEP is passing on its obligation to calculate a reasonable repair or replacement cost by having the Board examine whether the cost calculated by DEP is reasonable. It is a long-standing principle that the Board conducts its hearings *de*

novo. Pequa Township v. Herr, 716 A.2d 678 (Pa. Cmwlth. 1998); *Warren Sand & Gravel Co. v. DER*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975); *Smedley v. DEP*, 2001 EHB 131. As explained in *Smedley*:

We must fully consider the case anew and we are not bound by prior determinations made by 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. DEP*, Docket No. 99-166-L, slip op. at 14 (Adjudication issued January 3, 2001). Rather than deferring in any way to findings of fact made by the Department, the Board makes its own factual findings, findings based solely on the evidence of record in the case before it. *See, e.g., Westinghouse Electric Corporation v. DEP*, 1999 EHB 98, 120 n. 19.

Smedley, 2001 EHB at 156.

Therefore, it is entirely proper that the Board should review DEP’s repair cost estimate and make a determination as to its reasonableness.

DEP’s Authority under Sections 5.5(c) and 9 of the Mine Subsidence Act

Consol argues that DEP has exceeded its authority under Sections 5.5(c) and 9 of the Mine Subsidence Act in issuing what Consol has designated as “Remedial Orders” in this case. Section 9 states that “the department may issue such orders as are necessary to aid in the enforcement of the provisions of this act.” 52 P.S. § 1406.9. Section 5.5(c) authorizes DEP to “issue a written order directing the operator to compensate or to cause repairs to be made within six months or a longer period if the department finds that occurrence of subsidence or subsequent damage may occur to the same building as a result of mining.” 52 P.S. § 1406.5e(c).

According to DEP’s response, DCNR proactively undertook some of the engineering and design work involved in repairing the dam and incurred costs associated with it. Those costs are

known. The remainder of the repair work will be paid for by Consol. However, because Section 5.5(c) states that DEP “shall issue a written order directing the operator to compensate *or* to cause repairs,” Consol argues that DEP has exceeded its authority by ordering the company both to repair the damaged structure and to compensate DCNR for damage to the dam. According to Consol, DEP may either order Consol to pay compensation to DCNR equal to the reasonable cost of repairing or replacing the dam or direct Consol to make all of the necessary repairs, but may not require Consol to undertake repairs and compensate DCNR for work it has already done. We disagree with Consol’s unduly restrictive interpretation of Section 5.5(c) and do not read it as an all-or-nothing provision. It would be illogical to conclude that if the owner of a damaged structure undertakes any work to proactively ensure repair of the structure DEP’s hands are tied with regard to ordering any repairs to be undertaken by the mining company found to have caused the damage. As DEP points out in its response, it is a well-established principal of statutory construction that “or” may be read as “and” and vice versa. *In re Appeal of Martin*, 381 A.2d 1321, 1322 (Pa. Cmwlth. 1978); *In re Petrash*, 229 A.2d 878 (Pa. 1967). As explained in *Petrash*, “In the construction of statutes, it is the duty of the Court to ascertain the clear intention of the legislature. In order to do this, courts are often compelled to construe “or” as meaning “and,” and again “and” as meaning “or.” 229 A.2d at 879-80, quoting *U.S. v. Fish*, 70 U.S. 445, 447. Indeed, Section 19 of the Mine Subsidence Act directs us to give a liberal interpretation to the statute: “[E]ach and every provision hereof is intended to receive a liberal construction such as will best effectuate that purpose, and no provision is intended to receive a strict or limited construction.” 52 P.S. § 1406.19. In order to effectuate the goal of Section 5.5(c) of the Act, which is to ensure that structures that are damaged due to mine subsidence are repaired or replaced and that owners of such structures are compensated for such repairs, we are convinced

that the General Assembly intended the word “or” in Section 5.5(c) to mean “and/or.” Moreover, this view also appears to have been adopted by the Commonwealth Court in *Faldowski v. Eighty-Four Mining Co. and DEP*, 725 A.2d 843 (Pa. Cmwlth. 1998), in which the Court stated that Section 5.5 of the Mine Subsidence Act provides the remedy for “securing ‘repairs’ and/or ‘compensation’ for damages to structures caused by underground mining.” 725 A.2d at 845 (emphasis added).²

In its reply brief, Consol relies on the second sentence of Section 5.5(d), as limiting the amount for which it may be held liable. That sentence reads as follows:

(d) . . . The occupants of a damaged structure shall also be entitled to additional payment for reasonable, actual expenses incurred for temporary relocation and for other actual reasonable, incidental costs agreed to by the parties or approved by [DEP].

52 P.S. § 1406.5e(d). Consol argues that this is the only section of the Mine Subsidence Act that allows the Department to combine an order for monetary payment with an order requiring repair or compensation, and DCNR does not qualify under this section since it is not an “occupant” of Ryerson Dam. The term “occupant” is not defined in the Mine Subsidence Act. However, in its sur-reply, DCNR argues that the term “occupant” has a broader meaning than simply that of a “physical resident” of a premises or building. It argues that “occupant” also refers to “one who has possessory rights in, or control over, certain property or premises,” citing *Black’s Law Dictionary*, 8th ed. (2004). The term “control” is defined as “the power or authority to manage, direct, or oversee.” *Id.* This definition was adopted by the Pennsylvania Supreme Court when it was called upon to determine who constitutes an “occupant of property” under the Recreational Use of Land and Water Act, Act of February 2, 1966, P.L. 1860, as amended, 68 P.S. §§ 477-1 *et*

² The interpretation of “or” in Section 5.5(c) was not an issue in *Faldowski*; nonetheless, in discussing this provision, the Court read “or” as “and/or.”

seq. The Court recognized an occupant as one who exercises power or control over the property. *Stanton v. Lackawanna Energy Ltd.*, 886 A.2d 667 (2005). We agree that the same definition of “occupant” applies here. Because DCNR has control over and the authority to govern, manage and oversee the dam, we disagree with Consol’s argument that DCNR does not qualify as an “occupant” under Section 5.5(d).

Second, Consol argues that DEP has exceeded its authority under the Mine Subsidence Act by requiring Consol to pay for repairs and compensation that may exceed the cost of actually replacing the dam. The amount for which Consol may be held liable is limited by Section 5.5(d) of the Act which states in relevant part as follows:

(d) In no event shall the mine operator be liable for repairs or compensation in an amount exceeding the cost of replacement of the damaged structure.

52 P.S. § 1406.5e(d).

None of the parties has provided to us clear and concrete evidence as to what the cost of replacing the dam is in comparison to repairing it. This issue is heavily dependent on facts which are clearly still in dispute and which will no doubt be addressed at the hearing on the merits.

Finally, Consol argues that DEP has improperly delegated its authority under the Mine Subsidence Act by allowing DCNR to control the design of the project and by requiring that any disputes be decided by a third party arbitrator. Consol points to the following provisions of the November 3, 2010 Order as delegating DEP’s authority to DCNR: Paragraph 2a which states that DCNR and its consultants will complete the final design; Paragraph 3 which states that a project manager acceptable to DCNR will manage and direct the repairs; and Paragraph 4 which states that Consol may not enter into a contract with a prime contractor if the project manager

selected by DCNR finds that entity to be unqualified. The November 3 Order also states that if Consol and DCNR are unable to resolve any disputes over the payment of design-related costs, Consol shall promptly arrange and pay for a neutral arbitrator who is acceptable to DCNR. Consol argues, “there is nothing fair, nor legal about allowing the owner of an allegedly damaged structure a *carte blanche* to run up design costs and then requiring the disputes over these ‘costs’ to be heard by a third party acceptable to the structure owner, and whose compensation must be paid for by Consol.” (Consol Memorandum in Support of Motion, p. 22)

Consol contends that the provisions of DEP’s November 3, 2010 Order are similar to those provisions of an order that was invalidated by the Commonwealth Court in *Elias v. EHB and DER*, 312 A.2d 486 (Pa. Cmwlth. 1973). In that case DEP’s predecessor, the Department of Environmental Resources (DER), ordered the appellants, owners of a housing development, to abate unhealthful and dangerous conditions in the housing development. The appellants appealed the order to the Environmental Hearing Board, and the Board not only found in favor of DER but ordered the appellants to enter into contracts with commercial contractors approved by DER to remedy the conditions. On appeal to the Commonwealth Court, the Court invalidated the order and simply ordered the appellants to abate the nuisances by a specific date. The Court found that while DER had the authority to order the appellants to correct the unhealthful and dangerous conditions, there was no authority under the Administrative Code for either DER or the Board to require them to enter into a contract to do so.³ Consol argues that in the present case DEP likewise does not have the authority to order Consol to enter into a contract for repair of the dam with a contractor selected by DCNR.

³ In reaching its decision in *Elias*, the Court relied on Section 1917-A of the Administrative Code of 1929.

Consol also cites *Eagle Environmental, L.P. v. DEP et al.*, 1998 EHB 896, *aff'd*, 2704 C.D. 1998 (Pa. Cmwlth. 2001), in support of its argument that DEP cannot defer to others the resolution of issues which it is required by statute to make. In that case, DEP had suspended and revoked permits under the Dam Safety and Encroachments Act based on a determination by the Pennsylvania Fish and Boat Commission that streams in the area were wild trout streams. The Board held that, although DEP “may rely upon the expertise of other agencies. . .[it] may not blindly defer to the determinations of other agencies. . .[but] must reserve for itself the ultimate decision of whether or not to issue a permit, or in this case, suspend a permit.” 1998 EHB at 923 (citations omitted) (emphasis in original). Although *Eagle Environmental* dealt with a permit suspension/revocation, it is instructive here where DEP has been assigned the statutory duty of determining the reasonable cost of repairing structures damaged by subsidence. As the Board stated in *Eagle Environmental*, “[DEP] must evaluate the determination of another agency and exercise its legislatively mandated discretion to reject that determination if it so chooses.” *Id.* at 923-24. Here, the matter is made more complicated by the fact that the sister agency on whose judgment DEP is relying is also the claimant.

We agree that the amount of authority and control delegated to DCNR in this matter to direct the course of the dam repair raises some questions. Based on our reading of the parties’ pleadings, our understanding of the situation is that the repair of the dam is an evolving process dictated primarily by DCNR, with any disputes along the way to be decided, at least initially, by an arbitrator paid for by Consol and agreed to by DCNR.

We have some concern regarding the *ad hoc* process that has been fashioned in this case and the amount of authority that has been given to DCNR to direct the process. Nonetheless, we recognize that this is a unique area of the law. While the provisions of the Mine Subsidence Act

are set up to easily deal with cases involving damage to houses and buildings, repair of a dam is a less common occurrence. We are hesitant to make any final judgments without hearing all of the facts underlying DEP's decision. Moreover, we are unconvinced that this is an issue that is free from doubt where one party is clearly entitled to summary judgment as a matter of law. All of the issues raised by Consol on this subject raise material questions of fact on which the Board needs to hear testimony, including expert testimony.

For Appellants:

Thomas C. Reed, Esquire
Dinsmore & Shohl, LLP
One Oxford Centre
301 Grant Street, Suite 2800
Pittsburgh, PA 15219

Samuel W. Braver, Esquire
Daniel Garfinkel, Esquire
Buchanan Ingersoll & Rooney, P.C.
One Oxford Centre
301 Grant Street, 20th Floor
Pittsburgh, PA 15219

Stanley Geary, Esquire
Consol Energy, Inc.
CNX Center
1000 Consol Energy Drive
Canonsburg, PA 15317-6506

For DCNR:

Stewart L. Cohen, Esquire
Michael Coren, Esquire
Mark Goodheart, Esquire
Joel Rosen, Esquire
Cohen, Placitella & Roth, P.C.
Two Commerce Square
2001 Market Street, Suite 2900
Philadelphia, PA 19103

Dennis Whitaker, Esquire
Chief Counsel
DCNR – OCC
400 Market Street, 7th Floor
Harrisburg, PA 17101

For Center for Coalfield Justice:

Emily Collins, Esquire
Oday Salim, Esquire
University of Pittsburgh Environmental Law Clinic
P.O. Box 7226
Pittsburgh, PA 15213