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EDITORIAL STAFF

EDITORS-IN-CHIEF

Maxine M. Woelfling
Morgan, Lewis & Bockius LLP
One Commerce Square
417 Walnut Street
Harrisburg, PA 17101-1904
(717) 237-4065
(717) 237-4004 (Fax)

Jennifer A. Smokelin
Babst Calland Clements and Zomnir
Two Gateway Center, Eighth Floor
Pittsburgh, PA 15222
(412) 394-6514
(412) 394-6576 (Fax)

Chad A. Wissinger
Klett Rooney Lieber & Schorling
40th Floor, One Oxford Centre
Pittsburgh, PA 15219
(412) 392-1698
(412) 392-2128 (Fax)

FEATURE EDITORS

G. Bryan Salzmann
1580 Gabler Road
P. O. Box 276
Chambersburg, PA 17201-0276
(717) 263-2121
(717) 264-8967 (Fax)
Appellate and Common Pleas Court Opinions

Jennifer A. Smokelin
EHB Opinions and Orders

Maxine M. Woelfling
EHB Adjudications
CHAIRMAN’S MESSAGE

Pennsylvanians recently voted in what the pundits are calling the most important gubernatorial election in a generation. On September 26, the Section tried to give its Members an inside view of how the results of that election might affect their lives and their practices. Brian Clark, who chairs the Fisher for Governor Environmental Issues Committee, and I (I co-chair the Rendell committee) discussed the issues in a roundtable format with about 20 Members present in person and another 40-50 listening by telephone. We probably did not sway a single vote, but we hope to have provided those who participated with something at least amusing and hopefully useful in planning out their practices.

The Section reorganized several months ago to improve our ability to provide that kind of real-time, useful information to our Members. Five substantive committees have as their missions, among other things, to provide useful information and experiences to their members and to members of the Section generally. Other coordinators help focus those substantive committees to provide specific services to members: law student programs, in-house counsel programs, the newsletter, the annual dinner, public outreach opportunities, county bar outreach opportunities, and pro bono opportunities.

Help us to help you. Face it. You’re reading the “Message from the Chair” column in a Section Newsletter. You either display an odd form of compulsive behavior or you are mildly interested. Take three simple steps now to connect to the Section.

1. **Subscribe to the listserv.** I know you have been on listservs that bombard you with inane controversy closely followed by messages from subscribers demanding to be taken off the list prompting irate notes from computer geeks pointing people to the “unsubscribe” instructions and so on and so on. That’s not us. Our listserv primarily acts as an electronic mailing list to allow us inexpensively and quickly to let you know what is going on. If you are not on the listserv, you are getting incomplete information, and it’s late when it comes. Subscribe at: [http://www.pabar.org](http://www.pabar.org) If you don’t like it, you can always unsubscribe; the instructions are below each message.

2. **Join a Committee.** See if you like it. See if it is useful. You can always quit. If you don’t have information about the Committees, see the minutes of our meetings posted on the Members Only portion of our web page or contact me at mandelbaum@ballardspahr.com.

3. **Mark your Calendar.**

   Environmental Law Forum, Section Election, Annual Reception and Dinner, April 9 and 10, State College.

   There is no one too inexperienced, too unconnected, too remote, or too whatever to be involved. If all else fails, send me a note, and I’ll get you in; I know the folks in charge, at least until April.

DGM
Preserving Site-Specific Remedies Through Institutional Controls: the Next Challenge

- Anderson Lee Hartzell

In 1995, Governor Ridge signed the Land Recycling and Environmental Remediation Standards Act (“Act 2”) into law. Act 2, and the voluntary Land Recycling Program established by the Department under Act 2, has been generally hailed by the business and financial investment communities as a solution to the uncertain environmental liabilities faced by business entities which either found themselves under the broad umbrella of liability associated with such statutes as CERCLA and HSCA or desired to purchase and redevelop contaminated properties but were discouraged from doing so because of such potential liability. However, there are important questions about the long-term effectiveness of many Act 2 remedies (as well as the long-term effectiveness of many Superfund remedies). This comment focuses briefly on some of the issues surrounding the use of institutional controls at remediation sites.

Act 2 has two fundamental underpinnings. The first is that any entity which cleans a site up under Act 2 and the administrative requirements of the Department’s Land Recycling Program will obtain a self-executing statutory release of liability for further remediation of the Site. While there are some significant limitations upon the release of liability in Chapter 5, a remediator will generally be assured that, unless the remedy in some way fails, it cannot be legally compelled to implement further remedial action at the site.

1Mr. Hartzell is a Supervising Counsel in the Pennsylvania Department of Environmental Protection’s Southeast Region Office of Chief Counsel. This Comment reflects the views of Mr. Hartzell and should not be considered to reflect those of the Department.

2A common misperception of Act 2 is that the Department actually grants the release of liability set forth in Chapter 5 of the statute in the same way that the Department grants a Covenant Not to Sue in certain administrative or court settlement documents. This, however, is not true. Rather, a voluntary remediator under Act 2 receives a self-executing statutory release of liability when it has demonstrated attainment of the cleanup standard selected in the Notice of Intent to RemEDIATE. The Department’s role is generally limited to issuing approvals, denials, or confirmation letters, depending on the particular standard selected by the remediator. This distinction is important because the scope of the release of liability under Act 2, or other legal issues associated with such release, are not fashioned by the Department but will be determined by a court of law. The Department’s interpretation of the statute may ultimately carry great weight before a reviewing tribunal, but it cannot expand or contract the nature of the release in the same way that it can by modifying the language of, e.g., a Covenant Not To Sue.
The second fundamental basis of the statute is its establishment of specific remedial action cleanup standards: the Background Standard, a Statewide Health Standard, and a Site-Specific Standard. Since 1995, the Department has issued various regulatory packages, guidances, and policy documents under the Act 2 program. These have established numerical, health-based cleanup standards for soils and groundwater, defined the requirements necessary for Department approval of a Site-Specific Standard, delineated the relationship between an Act 2 cleanup and the requirements of other environmental laws, and otherwise facilitated the process through which a voluntary remediator may demonstrate attainment of its selected cleanup standard under the Land Recycling Program.

Judging solely from the number of sites which have passed through the system, the Act 2 Land Recycling Program has been a success. As of the date of this article, for instance, more than one thousand sites around the Commonwealth have passed through the Act 2 process, and the Department has received a number of distinguished awards for its Land Recycling Program. What is also clear, however, is that numerous cleanups under the Act 2 program have not attained numerical, health-based Statewide Health Standards or background standards but have instead have attained a Department-approved Site-Specific Standard.

A Site-Specific Standard is one that, in most cases, “risks away” any potential exposure that humans or the environment might face by the contaminants associated with the particular Site. Section 304 of Act 2, 35 P.S. § 6026.304, sets forth the criteria and process for Site-Specific Standards. In general, a remediator seeking to attain a Site-Specific Standard must determine all potential exposure pathways for the contaminants addressed under the cleanup after a site characterization, provide a fate and transport analysis for such contaminants, and submit a risk assessment report describing the potential adverse effects on human health and the environment from such contaminants. Section 304(j) establishes criteria which the Department will use to evaluate cleanup plans under the Site Specific Standard, and Section 304(k) establishes criteria for attainment of the Site-Specific Standard.

The majority of cleanups under the Site-Specific Standard of Act 2 achieve protection of human health and the environment through the elimination of exposure pathways and complementary risk analysis. The exposure pathways most often taken into account are direct contact with contaminated soils and the migration of contaminated groundwater to human or ecological receptors, although others, such as vapor migration, are often considered and addressed under a Site-Specific Standard. Elimination of an exposure pathway, however, usually takes the form of an engineering control (EC) or institutional control (IC) measure. Engineering controls - physical measures such as caps, fences or barriers which are generally designed to prevent exposure to contaminated media - are often used to prevent or eliminate the direct contact exposure pathway at a

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3This is merely a brief and general synopsis of Site-Specific Standards under Act 2 and is not intended to provide a matrix for all voluntary cleanups using this standard.
given Site. For example, if the remediator places an asphalt surface over a specific area of soils contamination, that surface will eliminate the potential for human direct contact with the subsurface contamination. Institutional controls - legal measures designed to prevent certain uses or activities at or in the vicinity of Sites - are also used frequently to eliminate contact between the public and a contaminated media. Restrictions upon the use of groundwater at a given Site are a common institutional control at an Act 2 Site.

What happens most often at Act 2 Sites is that the remediator proposes to meet a Site-Specific Standard through pathway elimination and to accomplish that aim through implementation of engineering and institutional controls. Such a proposal will typically include installation of some form of cap over soil media contamination along with a restriction upon the use of contaminated groundwater at the Site. Through a coordinated risk assessment, the remediator can often demonstrate that, once these measures have been implemented, neither the public nor the environment will be exposed to the existing contamination or that whatever risk does remain satisfies the Act 2 threshold for acceptable risk.⁴

The same is often true at Superfund Sites. While the decisional factors going into remedy selection at both NPL and HSCA Sites will usually differ from those at Act 2 Sites, the plain fact is that, primarily due to budgetary limitations on both DEP and EPA, many Superfund Sites are addressed through containment remedies with corresponding engineering and institutional controls. While Act 2 is not generally applied at federal Superfund Sites, settling PRPs usually gain some degree of liability resolution through a Consent Decree with EPA, and, as with Act 2 Sites, protection of future liabilities often will hinge upon preservation of the remedy.

Because so many Act 2 and Superfund Sites depend on institutional and/or engineering controls to contain the release of regulated substances, both the environmental agencies and those legally responsible for conditions at the Sites have a joint interest in assuring the most effective implementation, monitoring, and enforcement of such controls which may be legally and practicably feasible. Any failure of an engineering or institutional control may result in (1) the exposure of the public or the environment to the contaminants sought to be contained; (2) the potential expenditure of public monies for enforcement; and (3) a reopening of liability for responsible parties to correct or abate any or all detrimental conditions associated with the failure of the engineering or institutional control.

⁴For carcinogens, Section 304(c) of Act 2 establishes an excess upper-bound lifetime risk of between 1 in 10,000 and 1 in 1,000,000.
The most important question regarding an institutional control is how to implement it. For instance, in the case where either the voluntary remediator (in the Act 2 context) or the remediating agency (in the case of Superfund) wishes to eliminate any potential exposure pathway to contaminated groundwater at a Site by preventing its use, just how exactly should this be accomplished? Is it enough simply for a property owner to place a “deed restriction” against the use of such groundwater on the property deed? What would be the legal effect of such a unilaterally imposed “deed restriction”, and how would a non-property owner who participates in the cleanup under Act 2, or a settling PRP under Superfund, be assured that the deed restriction remains in place? Of equal importance, how would the agency responsible for assuring protection of human health and the environment at a Site be assured of fulfilling its responsibility through such a unilaterally imposed deed restriction?

What often happens at Act 2 Sites attaining a Site-Specific Standard is that the remediator submits with the Final Report a deed restriction. These vary greatly, but generally they consist of a proclamation by the owner that the property shall be restricted in some fashion or another and an assurance that this proclamation is recorded with the deed in the county register. These deed restrictions, while seemingly appropriate in scope and nature, may not carry sufficient legal effect to assure their long-term enforceability. I may unilaterally impose a deed restriction on my property today, but there is nothing to guarantee that I, a future property owner, the recorder of deeds, or perhaps even another person will not simply remove that restriction from the deed tomorrow. It is certainly true that the removal of such a deed restriction would likely trigger a re-opener under Act 2 and subject all participants in the remediation to liability for any renewed exposure pathways, but there is an open question as to whether these concerns about a potential re-opener would provide sufficient assurance to guarantee the long term maintenance of the restriction. Remediators under Act 2 are required to submit Post-Remediation Care Plans to the Department as a part of their Final Report for Site-Specific Standards. See 25 Pa. Code §§ 250.204(g) and 250.411(d). However, the degree to which these are effective in maintaining engineering or institutional controls is far from certain. Moreover, there is a serious question as to whether such a unilateral action constitutes an adequate legal underpinning for the restriction in the first place.

\[5\]This commentary focuses primarily on institutional controls rather than engineering controls. While engineering controls are often equally as important as institutional controls to the long-term success of a remedial action, implementation and maintenance of institutional controls involve more thorny legal and policy issues.

\[6\]I place quotation marks around deed restriction because the term is somewhat of a misnomer. What is commonly referred to as a “deed restriction” - that is, a restriction on the deed, or, more properly, a restriction on a certain use of the property described by the deed - must be implemented and maintained through some legally recognizable mechanism. It is not a legal end in and of itself.
Both EPA and the Commonwealth are also faced with considerable problems regarding long-term implementation of engineering and institutional controls at NPL and HSCA Sites. Pursuant to its authority and responsibility under CERCLA, EPA has an obligation to ensure that NPL Sites remain protective of human health and the environment long after remedial action has been completed. Because States are generally required to undertake operation and maintenance obligations in order for remedies to proceed at funded Sites, EPA has been working with the various States to develop means of implementing and maintaining both engineering and institutional controls during the post-remediation period.

Under Superfund, institutional controls can be implemented by using some form of property interest model. That is, a prohibition on a certain use of property at a Site may be accomplished through transfer of the property interest in the form of a negative easement or restrictive covenant. One way to effectuate a prohibition on the use of groundwater at an NPL Site, for instance, would be for the property owner to grant this interest to a third party, who, by virtue of holding such a negative easement, would maintain the authority to enforce the institutional control and thereby assure the long-term effectiveness of the remedy. In addition, pursuant to Section 104(j) of CERCLA, EPA has the authority to acquire such property interests at Superfund Sites and to transfer such interests to, e.g., States. Under the property interest model, the critical question for the implementing agency, then, is to identify the most appropriate grantee for such a property interest. EPA has, in recent times, struggled with this question and faced difficult issues in determining how to fulfill their obligation to assure long-term protectiveness in this era of containment remedies.

Voluntary participants in the Act 2 program have also by and large employed the property interest model in implementing institutional controls to attain Site-Specific Standards. As stated above, these deed restrictions are often little more than unilateral declarations of property owners without any controlling mechanism to assure that they will remain in place. The Post-Remediation Care Plans submitted with the Final Reports do not, in most cases, provide for any self-executing assurance that the institutional control will stay in place, and there is not normally a separate holder of the negative easement property interest to provide for sufficient oversight or enforcement of the institutional control.

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7CERCLA’s Section 104(J)(2) requirement that States accept such property interests following completion of remedial action is relevant to this issue but not discussed further here.

8In a comprehensive case study of four NPL Sites, the Environmental Law Institute found that the institutional controls used as a part of the EPA remedial response were of questionable effectiveness. See, Protecting Public Health at Superfund Sites: Can Institutional Controls Meet the Challenge?, Environmental Law Institute Research Report, 1999.
There are a number of ways in which the property interest model for institutional controls can be supported or supplemented to assure long-term effectiveness, and both EPA and state governments are considering ways to bolster this approach towards institutional controls. For instance, Colorado recently passed legislation expressly creating environmental covenants at remediation sites. These covenants are “instrument[s] containing environmental use restrictions” which are “created only by the owner of the property through a written grant to the Department [of Public Health and Environment] by a deed or other instrument of conveyance” to be “held by the Department”, and are specifically enforceable by the Department, affected local governments, the grantor, and “any third-party beneficiary specifically named in an environmental covenant.” Colorado Senate Bill 01-145, Sections 1 and 2. This legislation seeks to support the common law property interest model for institutional controls and to assure their long-term stability through both agency oversight and locally-affected party enforcement capability. This legislation would also appear to address concerns about the statutory limitations upon the State’s authority to accept or enforce property interests in the form of environmental covenants.

Private parties have also approached the regulating government entities with suggestions on ways to supplement the property interest model and assure protection of the public health and the environment in the context of containment remedies. For instance, the Department has recently been reviewing a proposal for the creation of a trust entity which would be the residual holder of institutional control property interests granted by participating parties under the Act 2 program or acquired by the Department pursuant to its authority under HSCA. This trust entity would hold and maintain these property interests, perform inspections, refer problem sites for enforcement, guarantee the maintenance of these controls to private parties, and otherwise perform an oversight function for containment remedies. The aim of this trust proposal is to eliminate or minimize existing deficiencies in assuring the long-term maintenance of both engineering and institutional controls and would be funded through a partnership of private and public entities.

While the property interest model can be used to effectuate and perhaps even provide appropriate long-term assurance for institutional and engineering controls, this model does carry with it certain fundamental problems. Perhaps the most significant of these is that the long-term protection of a containment remedy will be premised upon the vagaries of property law and may require regulating agencies to become immersed in an entirely new role as a property interest holding bank or overseer. The degree to which the Pennsylvania General Assembly intended that the DEP manage a host of varying property interests at numerous sites around the Commonwealth is far from clear. For instance, under Hazardous Sites Cleanup Act (“HSCA”), the General Assembly has granted to the Department the authority to acquire property interests in its administration of the Superfund Program, but it did not provide concurrent authority for the Department to transfer or divest itself of such property interests. See 35 P.S. § 6020.511. That authority resides in the Department of General Services, and the process for such potential divestiture is complicated and lengthy at best.
Moreover, issues of privity, standing, overlapping or conflicting property interests and the reliability of common law principles and county records offices in the entirely new arena of environmental use restrictions complicates the property interest model to the degree that it calls into question the fundamental utility of the approach. As noted above, Colorado has attempted to minimize or simplify some of these problems with its recent environmental covenant legislation. The degree to which this legislation solves more problems than it creates and the efficiency of the State’s management and oversight of a bank of environmental covenants all remain to be seen. What is clear, however, is that some form of legislation will be needed in most, if not all, states to effectuate the property interest model for institutional controls. As a result of these potentially thorny problems, environmental regulating agencies might do well to consider alternative approaches to implementing and maintaining engineering and institutional controls at remediation sites.

One alternative to the property interest model is for a state government to use its police power authority to implement and perpetuate a restrictive use at a containment remedy site. The police power model does not have the disadvantages of the property interest model because it is not dependent upon (1) the creation and transfer of property interests; (2) the necessity of some form of holding entity; or (3) potentially difficult issues of property law. Rather, the restriction upon some use at the site may be accomplished through an agency’s authority under the state police power to protect human health and the environment. There may be need in some states for appropriate statutory authority, but, as stated above, that will also be the case with the property interest model.

In HSCA, the General Assembly has already provided DEP with the kind of authority under the police power to effectuate self-perpetuating institutional controls. Section 512 of HSCA provides that DEP may issue an order “precluding or requiring cessation of activity at a facility which the Department finds would disturb or be inconsistent with the response action implemented.” 35 P.S. § 6010.512(a). Furthermore, such orders are not only issued to property owners, but are also issued directly to the Recorder of Deeds, who shall record the order “in a manner which will assure its disclosure in the ordinary course of a title search of the subject property, [and the order] shall be binding upon subsequent purchasers.” Id.

Section 512 Orders have the dual effect of implementing legally binding institutional controls at a Site and assuring that such controls shall be discovered and maintained throughout the transactional history of the site. There is no need for any definition of the type of property interest which would be necessary to accomplish the institutional control, nor is there any need for either the transfer of such property interest or for the creation of some kind of holding entity. Rather, the required restriction is assured in the same manner that a zoning ordinance restricts certain activities in local municipalities. Recorders of deeds would be specifically responsible for providing proper disclosure of the Section 512 Order, and there are no property law issues associated with the restriction which may complicate its perpetuation.
The Department has successfully used Section 512 Orders at both Superfund Sites and Act 2 Sites. Moreover, this approach to institutional controls solves the dilemma EPA often faces at containment remedy NPL sites where they may lack the kind of authority necessary to implement an institutional control. EPA and the Department have yet to enter into a consistent arrangement for long-term institutional controls at NPL sites. However, just as various provisions of HSCA have provided the regulating agencies with the tools to work together in other Superfund matters, Section 512 of HSCA provides the possibility for a relatively simple state-federal partnership in this area of long-term protection at containment remedy sites.

The police power model could also be used to assure long-term implementation of institutional controls at Act 2 Sites. For instance, rather than submitting a “deed restriction” and Post-Remediation Care plan to the Department with the Final Report, a voluntary participant in the Act 2 program could use a standard form to provide the Department with a draft Section 512 Order at the time he or she submits the Final Report. In its approval letter, the Department could issue the Section 512 Order to the property owner and the Recorder of Deeds and thereby assure that the restriction will be legally binding on the property owner and will run with the land.

The point of this discussion is to note that there are different legal mechanisms to assure that containment remedies will continue to be protective over the long term. Important issues such as systematic monitoring of institutional and engineering controls (including the allocation of resources for that purpose), and the enforcement or maintenance of such controls are beyond the scope of this comment, and whether the property interest model or the police power model is ultimately adopted by the Department, by the EPA, or by other states throughout the nation remains to be seen. However, states that are beginning to address these issues might do well to consider the different approaches available to regulating agencies in this important field. Over the past eight years, the Commonwealth has actively and successfully promoted hundreds of cleanups in Pennsylvania. The challenge will now be to systematically assure the long-term stability and protectiveness of site-specific remedies through a sound, proactive program for implementation, maintenance and enforcement of institutional and engineering controls.

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9This is not to say that there are not unsettled issues over Section 512, one of which, for instance, is how the petroleum exclusion would affect Section 512 Orders at Act 2 storage tank Sites. Section 512 does, however, provide a solid framework for using the police power model to implement institutional controls.
Machipongo Land & Coal Co., Inc. v. Commonwealth of Pennsylvania: PENNSYLVANIA SUPREME COURT SETS NEW REGULATORY TAKINGS LAW

By
Joel R. Burcat *

On May 30, 2002, the Supreme Court of Pennsylvania largely reversed and remanded a Commonwealth Court decision which had held that a regulation designating land unsuitable for mining effected a taking of private property. Machipongo Land & Coal Co., Inc. v. Commonwealth of Pennsylvania, 799 A.2d 751 (Pa. 2002). The Machipongo decision is noteworthy as it involves the most perplexing issue in regulatory takings law today – how to define the relevant parcel for purposes of the takings analysis. On November 4, 2002, the United States Supreme Court entered an order denying certiorari in the case, so the Pennsylvania Supreme Court's Machipongo decision represents the most recent and wide ranging discussion of the law of regulatory takings in the Commonwealth.

Background: The Machipongo litigation began in 1992 when the Pennsylvania Environmental Quality Board, upon recommendation of the state Department of Environmental Resources (DER),¹ issued a regulation designating 555 acres of land in the Goss Run Watershed in Clearfield County, Pennsylvania unsuitable for mining ("UFM"). Owners of coal reserves in the watershed (the Machipongo Land & Coal Co., Inc., Joseph Naughton and The Erickson Family Trust, collectively "Coal Owners") filed an action in the Commonwealth Court alleging a taking without just compensation in violation of the Fifth Amendment.


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¹ The case was filed when the Department was still called DER. Although the Department's name has since changed, to the Department of Environmental Protection, the Department is still referred to in all pleadings as "DER."

Machipongo Surface Mine, and a Machipongo Deep Mine. The Coal Owners argued that each proposed mining operation was technologically feasible and potentially profitable. They also argued that because the regulation completely prohibited the extraction of coal, a categorical regulatory taking under *Lucas v. South Carolina Coastal Council* had occurred. In August 2000 the Commonwealth Court entered its ruling following the trial. The Commonwealth Court ultimately found that the Erickson/Naughton surface reserves and the Machipongo underground reserves were substantial, valuable and economically mineable and thus, had been taken by the regulation, and that the Machipongo surface reserves were insufficient in quantity to sustain mining, and thus had not been taken. The Commonwealth Court partially struck the regulation as an unconstitutional taking and concluded that "[b]ecause Coal Owners are now free to seek permits to mine the coal, any damages that they now desire to seek shall be through the normal eminent domain process for a temporary taking." Both parties appealed.

**Decision of the Supreme Court of Pennsylvania:**

*Standing and Post-Enactment Transfer:* The Pennsylvania Supreme Court first addressed a persisting issue of standing. The interest in the Erickson/Naughton estate, held by the beneficiaries of the Victor E. Erickson Trust prior to 1992, was transferred due to the death of a beneficiary to the Erickson Family Trust after the regulation took effect. All of the beneficiaries of the newly-formed Family Trust, less the decedent, were the same. DER argued that this "post-enactment transfer" deprived the Family Trust of standing. Citing *Palazzolo v. Rhode Island*, in which the U.S. Supreme Court held that a post-enactment transfer due to devolution of title from a corporation to an individual did not prevent the individual from asserting a takings claim, the Pennsylvania Supreme Court held that "[a] similar result should follow in this case," and allowed the Family Trust to proceed. 799 A.2d at 762.

*Defining the Relevant Parcel:* On the merits, the Pennsylvania Supreme Court first summarized the two tests used to assess regulatory takings claims – i.e., the categorical takings analysis of *Lucas* and the partial takings analysis of *Penn Central Transp. Co. v. City of New York*. It noted that, under either test, identifying the relevant parcel was the critical threshold issue. 799 A.2d at 765. To define the relevant parcel, issues of both vertical and horizontal severance had to be addressed.

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3 The proposals were designed to access the coal reserves in accordance with Pennsylvania law and minimize adverse effects on the watershed. Through the Machipongo Deep Mine, Coal Owners would access underground reserves within the regulated area and also those in a geologically isolated but structurally connected tract of Machipongo property.
5 On cross-appeal, Coal Owners argued that the Machipongo surface reserves were sufficient in quantity to mine and that the Trial Court's reference to the eminent domain process for compensation without further instructions as to forum or procedure failed to provide an adequate remedy.
7 See 533 U.S. at 617; id. at 632-33 (O'Connor, J., concurring); id. at 637 (Scalia, J., concurring).
Vertical severance: Commonwealth Court, relying on over 100 years of Pennsylvania common law and precedent, recognized that the coal estate is separable from other estates in land. The Supreme Court, on the other hand, believing that the U.S. Supreme Court had rejected Pennsylvania's division of estates in Keystone Bituminous Coal Assoc. v. DeBenedictis in favor of the 'parcel as a whole rule' (set forth in Penn Central and recently reaffirmed in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency) held that "the relevant parcel cannot be vertically segmented and must be defined to include both the surface and mineral rights." 799 A.2d at 768.

Horizontal severance: The Pennsylvania Supreme Court then addressed horizontal severance, rejecting the approach of the Commonwealth Court and the Coal Owners (i.e., to define the parcel as the coal estate in the regulated area) as "overly restrictive" and the approach of DER (i.e., to define the parcel as all of Coal Owners' property in Clearfield County) as "overly inclusive." 799 A.2d at 768. Instead, the Court adopted a "flexible approach, designed to account for factual nuances" consisting of several factors used by the Court of Appeals for the Federal Circuit in several cases to define the relevant parcel. Because the record did not address these factors, the case was remanded for the Commonwealth Court to "identify[] the appropriate horizontal conceptualization of the property for use in both the Lucas and Penn Central analyses." Id. at 769.

Applying Lucas: Notwithstanding its decision to remand the issue of horizontal severance, the Machipongo Court determined that it could perform the Lucas analysis for the Machipongo property because it was held in the regulated area in fee simple. Having rejected vertical severance of the coal estate, the Pennsylvania Supreme Court reasoned that because the record revealed that Machipongo had sold timber from and entered into leases for gas development on the regulated land, all "economically viable use" had not been precluded. 799 A.2d at 769-770.

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9  480 U.S. 470 (1987). See id. at 500 ("Pennsylvania property law is apparently unique in regarding the support estate as a separate interest in land that can be conveyed apart from either the mineral estate or the surface estate. … It is clear, however, that our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of rights.").

10  122 S. Ct. 1465 (2002). The 'parcel as whole' rule derives from language in Penn Central: "'Takings' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." 438 U.S. at 130-131. The Machipongo Court acknowledged that some Justices expressed discomfort with this rule in Palazzolo, see 533 U.S. at 631, but concluded that "[f]ollowing Tahoe-Sierra, there can be no dispute that the 'property as a whole' rule remains controlling." 799 A.2d at 768. For a detailed discussion of Tahoe-Sierra, see J. R. Burcat & J. M. Glencer, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency: Is There a There There?, 32 Env'tl L. Rep. 11212 (2002).

11  The factors included: "unity and contiguity of ownership, the dates of acquisition, the extent to which the proposed parcel has been treated as a single unit, the extent to which the regulated holding benefits the unregulated holdings, the timing of transfers, if any, in light of the developing regulatory environment, the owner's investment-backed expectations and, the landowner's plans for development." 799 A.2d at 768.
The Court was unable to conduct the *Lucas* analysis for the Erickson/Naughton property, however, due to uncertainty in the record concerning the nature of the interest held in the regulated area. The case was remanded for the Commonwealth Court to conduct the *Lucas* analysis on additional facts. 799 A.2d at 770. The Pennsylvania Supreme Court did acknowledge, however, that if Erickson/Naughton "own only coal estates and do not own surface rights in the UFM area[,] [t]his would appear to distinguish them from [] Machipongo…" *Id.* In other words, if the Erickson/Naughton property included only the coal estate, then the *Lucas* analysis would be appropriate.

**Applying Penn Central:** Having found the regulation valid under *Lucas* as it pertained to the Machipongo property, the *Machipongo* Court then invoked the *Penn Central* partial takings analysis. After identifying the relevant factors, and noting that the record (built as it was around the economic viability of mining) did not include facts pertinent thereto, the Court instructed the Commonwealth Court to "conduct a trial to consider the facts relevant to the determination of whether the regulation is a taking pursuant to the traditional [partial] takings analysis." 799 A.2d at 771.

**Nuisance:** In *Lucas*, the U.S. Supreme Court had held that a property owner need not be compensated for a categorical taking if the regulation prevents a land-use (such as a nuisance) already prohibited by the state's property law. 12 The Commonwealth Court, reasoning that DER could have prevented harm to the watershed by denying Coal Owners a mining permit, essentially refused to allow DER preemptively to prevent mining via regulation based on allegations of prospective harm. The Pennsylvania Supreme Court refocused the inquiry. That court ignored the evidence in the record of extensive strip and deep mining in and around the UFM area. It noted that "although mining is not a nuisance *per se*, pollution of public waterways is. . . [and] experts need not wait until acid mine water flows out of mines in the [regulated] area to predict the likely results of mining this land." 799 A.2d at 774. Thus, "[i]f the [Coal Owners] are correct that additional mining would not pollute the Watershed, then there is no nuisance [but] if the Commonwealth can prove that mining the [regulated] area would pollute Goss Run, the cause of the nuisance can be prohibited." *Id.* at 775.

**The Future of Machipongo:** Coal Owners' filed a petition for a writ of certiorari with the United States Supreme Court. On November 4, 2002, the Court denied the petition. The case now returns to Commonwealth Court for the second trial ordered by the Pennsylvania Supreme Court.

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12 *See* 505 U.S. at 1027-1030.
RECENT ADJUDICATIONS OF THE ENVIRONMENTAL HEARING BOARD

Department’s Denial of Landfill’s Request to Increase Its Average Daily Volume is Reversed

The Board concluded, in Environmental Recycling Services, Inc. v. DEP, EHB Docket No. 2000-172-C (issued May 8, 2002), that the operator of a construction/demolition waste landfill demonstrated that the Department’s denial of its application to increase its permitted average daily volume was contrary to the law or otherwise unreasonable and inappropriate and that the application should be approved.

Finding that the Department’s denial of the application was contrary to law because it relied on the so-called Harms/Benefit Policy invalidated by the Board in Dauphin Meadows, Inc. v. DEP, 2000 EHB 521, the Board refused to accept the Department’s argument that there was a distinction between requiring the operator to submit a harms/benefits analysis as part of the application, as it did here, and its actual review of that analysis, characterizing it as a “semantic distinction . . . of no import . . .,” especially since the Department did not refute its reliance on the policy in reviewing the application. Although it did not address the issue of whether the Department’s “concern” that the volume increase would be filled by non-local (i.e., out-of-state) sources of waste constituted a violation of the Commerce Clause, the Board did determine that reliance on such a criterion by the Department was “outside the scope of the relevant regulatory requirements” and, as such, was a violation of law.

The Board held that a remand to the Department was unnecessary and would subject the operator to “further needless delays” because the operator had presented ample evidence regarding the potential effects of the proposed volume increase and its mitigation measures. It then determined that the operator demonstrated that the application met the applicable regulations and that the volume increase would not adversely affect the environment, create a health or safety hazard or cause a public nuisance that would not be adequately mitigated by the operator. In particular, the Board dismissed the Department’s assertions regarding significant traffic and environmental impacts, finding the testimony of the Department’s witnesses on these subjects to be less than credible because it did not demonstrate “an adequate understanding of the landfill operations.”

The Department’s contention that the volume increase request could not be approved because it should have been submitted as a major permit modification application was dismissed by the Board. The basis for the argument was stipulated testimony by central office staff regarding the Department’s interpretation of permit modification regulations. The Board gave little credence to the central office interpretation in light of testimony by regional office staff that requests for volume increases had been treated as both major and minor permit modifications. Given that, the Board concluded that it could not defer to the Department’s interpretation of the regulation because there was no single interpretation. Consequently, the Board reviewed the application for compliance with the requirements for a minor permit modification, which is how the regional office treated the application. Although amendments to the residual waste permitting regulations adopted after the application was denied require that requests for volume increases be treated as major permit modifications, the Board
was bound to apply the regulations that were in effect at the time the Department acted on
the application.

RepeateViolations of Storage Tank Act Constitute Ample Grounds For Permit
Revocation and Penalty Assessments

The Board held in Kim Graves v. DEP, EHB Docket No. 2000-189 MG (issued
June 12, 2002) that the Department had satisfied its burden of proving that its revocation
of underground storage tank permits at two facilities owned by Graves was authorized by
the Storage Tank and Spill Prevention Act, 35 P.S. § 6020.101 et seq. (Storage Tank Act)
and necessary to aid in the enforcement of the statute. Noting that the Department clearly
has authority under the Storage Tank Act to revoke permits, the Board then went on to
find that the releases at Graves’ Market Street facility, Graves’ repeated failure to
perform a site characterization as ordered by both the Department and the
Commonwealth Court, and the considerable expenditure of time and effort by the
Department to secure Graves’ compliance more than justified the revocation of the
permits for that facility. In doing so, it rejected Graves’ argument that the alleged
contamination of the site by a previous owner somehow relieved him of his responsibility
as an owner to remediate the site.

The Board also concluded that the Department’s revocation of the permits for
Graves’ Hook Road facility was necessary to aid in the enforcement of the Storage Tank
Act, as Graves had failed to produce leak detection records, ignored orders of the
Commonwealth Court, and had not paid an unappealed civil penalty assessment. Further,
it held that his unwillingness and inability to operate both of his facilities in compliance
with the Storage Tank Act were also grounds for revocation of the permits.

Turning to the three civil penalty assessments issued to Graves, the Board
determined that the Department had met its burden of proving by a preponderance of the
evidence that Graves had violated the relevant statute and the amount of the penalty was
appropriate. Two of the assessments dealt with storage tank violations at the Market
Street facility. The Board reduced a $210,000 assessment for failure to perform
corrective action to $186,000, finding that the duration of the violation was shorter than
alleged by the Department because there were periods of time during which Graves
performed some remedial action. The second assessment of $15,000 related to two
releases at the facility, and the Board found that the Department had properly
classified the seriousness of the violations and appropriately increased the penalty for
the second release because Graves’ conduct was reckless in light of the Department’s
effort to impress the importance of leak detection upon him.

The third penalty of $78,927 was assessed under the Air Pollution Control Act for
Graves’ failure to install Stage II vapor recovery systems at both facilities by the deadline
specified in the regulations. Graves admitted the violations, so the Board’s only task was
to review whether the formula used by the Department to assess the penalty was
reasonable. The formula, which is based on the amount of gasoline dispensed without
vapor recovery equipment and the economic benefit to the tank owner, was upheld in
previous Board decisions (e.g. American Auto Wash v. DEP, 1997 EHB 1029, affirmed
729 A.2d 175 (Pa. Cmwlth. 1999)), and the Board found that Graves presented no
defenses that would justify reduction of the assessment. It also dismissed his contention
that all three penalty assessments were so excessive as to amount to an unconstitutional forfeiture. Since the penalty assessments were substantially less than the statutory maximums and there was a reasonable fit between the amount of the assessments and the violations, the Board concluded that the penalties were not excessive.

Graves filed a petition for review at No. 1699 C.D. 2002.

Department’s Refusal To Renew Storage Tank Installer’s Certification Justified

The Department’s denial of a storage tank installer’s application for renewal of his certification was sustained by the Board in Robert J. Legge v. DEP, EHB Docket No. 2001-108-C (issued June 20, 2002). Finding that Legge had failed to submit a timely application for renewal of the certification in accordance with 25 Pa. Code § 245.114(a)(1), the Board concluded that the Department was justified in requiring Legge to apply for a new certification. While the Board admonished the Department for its informal practice of accepting renewal applications for up to a year after expiration of the certifications as clearly contrary to the storage tank regulations, it refused to rely on the practice as a basis for what would amount to a reinstatement of an expired certification. Even if the Department were somehow precluded from enforcing the regulation by this practice, the Board noted that the denial of the renewal application was still required under the practice because Legge did not file his renewal application until almost three years after the expiration of his certification.

Legge also contested the Department’s determination that he was required to re-take the certification examination since his certification was now inactive. Rejecting his argument that the regulations did not explicitly recognize “inactive” status, the Board cited language in the storage tank regulations limiting the duration of certifications to three years and providing for the re-taking of the technical portion of the examination for “inactive certification categories” to support the Department’s interpretation of the regulations. The Board also found factual support for the Department’s determination of inactive status in Legge’s own admission that he had not installed any tanks in Pennsylvania for six years.

The Board dismissed Legge’s contention that the Department had an obligation to notify him of the expiration of the certification. It found that even if the Department notifies installers of the impending expiration of their certifications as a courtesy, the holder of the certification has the ultimate responsibility to assure that it is current if he wants to perform tank installations. Finally, it refused to give any credence to Legge’s argument that the Department improperly based its denial of his renewal application on his failure to pass the certification examination when he first took it, finding that there was no evidence to support the assertion.

Appellant Fails to Prove That His Activities Are Outside The Scope Of Regulation Under The Noncoal Surface Mining Act

The Board held that the issuance of two orders compelling a landowner to reclaim an area on which he conducted noncoal surface mining activities without a permit was a proper exercise of the Department’s authority in Goetz v. DEP, EHB Docket No. 99-168-C (issued October 11, 2002). Goetz had excavated an area on his property to obtain fill
material to reclaim two pits on another part of the property where he had conducted noncoal surface mining activities, also without a permit. The Board rejected Goetz’s argument that the excavation fell within the so-called landowner non-commercial use exception to the definition of noncoal surface mining, finding that such an interpretation of the statute was inconsistent with prior decisions broadly construing the definition of noncoal surface mining, as well as with the purposes of the statute. Furthermore, the Board found that Goetz’s extraction of the fill and use of it on his property could not be isolated from the fact that the fill was being used to reclaim areas that had been mined in violation of the Noncoal Surface Mining Conservation and Reclamation Act, 35 P.S. § 3301 et seq. (Noncoal Act).

Having determined that Goetz failed to establish that his activities were exempt from regulation under the Noncoal Act, the Board then concluded that the Department had proved by a preponderance of the evidence that Goetz did not meet the performance standards for noncoal mining activities and, therefore, the issuance of the compliance orders was justified. Noting that the testimony by the Department’s inspector was uncontroverted and that Goetz did not introduce any documentary evidence to refute the Department’s evidence, the Board observed that Goetz’s failure to take the witness stand created an inference that his testimony would have been unfavorable.

Although the Board found that Goetz did not contest the reasonableness of the remedial measures prescribed by the orders, it stated in dicta that they were “a straightforward application of the regulatory standards for reclamation, and are not excessive or burdensome.” And, as further support for the reasonableness of the remedial measures, the Board cited the Department’s amendment of the compliance order to provide Goetz with extra time to revegetate because of drought conditions.
ENVIRONMENTAL HEARING BOARD OPINIONS AND ORDERS

Protective Order, Relevant Documents; Overly Broad

The Board issued an order following a conference call on a discovery dispute related to an appeal from a water allocation permit. This opinion is issued to further explain rulings made in that order which disposes of some of the discovery disputes.

The permit at issue provides a framework under which a public water supply agency may obtain new water rights by withdrawing stream flow from one creek and storing the withdrawn water in a former quarry (the “Project”).

The Board granted in part and denied in part motions to compel by the appellants. Many of the interrogatories and document requests that related to “all” conditions and water sources in the “general area” of the Project were overly broad and ambiguous; the Board therefore limited the permittee’s obligation to respond to subjects related to the environmental impact of the Project, water sources hydrogeologically connected to the Project, and limited the responses to a specified geographic area around the Project.

The Board’s order reserved judgment on the extent to which the appellants may explore information that might have remote relevance to alternatives to the project, including past negotiations to acquire the assets of the municipal water authority which is one of the parties in these appeals. The information sought on pricing of water and negotiation strategy with the municipal water authority is said to be confidential business information by the permittee. The permittee further seeks to protect its disclosure to counsel for some of the appellants on the grounds that those counsel represent its competitors. The Board has reserved judgment on these discovery requests pending copies of documents submitted by the permittee to the Department with respect to alternatives to the project so that the Board’s ruling on relevance will not be made in a complete vacuum. The Board has also reserved ruling on motions for protective orders by both the appellants and the permittee.


Petition for Reconsideration; Extraordinary Circumstances; Leave to Amend; Futility

Appellants’ petitions for reconsideration of Board orders issued on discovery motions are denied where Appellants have not shown extraordinary circumstances justifying consideration of the matters anew. Appellants’ motion for leave to amend their notice of appeal, filed after the close of fact discovery in this matter, is denied where the proposed amendments would be futile, they have not satisfied the applicable criteria, and the Department would be prejudiced by amendment at this late stage of the proceedings. The Board held the proposed amendments were futile because the Board could discern no connection between the proposed allegations and the matters
at issue as well as the fact that the proposed amendments were based on hearsay and
innuendo and not “competent evidence” since by the close of fact discovery the
Appellants should be able to articulate their allegations with greater specificity.
Max Starr and Martha Starr v. Commonwealth of Pennsylvania, Department of
Environmental Protection, EHB Docket No. 2002-049-C (September 18, 2002)

**Supersedeas, “Last Lawful Status Quo Ante”; Necessity of Testimony Evidence;
Injury, Harm to Environment**

In a hearing for supersedeas of an NPDES permit renewal, the appellant
presented the testimony of four experts, two department employees and several lay
witnesses; the DEP and permittee presented no witnesses. The Board rejected DEP’s
argument that the supersedeas should be denied because it would destroy the “last lawful
status quo ante” stating this standard was too difficult to apply in a “real world situation”
and instead held that the statutory criteria for grant of a supersedeas must be applied. The
Board granted supersedeas where the Board found, due to complete lack of any testimony
to the contrary (there was some argument to the contrary by counsel for DEP and
Permittee, but no corroborating testimony as is necessary), that the appellant has
demonstrated that the permittee will not suffer any injury and the environment will not be
harmed if a supersedeas is granted, that local residents and the hydrologic regime are
suffering irreparable harm and that the harm may be exacerbated in the absence of a
supersedeas, and that the appellant has a substantial likelihood of proving that the
Department materially erred by not considering the environmental impact of pumping in
accordance with the renewed permit’s terms.

Tinicum Township and Walter Schneiderwind, Intervenor v. Commonwealth of
Pennsylvania, Department of Environmental Protection and Delaware Valley Concrete

**Motion for Summary Judgment, Administrative Finality, Water Quality Management
Permits Part I and II; Act 537**

The Board grants a joint motion for partial summary judgment filed by
Hilltown Township Water and Sewer Authority (“HTWSA”) and the Department of
Environmental Protection in an appeal of HTWSA’s Part II/Water Quality Management
Permit. Appellant, Perkasie Borough Authority (“PBA”), is precluded by the doctrine of
administrative finality from asserting that the HTWSA’s new sewage treatment plant is
not needed and that, instead, sewage should be directed to the existing treatment plant.
This is because PBA failed to appeal HTWSA’s Act 537 Sewage Facilities Plan that
provided for construction of the new sewage treatment plant and PBA failed to appeal
Part I/NPDES permit the Department granted for HTWSA’s new sewage treatment plant.
PBA’s cross-motion for summary judgment asserting that the contemplated plant would
not be able to meet its permitted effluent limitations is denied as there are disputed issues
of fact, including expert opinion, and the Board will not grant summary judgment on the
papers.

Perkasie Borough Authority v. Commonwealth of Pennsylvania, Department of
Environmental Protection and Hilltown Township Water and Sewer Authority, Permittee,
EHB Docket No. 2001-267-K (September 17, 2002)
Partial Summary Judgment, Administrative Finality; Act 537 Plan; Subsequent Updates to Act 537 Plan

Dublin Township, with the approval of the DEP, adopted an Act 537 Plan update in 1995 that called for public sewers and centralized waste water treatment. Notice of this Plan update was published in the Pennsylvania Bulletin. In 2002, Dublin Township adopted a further update to the plan that left the concept of public sewage intact, but changed the engineering for the system and added 7 homes to the proposed service area, including the home of Mr. Winegardner. Winegardner filed an appeal of the 2002 update. The Board held that an appellant may generally not use an appeal from the latest update to an Act 537 Plan as a vehicle for attacking concepts contained in previous updates to the Plan. The appellant’s appeal is limited to the subject matter of the latest update and Winegardner cannot challenge the fundamental concept of centralized sewage.

Derrick S. Winegardner v. Commonwealth of Pennsylvania, Department of Environmental Protection and Dublin Township Supervisors, Permittee, EHB Docket No. 2002-003-L (September 17, 2002)

Surface Mining Act, Challenge to Both Amount of Penalty and Underlying Violation

Colt Resources is the permittee of a surface mine. On December 14, 2001, DEP issued a compliance order to Colt for mine drainage discharges. Colt did not appeal the compliance order. On March 19, 2002, DEP imposed a civil penalty of $500 on Colt for alleged violations of the Clean Streams Law and the Surface Mining Act. Colt appealed the civil penalty assessment and, in doing so, challenged the violations cited in the earlier compliance order. DEP filed a motion for partial summary judgment stating that Colt may not challenge that facts or legality of the violations cited in the compliance order since the order was not appealed. The Board held that pursuant to Section 18.4 of the Surface Mining Act and the Commonwealth Court’s holding in Kent Coal Mining Co. v. Department of Environmental Resources, a party who appeals a civil penalty assessment issued under Section 18.4 may challenge both the amount of the penalty as well as the fact of the underlying violation, even where that party has not appealed the compliance order giving rise to the civil penalty.


Summary Judgment, Exhibits Attached to Memorandum of Law and Not Motion

James Kleissler et al. filed an appeal of DEP’s issuance of three NPDES permits and 10 oil well permits to Pennsylvania General Energy Corporation (“PGE”). Kleissler filed a motion for summary judgment and PGE filed a cross motion. The first argument raised by PGE is that Kleissler’s motion must be denied because he attached his exhibits to his memorandum of law in support of the motion and not the motion itself. As a result, PGE contends the exhibits may not be considered and there is therefore no basis for granting Kleissler’s motion. The Board held that even if it were to assume for purposes of argument that Kleissler improperly “attached” his exhibits to his memorandum, it would not grant PGE’s motion. “In an effort to keep this alleged procedural irregularity in perspective,” the Board noted it is in the process of changing its
rules to allow for the federal-style motions and allow for the Kleissler-type motion. Also, the Board noted its preference to decide motions on the merits rather than procedural technicalities. As to the other issues raised on summary judgment, the Board denies motions for summary judgment for a well field in the Allegheny National Forest due to genuine issues of disputed fact regarding every issue. Disputed factual issues and incomplete legal arguments prevent the issuance of summary judgment on such issues as whether the oil wells should have been permitted due to their alleged impact on the forest, the habitats of sensitive wildlife, and receiving streams. The record is also disputed and incomplete on such questions as which wells should have been covered by which permits, whether the Department should have considered the cumulative impact of multiple permitted segments, and the significance of alleged deficiencies in the processing of the permit applications.


Landfill Permit Renewal, Third Party, Municipal Incorporation

In an appeal from the renewal of a landfill’s permit, a third-party appellant may not challenge the legality of a host municipality’s incorporation because the Pennsylvania Supreme Court has already determined that the incorporation was legal. In addition, the Board suggests that it is likely to exclude at hearing any argument or evidence delving into the “circumstances of the [Borough’s] incorporation.” The Board also held, as a corollary, that the appellant, however, is not necessarily precluded solely as a result of the Supreme Court’s holding from arguing that the fees being paid to the host municipality should not be considered as adequate mitigation for harms being suffered by parties other than that municipality.


Summary Judgment, Prima Facie Case, Authority to Issue Order

Where a motion for summary judgment seeks to sustain an appeal from an enforcement order because the Department cannot make out a prima facie case that it has the legal authority to issue the order, the motion must be denied where, as here, the Department can show a prima facie case that it had the requisite authority under any one provision of any one statute or regulation. The Board declined to issue partial summary judgment or treat the motion as a motion to limit issues for trial.


Motion to Dismiss; Jurisdiction; EOB; Rejection of Petition to Upgrade Designation of a Waterway

The Board grants a motion to dismiss an appeal of a decision by the Environmental Quality Board rejecting a petition to upgrade the designation of a
waterway. It is well-settled that this Board has no jurisdiction to review rulemaking decisions of the Environmental Quality Board outside the context of an action by the Department of Environmental Protection applying or otherwise implementing the regulation.


Motion to Dismiss; Appealable Action; Letter Stating DEP Legal Position

The Board grants a Department Motion to Dismiss the appeal of a Department letter (Docket No. 2002-096-K) that asserted the Commonwealth’s legal position that it owns the riverbed of the Little Juniata River and that the public has a right to lawfully access a portion of the river adjacent to Appellants’ land. The letter is not an appealable agency action within the Board’s jurisdiction. The Board also grants a Department Motion to Dismiss a second appeal from a subsequent letter to Appellants (Docket No. 2002-151-K). The second letter merely reiterates the legal positions outlined in the original letter and similarly does not constitute an appealable action.

The Case for Increased Judicial Discretion in the Award of Costs and Fees in Pennsylvania Environmental Litigation

- Brian G. Glass*

In Lucchino v. Commonwealth, 809 A.2d 264 (Pa. 2002), the Pennsylvania Supreme Court affirmed an Order of the Environmental Hearing Board (EHB) directing George M. Lucchino (Lucchino) to pay costs and counsel fees to a permittee, Luzerne Land Corporation (Luzerne), pursuant to Section 4(b) of the Surface Mining Conservation and Reclamation Act (SMCRA) and Section 207(b) of the Clean Streams Law (CSL). In reaching this decision, the court implicitly endorsed the requirement that a permittee seeking to recover costs and counsel fees from an appellant demonstrate that the appeal was brought in bad faith.

The general rule within this Commonwealth, of course, has been that each side is responsible for the payment of its own costs and counsel fees absent bad faith or vexatious conduct. See Department of Environmental Protection v. Bethenergy Mines, Inc., 758 A.2d 1168 (Pa. 2000). A number of environmental statutes in Pennsylvania, however, including the Pennsylvania Clean Streams Law, Pa. Stat. Ann. tit. 35, § 691.601 et seq., and the Pennsylvania Storage Tank and Spill Prevention Act (Storage Tank Act), Pa. Stat. Ann. tit. 35, § 6021.101 et seq., vary that rule by providing that a court may award costs of litigation, including attorney and expert witness fees, to any party, whenever the court determines that such award is appropriate. See id. §§ 691.601(g), 6021.1305(f).

Certainly, these provisions were doing more than simply codifying the common law rule. If codification was all that the Pennsylvania legislature was aiming to achieve, it would have incorporated language about bad faith and vexatious conduct. It did not. It also did not limit recovery of costs and fees to prevailing parties, as it did under the Pennsylvania Hazardous Sites Cleanup Act (HSCA), 35 Pa. Cons. Stat. § 6020.101 et seq. (Under the citizens suit provision of HSCA, the court may award litigation costs, including reasonable attorney and witness fees, to the prevailing or substantially prevailing party whenever the court determines such an award is appropriate. 35 P.S. § 6020.1115(b) (2002)). Just as the legislature knew how to limit recovery of costs and fees to the prevailing or substantially prevailing party when it so desired, we must presume that it also knew how to limit such recovery to instances involving bad faith. That it did neither in a number of environmental statutes should be instructive.

Nevertheless, Pennsylvania courts and hearing boards have taken it upon themselves to whittle away at these provisions, reading requirements into these statutes that a party must meet in order to recover. In 1990, the EHB established the following criteria for awarding costs and attorneys fees: (1) a final order must have been issued; (2) the applicant for the fees and expenses must be the prevailing party; (3) the applicant

* Brian G. Glass (B.A., Haverford College; J.D., University of Virginia School of Law), is an associate in the Environmental Group of Ballard Spahr Andrews & Ingersoll, LLP’s Philadelphia Office.
must have achieved some degree of success on the merits; and (4) the applicant must
have made a substantial contribution to a full and final determination of the issues.
_Kwalwasser v. Department of Environmental Resources_, 1988 WL 161059
Protection Ass’n v. Department of Environmental Protection, 1997 WL 610299
(Pa.Env.Hrg.Bd.), the EHB modified its eligibility requirements by requiring also that a
permittee seeking to recover costs and counsel fees from a third-party appellant
demonstrate that the appeal was brought in bad faith, a requirement that the Pennsylvania
Supreme Court has now affirmed.

These requirements are simply inappropriate. The legislature did not
explicitly limit fee awards to parties defending a frivolous action. Instead, it left it to
judicial discretion to determine when it would be appropriate to award such fees. In
doing so, the legislature implicitly recognized that there are reasons besides bad faith to
award fees and costs. These awards provide a fee-shifting mechanism to soften the
burden all parties must bear in litigating a case. They also encourage parties to litigate
their cases more vigorously, which has the beneficial side-effect of providing a more
balanced presentation of views and consequently assisting in the interpretation and
implementation of environmental laws. Of course, these benefits have to be balanced
against the chilling effect the imposition of fees and costs could potentially have on the
parties bringing these actions. The complex nature of these determinations is precisely
why judicial discretion in this arena is so critical. By limiting the award of fee and costs
as they have, courts have unwittingly foreclosed the potential benefits a more liberal
construction of these provisions might have afforded. Unfortunately, that is a cost and a
fee that all of us will be forced to bear moving forward.
Declaring an area “Unsuitable for Mining” may not be a compensable taking of coal reserves.

A recent Pennsylvania Supreme Court decision has applied constitutional “takings” law in a manner unfavorable to the owners of Pennsylvania’s coal reserves. In the case of Machipongo Land and Coal v. Commonwealth [2002 WL 1070113 (Pa.); Decided May 30, 2002], the Court reversed a Commonwealth Court decision that had declared a governmental prohibition of mining in a certain watershed as, in part, an unconstitutional taking of private property.

**Background:** Pennsylvania’s Surface Coal Mining Conservation and Reclamation Act (“SMCRA”) allows the state to designate certain areas of the state as “Unsuitable for Mining” (“UFM”). Candidate areas for UFM designation include uniquely sensitive environmental areas. [52 P.S. § 1396.4e(b)]. The Pennsylvania provision codifies the Federal SMCRA’s directive that states must create mechanisms to designate certain lands as UFM areas. Depending on its expressed scope, the designation may also affect deep mining. This is because the definitions of “surface coal mining operations” in the State and Federal laws include the surface impacts of deep mining.

In 1992, Pennsylvania adopted a regulation designating the Goss Run Watershed, in Clearfield County, as unsuitable for surface mining operations. The owners of the coal reserves in the watershed filed suit, claiming that the designation constituted an unlawful taking of private property for public use without compensation. Procedurally the case was transferred several times among Commonwealth Court, the Environmental Hearing Board, and the county court before finally being decided by the Supreme Court.

**The lower court decision:** The Commonwealth Court noted that Pennsylvania recognized three separate estates in the same piece of land: the surface estate, the coal/mineral estate, and the support estate. Accordingly, the court reasoned that it was appropriate to consider the coal estate alone as the applicable parcel to determine whether there has been a complete taking. Because all of the applicable parcel, i.e., the coal estate, was taken, the UFM designation was held to constitute an unlawful taking of the coal in those areas where mining was economically feasible.

The Commonwealth Court had also refused to allow the Commonwealth to introduce evidence tending to show that the mining activities would constitute a public nuisance, holding that, as a matter of law, the proposed mining activities could not rise to the level of a public nuisance.

**The Supreme Court opinion:** In reversing these holdings, the Pennsylvania Supreme Court held that the relevant parcel could not be “vertically segmented” for
purposes of a takings analysis, and that it must be defined to include both surface and mineral rights owned by the coal companies. A taking occurs only if the regulation deprives the owner of all economically viable use of the property. The uses of the surface rights must be included in this analysis if the owner also owns those rights.

The court also held that it was error for the Commonwealth Court to fail to consider evidence that mining the area would constitute a public nuisance. This is significant because if an activity is held to constitute a public nuisance, it can be prohibited and does not constitute a taking even if the prohibition eliminates all economically viable use of the property. The court held that while mining is not, per se, a public nuisance, if the Commonwealth can show that mining is likely to cause pollution of the relevant watershed it could validly prohibit mining absolutely in that watershed, with no requirement to compensate the coal owner. It further held that previous case law premising the public nuisance exception on a showing that pollution is “practically certain” to occur was in error. All that the Commonwealth has to show, the court ruled, is that mining in the designated area has a “significant potential” to cause pollution, and it could qualify as a public nuisance.

**Analysis:** In this decision, the court made it more difficult for coal owners to defeat UFM designations or alternatively, obtain compensation for loss of mining rights based on takings of the property, assuming that the owner of the coal reserves also owns the surface rights, the UFM designation will not be held to be a taking. Alternatively, if the Commonwealth can show a significant potential for pollution being caused by the mining, the designation without compensation is likely to be affirmed. Note however that the case does not deal with the situation where the mineral estate and support estate are the only estates owned by a company. In that circumstance, the UFM designation would more certainly constitute a taking, but even in that case the relaxed standard of what constitutes a public nuisance makes the establishment of an unconstitutional taking more difficult.

There have been several other appellate opinions of interest. In Chalfont-New Britain Township Joint Sewage Authority (“Chalfont”) v. Bucks County Water Sewer Authority (“Bucks”), 801 A.2d 1224 (Pa. 2002), the Supreme Court of Pennsylvania reversed and remanded the Commonwealth Court’s dismissal of a suit that alleged an unlawful discharge of sewage into a treatment plant. Chalfont owned and operated a sewage treatment plant (“Plant”) that treated wastewater, which discharged into Neshaminy Creek (“Creek”) pursuant to a Department of Environmental Protection (“DEP”) permit.

In an agreement made with Bucks, Chalfont designated a portion of the Plant’s treatment plant capacity for waste from sewers, which Bucks operated. Sewage not covered by the contract was disposed of in separate waste treatment facilities operated by Bucks, which did not hold a DEP permit for the Plant. All sewage discharged into the plant from Bucks was treated under the auspices of Chalfont’s permit. Chalfont stated that effluent from the Plant increased in 1999 and resulted in a DEP directive to halt
connections to the Plant and to develop a plan to ensure adequate treatment of the waste before being discharged into the creek.

Although DEP did not allege that there were violations of the Clean Streams Law (“CSL”), 35 P.S. § 691.601(a), and did not issue an administrative sanction, Chalfont claimed the increased discharge had risen to levels that exceeded the treatment capacity of the plant, and could cause violations of their permit. Chalfont also claimed that the increase in discharges was attributed to influx to the Plant from the Bucks’ system that exceeded the level allowed by the Bucks-Chalfont agreement. Chalfont filed a complaint in May 2001 alleging that Bucks contributed waste exceeding its allocations under the contract, causing the plant to surpass the capacity allowed. Chalfont contended that the excessive waste reduced the effectiveness of the plant and could result in untreated or improperly treated waste to be discharged into the creek causing Chalfont to violate its DEP permit. Chalfont requested in its complaint that Bucks be found to have breached the waste disposal contract and be ordered to make account for existing connections flowing to the Plant, and reimburse Chalfont for all expenses regarding overuse of the Plant.

In September 2001, Chalfont filed a Petition for Review in the Commonwealth Court under Section 601(a) of the CSL providing that “any activity or condition declared by the CSL to be a nuisance…shall be abatable in the manner provided by law or equity for the abatement of public nuisances.” 35 P.S. § 691.601(a). Section 202 of the CSL prohibits and declares the discharge of sewage, directly or indirectly into the waters of the Commonwealth without a DEP permit, to be a nuisance. 35 P.S. § 691.202. The Commonwealth Court dismissed the petition declaring that any violation would be against Chalfont, as holder of the permit, and not against Bucks. However, the Supreme Court of Pennsylvania reversed and remanded this decision for appropriate treatment of the complaint holding that Section 202 of the CSL clearly applies to entities that do not hold DEP permits and that Section 202 applies to discharges that are indirect by defining “discharge” as including “a discharge of sewage by a person or municipality into a sewer system or other facility owned, operated or maintained by another person or municipality and which then flows into the waters of the Commonwealth.” 35 P.S. § 691.202.

* * * *

The United States Court of Appeals in In re Joshua Hill, Inc. et al. v. Whitemarsh Township Authority (“Authority”) et al. 294 F.3d 482 (3d Cir. June 24, 2002), held that the Authority’s disposal of hazardous substances constituted an environmental release pursuant to the interpretation of the Pennsylvania Hazardous Sites Clean-Up Act (“Act”), 35 P.S. § 6020.101 et seq. and held the Authority to be the responsible party, liable to the plaintiffs for response costs pursuant to sections 702 and 507 of the Act.

Plaintiff purchased property from Whitemarsh Township (“Township”) in 1987, which previously operated the property as a landfill. During such operation, officials from the Pennsylvania Department of Environmental Resources (“DER”) performed periodic inspections, which showed disposal of solids, liquids or hazardous waste without
DER approval. No limitation of household and industrial wastes were given to Township residents for waste pick-up. Upon conducting environmental testing, various hazardous substances were found on the property. At trial, the origins of the contaminants were in question. The District Court concluded that hazardous materials listed in 40 C.F.R. § 302.4 were present in the landfill on the property; that the substances were probably disposed and can be the by-products of waste disposed of at the landfill; and that the Township was the owner and operator of a site in which a hazardous substance was found and was a responsible party within the meaning of the Act. Under the Act, a “hazardous substance” includes “any element, compound or material which is...defined or designated as a hazardous substance pursuant to CERCLA.” 35 P.S. § 6020.103. The elements and compounds designated as hazardous substances under section 102(a) of CERCLA are listed at 40 C.F.R. § 302.4.

According to the Act, a person is responsible for a release when the person owns or operates the site when a hazardous substance is placed or comes to be located in or on a site; when a hazardous substance is located in or on the site but before it is released, or; during the time of the release or threatened release. 35 P.S. § 6020.701. The District Court found that Marc A. Zaid and Joshua Hill, Inc. (“Plaintiffs”) failed to establish that hazardous substances were being released into the environment. Plaintiffs needed to prove not only an existence of a hazardous substance, but that it also made its initial entrance into the “groundwater,…land surface or subsurface strata” at some location on the property. The District Court concluded that plaintiffs were not entitled to relief under the Act. However, the United States Court of Appeals concluded that the District Court’s interpretation, immunizing individuals who dumped hazardous materials at a landfill unless such materials are proven to have entered the soil or groundwater at the site, was not confirmed by the Act and conflicted with the purpose to “protect the public health, safety and welfare…from the short term and longer effects of the release of hazardous substances and contaminants into the environment.” 35 P.S. § 6020.102(12)(vi).

Plaintiffs sought to recover costs acquired for the investigation, testing and assessment of hazardous substance at the property in question. The District Court did not support recovery of such costs because they were for potential development, not to remedy an environmental hazard. However, the Court of Appeals concluded that District Courts have consistently ruled under CERCLA provisions that plaintiffs motivated by a desire to sell property are not hindered from the recovery of reasonable and necessary
response costs. Therefore, the United District Court of Appeals held that Plaintiffs were entitled to response recovery costs for developing the property.

In conclusion, the United States District Court of Appeals reversed the judgment in that the Township’s disposal of hazardous substances at a landfill is a release within the meaning of Section 701 of the Act and makes them responsible parties and liable to Plaintiffs for response costs pursuant to Sections 702 and 507 of the Act. Also, the Court held that the Plaintiffs were entitled to recover the response costs previously incurred, but not their litigation costs. On remand for further documentation was Appellant’s requested expenses and prospective costs of response that are reasonable and necessary or appropriate. On June 24, 2002, the United States Court of Appeals reversed the District Court’s judgment and Remanded for further proceedings.

* * * * *

Upon review of an order of the Environmental Hearing Board (“Board”) affirming the approval by the Department of Environmental Protection (“DEP”) of a sewage-planning module for a proposed development, the Commonwealth Court of Pennsylvania in *The Ainjar Trust v. The Department of Environmental Protection*, 2002 WL 1972961 (Pa. Cmwlth. 2002), held that the Board did not err in the approval of the module based on the possibility of future development.

Being a competing developer, the Petitioner owned a tract of land in Susquehanna Township (“Township”) adjacent to a proposed residential development, (“Margaret’s Grove”) to be developed by the McNaughton Company (“McNaughton”). Petitioner opposed the module proposed by McNaughton for Margaret’s Grove. The module was revised according to the existing sewage facilities plan, since additional connections and flows from the new development were planned.

McNaughton’s original proposal would serve 290 equivalent dwelling units (“EDUs”). Upon review by the Township Authority, the module was sent to CTE Engineering Services (“CTE”) who concluded that the system had adequate capacity to accept the additional gallons per day (“GPD”) planned by the module. After certain modification, the Township approved the module, forwarding the same to the DEP for approval, who determined that the module conformed to the Township’s “Act 537” sewage plan as well as Chapter 94 regulations, 25 Pa. Code, Chapter 94, pertaining to municipal waste load management.

The DEP also concluded in its review that the existing sewerage facilities were in an “existing or project hydraulic overload.” A hydraulic overload is defined as, “[t]he condition that occurs when the monthly average flow entering a plant exceeds the hydraulic design capacity for 3 consecutive months out of the preceding 12 months for when the flow in a portion of the sewer system exceeds its hydraulic carrying capacity.” 25 Pa. Code § 94.1. An existing overload is present when “the permittee of the sewerage facilities shall (1) prohibit new sewer connections, except under certain circumstances;
immediately begin to plan and build additional sewerage capacity; (3) submit to DEP for its review and approval, a corrective action plan (“CAP”).” 25 Pa. Code § 94.21. The way DEP determines whether the overload exists or projected is from annual reports that have been submitted by permittees pursuant to 25 Pa. Code § 94.12.

On January 5, 1999, DEP sent correspondence informing the Township Authority that the existing sewerage facilities were in a projected overload status. DEP directed the authority to submit a CAP within 90 days and limit new sewer connections based on available capacity and the CAP. Upon submission of its CAP, the Township passed a resolution to limit future sewer connections. The DEP module included a section completed by the Township Authority regarding the module’s consistency with Chapter 94 and requested the Authority to state whether the proposed sewer extension and tap-ins would create a hydraulic overload within a period of five years on any existing collection or conveyance facilities that are included in the existing system. Upon review of the average and peak sewage flows for the Paxton Creek Interceptor, the Environmental Hearing Board (“Board”) stated that the module did not establish that the interceptor had exceeded its hydraulic design capacity for three consecutive months out of twelve. Therefore, the Board rejected the Petitioner’s expert witness that the module verified that the interceptor operated at an existing overload condition and that the module was consistent with Chapter 94.

A public notice was advertised in the Harrisburg Patriot News on December 11, 1998 announcing the Township residents had thirty days to submit written comments regarding the module to which Petitioner actively participated in the public input process. Considering the Petitioner’s comments, DEP sent a letter to the Township requesting a response to the public comments received. The Township responded by letter through their law firm. DEP reviewed the Petitioner’s comments and concluded that the approval of the module was consistent with DEP’s regulations. The Commonwealth Court of Pennsylvania’s scope of review for this case was based on whether the Board committed an error of law or a constitutional violation.

* * * * *

Filing a complaint against Belfast Township’s Board of Supervisors, Plaintiffs Leese, Swope and Hurline claimed ordinances prohibited corporations from farmland ownership, engagement in farming or the use of 3,000 gallons per day of ground or spring water without a Township permit in Leese et al v. Belfast Township and Belfast Board of Supervisors, No. 304 of 2002, Fulton Co., (Pa. Com. Pl. 2002). Upon Defendants filing preliminary objections to the original complaint, Plaintiffs filed an amended complaint alleging the ordinances devalued the farmland and the farming
businesses; hindered or prevented expansion of the farming operations; hindered future planning with respect to family and business matters; caused unnecessary time, money and energy on the problem; resulted in suffering from uncertainty, stress and anxiety; and were vague and unclear. Plaintiffs were requesting invalidation of the ordinances alleging that the supervisors knew that the ordinances were illegal from the beginning.

Upon review of the all of the pleadings and the arguments from the parties, the Court denied defendants’ preliminary objections for the following reasons:

1. The ordinances were self-executing and the Plaintiffs should not be required to spend time and money to test ordinances that clearly affected their interests. The Court held that the Plaintiffs have suffered a legally cognizable injury since they had hired two consulting land and business valuation experts who had concluded that their land valuation had decreased due to the ordinances. The Court held that under Pennsylvania law, a party had a right to seek pre-enforcement review of a regulation or an ordinance if it is self-executing, which means that the agency having the power to enforce the regulation did not have to take action prior to enforcement of the ordinance. The Court cited Duquesne Light Company v. Commonwealth of Pa. Department of Environmental Protection, 724 A. 2d 413 (Pa. Cmwlth. 1999), in which the Commonwealth Court held that petitioners were not required to spend time and money on a permit that might be denied under the township ordinance. Also, based on the Leese pleadings, the Court found that the Plaintiffs’ allegations of suffering from uncertainty, stress, and anxiety were injuries that were legally cognizable. Defendant relied upon ACS Enters, Inc. v. Norristown Borough Zoning Hearing Board, 659 A. 2d 651, (Pa. Cmwlth. 1994), alleging that emotional states of uncertainty, stress and anxiety are not legally cognizable injuries. The Court held that ACS did not state that these emotions were not legally cognizable injuries, but ruled that Plaintiffs must establish a direct interest between the challenged action and the alleged injury to qualify the injury as “immediate rather than remote.” The Court concluded that Plaintiffs Leese, Swope and Hurline had asserted injuries that were immediate rather than remote.

2. The Defendants maintained that the Plaintiffs’ complaint should be dismissed due to being improperly vague. The Court held that the Defendant’s preliminary objection regarding Plaintiff’s complaint being improperly vague should be denied for two reasons. First under Pennsylvania law, all well pleaded facts that are relevant and material must be considered as true when deciding on preliminary objections in the nature of a demurrer. Secondly, the Court held that in a negligence suit, the Defendants have the right to be advised of the particular acts or omissions that establish the
Plaintiff’s claim. Also, the Court decided that the Plaintiffs had stated averments in the pleadings specifically that the ordinances injured them because they devalued their land and business and prevented them from expansion of their businesses and the passage of the ordinances were invalid. Therefore, the Defendants’ preliminary objection that the Plaintiffs failed to plead material facts is denied because the Court must accept all well-pleaded facts as true.

3. Plaintiffs have the statutory right to recover attorneys’ fees. The Court held that statutory language existed authorizing reasonable counsel fees in 42 Pa. C.S.A. § 2503, derived from an act of April 22, 1863 P.L. 527:

The following participants shall be entitled to a reasonable counsel fee as part of the taxable costs of the matter: any participant who is awarded counsel fees because the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith.

The Court held that, based on the pleadings, the Plaintiffs could determine the manner in which the township acted when ordinances were passed.

4. The defense of official immunity is not absolute and, pursuant to Pennsylvania law, the Plaintiffs have the right to establish willful misconduct. The defense of official immunity is not absolute according to 42 P.S. § 8850:

In any action against a local agent or employee thereof for damages on account of an injury caused by the act of the employee in which it is judicially determined that the act of the employee caused the injury and that such act constituted a crime, actual fraud, actual malice or willful misconduct does not apply.

Under Pennsylvania statutes, the defense of official immunity does not apply when the official acted with malice or willful misconduct. 42 Pa. Cons. Stat. § 8550 (1980). The Court accepted that the township supervisors knew the ordinances were illegal at the time the ordinances were passed and thus constituted willful misconduct.
Immunity to personal liability under Pennsylvania law does not apply when it is determined by the judiciary that the official acted with actual malice or willful misconduct. 42 Pa. C.S. § 8550 (1980). The Court agreed that a public official’s immunity should attach where the public official’s decisions cannot be measured by a predictable standard of care, however the immunity is not absolute. The defense of official immunity does not apply when the public official’s actions were with actual malice or willful misconduct. The Court accepted that the supervisors knew that the ordinances were illegal at the time the ordinances were passed and the Defendants’ preliminary objection that the Plaintiff may not bring suit against the supervisors was denied.

5. The Court held that the Plaintiffs’ amended complaint was not defective thus the Defendants’ preliminary objection that the amended complaint should be dismissed with prejudice for repeated failure to cure was denied.
## EnvironmenTal Law Forum 2003

**Wednesday, April 9, 2003**

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<tr>
<th>Time</th>
<th>CLE</th>
<th>Programs</th>
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<tbody>
<tr>
<td>8:00 – 8:45</td>
<td>0</td>
<td>Registration; continental breakfast</td>
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<tr>
<td>8:45 – 9:00</td>
<td>0</td>
<td>Welcome from Section, Introductions, and CLE Information</td>
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<tr>
<td>9:00 – 9:30</td>
<td>½</td>
<td>PA DEP Acting Secretary Kathleen A. McGinty invited to make opening remarks</td>
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<td>9:30 – 9:45</td>
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<td>Travel</td>
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<td>9:45 – 11:15</td>
<td>1½</td>
<td>Citizen Participation, Private Rights of Action and SLAPP Suits Embick, Harris, Wilmer (M) Due Diligence and Acquisition Issues Boyle, Friedman, Harmon (M) Solid Waste Update Brooman (M), Meloy, Seighman Client Interview (Ethics) Hyson, Fox</td>
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<td>11:15 – 11:30</td>
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<td>11:30 – 12:30</td>
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<td>Challenging Government Regulations Mather, Miller Development in Envir. Sensitive Areas Rinde (M), Jennings HSCA/CERCLA &amp; Brownfields Update N. Wise, Hartzell (M) Neg. of the Deal I Stoltzfus (M), Boyle, Rader</td>
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<td>12:30 – 1:40</td>
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<td>Lunch &amp; Travel</td>
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<td>1:40 – 3:10</td>
<td>1½</td>
<td>EHB Roundtable Miller, Boni, Stares, Wilson Negotiating Transaction Documents Davies, Hawkinberry, Hinerman (M) Site Remediation Under Act 2 &amp; the Interplay with the Waste Program Bowman, Gold (M), Robertson Neg. of the Deal II Stoltzfus (M), Boyle, Rader</td>
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<td>3:10 – 3:20</td>
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<td>Travel</td>
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<td>3:20 – 4:20</td>
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<td>Energy &amp; Environment Fitzpatrick, Hanger Env. Regulation of Real Estate Management Clark (M), Kirkpatrick Air Update Reiley (M), Khanwalkar, McPhedran Obtaining Government Protection I Stoltzfus (M), Hartzell, Bergere, N. Wise</td>
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<td>4:20 – 4:30</td>
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<td>4:30 – 5:30</td>
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<td>State and Future of Environmental Law</td>
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<td>David Buente, Woelfling</td>
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<td>Takings Update</td>
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<td>Strain, Burcat (M)</td>
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<td>Hot Topics in Ethics</td>
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<td>Barnett (M), Bossert, Buchwach</td>
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<td>Obtaining Government Protection II (EMNRLS Welcome to Students)</td>
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<td>Stoltzfus (M), Hartzell, Bergere, N. Wise</td>
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<td>5:30 – 7:00</td>
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<td>Reception – Sponsored by the PBA Environmental Minerals and Natural Resources Section</td>
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<td>(The Section’s Annual Dinner to follow)</td>
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* - Suggest schedule program for larger room.
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<th>Time</th>
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<tr>
<td>7:30 – 8:30</td>
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<td>Registration; continental breakfast</td>
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<td>8:30 – 10:15</td>
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<td>Litigation¹</td>
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<td>Warren (M)</td>
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<td>Water Update¹ (Inc. Stormwater and Anti-degradation)</td>
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<td>Obtaining Permits¹</td>
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<td>Mandelbaum (M), Herschlag</td>
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<td>PA Right to Know and Obtaining Public Documents</td>
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<td>Edelstein, Kaplan (M), Spergel</td>
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<td>Administrative Appeals I</td>
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<td>Mandelbaum (M), Herschlag, Labuskes, Bolstein</td>
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<td>11:30 – 1:00</td>
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<td>Luncheon presentation, Michael D. Bedrin, PA DEP Chief Counsel</td>
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<td>1:00 – 2:00</td>
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3:20 – 4:20 | 1 | Hot Topics in Ethics
Barnett (M), Bossert, Buchwach | Enforcement II
Mandelbaum (M), Sokolow, Stoviak

1 Includes 15 minutes for Welcome from Section, Introductions, and CLE info.