

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard C. Angino, Esquire,	:	
King Drive Corporation, and	:	
Sebastiani Brothers,	:	
	:	
Petitioners	:	
	:	
v.	:	No. 664 C.D. 2007
	:	
Department of Environmental	:	Argued: September 4, 2007
Protection,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE KELLEY

FILED: June 26, 2008

Richard C. Angino, Esquire, King Drive Corporation, and Sebastiani Brothers (collectively, Angino<sup>1</sup>) petition for review of the order of the Environmental Hearing Board (Board) assessing a civil penalty totaling \$21,000.00 for violations of the Clean Streams Law (Law).<sup>2</sup> We affirm.

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<sup>1</sup> Richard C. Angino is the president and sole shareholder of King Drive Corporation, and the parties treated Angino and King Drive Corporation as one in the same in the proceedings before the Environmental Hearing Board. In addition, Sebastiani Brothers was a contractor hired by Angino. Although named as a defendant in the complaint issued by the Pennsylvania Department of Environmental Protection (Department), Sebastiani Brothers was not represented at the hearings before the Environmental Hearing Board and no penalty was imposed against it following those proceedings.

<sup>2</sup> Act of June 22, 1937, P.L.1987, as amended, 35 P.S. §§ 691.1-691.1001.

Angino owns a 750-acre resort, Felicita Resort, in Middle Paxton Township, Dauphin County. The resort includes an inn and tavern, lodges, a golf course and clubhouse, a spa, and a number of gardens. There is an 83-acre tract in the southwestern portion of the property referred to as the “Boy Scout Tract” as it was formerly a Boy Scout camp. Approximately 24 acres of the Boy Scout Tract are included in the 357 acres of the golf course. The Boy Scout Tract slopes toward two unnamed tributaries (UNTs) located on the tract which flow into Fishing Creek, a warm water fish stream located on Angino’s property.

On April 29, 1999, Angino submitted an NPDES permit application<sup>3</sup>

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<sup>3</sup> As this Court has previously noted:

“NPDES” is an acronym for National Pollutant Discharge Elimination System, a system of federal regulatory controls, pursuant to the Federal Water Pollution Control Act (also known as the federal Clean Water Act), 33 U.S.C. §§ 1251-1376, governing the discharge of pollutants into waters of the United States. A NPDES permit may be issued by the Administrator of the federal Environmental Protection Agency or, since the 1972 amendments to the federal Clean Water Act, may be issued by [the Department] pursuant to the regulations at 25 Pa. Code §§ 92.1-92.94.

Delaware Riverkeeper v. Department of Environmental Protection, 879 A.2d 351, 353 fn. 3 (Pa. Cmwlth. 2005). See also Section 102.1 of the Department’s regulations, 25 Pa. Code § 102.1 (“*NPDES-National Pollutant Discharge Elimination System*-The National system for the issuance of permits under section 402 of the Federal Clean Water Act (33 U.S.C. § 1342) including a state or interstate program which has been approved in whole or in part by the EPA.”).

With respect to the application submitted by Angino, Section 102.1 of the Department’s regulations also provides, in pertinent part:

*NPDES Permit for Stormwater Discharges Associated With Construction Activities*—A permit required for the discharge or potential discharge of storm-waters into waters of this Commonwealth from construction activities, including clearing and grubbing, grading and excavation activities involving 5 acres

(Continued....)

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(2 hectares) or more of earth disturbance, or an earth disturbance on any portion, part or during any stage of, a larger common plan of development or sale that involves 5 acres (2 hectares) or more of earth disturbance over the life of the project.

25 Pa. Code § 102.1.

In turn, Section 102.1 defines “earth disturbance activity” as follows:

A construction or other human activity which disturbs the surface of the land, including, but not limited to, clearing and grubbing, grading, excavations, embankments, land development, agricultural plowing or tilling, timber harvesting activities, road maintenance activities, mineral extraction, and the moving, depositing, stockpiling, or storing of soil, rock or earth materials.

Id.

Likewise, Section 102.5 of the Department’s regulations provides, in pertinent part:

(a) Other than agricultural plowing or tilling, timber harvesting activities or road maintenance activities, a person proposing an earth disturbance activity that involves 5 acres ... or more of earth disturbance, or an earth disturbance on any portion, part, or during any stage of, a larger common plan of development ... that involves 5 acres ... or more of earth disturbance over the life of the project, shall obtain a general or individual NPDES Permit for Stormwater Discharges Associated With Construction Activities prior to commencing the earth disturbance activity.

(b) A person proposing a timber harvesting or road maintenance activity involving 25 acres (10 hectares) or more of earth disturbance shall obtain an Erosion and Sediment Control permit under this chapter prior to commencing the earth disturbance activity.

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(d) A person proposing or conducting agricultural plowing or tilling activities is not required to obtain an Erosion and Sediment Control Permit, or an NPDES Permit for Stormwater Discharges Associated with Construction Activities, for these activities under this chapter.

25 Pa. Code § 102.5(a), (b) & (d).

to the Department's Dauphin County Conservation District (DCCD) indicating that it was the final subdivision plan for the development of a residential subdivision of single-family home sites adjacent to the golf course on the resort property. See Reproduced Record (RR) at 49a-52a. In addition, Angino submitted an NOI<sup>4</sup> and a Project Description to the Department relating to the development. See Id. at 54a-55a, 1972a-1976a.

In the Project Description portion of the application, Angino indicated that the proposed lots were to be subdivided from the 357 acres of the golf course property and construction would occur in two phases. Id. at 63a-64a. The first phase proposed building 17 lots along Mockingbird Drive, which runs from east to west in the southern portion of the resort property. This phase included the construction of an extension of Mockingbird Drive, Mockingbird Drive Extended, to the existing Straw Hollow Road. The second phase proposed building up to 16 additional lots on Mockingbird Drive Extended which would travel along the east side of the golf course and connect to Straw Hollow Road. The NOI included an Erosion and Sediment Control Plan (E&S plan)<sup>5</sup> and Best Management Practices

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<sup>4</sup> Section 102.1 of the Department's regulations defines an NOI as "[a] request, on a form provided by the Department or county conservation district, for coverage under a General NPDES Permit for Stormwater Discharges Associated With Construction Activities." 25 Pa. Code § 102.1.

<sup>5</sup> Section 102.1 of the Department's regulations defines an E&S plan as "[a] site specific plan identifying BMPs to minimize accelerated erosion and sedimentation..." 25 Pa. Code § 102.1. Pursuant to Section 102.4(a)(1) and (2), "[t]he implementation and maintenance of erosion and sediment control BMPs are required to minimize the potential for accelerated erosion and sedimentation, including for those activities which disturb less than 5,000 square feet...", and "[w]ritten [E&S plans] are required for agricultural plowing or tilling activities that disturb 5,000 square feet ... or more of land." 25 Pa. Code § 102.4(a)(1) & (2).

(BMPs)<sup>6</sup> for the first phase of construction, and sought approval for that phase of the construction.

In the Permit Coordination Section of the application, Angino indicated that the “Total Disturbed Acreage” involved would be “GOLF COURSE-OVERALL PROPERTY SIZE = 357 AC.±”, and that the “DISTURBED PROJECT AREA” would be comprised of “PHASE-1 = 28 AC.±” and “PHASE-2 = 27 AC.±”. RR at 50a. Likewise, the NOI indicated that the “SIZE OF TOTAL DEVELOPMENT (ACRES)” was “357 AC.± (OVERALL GOLF COURSE PROPERTY)”, and that the “TOTAL DISTURBED (ACRES)” would be comprised of “PH-1 = 28 AC±” and “PH-2 = 27 AC±”. Id. at 54a, 1972a. In addition, both the Supplement No. 1 and the Cultural Resource Notice to the application indicated that the overall project size included the 357-acre golf course and a subdivided area of “21 AC.±”. Id. at 57a, 60a.

On July 23, 1999, the Department issued Angino an NPDES general permit authorizing the discharge of storm water associated with construction activities subject to a number of enumerated terms and conditions. Id. at 1979a-1990a. Section 1 of the permit provided that “[p]ersons proposing to expand the scope of previously authorized construction activity which discharges stormwater who wish to be covered by this general permit must file an administratively complete and acceptable [NOI] with the reviewing entity at least 30 days prior to commencing the construction activity....” Id. at 1979a. In addition, Part C, Section 2a of the permit provided that “an [(E&S plan)] must be developed for

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<sup>6</sup> Section 102.1 of the of the Department’s regulations defines BMPs as “[a]ctivities, facilities, measures, or procedures used to minimize the accelerated erosion and sedimentation to protect, maintain, reclaim and restore the quality of waters and the existing and designated uses of waters within this Commonwealth.” 25 Pa. Code § 102.1.

each activity covered by this permit...”, and that “E&S Control Plans, BMPs, and revisions thereto ... are conditions of this permit and incorporated by reference.”

Id. at 1989a.

Finally, Section 8 of the permit provided:

Prior to the commencement of earth disturbance activities for additional phases or portions of the project, the permittee ... shall submit an [E&S plan] for each additional phase or portion of the project for review and authorization by the reviewing entity.

Coverage under this permit is only granted for those phases or portions of a project for which an [E&S plan] has been submitted to and authorized by the reviewing entity.

Id. at 1990a.

On August 20, 2000, Angino submitted an E&S plan for a timber harvesting operation to be conducted on 1.1 acres of the Boy Scout Tract both inside and outside of the golf course property. Id. at 620a-627a, 2106a-2111a. The timber harvest was to begin on September 20, 2000 and end by December 20, 2000. Id. On September 7, 2000, the DCCD sent Angino a letter which indicated that the timber harvesting E&S plan was adequate. Id. at 2112a-2113a.

On July 13, 2001, Angino submitted an application for an E&S plan revision for the second phase of the construction which included Straw Hollow Road and Mockingbird Drive Extended. RR at 82a-83a, 1991a. In the application, Angino again indicated that the “Total Acres of Entire Project Site” was “GOLF COURSE = 350 ACRES±”, and that “the total acres in the phase submitted” was “22 ACRES±”. Id. at 82a.

The narrative portion of the E&S plan indicated that “[t]he existing section of Straw Hollow Road from the Fishing Creek Valley Road intersection to

the Spruce Drive intersection is also to be improved. Again minor widening and aligning is required to obtain the required total width of 22-feet.” Id. at 1993a. The plan included BMPs for the Straw Hollow Road portion of the second phase extending north to south from Fishing Creek Valley Road to Spruce Drive. See Id. at 1992a-1995a. The BMPs included installing a silt fence down slope from the construction to prevent sediment from entering the nearby UNT which runs parallel to Straw Hollow Road and flows into Fishing Creek. Id. On September 26, 2001, a resource conservationist for the DCCD sent Angino a technical deficiency letter identifying deficiencies in the application and E&S plan that had been submitted. Id. at 97a-98a, 2021a-2022a.<sup>7</sup>

On October 4, 2001, the Department’s resource conservationist conducted an investigation after receiving complaints that Angino was conducting earth disturbance activities on Straw Hollow Road. Id. at 258a. The resources conservationist observed Angino had extensively cut into an embankment on the west side of the road, and that he had cleared vegetation and trees on the east side of the road near the UNT and the outlet of an 18-inch corrugated metal drainage pipe. Id. at 258a-259a. The work was conducted before the 2001 E&S plan had been approved, DCCD had not been notified of the activity as required by the 1999 E&S plan, and no BMPs had been installed in the disturbance area at the time of the inspection. Id. at 259a-261a. In addition, sediment pollution occurred as a result of this earth disturbance activity. Id. at 269a.

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<sup>7</sup> More specifically, one of the deficiencies outlined in the letter indicated that “[i]f proposed embankment cut for Straw Hollow Road between Sta. 74+75 and the bridge at Fishing Creek concentrates runoff at the roadway shoulder, provide calculations showing adequate channel capacity, stability, and appropriate protective lining.” Id. At 2022a.

As a result, the resource conservationist issued an inspection report which stated that the earth disturbance activities had occurred in violation of the NPDES permit. Id. at 2028a-2029a. The notice directed Angino to submit appropriate and adequate planning for a permit revision, to install appropriate BMPs to control erosion and sediment pollution, and to stabilize all exposed areas resulting from the activities. Id. at 2029a.

On February 25, 2002, Angino submitted a revised E&S plan to address the technical deficiencies in the previous submission for the second phase of the construction. See 114a-115a. On March 27, 2002, the DCCD notified Angino of the deficiencies in the revised plan. See Id. at 129a-130a, 134a-135a.

On April 8, 2002, the Department's resource conservationist conducted another inspection of Straw Hollow Road and discovered that Angino had engaged in additional earth disturbance activities along the Spruce Drive access area. Id. at 287a. He observed an unstabilized cutback slope embankment along the west side of the road, and there was clearing, grading and grubbing. Id. at 288a. The work had been conducted without the installation of proper BMPs, the activities were not conducted in accordance with the NPDES permit, and the activity created the potential for sediment pollution of the Straw Hollow Road UNT. Id. at 288a-290a.

As a result, the resource conservationist issued an inspection report which stated that the earth disturbance activities had occurred in violation of the NPDES permit. Id. at 2052a-2053a. The notice directed Angino to submit adequate revised planning for a permit revision, and to stabilize all exposed areas resulting from the activities. Id. at 2053a.

Between March 12, 2002 and April 1, 2002, Angino conducted earth disturbance activities on the Boy Scout Tract including clearing, grubbing and



stockpiling. Id. at 302a-303a. A large part of the activity was located within that tract but was not within the area covered by the 1999 NPDES permit. Id. at 304a. Within the permit area, Angino lengthened the yardage of Holes 1 and 2 on the golf course and stockpiled rocks and soil on an access road behind the clubhouse. Id. at 304a-305a. No BMPs were installed in the affected area, and the area was not stabilized as of an April 26, 2002 inspection. Id. at 308a, 316a.

The total extent of earth disturbance activities on the golf course and outside of the permit area was greater than five acres. Id. at 307a, 316a. In this area, Angino removed stumps from the ground, and cleared, grubbed and removed debris from the forested area. Id. at 302a-303a, 2147a. No BMPs had been installed in the area, and the area was not stabilized as of an April 26, 2002 inspection. Id. at 308a, 316a, 2148a. On May 2, 2002, the Department and DCCD met with Angino to discuss the BMPs that should be installed within the Boy Scout Tract. Id. at 322a, 329a-331a.

That same day, the Department issued a compliance order which required Angino to: (1) stop all earth disturbance activities; (2) remove all debris from the Boy Scout Tract; (3) install water bars along the cut roadways; (4) seed and mulch the disturbed area; (5) install silt fences in the appropriate areas; and (6) re-establish stream channels by removing all fill material from the UNTs. Id. at 2233a-2236a. No appeal was filed from this compliance order. Id. at 334a.

On May 20, 2002, Angino submitted a new NPDES permit application to revise and supplement the 1999 NPDES permit. Id. at 2256a-2257a. The application sought to add .77 acres to the 1999 NPDES permit coverage which “[i]ncludes the right-of-way area of Straw Hollow Road from the Fishing Creek Valley Road intersection to the point where it enters lands of [Angino] (just north of the Spruce Drive intersection). . . .” Id. at 2257a. The application also sought to

add 59 acres of the Boy Scout Tract which “[i]s located just west of the Felicita Golf Course...” Id.

In addition, the application noted that it was “[b]eing submitted in response to the Compliance Order issued by [the Department] on May 2, 2002....” Id. Further, the application stated that “[a]fter stabilization of the disturbed areas noted in the Order, there is no further construction proposed on the tract. Furthermore, the area of Straw Hollow Road has been completed and there is no further construction proposed on the tract....” Id. Eventually, Angino obtained an individual NPDES permit covering this property. Id. at 818a, 1089a-1090a.

On July 9, 2002, Angino conducted earth disturbance activities on Hole 15 of the golf course adjacent to a pond and parallel to the cart path on the north side of Fishing Creek. Id. at 2258a. Hole 15 is within the scope of the 1999 NPDES permit, and Angino did not develop an E&S plan for the disturbance. Id. at 343a-346a. Although a silt fence was installed on one side of the activity, it was not installed properly, and no silt fence was installed on the other side to prevent silt from entering Fishing Creek. Id. at 343a-345a. Angino properly fixed and installed the required silt fences on July 11, 2002. Id. at 347a.

On January 9, 2003, the Department issued a Complaint for Assessment of Civil Penalty in which it alleged, inter alia, that “[i]nspections by the [DCCD] on October 4, 2001, April 8, 2002, April 26, 2002, May 13, 2002 and July 10, 2002 determined that [Angino was] conducting earth disturbance activities without an [NPDES permit] and without an [E&S plan] and failed to install, implement and maintain [BMPs] to effectively minimize accelerated erosion and sedimentation at the Felicita Golf, Garden, Spa Resort, including the ‘Straw Hollow Site’, and the ‘Boy Scout Tract’....” Id. at 15a. As a result, the Department alleged that these violations “[c]onstitute unlawful conduct under

Section 611 of the [Law], 35 P.S. § 691.611<sup>[8]</sup>; a statutory nuisance under Section 402 of the [Law], 35 P.S. § 691.402<sup>[9]</sup>; and subject [Angino] to civil penalty liability under Section 605 of the [Law], 35 P.S. § 691.605.<sup>[10]</sup>” Id. at 16a. Hearings before an administrative law judge (ALJ) of the Board ensued.

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<sup>8</sup> Section 611 of the Law provides, in pertinent part:

It shall be unlawful to fail to comply with any rule or regulation of the department or to fail to comply with any order or permit or license of the department, to violate any of the provisions of this act or rules and regulation adopted hereunder, or any order or permit or license of the department, [or] to cause ... water pollution.... Any person ... engaging in such conduct shall be subject to the provisions of sections 601, 602 and 605.

Id.

<sup>9</sup> Section 402 of the Law provides, in pertinent part:

(b) Whenever a permit is required by rules and regulations issued pursuant to this section, it shall be unlawful for a person ... to conduct the activity regulated except pursuant to a permit issued by the department. Conducting such activity without a permit, or contrary to the terms or conditions of a permit or conducting an activity contrary to the rules and regulations of the department or conducting an activity contrary to an order issued by the department, is hereby declared to be a nuisance.

35 P.S. § 691.402(b).

<sup>10</sup> Section 605 of the Law provides, in pertinent part:

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

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On March 13, 2007, the ALJ issued an adjudication disposing of the complaint in which he made the following relevant conclusions of law: (1) “[t]he earth disturbance activities conducted along Straw Hollow Road in October 2001 and March/April 2002 were a violation of the [Law] because they were conducted without an NPDES permit, an [E&S] plan was not approved, and [BMPs] were not installed. 35 P.S. § 691.611; 25 Pa. Code [§§ 102.4, 102.5].”; (2) “[t]he earth disturbance activities on the Boy Scout tract inside the 1999 NPDES permit area were a violation of the [Law] because no [BMPs] were installed and no [E&S] plan was in place. 35 P.S. [§§ 691.402(b), 691.611]; 25 Pa. Code § 102.4.”; (3) “[t]he earth disturbance activities outside the 1999 NPDES permit area were a violation of the [Law] because they were conducted without an NPDES permit, no [E&S] plan was approved, and no [BMPs] were installed. 35 P.S. [§§ 691.402(b), 691.611]; 25 Pa. Code [§§ 102.4, 102.5].”; (4) “[t]he 2002 earth disturbance activities outside the 1999 NPDES permit area were not “timber harvesting activities” as defined by the regulations under the [Law]. 25 Pa. Code § 102.1.”; (5) “[t]he earth disturbance activities around Hole 15 and the cart path were a violation of the [Law] because they were conducted without an approved [E&S] plan and [BMPs] were not properly installed. 35 P.S. [§§ 691.402(b), 691.611]; 25 Pa. Code § 102.4.”; (6) “[A]ngino’s violations constituted unlawful conduct under Section 611 of the [Law], 35 P.S. § 691.611.”; and (7) “[t]he Board assesses a civil penalty in the amount of \$21,000 against Angino for his violations of the [Law]. 35 P.S. § 691.605].” Board Adjudication at 37-38.

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35 P.S. § 691.605(a).

Based on the foregoing, the Board issued the instant order assessing civil penalties against Angino in the amount of \$21,000.00. Id. at 39. Angino then filed the instant petition for review.<sup>11</sup>

In this appeal, Angino claims<sup>12</sup>: (1) the Board erred in determining that he violated the Law by failing to have an NPDES permit and/or an E&S plan for the earth disturbance activities in the Straw Hollow Road right-of-way, on the Boy Scout Tract, including Holes 1 and 2 on the golf course, and Hole 15 on the golf course; and (2) the Board's civil penalty totaling \$21,000.00 is excessive.

Angino first claims that the Board erred in determining that an NPDES permit and/or an E&S plan were required for the earth disturbance activities in the Straw Hollow Road right-of-way, on the Boy Scout Tract, including Holes 1 and 2 on the golf course, and Hole 15 on the golf course.<sup>13</sup> With

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<sup>11</sup> This Court's scope of review of a Board adjudication imposing penalties for violation of the Law is limited to whether the Board's findings are supported by substantial evidence and whether constitutional violations or errors of law were committed. Leeward Construction, Inc. v. Department of Environmental Protection, 821 A.2d 145 (Pa. Cmwlth.), petition for allowance of appeal denied, 573 Pa. 706, 827 A.2d 431 (2003). Credibility determinations are made by the Board as the finder of fact, and this Court can not engage in the process of reweighing the evidence or disturbing credibility determinations. Id. This Court will not disturb the Board's findings if there is substantial evidence to support them. Id. In addition, in reviewing the Board's penalty assessments, this Court may not substitute its judgment for that of the Board, and the Board's adjudication must be upheld so long as the penalty imposed reasonably fits the violation. Id.

<sup>12</sup> In the interest of clarity, the issues raised in the "Statement of the Questions Involved" portion of Angino's appellate brief have been consolidated to conform to the arguments raised in the "Argument" portion of that brief. See, e.g., Singer v. Bureau of Professional and Occupational Affairs, 633 A.2d 246 (Pa. Cmwlth. 1993) (Issues included in the Statement of Questions Involved portion of an appellate brief, but not addressed in the Argument portion of the appellate brief, are deemed to have been waived.).

<sup>13</sup> As a corollary to this allegation of error, Angino makes a vague claim that the Board erred in determining that the activities conducted at these sites were "construction" activities thereby requiring NPDES permits and E&S plans. However, as noted above, Section 102.1 of

(Continued...)

respect to the Straw Hollow Road right-of-way, Angino claims that an NPDES permit and/or an E&S plan were not required because these earth disturbance activities were not part of a larger common plan of development involving five or more acres of disturbance under Section 102.5(a) of the Department's regulations.

As noted above, Section 102.5(a) of the Department's regulations provides, in pertinent part, that "[a] person proposing ... an earth disturbance on any portion [or] part ... of, a larger common plan of development ... that involves 5 acres ... or more of earth disturbance over the life of the project, shall obtain a general or individual NPDES Permit ... prior to commencing the earth disturbance activity." 25 Pa. Code § 102.5(a). Although the phrase "larger common plan of development" is not defined in the Department's regulations, a comparable federal regulation<sup>14</sup> has been interpreted by the federal courts as follows:

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the Department's regulations defines "earth disturbance activity" quite broadly to include "[a] construction or other human activity which disturbs the surface of the land...." 25 Pa. Code § 102.1. Thus, any human activity that disturbs the surface of the land, including construction activities, falls within the definition of "earth disturbance activity". Thus, the Board's use of the term "construction" to describe some of the activities occurring at the various sites merely indicates that what was occurring at those sites falls within the extremely broad definition of "earth disturbance activity" that is not limited to only "construction" activities and is subject to regulation under the Law and the Department's regulations.

<sup>14</sup> It is appropriate to look for guidance to federal court opinions interpreting the Clean Water Act and similar federal regulations where, as here, there is a dearth of case law interpreting the relevant Department regulations. See, e.g., Pennsylvania Trout v. Department of Environmental Protection, 863 A.2d 93, 109 (Pa. Cmwlth. 2004) ("While our research reveals no Pennsylvania cases interpreting the 'basic project purpose' language [contained in Section 105.18a of the Department's regulations, 25 Pa. Code § 105.18a], our interpretation is consistent with federal case law interpreting the Clean Water Act (CWA) and its attendant regulations, which contain similar permitting requirements for the filling of wetlands.") (footnote omitted); Department of Environmental Resources v. PBS Coals, Inc., 677 A.2d 868, 873-874 (Pa. Cmwlth.), petition for allowance of appeal denied, 546 Pa. 684, 686 A.2d 1313 (1996) ("Because there is no Pennsylvania case law interpreting the statutes and because the Clean Water Act encompasses similar aims, and because the provisions governing attorney's fees in all three of

*(Continued....)*

In order to fall within the exception of 40 C.F.R. § 122.26(b)(14)(x)<sup>15</sup>, the disturbed acreage must be less than five acres *and* the construction must not have occurred pursuant to a “larger common plan of development”. The “plan” in a common plan of development is broadly defined by the EPA as any announcement or piece of documentation or physical demarcation indicating construction activities may occur on a specific plot. The EPA further clarified what is meant by a “larger common plan of development”:

“Part of a larger common plan of development or sale” is a contiguous area where multiple separate and distinct construction activities may be taking place at different times on different schedules under one plan. Thus, if a distinct construction activity has been identified onsite by the time the [NPDES] application would be submitted, that distinct activity should be included as part of a larger plan.

NPDES Storm Water Program Question and Answer Document Volume I, March 1992, page 16. Various examples provided by the EPA include residential subdivisions, industrial parks, and shopping malls.

Na Mamo O 'Aha'ino v. Galiher, 28 F.Supp.2d 1258, 1263 (D.Haw. 1998).<sup>16</sup>

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the acts are virtually identical, we find it appropriate to consider the Federal Courts' interpretation of the Clean Water Act for guidance in ascertaining our General Assembly's intent.”).

<sup>15</sup> 40 C.F.R. § 122.26(b)(14)(x) provides, in pertinent part, that “[t]he following categories of facilities are considered to be engaging in ‘industrial activity’ for purposes of paragraph (b)(14): ... [c]onstruction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more....”

<sup>16</sup> See also EPA Reissuance of NPDES General Permits for Storm Water Discharges From Construction Activities, 63 Fed. Reg. 7858, 7859-7860 (February 17, 1998) (“If your  
(Continued....)

In this case, Angino specifically included the earth disturbance activities in the Straw Hollow Road right-of-way in the E&S plan that he submitted to the Department on July 13, 2001 as part of Phase 2 of the subdivision development of the resort property, and specifically outlined the BMPs to be used during this construction. See RR at 1992a-1995a.<sup>17</sup> Thus, Angino clearly included this earth disturbance activity as part of Phase 2 of the larger plan of subdivision development outlined by him in his 1999 NPDES permit application and NOI. See Id. at 49a-64a. However, as noted above, the 1999 NPDES permit that was issued by the Department only encompassed “[t]hose phases or portions of a project for which an [E&S plan] has been ... authorized by the reviewing entity...”, and required that “[p]rior to the commencement of earth disturbance activities for additional phases and portions of the project, the permittee ... shall submit an [E&S plan] for each additional phase or portion of the project for review and authorization by the reviewing entity.” Id. at 1990a.

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smaller project is part of a larger common plan of development or sale that collectively will disturb five or more acres (e.g., you are building on six half-acre residential lots in a 10-acre development or are putting in a parking lot in a large retail center) you need permit coverage. The ‘plan’ in a common plan of development or sale is broadly defined as any announcement or piece of documentation (including a sign, public notice or hearing, sales pitch, advertisement, drawing, *permit application*, zoning request, computer design, etc.) ... indicating construction activities may occur on a specific plot.... In many cases, a common plan of development or sale consists of many small construction projects that collectively add up to five (5) or more acres of total disturbed land. For example, an original common plan of development for a residential subdivision might lay out the streets, house lots, and areas for parks, schools and commercial development that a developer plans to build or sell to others for development. All these areas would remain part of the common plan of development or sale until the intended construction occurs....”) (emphasis added).

<sup>17</sup> As noted above, the plan included BMPs for the Straw Hollow Road portion of the Phase 2 extending from Fishing Creek Valley Road to Spruce Drive, which included installing a silt fence down slope from the construction to prevent sediment from entering the nearby UNT that runs parallel to Straw Hollow Road and flows into Fishing Creek. Id.



Based on the foregoing, it is clear that the Board properly determined that an NPDES permit and an E&S plan were required for the earth disturbance activities in the Straw Hollow Road right-of-way as they were part of a larger common plan of development as provided in Section 102.5(a) of the Department's regulations. As a result, the Board properly concluded that Angino conducted the earth disturbance activities in the Straw Hollow right-of-way in violation of the Law and the relevant Department regulations, and his claim to the contrary is without merit.<sup>18</sup>

With respect to the earth disturbance activities on the Boy Scout Tract, including Holes 1 and 2 on the golf course, Angino claims that the Board erred in determining that he violated the Law by failing to have a NPDES permit for the earth disturbance activities that took place on that tract. More specifically, Angino claims that the Board's determination that an NPDES permit was required, on the basis that these activities involved more than five acres of earth disturbance, is not supported by substantial evidence. We do not agree.

In its Adjudication, the Board stated the following in support of its determination in this regard:

There has never been any dispute that the earth disturbance activities that occurred on the Boy Scout Tract involved five acres or more of earth disturbance,

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<sup>18</sup> As a corollary to this allegation of error, Angino also claims that an NPDES permit and E&S plans were not required because the earth disturbance activities on Straw Hollow Road were also exempt "road maintenance activities" under Section 102.5 of the Department's regulations. However, the "Statement of the Case" and "Argument" portions of Angino's brief do not specify where in the record this precise issue was raised before the Board, as required by Pa.R.A.P. 2117(c) and 2119(e), and the Board did not consider this claim in its disposition of this matter. Accordingly, this Court will not consider this claim for the first time in this appeal. Pa.R.A.P. 1551(a); Tri-State Transfer Company, Inc. v. Department of Environmental Protection, 722 A.2d 1129 (Pa. Cmwlth. 1999).

even without including areas previously covered by Angino's permit. Therefore, an NPDES permit was obviously required. 25 Pa. Code § 102.5(a). Further, Angino's earth disturbance activities within the Boy Scout Tract do not fall within the timber harvesting exception to 25 Pa. Code § 102.5(a).... Angino's earth disturbance activities within the Boy Scout Tract in 2002 do not meet the definition of "timber harvesting activities", which the regulations define as "earth disturbance activities including the construction of skid trails, logging roads, landing areas and other similar logging or silvicultural practices." 25 Pa. Code § 102.1. Angino's earth disturbance activities within the Boy Scout Tract in 2002 were too far removed and much more extensive than the timbering activities defined in the regulations. Furthermore, Angino's earth disturbance activities within the Boy Scout Tract in 2002 were not part of the timbering that occurred on 1.1 acres within the Boy Scout Tract in 2000.

Board Adjudication at 20-21 (footnote omitted).

Contrary to Angino's assertion, substantial evidence clearly supports the Board's determination in this regard. The Department's resource conservationist specifically testified regarding what earth disturbance activities he observed on that tract, and that the total area of earth disturbance activities exceeded five acres. See RR at 298a-299a, 302a-303a, 304a-306a, 307a-308a, 314a-317a.<sup>19</sup> In addition, Angino's consultant and expert witness, William

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<sup>19</sup> Specifically, the resource conservationist testified, in pertinent part, as follows:

Q Based on your previous testimony, what surface water resources are located within the area described as the Boy Scout Tract?

A Two tributaries. The one that we described at the rear of the clubhouse that flows parallel to Lakewood Drive ... and the other which originated near this area maybe townhomes – indicated as townhomes and condominiums that flows west and

*(Continued....)*

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then ... parallel to Mehaffie Lane.

\* \* \*

Q Going back to your Inspection Report ... please describe your observations.

A I observed evidence of clearing, grubbing, stockpiling, and earth moving activities throughout a wooded area extending from a location on Mehaffie Lane eastward to the Felicita Golf Resort Clubhouse and including areas southward toward the mountain ... approximately, 5 to 800 feet to a line parallel with the rise of the mountain.

I observed a significant area of this – a significant area of this scope of activity appears to be outside the permanent boundaries of the existing NPDES permit, and I did not observe evidence of any installed BMPs to control accelerated erosion or sediment pollution or efforts to stabilize exposed areas.

\* \* \*

Q Now, you're showing us what you had previously marked as Mehaffie Lane?

A Mehaffie Lane, correct.

Q Where it intersects with the Felicita property?

A Right. There appeared to be – there was disturbance ... between the Mehaffie Lane area up through the Boy Scout Tract area. There were avenues graded in and cleared from the overflow parking lot at the clubhouse back into the – this portion of the Boy Scout area. There were stockpiles of material, basically, at this western end of the golf course area and up through to and – disturbance and grading up through Mockingbird Lane. There was grading and development of some access roads, trails, through the – at the rear of the clubhouse area.

\* \* \*

Q What portion of the earth disturbance activities that you observed were located within the '99 NPDES storm water permit boundary?

A The disturbances, the stockpiling at the rear of the golf course areas, the ... access road or land graded in behind the clubhouse area, the disturbance ... adjacent to the ravine area

*(Continued....)*

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behind the clubhouse area, the activities adjacent to Mehaffie Lane were outside the boundaries of the existing permit.

\* \* \*

Q And what type of activity would you characterize the earth disturbance related to Holes 1 and 2 of the golf course?

A In terms of earth disturbance, I was stockpiling, and it was clearing, it was –

\* \* \*

Q Now, you also indicated that you observed earth disturbance activity in a roadway in back of the ... golf course clubhouse.

A. Yes.

Q Would you describe that for us.

A It appeared to me to be a wide access avenue, wide enough to be a street extended from the east to the west back into the Boy Scout area.

\* \* \*

Q And what ... earth disturbance activities that you observed occurred outside of the 1999 NPDES permit boundary?

A It would have been the disturbance activities in the Mehaffie Road area....

Q And what was that?

A This was ... what appeared to be an access or connection from the Boy Scout Tract area to the Mehaffie Road area that extended back up to the east and into the Boy Scout Tract area.

Q And what was included in that access? Was there – what type of earth disturbance activities?

A Grubbing, clearing, grading, activities that would be similar to clearing a roadway or an access way.

\* \* \*

Q In total, based on you observations and experience, what was the total aerial extent of the earth disturbance activities that occurred within the Boy Scout Tract – what we've described as the Boy Scout Tract, including the portion that was within and the

*(Continued....)*

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portion outside of the NPDES permit boundary?

A Five acres would be a good estimate.

Q Did the [DCCD] receive an E&S plan for any portion of the earth disturbance activity that you observed on April 26, 2002?

A No.

Q Was a plan required?

A Yes.

Q Why?

A A plan was required on the portion of the property that was covered under the permit as a plan revision, and planning would have been required for any areas – any areas adjacent to and part of any common plan of development that were outside the current permit boundaries.

Q And were the areas outside the current permit boundaries greater than 5,000 square feet?

A Yes, they were.

Q Were there any BMPs in place, either within or outside of the permit boundary, to control accelerate erosion within the disturbed area?

A No, there weren't.

\* \* \*

Q [Y]ou identified a list of violations in the Earth Disturbance Inspection Report. First, you marked failure to develop a written [E&S plan]. Why?

A That's correct. There was no written planning for the activities within the permitted area, which would have been required. There was no [E&S plan] submitted for the disturbances within the Boy Scout – the former Boy Scout Tract area near Mehaffie Road.

Q You also checked failure to have an [E&S plan] on-site.

A That's correct.

Q Why?

A There was no plan on-site.

*(Continued....)*

Swanick, PE, confirmed in a letter to Angino the earth disturbance activities on that tract involved more than five acres. See RR at 2247a-2248a.<sup>20</sup> In light of the

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\* \* \*

Q You also checked failure to implement BMPs.

A There were no [BMPs] installed in any of these areas.

Q You also checked failure to obtain an NPDES permit. Why?

A Because of the activity in the former Boy Scout Tract area exceeded the – and it being – appearing to be a part of a common plan of development with the rest of the areas, would have required an NPDES permit.

Q Would it require a permit if it was not part of a common plan?

A If the disturbance exceeded five acres, it would have required its own permit.

Q Did the disturbance exceed five acres?

A I believe the disturbance exceeded five acres.

<sup>20</sup> Specifically, the letter stated the following, in pertinent part:

The “Boy Scout” earth disturbance was just another activity that reinforced the DEP’s belief that you were continuing to demonstrate a lack of awareness of the need or the willingness to comply with their regulations. As you know, I was unaware of this project. But, as your engineer, you invited me to face that proverbial “Cast-of-Thousands”, made up, of course, of representatives from the Township, the DCCD, and the DEP and ACOE; which had gathered on that infamous day in May of last year, to view an alleged environmental disaster area. After walking the site, it appeared to me that it was. The disturbances certainly appeared to be greater than 5000 square feet, and collectively greater than five (5) acres. And that “Cast-of-Thousands” only reinforced my opinion. I saw what I saw. We all saw, though, that you were trying to clean up the site after your logging operation, but unfortunately, your efforts did not necessarily include any of the DEP’s [BMPs]. Even you agreed to that. They also believed, at that time, that this area was a part of

*(Continued....)*

foregoing, the Board properly concluded that Angino conducted the earth disturbance activities in the Boy Scout Tract in violation of the Law and the relevant Department regulations, and his claim to the contrary is likewise without merit.<sup>21,22</sup>

With respect to the earth disturbance activities on Hole 15 on the golf course, Angino claims that the Board erred in determining that he violated the Law by failing to meet the requirements of the 1999 NPDES permit prior to conducting the earth disturbance activities. More specifically, Angino claims that the Board erred in determining that this parcel was covered by the 1999 NPDES permit on

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the Golf Course area and should have been part of that NPDES permit. In your defense, I clearly defined the limits of your separate ownerships. And, that this disturbance was not included as part of the Golf Course NPDES. But that really wasn't the issue. The real issue was, as they saw it, that you apparently violated the DEP regulation. You disturbed the earth. And, because the disturbance appeared to be in excess of the DEP's prescribed limits, you did it without an approved E&S plan and /or NPDES Permit. Even though the DEP may have thought that the 58 acre Boy Scout Tract was part of the Golf Course [sic] doesn't really matter. The disturbance was done....

<sup>21</sup> As a corollary to this allegation of error, Angino claims that the Board erred in failing to determine that the activities conducted on the Boy Scout Tract did not fall within the "timber harvesting" exception contained in Section 102.5(a) of the regulations. However, the foregoing testimony of the Department's resource conservationist regarding what earth disturbance activities he observed on that tract clearly provides substantial evidence for the Board's determination that the "[e]arth disturbance activities within the Boy Scout Tract in 2002 were too far removed and much more extensive than the timbering activities defined in the regulations." Board Adjudication at 21. Thus, Angino's claim in this regard is likewise without merit.

<sup>22</sup> Moreover, and quite importantly, on May 2, 2002, the Department issued a compliance order which: (1) required Angino to stop all earth disturbance activities; (2) remove all debris from the Boy Scout Tract; (3) install water bars along the cut roadways; (4) seed and mulch the disturbed area; (5) install silt fences in the appropriate areas; and (6) re-establish stream channels by removing all fill material from the UNTs. RR at 2233a-2236a. No appeal was filed from this compliance order. Id. at 334a.

the basis that this area was part of the larger common plan of development under Section 102.5(a) of the Department's regulations. We do not agree.

In its Adjudication, the Board stated the following in support of its determination in this regard:

Angino did not have an approved E&S plan in place at the time he conducted earth disturbance activities in and around Hole 15.... An E&S plan was required for these earth disturbances because Hole 15 was located within the original 357-acre 1999 NPDES permit coverage area and the earth disturbances were greater than 5,000 square feet. 25 Pa. Code § 102.4(b)(2)(ii). Angino's failure to have an approved E&S plan in place at the time of the ... earth disturbance activities was a violation of the 1999 NPDES permit and the [Law]. 35 P.S. § 691.402; 35 P.S. § 691.611.

Board Adjudication at 23.

As noted above, Section 102.5(a) of the Department's regulations provides, in pertinent part, that "[a] person proposing ... an earth disturbance on any portion [or] part ... of, a larger common plan of development ... that involves 5 acres ... or more of earth disturbance over the life of the project, shall obtain a general or individual NPDES Permit ... prior to commencing the earth disturbance activity." 25 Pa. Code § 102.5(a). As also noted above, although the phrase "larger common plan of development" is not defined in the Department's regulations, a comparable federal regulation has been interpreted "[a]s any announcement or piece of documentation or physical demarcation indicating construction activities may occur on a specific plot...." Na Mamo O 'Aha'ino, 28 F.Supp.2d at 1263.<sup>23</sup>

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<sup>23</sup> See also EPA Reissuance of NPDES General Permits for Storm Water Discharges From Construction Activities, 63 Fed. Reg. 7858, 7859-7860 (February 17, 1998) ("[T]he 'plan' (Continued....)



In the Permit Coordination Section of his original 1999 NPDES permit application, Angino indicated that the “Total Disturbed Acreage” involved would be “GOLF COURSE-OVERALL PROPERTY SIZE = 357 AC.±”. RR at 50a. Likewise, the NOI indicated that the “SIZE OF TOTAL DEVELOPMENT (ACRES)” was “357 AC.± (OVERALL GOLF COURSE PROPERTY)”. Id. at 54a, 1972a. In addition, both the Supplement No. 1 and the Cultural Resource Notice to the application indicated that the overall project size included the 357-acre golf course. Id. at 57a, 60a. Moreover, in the application for an E&S plan revision for the second phase of construction submitted in 2001, Angino again indicated that the “Total Acres of Entire Project Site” was “GOLF COURSE = 350 ACRES±”. Id. at 82a.

Thus, Angino clearly included the entire golf course as part of the larger plan of subdivision development outlined by him in his 1999 NPDES permit application. See Id. at 49a-66a. Moreover, the 1999 NPDES permit that was issued by the Department required that “[p]rior to the commencement of earth disturbance activities for additional phases and portions of the project, the permittee ... shall submit an [E&S plan] for each additional phase or portion of the project for review and authorization by the reviewing entity.” Id. at 1990a.

Based on the foregoing, it is clear that the Board properly determined that an E&S plan was required for the earth disturbance activities on Hole 15 of the golf course as they were part of a larger common plan of development as provided

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in a common plan of development or sale is broadly defined as any announcement or piece of documentation (including a sign, public notice or hearing, sales pitch, advertisement, drawing, **permit application**, zoning request, computer design, etc.) ... indicating construction activities may occur on a specific plot....”) (emphasis added).

in Section 102.5(a) of the Department’s regulations.<sup>24</sup> As a result, the Board properly concluded that Angino conducted the earth disturbance activities on Hole 15 in violation of the Law and the relevant Department regulations, and his claim to the contrary is without merit.<sup>25</sup>

Finally, in the Statement of Questions Involved portion of his brief, Angino claims that “[t]he EHB order of \$21,000 in civil penalties [is] excessive under the circumstances of this case and not in keeping with civil penalties

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<sup>24</sup> This determination is also supported by the testimony of the Department’s resource conservationist who testified, in pertinent part, as follows:

Q What is the overall scope of the permit’s coverage?

A Okay. The overall scope of the permit is the 357-acre golf course property.

\* \* \*

Q You listed the failure to comply with permit conditions. What permit are you talking about there?

A Okay. This would be the 1999 NPDES permit.

Q And why did you list failure to comply with permit conditions?

A Permit conditions would have required notification of the activity, would have required preparation of an [E&S] plan, submission of approval of that would have required stabilization and installation of BMPs and stabilization of the site.

RR at 245a, 346a.

<sup>25</sup> As a corollary to this allegation of error, Angino claims that the Board erred in failing to determine that the activities conducted on Hole 15 of the golf course did not fall within the “agricultural plowing or tilling” exception contained in Section 102.5(a) of the regulations. However, Section 102.1 of the Department’s regulations defines “agricultural plowing or tilling activity” as “[e]arth disturbance activity involving the preparation and maintenance of soil for the production of agricultural crops.” 25 Pa. Code § 102.1. There is absolutely no evidence in this case that the earth disturbance activities adjacent to a pond and parallel to the cart path on the 15<sup>th</sup> hole of the Felicita Resort’s golf course was in any way related to “[t]he preparation and maintenance of soil for the production of agricultural crops.” *Id.* Thus, Angino’s claim in this

*(Continued....)*

assessed in other projects....” Brief of Appellants at 5. However, in the Argument portion of his brief, Angino argues that the civil penalties imposed for the earth disturbance activities on the Boy Scout Tract and Hole 15 of the golf course are without legal basis because the violations of the Law and the relevant Department regulations for which they were imposed by the Board are “without legal basis”. Id. at 35. With respect to the penalties imposed for the earth disturbance activities in the Straw Hollow Road right-of-way, Angino argues that the violations of the Law and relevant Department regulations for which they were imposed constitute a “hypertechnicality”. Id. at 32.

However, as outlined above, the Board’s determination that Angino’s activities in the Straw Hollow Road right-of-way, on the Boy Scout Tract, and on Hole 15 of the golf course constituted violations of the Law and the Department’s regulations is neither “without legal basis” nor “hypertechnical”. To the contrary, the violations found by the Board in this case are eminently proper and supported by both the facts of this case and the applicable law. Moreover, and more importantly, the Board extensively and exhaustively considers and sets forth the reasoning underlying the civil penalties imposed in this case in its Adjudication. See Board Adjudication at 27-36.

As noted above, pursuant to Section 605(a) of the Law, the Department may assess a civil penalty whether or not the violation was willful, and the penalty imposed cannot exceed \$10,000 per day for each violation. 35 P.S. § 691.605(a). In addition, “[i]n determining the amount of the civil penalty the department shall consider willfulness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant

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regard is likewise without merit.

factors....” Id. Moreover, in reviewing the Board’s penalty assessments, this Court may not substitute its judgment for that of the Board, and the Board’s adjudication must be upheld so long as the penalty imposed reasonably fits the violation. Leeward Construction, Inc. Our review of the Board’s Adjudication amply demonstrates that the penalty imposed reasonably fits the violations in this case, and Angino’s terse and unsupported assertions to the contrary provide no basis to disturb the Board’s determination in this regard.

Accordingly, the order of the Board is affirmed.

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JAMES R. KELLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard C. Angino, Esquire,	:	
King Drive Corporation, and	:	
Sebastiani Brothers,	:	
	:	
Petitioners	:	
	:	
v.	:	No. 664 C.D. 2007
	:	
Department of Environmental	:	
Protection,	:	
	:	
Respondent	:	

**ORDER**

AND NOW, this 26th day of June, 2008, the order of the Environmental Hearing Board, dated March 13, 2007 at EHB Docket No. 2003-004-CP-L, is AFFIRMED.

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JAMES R. KELLEY, Senior Judge