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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

Date: December 1, 1988

From: Beverly Whitehead BW
HQ Superfund Docket Coordinator

To: Mary Anne Daly
NPL Coordinator - Region 3

Subject: NPL Update 3 and NPL Update 6 documents

Enclosed you will find various documents pertaining to NPL Update 3 and NPL Update 6 to be included in the Regional dockets.

NPL Update 3

Public Comments	NPL-U3-3-L45 NPL-U3-3-L46
Correspondence/Communications	NPL-U3-8-36
Score Revisions/Name Changes	NPL-U3-9-4

NPL Update 6

Public Comments	NPL-U6-3-L33-R3 NPL-U6-3-L34-R3 NPL-U6-3-L43-R3
Score Revisions/Name Changes	NPL-U6-9-1 NPL-U6-9-2
Responds to Comments/Support Documents	NPL-U6-10-18

100438

NPL-U6-3-L43-R3

LAW OFFICES
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October 13, 1988

~~Russell H. Wyer, P.E.~~
~~Hazardous Site Control Division~~
(Attention LNPL Staff)
Office of Emergency and Remedial
Response (WH-548E)
Environmental Protection Agency
401 M. Street, S.W.
Washington, DC 20460

RE: Public Comment On the HRS for Novak Sanitary Landfill, EPA Nos. 248/566

Dear Mr. Wyer:

On behalf of Novak Sanitary Landfill, I am herein enclosing a copy of the August 13, 1987 Partial Adjudication of the Environmental Hearing Board of the Commonwealth of Pennsylvania relating to the Novak site in South Whitehall Township, Pennsylvania. This decision is submitted to further support the contention asserted by Walter B. Satterthwaite Associates, Inc., a consultant for Novak Sanitary Landfill in its March 20, 1987 letter challenging the proposal of the EPA to place the Novak Site on the National Priorities List ("NPL"). At the time that the Satterthwaite submission was made to EPA, the enclosed Decision of the Environmental Hearing Board ("EHB") had not yet been issued, although the Satterthwaite submission included certain portions of the voluminous testimony taken as part of the EHB proceeding.

As you will note, the enclosed EHB Decision holds, at the conclusion of a proceeding lasting over 2-1/2 years, that no substantial evidence was presented in support of the contention that the Novak Site is causing groundwater pollution. This holding was reached because of the finding that there is no reliable evidence from analysis of any monitoring wells indicating the presence of any parameters commonly attributable to landfills. In fact, the EHB held that evidence previously

relied upon to indicate groundwater problems associated with Novak, i.e., groundwater samples taken from wells on properties near the Landfill, in fact did not reveal any pollutants which had the same "fingerprint" as those that could be tied to the Landfill. The EHB Decision suggests that contamination of certain monitoring wells caused by improper installation may have caused false positives in certain groundwater monitoring tests.

Consequently, because the EHB found that the Novak Site was not negatively impacting the local environment, it allowed the Site to resume operations as a sanitary landfill. Obviously, the Decision of the EHB after its thorough, comprehensive proceeding is in direct contravention of EPA's preliminary ranking which caused the Novak Site to be proposed for the NPL. I urge you to reconsider the preliminary ranking in light of this substantial evidence and to remove the Novak Site from NPL consideration.

For your convenience, I have highlighted and tabbed certain portions of the Synopsis, Findings of Fact and Conclusions of Law contained in the EHB Decision. Outlined below are the significant portions which I call to your attention:

Snyopsis.

"The Department also failed to satisfy its burden of proof relating to alleged groundwater contamination."

Findings of Fact. (quotations as stated)

34. The soil composition of NSL is a glacially derived, high silt, clay rich soil excellent for use in the natural renovation landfill process.

35. The glacial material ranges from 0-45 feet in depth.

36. The bedrock underlying the site is dense dolomite with relatively few fractured surfaces.

37. A deep layer of unconsolidated material lies above the bedrock in most areas of the site.

38. The bedrock/unconsolidated material unit on the site has a very low water yield capability.

39. Although the surface topography slopes from north to south at the site, the direction of the groundwater flow is south to north.

40. There is a single groundwater flow under the site.

41. Surface water infiltrating into the surface of the site moves essentially perpendicular to the surface through the unconsolidated material of the site and will not create any significant secondary flow.

42. Four monitoring Wells (MW) existed on the site in June, 1984, with MW-1 and 2 located between the completed area fill section and the newly-operable trench fill section to the south, and MW-3 and 4 located in an area north of the landfill.

43. MW-1 and 2 were differently constructed than MW-3 and 4. MW-1 and 2 were constructed with solid casing to a depth of 10 feet. Below 10 feet, the well casings were perforated, thereby allowing any substance in the unconsolidated material below 10 feet to penetrate and contaminate the wells. Furthermore, MW-1 and 2 were located in low-lying areas in close vicinity to the access road to the trench area of the landfill. MW-3 and 4, on the other hand, were solid cased to the bedrock, thus eliminating the potential for contamination in the unconsolidated area.

44. Groundwater samples were taken from the four monitoring wells in June, 1984. Satterthwaite Associates, Inc., performed the sampling in accordance with EPA-approved procedures for quality assurance/quality control. Two priority pollutant volatile compounds were reliably found in trace concentrations in MW-2--toluene at 42 to 53 ppb and 1-1-1 trichlorethane at 17 to 34 ppb.

45. Further groundwater sampling was performed on November 20, 1984. In addition to sampling from MW-1-4, Satterthwaite Associates also sampled at two new wells, MW-5 and 6, located in an area north of the landfill. These wells were of solid casing construction, similar to MW-3 and 4. The location of MW-5 and 6 was approved by the Department.

46. The November 20, 1984, sampling reliably indicated six organic compounds presented in the sample from MW-1, including chlorobenzene (11 ug/1), 1, 1-dichloroethane (14 ug/1), toluene (11 ug/1), and vinyl chloride (19 ug/1).

47. The November 20, 1984, sampling did not reveal any reliable indications of the contamination in MW-3, 4, 5, and 6.

48. Packer tests were subsequently performed on MW-1 and 2 in an attempt to determine whether the contamination

found at MW-1 and 2 was attributable to penetration of contaminants through the perforations of the casings of MW-1 and 2, or a breakdown in the natural renovation process at the landfill.

49. Packers (or well seals) were placed in MW-1 and 2 above the water table at the point where the perforated casing met rock for the purpose of collecting and testing waters entering the well casings through perforations.

50. The packer tests indicated that the likely source of contamination in MW-1 and 2 is penetration of contaminants through the perforations in the casing.

53. After closing and sealing MW-1 and 2, additional groundwater sampling was performed on May 23, 1985. Sampling was taken at MW-1-B, 2-A, 3, 4, 5, 6 and several private wells off the landfill site.

54. The only on-site well indicating reliable levels of pollutants was MW-1-B.

55. The May 23, 1985, sampling of MW-1-B revealed the presence of trans-1,2-dicholroethylene in the range of 24-30 ug/1 and vinyl chloride in the range of 11-14.5 ug/1. Toluene was also detected at concentrations in excess of 35 ug/1.

56. Groundwater samples taken from wells on nearby properties revealed some contamination; however, the pollutants discovered had a different "fingerprint" from the pollutants found in MW-1-B and cannot be attributed to the landfill.

57. Surface water samples taken on July 26, 1985, did not reveal any reliable levels of pollutants.

58. In all cases, the contaminants found in MW-1 and 2 (or 1B and 2A) are not also found in MW-3 and 4 to the north, the direction of groundwater flow.

59. Toluene, the compound consistenly discovered in MW-1-B, is a common component of gasoline.

65. The contamination discovered during the testing of MW-1 and 2 is not the result of a breakdown in the natural renovation process at the landfill, but rather, the toluene contamination is the result of gasoline mixing with surface water runoff from the access road near MW-1 and 2 which penetrated the defective and outdated casing in MW-1 and 2, while the vinyl chloride and trans-1, 2-dichloroethylene contamination is the result of these gases becoming soluble in the surface water in MW-1-B.

77. Stormwater escaped from the site on one occasion, due to an intense storm which caused a berm to erode. Moreover, the area surrounding the site was flooded.

83. There was no evidence of malodors leaving the NSL site.

Discussion. (quotations as stated)

"We find that the Department has not presented substantial evidence in support of its contention and has, therefore failed to satisfy its burden of proof in this issue."

Despite the deficiencies in the monitoring wells, we can hardly conclude that groundwater pollution, much less contamination, is occurring where there is no reliable evidence of any parameters commonly attributable to landfills.

"We cannot reach our findings on the basis of blind faith or tortured or simplistic logic; we require substantial evidence which, in this case, the Department has failed to provide us."

Conclusions of Law.

13. "The Department has failed to prove by substantial evidence that NSL is polluting the groundwater, in violation of the Clean Streams Law and the Solid Waste Management Act."

It is respectfully requested that you consider this together with the data previously submitted in properly evaluating the pending issue before you. Many, many hours of testimony from experts and various other witnesses were taken into consideration before the Environmental Hearing Board issued the attached Order.

Should you have any questions, please call me.

Very truly yours,

MARTIN J. KARESS

MJK/blp

Enclosure

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
221 NORTH SECOND STREET
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WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE B

LOUIS J. NOVAK, SR., HILDA NOVAK and NOVAK SANITARY LANDFILL, INC. :

v. : EHB Docket No. 84-425-M

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: August 13, 1987

PARTIAL ADJUDICATION

By the Board

Synopsis

An appeal of an order relating to the closure of a solid waste disposal facility is sustained in part and denied in part. The Board holds that the Department of Environmental Resources (Department) failed to prove by substantial evidence that the conduct of the corporate officers rose to the level of participation necessary to establish individual liability. The Department also failed to satisfy its burden of proof relating to alleged permit boundary violations, groundwater contamination, daily cover violations and failure to submit erosion and sediment control plans. It was an abuse of discretion for the Department to impose a bonding requirement under §505 of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.505 (the Solid Waste Management Act), when the savings clause in §1001 of that same statute preserved the bonding scheme in 25 Pa.Code §101.9 until amended by subsequent adoption of regulations under the Solid Waste

Management Act. The Board holds that the Department's order was not an abuse of discretion as it related to surface water management, completion of a gas venting system, and completion of final cover, grading, and vegetation requirements. The Board substituted its discretion for that of the Department in permitting the facility to reopen under certain conditions and superseded the Department's civil penalty assessment pending a hearing on the propriety of the amount.

INTRODUCTION

This matter was initiated on December 18, 1984, by the filing of a Notice of Appeal by Louis J. and Hilda Novak and Novak Sanitary Landfill (NSL) contesting the Department's December 13, 1984 issuance of an order and civil penalty assessment. The notice was accompanied by a Petition for Supersedeas, the first of three filed in this matter. Hearings on the petitions were held on December 26-28 and 31, 1984; January 2 and 3, 1985; April 3, 1985; and September 4 and 5, 1985. During the course of the September, 1985 hearings, the parties, in an attempt to expedite the resolution of the matter, agreed to allow the supersedeas hearings to serve as hearings on the merits. The parties also agreed during the initial supersedeas hearings to defer adjudication of the civil penalties assessment until the Board had decided the merits of the order.

The appeal was originally assigned to former Member Anthony J. Mazullo, Jr., who conducted all three supersedeas hearings and participated in a view of the premises. Mr. Mazullo resigned from the Board on January 31, 1986, without having drafted a proposed adjudication. Consequently, the Board must adjudicate this matter on the basis of a cold record. In an effort to infuse some life into the record, oral argument was held before Chairman Woelfling on March 25, 1986. But, in any event, we have held on

several recent occasions, that failure of the current Board Members to conduct the hearing and assess the credibility of witnesses does not preclude the Board from rendering an adjudication. DER v. Lucky Strike Coal Company and Louis J. Beltrami, EHB Docket No. 80-211-CP-W (Adjudication issued April 22, 1987). If such were not the case, the Board would be even further impaired in its attempts to resolve the numerous matters before it with the constraints imposed on it by the seemingly continuous vacancies on the Board in recent years. With all of this in mind, we proceed to make the following findings.

FINDINGS OF FACT

1. Appellants are Louis J. and Hilda Novak, husband and wife, R. D. 1, Box 268, Allentown, and Novak Sanitary Landfill, Inc., a Pennsylvania corporation located on Orefield Road in South Whitehall Township, Lehigh County. (N.T. 323)

2. Louis J. and Hilda Novak are president/manager and secretary, respectively, of NSL. (N.T. 323-4)

3. Louis J. and Hilda Novak, jointly, own the landfill property. (N.T. 323)

4. Appellee is the Department, the agency authorized to administer and enforce the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et sec. (the Clean Streams Law) and the rules and regulations adopted thereunder, and the Solid Waste Management Act and the rules and regulations adopted thereunder.

5. The Department issued solid waste management permit No. 100534 (the permit) to Appellants on March 24, 1972. (Ex.A-1)

6. The permit, which incorporated the plans submitted with the permit application (the 1972 plans), authorized the operation of a natural renovation landfill, with waste disposal in distinct locations on the site,

an area fill section on the northerly portion of the site for contiguous surface disposal of waste, and a trench fill section on the southern portion of the site in which waste was to be deposited in five excavated trenches. (N.T. 512-513 and Ex.A-2)

7. Specific grades and elevations for the area fill section were provided for in the 1972 plans and permit. (Ex.A-2)

8. The 1972 plans were subject to several minor revisions, the latest occurring in 1978. (Ex.A-2)

9. Solid waste was deposited solely in the area fill section of the landfill from 1972 until the summer of 1982.

10. In 1982, the Department conducted an assessment of the area fill portion and determined that it was filled beyond the limits allowed in the permit. (N.T. 499-500)

11. The extent of overfill in the area fill section of NSL in 1982 was 625,689.81 cubic yards. (N.T. 487 and Ex.C-2)

12. After learning of this overfill, the Department directed Appellants to shift the disposal of waste to the trench area of NSL. (N.T. 313 and 500)

13. Appellants and the Department held meetings during the summer of 1982 in an attempt to resolve the issues of overfill in the area fill section and operation of the trench fill section of NSL. (N.T. 500)

14. These meetings resulted in the submittal of plans by Appellants to raise the elevation in the trench fill area and set forth new grades and slopes to provide for proper drainage and shedding of water from the overfill in the area fill section (the 1982 plans). The Department approved the 1982 plans. (N.T. 26-27, 527-530, 479-480, and 537 and Ex. A-4 and A-24)

15. The proposed trenches are numbered sequentially, one through

five, on the 1972 plans, with Trench 1 being the northern-most trench and Trench 5 the southern-most trench. (Ex.A-2)

16. The 1972 plans specified a minimum setback of the trench fill area of two hundred (200) feet from the southern-most edge of proposed Trench 5 to the southern boundary of the landfill. (Ex.A-2)

17. Neither the 1972 plans nor the permit provided any other specific longitudinal or latitudinal limitations concerning the location of the various trenches, nor was a grid system employed for proposed placement of the trenches. (N.T. 545)

18. A series of Pennsylvania Power and Light (P.P.& L.) electrical poles run in a north-south direction on the site at varying distances from the eastern edge of the trench fill section of the landfill. (Ex.A-2)

19. The 1972 plans state "Benchmarks shall be marked on P.P.& L. poles in trenching area to serve as control elevations for the trenches." These benchmarks are not relevant to the lateral placement of the trenches. (N.T. 575 and Ex.A-2)

20. Appellants commenced the disposal of waste in the trenches on August 30, 1982, beginning with Trench 2, and then proceeded in the following order to Trench 1, 3, 4 and excavation of Trench 5. (Ex.C-4)

21. Each trench in the trench fill must be separated from the neighboring trenches by a distance of at least eight feet. (N.T. 632-633 and Ex.A-13 and A-14)

22. The actual separation of Trenches 1-5 is approximately 25 feet or greater.

23. Construction of trenches with a separation greater than eight feet does not, in and of itself, result in environmental harm, and may, in fact, be environmentally beneficial. (N.T. 606-607)

24. Due to the separation of Trenches 1-4 being greater than eight feet, proposed Trench 5 is staked out farther south than contemplated by the 1972 plans.

25. The Department requires the trenches to be dug parallel and as shown in the approved plans. (Ex.A-14)

26. The Department was present at the excavation of Trenches 1-4 and the closure of Trenches 1-3. The Department approved the location and separation distances of Trenches 1-4. (N.T. 33-34, 309-3101, 314-315, 449-450, 515-516, 545, 604-605, 679-680, and 720-725)

27. Neither the 1972 plans nor the 1982 plans contained a grid with north-south coordinates precisely depicting the actual locations of the trenches. The only distance specified consistently in all the plans was the 200 foot setback requirement. (N.T. 231-232 and 545 and Ex.A-2 and A-4)

28. Subsequent to the January, 1985, hearings in this matter, a survey of the site was performed to establish the location of the southern property line in relation to the southern-most proposed trench, Trench 5. (N.T. 888-890 and Ex.S-1)

29. Although located farther south than contemplated by the 1972 plans, proposed Trench 5, as staked out, is not within the 200 foot setback requirement. (Ex.S-1)

30. Trench 4 is overfilled beyond the required grade. (N.T. 643, 689-690, and 707-708 and Ex.A-4)

31. The amount of overfill is a matter for speculation. Walter B. Satterthwaite Associates estimated it to be 2000-3000 cubic yards, while the Department, based on hours of operation, estimated it to be 5100-6250 cubic yards over the 2000-3000 cubic yards estimated by Satterthwaite. (N.T. 215 and 327 and Ex.A-11)

32. Prior to Appellants' submission of a solid waste management permit application to the Department in 1969, solid waste had been disposed of in an old surface mine excavation at the site in accordance with applicable surface mine reclamation requirements. Filling of the mine was substantially completed and final cover applied prior to the 1972 issuance of the permits. (N.T. 10, 17-20, 29-30, and 171 and Ex.A-2)

33. The performance of a natural renovation landfill is influenced by the geology and hydrogeology of the site.

34. The soil composition of NSL is a glacially derived, high silt, clay rich soil excellent for use in the natural renovation landfill process. (N.T. 305 and Ex.A-5(a)).

35. The glacial material ranges from 0-45 feet in depth. (N.T. 125-126)

36. The bedrock underlying the site is dense dolomite with relatively few fractured surfaces. (N.T. 61-62, 125-126, 418 and Ex.A-5(a))

37. A deep layer of unconsolidated material lies above the bedrock in most areas of the site. (N.T. 62)

38. The bedrock/unconsolidated material unit on the site has a very low water yield capability. (N.T. 62, 418, and 985-987)

39. Although the surface topography slopes from north to south at the site, the direction of groundwater flow is south to north. (N.T. 37-43, 90, and 151-161 and Ex.A-5(a) and A-5(b)).

40. There is a single groundwater flow under the site. (N.T. 37-40).

41. Surface water infiltrating into the surface of the site moves essentially perpendicular to the surface through the unconsolidated material of the site and will not create any significant secondary flow. (N.T. 162

and 459)

42. Four monitoring wells (MW) existed on the site in June, 1984, with MW-1 and 2 located between the completed area fill section and the newly-operable trench fill section to the south, and MW-3 and 4 located in an area north of the landfill. (Ex.A-2)

43. MW-1 and 2 were differently constructed than MW-3 and 4. MW-1 and 2 were constructed with solid casing to a depth of 10 feet. Below 10 feet the well casings were perforated, thereby allowing any substances in the unconsolidated material below 10 feet to penetrate and contaminate the wells. Furthermore, MW-1 and 2 were located in low-lying areas in close vicinity to the access road to the trench area of the landfill. MW-3 and 4, on the other hand, were solid cased to the bedrock, thus eliminating the potential for contamination in the unconsolidated area. (Ex.A-6)

44. Groundwater samples were taken from the four monitoring wells in June 1984 (Ex.A-6). Sattarthwaite Associates, Inc. performed the sampling in accordance with EPA approved procedures for sample, field, and laboratory control. (N.T. 272). Two priority pollutant volatile compounds were reliably found in trace concentrations in MW-2--toluene at 42 to 53 ppb and 1-1-1 trichloroethane at 17 to 34 ppb. (Ex.A-6)

45. [redacted] water sampling was performed on November 20, 1984. (Ex.A-7). [redacted] sampling from MW-1-4, Sattarthwaite Associates also sampled at two new wells, MW-5 and 6, located in an area north of the landfill. These wells were of solid casing construction, similar to MW-3 and 4. The location of MW-5 and 6 was approved by the Department. (N.T. 434)

46. The November 20, 1984, sampling reliably indicated six organic compounds present in the sample from MW-1, including chlorobenzene (11 µg/l), 1,1-dichloroethane (14 µg/l), toluene (11 µg/l), and vinyl chloride (19

µg/l).

47. The November 20, 1984, sampling did not reveal any reliable indication of contamination in MW-3, 4, 5, and 6.

48. Packer tests were subsequently performed on MW-1 and 2 in an attempt to determine whether the contamination found at MW-1 and 2 was attributable to penetration of contaminants through the perforations of the casings of MW-1 and 2, or a breakdown in the natural renovation process at the landfill. (N.T. 1206)

49. Packers (or well seals) were placed in MW-1 and 2 above the water table at the point where the perforated casing met rock for the purpose of collecting and testing any waters entering the well casings through perforations. (N.T. 1206)

50. The packer tests indicated that the likely source of contamination in MW-1 and 2 is penetration of contaminants through the perforations in the casing. (N.T. 1206)

51. Pursuant to an agreement between the parties subsequent to the hearings in January, 1985, NSL agreed to close and seal MW-1 and 2 and drill two new monitoring wells to replace MW-1 and 2. (N.T. 362)

52. NSL had difficulty with the construction of MW-1-A, the replacement well for MW-1. This well was abandoned by NSL and replaced by MW-1-B. MW-2-A was constructed to replace MW-2.

53. After closing and sealing MW-1 and 2, additional groundwater sampling was performed on May 23, 1985. (N.T. 891 and Ex.C-8 and C-9). Sampling was taken at MW-1-B, 2-A, 3, 4, 5, 6 and several private wells off the landfill site.

54. The only on-site well indicating reliable levels of pollutants was MW-1-B. (Ex.C-8 and C-9)

55. The May 21, 1985, sampling of MW-1-B revealed the presence of trans-1,2-dichloroethylene in the range of 24-30 µg/l and vinyl chloride in the range of 13-14.5 µg/l. Toluene was also detected at concentrations in excess of 35 µg/l. (Ex.C-8 and C-9)

56. Groundwater samples taken from wells on nearby properties revealed some contamination; however, the pollutants discovered had a different "fingerprint" from the pollutants found in MW-1-B and cannot be attributed to the landfill. (N.T. 1164-1166)

57. Surface water samples taken on July 28, 1985, did not reveal any reliable levels of pollutants. (Ex.C-10 and C-11)

58. In all cases, the contaminants found in MW-1 and 2 (or 1B and 2A) are not also found in MW-3 and 4 to the north, the direction of groundwater flow. (Ex.C-8, C-9, C-10, and C-11)

59. Toluene, the compound consistently discovered in MW-1-B, is a common component of gasoline.

60. Vinyl chloride and trans-1,2-dichloroethylene are gases which are common constituents of the gases vented and discharged from municipal waste landfills. (N.T. 1166 and 1189-1192)

61. A gas venting system was part of the approved plans for the site. In August, 1984, the Department filed a complaint before a District Justice alleging 13 violations by NSL, including a failure to install a portion of the venting system located in the northernmost portion of the site. After hearing, the District Justice found in favor of the Department on only one of the alleged violations, namely the failure to install the venting system in the northernmost area of the site. (N.T. 40-41, 105, and 586 and Ex.A-4)

62. Subsequently, NSL proceeded to install the gas venting system in

the designated area of the site. In addition to the portions of the venting system constructed as of this date, there are additional perimeter portions of the gas venting system which have not been completed. (N.T. 623-625)

63. MW-1-B is venting gas from the landfill at a rate of between 1000 and 2000 cubic feet per day. (N.T. 1200)

64. The gases vinyl chloride and trans-1,2-dichloroethylene, when confined over a period of time, are soluble in surface water. (N.T. 1189-1191 and 1201)

65. The contamination discovered during the testing of MW-1 and 2 is not the result of a breakdown in the natural renovation process at the landfill, but rather, the toluene contamination is the result of gasoline mixing with surface water runoff from the access road near MW-1 and 2 which penetrated the defective and outdated casing in MW-1 and 2, while the vinyl chloride and trans-1,2-dichloroethylene contamination is the result of these gases becoming soluble in the surface water in MW-1 and 2.

66. In July and August, 1985, it was discovered that MW-1-B was dry. (N.T. 1008-1011, 1021, and 1084)

67. With the exception of MW-1-B, the present groundwater monitoring system is adequate to provide accurate appraisals of the status of the groundwater quality at the NSL.

68. With the exception of the area surrounding MW-1-B, the gas venting system is adequate at NSL.

69. The 1:1 ratio of renovating soil to trash, as required by the permit, was maintained in the excavation and filling of Trenches 1-4. (N.T. 516-517)

70. Daily cover is to be applied at the end of the working day to exposed refuse. (N.T. 692)

71. The Department inspector normally visited NSL between 12:00 and 1:00 p.m. (N.T. 691-695)

72. NSL closes at 5:00 p.m. daily. (N.T. 691)

73. A final minimum uniform two foot layer of compacted cover material must be placed on the surface of each trench upon closure. (Ex.C-5)

74. Adequate final cover was initially placed on the area fill portion of the site and Trenches 1-3; however, this cover was subsequently disturbed by a combination of storm water and NSL machinery. (N.T. 62 and 691-695). Uniform final cover does not exist on the site.

75. The surface water management system on the site consists of a stormwater basin in the southern portion of the site. (N.T. 63 and Ex.A-11). A system of swales and berms is utilized to keep stormwater from escaping the site. (N.T. 66)

76. A partially implemented plan devised by NSL utilizes a system of dual basins in the southern corners of the site to augment the volume of stormwater that can be managed at the site. (N.T. 66 and 104)

77. Stormwater escaped from the site on one occasion, due to an intense storm which caused a berm to erode. Moreover, the area surrounding the site was flooded. (N.T. 63)

78. NSL repeatedly attempted to vegetate closed areas of the landfill. Extremely wet weather resulted in the vegetation either not germinating or being washed away. (N.T. 103)

79. Portions of the landfill remain unvegetated.

80. NSL submitted an erosion and sedimentation control plan to DER in January, 1984. (N.T. 57-58 and Ex.A-9)

81. The Department first claimed that the plan was never submitted, yet eventually admitted it received the plan in January, 1984. (N.T. 58)

82. The Department failed to accept, reject, or respond to the plan until September, 1985, when it presented written comments to NSL prior to the September 5, 1985 hearing. (N.T. 104 and Ex.C-19)

83. There was no evidence of malodors leaving the NSL site. (N.T. 536)

84. Louis J. Novak has been cooperative in complying with Department requests regarding the landfill.

DISCUSSION

NSL is a solid waste disposal facility located in South Whitehall Township, Lehigh County. The property upon which the landfill lies is owned jointly by Louis J. and Hilda Novak, husband and wife, and president and secretary, respectively, of NSL (hereinafter collectively referred to as Novaks). The landfill, permitted by the Department in 1972, is divided into three separate areas--a demolition fill section, an area fill section, and a trench fill section.

After filling the area fill section to capacity in 1982, the Department directed NSL to begin disposing of waste in the trench fill section. The trench fill section consists of a group of five adjacent trenches in the southern portion of the landfill which are separated from each other by a minimum of eight feet. Each trench is numbered sequentially, with Trench 1 being the northern-most trench and Trench 5 being the southern-most trench. NSL first began disposing of waste in Trench 2, and, after that was filled, moved to Trench 1, and, thereafter, progressed sequentially southward.

The Department was present at the opening excavation and final closure of Trenches 1 through 3. The Department was notified of the

excavation of Trench 4; however, it chose not to attend. On December 13, 1984--after Trench 4 had been closed, yet before the final Trench 5 was to be excavated--the Department issued an order and civil penalty assessment to NSL directing, inter alia, NSL to cease all solid waste disposal operations, initiate final closure of the landfill, complete installation of a gas venting system, provide further groundwater sampling and present a hydrogeological study, implement an erosion and sedimentation plan, post a bond in the amount of $300,000, and finally, pay a $46,000 civil penalty assessment. NSL responded by denying all of the Department's allegations of violations, asserting that the landfill was in substantial compliance with all rules and regulations of the Department. Moreover, NSL disputed the Department's contention that Trench 5 was outside the boundaries of the permitted area and argued that the bonding requirements were not applicable to its operation.

Because this is an appeal of an order, the Department bears the burden of proof under 25 Pa.Code §21.101(b)(3). FR&S, Inc. v. DER, EHB Docket No. 83-093-M (Adjudication issued June 16, 1987). In reviewing the action of the Department, our duty is to determine whether the Department's action is supported by substantial evidence and whether it is arbitrary, capricious or unreasonable. If the Department is acting pursuant to a mandatory provision of statute or regulation, our only task, after evaluating the evidence, is to either uphold or vacate the Department's action. But, if the Department is acting under a grant of discretionary authority, we may, based on the record before us, substitute our discretion for that of the Department. Warren Sand & Gravel Co., Inc. v. DER, 20 Pa.Cmwlth.186, 341 A.2d 556 (1975). The issuance of orders under the Solid Waste Management Act and the Clean Streams Law is a discretionary act. Therefore, should we find

that the Department abused its discretion, we may substitute our own.

Individual Liability of Louis J. and Hilda Novak

The Department seeks to have the Board hold Louis J. and Hilda Novak individually and personally liable under the order. Louis J. and Hilda Novak are husband and wife and own the land upon which the landfill lies. Louis Novak is the president of NSL and manager of the landfill, while Mrs. Novak serves as secretary (Findings of Fact 2 and 3).

Corporate officers may be held personally liable under the Solid Waste Management Act and the Clean Streams Law, despite the fact that the corporation may also be found liable. Personal liability of corporate officers may be established under two theories--piercing the corporate veil or participation in the action by the officer. DER v. Lucky Strike Coal Company and Louis J. Beltrami, supra.

In order to pierce the corporate veil, the Department must establish that "The corporation was an artifice and a sham designed to execute illegitimate purposes in abuse of the corporate fictim and the immunity it carries." Zubik v. Zubik, 384 F.2d 267, note 2 (3d Cir.1967), cert.denied, 390 U.S.988 (1968). To do so, the Department must present evidence of the sort summarized in U. S. v. Pisani, 646 F.2d 83 (3d Cir.1981), as:

> Whether the corporation is grossly undercapitalized for its purpose...failure to observe corporate formalities, non-payment of dividends, the insolvency of the debtor corporation at the time, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of corporate records and the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders.

The Superior Court has recently stated in Burton v. Boland, ___ Pa.Super.___, 489 A.2d 243 (1985) that

> Even when a corporation is owned by one person or

> family, the corporate form shields the invididual members of the corporation from personal liability and will be disregarded only when it is abused to permit perpetration of a fraud or other illegality.

Because the Department did not present any evidence regarding the corporate veil theory, we will not look behind the corporate persona in an attempt to establish Louis J. and Hilda Novak's individual liability.

We must then examine the degree of participation of the Novaks in the violations complained of by the Department. In John E. Kaites, et al. v. DER, 1986 EHB 234, we analyzed liability of corporate officers under the "participation" theory. Analogizing to tort law, we stated that an officer is personally liable if his actions actually further the alleged violations. We held that although an officer cannot be held liable for mere nonfeasance, a conscious decision to pursue a certain course of conduct, accompanied by an order implementing that decision, can be sufficient "participation" to establish personal liability. The Board also in Kaites recognized corporate officer liability under the "participation" theory on the basis of a violation of a statutorily created duty, such as under §501 of the Solid Waste Management Act, following the reasoning enunciated in U.S. v. Park, 421 U.S. 658 (1975). The Commonwealth Court has recently overturned this expansive view of corporate officer liability in John E. Kaites, et al. v. DER, No. 1061 C.D. 1986 (Pa.Cmwlth., filed August 6, 1987) wherein it held that evidence of misconduct or intentional neglect is necessary before individual liability will be imposed on a corporate officer under the participation theory.

The Department's post-hearing brief did not contain any arguments relating to the Novaks being held personally liable under the participation theory. Therefore, the Department is deemed to have abandoned this argument.

William J. McIntire Coal Company, Inc., et al. v. DER, 1986 EHB 969. But, even if the Department had not waived this issue, the evidence produced at the hearing does not rise to the level necessary to establish personal liability. The evidence regarding Hilda Novak is virtually non-existent, as it is confined to her co-ownership of the property, her title of corporate secretary, and her performance of clerical duties. Evidence regarding Louis J. Novak, Sr. is very weak. Rather than proving that Mr. Novak violated the Solid Waste Management Act and the Clean Streams Law through either misconduct or intentional neglect, testimony of Department officials characterized Mr. Novak's conduct as being cooperative, much as John E. Kaites' conduct was characterized by the Commonwealth Court in its recent opinion. Since we do not hold the Novaks personally liable, the remainder of the adjudication will refer solely to NSL.

Propriety of the Department's Closure Order

In its December 13, 1984, order and civil penalty assessment, the Department alleged numerous violations of the Solid Waste Management Act, the Clean Streams Law, and 25 Pa.Code §§75.1 et seq. and 102.1. More specifically, the Department alleged that NSL exceeded both the vertical elevations and horizontal boundaries allowed by the permit, polluted the groundwater at the site, failed to implement a proper groundwater monitoring system, failed to provide adequate daily and final cover on the landfill, inadequately managed surface water on the site, did not provide an erosion and sedimentation plan and failed to properly grade or vegetate the site, failed to install a gas venting system, and finally, failed to post a bond for closure of the site. Each of these violations will be addressed individually below.

Lateral Boundaries and Vertical Elevations

The Department alleges that the trench fill section of the landfill, as presently staked out, extends beyond the boundaries set forth in the permit and that NSL has filled above the elevation limits directed in NSL's 1972 permit and plans in violation of §§201(a), 610(1), 610(2), and 610(4) of the Solid Waste Management Act. Section 201(a) of the Solid Waste Management Act prohibits the disposal of municipal waste unless authorized by a permit or the rules and regulations of the Department. Sections 610(1), (2) and (4) declare that it is unlawful for a person to

> (1) Dump or deposit, or permit the dumping or depositing, of any solid waste onto the surface of the ground or underground or into the waters of the Commonwealth, by any means, unless a permit for the dumping of such solid wastes has been obtained from the department; provided, the Environmental Quality Board may by regulation exempt certain activities associated with normal farming operations as defined by this act from such permit requirements.
>
> (2) Construct, alter, operate or utilize a solid waste storage, treatment, processing or disposal facility without a permit from the department as required by this act or in violation of the rules or regulations adopted under this act, or orders of the department, or in violation of any term or condition of any permit issued by the department.
>
> * * * * *
>
> (4) Store, collect, transport, process, treat, or dispose of, or assist in the storage, collection, transportation, processing, treatment, or disposal of, solid waste contrary to the rules or regulations adopted under this act, or orders of the department, or any term or any condition of any permit, or in any manner as to create a public nuisance or to adversely affect the public health, safety and welfare.
>
> * * * * *

NSL denies that it has exceeded the lateral boundaries of its permit area, but admits to minor violations of the elevation limits.

The plans submitted by NSL to the Department as part of the 1972 permit application contained vague lateral boundaries. The only specific limitation was a 200 foot setback from the southern boundary of the landfill

to the southernmost trench, Trench 5. At the hearing, the Department alleged that, according to measurements taken from P.P.& L. electric poles on the plan, NSL was now in violation of the 200 foot setback requirement. NSL denied this charge and argued that the P.P.& L. poles could not be used as a point of reference because their exact location had not been precisely determined on the 1972 plans.

In an attempt to resolve this conflict, the parties stipulated to have a survey performed during the course of the hearings. (Ex.S-1) The results of the survey indicate that Trench 5 does not violate the 200 foot setback requirement. The Department disputed the results of the survey, and continued, however, to assert that, in relation to the P.P.& L. poles, NSL is beyond the boundaries of the permitted area. The Department, which carries the burden of proof, failed to provide any convincing or credible evidence that the P.P.& L. poles were intended by the parties to control the lateral borders of the site. The Department relied heavily on the testimony of a Mr. Rajkotja here, but we must accord little weight to his testimony because of his lack of expertise in surveying. This is a case where the boundaries of the landfill as established on the initial permit and plans were imprecise and the Department is attempting to establish reference points after the fact. Based on the evidence before us, we cannot conclude that NSL is violating its permit boundaries.

Groundwater Monitoring System

Paragraph I of the Department's order alleged that NSL's groundwater monitoring system "is inadequate under the requirements of the Solid Waste Act and the Clean Streams Law." The Department further alleged that MW-5 and 6 were not installed prior to deposition of solid waste in the trenches, as required by the permit, and that sampling results have not been submitted to

the Department.

We are unaware of any specific requirements relating to the adequacy of groundwater monitoring systems in either the Clean Streams Law or the Solid Waste Management Act, so it is our belief that the Department was, in reality, citing NSL for violations of its permit, which contained terms and conditions relating to monitoring.

We have found that MW-5 and 6 were not installed until November, 1984 (Finding of Fact 45) and that the construction of the upgradient monitoring wells (MW-1 and 2) was deficient (Finding of Fact 43). However, by virtue of an agreement between the parties after the January, 1985, hearings, MW-1 and 2 were replaced by MW-1-B and MW-2-A (Findings of Fact 51 and 52). Subsequently, MW-1-B went dry (Finding of Fact 66), and, with its exception, the monitoring system is adequate.

Therefore, we must conclude that the terms and conditions of NSL's permit were not complied with, to the extent that an additional upgradient monitoring well is necessary.

Groundwater Pollution

The Department's order contends that NSL is causing groundwater pollution as a result of its "excessive" deposits of waste. We find that the Department has not presented substantial evidence in support of its contention and has therefore failed to satisfy its burden of proof in this issue.

Despite the deficiencies in the monitoring wells, we can hardly conclude that groundwater pollution, much less contamination, is occurring when there is no reliable evidence of any parameters commonly attributable to landfills. The essence of the Department's argument is that because the Department has established that NSL has exceeded the vertical elevations in its permit and there are some deficiencies in its groundwater monitoring

system, it naturally follows that NSL is causing or threatening to cause groundwater pollution. We cannot reach our findings on the basis of blind faith or tortured or simplistic logic; we require substantial evidence which, in this case, the Department has failed to provide us.

Final Cover and Grading

Paragraph K of the Department's order alleged that completed portions of NSL had not received proper final cover and were not adquately graded and vegetated, in violation of 25 Pa.Code §§75.24(c)(2)(xxi) and (xxii), 75.26(o) and 75.26(p).

Sections 75.24(c)(2)(xxi) and (xxii) provide as follows:

> (c) Phase II. Application Design Requirements
>
> * * * * *
>
> (2) Design criteria
>
> * * * * *
>
> (xxi) A final layer of cover material, compacted to a minimum uniform depth of two feet and having the characteristics specified in (ix) of this section shall be placed over the entire surface of each portion of the final lift.
>
> (xxii) The final cover layer shall be compacted within two weeks after placement of solid waste in the final lift. Completion shall include permanent stabilization of all slopes.

These requirements, although contained in a permit application regulation, are operational requirements.[1] However, the title of a regulation is not necessarily controlling in its interpretation. §1924 of the Statutory Construction Act, 1 Pa.C.S.A. §1924. It is clear that 25 Pa.Code §§75.26(o) and (p), which state that

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[1] We have previously pointed out similar difficulties with the Department's application of Chapter 75 in Globe Disposal et al. v. DER, 1986 EHB 891 and FR&S, Inc. v. DER, supra.

(o) Completed portions of the landfill shall be graded as specified in this Chapter (relating to drainage of surface water) within two weeks of completion.

(p) Seed bed preparation and planting operations to promote stabilization of the final soil cover shall be done as soon as weather permits and seasonal conditions are suitable for the establishment of the type of vegetation to be used. Reseeding and maintenance of cover material shall be mandatory until adequate vegetative cover is established in PennDOT Form 408 or the current "Agronomy Guide" of the College of Agriculture, Pennsylvania State University, may be utilized.

are operational in nature.

We have found that, although adequate final cover may have initially been placed on the area fill and Trenches 1-3, it was disturbed and does not exist in a uniform condition across the site (Finding of Fact 74). Furthermore, portions of the landfill were not revegetated and others were not successfully revegetated (Findings of Fact 78 and 79). As a result, violations of 25 Pa.Code §§75.24(c)(2)(xxi), 75.24(c)(2)(xxii), 75.26.(o) and 75.26(p) and §§610(2), (4), and (9) of the Solid Waste Management Act occurred at NSL.

Surface Water Management

Section 75.24(c)(2)(xviii) of the Department's regulations provides

that:

> (c) Phase II. Application Design Requirements
>
> * * * * *
>
> (2) Design criteria
>
> * * * * *
>
> (xviii) The site shall be designed and operated in a manner which will prevent or minimize surface water percolation into the solid waste material deposits.

Paragraph L of the Department's order alleges that NSL has violated this regulation and §§610(2), (4), and (9) of the Solid Waste Management Act because improper grading has resulted in ponding of surface water at the site.

We have some of the same difficulties with the Department's citation of §75.24(c)(2)(xviii) as we did with its citations of §§75.24(c)(2)(xxi) and (xxii), largely due to the organization and drafting of Chapter 75. However, despite being placed in a design requirement regulation, subsection (c)(2)(xviii) does directly relate to operation of the site. We have found that NSL has not fully implemented its surface water management system, thereby resulting in problems at the site (Findings of Fact 75 and 76). Therefore, we find that NSL has violated §§610(2), (4) and (9) of the Solid Waste Management Act and 25 Pa.Code §§75.24(c)(2)(xviii).

Erosion and Sedimentation Control Plan

The Department's order cited NSL for failing to have an erosion and sediment control plan, in violation of the Clean Streams Law and 25 Pa.Code §102.4. The pertinent subsection of §102.4, subsection (a), provides that:

> (a) All earthmoving activities within this Commonwealth shall be conducted in such a way as to prevent accelerated erosion and the resulting sedimentation. To accomplish this, except as provided in subsection (b) of this section, any landowner, person, or municipality engaged in earthmoving activities shall develop, implement, and maintain erosion and sedimentation control measures which effectively minimize accelerated erosion and sedimentation. These erosion and sedimentation

> measures shall be set forth in a plan as set forth in §102.5 of this title (relating to erosion and sedimentation control plan) and be available at all times at the site of the activity. The Department or its designee may, at its discretion, require this plan to be filed with the Department or its designee.

That NSL is being charged with a violation of this regulation is somewhat astounding in light of the evidence that such a plan did exist and was submitted to the Department in January, 1984 (Findings of Fact 80 and 81). We cannot sustain the Department's order as it relates to 25 Pa.Code §102.4.[2]

Gas Venting System

The Department's order alleged that NSL had violated the terms and conditions of its permit by not completing the installation of a gas venting system. We have found that NSL did fail to install the gas venting system provided for in its permit in the northernmost portion of the site (Finding of Fact 61) and in certain portions of the site's perimeter (Finding of Fact 62). Therefore, NSL has violated §§610(2), (4), and (9) of the Solid Waste Management Act.

Adequate Daily Cover

Section 75.26(1) of the Department's regulations states that "a uniform six inch compacted layer of daily cover material shall be placed on all exposed solid waste at the end of each working day." Paragraph 0 of the Department's order alleged that NSL, on 18 occasions between March 12, 1982 and December 7, 1984, failed to provide adequate daily cover material.

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[2] While there is no requirement in Chapter 102 that erosion and sediment control plans be reviewed by the Department or its designee--only that the plan be filed, if requested--we find it even more unusual that the Department required nearly two years to even react to NSL's erosion and sediment control plan. We note also that the only issue regarding NSL's erosion and sediment control plan was whether it possessed the plan, and not the plan's adequacy.

While we recognize that the customary working hours of most Department employees are from 8:00 a.m. to 4:00 p.m., we are extremely reluctant to hold NSL liable for violations of 25 Pa.Code §75.26(1) when most of the inspections upon which these violations were based were conducted between 12:00 p.m. and 1:00 p.m. We are not suggesting that Department inspectors must work overtime in order to prove violations of 25 Pa.Code §75.26(1). However, there are other means--such as conducting inspections at the beginning of the working day--to establish violations of this regulation. We cannot hold that the Department proved any violations of §75.26(1) under the circumstances of this appeal.

Bonding Requirement

The Department's order alleged that "Novak has not filed a collateral bond for the land occupied by the Novak Landfill as required Section 505(a)." It went on to require that

> By no later than December 31, 1984, Novak shall submit to the Department an acceptable bond on forms provided by the Department for the closure of Novak Landfill. The bond shall comply with the requirements of Section 505 of the Solid Waste Act, shall be in the amount of $300,000.00 and shall name the Commonwealth of Pennsylvania as obligee.

NSL argues that the bonding requirement in the order is a prohibited retroactive application of the statute, that it conflicts with the requirements of 25 Pa.Code §101.9, and that the Department is estopped from applying a bonding requirement to NSL. The legal arguments aside, NSL also contested the area used to calculate the bond, asserting that the mine area fill and the area fill should not, as the Department suggests, be used to calculate the amount.

The Department offered little in the way of legal argument to

support its bonding requirement. Because the permit was modified in 1982, the Department opines that its 1984 bonding requirement is properly based on authority in the 1980 Solid Waste Management Act. The Department also justified the amount of the bond by advancing the argument that the NSL consultant believes it is proper, if not substantial enough.

The Solid Waste Management Act, although enacted primarily to secure hazardous waste primacy for the Commonwealth under the federal Resource Conservation and Recovery Act, 42 U.S.C.§6901 et seq., also contained a scheme for regulation of municipal and residual waste. The statutory provision relevant to the issue now before us is §505, which reads in pertinent part that:

> (a)...[p]rior to the commencement of operations, the operator of a municipal or residual waste processing or disposal facility...for which a permit is required by this section shall file with the department a bond for the land affected by such facility on a form prescribed and furnished by the department... The department may require additional bond amounts for the permitted areas should such an increase be determined by the department to be necessary to meet the requirements of this act...
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> * * * * *
>
> (c) The operator shall, prior to commencing operations on any additional land exceeding the estimate made in the application for a permit, file an additional application and bond. Upon receipt of such additional application and related documents and information as would have been required for the additional land had it been included in the original application for a permit and should all the requirements of this act be met as were necessary to secure the permit, the secretary shall promptly issue an amended permit covering the additional acreage covered by such application, and shall determine the additional bond requirement therefor.
>
> * * * * *

Recognizing that a comprehensive solid waste management regulatory program could not be implemented immediately, §1001 of the Solid Waste Management Act

stated:

> The Act of July 31, 1968 (P.L.788, No.241), known as the "Pennsylvania Solid Waste Management Act," is repealed: Provided, however, that all permits and orders issued, municipal solid waste management plans approved, and regulations promulgated under such act shall remain in full force and effect unless and until modified, amended, suspended or revoked.

We must now determine whether the Department's application of bonding requirements based on §505 of the Solid Waste Management Act conflicts with the savings clause in §1001 of the statute. We believe that it does.

The General Assembly was clear in expressing its intent that the framework of permits and regulations existing at the time of passage of the 1980 statute remain in place until a new scheme of regulations was adopted after careful thought and deliberation. One of the applicable regulations adopted under the 1968 statute was 25 Pa.Code §75.22(d), which provided that "When the Department has determined that the application is completed and that the proposed design meets the requirements of the pertinent regulations and acts, a permit will be issued." A "pertinent" regulation was 25 Pa.Code §101.9, which was adopted on May 5, 1978. The relevant portions of 25 Pa.Code §101.9 read as follows:

> §101.9. Bonding requirements for solid waste facilities.
>
> (a) The applicant shall provide as a part of his application for a permit, a bond sufficient to assure closure and final closure of the permitted site in a manner that will abate and prevent pollution of the waters of this Commonwealth. The bond or cash guarantee or performance shall be as set forth in this section. Closure is that condition in which a permitted site is no longer utilized for the disposal or processing of waste. In the case of landfills, closure is when final cover has been placed in accord with Departmental regulations and certified through inspection by the Department. In the case of processing facilities,

closure is when waste is removed from the facility and so certified by Departmental inspection. Final closure is when a facility has been certified by the Department as in compliance with applicable Departmental regulations.

(b) The provisions of this section may not be applicable to the following:

(1) Permittees and permit applicants which are municipalities or municipal authorities.

(2) Those facilities under permit on January 1, 1978. However, those facilities under permit on January 1, 1978 and currently bonded may elect either to continue their current bonding requirements or be governed by the provisions of this section.

(3) Those disposal facilities constructed in mines.

(4) Those disposal facilities accepting only Class I and Class II demolition waste.

(c) The bond may consist of surety or collateral bonds or a cash deposit in escrow.

(1) Surety bonds shall be acceptable when provided by a surety company licensed to conduct business in this Commonwealth.

(2) Collateral bonds shall be on a form provided by the Department and shall be accompanied by negotiable bonds of the United States Government or the Commonwealth, the Turnpike Commission, the General State Authority, the State Public School Building Authority or a municipality within this Commonwealth, by bank savings accounts or certificates of deposit properly assigned to the Secretary and with approval of the assignment by the bank; or by certified, cashier's or trust company's treasurer's check in accordance with the provisions of this section.

(d) Types of facilities requiring bond are as follows:

(1) Sanitary landfills utilizing natural renovation.

* * * * *

(e) Bonding payments shall be made in initial payments and year-end payments.

(1) Initial bonding payments, which are the bonds in the amounts required under the applicable provisions of this section, shall be delivered to the appropriate agent of the Commonwealth at least 10 calendar days prior to the issuance date of the solid waste management permit. The Departmental permits may not be released until an acceptable bond is presented.

(2) Year-end bonding payments, which are those bond amounts due annually as required under the applicable provisions of this section, shall be delivered to the appropriate agent of the Commonwealth no later than 45 calendar days following the anniversary date of the

> solid waste management permit issuance. Failure to provide the year-end payment in a timely manner may result in a suspension, modification, or revocation of the facility permit.
>
> (f) Bonding schedules shall comply with the following:
>
> (1) Natural renovation landfills. The initial bond payment shall be in the amount of $7,500. The year-end bond payments shall be in the amount of $5,000 per acre utilized for the deposit or storage of solid waste during the previous year. The $5,000 amount shall be applied to an acre one time only. When the Department certifies that the permitted site area has been properly closed in accordance with Departmental regulations, an amount of 70% of the amount on deposit with the Department will be released immediately. The remainder, 30%, will be retained for an additional 5-year period following closure and then released after final closure if no further remedial action is required, or forfeited if required action is not undertaken. Remedial action shall mean those activities necessary to maintain a site as required by Departmental regulations.

This regulation has not been modified or repealed, except as it related to hazardous waste facilities, since its adoption. Thus, by virtue of the application of the savings clause in the Solid Waste Management Act, any bond required of NSL should have been required under 25 Pa.Code §101.9.

Having now decided that 25 Pa.Code §101.9 would be applicable to any bonding required of NSL, we now turn to a determination of the area of NSL to which the bond should be applied. Neither party provides us with any legal support for its position regarding the area to be covered by the bond. And, the regulation provides us with no guidance. The NSL permit was originally issued on March 24, 1972 (Finding of Fact 5). The language of 25 Pa.Code §101.9(b)(2) is rather confusing as it relates to facilities pre-dating the regulation. On one hand, the first sentence conveys the impression that facilities permitted before January 1, 1978 are not subject to a bonding requirement. However, the second sentence seems to indicate that bonding requirements were in existence prior to the adoption of 25 Pa.Code

§101.9. We are aware of no regulation predating 25 Pa.Code §101.9, so any such requirements must have been imposed as a matter of discretion. In any event, the Department did not impose any bonding requirement on NSL until the issuance of the order. Although the Department cannot be estopped from enforcing a lawful regulation because of its prior laxity in enforcement, Lackawanna Refuse Removal, 65 Pa.Cmwlth.372, 442 A.2d 423 (1982), we are reluctant in light of the ambiguous language of 25 Pa.Code §101.9 to hold that the amount of the bond should be based on the acreage of the mine area fill, the area fill, and the trench area. Rather, we will hold that the amount of the bond be calculated on the basis of the area devoted to trench fill. While we have some difficulty with the result, we have no difficulty with acknowledging that we are without authority to act in a quasi-legislative capacity and amend or repeal 25 Pa.Code §101.9 to comprehensively address bonding of municipal and residual waste disposal facilities.

Remedial Action Directed by the Department

In light of our holdings that the Department has abused its discretion in several respects in the issuance of this order, particularly those relating to the most serious allegations in the order, we believe that the cessation of all solid waste disposal activities at NSL is a harsh result. We will enter an order which will, inter alia, permit NSL to complete filling Trench 5.

There are outstanding petitions for supersedeas, and because of our partial adjudication, we will supersede NSL's civil penalty assessment pending a hearing and adjudication on whether the amount of the Department's assessment was an abuse of discretion.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the subject matter and parties

to this appeal. §1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended 71 P.S. §510-21.

2. The Board may adjudicate a matter on the basis of a cold record. DER v. Lucky Strike Coal Company and Louis J. Beltrami, EHB Docket No. 80-211-CP-W (Adjudication issued April 22, 1987).

3. The Department has the burden of proof in an appeal of a closure order issued pursuant to the Solid Waste Management Act. 25 Pa.Code §21.101(b)(3).

4. In reviewing actions of the Department the Board must determine if the Department has abused its discretion by acting arbitrarily, capriciously or unreasonably or contrary to law. Warren Sand & Gravel Co., Inc. v. DER, 20 Pa.Cmwlth.186, 341 A.2d 556 (1975).

5. Where the Department has taken a discretionary action, such as the issuance of an order, the Board may substitute its discretion for that of the Department, if the Board determines that the Department has abused its discretion. Warren Sand & Gravel Co., Inc. v. DER, 20 Pa.Cmwlth.186, 341 A.2d 556 (1975).

6. Corporate officers may be held personally liable for violations of the Solid Waste Management Act and the Clean Streams Law either through piercing the corporate veil or establishing their participation in the violations. John E. Kaites, et al. v. DER, No. 1061 C.D. 1986 (Pa.Cmwlth., Filed August 6, 1986).

7. The Department failed to present any evidence regarding piercing the corporate veil of NSL. Therefore, it failed to satisfy its burden of proof and the Novaks, therefore, cannot be held personally liable for violations of the Clean Streams Law and the Solid Waste Management Act under this theory.

8. Because the Department did not argue the participation theory of corporate officer personal liability in its post-hearing brief, it abandoned the issue. William J. McIntire Coal Company, Inc. et al. v. DER, 1986 EHB 969.

9. Even if the Department had not waived the issue of the Novaks' personal liability under the participation theory, the Department failed to present sufficient evidence to establish the Novaks' individual liability.

10. NSL exceeded the vertical elevations of solid waste authorized by its solid waste management permit, in violation of §§201 and 610(1), (2), and (4) of the Solid Waste Management Act.

11. The Department failed to prove by substantial evidence that NSL had exceeded the lateral boundaries of its permit.

12. Because of the failure of MW-1-3, NSL has not complied with the terms and conditions of its permit, in violation of §§610(2), (4), and (9) of the Solid Waste Management Act.

13. The Department has failed to prove by substantial evidence that NSL is polluting the groundwater, in violation of the Clean Streams Law and the Solid Waste Management Act.

14. Completed portions of NSL have not been properly graded, covered, and vegetated as required by the permit and 25 Pa.Code §§75.24(c)(2)(xxi), 75.24(c)(2)(xxii), 75.26(o) and 75.26(p) and §§610(2), (4), and (9) of the Solid Waste Management Act.

15. NSL failed to implement an adequate surface water management system, in violation of 25 Pa.Code §75.24(c)(2)(xviii) and §§610(2), (4), and (9) of the Solid Waste Management Act.

16. NSL possessed an erosion and sediment control plan as required by §402 of the Clean Streams Law and 25 Pa.Code §102.4.

17. NSL failed to complete the installation of the gas venting system set forth in its permit, in violation of §§610(2), (4) and (9) of the Solid Waste Management Act.

18. The Department failed to establish through the production of substantial evidence that NSL violated 25 Pa.Code §75.26(e).

19. The savings clause in §1001 of the Solid Waste Management Act, 35 P.S. §6018.1001, preserved 25 Pa.Code §101.9 as it related to non-hazardous solid waste.

20. The Department's imposition of a bonding requirement on NSL under §505 of the Solid Waste Management Act, rather than 25 Pa.Code §101.9, was an abuse of discretion.

21. Because the Department has abused its discretion in several respects in the issuance of this order, the Board will substitute its discretion for the Department's and enter the following order

O R D E R

AND NOW, this 13th day of August, 1987, it is ordered that:

1) The appeals of Louis J. Novak, Sr. and Hilda Novak are sustained.

2) The appeal of NSL is sustained in part and denied in part.

a) NSL may complete the filling of Trench 5;

b) The overfill from Trench 4 shall be removed and properly disposed of in Trench 5;

c) The gas venting system near MW-1-B shall be completed in accordance with the 1982 plans;

d) MW-1-B shall be replaced and monitoring reports shall be submitted to the Department in accordance with the requirements of

the NSL permit;

e) NSL shall properly grade, cover, and vegetate those areas which have been completed;

f) NSL shall fully implement the dual basin surface water management plan; and

g) Within 90 days of the date of this order, NSL shall submit a bond in accordance with 25 Pa.Code §101.9, which bond shall cover the trench fill area of NSL.

3) NSL's obligation to pay the civil penalty assessment imposed by the order is superseded pending a hearing and adjudication on the propriety of the amount of the assessment.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: August 13, 1987

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