

03-1566-CD
CHESTER A. OGDEN VS. COMMONWEALTH OF PENNA. DEPT. OF ENVIRONME

Date: 12/05/2003

Clearfield County Court of Common Pleas

User: BANDERSON

Time: 11:22 AM

ROA Report

Page 1 of 1

Case: 2003-01566-CD

Current Judge: J. Michael Williamson

Chester A. Ogden vs. Commonwealth of Pennsylvania Department of Environ

Civil Other

Date	Judge	
10/17/2003	Filing: Civil Complaint Paid by: Ogden, Chester A. (plaintiff) Receipt number: 1867754 Dated: 10/17/2003 Amount: \$85.00 (Cash) 3 cert. to Plaintiff	No Judge ✓
11/05/2003	Sheriff Returns: Dauphin County Sheriff served Defendant Comm. of PA October 28, 2003. So Answers, Chester A. Hawkins, Sheriff by s/Marilyn Hamm \$37.97 Shff Hawkins \$25.50 Dauphin Co. Shff-paid by Plaintiff	No Judge ✓
11/17/2003	Entry Of Appearance On Behalf Of the Commonwealth of Pennsylvania, Department of Environmental Protection. filed by, s/Dennis A.Whitaker no cc	No Judge ✓
11/21/2003	Commonwealth of Pennsylvania, Department of Environmental Protection's No Judge Preliminary Objections. filed by, s/Dennis A. Whitaker, Esquire no cc	
11/26/2003	ORDER, NOW, this 25th day of November, 2003, re: CA of Clearfield County to refer theaboe-captioned civil matter to Administrative Regional Unit II for assignment of a specially presiding judicial authority. by the Court, s/JKR,JR.,P.J. 1 ccC/A, 1 cc Atty Whitaker,1 cc Plff	No Judge ✓
12/05/2003	Commonwealth of Pennsylvania, Department of Environmental Protection's J. Michael Williamson Preliminary Objections. filed by, s/Dennis A. Whitaker, Esquire no cc	

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

CHESTER A. OGDEN, PRESIDENT *
COAL HILL CONTRACTING CO., INC. *
Plaintiff *
vs. * NO. 2003-1566 CD
*
COMMONWEALTH OF PENNSYLVANIA *
DEPARTMENT OF ENVIRONMENTAL PROTECTION *
Defendant *

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE . IF
YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE GO TO OR
TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU
CAN GET LEGAL HELP

William A. Shaw, Prothonotary/Clerk of Courts

Court House; First Floor
1 North Second Street

Clearfield, Pa. 16830

Phone: (814) 765-2641; Ext. 19

FILED

OCT 17 2003

072-451u

William A. Shaw

Prothonotary/Clerk of Courts

3 cent to Plaintiff

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

CHESTER A. OGDEN,
Plaintiff

vs.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Defendant

*
*
*
* NO. CD
* Trial by Jury
*
*

COMPLAINT

AND NOW, Comes the Plaintiff/Citizen, Chester A. Ogden, under law of the Constitution of The United States and law of Commonwealth of Pennsylvania and petitions Government for redress of grievance against above listed Defendant , whereof the following are statements:

1. The Plaintiff, Chester A. Ogden, is an adult individual engaged in the open -pit coal mining business since 1945 and residing at 512 Hartshorn Road, Clearfield, Pennsylvania 16830.
2. The Defendant, Commonwealth of Pennsylvania Department of Environmental Protection (DEP), is the regulator of the Surface Mining Conservation and Reclamation Act.

COUNT ONE

3. In 1974, Plaintiff submitted Application For Permit to DEP to conduct open pit coal mining on land of Chester A. Ogden, S.K. Williams, and Bellman Ogden in Lawrence Township, Clearfield County.
4. The Application contained evidence of the area of proposed mining being within the confines of a 90 acre site previously mined and unreclaimed, and Applicant/Coal Operator proposing to mine remaining coal and restore the (his) site "equal to or better than prior to mining condition".
5. Plaintiff/Coal Operator deposited Performance and Collateral Bonds with Defendant for the subject, Ogden # 8, (M.D.# 4574SM4) mining operation.
6. In January 1976, declining market for coal caused the operation to be temporarily shut down.

7. At time of shutting down the mine site, the operator's work area was "equal to or better than prior to mining condition", plus having restored 20 acres of previously mined land, as evidenced by information compiled by Hess & Fisher Engineers, Inc., Rick Vaow, Hydrogeologist dated April 21, 1982

8. In 1981, Defendant/ claimed the operator degraded the water supply of four residents and ordered the water replaced, under threat of bond forfeiture.

9. Plaintiff undertook immediate measures in compliance with the directive and employed two contractors to provide the complainants with "city water" from Clearfield Municipal Authority, at a cost of \$30,000.00

COUNT TWO

10. In 1975, Plaintiff submitted Application For Permit to DEP to conduct coal mining operations on land of Mitchell Estate in Bradford Township, Clearfield County

11. The Application For Permit contained evidence of the proposed mining site being subject of deep and surface mining throughout the past one hundred years and not reclaimed, and the Applicant/Coal Operator proposing to mine remaining coal and reclaim the (his) site "equal to or better than prior to mining condition".

12. Plaintiff/Coal Operator deposited Performance and Collateral Bonds with Defendant for the subject, Ogden # 9 (M.D. # 4474SM20, mining operation.

13. On September 29, 1979, declining market for coal caused the mining operation to be temporarily shut down, and with conditions at the site being "better than prior to mining condition", plus restoring additional 21 acres of previously mined land, as evidenced in information compiled by Hess & Fisher Engineers, (prior listed at 7).

14. On July 9, 1982, which was twenty-eight days after complying with directive to replace private water supply (prior stated at 8), DEP forfeited all bonding, \$59,640.00, and terminated the coal mining business of Coal Hill Contracting Co., Inc., License File No.1470 (see attached "Exhibit A").

15. The Defendant has knowingly, willfully, and intentionally committed a wrongful act in that record of the Plaintiff's mining activity is absent of evidence of harm to the environment or to person or property of another, and while also being in a position to know of the person's high moral standards.

16. The Defendant's failure to recognize Record of Plaintiff's high standards of mining and reclamation, as evidenced by conditions "Before" and "After" mining, and especially that of reclaiming an additional 69 acres of land previously mined by others, (evidenced by Hess & Fisher Engineers,Inc.) which otherwise would still exist and cost approximately \$700,000.00 to reclaim, and proceed with forfeiture of all bonding and termination of the business without lawful cause; it becomes evident of DEP officials violating personal honesty and ethics and acting contrary to public interest to the extent that it constitutes outrageous conduct, that is; that the circumstances are such that the bad motive or reckless indifference of the Defendant to the interest and rights of others may be readily inferred and for which punitive damages should be awarded in order to deter the Defendant and others from engaging in similar conduct in the future.

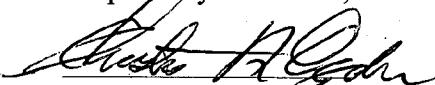
WHEREFORE, Plaintiff requests judgment in his favor and against Defendant for return of forfeited bonding, reimbursement of cost of water line construction, and interest thereof at prime rate from July 9, 1982 to date of settlement, as following indicated

Forfeited bonding.....	\$ 59,640.00
Water line construction cost.....	\$ 30,000.00
Interest @ prime 7/9/82 (computed) to 10/15/03 ..	\$ 562,445.07

\$ 652,085.07

And such other relief as the Court deems just, proper, and equitable.

Respectfully Submitted,


Chester A. Ogden
512 Hartshorn Road
Clearfield, Pa. 16830



THE COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
P. O. Box 2063 - Harrisburg, PA 17120

July 9, 1982

Area Code 717
787-4827

CERTIFIED MAIL NO. 5137121

Chester A. Ogden, President
Coal Hill Contracting Co., Inc.
P. O. Box 1001
Clearfield, PA 16830

Re: Coal Hill Contracting Co., Inc.
License File No. 1470

Dear Mr. Ogden:

The Bureau previously notified you of violations on your surface mine operation described for the permits in this letter. The violations have not been corrected. You failed and have continued to fail to correct the violations and to reclaim the areas you have affected in the course of surface mining operations. In accordance with Section 4(h) of the Surface Mining Conservation and Reclamation Act, the Department hereby certifies and declares forfeited the following bonds provided by you for the subject mining operations:

Performance and Collateral Bonds

(1) Mine Permit No. 1470-1

Surety Bond No. 217B6839, executed 8/7/74 with Change Rider dated 11/5/75 in the amount of \$11,500.00 with The Travelers Indemnity Co. on the property of S. K. Williams and Bellman Ogden in Lawrence Township, Clearfield County (M.D. #4574SM4).

(2) Mine Permit No. 1470-1(A)

Surety Bond No. 218B2244, executed 10/25/74 with Change Rider dated 11/5/75 in the amount of \$15,640.00 with The Travelers Indemnity Co. on the property of Bellman Ogden in Lawrence Township, Clearfield County (M.D. No. 4574SM4).

(3) Mine Permit No. 1470-1(A2)

Savings Certificate No. 977, executed 10/14/75 in the amount of \$2,400.00 drawn on Clearfield Bank & Trust Co., Clearfield, PA, payable to C. A. Ogden Company. Assigned to the Department of Environmental Resources on the property of Bellman Ogden in Lawrence Township, Clearfield County (M.D. #4574SM4).

(4) Mine Permit No. 1470-2

Savings Certificate No. 879, executed 7/14/75 in the amount of \$23,000.00 drawn on Clearfield Bank & Trust Company, Clearfield, Pa. payable to C. A. Ogden Company. Assigned to the Department of Environmental Resources on the property of Francis McGoey and John F. Mitchell in Bradford Township, Clearfield County (M.D. #4474SM20).

"Exhibit A"

Coal Hill Contracting Co., Inc.

July 9, 1982

(5) Mine Permit No. 1470-2(A)

Savings Certificate No. 879 on deposit under Mine Permit No. 1470-2 is also held for 20 acres at \$275.00 per acre \$5,500.00 for planting of Completion Report No. 2480016 on the property of Francis McGahey and John F. Mitchell in Bradford Township, Clearfield County (M.D. #4474SM20).

(6) Mine Permit No. 1470-2(A2)

Savings Certificate No. 879 on deposit under Mine Permit No. 1470-2 is also held for 10 acres at \$200.00 per acre \$2,000.00 for planting of Completion Report No. 2480016 on the property of Francis McGahey and John F. Mitchell in Bradford Township, Clearfield County (M.D. #4474SM20).

(7) Mine Permit No. 1470-3

Surety Bond No. 558E2324, executed 12/22/77 in the amount of \$7,100.00 with The Travelers Indemnity Co. on the property of John F. Mitchell and Francis McGahey in Bradford Township, Clearfield County (M.D. #4474SM20).

The Travelers Indemnity Company is being notified of the forfeiture action by copy of this letter, forwarded by certified mail.

This action of the Department may be appealable to the Environmental Hearing Board, Third Floor, 221 N. Second Street, Harrisburg, PA 17101, (717-787-3483) by any aggrieved person pursuant to Section 1921-A of the Administrative Code of 1929, 71 P.S. Section 510-21; and the Administrative Agency Law, 2 Pa. C.9., Chapter 5A. Appeals must be filed with the Environmental Hearing Board within 30 days of receipt of written notice of this action unless the appropriate statute provides a different time period. Copies of the appeal form and the regulations governing practice and procedure before the Board may be obtained from the Board. This paragraph does not, in and of itself, create any right of appeal beyond that permitted by applicable statutes and decisional law.

JAE/DJZ/hw

Very truly yours,

Anthony Ercole
J. Anthony Ercole, Director
Bureau of Mining & Reclamation

COMMONWEALTH OF PENNSYLVANIA :
SS.
COUNTY OF CLEARFIELD

Before me, the undersigned authority, personally appeared
Chester A. Ogden, who, being duly sworn according to law, deposes
and says that the facts and averments set forth in the foregoing Complaint
are true and correct to the best of his knowledge, information, and belief.



Sworn and subscribed
before me this 17 day
of October, 2003

WILLIAM A. SHAW
Prothonotary
My Commission Expires
1st Monday in Jan. 2006
Clearfield Co., Clearfield, PA

FILED

OCT 17 2003

William A. Shaw
Prothonotary/Clerk of Courts

In The Court of Common Pleas of Clearfield County, Pennsylvania

OGDEN, CHESTER A., PRESIDENT COAL HILL CONTRACTING CO. INC.

VS.

Sheriff Docket # 14682

03-1566-CD

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENT

COMPLAINT

SHERIFF RETURNS

NOW OCTOBER 20, 2003, J.R. LOTWICK, SHERIFF OF DAUPHIN COUNTY WAS DEPUTIZED BY CHESTER A. HAWKINS, SHERIFF OF CLEARFIELD COUNTY TO SERVE THE WITHIN COMPLAINT ON COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, DEFENDANT.

NOW OCTOBER 28, 2003 SERVED THE WITHIN COMPLAINT ON COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, DEFENDANT BY DEPUTIZING THE SHERIFF OF DAUPHIN COUNTY. THE RETURN OF SHERIFF LOTWICK IS HERETO ATTACHED AND MADE A PART OF THIS RETURN STATING THAT HE SERVED THOMAS Y AU, ASST. COUNSEL.

Return Costs

Cost	Description
27.97	SHERIFF HAWKINS PAID BY: PLFF.
10.00	SURCHARGE PAID BY: PLFF.
25.50	DAUPHIN CO. SHFF. PAID BY: PLFF.

Sworn to Before Me This

5th Day Of Nov 2003
WILLIAM A. SHAW

WILLIAM A. SHAW
Prothonotary
My Commission Expires
1st Monday in Jan. 2006
Clearfield Co., Clearfield, PA

So Answers,

Chester A. Hawkins
by Marilyn Hause
Chester A. Hawkins
Sheriff

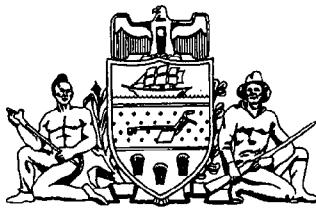
FILED

NOV 05 2003

WAS
William A. Shaw

Prothonotary/Clerk of Courts

Office of the Sheriff



Mary Jane Snyder
Real Estate Deputy

William T. Tully
Solicitor

J. Daniel Basile
Chief Deputy

Michael W. Rinehart
Assistant Chief Deputy

Dauphin County
Harrisburg, Pennsylvania 17101
ph: (717) 255-2660 fax: (717) 255-2889

Jack Lotwick
Sheriff

Commonwealth of Pennsylvania : OGDEN CHESTER A

vs

County of Dauphin : COMMONWEALTH OF PENNSYLVANIA

Sheriff's Return

NO. 2807-T - - - 2003

OTHER COUNTY NO. 03 1566 CD

AND NOW: October 28, 2003 at 12:40PM served the within

COMPLAINT

upon

COMMONWEALTH OF PENNSYLVANIA by personally handing
DEPARTMENT OF ENVIRONMENTAL PROTECTION
to THOMAS Y AU (ASSISTANT COUNSEL) 1 true attested copy(ies)

of the original COMPLAINT and making known

to him/her the contents thereof at 16TH FLOOR

RACHAEL CARSON BUILDING
HARRISBURG, PA 00000-0000

Sworn and subscribed to

before me this 28TH day of OCTOBER, 2003

Stephen C. (T)arina

PROTHONOTARY

So Answers,

J.R. Lotwick

Sheriff of Dauphin County, Pa.

By

Emigre Law

Deputy Sheriff

Sheriff's Costs: \$25.50 PD 10/24/2003

RCPT NO 184155

E TORO



Sheriff's Office Clearfield County

OFFICE (814) 765-2641 EXT. 5986
AFTER 4:00 P.M. (814) 765-1533
FAX (814) 765-5915

CHESTER A. HAWKINS
SHERIFF

COURTHOUSE
1 NORTH SECOND STREET, SUITE 116
CLEARFIELD, PENNSYLVANIA 16830

ROBERT SNYDER
CHIEF DEPUTY

MARILYN HAMM
DEPT. CLERK

CYNTHIA AUGHENBAUGH
OFFICE MANAGER

PETER F. SMITH
SOLICITOR

DEPUTATION

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

PAGE 14676 14682

CHESTER A. OGDEN, PRESIDENT
COAL HILL CONTRACTING CO. INC.
VS

TERM & NO. 03-1566-CD

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

DOCUMENT TO BE SERVED:

COMPLAINT

SERVE BY: 11/16/2003

COPIES

MAKE REFUND PAYABLE TO:

CHESTER A. OGDEN

SERVE: COMMONWEALTH OF PENNSYLVANIA D.E.P.

ADDRESS: 16TH FLOOR, RACHEL CARSON STATE OFFICE BLDG., HARRISBURG, PA.

Know all men by these presents, that I, CHESTER A. HAWKINS, HIGH SHERIFF of CLEARFIELD COUNTY, State of Pennsylvania, do hereby depelize the SHERIFF OF DAUPHIN COUNTY, Pennsylvania to execute this writ. This Deputation being made at the request and risk of the Plaintiff this 20th Day of OCTOBER 2003

Respectfully,

CHESTER A. HAWKINS,
SHERIFF OF CLEARFIELD COUNTY

FILED

NOV 17 2003

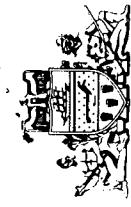
013:52

William A. Shaw
Prothonotary

cc
GK

COUNTY OF DAUPHIN
HARRISBURG, PA.

J. R. LOTTWICK
SHERIFF OF DAUPHIN COUNTY
OFFICIAL RECEIPT



RECEIPT NUMBER... 184155
RECEIVED FROM... CHESTER A HAWKINS SH
DESCRIPTION... (1) CIVIL ACTION-NOTICE
DOCKET NUMBER... 28077 2003
DEFENDANT... COMMONWEALTH OF PENN

RECEIPT DATE... 10/24/2003

OPERATOR... HAH

COUNTY	*****23.00
STATE	*****00
AGENCY	*****2.50
TOTAL	*****25.50

CASH	*****00
CHECK	*****25.50

RECD. BY

J. R. Lottwick

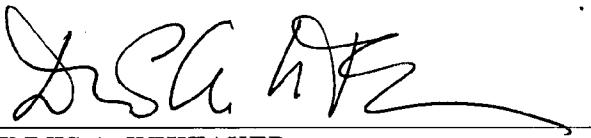
IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

CHESTER A. OGDEN, PRESIDENT :
COAL HILL CONTRACTING CO., INC. :
Plaintiff :
v. : No. 2003-1566-CD
: :
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :
Defendant :
:

ENTRY OF APPEARANCE

Please enter my appearance in the above-captioned matter on behalf of the Commonwealth of Pennsylvania, Department of Environmental Protection. I am authorized to accept service on behalf of said participant in this matter.

FOR THE COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION



DENNIS A. WHITAKER
Assistant Counsel
Supreme Court I.D. #53975

Commonwealth of Pennsylvania,
Department of Environmental Protection
Southcentral Regional Counsel
909 Elmerton Avenue, Third Floor
Harrisburg, PA 17110
Telephone: (717) 787-8790

cc: Chester A. Ogden

Date: November 17, 2003

NOV 17 2003
WILLIAM A. SHAW
PROTHONOTARY
COURT OF COMMON PLEAS
CLEARFIELD COUNTY
PA
FILED

NOV 17 2003

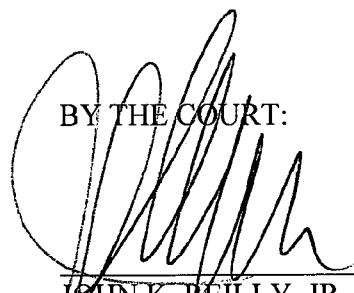
William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY,
PENNSYLVANIA
CIVIL DIVISION

CHESTER A. OGDEN, PRESIDENT :
COAL HILL CONTRACTING CO., INC. :
vs. : No. 03-1566-CD
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :
:

ORDER

NOW, this 25th day of November, 2003, upon consideration of
recusal of both Judges sitting in the 46th Judicial District, it is the ORDER of this
Court that the Court Administrator of Clearfield County refer the above-captioned
civil matter to Administrative Regional Unit II for assignment of a specially presiding
judicial authority.

BY THE COURT:


JOHN K. REILLY, JR.
President Judge

FILED

NOV 26 2003

William A. Shaw
Prothonotary/Clerk of Courts

FILED

08:55 AM
NOV 26 2003

William A. Shaw
Prothonotary/Clerk of Courts

1cc cja
1cc Atty Whitaker
1cc Piff - 512 Hartshorn Road
Clearfield, PA 16830

gj
kpk

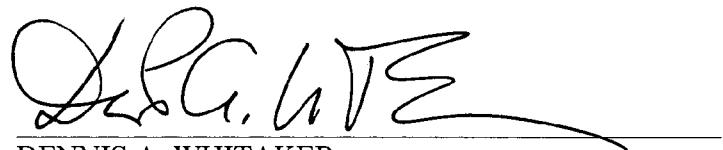
IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

CHESTER A. OGDEN, PRESIDENT :
COAL HILL CONTRACTING CO., INC. :
Plaintiff :
v. : No. 2003-1566-CD
: :
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :
Defendant :
:

NOTICE TO PLEAD

TO: CHESTER A. OGDEN

YOU ARE HEREBY NOTIFIED TO FILE A WRITTEN RESPONSE TO THE
ENCLOSED PRELIMINARY OBJECTIONS WITHIN TWENTY (20) DAYS OF SERVICE
HEREOF OR A JUDGMENT MAY BE ENTERED AGAINST YOU.



DENNIS A. WHITAKER
Assistant Counsel
Supreme Court I.D. No. #53975
909 Elmerton Avenue
Harrisburg, PA 17110-8200
(717) 787-8790

FILED

NOV 17 2003

William A. Shaw
Prothonotary

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

CHESTER A. OGDEN, PRESIDENT :
COAL HILL CONTRACTING CO., INC. :
Plaintiff :
v. : No. 2003-1566-CD
: :
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :
Defendant :

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL PROTECTION'S
PRELIMINARY OBJECTIONS**

Pursuant to Pa. R.C.P. No. 1028, the Commonwealth of Pennsylvania, Department of Environmental Protection (Department), by and through its undersigned attorney, files these Preliminary Objections to Plaintiff's Complaint.

**I. PRELIMINARY OBJECTION FOR LACK OF JURISDICTION:
COMMONWEALTH COURT HAS EXCLUSIVE JURISDICTION OVER ACTIONS
AGAINST THE COMMONWEALTH. (ALL COUNTS)**

1. Section 761(a)(1) of the Judicial Code, 42 Pa. C.S. § 761(a)(1), provides that the Commonwealth Court shall have original jurisdiction of all civil actions or proceedings against the "Commonwealth government."

2. The Department is an executive agency of the Commonwealth and is encompassed within the term "Commonwealth government." Section 1901-A et. seq. of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, No. 175, *as amended*, 71 P.S. § 510-1 et. seq. ("Administrative Code"); Section 101 of the Conservation and Natural Resources Act, Act of June 28, 1995, P.L. 89, 71 P.S. § 1340.101.

3. Plaintiff's complaint does not contain allegations which would place this matter within any of the exceptions enumerated in Section 761(a)(1).

4. Jurisdiction over this matter therefore lies in Commonwealth Court rather than in this court. *CRY, Inc. v. Mill Service, Inc.*, 536 Pa. 462, 640 A.2d 372, 377 (1994); *Konhaus v. Lutton*, 344 A.2d 763 (Pa. Cmwlth. 1975).

WHEREFORE, the Department respectfully requests that this Court enter an Order dismissing Plaintiff's complaint for lack of jurisdiction, or in the alternative, transferring this matter to Commonwealth Court.

II. PRELIMINARY OBJECTION IN THE NATURE OF A DEMURRER: FAILURE TO ALLEGEE FACTS WHICH ESTABLISH A CAUSE OF ACTION WHICH WOULD DEFEAT THE DEPARTMENT'S SOVEREIGN IMMUNITY. (ALL COUNTS)

5. Plaintiff in his complaint purports to allege that the Department acted without cause when it declared forfeit and collected the bonds posted for two surface mines permitted by Plaintiff.

6. Under Section 4(h) of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1998, *as amended*, 35 P.S. § 1396.4(h), ("Surface Mining Act"), the Department may declare forfeit and collect reclamation bonds on any site where an operator fails or refuses to comply with the requirements of this Act.

7. The sole information in Plaintiff's complaint which addresses the issue of Plaintiff's compliance with the requirements of the Surface Mining Act specific to the permits at issue is Exhibit A thereto, a letter from the Department which states that Plaintiff failed to comply that Act on the permits identified therein, which permits are identical to those referenced in Plaintiff's complaint.

8. The General Assembly in 1978 reaffirmed sovereign immunity and provided for a specific waiver through its implementation of constitutional provisions at 1 Pa. C.S. § 2310. That section provides in pertinent part that “The Commonwealth...shall continue to enjoy sovereign and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity.”

9. A Plaintiff seeking to defeat the sovereign immunity bar must meet two distinct requirements. Pursuant to 42 Pa. C. S. § 8522(a), the Plaintiff must show that he or she possesses a common law or statutory cause of action against the Commonwealth. Then, pursuant to 42 Pa. C. S. § 8522(b), the Plaintiff must show that the cause of action falls within one of the nine enumerated exceptions to sovereign immunity at Section 8522(b)(1-9).

10. Plaintiff's complaint fails to allege facts sufficient to establish actions by the Department which would create a common law or statutory cause of action against the Commonwealth.

11. Plaintiff's complaint fails to allege any facts which establish actions by the Department which support a claim under any of the exceptions to sovereign immunity found at 42 Pa. C. S. § 8522(b)(1-9).

12. Plaintiff's complain fails to allege any facts or conditions which would defeat the Department's sovereign immunity in this matter.

WHEREFORE, the Department respectfully requests that this Court issue an Order dismissing Plaintiff's complaint as barred by sovereign immunity.

III. PRELIMINARY OBJECTION IN THE NATURE OF A DEMURRER: FAILURE TO ALLEGE ANY FACTS OR LEGAL THEORY WHICH WOULD ENTITLE PLAINTIFF TO THE RELIEF SOUGHT OR ESTABLISH A DUTY ON THE COMMONWEALTH'S PART TO PAY THE FUNDS SOUGHT. (ALL COUNTS)

13. Plaintiff in his complaint purports to allege that the Department acted without cause when it declared forfeit and collected the bonds posted for two surface mines permitted by Plaintiff.

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16. Plaintiff fails to allege any facts or legal theory which would entitle him to the relief sought or which would establish a duty on the Commonwealth's part to pay the funds sought.

WHEREFORE, the Department respectfully requests that this Court enter an Order dismissing Plaintiff's complaint for legal insufficiency.

IV. PRELIMINARY OBJECTION FOR LACK OF JURISDICTION: IMPERMISSIBLE COLLATERAL ATTACK UPON A FINAL ADMINISTRATIVE ACTION. (ALL COUNTS)

17. Plaintiff in his complaint seeks reimbursement of costs allegedly incurred in replacing residential water supplies as ordered by the Department (Complaint ¶¶ 8, 9 16).

18. As Plaintiff admits in Paragraph 8, the Department directed Plaintiff to replace the water supplies under threat of bond forfeiture. This directive is contained in a letter dated April 9, 1981 which was served on Plaintiff by certified mail. Plaintiff's receipt of the April 9, 1981 letter is established by Paragraph 8 and by Plaintiff's letter to the Department dated April 13, 1981 acknowledging receipt. True and correct copies of the Department's April 9, 1981 letter and Plaintiff's April 13, 1981 response are attached hereto as Exhibit A.

19. The Department's April 9, 1981 letter directing Plaintiff to replace the water supplies under threat of bond forfeiture constitutes a final appealable decision. *Gateway Coal Co. v. Department of Environmental Resources*, 399 A.2d 802, 804-05 (Pa. Cmwlth. 1979).

20. At all times relevant hereto, the Environmental Hearing Board (EHB) has been the agency with the power and duty to hold hearings and issue adjudications on orders, permits, licenses or decisions of the Department. Pursuant first to Section 1921-A of the Administrative Code of 1929, Act of April 7, 1929, P.L. 177, *as amended*, 71 P.S. § 510-21, and currently pursuant to Section 4(a) of the Environmental Hearing Board Act, Act of July 31, 1988, P.L. 530 *as amended*, 35 P.S. § 7514(a).

21. The EHB has exclusive jurisdiction to review Department actions such as bond forfeiture declarations. *Machipongo Land and Com. Co. v. Department of Environmental Resources*, 538 Pa. 361, 648 A.2d 767 (1994).

22. The statute in effect in 1982, Section 21(c) of the Administrative Code, 71 P.S. § 510-21(c), provided in pertinent part that "No action of the department adversely affecting any person shall be final as to such person until such person has had the opportunity to appeal such action to the Environmental Hearing Board." Section 4(c) of the EHB Act contains virtually identical language.

23. Plaintiff in his complaint fails to allege that he appealed the Department's April 9, 1981 final decision to the EHB.

24. The EHB's records establish that Plaintiff failed to appeal the April 9, 1981 decision. A true and correct copy of the Certification of the Secretary of the EHB is attached hereto as Exhibit B.

25. As a result of Plaintiff's failure to appeal the Department's April 9, 1981 final decision to the EHB, that decision is final and is no longer subject to attack in later proceedings.

Commonwealth v. Derry Township, 466 Pa. 31, 351 A.2d 606 (1976).

WHEREFORE, the Department respectfully requests that this Court enter an Order dismissing Plaintiff's complaint as to the replacement of the water supplies and the costs allegedly associated therewith.

**V. PRELIMINARY OBJECTION IN THE NATURE OF A DEMURRER:
PLAINTIFF'S COMPLAINT IS BARRED BY RES JUDICATA. (ALL COUNTS)**

26. The damages alleged by Plaintiff in his complaint are attributed to the July 9, 1982 forfeiture declaration attached thereto as Exhibit A. The second page of Exhibit A contains a notice to Plaintiff of his appeal rights to the EHB.

27. Plaintiff timely appealed the Department's July 9, 1982 action to the EHB which appeal was docketed at EHB Docket No. 82-193-G. The EHB held a hearing at which Plaintiff was represented by counsel and presented evidence. On August 5, 1984, the EHB issued an adjudication by which it upheld the Department's bond forfeitures in the amount of \$36,695.00. *Chester A. Ogden, President Coal Hill Contracting Co. v. DER*, 1984 EHB 374. Plaintiff failed to appeal this adjudication to Commonwealth Court, and it is thus final as to Plaintiff. The Department appealed the EHB's adjudication to Commonwealth Court which affirmed the EHB.

Department of Environmental Resources v. Ogden, 501 A.2d 311 (Pa. Cmwlth. 1985). A true and correct copy of the EHB's adjudication is attached hereto as Exhibit C.

28. The proceeds from the certificates under which the EHB disallowed forfeiture were returned to Plaintiff. True and correct copies of correspondence reflecting the return of those funds to Plaintiff are attached thereto as Exhibit D.

29. For the doctrine of Res Judicata to prevail, there must be a concurrence of four conditions: (1) identity of issues; (2) identify of causes of action; (3) identity of persons and parties to the action; and (4) identity or capacity of the parties suing or sued. *Day v. Volkswagenwerk Aktiengesellschaft*, 464 A.2d 1313, 1316-17 (Pa. Super. 1983).

30. A review of Plaintiff's complaint, the Department's July 9, 1982 forfeiture declaration and the EHB Adjudication, and Commonwealth's Court's affirmance thereof demonstrate beyond question that there is here a concurrence of the four conditions required for the doctrine of Res Judicata to apply.

31. Plaintiff's complaint is barred by Res Judicata because the issues raised therein regarding the Department's July 9, 1982 bond forfeiture declaration have been conclusively determined in prior actions.

WHEREFORE, the Department respectfully requests that this Court enter an Order dismissing Plaintiff's complaint as barred by Res Judicata.

VI. PRELIMINARY OBJECTION FOR LACK OF JURISDICTION: FAILURE TO EXHAUST STATUTORY REMEDIES. (ALL COUNTS)

32. Plaintiff's complaint is based upon his disagreement with two Department actions, the April 9, 1981 directive to replace water supplies and the July 9, 1982 forfeiture declaration.

33. Plaintiff had statutory remedies available by which he could contest those actions, an appeal to the EHB under Section 21(c) of the Administrative Code, 71 P.S. § 510-21(c), for the water supply directive, and an appeal of the EHB's adverse decision to Commonwealth Court pursuant to Section 763 (a)1 of the Judicial Code, 42 Pa. C. S. § 763 (a)(1), and the Administrative Agency Law, 2 Pa. C. S. Ch. 5 (Subchapter A) and Ch. 7 (Subchapter A).

34. Where, as here, a specific statute such as the Administrative Code, the EHB Act, the Judicial Code and the Administrative Agency Law provide a specific method of appeal from a decision of an administrative agency, the procedure required by that remedy must be followed to the exclusion of all others. *Pennsylvania Life Insurance Co. v. Pennsylvania National Life Insurance Co.*, 417 Pa. 168, 208 A.2d 780 (1965).

35. Plaintiff's failure to exhaust his statutory remedies bars his complaint in this Court. WHEREFORE, the Commonwealth respectfully requests that this Court enter an Order dismissing Plaintiff's complaint for failure to exhaust statutory remedies.

VII. PRELIMINARY OBJECTION AS TO JURISDICTION: PLAINTIFF'S COMPLAINT IS BARRED BY THE STATUTE OF LIMITATIONS. (COUNTS 1 AND 2)

23. Plaintiff's complaint (Paragraphs 14 and 16, Exhibit A) establishes that the Department action from which Plaintiff's alleged damages flow occurred on July 9, 1982.

24. Plaintiff's alleged cause of action for forfeiture of bonds contrary to law is not one of the actions enumerated at 42 Pa. C. S. § 5531 for which no time limitation applies. Every other suit must be commenced between six months and 15 years from the date the injury was sustained or the cause of action accrued. 42 Pa. C. S. §§ 5522-5528. Plaintiff's cause of action does not fall within the ambit of the 20 and 21 year limitation periods at 42 Pa. C.S. § 5529 and 5530.

25. It is unnecessary for this Court to determine which specific time limitation (6 months to 15 years) applies to Plaintiff's complaint because it was filed on October 17, 2003,

more than 21 years from July 9, 1982, the date upon which Plaintiff's alleged injuries were sustained and upon which his cause of action accrued, and more than 15 years from the August 5, 1984 EHB adjudication and Commonwealth Court's November 25, 1985 affirmance. Plaintiff does not allege that the Department failed to return any funds due him after the conclusion of the litigation.

WHEREFORE, the Department respectfully requests that this Court dismiss Plaintiff's appeal.

WHEREFORE, for the aforestated reasons, the Department respectfully requests that its preliminary objections be granted and that Plaintiff's complaint be dismissed.



DENNIS A. WHITAKER
Assistant Counsel
Supreme Court I.D. No. #53975
909 Elmerton Avenue
Harrisburg, PA 17110-8200
(717) 787-8790

Date: November 17, 2003



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
Bureau of Mining and Reclamation
P. O. Box 208
Hawk Run, PA 16840
(814) 342-5399



Certified Mail #6949919

April 9, 1981

Mr. Chester Ogden
Coal Hill Contracting Co.
P. O. Box 1001
Clearfield, PA 16830

RE: 1470 Coal Hill Contracting Co., Inc.
MDP#4574SM4 and 4474SM20
Ogden #8 and #9 Operations
Lawrence and Bradford Townships,
Clearfield County

Dear Mr. Ogden:

This letter is a final notice that the Department intends to forfeit the bonds that you have posted on your Ogden #8 and #9 Operations. These operations have been in a continuous state of violation since July of 1980. An Administrative Conference was held with your company on January 14, 1981, in an effort to resolve the violations. To date, no progress has been made in correcting the violations. The compliance plan that the Department requested from you at the conference and in a February 17, 1981 letter has not been received.

In addition to the outstanding violations, there are three private water supplies that were degraded by your mining on the Ogden #8 Operation. The details of the water supply problem were explained to you during the administrative conference.

If you do not submit a satisfactory compliance plan and take positive action to correct the violations and replace the affected water supplies within thirty (30) calendar days, all bonds that you have on deposit will be forfeited. The declaration of bond forfeiture is an irrevocable action.

Sincerely,

John P. Varner
John P. Varner,
Compliance Specialist

JPV/vlr

cc: Nile F. Linberg
James W. Forcey
Gary Byron
Don Zutlas
Travelers Indemnity Co. (Certified Mail #6949920)

COAL HILL CONTRACTING CO., INC.

- Bituminous Coal Producers -

P. O. BOX 1001 CLEARFIELD, PA. 16830

Bureau of Surface Mine Reclamation
RECEIVED
APR 16 1981

April 13, 1981

Hawk Run District Office

Mr. John P. Varner
 Dept. Of Environmental Resources
 Bureau Of Mining And Reclamation
 P.O.Box 208
 Hawk Run, Pa. 16840

1470
 RE: MDP#4574SM4 and 4474SM20
 Ogden #8 and #9 Operations
 Lawrence And Bradford Twp.
 Clearfield County

Dear Mr. Varner;

This letter is in reply to your letter of April 9, 1981 whwreby you informed me of D.E.R.s decision to forefit the bonds this company has posted on property in both Lawrence and Bradford Townships.

You claim our operations have been in a continious state of violation since July of 1980. - We certainly have a differhce of opinion on this. Both operations are in such conditon today that there is less cause of pollution existing today than there has been for the past thirty years. The prior to mining maps available to you, and at your disposal will prove this beyond question.

I would like you to list the necessary work needed on these operations to put them in a state of compliance. Also, I would appreaciate the oppurtunity to meet with the inspectors involved to personally go over the job site and arrive at some plan of procedure once I am familiar with the requirements of your office.

It is difficult to think that D.E.R. would consider proceeding with bond forfiture plans against an operator with a past history of excellent reclamation practices.

During the meeting in your office on January 14, 1981. You told me you could recommend our removing the stockpiled coal on these operations in order that we might generate some income. Your granting that permission now would be extremely helpfull now.

In your letter of 4/9/81 you apparently overlooked answering my question in my letter of 3/2/81 - I would appreciate information from D.E.R. as to how you have determined that this company is responsible for having destroyed the water supply of the Rowles, Shupp and Fenton family's. Based on water quality checks. There has been a change in their water. But I'm curious as to how you arrived at this company being responsible for the change.

Upon receipt of your suggestions for correcting the existing violations on these operations. I will have them in a condition of compliance as promptly as my finances and time permit.

Sincerely,

Chester A. Ogden Pres.

Exhibit B



(717) 787-3483
TELECOPIER (717) 783-4738
WWW.EHB.VERILAW.COM

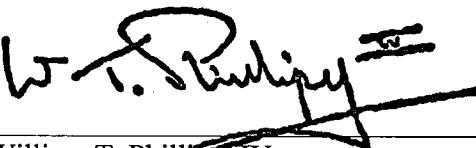
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2ND FLOOR - RACHEL CARSON STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457

WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CERTIFICATION

I, William T. Philliply, IV, Secretary to the Environmental Hearing Board, by virtue of the powers and duties vested in that office, do hereby certify in accordance with § 6103 of the Judicial Code, 42 Pa. C.S.A. § 6103, that I am the legal custodian of the records for the Environmental Hearing Board, and further certify that upon checking the docket entries and records of the Environmental Hearing Board, there exists no record of any appeal filed by Chester A. Ogden and/or Coal Hill Contracting Co., Inc. of the Department's April 9, 1981 letter directing Ogden/Coal Hill to replace water supplies or of a request for a supersedeas of that letter, and that the mandatory time period for filing such an appeal has passed.

Date: November 14, 2003


William T. Philliply, IV
Secretary to the Environmental Hearing Board
Legal Custodian

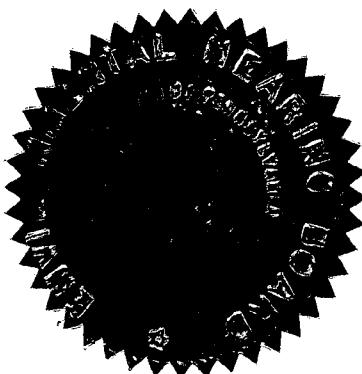


Exhibit C

(7005)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
221 NORTH SECOND STREET
THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

3
M/W

CHESTER A. OGDEN, PRESIDENT
COAL HILL CONTRACTING COMPANY, INC.

Docket No. 82-193-G

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By: Edward Gerjuoy, Member, August 6, 1984

Syllabus

In an appeal from the forfeiture of bonds under section 4(h) of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.4(h), DER has the burden of proof 1) that the mine operator has failed to comply with the applicable law and 2) that the amount DER seeks to forfeit has been correctly computed from the acreage affected and unreclaimed. Where the evidence is not disputed with regard to these two requirements, the burden has clearly been met. Where, however, DER's witness states that the acreage covered by two permits has been restored, a forfeiture of any amount of the bond accompanying either permit is not justified, in the absence of a contrary showing. It is an abuse of discretion for DER to forfeit a bond covering a permitted area on the sole ground that mining operations were conducted on an adjacent unpermitted area.

ADJUDICATION

This matter comes before the Board as an appeal of DER's forfeiture of seven bonds pursuant to section 4(h) of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.4 (h). The bonds were submitted by Coal Hill as a condition of obtaining surface mining permits for two sites in Lawrence and Bradford Townships, Clearfield County, Pennsylvania.

Several months following the filing of the notice of appeal, Coal Hill's president, Chester Ogden, informed the Board that he intended to handle the appeal without the assistance of counsel. After repeated warnings by the Board that failure to file a pre-hearing memorandum would limit the presentation of his case, Mr. Ogden did file a pre-hearing memorandum, apparently drafted by himself. Counsel for DER states that he never received a copy of this memorandum. (DER post-hearing brief, page 8). No prejudice to DER has been occasioned by this failure of Coal Hill to supply a copy of the memorandum, however. The presentation of Coal Hill's case was essentially limited to evidence tending to refute the evidence presented by DER. Furthermore, the decision reached herein is based solely upon a determination of whether DER had met its initial burden of proof with regard to the forfeiture of each bond.

Coal Hill did not engage in discovery in the presentation of its case. It was, however, represented by counsel at the hearing.

Near the close of the hearing the parties entered into a stipulation concerning the number of acres affected, and in some cases, reclaimed in part, by Coal Hill. The board directed the parties to provide a written summarization of this stipulation. DER has provided the requested summarization, as well as a post-hearing brief. Coal Hill has provided neither and has informed the Board of

no circumstances justifying this failure. The summary supplied by DER accurately reflects the stipulation entered into on the record at the hearing. Where relevant, it has been relied upon in the determination reached herein.

FINDINGS OF FACT

1. Appellant is Coal Hill Contracting Company, a Pennsylvania corporation with mailing address P. O. Box 1001, Clearfield, Pennsylvania 16830.
2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, which is empowered to administer the provisions of the Surface Mining Conservation and Reclamation Act (hereinafter "SMCRA"), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq., The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., and the rules and regulations promulgated thereunder by the Environmental Quality Board.
3. On August 7, 1974 C. A. Ogden Company executed and submitted to DER surety bond No. 217B6839 in the amount of \$11,500 as a condition of obtaining mining permit 585-5A. On November 5, 1975, a change rider was submitted to DER changing the principal's name on the bond to Coal Hill. The bond was issued by Traveler's Indemnity Company.
4. On October 27, 1978 DER issued mining permit 1470-1 to Coal Hill; a special permit condition transferred the liability and obligation under surety bond No. 217B6839 which had been previously accrued by C. A. Ogden Company under mining permit 585-5A.
5. On October 25, 1974 C. A. Ogden Company executed and submitted to DER surety bond No. 218B2244 in the amount of \$15,640 as a condition of obtaining mining permit 585-5(A2). On November 5, 1975 a change rider was submitted to DER changing the principal's name on the bond to Coal Hill. The bond was issued by Traveler's Indemnity Company.

6. On October 27, 1978 DER issued mining permit 1470-1A to Coal Hill; a special permit condition transferred the liability and obligation under surety bond No. 218B2244 which had been previously accrued by C. A. Ogden Company under mining permit 585-5(A2).

7. The terms of surety bond No. 217B6839 and surety bond No. 218B2244 provide that liability shall accrue in proportion to the area of land affected by surface mining at the rate of five hundred seventy-five (\$575.00) dollars per acre or part thereof.

8. On October 14, 1975 Coal Hill assigned to DER savings certificate No. 977 in the amount of \$2400 as a condition of obtaining mining permit 585-5(A3). The savings certificate was drawn on the Clearfield Bank and Trust Company.

9. On October 27, 1978 DER issued mining permit 1470-1(A2) to Coal Hill; a special permit condition transferred the liability and obligation under savings certificate No. 977 which had been previously accrued by C. A. Ogden Company under withdrawn mining permit 585-5(A3).

10. The terms of the collateral bond submitted as a condition of obtaining mining permit 585-5(A3) [now permit 1470-1(A2)] provide that liability shall accrue in proportion to the area of land affected by surface mining at the rate of five hundred (\$500.00) dollars per acre or part thereof.

11. On March 17, 1976 Coal Hill assigned to DER savings certificate No. 879 in the amount of \$23,000 as a condition of obtaining mining permit 585-6. The savings certificate was drawn on the Clearfield Bank and Trust Company.

12. On October 30, 1978 DER issued mining permits 1470-2 and 1470-2A to Coal Hill; a special condition of both permits transferred the liability and obligation under the bond associated with permit 585-6 which had been previously accrued by C. A. Ogden Company.

13. The terms of the collateral bond submitted as a condition of permit 585-6 (now permits 1470-2 and 1470-2A) provide that liability shall accrue in proportion to the area of land affected by surface mining at the rate of five hundred and seventy-five (\$575.00) dollars per acre or part thereof.

14. On March 17, 1976 Coal Hill assigned to DER savings certificate No. 976 in the amount of \$5000 as a condition of obtaining mining permit 585-6A. The savings certificate was drawn on the Clearfield Bank and Trust Company.

15. On October 30, 1978 DER issued mining permit 1470-2(A2) to Coal Hill; a special permit condition transferred the liability and obligation under the bond associated with permit 585-6A which had been previously accrued by C. A. Ogden Company.

16. The terms of the collateral bond submitted as a condition of permit 585-6A [now permit 1470-2(A2)] provide that liability shall accrue in proportion to the area of land affected by surface mining at the rate of five hundred (\$500.00) dollars per acre or part thereof.

17. On December 22, 1977 Coal Hill executed and submitted to DER surety bond No. 558E2324 in the amount of \$7100 as a condition of obtaining mining permit 1470-3. The bond was issued by the Traveler's Indemnity Company.

18. On March 14, 1978 DER issued mining permit 1470-3 to Coal Hill.

19. The terms of surety bond 558E2324 provide that liability shall accrue in proportion to the area of land affected by surface mining at the rate of one thousand (\$1000.00) dollars per acre or part thereof.

20. All of the bonds provide that liability is conditioned upon the following:

"The said surface mine operator shall faithfully perform all of the requirements of (1) Act 418, (2) the Act of Assembly approved June 22, 1937, as amended, known as "the Clean Streams Law"

(Act 394), (3) the applicable rules and regulations promulgated thereunder, and (4) the provisions and conditions of the permits issued thereunder and designated in this bond (all of which are hereafter referred to as "law"), then this obligation shall be null and void, otherwise to be and remain in full force and effect in accordance with the provisions of the law."

21. All of the bonds provide that the accrual of liability shall be in proportion to the acreage affected and in no case shall such liability be for an amount less than five thousand (\$5000.00) dollars.

22. Coal Hill ceased mining at the Lawrence Township site in 1976.

23. Coal Hill ceased mining at the Bradford Township site in 1979.

24. Mining permit 1470-1 was issued for 20 acres; 10.2 acres were affected by Coal Hill.

25. Coal Hill graded 6 acres on permit 1470-1 to approximate original contour and accomplished no reclamation of the remaining 4.2 affected acres.

26. Mining permit 1470-1A was issued for 27.2 acres; 17.3 were affected by Coal Hill.

27. Coal Hill graded 6 acres on permit 1470-1A to approximate original contour and accomplished no reclamation of the remaining 11.3 affected acres.

28. Mining permit 1470-1(A2) was issued for 4.8 acres; 0.5 acres were affected by Coal Hill.

29. No reclamation of the 0.5 affected acres on permit 1470-1(A2) was accomplished.

30. Mining permit 1470-2 was issued for 20 acres, all of which were affected by Coal Hill; no reclamation has been accomplished.

31. Mining permit 1470-2A was issued for 20 acres, all of which were affected by Coal Hill. These acres have been restored. (T. 88)

32. Mining permit 1470-2(A2) was issued for 10 acres, all of which

were affected by Coal Hill. These acres have been restored. (T. 88)

33. Mining permit 1470-3 was issued for 7.1 acres, all of which were affected by Coal Hill. No reclamation has been accomplished. (T. 103)

34. Coal Hill affected three acres not covered by a mining permit on the property of Real Estate Trade-In Company adjacent to the Bradford Township site. No reclamation of this affected area was accomplished.

35. The Travelers Indemnity Company was notified of DER's forfeiture action by a copy of the notice of forfeiture letter of J. Anthony Ercole dated July 9, 1982.

DISCUSSION

The Board's scope of review in this case is to determine whether DER has committed an abuse of discretion or an arbitrary exercise of its duties or functions. Warren Sand and Gravel Company, Inc. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975).

In appeals from the forfeiture of surface mining bonds, DER has the burden of proof that it acted properly. Southwest Pennsylvania Natural Resources v. DER, 1982 EHB 48, Rockwood Insurance Company v. DER, 1981 EHB 424. This burden is set forth in section 4(h) of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.4(h) as follows:

If the operator fails or refuses to comply with the requirements of the act in any respect for which liability has been charged on the bond, the department shall declare such portion of the bond forfeited....

The bonds at issue here provide that liability shall accrue unless Coal Hill "faithfully perform(s) all the requirements of (1) Act 418, (2) the Act of Assembly approved June 22, 1937, as amended, known as "The Clean Streams Law" (Act 394),

(3) the applicable rules and regulations promulgated thereunder, and (4) the provisions of the permits issued thereunder and designated in this bond." The permits themselves are subject to "all requirements of the Surface Mining Conservation and Reclamation Act and all existing orders, rules, regulations, conditions and standards adopted or issued or hereafter issued or adopted by the Department under Act No. 394, Act No. 418 and Act No. 472 and amendments thereto."

Stated more simply, DER must demonstrate (1) that Coal Hill has failed to comply with the applicable statutes, rules or regulations and (2) that the dollar amount DER seeks to forfeit has been correctly computed from the acreage affected and unreclaimed. Where liability on a bond accrues in proportion to the area of land affected, as is the case with all of the bonds here, DER can forfeit only the amount corresponding to the number of acres affected multiplied by the per acre liability specified in the terms of the bond. Southwest Pennsylvania Natural Resources v. DER, supra.

The Lawrence Township Site

The parties stipulated that, of the 52 acres covered by permits 1470-1, 1470-1A and 1470-1(A2), 24 acres had not been affected by Coal Hill's surface mining operations. 4.3 of these 24 unaffected acres were included under permit 1470-1(A2). The remaining 19.7 unaffected acres were distributed equally between permits 1470-1 and 1470-1A, by agreement of the parties. This left 10.2 and 17.3 acres respectively, which had been affected by Coal Hill. The parties further agreed that six of those affected acres on each of permits 1470-1 and 1470-1A had been regraded to the approximate original contour (AOC). The remainder of the acreage covered by these two permits remains entirely unreclaimed, i.e., 4.2 acres on 1470-1 and 11.3 acres on 1470-1A. Furthermore, DER Mine Inspector McGinness

testified that large open pits remained on both sites. (T. 15, 16, 20, 21). This testimony was uncontradicted.

The foregoing establishes that Coal Hill has failed to comply with the applicable law. Specifically, there has been a failure to comply with the terms of 25 Pa. Code §87.140 which reads in pertinent part:

§87.140. Contemporaneous reclamation.

Reclamation efforts including, but not limited to, backfilling, grading, topsoil replacement, and revegetation of all land that is disturbed by surface mining activities shall occur in accordance with the provisions of §§87.141 - 87.148 (relating to backfilling and grading) and the approved reclamation plan.

§87.141 provides in part that "all disturbed acres shall be returned to their approximate original contour." To the extent that this has not been accomplished, Coal Hill is in non-compliance. Thus, the failure to take any steps to reclaim the 4.2 acres on permit 1470-1 and the 11.3 acres on permit 1470-1A justifies the forfeiture of the entire amount of bond liability which has accrued for those specific acres. Both permits provide that liability will accrue at the rate of \$575 per acre or part thereof affected. Thus for the wholly unreclaimed acres under present discussion, a forfeiture of \$2875 for permit 1470-1 and \$6900 for permit 1470-1A is appropriate. Although the terms of permit 1470-1 require that liability shall not be less than \$5000, this provision is not applicable here in light of the determination reached infra regarding Coal Hill's liability for the acres covered by that permit which were affected and only partially reclaimed.

With regard to the six acres on each of permits 1470-1 and 1470-1A which the parties agreed had been graded to AOC, the determination of liability is slightly more complex. Grading to AOC constitutes partial compliance with the applicable law. However, to the extent that further reclamation is required,

there is non-compliance. As noted above, 25 Pa. Code §87.140 requires more than grading to AOC. Section 4(h) of the SMCRA, 52 P.S. §1396.4(h), requires that DER forfeit the bond where the operator has failed to reclaim the site in accordance with the provisions of the law. Consequently, we cannot find that DER has abused its discretion in forfeiting the portion of the bond corresponding to the acres affected on permits 1470-1 and 1470-1A, despite the fact that partial reclamation was accomplished. For these affected and only partially reclaimed acres, therefore, an additional forfeiture of \$3450 on each of permits 1470-1 and 1470-1A is sustained.

The record in this case contained some suggestion that a "completion report" had been filed by DER for the Lawrence Township site. (T. 40) However, such a report, if it in fact exists, was not produced at the hearing. (As noted, Coal Hill did not engage in discovery.) No evidence documenting the existence of this report was produced. In the absence of such evidence we must uphold DER's finding that no portion of the affected acreage at the Lawrence Township site has been adequately reclaimed.

The final issue that must be addressed with regard to the Lawrence Township site is the liability for the grading of one half an acre on permit 1470-1(A2). The parties stipulated that Coal Hill did not affect any of the acres covered by this permit by mining; it simply graded the half acre. The half acre was excluded from the acreage stipulated to have been returned to AOC. The fact that no mining was conducted on permit 1470-1(A2) is irrelevant since there clearly was mining on the immediately adjacent permit sites. 25 Pa. Code §86.1 defines "surface mining activities" to include "all activities in which the land surface has been or is disturbed as a result of or incidental to surface mining operations of the operator." Consequently, since the grading falls within the

regulatory definition of surface mining and since no reclamation of this half acre was accomplished, it follows that Coal Hill has failed to comply with the applicable law. Therefore, forfeiture of the portion of the bond corresponding to that half acre is appropriate. However, given the fact that the terms of the bond provide that in no event shall liability be for an amount less than \$5000, a forfeiture of the entire amount of the bond (\$2400) is warranted.

The Bradford Township Site

The parties stipulated that the entire area covered by permits 1470-2, 1470-2A, 1470-2(A2) and 1470-3 was affected by Coal Hill's mining operations. No stipulation was entered into with regard to the amount of this affected area which was reclaimed.

DER Mine Inspector Forcy testified that with regard to the acres covered under permits 1470-2 and 1470-3 no reclamation had been accomplished. (T. 103). Consequently, DER has clearly met its burden of proof regarding non-compliance with the applicable law. The forfeiture of the entire per acre liability on these bonds is justified, i.e., \$11,500 for permit 1470-2 and \$7100 for permit 1470-3.

However, we find it impossible to hold that DER has met its burden of proof with regard to the violations existing on the acres covered by permits 1470-2A and 1470-2(A2). DER must not only demonstrate that violations are present; it must demonstrate the number of acres which have not been restored in compliance with the applicable statutes, rules and regulations. It is not clear that either of these requirements has been met with regard to permits 1470-2A and 1470-2(A2). Inspector Forcy's report of January 8, 1980 (C.Ex.10) states that "the area of 1470-2A and 1470-2(A2) is restored and planted." His next report, dated April 29, 1980 (C.Ex.10) states that the "completed area is in good condition." No evidence

was introduced at the hearing to counter this suggestion that Coal Hill has fully complied with the requirements of the law on these two permit sites. Indeed, Mr. Forcy testified that "2A and 2A2, in particular have been restored." (T. 88). In the absence of evidence to the contrary, we are constrained to find that DER has abused its discretion by seeking forfeiture of the bonds associated with these two permit areas.

Counsel for DER argues in his post-hearing memorandum that, since permits 1470-2A and 1470-2(A2) are amendments to permit 1470-2, all three should be construed together as a single permit so that a violation on any portion of the acreage covered by the three will prevent release of liability accruing under the terms of any bond associated with the permit applications. We find this argument untenable.

First, permit 1470-2(A2) does not by its terms condition liability upon failure to comply with the terms of any other permit. In the absence of any indication that the intent of the parties was to the contrary, this permit must be construed as a separate and independent contract between Coal Hill and DER.

Second, permits 1470-2 and 1470-2A both provide that:

The Permit No. 1470-2 and No. 1470-2(A) both issued for 20 acres each assumes all liability and obligation accrued under the Permit No. 585-6 issued July 16, 1975, to C. A. Ogden Co., for 40 acres.

Even assuming that this language requires the Board to treat permits 1470-2 and 1470-2A as one permit, our holding in Southwest Pennsylvania Natural Resources, discussed supra, precludes our adoption of the argument put forth by DER. DER is justified in forfeiting only that portion of a bond which corresponds to the number of acres affected and not reclaimed multiplied by the per acre liability specified in the terms of the bond.

One final issue requires attention. The parties agreed that Coal Hill affected three acres not covered by any mining permit. (T. 148). There was no evidence presented suggesting that any portion of these three acres has been reclaimed. DER argues that, since the terms of all the bonds in issue here provide that Coal Hill must abide by the terms of the applicable law, and since mining off a permit area is prohibited by law, a forfeiture is justified.

The flaw in this argument lies in the fact that the bonds by their terms apply only to specifically designated acres covered by existing mining permits. The bond and permit of which it forms a part are contracts between DER and the operator. Southwest Pennsylvania Natural Resources v. DER, supra. This Board cannot extend liability on the bond beyond the terms agreed upon by the parties. The proper remedy for mining without a permit is contained in section 18.4 of the SMCRA, 52 P.S. §1396.22, the assessment of a civil penalty. Forfeiture of a bond for a permitted area on the basis that there was mining in an adjacent unpermitted area constitutes an abuse of DER's discretion.

In summary, DER's forfeiture of the following amounts for the Lawrence Township site is sustained: for permit 1470-1, \$6325 for 10.2 acres; for permit 1470-1A, \$10,350 for 17.3 acres; for permit 1470-1(A2), \$2400, the minimum liability under the terms of the bond. The forfeiture of the following amounts for the Bradford Township site is sustained: for permit 1470-2, \$11,500 for 20 acres; for permit 1470-3, \$7100 for 7.1 acres. No forfeiture of the bonds associated with permits 1470-2A and 1470-2(A2) is allowed. No portion of any of the bonds may be forfeited for the violations associated with Coal Hill's affecting of those acres not covered by an existing permit.

CONCLUSIONS OF LAW

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

2. The burden of proving the facts that can justify forfeiture of the bonds which are the subject of this appeal falls on DER.

3. DER has met its burden of proof that Coal Hill failed to comply with the applicable statutes, rules or regulations with regard to all of the affected acreage covered by permits 1470-1, 1470-1A, 1470-1(A2), 1470-2 and 1470-3.

4. For each of the bonds associated with the permits specified in Conclusion of Law 3, with the exception of permit 1470-1(A2), forfeiture is appropriate in an amount equal to the number of acres affected and not reclaimed multiplied by the per acre liability specified in the applicable bonds.

5. Forfeiture of the entire amount of the bond associated with permit 1470-1(A2) is appropriate; the minimum liability condition of the bond is applicable where the forfeiture would otherwise be for an amount less than \$5000.

6. DER has not abused its discretion or arbitrarily exercised its duties or functions in forfeiting the bond amounts specified in Conclusions of Law 4 and 5.

7. DER has not met its burden of proof that Coal Hill failed to comply with the applicable statutes, rules or regulations with regard to the acreage covered by permits 1470-2A and 1470-2(A2).

8. DER's forfeiture of the bonds associated with permits 1470-2A and 1470-2(A2) is an abuse of discretion and an arbitrary exercise of its duties or functions.

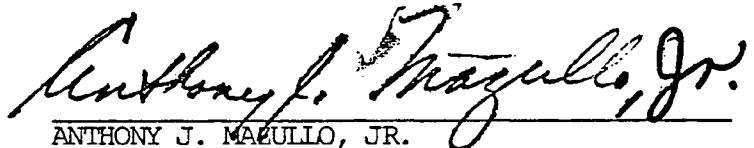
9. DER cannot forfeit any portion of any bond submitted as a condition of obtaining a mining permit where the forfeiture is for mining occurring off the permit area.

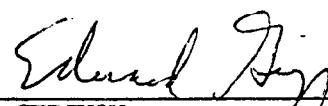
O R D E R

AND NOW, this 6th day of AUGUST, 1984, the above-captioned appeal is partially dismissed and partially sustained. In particular, it is ordered that:

1. DER's forfeiture of surety bond No. 217B6839, accompanying permit 1470-1, is sustained in the amount of \$6325.00.
2. DER's forfeiture of surety bond No. 218B2244, accompanying permit 1470-1A, is sustained in the amount of \$10,350.
3. DER's forfeiture of the collateral bond accompanying permit 1470-1(A2) is sustained in the amount of \$2400.
4. DER's forfeiture of the collateral bond accompanying permit 1470-2 is sustained in the amount of \$11,500.
5. DER's forfeiture of surety bond No. 558E2324, accompanying permit 1470-3, is sustained in the amount of \$7100.

ENVIRONMENTAL HEARING BOARD


Anthony J. Magullo, Jr.
ANTHONY J. MAGULLO, JR.
Member


Edward Gerjuoy
EDWARD GERJUOY
Member

DATED: August 6, 1984



ALL-STATE LEGAL™ 800-222-0510

Exhibit D

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF THE BUDGET
COMPTROLLER OPERATIONSCOMPTROLLER'S OFFICE
PUBLIC PROTECTION & RECREATION
P.O. BOX 2063
HARRISBURG, PA 17120
(717) 767-3105

September 26, 1986

FILE
Control
1470-2

Clearfield Bank and Trust Company
11 N. Second Street
P. O. Box 171
Clearfield, PA 16830

Attention: Ms. Sybal Owens

Dear Ms. Owens:

Please find enclosed your Savings Certificates, as described below, for conversion to cash.

Certificate No. 879, dated July 14, 1975, at 7.25% per annum drawn on the Clearfield Bank and Trust Company, Clearfield, Pennsylvania, for Coal Hill Contracting Co., formerly C.A. Ogden Co., in the amount of \$23,000.00 and assigned to the Commonwealth of Pennsylvania, Department of Environmental Resources.

Collect -
\$11,500

Certificate No. 977, dated October 14, 1975, at 7.25% per annum drawn on the Clearfield Bank and Trust Company, Clearfield, Pennsylvania, for Coal Hill Contracting Co., formerly C.A. Ogden Co., in the amount of \$2,400.00 and assigned to the Commonwealth of Pennsylvania, Department of Environmental Resources.

We hereby certify that Coal Hill Contracting Co., has and continues to fail to comply with the requirements of the Clean Streams Law and the Surface Mining Conservation and Reclamation Act, as amended. As a result the Department has certified and declared said savings certificate forfeited as of July 9, 1982.

Accordingly, your bank is requested to forward a check in the amount of \$13,900.00 plus accrued interest from July 9, 1982. Please forward your check, payable to Commonwealth of Pennsylvania, Department of Environmental Resources, to the following address.

Department of Environmental Resources
Comptroller's Office
5th Floor, Fulton Building
P. O. Box 2063
Harrisburg, PA 17120

Attn: Ann C. Wildeman

Mount Bald Bank and Trust Company
September 25, 1986
Re: [redacted]

The balance of the \$11,507.00 savings certificate, in the amount of \$11,507.00
may be paid to the Coal Hill Connecting Co.

If your bank is unable to consummate the conversion to cash within three weeks
from the date of this letter, please contact me at 717-751-3606.

Your assistance in expediting this transaction is appreciated.

Sincerely,

Ann C. Wittenberg, Chief
ACCOUNTING CONTROL DIVISION

cc: [redacted]

Enclosure

cc: Robert S. Slatick



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
P. O. Box 209

Hawk Run, PA 16840-0209

May 30, 1995

Hawk Run District Office

(814) 342-0410

(814) 693-3904

FAX (814) 342-6136

Chester A. Ogden
Route 4, Box 63-A
Clearfield, PA 16830

RE: Bond Forfeitures
Coal Hill Contracting Company, Inc.
MDP #4574SM4, Ogden #8
Lawrence Township, Clearfield County
MDP #4474SM20, Ogden #9
Bradford Township, Clearfield County

Dear Chet:

Thank you for your letter of May 1, 1995. The Department has researched its records. I hope that this explanation resolves this matter to your satisfaction.

In your letter you stated that the Commonwealth forfeited bonding in the amount of \$67,100.00 plus interest. Our records indicate that the original amount of bonds held for these Coal Hill Contracting Company (hereinafter "Coal Hill") permits referenced above was a total of \$64,640.00. This amount of bonds was posted to insure the reclamation of the land although "previously mined and unreclaimed", your operation was to reaffect.

Coal Hill caused and was responsible for numerous violations of the law on these permits. Coal Hill failed to comply with the requirements of the Clean Streams Law and the Surface Mining Conservation and Reclamation Act. Coal Hill had been previously notified of these violations and legal obligations by numerous inspection reports, correspondence, verbal contacts, meetings, and conferences. The Department notified Coal Hill on February 17, 1981, April 9, 1981, April 28, 1981, June 30, 1981, and February 23, 1982 of its intention to forfeit the bonds unless the violations were satisfactorily addressed.

By letter dated July 9, 1982 the Department declared forfeit the total amount of bonds remaining for these sites in the amount of \$59,640.00 as illustrated in the chart.

<u>MDP #</u>	<u>MINE PERMIT NO.</u>	<u>PERMITTED ACRES</u>	<u>ORIGINAL BOND AMT.</u>	<u>BOND AMOUNT DECLARED</u>	<u>BOND AMOUNT COLLECTED</u>	<u>BOND TYPE</u>	<u>BOND NO. FORFEIT</u>
4574SM4	1470-1	20.0	\$11,500.00	\$11,500.00	\$ 6,325.00	Surety	Travelers 217B6839
4574SM4	1470-1(A)	27.2	\$15,640.00	15,640.00	10,350.00	Surety	Travelers 218B2244
4574SM4	1470-1(A2)	4.8	\$ 2,400.00	2,400.00	2,400.00	Collateral	SC977
4474SM20	1470-2	20.0	\$11,500.00	11,500.00	11,500.00	Collateral	SC879
4474SM20	1470-2(A)	20.0	\$11,500.00	5,500.00	NONE	Collateral	SC879
4474SM20	1470-2(A2)	10.0	\$ 5,000.00	2,000.00	NONE	Collateral	SC879, SC976
4474SM20	1470-3	7.1	\$ 7,100.00	7,100.00	7,100.00	Surety	Travelers 558E2324
		Excess Bond		<u>4,000.00</u>	<u>NONE</u>	Collateral	SC879
			\$64,640.00	\$59,640.00	\$37,675.00		

The difference in the original bond amount and total bonds declared forfeit is the amount of Stage I release you received for reclamation you had completed. On July 9, 1980, Coal Hill was released of \$5,000.00 liability for the reclamation of 30 acres of land to Stage I backfilling and grading standards on MDP #4474SM20, MP 1470-2(A) and 2(A2) under Completion Report #2480016. Savings Certificate 976 was released to Coal Hill.

Although there was \$4,000.00 of excess bond at the time of forfeiture, the full amount of remaining bond was demanded by the Department because forfeiture of a site is penal in nature and not solely based on performance objectives.

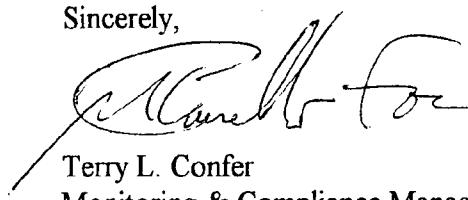
You appealed the forfeiture of these bonds with the Environmental Hearing Board (EHB); the appeal was docketed at 82-193-G. A hearing was held in Pittsburgh on January 25, 1984. On August 6, 1984 the decision of the Board was to sustain a partial collection of the bonds and release the remaining. The amounts collected are shown in the previously referenced chart. The amounts released were directed by the EHB and reflect a return of bond for the reclamation Coal Hill Contracting had completed on MDP #4474SM20, MP 1470-2(A) and 2(A2), excess bond carried, and bond return for #4574SM4, 1470-1, 1470-1(A), 1470-(A2).

May 30, 1995

As directed by the Environmental Hearing Board decision, The Travelers Indemnity Company was released of further liability for its surety bonds that were not collected. The final distribution of Savings Certificate No. 879, in the face amount of \$23,000.00, drawn on Clearfield Bank & Trust Company, Clearfield, PA, formerly assigned to the Department of Environmental Resources was: \$11,500.00 COLLECTED with interest from date of forfeiture, July 9, 1982. The remaining portion of Savings Certificate No. 879, \$11,500.00, was released to Clearfield Bank & Trust Company, Clearfield, PA payable to Coal Hill Contracting Company with interest. Clearfield Bank reports that they no longer carry this savings certificate.

This office cannot consider your request for recovery of the forfeited and collected bonds. Not only have your appeal rights expired long ago but the statute of limitations would probably apply to these matters. If you have any questions, please call Mario Carrello or myself at the above referenced number.

Sincerely,



Terry L. Confer
Monitoring & Compliance Manager
District Mining Operations

cc: Michael Smith
Terry L. Confer
Mario P. Carrello
Mike Terretti
MDP Files (2)
TLC/MPC/hao

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

CHESTER A. OGDEN, PRESIDENT *
COAL HILL CONTRACTING CO., INC.*
Plaintiff *
*
vs. * No. 2003-1566-CD
*
COMMONWEALTH OF PENNSYLVANIA,*
DEPARTMENT OF ENVIRONMENTAL *
PROTECTION *
Defendant *

ANSWER TO PRELIMINARY OBJECTIONS

The Plaintiff, Chester A. Ogden, answer Defendant's Preliminary Objections as follows

1. Not admitted nor denied for reason of Plaintiff's minimal education.
2. Not admitted nor denied for reason of Plaintiff's minimal education.
3. Not admitted nor denied for reason of Plaintiff's minimal education.
4. Not admitted nor denied for reason of Plaintiff's minimal education.
5. As to "WHEREFORE", The Plaintiff respectfully requests that this

Court deny Defendant's request of an Order dismissing Plaintiff's complaint for lack of jurisdiction and also deny request to have the matter transferred to Commonwealth Court, for reason following stated;

(a) Clearfield County is the district wherein the matter

occurred

(b) The matter at issue pertains to Plaintiff's coal mining

sites, Ogden # 8 and Ogden # 9, in the area of Clearfield,
Pennsylvania

FILED

DEC 09 2003

mlw
William A. Shaw
Prothonotary *mlw*

- (c) Plaintiff's witnesses that could be called are all from area of Clearfield, Pennsylvania
- (d) Defendant's witnesses and records of the matter that could be used at trial are all within close proximity to Clearfield, Pennsylvania
- (e) Jury review of subject coal mining sites would be most cost efficient with the trial conducted in Clearfield County
- (f) Plaintiff is almost 80 years of age with declining health, living on minimum social security, and limits vehicle use to familiar area in Clearfield County.

WHEREFORE, Plaintiff respectfully requests that this Court enter an Order retaining jurisdiction of the matter.

II. As to - Preliminary Objections In The Nature Of A Demurrer:

- 5. Admitted. Plaintiff's Complaint did allege that Defendant acted without lawful cause when it declared forfeited and collected the bonds posted for two surface mines permitted by Plaintiff, and strict proof thereof is demanded.
- 6. Not admitted nor denied. In answer thereto Plaintiff avers that he is without such knowledge or information sufficient to form a belief as to the truth of the Defendant's averment and strict proof thereof is demanded.

7. Not admitted nor denied. In answer thereto Defendant's Exhibit A is a bald assertion that Plaintiff failed to comply with Surface Mining Conservation and Reclamation Act and that the operations, Ogden #8 and Ogden #9, have been in a constant state of violation since July of 1980 in that the Department's (DEP) directive dated April 9, 1981 was not specific in the identify of violation alleged by which the mine operator could have undertaken corrective measures, and the Department knew both mining sites had been previously mined and not reclaimed and that the current operator had undertaken to mine remaining coal and restore the land to productive use.

8. Denied. In answer thereto the Plaintiff avers that he is without such knowledge or information sufficient to form a belief that "The Commonwealth shall continue to enjoy sovereign and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity." and strict proof thereof is demanded.

9. Not admitted nor denied. In answer thereto the Plaintiff is without such knowledge or information to form a belief as to the truth of Defendant's averment and strict proof thereof is demanded.

10. Denied. In answer thereto the Plaintiff's complaint does allege facts sufficient to establish actions by the Department which would create a common law cause of action against the Commonwealth.

11. Denied. In answer thereto the Plaintiff's complaint does allege facts which establish actions by the Department which support a claim under law of The Constitution of The United States and Constitution Of The Commonwealth Of Pennsylvania.

12. Denied . In answer thereto the Plaintiff's complaint does allege facts or conditions which establish actions by the Department which support a claim under supreme law of the United States in that the Department undertook forfeiture of bonding and terminated coal mining business Plaintiff without lawful cause.

WHEREFORE, the Plaintiff respectfully requests that this Court issue an Order denying Defendant's request to dismiss complaint.

**III as to PRELIMINARY OBJECTIONS IN THE NATURE OF A DEMURRER;
FAILURE TO ALLEGE ANY FACTS OR LEGAL THEORY WHICH WOULD
ENTITLE PLAINTIFF TO THE RELIEF SOUGHT OR ESTABLISH A DUTY ON THE
COMMONWEALTH'S PART TO PAY THE FUNDS SOUGHT**

13. Admitted. with comment In answer thereto the Plaintiff's complaint alleges that the Department/ Defendant acted without "lawful" cause when it declared forfeit and collected the bonds posted for two surface mines permitted by Plaintiff.

14. Not admitted nor denied. In answer thereto the Plaintiff avers that he is without such knowledge or information sufficient to form a belief as to the requirement of Section 4(h) of the Surface Mining Conservation and Reclamation Act ,when the area of mining consists of land previously mined and not reclaimed, So other than the "Act" requiring mine operator to reclaim the mine site "equal to or better than (his) prior to mining condition", which in this instance the operator could have mined remaining coal and not reclaimed the site and been in compliance with requirements of the Act.

15. Denied. In answer thereto the Plaintiff alleges that the information in the complaint sets forth factual and general information in support of the action undertaken against Defendant, and Plaintiff further alleges that Defendant's Exhibit A, Department's letter dated April 9, 1981, for the most part, is a fabrication of information and strict proof thereof is demanded.

16. Denied. In answer thereto the Plaintiff's complaint does not allege fact or legal theory which would entitle him to the relief sought and would establish a duty on the Commonwealth's part to pay the funds sought in that the Commonwealth undertook act of confiscation, by forfeiture of Plaintiff's bonding on deposit, and terminated the operator's coal mining business without lawful cause.

WHEREFORE, the Plaintiff respectfully requests that this Court enter an Order denying Defendant's request to dismiss for legal insufficiency

**IV. as to PRELIMINARY OBJECTION FOR LACK OF JURISDICTION:
IMPERMISSIBLE COLLATERAL ATTACK UPON A FINAL ADMINISTRATIVE
ACTION**

17. Admitted.

18. Admitted with comment. In answer thereto the Plaintiff admits that by letter dated April 9, 1981 the Department directed Plaintiff to replace the water supplies under threat of bond forfeiture, and Plaintiff by letter dated April 13, 1981, challenged the directive by stating "... there is less cause of pollution existing today than there has been for the past thirty years. The prior to mining maps available to you will prove this beyond question" and further states "I would appreciate information from DER as to how you have determined that this company is responsible for having destroyed the water supply...", and strict proof thereof is demanded.

19. Denied. In answer thereto the Plaintiff alleges that the Department's April 9, 1981 letter directing Plaintiff to replace the water supplies under threat of bond forfeiture is not a final appealable decision in that the Department's letter was absent of evidence in support of the claim of water supplies being degraded.

20. Denied. In answer thereto the Plaintiff alleges that the dispute between Plaintiff and Defendant was not one for Environmental Hearing Board (EHB) involvement without the Department first possessing warranted cause for its decisions.

21. Denied with comment. In answer thereto the Plaintiff alleges that while the EHB may have exclusive jurisdiction to review Department actions such as bond forfeiture declarations, justice requires that the Department first posses warranted cause for its decisions.

22. Denied. In answer thereto the Plaintiff alleges that while the statute in effect in 1982, Section 21(c) of the Administrative Code, 71 P.S. s/s 510-21(c), states, in pertinent part, "No action by the department adversely affecting any person shall be final as to such person until such person has had the opportunity to appeal such action to the Environmental Hearing Board.", the statute does not relieve the department of producing evidence relied upon for forfeiture declaration.

23. Not Admitted nor Denied. In answer thereto the Plaintiff alleges that the matter wasn't one of appealing the Departments April 9, 1981 decision to EHB in that it was a matter of requiring the Department to produce evidence being relied upon for instructing Plaintiff to replace private water supplies.

24. Admitted with comment. In answer thereto the Plaintiff alleges that while the EHB's records establish that Plaintiff failed to appeal Department's April 9, 1981 decision, the Department's records do not establish having supplied Plaintiff with evidence relied upon for forfeiture declaration.

25. Denied. In answer thereto the Plaintiff alleges that failure to appeal the Department's April 9, 1981 decision is not final in that before appealing a decision, justice requires that the Department posses warranted cause in support of its decision to instruct Plaintiff to replace private water supplies.

WHEREFORE, the Plaintiff respectfully requests that this Court enter an Order denying Department's request as to the replacement of the water supplies and the costs associated therewith.

**V. as to PRELIMINARY OBJECTION IN THE NATURE OF A DEMURRER:
PLAINTIFF'S COMPLAINT IS BARRED BY RES JUDICATA..**

26. Admitted with comment. While damages alleged by Plaintiff are attributed to the Department's letter of July 9, 1982, as attached to Preliminary objections as Exhibit A, the letter is a bald assertion of Plaintiff's coal mining sites being in a continuos state of violation since July of 1980 in that the letter was absent of evidence in support, and the Department never informed Plaintiff of his mining activity causing harm to the environment or to person or property of another. The second page of Exhibit A is alleged to be nothing more than the Department's attempt to avoid production of evidence to justify forfeiture declaration and cause the Plaintiff to seek relief through EHB.

27. Admitted in part. Denied in part. In answer thereto the Plaintiff admits to Plaintiff timely appealed the Department's July 9, 1982 action; The EHB held a hearing at which Plaintiff was represented by counsel and

presented evidence; On August 5, 1984, the EHB issued an adjudication by which it upheld the Department's bond forfeitures in the amount of \$36,695.00; and. Plaintiff failed to appeal this adjudication to Commonwealth Court, and it is final as to Plaintiff. Denied that failure to appeal EHB's adjudication to Commonwealth Court is final as to Plaintiff in that EHB's adjudication was absent of the Department having met burden of proof in the matter complained of and, therefore, Commonwealth Court lacked warranted cause for affirming EHB decision.

28. Admitted with comment. The Department's Paragraph 28 served to now remind Plaintiff of some finances being returned, as reflected in Department's Exhibit D.

29. Not admitted nor denied. In answer thereto the Plaintiff avers that he is without knowledge or information sufficient to understand doctrine of Res Judicata.

30. Denied. In answer thereto the Plaintiff avers that he is without knowledge or information to understand Department's assertion that Plaintiff's complaint is barred by doctrine of Res Judicata, without the Department first possessing evidence to justify forfeiture declaration.

31. Denied. In answer thereto the Plaintiff asserts that Plaintiff's complaint is not barred by any claim without the Department first possessing evidence being relied upon in support of bond forfeiture declaration.

WHEREFORE, the Plaintiff respectfully requests that this Court enter an Order denying Defendant's request to dismiss complaint for reason of Res Judicata.

VI. as to PRELIMINARY OBJECTION FOR LACK OF JURISDICTION: FAILURE TO EXHAUST STATUTORY REMEDIES.

32. Admitted, with comment In answer thereto the Plaintiff's complaint is based upon his disagreement with the two actions in that the Department has failed to produce evidence being relied upon in support of the forfeiture declaration July 9, 1982 and has refused to produce the information throughout the past twenty-one years.

33. Not admitted nor denied. In answer thereto the Plaintiff alleges that while he may of had statutory remedies by which he could contest Department actions of water supply directive and bond forfeiture declaration, the matter first involved having the Department produce evidence relied upon to justify bond forfeiture declaration.

34. Denied. In answer thereto the Plaintiff alleges that while a specific statute such as the Administrative Code, the EHB Act, the Judicial Code and the Administrative Agency Law provide a specific method of appeal from a decision of an administrative agency, the matter complained of was the Department's refusal to produce evidence relied upon to justify forfeiture declaration.

35. Denied. In answer thereto the Plaintiff alleges that statutory remedies which may be available to him do not preclude use of this Court in the matter complained of.

WHEREFORE, the Plaintiff respectfully requests that this Court enter an Order denying Defendant's request to dismiss for failure to exhaust statutory remedies.

VII. as to PRELIMINARY OBJECTION AS TO JURISDICTION: PLAINTIFF'S COMPLAINT IS BARRED BY THE STATUTE OF LIMITATIONS.

36. (Defendant's 23) Admitted with comment. In answer thereto the Plaintiff's complaint establishes that the Department action from which damages flow occurred on July 9, 1982, and further alleges that throughout more than twenty-one years following the occurrence the Department failed to honor Plaintiff's numerous request for evidence relied upon to justify bond forfeiture declaration.

37. (Defendant's 24) Denied with comment. In answer thereto the Plaintiff's alleged cause of action for forfeiture declaration is not contrary to law for which a time limit applies when the Department has failed throughout more than twenty-one years to produce evidence relied on for forfeiture declaration April 9, 1982.

38. (Defendant's 25) Denied in part, Admitted in part In answer thereto the Plaintiff denies that the matter complained of is subject to time limitation in

that the Defendant failed, and continues to fail, to produce evidence being relied upon to warrant forfeiture declaration, and time limitations do not preclude citizen's lawful right to petition the Government for redress of grievance pursuant to Constitution of The United States, Amendment I. Plaintiff admits that some funds due him may have been returned.

WHEREFORE, the Plaintiff respectfully requests that this Court enter an Order denying Defendant's request to dismiss Complaint

Respectfully submitted,



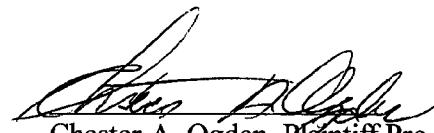
Chester A. Ogden, Plaintiff Pro se
512 Hartshorn Road
Clearfield, Pa. 16830
(814) 765-4682

Date December 5, 2003

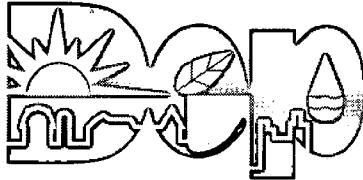
CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2003, copy of the foregoing Answer To Preliminary Objections was served by regular mail, postage prepaid, on the following at address indicated.

Dennis A. Whitaker, Assistant Counsel
Office of Chief Counsel
3rd Floor, 909 Elmerton Avenue
Harrisburg, Pa. 17110-8200



Chester A. Ogden, Plaintiff Pro se



Pennsylvania Department of Environmental Protection

Office of Chief Counsel

3rd Floor

909 Elmerton Avenue

Harrisburg, Pennsylvania 17110-8200

December 10, 2003

Southcentral Regional Office

Telephone: (717) 787-8790

Telecopier: (717) 772-2400

VIA OVERNIGHT MAIL

David S. Meholic
Court Administrator
Clearfield County Courthouse
Suite 228, 230 East Market Street
Clearfield, PA 16830

RE: Chester A. Ogden, Coal Hill Contracting Co., Inc. v. Commonwealth of Pennsylvania,
Department of Environmental Protection
No. 2003-1566-CD

Dear Mr. Meholic:

Enclosed for filing in the above-referenced matter please find an original and one copy of the Department of Environmental Protection's Memorandum of Law in Support of Preliminary Objections. A copy has been served as per the attached Certificate of Service.

Sincerely,

Dennis A. Whitaker
Assistant Counsel

cc: Chester A. Ogden

RECEIVED

DEC 11 2003

**COURT ADMINISTRATOR'S
OFFICE**



IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

CHESTER A. OGDEN, PRESIDENT :
COAL HILL CONTRACTING CO., INC. :
Plaintiff :
v. : No. 2003-1566-CD
: :
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :
Defendant :
:

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COURT ADMINISTRATOR'S
OFFICE

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL PROTECTION'S
MEMORANDUM OF LAW IN SUPPORT OF PRELIMINARY OBJECTIONS

INTRODUCTION

Presently before the Court for consideration are the Commonwealth of Pennsylvania, Department of Environmental Protection's (Department) Preliminary Objections to Plaintiff Chester A. Ogden's Complaint. Plaintiff through his Complaint seeks reimbursement of forfeited bond proceeds, reimbursement of water line construction costs, and interest on those sums from July 9, 1982 through the present. The Department on November 17, 2003 filed Preliminary Objections for lack of jurisdiction (Preliminary Objections I, IV, VI and VII) and demurrers for sovereign immunity, for legal insufficiency and for res judicata (Preliminary Objections II, III and V). By notice dated December 5, 2003, argument on the Department's Preliminary Objections was scheduled for December 12, 2003. This memorandum is submitted in support of those Preliminary Objections. For the reasons stated therein, as amplified below, Plaintiff's Complaint should be dismissed.

PROCEDURAL AND FACTUAL HISTORY

Plaintiff's Complaint and Exhibit A thereto, the Department's Preliminary Objections endorsed with a Notice to Plead and the public records attached thereto, and Plaintiff's Answer to the Preliminary Objections establish the following facts.

Plaintiff operated two surface coal mines located in Lawrence and Bradford Townships, Clearfield County. (Complaint, Paragraphs 3-6, 10); *Ogden v. DER*, 1984 EHB 374, 376-378 (attached to the Department's Preliminary Objections as Exhibit C). As required by law, Plaintiff posted surety bonds and collateral with the Department to ensure reclamation of Plaintiff's mine sites. (Complaint, Paragraphs 5, 11); *Ogden v. DER, passim*.

By letter dated April 9, 1981, the Department directed Plaintiff to replace three private water supplies which the Department determined were degraded by Plaintiff's mining operations on his Lawrence Township permit. (Department's Preliminary Objection IV, Paragraph 18, and Exhibit A thereto; Plaintiff's Answer, Paragraph 18). Plaintiff received the April 9, 1981 letter and replied to it on April 13, 1981 (Department's Preliminary Objection's Exhibit A and Plaintiff's Answer, Paragraph 18). Plaintiff did not appeal the Department's directive to replace the water supplies to the Environmental Hearing Board (EHB), the administrative tribunal with exclusive jurisdiction to review Department actions. (Department's Preliminary Objections, Paragraphs 23, 24, and Exhibit B thereto). Plaintiff replaced the affected water supplies. (Complaint, Paragraph 9).

By letter dated July 9, 1982, the Department declared forfeit the \$59,640.00 in bonds posted on Plaintiff's surface mines in Lawrence and Bradford Townships due to Plaintiff's failure to reclaim those mines. (Complaint, Paragraph 14 and the Request for Relief; Complaint, Exhibit A; *Ogden v. DER, passim*). The forfeiture was not based upon Plaintiff's having affected the

private water supplies. *Ogden v. DER, passim*. Plaintiff appealed the July 9, 1982 forfeiture declaration to the EHB, which appeal was docketed at EHB Docket No. 82-193-G. *Ogden v. DER*; (Answer, Paragraph 27). The EHB held a hearing at which Plaintiff was represented by counsel and presented evidence. *Ogden v. DER*; (Answer, Paragraph 27). On August 5, 1984, the EHB issued an adjudication by which it upheld the bond forfeitures in the amount of \$36, 695.00. *Ogden v. DER*. Plaintiff failed to appeal this adjudication to Commonwealth Court. (Answer, Paragraph 27). The proceeds from the Certificate of Deposit on which the EHB disallowed forfeiture were returned to Plaintiff. (Answer, Paragraphs 28, 38; Exhibit D to the Department's Preliminary Objections). Plaintiff commenced this action by Complaint filed October 17, 2003, which was served on the Department on October 28, 2003. The Department timely filed Preliminary Objections on November 17, 2003 and Plaintiff timely filed an Answer thereto on December 6, 2003.

STANDARD OF REVIEW

When ruling upon Preliminary Objections, this Court must accept as true all well pleaded allegations of material fact as well as all reasonable inferences deducible therefrom. However, this Court is not required to accept as true any conclusions of law, unwarranted inferences from facts, argumentative allegations or expressions of opinion. To sustain preliminary objections, it must appear with certainty that the law will not permit recovery, and dismissal should occur only in cases that are clear and free from doubt. *Independent Oil and Gas Association of Pennsylvania v. Public Utility Commission*, 804 A.2d 693 (Pa. Cmwlth. 2002); *Uniontown Newspapers v. Roberts*, 777 A.2d 1225 (Pa. Cmwlth. 2001).

DISCUSSIONS

I. THIS COURT LACKS JURISDICTION OVER PLAINTIFF'S COMPLAINT.

This Court lacks jurisdiction over Plaintiff's Complaint where Commonwealth Court has exclusive jurisdiction over actions against the Commonwealth. Jurisdiction is barred over that portion of Plaintiff's Complaint which seeks to recover funds expended replacing private water supplies where the record establishes that Plaintiff failed to appeal to the EHB the Department's April 9, 1981 directive to replace those water supplies. That action is now final as to Plaintiff and may not be collaterally attacked through the instant Complaint. Plaintiff's Complaint also is barred by res judicata as to that portion of the July 9, 1982 bond forfeiture upheld by the EHB, and by the statue of limitations for those damages claimed by Plaintiff to have resulted from the April 9, 1981 directive and from July 9, 1982 forfeiture.

A. JURISDICTION OVER THIS MATTER LIES IN COMMONWEALTH COURT.

Commonwealth Court has exclusive jurisdiction over the civil actions or proceedings against the "Commonwealth government." 42 Pa. C. S. § 761 (a)(1). The Department is an executive agency of the Commonwealth which falls within the ambit of the term "Commonwealth government." *see, e.g.*, Section 1901-A *et seq.* of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, No. 175, *as amended*, 71 P.S. § 510-1 *et seq.*

The only exceptions to this general rule are found at 42 Pa. C. S. § 761 (a)(1)(i-v), as follows:

§ 761. Original Jurisdiction

- (a) General Rule. – The Commonwealth Court shall have original jurisdiction of all civil actions or proceedings:
 - (1) Against the Commonwealth government, including any officer thereof, acting in his official capacity, except:

- (i) actions or proceedings in the nature of applications for a writ of habeas corpus or postconviction relief not ancillary to proceedings within the appellate jurisdiction of the court;
- (ii) eminent domain proceedings;
- (iii) actions or proceedings conducted pursuant to Chapter 85 (relating to matters affecting government units);
- (iv) actions or proceedings conducted pursuant to the act of May 20, 1937 (P. L. 728, No. 193), referred to as the Board of Claims Act; and
- (v) actions or proceedings in the nature of trespass as to which the Commonwealth government formerly enjoyed sovereign or other immunity and actions or proceedings in the nature of assumpsit relating to such actions or proceedings in the nature of trespass.

Plaintiff's Complaint does not contain allegations which would place this matter within any of the exceptions enumerated in Section 761(a)(1). The Department addresses the sovereign immunity aspect of this matter in Part II A, *infra*.

Where, as here, the Department falls within the ambit of the term "Commonwealth government" and where Plaintiff's Complaint fails to contain allegations which would place this matter within any of the exceptions to Commonwealth Court's jurisdiction at 42 Pa. C. S. § 761 (a)(1), jurisdiction over this matter lies in Commonwealth Court. *Cry, Inc. v. Mill Service, Inc.*, 536 Pa. 462, 640 A.2d 372, 377 (1994); *Konhaus v. Lutton*, 344 A.2d 763 (Pa. Cmwlth. 1975).

B. PLAINTIFF MAY NOT ATTACK THROUGH THIS COMPLAINT THE DEPARTMENT'S DIRECTIVE TO REPLACE WATER SUPPLIES WHERE PLAINTIFF FAILED TO APPEAL THAT DIRECTIVE TO THE EHB.

That portion of Plaintiff's Complaint which seeks reimbursement for funds expended in compliance with the Department's directive to replace private water supplies affected by Plaintiff's mining is barred as an impermissible collateral attack on a final administrative action where Plaintiff failed to appeal that directive to the EHB.

The record in this matter establishes that the Department on April 9, 1981 directed Plaintiff to replace three private water supplies which the Department determined were affected by

Plaintiff's mining and that Plaintiff received the directive but failed to appeal that directive to the EHB. The Department's April 9, 1981 directive to replace the water supplies under threat of bond forfeiture constituted a final appealable decision where it directed compliance with the mining laws and imposed liability or otherwise affected Plaintiff's obligations or duties. *Gateway Coal Co. v. Department of Environmental Resources*, 309 A.2d 802, 804-805 (Pa. Cmwlth. 1979).

As referenced in Paragraphs 20 through 22 of the Department's Preliminary Objections, the EHB at all times relevant hereto has been the tribunal established by statute and given exclusive authority to review Department actions such as the April 9, 1981 directive to Plaintiff to replace the water supplies affected by his mining. The April 9, 1981 letter was a final action appealable to the EHB. Plaintiff failed to avail himself of the exclusive remedy prescribed by the General Assembly to challenge the Department's determination that Plaintiff affected the water supplies. As such, that determination is final and is no longer subject to attack in later proceedings. *Commonwealth v. Derry Township*, 466 Pa. 31, 351 A.2d 606 (1976).

C. PLAINTIFF'S COMPLAINT IS BARRED WHERE HE FAILED TO EXHAUST HIS EXCLUSIVE STATUTORY REMEDIES.

Plaintiff failed to exhaust his exclusive statutory remedies by which he could contest the Department actions of which he complains here. As such, his Complaint is barred in this Court.

Plaintiff here complains about two Department actions, the April 9, 1981 directive to replace water supplies and the July 9, 1982 forfeiture declaration. The exclusive statutory remedy to contest the directive to replace water supplies was in appeal to the EHB under the statute then in effect, Section 21(c) of the Administrative Code, 71 P.S. § 510-21(c). Plaintiff's exclusive statutory remedy to contest the portion of the EHB's adjudication adverse to him was an appeal to Commonwealth Court pursuant to Section 763(a)(1) of the Judicial Code, 42 Pa. C. S. § 763 (a)(1),

and the Administrative Agency Law, 2 Pa. C. S. Chapter 5 (Subchapter A) and Chapter 7 (Subchapter A).

In *Pennsylvania Life Ins. Co. v. Pennsylvania National Life Ins. Co.*, 417 Pa. 168, 208 A.2d 780 (1965), our Supreme Court held that where, as here, a specific statute provided a specific method of appeal from a decision of an administrative agency, the procedure required by that remedy must be followed to the exclusion of all others. That decision instructs that Plaintiff's failure to appeal to the EHB or to Commonwealth Court bars his Complaint in this Court.

D. PLAINTIFF'S COMPLAINT IS BARRED BY THE STATUTE OF LIMITATIONS.

This Court lacks jurisdiction over Plaintiff's Complaint because it is barred by the statute of limitations. Plaintiff's Complaint establishes that the Department actions from which his alleged damages flow occurred on April 9, 1981 and July 9, 1982. However, Plaintiff's Complaint does not fall within the actions enumerated at 42 Pa. C. S. § 5531 for which no time limit applies. Nor does it fall within the ambit of the 20 and 21-year limitation periods at 42 Pa. C. S. §§ 5528 and 5530 respectively. As such, it must have been commenced between six months and 15 years from the date injury was sustained or the cause of action accrued. 42 Pa. C. S. §§ 5522-5528.

The Department submits that the applicable time period is the six month limitation on civil actions against a Commonwealth agency found at 42 Pa. C. S. § 5522. However, it is unnecessary for this Court to determine which specific time limitation (6 months to 15 years) applies to Plaintiff's Complaint because the Complaint was filed on October 17, 2003, more than 21 years from July 9, 1982, the last date upon which Plaintiff's alleged injuries were sustained. Plaintiff's Complaint therefore is barred by the statute of limitations.

II. PLAINTIFF'S COMPLAINT IS BARRED BY SOVEREIGN IMMUNITY, IS LEGALLY INSUFFICIENT AND IS BARRED BY RES JUDICATA.

Plaintiff's Complaint is barred by sovereign immunity where Plaintiff fails to establish a common law or statutory cause of action against the Department and where Plaintiff's Complaint does not fall within one of the nine enumerated exceptions to sovereign immunity. The Complaint is legally insufficient where Plaintiff fails to allege any facts or legal theory which would entitle him to the relief sought or establish a duty on the Commonwealth's part to pay the funds sought. Plaintiff's Complaint is barred by res judicata where the Department's July 9, 1982 forfeiture action was litigated and the issues raised in Plaintiff's Complaint regarding that action have been conclusively determined in prior actions.

A. PLAINTIFF'S COMPLAINT IS BARRED BY SOVEREIGN IMMUNITY.

The General Assembly in 1978 reaffirmed that the Commonwealth remains immune from suit except where that immunity is specifically waived. 1 Pa. C.S. § 2310. In order to defeat that immunity, Plaintiff first must show that he possesses a common law or statutory cause of action against the Commonwealth. 42 Pa. C.S. § 8522(a). Assuming he meets that burden, Plaintiff must then show that the cause of action falls within one of the nine enumerated exceptions at 42 Pa. C.S. § 8522(b)(1-9).

The gravamen of Plaintiff's Complaint is that he disputes the Department's basis for directing him to replace water supplies affected by his mining and disputes the Department's basis for forfeiting the bonds posted on his mine sites. Sections 4.2 and 4.3 of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P. L. 1998, *as amended*, 52 P.S. §§ 1396.4b, 1396.4c, provide the Department with authority to direct compliance with the Act. Section 18.6 of the Act, 52 P. S. § 1396.18f, provides that it is unlawful to cause water pollution by mining. The Department's April 9, 1981 directive to replace the water supplies was based upon

the Department's determination that the three water supplies were degraded by Plaintiff's mining. (Exhibit A to Preliminary Objections). As such, the Department was statutorily authorized if not required to take that action against the Plaintiff.

The same rubric applies to the July 9, 1982 bond forfeiture declaration. Section 4(h) of the Surface Mining Act, 52 P. S. § 1396.4(h)¹, provides that the Department may declare forfeit and collect reclamation bonds on any site where an operator fails or refuses to comply with the requirements of the Act. Where the Department concluded that Plaintiff was in violation, the Department was statutorily authorized to Act as it did.

Where, as here, the Department acts pursuant to the authorization of the General Assembly to regulate activities not regulated at common law, Plaintiff can allege no common law cause of action. Plaintiff cannot here allege a statutory cause of action because the General Assembly provided specific statutory remedies for the Department acts Plaintiff disputes which remedies do not include a suit for damages in this Court. Plaintiff thus fails to meet the first requirement in Section 8522(a).

That Plaintiff's Complaint fails to allege a cause of action which falls within one of the nine enumerated exceptions at Section 8522(b) (1-9) is evident on the face of the Complaint. Plaintiff seeks to dispute the basis of two Department actions and seeks reimbursement of funds expended or declared forfeit pursuant to those actions. However, nothing in Plaintiff's Complaint remotely establishes an action by the Department which falls within the nine enumerated exceptions. Plaintiff's Complaint is barred by sovereign immunity.

¹ Incorrectly cited in the Department's Preliminary Objections as 35 P.S. § 1396.4(h). Counsel apologizes for any confusion caused by the error.

B. PLAINTIFF'S COMPLAINT IS LEGALLY INSUFFICIENT.

Plaintiff's Complaint is wholly devoid of any facts or legal theory which would entitle him to the relief sought or establish a duty on the Commonwealth's part to pay the funds sought. The Complaint at best establishes that Plaintiff believes that the Department's actions were without basis. That alone is insufficient to entitle him to the relief sought. Moreover, Plaintiff wholly fails to articulate any theory under which his dissatisfaction with Department actions mandates that the Department pay to him the funds sought. Plaintiff's Complaint is legally insufficient and should be dismissed.

C. PLAINTIFF'S COMPLAINT IS BARRED BY RES JUDICATA.

The record in this matter establishes that the July 9, 1982 Department action which forms the basis of a portion of Plaintiff's Complaint was litigated before the EHB and affirmed by Commonwealth Court. It is clear from the Complaint that there is a concurrence of the four conditions necessary to the application of res judicata. (Preliminary Objections, Paragraph 29). Plaintiff's Complaint is thus barred by res judicata because the issues raised therein regarding the Department's July 9, 1982 bond forfeiture declaration have been conclusively determined in prior actions.

WHEREFORE, for the aforestated reasons, Plaintiff's Complaint should be dismissed, or, in the alternative, transferred to Commonwealth Court for disposition.



DENNIS A. WHITAKER
Assistant Counsel
Supreme Court I.D. No. #53975
909 Elmerton Avenue
Harrisburg, PA 17110-8200
(717) 787-8790

Date: December 10, 2003

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISON

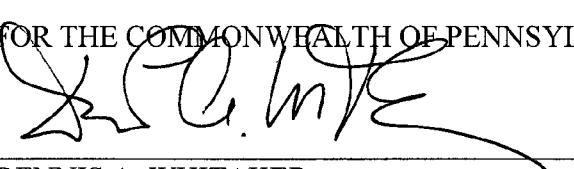
CHESTER A. OGDEN, PRESIDENT :
COAL HILL CONTRACTING CO., INC. :
Plaintiff :
v. : No. 2003-1566-CD
: :
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :
Defendant :
:

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Commonwealth's Memorandum of Law in Support of Preliminary Objections in the above-referenced matter was served upon the individual named below by overnight mail:

Chester A. Ogden
512 Hartshorn Road
Clearfield, PA 16830

FOR THE COMMONWEALTH OF PENNSYLVANIA



DENNIS A. WHITAKER
Assistant Counsel
Supreme Court I.D. #53975
909 Elmerton Avenue
Harrisburg, PA 17110-8200
Telephone: (717) 787-8790

Date: December 10, 2003

ARGUMENT

Honorable J. Michael Williamson,
Specially Presiding

Chester A. Ogden, Plaintiff

Dennis A. Whitaker
Counsel for Commonwealth

Case No. 2003 - 1566 - CD, Ogden vs. Commonwealth
Clearfield County Courthouse December 12, 2003 10:30 a.m.

As the Plaintiff in the matter before the Court, I would like the record to reflect that Commonwealth of Pennsylvania, Department of Environmental Protection's (DEP) Bond Forfeiture Declaration, undertaken against Chester A. Ogden, President, Coal Hill Contracting Co., Inc., is the most outrageous, reckless, and irresponsible act ever known to occur in my 58 years involvement in open-pit coal mining in that DEP never produced warranted cause for the action undertaken, and failed to honor Chester A. Ogden's numerous requests for the information throughout the past twenty-one years.

After exhausting every known means and failing to have DEP produce requested information. The Plaintiff contacted State Representative Camille (Bud) George for assistance with upholding citizen's right to be treated fairly, and Mr. George wrote to Scott Roberts, Deputy Secretary for Mineral Resources and requested that a meeting be scheduled for the parties to meet in his Houtzdale (Pa.) Office and DEP produce evidence relied upon in support of bond forfeiture declaration.

On August 26, 2003 a meeting was conducted in Representative George's Houtzdale office and attended by Deputy Secretary for Mineral Resources Scott Roberts, District Mine Manager Michael Smith, and Chester A. Ogden, President, Coal Hill Contracting Co., Inc., and during which DEP failed to produce warranted cause for bond forfeiture declaration. Then Mr. Roberts and Mr. Smith went to the residence of Chester Ogden at Clearfield, RD, to further discuss the matter and during which the only information presented in support of the forfeiture declaration was the Inspection Report No. 51-F, dated February 25, 1982 by Mine Inspector Gary Byron, which was read by Mr. Roberts and stated therein at "(7) Backfilling is not concurrent with mining- two open pits on site- Both on lower kitanning seam- one cut runs NE - SW 1500 Ft. long by 200 Ft. wide. This cut is partially backfilled with estimated 80 ft. Highwall remaining. Overburden sand rock - Adjacent Lower Kitanning Cropline cut on the extreme western end of this area runs E-W its 1000 ft long by 150 Ft wide with a maximum Highwall height of 60 ft (cut borders Hile's Auto Salvage yard- Junked Autos & Parts have been disposed of in this cut)". At that point. I challenged the validity of the Report in that no such open pits ever existed at the mine site- two open pits, one being 1500 feet long by 200 feet wide by 80 feet deep, and one being 1000 feet long by 150 feet wide by 60 feet deep- and I displayed an Ariel photograph of the mine site and stated that if such excavations of that magnitude had ever been undertaken evidence thereof would still exist. Consequently, as of August 26, 2003, DEP failed to produce warranted cause for forfeiture declaration on July 9, 1982

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**COURT ADMINISTRATOR'S
OFFICE**

For purpose of argument. It is indisputable that DEP has forfeited the bonding of Chester A. Ogden, President Coal Hill Contracting Co., Inc. pursuant to Certified Mail No. 5137121 dated July 9, 1982, and whereby terminated the business.

It is indisputable that DEP failed to produce evidence of fact in support of forfeiture declaration dated July 9, 1982 and continues to withhold such evidence.

DEP's forfeiture declaration has confiscated finances of Chester A. Ogden, terminated his coal mining business, deprived the citizen of his livelihood, deprived the community of economic benefit the business represented, and deprived numerous people of employment. All without warranted cause

DEP has directed the coal operator to replace private water supplies without first possessing evidence of fact in support, and while knowing the water being complained of was derived from land previously mined about 1950.

DEP has forfeited Plaintiff's bonding on Ogden #8 mining site and while knowing the land had been previously mined by others and that Plaintiff owned the land and had undertaken to mine remaining coal and restore the land to prior to mining values.

DEP has forfeited Plaintiff's bonding on Ogden #9 mining site (Mitchell Estate) while knowing the land had been subject to Deep and Surface Coal Mining throughout the past one hundred years and not reclaimed, and also knew, in addition to restoring his mine site, that the operator had reclaimed 20 acres of old spoils

DEP has confiscated finances (bonding) of Chester A. Ogden against his will and without first possessing evidence of harm to the environment or injury to person or property of another. Thus representing Act of Robbery.

DEP has acted contrary to duty of environmental protection in that they terminated Plaintiff's coal mining business and while knowing record of the operator's past mining activity reflected improvement in the environment by eliminating hazards of previous open-pit coal mining such as high walls, open pits, water impoundment's, and deep mine openings.

DEP is in a position to know that Record of Chester Ogden's mining and reclamation activity reflects conduct of the highest standards in that, where land was previously mined and unreclaimed, he has undertaken to mine remaining coal and restore the land equal to or better than prior to mining condition, and, where mining was undertaken to recover coal from under an area previously mined, not reclaimed, and bonding forfeited, he proceeded with mining remaining coal at the point where prior mining had been abandoned and reclaimed the land equal to or better than prior to mining condition, and, in addition to complying with permit requirements, he has reclaimed approximately 69 acres of old spoils, which would still exist, at a cost saving to others of approximately \$700,000.00.

Finally. In causing this matter to be brought before the Court. I seek Justice by Rule of Law in that both parties, Plaintiff and Defendant, be held accountable for conduct which the Court deems improper Thank you

Chester A. Ogden, Plaintiff

In addition: As to Department of Environmental Protection's Memorandum of Law in Support of Preliminary Objections dated December 10, 2003 **VIA OVERNIGHT MAIL** The information was received December 11th at 5:20 p.m. and Plaintiff lacked sufficient time to prepare a response prior to Hearing of Argument scheduled for December 12th at 10:30 a.m..

WHEREFORE: Plaintiff respectfully requests that this Court enter an Order Dismissing Defendant's Memorandum of Law.

Thank you

Chester A. Ogden, Plaintiff

cc; J. Michael Williamson, Judge S.P
Dennis A. Whitaker, Esquire

IN THE COURT OF COMMON PLEAS

OF CLEARFIELD COUNTY, PENNSYLVANIA

CA
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CIVIL DIVISION

DEC 12 2003

CHESTER A. OGDEN, PRESIDENT
COAL HILL CONTRACTING CO.,
INC.

William A. Shaw
Prothonotary/Clerk of Courts

-VS- : No. 03-1566-CD

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

O R D E R

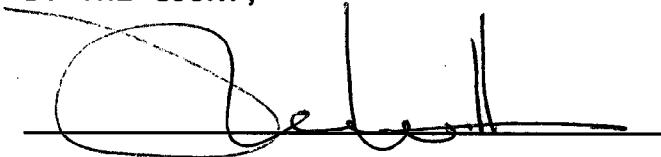
Before the Court are preliminary objections filed by Defendant to Plaintiff's complaint. The Court finds that all of the objections of Defendant are of significant merit, particularly the argument that the statute of limitations has long run in this case.

While this matter was scheduled for oral argument today, Mr. Ogden has not appeared. A phone call was received by the court administrator's office from his wife suggesting he has some medical problem. We do, however, have the benefit of a typewritten, three-page "argument" submitted by Mr. Ogden which presumably sets forth his position.

Now, this 12th day of December, 2003, the Court being satisfied beyond any question that the statute of limitations on these claims have run, it is hereby ORDERED as follows:

1. The preliminary objections of the Defendant are sustained and this matter is dismissed with prejudice;
2. Because the Court finds these proceedings to be totally frivolous, we retain jurisdiction to consider any request for attorney's fees filed by Defendant in the event Plaintiff files an appeal.

BY THE COURT,

A handwritten signature in black ink. It starts with a large, rounded, oval-like shape on the left, followed by a series of vertical and horizontal strokes that form a stylized 'J' and 'M'.

The Honorable J. Michael Williamson,
Specially Presiding

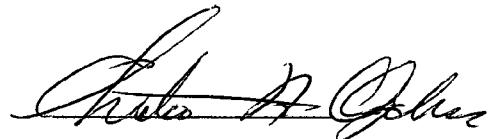
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DEC 12 2003 Clearfield, PA 16830

William A. Shaw
Prothonotary/Clerk of Courts

1CC Atty Whittaker

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

CHESTER A. OGDEN, PRESIDENT *
COAL HILL CONTRACTING CO., INC. *
Plaintiff *
*
vs. * No. 03-1566-CD
*
*
COMMONWEALTH OF PENNSYLVANIA, * Type of Case; Civil
DEPARTMENT OF ENVIRONMENTAL *
PROTECTION, *
Defendant * Type of Pleading: Request Extension of
* Time to Appeal
*
* Filed by Plaintiff;
*
* Chester A. Ogden
* 512 Hartshorn Road
* Clearfield, Pa. 16830
* (814) 765-4682



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William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

CHESTER A. OGDEN, PRESIDENT *
COAL HILL CONTRACTING CO., INC. *
Plaintiff *
vs * No. 03-1566-CD
*
COMMONWEALTH OF PENNSYLVANIA *
DEPARTMENT OF ENVIRONMENTAL *
PROTECTION, *
Defendant *

REQUEST EXTENTION OF TIME TO APPEAL

Now comes the Plaintiff, Chester A. Ogden, with a request of the Court to grant an extention of sixty days, to March 7, 2004, to file Appeal to Order of The Honorable J. Michael Williamson, Specially Presiding, dated 12th day of December 2003, for reason following stated.

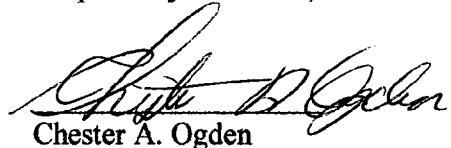
(1) Plaintiff could not participate in Hearing of Arguiment of Preliminary Objections conducted December 12th due to being admitted to Clearfield Hospital at 10:30 a.m..

(2) Plaintiff's mother, Emma L. Ogden (100 years of age) was a patient at Clearfield Hospital and passes away December 16th and with funeral services conducted December 22, 2003.

(3) Plaintiff is 80 years of age, with declyning health, living on Social Security, without financial means to acquire assistance of Counsel, and in need of additional time to prepare and file an Appeal

WHEREFORE, the Plaintiff respectfully requests that this Court enter an Order granting Plaintiff extention of time, to March 7, 2004, to file an Appeal.

Respectfully submitted,

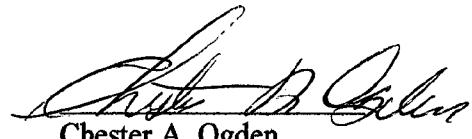


Chester A. Ogden
512 Hartshorn Road
Clearfield, Pa. 16830
(814) 765-4682

CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2004 a copy of the foregoing Request Extention of Time to Appeal was served by regular mail, postage prepaid, on the following at address indicated.

Dennis A. Whitaker, Assistant Counsel
Office of Chief Counsel
3rd Floor, 909 Elmerton Avenue
Harrisburg, a. 17110-8200



Chester A. Ogden
512 Hartshorn Road
Clearfield, Pa. 16830
(814) 765-4682

FILED 2cc

JAN 8 2004 C. Ogden

William A. Shaw
Prothonotary/Clerk of Courts

W.A.S.

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

CHESTER A. OGDEN, PRESIDENT,)
COAL HILL CONTRACTING CO., INC.,)
Plaintiff)
)
v.) NO. 03-1566-CD
)
COMMONWEALTH OF PENNSYLVANIA,)
DEPARTMENT OF ENVIRONMENTAL)
PROTECTION,)
Defendant)

ORDER

February 9, 2004

On December 12, 2003, we traveled to Clearfield County to hear the above matter. As noted in our Order entered that date the suggestion was made that Plaintiff could not appear because of some medical problem. No confirmation has ever been received by us explaining the nature of his problem. Because we had the benefit of Plaintiff's thoughts with respect to the Preliminary Objections and because it was so clear that the statute of limitations had run with respect to the claims set forth in the Complaint, we sustained Defendant's Preliminary Objections and dismissed the Complaint with prejudice.

This date we received from the Court Administrator of Clearfield County a copy of the "Request Extension of Time to Appeal," filed by Plaintiff on January 7, 2004. Assuming Plaintiff has not already filed an appeal, we reject his request for an extension of time and set forth for the record that we would have rejected the request for extension had we received it from

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William A. Shaw
Prothonotary

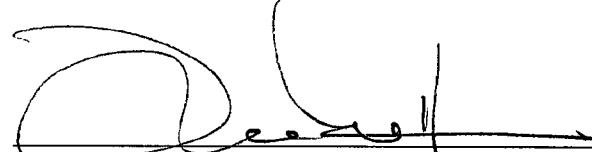
J. MICHAEL WILLIAMSON
JUDGE

COURT OF COMMON PLEAS
25TH JUDICIAL DISTRICT
OF PENNSYLVANIA

COURT HOUSE
LOCK HAVEN, PA 17745

the Court Administrator in a timely manner. Plaintiff's claims are totally frivolous, the statute of limitations has long ago run, and Plaintiff's abuse of the court system must cease.

BY THE COURT:



J. Michael Williamson, Judge
Specially Presiding
25th Judicial District of Pennsylvania

xc: Chester A. Ogden, Plaintiff
Dennis A. Whitaker, Esquire
Court Administrator

J. MICHAEL WILLIAMSON
JUDGE
COURT OF COMMON PLEAS
25TH JUDICIAL DISTRICT
OF PENNSYLVANIA
COURT HOUSE
LOCK HAVEN, PA 17745

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William A. Shaw
Prothonotary



JUDGES CHAMBERS
TWENTY-FIFTH JUDICIAL DISTRICT OF PENNSYLVANIA
LOCK HAVEN, PENNSYLVANIA 17745

J. MICHAEL WILLIAMSON
Judge

Clinton County Courthouse
230 E. Water Street
Lock Haven, PA 17745
570-893-4014
FAX 570-893-4126

February 9, 2004

William Shaw, Prothonotary
Clearfield County Courthouse
230 East Market Street
Clearfield, PA 16830

**Re: Coal Hill Contracting v. Department
of Environmental Protection
No. 03-1566- CD**

Dear Mr. Shaw:

Please file the enclosed Order in the above referenced matter. All copies
have been distributed.

Thank you.

Very truly yours,

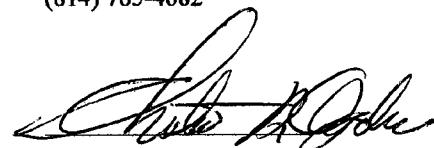
A handwritten signature in cursive ink that reads "Carol E. Miller".

Carol E. Miller
Secretary to Judge Williamson

Enclosure

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

CHESTER A. OGDEN, PRESIDENT :
COAL HILL CONTRACTING, CO. INC :
Plaintiff :
vs : No. 03-1566-CD
COMMONWEALTH OF PENNSYLVANIA : Type of Case; Civil
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION : Type of Pleading: Petition to vacate
Defendant : Order of Court
: Filed by Plaintiff
: Chester A. Ogden
: 512 Hartshorn Road
: Clearfield, Pa. 16830
: (814) 765-4682



FILED 

JUL 23 2004

• (3:451 wng

William A. Shaw

Prothonotary/Clerk of Courts

3 cent to Plaintiff

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

CHESTER A. OGDEN, PRESIDENT	:	
COAL HILL CONTRACTING CO.,	:	
INC.	:	
Plaintiff	:	
- vs -	:	No. 03 - 1566 - CD
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	
Defendant		

PETITION TO VACATE ORDER OF COURT

Now Comes Plaintiff, Chester A. Ogden, a free and natural citizen of the United States claiming rights under Constitution of The United States and The Constitution of The Commonwealth of Pennsylvania with Petition to vacate Order of Court entered 12th day of December, 2003 dismissing the matter with prejudice, for reason following stated.

First. Plaintiff is 80 years of age, divorced, retired on Social Security of \$653.00 per month, a combat veteran of WW-II, with a ninth grade education from Clearfield Pennsylvania area schools, without financial means to undertake legal assistance, and trusts to the Court to defend citizen's right to be treated fairly.

The matter before the Court rests on Defendant acting without warranted cause by declaring forefit and collecting bonds posted for two surface mines permitted by Plaintiff, and Plaintiff pursuing recovery of finances and damages for loss incurred.

On July 9, 1982, Department of Environmental Resources, now Department of Environmental Protection (DEP), declared forfeiture of all bonding of Chester A. Ogden, President, Coal Hill Contracting Co., Inc. (Ogden) and terminated the mining operation under the bald assertion of violating Surface Mining Conservation and Reclamation Act

Throughout more than twenty years, DEP has refused to supply evidence being relied upon to warrant forfeiture declaration, and after the matter was brought to the attention of State Representative Camille (Bud) George, he was instrumental in having the parties meet in his office at Houtzdale and have DEP produce evidence being relied upon for the forfeiture action. And on August 26, 2003, J. Scott Roberts, Deputy Secretary for Mineral Resources Management; Michael Smith, District Mine Manager; and Chester A. Ogden, President, Coal Hill Contracting Co., Inc. met in the Houtzdale office of Representative George and during which **DEP did not present evidence in support of forfeiture action.** Then J. Scott Roberts and Michael Smith met at the Ogden residents to further discuss the matter, and after reviewing Ogden's mining record for evidence in support of the forfeiture action, Mr. Roberts read the Inspection Report No. 51-F dated February 25, 1982 by Mine Inspector Gary Byron whereby it stated "(7) Backfilling is not concurrent with mining- two open pits on site - Both on lower kittanning seam - one cut runs NE - SW 1500 Ft. long by 200 Ft. wide. This cut is partially backfilled with estimated 80 ft. Highwall remaining..... Adjacent Lower Kittanning Cropline cut on the extreme western end of this area runs E-W its 1000 ft long by 150 Ft wide with a

maximum Highwall of 60 ft....". At that point, Ogden produced an ariel photograph of the mine site (Ogden # 8, Lawrence Township) dated July 15, 1975, which was taken about six month prior to the mining operation being shut down January, 1976, and challenged the Inspection Report with containing statements known to be false in that open pits of such extremes never existed at the mine site, and provably so by Ogden employees, land owner, and adjacent property owners. Consequently, **on August 26, 2003 DEP could not produce evidence to warrant forfeiture of bonding July 9, 1982 on mining sites of Chester A. Ogden.**

On September 9, 2003, a letter was submitted to DEP, J.Scott Roberts, explaining assessment of the meeting conducted August 26th, and requesting that DEP settle the matter by payment of \$645,663.00 within 30 days, October 15, 2003, .and further stating that failure to settle the matter within allotted time will constitute just cause for seeking relief through the Court and such other relief the Jury feels fair and equitable (see copy of letter attached, marked "Exhibit "A")

On October 17, 2003, Complaint was filed with Clerk of Court, Clearfield County, Pennsylvania, at No. 03-1566-CD, with Plaintiff seeking judgment in his favor and against Defendant in the amount of \$652, 085.07, at that point in time, and such other relief as the Court deems just, proper, and equitable (see attached copy of Complaint marked "Exhibit B")

By assessment of the matter it becomes evident; (1) Defendant took posession of Plaintiff's finances (bonding) July 9, 1982 absent warranted cause; (2) Defendant has refused production of just cause for bond forfeiture action and denied Plaintiff of his finances throughout more than twenty-one (21) years; (3) Plaintiff has petitioned the Court in Suit Against the Commonwealth for an injury done him by due courise of law pursuant to Complaint filed with the Court October 17, 2003.

ARGUMENT

No evidence exists of Defendant posessing warranted cause for forfeiture declaration and terminating Plaintiff's coal mining business on July 9, 1982, while at the same time posessing record of the operator's high standards of mining and reclamation; Never a lost time accident, every mining site being equal to or better than prior to mining condition, tax base value of every mine site improved, restored approximately 69 acres of old spoils, previously mined by others, at a cost saving to society of approximately \$700,000.00, and never violated the trust of his fellow man. All considered, it becomes evident of DEP acting contrary to the very purpose of which the Government agency was created - Environmental Protection.

WHEREFORE, the Plaintiff respectfully requests that the Court enter Order vacating order to dismiss, and instruct Court Administrator to schedule the matter for jury trial.



Chester A. Ogden, Plaintiff
512 Hartshorn Road
Clearfield, Pa. 16830
(814) 765-4682

J. Scott Roberts, P.G.
Deputy Secretary for Mineral Resources Management
Department of Environmental Protection
16th Floor, Rachel Carson State Office Building
Harrisburg, Pa. 17105-2063

September 9, 2003

Re: Recovery of forfeited bonding, Coal Hill Contracting Co., Inc.

Dear Mr. Roberts:

This is in further reference to our meeting August 26th in the office of State Representative Camille George in Houtzdale and later at my residence in Pike Township, Clearfield County, and my review of DEP record of Coal Hill's mining activity as supplied by District Mine Manager Michael Smith September 4th.

As record reflects; The meeting was arranged for the purpose of having DEP present evidence, being relied upon, for forfeiture of bonding and terminating the operator's coal mining business July 9, 1982.

After consideration of the information presented at the meeting by you and District Mine Manager Michael Smith, and review of DEP's records. Neither you nor Mr. Smith presented any evidence, relied upon by DEP, for undertaking the bond forfeiture action, and I could not detect such evidence in the record supplied by Mr. Smith. Consequently, the matter is no further advanced today than it was twenty-one years ago.

With DEP having forfeited bonding and terminated the coal mining business of Chester A. Ogden, President, Coal Hill Contracting Co., Inc. pursuant to letter dated July 9, 1982, Certified Mail No. 5137121, they have deprived the operator of the proceeds of his life's work, destroyed his business, deprived numerous people of employment, deprived the community of the economic benefit the business represented, and forced the operator/citizen into retirement on minimum Social Security. All without warranted cause.

Moreover, By taking possession of the posted bonding. DEP has deprived Chester Ogden of the pleasures of life the finances could have represented throughout the past twenty-one years.

Therefore, it is requested that settlement of the matter be made by payment of \$645,663.00 (as fully set forth in letter to you dated April 11, 2003 Certified Mail No. 7099-3400-0016-7882-4998) within 30 days, October 15, 2003.

Failure to settle the matter within allotted time will constitute just cause for seeking relief through the Court and such other relief that the Jury feels fair and equitable.

Exhibit "A"

J. Scott Roberts, P.G.
September 9, 2003
Page 2.

Sincerely,

Chester A. Ogden
512 Hartshorn Road
Clearfield, Pa. 16830

c: Camille (Bud) George

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

CHESTER A. OGDEN, PRESIDENT
COAL HILL CONTRACTING CO., INC.
Plaintiff
vs.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Defendant

*
*
* 2003-1566-
* NO. CD
*
*
*
*

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE . IF
YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE GO TO OR
TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU
CAN GET LEGAL HELP

William A. Shaw, Prothonotary/Clerk of Courts

Court House; First Floor
1 North Second Street

Clearfield, Pa. 16830

Phone: (814) 765-2641; Ext. 19

I hereby certify this to be a true and attested copy of the original statement filed in this case.

OCT 17 2003

Attest.

Will A. Shaw
Prothonotary/
Clerk of Courts

Exhibit "B"

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

CHESTER A. OGDEN,
Plaintiff

vs.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Defendant

*
*
*
* NO. CD
* Trial by Jury
*
*

COMPLAINT

AND NOW, Comes the Plaintiff/Citizen, Chester A. Ogden, under law of the Constitution of The United States and law of Commonwealth of Pennsylvania and petitions Government for redress of grievance against above listed Defendant , whereof the following are statements:

1. The Plaintiff, Chester A. Ogden, is an adult individual engaged in the open -pit coal mining business since 1945 and residing at 512 Hartshorn Road, Clearfield, Pennsylvania 16830.
2. The Defendant, Commonwealth of Pennsylvania Department of Environmental Protection (DEP), is the regulator of the Surface Mining Conservation and Reclamation Act.

COUNT ONE

3. In 1974, Plaintiff submitted Application For Permit to DEP to conduct open pit coal mining on land of Chester A. Ogden, S.K. Williams, and Bellman Ogden in Lawrence Township, Clearfield County.
4. The Application contained evidence of the area of proposed mining being within the confines of a 90 acre site previously mined and unreclaimed, and Applicant/Coal Operator proposing to mine remaining coal and restore the (his) site "equal to or better than prior to mining condition".
5. Plaintiff/Coal Operator deposited Performance and Collateral Bonds with Defendant for the subject, Ogden # 8, (M.D.# 4574SM4) mining operation.
6. In January 1976, declining market for coal caused the operation to be temporarily shut down.

7. At time of shutting down the mining site, the site was "equal to or better than prior to mining condition", plus having restored 20 acres of previously mined land, as evidenced by information compiled by Hess & Fisher Engineers, Inc., Rick Vaow, Hydrogeologist dated April 21, 1982

8. In 1981, Defendant/ claimed the operator degraded the water supply of four residents and ordered the water replaced, under threat of bond forfeiture.

9. Plaintiff undertook immediate measures in compliance with the directive and employed two contractors to provide the complainants with "city water" from Clearfield Municipal Authority, at a cost of \$30,000.00

COUNT TWO

10. In 1975, Plaintiff submitted Application For Permit to DEP to conduct coal mining operations on land of Mitchell Estate in Bradford Township, Clearfield County

11. The Application For Permit contained evidence of the proposed mining site being subject of deep and surface mining throughout the past one hundred years and not reclaimed, and the Applicant/Coal Operator proposing to mine remaining coal and reclaim the (his) site "equal to or better than prior to mining condition".

12. Plaintiff/Coal Operator deposited Performance and Collateral Bonds with Defendant for the subject, Ogden # 9 (M.D. # 4474SM20, mining operation.

13. On September 29, 1979, declining market for coal caused the mining operation to be temporarily shut down, and with conditions at the site being "better than prior to mining condition", plus restoring additional 21 acres of previously mined land, as evidenced in information compiled by Hess & Fisher Engineers, (prior listed at 7).

14. On July 9, 1982, which was twenty-eight days after complying with directive to replace private water supply (prior stated at 8), DEP forfeited all bonding, \$59,640.00, and terminated the coal mining business of Coal Hill Contracting Co., Inc., License File No.1470 (see attached "Exhibit A").

15. The Defendant has knowingly, willfully, and intentionally committed a wrongful act in that record of the Plaintiff's mining activity is absent of evidence of harm to the environment or to person or property of another, and while also being in a position to know of the person's high moral standards.

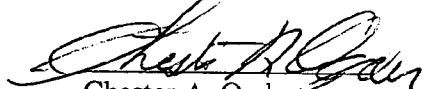
16. The Defendant's failure to meet the minimum reclamation standards of mining and reclamation, as evidenced by conditions "Before" and "After" mining, and especially that of reclaiming an additional 69 acres of land previously mined by others, (evidenced by Hess & Fisher Engineers, Inc.) which otherwise would still exist and cost approximately \$700,000.00 to reclaim, and proceed with forfeiture of all bonding and termination of the business without lawful cause; it becomes evident of DEP officials violating personal honesty and ethics and acting contrary to public interest to the extent that it constitutes outrageous conduct, that is; that the circumstances are such that the bad motive or reckless indifference of the Defendant to the interest and rights of others may be readily inferred and for which punitive damages should be awarded in order to deter the Defendant and others from engaging in similar conduct in the future.

WHEREFORE, Plaintiff requests judgment in his favor and against Defendant for return of forfeited bonding, reimbursement of cost of water line construction, and interest thereof at prime rate from July 9, 1982 to date of settlement, as following indicated

Forfeited bonding.....	\$ 59,640.00
Water line construction cost.....	\$ 30,000.00
Interest @ prime 7/9/82 (computed) to 10/15/03 ..	\$ 562,445.07
<hr/> \$ 652,085.07	

And such other relief as the Court deems just, proper, and equitable.

Respectfully Submitted,


Chester A. Ogden
512 Hartshorn Road
Clearfield, Pa. 16830



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
P. O. Box 2063 - Harrisburg, PA 17120



July 9, 1982

Area Code 717
787-4827

CERTIFIED MAIL NO. 5137121

Chester A. Ogden, President
Coal Hill Contracting Co., Inc.
P. O. Box 1001
Clearfield, PA 16830

Re: Coal Hill Contracting Co., Inc.
License File No. 1470

Dear Mr. Ogden:

The Bureau previously notified you of violations on your surface mine operation described for the permits in this letter. The violations have not been corrected. You failed and have continued to fail to correct the violations and to reclaim the areas you have affected in the course of surface mining operations. In accordance with Section 4(h) of the Surface Mining Conservation and Reclamation Act, the Department hereby certifies and declares forfeited the following bonds provided by you for the subject mining operations:

Performance and Collateral Bonds

(1) Mine Permit No. 1470-1

Surety Bond No. 217B6839, executed 8/7/74 with Change Rider dated 11/5/75 in the amount of \$11,500.00 with The Travelers Indemnity Co. on the property of S. K. Williams and Bellman Ogden in Lawrence Township, Clearfield County (M.D. #4574SM4).

(2) Mine Permit No. 1470-1(A)

Surety Bond No. 218B2244, executed 10/25/74 with Change Rider dated 11/5/75 in the amount of \$15,640.00 with The Travelers Indemnity Co. on the property of Bellman Ogden in Lawrence Township, Clearfield County (M.D. No. 4574SM4).

(3) Mine Permit No. 1470-1(A2)

Savings Certificate No. 977, executed 10/14/75 in the amount of \$2,400.00 drawn on Clearfield Bank & Trust Co., Clearfield, PA, payable to C. A. Ogden Company. Assigned to the Department of Environmental Resources on the property of Bellman Ogden in Lawrence Township, Clearfield County (M.D. #4574SM4).

(4) Mine Permit No. 1470-2

Savings Certificate No. 879, executed 7/14/75 in the amount of \$23,000.00 drawn on Clearfield Bank & Trust Company, Clearfield, Pa. payable to C. A. Ogden Company. Assigned to the Department of Environmental Resources on the property of Francis McGoey and John F. Mitchell in Bradford Township, Clearfield County (M.D. #4474SM20).

"Exhibit A"

Coal Hill Contracting Co., Inc.

July 9, 1982

(5) Mine Permit No. 1470-2(A)

Savings Certificate No. 879 on deposit under Mine Permit No. 1470-2 is also held for 20 acres at \$275.00 per acre \$5,500.00 for planting of Completion Report No. 2480016 on the property of Francis McGoey and John F. Mitchell in Bradford Township, Clearfield County (M.D. #4474SM20).

(6) Mine Permit No. 1470-2(A2)

Savings Certificate No. 879 on deposit under Mine Permit No. 1470-2 is also held for 10 acres at \$200.00 per acre \$2,000.00 for planting of Completion Report No. 2480016 on the property of Francis McGoey and John F. Mitchell in Bradford Township, Clearfield County (M.D. #4474SM20).

(7) Mine Permit No. 1470-3

Surety Bond No. 558E2324, executed 12/22/77 in the amount of \$7,100.00 with The Travelers Indemnity Co. on the property of John F. Mitchell and Francis McGoey in Bradford Township, Clearfield County (M.D. #4474SM20).

The Travelers Indemnity Company is being notified of the forfeiture action by copy of this letter, forwarded by certified mail.

This action of the Department may be appealable to the Environmental Hearing Board, Third Floor, 221 N. Second Street, Harrisburg, PA 17101, (717-787-3483) by any aggrieved person pursuant to Section 1921-A of the Administrative Code of 1929, 71 P.S. Section 510-21; and the Administrative Agency Law, 2 Pa. C.S., Chapter 5A. Appeals must be filed with the Environmental Hearing Board within 30 days of receipt of written notice of this action unless the appropriate statute provides a different time period. Copies of the appeal form and the regulations governing practice and procedure before the Board may be obtained from the Board. This paragraph does not, in and of itself, create any right of appeal beyond that permitted by applicable statutes and decisional law.

JAE/DJZ/hw

Very truly yours,

Anthony Ercole
Anthony Ercole, Director
Bureau of Mining & Reclamation

COMMONWEALTH OF PENNSYLVANIA :
COUNTY OF CLEARFIELD

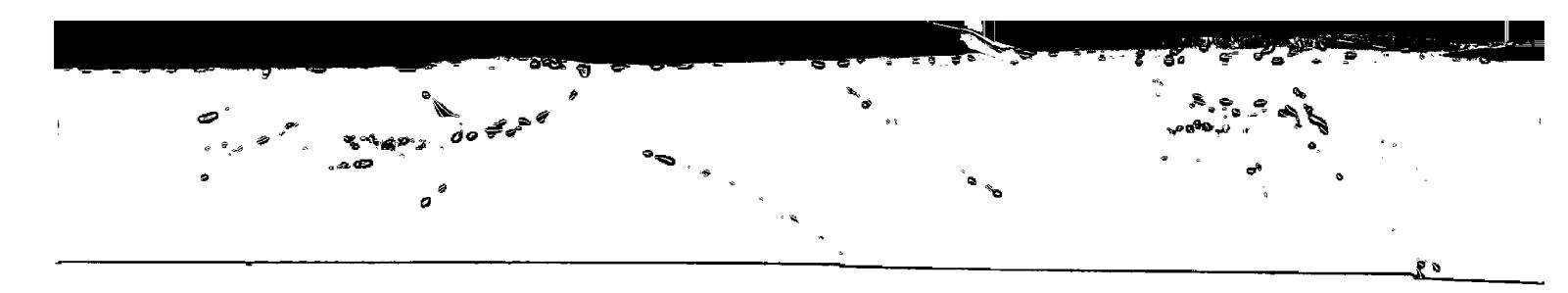
SS.

Before me, the undersigned authority, personally appeared Chester A. Ogden, who, being duly sworn according to law, deposes and says that the facts and averments set forth in the foregoing Complaint are true and correct to the best of his knowledge, information, and belief.



Sworn and subscribed
before me this 17 day
of October, 2003

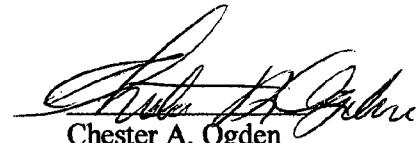
WILLIAM A. SHAW
Prothonotary
My Commission Expires
1st Monday in Jan. 2006
Clearfield Co., Clearfield, PA



CERTIFICATE OF SERVICE

I, Chester A. Ogden, hereby certify that on July 23, 2004 a copy of the foregoing Petition to Vacate Order of Court was served by regular mail, postage prepaid, on the following at address indicated.

Dennis A. Whitaker, Assistant Counsel
Office of Chief Counsel
3rd Floor, 909 Elmerton Avenue
Harrisburg, Pa. 17110-8200



Chester A. Ogden
512 Hartshorn Road
Clearfield, Pa. 16830
(814) 765-4682

FILED

JUL 23 2004

William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

CHESTER A. OGDEN, President, :

COAL HILL CONTRACTING CO., INC. :

VS. : NO. 03-1566-CD

COMMONWEALTH OF PENNSYLVANIA, :

DEPARTMENT OF ENVIRONMENTAL :

PROTECTION :

O R D E R

NOW, this 15th day of October, 2004, the Petition to Vacate Order of Court filed by Plaintiff be and is hereby dismissed.

BY THE COURT:
J. MICHAEL WILLIAMSON
Specially Presiding

FILED

08:54 AM 5/2/2004
cc: Chester Ogden
cc: Ned L. Kunkel
cc: City of Clearfield
cc: William A. Shaw
cc: City of Whiteaker
OCT 18 2004

William A. Shaw
Prothonotary

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

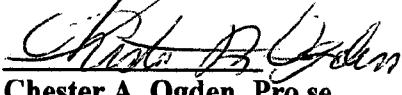
CHESTER A. OGDEN ;
Petitioner :
VS ; No. 03-1566-CD :
: ;
Commonwealth of Pennsylvania, :
Department of Environmental Protection. :
Defendant : ;

FILED

NOV 15 2007
will Shaw
William A. Shaw
Prothonotary/Clerk of Courts
No C/C

STATEMENT OF INTENT TO PROCEED

Petitioner, Chester A. Ogden, alleges the grievbance ready for trial


Chester A. Ogden, Pro se
512 Hartshorn Road
Clearfield, Pa. 16830

**William A. Shaw, Prothonotary/Clerk of Courts
Clearfield County Courthouse
1 North Second Street
Clearfield, Pa. 16830**

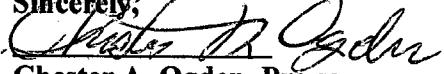
November 12, 2007

**RE: Case No. 03-1566-CD
Ogden vs Pa. Department of Environmental Protection**

Dear Mr. Shaw;

**Enclosed herewith please find Statement of Intention to Proceed
for filing with the record of above referenced case.**

Sincerely,



**Chester A. Ogden, Pro se
512 Hartshorn Road
Clearfield, Pa. 16830**

cc; Kathie McGinty, Secretary, DEP