

05-1643-CD  
Comm. Of Pa vs John Niebauer Jr.

Comm. Of Pa. vs. John Niebauer Jr. et al  
2005-1643-CD

CA

IN THE  
COURT OF COMMON PLEAS OF THE  
46<sup>TH</sup> JUDICIAL DISTRICT - CLEARFIELD COUNTY

COMMONWEALTH OF  
PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

Petitioner,

v.

JOHN NIEBAUER, JR. and  
DIANE NIEBAUER,

Respondents.

Civil Action  
(Petition to Enforce)

No. 05-1643CD

FILED *Att'y pd.*  
*85.00*  
*m/11:24/01*  
OCT 24 2005 CC SHFF  
William A. Shaw *cc Att'y*  
Prothonotary/Clerk of Courts

**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, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

Pennsylvania Lawyer Referral Service  
Pennsylvania Bar Association  
POB 186  
Harrisburg, PA 17108  
(800) 692-7375

**IN THE  
COURT OF COMMON PLEAS OF THE  
46<sup>TH</sup> JUDICIAL DISTRICT - CLEARFIELD COUNTY**

COMMONWEALTH OF	:	
PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	Civil Action
PROTECTION	:	(Petition to Enforce)
Petitioner,	:	No.
v.	:	
	:	
JOHN NIEBAUER, JR. and	:	
DIANE NIEBAUER,	:	
	:	
Respondents.	:	

**PETITION TO ENFORCE ORDER**

COMES the Commonwealth of Pennsylvania, Department of Environmental Protection ("Department"), who files this Petition to Enforce Order. In support thereof, the Department avers as follows:

**Parties**

1. The Department is the administrative agency vested with the authority and responsibility to administer and/or enforce the requirements of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1 *et seq.* ("CSL"); the Dam Safety and Encroachment Act, 32 P.S. §693.1 *et seq.* ("DSEA"); the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380 *as amended*, 35 P.S. §6018.101 *et seq.* ("SWMA"); the Hazardous Sites Cleanup Act, the Act of October 18, 1988, P.L. 756, No. 1988-108, 35 P.S. §6020.101 *et seq.* ("HSCA"); the Land Recycling and Remediation Standards Act, Act of May 19, 1995, P.L. 4, No. 1995-2, 35 P.S. §§6026.101 *et seq.* ("Act 2"); Section 1917-A of

the Administrative Code, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §510-17 ("Administrative Code"); and the rules and regulations promulgated thereunder.

2. John P. Niebauer, Jr. is the CEO and Vice President and Diane A. Niebauer is the Secretary and Treasurer of Earthmovers Unlimited, Inc. John P. Niebauer, Jr. is the CEO and Diane Niebauer is the Secretary and Treasurer of Earthmovers Equipment Company. Hereinafter John P. Niebauer, Jr. and Diane A. Niebauer together shall be referred to as "Niebauers".

### **Jurisdiction**

3. This Court has jurisdiction over this proceeding pursuant to Sections 761 and 931 of the Judicial Code, 42 Pa. C.S.A. §§761 and 931.

### **Factual Background**

4. The Niebauers own property located on Route 322 in Bigler Township and Boggs Township in Clearfield County, PA. There is a sign on the property near Route 322 that says "Loggers Equipment". The property is comprised of three separate tax parcels. The tax parcel numbers are 010-000-008.1, N09-000-049.1, and NO9-000-00055 ("Site"). All three parcels are owned by the Niebauers. There is one building hereinafter referred to as the Loggers Equipment Building or Main Building, and also a Quonset-type building on the Site.

5. On or about September 6, 2002, the Department conducted an inspection at the Site. At that time a disposal area covering approximately 112 by 40 yards located

approximately 75-80 yards north of the Loggers Equipment Building was discovered by the Department. The Department estimates the disposal area to be approximately fifteen feet deep ("Disposal Area"). Solid waste, consisting of, but not limited to, wood, shingles, carpeting, interior and exterior siding and pieces of hard metal, was on the Site on September 6, 2002. William Peterson, Loggers Equipment General Manager, was present during the September 6, 2002 inspection. Mr. Peterson indicated to the Department that the solid waste was buried using a truck loader, owned by John P. Niebauer, Jr., which was operated by the persons bringing in the waste.

6. The Department has never issued a permit or approval to allow the Niebauers or any other person or entity to burn, bury, process, store or dispose, or allow the burning, burying, processing, storage or disposing of solid waste at the Site.

7. On January 6, 2004, the Department issued an administrative order to the Niebauers. A copy of the January 6, 2004 administrative order ("2004 Order") is marked as Exhibit A, attached hereto and incorporated herein.

8. The 2004 Order was received by Niebauers. The 2004 Order was appealed by the Niebauers to the Pennsylvania Environmental Hearing Board ("EHB"). The case was docketed to EHB Docket No. 2004-038-R.

9. The appeal is currently stayed by an Opinion and Order of the EHB entered August 27, 2004 (August Order), which is marked as Exhibit B, attached hereto and incorporated herein. The August Order specifically states that the EHB is "only staying the

Appeal before the Board and not the provisions of the Department's January 6, 2004 Order which *remain in effect*." (Emphasis added by the EHB).

10. Although the appeal of the Niebauers is pending, this petition to enforce can proceed against them. *DER v. Norwesco Development Corp.*, 531 A.2d 94, 96 (Pa. Commw. Ct. 1987). The appeal does not act as a supersedeas, and until there is a final adjudication, the order is enforceable. *Id.*

#### **The Requirements of the 2004 Order**

11. The 2004 Order directed that the Niebauers immediately cease bringing or allowing anyone to bring solid waste to the Site. The Niebauers were also directed to immediately cease disposing and burying or allowing anyone to dispose or bury any solid waste at the Site.

12. Within two years from the effective date of the 2004 Order, the Niebauers were required to excavate and remove all solid waste buried or covered at the Site in the following manner:

a. The Niebauers shall remove all solid waste from the Site for proper disposal or processing at a facility permitted or approved to accept such waste.

...

c. Beginning the first full month after the E&S Control Plan has been approved by the Clearfield County Conservation District, (and after receiving an NPDES permit, if necessary), and then continuing each month thereafter, the Niebauers shall sort

through 1000 cubic yards of the Disposal Area. The Niebauers shall remove all solid waste found in each 1000 cubic yards of the Disposal Area for proper processing or disposal.

d. When Niebauers believe that they have removed all solid waste from the Site, Niebauers shall provide written notice to the Department indicating they believe they have complied with the requirement that all solid waste has been removed from the Site. The written notice shall be sent to the address set forth in Paragraph 19, below. If the Department determines any further action is required, the Niebauers shall take such action to fully address the Department's concerns. Any such actions directed by the Department shall be incorporated as part of this Order.

e. Following the removal of solid waste from each 1000 cubic yard area, the Niebauers shall visually inspect the soils remaining within the excavation for indications of contamination. Indications of contamination may include, but are not to be limited to discoloration, unusual odors, and/or the presence of foreign material, either liquid or solid, that is not typical of native soils. If any indications of contamination are present, then Niebauers shall collect at least three soil samples from the remaining surface of the excavation from within the areas exhibiting suspected contamination. The Niebauers shall submit the samples for laboratory analysis for the parameters set forth in Appendix A, attached to the 2004 Order and incorporated herein by reference. If groundwater is encountered within the excavation area, and if the groundwater exhibits indications of contamination, including but not limited to, discoloration, cloudiness or odors, Niebauers



shall collect at least two water samples and shall submit the samples for laboratory analysis for the parameters set forth in Appendix B, attached to the 2004 Order and incorporated herein by reference. If any water exhibits a sheen on its surface, the Niebauers shall collect at least two water samples from the surface of the water, and at least an additional two samples from the water below the surface, and shall submit the samples for laboratory analysis for the parameters set forth in Appendix B of the 2004 Order.

- (i) The Department shall be notified when the Niebauers intend to collect samples. Notification can be in person or by telephone at the telephone number noted in Paragraph [19], below.
- (ii) The Niebauers shall submit the sample results to the Department within five (5) business days after receiving the sample results to the address noted in Paragraph [19], below.
- (iii) If, after comparing the sample results to the Department's statutory or regulatory standards, the Department determines that the soil and/or groundwater is contaminated, then the Niebauers shall fully characterize the vertical and horizontal extent of the site contamination in accordance with the administrative and procedural requirements of Act 2.
- (iv) The Niebauers shall, within thirty (30) days after receiving written notification from the Department regarding

contaminated soil and/or groundwater, submit to the Department a Work Plan outlining the proposed activity necessary to attain and demonstrate compliance with an environmental remediation standard set forth in Sections 302, 303, or 304 of Act 2, 35 P.S. §6026.302, 303, and 304; and Section 2 of the Department's Act 2 regulations, 25 Pa. Code §250.2. The Work Plan shall be prepared in accordance with the procedures set forth in Act 2, and shall include a schedule for implementation. In the event that the Department determines that any modification, amendment, or addition is necessary to the Work Plan, the Niebauers shall submit such revisions as are necessary to fully address all of the Department's comments within thirty (30) days after receipt of those comments. The deadline set forth in this type of correspondence from the Department is incorporated as part of this Order. The corrected Work Plan may be approved, rejected or approved with conditions by the Department. The final approved Work Plan and the time frames within that Work Plan shall be incorporated as part of this Order. The Work Plan may specify that the site characterization and any necessary remedial actions shall occur after all solid waste has been

removed from the Site or that site characterization and any necessary remedial actions shall occur as the solid waste is being removed from the Site. Similarly, the Work Plan may specify that if the sampling that is required under the 2004 Order reveals contamination, additional sampling necessary for a complete site characterization may either be collected as each 1000 cubic yard cell is excavated, or it may be completed after all of the solid waste has been removed from the Site. Any site characterization that is to be completed after all solid waste is removed from the Site shall begin within thirty (30) days after the date the Department concurs that all solid waste has been removed from the Site.

f. No soil areas found to be contaminated shall be backfilled until the Act 2 Final Report has been approved. All individual soil areas found to be contaminated may be combined within one Act 2 Final Report. The Final Report for soils shall be submitted within 6 (six) months after removing the last of the solid waste from the Site. If groundwater contamination is discovered, the Act 2 Final Report for groundwater shall be submitted after the required number of sampling rounds have been completed and attainment of an Act 2 standard can be demonstrated.

g. After receiving written authorization from the Department's

Northcentral Regional Office, any materials that are not disposed of as solid waste may be stockpiled on the Site and used to bring the site up to grade. The Niebauers shall ensure that when any backfilling occurs, it does so in such a way as not to violate the DSEA and the rules and regulations promulgated thereunder.

13. During the excavation of the Site, Niebauers shall take precautions and prevent the discharge of any liquids contained in containers or tanks.

14. At least forty-eight (48) hours before excavating at the Site, the Niebauers shall notify the Regional Environmental Program Manager, Waste Management Program, located in the Northcentral Regional Office as to when such waste removal shall occur. Notification may be by telephone at 570-327-3431 or in writing sent to the address in Paragraph [19] below, provided the written notice is received in the office at least 48 hours before excavation begins.

15. The Department reserves the right to have the Niebauers take any additional action in order to achieve compliance with the environmental remediation standards set forth in Act 2.

16. Within 30 months after the effective date of the 2004 Order, the Niebauers shall grade to original contours, dress, seed and mulch the affected areas of the wetlands and stream channel.

17. Effective immediately, the Niebauers shall allow Department employees and/or their agents to have access to the site for the purpose of observing excavation and

remediation activities, collecting samples and for the purpose of ensuring compliance with this Order.

18. Nothing in the 2004 Order is intended, nor shall it be construed, to relieve or limit the Niebauers' obligations to comply with any existing or subsequent Departmental statute, regulation, permit or order. In addition, nothing set forth in this Order is intended, nor shall be construed, to authorize any violation of any statute, regulation, order, or permit issued or administered by the Department.

19. Beginning the first month after this Order's effective date, and for each month thereafter, the Niebauers were required to submit copies of all disposal records or other documentation indicating proper processing or disposal of solid wastes. The documentation is due by the 10<sup>th</sup> day of the following month. All such documentation shall be sent to:

Regional Environmental Program Manager  
Waste Management Program  
Department of Environmental Protection  
Northcentral Regional Office  
208 West Third Street, Suite 101  
Williamsport, PA 17701-6448  
570-327-3431  
fax: 570-327-3420

**There has been no compliance with the 2004 Order**

20. An E&S Control Plan was approved by the Clearfield County Conservation District on March 1, 2004. Accordingly, the Niebauers were required to commence sorting through 1000 cubic yards of the Disposal Area each month pursuant to Paragraph 2.c. of the 2004 Order. The Niebauers initially complied with this requirement, from April 2004

through December 2004.

21. As of the date of the filing of this Petition to Enforce, Niebauer has not sorted through 1000 cubic yards of the Disposal Area per month, as required by Paragraph 2.c. of the 2004 Order, since January 2005.

22. As of the date of the filing of this Petition to Enforce, Niebauer has not removed solid waste found in the Disposal Area for proper processing or disposal, as required by Paragraph 2.c. of the 2004 Order, since July 12, 2005

23. As determined by an inspection conducted by the Department on September 15, 2005, solid waste remains disposed at the Site. The Niebauers have not, at any time, provided written notice to the Department indicating they believe they have complied with the requirement that all solid waste has been removed from the Site.

24. No receipts or records have been submitted to the Department indicating the manner in which the solid waste was processed or disposed, as required by Paragraph 10 of the 2004 Order since July 12, 2005 .

WHEREFORE, pursuant to Sections 104(10), 104(13) and 603 of the SWMA, 35 P.S. §§6018.104(10), 6018.104(13) and 6018.603, and Section 693.20 of the DSEA, 32 P.S. §693.20, and Section 691.601 of the CLS, 35 P.S. §691.601, the Department requests that this Honorable Court:

A. Enforce the Department's January 6, 2004 Order by directing that:

1. The Niebauers immediately resume sorting through at least 1000 cubic

yards of the Disposal Area each month and remove all solid waste found in each 1000 cubic yards for proper processing or disposal. The waste shall be taken to a permitted solid waste processing or disposal facility. The entire area of the Disposal Area must be sorted through within 9 months of the date of this Honorable Court's Order.

2. When Niebauers believe that they have removed all solid waste from the Site, Niebauers shall provide written notice to the Department indicating they believe they have complied with the requirement that all solid waste has been removed from the Site. The written notice shall be sent to the address set forth in Paragraph A.11, below. If the Department determines any further action is required, the Niebauers shall take such action to fully address the Department's concerns. Any such actions directed by the Department shall be incorporated as part of this Order.

3. Following the removal of solid waste from each 1000 cubic yard area, the Niebauers shall visually inspect the soils remaining within the excavation for indications of contamination. Indications of contamination may include, but are not to be limited to discoloration, unusual odors, and/or the presence of foreign material, either liquid or solid, that is not typical of native soils. If any indications of contamination are present, then Niebauers shall collect at least three soil samples from the remaining surface of the excavation from within the areas exhibiting suspected contamination. The Niebauers shall submit the samples for laboratory analysis for the parameters set forth in Appendix A, attached to the 2004 Order and incorporated herein by reference. If groundwater is

encountered within the excavation area, and if the groundwater exhibits indications of contamination, including but not limited to, discoloration, cloudiness or odors, Niebauers shall collect at least two water samples and shall submit the samples for laboratory analysis for the parameters set forth in Appendix B, attached to the 2004 Order and incorporated herein by reference ("Appendix B"). If any water exhibits a sheen on its surface, the Niebauers shall collect at least two water samples from the surface of the water, and at least an additional two samples from the water below the surface, and shall submit the samples for laboratory analysis for the parameters set forth in Appendix B.

4. The Department shall be notified when the Niebauers intend to collect samples. Notification can be in person or by telephone at the telephone number noted in Paragraph A.11, below.

- (a) The Niebauers shall submit the sample results to the Department within five (5) business days after receiving the sample results to the address noted in Paragraph A.11, below.
- (b) If, after comparing the sample results to the Department's statutory or regulatory standards, the Department determines that the soil and/or groundwater is contaminated, then the Niebauers shall fully characterize the vertical and horizontal extent of the site



contamination in accordance with the administrative and procedural requirements of Act 2.

- (c) The Niebauers shall, within thirty (30) days after receiving written notification from the Department regarding contaminated soil and/or groundwater, submit to the Department a Work Plan outlining the proposed activity necessary to attain and demonstrate compliance with an environmental remediation standard set forth in Sections 302, 303, or 304 of Act 2, 35 P.S. §6026.302, 303, and 304; and Section 2 of the Department's Act 2 regulations, 25 Pa. Code §250.2. The Work Plan shall be prepared in accordance with the procedures set forth in Act 2, and shall include a schedule for implementation. In the event that the Department determines that any modification, amendment, or addition is necessary to the Work Plan, the Niebauers shall submit such revisions as are necessary to fully address all of the Department's comments within thirty (30) days after receipt of those comments. The deadline set forth in this type of correspondence from the Department is incorporated as

part of this Order. The corrected Work Plan may be approved, rejected or approved with conditions by the Department. The final approved Work Plan and the time frames within that Work Plan shall be incorporated as part of this Order. The Work Plan may specify that the site characterization and any necessary remedial actions shall occur after all solid waste has been removed from the Site or that site characterization and any necessary remedial actions shall occur as the solid waste is being removed from the Site. Similarly, the Work Plan may specify that if the sampling that is required under this Order reveals contamination, additional sampling necessary for a complete site characterization may either be collected as each 1000 cubic yard cell is excavated, or it may be completed after all of the solid waste has been removed from the Site. Any site characterization that is to be completed after all solid waste is removed from the Site shall begin within thirty (30) days after the date the Department concurs that all solid waste has been removed from the Site.

5. No soil areas found to be contaminated shall be backfilled until the Act 2 Final Report has been approved. All individual soil areas found to be contaminated may be combined within one Act 2 Final Report. The Final Report for soils shall be submitted within 6 (six) months after removing the last of the solid waste from the Site. If groundwater contamination is discovered, the Act 2 Final Report for groundwater shall be submitted after the required number of sampling rounds have been completed and attainment of an Act 2 standard can be demonstrated.

6. After receiving written authorization from the Department's Northcentral Regional Office, any materials that are not disposed of as solid waste may be stockpiled on the Site and used to bring the site up to grade. The Niebauers shall ensure that when any backfilling occurs, it does so in such a way as not to violate the DSEA and the rules and regulations promulgated thereunder.

7. During the excavation of the Site, Niebauers shall take precautions and prevent the discharge of any liquids contained in containers or tanks.

8. At least forty-eight (48) hours before excavating at the Site, the Niebauers shall notify the Regional Environmental Program Manager, Waste Management Program, located in the Northcentral Regional Office as to when such waste removal shall occur. Notification may be by telephone at 570-327-3431 or in writing sent to the address in Paragraph A.11 below, provided the written notice is received in the office at least 48 hours before excavation begins.

9. Within 9 months after the effective date of this Order, the Niebauers shall grade to original contours, dress, seed and mulch the affected areas of the wetlands and stream channel.

10. Effective immediately, the Niebauers shall allow Department employees and/or their agents to have access to the site for the purpose of observing excavation and remediation activities, collecting samples and for the purpose of ensuring compliance with this Order.

11. The Niebauers shall submit copies of all disposal records or other documentation indicating proper processing or disposal of solid wastes. The documentation is due by the 10<sup>th</sup> day of the following month. All such documentation shall be sent to:

Regional Environmental Program Manager  
Waste Management Program  
Department of Environmental Protection  
Northcentral Regional Office  
208 West Third Street, Suite 101  
Williamsport, PA 17701-6448  
570-327-3431  
fax: 570-327-3420

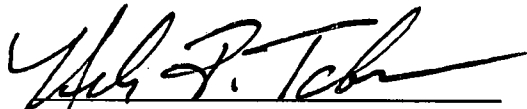
b. Order that the Niebauers pay a fine of Two Hundred Fifty Dollars (\$250.00) per day for each day they fail to comply with this Court's Order, with costs to be calculated at the time of any finding of contempt by this Honorable Court

c. Grant the Department attorney's fees and costs; and

- d. Order such other relief that the Court deems just and proper.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION:



Nels J. Taber  
Regional Counsel  
Department of Environmental Protection  
Northcentral Region Office of Chief Counsel  
208 West Third Street - Suite 101  
Williamsport, PA 17701  
570-321-6568

Date: 10/12/05

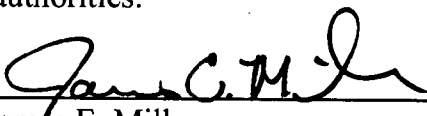
**IN THE  
COURT OF COMMON PLEAS OF THE  
46<sup>TH</sup> JUDICIAL DISTRICT - CLEARFIELD COUNTY**

COMMONWEALTH OF	:	
PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	Civil Action
	:	(Petition to Enforce)
Petitioner,	:	No.
	:	
v.	:	
	:	
JOHN NIEBAUER, JR. and	:	
DIANE NIEBAUER,	:	
	:	
Respondents.	:	

**VERIFICATION**

I, James E. Miller, hereby Program Manager for the Commonwealth of Pennsylvania, Department of Environmental Protection's ("Department") Waste Management Program in the Northcentral Region, hereby certify that I am authorized to make this verification on behalf of the Department and that the facts recited in the foregoing Petition to Enforce Order are true and correct to the best of my knowledge, information and belief.

I understand that this verification is made subject to the penalties of 18 Pa. C.S.A. §4904 relating to unsworn falsification to authorities.

  
\_\_\_\_\_  
James E. Miller  
Program Manager  
Waste Management Program  
Department of Environmental Protection  
Northcentral Field Operations

DATE: October 12, 2005

A

**COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

In the matter of:

John Niebauer, Jr. and Diane Niebauer	:	
611 Devonshire Drive	:	
State College, PA 16803-1216	:	Illegal Disposal of Solid Waste
	:	Clearfield County
	:	

**ORDER**

NOW, this 6<sup>th</sup> day of January, 2004, the Commonwealth of Pennsylvania, Department of Environmental Protection (hereinafter referred to as "Department"), has determined the following findings of fact and conclusions of law:

A. The Department is the administrative agency vested with the authority and responsibility to administer and/or enforce the requirements of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1 *et seq.* ("CSL"); the Dam Safety and Encroachment Act, 32 P.S. §693.1 *et seq.* ("DSEA"); the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380 *as amended*, 35 P.S. §6018.101 *et seq.* ("SWMA"); the Hazardous Sites Cleanup Act, the Act of October 18, 1988, P.L. 756, No. 1988-108, 35 P.S. §6020.101 *et seq.* ("HSCA"); the Land Recycling and Remediation Standards Act, Act of May 19, 1995, P.L. 4, No. 1995-2, 35 P.S. §§6026.101 *et seq.* ("Act 2"); Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §510-17 ("Administrative Code"); and the rules and regulations promulgated thereunder.

B. John P. Niebauer, Jr. is the CEO and Vice President and Diane A. Niebauer is the Secretary and Treasurer of Earthmovers Unlimited, Inc. John P. Niebauer, Jr. is the CEO



and Diane Niebauer is the Secretary and Treasurer of Earthmovers Equipment Company. Hereinafter John P. Niebauer, Jr. and Diane A. Niebauer together shall be referred to as "Niebauers".

C. Earthmovers Equipment Company is a Pennsylvania corporation with a mailing address of P.O. Box 187, Kylertown, PA 16830. The Pennsylvania Department of State ("Department of State") lists Earthmovers Equipment Company as having a broad purpose and as leasing on-the-road licensed vehicles. The Department of State lists Earthmovers Unlimited, Inc. as a Pennsylvania corporation with a mailing address of PO Box 187, Kylertown, PA 16830, and as having a broad purpose and also performing construction and demolition work.

D. The Niebauers own property located on Route 322 in Bigler Township and Boggs Township in Clearfield County, PA. There is a sign on the property near Route 322 that says "Loggers Equipment". The property is comprised of three separate tax parcels. The tax parcel numbers are 010-000-008.1, N09-000-049.1, and NO9-000-00055 ("Site"). All three parcels are owned by the Niebauers. There is one building hereinafter referred to as the Loggers Equipment Building or Main Building, and also a Quonset-type building on the Site.

E. On or about September 6, 2002, the Department conducted an inspection at the Site. At that time a disposal area covering approximately 112 by 40 yards located approximately 75-80 yards north of the Loggers Equipment Building was discovered by the

Department. The Department estimates the disposal area to be approximately fifteen feet deep ("Disposal Area"). Solid waste, consisting of, but not limited to, wood, shingles, carpeting, interior and exterior siding and pieces of hard metal, was on the Site on September 6, 2002. William Peterson, Loggers Equipment General Manager, was present during the September 6, 2002 inspection. Mr. Peterson indicated to the Department that the solid waste was buried using a truck loader, owned by John P. Niebauer, Jr., which was operated by the persons bringing in the waste.

F. The September 6, 2002 inspection report from the Department was signed by William Peterson. A carbon copy was left with Mr. Peterson and a copy was mailed to John P. Niebauer, Jr. on September 9, 2002. The report requested that there be no more dumping of waste at the Site; that all solid waste be excavated and transported to a permitted landfill; that disposal receipts be retained; and that the Department be notified when excavation of waste begins. The inspection report said the unpermitted dumping of waste onto the surface of the ground violated Section 610(1) of the SWMA, 35 P.S. §6018.610(1), and operating a solid waste disposal facility without a permit violated Section 610(2) of the SWMA, 35 P.S. §6018.610(2).

G. On September 19, 2002, the Department conducted another inspection at the Site. William Peterson, who was present at the Site during the September 6, 2002 inspection, was also present during this inspection. Among other things:

- (1) Solid waste was observed mixed with fill material. The solid waste included four different colors of roofing shingles, plywood, aluminum siding, garden hose, metal, painted wood, lumber, particle board with shingles, and four different types of carpet. Other items found at the Site on September 19, 2002, included a tire, plastic plumbing, a television set and petroleum or creosote coated wooden blocks.
- (2) Mr. Peterson indicated that he started his employment with Loggers Equipment in 1988. He noted that in 1988, the only fill area on the Site was located about 75 to 80 yards north of the Loggers Equipment Building and eastward from the eastern corner of the Loggers Equipment Building. Mr. Peterson indicated the disposal area has been filled in since 1988.

H. An inspection report dated September 19, 2002, from the Department, signed by William Peterson, and mailed to John P. Niebauer, Jr., advised Mr. Niebauer that the items found on the Site are considered to be solid waste, not clean fill, and should not be disposed on the Site. It was requested that all solid waste at the Site be excavated and taken to a processing or disposal facility with disposal receipts being provided to the Department.

- (1) The Department indicated that a shaker/screener could be used to separate the waste from the fill material, but the Department's Air

Quality Program should be contacted before using such a device to determine if a permit would be needed.

- (2) The report advised that it appeared as though a wetland area was being filled.
- (3) The Department noted Mr. Niebauer was in violation of Section 610(1) of the SWMA, 35 P.S. §6018.610(1), and Section 610(2) of the SWMA, 35 P.S. §6018.610(2), for the unpermitted disposal of solid waste without a permit.
- (4) The report advised Mr. Niebauer to contact the Department if there were questions.

I. On April 22, 2003, the Department conducted another inspection at the Site and observed that solid waste was still deposited and buried at the Site. Additional covering of the solid waste had occurred. The waste disposed of at the Site consisted of, but was not necessarily limited to, wood, shingles, carpeting, interior and exterior siding and pieces of metal.

J. The Department returned to the Site in the afternoon of April 22, 2003, to take liquid and soil samples.

- (1) The liquid samples were analyzed for phenols, general chemicals, metals, and semi-volatiles. A tentatively identified compounds (TIC) analysis was also performed for the semi-volatiles.

- (2) The TIC results for both samples were positive for organic acids, within the carbon-3 to carbon-8 range, which is indicative of leachate.
- (3) Other liquid sample results showed some acidity and elevated specific conductance.
- (4) The soil samples did not show results above the detection limits.

K. Copies of the April 22, 2003 inspection report and sample results were given to Mr. Niebauer.

L. With Mr. Niebauer's permission, on May 21, 2003, seven exploratory trenches were dug at the Site in the Disposal Area at locations chosen by the Department. The equipment and operator were provided by Mr. Niebauer. The trenches were numbered 1 through 7. Among other things:

- (1) All seven trenches contained construction/demolition waste, including, but not limited to wood, wire, shingles, PVC pipe, and creosote blocks.
- (2) Municipal waste was also observed in the various trenches and included, but was not limited to: grocery bags, children's toys, clothing, food containers, carpeting, Tupperware, scrap metal, burnt wood, wire, several couch cushions, a Christmas Carol music book also in Japanese, cosmetic containers, bedding and bedsprings. In Trench No. 6, there was a water bed.

- (3) In Trench No. 4 and Trench No. 7, two home heating fuel tanks were uncovered. The fuel tank pulled out from Trench No. 4 contained fuel, and most of the fuel discharged to the ground during excavation. Absorbent pads were placed to catch the spilled fuel. Absorbent pads were also placed to catch hydraulic oil leaking from the backhoe.

M. An inspection report dated May 21, 2003, advised, among other things, that the absorbent pads would need to be recovered, and that the fuel soaked absorbent pads and the soil that was contaminated when the fuel tank was excavated would need to be removed to a permitted disposal facility. John P. Niebauer, Jr. was informed to mail copies of disposal receipts to the Department. Violations of Sections 610(1) and 610(2) of the SWMA, 35 P.S. §§6108.610(1) and 610(2), for the disposal of solid waste without a permit were found to have occurred.

N. On May 30, 2003, the Department again inspected the Site. At that time it was observed that placement of solid waste and fill had impacted wetlands and a section of the stream channel of an unnamed tributary to Moravian Run. The impacted wetlands totaled approximately 500 square feet, and approximately 300 feet of the stream channel had been impacted.

O. As of May 30, 2003, the home heating fuel tank in Trench No. 4 was still present with an estimated gallon of liquid still in the tank. The pads and boom used to absorb the spilled fuel on May 21, 2003, were still in place.

- (1) An inspection report dated May 30, 2003, which was mailed to Mr. Niebauer, advised that the pads and boom used to absorb the spilled fuel needed to be recovered and taken to an approved landfill.
- (2) In the same May 30, 2003 inspection report, Mr. Niebauer was advised that the contents of the fuel tank in Trench No. 4 needed to be drained and handled properly.

P. The tanks and pads and boom were removed from the Site after May 30, 2003, and before October 1, 2003. No receipts showing proper disposal of the tanks, pads and boom have been provided to the Department.

Q. With Mr. Niebauer's permission, on October 1, 2003, and October 2, 2003, a geophysical investigation was performed at the Site using metal detectors, ground penetrating radar and other equipment. A purpose of the investigation was to locate underground storage tanks and any other buried objects.

- (1) Based on the field geophysical surveys and an office evaluation of the data, six areas were thought to be the most susceptible for underground storage tanks, drums or other large underground objects.
- (2) Twenty-two locations with either extremely high or extremely low conductivity values were identified.
- (3) "X's" were marked across the Site to identify the twenty-two locations of concern.

R. Copies of the results of the October 1-2, 2003 geophysical investigation and an inspection report were sent to Mr. Niebauer.

S. Section 103 of the SMWA defines "disposal" as follows:

The incineration, deposition, injection, dumping, spilling, leaking, or placing of solid waste into or on the land or water in a manner that the solid waste or a constituent of the solid waste enters the environment, is emitted into the air or is discharged to the waters of the Commonwealth.

35 P.S. §6018.103.

T. The conditions described in Paragraphs E, G, I, L, N, and O, above, constitute disposal as that term is defined in Section 103 of the SWMA, 35 P.S. §6018.103.

U. Pursuant to Section 3 of the DSEA, an "encroachment" includes "...any dike, bridge, culvert, wall, wing wall, fill, pier, wharf, embankment, abutment or other structure located in, along, across or projecting into any watercourse, floodway or body of water." 32 P.S. §693.3.

V. The activities described in Paragraph N, above, constitute an encroachment as that term is defined in Section 3 of the DSEA, 32 P.S. §693.3.

W. The Site constitutes a waste disposal facility as those terms are defined in Section 103 of the SWMA, 35 P.S. §6018.103.

X. The Niebauers do not, nor did they ever, have a permit or approval from the Department to dispose, or allow the disposal of, solid waste at the Site.

Y. Section 201(a) of the SWMA, 35 P.S. §6018.201(a), states that:



No person or municipality shall store, collect, transport, process or dispose of municipal waste within this Commonwealth unless such storage, collection, transportation, processing or disposal is authorized by the rules and regulations of the [D]epartment and no person or municipality shall own or operate a municipal waste processing or disposal facility unless such person or municipality has first obtained a permit for such facility from the [D]epartment.

Z. Section 301 of the SWMA, 35 P.S. §6018.301, states, in part that:

No person or municipality shall store. . .or dispose of residual waste within this Commonwealth unless such storage. . .is consistent with or such. . .disposal is authorized by the rules and regulations of the [D]epartment and no person or municipality shall own or operate a residual waste processing or disposal facility unless such person or municipality has first obtained a permit for such facility from the [D]epartment.

AA. Section 302 of the SWMA, 35 P.S. §6018.302, states, in part that:

It shall be unlawful for any person or municipality to dispose. . .store, or permit the disposal. . .or storage of any residual waste in a manner which is contrary to the rules and regulations of the [D]epartment. . . . [and that] . . . [i]t shall be unlawful for any person or municipality who stores. . .or disposes of residual waste to fail to. . .[d]esign, construct, operate, and maintain facilities and areas in a manner which shall not adversely effect or endanger public health, safety and welfare or the environment or cause a public nuisance.

BB. Section 501 of the SWMA, 35 P.S. §6018.501, states, in part that:

It shall be unlawful for any person or municipality to use, or continue to use, their land or the land of any other person or municipality as a solid waste processing, storage, treatment or disposal area without first obtaining a permit from the [D]epartment as required by this act. . . .

CC. Section 601 of the SWMA, 35 P.S. §6018.601, states:

Any violation of any provision of this act, any rule or regulation of the [D]epartment, any order of the [D]epartment, or any term or condition of any permit, shall constitute a public nuisance. Any person or municipality committing such a violation shall be liable for the costs of abatement of any pollution and any public nuisance caused by such violation. . . .

DD. Section 610(1) of the SWMA, 35 P.S. §6018.610(1), states, in part that:

It shall be unlawful for any person or municipality to: 1) Dump or deposit, or permit the dumping or depositing, of any solid waste onto the surface of the ground. . . unless a permit for the dumping of such solid wastes has been obtained from the [D]epartment. . . .

EE. Section 610(2) of the SWMA, 35 P.S. §6018.610(2), states, in part that:

It shall be unlawful for any person or municipality to: 2) Construct, alter, operate or utilize a solid waste storage, treatment, processing, disposal facility without a permit from the [D]epartment. . . .

FF. Section 610(4) of the SWMA, 35 P.S. §6018.610(4), states, in part that:

It shall be unlawful for any person or municipality to: 4) Store, collect, transport, process, treat, beneficially use or dispose of, or assist in the storage, collection, transportation, processing, treatment, beneficially use or disposal of, solid waste contrary to the rules or regulations. . . of the [D]epartment, . . . or in any manner as to create a public nuisance or to adversely affect the public health, safety and welfare.

GG. Section 610(9) of the SWMA, 35 P.S. §6018.610(9), states in part that:

It shall be unlawful for any person or municipality to: 9) Cause or assist in the violation of any provision of this act, any rule or regulation of the department, any order of the department or any term or condition of any permit.

HH. Section 316 of the CSL, 35 P.S. §691.316, provides in part that:

Whenever the [D]epartment finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the [D]epartment may order the landowner or occupier to correct the condition in a manner satisfactory to the [D]epartment. . . .

II. Section 401 of the CSL, 35 P.S. §691.401, provides that:

It shall be unlawful for any person or municipality to put or place into any of the waters of the Commonwealth, or allow or permit to be discharged from property owned or occupied by such person or municipality into any of the waters of the Commonwealth, any substance of any kind or character resulting in pollution as herein defined. Any such discharge is hereby declared to be a nuisance.

JJ. Section 402 of the CSL, 35 P.S. §691.402, provides in part that:

Whenever the [D]epartment finds that any activity, not otherwise requiring a permit under this act. . . creates a danger of pollution of the waters of the Commonwealth. . . the [D]epartment may issue an order to a person or municipality regulating a particular activity.

KK. Section 611 of the CSL, 35 P.S. §691.611, states in part that:

It shall be unlawful to fail to comply with any rule or regulation of the [D]epartment or . . . to violate any of the provisions of this act or. . . to cause air or water pollution. . . .

LL. Sections 1 and 3 of the Administrative Code, 71 P.S. §§510-17(1), (3), state

in part that:

The Department . . . shall have the power and its duty shall be . . . [t]o protect the people of this Commonwealth from unsanitary conditions and other nuisances, including any condition which is declared to be a nuisance by any law administered by the

[D]epartment. . . (and) . . . to order such nuisances including those detrimental to the public health to be abated and removed.

MM. Section 6 of the DSEA, 32 P.S. §693.6, states in part, that:

No person shall construct, operate, maintain, modify, enlarge or abandon any dam, water obstruction or encroachment without the prior written permit of the [D]epartment. . . .

NN. Section 18 of the DSEA, 32 P.S. §693.18 states in part:

It shall be unlawful for any person to violate or assist in the violation of any of the provisions of this act or of any rules and regulations adopted hereunder. . . [or to] [c]onstruct, enlarge, repair, alter, remove, maintain, operate or abandon any dam, water obstruction or encroachment contrary to . . . the rules and regulations of the [D]epartment.

OO. The conditions described in Paragraphs E, G, I, L, N, and O, above, constitute violations of Sections 201, 301, 302, 501, 610(1), 610(2), 610(4), and 610(9) of the SWMA, 35 P.S. §§6018.201, 6018.301, 6018.302, 6018.501, 6018.610(1), 6018.610(2), 6018.610(4), and 6018.610(9); and Section 401 of the CSL, 35 P.S. §691.401.

PP. The conditions described in Paragraph N, above, constitute a violation of Sections 6 of the DSEA, 32 P.S. §693.6.

QQ. The violations described in Paragraph OO, above, constitute unlawful conduct under Section 610 of the SWMA, 35 P.S. §6018.610, and Section 611 of the CSL, 35 P.S. §691.611; and a statutory nuisance under Section 601 of the SWMA, 35 P.S. §6018.601 and Section 601 of the CSL, 35 P.S. §691.601.

RR. The violations described in Paragraph PP above, constitute unlawful conduct under Section 18 of the DSEA, 32 P.S. §693.18.

NOW, THEREFORE, pursuant to Section 1917-A of the Administrative Code, 71 P.S. §510-17; Sections 5, 316, 402 and 610 of the CSL, 35 P.S. §§691.5, 691.316, 691.402 and 691.610; Sections 104 and 602 of the SWMA, 35 P.S. §6018.104 and 6018.602; and Sections 14 and 20 of the DSEA, 32 P.S. §§693.14 and 693.20, it is ORDERED as follows:

1. Effective immediately, the Niebauers shall cease bringing or allowing anyone to bring solid waste to the Site. Effective immediately, the Niebauers shall cease disposing and burying or allowing anyone to dispose or bury any solid waste at the Site
2. Within two years from the effective date of this Order, the Niebauers shall excavate and remove all solid waste buried or covered at the Site in the following manner:
  - a. The Niebauers shall remove all solid waste from the Site for proper disposal or processing at a facility permitted or approved to accept such waste.
  - b. On or before January 28, 2004, the Niebauers shall submit to the Clearfield County Conservation District, an Erosion and Sedimentation (E&S) Control Plan for the site that meets the requirements of Chapter 102 of the Department's Rules and

Regulations, 25 Pa. Code Chapter 102. The E&S Control Plan shall be sent to the following address:

Clearfield County Conservation District  
650 Leonard Street  
Clearfield, PA 16830  
814-765-2629  
Attn: Mr. Fred Berry

(E&S Control Plan requirements can be found at the Clearfield County Conservation District web site, [www.clfdccd.com](http://www.clfdccd.com) or by calling 814-765-2629).

- (i) If the Clearfield County Conservation District determines that any modification, amendment, or addition is necessary to the E&S Control Plan, the Niebauers shall submit such revisions as are necessary to fully address all of the Clearfield County Conservation District's comments within fourteen (14) days after receipt of those comments. The deadline set forth in this type of correspondence from the Clearfield County Conservation District is incorporated as part of this Order.

- (ii) The final approved E&S Control Plan and the timeframes within the E&S Control Plan shall be incorporated as part of this Order.
- (iii) If the Clearfield County Conservation District determines that an NPDES permit is needed for the site then the Niebauers shall submit a complete NPDES permit application to the Clearfield County Conservation District within thirty (30) days after notification from the Clearfield County Conservation District. In the event that the Clearfield County Conservation District determines that any modification, amendment, or addition is necessary to the NPDES permit application, the Niebauers shall submit such revisions as are necessary to fully address all of the Clearfield County Conservation District's comments within fourteen (14) days after receipt of those comments. The deadline(s) set forth in this type of correspondence from the

Clearfield County Conservation District is  
incorporated part of this Order.

- c. Beginning the first full month after the E&S Control Plan has been approved by the Clearfield County Conservation District, (and after receiving an NPDES permit, if necessary), and then continuing each month thereafter, the Niebauers shall sort through 1000 cubic yards of the Disposal Area. The Niebauers shall remove all solid waste found in each 1000 cubic yards of the Disposal Area for proper processing or disposal.
- d. When Niebauers believe that they have removed all solid waste from the Site, Niebauers shall provide written notice to the Department indicating they believe they have complied with the requirement that all solid waste has been removed from the Site. The written notice shall be sent to the address set forth in Paragraph 10, below. If the Department determines any further action is required, the Niebauers shall take such action to fully address the Department's concerns. Any such actions directed by the Department shall be incorporated as part of this Order.
- e. Following the removal of solid waste from each 1000 cubic yard area, the Niebauers shall visually inspect the soils remaining



within the excavation for indications of contamination. Indications of contamination may include, but are not to be limited to discoloration, unusual odors, and/or the presence of foreign material, either liquid or solid, that is not typical of native soils. If any indications of contamination are present, then Niebauers shall collect at least three soil samples from the remaining surface of the excavation from within the areas exhibiting suspected contamination. The Niebauers shall submit the samples for laboratory analysis for the parameters set forth in Appendix A, attached to this Order and incorporated herein. If groundwater is encountered within the excavation area, and if the groundwater exhibits indications of contamination, including but not limited to, discoloration, cloudiness or odors, Niebauers shall collect at least two water samples and shall submit the samples for laboratory analysis for the parameters set forth in Appendix B, attached to this Order and incorporated herein. If any water exhibits a sheen on its surface, the Niebauers shall collect at least two water samples from the surface of the water, and at least an additional two samples from

the water below the surface, and shall submit the samples for laboratory analysis for the parameters set forth in Appendix B.

- (i) The Department shall be notified when the Niebauers intend to collect samples. Notification can be in person or by telephone at the telephone number noted in Paragraph 10, below.
- (ii) The Niebauers shall submit the sample results to the Department within five (5) business days after receiving the sample results to the address noted in Paragraph 10, below.
- (iii) If, after comparing the sample results to the Department's statutory or regulatory standards, the Department determines that the soil and/or groundwater is contaminated, then the Niebauers shall fully characterize the vertical and horizontal extent of the site contamination in accordance with the administrative and procedural requirements of Act 2.
- (iv) The Niebauers shall, within thirty (30) days after receiving written notification from the

Department regarding contaminated soil and/or groundwater, submit to the Department a Work Plan outlining the proposed activity necessary to attain and demonstrate compliance with an environmental remediation standard set forth in Sections 302, 303, or 304 of Act 2, 35 P.S. §6026.302, 303, and 304; and Section 2 of the Department's Act 2 regulations, 25 Pa. Code §250.2. The Work Plan shall be prepared in accordance with the procedures set forth in Act 2, and shall include a schedule for implementation. In the event that the Department determines that any modification, amendment, or addition is necessary to the Work Plan, the Niebauers shall submit such revisions as are necessary to fully address all of the Department's comments within thirty (30) days after receipt of those comments. The deadline set forth in this type of correspondence from the Department is incorporated as part of this Order. The corrected

Work Plan may be approved, rejected or approved with conditions by the Department. The final approved Work Plan and the time frames within that Work Plan shall be incorporated as part of this Order. The Work Plan may specify that the site characterization and any necessary remedial actions shall occur after all solid waste has been removed from the Site or that site characterization and any necessary remedial actions shall occur as the solid waste is being removed from the Site. Similarly, the Work Plan may specify that if the sampling that is required under this Order reveals contamination, additional sampling necessary for a complete site characterization may either be collected as each 1000 cubic yard cell is excavated, or it may be completed after all of the solid waste has been removed from the Site. Any site characterization that is to be completed after all solid waste is removed from the Site shall begin within thirty (30) days after the date the

Department concurs that all solid waste has been removed from the Site.

- f. No soil areas found to be contaminated shall be backfilled until the Act 2 Final Report has been approved. All individual soil areas found to be contaminated may be combined within one Act 2 Final Report. The Final Report for soils shall be submitted within 6 (six) months after removing the last of the solid waste from the Site. If groundwater contamination is discovered, the Act 2 Final Report for groundwater shall be submitted after the required number of sampling rounds have been completed and attainment of an Act 2 standard can be demonstrated.
- g. After receiving written authorization from the Department's Northcentral Regional Office, any materials that are not disposed of as solid waste may be stockpiled on the Site and used to bring the site up to grade. The Niebauers shall ensure that when any backfilling occurs, it does so in such a way as not to violate the DSEA and the rules and regulations promulgated thereunder.

3. During the excavation of the Site, Niebauers shall take precautions and prevent the discharge of any liquids contained in containers or tanks.

4. At least forty-eight (48) hours before excavating at the Site, the Niebauers shall notify the Regional Environmental Program Manager, Waste Management Program, located in the Northcentral Regional Office as to when such waste removal shall occur. Notification may be by telephone at 570-327-3431 or in writing sent to the address in Paragraph 10 below, provided the written notice is received in the office at least 48 hours before excavation begins.

5. The Department reserves the right to have the Niebauers take any additional action in order to achieve compliance with the environmental remediation standards set forth in Act 2.

6. Within 30 months after the effective date of this Order, the Niebauers shall grade to original contours, dress, seed and mulch the affected areas of the wetlands and stream channel.

7. Within five days after the effective date of this Order, the Niebauers shall provide receipts or other appropriate documentation to the Department showing that the pads and boom used to absorb the spilled fuel on May 21, 2003, were properly disposed. All such documentation shall be sent to the address set forth in Paragraph 10, below.

8. Effective immediately, the Niebauers shall allow Department employees and/or their agents to have access to the site for the purpose of observing excavation and

remediation activities, collecting samples and for the purpose of ensuring compliance with this Order.

9. Nothing in this Order is intended, nor shall it be construed, to relieve or limit the Niebauers' obligations to comply with any existing or subsequent Departmental statute, regulation, permit or order. In addition, nothing set forth in this Order is intended, nor shall be construed, to authorize any violation of any statute, regulation, order, or permit issued or administered by the Department.

10. Beginning the first month after this Order's effective date, and for each month thereafter, the Niebauers shall submit copies of all disposal records or other documentation indicating proper processing or disposal of solid wastes. The documentation is due by the 10<sup>th</sup> day of the following month. All such documentation shall be sent to:

Regional Environmental Program Manager  
Waste Management Program  
Department of Environmental Protection  
Northcentral Regional Office  
208 West Third Street, Suite 101  
Williamsport, PA 17701-6448  
570-327-3431  
fax: 570-327-3420

## NOTICE OF APPEAL

Any person aggrieved by this action may appeal, pursuant to Section 4 of the Environmental Hearing Board Act, 35 P.S. Section 7514, and the Administrative Agency Law, 2 Pa. C.S. Chapter 5A, to the Environmental Hearing Board, Second Floor, Market Street State Office Building, 400 Market Street, PO Box 8457, Harrisburg, PA 17105-8457, (717) 787-3483. TDD users may contact the Board through the Pennsylvania Relay Service, (800) 654-5984. 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 Board's rules of practice of procedure may be obtained from the Board. The appeal form and the Board's rules of practice and procedure are also available in Braille or on audiotape from the Secretary to the Board at (717) 787-3483. This paragraph does not, in and of itself, create any right of appeal beyond that permitted by applicable statutes and decisional law.

IF YOU WANT TO CHALLENGE THIS ACTION, YOUR APPEAL MUST REACH THE BOARD WITHIN 30 DAYS. YOU DO NOT NEED A LAWYER TO FILE AN APPEAL WITH THE BOARD.

IMPORTANT LEGAL RIGHTS ARE AT STAKE, HOWEVER, SO YOU SHOULD SHOW THIS DOCUMENT TO A LAWYER AT ONCE. IF YOU CANNOT AFFORD A LAWYER, YOU MAY QUALIFY FOR FREE PRO BONO REPRESENTATION. CALL THE SECRETARY TO THE BOARD (717) 787-3783 FOR MORE INFORMATION.

FOR THE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION:



James E. Miller  
Acting Program Manager  
Waste Management Program  
Northcentral Regional Office



# APPENDIX A

## Soil Analysis NIEBAUER SITE

Parameter	Digestion/Extraction Procedures	**Determinative Procedures
-----------	---------------------------------	----------------------------

### TOTAL METALS, mg/kg

Arsenic	3051	6010, 7060, 7061
Barium	3051	6010, 7080, 7081
Cadmium	3051	6010, 7130, 7131
Chromium	3051	6010, 7190, 7191
Lead	3051	6010, 7420, 7421
Mercury	3051	245.1, 245.2, 7470
Selenium	3051	6010, 7740, 7741
Silver	3051	7760, 7761
Aluminum	3051	6010, 7020
Antimony	3051	6010, 7040, 7041
Beryllium	3051	6010, 7090, 7091
Boron	3051	200.7, 200.8, 200.9
Cobalt	3051	6010, 7200, 7201
Copper	3051	6010, 7210, 7211
Iron	3051	6010, 7380, 7381
Manganese	3051	6010, 7460, 7461
Nickel	3051	6010, 7520
Thallium	3051	6010, 7840, 7841
Tin	3051	200
Vanadium	3051	6010, 7910, 7911
Zinc	3051	6010, 7950, 7951

Parameter	Digestion/Extraction Procedures	**Determinative Procedures
-----------	---------------------------------	----------------------------

LEACH INORGANIC INDICATORS, mg/L

Ammonia-Nitrogen	ASTM D3987-85	350, 4500
Chloride	ASTM D3987-85	9056, 9250, 9251
Total & Amenable Cyanide	ASTM D3987-85	9010, 9012
Fluoride	ASTM D3987-85	340, 9056
Nitrate	ASTM D3987-85	352, 9056
Nitrite	ASTM D3987-85	354, 4500, 9056
pH	ASTM D3987-85	9040, 9045
Sulfate	ASTM D3987-85	9035, 9036, 9038, 9056
Sulfides	ASTM D3987-85	427, 9030, 9031

TOTAL INORGANIC INDICATORS, mg/kg

Organic Halogen (TOX)		9020, 9022, 9023
Petroleum Hydrocarbons (TPH)	3560, API/Gas/Diesel/ PHC, NY DOH 310-13	8440, API/Gas/Diesel/ PHC, NY DOH 310-13
Solids (%)		209, 2540
Volatile Solids (%)		209, 2540

TOTAL VOLATILE ORGANICS, mg/kg	5035	8260
--------------------------------	------	------

TOTAL SEMIVOLATILE ORGANICS, mg/kg	3540/3541	8270
------------------------------------	-----------	------

**\*\*Note:** This is a collection of acceptable EPA test methods, and not a complete listing. The most recently promulgated test method updates shall be used. Other acceptable EPA test methods may be used with prior approval of the Department.

## APPENDIX B

### Ground Water Analysis NIEBAUER SITE

Parameter	**Determinative Procedures
-----------	-------------------------------

#### TOTAL & DISSOLVED METALS, mg/L

Arsenic	6010, 7060, 7061
Barium	6010, 7080, 7081
Cadmium	6010, 7130, 7131
Chromium	6010, 7190, 7191
Lead	6010, 7420, 7421
Mercury	245.1, 245.2, 7470
Selenium	6010, 7740, 7741
Silver	7760, 7761
Aluminum	6010, 7020
Antimony	6010, 7040, 7041
Beryllium	6010, 7090, 7091
Boron	200.7, 200.8, 200.9
Cobalt	6010, 7200, 7201
Copper	6010, 7210, 7211
Iron	6010, 7380, 7381
Manganese	6010, 7460, 7461
Nickel	6010, 7520
Thallium	6010, 7840, 7841
Tin	200
Vanadium	6010, 7910, 7911
Zinc	6010, 7950, 7951

Parameter	**Determinative Procedures
-----------	----------------------------

INORGANIC INDICATORS, mg/L

Ammonia-Nitrogen	350, 4500
Chloride	9056, 9250, 9251
Total & Amenable Cyanide	9010, 9012
Fluoride	340, 9056
Nitrate	352, 9056
Nitrite	354, 4500, 9056
pH	9040, 9045
Dissolved Solids (TDS)	SM 2540
Solids, Suspended (TSS)	SM 2540
Sulfate	9035, 9036, 9038, 9056
Sulfides	427, 9030, 9031
Organic Halogen (TOX)	9020, 9022, 9023
Petroleum Hydrocarbons (TPH)	8440, API/Gas/Diesel/ PHC, NY DOH 310-13

TOTAL VOLATILE ORGANICS, mg/L	8260
-------------------------------	------

TOTAL SEMIVOLATILE ORGANICS, mg/L	8270
-----------------------------------	------

**\*\*Note:** This is a collection of acceptable EPA test methods, and not a complete listing. The most recently promulgated test method updates shall be used. Other acceptable EPA test methods may be used with prior approval of the Department.



*Ind*



(412) 565-3511  
TELECOPIER (412) 565-5298  
WWW.EHB.VERILAW.COM

COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD  
1507 PITTSBURGH STATE OFFICE BUILDING  
300 LIBERTY AVENUE  
PITTSBURGH, PA 15222-1210

WILLIAM T. PHILLIPY IV  
SECRETARY TO THE BOARD

JOHN P. NIEBAUER, JR. and  
DIANE A. NIEBAUER

v.

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

:  
:  
:  
:  
:  
:  
:  
:

EHB Docket No. 2004-038-R

Issued: August 27, 2004

**OPINION AND ORDER ON  
APPELLANTS' MOTION TO STAY  
FURTHER PROCEEDINGS**

By Thomas W. Renwand, Administrative Law Judge

**Synopsis:**

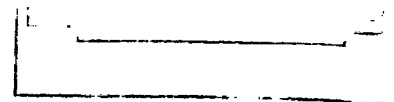
The Board grants a stay of an Appeal from an Order alleging illegal disposal of solid waste on Appellants' property pending the resolution of a criminal complaint against one of the Appellants.

The Board earlier refused to stay the Department's Order holding that the motion was in reality a request for a supersedeas. The Board finds that the Department will not be prejudiced by the stay of proceedings as the Order remains in effect.

**Discussion**

Presently before the Pennsylvania Environmental Hearing Board (Board) is the Appellants', John P. Niebauer, Jr. and Diane A. Niebauer (Appellants, or Mr. and Mrs. Niebauer, or the Niebauers), Motion to Stay further proceedings pending the resolution of the pending parallel

SEP - 2 2004



criminal prosecution of Mr. Niebauer. The Pennsylvania Department of Environmental Protection (Department) vigorously opposes the Motion to Stay.

The Department issued an Order to Appellants on January 6, 2004 which is the subject of this Appeal before the Board. The Order alleges, *inter alia*, that Appellants are responsible for the illegal disposal of solid waste on their property. The Order also requires Appellants to take certain actions including sorting through and separating fill from solid waste allegedly buried on the site and properly disposing of the solid waste.

On March 12, 2004, the Pennsylvania Attorney General filed a criminal complaint against Mr. Neibauer alleging criminal violations of the Solid Waste Management Act. Appellants claim that this proceeding should be stayed so as not to “undermine Mr. Niebauer’s privilege against self-incrimination, expose the basis of Mr. Niebauer’s defense to the prosecution in advance of criminal trial, and otherwise prejudice the case.” Motion to Stay, paragraph 11. Appellants also contend that both the Attorney General’s criminal complaint and the Department’s Order under Appeal are both based on the Department’s inspection of Appellants’ property on September 6, 2002.

The Department did not take any enforcement action against the Appellants until sixteen months later when it issued its Order of January 6, 2004. Therefore, if the Department waited sixteen months before acting, Appellants argue it must not be an environmental problem of any urgency. Finally, when each of the factors the Board considers in deciding whether to issue a stay are analyzed, Appellants insist a stay clearly should be issued. There factors are: the Appellants’ interests and potential prejudice, the burden of a stay on the Department or other parties, the burden on the Board, and the public interest.” *Sechan Limestone Industries, Inc. v. DEP*, EHB Docket No.

2003-222-R (Opinion and Order issued April 6, 2004) page 3.

The Department points out that a stay of proceedings is an extraordinary measure that should only be granted for compelling reasons. *Ziviello v. DEP*, 1998 EHB 1138. The Department contends that administrative and criminal matters can proceed at the same time. *Sysak v. DER*, 1989 EHB 126, 131. It further argues that there are no compelling reasons to grant a stay. Moreover, the outcome of the case pending before the Pennsylvania Environmental Hearing Board is not dependent on the outcome of the criminal case filed in Clearfield County. The Department correctly points out that Mr. Niebauer may assert his privilege against self-incrimination at the proper time in this case. The Department is also correct in its argument that both the Solid Waste Management Act and the Clean Streams law provide for both criminal and civil remedies.

The Department contends that a stay would conflict with its duty and mission to protect the public pursuant to the Solid Waste Management Act and its implementing regulations. "Curtailing a civil action pending the resolution of the criminal action runs contrary to the statutory mandate bestowed upon the Department." Department's Memorandum of Law, page 12.

Although we certainly acknowledge the merit in the Department's arguments as general statements of the law the specific facts of this case cause us to pause. Indeed, the Department is vague as to how the public and the environment will be harmed if we grant a stay of the Appellants' Appeal.

The Department's Order challenged in this Appeal remains in full force and effect. According to the Department and the Appellants, the Order requires Appellants to take certain actions. We earlier denied the Appellants' Motion to Stay these requirements.



This is thus not a situation where a stay of these proceedings would impact the Department's ability to defend the legality of its Order.

It is important from a due process standpoint that an appeal of the government's action should not place the appellant in a worse position than if no appeal were taken. The parties enjoy much more wide-open discovery in proceedings before the Board than in a state criminal matter.

If no appeal had been taken of the Department's Order, the Department would be in the same position. Our stay of these proceedings does not in any way prevent the Department from protecting the environment. As for the Department's contentions that a delay would impact "the public's interest in knowing that the time frames and requirements set forth in the January 6, 2004 Order will be upheld and are enforceable" the Department fails to point out how this delay will hurt the public. Moreover, it certainly can be argued that the public's greater interest is that justice be done. If justice is done "then the Crown wins."

In this same spirit of fairness we think it best, since there is no harm to the public or environment, to allow Mr. Niebauer and his counsel to focus their resources and energies on defending the criminal complaint filed by the Pennsylvania Attorney General rather than to also have to battle at the same time the formidable forces of the Department of Environmental Protection. This is not a situation such as *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368 [D.C. Circ 1980] where the Securities and Exchange Commission was seeking out documents to conduct a civil investigation while a criminal action was also pending. We, therefore, enter the following order:

COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

JOHN P. NIEBAUER, JR. and  
DIANE A. NIEBAUER

v.

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

:  
:  
:  
: EHB Docket No. 2004-038-R  
:  
:  
:

ORDER

AND NOW, this 27<sup>th</sup> day of August, 2004, Appellants' Motion to Stay Further Proceedings is *granted*. We are only staying the Appeal before the Board and not the provisions of the Department's January 6, 2004 Order which *remain in force*. This Appeal is *stayed* pending the resolution of the criminal proceedings against Mr. Niebauer or until further Order of this Board. Counsel for Appellant shall file *status reports* setting forth the status of the criminal proceeding (concentrating on the stage of the action) on or before **September 7, 2004, December 8, 2004, and February 8, 2005.**

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND  
Administrative Law Judge  
Member

DATED: August 27, 2004

**EHB Docket No. 2004-038-R**

**c: DEP Bureau of Litigation:**  
Attention: Brenda Morris, Library

**For the Commonwealth, DEP:**  
Nels J. Taber, Esq.  
Amy Ershler, Esq.  
Northcentral Regional Counsel

**For Appellant:**  
William J. Cluck, Esq.  
587 Showers Street  
Harrisburg, PA 17104-1663

med

**FILED**

OCT 24 2005

William A. Shaw  
Prothonotary/Clerk of Courts

CA

IN THE  
COURT OF COMMON PLEAS OF THE  
46<sup>TH</sup> JUDICIAL DISTRICT - CLEARFIELD COUNTY

COMMONWEALTH OF  
PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

Petitioner,

v.

JOHN NIEBAUER, JR. and  
DIANE NIEBAUER,

Respondents.

Civil Action

(Petition to Enforce)

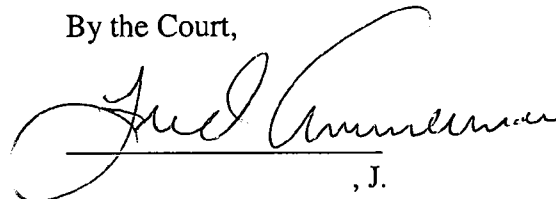
No. 05-1643-CD

ORDER

AND NOW, this 25 day of October, 2005, upon consideration of the foregoing  
Complaint, it is hereby ordered that:

1. a RULE is issued upon the Respondents to show cause why the Petitioner is not entitled to the relief requested;
2. the Respondents shall file an answer to the Complaint within 30 days of this date;
3. the Complaint shall be decided under Pa. R.C.P. No. 206.7;
4. argument shall be held on December 20, 2005, at 9:00 a.m. in Courtroom Number 1 of the Clearfield County Courthouse; and
5. notice of the entry of this Order shall be provided to all parties by the Petitioner.

By the Court,

  
, J.

FILED 3cc Shff

014:0061  
OCT 25 2005  
KCC Atty

William A. Shaw  
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY,  
PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : CIVIL ACTION  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION :

VS.

NO. 05-1643-CD

JOHN P. NIEBAUER, JR. and  
DIANE NIEBAUER


---

ENTRY OF APPEARANCE

Filed on behalf of:  
John P. Niebauer, Jr. and Diane  
Niebauer, Respondents

Counsel for these parties:

William J. Cluck, Esquire  
Supreme Court No. 52892  
Law Office of William J. Cluck  
587 Showers Street  
Harrisburg, PA 17104  
(717) 238-3027  
FAX (717) 238-8033

FILED <sup>icc</sup>  
012:4681 Amy  
NOV 28 2005 

William A. Shaw  
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY,  
PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : CIVIL ACTION  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION :

VS.

NO. 05-1643-CD

JOHN P. NIEBAUER, JR. and  
DIANE NIEBAUER

---

**Entry of Appearance on Behalf of Respondents John P. Niebauer, Jr. and Diane  
Niebauer**

William J. Cluck of the Law Office of William J. Cluck files this entry of  
appearance on behalf of Respondents, John P. Niebauer, Jr. and Diane Niebauer. Mr.  
Cluck is authorized to accept service on behalf of Respondents.

Respectfully submitted,

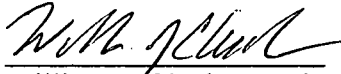


William J. Cluck

**Certificate of Service**

I, the undersigned, hereby certifies that a true and correct copy of the within Entry of Appearance on Behalf of Respondents John P. Niebauer, Jr. and Diane Niebauer was served this 23rd day of November, 2005 by U.S. Mail, first class postage prepaid upon the following:

Nels Taber, Esquire  
Commonwealth of Pennsylvania  
Department of Environmental Protection  
Office of Chief Counsel  
Northcentral Regional Office  
208 West Third Street, Suite 101  
Williamsport, PA 17701

  
William J. Cluck, Esquire  
Attorney for Respondents

CA

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY,  
PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : CIVIL ACTION  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION :

VS.

NO. 05-1643-CD

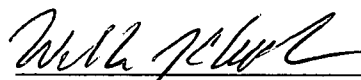
JOHN P. NIEBAUER, JR. and  
DIANE NIEBAUER

**PRAECIPE**

To the Prothonotary:

Respondents have filed Preliminary Objections to Petitioner's Civil Action –  
Petition to Enforce. Pursuant to Local Rules 1028(c) and 211, Respondents request the  
Prothonotary direct the Court Administrator to schedule an argument date for  
consideration of the Preliminary Objections.

Counsel for Respondents



William J. Cluck  
Pa Attorney No. 52892  
Law Office of William J. Cluck  
587 Showers Street  
Harrisburg PA 17104

**FILED** 1cc  
012:4681 Atty  
NOV 28 2005

William A. Shaw  
Prothonotary/Clerk of Courts



CA

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY,  
PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : CIVIL ACTION  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION :

VS.

NO. 05-1643-CD

JOHN P. NIEBAUER, JR. and  
DIANE NIEBAUER

PRELIMINARY OBJECTIONS

Filed on behalf of:  
John P. Niebauer, Jr. and Diane  
Niebauer, Respondents

Counsel for these parties:

William J. Cluck, Esquire  
Supreme Court No. 52892  
Law Office of William J. Cluck  
587 Showers Street  
Harrisburg, PA 17104  
(717) 238-3027  
FAX (717) 238-8033

FILED <sup>ICC</sup>  
2/12/46 BDL AHY  
NOV 28 2005

William A. Shaw  
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY,  
PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : CIVIL ACTION  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION :

VS.

JOHN P. NIEBAUER, JR. and  
DIANE NIEBAUER

NO. 05-1643-CD

---

**RESPONDENTS' PRELIMINARY OBJECTIONS**

AND NOW comes Respondents, John P. Niebauer, Jr. and Diane Niebauer, by and through their undersigned counsel William J. Cluck, Esquire and files these Preliminary Objections pursuant to Rule 1028(a)(2) and (6) of the Pennsylvania Rules of Civil Procedure and Local Rule 1028(c) due to Petitioner's failure to conform to rule of court and pendency of a prior action and avers the following:

1. On or about October 24, 2005, the Commonwealth of Pennsylvania Department of Environmental Protection ("DEP") filed the within Civil Action styled as a Petition to Enforce.
2. On or about October 25, 2005, this Honorable Court issued an Order based upon consideration of the foregoing "Complaint" requiring Respondents to file an answer to the "Complaint" within 30 days.

3. The Complaint contains 24 separately numbered paragraphs (one contains six subparagraphs and four sub-sub paragraphs) which identifies the parties, asserts the basis for this Court's jurisdiction, the alleged factual background, the requirements of a January 6, 2004 administrative order, an allegation that there has been no compliance with the January 6, 2004 administrative order, and a request that this Court enforce the January 6, 2004 administrative order, order Respondents to pay a fine if they fail to comply with this Court's Order, grant attorney's fees and costs and such other relief as the Court deems just and proper.
4. The January 6, 2004 administrative order is attached to DEP's Petition to Enforce as Exhibit A. Respondents appealed the administrative order to the Environmental Hearing Board.
5. Administrative Law Judge Thomas Renwand issued an Opinion and Order dated August 27, 2004 (Attached to DEP's Petition to Enforce as Exhibit B) staying the litigation due to a pending criminal matter against Mr. Niebauer.
6. The criminal matter is Commonwealth of Pennsylvania versus John P. Niebauer, Jr., docket no. 2004-766-CRA, currently pending before this Court of Common Pleas in Clearfield County.
7. The criminal charges against Mr. Niebauer and the administrative order pertain to certain property in Clearfield County owned by Respondents jointly as husband and wife.

**I. Preliminary Objection – Failure to Conform to Local Rule**

8. Local Rule 205.2(a)(6) requires a proposed order accompany all petitions, motions or other requests for relief.
9. Respondents were served by the Centre County Sheriff at their home on the evening of October 31, 2005. The pleadings served did not include a proposed order.
10. On November 21, 2005, the undersigned counsel phoned the Clearfield County Prothonotary's Office and was informed the file did not contain a proposed order.
11. Local Rule 205.2(b) requires all papers constituting the initial pleadings to have a cover sheet in substantially the form set forth in the local rules.
12. The Complaint did not include a cover sheet.
13. If the Complaint is determined to be a Petition, then DEP failed to conform to Local Rules 206.1(a)(3) which requires a petition to be divided into paragraphs numbered consecutively and each paragraph shall contain as far as practicable only one material allegation.
14. Numerous paragraphs of the Complaint contain more than one material allegation.
15. If the Complaint is determined to be a Petition, then DEP failed to conform to Local Rule 206.1(a)(7) which requires all petitions to have affixed to the front of the petition a proposed order in accordance with Local Rule 206.4(c)(2) or (3).

16. Upon information and belief, the petition to enforce did not have affixed to the front a proposed order.
17. DEP failed to conform to Local Rule 206.4(c) which sets forth the procedure for issuing a rule to show cause.
18. This Court's October 25, 2005 Order was served upon Respondents at their home by the Center County Sheriff on November 7, 2005. Upon information and belief, the Order did not include the Notice required by Local Rule 206.4(c).
19. Local Rule 206.4(c)(5) requires the moving party to file a certificate of service within five days of the service of the petition and order showing how the petition was served.
20. Upon information and belief, as of November 21, 2005, DEP has yet to file the required certificate of service.
21. Failure to comply with any provision of Local Rule 206.1(a)(9) may constitute sufficient grounds for the Court to dismiss the petition and/or deny any requested relief.

WHEREFORE, Respondents request this Honorable Court dismiss the Petition to Enforce Order or in the alternative require DEP to comply with the provisions of the Local Rules and refile the Petition.

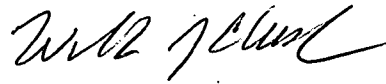
## **II. Preliminary Objection – Pendency of Prior Action**

22. Respondents submit this preliminary objection pursuant to Rule 1028(a)(6) of the Pennsylvania Rules of Civil Procedure.

23. As stated above, there is a criminal action pending against Mr. Niebauer. The criminal matter is Commonwealth of Pennsylvania versus John P. Niebauer, Jr., docket no. 2004-766-CRA, currently pending before this Court of Common Pleas in Clearfield County. Trial is presently scheduled for the January Term, 2006.
24. The lis pendens, or prior action pending, doctrine permits a court to dismiss a suit when a pending case involves (1) the same parties, (2) the same cause of action and (3) the same relief. Klein v. City of Philadelphia, 465 A.2d 730 (Pa. Cmwlth 1983).
25. The purpose of the doctrine of lis pendens, i.e., the pendency of a prior action, is to protect a defendant from harassment by having to defend several suits on the same cause of action at the same time. Penox Technologies, Inc. v. Foster Medical Corp., 546 A.2d 114 (Pa. Super. 1988).
26. The Environmental Hearing Board stayed the underlying litigation in its August 27, 2004 Opinion and Order so as not to undermine Mr. Niebauer's privilege against self-incrimination, expose the basis of Mr. Niebauer's defense to the prosecution in advance of criminal trial, and otherwise prejudice the case.
27. Defending against the Petition to Enforce raises similar issues, including the possibility of duplication of effort on the part of the parties and waste judicial resources. Norristown Auto Co. v. Hand, 562 A.2d 902, 905 (Pa. Super. 1989).

WHEREFORE, Respondents request this Honorable Court dismiss the Petition to Enforce or in the alternative, stay this later-filed action pending the outcome of the criminal proceeding.

Respectfully submitted,

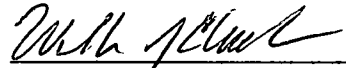
A handwritten signature in cursive script, appearing to read "Will J. Cluck".

William J. Cluck

## VERIFICATION

The undersigned hereby certifies that he is counsel of record for John P. Niebauer, Jr. and Diane Niebauer, respondents herein and that he is authorized to make this verification on behalf of respondents and that the facts recited in the foregoing Respondents' Preliminary Objections are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. Section 4904 relating to unsworn falsification to authorities.

Date: November 23, 2005

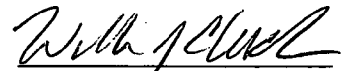
  
William J. Cluck, Esquire  
Counsel for Respondents



**Certificate of Service**

I, the undersigned, hereby certifies that a true and correct copy of the within Respondents' Preliminary Objections was served this 23rd day of November, 2005 by U.S. Mail, first class postage prepaid upon the following:

Nels Taber, Esquire  
Commonwealth of Pennsylvania  
Department of Environmental Protection  
Office of Chief Counsel  
Northcentral Regional Office  
208 West Third Street, Suite 101  
Williamsport, PA 17701

  
William J. Cluck, Esquire  
Attorney for Respondents

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY,  
PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : CIVIL ACTION  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION :

NO. 05-1643-CD

VS.

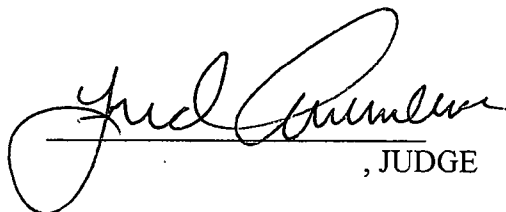
JOHN P. NIEBAUER, JR. and  
DIANE NIEBAUER

ORDER

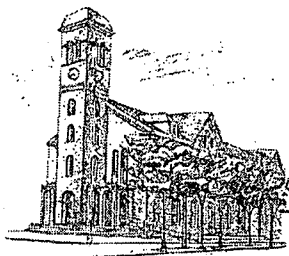
NOW, this 5<sup>th</sup> day of December, 2005, upon the filing of the Preliminary  
Objections of Respondents, John P. Niebauer, Jr. and Diane Niebauer, it is the Order and  
Decree of this Court that Petitioner shall:

1. File a response to the Preliminary Objections within 30 days of this Order;
2. Argument scheduled for December 20, 2005 is continued until  
January 4, 2006 at 10:00 am in Courtroom Number 1 of the  
Clearfield County Courthouse.

BY THE COURT:

  
\_\_\_\_\_, JUDGE

**FILED**  
01/10/1987  
DEC 07 2005  
William A. Shaw  
Prothonotary/Clerk of Courts  
1cc Atty Koerber  
(delivered for Atty Cluck)



## Clearfield County Office of the Prothonotary and Clerk of Courts

**William A. Shaw**  
Prothonotary/Clerk of Courts

**David S. Ammerman**  
Solicitor

**Jacki Kendrick**  
Deputy Prothonotary

**Bonnie Hudson**  
Administrative Assistant

To: All Concerned Parties

From: William A. Shaw, Prothonotary

Date: September 19, 2005

Over the past several weeks, it has come to my attention that there is some confusion on court orders over the issue of service. To attempt to clear up this question, from this date forward until further notice, this or a similar memo will be attached to each order, indicating responsibility for service on each order or rule. If you have any questions, please contact me at (814) 765-2641, ext. 1331. Thank you.

Sincerely,

William A. Shaw  
Prothonotary

X You are responsible for serving all appropriate parties.

\_\_\_\_\_ The Prothonotary's office has provided service to the following parties:

\_\_\_\_\_ Plaintiff(s)/Attorney(s)

\_\_\_\_\_ Defendant(s)/Attorney(s)

\_\_\_\_\_ Other

\_\_\_\_\_ Special Instructions:

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

COMMONWEALTH OF :  
PENNSYLVANIA, DEPARTMENT OF :  
ENVIRONMENTAL PROTECTION :

vs.

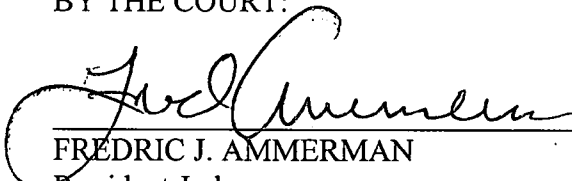
: No. 05-1643-CD  
:  
:

JOHN P. NIEBAUER, JR., and :  
DIANE NIEBAUER :

**ORDER**

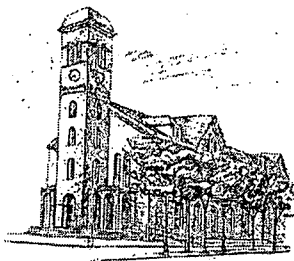
AND NOW, this 6<sup>th</sup> day of December, 2005, upon consideration  
of Defendants' Preliminary Objections filed in the above matter, it is the Order of  
the Court that argument has been scheduled for the 4<sup>th</sup> day of  
January, 2006, at 10:00 A.M, in Courtroom No. 1,  
Clearfield County Courthouse, Clearfield, PA.

BY THE COURT:

  
FREDRIC J. AMMERMAN  
President Judge

FILED 10044ys  
010:2181 Taber  
DEC 07 2005 Cluck

William A. Shaw  
Prothonotary/Clerk of Courts  
Courtesy copy  
to Amy Koester  
(60)



## Clearfield County Office of the Prothonotary and Clerk of Courts

**William A. Shaw**  
Prothonotary/Clerk of Courts

**David S. Ammerman**  
Solicitor

**Jacki Kendrick**  
Deputy Prothonotary

**Bonnie Hudson**  
Administrative Assistant

To: All Concerned Parties

From: William A. Shaw, Prothonotary

Date: September 19, 2005

Over the past several weeks, it has come to my attention that there is some confusion on court orders over the issue of service. To attempt to clear up this question, from this date forward until further notice, this or a similar memo will be attached to each order, indicating responsibility for service on each order or rule. If you have any questions, please contact me at (814) 765-2641, ext: 1331. Thank you.

Sincerely,

William A. Shaw  
Prothonotary

\_\_\_\_\_ You are responsible for serving all appropriate parties.

☒ The Prothonotary's office has provided service to the following parties:

☒ Plaintiff(s)/Attorney(s)

☒ Defendant(s)/Attorney(s)

\_\_\_\_\_ Other

\_\_\_\_\_ Special Instructions:

Rae 12-12-05

# Law Office of William J. Cluck

587 Showers Street  
Harrisburg, PA 17104-1663

Phone 717-238-3027  
Fax 717-238-8033  
Email billcluck@billcluck.com

December 10, 2005

Nels Taber  
PaDEP Office of Chief Counsel  
Northcentral Regional Office  
208 West Third Street, Suite 101  
Williamsport, PA 17701-6448

RE: DEP v. John and Diane Niebauer, Civil Action 05-1643-CD, Clearfield  
County CCP

Dear Nels:

Enclosed please find two Orders issued by Judge Ammerman in the above-captioned matter. The first Order, dated December 5, 2005, requires Petitioner to file a response to Respondents' Preliminary Objections within 30 days of the Order and continues the December 20, 2005 argument until January 4, 2006. The second Order, dated December 6, 2005 schedules argument on the Preliminary Objections for January 4, 2006.

Pursuant to Clearfield County local rules, I certify that the aforementioned Orders have been served via first class United States mail, postage prepaid on this 10th day of December, 2005.

Sincerely,



William J. Cluck

CC: John P. Niebauer, Jr.  
Diane A. Niebauer  
William A. Shaw, Prothonotary ✓

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

COMMONWEALTH OF  
PENNSYLVANIA, DEPARTMENT OF:  
ENVIRONMENTAL PROTECTION :

vs.

No. 05-1643-CD

JOHN P. NIEBAUER, JR., and  
DIANE NIEBAUER

**ORDER**

AND NOW, this 6<sup>th</sup> day of December, 2005, upon consideration  
of Defendants' Preliminary Objections filed in the above matter, it is the Order of  
the Court that argument has been scheduled for the 4<sup>th</sup> day of  
January, 2006, at 10:00 A.M, in Courtroom No. 1,  
Clearfield County Courthouse, Clearfield, PA.

BY THE COURT:

/s/ Fredric J. Ammerman

FREDRIC J. AMMERMAN  
President Judge

DEC 9 2005

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY,  
PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : CIVIL ACTION  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION :

NO. 05-1643-CD

VS.

JOHN P. NIEBAUER, JR. and  
DIANE NIEBAUER

ORDER

NOW, this 5<sup>th</sup> day of December, 2005, upon the filing of the Preliminary  
Objections of Respondents, John P. Niebauer, Jr. and Diane Niebauer, it is the Order and  
Decree of this Court that Petitioner shall:

1. File a response to the Preliminary Objections within 30 days of this Order;
2. Argument scheduled for December 20, 2005 is continued until  
January 4, 2006 at 10:00 am in Courtroom Number 1 of the  
Clearfield County Courthouse.

BY THE COURT:

/s/ Fredric J. Ammerman

, JUDGE

DEC 07 2005



**IN THE  
COURT OF COMMON PLEAS OF THE  
46<sup>TH</sup> JUDICIAL DISTRICT - CLEARFIELD COUNTY**

COMMONWEALTH OF  
PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

Petitioner,

v.

JOHN NIEBAUER, JR. and  
DIANE NIEBAUER,

Respondents.

:  
:  
:  
: Civil Action  
: (Petition to Enforce)  
: No. 05-1643-CD  
:  
:  
:  
:  
:

**CERTIFICATE OF SERVICE**

Pursuant to Clearfield County Local Rule 206.4(c)(5), I hereby certify to the best of my knowledge and belief that two copies of the Petition to Enforce Order and the Court's Order of October 25, 2005 were personally served upon Diane Niebauer at the address indicated below on the date specified, as relayed to me by Marilyn Hamm of the Clearfield County Sheriff's Office on December 9, 2005:

Personal Service by the Centre County Sheriff's Office, as deputized by the Clearfield County Sheriff, upon:

Diane Niebauer  
611 Devonshire Drive  
State College, PA 16803-1216.

Petition to Enforce Order personally served October 31, 2005  
Court's Order of October 25, 2005 personally served November 7, 2005

**FILED** 

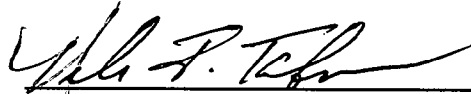
DEC 14 2005

*m/11:20/um*  
William A. Shaw  
Prothonotary  
*no c/c*

Sheriff's Return of Service to be completed by the Clearfield County Sheriff's Office.

Respectfully submitted,

FOR THE COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL PROTECTION



---

Nels J. Taber, Regional Counsel  
Supreme Court No. 44486  
Northcentral Region Office of Chief Counsel  
208 West Third Street, Suite 101  
Williamsport, PA 17701-6448

DATE: December 12, 2005

cc: William J. Cluck, Esquire  
Law Office of William J. Cluck  
587 Showers Street  
Harrisburg, PA 17104-1663

**COURT OF COMMON PLEAS OF CLEARFIELD COUNTY  
PENNSYLVANIA**

**CIVIL ACTION – (LAW) (EQUITY)**

Commonwealth of Pennsylvania  
Department of Environmental Protection  
Petitioner

No. 05-1643-CD

Type of Case: Civil Action - Law

Type of Pleading: Petition to Enforce Order

vs.

John Niebauer, Jr.  
Diane Niebauer  
Respondent

Filed on Behalf of:

Commonwealth of Pennsylvania  
Department of Environmental Protection  
Petitioner

Counsel of Record for this Party:

Nels J. Taber  
Supreme Court No. 44486  
Amy Ershler  
Supreme Court No. 37353

Pennsylvania Department of  
Environmental Protection  
Office of Chief Counsel  
208 West Third Street, Suite 101  
Williamsport, PA 17701  
(570) 321-6568

Dated: December 12, 2005



Pennsylvania Department of Environmental Protection

---

Office of Chief Counsel  
208 West Third Street  
Suite 101  
Williamsport, PA 17701-6448  
December 12, 2005

Northcentral Regional Counsel

(570) 321-6568  
FAX: (570) 327-3565

Office of the Prothonotary  
Attention: Mr. William A. Shaw  
Clearfield County Courthouse  
230 East Market Street  
Clearfield, PA 16830

**Re: DEP v. John Niebauer, Jr. and Diane Niebauer, Petition to  
Enforce Order**

Dear Mr. Shaw:

Please find enclosed for filing a Certificate of Service, pursuant to Local Rule 206.4(c)(5). It is my understanding that the Clearfield County Sheriff's Office will soon be filing the Sheriff's Return of Service in this matter. I am also enclosing a Cover Sheet, pursuant to 205.2(b), to correct my failure to do so when the Petition to Enforce was originally filed.

If there are any concerns I can be reached at the address and telephone number listed at above. Thank you for your attention to this matter.

Sincerely,

Nels J. Taber  
Regional Counsel

Encl.

cc: William J. Cluck, Esquire



IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

DOCKET # 100919  
NO: 05-1643-CD  
SERVICE # 1 OF 2  
COMPLAINT TO COMPEL COMPLIANCE

PLAINTIFF: COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION  
vs.  
DEFENDANT: JOHN NIEBAURER, JR. and DIANE NIEBAUER

**SHERIFF RETURN**

---

NOW, October 26, 2005, SHERIFF OF CENTRE COUNTY WAS DEPUTIZED BY CHESTER A. HAWKINS, SHERIFF OF CLEARFIELD COUNTY TO SERVE THE WITHIN COMPLAINT TO COMPEL COMPLIANCE ON JOHN NIEBAUER JR..

NOW, October 31, 2005 AT 3:45 PM SERVED THE WITHIN COMPLAINT TO COMPEL COMPLIANCE ON JOHN NIEBAUER JR., DEFENDANT. THE RETURN OF CENTRE COUNTY IS HERETO ATTACHED AND MADE PART OF THIS RETURN.

**FILED**  
019104301  
DEC 15 2005

William A. Shaw  
Prothonotary/Clerk of Courts

**IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA**

DOCKET # 100919

NO: 05-1643-CD

SERVICE # 2 OF 2

COMPLAINT TO COMPEL COMPLIANCE

PLAINTIFF: COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION  
vs.

DEFENDANT: JOHN NIEBAURER, JR. and DIANE NIEBAUER

**SHERIFF RETURN**

---

NOW, October 26, 2005, SHERIFF OF CENTRE COUNTY WAS DEPUTIZED BY CHESTER A. HAWKINS, SHERIFF OF CLEARFIELD COUNTY TO SERVE THE WITHIN COMPLAINT TO COMPEL COMPLIANCE ON DIANE NIEBAUER.

NOW, October 31, 2005 AT 3:45 PM SERVED THE WITHIN COMPLAINT TO COMPEL COMPLIANCE ON DIANE NIEBAUER, DEFENDANT. THE RETURN OF CENTRE COUNTY IS HERETO ATTACHED AND MADE PART OF THIS RETURN.

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

DOCKET # 100919  
NO: 05-1643-CD  
SERVICE # 1 OF 2  
ORDER & RULE TO SHOW CAUSE

PLAINTIFF: COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION  
vs.

DEFENDANT: JOHN NIEBAURER, JR. and DIANE NIEBAUER

**SHERIFF RETURN**

---

NOW, October 26, 2005, SHERIFF OF CENTRE COUNTY WAS DEPUTIZED BY CHESTER A. HAWKINS, SHERIFF OF CLEARFIELD COUNTY TO SERVE THE WITHIN ORDER & RULE TO SHOW CAUSE ON JOHN NIEBAUER JR..

NOW, November 07, 2005 AT 3:50 PM SERVED THE WITHIN ORDER & RULE TO SHOW CAUSE ON JOHN NIEBAUER JR., DEFENDANT. THE RETURN OF CENTRE COUNTY IS HERETO ATTACHED AND MADE PART OF THIS RETURN.

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

DOCKET # 100919  
NO: 05-1643-CD  
SERVICE # 2 OF 2  
ORDER & RULE TO SHOW CAUSE

PLAINTIFF: COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION  
vs.  
DEFENDANT: JOHN NIEBAURER, JR. and DIANE NIEBAUER

**SHERIFF RETURN**

---

NOW, October 26, 2005, SHERIFF OF CENTRE COUNTY WAS DEPUTIZED BY CHESTER A. HAWKINS, SHERIFF OF CLEARFIELD COUNTY TO SERVE THE WITHIN ORDER & RULE TO SHOW CAUSE ON DIANE NIEBAUER.

NOW, October 31, 2005 AT 3:45 PM SERVED THE WITHIN ORDER & RULE TO SHOW CAUSE ON DIANE NIEBAUER, DEFENDANT. THE RETURN OF CENTRE COUNTY IS HERETO **ATTACHED** AND MADE PART OF THIS RETURN.



IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

DOCKET # 100919  
NO: 05-1643-CD  
SERVICES 2  
COMPLAINT TO COMPEL COMPLIANCE WITH

ORDER OF DEPT.

PLAINTIFF: COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION  
vs.

DEFENDANT: JOHN NIEBAURER, JR. and DIANE NIEBAUER

SHERIFF RETURN

RETURN COSTS

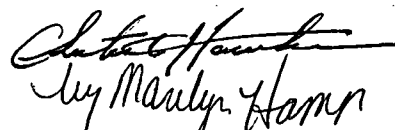
Description	Paid By	CHECK #	AMOUNT
SURCHARGE	COMM OF PA	9134	20.00
SHERIFF HAWKINS	COMM OF PA	9134	36.00
CENTRE CO.	COMM OF PA	9135	53.20

Sworn to Before Me This

\_\_\_\_\_ Day of \_\_\_\_\_ 2005

\_\_\_\_\_

So Answers,



Chester A. Hawkins  
Sheriff

100919

# SHERIFF'S OFFICE

## CENTRE COUNTY

Rm 101 Court House, Bellefonte, Pennsylvania, 16823 (814) 355-6803

SHERIFF SERVICE		INSTRUCTIONS FOR SERVICE OF PROCESS: You must file one instruction sheet for each defendant. please type or print legibly. Do Not detach any copies.	
<b>PROCESS RECEIPT, AND AFFIDAVIT OF RETURN</b>			
1. Plaintiff(s) <u>Commonwealth of Pennsylvania, Department of Environment Protection</u>		2. Case Number <u>05-1643-CD</u>	
3. Defendant(s) <u>John Niebauer Jr and Diane Niebauer</u>		4. Type of Writ or Complaint: <u>Complaint</u>	
SERVE → AT	5. Name of Individual, Company, Corporation, Etc., to Serve or Description of Property to be Levied, Attached or Sold. <u>Diane Niebauer</u>		
	6. Address (Street or RFD, Apartment No., City, Boro, Twp., State and Zip Code) <u>611 Devonshire Drive, State College, PA</u>		
7. Indicate unusual service: <input type="checkbox"/> Reg Mail <input type="checkbox"/> Certified Mail <input type="checkbox"/> Deputize <input type="checkbox"/> Post <input type="checkbox"/> Other			
Now, <u>20</u> I SHERIFF OF CENTRE COUNTY, PA., do hereby deputize the Sheriff of <u>Centre</u> County to execute this Writ and make return thereof according to law. This deputation being made at the request and risk of the plaintiff. <u>Sheriff of Centre County</u>			
8. SPECIAL INSTRUCTIONS OR OTHER INFORMATION THAT WILL ASSIST IN EXPEDITING SERVICE			

**NOTE ONLY APPLICABLE ON WRIT OF EXECUTION: N.B. WAIVER OF WATCHMAN** - Any deputy sheriff levying upon or attaching any property under within writ may leave same without a watchman, in custody of whomever is found in possession, after notifying person of levy or attachment, without liability on the part of such deputy or the sheriff to any plaintiff herein for any loss, destruction or removal of any such property before sheriff's sale thereof.

9. Print/Type Name and Address of Attorney/Originator	10. Telephone Number	11. Date
	12. Signature	

SPACE BELOW FOR USE OF SHERIFF ONLY - DO NOT WRITE BELOW THIS LINE									
13. I acknowledge receipt of the writ or complaint as indicated above.		SIGNATURE of Authorized CCSD Deputy of Clerk and Title			14. Date Filed		15. Expiration/Hearing Date		
<b>TO BE COMPLETED BY SHERIFF</b>									
16. Served and made known to <u>Diane Niebauer</u> , on the <u>31<sup>st</sup></u> day of <u>October</u> , 20 <u>05</u> , at <u>3:45</u> o'clock, <u>P</u> m., at <u>Same as above</u> , County of Centre Commonwealth of Pennsylvania, in the manner described below: <input checked="" type="checkbox"/> Defendant(s) personally served. <input type="checkbox"/> Adult family member with whom said Defendant(s) resides(s). Relationship is _____ <input type="checkbox"/> Adult in charge of Defendant's residence. <input type="checkbox"/> Manager/Clerk of place of lodging in which Defendant(s) resides(s). <input type="checkbox"/> Agent or person in charge of Defendant's office or usual place of business. <input type="checkbox"/> _____ and officer of said Defendant company. <input type="checkbox"/> Other _____									
On the _____ day of _____, 20 _____, at _____ o'clock, _____ M. Defendant not found because: <input type="checkbox"/> Moved <input type="checkbox"/> Unknown <input type="checkbox"/> No Answer <input type="checkbox"/> Vacant <input type="checkbox"/> Other _____									
Remarks:									
Advance Costs	Docket	Service	Sur Charge	Affidavit	Mileage	Postage	Misc.	Total Costs	Costs Due or Refund
<u>75.00</u>	<u>9.00</u>	<u>15.00</u>	<u>0</u>	<u>3.50</u>	<u>20.70</u>	<u>1.00</u>	<u>4.00</u>	<u>53.20</u>	<u>21.80</u>
17. AFFIRMED and subscribed to before me this <u>10</u> day of <u>Nov</u> , 20 <u>05</u> <u>Corinne Peters</u> COMMONWEALTH OF PENNSYLVANIA Notary Seal: Corinne H. Peters, Notary Public Bellefonte Boro, Centre County My Commission Expires <u>Sept 5, 2009</u>				18. Signature of Dep. Sheriff <u>Clough P. Kahlbach</u> 19. Date <u>11/8/05</u> 21. Signature of Sheriff 22. Date					
24. I ACKNOWLEDGE RECEIPT OF THE SHERIFF'S RETURN SIGNATURE OF MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES				25. Date Received					

# SHERIFF'S OFFICE

## CENTRE COUNTY

Rm 101 Court House, Bellefonte, Pennsylvania, 16823 (814) 355-6803

SHERIFF SERVICE		INSTRUCTIONS FOR SERVICE OF PROCESS: You must file one instruction sheet for each defendant. please type or print legibly. Do Not detach any copies.	
<b>PROCESS RECEIPT, AND AFFIDAVIT OF RETURN</b>			
1. Plaintiff(s) <u>Commonwealth of Pennsylvania and Department of Environmental Protection</u>		2. Case Number <u>05-1643-CO</u>	
3. Defendant(s) <u>John Niebauer, Jr. and Diane Niebauer</u>		4. Type of Writ or Complaint: <u>Complaint</u>	
5. Name of Individual, Company, Corporation, Etc., to Serve or Description of Property to be Levied, Attached or Sold. <u>John Niebauer</u>			
6. Address (Street or RFD, Apartment No., City, Boro, Twp., State and Zip Code) <u>611 Devonshire Drive, State College, PA</u>			
7. Indicate unusual service: <input type="checkbox"/> Reg Mail <input type="checkbox"/> Certified Mail <input type="checkbox"/> Deputize <input type="checkbox"/> Post <input type="checkbox"/> Other			
Now, <u>20</u> I SHERIFF OF CENTRE COUNTY, PA., do hereby deputize the Sheriff of <u>Centre</u> County to execute this Writ and make return thereof according to law. This deputation being made at the request and risk of the plaintiff. <u>Sheriff of Centre County</u>			
8. SPECIAL INSTRUCTIONS OR OTHER INFORMATION THAT WILL ASSIST IN EXPEDITING SERVICE			

**NOTE ONLY APPLICABLE ON WRIT OF EXECUTION: N.B. WAIVER OF WATCHMAN** - Any deputy sheriff levying upon or attaching any property under within writ may leave same without a watchman, in custody of whomever is found in possession, after notifying person of levy or attachment, without liability on the part of such deputy or the sheriff to any plaintiff herein for any loss, destruction or removal of any such property before sheriff's sale thereof.

9. Print/Type Name and Address of Attorney/Originator	10. Telephone Number	11. Date
12. Signature		

SPACE BELOW FOR USE OF SHERIFF ONLY - DO NOT WRITE BELOW THIS LINE									
13. I acknowledge receipt of the writ or complaint as indicated above.		SIGNATURE of Authorized CCSD Deputy of Clerk and Title			14. Date Filed		15. Expiration/Hearing Date		
<b>TO BE COMPLETED BY SHERIFF</b>									
16. Served and made known to <u>Diane Niebauer</u> , on the <u>31<sup>st</sup></u> day of <u>October</u> , 20 <u>05</u> , at <u>3:45</u> o'clock, <u>P</u> m., at <u>611 Devonshire Drive, State College</u> , County of Centre Commonwealth of Pennsylvania, in the manner described below: <input type="checkbox"/> Defendant(s) personally served. <input checked="" type="checkbox"/> Adult family member with whom said Defendant(s) resides(s). Relationship is <u>wife and Co-Defendant</u> <input type="checkbox"/> Adult in charge of Defendant's residence. <input type="checkbox"/> Manager/Clerk of place of lodging in which Defendant(s) resides(s). <input type="checkbox"/> Agent or person in charge of Defendant's office or usual place of business. <input type="checkbox"/> _____ and officer of said Defendant company. <input type="checkbox"/> Other _____									
On the _____ day of _____, 20 _____, at _____ o'clock, _____ M. Defendant not found because: <input type="checkbox"/> Moved <input type="checkbox"/> Unknown <input type="checkbox"/> No Answer <input type="checkbox"/> Vacant <input type="checkbox"/> Other _____									
Remarks:									
Advance Costs	Docket	Service	Sur Charge	Affidavit	Mileage	Postage	Misc.	Total Costs	Costs Due or Refund
17. AFFIRMED and subscribed to before me this <u>10</u> day of <u>Nov.</u> , 20 <u>05</u> <u>Corinne Peters</u> COMMONWEALTH OF PENNSYLVANIA Notarial Seal Corinne H. Peters, Notary Public My Commission Expires <u>11/8/2005</u>				So Answer. 18. Signature of Dep. Sheriff <u>[Signature]</u> 21. Signature of Sheriff <u>[Signature]</u>			19. Date <u>11/8/2005</u> 22. Date		
24. I ACKNOWLEDGE RECEIPT OF THE SHERIFF'S RETURN SIGNATURE OF AUTHORIZED AUTHORITY AND TYPE <u>Member, Pennsylvania Association of Notaries</u>				SHERIFF OF CENTRE COUNTY Amount Pd. _____ Page _____			25. Date Received		

# SHERIFF'S OFFICE

## CENTRE COUNTY

Rm 101 Court House, Bellefonte, Pennsylvania, 16823 (814) 355-6803

SHERIFF SERVICE PROCESS RECEIPT, AND AFFIDAVIT OF RETURN		INSTRUCTIONS FOR SERVICE OF PROCESS: You must file one instruction sheet for each defendant. please type or print legibly. Do Not detach any copies.	
1. Plaintiff(s) <u>Commonwealth of Pennsylvania and Department of Environment Protection</u>		2. Case Number <u>05-1643-CD</u>	
3. Defendant(s) <u>John Niebauer and Diane Niebauer</u>		4. Type of Writ or Complaint: <u>Order and Rule to show cause</u>	
5. Name of Individual, Company, Corporation, Etc., to Serve or Description of Property to be Levied, Attached or Sold. <u>John Niebauer</u>			
6. Address (Street or RFD, Apartment No., City, Boro, Twp., State and Zip Code) <u>611 Devonshire Drive, State College, PA</u>			
7. Indicate unusual service: <input type="checkbox"/> Reg Mail <input type="checkbox"/> Certified Mail <input type="checkbox"/> Deputize <input type="checkbox"/> Post <input type="checkbox"/> Other			
Now, <u>20</u> I SHERIFF OF CENTRE COUNTY, PA., do hereby deputize the Sheriff of <u>Centre</u> County to execute this Writ and make return thereof according to law. This deputation being made at the request and risk of the plaintiff. <u>Sheriff of Centre County</u>			
8. SPECIAL INSTRUCTIONS OR OTHER INFORMATION THAT WILL ASSIST IN EXPEDITING SERVICE			

**NOTE ONLY APPLICABLE ON WRIT OF EXECUTION: N.B. WAIVER OF WATCHMAN** - Any deputy sheriff levying upon or attaching any property under within writ may leave same without a watchman, in custody of whomever is found in possession, after notifying person of levy or attachment, without liability on the part of such deputy or the sheriff to any plaintiff herein for any loss, destruction or removal of any such property before sheriff's sale thereof.

9. Print/Type Name and Address of Attorney/Originator	10. Telephone Number	11. Date
	12. Signature	

SPACE BELOW FOR USE OF SHERIFF ONLY - DO NOT WRITE BELOW THIS LINE									
13. I acknowledge receipt of the writ or complaint as indicated above.		SIGNATURE of Authorized CCSD Deputy of Clerk and Title			14. Date Filed		15. Expiration/Hearing Date		
TO BE COMPLETED BY SHERIFF									
16. Served and made known to <u>Diane Niebauer</u> , on the <u>7th</u> day of <u>November</u> , 20 <u>05</u> , at <u>3:50</u> o'clock, <u>P</u> m., at <u>611 Devonshire Drive, State College</u> , County of Centre Commonwealth of Pennsylvania, in the manner described below: <input type="checkbox"/> Defendant(s) personally served. <input checked="" type="checkbox"/> Adult family member with whom said Defendant(s) resides(s). Relationship is <u>wife and Co-Defendant</u> <input type="checkbox"/> Adult in charge of Defendant's residence. <input type="checkbox"/> Manager/Clerk of place of lodging in which Defendant(s) resides(s). <input type="checkbox"/> Agent or person in charge of Defendant's office or usual place of business. <input type="checkbox"/> _____ and officer of said Defendant company. <input type="checkbox"/> Other _____									
On the _____ day of _____, 20____, at _____ o'clock, _____ M. Defendant not found because: <input type="checkbox"/> Moved <input type="checkbox"/> Unknown <input type="checkbox"/> No Answer <input type="checkbox"/> Vacant <input type="checkbox"/> Other _____									
Remarks:									
Advance Costs	Docket	Service	Sur Charge	Affidavit	Mileage	Postage	Misc.	Total Costs	Costs Due or Refund
17. AFFIRMED and subscribed to before me this <u>10</u>				So Answer.			19. Date		
20. day of <u>Nov.</u> 20 <u>05</u>				18. Signature of Dep. Sheriff <u>[Signature]</u>			21. Date <u>11/8/2005</u>		
23. <u>[Signature]</u> COMMONWEALTH OF PENNSYLVANIA Notary Public Connekt Peters, Notary Public Bellefonte Boro, Centre County My Commission Expires Sept. 5, 2009				21. Signature of Sheriff			22. Date		
				SHERIFF OF CENTRE COUNTY					
				Amount Pd. _____ Page _____					
24. I Acknowledge Receipt of the Sheriff's Return Signature of AUTHORIZED AUTHORITY AND TITLE.								25. Date Received	

# SHERIFF'S OFFICE

## CENTRE COUNTY

Rm 101 Court House, Bellefonte, Pennsylvania, 16823 (814) 355-6803

SHERIFF SERVICE PROCESS RECEIPT, AND AFFIDAVIT OF RETURN		INSTRUCTIONS FOR SERVICE OF PROCESS: You must file one instruction sheet for each defendant. please type or print legibly. Do Not detach any copies.	
1. Plaintiff(s) <u>Commonwealth of Pennsylvania</u> <u>Department of Environment Protection</u>		2. Case Number <u>05-1643-CO</u>	
3. Defendant(s) <u>John Niebauer, Jr and Diane Niebauer</u>		4. Type of Writ or Complaint: <u>Order and Rule to Show Cause</u>	
5. Name of Individual, Company, Corporation, Etc., to Serve or Description of Property to be Levied, Attached or Sold. <u>Diane Niebauer</u>			
6. Address (Street or RFD, Apartment No., City, Boro, Twp., State and Zip Code) <u>611 Devonshire Drive, State College, PA</u>			
7. Indicate unusual service: <input type="checkbox"/> Reg Mail <input type="checkbox"/> Certified Mail <input type="checkbox"/> Deputize <input type="checkbox"/> Post <input type="checkbox"/> Other			
Now, <u>20</u> <u>05</u> , I SHERIFF OF CENTRE COUNTY, PA., do hereby deputize the Sheriff of <u>Centre</u> County to execute this Writ and make return thereof according to law. This deputation being made at the request and risk of the plaintiff. <u>Sheriff of Centre County</u>			
8. SPECIAL INSTRUCTIONS OR OTHER INFORMATION THAT WILL ASSIST IN EXPEDITING SERVICE			

**NOTE ONLY APPLICABLE ON WRIT OF EXECUTION: N.B. WAIVER OF WATCHMAN** - Any deputy sheriff levying upon or attaching any property under within writ may leave same without a watchman, in custody of whomever is found in possession, after notifying person of levy or attachment, without liability on the part of such deputy or the sheriff to any plaintiff herein for any loss, destruction or removal of any such property before sheriff's sale thereof.

9. Print/Type Name and Address of Attorney/Originator	10. Telephone Number	11. Date
12. Signature		

SPACE BELOW FOR USE OF SHERIFF ONLY - DO NOT WRITE BELOW THIS LINE									
13. I acknowledge receipt of the writ or complaint as indicated above.		SIGNATURE of Authorized CCSD Deputy of Clerk and Title			14. Date Filed		15. Expiration/Hearing Date		
TO BE COMPLETED BY SHERIFF									
16. Served and made known to <u>Diane Niebauer</u> , on the <u>7th</u> day of <u>November</u> , 20 <u>05</u> , at <u>3:50</u> o'clock, <u>P</u> m., at <u>611 Devonshire Drive, State College</u> , County of Centre Commonwealth of Pennsylvania, in the manner described below: <input checked="" type="checkbox"/> Defendant(s) personally served. <input type="checkbox"/> Adult family member with whom said Defendant(s) resides(s). Relationship is _____ <input type="checkbox"/> Adult in charge of Defendant's residence. <input type="checkbox"/> Manager/Clerk of place of lodging in which Defendant(s) resides(s). <input type="checkbox"/> Agent or person in charge of Defendant's office or usual place of business. <input type="checkbox"/> _____ and officer of said Defendant company. <input type="checkbox"/> Other _____ On the _____ day of _____, 20 _____, at _____ o'clock, _____ M. Defendant not found because: <input type="checkbox"/> Moved <input type="checkbox"/> Unknown <input type="checkbox"/> No Answer <input type="checkbox"/> Vacant <input type="checkbox"/> Other _____ Remarks:									
Advance Costs	Docket	Service	Sur Charge	Affidavit	Mileage	Postage	Misc.	Total Costs	Costs Due or Refund
17. AFFIRMED and subscribed to before me this <u>10</u> <u>Nov.</u> 20 <u>05</u> <u>Carrie Peters</u> COMMONWEALTH OF PENNSYLVANIA Notarial Seal Carrie H. Peters, Notary Public Belleville Boro, Centre County My Commission Expires _____				So Answer 18. Signature of Dep. Sheriff <u>Rough P. Kalmbrink</u> 21. Signature of Sheriff		19. Date <u>11/8/2005</u> 22. Date			
24. I ACKNOWLEDGE RECEIPT OF THE SHERIFF'S RETURN SIGNATURE OF AUTHORIZED AUTHORITY AND TITLE Member, Pennsylvania Association of Notaries				SHERIFF OF CENTRE COUNTY Amount Pd. _____ Page _____		25. Date Received			



Pennsylvania Department of Environmental Protection

1216

Office of Chief Counsel  
208 West Third Street  
Suite 101  
Williamsport, PA 17701-6448

October 18, 2005

Northcentral Regional Office

(570) 321-6568

FAX: (570) 327-3565

Sheriff Denny Nau  
Centre County Courthouse  
Allegheny Street  
Bellefonte, PA 16823

**Re: DEP v. John Niebauer, Jr. and Diane Niebauer, Complaint to  
Compel Compliance With An Order of the Department**

Dear Sheriff Nau:

Enclosed are two file stamped copies of the Complaint to Compel Compliance with an Order of the Department and a Rule to Show Cause filed by the Department of Environmental Protection against John Niebauer, Jr. and Diane Niebauer and the \$75.00 fee for service. The Complaint was filed in Clearfield in the Clearfield County Court of Common Pleas. I have requested that the Sheriff of Clearfield County deputize you for service. Please serve John and Diane Niebauer. They both reside at 611 Devonshire Drive, State College, PA 16803-1216.

Should there be any questions, please contact me at 570-321-6568. Thank you for your attention to this matter.

Sincerely yours,

Nels J. Taber  
Regional Counsel

Enclosures

cc: Ron Sommers

pg 3262-29  
Pl. 75-2





Pennsylvania Department of Environmental Protection

Office of Chief Counsel  
208 West Third Street  
Suite 101  
Williamsport, PA 17701-6448  
October 18, 2005

Northcentral Regional Office

(570) 321-6568  
FAX: (570) 327-3565

Sheriff Chester A. Hawkins  
Clearfield County Sheriff  
Clearfield County Courthouse  
230 East Market St.  
Clearfield, PA 16830

**Re: Service of DEP v. John Niebauer, Jr. and Diane Niebauer, Complaint to  
Compel Compliance with Order of Department**

Dear Sheriff Hawkins:

Enclosed are three file stamped copies of the Complaint to Compel Compliance with an Order of the Department and Rule to Show Cause filed by the Department of Environmental Protection against John and Diane Niebauer. A check for \$100.00 for the service costs and an envelope to be delivered to the Sheriff of Centre County, which contains an instruction letter and \$75 check, are also enclosed.

Please deputize the Centre County Sheriff to effectuate service on John and Diane Niebauer. Should there be any questions, please contact me at 570-321-6568. Thank you for your assistance in this matter.

Sincerely yours,

Nels J. Taber  
Regional Counsel

Enclosure

cc: Ron Sommers  
Centre County Sheriff ->





CHESTER A. HAWKINS  
SHERIFF

# Sheriff's Office Clearfield County

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

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

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 100919

TERM & NO. 05-1643-CD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION

COMPLAINT TO COMPEL COMPLIANCE WITH ORDER OF

DEPT.  
VS.

JOHN NIEBAURER, JR. and DIANE NIEBAUER

**SERVE BY: 11/26/05**

### MAKE REFUND PAYABLE TO COMMONWLEALTH OF PA. D.E.P.

**SERVE:** JOHN NIEBAUER JR.

**ADDRESS:** 611 DEVONSHIRE DRIVE, STATE COLLEGE, PA 16803-1216

Know all men by these presents, that I, CHESTER A. HAWKINS, HIGH SHERIFF OF CLEARFIELD COUNTY, State of Pennsylvania, do hereby deputize the SHERIFF OF CENTRE COUNTY, Pennsylvania to execute this writ. This Deputation being made at the request and risk of the Plaintiff this day, October 26, 2005.

RESPECTFULLY,

CHESTER A. HAWKINS,  
SHERIFF OF CLEARFIELD COUNTY, PENNSYLVANIA





CHESTER A. HAWKINS  
SHERIFF

# Sheriff's Office Clearfield County

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

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

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 100919

TERM & NO. 05-1643-CD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION

COMPLAINT TO COMPEL COMPLIANCE WITH ORDER OF

DEPT.  
VS.

JOHN NIEBAURER, JR. and DIANE NIEBAUER

**SERVE BY: 11/26/05**

### MAKE REFUND PAYABLE TO COMMONWEALTH OF PA D.E.P.

**SERVE:** DIANE NIEBAUER

**ADDRESS:** 611 DEVONSHIRE DRIVE, STATE COLLEGE, PA 16803-1216

Know all men by these presents, that I, CHESTER A. HAWKINS, HIGH SHERIFF OF CLEARFIELD COUNTY, State of Pennsylvania, do hereby deputize the SHERIFF OF CENTRE COUNTY, Pennsylvania to execute this writ. This Deputation being made at the request and risk of the Plaintiff this day, October 26, 2005.

RESPECTFULLY,

CHESTER A. HAWKINS,  
SHERIFF OF CLEARFIELD COUNTY, PENNSYLVANIA

IN THE  
COURT OF COMMON PLEAS OF THE  
46<sup>TH</sup> JUDICIAL DISTRICT - CLEARFIELD COUNTY

COMMONWEALTH OF  
PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

Petitioner,

v.

JOHN NIEBAUER, JR. and  
DIANE NIEBAUER,

Respondents.

Civil Action  
(Petition to Enforce)

No. 05-1643-CD

**ORDER**

AND NOW, this 25 day of October, 2005, upon consideration of the foregoing Complaint, it is hereby ordered that:

1. a RULE is issued upon the Respondents to show cause why the Petitioner is not entitled to the relief requested;
2. the Respondents shall file an answer to the Complaint within 30 days of this date;
3. the Complaint shall be decided under Pa. R.C.P. No. 206.7;
4. argument shall be held on December 20, 2005, at 9:00am in Courtroom Number 1 of the Clearfield County Courthouse; and
5. notice of the entry of this Order shall be provided to all parties by the Petitioner.

By the Court,

/s/ Fredric J. Ammerman

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

OCT 25 2005

Attest.

*William L. Shaw*  
Prothonotary/  
Clerk of Courts

IN THE  
COURT OF COMMON PLEAS OF THE  
46<sup>TH</sup> JUDICIAL DISTRICT - CLEARFIELD COUNTY

COMMONWEALTH OF  
PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

Petitioner,

v.

JOHN NIEBAUER, JR. and  
DIANE NIEBAUER,

Respondents.

Civil Action

(Petition to Enforce)

No. 05-1643-CD

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

OCT 24 2005

Attest.

*William L. Shaw*  
Prothonotary/  
Clerk of Courts

**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, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

Pennsylvania Lawyer Referral Service  
Pennsylvania Bar Association  
POB 186  
Harrisburg, PA 17108  
(800) 692-7375

**IN THE  
COURT OF COMMON PLEAS OF THE  
46<sup>TH</sup> JUDICIAL DISTRICT - CLEARFIELD COUNTY**

COMMONWEALTH OF	:	
PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	Civil Action
PROTECTION	:	(Petition to Enforce)
Petitioner,	:	No.
v.	:	
	:	
JOHN NIEBAUER, JR. and	:	
DIANE NIEBAUER,	:	
	:	
Respondents.	:	

**PETITION TO ENFORCE ORDER**

COMES the Commonwealth of Pennsylvania, Department of Environmental Protection ("Department"), who files this Petition to Enforce Order. In support thereof, the Department avers as follows:

**Parties**

1. The Department is the administrative agency vested with the authority and responsibility to administer and/or enforce the requirements of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1 *et seq.* ("CSL"); the Dam Safety and Encroachment Act, 32 P.S. §693.1 *et seq.* ("DSEA"); the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380 *as amended*, 35 P.S. §6018.101 *et seq.* ("SWMA"); the Hazardous Sites Cleanup Act, the Act of October 18, 1988, P.L. 756, No. 1988-108, 35 P.S. §6020.101 *et seq.* ("HSCA"); the Land Recycling and Remediation Standards Act, Act of May 19, 1995, P.L. 4, No. 1995-2, 35 P.S. §§6026.101 *et seq.* ("Act 2"); Section 1917-A of

the Administrative Code, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §510-17 ("Administrative Code"); and the rules and regulations promulgated thereunder.

2. John P. Niebauer, Jr. is the CEO and Vice President and Diane A. Niebauer is the Secretary and Treasurer of Earthmovers Unlimited, Inc. John P. Niebauer, Jr. is the CEO and Diane Niebauer is the Secretary and Treasurer of Earthmovers Equipment Company. Hereinafter John P. Niebauer, Jr. and Diane A. Niebauer together shall be referred to as "Niebauers".

### **Jurisdiction**

3. This Court has jurisdiction over this proceeding pursuant to Sections 761 and 931 of the Judicial Code, 42 Pa. C.S.A. §§761 and 931.

### **Factual Background**

4. The Niebauers own property located on Route 322 in Bigler Township and Boggs Township in Clearfield County, PA. There is a sign on the property near Route 322 that says "Loggers Equipment". The property is comprised of three separate tax parcels. The tax parcel numbers are 010-000-008.1, N09-000-049.1, and NO9-000-00055 ("Site"). All three parcels are owned by the Niebauers. There is one building hereinafter referred to as the Loggers Equipment Building or Main Building, and also a Quonset-type building on the Site.

5. On or about September 6, 2002, the Department conducted an inspection at the Site. At that time a disposal area covering approximately 112 by 40 yards located

approximately 75-80 yards north of the Loggers Equipment Building was discovered by the Department. The Department estimates the disposal area to be approximately fifteen feet deep ("Disposal Area"). Solid waste, consisting of, but not limited to, wood, shingles, carpeting, interior and exterior siding and pieces of hard metal, was on the Site on September 6, 2002. William Peterson, Loggers Equipment General Manager, was present during the September 6, 2002 inspection. Mr. Peterson indicated to the Department that the solid waste was buried using a truck loader, owned by John P. Niebauer, Jr., which was operated by the persons bringing in the waste.

6. The Department has never issued a permit or approval to allow the Niebauers or any other person or entity to burn, bury, process, store or dispose, or allow the burning, burying, processing, storage or disposing of solid waste at the Site.

7. On January 6, 2004, the Department issued an administrative order to the Niebauers. A copy of the January 6, 2004 administrative order ("2004 Order") is marked as Exhibit A, attached hereto and incorporated herein.

8. The 2004 Order was received by Niebauers. The 2004 Order was appealed by the Niebauers to the Pennsylvania Environmental Hearing Board ("EHB"). The case was docketed to EHB Docket No. 2004-038-R.

9. The appeal is currently stayed by an Opinion and Order of the EHB entered August 27, 2004 (August Order), which is marked as Exhibit B, attached hereto and incorporated herein. The August Order specifically states that the EHB is "only staying the

Appeal before the Board and not the provisions of the Department's January 6, 2004 Order which *remain in effect*." (Emphasis added by the EHB).

10. Although the appeal of the Niebauers is pending, this petition to enforce can proceed against them. *DER v. Norwesco Development Corp.*, 531 A.2d 94, 96 (Pa. Commw. Ct. 1987). The appeal does not act as a supersedeas, and until there is a final adjudication, the order is enforceable. *Id.*

#### **The Requirements of the 2004 Order**

11. The 2004 Order directed that the Niebauers immediately cease bringing or allowing anyone to bring solid waste to the Site. The Niebauers were also directed to immediately cease disposing and burying or allowing anyone to dispose or bury any solid waste at the Site.

12. Within two years from the effective date of the 2004 Order, the Niebauers were required to excavate and remove all solid waste buried or covered at the Site in the following manner:

a. The Niebauers shall remove all solid waste from the Site for proper disposal or processing at a facility permitted or approved to accept such waste.

...

c. Beginning the first full month after the E&S Control Plan has been approved by the Clearfield County Conservation District, (and after receiving an NPDES permit, if necessary), and then continuing each month thereafter, the Niebauers shall sort



through 1000 cubic yards of the Disposal Area. The Niebauers shall remove all solid waste found in each 1000 cubic yards of the Disposal Area for proper processing or disposal.

d. When Niebauers believe that they have removed all solid waste from the Site, Niebauers shall provide written notice to the Department indicating they believe they have complied with the requirement that all solid waste has been removed from the Site. The written notice shall be sent to the address set forth in Paragraph 19, below. If the Department determines any further action is required, the Niebauers shall take such action to fully address the Department's concerns. Any such actions directed by the Department shall be incorporated as part of this Order.

e. Following the removal of solid waste from each 1000 cubic yard area, the Niebauers shall visually inspect the soils remaining within the excavation for indications of contamination. Indications of contamination may include, but are not to be limited to discoloration, unusual odors, and/or the presence of foreign material, either liquid or solid, that is not typical of native soils. If any indications of contamination are present, then Niebauers shall collect at least three soil samples from the remaining surface of the excavation from within the areas exhibiting suspected contamination. The Niebauers shall submit the samples for laboratory analysis for the parameters set forth in Appendix A, attached to the 2004 Order and incorporated herein by reference. If groundwater is encountered within the excavation area, and if the groundwater exhibits indications of contamination, including but not limited to, discoloration, cloudiness or odors, Niebauers

shall collect at least two water samples and shall submit the samples for laboratory analysis for the parameters set forth in Appendix B, attached to the 2004 Order and incorporated herein by reference. If any water exhibits a sheen on its surface, the Niebauers shall collect at least two water samples from the surface of the water, and at least an additional two samples from the water below the surface, and shall submit the samples for laboratory analysis for the parameters set forth in Appendix B of the 2004 Order.

- (i) The Department shall be notified when the Niebauers intend to collect samples. Notification can be in person or by telephone at the telephone number noted in Paragraph [19], below.
- (ii) The Niebauers shall submit the sample results to the Department within five (5) business days after receiving the sample results to the address noted in Paragraph [19], below.
- (iii) If, after comparing the sample results to the Department's statutory or regulatory standards, the Department determines that the soil and/or groundwater is contaminated, then the Niebauers shall fully characterize the vertical and horizontal extent of the site contamination in accordance with the administrative and procedural requirements of Act 2.
- (iv) The Niebauers shall, within thirty (30) days after receiving written notification from the Department regarding

contaminated soil and/or groundwater, submit to the Department a Work Plan outlining the proposed activity necessary to attain and demonstrate compliance with an environmental remediation standard set forth in Sections 302, 303, or 304 of Act 2, 35 P.S. §6026.302, 303, and 304; and Section 2 of the Department's Act 2 regulations, 25 Pa. Code §250.2. The Work Plan shall be prepared in accordance with the procedures set forth in Act 2, and shall include a schedule for implementation. In the event that the Department determines that any modification, amendment, or addition is necessary to the Work Plan, the Niebauers shall submit such revisions as are necessary to fully address all of the Department's comments within thirty (30) days after receipt of those comments. The deadline set forth in this type of correspondence from the Department is incorporated as part of this Order. The corrected Work Plan may be approved, rejected or approved with conditions by the Department. The final approved Work Plan and the time frames within that Work Plan shall be incorporated as part of this Order. The Work Plan may specify that the site characterization and any necessary remedial actions shall occur after all solid waste has been

removed from the Site or that site characterization and any necessary remedial actions shall occur as the solid waste is being removed from the Site. Similarly, the Work Plan may specify that if the sampling that is required under the 2004 Order reveals contamination, additional sampling necessary for a complete site characterization may either be collected as each 1000 cubic yard cell is excavated, or it may be completed after all of the solid waste has been removed from the Site. Any site characterization that is to be completed after all solid waste is removed from the Site shall begin within thirty (30) days after the date the Department concurs that all solid waste has been removed from the Site.

f. No soil areas found to be contaminated shall be backfilled until the Act 2 Final Report has been approved. All individual soil areas found to be contaminated may be combined within one Act 2 Final Report. The Final Report for soils shall be submitted within 6 (six) months after removing the last of the solid waste from the Site. If groundwater contamination is discovered, the Act 2 Final Report for groundwater shall be submitted after the required number of sampling rounds have been completed and attainment of an Act 2 standard can be demonstrated.

g. After receiving written authorization from the Department's

Northcentral Regional Office, any materials that are not disposed of as solid waste may be stockpiled on the Site and used to bring the site up to grade. The Niebauers shall ensure that when any backfilling occurs, it does so in such a way as not to violate the DSEA and the rules and regulations promulgated thereunder.

13. During the excavation of the Site, Niebauers shall take precautions and prevent the discharge of any liquids contained in containers or tanks.

14. At least forty-eight (48) hours before excavating at the Site, the Niebauers shall notify the Regional Environmental Program Manager, Waste Management Program, located in the Northcentral Regional Office as to when such waste removal shall occur. Notification may be by telephone at 570-327-3431 or in writing sent to the address in Paragraph [19] below, provided the written notice is received in the office at least 48 hours before excavation begins.

15. The Department reserves the right to have the Niebauers take any additional action in order to achieve compliance with the environmental remediation standards set forth in Act 2.

16. Within 30 months after the effective date of the 2004 Order, the Niebauers shall grade to original contours, dress, seed and mulch the affected areas of the wetlands and stream channel.

17. Effective immediately, the Niebauers shall allow Department employees and/or their agents to have access to the site for the purpose of observing excavation and

remediation activities, collecting samples and for the purpose of ensuring compliance with this Order.

18. Nothing in the 2004 Order is intended, nor shall it be construed, to relieve or limit the Niebauers' obligations to comply with any existing or subsequent Departmental statute, regulation, permit or order. In addition, nothing set forth in this Order is intended, nor shall be construed, to authorize any violation of any statute, regulation, order, or permit issued or administered by the Department.

19. Beginning the first month after this Order's effective date, and for each month thereafter, the Niebauers were required to submit copies of all disposal records or other documentation indicating proper processing or disposal of solid wastes. The documentation is due by the 10<sup>th</sup> day of the following month. All such documentation shall be sent to:

Regional Environmental Program Manager  
Waste Management Program  
Department of Environmental Protection  
Northcentral Regional Office  
208 West Third Street, Suite 101  
Williamsport, PA 17701-6448  
570-327-3431  
fax: 570-327-3420

**There has been no compliance with the 2004 Order**

20. An E&S Control Plan was approved by the Clearfield County Conservation District on March 1, 2004. Accordingly, the Niebauers were required to commence sorting through 1000 cubic yards of the Disposal Area each month pursuant to Paragraph 2.c. of the 2004 Order. The Niebauers initially complied with this requirement, from April 2004

through December 2004.

21. As of the date of the filing of this Petition to Enforce, Niebauer has not sorted through 1000 cubic yards of the Disposal Area per month, as required by Paragraph 2.c. of the 2004 Order, since January 2005.

22. As of the date of the filing of this Petition to Enforce, Niebauer has not removed solid waste found in the Disposal Area for proper processing or disposal, as required by Paragraph 2.c. of the 2004 Order, since July 12, 2005

23. As determined by an inspection conducted by the Department on September 15, 2005, solid waste remains disposed at the Site. The Niebauers have not, at any time, provided written notice to the Department indicating they believe they have complied with the requirement that all solid waste has been removed from the Site.

24. No receipts or records have been submitted to the Department indicating the manner in which the solid waste was processed or disposed, as required by Paragraph 10 of the 2004 Order since July 12, 2005 .

WHEREFORE, pursuant to Sections 104(10), 104(13) and 603 of the SWMA, 35 P.S. §§6018.104(10), 6018.104(13) and 6018.603, and Section 693.20 of the DSEA, 32 P.S. §693.20, and Section 691.601 of the CLS, 35 P.S. §691.601, the Department requests that this Honorable Court:

A. Enforce the Department's January 6, 2004 Order by directing that:

1. The Niebauers immediately resume sorting through at least 1000 cubic

yards of the Disposal Area each month and remove all solid waste found in each 1000 cubic yards for proper processing or disposal. The waste shall be taken to a permitted solid waste processing or disposal facility. The entire area of the Disposal Area must be sorted through within 9 months of the date of this Honorable Court's Order.

2. When Niebauers believe that they have removed all solid waste from the Site, Niebauers shall provide written notice to the Department indicating they believe they have complied with the requirement that all solid waste has been removed from the Site. The written notice shall be sent to the address set forth in Paragraph A.11, below. If the Department determines any further action is required, the Niebauers shall take such action to fully address the Department's concerns. Any such actions directed by the Department shall be incorporated as part of this Order.

3. Following the removal of solid waste from each 1000 cubic yard area, the Niebauers shall visually inspect the soils remaining within the excavation for indications of contamination. Indications of contamination may include, but are not to be limited to discoloration, unusual odors, and/or the presence of foreign material, either liquid or solid, that is not typical of native soils. If any indications of contamination are present, then Niebauers shall collect at least three soil samples from the remaining surface of the excavation from within the areas exhibiting suspected contamination. The Niebauers shall submit the samples for laboratory analysis for the parameters set forth in Appendix A, attached to the 2004 Order and incorporated herein by reference. If groundwater is



encountered within the excavation area, and if the groundwater exhibits indications of contamination, including but not limited to, discoloration, cloudiness or odors, Niebauers shall collect at least two water samples and shall submit the samples for laboratory analysis for the parameters set forth in Appendix B, attached to the 2004 Order and incorporated herein by reference ("Appendix B"). If any water exhibits a sheen on its surface, the Niebauers shall collect at least two water samples from the surface of the water, and at least an additional two samples from the water below the surface, and shall submit the samples for laboratory analysis for the parameters set forth in Appendix B.

4. The Department shall be notified when the Niebauers intend to collect samples. Notification can be in person or by telephone at the telephone number noted in Paragraph A.11, below.

- (a) The Niebauers shall submit the sample results to the Department within five (5) business days after receiving the sample results to the address noted in Paragraph A.11, below.
- (b) If, after comparing the sample results to the Department's statutory or regulatory standards, the Department determines that the soil and/or groundwater is contaminated, then the Niebauers shall fully characterize the vertical and horizontal extent of the site

contamination in accordance with the administrative and procedural requirements of Act 2.

- (c) The Niebauers shall, within thirty (30) days after receiving written notification from the Department regarding contaminated soil and/or groundwater, submit to the Department a Work Plan outlining the proposed activity necessary to attain and demonstrate compliance with an environmental remediation standard set forth in Sections 302, 303, or 304 of Act 2, 35 P.S. §6026.302, 303, and 304; and Section 2 of the Department's Act 2 regulations, 25 Pa. Code §250.2. The Work Plan shall be prepared in accordance with the procedures set forth in Act 2, and shall include a schedule for implementation. In the event that the Department determines that any modification, amendment, or addition is necessary to the Work Plan, the Niebauers shall submit such revisions as are necessary to fully address all of the Department's comments within thirty (30) days after receipt of those comments. The deadline set forth in this type of correspondence from the Department is incorporated as

part of this Order. The corrected Work Plan may be approved, rejected or approved with conditions by the Department. The final approved Work Plan and the time frames within that Work Plan shall be incorporated as part of this Order. The Work Plan may specify that the site characterization and any necessary remedial actions shall occur after all solid waste has been removed from the Site or that site characterization and any necessary remedial actions shall occur as the solid waste is being removed from the Site. Similarly, the Work Plan may specify that if the sampling that is required under this Order reveals contamination, additional sampling necessary for a complete site characterization may either be collected as each 1000 cubic yard cell is excavated, or it may be completed after all of the solid waste has been removed from the Site. Any site characterization that is to be completed after all solid waste is removed from the Site shall begin within thirty (30) days after the date the Department concurs that all solid waste has been removed from the Site.

5. No soil areas found to be contaminated shall be backfilled until the Act 2 Final Report has been approved. All individual soil areas found to be contaminated may be combined within one Act 2 Final Report. The Final Report for soils shall be submitted within 6 (six) months after removing the last of the solid waste from the Site. If groundwater contamination is discovered, the Act 2 Final Report for groundwater shall be submitted after the required number of sampling rounds have been completed and attainment of an Act 2 standard can be demonstrated.

6. After receiving written authorization from the Department's Northcentral Regional Office, any materials that are not disposed of as solid waste may be stockpiled on the Site and used to bring the site up to grade. The Niebauers shall ensure that when any backfilling occurs, it does so in such a way as not to violate the DSEA and the rules and regulations promulgated thereunder.

7. During the excavation of the Site, Niebauers shall take precautions and prevent the discharge of any liquids contained in containers or tanks.

8. At least forty-eight (48) hours before excavating at the Site, the Niebauers shall notify the Regional Environmental Program Manager, Waste Management Program, located in the Northcentral Regional Office as to when such waste removal shall occur. Notification may be by telephone at 570-327-3431 or in writing sent to the address in Paragraph A.11 below, provided the written notice is received in the office at least 48 hours before excavation begins.

9. Within 9 months after the effective date of this Order, the Niebauers shall grade to original contours, dress, seed and mulch the affected areas of the wetlands and stream channel.

10. Effective immediately, the Niebauers shall allow Department employees and/or their agents to have access to the site for the purpose of observing excavation and remediation activities, collecting samples and for the purpose of ensuring compliance with this Order.

11. The Niebauers shall submit copies of all disposal records or other documentation indicating proper processing or disposal of solid wastes. The documentation is due by the 10<sup>th</sup> day of the following month. All such documentation shall be sent to:

Regional Environmental Program Manager  
Waste Management Program  
Department of Environmental Protection  
Northcentral Regional Office  
208 West Third Street, Suite 101  
Williamsport, PA 17701-6448  
570-327-3431  
fax: 570-327-3420

b. Order that the Niebauers pay a fine of Two Hundred Fifty Dollars (\$250.00) per day for each day they fail to comply with this Court's Order, with costs to be calculated at the time of any finding of contempt by this Honorable Court

c. Grant the Department attorney's fees and costs; and

- d. Order such other relief that the Court deems just and proper.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION:



Nels J. Taber  
Regional Counsel  
Department of Environmental Protection  
Northcentral Region Office of Chief Counsel  
208 West Third Street - Suite 101  
Williamsport, PA 17701  
570-321-6568

Date: 10/12/05

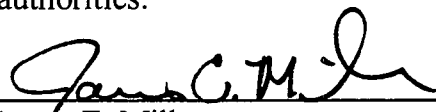
**IN THE  
COURT OF COMMON PLEAS OF THE  
46<sup>TH</sup> JUDICIAL DISTRICT - CLEARFIELD COUNTY**

COMMONWEALTH OF	:	
PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	Civil Action
	:	(Petition to Enforce)
Petitioner,	:	No.
	:	
v.	:	
	:	
JOHN NIEBAUER, JR. and	:	
DIANE NIEBAUER,	:	
	:	
Respondents.	:	

**VERIFICATION**

I, James E. Miller, hereby Program Manager for the Commonwealth of Pennsylvania, Department of Environmental Protection's ("Department") Waste Management Program in the Northcentral Region, hereby certify that I am authorized to make this verification on behalf of the Department and that the facts recited in the foregoing Petition to Enforce Order are true and correct to the best of my knowledge, information and belief.

I understand that this verification is made subject to the penalties of 18 Pa. C.S.A. §4904 relating to unsworn falsification to authorities.

  
\_\_\_\_\_  
James E. Miller  
Program Manager  
Waste Management Program  
Department of Environmental Protection  
Northcentral Field Operations

DATE: October 12, 2005

A



**COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

In the matter of:

John Niebauer, Jr. and Diane Niebauer	:	
611 Devonshire Drive	:	
State College, PA 16803-1216	:	Illegal Disposal of Solid Waste
	:	Clearfield County
	:	

**ORDER**

NOW, this 6<sup>th</sup> day of January, 2004, the Commonwealth of Pennsylvania, Department of Environmental Protection (hereinafter referred to as "Department"), has determined the following findings of fact and conclusions of law:

A. The Department is the administrative agency vested with the authority and responsibility to administer and/or enforce the requirements of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1 *et seq.* ("CSL"); the Dam Safety and Encroachment Act, 32 P.S. §693.1 *et seq.* ("DSEA"); the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380 *as amended*, 35 P.S. §6018.101 *et seq.* ("SWMA"); the Hazardous Sites Cleanup Act, the Act of October 18, 1988, P.L. 756, No. 1988-108, 35 P.S. §6020.101 *et seq.* ("HSCA"); the Land Recycling and Remediation Standards Act, Act of May 19, 1995, P.L. 4, No. 1995-2, 35 P.S. §§6026.101 *et seq.* ("Act 2"); Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §510-17 ("Administrative Code"); and the rules and regulations promulgated thereunder.

B. John P. Niebauer, Jr. is the CEO and Vice President and Diane A. Niebauer is the Secretary and Treasurer of Earthmovers Unlimited, Inc. John P. Niebauer, Jr. is the CEO

and Diane Niebauer is the Secretary and Treasurer of Earthmovers Equipment Company. Hereinafter John P. Niebauer, Jr. and Diane A. Niebauer together shall be referred to as "Niebauers".

C. Earthmovers Equipment Company is a Pennsylvania corporation with a mailing address of P.O. Box 187, Kylertown, PA 16830. The Pennsylvania Department of State ("Department of State") lists Earthmovers Equipment Company as having a broad purpose and as leasing on-the-road licensed vehicles. The Department of State lists Earthmovers Unlimited, Inc. as a Pennsylvania corporation with a mailing address of PO Box 187, Kylertown, PA 16830, and as having a broad purpose and also performing construction and demolition work.

D. The Niebauers own property located on Route 322 in Bigler Township and Boggs Township in Clearfield County, PA. There is a sign on the property near Route 322 that says "Loggers Equipment". The property is comprised of three separate tax parcels. The tax parcel numbers are 010-000-008.1, N09-000-049.1, and NO9-000-00055 ("Site"). All three parcels are owned by the Niebauers. There is one building hereinafter referred to as the Loggers Equipment Building or Main Building, and also a Quonset-type building on the Site.

E. On or about September 6, 2002, the Department conducted an inspection at the Site. At that time a disposal area covering approximately 112 by 40 yards located approximately 75-80 yards north of the Loggers Equipment Building was discovered by the

Department. The Department estimates the disposal area to be approximately fifteen feet deep ("Disposal Area"). Solid waste, consisting of, but not limited to, wood, shingles, carpeting, interior and exterior siding and pieces of hard metal, was on the Site on September 6, 2002. William Peterson, Loggers Equipment General Manager, was present during the September 6, 2002 inspection. Mr. Peterson indicated to the Department that the solid waste was buried using a truck loader, owned by John P. Niebauer, Jr., which was operated by the persons bringing in the waste.

F. The September 6, 2002 inspection report from the Department was signed by William Peterson. A carbon copy was left with Mr. Peterson and a copy was mailed to John P. Niebauer, Jr. on September 9, 2002. The report requested that there be no more dumping of waste at the Site; that all solid waste be excavated and transported to a permitted landfill; that disposal receipts be retained; and that the Department be notified when excavation of waste begins. The inspection report said the unpermitted dumping of waste onto the surface of the ground violated Section 610(1) of the SWMA, 35 P.S. §6018.610(1), and operating a solid waste disposal facility without a permit violated Section 610(2) of the SWMA, 35 P.S. §6018.610(2).

G. On September 19, 2002, the Department conducted another inspection at the Site. William Peterson, who was present at the Site during the September 6, 2002 inspection, was also present during this inspection. Among other things:

- (1) Solid waste was observed mixed with fill material. The solid waste included four different colors of roofing shingles, plywood, aluminum siding, garden hose, metal, painted wood, lumber, particle board with shingles, and four different types of carpet. Other items found at the Site on September 19, 2002, included a tire, plastic plumbing, a television set and petroleum or creosote coated wooden blocks.
- (2) Mr. Peterson indicated that he started his employment with Loggers Equipment in 1988. He noted that in 1988, the only fill area on the Site was located about 75 to 80 yards north of the Loggers Equipment Building and eastward from the eastern corner of the Loggers Equipment Building. Mr. Peterson indicated the disposal area has been filled in since 1988.

H. An inspection report dated September 19, 2002, from the Department, signed by William Peterson, and mailed to John P. Niebauer, Jr., advised Mr. Niebauer that the items found on the Site are considered to be solid waste, not clean fill, and should not be disposed on the Site. It was requested that all solid waste at the Site be excavated and taken to a processing or disposal facility with disposal receipts being provided to the Department.

- (1) The Department indicated that a shaker/screener could be used to separate the waste from the fill material, but the Department's Air

Quality Program should be contacted before using such a device to determine if a permit would be needed.

- (2) The report advised that it appeared as though a wetland area was being filled.
- (3) The Department noted Mr. Niebauer was in violation of Section 610(1) of the SWMA, 35 P.S. §6018.610(1), and Section 610(2) of the SWMA, 35 P.S. §6018.610(2), for the unpermitted disposal of solid waste without a permit.
- (4) The report advised Mr. Niebauer to contact the Department if there were questions.

I. On April 22, 2003, the Department conducted another inspection at the Site and observed that solid waste was still deposited and buried at the Site. Additional covering of the solid waste had occurred. The waste disposed of at the Site consisted of, but was not necessarily limited to, wood, shingles, carpeting, interior and exterior siding and pieces of metal.

J. The Department returned to the Site in the afternoon of April 22, 2003, to take liquid and soil samples.

- (1) The liquid samples were analyzed for phenols, general chemicals, metals, and semi-volatiles. A tentatively identified compounds (TIC) analysis was also performed for the semi-volatiles.

- (2) The TIC results for both samples were positive for organic acids, within the carbon-3 to carbon-8 range, which is indicative of leachate.
- (3) Other liquid sample results showed some acidity and elevated specific conductance.
- (4) The soil samples did not show results above the detection limits.

K. Copies of the April 22, 2003 inspection report and sample results were given to Mr. Niebauer.

L. With Mr. Niebauer's permission, on May 21, 2003, seven exploratory trenches were dug at the Site in the Disposal Area at locations chosen by the Department. The equipment and operator were provided by Mr. Niebauer. The trenches were numbered 1 through 7. Among other things:

- (1) All seven trenches contained construction/demolition waste, including, but not limited to wood, wire, shingles, PVC pipe, and creosote blocks.
- (2) Municipal waste was also observed in the various trenches and included, but was not limited to: grocery bags, children's toys, clothing, food containers, carpeting, Tupperware, scrap metal, burnt wood, wire, several couch cushions, a Christmas Carol music book also in Japanese, cosmetic containers, bedding and bedsprings. In Trench No. 6, there was a water bed.

- (3) In Trench No. 4 and Trench No. 7, two home heating fuel tanks were uncovered. The fuel tank pulled out from Trench No. 4 contained fuel, and most of the fuel discharged to the ground during excavation. Absorbent pads were placed to catch the spilled fuel. Absorbent pads were also placed to catch hydraulic oil leaking from the backhoe.

M. An inspection report dated May 21, 2003, advised, among other things, that the absorbent pads would need to be recovered, and that the fuel soaked absorbent pads and the soil that was contaminated when the fuel tank was excavated would need to be removed to a permitted disposal facility. John P. Niebauer, Jr. was informed to mail copies of disposal receipts to the Department. Violations of Sections 610(1) and 610(2) of the SWMA, 35 P.S. §§6108.610(1) and 610(2), for the disposal of solid waste without a permit were found to have occurred.

N. On May 30, 2003, the Department again inspected the Site. At that time it was observed that placement of solid waste and fill had impacted wetlands and a section of the stream channel of an unnamed tributary to Moravian Run. The impacted wetlands totaled approximately 500 square feet, and approximately 300 feet of the stream channel had been impacted.

O. As of May 30, 2003, the home heating fuel tank in Trench No. 4 was still present with an estimated gallon of liquid still in the tank. The pads and boom used to absorb the spilled fuel on May 21, 2003, were still in place.

- (1) An inspection report dated May 30, 2003, which was mailed to Mr. Niebauer, advised that the pads and boom used to absorb the spilled fuel needed to be recovered and taken to an approved landfill.
- (2) In the same May 30, 2003 inspection report, Mr. Niebauer was advised that the contents of the fuel tank in Trench No. 4 needed to be drained and handled properly.

P. The tanks and pads and boom were removed from the Site after May 30, 2003, and before October 1, 2003. No receipts showing proper disposal of the tanks, pads and boom have been provided to the Department.

Q. With Mr. Niebauer's permission, on October 1, 2003, and October 2, 2003, a geophysical investigation was performed at the Site using metal detectors, ground penetrating radar and other equipment. A purpose of the investigation was to locate underground storage tanks and any other buried objects.

- (1) Based on the field geophysical surveys and an office evaluation of the data, six areas were thought to be the most susceptible for underground storage tanks, drums or other large underground objects.
- (2) Twenty-two locations with either extremely high or extremely low conductivity values were identified.
- (3) "X's" were marked across the Site to identify the twenty-two locations of concern.



R. Copies of the results of the October 1-2, 2003 geophysical investigation and an inspection report were sent to Mr. Niebauer.

S. Section 103 of the SMWA defines "disposal" as follows:

The incineration, deposition, injection, dumping, spilling, leaking, or placing of solid waste into or on the land or water in a manner that the solid waste or a constituent of the solid waste enters the environment, is emitted into the air or is discharged to the waters of the Commonwealth.

35 P.S. §6018.103.

T. The conditions described in Paragraphs E, G, I, L, N, and O, above, constitute disposal as that term is defined in Section 103 of the SWMA, 35 P.S. §6018.103.

U. Pursuant to Section 3 of the DSEA, an "encroachment" includes "...any dike, bridge, culvert, wall, wing wall, fill, pier, wharf, embankment, abutment or other structure located in, along, across or projecting into any watercourse, floodway or body of water." 32 P.S. §693.3.

V. The activities described in Paragraph N, above, constitute an encroachment as that term is defined in Section 3 of the DSEA, 32 P.S. §693.3.

W. The Site constitutes a waste disposal facility as those terms are defined in Section 103 of the SWMA, 35 P.S. §6018.103.

X. The Niebauers do not, nor did they ever, have a permit or approval from the Department to dispose, or allow the disposal of, solid waste at the Site.

Y. Section 201(a) of the SWMA, 35 P.S. §6018.201(a), states that:

No person or municipality shall store, collect, transport, process or dispose of municipal waste within this Commonwealth unless such storage, collection, transportation, processing or disposal is authorized by the rules and regulations of the [D]epartment and no person or municipality shall own or operate a municipal waste processing or disposal facility unless such person or municipality has first obtained a permit for such facility from the [D]epartment.

Z. Section 301 of the SWMA, 35 P.S. §6018.301, states, in part that:

No person or municipality shall store. . . or dispose of residual waste within this Commonwealth unless such storage. . . is consistent with or such. . . disposal is authorized by the rules and regulations of the [D]epartment and no person or municipality shall own or operate a residual waste processing or disposal facility unless such person or municipality has first obtained a permit for such facility from the [D]epartment.

AA. Section 302 of the SWMA, 35 P.S. §6018.302, states, in part that:

It shall be unlawful for any person or municipality to dispose. . . store, or permit the disposal. . . or storage of any residual waste in a manner which is contrary to the rules and regulations of the [D]epartment. . . . [and that] . . . [i]t shall be unlawful for any person or municipality who stores. . . or disposes of residual waste to fail to. . . [d]esign, construct, operate, and maintain facilities and areas in a manner which shall not adversely effect or endanger public health, safety and welfare or the environment or cause a public nuisance.

BB. Section 501 of the SWMA, 35 P.S. §6018.501, states, in part that:

It shall be unlawful for any person or municipality to use, or continue to use, their land or the land of any other person or municipality as a solid waste processing, storage, treatment or disposal area without first obtaining a permit from the [D]epartment as required by this act. . . .

CC. Section 601 of the SWMA, 35 P.S. §6018.601, states:

Any violation of any provision of this act, any rule or regulation of the [D]epartment, any order of the [D]epartment, or any term or condition of any permit, shall constitute a public nuisance. Any person or municipality committing such a violation shall be liable for the costs of abatement of any pollution and any public nuisance caused by such violation. . . .

DD. Section 610(1) of the SWMA, 35 P.S. §6018.610(1), states, in part that:

It shall be unlawful for any person or municipality to: 1) Dump or deposit, or permit the dumping or depositing, of any solid waste onto the surface of the ground. . . unless a permit for the dumping of such solid wastes has been obtained from the [D]epartment. . . .

EE. Section 610(2) of the SWMA, 35 P.S. §6018.610(2), states, in part that:

It shall be unlawful for any person or municipality to: 2) Construct, alter, operate or utilize a solid waste storage, treatment, processing, disposal facility without a permit from the [D]epartment. . . .

FF. Section 610(4) of the SWMA, 35 P.S. §6018.610(4), states, in part that:

It shall be unlawful for any person or municipality to: 4) Store, collect, transport, process, treat, beneficially use or dispose of, or assist in the storage, collection, transportation, processing, treatment, beneficially use or disposal of, solid waste contrary to the rules or regulations. . . of the [D]epartment, . . . or in any manner as to create a public nuisance or to adversely affect the public health, safety and welfare.

GG. Section 610(9) of the SWMA, 35 P.S. §6018.610(9), states in part that:

It shall be unlawful for any person or municipality to: 9) Cause or assist in the violation of any provision of this act, any rule or regulation of the department, any order of the department or any term or condition of any permit.

HH. Section 316 of the CSL, 35 P.S. §691.316, provides in part that:

Whenever the [D]epartment finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the [D]epartment may order the landowner or occupier to correct the condition in a manner satisfactory to the [D]epartment. . . .

II. Section 401 of the CSL, 35 P.S. §691.401, provides that:

It shall be unlawful for any person or municipality to put or place into any of the waters of the Commonwealth, or allow or permit to be discharged from property owned or occupied by such person or municipality into any of the waters of the Commonwealth, any substance of any kind or character resulting in pollution as herein defined. Any such discharge is hereby declared to be a nuisance.

JJ. Section 402 of the CSL, 35 P.S. §691.402, provides in part that:

Whenever the [D]epartment finds that any activity, not otherwise requiring a permit under this act. . . creates a danger of pollution of the waters of the Commonwealth. . . the [D]epartment may issue an order to a person or municipality regulating a particular activity.

KK. Section 611 of the CSL, 35 P.S. §691.611, states in part that:

It shall be unlawful to fail to comply with any rule or regulation of the [D]epartment or . . . to violate any of the provisions of this act or. . . to cause air or water pollution. . . .

LL. Sections 1 and 3 of the Administrative Code, 71 P.S. §§510-17(1), (3), state

in part that:

The Department . . . shall have the power and its duty shall be . . . [t]o protect the people of this Commonwealth from unsanitary conditions and other nuisances, including any condition which is declared to be a nuisance by any law administered by the

[D]epartment. . . (and) . . . to order such nuisances including those detrimental to the public health to be abated and removed.

MM. Section 6 of the DSEA, 32 P.S. §693.6, states in part, that:

No person shall construct, operate, maintain, modify, enlarge or abandon any dam, water obstruction or encroachment without the prior written permit of the [D]epartment. . . .

NN. Section 18 of the DSEA, 32 P.S. §693.18 states in part:

It shall be unlawful for any person to violate or assist in the violation of any of the provisions of this act or of any rules and regulations adopted hereunder. . . [or to] [c]onstruct, enlarge, repair, alter, remove, maintain, operate or abandon any dam, water obstruction or encroachment contrary to . . . the rules and regulations of the [D]epartment.

OO. The conditions described in Paragraphs E, G, I, L, N, and O, above, constitute violations of Sections 201, 301, 302, 501, 610(1), 610(2), 610(4), and 610(9) of the SWMA, 35 P.S. §§6018.201, 6018.301, 6018.302, 6018.501, 6018.610(1), 6018.610(2), 6018.610(4), and 6018.610(9); and Section 401 of the CSL, 35 P.S. §691.401.

PP. The conditions described in Paragraph N, above, constitute a violation of Sections 6 of the DSEA, 32 P.S. §693.6.

QQ. The violations described in Paragraph OO, above, constitute unlawful conduct under Section 610 of the SWMA, 35 P.S. §6018.610, and Section 611 of the CSL, 35 P.S. §691.611; and a statutory nuisance under Section 601 of the SWMA, 35 P.S. §6018.601 and Section 601 of the CSL, 35 P.S. §691.601.

RR. The violations described in Paragraph PP above, constitute unlawful conduct under Section 18 of the DSEA, 32 P.S. §693.18.

NOW, THEREFORE, pursuant to Section 1917-A of the Administrative Code, 71 P.S. §510-17; Sections 5, 316, 402 and 610 of the CSL, 35 P.S. §§691.5, 691.316, 691.402 and 691.610; Sections 104 and 602 of the SWMA, 35 P.S. §6018.104 and 6018.602; and Sections 14 and 20 of the DSEA, 32 P.S. §§693.14 and 693.20, it is ORDERED as follows:

1. Effective immediately, the Niebauers shall cease bringing or allowing anyone to bring solid waste to the Site. Effective immediately, the Niebauers shall cease disposing and burying or allowing anyone to dispose or bury any solid waste at the Site

2. Within two years from the effective date of this Order, the Niebauers shall excavate and remove all solid waste buried or covered at the Site in the following manner:

- a. The Niebauers shall remove all solid waste from the Site for proper disposal or processing at a facility permitted or approved to accept such waste.
- b. On or before January 28, 2004, the Niebauers shall submit to the Clearfield County Conservation District, an Erosion and Sedimentation (E&S) Control Plan for the site that meets the requirements of Chapter 102 of the Department's Rules and

Regulations, 25 Pa. Code Chapter 102. The E&S Control Plan shall be sent to the following address:

Clearfield County Conservation District  
650 Leonard Street  
Clearfield, PA 16830  
814-765-2629  
Attn: Mr. Fred Berry

(E&S Control Plan requirements can be found at the Clearfield County Conservation District web site, [www.clfdccd.com](http://www.clfdccd.com) or by calling 814-765-2629).

- (i) If the Clearfield County Conservation District determines that any modification, amendment, or addition is necessary to the E&S Control Plan, the Niebauers shall submit such revisions as are necessary to fully address all of the Clearfield County Conservation District's comments within fourteen (14) days after receipt of those comments. The deadline set forth in this type of correspondence from the Clearfield County Conservation District is incorporated as part of this Order.

- (ii) The final approved E&S Control Plan and the timeframes within the E&S Control Plan shall be incorporated as part of this Order.
- (iii) If the Clearfield County Conservation District determines that an NPDES permit is needed for the site then the Niebauers shall submit a complete NPDES permit application to the Clearfield County Conservation District within thirty (30) days after notification from the Clearfield County Conservation District. In the event that the Clearfield County Conservation District determines that any modification, amendment, or addition is necessary to the NPDES permit application, the Niebauers shall submit such revisions as are necessary to fully address all of the Clearfield County Conservation District's comments within fourteen (14) days after receipt of those comments. The deadline(s) set forth in this type of correspondence from the



Clearfield County Conservation District is  
incorporated part of this Order.

- c. Beginning the first full month after the E&S Control Plan has been approved by the Clearfield County Conservation District, (and after receiving an NPDES permit, if necessary), and then continuing each month thereafter, the Niebauers shall sort through 1000 cubic yards of the Disposal Area. The Niebauers shall remove all solid waste found in each 1000 cubic yards of the Disposal Area for proper processing or disposal.
- d. When Niebauers believe that they have removed all solid waste from the Site, Niebauers shall provide written notice to the Department indicating they believe they have complied with the requirement that all solid waste has been removed from the Site. The written notice shall be sent to the address set forth in Paragraph 10, below. If the Department determines any further action is required, the Niebauers shall take such action to fully address the Department's concerns. Any such actions directed by the Department shall be incorporated as part of this Order.
- e. Following the removal of solid waste from each 1000 cubic yard area, the Niebauers shall visually inspect the soils remaining

within the excavation for indications of contamination. Indications of contamination may include, but are not to be limited to discoloration, unusual odors, and/or the presence of foreign material, either liquid or solid, that is not typical of native soils. If any indications of contamination are present, then Niebauers shall collect at least three soil samples from the remaining surface of the excavation from within the areas exhibiting suspected contamination. The Niebauers shall submit the samples for laboratory analysis for the parameters set forth in Appendix A, attached to this Order and incorporated herein. If groundwater is encountered within the excavation area, and if the groundwater exhibits indications of contamination, including but not limited to, discoloration, cloudiness or odors, Niebauers shall collect at least two water samples and shall submit the samples for laboratory analysis for the parameters set forth in Appendix B, attached to this Order and incorporated herein. If any water exhibits a sheen on its surface, the Niebauers shall collect at least two water samples from the surface of the water, and at least an additional two samples from

the water below the surface, and shall submit the samples for laboratory analysis for the parameters set forth in Appendix B.

- (i) The Department shall be notified when the Niebauers intend to collect samples. Notification can be in person or by telephone at the telephone number noted in Paragraph 10, below.
- (ii) The Niebauers shall submit the sample results to the Department within five (5) business days after receiving the sample results to the address noted in Paragraph 10, below.
- (iii) If, after comparing the sample results to the Department's statutory or regulatory standards, the Department determines that the soil and/or groundwater is contaminated, then the Niebauers shall fully characterize the vertical and horizontal extent of the site contamination in accordance with the administrative and procedural requirements of Act 2.
- (iv) The Niebauers shall, within thirty (30) days after receiving written notification from the

Department regarding contaminated soil and/or groundwater, submit to the Department a Work Plan outlining the proposed activity necessary to attain and demonstrate compliance with an environmental remediation standard set forth in Sections 302, 303, or 304 of Act 2, 35 P.S. §6026.302, 303, and 304; and Section 2 of the Department's Act 2 regulations, 25 Pa. Code §250.2. The Work Plan shall be prepared in accordance with the procedures set forth in Act 2, and shall include a schedule for implementation. In the event that the Department determines that any modification, amendment, or addition is necessary to the Work Plan, the Niebauers shall submit such revisions as are necessary to fully address all of the Department's comments within thirty (30) days after receipt of those comments. The deadline set forth in this type of correspondence from the Department is incorporated as part of this Order. The corrected

Work Plan may be approved, rejected or approved with conditions by the Department. The final approved Work Plan and the time frames within that Work Plan shall be incorporated as part of this Order. The Work Plan may specify that the site characterization and any necessary remedial actions shall occur after all solid waste has been removed from the Site or that site characterization and any necessary remedial actions shall occur as the solid waste is being removed from the Site. Similarly, the Work Plan may specify that if the sampling that is required under this Order reveals contamination, additional sampling necessary for a complete site characterization may either be collected as each 1000 cubic yard cell is excavated, or it may be completed after all of the solid waste has been removed from the Site. Any site characterization that is to be completed after all solid waste is removed from the Site shall begin within thirty (30) days after the date the

Department concurs that all solid waste has been removed from the Site.

- f. No soil areas found to be contaminated shall be backfilled until the Act 2 Final Report has been approved. All individual soil areas found to be contaminated may be combined within one Act 2 Final Report. The Final Report for soils shall be submitted within 6 (six) months after removing the last of the solid waste from the Site. If groundwater contamination is discovered, the Act 2 Final Report for groundwater shall be submitted after the required number of sampling rounds have been completed and attainment of an Act 2 standard can be demonstrated.
- g. After receiving written authorization from the Department's Northcentral Regional Office, any materials that are not disposed of as solid waste may be stockpiled on the Site and used to bring the site up to grade. The Niebauers shall ensure that when any backfilling occurs, it does so in such a way as not to violate the DSEA and the rules and regulations promulgated thereunder.

3. During the excavation of the Site, Niebauers shall take precautions and prevent the discharge of any liquids contained in containers or tanks.

4. At least forty-eight (48) hours before excavating at the Site, the Niebauers shall notify the Regional Environmental Program Manager, Waste Management Program, located in the Northcentral Regional Office as to when such waste removal shall occur. Notification may be by telephone at 570-327-3431 or in writing sent to the address in Paragraph 10 below, provided the written notice is received in the office at least 48 hours before excavation begins.

5. The Department reserves the right to have the Niebauers take any additional action in order to achieve compliance with the environmental remediation standards set forth in Act 2.

6. Within 30 months after the effective date of this Order, the Niebauers shall grade to original contours, dress, seed and mulch the affected areas of the wetlands and stream channel.

7. Within five days after the effective date of this Order, the Niebauers shall provide receipts or other appropriate documentation to the Department showing that the pads and boom used to absorb the spilled fuel on May 21, 2003, were properly disposed. All such documentation shall be sent to the address set forth in Paragraph 10, below.

8. Effective immediately, the Niebauers shall allow Department employees and/or their agents to have access to the site for the purpose of observing excavation and

remediation activities, collecting samples and for the purpose of ensuring compliance with this Order.

9. Nothing in this Order is intended, nor shall it be construed, to relieve or limit the Niebauers' obligations to comply with any existing or subsequent Departmental statute, regulation, permit or order. In addition, nothing set forth in this Order is intended, nor shall be construed, to authorize any violation of any statute, regulation, order, or permit issued or administered by the Department.

10. Beginning the first month after this Order's effective date, and for each month thereafter, the Niebauers shall submit copies of all disposal records or other documentation indicating proper processing or disposal of solid wastes. The documentation is due by the 10<sup>th</sup> day of the following month. All such documentation shall be sent to:

Regional Environmental Program Manager  
Waste Management Program  
Department of Environmental Protection  
Northcentral Regional Office  
208 West Third Street, Suite 101  
Williamsport, PA 17701-6448  
570-327-3431  
fax: 570-327-3420



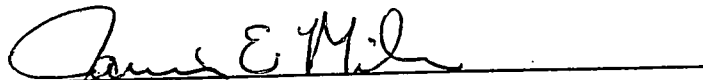
## NOTICE OF APPEAL

Any person aggrieved by this action may appeal, pursuant to Section 4 of the Environmental Hearing Board Act, 35 P.S. Section 7514, and the Administrative Agency Law, 2 Pa. C.S. Chapter 5A, to the Environmental Hearing Board, Second Floor, Market Street State Office Building, 400 Market Street, PO Box 8457, Harrisburg, PA 17105-8457, (717) 787-3483. TDD users may contact the Board through the Pennsylvania Relay Service, (800) 654-5984. 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 Board's rules of practice of procedure may be obtained from the Board. The appeal form and the Board's rules of practice and procedure are also available in Braille or on audiotape from the Secretary to the Board at (717) 787-3483. This paragraph does not, in and of itself, create any right of appeal beyond that permitted by applicable statutes and decisional law.

IF YOU WANT TO CHALLENGE THIS ACTION, YOUR APPEAL MUST REACH THE BOARD WITHIN 30 DAYS. YOU DO NOT NEED A LAWYER TO FILE AN APPEAL WITH THE BOARD.

IMPORTANT LEGAL RIGHTS ARE AT STAKE, HOWEVER, SO YOU SHOULD SHOW THIS DOCUMENT TO A LAWYER AT ONCE. IF YOU CANNOT AFFORD A LAWYER, YOU MAY QUALIFY FOR FREE PRO BONO REPRESENTATION. CALL THE SECRETARY TO THE BOARD (717) 787-3783 FOR MORE INFORMATION.

FOR THE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION:



James E. Miller  
Acting Program Manager  
Waste Management Program  
Northcentral Regional Office

# APPENDIX A

## Soil Analysis NIEBAUER SITE

Parameter	Digestion/Extraction Procedures	**Determinative Procedures
-----------	---------------------------------	----------------------------

### TOTAL METALS, mg/kg

Arsenic	3051	6010, 7060, 7061
Barium	3051	6010, 7080, 7081
Cadmium	3051	6010, 7130, 7131
Chromium	3051	6010, 7190, 7191
Lead	3051	6010, 7420, 7421
Mercury	3051	245.1, 245.2, 7470
Selenium	3051	6010, 7740, 7741
Silver	3051	7760, 7761
Aluminum	3051	6010, 7020
Antimony	3051	6010, 7040, 7041
Beryllium	3051	6010, 7090, 7091
Boron	3051	200.7, 200.8, 200.9
Cobalt	3051	6010, 7200, 7201
Copper	3051	6010, 7210, 7211
Iron	3051	6010, 7380, 7381
Manganese	3051	6010, 7460, 7461
Nickel	3051	6010, 7520
Thallium	3051	6010, 7840, 7841
Tin	3051	200
Vanadium	3051	6010, 7910, 7911
Zinc	3051	6010, 7950, 7951

Parameter	Digestion/Extraction Procedures	**Determinative Procedures
-----------	---------------------------------	----------------------------

LEACH INORGANIC INDICATORS, mg/L

Ammonia-Nitrogen	ASTM D3987-85	350, 4500
Chloride	ASTM D3987-85	9056, 9250, 9251
Total & Amenable Cyanide	ASTM D3987-85	9010, 9012
Fluoride	ASTM D3987-85	340, 9056
Nitrate	ASTM D3987-85	352, 9056
Nitrite	ASTM D3987-85	354, 4500, 9056
pH	ASTM D3987-85	9040, 9045
Sulfate	ASTM D3987-85	9035, 9036, 9038, 9056
Sulfides	ASTM D3987-85	427, 9030, 9031

TOTAL INORGANIC INDICATORS, mg/kg

Organic Halogen (TOX)		9020, 9022, 9023
Petroleum Hydrocarbons (TPH)	3560, API/Gas/Diesel/ PHC, NY DOH 310-13	8440, API/Gas/Diesel/ PHC, NY DOH 310-13
Solids (%)		209, 2540
Volatile Solids (%)		209, 2540

TOTAL VOLATILE ORGANICS, mg/kg	5035	8260
--------------------------------	------	------

TOTAL SEMIVOLATILE ORGANICS, mg/kg	3540/3541	8270
------------------------------------	-----------	------

**\*\*Note:** This is a collection of acceptable EPA test methods, and not a complete listing. The most recently promulgated test method updates shall be used. Other acceptable EPA test methods may be used with prior approval of the Department.

## APPENDIX B

### Ground Water Analysis NIEBAUER SITE

Parameter	**Determinative Procedures
-----------	-------------------------------

#### TOTAL & DISSOLVED METALS, mg/L

Arsenic	6010, 7060, 7061
Barium	6010, 7080, 7081
Cadmium	6010, 7130, 7131
Chromium	6010, 7190, 7191
Lead	6010, 7420, 7421
Mercury	245.1, 245.2, 7470
Selenium	6010, 7740, 7741
Silver	7760, 7761
Aluminum	6010, 7020
Antimony	6010, 7040, 7041
Beryllium	6010, 7090, 7091
Boron	200.7, 200.8, 200.9
Cobalt	6010, 7200, 7201
Copper	6010, 7210, 7211
Iron	6010, 7380, 7381
Manganese	6010, 7460, 7461
Nickel	6010, 7520
Thallium	6010, 7840, 7841
Tin	200
Vanadium	6010, 7910, 7911
Zinc	6010, 7950, 7951

Parameter	**Determinative Procedures
-----------	----------------------------

INORGANIC INDICATORS, mg/L

Ammonia-Nitrogen	350, 4500
Chloride	9056, 9250, 9251
Total & Amenable Cyanide	9010, 9012
Fluoride	340, 9056
Nitrate	352, 9056
Nitrite	354, 4500, 9056
pH	9040, 9045
Dissolved Solids (TDS)	SM 2540
Solids, Suspended (TSS)	SM 2540
Sulfate	9035, 9036, 9038, 9056
Sulfides	427, 9030, 9031
Organic Halogen (TOX)	9020, 9022, 9023
Petroleum Hydrocarbons (TPH)	8440, API/Gas/Diesel/ PHC, NY DOH 310-13

TOTAL VOLATILE ORGANICS, mg/L	8260
-------------------------------	------

TOTAL SEMIVOLATILE ORGANICS, mg/L	8270
-----------------------------------	------

**\*\*Note:** This is a collection of acceptable EPA test methods, and not a complete listing. The most recently promulgated test method updates shall be used. Other acceptable EPA test methods may be used with prior approval of the Department.

7  
B

*jud*



(412) 565-3511  
TELECOPIER (412) 565-5298  
WWW.EHB.VERILAW.COM

COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD  
1507 PITTSBURGH STATE OFFICE BUILDING  
300 LIBERTY AVENUE  
PITTSBURGH, PA 15222-1210

WILLIAM T. PHILLIPY IV  
SECRETARY TO THE BOARD

JOHN P. NIEBAUER, JR. and  
DIANE A. NIEBAUER

v.

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

:  
:  
:  
: EHB Docket No. 2004-038-R  
:  
:

:  
:  
:  
:  
: Issued: August 27, 2004

**OPINION AND ORDER ON  
APPELLANTS' MOTION TO STAY  
FURTHER PROCEEDINGS**

By Thomas W. Renwand, Administrative Law Judge

**Synopsis:**

The Board grants a stay of an Appeal from an Order alleging illegal disposal of solid waste on Appellants' property pending the resolution of a criminal complaint against one of the Appellants.

The Board earlier refused to stay the Department's Order holding that the motion was in reality a request for a supersedeas. The Board finds that the Department will not be prejudiced by the stay of proceedings as the Order remains in effect.

**Discussion**

Presently before the Pennsylvania Environmental Hearing Board (Board) is the Appellants', John P. Niebauer, Jr. and Diane A. Niebauer (Appellants, or Mr. and Mrs. Niebauer, or the Niebauers), Motion to Stay further proceedings pending the resolution of the pending parallel

SEP - 2 2004

criminal prosecution of Mr. Niebauer. The Pennsylvania Department of Environmental Protection (Department) vigorously opposes the Motion to Stay.

The Department issued an Order to Appellants on January 6, 2004 which is the subject of this Appeal before the Board. The Order alleges, *inter alia*, that Appellants are responsible for the illegal disposal of solid waste on their property. The Order also requires Appellants to take certain actions including sorting through and separating fill from solid waste allegedly buried on the site and properly disposing of the solid waste.

On March 12, 2004, the Pennsylvania Attorney General filed a criminal complaint against Mr. Neibauer alleging criminal violations of the Solid Waste Management Act. Appellants claim that this proceeding should be stayed so as not to “undermine Mr. Niebauer’s privilege against self-incrimination, expose the basis of Mr. Niebauer’s defense to the prosecution in advance of criminal trial, and otherwise prejudice the case.” Motion to Stay, paragraph 11. Appellants also contend that both the Attorney General’s criminal complaint and the Department’s Order under Appeal are both based on the Department’s inspection of Appellants’ property on September 6, 2002.

The Department did not take any enforcement action against the Appellants until sixteen months later when it issued its Order of January 6, 2004. Therefore, if the Department waited sixteen months before acting, Appellants argue it must not be an environmental problem of any urgency. Finally, when each of the factors the Board considers in deciding whether to issue a stay are analyzed, Appellants insist a stay clearly should be issued. There factors are: the Appellants’ interests and potential prejudice, the burden of a stay on the Department or other parties, the burden on the Board, and the public interest.” *Sechan Limestone Industries, Inc. v. DEP*, EHB Docket No.



2003-222-R (Opinion and Order issued April 6, 2004) page 3.

The Department points out that a stay of proceedings is an extraordinary measure that should only be granted for compelling reasons. *Ziviello v. DEP*, 1998 EHB 1138. The Department contends that administrative and criminal matters can proceed at the same time. *Sysak v. DER*, 1989 EHB 126, 131. It further argues that there are no compelling reasons to grant a stay. Moreover, the outcome of the case pending before the Pennsylvania Environmental Hearing Board is not dependent on the outcome of the criminal case filed in Clearfield County. The Department correctly points out that Mr. Niebauer may assert his privilege against self-incrimination at the proper time in this case. The Department is also correct in its argument that both the Solid Waste Management Act and the Clean Streams law provide for both criminal and civil remedies.

The Department contends that a stay would conflict with its duty and mission to protect the public pursuant to the Solid Waste Management Act and its implementing regulations. "Curtailling a civil action pending the resolution of the criminal action runs contrary to the statutory mandate bestowed upon the Department." Department's Memorandum of Law, page 12.

Although we certainly acknowledge the merit in the Department's arguments as general statements of the law the specific facts of this case cause us to pause. Indeed, the Department is vague as to how the public and the environment will be harmed if we grant a stay of the Appellants' Appeal.

The Department's Order challenged in this Appeal remains in full force and effect. According to the Department and the Appellants, the Order requires Appellants to take certain actions. We earlier denied the Appellants' Motion to Stay these requirements.

This is thus not a situation where a stay of these proceedings would impact the Department's ability to defend the legality of its Order.

It is important from a due process standpoint that an appeal of the government's action should not place the appellant in a worse position than if no appeal were taken. The parties enjoy much more wide-open discovery in proceedings before the Board than in a state criminal matter.

If no appeal had been taken of the Department's Order, the Department would be in the same position. Our stay of these proceedings does not in any way prevent the Department from protecting the environment. As for the Department's contentions that a delay would impact "the public's interest in knowing that the time frames and requirements set forth in the January 6, 2004 Order will be upheld and are enforceable" the Department fails to point out how this delay will hurt the public. Moreover, it certainly can be argued that the public's greater interest is that justice be done. If justice is done "then the Crown wins."

In this same spirit of fairness we think it best, since there is no harm to the public or environment, to allow Mr. Niebauer and his counsel to focus their resources and energies on defending the criminal complaint filed by the Pennsylvania Attorney General rather than to also have to battle at the same time the formidable forces of the Department of Environmental Protection. This is not a situation such as *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368 [D.C. Circ 1980] where the Securities and Exchange Commission was seeking out documents to conduct a civil investigation while a criminal action was also pending. We, therefore, enter the following order:

COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

JOHN P. NIEBAUER, JR. and  
DIANE A. NIEBAUER

v.

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

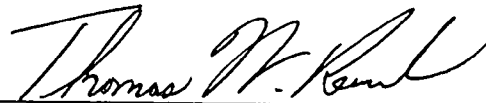
:  
:  
:  
:  
:  
:  
:

EHB Docket No. 2004-038-R

**ORDER**

AND NOW, this 27<sup>th</sup> day of August, 2004, Appellants' Motion to Stay Further Proceedings is *granted*. We are only staying the Appeal before the Board and not the provisions of the Department's January 6, 2004 Order which *remain in force*. This Appeal is *stayed* pending the resolution of the criminal proceedings against Mr. Niebauer or until further Order of this Board. Counsel for Appellant shall file *status reports* setting forth the status of the criminal proceeding (concentrating on the stage of the action) on or before **September 7, 2004, December 8, 2004, and February 8, 2005.**

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND  
Administrative Law Judge  
Member

**DATED: August 27, 2004**

**EHB Docket No. 2004-038-R**

**c: DEP Bureau of Litigation:**  
Attention: Brenda Morris, Library

**For the Commonwealth, DEP:**  
Nels J. Taber, Esq.  
Amy Ershler, Esq.  
Northcentral Regional Counsel

**For Appellant:**  
William J. Cluck, Esq.  
587 Showers Street  
Harrisburg, PA 17104-1663

med

William A. Shaw  
Prothonotary/Clerk of Courts

DEC 15 2005

FILED

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY,  
PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : CIVIL ACTION  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION :

VS.

NO. 05-1643-CD

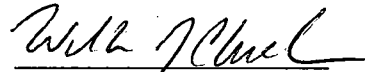
JOHN P. NIEBAUER, JR. and  
DIANE NIEBAUER

**Certificate of Service**


I, the undersigned, hereby certify that a true and correct copy of the Orders dated  
December 5, 2005 and December 6, 2005 were served on December 10, 2005 by

U.S. Mail, first class postage prepaid upon the following:

Nels Taber, Esquire  
Commonwealth of Pennsylvania  
Department of Environmental Protection  
Office of Chief Counsel  
Northcentral Regional Office  
208 West Third Street, Suite 101  
Williamsport, PA 17701

  
William J. Cluck, Esquire  
Attorney for Respondents

Date: December 12, 2005

**FILED** *mcc*  
*11/14/05*  
DEC 15 2005 

William A. Shaw  
Prothonotary/Clerk of Courts

IN THE  
COURT OF COMMON PLEAS OF  
CLEARFIELD COUNTY

FILED 2 cc  
m/12:4239 Amy  
DEC 29 2005

William A. Shaw  
Prothonotary/Clerk of Courts

COMMONWEALTH OF  
PENNSYLVANIA

DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

v.

JOHN P. NIEBAUER, JR. AND  
DIANE A. NIEBAUER

No. 05-1643-CD

**CERTIFICATE OF SERVICE**

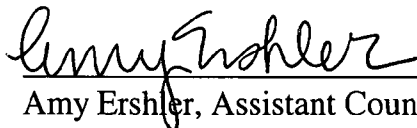
I hereby certify that copies of the foregoing Response to Preliminary Objections and proposed order filed by the Department of Environmental Protection were served upon the person and in the manner indicated below:

Service via first class mail:

William J. Cluck, Esquire  
Law Office of William J. Cluck  
587 Showers Street  
Harrisburg, PA 17104-1663

Respectfully submitted,

FOR THE COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL PROTECTION:



Amy Ershler, Assistant Counsel  
Northcentral Region Office of Chief Counsel  
208 West Third Street, Suite 101  
Williamsport, PA 17701-6448  
Telephone: (570) 321-6568

DATE: December 27, 2005

As the Court has directed that an answer to these preliminary objections be filed, the Department responds to the Preliminary Objections as follows:

1. It is admitted that on or about October 24, 2005, the Department filed a Petition to Enforce, an Order issued by the Department. The Order was dated January 6, 2004 ("2004 Order").

2. It is admitted that this Court issued an order dated October 25, 2005, which speaks for itself. The fact that the Petition is alternately characterized as a complaint and a petition is not relevant. The procedure that the Court directed the parties to follow is the procedure set forth in Pa. R.C.P. 206.7, entitled Procedure After Issuance of Rule to Show Cause. Pa. R.C.P. 206.7 is specific to the chapter governing petitions. (*See* Pa. R.C.P. 206.1).

3. It is admitted that the Petition contains twenty-four separately numbered paragraphs. It is denied that the document is a complaint. The Petition also contains a "wherefore" clause which sets forth the relief sought by the Department. The document filed by the Department speaks for itself. Any of the characterizations set forth in Paragraph 3 of the Preliminary Objections that varies from the Department's Petition is denied.

4. Admitted. By way of further answer, the appeal to the Environmental Hearing Board ("Board" or "EHB") has been docketed to EHB Docket No. 2004-038-R.

5. It is admitted that the EHB issued an Opinion and Order dated August 27, 2004, which is attached to the Department's Petition to Enforce as Exhibit B. The August 27, 2004 Order specifically directs that the provisions of the 2004 Order remain in full force.



6. This answer is admitted to the extent that there is a pending criminal action in this Court. The Department is without information or belief as to the docket number of the pending criminal action.

7. While it is admitted that the same property in Clearfield County is involved in both pending criminal case and the 2004 Order, that fact is of little to no relevance with the relief that is being requested by the Department.

**I. Preliminary Objection - Failure to Conform to Local Rule**

The Department submits that it has complied with Clearfield County's Local Rules and with the Pennsylvania Rules of Civil Procedure in the filing of this Petition.

Nonetheless, the Department responds to this set of preliminary objections as follows:

8. Denied that Local Rule 205.2(a)(6) requires the proposed order accompany all petitions, motions or other requests for relief. Admitted that Local Rule 205.2(a)(5) states as follows: "A proposed order shall accompany all petitions, motions or other requests for relief."

9. Denied in that the Department is without information or belief as to whether a proposed order was included with the packet of documents served by the Centre County Sheriff at Respondent's home. By way of further answer, attached hereto and incorporated herein is Exhibit A, a copy of a letter dated October 20, 2005, from counsel for the Department to the office of the Prothonotary. This letter includes a scheduling order that is requested to be served with the Petition to Enforce. A copy of an Order dated October 25,

2005, signed by the Honorable Fredric J. Ammerman, is marked as Exhibit B, attached hereto and incorporated herein. The October 25, 2005 Order is identical to the order that was forwarded to the Court by the Department, and was entered by this Court before October 31, 2005, when Respondents indicate that they were served.

10. Denied in that the Department is without information or belief as to the truth of this averment. Strict proof is demanded thereof.

11. Admitted that Local Rule 205.2(b) requires that initial pleadings have a cover sheet. To the extent that the allegations contained herein deviate from the actual language of the rule, they are denied.

12. While it is admitted that the petition did not include a cover sheet, by way of further answer, by letter dated December 12, 2005, a cover sheet was filed with the office of the prothonotary. The December 12, 2005 letter is marked as Exhibit C, attached hereto and incorporated herein. A copy of the cover sheet itself is marked as Exhibit D, attached hereto and incorporated herein.

13. Specifically denied that the Department failed to conform to Local Rules 206.1(a)(3). By way of further answer, Pa. R.C.P. 126, **Liberal Construction and Application of Rules**, states as follows:

The rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not effect the substantial rights of the parties.

According to Section 206.1:3 of Goodrich Amram 2d, the provision of Pa.R.C.P. 206.1 that states that each paragraph should contain "as far as practicable only one material allegation" is not mandatory but directory. It is recognized that often, as a practical matter, literal compliance with this portion of the rule cannot be achieved. The inclusion of more than one allegation in one or more paragraphs should not make a petition *per se* defective.

1 *Goodrich Amram* 2<sup>nd</sup> §206.1:3. Local Rule 206.1(c) is identical to Pa.R.C.P. 206.1(b).

14. The answer to No. 13, above, is incorporated herein. If, assuming for purposes of discussion only that this allegation is accurate, the Department admits that the substantial rights of the Respondents have not been impacted by any possible procedural error or defect. By way of further answer, by elaborating on the nature of the allegations in the petition, the Respondents are in a better position to understand what is being pleaded against them and to respond to the Petition.

15. Denied that the Department failed to affix an order to the petition. As set forth in No. 8, above, a proposed order accompanied the petition. A copy of the proposed order is found on the second page of Exhibit A, attached hereto. Further affixed to the Department's Petition was a notice advising Respondents of their legal rights. While the language in the Notice was not identical to the language set forth in Paragraph 206.4(c), in fact, the Petition filed by the Department included a Notice. Both the notice issued by the Department and the notice included in Local Rule 206.4 indicate that if the Respondents wish

to defend, they must enter a written appearance and must file an answer setting forth defenses or objections, noting that the failure to do so could result in Respondents' losing rights.

The substance of the rules has been met, as evidenced by the fact that Respondents filed Preliminary Objections.

16. Specifically denied. The Answer to No. 15, above, is incorporated herein.

17. Denied. An order was issued. The Answer to No. 15, above, is incorporated herein. The substance of the Rules of Civil Procedure, both for Clearfield County and the Commonwealth have been met.

18. Denied that the Order did not include a notice required by Local Rule 206.4(c). The Answer to No. 15, above, is incorporated herein.

19. The language of Local Rule 206.4(c)(5) speaks for itself. To the extent that the characterization set forth in this objection differs from the language of the Rule, the characterization is denied. By way of further answer, on December 12, 2005, a copy of the certificate of service was mailed to the prothonotary's office. A copy of the cover letter has already been identified as Exhibit C, and is attached hereto. A copy of the certificate of service is marked as Exhibit E, attached hereto, and incorporated herein. Any alleged defect in response to Local Rule 206.4(c)(5) has been cured. Respondents are not prejudiced thereby.

20. Specifically denied. The certificate of service has been filed with the prothonotary. The answer to No. 19, above, is incorporated herein.

21. This answer is specifically denied. Strict proof is demanded thereof.

WHEREFORE, the Department prays that the Petition to Enforce Order not be dismissed. The Department has complied with the local rules of Clearfield County.

## **II. Preliminary Objection, Pendency of Prior Action**

In response to this preliminary objection, and as set forth in more detail below, the Department submits that the doctrine of *lis pendens* has absolutely no relevance to this proceeding. As noted by the Respondents, among other things, the prior action and this action must result in the same relief. Among other things, these two proceedings do not involve either the same cause of action nor is the same relief contemplated.

In support of its position, the Department answers this preliminary objection as follows:

22. As noted above, as this is a Petition, the respondents should have replied to the Petition through an answer, as set forth in Pa. R.C.P. 206.2. It is denied that Pa. R.C.P. 1028(a)(6) is applicable in this case.

23. Admitted there is a criminal action pending against Respondent John Niebauer. The Department is uncertain as to when the trial is presently scheduled.

24. While the Department concurs that the doctrine of *lis pendens* "permits a court to dismiss a suit when a pending case involves (1) the same parties, (2) the same cause of action, and (3) the same relief," *Klein v. the City of Philadelphia*, 465 A.2d 730, 731 (Pa.

Commw. Ct.1983), the doctrine is not applicable in this case. This case should not be dismissed.

25. Admitted that the doctrine of *lis pendens* is to "protect a defendant from harassment by having to defend several suits in the same cause of action at the same time" (*Citations Omitted*). ... "*Lis pendens* has no application where the relief requested in a separate action is different." ... *Penox Technologies, Inc. v. Foster Medical Corporation*, 546 A.2d 114, 115 (Pa. Super. Ct. 1988). The doctrine is not applicable in this matter.

The instant action is to enforce the 2004 Order. It is a civil action. The relief the Department is requesting is simply that this Court enforce the 2004 Order. The criminal action was filed by the Attorney General's office, and it is to determine whether Mr. Niebauer is guilty of illegally placing waste on his property. The relief requested in that action is to convict Mr. Niebauer. While both of the captions are titled "Commonwealth", the Attorney General and the Department are two different agencies. They have separate purposes and missions. The relief requested in each case is wholly separate and distinct.

26. While it is true that the litigation has been stayed by the Board, the Order dated August 27, 2004 (*See Exhibit B attached to the Petition to Enforce*), specifically states that **enforcement is not** stayed. The fact that an appeal has been filed to the Board is irrelevant. With an appeal pending, this Petition to Enforce case can proceed. Until there is a final adjudication from the Environmental Hearing Board, the 2004 Order is enforceable. *DER v. Norwesco Development Corporation*, 531 A.2d 94, 96 (Pa. Commw. Ct. 1987).

The 2004 Order was issued under the authority of Section 602 of the Solid Waste Management Act, 35 P.S. §6018.602. Once the 2004 order is issued, "it shall be the duty of any person ... to proceed diligently to comply with any order issued" by the Department. 35 P.S. §6018.603. Further, 35 P.S. §6018.603 provides in relevant part that:

If such person or municipality fails to proceed diligently, or fails to comply with the order within such time, if any, as may be specified; such person or municipality shall be guilty of contempt, and shall be punished by the Court in an appropriate manner and for this, application may be made by the Department to the Court. *Id.*

In addition, the 2004 Order was issued pursuant to the authority of the Dam Safety and Encroachments Act. This act states that:

"an Order issued under this section shall take effect upon notice, unless the order specifies otherwise." 32 P.A. 693.2(b). "Any person ... failing to comply with any order of the Department from which no appeal has been taken or ... which has been appealed but where no supersedeas has been granted for the period in which the order has been violated shall be deemed to be in conduct of such order." 32 P.S. §693.20.

No supersedeas has been issued in this case.

*Id.* Failure to comply with the 2004 order issued by the Department is unlawful.

27. Denied that the criminal case and the Petition to Enforce raise similar issues, and will result in a waste of judicial resources. Further, there will not be a duplication of effort. The only relief the Department requests in this case is that the Court enforce the 2004 Order. The guilt or innocence of Mr. Niebauer has nothing to do with this proceeding. If

Mr. Niebauer is acquitted for example, the 2004 Order still must be followed as noted by Judge Renwand, and can still be enforced by this Court.

WHEREFORE, the Department respectfully requests this honorable court to dismiss the preliminary objections. By way of further answer, the Department requests that this action not be stayed.

Respectfully submitted,

FOR THE COMMONWEALTH OF  
PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION



---

Amy Ershler, Assistant Counsel  
Supreme Court I.D. No. 37353  
Nels J. Taber, Regional Counsel  
Supreme Court I.D. No. 44486  
Northcentral Region Office of Chief Counsel  
208 West Third Street, Suite 101  
Williamsport, PA 17701-6448  
(570) 321-6568

DATE: December 27, 2005





Pennsylvania Department of Environmental Protection

Office of Chief Counsel  
208 West Third Street  
Suite 101  
Williamsport, PA 17701-6448  
October 20, 2005

Northcentral Regional Counsel

(570) 321-6568  
FAX: (570) 327-3565

Office of the Prothonotary  
Attention: Mr. William A. Shaw  
Clearfield County Courthouse  
230 East Market Street  
Clearfield, PA 16830


**Re: DEP v. John Niebauer, Jr. and Diane Niebauer, Complaint to  
Compel Compliance with Order of Department**

Dear Prothonotary:

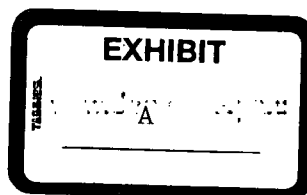
Bonnie Hudson from your office called earlier today to inform me that I had failed to include the proposed Rule to Show Cause with the Complaint to Compel Compliance with an Order of the Department sent for filing on October 18, 2005. I apologize for the oversight. Enclosed for filing is the proposed Rule to Show Cause. Please include the Rule to Show Cause with the Complaint and proceed to file the case and disburse for service as requested in my letter of October 18, 2005.

If there are any concerns I can be reached at the address and telephone number listed at the top of this correspondence. Thank you for your attention to this matter.

Sincerely,

  
Nels J. Taber  
Regional Counsel

Encl.



IN THE  
COURT OF COMMON PLEAS OF THE  
46<sup>TH</sup> JUDICIAL DISTRICT - CLEARFIELD COUNTY

COMMONWEALTH OF  
PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

Petitioner,

v.

JOHN NIEBAUER, JR. and  
DIANE NIEBAUER,

Respondents.

:  
:  
:  
: Civil Action  
: (Petition to Enforce)  
: No.  
:  
:  
:  
:  
:  
:

**ORDER**

AND NOW, this \_\_\_\_ day of \_\_\_\_\_, 2005, upon consideration of the foregoing

Complaint, it is hereby ordered that:

1. a RULE is issued upon the Respondents to show cause why the Petitioner is not entitled to the relief requested;
2. the Respondents shall file an answer to the Complaint within \_\_\_\_\_ days of this date;
3. the Complaint shall be decided under Pa. R.C.P. No. 206.7;
4. argument shall be held on \_\_\_\_\_, at \_\_\_\_\_ in Courtroom Number \_\_\_\_ of the Clearfield County Courthouse; and
5. notice of the entry of this Order shall be provided to all parties by the Petitioner.

By the Court,

\_\_\_\_\_  
, J.

IN THE  
COURT OF COMMON PLEAS OF THE  
46<sup>TH</sup> JUDICIAL DISTRICT - CLEARFIELD COUNTY

COMMONWEALTH OF  
PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

Petitioner,

v.

JOHN NIEBAUER, JR. and  
DIANE NIEBAUER,

Respondents.

Civil Action  
(Petition to Enforce)

No. 05-1643-CD

**ORDER**

AND NOW, this 25 day of October, 2005, upon consideration of the foregoing  
Complaint, it is hereby ordered that:

1. a RULE is issued upon the Respondents to show cause why the Petitioner is not entitled to the relief requested;
2. the Respondents shall file an answer to the Complaint within 30 days of this date;
3. the Complaint shall be decided under Pa. R.C.P. No. 206.7;
4. argument shall be held on December 30, 2005, at 9:00am in Courtroom Number 1 of the Clearfield County Courthouse; and
5. notice of the entry of this Order shall be provided to all parties by the Petitioner.

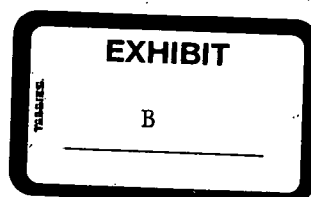
By the Court,

/s/ Fredric J. Ammerman

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

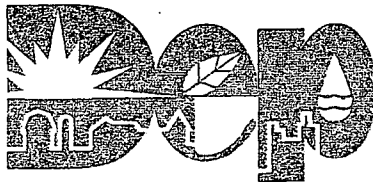
OCT 28 2005

OCT 25 2005



Attest.

*Wesley A. H.*  
Prothonotary/  
Clerk of Courts



Pennsylvania Department of Environmental Protection

Office of Chief Counsel  
208 West Third Street  
Suite 101  
Williamsport, PA 17701-6448  
December 12, 2005

Northcentral Regional Counsel

(570) 321-6568  
FAX: (570) 327-3565

Office of the Prothonotary  
Attention: Mr. William A. Shaw  
Clearfield County Courthouse  
230 East Market Street  
Clearfield, PA 16830

**Re: DEP v. John Niebauer, Jr. and Diane Niebauer, Petition to Enforce Order**

Dear Mr. Shaw:

Please find enclosed for filing a Certificate of Service, pursuant to Local Rule 206.4(c)(5). It is my understanding that the Clearfield County Sheriff's Office will soon be filing the Sheriff's Return of Service in this matter. I am also enclosing a Cover Sheet, pursuant to 205.2(b), to correct my failure to do so when the Petition to Enforce was originally filed.

If there are any concerns I can be reached at the address and telephone number listed at above. Thank you for your attention to this matter.

Sincerely,

Nels J. Taber  
Regional Counsel

Encl.

cc: William J. Cluck, Esquire

EXHIBIT

C



**COURT OF COMMON PLEAS OF CLEARFIELD COUNTY  
PENNSYLVANIA**

**CIVIL ACTION - (LAW) (EQUITY)**

Commonwealth of Pennsylvania  
Department of Environmental Protection  
Petitioner

No. 05-1643-CD

Type of Case: Civil Action - Law

Type of Pleading: Petition to Enforce Order

vs.

John Niebauer, Jr.  
Diane Niebauer  
Respondent

Filed on Behalf of:

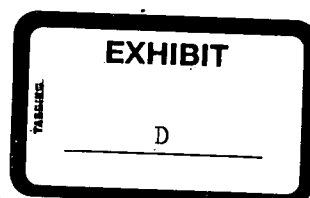
Commonwealth of Pennsylvania  
Department of Environmental Protection  
Petitioner

Counsel of Record for this Party:

Nels J. Taber  
Supreme Court No. 44486  
Amy Ershler  
Supreme Court No. 37353

Pennsylvania Department of  
Environmental Protection  
Office of Chief Counsel  
208 West Third Street, Suite 101  
Williamsport, PA 17701  
(570) 321-6568

Dated: December 12, 2005



IN THE  
COURT OF COMMON PLEAS OF THE  
46<sup>TH</sup> JUDICIAL DISTRICT - CLEARFIELD COUNTY

COMMONWEALTH OF  
PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

Petitioner,

v.

JOHN NIEBAUER, JR. and  
DIANE NIEBAUER,

Respondents.

:  
:  
:  
: Civil Action  
: (Petition to Enforce)  
: No. 05-1643-CD  
:  
:  
:  
:  
:  
:

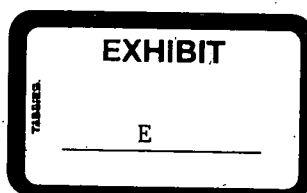
**CERTIFICATE OF SERVICE**

Pursuant to Clearfield County Local Rule 206.4(c)(5), I hereby certify to the best of my knowledge and belief that two copies of the Petition to Enforce Order and the Court's Order of October 25, 2005 were personally served upon Diane Niebauer at the address indicated below on the date specified, as relayed to me by Marilyn Hamm of the Clearfield County Sheriff's Office on December 9, 2005:

Personal Service by the Centre County Sheriff's Office, as deputized by the Clearfield County Sheriff, upon:

Diane Niebauer  
611 Devonshire Drive  
State College, PA 16803-1216.

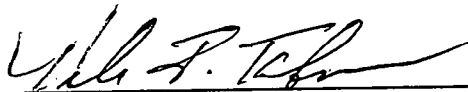
Petition to Enforce Order personally served October 31, 2005  
Court's Order of October 25, 2005 personally served November 7, 2005



Sheriff's Return of Service to be completed by the Clearfield County Sheriff's Office.

Respectfully submitted,

FOR THE COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL PROTECTION



---

Nels J. Taber, Regional Counsel  
Supreme Court No. 44486  
Northcentral Region Office of Chief Counsel  
208 West Third Street, Suite 101  
Williamsport, PA 17701-6448

DATE: December 12, 2005

cc: William J. Cluck, Esquire  
Law Office of William J. Cluck  
587 Showers Street  
Harrisburg, PA 17104-1663

**In The  
COURT OF COMMON PLEAS OF  
CLEARFIELD COUNTY**

COMMONWEALTH OF  
PENNSYLVANIA  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

v.

JOHN P. NIEBAUER, JR. AND  
DIANE A. NIEBAUER

No. 05-1643-CD

**VERIFICATION**

I, verify that the answers set forth in the foregoing Response to Preliminary  
Objections are true and correct to the best of my knowledge, information and belief. I  
certify that I am authorized to make this verification on behalf of the Department.

I understand that this verification is made subject to the penalties of 18 Pa.C.S.A.  
§4904 relating to unsworn falsification to authorities.



James E. Miller, Program Manager  
Waste Management Program  
Department of Environmental Protection  
Northcentral Field Operations

DATE: 12/22/05