

COMMONWEALTH OF PENNSYLVANIA

HARRY R. GUARDASONI and : BEFORE THE BOARD OF CLAIMS
ELIZABETH E. GUARDASONI :
 :
VS. :
 :
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
RESOURCES : DOCKET NO. 1905

FINDINGS OF FACT

1. Claimants, Harry and Elizabeth Guardasoni, reside in an area of Western Pennsylvania known as Sewickley Township, Westmoreland County, Pennsylvania. (Complaint, paras. 1-3)

2. The Defendant, Commonwealth of Pennsylvania, Department of Environmental Resources, a Commonwealth agency, has its main office in Harrisburg, Pennsylvania, with several regional offices throughout the Commonwealth, and is now known as the Pennsylvania Department of Environmental Protection. (Board Finding)

3. The Claimants allege that an underground spring, which served their agricultural and domestic needs of their farm property, was permanently damaged by the Department's activities by work performed in conjunction with a project of the Department known as the Shaner Project. (Tr. 560-565)

4. Defendant, Commonwealth of Pennsylvania, Department of Environmental Resources (DEP) is a public agency charged by law with, inter alia, the power and duty to extinguish fires in abandoned coal mines and in clum banks, in those instances where such work is in the interest of the public welfare. (Complaint & Answer, para. 4)

5. The United States of America Office of Surface Mining approved funding for DEP to conduct operations relating to the control of a mine fire and removal of coal, "Shaner Mine Fire Project", Project No. OSM 65(0217) 101.1, located in part in Sewickley Township, Westmoreland County, Commonwealth of Pennsylvania in the immediate vicinity of and upon certain land owned by Claimants. (Complaint, para. 5; Tr. 639-640, 270-271)

6. At all times relevant hereto, Claimants, Harry R. Guardasoni and Elizabeth E. Guardasoni, resided at R.D. #1, Box 330, Guffey Hill Road, Sewickley Township, Westmoreland County, Commonwealth of Pennsylvania. (Complaint, para. 3)

7. At all times relevant hereto, the Claimants, Harry R. Guardasoni and Elizabeth E. Guardasoni, as joint tenants, owned property located at R.D. #1, Box 12, Guffey Hill Road, Sewickley Township, Westmoreland County, Pennsylvania. (Complaint, paras. 1-2)

8. In the 1970's, local residents, including the Guardasonis, became concerned about smoke which was rising from certain areas above the abandoned mine workings. The Commonwealth of Pennsylvania was notified of these concerns and in the late 1970's - early 1980's began evaluating the risks associated with the mine fire. (Tr. 634-635)

9. DEP put a team together whose initial planning efforts evaluated the likelihood that the excavation for their project would result in loss of private water supplies in the area, including the water supply at issue. (Tr. 260-261, 366-369)

10. Late in the 1980's, DEP sent personnel (Mr. Steve Jones) out to the area of the proposed Shaner Project to collect data on the private water supplies in the area. (Tr. 636-638)

11. In 1990, DEP representative, David Wary, visited the Guardasonis and informed them that should a mine fire project take place, they would likely lose their water supply. (Tr. 637-638)

12. DEP's David Wary admitted to visiting with the Guardasonis during this time period and discussing the possibility of loss of private water supplies. (Tr. 364-365)

13. The Guardasonis, as well as the other land owners effected by the proposed project, were deeply concerned. The Guardasonis owned two farms in the project area. The one in which Elizabeth and Harry reside, and the Guardasoni family farm occupied by the Rimels (the Claimants' daughter and her family). (Tr. 638-641)

14. Deep mining was extensive in the area, leaving miles and miles of rooms and tunnels directly beneath the Claimants' property and the surrounding properties. (Pltf. Ex. 732-733)

15. In fact, according to mine maps, approximately eighty percent (80%) of the area beneath the aquifer which fed the Claimants' spring was mined out prior to the Shaner Project. (Tr. 935)

16. Moreover, "second mining", or pillar mining, also occurred in the area of Claimants' property. Large open voids, therefore, existed beneath the various areas pertinent to this litigation. (Pltf. Ex. 23 and 713)

17. Over the course of the years, rain water has permeated through the ground and has filled the various underground tunnels and voids. This water is referred to as the "mine pool". It is estimated to contain hundreds of thousands of gallons of water which discharges into various waterways in the area. (Tr. 279 - 281)

18. The mine pool water is not suitable for drinking, is brownish-yellow in color and has stained the area around the discharge points and the beds of the waterways to which it feeds. (Tr. 279)

19. DEP determined early on that based on the location of the polluted mine pool, providing a public water supply was the appropriate and feasible path to take should a water supply be damaged. (Tr. 263-264; Oberman Memo, April 6, 1988; Pltf. Ex. 30)

20. Specifically, the DEP's geologist, Robert Oberman, found that because "the mine pool is polluted water and since the trench might drain the perched aquifer presently being used by residences, it will probably be necessary to establish a water supply below the area polluted by the mine pool. Since the condition of the water below the mine pool is unknown, the cost of or possibility of providing an adequate water supply if necessary cannot be evaluated. Instead, it is necessary to establish before the fact that establishment of a water supply is feasible". Hence, Mr. Oberman determined that "city water" was the feasible permanent water supply available. (Tr. 263-264; Pltf. Ex. 30)

21. As early as September of 1990, the DEP Planning Group contacted the Westmoreland County Municipal Authority, the only provider of a public water supply in the area, and obtained estimates for bringing "city water" to the Shaner Mine Fire Project area. It was estimated to cost approximately Two Hundred Thousand Dollars (\$200,000.00) to bring water to the area. (Tr. 260-261, 337-380)

22. In fact, in 1990, DEP's David Wary began steps to develop a provisional mechanism for the Shaner Project which would immediately provide the necessary monies so that city water could be brought to effected residences in the Project area should a loss occur because of the Project. (Tr. 377-382)

23. However, when DEP's David Wary was transferred out of the Planning Group, the provisional mechanism for providing city water was not followed through by the other members of DEP's Planning Group. (Tr. 377-388)

24. Critically, in 1990, DEP engineers determined that the Guardasonis' water supply, which is the subject of the instant litigation (and which fed water to the property occupied by the Rimels), was **specifically** at risk of loss. (Tr. 377-380; Oberman Memo and Draft Submission; Pltf. Ex. 30 and 33)

25. DEP then began approaching the local property owners, including the Guardasonis, requesting that they execute a Consent for Right of Entry Agreement to allow DEP to use their lands to effectuate the OSM/DEP Project. (Tr. 639-642)

26. The property owners were told if they refused to consent they would eventually be forced to allow DEP to enter their land to perform reclamation activities. Yet, they understood that in consideration for their consent, additional protections would be afforded them in that DEP would agree to take care of any damage caused by the Project. (Tr. 639-642)

27. In this regard, on October 22, 1992, the Guardasonis negotiated an Agreement with the DEP which provided that the Guardasonis would allow the DEP to utilize their land for the Project activities, but that should these activities cause damage to any of the Guardasonis' water supplies, DEP had to replace the supply with one at least as good as the supply damaged. (Tr. 642; Pltf. Ex. 126)

28. The contract specifically provides the following: The Department of Environmental Resources Bureau of Abandoned Mine Reclamation will monitor the potable water supply before during and upon completion of the project. If the water supply is lost or impaired as a result of this project and not as a result of seasonal drought the department will immediately furnish a temporary potable water supply. Moreover, **if the owners water supply is permanently lost or impaired as a result of this project, the Department of Environmental Resources will provide a permanent substitute water supply by drilling a well, by doing whatever necessary to access a public water supply, or by any other reasonable means available which will replace the lost or damaged water supply.** The Department of Environmental Resources will not be responsible for the continued maintenance of the new installation or the costs of water consumption once the lost or damaged water supply is replaced. If the present water supply is permanently lost or impaired the Department of Environmental Resources will furnish a water supply which is as good as or better than the present one. (Tr. 642; Pltf. Ex. 126)

29. In this regard, a bid packet was put together for the Shaner Project and submitted to perspective bidders including the successful bidder, Casselman Enterprises. (Pltf. Ex. 142, DEP Bid Document)

30. The bid documents did not include the background information on the vulnerability of the private water supplies in the area, nor did the bid documents include detailed information on the extent of the underground mine workings in and around the proposed project area. (Pltf. Ex. 142, DEP Bid Document)

31. The loss of private water supplies was not only foreseeable to DEP, it was also foreseeable to those submitting bids on the Shaner Mine Fire Reclamation Project. (Tr. 202-204)

32. Michael Svonavec, a principal of Casselman Enterprises, the successful bidder, was so concerned about the possible loss of private water supplies resulting from the Project that, before submitting his bid, he contacted the DEP and specifically asked who would be responsible if private water supplies were damaged. (Tr. 202-204)

33. Casselman Enterprises' Michael Svonavec was told by the DEP not to worry if private water supplies were lost or damaged as a result of the Project, because the DEP would take care of it. (Tr. 202-204)

34. The Shaner Project Bid Specifications Document did not specify the method of excavation which was to be used on the Shaner Project. (Stipulation of Counsel; Tr. 64)

35. Project activities (not construction) began in early 1993. As part of the Project, Casselman received a bid from Vibra-Tech, a seismic monitoring company, to perform "Pre-blast Surveys" (which included documenting the existing conditions of structures and water supplies) and also to perform independent blast monitoring activities which was proposed to have included setting up at least two seismographs, having independent personnel on site operating the seismographs and providing analyses of the data independently obtained. (Tr. 230-236; Pltf. Ex. 167)

36. Unconcerned about liability for the likely loss of private water supplies on the Project, Casselman chose to use blasting throughout much of the life of the Project which was significantly cheaper and allowed a large amount of under burden to be removed from the Project area relatively quickly. (Tr. 811-812)

37. Casselman decided to hire Vibra-tech **only** for the Pre-blast surveys opting to do the monitoring of its own blasting activities. (Tr. 230-236; Pltf. Ex. 167)

38. At the time of deciding to conduct its own monitoring activities, Casselman was aware of the fact that it would not be held accountable or liable for water supply damage that occurred as a result of the Project because DEP had already indicated that DEP would "take care of it". (Tr. 202-204)

39. Casselman had its own men monitor their own blasting using one seismograph until the Guardasonis claim of damage to the spring was made. (Tr. 202-204)

40. On September 18, 1993, less than two weeks after excavation began, blasting the trench area commenced. (Tr. 520-522; DEP Daily Report Ex. No. 230; Blasting Record of 9/18/93, Ex. No. 230)

41. Less than one week later, by September 24, 1993, the Contractor hit water in the trench area which had to be pumped from the trench into a nearby stream. (Tr. 520-522; DEP Daily Report, Pltf. Ex. 244)

42. The water hit in the trench area was tested and found to be inconsistent with mine pool water in that it had a high level of pH and did not need to be treated before being discharged into the nearby waterway. Specifically, on September 24, 1993, the mine pool water was tested and

found to have a pH of 6.5. However, the water hit in the trench was tested that day as well and was found to have a pH of 8.5 and an iron content of less than 1.0. (Tr. 520-522; DEP Daily Report, Pltf. Ex. 244)

43. Various tests were performed relative to the pH content of the water that was hit after blasting began. Said tests revealed a consistently high pH. (DEP Daily Reports, Pltf. Exs. 244, 252, 253, 254, 261, 268, 272, 287)

44. Exactly one month after blasting on October 18, 1993, for the first time in the history of the Guardasoni family's ownership of the farm, the spring went dry. (Tr. 642-643)

45. At that time, Harry and Elizabeth's daughter, Maureen, and her family were living in the farm residence and had livestock on the farm which were watered from the spring. (Tr. 67-68, 569-570, 645)

46. DEP and its Contractor were immediately notified of the water loss. (Tr. 570-571)

47. DEP Project Supervisor, John George, in turn contacted Dennis Steele in DEP's Ebersburg Office, and informed him of the Guardasonis' water loss. Mr. Steele informed Mr. George that it was the "contractors problem" because "they had insurance" to cover it. (Tr. 523-525)

48. DEP and its Contractor came to the area of the Claimants' spring and were shown the spring's failure to produce. (Tr. 525-526, 571-572; DEP Daily Report, Pltf. Ex. 288)

49. Claimant, Harry Guardasoni, then contacted DEP in Harrisburg and initially talked to Richard Beliecki, the Director of Bureau of Abandoned Mine Reclamation. (Tr. 575-576)

50. Harry Guardasoni was told by DEP's Richard Beliecki that it was the "contractors responsibility". (Tr. 575-576, 640-644)

51. DEP's Richard Beliecki agreed to contact Harry Guardasoni again, but never did; nor did Richard Beliecki return Harry Guardasoni's numerous telephone calls. Eventually, Harry Guardasoni was able to reach Mr. Beliecki and threatened to bring his daughter Maureen and her family to Mr. Beliecki's house to live if DEP did not provide a source of water for Maureen and her family. (Tr. 575-576)

52. Thereafter, on October 21, 1993, the Contractor provided a water buffalo at the Rimel residence. (Tr. 576-577, 645)

53. On December 9, 1993, the DEP instructed the Contractor to remove the water buffalo, indicating that an expert had performed a thorough study of the Guardasonis' claim and had

determined that any damage to the spring could not have been caused by the Project activities. (Letter from DEP to Casselman, Pltf. Ex. 350)

54. On Christmas Eve, 1993, the Contractor came to the Rimel's home and notified them that DEP had instructed the Contractor to remove their temporary water supply. (Tr. 645-646)

55. From September 18, 1993, through April 20, 1994, at least twenty-eight (28) separate blasts were detonated during the course of the Shaner Project. (Blasting Records; Pltf. Exs. 231, 237, 245, 255, 313, 324, 354, 360, 365, 374, 382, 390, 408, 417, 426, 433, 443, 452, 460, 466, 473 and 479; Group Ex. 726)

56. DEP determined that it would no longer provide water to the Rimels due to a "study and report" of DEP's experts which allegedly indicated that it was not scientifically possible for the spring to have been damaged by the Shaner Project. (Tr. 646-650)

57. In early 1994, the Guardasonis consulted with Licensed Hydrogeologist Peter Hutchinson who visited the site, reviewed the records and found that the Project caused damage to the spring by draining the perched aquifer which fed the spring. (Tr. 655-656)

58. The Guardasonis also hired a Licensed Professional Geologist, Peter Briggs, and traveled to Ebensburg to review DEP records, studies and reports. When the Claimants and Mr. Briggs arrived in Ebensburg, they were very disappointed to learn that there were not any "studies" or "reports". (Tr. 646-650)

59. Instead, DEP's (George Katrancha) repeatedly referred to one map which was not of the proper location and indicated that his "evaluation" consisted of calculating the distance between the spring house and the location of the blasting. (Tr. 648-650)

60. Geologist Peter Briggs, reached the opposite conclusion after visiting the site and reviewing the documents. In fact, Mr. Briggs found that the Rimel spring's diminution **was** caused by the Project's activities, the Project having drained the perched aquifer which fed the Rimel spring. (Tr. 650-651)

61. The Guardasonis authorized a cooperative effort with the DEP, instructing Geologist, Peter Briggs, to share all information he had gathered relative to the Project and water loss with the DEP, in the hopes of informally resolving the matter. (Tr. 652-654)

62. As a result, the Guardasonis pleaded with DEP to take a more careful look at the situation so as to avoid litigation. (Tr. 652-654)

63. DEP asked the United States Office of Surface Mining ("OSM"), who funded the Shaner Project, to evaluate the Guardasonis' claim. (Tr. 652-654)

64. OSM found that damage to the spring appeared to occur, but that it was not the Project that caused the damage. (Tr. 909-929)

65. However, OSM did find, based on precipitation data, that diminution of flow from the spring was not due to seasonal drought, as was originally asserted by DEP. In short, it was not a period of dry weather which preceded the spring's flow stopping. (Def. Ex. 59, Tr. of David Hartos; Tr. 948-949, Record of River and Climatological Observations 1993; Pltf. Ex. 723)

66. OSM found that the damage was likely caused by a fluke coincidental settling, coincidental subsidence or the existence of an abandoned well (abandoned for almost 40 years before) on an adjacent property, any or all of which happened coincidentally to the blasting, but were not effected by the blasting. However, the Board finds that none of these explanations are credible. (Def. Ex. 59; Tr. 939-947)

67. The Guardasonis consulted with Dr. Shelton Alexander, the head of the Department of Geosciences at Pennsylvania State University in State College, Pennsylvania, who has a Doctorate Degree in Geosciences from the California Polytechnical Institute ("Cal-tech"). (Tr. 654)

68. Dr. Alexander has been the head of the Department of Geosciences at Pennsylvania State University in State College, Pennsylvania since 1985. He received his Doctorate in Geophysics from the California Institute of Technology (Cal-Tech) in 1963. He is a renowned expert in the area of seismology and ground movement. Dr. Alexander visited the location of the DEP Project and the location of the Claimants' water supply. He has studied the blasting records provided by DEP and comfortably concluded that the blasting activities conducted in conjunction with the Shaner Project damaged the aquifer which fed the Claimants' spring and is, therefore, responsible for the loss of water on the Claimants' property. (Dr. Alexander's Report and Curriculum Vitae; Pltf. Ex. 729; Tr. 591-511)

69. Dr. Alexander quickly disregarded the findings of the OSM and comfortably found that the Shaner Project did in fact cause the damage to the aquifer which fed the Guardasonis' spring. Thus, consistent with his expert report admitted into evidence. (Tr. 491-511; Pltf. Ex. 729)

70. Dr. Alexander found within a reasonable degree of scientific certainty that the blasts on the Shaner Project induced leakage in the aquitard that contained the perched water table and that resulted in a diminution of the flow at the Rimel spring. (Tr. 495; Pltf. Ex. 729)

71. Dr. Alexander's Report states that heterogeneities in the surrounding geologic materials, surface topography and disturbed zones from prior mining or other activities caused significant variations in ground motion levels and their durations along different distances and azimuths from the source. (Expert Report of Dr. Alexander; Pltf. Ex. 729)

72. In this regard, Dr. Alexander testified that the aquiclude and the aquifer overlying it constituted a wave guide, such that the upper zone, consisting of the aquiclude and aquifer were

isolated from the zone below only by a void space (the underground mine workings). Therefore, the energy that was trapped in the aquiclude was significantly greater than it would have been had there not been mine workings under the aquiclude. (Tr. 508-509; Pltf. Ex. 729)

73. Dr. Alexander pointed to the variability of the Project's readings and ground vibration levels by pointing out the seismic records themselves. The seismic readings indicate that greater levels of vibrations were felt farther away from the blasting with lower amounts of explosives. (Tr. 491-511; Pltf. Ex. 729)

74. DEP's "expert" Kenneth Eltschlager confirmed the variability of the seismic readings and the lack of consistency relative to size of blast, and level of vibration felt at various distances, including farther away from the blast. (Tr. 875-876; Pltf. Ex. 729)

75. Kenneth Eltschlager was unable to explain why one of the smaller blasts which occurred on March 14, 1994, and which had the seismograph placed one of the greatest distances away from the blasting, demonstrated one of the highest levels of vibration. (Tr. 892-893; Pltf. Ex. 729)

76. This level of inconsistency and variability is completely consistent with the testimony and Expert Report of Dr. Shelton Alexander's in which he concludes that the DEP Project **did** cause the damage to the Claimants' underground water supply (the Rimel Spring). (Tr. 491-511; Pltf. Ex. 729)

77. The DEP's expert Kenneth Eltschlager, indicated that he was "aware" of the principle of "wave guides" and their effect on how ground vibration travels through medium, but that the principle was "complicated". (Tr. 491-511; Pltf. Ex. 729)

78. The Board finds the testimony of Dr. Alexander to be very credible. (Board observation and finding from testimony)

79. The Guardasonis also secured the services of Hydrogeologist, Walter Ebaugh, also with a Doctorate in Geosciences. Dr. Ebaugh, the past President of Nittany Geosciences, Inc., is a learned Hydrogeologist. He obtained his Doctorate in Geology from the University of Colorado in 1977. He is a registered professional geologist in the Commonwealth of Pennsylvania and, inter alia, a Member of the Association of Ground Water Scientists and Engineers and the National Ground Water Association. Dr. Ebaugh has had varied experience as a professor of Geology at Allegheny College and was a Geologist for the U.S. Geological Survey. Dr. Ebaugh is an expert in the area of hydrogeology with significant experience in the area of ground water, its sources and damages thereto. He has visited the site of the Shaner Mine Fire Project and the Claimants' property. (Expert Report and Curriculum Vitae of Dr. Walter Ebaugh, Pltf. Ex. 728)

80. He too visited the site to conduct his own independent evaluation prior to preparing his Report. Dr. Ebaugh concluded that the Project caused the perched aquifer which fed the Guardasonis' spring to drain thereby damaging the water supply. (Expert Report of Dr. Walter Ebaugh; Pltf. Ex. 728)

81. Dr. Ebaugh found that the perched aquifer and its associated aquicludes and/or aquitards were located within close proximity of the excavation activities that were taking place at the time the Guardasonis reported the damage to the spring to the DEP. (Tr. 436; Pltf. Ex. 728)

82. Dr. Ebaugh found that leakage down through the aquitard, caused by blasting, sapped some of the water that naturally discharged from the Rimel spring causing a new discharge avenue because of the fracturing and opening up of the permeability of the aquiclude. Therefore, as a result of the blasting and fracturing, more water began leaking into the underlying mine working. That water not leaking downward is water which would have otherwise discharged from the Rimel spring. (Tr. 428-429; Pltf. Ex. 728)

83. Dr. Ebaugh pointed out that at the time the DEP Contractor hit water in the trench in mid September, 1993, they were only 1/10 into its 30+ blast program for the Project. Therefore, points out Dr. Ebaugh, there was "no way" the water the DEP Contractor encountered was from flooded mine workings. Based on the Project Maps and Daily Reports, Dr. Ebaugh pointed out that the Contractor had a lot more excavation to go until it was at the location of the mine pool. (Tr. 435-437; Pltf. Ex. 728)

84. Furthermore, the pH measurements indicate the water that was encountered in the trench before the Rimel spring went dry was "basic" water; Alkaline water. (Tr. 435-437; Pltf. Ex. 728)

85. Mine pool water, and water associated with coal seams, is more acidic and tends to have pH's lower than seven. (Tr. 435-437; Pltf. Ex. 728)

86. The water in the aquifer which fed the Rimel spring had a high pH because it was a limestone aquifer. It is "basic" water. (Tr. 435-437; Pltf. Ex. 728)

87. The blasting took place in rock that was hydraulically tight (aquiclude) and the only closest known source of "basic" water from which the water in the trench originated was the aquifer located just 200 feet above. (Tr. 436; Pltf. Ex. 728)

88. Dr. Ebaugh pointed to the DEP's Planning Report, Exhibit No. 33, which showed that early on, DEP had a real concern that the hydraulic conditions of the aquiclude were at risk and that the excavation would likely induce greater drainage from the aquifer and, therefore, diminish flow to the Rimel spring. Hence, a contingency plan for alternative water supplies was initially built into the Project. (Tr. 431-432; 377-380; Oberman Memo and Draft Submission; Pltf. Exs. 30 and 33)

89. Moreover, Dr. Ebaugh points out that since 1945, when the Rimel residence was constructed, there was nearly 50 years of use of the spring and reportedly never an incident of insufficient flow. Yet, days after the onset of blasting for the Project and the appearance of water having the chemistry like that in the perched aquifer which fed the Rimel spring, a report of loss of flow to the spring is made. (Tr. 437; Pltf. Ex. 728)

90. As such, it is Dr. Ebaugh's opinion that within a reasonable degree of scientific certainty, the spring's diminution was caused by the DEP Project. (Tr. 437; Pltf. Ex. 728)

91. Moreover, Dr. Ebaugh found that within a reasonable degree of scientific certainty the damage to the Claimants' spring is permanent. (Tr. 438-439; Pltf. Ex. 728)

92. The Board finds that the background and history of the site, as well as the testimony of the Claimants, supports the testimony of Dr. Alexander and Dr. Ebaugh. (Board finding from record in general)

93. The Board finds the testimony of Dr. Ebaugh to be credible. (Board finding from observation and hearing of testimony)

94. The Guardasoni family ran a dairy farm operation on the subject farmland for decades. (Tr. 560-565)

95. All of the agricultural and domestic needs of the Guardasoni farm were provided by an underground spring, which spring was permanently damaged by Defendant's activities. (Board finding from review of entire record and testimony presented)

96. The spring provided more than ample water for all of the household needs plus the agricultural needs of the Guardasoni farm. (Tr. 560-565)

97. The property was leased as a hog farm in the Mid 1980s and the subject spring was used as the only source of water for over 200 hogs. (Tr. 567-568)

98. Even in times of drought, conservation measures were never needed. (Tr. 102, 107-108)

99. Historically, local residents use to fill their jugs up from spring for their domestic use. (Tr. 296-297)

100. The evidence provided by the Claimants concerning the production of the spring and the fact that the spring never went dry and never ceased to produce sufficient water for all of their farming and domestic needs is not contradicted by any evidence in the record. (Board finding from record generally)

101. DEP's pre-project information concerning the production of the Guardasonis' Rimel spring corroborates the Claimants' testimony that even in times of drought or dry weather, the Rimel spring never stopped flowing. (Tr. 373-374; Pltf. Ex. 23 and 713)

102. In fact, DEP's David Wary testified that DEP's pre-project information was consistent with the Claimants' evidence; namely that the Rimel spring was NEVER observed to go dry. (Tr. 358-359; Pltf Ex. 23 and 713)

103. Until the Shaner Mine Fire Project, there was NEVER a time when flow ceased at this spring nor were significant fluctuations in flow observed. (Tr. 566-567)

104. To this day, the spring has not produced its consistent normal and healthy flow. (Tr. 184-185)

105. The Guardasonis' daughter, Maureen Rimel, and her three children continue to live in the residence using EXTREME conservation measures which they have used since the DEP instructed that the temporary water supply be removed in August, 1994. (Tr. 114-117)

106. The Rimels can not flush the toilet after they use it. (Tr. 95-96, 102, 116)

107. The Rimels have to take baths in the same bath water or carefully schedule their showers. (Tr. 95, 101-102, 116)

108. The Rimels can not have a horse or other barn animals like they had before the Project. (Tr. 96-97, 102, 106)

109. The Rimels can not do laundry when they wish. (Tr. 96, 102, 116-117)

110. The Rimels can not wash their car nor can the children play in the summer with the garden hose. (Tr. 102, 114-116)

111. The Rimels can no longer drink the water because of its muddy consistency. (Tr. 100-101)

112. Maureen Rimel and her family have had to live with extreme conservation measures for five years with no observable improvement in the damaged springs production. (Tr. 102-103, 184-185)

113. The ongoing diminution of flow is corroborated by DEP's own collection data, which shows various incidents of a "no flow" at the Rimel spring since the Project, an occurrence which never arose prior to blasting on the Shaner Project. (DEP's Flow Data, Pltf. Ex. 371; Tr. 603-606)

114. Maureen Rimel also testified about the numerous times she has observed a complete lack of flow at the spring since the Project and would make a notation on her calendar, which shows no flow from the spring on at least the following occasions after the temporary water supply was removed: July 11, 1995, August 1, 1995, August 3, 1995, August 4, 1995, August 7, 1995, August 11, 1995, August 16, 1995, August 23, 1995, August 26, 1995, August 27, 1995, August 28, 1995, August 31, 1995, September 6, 1995, September 8, 1995, September 15, 1995, September 16, 1995, September 20, 1995, September 24, 1995, September 26, 1995, September 27, 1995, September 29, 1995, November 1, 1995, November 3, 1995, November 5, 1995, November 7, 1995, November 8, 1995, November 10, 1995, November 13, 1995, November 14, 1995, September 2, 1996, September 3, 1996, March 7, 1997, March 24, 1997, July 15, 1997, July 16, 1997, August 7, 1997, August 13, 1997, August 14, 1997, September 3, 1997, September 8, 1997, September 19, 1997, September 21, 1997, September 28, 1997, October 4, 1997, October 9, 1997, October 10, 1997, October 12, 1997, October 15, 1997, October 20, 1997, October 21, 1997, October 31, 1997, November 13, 1997, December 21, 1997, October 28, 1998, November 3, 1998, November 8, 1998, November 14, 1998, November 15, 1998, November 17, 1998. (Tr. 130-136, 176, 179-181, 184; Rimel Calendars, Pltf. Exs. 686, 687, 688, 689)

115. DEP's pre-project data indicates a minimum flow amount of 3.75 gallons of water per minute and contained additional information that the flow averaged 14 gallons per minute. (Pltf. Ex. 713; Tr. 372-373)

116. Other flow data from DEP's pre-project data (which included a flow from the Rimel spring of 14 gallons per minute) was used by the DEP's Expert, Robert Hershey, when formulating his opinion on causation. In this regard, Hershey provided that it would have been likely that the flow information (i.e. 14 gpm from the Guardasonis' Rimel spring) would have been verified by a DEP technician. (Tr. 1136-1137; Pltf. Ex. 23, 713)

117. The loss of the spring water by the Claimants was the direct result of the activity of the Department. (Board finding from record as a whole)

118. In accordance with the Agreement with the Claimants, the Department must replace or pay for Plaintiffs' loss of water. (Tr. 642; Pltf. Ex. 126)

119. As the Department has failed and refused to replace Claimants water loss, a Breach of Contract has occurred and the Claimants are entitled to damages. (Board finding from record)

120. The Department had an equal opportunity to mitigate damages and failed to do so. (Board Finding by reason of constant refusal of DEP to act)

121. The only apparently feasible replacement which would provide a supply of water "as good as or better" in quality and quantity as that taken, as required by the Agreement between the Guardasonis and DEP, is to bring a public water supply to the area which has an agricultural tap to

accommodate the watering of livestock. (Tr. 260-263 - concerning contact made to Westmoreland County Municipal Authority and location of mine pool regarding feasibility of drilling well)

122. The Municipal Authority of Westmoreland County estimated it would cost Two Hundred Thousand Dollars (\$200,000.00) to bring water to the area of the property. (Letter from Westmoreland County Municipal Authority to DEP; Pltf. Ex. 77)

123. The Board finds that the Claimants have been damaged as a direct result of the Department's activities in the amount of Two Hundred Thousand Dollars (\$200,000.00), the cost of bringing replacement water to the site. (Board finding from record)

124. The Claimants are entitled to interest at the statutory rate of six percent (6%) from March 6, 1995, when the Claimants filed this Claim with this Board.

CONCLUSIONS OF LAW

1. The Board of Claims has exclusive jurisdiction over the parties and the subject matter pursuant to 72 P.S. 4651-4.

2. On October 22, 1992, the Claimants entered into a Contract with the Department giving the Department the right of entry onto their land and to utilize their land for the Shaner Mine Fire Project, Project No. OSM 65 (0217) 101.1.

3. The Contract between the parties specifically provided that if the Claimants water supply was permanently lost or impaired as a result of the Project, the Department would provide a permanent substitute water supply by drilling a well, by doing whatever was necessary to access public water supply, or by any other reasonable means replace the lost or damaged water supply.

4. Further, the Contract provided that in the event the supply was permanently lost or impaired, a water supply which was as good as or better than the present one would be furnished.

5. Adequate consideration exists for the formation of the Agreement between the Claimants and the DEP; namely the Consent for Right of Entry Agreement.

6. The Shaner Mine Fire Project activities directly caused damage to the Claimants' private water supply; namely, a spring fed by associated aquifers and aquicludes.

7. The damage was the loss of the water supply of the spring.

8. The loss of the water supply is permanent.

9. The Department provided only a temporary water supply and discontinued the temporary water supply.

10. The Department never provided a permanent substitute water supply and refuses to do so.

11. By terms of the Agreement, the Department must provide a permanent substitute water supply.

12. The DEP breached its Agreement with the Guardasonis, which breach is material.

13. DEP has failed to perform its duties under the Agreement with the Guardasonis by failing to provide a permanent water supply which is “as good as or better” than the supply the Claimants had before the damage occurred.

14. The Claimants, Harry and Elizabeth Guardasoni, reasonably relied on the promises of the DEP that it would provide a permanent source of water should their supply have been damaged by the Shaner Project.

15. The only feasible water supply which assures production which is “as good as or better” than that provided by the Claimants’ spring before the damage caused by the DEP’s Shaner Project is a public water supply with a tap sufficient in size to provide for agricultural needs.

16. The Claimants, as the injured party, are not obligated to mitigate damages as they and the DEP, the liable party, had an equal opportunity to mitigate damages.

17. The cost of the public water supply is Two Hundred Thousand Dollars (\$200,000.00)

18. The Department is responsible for the cost of the public water supply.

19. The Claimants are entitled to an award against the Department in the amount of Two Hundred Thousand Dollars (\$200,000.00)

20. The Claimants are entitled to interest at the statutory rate from the date of March 6, 1995, when Claimants filed their Claim with this Board.

DISCUSSION

The Claimants, Harry R. Guardasoni and Elizabeth E. Guardasoni, are the owners of real estate located on Guffey Hill Road, Sewickley Township, Westmoreland County, Pennsylvania. The Guardasoni property, as well as the surrounding properties, had been extensively mined. In the 1970's, the Guardasonis, and other persons living in the area, became concerned about smoke that was rising from areas above the abandoned mine workings. The Commonwealth of Pennsylvania was notified of the observations and concerns, and in the late 1970's and early 1980's the Commonwealth began evaluating the risks associated with mine fire. Deep mining had been extensive in the area and there were miles and miles of rooms and tunnels directly beneath the Claimants' property and the surrounding properties. Additionally, second mining, or pillar mining, had also occurred in the area, leaving large open voids beneath the various areas of the property. Over the course of the years, rain water had permeated through the ground and had filled the various underground tunnels and voids which became known as mine pools. The mine pool water is not suitable for drinking and is a brownish-yellow in color and stains the ground around the discharge points and the beds of the waterways to which it feeds.

The Defendant, Commonwealth of Pennsylvania, Department of Environmental Resources, now, Commonwealth of Pennsylvania, Department of Environmental Protection (DEP), is a Commonwealth agency charged by law with the power and duty to extinguish fires in abandoned coal mines in those instances where such work is in the interest of the public welfare. The United States of America, Office of Surface Mining, approved funding for DEP to conduct operations relating to the control of the mine fire in the area of the Claimants' project, known as the Shaner Mine Fire Project, Project No. OSM65(0217)101.1, located in Sewickley Township, Westmoreland

County, Pennsylvania. A preliminary study of the area done by the DEP revealed that there was a high likelihood that the water supply of the Claimants' and other surrounding properties would be lost due to the reclamation activities and further investigation was made to determine what type of water supply would be appropriate and feasible. Because of the location of the polluted mine pool, it was concluded, preliminarily, that a public water supply would be the appropriate path to take should water supplies be damaged. The DEP determined, from contact with the Westmoreland County Municipal Authority, the public water supplier in the area, that a public water supply to the Shaner Mine Fire Project Area would cost \$200,000.00.

On or about October 22, 1992, the DEP entered into a Consent for Right of Entry Agreement with the Claimants wherein the DEP agreed to provide a replacement water supply in the event that the operations associated with the Shaner Mine Fire Control Project caused damage to Claimants' water supply.

Specifically, the Consent for Right of Entry Agreement entered into between the DEP and the Claimants provided:

“monitor the potable water supply before, during, and upon completion of the project. If water supply is lost or impaired as a result of this project and not a result of seasonal drought, the department will immediately furnish a temporary potable water supply. Moreover, if the owners' water supply is permanently lost or impaired as a result of this project, the Department of Environmental Resources will provide a permanent substitute water supply by drilling a well, (or) by doing whatever necessary to access a public water supply, or by any other reasonable means available which will replace the lost or damaged water supply. The Department of Environmental Resources will not be responsible for the continuing maintenance of the new installation or the cost of water consumption once the lost or damaged water

supply is replaced. If the present water supply is permanently lost or impaired, the Department of Environmental Resources will furnish a water supply which is as good as or better than the present one.”

Project activities on the Shaner Project began early in 1993 and in September of 1993, excavation and blasting commenced. During excavation, the contractor hit water which had to be pumped into nearby streams. The water was tested and found to be inconsistent with mine water, as it had a pH level of 8.5 and an iron content of less than 1.0. On October 18, 1993, the Claimants’ spring on their farm went dry.

Historically, the Claimants’ property had been used for residential and agricultural purposes. At times the Claimants’ agricultural purposes include the raising of two hundred hogs and forty milk cattle, all of which was supported by the spring located on the Claimants’ property. The Claimants immediately notified the DEP and the contractor of the water loss. The DEP informed the Claimants that it was the contractor’s responsibility to supply Claimants with a water source. On October 21, 1993, the contractor provided a water buffalo which the DEP ordered removed in December of 1993, concluding that the damage to the spring was not caused by the Project activities.

The Claimants hired a Licensed Professional Hydrogeologist, Peter Hutchinson, and a Professional Geologist, Peter Briggs, who both visited the site and reviewed available DEP records and concluded that the water loss in fact was caused by the Project’s activities. The Claimants shared their information with the DEP and requested the DEP to take a closer look at the situation in order to avoid litigation. The United States Office of Surface Mining retained an expert who concluded that the water loss was caused by a coincidental settling of an abandoned well which

happened at the time of the blastings but was not the effect of blasting or construction activities of the Project.

The Claimants thereafter consulted with Sheldon Alexander, Ph.D., the head of the Department of Geosciences at Pennsylvania State University in State College, Pennsylvania, and a Hydrogeologist, Walter Ebaugh, Ph.D., both of whom, in extensive examinations and reports, concluded that the loss of the water to the Claimants' property was caused directly by the activities of the Mine Reclamation Project.

Considering the historical usage of Claimants' property, the loss of water at the time of the Project activities, and this Board's observation of the witnesses and review of the evidence, it is the specific finding of the Board that the testimony presented by DEP, concerning the water loss, is not credible. This Board specifically finds that the testimony of the expert witnesses of the Claimants are credible and makes sense in light of all the surrounding facts. It was the DEP itself that first recognized the possibilities of water loss due to the Project activities that were to be conducted and concluded that the only remedy to replace such water loss was the construction of a public water supply. Given these preliminary investigations, the history of the water use supporting entire agricultural and residential uses, the manner in which blasting and construction activities occurred, and the review of the evidence, this Board finds it unbelievable that the water loss was due to a collapse of an abandoned well or that the collapse of the abandoned well did not occur because of the construction activities. Therefore, it is the specific finding of this Board that the Project activities did in fact cause, and was the proximate cause of the Claimants' water supply loss.

As this Board has found that causation and liability exists, it must now be determined what are the proper measurement of damages. The Board must interpret contracts as written, and

in construing a contract, each and every section of it must be taken into consideration and the intention of the parties must be ascertained from the four corners of the document. See John McShain, Inc. v. Commonwealth, General State Authority, 9 Pa. Cmwlt. 427, 307 A.2d 469 (1973). The parties have the right to make their own contract, and it is not a function of this Board to rewrite a contract with the plain meaning of the language agreed upon. See Commonwealth, Dept. of Transportation v. Brayman Construction Company, 33 Pa. Cmwlt. 485, 382 A.2d 767 (1978). In a written contract, the intent of the parties is the writing itself, and when the words are clear and unambiguous, the intent is to be determined only from the expressed language of the agreement. Robert F. Felte, Inc. v. White, 451 Pa. 137, 302 A.2d 347 (1973); Marcinak v. Southeastern Green School District, 375 Pa. Super. 486, 544 A.2d 1025 (1988).

The language of the contract between the parties in this case is very clear. If the owners' (Claimants') water supply is permanently lost (which this Board specifically has found to be the fact), DEP agreed to provide a permanent substitute water supply by drilling a well or to access public water supply to replace the lost water supply. This Board can not think of any clearer language mandating the expressed direction and activity which the Department should have taken. The failure to take such actions is a breach of contract entitling the Claimants to damages. The DEP contends that this Board can not grant relief to the Claimant's because the Board has no authority to order specific performance. While this may be true, the Board does have the power and authority to award damages to permit the Claimant to restore its water supply. This Board is of the opinion that the cost of \$200,000 to replace the water supply system with a public water supply is not unreasonable, is necessary, and is required by the specific language of the contract between the parties. The Department argues that an award would be unreasonable as the Claimants have failed

to mitigate damages by showing that a well would not be feasible or that the cost of a well exceeded the cost of running the public line. The record is clear that the Department time and time again refused to take the action, even though the Claimant offered opportunity after opportunity for the Department to take action, to replace the water supply. The opportunity was extended to the Commonwealth also to mitigate damages time and again, and the Commonwealth, time and again, refused to mitigate the damages or to take the course of action which the Commonwealth contends the Claimant should have taken. The removal of a temporary water supply on the eve of Christmas was surely not the type of action that was contemplated by the Contract between the parties. An injured party is not obligated to mitigate damages when both they and the liable party had an equal opportunity to mitigate the damages. Loyal Christian Benefit Assoc. v. Bender, 342 Pa. Super. 614, 620, 493 A.2d 760, 763 (1985)

The DEP placed its own self into this position and can not now claim that the Guardasonis had failed to take an action which the DEP should have taken at the very outset. Accordingly, this Board will award the sum of \$200,000.00 to the Claimants, which is the cost of a public water supply to enable the restoration of the water lost due to the activities of the DEP.

ORDER

AND NOW, this 31st day of May, 2000, an award is entered in favor of the Claimants, Harry R. Guardasoni and Elizabeth E. Guardasoni, in the amount of Two Hundred Thousand Dollars (\$200,000.00) with interest at the statutory rate of six percent (6%) per annum from March 6, 1995.

Upon receipt of said award, Plaintiff shall forthwith file with the Board of Claims a Praeceptum requesting that this matter be marked "closed, discontinued and ended with prejudice".

Each party to bear their own costs and attorneys' fees.

BOARD OF CLAIMS

David C. Clipper
Chief Administrative Judge

Louis G. O'Brien, P.E.
Engineer Member

James W. Harris
Citizen Member

May 31, 2000