

SELECTED ENVIRONMENTAL HEARING BOARD AND RELATED DECISIONS OF 2005

Air Quality

The Board denied a motion in limine seeking to bar expert testimony regarding the propriety of conditions from previous unappealed air permits regarding sulfur dioxide. In *East Penn Manufacturing Co. v. DEP*, EHB Docket No. 2003-169-K (Opinion issued January 3, 2005), the Board held that as a matter of law there did not appear to be a legal provision in Title V which says that a Title V application is an inappropriate venue to seek a change in emissions limitations.

The Board dismissed an appeal from civil penalty assessments under the Air Pollution Control Act in *American Iron Oxide Co. v. DEP*, EHB Docket No. 2004-219-R (Opinion issued September 12, 2005). The Board held that the appellant's failure to prepay the civil penalty or post an appeal bond or make a claim of financial inability to prepay the penalty within the 30-day appeal period results in a waiver of its right to challenge the penalty pursuant to Section 9.1 of the Air Pollution Control Act.

A challenge to an air plan approval was dismissed as moot in *Cooley v. DEP*, EHB Docket No. 2003-246-K (Opinion issued September 15, 2005). Shortly after the appeal was filed, the permittee submitted an application for a new plan approval, which was treated by the Department as a new application. The second plan was approved, effectively replacing the original plan approval. Since the appellants did not appeal the second plan approval, their appeal was dismissed as moot.

In *National Fuel v. DEP*, EHB Docket No. 2005-168-MG (Opinion issued October 26, 2005), the Board a motion for summary judgment which sought judgment as a matter of law that the Department improperly refused to grant a plan approval for an increased emissions limit for an engine at the appellant's gas distribution facility. The Board found that there were disputes of material facts which precluded the entry of summary judgment, including whether the increase in capacity of the source involved a modification of the source and whether the requested increase in emission limits should be deemed contrary to the terms of the plan approval.

Administrative Finality

In *East Penn Manufacturing Co. v. DEP*, EHB Docket No. 2003-169-K (Opinion issued January 3, 2005), the Board held in deciding a motion in limine that testimony will not be precluded on the issue of sulfur dioxide limits in a Title V permit where the permittee's request to change an emissions limitation from prior unappealed permits was denied by the Department.

The Board granted a motion for summary judgment in *Potratz v. DEP*, EHB Docket No. 2003-084-R (Opinion issued March 11, 2005), on the basis that the appellant's challenge relating to the construction of a fluoridation facility was administratively final because he failed to appeal that approval, but that he could pursue his objections relating to the operation of that facility. The Board rejected the appellant's claim that a challenge to the construction permit was not ripe for review at the time it was issued. Two judges concurred in the result only.

The Board rejected a claim by the Department that the appellants should be precluded by the doctrine of administrative finality from introducing evidence concerning other mining permits in a watershed in an appeal from a new noncoal surface mining permit. In *Ehmann v. DEP*, EHB Docket No. 2003-015-C (Opinion issued March 10, 2005), the Board held that the appellants' argument was not an improper collateral attack on previously issued permits. Rather they argued that the Department should have considered the cumulative environmental impacts of those permits in its decision to grant the permit under appeal.

The Board rejected the notion that the doctrine of administrative finality was an appropriate basis upon which to exclude objections to an unappealed Act 537 Plan revision in *Yoskowitz v. DEP*, EHB Docket No. 2003-172-C (Opinion issued April 22, 2005). Rather, the Board concluded that since the appeal was from the Department's denial of a private request, matters pertaining to the 537 Plan were beyond the scope of the appeal and not relevant to the matter being considered.

Board Procedure

Appeals Nunc Pro Tunc

The Board denied a petition for leave to file an appeal *nunc pro tunc* where the appellant incorrectly addressed the envelope to the Department rather than to the Board in *Greenridge Reclamation LLC v. DEP*, EHB Docket No. 2005-053-L (Opinion issued April 21, 2005).¹ The Board observed that the appellant could have easily verified receipt of the appeal by the Board within the appeal period and that there was no real excuse for not doing so.

Default Judgment and Deemed Admissions

The Board refused to grant a motion for deemed admissions against a defendant where the Department failed to properly serve the complaint and notice to defend. *DEP v. J&G Trucking, Inc.*, EHB Docket No. 2005-072-CP-L (Opinion issued August 9, 2005). The Board's rules require that complaints be served by certified or registered mail. Because the complaint mailed by certified mail was returned unclaimed, service had not been completed.

¹ This case has been appealed to the Commonwealth Court.

Privilege

The Board held, despite opposition from the Department, that it is appropriate to review e-mails of the Department in camera in order to determine whether part or all of any of the documents are protected from disclosure in discovery by the deliberative process privilege in *Waste Management Disposal Services of Pennsylvania, Inc. v. DEP*, EHB Docket No. 2004-236-K (Opinion issued February 14, 2005)(corrected opinion issued February 15, 2005). The Board observed that the privilege had not been explicitly adopted by the Pennsylvania Supreme Court but, for present purposes, it would assume that the privilege could be claimed and applied if the appropriate prerequisites for its applicability were present.

After reviewing the e-mails, the Board concluded that the privilege did not apply to these particular documents because they pertained to the particular site at issue and were not an ongoing discussion of policy. Moreover, the Board concluded that even if they were privileged, they were highly relevant evidence on the main issue in the case and that the appellant's need for the documents outweighed the government's interests in maintaining their secrecy. *Waste Management Disposal Services v. DEP*, EHB Docket No. 2004-236-K (Opinion issued February 22, 2005).²

In *Groce v. DEP*, EHB Docket No. 2005-246-R (Opinion issued December 14, 2005), the Board granted a motion for a protective order barring the deposition of a consulting attorney to the appellant. The Board held that the attorney-client privilege and work product doctrine applied since the attorney provided legal research, developed legal strategy and produced legal analysis on behalf of the appellant.

Reconsideration

The Board denied a petition for reconsideration filed by an appellant-public interest group which had prevailed in the underlying summary judgment order. *Mountain Watershed Association v. DEP*, EHB Docket No. 2004-102-R (Opinion issued July 15, 2005). The appellants had prevailed on three of the arguments on summary judgment, but the Board declined to rule on a fourth issue because the permit involved was being remanded to the Department for further action and the factual record was not fully developed. On reconsideration, the Board held that declining to rule on that issue did not present a compelling and persuasive reason for reconsidering the prior order.

² A brief stay of the disclosure order was granted as a courtesy to allow the Department to seek relief at the Commonwealth Court. *Waste Management Disposal Services v. DEP*, EHB Docket No. 2004-236-K (Opinion issued February 25, 2005). By order dated March 11, 2005, the Court granted a stay of the Board's order pending appellate review of the Department's petition for review. However, Waste Management withdrew its motion to compel disclosure and proceeded with the appeal without the benefit of the documents. The Commonwealth Court therefore dismissed the Department's appeal of the Board's order as moot. *Department of Environmental Protection v. Waste Management Disposal Services of Pennsylvania*, 422 C.D. 2005 (Pa. Cmwlth. filed July 7, 2005).

Representation

The Board declined to disqualify appellant's counsel who also served as the president and sole shareholder of the company in *Hartstown Oil and Gas Exploration Co.*, EHB Docket No. 2005-268-R (Opinion issued December 14, 2005). The Board found that the issues raised in the appeal were simple and straightforward, counsel expresses a willingness to be deposed as the president of the company, and that the appellant would suffer significant prejudice by incurring tremendous expense if required to secure new counsel.

Spoilation of Evidence

The Board refuses to sanction the Department for the destruction of meeting notes by an official of the Department where the defendant did not show that the destruction of those notes resulted in prejudice. *DEP v. Neville Chemical Company*, EHB Docket No. 2003-297-CP-R (Opinion issued March 15, 2005).

Sanctions

The Board declined to preclude an appellant from presenting expert testimony at a hearing as a sanction for failing to file timely responses to expert testimony. In *UMCO, Inc. v. DEP*, EHB Docket No. 2004-245-L (Opinion issued June 15, 2005), the Board determined that given the complex nature of the matter, it was more important to develop a complete factual record on the dispute, and that a better solution was to delay the hearing and provide additional time for the Department and the interveners to review the appellant's expert reports and amend their pre-hearing memoranda.

Supersedeas

After a hearing the Board dismissed an amended petition for supersedeas in *Achenbach v. DEP*, EHB Docket No. 2004-202-C (Opinion issued May 25, 2005). The Board took testimony from several expert witnesses and held that the petitioners had failed to prove that stormwater discharges associated with construction activities on the permittee's property were entering an impaired waterway or otherwise violated the Clean Water Act or the Clean Streams Law. Therefore, it was the Board's conclusion that the petitioners failed to meet the requirements of demonstrating that they were likely to be irreparably harmed or that they had a likelihood of succeeding on the merits of their appeal.

The Board declined to issue a supersedeas of an approval to construct a water storage tank on farmland that had allegedly been mined many years ago, in *Neubert v. DEP*, EHB Docket No. 2005-103-R (Opinion issued July 15, 2005). After considering engineering testimony from the appellants, the Department and the municipal water authority, the Board found that the appellants had failed in meeting their burden of proving a likelihood of success on the merits or that they would suffer irreparable harm if the supersedeas were not granted.

The Board granted in part and denied in part a petition for supersedeas in *Prizm Asset Management Co. v. DEP*, EHB Docket No. 2005-279-K (Opinion issued October 24, 2005). The Board held that while there were several issues that the Appellants were not likely to succeed on the merits, it was clear from the evidence presented that the Department should have re-noticed an application for a NPDES permit which changed to call for drainage in a new watershed. Accordingly, the Board required a new notice for the permit, but declined to revoke the existing permit.

Dam Safety and Encroachments Act

The Commonwealth Court, affirming an adjudication by the Board, held that the Department properly revoked a general permit for a box culvert when the Department learned that the culvert was located within a floodway. *Attaweed Foundation v. Department of Environmental Protection*, 162 C.D. 2005 (Pa. Cmwlth. filed November 1, 2005). The Court rejected the argument that there was no actual harm to public health and safety and held where there was no dispute the box culvert increased the potential for flooding, that no actual harm need occur in order for the public welfare to be adversely affected. The Court also rejected the petitioners claim that the Department was equitably estopped from revoking the permit.

In *Rockwood Borough v. DEP*, EHB Docket No. 2004-034-L (Adjudication issued April 19, 2005), the Board held that the Department appropriately ordered a municipality to replace an undersized culvert even though the increased water flow is allegedly due to upstream development being carried out by third parties. The Board held that it was not unreasonable to issue the order to the Borough, and noted that the Borough may have a claim for contribution from other parties in another forum.

Enforcement

The Commonwealth Court affirmed the Board and held that a \$3,465,660 civil penalty assessed against Sunoco for its failure to timely install RACT technology was reasonable and appropriate. *Sunoco, Inc. v. Department of Environmental Protection*, 865 A.2d 960 (Pa. Cmwlth. 2005). Specifically, the Court rejected arguments that the Board had improperly credited the testimony of the Department's economic expert, or that the penalty was calculated unreasonably based on Department guidance documents. Accordingly, the penalty was a lawful application of the Department's enforcement authority pursuant to the Air Pollution Control Act.

In *Department of Environmental Protection v. Schneiderwind*, 867 A.2d 724 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 132 EAL 2005 (Pa. filed December 2, 2005), the Commonwealth Court held that a determination of the Department that mining activity did not affect the crop yield of a neighboring farmer was not a final action reviewable by the Board because it constituted an exercise of the Department's prosecutorial discretion. The Court further held that it was further error for the Board to

consider the case without the participation of the mining company even though the company did not choose to intervene in the proceedings before the Board.

The Board held in *Benacci v. DEP*, EHB Docket No. 2002-243-R (Adjudication issued June 22, 2005), that the Department appropriately ordered the registered owner of underground storage tanks to perform a site characterization where there was evidence of contamination at the site. However, the Board found that the \$ 4,000 civil penalty assessed for failing to comply with the site characterization and tank closure requirement was too high in the circumstances, and reduced the penalty to \$ 2,000.

Evidence

A motion in limine was denied by the Board in *Borough of Edinboro v. DEP*, EHB Docket No. 2004-016-R (Opinion issued March 22, 2005), where the appellant sought to exclude evidence of conversations between Department personnel and the appellant's staff. The Board observed that although Rule 4.2 of the Rules of Professional Conduct prohibits communication between a lawyer and another party who is represented by counsel, a comment to the Rule specifically provides that parties to a matter may communicate directly with one another.

Mining

The Commonwealth Court determined that it was not appropriate to defer to the Department's interpretation of the Bituminous Coal Mine Act, where the Department recently changed its interpretation of the section of the Act requiring mine inspections at certain intervals. *RAG Cumberland Resources, LP v. Department of Environmental Protection*, 869 A.2d 1065 (Pa. Cmwlth. 2005). Reversing the Board which found the language of the Act unambiguous concerning the requirement for pre-shift safety inspections, the Court found that the Board had improperly ignored the specialized meaning of the term "shift" as a designated block of time rather than a group of workers. The Court also noted that the Department had recently changed its interpretation of the meaning of "shift." Therefore, the Court held that deference to the Department's interpretation was inappropriate and concluded that the Act requires pre-shift examinations prior to the designated start time of each primary production shift, and that these inspections cover any worker who enters the mine during that block of time.

The Board dismissed an appeal of a non-coal surface mining permit by various individuals and a citizens group in *Shuey v. DEP*, EHB Docket No. 2002-268-R (Adjudication issued August 10, 2005). The appellants failed to adduce adequate evidence that the permit operation would adversely affect a nearby state park or that the issuance of the permit was otherwise inappropriate or not in accordance with the law.

Mootness

The Board dismissed an appeal by a borough from a Department ban on sewer connections based on a determination that the borough's system was hydraulically

overloaded in *Borough of Edinboro v. DEP*, EHB Docket No. 2004-016-R (Opinion issued April 12, 2005). Specifically, the Board concluded that the removal of the ban pursuant to the Department's regulation rendered the appeal moot because there was no further relief that could be provided.

Sewage Planning

The Commonwealth Court affirmed an adjudication of the Board and held that the Department properly approved an Act 537 Plan and related NPDES permit to a borough for the construction of a sewage treatment plant in *Delaware Riverkeeper v. Department of Environmental Protection*, 879 A.2d 351 (Pa. Cmwlth. 2005). Although the plan contemplated possible further development of the plant to accommodate flows from a neighboring township, there was nothing in the sewage facilities regulations which required the Department to order the neighboring township to submit a plan revision at the same time.

An appeal from the Department's approval of a sewage planning module was dismissed by the Board in *Noll v. DEP*, EHB Docket No. 2003-131-K (Adjudication issued May 20, 2005). The appellants failed to prove that the approved plan was infeasible because it failed to consider private costs, such as costs to residents to hook into the public collection system, or that the financing rate used in the planning was inappropriate. The appellants also failed to prove that the public notice and comment period was inadequate.

Solid Waste

At long last the Supreme Court rendered judgment on the "harms/benefit" review in *Eagle Environmental II v. Department of Environmental Protection*, 884 A.2d 867 (Pa. 2005). A divided court upheld the regulations holding that consideration of economic and social harms is within the authority granted to the Department by solid waste legislation, and that balancing of harms and benefits is a commonly understood test, well within the expertise of the Department. The Court also held that the test was not an improper delegation by the General Assembly to the Department and that a legislative regime balancing a projects harms and benefits is within the police power of legislature.

In *Brunner v. Department of Environmental Protection*, 869 A.2d 1172 (Pa Cmwlth. 2005), the Commonwealth Court, reversing a 3 to 2 decision by the Board, concluded that foundry sand used for alternate daily cover was not subject to a \$ 4.00 per ton fee imposed by Section 6301 of Act 90, 27 Pa. C.S. § 6301. Specifically, the Court found that the exception to the fee requirement found in Section 6301(b)(1) was not limited to alternate daily cover from a "resource recovery facility" because the section did not contain that language. Using principles of statutory construction, the Court concluded that it was improper to insert language that was not there.

The Board dismissed two appeals of an expansion permit issued to the Pioneer Crossing Landfill based on the Department's application of the so-called "harms/benefits" analysis in 25 Pa. Code § 271.127(c), which requires that the benefits of a landfill project clearly

outweigh the projects known and potential harms. Judges Krancer and Labuskes filed concurring opinions which questioned whether it is an appropriate role for government to create and attempt to apply what appears to be a subjective standard. *County of Berks v. DEP*, EHB Docket No. 2002-155-MG (Adjudication issued March 31, 2005)³; *Exeter Citizens Action Committee v. DEP*, EHB Docket No. 2002-156-MG (Adjudication issued March 31, 2005).

In *Waste Management Disposal Services of Pennsylvania, Inc. v. DEP*, EHB Docket No. 2004-236-K (Adjudication issued May 18, 2005), three judges of the Board held that the “Runway Flight Path Exclusionary Criteria,” a landfill siting criteria, prohibits the vertical expansion of a landfill which would penetrate the “conical surface” associated with an airport. Although the Board refused to defer to the Department because of conflicting interpretations of the regulation and an admitted lack of expertise in aviation, the Board nevertheless rejected the appellant’s alternative interpretation.⁴

Sanctions

In *DEP v. Dotan*, EHB Docket No. 2004-155-CP-MG (Opinion issued May 2, 2005), the Board granted a motion for sanctions filed by the Department by limiting the defendant’s presentation of evidence in a hearing on a complaint for civil penalties. The defendant failed to answer interrogatories and a request for documents filed by the Department, after being ordered to do so by the Board. Accordingly, the Board precluded him from offering any evidence at the hearing other than his own testimony.

TMDL

The Board denied a motion to dismiss the appeal of a TMDL in *Lower Salford Township Authority v. DEP*, EHB Docket No. 2005-100-K (Opinion issued October 25, 2005). Rejecting the argument that the record was clear that the TMDL was an action of the EPA and not DEP, the Board held that there is a legitimate factual and legal dispute regarding which agency promulgated the TMDL.

Water Quality

The Board sustained an appeal and revoked an NPDES permit where the Department admitted that various terms of the permit were inadequate and violated the law in *Mountain Watershed Association v. DEP*, EHB Docket No. 2004-102-R (Opinion issued June 23, 2005). However, the Board declined to decide a bonding issue raised by the appellant organizations, determining that there were insufficient facts and the Department was in the process of reevaluating the bond under the noncoal mining regulations.

³ The *County of Berks* decision has been appealed to the Commonwealth Court.

⁴ This decision has been appealed to the Commonwealth Court.