

SELECTED ENVIRONMENTAL HEARING BOARD AND RELATED DECISIONS OF 2006

Administrative Finality

The Commonwealth Court affirmed the Board in *Potratz v. Department of Environmental Protection*, 897 A.2d 16 (Pa. Cmwlth. 2006), and held that the petitioner was foreclosed from contesting the construction of a water treatment facility in his appeal from the approval of an operation permit. The court found that the appellant could have raised his objections in an appeal of the construction permit and by failing to do so, the construction permit was administratively final.

The Board will not generally apply the doctrine of administrative finality to an appeal which involves a challenge to a general permit, unless it is clear that a party was aggrieved by the earlier issuance of a general permit. In *Army for a Clean Environment v. DEP*, EHB Docket 2005-036-L (Opinion issued September 22, 2006), the Board concluded that the appellant was not precluded from challenging the general permit as it was applied to a mining permit because at the time it was originally issued the general permit was not site-specific. Therefore the appellant was not aggrieved until the permit was applied to a specific location.

Air Quality

In *Groce v. DEP*, EHB Docket No. 2005-246-R (Adjudication issued November 22, 2006), the Board dismissed an appeal from the Department's approval of an air quality plan approval to construct a waste coal fired power plant. Specifically, the Board found, among other things, that the Department had properly concluded that the No_x emission limit met LAER requirements; that emissions from the facility will not cause an increment violation under the PSD program; and that the plan approval had an appropriate mitigation plan in place to protect air quality in a Class I national park.

Amendment of Appeals

The Board denied a motion to amend a notice of appeal, made after the hearing on the merits, to add claims related to a separate enforcement order and to include a government estoppel defense. In *Robachele, Inc. v. DEP*, EHB Docket No. 2005-091-L (Opinion issued June 14, 2006), the Board concluded that to permit an amendment relating to a separate enforcement order would effectively allow an untimely appeal of that order. The Board denied the motion to amend the government estoppel defense because the requested amendment was made after the close of the hearing and to allow it would pose substantial prejudice to the Department.

The Board permitted an amendment to a notice of appeal which was filed beyond the 20-day amendment period where the Board misstated the expiration of the amendment

period in an order directing the appellants to perfect their appeal. *Devault v. DEP*, EHB Docket No. 2006-083-C (Opinion issued June 29, 2006).

Appealable Actions

A majority of the Board held that a letter from the Department which included a demand for civil penalties based upon the terms of a consent agreement constituted an appealable action in *Redbank Valley Municipal Authority v. DEP*, EHB Docket No. 2005-262-L (Adjudication issued November 9, 2006). Judge Labuskes strongly disagreed in a concurring opinion and would have held that the letter merely repeated the terms of the consent agreement and did not create any new obligations and because the appellant was not aggrieved by an action of the Department. The appeal was ultimately dismissed on the merits.

Appeals – Timeliness

In *Onyx Greentree Landfill, Inc. v. DEP*, EHB Docket No. 2006-037-K (Opinion issued June 30, 2006), the Board denied a motion to dismiss an appeal of the Department's denial of a refund petition relating to Act 90 disposal fees. The Board held that the letter which the Department contended was its final action on the permittee's petition was ambiguously worded and did not unmistakably communicate the Department's denial of the refund petition. Therefore the notice of appeal filed pursuant to a later letter of the Department was not clearly untimely as a matter of law.

The Board granted a motion to dismiss where the Department provided an affidavit stating that the compliance order was hand-delivered to the appellant 32 days before the notice of appeal was filed. The appellant failed to respond to the motion. *Tanner v. DEP*, EHB Docket No. 2005-223-R (Opinion issued July 25, 2006).

Associations

The Board concluded that a group of people associated in a common enterprise qualifies as a "person" as defined in the Board's regulations and is an entity that may pursue an appeal before the Board. The Board found that formal incorporation as an association was not necessary. *Citizen Advocates United to Safeguard the Environment v. DEP*, EHB Docket No. 2006-005-L (consolidated)(Opinion issued September 28, 2006).

Certification

The Board dismissed the appeal of the denial of the appellant's application for renewal of his wastewater treatment operator's certification by the State Board for Certification of Water and Wastewater Operators. *Alexander v. DEP*, EHB Docket No. 2005-105-K (Adjudication issued May 30, 2006). The Board found that two pleas to criminal charges related to records tampering and the appellant's negligent operation of the plant were sufficient grounds for his certification renewal request to be denied.

Enforcement

The Board assessed a civil penalty of \$20,500 in *DEP v. Hostetler*, EHB 2005-011-CP-K (Adjudication issued June 8, 2006), for violations of the Clean Streams Law connected with the defendant's timbering operation. Although in its complaint the Department only sought a penalty of \$4,500, after hearing the evidence and concluding that the defendant had flagrantly violated the law and caused damage to high quality streams, the Board exercised its authority under the Clean Streams Law to assess its own penalty.

Although the issue was waived because of the sewer authority's failure to raise the objection in its notice of appeal, the Board found that a compliance order requiring the authority to remediate manholes was reasonable and appropriate. The record of communication between the authority and the Department demonstrated that although the wording of the order may have been inartful, the authority was well aware of what it was supposed to do to remediate the malfunctioning manholes. *Bucks County Water and Sewer Authority v. DEP*, EHB Docket No. 2005-101-K (Adjudication issued April 17, 2006).

The Department may not base a civil penalty on a requirement found only in a policy manual notwithstanding the fact that parts of the manual are generally incorporated by reference into a regulation. *United Refining v. DEP*, EHB Docket No. 2006-007-L (Opinion issued November 16, 2006).

In *Snyder Brothers, Inc. v. DEP*, EHB Docket No. 2006-002-K (Opinion issued December 4, 2006), the Board denied an appellant's motion for summary judgment which sought relief from an order requiring it to perform testing on its gas well. The Board found that the Oil and Gas Act provides the Board with authority to issue such an order where the appellant's gas well was proximate to a gas explosion.

The Board granted, in part, an appeal for a compliance order which required the appellants to remove encroachments from a floodway and wetlands in *Schaffer v. DEP*, EHB Docket No. 2005-087-L (Adjudication issued December 21, 2006). The Board found that although the appellants were guilty of constructing the encroachments as charged in the Department's order, it was not reasonable to require them to remove all of the encroachments and restore all areas to their pre-construction conditions. The Board held that it was more appropriate, given the circumstances, to allow the appellants to apply for after-the-fact permits.

HSCA

The Board denied a motion for summary judgment in *DEP v. American Fuel Harvesters*, EHB Docket No. 2004-201-SA-K (Opinion issued March 1, 2006), in an action by the Department to recover interim response costs under the Hazardous Substances Control Act. The Board rejected arguments by two defendants that an alleged failure to provide notice under Section 501(e) of HSCA precluded the Department from pursuing the cost recovery action. The Board further rejected the notion that Section 1301 of HSCA creates

a requirement of initiating and completing an enforcement action against all past and subsequent owners and operators of a site as a prerequisite to a cost recovery suit.

Mining

In *Lang v. DEP*, EHB Docket No. 2003-145-R (Adjudication issued January 12, 2006),¹ the Board sustained in part and dismissed in part the appeals of landowners whose pond had been affected by mine subsidence. Specifically, the Board held since the natural recharge of the pond had not been restored that the Department properly found the mine operator liable for increased cost of operating and maintaining the pond. The Board adjusted the Department's present value calculation used to value those costs. However, the Board also concluded that the landowners failed to prove that additional repairs were necessary or that a carbon filtration dechlorination system was necessary for the pond's operation.

The Board vacated and remanded a surface mining permit in *Colbert v. DEP*, EHB Docket No. 2005-029-MG (Adjudication issued March 10, 2006), because the Department failed to perform a complete compliance review as required by Section 3308 of the Noncoal Act. The Board also found that the Department should have required the permittee to include information concerning a subcontractor who was performing mining activities on the site.

The Board granted summary judgment in *Barra v. DEP*, EHB Docket No. 2003-038-L (Opinion issued April 24, 2006), in a third-party appeal from the Department's forfeiture of surface mining bonds. The Board held that since the appellant did not challenge the Department's conclusion that the operator of the mine site had failed or refused to comply with the law and that the unchallenged facts supported that conclusion, the Department was required to forfeit the bonds.

The Board denied motions to dismiss and appeal of a waiver letter issued by the Department pursuant to regulations under the Noncoal Surface Mining Act, which purported to grant a waiver to conduct exploration activities in *Lower Milford Township v. DEP*, EHB Docket No. 2006-109-K (Opinion issued June 29, 2006). Although the opposing parties argued that a subsequent letter by the Department rescinding the waiver and the conclusion by the permittee of the activity rendered the appeal moot, the Board held that due to the short duration of the permission and activity, and the important issues of regulatory and statutory interpretation involved, the complaint was likely to evade review, and an exception to the mootness doctrine applied.

The Board dismissed an appeal from an order restricting an underground mine operator to room-and-pillar mining in one of its eleven mining panels. In *UMCO Energy, Inc. v. DEP*, EHB Docket No. 2004-245-L (Adjudication issued September 5, 2006), the Board

¹ This adjudication has been appealed to the Commonwealth Court.

held that the Department had the legal authority to prohibit longwall mining where such mining will likely cause a complete and permanent elimination of flow in a perennial stream and the appurtenant springs, seeps and wetlands.

The Board refused to dismiss an appeal from the Department's reinstatement of a special condition requiring the maintenance of a minimum stream flow in a stream affected by longwall mining. *UMCO Energy, Inc. v. DEP*, EHB Docket No. 2004-140-L (Opinion issued September 7, 2006). The Department argued that the reinstatement of the condition was merely a correction of a clerical error, therefore the Board had no jurisdiction. The Board rejected this argument and held that in matters of jurisdiction the Board would focus on objective criteria rather than the Department's institutional state of mind.

The Board dismissed an appeal from a compliance order and held that loading noncoal materials into trucks at a permitted noncoal surface mine, fits within the definition of surface mining activities. *Robachele, Inc. v. DEP*, EHB Docket No. 2005-091-L (Adjudication issued December 18, 2006). The Board also held that the fact that the appellant had permission from the permittee to load the noncoal materials was not relevant because the appellant nevertheless needed authorization from the Department.

Permits

The Board held that the Department did not exceed its authority or act unreasonably by including concentration limits in an NPDES permit, even where such limits are not explicitly required under the applicable regulations in *Shenango, Inc. v. DEP*, EHB Docket No. 2002-259-L (Opinion issued November 1, 2006). Both state and federal regulations give the Department authority to set concentration limits in addition to mass limits in NPDES permits. In this case, the Department was justified in doing so by the permittee's lack of compliance with the limitations in prior permits.

Sanctions

The Board dismissed an appeal of a surface mining permit in *Swistock v. DEP*, EHB Docket No. 2005-158-MG (Opinion issued June 29, 2006), as a sanction for failing to respond to discovery requests. The Board found that the *pro se* appellant steadfastly failed to respond to discovery requests and orders of the Board thereby evidencing a refusal to comply with the appeals process of the Board.

Similarly, the Board dismissed an appeal in *Kennedy v. DEP*, EHB Docket No. 2005-332-L (Opinion issued July 26, 2006), and also required the appellant to reimburse the Department for court reporter fees incurred when he failed to attend a deposition after being ordered by the Board to do so.

Sewage Facilities

In *Yoskowitz v. DEP*, EHB Docket No. 2003-172-C (Adjudication issued June 5, 2006), the Board dismissed an appeal from the Department's denial of a private request under the Sewage Facilities Act. Specifically, the Board found that the appellant, the owner of a gas station, automobile service facility and a convenience store, failed to adduce any evidence that the borough's official plan was inadequate to meet his sewage disposal needs.

The Board granted in part a motion for summary judgment filed by a developer in an appeal of the Department's denial of a private request. *Gilmore v. DEP*, EHB Docket No. 2005-328-L (Opinion issued September 20, 2006). The Board held that the Department failed to properly evaluate whether the private request demonstrated that the developer's sewage disposal needs were not being met by the township's current official plan. Instead the Department simply deferred to the township's conclusion that the request was inadequate because it did not include a hydrogeologic study, and did not independently decide whether such a study was a reasonable requirement under the Sewage Facilities Act and regulations.

Solid Waste

The Commonwealth Court affirmed the Board in *Berks County v. Department of Environmental Protection*, 894 A.2d 183 (Pa. Cmwlth. 2006), and held that the Department properly conducted the harms/benefits analysis required by the solid waste regulations and concluded that the environmental harms of the project were outweighed by environmental, social and economic benefits provided by the permittee. The court also concluded that the land use consistency review and other procedural and technical aspects of the Department's review were proper.

TMDL

In *Lower Salford Township Authority v. DEP*, EHB Docket No. 2005-100-K (Opinion issued September 19, 2006), the Board denied a motion for summary judgment by the Department and held that the Board has jurisdiction to consider a challenge to the Skippack Creek TMDL. The Board found that although the Environmental Protection Agency clearly was involved in the creation of the TMDL, it was not clear as a matter of law that the Department's involvement was not a state action reviewable by the Board.

Water Quality

The Board vacated and remanded an NPDES permit for a stormwater discharge related to construction of a roadway because it failed to comply with the Chapter 93 anti-degradation regulations with respect to high quality waters in *Blue Mountain Preservation Association, Inc. v. DEP*, EHB Docket No. 2005-077-K (Adjudication

issued September 7, 2006).² The Board rejected the argument that the special protection Best Management Practices in Chapter 102 erosion and sedimentation regulations incorporated the anti-degradation requirements of Chapter 94, holding that each chapter has unique requirements that must be complied with.

² This decision has been appealed to the Commonwealth Court, 1901 C.D. 2006.