



**COMMONWEALTH OF PENNSYLVANIA
BEFORE THE ENVIRONMENTAL HEARING BOARD**

SIRI LAWSON,	:	
	:	
v.	:	EHB Docket No. 2017-051-B
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HYDRO TRANSPORT LLC, Permittee, and FARMINGTON TOWNSHIP, Intervenor, and PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP SUPERVISORS, Intervenor.	: : : : : : : : : : : :	

DEPARTMENT’S MOTION TO DISMISS

AND NOW comes the Commonwealth of Pennsylvania, Department of Environmental Protection (“Department”), by and through its undersigned counsel, and moves to dismiss this appeal pursuant to 25 Pa. Code § 1021.94, because the Department’s Approval No. NW9517, which was issued to Hydro Transport, has expired and this appeal is now moot. In support of this motion, the Department avers as follows:

1. On June 8, 2017, the Department issued Approval No. NW9517 to Hydro Transport, LLC (“Hydro Transport”), for road spreading of brine for the purpose of dust control in Sugar Grove and Farmington Townships in Warren County, Pennsylvania (“Hydro’s 2017 Plan Approval”).

2. On July 6, 2017, the Appellant, Siri Lawson, filed this appeal with the Environmental Hearing Board objecting to the Department’s decision to issue Hydro’s 2017 Plan Approval.

3. Hydro’s 2017 Plan Approval provides that it “is granted on a calendar year basis and expires on December 31, 2017.” Accordingly, Hydro’s 2017 Plan Approval expired on December 31, 2017.

4. Hydro's 2017 Plan Approval is moot and nonjusticiable because Hydro's 2017 Plan Approval expired on December 31, 2017 and none of the recognized exceptions to the mootness doctrine apply.

For the foregoing reasons, the Department respectfully requests that this motion be granted and that the appeal of Siri Lawson be dismissed.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

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Date: February 12, 2018



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 DEPARTMENT OF ENVIRONMENTAL :
 PROTECTION and HYDRO TRANSPORT :
 LLC, Permittee, and FARMINGTON :
 TOWNSHIP, Intervenor, and :
 PENNSYLVANIA STATE ASSOCIATION :
 OF TOWNSHIP SUPERVISORS, Intervenor. :

ORDER

AND NOW, upon the motion to dismiss filed by the Department and for good cause being shown therefore, the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD,

STEVEN C. BECKMAN.
Judge

Dated: _____



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Department’s Motion to Dismiss and its Memorandum of Law in Support of its Motion to Dismiss, filed on this date in the above-captioned matter, are being served upon the following via Electronic Service:

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Respectfully submitted,

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DEPARTMENT OF ENVIRONMENTAL
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LLC, Permittee, and FARMINGTON	:	
TOWNSHIP, Intervenor, and	:	
PENNSYLVANIA STATE ASSOCIATION	:	
OF TOWNSHIP SUPERVISORS, Intervenor.	:	

**MEMORANDUM OF LAW IN SUPPORT
OF THE DEPARTMENT’S MOTION TO DISMISS**

AND NOW Comes the Commonwealth of Pennsylvania Department of Environmental Protection (“Department”) and files this Memorandum of Law in Support of its Motion to Dismiss in the above-captioned appeal, stating as follows:

I. INTRODUCTION

The Department moves to dismiss the present appeal as moot because the Board no longer has the ability to grant effective relief and the Appellant has been deprived of a necessary stake in the outcome.¹ The present appeal involves the Department’s written approval of a plan for spreading brine on unpaved roads for dust suppression. Specifically, Appellant challenges the Department’s Approval No. NW9517, which was issued to Hydro Transport, LLC (“Hydro Transport”) on June 8, 2017 for road spreading of brine for the purpose of dust control in Sugar

¹ The Department is aware that the argument set forth in this Memorandum of Law in Support of its Motion to Dismiss is part of the same substantive argument set forth in the Department’s Brief in Support of its Response to Appellant’s Motion for Summary Judgment. However, the Department’s Brief in Support of its Response to Appellant’s Summary Judgment does not provide the Board with the opportunity to dismiss the present appeal. As such, the Department filed the Motion to Dismiss and this Memorandum of Law in Support of its Motion to Dismiss to give the Board a vehicle to dismiss the present appeal should the Board agree with the Department that the present appeal is moot.

Grove and Farmington Townships in Warren County, Pennsylvania (“Hydro’s 2017 Plan Approval”).

II. ARGUMENT

A. Standard for a Motion to Dismiss

The Board is receptive to a motion to dismiss where there are no material facts in dispute and where the moving party is entitled to judgment as a matter of law. *Boinovych v. DEP*, 2015 EHB 566; *City Brockley v. DEP*, 2015 EHB 198; *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1282. The Board will evaluate a motion to dismiss in the light most favorable to the nonmoving party and will only grant the motion where the moving party is entitled to judgment as a matter of law. *Id.*

A motion to dismiss is appropriate where a party objects to the Board hearing an appeal because of a lack of jurisdiction, some issue of justiciability, or another preliminary concern. *Consol Pennsylvania Coal Company v. DEP*, 2015 EHB 48, 54. Mootness is a prudential limitation related to justiciability. *M&M Stone v. DEP*, 2009 EHB 495, 500. Absent exceptional circumstances, the Board will ordinarily dismiss an appeal when the authorization under appeal is no longer viable. *Id.*

B. Hydro’s 2017 Plan Approval Expired and is No Longer Viable

An appeal should be dismissed as moot when an event occurs that deprives the Board of the ability to grant effective relief or when the appellant has been deprived of a necessary stake in the outcome. *M&M Stone v. DEP*, 2009 EHB 495, 499 (citing *Horsehead Res. Dev. Co. v. Dep’t of Env’tl. Prot.*, 780 A.2d 856 (Pa. Cmwlth. 2001), *appeal denied*, 796 A.2d 987 (Pa. 2002)); *see also Morris Twp. v. DEP*, 2006 EHB 55, 56. This Board has dismissed appeals as

moot where the permit or approval under appeal expired by its terms, thus depriving the Board of the ability to grant relief based on that permit or approval. *M&M Stone*, 2009 EHB at 498-501 (dismissing appeal from the Department’s rescission of a temporary authorization to discharge water as moot because the authorization expired by its own terms and as a matter of law); *Kutsey v. DEP*, 1997 EHB 129, 133 (dismissing appeal of an explosives permit for mining as moot where the permit expired by its own terms and by operation of law); *CPM Energy Systems, Inc. v. DEP*, 1996 EHB 689, 693 (dismissing appeal where the permit upon which the appeals of two Department enforcement orders were based had expired by operation of law).

Hydro’s 2017 Plan Approval provides that it “is granted on a calendar year basis and expires on December 31, 2017.” It is thus undisputed that Hydro’s 2017 Plan Approval has expired. Simply put, Appellant seeks the Board’s revocation of an approval that no longer exists. Therefore, the Board lacks the ability to provide the Appellant with the relief she requests, *i.e.*, to vacate Hydro’s 2017 Plan Approval. See *Silver Spring Twp. v. Dep’t of Env’tl. Prot.*, 368 A.2d 866, 868 (Pa. Cmwlth. 1977) (holding that the Board had no authority to retroactively alter or abolish a temporary variance that had expired). Given these facts, it would be a purely academic exercise for the Board to hold a hearing and issue an adjudication on this appeal. *Horsehead Res. Dev. Co.*, 780 A.2d at 858 (ruling on a vacated DEP order “would be a useless exercise, a matter of, at best, academic, historical significance”) (citations omitted); *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1124 (“Board review is unnecessary and inappropriate in academic disputes.”).

C. None of the Recognized Exceptions to the Mootness Doctrine Apply to this Appeal.

While the Board has recognized narrow exceptions to the mootness doctrine, none of those exceptions apply to the present appeal. The Board may adjudicate an otherwise moot case

where: 1) the disputed conduct is capable of repetition yet likely to evade review; 2) the case involves issues important to the public interest; or 3) a party will suffer some detriment without a Board decision. *Sierra Club v. Pennsylvania Pub. Util. Comm'n*, 702 A.2d 1131, 1134 (Pa. Cmwlth. 1997), *aff'd*, 731 A.2d 133 (Pa. 1999); *Lower Milford Twp. v. DEP*, 2006 EHB 387, 394-95. None of these exceptions, which apply only in exceptional circumstances, apply to Appellant's appeal from Hydro's 2017 Plan Approval. *See M&M Stone*, 2009 EHB at 500 ("Absent exceptional circumstances, however, we will ordinarily dismiss an appeal when the permit being appealed is no long[er] viable.") (citations omitted).

First, the Department determination at issue in this appeal will not recur without a suitable opportunity for review. Specifically, the Department acknowledges that the brine described in Hydro's 2017 Plan Approval is a residual waste that the Department cannot authorize to be disposed or beneficially used under the Solid Waste Management Act without a permit. The Department disagrees with Appellant's position that the Department is required to issue a general permit for the road spreading of brine in every possible scenario. However, the Department affirms that issuing a brine spreading plan approval to Hydro Transport in the future under the present facts would be not be authorized under the Solid Waste Management Act. Therefore, the Department decision subject of this appeal will not recur. Further, even if the Department were to issue a brine spreading approval in the future, Appellant retains her right of appeal.

Where the Department has expressly disavowed the action under appeal, the Board has not hesitated to apply the mootness doctrine. *See, e.g., Delaware Riverkeeper v. DEP*, 2012 EHB 215, 216-17 (dismissing appeal as moot where the Department revoked the permit under appeal); *Cromwell Twp. v. DEP*, 2007 EHB 8, 12 (dismissing appeal from a Department

approval of a township's Act 537 plan amendment as moot where the Department issued a letter rescinding the approval and reinstating the township's former plan); *Borough of Edinboro v. DEP*, 2000 EHB 1067, 1067-68 (appeal rendered moot where the Department issued a letter expressly withdrawing a previously-issued letter that formed the basis of the appeal); *compare ELG Metals v. DEP*, 2011 EHB 741, 747-48 (holding that the appeal of an administrative order involved an issue that was capable of repetition yet likely to evade review where the Department withdrew the order without clearing the appellant of any wrongdoing). The Department cannot now take affirmative action to revoke Hydro's 2017 Plan Approval because, as described above, it has expired. Nevertheless, the Department repudiates its authorization under the Solid Waste Management Act based on the specific facts of Hydro's 2017 Plan Approval and it is not capable of repetition.

In addition, Appellant's appeal of Hydro's 2017 Plan Approval does not fall within the rare class of cases that satisfy the "matter of great public importance" exception to the mootness doctrine. *See Consol Pennsylvania Coal Co. v. DEP*, 2015 EHB 48, 63 (noting that "courts have rarely applied the public importance exception to the mootness doctrine") (citation omitted); *Tinicum v. DEP*, 2003 EHB 493, 497 ("The public interest exception is granted only in rare circumstances.") (citation omitted). As this Board held in *Consol Pennsylvania Coal Co.*, a claim does not fall under this exception to the mootness doctrine simply because the challenged action involves an allegation that the Department acted in a manner exceeding its lawful authority. *Consol Pennsylvania Coal Co.*, 2015 EHB at 64. Nearly every appeal filed with the Board contains such an allegation and such a broad exception would completely swallow the mootness doctrine. *Id.* Appellant's appeal is based on the Department exceeding its lawful authority in issuing Hydro's 2017 Plan Approval, which the Department concedes as it relates to

the Solid Waste Management Act and the specific facts of this case. Given the Department's concession and the facts of this appeal, this is not a matter of great public importance necessary for the Board to allow an otherwise moot appeal to proceed.

Finally, refusing to hear this appeal as moot will place Appellant in no worse position than she would be in if her appeal was sustained. As explained more fully in the Department's Brief in Support of its Response to Appellant's Motion for Summary Judgment, the only relief this Board could provide Appellant is to vacate Hydro's 2017 Plan Approval. Because the Approval has expired, and because the Department has affirmed that future approvals under these same facts are beyond its authority under the Solid Waste Management Act, Appellant has obtained precisely the relief to which she would be entitled had she prevailed. *See Broad Top Twp. v. DEP*, 2004 EHB 500, 505 ("Aside from a declaration by the Board that DEP's [permit provision] was unlawful, Appellant has already obtained precisely the relief to which it would be entitled had it prevailed in this appeal[.]"). Accordingly, Appellant will not suffer a detriment if this Board declines to address the issues because her appeal is moot.

III. CONCLUSION

For all the foregoing reasons, the present appeal is moot and none of the exceptions to the mootness doctrine apply. Accordingly, the Department respectfully requests that the Board dismiss the present appeal.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA,
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