



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SIRI LAWSON	:	
	:	
v.	:	EHB Docket No. 2017-051-B
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	Issued: May 17, 2018
PROTECTION and HYDRO TRANSPORT	:	
LLC, Permittee, and FARMINGTON	:	
TOWNSHIP, Intervenor, and	:	
PENNSYLVANIA STATE ASSOCIATION	:	
OF TOWNSHIP SUPERVISORS, Intervenor	:	

**OPINION AND ORDER ON
DEPARTMENT’S MOTION TO DISMISS**

By Steven C. Beckman, Judge

Synopsis

The Board dismisses as moot an appeal of a brine spreading plan approval where the plan approval has expired and there is no exception to the mootness doctrine under the unique circumstances of this case. The Department conceded in its Motion to Dismiss that the plan approval was not issued in accordance with the Solid Waste Management Act.

OPINION

Background

On July 6, 2017, Siri Lawson filed a Notice of Appeal appealing the Department of Environmental Protection’s (“Department”) decision to grant Approval No. NW9517 to Hydro Transport LLC (“Hydro Transport”) authorizing brine spreading in Sugar Grove and Farmington Townships in Warren County (“Plan Approval”). Hydro Transport is engaged in providing services for the oil and gas industry, including but not limited to hauling and spreading of brine. In her Notice of Appeal Ms. Lawson contends as follows: 1) the Plan Approval constitutes an

approved discharge of an industrial waste that contributes to or creates a danger of pollution to waters of the Commonwealth; 2) the Plan Approval fails to impose adequate operating requirements to protect waters of the Commonwealth or prevent the deterioration of air quality in violation of Article 1, Section 27 of the Pennsylvania Constitution; 3) the Plan Approval is a violation of the Clean Streams Law and the Solid Waste Management Act; and 4) the Department lacks authority to grant approval for road spreading plans. The Board has granted two petitions to intervene in this appeal allowing Farmington Township and the Pennsylvania State Association of Township Supervisors (“PSATS”) to directly participate in this case.

Pending in this matter is a Summary Judgment Motion filed by Ms. Lawson on January 12, 2018 (“Lawson Motion”), a Joint Cross Motion for Summary Judgement filed by Hydro Transport and intervenors Farmington Township and PSATS on February 12, 2018 (“Hydro Transport Cross Motion”), and a Motion to Dismiss filed by the Department on February 12, 2018 (“Department Motion”). At this juncture all responses and replies have been filed in relation to the various motions and they are ripe for a decision. We will start by addressing the Department Motion. As will become apparent, our resolution of the Department Motion eliminates the need for the Board to rule on the Lawson Motion and the Hydro Transport Cross Motion.

Standard

A motion to dismiss is appropriate where a party objects to the Board hearing an appeal because of a lack of jurisdiction, an issue of justiciability, or another preliminary concern. *Consol Pa. Coal Company, Inc. v. DEP*, 2015 EHB 48, 54. The Board evaluates a motion to dismiss in the light most favorable to the non-moving party and will only grant the motion where the moving party is entitled to judgment as a matter of law. *Burrows v. DEP*, 2000 EHB 20, 22.

Rather than comb through the parties' filings for factual disputes, for the purposes of resolving motions to dismiss, we accept the non-moving party's version of events as true. *Consol*, 2015 EHB at 54, citing *Ehmann v. DEP*, 2008 EHB 386, 390.

"Mootness is a prudential limitation related to justiciability," and so is generally an issue that is properly resolved by a motion to dismiss. *M & M Stone Co. v. DEP*, 2009 EHB 495, 500. "A matter before the Board becomes moot when an event occurs which deprives the Board of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome." *Horsehead Res. Dev. Co. v. DEP*, 1998 EHB 1101, 1103, *aff'd*, 780 A.2d 856 (Pa. Cmwlth. 2001). There are exceptions to mootness under certain exceptional circumstances. Examples of exceptional circumstances that may overcome mootness include where the action complained of is capable of repetition but likely to evade review, where issues of great public importance are involved, or where a party will suffer a detriment without a decision by the Board. *Consol*, 2015 EHB at 56. The existence of any of these circumstances "may justify" the Board retaining jurisdiction of the matter. *Id.* citing *Ehmann*, 2008 EHB at 390.

Discussion

The Department Motion argues that the Board should dismiss Ms. Lawson's appeal of the Plan Approval as moot. There is no dispute between Ms. Lawson, the Department and the other parties concerning the key fact on this point. The Plan Approval expired by its own terms on December 31, 2017. At this point, therefore, the Plan Approval is no longer valid and Hydro Transport is not authorized to conduct any further brine spreading pursuant to the Plan Approval. The Department argues that because the Plan Approval has expired, the Board lacks the ability to grant the relief requested by Ms. Lawson and any effort by the Board to hold a hearing and issue an adjudication would be purely an academic exercise. Ms. Lawson acknowledges that the Plan

Approval has expired but asserts that the Board can still provide effective relief “because the Board may still make a ruling on the legality of the Department’s actions.” (Appellant’s Brief in Support of Her Response to Department’s Motion to Dismiss, p. 3). She states that she continues to oppose the spreading of brine in her community and notes that plan approvals are consistently issued on a yearly basis and it is likely that someone will seek brine spreading approval in Farmington Township for 2018.

We find that this appeal is moot because we cannot grant effective relief to the specific action that is being appealed, the issuance of the Plan Approval to Hydro Transport. The Board has previously held that an appeal is moot where the authorization expired by its own terms and as a matter of law the Board can offer no further relief to the appellant. *M & M Stone Co.*, 2009 EHB at 499. At the same time, it is also true that the rescission of a Department action will not always moot an appeal where, for example, concrete continuing obligations exist. *Consol*, 2015 EHB at 55. No party asserts that Hydro Transport has any continuing obligations under the Plan Approval and we see none based on our review. Absent exceptional circumstances we will ordinarily dismiss an appeal when the permit being appealed is no longer viable. *Id.* at 500. Similarly in *Solebury Township v. DEP*, 2004 EHB 23, the Board dismissed the appeal as moot holding that “delving into whether the granting of a now rescinded and gone Section 401 Certification had been granted erroneously in the first place would be a quintessential academic exercise and any opinion issued would be nothing more than an advisory opinion.” *Solebury*, 2004 EHB at 34. *See also Borough of Kutztown v. DEP*, 2004 EHB 1115, 1124 (“At the most basic level, the requirement that a Departmental action be an ‘action or an adjudication’ before this Board may get involved is based on the principle that Board review is unnecessary and inappropriate in academic disputes or in cases where a person does not have anything at stake.”).

Any Board ruling on the Department's issuance of the now expired Plan Approval to Hydro Transport would be nothing more than advisory. As explained in *Winegardner v. DEP*, 2002 EHB 790, "Our role is necessarily circumscribed by the Departmental action that has been appealed. 35 P.S. § 7514 ... Our responsibility is limited to reviewing the propriety of *that action*." (emphasis in original). The Board cannot vacate or remand the Plan Approval back to the Department and thus there is no effective relief that the Board can provide to Ms. Lawson on the Department action challenged in this matter.

We now turn to the next issue. Having determined that Ms. Lawson's appeal is moot "the question becomes whether it is appropriate to allow the appeal to go forward because of exceptional circumstances." *Consol*, 2015 EHB at 61. Ms. Lawson argues that exceptional circumstances exist in this case because the Department's action, the approval of brine spreading, is capable of repetition but will evade review.¹ Ms. Lawson points out that because the Plan Approval is an annual approval, the appeal process in front of the Board is likely to routinely extend beyond the term of the Plan Approval, leading to a recurring claim of mootness. She notes two prior Board decisions addressing the appeal of annual permits in support of her position. See *Harriman Coal Co. v. DEP*, 2000 EHB 1170 (noting that where the Department's permit renewal is on an annual basis, "it is doubtful whether the Board could review challenges" to conditions within the annual permit); *Keystone Mining Co., Inc. v. DER*, 1985 EHB 542 (holding that an appeal of an annual surface mining license was not moot even after the year for which the license was requested had passed). Ms. Lawson argues that if the Board refuses to hear appeals of annual permits and approvals after the approval has expired, this class of permits and approvals would consistently evade our review.

¹ Ms. Lawson did not argue that any other possible exceptions to the mootness doctrine applied to her situation so the Board will not concern itself with reviewing them.

We agree with Ms. Lawson that annual approvals may evade our review if we were to routinely find that challenges to these types of approvals were moot. That concern regarding the Plan Approval in this case would be persuasive under routine circumstances. However, in addition to the concern about evading review, our jurisprudence requires that the Department action being challenged also be capable of repetition. In a rather unusual concession on its part, the Department states,

“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 affirms that issuing a brine spreading plan approval to Hydro Transport in the future under the present facts would not be authorized under the Solid Waste Management Act. Therefore, the Department decision subject of this appeal will not recur. ... [t]he Department repudiates its authorization under the Solid Waste Management Act based on the specific facts of Hydro’s 2017 Plan Approval.”

(Memorandum of Law in Support of the Department’s Motion to Dismiss, p. 4-5) Further the Department states that “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.” (Memorandum of Law, p 5-6).²

² In further related filings in this case, the Department states “the Department admits that the brine authorized for spreading under the Department’s Approval No. NW9517, issued to Hydro Transport, LLC on June 8, 2017 (“Hydro’s 2017 Plan Approval”), is a residual waste as defined by the Solid Waste Management Act, 35 P.S. § 6018.103, and its residual waste regulations.” (The Department’s Response to Appellant’s Statement of Undisputed Material Facts, No. 2, pg. 1) and “the Department agrees that, under the particular facts of this case, Hydro’s 2017 Plan Approval was not properly issued to Hydro Transport under the authority of the Solid Waste Management Act. Specifically, the Department agrees the brine authorized for spreading under Hydro’s 2017 Plan Approval is a residual waste under the Solid Waste Management Act and that the placement of that brine on unpaved roads as approved by the Department under Hydro’s 2017 Plan Approval must be authorized under the Solid Waste Management Act and residual waste regulations. See 35 P.S. § 6018.103.” (Brief of the Department in Support of its Response to Appellant’s Motion for Summary Judgment, p. 3).

Ms. Lawson argues that despite the Department's apparent agreement with her that the brine in question is a residual waste and that it was improper for the Department to authorize its spreading under the Solid Waste Management Act, the Department does not go far enough in disavowing brine spreading. Ms. Lawson discusses other current brine spreading approvals as well as speculative future brine spreading plan approvals and other hypothetical authorizations and scenarios surrounding the Department's permitting of brine spreading including the use of individual permits, re-categorizing brine, and discharge by operators, none of which are at issue in the Plan Approval under appeal. The Board has stated that "we do not believe that speculation about a hypothetical future action of the Department, which may or may not be lawful, creates the type of exceptional circumstance that warrants overcoming a finding of mootness." *Consol*, 2015 EHB at 61. We do not believe that it would be proper to continue this matter challenging a particular Department action because of Ms. Lawson's generalized opposition to the practice of brine spreading. The Department has conceded that it improperly issued the Plan Approval challenged by Ms. Lawson in this action, and it is not likely that the Department's improper action will be or is capable of being repeated. Ms. Lawson has, for all practical purposes, received the relief that she would be entitled to if she prevailed on the Lawson Motion or following a hearing in this matter.³ Based on the foregoing, we have determined that Ms. Lawson's appeal is moot and the exception to mootness asserted by Ms. Lawson does not apply. Therefore, we will grant the Department's Motion to Dismiss.⁴

³ In the Lawson Motion, Ms. Lawson requested four items of relief, only one of which was directed at the Plan Approval. She requested that the Plan Approval be vacated as issued in violation of the Solid Waste Management Act and Article 1, Section 27 of the Pennsylvania Constitution. The three remaining requests for relief are arguably requests for injunctive and/or equitable relief and beyond the Board's authority. (Lawson Motion, p. 1-2)

⁴ Because we are granting the Department's Motion and dismissing this matter, we do not need to rule on the Lawson Motion or the Hydro Transport Cross Motion.



Accordingly, we issue the following Order.



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TOWNSHIP, Intervenor, and :
PENNSYLVANIA STATE ASSOCIATION :
OF TOWNSHIP SUPERVISORS, Intervenor :

ORDER

AND NOW, this 17th day of May, 2018, it is hereby ordered that the Department’s Motion to Dismiss is **GRANTED** and the Appeal of Siri Lawson is **dismissed**.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: May 17, 2018

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