REV. DR. W. BRAXTON COOLEY, SR., CHARLES CHIVIS, DIANE WHITE, WENDI J. TAYLOR, EVELYN WARFIELD, & FRANK DIVONZO	:	
v.	:	**EHB Docket No. 2003-246-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION & THE HARRISBURG AUTHORITY, Permittee	:	**Issued: September 15, 2005**

OPINION AND ORDER GRANTING JOINT MOTION FOR SUMMARY JUDGMENT OF THE PERMITTEE AND THE DEPARTMENT AND DENYING APPELLANTS' DISPOSITIVE MOTION TO RESCIND PLAN APPROVAL

By Michael L. Krancer, Chief Judge and Chairman

Synopsis:

The Department's and the Permittee's Joint Motion for Summary Judgment is granted and this appeal is dismissed as moot. Appellants filed this appeal challenging the Department's issuance of Air Pollution Control Act Plan Approval No. 22-05007A on September 10, 2003. Shortly after this appeal was filed, the Permittee submitted an application to modify the plan approval, which the Department treated as an application for a new plan approval. When the second plan approval subsequently was issued it superseded the first plan approval which is the subject of this appeal. Appellants did not file an appeal challenging the issuance of the second plan approval. Appellants' appeal of the first plan approval does not cover the second plan approval. In order to have challenged the second plan approval, Appellants needed to have filed

an appeal from the issuance of the second plan approval. They did not do so and we cannot grant meaningful or effective relief to Appellants with regard to the extant plan approval by issuing a ruling on the now defunct first plan approval.

I. Factual and Procedural Background

The Parties and Facility

Currently before the Board are the parties' cross motions for summary judgment. This appeal was filed by six individuals (Appellants) who reside in general proximity to the Harrisburg Materials, Energy, Recycling and Resource Facility (HMERRF or Facility), a waste-to-energy facility located in Harrisburg and owned by the Harrisburg Authority (Authority or Permittee).[1] The Facility is located at 1670 South 19th Street, Harrisburg, Pennsylvania and is part of the Authority's integrated waste management system, which includes the HMERRF, a transfer station and a landfill. Joint List of Stipulated Facts (Stipulated Facts) B.8.[2] The Department of Environmental Protection (Department or DEP) is the state administrative agency with responsibilities that include, *inter alia*, the permitting of solid waste disposal facilities, including landfills, transfer stations and resource recovery facilities, in the Commonwealth. Stipulated Facts B.7.

The HMERRF was built by the City of Harrisburg and commenced operation in 1972. Affidavit of Thomas J. Mealy, Executive Director of The Harrisburg Authority (Mealy Affidavit) ¶ 4. The City sold the HMERRF and an adjacent landfill to the Authority in

[1] The Authority is a municipal authority created pursuant to the Municipalities Authorities Act, 53 Pa.C.S. §§ 5601-5623.

[2] On May 13, 2005 counsel for Appellants filed the parties' Joint List of Stipulated Facts. The document contains two headings: "I. List of Stipulated Facts Based on Appellants' Proposals" followed by 41 facts numbered, but not numbered consecutively; and B. List Proposed By Pennsylvania Department of Environmental Protection Agency and the Harrisburg Authority" followed by 64 facts, also numbered, but not consecutively. We will cite to the stipulated facts using the heading designation and number given the fact by the parties in the filing despite the unusual heading and numbering nomenclature in the document.

December 1993, Stipulated Facts ¶ 6, but remained the operator of the Facility pursuant to an agreement with the Authority. *Id.* ¶ 7.[3]

In August 1998, the operating permit for the HMERRF was modified to allow the HMERRF to be retrofitted to comply with the Clean Air Act regulations for municipal waste combustors or, after December 19, 2000, to be operated as "de-rated units." Stipulated Facts B.24. In January 2001 the Authority and the Department and the United States Environmental Protection Agency (EPA) entered into consent decrees pursuant to which the Authority operated the HMERRF as a de-rated facility until June 18, 2003 and agreed to cease operation of the HMERRF on June 18, 2003 and not to re-open the HMERRF until it had retrofitted and substantially upgraded the HMERRF to comply with the new Clean Air Act regulations. Stipulated Facts B.26. Operation of the HMERRF ceased on June 18, 2003. Mealy Affidavit ¶ 8.

First Plan Approval Process

On May 17, 2002, the Authority filed a plan approval application for the retrofit and substantial upgrade of the HMERRF (First Plan Approval Application). Stipulated Facts I.5, B.59. On June 6, 2002, the Department published notice in the *Pennsylvania Bulletin* that the First Plan Approval Application had been received and notified the Authority that the application was determined to be administratively complete. Stipulated Facts B.60. Following discussions between EPA and the Department, it was determined that the federal regulations on New Source Performance Standards for Large Municipal Waste Combustors applied to review of the First Plan Approval Application. Mealy Affidavit ¶ 29. Pursuant to the federal regulations, 40 C.F.R.

[3] The Harrisburg City Council approved a guaranty of the financing to retrofit the Facility by a 6-1 vote by the 7 members of the City Council, all of whom are African-American. Stipulated Facts. B.54.

§ 60.51b, the Authority prepared a Materials Separation Plan (MSP) and a Siting Analysis.[4] The Authority submitted the preliminary draft MSP for public comment and held a public hearing on the draft MSP. Mealy Affidavit ¶ 30. Following the pubic hearing, the Authority published responses to the comments received and a final draft MSP and noticed and conducted a public hearing on the final draft MSP. Mealy Affidavit ¶ 31.

DEP also provided public notice of the First Plan Approval Application and conducted public hearings. Plain language notices of a public hearing regarding the First Plan Approval Application to be held on June 10, 2003 were published in the *Harrisburg Patriot News* on May 22, 2003 and June 3, 2003. Stipulated Facts B.74. Several of the Appellants attended and spoke at the June 10, 2003 public hearing. Stipulated Facts B.66. On June 14, 2003, four days after the public hearing on the First Plan Approval Application, DEP published notice in the *Pennsylvania Bulletin* of its Proposed Determination to Issue Plan Approval (First Proposed Determination). Stipulated Facts B.67. On July 9, 2003 the Department held a public hearing regarding the First Proposed Determination and several of the Appellants attended and spoke at that public hearing. Stipulated Facts B.68. Comments regarding the First Proposed Determination were accepted until July 19, 2003, Stipulated Facts B.69, and a comment response document was issued by the Department in September 2003 responding to the comments received at the July 9, 2003 public hearing and to comments which had been received in writing thereafter. *Id.* B.70.

On September 10, 2003, DEP issued an Air Pollution Control Act Plan Approval designated Plan Approval No. 22-05007A (First Plan Approval) to the Authority covering the Facility, Stipulated Facts I.10, B.76, B.78, and published notice of issuance of the First Plan

[4] An MSP is a "plan that identifies both a goal and an approach to separate certain components of municipal solid waste for a given service area in order to make the separated materials available for recycling." 40 C.F.R. § 60.51b. A siting analysis is "an analysis of the impact of the affected facility on ambient air quality, visibility, soils, and vegetation." *Id.* § 60.57b(b)(1).

Approval in the *Pennsylvania Bulletin* on September 27, 2003. *Id.* B.78. The First Plan Approval authorized construction of two municipal waste combustion units each with a capacity of 400 tons of waste per day, for a total design capacity of 800 tons of waste per day. Stipulated Facts I.10, B.77.

At the time of issuing the First Plan Approval, DEP was aware that the $PM_{2.5}$ 3-year ambient annual average concentration in Dauphin County exceeded 15.0 μg/m³. Stipulated Facts I.11. Operation of the municipal waste incinerators covered by the First Plan Approval would emit $PM_{2.5}$ particulate matter and $PM_{2.5}$ precursors into the environment. *Id.* I.15. The First Plan Approval did not include any specification or conditions related to $PM_{2.5}$, Stipulated Facts I.12, and did not include any limitation on emission of $PM_{2.5}$. *Id.* I.19. The First Plan Approval did not condition operation of the incinerator on prior acquisition of PM $_{2.5}$ emission offsets. *Id.* I.18.

On October 10, 2003 Appellants filed a *pro se* appeal challenging the issuance of the First Plan Approval. Stipulated Facts I.20, B.84.[5] The Notice of Appeal (NOA) specified two grounds for appeal as follows:

> (1) The Department issued the permit without making any investigation regarding possible violations of the Civil Rights Act of 1964, Title VI, Section 601, 42 U.S.C. § 2000d as it is required to do. The Department is the recipient of federal financial resources from the [EPA] which requires the Department to prevent racial discrimination.
>
> (2) In granting the permit, the Department failed to give any consideration to the emission of PM $_{2.5}$ and the amount of PM $_{2.5}$ in the ambient air.

Notice of Appeal ¶ 3; Stipulated Facts I.20.

[5] From October 2003 until April 2004 the appeal lay dormant while Appellants attempted to secure *pro bono* representation. On December 9, 2003, the Board entered an order extending fact discovery to March 19, 2004 and expert discovery until April 16, 2004. None of the parties undertook discovery during either the original or the extended discovery period. On April 5, 2004, counsel entered an appearance on behalf of Appellants.

Second Plan Approval Process

On October 27, 2003, the Authority filed what it characterized as an application for a modification of the First Plan Approval. The application requested that the Department approve installation of three 266 ton per day units instead of the two 400 ton per day units previously approved. Stipulation of Facts I.22, B.86. The Department, however, treated the submission as an application for a new plan approval, not as an application for an amendment or modification of the First Plan Approval. Affidavit of Leif Ericson, Air Quality Program, Southcentral Region of DEP (Ericson Affidavit) ¶ 21; Mealy Affidavit ¶ 52. The Department immediately notified the Authority that the application would be treated as an application for a new plan approval and would require that the Authority conduct new meetings and hearing, prepare a revised siting analysis and comply with other requirements applicable to new plan approval applications. Mealy Affidavit ¶ 52. The Authority objected to the Department's treatment of this application as one for a new plan approval, but it complied with DEP's decision, including paying the application fee for a new plan approval application. Mealy Affidavit ¶ 53.

Because the application was considered one for a new plan approval, the Department required that the Authority provide a new and updated air modeling analysis for purpose of considering the application. Ericson Affidavit ¶ 24. Likewise, the Department required the Authority to prepare a new, updated siting analysis. Ericson Affidavit ¶ 23. Accordingly, in November 2003, the Authority published a "Revised Siting Analysis," submitted it for public comment and noticed a public hearing regarding the document for January 5, 2004. Stipulated Facts B.99. On December 3, 2003, the Department's Environmental Advocate held a public meeting on the Authority's Second Plan Approval Application during which members of the public attended and commented on the application. Stipulated Facts B.100. On December 6,

2003, the Department published notice in the *Pennsylvania Bulletin* regarding its intent to approve the application. Stipulated Facts B.101. The Department and its Environmental Advocate noticed and held a public hearing on January 13, 2004 regarding the Department's proposed approval of the application. Stipulated Facts I.30, B.102. Two of the Appellants submitted written comments regarding the application. Stipulated Facts B.102.

On February 5, 2004, DEP approved the application by issuing Air Pollution Control Act Plan Approval No. 22-05007B (Second Plan Approval) to the Authority covering the Facility, Stipulated Facts I.34, B.105, and published notice of issuance of the Second Plan Approval in the *Pennsylvania Bulletin* on February 21, 2004. *Id.* B.108. The Second Plan Approval authorized the construction of 3 266 ton per day combustion units rather than the 2 400 ton per day units. Stipulated Facts I.30, B.105. Appellants filed no appeal from the Second Plan Approval Application.

During its consideration of the application which resulted in issuance of the Second Plan Approval Application, DEP was aware of the appeal filed by Appellants challenging the First Plan Approval. Stipulated Facts. I.23, I.32. Before issuing the Second Plan Approval DEP personnel from the Central Office and the Southcentral Office discussed the $PM_{2.5}$ issue, Stipulated Facts I. 25, but the Central Office personnel did not require the inclusion of a specific $PM_{2.5}$ limitation in the Second Plan Approval. *Id.* I.26. At the time of issuing the Second Plan Approval DEP was aware that the average annual ambient $PM_{2.5}$ for Dauphin County exceeded 15,0 $\mu g/m^3$. Stipulated Facts I.33. The Second Plan Approval did not include any specification or conditions related to $PM_{2.5}$ nor any limitation on emission of $PM_{2.5}$ from the Facility. Stipulated Facts I.35, I.36. DEP conditioned both the First Plan Approval and the Second Plan Approval on Pennsylvania's "Best Available Technology" Standard as well as the EPA New

Source Performance Standard established in 40 C.F.R. Part 60, Subpart Eb. Stipulated Facts B.119. EPA's New Source Performance Standards do not include a numeric standard for $PM_{2.5}$. Stipulated Facts B.140. Under the Clean Air Act, the Department has until April 5, 2008 to develop a statewide implementation plan that contains both a plan, emission inventory and regulations to deal with $PM_{2.5}$. Stipulated Facts B.187.

Counsel for the Authority provided notice of the issuance of the Second Plan Approval directly to Appellants, Stipulated Facts B.106, and he even went so far as to recommend that, in order to sustain their appeal of the First Plan Approval, Appellants would have to appeal the Second Plan Approval. *Id.* B.107. As noted, Appellants did not file an appeal challenging the Department's issuance of the Second Plan Approval. Appellants' Memorandum in Support of its Dispositive Motion to Rescind Plan Approval No. 22-05007B at 2.

The Department and the Authority have filed a Joint Motion for Summary Judgment with supporting exhibits and affidavits (Appellees' Motion), a joint memorandum supporting their motion, a joint brief opposing Appellants' Motion and a joint surreply brief. Appellants have filed what they labeled a Dispositive Motion to Rescind Plan Approval No. 22-05007B with exhibits (Appellant's Motion), a memorandum supporting their motion, a memorandum opposing Appellees' Motion with exhibits and a reply to the joint reply brief filed by Appellees.

Appellees' Motion raises six bases for their request that the Board dismiss this appeal:

A. Appellants have failed to develop facts on the record to support either of the two claims raised in the NOA;
B. This Board lacks jurisdiction to hear either of Appellants' claims because they are based on federal statutes that provide for exclusive federal jurisdiction or if jurisdiction exists, this Board should decline to exercise jurisdiction because the claims are based on federal statutes;
C. The Appellants have no evidence to establish a federal civil rights claim under § 601 of Title VI of the Civil Rights Act of 1964 because there is no proof of intentional discrimination by the Department;

D. Appellants cannot establish their $PM_{2.5}$ claim as a matter of law because DEP had no ability or authority to impose a $PM_{2.5}$ limitation or criteria in the First Plan Approval or the Second Plan Approval since the EPA has not developed regulations for the criteria pollutant of $PM_{2.5}$;

E. The appeal as it applies to the First Plan Approval should be dismissed as moot because the Second Plan Approval superseded the First Plan Approval and, thus, there is no meaningful relief which the Board can grant; and

F. The Second Plan Approval was not appealed, thus is insulated from any attack by the doctrine of administrative finality.

Appellees had raised many of these same challenges to the viability of the Appellants' appeal in a Joint Motion to Dismiss, which we denied on July 16, 2004. *Cooley v. DEP*, 2004 EHB 554 (Motion to Dismiss Opinion). In that Motion, Appellees urged dismissal on the basis of: (1) mootness/administrative finality; (2) lack of standing of Appellants; (3) inability of Appellants to show intentional discrimination; and (4) lack of a legal requirement to include in the permit a condition specifically limiting emission of $PM_{2.5}$. We found that all four of these challenges required the development of a factual record and we denied the Motion. The parties have conducted discovery and Appellees seek a ruling on the issues it raises in its Motion for Summary Judgment based upon the more developed factual record that now exists.

Appellants not only oppose dismissal of the appeal as requested in the Appellees' Motion, Appellants through their Motion, seek an order rescinding the Second Plan Approval based on the alleged failure of the Department to conduct an investigation of the civil rights impact of the Second Plan Approval and the failure of the Department to include a $PM_{2.5}$ emission limitation or other condition in the Second Plan Approval despite knowing the location of the Facility was in a nonattainment area and the Facility would emit $PM_{2.5}$.

This Opinion and Order resolves both pending motions.

II. Standard of Review

Motions for summary judgment before the Board must conform to and are governed by Pennsylvania Rules of Civil Procedure 1035.1-1035.5. 25 Pa. Code § 1021.94. Under the Pennsylvania Rules of Civil Procedure, we may grant summary judgment if the record, which consists of the pleadings, depositions, answers to interrogatories, admissions, affidavits and signed expert reports, Pa.R.C.P. 1035.1, shows "there is no genuine issue of any material fact as to a necessary element of the cause of action or defense[.]" Pa.R.C.P. 1035.2. Also, when evaluating a motion for summary judgment, the Board views the record in a light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Holbert v. DEP*, 2000 EHB 796, 808.

III. Discussion

The last two issues raised by Appellees, mootness and administrative finality, are actually threshold issues because they deal with whether the appeal is viable *ad initio*. When we examined these questions at the Motion to Dismiss stage before discovery and with no factual record we found that we could not conclusively resolve the question of the relationship, if any, between the First Plan Approval and the Second Plan Approval. *Cooley v. DEP, 2004 EHB 554,* 564-66. As we noted in our Motion to Dismiss Opinion:

> There does not seem to be much dispute as to the facts about the history and circumstances of the issuance of the [First] Plan Approval and then the application for and issuance of the [Second] Plan Approval. The significant question is the legal interpretation to be accorded those events with respect to the relationship, if any, between the [First] Plan Approval and the [Second] Plan Approval.

Id. at 559.[6] Thus, we declined to dismiss Appellants' appeal on either or both of these grounds at that early stage in the proceedings, concluding "[t]he bottom line is that we cannot conclude now that the issuance of the Second Plan Approval automatically cuts off Appellants' appeal by operation of the mootness doctrine and administrative finality." *Id.* at 562.

We now have a factual record that addresses the relationship between the First Plan Approval and the Second Plan Approval and we can and do conclude that the appeal of the First Plan Approval has been rendered moot by the issuance of the superseding Second Plan Approval. The appeal of the First Plan Approval cannot act as an appeal of the Second Plan Approval. "This Board repeatedly has stated that where an event occurs during the pendency of an appeal before the Board which deprived it of the ability to provide effective relief, the matter becomes moot." *Valley Forge Chapter of Trout Unlimited v. DEP*, 1997 EHB 1160, 1163 (appeal of original NPDES permit dismissed as moot because amended NPDES permit was issued that superseded the specific condition in the original NPDES challenged in the appeal).

While the Authority submitted what it would have liked to have been an application for a modification of the First Plan Approval, the Department, from the start, treated the application as one for a new plan approval, not as an amendment or modification of the First Plan Approval. Ericson Affidavit ¶ 21; Mealy Affidavit ¶ 52. This treatment by the Department comported with its statement in the cover letter transmitting the First Plan Approval, that "[t]he approval is specific to the combustion units and ancillary equipment in the Harrisburg Authority's application. Any change in the number of units would require a new application from the

[6] In their memorandum opposing Appellees' Motion, Appellants urge us to disregard facts offered by Appellees to which the Appellants have not stipulated. We need not do so. "A grant of summary judgment by the EHB is proper where the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Global Eco-Logical Serv., Inc. v. DEP*, 789 A.2d 789, 793 n.9 (Pa. Cmwlth. 2001). The record at this stage is stipulated to in large part, the parties having submitted a comprehensive Joint List of Stipulated Facts. Otherwise, there are no factual disputes as to points on which we base our rulings today. In other words, to use summary judgment parlance, there are no genuine issues of material fact.

[A]uthority and a new authorization from the Department." Appellees' Motion, Exhibit L; Ericson Affidavit ¶ 22; Appellants' Motion, Exhibit 1. The Authority was not happy with the Department's treating its submission as an application for a new plan approval, but, as just noted, it knew from the start and well in advance of its second application that any request like the one contained in that application would require "a new authorization" and would not involve an amendment or modification of the First Plan Approval.

The Authority complied with DEP's treatment of its second application as being one for a new plan approval, not an amendment or modification of the existing plan approval and the Authority acted in accordance with that reality. It even observed the minor detail of paying the application fee for a new permit. Mealy Affidavit ¶ 53. More substantively, the Authority submitted copious new technical information and data to support the Department's new consideration of the new plan approval application. The Authority prepared a new Revised Siting Analysis and made it available for public review and comment; and noticing a public hearing on the Revised Siting Analysis. Stipulated Facts B.99. Moreover, the Department also required a new and updated air modeling analysis for purposes of reviewing the Second Plan Approval Application. Ericson Affidavit ¶ 24. The Department noticed and conducted a public meeting on the application for a new plan approval. Stipulated Facts B.100. Members of the public attended the public meeting and provided comments on the application. *Id.* After publishing notice of its intent to approve the application for new plan approval in the *Pennsylvania Bulletin*, the Department noticed and held a public hearing on the proposed approval of the application. Stipulated Facts I.30, B.101, B.102. Indeed, two of the Appellants submitted written comments. *Id.* B.101, B.102. Further, the Department's Central and Southcentral Offices discussed $PM_{2.5}$ issues in connection with the application but the

Southcentral Office decided not to include a specific $PM_{2.5}$ limitation in the Second Plan Approval Application. Stipulated Facts I.25-I.27.

Given this record, the Second Plan Approval cannot be viewed as a continuation, amendment or modification of the First Plan Approval. The decision to issue the Second Plan Approval was a separate, different permitting decision based upon different technical input. Upon the issuance of the Second Plan Approval, the First Plan Approval ceased to exist or have any legal effect on the activities occurring at the Facility.[7] In light of these facts and our long standing precedent on the issue, Appellants' appeal of the First Plan Approval is moot. We cannot grant meaningful or effective relief to the Appellants by issuing a ruling on the now defunct First Plan Approval. As we noted in *Stewart & Conti Dev. Co. v. DEP*:

> The question originally presented in this appeal was whether the Department erred by disapproving a version of the Township's plan that no longer exists. There is nothing that we can do with respect to that earlier version that would have any effect on the later version of the plan. It is not possible to use the earlier, now defunct version of the plan as a vehicle for reviewing the new plan. Even if we concluded that the Department committed egregious errors in approving the obsolete plan, it would not matter. Such a ruling would have no effect on the new plan.

2004 EHB 18, 19-20. *See e.g. Valley Forge Chapter of Trout Unlimited v. DEP*, 1997 EHB 1160; *Commonwealth Envtl. Sys., L.P. v. DEP*, 1996 EHB 340.

[7] In the Motion to Dismiss Opinion we noted that the First Plan Approval is Plan Approval No. 22-05007A and the New Plan Approval is Plan Approval No. 22-05007B and questioned the meaning of the same number with only a different letter designation. The record before us indicates that the first Air Quality Plan Approval given to the facility in 1972 was designated as No. 22-05007. The Number "05007" is a site designation relating to this particular site. Davis Deposition Tr. at 62. The "A" and "B" designations are simply clerical suffixes added in series to permitting decisions regarding this site. *Id*. When DEP issued the First Plan Approval in September, 2003 it added the letter "A" to the end of the number. Then when DEP issued the Second Plan Approval the suffix designation went from "A" to "B". Stipulated Facts B.117. Accordingly, the designations "A" and "B" are demonstrably purely clerical and such designations do not either create or evidence any legal relationship between the First Plan Approval and the Second Plan Approval which would dictate a different result than we have reached here today. Indeed, it would seem that, if anything, the change of suffix from "A" to "B" would be confirmatory that the Second Plan Approval is a different and distinct one from the First Plan Approval.

Nor can this appeal of the First Plan Approval be considered as somehow "covering" the Second Plan Approval. We rejected that argument in the Motion to Dismiss Opinion, 2004 EHB at 560 ("we … reject the notion that an appeal of an original permit automatically 'covers' any subsequent amendment or new permit covering the same subject matter."). The subject matter of Appellants' appeal is the First Plan Approval. That action is gone and is no longer here for Appellants to appeal or for the Board to issue any relief with respect thereto. Our decision in *Kilmer v. DEP*, 1999 EHB 846, is directly on point. *Kilmer* dealt with an appeal of a compliance order. The first compliance order was vacated and a second compliance order was issued. *Id.* at 846. Appellant had appealed the first compliance order, but failed to file an appeal of the second compliance order. *Id.* at 846-47. The Department filed a motion to dismiss the appeal as moot and Appellant argued, as do the Appellants in this action, that the first appeal covered the second compliance order because the second order was a continuation of the first order. *Id.* at 849. What we said in *Kilme*r is clear and applies to this appeal as well:

> There is no question that the second order was an appealable action in its own right. Kilmer could have and should have appealed the second order. Doing so would have required very little effort. Furthermore, had he done so, he would have had no incentive to contest the motion to dismiss that is now before us. All of his arguments would have been preserved. There would be no question of the Board's ability to grant effective relief. Kilmer's opposition to the Department's motion, then, is really a request that he be excused from the second effort. Unfortunately for Kilmer, we see no good reason to excuse his failure to file a second appeal, and several good reasons not to.
>
> Aside from the Board precedent that is squarely against Kilmer's position, were we to adopt Kilmer's argument, we would in effect be holding that this Board has jurisdiction to review a DEP action (the second order) even though it was not itself appealed. Requiring parties to file appeals from challenged actions goes to the heart of this Board's authority. We are neither a court of equity nor a court of general jurisdiction. We are an administrative agency with limited, defined jurisdiction charged with reviewing appeals that are brought before us. We do not have the authority to substitute our initiative for that of aggrieved parties.

Although we are not prone to elevate form over substance, Kilmer would have us ignore form altogether, which we are not willing to do, particularly given the fact that we are dealing with the Board's subject matter jurisdiction. We are not willing to write legal fiction. The Department did not take one action here, it took three: it issued an order, vacated that order, and issued a new order. It did not "amend' the first order. It was very clear in what it was doing.[8]

Deciding when two Departmental actions should be treated as one puts us on a slippery slope. We think it would establish a dangerous precedent to hold that a party's appeal of one DEP action can, in effect, sometimes cover subsequent, similar acts of the Department. …

It is not difficult to postulate other troublesome examples. Suppose the Department finds certain violations, issues an order to remediate, decides that no remediation is necessary, withdraws the order, but issues a civil penalty assessment for the past violations. Should an appeal from the superseded order be deemed to cover the follow-up civil penalty? We simply do not want to get in the business of making these types of determinations, particularly when it is such a simple matter to file a second appeal.

We are not imposing a particularly burdensome requirement when we hold that each Departmental action must be appealed separately. Filing a notice of appeal is a relatively straightforward procedure. If the two Departmental actions are very similar, the two notices of appeal will doubtless be very similar, and the second notice should require very little incremental effort. Similar appeals can readily be consolidated.

There is a great deal of value in maintaining certainty and clarity when it comes to defining this Board's authority. Holding that parties need only sometimes appeal from serial Departmental actions would mean that neither the Department nor the public can predict whether this Board will hold that subsequent DEP actions are really just resurrected versions of prior actions. It is much easier, clearer, and not the least bit burdensome to hold that each DEP action--even if it is similar to, repetitive of, or overlaps a prior DEP action - must be separately appealed.

…

Kilmer suggests that his failure to appeal the second order should be excused because he was acting without counsel at the time. Kilmer is now represented by able counsel, and Kilmer offers no explanation for his ill-considered decision to represent himself. Even if he did, absent a showing of bad faith or estoppel, which has not been attempted to be made here, or justification for allowance of an appeal *nunc pro tunc*, which also does not exist here, a party's

[8] The current case differs from *Kilmer* only in that in *Kilmer* it was clear at the motion to dismiss stage that the Department had taken separate actions, three in the *Kilmer* case. Here, as we have discussed, it was not clear at the motion to dismiss stage but it is clear now that issuance of the First Plan Approval and issuance of the Second Plan Approval were separate Departmental actions.

> motive for failing to file an appeal is irrelevant. The scope of our jurisdiction cannot turn on whether a party seeks the advice of counsel. We have repeatedly held that appellants opting to appear before this Board *pro se* assume the risk that their lack of legal expertise may be their undoing.[9]
>
> Kilmer seems to suggest that we can review the Department's findings in the first order (e.g that Kilmer is an operator) because those findings were repeated in subsequent Department actions and may have an impact on future Department actions. The argument has no merit. We cannot review Department findings independent of a Department action. If the findings are repeated in another action we can review them then, but we cannot deal with findings that are disembodied from an appealable action. Our statutory duty is to review actions, not findings. We have held in the past that the existence of a simmering controversy because of an ongoing disagreement regarding a finding does not prevent a case from becoming moot when there is no appealable action pending.

1999 EHB at 849-53 (citations omitted, footnote added).

Since we are unable to grant any effective relief regarding the First Plan Approval and no appeal of the Second Plan Approval is before us, we dismiss the appeal. It is, thus, not necessary for us to address the Appellees' remaining arguments for dismissal. Obviously also, the Appellants' Dispositive Motion to Rescind the Second Plan Approval must be denied.

IV. Conclusion

Based on the foregoing analysis, we grant the Appellees' Joint Motion for Summary Judgment and deny the Appellants' Dispositive Motion to Rescind Plan Approval No. 22-05007B. An appropriate Order consistent with this Opinion follows.

[9] The point we made in *Kilmer* about the *pro se* Appellant is equally applicable here. The appeal of the First Plan Approval was filed *pro se*. Although Appellants are now represented by counsel, they were not when the Department issued the Second Plan Approval. As in *Kilmer*, this fact, of course, does not permit the appeal of the First Plan Approval to proceed as if Appellants had appealed the Second Plan Approval. Also, we note that in this case we have counsel for the Authority, in a remarkable gesture of good sportsmanship and civility, having advised Appellants to appeal the Second Plan Approval.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

REV. DR. W. BRAXTON COOLEY, SR., CHARLES CHIVIS, DIANE WHITE, WENDI J. TAYLOR, EVELYN WARFIELD, & FRANK DIVONZO	:	
v.	:	**EHB Docket No. 2003-246-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION & THE HARRISBURG AUTHORITY, Permittee	:	

ORDER

AND NOW this 15th day of September 2005, upon consideration of Appellees' Joint Motion for Summary Judgment, Appellants' Dispositive Motion to Rescind Plan Approval No. 22-05007B and the parties' supportive and opposing materials, it is HEREBY ORDERED that Appellees' Joint Motion for Summary Judgment is **GRANTED** and this appeal is dismissed as moot. Appellants' Dispositive Motion to Rescind Plan Approval No. 22-05007B is **DENIED**.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
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DATED: September 15, 2005

c: DEP Bureau of Litigation
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