BEFORE THE WV ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA

REILLY INDUSTRIES,

APPELLANT,

v.

DIRECTOR, DIVISION OF WATER AND WASTE MANAGEMENT,
DEPARTMENT OF ENVIRONMENTAL PROTECTION,

APPELLEE.

FINAL ORDER

I. PROCEDURAL HISTORY

Appeal No. 05-12-EQB was filed with the West Virginia Environmental Quality Board ("Board") on May 12, 2005. The basis of this appeal is an administrative Order No. 5711 issued by the West Virginia Department of Environmental Protection ("Appellee") on April 1, 2005. Order 5711 sought injunctive relief and required Reilly Industries ("Appellant") to submit a plan to delineate the extent of and to take corrective action to clean up "deposits" on the bottom of the Monongahela River near the mouth of an unnamed tributary (also known as "Sharon Steel Run").

By motion dated November 8, 2005, Appellant moved for summary judgment in this case. The Board heard oral argument regarding Appellant’s Motion for Summary Judgment on December 15, 2005. The Board denied Appellant’s Motion for Summary Judgment, finding that "questions of fact exist as it relates to the violation of the water
quality regulations, whether Reilly caused the violation and whether the violation constitutes an ongoing violation within the statute of limitations."

Issues raised by the Appellant in the appeal were whether DEP had the authority to enforce the State's Water Pollution Control Act against a former property owner, whether the water quality standards rule is violated in the absence of a discharge, whether DEP is precluded from bringing an action because of the statute of limitations, whether DEP is precluded from issuing its Order against Appellant because the USEPA CERCLA action to clean up the Big John Salvage site contemplates clean-up of the Monongahela River, and whether other nearby property owners are responsible for the clean up.

The aforementioned issues were raised and evidence was taken in a hearing before a quorum of the members of the Board on April 6 and 7, 2006, and reconvened on May 4 and 5, 2006, July 21, 2006 and August 4, 2006. David Flannery, Esquire and Lindsay Griffith, Esquire of the law firm Jackson Kelly PLLC represented the Appellant, Reilly Industries, Inc. Mark Rudolph, Esquire, of the DEP Office of Legal Services, represented the Appellee, West Virginia Department of Environmental Protection.

In deciding this appeal, the Board reviewed and considered the certified file, the relevant law and regulations, the Notice of Appeal, all written filings and memoranda, the testimony of the witnesses, exhibits, and arguments by counsel. In accordance with W.Va. Code § 22B-1-7(g)(1), the Board VACATES the Order issued to Reilly Industries, Inc. on April 1, 2005.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of Counsel have been considered and reviewed in
relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings of fact, conclusions and argument advanced by the parties are in accordance with these findings of fact, conclusions and legal analysis of the Board and are supported by evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions, and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or necessary to a proper decision. To the extent that the testimony of the various witnesses is not in accord with the findings stated herein, it is not credited.

II. STANDARD OF REVIEW

The Board hears appeals of enforcement actions in accordance with West Virginia Code §22B-1-7. The applicable standard of review of the Appellee's action is de novo review. West Virginia Code §22B-1-7(e). Pursuant to de novo review, the Board does not afford deference to the Director's action, but rather, the Board acts independently on the evidence before it. West Virginia Division of Environmental Protection v. Kingwood Coal Company, 200 W.Va. 734, 745, 490 S.E.2d 823, 834 (1997).

To prevail in the appeal, the Appellant must raise an issue with sufficient evidence to support a finding that the Appellee's decision was incorrect. If sufficient evidence supported such a finding, then the Appellee would have to produce the evidence demonstrating why its decision was sound, regardless of the Appellant's evidence. The Appellant has an opportunity to show that the evidence produced by the Appellee is pretextual or otherwise deficient. This shifting burden of proof standard was set out in Wetzel County Solid Waste Authority v. Chief, Office of Waste Management, Division of
Environmental Protection, Civil Action Number: 95-AA-3 (Circuit Court of Kanawha County, 1999). While Wetzel County is merely persuasive authority, the Board agrees with the analysis and has used that test here.

III. DISCUSSION

This appeal involves administrative Order No. 5711 issued to Appellant by Appellee on April 1, 2005 for the clean up and removal of a deposit on the bottom of the Monongahela River. The Order requires the Appellant to submit a plan to delineate the extent of and to take corrective action to clean up “deposits” on the bottom of the Monongahela River at the mouth of an unnamed tributary.

In its appeal, the Appellant raised many issues. First, Appellant argued that it did not cause the deposit on the river bottom. Second, Appellant argued that even if the evidence demonstrated that it did cause the deposit, the applicable Statute of Limitations has expired and therefore the Order is invalid. Third, Appellant argued that the Order contained gross errors so as to require the Board to vacate the Order. Fourth, Appellant argued that various statutes, regulations, and consent order language denied DEP authority to issue the Order.

The first issue raised by Appellant concerns whether or not it caused black semi-solid deposit (“BSD”), on the bottom of the river. The Appellant asserted that Appellee ignored evidence of other possible causes or sources of the BSD in favor of finding that Appellant caused the deposit. The Board agrees. While the Board does not find that Appellant was innocent in its operations and discharges to the Monongahela River, it disagrees with Appellee’s finding that Appellant was solely responsible for the deposit and that it should therefore be required to delineate and remove the deposit.
The Appellant's second argument regarding the Statute of Limitations is a valid one. There are several rationales for having statutes of limitations: *Fairness.* Over time memories fade, evidence is lost or disappears. *The diminishing value of evidence.* After an event takes place, over time, memories fade and important evidence may be lost or disappear. *Diligence on the part of the enforcement agency.* The enforcement agency should be required to pursue an action diligently with speed and efficiency, both because of the diminishing value of evidence and because of the importance of closure for all parties.

This case is a perfect example for why a Statute of Limitations is needed. In finding that Appellant was responsible for the BSD, the DEP relied on notes to the files from the 1960's and recollections of government officials that were not present at the time or able to testify about the "numerous spills" referred to in the Order. Nobody was available to testify about the 20,000 gallon release of coal tar that presumably happened more than thirty years ago.

Record keeping in the 1960's and twentieth century was different than the record-keeping of the twenty-first century. Many of the documents in the record are undated and unsigned. Undated photographs were used as evidence in the record. Although water quality standards or rules existed at the time, the rules and standards for compliance were very different from the standards of today. As enforcement standards were different apparently record keeping and sampling were different as well. The Board finds that the evidence presented linking Appellant as the responsible party was questionable. DEP's investigation did not adequately link Appellant to the BSD on the bottom of the river. Absent from the evidence presented was scientific evidence or data.
related to the existing problem in the river. The Board finds that the science presented from both sides of the argument was inconclusive.

Appellee argued that it could overcome a statute of limitations challenge because the BSD was a continuous and ongoing violation of water quality standards. Appellee points to State Ex. Rel. Smith v. Kermit Lumber and Pressure Treating Co., 200 W.Va. 221, 488 S.E.2d 901 (1997) to make its argument that every day that the river deposit sits there it is violating water quality standards.

The Board does not find it necessary to rule on the question of whether the Statute of Limitations has been exceeded or whether the BSD constitutes a continuous and ongoing violation because the Board does not agree with the Appellee in its finding that Appellant was solely responsible for the deposit. The Board finds that even if it were to give every deference or inference or favorable light to Appellee’s evidence and legal theories, it would not come to the same conclusion as the Appellee. Because the Board finds that there is not enough evidence in the record to establish that Appellant was the sole source of the BSD at the bottom of the Monongahela River, the Board finds that it is unnecessary to rule on each and every defense and conclusion of law offered by Appellant.

IV. FINDINGS OF FACT

1. DEP issued administrative Order No. 5711 (Cert. File pp. 8-9) on April 1, 2005 pursuant to W.Va. Code § 22-11-15, the “corrective action” provision of the Water Pollution Control Act. (W.Va. Code § 22-11-1 through § 22-11-29.) Order 5711 was issued to require injunctive relief, namely, to require Appellant to submit a plan to delineate the extent of and to take corrective action to clean up
"deposits" on the bottom of the Monongahela River near the mouth of an unnamed tributary.

2. Reilly Industries operated a coal tar refining and distillation facility near the City of Fairmont along the banks of the Monongahela River from 1933 through 1972. (Tr. at 31, 35.) Appellant's predecessor, F. J. Lewis, began tar distillation at the former Appellant site in 1925. (Tr. at 35.)

3. The property Appellant formerly owned and operated, through which the unnamed tributary flows, is directly adjacent to the Monongahela River and is now undergoing extensive, emergency removal actions, remedial investigation(s) and clean up. (Tr. at 845, 854-856.)

4. To the east of Appellant's former operations was a coking operation known variously as Fairmont Coke Works, Domestic Coke or Sharon Steel, which operated between 1918 and 1979. (Tr. at 32, 35, 36.) These operations coked coal by heating it and driving off water, coal tar, and gases. (Tr. at 34-35.) A decanter was used to separate solids, water, coal tar, and gases. Id.

5. The raw material for Appellant's operation was crude coal tar, which was the waste tar material coming from the adjacent coking operations of Sharon Steel. (Tr. at 33, 176.) The crude coal tar was distilled by Appellant into light oil, water, chemicals such as naphthalene and cresylic acid, road tar, creosote oil, and pitch. (Tr. at 33-34, 37-38.)

6. The waste products from Appellant's operations were: wastewater distilled from the tar, still bottoms which were cleaned of residue every few months, non-contact cooling water and boiler blow-down. (Tr. at 148-150.)
7. By October of 1972, all production operations at the Appellant plant had ceased. (Tr. at 52; Appellant Ex. 5.) The Appellant plant inventory was completely depleted, and the plant was sold to Big John Salvage on May 4, 1973. (Tr. at 31, 36, 51; Appellant Ex. 4.)

8. Big John Salvage conducted a scrap salvaging operation (recycling used oil, glass bulbs, various materials) on the property until the early 1980's, when the company went into bankruptcy. (Tr. at 36-37, 243.)

9. An inspection report from the time that Big John Salvage was operating states that liquid wastes were leaving the plant area and solid, asphaltic, and semi-solid wastes were accumulating below the plant in a field. (Tr. at 54-55; Appellant Ex. 7.) Photographs from a Water Resources Division trip report and RCRA inspection indicate the presence of leaking 55-gallon drums on the Big John site. (Tr. at 56-57; Appellant Ex. 8.)

10. The partial expanded site investigation work plan for the Sharon Steel site also references a spill that occurred at the Big John Salvage site in the late 1970’s, after Appellant had sold the property. (Tr. at 833, 838-839; Appellant Ex. 69 at 4-5.)

11. The Appellant’s former property comprises a portion, but not all, of the former Big John Salvage property. (Tr. at 283.)

12. In the mid-1980’s, Appellant undertook removal efforts to excavate and dispose of the materials that Big John Salvage had managed. (Tr. at 58, 245.)

13. In 1985, as a result of the removal actions taken by Appellant, the Environmental Protection Agency issued a Consent Order releasing Appellant of further
responsibility at the site and containing a covenant not to take civil or administrative action against Appellant for "all claims resulting from or relating to the generation, handling, treatment storage, disposal or presence of, or migration or threat of migration or discharge or threat thereof, of coal tar, the constituents of coal tar, creosote and other chemical substances." (Tr. at 58-60; Appellant Ex. 9; see also Tr. at 363.)

14. Mr. Doug Taylor testified on behalf of the Appellant that he oversaw the Superfund response actions taken by Appellant, described in part in a removal action plan dated November 16, 2000. (Tr. at 241-242, 253-254; Appellant Ex. 44.) Section 8.3, sub-items A through K, of the removal action plan list the specific work items that Appellant was to undertake. (Appellant Ex. 44.) Sub-items D and E regard stabilization of the site and capturing of releases from the site. Id. Investigations revealed oily seeps in the east and middle tributaries to Sharon Steel Run. (Tr. at 256.) The material coming from these seeps was a liquid, flowable, oily material with no solid component to it. (Tr. at 260.)

15. The former Sharon Steel site is now owned in trust by Appellee. (Tr. at 744; Appellee Ex. 38.) It was acquired by Appellee pursuant to a settlement between DEP, EPA, Green Bluff Development Corporation and Exxon Corporation and the associated Fairmont Coke Works site custodial trust agreement. (Tr. at 745; Appellee Ex. 38.) ExxonMobil retains responsibility for the remediation costs at the Sharon Steel Site. (Tr. at 746.) The collection systems are on Exxon's property, but Appellant has received permission from Exxon to enter the property for the purpose of maintaining these systems. (Tr. at 301-302.) However,
Exxon's access agreement with Appellant prohibited Appellant from doing any work or collecting any samples in Sharon Steel Run itself. (Tr. at 302, 365.)

16. Chemicals found off-site of the Big John Salvage site in the Monongahela River may not be attributed exclusively to only one source. (Tr. at 69; Appellant Ex. 12.)

17. Following Appellee's issuance of the April 1, 2205 Order, Appellant sent a dive team to the bottom of the Monongahela River to investigate. (Tr. at 139.) The dive, which took place June 20-22, 2005, was overseen by Doug Taylor and his company. (Tr. at 310-311.) The dive team was hired to specifically delineate and map the extent of the black material in the Monongahela River and to take samples of that material. (Tr. at 318.) The extent of the black deposit was mapped on Appellant Exhibit 42. (Tr. at 314-316.)

18. The divers described the black deposit as being a solid "underwater parking lot," which has a distinct edge, or lip, to it. (Tr. at 316.) There was no sediment on top of the black deposit. (Tr. at 318, 342-343.) Samples of the black deposit were taken by peeling it off the bottom of the river. (Tr. at 318, 342.) Underneath this distinct layer of solid material, the sediment was "visibly clean." (Tr. at 342.)

19. The downstream-most portion of the deposit transitioned from a solid to a softer material, to a stained sediment. (Tr. at 317, 314.) However, there was no black material underlying the stained sediment. (Tr. at 319, 341.)

20. Mr. Taylor testified that the black material on the bottom of the Monongahela River appears to be the same as the solid black material in the upstream portion of Sharon Steel Run, which was deposited by drainage from the Sharon Steel Site.
Mr. Taylor testified that he or someone under his direction has been on the Big John Salvage site at least 175 times to check Appellant's collection systems and has never seen anything coming off the former Appellant property which resembles the black solid deposit in the Monongahela River. (Tr. at 328.)

21. The samples taken during the dive commissioned by Appellant were shipped to David Mauro at META Environmental, Inc. for chemical analysis. (Tr. at 320.) Mr. Mauro testified that his analysis determined that the material at the bottom of the river was not from a release of crude coal tar and in his opinion it definitely was not the result of a release of the sorts of products that Appellant produced. (Tr. at 537.) Mr. Mauro opined that the most likely source of the deposit at the bottom of the Monongahela River was the Sharon Steel plant. (Tr. at 537-538.)

22. Coal tar can exist in varying states, ranging from a viscous, dense, sticky liquid to a rock-hard material.

23. A second dive was commissioned by Appellant on April 20, 2006, and again overseen by Doug Taylor (Tr. at 545), to confirm the extent of the deposit and examine the river bottom beneath the river deposit. (Tr. at 545-546.) During this second dive, five additional samples were taken of the deposit on the bottom of the Monongahela River. Id.

24. Mr. Bass conceded that he could not unequivocally state that no tar had been released from the Sharon Steel site to the river. (Tr. at 948, 951.)

25. Under federal and state consent decrees between EPA, DEP, Green Bluff Development Incorporated and ExxonMobil Corporation, Exxon received a
covenant not to sue by the agencies. (Tr. at 900-903; Appellee Ex. 34, 35; Appellant Ex. 75.)

26. Appellee is also the recipient of a covenant not to sue, and is held harmless for contamination generated from the Sharon Steel Site. (Tr. at 993; Appellee Ex. 39.)

27. Appellee’s Order 5711 states that on or about the mid-1960’s a large storage tank of coal tar failed and released a significant volume of coal tar into the Monongahela River via an unnamed tributary. (Tr. at 46.) Appellee’s Order also mentions miscellaneous releases which would have occurred before Appellant ceased operation of the site in 1973. (Record at 8.) However, Mr. Jones, Appellant’s current Director of Regulatory Management, testified that he was not aware of any tank failure on or about the mid-1960’s. (Tr. at 46-47.) Mr. Doug Taylor also testified that he has never seen anything on the site which would indicate any sort of large scale tank leak from Appellant’s former operations. (Tr. at 397.) Further, Mr. Tom Bass testified on behalf of Appellee that he could not say that the 1960’s spill referred to in the certified file came from the failure of a tank. (Tr. at 770-771, 797.) Mr. Bass agreed that there was no evidence of a tank failure at any time that Appellant owned the property. (Tr. at 966.)

28. On the night of January 28, 1960, approximately 20,000 gallons of coal tar was released at the Appellant’s former site as the result of pumping the contents of a large storage tank into one of less capacity and some portion of it was reported to flow into the Monongahela River. (Tr. at 48-49; Appellant Exs. 2-3.) Indications of the release, which was reported to the State Water Commission, an early
environmental regulatory agency similar in authority to the existing DEP, had reached two to three miles downstream to the power station within six or seven hours. (Tr. at 48-50; Appellant Exs. 2-3.) This evidence indicates that some undeterminable quantity of the spilled material quickly moved downstream. (Tr. 1255.)

29. Mr. Brad Swiger, an environmental enforcement employee of the DEP, testified that he participated in the dive conducted on August 18, 2004 in the Monongahela River. It was a result of this dive and sampling that Order 5711 was issued to Appellant. (Tr. at 418.)

30. Mr. Swiger described the deposit on the bottom of the Monongahela River as similar to a lava flow, "there was an edge" to it and they were able to just peel off the layer of the material. (Tr. at 425.) He also indicated that the deposit appeared to be similar in appearance to one in the Ohio River, associated with Wheeling-Pittsburgh Steel Company, a steel company like Sharon Steel. (Tr. at 446; Tr. at 517-518.)

31. Appellee performed analysis of samples taken from the bottom of the Monongahela River. (Tr. at 425-426.)

32. The sample results showed high levels of chemicals, far in excess of regulatory limits, including: Benzene at 56,500 µg/kg, Ethylbenzene at 5410 µg/kg, Toluene at 2610 µg/kg, and o-Xylene at 28,300 µg/kg. (Tr. at 416-419.)

33. Appellee's analysis was limited primarily to the Batelle report. However, DEP's witness admitted that Battelle was never charged with determining where the River BSD came from. (Tr. At 1079.) Instead the report only investigated
whether black, semi-solid deposits in Sharon Steel Run were coke breeze, coke, or coal. (Tr. At 1060.) There were no benthic studies done to determine whether or not the BSD was having a detrimental effect upon the river’s invertebrate fauna.

34. Mr. Michael Zeto, Chief Inspector of Environmental Enforcement for the DEP, testified regarding the details of the Order issued to Appellant. The Order states in Paragraph 7 that “On August 18, 2004, WVDEP personnel confirmed the deposition of coal tars on the bottom of the Monongahela River ... in concentrations that are harmful, hazardous or toxic to man, animal or aquatic life.” (Tr. at 463.) However, Mr. Zeto testified that the harm to life would have occurred at the time of the deposit. (Tr. 465.) No evidence was presented indicating a current harm to aquatic life.

35. Mr. Zeto clarified that although any discharge causing the deposit in the river would have occurred many years ago, the Order to Appellant relies upon the water quality regulations in effect in April 2005. (Tr. At 502.)

36. The Order refers to a “location map” which is attached. (Tr. at 495.) Tom Bass testified that it appeared to be a 1955 aerial photo (Tr. at 886-887.) even though the version of the photo attached to the Order states “date unknown.” (Tr. at 496.) The Order references this photo in Finding of Fact Number 5 with regard to a storage tank failure that is alleged to have occurred in the 1960s, and implies that the photo depicts such a failure, even though the photo was not actually taken at the time of the alleged tank failure. (Tr. at 496-497.)
V. CONCLUSIONS OF LAW

1. The Environmental Quality Board has jurisdiction to decide this appeal pursuant to *West Virginia Code* §22B-1-7.

2. The Environmental Quality Board standard of review is *de novo* which requires the Board to hear the appeal and be the "ultimate finder of fact and to act independently on the evidence before it." Accordingly, the Board does not afford deference to the decision by the Department of Environmental Protection.

3. This appeal and review procedures were conducted in accordance with *West Virginia Code* §§ 22-11-21; 22B-1-1 et seq.; 22B-3-1 et seq.; 29A-5-1 et seq.; and 46 C.S.R. 4.

4. After hearing and considering all of the testimony, evidence and record in this case, the Board is required by statute to make and enter an order affirming, modifying, or vacating the order, permit or official action of the chief or director. *West Virginia Code* §22B-1-7(g).
VI. CONCLUSION

On this 28th day of December, 2006, the Board hereby VACATES administrative Order No. 5711 issued to Reilly Industries, Inc. by the WVDEP on April 1, 2005.

Dr. Edward Snyder, Chairperson
Environmental Quality Board
NOTICE OF RIGHT TO APPEAL FINAL ORDER

In accordance with § 22B-1-7(j) of the West Virginia Code, you are hereby notified of your right to judicial review of this FINAL ORDER in accordance with § 22B-1-9(a) and §22B-3-3 of the West Virginia Code. If appropriate, an appeal of this final order may be made by filing a petition in the appropriate Circuit Court within thirty (30) days from your receipt of this final order in the manner provided by § 29A-5-4 of the West Virginia Code.
BEFORE THE WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD  
CHARLESTON, WEST VIRGINIA

Reilly Industries,  
Appellant,  

v.  

Director, Division of Water and Waste Management,  
Department of Environmental Protection,  

Appellee.  

Appeal No. 05-12-EQB

CERTIFICATE OF SERVICE

This is to certify that I, Jackie D. Shultz, Clerk for the Environmental Quality Board, have this day, the 29th day of December, 2006, served a true copy of the foregoing “FINAL ORDER” to all parties in Appeal No. 05-12-EQB, by mailing the same via United States Mail, with sufficient postage, to the following address:

via certified mail:

David M. Flannery, Esquire  
Jackson Kelly PLLC  
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Jackie D. Shultz, Clerk