

**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
OF THE STATE OF DELAWARE**

<b>MCGINNIS AUTO &amp; MOBILE HOME SALVAGE, LLC</b>	)	
	)	
<b>Appellant,</b>	)	
	)	
<b>v.</b>	)	<b>EAB Appeal No. 2016-08</b>
	)	
<b>DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL</b>	)	
	)	
<b>Appellees.</b>	)	

**DECISION AND FINAL ORDER**

Pursuant to due and proper notice of time and place of hearing served on all parties in interest and to the public, the above-stated cause of action came before the Environmental Appeals Board (“Board”) on May 23, 2017, in the Auditorium of the Richardson & Robbins Building, located at 89 Kings Highway, Dover, Kent County, Delaware.

Members of the Board present and constituting a quorum were: Dean Holden (then-Acting Chair), Michael Horsey, Robert Mulrooney, Sebastian LaRocca, Frances Riddle and Guy Marcozzi. No Board Members disqualified themselves or were otherwise disqualified. Deputy Attorney General Kevin P. Maloney represented the Board.

John W. Paradee, Esquire, represented Appellant McGinnis Auto & Mobile Home Salvage, LLC (“McGinnis” or “Appellants”). Deputy Attorney General Ralph K. “Dirk” Durstein, III represented Appellees Delaware Department of Natural Resources and Environmental Control (“DNREC”) and DNREC Secretary David Small (“Secretary”).

## STATEMENT OF THE CASE AND PROCEEDINGS

On August 2, 2016, DNREC issued Secretary's Order No. 2016-WH0032 (the "Cease and Desist Order" or the "Order") which, among other things, ordered the Appellants to: (1) "immediately cease and desist receiving and dismantling mobile homes and construction and demolition waste"; (2) within 30 days "remove all solid wastes including, but not limited to, discarded mobile homes and piles of construction and demolition waste on land and in containers"; (3) within 30 days, "provide documentation ...confirming the proper disposal or recycling of the solid wastes"; (4) within 30 days, "provide...a list of all mobile homes received since 2001, the vehicle identification number for each mobile home, and the date of manufacture of each mobile home"; and (5) within 30 days, "provide a detailed explanation of inspection, handling, storage disposal, and recycling procedures for all materials removed from, or contained within, mobile homes."

On August 16, 2016, the Appellants filed a Notice of Appeal pursuant to 7 Del. C. §§ 6008 and 6009 (the "Appeal"). The parties to this Appeal have agreed that the sole issue for determination by the Board is whether DNREC had the legal authority to compel the Appellants to undertake the affirmative remedies demanded by the Order. Appellants also argued that Martia McGinnis, acting in her individual capacity, could not be held personally responsible or liable for any alleged violation. The parties further agreed that there would be no need for an evidentiary hearing and agreed to proceed by means of legal argument only. In light its final disposition of the appeal with respect to DNREC's legal authority, the Board did not find it necessary to address the personal liability issue.

## **THE CHRONOLOGY**

Prior to the hearing and in accordance the Board's Regulations, the Board received DNREC's Chronology, which consisted of the following:

- Solid and Hazardous Waste Management Section Memorandum RE: Illegal Disposal and Operating Without a Permit dated March 24, 2015;
- Notice of Violation 15-SW-03 dated August 17, 2015;
- Letter from McGinnis to DNREC regarding solid waste disposal plan dated September 17, 2015;
- Correspondence from McGinnis to DNREC RE: Cleanup & Removal dated September 17, 2015;
- Email from DNREC regarding the Deadline to submit Resource Recovery Facility Permit Application dated December 17, 2015;
- Memorandum RE: Site Visit dated April 8, 2016;
- Letter to McGinnis RE: Potential For Asbestos dated June 29, 2016;
- Correspondence from McGinnis to DNREC RE: deadline for solid waste pile to be removed dated September 17, 2015;
- Cease and Desist Order 2016-WH-0032 dated August 2, 2016;
- Statement of Appeal dated August 16, 2016;
- Appeal Receipt Letter dated August 17, 2016.

### **APPELLANT'S ARGUMENT**

Appellants argue that 7 *Del. C.* §6005 provides DNREC four enforcement remedies for violation of a provision of Chapter 60 or DNREC regulations. In addition DNREC may issue a cease and desist order when a person is violating a DNREC regulation or provision of Chapter 60. *See 7 Del. C.* § 6018. Appellants submit that, absent an order secured from a court of competent jurisdiction, the Secretary did not have the authority to compel the Appellants to undertake the tasks required by paragraphs 2 through 6 of the Order. Appellants argue that “[w]here an agency exceeds the statutory authority delegated to the agency under its enabling statutes, the agency’s actions are void.” Sussex County v. Delaware Department of Natural Resources & Environmental Control, 2011 WL 1225664 at \*6 (Del. Super. Ct. 2011). If the Secretary desires to secure the types of affirmative remedies afforded by paragraphs 2 through 6 of the Order Appellants contend he or she is required to pursue injunctive relief pursuant to 7 *Del. C.* §6005(b).

### **DNREC'S ARGUMENT**

DNREC argues that the Secretary acted within his broad powers to enforce environmental laws regulating waste facilities and that he properly exercised DNREC’s regulatory authority to enforce the law by imposing the conditions and deadlines for compliance contained in the Cease and Desist Order. DNREC contends that the broad authority of the DNREC Secretary to regulate permits was recognized by the Delaware Supreme Court in Formosa Plastics Corp. v. Wilson, 504 A. 2d 1083, 1088 (Del. 1986). DNREC asserts that when a business owner has

engaged in illegal conduct without a necessary permit it is reasonable for the Secretary to require that the violator take steps to remediate the problem, and to document that remediation, before obtaining a permit.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

At the conclusion of legal argument by the parties, and in light of the parties agreement that there were no facts in dispute, the Board entered into executive session as permitted by 7 *Del. C.* §6008(a) to deliberate.

After deliberation and careful review of the parties' arguments, their written submissions, and the evidence presented, the Board finds, by a vote of 5 to 1, that DNREC had adequate legal authority to impose paragraphs 1 and 7 of the Order but did not have adequate legal authority to impose paragraphs 2 through 6 of the Order. The Board concluded that the cease and desist order is not the proper enforcement mechanism to mandate affirmative injunctive relief against Appellant. The Board is of the opinion that there may exist other, more appropriate, enforcement mechanisms available to the Secretary to obtain the relief sought but that 7 *Del. C.* §6018 cannot be fairly read to provide such legal foundation. Formosa is a permit revocation and conditions case and provides no authority for the conditions found in paragraphs 2 through 6 in this case. The Board determined that, in light of the above conclusions, it need not decide the question of personal liability with respect to Ms. McGinnis.

**ENVIRONMENTAL APPEALS BOARD**

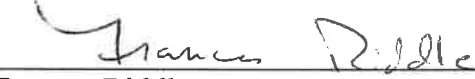
The following five Board members concur in this decision.

Date: 8/8/2017 

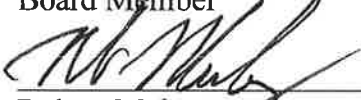
Dean Holden  
Chairperson

Date: 8/8/2017 


Guy Marcozzi  
Board Member

Date: 8/8/17 

Frances Riddle  
Board Member

Date: 8/8/2017 

Robert Mulrooney  
Board Member

Date: 8/8/17 

Michael Horsey  
Board Member

The following Board member does not concur in the decision.

Date: 8/8/17 

Sebastian LaRocca  
Board Member