

Missouri Clean Water Commission Meeting
Truman Hotel and Conference Center
1510 Jefferson Street
Jefferson City, Missouri

October 1, 2014

The Doe Run Company, Glover Smelter
Appeal of Missouri State Operating Permit, #MO-0001121
Iron County, MO

Issue: The Missouri Department of Natural Resources' Water Protection Program issued the Missouri State Operating Permit renewal for the Doe Run Glover Smelter, permit #MO-0001121, on March 23, 2007. The Doe Run Company appealed the permit issuance on April 20, 2007. The permit expired March 22, 2012. The hearing on the appeal was continued multiple times until the case was closed by the Administrative Hearing Commission on June 24, 2014.

Background: The above referenced appeal was continued throughout the permit cycle March 23, 2007 – March 22, 2012. The 2007 permit contained a three year schedule of compliance to meet water quality based effluent limits. The permit was also modified on October 25, 2011 to incorporate results from a site-specific metals translator study. The results of this study allowed the Department to increase effluent limitations in the permit.

Staff Recommendation: The Department recommends that the Missouri Clean Water Commission accept the Administrative Hearing Commission's decision to dismiss the appeal.

List of Attachments:

- Administrative Hearing Commission's Recommended Decision

Before the
 Administrative Hearing Commission
 State of Missouri



RECEIVED
 JUN 25 2014
 MISSOURI
 ATTORNEY GENERAL

DOE RUN COMPANY, (THE))	
)	
Petitioner,)	
)	
vs.)	No. 07-0543 CWC
)	
MISSOURI DEPARTMENT OF NATURAL)	
RESOURCES,)	
)	
Respondent)	

RECOMMENDED DECISION

This case has an extensive procedural history involving many different attorneys and several Administrative Hearing Commissioners, to the last of whom the case was transferred in September 2013. From April 20, 2007, when Doe Run Company (“Doe Run”) filed the complaint¹ until now, the issues on appeal have expanded and contracted, the parties have entered into a consent decree, and the permit has expired. Because the subject of this appeal – Permit No. MO-0001121 (“the Permit”) – has expired, the case is moot. Moreover, we fail to see how keeping the case open at the Administrative Hearing Commission (“the AHC”) serves a useful purpose at this point. Therefore, we recommend that the Clean Water Commission (“CWC”) dismiss the appeal. When the Department of Natural Resources (“DNR”) issues a new permit, with a new expiration date, Doe Run may file a new appeal if necessary.

¹ The complaint is also referred to in various motions as a notice of appeal.

Procedure

On April 20, 2007, Doe Run filed a complaint appealing DNR's decision to issue the Permit for Doe Run's Glover Smelter.² We set the hearing for September 27, 2007. On August 22, 2007, Doe Run filed a motion for a continuance, which we granted. We reset the hearing for March 24, 2008. On January 25, 2008, DNR filed a motion for a continuance, which we granted. We reset the hearing for September 24, 2008, and then rescheduled it for September 30, 2008, at Doe Run's request. On August 12, 2008, the parties filed a joint motion for continuance, which we granted. We rescheduled the hearing for March 30, 2009. On February 11, 2009, DNR filed a motion for continuance, which we granted. We reset the hearing for March 15-16, 2010. By order dated March 8, 2010, following agreement of the parties at a prehearing conference, we rescheduled the hearing for May 3-4, 2010.

On April 13, 2010, Doe Run filed a motion for leave to file a first amended notice of appeal, which we granted. On April 16, 2010, the parties filed a joint motion for continuance, which we granted. We rescheduled the hearing for September 13-14, 2010. On September 3, 2010, the parties filed a joint motion for continuance, which we granted. We did not reschedule the hearing, but required the parties to file status reports. On July 19, 2012, Doe Run filed a motion for leave to file a third amended notice of appeal. We do not appear to have ruled on the motion, and we do so now, granting the motion and deeming the third amended notice of appeal filed on July 19, 2012. On August 13, 2012, DNR filed an answer to the third amended complaint.

On August 13, 2013, we issued a show cause order, ordering the parties to show cause why this case should not be dismissed. On August 20, 2013, the parties filed a joint response,

² This filing pre-dated the deadlines for issuing a decision currently found in § 621.250, RSMo. Supp. 2013.

arguing – as they had previously – that DNR was in the process of reissuing the Permit and the parties anticipated that the revised permit would resolve issues that were subject to this appeal. The parties represented that DNR had intended to reissue the Permit on May 17, 2013, but the U.S. Environmental Protection Agency (“EPA”) interceded. The parties asked us to continue to stay the appeal and order a joint status report to be filed on December 1, 2013. We did so, and the parties filed a joint status report on November 27, 2013.

By order dated December 3, 2013, we ordered the parties to file a joint status report by June 1, 2014. The parties failed to do so. On June 5, 2014, we ordered the parties to show cause why this case should not be dismissed. On June 13, 2014, DNR and Doe Run filed separate responses. We make our findings of fact from a copy of the Permit submitted and DNR’s answer to the third amended complaint, admitting the following facts.

Findings of Fact

1. Doe Run owns an inactive lead smelter known as the Glover Smelter located near Glover, Missouri.
2. On March 23, 2007, DNR issued the Permit relating to the Glover Smelter, and Doe Run timely filed its complaint on April 20, 2007.
3. On October 8, 2010, a Consent Decree between Doe Run, the United States of America, the EPA, and DNR was lodged with the U.S. District Court for the Eastern District of Missouri. The Consent Decree was approved and entered by the Court on December 21, 2011.
4. The Consent Decree required Doe Run and DNR to file a Joint Stipulation to Dismiss in Part and Hold in Abeyance in Part within 30 days of lodging of the Consent Decree. This Joint Stipulation was timely filed on November 8, 2010.
5. DNR revised the Permit on October 25, 2011. Doe Run requested and was granted leave to file a second amended notice of appeal.

6. Doe Run and DNR engaged in settlement discussions in regard to the Permit.
7. The Permit expired on March 22, 2012.
8. Doe Run requested and was granted leave to amend leave to file a third amended notice of appeal.
9. We ordered the parties to file a status report by June 1, 2013. Neither party did so. On June 5, 2013, we ordered the parties to show cause why we should not dismiss the case for failure to comply with our order. The parties then filed separate status reports, each on June 13, 2014.
10. Doe Run and DNR are currently engaged in discussions in regard to a new permit to replace the Permit. The new permit will have its own expiration date.

Conclusions of Law

We have jurisdiction to hear a complaint appealing a decision of DNR. § 621.250.³ We exercise the authority to conduct a hearing and recommend a decision to certain commissions within DNR, including the CWC. *Id.*

DNR, changing its position from earlier motions and status reports, states it cannot show cause why the case should not be dismissed. DNR states that the Permit has expired, and a new permit will issue that will be subject to appeal. In its response to our show cause order, DNR states:

The parties have been negotiating technical issues that may affect the next permit, but there is no clear endpoint for these discussions, and no assured outcome. When Respondent issues a permit with a new expiration date for this facility, Petitioner, if aggrieved, will be able to appeal it pursuant to § 621.250 RSMo. Respondent can offer no justification for this case to remain active and on-hold during negotiations over the next permit.

³ Statutory references, unless otherwise noted, are to the 2013 Supplement to the Revised Statutes of Missouri.

Doe Run continues to argue that “for the purposes of judicial economy” the appeal should continue to be stayed.

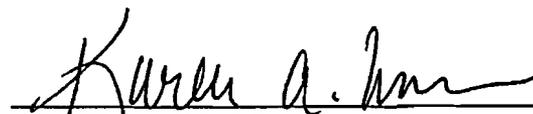
We originally asked the parties to show cause why we should not recommend dismissal of this case for failure to comply with our order. But on closer examination, we believe there is a more substantive reason to dismiss the case. A case is moot when a decision on the merits would have no practical effect on existing controversy or where it is impossible to grant any effective relief. *Rosenfeld v. Thoele*, 28 S.W.3d 446, 451 (Mo. App., E.D. 2000). “When an event occurs that makes a [tribunal’s] decision unnecessary or makes granting effectual relief by the [tribunal] impossible, the case is moot and generally should be dismissed.” *Hihn v. Hihn*, 235 S.W.3d 64, 68 (Mo. App., E.D. 2007). Because the Permit expired two years ago, the case is moot, even if the parties continue to discuss similar issues.

Furthermore, this case has been open at this Commission for over seven years. It appears we could have recommended dismissal years ago, but both parties urged us to keep the case open. Now DNR has changed its position, and we agree with it. An open case requires monitoring and paperwork. We see no “judicial economy” in our continuing to keep this case open after seven years have passed and the Permit has expired so that the parties can continue to negotiate issues regarding a proposed permit that has not been issued. They may do that without an open case. When the new permit is issued, if it contains requirements objectionable to Doe Run, a more focused, pertinent notice of appeal may be filed at that time.

Summary

The AHC recommends that the CWC dismiss this case.

SO RECOMMENDED on June 24, 2014.


KAREN A. WINN
Commissioner

