BEFORE THE ENVIRONMENTAL APPEALS BOARD

FOR THE STATE OF DELAWARE

FREE-FLOW PACKAGING INTERNATIONAL, INC., Appellant,	)	
v.	)	Appeal No. 2000-12
SECRETARY OF THE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL, CONTROL OF THE STATE OF DELAWARE, Agency-Below, Appellee.	)	

FINAL ORDER AND DECISION

Pursuant to due notice of time and place of hearing served on all parties in interest, the above stated cause came before the Environmental Appeals Board on July 10, 2001, in the Auditorium, Richardson & Robbins Building, 89 Kings Highway, Dover, Kent County, Delaware.

PRESENT:

Donald Dean, Chairman

Joan Donoho, Member

Robert Erhlich, Member

Stanley Tocker, Ph.D., Member

Kevin Slattery, Attorney for the Board.

APPEARANCES:

Michael Teichman, Esquire, for the appellant.

Matthew Chesser, Esquire, for the agency

A hearing was held before the Environmental Appeals Board on July 10, 2001, pursuant to the appeal of Free-Flow Packaging International, Inc. ("Free-Flow" or appellant) from a notice of violation issued by the Department of Natural Resources and Environmental Control ("DNREC" or agency) alleging a failure of Free-Flow to pay its Title V permit fees in full for the year 2000.

In response to the appeal, the agency filed a motion to dismiss arguing that the appeal is untimely. The agency contends that it published in the Register of Regulations its determination that Free-Flow is a complex facility in December of 1999. Free-Flow did not file an appeal from that determination. The agency further contends that it issued an invoice to Free-Flow for the payment of its Title V permit fees for the year 2000 on December 30, 1999, and no appeal was taken at that time. It was not until the notice of violation that Free-Flow first appealed its objections to the determination that it is a complex facility. Accordingly, the agency contends the appeal should be dismissed as untimely.

On the motion to dismiss, the Free-Flow contends that the notice of violation is the first and only notice of a violation of the permit. Prior to that, there were no final determinations. Accordingly, the appeal was timely and should go forward.

In rebuttal, the agency contends that the fees were not paid, but the determination that Free-Flow is a complex facility and the billing occurred months prior. They cannot use the notice of violation to springboard back in time.

The Board denied the agency's motion to dismiss for the reasons that follow in the findings and conclusions section of this opinion.

On the merits of the appeal, Free-Flow contends that under the statute (7 Del. C. section 6907), the base fee is to be calculated using "estimated" time spent in regulating the source. Initially, the agency indicated that the fee was based upon time actually spent regulating Free-Flow in the past. Thereafter, in April, 2000, the agency claimed they placed sources in categories based upon the complexity of regulating each source. Perceptions of complexity were used and not estimates of time the agency anticipated spending to regulate Free-Flow in the future. Therefore, the agency ignored the statute and acted arbitrarily and capriciously. The agency also ignored relevant facts and considerations. Free-Flow is not a complex source: it is a single process with a single product.

Free-Flow further contends that an agency must set forth its rules and regulations in writing. When the agency set out to put sources in categories, it did so without putting it down in writing. There is no way to know what criteria were used and whether they were applied uniformly to each and every source. In addition, when it placed sources in categories and published that information in the Register of Regulations, the agency adopted a regulation. This regulation should have been adopted pursuant to the Administrative Procedures Act ("APA"). Any enforcement of a regulation that was not adopted in accordance with the APA is void. Free-Flow is seeking a finding that the notice of violation is void.

The agency notes that Free-Flow does not deny it is in violation of its permit–i.e. that it has not paid the fee in full. The statute was developed through contact with industry, the Chamber of Commerce and the legislature. Everyone was fully aware of what was

going to be imposed upon the source polluters. Industry lobbied to get the fee structure changed. The larger industries with greater emissions would not be the only ones to bear the brunt of the fees. The smaller sources would also be required to support their fair share of the costs of regulation. When the statute was enacted, the General Assembly had the categories and placement of each source in front of them. Therefore, the General Assembly approved the categorization of all the sources. There were 146 sources categorized. The agency placed them into categories based upon its expertise in accordance with the statute. They categorized the sources based upon the estimated use of program services. The agency considered indicators such as current emissions levels, applicable regulatory requirements and the complexity of the operation. Actual hours were not pulled until Mr. Clazie started his inquiries. The actual hours were utilized to validate what was done to categorize this source. The agency now has actual hours to back up the determination, and the categorization was appropriate.

The agency contends that this is not a Butler issue: it was not a desk drawer regulation. The agency followed the statute. Just by publishing the listing in the Register of Regulations does not make it a regulation. It published a table of individual case decisions. There was no general applicability that is the hallmark of a regulation. If it were a regulation, an appeal should have been brought before the Superior Court following the publication in the Register. As there has been no chapter 60 enforcement action, the APA requires a challenge in the Superior Court.

The criteria used by the agency to categorize Free-Flow are in the statute. Free-Flow recycles polystyrene which is not a simple process product. Free-Flow is subject to

several regulatory provisions, and it has made several changes to its process over the years. No other industry benefits from certain regulations enacted specifically to benefit the appellant (i.e., the alternative RACT requirement). The agency has spent In excess of 500 hours already on Free-flow matters.

SUMMARY OF THE EVIDENCE

1) The Board considered the testimony of Dr. Ronald Clazie.

Dr. Ronald N. Clazie testified that he is a registered in the State of California as a chemical and manufacturing engineer. He holds a Ph.D. in chemical engineering. He has been employed by the appellant as the Vice President of Engineering for the past 8 1/2 years.

The witness testified that the appellant recycles polystyrene and manufactures a loose fill polystyrene product. They are the largest recylcer of polystyrene in the country. Once they have the material, it is ground up, extruded as pellets, melted with other products, extruded again as pellets, and put through two sequential expansion steps where the pellets swell to the end product. Free-Flow employs 30 people at the Newark plant. They have 3 shifts with four production employees per shift. The remaining employees are truck drivers, engineers, customer service representatives or maintenance people.

Free-Flow has to have a Title V permit because they have the ability to emit more than 25 tons of pollutants per year. They emit between 26 and 40 plus tons each year. Last year they emitted around 26 tons. They applied for their Title V permit in July,1996 and paid $7,000 in permit fees that year. The fees remained the same amount each year

for the next 3 years. In 2000 and 2001 they paid $9,500.

The witness testified that Free-Flow first learned of the increase in fees in the early part of January 2000. When he received a copy of the letter, he felt there was a mistake because the fee increased from $7,000 to $20,000. He asked a fellow employee to contact Mr. Koska. That employee, Mr. Villareal, spoke with Mr. Koska, and he was informed that the fee had increased because the agency spent more that 400 hours over the past couple years on the Free-Flow permit. He did not believe this. They had spent time three years ago working on a non-Title V dispute, and he felt this may have been included in the calculation. He then contacted Mr. Koska himself and it was confirmed that the categorization was determined based upon actual hours spent. He was told to put his concerns in writing.

The witness further testified that a month later (end of February, 2000) he received a response from Mr. Tyler that over 500 hours had been spent on the permit. It did not give any detail about the number of hours. In a letter received in July, 2000, there was a breakdown per employee. He suspected that Ms. Joanna French would not have spent 389 hours of her time on the permit. The letter also indicated that Mr. Mirzakahili, Pat Doss and Bob Taggart also spent time on the permit. No one indicated this breakdown was provided as a "courtesy". No one indicated this was provided as an example. No one indicated they were placed in the category because of the complexity of their source or based upon an estimate of hours.

The witness further testified that the alternative RACT technology–reasonable available control technology--could be proposed as an alternative to the regulatory

requirement that they obtain an 81% rate of recovery for VOC's. They had until May 31, 1995 to put control systems in, and they knew they would not meet the 81% requirement. Accordingly, Free-Flow did a study and submitted a draft report containing its alternative control plan. In 1996 it was revised a couple times. There has been no contact with the agency since October of 1996 regarding the RACT. They have never received a notice of violation regarding their exceeding the 81% limit.

The witness testified that there have been no process changes since the 1995 changes related to the RACT (i.e., putting in the control systems). They added an oxidizer and another expander, but the latter addition was not a process change. They sought no changes or amendments to their permit since 1995. No one asked the appellant to comment on the new statute. Since July, 1999 (when the new statute was enacted), the agency has conducted an annual inspection--in the Fall of 1999 and 2000. It was a visit by Joanna French and an engineer. They spend less than one-half day going over records and examining the process.

On cross examination, Dr. Clazie testified that the appellant is in compliance with the RACT. They are not in compliance with the 81% VOC removal standard. If technically feasible, they could have become a synthetic minor. The checks they submitted were marked "paid in full". It was the appellant's position that had they been cashed, they would have considered their Title V fees paid in full. He is not aware of whether his employer is a member of the Chamber of Commerce. They are not in the process of working out an alternative RACT requirement. They feel it was completed in October of 1996 and they have received their permit. The witness knows the net worth of Free-Flow is several million

dollars with seven plants across the U.S. He did not know what their annual profit was last year. Their plants are unique among plants making loose fill products. It was his understanding that actual hours were used in making the determination of the complex category. He admitted reading the letter from Mr. Tyler where Mr. Tyler stated that they were "validating" the categorization. He admits the letters talk about validating. He did not understand this to be the case.

On re-direct examination, Dr. Clazie testified that they sent the checks when the agency requested scheduled payments in $5,000 installments. They were not expecting an "approval" on the RACT. They felt all they needed was the permit which they received.

On examination by the Board members, Dr. Clazie testified that the VOC's are the blowing agents--isobutane and isopentane. They chose not to pay the entire fee amount because of the difficulty in getting the information they were requesting. They paid only what they felt was "right" because it is not a complex process. They felt that Joanna French could not have spent as much time as she claims without training hours being included.

2) The Board considered the testimony of Ali Mirzakhalili.

Mr. Mirzakhalili testified that he is the program administrator for the Air Quality Management Section. He was indirectly involved in the discussions with the Chamber of Commerce and the agency regarding the revisions to section 6097. Mr. Koska, Mr.. Tyler and Mr. Taggart were also involved. These discussions began around April of 1999. There was in-house preparation. One of the assignments given Air Quality Management

by the advisory committee/ work group was to sort the sources into various categories--synthetic minors and then small, medium and large sources. They estimated how long it would take to issue a permit for facility X. They considered the various criteria depending upon the type of facility. They did not estimate how much time would be spent in any specific year--simply how many hours would take to permit this particular source. This methodology was never reduced to writing. A presentation was made to the Title V advisory committee where the agency explained what was involved in the permitting process.

The witness testified that he is aware of the recommendation of the Title V subcommittee of the Delaware State Chamber of Commerce. He believes this was used to make a recommendation to the Delaware General Assembly, however, he is not sure. He believes this recommendation was used to assist the General Assembly to draft and adopt the legislative change to section 6097. The Air Quality Management Section never published its criteria used in determining the sources' rankings as recommended by the Chamber's subcommittee.

Mr. Mirzakhalili testified that the agency spent many hours doing the testing and determining what is emitted and retained. There have been process changes--he views the construction of the expander as a process change. He is not aware of any other process changes other than the oxidizer. There was a dispute regarding the expander that was resolved in the latter part of 1998.

The witness testified that regulations 24 and 30 apply to the appellant. Regulation 24 applies to VOC sources. Regulation 30 applies to all Title V sources. Regulations 14

(visible emissions) and 19 (odor sources) also apply to the facility. With regard to the alternate RACT proposal, there has been additional contact. There has been no movement toward the regulations approval process for the alternate RACT proposal, but it was included in Free-Flow's Title V permit, and the terms and conditions of that proposal are a part of the Title V permit review. There have been discussions regarding monitoring, compliance methodology and record-keeping. In the Title V permit, condition #3 pertains to the alternate RACT. There are six conditions in the entire permit. Work wise, "significant effort" went into this portion of the permit. They don't just regurgitate what was contained in the Free-Flow submittal. There is a process of technical review and engineering evaluation. Since the permit was issued there have been no further "negotiations" with regard to the RACT. Services related to Title V sources include air monitoring and chemical assessment central monitoring which are common to all sources. Specifically related to Free-Flow there is a stack of letters (1 1/2 inch thick) of notifications of excess emissions. These have to be reviewed for potential violations, potential enforcement action, off-site impact considerations, and planning. Similar quantities are not received from all sources. This amount is typical of complex sources. On cross-examination, Mr. Mirzakhalili testified that it was his interpretation of the statute that he was not required to give exact hours in their estimates. In the base fee, the services common to all facilities are air monitoring, regulatory development, stack testing, small business assistance program, etc.... These costs must be recovered under the statute regardless of whether there has been any direct contact with any particular source. The old fee system was based upon emissions, and the synthetic minors paid a small flat fee. The

new system was made to spread the costs more evenly. The parties involved were aware of the impact this would have on the smaller sources.

In addition, for a source like Free-Flow with an alternate RACT, there must be a state implementation plan created similar to Exhibit 2. The agency will have to verify that this is a unique facility. It has to justify why it would not be reasonable to require an 81% compliance rate. There will be compliance committee reviews, public hearings and comment, review of comments and findings, publication in the register, submission to EPA, review by EPA, etc.... They often have to reverse engineer the proposals and they are often reworked. It can take years to complete this process. The formal rule-making process has not started. Those costs would have to be recovered under the base fee.

On re-direct examination, Mr. Mirzakhalili testified that the agency has not given Mr. Clazie any endorsement of the alternate RACT. The ultimate approval is up to the EPA.

On re-cross examination, Mr. Mirzakhalili testified that part of the purpose of the statutory changes were to help increase staffing.

On questioning by the Board members, the witness testified that there have been no re-classifications since the initial category decisions. None of the companies have asked to be re-categorized.

3) The Board considered the testimony of Dr. Clazie in rebuttal.

Dr. Clazie testified that he had direct contact with Ms. French regarding the Title V permit. She did not bring up the topic of finalizing the alternate RACT.

4) The Board considered the testimony of Craig Koska.

Mr. Koska testified that he is a Management Analyst III with the agency. He has been employed with the agency since 1996. He has been in his present position since 1997. He arranged the Title V committee and has been involved in every aspect of the new Title V fee development. The witness explained the process of determining the fees for the Title V program using agency exhibit #1. Prior to the new legislation, the fees were based upon emissions only. At the time they were preparing for the sunset of the old legislation, they knew they were looking at a 69% increase in the Title V fees based upon emissions only. The Title V committee was made up of industry, small business, legislators, and agency representatives. They brought that increase to the committee. There was an imbalance between sources requiring complex regulation but low emissions, and those with little regulation but large emissions. The committee rejected the straight 69% increase.

Mr. Koska testified that they began working with the subgroup of the Chamber to address the complexity issue. That idea came from this subgroup. In March of 1999, at the second meeting of the advisory committee, the subgroup presented a proposal to classify sources into categories of synthetic minor, small, medium and large in complexity for determining a base fee. The proposal also included a user fee based upon emissions. At the third meeting, the advisory committee endorsed the Chamber subgroup's recommendations. The agency then began to look at the impacts. They recognized that certain smaller sources would be taking large hits. A courter-proposal was suggested with an alternate fee structure for the synthetic minors and the small sources. This was rejected

by the subgroup.

Part of the problem was semantics: the designations of small, medium and large in dealing with the complexity issue suggested the actual size of the physical plant. They then came up with the designations of routine, complex and very complex. The Chamber expanded the number of hours in each classification. Thereafter, the legislation was introduced, passed and the fees published in the Register of Regulations.

The witness further testified that 119 facilities saw an increase in their fees. The minimum increase was $500 and the largest increase was $41,000. There were 21 facilities with larger increases than Free-flow. There were 24 facilities with decreases from $1000 to $62,000. The Chamber had these numbers before them when they rejected the agency's proposal to re-distribute the range of increases and decreases. The General Assembly was sent the actual language for the bill. The Chamber's recommendation was available to the General Assembly, but it was not specifically sent to them.

The witness testified as to dealings with the appellant, Free-Flow was sent a notice of the fee along with an explanatory letter as to why the fees had changed. He spoke with Mr. Villareal on January 5, 2000. He spoke with Mr. Clazie on January 7, 2000. He told Mr. Clazie that the Title V fees were based upon the hours it took to produce the Title V permit. Mr. Koska testified that he did not use either the term "actual" or "estimated" when talking about hours. He asked Mr. Clazie to put his concerns in writing. He then would go to engineering and compliance to validate the estimated number of hours based upon actual hours. The pulling of hours was used to validate the complex determination. They felt uncomfortable using the estimates only. In March, 2000, Mr. Clazie asked for

confirmation of the number of hours believing it to be a mistake.

Mr. Koska testified further that Free-Flow has not paid its Title V permit fees in full for 2000 and 2001. The first payment schedule was not met. The first check from Free-Flow in the amount of $5,000 was received in August of 2000. It was due by February 5, 2000. A second check in the amount of $4,500 was marked "payment in full–final payment" and has not been deposited. Regarding the 2001 billing, another $9,500 was received marked "payment in full" and it as well has not been deposited.

On cross-examination, Mr. Koska testified that the advisory committee is made up of one member from each house of the General Assembly, representatives from environmental groups, industry and the agency. The publication of the sources was based upon the working documents of the committee.

On examination by the Board, Mr. Koska testified that on January 1, 2000 the agency started using an electronic time keeping system. Prior to this, there was no reliable source of the number of hours spent on each source. This was the reason for using estimates in the legislation. The time frame for the 522 hours used to categorize Free-flow was the time spent up to the issuance of the permit, however, as the Title V permit is not issued one time only, there is no clear-cut end to the time frame. The present categorization is in place for three years–2000, 2001 and 2002.

On re-cross examination, Mr. Koska testified that he believes the Title V permit is issued for a five year period.

5) The Board considered the testimony of Ali Mirzakhalili.

Mr. Mirzakhalili testified that initially they did not look at actual hours. All they did

was make an estimate. From January 2000, they began tracking the actual number of hours. The witness outlined the Title V permitting process. All the other pre-existing permits had to be included within the Title V program. There is record keeping, testing, and compliance program development among other requirements. This is not done in a vacuum but with correspondence with the facility. It is not unusual for this process to take hundreds of hours. Thereafter, the permit renewal period is not to exceed five (5) years. In the interim there are annual and semi-annual reports. They have to be reviewed and entered into a database to be shared with the EPA. They develop a guidance document to assist when a facility comes in for permit renewal.

On cross-examination, Mr. Mirzakhalili testified that the people who determined the categorization had over 60 years of experience in this area. This was not an easy task. They consulted the engineers. It was not explained what was going to happen with the categorization of the sources when the process began in 1999.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The appellant, Free-Flow, appeals from a notice of violation issued by the agency alleging a failure of Free-Flow to pay its Title V permit fees in full for the year 2000. While it is not an issue in the appeal before the Board today, Free-Flow has also not paid the full amount of its invoice for the Title V fees for the year 2001 as well. The Board's decision today will likely be determinative of this issue as well.

The appeal before the Board was brought as a result of the agency's notice of violation, and while it is admitted by the appellant that it has not paid the fees in full as

invoiced by the agency, the underlying question before the Board is whether the agency acted in an arbitrary and capricious manner in classifying Free-Flow in the "complex" category for purposes of imposing a base fee in accordance with 7 Del. C. § 6907. In appeals to the Board, the appellant has the burden of proving that the decision of the agency is not supported by the evidence before the Board. 7 Del. C. § 6008(b). For the reasons that follow, the Board concludes that Free-Flow has not met its burden of proof and that the agency did not act in an arbitrary and capricious manner. The Board further concludes that the notice of violation was properly issued.

The Board finds the facts in this matter are as testified to by the agency's witnesses–Mr. Mirzakahili and Mr. Koska. The Board did not find the testimony of Dr. Clazie on the facts leading up to the issuance of the notice of violation to be particularly credible. While Dr. Clazie has acted professionally with his dealings with the agency, he was not as forthright with the Board on certain responses to questioning as the Board might have expected. As an example, the Board was somewhat skeptical that Dr. Clazie was not aware of at least the approximate net worth of the company in which he holds a significant position. He was also unaware of the other Title V permit fees imposed upon his company's other facilities by other states.

We find that the agency was diligent in forming a committee to address the Title V permit fees issues in advance of the date the legislation would sunset. Effort was made to include parties representing a range of interests likely to be affected by the new legislation that was going to be enacted. Obviously, not every interest could be represented, and not every affected industry could be heard on the issue. It is significant

that the advisory committee included two members of the General Assembly and the Chamber of Commerce. As is typical in a small state such as Delaware, the Chamber's opinion carries significant weight in the General Assembly. Given the synopsis of the bill, the General Assembly was aware of the Chamber's involvement. The result was a re-distribution of the Title V operating permit fees based upon emissions and the complexity of permitting the various sources. While not everyone was pleased with the outcome, the process leading up to the enactment of the legislation was reasonable.

We further find that the record supports the categorization of Free-Flow as a "complex" source. While the process of manufacturing the product may not be complex (i.e., in the number of steps or people involved to produce it), it is the time and effort required to regulate and oversee this process that places it in the complex category. Mr. Mirzakahili testified that during the five year period between Title V permit renewals, there is record-keeping, testing, and compliance program development among other requirements. This can take hundreds of hours. There are annual and semi-annual reports that have to be reviewed and entered into a database. Mr. Mirzakahili also testified that there was a stack of excess emissions notifications from Free-Flow that had to be reviewed for potential violations, potential enforcement actions, off-site impact considerations and planning. This amount was typical for sources placed in the complex category. All the foregoing has to be taken into consideration even before one begins to factor in the time that has been, and eventually will be, put into the regulatory process involved with the alternate RACT.

In addition to those costs and services that are specific to Free-Flow, there are

general costs associated with the Title V program that must be borne by the sources. The statute in question is a "cost recovery" statute. The Title V program in this state is financed by the sources that are regulated, and whatever the cost of this program, the industries involved will bear the burden of that cost. Prior to the enactment of section 6097 in July of 1999, that cost was based solely upon the emissions from each source. Obviously, the larger sources paid the greater portion of that cost regardless of the complexity of their regulation by the agency. The new fee structure contains a so-called "base fee" that takes into account the complexity of each source's regulation and is not dependent upon its total emissions. As the statute indicates, that base fee relates to services common to all sources including permit issuance and renewals.

Free-Flow contends that the agency erred in the categorization because it did not consider solely an estimation of the number of hours the agency intended to expend upon Free-Flow in the next year or possibly the next few years. This contention, however, does not comport with the cost recovery nature of the statute. The base fee is not composed of just the services specifically provided to each respective source. It includes a share of all the services provided across the board as enumerated in sections 6097(b) and 6097(d). It is analogous to school property taxes. While one particular taxpayer may not utilize the services provided by the public schools, that taxpayer must still provide a portion of the cost of supporting the system as a whole. Here, Mr. Mirzakahili testified that some of those specific general services provided to implement the States Title V program include air monitoring, regulatory development, stack testing, small business assistance, etc...

Furthermore, even where services are specific to the user, the base fee is not

calculated upon an amount of hours expended, or to be expended, during any particular year or even the next three years. Mr. Koska testified that the Title V permit is issued for a period of five years. As Mr. Mirzakahili testified, during this period there are numerous agency hours put into record-keeping, testing, compliance program development, and other requirements that Free-Flow never sees.

Moreover, it is evident from the structure of the statute itself, that the first three years of the base fee is its "start-up" period. As Mr. Koska testified, prior to January 1, 2000 there was no reliable source of the number of actual hours spent on each source. As a result, the initial placement of each source in one of the four enumerated categories was based upon an estimation of the hours involved in producing the Title V permit. That has now changed, and it is a fair presumption that when this statute undergoes sunset review in the next year that the data collected over the previous three years will be utilized in setting the fee structure for the next three years, and so on for the three year cycle thereafter. Even with the estimation utilized for Free-Flow during this "start-up" period, the agency was later able to validate its categorization of Free-Flow by pulling the actual number of hours spent in permitting and providing services to the appellant.

Free-Flow also places significance on the fact that the agency put the sources in their categories prior to the enactment of the legislation itself. Given the history of the enactment of the legislation and the efforts of the Title V committee to have the sources categorized in advance, it makes little sense to hold the agency to an interpretation that the categorization had to be performed subsequent to the enactment of the legislation. By sending out its notices to the sources, the agency ratified its prior actions. It would have

been a waste of State resources to have the agency go through the motions and make the categorization determinations all over again.

Free-Flow also contends that the agency's process of categorizing the sources amounted to a "desk drawer" regulation. Free-Flow argues that as the agency did not follow the APA by promulgating regulations outlining the process, the categorizations are void.

The Board does not find this matter to be analogous to the facts outlined in the case of Butler v. Insurance Commissioner, Del. Supr., 686 A.2d 1017 (1997). In Butler, the appellant was an insurance agent attempting to have his suspended license reinstated. Upon successful completion of the licensing examination, the Licensing Director imposed additional conditions upon the appellant for reinstatement that were not required under any existing statute or regulation. In reversing the lower courts decision, the Delaware Supreme Court held that the Insurance Department could not hold individual licensees to unwritten policies not adhered to uniformly throughout the agency. Butler, 686 A.2d at 1022. The Court emphasized that this holding was particularly applicable where the consequence of non-compliance with such a policy was severe (in this case license revocation).

Unlike Butler, the applicable statute in this case was extremely specific and aimed at accomplishing a result that was the culmination of months of planning and careful consideration by many of the essential players in the legislative process. This was a very open process with no intention of keeping the public in the dark. Publication of the categories in the Register of Regulations gave the public further opportunity to become

involved in the process. It is the specificity of the statute that led the Board to believe the General Assembly intended to take the placement of the sources outside the realm of the regulatory process. The statute lays out the essential criteria and factors to be applied by the agency in making its placement decisions and calculating the fees involved. It then sets those fees in the statute itself. There was little else to do other than to apply those criteria and factors to each individual case. Accordingly, the Board concludes that the nature of the agency's actions in placing the sources in categories was more akin to that of a case decision than a regulation.[1]

This matter is also distinguishable from Butler in that Free-Flow, according to Dr. Clazie's testimony, is the largest recycler of polystyrene in the nation. They are a multi-million dollar operation and have seven plants throughout the country. While the impact of this new statute and the agency's categorization of Free-Flow is not negligible, it is not the severe result contemplated in Butler.

On the agency's Motion to Dismiss, the Board found that the December 30, 1999 invoice sent to Free-Flow was not a final decision. While the invoice could have been appealed at that time, there was no notice of appeal appended to the document, and Free-Flow entered into a dialogue with the agency as instructed on the notice. Thereafter, in

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[1]While the Board concludes that this process resembles a case decision more than one requiring the regulatory process, the Board also understands the appellant's frustration in not having a breakdown of the hours expended for each factor or criteria considered by the agency. The Board attributes this to the estimations required by the "start up" phase of this new statutory scheme, and it would expect in the future (given the hard data the agency is collecting) that the agency will publish its ranking system as recommended by the Chamber of Commerce.

August of 2000, the agency received a partial payment. It was not until the second check marked "payment in full–final payment" was received that the agency issued its notice of violation. At this point, a final decision had been entered. The agency, in effect, had indicated that there would be no more dialogue. The appeal was properly exercised in a timely fashion at this time.

STATEMENT OF DETERMINATION

The Board upholds the decision of the agency finding non-compliance with Condition 2(h) of Free-Flow's Title V permit for failure to submit full payment of its Title V fees.

SO ORDERED this 3rd day of October, 2001.

ENVIRONMENTAL APPEALS BOARD

The following Board members concur in this decision.

Donald Dean
Chairman

Date: Oct 3 2001

Environmental Appeals Board
Appeal No. 2000-12

Joan Donoho

Joan Donoho
Board Member

Date: 10/2/01

Environmental Appeals Board
Appeal No. 2000-12

The following Board members dissented with this decision.

Stanley Tocker

Stanley Tocker, Ph.D.
Board Member

Date: October 2, 2001

Robert Ehrlich
Board Member

Date: 10/2/2001