BEFORE

THE ENVIRONMENTAL APPEALS BOARD

OF THE STATE OF DELAWARE

The Appeal of Thomas V. Spano and T. V. Spano Building Corporation	))))))))

March 23, 1988

FINAL ORDER

This matter came before the Environmental Appeals Board on November 16, 1987. The following Board members were present: Thomas J. Kealy, Chairman; Evelyn H. Greenwood; Ray K. Woodward; and Richard Sames. Richard D. Allen and Palmer L. Whisenant appeared on behalf of the appellants, Thomas V. Spano ("Spano") and T. V. Spano Building Corporation ("Spano Corp."). The Department of Natural Resources and Environmental Control ("DNREC") was represented by Deputy Attorneys General Richmond Williams and James Eberly. The Board was advised by Deputy Attorney General Ann Marie Johnson.

SUBJECT OF THE APPEAL

The question presented for appeal was whether the Secretary had the power and authority under 7 Del. C. Section 6308 to issue an order to the appellants, dated October 1, 1987.[Bd.Ex.-1] The order generally required the appellants to hire a consultant and investigate the cause of the existence of methane gas at the site

of Raintree Village. The order, additionally, requires both appellants to operate and maintain temporary remedial equipment at the site and to pay for such operation, to implement a DNREC approved remedial plan, and to reimburse DNREC for all costs of investigation, sampling, and clean up. The order applied to both Spano Corp. and Spano personally. For the reasons stated below, the Board affirms the Secretary as to Spano Corp., by a vote of 3-1 and unanimously reverses as to Spano, personally.

SUMMARY OF THE LAW

Section 6308 of Title 7 is part of the hazardous waste management section of Title 7, Delaware's code of environmental law. This section states in relevant part:

> Notwithstanding any other provision of this chapter, the Secretary, upon receipt of information that the storage, transportation, treatment or disposal of any hazardous waste may present an imminent and substantial hazard to the health of persons or to the environment, may take such action as he determines to be necessary to protect the health of such persons or the environment. The action the Secretary may take includes, but is not limited to:
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> (1) issuing an order directing the operator of the treatment storage or disposal facility or site, or the custodian of such hazardous wastes, to take such steps as are necessary to prevent the act or eliminate the practice which constitutes such hazard. Such action may include, with respect to a facility or site, permanent or temporary cessation of operation;
> (2) issuing an order directing a person who previously owned or operated a treatment storage or disposal facility or site which constitutes such hazard and who are determined by the Secretary to be responsible for activities causing

> the hazard, to take such steps as are necessary to prevent or eliminate the hazard;
> (3) enforcement action pursuant to Section 6309 of this title;
> (4) directing department personnel to undertake emergency cleanup and remedial measures. The Secretary may recover the costs of such measures from the responsible party.

Interpretation of Section 6308 necessarily requires reference to other parts of Chapter 63. Hazardous wastes are defined by Section 6302(7) as:

> a solid waste, or a combination of solid waste, which because of its quantity, concentration or physical, chemical, or infectious characteristics may cause or significantly contribute to an increase in mortality or an increase in serious, irreversible, or incapacitating irreversible illness, or pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported or disposed of, or otherwise managed.

Solid waste is defined by Section 6302 (12) as "any garbage, refuse, ... resulting from industrial, commercial, ... and from community activities." Solid waste is defined by the solid waste disposal regulation 2.23 as " ...any garbage, refuse, rubbish, special solid waste, other waste, or any combination thereof with insufficient liquid content to be free flowing."

The parties agreed that items 1 through 4 of the Secretary's order had already been complied with and were by implication not at issue before the Board. Thus, the sole issue before the Board was whether the appellants could be held responsible to pay the costs of clean up of the methane gas problem at Raintree Village. The Board limited evidence to that information which was available to the Secretary on or before October 1, 1987, the date of the Order. Each party submitted memoranda outlining their legal and factual arguments.

SUMMARY OF THE EVIDENCE

The Board submitted the chronology as Board Exhibit-1. All documents and information which post-dated October 1, 1988 were not considered by the Board. The appellant's first witness was Gary Molchan[1].

Mr. Molchan is employed by the Environmental Protection Agency and has been "on loan" to DNREC since 1986. He testified that he, along with with the Emergency Response Team (ERT), were the first to arrive at Raintree Village, ("Raintree"), on September 24, 1987, after responding to a telephone call from the Fire Board. He was told that a plumber working at 27 Jonathan Drive had lit a lighter near the sump hole in the basement and a blue flame flashed out of the hole. The resident

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1 Mr. Robert Caron of the Environmental Protection Agency actually testified first, out of order, to accomodate his schedule. His testimony will be summarized later.

of the home repeated the test with the same results, a blue flame flashed out of the sump hole.

The ERT tested the home at 27 Jonathan Drive using an Explosimeter and determined that there was an organic gas in the home near the sump hole. By early in the morning of September 25, the team had concluded that the problem was methane gas as determined by using an Organic Vapor analyser. After subsequent tests throughout the neighborhood, the team decided to evacuate the homes at 25, 27 and 29 Jonathan Drive. The rest of the homes in the developement were evacuated when, late in the afternoon of September 25, one of the contractors struck a gas line. By this time the EPA had been notified and their Technical Assistance Team (TAT) had arrived on site. New Castle County had also been notified of the problem.

By evening of September 25, scheduled monitoring of twelve homes on Jonathan Drive began. This monitoring continued through October 1, 1987 at four hour intervals. Relatively high measurements were recorded in the sump area of some of the homes during this period. On September 26 at 2200 hours, 21 Jonathan Drive showed a level of 60% LEL. On September 28 at 1400 hours the sump area of 21 Jonathan Drive showed a 90% of LEL reading, and on September 28 at 1800 hours it showed 100% of LEL reading[2].

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2 Mr. Molchan explained that the note on the last reading suggesting that the reading might be "PVC adhesive" was an indication that the high reading could possibly be attributable to something other than methane.

Mr. Molchan explained the significance of the air monitoring measurements. The instrument used to make these readings is called an explosimeter. It purportedly measured the percentage of methane in a particular area as a percentage of its lower explosive limit (LEL). For instance, the LEL of methane is 5% - this is the lowest percentage of methane necessary to be present in air in order to cause an explosion. The appellant's Exhibit 1 included typed reports which set out the percentage of LEL measured in several of the homes at various locations in the home.[3]

Ventilation systems were installed for the sump area at 29, 27, 25, and 23 Jonathan Drive on September 26, 1987. By September 26, all of the homeowners, except for the original twelve families evacuated on Jonathan Drive were authorized to return to their homes. The remaining twelve families were allowed to return to their homes on September 29th.

Mr. Molchan testified that as of October 1, he was fairly certain that the debris pits in the development were at least one source of the methane problem, although he did not rule out the possibility of the existence of other sources. His interviews with residents and his own general knowledge of how homes are

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3 Later testimony revealed that the explosimeters used in all the testing were not calibrated for methane, but for pentane and there was doubt that a factor was used to correct the measurements. Therefore, the explosimeter data may have been somewhat imprecise on a quantitative basis. However, the calibration used for pentane is close to that of methane, and the flash that occurred at the sump at 27 Jonathan drive shows that the methane explosion range was reached.

constructed confirmed his belief that tree stumps and general debris had been buried in the debris pits behind the homes.

Mr. Molchan identified where the Department had taken water tests prior to October 1, on the site-plan (DNREC Exhibit-1). The samples were taken along lots 52, 53, 55, and 58, all in front of debris disposal area indicated on the Raintree Village site plan, by digging "bore-holes". (These lots corresponded to the homes along Jonathan Drive which had been evacuated). Mr. Molchan clarified this by testifying on cross-examination that these houses in front of the debris pit had high LEL readings as well as showing significant amounts of "contaminated leachate" in the bore-hole. The explosimeter measurements taken in homes with venting systems after the installation of these venting systems indicated that the venting systems did not remove all of the methane, but the values were well below the LEL.

The ground water samples taken differed from natural ground water in that the chemicals and elements found in the samples correlated with the presence of methane generating bacteria. The test generally confirmed that the liquid in the pits was a prime environment needed to generate methane when in contact with wood. In his opinion, the ventilating systems reduced the risk of collecting methane but did not eliminate the risk. He stated the conditions generating the methane still were present currently. At the time the order was issued, they knew there were disposal areas although they didn't know the exact location of the pits. But the data indicated that something was there.

The next witness to testify for the appellants was Mr. Tad Yancheski. Mr. Yancheski is employed by TetraTech Richardson, the environmental and engineering consulting firm which was under contract to Spano Corp. He stated that on September 28 he was contacted and asked to go out to the Raintree site to make an assessment. Based on the information that he reviewed prior to October 1, he believed that the methane in the ground did not present a geological problem. He stated that in his view the imminent hazard posed by the methane was the presence of the methane in the homes, but that the methane in ground water was not a problem. He admitted on cross-examination, that he had not reviewed quantitative data regarding methane in the water prior to October 1, but he had reviewed maps, seen data on soil gas, and had made visual observations of water in test pits. He admitted that the potential for explosion did constitute a hazard in an enclosed space.

Thomas V. Spano testified that he had been a builder and developer for approximately 17 years and that his corporate entity was entitled T. V. Spano Building Corporation. He noted that the Raintree Village project was his first development in Delaware. TetraTech Richardson was hired to draft the engineering plans.

Spano had personally seen the debris pits on the site as he usually visited once or twice a week. The pits had been dug by his sub-contractor who was responsible for clearing the trees. The sub-contractor buried the debris, with the approval of New

Castle County. No approvals for debris disposal were sought from DNREC.

Next to testify was Ronald T. Hughes, project coordinator for T. V. Spano Corp. He testified that the debris pits had been discussed at a meeting between the County and the sub-contractors, as indicated in a memo from the Department of Public Works [See tab 10, Bd-Ex.-1]. The area in the DP&L right-of-way was determined to be the best area for debris disposal because no houses would be built there. He stated that debris was put in the pits during the period of May through June of 1986. The pits were 15 to 16 feet deep and there were a total of 5. He testified that tree stumps and limbs had been buried in the debris pits and that there could be 2 X 4s and dry wall, but he wasn't sure.

For the Department, Mr. Robert Caron of EPA, testified first. He stated that he first arrived at the Raintree site on September 27 and participated in the technical investigation. He confirmed that the gas was methane, that its primary location was lots 52 through 58, and had also determined that there was a fill area behind those lots through conversations with Raintree residents and his own personal inspection. He stated that in order to develop methane, there needed to be a moist, oxygen-deficient environment. Finally, he testified that in his opinion an emergency situation still existed because of the presence of methane, which poses some dangers in the home. He admitted on cross-examination that the EPA had taken no action

under CERCLA and agreed that the homes were safe enough for the evacuees to return because of the venting apparatus.

Second to testify for DNREC was Phil Retallick, Director of the Division of Air and Waste Management. He stated that the EPA had confirmed the existence of methane gas at the site. The ventilation systems were explained: the system has a auto-dialer that would call 911 (emergency number) if the gas built up quickly and to a dangerous level. He noted that some areas of the homes were not covered by the ventilation system and he stated that he wasn't sure that the system would remove all the methane generated. In his view, the ventilation system was not fail-safe. For instance, either clogging in the French drains or the presence of excess water in the suction system might cause a malfunction or a short. He confirmed that methane detectors had been installed in all the homes at Raintree. He explained that part of the reason that the methane did not vent out of the soil on its own was because of the high clay content of the soil which acted as a natural cap to keep the methane under ground. He also confirmed that water tests indicated the presence of methane near the disposal pits.

Next to testify was Dr. Lawrence Krone of Public Health. Dr. Krone is a member of the ERT. He testified that his observations at Raintree led him to believe that the methane vapor created a health risk. He stated that methane gas could cause respiratory problems and at lethal concentrations could cause death. It was his view that it appeared that the disposal pit was the source of the methane gas.

Next to testify was Mr. William Henegar of 21 Raintree Drive. Mr. Henegar testified that he had personally seen trees and other debris piled up in the pits and buried on lots 74 and 75, and that he saw debris buried before he moved in behind lot 52. He stated that at times he had seen metal, wood chips, a lawn mower, a charcoal grill and hefty laundry bags, all resting in the debris pit before it was covered. He confirmed that he had been evacuated from his home for five days, and that a ventilator was installed in his basement. He stated that he did not feel secure living in his home.

Next to testify was Mr. Richard Folmsbee of DNREC. Mr. Folmsbee is the supervisor of the Solid Waste Branch of the Division of Air and Waste. He stated the regulations required that disposal areas had to be 200 feet from construction areas, and that wastes such as those buried at Raintree must be buried 3 feet above the water table. The Raintree Village disposal pits did not comply with their regulations, nor was there any approval for the Raintree site disposal pits from DNREC. He stated that ordinarily the County puts a stamp on plans indicating when State approvals were needed, but that to the best of his knowledge no such stamp had been put on the plans by the County in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to 7 Del. C. Section 6008(a) the Environmental Appeals Board is authorized to "affirm, modify, or reverse the decision of the Secretary" in an appeal brought by "any person whose interest is substantially affected by any action of the

Secretary ..." In making its decision, the Board is required to "enter an order that will best further the purpose of [chapter 60]...", 7 Del. C. Section 6006(4). Thus, the Board is not required to narrowly affirm or reverse the Secretary's decision, but is free to enter whatever decision, based on the entire record, will best further the purposes of the Chapter 60.

The Board notes that this action was brought pursuant to Chapter 63 of Title 7, the scope of which is broad. Its purpose is to "protect the public health and safety ... and the environment from the effects of the improper, inadequate or unsound management of hazardous waste." 7 Del. C. Section 6301(b)(1). Chapter 63 is part of the larger rubric of environmental statutes in title 7, whose purpose is to protect the interests of the public in maintaining the environment.

Protection of the environment has been held to be of paramount consideration in Chapters 60 (See State vs. Getty Oil Company, Del.Supr., 305 A.2d 327 (1973), and statutes directed at the control of pollution in the environment are intended to encompass infinitely variable conditions. State vs. Braun, Del. Supr., 378 A.2d 640 (1977). The intent of Chapter 60 Title 7 has been held to be to make those who make or contribute to the pollution problem in the State responsible for its correction. See Hindt vs. State, Del.Supr., 421 A.2d 1325 (1980). Because the intent and purpose of Chapter 60 is closely aligned with that of Chapter 63, it is reasonable to apply these cases and the principles which they represent to Chapter 63. This comports with the general rule of statutory construction which require a

statute to be read "as a whole in an effort to effectuate its general legislative intent." Richardson v. Town of Ocean View, Del. Supr., No. 128, 1987, Walsh, J. (Jan. 4, 1988). Thus the guidelines imposed in Chapter 63 are to be read broadly in order to accomplish the purpose that this Chapter is intended to accomplish, i.e., the protection of the environment from hazardous wastes.

Based upon the record before it, the Board makes the following findings:

1. There is sufficient testimony on the record to indicate that Spano Corp. owns or owned the Raintree Village property and was responsible directly or indirectly for the disposal of the debris in disposal pits on the property. Mr. Spano testified that he knew of the existence of the pits and that his company had hired the sub-contractor who in turn recommended disposal at the waste site.

The Board further finds that the waste disposed of in the pits included trees, tree limbs, wood, 2X4s, and other refuse. The testimony indicates that this material was refuse resulting from the development of the Raintree site. Land development, with the purpose of preparing land for residential units, built to be sold to the general public, is a commercial activity. Having found this to be so, the Board is satisfied that this material comes within the definition of solid waste in the Code under Section 6302(12).

2. The Board finds that the waste buried in the disposal pits, designated on the site plan, because of its quantity,

concentration, and physical characteristics, posed a substantial present and potential hazard to human health and the environment and therefore constituted hazardous wastes under Section 6302(7). After listening to the evidence, the Board is satisfied that there is sufficient evidence to indicate that the tree limbs and other materials which were buried at the debris pits decomposed to create methane gas, and that this methane gas was created as a direct result of the moist environment and the manner in which the waste was buried below the water table.

Furthermore, the Board finds that the presence of the methane gas, notwithstanding the ventilation systems, presents an imminent and substantial hazard to the health of persons at Raintree and to the environment at the Raintree site. The Board bases this finding upon the fact that the threat of the methane gas reaching explosive limits exists with sufficient probability because of the possibility that the ventilation systems may shut down.

The testimony indicates that the ventilation systems are not failsafe; they reduce the risk of gas but do not resolve the problem of methane gas at Raintree. The homes at Raintree are only safe for habitation when the ventilation systems are operational. Should those ventilation systems break down for any reason because of a power outage, mechanical failure, or malfunction because of a clog up in the French drains, the methane gas levels will begin again to increase.

This danger, in the Board's view, is also imminent. As indicated by DNREC, "imminent" is defined as "ready to take

place", Webster's New Collegiate Dictionary (B & C Merrian Co., Springfield, MA, 1973). Caselaw suggests that imminence need not be an emergency. See U.S. v Conservation Chemical Co., 619 F. Supp. 162, 193-194 (W. D. Mo. 1985).[4] The Board is convinced of the "imminence" of the danger the methane poses for two reasons. First, it is consistent with the intent of the statute to protect the general public from harm due to hazardous wastes, and to therefore interpret this standard in a manner that best accomplishes that end. Secondly, the threat of harm to the public in this case exists in the homes of families living in Raintree Village. From the perspective of the homeowners, any threat to the safety of their families and their home goes to the very core of their everyday life. For them, the danger is imminent and substantial as long as the methane gas source exists because they can not completely remove themselves from it, short of leaving their homes. Because such imminent and substantial hazards exist, the Board is satisfied that the Secretary had the authority to issue the order under the statute.

3. The Board further finds that the Secretary's authority extended to T. V. Spano Building Corporation but not Mr. Spano

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[4] The legislative history underlying the amendment of the Federal law regarding hazardous wastes cleanup (Comprehensive Environmental Response, Compensation, and Liability Act - "CERCLA") is instructive. The Court notes that "... [a]n endangerment need not be immediate to be "imminent," and thus warrant relief." Thus, an endangerment is "imminent" if factors giving rise to it are present, even though the harm may not be realized for years. Conservation Chemical, 619 F. Supp. 162 at 193.

personally. There is insufficient evidence to support any basis for holding Mr. Spano liable personally. It is clear on the record that the Corporation owned the property and that the Corporation was the custodian and overseer of all building operations. Although Mr. Spano personally oversaw such operations, he did so in his capacity as an officer of the Corporation.

Finally, the Board does not agree with the appellant's argument that long-term remedial action is not a necessary measure under the statute. It seems clear to the Board that the problem of methane gas in the soil at Raintree Village will not be alleviated until the methane gas source is removed. The appellant argues that Section 6308(4) merely provides the Secretary with the right to recover the costs of emergency clean up and remedial measures but does not authorize the Secretary to order such relief. Appellants suggest this section should be interpreted differently because it is worded differently from Paragraphs 1 through 3 which precede it.

The Board does not agree. Statutes should be construed to produce reasonable results. If the plain language leads to an absurd conclusion it will be disregarded. Coastal Barge Corp.v Coastal Zone Industrial Control Board Del.Supr., 492 A2d 1242. As was recently noted by the Supreme Court, "...[t]he object of statutory construction is to give a sensible and practical meaning to a stature as a whole in order that it may be applied to future cases without difficulty." The purpose of the statute is to require an offending party to bear the cost of correcting

an environmental problem that they have created. It therefore runs counter to this purpose to suggest that the Secretary could not order that those costs be paid. The words "may recover" merely indicate that the Secretary has the discretion to order such payment.

ACTION OF THE BOARD

For the foregoing reasons, by a vote of 3 to 1, the Board hereby AFFIRMS the Secretary's order with regard to T. V. Spano Building Corp. and unanimously REVERSES the order with regard to Thomas V. Spano personally.

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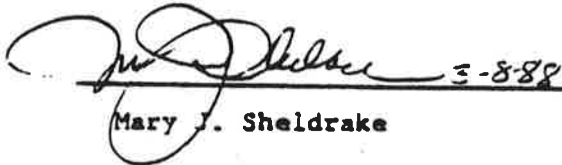

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