Eureka Stone Quarry, Inc. v. Department of Environmental Protection: The Rocky Results of Air Quality Violations

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EUREKA STONE QUARRY, INC. V. DEPARTMENT OF ENVIRONMENTAL PROTECTION: THE ROCKY RESULTS OF AIR QUALITY VIOLATIONS

I. Introduction

Most people know the adage, "sticks and stones may break my bones, but words will never hurt me." For a corporation that specializes in excavating stones, the words "penalty" and "compliance docket" can potentially hurt the company tremendously.1

In 1960, the Pennsylvania legislature passed the Air Pollution Control Act (Act) to reduce air pollution in accordance with the federal Clean Air Act (CAA).2 The Act grants Pennsylvania's Department of Environmental Protection (DEP) the authority to set emission standards for air pollutants, to issue building and equipment permits and to monitor the air quality index in the state.3 Additionally, the Act grants the DEP the power to enforce these regulations by issuing fines to companies that violate air quality emission standards, do not maintain proper equipment or do not keep required records of equipment upgrades and maintenance.4

The DEP may also place companies on a compliance docket, which prohibits those companies from acquiring permits until they comply with the law.5 Placement on the compliance docket can slow company business or even bring it to a complete halt.6

Companies that receive penalties or find themselves placed on the compliance docket, however, are not without remedy.7 These companies may appeal to the Environmental Hearing Board.

1. See Sarah Larson, Quarry Must Pay Big Fines: The Environmental Hearing Board Upheld Department of Environmental Protection Against Eureka Stone Quarry for Air Quality Violations, INTELLIGENCER (Doylestown, PA), Aug. 24, 2007, at B1 (finding that penalties and compliance docket issuances are serious enforcement actions).


4. See id. §§ 4007.1, 4009, 4010.1 (allowing DEP to review air quality compliance, issue penalties and enforce compliance).

5. See id. § 4010.1 (authorizing DEP to suspend or terminate businesses' plan approvals and permits until Act violations are corrected).

6. See Larson, supra note 1, at B1 (recognizing compliance docket penalty stops companies from applying for more permits or reviews).

7. See id. (noting Eureka's appeal to EHB).
(EHB).\(^8\) The EHB conducts trials to determine whether DEP actions are appropriate, and, if not, the EHB may overrule the DEP sanctions against the companies.\(^9\)

Recently, the EHB had its first opportunity to review the DEP's decision that placed a company on the compliance docket for Act violations.\(^10\) In Eureka Stone Quarry, Inc. v. Department of Environmental Protection (Eureka Stone Quarry),\(^11\) a stone crushing company appealed the DEP enforcement actions for its air quality violations.\(^12\) While the EHB lowered many of the civil penalties issued against Eureka Stone Quarry, Inc. (Eureka), the board ultimately upheld the DEP decision that placed Eureka on the compliance docket.\(^13\)

This Note analyzes the EHB's decision in Eureka Stone Quarry. Part II of the Note discusses the conflict between Eureka and the DEP.\(^14\) Part III of this Note examines the Act, which gives the DEP authority to issue violations to companies that do not confine their operations to the law.\(^15\) Part III also explores the EHB's purpose and its role in Pennsylvania.\(^16\) Part IV considers the EHB decision in Eureka Stone Quarry and analyzes the rationale behind the decision.\(^17\) Part V provides a critical analysis of the EHB's holding in this case as compared to its previous decisions.\(^18\) Finally, Part VI of

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9. See id. (explaining EHB has authority to alter DEP decisions if finding DEP abused discretion, but noting EHB usually remands case to DEP for corrective action).


12. See id. (challenging two significant civil penalties and placement on compliance docket in 2006).

13. See id. at **1-2 (lowering civil penalties from $175,300 to $93,350, but holding DEP did not abuse discretion in using compliance docket action).

14. For a further discussion of the facts of Eureka Stone Quarry, see infra notes 19-41 and accompanying text.

15. For a further discussion of background information regarding DEP's authority to review company procedures and enforce compliance, see infra notes 42-75 and accompanying text.

16. For a further background description of the appointment and functions of the EHB, see infra notes 42-75 and accompanying text.

17. For a narrative analysis of the EHB's conclusions of law in Eureka Stone Quarry, see infra notes 76-117 and accompanying text.

18. For a critical analysis of the EHB's reasoning in Eureka Stone Quarry, see infra notes 118-162 and accompanying text.
this Note discusses how the *Eureka* decision will affect future DEP decisions.\(^{19}\)

II. FACTS

Eureka owns and operates three stone quarry facilities in Bucks County, Pennsylvania.\(^{20}\) At these facilities, stone crushing plants and asphalt plants manufacture a variety of crushed stone and asphalt.\(^{21}\) Of the three facilities, only the Rush Valley and the Chalfont facilities are subject to DEP-issued Air Quality State Only Operating Permits; the Warrington facility is not.\(^{22}\)

Between September 2004 and November 2005, Inspector Robert Guzek and Compliance Specialist Christian Vlot of the DEP visited Eureka's facilities.\(^{23}\) During their visits, they discovered faulty machinery that caused multiple fugitive emissions violations.\(^{24}\) The inspectors also discovered that the company was not maintaining DEP-required records.\(^{25}\) Additionally, the inspectors found that the company had a broken manometer, an important component of an air pollution control device.\(^{26}\)

In January of 2006, after the company failed to respond to three violation notices, the DEP placed Eureka on the compliance docket.\(^{27}\) As a result, the DEP refused to issue any construction

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\(^{19}\) For a discussion of the impact of *Eureka Stone Quarry* on DEP's future compliance docket use, see *infra* notes 165-99 and accompanying text.


\(^{21}\) *See* id. (detailing precise operations conducted at Rush Valley, Chalfont and Warrington facilities).

\(^{22}\) *See* id. at *23 (explaining permit requires facilities to monitor NOX and VOC emissions on rolling basis and keep maintenance and inspection records).

\(^{23}\) *See* id. at **7-18 (describing repeated DEP visits to Eureka’s facilities).

\(^{24}\) *See* id. (observing fugitive dust emitted from excavation and stone crushing sites due to defective misting sprayers).

\(^{25}\) *See* Eureka Stone Quarry, 2007 Pa. Envrn. LEXIS 40, at **23-25 (determining that Eureka failed to monitor NOX and VOC emissions on rolling basis at Chalfont and Rush Valley facilities).

\(^{26}\) *See* id. at *27 (finding Rush Valley’s manometer cracked, disconnected and inoperable). The manometer monitors the baghouse which is an air pollution control device filtering particulate matter. *Id.* The manometer “provide[s] data concerning the operation of the bags in the baghouse and indicate[s] when they need to be cleaned or replaced.” *Id.*

\(^{27}\) *See* id. at **29-30 (considering DEP’s past enforcement actions and Eureka’s failure to respond to violations in utilizing compliance docket).
plan approvals or permits to Eureka until the violations were corrected and the company was in compliance with the law.\textsuperscript{28}

In May of 2006, the DEP and Eureka entered into a Consent Order and Agreement.\textsuperscript{29} During the meetings, Eureka agreed to purchase wet-dust suppression air cleaning systems to correct its fugitive dust problems.\textsuperscript{30} As a result of the negotiations and the company’s intent to remedy violations, Eureka was removed from the compliance docket.\textsuperscript{31} Shortly thereafter, the DEP discovered that Eureka had begun installing new wet-dust systems without first obtaining the required DEP plan approval.\textsuperscript{32} When Eureka learned of its error, however, it stopped using the systems and contacted the DEP to correct the issue.\textsuperscript{33}

In June of 2006, Eureka received an Assessment of Civil Penalties for its problems and violations occurring in January 2006 and June 2006.\textsuperscript{34} While Eureka did not challenge its liability for fugitive dust emissions violations, Eureka appealed to the EHB, complaining that the fines were excessive.\textsuperscript{35} Eureka also argued that it was an unreasonable abuse of discretion for the DEP to place it on the compliance docket.\textsuperscript{36}

In response, the DEP asserted that both the penalties and Eureka’s placement on the compliance docket were reasonable.\textsuperscript{37} The DEP justified its actions based on its two years of inspections and attempts to get Eureka to comply with the law.\textsuperscript{38} Additionally,

\footnotesize{28. See id. (notifying Eureka by letter that DEP halted plan approval for new asphalt plant based on placement on compliance docket).
29. See id. at **35-36 (agreeing to comply with DEP regulations).
30. See Eureka Stone Quarry, 2007 Pa. Envirn. LEXIS 40, at **36-37 (agreeing to install wet suppression system and implement environmental management program).
31. See id. at *36 (noting Eureka’s entering into Consent Order and Agreement led DEP to remove Eureka from compliance docket).
32. See id. at *37 (observing Eureka installed and operated NESCO wet system without DEP plan approval and operating permit).
33. See id. at **38-39 (indicating Eureka stopped using system and contacted DEP to correct issue once Eureka learned of violation).
34. See id. at *1. (assessing civil penalties for Eureka’s violations totaled $175,300).
35. See Eureka Stone Quarry, 2007 Pa. Envirn. LEXIS 40, at **40-46 (arguing double penalty is unreasonable just because two facilities have permits).
36. See id. at *61 (claiming placement on compliance docket was abuse of discretion as two facilities were in compliance and third was resolving violations).
37. See Larson, supra note 1, at B1 (asserting Eureka lacked intent to comply with regulations leading to serious DEP enforcement actions).
38. See id. (noting Eureka’s string of environmental issues over past several years). For example, “even after [Eureka] was removed from the DEP’s compliance docket in May 2006, the DEP discovered more violations.” Id.}
the DEP stated that the compliance docket issue was moot because it already removed Eureka from the docket.\textsuperscript{39}

The EHB lowered many of the civil penalties, finding that fines should not be doubled for companies holding state permits.\textsuperscript{40} The EHB decided, however, that the DEP’s placement of Eureka on the compliance docket was not an abuse of discretion and upheld the action.\textsuperscript{41} Dissatisfied with the result, Eureka appealed to the Pennsylvania Commonwealth Court, which affirmed the EHB’s decision.\textsuperscript{42}

\section*{III. Background}

In 1970, the United States federal government responded to increased public concern about air pollution by creating the Environmental Protection Agency (EPA).\textsuperscript{43} Concurrently, Congress passed the federal Clean Air Act (CAA).\textsuperscript{44} As amended in 1990, the CAA mandates that all states comply with specific regulations to decrease air pollution in the country and reduce global warming.\textsuperscript{45}

A. Pennsylvania Environmental Regulation under the Air Pollution Control Act

Pennsylvania enacted the Air Pollution Control Act (Act), which imposes higher air quality standards than those mandated at

\begin{itemize}
\item 41. See \textit{Eureka Stone Quarry}, 2007 Pa. Envrn. LEXIS 40, at *63 (holding there was sufficient evidence showing Eureka lacked intent to comply with DEP and was properly placed on compliance docket).
\item 44. See U.S. Environmental Protection Agency, History of the Clean Air Act, http://www.epa.gov/air/caa/caa_history.html (last visited Feb. 21, 2009) (creating legislation for comprehensive federal and state regulations to limit air pollution emissions).
\item 45. See 42 U.S.C. § 7401 (2006) (aiming to protect and enhance national air quality through development of air pollution prevention programs in each state).
\end{itemize}
the federal level. The Act authorizes the Department of Environmental Protection (DEP) to enforce the rules and regulations of the Act and to issue penalties for violating the law. To facilitate compliance, the DEP has the authority to enter any premises to investigate possible violations and ensure compliance.

Additionally, the Act enables the DEP to use the compliance docket as another penalty tool. The DEP can place a company on the compliance docket, thereby barring that company from receiving a permit when the DEP finds that the company lacks the intention or ability to comply with the Act and its regulations. Under the Act, a permit applicant or a permittee may appeal its placement on the compliance docket. While the Act enables the DEP to issue civil penalties for permit violations, the Environmental Hearing Board (EHB) has the power to adjust these penalties as it sees fit.

The EHB’s jurisdiction is limited to reviewing only the DEP’s final actions. EHB trials are similar to civil trials in the Pennsylvania Court of Common Pleas; an exception is that the trials are not heard in the presence of a jury. While the EHB is functionally equivalent to a court of adjudication, it is not actually part of the judicial branch of government.

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47. For a description of DEP’s powers, responsibilities and authority to enforce Act, see supra notes 3-7 and accompanying text.


50. See id. (noting DEP’s ability to suspend, terminate or revoke a permit).

51. See id. § 4006 (granting EHB power to hear appeals from companies dissatisfied with placement on compliance docket).

52. See History of the EHB, supra note 8 (explaining that if EHB finds DEP abused discretion, based on evidence provided, EHB may substitute own discretion).

53. See id. (restricting EHB’s jurisdiction).

54. See id. (explaining EHB’s modus operandi). The EHB, like courts, allows litigants to use discovery, file pleadings, petitions, motions, briefs and participate in hearings. Id.

The EHB reviews cases de novo. The EHB stated in Keinath v. Department of Environmental Protection that appeals are decided based on all the evidence available at trial, not simply the facts that the DEP considered in issuing its penalties. If the EHB finds that the DEP abused its discretion, it has the authority to issue a new ruling. If the EHB agrees with the DEP’s action, however, the appellant may bring the case before the Commonwealth Court and may continue appealing up to the Supreme Court of Pennsylvania. When cases do proceed to these courts, the courts generally defer to the EHB ruling.

B. Act Violations and Penalty Assessment

The Act states that the DEP should consider many factors in assessing civil penalties. These factors include: willfulness of the violation, the actual damage, financial benefit of the penalties, deterrence for future violations, cost to the department, the size of the facility, compliance history, severity and duration of the violation, amount of cooperation from the violator, speed with which compliance occurs and whether the violation was voluntarily reported. In American Auto Wash, Inc. v. Department of Environmental Protection, the EHB considered several of these factors in determining whether the size and impact of the violation was accurately

58. See id. (explaining DEP bears burden to prove by preponderance of evidence that there exists factual basis for assessed penalties).
59. For a discussion on the EHB’s authority to alter DEP actions, see supra notes 49-51 and accompanying text.
60. See History of the EHB, supra note 8 (authorizing parties displeased with EHB decision to appeal to Commonwealth Court). If still displeased, the litigants may, if allowed, appeal to the Pennsylvania Supreme Court. Id.
63. See id. (listing factors DEP considers in either lowering or increasing penalty amounts).
reflected in the penalty assessment.65 After considering these factors, the EHB upheld the penalty assessment, but reduced the penalty amount.66

While the EHB considers these factors listed in the Act, the DEP created its own penalty matrix, which is designed to give specific weight to each factor.67 This penalty matrix, however, is only considered a guidance document.68 As the EHB previously held, in Upper Gwynedd Township v. Department of Environmental Protection69, guidance documents do not have the force of law, and neither the DEP nor the EHB are required to follow them in penalty assessment.70

Under this particular guidance document, the DEP may consider the penalty's deterrent value when assessing the amount.71 The Pennsylvania Commonwealth Court upheld this idea in Westinghouse Electric v. Department of Environmental Protection72, when the EHB issued a $3.2 million penalty to a company that allowed toxins to seep into a nearby stream, violating the Clean Stream Law.73 In agreeing with the EHB decision, the court stated that the DEP is authorized to implement a policy of deterrence without proof that there will be an actual deterring effect on the company or the industrial community.74 The DEP may consider deterrence in con-

65. *Id.* at 181 (deciding that where base penalty for AAW's failure to install new technology was calculated based on “throughput”, subsequent ten percent increase in penalty, based on monthly “throughput”, was unreasonable).

66. See *id.* (reducing penalty because AAW’s non-compliance was partly caused by factors beyond own control and because base penalty was incorrectly augmented).


68. See *id.* at *65 (explaining guidance document does not bear force of regulation and DEP is free to deviate from procedures in guidance document).


70. See *id.* (explaining guidance documents do not have force of law and DEP is not required to follow them).

71. See Eureka Stone Quarry, 2007 Pa. Envrn. LEXIS 40, at **41-43 (addressing DEP's decision to apply highest base penalty in matrix range for Eureka's fugitive dust violations to deter future violations).


73. See *id.* at 1280 (concluding EHB can consider policy of deterrence factor in calculating penalty assessment).

74. See *id.* at 1279 (holding large penalty will send message to potential polluters and will encourage company managers to pay more attention to environmental issues).
junction with such factors as the number of violations, the duration of the violations and the hazards the violations caused.75

During the twenty-five years of the EHB’s existence, Pennsylvania residents have filed almost ten thousand cases; the EHB, however, had not encountered the appeal of a compliance docket action until 2007.76 Eureka Stone Quarry is a landmark case because the EHB had its first opportunity to decide whether the compliance docket was used appropriately as a penalty.77 This case is likely to have an affect on how the DEP will use this tool in the future.78

IV. NARRATIVE ANALYSIS

Eureka appealed to the EHB, objecting to a series of DEP-issued enforcement actions.79 The EHB reviewed the DEP’s assessed penalties for fugitive emissions violations, in addition to inconsistent recordkeeping, broken equipment and installation of new systems without plan approval.80 More importantly, for the first time, the EHB examined the DEP’s decision to use the compliance docket as a penalty against a company.81

A. Fugitive Emissions Violations

The EHB agreed with Eureka’s argument that the fines for its fugitive dust emissions violation were excessive.82 Consequently, the EHB lowered the fines, deciding that fines should not be doubled and a company should not be punished more simply because two of the facilities had permits.83

75. See id. (noting penalty was not solely based on deterrence, but number of violations and duration of violations were primary factors).

76. See History of the EHB, supra note 8 (explaining most compliance docket cases were withdrawn or settled).

77. For an explanation of Eureka’s appeal against DEP’s use of the compliance docket against Eureka, see supra note 39 and accompanying text.

78. See Larson, supra note 1, at B1 (explaining finding in favor of Eureka may have hampered DEP from using compliance docket tool in future).


80. See id. at *3 (detailing Eureka’s specific dissatisfaction with DEP’s violations and penalties).

81. For a further discussion of the importance of the EHB’s evaluation of compliance docket use, see infra notes 147-51 and accompanying text.

82. See Eureka Stone Quarry, 2007 Pa. Envirn. LEXIS 40, at *41 (describing Eureka’s argument that $6,500 for each fugitive dust violation at Rush Valley and Chalfont facilities was unreasonably high).

83. For a further discussion of how the EHB decided that penalty doubling was unreasonable, see infra notes 120-21 and accompanying text.
While the DEP properly followed the guidance document, which suggests doubling the penalty for permitted facilities, the EHB found no reasonable basis for this policy. The EHB held that the DEP's assertion, that the doubling was based on the facilities' sizes, was unfounded because no evidence was introduced regarding the sizes of the permitted facilities in comparison to that of the un-permitted facility.

The EHB, however, disagreed with Eureka's argument that the penalties should be lowered because the company's conduct was only negligent, not willful. The EHB held that the company was reckless because Eureka chose not to develop an effective program to control the problematic dust emissions. According to the Commonwealth Court of Pennsylvania, "[a] quarry operator has an affirmative duty to provide an adequate dust suppression system when and where it is necessary." Nonetheless, the EHB reduced the penalties because the operator's level of knowledge was already accounted for in establishing a degree of willfulness; the doubling based on the permit, therefore, was excessive.

B. Recordkeeping Violations

The EHB reduced the DEP penalty for rolling recordkeeping violations absent evidence of prior recordkeeping issues. Similarly, the EHB lowered the penalties because the lack of recordkeeping did not cause direct environmental damage.

The EHB agreed with the DEP, finding that the violations for the lack of maintaining compliance history rolling records were appropriate; the EHB, however, agreed with Eureka, deciding that the

84. See Eureka Stone Quarry, 2007 Pa. Envirn. LEXIS 40, at *44 (explaining inspectors' arguments that guidance document suggests doubling penalty is necessary because it is based on size of facility).
85. See id. (finding DEP introduced no evidence regarding size of Eureka quarries with permits compared to facility without permit).
86. See id. at **45-46 (relying on Act when determining DEP should consider violator's culpability in assessing penalties).
87. See id. (holding Eureka responsible for failing to control dust emissions). "Recklessness is demonstrated by a conscious disregard of the fact that one's conduct may result in a violation of the law." Id.
89. For a further discussion of how the EHB decided that penalty doubling was unreasonable, see infra notes 120-21 and accompanying text.
91. See id. (finding no evidence that violation had potential to cause environmental damage).
DEP should not have augmented the base penalty for such an offense. 92 The EHB found no evidence of prior failures to keep emissions records or that the violation could cause environmental damage. 93 As a result, the EHB reduced the penalty amount. 94

Conversely, the EHB held that the penalties for Eureka’s failure to complete daily site monitoring and maintenance logs were reasonable. 95 If Eureka had complied, it would have noticed, and possibly remedied, some of the fugitive dust emissions problems without the DEP’s interference. 96

C. Equipment Violations

The EHB adjusted the broken manometer penalty, finding that there was no proof that Eureka failed to properly maintain the manometer in the past. 97 The EHB also found no evidence of emission violations from the broken equipment. 98

Despite Eureka’s claim against any type of penalty for broken equipment that was not in use, the EHB did not find any permit provision that allowed Eureka to take the equipment out of commission until it was repaired. 99 While the EHB acknowledged that perhaps such a provision should exist, the EHB held that the construction of permit provisions was for the DEP to decide. 100 Regardless, the EHB upheld some penalty because Eureka did not report the broken equipment to the DEP and delayed repair for three months. 101

92. See id. (explaining DEP assessed civil penalties against Eureka for failing to maintain VOCs and NOx rolling records and for failing to maintain site monitoring and baghouse records).

93. See id. at *53 (determining VOCs and NOx annual emissions at both facilities were well below twenty-five tons per year approved in operating permits).

94. See id. (finding that total of $2,000 for recordkeeping violations was reasonable penalty).

95. See Eureka Stone Quarry, 2007 Pa. Envrn. LEXIS 40, at *54 (holding since daily logs are fairly simple records to keep, it was unreasonable for Eureka not to comply).

96. See id. (finding $700 penalty for not conducting daily site monitoring and $1,400 for not maintaining maintenance logs reasonable).

97. See id. at *56 (considering circumstances surrounding violation and finding DEP’s penalty unreasonable fit for gravity of violation).

98. See id. (explaining entire facility was closed in winter and no evidence existed that crusher and baghouse were in use when manometer was broken).

99. For a discussion of the application of the permit language in assessing the violation, see infra notes 134-39 and accompanying text.

100. See Eureka Stone Quarry, 2007 Pa. Envrn. LEXIS 40, at **55-56 (suggesting DEP should make provisions to allow permittee to take equipment out of commission for six months to allow for broken device replacement).

101. See id. at *56 (finding reasonable penalty for broken manometer was $500).
D. System Installation without Plan Approval

The EHB decided that the DEP’s assessed penalties were too high for Eureka’s installation and operation of the NESCO systems without plan approvals. The EHB agreed with the DEP, holding that Eureka was overzealous when it installed the system without the DEP’s plan approval. Nevertheless, the EHB did not find that the circumstances warranted such a high penalty. The EHB noted that upon notice of its improper NESCO systems operation, Eureka immediately shut down and locked the systems until it received the plan approvals several months later. Based on Eureka’s good faith effort to comply with the law, the EHB did not find such a high penalty reasonable. At the same time, the EHB emphasized the importance of requiring DEP plan approval prior to construction. As a result, the EHB issued a reduced penalty.

E. Placement on the Compliance Docket

Determining that the issue was not moot, the EHB decided to review the DEP’s placement of Eureka on the compliance docket and found that placement was proper. The EHB held that the DEP’s removal of Eureka from the docket did not render the issue moot. As a question of first impression for the EHB, this decision is extremely important.

102. See id. at *70 (assessing $6,500 civil penalties for each NESCO installation at Chalfont and Warrington and additional $6,500 for NESCO use at Warrington without approval).

103. See id. at *71 (explaining DEP properly places importance on requiring plan approval).

104. See id. at *70 (detailing Eureka’s attempts to address fugitive dust problem).


106. See id. at **70-71 (finding punishing Eureka’s one significant attempt to comply with DEP regulations unreasonable).

107. See id. at *71 (weighing importance of issuing higher penalty). “Consistency in enforcement reasonably calls for some penalty.” Id.

108. See id. (reducing DEP penalty for system installation and use from $19,500 to $7,500).

109. For a discussion of the EHB’s reasoning for reviewing DEP’s compliance docket and concluding that DEP properly used the compliance docket, see infra notes 147-156 and accompanying text.

110. See Eureka Stone Quarry, 2007 Pa. Envirn. LEXIS 40, at **58-59 (establishing exception to mootness doctrine when conduct is likely to be repeated yet continuously evades review).

111. See id. at **59-60 (stating EHB reviews cases involving issues of public importance or when one party will suffer detriment without court decision).
The EHB explained that, by nature, placement on the docket is limited in duration.\textsuperscript{112} It can, therefore, always be argued that there is no need for review because the company is usually removed from the docket by the time the issue gets to the EHB.\textsuperscript{113} The EHB acknowledged the importance of reviewing the issue, highlighting its likely future impact on Eureka and other companies.\textsuperscript{114}

Upon review, the EHB held that the DEP's action was not an abuse of discretion even though, at the time, two of Eureka's facilities were in compliance.\textsuperscript{115} Regardless, the EHB found that Eureka's operators should have been proactive in complying with the permits, instead of merely reacting to a violation citation.\textsuperscript{116} Upon examining the company's compliance history, the EHB held that Eureka lacked the intent to comply with the law; therefore, Eureka was properly placed on the docket.\textsuperscript{117}

The EHB also did not find merit in Eureka's argument that its placement on the docket was procedurally defective.\textsuperscript{118} Eureka claimed that prior to placement on the docket, it should have received a warning letter stating that it was in danger of being placed on the docket.\textsuperscript{119} The EHB disagreed, stating that the DEP is free to deviate from sending this warning letter; the placement, therefore, was not procedurally defective.\textsuperscript{120}

\begin{itemize}
\item \textsuperscript{112} See id. at **60-61 (explaining short duration could allow compliance docket use to evade review).
\item \textsuperscript{113} See id. (agreeing while issue may be moot, it must be reviewed when permittee has continuing stake in controversy).
\item \textsuperscript{114} See id. at *61 (holding Eureka's placement on compliance docket may have future impact on Eureka and that EHB must have jurisdiction to review).
\item \textsuperscript{115} See Eureka Stone Quarry, 2007 Pa. Envrn. LEXIS 40, at *62 (viewing entire record and holding civil penalties from 2000 through 2004 did not effect Eureka's operations).
\item \textsuperscript{116} See id. at **62-63 (explaining Eureka waited for DEP to catch violations rather than correcting issues itself).
\item \textsuperscript{117} See Larson, supra note 1, at B1 (explaining serious enforcement action was necessary after string of civil penalties failed to change Eureka's operations).
\item \textsuperscript{118} See Eureka Stone Quarry, 2007 Pa. Envrn. LEXIS 40, at *62 (claiming DEP did not "informally" attempt to resolve violations by sending Eureka warning letter).
\item \textsuperscript{119} See id. (noting warning letter is not requirement but suggestion through guidance document).
\end{itemize}
V. CRITICAL ANALYSIS

As a matter of first impression for the EHB, this decision reinforces the DEP’s significant authority in dealing with companies that are lax on compliance efforts.121 While the EHB correctly affirmed the DEP-issued violations and the DEP’s use of the compliance docket against Eureka, the EHB undermined the DEP’s penalty matrix by reducing the penalty amounts.122

A. Fugitive Emissions Violations

In its fugitive emissions violations analysis, the EHB correctly considered the violation’s size, its environmental impact and the company’s culpability in assessing a base penalty.123 A company that is aware of its air pollution problem, but fails to adopt an effective control program is deemed reckless.124 This level of culpability correctly affects the base penalty applied to the violator.125

Applying the American Auto Wash analysis, however, the EHB found no reasonable basis for doubling a penalty merely because a facility holds a permit.126 Because the operator’s knowledge is already considered in the base penalty assessment, the EHB held that Eureka should not be punished twice for advanced knowledge.127 This result is counterintuitive because permitted facilities are by nature held to a higher standard.128 Permitted facilities are required to conduct their own inspections and to proactively assess possible

121. See Larson, supra note 1, at B1 (stressing EHB’s ruling against Eureka effectively upheld DEP’s ability to use compliance docket threat against other companies).


123. See id. at **44-45 (relying on American Auto Wash, Inc. to determine base penalty assessments reflect size and impact of violations).

124. See id. at *45 (explaining Eureka’s non-compliance cannot be defined as willful because violation of DEP regulations was not deliberate).

125. See id. at *48 (assessing $3,250 penalty per fugitive dust violation based on Eureka’s recklessness).

126. See Am. Auto Wash Inc. v. Dep’t of Envtl. Prot., 729 A.2d 175, 181 (Pa. Commw. Ct. 1999) (deciding where base penalty for AAW’s failure to install new technology was calculated based on “throughput,” subsequent ten percent increase in penalty, based on monthly “throughput”, was unreasonable).


128. For a discussion of standards applied to permitted facilities, see supra note 123 and accompanying text.
pollution problems. Given this higher standard, the permitted facilities should be punished more severely for their blunders. Without this doubling, the penalty for Eureka's eighteen violations is grossly understated and, above all, fails to deter.

B. Recordkeeping Violations

The EHB correctly implemented the DEP's deterrence policy in reviewing and upholding a penalty issuance for record keeping violations. Consistent with its previous decisions, the EHB held that the deterrence factor has value, not only for the current violator, but also for other companies tempted to act similarly in the future.

Conversely, the EHB erroneously lowered the penalties for the rolling record violations. The EHB excused Eureka's failure to maintain the rolling record by stating the requirement was new and, furthermore, that the company was unfamiliar with implementing this different calculation system. Because it took the company time to acquire the appropriate methodology needed for this type of recordkeeping, the EHB reduced the penalties. This opinion well established, however, that the operator has an affirmative duty and responsibility to comply with DEP regulations. By reducing penalties because the operator was unaware of new requirements, the EHB effectively condones an operator turning a blind eye to such advanced DEP requirements. Consequently,

130. See id. (establishing Eureka could have achieved many simple abatement measures by conducting required self-inspections).
131. See id. at *48 (calculating $58,500 penalty for eighteen violations).
133. See Eureka Stone Quarry, Inc., 2007 Pa. Envirn. LEXIS 40, at *52 (noting penalties should have specific and general deterrence goals).
134. See id. at *53 (dismissing DEP's argument for higher penalties based on Eureka's poor compliance history and recalcitrance).
135. See id. (guessing rolling recordkeeping was not permit requirement prior to 2003).
136. See id. at **52-53 (using specific circumstances to lower penalty from $700 per violation to $500 per violation).
137. For a discussion of the establishing of quarry operators' duties, see supra note 83 and accompanying text.
138. See Eureka Stone Quarry, Inc., 2007 Pa. Envirn. LEXIS 40, at *47 (citing quarry operators should be committed to compliance and communicate commitment to facility employees).
this decision frustrates the deterrent value that the EHB previously applied.\textsuperscript{139} 

C. Equipment Violations

The EHB’s decision to lower the penalty for the broken manometer contradicts the explicit language of the permit issued to Eureka.\textsuperscript{140} The EHB lowered the broken manometer penalty because there was no evidence that the crusher and baghouse were in operation while broken.\textsuperscript{141} The permit, however, requires Eureka to “maintain pressure drop monitors in operable condition on all fabric collectors which are associated with air contamination sources for this source.” (emphasis added).\textsuperscript{142} The provision is silent on whether taking the machine out of commission would prevent a penalty.\textsuperscript{143}

Furthermore, even after the DEP notified Eureka of the violation, it took three months for Eureka to repair the machine.\textsuperscript{144} Based on the EHB’s previous analysis regarding culpability, the company acted willfully in its continued violation.\textsuperscript{145} Yet, the EHB reduced the penalty from $1,400 to $500, which practically condones this type of behavior and frustrates the penalty’s deterrent value.\textsuperscript{146}

D. System Installation without Plan Approval

The EHB reduced the penalty for installing the new equipment without approval because the EHB viewed this as Eureka’s attempt to avoid further violations.\textsuperscript{147} Decreasing this penalty

\textsuperscript{139} For an explanation of the deterrent value of penalty amounts, see supra notes 129-130 and accompanying text.

\textsuperscript{140} See Eureka Stone Quarry, Inc., 2007 Pa. Envrn. LEXIS 40, at *55 (finding no provision exists that would release Eureka from obligation simply because manometer was not in operation).

\textsuperscript{141} See id. at *56 (explaining DEP lacked evidence proving broken manometer caused air pollution emissions).

\textsuperscript{142} Id. (citing permit Condition 004).

\textsuperscript{143} See id. at **55-56 (admitting while taking equipment off line for replacement is reasonable permit provision, it is not Condition 004 language).

\textsuperscript{144} See id. at *56-57 (considering Eureka’s inactive response to violation in assessing penalty).

\textsuperscript{145} For a definition of culpability levels in assessing violation penalty amounts, see supra notes 81-83 and accompanying text.

\textsuperscript{146} For an explanation of the deterrent value of penalty amounts, see supra notes 129-130 and accompanying text.

\textsuperscript{147} See Eureka Stone Quarry, Inc., 2007 Pa. Envrn. LEXIS 40, at *70 (holding DEP’s penalty assessment unreasonable punishment for Eureka’s effort to address fugitive dust problem).
encourages Eureka and other companies to blatantly ignore DEP regulations and operate at will without oversight.\textsuperscript{148} According to DEP testimony, the DEP already informed Eureka that it would not issue further violations while Eureka awaited the DEP’s approval for the installation of the new system.\textsuperscript{149} Yet, the EHB erroneously reduced the penalty by focusing on Eureka’s good faith effort to comply with the DEP’s permit.\textsuperscript{150} Although Eureka knew plan approval was required before installing and using the new system, it ignored these requirements and began using the system anyway.\textsuperscript{151} This ruling, reducing the penalties, is inconsistent with EHB’s previous analysis regarding culpability and deterrence.\textsuperscript{152}

E. Placement on the Compliance Docket

The EHB’s decision to review the DEP’s use of the compliance docket is significant primarily for two reasons.\textsuperscript{153} First, it is important because of its potential impact on future cases, and second because it places a check on the DEP’s power.\textsuperscript{154} Because the EHB found that the matter should be reviewed, it became an issue that the EHB can review in future cases.\textsuperscript{155} If the EHB decided the issue was moot, the DEP’s use of the compliance docket would continuously evade review.\textsuperscript{156} In turn, this would give the DEP unbridled authority to place any violator on the compliance docket as long as it removed that violator prior to an EHB hearing.\textsuperscript{157} Such discre-

\textsuperscript{148} For a discussion of culpability levels, see \textit{supra} notes 83-85 and accompanying text.

\textsuperscript{149} See \textit{Eureka Stone Quarry, Inc.}, 2007 Pa. Envrn. LEXIS 40, at **37-38 (reiterating DEP’s decision that if Eureka operated current system as best as possible before receiving approval for new system installation, it should not be penalized for dust violations).

\textsuperscript{150} See id. at *70 (stating DEP’s violations against Eureka for addressing fugitive dust problem with recommended water suppression system were unreasonable).

\textsuperscript{151} See id. (noting installation of new system without approval was intentional act and willful violation).

\textsuperscript{152} See id. at *71 (highlighting apparent inconsistency between lowering penalties after recognizing importance of plan approval before construction begins and need for consistency in enforcement actions).

\textsuperscript{153} See Larson, \textit{supra} note 1, at B1 (explaining this was first time DEP’s Southeast Regional Office used compliance docket tool).

\textsuperscript{154} See id. (noting significance of EHB’s decision to review DEP’s use of compliance docket).

\textsuperscript{155} See \textit{Eureka Stone Quarry, Inc.}, 2007 Pa. Envrn. LEXIS 40, at *60 (finding if EHB does not review compliance docket tool then companies can only challenge tool through complete litigation, likely causing unnecessary delay in business).

\textsuperscript{156} See id. (acknowledging problems of ruling issue moot).

\textsuperscript{157} See id. at **60-61 (holding placement on compliance docket is always short in duration and could always evade review).
tion could be potentially unfair to companies placed on the docket, especially if it would result in the significant disruption of business.158

This decision to uphold Eureka’s placement on the compliance docket reinforces the DEP’s authority.159 The EHB focused on Eureka’s lack of intent to develop a long-term solution to the fugitive emission problems, as well as Eureka’s compliance history prior to its placement on the docket.160 In deciding whether the company was properly placed on the docket, the EHB correctly examined evidence of the company’s effort to proactively prevent violations.161 This shows that both the DEP and the EHB seek a good faith effort from a company regarding compliance.162 The EHB was consistent with its previous decisions holding that a company in business for a long time should have the sophistication to know that civil penalties are not simply a cost of doing business.163 A company is expected to be proactive in addressing violations beyond doing the bare minimum.164 Given this decision, a company should not wait for the DEP to issue violations before attempting to correct problems.165

VI. IMPACT

The EHB’s decision in Eureka Stone Quarry, in conjunction with the Pennsylvania Commonwealth Court’s affirmation, is certain to have lasting effects on DEP operations.166 Namely this decision will

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158. See id. at *61 (explaining EHB has jurisdiction over issue because of major impact it could have on Eureka and similar companies).
159. See Larson, supra note 1, at B1 (explaining if EHB did not uphold Eureka’s placement on compliance docket, it could have prevented DEP from using compliance docket tool in future).
161. See id. at *63 (discussing lack of evidence in record regarding Eureka’s intention to develop long-term abatement plan for on-going fugitive emissions).
162. See id. at **62-63 (explaining companies should do more than bare minimum to avoid violations and should work with DEP in reporting problems encountered).
163. See id. at *62 (holding that civil penalties should not be considered cost of doing business).
164. See id. (expecting operators to do whatever is necessary to comply with DEP regulations).
165. See generally Dep’t of Envtl. Res. v. Pennsylvania Power Co., 337 A.2d 823 (Pa. 1975) (finding company’s good faith effort to comply with law should be considered in assessing penalty amounts).
166. See Larson, supra note 1, at B1 (explaining EHB’s decision to uphold compliance docket use allows DEP to use compliance docket as threat against other companies).
impact how the DEP assesses civil penalties and, further, how it will
decide to place a company on the compliance docket. Similarly,
the decision will influence how companies operate and attempt to
avoid these potentially harsh penalties.167

Based on the *Eureka* decision, the DEP will no longer double
the penalty amount for facilities simply because they hold a per-
mit.168 While the EHB reduced these penalties, finding no rational
basis for the doubling, the importance of these penalties should not
be overlooked.169 The Act states that:

[A]ll fines, civil penalties and fees collected under this act
shall be paid into the Treasury of the Commonwealth in a
special fund known as the Clean Air Fund, hereby estab-
lished, which, along with interest earned, shall be adminis-
tered by the department for use in the elimination of air
pollution.170

The legislature created these penalties not simply as a punish-
ment or for a deterrent value.171 The money collected from the
DEP-issued penalties is used for supplemental environmental
projects.172 The DEP issues fines and penalties that are paid to the
state's Clean Air Fund.173 In turn, this Fund finances air quality
improvements throughout the state.174 As a result, the EHB's deci-

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167. See *Eureka Stone Quarry, Inc. v. Dep't of Envtl. Prot.*, 31 PENNSYLVANIA LAW
       WEEKLY (Philadelphia), Sept. 22, 2008, at 20 (listing reasons Commonwealth Court
       upheld EHB's ruling). These reasons included Eureka's numerous past violations,
       few proactive steps for remedy and failure to respond to DEP's attempts to resolve
       problems informally. *Id.*

168. For an explanation regarding the unreasonableness of a penalty matrix
       that doubles fines, see *supra* notes 81-82 and accompanying text.

169. See generally Lead Envtl. Awareness Dev. v. Exide Corp., No. CIV. 96-3030,
       violators' air pollution).

170. 35 PA. CONN. STAT. § 4009.2 (2003) (stating civil penalties are paid to
       Clean Air Fund to protect air quality).

171. For a discussion of the deterrence value of civil penalties, see *supra* notes
       67-70 and accompanying text.

172. See *Sunoco to pay $123,730 in Penalties, Emissions Fees for its Marcus Hook
       Refinery*, US STATE NEWS, Oct. 25, 2005 (stipulating penalties are used to offset
damage caused by negligent companies).

173. See *Pennsylvania Department of Environmental Protection Orders Maid-Rite
       fines finance air pollution control throughout Pennsylvania).

174. See *id.* (discussing role of Clean Air Fund).
funds for air quality improvements, which can ultimately harm Pennsylvania residents’ health and welfare.175

By reducing Eureka’s penalty for installing the new wet-dust suppression system, the EHB seemed to reward and even encourage Eureka’s non-approved construction project.176 According to the EHB, punishing Eureka for its first attempt to remedy air violations would be too harsh.177 While it is important to encourage companies to remedy issues and comply with the law, it is inappropriate for the EHB to encourage companies to begin construction without the necessary permit approval.178

The DEP’s purpose in granting construction approvals is to ensure that the company’s “design, equipment, work practice or operational standards” reduce or control hazardous air pollutants.179 The EHB’s decision is likely to encourage other companies to begin construction and new equipment installation without the DEP’s approval. This could lead to a significant increase in improper construction, causing pollution and harm to Commonwealth residents.

Other companies that follow Eureka’s lead may be subject to similar DEP penalties.180 These companies, however, are also likely to appeal successfully based on the Eureka decision.181 It will be easy for these companies to claim that their violations were attempts to comply with the law; thus, they should not be severely penalized for such behavior.182 This decision could lead to major construction and equipment installation problems, which will flood the EHB with unnecessary appeals of valid penalties.

175. For a statement of the purpose of the Act, see supra notes 44-45 and accompanying text.
176. For a description of the imperfection in EHB’s analysis dealing with the penalty for non-approved installation, see supra notes 140-45 and accompanying text.
177. For a further discussion of EHB’s analysis in lowering penalties for installation of new NESCO system, see supra notes 98-103 and accompanying text.
179. 35 Pa. CONN. STAT. § 4006.6 (2003) (establishing permit program to ensure emissions standards are met).
180. For a discussion of DEP’s issuing of violations for non-approved equipment installation, see supra notes 31-32 and accompanying text.
181. For a discussion of the EHB’s consideration of a company’s good faith effort to comply with DEP, see supra notes 100-03 and accompanying text.
182. For an explanation of the EHB’s reasoning for lowering penalties for system installation, see supra note 140 and accompanying text.
The EHB decision will also help guide the DEP in determining when to place a company on the compliance docket. Because the EHB deemed compliance history as a major factor in placing a company on the compliance docket, the Eureka analysis may aid the DEP in deciding which companies to place on the docket. Further, this analysis may also help the EHB determine which companies were properly placed on the docket and what is needed to uphold the DEP’s decisions. The EHB stresses the importance of companies being proactively compliant and willing to do whatever necessary to achieve compliance. As a result, the Eureka analysis will guide companies in avoiding placement on the compliance docket.

The Eureka decision has already proven influential, as Erie Coke, Corporation is currently appealing air quality violations and civil penalties equaling $6.1 million. In July 2008, the DEP assessed penalties based on Erie Coke’s failure to replace and repair old equipment. On August 21, 2008, a mere fifteen days after the Eureka decision, the DEP sent Erie Coke a notification letter, placing the company on the compliance docket. Based on the Eureka decision, the DEP appears to have a newfound confidence in utilizing the compliance docket tool.

Typically, a hearing is scheduled six months after the appeal is filed. The question that remains is how the Eureka decision will affect the EHB’s analysis in Erie Coke. The EHB is likely to con-

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183. For a discussion highlighting the EHB’s analysis in deciding the compliance docket issue, see supra notes 109-11 and accompanying text.

184. See Eureka Stone Quarry, Inc., 2007 Pa. Envrn. LEXIS 40, at **62-63 (holding lack of compliance history and lack of intent to comply with DEP regulations in future as strong reasons to place companies on compliance docket).

185. See id. (stating EHB’s reasoning for upholding DEP’s compliance docket use against Eureka).

186. For a discussion of the EHB’s view of companies using good faith effort to comply with regulations, see supra notes 154-56 and accompanying text.

187. For a discussion on the EHB’s desire for companies to be proactive in conforming to regulations, see supra notes 154-56 and accompanying text.

188. See Robb Frederick, Erie Appeals $6.1 M Fine, ERIE TIMES NEWS, July 24, 2008 (describing steel production company’s violations).

189. See id. (explaining since 1942 company has used same 58 Coke ovens to bake coal to remove impurities).

190. See id. (noting this is only second time DEP has placed company on compliance docket for air quality violations).

191. See Larson, supra note 1, at B1 (speculating if EHB did not uphold DEP’s decision to place Eureka on compliance docket it might have prevented DEP from using tool again).

192. See Frederick, supra note 186 (explaining Erie Coke’s adjudication is pending).
sider the *Eureka* analysis in determining whether the DEP used the compliance docket tool correctly against Erie Coke.

As illustrated in *Eureka Stone Quarry*, the EHB is apt to review Erie Coke's compliance history and previous activity in resolving air quality violations.⁹³ Erie Coke's owner cites a number of improvements, including a newly implemented oven repair process, which may help prove the company's proactivity in resolving air quality issues.⁹⁴ If Erie Coke adequately proves a good faith effort to comply with the law and a proactive approach in dealing with the DEP, the EHB is more likely to reduce the penalties and to remove the company from the compliance docket.⁹⁵

Based on the EHB's opinion in *Eureka*, the DEP may argue the validity of its compliance docket use by proving that Erie Coke has a longstanding history of air violations.⁹⁶ If the DEP can prove that Erie Coke lacked the ability and intent to comply with the law, the EHB will most likely uphold the DEP penalties and the compliance docket use.⁹⁷

No matter how the EHB decides Erie Coke's appeal, it is clear that the *Eureka* decision has already affected how the DEP will continue to operate.⁹⁸ Furthermore, the *Eureka* decision will most likely have a continued affect on how companies will operate in the future and how they will appeal DEP-issued violations.⁹⁹ Lastly, the *Eureka* decision is bound to affect how the DEP will decide when to use the compliance docket, as to ensure its issuance is upheld.²⁰⁰ Given these considerations, it is apparent that the *Eureka* decision

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⁹³. For a further discussion of the importance of compliance history and proactive resolutions to air quality problems, see *supra* notes 110-11 and accompanying text.

⁹⁴. See Frederick, *supra* note 186 (detailing patented repair process used to reduceumber of joints on 58 coke ovens).

⁹⁵. For a discussion on the EHB's desire for companies to put forth good faith efforts to conform with regulation, see *supra* notes 152-56 and accompanying text.


⁹⁷. For a discussion on the EHB's reasoning for upholding DEP's compliance docket use against Eureka, see *supra* notes 150-51 and accompanying text.

⁹⁸. For a discussion showing effect of *Eureka* on DEP's dealings with other violating companies, see *supra* notes 188-89 and accompanying text.

⁹⁹. For possible arguments companies will use to avoid harsh penalties and compliance docket placement derived from *Eureka* decision, see *supra* notes 165 and accompanying text.

²⁰⁰. For an explanation that the EHB's decision in *Eureka* suggests poor compliance history warrants use of the compliance docket, see *supra* note 157 and accompanying text.
will continue to have a significant influence over the operations of the DEP and various companies.

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