

**ENVIRONMENTAL QUALITY BOARD  
CHARLESTON WEST VIRGINIA**

**ELSA YIGZAW,**

**Appellant,**

**v.**

**Appeal No. 09-01-EQB**

**DIRECTOR, DIVISION OF WATER AND  
WASTE MANAGEMENT, DEPARTMENT  
OF ENVIRONMENTAL PROTECTION,**

**Appellee.**

**ORDER**

Appeal No. 09-01-EQB was filed with the West Virginia Environmental Quality Board (hereinafter “Board”) on February 5, 2009. In accordance with West Virginia Code §22B-1-7(f), an evidentiary hearing concerning the matters set forth in the Notice of Appeal filed in Appeal No. 09-02-EQB was held on March 12, 2009.

Elsa Yigzaw (hereinafter “Appellant”) represented herself *pro se*. Mark Rudolph, Esquire, of the West Virginia Department of Environmental Protection (hereinafter “WVDEP” or “Appellee”) Office of Legal Services represented the Appellee. The Board was comprised of Dr. Edward Snyder, Chairman; Dr. James Van Gundy, and Mr. William Gillespie.

In deciding this appeal, the Board reviewed and considered the certified file, the relevant law and regulations, the Notice of Appeal, all written filings and memoranda, the testimony of the witnesses, exhibits, and arguments by counsel. In accordance with *West Virginia Code* § 22B-1-7(g)(1), the Board **MODIFIES** Appellee’s civil administrative penalty issued in this matter and

**ORDERS** the Appellant to pay three hundred ninety-six dollars (\$396.00) within sixty (60) days of receipt of this order.

## **II. STANDARD OF REVIEW**

The Board hears appeals of enforcement actions in accordance with *West Virginia Code* § 22B-1-7. The applicable standard of review of the Appellee's action is *de novo* review. *West Virginia Code* § 22B-1-7(e). Pursuant to *de novo* review, the Board does not afford deference to the decision of the Department of Environmental Protection, but rather, the Board acts independently on the evidence before it. *West Virginia Division of Environmental Protection v. Kingwood Coal Company*, 200 W.Va. 734, 745, 490 S.E. 2d 823, 834 (1997).

To prevail in the appeal, the Appellant must raise an issue with sufficient evidence to support a finding that the Appellee's decision was incorrect. If sufficient evidence supported such a finding, then the Appellee would have to produce the evidence demonstrating why its decision was sound, regardless of the Appellant's evidence. The Appellant has an opportunity to show that the evidence produced by the Appellee is pre-textual or otherwise deficient. This shifting burden of proof standard was set out in *Wetzel County Solid Waste Authority v. Chief, Office of Waste Management, Division of Environmental Protection*, Civil Action Number 95-AA-3 (Circuit Court of Kanawha County, 1999). While *Wetzel County* is merely persuasive authority, the Board agrees with the analysis and has used that test here.

## **III. DISCUSSION**

This appeal requested the Board to waive the full amount of the civil administrative penalty assessed. The Board declined to waive the full amount of the penalty but modified the penalty consistent with these findings and conclusions.

The Appellant argued that she should not be penalized for the actions of her delinquent tenants. Ms. Yigzaw is in the business of renting property in West Virginia. A review of the lease and rental agreement indicates that the Appellant requires a security deposit to cover damage to the rental property. (CR 19-21). Tenants changed at least twice over the last two (2) years which would indicate that Ms. Yigzaw and/or her agent would have been on notice of a problem with the property. Evidentiary Hearing Transcript, page 16 (hereinafter “Tr \_”).

It is apparent from the record that after Ms. Yigzaw received the Notice of Violation she contracted with a solid waste hauler to remove the tires from the property. The record indicates more than four hundred (400) tires were removed by contractors in the fall of 2008. The Notice of Violation indicated a penalty of one thousand four hundred forty-four dollars (\$1,440.00). Ms. Yigzaw requested an assessment conference to review the penalty amount. In December 2008, a civil penalty informal hearing was held and the assessment officer lowered the penalty to one thousand two hundred eighty-two dollars and fifty cents (\$1,282.50). However, a review of the record indicates that this decrease was the result of a correction to the prior penalty rather than a reflection of a compromise. The WVDEP inspector incorrectly used the hazardous waste seriousness of violation Table C rather than the solid waste seriousness of violation Table D.

The Board finds that the assessment officer should have considered the evidence of cleanup of more than four hundred (400) tires as an attempt by the Appellant to clean up the property. Instead, it appears that the WVDEP upheld the seriousness score of ten (10) which, according to the regulation, is the value assessed if the violator had not completed any of the requirements of the statute, rule, regulation, order, or permit condition in question or the requirements were not completed in any area of the facility. The evidence in the record indicates that an effort had been

made to clean up the area and that as of the date of the conference more than four hundred (400) tires had been removed from the property. Certified Record at 9-11 (hereinafter “CR \_\_\_“). Therefore the Board has adjusted the deviation factor and the associated multipliers to result in a reduction in the amount of penalty assessed to the Appellant.

#### **IV. FINDINGS OF FACT**

1. Appellant filed the instant appeal on February 5, 2009.
2. On March 26, 2008, Appellee issued to Appellant an “Open Dump Notice of Violation and Compliance Schedule” (hereinafter “NOV”) for property located at 9375 Winchester Avenue, Bunker Hill WV. (CR 39). This NOV was mailed to Appellant’s last known address of 6468 Silver Ridge Circle, Alexandria VA, via certified U.S. mail on April 1, 2008 and returned as undeliverable on April 14, 2008. (CR 42).
3. On June 20, 2008, Appellee issued to Appellant an “Open Dump Notice of Violation and Compliance Schedule.”(CR 40). This NOV and the NOV issued on March 26, 2008, were mailed to Appellant at P.O. Box 419, Bunker Hill WV 25413 via certified U.S. mail on July 1, 2008 and was received by Appellant or her appointee on July 7, 2008. (CR 39-41).
4. On September 5, 2008, Appellee issued an “Open Dump Notice of Violation and Compliance Schedule” to Appellant. (CR 37). This NOV was mailed to Appellant at P.O. Box 419, Bunker Hill WV, via certified U.S. mail on September 6, 2008 and received by Appellant or her appointee on September 9, 2008. (CR 38).

5. On September 24, 2008, Appellee issued a “Notice of Civil Administrative Penalty” in the amount of one thousand four hundred forty-four dollars (\$1,440.00) (CR 32-33) and mailed to Appellant via certified U.S. mail to Appellant on September 24, 2008 to P.O. Box 419, Bunker Hill WV 25413. (CR 31). However, the notice was returned on September 27, 2008 as “box closed - unable to forward.”
6. On October 21, 2008, Appellee re-issued the “Notice of Civil Administrative Penalty” in the amount of one thousand four hundred forty-four dollars (\$1,440.00) (CR 29-30) and mailed to Appellant via certified U.S. mail on October 21, 2008 to P.O. Box 419, Bunker Hill WV 25413. (CR 28). However, the notice was returned on October 22, 2008 as “box closed - unable to forward.”
7. Thereafter, on November 21, 2008, the “Notice of Civil Administrative Penalty” was hand delivered to Appellant by Appellee’s representative, S. W. Woody. (CR 26).
8. By undated requested received by WVDEP on November 18, 2008, Appellant requested an informal assessment conference. (CR 25).
9. By notice dated November 21, 2008, Appellant was advised that an Informal Hearing for Civil Administrative Penalty (CAP) was scheduled at WVDEP’s Romney Regional Office for December 17, 2008. (CR 24).
10. Appellant’s property located at 9375 Winchester Avenue, Bunker Hill WV was leased for thirteen (13) or fourteen (14) months beginning April 10, 2006 to approximately May or June 2007 (Tr. 68-69). After the property was vacated in approximately May or June 2007, Appellant immediately rented the property to another tenant. (Tr. 70-71).

11. According to the lease agreement, Appellant required a security deposit in the amount of nine hundred dollars (\$900.00). (CR 19).
12. According to the September 24, 2008 “Notice of Civil Administrative Penalty,” the final amount for the NOV was calculated as follows:

Seriousness of Violation	=	\$1,600.00
Negligence/Good Faith	X	1.2
Subtotal:	=	\$1,920.00
Adjustment Factor	X	0.75
Subtotal:	=	\$1,440.00
History of Noncompliance	X	\$0
Total for this Violation	=	\$1,440.00

(CR 32).

13. On October 4, 2008, R.J.J. Tire Company, Inc. disposed of two hundred (200) tires. (CR 11).
14. Deborah Rohrbaugh, Office Manager for R.J.J. Tire Company, Inc., stated as follows in an undated letter addressed to whom it may concern: “R.J.J. Tire was contracted to clean up the old tires at 9375 Winchester Avenue in Bunker Hill, West Virginia on October 4, 2008. At that time we cleaned up over half of the tires. Due to mechanical issues, we were unable to complete until the second week of November, 2008.” (CR 9).
15. By letter dated January 9, 2009, Appellant was advised the CAP assessment had been reduced to one thousand two hundred ninety-two dollars and fifty cents (\$1,292.50.) The original assessment was upheld, however, a miscalculation in the original notice resulted in a lower final assessment. WVDEP used the following assessment factors:

	<u>Pre-Conf.</u>	<u>Conference</u>	<u>Amount</u>
Seriousness Score Negligence/Good	10/4	10/4	\$1,425.00
Faith Score:	6 (1.2)	6 (1.2)	\$1,710.00
Adjustment Factor:	0.75	0.75	\$1,282.50
History of Non- Compliance	0	0	\$0.00
Final Amount			\$1,282.00

(CR 2-4).

## V. CONCLUSIONS OF LAW

1. The Board hears appeals of civil penalty assessments in accordance with *West Virginia Code* §22B-1-7 and 22-15-15(c). The applicable standard of review of the Appellee’s action is *de novo* review. *West Virginia Code* §22B-1-7(e).

2. West Virginia Code of State Regulations §33-22-7 provides that the director shall calculate a civil administrative penalty by taking into account the seriousness of the alleged violation, negligence or good faith on the part of the violator, the type of facility, and any history of noncompliance by the violator. 33 CSR 22-§ 7.1. (1991).

3. An evaluation of the seriousness of the violation shall take into account the extent of deviation from the requirement of the statute, rule, regulation, order, or permit condition. The “seriousness of violation” ratings shall be used to determine the base penalty amount of the civil administrative penalty assessment. 33 CSR 22-§ 7.1.a. (1991).

4. The director shall take into account the negligence or good faith which the violator displayed with regard to the alleged violation by assigning a rating in accordance with Table E of the regulations. The negligence/good faith rating shall be used to determine the multiplying factor

to be applied to the base penalty amount through the use of Table F of the rule. 33 CSR 22-§ 7.2. (1991).

5. The director shall take into account the type of facility by assigning an adjustment factor in accordance with Table G of the regulation. The subtotal calculated is then multiplied by the adjustment factor. 33 CSR 22-§ 7.3. (1991).

6. The director shall take into account the violator's history of noncompliance by determining the number of previous enforcement actions (administrative, civil, or criminal) which have been taken against the facility during the twenty-four (24) months prior to the violation. Those enforcement actions which were withdrawn, dismissed, or vacated shall not be included in this determination. The number of previous enforcement actions shall be used to determine the dollar amount to be added to the penalty through the use of Table I of the rule. 33 CSR 22-§ 7.4. (1991).

7. The civil administrative penalty is calculated by multiplying the base penalty amount (established from the seriousness of violation) by the multiplying factor (established from the negligence/good faith ratings), multiplying that product by the adjustment factor and then adding to that product a dollar amount (established from the history of noncompliance). 33 CSR 22-§ 7.5. (1991).

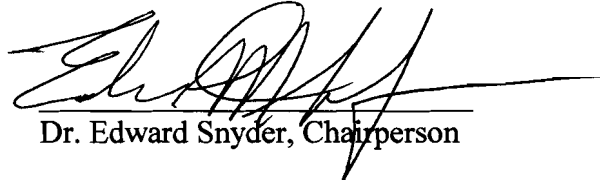
8. The civil administrative penalty assessed may not exceed the maximum assessments prescribed by the statute. The maximum assessment for solid waste violations shall not exceed five thousand dollars (\$5,000.00) per day per violation, up to a maximum of twenty thousand dollars (\$20,000.00) total penalty. 33 CSR 22-§ 7.6. (1991).

## **V. CONCLUSION**

The Board disagrees with the serious score and **MODIFIES** the assessment by finding that a deviation of two (2) and a potential for harm of four (4) is a more appropriate rating for the violation. This would result in four hundred forty dollars (\$440.00) from the matrix in Table D of the regulation. The result of four hundred forty dollars (\$440.00) multiplied by the negligence factor of six (6), or 1.2 from the matrix in Table F would result in the amount of five hundred twenty-eight dollars (\$528.00) which would then be multiplied by .75 adjustment factor (open dump) from Table G. A non-compliance number of zero (0) would result in a final penalty of three hundred ninety-six dollars (\$396.00). **The resulting penalty of three hundred ninety-six dollars (\$396.00) is to be paid in full within sixty (60) days of receipt of this order.**

It is so **ORDERED** and **ENTERED** this 20<sup>th</sup> day of August, 2009.

**Environmental Quality Board**



Dr. Edward Snyder, Chairperson