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Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002406-MR

NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION
CABINET — APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 96-CI-01779

LOUISVILLE ENVIRONMENTAL
SERVICES, INC.;
CONCERNED CITIZENS COALITION;
AND KENTUCKY RESOURCES COUNCIL, INC. — APPELLEES

AND NO. 1998-CA-002461-MR

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AND CONCERNED CITIZENS COALITION — APPELLANTS

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LOUISVILLE ENVIRONMENTAL
SERVICES, INC. AND
NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, KNOPF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: We have before us consolidated appeals from a July 6, 1998 order of the Franklin Circuit Court reversing a decision by the secretary of the Natural Resources and Environmental Protection Cabinet (the "Cabinet"). The secretary had vacated the operator's permit of Louisville Environmental Services, Inc. ("LES"), a hazardous waste treatment facility located in southwestern Jefferson County, on the ground that LES had failed to pay an application fee in a timely manner. The circuit court rejected this ground of disqualification, reinstated LES's permit, and remanded the matter to the agency for further review. We agree with the circuit court and, hence, affirm.

LES requested, and on August 31, 1993, received a modification to a hazardous waste permit for a hazardous waste facility located in Jefferson County, Kentucky. The permit modification reflected a change in ownership to LES and carried an expiration date of September 28, 1994. On March 23, 1994 (six months prior to its expiration), LES filed an application with the Division of Waste Management ("DWM") of the Cabinet to renew its hazardous waste permit. On September 30, 1994, DWM notified LES that the permit application was incomplete in several respects, including that the application was not accompanied by a Part A application fee of $1,000.00. LES submitted a Part A application along with a $5,040.00 fee. On January 5, 1996, DWM issued a permit to LES for continued operations. The Concerned Citizens Coalition ("CCC") and the Kentucky Resources Council ("KRC") challenged the DWM's decision to issue the permit. A

hearing officer recommended the Cabinet secretary revoke the permit because LES had not paid the $1,000.00 fee due with Part A of the application. The secretary agreed and revoked LES's permit, requiring LES to file an application for a new permit rather than for a continuation of the old permit.

LES appealed to the circuit court, contending that it was not required to file a Part A application as a new permit holder but only needed to file a Part B application for continuing an existing permit. The circuit court agreed with LES in a well reasoned opinion which we adopt in part as our own:

"II. Discussion

The Secretary, in his Final Order, determined that DWM erred in issuing a renewal permit because, as of the expiration date of LES's Part B permit, LES had failed to pay the Part A application fee due under 401 KAR Chapter 39, as required by 401 KAR 38:040 Section 6. Accordingly, he found that the conditions of the expired permit could not be continued and that the permit was no longer in effect.

The following regulation is at issue:

401.KAR 38:040. Changes to permits; expiration of permits.

* * *

Section 6. Continuation of Expiring Permits. (1) The conditions of an expired permit continue in force until the effective date of a new permit if:

(a) The permittee has submitted a timely application under 401 KAR 38:090 and 401 KAR 38:100 and the applicable requirements in 401 KAR 38:150 to 401 KAR 38:210 and which is a complete (under Section 1(3) of 401 KAR 38:070) application for a new permit, paid

> the appropriate fees due (under 401 KAR Chapter 39); and
>
> (b) The cabinet, through no fault of the permittee, does not issue a new permit with an effective date on or before the expiration date of the previous permit (for example, when issuance is impracticable due to time or resources constraints).

For purposes of this discussion, the Court is primarily concerned with the part of 401 KAR 38:040 Section 6(1)(a) that requires the permittee to have paid the "appropriate fees due" under 401 KAR Chapter 39, as this is the provision upon which the Secretary based his Final Order. 401 KAR Chapter 39, Hazardous Waste Fees, provides the fee schedule for hazardous waste management. 401 KAR 39:120 provides for the payment of Part A application fee. Specifically, the regulation provides that "[t]his administrative regulation establishes the fee schedule for submitting Part A of the application for storage, treatment or disposal facility permits." 401 KAR 39:120. Section 1 of that regulation, "Applicability," provides that the regulation applies to "all treatment, storage, or disposal facilities required by Section 2(1) of 401 KAR 38:070 to submit Part A of the application for a hazardous waste site or facility permit." 401 KAR 39:120 Section 2, "Filing Fees," provides that "[a]ny owner or operator who submits a part A application for a treatment, storage, or disposal facility shall submit with the application a filing fee in the amount of $1,000.00." 401 KAR 39:120 Section 2.

Therefore, it is clear from these regulations that if a facility is required to submit a Part A application, then that facility must also submit the $1,000.00 filing fee.

However, as a basis for its appeal, LES argues that it is not required to submit a Part A application fee in order to continue its permit through the renewal process. LES maintains that no Part A application fee is due, and that 401 KAR 38:040 Section 6 itself supports this argument. We agree. 401 KAR 38:040 Section 6(1)(a) provides that for an existing permit to be continued in effect, the permittee must have submitted a timely application under 401 KAR 38:090, entitled "General Contents of Part B Application," as well as 401 KAR 38:100, entitled "Specific Part B Requirements for Groundwater Protection." 401 KAR 38:040 Section 6(1)(a) also states that the applicable requirements of 401 KAR 38:150 ("Specific Part B Requirements for Containers") to 401 KAR 38:210 (other Part B requirements) must be met. There is no reference to any Part A application or fees. The only mention of Part A in connection with 401 KAR 38:040 Section 6, is where Section 6 references 401 KAR Chapter 39 which deals with hazardous waste fees. However, while 401 KAR 39:120 provides for Part A application fees, this does not mean that it is required to be paid in a 401 KAR 38:040 situation. 401 KAR Chapter 39 references *many* types of fees that apply in different situations. The reference to the entire chapter in no way obligates someone attempting to renew his Part B permit under 401 KAR 38:040 to pay the Part A application fee. It simply is not relevant.

Therefore, the Court must determine whether the Secretary's decision is based on substantial evidence and is in conformity with the law. The Court of Appeals, in *Kentucky Board*

of Nursing v. Ward, Ky. App., 890 S.W.2d 641, 642-43 (1994) summarized the law of administrative appeals in the following manner:

> "The position of the circuit court in administrative matters is one of review, not of reinterpretation." *Commonwealth, Department of Education v. Commonwealth, Kentucky Unemployment Insurance Commission*, Ky. App., 798 S.W.2d 464, 467 (1990). The appellate (circuit) court is not free to consider new or additional evidence, or substitute its judgment as to the credibility of the witnesses and/or the weight of the evidence concerning questions of fact. *Mill Street Church of Christ v. Hogan*, Ky. App., 785 S.W.2d 263 (1990). Thus, if administrative findings of fact are based upon substantial evidence, then those findings are binding upon the appellate court. *Commonwealth, Dept. of Education, supra*. The only question remaining for the appellate court to address is "whether or not the agency applied the correct rule of law to the facts so found." *Starks v. Kentucky Health Facilities*, Ky. App., 684 S.W.2d 5, 6 (1984). If the ruling of the administrative agency is based on an incorrect view of the law, the reviewing court may substitute its judgment for that of the agency. *Mill Street Church of Christ, supra*, at 266.

There is no disputed issue of fact in this case, and the Court must only determine whether the Secretary applied an incorrect rule of law. As illustrated by the foregoing discussion, the Court finds that the Secretary's interpretation of the requirements of 401 KAR 38:040 Section 6 is incorrect.

III. Conclusion

The Secretary's decision was contrary to law. LES was not required by law to submit a Part A application fee, and thus the question of whether it paid money or how much or for what

purpose is irrelevant. The permit continuation/renewal statute clearly is intended to reference Part B applications and fees only. LES's permit was improperly revoked, and that matter should be remanded to the Division of Waste Management for processing in accordance with 401 KAR 38:040 Section 6 as clarified by this opinion.

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner Louisville Environmental Services, Inc.'s appeal, shall be, and the same hereby is, SUSTAINED.

IT IS FURTHER ORDERED that the matter is hereby REMANDED to the Natural Resources and Environmental Protection Cabinet Division of Waste Management for further proceedings consistent with this opinion."

For the reasons discussed above, we affirm the July 6, 1998 order of the Franklin Circuit Court.

GUIDUGLI, JUDGE, CONCURS.

KNOPF, JUDGE, DISSENTS.

KNOPF, JUDGE, DISSENTING: These consolidated appeals challenge an order by the Franklin Circuit Court that overrides a Cabinet Secretary's judgment concerning the process by which one of the more important decisions entrusted to the Secretary's agency is to be made. Whether this is an appropriate exercise of judicial authority is as much an issue in this case as whether the circuit court accurately corrected the Secretary's reading of his own regulation. It is an issue of more than passing concern to the parties and one to which they have devoted considerable effort. That concern and that effort merit a full response; I

write separately in part to provide that response. I also write separately because, believing that the administrative process may not yet have reached an appealable outcome, and agreeing with the appellants that, if it has, the circuit court's order misconstrues the pertinent law, I respectfully dissent.

The parties have addressed themselves to Kentucky statutory and administrative law, but as a preliminary matter it is well to note that federal law provides the framework for most environmental regulation. The hazardous waste processing at the heart of this case, for example, is subject to the provisions of the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* (1976 as amended) (RCRA), and in particular to Subtitle C of that Act, 42 U.S.C. §§ 6921-6934. In the words of the Supreme Court,

> RCRA is a comprehensive environmental statute that empowers EPA [the Environmental Protection Agency] to regulate hazardous wastes from cradle to grave, in accordance with the rigorous safeguards and waste management procedures of Subtitle C[.] . . . Under the relevant provisions of Subtitle C, EPA has promulgated standards governing hazardous waste generators and transporters, . . . and owners and operators of hazardous waste treatment, storage, and disposal facilities (TSDF's), see § 6924. Pursuant to § 6922, EPA has directed hazardous waste generators to comply with handling, record keeping, storage, and monitoring requirements . . . . TSDF's, however, are subject to much more stringent regulation than either generators or transporters, including a 4 to 5-year permitting process, . . . burdensome financial assurance requirements, stringent design and location standards, and, perhaps most onerous of all, responsibility to take corrective action for releases of hazardous substances and to ensure safe closure of each facility[.]

City of Chicago v. Environmental Defense Fund, 511 U.S. 328, 331-32, 128 L. Ed. 2d 302, 307-08, 114 S. Ct. 1588 (1994).

Under RCRA, the EPA is authorized to approve state hazardous waste regulatory programs that satisfy federal standards. 42 U.S.C. § 6926.

> If a state elects to enact its own program meeting minimum federal standards and receives approval from the EPA, then the state program operates in lieu of the federal program.

Coalition for Health Concern v. LWD, Inc., 60 F.3d 1188, 1190 (6th Cir. 1995). To qualify under RCRA, state programs must be substantially equivalent to the federal program, must be consistent with it and the programs of other states, and must provide for adequate means of enforcement. 42 U.S.C. § 6926. State regulations must be no less stringent than the federal ones. 42 U.S.C. § 6929.

Kentucky has duly enacted its own hazardous waste disposal program. KRS §§ 224.10-010 *et seq.* (1980 as amended). Stephens, "Commencing the Decade with Environmental Reform," 69 Ky. L. J. 227 (1980-81). The state received interim EPA approval in 1981 (*see* 46 Fed. Reg. 19, 819 (1981)) and final approval on January 31, 1985 (*see* 50 Fed. Reg. 2550 (1985)). Numerous revisions of Kentucky's hazardous waste laws have since been approved as adequate responses to changes in the federal law. *See*, for example, 61 Fed. Reg. 25799 (1996). Any modification of the federal law for which there is not yet an approved state equivalent applies directly to the state. Coalition for Health Concern v. LWD, Inc., *supra*. The Kentucky law at issue in this

case, therefore, operates in lieu of its federal counterpart. In construing that law, however, the counterpart serves as a fundamental guide. *See* KRS 224.40-330(3).

The legal background thus sketched in, it is necessary as well to sketch in the facts underlying this dispute and the procedural steps by which the parties have come before this Court. LES acquired its Jefferson County waste processing and storage facility from B-T Energy Corporation. B-T was operating the facility when RCRA took effect, and in or soon after November 1980 was first accorded "interim status" under the new regulatory regime. As noted above, facilities that treat, store, or dispose of hazardous waste must have a RCRA permit. "Interim status" under RCRA is the mechanism for phasing pre-existing facilities into the program. A facility in operation prior to November 19, 1980 (the effective date of RCRA), or at the time of a statutory or regulatory change that first subjects the facility to RCRA, may preserve its right to carry on its business pending final agency approval by properly notifying EPA (or the designated state regulator) of its operation and filing a preliminary permit application. State of New Mexico v. Watkins, 969 F.2d 1122 (D.C.Cir. 1992).

B-T Energy received a ten-year RCRA permit for the storage of hazardous waste on September 28, 1984. In August 1993, the permit was modified to reflect that ownership and operational control of the facility had passed to LES. Apparently, prior to the transfer to LES, B-T had stopped accepting hazardous waste at the facility. LES intended, it

seems, to resume that activity, and so, or in any event, in March 1994, it submitted its preliminary application for a new permit.

We note here that 42 U.S.C. § 6925(c)(3) provides as follows:

> Any permit under this section shall be for a fixed term, not to exceed 10 years in the case of any land disposal facility, storage facility, or incinerator or other treatment facility. Each permit for a land disposal facility shall be reviewed five years after date of issuance or reissuance and shall be modified as necessary to assure that the facility continues to comply with the currently applicable requirements of this section and section 6924 of this title. Nothing in this subsection shall preclude the Administrator from reviewing and modifying a permit at any time during its term. Review of an application for a permit renewal shall consider improvements in the state of control and measurement technology as well as changes in applicable regulations. Each permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment.

LES's application for a new permit was necessitated by this section and by the state regulations promulgated in accordance with it. In particular, 401 KAR 38:040 § 5, **Duration of Permit**, provides in part that "[h]azardous waste site or facility permits shall be effective for a fixed term not to exceed ten (10) years." Section 6 of the same chapter, **Continuation of Expiring Permits**, then provides as follows:

> (1) The conditions of an expired permit continue in force until the effective date of a new permit if: (a) The permittee has submitted a timely application under 401 KAR 38:090 and 401 KAR 38:100 and the applicable requirements in 401 KAR 38:150 to 401 KAR 38:210 and which is a complete (under Section 1(3) of 401 KAR 38:070) application for a new

> permit, paid the appropriate fees due (under 401 KAR Chapter 39); and (b) The cabinet, through no fault of the permittee, does not issue a new permit with an effective date on or before the expiration date of the previous permit (for example, when issuance is impracticable due to time or resource constraints).

The circuit court's construction of this regulation is what prompted the present appeal. I shall consider the circuit court's reading in detail below, but first I must sketch in a bit more of the background.

The Cabinet, through its Division of Waste Management (DWM), responded by letter to LES's application on September 30, 1994, two days after the expiration date of the original B-T/LES permit. DWM noted that the application had numerous defects, including the lack of site maps, a list of industries to be served, and processing fees. LES eventually supplied these defects, and on January 5, 1996, DWM issued Permit No. KYD079-661-146 to LES for hazardous waste activities at the Jefferson County site. On February 2, 1996, KRC and CCC, pursuant to KRS 224.10-420(2),[1] filed an administrative petition challenging the permit. Petitioners alleged, among other things, that LES's application had not been timely filed and thus that the DWM had erred by processing the application as one for the renewal of a

[1]KRS 224.10-420(2) provides in part that "[a]ny person not previously heard in connection with the issuance of any order or the making of any final determination arising under this chapter by which he considers himself aggrieved may file with the cabinet a petition alleging that the order or final determination is contrary to law or fact and is injurious to him, alleging the grounds and reasons therefor, and demand a hearing." Cf. 42 U.S.C. § 6972(a).

continuing permit. DWM should have considered the application, the petitioners maintained, as one for a new permit.

The matter was referred to a hearing officer, and a hearing was scheduled. Prior to the hearing but after some discovery, the petitioners moved for summary disposition on the ground that LES had failed to file a complete application by the September 28, 1994, deadline, and thus was not eligible for a continuing-facility permit. On September 19, 1996, The hearing officer granted this motion. She recommended that Permit No. KYD079-661-146 be voided and that the matter be remanded to DWM for reconsideration as an application for a new-facility permit. LES had failed, the hearing officer found (and apparently believed was beyond dispute), to supply required information with its original application and had failed to pay when due the requisite filing fees. DWM was not authorized, the hearing officer ruled, to excuse these lapses after the fact. LES had also failed, the hearing officer continued, to provide the requisite assurances that the expense of closing the facility could be met, and again DWM was not authorized to waive or modify that requirement.

The hearing officer's report and the parties' exceptions thereto[2] were then submitted to the Secretary. By order entered November 11, 1996, the Secretary upheld the hearing officer's recommendation that LES's application be remanded to

[2]The parties also submitted various responses to one another's exceptions and replies to the responses. One of the questions on appeal, as we shall discuss below, concerns the propriety of these responses and replies and their efficacy as vehicles for the raising and preserving of issues.

DWM for reconsideration as an application for a new, as opposed to a renewal, permit. The Secretary agreed with the hearing officer that LES had failed to pay a portion of its application fee on time and that consequently its previous permit had lapsed. Finding this ground a sufficient rationale for the recommended disposition, the Secretary declined to discuss the other aspects of the hearing officer's report.

It was from the Secretary's order that LES sought review in circuit court. Before I discuss that review, I should clarify that EPA regulations provide for a two-part permit application. Part A

> contains information concerning the nature of the applicant's business, a scale drawing, photographs and a topographic map of the facility, a description of its hazardous waste management processes and the design capacity of these processes, a specification of the types and quantities of hazardous wastes processed, stored, or disposed of at the facility, as well as information regarding permits or construction approvals.

United States v. Power Engineering Company, 10 F.Supp.2d 1145, 1147 (D.Colo. 1998). Part A is an abbreviated document and, aside from the noted attachments, is to be supplied on forms provided by EPA. Part B, on the other hand, is a detailed document which describes, in narrative form, "how the facility will comply with substantive regulations governing the operation of hazardous waste management facilities." State of New Mexico v. Richardson, 39 F.Supp.2d 48, 52 (D.Dist.Colo. 1999). 40 C.F.R. § 270.1; 40 C.F.R. § 270.10 *et seq.* Although the states need not adopt the federal two-part application procedure (40 C.F.R. § 271.), Kentucky has done so. 401 KAR 38:070.

The Hearing Officer construed the regulations as requiring LES to submit a complete new application, both part A and part B. Filing fees are to accompany both parts, and the Hearing Officer found LES's application to have been incomplete with respect to the information required by both parts as well as with respect to both fees. The Secretary focused, however, on the $1,000.00 processing fee which is to accompany part A. 401 KAR § 39:120(2). Even if part A had been the only part of LES's application due prior to the expiration of the former permit, the Secretary seems likely to have reasoned, and even if LES's incomplete initial submission could be deemed an adequate first attempt to file part A, LES was clearly on notice prior to the DWM's deficiency report that the part-A fee was due as well, and thus its failure to pay that fee when due rendered its application inexcusably incomplete until after the expiration of its permit. The old permit no longer viable, LES's application should have been deemed one for a new permit.

LES sought review of this order in Franklin Circuit Court. Before that court, LES maintained (1) that it had in fact paid the part-A fee and should have been afforded an opportunity before the hearing officer to prove this; i.e., that summary disposition of this issue had been inappropriate, and (2) that no part-A fee had been due because no part A had been due: a renewal application, LES asserted, requires only part B. The circuit court agreed with this second contention and so remanded to the DWM, "for processing in accordance with 401 KAR 38:040 Section 6 as clarified by this opinion."

This is the order from which the Cabinet and the citizens associations have appealed. The appellants insist that LES's part-A-was-not-due contention was not properly raised during the administrative proceedings and thus was not preserved for circuit court review. They also insist that, in agreeing with LES on this point, the circuit court misinterpreted the pertinent regulations. The Cabinet maintains, moreover, that LES's alleged failure to raise this issue during the agency proceedings amounts to a failure to exhaust its administrative remedies. The circuit court, the Cabinet argues, was therefor without jurisdiction to entertain that question.

I have noted the pertinence of federal law to this dispute and have sketched the dispute's factual and procedural history. Before I begin my discussion, it remains only to describe this Court's standard of review. The familiar rule in Kentucky, as observed in Bowling v. Natural Resources and Environmental Protection Cabinet, 891 S.W.2d 406 (1994) is that

> "[j]udicial review of an administrative agency's action is concerned with the question of arbitrariness." Com. Transp. Cabinet v. Cornell, Ky.App., 796 S.W.2d 591, 594 (1990) (citing American Beauty Homes Corporation v. Louisville and Jefferson County Planning and Zoning Commission, Ky., 379 S.W.2d 450, 456 (1964). Section 2 of the Kentucky Constitution prohibits the exercise of arbitrary power by an administrative agency. Id.
>
> In determining whether an agency's action was arbitrary, the reviewing court should look at three primary factors. The court should first determine whether the agency acted within the constraints of its statutory powers or whether it exceeded them. (citation omitted). Second, the court should examine the agency's procedures to see if a party to be affected by an administrative

> order was afforded his procedural due process. The individual must have been given an opportunity to be heard. Finally, the reviewing court must determine whether the agency's action is supported by substantial evidence. (citation omitted). If any of these three tests are failed, the reviewing court may find that the agency's action was arbitrary. Com. Transp. Cabinet v. Cornell, 796 S.W.2d at 594. See also KRS 18A.100 (5).

Id. at 409. The substantive question here is whether the agency misconstrued one of its own regulations. In construing statutes and regulations a reviewing court seeks first to give effect to the legislative intent. When that intent is clear, the standard of review is "*de novo*"; *i.e.*, without deference to the interpretation under review, regardless of whether the ruling at issue is that of an administrative agency or a court. Mill St. Church of Christ v. Hogan, Ky. App., 785 S.W.2d 263 (1990). When the legislative or regulatory text is ambiguous, however, and the decision under review is that of an administrative agency, courts generally do defer to an agency's reasonable interpretation, particularly where the interpretation benefits from the expertise which is the agency's *raison d'être*. Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Courts must take care, however, that this deference does not become an abdication of their ultimate responsibility to construe the law. Delta Air Lines, Inc. v. Commonwealth of Kentucky Revenue Cabinet, Ky., 689 S.W.2d 14 (1985); Kentucky Board of Nursing v. Ward, Ky. App., 890 S.W.2d 641 (1994).

Before addressing the regulatory construction at the heart of the Cabinet's and the citizens' appeals, it is necessary

first to consider several preliminary questions. Among these are questions concerning the propriety of judicial review. First, the doctrine of the separation of powers as well as considerations of procedural efficiency mandate that judicial review of agency actions generally be confined to *final* agency actions. Abbott Laboratories v. Gardner, 387 U.S. 136, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967). Indeed, KRS 224.10-470, upon which LES bases its right to judicial review, provides that appeals may be taken from "final orders of the Natural Resources and Environmental Protection Cabinet." "Finality" is thus a jurisdictional matter that this Court is obliged to address. Commonwealth, Department of Highways, v. Berryman, Ky., 363 S.W.2d 525 (1962); Payton v. Payton, Ky., 293 S.W.2d 883 (1956).

Was the Secretary's order remanding LES's permit application final and appealable? The question arises from the obvious fact that the agency has yet either to issue or to deny LES's permit and from the strong policy against piecemeal review of adjudications. *Cf*. CR 54. The circuit court at least implicitly recognized the problem when it refused to remand the matter to the Secretary, lest there be successive appeals from each of the hearing officer's three grounds for vacating LES's permit.

> The finality of any given administrative adjudication depends not upon the label affixed to its action by the administrative agency but rather upon a realistic appraisal of the consequences of such action. The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by

> administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control. Thus, administrative orders are ordinarily reviewable when they impose an obligation, deny a right, or fix some legal relationship as a consumment of the administrative process. Under this test, a final order need not necessarily be the very last order.

Trans-Pacific Freight Conference of Japan v. Federal Maritime Board, 302 F.2d 875, 877 (D.C.Cir. 1962) (internal quotations marks and citations omitted). *Cf.* Tube Turns Division v. Logsdon, Ky. App., 677 S.W.2d 897 (1984) (reciting a similar version of this test). *Cf. also* Davis v. Island Creek Coal Company, Ky., 969 S.W.2d 712 (1998) (noting this test, but holding, in the pre-1996 workers' compensation context where the first level of appellate-like review was provided by the agency, that finality is primarily an attribute of adjudications, not decisions of intermediate reviewing bodies); *and* Essex County v. Zagata, 91 N.Y.2d 447 (1998) (providing a clear statement of New York's version of the test). Can the Secretary's decision (the Secretary in this instance is the fact finder) be said to "impose an obligation, deny a right or fix some legal relationship"?

"It is firmly established that agency action is not final merely because is has the effect of requiring a party to participate in an agency proceeding." Aluminum Company of America v. United States, 790 F.2d 938, 941 (D.C.Cir. 1986). The Secretary's order, therefore, is not final merely because it requires LES to submit to further agency review and perhaps to stricter agency scrutiny than was originally applied to its

permit application. In their briefs and in the oral arguments included in the record, the parties have suggested that the gravamen of their dispute is precisely this question about the standard to be applied to LES's application. No standard having yet been applied and the question not having yet been squarely put to the agency, this issue clearly is not ripe for judicial appeal.

Of course a further consequence of the Secretary's ruling is the expiration of LES's right to conduct hazardous waste operations under its former permit pending a decision on its new application. 401 KAR 38.040 § 6. If LES was in fact conducting such operations, or if it would be capable and desirous of doing so before the final approval of its new permit, then the Secretary's ruling would have the effect of "denying a right." It would thus be final and subject to judicial appeal. Finality determinations are, however, pragmatic. They are to be based not on the hypothetical effects of the agency decision, but rather on whether that decision "had a 'direct and immediate . . . effect on the day-to-day business' of the complaining parties." Federal Trade Commission v. Standard Oil Company of California, 449 U.S. 232, 239, 66 L. Ed. 2d 416, 424, 101 S. Ct. 488 (1980) (quoting Abbot Laboratories v. Gardner, *supra*); *see also* Abbs v. Sullivan, 963 F.2d 918 (7th Cir. 1992).

It is not clear from the record whether LES has in fact been harmed by having to cease or to postpone hazardous waste operations as a result of the Secretary's order. The company has not alleged such an injury. In fact, the record suggests that

LES planned an essentially new hazardous waste operation for which its financial assurances would not be due until shortly before start up at some point in the future. In any event, the record as it comes to us suggests that the Secretary's order may not be final. It is thus unclear whether the circuit court's jurisdiction was properly invoked. Accordingly, this Court is compelled, it seems to me, to remand this matter to the circuit court for a resolution of this question.

Next, the Cabinet maintains that, even if the Secretary's order is final, still the circuit court either lacked authority to review the particular regulatory question on which it based its ruling or abused its discretion by exercising its power of review in this instance. As noted above, the issue presented to the hearing officer was whether LES had satisfied the part-A-fee and other application requirements. The hearing officer found that in three respects, including the part-A fee, LES had not met those requirements. Without ruling on the hearing officer's other two findings, the Secretary agreed that LES had failed to pay within the time allowed the fee associated with part A of the permit application. That failure, according to the Secretary, precluded granting LES interim status under its prior permit and precluded considering LES's application as one for the renewal of an existing permit as opposed to considering it as an application for a new permit.

In a belated addendum to its exceptions from the hearing officer's report, LES argued for the first time that its alleged failure to pay the part-A fee was immaterial because as a

renewal applicant it was not obliged to submit a new part A of the application. KRC and CCC moved that this argument be stricken from the record for not having been timely raised, but the Secretary addressed neither their motion nor LES's argument.

The circuit court, however, did address the argument and agreed with LES that a renewal applicant is not required to file a new part A. Believing, with relief no doubt, that this construction of the regulations not only addressed the present appeal, but also answered the hearing officer's other deficiency rulings and thus obviated a remand to the Secretary for reconsideration of those rulings, the circuit court remanded the matter to the hearing officer that she might resume the review of LES's new permit.

In contesting the circuit court's decision, the Cabinet maintains, first, that LES's failure properly to raise this issue before the Secretary amounts to a failure to exhaust its administrative remedies and thus that the issue was not judicially reviewable. Next, it argues that the issue was not properly preserved before the fact finder, and so the circuit court should have declined to review it. Finally, it argues that this issue concerns what was essentially an affirmative defense and that LES waived that defense by failing to include it in its initial pleading. I shall consider these arguments in turn.

The doctrine of exhaustion of remedies is closely related to the finality requirement discussed above. Federal Trade Commission v. Standard Oil Company of California, 449 U.S. 232, 66 L. Ed. 2d 416, 101 S. Ct. 488 (1980). Ordinarily, courts

"should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction." McKart v. United States, 395 U.S. 185, 194, 23 L. Ed 2d 194, 203, 89 S. Ct. 1657 (1969). Accordingly, "[e]xhaustion is generally required as a matter of preventing premature interference with agency processes, . . ." Weinberger v. Salfi, 422 U.S. 749, 765, 45 L. Ed. 2d 522, 538, 95 S. Ct. 2457 (1975).

Premature resort to the courts is not the issue here, but the exhaustion doctrine may still apply

> where the administrative process is at an end and a party seeks judicial review of a decision that was not appealed through the administrative process. Particulary, judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise. . . . Certain very practical notions of judicial efficiency come into play as well. A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene. And notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors. Finally, it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures.

McKart v. United States, *supra*, 395 U.S. at 194-95, 23 L. Ed. 2d at 203-04.

As the Cabinet notes, our Supreme Court has applied the exhaustion principle where parties subjected to adverse agency decisions have ignored opportunities for administrative review and have then sought review in court. In Swatzell v. Commonwealth, Ky., 962 S.W.2d 866 (1998), for example, an NREPC

hearing officer had recommended penalties against a surface mining permittee for regulatory violations, and the permittee had filed no exceptions to the officer's report or otherwise availed himself of the opportunity for administrative reconsideration. When the permittee then sought review in court, the circuit court summarily dismissed. Affirming the dismissal, our Supreme Court explained that the exhaustion principle

> requires a party to raise issues before that particular [administrative] entity . . . before those issues are available for appellate review. If a party fails to exhaust all available administrative remedies, a reviewing court is without jurisdiction to consider the contested matters as the administrative agency did not have the opportunity to first review them.

Id., at 868. *See also* White v. Natural Resources and Environmental Protection Cabinet, Ky. App., 940 S.W.2d 909 (1997). The Cabinet maintains that, under the rule thus enunciated in Swatzell, the circuit court lacked jurisdiction to consider LES's belatedly raised argument concerning its obligation under the regulations--or rather its lack of obligation--to file part A of the permit renewal application. I disagree.

As the discussion in Swatzell illustrates, the exhaustion of remedies doctrine is closely related not only to the finality rule, but also to the general rule that reviewing courts not address alleged errors unless those errors were preserved (*i.e.*, expressly raised) in the proceedings under review. Unlike non-finality or non-exhaustion, however, non-preservation generally does not raise jurisdictional concerns.

Courts, of course, are under a general duty to exercise their jurisdiction.[3] Lest it narrow its jurisdiction unnecessarily, therefore, a reviewing court should take care not to apply exhaustion principles when preservation principles will do.

This is such a case. Unlike Swatzell, where the appellant flouted the administrative authority and refused to participate in the agency's full, two-part fact-finding procedure, LES participated in both parts of the administrative process and recognized its responsibility to assist in the making of an administrative record. In these circumstances, we are not persuaded that LES failed to exhaust its administrative remedies and thus are not persuaded that the circuit court lacked authority on this ground to consider LES's belatedly raised issue as part of its review.

The matter is not thus settled, however, for the Cabinet correctly insists that, even if the circuit court had authority to consider LES's belated argument, the propriety of that consideration is doubtful: alleged errors which have not been properly brought to the fact-finder's attention are unpreserved, and unpreserved errors are, as a general rule, not subject to review. Urella v. Kentucky Board of Medical Licensure, Ky., 939 S.W.2d 869 (1997); Regional Jail Authority v.

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[3] "[F]ederal courts are vested with a 'virtually unflagging obligation' to exercise the jurisdiction given them. . . . 'We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" McCarthy v. Madigan, 503 U.S. 140, 146, 117 L. Ed. 2d 291, 300, 112 S. Ct. 1081 (1992) (citations omitted). The principle in Kentucky is the same: Constitution of Kentucky § 14; Campbell v. Hulett, Ky., 243 S.W.2d 608 (1951).

Tackett, Ky., 770 S.W.2d 225 (1989); Taxpayers Action Group of Madison County v. Madison County Board of Elections, Ky. App., 652 S.W.2d 666 (1983).

For two reasons, however, I am not persuaded that the circuit court abused its discretion by reviewing LES's very fundamental regulatory question in this case. First, it is not clear that the issue was not preserved. To be sure, LES did not raise the regulatory interpretation issue within ordinary NREPC procedures. But its untimely motion had no bearing on the Secretary's jurisdiction, as established by statute, and the Secretary has considerable discretion to decide how best to address non-jurisdictional procedural irregularities. Union Light, Heat & Power Company v. Public Service Commission, Ky., 271 S.W.2d 361 (1954); Western Kraft Paper Group v. Department for Natural Resources and Environmental Protection, Ky. App., 632 S.W.2d 454 (1981). KRC and CCC, moreover, responded to the motion on its merits. The Secretary's silence, therefore, with respect both to LES's belated argument and to appellants' procedural objection to that argument, might well be construed simply as a rejection of LES's position. *Cf.* Eiland v. Ferrell, Ky., 937 S.W.2d 713 (1997) (finding untimely objections to a commissioner's report nevertheless suitable for appellate review).

More importantly, I am persuaded that, even if the part-A issue be deemed unpreserved, the circuit court did not abuse its discretion by reviewing it. Under CR 61.02, courts have a limited discretion to review unpreserved errors in civil

cases. Pursuant to that rule, "a palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." The error alleged by LES, we believe, was reviewable under this rule.

The unpreserved error rule applies most forcibly to alleged procedural errors. Although it is the goal of our system that all trials be fundamentally fair, as a matter of hard fact, no trial is procedurally perfect. It is largely in light of this fact that the rules of procedure and the rules of evidence provide litigants with an elaborate means to protect themselves from unfairness. Parties routinely waive their rights under those rules for strategic reasons, however, so that, even if fact-finding tribunals were able to remedy each lapse from horn-book procedure, the parties would not want them to do so. The unpreserved error rule thus protects each litigant's right, within limits, to engage in the trial strategy he or she believes most likely to succeed. Without the unpreserved error rule, moreover, parties would be tempted to use procedural error as a sort of trial insurance. Procedural errors could pass unremarked and uncorrected and could then be resorted to on appeal if the trial turned out badly. For these reasons the palpable error rule is rarely applied to procedural errors. Salisbury v. Commonwealth, Ky. App., 556 S.W.2d 922 (1977).

The unpreserved error rule also prevents a party from changing his or her substantive theory of the case on appeal. A new cause of action or a new affirmative defense may not be raised for the first time on appeal after the old one failed at trial. An appellant may not, as our Supreme Court has put it, "feed one can of worms to the trial judge and another to the appellate court." Kennedy v. Commonwealth, Ky., 544 S.W.2d 219, 222 (1976); Cabbage Patch Settlement House v. Wheatly, Ky., 987 S.W.2d 784 (1999); Weissinger v. Mannini, Ky., 311 S.W.2d 199 (1958). This is so because the opponent's evidence would likely have been different had the additional claim been tried, and it is thus ordinarily impossible to say with the requisite confidence that, had the neglected claim been properly raised, the result would have been different. Commonwealth, Transportation Cabinet v. Roof, Ky., 913 S.W.2d 322 (1996).

A harder question is presented, however, when, as in this case, a party wishes merely to add an argument to those arguments raised at trial in support of his or her cause of action. Yee v. City of Escondido, 503 U.S. 519, 118 L. Ed. 2d 153, 112 S. Ct. 1522 (1992); The First National Bank of Mayfield v. Gardner, Ky., 376 S.W.2d 311 (1964); Plesko v. Figgie International, 528 N. W. 2d 446 (Wis. 1994); Koch v. Rodlin Enterprises, Inc., 273 Cal. Rptr. 438 (1990); Nutt v. Knutson, 795 P. 2d 30 (Kan. 1989). A losing defendant may have focused at trial on the causation element of the plaintiff's claim, for example, and then discovered while preparing his appeal favorable, controlling law on the issue of duty. The reviewing

court itself may have discovered a controlling rule neglected by the parties. May a reviewing court consider such unpreserved legal arguments? Only, our highest court has said, if application of the unpreserved argument does not implicate unaddressed questions of material fact, and only if the unpreserved rule is so basic to the litigation that failure to incorporate it would result in a misleading application of the law or a substantial injustice. Priestly v. Priestly, Ky., 949 S.W.2d 594 (1997); Commonwealth, Transportation Cabinet v. Roof, *supra*; Mitchell v. Hadl, Ky., 816 S.W.2d 183 (1991); First National Bank of Mayfield v. Gardner, *supra*.

Whether, under KRS Chapter 224 and the Cabinet's regulations, one applying to renew a hazardous-waste-facility permit is required to submit both part A and part B of the permit application or part B only is a question of law utterly basic to this case and one completely independent of all evidentiary matters beyond the undisputed fact that LES does indeed wish to renew its permit. The parties, LES included, seem initially to have assumed that part A was required, but if that assumption is incorrect, as LES now maintains, then conditioning LES's application status on its failure to file the part-A fee would be a misleading application of the law and would be substantially unjust. Even if this question was not adequately preserved, therefore, the circuit court did not abuse its discretion under CR 61.02 by addressing it.

There is one final preliminary question: characterizing the part-A issue as an affirmative defense, the Cabinet argues

that LES waived consideration of that issue by failing to raise it as such a defense in its original pleadings.[4] I disagree. The original KRC/CCC petition alleged in general terms that LES's "application . . . failed to meet the applicable regulatory requirements . . . ." Citing 401 KAR chapter 38:040 § 6, the regulation here at issue, the petition asserted that the regulations include the requirements that the application be "complete" and that the fees "due" be paid, but it did not specify how LES had failed to comply. In its answer to the petition, LES denied this paragraph. That LES had a duty under the regulations to submit part A of the application and to pay the part-A fee was thus an element of KRC and CCC's cause of action. That element could be challenged by denial without being pled as an affirmative defense. Adkins v. International Harvester Co., Ky., 286 S.W.2d 528 (1956). LES did not waive its part-A issue by failing adequately to plead it.

Having addressed my own and the parties' procedural concerns, I shall turn now to the substance of the trial court's ruling. The circuit court focused on the portion of the regulation that requires renewal permit applications to be timely. That portion refers directly to part B. Finding no similarly express reference to part A, the circuit court concluded that "[t]here is no reference [in 401 KAR 38:040 § 6] to any Part A application or fees." That regulation, therefore,

[4]The Cabinet bases its argument on 400 KAR 1:090 § 5(3) and 401 KAR 100:010 which provide in part that the failure to raise an affirmative defense in a required responsive administrative pleading "may constitute a waiver of such defense[.]"

"in no way obligates someone attempting to renew his Part B permit . . . to pay the Part A application fee. It simply is not relevant." The appellants maintain that, by focusing too narrowly on only a portion of the disputed regulation, the circuit court distorted its meaning. I agree.

A more accurate reading emerges from a broader consideration of the regulatory context. As the Supreme Court has observed,

> [s]tatutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme--because the same terminology is used elsewhere in a context that makes its meaning clear, . . . or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law[.]

United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371, 98 L. Ed. 2d 740, 748, 108 S. Ct. 626 (1988) (citations omitted). As noted above, federal law provides the context for hazardous waste regulation. It will be helpful then to set out the pertinent federal regulations and to juxtapose Kentucky's virtually identical counterparts.[5]

[5]These citations are to the 1998 edition of the Code of Federal Regulations and to the 1994 version of the Kentucky Administrative Regulations. The Kentucky regulations are controlling and are those in effect at the time LES initiated its permit application. As the more recent federal regulations show, however, the law in this area has recently been stable.

40 CFR § 270.10 **General Application Requirements.**

(a) *Permit application*. Any person who is required to have a permit (including new applicants and permittees with expiring permits) shall complete, sign and submit an application to the Director as described in this section and §§ 270.70 through 270.73 [pertaining to interim status. *Cf.* 401 KAR 38:020.]. . . .

(c) *Completeness*. The Director shall not issue a permit before receiving a complete application for a permit except for permits by rule, or emergency permits. An application for a permit is complete when the Director receives an application form and any supplemental information which are completed to his satisfaction. . . .

(d) *Information requirements*. All applicants for RCRA permits shall provide information set forth in § 270.13 [part A] and applicable sections in §§ 270.14 through 270.29 [part B] to the Director, using the application form provided by the Director. . . .

401 KAR 38:070 § 1. **General Application Requirements.**

(1) *Permit application*. Any person who is required to have a permit (including new applicants and permittees with expiring permits) shall complete, sign, and submit an application to the cabinet as described in Sections 1 through 6 of this regulation and 401 KAR 38:020. . . .

(3) *Completeness.* The cabinet shall not issue a permit before receiving a complete application for a permit except for permits by rule or emergency permits. An application for a permit is complete when the cabinet receives an application form and any supplemental information which are completed to the satisfaction of the cabinet.

(4) *Information requirements.* All applicants for permits shall provide the applicable information in compliance with 401 KAR 38:080 [part A] through 401 KAR 38:210 [end of part B] to the cabinet, using the application form provided by the cabinet. . . .

(h) *Reapplications.* Any HWM [hazardous waste management] facility with an effective permit shall submit a new application at least 180 days before the expiration date of the effective permit, unless permission for a later date has been granted by the Director. (The Director shall not grant permission for applications to be submitted later than the expiration date of the existing permit.) . . .	401 KAR 38:070 § 5. **Reapplications.** Any hazardous waste site or facility with an effective permit shall submit a new application at least 180 days before the expiration date of the effective permit, unless permission for a later date has been granted by the cabinet. (The cabinet shall not grant permission for applications to be submitted later than the expiration date of the existing permit.) . . .
40 C.F.R. § 270.50. **Duration of Permits.**	401 KAR 38:040 § 5. **Duration of Permits.**
(a) RCRA permits shall be effective for a fixed term not to exceed 10 years. . . .	(1) *Term of Permit.* Hazardous waste site or facility permits shall be effective for a fixed term not to exceed ten (10) years. (See also Section 5 of 401 KAR 38:060.)
(d) Each permit for a land disposal facility shall be reviewed by the Director five years after the date of permit issuance or reissuance and shall be modified as necessary, as provided in § 270.41. . . .	(4) Each permit for a land disposal facility shall be reviewed by the cabinet five (5) years after the date of permit issuance or reissuance and shall be modified as necessary, as provided in Section 2 of this administrative regulation. . . .

40 C.F.R. § 270.51. **Continuation of Expiring Permits.**

(a) *EPA permits.* When EPA is the permit-issuing authority, the conditions of an expired permit continue in force under 5 U.S.C. 558(c) until the effective date of a new permit (see § 124.15) if:
(1) The permittee has submitted a timely application under § 270.14 and the applicable sections in §§ 270.15 through 270.29 which is a complete (under § 270.10(c) application for a new permit; and
(2) The Regional Administrator, through no fault of the permittee, does not issue a new permit with an effective date under § 124.15 on or before the expiration date of the previous permit (for example, when issuance is impracticable due to time or resource constraints). . . .

(d) *State continuation.* In a State with an hazardous waste program authorized under 40 CFR part 271, if a permittee has submitted a timely and complete application under applicable State law and regulations, the terms and conditions of an EPA-issued RCRA permit continue in force beyond the expiration date of the permit, but only until the effective date of the State's issuance or denial of a State RCRA permit. . . .

401 KAR 38:040 § 6. **Continuation of Expiring Permits.** [This is the section at issue.]

(1) The conditions of an expired permit continue in force until the effective date of a new permit if:
(a) The permittee has submitted a timely application under 401 KAR 38:090 and 401 KAR 38:100 and the applicable requirements in 401 KAR 38:150 to 401 KAR 38:210 and which is a complete (under Section 1(3) of 401 KAR 38:070) application for a new permit, paid the appropriate fees due (under 401 KAR Chapter 39); and
(b) The cabinet, through no fault of the permittee, does not issue a new permit with an effective date on or before the expiration date of the previous permit (for example, when issuance is impracticable due to time or resource constraints). . . .

(4) *State continuation.* As provided in 40 CFR 270.51(d), an EPA issued permit shall not continue in force beyond its expiration date under federal law if at that time the cabinet is the RCRA permitting authority. . . .

As these provisions show, RCRA permits expire after no more than ten years. The facility operator may receive a new permit thereafter, but only by filing a new application. If the operator files the application no later than 180 days before the old permit's expiration date (or by another pre-expiration

deadline set by the administrator), then the conditions of the old permit may continue in force until the application process is finished. The renewal process thus contemplates not simply the routine continuation of business as usual, but rather a periodic thorough review of existing hazardous waste facilities. While the process does not require that the Cabinet make no distinction between existing facilities seeking renewal of their permits and facilities making their first permit application, it does require that all permit applications, new and renewal, be complete. A complete application includes part A, and thus, under 401 KAR 39:120 § 2,[6] requires the part-A application fee. The circuit court erred, I believe, by concluding otherwise.

It is true, as the circuit court noted, that 401 KAR 38:040 § 6(a) refers expressly to the necessity of a timely part B but not to a timely part A. It is also true that the necessary conditions expressed in a statute are sometimes construed to create sufficient conditions as well. Al-Salehi v. Immigration & Naturalization Service, 47 F.3d 390 (10th Cir. 1995). Ordinarily, however, the statutory language should be given its plain meaning. Shanklin v. Norfolk Southern Railway Company, 173 F.3d 386 (6th Cir. 1998). In light of the full statutory context set out above and the clear legislative intent that renewal applications be meaningfully scrutinized, I am not persuaded that the expressed necessity of part B in 401 KAR 38:040 § 6(a) implies the sufficiency of part B. Part A is necessary too.

[6]"Any owner or operator who submits a part A application for a treatment, storage, or disposal facility shall submit with the application a filing fee in the amount of $1,000.00."

This reading, I believe, comports better than does the circuit court's with the rest of the regulatory scheme.

LES defends the circuit court's reading by claiming that the information contained in part A is so basic ("name" and "address") and unchanging that resubmission would be a waste of time. On the contrary, an applicant with an existing facility is required to submit on part A, among other information,

> a scale drawing of the facility showing the location of all past, present, and future treatment, storage, and disposal areas; . . . [a] description of the processes to be used for treating, storing, and disposing of hazardous waste, . . . a specification of the hazardous wastes [and] an estimate of the quantity of such wastes to be treated, stored, or disposed annually, . . .[and] a listing of all permits or construction approvals received or applied for under [various regulatory programs].

40 CFR § 270.13. None of this information is likely simply to carry over from a prior application. *See* Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency, 859 F.2d 156 (D.C. Cir. 1988) (discussing the virtually identical permit renewal provisions (40 CFR. § 122.6) under the National Pollution Discharge Elimination System).

To summarize, the parties' underlying dispute concerns LES's eligibility for a new permit to operate a continuing or resuming hazardous waste storage, treatment, or disposal facility. The parties disagree about the standards governing that eligibility. This is an important question, the answer to which is not yet clear. *See* 42 U.S.C. §6925(c)(3), *supra*; Natural Resources Defense Council, Inc. v. United States

Environmental Protection Agency, *supra*; Sanders, "Kentucky Adopts Risk Assessment for Closing Hazardous Waste Units," 22 N. Ky. L. Rev. 37 (1995); and Robertson, "If Your Grandfather Could Pollute, So Can You," 45 Cath. U. L. Rev. 131 (1995). That is not the question before this Court, however. We are asked to decide only whether LES, in order to postpone the expiration of its existing permit and perhaps to qualify for more lenient consideration of its "renewal" application than it would otherwise receive, was required to file part A of the application form and to pay the accompanying fee. This purely procedural question strikes me as a quintessentially administrative matter best left to the branch of government to which, under the constitution, it has been assigned. Judicial review of agency proceedings, moreover, must await a final agency outcome. Review in this case may well have been premature. Finally, judicial interference with agency procedures is only justified upon a clear showing that the agency has deviated from its statutory mandate. Regulatory construction, therefore, demands of courts that they place the regulation under review in its statutory context. The Secretary's decision that we have repudiated in this case not only does not deviate from the underlying mandate of our hazardous-waste-control legislation, but it comports with that mandate far better than does the result we have substituted. For these reasons, I respectfully dissent.

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