Licensee's Response to the Appeal

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Via Overnight Delivery

Susan M. Lessard, Chair
Board of Environmental Protection
c/o Terry Dawson
#17 State House Station
Augusta, Maine 04333-0017

RE: Response to Appeal of Department Permit A-001041-71-A-N (SM)
Berwick Iron & Metal Recycling, Inc.

Dear Chair Lessard:

Enclosed for filing is the Response of Berwick Iron & Metal Recycling, Inc. to the Appeal of Jeanette and Doug Seivwright, Robert and Donna Duffy, Tom and Carol Planche, and Joyce and Raymond Provencher.

Sincerely,

Matthew D. Manahan

Enclosure
cc: Service List (via U.S. Mail)

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
IN THE MATTER OF

BERWICK IRON & METAL RECYCLING, INC.	)	
Berwick	)	AIR EMISSIONS LICENSE
York County	)	
#A-1041-71-A-N	)	

**RESPONSE OF BERWICK IRON & METAL RECYCLING, INC.
TO THE APPEAL OF
JEANETTE AND DOUG SEIVWRIGHT, ROBERT AND DONNA DUFFY,
TOM AND CAROL PLANCHE, AND JOYCE AND RAYMOND PROVENCHER**

Pursuant to Chapter 2, Section 24(B) of the Department's rules, Berwick Iron & Metal Recycling, Inc. ("BI&MR") hereby responds to the November 26, 2010 appeal of Jeanette and Doug Seivwright, Robert and Donna Duffy, Tom and Carol Planche, and Joyce and Raymond Provencher ("Appellants").

I. Background

BI&MR is a metal recycling facility. On September 24, 2009 BI&MR purchased a used "hammer-mill" metal shredder, manufactured by Texas Shredder, Inc., for use at BI&MR's metal recycling facility on Route 236 in Berwick. The shredder was delivered from North Carolina to BI&MR's property in March 2010. The shredder is powered by a diesel engine rated at 3,600 horsepower, to process scrap metal and facilitate the recycling of cars and other large scrap items. The shredder will process large metal objects such as crushed cars to reduce the metal to a six-inch size. The shredded metal will be divided into ferrous and non-ferrous components using a large eddy-current electromagnet. All components, including aluminum, copper, plastic, and foam, will be sold for further processing off-site.

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The diesel engine was manufactured in 1967 and has not been reconstructed or modified since then. The shredder uses a sophisticated computerized control system to maintain optimum engine loading and, thereby, to minimize engine emissions.

On June 21, 2010, BI&MR applied to the DEP for a minor source air emission license for the shredder and the diesel engine. The potential emissions from the shredder consist of particulate matter generated from the physical impact of the shredder hammers on the materials, as well as from the potential heating of the material by the friction of the shredder. The diesel engine will burn ultra low sulfur diesel fuel with a maximum sulfur content of 15 ppm or less by weight (equivalent to 0.0015% by weight or less).

On June 17, 2010, notice of BI&MR's application was published in Foster's Daily Democrat newspaper, as required by Chapter 115. A copy of the air license application also was delivered to the Town of Berwick town office that day. The Department accepted BI&MR's application as complete for processing on July 27, 2010.

On August 26, 2010 BI&MR submitted an addendum to its June 18, 2010 application, proposing a reduced fuel limit of 150,000 gallons of ultra low sulfur diesel fuel per year, which is less than ten percent (10%) of its capacity and half of the 300,000 gallon per year limit proposed in BI&MR's initial June 18 application BI&MR also proposed to minimize its peak emissions by limiting operations to 8 hours per day, 40 hours per week, and 50 weeks per year, for a total of 2,000 hours per year. BI&MR proposed to meet Best Available Control Technology ("BACT") requirements for the engine by use of ultra low sulfur diesel fuel, GM Ecotip fuel injectors, a four pass intercooler, ignition timing retard, and the 150,000 gallon annual fuel use limit to limit NOx emissions to 19.5 tons per year ("TPY").

On September 17, 2010, BI&MR submitted to the Department a solid waste processing facility application for the shredder. Notice of the solid waste processing facility application was published in the Foster's Daily Democrat newspaper on August 31, 2010, filed in the Town of Berwick municipal office on September 16, 2010, and sent by certified mail to all abutters, including Appellants Robert and Donna Duffy, on August 27, 2010. The solid waste facility processing application noted that an air license application was received by the Department on June 21, 2010, and issuance was pending.

On October 19, 2010, the attorney for the Appellants submitted a letter to the Department commenting on the BI&MR air license application, making many of the same arguments included in this appeal.

On October 27, 2010 the Department issued the air emission license (the "License") that is the subject of this appeal.

II. The Appeal

On November 26, 2010 Appellants filed this appeal to the Board. In their appeal Appellants assert five reasons the Board should reverse the Department's issuance of the License:

(1) procedural "inadequacies";

(2) the BI&MR shredder facility was constructed without first obtaining a DEP permit;

(3) the License does not "sufficiently reference" applicable BACT and federally enforceable operational limits;

(4) the License lacks appropriate reporting and other requirements for enforcing applicable operational and emission limits; and

(5) the License was issued without an adequate ambient air quality analysis.

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The Appellants request that the Board conduct a public hearing on this appeal.

III. The Board should affirm the License.

A. Alleged Procedural Inadequacies

The Appellants first assert that the Board should reverse the License because of the following alleged procedural inadequacies: (1) the Department should not have processed the air license application until BI&MR had filed its Solid Waste Processing Facility application (on September 16, 2010), (2) the Department failed to notify the Board of the date it accepted BI&MR's air license application as complete for processing, (3) the Department did not send a copy of the License to the lawyer for Appellants until 18 days after the Department issued the License, and (4) the License did not incorporate the comments filed by Appellants.

1. There is no requirement that the Department must process all related applications together.

Appellants first allege that the Department should not have processed the air license application until BI&MR had filed its Solid Waste Processing Facility application, on September 16, 2010. The only support for this assertion cited by Appellants is Chapter 2, Section 11(C), which provides that "upon filing of an application which involves an activity or project which will require more than one license from the Department, the Board or Commissioner may require the applicant to submit all other required applications before any such application will be accepted as complete for processing." As this language demonstrates through the use of the word "may," there is nothing in Section 11(C) that requires the Department to process all related applications together.

Because BI&MR may not operate the facility until all required license have been issued, the fact that the Department issued the air license before the waste processing facility license has no practical impact on the Appellants.

2. The failure of the Department to notify the Board of the date it accepted BI&MR's application as complete for processing is not a basis to overturn the License.

Appellants next allege that the Board should overturn the License because the Department failed to notify the Board of the date the Department accepted BI&MR's application as complete for processing. There is nothing in the applicable statute (38 M.R.S. § 344(1)) or the rule (DEP Reg. 2.15) that gives interested persons any right to complain about the Department's failure to notify the Board under those provisions.

In any case, Appellants were not harmed by that oversight, because notice to the public of the application was provided at the time the application was filed, as required by Chapter 115 of the Department's rules, by publication in the newspaper. Even if Appellants were unaware of the newspaper notice, they were aware of the air license application at least as early as September 20, 2010, when their attorney (Nancy McBrady of Preti Flaherty) first contacted Department staff working on the application.

3. The fact that the Department did not send a copy of the License to the lawyer for Appellants until 18 days after the Department issued the License is not a basis to overturn the License.

Appellants next complain that the Department did not send a copy of the License to the lawyer for Appellants until 18 days after the Department issued the License. It is true that Chapter 2.18(B) provides that "any person who submits written comments on a draft order will receive a copy of the final order and notice of appeal rights," but Chapter 2 does not specify a time period for providing the final order. The Department did provide the final License to the attorney for Appellants sufficiently in advance of the appeal deadline (12 days in advance) to allow Appellants to file an appeal – as evidenced by the fact that Appellants did, in fact, file this

appeal. Thus, although the Department did not send a copy of the License to Appellants immediately, Appellants were not harmed by that oversight.

4. The fact that the License did not incorporate the comments of Appellants is not a basis to overturn the License.

Finally, Appellants complain that the License did not incorporate the comments filed by their lawyer by letter dated October 19, 2010. There is no requirement, however, to incorporate comments received into a license order. That the Department did not agree with the comments submitted by Appellants is not a basis to appeal the License.

B. Construction without first obtaining a DEP permit

Appellants appear to argue that the Board should overturn the License because BI&MR constructed the facility without first obtaining the License. While it is true that Chapter 115.4 provides that "the license must be issued by the Department prior to beginning actual construction of the modification or the new source," that provision does not provide a basis to overturn a license that was issued after construction. In this case, BI&MR did install the shredder prior to issuance of the License, but it has not operated the shredder, and it did not connect the diesel engine to a fuel source until testing of the engine after issuance of the License.

C. Inclusion in the License of applicable BACT and federally enforceable operational limits

Appellants claim that the diesel drive unit did not undergo a BACT analysis and complain that "as a synthetic minor the facility must accept federally-enforceable emission limits and/or limits on the hours of operation." Contrary to the Appellants' claim, the diesel engine did undergo a BACT analysis (provided in BI&MR's air license application), and the License contains the Department's BACT determination for the engine -- which includes federally enforceable limits necessary to establish BI&MR as a synthetic minor source.

The status of BI&MR as a new "minor source" is based on the facility's potential to emit regulated pollutants. Under the Department's rules, a source's potential to emit is based on the capacity of the source, considering physical or operational limits, including air pollution control equipment and restrictions on the hours of operation or limits on the type or amount of material combusted, stored, or processed provided such limitations are federally-enforceable. Chapter 100.125. The License limits the amount of fuel that may be combusted in the engine (150,000 gallons per year) and the type of fuel that may be combusted in the engine (diesel fuel with sulfur by weight not to exceed 15 ppm), and requires that the engine be equipped with Ecotip injectors, a four pass intercooler, and an ignition timing retard.[1] The License also requires that the shredder be equipped with a water spray. These requirements are all federally-enforceable as part of the License because it was issued pursuant to the New Source Review Provisions of Chapter 115. Therefore, these BACT requirements are effective to limit BI&MR's potential to emit and to establish BI&MR's status as a minor source.

The BACT limits in the License are effective to limit both annual emissions and short term emissions. BACT is based on an analysis of both annual and short term emissions rates. The number of hours per year and the hours during a day that a unit operates are not relevant to a BACT analysis, except to the extent they impact annual emissions rates. Annual emissions are addressed in the License by limits on the annual fuel use. BACT does not require limits on the number of hours per year or hours per day the source may operate.

[1] The fuel sulfur limit (equivalent to 0.0015% sulfur) is much more stringent than the current statewide 0.5% sulfur content limit for diesel fuel. In fact, when it amended Maine's low sulfur fuel statute (38 M.R.S.A. § 603-A) in 2010 the Legislature determined that 0.0015% sulfur diesel fuel would not be required statewide until January 1, 2018.

D. Inclusion in the License of reporting and other requirements for enforcing applicable operational and emission limits

Appellant argues that the License fails to include sufficient requirements to document that BI&MR's fuel use will be in compliance with the License. Specific Condition 16.A of the License requires that BI&MR maintain records of the amount of fuel purchased. In addition, Standard Condition 8 requires BI&MR to maintain records to document compliance with license conditions. These conditions sufficiently require BI&MR to demonstrate compliance with the fuel use limit in the License and are consistent with similar requirements imposed by the Department in numerous other air licenses for documenting compliance with fuel use limitations.

Appellants argue that DEP must impose additional controls to "prevent the possibility of BI&MR exceeding its proposed 2,000 operational hours per year and using diesel fuel in excess of 150,000 gallons." As discussed above, the Department appropriately determined that BACT is a limit of 150,000 gallons fuel per year. It did not conclude that BACT requires an hourly operational limit. Because the License does not impose an hourly limit, there is no basis for Appellants' claim that the License must require additional records to document compliance with an hourly limit.

A BACT determination requires a "top-down" analysis of emissions control technologies, considering technical and economic limitations. Under the Department's definition of BACT, where the Department determines that imposition of an emission standard is infeasible, it may prescribe a design, equipment, or work practice as BACT. Chapter 100.17. BI&MR submitted a BACT analysis, which addressed particulate matter emissions from the shredder. The Department reviewed the BACT analysis and imposed a work standard in the License as BACT for the shredder, namely the requirement to operate water sprays at all times the shredder is in operation. In addition, the Department imposed a limit on visible emissions from the shredder.

The Department's BACT determination for the shredder meets the definition of BACT. The Appellants' claim that the Department did not sufficiently review particulate matter emissions from the shredder is without merit.

E. The need for an ambient air quality analysis

Appellants claim that BI&MR's location in southern Maine deserves a more rigorous ambient air quality analysis, citing to the limitation of 20 tons per year of nitrogen oxide. Chapter 115, Section 7(B)(3)(c)(1) provides that a new minor source is required to submit an ambient air quality analysis if its emissions are in excess of the levels in Chapter 115, § 7(B)(3), which includes a threshold of 100 tons/year for NOx. At 20 tons/year, BI&MR's emissions will be much less than the threshold established in the Department's regulations for the requirement of submittal of an ambient air quality analysis. Furthermore, the only difference between southern Maine and the rest of the State with respect to regulation of NOx relates to formation of ozone. There is no requirement in the Department's regulations for a source to undertake an ambient air quality analysis of the impacts of its NOx emissions on ozone levels.

IV. The Board should not hold a hearing.

Appellants request a public hearing but fail entirely to satisfy the requirements for holding a hearing, that they demonstrate that (1) there is credible conflicting technical information regarding a licensing criterion and (2) it is likely that a public hearing will assist the decision maker in understanding the evidence. DEP Reg. 2.7(B). In fact, Appellants do not even address those requirements.

With respect to the first criterion for a public hearing, Appellants have not shown that there is any conflicting technical information, never mind credible conflicting technical information. Instead, they say that they will "engage necessary air licensing expert consultants,

charge them with assessing the Application and the License and receive final reports and/or draft testimony." See Appeal, p. 6. But we do not know what such experts would conclude – they might agree entirely with BI&MR's experts. Appellants want to conduct a fishing expedition.

In any case, Appellants already had their opportunity to hire such experts, and they failed to do so. They were aware of the air application sometime before September 20, 2010, when their attorney (Nancy McBrady) first contacted Department staff working on the air application, and they therefore had ample opportunity (more than a month) to file additional evidence with the Department prior to issuance of the license on October 27, 2010. Even if they believed they needed more time to engage their own experts, they could have asked the Department to give them the time needed to do so. Tellingly, Appellants made no mention at all in their October 19 letter of any additional evidence, never mind any plan or request to engage their own experts to review the application. It is disingenuous to now complain that they did not have enough time after the License was issued, because that ignores the time they had before the License was issued.

Appellants are precluded from seeking to introduce new evidence to supplement the Department's record unless they meet the requirements of Chapter 2.24(B)(5). That section provides that "the record for appeals heard by the Board is the administrative record prepared by the Department in its review of the application. If any person seeks to supplement the record, that person shall provide copies of all new documents and, if a public hearing is requested, summaries of all proposed testimony, including the name and qualifications of each witness, to the Board, Department staff and all other persons notified of the appeal." Appellants have failed entirely to meet these requirements in their hearing request – or to even try to meet them.

Chapter 2.24(B)(5) includes the following criteria for supplementing the record:

> The Board may allow the record to be supplemented on appeal when it finds that the evidence offered is relevant and material and that:
>
> (a) the person seeking to supplement the record has shown due diligence in bringing the evidence to the attention of the Department at the earliest possible time; or
>
> (b) the evidence is newly discovered and could not, by the exercise of reasonable diligence, have been discovered in time to be presented earlier in the licensing process.

Appellants could have asked the Department to give them time to engage their experts during the Department's processing of the application, and they could have submitted expert evidence during that time, so they have not shown due diligence in bringing the evidence to the attention of the Department at the earliest possible time, and whatever evidence they might seek to offer at the hearing could have been discovered in time to be presented earlier in the licensing process. Again, in their comments filed with the Department on October 19, 2010, the Appellants made no mention of seeking to introduce additional evidence. If they had, the Department may well have given them additional time to prepare and submit such evidence. It is completely disingenuous to now claim that they did not have sufficient time to prepare and submit such evidence, when they never even requested to do so. Thus, they may not supplement the record.

With respect to the second criterion for a public hearing, Appellants have not shown that it is likely that a public hearing will assist the Board in understanding the evidence. In fact, Appellants have not even explained what evidence they will offer at a hearing, so there is no basis to assume that a hearing will assist the Board in understanding this nonexistent evidence.

For these reasons, the Board should deny the request for a public hearing.

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V. Conclusion

For all of the foregoing reasons, BI&MR requests that the Board deny the appeal and affirm the License.

Dated: December 30, 2010

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