

OK  
7-13-11 cc: Permits  
EE  
M&R

**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

**SCOTT MANDIROLA, DIRECTOR,  
DIVISION OF WATER AND WASTE  
MANAGEMENT, WEST VIRGINIA  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION,**

**Petitioner,**

**v.**

**Civil Action No.: 10-AA-132  
Judge Louis H. Bloom**

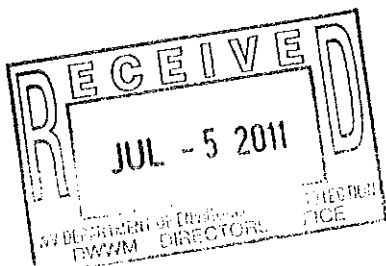
**CITY OF WHITE SULPHUR SPRINGS and  
TOWN OF HILLSBORO,  
Respondents.**

2011 JUN 29 AM 11:09  
CATHY S. GREENBERG  
KANAWHA COUNTY CIRCUIT COURT

**FINAL ORDER**

On January 21, 2011, came the petitioner, the West Virginia Department of Environmental Protection ("WVDEP"), by counsel, Jennifer L. Hughes, and the respondents, the City of White Sulphur Springs and the Town of Hillsboro ("Respondents"), for a hearing on the WVDEP's Petition for Appeal filed on August 16, 2010. The WVDEP appeals from the Final Order entered on July 15, 2010, by the West Virginia Environmental Quality Board ("EQB"). In said Final Order, the EQB ordered the removal of ambiguous language regarding effluent limitations on phosphorus in West Virginia National Pollutant Discharge Elimination System ("NPDES") permits issued to the Respondents' waste water treatment facilities.

The WVDEP raises the following issues on appeal: (1) the EQB's conclusion that the WVDEP should establish a clear standard for algal growth is impractical and has no legal basis; (2) the EQB erred in concluding that the WVDEP's actions were not based on sound science; and (3) the EQB erroneously failed to address a federal regulation directly on point.



Upon review of the record, the Petition for Appeal, the parties' legal memoranda and oral arguments, the Court is of the opinion that the EQB's Final Order should be affirmed based on the following findings of fact and conclusions of law.

### FINDINGS OF FACT

1. The Greenbrier River ("River") is a popular recreational venue in West Virginia. Among its many designated uses, the River is utilized for recreational purposes such as boating, tubing, fishing, and swimming. This designated use is classified as a Category C. *See* 47 W.Va. C.S.R. § 2-6.4.

2. During the summer of 2007, the WVDEP had received an increased number of complaints concerning algal growth on the River. In response, the WVDEP commissioned a study of the River. Petitioner's Opening Brief, p. 3.

3. The WVDEP's regulatory action was based largely on the findings of a study conducted by James Summers in 2007 and 2008 titled "Assessment of Filamentous Algae in the Greenbrier River and Other West Virginia Streams" ("Algae Study"). October 8, 2009, Hearing Transcript ("Hr. Tr. Vol. II."), p. 20; Hillsboro Certified File at 30-55. The study identified a number of factors that contributed to algae growth, including depth, temperature, flow, nitrogen, alkalinity and hardness. The study recommended development of an "algae index" to determine the appropriate level of algae reduction necessary to maintain the uses of the River for water contact recreation. However, no such index has ever been developed by the WVDEP. EQB's Final Order ¶ 42.

4. On April 30, 2009, the WVDEP renewed a NPDES permit authorizing the operation of a wastewater treatment facility in White Sulphur Springs, West Virginia, which serves approximately 16,000 residents. The facility is currently being modified to provide for a new

wastewater treatment facility, as well as, improvements to its collection system. The cost of the project in excess of \$20,000,000, resulting in a 40% rate increase for the facility's customers. However, none of the improvements will provide for the treatment or removal of phosphorus from the facility's wastewater effluent. September 10, 2009, Hearing Transcript ("Hr. Tr. Vol. I."), pp. 102-104.

5. Similarly, on April 30, 2009, the WVDEP renewed a NPDES permit to operate a wastewater treatment facility in the town of Hillsboro, West Virginia. This facility serves approximately 143 residents and has no capability to treat or remove phosphorous from its wastewater effluent. The current utility rates charged by the facility are unable to meet its operation and maintenance costs. In order to meet these costs, a rate increase is likely to be required which will raise monthly customer bills to an average of \$40.00 per month. Hr. Tr. Vol. I., pp. 69, 126, and 128-29.

6. The NPDES permits issued on April 30, 2009, to the Respondents contain certain terms and conditions relating to controlling the discharge of phosphorus into the River. The permits contain guidelines that require "phosphorus limitations of .05 mg/L average monthly and 1.0 mg/L maximum daily during the months of April through October, within three years from the issuance date of [the] permits." In the long term, the permits require each Respondent to achieve "final phosphorus limitations of 0.01 mg/L average monthly and 0.02 mg/L maximum daily during the months of April through October within twenty years from the issuance date of [the] permits." See WV/NPDES Permit Nos. WV008400 and WV0054283.

7. The WVDEP imposed phosphorus effluent limitations as a means to control algal growth in the River. The algal growth is the main concern of the WVDEP, not phosphorus effluents. Hr. Tr. Vol. I., p. 20.

8. Prior to the issuance of the renewal permits, the permits had not previously contained effluent limitations for the discharge of phosphorus or terms and conditions related to the control of algal growth. EQB's Final Order ¶ 5. Installation of control technology would be required to meet the proposed interim effluent limitations at both of the Respondents' wastewater treatment facilities, at a considerable cost to both facilities. Hr. Tr. Vol. I., pp. 69-70, 111-112. Furthermore, a WVDEP official testified that in order to comply with the new mandates a complete facility upgrade has, in some instances, been required. Hr. Tr. Vol. II., p. 22.

9. In its Final Order, the EQB noted that while the permits mandate the installation of phosphorus control technology at the wastewater treatment facilities along the River, the permits do not list other alternative means of algal control such as real time water quality management, algaecides, and potential canopy augmentation. EQB's Final Order ¶ 29-30.

10. Algae are a natural element found in the waters of West Virginia. The size and timing of the algal blooms in the River are directly correlated to natural conditions in the River relating to its depth, flow, canopy cover, and temperature. Furthermore, low flows, shallow water and high water temperature all contribute to larger or smaller algal blooms during the late summer. The River has historically been susceptible to algal growth due to its depth, flow and temperature. Hr. Tr. Vol. I., pp. 20, 22, and 29. Mayor Richard Workman of Hillsboro testified that the algal blooms in and around Hillsboro were always confined to a small section of the River's bank and that it never interfered with the River's main channel. Hr. Tr. Vol. I., p. 124. Further, the EQB noted that the area of Howards Creek located directly below the White Sulphur Springs facility discharge had little to no algal growth. EQB's Final Order ¶ 36.

11. The WVDEP offered testimony that out of 150 miles, only a portion of a 30-mile segment on the River contained algal blooms and further, consistent with other testimony, that “impacts” from the blooms would vary and be widely divergent and dependent upon many variables, including weather and the River’s conditions, independent of any action of the Respondents. Hr. Tr. Vol. I., p. 182.

12. Prior to issuing the permits, the WVDEP made no findings that any of the designated uses of the River were being impaired. Additionally, neither White Sulphur Springs nor Hillsboro received an order from the WVDEP notifying them that their discharges were impairing or were violating the designated uses of the River or any established water quality standard or criteria. Hr. Tr. Vol. I., p. 65.

13. The EQB concluded that that at the time the permits were reissued, the River was not listed as being impaired or in violation of the designated use standards and that the WVDEP implemented the permits for the sole purpose of controlling algal blooms in the River by controlling the phosphorus discharges from the various wastewater treatment facilities discharging into the River or its tributaries. EQB’s Final Order ¶ 27. While other potential sources of phosphorus discharge, including other point and non-point sources were identified, only wastewater treatment facilities have been mandated by the WVDEP to limit or control their phosphorus discharges to the River. Hr. Tr. Vol. I., pp. 26 and 55; EQB’s Final Order ¶ 28.

14. Beyond the narrative criteria, West Virginia maintains no water quality standard or other such guidance for managing algal growth or controlling phosphorus discharge. Hr. Tr. Vol. I., p. 90; *See* 47 W.Va. C.S.R. § 2-2.20.

15. The EQB found that no Total Maximum Daily Load has been developed for the River for the control of the discharge of phosphorus into the River or the existence of algae in the River. EQB's Final Order ¶ 33. The EQB concluded that the Algae Report did not contain or propose any workable standard for algal growth in the River. Further, according to the EQB it also contains no finding or scientific basis that the interim permit limits of 0.5 mg/L will achieve any acceptable standard of algal growth, but instead the interim standard proposed by the WVDEP is based solely upon the availability of technology to achieve the interim limit. Finally, the EQB found that the Algae Report contains no findings or scientific basis that the final permit limits of 0.01 mg/L will achieve any acceptable standard of algal growth. EQB's Final Order ¶¶ 38-40.

16. The EQB concluded that that final permit limit of 0.01 mg/L is based largely upon USEPA's current recommended criteria for nutrients in Eco-Region IX, which states that individual state permitting authorities should use the Eco-Region IX recommendations as a *starting point* for the development of standards and criteria. EQB's Final Order ¶ 43 (emphasis added). Therefore, the EQB concluded that the WVDEP failed to set forth a clear standard for algal growth and that the permit limits are not based on sound science and thus, must be revised or removed.

### STANDARD OF REVIEW

The Court reviews the EQB's Final Order pursuant to the West Virginia Administrative Procedures Act, which states as follows:

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedures;

- (4) Affected by other error of law;
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

W.Va. Code § 29A-5-4(g). Furthermore, on appeal a circuit court reviews questions of law presented *de novo* and findings of fact are accorded deference unless the court believes the findings to be clearly wrong. Syl. pt. 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1999). The “clearly wrong” and “arbitrary and capricious” standards of review are deferential ones, which presume that an administrative agency’s actions valid as long as the decision is supported by substantial evidence or a rational basis. *Webb v. West Virginia Board of Medicine*, 202 W.Va. 149, 569 S.E.2d 225 (2002).

#### DISCUSSION

1. The EQB is a five-member expert panel made up of “persons who by reason of previous training and experience are knowledgeable in the husbandry of the state’s water resources,” most of whom come from highly technical backgrounds and hold advanced degrees in scientific fields. W.Va. Code § 22B-3-1. Furthermore, the record shows that the EQB members were highly engaged in cross-examining the experts and other witnesses regarding the scientific basis for the WVDEP’s actions and the regulatory application of the scientific findings. Hr. Tr. Vol. I., pp. 92-97, 114-121, 157-177, 266-268; Hr. Tr. Vol. II., pp. 49-51, 105-136, 139-142, 148-151.

2. In its Final Order, the EQB noted that without an available, well-defined, and concrete standard of compliance for phosphorus algal growth, it is extremely difficult for the Respondents to determine if they are causing or may be causing or contributing to a violation of the designated uses of the River.<sup>1</sup> EQB’s Final Order ¶ 56. Furthermore, the EQB noted that the

---

<sup>1</sup> As stated previously, the River is not listed as an impaired stream failing to meet its designated uses. Findings of Fact, ¶ 14, *supra*.

establishment of a clear and viable standard removes subjectivity from its enforcements, as well as, would provide clear notice of the law to the Respondents. Hr. Tr. Vol. I., p. 64; Hr. Tr. Vol. II., pp. 84-86.

3. The WVDEP's sole cited authority for the development of its algal and phosphorus standards/effluent limitations is the catch-all language in the State Water Quality Standards which states that no significant adverse impact to waters may be allowed. None of the terms in such WQS are defined and the rule does not prevent the WVDEP from putting forth a clear and understandable standard of compliance. EQB's Final Order ¶ 57 (citing 47 W.Va. C.S.R. § 2.3.2.i).<sup>2</sup>

4. The WVEP took no surveys and collected no data with regard to the public's use of the River or its tolerance for algal growth outside anecdotal evidence taken from electronic mail and pictures. Hr. Tr. Vol. II., p. 97. A WVDEP representative's own testimony presented conflicting views of the status of algal growth in the River. Mr. James Summers, author of the Algae Study, first testified that the impacts of the Hillsboro's discharge to the River were "significant." However, his own report states that the alleged impacts of Hillsboro's facility are "short lived" and that "Hillsboro is a very small load" and "got caught in the cross-fire on this issue." Hr. Tr. Vol. II., pp. 139-141.

5. A WVDEP representative also testified that designated uses of the River were being threatened, but could not identify the number of days the River was failing to meet its designated uses or whether the River was failing to meet the designated uses at any given time. Hr. Tr. Vol. II., pp. 62-70. Also, although the WVDEP offered testimony that the breadth of algal bloom is

---

<sup>2</sup> 47 W.Va. C.S.R. § 2-3.2i states that "[a]ny other condition, including radiological exposure, which adversely alters the integrity of the waters of the State including wetlands; no significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems shall be allowed" in West Virginia waters.



important in determining whether a use was being met, it could not state what amount of algae would be considered unacceptable. Hr. Tr. Vol. II., pp. 67-68.

*The EQB's Omission of an Extensive Discussion of 40 C.F.R. § 122.44*

6. The WVDEP's primary objection to the EQB's Final Order is that the EQB did not explicitly discuss a number of the WVDEP's proposed findings of fact and conclusions of law that discussed 40 C.F.R. § 122.44. This federal regulation provides certain procedures and requirements for establishing limitations, standards, and other permit conditions applicable to state NPDES programs. Subsection (d) specifically provides procedures for imposition of NPDES permit limits necessary to achieve water quality standards and state narrative criteria.

7. In its findings of fact and conclusions of law, the WVDEP argued that its actions were based on 40 C.F.R. § 122.44(d)(1)(vi). This subsection provides several options for development of effluent limitations where no numeric water quality criteria have been developed for a pollutant that is "present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criterion within an applicable state water quality standard." However, 40 C.F.R. § 122.44 does not provide specific water quality criteria, but merely provides procedures and requirements for enforcing water quality criteria contained within state regulations. Furthermore, the WVDEP failed to present reliable scientific evidence that phosphorus was present in the effluents of the Respondents' wastewater treatment facilities at a concentration that is causing or has the reasonable potential to cause algal growth impairing the designated uses of the River.

8. It is not necessary for an administrative agency to discuss every proposed finding of fact or conclusion of law submitted by a party, but the agency's order must be "sufficiently clear to assure a reviewing court that all those findings have been considered and dealt with, not

overlooked or concealed.” Syl. pt. 4, *St. Mary’s Hosp. v. State Health Planning and Dev. Agency*, 178 W.Va. 792, 364 S.E.2d 805 (1987). Additionally, an agency’s order need not explicitly address each finding or conclusion, but may implicitly address them in other findings or conclusions, or address them in language such as “[t]he following proposed findings of fact are adopted from [petitioner’s] Proposed Findings of Fact.” See *Varney v. Hechler*, 189 W.Va. 655, 661, 434 S.E.2d 15, 21 (1993).

9. The EQB’s Final Order made clear that the WVDEP’s findings and conclusions were considered by stating that the findings and conclusions that were consistent with the EQB’s analysis and the evidence were adopted, while those that were inconsistent with the evidence and the EQB’s conclusions, or irrelevant thereto, were rejected or omitted. See EQB’s Final Order, p. 6. Specifically, the record is clear that the EQB was primarily concerned with the WVDEP’s failure to define critical statutory terms such as “significant,” and its failure to determine what level of algae would be appropriate for the designated uses of the River. See Hr. Tr. Vol. I, p. 81; EQB’s Final Order ¶¶ 56-57. Thus, the allegedly omitted regulations cited by the WVDEP were, in fact, addressed in the EQB’s findings addressing the state narrative criteria that the WVDEP sought to enforce through the 40 C.F.R. § 122.44 procedures. See EQB’s Final Order ¶¶ 56-57 (discussing 47 W.Va. C.S.R. §2- 3.2).

10. Upon concluding that the WVDEP failed to make findings necessary to determine whether state narrative criteria were being violated or the extent of the action necessary to comply with the criteria or maintain the designated uses of the River, it was reasonable for the EQB to omit an extensive discussion of procedures relevant only to enforcement. Further, such conclusion by the EQB is supported by the evidence adduced below. In the Final Order, the EQB does not deny the regulatory authority of the WVDEP. However, the basis for the EQB’s

decision was the flawed process used by the WVDEP to investigate the effects of algae growth on the designated uses of the River and the its implementation of the arbitrary terms imposed upon the Respondents in their renewal permits. Therefore, because the EQB's assignments of error correlate to the procedural steps taken by the WVDEP, not the substantive law granting the WVDEP's regulatory authority, the Court deems it unnecessary for an extensive discussion of said statutes and regulations.

*Permit Conditions and Established Standards*

11. As grounds for the phosphorus limits set forth in the Respondents' renewal NPDES permits, the WVDEP invokes a state narrative water quality criterion that broadly prohibits any condition that causes or contributes to a significant adverse impact to the chemical, physical, hydrologic, or biological components of waters of the state. *See* 47 C.S.R. 2 § 3.2.i. The WVDEP claims that the algae blooms alter the physical state of the River to the extent that the algae partially or completely impede the water contact recreational uses of the River. WVDEP's Opening Brief, p. 9.

12. The record is clear that the EQB did not have an issue with the state's water quality criteria, but with the WVDEP's application of the narrative criteria without first making critical findings as to the appropriate level of algae in the River to avoid interference with designated uses. Hr. Tr. Vol. II, p. 82; EQB's Final Order ¶¶ 56-57. The evidence on the record shows that the EQB found the term "significant" with respect to the narrative water quality criteria a critical term, but despite repeatedly requesting the WVDEP to further define the term, they were unable to do so. Hr. Tr. Vol. II, p. 81; EQB's Final Order ¶ 57.

13. The WVDEP repeatedly referred to its own narrative water quality criteria as a “generic” or “catchall” provision. Hr. Tr. Vol. II., p. 49. The EQB stated that the WVDEP was basically setting water quality standards as it went and that the WVDEP could do whatever it wanted whenever it wanted and cite to the catchall phrases for support of its actions. Hr. Tr. Vol. II, p. 50. Moreover, the EQB recognized that the WVDEP’s exercise of regulatory authority without defining critical terms resulted in an unfettered exercise of agency discretion. Hr. Tr. Vol. II., p. 82.

14. The Court finds that the above stated conclusions by the EQB are clearly supported by the evidence on the whole record. In its Final Order, the EQB noted the ample testimony demonstrating the inability of the WVDEP to further define or rationalize critical language, such as “significant,” in regards to the River’s impairment. To allow the enforcement the NDPES permits at issue based on the critical ambiguities, as noted in the EQB’s Final Order, would be clearly wrong, contrary to the substantial evidence on the whole record, and founded on an irrational basis.

#### *The Lack of Sound Science*

15. The WVDEP’s regulatory action was based largely on the findings of the Algae Study conducted by James Summers in 2007 and 2008. Hr. Tr. Vol. II., p. 20; Hillsboro Certified File, pp. 30-55. There is substantial evidence that the WVDEP’s Algae Study was based on data collected from two historically low-flow years, not representative of normal flow conditions of the River and that the abnormal flow conditions resulted in greater than normal algae during those years. Furthermore, according to expert testimony, the Algae Study data is inappropriate for determining appropriate levels of phosphorus in the River. Hr. Tr. Vol. I., pp. 26-28. Also, despite Mr. Summers’ recommendation set forth in the Algae Study that an “algae index” be

developed to determine an acceptable level of algae in the River for water contact recreational purposes, the WVDEP failed to develop such index. Hr. Tr. Vol. II., p. 142.

16. Similarly, there is substantial evidence on the record to show that the WVDEP failed to properly consider the effects of dilution when setting the effluent limits in the Respondents' NPDES permits. The WVDEP relied on a United States Environmental Protection Agency document titled "Ambient Water Quality Criteria Recommendations: Information Supporting the Development of State and Tribal Nutrient Criteria for Rivers and Streams in Nutrient Ecoregion XI," as a guideline for the "end of pipe" limitations imposed by the permits, not considering the effects of dilution. Hr. Tr. Vol. I, p. 61; Hr. Tr. Vol. II., p. 105. Furthermore, the record clearly shows that the EPA Guidance for Ecoregion XI is intended as a mere starting point for development of ambient water quality criteria applicable to streams and rivers as a whole, not NPDES permit limits applicable to individual point sources. *See* USEPA Guidance for Ecoregion XI, Hillsboro Certified File, p. 113; Hr. Tr. Vol. II., pp. 104-106; EQB's Final Order ¶ 43.

17. The Court finds that the EQB's conclusion that the phosphorus limits contained in the renewal NPDES permits were not based on sound science is clearly supported by the record below. There is substantial testimony that the findings in the Algae Study were irregular and not correlative to the traditional nature of algal growth in the River. The WVDEP not only used these abnormal standards to implement arbitrary mandates into the renewal permits issued to the Respondents, but also failed to heed the recommendation to develop an algae index. Without quantitative data that is reflective of a more accurate picture of the normal conditions of the River, no discernable or sound scientific computation can be made. More specifically, the Court agrees with the EQB that calculations based on one study, over a two-year period when the

River's condition is not at its normal flow conditions, cannot be deemed a workable standard or based on sound science. Furthermore, the Court agrees that the WVDEP's omission of an algae index only further shows the use of a hasty and flawed administrative process by the WVDEP in implementing the phosphorus limits in the renewal permits.

#### *Economic Feasibility*

18. The substantial evidence on the record clearly shows that the effluent limitations imposed by the WVDEP would pose an extreme economic hardship to the Respondents. New wastewater treatment facilities are already in the process of being built by the City of White Sulphur Springs at a cost in excess of \$20 million, causing the sewer rates to rise by 40%. Hr. Tr. Vol. I., pp. 128-129. Compliance with the phosphorus limits set forth in the renewal permit would require the City of White Sulphur Springs to install additional technology at substantial cost. Additional costs are expected due to the resulting increase in sludge production, costs related to the production of chemicals, and costs of other needs such as energy. *Id.*

19. In regards to Hillsboro, compliance with the revised NPDES permits would require it to replace its entire wastewater facility, which serves fewer than 150 residential customers, in order to implement phosphorus removal technology. Hr. Tr. Vol. I., p. 70. Hillsboro's wastewater facility's operating expenses are already in excess of its yearly income and sewer bills for Hillsboro residents need to be raised to an average of \$40.00 per month to meet the current shortfalls. Hr. Tr. Vol. I., p. 129. The WVDEP's own expert admitted that Hillsboro is a "very small load," and was "caught in the crossfire." Hr. Tr. Vol. II., p. 140.

20. In light of the substantial economic cost for the Respondents to comply with the limits set forth in the renewal permits, the EQB found based on the evidence that other methods of achieving the WVDEP's goals were not considered and no limitations were placed on other point

and non-point sources. EQB's Final Order ¶ 28. The Court finds that the EQB's conclusions are fully supported by the evidence on the whole record. In the absence of a reliable, coherent, and applicable standard to control algal growth through phosphorus discharge, it would be unjust to subject either White Sulphur Springs or Hillsboro to such a financial undertaking when both of the towns' facilities are currently dealing with budgetary dilemmas of their own. Furthermore, the Court agrees with the EQB that the WVDEP substantially erred by failing to consider or propose alternative control measures, as well as, other sources of phosphorus discharge in their attempt to control algal growth through the control of phosphorus discharges in the River.

### CONCLUSIONS OF LAW

1. Based on the foregoing, the Court concludes that the EQB's Final Order is not clearly wrong in view of the reliable, probative and substantial evidence on the whole record, or contrary law. The EQB does not deny the regulatory authority of the WVDEP or that the River may have issues of with algal growth; the EQB only concludes that the actions and methods employed by the WVDEP were not scientifically sound and done in haste. Such conclusions by the EQB are supported by the record.

2. The Court further concludes that the EQB's decision that the WVDEP failed to follow regulatory protocol and to define critical statutory terms prior to effectuating its phosphorus limits in the renewal permits was not contrary to the law, but clearly supported by the substantial evidence on the whole record. Prior to the implementation of the phosphorus limits in the Respondents' renewal permits, the WVDEP failed to make any findings that the designates uses of the River were impaired; the WVDEP failed to define critical ambiguous statutory terms, such as "significant," contained within the state water quality criteria; the WVDEP failed to determine what level of algae growth would be considered detrimental to the designated uses of the River;

and the WVDEP failed to provide adequate notice to either Respondent that they were violating the designated uses of the River or the established water quality standards.

3. Furthermore, the Court concludes that the EQB did not err in its decision, as the record clearly shows that the scientific evidence to support the permit language related to “effluent limitations for the discharge of phosphorus or terms and conditions related to algal growth” is unfounded. One study over a two year period at which the River was faced with irregular conditions is not a sufficient sample to derive a relevant and imposable standard upon the Respondents. Without a more in-depth study that can provide indicative and reliable scientific data to develop a more clear and pertinent standard regarding phosphorus limits to combat algal growth in the River, the Court agrees with the EQB that it would be unjust to impose such a substantial economic burden on the Respondents based on the clearly arbitrary findings of the Algae Study and the flawed regulatory process used by the WVDEP.

### **DECISION**

Accordingly, the Court does hereby **ORDER** that the WVDEP’s Petition for Appeal is **DENIED** and that the EQB’s Final Order is **AFFIRMED**. There being nothing further, the Court does further **ORDER** that the above-styled action be **DISMISSED** and **STRICKEN** from the docket of this Court. The objections of any party aggrieved by this Order are noted and preserved.



The Clerk is **DIRECTED** to send a certified copy of this Order to all counsel of record for the parties and the WVDEP at the following addresses:

Patricia Proctor, Esq.  
Gregory P. Neil, Esq.  
STEPTOE & JOHNSON PLLC  
P.O. Box 2195  
Huntington, WV 25722-2195

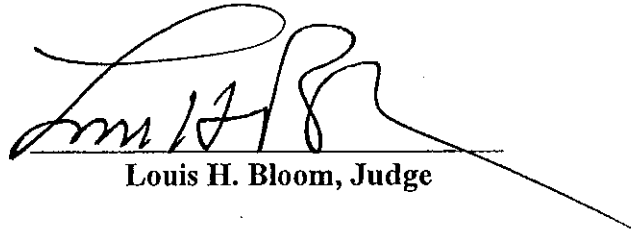
Jennifer Hughes, Esq.  
Office of Legal Services  
WV Dept. of Environmental Protection  
601 57<sup>th</sup> Street, S.E.  
Charleston, WV 25304

Armando Benincasa  
STEPTOE & JOHNSON PLLC  
P.O. Box 1588  
Charleston, WV 25326-1588

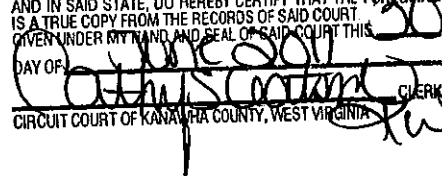
Scott Mandirola, Director  
Div. of Water and Waste Management  
WVDEP  
601 57<sup>th</sup> Street, S.E.  
Charleston, WV 25304

Jackie Shultz, Clerk  
Environmental Quality Board  
601 57<sup>th</sup> Street, S.E.  
Charleston, WV 25304

ENTERED this 28 day of June, 2011.



Louis H. Bloom, Judge

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 30  
DAY OF JUNE 2011  
 CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

6/28/11  
Copies sent to:  
Counsel of record  
Parties  
Other  
Circuit Clerk's mail  
Fax  
Other parties  
Press  
Proctor  
Benincasa  
Shultz  
Hughes  
Mandirola  
Clerks