BEFORE THE ENVIRONMENTAL BOARD OF REVIEW

STATE OF OHIO

OHIO MINING AND RECLAMATION ASSOCIATION	:	Case No. EBR 253195
Appellant	:	
v.	:	
DONALD SCHREGARDUS, DIRECTOR OF ENVIRONMENTAL PROTECTION	:	
Appellee	:	Issued: October 31, 1996

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND FINAL ORDER

Issued By:

ENVIRONMENTAL BOARD OF REVIEW

Toni E. Mulrane, Chairman
Mary Kay Finn, Vice-Chairman
Jerry Hammond, Member

236 East Town Street, Room 300
Columbus, Ohio 43215
Telephone: 614/466-8950

COUNSEL FOR APPELLANT:
Thomas P. Michael, Esq.
555 Metro Place North, Suite 100
Dublin, Ohio 43017

COUNSEL FOR APPELLEE DIRECTOR:
Lauren C. Angell, Esq.
Assistant Attorney General
Environmental Enforcement Section
30 East Broad Street, 25th Floor
Columbus, Ohio 43215

This matter comes before the Environmental Board of Review ("Board" or "EBR") upon a July 5, 1994 Notice of Appeal filed by Appellant the Ohio Mining and Reclamation Association ("OMRA") of the Appellee Director of the Environmental Protection Agency's ("Director" or "OEPA") June 3, 1994 final action creating a General Permit Authorization to Discharge Wastewater from Coal Strip Mining Activities under the National Pollutant Discharge Elimination System ("GNPDES"). On July 14, 1995, Appellant OMRA filed a Motion for Summary Judgment, and the Director filed a counter Motion for Summary Affirmance and/or Motion In Limine. Also on July 14, 1995, the Director filed an unopposed Motion to Admit the Certified Record into evidence, which the Board granted previously in a Ruling and Order for Oral Argument issued on May 9, 1996. At a subsequent Status Conference[1], the Board requested statements from counsel on the limited issue of the method by which the 1.4 milligrams per liter (mg/l) 30-day average for iron limitation was derived for the GNPDES permit. However, the parties declined to address the issue, submitting instead that the Board rule on the limited legal question of the applicability of Ohio's water quality standards to the GNPDES terms and conditions. No additional evidence was admitted at the Status Conference.

In extensive pleadings concerning the cross Motions for Summary Affirmance and Summary Judgment, the parties agreed that there are no genuine

---

[1] At the request of the parties, the Oral Argument was converted to a Status Conference.

issues of fact in this matter, and each party thoroughly briefed the legal issues associated with their respective Motions. Accordingly, the Board has determined that it will treat the pending Motions as if the matter has been submitted on briefs of counsel, using the certified record of proceedings as the evidentiary basis for its determination. Consequently, and in light of the following decision, the Director's Motion for Order In Limine is hereby denied. On July 22, 1996, the Director filed a Clarification of Motion to Admit Document into Evidence relating to an August 3, 1995 letter from Howard Pham of the U.S. EPA to George Elmaraghy of the OEPA. (See N. 4, infra.) Noting Appellant's objection the Motion is hereby granted, and the subject document is accepted into evidence in this matter.

Appellant OMRA is represented by Thomas P. Michael, Columbus, Ohio. The Director is represented by Assistant Attorney General Lauren C. Angell.[2]

Based upon the certified record and the pleadings of the parties, the Board issues the following Findings of Fact, Conclusions of Law and Final Order GRANTING summary affirmance in favor of the Director, and DENYING Appellant's Motion for Summary Judgment.

FINDINGS OF FACT

1. This appeal involves a decision by the Director to issue a final GNPDES for coal mining related activities. A GNPDES is a type of National Pollutant Discharge Elimination System ("NPDES") permit which authorizes multiple point source discharges by persons conducting similar activities

---

[2] Assistant Attorney General Thomas J. Grever, who initially entered an appearance in this matter, has since withdrawn as co-counsel. June 25, 1996 Notice of Withdrawal of Counsel.

within a prescribed geographic region; i.e. coal strip mining. [O.A.C. Sec. 3745-38-01(J).]

2. No person may discharge any pollutant into the waters of the state without either an individual or general NPDES permit. [O.A.C. Sec. 3745-38-02.]

3. In this case, the GNPDES was issued for similarly-situated coal mining related activities as provided for in O.A.C. Sec. 3745-38-03(B)(1).

4. A person who is eligible for coverage under a GNPDES permit may elect to be subject to the conditions set forth therein by filing with the Director a Notice of Intent to Comply with the general permit. [O.A.C. Sec. 3745-38-05.]

5. However, any person otherwise eligible may elect to be excluded from the GNPDES conditions by applying for an individual NPDES permit identifying the reasons for exclusion. [Id.]

6. Conversely, the Director may require that any person otherwise eligible for coverage under a GNPDES permit be subject to individual regulation upon a determination that certain enumerated factors merit a more tailored permit. [Id.]

7. The Federal Water Pollution Control Act ("FWPCA"), also referred to as the Clean Water Act ("CWA"), 33 U.S.C. Sec. 1251 - 1387, was enacted in 1972. One of the expressed purposes of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." [33 U.S.C. Sec. 1251(a).]

8. The CWA generally prohibits any and all discharges of pollutants

into the waters of the United States unless done in compliance with, among other things, national effluent limitations, water quality related effluent limitations or any other more stringent requirements imposed in state-issued NPDES permits. [33 U.S.C. 1342, 33 U.S.C. Secs. 1312, and 1311(a)(1)(c), respectively.]

9. Title 33 U.S.C. Sec. 1342 authorizes a state to issue its own NPDES permits, provided that the subject state regulatory program meets federal approval, and the state is authorized to administer the NPDES program by the Administrator of the U.S. EPA. Once a state obtains this regulatory primacy, U.S. EPA assumes an oversight role, and the state may assume the responsibility of issuing NPDES permits. [33 U.S.C. 1342(a) - (c).]

10. The residual federal oversight role, among other things, includes the authority to review each final state NPDES permit to determine compliance with federal requirements, and to prevent the Director from issuing any unapproved NPDES permit or permit condition. [33 U.S.C. 1342(a) and (d).]

11. It is not disputed that the State of Ohio currently has federally delegated authority to issue NPDES permits pursuant to 33 U.S.C. Sec. 1342.

12. Ohio's NPDES authorization, which is part of the state's water pollution control laws, is found in R.C. Chapter 6111. Specifically, R.C. Section 6111.03(R) provides:

* * *

> This chapter authorizes the state to participate in the national pollutant discharge elimination system . . . in accordance with the "Federal Water Pollution Control Act." This chapter shall be administered, consistent with the laws of this state and federal law, in the same manner that the "Federal Water Pollution Control Act" is required to be administered. [Emphasis added.]

13. Title 33 U.S.C. Sec. 1311, inter alia, requires that all NPDES permits meet water quality related effluent limitations. [33 U.S.C. 1311(a) and 33 U.S.C. 1342(a)(1), by reference to 33 U.S.C. Sec. 1312.]

14. So-called "water quality standards" ("WQS") must be adopted by all states. [33 U.S.C. Sec. 1313(a)(3)(A).] Ohio's WQS are contained in O.A.C. Section 3745-1.

15. No discharge of pollutants to surface waters of the state that violates any portion of the WQS can be permitted without a variance, such variance being temporary in nature. [O.A.C. 3745-1-01(G).]

16. Title 40 Part 123.25 of the Code of Federal Regulations governs requirements for state-issued NPDES permits. That division states:

> (a) All State Programs under this part must have legal authority to implement each of the following provisions and must be administered in conformance with each, ... In all cases, States are not precluded from omitting or modifying any provisions to impose more stringent requirements. 40 C.F.R. 123.25 (a). [Emphasis added.]

17. Title 40 Part 123.25 also requires states to comply with 40 C.F.R. 122.44. Title 40 C.F.R. Part 122.44(d) mirrors the liberality afforded states in 40 C.F.R. 123.25 by providing that NPDES permit conditions imposed by states may be more stringent than the national effluent limitations where necessary to meet, among other things, state water quality standards, including "State narrative criteria for water quality." [40 C.F.R. Part 122.44(d).]

18. A reading of O.A.C. 3745-1, et seq. reveals that Ohio's WQS are comprised of "use designations" related to aquatic life, water supply and

recreation, and assigned values which include narrative, numeric, and biocriteria designed to protect the designated use. [O.A.C. 3745-1-07.]

19. The WQS rule is structured so that each body of water in Ohio is assigned one or more aquatic life habitat use designations, one or more water supply use designations, and one recreational use designation. [Id.]

20. In addition, each regulated pollutant is listed in the rule with applicable WQS limitations set forth in graphic format below the pertinent habitat designations. [Id., at Table 7-1.]

21. With regard to the issuance of general NPDES permits regulating discharges from coal mining activities in Ohio, the subject of the instant case, R.C. Section 6111.035 provides:

> The director . . ., consistent with the "Federal Water Pollution Control Act" and the regulations adopted thereunder, without application therefor, may issue, modify, revoke, or terminate a general permit under this chapter . . . (Emphasis added).

22. Ohio Administrative Code Section 3745-38-07, which amplifies the GNPDES statute, authorizes the Director to issue a coal mining activity-related general NPDES permit if he finds:

> . . . (d) The authorized discharge levels meet the criteria specified in paragraph (B)(1) of rule 3745-33-04 of the Administrative Code. O.A.C. Section 3745-38-07(A)(1)(d).

23. Ohio Administrative Code Section 3745-33-04 governs final effluent limitations in NPDES permits, and provides:

> . . . the Director shall determine and specify in the permit the maximum levels of pollutants that may be discharged to insure compliance with
>
> (i) applicable water quality standards, and

> (ii) . . . the national effluent limitations and guidelines adopted by the Administrator pursuant to Sections 301 and 302 of the [Clean Water] Act, [33 U.S.C. Secs. 1311 and 1312] and national standards of performance for new sources pursuant to Section 3096 of the Act, [33 U.S.C. Sec. 1316] and national toxic and pretreatment effluent limitations pursuant to Section 307 of the Act, [33 U.S.C. Sec. 1317] and
>
> (iii) standards which prohibit significant degradation of the waters of the state . . . and . . .
>
> (v) any more stringent limitations required to comply with any other State of [sic] Federal law of [sic] regulation. [Emphasis added.]

24. The procedures applicable to Ohio's NPDES general permit processing are set forth in O.A.C. Section 3745-38-10. That rule provides:

> Ohio NPDES general permit processing shall be conducted in accordance with provisions in the "Rules of Procedure," Chapter 3745-47 of the Administrative Code except as superseded by division (B) of section 6111.035 of the Revised Code.

25. Between March 2 and 7, 1994, the Director published initial notice of the preliminary "draft" GNPDES which is the subject of this appeal in twelve newspapers of general circulation in Ohio: *The Vindicator* (Mahoning County), *The Athens Messenger* (Athens County), *The Cincinnati Enquirer* (Hamilton County), *The Herald-Star* (Jefferson County), *The Marietta Times* (Washington County), *The Repository* (Stark County), *The Toledo Blade* (Lucas County), *The Columbus Dispatch* (Franklin County), *The Akron Beacon Journal* (Summit County); *The Portsmouth Daily Times* (Scioto County), *The Dayton Daily News* (Montgomery County), and *The Plain Dealer* (Cuyahoga County). [Certified

Record No. 23.]

26. The public notice, among other things, informed the public that preliminary OEPA staff review had resulted in a "draft" GNPDES Permit for Coal Strip Mining Facilities which was available for inspection at OEPA's district offices. The public notice also indicated that interested persons could submit written comments on the draft GNPDES permit within 30 days after the date of the notice, or no later than April 6, 1994. The notice stated that a notice of a public meeting to explain the contents of the GNPDES permit and its applicability would be published in the near future. Finally, the public notice informed the public that the GNPDES itself provided information on the scope of its coverage, the procedures for coverage and discontinuing coverage, and its various other requirements for a storm water pollution prevention plan, soil erosion control, and effluent limitations. [Certified Record No. 23.]

27. The draft GNPDES permit did not incorporate Ohio's WQS, but rather contained four tables of discharge limitations which are characterized by the parties as "technology-based" effluent limits. [Certified Record Item No. 19.]

28. On March 3, 1994, the Director published notice of the date, time and location of the public meeting referenced in Finding of Fact No. 25 in the OEPA Weekly Review. The public meeting was to take place on April 7, 1994 at 7:00 p.m. at Cambridge High School in Cambridge, Ohio. This notice invited the public to attend the meeting and present written or oral comments on the draft GNPDES. The public was given eight additional days in which to submit written comments after the public meeting, with the proviso that written

comments received after April 14, 1994 would not be considered by the Director. Finally, the notice described the locations at which interested persons could secure copies of the GNPDES as well as a fact sheet concerning the permit. [Certified Record Nos. 25 and 26.]

29. The notice described in Finding of Fact No. 27 was published between March 5 and 8, 1994 in eleven Ohio newspapers: *The Akron Beacon Journal* (Summit County), *The Plain Dealer* (Cuyahoga County), *The Vindicator* (Mahoning County), *The Athens Messenger* (Athens County), *The Cincinnati Enquirer* (Hamilton County), *The Columbus Dispatch* (Franklin County), *The Dayton Daily News* (Montgomery County), *The Marietta Times* (Washington County), *The Repository* (Stark County), *The Toledo Blade* (Lucas County), and *The Herald-Star* (Jefferson County). [Certified Record No. 25.]

30. Appellant OMRA has raised no issue concerning the timing or adequacy of the public notice and hearings conducted in regard to the preliminary notice of the draft permit or the notice of the time and date of the hearing on the draft permit.

31. The U.S. Fish and Wildlife Service, through Kent E. Kroonemeyer, Field Supervisor, submitted written comments to the Director on March 16, 1994. [Certified Record No. 5.]

32. On March 31, 1994, Abbot Stevenson of the OEPA's Southeast District Office, Division of Surface Water, submitted written comments concerning the draft GNPDES permit to Bob Rothwell, Division of Surface Water, Central Office. This comment letter was accompanied by additional comments from Ms. Stevenson's supervisor, Bruce Goff, of the Southeast District Office of the OEPA. [Certified Record No. 6.]

33. On or about March 4, 1994, the Director received a comment letter from Mr. Daniel E. Susany, P.S., of Technical Land Consultants in North Lima, Ohio. Among other things, Mr. Susany expressed concern that the new GNPDES permit added a third NPDES permitting requirement to coal mining operations. [Certified Record No. 7.]

34. In accordance with the public notice, an informational meeting concerning the GNPDES proposal was convened on April 7, 1994 from 7:00 to 8:00 p.m. [Certified Record No. 9.]

35. On April 7, 1994, the Director received a joint comment letter from the Southern Ohio Coal Company and the Central Ohio Coal Company. This lengthy letter was detailed and comprehensive, and addressed a number of concerns with the proposed GNPDES permit. Among other things, the commenters believed the new permit to be too broad, and claimed that the draft permit's failure to incorporate existing detailed plans would create needless and costly regulatory burdens. [Certified Record No. 21.]

36. It is not disputed that both Southern Ohio Coal Company and Central Ohio Coal Company are members of Appellant OMRA. [Appellee Director's Motion for Summary Affirmance, Attachment 1.]

37. On April 12, 1994, the Director received written comments from Region V of the United States Environmental Protection Agency ("U.S.EPA") over the signature of Ken A. Fenner, Chief of the Water Quality Branch. In pertinent part, this letter required two changes to the permit terms and conditions, and specifically required that the permit be revised to exclude from eligibility for the GNPDES permit "discharges which the Director determines may cause or contribute to a violation of water quality standards."

Upon satisfaction of the conditions enumerated in his letter, Mr. Fenner indicated that USEPA would not "object to issuance of the [GNPDES] permit," and that "the permit may be issued in accordance with the Memorandum of Agreement and pursuant to the Clean Water Act." [Certified Record No. 10.]

38. On April 8, 1994, the Director received a letter from David L. Bartsch, Environmental Coordinator and Permit Administrator for The Ohio Valley Coal Company. This two-page comment letter outlined Ohio Valley Coal Company's concerns with the proposed permit from the company's perspective as a large underground coal mining operation. [Certified Record No. 11.]

39. It is not disputed that The Ohio Valley Coal Company is also a member of Appellant OMRA. [Appellee Director's Motion for Summary Affirmance, Attachment 1.]

40. On April 13, 1994, Jody G. Belviso, Environmental Engineer for AEP Fuel Supply, sent a letter to OEPA containing questions and comments arising from the public meeting which she had attended on April 7, 1994. In the comment letter, Belviso requested that the Director provide written responses to the questions raised in her correspondence, and also offered to meet with the OEPA to continue work on the GNPDES. [Certified Record No. 13.]

41. The Director received a letter from Richard J. Seibel, Columbus Field Director for the United States Department of the Interior, on April 25, 1994. This letter contained comments and recommendations for the general permit. [Certified Record No. 14.]

42. On May 10, 1994, apparently in response to concerns of the industry about U.S. EPA's requirement that Ohio's WQS be incorporated into the GNPDES, an informal meeting was held between OEPA and members or associates of

the Ohio coal mining industry at the OEPA offices in Columbus. [Certified Record Item No. 15.]

43. The OEPA's meeting attendance record reveals that representatives of Bair, Goodie & Associates, Jack A. Hamilton & Associates, Inc., OMRA, American Electric Power, Central Ohio Coal, the Ohio Division of Reclamation, and OEPA attended the meeting to discuss the Coal Mining General NPDES Permit. [Certified Record No. 15.]

44. The parties do not dispute that a significant portion of the May 10 meeting and discussions centered on U.S. EPA's comment letter and the required incorporation of state water quality standards in the GNPDES in order to secure mandatory federal approval of the proposed permit. (Cert. Record Item No. 10.)

45. As a follow-up to the May 10, 1994 informal meeting, the Director received a May 13, 1994 letter from William Bosworth, Environmental Engineering Manager for AEP Fuel Supply, summarizing the issues discussed at the May 13, 1994 informal meeting, and reiterating the company's concern with the potential incorporation of water quality standards into the GNPDES permit. Mr. Bosworth also raised issues concerning the process of establishing effluent limitations in terms of both methodology and data. [Certified Record No. 12.]

46. Although the last three comment letters from Belviso, Seibel, and Bosworth, respectively, were not received by the Director prior to the expiration of the comment period specified in the public notice, the affidavit of John Morrison establishes that the Director considered all comments received through May 13, 1994 prior to issuance of the final GNPDES permit.

[Affidavit of John Morrison, Director's Motion for Summary Affirmance, Attachment 2, para. 4.]

47. Following receipt of all of the identified comment letters, the Director modified the draft GNPDES permit in three general areas. [See Findings of Fact No. 49, infra.] One of the changes effectuated by the Director was the incorporation of the comments and requirements submitted by Mr. Fenner on behalf of U.S. EPA. This resulted in the supplanting of the four technology-based effluent limitations tables by 13 tables of discharge limitations based on narrative descriptions of the quality and characteristics of the receiving stream and the WQS set forth in O.A.C. 3745-1-07. [Certified Record Item No.3.]

48. On June 3, 1994, the Director issued the final GNPDES permit reflecting the revisions identified in Finding of Fact No. 46.

49. Between June 11, and 19, 1994, the Director published notice of the June 3, 1994 issuance of the final GNPDES permit in The Vindicator, The Athens Messenger, The Cincinnati Enquirer, The Herald-Star, The Marietta Times, The Repository, The Toledo Blade, The Columbus Dispatch and The Plain Dealer. The notice informed the public that the GNPDES permit affords coverage to coal mines, and cited the federal definitions for the permit's regulation of process wastewaters and storm water discharges. The notice informed the public that the permit contained information about who was potentially covered by the permit, how to apply for coverage, and how to discontinue coverage, as well as information on the required storm water pollution prevention plan. [Certified Record No. 2.]

50. The third paragraph of the June 20, 1994 notice provided:

> The final permit does differ from the draft permit. The scope of the facilities covered has been narrowed to strip mine activities, additional effluent limitations have been included to insure that facilities covered by the permit do not contribute to a violation of water quality standards, and the storm water pollution prevention plan (SPW3) requirements were revised and are now based upon the standard SWP3 requirements contained in the general permit for storm water associated with industrial activity. [Emphasis added.]

[Certified Record No. 2.]

51. Finally, the June 20, 1994 notice informed the public of where and how to secure copies of the final permit, and contained language informing the public about how to appeal the final permitting action to this Board. [Id.]

52. Notice identical to that contained in the June 11, to 19, 1994 newspapers' notices described in Finding of Fact No. 48 was published in the June 20, 1994 OEPA Weekly Review. [Substitute Certified Record No. 2.]

53. Despite the fact that several additional tables of limitations were contained in the final permit, with two exceptions, the effluent limitations set forth in the final GNPDES permit are identical to those required in 40 C.F.R. 434.35, et seq. relative to discharges from coal mining related activities. These conforming limits are not at issue here. [Cf. Certified Record Item No. 3 and 40 C.F.R. 434.35, 434.55 and 434.66.]

54. However, the final GNPDES permit differs from both the draft permit and federal effluent limitations with regard to daily range of limitations for pH. Whereas the draft permit and applicable federal regulations would allow for a range of pH of 6.0 to 9.0, the final permit set

the more stringent limits of 6.5 to 9.0.[3] [Certified Record Item No. 3.]

55. In addition, the final GNPDES permit contains, at Table 1-3 in Part III.C., what the Director concedes to be more stringent limitations for the 30-day average for total iron than the federal regulations would allow. While the federal allowable limit is 3.0 milligrams per liter (mg/l) for the thirty-day average for iron, the final GNPDES permit requires that discharges not exceed 1.4 mg/l for the 30-day average.

56. The receiving streams for discharges regulated under Table 1-3 in Part III.C. of the GNPDES permit are designated as warmwater habitat, exceptional warmwater habitat, modified warmwater habitat, or coldwater habitat. [Certified Record item No. 3.]

57. The Ohio water quality standard for pH set forth in O.A.C. 3745-1-07 is 6.5 to 9.0 the same range specified in the GNPDES permit for the subject aquatic life categories. [O.A.C. 3745-1-07, Table 7-1 at page 14 of 20.]

58. The Ohio water quality standard for the thirty-day average for iron set forth in O.A.C. 3745-7-01 for the subject aquatic life categories is 1.0 mg/l, .4 mg/l less than the amount set forth in the GNPDES permit. [O.A.C. 3745-1-07, Table 7-1 at page 12 of 20.[4]]

---

[3] In pleadings filed by the Director, the Board learned that the 6.0 - 9.0 range for pH contained in the final GNPDES permit at Table 7-1 was a "typographical error." The "6.0" should, in fact, have been published as "6.5". [Affidavit of John Morrison.]

[4] Although the Board requested briefing on this issue of divergence from the specified state WQS for the thirty-day average for iron, the parties jointly argued in subsequent filings and at a status conference that the propriety of the actual limit is not herein under appeal. The Board was misled by various references to the actual limit contained in pleadings filed by both parties, and took a liberal view of the Notice of Appeal. The parties, nonetheless, apparently are now in agreement that the only relevant issue to be decided in this appeal is whether the state lawfully may impose

59. On August 3, 1995, Howard Pham, an Environmental Scientist in the Permits Sections of the U.S. EPA, sent a letter to George Elmaraghy, Deputy Director, Division of Surface Water at the OEPA.[5] This letter evidenced the completion of U.S.EPA's review of the GNPDES permit under appeal herein, and contains the statement that Pham "[has] no objection to the Ohio Environmental Protection Agency's issuance of this permit."

60. On June 5, 1994, OMRA filed a Notice of Appeal with this Board setting forth three separate assignments of error. In numbered paragraph 1, Appellant claims that the effluent limitations set forth in the GNPDES are not consistent with applicable federal law and regulations, in violation of R.C. Section 6111.035. In support of its position on this issue, OMRA cites to federal regulations that authorize a higher discharge level than is specified in the GNPDES herein under appeal. In addition, in subsequent pleadings, Appellant alleges a violation of an Ohio/U.S. EPA Memorandum of Understanding.

61. In numbered paragraph 2, Appellant asserts that the existence of

---

state WQS in the GNPDES permit, the question of what those limits ultimately may be being a question for another day. June 21, 1996 Supplemental Memorandum of Appellant in Support of Motion for Summary Judgment; June 21, 1996 Director's Supplement to his July[sic] 14, 1995 Motion for Summary Affirmance.

The Board is confused by this reasoning, for it appears that once the appeal time on the final permit has expired, there would not be an available means to challenge the iron limit via an administrative appeal. However, Appellants may be granted another "bite at the apple," based on the Director's representations that he intends to republish a draft GNPDES permit with certain revised water quality-based effluent limitations in the near future. June 21, 1996 Director's Supplement.

[5] Although the Board admitted this document into evidence in this proceeding, we did so over the objection of Appellant as to its relevance. Accordingly, we will consider the document, but weigh it in light of Appellant's assertions that the fact that it post-dates the issuance of the GNPDES permit dilutes its probative value.

substantive differences between the proposed and final GNPDES permits, without benefit of a second draft permit and public notice thereon, violates R.C. Sections 3745.07 and 6111.035. In the second part of this assignment of error, Appellant further claims that these substantive differences resulted in a deprivation of substantive and procedural due process under the Ohio and United States Constitutions.

62. Finally, Appellant asserts that the GNPDES permit is invalid for the reason that the effluent limits therein have been preempted by the United States Environmental Protection Agency in 40 C.F.R. Part 424.

63. In its July 14, 1995 Motion for Summary Judgment, Appellant focuses solely on the fact that a revised draft permit was not public noticed before issuance of the final GNPDES permit. OMRA claims that this failure to publish the revisions to the draft permit violates R.C. Section 6111.035's requirement that state law in this regard be consistent with the CWA.

64. More precisely, OMRA argues that the substitution of 13 water quality-based effluent limitation tables for the original four technology-based effluent limitations tables set forth in the draft permit merited publication of notice of a second revised draft permit. Appellant cites no federal or state law directly in support of this contention.

65. In his July 14, 1995 Motion for Summary Affirmance, the Director emphasizes the lack of legal support for Appellant's claim that a second draft permit should have been public noticed before finalization of the GNPDES. The Director alleges that the substance and procedure involved in the GNPDES permit were consistent with both state and federal law, and that the arguments regarding preemption have no merit under the clear language of the federal

statute and applicable rules.

66. Finally, the Director argues that because participation in the GNPDES is permissive rather than mandatory, the fact the OMRA can "opt out" of coverage and apply for an individual NPDES permit deprives Appellant of the right to claim that it was prejudiced by the issuance of the GNPDES permit.[6]

CONCLUSIONS OF LAW

1. Summary affirmance, although not addressed specifically in the regulations of the Board, is an appropriate way in which to resolve factually undisputed appeals on purely legal questions with resulting economy to the parties and this Board.

2. Where, as here, the parties have stipulated that there are no genuine issues of material fact and the complete certified record has been admitted upon the unopposed motion of the Appellee, the appeal lends itself to a determination of law.

3. The Board has previously considered such motions, and we herein continue to do so under the analogous standards developed in Harless v. Willis Day Warehousing Co., 43 Ohio St. 2d 64, 66 (1978) for resolution of Motions for Summary Judgment under Ohio Rule of Civil Procedure 56:

> The appositeness of rendering a summary judgment hinges upon the tripartite demonstration: (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgement as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse

---

[6] We decline to address this argument further based on our belief that the fact that OMRA may be deprived of the ability to participate in a stream-lined, general permit due to a dispute about the GNPDES terms is sufficient to sustain its standing.

> to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. [Id., at 66.]

4. Accordingly, we must determine, applying the facts presented to us in the certified record and construing those facts most strongly in favor of Appellant OMRA, whether the Director's action is unlawful or unreasonable.

5. "Unlawful" means that the action is not in accordance with law. "Unreasonable" means that the action does not comport with reason or that it has no factual foundation. It is only where the Board can properly find from the evidence presented at hearing that there is no valid factual foundation for the Director' action that the action in question can be found to be unreasonable. Citizens Committee to Preserve Lake Logan v. Williams, 56 Ohio App. 2d 61, 381 N.E. 2d 661 (Franklin County, 1977).

6. In this case, there was no allegation of unreasonableness in the Notice of Appeal, and the issue was not raised by the parties in their respective briefs. Consequently, if the evidence contained in the certified record and supplemented by the affidavits of the parties demonstrates that the Director's action was lawful, the Board must affirm the Director's action. Citizens Committee to Preserve Lake Logan, supra, at 69-70.

7. With regard to the burden of proof, we are constrained to conclude that the burden rests on OMRA, despite the circumstances of this unique case.

8. Although there was no formal "application" for the GNPDES permit and the Director is in the rare position of essentially devising and issuing a permit not specifically applied for by a member of the regulated community, we are of the opinion that the OMRA is nonetheless the "applicant for the permit" who bears the burden of proof under The Jackson County Environmental Committee

v. Shank, Case Nos. 91AP-57, -58, 1991 Ohio App. LEXIS 6006 (Franklin County App. December 10, 1991).

9. We are cognizant of the fact that this conclusion charges the OMRA with the task of proving the unlawfulness or unreasonableness of a permit which was developed almost exclusively within the province of the OEPA. However, we cannot ignore sound guidance provided in the binding precedent of the court of appeals that "the burden of proof . . . in a permit proceedings [sic] is upon the applicant for the permit regardless of who is the appellant." [Id., at 7.]

10. Despite the uniqueness of this matter, we can identify no clear reason to distinguish the present situation to a degree which would alter the burden of proof.

11. As an overview to our decision, the Board notes that the Notice of Appeal in this matter purports to contest the Director's imposition of Ohio's water quality based effluent limitations in the GNPDES permit. This, the Appellant contends, thrusts more stringent limitations on Appellant than certain federal rules would allow and, therefore, renders the GNPDES inconsistent with the CWA in violation of R.C. Section 611.035.

12. The Director has conceded that Ohio's specified levels for pH and iron are more stringent than the levels permitted in the federal regulations, but counters that both state and federal law allow, if not require, the imposition of more stringent state effluent limitations where those limitations are embodied in water quality standards.[1]

---

[1] As an aside, the Director also pointed out that the limitation for the 30-day average for iron set forth in the GNPDES permit is less stringent than the listed state WQS for iron, for the reason that OEPA policy

13. To avoid confusion, we establish at this juncture that the state WQS are established at O.A.C. 3745-1-07, a rule which was duly promulgated, and which is not currently challenged herein. We therefore must assume that the state water quality standards at issue here are validly promulgated regulations with the force and effect of law.

14. The only question remaining is whether existing law permits the imposition of state WQS as the Director has done in this permit.

15. We conclude that applicable state and federal law require that the state WQS, in those instances where they are more stringent than federal effluent limitations, be incorporated into any NPDES permit, including the GNPDES permit at issue. We base this conclusion on our reading of the federal statutes and rules which clearly require the incorporation of state water quality based standards into all NPDES permits.

16. We begin our analysis with 33 U.S.C. 1251, which sets forth the "Congressional declaration of goals and policy" under the Federal Water Pollution Control Act. At subparagraph (b), entitled "Congressional recognition, preservation, and protection of primary responsibilities and rights of States", federal lawmakers declared:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibility and rights of States to prevent, reduce, and eliminate

---

allows for the consideration of background conditions for the receiving stream when determining whether water quality will be preserved. Thus, contends the Director, the 1.4 mg/l for iron established in the GNPDES permit actually affords some modicum of relief to the Appellant, albeit far less than the 3.0 mg/l limit it contends is permissible under federal law. However, as explained by the Director's counsel at the status conference, the background level for iron allowed in this appeal may not carry over to the second draft permit.

> pollution, to plan the development and use . . . of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.

17. Thus recognizing the importance of state's rights in this area, we turn to the effluent limitations set forth in 33 U.S.C. 1311.

18. To paraphrase, this provision of federal law prohibits unlawful discharges of pollutants, and specifies a compliance schedule that required, by July 1, 1977, the achievement of "any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations . . . or required to implement any applicable water quality standards established pursuant to this chapter." [33 U.S.C. 1311(a) and (b)(1)(C.]

19. The importance of preserving state regulation in the area of water pollution control is again reinforced in 33 U.S.C. 1342(b) governing state-issued NPDES permits. This section precisely requires that state permit program legislation must be designed specifically to "(A) apply, and insure compliance with, any applicable requirements of sections 1311 [preserving primacy of state water quality standards] ... "

20. Perhaps the clearest guidance, however, originates from the federal regulations addressing limitations and conditions on state-issued NPDES permits. The introductory language of the pertinent rule, 40 C.F.R. 122.44, requires that each NPDES permit shall include conditions meeting all of the requirements set forth in subparagraphs (a) through (q) of the rule.

21. Enumerated among the listed conditions for all NPDES permits is 40 C.F.R. 122.44 (d) which provides that the following standards be incorporated:

> Water quality standards and State requirements: any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards . . . necessary to:
>
> (1) Achieve water quality standards established under section 303 of the CWA[8], including State narrative criteria for water quality.

22. Thus, the applicable federal regulations clearly contemplate that state water quality standards remain inviolate in the permitting area.

23. Aside from the language of the federal law and rules, R.C. Section 6111.035, the validity of which is not before us, requires that state NPDES permits be "consistent with" federal law and regulations.

24. Finally, O.A.C. 3745-33-04(B)(1) states that final effluent limitations in all state NPDES permits must comply with:

> (i) applicable water quality standards, and
>
> * * *
>
> (v) any more stringent limitations required to comply with any other State . . . law of [sic] regulation. O.A.C. 3745-33-04(B)(1).

25. Consistent with federal law, therefore, the Ohio regulatory program mandates that state water quality standards be incorporated into all NPDES permits, including the general permit at issue here.[9]

26. Appellant OMRA next contends that the Director's decision to issue the GNPDES as a final action, where the final permit and the draft permit were

---

[8] Section 303 of the Clean Water Act (33 U.S.C. 1313), in sum, governs the procedures for federal review and approval of state water quality standards rules and accompanying implementation plans.

[9] We will address OMRA's arguments concerning preemption of State law by federal regulation, infra.

substantively different, violates applicable state law.

27. In particular, Appellant cites language in the governing federal law which requires the incorporation of certain federal procedural safeguards in order to be "consistent with the FWPCA" as that phrase is employed in R.C. Section 6111.035.[16] We do not agree.

28. First, Appellant cites no precise authority for any republication requirement. The issue of the duty to republish and solicit public comments ad infinitum when changes are made in draft actions prior to finalization is simply not addressed in the state program. Therefore, we have no basis to conclude, as a matter of law, that the Director was statutorily obligated to publish in draft form the substantial revisions effectuated in the final GNPDES permit.

29. The applicable portions of the federal procedural regulations do not further Appellant's arguments. Although 40 C.F.R. Sec. 123.25 provides that:

> (a) All state programs under this part must have legal authority to implement each of the following provisions and must be administered in conformance with each . . .,

the provisions referenced do not address a republication requirement. See 40 C.F.R. 124.6(a), (c), (d) and (e) and 40 C.F.R. 124.8 [dealing with the requirements for the development and content of a draft permit and an accompanying "fact sheet"]; 40 C.F.R. 124.10(a)(1)(ii), (iii), (A)(1)(v), (b), (c), (d), and (e) [addressing the procedures for initial public notice of the draft permit]; 40 C.F.R. 124.12(a) [setting forth requirements for public

---

[16] For the text of the applicable portion of R.C. Section 6111.035, see Finding of Fact No. 20.

hearings].

30. Furthermore, Appellant OMRA did not contest any of these procedural aspects in the development and publication of the original draft permit.

31. Accordingly, we conclude that the Director followed the procedures contained in Ohio law for the publication of notice of the draft permit, and that nothing in state or federal law requires that he public notice a revised draft permit, even in this extreme case where the final permit differs significantly in form and content from the draft action.[11]

32. Where the final permit was altered on the basis of comments interposed to the provisions of the properly noticed draft permit, as a matter of law, we cannot require more than what the Director afforded in this case.

33. Thus, while OMRA, as well as other industry members, may have preferred another opportunity for input before finalization of the GNPDES permit, we cannot conclude that such an opportunity is required by law.

34. Even despite the alleged inadequacies in the public notice, we do not perceive any prejudice to OMRA. The Ohio Administrative Code makes a distinction between a "proposed" and a "draft" action.

---

[11] We are compelled to observe, however, that we find the Director's action in this regard, while not unlawful, somewhat surprising. In light of the fact that the precise question of the imposition of state water quality standards was raised by at least one commenter and member of the Appellant organization as an issue of great concern in the period following the public notice of the draft permit, we question the reluctance to provide a second avenue for input. Even if the constraints imposed by U.S.EPA oversight required the exact results which were ultimately reached in the final permit, it seems that the encouragement of input through a second round of hearings or solicitation of comments would have furthered the openness of the proceedings. Nonetheless, showing proper deference to the Director's decision, we cannot find the failure to elect to provide public notice of a revised draft permit to be unlawful.

35. A draft action is one to which no adjudication rights attach. A draft action is issued merely for the purposes of providing public notice of an intended action, and is designed to solicit comments thereon. A draft action may or may not be followed by a hearing(s). [O.A.C. 3745-47-03(E).]

36. A proposed action, on the other hand, serves nearly identical purposes as the draft action, with the important distinction that persons who are subject to a proposed action may request an adjudication hearing before an OEPA hearing officer on the action. [O.A.C. 3745-47-03(M).]

37. Thus, contrary to OMRA's assertion of a deprivation of a right to adjudicate the permit before the Director, draft actions do not carry with them the right to an adjudication. [CLEAN v. Shank, Case No. 91AP-499, Franklin County App. (1991), cf. O.A.C. 3745-47-03(E) and (M).]

38. At best, OMRA was deprived of another round of public notice and the opportunity to attend a second hearing or submit objection to the permit.

39. With regard to that portion of Appellant's second assignment of error which alleges a deprivation of procedural and substantive due process under the Ohio and United States Constitutions, the law is well-settled that this Board does not have the authority to rule upon constitutional questions.

40. More than twenty years ago, in Berger Brewing Co. v. Thomas, 42 Ohio St. 2d 377, 329 N.E. 2d 693 (1975), the Ohio Supreme Court established that an administrative agency is a creature of statute that may only exercise such authority as is conferred by law. Concerning constitutional questions, Ohio Supreme Court has clearly enunciated that "it is well established that an administrative agency is without jurisdiction to determine the constitutional validity of a statute." [Herrick v. Kosydar, 44 Ohio St. 2d 128, 339 N.E.2d

626 (1975).]

41. In our own decisions, we have consistently observed this limitation on our ability to rule on constitutional questions or issues. [Justin v. Maynard, Case No. EBR 471106 (October 17, 1984); Youngstown Sheet & Tube Co. v. Williams, Case No. EBR 75-37, aff'd. Case No. 76-AP-181 (Franklin County Court of Appeals, October 26, 1976).]

42. We, therefore, conclude that we lack jurisdiction to rule on that portion of the Notice of Appeal that asserts a denial of state and federal constitutional rights to due process.

43. Finally, we address the issue of preemption raised in the third assignment of error. In sum, Appellant contends, despite ample references to the primacy of state WQS in the federal program, that the GNPDES limits are invalid for the reason that they are preempted by a federal regulation, 40 C.F.R. Part 424.

44. The Board is mindful of the limits of its jurisdiction, and for that reason is reluctant to consider the issue of preemption.

45. However, the Board is of the opinion that the lawfulness of the Director's action in this matter ultimately hinges upon a finding that the state law applied to the GNPDES permit has not been abrogated by operation of an applicable federal law in which Congress has clearly expressed an intent to preempt the regulatory field.

46. Therefore, in response to this assertion, we look first to provision of the applicable federal law, which provides:

> Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State . . . to adopt or enforce (A) any standard or limitation respecting discharges of

> pollutants, or (B) any requirement respecting control or abatement of pollution, . . . or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States. [33 U.S.C. Sec. 1370.]

47. Also in the context of the CWA, the United States District Court for the Northern District of Illinois has provided the following guidance:

> Where Congress specifically intends that its exercise of statutory powers should preempt all other remedies it has expressly so stated that it is preempting such remedies . . . Moreover, Congress was very explicit in the 1972 amendments [to the FWPCA] where it intended to preempt state authority and to make the statutory structure of the amendments the exclusive remedial scheme.

[Illinois ex rel. Scott v. City of Milwaukee, Wisconsin, (1973) 366 F. Supp. 298, 301, 302.]

48. There is no indication in the applicable federal statutes that state WQS are intended to be preempted by federal effluent limitations set forth in agency regulations.

49. To the contrary, we find it quite clear that federal law and rules make repeated allowances for the imposition of state effluent limitations which are more stringent than those set forth in federal regulations.

50. First, 33 U.S.C. Sec. 1311(b)(1)(C), entitled "Timetable for achievement of objectives" states:

> In order to carry out the objective of this chapter there shall be achieved---
>
> (1)(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, . . . established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) . . .

51. Moreover, the Federal Register addressing state effluent limitations in the context of the 1985 amendments to 40 C.F.R. Part 424 acknowledges ongoing state authority wherein it provides:

> We note, however, that State permitting authorities have the authority to require more stringent limitations, (including zero discharge) . . . if necessary to meet state water quality standards.

[50 Fed. Reg. 41304, October 9, 1985, Part IV.J.]

52. And, later, the Federal Register provides:

> If this increased pollutant loading would result in localized water quality problems, then these can be handled on a case-by-case basis through the NPDES permitting process. [Id., at Part V.B.]

53. Equally persuasive of the intent of the federal program is U.S. EPA's interpretation of the status enjoyed by state water quality standards in the NPDES permitting process. In its July, 1993 publication entitled, "NPDES Storm Water Program - Question and Answer Document Volume 2," the Agency indicated:

> General permit requirements for authorized NPDES States may vary considerably because these States develop and issue permits independently from [U.S.] EPA. However, all NPDES permits must meet minimum technical and water quality-based requirements of the Clean Water Act. Permittees in NPDES authorized States should consult with their permitting authorities regarding particular State conditions. Under [U.S.] EPA's storm water general permits, State-specific requirements vary because of different water quality concerns in different States. Each of the 12 non-authorized States and Territories provided certification that [U.S.] EPA's general permits comply with State water quality standards, and added permit requirements where necessary to achieve compliance with those standard in the final general permits. [EPA 833-F-93-002B, Answer No. 71, pp. 25 - 26. Attachment No. 4 to the Director's Motion for Summary Affirmance, etc.]

54. As in the case of state statutes, great deference will be accorded by this Board to the interpretation of federal statutes and regulations given by the agencies charged with their enforcement. [Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. (1984), 467 U.S. 837, 843-44; Industrial Commission of Ohio, et al., v. Brown (1915), 92 Ohio St. 309, 311, 110 N.E. 744, 745; Miami Conservancy District v. Bucher (1950), 87 Ohio App 390, 95 N.E. 2d 226.]

55. Thus, we find neither an express intent by Congress to preempt state law in the applicable federal statutes, nor any evidence that the federal regulations which further state autonomy through the preservation of state rights to impose more stringent water quality standards are at odds with those statutes.

56. To the contrary, we conclude that there is ample authority for states to impose more stringent water quality based effluent limitations, as evident in the previously-cited federal statutes and rules, as well as the construction by U.S. EPA of the status of state WQS within the NPDES program. [See Findings of Fact Nos. 48-50.]

57. Finally, we find no evidence of, or basis for, Appellant's argument that issuance of the GNPDES violated a Memorandum of Agreement between Ohio and U.S. EPA. There is no indication that either party to that agreement has any concerns about the issuance of the GNPDES permit vis-a-vis the provisions of the Memorandum. Further, we are not persuaded, as a matter of law, that OMRA has any standing to enforce such a Memorandum.

FINAL ORDER

Based on the foregoing, the Board hereby orders that the Director's action approving the final NPDES permit is lawful and reasonable, and the same is hereby AFFIRMED.

The Board, in accordance with Section 3745.06 of the Revised Code and Ohio Administrative Code 3746-13-01, informs the parties that:

> Any party adversely affected by an order of the Environmental Board of Review may appeal to the Court of Appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation to the court of appeals of the district in which the violation was alleged to have occurred. Any party desiring to so appeal shall file with the Board a Notice of Appeal designating the order appealed from. A copy of such notice shall also be filed by the Appellant with the court, and a copy shall be sent by certified mail to the Director of Environmental Protection. Such notices shall be filed and mailed within thirty days after the date upon which Appellant received notice from the Board by certified mail of the making of an order appealed from. No appeal bond shall be required to make an appeal effective.

THE ENVIRONMENTAL BOARD OF REVIEW

Toni E. Mulrane, Chairman

Mary Kay Finn, Vice-Chairman

Jerry Hammond, Member

Entered into the Journal of
the Board this 31st
day of October, 1996.

COPIES SENT TO:

OHIO MINING AND RECLAMATION ASSOCIATION [CERTIFIED MAIL]
DONALD SCHREGARDUS, DIRECTOR [CERTIFIED MAIL]
Thomas P. Michael, Esq.
Lauren C. Angell, Esq.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND FINAL ORDER
Case No. EBR 253195

CERTIFICATION

I hereby certify that the foregoing is a true and accurate copy of the FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER in OHIO MINING AND RECLAMATION V. DONALD SCHREGARDUS, DIRECTOR OF ENVIRONMENTAL PROTECTION, Case No. EBR 253195 entered into the Journal of the Board this 31st day of October, 1996.

Mary J. Oxley

Mary J. Oxley, Executive Secretary

Dated this 31st day of
October, 1996, at Columbus, Ohio.