

**COMMONWEALTH OF PENNSYLVANIA
BEFORE THE
ENVIRONMENTAL HEARING BOARD**

**BLUE MOUNTAIN PRESERVATION)
ASSOCIATION, INC.,)**

v.)

EHB Docket No. 2005-077-K

**COMMONWEALTH OF)
PENNSYLVANIA, DEPARTMENT OF)
ENVIRONMENTAL PROTECTION)
and ALPINE ROSE RESORTS, INC.,)
Permittee.)**

**POST-TRIAL REPLY MEMORANDUM
OF APPELLANT BLUE MOUNTAIN PRESERVATION ASSOCIATION, INC.**

The Post-Trial Brief of Appellee Department of Environmental Protection (“DEP Br.”) and the Post-Trial Brief of Permittee, Alpine Rose Resorts, Inc. (“Alpine Br.”) bring into sharp relief the fundamental reason why the Department and permittee violated the antidegradation regulations at 25 Pa. Code § 93.4c(b)(1): both took analytical shortcuts that ignored the express requirements of § 93.4c(b)(1). For the Department of Environmental Protection (“DEP”), the DEP Br. conclusively shows that DEP fervently believes antidegradation in the stormwater context begins and ends with the special protection BMPs of Chapter 102—a focus on erosion and sediment control that ignores threats like thermal pollution exacerbated by Chapter 102’s requirements. For Alpine Rose Resorts, Inc. (“Alpine”), the Alpine Br. conclusively shows that Alpine believes focusing on infiltration and Chapter 102 alone satisfies § 93.4c(b)(1)—a focus that ignores the requirements of nondischarge alternatives analysis and ABACT as well as the threats from problems other than sediment and erosion. The too-narrow focus of Alpine and DEP shows noncompliance with the basic, straightforward requirements of § 93.4c(b)(1), and, as a result, show DEP’s issuance of the NPDES permit was improper.

Neither DEP nor Alpine dispute that the language of § 93.4c(b)(1)¹ can be boiled down to the following three process requirements:

A. That the *applicant*, that is, the “person proposing a new, additional or increased discharge” to a High Quality (“HQ”) water, must evaluate “nondischarge alternatives” and use an environmentally sound and cost-effective alternative if possible;

B. That the *applicant* must use the best available combination of cost-effective technologies if no environmentally sound and cost-effective nondischarge alternative exists; and

C. That the *applicant* must demonstrate that the proposed discharge will maintain and protect the existing quality of the receiving water.

From the very language of the regulation itself, it is clear that each of these requirements is independent from the others such that, even if the applicant satisfies A and B, the failure to satisfy C means that § 93.4c(b)(1) is violated. While the DEP Br. and Alpine Br. both provide extensive analysis on the first two of these requirements, they spend considerably less time on

¹ Section 93.4c(b)(1) states in relevant part:

(b) Protection of High Quality and Exceptional Value Waters.

(1) Point source discharges. The following applies to point source discharges to High Quality . . . Waters.

(i) Nondischarge alternatives/use of best technologies.

(A) A person proposing a new, additional or increased discharge to High Quality . . . Waters shall evaluate nondischarge alternatives to the proposed discharge and use an alternative that is environmentally sound and cost-effective when compared with the cost of the proposed discharge. If a nondischarge alternative is not environmentally sound and cost-effective, a new, additional, or increased discharge shall use the best available combination of cost-effective treatment, land disposal, pollution prevention and wastewater reuse technologies.

(B) A person proposing a new, additional or increased discharge to High Quality . . . waters, who has demonstrated that no environmentally sound and cost-effective nondischarge alternative exists under clause (A), shall demonstrate that the discharge will maintain and protect the existing quality of receiving surface waters

the third. While BMPA believes that all three requirements were not met in this case, DEP's failure to satisfy § 93.4c(b)(1) is most obvious on the third requirement.

This Reply Memorandum consists of five parts. First, BMPA addresses the burden of proof issues raised by both DEP and Alpine and shows that BMPA can satisfy its burden by showing a failure to perform part or all of the § 93.4c(b)(1) process. Second, BMPA responds to DEP and Alpine's attempts to distinguish *Zlomsowitch v. DEP*, 2004 Pa. Environ. LEXIS 56 (November 15, 2004) and shows that *Zlomsowitch* is directly relevant for the claims in this case. Third through fifth, BMPA shows how, despite the narrow protestations of DEP and Alpine to the contrary, DEP has failed to satisfy the requirements of § 93.4c(b)(1), starting with the third requirement first.

I. BMPA'S BURDEN OF PROOF IS TO SHOW A FAILURE TO SATISFY THE PROCESS REQUIREMENTS OF § 93.4c

Both DEP's (*see* DEP Br. 18, 29-30) and Alpine's (*see* Alpine Br. 16-17, 52) claims that BMPA's burden of proof includes showing some negative environmental harm misstates the law governing this appeal. Section 93.4c(b)(1) requires that three process steps must take place, and a violation occurs when one or more of those steps is absent. That is all that the Board required in *Zlomsowitch*; once the Board found that there was no evidence that the applicant had done a nondischarge alternatives analysis, a violation of § 93.4c(b)(1) was proved—even if, for example, the technology and BMPs to be employed were in fact the best available control technology and would maintain and protect the existing water quality of the receiving water. *See Zlomsowitch*, 2004 Pa. Environ. LEXIS 56 at *56-57. When the process of § 93.4c(b)(1) is “short-circuited,” *id.* at *57-58, by the failure to perform a required step, DEP is acting contrary to law in a way that justifies remand to DEP for “a proper application” of the antidegradation

regulations. *Id.* at *60-61. Thus, BMPA's burden is simply to show that the one or more of the § 93.4c(b)(1) steps were not done.

None of DEP's and Alpine's cases alter this simple conclusion. Neither *Pennsylvania Game Commission v. DER*, 97 Pa.Cmwlth. 78, 509 A.2d 877 (1986) (*cited* in Alpine Br. 16-17) nor *Shuey v. DEP*, 2005 Pa. Environ. LEXIS 51 (August 10, 2005) (*cited* in DEP Br. 29-30) involved a NPDES permit, discharge to a High Quality Water, or application of the antidegradation regulations; rather, *Pa Game Commission* involved a solid waste permit, 97 Pa. Commw. at 80, 509 A.2d at 879, while *Shuey* involved a non-coal mining permit. 2005 Pa. Environ. LEXIS 51 at *1. Neither of the statutes controlling the permits in *Pa. Game Commission* and *Shuey* required a demonstration by the applicant that the proposed activity would "protect and maintain" the quality of the environment affected by the activity. *O'Reilly v. DEP*, 2001 Pa. Environ. LEXIS 2 (January 3, 2001), (*cited* in Alpine Br. 52), while involving a NPDES stormwater permit, likewise did not discuss the antidegradation regulations.² In short, none of these cases provide any guidance on the burden of proof for a failure to comply with the antidegradation regulations. *Zlomsowitch* provides the best (and indeed only) precedent for what must be shown to prove a violation of the antidegradation regulations. As will be shown below, BMPA easily meets its burden of proof by showing Alpine and DEP's failure to comply with the three basic requirements of § 93.4c(b)(1).

² In fact, *O'Reilly* limited its analysis by excluding from consideration harms that would occur post-construction, which the Board considered outside the scope of the NPDES program at that time. *Id.* at *26. However, *O'Reilly* was decided before DEP changed the NPDES program for discharges during construction activity to include a post-construction component, *see* DEP Br. 14 (change in 2002 requiring stand-alone Post Construction Stormwater Management Plan)—thereby undermining the theoretical underpinning of the case.

II. *ZLOMSOWITCH* IS CONTROLLING PRECEDENT HERE

Zlomsowitch is the Board’s only direct statement on the antidegradation regulations in the context of the issuance of a NPDES permit. It sets forth a clear rule: the process of § 93.4c(b)(1) must be followed, including the performance of the all three required steps, in order for DEP to comply with the law and a permit to be considered properly issued. DEP and Alpine attempt to distinguish or limit *Zlomsowitch* by making two basic arguments: (1) that the activity or discharge at issue in each case is different, *see* DEP Br. 11 (*Zlomsowitch* involved industrial permit for discharge arising from mining activity); Alpine Br. 18 (*Zlomsowitch* involved new discharge vs. existing stormwater discharge here); and (2) that here DEP and the applicant both assert a nondischarge alternatives analysis is required vs. DEP’s position in *Zlomsowitch* that no such analysis needed to be done, *see* DEP Br. 18; Alpine Br. 19.³ Both of these arguments ultimately fail.

As to the first argument, neither DEP nor Alpine deny that *Zlomsowitch* involved a NPDES permit regulating the discharge of stormwater to a special protection watershed. *See* 2004 Pa. Envirn. LEXIS 56 at *6-7 (Finding #9), *19-20 (Finding #41), *51-52, and *52 n. 12. Nothing in § 93.4c(b)(1) makes any distinction between discharges based on the activity giving rise to the discharge or the nature of the pollutants within the discharge—all “new, additional, or increased discharges” must meet the same process requirements.⁴ Similarly, § 93.4c(b)(1) makes

³ A third argument concerning whether or not *Zlomsowitch* requires an express Nondischarge Alternatives Analysis document, *see* DEP Br. 26; Alpine Br. 20, is addressed in Section IV *infra*.

⁴ For this reason, Alpine’s argument about a “new” discharge in *Zlomsowitch* vs. an existing discharge here is irrelevant. Neither DEP nor Alpine seriously disputes that the “new, additional, or increased” language of § 93.4c(b)(1) requires some additional discharge, and as Alpine admits in its brief, there will be an increase in discharge volume post-construction. Alpine Br. 46-47. Thus, there is a “new” discharge here as well.

no distinction based on the program within DEP that regulates the discharge,⁵ nor does it make any distinction between Exceptional Value (EV) waters (involved in *Zlomsowitch*) and HQ waters (involved here).⁶ Thus, the fact that the activity in *Zlomsowitch* giving rise to the discharge, the agency regulating the discharge, and the type of special protection watershed discharged into is not the same here are all distinctions without a difference. Like the language of § 93.4c(b)(1) it interprets, *Zlomsowitch* applies to all discharges into all special protection watersheds, however regulated.

As for the second argument, the fact that DEP in this case recognizes the need for a nondischarge alternatives analysis does not render *Zlomsowitch* irrelevant or limit its application here. As the language of § 93.4c(b)(1) makes plain, the three requirements outlined above must be done. All *Zlomsowitch* did was state the obvious: the failure to follow the § 93.4c(b)(1) process (i.e., to perform all three required steps) means the regulation was not followed and thus the permit issuance was contrary to law. While the DEP's error in *Zlomsowitch* was to ignore the first requirement entirely, that is not the only way DEP can fail to comply with § 93.4c(b)(1). For example, a failure to perform the required nondischarge alternatives analysis can happen even if the DEP recognizes one should be done. Likewise, failure to use ABACT or to demonstrate that a discharge will protect and maintain the water quality of the existing body can "short-circuit" the § 93.4c(b)(1) process as well. Under DEP and Alpine's position here, all DEP need do is "recognize" that § 93.4c(b)(1) applies and the regulation is satisfied. That is not what the express language of § 93.4c(b)(1) requires; rather, as *Zlomsowitch* establishes, the actual

⁵ For this reason, DEP's distinction between the mining program regulating the permit *Zlomsowitch* and the water program regulating the permit here, *see* DEP Br. 17, is irrelevant. Indeed, it strains credulity to suggest that the DEP can have different interpretations of the same regulation merely by having different programs within DEP take different positions.

⁶ *See* 25 Pa. Code § 93.4c(b)(1) (stating that its requirements apply to point source discharges to HQ and EV waters).

performance of the required process steps must take place. Therefore, DEP's recognition that § 93.4c(b)(1)'s requirement of a nondischarge alternatives analysis does nothing to distinguish the essential holding of *Zlomsowitch* from applying here.

Thus, under *Zlomsowitch* and the express language of § 93.4c(b)(1), Alpine was required to perform a nondischarge alternatives analysis, use the best available combination of control technologies, and demonstrate that the discharge will protect and maintain the water quality of the Aquashicola Creek. BMPA respectfully submits that the record in this case shows that these requirements were not met.

III. THE EVIDENCE SHOWS THAT THE REQUIRED MAINTAIN AND PROTECT WATER QUALITY DEMONSTRATION WAS NOT DONE.

Section 93.4c(b)(1) requires that the applicant “demonstrate that the discharge will maintain and protect the existing quality of receiving surface waters.” BMPA respectfully submits that the evidence in this case—as highlighted and underscored by the DEP Br.—shows that DEP and Alpine “short-circuited” this requirement by their too-narrow focus on erosion and sedimentation pursuant to 25 Pa. Code Chapter 102.

The DEP presents an extensive historical argument (DEP Br. 12-29) trying to show that the Department incorporated the antidegradation concerns of 25 Pa. Code § 93.4c into the 25 Pa. Code Chapter 102 requirements for construction activities. There are at least three problems with DEP's argument:

First, three of the five documents DEP cites as proof of its intent to incorporate antidegradation into Chapter 102—the 2002 Comprehensive Stormwater Management Policy Comment/Response Document (*see* DEP Br. 21), the 2000 Erosion and Sediment Pollution Control Program Manual (*see* DEP Br. 22), and the 2006 Instructions for a General (PAG-2) or Individual NPDES Permit for Stormwater Discharges Associated with Construction Activities

(*see* DEP Br. 22, 23, 24)—are not in evidence. DEP’s reliance upon those documents is simply improper.⁷

Second, the two documents cited that are in evidence—the 2002 Comprehensive Stormwater Management Policy (*see* DEP Br. 23-24) and the 2006 Draft Pennsylvania Stormwater Best Management Practices Manual (*see* DEP Br. 25-26)—do not say that compliance alone with Chapter 102 during construction or the draft Manual post-construction satisfies all antidegradation requirements such that nothing more need be done.⁸ Even if the Board considers the three cited documents not in evidence, the result is the same because they are all focused on erosion and sediment control and not the full range of potential impacts to water quality.

Third, what is very clear from the DEP’s argument is the Department believes compliance with Chapter 102 is all that is needed to satisfy the requirements of § 93.4c(b)(1). However, Chapter 102 is focused solely on erosion and sedimentation. *See* 25 Pa. Code § 102.2(a) (express purpose is to “require persons proposing or conducting earth disturbance activities to develop, implement and maintain BMPs to minimize the potential for accelerated erosion and sedimentation”); Mayer, 3/29/06 TR. p. 103, ln. 12-19 (Chapter 102 provisions are related towards erosion and sediment control); Murin, 3/31/06 TR. p. 35, ln. 21 – p. 36, ln. 18 (Chapter 102 implements NPDES storm water construction permit program which regulates

⁷ These are not the only problems DEP has with the record. Findings 22-27 and 33 have no record citations to support them, while Finding 31 is simply not accurate, as Mr. Blechschmidt’s full testimony makes clear that he was discussing only one, and not all, of the stormwater discharges. Blechschmidt, 3/30/06 TR. p. 14-15. Similarly, Alpine’s Findings 22-25, 29, 34 provide no record citations to support them.

⁸ In fact, all the quoted passages from the Comprehensive Stormwater Management Policy state is the requirement that that one most demonstrate compliance with the antidegradation regulations. The bolded language from the draft Manual merely states that “proper” implementation and maintenance of BMPs in the Manual can maintain and protect water quality. Of course, given that the draft Manual strongly discourages the use of detention basins and wet ponds in temperature-sensitive watersheds (like a CWF), there is a significant issue of whether a Alpine’s use of those basins and a wet pond is in fact a “proper” implementation.

accelerated erosion and resulting sedimentation). While that focus makes some sense because of the concern that earth disturbance activities generate dirt that can become sediment and accelerate erosion, the antidegradation regime is not limited to only those pollutants that may be the focus of the permit (otherwise, a sediment-free but highly acidic or toxic stormwater discharge that killed fish in the receiving water would not violate § 93.4c(b)(1) provided it flowed through Chapter 102-compliant BMPs—a clearly nonsensical result). Rather, as DEP itself has stated:

The basic concept of antidegradation is to promote the maintenance and protection of existing water quality for High Quality (HQ) and Exceptional Value (EV) waters, and protection of existing uses for all surface waters because it recognizes that existing water quality and uses have inherent value worthy of protection and preservation . . . “water quality standards” for any surface body are the combination of “water uses” and the instream “water quality criteria” necessary to protect and maintain those uses . . . the adopted water quality criteria are the numerical and descriptive chemical, biological, or physical stream conditions which must be maintained to support the uses.

Water Quality Antidegradation Implementation Guidance (BMPA Ex. 55) at 1. *See also* 25 Pa. Code § 93.1 (defining “water quality criteria” as “numeric concentrations, levels or surface water conditions that need to be maintained or attained to protect existing and designated uses”). Among the “uses” protected in Pennsylvania are HQ waters and Cold Water Fisheries (CWF). 25 Pa. Code §93.3. Thus, the § 93.4c(b)(1) demonstration of “protect and maintain” water quality must look at all possible pollutants that could impact an existing use. *See* 25 Pa. Code § 93.4a(b) (“Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected”); *Borough of Roaring Spring v. DEP*, EHB 2003-106-C (January 18, 2005) at p. 4 (if appellant’s contention is true that existing use is CWF, “then the streams’ existing use . . . would have to be protected by maintaining the necessary level of water quality associated with that use”). Antidegradation in the stormwater discharges during

construction context does not and cannot end with Chapter 102.⁹ Allowing DEP to focus solely on erosion and sediment would gut the protections of § 93.4c(b)(1).

The DEP and Alpine Briefs thus show how the § 93.4c(b)(1) “protect and maintain” demonstration requirement was “short-circuited” in this case: by focusing on the erosion and sedimentation requirements under Chapter 102, Alpine did not look at or analyze all other potential water quality impacts in the Aquashicola. Neither DEP nor Alpine deny that at least one potential impact to the Creek was not analyzed: the thermal impact from stormwater being retained in the detention basins and wet pond, an impact that may be exacerbated by Chapter 102’s requirement that the water stay in the basins/pond for longer periods of time. *See* 25 Pa. Code § 102.4(b)(6)(i)(c); Mayer, 3/29/06 TR. p. 60, ln. 7-13).¹⁰ Nor does DEP or Alpine deny that DEP itself warns against use of these BMPs in temperature sensitive and HQ waters. *See* BMPA Ex. 58, Chapter 6, p. 154 (“[d]ue to the potential to discharge warm water, wet ponds should be used with caution near temperature sensitive waterbodies”) and p. 166 (“[t]he use of extended detention basins within . . . High Quality watersheds as defined by Chapter 93 of Pennsylvania’s Code is not recommended and may be prohibited by local ordinances”). This fundamental conflict between the requirements of Chapter 102 and DEP’s own guidance on the use of these basins and ponds strongly supports the need for Alpine to analyze the effects in

⁹ The preamble to Chapter 102 (*see* DEP Br. 20-21) underscores this point. Far from stating that antidegradation begins and ends with Chapter 102’s special protection BMPs, the preamble merely indicates that these measures “work in conjunction with” the antidegradation program—i.e., that they are part of but not the whole story to antidegradation.

¹⁰ Note that the same detention basins and wet pond are used both during construction and post-construction. *See* Mayer, 3/29/06 TR. p. 91, ln. 9-15, and *compare* Alpine Ex. 52 sheets 27-39 (construction phase) *with* 71-82 (post-construction phase). Thus, the thermal issue will exist throughout the life of this project. Further, although the “new” discharge itself is only about 52,000 gallons, because most stormwater is being routed through the detention basins and wet pond, up to nearly 30 million gallons of stormwater during a 2-year storm event (*see* BMPA Ex. 21 Notice of Intent p. 7 showing 91.59 acre-feet of stormwater post-construction, which translates to 325,851 gal/ac-ft x 91.59 ac-ft. = 29,844,693 gal) will be subject to thermal heating—a potentially significant slug of hot water to a CWF. Yet the NPDES Permit does not even require Alpine to monitor the temperature of the discharge so that DEP can determine if in fact the temperature regulations for CWF waters are being violated. *See* BMPA Ex. 23 p. 10 Appendix A.

order to demonstrate that the discharge will “maintain and protect” the water quality of the Aquashicola—an analysis Alpine never did. Blechschmidt, 3/30/06 TR. p. 57, ln. 4-5.

Alpine attempts in its brief to show that thermal impacts were considered (Alpine Br. 49-51), but that evidence fails to show compliance with § 93.4c(b)(1) for several reasons.

First, the evidence does not show that Alpine did the demonstration as required by § 93.4c(b)(1)—and it cannot in light of Mr. Blechschmidt’s admission that Alpine did no such analysis.

Second, Mr. Murin’s reference to the braided channel having shade that could provide temperature control ignores two critical facts: (a) that Drainage Areas 1 and 2 (which drain 230 acres, or more than 55% of the total post-construction drainage acreage, *see* Alpine Ex. 60) do not discharge into the braided channel, *see* Blechschmidt, 3/30/06 TR. p. 15 ln. 5-15 (drainage areas 1 and 2—yellow and green depicted on Alpine Ex. 60—drain to wetland area on eastside of property); *id.* at p. 16 ln. 8 – 17 ln. 9 (study point 1 discharge—described as “water on eastern side of property,” *id.* at p. 13 ln. 12-14—same pre- and post-construction); Mayer, 3/29/06 TR. p. 85 ln. 10-17 (Sedimentation Basins 1 and 2 discharge to the wetlands, and (b) only Drainage Area 3 (which drains only 99 acres, *see* Alpine Ex. 60) contributes stormwater to the braided channel. *See* Blechschmidt 3/30/06 T.R. at p. 13 ln. 17 – 14 ln. 6. Thus, even if the shading of the braided channel provided some temperature control (an unknown fact, given that Alpine failed to do any thermal analysis), it does not provide thermal control for stormwater on the vast majority of the site.

Third, Mr. D’Onfrio’s testimony about thermal impacts is rebutted by the record. Mr. D’Onfrio cites only tree and facultative plantings as providing thermal relief. Yet the record makes clear that: (1) the tree plantings will not occur until the post-construction phase, so there

will be no tree plantings (or thermal control) during the erosion control plan stages, *see* Alpine Exhibit 52, sheets 26-42; (2) the trees being planted are only 6-feet to 7-feet tall, *see id.* sheets 23, 81, and it doesn't take an expert to recognize that a 6 foot high tree cannot cast a long enough shadow to shade ponds that are from 90 to approximately 200 feet in width;¹¹ and (3) there will be no trees around the wet pond at all in either the construction stage or post-construction operational phase, *see id.* sheets 72, 73, so that no shading of the very thing DEP says "should be used with caution near temperature sensitive waterbodies" will ever occur. Given the admissions that evidence at trial showed that stormwater held in basins will be heated via the warm air above the water and by absorbing solar radiation, *see* Blechschmidt, 3/30/06 TR. p. 56, ln. 9-14; Murin, 3/31/06 TR. p. 117, ln. 6-9, these facts raise serious questions about Mr. D'Onfrio's glib assertion. Only a §93.4c(b)(1)-required thermal analysis can show that the stormwater discharges both during and after construction will not adversely impact the CWF use of the Aquashicola Creek—but that analysis was never done.

The evidence in this matter is clear: Alpine never demonstrated that the permitted discharge will protect and maintain the water quality of the Aquashicola Creek because it never demonstrated that the discharge will have no adverse thermal impacts to the temperature-sensitive Aquashicola. As such, the "protect and maintain" demonstration requirement of § 93.4c(b)(1) was never satisfied.

¹¹ See Alpine Ex. 52 Sheets 26 (showing Sediment Basin #3 approximately 150 ft. wide); 28 (showing Sediment Basin #5 approximately 150 ft. wide); 29 (showing Sediment Basin #4 approximately 120 ft. wide); 30 (showing Sediment Basin #1 approximately 150 ft. wide and Sediment Basin #2 approximately 120 ft. wide); 32 (showing Sediment Basin #6 approximately 200 ft. wide); 37 (showing Sediment Basin #7 approximately 125 ft. wide); 72 (showing Pond #3 (the wet pond) approximately 130 ft. wide and Pond #4 approximately 100 ft. wide); 73 (showing Sediment Basin #5 approximately 150 ft. wide and Sediment Basin #2 approximately 100 ft. wide); 76 (showing Pond #6 approximately 180 ft. wide); and 77 (showing Pond # 1 approximately 90 ft. wide).

IV. THE EVIDENCE SHOWS THAT THE REQUIRED NONDISCHARGE ALTERNATIVE ANALYSIS WAS NOT DONE

All parties here agree that § 93.4c(b)(1) requires a nondischarge alternatives analysis be done for this project. DEP's (*see* DEP Br. 30) and Alpine's (*see* Alpine Br. 20-32) arguments both sound a single note: because Alpine looked at and rejected infiltration, § 93.4c(b)(1)'s requirement was satisfied. Once again, both DEP and Alpine show how they "short-circuited" the regulatory process.

The language of § 93.4c(b)(1) is clear: the permit applicant "shall evaluate nondischarge alternatives to the proposed discharge and use an alternative that is environmentally sound and cost-effective when compared with the cost of the proposed discharge." Thus, the applicant is charged with evaluating a number of nondischarge alternatives to see if there is one alternative that is environmentally sound and cost-effective because, as the Board has recognized, there is a "hierarchical structure which prefers no new point source discharges into the highest quality waters." *Zlomsowitch*, 2004 Pa. Envirn. LEXIS 56 at 46. DEP in its *Water Quality Antidegradation Implementation Guidance* (BMPA Ex. 55) likewise emphasizes this need for multiple alternatives to ensure thoroughness: "[t]o satisfy the antidegradation requirements of DEP water quality standards regulations . . . a special pre-permit analysis is required prior to a proposed discharge to HQ . . . waters. Alternatives to new, additional, or increased point source discharges to surface waters must be employed where they are cost-effective and environmentally sound. This requirement is known as a nondischarge alternative analysis . . .". BMPA Ex. 55 at 3. A requirement to look at many (i.e., plural) alternatives is not only consistent with the language of § 93.4c(b)(1), it also makes sense given the policy and structure of the antidegradation regime. If, as the Board suggests, there is a hierarchy which prefers nondischarge to discharge, then the applicant must explore and exhaust all possible nondischarge

alternatives. A “one and done” regulatory regime which allows the applicant to examine a single alternative and then pronounce completion of the nondischarge alternatives analysis requirement creates a gaping loophole that allows applicants to analyze one, meaningless option and ignore others that could satisfy the Board’s hierarchical preference.

In addition, the review of these plural alternatives must be meaningful. The Antidegradation Guidance provides detailed explanations of what is needed for the required nondischarge alternatives analysis, including consideration of siting the project somewhere else, BMPA Ex. 55 at 48-52, as well as an “affordability analysis” and a “direct cost comparison of alternatives.” *Id.* at 52-55. DEP makes it very clear what the applicant and DEP must do: “it is the responsibility of the applicant for a permit or approval to prepare detailed cost estimates for all appropriate and approvable discharge, nondischarge, and combination discharge/nondischarge alternatives,” *id.* at 56, while “DEP will review the cost estimates for completeness, accuracy, and validity of assumptions.” *Id.* Thus, it is not enough for a nondischarge alternative to have merely flitted through the applicant’s mind; §93.4c(b)(1) requires both the applicant and DEP to perform meaningful, documented analysis of the alternatives.

The record here is clear: Alpine (at best) looked at one nondischarge alternative: infiltration. It did not look at other possible alternatives (such as off-site mitigation) or prepare any of the analyses that DEP says should be part of a nondischarge alternatives analysis. In other words, it “short-circuited” the § 93.4c(b)(1) process by abandoning the nondischarge alternatives analysis after considering only one alternative (in a manner other than what DEP says is required for a proper “analysis” of that alternative).¹² This violates the express language of §93.4c(b)(1),

¹² DEP (*see* DEP Br. 26) and Alpine (*see* Alpine Br. 20) both make great efforts to show that an express document entitled “Nondischarge Alternative Analysis” is not required under *Zlomsowitch*. BMPA believes that an express document would be a good requirement under § 93.4c(b)(1) because it would make compliance with the regulation far easier for DEP and the Board to determine. However, the Board need not decide that issue in this

and DEP's failure to require Alpine to perform the analysis DEP itself says is required underscores the violation of §93.4c(b)(1) here.

V. THE EVIDENCE SHOWS THAT THE REQUIRED ABACT ANALYSIS WAS NOT DONE

All parties agree that § 93.4c(b)(1) requires the use of the best available combination of treatment technologies when a nondischarge alternative is not available. Neither DEP nor Alpine denies that the only way to determine whether the best available combination exists is to conduct what DEP calls an Antidegradation Best Available Control Technologies, or ABACT, analysis. In their briefs, both DEP (*see* DEP Br. 30) and Alpine (*see* Alpine Br. 33-46) argue that the selection of the BMPs being installed at the site satisfies the ABACT requirement. Once again, this argument underscores the “short-circuit” of the § 93.4c(b)(1) process.

The BMPs that both DEP and Alpine rely on are not comprehensive. Neither DEP nor Alpine dispute DEP's own statement that ABACT “is specific to discharge type and wastewater characteristics,” BMPA Ex. 55 at 69, “should account for pertinent pollutants and water quality parameters associated with the discharge under consideration,” *id.*, and “should be flexible enough to account for case-specific or site specific unique characteristics.” *Id.* However, the BMPs discussed are primarily the Chapter 102 erosion and sediment control BMPs that address only those two water quality concerns. With the exception of Mr. D'Onfrio's easily-rebutted reliance on small trees and grasses, none of the BMPs deal with thermal impacts of the discharge—no doubt because Alpine, not having done a thermal analysis, did not know what those impacts will be.

It may well be that the BMPs proposed are in fact the “best available combination” for purposes of controlling erosion and sediment, but it is impossible to know if a combination of

case. Alpine's failure to consider other alternatives besides infiltration proves the failure to comply with § 93.4c(b)(1), and that is sufficient to warrant remand of the permit so that the proper analysis can be done.

actions is the “best available” if one does not know all of what needs to be addressed. In short, the failure to consider all of the impacts from the discharge meant that the analysis of combinations of technologies would of necessity be incomplete, and thus the “best available combination” would not be known. Focusing on the Chapter 102 pollutants meant that the required ABACT analysis was “short-circuited,” and the § 93.4c(b)(1) ABACT analysis requirement was not satisfied.

CONCLUSION

The evidence in this case shows DEP and Alpine focused on erosion and sediment control. The requirements of § 93.4c(b)(1), however, are far broader, and require analyses and demonstrations related to all potential impacts on the HQ, CWF Aquashicola Creek. Indeed, the fact that the Aquashicola is a CWF use waterbody puts the issue of thermal impacts squarely within the ambit of the antidegradation regulations. Yet Alpine admitted it did no analysis of thermal impacts, despite its own engineer’s admission that the detention basins and wet ponds can heat up the water, and DEP’s own cautions that these types of BMPs create issues around temperature-sensitive waterbodies. The failure to analyze the thermal impacts means Alpine cannot have demonstrated that the discharge will “protect and maintain” the Aquashicola’s CWF use. Indeed, the evidence at trial clearly shows that Alpine and DEP short-circuited all steps of the § 93.4c(b)(1) process - failing to analyze all nondischarge alternatives, failing to complete an ABACT analysis, and failing to demonstrate that the discharge will protect and maintain the water quality and uses of the Aquashicola Creek. As the Board clearly held in *Zlomsowitch*, short-circuiting the § 93.4c(b)(1) process renders a permit invalid and necessitates remand. To preserve the integrity and vitality of the § 93.4c antidegradation process, Appellant Blue Mountain Preservation Association, Inc. respectfully requests that this Court revoke the NPDES

permit issued to Alpine and remand the permit back to DEP for the analyses required under 25 Pa. Code § 93.4c(b)(1)(i).

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Respectfully submitted,
BLUE MOUNTAIN PRESERVATION ASSOCIATION

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