

**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., )  
Permitee. )**

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

Pursuant to the May 4, 2006 Post-Trial Briefing Schedule and 25 Pa. Code § 1021.131, Appellant Blue Mountain Preservation Association, Inc. (“BMPA”) hereby submits its Post-Trial Memorandum. Pursuant to § 1021.131, BMPA divides this memorandum into three parts:

- BMPA’s Proposed Findings of Fact
- BMPA’s Legal Argument
- BMPA’s Proposed Conclusions of Law

## **BMPA's PROPOSED FINDINGS OF FACT**

### **Parties**

1. Appellant BMPA is a nonprofit organization located in Eldred Township, Monroe County, Pennsylvania. (Stipulation of Facts (“Stip.”) No. 1). BMPA is dedicated to the preservation and protection of the Blue Mountain, the Aquashicola Creek, and the natural resources in Monroe County. (O’Donnell, 3/28/06 TR. p. 32, ln. 6-18<sup>1</sup>).

2. Frank O’Donnell is the President of BMPA. (Stip. No. 2).

3. BMPA has over a hundred members, including residents of Eldred Township who live, work, recreate and own property in the immediate vicinity of the Subject Property described below. (O’Donnell, 3/28/06 TR. p. 35, ln. 15 – p. 36, ln. 9).

4. Appellee Pennsylvania Department of Environmental Protection (“DEP”) is an agency of the Commonwealth of Pennsylvania responsible for issuing NPDES Stormwater Permits and WQM Part II Permits. It has the duty and authority to administer and enforce the Pennsylvania Clean Streams Law, 35 P.S. § 691.1 et. seq., the Pennsylvania Sewage Facilities Act, 35 P.S. § 750.1 et seq., Section 1917-A of the Administrative Code, 71 P.S. § 510-17, and the rules and regulations thereunder. (Stip. No. 3).

5. Permittee Alpine Rose Resorts, Inc. (“Alpine”) is a Pennsylvania corporation with offices at 100 Ivy Hill Circle, Reading, PA 19606. (Stip. No. 4).

### **Project Site**

6. The property which is the subject of the permits in this appeal is an approximately 350 acre tract on the north slope of Blue Mountain, on Upper Smith Gap Road in Eldred Township, Monroe County, Pennsylvania (“Subject Property”). (Stip. No. 5).

---

<sup>1</sup> The trial transcripts were paginated for each day of testimony (instead of consecutively). To avoid confusion, BMPA will cite the record by identifying the witness, the date of the transcript, and the page(s) and lines on which the relevant testimony occurs.

7. The Aquashicola Creek flows through the northeast corner of the Subject Property. (Stip. No. 6).

8. The Aquashicola Creek is designated by DEP as a High Quality (“HQ”), Cold Water Fishery (“CWF”), Migratory Fishes (“MF”) pursuant to 25 Pa. Code § 93.9d. (Stip. No. 7).

9. The Project Site is entirely within the drainage area of Aquashicola Creek. (Blechsmidt, 3/30/06 TR. p. 49, ln. 16 – p. 50, ln. 9).

### **Project Description**

10. Alpine is proposing to utilize the Subject Property to construct a road course for sports cars and high performance vehicles, as well as support facilities including a welcome center, garages with 52 bays, paddock areas, a self-service fuel station with carwash, classrooms, food service, pro shop, lavatories, and supervision and control facilities. (Stip. No. 8<sup>2</sup>).

11. The Subject Property will be serviced by an on-site sewage system and treatment facility. This treatment facility will include a sewer system, a pump station, two aerated lagoons, ultraviolet disinfection and a 3.5 acre spray irrigation field with 54 nozzles in the northeast corner of the Subject Property. (Stip. No. 9<sup>3</sup>).

### **NPDES Stormwater Permit**

12. On September 17, 2002, Alpine submitted to DEP a National Pollution Discharge Elimination System (“NPDES”) Permit application for discharges of stormwater to the Aquashicola Creek associated with construction activities. (Stip. No. 8<sup>4</sup>).

---

<sup>2</sup> The Stipulation of Facts accidentally contains two paragraphs numbered “8” and two numbered “9.” This is referring to the first stipulation numbered “8.”

<sup>3</sup> This refers to the first stipulation numbered “9”.

<sup>4</sup> This refers to the second stipulation numbered “8.”

13. On October 26, 2002, notice of the NPDES Permit application was published in the PA Bulletin. (Stip. No. 9<sup>5</sup>).

14. Due to comments and concerns received after the PA Bulletin notice, DEP scheduled a public hearing to discuss the Permit and project. Notice of the public hearing was published in the PA Bulletin on December 14, 2002. (Stip. No. 10).

15. On January 23, 2003, DEP held a public hearing on Alpine Rose Resort's application for an NPDES permit. (Stip. No. 11).

16. Forty-one individuals and associations who attended the public hearing provided testimony as well as submitted written comments. (Stip. No. 12).

17. DEP subsequently issued a Comments and Response Document addressing the issues raised in the public hearing testimony and the written comments. (Stip. No. 13).

18. On August 5, 2003, Alpine Rose Resorts submitted to DEP a second National Pollutant Discharge Elimination System ("NPDES") Permit application for stormwater discharges to the Aquashicola Creek associated with construction activities at the Subject Property. (Stip. No. 14).

19. On March 28, 2005, DEP issued Alpine Rose Resorts a NPDES Permit for Discharge of Stormwater from Construction Activities from the Subject Property. (Stip. No. 15).

20. On August 6, 2005, DEP published notice of the NPDES permit in the PA Bulletin. (Stip. No. 16).

21. In 2003, DEP published its *Water Quality Antidegradation Implementation Guidance* (BMPA Ex. 55) ("*Antidegradation Guidance*") "to provide guidance to DEP staff and aid the regulated community and the public in understanding the implementation of the

---

<sup>5</sup> This refers to the second stipulation numbered "9."

Antidegradation Program in Pennsylvania,” *id.* at i, “to define and clarify numerous complex issues surrounding the Antidegradation Program,” *id.* at 4, and to “discuss[] implementation issues concerning the protection . . . of HQ and EV waters . . . through various DEP programs.” *Id.*

22. Alpine did not perform and submit to DEP a nondischarge alternatives analysis. (Crowley, 3/28/06 TR. p. 118, ln. 9-24).

23. DEP did not make an express finding that an environmentally sound and cost-effective nondischarge alternative to Alpine discharge did not exist. (Crowley, 3/28/06 TR. p. 119, ln. 6-12).

24. Alpine is employing extended detention stormwater basins in their stormwater control and treatment system that are primarily designed to change the existing stormwater runoff by diverting most of the stormwater into extended detention stormwater basins, including a wet pond, so as to reduce the sediment load and improve the water quality. (DEP Exhibit 16, p. 2-3).

25. Stormwater held in Alpine’s basins will be heated via the warm air above the water, and by absorbing solar radiation. (Blechschtmidt, 3/30/06 TR. p. 56, ln. 9-14; Murin, 3/31/06 TR. p. 117, ln. 6-9).

26. Alpine never did a thermal analysis of the stormwater discharge. (Blechschtmidt, 3/30/06 TR. p. 57, ln. 4-5).

27. Tree plantings that might provide shade 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), the trees being planted are only 6-feet to 7-feet tall and therefore unlikely to cast significant shade over the ponds for years, (*see id.* sheets 23, 81),

and 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).

### **BMPA LEGAL ARGUMENT**

The evidence in this case clearly shows that DEP acted unreasonably and not in conformance with applicable law in issuing the NPDES permit to Alpine by failing to follow the requirements of the Antidegradation regulations, 93 Pa. Code § 93.4a et seq., as set forth in the express language of the regulation itself as well as described by DEP in its own guidance. DEP's efforts at trial to rationalize its actions merely underscore the fact that DEP's "analysis" was after-the-fact and incomplete, and therefore fails to comply with the regulations. Remand of the NPDES permit is essential not only to maintain the integrity of the Antidegradation regulations but also to assure that Alpine will, in fact, "maintain and protect" the water quality of the Aquashicola Creek.

The Board reviews all DEP final actions *de novo*. *Zlomsowitch v. DEP*, 2004 Pa. Environ. LEXIS 56 at \*42 (November 15, 2004), and reviews the "issuance of the permit to determine, based on the evidence presented to the Board, whether DEP's action conformed with applicable law and was reasonable". *Id.* The party appealing the issuance of the permit bears the burden of proof in showing the DEP's action was contrary to law or is unreasonable. *Id.* The appellant must meet this burden using a preponderance of the evidence standard, *Shuey v. DEP*, No. 2002-269-R, *slip op.* at 54-55 (Opinion Issued August 10, 2005), meaning that "the evidence in favor of the proposition must be greater than that opposed to it . . . 'It must be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established.'" *Id.*

The Antidegradation regulations required DEP to compel Alpine to perform three critical analyses before allowing discharge to a HQ water like the Aquashicola Creek: (1) conduct a

nondischarge alternatives analysis, (2) use the best available combination of technologies (ABACT), and (3) demonstrate that the discharge will maintain and protect the existing water quality of the Aquashicola Creek. The evidence shows that Alpine never performed these required analyses. Instead, DEP tried to show at trial that compliance with the erosion and sediment control requirements of 25 Pa. Code Chapter 102 satisfy the Antidegradation regulation requirements. DEP's arguments ignore and in fact contradict the express language of the regulations and DEP's own statements of what the regulations require. That is the essence of acting unreasonably and contrary to law.

**I. THE ANTIDegradation REGULATIONS CLEARLY MANDATE THE THREE ANALYSES MISSING HERE**

Pennsylvania's antidegradation regulations "applies to surface waters of this Commonwealth," 25 Pa. Code § 93.4a(a). Within these regulations, 25 Pa. Code § 93.4c(b)(1)(i) "creates a hierarchical structure which prefers no new point source discharges into the highest quality waters." See *Zlomsowitch v. DEP*, 2004 Pa. Environ. LEXIS 56 at \*46 (November 15, 2004). Ms. Kate Crowley, Water Program Manager for the DEP's Northeast Regional Office, testified at trial that Section "93.4 requires that the [DEP] in all of its regulatory programs review applications that come before us for discharges in those watersheds from a standpoint of protection and maintenance of that high quality special protection status." Crowley, 3/28/06 TR. p. 117, ln. 1-6.

**A. The Requirements of § 93.4c(b)(1)(i)**

Section 93.4c(b)(1)(i) deals specifically with protection of HQ waters like the Aquashicola Creek, and provides in pertinent 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 express language of § 93.4c(b)(1)(i) therefore requires four things occur before a discharge to a HQ water be permitted:

- (1) A “nondischarge alternatives” evaluation take place that includes consideration of environmental soundness and cost-effectiveness, *see Zlomsowitch* 2004 Pa. Environ. LEXIS 56 at \*46 (“The scheme devised in §93.4c(b)(1)(i) to prevent degradation is to require all those who propose to discharge into [HQ] water[s] to engage in an alternatives-analysis process before obtaining a NPDES permit”);
  - (2) Analysis and use of the “best available combination” of technologies, which of necessity implies consideration of various technologies and combinations of technologies to find the “best” available combination;
  - (3) Demonstration that the discharge will maintain and protect existing water quality;
- and

- (4) The “person proposing” the discharge (i.e., the permit applicant) must do the analyses and demonstration. *See Zlomsowitch* 2004 Pa. Envir. LEXIS 56 at \*46-47 (“Thus, when applying § 93.4c(b)(1)(i) the agency must compel the discharge proponent to first evaluate whether an environmentally sound “nondischarge alternative” is available under the circumstances . . .”).

**B. DEP’s *Antidegradation Guidance* Further Explains § 93.4c(b)(1)(i)**

The DEP has drafted and published *Water Quality Antidegradation Implementation Guidance* (BMPA Ex. 55) (“*Antidegradation Guidance*”) “to provide guidance to DEP staff and aid the regulated community and the public in understanding the implementation of the Antidegradation Program in Pennsylvania,” *id.* at i, “to define and clarify numerous complex issues surrounding the Antidegradation Program,” *id.* at 4, and to “discuss[] implementation issues concerning the protection . . . of HQ and EV waters . . . through various DEP programs.” *Id.* Thus, the *Antidegradation Guidance* is DEP’s pre-litigation interpretation of what the Antidegradation regulations require. In this context, DEP reinforces and expands upon the four requirements of § 93.4c(b)(1)(i) outlined above.

**1. *Nondischarge Alternative Analysis***

The *Antidegradation Guidance* makes clear that “[a] *pre-permit* nondischarge alternatives analysis must be conducted *prior* to DEP considering a proposed discharge.” BMPA Ex. 55 at 39 (emphasis added). *See also id.* at 3 (“[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 . . .”).

DEP does not view the nondischarge alternative analysis as a mere formality: “[t]he requirement to evaluate and use nondischarge alternatives . . . is a *critical test* and must be met by *any* activity or project generating new, additional, or increased point source discharges to HQ . . . waters.” *Id.* at 46 (emphasis added). As a result, “DEP will not approve a new, additional, or increased discharge in [HQ waters] unless it has been determined that there are no feasible alternatives to a direct discharge.” *Id.*

The *Antidegradation Guidance* also spells out in great detail the components of the nondischarge alternatives analysis. They include 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.*<sup>6</sup>

The Board has emphasized the importance of performing a nondischarge alternatives analysis. In *Zlomsowitch*, the Board found a violation of the antidegradation regulations because “[t]here was also no substantial evidence presented: (1) that DEP made an express finding that a cost-effective environmentally-sound nondischarge alternative does not exist . . . .” 2004 Pa. Environ. LEXIS 56 at \*46-47.

---

<sup>6</sup> During its pre-closing argument comments, the Court raised the issue of whether § 93.4c(b)(1)(i) requires that the nondischarge alternatives analyses must be an actual document. This language in the *Antidegradation Guidance* clearly suggests DEP thinks so, for it seems difficult if not impossible to imagine “detailed cost estimates” and direct cost comparisons of alternatives “not being written down on paper for DEP to review. In this case, it is not necessary for the Court to determine whether the analyses must be in writing, for the evidence clearly establishes that no such analyses was ever done. Both DEP and Alpine operated on the assumption that Chapter 102 drove the antidegradation issue – an assumption that is demonstrably wrong. *See infra.*

## **2. Best Available Combination of Technologies**

The *Antidegradation Guidance* states that the language of § 93.4c(b)(1)(i)(A) requiring that a new, additional or increased discharge shall use the best available combination of cost-effective treatment, land disposal, pollution prevention and wastewater reuse technologies “provides a basis for antidegradation best available combination of technologies (ABACT) for point source discharges, applied by DEP as one of the ‘tests’ of acceptability for proposed discharges to HQ . . . waters.” BMPA Ex. 55 at 68. Because “ABACT is specific to discharge type and wastewater characteristics,” *id.* at 69, DEP envisions a detailed analysis be performed in which “ABACT should account for pertinent pollutants and water quality parameters associated with the discharge type under consideration” and “ABACT should be flexible enough to account for case-specific or site-specific unique characteristics.’ *Id.* The utility of ABACT is that it forces the permittee to look at all the available options and choose the best combination for the particular discharge and receiving water. This necessarily requires the ABACT analysis to be conducted early in the permitting process.

The Board likewise recognizes the significance of the ABACT analysis. In *Zlomsowitch*, the Board remanded a NPDES permit back to the DEP because of the failure to comply with the antidegradation regulations in that “[t]here was also no substantial evidence presented . . . that [the permittee] demonstrated, and DEP found, that [the permittee] would employ the best available combination of water pollution control methods for this site . . .” *Zlomsowitch*, 2004 Pa. Environ. LEXIS 56 at \*57.

## **3. Maintain and Protect Water Quality**

The *Antidegradation Guidance* clearly echoes the regulation when it states that the “project sponsor must demonstrate that any discharge will maintain and protect the existing

quality of the receiving water and will result in no degradation.” BMPA Ex. 55 at 39. This is reiterated in DEP’s Stormwater Management Policy (which is Appendix F of the *Antidegradation Guidance*), where DEP states:

Procedurally, post-construction stormwater management plans required under the NPDES Stormwater Discharges Associated with Construction Activities permit program . . . must demonstrate compliance with the antidegradation requirements . . . to protect and maintain existing uses and the level of water quality necessary to protect those uses in all surface waters and protect and maintain water quality in special protection waters.

BMPA Ex. 55 at 122. The Board in *Zlomsowitch* found it significant in the decision to remand a NPDES permit that “[t]here was also no substantial evidence presented . . . that [the permittee] properly demonstrated--with water quality monitoring data and scientific analysis of the effects on the stream from the addition of identified and quantified pollutants in a permitted discharge--that the selected control methods will maintain and protect the existing quality of [the receiving water body].” *Zlomsowitch*, 2004 Pa. Environ. LEXIS 56 at \*57-58.

### **C. The *Zlomsowitch* Case Is Directly Relevant Here**

As has been evident throughout this case and will be so in this Memorandum, BMPA relies upon *Zlomsowitch v. DEP*, 2004 Pa. Environ. LEXIS 56 at \*42 (November 15, 2004), to support its legal theory of the case. During the trial, questions were raised about whether *Zlomsowitch* was distinguishable from this case, primarily because it involved a non-coal mining permit. In fact, *Zlomsowitch* applies with full force here for several reasons:

**First**, although the permittee in *Zlomsowitch* was seeking to conduct mining operations, the case itself centered on an NPDES permit concerning discharges to an unnamed tributary of Lizard Creek. *See* 2004 Pa. Environ. LEXIS 56 at \*6-7 (Finding #9: initial permit application included request for NPDES permit for discharge of stormwater runoff at site); *id.* at \*19-20

(Finding #41: sets forth terms of NPDES permit actually issued). The ultimate issue in that case was a discharge to a stream. *See id.* at \*51-52 (“thus, by its act of issuing an NPDES permit specifying UNT Lizard Creek as the receiving water, DEP necessarily determined that the mining operation will discharge from a point source into the exceptional value water”). As in *Zlomsowitch*, Alpine here seeks an NPDES permit to discharge into the Aquashicola Creek, a HQ water.

**Second**, the discharge at issue in *Zlomsowitch* was a discharge of **stormwater** from the site. *See* 2004 Pa. Environ. LEXIS 56 at \*52 n. 12 (describing terms of the NPDES permit issued; “The permit prohibits discharges from the designated outfalls ‘except in response to precipitation events’”); *id.* at \*19-20 (Finding #41: setting forth full terms of the discharge provision of the NPDES permit); *id.* at \*40-41 (Findings #100-101: describing expert admission that a large (10-year/24-hour) storm event could overwhelm the controls and result in a point source discharge). As in *Zlomsowitch*, the discharge at issue here is a discharge of stormwater to the Aquashicola Creek.

**Third**, the Board’s language in discussing §93.4c(b)(1)(i) in *Zlomsowitch* speaks in general terms about “discharge” or “point source discharge” and does not limit itself to discharges in connection with mining activity. *See e.g.*, 2004 Pa. Environ. LEXIS 56 at \*46 (“The scheme devised in § 93.4c(b)(1)(i) to prevent degradation is to require all those who propose to discharge in [a special protection] water to engage in an alternatives-analysis . . .”); *id.* at \*47-48 (“§ 93.4c(b)(1)(i)(B) places a condition on the discharger’s use of control methods: before a point source discharge into [a special protection] water is permitted, the proposed discharger must demonstrate that its selected combination of control methods ‘will maintain and protect the existing quality’ of the receiving water”). This is consistent with the express language of §

93.4c(b)(1)(i), which contains no qualifications or limitations on the types of discharges it regulates. Thus, there is nothing within the language of *Zlomsowitch* to indicate that its analysis of § 93.4c(b)(1)(i) is limited to particular types of discharges. *Zlomsowitch* makes clear that its analysis applies to all discharges into HQ or EV waters, and thus applies with full force here.

*Zlomsowitch* is the Board's most complete and most recent statement on the meaning of § 93.4c(b)(1)(i). It was published four months before DEP issued the NPDES permit to Alpine, so DEP had full opportunity to consider how § 93.4c(b)(1)(i) could and should apply to Alpine's project. It provides a clear analysis of the general principles of § 93.4c(b)(1)(i). There is simply no good reason to ignore or distinguish the Board's thoughtful analysis of what the Antidegradation regulations require.

Applying these legal principles to the facts of this case, it is clear by a preponderance of the evidence that DEP did not comply with the express requirements of § 93.4c(b)(q)(i), DEP's own interpretation of those requirements as set forth in the *Antidegradation Guidance*, or the Board's interpretation of those requirements in *Zlomsowitch*.

## **II. THE EVIDENCE SHOWS THAT THE REQUIRED NONDISCHARGE ALTERNATIVE ANALYSIS WAS NOT DONE**

The evidence adduced at trial clearly shows that Alpine did not submit to DEP a nondischarge alternatives analysis like that envisioned in § 93.4c(b)(1)(i) or DEP's *Antidegradation Guidance*. Kate Crowley, the DEP official who signed the NPDES permit, Crowley, 3/28/06 TR. p. 113, ln. 17-19; BMPA Ex. 23, admitted that Alpine did not perform a nondischarge alternatives analysis. Crowley, 3/28/06 TR. p. 118, ln. 9-24. None of the documents submitted by Alpine to DEP during the permitting process (BMPA Exs. 4-21, Alpine Exs. 3-20, DEP Exs. 1-4, 6, 9-11, 13-17) include a nondischarge alternatives analysis

considering environmental soundness and cost-effectiveness called for in § 93.4c(b)(1)(i), nor anything even remotely resembling the form and detail of such an analysis described by DEP's *Antidegradation Guidance*. Finally, despite the fact that the Board *Zlomsowitch* found a violation of the antidegradation regulations because “[t]here was also no substantial evidence presented: (1) that DEP made an express finding that a cost-effective environmentally-sound nondischarge alternative does not exist,” 2004 Pa. Environ. LEXIS 56 at \*46-47, Ms. Crowley admitted that DEP made no such express finding in this case. Crowley, 3/28/06 TR p. 119, ln. 6-12.

DEP and Alpine attempted to obscure this clear record of noncompliance with §93.4c(b)(1)(i) by raising several issues that attempt a *post-hoc* justification of their actions.

These issues included:

- \* That nondischarge alternatives analysis is somehow different in this context because of the existence of a pre-existing stormwater discharge off Blue Mountain, *See* Mr. Kantra's closing argument, 3/31/06 TR. p. 142, ln. 7-9 (“The driving thing that distinguishes this type of discharge from all of the others is the existing discharge”); Murin, 3/31/06 TR. p. 93, ln. 6-10 (“The Department determined that there was a lot of confusion on how do you apply [the nondischarge alternative evaluation] . . . in that there are these existing discharges”);
- \* That compliance with the Chapter 102 stormwater discharge requirements constitutes a nondischarge alternatives analysis, *see* Crowley, 3/28/06 TR. p. 118, ln. 22 – p. 119, ln. 4; Murin, 3/31/06 TR. p. 88, ln. 1-15; and
- \* That DEP, in its review of the permit application, did the nondischarge alternatives analysis, *see* D’Onofrio, 3/30/06 TR. p. 122, ln. 8-11, and p. 129, ln. 12-15.

None of these proffered rationales excuse DEP's failure to comply with its own regulations and guidance.

**A. Nondischarge Analyses Are Not Different or Excused Because of Pre-Existing Stormwater Discharges**

Contrary to DEP and Alpine’s attempts to confuse the issue, the language of § 93.4c(b)(1)(i) and DEP’s *Antidegradation Guidance* prohibits concluding that a pre-existing stormwater discharge excuses noncompliance with § 93.4c(b)(1)(i)’s requirement of a nondischarge alternatives analysis. Nothing in § 93.4c(b)(1)(i) mandates that “nondischarge” mean “no discharge at all,” thereby requiring Alpine to “cut off the flow of water to the creek that existed predevelopment,” D’Onofrio, 3/30/06 TR. p. 136, ln. 7-11, build a large “tank” to hold all the stormwater, *see* Kantra closing, 3/31/06 TR. p. 142, ln. 18, or employ “Star Trek” technology, *see* D’Onofrio, 3/30/06 TR. p. 136, ln. 1-2. Rather, § 93.4c(b)(1)(i)(A) makes clear that the nondischarge alternatives analysis requirement applies only to a “new, additional, or increased discharge”—i.e., the amount of discharge *above* the pre-existing discharge. DEP itself adopts this notion of regulating only the incremental flow in the *Antidegradation Guidance* by:

(1) defining “new additional, or increased” in a way that focuses on the incremental flow, *see* BMPA Ex. 55 at 46 top of page: “new” discharge defined as the wasteload “*not previously present* on that waterbody” while “additional” and “increased” defined in terms of the “flow and/or loading *added*” to an existing flow (emphasis supplied); and

(2) expressly recognizing that pre-existing flows are not subject to the requirement of a nondischarge alternatives analysis, *see id.* bottom of page: “For purposes of the requirements established under 93.4c(b)(1)(i), ‘new, additional, or increased discharge’ refers to point or nonpoint sources from projects or activities undertaken after the waterbody is designated for HQ . . . protection . . . discharges in existence prior to the HQ . . . designation [of which stormwater flow down the mountain must be] are ‘grandfathered’ and considered to be part of the existing

quality of the waterbody. ‘Grandfathered’ flows are not subject to ‘the nondischarge alternatives/use of best technologies analysis’ . . . .”

Thus, in 2003 (before this litigation commenced), DEP formally stated that the focus is only on the incremental increase in flow. For it now to profess confusion about the application of § 93.4c(b)(1)(i)’s nondischarge alternatives analysis requirement (because such confusion might help excuse its conduct on the permit at issue here) is at best suspect and at worst disingenuous. In this case, the incremental flow to the Aquishicola Creek resulting from this project has in fact been identified: 0.16 acre-feet of water during a 2-year storm event, *see* Blechschmidt, 3/30/06 TR. p. 49, ln. 1-15, which translates into just over 52,000 gallons.<sup>7</sup> This is not a huge volume of water to consider handling through one or more nondischarge alternatives.<sup>8</sup>

Finally, both § 93.4c(b)(1)(i) and the *Antidegradation Guidance* clearly rebut any notion that stormwater discharges are to be treated differently under the antidegradation regulations. Section 93.4c(b)(1)(i), on its face, indicates the nondischarge alternatives evaluation applies and is required whenever there is a “new, additional or increase discharge” in a HQ water. Thus, the regulation itself treats all “new, addition, or increased” discharges the same. DEP’s

---

<sup>7</sup> The American Heritage Dictionary of the English Language defines an acre-foot as containing 43,560 cubic feet of water, a cubic foot as containing 1,728 cubic inches, and a gallon as taking up 231 cubic inches. Combining these together, one finds that there are 325,851 gallons in an acre-foot of water ( $43,560 \text{ ft}^3 \times 1,728 \text{ in}^3/\text{ft}^3 / 231 \text{ in}^3/\text{gal}$ ). Thus,  $0.16 \text{ ac-ft.} \times 325,851 \text{ gal/ac-ft} = 52,136 \text{ gal}$ .

<sup>8</sup> The Court’s pre-closing argument comments raised the issue of BMPA advocating infiltration while also seeking a sound barrier located in the area determined to be suited for infiltration. The evidence in the case refutes the notion that there needs to be a trade-off between sound mitigation and infiltration. BMPA Ex. 21 contains Alpine’s March 22, 2005 Application for NPDES Permit. Section E(2) (on p. 4 of the Application) states that infiltration is not feasible and references the February 2, 2004 Report of Alternative Environmental Solutions (AES). The AES Report is an attachment to the Post-Construction Stormwater management Report (BMPA Ex. 17). Contrary to the Application, the AES Report identified two test boreholes (P-1 and Sump Condition #2) that meet EPA minimum and maximum guidelines and “appear to be suitable for use as stormwater infiltration areas.” BMPA Ex. 17, AES Report p. 5 of 6. Figure 2 of the AES Report shows that P-1 and Sump Condition #2 are located on the East side of the Subject Property, *see* BMPA Ex. 17, AES Report Figure 2, in what appears to be the areas of Pond #1 and Sump #1, respectively, on Alpine’s Final Plans. *See* Alpine Ex. 52 Sheet #0 of 85. The sound attenuation wall in this area of the Subject Property does not interfere with the placement of either Pond #1 or Sump #1, *see* Alpine Ex. 52 Sheet #7 of 85 (showing Pond #1 inside the sound attenuation wall and Sump #1 more than 200 feet away from the sound attenuation wall). It appears that Alpine chose to use these areas for stormwater detention and to add a series of hairpin curves to the track instead of for infiltration. That, however, is driven by Alpine’s choice of design, not the sound attenuation wall.

*Antidegradation Guidance* underscores this point by stating that “[t]he requirement to evaluate and use nondischarge alternatives . . . is a critical test and must be met by *any* activity or project generating new, additional, or increased point source discharges to HQ . . . waters.” BMPA Ex. 55 p. 46 (emphasis added).<sup>9</sup>

Despite the clear language of § 93.4c(b)(1)(i) and DEP’s own language in the *Antidegradation Guidance*, there is no evidence that the required detailed nondischarge alternatives analysis was ever conducted by Alpine. When the evidence does “not show that the alternatives analysis required by the antidegradation regulation was performed,” DEP abuses its discretion and the permit issued is unlawful. *Zlomsowitch*, 2004 Pa. Environ. LEXIS 56 at \*58 and \*60.<sup>10</sup>

**B. Compliance with Chapter 102 Cannot Satisfy § 93.4c(b)(1)(i)’s Nondischarge Alternatives Analysis Requirement**

The notion that compliance with 25 Pa. Code Chapter 102 satisfies the § 93.4c(b)(1)(i) nondischarge alternatives analysis requirement is completely inconsistent with the regulatory language of both §93.4c(b)(1)(i) and Chapter 102. Section § 93.4c(b)(1)(i) clearly requires that the permit applicant analyze alternatives that do not involve a discharge, and as both DEP and the Board have made clear, this requirement means that the regulation mandates use of a nondischarge alternative if it is environmentally sound and cost effective. *See* BMPA Ex. 55 p. 3

---

<sup>9</sup> Thus, as the Court noted in its comments before closing argument, the fact that this case involves a flow more like a Wal-Mart than from an industrial facility, does not affect the need for a nondischarge alternatives analysis. It may affect what parameters of concern must be included in the analysis, but the regulation itself and the antidegradation analysis must be done.

<sup>10</sup> The Court’s pre-closing argument comments also raised the issue of why a remand is necessary if it would simply result in the same project with a Nondischarge Alternatives Analysis document. Without the analysis being done, there is no assurance that the project will be the same. In fact, BMPA believes having to address the thermal issues discussed *infra* will likely result in design changes. In any event, this appeal is about DEP complying with § 93.4c(b)(1)(i). Nothing in the language of that section creates a “no harm, no foul” exception. Indeed, the language of the section and the *Antidegradation Guidance* make it clear that the analysis must take place before a permit can be issued. As *Zlomsowitch* makes clear, compliance with this process requirement is critical to achieving the protection of HQ waters that § 93.4c(b)(1)(i) seeks to provide.

(“Alternatives to new, additional, or increased point source discharges to surface waters must be employed where they are cost-effective and environmentally sound”); *Zlomsowitch*, 2004 Pa. Environ. LEXIS 56 at \*46 (“Section 93.4c(b)(1)(i) creates a hierarchical structure which prefers no new point source discharges into the highest quality waters . . . a ‘nondischarge alternative’ *must* be used by the discharge proponent when such an alternative is both environmentally sound and cost effective” (emphasis in original)). Alternatives that involve no discharge are clearly the focus of this requirement.

Chapter 102, by contrast, presumes that there is a discharge and therefore seeks to minimize the erosion and sedimentation that can result from discharges during earth disturbance activities. The express purpose of the Chapter 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,” 25 Pa. Code § 102.2(a)—which makes sense only if there is a discharge that could cause erosion and sedimentation. The Chapter 102 Special Protection BMPs for discharges to HQ waters that Alpine and DEP’s witnesses spent so much time talking about are required “where an earth disturbance activity *may result in a discharge*” to a HQ water. 25 Pa. Code § 102.4(b)(6) (emphasis added). The BMPs themselves all envision discharges: Sediment basins must “dewater” in at least 4 and no more than 7 days, § 102.4(b)(6)(i)(C); the channels, collectors and diversions that must be lined are there to convey water for ultimate discharge, § 102.4(b)(6)(ii); BMPs that “divert or carry surface water” must have minimum capacity “to convey the peak discharge” of a 5-year storm, § 102.4(b)(6)(iii). Nothing in Chapter 102 mentions, discusses, or even contemplates a nondischarge situation; instead, Chapter 102 is focused on minimizing the effects of a discharge that is presumed will

take place. As such, it is impossible for Chapter 102 to be the nondischarge alternatives analysis § 93.4c(B)(1)(i) requires.

Nor does DEP's apparent position—that Chapter 102 is really the specific rules for antidegradation in the stormwater context—square with the facts or the law. As Mr. Murin admitted, Chapter 102 was revised in January 2000, six months after the promulgation of the § 93.4c antidegradation regulation in July 1999. Murin, 3/31/06 TR. p. 124, ln. 11-15. The Chapter 102 regulations were thus finalized with the § 93.4c requirements fully articulated. Yet Chapter 102 completely fails to address the nondischarge alternatives analysis requirement of § 93.4c(b)(1)(i), choosing instead to presume that a discharge will take place and seeking only to minimize the discharge's impacts. The *Antidegradation Guidance* issued in 2003, nowhere states that Chapter 102 satisfies any of the § 93.4c antidegradation regulation requirements. DEP, in its *Pennsylvania Stormwater Best Management Practices Manual*, DEP Doc. No. 363-0300-002 (BMPA Ex. 58) ("*Manual*"), issued in April 2006, makes absolutely no mention of Chapter 102 when it speaks of meeting the antidegradation requirements for HQ waters. See BMPA Ex. 58, Chapter 7, § 7.7 at 18. In fact, the *Manual* views compliance with the antidegradation regulations solely in terms of infiltrating stormwater (a nondischarge alternative). *Id.* Thus, six years after the Chapter 102 regulations were revised, DEP as regulator still does not publicly make the § 93.4c(b)(1)(i) – Chapter 102 connection that DEP as litigant now wants to draw. This suggests that DEP's position during trial smacks of expediency. In short, nothing in Chapter 102 lends any support to the notion that Chapter 102 is a full implementation of § 93.4c in the stormwater context, and Chapter 102's complete failure to deal with the nondischarge alternatives analysis requirement belies Crowley's and Murin's claim that Chapter 102 satisfies this first and most important requirement of § 93.4c(b)(1)(i).

**C. DEP Performance of an Analysis Cannot Satisfy § 93.4c(b)(1)(i)'s Nondischarge Alternatives Analysis Requirement**

DEP's claim that former DEP employee Joseph D'Onofrio performed a nondischarge alternatives analysis during his review of Alpine's Erosion and Sediment Control Plan and the Post-Construction Stormwater Management Plan, *see* D'Onofrio, 3/30/06 TR., p. 122, ln. 8-11, and p. 129, ln. 12-15, does not save DEP. This is so for at least three reasons:

**First**, § 93.4c(b)(1)(i) specifically requires the **permit applicant** to perform the analysis—something which the evidence shows did not occur. DEP clearly stated this in the *Antidegradation Guidance* as well. *See* BMPA Ex. 55 p. 56 (“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”). Thus, DEP cannot perform the analysis for Alpine without violating § 93.4c(b)(1)(i).

**Second**, performing the nondischarge alternatives analysis late in the review process violates DEP's own rules and makes no sense. DEP requires the analysis be done prior to DEP consideration of the application, *see* BMPA Ex. 55 p. 39 (“[a] pre-permit nondischarge alternatives analysis must be conducted *prior* to DEP considering a proposed discharge”) (emphasis supplied). Requiring the analysis early in the process allows for a realistic assessment and consideration of the nondischarge alternatives; waiting until after submission of Erosion and Sediment Control Plans and Post-Construction Stormwater Management Plans (with significant investment in and momentum for the BMPs already designed and included in the plans) makes it impossible to assess alternatives that involve no discharge at all.

**Third**, there is no evidence that Mr. D'Onofrio's analysis contained any of the detailed cost and environmental effectiveness considerations that § 93.4c(b)(1)(i) requires or the *Antidegradation Guidance* identifies. *See* BMPA Ex. 55 p. 52-55 (calling for an “affordability

analysis” and a “direct cost comparison of alternatives”). It appears that Mr. D’Onofrio simply looked at the proposed BMPs and thought they would be sufficient. That is not the nondischarge alternatives analysis DEP itself says is required under § 93.4c(b)(1)(i).

### *Summary*

The preponderance of the evidence makes clear that the nondischarge alternatives analysis required under § 93.4c(b)(1)(i) was not performed. DEP and Alpine’s post-hoc attempts to show compliance are inconsistent with the language of § 93.4c(b)(1)(i) and DEP’s own statements in the *Guidance*. As the Board made clear in *Zlomsowitch*, compliance with this requirement is essential:

In short, the evidence did not show that the alternatives analysis required by the antidegradation regulation was performed here. Process, however, is the critical means of accomplishing the antidegradation regulation’s fundamental purpose of maintaining and protecting the existing quality of the . . . water. 25 Pa. Code § 93.4c(b)(1)(i)(B). *Cf Lathan v. Brinegar*, 506 F.2d 677, 693 (9<sup>th</sup> Cir. 1974) (the history of environmental protection may prove to be largely the “history of observance of procedural safeguards”).

2004 Pa. Environ. LEXIS 56 at \*58. DEP’s failure to comply with this regulatory requirement means it acted contrary to law and the permit is unlawful. *Id.* at \*60. Revocation and remand of the NPDES permit is therefore appropriate. *Id.*

### **III. THE EVIDENCE SHOWS THAT THE REQUIRED ABACT ANALYSIS WAS NOT DONE**

The evidence adduced at trial clearly shows that the ABACT analysis required by § 93.4c(b)(1)(i) was not performed. DEP’s case at trial rested squarely on the proposition that compliance with Chapter 102 satisfies the ABACT analysis requirement, despite the fact that (as noted above) neither § 93.4c(b)(1)(i), Chapter 102, the *Antidegradation Guidance*, nor the *Manual* expressly state that or make that connection. In fact, Chapter 102’s limited scope means

that reliance on Chapter 102 cannot satisfy the ABACT provisions of § 93.4c(b)(1)(i) in this case.

It is clear that § 93.4c(b)(1)(i) is meant to be comprehensive in the sense that it requires protection of the receiving water from all pollutants that might impact the quality of the water. This is obvious from the language of §93.4c(b)(1)(i)(B) requiring a permit applicant to “demonstrate that the discharge will maintain and protect the existing quality of receiving surface waters,” as such a demonstration can only be made by examining all possible impacts on the receiving water from the discharge. Such a holistic approach is essential for ABACT, for it is impossible to know whether a combination of technologies is the “best available” without knowing what pollutants must be addressed so that the combination will in fact “maintain and protect” the water quality from the pollutants in the discharge. DEP underscores this need to be comprehensive in the *Antidegradation Guidance* when it states 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.* This broad focus on all parameters is underscored by DEP’s Stormwater Management Policy, which states unequivocally that a proponent of a new stormwater discharge “. . . can ensure that existing water quality will be protected and maintained by demonstrating that . . . any post-construction discharge will not degrade the physical, chemical, or biological characteristics of the special protection surface water.” BMPA Ex. 55 at 123.

Chapter 102 cannot by itself satisfy the comprehensive focus of § 93.4c(b)(1)(i) because it is focused only two possible impacts to water quality: 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 accelerated erosion and resulting sedimentation). Given this narrow focus, it is impossible for Chapter 102 compliance to satisfy the full range of what § 93.4c(b)(1)(i) requires (i.e., all of the “physical, chemical, or biological characteristics” of the water). It may be *necessary* for compliance with the Antidegradation regulations (because it deals with the erosion and sedimentation effects), but it cannot be *sufficient* to achieve compliance when other pollutants threaten a HQ receiving water. The evidence at trial shows such a threat in this case.

The parties have stipulated that the Aquashicola Creek is a HQ, Cold Water Fishery (“CWF”) stream. Stip. No. 7. In Pennsylvania, CWF streams are subject to 25 Pa. Code § Section 93.7(a), which imposes limitations on the temperature in a CWF receiving water after a discharge, ranging from as low as 38°F during January and February, a range of 48-58°F during April and May, to only 66°F in July and August. Thus, one of the essential tasks of DEP under the Antidegradation regulations is to assure that this existing CWF use will be maintained when Alpine’s discharge commences. *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”).

In this case, Alpine is employing extended detention stormwater basins, including a wet pond, in their stormwater control and treatment system so as to reduce the sediment load and improve the water quality. *See* DEP Exhibit 16, p. 2-3. The evidence at trial showed that stormwater held in basins will be heated via the warm air above the water and by absorbing solar radiation. Blechschmidt, 3/30/06 TR. p. 56, ln. 9-14; Murin, 3/31/06 TR. p. 117, ln. 6-9. Ironically, compliance with Chapter 102 increases this heating effect because the special protection BMPs hold the water in the basins 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 (“When you have high quality watersheds, the sed. basin designs are more conservative. In other words, they dewater between four and seven days as opposed to the non high quality, you can dewater between two and seven days. So, you’re actually holding the water longer in the basin, encouraging the sediment to drop out better”). In fact, DEP itself warns about this very problem. The *Manual* which both Mr. D’Onofrio and Mr. Murin reference as part of the materials reviewed in relation to the NPDES Permit, *see* D’Onofrio, 3/30/06 TR. p. 136, ln. 23 - p. 137, ln. 12; Murin, 3/31/06 TR. p. 63, ln. 20-22, recognizes the threat to a temperature sensitive HQ-CWF by extended detention stormwater basins and wet ponds: “[d]ue to the potential to discharge warm water, wet ponds should be used with caution near temperature sensitive waterbodies.” BMPA Ex. 58, Chapter 6, p. 154. The *Manual* further states that “[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.” *Id.* at 166. That DEP as regulator finds a special protection BMP encouraged under Chapter 102 is “not recommended” for HQ waters under the Antidegradation regulations underscores the disconnect between Chapter 102 and § 93.4c(b)(1)(i)—the exact opposite of DEP’s position at trial.

Thus, a very real threat of thermal pollution of the Aquashicola Creek exists that would degrade its use as a CWF. Yet the evidence at trial shows that that Alpine never did a thermal analysis of the stormwater discharge. Blechschmidt, 3/30/06 TR. p. 57, ln. 4-5. Mr. D’Onofrio’s claim that trees and other plantings might provide thermal control, 3/30/06 TR. p. 134, ln. 14 – p. 135, ln. 1, is rebutted not only by Mr. Murin, 3/31/06 TR. p. 116, ln. 22 – p. 117, ln. 2, but by the facts 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 (therefore unlikely to cast significant shade over the ponds for years), *see id.* sheets 23, 81; 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. There is a significant risk of adverse thermal impacts from the very design of the project, yet the narrow focus on erosion and sediment precluded any analysis of these thermal impacts.<sup>11</sup>

Thus, the focus on Chapter 102 produced a set of controls that Alpine could not identify as the best available combination of control technologies and DEP could not determine was the best available combination because the issue of thermal impacts was ignored. This constitutes a failure to perform the ABACT required under § 93.4c(b)(1)(i). As the Board made clear in *Zlomsowitch*, when “[t]here was also no substantial evidence presented . . . that [the permittee] demonstrated, and DEP found, that [the permittee] would employ the best available combination of water pollution control methods for this site . . .,” 2004 Pa. Environ. LEXIS 56 at \*57, DEP’s

---

<sup>11</sup> During its pre-closing argument comments, the Court raised the issue of what environmental harm or detrimental effect from the facility had been shown. BMPA respectfully submits that nothing in § 93.4c(b)(1)(i) requires a showing of an actual environmental harm; rather, the regulation requires showings by the permit applicant of an absence of such harms. In *Zlomsowitch*, the Board remanded without an express finding of a detrimental effect; a discharge would occur, and remand was appropriate because the analyses required under § 93.4c(b)(1)(i) were not done. Nevertheless, the threat of thermal impacts admitted to by Alpine and DEP witnesses makes the need for the required analyses more than theoretical. The failure to conduct those analyses – especially as to thermal impacts – makes remand appropriate and indeed necessary here.

failure to comply with this regulatory requirement means it acted contrary to law and the permit is unlawful. *Id.* at \*60. Revocation and remand of the NPDES permit is therefore appropriate.

*Id.*

#### **IV. THE EVIDENCE SHOWS THAT THE REQUIRED MAINTAIN AND PROTECT WATER QUALITY DEMONSTRATION WAS NOT DONE**

The evidence adduced at trial clearly shows that Alpine and DEP failed to satisfy the third component of § 93.4c(b)(1)(i) requiring a demonstration that the stormwater discharge will maintain and protect the existing quality of Aquashicola Creek. There is no evidence in the record that Alpine made any such demonstration to DEP. Instead, both Alpine and DEP rely on compliance with Chapter 102 to show that they indirectly addressed this express requirement of § 93.4c(b)(1)(i)(B). There are two problems with Alpine and DEP's approach:

**First**, the notion of making a *de facto* showing by complying with Chapter 102 requirements is directly contrary to the express language of § 93.4c(b)(1)(i)(B) requiring the permit applicant to “demonstrate that the discharge will maintain and protect the existing quality of receiving surface waters.” DEP echoes this language in the *Antidegradation Guidance*: the “project sponsor must demonstrate that any discharge will maintain and protect the existing quality of the receiving water and will result in no degradation.” BMPA Ex. 55 p. 39. In *Zlomsowitch*, the Board described a “proper” demonstration as including “water quality monitoring data and scientific analysis of the effects on the stream from the addition of identified and quantified pollutants in a permitted discharge.” 2004 Pa. Environ. LEXIS 56 at \*57-58. No evidence of such a demonstration exists.

**Second**, as noted above in connection with ABACT, Chapter 102's narrow focus precludes the complete analysis of all possible impacts on the Aquashicola Creek. Thus, even if Alpine presented detailed data to DEP showing that the Chapter 102 BMPs would maintain and

protect the Aquashicola Creek from water quality degradation due to erosion and sediment, such analysis does not “demonstrate” that the Creek’s water quality will be maintained and protected from other parameters like thermal pollution. The record clearly establishes that Alpine performed no thermal analysis, Blechschmidt, 3/30/06 TR. p.57, ln. 4-5, and therefore it is impossible for Alpine to have “demonstrated” to DEP that its discharge will maintain and protect the Aquashicola Creek’s cold water fishery quality.

As the Board made clear in *Zlomsowitch*, when “[t]here was also no substantial evidence presented . . . that [the permittee] demonstrated, and DEP found, that the selected control methods will maintain and protect the existing quality” of the receiving water,” 2004 Pa. Environ. LEXIS 56 at \*58, DEP’s failure to comply with this regulatory requirement means it acted contrary to law and the permit is unlawful. *Id.* at \*60. Revocation and remand of the NPDES permit is therefore appropriate. *Id.*

### **CONCLUSION OF ARGUMENT**

The evidence at trial made clear that both Alpine and DEP focused solely on the Chapter 102 special protection BMPs. No real nondischarge alternatives analysis was done, and both ABACT and the protection of water quality analyses were short-circuited by focusing solely on erosion and sediment control under Chapter 102. When confronted with the actual requirements of § 93.4c(b)(1)(i), Alpine and DEP tried to create post-hoc explanations that relied on Chapter 102. However, Chapter 102 cannot satisfy any of the three requirements of § 93.4c(b)(1)(i) because of its narrow focus on discharge and on erosion and sediment control. Thus, the record establishes by a preponderance of the evidence that the three requirements of § 93.4c(b)(1)(i) were not satisfied. Failure to satisfy any one of those requirements is grounds for remand of the permit to have the necessary analyses done and, if necessary, the project redesigned.

## **BMPA CONCLUSIONS OF LAW**

1. Appellant BMPA has standing to pursue this appeal.
2. The Board reviews DEP's issuance of the permit to determine, based on the evidence presented to the Board, whether DEP's action conformed with applicable law and was reasonable. *Zlomsowith v. DEP*, 2004 Pa. Environ. LEXIS 56 at \*68.
3. Appellant bears the burden of proving that the permit was issued contrary to law or is otherwise unreasonable. *Id.*
4. In reviewing the application and issuing the permit, DEP failed to properly apply 25 Pa. Code 93.4c(b)(1)(i) when the agency failed to compel Alpine to undertake the alternatives analysis required by the water quality antidegradation regulation for high quality waters.
5. In reviewing the application and issuing the permit, DEP failed to properly apply 25 Pa. Code § 93.4c(b)(1)(i) when the agency failed to compel Alpine to undertake the analysis for and use the Antidegradation Best Available Combination of Treatment Technologies to address all parameters impacting water quality in the Aquashicola Creek.
6. In reviewing the application and issuing the permit, DEP failed to properly apply 25 Pa. Code § 93.4c(b)(1)(i) when the agency failed to compel Alpine to demonstrate that the discharge will maintain and protect the existing quality of the Aquashicola Creek.

For the reasons set forth above, 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).

Dated: June 7, 2006

Respectfully submitted,  
BLUE MOUNTAIN PRESERVATION ASSOCIATION

By: \_\_\_\_\_  
Kenneth T. Kristl, Esq.  
David Jablonski, Student intern  
Mid-Atlantic Environmental Law Center  
Widener University School of Law  
4601 Concord Pike  
Wilmington, DE 19803  
Counsel for Blue Mountain Preservation Association, Inc.

**COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD**

<b>BLUE MOUNTAIN PRESERVATION</b>	)	
<b>ASSOCIATION, INC.</b>	)	
	)	
<b>v.</b>	)	<b>EHB No. 2005-077-K</b>
	)	
<b>COMMONWEALTH OF PENNSYLVANIA</b>	)	
<b>DEPARTMENT OF ENVIRONMENTAL</b>	)	
<b>PROTECTION and ALPINE ROSE</b>	)	
<b>RESORTS, INC.</b>	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on the 7<sup>th</sup> day of June, 2006 I served a copy of the Post-Hearing Memorandum of Appellant Blue Mountain Preservation Association, Inc. via Overnight Mail upon the persons indicated below.

Fay Dempsey, Esquire  
Assistant Counsel  
Pa. Dept. of Environmental Protection  
Office of Chief Counsel  
2 Public Square  
Wilkes Barre, PA 18711-0790  
Ph: 570-826-2519  
Fax: 570-820-4838

Emil W. Kantra, II, Esquire  
FITZPATRICK, LENTZ & BUBBA  
4001 Schoolhouse Lane  
Stabler Corporate Center  
P.O. Box 210  
Center Valley, PA 18034-0219  
Ph: 610-797-9000  
Fax: 610-797-6663

---

Kenneth T. Kristl, Esq.  
Mid-Atlantic Environmental Law Center  
4601 Concord Pike  
Wilmington, DE 19803  
Ph: 302-477-2053  
Fax: 302-477-2032