

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

<b>STATE OF OHIO ex rel.</b>	:	<b>CASE NO. 11-0252</b>
<b>OHIO ATTORNEY GENERAL,</b>	:	
	:	
<b>Plaintiff-Appellee</b>	:	<b>On Appeal from the</b>
	:	<b>Court of Appeals of Ohio</b>
	:	<b>Tenth Appellate District</b>
<b>v.</b>	:	
	:	<b>Court of Appeals</b>
	:	<b>Case No. 09AP-938</b>
<b>THE SHELLY HOLDING CO., et al.,</b>	:	
	:	
<b>Defendants-Appellants.</b>	:	

**REVISED MEMORANDUM IN SUPPORT OF JURISDICTION  
OF DEFENDANTS-APPELLANTS  
SHELLY MATERIALS, INC. AND ALLIED CORPORATION**

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**EXPLANATION OF WHY THIS CASE INVOLVES A  
SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS A CASE OF PUBLIC OR  
GREAT GENERAL INTEREST**

This case presents two issues of broad and fundamental importance to Ohio's significant industrial, manufacturing, and business communities, which collectively employ millions of Ohioans and provide an on-going tax base in every corner of Ohio. Here, the Tenth Appellate District Court of Appeals, ("Tenth District") lowered the long-established civil burden of proof and allowed the State of Ohio ("State") to carry its burden to show an on-going violation of law based solely on a stipulated one-day emissions test exceedance and an inference that the facility performing the test operated every day after the test under the same conditions that caused the exceedance. More troubling, after finding that the State could meet its civil burden based only on an inference, the Tenth District also held that a defendant had no right to present any evidence to rebut the State's inference and demonstrate that the emissions exceedance did not continue after the day of the testing event. In so holding, the Tenth District completely eradicated the due process rights of a civil defendant to show that the State's claims were not true.

The Tenth District's decision will affect the thousands of businesses and industries across the state that are regulated by the Ohio Environmental Protection Agency ("Ohio EPA"). While permits issued to Ohio's business and industry, which range from power generation to steel-making, manufacturing, road construction, mining and everything in between (collectively "Regulated Business"), have widely varying terms and requirements, each Regulated Business has one thing in common relevant to this appeal: each has an Ohio EPA-issued permit that sets emission limits. Although Ohio EPA strives to set the correct emission limits when it issues each permit, and although Regulated Business strives to meet the emission limits set in each permit, the practical reality is that Ohio EPA sometimes sets the wrong limits and Regulated

Business sometimes does not demonstrate compliance with the limits during testing under maximum operational conditions.

Under the framework of these common circumstances, the paramount issue to Regulated Business is the status of a facility's compliance during the time it takes for Ohio EPA to change emission limits or for the facility to retest after a failed test. Therefore, the first question that must be answered by this Court is whether a single failed emissions test performed on a single day under a facility's maximum operating conditions is enough to carry the State's burden of proof to demonstrate on-going non-compliance with an emission limit—even on days when there are no facility operations and, as such, no emissions. If an on-going emissions exceedance can be inferred, the second question that must be answered by this Court is whether it is constitutional for a court to determine that a Regulated Business has no right to rebut an inference of an on-going exceedance with evidence to the contrary.

The Supreme Court should accept jurisdiction of this case to pronounce that the decision of the Tenth District is not the law of Ohio. This case presents an opportunity for this Court to address these two critical issues and to provide clarity and certainty as to the legal standards that apply when the State brings a civil action against a Regulated Business. If allowed to stand, the Tenth District's erroneous decision will severely diminish the rights of thousands of industries, manufacturers and businesses regulated by the State as well as other civil defendants subject to similar civil statutes. As such, this matter raises a significant constitutional question and is of public and great general interest.

### **STATEMENT OF CASE AND FACTS**

On July 23, 2007, the State, on behalf of Ohio EPA, brought an air enforcement action pursuant to R.C. Chapter 3704 against five companies: The Shelly Holding Company, The

Shelly Company, Shelly Materials, Inc., Allied Corporation and Stoneco, Inc. (collectively “Shelly”).<sup>1</sup> The Complaint alleged that Shelly violated Ohio’s air pollution control laws and regulations, and the State sought both injunctive relief and civil penalties.

The Shelly defendants are Ohio-based businesses that operate hot-mix asphalt plants (“HMA plants”) and pave roads throughout Ohio. Typically, HMA plants are small facilities due to their portable nature. Since asphalt must be used within four to five hours of production, HMA plants must be small and able to move quickly to serve customers on road jobs throughout Ohio. Shelly does not operate its HMA plants in the winter or when temperatures are below freezing because the asphalt is difficult or impossible to pour. HMA plants are regulated by Ohio EPA pursuant to Ohio’s air pollution control law, R.C. Chapter 3704 *et seq.*, and Shelly’s HMA plants all have air permits issued by Ohio EPA. Due to their small size, Shelly’s HMA plants are not large sources of air emissions.

Specific to this appeal, the State’s Seventh Claim (“Claim 7”) alleged that four Shelly Materials HMA plants and one Allied Corporation HMA plant were in continued violation of Ohio law because each HMA plant exceeded a permit emission limit during a three-hour testing event, called a “stack test.” The State claimed that Shelly’s testing results, obtained while each HMA plant operated at full capacity and using worst-case fuels and materials, were enough to infer on-going emissions violations until such time that each HMA plant was retested.

A stack test measures emissions of gases or dust that exhaust from a facility’s stack (i.e. chimney) during maximum operating conditions. *State ex rel. Ohio Attorney General v. The Shelly Holding Co., et al.* (Sept. 2, 2009), Franklin Cty. C.P. No. 07CVH07-9702, at 44 (“*Shelly*

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<sup>1</sup>The Trial Court dismissed The Shelly Holding Company and The Shelly Company as party-defendants. The issues on appeal to this Court involve only Shelly Materials, Inc. and Allied Corporation.

P"). Prior to testing, the permit holder must provide Ohio EPA with at least 30 days notice and must allow Ohio EPA the opportunity to witness the test. Ohio Adm.Code 3745-15-04(A). Ohio law does not require testing with any specific frequency for any source, and smaller sources like Shelly's HMA plants are legally allowed to operate without performing stack testing unless a new or modified permit is issued.

Stack tests are performed as three one-hour test runs on a single day under worst-case operating conditions, which consist of using the worst-case fuel and the worst-case material and operating at maximum production capacity. As Ohio's longtime Division of Air Pollution Control Chief Robert Hodanbosi testified, stack test results obtained during any particular test are only "snapshots" of emissions from a plant on a particular day and can be influenced by a number of factors, including the operational conditions present during the test, the raw materials used during the test and the particular fuel used during the test. Stack tests are not representative of day-to-day operational conditions at Shelly HMA plants because Shelly does not operate at maximum capacity outside stack tests, and Shelly utilizes a variety of fuels and materials during normal operating scenarios.

Contrary to the Tenth District's conclusion, the State presented no evidence that "a facility must conduct another stack test...in order to demonstrate compliance." *State ex rel. Ohio Attorney General v. The Shelly Holding Co., et al.*, 10th Dist. No. 09AP-938, 2010-Ohio-6526, at ¶56 ("*Shelly II*"). In fact, the State acknowledged in its Tenth District brief that compliance can be established by showing that the "operating conditions documented by the stack test no longer exist." If a permit holder fails a stack test, the permit holder has many choices to assure on-going compliance, including: asking Ohio EPA for different emission limits,

repairing mechanical failures, changing raw materials and fuels, running at less than maximum production or retesting.

At trial, Shelly stipulated that on particular dates at HMA plants 63, 73, 90/95 and 91, stack test results showed emission limit exceedances during three one-hour stack test runs. Thus, Shelly did not dispute that, during the test events run at maximum capacity and utilizing the worst case fuels and materials, emission of certain pollutants exceeded permit limits.

However, Shelly did dispute that those violations continued on days subsequent to the stack tests and argued that the State had not meet its burden of proof to demonstrate, by a preponderance of the evidence, that the HMA plants were in violation of the emission limits on any days other than the days of the stack tests. Shelly's argument focused on the undisputed evidence that day-to-day operating conditions at the HMA plants were quite different than operating conditions during stack test events and that the HMA plants did not operate at all during many of the days on which violations by the State were alleged (i.e. because of winter shutdown, project specific operations).

On September 2, 2009, following a lengthy trial, the Franklin County Court of Common Pleas issued its Decision and Judgment Entry in this case, finding liability on the part of Shelly on certain claims but denied the State's request for injunctive relief. The Trial Court specifically found that there was no evidence "that any of the [Shelly Defendants'] facilities are not properly permitted or being operated in violation of the terms of the operating permits." *Shelly I* at 97-98. The Trial Court also found that the Shelly showed "a sincere desire to identify and correct problems" and the disclosure of the voluntary audit results to Ohio EPA "demonstrated an openness that is to be commended." *Id.* at 80.

Regarding Claim 7, the Trial Court rejected the State's invitation to infer continued violations stating:

Except for the date of the specific "stack test," there is not a specific test result [or other evidence] proving that the violation continued. The State wants the Court to infer that the violation continued until Shelly proved that it did not, at the subsequent "stack test." \*\*\* If it is reasonable for the Court to infer that the violation stopped with the second "stack test," why not infer that the violation ended the day before or the day before that or the day after the first "stack test"?

Simply put the Court does not find the requested inference to be reasonable given the fact that the State has the burden. Further, the Court finds Shelly's argument that a "stack test" does not represent normal operating conditions to be compelling. Based on the foregoing, the Court will only consider the day of the "stack test" demonstrating excess emission to be evidence of a violation. *Shelly I* at 45-46.

Accordingly, the Trial Court found that the State had met its burden of proof only for those specific dates on which the stack tests were conducted, and it assessed penalties against each HMA plant based only on the specific date that the State had carried its burden of proof by demonstrating more than an "inference" of a violation. *Id.*

On October 2, 2009, the State appealed the Trial Court's Decision to the Tenth District. The appeal raised four assignments of error, including a claim that the Trial Court erred with regard to Claim 7 by limiting the dates of emissions violations to only the dates of the nonconforming emissions test results. The Tenth District found that the Trial Court should have concluded that the violation continued until a subsequent stack test determined that the plant no longer was violating the permit limitations. *Shelly II* at ¶66. In so holding, the Tenth District removed the State's legal burden to affirmatively prove by a preponderance of the evidence that the violation continued each and every day subsequent to the stack test. Even if it were appropriate to lower or completely eradicate the State's burden of proof, which it is not, the Tenth District also denied Shelly its due process rights by ignoring evidence submitted by Shelly

that was found to be “compelling” by the Trial Court. The Tenth District’s decision transcends this specific case and will detrimentally impact all Regulated Business in Ohio.

### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

#### **FIRST PROPOSITION OF LAW: IN A CIVIL ENFORCEMENT ACTION, THE STATE HAS THE BURDEN OF PROOF TO DEMONSTRATE BY A PREPONDERANCE OF THE EVIDENCE EACH AND EVERY DAY OF VIOLATION.**

In this matter, the Tenth District changed the civil burden of proof in Ohio—from one that requires a showing of a violation by a preponderance of the evidence—to one that allows for a violation to be deemed continuing based solely on an inference without evidence. The impact of the Tenth District’s decision to unilaterally change long-standing Ohio law regarding the civil burden of proof is significant and simply cannot be allowed to stand.

It is well established that the plaintiff in a civil action bears the burden of proof on each essential element of any claim for relief. *Schaffer v. Donegan* (1990), 66 Ohio App.3d 528, 534, 585 N.E.2d 854; *Ohio Valley Radiology Assocs., Inc. v. Ohio Valley Hosp. Ass’n* (1986), 28 Ohio St.3d 118, 502 N.E.2d 599. This is the plaintiff’s burden, even when the plaintiff is the State. Similarly, Ohio law is well settled that, in civil actions, the burden of proof is carried by a preponderance of the evidence standard when the statute is silent as to the burden. *Cincinnati, Hamilton & Dayton Ry. v. Frye* (1909), 80 Ohio St. 289, 88 N.E. 642, paragraph two of the syllabus; see also *Cincinnati Bar Assn. v. Young* (2000), 89 Ohio St.3d 306, 314, 731 N.E.2d 631; *Felton v. Felton* (1997), 79 Ohio St.3d 34, 41-42, 679 N.E.2d 672; *Walden v. State* (1989), 47 Ohio St.3d 47, 53, 547 N.E.2d 962 (concluding that “the General Assembly intended to apply the usual preponderance of the evidence standard” when it did not “specify a ‘clear and convincing’ standard”). Preponderance of the evidence is more than a mere inference. This standard requires the State to demonstrate by the greater weight of the evidence that a violation occurred. *State v. Stumpf* (1987), 32 Ohio St.3d 95, 102, 512 N.E.2d 598.

In accord, under Ohio's environmental statutes, the State bears the burden of proof to demonstrate that a violation exists for each and every day the State claims liability exists. R.C. 3704.06(B); R.C. 3734.13(C); R.C. 6111.07. The State's burden of proof under Ohio's environmental statutory scheme is a preponderance of the evidence standard. *State ex rel. Brown v. City of East Liverpool* (May 6, 1981), 7th Dist. No. 80-C-19 (In the context of a water enforcement matter, the court stated that "very plainly, the foregoing is a civil action. The violation must be proven by a preponderance of the evidence").

As the Ohio General Assembly intended when it developed Ohio's air laws, the State must be required to show more than an inference of violation: "The court shall have jurisdiction to grant prohibitory and mandatory injunctive relief and to require payment of a civil penalty upon the showing that such person has violated this chapter or rules adopted thereunder." R.C. 3704.06(B). Thus, the General Assembly expressly requires the State to bear the burden of proof with a "showing" for each and every day a violation is alleged. If it intended otherwise, it would have said so. As this Court has repeatedly recognized, Ohio law must be applied as written. *Hudson v. Petrosurance, Inc.* (2010), 127 Ohio St.3d 54, 59, 936 N.E.2d 481. An "inference" of an on-going violation cannot be and is not a "showing" of a violation by preponderance of the evidence.

At trial in this matter, the State presented no testimony, no documents, no operational data, no additional engineering tests, no calculations; simply no proof whatsoever that Shelly operated the HMA plants in a manner after each stack test that caused emissions to continue in excess of applicable permit limits. In fact, the State wholly failed to show that Shelly's HMA plants were even operating on all days for which the State sought a penalty for emissions exceedances. Instead, the State relied solely on one-day stack tests and the inference that the

days following the test demonstrated the exact same emissions exceedances. Put simply, the State wanted the Trial Court to infer emissions violations for each and every day following a stack test, even for those days on which the HMA plants clearly had zero emissions because they were not operational.

There is no legal authority to support an “inference of continuing violation” theory as sufficient to carry a preponderance of the evidence burden of proof. No other Ohio court has ever found in favor of the State based solely on an assumption or inference that every day subsequent to an exceeded stack test is a separate day of violation. In fact, just the opposite; in air enforcement matters, any presumption given should be one of compliance in favor of the permit holder. *State ex rel. Celebrezze v. Natl. Lime & Stone Co.* (1994), 68 Ohio St.3d 377, 385, 627 N.E.2d 538.

However, on appeal in this case, the Tenth District never considered the burden of proof in ruling for the State on Claim 7. *Shelly II* at ¶55-66. Rather, the Tenth District’s analysis focused only on how to calculate a penalty amount, while completely ignoring the precedent issue of the State’s burden to demonstrate liability for each and every day the State alleged permit violations before any penalty assessment could be considered, stating:

[H]ere, the trial court did not err in assessing the factors [for penalty] in each step. Nonetheless, in determining the number of days each violation existed, the trial court should have concluded the violation continued until the subsequent stack test determined the plant no longer was violating the permit limitations... Consistent with the few cases addressing the issue, we conclude the trial court must calculate again, in accordance with this decision, the number of days Shelly violated the applicable PTI and then impose the fine, in its discretion, as it deems appropriate. *Shelly II* at ¶66.

The Tenth District’s conclusion plainly contradicts Ohio law and removes from the State any burden to demonstrate that the permit holder continued to exceed emission limits in its permit on days subsequent to a stack test. Additionally, contrary to the Tenth District’s

determination, the few cases addressing this issue clearly do not stand for, or even suggest, that mere inference without evidence is sufficient to carry the State's burden of proof. *State ex rel. Celebrezze v. Thermal-Tron, Inc.* (1992), 71 Ohio App.3d 11 ("*Thermal-Tron*"); *United States v. Hoge Lumber Co.* (N.D. Ohio, May 7, 1997), No. 3:95 CV 7044, 1997 U.S. Dist. LEXIS 22359.

In *Thermal-Tron*, the State alleged that an incinerator facility was in violation of law for the days on which it failed three stack tests as well as on intervening days between the failed tests and the subsequent test demonstrating compliance. *Thermal-Tron* at 14, 16. To meet its burden, a witness for the State testified that he used waste manifests, burn logs and temperature recording charts to determine that Thermal-Tron had actual operations five days a week, four to eight hours a day. *Id.* at 16. Another witness for the State testified that Thermal-Tron's day-to-day operations were consistent with operations during the three failed stack tests. *Id.* In finding that the State met its burden of proof, the Eighth District Court of Appeals stated: "in light of the record, particularly the testimony of Seaman and Curtain as well as the waste manifests, temperature charts and operating records, we find competent, credible evidence to support the Trial Court's finding of a violation." *Id.* Ironically, the Tenth District acknowledged this legal standard, stating "the court found competent, credible evidence" that Thermal-Tron was in violation of law. (Emphasis added.) *Shelly II* at ¶65. However, the Tenth District identified no such competent, credible evidence in the State's case against Shelly.

The second case cited by the Tenth District, *U.S. v. Hoge Lumber Company*, is a federal case brought by the Department of Justice ("DOJ") pursuant to the Clean Air Act ("CAA"). As an important distinction, the CAA has a lower burden of proof that does not exist in Ohio law. 40 U.S.C. 7413(e)(1), (2). However, even with the lower standard, the DOJ still presented actual

evidence, not an inference, that the defendant's facility was in on-going violation of its emissions limits.

In its case in chief, the DOJ offered an affidavit from an expert engineer who testified that the permit holder performed eight stack tests on its boiler under various operational conditions, including operating conditions as low as 22% of capacity, and all eight stack tests showed emissions violations. *Hoge* at \*14-15. In addition, the DOJ also presented testimony evidence of the company's designated Rule 30(b)(5) witness who testified that the boiler was not operating in compliance with its air permit limits and expressed pessimism that the boiler could ever meet the emission limit required by the air permit. *Id.* at \*16. Finally, the DOJ presented evidence of actual days on which the defendant operated its boiler in a manner exceeding emissions limits—2,700 days over a twelve year period (i.e. there was not a finding of on-going or continued emissions exceedances every day subsequent to the first failed stack test). *Id.* at \*16-17. Thus, even under the CAA's lower burden of proof, the DOJ still proved its case with evidence of the actual non-compliance and the actual days of violation. Contrary to the Tenth District's holding, the *Hoge* decision clearly does not support an inference burden of proof.

As a final point, the Tenth District identified a perceived policy concern that, without its holding, permittees would be able "to continue the harmful conduct at least until the next stack test, knowing no penalty will be imposed for interim violations." *Shelly II* at ¶66. This is simply not true. Shelly's proposition of law does not stop a Plaintiff from proving its case with actual evidence of an on-going violation. The distinction is, in this case, the State simply had no such evidence.

This professed concern of the Tenth District regarding the "continued harmful conduct" also ignores the reality that Ohio EPA can require that a permit holder wait to stack test until a

representative of Ohio EPA can be present to observe the test. Ohio Adm. Code 3745-15-04. Stack tests must be scheduled at least 30 days in advance of the test date, and the permit holder must coordinate scheduling with the Ohio EPA so that the appropriate agency representative can be on site for the test. Stack tests are routinely cancelled by Ohio EPA due to weather, conflicts in scheduling or agency backlog. For seasonal businesses like asphalt, retesting must sometimes wait until the following year due to winter plant closures. Because there are no regulatory exceptions or accelerated schedule for retesting, a permit holder must sometimes wait many months prior to conducting a subsequent stack test. During this time, the Tenth District believes it is appropriate for the penalty meter to keep clicking at a rate of up to \$25,000 a day. R.C. 3704.06(C).

Ohio law clearly establishes the burden of proof in an environmental enforcement matter with the State and as a preponderance of the evidence standard. The Tenth District's decision to lower, if not eliminate, this civil burden of proof creates a new dangerous and untenable standard that will transcend this matter and impact Regulated Business around the State. As such, the decision cannot be allowed to stand.

**SECOND PROPOSITION OF LAW: IF A CONTINUING VIOLATION OF PERMIT TERMS CAN BE INFERRED, A PERMIT HOLDER MUST BE GIVEN THE OPPORTUNITY TO REBUT THE INFERENCE.**

The Tenth District moved directly from a finding that an inference satisfies the State's burden of proof to an instruction to the Trial Court to recalculate days of violation against Shelly. *Shelly II* at ¶66. Even assuming, arguendo, that the State can meet its burden of proof by only an inference, a civil defendant must have the ability to rebut any such inference. To hold otherwise, as the Tenth District did, violates fundamental fairness and the constitutional due process rights of a defendant.

The United States Supreme Court has held that the Due Process Clause of the Fourteenth Amendment protects civil litigants who seek recourse in the courts. *Logan v. Zimmerman Brush Co.* (1982), 455 U.S. 422, 429, 102 S.Ct. 1148. Similarly, Ohio's constitution and law give civil defendants, including corporations, the right to defend themselves and rebut claims made by plaintiffs. *Johns v. Univ. of Cincinnati Med. Assoc., Inc.* (2004), 101 Ohio St.3d 234, 240, 804 N.E.2d 19; *Vlandis v. Kline* (1973), 412 U.S. 441, 446, 93 S.Ct. 2230; see also *Wheeling Steel Corp. v. Glander* (1949), 337 U.S. 562, 574, 69 S.Ct. 1291 (Fourteenth Amendment due process extends to corporations); *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary* (1925), 268 U.S. 510, 535, 45 S.Ct. 571 (due process protections extend to corporate assets).

Here, the Tenth District ignored the significant, compelling evidence Shelly presented to refute the State's inference of an on-going violation at each HMA plant. At trial, both the State's own employees and Shelly's witnesses testified that the HMA plants did not operate on a day-to-day basis consistent with operations during stack test events. In fact, there was specific testimony that the HMA plants never operated at maximum capacity unless they were conducting a stack test and were typically operated at 25% less than maximum testing conditions, run on different fuels day-to-day and utilize different materials. Importantly, Ohio EPA's own Air Division Chief agreed, describing stack tests as mere "snap shots" of operations on a single day. Further, Shelly presented testimony that Shelly does not operate its HMA plants seven days a week, even in the busy summer season. The State offered no evidence to refute Shelly's evidence.

The Trial Court accepted and cited Shelly's evidence regarding the actual daily operating conditions at its HMA plants, concluding that the Shelly Defendants had put forth "compelling" evidence that the stack tests did not represent normal operating conditions and refusing to find

that violations of the permit terms continued after the day of any particular stack test. *Shelly I* at 45-50. However, on appeal, the Tenth District neither acknowledged nor considered Shelly's evidence. Thus, the Tenth District declared that emissions violations continue after a failed stack test, no matter what evidence to the contrary is presented by the defendant.

Ohio's Air Pollution Control statute is remedial in nature, designed to give the State of Ohio the ability to punish those businesses that fail to comply with the law. However, it is plainly inequitable to punish a permit holder that has proven with evidence that it complied with Ohio law. If the State can seek and courts can assess civil penalties based only on an inference of a continuing violation, the ramification is that Regulated Business has no incentive to quickly remedy the issue causing the exceedance since the penalty will continue until such time that follow-up testing can be scheduled, witnessed, run and results presented to Ohio EPA. This is not and cannot be the law.

Due process requires that every court, including the Tenth District, consider evidence presented by a defendant in response to claims made by the plaintiff. Here, the Tenth District cut off all rights of any defense and created a new, irrebuttable standard in favor of the State. Not only is this holding a direct violation of Shelly's constitutional due process rights, but it raises the significant constitutional question of whether any civil defendant can have its due process rights stripped in the context of civil enforcement.

### **CONCLUSION**

For the reasons discussed above, this case involves a substantial question of constitutional law and a matter of public and great general interest. As such, Appellants request

that this Court grant jurisdiction and order the case to be fully briefed and heard on the merits.

Respectfully submitted,



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**PROOF OF SERVICE**

I certify that a copy of this Revised Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail postage prepaid on February 14th, 2011 to:

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Counsel for Defendants-Appellants, Shelly  
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*to usual*

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO

2010 DEC 30 PM 2: 05

CLERK OF COURTS

State of Ohio ex rel.  
Ohio Attorney General,

Plaintiff-Appellant,

v.

The Shelly Holding Co. et al.,

Defendants-Appellees.

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No. 09AP-938  
(C.P.C. No. 07CVH07-9702)  
  
(REGULAR CALENDAR)

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D E C I S I O N

Rendered on December 30, 2010

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*Bott Law Group, LLC, April R. Bott and Sarah H. Herbert; Chester, Willcox & Saxbe LLP, and Sarah Morrison, for appellees.*

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APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Plaintiff-appellant, State of Ohio, through its Attorney General, appeals from a judgment of the Franklin County Court of Common Pleas concluding, in four specific instances, that defendants-appellees did not violate provisions of Ohio's environmental laws and regulations, defendants were exempt from the relevant law, or defendants' violations were limited to the day of testing. Because the evidence and

applicable law do not support the trial court's determinations in those four instances, we reverse in part.

### **I. Facts and Procedural History**

{¶2} At the request of the Director of Environmental Protection, the State of Ohio, through its Attorney General, filed an action pursuant to R.C. 3704.06(B) and 3734.13(C) seeking injunctive relief and civil penalties against defendants-appellees, The Shelly Holding Company, The Shelly Company, Shelly Material, Inc., Allied Corporation, Inc., and Stoneco, Inc., for violations of Ohio's air quality standards. The trial court dismissed The Shelly Holding Company and The Shelly Company as defendants; remaining as defendants are Shelly Materials, Inc., Allied Corporation and Stoneco, Inc. (collectively, "Shelly").

{¶3} Shelly operates businesses in approximately 75 of Ohio's 88 counties; its operations include limestone, concrete production, rail and water sites, as well as 44 facilities for hot mix asphalt. The state alleged Shelly violated Ohio's environmental laws as described in the complaint's 20 separate counts directed to 27 asphalt plants, 30 portable generators, and one liquid asphalt terminal, all of which Shelly owned, operated, or both. Shelly stipulated to liability on 32 of the claims in 12 counts of the complaint. After a bench trial, the trial court found Shelly liable on 13 of the 20 counts and assessed a civil penalty in the amount of \$350,123.52 against Shelly. The state appeals.

## II. Assignments of Error

{¶4} The scope of the action in the trial court was voluminous, including 2,100 pages of trial transcript. Of the myriad of issues determined in the trial court, Shelly assigns no error; the state assigns only four errors:

[1]. THE TRIAL COURT ERRED BY INTERPRETING "POTENTIAL TO EMIT" IN A MANNER THAT FAILS TO REFLECT APPLICABLE LAW, WHICH, IN THE ABSENCE OF A FEDERALLY ENFORCEABLE PERMIT, REQUIRES A STATIONARY SOURCE'S POTENTIAL EMISSIONS BE CALCULATED BASED ON THE SOURCE'S MAXIMUM CAPACITY TO GENERATE EMISSIONS.

[2]. THE TRIAL COURT ERRED IN FINDING THAT FUGITIVE EMISSION SOURCES OF AIR POLLUTION AT PLANT #24 WERE EXEMPT FROM PERMIT TO INSTALL REQUIREMENTS EVEN THOUGH THOSE SOURCES WERE INSTALLED AT A TIME WHEN THEY DID NOT QUALIFY FOR AN EXEMPTION.

[3]. THE TRIAL COURT ERRED IN FINDING THAT DEFENDANTS DID NOT VIOLATE OHIO'S PERMIT TO INSTALL RULES EVEN THOUGH THE DEFENDANTS WERE "OPERATORS" OF THE FUGITIVE EMISSIONS SOURCES AT PLANT #40 AS DEFINED BY OHIO ADM.CODE 3745-15-01.

[4]. THE TRIAL COURT ERRED BY LIMITING EMISSIONS VIOLATIONS TO THE DATE OF THE NONCONFORMING EMISSIONS TEST RESULTS.

## III. Standard of Review

{¶5} The state contends more than one standard of review is involved on appeal, including error as a matter of law in some of the trial court's rulings and, in other instances, issues invoking a manifest weight of the evidence standard. Shelly similarly acknowledges the issues involved are matters of fact and law. Accordingly, after determining the applicable law, we must assess whether the evidence before the trial

court supports the trial court's decision under that law. In examining the facts, we determine whether some competent, credible evidence going to all the essential elements of the case supports the trial court's decision. If so, we will not reverse the trial court's judgment as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, syllabus.

#### **IV. First Assignment of Error – Potential to Emit**

{¶6} The state's first assignment of error contends the trial court erred when it interpreted "potential to emit" in a manner that fails to reflect applicable law. The state's first assignment of error thus concerns the method of calculating an air pollution source's potential emissions, a calculation that forms part of the permitting process.

##### **A. The Law**

{¶7} The primary purpose of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. 7401(B)(1). To achieve these goals, Congress instructed the United States Environmental Protection Agency ("USEPA") to develop limits on various pollutants, known as National Ambient Air Quality Standards ("air quality standards"). 42 U.S.C. 7409. The Clean Air Act requires states to create plans, known as "state implementation plans," ("state plan") to implement, maintain and enhance the air quality standards. 42 U.S.C. 7410(a)(1). A state plan is charged with bringing areas into attainment with the air quality standards. (Tr. 63.) Once the USEPA has approved a state's plan, the state is authorized to administer it. (Tr. 61-64.) The USEPA approves a state plan if it is both adopted after reasonable notice and hearing

and is substantively adequate to attain and maintain air quality standards. 42 U.S.C. 7410(a)(2).

### **B. Types of Permits**

{¶8} In accord with federal parameters, R.C. 3704.03(E) creates a system where regulated entities may apply for a permit to discharge air pollutants. Once a permit is received, the owners or operators of the air pollution source are required to self-report on a regular schedule pursuant to the permit terms. Although the pertinent law changed beginning June 30, 2008, the law applicable to the facts here separated permits for air emissions sources into two categories. One category requires an installation permit, referred to as a permit to install or "PTI," before construction of an air pollution source begins. A PTI contains emission restrictions based on a source's potential to emit. The other is an operating permit, either a Title V permit for larger sources or a permit to operate or "PTO" for smaller sources, that allows operation of a source on an ongoing basis. A Title V permit covers an entire facility and all the air pollution sources at the facility, while a PTO is needed for each individual air pollution source. (Tr. 77-78.)

### **C. The Trial Court's Decision**

{¶9} The state alleged Shelly violated applicable law when its facilities emitted air contaminants without Shelly's first obtaining the necessary PTIs. The trial court recognized the central issue in resolving the state's contentions and determining the appropriate fine was how to define the term "potential to emit." The court noted Ohio Adm.Code 3745-31-01(VVV) defines it as "the *maximum capacity* of an emission unit or stationary source to emit an air pollutant under its physical and operational design."

(Emphasis added.) (Decision at 24.) The trial court, however, aptly recognized a plant may have "physical or operational limitation[s] on the capacity of the emissions unit or stationary source to emit an air pollutant, \* \* \* including air pollution control equipment and *restrictions on hours of operation* or on the type or amount of material combusted, stored or processed \* \* \*." (Emphasis added.) (Decision at 24.)

{¶10} As the trial court noted, "[t]he State focuses on the language 'maximum capacity,' " calculating the "emissions from a source by assuming that the source is being operated 24 hours a day, 365 days a year." (Decision at 24.) "Conversely," the court stated, "Shelly makes the same calculation by using the number of hours that source is operating. These restrictions on hours of operation are included in the various permit applications, the purpose of which is to avoid the Title V threshold." (Decision at 24.) The trial court acknowledged the state would respond "that until the operating permit with the restricted hours of operation is approved, the [potential to emit] must be calculated assuming operation is 24 hours per day, 365 days a year." (Decision at 24.) The trial court decided that "[i]f the State's conclusion regarding the formula for calculating [potential to emit] is correct, then by definition, most if not all of the Fifth Claim must be decided for the State." (Decision at 24.)

{¶11} Determining the definition of potential to emit in 40 C.F.R. 52.21(b)(4) is the same as Ohio law, the trial court applied it to this case, noting both parties utilized the same formula to calculate potential to emit. As the court recognized, resolution of the parties' differences lies in whether limitation in operations may be incorporated into the PTI formula or whether, absent limits that are only federally enforceable, potential to

emit must be calculated at worst case conditions, which is operating at 24 hours per day, 365 days per year or 8,760 hours per year.

{¶12} Relying on *Alabama Power Co. v. Costle* (C.A.D.C., 1979), 636 F.2d 323, and *United States v. Louisiana-Pacific Corp.* (D.Colo., 1988), 682 F.Supp. 1141, to interpret the phrase "potential to emit" under the Clean Air Act, the trial court determined potential to emit contemplates the maximum emission that can be generated operating the source as it was intended to be operated. The trial court concluded the state's assumption that Shelly operated any of its plants or generators 24 hours a day, 365 days per year defied common sense.

{¶13} In *Alabama Power*, industry groups disputed the USEPA's 1978 regulations that targeted Prevention of Significant Deterioration of air quality in "clean air areas," challenging the USEPA's interpretation of "potential to emit." At that time, the USEPA defined "potential to emit" as "the projected emissions of a source when operating at full capacity, with the projection increased by hypothesizing the absence of air pollution control equipment designed into the source." *Alabama Power* at 353. After examining the statutory language and the legislative history of section 169 of the Clean Air Act, the court determined the USEPA should calculate potential to emit using a facility's design capacity, which includes a facility's maximum productive capacity and takes into account the anticipated functioning of the air pollution control equipment designed into the facility.

{¶14} In *Louisiana-Pacific*, the USEPA filed a civil enforcement action for violations of regulations dealing with Prevention of Significant Deterioration in air quality standards. The defendant responded with a summary judgment motion that argued the

conditions in the state permits should be considered in determining the potential to emit. According to the defendant, the plants at issue could not be classified as major stationary sources because the conditions set forth in the state permits limited each plant's output to levels well below the threshold levels of a major stationary source. The issue resolved to whether the conditions in the state permit were federally enforceable and should be considered a design limitation for purposes of determining the potential to emit.

{¶15} The district court concluded the state permits did not exist at the time of the alleged violations because, even though a Prevention of Significant Deterioration permit had to be applied for and obtained prior to construction of a stationary source, the defendant commenced construction before the permits were issued. The district court also determined the definition of potential to emit in 52 C.F.R. 52.21(B)(4), at that time, was "the maximum capacity of a stationary source to emit a pollutant under its physical and operational design." In denying summary judgment, the district court determined any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment, restrictions on hours of operation, or on the type or amount of material combusted, stored, or processed, would be treated as part of its design if the limitation or the effect it would have on emissions were federally enforceable, but not to include a blanket restriction on actual emissions. See *United States v. Louisiana-Pacific* (D.Colo., 1987), 682 F.Supp. 1122.

{¶16} After a trial, the district court reiterated that restrictions the state imposed in or pursuant to its state plan were federally enforceable. See *Union Elec. Co. v. E.P.A.* (C.A.8, 1975), 515 F.2d 206, 211, affirmed, 427 U.S. 246; *Friends of the Earth v. Carey*

(C.A.N.Y.1976), 535 F.2d 165, 171, n.6, cert. denied, 434 U.S. 902; *Friends of the Earth v. Potomac Elec. Power Co.* (D.C.D.C.1976), 419 F.Supp. 528, 533. With that premise, the district court held restrictions contained in state permits which limit specific types and amounts of actual emissions are not properly considered in determining a source's potential to emit, but federally enforceable permit provisions that restrict hours of operation or amounts of material combusted or produced are properly included in the calculation.

#### **D. The Appeal**

{¶17} The state on appeal argues the trial court misapplied both *Alabama Power* and *Louisiana-Pacific*. *Alabama Power* found fault with the USEPA's regulations that based potential to emit on "uncontrolled emissions," because the regulations at that time completely discounted the impact air pollution control equipment would have on a source's emissions. After that decision, the state notes, the concept of potential to emit evolved to include pollution control equipment, on which Ohio's EPA based its potential to emit analysis. Similarly, the state argues the trial court incorrectly applied the facts of *Louisiana-Pacific* to the maximum capacity of an emissions source under the potential to emit definition in Ohio Adm.Code 3745-31-01(VVVV), since the *Louisiana-Pacific* potential to emit calculations involved emissions sources that were operated outside of the design specifications. Shelly asserts the court properly applied the cases, both of which validate limitations imposed on the equipment at issue and thus define maximum capacity.

{¶18} Both parties' arguments are correct to some extent. Both appropriately agree the potential to emit is based on maximum capacity; both appropriately agree

limitations on the potential to emit may be considered in determining potential to emit. They, however, disagree about the nature of the limitations properly considered in determining potential to emit.

{¶19} As the trial court properly recognized, potential to emit is defined in Ohio Adm.Code 3745-31-01(VVVV) as "the maximum capacity of an emissions unit or stationary source to emit an air pollutant under its physical and operational design." According to the rule, "[a]ny physical or operational limitation on the capacity of the emissions unit or stationary source to emit an air pollutant, \* \* \* including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored or processed, shall be treated as part of its design" when "the limitation or the effect it would have on emissions is federally enforceable or legally and practicably enforceable by the state. Secondary emissions do not count in determining the potential to emit of a stationary source." See also Ohio Adm.Code 3745-77-01(BB) (defining potential to emit to be substantially similar to Ohio Adm.Code 3745-31-01(VVVV)). An examination of the USEPA's and the courts' struggle over the years to define potential to emit is instructive in resolving the parties' dispute and interpreting Ohio's definition of potential to emit.

{¶20} The USEPA initially defined potential to emit to exclude even emissions-reducing equipment; *Alabama Power* rejected that definition. The USEPA then proposed to define potential to emit to take into account air pollution control equipment, but not operational restraints. When the final version of the regulation was issued in 1980, it provided operational restraints could limit potential to emit, but only if they were federally enforceable or the Administrator could enforce them. 45 Fed.Reg. 52,737.

{¶21} In describing "physical or operational limitation," the regulation referred to (1) air pollution control equipment, (2) restrictions on hours of operation, and (3) restrictions on the type or amount of material combusted, stored, or processed. *Id.* The USEPA provided guidance regarding the regulation, explaining "potential to emit for all sources means the ability at maximum design capacity to emit air pollution, taking into account any *in-place* control equipment." (Emphasis sic.) 45 Fed.Reg. 52688. The USEPA also noted the new definition provided that "specific permit conditions" resulting in "infrequent operation" properly were considered in determining potential to emit. 45 Fed.Reg. 52688-89.

{¶22} The requirement of federal enforceability was deemed necessary to ensure sources "will perform the proper operation and maintenance for the control equipment." 45 Fed.Reg. 52688. Following litigation challenging the rule and subsequent amendments, the final rule, issued in 1989, defined "federal enforceability" limitations as those the administrator could enforce, including state constraints imposed under federally approved plans. See 54 Fed.Reg. 27,274, 27,285-6. As a result of 1990 amendments to the Clean Air Act, the USEPA interpreted potential to emit to require limitations be federally enforceable, meaning "all limitations that are enforceable by the Administrator and citizens under the Act or that are enforceable under other statutes administered by the Administrator." *Natl. Mining Assn. v. United States E.P.A.* (C.A.D.C., 1995), 59 F.3d 1351, quoting 54 Fed.Reg. 12, 433.

{¶23} While the USEPA worked to define potential to emit, the courts considered various versions of the applicable rules. In 1983, the D.C. Circuit Court of Appeals addressed section 120 of the Clean Air Act, as amended in 1977, and the definition of

potential to emit in the USEPA's regulations as it relates to major stationary sources. See 40 C.F.R. 66.3(j); *Duquesne Light Co. v. E.P.A.* (C.A.D.C.1983), 698 F.2d 456. At that time, the regulations defined potential to emit as "the capability at maximum design capacity to emit a pollutant after the application of air pollution control equipment." According to the regulation, annual potential would "be based on the larger of the maximum annual rated capacity of the stationary source assuming continuous operation, or on a projection of actual annual emission." The rule allowed "[e]nforceable permit conditions on the type of materials combusted or processed" to "be used in determining the annual potential." 40 C.F.R. 66.3(k). In *Duquesne*, the court upheld the USEPA's definition of potential to emit, concluding determinations of whether a source is major are not based upon actual emissions from day-to-day operations; but on a source's maximum design capacity.

{¶24} The Seventh Circuit Court of Appeals addressed a related issue in 1990 when the Wisconsin Electric Power Company ("WEPCO") filed suit challenging the USEPA's application of the Clean Air Act and related standards to WEPCO's Port Washington electric power plant. Based upon the increase in emissions, the USEPA concluded WEPCO's proposed renovations to the electric power plant would subject the plant to such standards. WEPCO contended the proposed renovations constituted routine maintenance, repair, and replacement, rendering the standards inapplicable. In determining whether emissions would increase, the USEPA calculated potential to emit assuming continuous operations, because the plant could potentially operate continuously even though it had not done so in the past. The court agreed the USEPA could not reasonably rely on a utility's unenforceable estimates of its annual emissions,

but also concluded the USEPA could not ignore past operating conditions and assume continuous operations when calculating potential to emit. The court ultimately set aside the USEPA's determination that WEPCO's renovations constituted a modification for purposes of Prevention of Significant Deterioration in air quality standards. See *Wisconsin Elec. Power Co. v. Reilly* (C.A.7, 1990), 893 F.2d 901.

{¶25} In an effort to more clearly define potential to emit, the USEPA issued a Guidance Memorandum on January 25, 1995 to clarify what constitutes a federally enforceable constraint on a source's potential to emit ("Seitz Memorandum"). The Seitz Memorandum outlined options a state could employ to allow sources to avoid classification as a major source under Title V and section 112 of the Clean Air Act, but recognized constraints used to limit a source's potential to emit as valid only if the constraint were federally and practicably enforceable. (Seitz Memo at 2.)

{¶26} According to the Seitz Memorandum, "two separate fundamental elements that must be present in all limitations on a source's potential to emit. First, EPA must have a direct right to enforce restrictions and limitations imposed on a source to limit its exposure to Act programs." The "requirement is based both on EPA's general interest in having the power to enforce 'all relevant features of [state plans] that are necessary for attainment and maintenance of [air quality standards] and [Prevention of Significant Deterioration] increments' (see 54 FR 27275, citing 48 FR 38748, August 25, 1983)" and on "the specific goal of using national enforcement to ensure that the requirements of the Act are uniformly implemented throughout the nation (see 54 FR 27277). Second, limitations must be enforceable as a practical matter." (Seitz Memo at 2.) Under the Seitz Memorandum, the USEPA considered a state operating permit

federally enforceable if the program were approved into the state plan, imposed legal obligations to conform to the permit limitations, provided for review and an opportunity for the public's and the USEPA's comment, and ensured no relaxation of otherwise applicable federal requirements. (Seitz Memo at 3.)

{¶27} Meanwhile, the General Electric Company, the National Mining Association and other trade associations challenged the USEPA's 1990 Clean Air Act amendments directed to identifying major sources of hazardous air emissions and subjecting them to stricter emissions controls. *Natl. Mining*. One issue questioned whether the USEPA exceeded its authority in considering only federally enforceable emission controls to calculate the site's potential to emit for purposes of determining whether the site was a major source. *Natl. Mining* held "effective" controls should be taken into account in assessing a source's potential to emit, even if the controls are not federally enforceable, but stated the "EPA clearly is not obliged to take into account controls that are only chimeras and do not really restrain an operator from emitting pollution." *Id.* at 1362. Rather, the controls need to be "demonstrably effective" to be a properly considered limit. *Id.* at 1364. As the court explained, the controls must stem from state or local or federal governmental regulations, not merely "operational restrictions that an owner might voluntarily adopt." *Id.* at 1362. See also *Ogden Projects, Inc. v. New Morgan Landfill Co., Inc.* (E.D.Pa., 1996), 911 F.Supp. 863. See also *Natl. Mining Assn. v. EPA*, No. 95-1006 (D.C.Cir. Jan. 2, 1996) (unpublished order) (denying a motion to enforce a mandate to vacate the USEPA's definition of potential to emit since the *Natl. Mining* court had not vacated the rule).

{¶28} In 1995, the plaintiffs in *Chemical Mfrs. Assn. v. E.P.A.* (C.A.D.C.,1995), 70 F.3d 637 directly challenged the definition of "potential to emit" in the USEPA regulations, where the USEPA defined "potential to emit" to exclude controls and limitations on a source's maximum emissions capacity unless those controls were federally enforceable. *Chemical Mfrs.* vacated the regulations and remanded the case to the USEPA for reconsideration in light of *Natl. Mining*.

{¶29} In response to *Natl. Mining* and *Chemical Mfrs.*, the USEPA in its Interim Policy of Federal Enforceability, effective January 22, 1996, planned to propose rulemaking amendments in the spring of 1996. The USEPA's final rule, issued on December 31, 2002, revised federal regulations governing the New Source Review programs mandated under parts C and D of title I of the Clean Air Act, and while it still included federal enforceability, it also encompassed "legally enforceable."

{¶30} In addressing enforceability, the USEPA stated "[a] requirement is 'legally enforceable' if some authority has the right to enforce the restriction." (EPA Final rule, Dec. 31, 2002, 11-12, 67 FR 80186-01, footnotes omitted.) "Practical enforceability for a source-specific permit will be achieved if the permit's provisions specify: (1) [a] technically-accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation (hourly, daily, monthly, and annual limits such as rolling annual limits); and (3) the method to determine compliance, including appropriate monitoring, recordkeeping, and reporting." *Id.* "For rules and general permits that apply to categories of sources, practicably enforceability additionally requires that the provisions: (1) [i]dentify the types or categories of sources that are covered by the rule; (2) where coverage is optional, provide for notice to the permitting authority of the

source's election to be covered by the rule; and (3) specify the enforcement consequences relevant to the rule." Id. " 'Enforceable as a practical matter' will be achieved if a requirement is both legally and practically enforceable." Id.

{¶31} By contrast, the USEPA defined federal enforceability to mean "that not only is a requirement practically enforceable, as described above, but in addition, 'EPA must have a direct right to enforce restrictions and limitations imposed on a source to limit its exposure to [Clean Air] Act programs.'" Id. The USEPA, however, acknowledged "that, for computing baseline actual emissions for use in determining major [New Source Review] applicability or for establishing a [plantwide applicability limitation]," the requirements of "legally enforceable" must be considered. Id.

{¶32} "Federally enforceable" is also defined in Ohio Adm.Code 3745-31-01(QQ) and "means all limitations and conditions" the administrator of the USEPA can enforce, "including those requirements developed pursuant to 40 CFR Parts 60, 61 and 63, requirements within the [state] plan that implements the requirements of the Clean Air Act," as well as "any permit requirements designated as federally enforceable established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Part 51, Subpart I." Among those included in the latter category are "operating permit requirements designated as federally enforceable issued under an United States environmental protection agency-approved program that is incorporated into the [state] plan and expressly requires adherence to any permit issued under such program."

{¶33} In light of the history of attempts to define potential to emit, coupled with the definition of potential to emit in the Ohio Administrative Code, the state's contention that any limitations must be federally enforceable is not correct; the administrative code

provisions include both "federally enforceable" or "legally and practicably enforceable by the state." See Ohio Adm.Code 3745-77-01(DD) .and 3745-77-01(BB). The remaining issue is whether a source owner's self-imposed limits, placed in a permit application, are acceptable limits for determining potential to emit.

{¶34} Although the limits do not have to be federally enforceable, the limits must stem from a state, local or federal governmental regulation and not merely "operational restrictions that an owner might voluntarily adopt." *Natl. Mining*, 59 F.3d at 1362 (noting the limitations cannot be "chimeras"). *WEPCO*, supra (stating the USEPA cannot reasonably rely on a company's own unenforceable estimates of its annual emissions). Similarly, *Louisiana-Pacific* does not dictate the source to be tested as it would be used. Rather, *Louisiana-Pacific* held the potential to emit regulations require a source to be tested and operated as it was designed to be operated, with its air pollution control equipment, at maximum capacity throughout the test.

{¶35} If limits on a potential to emit are not federally enforceable, the administrative code provisions require the state to be able to legally and practicably enforce the limits. Accordingly, the limitation must be one an authority has the right to enforce, must be technically accurate, and must specify a time period and compliance method. The administrative definition of potential to emit and the court interpretations of it require an element of agency enforceability; an owner's voluntary restriction is insufficient. Even if the potential to emit can be calculated based on past operating conditions for a PTO, as in *WEPCO*, no past operating conditions exist for a PTI because the permit is applied for before construction of a source begins. In that case, maximum capacity must be 8,760 hours because no enforceable limits are yet in place,

unless the source has air pollution control that may be treated as part of the design. See *Alabama Power*, Ohio Adm.Code 3745-31-01(VVV).

{¶36} In light of the historical underpinnings in defining potential to emit, Shelly's argument to some extent mixes the concepts of actual emissions with that of potential to emit, or at least potential actual emissions. While PTIs address the potential to emit and control operation of the source, a PTO addresses actual operation of the source. Shelly presented evidence it applied for PTOs that the Ohio EPA failed to either grant or deny.

{¶37} According to Ohio Adm.Code 3745-31-06 and R.C. 3704.034, the Ohio EPA must issue or deny a PTI or PTO within 180 days after determining that an application is complete. The Ohio EPA has not always acted timely upon the applications. Robert Hodanbosi, the chief of Ohio EPA's Division of Air Pollution Control testified that for a long period of time, the PTO program was a "low priority" for the Ohio EPA and the Ohio EPA was "backlogged" with permit applications for years. (Tr. 1597-98.) For example, the parties stipulated that Shelly applied for a PTO for Plant 24 on March 17, 2004, within months of its PTI being issued, and the Ohio EPA has never acted upon the application. See Stip. 24aa and 24cc. The fact that the Ohio EPA has not acted upon applications should not be held against an owner or operator. After the 180-day deadline has passed, the burden falls upon the Ohio EPA to perform its obligation under law; an owner cannot be penalized for the Ohio EPA's failure. Nonetheless, evidence before the trial court suggested sources do not aggressively pursue PTOs because PTIs set the boundaries of legal operation of the source. Indeed, 2008 amendments to the environmental laws eliminated PTOs.

{¶38} In any event, the state sued Shelly for violations of Ohio's permit statutes and regulations. Although Shelly raised the issue of PTOs in the trial court, it did not argue the requested PTOs would vary the terms of its PTI applications on which the state premises its complaint, possibly explaining Shelly's decision not to pursue more vigorously issuance of the requested PTOs. Nor does Shelly point to statute, regulations or case law that suggests a PTI does not set continuing required limitations for operating a source in compliance with environmental law. While the Ohio EPA's delays on Shelly's requested PTOs cannot be condoned, Shelly failed to present a basis to conclude the delay prejudiced it.

{¶39} In the final analysis, a source's potential to emit must be based on maximum design capacity in accord with Ohio Adm.Code 3745-31-01(VVV). See *Alabama Power* (noting an emitting facility is "major" within the meaning of section 169, only if it either (1) actually emits the specified annual tonnage of any air pollutant, or (2) has the potential, when operating at full design capacity, to emit that statutory amount). *Id.* at 353; *Duquesne* at 474 (stating, "[t]he very term itself-'potential to emit'-is clear indication that Congress did not intend determinations of whether a source is 'major' to be based on actual emissions in day-to-day operations"). See also CDR 7-1000-1112 (specifying " 'Potential to Emit' means the maximum capacity of a stationary source to emit nitrogen oxides under its physical and operational design and maximum operating hours (8760 hours/year) before add-on controls" so that "[a]ny physical or operational limitation on the capacity of the source to emit nitrogen oxides before add-on controls, such as restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design, if the limitation

or effect it would have on emissions is state and federally enforceable"); N.J.A.C. 7:27-16.1.

{¶40} Accordingly, the state errs to the extent it suggests any design limitation on the potential to emit must be federally enforceable. Ohio Adm.Code 3745-31-01(VVV) permits other terms of enforceability. Similarly, Shelly errs to the extent it contends the potential to emit may be determined based on voluntary restrictions a source owner places on the source's hours of operation that fall outside the design capacity as defined in Ohio Adm.Code 3745-31-01(VVV). Because the trial court, in adopting Shelly's argument, allowed Shelly to use limits to determine its potential to emit that were not federally enforceable or legally and practicably enforceable by the state, we sustain the state's first assignment of error to the extent indicated and remand this matter to the trial court to recalculate potential to emit and reconsider, consistent with R.C. 3704.06, the fourth, fifth, and sixth claims for relief regarding liability and civil penalties.

#### **V. Second Assignment of Error – Fugitive Emissions**

{¶41} The state's second assignment of error contends the trial court erred in concluding the sources of the fugitive emissions from Shelly's Plant 24 were installed at a time that exempted them from complying with Ohio Adm.Code 3745-31-02(A)'s requirement for a PTI.

{¶42} R.C. 3704.05(A) provides that no person shall cause, permit, or allow emission of an air contaminant in violation of any rule the director of environmental protection adopts. Ohio Adm.Code 3745-31-02(A) provides "no person shall cause, permit, or allow the installation of a new source of air pollutant without first applying for

and obtaining a Permit to Install from Ohio EPA" unless an exemption pursuant to Ohio Adm.Code 3745-31-03 applies. Although Plant 24 had 11 emissions sources, at issue are only the fugitive emissions. Ohio Adm.Code 3745-31-01(SS) defines "fugitive emissions" as "those emissions that cannot reasonably pass through a stack, chimney, vent or other functionally equivalent opening." The specific operations, property, or equipment constituting the fugitive emissions units ("F-sources") at Plant 24 were (1) F004, material unloading, (2) F005, stone crushing, (3) F006, crushed stone screenings, (4) F007, conveying and handling crushed stone, (5) F008, storage pile load-in and load-out, and (6) F009, material loading. (State's Ex. 347.)

{¶43} Ohio Adm.Code 3745-31-01(UUU) declared an effective date of January 1, 1974 for Ohio's PTI program. Sources installed and operating before that date are called existing sources and are exempt from the required PTI, unless the sources were modified; an existing source would need only a PTO. The parties stipulated Shelly operated Plant 24, a hot mix asphalt plant, but not the F-sources, pursuant to a July 10, 1981 PTI and renewal PTOs issued beginning in 1987. Shelly first applied for a PTI for the F-sources at the quarry on June 22, 2000.

{¶44} The complaint alleges that because Shelly installed the F-sources on April 1, 1997 and the PTI was issued on September 21, 2000, Shelly operated those sources of air pollutants without the required PTIs during the interim. The state on appeal contends that since the parties stipulated Plant 24's F-sources began their operation in 1974, a date necessarily after the January 1, 1974 effective date of the PTI rules, the record does not support the trial court's factual determination that the F-sources are exempt.

{¶45} Shelly submitted a PTI modification application form on June 22, 2000 identifying "commence construction date (month/year)" as "1974." (State's Ex. 348; Stip. 24q.) Shelly's vice president, Larry Shively, testified Plant 24's F-sources existed and were constructed "probably back in the 1970s" but the Ohio EPA did not tell Shelly a PTI was necessary. According to Shively, Shelly applied for the F-source PTI in 2000, despite the pre-existing F-sources, because the F-sources were a "gray area." (Tr. 1676.) Shively explained that, although "the asphalt plant uses the roadways and uses the stockpiles to manufacture the hot mix asphalt \* \* \* they're part of the aggregate operation. So how and when it actually becomes the asphalt plant's responsibility has somewhat been a little bit confusing for the industry. So we felt to be safe and to cover all bases that we would file it with our plant." (Tr. 1676.)

{¶46} Shively's testimony does not support the trial court's finding. Although Shively stated the F-sources came into being "probably back in the 1970's," his testimony lacks sufficient specificity to establish a start-up date before January 1, 1974. *Buckeye Forest Council v. Div. of Mineral Resources Mgt.*, 7th Dist. No. 01 BA 18, 2002-Ohio-3010, ¶11, citing *State ex rel. Natl. Broadcasting Co., Inc. v. Cleveland* (1988), 38 Ohio St.3d 79, 83 (noting "[t]he general rule is that the party asserting a statutory exemption is required to prove the facts warranting application of the exception"). Indeed, due to the ambiguity of his testimony, speculation would be required to ascertain a pre-1974 startup date, especially in light of the remaining evidence that includes Shelly's application form to which the parties stipulated. See State's Ex. 348; Stip. 24q, r. (stating the "commence construction date" was "1974" and the "Initial Startup Date" was "1974," not December 31, 1973). Because the only

evidence, apart from Shively's testimony, indicates the F-sources were installed and operating in 1974, after the effective date of the PTI requirements, the trial court erred in concluding the F-sources were exempt from PTI requirements.

{¶47} The evidence regarding modifications between 1974 and 2000 is less than clear, but suggests a possible modification date of 1996. See 2000 PTI Application (noting a "Most Recent Modification Date of 1996 for new plf"). The 2000 application does not identify any further modifications, and the trial court concluded any modifications were to the plant, not the F-sources. Given the uncertainty of the evidence, we cannot say those findings are against the manifest weight of the evidence.

{¶48} Accordingly, Shelly was required to have a PTI for the F-sources at Plant 24 because it was not exempt as existing prior to the PTI requirements. The Ohio EPA issued a PTI for the F-sources at Plant 24 on September 21, 2000. Stip. 24u; State's Ex. 347. The complaint, at paragraph 179, states the F-sources were installed on April 1, 1997, even though no evidence supports such an installation date. Nonetheless, because the trial court advised it would not allow the complaint to be amended to conform to the evidence, the state may not seek penalties back to 1974 but are limited to the installation date alleged in the complaint. As a result, even though the state demonstrated Shelly operated the six F-sources in violation of Ohio Adm.Code 3745-31-02(A) by operating without a PTI from 1974, the state's complaint, coupled with the trial court's ruling on complaint amendments, means the date for computation of damages begins with the installation date set forth in the complaint and runs until September 21, 2000, the date a PTI was issued. Accordingly, we remand this matter to the trial court with instructions to enter judgment in the state's favor and award civil

penalties for the number of days that each of the six F-sources violated Ohio Adm.Code 3745-31-02(A) from April 1, 1997 to September 21, 2000. The state's second assignment of error is sustained.

#### **VI. Third Assignment of Error – Operation of Plant 40**

{¶49} The state's third assignment of error contends the trial court erred in determining Shelly did not violate Ohio's PTI rules at Plant 40, since Shelly was an "operator" of the fugitive emissions sources at that plant. See Ohio Adm.Code 3745-15-01(defining "operator").

{¶50} Plant 40, located in Greenfield, Ohio in Highland County, just northeast of Cincinnati, was a 250-ton per hour hot mix asphalt plant. (Stip. 40a and 40b; Tr. 989-990.) The state alleged Shelly operated a source of air contaminants without a PTI for four emissions sources consisting of P901, a 250-ton per hour asphalt plant and three F-sources of particulate matter: F001, roadways and parking areas, F002, storage piles, and F003, raw material handling. At issue on appeal are the F-sources. As in the second assignment of error, the state alleged Shelly operated the F-sources from installation until July 1, 2003 without a PTI, in violation of Ohio's PTI statutes and regulations. See R.C. 3704.05(A) (providing no person shall cause, permit, or allow emission of an air contaminant in violation of any rule the director of environmental protection adopts) and Ohio Adm.Code 3745-31-02(A) (providing "no person shall cause, permit, or allow the installation of a new source of air pollutant without first applying for and obtaining a Permit to Install from Ohio EPA").

{¶51} For purposes of R.C. 3704.05(A) and Ohio Adm.Code 3745-31-02(A), a "person" is defined in Ohio Adm.Code 3745-15-01(V) as "the state or any agency

thereof, any political subdivision, or any agency thereof, public or private corporation, individual, partnership, or other entity." A "new source" is defined in Ohio Adm.Code 3745-31-01(UUU) as "any air contaminant source for which an *owner or operator* undertakes a continuing program of installation or modification or enters into a binding contractual obligation to undertake and complete, within a reasonable time, a continuing program of installation or modification, after January 1, 1974 and that at the time of installation or modification, would have otherwise been subject to the provisions of this chapter." (Emphasis added.) The trial court concluded Shelly did not maintain the F-sources at the limestone quarry where Plant 40 was located, but instead Martin Marietta owned the quarry and the F-sources, including the roadways and parking areas, storage piles, and raw material handling. With that determination, the trial court ruled in Shelly's favor regarding the F-sources at Plant 40.

{¶52} The state asserts the trial court erred in so ruling because Shelly applied for a PTI for the F-sources on August 18, 2000. (State Ex. 330; Stip. 40g; Tr. 370.) In that application, Shelly represented that it owned, leased, controlled, operated or supervised those air contaminant sources. According to the state, such admissions identify Shelly as an "owner" or "operator," render it bound to comply with the air pollution laws, including Ohio Adm.Code 3745-31-02(A), and make Shelly's operation of the Plant without a PTI a violation of Ohio Adm.Code 3745-31-02(A) and R.C. 3704.05. Shelly responds no evidence reflects it is an owner of the air contaminant sources.

{¶53} The evidence demonstrated Martin Marietta Company owned and operated the limestone quarry; Shelly did not own the quarry. (Tr. 1680.) Shively testified the stockpiles of F-sources "technically did not belong to [Shelly] until [Shelly]

actually went into them and used them in the plant. But again, to be safe, and possibly in case of where the quarry may close, that those piles may have become our property, our material. So we decided to go ahead to be safe and permit them as F sources." (Tr. 1681.) When Shively was asked about the existing roadways at Martin Marietta's quarries and why Shelly applied for a permit for them, he replied, "It was the same thing. It was the one way leading into this site which was shared by the quarry. We felt it was prudent for us to go ahead and submit that. In the event that something would change, it was easier to pull the permit or have it disabled than try to get it later." (Tr. 1681.) Plant 40 no longer is in operation because the aggregate supplier closed the quarry. (Tr. 992.) A PTI was issued July 1, 2003 (Tr. 366, 372; Stip. 40i; State's Ex. 334).

{¶54} The trial court correctly found Shelly was not the owner of the F-sources; Martin Marietta was the owner. Shelly, however, was an operator of the F-sources and applied for a PTI to protect its interests in the event the quarry was closed or some other unforeseen event occurred. Indeed, in its application for a PTI, Shelly represented itself as the owner or operator on August 18, 2000. In any event, Shively's testimony indicated Shelly took ownership of the stockpiles once they were used in the plant and used the other F-source, the road, because it was the only way leading to the site. Shelly at a minimum was an operator with respect to the F-sources and, as an operator, it violated the applicable PTI rule because it operated the F-sources without a permit. The state's third assignment of error is sustained.

#### **VII. Fourth Assignment of Error – Emissions Test Results**

{¶55} The state's fourth assignment of error contends the trial court erred by limiting emissions violations and resulting penalties to the date of the nonconforming

emissions test results. The state alleged Shelly exceeded the air pollution emission limitations as set forth in the PTIs at hot mix asphalt Plants 62, 73, 90, 91, and 95. With the exception of Plant 62, the violations were based upon stack test results that demonstrated the plants emitted air pollutants outside of the allowable permit terms.

{¶56} A stack test is conducted to determine whether a facility is complying with its permit. During a stack test, the source is operated at maximum capacity in order to allow a direct estimation of the amount and types of air pollutants being released. In the event of a failed stack test, a facility must conduct another stack test that meets the emissions standards in order to demonstrate compliance. The overall purpose of the air permitting rules is to maintain clean air, and the penalty is designed to encourage compliance in a timely manner. Although Plant 62 did not involve a stack test, the parties agreed the plant violated the PTI on two days. (Decision at 45.) As to the other four plants, Shelly stipulated only that the specific emission limits were exceeded during the three hours during which the particular stack tests were performed. (See Stip. 73f; 90bb; 90mm; 91q; 91s.)

{¶57} The trial court found the emissions at the five plants exceeded the allowable limits set forth in the respective permits and thus violated the permit terms and Ohio law. Because Shelly did not dispute that evidence in the trial court, the trial court proceeded to determine both the number of days Shelly should be fined for the violations and the amount of the fines.

{¶58} In that regard, Shelly argued the stack test is a snap test and does not relate to day-to-day operations, so that only the day of the stack test should constitute a violation and warrant a fine. The state, by contrast, asserted the violation continued until

another stack test demonstrated Shelly was complying with the PTI terms. The trial court concluded the stack test does not represent normal operating conditions, considered only the stack test to demonstrate excess emissions, and assessed a fine only for the day of the test, presuming the facility was in compliance on any other day.

{¶59} To determine the penalty amount, the trial court employed the three-step process articulated in *State ex rel. Petro v. Maurer Mobile Home Court, Inc.*, 6th Dist. No. WD-06-053, 2007-Ohio-2262, ¶¶55-61, citing *State ex rel. Brown v. Dayton Malleable, Inc.* (Apr. 21, 1981), 2d Dist. No. 6722, where the trial court followed the civil penalty policy from the USEPA, BNA Environmental Reporter, April 21, 1978, at pages 2011 et seq. According to the policy, Step 1 involves considering all the factors comprising the penalty. Step 1 of the policy requires the assessor to determine and add together the sum appropriate "to redress the harm or risk of harm to public health or the environment" and "to remove the economic benefit gained or to be gained from delayed compliance." *Dayton Malleable*, quoting USEPA BNA Environmental Reporter at 2014. It also includes the sum imposed "as a penalty for violator's degree of recalcitrance, defiance, or indifference to requirements of the law," as well as "the sum appropriate to recover unusual or extraordinary enforcement costs thrust upon the public."

{¶60} Under Step 2, addressing reductions for mitigating factors, the assessor must "[d]etermine and add together sums appropriate for mitigating factors," such as "the sum, if any, to reflect any part of the noncompliance attributable to the government itself," as well as "the sum appropriate to reflect any part of the non-compliance caused by factors completely beyond violator's control (floods, fires, etc.)." *Id.* Step 3, where penalty factors and mitigating reductions are aggregated, requires the assessor to

"[s]ubtract the total reductions of Step 2 from the total penalty of Step 1," the difference being "the minimum civil penalty." *Id.*

{¶61} In determining the penalty, the trial court here determined the violations involved in this claim were more serious than other permit violations because Shelly operated outside the scope of the terms of the permit and released potentially harmful emissions. Accordingly, in the first step the trial court found only the need to determine an amount appropriate to redress the harm or risk of harm to the environment. The trial court concluded no mitigating factors in Step 2 applied. As a result of its considerations, the court applied a fine of \$500 per day. Because Shelly took corrective action, subsequent stack tests demonstrated compliance, and the number of violations was limited, the trial court did not find necessary an additional penalty to deter future violations.

{¶62} The state on appeal argues the trial court's conclusion is inconsistent with the purpose of the emission testing and the statutory scheme under which civil penalties are imposed in environmental cases. To support its argument, the state points out that emissions testing is designed to demonstrate a facility's compliance or, in the event of a failed stack test, noncompliance. After a failed stack test, a facility must demonstrate compliance by conducting another stack test that meets the emissions standards.

{¶63} "Civil penalties can be used as a tool to implement a regulatory program." *State ex rel. Brown v. Howard* (1981), 3 Ohio App.3d 189, 191, citing *United States ex rel. Marcus v. Hess* (1943), 317 U.S. 537, 63 S.Ct. 379, *Oceanic Steam Navigation Co. v. Stranahan* (1909), 214 U.S. 320, 29 S.Ct. 671, affirmed, 214 U.S. 344. Substantial penalties are used as a mechanism to deter conduct contrary to the regulatory program.

Id., citing *United States v. ITT Continental Baking Co.* (1975), 420 U.S. 223, 231-32, 95 S.Ct. 926; *United States v. Atlantic Richfield Co.* (E.D.Pa.1977), 429 F.Supp. 830, affirmed, 573 F.2d 1303; *State ex rel. Brown v. Dayton Malleable, Inc.* (1982), 1 Ohio St.3d 151. In order to be an effective deterrent to violations, civil penalties should be large enough to hurt the offender but not cause bankruptcy. *Howard, supra; Dayton Malleable, supra.* Several factors which should be considered in assessing a penalty to deter future violations include such items as the offender's good or bad faith, the financial gain which accrued to the offender and the environmental harm. *Howard, supra* (citations omitted); *State ex rel. Celebrezze v. Thermal-Tron, Inc.* (1992), 71 Ohio App.3d 11.

{¶64} The Ohio Attorney General sued Thermal-Tron and its president for operating two infectious waste incinerators in violation of Ohio EPA emission standards and the company's PTIs. The PTIs required Thermal-Tron to demonstrate compliance with the given permit emission limits through stack tests. After receiving its PTIs, Thermal-Tron began stack tests. The first was conducted on November 30, 1987; Thermal-Tron failed to demonstrate compliance with the emission limits. Two more stack tests on June 29 and October 12, 1988 also failed to demonstrate compliance. In August 1989, Thermal-Tron successfully completed a stack test. Coupled with the remainder of the Attorney General's trial evidence, the evidence in the aggregate demonstrated Thermal-Tron operated from September 1987 through March 1988 and from September 1988 through February 7, 1989, despite a conditional PTO and three failed stack tests.

{¶65} The court found competent, credible evidence Thermal-Tron was operating in violation of R.C. 3704.05 for an 11-month period and profited \$41,060 in fiscal years 1987 and 1988. As a component of a total \$41,300 fine, the court assessed a penalty of \$19,000, representing the economic benefit realized as a result of an 11-month period of delayed compliance with the regulations. The appellate court reviewing the trial court's penalty found no error. See also *United States v. Hoge Lumber Co.* (N.D. Ohio, May 7, 1997), 1997 U.S. Dist. LEXIS 22359 (applying 42 U.S.C. 7413(e)(2) and concluding "an air pollution plaintiff makes a prima facie showing that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of notice," so that the number of "days of violation shall be presumed to include the date of such notice and each and every day thereafter until the violator establishes that continuous compliance has been achieved," unless "the violator can prove by a preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature").

{¶66} Here, the trial court did not err in assessing the factors in each step. Nonetheless, in determining the number of days each violation existed, the trial court should have concluded the violation continued until the subsequent stack test determined the plant no longer was violating the permit limitations. Indeed, to hold otherwise would allow a violator to continue the harmful conduct at least until the next stack test, knowing no penalty will be imposed for the interim violations. Consistent with the few cases addressing the issue, we conclude the trial court must calculate again, in accordance with this decision, the number of days Shelly violated the applicable PTI

and then impose the fine, in its discretion, as it deems appropriate. The state's fourth assignment of error is sustained.

{¶67} Finally, Shelly filed in this court a motion to strike portions of the state's brief and documents because the state included three new documents and argument not presented during the trial. Because we found the documents as part of our legal research and independently of the state's brief, we deny Shelly's motion.

{¶68} For the foregoing reasons, the state's four assignments of error are sustained to the extent indicated, Shelly's motion to strike is denied, the judgment of the trial court is affirmed in part and reversed in part. This cause is remanded to that court for further proceedings in accordance with law and consistent with this decision.

*Motion denied; judgment affirmed in part  
and reversed in part; cause remanded.*

BROWN and CONNOR, JJ., concur.

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IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO  
CIVIL DIVISION

STATE OF OHIO ex rel.	:	<u>Termination No. 6 by KT</u>
OHIO ATTORNEY GENERAL,	:	
Plaintiff,	:	
v.	:	Case No. 07CVH07-9702
THE SHELLY HOLDING CO.,	:	Judge Schneider
et al.,	:	
Defendants.	:	

DECISION AND JUDGMENT ENTRY

(This is a final and appealable order)

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## GLOSSARY OF ABBREVIATIONS

f of f	Finding of Fact
c of l	Conclusion of Law
stip.	Stipulation
Ex.	Exhibit
Tr.	Transcript

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## INTRODUCTION

The State of Ohio, by and through the Office of the Attorney General, filed suit against The Shelly Holding Company, The Shelly Company, Shelly Materials, Inc., Allied Corporation, Inc., and Stoneco, Inc., (hereinafter collectively referred to as Shelly), seeking both the assessment of civil penalties and injunctive relief. The action was initiated at the request of the Director of the Ohio Environmental Protection Agency and pursuant to R.C. 3704.06(B). R.C. 3704.06 grants the Attorney General the authority to prosecute violations of R.C. 3704.05 and 3704.16. R.C. Chapter 3704 is Ohio's federally approved plan for the implementation, maintenance and enforcement of air-quality standards as required by the federal Clean Air Act, 42 U.S.C. Section 7410.

At the close of plaintiff's case, The Shelly Holding Company and The Shelly Company were dismissed as party-defendants.

The State alleges that Shelly has installed and/or operated facilities that are regulated pursuant to R.C. Chapter 3704 without appropriate permits. The State also alleges that Shelly has operated various facilities in violation of the terms and conditions of applicable air-pollution permits.

This matter was tried to the Court on various days between August 27, 2008 and March 13, 2009. The State's complaint contains 20 claims for relief detailed in 333 paragraphs. The record includes in excess of 1000 Exhibits and 2000 pages of testimony.

The parties have also submitted extensive briefs, together with very detailed proposed findings of fact and conclusions of law. The State has submitted 301 pages of proposed findings of fact and conclusions of law. Shelly's proposed findings of fact and conclusions of law are 112 pages. In addition, the parties have submitted several hundred stipulations. The Court appreciates the parties' efforts in preparing the stipulations. The stipulations were very helpful and demonstrate a high degree of professionalism by counsel.

Shelly admits that each of the remaining defendants is an Ohio corporation with its principal place of business located in Ohio. Shelly Materials, Inc., Allied Corporation and Stoneco Inc., are subsidiaries of The Shelly Company.

In general terms, each of the remaining defendants are engaged in the asphalt, aggregate and road-construction industry. In connection with that business, they operate hot-mix asphalt plants and quarries, which are regulated by the State of Ohio pursuant to R.C. Chapter 3704.

The Court will address its findings of fact and conclusions of law in two parts. The first part shall be limited to the issue of whether a violation exists. The issue of penalties shall be addressed separately only for those claims where the Court makes a finding of a violation. The Court chose this strategy to avoid the possibility of having the amount of the penalty for any particular claim for relief influence the Court's decision

regarding a violation on a subsequent claim for relief. To be fair to both parties the Court believes that the issue of a violation must be separated from the issue of an appropriate penalty.

Shelly claims that because it conducted and submitted a Voluntary Compliance Audit Results Report to Ohio EPA, it is entitled to immunity for the identification of the permitting and compliance issues associated with the hot-mix asphalt plants and portable generators. The voluntary-disclosure report and immunity issue is set forth in R.C. 3745.72. To the extent that it is applicable to this Court's decision, it will be addressed in the penalty phase of this decision.

Finally, the Court will separately address the State's request for injunctive relief.

As a general note the Court has only identified the type and location of each facility in its initial finding of fact as to each facility. The type and location is not repeated.

#### **STATE'S FIRST CLAIM FOR RELIEF**

The State alleges that Shelly installed various sources of air pollution without first obtaining a permit to install (hereinafter referred to as a PTI).

While the permitting process has very strict time requirements, the evidence is clear that the same is not followed. R.C. 3704.03(F) provides that no installation permit shall be issued except in accordance with the requirements and rules adopted pursuant to this Chapter. The director has the power to adopt rules pursuant to R.C. 3704.03(D).

Rules regarding PTI for new sources are set forth in Chapter 3745-31 of the Ohio Administrative Code (O.A.C.) O.A.C. 3745-31-02(A) prohibits the installation or

modification of any new source of an air pollutant without first obtaining a PTL. Time restrictions regarding the application process are set forth in O.A.C. 3745-31-06. Relevant to this cause of action, the director has 180 days to issue or deny a PTL after an application has been filed and determined to be complete. The process by which an application is "determined to be complete" has specific time limits which are not relevant to this Court's determination.

### **Shelly Materials Plant 24**

#### **Findings of Fact**

1. Shelly operated a hot-mix asphalt plant in Ostrander, Ohio. Stip. 24a.
2. On October 26, 1999, Shelly submitted a PTL for a new hot-mix asphalt plant. Stip. 24b and Stip. 24c.
3. The 180 day period to issue or deny a PTL expired on April 24, 2000.
4. Shelly began installation of the new plant on March 15, 2000. Stip. 24d.
5. The installation began 140 days after the application was filed and 40 days before the expiration of the 180 day review period.
6. No evidence was presented that the application was incomplete or returned to Shelly for additional information. There was also no evidence to explain the delay in the issuance of the PTL.
7. The PTL was issued by Ohio EPA on December 16, 2003. Stip. 24e.
8. The PTL was issued 1371 days after installation began.
9. The PTL was issued 1331 days after the expiration of the 180 day review period.

#### **Conclusions of Law**

1. Shelly began installation of a new hot-mix asphalt plant before a PTL was issued.

2. The installation began 40 days before the expiration of the 180 day review period.
3. The PTI was issued 1331 days after the expiration of the 180 day review period.
4. The Court finds for the State.

### Shelly Materials Plant 24 Fugitive Emission Sources (F-Source)

#### Findings of Fact

1. Shelly maintained the following F-Sources at its quarry in Ostrander Ohio: material unloading (F004); stone crushing (F005); crushed-stone screening (F006); crushed-stone conveying (F007); storage pile load-in/out (F008); material loading (F009). State f of f 176, Shelly f of f 112 and State Ex. 347.
2. Shelly submitted a PTI for the F-Sources on June 22, 2000. Stip. 24p and State Ex. 348.
3. Robert Hodanbosi, Division Chief, Division of Air Pollution Control for Ohio EPA, testified that a source installed and not subsequently modified prior to January 1974 is exempt from the PTI requirements. Hodanbosi Tr. 1593.
4. The F-Sources at the quarry in Ostrander, Ohio, where Plant 24 is located, were constructed in 1974. State f of f 176h, State Ex. 348, Stip. 24q and Stip. 24r.
5. Robert Shively, VP Shelly Company testified that the F-Sources at Plant 24 were in existence prior to the PTI requirements. Shively Tr. 1675-1676.
6. The PTI for Plant 24 F-Sources notes a "Most Recent Modification Date of 1996 for new plt." State Ex. 348.
7. The State did not propose any findings of fact that the F-Sources were modified.
8. The term "modify or modification" is defined in O.A.C. 3745-31-01(QQQ).

9. No evidence was presented that the PTI application for the F-Sources was incomplete or returned to Shelly for additional information. There was also no evidence to explain the delay in the issuance of the PTI.
10. The State issued a final PTI for the F-Sources at Plant 24 on September 21, 2000.  
Stip. 24u.

#### **Conclusions of Law**

1. The F-Sources at Plant 24 existed prior to the PTI requirements.
2. The Court finds for Shelly.

#### **Shelly Materials Plant 24 Asphalt Cement Storage Tanks (T-Source)**

#### **Findings of Fact**

1. Shelly installed and operated two T-Sources (T008 and T009) in connection with the operation of Plant 24. State f of f 176.
2. On October 26, 1999 Shelly submitted a PTI that included the two T-Sources at Plant 24. Stip. 24c.
3. The 180 day period to issue or deny a PTI expired on April 24, 2000.
4. The two T-Sources were installed in April 1999. Stip. 24t, State Ex. 343 & 344.  
(No exact date in April was provided so the Court is using April 15.)
5. The installation began before the PTI was submitted.
6. A PTI which includes the two T-Sources was issued on June 5, 2001. Stip. 24x.
7. No evidence was presented that the PTI application was incomplete or returned to Shelly for additional information. There was also no evidence to explain the delay in the issuance of the PTI.
8. The PTI was issued 791 days after installation began.

9. The PTI was issued 417 days after the expiration of the 180 day review period.

#### **Conclusions of Law**

1. Although a T-Source does not currently require a PTI, the requirements were different at the time the T-Sources were installed.
2. The T-Sources were installed prior to the issuance of a PTI.
3. The installation began 374 days before the expiration of the 180 day review period.
4. The PTI was issued 417 days after the expiration of the 180 day review period.
5. Court finds for the State.

#### **Shelly Materials Plant 40**

#### **Findings of Fact**

1. Shelly operated a drum mix asphalt plant in Greenfield, Ohio. Stip. 40a.
2. On May 24, 2000, Shelly filed a PTI for a replacement hot-mix asphalt plant at Greenfield, Ohio. Stip. 40a.
3. The 180 day period to issue or deny a PTI expired on November 20, 2000.
4. Construction of the new hot-mix asphalt plant began on April 15, 2000. Stip. 40d.
5. No evidence was presented that the application was incomplete or returned to Shelly for additional information. There was also no evidence to explain the delay in the issuance of the PTI.
6. The Ohio EPA issued a final PTI for Plant 40 on July 1, 2003. Stip. 40i.
7. The PTI was issued 1171 days after installation began.
8. The PTI was issued 952 days after the expiration of the 180 day review period.

### **Conclusions of Law**

1. Shelly began construction of its replacement hot-mix asphalt plant before a PTI was issued.
2. The installation began 219 days before the expiration of the 180 day review period.
3. The PTI was issued 952 days after the expiration of the 180 day review period.
4. The Court finds for the State.

### **Shelly Materials Plant 40 Fugitive Emission Sources (F-Source)**

#### **Findings of Fact**

1. Shelly did not maintain the F-Sources at the limestone quarry where Plant 40 was located. Shively Tr. 1860 -1681.
2. Martin Marietta owned the quarry and the F-Sources including roadways and parking areas (F001), storage piles (F002), and raw material handling (F003). Shively Tr. 1680-1681.
3. The State did not propose any findings of fact to contradict the testimony of Mr. Shively.

#### **Conclusions of Law**

1. Shelly did not own the F-Sources at the limestone quarry where Plant 40 was located.
2. The Court finds for Shelly.

### **Shelly Material Plant 65**

#### **Findings of Fact**

1. Shelly operated an asphalt plant in Dresden Ohio. Stip. 65a.

2. The State did not propose any findings of fact or conclusions of law regarding Shelly Plant 65.
3. The parties stipulated that Shelly Plant 65 was installed prior to 1973 and is therefore exempt from the PTI process. Stip. 65d.

#### **Conclusions of Law**

1. The Court finds for Shelly.

#### **Portable Generators**

#### **Findings of Fact**

The Court makes the following findings of fact relative to all portable generators set forth in the State's First Claim for Relief:

1. Shelly operated the portable generators as alleged in paragraph 183 of the complaint.
2. Shelly did not submit a PTI application for any of the portable generators prior to 2003, believing that a PTI was not required. Shelly f of f 176.
3. Shelly received verbal guidance from Ohio EPA employees upon which they relied to conclude that a PTI was not required for a portable generator. Shively Tr. 1792-1793.
4. Shelly neither requested nor received written confirmation from anyone at the Ohio EPA that a PTI was not required for a portable generator. Shively Tr. 1794 - 1795.
5. The Shelly Holding Company commissioned Dine Comply, Inc., to conduct a Voluntary Air Compliance Audit. Shelly Ex. A and Stip. GEN1.

6. The Voluntary Air Compliance Audit, dated March 28, 2003, noted, among other things, a regulatory deficiency because the portable generators were not permitted. Shelly Ex. A, p. 4.
7. The Voluntary Air Compliance Audit was forwarded to the Ohio EPA on April 21, 2003. Shelly Ex. B and Stip. GEN2.
8. The State did not issue a notice of violation for the operation of a portable generator without a permit until after it received the Voluntary Air Compliance Audit. Shively Tr. 1665. The State did not identify in rebuttal any notice of violation for a portable generator that pre-dated the receipt of the Voluntary Air Compliance Audit.
9. Given the size of the portable generators, the frequency of Ohio EPA employees at Shelly facilities, and the conversations Shelly employees had with Ohio EPA employees regarding portable generators, the Court finds that the Ohio EPA knew or should have known that:
  - a. Shelly had portable generators.
  - b. The portable generators were not permitted.
10. There is no evidence that Ohio EPA issued any air permits for portable generators prior to 1999; and from 1999 to 2003, Ohio EPA issued only 7 PTIs for portable generators. Shelly Ex. OO Response to Interrogatory 34.
11. The date of installation on the PTIs for the portable generators are in fact the manufacture date. Shelly does not have the actual dates of installation. Mowery Tr. 1830.

12. Except for the manufacture date stated in the PTIs for the portable generators, the State produced no evidence regarding when the portable generators were first installed.

13. All of the portable generators identified in paragraph 183 of the complaint are now properly permitted. State c of l 185o.

#### **Conclusions of Law**

1. Portable generators are not exempt from the permitting process.
2. Shelly did operate its portable generators without a permit.
3. No evidence has been provided upon which the Court could rely to determine when a specific portable generator was installed. The Court finds that the manufacture date is not relevant.
4. The Court finds for State.

(The apparent conflict between Conclusion of Law No. 3 and 4 will be addressed in the Penalty Phase of this decision.)

#### **STATE'S SECOND CLAIM FOR RELIEF**

In its Second Claim for Relief, the State alleges that a PTI is required before an air-contaminant source is modified. The State further alleges that burning a fuel that is not authorized by an existing PTI constitutes a modification. It is alleged that Shelly received and burned used oil as fuel without first obtaining the required PTI. Shelly does not deny that, in some cases, it stopped using natural gas as a fuel and starting burning used oil before a new PTI was received. Shelly argues that it did not believe that PTI modifications were needed before burning used oil because it was just switching from one liquid fossil fuel to another. Shelly f of f 209.

### **Findings of Fact Common to all Plants as to Second Claim**

1. Switching to used oil as a fuel source from other fuels causes an increase in the amount of pollutants emitted and creates emissions of pollutants not found in natural gas or #2 diesel fuels. State f of f 187f.
2. On-spec used oil that may be permitted is used oil that meets certain criteria. The use of used oil is regulated to control the concentration of numerous contaminants. State f of f 187g.
3. While plants are capable of burning used oil, additional equipment is frequently necessary to assure total combustion, which is good from both an environmental and a safety perspective. Shelly f of f 208.
4. On November 1, 2000, Ohio EPA put Shelly on notice that a permit to install is required prior to any use of waste oil. State Ex. 556.
5. Shelly's employees knew that a permit was necessary in order to burn used oil. Prottegeier Tr. 256.

### **Conclusions of Law Common to all Plants as to Second Claim**

1. The 180 day time period for review set forth and discussed in the First Claim is applicable to the permitting process in the Second Claim.
2. Burning used oil without first acquiring a permit is a violation.

### **Shelly Materials Plant 2**

#### **Findings of Fact**

1. Shelly operated a hot mix asphalt plant in Gallipolis Ohio.
2. On November 5, 2002, Shelly filed a PTI modification to add recycled on-spec used oil (RUO). Stip. 2d.

3. The 180 day period to issue or deny a PTI expired on April 4, 2003.
4. The Ohio EPA never rejected Shelly's PTI modification and issued a draft modified PTI on March 11, 2003. Stip. 2e.
5. Shelly began using RUO on May 22, 2003. Stip. 2f.
6. Ohio EPA issued a final PTI modification for used oil on August 12, 2003. Stip. 2h.
7. Shelly began burning used oil without a final PTI.

#### **Conclusions of Law**

1. Shelly burned RUO without a permit for 111 days at Plant 2.
  2. Each of the 111 days that Shelly burned RUO without a permit was after the expiration of the 180 day review period.
  3. The Court finds for the State.
- 

#### **Shelly Materials Plant 15**

No findings of fact or conclusions of law are necessary as the Court dismissed the Second Claim for Plant 15 in its decision dated October 31, 2008.

#### **Shelly Materials Plant 62**

#### **Findings of Fact**

1. Shelly operated an asphalt batch plant in Lancaster, Ohio.
2. On December 4, 2000 Shelly filed a PTI modification to add recycled on-spec used oil (RUO). Stip. 62d.
3. The 180 day period to issue or deny a PTI expired on June 2, 2001.
4. The Ohio EPA never rejected Shelly's PTI modification.
5. Shelly began using RUO on May 11, 2001. Stip. 62e.

6. Ohio EPA issued a final PTI modification for used oil on July 24, 2001. Stip. 62f.
7. Shelly began burning used oil without a permit 22 days before the 180 days had expired.
8. The PTI was issued 52 days after the expiration of the 180 day review period.

#### **Conclusions of Law**

1. Shelly burned RUO without a permit at Plant 62.
2. Shelly burned RUO without a permit for 22 days before the 180 day review period had expired.
3. Shelly burned RUO without a permit for a total of 74 days.
4. The Court finds for the State.

#### **Shelly Materials Plant 63**

#### **Findings of Fact**

1. Shelly operated a plant in Newark, Ohio.
2. On December 7, 2000 Shelly filed a PTI modification to add recycled on-spec used oil (RUO). Stip. 63e.
3. The 180 day period to issue or deny a PTI expired on June 5, 2001.
4. The Ohio EPA never rejected Shelly's PTI modification.
5. Shelly began using RUO on April 12, 2001. Stip. 63f.
6. Ohio EPA issued a final PTI modification for used oil on July 19, 2001. Stip. 63q.
7. Shelly began burning used oil without a permit 54 days before the 180 days had expired.
8. The PIT was issued 44 days after the expiration of the 180 day review period.

### Conclusions of Law

1. Shelly burned RUO without a permit at Plant 63.
2. Shelly burned RUO without a permit for 54 days before the 180 day review period had expired.
3. Shelly burned RUO without a permit for a total of 98 days.
4. The Court finds for the State

### Shelly Materials Plant 65

#### Findings of Fact

1. On March 20, 2006 Shelly filed for a discretionary exemption to burn RUO from the Ohio EPA. State Ex. 144 and State f of f 188bb.
2. The requested discretionary permit was issued on May 18, 2006. State Ex. 145 and State f of f 188dd.
3. The purpose of the exemption was to allow Shelly to conduct certain tests using RUO at Plant 65. State f of f 188dd.
4. Shelly began burning used oil at Plant 65 on May 11, 2006. Stip. 65j.
5. On July 13, 2006 Shelly requested an extension of the exemption which was granted on July 20, 2006. Stip. 65k and Stip. 65l.
6. Shelly conducted a stack test using RUO on July 25, 2006. State Ex. 148 and State f of f 188gg.
7. Shelly burned used oil at Plant 65 from May 11, 2006 until July 31, 2006. Stip. 65p.
8. There is no evidence contrary to that presented by Ms. Mowery that RUO was not burned at Plant 65 after July 31, 2006. Shelly f of f 271 and Mowery Tr. 1840.

### **Conclusions of Law**

1. Shelly burned RUO at Plant 65 outside the scope of the exemption for 59 days.
2. The Court finds for the State.

### **Shelly Materials Plant 91**

#### **Findings of Fact**

1. Shelly Plant 91 is a portable plant.
2. On December 1, 2000, Shelly filed a PTI modification application to add recycled on-specification used oil (RUO) as a fuel. Stip. 91f.
3. The 180 day period to issue or deny a PTI expired on May 30, 2001.
4. The Ohio EPA never rejected Shelly's PTI modification.
5. Shelly began using RUO on July 1, 2001. Stip. 91h.
6. Ohio EPA issued a final PTI modification for used oil on July 24, 2001. Stip. 91g.
7. Shelly began burning used oil without a permit 23 days before a PTI was issue.
8. The PTI was issued 55 days after the expiration of the 180 day review period.

#### **Conclusions of Law**

1. Shelly burned RUO without a permit.
2. Shelly burned RUO after the expiration of the 180 day review period but 23 days before a permit was issued.
3. The Court finds for the State.

### **Stoneco, Inc., Plant 114**

#### **Findings of Fact**

1. Stoneco, Inc., Plant 114 is a portable facility.

2. On December 11, 2003, Shelly filed a PTI modification to add recycled on-spec used oil. Stip. 114d.
3. The 180 day period to issue or deny a PTI expired on June 9, 2004.
4. The Ohio EPA never rejected Shelly's PTI modification.
5. Shelly began using RUO on September 20, 2004. Stip. 114g.
6. Ohio EPA issued a final PTI modification for used oil on January 18, 2005. Stip. 114h.
7. Shelly began burning used oil without a permit 120 days before a PTI was issue.
8. The PTI was issued 223 days after the expiration of the 180 day review period.

#### **Conclusions of Law**

1. Shelly burned RUO without a permit.
2. Shelly burned RUO after the expiration of the 180 day review period but 120 days before a permit was issued.
3. The Court finds for the State.

#### **Economic-Benefit Analysis**

1. The State's expert testified that Shelly realized \$224,741.00 of economic benefit as a result of burning used oil without a permit. State Ex. 734.
2. The State's expert's testimony was based on Shelly burning used oil without a permit for 1351 days.
3. The Court has found Shelly to have burned used oil without a permit for a total of 485 days.
4. Based on a pro-rated basis, the economic benefit should be adjusted to \$80,680.52.

### STATE'S THIRD CLAIM FOR RELIEF

The State alleges that Shelly operated an air-contaminant source without first applying for and obtaining a Permit to Operate (PTO) from the Ohio EPA. O.A.C. 3745-35-02(A) prohibits the operation of an air-contaminant source without a PTO.

The Court notes that the rules regarding PTOs were changed. Specifically, O.A.C. Chapter 3745-35, regarding PTOs was repealed in 2008. However, the PTO requirements of O.A.C. Chapter 3745-35 were in full force and effect at all times relevant to the State's Third Claim for Relief.

A PTO is an "authorizing and control document issued to implement the requirements of Ohio's air pollution control laws." (This definition is taken from the State's Bench Brief.)

#### Findings of Fact Relevant to all Plants

1. A PTI allows the operation of an air-contaminant source for one year from the date the source commences operation. State f of f 194c, Shelly f of f 305 and Hopkins Tr. P.136.
2. The Director has 60 days from the date an application is received to determine if it is complete and 180 days to issue or deny a PTO after an application has been filed and determined to be complete. R.C. 3704.034.
3. The PTO program received a very low priority from the Ohio EPA and was very backlogged. Hodanbosi Tr. 1597.

#### Shelly Materials Plant 24

##### Findings of Fact

1. A PTI for Plant 24 was issued by the Ohio EPA on December 16, 2003.

2. Shelly applied for a PTO for its asphalt plant at Plant 24 on March 17, 2004. Stip. 24aa.
3. Shelly applied for the PTO within one year of the date the PTI was issued.
4. The Ohio EPA never notified Shelly that that the PTO was incomplete.
5. The Ohio EPA has never acted on Shelly's PTO application. Stip. 24cc.

#### **Conclusions of Law**

1. Shelly did everything it was required to do in order to comply with the PTO requirements.
2. Shelly operated its plant in compliance with the law for one year following the commencement of operation pursuant to the PTL.
3. To find for the State, the Court would have to conclude that Shelly should stop otherwise-permitted activities after a year to wait on the Ohio EPA to act on a program it admits was low priority, backlogged and now terminated.
4. The Court finds for Shelly.

#### **Shelly Materials Plant 24 Fugitive Emission Sources (F-Source)**

#### **Findings of Fact**

1. Shelly maintained the following F-Sources at its quarry in Ostrander, Ohio where Plant 24 is located: material unloading (F004); stone crushing (F005); crushed-stone screening (F006); crushed-stone conveying (F007); storage-pile load-in/out (F008); material loading (F009). State f of f 176, Shelly f of f 112 and State Ex. 347.
2. A PTI for F-Sources at Plant 24 was issued on September 21, 2000. Stip. 24ff.

3. Shelly was required to obtain a PTO for the F-Sources at Plant 24 by September 29, 2003. State f of f 193.
4. The Ohio EPA issued a PTO for the F-Sources at Plant 24 on April 21, 2003. State f of f 194d.

#### **Conclusions of Law**

1. The Ohio EPA issued a PTO for the F-Sources at Plant 24 prior to the required date.
2. The Court finds for Shelly.

#### **Shelly Materials Plant 24 Asphalt Cement Storage Tanks (T-Source)**

#### **Findings of Fact**

1. In connection with the operation of Plant 24, Shelly operated two T-Sources (T008 and T009). State f of f 194e.
2. A PTI for the T-Sources at Plant 24 was issued by the Ohio EPA on June 5, 2001. Stip. 24x.
3. Shelly applied for a PTO for its T-Sources at Plant 24 on June 7, 2001. Stip. 24ee.
4. Shelly applied for the PTO within one year of the date operation commenced pursuant to the PTI.
5. The Ohio EPA never notified Shelly that that the PTO was incomplete.
6. The Ohio EPA has never acted on Shelly's PTO application. Stip. 24cc.
7. A PTO is no longer required for T-Sources. Shelly f of f 334

#### **Conclusions of Law**

1. Shelly did everything it was required to do in order to comply with the PTO requirements.
2. Shelly operated its plant in compliance with the law for one year following the commencement of operation pursuant to the PTI.
3. To find for the State, the Court would have to conclude that Shelly should stop otherwise permitted activities after a year to wait on the Ohio EPA to act on a program it admits was low priority, backlogged and now terminated.
4. The Court finds for Shelly.

**Shelly Materials Plant 40 and Fugitive Emission Sources (F-Source)**

**Findings of Fact**

1. Shelly operated an asphalt plant, known as Plant 40, in Greenfield, Ohio. This plant included the following F-Sources: roadways and parking areas (F001); storage piles (F002); raw-material handling (F003). State of f 197a.
2. On July 1, 2003, Ohio EPA issued a modified PTI for the asphalt plant and the F-Sources at Plant 40. Stip. 40i.
3. On August 5, 2003 Shelly filed a PTO for the asphalt plant and F-Sources at Plant 40. Stip. 40j.
4. Shelly applied for the PTO within one year of the date operation commenced pursuant to a PTI.
5. The Ohio EPA never notified Shelly that the PTO application was incomplete.
6. Plant 40 closed operation in 2006.
7. Ohio EPA never acted on Shelly's PTO application.

### **Conclusions of Law**

1. Shelly did everything it was required to do in order to comply with the PTO requirements.
2. Shelly operated its plant in compliance with the law for one year following the commencement of operation pursuant to the PTL.
3. To find for the State, the Court would have to conclude that Shelly should stop otherwise-permitted activities after a year and wait on the Ohio EPA to act on a program it admits was low priority, backlogged and now terminated for a plant that is no longer in operation.
4. The Court finds for Shelly.

### **Portable Generators**

To the extent that the portable generators in Claim 3 were not dismissed by this Court's decision dated October 31, 2008, the Court adopts the findings of facts and conclusions of law set forth in the First Claim as to portable generators and finds for the State.

### **STATE'S FOURTH CLAIM FOR RELIEF**

The Court did not fully understand the State's Fourth Claim for Relief when it first considered both the State's and Shelly's proposed findings of fact and conclusions of law. In fact the Court did not decide the Fourth Claim until it had already resolved the other claims for relief.

In very general terms the State's Fourth Claim for Relief centers on allegations that Shelly Materials Plant 24 and combined operations of Allied Corp. Plant 12/Shelly Materials Plant 65 with associated generators each had the potential to emit a pollutant

that required a permit that they did not have. The potential to emit calculation that the State used in its attempt to prove that Shelly was operating its facilities without the necessary permit is addressed in detail in this Court's decision regarding the State's Fifth Claim for Relief.

In each case the potential to emit calculation was based on a short term emission rate which was taken from a stack test. The short term emission rate was converted into an annual emission rate assuming the facility was operated 24 hours per day, 365 days per year. These terms and calculation are addressed in detail in this Court's decision regarding the State's Fifth Claim for Relief.

For the reasons stated in this Court's decision as to the State's Fifth Claim for Relief the Court finds for Shelly.

#### **STATE'S FIFTH CLAIM FOR RELIEF**

R.C. 3704.05(k) prohibits the operation of any source required to obtain a Title V permit unless a permit has been issued. A Title V permit must be submitted within one year of becoming a Title V source. The State has approved various alternatives to avoid Title V requirements. One method to "op-out" of Title V requirements is the use of Engineering Guide 61. If the source had actual emissions below 20% of the Title V threshold, it did not have to obtain a Title V permit. The threshold for a Title V permit is a source that has a potential to emit (PTE) of 100 tons per year of a pollutant. The owner/operator of the source is required to keep actual emission records to prove it is below the 20% threshold (20 tons per year) and to notify the Ohio EPA that the owner/operator is claiming non-title V status.

The two central disputes between the parties that are common to all facilities in the State's Fifth Claim for Relief are (1) how to define the term "potential to emit" and (2) whether generators located at a facility count when determining PTE.

Potential to emit is defined in O.A.C. 3745-31-01(VVVV) as follows:

"Potential to emit" means the **maximum capacity** of an emissions unit or stationary source to emit an air pollutant under its physical and operation design. Any physical or operational limitation on the capacity of the emissions unit or stationary source to emit an air pollutant, which includes any federally regulation air pollutant as defined in paragraph (DD) of rule 3745-77-01 of the Administrative Code, including air pollution control equipment and **restrictions on hours of operation** or on the type or amount of material combusted, stored or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable or legally and practicably enforceable by the state. Secondary emissions do not count in determining the potential to emit of a stationary source. (emphasis added)

The State focuses on the language "maximum capacity." Specifically, the State calculates the PTE of emissions from a source by assuming that the source is being operated 24 hours a day, 365 days a year.

Conversely, Shelly makes the same calculation by using the number of hours that the source is operating. These restrictions on hours of operation are included in the various permit applications, the purpose of which is to avoid the Title V threshold.

It would be the State's position that until the operating permit with the restricted hours of operation is approved, the PTE must be calculated assuming operation is 24 hours per day, 365 days a year.

If the State's conclusion regarding the formula for calculating PTE is correct, then by definition most if not all of the Fifth Claim must be decided for the State.

It should be noted that there is no dispute regarding the math or, for that matter, the formula. The real dispute has to do with the hours of operation used when making the calculation. This explains the difference between the State's Exhibit 744 and Shelly's Exhibit 744D.

Both the State and Shelly use the same "short-term" emission rate for nitrogen oxide for each plant and associated generator. As the Court understands the calculation, the "short-term" emission rate is a known amount of a specific pollutant produced by a source in an hour. Using the State's formula, one assumes that the source is operating 24 hours per day, 365 days per year to calculate the PTE, which in turn determines if the source is governed by Title V. If the calculation is made with the restricted hours, as set forth in the permit application, then the source may have satisfied the requirements to be exempt from the Title V requirements.

The State's Exhibit 744, which includes the plant plus the associated generators, establishes that Shelly could be subject to Title V requirements. However, Shelly's Exhibit 744D shows that each plant, even including the portable generators, which Shelly disputes, shows that it is exempt from the Title V requirements.

Before the Court concludes which calculation is correct, it is necessary to decide whether the calculation should include the emissions from the associated portable generators.

Again, it is the State's position that each portable generator is an air-contaminant source. This is not disputed by Shelly. See State f of f 219b. Further, Shelly agrees that with regard to Title V regulations, the threshold is determined for the entire facility and not individual sources. See State f of f 218j and Shively Tr. Vol VIII p. 1725.

Given the fact that the Title V threshold and exemptions to the same are predicated upon the emissions of a regulated pollutant, together with the fact that generators emit regulated pollutants, the Court finds that the generators should have been included when calculating PTE. Shelly's argument that a different conclusion should be reached because emergency generators are excluded is not persuasive.

Nevertheless, the question for the Court remains the calculation of PTE. For the following reasons, the Court does not accept the State's conclusion regarding the calculation of PTE.

The definition of PTE was specifically addressed in *USA v. Louisiana-Pacific Corp.*, 682 F.Supp. 1141 (D. Colo. 1988). The Court interpreted PTE as set forth in 40 C.F.R. Sec. 52.21(b)(4). This Court finds that the definition of PTE as set forth in 40 C.F.R. Sec. 52.21(b)(4) is the same as set forth under Ohio law and therefore applicable to this case.

In the *Louisiana Pacific* case, the EPA brought an action for the violation of the Clean Air Act at two of defendant's plants. At each of the plants, a stationary source that generated regulated pollutants was operated. Emission tests were conducted at each facility, and the results of the tests were used to determine a potential to emit. The test results established a PTE in excess of the "major stationary source" emission levels. The government argued that because the PTE was in excess of the major stationary source limits and that the plants did not have the proper permit based on the PTE, they were in violation of the Clean Air Act.

The case eventually required the Court to consider the term "potential to emit."

The defendants argued that the test results should not be used because the units were not being operated as designed. There is no question that the plants were having difficulty when being tested which produced high levels of emissions which would not have occurred if the plants were operating as intended.

The government argued that the phase PTE turns on the word "potential." Regardless of whether the plant was working as intended, it was working and therefore had the *potential* to emit pollutants at a certain level.

In rejecting the government's argument, the Court began with reference to *Alabama Power Co. v. Costle* 636 F.2d 323 (D.C. Cir 1979). The current rule was promulgated as a result of the Court's decision in *Alabama Power* rejecting the EPA's definition of PTE. "The broad holding of *Alabama Power* is that potential to emit does not refer to the maximum emission that can be generated by a source hypothesizing the worst conceivable operation. Rather, the concept contemplates the maximum emission that can be generated operating the sources as it is intended to be operated and as it is normally operated." *Louisiana-Pacific*, 682 F Supp. at p. 45.

The Court went on to note that it would serve no legitimate purpose to test a source as it was not intended to operate. Rejecting the government's analysis, the Court noted that "common sense would also indicate" that the plant would never be operated as it was tested.

Applying that same reasoning to the case at bar, to assume that one of Shelly's plants and/or generators would be operating twenty-four hours a day, 365 days per year defies "common sense."

In addition, the permit process itself makes the State's conclusion regarding PTE unworkable. As already noted, a Title V permit is required if certain thresholds are reached regarding the emission of a regulated pollutant.

Once it is determined that a source has reached actual emissions that could trigger the Title V requirements, the owner/operator has one year to apply for either a synthetic minor permit or a Federally Enforceable State Operating Permit (FESOP). Approval of either a synthetic minor permit or a FESOP would avoid the need for a Title V permit. The third option would be to apply for a Title V permit. Hodonbosi Tr. pp. 1614 - 1615.

However, if one accepts the State's argument that PTE means 24/7 operation, an applicant would never really have a choice. According to the State, until the Synthetic Minor or FESOP was issued, the source would be subject to Title V because the restricted hours would not apply. The only way to avoid this result would be to apply for two permits (Title V and either a synthetic minor or FESOP) which would defeat the purpose of having two different permits. In addition, Robert Hodanbosi, the Division Chief of the Division of Air Pollution Control for the Ohio EPA, testified that a source would not apply for both permits and the Ohio EPA would not process both applications. Hodanbosi Tr. P. 1602.

The Court will review each portion of the State's Fifth Claim by applying the following:

- a. Emissions from generators located at a source should be included when calculating PTE.
- b. The number of hours used to calculate PTE is as set forth in the calculation submitted by Shelly in Exhibit 744D. The Court specifically rejects the

State's calculation that assumes a source is being operated 24 hours per day,  
365 days per year.

### Shelly Materials Plant 24

#### **Findings of Fact**

1. The State's proposed findings of fact and conclusions of law as to Plant 24 are based on a PTE calculation that assumes a source is being operated 24 hours per day, 365 days per year.
2. The Court has rejected the State's PTE calculation.

#### **Conclusions of Law**

1. The State has the burden of proof.
2. There is no evidence to prove that Plant 24 was an operating source that required a Title V permit.
3. The Court decides for Shelly.
4. To the extent that Plant 24 may have been operating without a permit, this issue was addressed in determining the State's Third Claim.

### Shelly Materials Plant 28

#### **Findings of Fact**

1. Shelly Materials Plant 28 is a portable facility.
2. On June 25, 2002, Shelly filed a FESOP to avoid Title V permit requirements. State f of f 220d and Shelly f of f 482.
3. The application was filed within one year after Shelly concluded that emissions at Plant 28 might require it to file for Title V.

4. The June 25, 2002 application did not include emissions for portable generators AG28-A and AG28-B.
5. Portable generators AG28-A and AG28-B are associated with Plant 28 and should have been included in the June 25, 2002 application.
6. The combined PTE for Plant 28 and generators AG28-A and AG28-B is 54.50 tons/yr NOx. Shelly Ex. 744D.
7. The State's only evidence that Plant 28 and associated generators were being operated in excess of Title V threshold is based on a PTE calculation that the Court has rejected.

#### **Conclusions of Law**

1. There is no evidence that Plant 28 and its associated generators were being operated in excess of the Title V threshold.
2. The Court finds for Shelly.

#### **Shelly Materials Plant 40**

#### **Findings of Fact**

1. The State's proposed findings of fact and conclusions of law as to Plant 40 are based on a PTE calculation that assumes a source is being operated 24 hours per day, 365 days per year.
2. The Court has rejected the State's PTE calculation.

#### **Conclusions of Law**

1. The State has the burden of proof.
2. There is no evidence to prove that Plant 40 was operating as a Title V source.
3. The Court decides for Shelly.

4. To the extent that Plant 40 may have been operating without a permit, this issue was addressed in determining the State's Third Claim.

### Shelly Materials Plant 49

#### **Findings of Fact**

1. Shelly Materials Plant 49 is a portable facility.
2. On June 25, 2002, Shelly filed a FESOP to avoid Title V permit requirements: Stip. 49g and State Ex. 186.
3. The application was filed within one year after Shelly determined that the operation at Plant 49 might exceed the Title V threshold.
4. The June 25, 2002 application did not include emissions for portable generators AG1-A and AG8-B.
5. Portable generators AG1-A and AG8-B are associated with Plant 49 and should have been included in the June 25, 2002 application.
6. The combined PTE for Plant 49 and generators AG1-A and AG8-B is 47.95 tons/yr NOx. Shelly Ex. 744D.
7. The State's only evidence that Plant 49 and associated generators were being operated in violation of Title V threshold is based on a PTE calculation that the Court has rejected.

#### **Conclusions of Law**

1. There is no evidence that Plant 49 and its associated generators were being operated in excess of the Title V threshold.
2. The Court decides for Shelly.

### Shelly Materials Plant 63

#### Findings of Fact

1. Shelly applied for and received Synthetic Minor PTI on May 12, 1999. Shelly f of f 535.
2. Shelly applied for and received a modified Synthetic Minor PTI on July 19, 2001. State Ex. 473.
3. Shelly applied for the Synthetic Minor PTI within one year of concluding that Plant 63 might meet Title V threshold. Shelly f of f 537.
4. The "hot elevator" at Plant 63 was an emission source that was not included in the PTI applications but should have been. State f of f 220v.
5. The State's proposed findings of fact and conclusions of law as to Plant 63 are based on a PTE calculation that assumes a source is being operated 24 hours per day, 365 days per year.
6. The Court has rejected the State's PTE calculation.

#### Conclusions of Law

1. The State has the burden of proof.
2. There is no evidence to prove that Plant 63 was an operating source that required a Title V permit.
3. The Court finds for Shelly.

### Shelly Materials Plant 90 and Plant 95

#### Findings of Fact

1. Shelly operated Plants 90 and 95 in Franklin County Ohio.

2. There is no evidence that Plants 90 and 95 were on "contiguous or adjacent" pieces of property prior to May 31, 2002, when Shelly purchased Columbus Limestone Quarry. The State's evidence that they were contiguous or adjacent comes from the testimony of Todd Scarborough pages 552 – 553:

**Question: "Are they in close proximity to one another?"**

**Answer: "Yes, they are located very close proximity to one another in an area that's basically a large quarry operation."**

There is no testimony about "contiguous or adjacent."

3. Prior to purchasing the quarry, Shelly had filed for and received a separate Synthetic Minor PTI for both plants 90 and 95. Stip. 90j and Stip. 90i.
4. The State's Title V calculations for the separate plants is based a PTE calculation that is not accepted by the Court.
5. There is no evidence that the separate plants, prior to the purchase of the quarry, exceeded the Title V threshold without the use of the PTE calculation used by the State and which has been rejected by this Court.
6. On May 15, 2003, within 12 months of Shelly purchasing the quarry, a Title V application was filed. Stip. 90u and Stip. 90v.
7. The State never acted upon the Title V application. Stip. 90w and Stip. 90x.
8. Plant 95 was moved in 2004, thereby removing the Title V issue.
9. Shelly was billed for Title V fees for Plants 90 and 95 for calendar years 2002 thru 2005. Stip. 90l and Stip. 90q.
10. Shelly paid Title V fees and submitted Title V emission reports for Plants 90 and 95 for the calendar years 2002 through 2005. Stip. 90n and Stip. 90s.

### Conclusions of Law

1. "Contiguous and adjacent" are not synonymous with "close proximity."  
Therefore, there is no evidence that Plants 90 and 95 should be treated as if they were "co-located" prior to the purchase of the quarry by Shelly.
2. Prior to the purchase of the quarry, Plants 90 and 95 had filed for permits that avoided the need to apply for a Title V permit.
3. There is no evidence that prior to the purchase of the quarry that either Plant 90 or 95 had a PTE that would require a Title V permit.
4. After Shelly purchased the quarry and the plants became "co-located," a proper Title V application was filed which was not acted upon by the State.
5. The Court finds for Shelly.

### Shelly Materials Plant 91

#### Findings of Fact

1. Shelly acquired Plant 91 sometime in 1999. Stip. 91b.
2. The exact date of the acquisition was not established.
3. Shelly's letter notifying the Ohio EPA of the acquisition is dated January 19, 1999. State Ex. 485.
4. Shelly maintained records of actual emissions for Plant 91 from 1999 thru 2001. Stip. 91l.
5. Shelly filed for a Synthetic Minor PTI on December 1, 2000. Shelly Ex. P91N and Stip. 91f.
6. The Ohio EPA issued a Synthetic Minor PTI on July 24, 2001. State Ex. 354 and Stip. 91q.

7. The only evidence that Plant 91 had emissions in excess of the Title V threshold was based on a PTE calculation that is not accepted by this Court.

#### **Conclusions of Law**

1. Shelly timely filed for and received a Synthetic Minor permit for Plant 91 and is therefore not required to file for a Title V permit.
2. The Court finds for Shelly.

#### **Shelly Materials Plant 92**

#### **Findings of Fact**

1. Shelly operated Plant 92 in Columbus Ohio.
2. Shelly acquired Plant 92 in 1999. Stip. 92d.
3. The exact date of the acquisition was not established.
4. Shelly's letter notifying the Ohio EPA of the acquisition is dated May 12, 1999.

Shelly Ex. D.

4. Shelly filed for a synthetic Minor PTI on August 16, 1999. Stip. 92e.
5. The Ohio EPA issued a Synthetic Minor PTI on April 25, 2006. Stip. 92k.
6. There is no evidence that either the PTI or the PTO applications were incomplete.

#### **Conclusions of Law**

1. Shelly timely filed for and received a Synthetic Minor permit for Plant 92.
2. Shelly is not required to file for a Title V permit.
3. The Court finds for Shelly.

#### **Shelly Materials Plant #94 (Old)**

#### **Findings of Fact**

1. Shelly operated Plant 94 in Reynoldsburg Ohio.

2. Shelly owned and operated Plant 94, formerly known as United Asphalt Plant 10. Stip. 94a.
3. Plant 94 was operated pursuant to a PTI issued on June 29, 1983, and a PTO issued June 23, 1998. Stip. 94a, Stip. 94f, State Ex. 367 and Shelly Ex. 94D.
4. The State claims that the PTI issued for Plant 94 does not contain any federally enforceable restrictions. (State f of f 220zz). However, both the PTI (State Ex. 367 and the PTO (Shelly Ex. 94D) limit the hours of operation to "not more than 10 hours per day, 6 days per week, 32 weeks per year."
5. A stack test was conducted at Plant 94 on October 30, 2001. Scarborough Tr. pg. 541, State f of f 220aa and State Ex. 375.
6. There is no reliable evidence to conclude that Title V threshold was reached prior to the October 30, 2001 stack test.
7. Using the stack test and the hourly restriction of the PTI and PTO, the PTE for Plant 94 was below the Title V threshold.
8. Shelly submitted a Synthetic Minor PTI. Stip. 94i.

#### **Conclusions of Law**

1. There is no evidence that Plant 94 was operated so as to require a Title V permit.
2. The Court finds for Shelly.

#### **Allied Corp. Plant 3 and Generators**

#### **Findings of Fact**

1. Applied Corp. Plant 3 is a portable facility.
2. On June 25, 2002, Shelly filed a FESOP to avoid Title V permit requirements. Stip. 3i.

3. The application was filed within one year after Shelly concluded that emissions at Plant 3 might require it to file for Title V.
4. The June 25, 2002 application did not include emissions for portable generators AG3-A or AG3-B.
5. Portable generators AG3-A and AG3-B are associated with Plant 3 and should have been included in the June 25, 2002 application.
6. The combined PTE for Plant 3 and generators AG3-A and AG3-B is 52.34 tons/yr NOx. Shelly Ex. 744D.
7. The State's only evidence that Plant 3 and associated generators were being operated in excess of Title V threshold is based on a PTE calculation that the Court has rejected.

#### **Conclusions of Law**

1. There is no evidence that Plant 3 and its associated generators were being operated in excess of the Title V threshold.
2. The Court finds for Shelly.

#### **Allied Corp. Plant 5 and Generators**

#### **Findings of Fact**

1. Allied Corp. Plant 5 is a portable facility.
2. On June 25, 2002, Shelly filed a FESOP to avoid Title V permit requirements. Stip. 5f.
3. The application was filed within one year after Shelly concluded that emissions at Plant 5 might require it to file for Title V.

4. The June 25, 2002 application did not include emissions for portable generators AG5-A and AG5-B.
5. Portable generators AG5-A and AG5-B are associated with Plant 5 and should have been included in the June 25, 2002 application.
6. The combined PTE for Plant 5 and generators AG5-A and AG5-B is 50.28 tons/yr NOx. Shelly Ex. 744D.
7. The State's only evidence that Plant 5 and associated generators were being operated in excess of Title V threshold is based on a PTE calculation that the Court has rejected.

#### **Conclusions of Law**

1. There is no evidence that Plant 5 and its associated generators were being operated in excess of the Title V threshold.
2. The Court finds for Shelly.

#### **Allied Corp. Plant 9 and Generators**

#### **Findings of Fact**

1. Allied Corp. Plant 9 is a portable facility.
2. On June 25, 2002, Shelly filed a FESOP to avoid Title V permit requirements.  
Stip. 9h.
3. The application was filed within one year after Shelly concluded that emissions at Plant 9 might require it to file for Title V.
4. The June 25, 2002 application did not include emissions for portable generators AG9-A and AG9-B.

5. Portable generators AG9-A and AG9-B are associated with Plant 9 and should have been included in the June 25, 2002 application.
6. The combined PTE for Plant 9 and generators AG9-A and AG9-B is 52.01 tons/yr NOx. Shelly Ex. 744D.
7. The State's only evidence that Plant 9 and associated generators were being operated in excess of Title V threshold is based on a PTE calculation that the Court has rejected.

#### **Conclusions of Law**

1. There is no evidence that Plant 9 and its associated generators were being operated in excess of the Title V threshold.
2. The Court finds for Shelly.

#### **Shelly Materials Plant 65/Allied Corp. Plant 12 and Generators**

#### **Finds of Fact**

1. Allied Corp. Plant 12 is a portable asphalt plant that is located on the same quarry as Shelly Materials Plant 65. Stip. 65q.
2. On June 26, 2002, Shelly filed a FESOP PTO to avoid Title V permit requirements for Allied Corp Plant 12. Stip. 65r.
3. On June 25, 2002, Shelly filed a FESOP PTO to avoid Title V permit requirements for Shelly Materials Plant 65. Stip. 65kk.
4. Neither the application for Allied Corp. Plant 12 nor the application for Shelly Materials Plant 65 included emissions for portable generators AG1-A, AG12A or AG12B.

5. Portable generators AG1-A, AG12A and AG12B are associated with Plants 12 and 65 and should have been included in the FESOP PTO applications.
6. The combined PTE for Plants 12 and 65, together with generators AG1-A, AG12A and AG12B, is 91.33 tons/yr. NOx. Shelly Ex. 744D.
7. The State's only evidence that Plants 12 and 65 and the associated generators were being operated in excess of Title V threshold is based on a PTE calculation that the Court has rejected.

#### **Conclusions of Law**

1. There is no evidence that Plants 12 and 65 and the associated generators were being operated in excess of the Title V threshold.
2. The Court finds for Shelly.

#### **Allied Corp. Generator 21.0012**

#### **Findings of Fact**

1. Allied Corp. Generator 21.0012 aka AG16-B is a source of emission which requires a permit. (See Findings of Fact and Conclusions of Law for First Claim.)
2. On September 8, 2004, Shelly filed for a synthetic minor PTI and PTO for Generator 21.0012. Stip. 21.0012c.
3. On June 16, 2005, the Ohio EPA issued a synthetic minor PTI for Generator 21.0012. Stip. 21.0012f.
4. The State's only evidence that Generator 21.0012 was being operated in excess of Title V threshold is based on a PTE calculation that the Court has rejected.

### Conclusions of Law

1. There is no evidence that Generator 21.0012 was being operated in excess of the Title V threshold.
2. The Court finds for Shelly.

### Allied Corp. Generator 21.0013

#### Findings of Fact

1. Allied Corp. Generator 21.0013 aka AG14-B is a source of emission which requires a permit. (See Findings of Fact and Conclusions of Law for First Claim)
2. On September 8, 2004, Shelly filed for a synthetic minor PTI and PTO for Generator 21.0013. Stip. 21.0013c.
3. On January 6, 2005, the Ohio EPA issued a synthetic minor PTI for Generator 21.0013. Stip. 21.0013f.
4. The State's only evidence that Generator 21.0013 was being operated in excess of Title V threshold is based on a PTE calculation that the Court has rejected.

#### Conclusions of Law

1. There is no evidence that Generator 21.0013 was being operated in excess of the Title V threshold.
2. The Court finds for Shelly.

### STATE'S SIXTH CLAIM FOR RELIEF

The Title V permit program requires that a Fee Emission Report be filed annually for each air-contaminant source that is subject to Title V. Fees are assessed based on the amount of actual emissions. In its Sixth Claim for Relief, the State alleges that Shelly failed to file the emission reports as required by the Title V permit program.

It is the State's claim that all of the facilities identified in its Sixth Claim for Relief are subject to the Title V permit program.

Shelly Materials Plants 24, 28, 40, 49, 63, 90/95, 91, 92, 94 (old) and Allied Corp. Plants 3, 5, 9, 12/Shelly Plant 65

**Findings of Fact**

1. The following plants did not submit Title V Fee Emission reports:

Plant	Stipulation
Shelly Materials Plant	
24	24hh
28	28y
40	40n
49	49y
63	63n
90/95*	90a
91	none
92	92o
94 (old)	94k
Allied Corp. Plant	
3	3aa
5	5o
9	9n
12 (Shelly Materials 65)	65ll, mm

\*This refers only to the time period before Shelly purchased the quarry and Plants 90/95.

2. According to the Court's Findings of Fact and Conclusions of Law for the State's Fifth Claim for Relief, there was insufficient proof to conclude that any of the facilities identified above are subject to the Title V permit requirements.
3. If a facility is a non-Title V facility, it would pay non- Title V fees.
4. Title V fees are based on actual emissions, and non-Title V fees are assessed as a flat rate.

5. No facility is required to pay both Title V fees and non-Title V fees for the same reporting period.
6. The following plants were billed by the State and paid non-Title V fees for the period of the alleged violation in the State's Sixth Claim for Relief:

Plant	Stipulation (unless otherwise noted)
<b>Shelly Materials Plant</b>	
24	24ii
28	28z, aaa
40	40p (covers 1996 – 2003) (State alleges 1995 also)
49	Shively Tr. 1710
63	63k
90/95	90k, p
91	91m
92	92l (covers 1999 – 2001) 92m (covers 1999 – 2005) (State alleges 1996 – 2005)
94 (old)	94l

**Allied Corp. Plant**

3	Shively Tr. 1710
5	5p
9	9s
12 (Shelly 65)	65nn, oo, pp, qq

**Conclusions of Law**

1. None of the facilities set forth above are subject to the Title V permit requirements.
2. Except for the periods noted for Plants 40 and 92, each of the facilities set forth above were billed by the State and paid non-Title V fees.
3. The Court finds for Shelly.



Tr. 1591 -1592. Ms. Mowery testified a stack test is conducted while "operating at worst-case conditions, at high tonnages, the max ton per hour in which typically you don't operate at max ton per hour." Mowrey Tr. 1863.

Shelly does not dispute that on the days of the specific stack tests alleged in the State's Seventh Claim for Relief, the emissions exceed the limits set forth in the permit and that this constitutes a violation. The Court will accept this as a Finding of Fact as to each facility identified in the State's Seventh Claim for Relief.

The real issue is the number of days of a violation. Shelly argues that because a "stack test" is a snap shot that does not relate to day-to-day operations, only the day of the "stack test" should constitute a violation.

The State takes a different position. In each case, except for Plant 62, (for which a "stack test" was not involved and both the State and Shelly agree that there are two days of violation), a subsequent "stack test" demonstrates that Shelly is in compliance. The State argues that each day between the "stack test" demonstrating a violation until the "stack test" demonstrating compliance constitutes a violation. The other exception is for Plants 90/95, where a new PTI was issued with new emission limits. In that case, the State argues that each day between the "stack test" demonstrating a violation until the new PTI was issued constitutes a violation.

Except for the date of the specific "stack test," there is not a specific test result proving that the violation continued. The State wants the Court to infer that the violation continued until Shelly proved that it did not, at the subsequent "stack test." However, the Court just as easily could infer that the second "stack test" was another "snap shot" and that the violation continued. If it is reasonable for the Court to infer that the violation

stopped with the second "stack test," why not infer that the violation ended the day before or the day before that or the day after the first "stack test"?

Simply put the Court does not find the requested inference to be reasonable given the fact that the State has the burden. Further, the Court finds Shelly's argument that a "stack test" does not represent normal operating conditions to be compelling.

Based on the foregoing, the Court will only consider the day of the "stack test" demonstrating excess emission to be evidence of a violation. This finding shall be applicable to each facility in the State's Seventh Claim for Relief.

### **Shelly Materials Plant 62**

#### **Findings of Fact**

1. The PTI for Plant 62 established a visible particulate emission limit from the stack of no more than 10% opacity as a three-minute average. Stip. 62i.
2. Visible emissions at Plant 62 exceed the 10% limitation on June 5, 2006, and June 6, 2006. State of f of f 232a, 233a and State Ex. 560.

#### **Conclusions of Law**

1. Shelly violated the terms of its permit on 2 days.
2. The Court finds for the State.

### **Shelly Materials Plant 63**

#### **Findings of Fact**

1. The PTI for Plant 63 limited the emission of particulate matter to 0.04 grains/dry standard cubic foot. Stip. 63o.
2. A stack test on July 23, 2002, showed that the emissions of the particulate matter exceeded the limitations of the permit. Stip. 63p.

### Conclusions of Law

1. Shelly violated the terms of its permit on 1 day.
2. The Court finds for the State.

### Allied Corp. Plant 73

#### Findings of Fact

1. Applied Corp. Plant 73 is a portable facility.
2. The PTI for Plant 73 limited the emission of particulate matter to 0.03 grains/dry standard cubic foot. Stip. 73e.
3. A stack test on July 27, 2006, showed that the emissions of the particulate matter exceeded the limitations of the permit. Stip. 73f.

(Shelly Finding of Fact 894 states that Plant 73 tested *above* the limit on July 26, 2006.

The Court assumes this was a typo.)

### Conclusions of Law

1. Shelly violated the terms of its permit on 1 day.
2. The Court finds for the State.

### Shelly Materials Plant 90/95

#### Findings of Fact

1. The PTI for Plant 90/95 limited the emission of volatile organic compounds to 15 pounds/hour. Stip. 90ll.
2. A stack test at Plant 90 on May 22, 2002, showed that the emissions of VOCs exceeded the limitations of the permit. State Ex. 682f.
3. A stack test at Plant 90 on December 7, 2001, showed that the emissions of VOCs exceeded the limitations of the permit. State Ex. 682e.

4. A stack test at Plant 90 on July 3, 2002, showed that the emissions of VOCs exceeded the limitations of the permit. Stip. 90bb.
5. A stack test at Plant 95 on August 2, 2002, showed that the emissions of VOCs exceeded the limitations of the permit. Stip. 90mm

#### **Conclusions of Law**

1. Shelly violated the terms of its permit on 4 days.
2. The Court finds for the State.

#### **Shelly Materials Plant 91**

#### **Findings of Fact**

1. The PTI for Plant 91 limited the emission of sulfur dioxide to 40 pounds/hour. Stip. 91o.
2. The PTI for Plant 91 limited the emission of volatile organic compounds to 20 pounds/hour. Stip. 91p.
3. A stack test on August 29, 2002, showed that the emissions of sulfur dioxide exceeded the limitations of the permit. Stip. 91q.
4. A stack test on August 29, 2002, showed that the emissions of VOCs exceeded the limitations of the permit. Stip. 91s.

#### **Conclusions of Law**

1. Shelly violated the terms of its permit two times on 1 day.
2. The Court finds for the State.

## STATE'S EIGHTH CLAIM FOR RELIEF

The State's Eighth Claim for Relief relates to allegations that Shelly operated Plant 24 in violation of the terms and conditions of a permit.

### Shelly Materials Plant 24

#### Findings of Fact

1. The PTI for Plant 24 limits the asphalt production rate to 400,000 tons, based upon a rolling, 12-month production. Stip. 24nn.
2. The rolling 12-month asphalt production at Plant 24 for the period ending October 2005 was 405,979 tons. Stip. 24pp.
3. The rolling 12-month asphalt production at Plant 24 for the period ending November 2005 was 422,926 tons. Stip. 24qq.
4. The rolling 12-month asphalt production at Plant 24 for the period ending April 2006 was 428,115 tons. Stip. 24ss.
5. The rolling 12-month asphalt production at Plant 24 for the period ending May 2006 was 405,798 tons. Stip. 24tt.
6. The State's expert Jonathan Shefftz testified that Shelly realized an economic advantage of \$148,413 by exceeding the rolling 12-month asphalt production limitations. State Ex. 661.
7. Shelly contends that the State's expert also testified that if a different calculation were used the economic advantage would be \$125,772. Shefftz Tr. 1302. The alternate calculation suggested by Shelly uses an average figure for profit per ton that the expert does not accept. Shefftz Tr. 1303.
8. Shelly did not offer any expert testimony to refute the State's expert.

### Conclusions of Law

1. Shelly violated the terms of its permit for Plant 24 by exceeding the rolling 12-month asphalt production for the periods ending October 2005, November 2005, April 2006 and May 2006.
2. Shelly realized an economic advantage of \$148,413 by exceeding the rolling 12-month asphalt production limitations.
3. The Court decides for the State.

### THE STATE'S NINTH CLAIM FOR RELIEF

The State alleges in its Ninth Claim for Relief that Shelly failed to file quarterly reports notifying the Ohio EPA of deviation from operating parameters specified in its PTIs or PTOs or informing Ohio EPA that there were no such deviations. The quarterly reports are due as follows: first quarter reports, covering January through March of each year are due April 30 of that year; second quarter reports covering April through June of each year are due July 31 of that year; third quarter reports covering July through September of each year are due October 31 of that year; and fourth quarter reports covering October through December of each year are due January 31 of the next year.

### Shelly Materials Plant 61

#### Findings of Fact

1. Shelly operated Plant 61 in Pickaway County, Ohio.
2. The State and Shelly agree that Shelly has not submitted quarterly deviation reports for the second and third quarters of calendar year 1999. Stip. 61h, Stip. 61i, State f of f 258a and Shelly f of f 937.

### Conclusions of Law

1. Shelly has failed to file the required deviation reports for the second and third quarters of calendar year 1999 and that the same constitutes a continuing violation.
2. The Court finds for the State.

### Shelly Materials Plant 91

#### Findings of Fact

1. Paragraph 258 of the State's Complaint alleges that Shelly failed to file a deviation report for the third quarter of 2001.
2. The State's Finding of Fact 258b, which applies to Plant 91, references the fourth quarter of 2002.
3. The authority for the State's Finding of Fact 258b is Stip 91x, which also refers to the fourth quarter of 2002.

#### Conclusions of Law

1. The State has not submitted any evidence regarding its allegation that Shelly failed to file a deviation report for the third quarter of 2001.
2. The Court finds for Shelly.

### Allied Corp. Plant 79 and Allied Corp. Generators 21.0293, 21.0299, 21.0008, 21.0010, 21.0011, 21.0012, 21.0013, 21.0015, 21.0020

No Findings of Fact or Conclusions of law are necessary, as the Court dismissed the State's Ninth Claim for Relief as to these facilities in its decision dated October 31, 2008.

**Allied Corp. Generator 21.0028**

**Findings of Fact**

1. The State and Shelly agree that Shelly has not submitted a quarterly deviation reports for the third quarter of calendar year 2005. Stip. 21.0028a, State f of f 258 and Shelly f of f 957.

**Conclusions of Law**

1. Shelly has failed to file the required deviation report for the third quarter of calendar year 2005 and that the same constitutes a continuing violation.
2. The Court finds for the State.

**THE STATE'S TENTH CLAIM FOR RELIEF**

In its Tenth Claim for Relief the State alleges that Shelly failed to submit quarterly reports informing Ohio EPA of any deviation from the terms of its operating permits or informing Ohio EPA that there were no such deviations. The quarterly reports are due as follows: first quarter reports, covering January through March of each year are due April 30 of that year; second quarter reports covering April through June of each year are due July 31 of that year; third quarter reports covering July through September of each year are due October 31 of that year; and fourth quarter reports covering October through December of each year are due January 31 of the next year

**Shelly Materials Plant 63**

**Findings of Fact**

1. Shelly filed a quarterly deviation report for the third quarter of calendar year 2003, which was due on October 31, 2003, on December 15, 2003. The report was 45 days late. Stip. 63u.

2. Shelly filed a quarterly deviation report for the first quarter of calendar year 2004, which was due on April 30, 2004, on May 27, 2004. The report was 27 days late. Stip. 63v.
3. Shelly filed a quarterly deviation report for the second quarter of calendar year 2004, which was due on July 31, 2004, on August 12, 2004. The report was 12 days late. Stip. 63w.

#### **Conclusions of Law**

1. Shelly was a combined 84 days late in filing its required quarterly deviation reports for Plant 63.
2. The Court finds for the State.

#### **Shelly Materials Plant 91**

#### **Findings of Fact**

1. Shelly filed a quarterly deviation report for the first quarter of calendar year 2003, which was due on January 31, 2003, on February 20, 2003. The report was 41 days late. Stip. 91x.

#### **Conclusions of Law**

1. Shelly was 41 days late in filing its required quarterly deviation reports for Plant 91.
2. The Court finds for the State.

#### **Shelly Materials Plant 94 (New) and Allied Corp. Plant 16**

No Findings of Fact or Conclusions of Law are necessary, as the Court dismissed the State's Tenth Claim for Relief as to these facilities in its decision dated October 31, 2008.

## STATE'S ELEVENTH CLAIM FOR RELIEF

In its Eleventh Claim for Relief, the State alleges that Shelly failed to submit semi-annual reports informing Ohio EPA of any deviations from the terms of its operating permits or informing Ohio EPA that there were no such deviations. The semi-annual reports are due as follows: first half reports covering January through June of each year are due on July 31 of that year; and second half reports covering July through December of each year are due on January 31 of the following year.

### Allied Corp. Plant 3

No Findings of Fact or Conclusions of Law are necessary, as the Court dismissed the State's Eleventh Claim for Relief as to this facility in its decision dated October 31, 2008.

### Shelly Materials Plant 80

#### Findings of Fact

1. Shelly Materials Plant 80 is a portable facility.
2. The semi-annual report for the second half of 2004 was to be filed by January 31, 2005.
3. The State alleges that the report was never filed. State f of f 266b.
4. The State's witness, Kimbra Reinbold testified that she was "not able" to locate the semi-annual report. Reinbold Tr. 1063.
5. Shelly Materials Plant 95 later became known as Shelly Materials Plant 80. Stip. 80-11b.

6. Shelly's witness Beth Mowrey testified that Shelly's fourth quarter report for Shelly Materials Plant 95 included the data for the semi-annual report. Mowrey Tr. 1871.
7. Shelly's fourth quarter report for Shelly Materials Plant 95 was introduced into evidence as Defendant's Exhibit PG10 dated January 28, 2005.
8. On cross-examination, the State never challenged Ms. Mowrey's testimony regarding this issue.

#### **Conclusions of Law**

1. The State failed to prove that Shelly did not file the semi-annual report for the second half of 2004.
2. The Court finds for Shelly.

#### **STATE'S TWELFTH CLAIM FOR RELIEF**

In its Twelfth Claim for Relief, the State alleges that Shelly failed to submit annual reports summarizing the rolling twelve-month summation of monthly emissions of nitrogen oxides. The annual reports are due on or before April 15 of the following year.

#### **Stoneco, Inc. Generator 21.0021**

#### **Findings of Fact**

1. Shelly admits that Stoneco submitted the annual report for 2004 relevant to this claim for relief on May 17, 2005. The report was 32 days late. Stip. 21.0021d.
2. Shelly admits that Stoneco submitted the annual report for 2006 relevant to this claim for relief on April 16, 2007. The report was 1 day late. Stip. 21.0021e.

3. Paragraph 270 of the State's Complaint alleges that the report was due on April 15, 2006. The Court finds that this date is a typographical error and should read April 15, 2007, as set forth in its proposed Conclusion of Law 271b.

#### **Conclusions of Law**

1. Shelly was a combined 33 days late in filing the required annual report.
2. The Court finds for the State.

#### **Stoneco, Inc. Generator 21.8795**

No Findings of Fact or Conclusions of Law are necessary as the Court dismissed the State's Twelfth Claim for Relief as to this facility in its decision dated October 31, 2008.

#### **STATE'S THIRTEENTH CLAIM FOR RELIEF**

In its Thirteenth Claim for Relief, the State alleges that Shelly failed to submit burner-tuning results within 30 days after the burner tuning was performed. Burning tuning is important to insure complete combustion of fuels which minimizes emissions.

#### **Shelly Materials Plant 80**

#### **Findings of Fact**

1. Shelly Materials Plant 80 is a portable facility.
2. In paragraph 274 of its complaint, the State alleges that a burner-tuning test was due on July 28, 2006.
3. In its proposed Finding of Fact 274a, the State alleges that a burner-test was conducted on June 28, 2006. To support its position, the State references "State Ex. 238 and Shelly Answer paragraph 274."

3. State Exhibit 238 is not included in the books of Exhibits submitted and updated by the parties.
4. Volume 7 of 9 Transcript p. 1501 line 9 Exhibits 224 through 240 were offered. Exhibit 240 was removed. On page 1502 the exhibits admitted were 224, 226, 228, 229, 231, 232, 233, 234, 235, 236, 237.
5. In its answer Shelly admits that the date the report was submitted was correct as alleged by the State but does not admit the date the test was conducted.

#### Conclusions of Law

1. There is no evidence regarding the date the burner-tuning test was conducted. Therefore, the Court does not have sufficient evidence to conclude that the report regarding the same was not timely filed.
2. The Court finds for Shelly.

#### Stoneco, Inc.. Plant 114

#### Findings of Fact

1. Stoneco, Inc., Plant 114 is a portable facility.
2. Shelly admits that it did not timely submit three burner-tuning test reports. Shelly f of f 998.
3. The parties have stipulated to the following regarding the three late burner-tuning test reports: Stip. 114j. (not 114k as suggested by the State in its Finding of Fact 274b)

Report Submittal Due Date	Submitted Date
July 3, 2005	February 6, 2006
October 21, 2005	February 6, 2006
May 27, 2006	June 23, 2006

### Conclusions of Law

1. Shelly did not timely submit burner-tuning test reports.
2. The reports were a total of 372 days late. The July 3 report was 218 days late. The October 21 report was 127 days late. The May 27 report was 27 days late.
3. The Court finds for the State.

### **STATE'S FOURTEENTH CLAIM FOR RELIEF**

The State's Fourteenth Claim for Relief includes a general allegation that Shelly failed to comply with the terms or conditions of its PTIs or PTOs. No single violation can be identified as being unique to this claim.

### **Shelly Materials Plant 24 Wet Suppression System**

#### Findings of Fact

1. On September 21, 2000, PTI 01-8208 was issued by the Ohio EPA that required Shelly to install a wet suppression system for its F Sources. The PTI included a compliance schedule. Final compliance was to be completed by April 2001. Stip. 24uu and Stip. vv.
2. Final compliance of the wet suppression system was achieved by April 2001. Shelly f of f 1010, State c of l 297b and c of l 297k.

#### Conclusions of Law

1. Shelly did not violate the terms or conditions of PTI 01-8208 with regard to the installation of the wet suppression system.
2. The Court finds for Shelly.

### **Shelly Materials Plant 24 Used Oil Records**

#### Findings of Fact

1. The Ohio EPA issued PTI 01-08322 for Plant 24 on December 16, 2003 that required Shelly to maintain records of the total quantity of each shipment of number 2 fuel oil and on-spec used oil received. Stip. 24o and Stip. zz.
2. The State alleges that Shelly failed to record the quantities of used oil received on June 3, 2004 and June 9, 2004.
3. In support of its allegation, the State offers the testimony of Todd Scarborough which is based on State Ex. 688.
4. State's Ex. 688 is a Notice of Violation that was issued as the result of an inspection conducted by Ohio EPA Central District Office on September 2 and 3, 2004, at Plants 24, 40, 61-63, 91 and 94.
5. Todd Scarborough conducted and/or supervised the inspection.
6. Shelly did not produce any evidence to rebut the findings of the inspection, either after the Notice of Violation was issued or at trial.

#### **Conclusions of Law**

1. A Notice of Violation, unlike a complaint, is more than a charging document. It is the result of an inspection during which the subject of the inspection participates and is given an opportunity to respond.
2. Shelly failed to record the quantities of used oil received on June 3, 2004, and June 9, 2004.
3. The Court finds for the State.

#### **Shelly Materials Plant 40 Dust Suppressants**

#### **Findings of Fact**

1. The Ohio EPA issued PTI 01-08196 for Plant 40 on July 1, 2003 that required Shelly to maintain records of dust-control measures used on unpaved roadways and parking areas. Stip. 40i, Stip. r and Stip. s.
2. The State alleges that Shelly failed to maintain records for dust-control measures for July, August and September 2003.
3. In support of its allegation, the State offers the testimony of Todd Scarborough, whose testimony is based on State Ex. 688.
4. State's Ex. 688 is a Notice of Violation that was issued as the result of an inspection conducted by Ohio EPA Central District Office on September 2 and 3, 2004, at Plants 24, 40, 61-63, 91 and 94.
5. Todd Scarborough conducted and/or supervised the inspection.
6. Shelly was asked at page 7 of the Notice of Violation to "confirm whether or not water, or an alternate dust suppressant, was applied at Shelly plant 40 during July, August and September of 2003."
7. Shelly did not produce any evidence that it responded to the Notice of Violation, either after the Notice of Violation was issued or at trial.

#### **Conclusions of Law**

1. A Notice of Violation, unlike a complaint, is more than a charging document. It is the result of an inspection during which the subject of the inspection participates and is given an opportunity to respond.
2. Shelly failed to maintain records that it used dust suppressants on its unpaved roads or parking areas at Plant 40 during July, August or September 2003.
3. The Court finds for the State.

## Shelly Materials Plant 40 Emissions Testing

### Findings of Fact

1. The Ohio EPA issued PTI 01-08196 for Plant 40 on July 1, 2003, requiring Shelly to conduct emissions testing within 60 days after achieving the maximum production but no later than 180 days after initial startup of the emissions unit. Stip. 40i, and Stip. 40t.
2. The State alleges that Shelly failed to conduct emissions testing as of mid-October 2004.
3. In support of its allegation, the State offers the testimony of Todd Scarborough whose testimony is based on State Ex. 688.
4. State's Ex. 688 is a Notice of Violation that was issued as the result of an inspection conducted by Ohio EPA Central District Office on September 2 and 3, 2004, at Plants 24, 40, 61-63, 91 and 94.
5. Todd Scarborough conducted and/or supervised the inspection.
6. Shelly admits that the testing was not conducted. Shelly f of f 1023.
7. The States proposed Conclusions of Law 297e suggests one day of violation.
8. The States proposed Conclusions of Law 297k suggests 288 days of violation.
9. The States proposed Conclusions of Law 297k suggests a compliance date of October 4, 2004.

### Conclusions of Law

1. A Notice of Violation, unlike a complaint, is more than a charging document. It is the result of an inspection during which the subject of the inspection participates and is given an opportunity to respond.

2. Shelly admits that it failed to conduct the test.
3. No evidence was provided as to the time Shelly might have reached its "maximum production."
4. The Court finds that the test should have been conducted by January 1, 2004, 180 days after the PTI was issued. The Court is using the issuance of the PTI as the initial startup date.
5. The Court finds Shelly in compliance as of October 4, 2004.
6. The Court finds that Shelly was not in compliance for 288 days.
7. The Court finds for the State.

#### Shelly Materials Plant 40 Used Oil Records

##### Findings of Fact

1. The Ohio EPA issued PTI 01-08196 for Plant 40 on July 1, 2003, requiring Shelly to maintain records of the quantity of oil received and the permittee's or oil supplier's analysis of the sulfur content of #2 fuel oil. Stip. 40i and Stip.40u.
2. The State alleges that Shelly failed to maintain the records from July 1, 2003, until September 3, 2004.
3. In support of its allegation the State offers the testimony of Todd Scarborough, whose testimony is based on State Ex. 688.
4. State's Ex. 688 is a Notice of Violation that was issued as the result of an inspection conducted by Ohio EPA Central District Office on September 2 and 3, 2004, at Plants 24, 40, 61-63, 91 and 94.
5. Todd Scarborough conducted and/or supervised the inspection.

6. Shelly did not produce any evidence to rebut the findings of the inspection either after the Notice of Violation was issued or at trial.

#### **Conclusions of Law**

1. A Notice of Violation, unlike a complaint, is more than a charging document. It is the result of an inspection during which the subject of the inspection participates and is given an opportunity to respond.
2. The Court finds that Shelly was out of compliance for 368 days.
3. The Court finds for the State.

#### **Shelly Materials Plant 61 Speed Limit Sign**

##### **Findings of Fact**

1. The parties stipulated that the PTI for Shelly Materials Plant 61 required a 15 mph speed-limit sign, that a 20-mph speed-limit sign was posted, and that Shelly corrected the problem. Stip. 61c, Stip. 61d, Stip. 61e and Stip. 61f.
2. No specific evidence was provided as to the duration of the violation.

##### **Conclusions of Law**

1. The Court accepts the State's proposed conclusion of law 297g and 297k that the violation was for 1 day.
2. The Court finds for the State.

#### **Shelly Materials Plant 61 Road Sweeping**

No findings of fact or conclusions of law were proposed by the State for this allegation. The Court finds for Shelly.

## Middleport Terminal Emissions Control

### Findings of Fact

1. Shelly operated the Middleport Terminal which is a bulk liquid asphalt cement storage facility in Callia County, Ohio.
2. On January 21, 1999, the Ohio EPA issued a PTI for a liquid-asphalt cement-storage tank (T006), requiring the tank to be equipped with a charcoal filter. Stip. MTId and Stip. MTIf.
3. On October 20, 1999, the Ohio EPA issued a PTI for a liquid-asphalt cement-storage tank (T007) requiring the tank to be equipped with a charcoal filter. Stip. MTIe and Stip. MTIg.
4. Shelly did not install a charcoal filter on emissions units T006 and T007. Stip. MTIh.
5. On September 15, 2005, Shelly installed a vapor recovery system for emissions unit T006, T007. Stip. MTIi.
6. Although not a charcoal filter, the Ohio EPA accepted the system as placing Shelly in compliance. State c of l 297h and c of l 297k.

### Conclusions of Law

1. Shelly was in violation of its PTI for its Middleport Terminal units T006 and T007 for not having a required emissions-control system for 2,157 days.
2. The Court finds for the State.

### STATE'S FIFTEENTH CLAIM FOR RELIEF

Ohio Administrative Code requires the Ohio EPA to be notified if a source breaks down so as to cause the emission of air contaminants. In its Fifteenth Claim for Relief,

the State claims that Shelly failed to notify Ohio EPA of a breakdown at Shelly Materials Plant 62 and Shelly Materials Plant 91.

### Shelly Materials Plant 62

#### **Findings of Fact**

1. The bag house at Shelly Materials Plant 62 malfunctioned, causing the emission of air contaminants on June 5 and June 6, 2006.
2. Ohio EPA employees were on-site and observed and discussed the emissions with Shelly employees.
3. PTI 01-08567 requires that the malfunction of any emissions unit be reported to the appropriate Ohio EPA District Office or local air agency in accordance with O.A.C. 3745-15-06(B).
4. Todd Scarborough was an on-site Ohio EPA employee who observed the emissions.
5. Todd Scarborough is with the Central District Office that is responsible for Plant 62.

#### **Conclusions of Law**

1. Neither the Ohio Administrative Code nor PTI 01-08567 specify the form of the notice that is required in connection with the reporting of a malfunction that results in the emission of air contaminants.
2. Ohio EPA received notice of the malfunction on June 5 and June 6, 2006.
3. The bag house might have malfunctioned on days prior to June 5 and June 6, 2006, but the only allegation in the complaint relates to these two days. Therefore, no other findings are appropriate.

4. The Court finds for Shelly.

#### **Shelly Materials Plant 91**

No findings of fact or conclusions of law are necessary, as the Court dismissed Claim Fifteen for Plant 91 in its October 31, 2008 decision.

#### **STATE'S SIXTEENTH CLAIM FOR RELIEF**

In its Sixteenth Claim for Relief, the State alleges that Shelly failed to perform a required chemical analysis of each used-oil shipment.

#### **Shelly Materials Plant 24**

##### **Findings of Fact**

1. The PTI issued on December 16, 2003, for Shelly Plant 24 requires that the plant must get a chemical analysis for each shipment of used oil. Stip. 24aaa.
2. On June 15, 2004, Shelly Plant 24 received a shipment of used oil that did not have the required chemical analysis. Stip. 24bbb.

##### **Conclusions of Law**

1. Shelly was in violation of its PTI when it received used oil on June 15, 2004 without the required chemical analysis.
2. The Court finds for the State.

#### **Shelly Materials Plant 62**

##### **Findings of Fact**

1. The PTI issued July 24, 2001, for Shelly Plant 62 requires that the plant must get a chemical analysis for each shipment of used oil. Stip. 62f and Stip. 62k.
2. On July 24, 2001, Shelly Plant 62 received a shipment of used oil that did not have the required chemical analysis. Scarborough Tr. 582 and Shelly f of f 1073.

3. All other Findings of Fact proposed by the State as to Shelly Materials Plant 62, including dates and analysis content, relate to matters outside the scope of the complaint. Given the length and detail of the complaint, the Court notified the parties that it would not make findings outside the scope of the complaint. Given the length and detail of the complaint the Court did not think it to be fair to also require Shelly to respond to matters not alleged in the complaint.

#### **Conclusions of Law**

1. Shelly was in violation of its PTI when it received used oil on July 24, 2001, without the required chemical analysis.
2. The Court finds for the State.

#### **STATE'S SEVENTEENTH CLAIM FOR RELIEF**

Each of the PTIs referenced in the State's Seventeenth Claim for Relief requires a minimum allowable limit on the heat content of any used oil received and burned. The heat content is measured in British Thermal Units (BTUs). Complete combustion of the fuel is important for efficient operation of the plant's equipment and the environment. It is a violation of the PTI to accept and burn used oil with a BTU content below that required by the PTI.

The Court finds that Shelly burns the oil that it receives at each plant that is the subject of the State's Seventeenth Claim for Relief.

#### **Shelly Materials Plant 24**

#### **Findings of Fact**

1. The PTI requires that all used oil that is burned shall meet a minimum heat content of 135,000 BTUs/gallon. Stip. 24ccc.

2. On May 12, 2004, Shelly received used oil with a BTU value below the minimum allowable limit contained in the PTI. Stip. 24ddd.
3. On May 18, 2004, Shelly received used oil with a BTU value below the minimum allowable limit contained in the PTI. Stip. 24eee.
4. On May 20, 2004, Shelly received used oil with a BTU value below the minimum allowable limit contained in the PTI. The chemical analysis by the supplier Summit shows a heat content of 122,603 BTU/gallon. State's Exhibit 681-000047. Shelly's summary of that shipment is State's Exhibit 681-000049 and it does not properly state the heat content of the used oil.
5. On May 22, 2004, Shelly received used oil with a BTU value below the minimum allowable limit contained in the PTI. The chemical analysis by the supplier Summit shows a heat content of 119,473 BTU/gallon. State's Exhibit 681-000050. Shelly's summary of that shipment is State's Exhibit 681-000051 and it does not properly state the heat content of the used oil.
6. On July 20, 2004, Shelly received used oil with a BTU value below the minimum allowable limit contained in the PTI. Stip. 24fff.

#### **Conclusions of Law**

1. Shelly received and burned used oil shipments with a BTU value below the minimum allowable limit, in violation of its PTI on five occasions.
2. The Court finds for the State.

#### **Shelly Materials Plant 62**

#### **Findings of Fact**

1. The PTI requires that all used oil that is burned shall meet a minimum heat content of 135,000 BTU/gallon. Stip. 62l.
2. On February 25, 2002, Shelly received two shipments of used oil with a BTU value below the minimum allowable limit contained in the PTI. The chemical analysis by the supplier Central Ohio shows a heat content of 133,249 BTUs/gallon. State's Exhibit 681-000074. Shelly's summary of those shipments is State's Exhibits 681-000075 and 681-000076 and they do not accurately state the heat content of the used oil.
3. On March 4, 2002, Shelly received a shipment of used oil with a BTU value below the minimum allowable limit contained in the PTI. The chemical analysis by the supplier Central Ohio shows a heat content of 133,249 BTUs/gallon. State's Exhibit 681-000074. Shelly's summary of those shipments is State's Exhibits 681-000077 and it does not accurately state the heat content of the used oil.
4. On September 10, 2002, Shelly received a shipment of used oil with a BTU value below the minimum allowable limit contained in the PTI. The chemical analysis by the supplier Central Ohio shows a heat content of 134,795 BTUs/gallon. State's Exhibit 681-000078. Shelly's summary of the shipment is State's Exhibit 681-000079 and it does not accurately state the heat content of the used oil.
5. On September 12, 2002, Shelly received a shipment of used oil with a BTU value below the minimum allowable limit contained in the PTI. The chemical analysis by the supplier Central Ohio shows a heat content of 134,795 BTUs/gallon. State's Exhibit 681-000078. Shelly's summary of the shipment is State's Exhibit 681-000080 and it does not accurately state the heat content of the used oil.

### **Conclusions of Law**

1. Shelly received and burned used oil shipments with a BTU value below the minimum allowable limit in violation of its PTI on five occasions.
2. The Court finds for the State.

### **Shelly Materials Plant 90**

#### **Findings of Fact**

1. The PTI requires that all used oil that is burned shall meet a minimum heat content of 135,000 BTU/gallon. Stip. 90ee.
2. Shelly admits that on five days -- July 20, 2004, September 3, 2005, September 6, 2005, December 3, 2005 and December 5, 2005 -- it received and burned used oil with a heat content below 135,000 BTU/gallon. Stip. 90ff, Stip. 90gg, Stip. 90hh, Stip. 90ii and Stip. 90jj.

#### **Conclusions of Law**

1. Shelly received and burned used oil shipments with a BTU value below the minimum allowable limit in violation of its PTI on five occasions.
2. The Court finds for the State.

### **Shelly Materials Plant 91**

#### **Findings of Fact**

1. The State claims in its Proposed Finding of Fact 313b that the PTI requires a chemical analysis of on-specification used oil and that it contains the BTU value.
2. In support of this Proposed Finding of Fact it references Stip. 24aaa, Stip. 62k, Stip. 91y and State Ex. 384.

3. Stips 24aaa and 62k are not applicable to Plant 91. State Ex. 384 is a PTI for Plant 90. There is no Stip 91y nor any other stipulation as to Plant 91 which establishes the required heat content for used oil.
4. State Ex. 354 is the PTI for Plant 91 and requires that all used oil that is burned shall meet a minimum heat content of 135,000BTU/gallon.
5. State Ex. 688 is a Notice of Violation that was issued as the result of an inspection conducted by Ohio EPA Central District Office on September 2 and 3, 2004, at Plants 24, 40, 61-63, 91 and 94.
6. Todd Scarborough conducted and/or supervised the inspection.
7. Shelly did not produce any evidence to rebut the findings of the inspection either after the Notice of Violation was issued or at Trial.
8. Shelly was in violation for 2 days. State f of f 314r.

#### **Conclusions of Law**

1. A Notice of Violation, unlike a complaint, is more than a charging document. It is the result of an inspection during which the subject of the inspection participates and is given an opportunity to respond.
2. Shelly received and burned used oil with a BTU value below the minimum allowable limit in violation of its PTI on two occasions.
3. The Court finds for the State.

#### **STATE'S EIGHTEENTH CLAIM FOR RELIEF**

Similar to other claims, the State alleges that Shelly operated one of its facilities in violation of the terms of its permit. Specifically, the State alleges that Shelly burned

used oil containing more than one thousand (1,000) parts per million total halogens at its Stoneco, Inc. Plant #118.

The Court finds that Shelly burns the oil that it receives at each plant that is the subject of the State's Eighteenth Claim for Relief.

### **Stoneco, Inc. Plant #118**

#### **Findings of Fact**

1. Stoneco, Inc. Plant #118 is a portable facility.
2. The PTI for Stoneco Plant 118 was issued on October 25, 1995. Stip. 118c.
3. The PTI requires that all on-specification used oil burned shall contain less than 1000 ppm of total halogens. Stip. 118d.
4. Shelly admits that on 35 days between October 3, 2004 and October 20, 2005, Stoneco received shipments of used oil above 1000 ppm of total halogens. Stip. 118e.
5. Shelly burns the used oil that it receives.

#### **Conclusions of Law**

1. Shelly burned used oil at its Stoneco Plant 118 in violations of the terms of its PTI for 35 days.
2. The Court finds for the State.

### **STATE'S NINETEENTH CLAIM FOR RELIEF**

Similar to other claims, the State alleges that Shelly operated one of its facilities in violation of the terms of its permit. Specifically, the State alleges that Shelly burned used oil that did not meet the "on-specification" for the used oil as set forth in the applicable PTI.

The Court finds that Shelly burns the oil that it receives at each plant that is the subject of the State's Nineteenth Claim for Relief.

**Shelly Materials Plant 62**

**Findings of Fact**

1. The PTI requires that that all used oil shall have a maximum lead concentration of not greater than 100 parts per million. Stip. 62m.
2. Shelly admits that on October 5 and October 8, 2001, it received used oil with a lead concentration in excess of 100 parts per million. Stip. 62n and Stip. 62o.

**Conclusions of Law**

1. Shelly burned used oil at Shelly Materials Plant 62 in violation of the terms of its PTI for 2 days.
2. The Court finds for the State.

**Shelly Materials Plant 63**

**Findings of Fact**

1. The PTI requires that that all used oil shall have a maximum mercury concentration of not greater than 1 part per million. Stip. 63y.
2. Shelly admits that on August 31, 2001 and September 5, 7, and 14, 2001, it received used oil with a mercury concentration in excess of 1 part per million. Stip. 63z, Stip. 63aa, Stip. 63bb and Stip. 63cc.

**Conclusions of Law**

1. Shelly burned used oil at Shelly Materials Plant 63 in violations of the terms of its PTI for 4 days.
2. The Court finds for the State.

**Shelly Materials Plant 91**

**Findings of Fact**

1. The State did not propose any Findings of Fact as to Shelly Materials Plant 91 for its Nineteenth Claim.

**Conclusions of Law**

1. The Court Finds for Shelly.

**STATE'S TWENTIETH CLAIM FOR RELIEF**

No Findings of Fact or Conclusions of Law are necessary, as the Court dismissed Claim Twenty in its October 31, 2008 Decision.

**IMMUNITY/PENALTY/INJUNCTIVE RELIEF**

Having made what the Court believes to be the necessary findings of facts and conclusions of law as to each of the State's Claims for Relief, it is necessary for the Court to address the issue of immunity, determine the appropriate civil penalty for each of the claims that were decided in favor of the State and against Shelly and the State's request for injunctive relief.

**Immunity**

Shelly argues that it is entitled to immunity as to most of the claims brought by the State. R.C. 3745.72 grants the owner or operator of a facility that conducts an environmental audit of its operation and discloses the information to the appropriate state director to petition for limited immunity from administrative and civil penalties. It does not provide for absolute immunity. In fact many violations are exempt from the immunity provisions. For example there is no immunity from the payment of damages for harm to persons or property. R.C. 3745.72(D). This is only one of several examples

where immunity is not available under the provisions of R.C. 3745.72. Further, the burden of proof is on the owner or operator that is asserting the entitlement to such immunity. R.C. 3745.72(A).

The Court does find that Shelly would qualify for consideration of immunity for some of the violations where the Court found for the State. Shelly retained an outside consultant, Dine Comply, to audit its compliance with air laws and regulations. A complete copy of the Dine Audit is included in the record as Defendant's Exhibit A. The audit was started on January 27, 2003 and ended on February 14, 2003. Defendant's Exhibit A p.4. The audit found numerous permitting violations by Shelly. For example, it was as a result of the Dine Audit that it was determined that Shelly did not get permits for its diesel-fired portable generators as required by law. A copy of the audit was forwarded to the Ohio EPA on April 21, 2003. See Defendant's Ex. B and Gen. Stip. 1.

The Dine Audit covered all Shelly facilities in the State of Ohio. Ohio EPA Northwest District Office reviewed the report and the request for immunity pursuant to R.C. 3745.72 for the facilities in its district (Allen, Van Wert, Auglaize and Marion County). Many of the issues were the same as the ones presented by the State in this law suit. The Northwest District Office granted the request for immunity pursuant to R.C. 3745.72. See Defendant's Ex. C. The Southeast and Central District Offices did not grant the request for immunity and commenced the present litigation seeking civil penalties and injunctive relief.

Unfortunately, the record is void of the different reasoning that may have lead to the very different results. Further, the statute is drafted in such a way that the Court does not believe, given the record that has been presented, that it could impose a finding of

immunity on the State. While the statute provides that an applicant that complies with the statute "is immune from any administrative and civil penalties" (R.C. 3745.72(A)) the exceptions and limitations consume this provision. For example, immunity is not available if the audit begins after an investigation has commenced. R.C. 3745.72 (B)(6). While most of the Notices of Violations are dated after the Dine Audit was forwarded to the Ohio EPA, several do predate the audit. See State's First Claim as to Shelly Materials Plant 24. The Court also finds it interesting that while some of the alleged violations have been occurring for an extended period of time, the Notices of Violation were filed in 2003 shortly after the Dine Audit was filed with the Ohio EPA. See State's Second Claim.

The State may well have concluded that Shelly's conduct prior to the audit demonstrated "a pattern of continuous or repeated violation of environmental laws" which would make Shelly ineligible for immunity. R.C. 3745.72 (E)(1). This provision makes sense in that the State has a legitimate interest in preventing a repeat violator from avoiding the consequences of violating the law by simply filing a report. Similarly, it might encourage owners and operators to gamble with the public's environmental safety by trying to beat the system after committing repeated violations with a report of disclosure.

The real point is that the statute grants sufficient breath and latitude to the regulatory agency that a court could not conclude that the Northwest District was right and the Southeast and Central Districts were wrong or visa-versa.

The tension between the benefits and the risks of voluntary compliance audits to both the regulated entity and the state is discussed in an excellent article *Ohio's New*

*Statutory Audit Privilege Promoting Environmental Performance or a Dirty Little Secrets Act*, 26 CapitalULREV 379 (1997). This quote is taken from the article at page 388:

The goal of voluntary environmental auditing programs should be to discover and remedy environmental problems, not to foster punishment of regulated entities for engaging in good environmental practices. The risk that regulatory agencies or private parties will use information collected during environmental audits is real. Civil and criminal actions have been brought based, at least in part, on information obtained from voluntary internal audits.

Based on the foregoing the Court denies Shelly's request for immunity.

### Penalty Theory

Having determined that Shelly is not entitled to immunity the Court must now determine what penalty if any is appropriate for each finding in favor of the State and against Shelly.

Several issues regarding the penalty phase are clear. First the applicable statute R.C. 3704.06 provides for a penalty of not more than \$25,000.00 for each day of each violation. Second the amount of the penalty rests with the trial court so long as it does not abuse its discretion by demonstrating an "unreasonable, arbitrary or unconscionable attitude." *State, ex rel. Brown v. Dayton Malleable* (1982), 1 Ohio St.3d 151, 157. Third, the guidelines provide that the determination of the amount of the penalty is a three step process. See *State, ex rel. Petro v. Maurer Mobil Home Court, Inc.*, (May 11, 2007), Wood App. No. WD-06-053. App. Lexis 2103, citing *State ex. rel. Brown v. Dayton Malleable, Inc.* (April 21, 1981), Court of Appeals of Ohio, Second Appellate District, 1981 Ohio App. LEXIS 12103 quoting USEPA BNA Environmental Reporter.

#### "Step 1 – Factors comprising Penalty

Determine and add together the appropriate sums for each of the four factors or elements of this policy namely: the sum appropriate to redress the harm or risk of harm to public health or the environment, the sum appropriate to remove the economic benefit

gained or to be gained from delayed compliance, the sum appropriate as a penalty for violator's degree of recalcitrance, defiance, or indifference to requirements of the law, and the sum appropriate to recover unusual or extraordinary enforcement costs thrust upon the public.

#### Step 2 – Reduction for Mitigating Factors

Determine and add together sums appropriate for mitigating factors, of which the most typical are the following: the sum, if any, to reflect any part of the noncompliance attributable to the government itself, the sum appropriate to reflect any part of the non-compliance caused by factors completely beyond violator's control (floods, fires, etc.)

#### Step 3 – Summing of Penalty Factors and Mitigating Reductions

Subtract the total reductions of Step 2 from the total penalty of Step 1. The result is the minimum civil penalty.”

In addition the court also noted that the civil penalty, in order to deter a violation must be large enough to hurt the offender.

Determining the amount to assess based on the foregoing is where the guidance is no longer clear at all.

As noted above the maximum penalty may not exceed \$25,000.00 per day per violation. The Court has made findings of fact and conclusions of law that Shelly has been in violation as alleged by the State for approximately 9,605 days. If the Court awarded the maximum penalty for each day of a violation the penalty would be \$240,125,000.00. This penalty would almost equal the gross receipts of Shelly Materials Inc., for 2005. See State's Ex. 275. While deterrence is an appropriate factor when determining a penalty it should not bankrupt the corporation. See *State ex re. Brown v. Dayton Malleable, Inc, supra* at 15.

The State is not suggesting a penalty of that amount. In fact the State's proposed penalty if the Court had found for the State on each and every claim ranges from \$2,454,820 to \$4,274,124. Using the State's proposed penalty for each separate violation

and applying the same to the violations where the Court found for the State, the penalty would be approximately \$500,000.00.

The Court struggles with the lack of consistency in the State's requested daily penalty. Claims One thru Five all involve a violation of the permitting process. Yet Claim One the proposed penalty is \$5.00 to \$10.00 per day, Claim Two the proposed penalty is \$25.00 to \$50.00 per day, Claim Three the proposed penalty is \$1.00 to 2.00 per day, Claim Four the proposed penalty is \$50.00 to \$100.00 and Claim Five the proposed penalty is \$5.00 to \$10.00 per day. Similarly Claims Nine through Thirteen all involve a failure to submit timely reports. For two of the Claims the State proposes a fine of \$1.00 per day (Claims 9 and 11) but \$15.00 per day for Claim Twelve, \$25.00 per day for Claim Ten and \$50.00 per day for Claim Thirteen. Claim Fifteen, although no finding against Shelly was made, is also a reporting violation; although it does involve a malfunction. Regardless the claim is not for the malfunction but for not reporting the same. In that claim the State is proposing a penalty of \$25,000.00 per day -- and a representative of the State was present and witness the malfunction.

Shelly does not really provide any better guidance for the Court. Shelly acknowledges that it was in violation on numerous occasions but suggests only a nominal penalty or a sum related to the permitting fee, to be appropriate. The trial court in Ohio ex. rel. Brown v. Dayton Malleable, Inc. noted a similar problem. It stated the following:

"... since OEPA did not approve DMI's plans until September 15, 1976, Plaintiff agrees that that was the first date of violation. Compliance was not achieved until November 1, 1978, a total of 714 days. The maximum penalty, therefore, could reach \$7,140,000. Plaintiff does not seek any such award, but does rationalize in his brief a penalty of \$725,302. Although DMI has admitted its default, and thus has admitted that it is subject to being penalized pursuant to Section 6111.09 of the Revised Code, DMI has not assisted the Court by suggesting any penalty it thinks ought to be assessed."

### Mitigation in General

Before the Court addresses what it believes to be the appropriate penalty the Court will address the concept of mitigation in general terms. Each claim may or may not have a specific mitigating factor that is relevant to a particular claim. Having said that the Court believes that there are two mitigating factors which apply to this entire case. Rather than address these factors repeatedly the Court will address the same in this section of the Court's decision with the understanding that the Court took these factors into consideration throughout the penalty phase.

First is the Voluntary Compliance Audit Results Report (Dine audit) which was commissioned by Shelly and forwarded to Ohio EPA in early 2003. The report was very detailed and identified several deficiencies. To the Court, this demonstrates a sincere desire to identify and correct problems. By forwarding the same to Ohio EPA Shelly demonstrated an openness that is to be commended. While no evidence regarding the cost of the report was introduced, the Court is confident that it was not inexpensive. Having made that observation it should be noted that the Court did not reduce any penalties based on a specific cost of the audit. Rather the Court simply considered the same when determining a mitigation of a penalty. The audit was especially important in regard to the permitting and reporting violations.

While a voluntary audit is not specifically mentioned as a possible mitigating factor noted above in Step 2 of the penalty provision, the list of mitigating factors suggested is by no means exclusive or exhaustive. In fact the language refers to mitigating factors in terms of "most typical". The Court believes and finds that a

voluntary audit that is complete and forwarded to the state to be an appropriate mitigating factor.

Second, in the State's Finding of Fact 8s and 8t, it admits to having millions of dollars of contracts with Shelly. If Shelly's conduct is so egregious why are they doing business with Shelly? If the State was really interested in making sure that Shelly as well as other corporations were in compliance with the regulations it could require compliance verification as a condition of the contract. The State complains that Shelly is operating its facilities in a way that is or can be harmful to the environment. Yet the State is the one that is purchasing the product which Shelly produces. The State can not both complain about the operation and at the same time facilitate its very operation. This is clearly a factor of mitigation that is attributable to the government.

#### **STATE'S FIRST CLAIM FOR RELIEF**

Claim One is a violation of the permitting process. This is very important. How else can the State control and manage the risk of harm to the public and the environment? Failure to comply with the permitting process is also some evidence of indifference to the law. As a mitigating factor the State has some responsibility to process the application in a timely manner. Failure to do so results in noncompliance attributable to the government itself.

Based on the foregoing the court believes that the appropriate penalty for installing or operating a facility without a proper permit should be \$25.00 per day. This figure is slightly greater than the \$10.00 per day suggested by the State. If the installation and or operation began prior to 180 days after a completed application was submitted an additional penalty of \$1,500.00 is assessed because failure to wait the

period of time the law allows the State to process the application demonstrates an indifference to the law. Although the statute speaks in terms of a daily penalty this additional penalty is consistent with the goal noted by other courts to "deter a violation." In addition the additional penalty is well within the statutory limits of \$25,000.00 per day. No such penalty should be included if the installation began after the State failed to act within the time provided for by law. Such a failure is an example of non-compliance attributable to the government itself. In addition the penalty is reduced to \$1.00 per day after the State has had the completed application for 180 days. Taking more than the amount of time allowed for by law clearly places the majority of the non-compliance on the government. The State knew or should have known that the facility was operating. The State can not just do nothing and expect a penalty to accrue on a daily basis. To expect one side to follow the law and not the other is simply not right.

**Shelly Materials Plant 24**

40 days prior to expiration of 180 days at \$25.00/day	\$1,000.00
1331 day after 180 days and before PTI issued at \$1.00/day	\$1,331.00
Additional penalty for starting prior to 180 days	\$1,500.00
<b>Total</b>	<b>\$3,831.00</b>

**Shelly Materials Plant 24 Storage Tanks**

374 days prior to expiration of 180 days at \$25.00/day	\$9,350.00
417 days after 180 days and before PTI issued at \$1.00/day	\$ 417.00

(The Court has decided not to assess the additional \$1,500.00 because of the unique facts regarding storage tanks including the fact that a PTI is not currently required. There is nothing to deter.)

**Total** **\$9,767.00**

**Shelly Materials Plant 40**

219 days prior to expiration of 180 days at \$25.00/day	\$5,475.00
952 days after 180 days and before PTI issued at \$1.00/day	\$ 952.00
Additional penalty for starting prior to 180 days	\$1,500.00
<b>Total</b>	<b>\$7,927.00</b>

**Portable Generators**

While the Court found for the State regarding the portable generators is has decided not to issue any penalty. The Court believes that the mitigating factors equal the factors comprising a penalty.

The portable generators were being operated without the requisite permit. However, in mitigation there are numerous factors including: (1) Shelly's reliance on verbal guidance from Ohio EPA employees; (2) the failure to have a permit was brought to the attention of Shelly and subsequently the Ohio EPA as a result of the Voluntary Air Compliance Audit commissioned by Shelly; (3) the Notices of Violation issued by the Ohio EPA post date the Audit; (4) Ohio EPA knew or should have known that Shelly had portable generators and that the same were not permitted; (5) prior to 1999 Ohio EPA did not issue any permits for portable generators.

In addition to the foregoing, because there is no evidence regarding the date of installation of the individual portable generators the Court has no basis upon which to issue a daily penalty.

**STATE'S SECOND CLAIM FOR RELIEF**

Much like the State's First Claim, the Second Claim relates to an operation that occurred before a PTI was issued. Specifically, Shelly admittedly started burning used oil before it received a permit to do so. The time period for the State to respond to a completed application is the same as set forth in the First Claim. For the reasons set forth above the penalty shall be the same.

**Shelly Materials Plant 2**

111 days after 180 days and before PTI issued at \$1.00/day	\$ 111.00
<b>Total</b>	<b>\$ 111.00</b>

**Shelly Materials Plant 62**

22 days prior to expiration of 180 days at \$25.00/day	\$ 550.00
52 days after 180 days and before PTI issued at \$1.00/day	\$ 52.00
Additional penalty for starting prior to 180 days	\$1,500.00
<b>Total</b>	<b>\$2,102.00</b>

**Shelly Materials Plant 63**

54 days prior to expiration of 180 days at \$25.00/day	\$1,350.00
44 days after 180 days and before PTI issued at \$1.00/day	\$ 44.00
Additional penalty for starting prior to 180 days	\$1,500.00
<b>Total</b>	<b>\$2,894.00</b>

**Shelly Materials Plant 65**

59 days outside scope of exemption at \$25.00/day \$1,475.00

(Because this violation involved a one time discretionary burn and not a permanent change in operation together with the fact that Shelly did seek a permit the Court does not find that the additional \$1,500.00 is applicable.)

**Total** \$1,475.00

**Shelly Materials Plant 91**

23 days after 180 days and before PTI issued at \$1.00/day \$ 23.00

**Total** \$ 23.00

**Shelly Materials Plant 114**

114 days after 180 days and before PTI issued at \$1.00/day \$ 114.00

**Total** \$ 114.00

**Additional Award for Economic Benefit**

The Court awards an additional amount of \$80,680.52

**STATE'S THIRD CLAIM FOR RELIEF**

For the reasons set forth above in the State's First Claim for Relief no penalty is assessed as to the portable generator claims in the State's Third Claim for Relief.

**STATE'S SEVENTH CLAIM FOR RELIEF**

The State's Seventh Claim for Relief involves excess emissions at a Shelly facility. In addition to being in violation of the terms of the permit it also is harmful to the environment. The State has suggested a penalty range of between \$25.00 and \$50.00 per day per violation. The Court finds these violations to be more serious than the permit

violations in Claims One and Two. In addition to operating outside the scope of the terms of the permit, there were actual emissions which could be harmful.

Applying the factors to be considered in Step 1 of the penalty consideration the Court is most concerned about an appropriate amount to redress the harm or risk of harm to the environment. The other factors in Step 1 do not appear to be applicable. Accordingly the Court believes that the appropriate penalty is \$500.00 per day. The Court does not believe that any of the mitigating factors from Step 2 are applicable. Because there is evidence that Shelly did take corrective action (subsequent tests that showed compliance) and the numbers of violations are limited, an additional penalty to deter future violations is not necessary.

**Shelly Materials Plant 62**

Two days at \$500.00 per day	\$1,000.00
<b>Total</b>	<b>\$1,000.00</b>

**Shelly Materials Plant 63**

One day at \$500.00 per day	\$ 500.00
<b>Total</b>	<b>\$ 500.00</b>

**Shelly Materials Plant 90/95**

Four days at \$500.00 per day	\$2,000.00
<b>Total</b>	<b>\$2,000.00</b>

**Shelly Materials Plant 91**

Two time on one day at \$500.00 per violation	\$1,000.00
<b>Total</b>	<b>\$1,000.00</b>

## STATE'S EIGHTH CLAIM FOR RELIEF

In its Eighth Claim for Relief the State did prove that Shelly violated the terms of its permits by exceeding its production limits. In addition to the economic benefit penalty which the Court finds appropriate the State suggests a penalty of \$200.00 per day. The State also suggests 1 day a \$25,000.00. However, there is no explanation as to the harm generated by this particular permit violation as compared to others where a lesser daily penalty was suggested. In addition Shelly was not in violation for each day of the final month. Also the amount of the excess was not very significant – approximately 1.5% for two of the months and 7% for the other two months. Finally given the length of time the plant has been in operation, having only four particular months where the violation occurred is certainly not evidence of recalcitrance, defiance or indifference to the law. Lastly, while there was no specific evidence regarding the actual harm to the environment, the Court does understand the argument that if there is more production there are more emissions and therefore a greater impact on the environment.

Using the State's Exhibit 734 the Court makes the following calculation to determine approximately how many days Shelly was in excess of its production limits. Shelly produced about 2,100 tons per day in October 2005. Shelly was over its production limits by about 6000 tons. Therefore it was over its production limits for about 3 days. Shelly produced about 1,500 tons per day in November 2005. Shelly was over its production limits by about 23,000 tons. Therefore it was over its production limits for about 15 days. Shelly produced about 980 tons per day in April 2006. Shelly was over its production limits by about 28,000 tons. Therefore it was over its production limits for about 28 days. Shelly produced about 1,500 tons per day in May 2006. Shelly

was over its production limits by about 6,000 tons. Therefore it was over its production limits for about 9 days.

Based on the foregoing the Court finds that Shelly was in violation of its production limits for 55 days. The Court will accept the State's suggested penalty of \$200.00 per day.

55 days at \$200.00 per day	\$ 11,000.00
Economic Benefit	\$148,413.00
<b>Total</b>	<b>\$159,413.00</b>

#### **STATE'S NINTH CLAIM FOR RELIEF**

In its Ninth Claim for Relief the State proved that certain required reports were not filed.

The Court does understand the need for and the importance of operating reports. These reports are essential to the State's obligation to regulate the industry. The failure to file reports while not harming the environment or producing any real economic advantage, does demonstrate a certain degree of indifference to the law. However, given the number of facilities Shelly operates and the very few reports that are not filed, the Court does not believe this to be a serious indifference to the law. Even the State does not view this issue too seriously as it has recommended a penalty of \$1.00 per day. The Court finds the failure to file required reports more serious and will impose a penalty of \$5.00 per day.

In mitigation the Court finds that part of the noncompliance is attributable to the government. The State is obviously aware that the facility exists, that a report is due and that it has not received the same. If the report is that important the government should

take action to get the report. At some point the report is really useless because the information is too old. Therefore the Court believes that after 90 days following when the report is due the appropriate penalty should be as suggested by the State, \$1.00 per day. After one year after the report is due the Court can not believe the information is of any real value. If the State has not done anything for one year after the report is due the Court will not assess a penalty.

**Shelly Materials Plant 61**

90 days at \$5.00 per day for each quarter that a report was not filed (90 x \$5.00 x 2)	\$ 900.00
275 days at \$1.00 per day for each quarter that a Report was not filed (275 x \$1.00 x 2)	\$ 550.00
<b>Total</b>	<b>\$1,450.00</b>

**Allied Corp. Generator 21.0028**

90 days at \$5.00 per day	\$ 450.00
275 days at \$1.00 per day	\$ 275.00
<b>Total</b>	<b>\$ 725.00</b>

**THE STATE'S TENTH CLAIM FOR RELIEF**

This claim is similar to the Ninth Claim. The reasoning and applicable penalty shall be adopted and applied herein. The Court does not understand why the State is recommending \$10.00 per day as opposed to \$1.00 per day.

**Shelly Materials Plant 63**

84 days at \$5.00 per day	\$ 420.00
<b>Total</b>	<b>\$ 420.00</b>

Shelly Materials Plant 91

41 days at \$5.00 per day	\$ 205.00
<b>Total</b>	<b>\$ 205.00</b>

THE STATE'S TWELFTH CLAIM FOR RELIEF

This claim is similar to the Ninth Claim. The reasoning and applicable penalty shall be adopted and applied herein.

Stoneco, Inc. Generator 21.0021

33 days at \$5.00 per day	\$ 165.00
<b>Total</b>	<b>\$ 165.00</b>

THE STATE'S THIRTEENTH CLAIM FOR RELIEF

This claim is similar to the Ninth Claim. The reasoning and applicable penalty shall be adopted and applied herein.

Stoneco, Inc., Plant 114

Report due July 3, 2005	
90 days at \$5.00 per day	\$ 450.00
128 days at \$1.00 per day	\$ 128.00
Report due October 21, 2005	
90 days at \$5.00 per day	\$ 450.00
37 days at \$1.00 per day	\$ 37.00
Report due May 27, 2006	
27 days at \$5.00 per day	\$ 135.00
<b>Total</b>	<b>\$1,200.00</b>

**STATE'S FOURTEENTH CLAIM FOR RELIEF**

As stated above each of the findings herein relate to a violation of the terms and conditions of a PTI or PTO. However, each violation is very different and consequently the Court is not able to settle upon a single penalty that it believes is applicable to each finding. Therefore the Court will establish a separate penalty for each violation in this claim.

**Shelly Materials Plant 24 Used Oil Records**

The Court finds this violation is most similar to the violations noted in the State's Ninth Claim for Relief. There is no allegation of harm to the environment. Rather, it is a record keeping issue. Further, there is no evidence that Shelly repeatedly violated the requirement to maintain used oil records. To the contrary the violations were rare. The Court believes that the appropriate penalty is \$5.00 per day.

2 days at \$5.00 per day	\$ 10.00
<b>Total</b>	<b>\$ 10.00</b>

**Shelly Materials Plant 40**

**Dust Suppressants**

The Court finds this violation is most similar to the violations noted in the State's Ninth Claim for Relief. There is no allegation of harm to the environment. Rather, it is a record keeping issue. Further, there is no evidence that Shelly repeatedly violated the requirement to use dust suppressants. To the contrary the violations were rare. The Court believes that the appropriate penalty is \$5.00 per day.

92 days at \$5.00 per day	\$ 460.00
<b>Total</b>	<b>\$ 460.00</b>

Emissions Testing

This is more than a records keeping issue. This is about failure to complete required testing. Without the required tests being complete there is no way to know if a facility is in compliance and not harming the environment. But again as the Court has noted in the assessment of other penalties the State has an obligation to make sure that the tests are done. If the State takes no action after the required period has expired then the State must accept some of the responsibility and an appropriate amount of the penalty should be mitigated. Therefore the Court will impose a penalty of \$50.00 per day for each day up to 180 days. Thereafter the penalty is reduced to \$5.00 per day.

180 days at \$50.00 per day	\$ 9,000.00
108 days at \$5.00 per day	\$ 540.00
<b>Total</b>	<b>\$ 9,540.00</b>

Used Oil Records

The Court finds this violation is most similar to the violations noted in the State's Ninth Claim for Relief. There is no allegation of harm to the environment. Rather, it is a record keeping issue. Unlike the record keeping for used oil noted above this violation did extend for over one year and is therefore more serious. The Court believes that the appropriate penalty is \$5.00 per day.

368 days at \$10.00 per day	\$ 1,840.00
<b>Total</b>	<b>\$ 3,680.00</b>

Shelly Materials Plant 61 Speed Limit Sign

Given the nature of the violation and the fact that it only occurred for 1 day the Court believes that the appropriate penalty is \$1.00 per day.

1 day at \$1.00 per day	\$ 1.00
<b>Total</b>	<b>\$ 1.00</b>

**Middleport Terminal Emissions Control**

Not having the required equipment in place is a very serious violation. This relates directly to the protection of the environment. However, as I have repeatedly stated the State has responsibility to make sure that the requirements that it imposes, especially as it relates to protecting the environment, are satisfied. Therefore the Court will impose a penalty of \$100.00 per day for the first 180 days. Thereafter the penalty will be reduced to \$10.00 per day.

180 days at \$100.00 per day	\$18,000.00
1977 days at \$10.00 per day	\$19,770.00
<b>Total</b>	<b>\$37,770.00</b>

**STATE'S SIXTEENTH CLAIM FOR RELIEF**

In the State's Sixteenth Claim for Relief the Court has found that Shelly on occasion accepted shipments of used oil without any chemical analysis as required. This is more than a record keeping error. The Court believes that if an analysis is not available the product should not be accepted. Evidence was provided that the quality of the used oil that is burned has a direct impact on the environment. Therefore it is important that Shelly know the content of the used oil that is accepted and burned. However the Court notes that the violations were rare. Accordingly the Court believes that the appropriate penalty is \$250.00 for each shipment.

**Shelly Materials Plant 24**

1 shipment at \$250.00	\$ 250.00
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Total \$ 250.00

Shelly Materials Plant 61

1 shipment at \$250.00 \$ 250.00

Total \$ 250.00

**STATE'S SEVENTEENTH CLAIM FOR RELIEF**

In its Seventeenth Claim for Relief the State proved that Shelly received and burned used oil that did not meet the specifications of operating permits. The Court is satisfied that the State proved that the content of the used oil is directly related to the environment. Accepting and burning used oil that the operator knows does not meet the specification is evidence of a disregard for the conditions of the operating permit. On the positive side, as serious as the Court finds this issue to be the number of occurrences of the same is not significant given the overall operation of Shelly's facilities. The Court believes that the appropriate penalty is \$500.00 for each shipment of used oil that was received and burned that does not meet the specification of the permit.

Shelly Materials Plant 24

5 Shipments at \$500.00 each \$ 2,500.00

Total \$ 2,500.00

Shelly Materials Plant 62

5 Shipments at \$500.00 each \$ 2,500.00

Total \$ 2,500.00

Shelly Materials Plant 90

5 Shipments at \$500.00 each \$ 2,500.00

Total \$ 2,500.00

Shelly Materials Plant 91

2 Shipments at \$500.00 each	\$ 1,000.00
<b>Total</b>	<b>\$ 1,000.00</b>

**STATE'S EIGHTEENTH CLAIM FOR RELIEF**

In its Eighteenth Claim for Relief the State proved that Shelly received and burned used oil that did not meet the specifications of operating permits. The Court is satisfied that the State proved that the content of the used oil is directly related to the environment. Accepting and burning used oil that the operator knows does not meet the specification is evidence of a disregard for the conditions of the operating permit. On the positive side, as serious as the Court finds this issue to be the number of occurrences of the same is not significant given the overall operation of Shelly's facilities. The Court believes that the appropriate penalty is \$500.00 for each day that used oil that was received and burned that does not meet the specification of the permit. The exact number of shipments was not proven.

Stoneco, Inc. Plant #118

35 days at \$500.00 per day	\$ 17,500.00
<b>Total</b>	<b>\$ 17,500.00</b>

**STATE'S NINETEENTH CLAIM FOR RELIEF**

In its Nineteenth Claim for Relief the State proved that Shelly received and burned used oil that did not meet the specifications of operating permits. The Court is satisfied that the State proved that the content of the used oil is directly related to the environment. Accepting and burning used oil that the operator knows does not meet the specification is evidence of a disregard for the conditions of the operating permit. On the

positive side, as serious as the Court finds this issue to be the number of occurrences of the same is not significant given the overall operation of Shelly's facilities. The Court believes that the appropriate penalty is \$500.00 for each day that used oil that was received and burned that does not meet the specification of the permit. The exact number of shipments was not proven.

**Shelly Materials Plant 62**

2 days at \$500.00 per day	\$ 1,000.00
<b>Total</b>	<b>\$ 1,000.00</b>

**Shelly Materials Plant 63**

4 days at \$500.00 per day	\$ 2,000.00
<b>Total</b>	<b>\$ 2,000.00</b>

**Deterrence**

The final factor for the Court's consideration when determining the appropriate penalty is deterrence. As quoted above "... the civil penalty, in order to deter a violation must be large enough to hurt the offender."

First of all the Court does not fully understand what is intended by hurting the offender. Any penalty would impact a corporation's profit and therefore hurt.

Second, except for the continuing violations that relates to reports that have not been filed it appears to the Court that Shelly is in compliance. The Court has already found that the data from the missing reports would be so old that its value would be negligible at best. The compliance is the result of a voluntary audit. What is left for the Court to deter?

Third, the total penalty awarded by the Court and summarized below is \$350,123.52. According to Shelly's Findings of Fact 1148 and 1149 the penalty is 8 times larger than the average penalty Ohio EPA obtained in 2006 and 10 times larger than the average penalty Ohio EPA obtained in 2005.

Based on the foregoing the Court does find that the amount of the penalty is appropriate.

### Injunctive Relief

Additionally, the State seeks injunctive relief.

The Tenth District Court of Appeals has held as follows:

When a request for injunctive relief is based upon a past wrong, a plaintiff must show a real or immediate threat that the plaintiff again will be wronged. *Davis v. Flexman* (S.D. Ohio 1999), 109 F.Supp.2d 776, 783-84, citing *City of Los Angeles v. Lyons* (1983), 461 U.S. 95, 111, 103 S.Ct. 1660, 1670, 75 L. Ed. 2d 675; *O'Shea v. Littleton* (1974), 414 U.S. 488, 495-96, 94 S.Ct. 669, 676, 38 L. Ed. 2d 674. "The gravamen of the remedy \* \* \* is that a defendant is about to commit an act that will produce immediate and irreparable harm for which no adequate legal remedy exists." *Hack v. Sand Beach Conservancy Dist.*, 176 Ohio App.3d 309, 2008 Ohio 1858, at P24, 891 N.E.2d 1228.

Other than bare allegations that Germain may once again choose to use a form which it voluntarily ceased using once it discovered the form was illegal, plaintiff has not demonstrated that the harm plaintiff seeks to prevent will recur. Quite simply, plaintiff's request for injunctive relief does no more than request that the court order Germain to "obey the law." See *United States v. Matusoff Rental Co.* (S.D. Ohio 2007), 494 F. Supp. 2d 740, 755-57. . . .

Searles v. Germain Ford of Columbus, L.L.C. (Franklin App., March 24, 2009), No. 08AP-728, 2009 Ohio App. LEXIS 1112, at \*9-10; see Athens Metro. Hous. Auth. v. Pierson (Athens App., March 12, 2002), Nos. 01CA28 & 01CA29, 2002 Ohio App. LEXIS 2100, at \*23-24 ("Generally, when the equitable remedy of injunction is sought, a plaintiff must demonstrate, by clear and convincing evidence, actual irreparable harm or

an actual threat of irreparable harm. . . . The design of an injunction is to prevent future injury and not to redress past wrongs.”).

In the present case, except for various reports which still have not been filed Shelly's operations are in compliance with the applicable regulations. There is no evidence that any of the facilities are not properly permitted or being operated in violation of the terms of its operating permits. To the extent that certain reports have not been filed the information would be so outdated as to have no value. Further given the fact that Shelly is now in compliance in large part as a result of the voluntary audit the State has failed to “show a real or immediate threat that the plaintiff again will be wronged.” Thus, the Court declines to grant injunctive relief.

## SUMMARY OF PENALTY

Judgment is entered in favor of the State and against Shelly on the claim of immunity. Judgment is entered in favor of Shelly and against the State on the request for injunctive relief. Judgment is entered in favor of the State and against Shelly in Claim One through Twenty as follows:

	<b>TOTAL</b>
<b>Total Penalty First Claim</b>	
Shelly Materials Inc.	\$ 15,525.00
<b>Total Penalty Second Claim</b>	
Shelly Materials Inc.	\$ 87,399.52
<b>Total Penalty Seventh Claim</b>	
Shelly Materials Inc.	\$ 4,500.00
<b>Total Penalty Eighth Claim</b>	
Shelly Materials Inc.	\$159,413.00
<b>Total Penalty Ninth Claim</b>	
Shelly Materials Inc.	\$1,450.00
Allied Corp.	\$ 725.00
	\$ 2,175.00
<b>Total Penalty Tenth Claim</b>	
Shelly Materials Inc.	\$ 625.00
<b>Total Penalty Twelfth Claim</b>	
Stoneco Inc.	\$ 165.00
<b>Total Penalty Thirteenth Claim</b>	
Stoneco Inc.	\$ 1,200.00

**Total Penalty Fourteenth Claim**

Shelly Materials Inc	\$11,851.00	
Middleport Terminal Inc.	\$37,770.00	
		\$ 49,621.00

**Total Penalty Sixteenth Claim**

Shelly Materials Inc.		\$ 500.00
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**Total Penalty Seventeenth Claim**

Shelly Materials Inc.		\$ 8,500.00
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**Total Penalty Eighteenth Claim**

Stoneco Inc.		\$ 17,500.00
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**Total Penalty Nineteenth Claim**

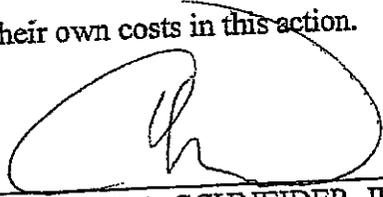
Shelly Materials Inc.		\$ 3,000.00
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Shelly Materials Inc.	\$292,763.52	
Allied Corp.	\$ 725.00	
Stoneco Inc.	\$ 18,865.00	
Middleport Terminal Inc.	\$ 37,770.00	

\$350,123.52

\$350,123.52

Both parties have prevailed in this action. The State prevailed on Shelly's claim for immunity. Shelly prevailed on the State's Claim for injunctive relief. As to Claims One through Twenty, each party prevailed depending on the claim and the facility. Therefore, each party shall be responsible for their own costs in this action.

  
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CHARLES A. SCHNEIDER, JUDGE