

**JEFF LIPTON, LOUISE E. MOYER,
BRIAN K. MOYER and JACQUELINE D.
MOYER**

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION, DISTRICT TOWNSHIP,
And PINE CREEK VALLEY WATERSHED
ASSOCIATION, INC.**

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: **EHB Docket No. 2007-026-MG**
: **(consolidated with EHB Docket**
: **No. 2008-038-MG)**
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: **Issued: May 20, 2008**
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**OPINION AND ORDER ON
MOTIONS FOR SUMMARY JUDGMENT and MOTION TO DISMISS**

By George J. Miller, Judge

Synopsis

The Board grants the Department's motion for summary judgment which seeks to dismiss the landowners' appeal from the Department's rescission of an approval of a sewage module for a residential land development. We find as a matter of law that the Department reasonably rescinded its approval of a sewage module under the Sewage Facilities Act, in order to consider whether the proposed on-lot disposal systems would adequately protect the exceptional value waters located on the site as required by the Department's antidegradation regulations.

The Board also grants the Department's motion to dismiss the appeal of the sewage module as moot. Since the Board holds that the Department properly rescinded its approval of the module, there is no further relief that can be granted.

OPINION

Before the Board are separate motions for summary judgment filed by each of the parties to these appeals involving sewage facilities planning for a subdivision located in Berks County known as Fredericksville Farms. Fredericksville Farms is located within the Pine Creek watershed.¹ The Pine Creek Valley Watershed Association (the Association) contends that the Department should consider the impact that the proposed sewage facilities might have on wetlands and other surface waters which are located on the property and which are part of the Pine Creek watershed. The Pine Creek and its tributaries are designated by the Department as exceptional value (EV) waters. The Association's advocacy on this point has generated a series of appeals resulting in a rather complex procedural history described below. For the purposes of the motions for summary judgment, most of the factual background does not appear to be disputed.

The Fredericksville Farms subdivision is owned by Jeff Lipton. Louise Moyer, Brian Moyer and Jacqueline Moyer each own lots. Mr. Lipton is marketing the remaining lots for sale and the Moyers utilize their lots for farming activity.² Fredericksville Farms consists of eight lots on approximately 74 acres. There are approximately 11 acres of wetlands located in the southeastern portion of the property.³ The parties do not dispute that these wetlands contain headwaters and tributaries to Pine Creek, and are therefore part of the Pine Creek EV watershed.⁴

¹ Exhibit 1 to the Department's motion for summary judgment is a stipulation of facts signed by all the parties. These facts will be referenced as "Stip. ¶ ____."

² Collectively Mr. Lipton and the Moyers will be referred to as "Landowners."

³ Association's Brief, Statement of Material Facts, ¶ 3 and Ex. 2.

⁴ See Stip. ¶ 5 and Association's Brief, Statement of Material Facts ¶¶ 8-11 and Exs. 1, 2,3, and 5.

The lots in Fredericksville Farms are to be served by on-lot sewage disposal systems. The proposed on-lot systems are designed to discharge effluent to absorption areas in the ground and allow the effluent to percolate through the soil, ultimately to be assimilated into groundwater.⁵ The groundwater flow on the property generally flows toward the east into a tributary of Pine Creek.⁶

The Department approved a sewage module for the Fredericksville Farms subdivision in November 2006. Neither the sewage planning specialist who approved the module nor anyone else at the Department explicitly considered the impact that the discharge from the on-lot septic systems may have on the EV waters that form the Pine Creek watershed.⁷ Accordingly, the Pine Creek Valley Watershed Association challenged the Department's action by filing a notice of appeal in January 2007. The Landowners⁸ intervened.

In the meantime, the Association was litigating another appeal before the Board relating to a sewage module for the Mulberry Hill II Subdivision, making a similar argument: that the Department should consider the impact that on-lot disposal systems may have on the Pine Creek watershed pursuant to the Department's antidegradation regulation, 25 Pa. Code § 93.4c, when reviewing sewage modules.⁹ After that case went to hearing and the Association had filed its post-hearing memorandum, the Department agreed to rescind its approval of that sewage module in order to consider potential impacts of its approval on the EV watershed, if any.

Shortly thereafter, the Department also rescinded the approval for Fredericksville Farms, and filed a motion to dismiss the Association's appeal on the basis of mootness. The Landowners

⁵ Stip. ¶ 4.

⁶ Association's Brief, Statement of Material Facts, ¶ 5 and Ex. 4.

⁷ Stip ¶ 6.

⁸ See Footnote 2, above.

⁹ *Pine Creek Valley Watershed Association v. DEP*, EHB Docket No. 2005-249-MG.

filed a notice of appeal from the rescission, challenging the Department's decision to further investigate the connection between the proposed method of sewage disposal and the EV watershed. The Association intervened in the appeal of the rescission. The Board consolidated the plan approval appeal with the rescission appeal and directed the parties to come to an agreement on how best to proceed. The parties contended that the issue before the Board was essentially one of law which could be decided on motions for summary judgment. Accordingly, each party has now filed a motion for summary judgment.

The Landowners' Motion

The basis for the Landowners' motion is simple: The Department's antidegradation regulations do not apply to the proposed method of sewage disposal because the on-lot systems do not discharge effluent as either a point source or a non-point source. Rather, according to the Landowners, the on-lot systems are an approved "non-discharge alternative" as defined by the Department's antidegradation guidance document. They contend that because the antidegradation regulations only relate to the protection of EV waters from point sources and non-point sources, and not non-discharge alternatives, it was improper to apply the required analysis to the Landowners' sewage module. Therefore, the Board should grant judgment in favor of the Landowners, and rescind the Department's rescission letter.

Both the Department and the Association oppose the Landowners' motion and take the position that there is no legal basis for the Landowners' analysis. In the Department's view, the antidegradation regulations apply to *any* permit or approval action that may have an effect on surface waters, including sewage planning modules and Act 537 plan revisions. The Association also argues that the Landowners' reliance on a Department guidance document which defines on-lot sewage disposal as a "non-discharge alternative" means only that there is no discharge

directly to a surface water. In the Association's view, the proposed on-lot systems discharge to groundwater which in turn discharges to surface water.

The Association's Motion

The Association's position is also simple: The Department has an absolute duty to consider the impact of on-lot sewage disposal systems on special protection waters pursuant to the antidegradation regulations. Therefore it was proper for the Department to rescind the approval for Fredericksville Farms. The Association points out that there is no dispute that the Department did not undertake such a review. There is no dispute that the wetlands on the property contain headwaters and tributaries to Pine Creek. Further, the groundwater on the site flows from the parcels toward the wetlands thereby creating at least a potential of pollution to the watershed. The Department generally concurs with the relief requested by the Association's motion, and agrees that the Department should consider whether the proposed systems will impact the watershed. However, the Department contends that it should not be required to perform an alternatives analysis required by 25 Pa. Code § 93.4c(b)(1)(i)(A) and (B). In the Department's view, this provision only applies to point source discharges.

The Landowners counter that there is no factual or legal basis to conclude that the proposed on-lot systems will have any potential impact on surface waters. On the legal argument the Landowners reiterate the contention in their own motion that the proposed sewage disposal systems are neither point source nor non-point source discharges, therefore the antidegradation regulations do not apply. As a point of fact, they argue that the hydrology study performed to determine whether the soil would be sufficient to remediate nitrate pollution below the drinking water standard is sufficient to demonstrate that no sewage from the systems will reach surface waters.

The Department's Motion

The Department agrees with the Association that it had a mandatory duty to consider whether or not the proposed sewage systems would negatively impact the Pine Creek watershed pursuant to the antidegradation regulations and the sewage facilities regulations which require compliance with the Clean Streams Law and regulations. Accordingly, the Department takes the position that it did not abuse its discretion as a matter of law, by rescinding the Fredericksville Farms approval in order to perform this analysis.

As we explain more fully below, we will grant the Department's motion for summary judgment. We believe that the Department acted reasonably by rescinding the Fredericksville Farms sewage module in order to consider what impact, if any, the proposed sewage systems may have on the Pine Creek watershed.

DISCUSSION

Motions for Summary Judgment

The purpose of summary judgment is to challenge the sufficiency of the evidence that the opposing party has to support his claim at hearing.¹⁰ Accordingly, the Board will only grant summary judgment where the evidentiary materials which support the motion demonstrate that the moving party is entitled to judgment as a matter of law.¹¹ In considering the merits of a motion for summary judgment, we view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved

¹⁰ *Scalice v. Pennsylvania Benefits Trust Fund*, 883 A.2d 429 (Pa. 2005); *Jones v. SEPTA*, 772 A.2d 435 (Pa. 2001); *Jackson v. DEP*, 2005 EHB 496.

¹¹ *E.g. Global Ecological Services, Inc. v. Department of Environmental Protection*, 789 A.2d 789 (Pa. Cmwlth. 2001); *Barra v. DEP*, 2006 EHB 198.

against the moving party. Finally, the entry of judgment in the moving parties' favor is only appropriate in cases where the right to judgment is clear and free of doubt.¹²

The Department's mandate under the antidegradation regime is clear: "The water quality of Exceptional Value waters *shall be* maintained and protected."¹³ In order to carry out this mandate, Section 93.4c of the Department's regulations, sets out general procedures for review:

(i) Existing use protection *shall be provided* when the Department's evaluation of information . . . indicates that a surface water attains or has attained an existing use.

. . . .

(iv) The Department will make a final determination of existing use protection for the surface water as part of the final permit or approval action.¹⁴

All of the parties agree that the Department did not explicitly perform any type of review pursuant to Section 93.4c of the regulations. All of the parties agree that the Pine Creek watershed is an EV water,¹⁵ and all of the parties agree that the wetlands located on the Fredericksville Farms property are part of the Pine Creek watershed. The Department's regulations define wetlands as a "surface water."¹⁶ The parties have stipulated that sewage effluent will be discharged to absorption areas and will ultimately be assimilated into groundwater through the soil. There does not appear to be a dispute that the general direction of groundwater flow is from at least some of the proposed subdivision lots toward the wetlands on the property. Accordingly, we can find no error in the Department's desire to review the proposed sewage facilities in order to make sure that the effluent from the proposed sewage

¹² *Scalice; Jones.*

¹³ 25 Pa. Code § 93.4a.

¹⁴ 25 Pa. Code § 93.4c(a)(1)(i) and (iv).

¹⁵ "Exceptional value" is defined as a "protected water use" by Section 93.3. 25 Pa. Code § 93.3.

¹⁶ 25 Pa. Code § 93.1.

facilities is indeed remediated by percolation through the soil before it reaches the groundwater thereby ensuring that the existing use of the wetlands in the EV watershed are protected. The antidegradation regulations clearly provide authority for such a review. Indeed the sewage facilities regulations also required that the Department ensure that sewage modules and approvals of official plans comply with antidegradation and other Clean Streams Law requirements.¹⁷ We further find no fault in the Department's desire to correct its oversight in failing to undertake this review in the first instance by taking the initiative to revoke the approval before being ordered to do so by the Board.¹⁸

We reject the Landowners' contention that the antidegradation regulations do not apply to on-lot sewage facilities because they are neither a point source nor a non-point source. This premise is based on the Landowners' view that the on-lot systems discharge to the ground and remediate sewage discharges through the soil, rather than discharging directly to surface water. The Landowners argue that this view is supported by the Department's antidegradation guidance manual which defines on-lot systems as an acceptable "non-discharge alternative."

First, even if we were to accept the Landowners' premise, there is nothing in the simple language of Section 94.3a which limits the command to protect the water quality of EV waters only from direct discharges to surface waters, nor do we find an exemption in the regulation from review of "non-discharge alternatives" because they discharge through an absorption area rather than directly to water. The fact that sewage may be remediated through the soil does not by itself mean that there is no possible impact on the wetlands and that the project should be shielded from review by the Department. The parties have stipulated that the effluent is

¹⁷ 25 Pa. Code § 71.32(d)(1).

¹⁸ See *Blue Mountain Preservation Association v. DEP*, 2006 EHB 589 (vacating and remanding an NPDES permit for antidegradation review).

ultimately “assimilated into groundwater.” There is no question that sewage from residences is pollution and that the purpose of the on-lot systems is to remediate that pollution. Whether those systems are adequate for the purposes of protecting the existing use of the watershed – as a point source, as a non-point source or as something else – is not necessary for us to resolve here. The regulation only requires that the Department protect the existing use of a watershed. It does not limit the types of discharges from which the watershed must be protected.

The Landowners also contend that there is no proof that all of the groundwater on the site will reach the surface waters on the site, and that even if it does, the nitrate studies which were done in the context of the sewage facilities regulations adequately establish that there is no pollution to the groundwater. By contrast, at the hearing in the appeal relating to the Mulberry Hill II Subdivision, the Association’s expert testified that the Department’s initial studies done in the context of the sewage planning module were inadequate to determine whether the sewage disposal plumes would not reach the Pine Creek watershed, located a few hundred feet from the property-line of the proposed development. In his view, it was likely that given the topography of the property and the likely flow of the groundwater, a more detailed study would show that the plumes from several of the on-lot systems would converge in a “funnel effect” and reach the Pine Creek watershed, resulting in pollution of the watershed.¹⁹ The Department agreed to withdraw its approval of that sewage module in order to consider what impacts, if any, the proposed on-lot systems would have on the Pine Creek watershed, after the hearing. No doubt, a similar criticism might be made of the studies performed in the Landowners’ sewage module. Accordingly, it was lawful and appropriate for the Department to review the situation in order to determine the

¹⁹ See testimony of John Ward, N.T. 42-62.

possible effect of its approval of the sewage module on EV waters.²⁰ The Department may well conclude that the proposed systems will not cause pollution either because the sewage is adequately remediated by discharge through the soil, or that the groundwater is not, in fact, hydrogeologically connected to the surface waters.

Further, the Board clearly required the Department to perform an independent antidegradation review in *Blue Mountain Preservation Association v. DEP*.²¹ There the Department had argued that the best management practices incorporated into the Chapter 102 erosion and sedimentation control regulations were an acceptable substitute for the antidegradation analysis required by Chapter 94. The Landowners have not demonstrated that the Chapter 71 nitrate analysis requirement, which assures compliance with the drinking water standard for nitrogen contamination, has any direct relationship to the broader requirements of the antidegradation regulations or that there is any unity of purpose or process between the two sets of regulations. Accordingly, we see no basis to depart from the *Blue Mountain Preservation* holding in this case.

Thus, the only issue for our resolution is whether the Department's position that it should have reviewed the sewage module under Section 93.4c, provides a reasonable basis for the Department to rescind its approval in order to effectuate that review. We find that the presence of wetlands on a substantial portion of the site which are part of an EV watershed and the testing of the Association's expert in the appeal related to the Mulberry Hill II Subdivision provide an adequate basis for the Department's desire to investigate whether there may be an adverse impact

²⁰ *Blue Mountain Preservation Association v. DEP*, 2006 EHB 589 (in a challenge to a stormwater permit the appellant need not prove that there will be degradation of the surface water, but only that the proper analysis was not performed).

²¹ 2006 EHB 589.

on the existing use of the watershed by the addition of on-lot sewage disposal facilities to the property, and that further review to answer that question is reasonable and appropriate.²² As we explained above, this analysis is clearly required by Sections 93.4a and 93.4c. Further, Section 71.32(d)(1), requires that the Department determine whether the proposed plan revision complies with the requirements of the Clean Streams Law. Accordingly, the Department is authorized and required to consider whether the approval of the sewage module was consistent with the regulations promulgated to effectuate the mandates of the Clean Streams Law, including the antidegradation regulations.

In short, we will grant the Department's and Association's motions for summary judgment and deny the Landowners' motion. Given our disposition of the Department's motion, we need not reach the issues raised in the Association's motion relating to the specifics of the analysis that the Department should perform under the antidegradation regulations.

Motion to Dismiss

We also have before us the Department's motion to dismiss the Association's appeal of the grant of the sewage module as moot.²³ The Department moved to dismiss the appeal because the approval had been rescinded and the Association had effectively achieved the relief which is sought in the appeal. The Landowners opposed the motion because they had filed an appeal from the rescission. The Association did not oppose the Department's motion.

²² See *Eagle Environmental LP v. DEP*, 1998 EHB 896, *affirmed*, No. 2704 C.D. 1998 (Pa. Cmwlth. filed October 19, 2001) (the Department did not abuse its discretion in suspending solid waste, air quality, and NPDES permits for a proposed landfill project based on the Department's revocation of a permit to fill wetlands in order to allow the opportunity for the Department to conduct further review of the project.)

²³ This motion was filed in December, 2007. The Board delayed disposing of the motion in order to permit the parties an opportunity to file the motions to dismiss in the rescission appeal.



In light of the Department's withdrawal of the approval of the sewage module and our ruling that the Department's desire to review the proposal under the antidegradation regulations is lawful and reasonable, we agree with the Department that the Association's original appeal is moot. There is no further relief that the Board can provide in the appeal of the sewage module.

We therefore enter the following;

**COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD**

**JEFF LIPTON, LOUISE E. MOYER,
BRIAN K. MOYER and JACQUELINE D.
MOYER** :
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COMMONWEALTH OF PENNSYLVANIA, :
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PROTECTION, DISTRICT TOWNSHIP, :
And PINE CREEK VALLEY WATERSHED :
ASSOCIATION, INC. :

ORDER

AND NOW, this 20th day of May, 2008, upon consideration of the motions for summary judgment and the motion to dismiss in the above-captioned matter, it is hereby ordered as follows:

1. The motions for summary judgment of the Department of Environmental Protection and the Pine Creek Valley Watershed Association are hereby **GRANTED**.
2. The motion for summary judgment of the Landowners is **DENIED**.
3. The Landowners' appeal at Docket No. 2008-038-MG is **DISMISSED**
4. The Department's motion to dismiss the appeal of the Pine Creek Valley Watershed Association at Docket No. 2007-026-MG is **GRANTED** and that appeal is **DISMISSED**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge



GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: May 20, 2008

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