



**BLUE MOUNTAIN PRESERVATION
ASSOCIATION, INC.**

v.

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

EHB Docket No. 2009-080-L

Issued: August 25, 2011

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board holds that the Department's issuance of a new NPDES permit for post-construction stormwater discharges that was revised following an earlier remand by the Board complied with antidegradation requirements.

FINDINGS OF FACT

1. Blue Mountain Preservation Association, Inc. ("BMPA") is a nonprofit organization based in Eldred Township, Monroe County. (Joint Stipulation of the Parties Number ("Stip.")1.)
2. The Department of Environmental Protection (the "Department") is the agency of the Commonwealth responsible for issuing NPDES permits. (Stip. 3.)
3. Alpine Rose Resorts, Inc. ("Alpine") is the permittee. (Stip. 4.)
4. Alpine owns approximately 348 acres on the northern slope of Blue Mountain on Upper Smith Gap Road in Eldred Township, Monroe County. (Stip. 5.)



5. The Aquashicola Creek flows through the northeast corner of Alpine's property. (Stip. 6.)

6. The Aquashicola Creek and the tributaries thereto are designated as a High Quality (HQ), Cold Water Fishery, Migratory Fishes pursuant to 25 Pa. Code § 93.9d. (Stip. 7.) It has also been designated as a wild trout stream. (Alpine Exhibit No. ("A. Ex.") 9; Notes of Transcript page ("T.") 241; A. Ex. 9.) Wetlands bordering the northeast corner of the property are considered Exceptional Value (EV) wetlands because of their ecological significance. (T. 242; A. Ex. 9.) (Aquashicola Creek, its tributaries, and its associated wetlands will hereinafter be referred to collectively as "Aquashicola Creek" unless otherwise noted.)

7. The property is entirely within the drainage area of the Aquashicola Creek. (Stip. 8.)

8. The property extends from a maximum elevation of approximately 1500 feet above sea level to a low elevation of approximately 500 feet at the Aquashicola Creek. (T. 225.) The site gets less rocky and has more soil as one goes down the hill. (T. 226.)

9. The following water resources are within the boundaries of the site and are designated as HQ:

- a. Floodplain wetlands adjacent to and within the floodplain of the Aquashicola Creek;
- b. A first-order intermittent tributary stream system in the middle and lower slopes of the western portion of the site along with associated wetlands and the surrounding riparian corridor; and
- c. A natural ephemeral water course and associated wetlands in a ravine on the eastern portion of the site.



T. 228-29, 236-38, 241-42; A. Ex. 9.)

10. The surface water resources are primarily sustained by groundwater, which includes interflow (shallow groundwater flow above any aquifers). (A. Ex. 9; T. 247-48.) Groundwater from the site also discharges into the Aquashicola Creek. (A. Ex. 9; T. 246, 322-23.)

11. Surface discharges of stormwater from the pre-construction property occur at the following discharge points.

- a. Discharge Point No. 1 – The mouth of the ephemeral first-order tributary stream on the eastern side of the property. This watercourse discharges into the floodplain wetlands of the Aquashicola Creek on the property;
- b. Discharge Point No. 2 – A culverted outfall from the first-order natural tributary stream system located on the western portion of the property. The discharge at this point is to off-property floodplain wetlands of the Aquashicola Creek; and
- c. Discharge Point No. 3 – This discharge point is a culverted discharge which collects runoff water from the western lower slopes on the property, from the adjacent neighbor's property, and from Upper Smith Gap Road via a small swale on the southern edge of the road pavement. Discharge at this point is to the floodplain wetlands of the Aquashicola Creek.

(T. 239-41, 244-45; A. Ex. 9.)



12. Alpine plans to construct a road course for sports cars and high performance vehicles, as well as support facilities, on the site. (*Blue Mountain Preservation Ass'n v. DEP*, 2006 EHB 589 (*"Blue Mountain I"*), Finding of Fact ("FOF") 9.)

13. On September 17, 2002, Alpine submitted to the Department an NPDES Permit application for stormwater discharges to the Aquashicola Creek associated with construction activities at the property. (*Blue Mountain I*, FOF 11.)

14. On August 5, 2003, Alpine submitted to DEP a second NPDES Permit application for stormwater discharges to the Aquashicola Creek associated with construction activities at the property. (*Blue Mountain I*, FOF 17.)

15. During the review process, Alpine was required to submit additional technical and scientific information to justify issuance of an NPDES permit for the project. (*Blue Mountain I*, FOF 18.)

16. On August 27, 2004, Alpine submitted its revised erosion and sedimentation control (E&S) plan to the Monroe County Conservation District. (*Blue Mountain I*, FOF 19.)

17. Alpine's revised E&S Plan included erosion and sedimentation control Best Management practices ("BMPs"). (*Blue Mountain I*, FOF 28.)

18. Alpine's BMPs included the following: topsoil stockpiles; a stabilized construction entrance; a silt fence; benches; sediment basins; baffles installed in the basins; skimmers for discharges from basins; erosion control lining placed in swales; filtration devices; water quality inlet structures (Stormceptors); planting of grasses, plants and trees; dry and wet ponds; swales or lined channels to direct runoff; and a riparian buffer. (*Blue Mountain I*, FOF 31.)



19. Alpine's proposed BMPs meet the requirements of 25 Pa. Code Chapter 102 with regard to prevention of accelerated erosion and sedimentation. (*Blue Mountain I*, FOF 32, 33.)

20. As originally designed, there would have been a net increase in post-construction stormwater runoff, i.e., discharge into the Aquashicola Creek, as a result of the construction of the Alpine project. (*Blue Mountain I*, FOF 34.)

21. The increase in discharge as a result of the project triggered the requirement of compliance with the antidegradation regulations for the Alpine permit. (*Blue Mountain I*, FOF 35.)

22. Alpine did not show in the first appeal that stormwater discharges leaving the site would maintain and protect the existing water quality of Aquashicola Creek as required by antidegradation regulations. (*Blue Mountain I*, FOF 54, 57.)

23. Therefore, this Board remanded the permit to the Department for further consideration. (*Blue Mountain I*, 2006 EHB at 624; Stip. 9-12.)

24. Following the remand, Alpine prepared and revised an antidegradation analysis. (T. 242, 450-89; DEP Ex. 13, 15, 21; BMPA Ex. 13, 15; A. Ex. 9.)

25. Meetings, correspondence, application revisions, and a public hearing ensued. (Stip. 14, 15, 16; T. 450-59; DEP Ex. 13, 15, 21; BMPA Ex. 13, 15.)

26. On May 6, 2009, the Department issued a new permit (NPDES Permit No. PAS10S119) for the project. (Stip. 15.) Before us is BMPA's appeal from this new permit.

27. The original BMPs as described in *Blue Mountain I* remain as integrated components of the post-construction stormwater management plan under the new permit. (T. 250-55.)



28. In addition, Alpine has added a few new BMPs, most importantly 50-foot-wide infiltration beds within the grassed safety aprons along the entire length of the road course. (T. 253-54; A. Ex. 9, 27-32.)

29. Due to limitations of location, size, gradient, porosity, relation to the seasonal water table, and construction specifications, the infiltration beds by themselves are not designed to and in fact will not infiltrate all of the stormwater falling on the site during larger storms. (T. 28, 39-41, 49-54, 60, 67, 164-65, 277, 331-32, 363; A. Ex. 9, 30.)

30. Infiltration trenches will be installed as needed under some infiltration beds to allow for additional infiltration. (T. 60, 256-57, 263-65; A.Ex. 9, 30, 39.)

31. Alpine's integrated stormwater management system, which includes the infiltration beds and the other BMPs, together with natural infiltration and evapotranspiration on the very large portions of the site that will remain forested and undisturbed by the project, will ensure that there will be neither an increase nor a decrease in the quantity, quality, or flow rate of surface or subsurface flow into Aquashicola Creek post-construction. (T. 234-35, 246-59, 288-89, 297-300, 303-15, 335-36, 348-50, 385-90, 404-05, 470-72, 478-88, 497-500; A. Ex. 2, 9; BMPA Ex. 2.)

32. The permit requires that Alpine conduct a visual site inspection on at least a weekly basis, and also after each measurable precipitation event. Several special conditions have been added to the permit regarding implementation of the post-construction stormwater management plan according to the approved plans. Inspections are required by a Pennsylvania registered Professional Engineer, or the engineer's designee, to provide onsite project oversight. Also, any deviations from the approved plans must be approved by the Department prior to



construction, and “as-built” plans will be required to document any changes. (T. 493; BMPA 1; 2.)

33. Unlike the project as originally designed (*Blue Mountain I*, FOF 34), the project as modified will not create a net increase in post-construction runoff to Aquashicola Creek. (T. 246-50, 298-99, 322-24, 331-32, 335-40, 345, 351-52, 385-90; A. Ex. 2, 9.)

34. The project as it is now designed will preserve the existing stormwater regime and the hydrologic balance of the watershed. (T. 246-50, 298-99, 322-24, 331-32, 335-40, 345, 351-52, 385-90; A. Ex. 2, 9.)

35. The project as it is now designed will protect and maintain the waters of the Commonwealth. (T. 246-50, 298-99, 322-24, 331-32, 335-40, 345, 351-52, 385-90; A. Ex. 9.)

36. There is no credible record evidence that post-construction runoff will create excess erosion or sedimentation of waters of the Commonwealth. (*Blue Mountain I*, FOF 33; *See* T. 274-75, 301-307.)

37. There is no credible record evidence that post-construction runoff will transport any other pollutants to waters of the Commonwealth. (*See* T. 307-10.)

DISCUSSION

As BMPA correctly points out, resolution of this appeal rests on whether the Department’s issuance of a new NPDES permit to Alpine following our remand complied with the antidegradation regulations codified at 25 Pa. Code Chapter 93. BMPA asserts that the Department has failed to properly consider two threats to the water quality of the Aquashicola watershed from Alpine’s development: (1) pollution (sedimentation and “road course pollutants”) associated with post-construction surface water discharges, and (2) reduced groundwater flow to the receiving waters. BMPA alleges that Alpine’s project will convert some



of the pre-construction *subsurface* flow into *surface* flow with unknown but potentially harmful consequences to the receiving waters. BMPA concedes that it has no proof that actual degradation will occur, but it argues that yet another remand for further study is necessary because there will be changes to the hydrologic regime and no one knows what effect those changes will bring.

Our *de novo* review of the record convinces us that Alpine's project as it is now designed will replicate pre-construction conditions with respect to groundwater and surface water flow. There will be no adverse effect on the waters of the Commonwealth because there will be no appreciable change from pre-construction conditions. Therefore, BMPA's appeal must fail.¹

Another thing that BMPA gets exactly right is that compliance with the laws against degradation "means more than simply engaging in some exercise using labels such as 'antidegradation,' 'nondischarge alternatives,' and 'ABACT.'" (Reply Brief, p. 4.) We have now explained on several occasions that compliance with the antidegradation requirement is ultimately not about checking off boxes on a form. *Crum Creek Neighbors v. DEP*, 2009 EHB 548, 564; *Blue Mountain I*, 2006 EHB 589; *Zlomsowitch v. DEP*, 2004 EHB 756. The overriding requirement of the antidegradation regulations is that the water quality of HQ and EV waters "shall be maintained and protected." 25 Pa. Code § 93.4a(b-c).² In the final analysis we will review the Department's issuance of a permit to ensure that special protection water quality will be maintained and protected.

¹ Although Alpine proposed modifications that go beyond what is required by the permit as part of Board-mandated settlement discussions, those discussions were ultimately unsuccessful. Alpine never committed to implement the changes, the Department never reviewed them, and it turned out that they were not enough to satisfy BMPA. Accordingly, we have not considered them. Along the same lines, we have not considered revisions to the E&S and stormwater regulations codified at 25 Pa. Code Chapter 102 because they by their own terms do not apply to any person, such as Alpine, conducting earth disturbance activities under a permit issued before November 19, 2010. *See* 25 Pa. Code § 102.8(a).

² Water quality of HQ waters may be reduced with appropriate social or economic justification, 25 Pa. Code § 93.4c(b)(1)(iii), but no party has raised that exception in this case.



Many of our cases evolve into a battle of the experts, which requires us to choose between contradictory opinions of a highly technical nature. Here, however, there was no battle on the central issue of protecting water quality because BMPA did not present any expert testimony to contradict the credible opinions of Alpine's expert, Thomas Gillespie, P.G. BMPA, apparently due to its understandably limited budget (Reply Brief at 6), did not call an expert on hydrology, geology, or hydrogeology. BMPA's only expert witness was Michelle Adams, P.E. Adams is an engineer with expertise in the design and construction of stormwater management systems. (T. 21.) She has "an understanding" of groundwater and geology as they relate to system design (T. 22), but she is not an expert in hydrology, geology, or hydrogeology (T. 90-92).

Adams's testimony as an engineer on behalf of BMPA focused on the design of Alpine's infiltration beds. She believes that the beds will not infiltrate as much stormwater runoff as Alpine claims they will infiltrate during large storms. As a result, they will not be adequate in her view to capture all of the increased stormwater runoff from newly paved and lawned areas and some of them will "overflow." However, the combined testimony of Gillespie, who was also qualified in engineering geology, Philip Amico, P.E., the Department's engineer, and Christopher Blechschmidt, P.E., Alpine's engineer, persuades us that Adams's engineering-based concerns regarding Alpine's stormwater management system are largely unfounded.

We will not dwell on the engineering debate because, even if we give Adam's engineering concerns the benefit of the doubt, BMPA has failed to show that any of the escaped surface water flow that she describes will materially alter pre-construction surface or subsurface flows on the site. Adams did not credibly and within the bounds of her limited expertise testify that any of this uncaptured runoff will ever reach waters of the Commonwealth, let alone have an



adverse impact on the water quality of those waters. At one isolated point, Adams testified in response to highly leading questions from her counsel that “it appears that” runoff from one area will reach the floodplain wetlands. (T. 68-69.) She somewhat vaguely said that, “depending upon the amount of water and the slope and soil conditions” the overflows “could” cause erosive conditions (and presumably excess sedimentation) (T. 70-72), but these statements fall well outside of her area of expertise (*see* T. 90-92) and fall short of a professional opinion given with a reasonable degree of certainty.³ Thus, BMPA has failed to show us that the project as it is now designed will result in any changes in the pre-construction discharges from the site. It has also not shown us that there will be any change affecting on-site waters (i.e. the tributaries and wetlands).

BMPA’s case regarding a diminution in flow (which theoretically could impact the receiving waters) is even weaker, which is not surprising given its lack of hydrogeological evidence. BMPA’s Proposed Finding of Fact 32 in its post hearing brief alleges that Adam’s posited overflow amounts from the infiltration beds “will flow on the surface of the Subject Property and be discharged as surface flow instead of as base flow or interflow from the Subject Property.” Curiously, BMPA only cites pages 17-19 of Alpine’s expert report, but that report stands for exactly the opposite of BMPA proposed finding. Other key BMPA proposed findings of fact on these key points contain no citations to the record at all. This is not an oversight because BMPA’s brief is otherwise very thorough and well written. Rather, there is no citation to the record because there is nothing in the record to cite.

We cannot simply assume that there will be erosion, or if there is, whether any of this supposed erosion will result in excess sedimentation of any waters. Indeed, we found in *Blue*

³ Contrary to the implication in BMPA’s briefs, Blechschmidt did *not* testify that any new post-construction discharges will alter the pre-construction hydrologic budget. (*See* T. 414-15.)



Mountain I that Alpine's system satisfied the Department's E&S requirements, even without the infiltration trenches. (*Blue Mountain I*, FOF 32, 33.) The fact that water runs downhill in and of itself proves nothing.

BMPA argues that it should not be its responsibility to show that off-site discharges or a diminution in baseflow will degrade water quality; it is Alpine's responsibility. This may or may not be true, but we never reach that question here because BMPA has not shown that there will be *any* new discharges or that there will be *any* diminution in flow as a result of the project. In *Crum Creek Neighbors*, *supra*, there was no question that there would in fact be new post-construction discharges into an EV stream. 2009 EHB at 564. The Department's error was its failure to evaluate the effect of those discharges on the stream. The critical difference here is that BMPA has failed to show that there will be any such new or changed discharges given Alpine's new site design. Similarly, in *Crum Creek Neighbors* neither the permittee nor the Department paid adequate attention to whether the hydrologic balance of the EV stream would be protected as a result of the construction project and its stormwater management system.⁴ Here, the permittee and the Department gave considerable attention to that very issue.

We are disappointed to see that the Department also did not perform a hydrogeological assessment of Alpine's project, even after our remand. In fact, the Department's reviewing engineer specifically requested that a hydrogeologist be assigned to review the project as a necessary supplement to his review as an engineer. That request was denied. (T. 488.) More to the point, no hydrogeologist testified on behalf of the Department.

We need not speculate on how this case would have turned out had Alpine failed to fill the gap left by the Department's failure to bring appropriate expertise to bear. As it happens,

⁴ The appellants in *Crum Creek* raised a credible threat based on expert testimony that the permittee's attempt to divert all discharges from the EV stream would have had the unintended consequence of drying up all or parts of that stream.



Alpine, undoubtedly at considerable expense, did *exactly* what we asked it to do in *Blue Mountain I*. Alpine presented the testimony of Thomas D. Gillespie, P.G., a highly qualified, licensed Professional Geologist expert in hydrogeology and engineering geology. (T. 221.) Gillespie participated in a nearly three-year antidegradation design and review process that included more than 16 site visits, direct observation of a storm event of an approximate magnitude close to a hundred-year storm, numerous submissions, review meetings, and comment letters. (DEP Ex. 13, 15, 21.) Gillespie's work complemented the work of Alpine's engineering consultants in implementing the antidegradation analysis and creating a new design with features to ensure replication of existing conditions. Among other things, Gillespie performed a "stream base flow separation analysis" which determined how much groundwater flows into the stream, how much direct runoff goes into the stream, and how much comes through the soil following the one to two week period after a rainfall. (T. 230.) The results of his stream base flow separation analysis were corroborated by the results of a similar study performed by the United States Geological Survey that same year. (T. 230.) Using the base flow separation analysis and the location of water resource features on the property, and by mapping those out and overlaying them onto the topography, Gillespie was able to describe surface and groundwater flow on the site. (T. 237; A. Ex. 9.) Based upon this extensive study, Gillespie credibly testified that there will be no new or changed discharges as a result of the project, and the pre-construction hydrogeological balance will be maintained. (T. 246, 249-50, 298-99, 322-24, 331-32, 335-40, 345, 351-52, 385-90; A. Ex. 2, 9.) Pre-construction conditions will be replicated. In other words, the regulatory requirement that water quality be maintained and protected will be met.

Gillespie's opinion comports well with the record facts. While one might get the impression from BMPA's presentation that there is only one BMP at this site, the infiltration



beds that so dominated its attention are only one part of an integrated stormwater management system. We have already found that that system will adequately control erosion and prevent sedimentation. *Blue Mountain I*, FOF 32. It also must be remembered that Alpine's project is a relatively low impact project with respect to stormwater. Large sections of the property will be left untouched. All parties agree that the natural sections of the site act like a sponge. Overflows from any one infiltration bed can be absorbed by other beds, the other portions of the management system, and undisturbed areas. Of course, existing on-site flow must and will be preserved as well. And we have seen nothing that gives us cause for concern that too much or too little infiltration will occur in a way that harms on-site or off-site waters. In sum, Gillespie's testimony gives us comfort that the HQ and EV waters will receive the special protection that they deserve. Alpine has undertaken the requisite antidegradation analysis and made the requisite antidegradation showing.

CONCLUSIONS OF LAW

1. When considering whether and on what terms to issue an NPDES permit for a project with discharges to High Quality or Exceptional Value Waters of the Commonwealth, the Department must ensure that existing water quality will be maintained and protected. 25 Pa. Code § 93.4a.

2. Alpine's project as it is now designed will maintain and protect existing water quality in the Aquashicola watershed.

3. The Department's issuance of a revised NPDES to Alpine was lawful and reasonable in light of the facts.



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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ORDER

AND NOW, this 25th day of August, 2011, it is hereby ordered that this appeal is
dismissed.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

Judge Richard P. Mather, Sr., did not participate in this Adjudication.

DATED: August 25, 2011



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