

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
FOR THE STATE OF DELAWARE**

STAR ENTERPRISE

Appellants,

v.

**SECRETARY OF DEPARTMENT OF
NATURAL RESOURCES & ENVIRONMENTAL
CONTROL, STATE OF DELAWARE,**

**Agency-below,
Appellee.**

Appeal No. 98-01

FINAL ORDER AND DECISION

R. Judson Scaggs, Jr., of Morris, Nichols, Arsht & Tunnell, 1201 North Market Street, P.O. Box 1347, Wilmington, Delaware 19899-1347 Attorney for Star Enterprise.

Kevin P. Maloney, DAG of Department of Justice, State of Delaware, 820 N. French St., 6th Flr. Wilmington, Delaware 19801 Attorney for the Secretary.

Before Chairman Clifton H. Hubbard, Jr., Robert S. Erlich, Joan Donoho, Charles Morris and Robert I. Samuel comprising a quorum of the Environmental Appeals Board. Joelle P. Hitch, Deputy Attorney General, Attorney for Environmental Appeals Board.

The Environmental Appeals Board (hereinafter the "Board") scheduled a hearing on the above captioned appeal for September 22, 1998. This is the second hearing on an appeal that was bifurcated into two separate hearing dates. The first hearing on this matter was conducted on May 12, 1998. A written Order was issued on approximately June 13, 1998. Both the Appellant, Star Enterprise, ("Star") and Appellee, Department of Natural Resources and Environmental Control, ("DNREC") appeared and presented evidence in the form of testimony and exhibits. The following is the Order of the Environmental Appeals Board. ("EAB").

STATEMENT OF THE CASE

On January 23, 1998, Star Enterprises filed its notice of appeal in a timely manner and in accordance with 7 *Del.C.* § 6008. This appeal involves the December 24, 1997, Secretary's Order No. 97-A-0043 Re: 1999 Rate-of-Progress Plan ("ROPP") Ozone Non-attainment issued by Secretary Christophe A. G. Tulou. The Secretary's Order reflects a hearing held on December 22, 1997, to receive comment on Delaware's 1999 ROPP for addressing non-attainment of National Ambient Air Quality Standards ("NAAQS") for ozone in Kent and New Castle Counties. The State was required to establish a ROPP that would implement control measures to reduce 1990 emission levels (the baseline) by an average of 3 percent per year for the 1996-1999 period and also offset emissions which will occur from any future economic growth. The Order of Secretary Tulou adopted the 1999 ROPP proposed by DNREC and forwarded to the Environmental Protection Agency ("EPA") the plan as part of its State Implementation Plan ("SIP") revision.

Star filed this appeal alleging numerous disagreements with the Secretaries Order. The issue addressed at the first hearing dealt specifically with whether or not any of the reductions in

Volatile Organic Compound ("VOC") emissions used by DNREC in the 1999 ROPP were voluntary on the part of Star and thereby available to them, upon application, as Earned Reduction Credits ("ERC"). The Board ultimately decided some of the reductions by Star were voluntary. (See Environmental Appeals Board Order on Appeal 98-01 June 13, 1998)

The matter now before the Board deals with three issues: a.) Was is lawful for DNREC to use the voluntary reductions in VOC emissions by Star in the 1999 ROPP, b.) Was the inclusion of Star's voluntary and mandatory reductions in the 1999 ROPP a Fifth Amendment violation and c.) Does Star have standing to object to the 1999 ROPP as approved by the Secretary and subsequently submitted by DNREC to the EPA.

It is the position of DNREC that Star suffered no "injury in fact" and therefore, could not claim they were substantially affected by the decision of the Secretary as required by 7 *Del.C.* § 6008 and was without standing to bring this appeal. DNREC further argues even assuming Star did have standing, the Clean Air Act implemented a "first in time" scenario whereby whichever party(DNREC or Star) claimed the reductions first would be entitled to use them thus barring the other party from claiming the same reductions and "double counting".

Star argues they have standing as they were "substantially affected" by the decision of the Secretary. Star argues the decision of the Secretary has resulted in it being unable to use for future offsets the credits previously granted and the voluntary VOC emission reductions not yet credited. Star argues they did have a substantial interest in the decision of the Secretary since as a result of the Secretary's decision, Star was forced to spend additional money (\$200,000.00) which it would otherwise not have had to spend if it were able to use the credits or reductions to apply for additional credits. Star argues DNREC did not have the authority to take the reductions

for use in the ROPP and alternatively, if they had the authority to take them, they exercised that authority in an arbitrary and capricious manner denying Star due process. Star is requesting the withdrawal of the reductions from the ROPP submitted by DNREC to the EPA and in the alternative, monetary compensation as the use of the reductions amounted to a governmental "taking" requiring just compensation.

SUMMARY OF THE EVIDENCE

The evidence in this matter consists of: the December 23, 1997, hearing Officer's Report on Delaware's 1999 Rate of Progress Plan, the December 24, 1997, Order No. 97-A-0043 of Secretary Christophe A. G. Tulou, and the testimony and exhibits before the Board.

Elizabeth Piovoso testified on behalf of Star Enterprises. Ms. Piovoso is an employee of Star in the Environmental Department. Ms. Piovoso testified that she has recently worked on the Reformulated Gasoline Project, a project which will allow Star Enterprise to make Phase II reformulated gasoline. The sale of this type of gasoline has to commence, in the State of Delaware, by January of the year 2000. Ms. Piovoso testified the Federal Clean Air Act imposes specifications on the formulation of gasoline designed to reduce emissions from mobile sources that use the gasoline. In laymen's terms, cleaner burning fuel. Ms. Piovoso testified that Star formulates about 25 percent of the gasoline sold in Delaware therefore, cleaner burning gasoline would result in substantial environmental improvements for the State.

To produce this gasoline, Ms. Piovoso testified the project will involve some existing equipment and the installation of some new equipment. Specifically, a reconfiguration of an existing unit to a cracked naphtha hydro-treating unit, a butamer unit, and the existing alkylation unit will be expanded with the addition of some distillation facilities. To obtain the approval for

the project from DNREC Star needs to show approximately 10 tons of VOC emission reductions to avoid a Regulation 25 review. The reductions would be needed for a netting analysis and will come through the installation of an internal floating roof on an existing fixed roof tank.

Ms. Piovoso testified the installation of the internal floating roof at a cost of approximately \$200,000, will provide Star with approximately 12 tons per year in VOC emission reductions. If the VOC reductions from the Waste Water Treatment Plant were not in the Rate of Progress Plan, Star would not be required to install the internal floating roof. In response to a question by the Board Ms. Piovoso further testified that the maintenance and inspection requirements associated with the floating roof require more record keeping and maintenance than the existing tank.

Donald F. Elias testified on behalf of Star Enterprises. Mr. Elias is a principal with RTP Environmental Associates and has an extensive history in the field of environmental control. Mr. Elias testified regarding the history of the 1999 Rate of Progress Plan and provided background information regarding Regulation No. 25. Regulation No. 25 is the Delaware regulation covering major New Source Review Permitting Programs and also defines the conditions necessary to qualify emission reductions as offsets for either netting or offset purposes in non-attainment areas.

Mr. Elias testified regarding the netting and offsetting process. The first step involves a determination whether the modification or new source itself is major. Then one looks to the contemporaneous increases or decreases that occurred over the five-year period prior to the operation of the New Source. Based upon a comparison of the increases and decreases against guidelines, a determination is made whether the non-attainment provisions are triggered. This

step is referred to as the netting step. Mr. Elias further testified that if a source does not net out, the source is required to obtain offsets at a ratio of 1.3 to 1 to enable the State to continue to show reasonable further progress towards attainment of the ozone standards.

Mr. Elias testified that DNREC could not legally approve any permit application from Star or any other source, using reductions included in the 1999 Rate of Progress Plan as both State and Federal Regulations prohibit double counting emission reductions. Mr. Elias testified DNREC could not remove the reductions from the 1999 ROPP once the plan is approved by the Environmental Protection Agency (EPA) without a major SIP revision. Mr. Elias did not believe the EPA had approved the 1999 ROPP as of the date of this hearing.

Mr. Elias further testified regarding Regulation No. 2 which implements Chapter 60 of the Delaware Code. He testified Regulation No. 2 requires the obtaining of permits for any new or modified source of air contaminants before the construction or operation of the source. Mr. Elias testified to four primary things required to establish a certifiable emission reduction. First the reduction must be voluntary or surplus, it must be real or actual, the reduction must be permanent and enforceable by the agency to ensure that the emission reduction continues to occur. Mr. Elias testified regarding the different types of enforceability requirements and sections 182 (b)(1) and 173 (c)(1) and (2) of the Clean Air Act.

Mr. Elias further testified regarding the records before the Secretary of DNREC at the time the reductions were placed in the 1999 ROPP. He testified the record consisted of the permit applications for the Benzene Waste Rule, the subsequently issued permits, the 1999 Plan, the summary of the Plan, Star's objections, DNREC's response, the hearing transcript and the Hearing Officer's report. The only record regarding consideration of Star's objection was a

summary dismissal holding the objection was premature and speculative.

Mr. Elias also testified regarding alternatives available to DNREC other than the use of Star's reductions for the Plan and the prudence of DNREC in investigating other sources of reductions in light of Star's objection to the use of these reductions. Mr. Elias testified DNREC has an obligation to comply with the emission reduction requirements while attempting to minimize the regulatory burden on industry.

Mr. Elias could not find any indication in the administrative records considering whether Star's reductions were actually needed to comply with the nine percent reduction requirement. Mr. Elias provided further testimony regarding whether Star's reductions were needed by DNREC to comply with the reduction requirement and alternatives DNREC could have used had they been explored prior to the adoption of the ROPP.

On cross-examination Mr. Elias testified that the EPA was in error when they approved the 1996 ROPP submitted by Delaware and that had Star applied for the emission reduction credits prior to DNREC using them in the ROPP, DNREC would have been precluded from using them. Mr. Elias testified Star had pursued using the emission reductions for credits through the permit approach, however they have not applied under the new regulations, which were not in existence at the time.

Alfred R. Deramo testified on behalf of DNREC. Mr. Deramo works for the Air Quality Management Section of DNREC. He has been the manager for approximately six years. Mr. Deramo testified he manages the group responsible for the development of the ROPP for ozone attainment and the emission inventories upon which the ROPP is based. He testified regarding the way DNREC developed the 1996 and 1999 ROPPs and regarding what ozone is and health

risks associated with it. Mr. Deramo testified regarding the requirements which must be met for reductions to be creditable in the ROPP. The reductions contained in the 1996 Plan were carried over into the 1999 Plan and that EPA had approved the 1996 Plan. There were other incidental reductions in the 1996 Plan in addition to those of Star. Mr. Deramo testified that under the Clean Air Act reductions can be both creditable as offsets and eligible for use in the ROPP.

Mr. Deramo stated there are three requirements of a ROPP: meeting the targets, the development of a mobile source budget, and a contingency plan. Mr. Deramo testified Star only examined the first component of the ROPP and did not consider the other two. DNREC used the figures in the contingency plan for the 1999 ROPP to cover a shortfall and to apply toward the mobile budget for transportation conformity, resulting in a deficit in the 1999 ROPP. The ROPP was developed under a tight deadline and they were trying to keep the State from being sanctioned.

Mr. Deramo further testified DNREC did consider alternatives to using Star's reductions in the ROPP, however he stated the Clean Air Act allows the use of incidental reductions towards the ROPP as a practical policy. This policy allows them to make the most efficient use of the reductions and to keep the State out of a situation of sanctions.

Mr. Deramo testified on cross-examination regarding DNREC's authority to take the reductions under the CAA. Pursuant to the CAA and EPA's interpretation of it, the State has the first choice in using incidental reductions. He testified that any source with a Regulation No. 2 permit is subject to having the reductions taken by the State regardless of them being voluntary. He stated that DNREC has no intention of using Star's reductions to fill the contingency plan and the ROPP has been adopted without a contingency plan. Mr. Deramo further testified regarding

when the ROPP is due to be submitted and the public hearing held in December of 1997, regarding the ROPP. Mr. Deramo testified DNREC met the 10 day requirement for considering and answering comments regarding the public hearing and that Star's comments were responded to the same day they were received. He testified that there were no legal requirements that Star's reductions in the 1996 ROPP be carried over into the 1999 ROPP and could have been taken out with a SIP revision. The EPA does not look at whether the reductions used in the ROPP are voluntary or non-voluntary.

Mr. Deramo testified if DNREC were to approve Star's application for the offsets it would have to make a SIP revision to the ROPP and if the ROPP had already been approved by the EPA they would likewise have to approve the SIP. DNREC did not consider whether it could obtain greater reductions through investigation of increased rule effectiveness although the Department is familiar with this concept and that the Department considered the Maximum Achievable Control Technology (MACT) standards, however there were no MACT standards promulgated in Delaware at the time they submitted the 1999 ROPP. Mr. Deramo testified however, that the record does not reflect this consideration.

FINDINGS OF FACT

Based on the evidence, the Board makes the following factual findings:

1. Pursuant to its previous Order, Star had 8.5 tpy of remaining credits which were given it by DNREC yet later included in the 1999 ROPP.
2. Pursuant to its previous Order, Star's actions surrounding the WWTP resulted in voluntary incidental VOC emissions which were used in the 1999 ROPP.
3. The record below does not reflect an adequate consideration of alternatives such as the

MACT standards or an investigation into increased rule effectiveness.

4. The 1999 ROPP was developed under a tight deadline and DNREC used the credits and voluntary VOC emission reductions of Star in an effort to keep the State from being sanctioned.

CONCLUSIONS OF LAW

There were several legal issues presented to the Board through the briefs submitted by counsel and the arguments presented at the hearing. The DNREC first argues that Star was not substantially affected by the Secretary's Order as required by 7 *Del.C.* § 6008 as they are unable to identify any "injury in fact" and are thus without standing to challenge the Order. DNREC references the "Data Processing test" set forth in *Assoc. Of Data Processing Serv. Org., Inc. v. Camp*, 397 U. S. 150 (1970) in support of this argument.

Pursuant to 7 *Del.C.* § 6008, Star must prove they have been "substantially affected" by the decision of the Secretary. In *Oceanport Ind. v. Wilmington Stevedores*, Del. Supr., 636 A.2d 892 (1994), the Delaware Supreme Court adopted the "Data Processing Test" established in *Assoc. Of Data Processing* in an attempt to provide a "workable and just interpretation" to the phrase "substantially affected". *Oceanport* at 904. Under the "Data Processing Test", the appellant must be able to show "1) a claim of injury in fact; and 2) the interest sought to be protected is arguably within the zone of interest to be protected or regulated by the statute. . ." *Gannett Co., Inc. v. State*, Del. Supr., 565 A.2d 895, 897 (1989) (citing *Data Processing*, 397 U.S. at 153-154).

The Court elaborated on this test through its decision in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992). In *Lujan*, the Court held a party "must have suffered an injury in fact,

which is the invasion of a legally protected interest within the zone of interest sought to be protected or regulated by the statute". *Lujan*, at 2136. The Court further determined this invasion must be 1) concrete and particularized, and 2) actual or imminent, not conjectural or hypothetical". The Court determined there must be "an actual connection between the injury and the conduct complained of, the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not. . . th[e] result [of] the independent action of some third party not before the court.'" Lastly, it must be likely the injury "will be redressed by a favorable decision, rather than merely speculative." *Id* at 2136.

Before the Board can decide if Star was "substantially affected" under 7 *Del.C.* § 6008, the Board must first determine if Star possessed a legally protected interest in the VOC reductions and if so, at what point they acquired this interest. The Board considered whether or not there exists a legally protected property interest in a reduction of VOC emissions. As of this date, there are no published opinions on point granting a property interest in a reduction of VOC emissions from which the Board can draw some guidance.

"Property interests do not emanate from the Constitution but 'are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.'" *Slawik v. State of Delaware and Pierre S. Dupont, IV.*, Del. Supr., 480 A.2d 636, 640 (1984) (citing *Board of Regents v. Roth*, 92 S. Ct. 2701, 2709 (1972)) "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id* at 641.

In reviewing the Clean Air Act (42 U.S.C. § 7503 [CAA § 173]), paragraph (c) regarding Offsets states in pertinent parts, "Incidental emission reductions which are not otherwise required by this Act shall be creditable as emission reductions for such purposes if such emission reductions meet the requirements of paragraph (1)". There was some testimony at the hearing regarding how the Board should interpret the presence of the word "creditable" in the statute as opposed to "credited". Webster's Ninth New Collegiate Dictionary (1983) defines creditable as "capable of being assigned". In an effort to understand the intention behind this choice of wording the Board looked to several sources.

The Guidance on the Relationship Between the 15 percent Rate of Progress Plans and Other provisions of the Clear Air Act consistently says "States may credit" when discussing emission reductions. The Environmental Protection Agency (EPA) Guidance on the Adjusted Base Year Emissions Inventory and the 1996 Target for the 15 Percent Rate of Progress Plans Section 4.0 Creditability of Emissions Reductions states in paragraph two, "States can credit emissions reductions toward the 15 percent VOC emissions reduction requirement . . .".

Regarding sections 182 (b)(1)(c) and 182 (b)(1)(D) of the CAA, the Guidance again states that VOC emission reductions are "creditable" as opposed to some stronger language mandating the crediting of such emission reductions. Under the General Preamble to Title 1 of the Clean Air Act; Guidance of Development of State Implementation Plans (57 FR 13498; April 16, 1992) page 82, it states, "For purposes of equity, EPA encourages States to allow sources to use pre-enactment banked emissions reductions credits for offsetting purposes". In looking at the Delaware DNREC Regulations, specifically Regulation 25, there is no provision requiring the granting of credits for a decrease in emissions. Again, the language used in Regulation 25 is that

such decrease in emissions is "creditable".

In the absence of any Federal Statute or guidance or State Statute or regulation clearly establishing a right to be granted credits for a reduction in VOC emissions, the Board has determined that there is no mandate requiring DNREC to grant such a credit. Although Star has demonstrated more than an abstract need or desire for such, Star has not demonstrated that under the Federal Rules and Regulations or under the State Rules and Regulations they have more than a unilateral expectation of such or a legitimate claim of entitlement to such as required by *Slawik*. Therefore, the Board concludes there is no legally protected property interest in a reduction of VOC emissions.

Since the Board has determined that Star does not have a legally protected property interest in voluntary VOC emission reductions not yet applied for and credited by DNREC, the Board must determine that as to those voluntary VOC emission reductions Star has not suffered an "injury in fact" under *Lujan*. The invasion alleged by Star in the use by DNREC of these reductions in the 1999 ROPP was not "concrete and particularized" but merely "conjectural and hypothetical" based upon an assumption such credit would be granted upon request.

Since the Board has determined there was no "injury in fact" under *Lujan*, it follows that Star did not show it had been "substantially affected" by the use of the reduction in VOC emissions in the 1999 ROPP and is subsequently without standing to bring this appeal under 7 *Del.C.* § 6008.

If this were the only loss claimed by Star, the appeal would be dismissed, however, Star has also argued that they were granted credits, specifically 75 tpy, of which 8.5 tpy were left over from the Ether Project yet were used by DNREC in the 1999 ROPP. The Board again applies the

above analysis to these credits that were actually granted to Star by DNREC. Through the application of the tests set out above, the Board has determined that Star does have a legally protected property interest in the credits granted them by DNREC. These credits were approved and granted to them by DNREC making them "concrete and particularized" and not "conjectural or hypothetical".

As to these credits granted Star yet used by DNREC in the 1999 ROPP, Star has shown it was "substantially affected". The testimony of Ms. Piovoso was that Star had to spend an additional two hundred thousand dollars (\$200,000.00) for the installation of an internal floating roof to achieve the necessary tons per year in VOC emission reductions. If Star had been able to use the credits granted it by DNREC, they would not have incurred this additional cost.

DNREC argued that Star's appeal is "limited to its economic interest in maintaining the pollution status quo and resisting the Clean Air Act's mandate of pollution reduction" therefore failing the "zone of interest" test and is without standing to take this appeal. (DNREC Pre-hearing Memorandum p. 5) DNREC cites the decision in *Oceanport Indus. Inc. v. Wilmington Stevedores, Inc.*, Del. Supr., 636 A.2d 892 (1994) in support of this argument.

The Board is not persuaded by this argument. In *Oceanport*, the Court held "A party's asserted claim to standing may include both economic and environmental injuries, and a pecuniary interest will not defeat standing where there is a bona fide environmental claim." *Id.* at p.905, citing *Overseas Shipholding Group*, 767 F. Supp. 287 (1991). As Ms. Piovoso testified, Star is attempting to conform to the Reformulated Gasoline Project allowing Star to make Phase II reformulated gasoline. The sale of such must commence by January of the year 2000. Clearly, it is in the best interests of the citizens of the State of Delaware that Star complete this project on

a timely basis and cleaner burning fuel is available within the State.

Further, under 7 *Del.C.* § 6001(a)(1), the emission reductions fall within the zone of interest to be protected or regulated by the statute: "The development, utilization and control of the land, water, underwater and air resources of the State are vital to the people in order to assure adequate supplies for domestic, industrial, power, agricultural, recreational and other beneficial uses". The emission reductions created by Star and regulated by DNREC are part of the "air resources" addressed in 7 *Del.C.* § 6001 (a)(1).

DNREC's use of Star's credits in the 1999 ROPP has affected Star's ability to complete the Reformulated Gasoline Project, has cost Star an economic loss, and falls within the zone of interest protected or regulated by 7 *Del.C.* § 6001(a)(1). Therefore, the Board has determined Star is within the "zone of interest", has been "substantially affected" and has standing to bring this appeal regarding the credits granted by DNREC and used in the 1999 ROPP.

Having established Star has standing to challenge DNREC using Star's credits for the 1999 ROPP, the Board now turns to the question: Was it lawful for DNREC to use the Credits previously granted Star in the 1999 ROPP. Again, the Board has little guidance from either the Federal or State law to determine the legality of DNREC usurping credits granted to Star for use in the ROPP.

As previously stated, the Board could find nothing in either the Federal or State authorities mandating states grant credits for emission reductions. It is clear however, that this practice is encouraged by the EPA and it provides a strong incentive to industry to engage in the voluntary reduction of pollutants. This incentive provides both a financial incentive to the industry and results in a reduction of air pollution in furtherance of the policy and purpose of

environmental control (7 Del.C. § 6001) and the Administrative Principles set forth in DNREC's Regulations.

Star has argued in both its Pre-hearing Brief and through the testimony at the hearing that the Secretary acted in an arbitrary and capricious manner in using Star's VOC reductions in the 1999 ROPP. Although Star's arguments concern primarily the VOC reductions, the Board has considered whether the Secretary acted in an arbitrary and capricious manner in using the credits previously granted Star in the 1999 ROPP.

As pointed out by Star in its Pre-hearing Memorandum, the authority of a state agency is not limitless and unfettered. *Raley v. State*, Del. Supr., 604 A.2d 418 (1991) An agency's discretion may not be exercised in an arbitrary and capricious manner. *Harmony Const., Inc., v. State Dept. Of Transportation*, Del. Ch. 668 A.2d 746, 749 (1995) A decision is arbitrary and capricious if it is unreasonable or without a rational basis. The terms "arbitrary and capricious" are also ascribed to that action which is "unconsidered or which is wilful and not the result of a winnowing or sifting process. It means action taken without consideration of and in disregard of the facts and circumstances of the case". *Willdel Realty, Inc. v. New Castle County*, Del. Ch., 270 A.2d 174, 178 (1970)

The scope of judicial inquiry into the "arbitrary and capricious" standard includes not only the evidence considered by the decision-maker, but also includes the adequacy of the process by which the relevant evidence and facts were obtained. *Harmony Construction, Inc. v. State of Delaware, Department of Transportation*, 668 A.2d 746, 750 (1995) The Board sees no reason why this analysis should not apply to the Board's review of the decision of the Secretary.

The testimony before the Board from Mr. Elias was that the record below consisted of

the permit applications for the Benzene Waste Rule, the subsequently issued permits, the 1999 Plan, the summary of the Plan, Star's objections, DNREC's response, the hearing transcript and the Hearing Officer's report. Mr. Elias testified that the only record regarding consideration of Star's objection was a summary dismissal holding the objection was premature and speculative. Mr. Elias testified to various other means by which the DNREC could have met their targeted percentage reduction other than the use of Star's previously granted credits.

Mr. Deramo testified the reductions used in the 1996 Plan were carried over into the 1999 plan and there were reductions other than Star's used in the 1996 Plan. Mr. Deramo testified the ROPP was due to be submitted January 1, 1998, and despite the last minute hearing, DNREC met the 10 day requirement for considering and answering comments regarding the public hearing. He also testified however, that he received Star's objection or comments regarding the 1999 ROPP, evaluated them and responded to them all on the same day.

There was no testimony regarding what consideration, if any, was given by the Secretary to Star's comments or to what other options were considered by the Secretary besides taking Star's credits. Mr. Deramo from DNREC testified that consideration was given to the MACT standards, however, he also testified the record below does not reflect any such consideration. Mr. Deramo further testified that no consideration was given to increased rule effectiveness although the Department was familiar with the concept.

As previously stated, the Board has determined that Star does have a property interest in the credits granted to it by DNREC. Clearly, Star is entitled to a rational and reasonable explanation for DNREC's use of its credits in the 1999 ROPP. "An agency decision based upon 'ignorance through lack of inquiry' is arbitrary and capricious". *Harmony Construction*, at 750,

citing *International Telecommunications Systems v. State*, Ala. Supr., 359 So. 2d 364, 367 (1978)

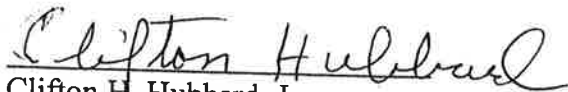
The Board is unable to determine by the record below that the Secretary gave any consideration to options other than the use of credits already granted to Star. There is no evidence that the Secretary's decision was the result of a winnowing or sifting inquiry process, and any consideration by DNREC of Star's comments appear to have been nothing more than a passing glance and dismissal.

The Board has determined therefore, that the decision of the Secretary was arbitrary and capricious as there is little to no evidence of consideration by the Secretary of Star's comments or complaints and the record does not adequately reflect other options examined by the Secretary short of taking credits previously granted to Star.

The Board hereby REVERSES the Order of the Secretary and REMANDS this matter back to the Secretary for a reasonable consideration of other options available to DNREC to fulfill the 1999 ROPP as an alternative to the use of any or all of the credits previously granted to Star.

IT IS SO ORDERED.

The following Board members concur in this decision.


Clifton H. Hubbard, Jr.
Chairman


Date

Environmental Appeals Board
Appeal No. 98-01

Robert S. Brlich
Robert S. Brlich,
EAB Board Member

11/12/98
Date

Environmental Appeals Board
Appeal No. 98-01

Joan Donoho

Joan Donoho
EAB Board Member

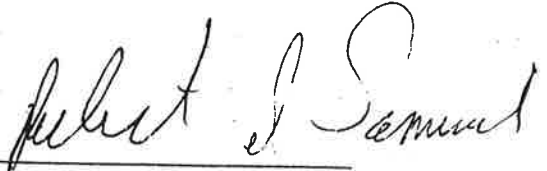
11/18/98
Date

Environmental Appeals Board
Appeal No. 98-01

Charles E. Morris
Charles Morris
EAB Board Member

11/13/98
Date

Environmental Appeals Board
Appeal No. 98-01



Robert I. Samuel
EAB Board Member

11/12/98
Date