

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

G. SCOTT CO INVESTMENT CO., et al.,

Plaintiffs,

v.

FRANKLIN COUNTY, et al.,

Defendants,

And,

STATE OF OHIO,

Third-Party Plaintiff

v.

Gayle Scott, Jr., et al.,

Third-Party Defendants,  
Third-Party Plaintiffs,

v.

WATER SPECIALISTS, INC., et al.,

Third-Party Defendants.

Case No. 05CVH09-10023

Judge: Sheward

Magistrate Petrucci

FILED  
COMMON PLEAS COURT  
FRANKLIN CO. OHIO  
2009 JUL 13 PM 4:52  
CLERK OF COURTS

MAGISTRATE'S DECISION  
CONCERNING THE BENCH TRIAL HELD ON JUNE 22, 2009 AND ENDING  
JUNE 29, 2009, ASSESSING CIVIL FINES AGAINST OAK HILLS, MHC, LLC,  
AND  
MAGISTRATE'S DECISION  
DISMISSING OAK HILLS' BREACH OF CONTRACT CLAIM AGAINST  
WATER SPECIALISTS, INC.  
AND  
MAGISTRATE'S DECISION  
DISMISSING THE CLAIMS OF THE OHIO ENVIRONMENTAL PROTECTION  
AGENCY AS AGAINST GEORGE DEGRACA AND KDM DEVELOPMENT

Rendered this 10<sup>th</sup> day of July, 2009

PETRUCCI, MAGISTRATE

Pursuant to Civil Rule 53 and Loc. R. 99.02, the above-styled matter was referred to this Magistrate, *See* 'Order of Reference' dated April 16, 2008 for a Bench Trial. The matter was heard during the days of June 22, 23, 24, 25, 26 and June 29, 2009. The parties at the trial were the Ohio Environmental Protection Agency (hereinafter referred to as the OEPA), Oak Hills MHC, LLC, George Degraca, and KDM (hereinafter referred to collectively as Oak Hills) and Water Specialists.

The OEPA called the following witnesses: Gary Bennett as on cross examination, Sheree Gossett-Johnson, Mark A. Smith, Edward L. Moore, Jr., Erin R. Sherer, as on direct examination, and George DeGraca, Bill Eitel, Wendy Nelson, Jason Nelson, as on cross examination.

The OEPA offered into evidence the following exhibits:<sup>1</sup> State's Exhibit 1 A – C admitted over the objection of Oak Hills. State's Exhibit 2 A – B, 3 – 4 admitted without objections, State's Exhibit 5, admitted as a demonstrative exhibit over Oak Hills' objection, State's Exhibit 6 – 11, 12 A – C, 13 -14 admitted without objections, State's Exhibit 15 admitted over Oak Hills' objection that was directed to the July portion of the chart, State's Exhibit 16 A – G as a demonstrative exhibit over Oak Hills' objections, State's Exhibit 17 – 20 admitted without objections, State's Exhibit 21 A admitted over Oak Hills' objections, State's Exhibit 21 B – C admitted without objections and State's Exhibit 22 – 27, 29, 30 – 34 admitted without objections.

Oak Hills called the following witnesses: Brian Coghaln, James A. Martin, George DeGraca, Thomas D. Shockly, and Dale Kocarek as on direct examination.

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<sup>1</sup> All parties appeared at the Bench Trial with their exhibits marked using numbers. Therefore all exhibits are referenced to reflect which party produced the exhibit. State's Exhibit for the OEPA, Oak Hills' Exhibit for Oak Hills, and Water Specialists for Water Specialists.

Oak Hills offered into evidence the following exhibits: Oak Hills' Exhibit 1 – 9, 11 – 27, Oak Hills' Exhibit 28 was offered but objected to, and the objection was sustained and Oak Hills' Exhibit 28 was not admitted, Oak Hills' Exhibit 36 was admitted without objection, Oak Hills' Exhibit 37 was admitted in its present form over the joint objections of OEPA and Water Specialists, Oak Hills' Exhibit 38 – 40, Oak Hills' Exhibit 42 – 43, Oak Hills' Exhibit 47, 49 – 51, Oak Hills' Exhibit 55 – 61, 66 – 67, 69, 80 – 92 were all admitted without objection.

Water Specialists called the following witness at trial: William Eitel as on direct examination.

Water Specialists offered into evidence the following Exhibits: Water Specialists 1 – 7, Water Specialists 10-11, Water Specialists 13 – 14, Water Specialists 16 – 20, Water Specialists 22 – 23, Water Specialists 26, Water Specialists 29 – 38, Water Specialists 40, Water Specialists 43 – 45, Water Specialists 47 – 57, Water Specialists 60 – 70, and Water Specialists 75 – 79. All were offered without objection and therefore they were admitted.

At the conclusion of OEPA's case, the Defendants Degraça and KDM moved for a dismissal pursuant to Civ.R. 41 (B) (2). Said motion was denied. At the conclusion of Oak Hills' case, Water Specialists moved for a dismissal pursuant to Civ.R. 41(B)(2). Said motion was denied. There was no rebuttal case presented by any party. By agreement of the parties, closing arguments were given and though each party had a burden, the parties limited themselves to one closing argument and no rebuttal. This Magistrate has reviewed the evidentiary material admitted at the Bench Trial. When this Magistrate has specifically relied upon a document or testimony, the source is referenced.

On November 21, 2008 this Court rendered a summary judgment in favor of the OEPA concerning its claims of violations against Oak Hills MHC, LLC. That decision found that the following facts have been established:

Plaintiff Oak Hills is an Ohio Limited Liability Company (“LLC”). See Second Amended Complaint, ¶ 2. Oak Hills owns the Oak Hills Mobile Home Community (“OHMHC”) located at 5965 Harrisburg-Georgesville Rd., Pleasant Township, Franklin County, Ohio. See Answer ¶ 3. This manufactured home community contains approximately 250 pads, of which approximately 190 are rented and occupied by manufactured homes. [footnote: Manufactured homes are also commonly called mobile homes.] See DaGraca Depo. pp. 29:21-25, 30:1-2. These homes are connected to a private sanitary sewer within OHMHC which conveys wastewater to the WWTP at OHMHC. See Nelson Depo. p.14:2-9; DaGraca Depo. p.119:10-20. Oak Hills’ WWTP discharges effluent to the Big Darby Creek. See Answer ¶ 3. The discharge of wastewater from the WWTP has been occurring since at least before July 2, 2002 through the present time.

Oak Hills currently has or has had individual NPDES permits for its WWTP. See Exhibit A, Smith Aff. Exhibits A-1 and A-3; Answer ¶ 4. On February 23, 1998, NPDES Permit no. 4PV00008\*DD was issued to Holiday Parks, aka O.H. Community Ltd., became effective April 1, 1998. See Exhibit A, Smith Aff. ¶ 4, Exhibits A-1, p. 1; Answer ¶ 4. Oak Hills assumed responsibility for NPDES Permit no. 4PV00008\*DD through a transfer agreement executed July 2, 2002. See Exhibit A, Smith Aff. ¶ 5, Exhibits A-2; Answer ¶ 4. Oak Hills formally submitted a “Permit Transfer Application Form” to Ohio EPA on August 21, 2002 concerning NPDES permit no. 4PV00008\*DD. See Exhibit A, Smith Aff. ¶ 6, Exhibit A-3. The Director of Ohio EPA approved the transfer on September 6, 2002. See Exhibit A, Smith Aff. ¶ 7, Exhibit A-4. Oak Hills submitted a NPDES permit renewal application on April 1, 2003. See Nelson Depo. Exhibit 3. On June 4, 2003, Permit 4PV00008\*ED was issued to Oak Hills effective July 1, 2003. See Smith Aff. ¶ 8 Exhibit A-5; Answer ¶ 4.

Oak Hills, through its contractor Water Specialist, has submitted MOR’s to Ohio EPA for the time period starting in August 2002 through at least October 2007. See Eitel depo, pp. 29:11 through 38:2; Taylor depo. pp. 21:8 through 31:23; Answer ¶ 5; DaGraca Depo. pp. 26:8-11, 49:17-23.

The following are also undisputed facts:

1) Oak Hills held two National Pollutant Discharge Elimination System permits. (hereinafter referred to as NPDES)

2) Oak Hills [sic] agent Waterworks [sic Water Specialists] submitted 'Monthly Operating Reports' (hereinafter referred to as MORs).

3) The MORs that were submitted showed that the wastewater treatment plant [sic] (hereinafter referred to as WWTP) operated by Oak Hills was not in compliance with the terms of Oak Hills' NPDES permits.<sup>2</sup>

This Magistrate understands that these issues have already been determined by the Court.

This Magistrate also understands that this Court has made the following findings:

The State is entitled to summary judgment as to Count One of its claims against Oak Hills concerning liability. The State has proven that there existed '929' days of violations.<sup>3</sup>

That finding was in regard to OEPA's Count One claiming that Oak Hills violated R.C. Chapter 6111 by failing to meet effluent limitations as required by the terms and conditions of the National Pollutant Discharge Elimination System permit (hereinafter referred to as NPDES permit) for the Oak Hills Mobile Home Park's Waste Water Treatment Plant. (hereinafter referred to as WWTP)

The following findings are binding on this Magistrate concerning the OEPA's claims for non-reporting violations:

Hence, the State is entitled to summary judgment on Count Four and Count Five of its claim against Oak Hills. This Court **GRANTS** same as to liability only. The State has established '1099' days of violations for non-reporting have occurred.<sup>4</sup>

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As to Count Two the State is entitled to summary judgment. It has proven that on September 1 and September 19 of 2006 the WWTP was in violation of the permits and Oak Hills was in violation of R.C. §6111.07. Therefore, liability is established as to two violations, one on September 1 and the second on September 19, 2006.<sup>5</sup>

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<sup>2</sup> This Court's Decision and Entry filed November 21, 2008 at page 2 -3.

<sup>3</sup> This Court's Decision and Entry filed November 21, 2008 at page 9.

<sup>4</sup> Id. at page 10.

<sup>5</sup> Id. at page 11.

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Summary judgment is appropriate at this time concerning the claims that Oak Hills has been in violation of its permit from July 1, 2005 to the present time. The State has established Oak Hills' liability on that issue.<sup>6</sup>

The last ruling by this Court concerned the failure of Oak Hills to submit plans to achieve compliance with the final effluent limitation for total residual chlorine as noted within Oak Hills' NPDES permit.

When Oak Hills received its permit in 2002 it was instructed to submit a plan to reduce the chlorine effluent. It did not. The Court held that Oak Hills was responsible for such a plan and that said plan was to be submitted by July 1, 2005. That led to 1169 days of violations from July 1, 2005 to September 11, 2008, the date that the OEPA moved for summary judgment.

This Magistrate now renders his Findings of Facts and Conclusions of Law. Said Findings of Facts are in supplement to the findings already determined by this Court's Entry of November 21, 2008.

### **FINDINGS OF FACTS**

The Magistrate has considered the credibility of the witnesses. The Magistrate's opinion concerning the credibility of the witnesses is based upon the appearance of each witness upon the stand; their manner of testifying; the reasonableness of the testimony; the opportunity they had to see, hear and know the things concerning which they testified; their accuracy of memory; frankness (or lack of it); intelligence, interest and bias (if any); together with all the facts and circumstances surrounding the testimony.

The OEPA called Sheree Gossett-Johnson to testify.

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<sup>6</sup> Id. at page 12.

Ms. Gosset-Johnson testified that she worked for the OEPA. She started with the OEPA in 1992. Amongst other certificates she holds an Ohio Class Three Wastewater Operator Certificate. She established that State's Exhibit 6 was/is her resume.

She established that it was the point of a NPDES permit so that a WWTP operator would know the acceptable levels of pollutants that could be discharged into a water source. Ms. Gossett-Johnson stated that you worked backwards to come up with the limits to place on a NPDES permit. You look at the stream and then determine what level of pollutants the stream can handle. Anyone discharging into the waters of this State needs a permit.

Ms. Gosset-Johnson had hands-on experience in running a WWTP. She was admitted as an expert at the trial.

Ms. Gosset-Johnson established that there were three types of inspections. The first type was to simply go to the WWTP and look at the sheets and match up the data with the reports sent to the OEPA. You would look at service issues and the machines and equipment at the WWTP. Finally, you would go to the outfall and check that.

Ms. Gosset-Johnson testified that the second type of inspections would be a sampling one. You would go to the outfall, take 24 hours of measurements, and test the samples on your own. The third type of inspection was triggered by a complaint. You then went to see if you can find the complaint and/or its source. You would generally not notify the WWTP before that form of inspection..

Ms. Gosset-Johnson testified that Infiltration and Inflow (hereinafter referred to as I&I) is a big problem with small old plants like the one located at Oak Hills.

Ms. Gosset-Johnson was assigned to handle Oak Hills. She was in charge of the Darbydale watershed. Ms. Gosset-Johnson started in 1998 looking at the Darbydale watershed.

Ms. Gosset-Johnson stated that the WWTP at Oak Hills was rated for no more than 69,000 gallons per day. She described the plant as a minor one. She also referred to it as a class one WWTP.

Ms. Gosset-Johnson established that she created State's Exhibit 1A: "Oak Hills Effluent Violations".

Ms. Gosset-Johnson confirmed that it was up to Oak Hills to take the samples and do the testing, and give the OEPA the test results. She testified that Oak Hills violated every limit in its permit.

She felt that the data showed a 'fairly clear pattern' that water was coming through the plant and pushing out the biomass. Ms. Gosset-Johnson established that that was very detrimental to the stream.

Ms. Gosset-Johnson testified that State's Exhibit 1 B showed all of the 'Failure to Monitor' findings where Oak Hills failed to report pursuant to its permit. She also prepared State's Exhibit 1C in regard to the use of the "AN" code monitoring violations. An AN code is a device used by holders of the permits to indicate that the plant did not monitor the findings because it was a holiday or weekend. A permit holder is not suppose to use the code when it is not a holiday or weekend. Ms. Gosset-Johnson testified that the permits allow certain items to be tested or reported only during the work week.



Ms. Gosset-Johnson identified the WWTP as shown in State's Exhibit 3; the NPDES permit for Oak Hills as found in State's Exhibit 4; and State's Exhibit 5 that was a graphic interpretation of the NPDES violations.

Ms. Gosset-Johnson testified to having created State's Exhibit 10. That was the February 27, 2006 letter to Oak Hills indicating it was violating the permit on a daily basis.

Ms. Gosset-Johnson also inspected the WWTP on September 1, 2006. She went to the outfall first and it was full of biomass. Ms. Gosset-Johnson established that she sent State's Exhibit 11 to Oak Hills reporting her findings and concerns following her September 1, 2006 inspection. That letter also reminded Oak Hills that it was still in violation for not submitting a permit to install (PTI) application that was required by its permit for the chlorine issue.

During her inspection she found biomass in the stream at the outfall. Ms. Gosset-Johnson testified that when she inspected the plant she found that the sand filters were dry. At the same time she noted that the chlorine setoff and mix media were overflowing with material. Her findings were so confusing she elected to come back and inspect a second time in the middle of September of 2006.

Ms. Gosset-Johnson testified that she returned on September 19, 2006. At that time she testified that she witnessed the same things. Her findings led to her belief that there was something substantially wrong with the workings of the WWTP but she could not figure out what it was. The plant was again violating its permit on that date. The findings were so problematic that Ms. Gosset-Johnson turned the matter over to the OEPA special investigation unit.

Ms. Gosset-Johnson also established State's Exhibit 13. That was a January 31, 2007 letter to Oak Hills wherein the OEPA responded to Oak Hills' report of an overflow. Ms. Gosset-Johnson was aware of the fact that the WWTP at Oak Hills had been having issues with I&I for years. Ms. Gosset-Johnson established State's Exhibit 14 wherein the OEPA again tried to determine if the I&I problem had been taken care of.

When she was asked about Oak Hills' Exhibit 27, (Oak Hills renewal application) she stated that it was on hold for two reasons. Oak Hills was grossly out of compliance with its permit and there was already an order requiring Oak Hills to connect to the new sewer system.

Ms. Gosset-Johnson also clarified the issue concerning the prior owner's permit and Oak Hills' permit concerning chlorine. The old owner was requested to address this issue and Ms. Gosset-Johnson stated that the prior owner complied. Then when Oak Hills received its permit it was asked to address the same issue but this time for a lower flow amount. Oak Hills never addressed that issue.

Ms. Gosset-Johnson testified that she did speak with Chuck Taylor in September of 2006 while conducting one of her inspections. She asked Mr. Taylor if he was aware that there was sludge in the stream and Mr. Taylor answered in the affirmative. Mr. Taylor was an employee of Water Specialists and was working at the WWTP of Oak Hills at the time.

Concerning MORs, Ms. Gosset-Johnson testified that the collection of the data can be done by maintenance personnel. She also testified that it was not the certified operators that pull all the samples. It is common for the maintenance staff to pull the samples.

The OEPA also called Mark A. Smith to testify. Mr. Smith established that he worked for the OEPA as an Environmental Specialist Three. He was responsible for collecting fish and fish tissue samples during 2002 in the Big Darby Creek. He established that State's Exhibit 8 was/is his resume. Mr. Smith has been with the OEPA full time since 1978. Mr. Smith was admitted as an Expert.

Mr. Smith sampled the Big Darby Creek in 1981 and several other times. He was also there to collect samples in 2001 and 2002. He testified that he sampled just up stream from the outfall of Oak Hills' WWTP.

Mr. Smith, and later Mr. Moore both testified that the life in the Big Darby can be broken down into intolerant species and tolerant species. Tolerant species can either survive with very little oxygen or have the ability to move away from the pollution. Intolerant species can generally move faster than the tolerant species.

Mr. Smith established that the Big Darby was "the cream of the crop" for fish population. It was normally number one or number two on the State's statistics showing the number of species. Mr. Smith claimed that from a fish's point of view it is at the top.

Mr. Smith reviewed State's Exhibit 1A. He testified that with those findings he would expect to see an avoidance of the outfall pipe by all fish.

Mr. Smith admitted that there had been no sampling since 2002.

When asked about the area affected by the Oak Hills discharge, Mr. Smith stated that it would all depend on the degree of the problem and the dilution ratio. It would all depend on how far the concentrations extended into the stream and he did not know the answer to that question.

The OEPA called Mr. Ed Moore to testify.

Mr. Moore testified that he was an Environmental Specialist Two and that he had held the job for 20 years with the OEPA. State's Exhibit 9 was/is his resume.

Mr. Moore's job responsibilities included the monitoring of streams and rivers throughout the state. He mainly worried concentrated on insects.

Mr. Moore established the process for monitoring water conditions in order to understand how the water is affecting the insect population.

In order to conduct his testing within the Big Darby Creek Mr. Moore stated that he put in a device that the bugs can colonize. He then came back after 6 weeks to take the device to a lab. Based on the findings, and other observations, he would 'score' the water source.

Mr. Moore stated that if you find a lot of the insects it tells you that the water quality is good.

Mr. Moore was admitted as an Expert.

Mr. Moore testified that he had been to the Big Darby Creek a number of times. When he was there last year it was on an unrelated project.

Mr. Moore did work in the Darbydale area in 2001 and 2002. He set up a colonizer downstream from Oak Hills and then took qualitative samples from the bridge at Harrisburg Georgesville Road, to the location of the colonizer. He also sampled further downstream in 2001.

Mr. Moore testified that the samples were taken on August 13, 2002.

Mr. Moore testified that he walked the stream from the bridge down to the colony sample location. The location of the colony sample was downstream from Oak Hills' outfall pipe just before the island identified in State's Exhibit 31.

Mr. Moore testified that he was able to locate the outfall pipe that lead to Oak Hills' WWTP. At that point in the stream he sank 8 inches into the sludge. He noted that there was sludge 15 yards around the pipe and nothing was living.

Mr. Moore testified that he continued downstream and found some living tolerant organisms. Mr. Moore established that the right side of the stream had a number of pooled areas on the side of Oak Hills and that side had much less diversity.

Mr. Moore established there was more diversity on the left side of the stream. He attributed that to the pooling and drifting down the right side of the stream from the outflow of Oak Hills. There were not a lot of ripples in the stream so the right side did not mix as fast nor did it mix with the left side of the stream.

He also noted much less tolerant life forms were still living on the left side of the stream downriver from Oak Hills.

Mr. Moore testified that the Big Darby is number one in the number of mussel species and has very good scores for its insect population in the State of Ohio

Mr. Moore testified that he was aware of the findings on State's Exhibit 1A. State's Exhibit 1A is a listing of the effluent violations at Oak Hills. He testified that the values on State's Exhibit 1A would impact negatively on the stream. He also stated that the values confirmed what he had personally observed during his visits in 2002.

Mr. Moore stated that the findings on State's Exhibit 1A supported the lack of the less tolerant organisms in the area of the outfall.

Mr. Moore also established that mussels can't avoid an area of pollution.

Mr. Moore did admit that quantifying the issue of pollution in a stream is hard to quantify but it is clear that all sources of pollution on the creek contributed to the

problems. Given the fact that the homes on the left side of the Big Darby have now been hooked up to a sewer system, Mr. Moore would expect to have an improvement in the quality of the water.

Mr. Moore testified that he had sampled upstream from the Oak Hills outfall and that is what gave him the ability to know what was going on and what was to blame relevant to this case.

Ms. Erin R. Sherer was called to testify by the OEPA. She has worked for the agency for over 15 years. Her resume is State's Exhibit 7. She currently holds the position of Environmental Supervisor, Division of Surface Water Central District office. In that capacity she makes the decision when to pursue enforcement after compliance fails.

Ms. Sherer was also responsible for water quality modeling for the OEPA prior to her current job. Her area of specialty was with the water chemistry. She was very knowledgeable concerning the issue of TMDL; i.e., total maximum daily load.

Ms. Sherer did the TMDL work for the Big Darby watershed. In order to do that the OEPA had to study the watershed, assess the problems, determine the solution, and then allocate the allowable loads to meet the standard. The OEPA then had to set the bases for implementation. This was an extensive multi-year process. Ms. Sherer also indicated that the United States Environmental Protection Agency had the final say on all TMDL numbers.

Ms. Sherer established that it was critical to know the amount of pollutants that were being discharged into a stream, because water quality modeling requires the information to be accurate. Water quality modeling places a number of scenarios of

mathematical expressions into a computer designed to simulate what a river's response will be to different inputs. She testified that you need to know the pollutants and the environment in order to be able to select a model out of the number of standard models. This testimony established the importance of the requirement to accurately report what was coming out of Oak Hills' WWTP. Ms. Sherer was admitted as an expert.

Ms. Sherer personally collected the data with a crew of ten other OEPA employees in 2004. There were four areas in the watershed that the OEPA studied. Ms. Sherer identified State's Exhibit 3 as the area that was checked in 2004. She established that she canoed and walked every bit of this stretch in 2004. Ms. Sherer collected data upstream from Oak Hills near the location used by Mr. Moore. Her last relevant sampling site was just upstream from the unnamed tributary where the new WWTP discharges its outflow.

Ms. Sherer established that when she was testing in 2004 the level of depleted oxygen (DO) was normal just upstream from the Oak Hills outflow pipe. However at the downstream location near the unnamed tributary the DO was being violated.

Ms. Sherer identified State's Exhibit 15. It is a set of graphs showing the DO. The top graph is the 2004 data. The first data point; i.e., 29.3 was just upstream from the bridge. The next data point was upstream from the island located between river mile 29.3 and the third data point of river mile 28. The third data point was just upstream from the unnamed tributary. There were 90 hours of data that made up that graph. It was established that the average criteria for DO is set by law. None of the red boxes on the graph should be below that line.

Ms. Sherer established that the chart showed the minimum level. She testified that at no time should you be below that line.

She testified that the findings at river mile 28 created an oxygen sag. It was her opinion that the sag found was caused by the effluents reported in State's Exhibit 1A related to Oak Hills' discharge. In fact she stated that the findings showed a direct link between Oak Hills and the DO sag she observed.

Ms. Sherer is unaware of any additional hands-on examination of the water after the efforts taken in 2004.

Ms. Sherer explained the reason why the DO was located downstream from Oak Hills' outflow. There is a delayed effect. Pollutants coming from upstream affect the findings about 1 mile downstream. It takes a while for the oxygen demand to be exerted on a water source.

Ms. Sherer was unconcerned with the discharge from the unsewered homes in July of 2004 and she did not find any discharge from the outflow pipes for the store or school that were located on the left side of the creek in the sampling area.

Miss Wendy Nelson also testified at trial. Miss Nelson had worked for the prior owners of Oak Hills from 1992 to 1999.

Miss Nelson testified that she gave the maintenance people the daily directives but the WWTP was always the priority. She came back to Oak Hills in July of 2002. She testified that she started reporting to George DeGraca around August of 2004.

Miss Nelson primarily communicated by phone and/or e-mails with Mr. DeGraca who was located in New York.



Miss Nelson testified that she could count on her hand the number of times during her employment at Oak Hills that she was actually in the WWTP. However, she did testify that she was aware that the WWTP had an I&I problem.

Miss Nelson established that she received a pay stub from KDM as well as a W2 from KDM. At the Bench Trial she was permitted to be present during the testimony of the other witnesses because she had been identified as the representative of KDM.

Miss Nelson testified that Mr. DeGraca was her supervisor. She did not know how the companies were organized but she did know that her e-mail address identified KDM.

Miss Nelson established State's Exhibit 22A, State's Exhibit 22B, State's Exhibit 22C, State's Exhibit 22D, State's Exhibit 22E, State's Exhibit 22F, State's Exhibit 27A, State's Exhibit 27B, State's Exhibit 27C, State's Exhibit 27D. All the documents were e-mails showing knowledge of the I&I problem at Oak Hills and other problems with the WWTP. The e-mails are dated between January 23, 2006 and June 29, 2007.

Miss Nelson stated that, in regard to the running of the WWTP, if Water Specialists told her to do something she would see that it was done.

Miss Nelson admitted that it was cheaper for Oak Hills to have its maintenance person handle the day-to-day running of the WWTP then it was to pay Water Specialists to do the work.

Miss Nelson admitted that the daily numbers were kept at the WWTP and that those sheets were submitted to Water Specialists so it could produce the MORs.

Miss Nelson established Water Specialists Exhibit 32 as an e-mail dated April 17, 2006 from Mr. Eitel to her and copied to Mr. DeGraca. That document indicated that

Jason Nelson, the then maintenance man for Oak Hills had missed the March 2006 data. She admitted that the e-mail warned about the fact that there were going to be consequences; i.e., OEPA violations.

Miss Nelson established that there were a number of contacts with Water Specialists where she and Mr. DeGraca were given warnings by Water Specialists concerning permit violations; see Water Specialists Exhibit 10, Water Specialists Exhibit 22, Water Specialists Exhibit 37.

Miss Nelson established that Jason Nelson was her son and that he was hired to perform maintenance tasks at Oak Hills in September of 2005 and terminated in September of 2006.

Miss Nelson was unwilling to state that she knew that her son was fabricating information concerning the WWTP 'bench sheets' (The forms used to report the data used for the MORs). That was true even after she established Water Specialists Exhibit 26 where the subject of the WWTP was discussed in a parenthetical. She claimed that she thought that the issue of fabrication was only in regard to the water plant. That statement was not credible. She did eventually admit under cross-examination that the parenthetical about the WWTP did reference back to the fabrication.

Miss Nelson also established that there was a time in 2006 when Water Specialists did not have access to the WWTP. That was supported by Water Specialists Exhibit 60.

Miss Nelson testified that her normal working hours were 9 to 5 Monday – Friday. She stated that she would not know if Water Specialists came to the WWTP before or after that time.

Mr. Jason Nelson also testified at trial and established that he worked for Oak Hills from September 2005 to September 2006.

He was hired by his mother Wendy Nelson. He did not remember speaking with anyone else when he was hired. Mr. Nelson had never worked at any WWTP prior to his work at Oak Hills.

Mr. Nelson remembered that it was KDM on his paycheck. Mr. Nelson testified that he was paid \$10.50 per hour. His job at Oak Hills consisted of normal maintenance work on top of his work at the WWTP. He testified that the first two hours of his daily job were devoted to the sewer plant Monday – Friday.

Mr. Nelson testified that he was told by Mr. Taylor from Water Specialists what to do at the WWTP and he would do it. Mr. Nelson remembered that the biggest job at the WWTP was to clean the sand filters.

Mr. Nelson was aware of the monthly sheet that was kept in the shed at the WWTP. He remembered that filling out the sheet was his job to perform. He also was responsible for collecting samples.

Mr. Nelson had a vague memory of the plant manual. He stated that Mr. Taylor went over things on a need-to-know basis with him. Mr. Taylor would show Mr. Nelson what to do day-to-day and he would do it.

Mr. Nelson testified that he had no idea that there existed some method to bypass the sand filters.

It was clear from State's Exhibit 34 that Mr. Nelson was filling in the daily sheets for Oak Hills' WWTP in August 2006.

Mr. Nelson felt that there had always been problems with the plant. It was having backup problems "from the day I got there." Mr. Nelson stated that Mr. Taylor told him that the WWTP needed an enema.

Mr. Nelson explained that his instructions would come by Mr. Taylor telling Mr. Eitel what was needed, then Mr. Eitel would tell Wendy Nelson and then Wendy Nelson would tell him what to do. However he also stated that he would go over it with Chuck Taylor.

Mr. Nelson remembered Mr. George DeGraca giving him an incentive to do the paperwork. The incentive was offered to Mr. Nelson by Mr. DeGraca directly.

Mr. Nelson remembered Mr. Taylor being at the WWTP two to three times a week when Mr. Nelson first started working. Then the number of visits to the WWTP, he witnessed, dropped off.

Mr. Nelson stated that Mr. Taylor would walk to a spot overlooking the WWTP and see what work was necessary and then Mr. Taylor would tell Mr. Nelson what needed to be done.

Mr. Nelson's typical hours were 8 a.m. to 5 p.m..

Gary Bennett from TCCI testified concerning his knowledge of the WWTP at Oak Hills. He holds a Class One certification as an operator. His company took over operation of Oak Hills' WWTP in February of 2008.

Mr. Bennett testified that he worked with Wendy Nelson and George DeGraca concerning the plant. The company contract is with Oak Hills. Mr. Bennett testified that the contract was sent to George DeGraca.

Mr. Bennett admitted that the day-to-day operation of the WWTP is done by Oak Hills employees. However, TCCI has someone there 5 to 6 days a week. Mr. Bennett established that when sand filters need to be cleaned it is done by park personnel.

Mr. Bennett admitted that some of the MORs filed by TCCI have had missing data. He also admitted that there were ammonia violations in May of 2008 and fecal violations in June of 2008. There were even additional violations in July of 2008.

Mr. Bennett established that there was an issue with securing required chlorine tablets for the WWTP. TCCI eventually purchased the right tablets and billed Oak Hills after Oak Hills failed to timely secure the tablets.

Mr. Bennett testified that the WWTP had problems with I&I. The effect of the I&I was that it allowed water to go into the plant and washed out the solids. Hence the solids got out of the plant and into the Big Darby. He testified to having been aware of at least three overflows of the sand filters with some near misses as well. He established State's Exhibit 29. That was a Sanitary Sewer Overflow 5-day Follow-up report from Oak Hills. Weather caused the problem due to heavy rains.

Mr. Bennett also established another weather event on December 24, 2008 due to heavy rain. He claimed that the WWTP had not recovered from the December 19, 2008 problem.

Mr. Bennett testified that the I&I problem was more than he normally had to deal with at other plants his company operates.

Mr. Bennett testified as follows concerning the supervision that TCCI provided concerning the running of the WWTP: He would ask Wendy Nelson to have the maintenance man check blowers and turn them on or off. He would also ask that they get

cleaned. Oak Hills would secure the trucks to pump the sludge. He believed that TCCI did most of the filter cleaning. If there would be a hard rain coming he would call Oak Hills and ask Wendy Nelson to ask the maintenance man to turn off the blows. But TCCI did not stand over Oak Hills' employees while they were doing the work. TCCI did inspect to see that Oak Hills' staff did its job.

Mr. Bennett established that Wendy Nelson never refused a request from TCCI but that there had been times when Oak Hills did not do the work as quickly as he wanted.

Mr. Bennett also established that the WWTP, as it exists at Oak Hills, does allow 'pretty much' for Oak Hills to keep within the limits of its NPDES permit.

Mr. Bennett testified that TCCI is not responsible for infrastructure improvements at the WWTP.

Mr. DeGraca testified at the Bench Trial and he established that he was affiliated with Oak Hills as one of the members of the LLC. He is also affiliated with KDM where he is an officer and employee of KDM. Mr. DeGraca established that KDM handles 47 mobile home parks across the USA.

Mr. DeGraca testified that Oak Hills was purchased in 2002 at a price of \$5.7 million. A majority of the purchase price was financed.

Mr. DeGraca admitted that Mr. Martin is another member of Oak Hills as well as KDM.

Mr. DeGraca denied knowing of the I&I problem at time of purchase even though the closing documents showed that money was escrowed for that issue. Mr. DeGraca

claimed that he first became aware of the escrow money in 2007. He now knows that the money was for an I&I study that was to be completed.

Mr. DeGraca's percentage ownership in Oak Hills has never changed after 2002 but he is now actively engaged in running the property and has been so since August 2004. He took over the active control of Oak Hills from a Mr. Morgan. However, there have never been any formal documents establishing that change and Mr. Morgan was still the managing member of the LLC during all times relevant to this case.

Though KDM pays Wendy Nelson, Mr. DeGraca claimed that Wendy Nelson was an employee of Oak Hills. He did admit that he supervised Miss Nelson and that she reports to him.

Mr. DeGraca admitted to having a 25% interest in KDM.

Mr. DeGraca acknowledged State's Exhibit 17. That was an e-mail dated October 22, 2004. The e-mail had been sent to Mr. DeGraca at KDM's office in New York. The e-mail discussed I&I issues at Oak Hills.

In fact Mr. DeGraca acknowledged State's Exhibit 18, an e-mail dated December 14, 2004 concerning I&I issues; State's Exhibit 19, R.D. Zande & Associates December 14, 2004 report concerning I&I issues; State's Exhibit 21A, an e-mail from July 25, 2006 referring to I&I problems; 21B, an e-mail dated August 22, 2006 concerning the need to move forward with an I&I study; 21C, an e-mail dated October 23, 2006 that again addressed the I&I issues; and State's Exhibit 21E, an e-mail dated December 24, 2006 concerning problems with I&I.

Mr. DeGraca admitted that the WWTP for Oak Hills was still having I&I issues as of the date of the June 2009 Bench Trial.

Mr. DeGraca testified that he instructed maintenance people from Columbia Mobile Home Park to come to Oak Hills to help out with the WWTP. That park was another park under the KDM umbrella.

State's Exhibit 22 A, was an e-mail dated April 10, 2007. Mr. DeGraca acknowledged the e-mail and testified that it showed that as of April 2007 Oak Hills was still discussing contractors to look into the I&I problem.

Mr. DeGraca acknowledged that he became aware of issues with Mr. Nelson's work at the WWTP in January or February 2006. Mr. Eitel, from Water Specialists brought the issue to his attention. Mr. DeGraca also acknowledged receipt of State's Exhibit 24J. That was an e-mail from Mr. Eitel to Wendy Nelson 'cc' to Mr. DeGraca. That e-mail discussed the fabrication of information by Mr. Nelson.

Mr. DeGraca established a number of e-mails in 2006 that brought to his attention the poor running of the WWTP by Mr. Nelson. (State's Exhibit 24M to 24S)

Mr. DeGraca established his meeting with Mr. Eitel in September of 2006 concerning the state of affairs at the WWTP and the need to remove or replace Mr. Nelson. He admitted to having viewed State's Exhibit 25. State's Exhibit 25 is a number of photographs taken by Mr. Eitel to show the poor maintenance of the WWTP in August and September of 2006.

Mr. DeGraca established that Oak Hills' Exhibit 19 was the agreement for Oak Hills LLC, but for the most part, his testimony established that the agreement was rarely referenced by the members. In fact he was unaware of the agreement when he was deposed during this pending lawsuit.



Concerning expenditures, Mr. DeGraca claimed that over a certain cash limit; i.e., \$5,000.00 he would talk to the members of the LLC. However, he characterized his talks with the members more in the nature of him telling them that he was going to make the expenditure than him seeking their input.

Mr. DeGraca established that Oak Hills has 249 pads that it could rent. As of the time of his testimony Oak Hills only had 171 pads rented. He characterized the park's renters as being blue collar.

Mr. DeGraca did not have any personal knowledge concerning the operating of a WWTP. He claimed that he relied on Water Specialists.

Mr. DeGraca testified that Oak Hills had assumed the agreement with Water Specialists from the prior owner.

Mr. DeGraca acknowledged Oak Hills' Exhibit 1 as the contract between Water Specialists and the prior owner.

Mr. DeGraca acknowledged that a dispute occurred between Oak Hills and Franklin County concerning the need for Oak Hills to connect to a new sewer system developed for the Big Darby. The issues of cost, ownership and maintenance was/were the stumbling blocks. Mr. DeGraca admitted that now all that had been settled.

Issues with I&I continued to plague Oak Hills even in regard to the settlement between it and Franklin County. Mr. DeGraca claimed that some of the delay in studying the I&I issue at Oak Hills was due to Franklin County not getting back to Oak Hills concerning what it needed.

Eventually Oak Hills hired Bird + Bull to conduct a study of the I&I in 2008. Mr. DeGraca signed the contract. The contract was signed in 2007, the work did not start until 2008 and it was not finished until just recently.

Mr. DeGraca confirmed that he offered Mr. Nelson an incentive to fill in the bench sheets properly and timely.

Eventually, in September of 2006 Mr. DeGraca fired Jason Nelson and then contracted with Water Specialists for it to secure someone to maintain the WWTP.

Mr. DeGraca claimed that Oak Hills had always wanted to connect to the new system. It just was not interested in connecting if it was going to cost it \$500,000.00.

When Oak Hills filed suit, Mr. DeGraca stated that there was no vote by the members of the LLC.

Mr. DeGraca claimed that it was probable that the other members of the LLC did not know about the lawsuit nor did they see the pleadings filed.

Mr. DeGraca did admit that at the time the pleadings were filed they indicated that Oak Hills was in full compliance with its permit, when in fact Oak Hills was not.

Mr. James A. Martin was called to testify. He testified that he was an investor in real-estate. He is a member in a company that purchased an interest in Oak Hills. He claimed that he was now an active managing member of Oak Hills.

Mr. Martin did not have any knowledge in operating a WWTP.

Mr. Martin confirmed that normally at Oak Hills the homes are owed by the renters but the pad is owned by the Park.

Mr. Martin testified that the basic revenue for Oak Hills comes from the rent paid for the occupied pads. The rent is \$315 to \$325 per pad. Oak Hills also charges a separate amount for water and sewer.

Mr. Marin claimed that KDM was a subchapter S corporation that was used as an accounting and payroll service for the other corporations KDM has a relationship with. He has a 25% interest in KDM. He further defined KDM as a central agency for all the parks. KDM does all the bill paying for all the parks. KDM collects all of the receivables and acts as the main insurance for all parks and runs the web site for all of the parks. KDM provides the e-mail addresses. Mr. Martin claimed that KDM does not make a profit but it might show a profit in some years due to a timing issue. According to Mr. Martin KDM has no assets.

Mr. Martin claimed that he and Mr. DeGraca were the two individuals who decided to end the relationship with Water Specialists. That was due to the reported problems at the WWTP.

Mr. Martin confirmed Mr. DeGraca's opinion that Oak Hills was purchased in June of 2002 and the primary mover in the purchase was Robert Morgan. He and Mr. DeGraca were just passive members in 2002.

Mr. Martin claimed that he and Mr. DeGraca took over the everyday management of Oak Hills in 2004 with George taking the lead. He stated that he and Mr. DeGraca were the ones responsible for knowing what was going on there.

Mr. Martin testified that the purchase of Oak Hills was financed with a non-recourse mortgage. He believed that there was still \$4.6 million dollars outstanding on the obligation. The note has a balloon payment due on August 1, 2009.

Mr. Martin testified that there have been a total of 4 cash calls to all members since 2002 that has raised \$400,000.00 in cash for Oak Hills.

Mr. Martin established a number of Oak Hills' Exhibits concerning the financial picture of Oak Hills.

Mr. Martin testified that there has not been a profit at Oak Hills after 2003. However Mr. Martin conceded that legal and professional expenses increased in 2004. Mr. Martin stated that there was no written agreement between Oak Hills and KDM for the services.

It was incredible when Mr. Martin testified that he did not know how much equity he had in Oak Hills nor did he know the true nature of his ownership.

But Mr. Martin was willing to state that, based on cash flow today you cannot sell Oak Hills for \$4.6 million.

According to Mr. Martin there has never been a distribution of capital to the members in the 7 years the park has been owned.

Mr. Martin remembered discussing the I&I problem with Mr. DeGraca around 2004. He also admitted that the members of Oak Hills did not vote prior to settling with Franklin County.

Mr. Martin confirmed that there were no written directives concerning Mr. DeGraca's authority.

Mr. Martin stated that Oak Hills was not a tax shelter but then he defined a tax shelter and Oak Hills fit the description.

Mr. Martin confirmed that Oak Hills had been using an aggressive form of depreciation that increased the depreciation amount that Oak Hills could use for federal tax purposes.

Oak Hills called Brian Coghlan to testify concerning the efforts it has taken to address the I&I issues. Mr. Coghlan is employed by the public works firm of Bird + Bull. He has been so employed over the last 15 years.

His firm was hired to do an I&I investigation for Oak Hills and prepare a report. Mr. Coghlan testified that the proposal for the work was made in October 2007 in accordance with the consent decree between Oak Hills and Franklin County. His firm started the actual work in February of 2008.

Mr. Coghlan stated that his firm was to establish the size of the I&I problem and then provide suggestions on what to do to limit the I&I. This was important because no one could decide how big of a pumping station was going to be required for Oak Hills to connect until someone understood the size and scope of Oak Hills' I&I.

Mr. Coghlan testified that in order to investigate the I&I issue he collected background information on the WWTP. This included looking at the EPA files. He also reviewed the prior work at Oak Hills in regard to the I&I problem including a previous report from 1999 and a report prepared in 2005.

As of the date of his testimony Mr. Coghlan stated that no permit to install had been requested by Franklin County in regard to the construction of the pumping station. The pumping station is necessary for Oak Hills to connect to the new sewer system.

Mr. Coghlan claimed that the reason behind the survey was so that Franklin County could understand the amount of water from the I&I. The total amount of I&I

directly concerned the size of the pumping station. Therefore Franklin County wanted to minimize I&I prior to completing the connection with Oak Hills.

Mr. Coghlan did see the I&I study in 1999. He was unaware of the author of the document but he stated that the survey had documented the deficiencies at that time.

Mr. Coghlan also was aware that a flow study is a measurement of the water passing through the collection system. Such a study was conducted between January 7, 2005 to March 7, 2005. The study identified what water was coming into and out of the system.

It was clear to Mr. Coghlan that during wet weather events there was a spike in the amount of water going into and then out of the system. The spike in the amount of flow dropped off significantly after the end of the wet weather event.

It was Mr. Coghlan's opinion that the earlier studies and tests did not fully map the sewer system at Oak Hills, so mapping was going to have to be accomplished. Once the system was mapped, Mr. Coghlan could formulate a plan of attack.

Mr. Coghlan established that his firm issued a report and that was identified as Oak Hills' Exhibit 67. Mr. Coghlan defined the terms Infiltration and Inflow. Inflow equals water entering the sewer drains by other means. Infiltration equals water entering the sewer system by deficiencies in the system itself. No system is water tight. Every system has an allowable amount of leakage.

Mr. Coghlan felt that the sewer system at Oak Hills was rather advanced relative to other parks. There was a defined structure to the system and it had been laid out well. Oak Hills sits on a hillside divided by a large ravine. The system was divided into two parts then recombined just short of the WWTP.

As part of his work he performed smoke testing. In that process you open a sewer and place a fan on top of the manhole. Then you put smoke into the system and the fan sends the smoke into the sewer. The smoke is free to move up through cracks in the pipes and then out of the ground. That way you can find the defects.

He concluded that there was an excessive amount of I&I that needed to be reduced. The main source was rainfall induced with a smaller quantity from other sources. Basically Mr. Coghlan concluded that the problem was rainfall induced infiltration.

Mr. Coghlan testified that his firm had already charged Oak Hills \$20,821.50 for work to date and it estimated that there was \$143,885 in future repair work to reduce the I&I problem.

Mr. Coghlan also opined that it would cost \$500,000.00 to finish the work required to connect Oak Hills to the new sewer line; i.e., the required building of a pump station.

Mr. Coghlan admitted that the original proposal for the work at Oak Hills was sent to George DeGraca at KDM. (See Oak Hills' Exhibit 91 second page).

It was Mr. Coghlan's opinion that there was as much as 69,000 gallons per day of I&I during wet weather events. He also confirmed that the WWTP at Oak Hills was designed to handle only 69,000 gallons per day during normal operating conditions.

Mr. Coghlan was not retained nor did he offer any opinion as to the day-to-day operation or maintenance of the WWTP.

Mr. Coghlan did testify that he had been performing the same study for Pleasant Acres. Pleasant Acres is another mobile home park in the relevant area and it was a

former party to this litigation, Pleasant Acres had been implementing his suggestions and upgrading its sewer system throughout the testing process.

Oak Hills called Mr. Thomas David Shockley, the former Franklin County Sanitary Engineer to testify. He established Oak Hills' Exhibit 81 that showed the overall layout of the Darbydale community.

Mr. Shockley was able to establish that there were a number of issues in the area relevant to this litigation including the 325 homes in Darbydale that were using aeration or septic systems. Mr. Shockley established that some of the homes on the left bank of the stream were discharging directly into the stream. The other homes had additional discharge when wet weather conditions occurred.

Mr. Shockley identified Oak Hills' Exhibit 5, the December 26, 2001 letter from OEPA declaring the area unsanitary. That was the administrative action that kicked off the building of the new WWTP for the Darby.

Mr. Shockley also indicated that the prior owner of Oak Hills had contacted the County and tried to make a deal concerning the use of its WWTP. Mr. Shockley stated that that idea was quickly rejected by his office because of the known I&I issues that the plant had at that time.

In order to connect to the new system it was clear to Mr. Shockley that Oak Hills was going to need a pumping station because it sat so low. Mr. Shockley also testified that because the trailer parks in the area were going to be connecting their systems to the new sewer, the issue of I&I was a factor that had to be discovered prior to hook up.



Mr. Shockley also explained that the new WWTP for the area was not going to be built as a development tool. It was going to be designed to handle the existing loads and no more.

Mr. Shockley testified that the new plant was designed for 300,000 gallons a day, with peaking factor of 1 million gallons. It was to cost \$3.5 million to build.

Mr. Shockley established Oak Hills' Exhibit 6. That document established the then position of the County that Oak Hills was going to be responsible for building a pumping station and an appropriate equalization basin. That was drafted on March 11, 2002 by Floyd Browne Associates Inc., at the behest of Franklin County. The document was sent to the prior owners of Oak Hills.

Mr. Shockley stated that it was the intent of his office to have all of the permits in the area rolled into one permit that was to be issued to the new WWTP that would handle the complete area.

Mr. Shockley identified Oak Hills' Exhibit 12 which was the permit to install secured by the County on June 26, 2003. He testified that the County started to move forward at that time and the new plant became operational in June of 2005. Again Mr. Shockley established that the County knew that there was going to be a need for several pumping stations because of the terrain.

Mr. Shockley identified Oak Hills' Exhibit 15 which is a letter from his office directing the mobile home parks to start the process of connecting with the new system. The letter is dated February 13, 2004.

Mr. Shockley also established that the County had been talking directly to the parks in 2003 to try to get them moving forward.

Mr. Shockley testified that the method and timing of the way Oak Hills was going to hook up to the system changed over the years.

Mr. Shockley established Oak Hills' Exhibit 18. That was his letter of August 8, 2008 that indicated that, in regard to Pleasant Acres, that park could move forward to connect. That was because it was Mr. Shockley's belief that Pleasant Acres had shown a willingness to adopt the recommendations of Bird + Bull and it had already addressed some of the I&I issues at that park. Mr. Shockley stated that it was more 'sketchy' concerning Oak Hills and therefore he was not sure that Oak Hills was ready to connect as of August 2008.

Mr. Shockley also stated that the County incurred \$80,00 to \$90,000 in costs tunneling under the Big Darby to bring the sewer line to Oak Hills' side of the stream. The sewer line was to serve only Oak Hills.

Mr. Shockley did not know if Pleasant Acres had been more responsive to the County's concerns but what he did know was that Pleasant Acres made changes that were requested to fix its I&I problem. Mr. Shockley stated that between the two parks Pleasant Acres had the worst system.

Mr. Shockley confirmed the County's concern over the 20 homes on south side of Avon Street downstream from Oak Hills. However, he stated that the oxygen drag issues in the stream were 'created by all of this'; referencing all of the issues with the homes, school, store and Oak Hills.

Mr. Shockley pointed out that a non governmental entity could construct the infrastructure for about 2/3 the costs charged to the County.

Mr. Dale E. Kocarek also testified at the trial. He is a professional engineer mainly employed in the field of sanitary engineering and maintaining waste water treatment plants. Mr. Kocarek holds a Class Three waste water certificate and is a board certified environmental engineer. Class Three certifications are for the bigger public plants.

Mr. Kocarek was asked by Oak Hills to address the work performed by Water Specialists at Oak Hills' WWTP. His report was identified as Oak Hills' Exhibit 66.

Mr. Kocarek first became aware of Oak Hills in January of 2005 when his firm was commissioned to do a small flow monitoring investigation. He had no other direct dealings with Oak Hills until he was hired for the litigation.

Mr. Kocarek identified the report of March 30, 2005 shown as Oak Hills' Exhibit 36. Mr. Kocarek testified concerning the purpose behind a flow monitoring study. He stated that his company installed one or more flow meters at strategic points to gather information on the flow generated into the sewer system that would be sent to the WWTP to determine the degree to which I&I generated by wet weather could have an impact on increasing flows to the WWTP.

Mr. Kocarek stated that he understood that the NPDES permit required a Class One operator to supervise the WWTP and he felt that that meant more of a hands-on role. In fact he felt that the Class One operator should process adjustments to the WWTP, process measurements; collect and oversee and preserve the samples and get them to the laboratory for analysis. The operator should also prepare the MORs and submit them to the OEPA in a timely manor.

Mr. Kocarek also held the belief that because of the significance of accurate information required by the OEPA and given that the system is self reporting, he would only delegate general observation of the plant to the park's maintenance staff. Such tasks would be a simple review of the fencing and simple observation of the system to see that it is working; i.e., blowers working, tanks operating, removing trash and mowing grass. Mr. Kocarek's opinion in this regard is contested by Water Specialists and even by Mr. Bennett of TCCI. His testimony in this regard was significantly discounted by this Magistrate.

Mr. Kocarek was not impressed with the original contract between Water Specialists and the prior owner of Oak Hills as shown in Oak Hills' Exhibit 1.

Mr. Kocarek claimed that there were three factors in regard to a plant failure. 1) Design issues, 2) Managerial support; i.e., denying of funds, not making investments to correct deficiencies, 3) Operational and maintenance considerations – this is under the oversight of an operator.

Mr. Kocarek held the opinion that the plant was good for its intended purpose but the I&I was the issue that it could not completely control. Mr. Kocarek felt that the new operator; i.e., TCCI had a better plan for dealing with the I&I issue at the plant to avoid overflows. However, Mr. Kocarek was forced to acknowledge that even with TCCI's improvements there had been a number of reported overflows directly related to I&I after TCCI was in control.

Mr. Kocarek claimed that he failed to find any evidence that money was withheld by the owners or that design or maintenance issues went unaddressed by the management

of Oak Hills. This testimony appeared to be limited to the WWTP and did not directly address the issues with the I&I problem systemic within Oak Hills' sewer system.

Mr. Kocarek held the opinion that Water Specialists did not sufficiently supervise the plant in order to live up to its obligations. He believed that Water Specialists should not have relied on the park maintenance to run the plant.

Mr. Kocarek concluded that Water Specialists did play a significant factor in the NPDES permit violations. He held the opinion that the custom of care was not met by Water Specialists.

Mr. Kocarek admitted that it was up to the owner of the park to pick the contractor.

Mr. Kocarek also admitted that if an employee of Oak Hills did not report the numbers correctly or even fabricated the numbers, which would not be the operator's fault.

Some of Mr. Kocarek's data lead him to believe that there had not been enough sludge hauled from Oak Hills' WWTP. However, he was confronted with Water Specialists' Exhibits 64 to 70 that established a number of times when sludge had been hauled from the WWTP thereby reducing the credibility of his conclusions.

Mr. William Eitel was called on direct by Water Specialists and on Cross by OEPA and Oak Hills. Mr. Eitel has a full time job as a water plant manager for the City of Columbus. He has held that job since 1986. He holds a Class One waste water operator certificate.

Mr. Eitel formed Water Specialists to help small water systems deal with issues that they did not know how to handle. This was mainly because of new issues with

chlorination procedures in the early '80s. Water Specialists worked primarily with water plants but it moved on to waste water plants in 1993 and/or 1994. Currently there are only three employees of Water Specialists. Himself, his wife and his father in law; i.e., Chuck Taylor. It was Mr. Taylor who had the primary job of supervising the waste water plants contracted to Water Specialists.

Water Specialists' first contact with Oak Hills was with the prior owner and it was in regard to the water plant only. Mr. Eitel testified that that had occurred back in 1993. Sometime after that Water Specialists was asked to work with the WWTP.

Mr. Eitel testified that Water Specialists never agreed to be responsible for all maintenance of the WWTP nor did it agree to provide daily review of the plant or workers for the WWTP.

Mr. Eitel also testified that when the new owners took over, the name he primarily heard was KDM.

Mr. Eitel testified that in 1994 Water Specialists entered into a written agreement with the prior owner. That was Oak Hills' Exhibit 1 and Water Specialists' Exhibit 1; i.e., the contract between Water Specialists and the old owner of Oak Hills.

It was Mr. Eitel's understanding that the contract only required that Water Specialists make three weekly observations of the WWTP, take samples and make recommendations to the owner as to how better to run the plant or what type of maintenance the WWTP needed.

Mr. Eitel identified Water Specialists' Exhibit 31 which was an April 2006 e-mail to Wendy Nelson. That exhibit contained the following statement: "Remember, park

staff actually do the day-to-day operation for the wastewater plant. We are only there a short time some days of the week.”

Mr. Eitel claimed that Chuck Taylor would do most of the visits but there was no set time for the visits. Their trips to Oak Hills could be before or after the normal working hours of Oak Hills staff.

Mr. Eitel clearly believed that it was up to Oak Hills to do the majority of the sampling. Water Specialists would train park personnel on how to capture the sample and avoid problems with sampling techniques. Water Specialists would also train park personnel on how to make observations and record them on the bench sheet.

Mr. Eitel identified Oak Hills’ Exhibit 39. He claimed that he had prepared that document, though he admitted he did not author all of the information in it. He also testified that it was a draft that he submitted to the prior owner. He believed that the prior owner then submitted the draft to the OEPA. Given the fact that he heard nothing further he never created a final draft of the manual.

Mr. Eitel testified that Water Specialists created the MORs for filing with the OEPA and that he or Mr. Taylor would fill in the preprinted forms. Water Specialists provided copies of the reports to Oak Hills by normally leaving them in the water plant. He admitted that an untrained eye would not be able to review the MORs and know that the plant was violating its permit.

Mr. Eitel admitted that there were times when he used the AN code when he did not have information from Oak Hills. He testified that the use of the AN code instead of leaving the data blank led to the same type of violation and fine from the OEPA. That was never contested by the OEPA. The potential range of the fine was the same.

Mr. Eitel stated that Water Specialists did not play any role in hiring or controlling park staff. Furthermore all equipment requests were to be approved by Miss Nelson and/or George DeGraca after 2004.

Mr. Eitel identified Water Specialists' Exhibit 3 which was a March 8, 2004 letter to Oak Hills explaining some of the issues with the WWTP and it warned of violations of the NPDES permit. Mr. Eitel also testified that I&I issues would get waste onto the filters, and if not cleaned the filters would not work correctly.

Mr. Eitel also established that Water Specialists began to aggressively notify Oak Hills of Water Specialists' belief that Jason Nelson was not doing his job at the WWTP. Mr. Eitel identified Water Specialists' Exhibits 20, 22, 23, that addressed some of the concerns and clearly notified Oak Hills of the issues with Jason Nelson.

Mr. Eitel testified that he trained Jason Nelson on taking the samples at the WWTP. Mr. Eitel felt that Mr. Nelson worked well with direct observation but not all of the time. Mr. Eitel was confident that he reported the problems Water Specialists was having with Mr. Nelson to Wendy Nelson.

Mr. Eitel identified Water Specialists' Exhibit 26 which is the document that contains the January 31, 2006 e-mail between Mr. Eitel and Wendy Nelson where he claimed that Jason was fabricating data. Due to the fabrication Mr. Eitel was unable to sign the NPDES MOR report for December 2005. Mr. Eitel stated that no one ever contested his belief that Jason Nelson had fabricated the data.

Mr. Eitel identified a number of other exhibits where he brought to the attention of Oak Hills the reporting issues at the WWTP; i.e., Water Specialists' Exhibit 32, 35.



Eventually Mr. Eitel called Mr. DeGraca when he felt that the situation was not going to improve. He informed him that Water Specialists was going to stop providing service to Oak Hills. Mr. Eitel stated that Mr. DeGraca pleaded with him to stay on board and Mr. DeGraca promised that things would improve.

Mr. Eitel identified Water Specialists' Exhibits 7, 11, 13 – 14, 16 – 19, 29 – 30, 33 & 34, 36, 43 – 44, 47 – 49, 52 – 55, and 57 as evidence that Water Specialists was getting inquiries from the OEPA and that Water Specialists was passing that on to Oak Hills.

Mr. Eitel testified that Water Specialists' relationship with Oak Hills ended in February 2008 by the receipt of a letter. Oak Hills did not pay its final invoice.

Mr. Eitel did identify Water Specialists' Exhibit 55. That was a July 12, 2007 e-mail from Wendy Nelson. Contained within the e-mail was her statement that Oak Hills did not want to spend money on a system that was going to be abandoned. Oak Hills at that point was asking for additional labor to keep the plant working. Mr. Eitel testified that it hired an individual as a 1099 laborer and billed Oak Hills for the money it paid to the sub-contractor to work at the WWTP. Mr. Eitel claimed that that employee worked 3-to-10 hour days at the plant.

Upon cross examination Mr. Eitel admitted that in the past he would take meter readings from over the weekend and then average them out and place the data into the Saturday, Sunday and Monday slot. He also testified that for some unknown reason he stopped doing that and instead he would take the meter reading for the two days of the weekend plus Monday and just report all that for Monday as if it was a Monday reading. That change led to a number of the OEPA violations for non-reporting.

Mr. Eitel confirmed his knowledge of the longstanding I&I issues at Oak Hills and he believed that information was passed on to Oak Hills' management.

Mr. Eitel did testify that Oak Hills' attorneys had to know of the violations of the NPDES permit at the time Oak Hills was denying violations in its pleadings.

Mr. Eitel confirmed that in August and September of 2006 he took some pictures of the WWTP to show management what was wrong. Mr. Eitel identified State's Exhibit 25 which were the pictures he took and the captions that he drafted for the pictures.

Mr. Eitel testified that page one of State's Exhibit 25 showed a portion of the plant that did not appear to have been used even through the WWTP records had said it had.

Mr. Eitel testified that page two of State's Exhibit 25 also showed that work was not being performed. Page three of State's Exhibit 25 showed algae in the tank that would not have been there with regular maintenance. On page four, Mr. Eitel established that there were some comparison photographs between a clean and a dirty flow filter. He testified that there was no way that the filter he saw in that picture could have become so dirty in 24 hours. That was when the WWTP records indicated that the filter had been last cleaned. That was also Mr. Eitel's testimony concerning page 5 of State's Exhibit 25.

Mr. Eitel testified that page 6 of State's Exhibit 25 showed a sand filter that plant records claimed was in use when his photograph led him to believe that the filter could not have been in use.

Mr. Eitel testified that pages 7 – 13 of State’s Exhibit 25 again showed plant equipment in a state that did not match up with the WWTP records maintained by Oak Hills’ employees.

Concerning the fees charged by Water Specialists Mr. Eitel claimed that the normal charge was about \$1,200.00 per month.

Mr. Eitel testified that Water Specialists was involved in the renewal of the NPDES permit in 2002. Mr. Eitel felt that Oak Hills’ WWTP could typically meet the permit limits. He then qualified his answer by stating that “at times it [WWTP] can meet the limits.”

Mr. Eitel stated that over the years he and Mr. Taylor had filled in the OEPA’s forms for reporting the MORs. OEPA Form 4500. Mr. Eitel established that Form 4500 had a certification signature line, and that sometimes over the years Water Specialists would submit the form unsigned to the OEPA.

Oak Hills’ Exhibit 61 was identified by Mr. Eitel as Water Specialists’ invoices to Oak Hills. The invoice showed a standard monthly fee of \$1,230.00. The invoice does not break down the work performed by Water Specialists at the water treatment plant versus the WWTP.

Mr. Eitel was forced to admit that there were times when Water Specialists failed to accurately report the numbers given by Oak Hills. Said failure led to some of the AN code violations. It was also clear that some of the reported violations established by the OEPA came at times were Jason Nelson was not employed by Oak Hills.

As indicated earlier, Mr. Eitel was forced to admit that Water Specialists discontinued the flow reporting averaging that it had done in the past. Instead Water

Specialists was not reporting any readings for Saturday and Sunday, which led to multiple violations.

Mr. Eitel identified Oak Hills' Exhibit 38. That document confirmed that the I&I problems existed as early as June 18, 1997.

### **LAW AND ARGUMENT**

In civil cases, the moving party bears the burden of proof to establish all the elements necessary to sustain a claim, which includes the element of damages. When the burden of proof is on a party for a given issue, that party will lose on that issue as a matter of law if he or she fails to come forward with evidence which tends to prove that issue. *Covey v. Bellman* (Sept. 29, 2000), Lucas App. No. L-99-1313, unreported, citing *State v. Robinson* (1976), 47 Ohio St. 2d 103, 107.

As already indicated, the OEPA has been granted summary judgment against Oak Hills. Concerning those claims, this Magistrate must determine the amount of the civil penalty to be assessed against Oak Hills. Also, the OEPA did request and is entitled to injunctive relief. This Magistrate must also determine the nature and extent of that injunction.

The OEPA also claimed that Mr. DeGraca and KDM were responsible for the permit violations. The OEPA claimed that Mr. DeGraca participated in the actions that led to the permit violations and that KDM employed Mr. DeGraca and therefore it was responsible for Mr. DeGraca's conduct on a theory of respondeat superior. On those issues, the OEPA held the burden of proof.

Oak Hills claimed that its contractor, Water Specialists, breached the contract between the parties. On that claim, Oak Hills held the burden of proof.

Water Specialists filed a counterclaim against Oak Hills asserting a theory that it had been harmed by the negligent hiring of Oak Hills' employee(s). At the conclusion of the Bench Trial, Water Specialists' counsel conceded that said 'claim' was in effect, an affirmative defense to Oak Hills' breach of contract claim. As such, Water Specialists held the burden in regard to that affirmative defense.

**A) Penalties:**

This Court has held that the OEPA already established a great number of violations by Oak Hills. It is now up to this Magistrate to determine the necessary amount of a civil fine to assess. Both the OEPA and Oak Hills acknowledge that in regard to assessing a fine, the controlling case is *State ex rel. Brown v. Dayton Malleable*, 1 Ohio St.3d 151. This Magistrate understands that the amount of penalty assessed must be a number larger than the cost of abatement or compliance. This Magistrate was never presented with evidence in regard to the issue of abatement.

R.C. §6111.09 allows for a penalty of up to \$10,000.00 per day for each day of violation. Concerning the amount of a penalty, this Magistrate is mindful of the following:

Civil penalties imposed for violations of environmental regulations are primarily deterrent in nature. *Id.* The penalties are "designed to deter conduct which is contrary to a regulatory scheme." *State ex rel. Celebrezze v. Thermal-Tron, Inc.* (1992), 71 Ohio App.3d 11, 19, 592 N.E.2d 912. To be an effective deterrent, the penalty imposed "must be large enough to hurt the offender," and the court should further consider "the good or bad faith of the defendant, the financial gain to the defendant as well as environmental harm." *Id. State ex rel. Rogers v. Elbert*, 180 Ohio App.3d 284 at 302, 2008-Ohio-6746 at ¶ 61.

The following is a review of the violations in light of the factors from *Dayton Malleable*.

1) Did the Violations Create a High Risk of Serious Harm?

Concerning this factor the violations must be broken down into two categories: a) violations associated with known pollutants being discharged into the stream; and b) technical violations of the reporting requirements of the OEPA.

a) Known Pollutants Discharged into the Stream:

In this case the Court has already determined that there existed 929 days of violations related to effluent getting into the stream. (State's Exhibit 1A) Oak Hills at the Bench Trial again asserted that the method that the OEPA used to calculate those days is artificial and has no relationship to the severity of the discharge. The OEPA did not offer much evidence to refute that assertion. However, this Court has held that there are 929 days and that will not be changed by this Magistrate.

The OEPA did not present evidence that aided this Magistrate in understanding how any of the individual violations affected the Big Darby watershed. For example, there was no testimony that documented how the Big Darby was affected when Oak Hills' WWTP released more ammonia than it was entitled to release pursuant to its permit. Nor was there evidence produced that indicated that the effluent violations shown in State's Exhibit 1A had or will have any lasting effect on the watershed.

It was clear to this Magistrate that Oak Hills was in violation of its permit but there was very limited evidence as to the extent of harm. The OEPA did establish that there was a dead zone extending yards out from the Oak Hills outfall. It also established a location further downstream where an oxygen sag occurred which was related to Oak Hills' discharge. There was also testimony that established that the left side of the creek had better water quality than the right side of the creek downstream from Oak Hills'

outfall. This Magistrate finds that said evidence established that Oak Hills' violations were more than just technical or insignificant.

Oak Hills addressed this issue by pointing out that others were potentially polluting the stream. In particular, Oak Hills pointed to the homes along the left bank of the stream downriver from Oak Hills' outflow that were discharging directly into the stream. Clearly, Oak Hills asserted, it could not be solely responsible for the findings downstream.

In response the OEPA's experts explained how there is a delay in the effect of effluents in a moving body of water. The OEPA's experts eliminated the homes as a factor in the oxygen sag that OEPA documented downstream from Oak Hills.

Oak Hills did not submit any direct evidence that established that the effluents shown on State's Exhibit 1A could not cause and/or did not cause significant harm to the Big Darby Creek. It was Oak Hills' burden to produce such evidence if it wanted to establish grounds for a minimum fine. Concurrently, it was the OEPA's burden to show significant harm if it wished fines to be assessed at or near the maximum.

This Magistrate holds that the fine should not be nominal or minimal based upon the evidence adduced at trial. However, the fine should not be at the high end given the lack of any evidence that the damage to the environment was more significant than what was established at the Bench Trial. This Magistrate holds that the fine should be \$300.00 per day.

Also, in this category of violations there exists the September 1 and the September 19 violations established by Ms. Gossett-Johnson. Here the OEPA produced evidence that what was found in the creek did not match up with the findings in the

WWTP. These violations caused the OEPA a number of concerns, some of which are not yet resolved. [There was some evidence at the Bench Trial that the issue was turned over to the OEPA's special investigation unit.] The evidence was that the WWTP was discharging solid pollutants directly into the Big Darby. But again, the evidence did not establish lasting environmental harm. Nor did the evidence show that the harm was going to take years to abate.

This Magistrate feels that the per day fine should be significantly higher than the fine assessed for the 'normal' effluent violations. The evidence produced leads this Magistrate to determine that the fine should be in the mid-range of the available statutory fine. The fine should be \$5,000.00 per day of violation.

b) Technical Violations of the Permit:

This area of violations also can be broken down into two categories: i) 1099 days of violations for failure to report information; and ii) 1169 days of violation for not having submitted a plan to comply with the new chlorine limits.

i) 1099 days of violations for failure to report information:

Once again, the November 21, 2008 Decision of this Court has found that there exist 1099 days of reporting violations. Here, as for the prior violations, the OEPA did not produce any evidence that would aid this Magistrate in knowing which information was more critical than others. However, the OEPA did clearly establish that its system of enforcement relies on self reporting. Furthermore, Ms. Sherer established that the numbers are important to the OEPA's modeling. Finally, it is clear that the OEPA needs to know what is going into a body of water so that it can have the ability to protect the water quality. Without accurate self reporting, the system would not work and that would



create a great hardship on the State of Ohio. Therefore any fine assessed must take that into consideration.

Oak Hills addressed the self reporting violations by showing how some of the mistakes were due to Water Specialists' failure to report or to report accurately the information it was provided by Oak Hills. Also, Oak Hills pointed out the technical violations did not lead to a direct conclusion that the Big Darby Creek was harmed by its failure to report.

These factors indicated that a fine closer to a minimal yet not nominal fine is in order. A minimal fine will address the OEPA's need to make sure that Oak Hills and others comply with the self-reporting requirement. At the same time the fine will not be out of balance with the technical nature of the violation. This Magistrate holds that the fine should be \$20.00 per violation.

ii) 1169 days of violation for not having submitted a plan to comply with the new chlorine limits:

This category is more troubling. In 2003 Oak Hills received its renewal permit.

The permit (State's Exhibit 2B) had the following requirement:

Within 6 months from the effective date of this NPDES permit, the permittee shall submit a Permit to Install (PTI) application and detailed plans to achieve compliance with the final effluent limitations for total residual chlorine listed in Part I.A. of this NPDES permit. (Page 5 of the NPDES permit contained within State's Exhibit 2B)

This was never done, nor did the evidence show that Oak Hills ever attempted to comply with this part of the permit.

Clearly, it is important that permit requirements are met. Oak Hills' failure to address this issue cannot go without some form of fine. However, the OEPA again failed to establish if Oak Hills' violation led to significant damage of the Big Darby watershed.

Nor did it produce evidence that the damage was irreversible or would take years to abate.

Given the evidence at trial, this Magistrate holds that this violation should be considered equal to the technical violations already addressed. This evidence indicated that a fine closer to a minimal yet not nominal fine is in order. That will address the OEPA's need to make sure that Oak Hills and others comply with their permit. At the same time the fine will not be out of balance with the nature of the violation. This Magistrate holds that the fine should be \$30.00 per violation.

2) Was There Evidence of a High Degree of Recalcitrance, Defiance and/or Indifference to Environmental Regulations?

The OEPA did try to establish at the Bench Trial its belief that Oak Hills was recalcitrant and did not address the issues at the WWTP in a timely fashion. The OEPA established the longstanding issues of I&I at Oak Hills and the minimal efforts taken by Oak Hills management to address the problem.

The evidence established that when the property was purchased in 2002, Oak Hills knew there was an I&I issue. This was supported by the testimony of Mr. Eitel and Mr. DeGraca. Furthermore, it was apparent that in wet weather conditions the WWTP would allow for discharge of pollutants into the Big Darby Creek. Knowing that, Oak Hills failed to address the problem. Only in 2008 and 2009 did Oak Hills finally hire Bird + Bull to conduct the necessary study to come to grips with this problem.

Even at that point in time, Oak Hills did not and has not invested in improvements to address the I&I problems. Mr. Shockley testified that while Bird + Bull was performing its investigation at Oak Hills and Pleasant Acers, Pleasant Acers was making the changes requested by Bird + Bull. That was not what was happening at Oak Hills.

The OEPA also established evidence that Oak Hills was uninterested in putting money into a plant that was going to be abandoned. The OEPA asserted that Oak Hills was an entity that was trying to get by on the cheap. The OEPA asserted that Oak Hills was created or run as a tax shelter and it was that thinking that drove its decision making.

In response, Oak Hills tried to establish that it did not delay its actions on purpose but that it was others that delayed the matter. Oak Hills advanced evidence that the Franklin County Sanitary Engineer created a number of delays that kept it from performing an I&I study, and that because of the issues it had with the County it was in no position to address the WWTP's problems. This argument was unpersuasive.

The park was purchased by Oak Hills, and at the time of purchase Oak Hills knew it had an I&I issue. There were no meaningful attempts by Oak Hills to address the I&I issues in 2002, 2003, 2004 or even 2005. The evidence established that Oak Hills' management knew that wet weather events led to inappropriate discharge into the Big Darby Creek. This was known to Water Specialists in the '90s and Oak Hills at the time of closing on the property.

The delay caused by the Franklin County Sanitary Engineer had nothing to do with the ongoing violations of Oak Hills' NPDES permit. Oak Hills needed to address the I&I to stay in compliance with its permit. It also needed the I&I addressed in order to connect with the new sewer system. The evidence at the Bench Trial established that the I&I problem was going to have to be fixed by Oak Hills with or without the order to connect to the new sewer system. Oak Hills' delay in addressing that issue caused a number of documented violations of its permit including violations as recently as December of 2008 some 5 ½ years after the purchase of the park.

If not recalcitrance, the OEPA established clear indifference as it relates to Oak Hills' violations of the park's NPDES permit. The reports of permit violations made by Water Specialists to Oak Hills in early 2006 showed an anemic response from Oak Hills' management. Oak Hills did not establish that any additional efforts were taken other than to offer its employee a \$100.00 per month incentive to fill in the bench sheets.

Because Oak Hills exhibited recalcitrance and indifference, this Magistrate holds that the level of all daily fines assessed should be increased to reflect Oak Hills' conduct. An appropriate increase is \$50.00 per violation

3) The Economic Benefit Gained by the Violations:

It is clear that some economic benefit was gained by Oak Hills conducting itself in the way that it did. The delay in conducting the I&I study and the delay in incurring the necessary work to address the I&I study allowed Oak Hills to avoid those expenditures and thereby keep its capital for other purposes. However, the evidence at trial produced by Mr. Martin was that Oak Hills was rarely profitable and that the members of Oak Hills have yet to receive any disbursements. In fact Mr. Martin testified that there had been four \$100,000.00 cash calls to the members where the members were to contribute based on their percentage of ownership.

The OEPA argued within its Trial Brief that the economic gain could be shown by the difference between what Water Specialists was charging for its services to Oak Hills versus what TCCI was now charging,; the assumption being that had Oak Hills hired a better contractor it would have paid more but violated less. Oak Hills' Exhibit 42 showed that TCCI charged \$750.00 for its monthly work at the WWTP. Water Specialists only indicated a monthly amount for both the WWTP and the water plant. That amount was

\$1,230.00 per month. If half of that amount could be allocated to the WWTP then there is a difference of \$135.00 between the service providers.<sup>7</sup>

The totality of the evidence in this regard is not too compelling. However, this Magistrate holds that there was some minimal economic benefit that inured to the benefit of Oak Hills. To that end a small increase in the daily fines seems warranted. This Magistrate holds that this would justify an increase of \$10.00 per violation.

4) The State Has Incurred Extraordinary Enforcement Costs in this Case:

Next the case law allows for an upward modification of the fines should it be shown that the OEPA was forced to incur extraordinary enforcement costs. Here, unlike in *Dayton Malleable*, the OEPA has been forced to prove its case at every step. There were no stipulations or agreements as to the nature and extent of the violations. Also, the OEPA established that Oak Hills was making clearly false statements in its pleadings concerning Oak Hills' compliance with its permit. That required that the OEPA respond and prove facts that should have already been known to Oak Hills.

Furthermore, the OEPA reminded this Magistrate in its Trial Brief that it was Oak Hills that sued the State. Hence, the OEPA takes the position that Oak Hills brought this upon itself. In fact it was only on June 26, 2009, the fifth day of the Bench Trial, that Oak Hills dismissed its claim against the OEPA.

This Magistrate holds that the OEPA did have to engage in more litigation and more contentious litigation than would normally be required in similar situations. However, this Magistrate does not find that this factor requires a significant increase in the fines that are to be assessed. For the extraordinary enforcement costs the fine should be increased by \$20.00 per violation.

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<sup>7</sup> This becomes a critical issue in regard to Oak Hills' breach of contract claim against Water Specialists.

### 5) Oak Hills' Ability to Pay:

The OEPA correctly argued in its Trial Brief that it did not have a burden to show that Oak Hills can pay the fine. This Magistrate finds the following language compelling from *State ex rel. Dann v. Meadowlake Corp.*, 2007-Ohio-6798:

Appellants further contend that the trial court should have considered, but failed to do so, appellants' financial ability to pay the penalty. Appellants note that, pursuant to the Dayton Malleable case, which is cited above, the size of a business and its ability to pay a fine is a "significant factor" to be considered in determining the amount of a penalty. According to appellants, because it is a small seasonable business, the amount of the penalty "goes beyond deterrence and amounts of the most severe form of punishment, bankruptcy of the Meadowlake Defendants."

Appellants bore the burden of showing that the impact of a penalty would be ruinous or otherwise disabling. *United States v. Golf Water Park Co., Inc.* (S.D. Miss. 1998), 14 F.Supp.2d 854, 868. At the trial in this matter, Phillip Barr testified with respect to the extent of appellants' business operations. While there was no testimony as to appellants' revenues, the burden was on appellants, through counsel, to present such evidence. Appellants, however, failed to do so. *Id.*, at ¶¶ 65 – 66.

However, unlike in *Meadowlake*, Oak Hills did attempt to establish its financial picture at the Bench Trial.

Mr. Martin testified concerning the tax records of Oak Hills and both he and Mr. DeGraca established the current amount of renters living at the park. The amount of rent is the major cash revenue for Oak Hills. Mr. Martin did admit that Oak Hills can and does charge separately for water and sewer but he did not know the current rates. Mr. DeGraca stated that Oak Hills could increase those expenses in order to recoup some of the costs to fix the I&I problems but he believed that the income level of Oak Hills' renters could not sustain much of an increase. The inference to be drawn from that testimony was that Oak Hills does not have the ability to pass the costs on to its renters.

Oak Hills also supported its claim of financial distress with the testimony that the loan for the purchase of Oak Hills was due on August 1, 2009 and the balance was \$4.6 million dollars. It was Mr. Martin's opinion that Oak Hills was not going to be able to refinance the debt. That led to slightly veiled allusions to a foreclosure or bankruptcy.

Counterbalancing this testimony was the lack of any information concerning the financial viability of the members of the Oak Hills. The evidence at trial indicated that Oak Hills had successfully requested four cash calls over the proceeding years and each and every member met their respective obligation. Using that method, Oak Hills was able to receive \$400,000.00 in cash from its members. There was no indication at trial that Oak Hills' members were unable to continue to meet that type of obligation.

Clearly, when the members of Oak Hills MHC, LLC purchased the park in 2002 they were expecting a brighter future. The current economic downturn was unexpected and therefore could not have been within Oak Hills' calculations when it purchased the park. The economy is outside of the control of Oak Hills or the OEPA. The issue becomes whether or not the current economic downturn and its affect on the value of the park should be a factor that weights in favor of reducing the fine to be assessed against Oak Hills. This Magistrate holds that this must be a factor.

If the situation was reversed; i.e., if the park had greatly appreciated in value due to the economy, clearly the OEPA would be asserting that, based on *Dayton Malleable*, Oak Hills rosy finical situation must be used to assess a higher fine. Conversely a weak financial condition must be used to reduce the ultimate fine. That is more true when the current viability of Oak Hills may be more related to the economy than any actions or inactions of Oak Hills' management.

The ultimate fine must be reduced but because of Oak Hills apparent ability to secure capital when it needs it, the fine will only be reduced by a total of 15%.

6) Assessment of the Fine:

As stated there are reasons to increase and or decrease the fines to be assessed.

In the proceeding portion of this Decision this Magistrate has given his reasoning for the fines to be assessed.

In regard to the 929 effluent violations the fine is calculated as follows: \$300.00 per violation fine + \$50.00 per violation fine for evidence of recalcitrance, defiance and/or indifference + \$10.00 per violation fine for economic benefit + \$20.00 for extraordinary enforcement costs = \$380.00. Therefore the fine for the violations is: \$353,020.00. That fine is reduced by 15% due to the economic condition of Oak Hills for a fine of \$300,067.

In regard to the documented September 1, 2006 and September 19, 2006 violations, this Magistrate calculated the fine as follows: \$5,000 per violation fine + \$50.00 per violation fine for evidence of recalcitrance, defiance and/or indifference + \$10.00 per violation fine for economic benefit + \$20.00 for extraordinary enforcement costs = \$5,080.00. Therefore the fine for the two violations is \$10,160.00. That fine is reduced by 15% due to the economic condition of Oak Hills for a fine of \$8,636.00.

In regard to the 1099 days of reporting violations, this Magistrate calculated the fine as follows: \$20.00 per violation fine + \$50 per violation fine for evidence of recalcitrance, defiance and/or indifference + \$10.00 per violation fine for economic benefit + \$20.00 for extraordinary enforcement costs = \$100.00. Therefore the fine for



the 1099 violations is \$109,900.00. That fine is reduced by 15% due to the economic condition of Oak Hills for a fine of \$93,415.00

In regard to the 1458 days of violations for failing to comply with the permit concerning chlorine limits, this Magistrate calculated the fine as follows: \$30.00 per violation fine + \$50.00 per violation fine for evidence of recalcitrance, defiance and/or indifference + \$10.00 per violation fine for economic benefit + \$20.00 for extraordinary enforcement costs = \$110.00. Therefore the fine for the 1458 violations is \$160,380.00. That fine is reduced by 15% due to the economic condition of Oak Hills for a fine of \$136,323.00.

The total fine assessed is therefore \$538,441.00. This Magistrate has determined that this fine is appropriate, and adequately addresses past wrongs and deters future similar conduct.

**B) Injunctive Relief:**

The OEPA also moved for injunctive relief. R.C. §6111.07 entitled the OEPA to injunctive relief. Please note the following language from the relevant part of the statute:

(B) The attorney general, upon the written request of the director, shall prosecute any person who violates, or who fails to perform any duty imposed by, sections 6111.01 to 6111.08 of the Revised Code or who violates any order, rule, or condition of a permit issued or adopted by the director pursuant to those sections.

The attorney general, upon written request of the director, shall bring an action for an injunction against any person violating or threatening to violate this chapter or violating or threatening to violate any order, rule, or condition of a permit issued or adopted by the director pursuant to this chapter. In an action for injunction to enforce any final order of the director brought pursuant to this section, the finding by the director, after hearing, is prima-facie evidence of the facts found therein.

The OEPA has asked that the terms of the injunction include language mandating that Oak Hills comply with its permit. The OEPA also requested that the injunction mandate that Oak Hills be connected to the new sewer system no later than December 31, 2009. The requests of the OEPA were not contested at the Bench Trial. The requests of the OEPA are reasonable.

Therefore this Magistrate holds that Oak Hills is enjoined from any further violations of its NPDES permit. Any future violations will be viewed as a contempt of this Court and Oak Hills will be assessed \$1,000.00 per violation in addition to any necessary and appropriate civil penalty to be assessed in relation to the permit violation.

Furthermore, Oak Hills is **ORDERED** to connect to the new sewer line operated by the Franklin County Sanitary Engineer on or before the conclusion of December 31, 2009. If Oak Hills has not connected by that date, and Oak Hills' failure to connect has not occurred due to some force or event outside of its reasonable control, then Oak Hills will be in contempt of this Court's Order and subject to a \$1,000.00 per day fine until it has connected to the sewer line.

**C) OEPA's Claims Against Mr. DeGraca and KDM:**

The OEPA has advanced that Mr. DeGraca can be held responsible for the NPDES permit violations of Oak Hills. If Mr. DeGraca is held responsible then the OEPA asserted that KDM was responsible under a theory of respondeat superior. Clearly, Mr. DeGraca and KDM held an opposite opinion.

The OEPA claims that Mr. DeGraca can be held liable because of the holding of *Young v. Featherstone Motors, Inc.*, (1954) 97 Ohio App. 158. Mr. DeGraca argued that *Young* was not on point and had facts drastically different than the ones advanced by the

OEPA at the Bench Trial. It is clear that *Young* is good law and its conclusions remain valid. It is also clear that the facts of *Young* do not apply.

The following is helpful to understand the nature of this issue:

In order to hold an executive or an officer of a corporation, aside from shareholder status, liable for an act committed by the corporation, more evidence is required - generally evidence that the officer "specifically directed the particular act to be done, or participated, or co-operated therein." *Young v. Featherstone Motors, Inc.* (1954), 97 Ohio App. 158, 171 (emphasis in original; internal citations omitted). See, *Toledo v. Allen*, 2005-Ohio-1781 at ¶55.

Mr. DeGraca claims that in his capacity as the manager of Oak Hills he never 'specifically directed the particular act to be done, or participated, or co-operated therein'. The thrust of said argument is that there was never any direct evidence that Mr. DeGraca openly influenced any violation of the NPDES permit.

In this case the OEPA did establish a number of incidents where Mr. DeGraca may have not authorized work or maintenance in regard to the I&I issues at Oak Hills. Mr. DeGraca's conduct, however, did not show any 'direct or particular' act that led to a violation of Oak Hills' permit. There was no proof that he was involved in the keeping of the bench sheets utilized by Water Specialists to create the MORs. There was no proof that he took any direct action in the day-to-day operation of the WWTP that led to a violation.

A fact advanced by the OEPA concerned the continued utilization of Jason Nelson's services once Water Specialists raised the issue of the alleged fabrication. The OEPA would have this Magistrate believe that Mr. DeGraca's failure to terminate Mr. Nelson in early 2006 was an act or inaction sufficient enough to trigger his personal liability. This Magistrate holds that the failure to terminate Mr. Nelson as the proximate

cause of permit violations that may have steamed from Jason Nelson's conduct was not sufficiently established by the OEPA at the Bench Trial.

The earlier finding concerning recalcitrance and indifference in regard to Oak Hills is not inconsistent with a determination that Mr. DeGraca should not be held personally responsible. The actions of all members and employees of Oak Hills served to establish the finding of recalcitrance and indifference. In regard to Mr. DeGraca, the evidence adduced at the Bench Trail was not of the same quantity or caliber.

Having advanced no evidence of direct participation in some action that led to a NPDES permit violation this Magistrate holds that the evidence did not support the OEPA's claims against Mr. DeGraca. Furthermore there was insufficient evidence of inaction attributable to Mr. DeGraca that would establish the necessary act to assess a fine against him personally. Having so held, this Magistrate **DISMISSES** the claims of the OEPA as against Mr. DeGraca.

Having held that Mr. DeGraca was not personally responsible, there can be no respondeat superior finding against KDM. Therefore the claims asserted by the OEPA against KDM are **DISMISSED**.

**D) Oak Hills' Breach of Contract Claim Against Water Specialists:**

The legal issues associated with a breach of contract claim are well known:

To prevail on a claim for breach of contract, the claimant must demonstrate the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff. *Jarupan v. Hanna*, 173 Ohio App.3d 284, 2007-Ohio-5081, ¶18. It is axiomatic that damages must be the natural and proximate result of the defendant's breach. *Ziss Bros. Constr. Co., Inc. v. TransOhio Sav. Bank* (June 20, 1991), 8th Dist. No. 58787. Indeed, a contracting party is at liberty to breach his contract, being liable only for damages proximately resulting from the breach. *Sorensen v. Wise Mgt. Servs., Inc.*, 8th Dist. No. 81627, 2003-Ohio-767, ¶39. See also *DeMuesy v. Haimbaugh* (Dec. 31, 1991),

10th Dist. No. 91AP-212 (damages for breach of contract must be proximate and foreseeable). *Mills v. Best Western*, 2009-Ohio-2901 at ¶ 13.

This Magistrate heard sufficient evidence to establish that on a number of dates, the service being provided by Water Specialists to Oak Hills in regard to the WWTP was insufficient to meet Water Specialists' contractual obligations and/or was below the standard of care. The evidence at the Bench Trial established that Water Specialists failed to fully comply with the OEPA's MOR reporting requirements and failed to keep Oak Hills informed of some of Water Specialists' decisions that directly led to violations.

The evidence established that Water Specialists changed the way it was reporting the flow metering and that the change led to data not being reported to the OEPA. Oak Hills also established a number of occasions when Water Specialists failed to adequately report information that had been reported on the bench sheets, which also led to violations.

In response, Water Specialists tried to shift the responsibility onto Oak Hills specifically in regard to Oak Hills' reliance on Jason Nelson's work. That argument, however, only provided a limited defense to the breach of contract claim. It is limited to the time that Mr. Nelson worked for Oak Hills; i.e., September 2005 to September 2006. There were a number of errors/deficiencies in Water Specialists' reporting during that timeframe that were not due to Jason Nelson's performance or lack of performance. An example is the fact that Water Specialists continued to fail to report the flow rates for the weekends and that was a reporting error that Water Specialists created. (This Magistrate is not addressing the validity of the averaging method that had been used by Water

Specialists prior to it changing to no reporting. There was no evidence produced at trial that this method was unacceptable to the OEPA)

Furthermore, a number of the violations occurred at times when Jason Nelson was not employed or no longer employed by Oak Hills. Hence, Jason Nelson cannot be relevant to those violations.

Water Specialists also tried to establish an argument that Oak Hills brought this litigation onto itself by failing to cooperate with the County and the OEPA. Water Specialists' argument was in effect, had Oak Hills just agreed to connect with the new sewer system there would never had been an enforcement action against Oak Hills and therefore, Oak Hills never would have had to sue Water Specialists. That argument has no merit.

The actions of Oak Hills in relationship to the new proposed sewer system were independent of Water Specialists' obligations to perform the service under the contract. With or without enforcement action by the OEPA, Oak Hills could have sued for breach of contract.

Though not directly asserted by Oak Hills, it was apparent from the testimony that Water Specialists failed in its duty to inform Oak Hills of the continuing issue with the level of chlorine used by the WWTP. Mr. Eitel testified that Water Specialists aided Oak Hills in renewing its permit in June of 2003. Mr. Eitel also testified that he was aware of the permits' obligations.

It has been established by this Court's Entry of November 21, 2008 that "Oak Hills violated its NPDES when it failed to submit a required 'permit to install application'. The NPDES permit No. 4PV00008\*ED came with a requirement that Oak

Hills submit detailed plans to achieve compliance with the final effluent limitation for total residual chlorine within six months of the permits' effective date, or by January 1, 2004." (Entry of November 21, 2008 at pages 11 and 12) There was no evidence at the trial that indicated that Water Specialists informed Oak Hills of that condition nor was there any evidence that Water Specialists notified Oak Hills that it was not in compliance after January 1, 2004.

That is a clear violation of the contract between the parties that stated: "we will strive to stay current with Ohio EPA rules and will provide information to keep you up to date regarding the system and the changing requirements" (Water Specialists Exhibit 1 at ¶ 5) Though Oak Hills and its evidence established a breach of the contract, the damages flowing from the breach is less clear.

As noted, it was Oak Hills' burden to prove not only the breach but damages that followed the breach. The following provides some guidance on the issue of damages:

Damages need not be calculated with mathematical certainty, but cannot be based on mere speculation and conjecture. *Allied Erecting & Dismantling Co., Inc. v. Youngstown*, 151 Ohio App.3d 16, 2002-Ohio-5179, at ¶64. The plaintiff must show its entitlement to damages in an amount ascertainable with reasonable certainty. *Id.*; *Interstate Gas Supply, Inc. v. Calex Corp.*, Franklin App No. 04AP-980, 2006-Ohio-638, at ¶59. *Atelier Dist., L.L.C. v. Parking Co. of Am., Inc.*, 2007-Ohio-7138 at ¶ 60.

Here, this Court has already held that there is no indemnification or contribution claim that can be maintained by Oak Hills against Water Specialists. Therefore, in regard to damages, it would be error for this Magistrate to merely assign as damages the amount of civil penalties that have already been assessed against Oak Hills for the reporting issues associated with Water Specialists' breach.

Except for the acknowledged fines that were going to be assessed, Oak Hills barely provided evidence at the Bench Trial concerning the issue of damages. The only evidence produced at the Bench Trial was the contract (Water Specialists Exhibit 1 at ¶ 5) and seven invoices identified as Oak Hills' Exhibit 61. Mr. Eitel also testified to the standard monthly charge that Water Specialists had submitted to Oak Hills over the years. The standard charge was \$1,230.00 per month pursuant to the contract.

The problem with that evidence is the fact that Water Specialists provided services to Oak Hills's WWTP and its water plant. There is no evidence as to what portion of the standard fee went to perform work at which plant. The contract stated that there will be three visits per week to the WWTP and five to the water plant. Arguably three/eighths of the monthly fee was/is attributable to the WWTP. But in order to make that determination, this Magistrate would have to have heard evidence that the time at the water plant per visit was equal to the time at the WWTP. No evidence was produced on that issue. Therefore this Magistrate must speculate as to the actual contractual damages that could be awarded.

Left to speculate, this Magistrate must find that Oak Hills failed in its burden to establish the contractual damages. Therefore, this Magistrate holds that Oak Hills' breach of contract claim as against Water Specialists is **DENIED**.

### **DECISION**

Oak Hills is fined \$538,441.00 as an appropriate civil penalty for the violations of its NPDES permit.

This Magistrate issues an injunction enjoining Oak Hills from any further violations of its NPDES permit. Any future violations will be viewed as a contempt of



this Court and Oak Hills' will be assessed \$1,000.00 per violation in addition to any necessary and appropriate civil penalty to be assessed in relation to the permit violation.

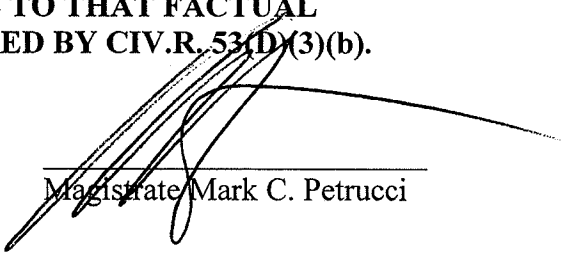
Oak Hills is **ORDERED** to connect to the new sewer line operated by the Franklin County Sanitary Engineer on or before the conclusion of December 31, 2009. If Oak Hills has not connected by that date, and Oak Hills' failure to connect has not occurred due to some force or event outside of its reasonable control, then Oak Hills will be in contempt of this Court's Order and subject to a \$1,000.00 per day fine until it has connected to the sewer line.

The claims of the OEPA against Mr. George DeGraca and KDM are **DISMISSED**.

The claim of Oak Hills MHC, LLC for breach of contract as against Water Specialists is **DISMISSED**.

Counsel for the OEPA shall prepare and circulate the required final entry pursuant to the Loc.R. 25.

**A PARTY SHALL NOT ASSIGN AS ERROR ON APPEAL THE COURT'S ADOPTION OF ANY FACTUAL FINDING OR LEGAL CONCLUSION, WHETHER OR NOT SPECIFICALLY DESIGNATED AS A FINDING OF FACT OR CONCLUSION OF LAW UNDER CIV.R. 53(D)(3)(a)(ii), UNLESS THE PARTY TIMELY AND SPECIFICALLY OBJECTS TO THAT FACTUAL FINDING OR LEGAL CONCLUSION AS REQUIRED BY CIV.R. 53(D)(3)(b).**

  
Magistrate Mark C. Petrucci

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