**COMMONWEALTH OF KENTUCKY**
**FRANKLIN CIRCUIT COURT**
**DIVISION I**
**CIVIL ACTION No. 11-CI-1613**

**KENTUCKY WATERWAYS ALLIANCE, SIERRA CLUB, VALLEY WATCH, and SAVE THE VALLEY** — **PETITIONER**

**v.** — **OPINION & ORDER**

**ENERGY AND ENVIRONMENT CABINET, LOUISVLILE GAS AND ELECTRIC COMPANY** — **RESPONDENT**

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This matter is before the Court on Petitioners' Petition for Judicial Review of a final administrative action. Petitioners challenge the validity of the Kentucky Pollutant Discharge Elimination System (hereinafter "KPDES") Permit No. KY0041971 issued by the Kentucky Division of Water to LG&E for its Trimble County Generating Station. This matter was initially filed in Trimble County, but was transferred to Franklin Circuit Court November 2, 2011. Both parties have fully briefed the merits of the case, and all parties were represented at a hearing held April 11, 2013. The Court then took this matter under submission, and hereby **REVERSES** the Cabinet Secretary's Order entered December 1, 2010, for reasons explained in full below.

## I. BACKGROUND

Intervening Respondent Louisville Gas and Electric Company (hereinafter "LG&E") operates a coal-fired power plant in Trimble County, Kentucky. The Trimble County Generating Station (hereinafter the "Trimble Station") has been in operation since 1990, and currently includes two units. The Trimble Station utilizes flue gas desulfurization devices to reduce sulfur emissions at the plant, commonly referred to as "wet scrubbers." This wet scrubbing process creates wastewater then pumped into gypsum storage basins where some pollutants settle out of

the water before the wastewater is discharged into the Ohio River via a submerged diffuser. Unit 1 is the older of the two units, and the KPDES permit for Unit 1 needed to be renewed after wastewater handling changed with the addition of Unit 2. In April 2007 LG&E submitted a KPDES permit application for the Trimble Station. At that time Unit 2 was under construction, anticipated to be operable by 2010. Petitioners actively participated in the permitting process, submitting public comments and appearing at a public hearing held November 5, 2009. The Kentucky Division of Water (hereinafter "KDOW") issued a final KPDES permit to LG&E for the Trimble Station, permit no. KY0041971, effective April 1, 2010.

Petitioners appealed the KDOW decision to issue a final KPDES permit for the Trimble Station. Specifically, Petitioners (in paragraph 9 of their administrative complaint) asserted:

a. The permit fails to comply with the Clean Water Act requirements for the flue gas desulfurization wastewater discharge;

b. The permit fails to control all discharges from the ash pond;

c. The permit allows illegal high temperature discharges;

d. The permit is otherwise contrary to law or fact.

(Hearing Officer's Report, p. 1). Petitioners claimed that the Trimble Station discharge permit failed to reflect the "Best Professional Judgment" (hereinafter "BJP") and the "Best Available Technology Economically Achievable" (hereinafter "BAT") standards required by the Clean Water Act. *See* 33 U.S.C. § 1311(b)(2); 401 K.A.R. 5:065(2),(5); 401 K.A.R. 5:080; 40 C.F.R. § 423.13; 33 U.S.C. § 1342(a)(1)(B); 401 K.A.R. 5:065. On September 23, 2010 the hearing officer entered an Order granting the Respondents' Motion for Partial Summary Disposition as to Petitioners' claim asserted in paragraph 9(a). (A.R., Docket No. 52) The hearing officer found that the KDOW *may* within their discretion conduct a case-by-case BPJ analysis, but that the

regulations do not *require* such analysis in this circumstance. The hearing officer further determined that the expert testimony and evidence presented by Petitioners revealed only that different technologies existed for reduction of mass loadings of pollutants in flue gas desulfurization wastewater, and that such technologies could have been considered. The Order stated that Petitioners, "cannot demonstrate a genuine issue of material facts as to whether the technologies they advocate are feasible at the Trimble Station, much less how the regulatory factors should have otherwise been weighed, and thus cannot establish that the conclusion or determination made by DOW on this issue was in error." (Id. at 7). Thus, the hearing officer dismissed Petitioners' claim 9(a), and Petitioners also voluntarily withdrew claims asserted in Paragraph 9(c) and 9(d). (A.R., Docket No. 53, 71). After discussing settlement on the day of the hearing Petitioners withdrew remaining claims in paragraph 9(b) with prejudice, on the condition that Respondents not seek costs or attorney's fees in connection with the administrative proceeding. (A.R., Docket No. 71, p. 2). Petitioners also filed a Motion to Reconsider Order Granting Partial Summary Disposition, asserting that the hearing officer incorrectly found that the BPJ duty is discretionary. Petitioners also requested an extension of the hearing schedule to allow for the hearing officer to reconsider his partial summary disposition. The Secretary granted Petitioners' Motion to withdraw claims asserted in paragraph 9(b), (c), and (d) and adopted the hearing officer's report and Recommendation and Order Granting Motion for Partial Summary Disposition. (A.R., Docket No. 73).

A Petition for Judicial Review in this matter was initially filed in Trimble County, but later was transferred to Franklin Circuit Court on jurisdictional grounds. *See* KRS 224.10-470(1). On July 5, 2012 this Court entered an Order denying Respondents' motion to set aside

the transfer and dismiss the petition for review,[1] and the parties then addressed the substantive merits of this action.

Petitioners argue that the Cabinet justified its decision on two erroneous premises: (1) that the Cabinet could rely on EPA effluent limitation guidelines issued thirty years ago to bypass having to set site-specific technology based limits on scrubber waste, even though scrubber waste was expressly excluded from the guidelines; and (2) that the Cabinet did in fact undertake a BPJ analysis and determined settling ponds to satisfy BAT for treatment of the Trimble scrubber wastewater, despite witnesses' contradictory testimony.[2]

A 1982 EPA Effluent Limitation Guideline (hereinafter "guideline" or "ELG") included national effluent limits for "low volume wastes." The 1982 guidelines specifically named four conventional pollutants- total suspended solids, pH, oil, and grease. Other toxic pollutants were "excluded" from regulation as they are "present in amounts too small to be effectively reduced by technologies known to the Administrator." 47 Fed. Reg. 52, 290-51, 291 (Nov. 19, 1982). The EPA in fact is currently in the process of updating guidelines addressing scrubber wastewater.[3] In 2009 the EPA issued a detailed public study of power plant discharges, concluding that scrubber wastes contain high concentrations of metals; that settling ponds do not effectively limit the discharge of these metals; and that the industry has developed effective

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[1] KRS 452.105 mandates that a court without proper venue must transfer a case to a court where venue is proper. "Where venue is improper, the remedy is transfer rather than dismissal." Dollar General Stores, Ltd. V. Smith, 237 S.W.3d 162, 166 (Ky. 2007). Thus the Court held that the "Trimble Circuit Court had subject matter jurisdiction, and all necessary authority to transfer the case to Franklin Circuit, the required venue."

[2] Petitioners cite: "the Cabinet does not set Best Professional Judgment limits for scrubber waste streams" (A.R., Docket No. 66, Sowder Depo. at 80); "There are no limits for metals on scrubber discharge." (A.R., Docket No. 56, Beard Depo. at 111); the Cabinet's permit writer, Sarah Beard, testified that she did not consider all available treatment options, did not review documents related to treatment options she did consider, and did not have or request cost information about treatment options. (Id.)

[3] This Court understands that the EPA is proposing to amend the effluent limitations guidelines and standards for the steam electric power generating category. A proposed rule was published on June 7, 2013.

technologies to control these discharges. (A.R., Docket No. 34, Ex. 5 to Petitioners' Response Brief). This study states that:

> Settling ponds are not designed to reduce the amount of dissolved metals in the wastewater. The [flue gas desulfurization] wastewater entering a treatment system contains significant amounts of several pollutants in the dissolved phase, including boron, manganese, and selenium. These dissolved metals are likely discharged largely untreated from [flue gas desulfurization] wastewater settling ponds.

(Id. at 4-26). This EPA study also names chemical and biological treatments, constructed wetlands, and zero discharge systems as available wastewater treatment options. (Id. at 4-26 to 4-40). In the meantime, and until new guidelines for scrubber wastewater are in place, the EPA has issued a guidance memo to assist states in conducting BPJ analysis (hereinafter "Hanlon Memo").[4] (A.R., Docket No. 50). Respondents' own expert, William Kennedy, confirmed that chemical treatment systems are currently used at other coal fired power plants, and that there is no reason why this technology cannot be implemented at the Trimble plant. (A.R., Docket No. 56, pp. 173-74).

Petitioners assert that no BPJ analysis was performed, and alternatively that even if the Court were to accept Respondents' assertion that such analysis was performed, the Cabinet's determination to use a settling pond was arbitrary as this is not the industry's leading control equipment. *Citing* Chem. Mfgs. Ass'n v. EPA, 870 F.2d 177, 226 (5th Cir. 1989). Petitioners claim that the Cabinet erroneously concluded that all pollutants discharged in the Trimble scrubber wastewater were subject to the 1982 EPA Effluent Limitation Guideline, and failed to conduct any meaningful BJP analysis on the scrubber wastewater. Petitioners ask that this matter be remanded to the Cabinet with instructions to conduct a BPJ analysis, to include

[4] Respondents assert that the Hanlon Memo was not considered by the Cabinet and should not be considered by this Court. The hearing officer ruled that the Hanlon Memo be excluded from evidence.

consideration of all potential treatment options and costs, and impose a technology-based limit with sufficient monitoring of wastewater discharges.

The Cabinet asserts that because the 1982 ELG applied, it was properly within the agency's discretion to not conduct any case-by-case BPJ analysis. Alternatively, Respondents contend that were the court to determine that a BPJ analysis was mandatory, the Cabinet did in fact effectively perform such analysis. The Cabinet notes that it is entitled to substantial deference as to these matters, and that the evidence and testimony presented by Petitioners does not prove the Secretary's decision was arbitrary. The Cabinet also notes that the EPA is set to take final action to establish standards for the pollutants at issue in this matter by May, 2014, and that was considered by the permit writer as a "unique factor" per 40 CFR § 125.3(c)(2). A hearing was held April 11, 2013, and thereafter the Court took this matter under submission.

## II. STANDARD OF REVIEW

In reviewing an administrative decision, the Court's role "is not to reinterpret or reconsider the merits of the claim." Kentucky Unemployment Insurance Commission v. King, 657 S.W.2d 250, 251 (Ky. App. 1983). In reviewing an agency decision, this Court may only overturn that decision if the agency acted arbitrarily or outside the scope of its authority, if the agency applied an incorrect rule of law, or if the decision itself is not supported by substantial evidence of record. As such, as long as there is substantial evidence in the record to support the Cabinet's determinations with regard to the Permit, we must defer to the Cabinet, even if there is conflicting evidence. Kentucky State Racing Comm'n v. Fuller, 481 S.W.2d 298, 308 (Ky. 1972). Substantial evidence "means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." Kentucky Retirement Systems v. Bowens, 281 S.W.3d 776, 780 (Ky. 2009) (internal citations omitted). If it finds that the

agency's decision is supported by substantial evidence, an appellate court must then determine whether the agency applied the correct rule of law. This Court reviews an agency's conclusions of law *de novo*, mindful of the fact that "agencies are entitled to great deference in interpreting their own statutes and regulations, at least where those interpretations do not contravene the law." Morgan v. Natural Resource and Environmental Protection Cabinet, 6 S.W.3d 833, 842 (Ky. App. 1999).

## III. Discussion

### 1. The Clean Water Act clearly provides that where no Effluent Limitation Guideline has been established, the Cabinet is required to set effluent limits on a case-by-case basis using Best Professional Judgment

The Clean Water Act requires the Cabinet to set technology based effluent limits for the discharge of pollutants. These "technology-based treatment requirements under section 301(b) of the Act represent the *minimum* level of control that must be imposed in a permit issued under section 402 of the Act." 33 U.S.C. §§ 1314(b), 1342(a); 40 CFR § 125.3(a); 401 KAR 5:080 § 2(3) (emphasis added). However, the EPA establishes national effluent guidelines for particular pollutants discharged at certain categories of industry dischargers, thus relieving the agency from conducting these case-by-case determinations. 40 C.F.R. § 423.15; *see also* 33 U.S.C. § 1342(a)(1)(B). EPA regulations clearly state that "[w]here promulgated effluent limitations guidelines only apply to certain aspects of a discharger's permit operations, or to certain pollutants, other aspects or activities are subject to regulation on a case-by-case basis." 40 C.F.R. §125.3(c)(3). *See also* 40 C.F.R. § 125.3(c)(2) (case-by-case determinations are required, "to the extent that EPA-promulgated effluent limitations are inapplicable.").

Where no effluent limitations guidelines apply for a certain pollutant otherwise subject to the BAT standard, the regulations direct the permit writer to consider the following when setting effluent limits based on BAT (for NSPS facilities):

(i) The age of equipment and facilities involved;
(ii) The process employed;
(iii) The engineering aspects of the application of various types of control techniques;
(iv) Process changes;
(v) The cost of achieving such effluent reduction;
(vi) Non-water quality environmental impact (including energy requirements);
(vii) The appropriate technology for the category or class of point sources of which the applicant is a member, based upon all available information; and
(vii) Any unique factors relating to the applicant.

40 CFR § 125.3 (c)(2)(i-ii); 40 CFR § 125.3(d)(3)(i-vi); *see also* Chem. Mfgrs. Ass'n v. EPA, 870 F.2d 177, 226 (5th Cir. 1989) ("Congress intended these [BAT] limitations to be based on the performance of the single best-performing plant in the industrial field."). These listed factors represent the necessary considerations for the agency to conduct a BJP analysis. The Court finds the law to be clear, and further corroborated by the EPA's 2010 Guidance Memo, stating:

> Where EPA has not promulgated technology-based effluent guidelines for a particular class or category of industrial dischargers, or where the technology-based effluent guidelines do not address all wastestreams or pollutants discharged by the industrial discharger, EPA must establish technology-based effluent limitations on a case-by-case basis in individual NPDES permits, based on its best professional judgment or 'BPJ.'

(A.R., Docket No. 50, Attachment A, pp. 1-2)[5] The Clean Water Act clearly provides where the EPA has not established an ELG, the Cabinet is required to set effluent limits using BPJ analysis.

[5] The Hearing Officer excluded this 2010 Memo from consideration at the administrative level, noting that this Guidance Memo was released in 2010- after the permit process had concluded. The Court finds that the Guidance Memo is relevant and should not have been excluded from consideration. The 2010 Memo does not represent some new policy enacted after the permit was issued, but rather offers guidance as to how the EPA interpreted the regulations and statutes in existence at the time the permit was issued. Furthermore, the 2010 Memo's directives are wholly consistent with the plain meaning and reasonable interpretation of the statues and regulations.

**2. The EPA's 1982 Effluent Limitation Guidelines Do Not Establish Any Technology-Based Limits on the Discharge of the Toxic Pollutants in Scrubber Waste**

The 1982 Guidelines for steam electric power generating point sources identifies wet air scrubber pollution control systems as a "low volume waste," but establishes no NSPS standard for the dissolved metals and other scrubber wastewater pollutants of concern to Petitioners. Respondents assert that no BPJ analysis is required because NSPS included standards for the "wet scrubber wastewater," included in the definition of "low volume waste." 40 CFR § 423.11(b). However, 40 CFR § 423.15 established standards for pH, total suspended solids ("TSS"), oil, and grease only- no standards are established for any of the scrubber wastewater pollutants of concern to Petitioners. The Court finds Respondents' logic to be deficient given the language of 40 C.F.R. §125.3(c)(3). [6]

Arsenic, mercury, and selenium are three of many pollutants found in scrubber wastewater, explicitly "excluded" from the 1983 ELG. "Toxic pollutants are *excluded from* national regulation because they are present in amounts too small to be effectively reduced by technologies known to the Administrator." 47 Fed. Reg. 224, 52303 (Nov. 19, 1982)(emphasis added). The dissolved metals at issue here are plainly not "subject to" the 1982 ELG- they were *excluded from* the ELG. Id. The Court finds that this language cannot be read as a determination that no ELG was necessary for these toxic pollutants thenceforth. Rather, this language indicates only that those pollutants named in Appendix A of the ELG were undetectable to the Administrator at that time, more than *thirty* years ago. The hearing officer's determined that "the Trimble [flue gas desulfurization] … wastewater is subject to an applicable [ELG]," then citing

[6] "Where promulgated effluent limitations guidelines only apply to certain aspects of the discharger's operation, or to certain pollutants, other aspects or activities are subject to regulation on a case-by-case basis in order to carry out the provisions of the Act."

the EPA Permit Writer's Manual's instruction that "BJP-based effluent limits are not required for pollutants that were considered by EPA for regulation under the effluent guidelines, but for which EPA determined that no ELG was necessary." (A.R., Docket No. 27, Permit Writer's Manual, pp. 69-70). The Court finds this determination arbitrary. The hearing officer incorrectly concluded that scrubber wastewater pollutants at issue here were "considered" for regulation- they were explicitly "excluded" due to insufficient technology some *thirty* years ago. The hearing officer was mistaken in stating that "ELGs represent EPA's determination as to the appropriate level of pollution control … for *all* sources within a particular source category." (A.R., Docket No. 52, Hearing Officer's Order, p. 3).This is plainly incorrect, as the EPA did recently confirm:

> The Steam Electric Power Generating effluent limitations guidelines and standards promulgated in 1982 include wastewater from wet FGD systems under the "catch-all" category of "low-volume wastes." 40 C.F.R. 423.11(b). However, the 1982 rulemaking *did not establish best available control technology economically achievable (BAT) limits for FGD wastewaters because EPA lacked the data necessary to characterize pollutant loadings from these systems*. See the Development Document3 for the 1982 effluent guidelines at p. 248 (noting that "[a]dditional studies will be needed to provide this data and to confirm the current discharge practices in the industry"). Accordingly, EPA determined that BAT limits for the FGD wastestream were outside the scope of the rulemaking, and explicitly reserved the development of such limits for a future rulemaking. See the Federal Register preamble for the 1982 effluent guidelines, 47 Fed. Reg. at 52291 (Nov. 19, 1982); Development Document at pp. 3, 7.

(A.R., Docket No. 50, Attachment A, p. 3) (emphasis added) (hereinafter "Hanlon Memo"). In 2010 the EPA signed a consent decree with Defenders of Wildlife to update effluent guidelines for coal-fired power plants by 2014. Defenders of Wildlife v. Jackson, No. 1:10-CV001915RWR (D.D.C., Mar. 18, 2012). An EPA "fact sheet" detailing the proposed Effluent Limitation Guidelines and standards states,

> The current effluent guidelines and standards for the steam electric power industry, which were last updated in 1982, *do not adequately address the associated toxic metals*

> *discharged to surface waters from facilities in this industry*. The current effluent limitations guidelines and standards are focused on settling out particulates rather than treating dissolved pollutants.

EPA, *Proposed Effluent Limitation Guidelines & Standards for Steam Electric Power Generating Industry* (April, 2013) (emphasis added). The Court finds that the EPA did not consider the scrubber waste pollutants at issue here, determining that no ELG was necessary. By the language quoted *supra*, it is clear to this Court that in 1982, some *thirty* years ago, these pollutants were not detectable with then-existing technologies and the EPA was thus forced to "exclude" them from the ELG.

Scrubber wastewater pollutants including selenium, arsenic, and mercury have all been identified by the EPA as toxic pollutants. As the EPA recently recognized,

> Steam electric power plants currently account for more than half of all toxic pollutants discharged into streams, rivers and lakes from permitted industrial facilities in the United States. High exposure to these types of pollutants has been linked to neurological damage and cancer as well as damage to the circulatory system, kidneys and liver. Toxic heavy metals do not break down in the environment and can also contaminate sediment in waterways and impact aquatic life and wildlife, including large-scale die-offs of fish.

EPA, *EPA Proposes to Reduce Toxic Pollutants Discharged into Waterways by Power Plants*, 2013 News Release (April 19, 2013). While the EPA's efforts to establish ELGs for scrubber wastewater pollutants are recent, the deleterious effects of scrubber wastewater pollutants are old news. Based on the foregoing, the Court finds it implausible that in 1982 the EPA concluded that setting technology based limits for these toxic pollutants was unnecessary and, by the relevant language published in the Federal Register, meant to totally suspend all efforts to decrease discharge of these pollutants. This interpretation advanced by Respondents is discordant with the plain language of the statutes and regulations.

Furthermore, the hearing officer's interpretation is wholly inconsistent with the technology-forcing framework of the Clean Water Act, enacted to "restore and maintain the

chemical, physical, and biological integrity of the Nation's waters," and establishing a "national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." Fed. Water Pollution Control Act, 33 U.S.C. § 1251(a). The Court finds it contradictory that the EPA, aiming to eliminate discharge of pollutants by 1985, would in 1982 establish a guideline recognizing the many toxic pollutants found in scrubber wastewater but intending to freeze all efforts to reduce discharge of these pollutants indefinitely, pending new regulation. The Hanlon Memo clearly provides that this was not the intent- scrubber wastewater pollutants were "outside the scope of the rulemaking." The 1982 ELG only applied to certain pollutants discharged at the Trimble Station- those being TSS, oil, and grease. 40 CFR § 423.15; 40 C.F.R. Pt. 423, App. A. "the [Clean Water Act] establishes a series of steps which impose progressively stricter standards until the final elimination of all pollutant discharges is achieved" Comm. For Consideration of Jones Falls Sewage System v. Train, 539 F.2d 1006, 1108 (C.A.Md., 1976). "States issuing permits pursuant to § 1342(b) stand in the shoes of the agency, and thus must similarly pay heed to § 1311(b)'s technology-based standards when exercising their BPJ. Thus, notwithstanding Industry's contrary assertions, States are required to compel adherence to the Act's technology-based standards regardless of whether EPA has specified their content pursuant to § 1314(b)." Natural Resources Defense Council, Inc. v. U.S.E.P.A., 859 F.2d 156, 183 (C.A.D.C., 1988). The Court finds that the Cabinet was required to conduct a BPJ analysis of the scrubber wastewater before issuing a permit to Respondent LG&E, and that such analysis is not discretionary as characterized by the Cabinet.

**3. The Cabinet Failed to Conduct a BPJ Analysis for Treatment of the Scrubber Wastewater as the Regulations Require**

The Court finds the Respondents' alternative assertion that a BPJ analysis was in fact completed to be unsupported by the record. The hearing officer's Order Granting Partial Summary Disposition stated, "this order agrees that it would have properly been within DOW's discretion to not conduct a case-by-case BPJ limits in the Permit for the Trimble FGD wastewater since that wastewater is subject to an applicable ELG." (A.R., Docket No. 52, p. 3). Further the Order states, "DOW was entitled to opt instead to apply only the NSPS requirements for low volume wastes." (Id.). Given the review of the Clean Water Act and regulations detailed *supra*, the Court finds the hearing officer's interpretation of the law inaccurate. It was the Cabinet's duty to conduct a BPJ analysis, and the Cabinet failed to do so. 33 U.S.C. § 1311; 40 C.F.R. § 125.3; 401 KAR 5:080.

Despite the hearing officer's assertion that the regulations do not mandate that a BPJ analysis be performed for scrubber wastewater pollutants, there is some discussion in the hearing officer's Order Granting Partial Summary Judgment indicating that the DOW did consider alternative treatment technologies, the costs effectiveness of these technologies, as well as other "unique factors." (Id. at 5). The Court finds that the Cabinet's analysis, even if it was undertaken as part of a BPJ analysis, to be insufficient.[7] Ms. Beard, the permit writer for the Trimble Station permit, testified that, aside from reverse osmosis, she did not consider any other control technologies, and that she considered no alternative technology cost information. (A.R., Docket No. 29, ¶ 10; A.R., Docket No. 25, p. 5). Specifically the permit writer testified, "I didn't look into the other technologies as in terms of practicality or expense." (A.R., Docket No. 56, p. 167).

[7] The question of substantial evidence aside, the Court finds that the hearing officer mischaracterized the burden. The hearing officer cited the Sierra Club's lack of expert evidence on specific portions of the BPJ analysis as "fatal to their case." (A.R., Docket No. 52, p. 7). Petitioners assert, and this Court agrees, that it is not Petitioners' burden conduct a BPJ analysis. This mischaracterization is telling, but not dispositive.

Further, the permit writer testified that she did not know how much the Trimble Station's gypsum settling ponds would cost, nor how much LG&E was to spend on effluent treatment technology at the Trimble Station. (A.R., Docket No. 56, p. 167-168). Although Ms. Beard by affidavit stated that she did "consider the extent of the pollutant reduction that had been adequately demonstrated over time," this vague assertion is contradicted by her own deposition testimony, and is unsupported by the record. (A.R., Docket No. 29, ¶ 10). Furthermore, Trimble's own expert Mr. William Kennedy did testify that chemical treatment technologies for scrubber wastewater were being employed elsewhere and had been for decades, and that this treatment technology could be used at the Trimble plant. ( A.R., Docket No. 65, pp. 173-175). Based on the foregoing the Court finds that the record does not support a finding that the Cabinet performed a BJP analysis on scrubber wastewater discharged from the Trimble Station.

## IV. CONCLUSION

The Cabinet was required, and failed, to conduct a BJP analysis for scrubber wastewater at the Trimble Station. The Court recognizes that this ruling may be superseded by a forthcoming EPA ruling applicable to scrubber wastewater. Nevertheless, this does not relieve the Cabinet from complying with its obligations under the Clean Water Act. The Court being sufficiently advised hereby **REVERSES** the Cabinet's Order Granting Partial Summary Disposition, and **REMANDS** this matter for further proceedings herewith. This is a final and appealable order, and there is no just cause for delay.

**SO ORDERED** this the 10th day of September, 2013.

Phillip Shepherd
Judge, Franklin Circuit Court

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