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

STATE OF OHIO ex rel. OHIO ATTORNEY GENERAL,	:	Termination No. 6 by KT
Plaintiff,	:	
v.	:	Case No. 07CVH07-9702
THE SHELLY HOLDING CO., et al.,	:	Judge Schneider
Defendants.	:	

DECISION AND JUDMENT ENTRY

(This is a final and appealable order)

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
2009 SEP -2 PM 3:19
CLERK OF COURTS-CV

Copies to:

Gary L. Pasheilich, Esq.
Gregg Bachmann, Esq.
Assistant Attorneys General
Environmental Enforcement Section
30 East Broad Street, 25th Floor
Columbus, Ohio 43215-3400
Counsel for Plaintiff

Sarah Daggett Morrison, Esq.
Gerhardt A. Gosnell, II., Esq.
CHESTER, WILLCOX & SAXBE
65 East State Street, Suite 1000
Columbus, Ohio 43215
Counsel for Defendants

April R. Bott, Esq.
BOTT LAW GROUP, LLC
6037 Frantz Road, Suite 105
Dublin, Ohio 43017
Counsel for Defendants

GLOSSARY OF ABBREVIATIONS

f of f	Finding of Fact
c of l	Conclusion of Law
stip.	Stipulation
Ex.	Exhibit
Tr.	Transcript

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INTRODUCTION

The State of Ohio, by and through the Office of the Attorney General, filed suit against The Shelly Holding Company, The Shelly Company, Shelly Materials, Inc., Allied Corporation, Inc., and Stoneco, Inc., (hereinafter collectively referred to as Shelly), seeking both the assessment of civil penalties and injunctive relief. The action was initiated at the request of the Director of the Ohio Environmental Protection Agency and pursuant to R.C. 3704.06(B). R.C. 3704.06 grants the Attorney General the authority to prosecute violations of R.C. 3704.05 and 3704.16. R.C. Chapter 3704 is Ohio's federally approved plan for the implementation, maintenance and enforcement of air-quality standards as required by the federal Clean Air Act, 42 U.S.C. Section 7410.

At the close of plaintiff's case, The Shelly Holding Company and The Shelly Company were dismissed as party-defendants.

The State alleges that Shelly has installed and/or operated facilities that are regulated pursuant to R.C. Chapter 3704 without appropriate permits. The State also alleges that Shelly has operated various facilities in violation of the terms and conditions of applicable air-pollution permits.

This matter was tried to the Court on various days between August 27, 2008 and March 13, 2009. The State's complaint contains 20 claims for relief detailed in 333 paragraphs. The record includes in excess of 1000 Exhibits and 2000 pages of testimony.

The parties have also submitted extensive briefs, together with very detailed proposed findings of fact and conclusions of law. The State has submitted 301 pages of proposed findings of fact and conclusions of law. Shelly's proposed findings of fact and conclusions of law are 112 pages. In addition, the parties have submitted several hundred stipulations. The Court appreciates the parties' efforts in preparing the stipulations. The stipulations were very helpful and demonstrate a high degree of professionalism by counsel.

Shelly admits that each of the remaining defendants is an Ohio corporation with its principal place of business located in Ohio. Shelly Materials, Inc., Allied Corporation and Stoneco Inc., are subsidiaries of The Shelly Company.

In general terms, each of the remaining defendants are engaged in the asphalt, aggregate and road-construction industry. In connection with that business, they operate hot-mix asphalt plants and quarries, which are regulated by the State of Ohio pursuant to R.C. Chapter 3704.

The Court will address its findings of fact and conclusions of law in two parts. The first part shall be limited to the issue of whether a violation exists. The issue of penalties shall be addressed separately only for those claims where the Court makes a finding of a violation. The Court chose this strategy to avoid the possibility of having the amount of the penalty for any particular claim for relief influence the Court's decision

regarding a violation on a subsequent claim for relief. To be fair to both parties the Court believes that the issue of a violation must be separated from the issue of an appropriate penalty.

Shelly claims that because it conducted and submitted a Voluntary Compliance Audit Results Report to Ohio EPA, it is entitled to immunity for the identification of the permitting and compliance issues associated with the hot-mix asphalt plants and portable generators. The voluntary-disclosure report and immunity issue is set forth in R.C. 3745.72. To the extent that it is applicable to this Court's decision, it will be addressed in the penalty phase of this decision.

Finally, the Court will separately address the State's request for injunctive relief.

As a general note the Court has only identified the type and location of each facility in its initial finding of fact as to each facility. The type and location is not repeated.

STATE'S FIRST CLAIM FOR RELIEF

The State alleges that Shelly installed various sources of air pollution without first obtaining a permit to install (hereinafter referred to as a PTI).

While the permitting process has very strict time requirements, the evidence is clear that the same is not followed. R.C. 3704.03(F) provides that no installation permit shall be issued except in accordance with the requirements and rules adopted pursuant to this Chapter. The director has the power to adopt rules pursuant to R.C. 3704.03(D).

Rules regarding PTI for new sources are set forth in Chapter 3745-31 of the Ohio Administrative Code (O.A.C.) O.A.C. 3745-31-02(A) prohibits the installation or

modification of any new source of an air pollutant without first obtaining a PTI. Time restrictions regarding the application process are set forth in O.A.C. 3745-31-06. Relevant to this cause of action, the director has 180 days to issue or deny a PTI after an application has been filed and determined to be complete. The process by which an application is "determined to be complete" has specific time limits which are not relevant to this Court's determination.

Shelly Materials Plant 24

Findings of Fact

1. Shelly operated a hot-mix asphalt plant in Ostrander, Ohio. Stip. 24a.
2. On October 26, 1999, Shelly submitted a PTI for a new hot-mix asphalt plant. Stip. 24b and Stip. 24c.
3. The 180 day period to issue or deny a PTI expired on April 24, 2000.
4. Shelly began installation of the new plant on March 15, 2000. Shelly f of f 82.
5. The installation began 140 days after the application was filed and 40 days before the expiration of the 180 day review period.
6. No evidence was presented that the application was incomplete or returned to Shelly for additional information. There was also no evidence to explain the delay in the issuance of the PTI.
7. The PTI was issued by Ohio EPA on December 16, 2003. Stip. 24o.
8. The PTI was issued 1371 days after installation began.
9. The PTI was issued 1331 days after the expiration of the 180 day review period.

Conclusions of Law

1. Shelly began installation of a new hot-mix asphalt plant before a PTI was issued.

2. The installation began 40 days before the expiration of the 180 day review period.
3. The PTI was issued 1331 days after the expiration of the 180 day review period.
4. The Court finds for the State.

Shelly Materials Plant 24 Fugitive Emission Sources (F-Source)

Findings of Fact

1. Shelly maintained the following F-Sources at its quarry in Ostrander Ohio: material unloading (F004); stone crushing (F005); crushed-stone screening (F006); crushed-stone conveying (F007); storage pile load-in/out (F008); material loading (F009). State f of f 176, Shelly f of f 112 and State Ex. 347.
2. Shelly submitted a PTI for the F-Sources on June 22, 2000. Stip. 24p and State Ex. 348.
3. Robert Hodanbosi, Division Chief, Division of Air Pollution Control for Ohio EPA, testified that a source installed and not subsequently modified prior to January 1974 is exempt from the PTI requirements. Hodanbosi Tr. 1593.
4. The F-Sources at the quarry in Ostrander, Ohio, where Plant 24 is located, were constructed in 1974. State f of f 176h, State Ex. 348, Stip. 24q and Stip. 24r.
5. Robert Shively, VP Shelly Company testified that the F-Sources at Plant 24 were in existence prior to the PTI requirements. Shively Tr. 1675-1676.
6. The PTI for Plant 24 F-Sources notes a "Most Recent Modification Date of 1996 for new plt." State Ex. 348.
7. The State did not propose any findings of fact that the F-Sources were modified.
8. The term "modify or modification" is defined in O.A.C. 3745-31-01(QQQ).

9. No evidence was presented that the PTI application for the F-Sources was incomplete or returned to Shelly for additional information. There was also no evidence to explain the delay in the issuance of the PTI.
10. The State issued a final PTI for the F-Sources at Plant 24 on September 21, 2000. Stip. 24u.

Conclusions of Law

1. The F-Sources at Plant 24 existed prior to the PTI requirements.
2. The Court finds for Shelly.

Shelly Materials Plant 24 Asphalt Cement Storage Tanks (T-Source)

Findings of Fact

1. Shelly installed and operated two T-Sources (T008 and T009) in connection with the operation of Plant 24. State f of f 176.
2. On October 26, 1999 Shelly submitted a PTI that included the two T-Sources at Plant 24. Stip. 24c.
3. The 180 day period to issue or deny a PTI expired on April 24, 2000.
4. The two T-Sources were installed in April 1999. Stip. 24t, State Ex. 343 & 344. (No exact date in April was provided so the Court is using April 15.)
5. The installation began before the PTI was submitted.
6. A PTI which includes the two T-Sources was issued on June 5, 2001. Stip. 24x.
7. No evidence was presented that the PTI application was incomplete or returned to Shelly for additional information. There was also no evidence to explain the delay in the issuance of the PTI.
8. The PTI was issued 791 days after installation began.

9. The PTI was issued 417 days after the expiration of the 180 day review period.

Conclusions of Law

1. Although a T-Source does not currently require a PTI, the requirements were different at the time the T-Sources were installed.
2. The T-Sources were installed prior to the issuance of a PTI.
3. The installation began 374 days before the expiration of the 180 day review period.
4. The PTI was issued 417 days after the expiration of the 180 day review period.
5. Court finds for the State.

Shelly Materials Plant 40

Findings of Fact

1. Shelly operated a drum mix asphalt plant in Greenfield, Ohio. Stip. 40a.
2. On May 24, 2000, Shelly filed a PTI for a replacement hot-mix asphalt plant at Greenfield, Ohio. Stip. 40a.
3. The 180 day period to issue or deny a PTI expired on November 20, 2000.
4. Construction of the new hot-mix asphalt plant began on April 15, 2000. Stip. 40d.
5. No evidence was presented that the application was incomplete or returned to Shelly for additional information. There was also no evidence to explain the delay in the issuance of the PTI.
6. The Ohio EPA issued a final PTI for Plant 40 on July 1, 2003. Stip. 40i.
7. The PTI was issued 1171 days after installation began.
8. The PTI was issued 952 days after the expiration of the 180 day review period.

Conclusions of Law

1. Shelly began construction of its replacement hot-mix asphalt plant before a PTI was issued.
2. The installation began 219 days before the expiration of the 180 day review period.
3. The PTI was issued 952 days after the expiration of the 180 day review period.
4. The Court finds for the State.

Shelly Materials Plant 40 Fugitive Emission Sources (F-Source)

Findings of Fact

1. Shelly did not maintain the F-Sources at the limestone quarry where Plant 40 was located. Shively Tr. 1860 -1681.
2. Martin Marietta owned the quarry and the F-Sources including roadways and parking areas (F001), storage piles (F002), and raw material handling (F003). Shively Tr. 1680-1681.
3. The State did not propose any findings of fact to contradict the testimony of Mr. Shively.

Conclusions of Law

1. Shelly did not own the F-Sources at the limestone quarry where Plant 40 was located.
2. The Court finds for Shelly.

Shelly Material Plant 65

Findings of Fact

1. Shelly operated an asphalt plant in Dresden Ohio. Stip. 65a.

2. The State did not propose any findings of fact or conclusions of law regarding Shelly Plant 65.
3. The parties stipulated that Shelly Plant 65 was installed prior to 1973 and is therefore exempt from the PTI process. Stip. 65d.

Conclusions of Law

1. The Court finds for Shelly.

Portable Generators

Findings of Fact

The Court makes the following findings of fact relative to all portable generators set forth in the State's First Claim for Relief:

1. Shelly operated the portable generators as alleged in paragraph 183 of the complaint.
2. Shelly did not submit a PTI application for any of the portable generators prior to 2003, believing that a PTI was not required. Shelly f of f 176.
3. Shelly received verbal guidance from Ohio EPA employees upon which they relied to conclude that a PTI was not required for a portable generator. Shively Tr. 1792-1793.
4. Shelly neither requested nor received written confirmation from anyone at the Ohio EPA that a PTI was not required for a portable generator. Shively Tr. 1794 - 1795.
5. The Shelly Holding Company commissioned Dine Comply, Inc., to conduct a Voluntary Air Compliance Audit. Shelly Ex. A and Stip. GEN1.

6. The Voluntary Air Compliance Audit, dated March 28, 2003, noted, among other things, a regulatory deficiency because the portable generators were not permitted. Shelly Ex. A, p. 4.

7. The Voluntary Air Compliance Audit was forwarded to the Ohio EPA on April 21, 2003. Shelly Ex. B and Stip. GEN2.

8. The State did not issue a notice of violation for the operation of a portable generator without a permit until after it received the Voluntary Air Compliance Audit. Shively Tr. 1665. The State did not identify in rebuttal any notice of violation for a portable generator that pre-dated the receipt of the Voluntary Air Compliance Audit.

9. Given the size of the portable generators, the frequency of Ohio EPA employees at Shelly facilities, and the conversations Shelly employees had with Ohio EPA employees regarding portable generators, the Court finds that the Ohio EPA knew or should have known that:

    a. Shelly had portable generators.

    b. The portable generators were not permitted.

10. There is no evidence that Ohio EPA issued any air permits for portable generators prior to 1999; and from 1999 to 2003, Ohio EPA issued only 7 PTIs for portable generators. Shelly Ex. OO Response to Interrogatory 34.

11. The date of installation on the PTIs for the portable generators are in fact the manufacture date. Shelly does not have the actual dates of installation. Mowery Tr. 1830.

12. Except for the manufacture date stated in the PTIs for the portable generators, the State produced no evidence regarding when the portable generators were first installed.
13. All of the portable generators identified in paragraph 183 of the complaint are now properly permitted. State c of l 185o.

Conclusions of Law

1. Portable generators are not exempt from the permitting process.
2. Shelly did operate its portable generators without a permit.
3. No evidence has been provided upon which the Court could rely to determine when a specific portable generator was installed. The Court finds that the manufacture date is not relevant.
4. The Court finds for State.

(The apparent conflict between Conclusion of Law No. 3 and 4 will be addressed in the Penalty Phase of this decision.)

STATE'S SECOND CLAIM FOR RELIEF

In its Second Claim for Relief, the State alleges that a PTI is required before an air-contaminant source is modified. The State further alleges that burning a fuel that is not authorized by an existing PTI constitutes a modification. It is alleged that Shelly received and burned used oil as fuel without first obtaining the required PTI. Shelly does not deny that, in some cases, it stopped using natural gas as a fuel and starting burning used oil before a new PTI was received. Shelly argues that it did not believe that PTI modifications were needed before burning used oil because it was just switching from one liquid fossil fuel to another. Shelly f of f 209.

Findings of Fact Common to all Plants as to Second Claim

1. Switching to used oil as a fuel source from other fuels causes an increase in the amount of pollutants emitted and creates emissions of pollutants not found in natural gas or #2 diesel fuels. State f of f 187f.
2. On-spec used oil that may be permitted is used oil that meets certain criteria. The use of used oil is regulated to control the concentration of numerous contaminants. State f of f 187g.
3. While plants are capable of burning used oil, additional equipment is frequently necessary to assure total combustion, which is good from both an environmental and a safety perspective. Shelly f of f 208.
4. On November 1, 2000, Ohio EPA put Shelly on notice that a permit to install is required prior to any use of waste oil. State Ex. 556.
5. Shelly's employees knew that a permit was necessary in order to burn used oil. Prottengeier Tr. 256.

Conclusions of Law Common to all Plants as to Second Claim

1. The 180 day time period for review set forth and discussed in the First Claim is applicable to the permitting process in the Second Claim.
2. Burning used oil without first acquiring a permit is a violation.

Shelly Materials Plant 2

Findings of Fact

1. Shelly operated a hot mix asphalt plant in Gallipolis Ohio.
2. On November 5, 2002, Shelly filed a PTI modification to add recycled on-spec used oil (RUO). Stip. 2d.

3. The 180 day period to issue or deny a PTI expired on April 4, 2003.
4. The Ohio EPA never rejected Shelly's PTI modification and issued a draft modified PTI on March 11, 2003. Stip. 2e.
5. Shelly began using RUO on May 22, 2003. Stip. 2f.
6. Ohio EPA issued a final PTI modification for used oil on August 12, 2003. Stip. 2h.
7. Shelly began burning used oil without a final PTI.

Conclusions of Law

1. Shelly burned RUO without a permit for 111 days at Plant 2.
2. Each of the 111 days that Shelly burned RUO without a permit was after the expiration of the 180 day review period.
3. The Court finds for the State.

Shelly Materials Plant 15

No findings of fact or conclusions of law are necessary as the Court dismissed the Second Claim for Plant 15 in its decision dated October 31, 2008.

Shelly Materials Plant 62

Findings of Fact

1. Shelly operated an asphalt batch plant in Lancaster, Ohio.
2. On December 4, 2000 Shelly filed a PTI modification to add recycled on-spec used oil (RUO). Stip. 62d.
3. The 180 day period to issue or deny a PTI expired on June 2, 2001.
4. The Ohio EPA never rejected Shelly's PTI modification.
5. Shelly began using RUO on May 11, 2001. Stip. 62e.

6. Ohio EPA issued a final PTI modification for used oil on July 24, 2001. Stip. 62f.
7. Shelly began burning used oil without a permit 22 days before the 180 days had expired.
8. The PTI was issued 52 days after the expiration of the 180 day review period.

Conclusions of Law

1. Shelly burned RUO without a permit at Plant 62.
2. Shelly burned RUO without a permit for 22 days before the 180 day review period had expired.
3. Shelly burned RUO without a permit for a total of 74 days.
4. The Court finds for the State.

Shelly Materials Plant 63

Findings of Fact

1. Shelly operated a plant in Newark, Ohio.
2. On December 7, 2000 Shelly filed a PTI modification to add recycled on-spec used oil (RUO). Stip. 63e.
3. The 180 day period to issue or deny a PTI expired on June 5, 2001.
4. The Ohio EPA never rejected Shelly's PTI modification.
5. Shelly began using RUO on April 12, 2001. Stip. 63f.
6. Ohio EPA issued a final PTI modification for used oil on July 19, 2001. Stip. 63q.
7. Shelly began burning used oil without a permit 54 days before the 180 days had expired.
8. The PIT was issued 44 days after the expiration of the 180 day review period.

Conclusions of Law

1. Shelly burned RUO without a permit at Plant 63.
2. Shelly burned RUO without a permit for 54 days before the 180 day review period had expired.
3. Shelly burned RUO without a permit for a total of 98 days.
4. The Court finds for the State

Shelly Materials Plant 65

Findings of Fact

1. On March 20, 2006 Shelly filed for a discretionary exemption to burn RUO from the Ohio EPA. State Ex. 144 and State f of f 188bb.
2. The requested discretionary permit was issued on May 18, 2006. State Ex. 145 and State f of f 188dd.
3. The purpose of the exemption was to allow Shelly to conduct certain tests using RUO at Plant 65. State f of f 188dd.
4. Shelly began burning used oil at Plant 65 on May 11, 2006. Stip. 65j.
5. On July 13, 2006 Shelly requested an extension of the exemption which was granted on July 20, 2006. Stip. 65k and Stip. 65l.
6. Shelly conducted a stack test using RUO on July 25, 2006. State Ex. 148 and State f of f 188gg.
7. Shelly burned used oil at Plant 65 from May 11, 2006 until July 31, 2006. Stip. 65p.
8. There is no evidence contrary to that presented by Ms. Mowery that RUO was not burned at Plant 65 after July 31, 2006. Shelly f of f 271 and Mowery Tr. 1840.

Conclusions of Law

1. Shelly burned RUO at Plant 65 outside the scope of the exemption for 59 days.
2. The Court finds for the State.

Shelly Materials Plant 91

Findings of Fact

1. Shelly Plant 91 is a portable plant.
2. On December 1, 2000, Shelly filed a PTI modification application to add recycled on-specification used oil (RUO) as a fuel. Stip. 91f.
3. The 180 day period to issue or deny a PTI expired on May 30, 2001.
4. The Ohio EPA never rejected Shelly's PTI modification.
5. Shelly began using RUO on July 1, 2001. Stip. 91h.
6. Ohio EPA issued a final PTI modification for used oil on July 24, 2001. Stip. 91g.
7. Shelly began burning used oil without a permit 23 days before a PTI was issue.
8. The PTI was issued 55 days after the expiration of the 180 day review period.

Conclusions of Law

1. Shelly burned RUO without a permit.
2. Shelly burned RUO after the expiration of the 180 day review period but 23 days before a permit was issued.
3. The Court finds for the State.

Stoneco, Inc., Plant 114

Findings of Fact

1. Stoneco, Inc., Plant 114 is a portable facility.

2. On December 11, 2003, Shelly filed a PTI modification to add recycled on-spec used oil. Stip. 114d.
3. The 180 day period to issue or deny a PTI expired on June 9, 2004.
4. The Ohio EPA never rejected Shelly's PTI modification.
5. Shelly began using RUO on September 20, 2004. Stip. 114g.
6. Ohio EPA issued a final PTI modification for used oil on January 18, 2005. Stip. 114h.
7. Shelly began burning used oil without a permit 120 days before a PTI was issue.
8. The PTI was issued 223 days after the expiration of the 180 day review period.

Conclusions of Law

1. Shelly burned RUO without a permit.
2. Shelly burned RUO after the expiration of the 180 day review period but 120 days before a permit was issued.
3. The Court finds for the State.

Economic-Benefit Analysis

1. The State's expert testified that Shelly realized $224,741.00 of economic benefit as a result of burning used oil without a permit. State Ex. 734.
2. The State's expert's testimony was based on Shelly burning used oil without a permit for 1351 days.
3. The Court has found Shelly to have burned used oil without a permit for a total of 485 days.
4. Based on a pro-rated basis, the economic benefit should be adjusted to $80,680.52.

STATE'S THIRD CLAIM FOR RELIEF

The State alleges that Shelly operated an air-contaminant source without first applying for and obtaining a Permit to Operate (PTO) from the Ohio EPA. O.A.C. 3745-35-02(A) prohibits the operation of an air-contaminant source without a PTO.

The Court notes that the rules regarding PTOs were changed. Specifically, O.A.C. Chapter 3745-35, regarding PTOs was repealed in 2008. However, the PTO requirements of O.A.C. Chapter 3745-35 were in full force and effect at all times relevant to the State's Third Claim for Relief.

A PTO is an "authorizing and control document issued to implement the requirements of Ohio's air pollution control laws." (This definition is taken from the State's Bench Brief.)

Findings of Fact Relevant to all Plants

1. A PTI allows the operation of an air-contaminant source for one year from the date the source commences operation. State f of f 194c, Shelly f of f 305 and Hopkins Tr. P.136.
2. The Director has 60 days from the date an application is received to determine if it is complete and 180 days to issue or deny a PTO after an application has been filed and determined to be complete. R.C. 3704.034.
3. The PTO program received a very low priority from the Ohio EPA and was very backlogged. Hodanbosi Tr. 1597.

Shelly Materials Plant 24

Findings of Fact

1. A PTI for Plant 24 was issued by the Ohio EPA on December 16, 2003.

2. Shelly applied for a PTO for its asphalt plant at Plant 24 on March 17, 2004. Stip. 24aa.
3. Shelly applied for the PTO within one year of the date the PTI was issued.
4. The Ohio EPA never notified Shelly that that the PTO was incomplete.
5. The Ohio EPA has never acted on Shelly's PTO application. Stip. 24cc.

Conclusions of Law

1. Shelly did everything it was required to do in order to comply with the PTO requirements.
2. Shelly operated its plant in compliance with the law for one year following the commencement of operation pursuant to the PTI.
3. To find for the State, the Court would have to conclude that Shelly should stop otherwise-permitted activities after a year to wait on the Ohio EPA to act on a program it admits was low priority, backlogged and now terminated.
4. The Court finds for Shelly.

Shelly Materials Plant 24 Fugitive Emission Sources (F-Source)

Findings of Fact

1. Shelly maintained the following F-Sources at its quarry in Ostrander, Ohio where Plant 24 is located: material unloading (F004); stone crushing (F005); crushed-stone screening (F006); crushed-stone conveying (F007); storage-pile load-in/out (F008); material loading (F009). State f of f 176, Shelly f of f 112 and State Ex. 347.
2. A PTI for F-Sources at Plant 24 was issued on September 21, 2000. Stip. 24ff.

3. Shelly was required to obtain a PTO for the F-Sources at Plat 24 by September 29, 2003. State f of f 193.

4. The Ohio EPA issued a PTO for the F-Sources at Plant 24 on April 21, 2003. State f of f 194d.

Conclusions of Law

1. The Ohio EPA issued a PTO for the F-Sources at Plant 24 prior to the required date.

2. The Court finds for Shelly.

Shelly Materials Plant 24 Asphalt Cement Storage Tanks (T-Source)

Findings of Fact

1. In connection with the operation of Plant 24, Shelly operated two T-Sources (T008 and T009). State f of f 194e.

2. A PTI for the T- Sources at Plant 24 was issued by the Ohio EPA on June 5, 2001. Stip. 24x.

3. Shelly applied for a PTO for its T-Sources at Plant 24 on June 7, 2001. Stip. 24ee.

4. Shelly applied for the PTO within one year of the date operation commenced pursuant to the PTI.

5. The Ohio EPA never notified Shelly that that the PTO was incomplete.

6. The Ohio EPA has never acted on Shelly's PTO application. Stip. 24cc.

7. A PTO is no longer required for T-Sources. Shelly f of f 334

Conclusions of Law

1. Shelly did everything it was required to do in order to comply with the PTO requirements.
2. Shelly operated its plant in compliance with the law for one year following the commencement of operation pursuant to the PTI.
3. To find for the State, the Court would have to conclude that Shelly should stop otherwise permitted activities after a year to wait on the Ohio EPA to act on a program it admits was low priority, backlogged and now terminated.
4. The Court finds for Shelly.

Shelly Materials Plant 40 and Fugitive Emission Sources (F-Source)

Findings of Fact

1. Shelly operated an asphalt plant, known as Plant 40, in Greenfield, Ohio. This plant included the following F-Sources: roadways and parking areas (F001); storage piles (F002); raw-material handling (F003). State f of f 197a.
2. On July 1, 2003, Ohio EPA issued a modified PTI for the asphalt plant and the F-Sources at Plant 40. Stip. 40i.
3. On August 5, 2003 Shelly filed a PTO for the asphalt plant and F-Sources at Plant 40. Stip. 40j.
4. Shelly applied for the PTO within one year of the date operation commenced pursuant to a PTI.
5. The Ohio EPA never notified Shelly that the PTO application was incomplete.
6. Plant 40 closed operation in 2006.
7. Ohio EPA never acted on Shelly's PTO application.

Conclusions of Law

1. Shelly did everything it was required to do in order to comply with the PTO requirements.
2. Shelly operated its plant in compliance with the law for one year following the commencement of operation pursuant to the PTI.
3. To find for the State, the Court would have to conclude that Shelly should stop otherwise-permitted activities after a year and wait on the Ohio EPA to act on a program it admits was low priority, backlogged and now terminated for a plant that is no longer in operation.
4. The Court finds for Shelly.

Portable Generators

To the extent that the portable generators in Claim 3 were not dismissed by this Court's decision dated October 31, 2008, the Court adopts the findings of facts and conclusions of law set forth in the First Claim as to portable generators and finds for the State.

STATE'S FOURTH CLAIM FOR RELIEF

The Court did not fully understand the State's Fourth Claim for Relief when it first considered both the State's and Shelly's proposed findings of fact and conclusions of law. In fact the Court did not decide the Fourth Claim until it had already resolved the other claims for relief.

In very general terms the State's Fourth Claim for Relief centers on allegations that Shelly Materials Plant 24 and combined operations of Allied Corp. Plant 12/Shelly Materials Plant 65 with associated generators each had the potential to emit a pollutant

that required a permit that they did not have. The potential to emit calculation that the State used in its attempt to prove that Shelly was operating its facilities without the necessary permit is addressed in detail in this Court's decision regarding the State's Fifth Claim for Relief.

In each case the potential to emit calculation was based on a short term emission rate which was taken from a stack test. The short term emission rate was converted into an annual emission rate assuming the facility was operated 24 hours per day, 365 days per year. These terms and calculation are addressed in detail in this Court's decision regarding the State's Fifth Claim for Relief.

For the reasons stated in this Court's decision as to the State's Fifth Claim for Relief the Court finds for Shelly.

STATE'S FIFTH CLAIM FOR RELIEF

R.C. 3704.05(k) prohibits the operation of any source required to obtain a Title V permit unless a permit has been issued. A Title V permit must be submitted within one year of becoming a Title V source. The State has approved various alternatives to avoid Title V requirements. One method to "op-out" of Title V requirements is the use of Engineering Guide 61. If the source had actual emissions below 20% of the Title V threshold, it did not have to obtain a Title V permit. The threshold for a Title V permit is a source that has a potential to emit (PTE) of 100 tons per year of a pollutant. The owner/operator of the source is required to keep actual emission records to prove it is below the 20% threshold (20 tons per year) and to notify the Ohio EPA that the owner/operator is claiming non-title V status.

The two central disputes between the parties that are common to all facilities in the State's Fifth Claim for Relief are (1) how to define the term "potential to emit" and (2) whether generators located at a facility count when determining PTE.

Potential to emit is defined in O.A.C. 3745-31-01(VVVV) as follows:

> "Potential to emit" means the **maximum capacity** of an emissions unit or stationary source to emit an air pollutant under its physical and operation design. Any physical or operational limitation on the capacity of the emissions unit or stationary source to emit an air pollutant, which includes any federally regulation air pollutant as defined in paragraph (DD) of rule 3745-77-01 of the Administrative Code, including air pollution control equipment and **restrictions on hours of operation** or on the type or amount of material combusted, stored or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable or legally and practicably enforceable by the state. Secondary emissions do not count in determining the potential to emit of a stationary source. (emphasis added)

The State focuses on the language "maximum capacity." Specifically, the State calculates the PTE of emissions from a source by assuming that the source is being operated 24 hours a day, 365 days a year.

Conversely, Shelly makes the same calculation by using the number of hours that the source is operating. These restrictions on hours of operation are included in the various permit applications, the purpose of which is to avoid the Title V threshold.

It would be the State's position that until the operating permit with the restricted hours of operation is approved, the PTE must be calculated assuming operation is 24 hours per day, 365 days a year.

If the State's conclusion regarding the formula for calculating PTE is correct, then by definition most if not all of the Fifth Claim must be decided for the State.

It should be noted that there is no dispute regarding the math or, for that matter, the formula. The real dispute has to do with the hours of operation used when making the calculation. This explains the difference between the State's Exhibit 744 and Shelly's Exhibit 744D.

Both the State and Shelly use the same "short-term" emission rate for nitrogen oxide for each plant and associated generator. As the Court understands the calculation, the "short-term" emission rate is a known amount of a specific pollutant produced by a source in an hour. Using the State's formula, one assumes that the source is operating 24 hours per day, 365 days per year to calculate the PTE, which in turn determines if the source is governed by Title V. If the calculation is made with the restricted hours, as set forth in the permit application, then the source may have satisfied the requirements to be exempt from the Title V requirements.

The State's Exhibit 744, which includes the plant plus the associated generators, establishes that Shelly could be subject to Title V requirements. However, Shelly's Exhibit 744D shows that each plant, even including the portable generators, which Shelly disputes, shows that it is exempt from the Title V requirements.

Before the Court concludes which calculation is correct, it is necessary to decide whether the calculation should include the emissions from the associated portable generators.

Again, it is the State's position that each portable generator is an air-contaminant source. This is not disputed by Shelly. See State f of f 219b. Further, Shelly agrees that with regard to Title V regulations, the threshold is determined for the entire facility and not individual sources. See State f of f 218j and Shively Tr. Vol VIII p. 1725.

Given the fact that the Title V threshold and exemptions to the same are predicated upon the emissions of a regulated pollutant, together with the fact that generators emit regulated pollutants, the Court finds that the generators should have been included when calculating PTE. Shelly's argument that a different conclusion should be reached because emergency generators are excluded is not persuasive.

Nevertheless, the question for the Court remains the calculation of PTE. For the following reasons, the Court does not accept the State's conclusion regarding the calculation of PTE.

The definition of PTE was specifically addressed in *USA v. Louisiana-Pacific Corp.*, 682 F.Supp. 1141 (D. Colo. 1988). The Court interpreted PTE as set forth in 40 C.F.R. Sec. 52.21(b)(4). This Court finds that the definition of PTE as set forth in 40 C.F.R. Sec. 52.21(b)(4) is the same as set forth under Ohio law and therefore applicable to this case.

In the *Louisiana Pacific* case, the EPA brought an action for the violation of the Clean Air Act at two of defendant's plants. At each of the plants, a stationary source that generated regulated pollutants was operated. Emission tests were conducted at each facility, and the results of the tests were used to determine a potential to emit. The test results established a PTE in excess of the "major stationary source" emission levels. The government argued that because the PTE was in excess of the major stationary source limits and that the plants did not have the proper permit based on the PTE, they were in violation of the Clean Air Act.

The case eventually required the Court to consider the term "potential to emit."

The defendants argued that the test results should not be used because the units were not being operated as designed. There is no question that the plants were having difficulty when being tested which produced high levels of emissions which would not have occurred if the plants were operating as intended.

The government argued that the phase PTE turns on the word "potential." Regardless of whether the plant was working as intended, it was working and therefore had the ***potential*** to emit pollutants at a certain level.

In rejecting the government's argument, the Court began with reference to *Alabama Power Co. v. Costle* 636 F.2d 323 (D.C. Cir 1979). The current rule was promulgated as a result of the Court's decision in *Alabama Power* rejecting the EPA's definition of PTE. "The broad holding of *Alabama Power* is that potential to emit does not refer to the maximum emission that can be generated by a source hypothesizing the worst conceivable operation. Rather, the concept contemplates the maximum emission that can be generated operating the sources as it is intended to be operated and as it is normally operated." *Louisiana-Pacific,* 682 F Supp. at p. 45.

The Court went on to note that it would serve no legitimate purpose to test a source as it was not intended to operate. Rejecting the government's analysis, the Court noted that "common sense would also indicate" that the plant would never be operated as it was tested.

Applying that same reasoning to the case at bar, to assume that one of Shelly's plants and/or generators would be operating twenty-four hours a day, 365 days per year defies "common sense."

In addition, the permit process itself makes the State's conclusion regarding PTE unworkable. As already noted, a Title V permit is required if certain thresholds are reached regarding the emission of a regulated pollutant.

Once it is determined that a source has reached actual emissions that could trigger the Title V requirements, the owner/operator has one year to apply for either a synthetic minor permit or a Federally Enforceable State Operating Permit (FESOP). Approval of either a synthetic minor permit or a FESOP would avoid the need for a Title V permit. The third option would be to apply for a Title V permit. Hodonbosi Tr. pp. 1614 – 1615.

However, if one accepts the State's argument that PTE means 24/7 operation, an applicant would never really have a choice. According to the State, until the Synthetic Minor or FESOP was issued, the source would be subject to Title V because the restricted hours would not apply. The only way to avoid this result would be to apply for two permits (Title V and either a synthetic minor or FESOP) which would defeat the purpose of having two different permits. In addition, Robert Hodanbosi, the Division Chief of the Division of Air Pollution Control for the Ohio EPA, testified that a source would not apply for both permits and the Ohio EPA would not process both applications. Hodanbosi Tr. P. 1602.

The Court will review each portion of the State's Fifth Claim by applying the following:

a. Emissions from generators located at a source should be included when calculating PTE.

b. The number of hours used to calculate PTE is as set forth in the calculation submitted by Shelly in Exhibit 744D. The Court specifically rejects the

State's calculation that assumes a source is being operated 24 hours per day, 365 days per year.

Shelly Materials Plant 24

Findings of Fact

1. The State's proposed findings of fact and conclusions of law as to Plant 24 are based on a PTE calculation that assumes a source is being operated 24 hours per day, 365 days per year.
2. The Court has rejected the State's PTE calculation.

Conclusions of Law

1. The State has the burden of proof.
2. There is no evidence to prove that Plant 24 was an operating source that required a Title V permit.
3. The Court decides for Shelly.
4. To the extent that Plant 24 may have been operating without a permit, this issue was addressed in determining the State's Third Claim.

Shelly Materials Plant 28

Findings of Fact

1. Shelly Materials Plant 28 is a portable facility.
2. On June 25, 2002, Shelly filed a FESOP to avoid Title V permit requirements. State f of f 220d and Shelly f of f 482.
3. The application was filed within one year after Shelly concluded that emissions at Plant 28 might require it to file for Title V.

4. The June 25, 2002 application did not include emissions for portable generators AG28-A and AG28-B.
5. Portable generators AG28-A and AG28-B are associated with Plant 28 and should have been included in the June 25, 2002 application.
6. The combined PTE for Plant 28 and generators AG28-A and AG28-B is 54.50 tons/yr NOx. Shelly Ex. 744D.
7. The State's only evidence that Plant 28 and associated generators were being operated in excess of Title V threshold is based on a PTE calculation that the Court has rejected.

Conclusions of Law

1. There is no evidence that Plant 28 and its associated generators were being operated in excess of the Title V threshold.
2. The Court finds for Shelly.

Shelly Materials Plant 40

Findings of Fact

1. The State's proposed findings of fact and conclusions of law as to Plant 40 are based on a PTE calculation that assumes a source is being operated 24 hours per day, 365 days per year.
2. The Court has rejected the State's PTE calculation.

Conclusions of Law

1. The State has the burden of proof.
2. There is no evidence to prove that Plant 40 was operating as a Title V source.
3. The Court decides for Shelly.

4. To the extent that Plant 40 may have been operating without a permit, this issue was addressed in determining the State's Third Claim.

Shelly Materials Plant 49

Findings of Fact

1. Shelly Materials Plant 49 is a portable facility.
2. On June 25, 2002, Shelly filed a FESOP to avoid Title V permit requirements. Stip. 49g and State Ex. 186.
3. The application was filed within one year after Shelly determined that the operation at Plant 49 might exceed the Title V threshold.
4. The June 25, 2002 application did not include emissions for portable generators AG1-A and AG8-B.
5. Portable generators AG1-A and AG8-B are associated with Plant 49 and should have been included in the June 25, 2002 application.
6. The combined PTE for Plant 49 and generators AG1-A and AG8-B is 47.95 tons/yr NOx. Shelly Ex. 744D.
7. The State's only evidence that Plant 49 and associated generators were being operated in violation of Title V threshold is based on a PTE calculation that the Court has rejected.

Conclusions of Law

1. There is no evidence that Plant 49 and its associated generators were being operated in excess of the Title V threshold.
2. The Court decides for Shelly.

Shelly Materials Plant 63

Findings of Fact

1. Shelly applied for and received Synthetic Minor PTI on May 12, 1999. Shelly f of f 535.
2. Shelly applied for and received a modified Synthetic Minor PTI on July 19, 2001. State Ex. 473.
3. Shelly applied for the Synthetic Minor PTI within one year of concluding that Plant 63 might meet Title V threshold. Shelly f of f 537.
4. The "hot elevator" at Plant 63 was an emission source that was not included in the PTI applications but should have been. State f of f 220v.
5. The State's proposed findings of fact and conclusions of law as to Plant 63 are based on a PTE calculation that assumes a source is being operated 24 hours per day, 365 days per year.
6. The Court has rejected the State's PTE calculation.

Conclusions of Law

1. The State has the burden of proof.
2. There is no evidence to prove that Plant 63 was an operating source that required a Title V permit.
3. The Court finds for Shelly.

Shelly Materials Plant 90 and Plant 95

Findings of Fact

1. Shelly operated Plants 90 and 95 in Franklin County Ohio.

2. There is no evidence that Plants 90 and 95 were on "contiguous or adjacent" pieces of property prior to May 31, 2002, when Shelly purchased Columbus Limestone Quarry. The State's evidence that they were contiguous or adjacent comes from the testimony of Todd Scarborough pages 552 – 553:

   Question: "Are they in close proximity to one another?"

   Answer: "Yes, they are located very close proximity to one another in an area that's basically a large quarry operation."

   There is no testimony about "contiguous or adjacent."

3. Prior to purchasing the quarry, Shelly had filed for and received a separate Synthetic Minor PTI for both plants 90 and 95. Stip. 90j and Stip. 90i.
4. The State's Title V calculations for the separate plants is based a PTE calculation that is not accepted by the Court.
5. There is no evidence that the separate plants, prior to the purchase of the quarry, exceeded the Title V threshold without the use of the PTE calculation used by the State and which has been rejected by this Court.
6. On May 15, 2003, within 12 months of Shelly purchasing the quarry, a Title V application was filed. Stip. 90u and Stip. 90v.
7. The State never acted upon the Title V application. Stip. 90w and Stip. 90x.
8. Plant 95 was moved in 2004, thereby removing the Title V issue.
9. Shelly was billed for Title V fees for Plants 90 and 95 for calendar years 2002 thru 2005. Stip. 90l and Stip. 90q.
10. Shelly paid Title V fees and submitted Title V emission reports for Plants 90 and 95 for the calendar years 2002 through 2005. Stip. 90n and Stip. 90s.

Conclusions of Law

1. "Contiguous and adjacent" are not synonymous with "close proximity." Therefore, there is no evidence that Plants 90 and 95 should be treated as if they were "co-located" prior to the purchase of the quarry by Shelly.
2. Prior to the purchase of the quarry, Plants 90 and 95 had filed for permits that avoided the need to apply for a Title V permit.
3. There is no evidence that prior to the purchase of the quarry that either Plant 90 or 95 had a PTE that would require a Title V permit.
4. After Shelly purchased the quarry and the plants became "co-located," a proper Title V application was filed which was not acted upon by the State.
5. The Court finds for Shelly.

Shelly Materials Plant 91

Findings of Fact

1. Shelly acquired Plant 91 sometime in 1999. Stip. 91b.
2. The exact date of the acquisition was not established.
3. Shelly's letter notifying the Ohio EPA of the acquisition is dated January 19, 1999. State Ex. 485.
4. Shelly maintained records of actual emissions for Plant 91 from 1999 thru 2001. Stip. 91l.
5. Shelly filed for a Synthetic Minor PTI on December 1, 2000. Shelly Ex. P91N and Stip. 91f.
6. The Ohio EPA issued a Synthetic Minor PTI on July 24, 2001. State Ex. 354 and Stip. 91q.

7. The only evidence that Plant 91 had emissions in excess of the Title V threshold was based on a PTE calculation that is not accepted by this Court.

Conclusions of Law

1. Shelly timely filed for and received a Synthetic Minor permit for Plant 91 and is therefore not required to file for a Title V permit.
2. The Court finds for Shelly.

Shelly Materials Plant 92

Findings of Fact

1. Shelly operated Plant 92 in Columbus Ohio.
2. Shelly acquired Plant 92 in 1999. Stip. 92d.
3. The exact date of the acquisition was not established.
4. Shelly's letter notifying the Ohio EPA of the acquisition is dated May 12, 1999. Shelly Ex. D.
4. Shelly filed for a synthetic Minor PTI on August 16, 1999. Stip. 92e.
5. The Ohio EPA issued a Synthetic Minor PTI on April 25, 2006. Stip. 92k.
6. There is no evidence that either the PTI or the PTO applications were incomplete.

Conclusions of Law

1. Shelly timely filed for and received a Synthetic Minor permit for Plant 92.
2. Shelly is not required to file for a Title V permit.
3. The Court finds for Shelly.

Shelly Materials Plant #94 (Old)

Findings of Fact

1. Shelly operated Plant 94 in Reynoldsburg Ohio.

2. Shelly owned and operated Plant 94, formerly known as United Asphalt Plant 10. Stip. 94a.
3. Plant 94 was operated pursuant to a PTI issued on June 29, 1983, and a PTO issued June 23, 1998. Stip. 94a, Stip. 94f, State Ex. 367 and Shelly Ex. 94D.
4. The State claims that the PTI issued for Plant 94 does not contain any federally enforceable restrictions. (State f of f 220zz). However, both the PTI (State Ex. 367 and the PTO (Shelly Ex. 94D) limit the hours of operation to "not more than 10 hours per day, 6 days per week, 32 weeks per year."
5. A stack test was conducted at Plant 94 on October 30, 2001. Scarborough Tr. pg. 541, State f of f 220aa and State Ex. 375.
6. There is no reliable evidence to conclude that Title V threshold was reached prior to the October 30, 2001 stack test.
7. Using the stack test and the hourly restriction of the PTI and PTO, the PTE for Plant 94 was below the Title V threshold.
8. Shelly submitted a Synthetic Minor PTI. Stip. 94i.

Conclusions of Law

1. There is no evidence that Plant 94 was operated so as to require a Title V permit.
2. The Court finds for Shelly.

Allied Corp. Plant 3 and Generators

Findings of Fact

1. Applied Corp. Plant 3 is a portable facility.
2. On June 25, 2002, Shelly filed a FESOP to avoid Title V permit requirements. Stip. 3i.

3. The application was filed within one year after Shelly concluded that emissions at Plant 3 might require it to file for Title V.
4. The June 25, 2002 application did not include emissions for portable generators AG3-A or AG3-B.
5. Portable generators AG3-A and AG3-B are associated with Plant 3 and should have been included in the June 25, 2002 application.
6. The combined PTE for Plant 3 and generators AG3-A and AG3-B is 52.34 tons/yr NOx. Shelly Ex. 744D.
7. The State's only evidence that Plant 3 and associated generators were being operated in excess of Title V threshold is based on a PTE calculation that the Court has rejected.

Conclusions of Law

1. There is no evidence that Plant 3 and its associated generators were being operated in excess of the Title V threshold.
2. The Court finds for Shelly.

Allied Corp. Plant 5 and Generators

Findings of Fact

1. Allied Corp. Plant 5 is a portable facility.
2. On June 25, 2002, Shelly filed a FESOP to avoid Title V permit requirements. Stip. 5f.
3. The application was filed within one year after Shelly concluded that emissions at Plant 5 might require it to file for Title V.

4. The June 25, 2002 application did not include emissions for portable generators AG5-A and AG5-B.
5. Portable generators AG5-A and AG5-B are associated with Plant 5 and should have been included in the June 25, 2002 application.
6. The combined PTE for Plant 5 and generators AG5-A and AG5-B is 50.28 tons/yr NOx. Shelly Ex. 744D.
7. The State's only evidence that Plant 5 and associated generators were being operated in excess of Title V threshold is based on a PTE calculation that the Court has rejected.

Conclusions of Law

1. There is no evidence that Plant 5 and its associated generators were being operated in excess of the Title V threshold.
2. The Court finds for Shelly.

Allied Corp. Plant 9 and Generators

Findings of Fact

1. Allied Corp. Plant 9 is a portable facility.
2. On June 25, 2002, Shelly filed a FESOP to avoid Title V permit requirements. Stip. 9h.
3. The application was filed within one year after Shelly concluded that emissions at Plant 9 might require it to file for Title V.
4. The June 25, 2002 application did not include emissions for portable generators AG9-A and AG9-B.

5. Portable generators AG9-A and AG9-B are associated with Plant 9 and should have been included in the June 25, 2002 application.
6. The combined PTE for Plant 9 and generators AG9-A and AG9-B is 52.01 tons/yr NOx. Shelly Ex. 744D.
7. The State's only evidence that Plant 9 and associated generators were being operated in excess of Title V threshold is based on a PTE calculation that the Court has rejected.

Conclusions of Law

1. There is no evidence that Plant 9 and its associated generators were being operated in excess of the Title V threshold.
2. The Court finds for Shelly.

Shelly Materials Plant 65/Allied Corp. Plant 12 and Generators

Finds of Fact

1. Allied Corp. Plant 12 is a portable asphalt plant that is located on the same quarry as Shelly Materials Plant 65. Stip. 65q.
2. On June 26, 2002, Shelly filed a FESOP PTO to avoid Title V permit requirements for Allied Corp Plant 12. Stip. 65r.
3. On June 25, 2002, Shelly filed a FESOP PTO to avoid Title V permit requirements for Shelly Materials Plant 65. Stip. 65kk.
4. Neither the application for Allied Corp. Plant 12 nor the application for Shelly Materials Plant 65 included emissions for portable generators AG1-A, AG12A or AG12B.

5. Portable generators AG1-A, AG12A and AG12B are associated with Plants 12 and 65 and should have been included in the FESOP PTO applications.
6. The combined PTE for Plants 12 and 65, together with generators AG1-A, AG12A and AG12B, is 91.33 tons/yr. NOx. Shelly Ex. 744D.
7. The State's only evidence that Plants 12 and 65 and the associated generators were being operated in excess of Title V threshold is based on a PTE calculation that the Court has rejected.

Conclusions of Law

1. There is no evidence that Plants 12 and 65 and the associated generators were being operated in excess of the Title V threshold.
2. The Court finds for Shelly.

Allied Corp. Generator 21.0012

Findings of Fact

1. Allied Corp. Generator 21.0012 aka AG16-B is a source of emission which requires a permit. (See Findings of Fact and Conclusions of Law for First Claim.)
2. On September 8, 2004, Shelly filed for a synthetic minor PTI and PTO for Generator 21.0012. Stip. 21.0012c.
3. On June 16, 2005, the Ohio EPA issued a synthetic minor PTI for Generator 21.0012. Stip. 21.0012f.
4. The State's only evidence that Generator 21.0012 was being operated in excess of Title V threshold is based on a PTE calculation that the Court has rejected.

Conclusions of Law

1. There is no evidence that Generator 21.0012 was being operated in excess of the Title V threshold.
2. The Court finds for Shelly.

Allied Corp. Generator 21.0013

Findings of Fact

1. Allied Corp. Generator 21.0013 aka AG14-B is a source of emission which requires a permit. (See Findings of Fact and Conclusions of Law for First Claim)
2. On September 8, 2004, Shelly filed for a synthetic minor PTI and PTO for Generator 21.0013. Stip. 21.0013c.
3. On January 6, 2005, the Ohio EPA issued a synthetic minor PTI for Generator 21.0013. Stip. 21.0013f.
4. The State's only evidence that Generator 21.0013 was being operated in excess of Title V threshold is based on a PTE calculation that the Court has rejected.

Conclusions of Law

1. There is no evidence that Generator 21.0013 was being operated in excess of the Title V threshold.
2. The Court finds for Shelly.

STATE'S SIXTH CLAIM FOR RELIEF

The Title V permit program requires that a Fee Emission Report be filed annually for each air-contaminant source that is subject to Title V. Fees are assessed based on the amount of actual emissions. In its Sixth Claim for Relief, the State alleges that Shelly failed to file the emission reports as required by the Title V permit program.

It is the State's claim that all of the facilities identified in its Sixth Claim for Relief are subject to the Title V permit program.

Shelly Materials Plants 24, 28, 40, 49, 63, 90/95, 91, 92, 94 (old) and Allied Corp. Plants 3, 5, 9, 12/Shelly Plant 65

Findings of Fact

1. The following plants did not submit Title V Fee Emission reports:

Plant	Stipulation
Shelly Materials Plant	
24	24hh
28	28y
40	40n
49	49y
63	63n
90/95*	90a
91	none
92	92o
94 (old)	94k
Allied Corp. Plant	
3	3aa
5	5o
9	9n
12 (Shelly Materials 65)	65ll, mm

*This refers only to the time period before Shelly purchased the quarry and Plants 90/95.

2. According to the Court's Findings of Fact and Conclusions of Law for the State's Fifth Claim for Relief, there was insufficient proof to conclude that any of the facilities identified above are subject to the Title V permit requirements.
3. If a facility is a non-Title V facility, it would pay non- Title V fees.
4. Title V fees are based on actual emissions, and non-Title V fees are assessed as a flat rate.

5. No facility is required to pay both Title V fees and non-Title V fees for the same reporting period.

6. The following plants were billed by the State and paid non-Title V fees for the period of the alleged violation in the State's Sixth Claim for Relief:

Plant	Stipulation (unless otherwise noted)
Shelly Materials Plant	
24	24ii
28	28z, aaa
40	40p (covers 1996 – 2003) (State alleges 1995 also)
49	Shively Tr. 1710
63	63k
90/95	90k, p
91	91m
92	92l (covers 1999 – 2001) 92m (covers 1999 – 2005) (State alleges 1996 – 2005)
94 (old)	94l
Allied Corp. Plant	
3	Shively Tr. 1710
5	5p
9	9s
12 (Shelly 65)	65nn, oo, pp, qq

Conclusions of Law

1. None of the facilities set forth above are subject to the Title V permit requirements.

2. Except for the periods noted for Plants 40 and 92, each of the facilities set forth above were billed by the State and paid non-Title V fees.

3. The Court finds for Shelly.

Allied Corp. Generators 21.0012 and 21.0013

Findings of Fact

1. The following generators did not submit Title V Fee Emission Reports:

   Generator 21.0012 Stip. 21.0012j

   Generator 21.0013 Stip. 21.0013h

2. According to the Court's Findings of Fact and Conclusions of Law for the State's Fifth Claim for Relief, there was insufficient proof to conclude that either of the generators identified above are subject to the Title V permit requirements.

Conclusions of Law

1. Neither of the generators set forth above is subject to the Title V permit requirements.
2. The Court finds for Shelly.

STATE'S SEVENTH CLAIM FOR RELIEF

The State's Seventh Claim for Relief relates to allegations that Shelly operated various sources in violation of the terms and conditions of a permit. For example, an Ohio EPA permit might place limits on emissions. As a result of a "stack test," it might be determined that the limits regarding emissions had been exceeded. This would constitute a violation.

The State defines "stack testing" in its Bench Brief, Glossary of Terms as "[t]he collection of representative portions of the gases and particulate matter that are being discharged through a smokestack or duct; this type of sampling allows direct estimation of the amount and types of air pollutants being released." Mr. Hodanbosi acknowledged that stack tests are snapshots and can be influenced by a number of factors. Haodanbosi

Tr. 1591 -1592. Ms. Mowery testified a stack test is conducted while "operating at worst-case conditions, at high tonnages, the max ton per hour in which typically you don't operate at max ton per hour." Mowrey Tr. 1863.

Shelly does not dispute that on the days of the specific stack tests alleged in the State's Seventh Claim for Relief, the emissions exceed the limits set forth in the permit and that this constitutes a violation. The Court will accept this as a Finding of Fact as to each facility identified in the State's Seventh Claim for Relief.

The real issue is the number of days of a violation. Shelly argues that because a "stack test" is a snap shot that does not relate to day-to-day operations, only the day of the "stack test" should constitute a violation.

The State takes a different position. In each case, except for Plant 62, (for which a "stack test" was not involved and both the State and Shelly agree that there are two days of violation), a subsequent "stack test" demonstrates that Shelly is in compliance. The State argues that each day between the "stack test" demonstrating a violation until the "stack test" demonstrating compliance constitutes a violation. The other exception is for Plants 90/95, where a new PTI was issued with new emission limits. In that case, the State argues that each day between the "stack test" demonstrating a violation until the new PTI was issued constitutes a violation.

Except for the date of the specific "stack test," there is not a specific test result proving that the violation continued. The State wants the Court to infer that the violation continued until Shelly proved that it did not, at the subsequent "stack test." However, the Court just as easily could infer that the second "stack test" was another "snap shot" and that the violation continued. If it is reasonable for the Court to infer that the violation

stopped with the second "stack test," why not infer that the violation ended the day before or the day before that or the day after the first "stack test"?

Simply put the Court does not find the requested inference to be reasonable given the fact that the State has the burden. Further, the Court finds Shelly's argument that a "stack test" does not represent normal operating conditions to be compelling.

Based on the foregoing, the Court will only consider the day of the "stack test" demonstrating excess emission to be evidence of a violation. This finding shall be applicable to each facility in the State's Seventh Claim for Relief.

Shelly Materials Plant 62

Findings of Fact

1. The PTI for Plant 62 established a visible particulate emission limit from the stack of no more than 10% opacity as a three-minute average. Stip. 62i.
2. Visible emissions at Plant 62 exceed the 10% limitation on June 5, 2006, and June 6, 2006. State f of f 232a, 233a and State Ex. 560.

Conclusions of Law

1. Shelly violated the terms of its permit on 2 days.
2. The Court finds for the State.

Shelly Materials Plant 63

Findings of Fact

1. The PTI for Plant 63 limited the emission of particulate matter to 0.04 grains/dry standard cubic foot. Stip. 63o.
2. A stack test on July 23, 2002, showed that the emissions of the particulate matter exceeded the limitations of the permit. Stip. 63p.

Conclusions of Law

1. Shelly violated the terms of its permit on 1 day.
2. The Court finds for the State.

Allied Corp. Plant 73

Findings of Fact

1. Applied Corp. Plant 73 is a portable facility.
2. The PTI for Plant 73 limited the emission of particulate matter to 0.03 grains/dry standard cubic foot. Stip. 73e.
3. A stack test on July 27, 2006, showed that the emissions of the particulate matter exceeded the limitations of the permit. Stip. 73f.

(Shelly Finding of Fact 894 states that Plant 73 tested *above* the limit on July 26, 2006. The Court assumes this was a typo.)

Conclusions of Law

1. Shelly violated the terms of its permit on 1 day.
2. The Court finds for the State.

Shelly Materials Plant 90/95

Findings of Fact

1. The PTI for Plant 90/95 limited the emission of volatile organic compounds to 15 pounds/hour. Stip. 90ll.
2. A stack test at Plant 90 on May 22, 2002, showed that the emissions of VOCs exceeded the limitations of the permit. State Ex. 682f.
3. A stack test at Plant 90 on December 7, 2001, showed that the emissions of VOCs exceeded the limitations of the permit. State Ex. 682e.

4. A stack test at Plant 90 on July 3, 2002, showed that the emissions of VOCs exceeded the limitations of the permit. Stip. 90bb.
5. A stack test at Plant 95 on August 2, 2002, showed that the emissions of VOCs exceeded the limitations of the permit. Stip. 90mm

Conclusions of Law

1. Shelly violated the terms of its permit on 4 days.
2. The Court finds for the State.

Shelly Materials Plant 91

Findings of Fact

1. The PTI for Plant 91 limited the emission of sulfur dioxide to 40 pounds/hour. Stip. 91o.
2. The PTI for Plant 91 limited the emission of volatile organic compounds to 20 pounds/hour. Stip. 91p.
3. A stack test on August 29, 2002, showed that the emissions of sulfur dioxide exceeded the limitations of the permit. Stip. 91q.
4. A stack test on August 29, 2002, showed that the emissions of VOCs exceeded the limitations of the permit. Stip. 91s.

Conclusions of Law

1. Shelly violated the terms of its permit two times on 1 day.
2. The Court finds for the State.

STATE'S EIGHTH CLAIM FOR RELIEF

The State's Eighth Claim for Relief relates to allegations that Shelly operated Plant 24 in violation of the terms and conditions of a permit.

Shelly Materials Plant 24

Findings of Fact

1. The PTI for Plant 24 limits the asphalt production rate to 400,000 tons, based upon a rolling, 12-month production. Stip. 24nn.
2. The rolling 12-month asphalt production at Plant 24 for the period ending October 2005 was 405,979 tons. Stip. 24pp.
3. The rolling 12-month asphalt production at Plant 24 for the period ending November 2005 was 422,926 tons. Stip. 24qq.
4. The rolling 12-month asphalt production at Plant 24 for the period ending April 2006 was 428,115 tons. Stip. 24ss.
5. The rolling 12-month asphalt production at Plant 24 for the period ending May 2006 was 405,798 tons. Stip. 24tt.
6. The State's expert Jonathan Shefftz testified that Shelly realized an economic advantage of $148,413 by exceeding the rolling 12-month asphalt production limitations. State Ex. 661.
7. Shelly contends that the State's expert also testified that if a different calculation were used the economic advantage would be $125,772. Shefftz Tr. 1302. The alternate calculation suggested by Shelly uses an average figure for profit per ton that the expert does not accept. Shefftz Tr. 1303.
8. Shelly did not offer any expert testimony to refute the State's expert.

Conclusions of Law

1. Shelly violated the terms of its permit for Plant 24 by exceeding the rolling 12-month asphalt production for the periods ending October 2005, November 2005, April 2006 and May 2006.
2. Shelly realized an economic advantage of $148,413 by exceeding the rolling 12-month asphalt production limitations.
3. The Court decides for the State.

THE STATE'S NINTH CLAIM FOR RELIEF

The State alleges in its Ninth Claim for Relief that Shelly failed to file quarterly reports notifying the Ohio EPA of deviation from operating parameters specified in its PTIs or PTOs or informing Ohio EPA that there were no such deviations. The quarterly reports are due as follows: first quarter reports, covering January through March of each year are due April 30 of that year; second quarter reports covering April through June of each year are due July 31 of that year; third quarter reports covering July through September of each year are due October 31 of that year; and fourth quarter reports covering October through December of each year are due January 31 of the next year.

Shelly Materials Plant 61

Findings of Fact

1. Shelly operated Plant 61 in Pickaway County, Ohio.
2. The State and Shelly agree that Shelly has not submitted quarterly deviation reports for the second and third quarters of calendar year 1999. Stip. 61h, Stip. 61i, State f of f 258a and Shelly f of f 937.

Conclusions of Law

1. Shelly has failed to file the required deviation reports for the second and third quarters of calendar year 1999 and that the same constitutes a continuing violation.
2. The Court finds for the State.

Shelly Materials Plant 91

Findings of Fact

1. Paragraph 258 of the State's Complaint alleges that Shelly failed to file a deviation report for the third quarter of 2001.
2. The State's Finding of Fact 258b, which applies to Plant 91, references the fourth quarter of 2002.
3. The authority for the State's Finding of Fact 258b is Stip 91x, which also refers to the fourth quarter of 2002.

Conclusions of Law

1. The State has not submitted any evidence regarding its allegation that Shelly failed to file a deviation report for the third quarter of 2001.
2. The Court finds for Shelly.

Allied Corp. Plant 79 and Allied Corp. Generators
21.0293, 21.0299, 21.0008, 21.0010, 21.0011, 21.0012, 21.0013, 21.0015, 21.0020

No Findings of Fact or Conclusions of law are necessary, as the Court dismissed the State's Ninth Claim for Relief as to these facilities in its decision dated October 31, 2008.

Allied Corp. Generator 21.0028

Findings of Fact

1. The State and Shelly agree that Shelly has not submitted a quarterly deviation reports for the third quarter of calendar year 2005. Stip. 21.0028a, State f of f 258 and Shelly f of f 957.

Conclusions of Law

1. Shelly has failed to file the required deviation report for the third quarter of calendar year 2005 and that the same constitutes a continuing violation.
2. The Court finds for the State.

THE STATE'S TENTH CLAIM FOR RELIEF

In its Tenth Claim for Relief the State alleges that Shelly failed to submit quarterly reports informing Ohio EPA of any deviation from the terms of its operating permits or informing Ohio EPA that there were no such deviations. The quarterly reports are due as follows: first quarter reports, covering January through March of each year are due April 30 of that year; second quarter reports covering April through June of each year are due July 31 of that year; third quarter reports covering July through September of each year are due October 31 of that year; and fourth quarter reports covering October through December of each year are due January 31 of the next year

Shelly Materials Plant 63

Findings of Fact

1. Shelly filed a quarterly deviation report for the third quarter of calendar year 2003, which was due on October 31, 2003, on December 15, 2003. The report was 45 days late. Stip. 63u.

2. Shelly filed a quarterly deviation report for the first quarter of calendar year 2004, which was due on April 30, 2004, on May 27, 2004. The report was 27 days late. Stip. 63v.

3. Shelly filed a quarterly deviation report for the second quarter of calendar year 2004, which was due on July 31, 2004, on August 12, 2004. The report was 12 days late. Stip. 63w.

Conclusions of Law

1. Shelly was a combined 84 days late in filing its required quarterly deviation reports for Plant 63.

2. The Court finds for the State.

Shelly Materials Plant 91

Findings of Fact

1. Shelly filed a quarterly deviation report for the first quarter of calendar year 2003, which was due on January 31, 2003, on February 20, 2003. The report was 41 days late. Stip. 91x.

Conclusions of Law

1. Shelly was 41 days late in filing its required quarterly deviation reports for Plant 91.

2. The Court finds for the State.

Shelly Materials Plant 94 (New) and Allied Corp. Plant 16

No Findings of Fact or Conclusions of Law are necessary, as the Court dismissed the State's Tenth Claim for Relief as to these facilities in its decision dated October 31, 2008.

STATE'S ELEVENTH CLAIM FOR RELIEF

In its Eleventh Claim for Relief, the State alleges that Shelly failed to submit semi-annual reports informing Ohio EPA of any deviations from the terms of its operating permits or informing Ohio EPA that there were no such deviations. The semi-annual reports are due as follows: first half reports covering January through June of each year are due on July 31 of that year; and second half reports covering July through December of each year are due on January 31 of the following year.

Allied Corp. Plant 3

No Findings of Fact or Conclusions of Law are necessary, as the Court dismissed the State's Eleventh Claim for Relief as to this facility in its decision dated October 31, 2008.

Shelly Materials Plant 80

Findings of Fact

1. Shelly Materials Plant 80 is a portable facility.
2. The semi-annual report for the second half of 2004 was to be filed by January 31, 2005.
3. The State alleges that the report was never filed. State f of f 266b.
4. The State's witness, Kimbra Reinbold testified that she was "not able" to locate the semi-annual report. Reinbold Tr. 1063.
5. Shelly Materials Plant 95 later became known as Shelly Materials Plant 80. Stip. 80-11b.

6. Shelly's witness Beth Mowrey testified that Shelly's fourth quarter report for Shelly Materials Plant 95 included the data for the semi-annual report. Mowrey Tr. 1871.
7. Shelly's fourth quarter report for Shelly Materials Plant 95 was introduced into evidence as Defendant's Exhibit PG10 dated January 28, 2005.
8. On cross –examination, the State never challenged Ms. Mowrey's testimony regarding this issue.

Conclusions of Law

1. The State failed to prove that Shelly did not file the semi-annual report for the second half of 2004.
2. The Court finds for Shelly.

STATE'S TWELFTH CLAIM FOR RELIEF

In its Twelfth Claim for Relief, the State alleges that Shelly failed to submit annual reports summarizing the rolling twelve-month summation of monthly emissions of nitrogen oxides. The annual reports are due on or before April 15 of the following year.

Stoneco, Inc. Generator 21.0021

Findings of Fact

1. Shelly admits that Stoneco submitted the annual report for 2004 relevant to this claim for relief on May 17, 2005. The report was 32 days late. Stip. 21.0021d.
2. Shelly admits that Stoneco submitted the annual report for 2006 relevant to this claim for relief on April 16, 2007. The report was 1 day late. Stip. 21.0021e.

3. Paragraph 270 of the State's Complaint alledges that the report was due on April 15, 2006. The Court finds that this date is a typographical error and should read April 15, 2007, as set forth in its proposed Conclusion of Law 271b.

Conclusions of Law

1. Shelly was a combined 33 days late in filing the required annual report.
2. The Court finds for the State.

Stoneco, Inc. Generator 21.8795

No Findings of Fact or Conclusions of Law are necessary as the Court dismissed the State's Twelfth Claim for Relief as to this facility in its decision dated October 31, 2008.

STATE'S THIRTEENTH CLAIM FOR RELIEF

In its Thirteenth Claim for Relief, the State alleges that Shelly failed to submit burner-tuning results within 30 days after the burner tuning was performed. Burning tuning is important to insure complete combustion of fuels which minimizes emissions.

Shelly Materials Plant 80

Findings of Fact

1. Shelly Materials Plant 80 is a portable facility.
2. In paragraph 274 of its complaint, the State alleges that a burner-tuning test was due on July 28, 2006.
3. In its proposed Finding of Fact 274a, the State alleges that a burner-test was conducted on June 28, 2006. To support its position, the State references "State Ex. 238 and Shelly Answer paragraph 274."

3. State Exhibit 238 is not included in the books of Exhibits submitted and updated by the parties.
4. Volume 7 of 9 Transcript p. 1501 line 9 Exhibits 224 through 240 were offered. Exhibit 240 was removed. On page 1502 the exhibits admitted were 224, 226, 228, 229, 231, 232, 233, 234, 235, 236, 237.
5. In its answer Shelly admits that the date the report was submitted was correct as alleged by the State but does not admit the date the test was conducted.

Conclusions of Law

1. There is no evidence regarding the date the burner-tuning test was conducted. Therefore, the Court does not have sufficient evidence to conclude that the report regarding the same was not timely filed.
2. The Court finds for Shelly.

Stoneco, Inc., Plant 114

Findings of Fact

1. Stoneco, Inc., Plant 114 is a portable facility.
2. Shelly admits that it did not timely submit three burner-tuning test reports. Shelly f of f 998.
3. The parties have stipulated to the following regarding the three late burner-tuning test reports: Stip. 114j. (not 114k as suggested by the State in its Finding of Fact 274b)

Report Submittal Due Date	Submitted Date
July 3, 2005	February 6, 2006
October 21, 2005	February 6, 2006
May 27, 2006	June 23, 2006

Conclusions of Law

1. Shelly did not timely submit burner-tuning test reports.
2. The reports were a total of 372 days late. The July 3 report was 218 days late. The October 21 report was 127 days late. The May 27 report was 27 days late.
3. The Court finds for the State.

STATE'S FOURTEENTH CLAIM FOR RELIEF

The State's Fourteenth Claim for Relief includes a general allegation that Shelly failed to comply with the terms or conditions of its PTIs or PTOs. No single violation can be identified as being unique to this claim.

Shelly Materials Plant 24 Wet Suppression System

Findings of Fact

1. On September 21, 2000, PTI 01-8208 was issued by the Ohio EPA that required Shelly to install a wet suppression system for its F Sources. The PTI included a compliance schedule. Final compliance was to be completed by April 2001. Stip. 24uu and Stip. vv.
2. Final compliance of the wet suppression system was achieved by April 2001. Shelly f of f 1010, State c of l 297b and c of l 297k.

Conclusions of Law

1. Shelly did not violate the terms or conditions of PTI 01-8208 with regard to the installation of the wet suppression system.
2. The Court finds for Shelly.

Shelly Materials Plant 24 Used Oil Records

Findings of Fact

1. The Ohio EPA issued PTI 01-08322 for Plant 24 on December 16, 2003 that required Shelly to maintain records of the total quantity of each shipment of number 2 fuel oil and on-spec used oil received. Stip. 24o and Stip. zz.
2. The State alleges that Shelly failed to record the quantities of used oil received on June 3, 2004 and June 9, 2004.
3. In support of its allegation, the State offers the testimony of Todd Scarborough which is based on State Ex. 688.
4. State's Ex. 688 is a Notice of Violation that was issued as the result of an inspection conducted by Ohio EPA Central District Office on September 2 and 3, 2004, at Plants 24, 40, 61-63, 91 and 94.
5. Todd Scarborough conducted and/or supervised the inspection.
6. Shelly did not produce any evidence to rebut the findings of the inspection, either after the Notice of Violation was issued or at trial.

Conclusions of Law

1. A Notice of Violation, unlike a complaint, is more than a charging document. It is the result of an inspection during which the subject of the inspection participates and is given an opportunity to respond.
2. Shelly failed to record the quantities of used oil received on June 3, 2004, and June 9, 2004.
3. The Court finds for the State.

Shelly Materials Plant 40 Dust Suppressants

Findings of Fact

1. The Ohio EPA issued PTI 01-08196 for Plant 40 on July 1, 2003 that required Shelly to maintain records of dust-control measures used on unpaved roadways and parking areas. Stip. 40i, Stip. r and Stip. s.
2. The State alleges that Shelly failed to maintain records for dust-control measures for July, August and September 2003.
3. In support of its allegation, the State offers the testimony of Todd Scarborough, whose testimony is based on State Ex. 688.
4. State's Ex. 688 is a Notice of Violation that was issued as the result of an inspection conducted by Ohio EPA Central District Office on September 2 and 3, 2004, at Plants 24, 40, 61-63, 91 and 94.
5. Todd Scarborough conducted and/or supervised the inspection.
6. Shelly was asked at page 7 of the Notice of Violation to "confirm whether or not water, or an alternate dust suppressant, was applied at Shelly plant 40 during July, August and September of 2003."
7. Shelly did not produce any evidence that it responded to the Notice of Violation, either after the Notice of Violation was issued or at trial.

Conclusions of Law

1. A Notice of Violation, unlike a complaint, is more than a charging document. It is the result of an inspection during which the subject of the inspection participates and is given an opportunity to respond.
2. Shelly failed to maintain records that it used dust suppressants on its unpaved roads or parking areas at Plant 40 during July, August or September 2003.
3. The Court finds for the State.

Shelly Materials Plant 40 Emissions Testing

Findings of Fact

1. The Ohio EPA issued PTI 01-08196 for Plant 40 on July 1, 2003, requiring Shelly to conduct emissions testing within 60 days after achieving the maximum production but no later than 180 days after initial startup of the emissions unit. Stip. 40i, and Stip. 40t.
2. The State alleges that Shelly failed to conduct emissions testing as of mid-October 2004.
3. In support of its allegation, the State offers the testimony of Todd Scarborough whose testimony is based on State Ex. 688.
4. State's Ex. 688 is a Notice of Violation that was issued as the result of an inspection conducted by Ohio EPA Central District Office on September 2 and 3, 2004, at Plants 24, 40, 61-63, 91 and 94.
5. Todd Scarborough conducted and/or supervised the inspection.
6. Shelly admits that the testing was not conducted. Shelly f of f 1023.
7. The States proposed Conclusions of Law 297e suggests one day of violation.
8. The States proposed Conclusions of Law 297k suggests 288 days of violation.
9. The States proposed Conclusions of Law 297k suggests a compliance date of October 4, 2004.

Conclusions of Law

1. A Notice of Violation, unlike a complaint, is more than a charging document. It is the result of an inspection during which the subject of the inspection participates and is given an opportunity to respond.

2. Shelly admits that it failed to conduct the test.
3. No evidence was provided as to the time Shelly might have reached its "maximum production."
4. The Court finds that the test should have been conduct by January 1, 2004, 180 days after the PTI was issued. The Court is using the issuance of the PTI as the initial startup date.
5. The Court finds Shelly in compliance as of October 4, 2004.
6. The Court finds that Shelly was not in compliance for 288 days.
7. The Court finds for the State.

Shelly Materials Plant 40 Used Oil Records

Findings of Fact

1. The Ohio EPA issued PTI 01-08196 for Plant 40 on July 1, 2003, requiring Shelly to maintain records of the quantity of oil received and the permittee's or oil supplier's analysis of the sulfur content of #2 fuel oil. Stip. 40i and Stip.40u.
2. The State alleges that Shelly failed to maintain the records from July 1, 2003, until September 3, 2004.
3. In support of its allegation the State offers the testimony of Todd Scarborough, whose testimony is based on State Ex. 688.
4. State's Ex. 688 is a Notice of Violation that was issued as the result of an inspection conducted by Ohio EPA Central District Office on September 2 and 3, 2004, at Plants 24, 40, 61-63, 91 and 94.
5. Todd Scarborough conducted and/or supervised the inspection.

6. Shelly did not produce any evidence to rebut the findings of the inspection either after the Notice of Violation was issued or at trial.

Conclusions of Law

1. A Notice of Violation, unlike a complaint, is more than a charging document. It is the result of an inspection during which the subject of the inspection participates and is given an opportunity to respond.
2. The Court finds that Shelly was out of compliance for 368 days.
3. The Court finds for the State.

Shelly Materials Plant 61 Speed Limit Sign

Findings of Fact

1. The parties stipulated that the PTI for Shelly Materials Plant 61 required a 15 mph speed-limit sign, that a 20-mph speed-limit sign was posted, and that Shelly corrected the problem. Stip. 61c, Stip. 61d, Stip. 61e and Stip. 61f.
2. No specific evidence was provided as to the duration of the violation.

Conclusions of Law

1. The Court accepts the State's proposed conclusion of law 297g and 297k that the violation was for 1 day.
2. The Court finds for the State.

Shelly Materials Plant 61 Road Sweeping

No findings of fact or conclusions of law were proposed by the State for this allegation. The Court finds for Shelly.

Middleport Terminal Emissions Control

Findings of Fact

1. Shelly operated the Middleport Terminal which is a bulk liquid asphalt cement storage facility in Callia County, Ohio.
2. On January 21, 1999, the Ohio EPA issued a PTI for a liquid-asphalt cement-storage tank (T006), requiring the tank to be equipped with a charcoal filter. Stip. MTId and Stip. MTIf.
3. On October 20, 1999, the Ohio EPA issued a PTI for a liquid-asphalt cement-storage tank (T007) requiring the tank to be equipped with a charcoal filter. Stip. MTIe and Stip. MTIg.
4. Shelly did not install a charcoal filter on emissions units T006 and T007. Stip. MTIh.
5. On September 15, 2005, Shelly installed a vapor recovery system for emissions unit T006, T007. Stip. MTIi.
6. Although not a charcoal filter, the Ohio EPA accepted the system as placing Shelly in compliance. State c of l 297h and c of l 297k.

Conclusions of Law

1. Shelly was in violation of its PTI for its Middleport Terminal units T006 and T007 for not having a required emissions-control system for 2,157 days.
2. The Court finds for the State.

STATE'S FIFTEENTH CLAIM FOR RELIEF

Ohio Administrative Code requires the Ohio EPA to be notified if a source breaks down so as to cause the emission of air contaminants. In its Fifteenth Claim for Relief,

the State claims that Shelly failed to notify Ohio EPA of a breakdown at Shelly Materials Plant 62 and Shelly Materials Plant 91.

Shelly Materials Plant 62

Findings of Fact

1. The bag house at Shelly Materials Plant 62 malfunctioned, causing the emission of air contaminants on June 5 and June 6, 2006.
2. Ohio EPA employees were on-site and observed and discussed the emissions with Shelly employees.
3. PTI 01-08567 requires that the malfunction of any emissions unit be reported to the appropriate Ohio EPA District Office or local air agency in accordance with O.A.C. 3745-15-06(B).
4. Todd Scarborough was an on-site Ohio EPA employee who observed the emissions.
5. Todd Scarborough is with the Central District Office that is responsible for Plant 62.

Conclusions of Law

1. Neither the Ohio Administrative Code nor PTI 01-08567 specify the form of the notice that is required in connection with the reporting of a malfunction that results in the emission of air contaminants.
2. Ohio EPA received notice of the malfunction on June 5 and June 6, 2006.
3. The bag house might have malfunctioned on days prior to June 5 and June 6, 2006, but the only allegation in the complaint relates to these two days. Therefore, no other findings are appropriate.

4. The Court finds for Shelly.

Shelly Materials Plant 91

No findings of fact or conclusions of law are necessary, as the Court dismissed Claim Fifteen for Plant 91 in its October 31, 2008 decision.

STATE'S SIXTEENTH CLAIM FOR RELIEF

In its Sixteenth Claim for Relief, the State alleges that Shelly failed to perform a required chemical analysis of each used-oil shipment.

Shelly Materials Plant 24

Findings of Fact

1. The PTI issued on December 16, 2003, for Shelly Plant 24 requires that the plant must get a chemical analysis for each shipment of used oil. Stip. 24aaa.
2. On June 15, 2004, Shelly Plant 24 received a shipment of used oil that did not have the required chemical analysis. Stip. 24bbb.

Conclusions of Law

1. Shelly was in violation of its PTI when it received used oil on June 15, 2004 without the required chemical analysis.
2. The Court finds for the State.

Shelly Materials Plant 62

Findings of Fact

1. The PTI issued July 24, 2001, for Shelly Plant 62 requires that the plant must get a chemical analysis for each shipment of used oil. Stip. 62f and Stip. 62k.
2. On July 24, 2001, Shelly Plant 62 received a shipment of used oil that did not have the required chemical analysis. Scarborough Tr. 582 and Shelly f of f 1073.

3. All other Findings of Fact proposed by the State as to Shelly Materials Plant 62, including dates and analysis content, relate to matters outside the scope of the complaint. Given the length and detail of the complaint, the Court notified the parties that it would not make findings outside the scope of the complaint. Given the length and detail of the complaint the Court did not think it to be fair to also require Shelly to respond to matters not alleged in the complaint.

Conclusions of Law

1. Shelly was in violation of its PTI when it received used oil on July 24, 2001, without the required chemical analysis.
2. The Court finds for the State.

STATE'S SEVENTEENTH CLAIM FOR RELIEF

Each of the PTIs referenced in the State's Seventeenth Claim for Relief requires a minimum allowable limit on the heat content of any used oil received and burned. The heat content is measured in British Thermal Units (BTUs). Complete combustion of the fuel is important for efficient operation of the plant's equipment and the environment. It is a violation of the PTI to accept and burn used oil with a BTU content below that required by the PTI.

The Court finds that Shelly burns the oil that it receives at each plant that is the subject of the State's Seventeenth Claim for Relief.

Shelly Materials Plant 24

Findings of Fact

1. The PTI requires that all used oil that is burned shall meet a minimum heat content of 135,000 BTUs/gallon. Stip. 24ccc.

2. On May 12, 2004, Shelly received used oil with a BTU value below the minimum allowable limit contained in the PTI. Stip. 24ddd.
3. On May 18, 2004, Shelly received used oil with a BTU value below the minimum allowable limit contained in the PTI. Stip. 24eee.
4. On May 20, 2004, Shelly received used oil with a BTU value below the minimum allowable limit contained in the PTI. The chemical analysis by the supplier Summit shows a heat content of 122,603 BTU/gallon. State's Exhibit 681-000047. Shelly's summary of that shipment is State's Exhibit 681-000049 and it does not properly state the heat content of the used oil.
5. On May 22, 2004, Shelly received used oil with a BTU value below the minimum allowable limit contained in the PTI. The chemical analysis by the supplier Summit shows a heat content of 119,473 BTU/gallon. State's Exhibit 681-000050. Shelly's summary of that shipment is State's Exhibit 681-000051 and it does not properly state the heat content of the used oil.
6. On July 20, 2004, Shelly received used oil with a BTU value below the minimum allowable limit contained in the PTI. Stip. 24fff.

Conclusions of Law

1. Shelly received and burned used oil shipments with a BTU value below the minimum allowable limit, in violation of its PTI on five occasions.
2. The Court finds for the State.

Shelly Materials Plant 62

Findings of Fact

1. The PTI requires that all used oil that is burned shall meet a minimum heat content of 135,000 BTU/gallon. Stip. 62l.
2. On February 25, 2002, Shelly received two shipments of used oil with a BTU value below the minimum allowable limit contained in the PTI. The chemical analysis by the supplier Central Ohio shows a heat content of 133,249 BTUs/gallon. State's Exhibit 681-000074. Shelly's summary of those shipments is State's Exhibits 681-000075 and 681-000076 and they do not accurately state the heat content of the used oil.
3. On March 4, 2002, Shelly received a shipment of used oil with a BTU value below the minimum allowable limit contained in the PTI. The chemical analysis by the supplier Central Ohio shows a heat content of 133,249 BTUs/gallon. State's Exhibit 681-000074. Shelly's summary of those shipments is State's Exhibits 681-000077 and it does not accurately state the heat content of the used oil.
4. On September 10, 2002, Shelly received a shipment of used oil with a BTU value below the minimum allowable limit contained in the PTI. The chemical analysis by the supplier Central Ohio shows a heat content of 134,795 BTUs/gallon. State's Exhibit 681-000078. Shelly's summary of the shipment is State's Exhibit 681-000079 and it does not accurately state the heat content of the used oil.
5. On September 12, 2002, Shelly received a shipment of used oil with a BTU value below the minimum allowable limit contained in the PTI. The chemical analysis by the supplier Central Ohio shows a heat content of 134,795 BTUs/gallon. State's Exhibit 681-000078. Shelly's summary of the shipment is State's Exhibit 681-000080 and it does not accurately state the heat content of the used oil.

Conclusions of Law

1. Shelly received and burned used oil shipments with a BTU value below the minimum allowable limit in violation of its PTI on five occasions.
2. The Court finds for the State.

Shelly Materials Plant 90

Findings of Fact

1. The PTI requires that all used oil that is burned shall meet a minimum heat content of 135,000 BTU/gallon. Stip. 90ee.
2. Shelly admits that on five days -- July 20, 2004, September 3, 2005, September 6, 2005, December 3, 2005 and December 5, 2005 -- it received and burned used oil with a heat content below 135,000 BTU/gallon. Stip. 90ff, Stip. 90gg, Stip. 90hh, Stip. 90ii and Stip. 90jj.

Conclusions of Law

1. Shelly received and burned used oil shipments with a BTU value below the minimum allowable limit in violation of its PTI on five occasions.
2. The Court finds for the State.

Shelly Materials Plant 91

Findings of Fact

1. The State claims in its Proposed Finding of Fact 313b that the PTI requires a chemical analysis of on-specification used oil and that it contains the BTU value.
2. In support of this Proposed Finding of Fact it references Stip. 24aaa, Stip. 62k, Stip. 91y and State Ex. 384.

3. Stips 24aaa and 62k are not applicable to Plant 91. State Ex. 384 is a PTI for Plant 90. There is no Stip 91y nor any other stipulation as to Plant 91 which establishes the required heat content for used oil.
4. State Ex. 354 is the PTI for Plant 91 and requires that all used oil that is burned shall meet a minimum heat content of 135,000BTU/gallon.
5. State Ex. 688 is a Notice of Violation that was issued as the result of an inspection conducted by Ohio EPA Central District Office on September 2 and 3, 2004, at Plants 24, 40, 61-63, 91 and 94.
6. Todd Scarborough conducted and/or supervised the inspection.
7. Shelly did not produce any evidence to rebut the findings of the inspection either after the Notice of Violation was issued or at Trial.
8. Shelly was in violation for 2 days. State f of f 314r.

Conclusions of Law

1. A Notice of Violation, unlike a complaint, is more than a charging document. It is the result of an inspection during which the subject of the inspection participates and is given an opportunity to respond.
2. Shelly received and burned used oil with a BTU value below the minimum allowable limit in violation of its PTI on two occasions.
3. The Court finds for the State.

STATE'S EIGHTEENTH CLAIM FOR RELIEF

Similar to other claims, the State alleges that Shelly operated one of its facilities in violation of the terms of its permit. Specifically, the State alleges that Shelly burned

used oil containing more than one thousand (1,000) parts per million total halogens at its Stoneco, Inc. Plant #118.

The Court finds that Shelly burns the oil that it receives at each plant that is the subject of the State's Eighteenth Claim for Relief.

Stoneco, Inc. Plant #118

Findings of Fact

1. Stoneco, Inc. Plant #118 is a portable facility.
2. The PTI for Stoneco Plant 118 was issued on October 25, 1995. Stip. 118c.
3. The PTI requires that all on-specification used oil burned shall contain less than 1000 ppm of total halogens. Stip. 118d.
4. Shelly admits that on 35 days between October 3, 2004 and October 20, 2005, Stoneco received shipments of used oil above 1000 ppm of total halogens. Stip. 118e.
5. Shelly burns the used oil that it receives.

Conclusions of Law

1. Shelly burned used oil at its Stoneco Plant 118 in violations of the terms of its PTI for 35 days.
2. The Court finds for the State.

STATE'S NINETEENTH CLAIM FOR RELIEF

Similar to other claims, the State alleges that Shelly operated one of its facilities in violation of the terms of its permit. Specifically, the State alleges that Shelly burned used oil that did not meet the "on-specification" for the used oil as set forth in the applicable PTI.

The Court finds that Shelly burns the oil that it receives at each plant that is the subject of the State's Nineteenth Claim for Relief.

Shelly Materials Plant 62

Findings of Fact

1. The PTI requires that that all used oil shall have a maximum lead concentration of not greater than 100 parts per million. Stip. 62m.
2. Shelly admits that on October 5 and October 8, 2001, it received used oil with a lead concentration in excess of 100 parts per million. Stip. 62n and Stip. 62o.

Conclusions of Law

1. Shelly burned used oil at Shelly Materials Plant 62 in violation of the terms of its PTI for 2 days.
2. The Court finds for the State.

Shelly Materials Plant 63

Findings of Fact

1. The PTI requires that that all used oil shall have a maximum mercury concentration of not greater than 1 part per million. Stip. 63y.
2. Shelly admits that on August 31, 2001 and September 5, 7, and 14, 2001, it received used oil with a mercury concentration in excess of 1 part per million. Stip. 63z, Stip. 63aa, Stip. 63bb and Stip. 63cc.

Conclusions of Law

1. Shelly burned used oil at Shelly Materials Plant 63 in violations of the terms of its PTI for 4 days.
2. The Court finds for the State.

Shelly Materials Plant 91

Findings of Fact

1. The State did not propose any Findings of Fact as to Shelly Materials Plant 91 for its Nineteenth Claim.

Conclusions of Law

1. The Court Finds for Shelly.

STATE'S TWENTIETH CLAIM FOR RELIEF

No Findings of Fact or Conclusions of Law are necessary, as the Court dismissed Claim Twenty in its October 31, 2008 Decision.

IMMUNITY/PENALTY/INJUNCTIVE RELIEF

Having made what the Court believes to be the necessary findings of facts and conclusions of law as to each of the State's Claims for Relief, it is necessary for the Court to address the issue of immunity, determine the appropriate civil penalty for each of the claims that were decided in favor of the State and against Shelly and the State's request for injunctive relief.

Immunity

Shelly argues that it is entitled to immunity as to most of the claims brought by the State. R.C. 3745.72 grants the owner or operator of a facility that conducts an environmental audit of its operation and discloses the information to the appropriate state director to petition for limited immunity from administrative and civil penalties. It does not provide for absolute immunity. In fact many violations are exempt from the immunity provisions. For example there is no immunity from the payment of damages for harm to persons or property. R.C. 3745.72(D). This is only one of several examples

where immunity is not available under the provisions of R.C. 3745.72. Further, the burden of proof is on the owner or operator that is asserting the entitlement to such immunity. R.C. 3745.72(A).

The Court does find that Shelly would qualify for consideration of immunity for some of the violations where the Court found for the State. Shelly retained an outside consultant, Dine Comply, to audit its compliance with air laws and regulations. A complete copy of the Dine Audit is included in the record as Defendant's Exhibit A. The audit was started on January 27, 2003 and ended on February 14, 2003. Defendant's Exhibit A p.4. The audit found numerous permitting violations by Shelly. For example, it was as a result of the Dine Audit that it was determined that Shelly did not get permits for it diesel-fired portable generators as required by law. A copy of the audit was forwarded to the Ohio EPA on April 21, 2003. See Defendant's Ex. B and Gen. Stip. 1.

The Dine Audit covered all Shelly facilities in the State of Ohio. Ohio EPA Northwest District Office reviewed the report and the request for immunity pursuant to R.C. 3745.72 for the facilities in its district (Allen, Van Wert, Auglaize and Marion County). Many of the issues were the same as the ones presented by the State in this law suit. The Northwest District Office granted the request for immunity pursuant to R.C. 3745.72. See Defendant's Ex. C. The Southeast and Central District Offices did not grant the request for immunity and commenced the present litigation seeking civil penalties and injunctive relief.

Unfortunately, the record is void of the different reasoning that may have lead to the very different results. Further, the statute is drafted in such a way that the Court does not believe, given the record that has been presented, that it could impose a finding of

immunity on the State. While the statute provides that an applicant that complies with the statute "is immune from any administrative and civil penalties" (R.C. 3745.72(A)) the exceptions and limitations consume this provision. For example, immunity is not available if the audit begins after an investigation has commenced. R.C. 3745.72 (B)(6). While most of the Notices of Violations are dated after the Dine Audit was forwarded to the Ohio EPA, several do predate the audit. See State's First Claim as to Shelly Materials Plant 24. The Court also finds it interesting that while some of the alleged violations have been occurring for an extended period of time, the Notices of Violation were filed in 2003 shortly after the Dine Audit was filed with the Ohio EPA. See State's Second Claim.

The State may well have concluded that Shelly's conduct prior to the audit demonstrated "a pattern of continuous or repeated violation of environmental laws" which would make Shelly ineligible for immunity. R.C. 3745.72 (E)(1). This provision makes sense in that the State has a legitimate interest in preventing a repeat violator from avoiding the consequences of violating the law by simply filing a report. Similarly, it might encourage owners and operators to gamble with the publics' environmental safety by trying to beat the system after committing repeated violations with a report of disclosure.

The real point is that the statute grants sufficient breath and latitude to the regulatory agency that a court could not conclude that the Northwest District was right and the Southeast and Central Districts were wrong or visa-versa.

The tension between the benefits and the risks of voluntary compliance audits to both the regulated entity and the state is discussed in an excellent article *Ohio's New*

Statutory Audit Privilege Promoting Environmental Performance or a Dirty Little Secrets Act, 26 CapitalULREV 379 (1997). This quote is taken from the article at page 388:

> The goal of voluntary environmental auditing programs should be to discover and remedy environmental problems, not to foster punishment of regulated entities for engaging in good environmental practices. The risk that regulatory agencies or private parties will use information collected during environmental audits is real. Civil and criminal actions have been brought based, at least in part, on information obtained from voluntary internal audits.

Based on the foregoing the Court denies Shelly's request for immunity.

Penalty Theory

Having determined that Shelly in not entitled to immunity the Court must now determine what penalty if any is appropriate for each finding in favor of the State and against Shelly.

Several issues regarding the penalty phase are clear. First the applicable statute R.C. 3704.06 provides for a penalty of not more than $25,000.00 for each day of each violation. Second the amount of the penalty rests with the trial court so long as it does not abuse its discretion by demonstrating an "unreasonable, arbitrary or unconscionable attitude." *State, ex rel. Brown v. Dayton Malleable* (1982), 1 Ohio St.3d 151, 157. Third, the guidelines provide that the determination of the amount of the penalty is a three step process. See *State, ex rel. Petro v. Maurer Mobil Home Court, Inc.*, (May 11, 2007), Wood App. No. WD-06-053. App. Lexis 2103, citing *State ex. rel. Brown v. Dayton Malleable, Inc.* (April 21, 1981), Court of Appeals of Ohio, Second Appellate District, 1981 Ohio App. LEXIS 12103 quoting USEPA BNA Environmental Reporter.

"Step 1 – Factors comprising Penalty

Determine and add together the appropriate sums for each of the four factors or elements of this policy namely: the sum appropriate to redress the harm or risk of harm to public health or the environment, the sum appropriate to remove the economic benefit

gained or to be gained from delayed compliance, the sum appropriate as a penalty for violator's degree of recalcitrance, defiance, or indifference to requirements of the law, and the sum appropriate to recover unusual or extraordinary enforcement costs thrust upon the public.

Step 2 – Reduction for Mitigating Factors

Determine and add together sums appropriate for mitigating factors, of which the most typical are the following: the sum, if any, to reflect any part of the noncompliance attributable to the government itself, the sum appropriate to reflect any part of the non-compliance caused by factors completely beyond violator's control (floods, fires, etc.)

Step 3 – Summing of Penalty Factors and Mitigating Reductions

Subtract the total reductions of Step 2 from the total penalty of Step 1. The result is the minimum civil penalty."

In addition the court also noted that the civil penalty, in order to deter a violation must be large enough to hurt the offender.

Determining the amount to assess based on the foregoing is where the guidance is no longer clear at all.

As noted above the maximum penalty may not exceed $25,000.00 per day per violation. The Court has made findings of fact and conclusions of law that Shelly has been in violation as alleged by the State for approximately 9,605 days. If the Court awarded the maximum penalty for each day of a violation the penalty would be $240,125,000.00. This penalty would almost equal the gross receipts of Shelly Materials Inc., for 2005. See State's Ex. 275. While deterrence is an appropriate factor when determining a penalty it should not bankrupt the corporation. See *State ex re. Brown v. Dayton Malleable, Inc, supra* at 15.

The State is not suggesting a penalty of that amount. In fact the State's proposed penalty if the Court had found for the State on each and every claim ranges from $2,454,820 to $4,274.124. Using the State's proposed penalty for each separate violation

and applying the same to the violations where the Court found for the State, the penalty would be approximately $500,000.00.

The Court struggles with the lack of consistency in the State's requested daily penalty. Claims One thru Five all involve a violation of the permitting process. Yet Claim One the proposed penalty is $5.00 to $10.00 per day, Claim Two the proposed penalty is $25.00 to $50.00 per day, Claim Three the proposed penalty is $1.00 to 2.00 per day, Claim Four the proposed penalty is $50.00 to $100.00 and Claim Five the proposed penalty is $5.00 to $10.00 per day. Similarly Claims Nine through Thirteen all involve a failure to submit timely reports. For two of the Claims the State proposes a fine of $1.00 per day (Claims 9 and 11) but $15.00 per day for Claim Twelve, $25.00 per day for Claim Ten and $50.00 per day for Claim Thirteen. Claim Fifteen, although no finding against Shelly was made, is also a reporting violation; although it does involve a malfunction. Regardless the claim is not for the malfunction but for not reporting the same. In that claim the State is proposing a penalty of $25.000.00 per day – and a representative of the State was present and witness the malfunction.

Shelly does not really provide any better guidance for the Court. Shelly acknowledges that it was in violation on numerous occasions but suggests only a nominal penalty or a sum related to the permitting fee, to be appropriate. The trial court in Ohio ex. rel. Brown v. Dayton Malleable, Inc. noted a similar problem. It stated the following:

> ". . . since OEPA did not approve DMI's plans until September 15, 1976, Plaintiff agrees that that was the first date of violation. Compliance was not achieved until November 1, 1978, a total of 714 days. The maximum penalty, therefore, could reach $7,140,000. Plaintiff does not seek any such award, but does rationalize in his brief a penalty of $725,302. Although DMI has admitted its default, and thus has admitted that it is subject to being penalized pursuant to Section 6111.09 of the Revised Code, DMI has not assisted the Court by suggesting any penalty it thinks ought to be assessed."

Mitigation in General

Before the Court addresses what it believes to be the appropriate penalty the Court will address the concept of mitigation in general terms. Each claim may or may not have a specific mitigating factor that is relevant to a particular claim. Having said that the Court believes that there are two mitigating factors which apply to this entire case. Rather than address these factors repeatedly the Court will address the same in this section of the Court's decision with the understanding that the Court took these factors into consideration throughout the penalty phase.

First is the Voluntary Compliance Audit Results Report (Dine audit) which was commissioned by Shelly and forwarded to Ohio EPA in early 2003. The report was very detailed and identified several deficiencies. To the Court, this demonstrates a sincere desire to identify and correct problems. By forwarding the same to Ohio EPA Shelly demonstrated an openness that is to be commended. While no evidence regarding the cost of the report was introduced, the Court is confident that it was not inexpensive. Having made that observation it should be noted that the Court did not reduce any penalties based on a specific cost of the audit. Rather the Court simply considered the same when determining a mitigation of a penalty. The audit was especially important in regard to the permitting and reporting violations.

While a voluntary audit is not specifically mentioned as a possible mitigating factor noted above in Step 2 of the penalty provision, the list of mitigating factors suggested is by no means exclusive or exhaustive. In fact the language refers to mitigating factors in terms of "most typical". The Court believes and finds that a

voluntary audit that is complete and forwarded to the state to be an appropriate mitigating factor.

Second, in the State's Finding of Fact 8s and 8t, it admits to having millions of dollars of contracts with Shelly. If Shelly's conduct is so egregious why are they doing business with Shelly? If the State was really interested in making sure that Shelly as well as other corporations were in compliance with the regulations it could require compliance verification as a condition of the contract. The State complains that Shelly is operating its facilities in a way that is or can be harmful to the environment. Yet the State is the one that is purchasing the product which Shelly produces. The State can not both complain about the operation and at the same time facilitate its very operation. This is clearly a factor of mitigation that is attributable to the government.

STATE'S FIRST CLAIM FOR RELIEF

Claim One is a violation of the permitting process. This is very important. How else can the State control and manage the risk of harm to the public and the environment? Failure to comply with the permitting process is also some evidence of indifference to the law. As a mitigating factor the State has some responsibility to process the application in a timely manner. Failure to do so results in noncompliance attributable to the government itself.

Based on the foregoing the court believes that the appropriate penalty for installing or operating a facility without a proper permit should be $25.00 per day. This figure is slightly greater than the $10.00 per day suggested by the State. If the installation and or operation began prior to 180 days after a completed application was submitted an additional penalty of $1,500.00 is assessed because failure to wait the

period of time the law allows the State to process the application demonstrates an indifference to the law. Although the statute speaks in terms of a daily penalty this additional penalty is consistent with the goal noted by other courts to "deter a violation." In addition the additional penalty is well within the statutory limits of $25,000.00 per day. No such penalty should be included if the installation began after the State failed to act within the time provided for by law. Such a failure is an example of non-compliance attributable to the government itself. In addition the penalty is reduced to $1.00 per day after the State has had the completed application for 180 days. Taking more than the amount of time allowed for by law clearly places the majority of the non-compliance on the government. The State knew or should have known that the facility was operating. The State can not just do nothing and expect a penalty to accrue on a daily basis. To expect one side to follow the law and not the other is simply not right.

Shelly Materials Plant 24

40 days prior to expiration of 180 days at $25.00/day	$1,000.00
1331 day after 180 days and before PTI issued at $1.00/day	$1,331.00
Additional penalty for starting prior to 180 days	$1,500.00
Total	**$3,831.00**

Shelly Materials Plant 24 Storage Tanks

374 days prior to expiration of 180 days at $25.00/day	$9,350.00
417 days after 180 days and before PTI issued at $1.00/day	$ 417.00

(The Court has decided not to assess the additional $1,500.00 because of the unique facts regarding storage tanks including the fact that a PTI is not currently required. There is nothing to deter.)

Total	**$9,767.00**

Shelly Materials Plant 40

219 days prior to expiration of 180 days at $25.00/day	$5,475.00
952 days after 180 days and before PTI issued at $1.00/day	$ 952.00
Additional penalty for starting prior to 180 days	$1,500.00
Total	**$7,927.00**

Portable Generators

While the Court found for the State regarding the portable generators is has decided not to issue any penalty. The Court believes that the mitigating factors equal the factors comprising a penalty.

The portable generators were being operated without the requisite permit. However, in mitigation there are numerous factors including: (1) Shelly's reliance on verbal guidance from Ohio EPA employees; (2) the failure to have a permit was brought to the attention of Shelly and subsequently the Ohio EPA as a result of the Voluntary Air Compliance Audit commissioned by Shelly; (3) the Notices of Violation issued by the Ohio EPA post date the Audit; (4) Ohio EPA knew or should have known that Shelly had portable generators and that the same were not permitted; (5) prior to 1999 Ohio EPA did not issue any permits for portable generators.

In addition to the foregoing, because there is no evidence regarding the date of installation of the individual portable generators the Court has no basis upon which to issue a daily penalty.

STATE'S SECOND CLAIM FOR RELIEF

Much like the State's First Claim, the Second Claim relates to an operation that occurred before a PTI was issued. Specifically, Shelly admittedly started burning used oil before it received a permit to do so. The time period for the State to respond to a completed application is the same as set forth in the First Claim. For the reasons set forth above the penalty shall be the same.

Shelly Materials Plant 2

111 days after 180 days and before PTI issued at $1.00/day	$ 111.00
Total	**$ 111.00**

Shelly Materials Plant 62

22 days prior to expiration of 180 days at $25.00/day	$ 550.00
52 days after 180 days and before PTI issued at $1.00/day	$ 52.00
Additional penalty for starting prior to 180 days	$1,500.00
Total	**$2,102.00**

Shelly Materials Plant 63

54 days prior to expiration of 180 days at $25.00/day	$1,350.00
44 days after 180 days and before PTI issued at $1.00/day	$ 44.00
Additional penalty for starting prior to 180 days	$1,500.00
Total	**$2,894.00**

Shelly Materials Plant 65

59 days outside scope of exemption at $25.00/day $1,475.00

(Because this violation involved a one time discretionary burn and not a permanent change in operation together with the fact that Shelly did seek a permit the Court does not find that the additional $1,500.00 is applicable.)

Total **$1,475.00**

Shelly Materials Plant 91

23 days after 180 days and before PTI issued at $1.00/day $ 23.00

Total **$ 23.00**

Shelly Materials Plant 114

114 days after 180 days and before PTI issued at $1.00/day $ 114.00

Total **$ 114.00**

Additional Award for Economic Benefit

The Court awards an additional amount of $80,680.52

STATE'S THIRD CLAIM FOR RELIEF

For the reasons set forth above in the State's First Claim for Relief no penalty is assessed as to the portable generator claims in the State's Third Claim for Relief.

STATE'S SEVENTH CLAIM FOR RELIEF

The State's Seventh Claim for Relief involves excess emissions at a Shelly facility. In addition to being in violation of the terms of the permit it also is harmful to the environment. The State has suggested a penalty range of between $25.00 and $50.00 per day per violation. The Court finds these violations to be more serious than the permit

violations in Claims One and Two. In addition to operating outside the scope of the terms of the permit, there were actual emissions which could be harmful.

Applying the factors to be considered in Step 1 of the penalty consideration the Court is most concerned about an appropriate amount to redress the harm or risk of harm to the environment. The other factors is Step 1 do not appear to be applicable. Accordingly the Court believes that the appropriate penalty is $500.00 per day. The Court does not believe that any of the mitigating factors from Step 2 are applicable. Because there is evidence that Shelly did take corrective action (subsequent tests that showed compliance) and the numbers of violations are limited, an additional penalty to deter future violations is not necessary.

Shelly Materials Plant 62

Two days at $500.00 per day	$1,000.00
Total	**$1,000.00**

Shelly Materials Plant 63

One day at $500.00 per day	$ 500.00
Total	**$ 500.00**

Shelly Materials Plant 90/95

Four days at $500.00 per day	$2,000.00
Total	**$2,000.00**

Shelly Materials Plant 91

Two time on one day at $500.00 per violation	$1,000.00
Total	**$1,000.00**

STATE'S EIGHTH CLAIM FOR RELIEF

In its Eighth Claim for Relief the State did prove that Shelly violated the terms of its permits by exceeding its production limits. In addition to the economic benefit penalty which the Court finds appropriate the State suggests a penalty of $200.00 per day. The State also suggests 1 day a $25,000.00. However, there is no explanation as to the harm generated by this particular permit violation as compared to others where a lesser daily penalty was suggested. In addition Shelly was not in violation for each day of the final month. Also the amount of the excess was not very significant – approximately 1.5% for two of the months and 7% for the other two months. Finally given the length of time the plant has been in operation, having only four particular months where the violation occurred is certainly not evidence of recalcitrance, defiance or indifference to the law. Lastly, while there was no specific evidence regarding the actual harm to the environment, the Court does understand the argument that if there is more production there are more emissions and therefore a greater impact on the environment.

Using the State's Exhibit 734 the Court makes the following calculation to determine approximately how many days Shelly was in excess of its production limits. Shelly produced about 2,100 tons per day in October 2005. Shelly was over its production limits by about 6000 tons. Therefore it was over its production limits for about 3 days. Shelly produced about 1,500 tons per day in November 2005. Shelly was over its production limits by about 23,000 tons. Therefore it was over its production limits for about 15 days. Shelly produced about 980 tons per day in April 2006. Shelly was over its production limits by about 28,000 tons. Therefore it was over its production limits for about 28 days. Shelly produced about 1,500 tons per day in May 2006. Shelly

was over its production limits by about 6,000 tons. Therefore it was over its production limits for about 9 days.

Based on the foregoing the Court finds that Shelly was in violation of its production limits for 55 days. The Court will accept the State's suggested penalty of $200.00 per day.

55 days at $200.00 per day	$ 11,000.00
Economic Benefit	$148,413.00
Total	**$159,413.00**

STATE'S NINTH CLAIM FOR RELIEF

In its Ninth Claim for Relief the State proved that certain required reports were not filed.

The Court does understand the need for and the importance of operating reports. These reports are essential to the State's obligation to regulate the industry. The failure to file reports while not harming the environment or producing any real economic advantage, does demonstrate a certain degree of indifference to the law. However, given the number of facilities Shelly operates and the very few reports that are not filed, the Court does not believe this to be a serious indifference to the law. Even the State does not view this issue too seriously as it has recommended a penalty of $1.00 per day. The Court finds the failure to file required reports more serious and will impose a penalty of $5.00 per day.

In mitigation the Court finds that part of the noncompliance is attributable to the government. The State is obviously aware that the facility exists, that a report is due and that it has not received the same. If the report is that important the government should

take action to get the report. At some point the report is really useless because the information is too old. Therefore the Court believes that after 90 days following when the report is due the appropriate penalty should be as suggested by the State, $1.00 per day. After one year after the report is due the Court can not believe the information is of any real value. If the State has not done anything for one year after the report is due the Court will not assess a penalty.

Shelly Materials Plant 61

90 days at $5.00 per day for each quarter that a report was not filed (90 x $5.00 x 2)	$ 900.00
275 days at $1.00 per day for each quarter that a Report was not filed (275 x $1.00 x 2)	$ 550.00
Total	**$1,450.00**

Allied Corp. Generator 21.0028

90 days at $5.00 per day	$ 450.00
275 days at $1.00 per day	$ 275.00
Total	**$ 725.00**

THE STATE'S TENTH CLAIM FOR RELIEF

This claim is similar to the Ninth Claim. The reasoning and applicable penalty shall be adopted and applied herein. The Court does not understand why the State is recommending $10.00 per day as opposed to $1.00 per day.

Shelly Materials Plant 63

84 days at $5.00 per day	$ 420.00
Total	**$ 420.00**

Shelly Materials Plant 91

41 days at $5.00 per day	$ 205.00
Total	**$ 205.00**

THE STATE'S TWELFTH CLAIM FOR RELIEF

This claim is similar to the Ninth Claim. The reasoning and applicable penalty shall be adopted and applied herein.

Stoneco, Inc. Generator 21.0021

33 days at $5.00 per day	$ 165.00
Total	**$ 165.00**

THE STATE'S THIREENTH CLAIM FOR RELIEF

This claim is similar to the Ninth Claim. The reasoning and applicable penalty shall be adopted and applied herein.

Stoneco, Inc., Plant 114

Report due July 3, 2005	
90 days at $5.00 per day	$ 450.00
128 days at $1.00 per day	$ 128.00
Report due October 21, 2005	
90 days at $5.00 per day	$ 450.00
37 days at $1.00 per day	$ 37.00
Report due May 27, 2006	
27 days at $5.00 per day	$ 135.00
Total	**$1,200.00**

STATE'S FOURTEENTH CLAIM FOR RELIEF

As stated above each of the findings herein relate to a violation of the terms and conditions of a PTI or PTO. However, each violation is very different and consequently the Court is not able to settle upon a single penalty that it believes is applicable to each finding. Therefore the Court will establish a separate penalty for each violation in this claim.

Shelly Materials Plant 24 Used Oil Records

The Court finds this violation is most similar to the violations noted in the State's Ninth Claim for Relief. There is no allegation of harm to the environment. Rather, it is a record keeping issue. Further, there is no evidence that Shelly repeatedly violated the requirement to maintain used oil records. To the contrary the violations were rare. The Court believes that the appropriate penalty is $5.00 per day.

2 days at $5.00 per day	$ 10.00
Total	**$ 10.00**

Shelly Materials Plant 40

Dust Suppressants

The Court finds this violation is most similar to the violations noted in the State's Ninth Claim for Relief. There is no allegation of harm to the environment. Rather, it is a record keeping issue. Further, there is no evidence that Shelly repeatedly violated the requirement to use dust suppressants. To the contrary the violations were rare. The Court believes that the appropriate penalty is $5.00 per day.

92 days at $5.00 per day	$ 460.00
Total	**$ 460.00**

Emissions Testing

This is more than a records keeping issue. This is about failure to complete required testing. Without the required tests being complete there is no way to know if a facility is in compliance and not harming the environment. But again as the Court has noted in the assessment of other penalties the State has an obligation to make sure that the tests are done. If the State takes no action after the required period has expired then the State must accept some of the responsibility and an appropriate amount of the penalty should be mitigated. Therefore the Court will impose a penalty of $50.00 per day for each day up to 180 days. Thereafter the penalty is reduced to $5.00 per day.

180 days at $50.00 per day	$ 9,000.00
108 days at $5.00 per day	$ 540.00
Total	**$ 9,540.00**

Used Oil Records

The Court finds this violation is most similar to the violations noted in the State's Ninth Claim for Relief. There is no allegation of harm to the environment. Rather, it is a record keeping issue. Unlike the record keeping for used oil noted above this violation did extend for over one year and is therefore more serious. The Court believes that the appropriate penalty is $5.00 per day.

368 days at $10.00 per day	$ 1,840.00
Total	**$ 3,680.00**

Shelly Materials Plant 61 Speed Limit Sign

Given the nature of the violation and the fact that it only occurred for 1 day the Court believes that the appropriate penalty is $1.00 per day.

1 day at $1.00 per day	$ 1.00
Total	**$ 1.00**

Middleport Terminal Emissions Control

Not having the required equipment in place is a very serious violation. This relates directly to the protection of the environment. However, as I have repeatedly stated the State has responsibility to make sure that the requirements that it imposes, especially as it relates to protecting the environment, are satisfied. Therefore the Court will impose a penalty of $100.00 per day for the first 180 days. Thereafter the penalty will be reduced to $10.00 per day.

180 days at $100.00 per day	$18,000.00
1977 days at $10.00 per day	$19,770.00
Total	**$37,770.00**

STATE'S SIXTEENTH CLAIM FOR RELIEF

In the State's Sixteenth Claim for Relief the Court has found that Shelly on occasion accepted shipments of used oil without any chemical analysis as required. This is more than a record keeping error. The Court believes that if an analysis is not available the product should not be accepted. Evidence was provided that the quality of the used oil that is burned has a direct impact on the environment. Therefore it is important that Shelly know the content of the used oil that is accepted and burned. However the Court notes that the violations were rare. Accordingly the Court believes that the appropriate penalty is $250.00 for each shipment.

Shelly Materials Plant 24

1 shipment at $250.00	$ 250.00

Total	**$ 250.00**

Shelly Materials Plant 61

1 shipment at $250.00	$ 250.00
Total	**$ 250.00**

STATE'S SEVENTEENTH CLAIM FOR RELIEF

In its Seventeenth Claim for Relief the State proved that Shelly received and burned used oil that did not meet the specifications of operating permits. The Court is satisfied that the State proved that the content of the used oil is directly related to the environment. Accepting and burning used oil that the operator knows does not meet the specification is evidence of a disregard for the conditions of the operating permit. On the positive side, as serious as the Court finds this issue to be the number of occurrences of the same is not significant given the overall operation of Shelly's facilities. The Court believes that the appropriate penalty is $500.00 for each shipment of used oil that was received and burned that does not meet the specification of the permit.

Shelly Materials Plant 24

5 Shipments at $500.00 each	$ 2,500.00
Total	**$ 2,500.00**

Shelly Materials Plant 62

5 Shipments at $500.00 each	$ 2,500.00
Total	**$ 2,500.00**

Shelly Materials Plant 90

5 Shipments at $500.00 each	$ 2,500.00
Total	**$ 2,500.00**

Shelly Materials Plant 91

2 Shipments at $500.00 each	$ 1,000.00
Total	**$ 1,000.00**

STATE'S EIGHTEENTH CLAIM FOR RELIEF

In its Eighteenth Claim for Relief the State proved that Shelly received and burned used oil that did not meet the specifications of operating permits. The Court is satisfied that the State proved that the content of the used oil is directly related to the environment. Accepting and burning used oil that the operator knows does not meet the specification is evidence of a disregard for the conditions of the operating permit. On the positive side, as serious as the Court finds this issue to be the number of occurrences of the same is not significant given the overall operation of Shelly's facilities. The Court believes that the appropriate penalty is $500.00 for each day that used oil that was received and burned that does not meet the specification of the permit. The exact number of shipments was not proven.

Stoneco, Inc. Plant #118

35 days at $500.00 per day	$ 17,500.00
Total	**$ 17,500.00**

STATE'S NINETEENTH CLAIM FOR RELIEF

In its Nineteenth Claim for Relief the State proved that Shelly received and burned used oil that did not meet the specifications of operating permits. The Court is satisfied that the State proved that the content of the used oil is directly related to the environment. Accepting and burning used oil that the operator knows does not meet the specification is evidence of a disregard for the conditions of the operating permit. On the

positive side, as serious as the Court finds this issue to be the number of occurrences of the same is not significant given the overall operation of Shelly's facilities. The Court believes that the appropriate penalty is $500.00 for each day that used oil that was received and burned that does not meet the specification of the permit. The exact number of shipments was not proven.

Shelly Materials Plant 62

2 days at $500.00 per day	$ 1,000.00
Total	**$ 1,000.00**

Shelly Materials Plant 63

4 days at $500.00 per day	$ 2,000.00
Total	**$ 2,000.00**

Deterrence

The final factor for the Court's consideration when determining the appropriate penalty is deterrence. As quoted above ". . . the civil penalty, in order to deter a violation must be large enough to hurt the offender."

First of all the Court does not fully understand what is intended by hurting the offender. Any penalty would impact a corporation's profit and therefore hurt.

Second, except for the continuing violations that relates to reports that have not been filed it appears to the Court that Shelly is in compliance. The Court has already found that the data from the missing reports would be so old that its value would be negligible at best. The compliance is the result of a voluntary audit. What is left for the Court to deter?

Third, the total penalty awarded by the Court and summarized below is $350,123.52. According to Shelly's Findings of Fact 1148 and 1149 the penalty is 8 times larger than the average penalty Ohio EPA obtained in 2006 and 10 times larger than the average penalty Ohio EPA obtained in 2005.

Based on the foregoing the Court does finds that the amount of the penalty is appropriate.

Injunctive Relief

Additionally, the State seeks injunctive relief.

The Tenth District Court of Appeals has held as follows:

> When a request for injunctive relief is based upon a past wrong, a plaintiff must show a real or immediate threat that the plaintiff again will be wronged. *Davis v. Flexman* (S.D.Ohio 1999), 109 F.Supp.2d 776, 783-84, citing *City of Los Angeles v. Lyons* (1983), 461 U.S. 95, 111, 103 S.Ct. 1660, 1670, 75 L. Ed. 2d 675; *O'Shea v. Littleton* (1974), 414 U.S. 488, 495-96, 94 S.Ct. 669, 676, 38 L. Ed. 2d 674. "The gravamen of the remedy * * * is that a defendant is about to commit an act that will produce immediate and irreparable harm for which no adequate legal remedy exists." *Hack v. Sand Beach Conservancy Dist.*, 176 Ohio App.3d 309, 2008 Ohio 1858, at P24, 891 N.E.2d 1228.
>
> Other than bare allegations that Germain may once again choose to use a form which it voluntarily ceased using once it discovered the form was illegal, plaintiff has not demonstrated that the harm plaintiff seeks to prevent will recur. Quite simply, plaintiff's request for injunctive relief does no more than request that the court order Germain to "obey the law." See *United States v. Matusoff Rental Co.*. (S.D.Ohio 2007), 494 F. Supp. 2d 740, 755-57. . . .

Searles v. Germain Ford of Columbus, L.L.C. (Franklin App., March 24, 2009), No. 08AP-728, 2009 Ohio App. LEXIS 1112, at *9-10; see Athens Metro. Hous. Auth. v. Pierson (Athens App., March 12, 2002), Nos. 01CA28 & 01CA29, 2002 Ohio App. LEXIS 2100, at *23-24 ("Generally, when the equitable remedy of injunction is sought, a plaintiff must demonstrate, by clear and convincing evidence, actual irreparable harm or

an actual threat of irreparable harm. . . . The design of an injunction is to prevent future injury and not to redress past wrongs.").

In the present case, except for various reports which still have not been filed Shelly's operations are in compliance with the applicable regulations. There is no evidence that any of the facilities are not properly permitted or being operated in violation of the terms of its operating permits. To the extent that certain reports have not been filed the information would be so outdated as to have no value. Further given the fact that Shelly is now in compliance in large part as a result of the voluntary audit the State has failed to "show a real or immediate threat that the plaintiff again will be wronged." Thus, the Court declines to grant injunctive relief.

SUMMARY OF PENALTY

Judgment is entered in favor of the State and against Shelly on the claim of immunity. Judgment is entered in favor of Shelly and against the State on the request for injunctive relief. Judgment is entered in favor of the State and against Shelly in Claim One through Twenty as follows:

		TOTAL
Total Penalty First Claim		
Shelly Materials Inc.		**$ 15,525.00**
Total Penalty Second Claim		
Shelly Materials Inc.		**$ 87,399.52**
Total Penalty Seventh Claim		
Shelly Materials Inc.		**$ 4,500.00**
Total Penalty Eighth Claim		
Shelly Materials Inc.		**$159,413.00**
Total Penalty Ninth Claim		
Shelly Materials Inc.	**$1,450.00**	
Allied Corp.	**$ 725.00**	**$ 2,175.00**
Total Penalty Tenth Claim		
Shelly Materials Inc.		**$ 625.00**
Total Penalty Twelfth Claim		
Stoneco Inc.		**$ 165.00**
Total Penalty Thirteenth Claim		
Stoneco Inc.		**$ 1,200.00**

Total Penalty Fourteenth Claim

Shelly Materials Inc	**$11,851.00**	
Middleport Terminal Inc.	**$37,770.00**	
		$ 49,621.00

Total Penalty Sixteenth Claim

Shelly Materials Inc.	**$ 500.00**

Total Penalty Seventeenth Claim

Shelly Materials Inc.	**$ 8,500.00**

Total Penalty Eighteenth Claim

Stoneco Inc.	**$ 17,500.00**

Total Penalty Nineteenth Claim

Shelly Materials Inc.	**$ 3,000.00**

Shelly Materials Inc.	**$292,763.52**	
Allied Corp.	**$ 725.00**	
Stoneco Inc.	**$ 18,865.00**	
Middleport Terminal Inc.	**$ 37,770.00**	
	$350,123.52	**$350,123.52**

Both parties have prevailed in this action. The State prevailed on Shelly's claim for immunity. Shelly prevailed on the State's Claim for injunctive relief. As to Claims One through Twenty, each party prevailed depending on the claim and the facility. Therefore, each party shall be responsible for their own costs in this action.

CHARLES A. SCHNEIDER, JUDGE