

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION

STATE OF OHIO

COLUMBUS STEEL CASTINGS CO.  
SUCCESSOR TO  
BUCKEYE STEEL CASTINGS COMPANY

Appellant,

v.

CHRISTOPHER JONES, DIRECTOR  
OF ENVIRONMENTAL PROTECTION

Appellee.

Case No. ERAC 255266

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DECISION

Rendered on September 29, 2011

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*Robert L. Brubaker, Esq. and David E. Northrup, Esq. for appellant*

*Mike DeWine, Attorney General, Gary L. Pasheilich, Esq. and Samuel Peterson, Esq., for appellee Director of Ohio Environmental Protection*

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PETERSEN, COMMISSIONER

This matter comes before the Environmental Review Appeals Commission ("ERAC," "Commission") upon the February 7, 2003 Notice of Appeal filed by Buckeye Steel Castings Company. The action underlying the instant appeal is the Director of the Ohio Environmental Protection Agency's ("Director") December 18, 2002 issuance of a Final Title V Permit to Buckeye Steel Castings Company ("Buckeye Steel"), which was amended and reissued by the Director on December 30, 2002. The Amended Final Title V Permit became effective on January 8, 2003.

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On April 12, 2010, Buckeye Steel's successor in interest, Columbus Steel Castings ("CSC"), filed a Motion for Summary Judgment Vacating New Substantive Requirements in the Title V Permit, which was supplemented on July 1, 2010, by order of the Commission. The Director filed two memoranda in opposition, one on May 14, 2010, and one July 20, 2010. The Commission heard oral argument on the motion on August 31, 2010, at which CSC presented its position that the Director included new substantive requirements in the federally enforceable portion of the Title V permit contrary to Ohio Revised Code ("R.C.") 3704.036(K).

Based upon a review of the facts of the case, relevant filings, oral argument, and pertinent law, the Commission finds the Director's final action issuing the Title V permit with new substantive requirements in the federally enforceable portion of the permit was unlawful. The Commission hereby makes the following Findings of Fact, Conclusions of Law, and order granting Appellant's Motion for Summary Judgment.

### **FINDINGS OF FACT**

{¶1} For decades, Buckeye Steel owned and operated a steel foundry that sits on 90 acres of land in Columbus, Ohio, 22 acres of which is under roof. Affidavit of Bryon Marusek at ¶6 attached as Exhibit A to Case File Item UUU.<sup>1</sup>

{¶2} The foundry was in operation well before Ohio's air pollution control program was developed and employs air emission sources that pre-date Ohio's Permit

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<sup>1</sup> Byron Marusek is an Environmental Specialist 2 at Ohio EPA in the Division of Air Pollution Control. Mr. Marusek is responsible for enforcing compliance with Ohio's air pollution control laws, as well as evaluating and enforcing permits issued thereunder. He maintains files related to CSC's steel foundry. Affidavit of Byron Marusek at ¶1-2, 4.

to Install ("PTI") program. Therefore, the majority of the air emission sources at the foundry were not required to have a PTI and in fact do not. Id. at ¶5, 8.

{¶3} Because the majority of the emission sources do not have PTI's, Ohio EPA required Buckeye Steel to submit a control plan to define reasonably available control measures ("RACM") for each relevant source if RACM was not being employed and to achieve final compliance with the RACM requirement by December 31, 1982. Affidavit of Byron Marusek at ¶8-10.

{¶4} Buckeye Steel submitted RACM studies in the early 1990's for its sources and defined the specific levels of control as meeting the definition of RACM. Id. at ¶13.

{¶5} Furthermore, in a letter from Ohio EPA to Buckeye Steel dated September 26, 1989, Buckeye Steel was required to develop a Preventative Maintenance and Malfunction Abatement Plan ("PMMAP") for the facility. That plan was submitted to Ohio EPA in two parts on March 16, 1990, and March 1, 1991. Buckeye Steel revised and updated the plan on May 31, 1995. Id. at ¶25-26.

{¶6} The Director approved the revised and updated PMMAP on August 14, 1995, and indicated at approval Ohio EPA's expectation that all air pollution control devices be operated in accordance with the PMMAP. Id. at ¶27.

{¶7} In 1990, the United States Congress enacted amendments to the federal Clean Air Act ("CAA"), which included authorization for a federal operating permit program, commonly referred to as the "Title V" program. Title V operating permit programs are intended "to consolidate into a single federally enforceable document all requirements of the [Clean Air Act] that apply to individual sources [of air pollution]." 66

F.R. 63180; *Lafleur v. Whitman* (2002), 300 F.3d 256, 262; Affidavit of James Orlemann at ¶4 attached as Exhibit C to Case File Item UUU.<sup>2</sup>

{¶8} On July 21, 1992, the United States Environmental Protection Agency ("U.S. EPA") promulgated final rules for the Title V permit program, which are codified at 40 CFR Part 70. *Id.* at ¶3.

{¶9} The U.S. EPA summarized the purpose and workings of Title V permits as follows:

The purpose of title V permits is to reduce violations of air pollution laws and improve enforcement of those laws. Title V permits do this by:

1. recording in one document all of the air pollution control requirements that apply to the source. This gives members of the public, regulators, and the source a clear picture of what the facility is required to do to keep its air pollution under the legal limits.
2. requiring the source to make regular reports on how it is tracking its emission of pollution and the controls it is using to limit its emissions. These reports are public information, and you can get them from the permitting authority.
3. adding monitoring, testing, or record keeping requirements, where needed to assure that the source complies with its emission limits or other pollution control requirements.
4. requiring the source to certify each year whether or not it has met the air pollution requirements in its title V permit. These certifications are public information.
5. making the terms of the title V permit federally enforceable. This means that EPA and the public can enforce the terms of the permit, along with the State. *Dayton Power & Light Company v. Jones* (2003), Case No. ERAC 574950, 2003 Ohio Env. Lexis 7, citing to <http://www.epa.gov/oar/oaqps/permits/>.

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<sup>2</sup> James Orlemann is the Assistant Chief of SIP Development and Enforcement at Ohio EPA and is responsible for supervising the staff within the SIP Development and Enforcement Section and overseeing the rulemaking and enforcement activities for the Division of Air Pollution Control at Ohio EPA. Affidavit of James Orlemann at ¶1-2.

**{¶10}** On October 29, 1993, R.C. 3704.036 was enacted to grant the Director the authority to create a federally approvable Title V program for the state. Specifically, this statute provides, in part:

(A) The director of environmental protection shall develop and administer a federally approvable Title V permit program and shall take all necessary and appropriate action to implement, through the issuance of Title V permits, applicable requirements of the federal Clean Air Act. \* \* \*

(B) The director shall adopt, and may amend, suspend, and rescind, rules to facilitate the implementation, supervision, administration, and operation of the Title V permit program that are consistent with, and no more stringent than, the requirements of Title V of the federal Clean Air Act and 40 C.F.R. part 70 \* \* \*.

**{¶11}** On April 20, 1994, pursuant to R.C. 3704.036, the Director adopted Ohio Administrative Code ("Ohio Adm.Code") Chapter 3745-77, which contains the administrative rules governing Ohio's Title V program. Affidavit of James Orelmann at ¶6.

**{¶12}** On August 15, 1995, U.S. EPA formally approved Ohio's Title V permit program and provided an effective date of October 1, 1995. Id. at ¶7.

**{¶13}** After Ohio's Title V permitting program was approved, Buckeye Steel applied to the Director for the issuance of a Title V permit for its steel foundry on January 7, 1999. Certified Record ("CR") Item 9.

**{¶14}** The Director issued a Title V permit to Buckeye Steel for its foundry on December 18, 2002, but as the result of a clerical correction, an amended Title V permit was issued to Buckeye Steel on December 30, 2002. The effective date of the amended Title V permit was January 8, 2003. CR Item 1.

**{¶15}** The Title V permit contains terms and conditions in the state and federally enforceable section of the permit for the following emissions units: F002, F006, F007, F008, F009, F010, K001, K002, K004, P007, P009, P011, P012, P023, P029, P030, P032, P033, P041, P042, P043, P044, P046, P047, P048, P049, P051, P052, P053, P055, P901, P902, P903, P904, P905, P906, P907, and P908. CR Item 1.

**{¶16}** These terms and conditions generally fall into three categories: 1) terms imposing requirements to capture a numerical percentage of fugitive dust emissions and to eliminate visible emissions of the dust using RACM; 2) operational restrictions on certain air emissions sources; and 3) miscellaneous requirements such as emission limits or limits on production.

**{¶17}** Having objections to the permit terms and conditions, Buckeye Steel timely filed its Notice of Appeal on February 7, 2003. Case File Item A.

**{¶18}** Buckeye Steel filed an Amended Notice of Appeal on February 10, 2003 raising the following assignments of error:

1. Ohio EPA failed to comply with the requirements of [Ohio Adm.Code] 3745-77-08 in issuing the Final and Amended Title V Permit because the Final and Amended Title V Permit contains new operational restrictions, monitoring, recordkeeping, reporting and testing requirements which were never previously publicly noticed. Therefore, the Final and Amended Final Title V Permit is unlawful and unreasonable. For instance, Ohio EPA changed Title V Permit provisions after the Preliminary Proposed Title V Permit was issued. [Buckeye Steel] and the public were thereby denied the opportunity to comment on these changes in violation of the procedures for permit issuance set forth in [Ohio Adm.Code] 3745-77-08. Changes to the Final and Amended Final Title V Permit that have not gone through public comment are unlawful and unreasonable.

2. The Final and Amended Final Title V Permit is unlawful under [R.C. 3704.036(K)] and unreasonable to the extent it imposes new substantive requirements beyond the federally enforceable requirements applicable to the facility independent of the Final and Amended Final Title V Permit.
3. The Final and Amended Final Title V Permit is unlawful under [R.C. 3704.036(K)] and unreasonable to the extent that the permit fails to specify the regulatory citation for a federal requirement or fails to identify the difference in form as compared to the federal requirement on which it is based.
4. The Final and Amended Final Title V Permit terms and conditions are unlawful and unreasonable to the extent that they fail to minimize procedural burdens and maximize source operational flexibility as required under [R.C. 3704.0636(M)]. For example, the Final and Amended Final Title V Permit fails to provide any flexibility or provisions to allow necessary time for facility operations to resume to full operational capacity, following the bankruptcy sale, before required testing by the new owners with emission units operating 'at or near maximum capacity.'
5. [Buckeye Steel] objects to all other aspects of the Title V Permit which are otherwise arbitrary, capricious, unlawful or unreasonable. Case File Item B.

**{¶19}** In 2003, CSC purchased the facility and was substituted as the appellant in this matter. Case File Item KKKKK.

**{¶20}** On April 12, 2010, CSC filed a Motion for Summary Judgment Vacating New Substantive Requirements in the Title V Permit ("Motion"). Case File Item GGG.

**{¶21}** In the Motion, CSC argues that the terms and conditions contained in the federally enforceable section of the Title V permit are new substantive requirements that appear in the Title V permit for the first time. Consequently, CSC contends that these terms and conditions violate R.C. 3704.036. Id.



**{¶22}** CSC attached an affidavit from Daniel Prater in support of its motion. Mr. Prater is an environmental policy analyst employed by the law firm of Porter Wright Morris & Arthur LLP. Affidavit of Daniel Prater at ¶1 attached to Case File Item GGG

**{¶23}** Mr. Prater attests that he compiled a table listing all substantive requirements in the Title V permit that do not appear in prior permits. Affidavit of Daniel Prater at ¶4 attached to Case File Item GGG. The table attached to Mr. Prater's affidavit contains four columns. The first column lists the name and Ohio EPA designated source number of the emissions unit in the Title V permit for which the permit imposes additional terms and conditions that CSC suggests were not contained in prior permits or rules applicable to the unit. The second column lists all substantive requirements for each emission unit that CSC contends do not appear in the rules cited by the Director or in any prior permits issued for those units. The third column lists the rule and prior permit to install, if one was issued, listed in the Title V permit as the source for the requirements listed in the second column. The fourth column sets forth a narrative from Mr. Prater stating his position that the cited rule and permit, if any, do not contain the requirements listed in the second column or contain a requirement that is different from the requirement contained in the second column. Id. at ¶ 5-8.

**{¶24}** CSC contends through the Motion and Mr. Prater's affidavit that the fugitive dust capture requirements and zero visibility emissions standards imposed on units F002, F006, F007, F008, F009, F010, P007, P009, P011, P012, P029, P033, P901, P902, P903, P904, P908, K002, K004, P046, P047, P048, P049, P051, P052, P053, P905, P906 and P907 are new requirements because the regulatory basis cited

by the Director for the requirements, either Ohio Adm.Code 3745-17-08(B)(3) or Ohio Adm.Code 3745-31-05(A)(3), do not require a unit to achieve a specified percentage of capture efficiency or to wholly eliminate the emissions of visible fugitive dust from non-stack openings in the building. Case File Item GGG.

**{¶25}** Moreover, CSC argues that the restrictions on the operation of emissions sources F006, P007, P009, P011, P012, P029, P030, P032, P033, P041, P053, P901, P902, P904, and P908 requiring a mandatory pressure drop range across a baghouse, imposing conditions on the operations of wet scrubbers, imposing a mandatory pressure drop range, or minimum water supply pressure have no regulatory citation to a rule or PTI for the conditions. Thus, CSC suggests that these restrictions are new, having appeared in the Title V permit for the first time. Id.

**{¶26}** The Director filed his Memorandum in Opposition to Appellant's Motion for Summary Judgment on May 14, 2010, arguing that Columbus Steel Castings failed to produce sufficient evidence for the Commission to grant the motion. The Director contends that Mr. Prater's affidavit relied upon documentary evidence that was not presented with the Motion, was not admitted into the records of the proceedings, and was not contained in the Certified Record. Case File Item MMM.

**{¶27}** After the Commission ordered CSC to supplement its motion with authenticated documents, CSC filed its Supplemental Filing in Support of its Motion for Summary Judgment on July 1, 2010, containing authenticated documents reviewed by Daniel Prater in support of the original Motion. Case File Item RRR.

**{¶28}** For purposes of authenticating the documents Mr. Prater reviewed in support of his affidavit, CSC attached an affidavit from Daniel Chamberlain, Environment Manager at CSC. Mr. Chamberlain's Affidavit contains copies of the Amended Title V permit as well as the following Permits to Install (PTI) issued to Buckeye Steel, which are now in the possession of CSC: PTI 01-2930, PTI 01-8142, PTI 01-8129, PTI 01-8082, PTI 01-8404, PTI 01-8278, and PTI 01-3005. Affidavit of Daniel Chamberlain at ¶2 attached to Case File Item RRR.

**{¶29}** Mr. Prater attests that he reviewed the documents authenticated by Mr. Chamberlain when preparing the table attached as an exhibit to his first affidavit. See Affidavit of Daniel Prater at ¶3 attached to Case File Item RRR.

**{¶30}** On July 20, 2010, the Director filed Appellee's Second Memorandum in Opposition to Appellant's Motion for Summary Judgment. Case File Item UUU.

**{¶31}** In his Second Memorandum in Opposition, the Director contends that the terms and conditions contained in the federally enforceable section of the Title V permit are not new substantive requirements because the disputed terms reflect RACM and best available technology ("BAT"), as contained in reports submitted from Buckeye Steel to the Director. Moreover, the Director contends that the terms contained in the federally enforceable section of the Title V permit were derived from CSC's PMMAP and are thus not new substantive requirements. *Id.*

**{¶32}** The Director attached an affidavit by James Orlemann in support of the arguments raised in his Second Memorandum in Opposition. Mr. Orlemann explains

the relationship between RACM and BAT and how such is considered in issuing Title V permits. Id.

{¶33} Mr. Orlemann avers, "RACM requirements are not defined by statute or rule, but that such are determined on a case-by-case basis." Affidavit of James Orlemann at ¶14. Moreover, he states, "BAT is a case-by-case determination of the Director and is emissions unit-specific." Affidavit of James Orlemann at ¶18. Further, he attests, "General rules that provide for case-by-case source determinations of requirements that are carried through into permit terms are not unusual." Id. at ¶16. Continuing, he states, "Source-specific and/or facility-specific, case-by-case determinations must be made for the control requirements and emission limitations in order to fully implement the rules. Once those determinations have been made, the details are then specified in the terms and conditions of the applicable permits to make the determinations enforceable." Id. at ¶17.

{¶34} On August 31, 2010, the Commission heard oral arguments on CSC's motion.

{¶35} By entry dated March 31, 2011, the Commission ordered the parties to submit proposed findings of fact and conclusions of law on the issues raised in CSC's Motion. The Commission received CSC's proposed findings of fact and conclusions of law on April 29, 2011 and the Director's proposed findings of fact and conclusions of law on May 2, 2011. Case File Items IIII, KKKKK.

{¶36} In the Director's proposed findings of fact and conclusions, the Director conceded that the terms and conditions contained in the federally enforceable section of

the Title V permit for the following emissions units were erroneous: K002, P046, P047, P048, P905, and P906. The Director also conceded that the opacity limit for emission unit P053 was erroneous. Case File item KKKKK.

{¶37} The Director also indicates that emissions units K004, P049, P051, P052, and P907 have been permanently shut down, and thus does not present any evidence to rebut the contentions raised by CSC in its motion with respect to these units. Case File Item KKKKK.

### CONCLUSIONS OF LAW

{¶38} Ohio Civil Rule ("Civ.R.") 56 governs summary judgment, a procedural mechanism to terminate litigation when a resolution of factual disputes is unnecessary. *Chalfant v. P.W. Motel Mgt.*, 2000 Ohio App. LEXIS 1308, 1309. Although not strictly bound by the Ohio Rules of Civil Procedure, the Commission has historically applied Civ.R. 56 when addressing motions for summary judgment. *Waste Mgt. of Ohio, Inc. v. Bd. of Health of the City of Cincinnati* (Sept. 29, 2005), ERAC Case Nos. 315713, 315743; *General Electric Lighting v. Jones* (Aug. 21, 2003), ERAC Case No. 185017; *Belmont Cty. Defenders, et al. v. Jones* (November 21, 2001), ERAC Case Nos. 074914-074949.

{¶39} Specifically, Civ.R. 56(C) states, in relevant part:

\* \* \* Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, and transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. \* \* \*

**{¶40}** Thus, it is well-established that a motion for summary judgment will be successful if the following three factors are demonstrated:

\* \* \* 1) there is no genuine issue as to any material fact; 2) the moving party is entitled to judgment as a matter of law; and 3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Daily v. Am. Family Ins. Co.*, 2008 Ohio 3082, 3083, 2008 Ohio App. LEXIS 2604 (Ohio Ct.App., June 19, 2008).

**{¶41}** Because the Director concedes that the terms and conditions contained in the federally enforceable section of the Title V permit for emissions units K002, P046, P047, P048, P905, and P906, as well as the opacity limit for emissions unit P053 were erroneous, the Commission grants Appellant's Motion with respect to those units.

**{¶42}** By arguing that emissions units K004, P049, P051, P052, and P907 have been permanently shut down, the Director has not presented any evidence of the type proscribed in Civ.R. 56 to create any genuine issue of material fact. Therefore, the Commission grants Appellant's Motion with respect to those units.

**{¶43}** The remaining issue before the Commission in CSC's motion is whether the terms and conditions contained in the federally enforceable section of Buckeye Steel's Title V permit, as it relates to the emission units F002, F006, F007, F008, F009, F010, K001, P007, P009, P011, P012, P023, P029, P030, P032, P033, P041, P042, P043, P044, P053 (except for the opacity limit), P055, P901, P902, P903, P904, and P908, are new substantive requirements in violation of R.C. 3704.036(K).

**{¶44}** R.C. 3704.036(K) states in pertinent part:

A Title V permit shall address all existing federally enforceable requirements applicable to the permitted facility and shall not impose new

substantive requirements beyond the federally enforceable requirements except for terms and conditions that are identified as not federally enforceable as provided in division (A) of this section. A Title V permit shall specify the regulatory citation for federal requirements addressed in the permit and shall identify any difference in form as compared to the federally enforceable requirement on which it is based.

{¶45} The controlling case on the interpretation of R.C. 3704.036(K) is the Tenth District Court of Appeal decision in *General Electric Lighting v. Koncelik*, 2006-Ohio-1655. In *General Electric Lighting*, the Director issued a Title V permit to General Electric Lighting ("GEL") for its lime glass-melting furnace. The Title V permit required GEL to operate its electrostatic precipitator ("ESP") on a glass furnace within a specific range for the secondary voltage and secondary current. This requirement was contained in the federally enforceable section of the permit. The permit also indicated that any operation outside of that designated range would constitute a violation, even if particulate emissions were below the limit prescribed in federal regulations. *Id.* at ¶3.

{¶46} GEL appealed the issuance of the permit to this Commission and moved for partial summary judgment arguing that the permit requirements for the ESP were new substantive requirements contained in the federally enforceable section of the permit in violation of R.C. 3704.036(K). Ohio EPA also filed a motion for partial summary judgment arguing that the ESP requirements did not violate R.C. 3704.036(K). *Id.* at ¶4.

{¶47} The Commission granted Ohio EPA's motion and denied GEL's motion relative to the ESP requirements. The Commission found that Ohio EPA's actions were lawful because Ohio Adm.Code 3745-77-07(A)(1) required Title V permits to contain

operational requirements and emission limitations that assure compliance with all applicable requirements at the time of issuance. *Id.* at ¶5.

¶48} GEL appealed the Commission's denial of its motion on the ESP restriction to the Tenth District Court of Appeals. *Id.* at ¶1. Analyzing the specific requirements placed on GEL in relationship to the regulations cited by the Director in the Title V permit, the Court held that the ESP requirements constituted new substantive requirements placed on GEL that could not be contained in the federally enforceable section of the permit.

¶49} The Court stated that a Title V permit can: "(1) incorporate existing substantive federally enforceable requirements; (2) incorporate new non-substantive federally enforceable requirements; or (3) impose new substantive requirements under state law that, as long as those terms and conditions are separately identified as not enforceable under federal law." *Id.* at ¶19.

¶50} Thus, it is for the Commission to determine whether the terms and conditions in the federally enforceable section of the Title V permit issued to Buckeye Steel are new substantive requirements.

¶51} The Commission finds, and neither party has disputed, that these terms and conditions are requirements because the permit demands that CSC, as successor in interest, comply with them.

¶52} A requirement is substantive "if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction, or creates a new right." *General*



*Electric Lighting* at ¶22, citing, *State v. Cook* (1998), 83 Ohio St.3d 404, 411, citing *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 107.

{¶53} Using this definition, the Commission finds that the requirements at issue are in fact substantive because they create and define a duty imposed upon CSC under the permit and define the conditions under which the emissions units may operate. Moreover, these requirements certainly impose liability upon CSC. Failure to comply with the requirements would subject CSC to federal penalties.

{¶54} Having determined that the permit terms and conditions are substantive requirements, the Commission must now decide whether they are new.

{¶55} Neither party disputes that the genesis for the terms and conditions in the federally enforceable section of the Title V permit is the RACM studies and PMMAP previously forwarded by Buckeye Steel to Ohio EPA. However, the parties disagree on whether those requirements are new substantive requirements, as CSC contends, or existing applicable requirements designed to ensure compliance with all applicable regulations per Ohio Adm.Code 3745-77-07(A)(1), as the Director argues<sup>3</sup>.

{¶56} Mr. Prater's affidavit cites to specific terms and conditions in the Title V permit for the various emissions sources that according to the Director are designed to implement general provisions in Ohio Adm.Code 3745-15-06(D), Ohio Adm.Code 3745-17-08(B), and/or Ohio Adm.Code 3745-31-05(A)(3). Mr. Prater states that the specific

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<sup>3</sup> The Tenth District Court of Appeals rejected Ohio EPA's contention that Ohio Adm.Code 3745-77-07(A)(1) gives the Director broad authority to include terms and conditions, including operational requirements and limitations, in the federally enforceable section of a Title V permit even if those operational restrictions assure compliance with all applicable requirements. The Court held that such a position ignores the plain language of R.C. 3704.036(K). *General Electric Lighting* at ¶17.

operational restrictions contained in the Title V permit do not appear in the rules cited by the Director in the permit.

{¶57} The Director does not dispute CSC's contention that the specific terms and conditions do not appear in the rules cited by the Director in the permit. In fact, Mr. Orlemann's affidavit actually supports CSC's point that the cited rules do not contain specific RACM or BAT requirements, but that such are determined on a case by case basis.

{¶58} Likewise, although Ohio Adm.Code 3745-15-06(D) authorizes the Director to require a facility operator to submit a PMMAP, it does not enable the Director to place specific restrictions into the federally enforceable section of a Title V permit even if the restrictions were submitted as part of the PMMAP and were intended to implement the provisions of Ohio Adm.Code 3745-15-06(D).

{¶59} The *General Electric Lighting* court found the operational restrictions at issue in that case to be new notwithstanding the fact that the restrictions were derived from documents previously submitted by the permit holder. In that case, Ohio EPA imposed the limitations for the ESP based upon historical emission test reports submitted by GEL to Ohio EPA that showed GEL was complying with the limitations imposed in GEL's Title V permit. *General Electric Lighting* at ¶20, 40.

{¶60} The Commission finds the Director's position that the operational restrictions contained in the federally enforceable section of CSC's Title V permit are not new because they are derived from the RACM studies and/or the PMMAP is similar to the position the Tenth District Court of Appeals rejected in the *General Electric Lighting*

case regarding the use of the emissions test reports. Notwithstanding the fact that the RACM studies and the PMMAP were submitted by Buckeye Steel and may contain elements that Ohio EPA considers necessary to ensure compliance per Ohio Adm.Code 3745-77-07(A)(1), the Commission finds that those restrictions contained in the federally enforceable section of the Title V permit, even if derived from the RACM studies and/or PMMAP, are new substantive requirements for purposes of R.C. 3704.036(K).

{¶61} Finally, it is important to underscore that by Mr. Orlemann's own statements, the terms and conditions contained in the federally enforceable section of the Title V permit are new. Mr. Orlemann states, "Source-specific and/or facility-specific, case-by-case determinations must be made for the control requirements and emission limitations in order to fully implement the rules. Once those determinations have been made, the details are then specified in the terms and conditions of the applicable permits *to make the determinations enforceable*." Emphasis added. By his own admission, the operational restrictions contained in the Title V permit were not enforceable until they were placed in the Title V permit notwithstanding the existence of RACM, BAT, or the PMMAP.

{¶62} Because the terms and conditions were not enforceable before being placed in the Title V permit, the Commission can come to only one conclusion: the terms and conditions are new.

{¶63} Having found that the terms and conditions in the federally enforceable section of the Title V permit are new substantive requirements, the Commission finds that Director's inclusion of those terms and conditions in the federally enforceable

section for units F002, F006, F007, F008, F009, F010, K001, P007, P009, P011, P012, P023, P029, P030, P032, P033, P041, P042, P043, P044, P053, P055, P901, P902, P903, P904, and P908 violates R.C. 3704.036(K).

**ORDER**

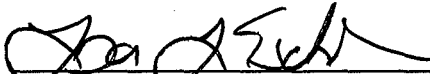
Based upon the foregoing, the Commission finds that Appellee Director acted unlawfully in issuing the Title V permit to Buckeye Steel with new substantive requirements in the federally enforceable section thereof. Accordingly, Appellant's Motion is hereby SUSTAINED.


The Commission finds there is no just cause for delay. Therefore, the Commission, in accordance with Ohio Adm.Code 3746-13-01, informs the parties that:


Any party adversely affected by an order of the commission may appeal to the court of appeals of Franklin County, or if the appeal arises from an alleged violation of a law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred. The party so appealing shall file with the commission a notice of appeal designating the order from which an appeal is being taken. A copy of such notice shall also be filed by the appellant with the court, and a copy shall be sent by certified mail to all other parties to the appeal. Such notices shall be filed and mailed within thirty days after the date upon which appellant received notice from the commission of the issuance of the order. No appeal bond shall be required to make an appeal effective.

ESCHLEMAN AND SHILLING, COMMISSIONERS, CONCUR

**THE ENVIRONMENTAL REVIEW  
APPEALS COMMISSION**

  
\_\_\_\_\_  
Lisa L. Eschleman, Chair

  
\_\_\_\_\_  
Melissa M. Shilling, Vice-Chair

  
\_\_\_\_\_  
Shaun K. Petersen, Member

Entered into the Journal of the  
Commission this 29th  
day of September, 2011.

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COLUMBUS STEEL CASTINGS  
SUCCESSOR TO BUCKEYE STEEL CASTINGS COMPANY  
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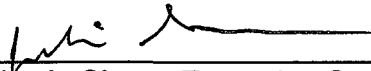
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Samuel Peterson, Esq.

No. 255266

**CERTIFICATION**

I hereby certify that the foregoing is a true and accurate copy of the DECISION in  
**Columbus Steel Castings Co. successor to Buckeye Steel Castings Company v.**  
**Christopher Jones, Director of Environmental Protection**, Case No. ERAC 255266  
entered into the Journal of the Commission this 29<sup>th</sup> day of September, 2011.

  
\_\_\_\_\_  
Julie A. Slane, Executive Secretary

Dated this 29<sup>th</sup> day of  
September, 2011, at Columbus, Ohio.

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