STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

In the matter of	Docket No.: 14-020647
Sierra Club and Anglers of the Au Sable on the permit issued to Harrietta-Grayling Fish Hatch (Consolidated Cases)	NPDES Permit No.: MI0059209
	Part: 31, Point Source Pollution Control
	Agency: Department of Environmental Quality
	Case Type: Water Resources Division

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FINAL DECISION AND ORDER

This matter was the subject of a contested case hearing resulting in the issuance of a Proposal for Decision (PFD) dated February 1, 2017, as well as a PFD on Remand from the Director dated September 19, 2017.

Exceptions to the February 1, 2017 PFD were filed by Petitioners Sierra Club and Anglers of the Au Sable (Anglers), Respondent Michigan Department of Environmental Quality's Water Resources Division (WRD), and Intervenor Harrietta Hills Trout Farm LLC (Harrietta Hills) on February 22, 2017. Responses to these exceptions were filed by Anglers, WRD, and Harrietta Hills on March 8, 2017.

Exceptions to the PFD on Remand from the Director were filed by Anglers on October 17, 2017, and by the other three Parties on October 24, 2017. Responses to

those exceptions were filed by all four Parties on November 7, 2017, and Anglers filed a correction to its response to exceptions on November 22, 2017.

This matter is now before the Director of the Michigan Department of Environmental Quality (DEQ) for a final agency decision pursuant to MCL 24.285 and Mich Admin Code, R 792.10133.

FACTS AND PROCEDURAL HISTORY

Harrietta Hills submitted an application for a National Pollutant Discharge Elimination System (NPDES) permit under Part 31, Water Resources Protection, of the Michigan Natural Resources and Environmental Protection Act (NREPA) on October 18, 2013. (Hearing Ex R-5.) The WRD issued Permit No. MI0059209 to Harrietta Hills on July 1, 2014. (Hearing Ex R-1.)

Sierra Club filed a petition for a contested case hearing to challenge the issuance of the permit pursuant to MCL 24.301 and MCL 324.3113(3) on August 13, 2014.[1] (Sierra Club's 8/13/14 Petition.) Anglers filed a similar petition on August 28, 2014. (Anglers' 8/28/14 Petition.) The Administrative Law Judge (ALJ) granted Harrietta Hills's motion to intervene on October 7, 2014. (10/7/14 Order.) The ALJ then issued an order consolidating the two cases on October 9, 2014. (10/9/14 Order.)

[1] Sierra Club's petition for contested case hearing references both MCL 324.3113(3) and MCL 324.3112(5). MCL 324.3112(5) allows aggrieved persons to challenge the reissuance, modification, suspension, or revocation of an existing NPDES permit and, therefore, does not apply here. MCL 324.3113(3) allows aggrieved persons to challenge the issuance of new NPDES permits, and so is the appropriate mechanism for challenging the permit at issue here.

As set forth in greater detail below, a contested case hearing was held in this matter, which resulted in the issuance of a PFD and the filing of exceptions to that PFD, as well as responses to those exceptions. Included in the exceptions filed by Anglers and Sierra Club were requests for oral argument on the exceptions. (Petitioners' 2/22/17 Exceptions.) Upon consideration of the exceptions, this tribunal, the DEQ Director, denied the Petitioners' requests for oral argument and remanded the matter for limited reconsideration of one of the ALJ's legal determinations. (DEQ Director's 6/27/17 Order.) Upon reconsideration, the ALJ issued a second PFD (Remand PFD), to which the Parties once again filed exceptions and responses to exceptions. (9/19/17 Remand PFD.)

This matter is now before this tribunal for rulings on the eight sets of exceptions and seven sets of responses to exceptions and issuance of a Final Decision and Order.

CONTESTED CASE HEARING

The contested case hearing was held on February 8, 9, 10, 11, 12, 24, 26, and 29, as well as March 1, 2, 3, 17, 18, and 22, and April 12, 13, 14, and 15, 2016. Over the course of this 18-day hearing, as set forth in detail in the PFD, Anglers offered the testimony of 9 witnesses and admitted 43 exhibits; Sierra Club offered the testimony of three witnesses and admitted 18 exhibits; the WRD offered the testimony of eight witnesses and admitted 54 exhibits; and Harrietta Hills offered the testimony of eight witnesses and admitted 51 exhibits. (2/1/17 PFD, pp 3–5.)

The parties subsequently submitted written closing arguments and written responses to closing arguments. (2/1/17 PFD, p 5.)

INITIAL PFD

The February 1, 2017 PFD included detailed findings of fact in which the ALJ conducted an extremely thorough review of the voluminous factual record created at the contested case hearing. (2/1/17 PFD, pp 6–99.) At the conclusion of this section of the PFD, the ALJ provided a three-page narrative summary of the findings of fact. (*Id.*, pp 99–101.) The PFD also contained 15 conclusions of law. (*Id.*, pp 101–104.) Because they are supported by the record and applicable law, these findings of fact (both the 94-page detailed narrative and the three-page summary) and conclusions of law are adopted by reference and incorporated into this Final Decision and Order, except as set forth below.

EXCEPTIONS TO THE INITIAL PFD

As noted above, exceptions to the 2/1/17 PFD were filed by all four parties on February 22, 2017, pursuant to MCL 24.281(1) and Mich Admin Code, R 792.10132. The exceptions filed by Sierra Club and Anglers included a request for oral argument on the exceptions. (Petitioners' 2/22/17 Exceptions.) The WRD, Anglers, and Harrietta Hills filed responses to each other's exceptions on March 8, 2017 (Sierra Club did not file responses to exceptions). Each exception, along with the responses to it, will be addressed here.

I. Exceptions filed by Sierra Club

Sierra Club set forth four exceptions to the initial PFD. (Sierra Club's 2/22/17 Exceptions, *passim*.)

1. First, Sierra Club argued that the ALJ erred when he concluded that the DEQ did not have the authority to include a permit term requiring Harrietta Hills to monitor for whirling disease or other biological organisms indicative of whirling disease. (Sierra Club's 2/22/17 Exceptions, pp 3, 5–10.) This exception was addressed and effectively adopted in this tribunal's June 27, 2017 order denying Petitioners' request for oral argument and remanding this matter to the Michigan Administrative Hearing System for limited reconsideration. (DEQ Director's 6/27/17 Remand Order, pp 2–7.)

Because this exception and the responses to it have been thoroughly addressed in the prior remand order, the reasoning for this tribunal's conclusion need not be repeated here. Rather, the February 27, 2017 remand order is adopted and incorporated by reference into this Final Decision and Order, and Sierra Club's exception on this issue is thereby adopted.

2. Sierra Club next argued that the ALJ erred when he did not propose amending the permit to require Harrietta Hills to adopt "certain operating practices," the employment of which was, according to Sierra Club, a major factor in the ALJ's decision not to add effluent limits for whirling disease and other biological organisms indicative of whirling disease. (Sierra Club's 2/22/17 Exceptions, pp 4, 10–13.) These "certain operating practices" are as follows:

- Harrietta Hills will use only trout eggs that are certified disease-free by the supplier;
- Harrietta Hills will use only trout eggs that were raised exclusively in groundwater;
- Harrietta Hills will only allow fish to be transferred to the facility after their bones have ossified;
- Harrietta Hills will keep a written schedule that describes the process for removing fish mortalities, which includes whole dead fish and fish parts, on a daily basis;
- Harrietta Hills must use raceways with concrete bottoms;
- Harrietta Hills must retain documentation of the above-described items, and make this documentation available upon request for inspection by the DEQ. [*Id*.]

As a preliminary matter, it should be noted that the ALJ has, since Sierra Club filed these exceptions, reconsidered the decision not to require Harrietta Hills to monitor for whirling disease. (DEQ Director's 6/27/17 Remand Order; 9/19/17 Remand PFD.) Therefore, Sierra Club's argument that the ALJ relied upon Harrietta Hills representing that it would perform these specific operating procedures in deciding not to require monitoring for whirling disease is now moot.

Additionally, Harrietta Hills and the WRD responded to this exception by arguing that the record clearly establishes that Harrietta Hills will operate its facility according to those procedures, so there is no need to make them specific

conditions of the permit. (WRD's 11/7/17 Response to Exceptions to PFD on Remand from the Director, pp 2–3; Harrietta Hills's 11/7/17 Response to Exceptions to PFD on Remand, p 5.)

As the WRD points out, "The purpose of the NPDES permit issued to the Permittee (as with all NPDES permits) is to identify and enforce the constituents allowed within the discharge from a permitted facility—to establish discharge limits. The means and methods used to meet those discharge limits are not to be dictated by the terms and conditions of an NPDES permit." (WRD's 11/7/17 Response to Exceptions to PFD on Remand from the Director, p 3.)

This exception is considered and is rejected because it is not necessary that every single fact established at a contested case hearing be inserted as a condition in a permit. The ALJ correctly did not require that these operating procedures be inserted as permit requirements. The purpose of the permit, as noted by the WRD, is to set effluent limitations which must be adhered to by the permittee. It is not to dictate the exact methodology that the permittee must use to comply with those effluent limitations.

3. Sierra Club then argued that the ALJ erred by failing to consider evidence that established that a significant increase in the quantity of fish within the hatchery, even with the various above-described safeguards in place, could increase the risk of whirling disease from upstream sources. (Sierra Club's 2/22/17 Exceptions, pp 4, 13–16.)

This exception is considered and rejected because it is factually inaccurate and unsupported by the record. The PFD specifically found, as a matter of fact, that, while it is unlikely that fish within the hatchery will contract whirling disease or cause an increase of whirling disease within the Au Sable River, "the increase of organic material entering the River from the Hatchery will result in a proportionate increase in the risk of whirling disease appearing in the River." (2/1/17 PFD, p 100.) While the ALJ's findings of fact did not specifically reference upstream sources, it did establish an increased risk of whirling disease. This is precisely why the ALJ recommended a permit condition requiring the installation of quiescent zones within six months of the issuance of a permit in accordance with a Final Decision and Order. (*Id.*, pp 100–101.)

One additional issue that must be addressed is a dispute between Sierra Club and Harrietta Hills over whether this exception was based on the administrative record, or whether it was improperly based on additional evidence not contained in the administrative record.

In this exception, Sierra Club explains its argument by using an analogy to the possible spread of measles between people in three different rooms, as well as a pair of exhibits demonstrating this hypothetical measles-spreading situation. (Sierra Club's 2/22/17 Exceptions, pp 14–15 & two unmarked exhibits.)

Harrietta Hills takes issue with this argument, noting that there was no evidence on the record at the contested case hearing to address how measles is spread or contracted by humans, and that the two unmarked exhibits attached to

Sierra Club's exceptions were never admitted at the contested case hearing and, therefore, should not be considered in this Final Decision and Order. (Harrietta Hills's 3/8/17 Response to Exceptions, p 4.)

Despite the fact that this tribunal does not find Sierra Club's overall exception to be persuasive for reasons completely unrelated to measles and rooms, this issue must be addressed herein to avoid potential questions on appeal about whether this tribunal considered improperly-offered evidence that was not part of the administrative record in this matter. On that issue, Harrietta Hills's objections to Sierra Club's argument are misplaced. It is clear from reading Sierra Club's exceptions that this measles analogy is exactly that—an analogy to help explain its exception, accompanied by a pair of visual demonstrative exhibits which were not offered for any evidentiary purpose, but rather to help this tribunal understand the underlying argument.

There is no legal authority that prevents Sierra Club from explaining its argument thusly. Therefore, Sierra Club's measles analogy was considered by this tribunal, as were the two demonstrative exhibits, simply to help understand the argument. No claims about measles, nor either of the drawings of dots in rooms, were given any evidentiary weight.

4. Finally, Sierra Club argued that the ALJ erred in making a determination with regard to antidegradation because, according to Sierra Club, there was insufficient evidence on the record to establish that the amount of reduction in water quality was the minimum amount necessary to achieve the

desired social and economic benefits of the project. (Sierra Club's 2/22/17 Exceptions, pp 4, 16–17.)

This exception is considered and rejected because it is not supported by the record. As Harrietta Hills notes in its response to Sierra Club's exceptions, it was determined by the WRD in issuing the permit, and it was established at the contested case hearing, that the discharge limits established in the permit will ensure that there will be no impairment to designated uses in the East Branch or Main Branch of the Au Sable River. (Harrietta Hills's 3/8/17 Response to Exceptions, p 5.)

Additionally, in the findings of fact portion of the PFD, the ALJ conducted an exhaustive and well-reasoned antidegradation analysis. (2/1/17 PFD, pp 17–50.) As previously noted, that analysis has been adopted and incorporated by reference into this Final Decision and Order. This tribunal finds the ALJ's antidegradation analysis to be persuasive, and it is not contradicted by Sierra Club's argument that there was not enough evidence on the record for the ALJ to make this determination.

II. Exceptions filed by Anglers

The exceptions filed by Anglers are lengthy, and are divided into sections titled "applicable law," "errors of law," "arbitrary and capricious inconsistencies," and "evidence defects." (Anglers' 2/22/17 Exceptions, *passim*.) In order to address these exceptions as clearly as possible, the same headings will be used herein.

A. Applicable Law

Anglers' first five exceptions refer to "applicable law" governing the issuance of a Final Decision and Order. (Anglers' 2/22/17 Exceptions, pp 1–2.) Between these five exceptions by Anglers and the responses by Harrietta Hills, there are material disagreements concerning two issues: whether the DEQ Director conducts a *de novo* review of the PFD or some more deferential form of review, and whether the Final Decision and Order issued by the DEQ Director must be based on a preponderance of the evidence or on competent, material, and substantial evidence. (*Id.*; Harrietta Hills's 3/8/17 Response to Exceptions to PFD, p 7; 11/7/17 Response to Exceptions to Remand PFD, pp 2–3.)

Michigan law is clear that the Final Decision and Order issued by a final decision maker in a contested case hearing (in this case the DEQ Director) must be based on competent, material, and substantial evidence. MCL 24.285; Mich Admin Code, R 792.10133. This is not the same as a preponderance of the evidence standard. Rather, Michigan courts have specifically held that "substantial evidence" can be less than a preponderance of the evidence. According to the Michigan Supreme Court, "'Substantial evidence' has a classic definition: the amount of evidence that a reasonable mind would accept as sufficient to support a conclusion. While it consists of more than a scintilla of evidence, *it may be*

substantially less than a preponderance."[2] *In re Payne*, 444 Mich 679, 692–693 (1994), citing *Michigan Employment Relations Comm v Detroit Symphony Orchestra*, 393 Mich 116, 122 (1974); *Tomczik v State Tenure Comm*, 175 Mich App 495, 499 (1989) (emphasis added).

Therefore, Anglers' argument that the Final Decision and Order must be supported by a preponderance of the evidence is considered, and it is rejected because it is contrary to the plain language of the applicable statute and administrative rule.

Regarding whether the DEQ Director's review of the PFD is *de novo* or something more deferential, the answer is that it is a *de novo* review. Michigan law is clear that the final decision maker shall have all the powers that it would have if it had presided at the hearing, and is free to accept, reject, or modify the PFD as it sees fit. MCL 24.281(3); Mich Admin Code, R 324.74(3). While the final decision maker's review is confined to the record created at the hearing, and while applicable administrative rules instruct the final decision maker to consider whether the PFD is deficient due to certain issues, there is no authority that says that the final decision maker must show any form of deference to the recommendations of the ALJ. Mich Admin Code, R 324.74.

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[2] It should be noted that, on p 693, the Michigan Supreme Court explains that the "substantial evidence" standard is not a *de novo* review. (*Id*.) The Supreme Court was referring to a circuit court's review of a final decision maker's Final Decision and Order, not the final decision maker's review of an ALJ's PFD. This language from *In re Payne* should not be misinterpreted as indicating that a final decision maker does not conduct a *de novo* review of a PFD.

B. Errors of Law

Anglers next sets forth exceptions 7–11 under the heading "errors of law." (Anglers' 2/22/17 Exceptions, pp 2–5.) Anglers first argues that the ALJ erred in finding that the East Branch of the Au Sable River is the receiving water at issue in this matter, and that the ALJ should have held that the entire Au Sable River is the receiving water because the East Branch is connected to the rest of the river. (*Id*.)

It should be noted that this is primarily a factual issue from Anglers, despite it being categorized as an "error of law" in the exceptions. Anglers' argument on this issue is almost entirely factual. The only legal authority cited by Anglers in support of this exception is a reference to Mich Admin Code, R 323.1044(m), which defines "receiving waters" as "the surface waters of the state into which an effluent is or may be discharged." In its exceptions, Anglers selectively quotes only a portion of this rule, stating that the rule defines "receiving waters" simply as "the surface waters of the state." (Anglers' 2/22/17 Exceptions, p 2.)

This is a material omission by Anglers because the law does not contemplate that *all* surface waters of the state are the receiving waters of this hatchery's effluent. Rather, the question is: What are the waters of the state to which effluent from this hatchery is discharged? The ALJ determined that the receiving waters are the East Branch of the Au Sable River, and this determination was clearly supported by competent, material, and substantial evidence.

Additionally, as set forth in the responses filed by Harrietta Hills, there is no authority to support the position that the receiving waters constitute the East Branch and every other body of water connected to the East Branch. (Harrietta

Hills's 3/8/17 Response to Exceptions to PFD, pp 7–8.) If this was the case, then the receiving waters for effluent from this hatchery would have to include Lake Huron, as well as the entire Au Sable River and all of its tributaries. (*Id*.) For these reasons, this exception is rejected.

Anglers then challenges the ALJ's determination with regard to the dissolved oxygen (DO) standard at issue here. In making the determination with regard to DO, the ALJ found that the entire Au Sable River was in attainment for DO based on a large number of samples. (*Id*., p 8.) Additionally, the ALJ specifically found the testimony of Anglers' witness Dr. Canale to not be credible with regard to the issue of DO. (*Id*.) Therefore, for the reasons stated in the PFD, this exception is rejected.

Anglers then argues that the ALJ erred in holding that the use of a 50% exceedance flow for phosphorus was permissible, rather than a 95% exceedance flow as required by Mich Admin Code, R 323.1090. (Anglers' 2/22/17 Exceptions, p 3.) This exception is rejected because it ignores the fact that Michigan law contains a specific exception that allows the use of a 50% exceedance flow for phosphorus. (Harrietta Hills's 3/8/17 Response to Exceptions, p 8, citing Mich Admin Code, R 323.1090(1) and 323.1060.)

Next, Anglers argues that the ALJ erred by "inject[ing] an economic term into the viability of alternatives" under Mich Admin Code, R 323.1098. (Anglers' 2/22/17 Exceptions, p 4.) This exception is rejected because, as set forth in the PFD and in the responses to exceptions submitted by Henrietta Hills, economic considerations

are permissible when determining whether a proposed alternative is viable. (2/1/17 PFD, pp 48–50; Harrietta Hills's 3/8/17 Response to Exceptions to PFD, pp 9–10.)

Anglers then argues that the ALJ erred in ignoring what Anglers describes as "a binding attorney general opinion that authorizes DEQ to monitor downstream effects of a permitted discharge." (Anglers' 2/22/17 Exceptions, pp 4–5.) This exception is rejected on the grounds that it misstates the nature and effect of the specific attorney general opinion at issue here.

This particular attorney general opinion was issued in 1969, prior to the existence of the federal Clean Water Act, prior to the existence of Part 31 of the NREPA, and prior to the existence of the NPDES permitting program (which was created by the federal Clean Water Act and adopted in Michigan via what is now Part 31). Because it predates the statutory scheme at issue here, it cannot be afforded any weight in interpreting the present requirements of Part 31 and the associated administrative rules. This does not merit deviation from the well-reasoned rulings of the ALJ, and therefore, this exception is rejected.

Next, Anglers argues that the ALJ ignored what Anglers describes as "binding federal regulations" that require Harrietta Hills to include in its permit application "the calendar month of maximum feeding and total mass of food fed during the month." (Anglers' 2/22/17 Exceptions, p 5.) This exception is rejected on the grounds that it is legally incorrect. As set forth by the ALJ in the initial PFD, Michigan law is clear that, under Part 31, "an application for a permit shall be submitted to the department in a format to be developed by the department."

(2/1/17 PFD, p 15, citing MCL 324.1303(1).) The PFD notes that Harrietta Hills filed an application for an NPDES permit on the form provided by the department in August of 2013. (*Id*., citing Exhibit R-5.) The WRD requested additional information, which Harrietta Hills promptly provided, and the WRD determined the application to be administratively complete. (*Id*.) As the ALJ correctly notes, federal permit application requirements cannot be applied to retroactively invalidate a state permit application. (*Id*., citing *Huggett v Dep't of Natural Resources*, 464 Mich 711, 722 (2001), *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 284 (2005), and *Dep't of Environmental Quality v Gomez*, 318 Mich App 1 (2016).)

Further, the PFD correctly notes that the purpose of a permit application is, "to provide the DEQ with the information necessary to review the project, and to provide the public with a form of notice of the project." (*Id*., p 16.) Even if Anglers was correct that this alleged procedural defect rendered the permit application administratively incomplete (which it is not), that would constitute a ministerial error and not a substantive deficiency that would merit invalidating the permit and starting over with an entirely new permit application after five years.

C. Arbitrary and Capricious Inconsistencies

Anglers then sets forth three exceptions under the heading "arbitrary and capricious inconsistencies." (Anglers' 2/22/17 Exceptions, pp 5–9.) As a preliminary matter, Anglers appears to apply an incorrect standard of review to this section of its exceptions. The "arbitrary and capricious" standard relied upon by Anglers does

not apply to a final decision maker's review of a PFD. Rather, it applies to a circuit court's review of a Final Decision and Order. MCL 24.306(1)(e).

Additionally, these three exceptions (numbers 12–14) consist of Anglers arguing that the ALJ erred in finding certain evidence more credible than other evidence. Anglers essentially argues that it was an arbitrary and capricious decision for the ALJ to afford greater weight to the testimony and evidence proffered by Harrietta Hills and the WRD than to the testimony and exhibits proffered by Anglers. (Anglers' 2/22/17 Exceptions, pp 5–9.) These exceptions are rejected because the ALJ's determinations on these issues were clearly supported by the record and premised on competent, material, and substantial evidence.

Anglers' exception number 13 bears specific mention here. Anglers argues that the ALJ erred in finding that the proposed project, if permitted, will generate a "farm gate" of approximately $800,000 in value. (Anglers' 2/22/17 Exceptions, pp 6–7.) Anglers does not challenge the $800,000 figure. Rather, Anglers argues that this figure should not be considered because the record does not contain "proof that the $800,000 will stay in Crawford County." (*Id.*)

Part 31 and the associated administrative rules require that the DEQ weigh the benefits and detriments of a proposed project and determine which carries more weight. (2/1/17 PFD, pp 30–50, citing Mich Admin Code, R 323.1098(4)(a)(i)–(vii).) In most cases, including this case, the benefits of a proposed project are social and economic, while the detriments of a proposed project are environmental in nature. (*Id.*) Contrary to Anglers' assertion, there is absolutely no requirement in the

statute or the rules that a permittee not only prove that there will be economic benefits from a proposed project, but also prove that the money derived from a project will remain confined to a single county. In fact, such a requirement would be impossible to satisfy because the nature of money is such that people spend it, and it moves from place to place.

In an erroneous attempt to prove the existence of this requirement, Anglers points out that the ALJ held that "Crawford County is the area of concern for the antidegradation statement, but inconsistently expands the analysis to include the state of Michigan and the world." (Anglers' 2/22/17 Exceptions, p 6, citing 2/1/17 PFD, p 28.) This is an inaccurate description of the PFD's conclusions.

The ALJ held that Crawford County was the area of concern in his antidegradation analysis. (2/1/17 PFD, p 28.) This means that Crawford County is the area of *environmental* concern when analyzing the potential environmental detriments of the proposed project. It does not mean that the ALJ may only consider money that will remain permanently in Crawford County when analyzing the social and economic benefits of a proposed project.

As previously noted, Anglers' exceptions premised on "arbitrary and capricious inconsistencies" are rejected on the grounds that they challenge determinations by the ALJ that are properly grounded in relevant law and supported by competent, material, and substantial evidence.

D. Evidence Defects

Anglers' final eight exceptions are set forth under the category "evidence defects." (Anglers' 2/22/17 Exceptions, pp 9–13.) Similar to the previous section of "arbitrary and capricious inconsistencies," Anglers argues here that the ALJ erred in affording greater weight and credibility to some evidence than he did to other evidence. These exceptions are considered and rejected on the grounds that the ALJ's well-reasoned evidentiary rulings are clearly supported by competent, material, and substantial evidence on the record. The PFD's evidentiary rulings are adopted and incorporated by reference into this Final Decision and Order, and Anglers has not persuaded this tribunal that the ALJ's evidentiary rulings should be set aside for any reason.

One exception included in this section merits specific examination, because it is not merely a challenge to the weight afforded various pieces of evidence by the ALJ but is in fact a legal challenge to the validity of the permit at issue. That is exception number 22, in which Anglers argues that Harrietta Hills's operation of the hatchery "violates the plain language of a state statute and deed restrictions." (Anglers' 2/22/17 Exceptions, p 13.)

Anglers' argument that a deed restriction on the property constitutes a reason to deny Harrietta Hills's NPDES permit is legally erroneous. First, the DEQ lacks authority to decide property disputes, and so this tribunal lacks jurisdiction to determine whether a deed restriction has been violated. MCL 600.1605(a) (providing that the Michigan circuit courts have subject matter jurisdiction to decide real property disputes); *Heeringa v Petroelje*, 279 Mich App 444, 446 (2008);

Proposal for Decision in the Petition of the Lake Leelanau Association, p 8 (found at 2007 WL 2142648).

Second, Anglers has already pursued this claim in the appropriate forum (the Crawford County Circuit Court), and its claim has been dismissed on the grounds that it lacks standing to enforce a deed restriction because it is neither a party to nor an intended third-party beneficiary of the deed. (Crawford Circuit Court 10/13/17 Opinion and Order on Defendant's Motion for Summary Disposition, Case No. 17-10016-CE.)

Regarding the alleged violation of a state statute, Anglers does not even indicate in its exceptions which state statute it believes Harrietta Hills to have violated. (Anglers' 2/22/17 Exceptions, p 13.) An examination of the record reveals that Anglers believes that Harrietta Hills is acting in violation of 1994 PA 321, which governs the conveyance of certain property to Crawford County by the Michigan Department of Natural Resources (DNR). An examination of this act reveals that it contains no provision that grants the DEQ authority to enforce its terms. Therefore, this exception is rejected because the DEQ lacks authority to determine property rights, enforce deed restrictions, or enforce the terms of 1994 PA 321.

III. Exceptions filed by WRD

The WRD set forth three exceptions to the initial PFD. First, the WRD argued that there appeared to be either a transcription error or a misstatement by a witness related to the capacity of the city of Grayling's municipal wastewater

system. (WRD's 2/22/17 Exception, p 2.) Specifically, the WRD notes that witness Mr. Vogler testified that Grayling's municipal wastewater system "is designed to handle 100 MGD, while the effluent of the facility is 8.6 MGD." (*Id*., citing 3/17/16 Hr'g Tr, p 2686:2–19.)

The WRD believes that this was either a misstatement by Mr. Vogler or a transcript error, because an exhibit generated by WRD witness Tarek Buckmaster stated that, "[T]he proposed flow rate of over 8.6 MGD is more than four times the current maximum daily discharge rate of the City of Grayling Wastewater Treatment Facility." (*Id*., citing Exhibit R-6, p 1.)

In reviewing this exception, this tribunal finds that this exception cannot be sustained because it is unclear that Mr. Vogler and Mr. Buckmaster's exhibit referred to the same thing. Mr. Vogler (who was not proffered as an expert in municipal wastewater treatment facilities) opined on the record that the city of Grayling's wastewater management system is *designed to handle* 100 million gallons per day. (*Id*.) Exhibit R-6, prepared by Mr. Buckmaster, states that the *current maximum daily discharge rate* of said facility is less than one quarter of the proposed flow rate from Harrietta Hill's facility. (*Id*.) It is unclear, based on the record, what Mr. Vogler meant by "designed to handle," and whether this is the same as the wastewater treatment facility's "current maximum daily discharge rate."

Additionally, the disposition of this issue is irrelevant to the Final Decision and Order in this matter. No other Party raised this issue in their exceptions, and so it appears that no Party has challenged the ALJ's recommendation based on this possible disagreement between Mr. Vogler and Mr. Buckmaster over the capacity of Grayling's municipal wastewater treatment facility.

Michigan law is clear that, in reviewing a PFD, the final decision maker shall consider, among other things, whether the PFD "[i]ncorporated typographical, mathematical, or other obvious errors that affect the substantial rights of 1 or all of the parties to the action," or whether the PFD "[m]ade factual findings inconsistent with the evidentiary record." Mich Admin Code, R 324.74(3)(c) & (e). Here, it is unclear whether these two pieces of evidence (Mr. Vogler's testimony and Mr. Buckmaster's exhibit) even contradict each other, so it cannot be clearly determined that there was any error. There is also nothing to indicate that the ALJ relied on one of these pieces of evidence over the other in issuing the PFD. Finally, it is clear that this potential inconsistency, or error, did not affect the substantial rights of any party to the action. Therefore, this exception is rejected.

The WRD next argues that the PFD erred in concluding that, "None of the NPDES permits for the 12 CAAP [confined aquatic animal production] facilities have discharge limits for Ammonia, CBOD [carbonaceous biochemical oxygen demand] or DO." (WRD's 2/22/17 Exceptions, p 3, citing the 2/1/17 PFD p 69.) The WRD notes that, in fact, one of the 12 confined aquatic animal production facilities in Michigan, the Indian Brook Trout Farm, does possess an NPDES permit that

contains discharge limits for Ammonia and CBOD. (*Id*., citing Exhibit R-17 chart, p 1.) This exception is duly noted and is adopted into this Final Decision and Order.

Finally, the WRD notes that the PFD referenced the WRD's opening brief in finding that Harrietta Hills's permit should require that Harrietta Hills report lab results for CBOD5 (CBOD measured over a five-day period), NH3-N (un-ionized ammonia), and DO for two *weeks* after trout production reaches 50,000 pounds per year, and for two *weeks* following each production rate increase of 50,000 pounds thereafter. (*Id*., p 3, citing the 2/1/17 PFD, pp 71, 74, 100, and 104.) The WRD notes that this is an apparent error by the ALJ because the WRD's brief actually advocated for such reporting to be required for two *months* after trout production reaches 50,000 pounds per year, and for two *months* after each production rate increase of 50,000 pounds thereafter. (*Id*.)

Pursuant to Mich Admin Code, R 324.74(3)(c), this tribunal finds that this was a typographical or other obvious error by the ALJ that affects the substantial rights of the parties to the action. The ALJ clearly intended to refer to reporting periods of two months, not two weeks, as evidenced by the fact that the ALJ described the WRD's brief as proposing reporting periods of two weeks when it actually proposed reporting periods of two months. And, even if this was not an error by the ALJ but was rather a conscious decision, this tribunal finds that reporting periods of two months are appropriate based upon the record. Therefore, this exception is adopted into this Final Decision and Order.

IV. Exceptions filed by Harrietta Hills

Harrietta Hills first notes that the PFD appears to include an error where it states that, "The record contains no testimony with respect to such hydraulic barrier. It is uncertain whether the Permittee intends to install such barrier when quiescent zones are added to the facility." (Harrietta Hills's 2/22/17 Exceptions, p 1, citing the 2/1/17 PFD, p 7 fn 6.) Harrietta Hills notes that, in fact, there was testimony from its witness Mr. Vogler indicating that Harrietta Hills would not install a hydraulic barrier. (*Id*., pp 1–2.) This exception is duly noted and will be incorporated in this Final Decision and Order.

Harrietta Hills then notes that the PFD correctly found that the permit application in this matter was administratively complete but did not include a transcript citation to testimony proffered by Harrietta Hills on the issue of maximum feeding, which is relevant to the permit application's administrative completeness. (*Id*., p 2.) Harrietta Hills argues that this transcript citation should be included in the PFD. (*Id*., citing 4/12/16 Hr'g Tr, p 3323; and 4/13/16 Hr'g Tr, p 3527.) Harrietta Hills cites no authority to support the proposition that every fact referenced in a PFD must contain a record citation, nor is there any indication that this one statement, without an accompanying citation, affected the substantial rights of any party. Therefore, it appears that this was not an error that affects the substantial rights of one or all of the Parties, nor was it an improper exclusion of evidence that substantially affects the outcome of the case. Mich Admin Code, R 324.74(3)(c) & (f). Therefore, this exception is rejected because it is immaterial.

Next, Harrietta Hills takes issue with the fact that the ALJ found as a matter of fact that the Stevenson Chart is entitled to receive weight as a useful guideline, but did not specifically find, as a matter of fact, that other evidence proffered by Harrietta Hills was also entitled to receive even greater weight than the Stevenson Chart. (Harrietta Hills's 2/22/17 Exceptions, p 2, citing the 2/1/17 PFD, p 40 fn 36.) Harrietta Hills argues that the PFD should be amended to include transcript references to Exhibit R-50 and testimony by witnesses Dr. Zorn and Dr. Diana, on the grounds that Harrietta Hills believes this evidence to be more persuasive than the Stevenson Chart. (*Id.*)

Harrietta Hills provides no authority to support its suggestion that it constitutes error for an ALJ to indicate that he afforded weight to one piece of evidence without also specifically indicating and providing citations to every other piece of evidence in the record that a party believes should also have been afforded similar, greater, or lesser weight. It should be noted that, in issuing this Final Decision and Order, this tribunal is required to show no deference to the weight afforded each piece of evidence by the ALJ. Rather, this Final Decision and Order is based upon the entire record and includes consideration of the entire record and every piece of evidence proffered therein. There is simply no need to modify a PFD to incorporate citations to every piece of evidence that every party believes is appropriate, particularly in a matter such as this where the contested case hearing yielded approximately 167 exhibits and close to 4,000 pages of transcript testimony.

The ALJ's factual findings were not inconsistent with the evidentiary record, nor did the ALJ improperly exclude or include evidence that substantially affects the outcome of the case. Mich Admin Code, R 324.74(3)(e) & (f). For that reason, and for the reasons set forth in the preceding paragraph, this exception is rejected.

Similarly, Harrietta Hills argues that the ALJ erred when he afforded little weight to the phosphorus study of the East Branch of the Au Sable River conducted by Dr. Canale (a witness adverse to the position of Harrietta Hills) on the grounds that Dr. Canale failed to consider four other outfalls discharging to the East Branch that could be sources of phosphorus in addition to Harrietta Hills's facility. (Harrietta Hills's 2/22/17 Exceptions, p 3.) The alleged error is that the ALJ relied on the existence of only four outfalls to do so, when in fact the evidence indicated that there were *six* outfalls that Dr. Canale failed to consider. (*Id*.) This exception is rejected for the same reason as Harrietta Hills's previous exception: the ALJ reached the correct conclusion, and this tribunal is not required to afford any deference to the amount of evidence that was relied upon in the PFD, nor to the weight that the ALJ assigned to each piece of evidence.

Finally, Harrietta Hills argues that the ALJ erred in finding that, "The Permittee made no commitment on the record when quiescent zones will be installed" when in fact Mr. Vogler testified that Harrietta Hills would "obtain the financing and put quiescent zones in" as soon as this permit dispute is resolved and further stated that, "I've already committed that we have to put in quiescent zones

and things of that nature before we go very far." (Harrietta Hills's 2/22/17 Exceptions, p 3, citing the 2/1/17 PFD, p 79, and 4/12/16 Hr'g Tr, p 3422.)

It is the opinion of this tribunal that the ALJ was likely referring to the fact that Harrietta Hills has not committed to install quiescent zones by a date certain. "As soon as this situation is resolved" and "before we go very far" are not firm commitments. This tribunal will note that Mr. Vogler has committed to installing quiescent zones at some point in the future but has not committed to installing them by a date certain. Therefore, this exception will be adopted in part into this Final Decision and Order to the extent that Mr. Vogler testified that Harrietta Hills will, at some point, install quiescent zones. But this exception is rejected in part to the extent that Harrietta Hills did not commit on the record to installing quiescent zones by a date certain.

ORDER OF REMAND FOR LIMITED RECONSIDERATION

On June 27, 2017, this tribunal issued an order denying Petitioners' request for oral argument and remanding this matter to the Michigan Administrative Hearing System for limited reconsideration. (6/27/17 Director's Remand Order.)

In that order, this tribunal first held that oral argument on the written exceptions and responses was unnecessary, as the ALJ and the Parties had done an admirable job of setting forth their respective positions in writing, so oral argument was unnecessary. (*Id*., p 2.)

Additionally, this tribunal held that one of the exceptions set forth by Sierra Club—that the ALJ erred in holding that the DEQ lacked authority to require testing for whirling disease—was correct. (*Id.*, pp 2–9.) Accordingly, this tribunal remanded the matter to the ALJ for reconsideration of the limited issue of whether Permit No. MI0059209 should be amended to include a condition that Harrietta Hills must conduct testing for whirling disease. (*Id.*)

REMAND PFD

After soliciting briefs from the Parties, the ALJ issued a PFD on Remand from the Director on September 19, 2017. (9/19/17 Remand PFD.) In that Remand PFD, the ALJ analyzed the positions of the Parties and proposed that this tribunal issue a Final Decision and Order imposing the following permit conditions:

> (a) Require annual testing, at a sufficient time before the spring thaw, of fish within the Hatchery for the presence of whirling disease, and reporting of the results to the WRD.
>
> (b) Require immediate removal, in the event the testing reveals the presence of whirling disease, of all fish within the Hatchery from the facility and disposal of such fish in accordance with the direction of the State Veterinarian.
>
> (c) Require a modification of the Permittee's BMP [Best Management Practices] plan, providing for testing of the sediment in the East Branch of the Au Sable River downstream of the Hatchery, which BMP plan sets forth the frequency, location, and qualifications of the individuals performing the tests and the labs performing DNA analysis of the tubificid worms, as determined by the WRD in its approval of the Permittee's modified BMP plan.

(d) Require a modification of the Permittee's BMP plan, providing for the manner of remedying a statistically significant increase in the presence of the whirling disease host in the sediments of the East Branch of the River downstream of the Hatchery, as well as defining the phrase "statistically significant." [9/19/17 Remand PFD, p 10.]

The "Analysis" portion of the Remand PFD is adopted and incorporated by reference into this Final Decision and Order, subject to the following rulings on exceptions to the Remand PFD filed by the Parties.

EXCEPTIONS TO THE REMAND PFD

As noted above, exceptions to the Remand PFD were filed by Anglers on October 17, 2017, and by the other three Parties on October 24, 2017, with responses to those exceptions filed by all four Parties on November 7, 2017, and a correction to its response filed by Anglers on November 22, 2017. Each exception, along with the responses to it, will be addressed here.

I. Exceptions filed by Sierra Club

Sierra Club's exceptions to the Remand PFD were limited to reasserting the argument from its exceptions to the initial PFD that "certain operating procedures" should be included as permit conditions rather than remaining as mere established facts in the contested case hearing. Once again, these operating procedures are using certified disease-free eggs, using eggs raised exclusively in groundwater, not bringing fingerling trout into the facility until their bones have ossified, removing fish mortalities on a daily basis, and using raceways with concrete bottoms. (Sierra

Club's 10/24/17 Exceptions to Remand PFD, pp 1–2.) These exceptions are rejected for the same reasons set forth earlier in this Final Decision and Order.

II. Exceptions filed by Anglers

Anglers begins its exceptions to the Remand PFD by reiterating its previous argument that the DEQ Director's review of a PFD is *de novo*. (Anglers' 10/17/17 Exceptions to Remand PFD, p 1.) As noted previously, this exception is correct and is, therefore, adopted in this Final Decision and Order.

Anglers next argues that the DEQ Director is not required to accept the ALJ's proposed findings, even if those findings are supported by substantial evidence. (*Id.*, pp 1–2.) This exception is also correct as a matter of law and is adopted in this Final Decision and Order. As noted previously, Michigan law is clear that two differing positions may both be supported by substantial evidence (because, once again, "substantial" evidence can be less than a preponderance of the evidence).

Anglers once again reiterates its position that the DEQ Director, or any other final decision maker under Michigan's Administrative Procedures Act, is held to a preponderance of the evidence standard, not a substantial evidence standard. (Anglers' 10/1/17 Exceptions to Remand PFD, p 2.) This exception is incorrect as a matter of law and is rejected for the reasons set forth previously in this Final Decision and Order.

Anglers then argues that the DEQ Director, or any other final decision maker under Michigan's Administrative Procedures Act, has "unfettered discretion" to

reject any finding of fact or conclusion of law in a PFD. (Anglers' 10/1/17 Exceptions to Remand PFD, p 2, citing *Galuszka v State Employees Retirement System*, 265 Mich App 34, 44 (2005).)

While it is true that a final decision maker conducts a *de novo* review of a PFD and may accept, reject, or modify any of an ALJ's findings of fact or conclusions of law, it is an exaggeration to say that the final decision maker has "unfettered discretion" to do so. The final decision maker's findings of fact must always be based upon competent, material, and substantial evidence and must be contained within the record. MCL 24.285; Mich Admin Code, R 792.10133; Mich Admin Code, R 324.74. Additionally, any conclusions of law made by the final decision maker must be based on applicable law. So, while it is accurate to say that the final decision maker, here the DEQ Director, is not required to show any deference to the findings of fact and conclusions of law proposed by the ALJ, to say that the final decision maker has "unfettered discretion" is a bridge too far. The final decision maker's findings of fact must still be based on competent, material, and substantial evidence set forth on the record, and the final decision maker's conclusions of law must still be grounded in applicable law.

Next, Anglers argues that the ALJ's recommendation of annual testing for whirling disease, as well as annual testing for TAMS (triactinomyxons), and annual testing of downriver sediment, is not sufficient, and that testing should be required on a quarterly basis. (Anglers' 10/17/17 Exceptions to Remand PFD, p 2.) As noted in the responses filed by Harrietta Hills, there is no evidence in the record to

support this exception. (Harrietta Hills's Response to Exceptions to Remand PFD, p 3.) These exceptions are, therefore, rejected.

Anglers also argues that Harrietta Hills's BMP plan should be modified to include the qualifications of the individuals performing the sampling for whirling disease and the laboratories performing any analysis. (Anglers' 10/17/17 Exceptions to Remand PFD, p 2.) It should be noted that these requirements are already proposed by the Remand PFD. (9/19/17 Remand PFD, p 10, ¶¶ (c) & (d).) This exception is, therefore, rejected on the grounds that it is unnecessary.

Anglers then argues that the ALJ erred in rejecting Anglers' request that Harrietta Hills be required to conduct testing of native trout within the Au Sable River for whirling disease. (Anglers' 10/17/17 Exceptions to Remand PFD, p 3.) As found by the ALJ, and noted by Harrietta Hills, it is undisputed that whirling disease already exists in native trout in the Au Sable River. (Harrietta Hills's 11/7/17 Response to Exceptions to PFD on Remand, pp 3–4.) The Remand PFD already proposes testing fish within the hatchery for whirling disease as well as monitoring downriver sediments for statistically significant increases in the whirling disease host. (9/19/17 Remand PFD, p 10, ¶¶ (c) & (d).) This tribunal finds that what the ALJ has proposed in the Remand PFD constitutes sufficient monitoring for whirling disease, and this exception is rejected on the grounds that it is unnecessary to require additional testing of native fish populations that are already known to contain the disease.

Finally, Anglers offers a series of exceptions that argue the following: the risk of whirling disease related to the proposed project can be quantified; the DNR already conducts sampling for whirling disease in nearby Slagle Creek; the permit should be modified to require Harrietta Hills to adopt the DNR's whirling disease testing protocols; and, if the DNR can test for whirling disease in a river, so can Harrietta Hills. (Anglers' 10/17/17 Exceptions to Remand PFD, p 3.) These exceptions are rejected on the grounds that the record does not support the contention that the testing proposed by the ALJ in the Remand PFD is insufficient, or that the testing protocols employed by the DNR in Slagle Creek are materially different or better, or are required by applicable law.

III. Exceptions filed by WRD

The WRD first requests that the Final Decision and Order clarify that the WRD may rely on the expertise of other state or federal agencies, including the DNR and the Michigan Department of Agriculture and Rural Development, to establish BMP standards for "the frequency, location, and qualification of the individuals performing the tests and the lab performing DNA analysis of tubificid worms," and in determining what constitutes a "statistically significant" increase in the presence of whirling disease in the downstream sediment of the East Branch of the Au Sable River (WRD's 10/24/17 Exceptions to Remand PFD, pp 2–3.)

Somewhat surprisingly, Sierra Club staunchly opposes these requests, casting them as attempts by the WRD to "outsource" or "delegate wholesale such a

core Part 31 function." (Sierra Club's 11/7/17 Response to Exceptions to Remand PFD, pp 2–3.)

The simple truth is that government agencies, both state and federal, routinely cooperate. As evidence of this, Sierra Club need look no further than this very case, in which three DNR staff members and one Michigan Department of Agriculture and Rural Development staff member were called as witnesses in the hearing. (2/1/17 PFD, pp 3–5.) This is entirely commonplace and completely appropriate.

Sierra Club, on the other hand, believes that this permit should be "put on hold" so that the WRD has time to purchase the necessary equipment and train or hire employees to have the necessary expertise to conduct this additional testing that is being required under the permit *at the request of Sierra Club and Anglers*. (Sierra Club's 11/7/17 Response to Exceptions to Remand PFD, pp 2–3.) Sierra Club's objection—that the WRD should not be permitted to consult with or work cooperatively with other government agencies—is meritless. The WRD's exception on this issue is adopted and incorporated into this Final Decision and Order.

The WRD next argues that the FDO should clarify that neither the PFD nor the Remand PFD supports a finding of fact that witness Dr. Mark Luttenton's sediment sampling work, placed in evidence at the hearing in this matter, constitutes a sufficient baseline from which to measure a "statistically significant increase" of the presence of the Tubifex tubifex worm of the genetic form that is susceptible to whirling disease in the downstream sediment of the East Branch of

the Au Sable River. (WRD's 10/24/17 Exceptions to Remand PFD, pp 3–5.) This exception is incorporated into this Final Decision and Order on the grounds that the PFD did not find, and the record does not support a finding, that Dr. Luttenton's sediment sampling constitutes such a baseline.

IV. Exceptions filed by Harrietta Hills

Harrietta Hills first argues that the DEQ lacks authority to order the removal and disposal of animals from its facility, or to regulate testing for animal diseases downstream of its facility in a Part 31 permit. (Harrietta Hills's 10/24/17 Exceptions to Remand PFD, pp 1–2.) Harrietta Hills adds that this is the province of the Michigan Department of Agriculture and Rural Development and the State Veterinarian, and not the WRD. (*Id.*) Harrietta Hills further adds that testing for the myxobolus parasite within the facility or downstream is pointless because it is already known to exist in those locations. (*Id.*)

This exception is rejected on the grounds that it is incorrect as a matter of law. As set forth in this tribunal's June 27, 2017 order, the WRD clearly has authority to require testing for whirling disease and the parasite that spreads whirling disease as a condition of a Part 31 permit. (DEQ Director's 6/27/17 Remand Order, pp 3–7.)

Harrietta Hills's argument that such testing is pointless also lacks merit. One of the purposes of an NPDES permit, such as the one at issue here, is to protect the designated uses of the receiving waters. Mich Admin Code, R 323.1100; Mich Admin Code, R 323.1062(5). To that end, it is not pointless to require testing to determine whether a statistically significant increase in whirling disease occurs downstream of Harrietta Hills's facility. This is especially appropriate where the ALJ has held that the proposed increase in the size and scope of Harrietta Hills's operation will cause an increase in the risk of whirling disease. (2/1/17 PFD, p 100.)

Next, Harrietta Hills argues that testing for the whirling disease host within the hatchery is unnecessary because, according to Harrietta Hills, there is no evidence that the fish in the hatchery can contract the parasite that causes whirling disease, the potential for fish escapement from the hatchery is too speculative to be a basis for regulation, and "open season" could be allowed on the Au Sable River in the event of a flood that causes large scale fish escapement. (Harrietta Hills's 10/24/17 Exceptions to Remand PFD, pp 3–8.)

These exceptions are rejected on the grounds that they are unsupported, and in fact contradicted, by the record in this matter. First, as noted previously, the ALJ specifically determined as a matter of fact that the proposed increase in the scope of Harrietta Hills's operation will result in an increase in the risk of whirling disease. (2/1/17 PFD, p 100.)

Additionally, the record clearly establishes that fish escapement can occur despite efforts to prevent it. (*Id.*, pp 89–90.) In fact, Harrietta Hills's owner, Mr. Vogler, testified at the hearing that, "[t]here is *absolutely no way* to completely prohibit all chance of escape from an aquaculture facility." (*Id.*, p 90, emphasis added.) Harrietta Hills's argument that the likelihood of fish escapement is too speculative to provide a basis for regulation is meritless when the record is clear that it is possible, and Harrietta Hills's owner himself acknowledged that there is no way to completely prevent it. This is not too speculative to provide a basis for regulation.

And Harrietta Hills's suggestion that allowing "open season" on the Au Sable River is a panacea that will prevent the spread of whirling disease is simply not supported by the record in this matter.

Next, Harrietta Hills argues that testing for whirling disease and removal of fish from the facility if whirling disease is detected should be limited to specific raceways, not to the entire facility. (Harrietta Hills's 10/24/17 Exceptions to Remand PFD, p 8.) This exception is rejected on the grounds that it is inconsistent with the evidence on the record. Harrietta Hills argues that, in the past, "When the DNR discovered whirling disease at one of its hatcheries, it only destroyed the impacted fish . . . . The State decided to leave the remaining fish where they were." (*Id.*, p 9, citing 2/10/16 Hr'g Tr, pp 762–763.)

This is an inaccurate description of the testimony of witness Mr. Ed Eisch. Mr. Eisch actually testified that, in one instance, whirling disease was discovered in a single fish that was not in the raceways of a hatchery. Specifically, Mr. Eisch testified that this instance of whirling disease was not detected in any of the "production fish," but rather was found in a single fish in a settling pond designed to collect effluent from the Harrietta Hills hatchery. (2/10/16 Hr'g Tr, p 762.) Mr. Eisch went on to testify that further testing revealed no presence of whirling disease in the fish in the actual hatchery. (*Id.*, pp 762–763). Harrietta Hills's statement that the DNR "only destroyed the impacted fish" is misleading because the record is clear that testing for whirling disease requires destroying the fish (in fact, it requires cutting the fish's head off and placing it in a blender). (2/1/17 PFD, p 95.)

A more accurate description of Mr. Eisch's testimony would be to say that, on one occasion, the DNR found a single fish that was infected with whirling disease in an effluent pond outside of a hatchery, so the DNR conducted testing of fish within the hatchery and did not find any instances of whirling disease. (2/10/16 Hr'g Tr, pp 762–763.) It is not at all accurate to say that the DNR only destroyed the impacted fish, because the DNR destroyed every single fish that it tested.

Additionally, in making this argument, Harrietta Hills ignored ample evidence that the DNR's response to detections of whirling disease within a hatchery is a large-scale disposal of every fish in the hatchery. The evidence on the record establishes that, when whirling disease was detected in the DNR's Sturgeon

River Hatchery in 1975, "all the fish in the facility were destroyed in an effort to try and minimize the spread of whirling disease around the state . . . . This meant destroying 500,000 yearling rainbows and 2.1 million coho salmon together with elimination of the facility by filling it in." (Anglers' 11/7/17 Response to Exceptions to Remand PFD, p 9, citing 4/13/16 Hr'g Tr, pp 3593–94.)

Finally, it should be noted that Harrietta Hills has argued throughout this proceeding that it is extremely unlikely, if not impossible, for fish within its hatchery to contract whirling disease due to the various preventative measures it has implemented. (Harrietta Hills's 10/24/17 Exceptions to Remand PFD, pp 3–6.) If Harrietta Hills is correct, then it need not worry about having to destroy its fish. Harrietta Hills appears to be hedging its argument by first asserting that this potential harm simply will not occur, but then arguing that, if the harm *does* occur, it should be insulated from having to take meaningful action to address it. Because Harrietta Hills's arguments rely entirely on an inaccurate description of the testimony on the record and ignoring much more applicable contradictory testimony on the record, this exception is rejected.

Harrietta Hills then argues that, if whirling disease is detected and it is required to dispose of its fish, "disposal" should expressly include being able to sell the fish. (Harrietta Hills's 10/24/17 Exceptions to Remand PFD, p 9.) In opposition to this argument, Anglers argues that, "The Fish Farm's Exception D is noteworthy that the Fish Farm, a distributor to restaurants and food stores, would want to distribute to the citizens of this state for public consumption a diseased fish that

has been ordered removed from the Fish Farm because of that disease. Anything for a dollar." (Anglers' 11/7/17 Response to Exceptions to Remand PFD, p 10.)

Anglers' opposition to Harrietta Hills's exception here is without merit. It was clearly established on the record in this matter, via testimony from the State Veterinarian, that whirling disease poses no threat to humans who consume fish and that fish with whirling disease are perfectly safe for consumption. (Harrietta Hills's 10/24/17 Exceptions to Remand PFD, citing 2/1/17 PFD p 81 fn 62 (citing 3/3/16 Hr'g Tr, p 2431).) In spite of this, Anglers styles its argument in such a way as to imply that Harrietta Hills seeks to sell unsafe fish for human consumption when that is clearly not the case. Harrietta Hills's exception on this issue is incorporated into this Final Decision and Order to the extent that "disposal" of its fish may include sale of the fish provided that such sale meets with the approval of the State Veterinarian.

Finally, Harrietta Hills argues that it should not have to test sediment downstream from the hatchery because it is "not the guardian of the entire Au Sable River," because it is "unclear just how far downstream" it would have to test, and because the installation of quiescent zones will prevent organic matter from leaving its facility and moving downstream. (Harrietta Hills's 10/24/17 Exceptions to Remand PFD, pp 10–14.) The record in this matter does not support Harrietta Hills's contentions here.

First, the suggestion that Harrietta Hills is being tasked with acting as the guardian of the entire Au Sable River is a gross exaggeration. As noted previously, the law allows, and the ALJ wisely recommended, for the DEQ to require that Harrietta Hills monitor whether a statistically significant increase in whirling disease occurs downstream from its facility. (DEQ Director's 6/27/17 Remand Order, pp 3–7; 9/19/17 Remand PFD, p 10, ¶¶ (c) & (d).) To that end, the ALJ has recommended that Harrietta Hills amend its BMP plan to monitor sediments in the East Branch of the Au Sable River downstream from Harrietta Hills's facility for a statistically significant increase in the whirling disease host. (9/19/17 Remand PFD, p 10, ¶¶ (c) & (d).) These amendments will, no doubt, include parameters for where Harrietta Hills must test. These parameters must be approved by the WRD staff and, presumably, will not include "the entire Au Sable River" as Harrietta Hills fears.

Second, the record is clear that quiescent zones are not a perfect answer and will not prevent 100% of the organic matter leaving Harrietta Hills's facility from moving downstream. (2/1/17 PFD, pp 75–80.) For these reasons, Harrietta Hills's exception on this issue is rejected.

LEGAL STANDARD GOVERNING REVIEW OF A PFD

Michigan law provides that the final decision maker in a contested case may remand, reverse, modify, or set aside a PFD. Mich Admin Code, R 324.74(3). The Final Decision and Order must be based upon the record as a whole or a portion of the record and must be supported by competent, material, and substantial evidence.

MCL 24.285; Mich Admin Code, R 792.10133. In reviewing the PFD, the final decision maker shall consider whether the PFD is deficient on the grounds that it does any of the following:

(a) Misapplies a rule, statute, or constitutional provision governing the issues involved.

(b) Adopts an incorrect interpretation of a rule or statute or an incorrect conclusion of law.

(c) Incorporates typographical, mathematical, or other obvious errors that affect the substantial rights of one or all of the parties to the action.

(d) Fails to address a relevant issue.

(e) Makes factual findings inconsistent with the evidentiary record.

(f) Improperly excludes or includes evidence that substantially affects the outcome of the case. [Mich Admin Code, R 324.74(3).]

FINDINGS OF FACT

The findings of fact set forth in pages 6–101 of the February 1, 2017 PFD, including both the narrative portion and the summary, as well as the analysis set forth in pages 4–9 of the September 19, 2017 Remand PFD, are adopted and incorporated by reference herein, with the following modifications:

- The PFD, at page 69, is amended to reflect that one of the 12 confined aquatic animal production facilities in Michigan, the Indian Brook Trout Farm, possesses an NPDES permit that contains discharge limits for Ammonia and CBOD.

- Harrietta Hills should report lab results for CBOD5, NH3-N, and DO for two months after trout production reaches 50,000 pounds per year, and for two months following each production rate increase of 50,000 pounds thereafter (not two weeks as set forth in the PFD at pages 71, 74, and 104).
- The record in this matter reflects that Harrietta Hills proffered testimony from Mr. Vogler that Harrietta Hills will not install a hydraulic barrier at its facility. This is contrary to the PFD's finding at page seven, footnote six.
- The record in this matter reflects that Harrietta Hills, through the testimony of Mr. Vogler, has committed on the record to install quiescent zones at some point in the future, but has not committed to do so by a date certain. This clarifies the PFD's finding on page 79.
- The sampling conducted by Dr. Luttenton, which was placed in evidence at the hearing in this matter and described at page 84 of the PFD, does not constitute a baseline from which to measure whether there has been a "statistically significant increase" in the presence of the Tubifex tubifex worm of the genetic form that is susceptible to whirling disease in the sediment of the East Branch of the Au Sable River downstream from Harrietta Hills's facility.

CONCLUSIONS OF LAW

The conclusions of law set forth in pages 101–104 of the February 1, 2017 PFD are adopted and incorporated by reference herein, with the following modifications:

- The DEQ Director's review of a PFD is a *de novo* review and the burden of proof is competent, material, and substantial evidence, not preponderance of the evidence.
- The DEQ lacks authority to determine property rights, enforce deed restrictions, or enforce the terms of 1994 PA 321.
- The WRD may consult with other state or federal government agencies in implementing the terms of this Final Decision and Order.
- If whirling disease is detected in a fish in Harrietta Hills's facility, Harrietta Hills must dispose of all of the fish within the facility, and this disposal may include selling the fish provided that such sale meets with the approval of the State Veterinarian.

NOW, THEREFORE, IT IS ORDERED:

1. The activity proposed in the permit application submitted by Harrietta Hills Trout Farm LLC is approved, consistent with the terms of this Final Decision and Order.

2. Permit No. MI0059209 shall be modified as follows:

(a) The Permittee shall report weekly lab results for concentrations of CBOD, Ammonia, and DO for a period of two months after trout production

reaches 50,000 pounds per year, and for two months following each production rate increase of 50,000 pounds thereafter;

(b) The Permittee shall install quiescent zones in each of the raceways in accordance with their description in the February 1, 2017 Proposal for Decision, and this installation shall occur within six months of the effective date of this Final Decision and Order.

(c) The Permittee shall conduct annual testing, at a sufficient time before the spring thaw, of fish within the hatchery for the presence of whirling disease, and the Permittee shall report the results of this testing to the WRD.

(d) In the event that the testing described in subparagraph (c) reveals the presence of whirling disease in any fish within the hatchery, all fish within the hatchery must be removed from the facility and disposed of in accordance with the direction of the State Veterinarian.

(e) The disposal of fish described in subparagraph (d) may include sale of the fish, provided such sale meets with the approval of the State Veterinarian.

3. The Permittee's Best Management Practices plan shall be modified to provide for testing of the sediment of the East Branch of the Au Sable River downstream of the hatchery. The Permittee's Best Management Practices plan shall specify the frequency and location of said testing, as well as the qualifications of the individuals performing the tests and the laboratories performing the DNA analysis of the tubificid worms.

4. The Permittee's Best Management Practices plan shall be modified to provide for the manner of remedying a statistically significant increase in the presence of the whirling disease host in the sediments of the East Branch of the Au Sable River downstream of the hatchery, as well as defining the phrase "statistically significant."

5. The modifications to the Permittee's Best Management Practices plan described in paragraph 3 must be approved by the Michigan Department of Environmental Quality's Water Resources Division, otherwise the Permittee shall be in violation of this Final Decision and Order and be subject to revocation of Permit No. MI0059209.

6. The Michigan Department of Environmental Quality's Water Resources Division is free to consult with other state and federal government agencies as it sees fit in determining whether to approve the Permittee's Best Management Practices plan as described in paragraphs 3 and 4, or in performing any other function necessary to enforce the terms of this Final Decision and Order.

7. The Michigan Department of Environmental Quality does not retain jurisdiction in this matter.

Date: 5.1.18

C. Heidi Grether

C. Heidi Grether, Director
Michigan Department of Environmental Quality

LF: Sierra Club & Anglers of the Au Sable (MAHS) Executive/AG# 2017-0192985-A/Final Decision and Order 2018-02-06