STATE OF MICHIGAN

THIRTIETH JUDICIAL CIRCUIT COURT FOR INGHAM COUNTY

BP PRODUCTS NORTH AMERICA, INC.,

Appellant,

DOCKET NO. 08-96-AV

-vs-

OPINION

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,

Appellee.
_____/

This is an appeal from a decision of the Michigan Department of Environmental Quality that imposed penalties for Appellant's failure to submit completed reports regarding its leaking underground storage tanks as required by law, Part 213 of the Natural Resources and Environmental Protection Act, 1994 PA 451 as amended, MCL 324.21301 *et seq.* Section 21311a of the Act, MCL 324.21311a, provides for a mandatory final assessment report (FAR) by an owner or operator of a contaminated site detailing, among other considerations, the extent of the contamination and a corrective action plan (CAP). The FAR is due within 365 days of discovery of the leaking release.

BP Products North America, Inc. (Appellant), owns and operates in Michigan eight sites contaminated by underground storage tank leaks. On May 30, 2007, the Michigan Department of Environmental Quality (Appellee) issued letters of "Late Report Penalty Assessments" imposing monetary fines on Appellant for its delinquency in submitting "statutorily incomplete" FARs for its eight contaminated sites. Thus, the agency found Appellant's FARs to be inadequate as out of compliance with section 21311a.

Appellant now challenges that decision as contrary to law, as an abuse of the agency's discretion, and as arbitrary and capricious.

This administrative appeal is based on section 631 of the Revised Judicature Act (RJA), 1961 PA 236 as amended, MCL 600.631,[1] which sets out the proper grounds for judicial review of agency action taken without benefit of an evidentiary hearing as in a contested case under the Administrative Procedures Act (APA), 1969 PA 306 as amended, MCL 24.201 *et seq.* See *Dignan* v *Michigan Public School Employees Retirement Bd*, 253 Mich App 571, 577-578; 659 NW2d 629 (2002), which summarizes the law of contested cases under the APA. In contrast with that, RJA 631 provides:

> "An appeal shall lie from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law, to the circuit court of the county of which the appellant is a resident or to the circuit court of Ingham county, which court shall have and exercise jurisdiction with respect thereto as in nonjury cases. Such appeals shall be made in accordance with the rules of the supreme court."

An appeal under this statute is also governed by MCR 7.104(A), which incorporates MCR 7.101 and 7.103. The standard of review is prescribed by Const 1963, art 6, § 28, which mandates that where an administrative hearing is not required the reviewing court must determine whether the agency's decision is authorized by law.

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[1]This appeal pursuant to RJA 631 is authorized by Part 213 of Appellee's enabling legislation. See MCL 324.21313a(6).

As noted in *Michigan Waste Systems* v *Dep't of Natural Resources*, 147 Mich App 729, 736; 383 NW2d 112 (1985)(quoting the circuit court approvingly), lv den 424 Mich 900 (1986):

> "'The scope of review under RJA 631 is limited. Where no hearing is required, the issue is "whether such final decision, findings, rulings and orders are authorized by law; * * * ." Const 1963, art 6, § 28; *Viculin* v *Dep't of Civil Service*, [386 Mich 375; 192 NW2d 499 (1971)], *supra*, at 392. The decision of the Director to deny Plaintiff's application must be affirmed unless it is in violation of a statute, in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedure resulting in material prejudice to a party, is arbitrary or capricious.'"

See also *English* v *Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 455; 688 NW2d 523 (2004). In short, the Department's discretionary decision to impose these penalties is reviewable for its accordance with law. Under RJA 631, the "substantial evidence" review criterion is not applicable. *Northwestern National Casualty Co* v *Comm'r of Ins*, 231 Mich App 483, 488-489; 586 NW2d 563 (1998); *Brandon School Dist* v *Michigan Education Special Services Ass'n*, 191 Mich App 257, 263; 477 NW2d 138 (1991), lv den 439 Mich 990 (1992); *Delly* v *Bureau of State Lottery*, 183 Mich App 258, 263-264; 454 NW2d 141 (1990). The Department's decision is not reviewable for the sufficiency of its evidentiary support because a hearing was not required before the decision was made.

Turning to the merits, the Court's resolution of this appeal requires application of the pertinent provisions in Part 213 of the Act, which deals with pollution control and remediation relative to leaking underground storage tanks. Specifically,

section 21313a of the Act, MCL 324.21313a, in subsection (1) bestows on the Department its discretionary authority to impose specified penalties, various gradations of monetary fines, "if a report is not completed or a required submittal . . . is not provided during the time required." (Emphasis added.) Appellant maintains, however, that this provision does not authorize Appellee to penalize the submission of incomplete reports so long as they are timely submitted. That sophistical argument must be rejected as unpersuasive and contrary to the statute's plain language.

The Court agrees with Appellee when it contends that Appellant reads the word "completed" out of section 21313a(1) and also ignores the detailed statutory requirements for a FAR, which must include an adequate CAP. Thus, Appellant's timely submission of a FAR lacking a CAP or any other pertinent statutory requirement renders the FAR incomplete, i.e., "not completed," within the contemplation of section 21313a(1) and thus liable to the imposition of a fine as penalty. In short, Appellee's decision to impose fines in these eight instances of Appellant's noncompliance with the Part 213 reporting requirements is authorized by law.[2]

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[2]On a related but minor issue Appellant also complains that Appellee acted unlawfully by requiring "multiple FARs," two or more successive FARs for the same site, whereas Part 213 authorizes the requirement of only a single FAR per site. That facetious view ignores the plain fact that Appellant either failed to submit any FAR at all for one of its sites or submitted statutorily incomplete FARs respecting the other seven sites. To repeat, with respect to the latter, an incomplete FAR does not fulfill the reporting requirement of Part 213. Because of such flaws in this regard, it is as if no FAR was submitted at all. In sum, Appellee could properly insist that a FAR be reworked and resubmitted until the final version is statutorily complete. The Court finds nothing in Part 213 that could possibly prohibit such practice by the agency.

The prominent issues in this appeal also require the Court to apply the legislative intent behind Part 213 and its mandate of retroactive application. Thus, section 21301a of the Act, MCL 324.21301a, provides:

> "(1) This part is intended to provide remedies for sites posing a threat to the public health, safety, or welfare, or to the environment, regardless of whether the release or threat of release of a regulated substance occurred before or after January 19, 1989, the effective date of the former leaking underground storage tank act, Act No. 478 of the Public Acts of 1988, and for this purpose, this part shall be given retroactive application. However, criminal penalties provided in the amendatory act that added this section only apply to violations of this part that occur after April 13, 1995.
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> "(2) The changes in liability that are provided for in the amendatory act that added this subsection shall be given retroactive application."(Emphasis added.)

Appellant avers that the express legislative intent for Part 213 "to provide remedies" at contaminated sites necessarily means that only the specific remedial measures provided in that part are intended to have retroactive application, and that therefore the statutory requirements of content in the FAR and CAP reports are not among the elements of Part 213 to be given retroactive effect. Thus, Appellant contends that Appellee acted without legal authority by imposing section 21313a(1) penalties for incomplete reports respecting sites where contamination was discovered and reported under the former act before the effective date of this new legislation. This argument, too, is unpersuasive and contrary to the plain statutory language.

The Court must agree again with Appellee when it points out that section 21301a(1) comprehensively says "this part," not merely its remedial measures, "shall be given retroactive application." The sole exception to that mandate is expressly made for criminal penalties, which are to be prospectively applied. Thus, Appellee is correct in asserting that the doctrine of *expressio unius est exclusio alterius* (expression of one thing implies exclusion of all others) requires the conclusion that Appellant's narrow interpretation of the statute's retroactivity requirement is wrong. Section 21301a(1) mandates that the whole of Part 213, including the reporting requirements but excepting only the criminal penalties, be given retroactive application. The Court determines that Appellee did not err by retroactively applying the Part 213 requirements for FARs and CAPs to sites of contamination discovered and reported before the new legislation's effective date.

Even so, Appellant also faults the agency for its informal manner of retroactively implementing the Part 213 requirements without having made resort to the formal promulgation of administrative rules. On this view, the manner by which Appellee prescribed the application of Part 213 requirements for FARs is said to have been unlawful because it not only allegedly imposed requirements exceeding those found in the new statutes but also supposedly violated the Administrative Procedures Act of 1969 (APA), 1969 PA 306 as amended, MCL 24.201 *et seq.*

Instead of promulgating an administrative rule pursuant to the APA procedures, Appellee chose to use informal guidance,

e.g., time deadlines as listed in a so-called Dovetailing Chart, for the requirements mandated for retroactive application by section 21301a. Appellant insists that such guidance under the Dovetailing Chart is actually a rule as defined by the APA but was unlawfully issued by the agency under the guise of a different name and without benefit of the formal promulgation requirements delineated in the APA. Thus, according to Appellant, failure to promulgate the Dovetailing Chart as an APA rule must mean that it lacks the force and effect of law and is therefore unenforceable against owners or operators of older contaminated sites. See, in general, *American Federation of State, County and Municipal Employees (AFSCME)* v *Dep't of Mental Health*, 452 Mich 1; 550 NW2d 190 (1996).

The Court disagrees. Section 7 of the APA, MCL 24.207, reads in part:

> "'Rule' means an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency."

The breadth of this definition would surely encompass the Dovetailing Chart were it not for one exception or exclusion specified in the same statute. Section 7 continues thus:

> "Rule does not include any of the following:
>
> * * *

> "(h) A form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory."

Appellee invokes this exception, subsection (h), to support its view that the Dovetailing Chart did not have to be promulgated as a rule pursuant to the APA. That view is correct.

Speaking specifically to the section 7(h) exclusion from the APA concept of rule, *Auto Club Ins Ass'n* v *Sarate*, 236 Mich App 432, 435; 600 NW2d 695 (1999), found that an agency's "instruction" expressing its intended implementation of a statute was within the exception and thus was not an enforceable rule that had to be promulgated pursuant to APA formalities:

> "Historically, the subsection 7(h) exception 'has been narrowly construed and requires that the interpretive statement at issue be merely explanatory.' *Detroit Base Coalition for the Human Rights of the Handicapped* v *Dep't of Social Services*, 431 Mich 172, 184; 428 NW2d 335 (1988). Accord *Clonlara, Inc* v *State Bd of Ed*, 442 Mich 230, 248-249; 501 NW2d 88 (1993).
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> "We believe the instruction at issue falls within the subsection 7(h) exception and therefore does not have the force and effect of a rule. *Clonlara*, *supra* at 240. Instead, the instruction expresses a position the Secretary of State's office intends to follow as it carries out its statutorily mandated responsibilities under the Michigan Vehicle Code. See LeDuc, Michigan Administrative Law (1993), § 4:07, ch 4, p 13. The fact that the public normally will follow the interpretation does not mean that it is binding in and of itself. *Clonlara*, *supra* at 244. Such behavior is to be expected, '"since the regulation provides a practical guide as to how the office representing the public interest in enforcing the law will apply it."' *Id.*, quoting 1 Schwartz,

> Administrative Law (2d ed), § 4.6, p 159." (Footnote deleted.)

Accord *By Lo Oil Co* v *Dep't of Treasury*, 267 Mich App 19, 45-46; 703 NW2d 822 (2005). See also *Faircloth* v *Family Independence Agency*, 232 Mich App 391, 403-404; 591 NW2d 314 (1998)(agency policy that merely interprets or explains a statute or rule need not itself be promulgated as a rule under the APA even if it has a substantial effect on the rights of a class of people); *Kent Co Aeronautics Bd* v *Dep't of State Police*, 239 Mich App 563, 583-584; 609 NW2d 593 (2000), aff'd sub nom *Byrne* v *State of Michigan*, 463 Mich 652 (2001)(personal rights not being equivalent to "public rights," agency instructions and interpretations regarding its operations are not rules even if they affect individual property rights).

The so-called Dovetailing Chart is clearly explanatory and interpretive, expressing Appellee's position on its statutory duty under section 21301a to give retroactive application to Part 213 and its reporting requirements. Such documents are within the section 7(h) exclusion from the APA concept of rule and thus do not have to be promulgated. The Court determines that by relying on interpretive and explanatory documents as a means to implementing Part 213 reporting requirements with retroactive effect the agency did not violate the APA and its rule-making protocols. In sum, Appellee's decision is authorized by law, is within the range of agency discretion bestowed by the Act, and is not arbitrary or

capricious.[3]

In conclusion, the Court finds no fault in Appellee's decision that constitutes action in excess of its statutory authority. That decision is not an abuse of the agency's discretion, nor is it arbitrary or capricious. It is, rather, authorized by law and must therefore be upheld.

An order consistent with this opinion and dismissing the appeal may enter upon its proper presentation.

AFFIRMED.

JAMES R. GIDDINGS
Circuit Judge

DATED: September 24, 2009

[3]On the remaining lesser issues raised by Appellant, suffice to say that the Court rejects them for the reasons stated and on the authority cited in Appellee's briefs.