

**LOUISVILLE METRO AIR  
POLLUTION CONTROL BOARD  
ADMINISTRATIVE ACTION NO. 05-LMAPD-0205**

LOUISVILLE METRO AIR  
POLLUTION CONTROL DISTRICT

12-05-06

PETITIONER

vs.



LOUISVILLE PAVING COMPANY, INC.

RESPONDENT

\* \* \* \* \*

**REPORT**

**FINDINGS OF FACT, CONCLUSIONS OF LAW  
and RECOMMENDED ORDER**

**AFFIRMING IN PART  
DISMISSING IN PART  
MODIFYING PENALTIES**

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**I. Introduction**

This administrative action is before the Hearing Officer on an Amended Petition for Administrative Hearing filed by the Louisville Metro Air Pollution Control District (sometimes “the District”) against the Louisville Paving Company (sometimes “LPC”). In this enforcement action the District has alleged four (4) general categories of violations committed by LPC:

- (a) Violations of District Regulations 1.09 and 1.13 for emitting excessive amounts of particulate matter and odor and causing a nuisance to the surrounding residential neighborhood;
- (b) Violations of District Regulation 2.03, for failure to comply with the 20% opacity limitation of their permit;
- (c) Monitoring, recordkeeping, and other permitting violations of District Regulations 2.17 and 2.03; and
- (d) Violations of District Regulation 1.14 for failure to use dust control at construction sites.

An administrative hearing was conducted at the Office of the Louisville Metro Air Pollution Control District over nine (9) days, beginning February 1, 2006, and concluding on May 30, 2006, to consider the allegations referenced in the District's Amended Petition. The hearing was conducted by Scott D. Majors, a hearing officer with the Division of Administrative Hearings, Office of the Attorney General. Appearing on behalf of the District were Lauren Anderson, Esq., and Stacy Fritze, Esq., who were accompanied by Terri E. Phelps, Esq., the District's Enforcement Supervisor. Appearing on behalf of LPC were David Kiser, Esq., and, on occasion, William Cooper, Esq., who were accompanied by LPC's Vice-President, John Dougherty, Jr., and, on occasion, Mr. Kevin Klain.

Following careful consideration of the record taken as a whole, and as set forth in greater detail below, it is recommended that the Louisville Metro Air Pollution Control Board enter a Final Order which: (1) AFFIRMS most, but not all, of the allegations set forth in the District's First Amended Petition for Administrative Hearing; (2) ADJUDGES LPC to be liable for committing most, but not all, of the violations set forth in the District's First Amended Petition; and (3) ASSESSES a modified civil penalty in the amount of \$41,650.00 against LPC.

## **II. Findings of Fact**

1. Petitioner Louisville Metro Air Pollution Control District (sometimes "the District") is a public body corporate and a political subdivision of the Commonwealth of Kentucky. The District is charged with enforcing the laws of the Commonwealth and of Louisville/Jefferson County Metro government relating to the control of air pollution in Louisville, Jefferson County, Kentucky, pursuant to Kentucky Revised Statutes (KRS) Chapter 77 and District Regulations promulgated pursuant thereto.

2. Respondent Louisville Paving Company, Inc. (sometimes "LPC") owns and operates a paving facility (the plant) located at 1801 Payne Street<sup>1</sup> in Louisville, Jefferson County, Kentucky. LPC and its predecessor companies have operated at the Payne Street location since 1919. The present plant at the Payne Street location was constructed in 1979. LPC's primary business at the Payne Street location is to provide and lay asphalt for commercial and public projects.

3. LPC's Vice-President is John Thomas Dougherty, Jr., who was present throughout most of the administrative hearing and with whom the District has had most contact on behalf of LPC.

4. LPC has been issued Federally Enforceable District Origin Operating Permit (FEDOOP) # 0184-01-F. (Petitioner's Exhibit #2.) LPC is subject to the conditions of FEDOOP #0184-01-F and the regulations enforced thereunder.

5. LPC's FEDOOP provides in pertinent part:

#### ADDITIONAL CONDITIONS

The owner or operator shall:

\* \* \*

6. Not allow visible emissions to equal or exceed 20% opacity. . . .

\* \* \*

2) Exhaust shall not exhibit twenty percent (20%) or greater opacity.

(Petitioner's Exhibit #2, p. 5, Additional Condition 6, and page 2, Additional Condition 2.)

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<sup>1</sup> The physical address for the paving facility sometimes has been referred to in this administrative action as 115 S. Charlton Street, which intersects with Payne Street.

6. Jane Grinstead Halliday is a citizen who has resided at 120 S. State Street, north of Louisville Paving, since 1995. (TR 100,103) Ms. Halliday is a musician by profession and is frequently at home during the afternoons because of her work schedule. (TR 103-04) Ms. Halliday phoned in complaints regarding the operation of Louisville Paving to the District approximately twelve to fourteen times between 2001-2004. (TR 104) The primary thrust of Ms. Halliday's complaints focused on dust and odor coming from the plant. (TR 104) Ms. Halliday described the odor as "oil burning on your car engine" and stated that it had an "acrid quality" that "makes you feel coughy." (TR 104-06) She described the dust as "chunky and dark gray to black" that had pieces in it. (TR 105) The only time she noticed the dust or odor was when the plant was running. (TR 107) Ms. Halliday observed excessive dust coming over the railroad tracks toward her home and, on one occasion, she and her father took photographs of the dust. (Petitioner's Exhibits #7 - #9; TR 110-117) The plant affected Halliday's enjoyment of her property because she would not work in the yard as planned or be outside when the plant was running. (TR 104-06) Since Ms. Halliday did not have central air-conditioning, she kept her windows open and could see evidence of this particular dust on her furniture. (TR 106) At times, Halliday had to decide whether to close her windows in the heat, just so the dust and smell didn't come in. (TR 106)

7. Sean Michael Allen is a citizen who resided at 112 S. State Street, north of the plant, from approximately September 2002 to July 2004. (TR 137-38) Mr. Allen is a registered nurse and was regularly at home during the day because of his work schedule. (TR 141-42) Mr. Allen called the District approximately 20 times between 2002-2004 to complain about Louisville Paving. (TR 142) The primary thrust of Mr. Allen's complaints focused on excessive smoke, dust and odor coming from the plant. (TR 142) Mr. Allen described the smoke as "heavy, like clouds, sometimes

dark” and ‘sometimes real dense.’ (TR 142) Mr. Allen had to close his windows in his house because of the smoke, and stated that sometimes the smoke was so dense that “even if it was a clear sunny day, it would seem like a cloudy day because the clouds would be shadowing the house from the sun.” (TR 143) The smoke would give him a headache and he didn’t feel like he could take a deep breath. (TR 144) Mr. Allen described the odor as a “tar, asphalt” smell. (TR 143) The dust was associated with the smoke and there was “always residue on the cars, the front of the house, on the windows.” (TR 143)

8. It seemed to Mr. Allen that the inside of his house stayed dusty. (TR 143) The smoke, odor and dust kept Mr. Allen from enjoying his yard on days he would have liked to have been outside. (TR 144) On one occasion, Mr. Allen went over to the plant to ask how long they would be operating because it was Mother’s Day and he wanted to be able to have his mother over for brunch on the back deck. (TR 145) Mr. Allen knew the smoke, dust and odor was coming from Louisville Paving because he could hear noises coming from the plant and he could see the plumes of smoke coming from the plant. (TR 146)

9. Raymond Christopher Graf is a citizen who has resided at 1742 Payne Street, south of the plant, since winter of 1998. (TR 163, 166) Mr. Graf is a renowned sculptor by profession and is regularly at home during the day. (TR 166) During 2001-2004, Mr. Graf contacted the District to complain about the plant approximately 6 times. (TR 166-67) The primary thrust of Mr. Graf’s complaints focused on “excessive pollutants” or “fairly thick smoke with a lot of caustic particulates in it.” (TR 167) The smoke traveled up and down Payne Street both east and west, as far as Mr. Graf could see. (TR 167) The smoke bothered Mr. Graf physically, he couldn’t breathe very well, it made his chest tighten and he sometimes had to stop his work outside because he felt it was so

harmful. (TR 168) On one occasion Mr. Graf followed the smoke to Louisville Paving and saw it coming out of the plant. (TR 170) Mr. Graf described the odor as a burning asphalt smell and the smoke as bluish-gray in color. (TR 168 - 169)

10. Edward Joseph (Chip) Chrisman, Jr., is a citizen who has resided at 105 S. State Street since December 1999. (TR 387, 389) Mr. Chrisman is a marriage and family therapist and is frequently at home during the day because of his work schedule. (TR 387, 389-90) Mr. Chrisman called the District over 30 times between 2001-2004 to complain about Louisville Paving. (TR 390) Mr. Chrisman complaints focused on smoke, odor and dust. (TR 390) The smoke was “thick and heavy smoke that at times would hover just above the ground and float up the street.” (TR 390) The color was whitish and pale or gray, and the odor was “a heavy diesel smell, very, either oily or musky, just a heavy stench that would, could take my breath away and make me feel nauseous.” (TR 390-91) The odor was strong in Mr. Chrisman’s home on a number of occasions even though his windows were never open. (TR 391-92) The dust, described as a “granular dust,” would coat Mr. Chrisman’s cars while parked near his residence. (TR 391) The smoke and odor from the plant affected the time Mr. Chrisman spent outside with his dog, running in the neighborhood, working in the yard, having breakfast outside on the back deck, entertaining friends, and working on the house. (TR 392) He had concerns about himself, his wife and his dog being exposed to the smoke and odor due to his sense of nauseousness and due to the thickness of the smoke. (TR 393) Mr. Chrisman knew the smoke came from Louisville Paving because he could see the smoke blowing over the railroad tracks and onto his property and he could observe the smoke from the southern side of his home. (TR 393)

11. Jennifer Byers Chrisman is a citizen and foster parent trainer, who is married to Chip Chrisman, and also resides at 105 S. State Street. (TR 438) Ms. Chrisman observed smoke from Louisville Paving that was expansive, floated down the streets and took a while to dissipate. (TR 440) The odor was “an exhaust smell” or “something you might smell from a big-rig truck.” (TR 440) The dust was “pebbly soot on her front porch and deck that was larger than regular dust.” (TR 440) It was difficult for Ms. Chrisman to enjoy her deck, and, similar to her husband, she feared breathing the smoke would affect her, her husband’s and her dog’s health. (TR 441) The smell would come inside the home, and sometimes the only option was to leave the home if she didn’t want to ingest the fumes. (TR 441) At times she would plan a dinner party or have friends over and wonder if the plant was going to start up and emit a noxious smell when her friends were there. (TR 441) Ms. Chrisman could see the stack from her home and the smoke coming from the plant. (TR 442)

12. Each of the citizens identified in paragraphs #6 - #11, above, were able to distinguish the smoke, dust and odor originating from LPC’s plant from other potential sources in the neighborhood. For example, Ms. Halliday determined that trains were not a source of dust or odor, nor was a gravel alley a source of dust. (TR108-09) From Ms. Halliday’s testimony, it is found that a caramel coating plant located nearby emitted a sweet odor that was not unpleasant and which could easily be distinguished from the odor coming from the plant. (TR 110) Moreover, Ms. Halliday did not notice dust from any other companies in the neighborhood. (TR 110)

13. Similar to Ms. Halliday, Mr. Allen did not recall the alley or trains being a source of dust. (TR 147) While Mr. Allen “might” smell exhaust from the engine of the train as it went by, he was able to distinguish that odor from the odor originating from LPC. (TR 147) Mr. Allen

noticed an odor associated with D.D. Williamson, a company located nearby, but he did not notice any smoke or dust from any other companies in the neighborhood. (TR 147-48)

14. Similar to Ms. Halliday and Mr. Allen, Mr. Graf noticed odors associated with other companies near his home that were distinct and had a food product base smell. (TR 171) Mr. Graf did not complain about these other odors, however, because he did not think they presented a danger like the odor originating from LPC. (TR 171-72)

15. From Mr. Chrisman's testimony, it is apparent that the dust from the gravel alley which adjoined his property was a problem in the drier months of the year, July and August. However, there was a difference between the dust from the alley, which was a lighter dust, and the dust from LPC, which was a heavier dust. (TR 398-99) Similar to Ms. Halliday, Mr. Allen and Mr. Graf, Mr. Chrisman did not notice dust originating from trains. (TR 398) Although Mr. Chrisman was aware of other companies operating in the area, he had not noticed smoke or dust coming from them. (TR 400) Similar to Ms. Halliday and Mr. Allen, Mr. Chrisman had noticed the sweet caramel smell from D.D. Williamson. (TR 400)

16. Similar to the description offered by her husband, Ms. Chrisman described the dust from the alley as a finer dust. (TR 444) The dust was not "pebbly" like the dust she would find after the plant had been in operation. (TR 444) Similar to Ms. Halliday, Mr. Allen and Mr. Chrisman, Ms. Chrisman detected odors from other companies, such as D.D. Williamson, but was able to distinguish those odors from LPC because they were "very different." (TR 444-45) Similar to Ms. Halliday, Mr. Allen, Mr. Graf and Mr. Chrisman, Ms. Chrisman did not notice dust or odor associated with trains. (TR 444)

**Incident 3693, November 14, 2003, Petitioner's Exhibit #20**  
**Regulation cited: 1.09**

17. On November 14, 2003, Mr. Chrisman reported that LPC was fumigating the neighborhood with pungent diesel fumes and smoke. (Petitioner's Exhibit #21) Later that day District Compliance Officer Nancy Kottak responded to Mr. Chrisman's complaint. (TR 227) Ms. Kottak has twelve (12) years experience as a District Compliance Officer, and she is certified in opacity. (TR 181, 184) Initially Ms. Kottak did not detect any smoke or odor at the plant. (TR 228) However, she discussed Mr. Chrisman's complaint with Louisville Paving employee Kevin Klain, who stated that there had been fumes on shut-down. (TR 228) While she was on site, the plant started up again and she observed a large cloud of steam. (Petitioner's Exhibit #20) Ms. Kottak returned to the Chrismans' home where, after a few minutes, a haze of smoke and asphalt fumes drifted from the plant property. (Petitioner's Exhibit #20) Ms. Kottak next observed a large plume of smoke coming over the train tracks, the hill, and rolling up State Street into the neighborhood. (Petitioner's Exhibit #20) Ms. Kottak then reported that smoke and asphalt fumes were emitted from the plant and traveled up State Street into a residential area, creating a nuisance and annoyance to the community. (Petitioner's Exhibit #20)

**Incident 3686, March 23, 2004, Petitioner's Exhibit #24**  
**Regulation cited: 1.09**

18. On March 23, 2004, Mr. Chrisman again reported smoke and odor coming from the plant. (Petitioner's Exhibit #25) District Compliance Officer Samuel Underwood Bate responded to Mr. Chrisman's complaint. (TR 297) Mr. Bate has fourteen (14) years experience as a District Compliance Officer, and he is certified in opacity. (TR 292-93) Mr. Bate went to the Chrismans' home to discuss the complaint but no one was home. (TR 299) When he was preparing to leave the

house, the plant began operation and Mr. Bate observed some white emissions from the stack , both smoke and steam, and he detected a strong, diesel, asphalt, petroleum base odor. (Petitioner's Exhibit #24) Mr. Bate proceeded to the plant and attempted to reach Mr. Klain but reached John Dougherty, Vice President of LPC, instead. (TR 299-300) Mr. Bate and Mr. Dougherty left the office and went to the plant, at which point Mr. Dougherty agreed that there was a problem. (TR 300) Mr. Bate and Mr. Dougherty observed particulate emissions and odors which were similar to what Mr. Bate had observed at the Chrismans' home. (TR 301) The problem was caused by the bins being out of balance and the air chute puffing up particulate dust because it was clogged. (TR 301) They went back to the Chrismans' home and again observed the emissions. (TR 301-02)

19. When Mr. Bate was at the Chrismans' home he could feel particulate matter on his face and in his eyes. (TR 302) Mr. Bate reported that improper operation of the facility caused dust, smoke and diesel-like fume emissions to travel into the surrounding community causing nuisance and annoyance to the residential neighbors and the general public. (Petitioner's Exhibit #24)

**Incident 3666, December 22, 2003, Petitioner's Exhibit #30**  
**Regulation cited: 1.09**

20. On December 22, 2003, Mr. Chrisman reported a gaseous smell. (Petitioner's Exhibit #31) District Compliance Officer Timothy Ray Priddy responded to Chrisman's complaint. (TR 455) Mr. Priddy has two (2) years experience as a District Compliance Officer, and he is certified in opacity. (TR 451) When Mr. Priddy arrived at the plant, a postman flagged him down and told him that about thirty (30) minutes earlier the smoke and fumes had been so bad that it was hard to breathe. (TR 456, 459) Mr. Priddy observed the plant operation and after about fifteen (15) minutes a cloud of smoke and heavy fumes drifted out of the plant and covered the neighborhood. (TR 459)

Mr. Priddy contacted Mr. Klain, who advised that LPC was running straight out of the plant and this would cause some smoke when the asphalt was dumped in trucks. (TR 459) From Mr. Priddy's testimony, it is found that the smoke obstructed the whole neighborhood, that the street got black as it went up, and it was like walking into a "fog bank" in the neighborhood. (TR 532) Mr. Priddy reported that LPC allowed smoke and asphalt fumes to leave their property, which caused a nuisance and annoyance to the neighborhood. (Petitioner's Exhibit #30)

**Incident 3689, April 9, 2004, Petitioner's Exhibit #32**  
**Regulation cited: 1.14**

21. On April 9, 2004, a citizen reported that a construction project behind her house was creating dust in the area near the plant and on her property. (TR 466) Mr. Priddy responded to the citizen's complaint and observed dust on the complainant's outdoor furniture and around her property. (TR 466-467) Mr. Priddy observed dust coming off of heavy equipment being used on a construction site to move gravel. (TR 467-78) LPC's site supervisor admitted that he knew he should have gotten a water truck. (TR 467) Mr. Priddy took photographs which depict excessive dust at the work site and in the residential area. (Petitioner's Exhibits #34-36) Mr. Priddy reported that the company allowed dust to be carried by the wind and would exit the work site without using dust suppression methods. (Petitioner's Exhibit #32)

**Incident 4049, July 29, 2005, Petitioner's Exhibit #41**  
**Regulation cited: 1.14**

22. On July 29, 2005, three (3) citizens reported excessive dust that had been present for weeks at a construction site near their homes. (Petitioner's Exhibits #42-44) District Compliance Officer Beverly Denise Tyler responded to the citizen complaints. (TR 560) Ms. Tyler has seventeen (17) years experience as a District Compliance Officer. (TR 555) As Ms. Tyler drove

down the road to the work site, she encountered dust so thick that she thought it was smoke. (TR 561) When she arrived at one complainant's home, she saw dust falling on the homes in the neighborhood. (TR 563) The complainant showed Tyler the dust on his property in several locations. (TR 563) Ms. Tyler then proceeded to the construction site where she spoke with Mr. Kevin Baird, who was foreman of the project for LPC. (TR 565-66) Mr. Baird admitted that the dust was a problem, and he agreed to get dust control as soon as possible. (TR 566) Ms. Tyler pointed out a water truck on site that was not being used, but she was told that the water truck was broken down. (TR 568-69, 571-72) Ms. Tyler took photographs near the work site (Petitioner's Exhibits #45-50), and she did not leave until a water truck arrived and the dust was under control. (TR 572) Ms. Tyler was agitated because she had experienced this type of problem on prior occasions with LPC at various construction sites. (TR 574) Ms. Tyler reported that Louisville Paving did not use proper dust suppression methods, causing the dust to become airborne beyond the work site and causing a nuisance to the surrounding community. (Petitioner's Exhibit #41)

23. LPC does not contest the facts of the violations for Incidents #3689 and #4049, set out in the two preceding paragraphs, but LPC does contest the amount of the associated penalties. (See, LPC's Post-Hearing Brief, p. 28)

**Incident 4079, May 3, 2005, Petitioner's Exhibit #51**  
**Regulations cited: 2.03 and 2.17**

24. On May 3, 2005, during a routine inspection, District Engineer Michael A. Brown observed what Mr. Klain described as a paint booth. (TR 661-62) Mr. Brown observed that the paint booth had not been rendered inoperable, which in this case would probably include removal of the ductwork. (TR 632, 695) LPC had not obtained a District permit for the paint booth. (TR

652-53) The paint booth was added to the plant in the 1980s, and it had been used between twelve (12) to fifty (50) times. (TR 631, 2290-91)

25. The District has always required a permit for the spray booth. (TR 631)

26. A parts washer also was in use, with the lid up, which allows solvent to evaporate into the atmosphere. (TR 633) LPC did not obtain a District permit for the parts washer, as required. (TR 633-34)

27. There were no recorded daily pressure drop readings for a total of 222 days in calendar year 2004. (Petitioner's Exhibit #51A) The importance of recording daily pressure drop readings is to ensure that the bags in the baghouse are functioning properly. (TR 634) The purpose of the baghouse is to filter dust. (TR 634) Mr. Brown reported that the company failed to obtain an operating permit for the spray booth and parts washer, and failed to conduct and record daily pressure drop readings on a number of days in 2004 when the plant was in operation. (Petitioner's Exhibit #51A)

28. Mr. Dougherty admitted that LPC has at least two (2) unpermitted parts washers at the plant. (TR 968-69, 2287)

**Incident 4081, May 5, 2005, Petitioner's Exhibits #67 - 69**  
**Regulation cited: 2.17**

29. Mr. Dougherty is the designated responsible official for LPC. (TR 767) The Annual Compliance Certification must be signed by the responsible official. (TR 773-74) The Annual Compliance Certifications for calendar years 2003 and 2004 were not signed by LPC's designated responsible official. (TR 784) The District is not required to contact the company and ask for re-submittal. (TR 1336) The violation was documented during a routine records review on May 5, 2005. (Petitioner's Exhibits #67 - #69)

**Incident 3314, March 3, 2003, Petitioner's Exhibit #77**  
**Regulation cited: 2.17**

30. LPC submitted a revised quarterly report to the District on March 3, 2003, with a self-reported visible emission. No corrective action was listed; therefore, the District cited LPC with a failure to comply with District Regulation 2.17. (Petitioner's Exhibit #77)

31. Based on testimony presented at hearing, it is clear that LPC mistakenly checked the "YES" box instead of the "NO" box in response to the relevant question and, in fact, the self-reported visible emission was simply made in error. (TR 2140 - 2142)

**Incident 3311, June 5, 2002, Petitioner's Exhibits #70 - 72, 133**  
**Regulation cited: 2.17**

32. LPC's FEDOOP first quarter compliance report for calendar year 2002 was due on May 30, 2002, but it was not submitted to the District until June 5, 2002. (Petitioner's Exhibits #70-#72)

**Incident 3753, October 25, 2002, Petitioner's Exhibits #73 - 75, 153**  
**Regulation cited: 1.09**

33. LPC's FEDOOP second quarter compliance report for calendar year 2002 was due on August 29, 2002, but it was not submitted to the District until October 25, 2002. (Petitioner's Exhibits #73 - #75 and #153)

34. On November 2, 2002, LPC indicated particulates were visible in the baghouse exhaust on a weekly inspection checklist. (Petitioner's Exhibit #78) LPC never performed corrective action on November 2, 2002, as required. (Petitioner's Exhibit #78) Initially, Mr. Dougherty claimed that LPC did perform corrective action as required, by running a dye test and replacing two bags. (TR 925) However, later he stated that a dye test log indicated zero bags were

replaced. (TR 927-28) Later still he stated that the checklist incorrectly indicated particulates were ever visible in the baghouse exhaust. (TR 2141-42) The violation was documented during a routine review of records on March 13, 2003. (Petitioner's Exhibit #78)

35. Ms. Terri Elms Phelps has served as the Enforcement Supervisor for the District since 2000. (TR 1002) Ms. Phelps was qualified as an expert in environmental issues, and she has over eighteen (18) years experience in environmental law. (Petitioner's Exhibit #106) Ms. Phelps has supervised all the compliance officers, except for Mr. Priddy, and she is familiar with their work. (TR 1018)

36. Compliance officers prepare incident investigation reports that go to their supervisor to determine whether a violation has occurred. (TR 1032) The compliance officers, engineers and supervisors are sworn peace officers who have taken an oath to be truthful and represent the interests of the state of Kentucky. (TR 1018-19)

37. Ms. Phelps reviewed all the Incident/Violation reports submitted by District employees for accuracy, and she agreed with the conclusions stated therein. (TR 1291) Ms. Phelps relied on District employees, the public, and LPC's records and management of their facility in determining whether a violation had occurred. (TR 1030)

38. Ms. Phelps attended smoke school training in 2002 and 2003 to learn how to read a smoke plume and conduct a Method 9 visible emissions evaluation ("VEE"). (TR 1024) A Method 9 that substantially conforms with protocol can prove that there is a violation. (TR 1435) The specificity of a Method 9 becomes more important when trying to determine opacity on a plume that's very close to the 20 percent standard. (TR 1489) When a plume is 70-80 percent opacity, some of the details become less important. (TR 1186) The essential elements of a Method 9

evaluation are for the readings to be done by a certified smoke reader; that a reading is taken every fifteen (15) seconds for twenty-four (24) readings; and that the sun is behind your back. (TR 1582)

The other variables have much less impact on the appearance of the plume. (TR 1582)

39. Ms. Phelps supervised District Compliance Officer Mark Goldsmith for three (3) years. (TR 1051) Mr. Goldsmith was a compliance officer with the District for seven (7) years. (TR 1052-53) Mr. Goldsmith was certified to conduct a Method 9. (TR 1065; Petitioner's Exhibit #120) Ms. Phelps relied on Mr. Goldsmith's investigation reports because he was qualified to do his job, he wrote the best reports and she had confidence in his observations. (TR 1066) Mr. Goldsmith passed the smoke reading test the first time, each time, and Ms. Phelps considered Goldsmith to be the District's best smoke reader. (TR 1127)

40. Mr. Goldsmith often complained of not being able to reach Dougherty, and Phelps instructed him to put that information in his reports. (TR 1132-33)

**Incident 2952, May 22, 2002, Petitioner's Exhibit #110**  
**Regulation cited: 1.09**

41. On May 22, 2002, during routine surveillance, Mr. Goldsmith observed a tremendous amount of dust coming from the baghouse operation at LPC's plant. (Petitioner's Exhibit #111) Mr. Goldsmith was unable to conduct a Method 9 because of the position of the sun. (TR 1080) He estimated the plume to be at 50-60 percent opacity, yet it was not constant. (TR 1080) Mr. Goldsmith observed the dust crossing the LPC property line and entering the residential neighborhood. (TR 1080) Mr. Goldsmith took photos of the opacity that show particulate matter in the plume. (Petitioner's Exhibits #113-15) Less than an hour later, Chip Chrisman reported that the dust and odor coming from LPC was out of control. (Petitioner's Exhibit #112) The next day,

Mr. Dougherty stated that they ran a dye test and found two (2) bags had holes and they were promptly replaced. (TR 1091) Mr. Goldsmith reported that the emissions from the plant caused a nuisance to the surrounding community. (Petitioner's Exhibit #110)

**Incident 3048, August 22, 2002, Petitioner's Exhibit #117**  
**Regulations cited: DR 1.09 and 1.13**

42. On August 22, 2002, during routine surveillance, Mr. Goldsmith observed a tremendous amount of dust and he detected a very strong and offensive odor coming from LPC's plant. (Petitioner's Exhibit #116) The dust was not continuous, but in pulses about every thirty (30) seconds, and it appeared to be at 50-60 percent opacity. (TR 1103) The odor was continuous and very offensive. (TR 1103) Mr. Goldsmith observed dust and odor invading the residential neighborhood north of the plant for over an hour. (TR 1103) Mr. Goldsmith left two messages for Mr. Dougherty to call back but did not hear from him. (Petitioner's Exhibit #117; TR 1104) Mr. Goldsmith reported that the emissions and odor leaving the facility caused a nuisance to the surrounding community and that the objectionable nature of the odor caused a nuisance to the local community. (Petitioner's Exhibit #117)

**Incident 3138, October 21, 2002, Petitioner's Exhibit #118**  
**Regulation cited: 2.03**

43. On October 21, 2002, during routine surveillance, Mr. Goldsmith observed a tremendous amount of particulate matter coming from the plant and crossing the property line. (Petitioner's Exhibit #118) Mr. Goldsmith conducted a Method 9, which revealed that the stack was emitting a continuous flow of heavy matter from 70-80 percent opacity. (TR 1116) The flow of particulate matter continued for twenty (20) minutes. (TR 1116) Mr. Goldsmith documented three (3) sets of readings in excess of 20 percent opacity. (TR 1120) Mr. Goldsmith unsuccessfully

attempted to contact Mr. Dougherty. (TR 1116) Mr. Goldsmith reported that the opacity emitting from the stack exceeded opacity limits. (Petitioner's Exhibit #118)

**Incident 3180, November 7, 2002, Petitioner's Exhibit #122**  
**Regulation cited: 1.13**

44. On November 7, 2002, at approximately 12:30 p.m., Chip Chrisman reported a very strong odor coming from the plant. (Petitioner's Exhibit #121) Mr. Goldsmith responded to the complaint in about thirty (30) minutes and at first only noticed steam coming from the plant. (Petitioner's Exhibit #122) He then headed north of the plant and detected a very strong odor coming from the plant and entering the residential neighborhood. (TR 1132) Mr. Goldsmith contacted Mr. Dougherty and left a message that, if the odor continued, it would be considered a violation. (TR 1132) Mr. Dougherty did not return his call. (TR 1132) The odor detected by Mr. Goldsmith was very strong, continuous and offensive for over an hour. (TR 1132) Mr. Goldsmith reported that the nature (offensive), strength, location (detectable in the neighborhood north of the plant) and duration (over an hour) of the odor caused a nuisance to the surrounding community. (Petitioner's Exhibit #122)

**Incident 3196, November 23, 2002, Petitioner's Exhibit #126 (avowal)**  
**Regulation cited: 1.13**

45. On November 23, 2002, Chip Chrisman reported at approximately 10:30 a.m. that all windows were shut but the smell was still coming in and filling his house. (Petitioner's Exhibit #123) He stated that it was an annoyance and he wanted suggestions for what could be done about the company. (Petitioner's Exhibit #123) Fifteen (15) minutes later, Ms. Halliday reported that the plant was spewing particulate, it was awful, and she couldn't breathe. (Petitioner's Exhibit #124) Ms. Phelps responded to Mr. Chrisman that afternoon. (TR 1139) At 2:00 p.m. he reported that the

problem had recurred; however, no compliance officer was available to respond to his complaint, as this was a Saturday. (TR 1139)

46. LPC's records show that the facility operated from 6:30 a.m. to 5:30 p.m. on November 23, 2002. (Petitioner's Exhibit #81)

47. On the following Monday morning, November 25, 2002, Sean Allen reported that the facility was a nuisance day and night and on weekends. (Petitioner's Exhibit #125)

48. At hearing the District urged the Hearing Officer to accept Mr. Chrisman's testimony as establishing the nature ("annoying," "awful"), intensity (it smelled inside the Chrismans' house even with all the windows closed), duration (two morning calls fifteen minutes apart, and another call at 2:00 p.m., in addition to Mr. Allen's statement that the plant is a nuisance ("day and night and on the weekends") and location (north of the plant) of the odor. Nevertheless, the Hearing Officer sustained LPC's objection to the District's motion to admit the Incident Violation Report ("I/V Report")(Petitioner's Exhibit #126A) into evidence, and it was admitted only as an avowal exhibit because no District employee had experienced the odor first-hand on that Saturday. A corresponding reduction in the proposed penalty of \$525 was declared by the Hearing Officer. (TR 1329)

**Incident 3211, December 18, 2002, Petitioner's Exhibit #130**  
**Regulation cited: 2.03**

49. On December 18, 2002, Ms. Halliday reported that LPC was emitting particulate matter into the area. (Petitioner's Exhibit #129) Mr. Goldsmith responded to the complaint and, as he approached the facility, he observed a thick plume of smoke coming from LPC's baghouse tower. (TR 1176-77) The smoke was traveling in a northerly direction toward the Clifton neighborhood

and settling up to two (2) blocks away. (TR 1176-77) The smoke was very thick, yellowish in color, and it affected several dozen homes in the area north of the plant. (TR 1177) Mr. Goldsmith conducted a Method 9 and he documented four (4) sets of readings at 70-80 percent opacity. (TR 1177, Petitioner's Exhibit #131) Mr. Dougherty, who was not present, claimed that it was just steam. (TR 1177) Mr. Goldsmith reported that the company emitted greater than 20 percent opacity and caused a nuisance to the surrounding community. (Petitioner's Exhibit #130)

50. Also on December 18, 2002, LPC responded to the December 4, 2002, Notice of Violation (*see*, paragraph #72, below) through correspondence from its counsel. The purpose of this correspondence was stated to be three fold: "a notice of representation, a request for hearing, and an objection to warrantless searches." (Petitioner's Exhibit #128.)

**Incident 3351, May 10, 2003, Petitioner's Exhibit #137**  
**Regulations cited: 1.09 and 2.03**

51. On May 10, 2003, Sean Allen reported dust, smoke and a very strong odor coming over the railroad track from the plant getting into his house. (Petitioner's Exhibit #135) Less than an hour later, Chip Chrisman reported a strong diesel-like odor coming from the plant. (Petitioner's Exhibit #136) Mr. Goldsmith responded to the complaints, and he observed dust that was heavy in the ambient air and traveling in the Clifton neighborhood for several blocks. (TR 1204) He performed a Method 9 consisting of four (4) sets of readings which averaged 40-45 percent opacity. (TR 1204, Petitioner's Exhibit #138) Mr. Goldsmith contacted Mr. Dougherty who said the plant would close at noon, he would check the baghouse for any problems, and he would call Goldsmith back. (TR 1205) Mr. Goldsmith had requested that Mr. Dougherty call him back and submit a malfunction report if there had been a malfunction. (TR 1205) Five (5) days later, Mr. Dougherty

had not called and no malfunction report had been submitted. (TR 1205) Mr. Goldsmith reported that the company emitted greater than 20 percent opacity from their stack, and that the odor and dust from the facility caused a nuisance to the surrounding community. (Petitioner's Exhibit #137)

**Incident 3359, May 29, 2003, Petitioner's Exhibit #140**  
**Regulation cited: 2.03**

52. On May 29, 2003, Raymond Graf reported a tremendous amount of dust and strong odor coming from the plant. (Petitioner's Exhibit #139) Mr. Goldsmith responded to Mr. Graf's complaint and, during his approach to the operation, Goldsmith could see a tremendous amount of particulate matter coming from the stack. (TR 1211) Mr. Goldsmith conducted a Method 9 and documented two (2) sets of readings at approximately 65 percent opacity. (TR 1211-12, Petitioner's Exhibit #141) Mr. Goldsmith left a message for Mr. Dougherty, who confirmed that there was a problem, the plant would shut down, and he would fax a malfunction report. (TR 1211-12) The next day LPC reported that three (3) loose bags in the baghouse were tightened. (TR 1214-15, Petitioner's Exhibit #142) Mr. Goldsmith reported that the company emitted greater than 20 percent opacity from the stack. (Petitioner's Exhibit #140)

**Incident 3370, June 5, 2003, Petitioner's Exhibit #148**  
**Regulation cited: 2.03**

53. On June 5, 2003, Raymond Graf reported tremendous amounts of dust coming from LPC and that the dust was all over the Clifton neighborhood south of the plant. (Petitioner's Exhibit #147) Mr. Graf remembered that he was very upset that day. (TR 177) Mr. Goldsmith responded to the complaint, but when he arrived the plant was shut down. (TR 1265) After a few minutes, the plant started up again and Mr. Goldsmith observed dust coming from the baghouse stack. (TR 1265-66) Mr. Goldsmith observed dust leaving LPC's property line and traveling approximately two (2)

blocks in a south to southeasterly direction. (TR 1266) Mr. Goldsmith conducted a Method 9. (Petitioner's Exhibit #149) Mr. Goldsmith conducted two (2) sets of readings averaging about 40 percent opacity. (Petitioner's Exhibit #149) He called Mr. Dougherty, who was out of town at the time, but Dougherty stated that there was only steam coming out of the stack that morning. (TR 1266) Mr. Goldsmith was advised that Mr. Klain was LPC's new contact person. (TR 1266) Mr. Klain said he would check to see if there were any problems. (TR 1267) The next day Mr. Klain stated that a dye test had been done and one loose bag was detected. (TR 1267) Mr. Goldsmith reported that the company emitted more than 20 percent opacity from the stack, and that the odor and dust from the facility caused a nuisance to the surrounding community. (Petitioner's Exhibit #148)

**Incident 3481, July 26, 2003, Petitioner's Exhibit #151A (avowal)**  
**Regulation cited: 1.09**

54. On July 26, 2003, Chip Chrisman reported that LPC was smoking up the neighborhood, that he was entertaining guests, and that he couldn't enjoy the use of the deck attached to the rear of his home. (Petitioner's Exhibit #151A) Mr. Chrisman was extremely unhappy because he and his wife had planned on having their mothers over, the plant had started up, and they couldn't follow through with plans to enjoy the outside of their property. (TR 1278) Mr. Chrisman normally was quite calm and polite when he complained to the District of problems with the plant, but this time he was very angry. (TR 1285) LPC's records show that the company operated from 6:00 a.m. to 3:00 p.m. on July 26, 2003. (Petitioner's Exhibit #81) On July 28, 2003, the dye test log and baghouse maintenance log show five (5) bad bags were discovered. (Petitioner's Exhibits #79 and #80) The smoke caused an extreme annoyance to the residents in the surrounding community.

55. Similar to Incident 3196, above, the Hearing Officer sustained LPC's objection to the District's motion to admit the I/V Report (Petitioner's Exhibit #151A) from this occasion into evidence, and it was admitted only as an avowal exhibit because no District employee was present to document the nuisance on the day in question. A corresponding reduction in the proposed penalty of \$2,250 was also declared by the Hearing Officer. (TR 1287 - 1295) However, the following day the District requested clarification of this ruling. In summary, the District asserted that, even if the "documented investigation" language set forth in District Regulation 1.13 requires personal observation by a District employee (a position the District disputes), there is no such language contained in District Regulation 1.09 and, thus, a District employee is not required to personally observe a violation of 1.09 for it to be established. (TR 1316 - 26) The Hearing Officer agreed to reconsider his ruling (TR 1325 - 26) and, as set forth in the conclusions of law, below, the reduction in the proposed penalty of \$2,250 is set aside. While the Hearing Officer expressed concern during the hearing with the strength of the District's evidence on this issue (*see*, TR 1660 - 61), after careful post-hearing review of Mr. Chrisman's testimony, coupled with a review of the corresponding CAP report dated July 26, 2003 (*see*, Petitioner's Exhibit #151) and LPC's records pertaining to this incident, it is now found as fact that Mr. Chrisman's testimony is competent and persuasive, and it is corroborated by LPC's records bearing the date of July 26, 2003 (*see*, Petitioner's Exhibits 79 - 81), from which it reasonably may be inferred that five (5) bad bags likely caused the plant to emit excess pollution for the time in question.

**Incident 3759, June 9, 2004, Petitioner's Exhibit #37**  
**Regulation cited: 1.14**

56. On June 9, 2004, a caller reported dusty conditions at a construction site due to heavy equipment being used off of Frankfort Avenue in Jefferson County, Kentucky. Mr. Priddy

responded to the call and, upon arriving at the construction site, he observed the construction crew spreading dry gravel. He advised the crew that the work would need to cease until a suppressant could be applied. The District concluded that LPC was serving as the general contractor for this construction project. Thus, Mr. Priddy reported that LPC violated District Regulation 1.14 by allowing dust to be carried by the wind and leaving the work site without first applying dust suppressant methods. (Petitioner's Exhibit #37)

57. At hearing, LPC (belatedly) produced a copy of a subcontract which demonstrates to the Hearing Officer's satisfaction that LPC served as a subcontractor on this construction project. The general contractor was Robert Mattingly & Sons Construction, which hired Mr. Gary Allgeier, who was responsible for the alleged violation. (Respondent's Exhibit #5; TR pp. 891, 2136 - 38)

#### **Method 9**

58. LPC never produced any Method 9s to refute the District's allegations of violations, despite the opinion offered by its own expert witness, Mr. Bill Eddins, that good business practice warrants LPC having a trained person to conduct a Method 9 reading if District employees repeatedly represented to LPC's officials that they had an opacity problem. (TR 1881-82) Mr. Dougherty admitted that there is no way to determine the opacity coming from the stack without doing a Method 9. (TR 875) Mr. Dougherty has never been certified in Method 9. (TR 2225) Mr. Klain was certified in opacity in November 2003, but that certification lapsed, and he was not re-certified until a date near in time to the hearing. (TR 2006-07) No one else at LPC had ever been certified until the time of the hearing, and only five (5) or six (6) Method 9s have ever been conducted at the plant. (TR 2032 - 2033) A bag that is loose or has a rip, tear, or hole likely would cause excess emissions. (Klain Depo 21, 31-36) Louisville Paving records show several instances of bag failures. (P Ex 79-

59. The record is replete with testimony supporting a factual finding that the compliance officers and citizens were capable during the time frame in question of distinguishing smoke from steam. The following examples clearly illustrate this finding: Steam dissipates and smoke hovers or hangs around for a period of time and will be lower to the ground. (TR 230 -- Nancy Kottak) Steam dissipates very quickly and it's usually white. (TR 293 – Sam Bate) Steam will rise and dissipate and smoke will not. (TR 453 – Tim Priddy) Steam dissipates while particulate matter is still visible. (TR 581 – Bev Tyler) Smoke hangs in the air longer than steam. (TR 107 – Jane Halliday) Smoke is more like clouds, opaque, and will hang lower to the ground, while steam is like a vapor and dissipates fairly quickly. (TR 146 – Sean Allen) Steam is white. (TR 169 – Raymond Graf) Steam will dissipate quickly – it does not sink and hover up the street, while smoke is denser and thicker. (TR 395 – Chip Chrisman)

#### **Consideration of Expert Testimony**

60. LPC argues that the testimony of Ms. Phelps should be accorded little evidentiary value for various reasons, summarized as follows:

- (a) she did not personally observe any of the incidents for which the District cited LPC for violating 1.09, 1.13 or 2.03;
- (b) she offered an erroneous opinion that the kind, volume and duration of the nuisance should be considered when citing a nuisance violation;
- (c) she offered an erroneous opinion that the length of time LPC has used its property as an asphalt plant should not be considered when citing a nuisance violation; and
- (d) as a District employee, her testimony is more properly deemed to be that of a biased lay witness rather than that of an unbiased expert witness.

The Hearing Officer finds to the contrary: no event during the hearing gave this Hearing Officer serious pause in perceiving Ms. Phelps to be anything other than a competent, articulate, and

authoritative source of information. While admittedly there were moments on cross-examination when her testimony lacked complete clarity, these moments were isolated, and they were understandable in view of the fatigue normally experienced by witnesses who are required to testify for an extended period of time, as Ms. Phelps did in this hearing.<sup>2</sup> Viewing the record taken as a whole, Ms. Phelps impressed this fact finder as being comprehensive in her approach, deliberate in her criticism, yet flexible and fair-minded in her willingness to make appropriate concessions to LPC, when warranted. (*See, e.g.*, TR 1232 - 33, 1251 - 54) In short, LPC's characterization of Ms. Phelps' testimony simply is not supported by the totality of this record.

61. Conversely, the Hearing Officer gives less weight to the expert opinions offered by William ("Bill") Eddins, LPC's expert witness. His experience, credentials and achievements are extensive, and his presentation at hearing was easy to comprehend. Nevertheless, the Hearing Officer was troubled by several aspects surrounding his testimony.

62. First, by any reasonable assessment, Mr. Eddins cannot be considered an expert in Method 9, for Mr. Eddins has never performed a Method 9 in the field. (Eddins' Depo; pp. 242-43) At the time his deposition was taken in this action, January 4, 2006, Mr. Eddins had been through Method 9 training once, some time between 1987 and 1990, and he was only re-certified to conduct opacity readings shortly before the commencement of the administrative hearing. (TR 1743; Eddins' Depo 222)

63. Second, from the totality of this record, the Hearing Officer is not persuaded that Mr. Eddins fully comprehends the manner by which a Method 9 is conducted. For example, at the time

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<sup>2</sup> Ms. Phelps' testimony consisted of over 860 pages of hearing testimony and over 125 pages of deposition testimony.

of his deposition, Mr. Eddins incorrectly opined that, while performing a Method 9, you were actually supposed to stare at the plume for 15 seconds at a time. (Eddins' Depo; pp. 215-16, 219, 267; TR pp. 220, 317) Furthermore, he repeatedly stated the sun must be over your right shoulder at the 140 degree quadrant, yet he also argued that he could obtain a valid reading with sun over his left shoulder and with the sun in a 230 degree quadrant to the rear. (TR 1891-94) In comparison, Ms. Phelps correctly testified that the sun may be within the entire 140 degree horizontal quadrant to your back. (TR 1579) Moreover, Mr. Eddins incorrectly testified that, when conducting a Method 9, wind direction indicates the direction in which the wind is blowing. (TR 1769) Instead, it is found as fact that wind direction is the direction from which the wind is blowing, as testified by Ms. Phelps. (TR 1178)

64. Third, Mr. Eddins' only degree is an undergraduate degree in Physical Education. While Mr. Eddins' air quality experience is notable and deserving of respect, this experience is with state environmental issues, and the state has no authority in the areas of air quality in Jefferson County. (TR 1713) Jefferson County has unique air quality issues and regulations, and only 1 percent of Mr. Eddins' consulting work is in Jefferson County. (TR 23-45; 1874)

65. Fourth, Mr. Eddins has never worked for the Louisville Metro Air Pollution Control District, he had never seen the specific District regulations at issue before this proceeding, and has never advised a client how to comply with them. (Eddins' Depo; pp. 130, 136, 139) While Mr. Eddins was properly qualified as an expert witness concerning state environmental issues, his testimony clearly established that he is not an expert concerning the District's regulations. For example, when asked specific questions on cross-examination concerning District Regulation 1.09, Mr. Eddins referred to Condition 7.b of LPC's permit, stating that as long as the company did some

unspecified corrective action within eight hours, there's no violation of 1.09 – "I believe I could argue that, yes[.]" (TR 1814) This opinion strains credulity: no reasonable reading of District Regulation 1.09 or Conditions 7.a and 7.b of LPC's permit supports an interpretation that LPC is relieved of its requirement to comply with its 20 percent opacity limit if corrective action is commenced within eight (8) hours of initial observation.

66. Fifth, Mr. Eddins is familiar with the Clean Air Act, but not in any detail. (Depo 35)

67. Sixth, Mr. Eddins's company represents the asphalt industry, known as PAIKY, Plant Mix Asphalt Industry of Kentucky. (TR 1720) However, Mr. Eddins has never observed LPC's plant in operation, and only shortly prior to offering his testimony at hearing did he drive through the facility in his car. (TR 1868-69)

68. Finally, for his presence and expert opinions offered at hearing, Mr. Eddins was compensated by LPC at the rate of \$110.00 per hour, plus travel expenses. (TR 1986) As noted above, it is found as fact that Ms. Phelps' testimony was competent, articulate, and authoritative. However, assuming arguendo that there is merit in LPC's argument that Ms. Phelps is a biased witness due to her compensated position with the District, and thus her testimony should be discounted, it reasonably appears that Mr. Eddins' testimony should equally be discounted, and considered as biased in favor of protecting LPC.

69. All of these facts viewed collectively, in the Hearing Officer's judgment, evidence both Mr. Eddins' impartiality and a general lack of familiarity with the applicable standards and regulations to such a degree that his expert opinions have been received with caution.

70. An analysis of District recorded complaints and LPC operating records show only two (2) complaints were received on days in which it was impossible to tell if the plant was operating.

(TR 2313) The District was unable to verify complaints on some occasions because the plant operates intermittently, and the compliance officers were not always able to investigate complaints immediately. (TR 108, 148, 170, 396, 2362-2363)

71. By all accounts, LPC's plant operated very seldom after 2004, and citizens who reside in the vicinity of the plant have not noticed any problems with smoke, dust or odor since 2004. (TR 118, 173, 400, 445, and 726)

**Notice of Violation 01345, Petitioner's Exhibit #127, December 4, 2002**

72. The five (5) incidents described in paragraphs #41 - #48, above, were bundled into one Notice of Violation (NOV), which was sent to LPC on December 4, 2002. This NOV provided in part:

The District hereby assesses a civil penalty of \$6,150 for this violation. If you agree to settle this matter without a hearing or further action by the District, you may enter into an agreement with the District, which may include remedial measures or corrective action, and pay \$4,425 as a settlement amount.

Please respond to this Notice of Violation by calling Terri Phelps . . . by 12/20/02.

...

(Petitioner's Exhibit #127)

**Notice of Violation 01422, Petitioner's Exhibit #132, May 1, 2003**

73. The three (3) incidents described in paragraphs #30 - #32, and #49, above, were bundled into one NOV, which was sent to LPC on May 1, 2003. This NOV provided in part:

The District hereby assesses a civil penalty of \$4,375 for these violations. If you agree to settle this matter without further action by the District, you may enter into an agreement with the District, which may include remedial measures or corrective action, and pay \$3,275 as a settlement amount.

Please respond to this Notice of Violation by calling Terri Phelps . . . by 5/16/03. .

..

(Petitioner's Exhibit #132)

**Notice of Violation 01514, Petitioner's Exhibit #150, July 3, 2003**

74. The three (3) incidents described in paragraphs #51 - #53, above, were bundled into one NOV, which was sent to LPC on July 3, 2003. This NOV provided in part:

The District hereby assesses a civil penalty of \$17, 625 for these violations. If you agree to settle this matter without further action by the District, you may enter into an agreement with the District, which may include remedial measures or corrective action, and pay \$13, 200 as a settlement amount. . . .

Please call Terri Phelps . . . by 07/18/03, to discuss settlement. . . .

(Petitioner's Exhibit #150)

**Notice of Violation 01622, Petitioner's Exhibit #152, September 30, 2004**

75. The five (5) incidents described in paragraphs #17 - #20, #33 and #54, above, were bundled into one NOV, which was sent to LPC on September 30, 2004. This NOV provided in part:

The District hereby assesses a civil penalty of \$9,750 for these violations. If you agree to settle this matter without further action by the District, you may enter into an agreement with the District, which may include remedial measures or corrective action, and pay \$7,150 as a settlement amount.

Please call Terri Phelps . . . by 10/15/04, to discuss settlement. . . .

(Petitioner's Exhibit #152)

**Notice of Violation 01654, Petitioner's Exhibit #154, September 30, 2004**

76. The two (2) incidents described in paragraphs #21 and #56 - #57, above, were bundled into one NOV, which was sent to LPC on September 30, 2004. This NOV provided in part:

The District hereby assesses a civil penalty of \$675 for these violations. If you agree to settle this matter without further action by the District, you may enter into an agreement with the District, which may include remedial measures or corrective action, and pay \$500 as a settlement amount. . . .

Please call Terri Phelps . . . by 10/15/04, to discuss settlement. . . .

(Petitioner's Exhibit #154)

**Notice of Violation 01750, Petitioner's Exhibit #157, October 13, 2005**

77. The two (2) incidents described in paragraphs #24 - #29, above, were bundled into one NOV, which was sent to LPC on October 13, 2005. This NOV provided in part:

The District hereby assesses a civil penalty of \$3,500 for these violations. If you agree to settle this matter without further action by the District, you may enter into an agreement with the District, which may include remedial measures or corrective action, and pay \$2,625 as a settlement amount. . . .

Please call Terri Phelps . . . by 10/28/05, to discuss settlement. . . .

(Petitioner's Exhibit #157)

**Notice of Violation 01759, Petitioner's Exhibit #156, October 13, 2005**

78. The single incident described in paragraph #22, above, resulted in a NOV, which was sent to LPC on October 13, 2005. This NOV provided in part:

The District hereby assesses a civil penalty of \$600 for this violation. If you agree to settle this matter without further action by the District, you may enter into an agreement with the District, which may include remedial measures or corrective action, and pay \$450 as a settlement amount. . . .

Please call Terri Phelps . . . by 10/28/05, to discuss settlement. . . .

(Petitioner's Exhibit #156)

**First Amended Petition**

79. The District's original Petition for Administrative Hearing was filed on or about May 2, 2005. The District's First Amended Petitioner, tendered November 9, 2005, was ordered filed of record by Prehearing Conference Order dated November 30, 2005.

**Penalties Assessed**

80. In summary, the District issued eighteen (18) Incident Reports against LPC beginning in May of 2002 through September of 2004. As a result, the District issued five (5) Notices of

Violation and assessed penalties totaling \$38,575. Three (3) additional Incident Reports were included in the District's First Amended Petition, which resulted in two (2) additional Notices of Violation being issued with assessed penalties totaling \$4,100. Thus, the total of the District's assessed penalties as reflected in the seven (7) Notices of Violation that are the subject of this administrative appeal is \$42,675.

81. The District escalates penalties for repeat violations, which is also common with state violations. (Eddins' Depo; 248)

### **III. Conclusions of Law**

82. The parties were properly served with all pleadings and scheduling notices, and all procedural due process requirements were satisfied.

83. KRS Chapter 77 confers upon the Air Pollution Control Board and the District the authority to promulgate regulations that are necessary to carry out the statute's provisions and purposes, including the power to prevent and reduce air pollution. KRS 77.180.

84. Strict liability is imposed for violations of any provision of KRS Chapter 77. KRS 77.990.

85. The administrative hearing was conducted pursuant to KRS 77.310 and District Regulation 1.19.

86. The standard of proof is the civil standard of preponderance of the evidence, in accordance with reasonable administrative practices. KRS 77.310. The burden of proof rests with the District. Based on the findings of fact, above, the Hearing Officer concludes that the District has met this burden in part.

87. LPC is subject to the conditions of FEDOOP #0184-01-F and the regulations enforced thereunder.

88. Under the terms of the permit, Louisville Paving's exhaust shall not exceed 20 percent opacity or greater.

89. A Method 9 is the proper test method to prove exceedance of Louisville Paving's 20 percent opacity standard.

90. The permit requirement to perform corrective action within eight hours if there are visible emissions from the stack, does not relieve the company of the requirement to comply with its 20 percent opacity limit.

91. A company is not allowed to exceed its opacity limit on start up and shut down without first notifying the District and meeting the other requirements of District Regulation 1.07.

92. A baghouse maintenance problem is not considered a malfunction pursuant to District Regulation 1.07.

93. A residential neighborhood is a public place.

94. "Opacity" means "the degree to which emissions reduce the transmission of light and obscure the view of an object in the background." (District Regulation 1.02.) In plainer terms, opacity is a measurement of "how well you can see through a plume" of particulates, "[s]o that 100 percent would mean that it's completely opaque and you can't see through it. Zero percent would mean there was no opacity." (TR pp. 1023-24) Opacity is a means of measuring particulate matter (PM) pollution. "Opacity is one of the most basic emission limitations imposed on sources of particulate air pollution. ...[It] is important in the Clean Air Act regulatory scheme as an indicator of the amount of visible particulate pollution being discharged by a source." Sierra Club v. TVA, 430 F.3d 1337, 1341 (11th Cir. 2005). "While opacity is not itself a regulated pollutant, it acts as a measurement surrogate for particulate matter, which is a regulated pollutant for which the EPA has

set national ambient air quality standards.” Sierra Club v. Georgia Power Co., 443 F.3d 1346, 1350 FN 4 (11th Cir. 2006). When first proposing an ambient air quality standard for PM, the EPA described some of the health effects of PM:

Particulate matter of technological origin is pervasive in its distribution and is associated with a variety of adverse effects on public health and welfare. Particulate matter in the respiratory tract may produce injury by itself, or it may act in conjunction with gases...Particles cleared from the respiratory tract by transfer to the lymph, blood, or gastro-intestinal tract may produce effects elsewhere in the body.

36 FR 1502 (1971), quoted in National Lime Assoc. v. EPA, 627 F.2d 416, 431 (FN 48) (D.C. Cir. 1980).

95. Opacity is measured by the use of EPA Method 9,<sup>3</sup> about which there was considerable testimony presented at hearing, much of it conflicting. Method 9 makes clear what is required for a valid reading. First, the person reading the plume of smoke must be trained and be currently certified.<sup>4</sup> In addition,

The qualified observer shall stand at a distance sufficient to provide a clear view of the emissions with the sun oriented in the 140° sector to his back. Consistent with maintaining the above requirement, the observer shall, as much as possible, make his observations from a position such that his line of vision is approximately perpendicular to the plume direction.

Method 9, section 2.1.

Method 9 is not a law unto itself. The procedures in it are not laws which, if broken, invalidate the entire reading. Rather, “it’s a method and the closer it’s followed the more precise you can be.” (TR 2353) The cases cited by LPC in its Post-Hearing Brief (p. 4) also make clear what the necessary factors are:

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<sup>3</sup> Method 9 is 40 CFR Part 60, Appendix A-4.

<sup>4</sup> To remain certified, an inspector must go to training and pass the field test every six months. Sierra Club v. Public Service Co. of Colorado, 894 F.Supp. 1455, 1457 (D. Colo. 1995); TR p. 1029 (Phelps).

1. A trained, certified observer. Sierra Club v. PSC Colo., 894 F.Supp. at 1457; Clean Air Implementation Project v. EPA, 150 F.3d 1200, 1203 (D.C. Cir. 1998); National Parks Conversation Assoc. v. TVA, 175 F.Supp.2d 1071, 1075 (2001);
2. Reading the plume at the point of greatest opacity where steam is not present. U.S. v. Comunidades Unidas Contra La Contaminacion, 106 F.Supp.2d 216, 219 (D. P.R. 2000);
3. Periodic observation (instead of one look). National Parks, 175 F.Supp.2d at 1075;
4. The sun in 140° quadrant behind the observer. Sierra Club v. PSC Colo., 894 F.Supp. at 1457; National Parks, 175 F.Supp.2d at 1075; and
5. To the extent possible, the observer must be “approximately” perpendicular to the plume. Method 9; Sierra Club v. PSC Colo., 894 F.Supp. at 1457; National Parks, 175 F.Supp.2d at 1075.

This agrees with the factors Ms. Phelps identified as necessary: that the reading be done by a certified reader; that it be done for six minutes; that the sun be behind the observer’s back. (TR 1582) More precision may be required in marginal cases, but opacity of 20%, which is barely visible, could never be mistaken for 70-80%, which is nearly opaque. (TR pp. 1127-28, 1186)

96. It is not always possible to perform a valid Method 9 evaluation. Plume direction and sun position are things over which the investigator has no control. The LPC plant poses a particular challenge because it is so hemmed in, which makes it difficult for the observer to get in the right position. (TR pp. 1093, 1183-84) This illustrates the necessity of District Regulation 1.09, a general prohibition of air pollution: to cover those instances when, because of difficulty of measuring opacity, a source would otherwise be able to blow out pollution with impunity. District Regulation 1.09 addresses emissions that, “while not measurable by precise standards...nevertheless are injurious or actually endanger the public health or harm property.” People v. Olsonite Corp., 80 Mich. App. 763, 265 N.W.2d 176, 178 (1978).

97. As noted at the outset of this Recommended Order, the District has alleged four (4) general categories of violations committed by LPC:

- (a) Violations of District Regulations 1.09 and 1.13 for emitting excessive amounts of particulate matter and odor and causing a nuisance to the surrounding residential neighborhood;
- (b) Violations of District Regulation 2.03, for failure to comply with the 20% opacity limitation of their permit;
- (c) Monitoring, recordkeeping, and other permitting violations of District Regulations 2.17 and 2.03; and
- (d) Violations of District Regulation 1.14 for failure to use dust control at construction sites.

**Regulation 1.09**

98. District Regulation 1.09, entitled “Prohibition of Air Pollution,” was referred to by both parties throughout the hearing as the District’s “nuisance regulation.” This regulation provides in its entirety:

No person shall permit or cause the emission of air pollutants which exceed the requirements of the District regulations of which cause injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public of which endanger the comfort, repose, health, or safety of any such persons or the public of which cause or have a natural tendency to cause injury or damage to business or property.<sup>5</sup>

99. A Method 9 is not required to prove a violation of District Regulation 1.09.

100. Based on the foregoing findings of fact, particularly in paragraph #41, above, it is concluded that on May 22, 2002, LPC permitted or caused the emission of air pollutants which

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<sup>5</sup> LPC argued at hearing that District Regulation 1.09 is unconstitutionally vague, as it does not give adequate notice to people in LPC’s position of the type of conduct proscribed. The argument is a facial challenge to the constitutionality of the regulation, and the Hearing Officer lacks authority to grant the relief sought. KRS 13A.140(1)(Administrative regulations are presumed to be valid until declared otherwise by a court.) An administrative tribunal is not a court.

caused injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public or which endangered the comfort, repose, health, or safety of any such persons or the public, or which caused or had a natural tendency to cause injury or damage to business or property, in violation of District Regulation 1.09.

101. Based on the foregoing findings of fact, particularly in paragraph #17, above, it is concluded that on November 14, 2003, LPC permitted or caused the emission of air pollutants which caused injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public or which endangered the comfort, repose, health, or safety of any such persons or the public, or which caused or had a natural tendency to cause injury or damage to business or property, in violation of District Regulation 1.09.

102. Based on the foregoing findings of fact, particularly in paragraphs #18 - #19, above, it is concluded that on March 23, 2004, LPC permitted or caused the emission of air pollutants which caused injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public or which endangered the comfort, repose, health, or safety of any such persons or the public, or which caused or had a natural tendency to cause injury or damage to business or property, in violation of District Regulation 1.09.

103. Based on the foregoing findings of fact, particularly in paragraph #20, above, it is concluded that on December 22, 2003, LPC permitted or caused the emission of air pollutants which caused injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public or which endangered the comfort, repose, health, or safety of any such persons or the public, or which caused or had a natural tendency to cause injury or damage to business or property, in violation of District Regulation 1.09.

104. Based on the foregoing findings of fact, particularly in paragraph #49, above, it is concluded that on December 18, 2002, LPC permitted or caused the emission of air pollutants which caused injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public or which endangered the comfort, repose, health, or safety of any such persons or the public, or which caused or had a natural tendency to cause injury or damage to business or property, in violation of District Regulation 1.09.

105. Based on the foregoing findings of fact, particularly in paragraph #51, above, it is concluded that on May 10, 2003, LPC permitted or caused the emission of air pollutants which caused injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public or which endangered the comfort, repose, health, or safety of any such persons or the public, or which caused or had a natural tendency to cause injury or damage to business or property, in violation of District Regulation 1.09.

106. Based on the foregoing findings of fact, particularly in paragraph #52, above, it is concluded that on May 29, 2003, LPC permitted or caused the emission of air pollutants which caused injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public or which endangered the comfort, repose, health, or safety of any such persons or the public, or which caused or had a natural tendency to cause injury or damage to business or property, in violation of District Regulation 1.09.

107. Based on the foregoing findings of fact, particularly in paragraph #53, above, it is concluded that on June 5, 2003, LPC permitted or caused the emission of air pollutants which caused injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public or which endangered the comfort, repose, health, or safety of any such persons or the public, or which

caused or had a natural tendency to cause injury or damage to business or property, in violation of District Regulation 1.09.

108. Based on the foregoing findings of fact, particularly in paragraphs #54 - #55, above, it is concluded that on July 26, 2003, LPC permitted or caused the emission of air pollutants which caused injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public or which endangered the comfort, repose, health, or safety of any such persons or the public, or which caused or had a natural tendency to cause injury or damage to business or property, in violation of District Regulation 1.09.

### **Regulation 1.13**

109. District Regulation 1.13, entitled "Control of Objectionable Odors in the Ambient Air," provides in pertinent part as follows:

\* \* \*

#### Section 1 Definitions

1.1 'Objectionable odor' means any odor present in the ambient air that, by itself or in combination with other odors, gases, or vapors, is offensive, foul, unpleasant, or repulsive.

#### Section 2 Prohibition of Objectionable Odors

2.1 No person shall emit or cause to be emitted into the ambient air any substance that creates an objectionable odor beyond the person's property line. An odor will be deemed objectionable when documented investigation by the District includes, as a minimum: observations on the odor's nature, intensity, duration, and location, and evidence that the odor causes injury, detriment, nuisance, or annoyance to persons or to the public.

2.2 An instrument, device, or technique *may* be used by the District in the determination of the intensity of an odor and *may* be used in the enforcement of this regulation. . . .

(Emphasis added.)

110. District Regulation 1.13 permits, but does not require, the use of an instrument or numerical standard in documenting an odor violation.

111. Based on the foregoing findings of fact, particularly in paragraph #42, above, it is concluded that on August 22, 2002, LPC emitted or caused to be emitted into the ambient air a substance that created an objectionable odor beyond their property line, in violation of District Regulation 1.13.<sup>6</sup>

112. Based on the foregoing findings of fact, particularly in paragraph #44, above, it is concluded that on November 7, 2002, LPC emitted or caused to be emitted into the ambient air a substance that created an objectionable odor beyond their property line, in violation of District Regulation 1.13.

113. Based on the foregoing findings of fact, particularly in paragraphs #45 - #48, above, it is concluded that on November 23, 2003, LPC emitted or caused to be emitted into the ambient air a substance that created an objectionable odor beyond their property line, in violation of District Regulation 1.13.

#### **Regulation 1.14**

114. District Regulation 1.14, entitled "Control of Fugitive Particulate Emissions," provides in pertinent part as follows:

\* \* \*

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<sup>6</sup> This Incident Violation was one of five (5) in which LPC was cited for violating more than one District Regulation. LPC repeatedly asserted at hearing that the District could not legitimately cite LPC for a violation of two (2) different District Regulations based on the same fact pattern. The Hearing Officer concludes otherwise. The District cited LPC for violations of 1.09 when the problem was primarily particulate matter, and for 1.13 when the problem was primarily odor. The two are related: objectionable odors are one type of nuisance. Moreover, exceeding one's opacity limit and causing a nuisance are two separate violations. (TR pp. 1092-94)

Section 2 Standard for Fugitive Particulate Matter

2.1 No person shall cause, allow, or permit any materials to be handled, transported, or stored; or a building and/or its appurtenances to be constructed, altered, used, repaired, or demolished; or a road to be used without taking reasonable precautions to prevent particulate matter from becoming airborne beyond the work site. Such precautions shall include, where applicable, but shall not be limited to the following:

2.1.1 Using, where possible, water or chemicals for control of dust in the demolition of existing buildings or structures, construction operations, the grading of roads or the clearing of land,

2.1.2 Applying and maintaining asphalt, oil, water, or suitable chemicals on roads, materials stockpiles, and other surfaces which can create airborne dusts,

\* \* \*

2.1.4 Covering at all times, except when loading and unloading, open bodied trucks transporting materials likely to become airborne,

2.1.6 Maintaining paved roadways in a clean condition,

2.1.7 Removing earth or other material from paved streets which earth or other material has been transported thereto by trucking or earth moving equipment or erosion by water. . . .

115. Based on the foregoing findings of fact, particularly in paragraph #21, above, it is concluded that on April 9, 2004, LPC caused, allowed, or permitted materials to be handled, transported or stored, or a road to be used, without taking reasonable precautions to prevent particulate matter from becoming airborne beyond the work site, in violation of District Regulation 1.14.

116. Based on the foregoing findings of fact, particularly in paragraph #22, above, it is concluded that on July 29, 2005, LPC caused, allowed, or permitted materials to be handled, transported or stored, or a road to be used, without taking reasonable precautions to prevent

particulate matter from becoming airborne beyond the work site, in violation of District Regulation 1.14.

**Regulation 2.03**

117. District Regulation 2.03, entitled “Permit Requirements Non-title V Construction and Operating Permits and Demolition/Renovation Permits,” provides in pertinent part as follows:

\* \* \*

Section 2 Prohibition of Objectionable Odors

2.1 Applications for permits required under Section 1 shall be made on forms prepared by the District for such purpose and shall contain such information as the District may deem necessary for issuance of the permit.

\* \* \*

5.2 Acceptance of a permit shall denote agreement to the restrictions embodied in the permit and shall be binding upon the holder of the permit[.]

118. Based on the foregoing findings of fact, particularly in paragraph #43, above, it is concluded that on October 21, 2002, LPC failed to limit its opacity to 20 percent, in violation of its permit and District Regulation 2.03.

119. Based on the foregoing findings of fact, particularly in paragraph #49, above, it is concluded that on December 18, 2002, LPC failed to limit its opacity to 20 percent, in violation of its permit and District Regulation 2.03.

120. Based on the foregoing findings of fact, particularly in paragraph #24, above, it is concluded that on May 3, 2005, LPC failed to obtain a permit to operate air pollution control equipment, specifically a paint booth and parts washer, in violation of District Regulation 2.03.

121. Based on the foregoing findings of fact, particularly in paragraph #51, above, it is concluded that on May 10, 2003, LPC failed to limit its opacity to 20 percent, in violation of its permit and District Regulation 2.03.

122. Based on the foregoing findings of fact, particularly in paragraph #52, above, it is concluded that on May 29, 2003, LPC failed to limit its opacity to 20 percent, in violation of its permit and District Regulation 2.03.

123. Based on the foregoing findings of fact, particularly in paragraph #53, above, it is concluded that on June 5, 2003, Louisville Paving failed to limit opacity to 20 percent, in violation of its permit and District Regulation 2.03.

### **Regulation 2.17**

124. District Regulation 2.17, entitled “Federally Enforceable District Origin Operating Permits,” provides in pertinent part as follows:

\* \* \*

#### Section 2      Applicability

This regulation applies to any stationary source, or one or more processes of process equipment at a stationary source, (stationary source) for which the owner or operator voluntarily applies for a federally enforceable District origin operating permit [FEDOOP].

#### Section 3      General Provisions

\* \* \*

3.5 All application forms, reports, compliance certifications, and any other relevant information submitted to the District shall contain certification by a responsible official. This certification shall include the following statement:

Based on information and belief formed after reasonable inquiry, I certify that the statements and information in this document are true, accurate, and complete. . . .

125. Based on the foregoing findings of fact, particularly in paragraph #24, above, it is concluded that on May 3, 2005, LPC failed to comply with all terms and conditions in its FEDOOP; specifically, failure to record pressure drop readings, in violation of District Regulation 2.17.

126. Based on the foregoing findings of fact, particularly in paragraph #29, above, it is concluded that on May 5, 2005, LPC failed to comply with all terms and conditions in a FEDOOP, specifically by failing to have its Responsible Official sign the annual compliance certifications for calendar years 2003 and 2004, in violation of District Regulation 2.17.

127. Based on the foregoing findings of fact, particularly in paragraph #32, above, it is concluded that on June 5, 2002, LPC failed to comply with all terms and conditions in a FEDOOP, specifically by failing to timely submit a first quarter compliance report in 2002, in violation of District Regulation 2.17.

128. Based on the foregoing findings of fact, particularly in paragraph #33, above, it is concluded that on October 25, 2002, LPC failed to comply with all terms and conditions in a FEDOOP, specifically by failing to timely submit a second quarter compliance report in 2002, in violation of District Regulation 2.17.

#### **Penalties**

129. By Hearing Order dated April 16, 2006, and pursuant to KRS 77.990, the Hearing Officer granted LPC's motion *in limine* to have the District's claims of fines and penalties limited to those assessed in its Petition for Administrative Hearing, as amended. Thus, the District was only permitted at hearing to present evidence of fines and penalties it assessed in the eighteen (18) Incident Reports and seven (7) Notices of Violation, which total \$42,675.

## **Penalty Adjustments**

### **Incident 3314, March 3, 2003, Petitioner's Exhibit #77**

#### **Regulation cited: 2.17**

130. As noted in paragraphs #30 - #31, above, the District cited LPC for a violation of District Regulation 2.17 based on a self-reported visible emission for which no corrective action was taken, yet LPC's report was made in error. Under these circumstances, the Hearing Officer agrees with LPC that, "to the extent the (\$500) penalty imposed is for Louisville Paving's failure to follow up on a visible emission, it should not be so penalized." (See, LPC's Proposed Findings of Fact and Conclusions of Law, p. 20) After it reviewed LPC's revised quarterly report, there can be no question that the District took appropriate action in concluding that a violation had been committed. However, based on evidence subsequently presented at hearing, it is equally clear that the public policy intended to be addressed by District Regulation 2.17 was never implicated in this instance, due to a clerical error. The imposition of a penalty in this circumstance is not rationally related to the protection of that public policy; accordingly, it is concluded that the \$500 penalty assessed against LPC for this violation should be vacated.

### **Incident 3196, November 23, 2002, Petitioner's Exhibit #126A**

#### **Regulation cited: 1.13**

131. As noted in paragraphs #45 - #48, above, the District cited LPC for a violation of District Regulation 1.13 based on citizen complaints of spewing particulate and offensive odor. Nevertheless, the Hearing Officer sustained LPC's objection to the District's motion to admit the I/V Report (Petitioner's Exhibit #126A) into evidence, and it was admitted only as an avowal exhibit because no District employee had experienced the odor first-hand on that Saturday. Consequently, it is concluded that the District did not meet its burden of proving this violation by a preponderance of the evidence, and the \$525 penalty assessed against LPC for this violation should be vacated.

132. Accordingly, as set forth in the preceding two (2) paragraphs, the District's penalties assessed in the eighteen (18) Incident Reports and seven (7) Notices of Violation, which total \$42,675, should be reduced by the amount of \$1,025.

#### **Motion to Open Record**

133. On October 16, 2006, the District filed a motion to open the record for the limited purpose of admitting one additional exhibit: the overhead photograph of the property of LPC that was referred to repeatedly by multiple witnesses throughout the administrative hearing. LPC has not filed any objection to this motion; thus, the Hearing Officer concludes it is unopposed, and it is therefore GRANTED. The District's tendered exhibit, the overhead photograph of the property of LPC, is ADMITTED as Exhibit A, and it shall be placed before all other exhibits in this record.

#### **IV. Recommended Order**

WHEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, it is HEREBY RECOMMENDED that the Louisville Metro Air Pollution Control Board enter a Final Order which: (1) AFFIRMS the allegations set forth in the District's First Amended Petition for Administrative Hearing, other than those expressly excepted in the Findings of Fact and Conclusions of Law, above; (2) ADJUDGES LPC to be liable for committing the violations set forth in the District's First Amended Petition, other than those expressly excepted in the Findings of Fact and Conclusions of Law, above; and (3) ASSESSES a MODIFIED civil penalty in the amount of \$41,650 against LPC, to be paid no later than thirty (30) days after finality attaches to the Board's Final Order, unless otherwise agreed to between LPC and the Board.

## V. Notice of Exception and Appeal Rights

Notice is hereby provided to the parties that:

1. Pursuant to KRS 77.310 (3):

\* \* \*

The hearing officer shall serve a copy of the report and recommended order upon all parties of record to the proceedings, and the parties shall be granted the right to file exceptions within fourteen (14) days of receipt. The Secretary-Treasurer shall schedule a time for the air pollution control board to consider the report, exceptions and recommended order and to decide the case. The decision shall be served by mail upon all parties and shall be a final order of the board.

...

2. Pursuant to District Regulation 1.19 Section 9.3:

The parties may, within 14 days of receipt of the hearing officer's report and recommended order, file with the Secretary-Treasurer exceptions to the report and recommended order.

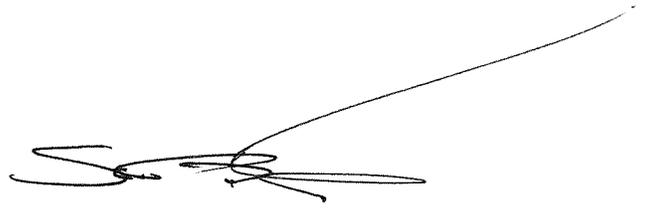
3. Pursuant to District Regulation 1.19 Section 9.4:

After completion of the administrative hearing and any filing of exceptions, the Secretary-Treasurer shall schedule a time for the Board to consider the report, recommended order, and exceptions and to adopt a final order resolving the matter. A copy of the adopted final order shall be served by certified mail, return receipt requested, to all parties of record to the proceeding.

4. Pursuant to District Regulation 1.19 Section 10:

Appeals of a final order following an administrative hearing shall be filed with the Jefferson Circuit Court within 30 days of the Board action. The petition shall state fully the grounds upon which a review is sought and assign all errors relied upon. The District shall be named respondent. Notice of the filing of an appeal shall be given by the appellant to all parties of record to the prior proceeding. Service shall be made upon the District by serving the Secretary-Treasurer.

SO REPORTED AND RECOMMENDED this 5<sup>th</sup> day of December, 2006.



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SCOTT D. MAJORS  
HEARING OFFICER  
DIV. OF ADMINISTRATIVE HEARINGS  
OFFICE OF THE ATTORNEY GENERAL  
1024 CAPITAL CENTER DR., STE. 200  
FRANKFORT, KENTUCKY 40601-8204  
(502) 696-5442  
(502) 573-1009 - FAX

**CERTIFICATE OF SERVICE**

I hereby certify that the original of this REPORT and RECOMMENDED ORDER was filed  
this 6th day of December, 2006, by personal, hand-delivery to:

JONATHAN L TROUT  
SEC/TRES & RECORD CUSTODIAN  
LOUISVILLE METRO AIR  
POLLUTION CONTROL BOARD  
850 BARRET AVE  
LOUISVILLE KY 40204

for filing; and a true copy was mailed by first-class mail, postage prepaid to:

DAVID KISER  
ACKERSON & YANN  
ONE RIVERFRONT PLZ  
401 W MAIN ST STE 1200  
LOUISVILLE KY 40202

LAUREN ANDERSON  
STACY FRITZE  
LOUISVILLE METRO AIR  
POLLUTION CONTROL DIST  
850 BARRET AVE  
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**DOCKET COORDINATOR**

050205fe.sdm.wpd