

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTIONS TO RECONSIDER

2 JUDGMENT ON THE PLEADINGS. The motion for reconsideration is
3 allowed.

4 However, upon reconsideration, the Court affirms its previous ruling.
5 The Court notes at the outset that the very issue that the Board of
6 Health was asked to decide was whether the site assignment should be
7 modified to allow an increase to tonnage limits. No modification of
8 the site assignment was necessary at all unless, in fact, there were
9 tonnage limits attached to the site assignment in the first place.
10 Thus, the parties and the Board of Health, itself apparently
11 proceeded on the premises that the tonnage limit was, in fact, part
12 of the site assignment. If the tonnage limit is not part of the site
13 assignment, then on modification was necessary, and Northside would
14 appear to be free to proceed independently of any determination by
15 the Board. However, the Court is of the view that the premise on
16 which the application was based was correct. Although the original
17 site assignment contained no tonnage limits--apparently because none
18 was required at the time--it would appear that the limits established
19 by the DEP's permit by rule and the Salem City Ordinance (Code 19731,
20 sect. 13.3; Ord. Of 2-28-2002, sect.II) have since attached to the
21 site by reason of established practice. In that regard, the Court
22 cites the "Response to Comments Summary Revisions to Site Assignment
23 Regulations, 310 C.M.R. 16.00. June, 2001,". What the Comment and the
24 Response indicate to the Court is that all tonnage limits are deemed
25 part of a site assignment and that any increase in tonnage limits is
26 a "modification" of that site assignment. Increases that do not
27 result from a "modification of the facility's operations" fall
28 outside of the definition of "expansions" of a site and are therefore
29 "minor modifications." However, as the Court ruled in its initial
30 memorandum, increase in tonnage that do result from a "modification
31 of the facility's operations" fall within the definition of
32 "expansions" and, thus, do constitute modifications. The defendants
33 would have the Court refine the definition of "minor modification"
34 set forth in 310 C.M.R. 16.22(3) by effectively adding the italicized
35 language which follows; "Any request to modify a site
36 assignment...including any request to modify conditions established
37 by the Board of Health in the site assignment, or to increase daily
38 or annual tonnage limits not otherwise stated in the site
39 assignment..." However, if that were the import of the section, then
40 it would be self-contradictory, because, as alluded to in the first
41 paragraph of this memorandum, it would then govern modification of a
42 site assignment that needed no modifying. Depending upon one's
43 application of grammatical rules, an alternative way to read the
44 section would define a minor modification as " Any request
to...increase daily or annual tonnage limits..." However, to do so

45 would fly in the face of the preceding section which defines as major
46 modifications "modifications required to expand a site." That is
47 because the definition of "expand a site," expressly includes
48 increases in tonnage limits, at least where they are stated in the
49 site assignment and where they result from a modification of the
50 facility's operations. Thus, in the view of the Court, its original
51 reading of the regulations is the only logical reading,
52 notwithstanding the views of at least one official of the DEP. As a
53 matter of policy, as well, the Court's reading makes sense. If, as is
54 noted in the Comment to the revisions to the regulation and implied
55 in the Response to the Comments, "daily tonnage clearly affects the
56 public health and environmental impacts of a facility," the manner in
57 which the Board of Health should address a request to increase a
58 particular tonnage limit should not turn on the fact that the limit
59 is expressly stated in the site assignment as opposed to being
60 implicitly contained therein by virtue of other action by the
61 regulatory authorities. The impact of the increase is the same in
62 either circumstance. Accordingly, the prior ruling of the Court
63 stands. dated 12/4/2012 (Howard Whitehead, Justice of the Superior
64 Court.)