

**BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO**

MARIETTA INDUSTRIAL	:	CASE NO. ERAC 11-846565
ENTERPRISES, INC.	:	
	:	
Appellant,	:	
v.	:	
	:	
SCOTT NALLY, DIRECTOR OF	:	
ENVIRONMENTAL PROTECTION	:	
	:	
Appellee.	:	

DECISION

Rendered on February 16, 2012

Edward L. Kropp, Esq. for Appellant Marietta Industrial Enterprises, Inc.

Mike DeWine, Attorney General, Christina Grassechi, Esq., and Wednesday M. Szollosi, Esq. for Appellee Scott Nally, Director of Environmental Protection

{¶1} This matter comes before the Environmental Review Appeals Commission (“Commission” “ERAC”) on a November 3, 2011 Notice of Appeal filed by Appellant Marietta Industrial Enterprises, Inc. Appellant challenges an October 4, 2011 “Follow up Letter” from Appellee Scott Nally, Director of Environmental Protection (“Director” “Ohio EPA”).

{¶2} Before the Commission is the Director’s Motion to Dismiss filed November 28, 2011. Appellant did not file a memorandum in opposition. On February 14, 2012, the parties submitted their joint proposed Findings of Fact, Conclusions of Law, and Final Order, which included a proposed order dismissing the present appeal. Based on the pleadings and relevant statutes, regulations, and case law, the Commission issues the following Findings of Fact,

Conclusions of Law, and Final Order GRANTING the Director's Motion to Dismiss.

FINDINGS OF FACT

{¶3} On April 14, 2011, Christina Wieg, Environmental Specialist III at Ohio EPA, mailed Appellant a letter entitled "Notification of Violations observed during March 30, 2011 site visit" ("original NOV"). The Original NOV stated in pertinent part:

Upon inspection of the #1 Crushing and Sizing Line (Emissions Unit P901), it was determined that a heating source has been installed and operated on one of the conveyors for the purpose of drying material processed on P901. The original permit-to-install application did not include heat processing as part of the emissions unit. The modification and operation of an emissions unit prior to perceiving a permit-to-install for the modified source is a violation of Ohio Administrative Code (OAC) 3745-31-02(A). At this time, I am requesting the following:

- the date the modification occurred;
- the purpose of the modification;
- the specific dates in which the facility operated the modified source; and
- the submittal of a Chapter 31 modification application to address the changes to P901 and a modified Title V Operating Permit renewal application including the changes to P901.

Please submit the above-requested information within 30 days of receiving this letter.

Case File Item A.

{¶4} After a series of emails between Appellant and Ohio EPA, Ms. Wieg sent another letter to Appellant on October 4, 2011 ("Follow up Letter"). The Follow up Letter, which is at issue in this appeal, was entitled "Follow up to Notice of Violation dated April 14, 201" and summarized the communications to that point regarding the burner/heater. The Follow up Letter concluded, "I

maintain that the facility violated OAC rule 3745-31-02(A) by installing and operating the burner/heater on the existing P901 emissions unit.” Case File Item A.

{¶5} On November 3, 2011, Appellant filed its Notice of Appeal challenging Ohio EPA’s Follow up Letter. Case File Item A.

{¶6} The Director filed the present Motion to Dismiss on November 28, 2011. The Director argues that the Follow up Letter does not constitute a final “action” within the meaning of Ohio Revised Code (“R.C.”) 3745.04 and the Commission therefore lacks jurisdiction over this appeal. Further, the Director argues that Appellant is not “aggrieved or adversely affected” and thus lacks standing to appeal. Case File Item F.

CONCLUSIONS OF LAW

{¶7} R.C. 3745.04(B) outlines the scope of the Commission’s jurisdiction as follows:

Any person who was a party to a proceeding before the director of environmental protection may participate in an appeal to the environmental review appeals commission for an order vacating or modifying the *action* of the director * * * (Emphasis added).

Thus, the Commission maintains jurisdiction only over appeals of final “actions” of the Director.

{¶8} “Action” is defined in R.C. 3745.04(A):

As used in this section, “action” or “act” includes the adoption, modification, or repeal of a rule or standard, the issuance, modification, or revocation of any lawful order other than an emergency order, and the issuance, denial, modification, or revocation of a license, permit, lease, variance, or certificate, or the approval or disapproval of plans and specifications pursuant to law or rules adopted thereunder.

{¶9} First, the Commission notes that the Follow up Letter does not fall within any of the specifically enumerated categories of appealable “actions” set out in R.C. 3745.04(A). However, the list in R.C. 3745.04(A) is illustrative rather than exhaustive. *Shelly Materials, Inc. v. Koncelik*, ERAC No. 645775 (Feb. 9, 2010), citing *Trans Rail America, Inc. v. Enyeart*, 123 Ohio St.3d 1, 2009-Ohio-3624. Where a document does not fall within the enumerated categories of “actions” under R.C. 3745.04(A), the Commission examines both the form and substance of the document to determine whether it is nonetheless appealable. *Shelly Materials*, at ¶16.

{¶10} In *Shelly Materials*, the Commission found that the form of the letter at issue did not possess “any of the indicia customarily found in final actions of the Director.” *Shelly Materials*, at ¶17. Specifically, the Commission noted four factors:

- 1) The letter was signed by an Ohio EPA employee rather than the Director;
- 2) the letter did not contain language identifying it is a final action;
- 3) the letter did not include information regarding the recipient’s right to appeal; and
- 4) the letter did not indicate that it had been entered into the Director’s journal as a final action. *Id.*

{¶11} Similarly, the Follow up Letter at issue here (1) was signed by Ms. Wieg rather than the Director, (2) did not contain language identifying itself as a final action, (3) did not include information about Appellant’s right to appeal, and (4) did not indicate that it had been entered into the Director’s journal as a final action. Therefore, the Commission finds that the form of the Follow up Letter does not demonstrate that it is a final “action.”

{¶12} With respect to substance of the document, the Commission has noted that a document is a final appealable “action” “if the document mandates that the appealing party take some action, or if the substance of the document adjudicates with finality any legal right or privilege of the appealing party.” *Shelly Materials*, at ¶18. Conversely, a document is not a final appealable action if it “simply represents an intermediate step in a continuing process, if it is part of a contemplated review or evaluation that will lead to a final action by the Director, or if it is merely an explanation of an Ohio EPA policy or position.” *Id.*

{¶13} Here, the Follow up Letter merely outlines the Director’s position regarding Appellant’s heating unit and concludes, “I maintain that the facility violated OAC rule 3745-31-02(A) by installing and operating the burner/heater on the existing P901 emissions unit.” This language, on its face, does not require Appellant to take any affirmative action or adjudicate any legal right or privilege with finality. Therefore, the substance of the Follow up Letter also does not demonstrate that it is a final appealable “action.”

{¶14} The Commission notes that the original NOV requested that Appellant submit certain information and a Chapter 31 Modification Application. However, this request does not alter the Commission’s conclusion. First, Appellant’s Notice of Appeal does not challenge the original NOV; instead, it challenges only the Follow up Letter. And second, a “request” does not rise to the level of a mandate. Although the original NOV requested Appellant to take some affirmative action, it also invited Appellant to contact Ohio EPA with further questions. Appellant’s subsequent series of emails with Ohio EPA reflects a clear

understanding that the original NOV was part of an ongoing process rather than a final appealable action.

{¶15} Accordingly, the Commission finds that the Follow up Letter does not constitute a final appealable “action” of the Director under R.C. 3745.04. Because this issue is dispositive of the instant matter, the Commission declines to address whether Appellant was aggrieved or adversely affected.

FINAL ORDER

{¶16} For the foregoing reasons, the Commission GRANTS the Director’s Motion to Dismiss and hereby ORDERS that the instant appeal be DISMISSED.

{¶17} The Commission, in accordance with Ohio Adm.Code 3746-13-01, informs the parties that:

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

THE ENVIRONMENTAL REVIEW
APPEALS COMMISSION

Lisa L. Eschleman, Chair

Melissa M. Shilling, Vice-Chair

Shaun K. Petersen, Member

Entered into the Journal
of the Commission this
_____ day of February 2012.

Copies sent to:

MARIETTA INDUSTRIAL ENTERPRISES, INC.
SCOTT NALLY, Director
Edward L. Kropp, Esq.
Christina Grassechi, Esq.
Wednesday M Szollosi, Esq.

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[Certified Mail]