BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO

MINERVA ENTERPRISES, LLC,	:	Case No. ERAC 13-766710
	:	Case No. ERAC 14-766808
Appellant,	:	
	:	
v.	:	
	:	
KIRKLAND NORRIS, HEALTH COMMISSIONER, STARK COUNTY HEALTH DEPARTMENT,	:	
	:	
Appellee.	:	

DECISION

Rendered on October 22, 2014

Michael A. Cyphert and *Bozana L. Lundberg* for Appellant Minerva Enterprises, LLC

Deborah Dawson for Appellee Kirkland Norris, Health Commissioner, Stark County Health Department

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{¶1} This matter comes before the Environmental Review Appeals Commission ("Commission") on two Notices of Appeal filed by Appellant Minerva Enterprises, LLC ("Minerva"). ERAC No. 13-766710, Case File Item A; ERAC No. ERAC 14-766808, Case File Item A.

{¶2} In its first Notice of Appeal, Case No. ERAC 13-766710, filed January 25, 2013, Minerva challenges the issuance of a 2013 construction and demolition debris ("C&DD") license by Appellee Kirkland K. Norris, Health Commissioner, Stark County Health Department ("Appellee," "Stark County Health Department," "Health Department") on December 26, 2012. In its second Notice of Appeal, Case No. ERAC 14-766808, filed January 30, 2014, Minerva challenges Appellee's issuance of a 2014 C&DD

license on December 31, 2013. ERAC No. 13-766710, Case File Item A; ERAC No. ERAC 14-766808, Case File Item A.

{¶3} In both appeals, Minerva generally asserts that the Health Department unlawfully and unreasonably imposed certain financial assurance requirements upon Minerva as a prerequisite to the issuance of the 2013 and 2014 C&DD licenses. ERAC No. 13-766710, Case File Item A; ERAC No. ERAC 14-766808, Case File Item A.

{¶4} The Commission consolidated Minerva's two appeals in an order dated March 5, 2014. Case File Item T.

{¶5} On July 15, 2014, the Commission held a de novo hearing on the consolidated case. Case File Item KK.

{¶6} Based upon the evidence adduced at hearing and the relevant statutes, regulations, and case law, the Commission hereby issues the following Findings of Fact, Conclusions of Law, and Final Order REMANDING Minerva's 2013 and 2014 C&DD licenses to Appellee for action consistent with this decision.

FINDINGS OF FACT

I. The Parties

{¶7} Minerva operates a C&DD facility located at 8955 Minerva Road SE, Waynesburg, Ohio 44688. Minerva Ex. 1.

{¶8} The Stark County Health Department is an approved health district authorized to review applications and issue C&DD licenses on behalf of the Ohio Environmental Protection Agency ("Ohio EPA") in Stark County. See Director's Approved List of Health Departments, http://epa.ohio.gov/portals/34/document/facility_lists/approved_list_of_hds.pdf (Feb. 18, 2014).

II. Regulatory Background

{¶9} Prior to 2012, the regulations governing C&DD facilities in Ohio required the owner or operator of a C&DD facility to maintain financial assurance for the closure of the facility in an amount based upon the acreage of the facility and the number of groundwater monitoring wells at the site. Specifically, the former version of Ohio Administrative Code ("Adm.Code") 3745-400-13(A)(1) provided as follows:

> (1) * * * The amount shall be calculated as the total acreage, to the nearest tenth of an acre, of the active licensed disposal area(s) as established in the facility's license application multiplied by thirteen thousand dollars per acre plus two thousand one hundred seventy-five dollars per ground water monitoring well.

Former Ohio Adm.Code 3745-400-13(A)(1), effective August 31, 2002.

{¶10} In August 2012, Ohio EPA amended its regulations governing financial assurance for C&DD facilities. Among other changes, the amended regulations require owners or operators of C&DD facilities to include, as a component of each annual license application, a site-specific financial assurance cost estimate. The amended regulation states in pertinent part as follows:

> (1) Final closure cost estimate. Financial assurance documentation shall include an *itemized* written final closure cost estimate that calculates the cost of conducting final closure activities in accordance with rule 3745-400-12 of the Administrative Code. *The amount shall be calculated in current dollars and be based upon a third party conducting all of the final closure activities required by rule 3745-400-12 of the Administrative Code*. The amount of the final closure cost estimate shall not be less than thirteen thousand dollars per acre to the nearest tenth of an acre as established in the license application for the construction and demolition debris facility for areas that have been or are being used for disposal.

Ohio Adm.Code 3745-400-13(A)(1) (emphasis added).

{¶11} Thus, under the amended regulations, the owner or operator of a C&DD facility must provide an itemized estimate for the closure and post-closure care of the facility based on the cost of a third party conducting the closure activities. In essence,

the amended regulations aim to achieve a more precise and site-specific approximation of the actual cost that would be incurred by a licensing authority for closing a C&DD facility if the owner or operator of the facility is unable or unwilling to do so. Accordingly, rather than establishing a uniform "per acre" cost regardless of the facility's specific operating conditions or location within the state as the original regulations did, the amended regulations require the owner or operator to develop a site-specific cost estimate for closure and post-closure care based upon actual conditions at the facility. Testimony De Havilland.

{¶12} As part of its implementation of the revised financial assurance regulations, Ohio EPA developed a Financial Assurance Cost Estimating ("FACE," "F.A.C.E.") spreadsheet. Although the regulations do not require applicants to utilize the FACE spreadsheet, Ms. Annette De Havilland, Environmental Specialist 3, Ohio EPA, Division of Materials and Waste Management, testified on behalf of Minerva that the purpose of the spreadsheet is to assist applicants and reviewers develop and assess itemized cost estimates for closure and post-closure care. Testimony De Havilland.

{¶13} The FACE spreadsheet includes text boxes in which applicants are to enter specific estimated costs for five components of closure and post-closure care: leachate collection system operation, surface water management, groundwater monitoring, cap construction and maintenance, and miscellaneous costs. Minerva Ex. 3; Testimony De Havilland.

{¶14} Within each component, the FACE spreadsheet also includes text boxes for entries of various sub-component estimates. For example, under cap construction and maintenance, the spreadsheet contains entry spaces for equipment mobilization/demobilization, clearing of trees and shrubs, purchase of a compacted

cohesive soil layer, purchase of a fertile soil layer, seeding and mulching, pre-cap grading of waste, certification reports, and surveying. Minerva Ex. 3; Testimony De Havilland.

{¶15} Significantly, for each sub-component, the FACE spreadsheet contains a "reference cost." Ms. De Havilland testified that Ohio EPA developed the reference cost for each sub-component by reviewing actual closure cost data and estimates for future closures from various landfill facilities throughout Ohio. Ms. De Havilland stated that the majority of facilities reviewed were solid waste facilities rather than C&DD facilities. She also testified that the reference costs in the FACE spreadsheet are not intended to serve as minimum costs, but to act as "triggers" for further review. And, if an estimate for a particular sub-component falls below the reference cost listed on the FACE spreadsheet, the owner or operator must provide an acceptable justification for the specific estimate. Minerva Ex. 3; Testimony De Havilland.

{¶16} Finally, the amended financial assurance regulations provide for an optional five-year transitional period to allow the owner or operator to adjust to the new closure costs. An owner or operator may elect to furnish five annual payments, beginning in 2013, with each payment consisting of 20% of the difference between the financial assurance required under the former version of Ohio Adm.Code 3745-400-13 and the financial assurance now required under the amended version of Ohio Adm.Code 3745-400-13.

III. Minerva's 2013 License Application

A. Initial Application Submission

{¶17} Minerva submitted its initial application for a 2013 C&DD license on September 28, 2012 ("2013 Application"). Pursuant to the amended regulations and to support its final closure cost estimates, Minerva submitted a FACE spreadsheet containing the following entries relevant to this appeal:

Item #	Component	Cost/Unit Estimate	Reference Cost/Unit	Justification
1C	Leachate Collection System –Leachate sampling	$1,743	$2,400	Equals 4 times per annual* 360.75 Lab cost + 75 labor
2A	Surface Water Management – Install surface water controls on cap	$7	$13	Tab Construction
3B	Groundwater Monitoring – Groundwater annual sampling	$506.85	$800	= 506.85 Belmont lab cost per sample
4A	Cap Construction – Equipment mobilize/demobilize	$2,400	$15,000	Placement costs include furnishing equipment
4B	Cap Construction – Cleaning/grub & restoration	$850	$5,500	No trees or large growth on borrow area only grass vegetation one day max grading 4-6 inches 7 acre
4C	Cap Construction – Cohesive soil layer (spot market)	$9.50	$15	Based on 2012 and 2011 Kimble clay & limestone –Acme Trucking Deliveries- Tab Const Placement
4D	Cap Construction – Fertile soil layer (spot market)	$8.25	$14	Based on 2012 and 2011 Kimble clay & limestone –Acme Trucking Deliveries
4E	Cap Construction – Seeding and mulching	$871	$1,800	$.02 per sf
4H	Cap Construction – Survey	$217.33	$518	67.46 alda-(30-65 capped)=36.81 ($8000.00 is div by $36.81)
5D	Misc. – Logs and record	$0	$900	

Minerva Ex. 1.

{¶18} Regarding items 1C and 3B, Mr. Steven Chandler, Vice President, Minerva, testified that Minerva's cost estimates reflected actual costs previously incurred for leachate and annual groundwater sampling. Mr. Chandler testified that, as a part of its ongoing operations, Minerva retains Eagon & Associates ("Eagon") to perform these tasks, and the amounts listed under "cost/unit estimate" in Minerva's

license application reflected the actual amounts paid to Eagon for those services. Testimony Chandler.

{¶19} Regarding items 2A, 4A, 4B, 4C, 4D, 4E, and 4H, Mr. Chandler testified that Minerva developed each of the estimates in conjunction with TAB Construction. Specifically, Mr. Chandler explained that certain site-specific factors, such as Minerva's location, influenced pricing and resulted in lower estimates for these sub-components than the reference costs included in the FACE spreadsheet. Mr. Chandler explained, for example, that the availability of locally-sourced clay functioned to reduce the price for the cohesive soil layer. And similarly, Mr. Chandler testified that the relative absence of trees and major vegetation at Minerva's facility reduced the cost of clearing/grubbing and restoration. Minerva Ex. 4; Testimony Chandler.

{¶20} Finally, regarding item 5D, Mr. Chandler testified that there was no cost associated with the storage of logs and records because Minerva had already purchased two storage units that would remain at the facility upon closure. Testimony Chandler.

{¶21} A review of Minerva's 2013 Application reveals that Minerva did not include Mr. Chandler's full explanations in its initial application. Instead, as shown in the table above, Minerva provided only brief references to various cost estimates. At the de novo hearing, Mr. Chandler explained that Minerva did not provide additional details in its application because a technical oversight in the FACE spreadsheet prevented resizing of the text box for printing. Testimony Chandler.

B. First Notice of Deficiency

{¶22} Upon receiving Minerva's September 28, 2012 submittal, Mr. Phillip Revlock, Sanitarian, Stark County Health Department, began his review of Minerva's 2013 Application. Mr. Revlock testified that he determined Minerva's justifications for

the cost estimates at issue in this appeal were insufficient. For example, Mr. Revlock explained that simply listing "Tab Construction" in the justification column of the FACE spreadsheet did not provide sufficient detail to support an estimate below the reference cost. Testimony Revlock.

{¶23} Accordingly, on October 26, 2012, Mr. Revlock sent Minerva a notice of deficiency ("NOD") regarding its 2013 Application. Relating to Minerva's financial assurance cost estimates, the NOD stated in pertinent part as follows:

> After consultation with the Ohio EPA, many of the unit costs that Minerva Enterprises, LLC used were below the reference costs in the F.A.C.E. form. We believe that the reference costs used by F.A.C.E. are accurate for a third party to conduct final closure. Please recalculate the closure costs using at least the minimum reference costs.

Minerva Ex. 6.

C. Response to Notice of Deficiency

{¶24} URS Corporation ("URS"), the consultants Minerva hired to assist with the preparation of its license application, sent a letter to the Health Department responding to the NOD on November 28, 2012. The URS response stated in pertinent part as follows:

> OEPA's FACE Summary Sheet Notes titled Reference Cost Sheet contains the following: "*This sheet provides Ohio EPA's best professional judgment estimation of likely costs for the various components of closure & post closure activities. The intent behind the numbers is to provide owners/operators and CE reviewers with a practical frame of reference for preparation of site specific cost estimates. In all cases, documented facility-specific costs should be used for preparation of cost estimates.* ***The provided reference values should not be viewed [as] a "required" or ["]baseline values."***
>
> Minerva's 2013 License submittal provided costing consisting of 3rd party costing that reflects the site specific costs and efficiencies of Minerva's rural economically distressed area. Minerva is located in a Department of Agriculture area classified as "labor surplus and economically distressed area". Minerva maintains pricing advantages on many items due to its

> proximity and location adjacent to even greater "situational distressed counties."
>
> The original form contained explanation boxes that were locked and did not reveal the printing of all information provided. This submittal has been updated with an unlocked form provided from the FACE team that contains fully printed and updated fields. Values that are less than the reference cost provided on the sheet contain corresponding justification language in the adjacent text box. Also a quote containing the same pricing backup is attached as provided from an Ohio DOT and DBE Certified construction and major excavation contractor, TAB Construction.

Minerva Ex. 7 (emphasis in original).

D. Health Department Review of URS Response

{¶25} Upon receiving URS's response, Mr. Revlock contacted Mr. John Hujar, Environmental Specialist 2, Ohio EPA, for assistance in reviewing Minerva's Application. On December 11, 2012, Mr. Hujar sent Mr. Revlock an email detailing his opinion about several specific cost estimates from Minerva. Mr. Hujar's email did not address items 1C (leachate sampling), 3B (groundwater sampling), 4B (cleaning/grub & restoration), or 5D (logs and record). Addressing item 2A (installation of surface water controls on cap), Mr. Hujar's email stated as follows:

> Provide specific details of the type of surface water controls to be constructed on the cap to justify the $7.00 per foot cost estimate. This shall include the borrow source/supplier of the construction materials for the surface water controls. The details shall include size, material of construction and length. Include down chute details as well as material of construction (i.e. plastic or steel pipe, soil, riprap, etc.) Additionally, provide costs for temporary controls (straw bales, straw wattles or silt fence) needed prior to installation of the required cap surface water controls. A clarification is needed to accept the third party cost estimate.

Appellee Ex. I.

{¶26} Regarding item 4A (equipment mobilization/demobilization), Mr. Hujar's email also offered the following comment:

> The equipment mobe /demobe costs are depicted on the FACE forms as $2400.00. Please provide a specific list of the quantity and type of

> equipment to be mobilized to the facility and a justification for the below average cost. Mobilization costs for a similar landfill construction project ranged from $8000 to $80,000 with an average of $33,519. TAB construction bid a similar landfill construction work approximately 50 miles west of Minerva at a range of $15,700 to $22,640 for similar type work. A clarification is needed to accept the third party cost estimate.

Appellee Ex. I.

{¶27} For item 4E (seeding and mulching), Mr. Hujar's email stated as follows:

> * * * The TAB construction estimate for seeding/mulching is $871.20 for Minerva Enterprises; however 50 miles west, the cost is $3300 to $5865 per acre for a similar size landfill. Please provide clarification for the cost estimate provided. Additionally, please indicate the warranty and type of seeding/mulching that will performed on the final cover soils and any other information needed to ensure the vegetation will be established on the capped facility. A clarification is needed to accept the third party cost estimate.

Appellee Ex. I.

{¶28} Regarding items 4C (spot market cohesive soil layer) and 4D (spot market fertile soil layer), Mr. Hujar's email stated as follows:

> If offsite soils are proposed an environmental covenant for offsite soils is needed with the necessary testing and assurance the soils will be available when the time comes to cap the facility. Your estimate indicates spot market costs that are significantly lower than the minimum FACE costs. Please provide the locations, quantity, and soil testing lab results, environmental covenant, trucking costs, access agreements, road permits and all other information needed for the licensing authority to secure the soils for capping.

Appellee Ex. I.

{¶29} And finally, regarding item 4H (survey), Mr. Hujar's email stated, "[a]lthough the surveying cost is below our minimum, at this time, it appears acceptable." Appellee Ex. I.

{¶30} Additionally, testimony at hearing supports that Mr. Revlock independently researched several items during his review of Minerva's cost estimates.[1] Specifically, Mr. Revlock testified that he reviewed two receipts for the type of clay that Minerva had proposed to use for the cohesive soil layer in its estimates. The receipts indicated such clay could be obtained for approximately $4.00 to $4.29 per ton. By using a conversion factor of 1.65 tons per cubic yard, Mr. Revlock testified that he was able to determine the cost for the clay would be greater than the figure of $9.50 per cubic yard cited in Minerva's application.[2]

{¶31} Mr. Revlock also testified that he compared Minerva's estimates to estimates he received from Ohio EPA for the closure of two other facilities: A&L Salvage and the Holmes County Landfill. Mr. Revlock made three observations about the cost estimates from the A&L Salvage closure. First, equipment mobilization costs were estimated at $12,555 for the first phase of closure and $55,745 for the second phase of closure. Second, soil to be used in the cohesive soil layer was listed at $4.92 per cubic yard. And third, seeding and mulching was listed at $1,865 per acre. Appellee Ex. S; Testimony Revlock.

{¶32} Regarding the Holmes County Landfill estimate, prepared by TAB Construction, Mr. Revlock observed that phase one and phase two equipment mobilization costs were listed at $22,640 and $15,700, respectively. Mr. Revlock

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[1] It is unclear to the Commission whether Mr. Revlock conducted this research prior to the issuance of Minerva's 2013 C&DD license. Mr. Revlock's testimony was inconsistent as to whether he conducted the research during his review of Minerva's 2013 Application or as a part of the discovery process in this appeal. However, the Commission notes counsel for Minerva did not cross-examine Mr. Revlock on the issue.

[2] The Commission takes judicial notice of the following:

$$\frac{\$4.29}{1\ ton} \times \frac{1.65\ tons}{1\ cubic\ yard} = \$7.08/cubic\ yard$$

conceded, however, that expected costs for equipment mobilization at Minerva's facility would be lower because Minerva's facility is located closer to TAB Construction's area of operation. Additionally, Mr. Revlock noted that TAB Construction estimated the price of soil for the cohesive soil layer at $5 per cubic yard. Appellee Ex. S; Testimony Revlock.

E. Health Department's Call to Mr. Stefano and Minerva's Revised Application

{¶33} On December 12, 2012, Mr. Revlock and Mr. DePasquale, another representative from the Stark County Health Department, initiated a telephone call with Mr. Frank Stefano, President, Minerva, regarding Minerva's then-pending license application. Testimony at hearing established that Mr. Stefano had not been involved in the preparation of Minerva's 2013 C&DD Application and did not reside in Ohio. But nonetheless, Mr. Revlock explained that he and Mr. DePasquale contacted Mr. Stefano, rather than Mr. Chandler, their regular contact at Minerva, because they "felt obligated to inform the owner that there were some issues with the FACE document." Testimony Revlock.

{¶34} Mr. Revlock testified that during the telephone call with Mr. Stefano, he and Mr. DePasquale advised Mr. Stefano that the Health Department could not grant Minerva's license application as originally submitted. Rather, if Minerva wanted to receive its 2013 license prior to January 1, 2013, Minerva must modify the financial assurance cost estimates supplied to the Health Department. Minerva Ex. 9; Testimony, Revlock.

{¶35} Mr. Chandler testified that he spoke to Mr. Stefano following Mr. Stefano's telephone call with the Health Department. Mr. Chandler testified that, as result of that call, he understood that under no circumstance would the Health Department accept financial assurance cost estimates below the reference costs listed on

Ohio EPA's FACE spreadsheet. In other words, Mr. Chandler testified that he believed the Health Department regarded the reference costs as minimum costs. Testimony Chandler.

{¶36} Consequently, Minerva submitted a revised 2013 C&DD license application ("2013 Revised Application") on December 19, 2012, in which it amended the financial assurance cost estimates at issue in this appeal to match the reference costs listed on Ohio EPA's FACE spreadsheet. Minerva Ex. 11.

F. Second Notice of Deficiency

{¶37} The Health Department sent Minerva a second NOD on December 19, 2012,[3] the same day Minerva submitted its 2013 Revised Application. The NOD did not respond to Minerva's revised application. Instead, it replied to URS's response to the first NOD, restating verbatim the language from the Health Department's October 26, 2012 letter. The second NOD also stated in pertinent part as follows:

> After consultation with the Ohio EPA, many of the unit costs that Minerva Enterprises, LLC used were below the reference costs in the F.A.C.E. form. We believe that the reference costs used by F.A.C.E. are accurate for a third party to conduct final closure. Please recalculate the closure costs using at least the minimum reference costs.

Minerva Ex. 10.

G. Issuance of 2013 C&DD License

{¶38} Finally, on December 26, 2012, after having received and reviewed the 2013 Revised Application, the Health Department granted Minerva's application and issued a 2013 C&DD license for the facility. The license does not contain detailed terms or conditions related to financial assurance, but the license does contain express

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[3] The testimony established Minerva did not receive Appellee's second NOD until December 26, 2012. Testimony Chandler.

language requiring the licensee to comply with "[a]ll applicable requirements of Ohio Administrative Code Chapters 3745-37, *3745-400*, and Rule 3745-520-50." Minerva Ex. 12 (emphasis added).

{¶39} Additionally, the cover letter accompanying Minerva's 2013 license states, "[u]pon review, the application is complete. *Therefore*, your 2013 [C&DD] License is granted." Minerva Ex. 12 (emphasis added).[4]

IV. 2014 License Application

A. Initial Application Submission

{¶40} Minerva submitted its initial application for a 2014 C&DD license ("2014 Application") on September 30, 2013. Although the financial assurance cost estimates included in Minerva's 2014 Application were similar to those in its initial 2013 Application, the 2014 Application contained revised cost estimates for items 1C, 3B, 4B, and 5D, as highlighted below:

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[4] The Commission notes that a licensing authority's review for completeness is distinct from its substantive review and decision whether to grant or deny the license application. An application is "complete" when it contains the requisite components; however, a complete application may be denied based on a substantive review of the application's contents.

Accordingly, the Health Department's cover letter accompanying Minerva's 2013 license, which indicates that because the application had been deemed complete it was therefore granted, does not appear to accurately reflect the Health Department's review process.

Based upon the testimony and evidence adduced at the de novo hearing, it appears that Minerva's 2013 license application was complete at some point well before the Health Department ultimately granted the license. However, the Health Department did not initially grant Minerva's application in part because its *substantive* review of the application revealed deficiencies. Only after Minerva submitted a revised application that addressed the *substantive* deficiencies to the Health Department's satisfaction (as opposed to merely correcting issues of completeness), did the Health Department grant Minerva's 2013 license.

Item #	Component	Cost/Unit Estimate	Reference Cost/Unit	Justification
1C	Leachate Collection System –Leachate sampling	$2,400	$2,400	
2A	Surface Water Management – Install surface water controls on cap	$7	$13	Tab Construction Third Party Quote
3B	Groundwater Monitoring – Groundwater annual sampling	$800	$800	
4A	Cap Construction – Equipment mobilize/demobilize	$2,400	$15,000	Tab Construction Third Party Quote
4B	Cap Construction – Cleaning/grub & restoration	$0[5]	$5,500	
4C	Cap Construction – Cohesive soil layer (spot market)	$9.50	$15	Tab Construction Third Party Quote
4D	Cap Construction – Fertile soil layer (spot market)	$8.50	$14	Tab Construction Third Party Quote
4E	Cap Construction – Seeding and mulching	$871.20	$1,800	Tab Construction Third Party Quote
4H	Cap Construction – Survey	$217.33	$518	Tab Construction Third Party Quote
5D	Misc. – Logs and record	$900	$900	

Additionally, in its 2014 Application, Minerva attached a quote from TAB construction containing the following justifications for the items at issue in this appeal:

Item #	Component	Cost/Unit Estimate	Reference Cost/Unit	Justification
2A	Surface Water Management – Install surface water controls on cap	$7	$13	TAB Const 3rd Party Quote
4A	Cap Construction – Equipment mobilize/demobilize	$2,400	$15,000	TAB Const 3rd Party Quote – Soil Placement includes mobilization of equipment
4C	Cap Construction – Cohesive soil layer (spot market)	$9.50	$15	TAB Const 3rd Party Quote – Includes furnish & place Clay from Kimble clay & limestone and if no Environmental Covenant
4D	Cap Construction – Fertile soil layer (spot market)	$8.50	$14	TAB Const 3rd Party Quote – if Env Covenant not complete for required spot soil
4E	Cap Construction – Seeding and mulching	$871.20	$1,800	TAB Const 3rd Party Quote
4H	Cap Construction – Survey	$217.33	$518	Tab Const 3rd Party- Quote LS

Minerva Ex. 13.

[5] The FACE spreadsheet indicates item 4B is applicable only if the applicant proposes to use on-site soil for cap construction. At hearing, the testimony established that Minerva no longer proposes to use on-site soils for cap construction, for purposes of its financial assurance calculations, because it had not yet secured an environmental covenant that would ensure such on-site soils would be available for closure. Testimony Chandler.

B. Notice of Deficiency

{¶41} On October 30, 2013, the Health Department sent Minerva an NOD letter detailing several deficiencies with the 2014 Application. The NOD stated in pertinent part as follows:

> The 2014 F.A.C.E. document utilizes unit costs not consistent with the approved Year 2013 License Application and accompanying F.A.C.E. document. Please resubmit utilizing the values from the approved 2013 License Application and accompanying F.A.C.E. document. * * *

Minerva Ex. 15.

{¶42} At hearing, Mr. Revlock testified that Minerva had elected to utilize the five-year transitional period for calculating financial assurance obligations. Thus, beginning in 2013, Minerva was responsible for furnishing five annual payments, with each payment consisting of 20% of the difference between the financial assurance required under the prior version of the regulations and the financial assurance now required under the amended regulations. Testimony Revlock.

{¶43} Mr. Revlock maintained that because circumstances and conditions at Minerva's facility had not changed between 2013 and 2014, Minerva was required to carry-over its 2013 financial assurance figures for purposes of calculating the required 20% in its 2014 application. Testimony Revlock.

C. Minerva's Revised Application

{¶44} On November 18, 2013, Minerva submitted a revised 2014 C&DD license application ("2014 Revised Application") to the Health Department. The 2014 Revised Application amended Minerva's financial assurance cost estimates for items 2A, 4A, 4C, 4D, 4E, and 4H to match the reference costs on Ohio EPA's FACE spreadsheet. Appellee Ex. XYZ.

D. 2014 C&DD License Issuance

{¶45} On December 31, 2013, having received and reviewed Minerva's 2014 Revised Application, the Stark County Health Department issued a 2014 C&DD license to Minerva. As with its 2013 license, Minerva's 2014 license does not contain detailed terms or conditions related to financial assurance, but does contain a term requiring the licensee to comply with "[a]ll applicable requirements of Ohio Administrative Code Chapters 3745-37, *3745-400*, and Rule 3745-520-50." Minerva Ex. 17 (emphasis added).

V. Minerva's Assignments of Error

{¶46} Minerva's appeal of its 2013 C&DD license contains the following two assignments of error:

> 1. * * * [T]he Health Department acted unreasonably and/or unlawfully in issuing the 2013 License with terms, conditions and other requirements that purport to require a minimum reference cost when reference costs are only to be used for reference and do not impose mandatory minimums.
>
> 2. The Health Department acted unreasonably and/or unlawfully in issuing the 2013 License with terms, conditions and requirements more stringent than the requirements and starts set forth in Ohio Revised Code ("O.R.C.") Chapter 3714 and Ohio Administrative Code ("O.A.C.") Chapter 3745-400.

ERAC No. 13-766710, Case File Item A.

{¶47} Minerva's appeal of its 2014 C&DD license contains the following three assignments of error:

> 1. * * * [T]he Health Department acted unreasonably and/or unlawfully in requiring, as a condition to license issuance, that Minerva use a minimum reference cost for determining third party cost estimates when such reference costs are to be used only for reference and do not impose mandatory minimums.
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> 2. * * * [T]he Health Department acted unreasonably and/or unlawfully in mandating the use of a minimum reference cost without providing an explanation of the rationale for its mandated "minimum" as required by O.A.C. §3745-400-13(A)(5).

> 3. * * * [T]he Health Department acted unreasonably and/or unlawfully in issuing the 2014 License with terms, conditions and requirements more stringent than the requirements and starts set forth in Ohio Revised Code ("O.R.C.") Chapter 3714 and Ohio Administrative Code ("O.A.C.") Chapter 3745-400.

ERAC No. 14-766808, Case File Item A.

VI. Arguments Presented at Hearing

{¶48} As presented at hearing, Minerva's arguments fall within two general categories: (1) challenges to the Health Department's rejection of specific cost estimates, and (2) a challenge to the overall review process. The Commission will address each challenged estimate separately, as well as Minerva's challenge to the overall application review process.

{¶49} But first, the Commission will outline the Health Department's continuing contention that ERAC lacks subject matter jurisdiction over these appeals.

A. Jurisdiction

{¶50} At several junctures during this proceeding, the Health Department asserted that ERAC lacks subject matter jurisdiction over these appeals. On March 11, 2013, the Health Department filed a Motion to Dismiss ("First Motion to Dismiss"), arguing that its issuance of a 2013 C&DD license did not constitute a final action within the meaning of Revised Code ("R.C.") 3745.04. The Commission denied the Health Department's Motion on April 11, 2013. Case File Items F, J.

{¶51} On May 30, 2014, more than two weeks after the due date for dispositive motions, the Health Department filed a response to Minerva's motion for summary judgment, which also included a Cross-Motion for Summary Judgment. The Health Department essentially reiterated its argument that its issuance of a 2013 C&DD license did not constitute a final action within the meaning of R.C. 3745.04 and postulated that

because Minerva ultimately capitulated to its requests regarding financial assurance, Minerva had not been aggrieved or adversely affected. Therefore, the Health Department asserted, the Commission lacks subject matter jurisdiction to hear this appeal. Minerva filed a motion to strike the cross-motion on June 12, 2014, which the Commission granted on June 19, 2014. Case File Items AA, BB, DD.

{¶52} On June 27, 2014, more than six weeks after the due date for dispositive motions, the Health Department filed a pre-hearing brief, which also included a Motion to Dismiss ("Second Motion to Dismiss") restating its argument from the Cross-Motion for Summary Judgment. The Commission denied the Health Department's Second Motion to Dismiss on July 2, 2014. Case File Items FF, II.

{¶53} Finally, at hearing, counsel for the Health Department made an oral motion to dismiss, again arguing that the Commission lacks subject matter jurisdiction. Consistent with its previous rulings, the Commission denied the oral motion. Transcript, pp. 11-15.

B. Specific Cost Estimates

{¶54} The Commission will now address each of the specific financial assurance cost estimates at issue in these appeals.

i. Item 1C – Leachate Sampling

{¶55} In its 2013 Application, Minerva estimated that leachate sampling would cost $1,743/sump. Mr. Chandler testified that Minerva retains Eagon & Associates to perform leachate sampling at its facility, and the amount included in Minerva's estimate reflected the actual amounts paid to Eagon for those services. Minerva Ex. 1; Testimony Chandler.

{¶56} At hearing, the Health Department presented no specific evidence explaining its rejection of Minerva's estimate for leachate sampling and subsequent request that Minerva amend its estimate to reflect the $2,400/sump reference cost.

{¶57} The Commission notes that the line item for leachate sampling in Minerva's 2014 Application did not reflect the 2013 estimate of $1,743/sump. Rather, Minerva's 2014 estimate simply matched the reference cost of $2,400/sump. Minerva Ex. 13.

ii. Item 2A – Installation of Surface Water Controls on Cap

{¶58} Both Minerva's 2013 and 2014 license applications included an estimate of $7/foot for installing surface water controls. Mr. Chandler testified that Minerva developed this estimate in conjunction with TAB Construction, but provided no additional details regarding the selection of the $7/foot figure. Minerva Ex. 1, 13; Testimony Chandler.

{¶59} In response, the Health Department cites the December 11, 2012 email from Mr. Hujar to Mr. Revlock, which states in pertinent part as follows:

> Provide specific details of the type of surface water controls to be constructed on the cap to justify the $7.00 per foot cost estimate. This shall include the borrow source/ supplier of the construction materials for the surface water controls. The details shall include size, material of construction and length. Include down chute details as well as material of construction (i.e. plastic or steel pipe, soil, riprap, etc.) Additionally, provide costs for temporary controls (straw bales, straw wattles or silt fence) needed prior to installation of the required cap surface water controls. A clarification is needed to accept the third party cost estimate.

Appellee Ex. I.

iii. Item 3B – Groundwater Sampling

{¶60} In its 2013 Application, Minerva estimated that groundwater sampling would cost $506.85/well. Mr. Chandler testified that Minerva retains Eagon & Associates to perform groundwater sampling at its facility, and the amount included in Minerva's estimate reflected the actual amounts paid to Eagon for those services. Minerva Ex. 1; Testimony Chandler.

{¶61} At hearing, the Health Department presented no specific evidence regarding its rejection of Minerva's estimate for leachate sampling and subsequent request that Minerva amend its estimate to reflect the $800/well reference cost.

{¶62} The Commission notes that the line item for groundwater sampling in Minerva's 2014 Application did not reflect the 2013 estimate of $506.85/well. Rather, Minerva's 2014 estimate simply matched the reference cost of $800/well. Minerva Ex. 13.

iv. Item 4A – Equipment Mobilization and Demobilization

{¶63} Regarding equipment mobilization and demobilization costs, Minerva included an estimate of $2,400 in both its 2013 and 2014 license applications. Mr. Chandler testified that this cost was developed in conjunction with TAB Construction. Additionally, Mr. Chandler explained that equipment mobilization and demobilization costs are often inflated by contractors, and based on his experience, the estimate of $2,400 constituted a more accurate representation of actual costs, as compared to the $15,000 reference cost. Minerva Ex. 1, 13; Testimony Chandler.

{¶64} In response, the Health Department cites Mr. Hujar's December 11, 2012 email, which states in pertinent part as follows:

> The equipment mobe /demobe costs are depicted on the FACE forms as $2400.00. Please provide a specific list of the quantity and type of

> equipment to be mobilized to the facility and a justification for the below average cost. Mobilization costs for a similar landfill construction project ranged from $8000 to $80,000 with an average of $33,519. TAB construction bid a similar landfill construction work approximately 50 miles west of Minerva at a range of $15,700 to $22,640 for similar type work. A clarification is needed to accept the third party cost estimate.

Appellee Ex. I.

{¶65} Additionally, Mr. Revlock testified he reviewed two estimates for comparable closures, one for the Holmes County Landfill and one for A&L Salvage. Mr. Revlock testified that the estimate for the Holmes County Landfill, prepared by TAB construction, listed equipment mobilization costs at a range between $15,700 and $22,640. Similarly, Mr. Revlock testified that the estimate for A&L Salvage listed equipment mobilization costs at a range between $12,555 and $55,745. Testimony Revlock.

v. Item 4B – Clearing and Grubbing

{¶66} Minerva's 2013 Application included an estimate for clearing and grubbing of $850/acre. At hearing, Mr. Chandler testified that the relative absence of trees and major vegetation at Minerva's facility reduced the cost of clearing/grubbing and restoration, as compared to the $5,500/acre reference cost. Minerva Ex. 1; Testimony Chandler.

{¶67} In response, the Health Department cites Mr. Hujar's email, which states that a comparable TAB Construction estimate for a project approximately 50 miles west of Minerva's facility listed a clearing/grubbing cost of $3,300/acre. Appellee Ex. I.

{¶68} Significantly, however, item 4B appears to apply only if the applicant is seeking to use on-site soils for closure. Testimony at hearing established that for purposes of its 2014 financial assurance calculations, Minerva proposed two alternative scenarios, one using on-site soils and one using off-site soils. Additionally, testimony

established Minerva no longer proposes to use on-site soils for cap construction because it has not yet secured an environmental covenant that would ensure on-site soils would be available for closure. Instead, the testimony indicated that Minerva now seeks to pursue only the alternative scenario in which soil would be purchased at spot market prices. Accordingly, the relevant portion of Minerva's 2014 Application, which details Minerva's estimates for closure using spot market soils, does not include any cost estimate for clearing and grubbing. Minerva Ex. 13; Testimony Chandler.

vi. Items 4C and 4D – Compacted Cohesive Soil Layer and Fertile Soil Layer

{¶69} In both its 2013 and 2014 applications, Minerva included spot market estimates for the purchase of soil for the cohesive soil layer and fertile soil layer of $9.50/cubic yard and $8.50/cubic yard, respectively. Mr. Chandler testified that these estimates, developed in conjunction with TAB Construction, reflected estimated third party prices for the purchase of clay from Kimble Clay & Limestone. Minerva Ex. 1, 13; Testimony Chandler.

{¶70} In response, the Health Department cites Mr. Hujar's email, which states in pertinent part as follows:

> If offsite soils are proposed an environmental covenant for offsite soils is needed with the necessary testing and assurance the soils will be available when the time comes to cap the facility. Your estimate indicates spot market costs that are significantly lower than the minimum FACE costs. Please provide the locations, quantity, and soil testing lab results, environmental covenant, trucking costs, access agreements, road permits and all other information needed for the licensing authority to secure the soils for capping.

Appellee Ex. I.

{¶71} Mr. Revlock testified that he also reviewed two receipts for similar clay purchases, which listed pricing at $4/ton and $4.29/ton. Mr. Revlock stated that he applied a conversion factor of 1.65 cubic yards/ton and concluded that soil prices would

be expected to be higher than the prices listed in Minerva's estimates.[6] Appellee Ex. S; Testimony Revlock.

{¶72} Finally, Mr. Revlock stated that his review of estimated closure costs for A&L Salvage and Holmes County Landfill revealed prices for similar clay of between $4.92 and $5 per cubic yard. Appellee Ex. T; Testimony Revlock.

vii. Item 4E – Seeding and Mulching

{¶73} Regarding seeding and mulching, Minerva's 2013 and 2014 license applications both included estimates of $871.20/acre. Mr. Chandler indicated that this estimate was developed in conjunction with TAB Construction, but provided no further details regarding the development of the estimate. Minerva Ex. 1, 13; Testimony Chandler.

{¶74} In response, Health Department cites Mr. Hujar's email, which states in pertinent part as follows:

> * * * The TAB construction estimate for seeding/mulching is $871.20 for Minerva Enterprises; however 50 miles west, the cost is $3300 to $5865 per acre for a similar size landfill. Please provide clarification for the cost estimate provided. Additionally, please indicate the warranty and type of seeding/mulching that will performed on the final cover soils and any other information needed to ensure the vegetation will be established on the capped facility. A clarification is needed to accept the third party cost estimate.

Appellee Ex. I.

{¶75} Further, Mr. Revlock testified that he reviewed an estimate for the closure of A&L Salvage, which listed seeding and mulching at $1,865/acre. Testimony Revlock.

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[6] See note 2, *supra*.

viii. Item 4H – Surveying

{¶76} Both Minerva's 2013 and 2014 license applications included an estimate of $217.33 for surveying costs. As Mr. Chandler explained, this cost was developed in conjunction with TAB Construction. Minerva Ex. 1, 13; Testimony Chandler.

{¶77} The Health Department did not present specific testimony regarding surveying costs at Minerva's facility, but Mr. Hujar's December 11, 2012 email provides in pertinent part as follows:

> Although the surveying cost is below our minimum, at this time, it appears acceptable.

Appellee Ex. I.

ix. Item 5D – Logs and Records Storage

{¶78} Minerva's 2013 Application states that no cost would be incurred for the storage of logs and records. Mr. Chandler testified that a third party would incur no costs for the storage of logs and records after closure because Minerva had already purchased two storage units that would remain at the facility upon closure. Minerva Ex. 1; Testimony Chandler.

{¶79} At hearing, the Health Department presented no specific evidence explaining its rejection of Minerva's estimate for records storage and subsequent request that Minerva amend its estimate to reflect the $900 reference cost.

{¶80} Nonetheless, the Commission notes that Minerva simply matched the reference cost of $900 in its 2014 Application. Minerva Ex. 13.

C. Application Review Process

{¶81} In addition to challenging the specific line-items above, Minerva also challenges the general process through which the Health Department reviewed Minerva's license applications. In particular, Minerva argues that the process was

unlawful and unreasonable because the Health Department's NODs failed to specify what additional information was required for the Health Department to accept Minerva's cost estimates. Minerva argues that the lack of substantive information in the Health Department's NODs did not afford Minerva a meaningful opportunity to supplement or correct its application.

{¶82} Regarding Minerva's 2013 Application, both the October 26, 2012 and December 19, 2012 NODs stated in pertinent part as follows:

> After consultation with the Ohio EPA, many of the unit costs that Minerva Enterprises, LLC used were below the reference costs in the F.A.C.E. form. We believe that the reference costs used by F.A.C.E. are accurate for a third party to conduct final closure. Please recalculate the closure costs using at least the minimum reference costs.

Minerva Ex. 6, 12.

{¶83} Minerva argues that this language, in conjunction with the telephone conversation the Health Department initiated with Mr. Stefano, did not reflect an invitation to provide additional information to the Health Department. Rather, Minerva argues, the events constituted an outright rejection of Minerva's cost estimates. Testimony Chandler.

{¶84} Similarly, Minerva argues that the Health Department did not conduct a meaningful review of Minerva's 2014 Application. Instead, Minerva contends that the Health Department summarily rejected its financial assurance cost estimates and required Minerva to carry-over the figures from its 2013 Revised Application if it wanted to receive a 2014 C&DD license. Testimony Chandler, Revlock.

{¶85} The 2014 NOD sent to Minerva provides as follows:

> The 2014 F.A.C.E. document utilizes unit costs not consistent with the approved Year 2013 License Application and accompanying F.A.C.E. document. Please resubmit utilizing the values from the approved 2013 License Application and accompanying F.A.C.E. document. * * *

Minerva Ex. 15.

{¶86} As with the 2013 NODs, Mr. Chandler testified that this language did not reflect an invitation to provide additional information, but rather constituted an outright rejection of Minerva's proposed financial assurance numbers. Testimony Chandler.

{¶87} In response, Mr. Revlock simply noted that "paperwork can be kind of cold" and indicated that his expectation was that Minerva would contact the Health Department to better understand its concerns. In essence, the Health Department argues that it was Minerva's duty to provide sufficient information and that Minerva's failure to clarify any issues regarding its applications does not render the Health Department's actions unlawful or unreasonable. Testimony Revlock.

CONCLUSIONS OF LAW

I. ERAC Standard of Review

{¶88} Revised Code 3745.05 sets forth the standard ERAC must employ when reviewing a final action of the Director. The statute provides in relevant part as follows:

> If, upon completion of the hearing, the commission finds that the action appealed from was lawful and reasonable, it shall make a written order affirming the action, or if the commission finds that the action was unreasonable or unlawful, it shall make a written order vacating or modifying the action appealed from.

R.C. 3745.05.

{¶89} The term "unlawful" means "that which is not in accordance with law," and the term "unreasonable" means "that which is not in accordance with reason, or

that which has no factual foundation." *Citizens Committee to Preserve Lake Logan v. Williams*, 56 Ohio App.2d 61, 70 (10th Dist. 1977).

{¶90} The Commission is required to grant "due deference to the Director's 'reasonable interpretation of the legislative scheme governing his Agency.'" *Sandusky Dock Corp. v. Jones*, 106 Ohio St.3d 274 (2005), citing *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St.3d 282 (2001); *State ex rel. Celebrezze v. National Lime & Stone Co.*, 68 Ohio St. 3d 377 (1994); *North Sanitary Landfill, Inc. v. Nichols*, 14 Ohio App. 3d 331 (2nd Dist. 1984). Administrative agencies possess special expertise in specific areas and are tasked with implementing particular statutes and regulations. *National Wildlife Federation v. Korleski*, 2013-Ohio-3923 (10th Dist. 2013), ¶56. Thus, such agencies are entitled to considerable deference when reviewing their interpretation of their own governing rules and regulations. *Id.*

{¶91} Deference granted to an agency's interpretation of its administrative regulations is not, however, without limits. See e.g., *B.P. Exploration and Oil, Inc. v. Jones*, ERAC Nos. 184134-36 (March 21, 2001). The Commission has consistently held that an agency's interpretation of its governing statutes and regulations must not be "at variance with the explicit language of the [statutes or] regulations." *Id.*

{¶92} Further, the Commission's standard of review does not permit ERAC to substitute its judgment for that of the Director as to factual issues, and it is well-settled that there is a degree of deference for the agency's determination inherent in the reasonableness standard. *National Wildlife Federation v. Korleski*, 2013-Ohio-3923 (10th Dist. 2013), ¶48. "It is only where [ERAC] can properly find from the evidence that there is no valid factual foundation for the Director's action that such action can be found to be unreasonable." *Citizens Committee to Preserve Lake Logan v. Williams*, 56

Ohio App.2d 61, 70 (10th Dist. 1977). Accordingly, "the ultimate factual issue to be determined by [ERAC] upon the de novo hearing is whether there is a valid factual foundation for the Director's action and not whether the Director's action is the best or most appropriate action, nor whether [ERAC] would have taken the same action." *Id.*

{¶93} Similar to the deference afforded the Director's regarding interpretation of administrative regulations, deference toward an agency's factual determinations is also not unlimited. Instead, the Commission engages in "a limited weighing of the evidence." *Ohio Fresh Eggs, LLC v. Wise*, 2008-Ohio-2423, (10th Dist. App. 2008), ¶32 (emphasis added). Specifically, "ERAC must determine whether the evidence is of such quantity and quality that it provides a sound support for the Director's action." *Id.*

II. Discussion

A. Subject Matter Jurisdiction and Standing

{¶94} As an initial matter, the Commission finds Appellee's assertion that ERAC lacks subject matter jurisdiction not well-taken.

{¶95} Revised Code 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 or a local board of health, or ordering the director or board of health to perform an act.

(Emphasis added).

{¶96} Thus, the Commission maintains jurisdiction over appeals of final "actions" of the Director or Board of Health.

{¶97} "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.

(Emphasis added).

{¶98} Here, the Health Department argues that the Health Department, rather than its Director, issued the 2013 and 2014 C&DD licenses. Because Minerva filed these appeals against Kirkland Norris in his capacity as Director of the Health Department, rather than against the Health Department itself, the Health Department argues that ERAC lacks jurisdiction. The Commission disagrees.

{¶99} ERAC routinely adjudicates appeals in which the named appellee is the director of an administrative agency, acting is his official capacity as director. For example, a significant majority of appeals filed before ERAC challenge the action of the Director of Environmental Protection in his role as Director of Ohio EPA. Further, such practice is commonplace before other tribunals, and it is "[w]ell-settled law * * * that an action against an individual in his or her official capacity is actually an action against the entity for which the individual is an agent." *Horen v. Bd. of Educ. of Toledo Pub. Schs.*, 6th Dist. No. L-09-1143, 2010-Ohio-3631, at ¶44, citing *State ex rel. Estate of Miles v. Village of Piketon*, 121 Ohio St.3d 231, 2009-Ohio-786, 903 N.E.2d 311, ¶23.

{¶100} Accordingly, the Commission rejects the Health Department's argument that the distinction between an action of its own Director and an action of the Health Department is legally significant in this instance. The Commission finds the Health Department's issuances of the 2013 and 2014 C&DD licenses to Minerva fall well within the scope of the Commission's jurisdiction under R.C. 3745.04.

{¶101} Turning to the Health Department's alternative argument that ERAC lacks subject matter jurisdiction because Minerva was not aggrieved or adversely

affected, the Commission finds that such inquiry relates to standing, rather than to subject matter jurisdiction.

{¶102} A person may establish standing in an appeal before the Commission by showing that he or she was a "party to a proceeding before the director." R.C. 3745.04. To be a "party to a proceeding before the director," a person must have "appeared" before the Director and been "affected" by the Director's final action. *Girard Bd. of Health v. Korleski*, 193 Ohio App.3d 309, 2011-Ohio-1385, ¶13.

{¶103} The Tenth District has stated that a person "appears" before the Director if he "appears in person, or by his attorney, and presents his position, arguments, or contentions orally or in writing, or who offers or examines witnesses or presents evidence tending to show that said proposed [action], if adopted or effectuated, will be unreasonable or unlawful." *Girard*, at ¶12, quoting *Cincinnati Gas & Elec. Co. v. Whitman*, 10th Dist. No. 74AP–151 (Nov. 19, 1974).

{¶104} A person is "affected," or "aggrieved or adversely affected," by the Director's final action if: "(1) the challenged action will cause injury in fact, economic or otherwise, and (2) the interest sought to be protected is within the realm of interests regulated or protected by the statute being challenged." *Girard,* at ¶15, quoting *Citizens Against Megafarm Dairy Dev., Inc. v. Dailey*, 10th Dist. No. 06AP–836, 2007-Ohio-2649.

{¶105} Here, Minerva, as the license applicant, clearly participated in the proceedings before the Health Department. Moreover, by submitting its initial financial assurance cost estimates, and through its subsequent communications with the Health Department, Minerva presented its position in writing or otherwise to Appellee.

{¶106} Thus, the issue of standing turns on whether Minerva suffered an injury in fact when the Health Department issued the 2013 and 2014 licenses. The Commission acknowledges that neither the 2013 nor the 2014 C&DD licenses expressly delineated terms or conditions related to financial assurance. Nonetheless, listed on the face of each license was a term requiring compliance with the regulations governing C&DD facilities in Ohio, which includes the provisions for calculating financial assurances. Thus, the Commission finds Minerva suffered a concrete injury, as the financial assurance regulations—and the Health Department's interpretation thereof—were incorporated into the terms of the licenses.

{¶107} Specifically, both licenses contain a term requiring compliance with "[a]ll applicable requirements of Ohio Administrative Code Chapters 3745-37, *3745-400*, and Rule 3745-520-50." The regulations governing C&DD financial assurance calculations are contained within Ohio Adm.Code Chapter 3745-400. Therefore, the Commission finds the terms of the license incorporate the requirements of Ohio Adm.Code Chapter 3745-400; and significantly, the Health Department's interpretation of those requirements.

{¶108} Additionally, as noted above, a complete C&DD license application *must* include a site-specific financial assurance cost estimate. Testimony establishes that the Stark County Health Department would not have issued the 2013 and 2014 C&DD licenses *but for* Minerva's revisions to its applications, which occurred at the behest of the Health Department. Thus, the Commission also finds Minerva's revisions to its financial assurance cost estimates formed a *prerequisite* to the issuance of the 2013 and 2014 C&DD licenses at issue here.

{¶109} Having found the Health Department's review of Minerva's financial assurance cost estimates formed an integral part of the licensing process, and the terms of the license incorporate the C&DD financial assurance requirements and the Health Department's interpretation thereof, the Commission finds Minerva is aggrieved or adversely affected by Appellee's issuance of the 2013 and 2014 C&DD licenses. Therefore, the Commission finds Minerva has standing in these appeals.

B. Specific Cost Estimates

{¶110} The Commission will now address the specific cost estimates Minerva challenges in its appeals of the 2013 and 2014 C&DD licenses.

i. Items 1C (Leachate Sampling), 3B (Groundwater Sampling), and 5D (Logs and Records Storage)

{¶111} The Commission finds Minerva's challenges to items 1C (leachate sampling), 3B (groundwater sampling), and 5D (logs and records storage) are moot.

{¶112} As a general rule, courts will not resolve issues that are moot. See *Miner v. Witt*, 82 Ohio St. 237 (1910). "The doctrine of mootness is rooted both in the 'case' or 'controversy' language of Section 2, Article III of the United States Constitution and in the general notion of judicial restraint. * * * While Ohio has no constitutional counterpart to Section 2, Article III, the courts of Ohio have long recognized that a court cannot entertain jurisdiction over a moot question." *James A. Keller, Inc. v. Flaherty*, 74 Ohio App. 3d 788, 791 (1991) (internal citations omitted). "Thus, the 'duty of * * * every * * * judicial tribunal * * * is to decide actual controversies by a * * * judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Ohio Civ. Serv. Emp. Assn., AFSCME, Local 11, AFL-CIO v. Ohio Dept. of Transp.*, 104 Ohio App. 3d 340 (1995).

{¶113} Applying mootness doctrine to permits or licenses on appeal before ERAC, the Commission has consistently held that when an action under appeal is replaced or superseded by a subsequent action, the original action becomes moot, and the Commission will decline to render an opinion on the original matter. *E.g., Ormet Primary Aluminum Corp. v. Shregardus*, EBR No. 562933 (1995); *Sandusky County Organized to Protect the Environment (SCOPE) v. Schregardus*, EBR No. 723737 (1997); O*hio Environmental Council v. Jones*, ERAC No. 255043 (2002). Moreover, in considering such scenarios, the Commission has found that "where the action of the Director which is under appeal no longer has any meaningful legal force or effect, it is generally presumed that no live controversy capable of meaningful resolution remains." *SCOPE*, at p. 6-7.

{¶114} Here, Minerva's 2013 Application contained estimates for leachate sampling, groundwater sampling, and logs and records storage below the reference costs listed on Ohio EPA's FACE spreadsheet. In an NOD dated October 26, 2012, the Health Department rejected these estimates and instructed Minerva to revise its FACE spreadsheet to reflect the reference costs. On December 19, 2012, Minerva submitted a revised application in which it matched the reference costs for leachate sampling, groundwater sampling, and logs and records storage. The Health Department ultimately issued the 2013 C&DD license one week later.

{¶115} Significantly, however, no version of Minerva's 2014 license application contained a cost estimate less than the Ohio EPA reference cost for leachate sampling, groundwater sampling, or logs and records storage. Rather, both versions of Minerva's 2014 license application simply matched the Ohio EPA's reference costs for those items.

{¶116} Although Minerva disputed items 1C, 3B, and 5D in its 2013 Application, the 2013 C&DD license expired on December 31, 2013, and was superseded by the 2014 C&DD license. Therefore, the 2013 C&DD license no longer carries legal force or effect.

{¶117} Furthermore, by simply matching the Ohio EPA reference costs for items 1C (leachate sampling), 3B (groundwater sampling), and 5D (logs and records storage) in each of its 2014 license application submittals, Minerva has waived any challenge it might assert that the Health Department's decision to use the reference costs for those items is unlawful or unreasonable.

{¶118} Because the 2013 license has been superseded by the 2014 license and Minerva has waived any challenge to the use of the reference costs for items 1C, 3B, and 5D in the 2014 license, the Commission finds the issues are moot.

ii. Item 4B – Clearing and Grubbing

{¶119} The Commission also finds Minerva's challenge to item 4B (clearing and grubbing) moot.

{¶120} In its 2013 Application, Minerva included an estimated cost for clearing and grubbing of $850/acre, which was below Ohio EPA's reference cost of $5,500/acre. Significantly, however, the FACE spreadsheet indicates that the line-item for clearing and grubbing applies only if the applicant proposes to use on-site soil for the cohesive and fertile soil layers.

{¶121} Minerva's 2014 Application included two alternative proposals: one that utilized on-site soils and one utilizing off-site soils. And at hearing, Minerva repeatedly indicated that it no longer intends to pursue the use of on-site soils because it does not yet have the necessary environmental covenant required to ensure such on-site soils would remain available for use in closure.

{¶122} Because item 4B is applicable only if the applicant proposes to utilize on-site soils, and because Minerva has indicated that it does *not* intend to use on-site soils, the Commission finds Minerva's challenge to item 4B (cleaning and grubbing) moot.

iii. Item 2A – Installation of Surface Water Controls

{¶123} The Commission finds the Health Department had a valid factual foundation for its rejection of Minerva's cost estimate for the installation of surface water controls included in both the 2013 and 2014 license applications.

{¶124} At hearing, Minerva argued that it developed its estimate for surface water controls in conjunction with TAB Construction, and this explanation constituted sufficient justification for its figure of $7/foot.

{¶125} In response, the Health Department cited a December 11, 2012 email from Mr. Hujar to Mr. Revlock as the basis of its rejection of the $7/foot figure. The email stated in pertinent part as follows:

> Provide specific details of the type of surface water controls to be constructed on the cap to justify the $7.00 per foot cost estimate. This shall include the borrow source/ supplier of the construction materials for the surface water controls. The details shall include size, material of construction and length. Include down chute details as well as material of construction (i.e. plastic or steel pipe, soil, riprap, etc.) Additionally, provide costs for temporary controls (straw bales, straw wattles or silt fence) needed prior to installation of the required cap surface water controls. A clarification is needed to accept the third party cost estimate.

{¶126} Based on the contents of Minerva's applications and the testimony presented at hearing, the Commission finds that the Health Department could have reasonably concluded more information was required to justify a $7/foot estimate for groundwater controls.

{¶127} Specifically, the Commission notes that both Minerva's initial application and URS's response to the Health Department's first NOD simply referenced an

estimate from TAB Construction. Neither document provided detailed information regarding the work to be performed or the specific basis for the estimated cost. Similarly, at hearing, Minerva did not present any additional testimony regarding the details of the development of the estimate.

{¶128} Instead, testimony established that based on Mr. Hujar's email, Mr. Revlock believed that more information was necessary before accepting Minerva's estimate for the installation of surface water controls.

{¶129} Generally, it is the applicant's burden to supply sufficient information for the licensing authority to conduct an evaluation of its application. See *Oxford Mining Co., LLC v. Nally*, ERAC No. 12-256581 (Sept. 18, 2013), at ¶224 (noting that where the applicant for 401 certification fails to provide sufficient information, the applicable regulations authorize the Director to deny the application). And here, the evidence establishes that the Health Department had a valid factual foundation for concluding that Minerva's application lacked sufficient detail to allow the Health Department to evaluate the $7/foot estimate.

{¶130} Accordingly, the Commission finds the Health Department acted lawfully and reasonably in rejecting Minerva's estimate for item 2A (installation of surface water controls).

iv. Item 4A – Equipment Mobilization and Demobilization

{¶131} The Commission finds the Health Department had a valid factual foundation for rejecting Minerva's estimate for equipment mobilization and demobilization in Minerva's 2013 and 2014 license applications.

{¶132} Minerva argued that its estimate of $2,400, included in both its 2013 and 2014 license applications, was justified because the cost had been developed in

conjunction with TAB Construction. Additionally, Mr. Chandler explained that equipment mobilization and demobilization costs are often inflated by contractors, and that through his experience, he believed that the estimate of $2,400 constituted a more accurate representation of actual costs, as compared to the $15,000 reference cost.

{¶133} In response, the Health Department cited Mr. Hujar's December 11, 2012 email, which stated in pertinent part as follows:

> The equipment mobe/demobe costs are depicted on the FACE forms as $2400.00. Please provide a specific list of the quantity and type of equipment to be mobilized to the facility and a justification for the below average cost. Mobilization costs for a similar landfill construction project ranged from $8000 to $80,000 with an average of $33,519. TAB construction bid a similar landfill construction work approximately 50 miles west of Minerva at a range of $15,700 to $22,640 for similar type work. A clarification is needed to accept the third party cost estimate.

{¶134} Additionally, Mr. Revlock testified he reviewed two estimates for comparable closures. Regarding the Holmes County Landfill estimate, which was prepared by TAB construction, Mr. Revlock testified that the estimate listed equipment mobilization costs at a range between $15,700 and $22,640. Regarding A&L Salvage, Mr. Revlock explained that the estimated cost for equipment mobilization ranged between $12,555 and $55,745.

{¶135} The Commission finds that Mr. Hujar's email, in combination with Mr. Revlock's comparison of Minerva's estimate to those from Homes County Landfill and A&L Salvage, formed a valid factual foundation for the Health Department's rejection of Minerva's $2,400 estimate.

{¶136} Each estimate reviewed by Mr. Revlock and Mr. Hujar indicated that equipment mobilization and demobilization costs for other, comparable projects were several times greater than the figure Minerva provided in its financial assurance cost estimates. And although Mr. Revlock conceded that costs for Minerva would likely be

lower than those listed in the Holmes County Landfill estimate, the Commission finds Mr. Revlock could have reasonably concluded Minerva's costs would not be less than one-fifth of the equipment mobilization and demobilization costs for Holmes County Landfill.[7]

{¶137} Significantly, the Commission notes that Minerva did not present a detailed explanation, in either of its applications or at hearing, regarding the basis for the cost estimate of $2,400. As noted in Mr. Hujar's email, Minerva's applications did not include information regarding the type or quantity of equipment necessary to complete the project.

{¶138} Accordingly, the Commission finds the Health Department had a valid factual foundation for rejecting of Minerva's estimate for item 4A (equipment mobilization and demobilization) and acted reasonably in doing so.

v. Items 4C and 4D – Compacted Cohesive Soil Layer and Fertile Soil Layer

{¶139} The Commission finds the Health Department had a valid factual foundation for rejecting Minerva's estimates for spot market purchases of soil.

{¶140} Minerva argued that the cost estimates contained in the initial versions of its 2013 and 2014 license applications—$9.50 and $8.50 per cubic yard for the cohesive and fertile soil layers, respectively—were developed in conjunction with TAB Construction and reflected estimated third party prices for the purchase of clay from Kimble Clay & Limestone.

{¶141} In response, Mr. Revlock testified that he reviewed two receipts for similar clay purchases from Kimble Clay & Limestone, one of which listed a $4/ton

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[7] See note 1, *supra*.

price, while the other listed a price of $4.29/ton. Mr. Revlock stated that he applied a conversion factor of 1.65 cubic yards/ton and concluded that soil prices would be expected to be higher than the prices listed in Minerva's estimates.

{¶142} Additionally, Mr. Revlock stated that his review of estimated closure costs for A&L Salvage and Holmes County Landfill revealed prices for similar clay of between $4.92 and $5 per cubic yard.

{¶143} Neither the Kimble Clay & Limestone receipts, nor the estimates for A&L Salvage and Holmes County Landfill, support the Health Department's contention that soil prices are likely to be greater than $8.50/$9.50 per cubic yard. Specifically, the estimates for A&L Salvage and Holmes County Landfill indicate that the prices comparable clay purchases were between $4.92 and $5 per cubic yard.

{¶144} Further, regarding the two Kimble Clay & Limestone receipts, the Commission notes that applying a conversion factor of 1.65 cubic yards/ton to a price of $4.29/ton (the higher of the two prices listed) yields a result of approximately $7.08 per cubic yard:

$$\frac{\$4.29}{1\ \cancel{ton}} \times \frac{1.65\ \cancel{tons}}{1\ cubic\ yard} = \ \$7.08/cubic\ yard$$

{¶145} Nonetheless, the Commission finds the Health Department had a valid factual foundation for rejecting Minerva's estimates. Mr. Hujar's December 11, 2012 email, stated in pertinent part as follows:

> If offsite soils are proposed an environmental covenant for offsite soils is needed with the necessary testing and assurance the soils will be available when the time comes to cap the facility. Your estimate indicates spot market costs that are significantly lower than the minimum FACE costs. *Please provide the locations, quantity, and soil testing lab results, environmental covenant, trucking costs, access agreements, road permits and all other information needed for the licensing authority to secure the soils for capping*.

(Emphasis added).

{¶146} Thus, as explained in Mr. Hujar's email, price alone is insufficient information regarding soils to be used for capping. Instead, Mr. Hujar's email explains that an applicant should include information regarding "the locations, quantity, and soil testing lab results, environmental covenant, trucking costs, access agreements, road permits and all other information needed for the licensing authority to secure the soils for capping."

{¶147} As noted above, the applicant bears the burden of supplying sufficient information for the licensing authority to conduct an evaluation of its application. *Oxford Mining Co.*, ERAC No. 12-256581 (Sept. 18, 2013), at ¶224. And here, the record establishes that Minerva did not supply information of the type indicated in Mr. Hujar's email to the Health Department. Accordingly, the Commission finds that the Health Department had a valid factual foundation for rejecting Minerva's cost estimates for items 4C and 4D (compacted cohesive soil layer and fertile soil layer).

{¶148} While the Commission is troubled by the Health Department's review of comparable estimates, including the lack of communication from the Health Department to Minerva regarding the Health Department's specific concerns, ERAC's standard of review does not permit the Commission to substitute its judgment for that of the Health Department as to factual issues. *National Wildlife Federation v. Korleski*, 2013-Ohio-3923 (10th Dist. 2013), ¶48. It is well-settled that there is a degree of deference for the agency's determination inherent in the reasonableness standard. *Id.* Instead, "[i]t is only where [ERAC] can properly find from the evidence that there is no valid factual foundation for the [Health Department's] action that such action can be found to be unreasonable." *Citizens Committee to Preserve Lake Logan v. Williams*, 56 Ohio App.2d 61, 70 (10th Dist. 1977).

{¶149} Thus, although some evidence does support Minerva's position in this appeal, the Commission finds that the Health Department had a valid factual foundation for its rejection of Minerva's estimate for items 4C and 4D. Specifically, as noted above, Mr. Hujar's email detailed the additional information—beyond simply price—that would be required for the licensing authority to accept Minerva's estimates. Accordingly, the Commission finds that the Health Department acted reasonably in rejecting Minerva's cost estimates for items 4C and 4D.

vi. Item 4E – Seeding and Mulching

{¶150} The Commission finds the Health Department had a valid factual foundation for rejecting Minerva's cost estimate for item 4E (seeding and mulching) in both the 2013 and 2014 C&DD license applications.

{¶151} At hearing, Mr. Chandler testified that Minerva's estimate of $871.20/acre was developed in conjunction with TAB Construction.

{¶152} In response, the Health Department cited Mr. Hujar's email, which states in pertinent part as follows:

> * * * The TAB construction estimate for seeding/mulching is $871.20 for Minerva Enterprises; however 50 miles west, the cost is $3300 to $5865 per acre for a similar size landfill. Please provide clarification for the cost estimate provided. Additionally, please indicate the warranty and type of seeding/mulching that will performed on the final cover soils and any other information needed to ensure the vegetation will be established on the capped facility. A clarification is needed to accept the third party cost estimate.

{¶153} Further, Mr. Revlock testified that he reviewed an estimate for the closure of A&L Salvage, which listed seeding and mulching at $1,865/acre.

{¶154} Because no detailed evidence was presented by Minerva, in either of its applications or at hearing, regarding the specific development of its $871.20/acre cost estimate, the Commission finds that the Health Department had a valid factual

foundation for its rejection thereof. Mr. Hujar's email indicated that more information was necessary to evaluate the estimate and Mr. Revlock indicated that other, comparable projects reflected a higher cost expectation.

{¶155} Again, it is generally the applicant's burden to supply sufficient information for the licensing authority to conduct an evaluation of its application. *Oxford Mining Co.*, ERAC No. 12-256581 (Sept. 18, 2013), at ¶224. Accordingly, the Commission finds the Health Department acted reasonably in rejecting Minerva's estimate for item 4E (seeding and mulching) in the 2013 and 2014 C&DD license applications.

vii. Item 4H – Surveying

{¶156} The Commission finds the Health Department lacked a valid factual foundation for rejecting Minerva's cost estimate for item 4H (surveying) in the 2013 and 2014 C&DD license applications.

{¶157} The only evidence presented by either party regarding surveying costs was contained in Mr. Hujar's email, which stated, "[a]lthough the surveying cost is below our minimum, at this time, it appears acceptable."

{¶158} Accordingly, the Commission finds the Health Department lacked a valid factual foundation for its rejection of Minerva's cost estimate for surveying and thus acted unreasonably in doing so.

C. Application Review Process

{¶159} Finally, the Commission finds the Health Department acted lawfully and reasonably as to its review process for both the 2013 and 2014 C&DD license applications.

{¶160} Regarding the 2013 license, Minerva argued that the application review process was unlawful and unreasonable because the Health Department's NODs failed to specify what additional information was needed for the Health Department to accept Minerva's cost estimates. Minerva argued that the lack of substantive information in the Health Department's NODs did not afford Minerva a meaningful opportunity to supplement or correct its application.

{¶161} Both the October 26, 2012 and December 19, 2012 NODs stated in pertinent part as follows:

> After consultation with the Ohio EPA, many of the unit costs that Minerva Enterprises, LLC used were below the reference costs in the F.A.C.E. form. We believe that the reference costs used by F.A.C.E. are accurate for a third party to conduct final closure. Please recalculate the closure costs using at least the minimum reference costs.

{¶162} Minerva argued that this language, in conjunction with the telephone conversation the Health Department initiated with Mr. Stefano, did not reflect an invitation to provide additional information to the Health Department. Rather, Minerva argued, these events reflected an outright rejection of Minerva's cost estimates.

{¶163} Similarly, with regard to the 2014 license, Minerva argued that the Health Department summarily rejected its financial assurance cost estimates and required Minerva to carry-over the figures from its 2013 license.

{¶164} The NOD issued to Minerva regarding its 2014 license provides as follows:

> The 2014 F.A.C.E. document utilizes unit costs not consistent with the approved Year 2013 License Application and accompanying F.A.C.E. document. Please resubmit utilizing the values from the approved 2013 License Application and accompanying F.A.C.E. document. * * *

Minerva Ex. 15.

{¶165} As with its 2013 NODs, Mr. Chandler testified that this language did not reflect an invitation to provide additional information, but rather constituted an outright rejection.

{¶166} In response to Minerva's arguments regarding both the 2013 and 2014 licenses, Mr. Revlock indicated that he expected Minerva would contact the Health Department to better understand their concerns. In essence, the Health Department argued that it was incumbent upon Minerva to provide sufficient information, and Minerva's failure to clarify any issues regarding its applications does not render the Health Department's actions unlawful or unreasonable.

{¶167} While the Commission does not agree that the Health Department's NODs can reasonably be construed as invitations to submit additional information, the Commission nonetheless finds the Health Department acted lawfully and reasonably with respect to the overall application review process.

{¶168} Ohio Adm.Code 3745-400-13(A)(5) sets forth the requirements for the contents of an NOD. It states as follows:

> (5) Notice of deficiency. The licensing authority *shall notify the license applicant of deficiencies* with the final closure cost estimate and final closure financial assurance documentation not later than thirty days after licensing authority receipt of the license application. *Such notification shall identify any adjustment in the amount of final closure financial assurance being considered by the licensing authority*.
>
> The licensing authority may adjust the amount of financial assurance in conjunction with the issuance of the annual license. If the licensing authority issues the annual license with adjustment of the amount of financial assurance, the licensing authority shall identify the deficiencies in the itemized final closure cost estimate and provide an explanation of the rationale for financial assurance exceeding thirteen thousand dollars per acre, which may include information provided to or obtained by Ohio EPA or a local board of health.

(Emphasis added).

{¶169} Accordingly, an NOD must be sufficient to "notify the license applicant of deficiencies," and "identify any adjustment in the amount of financial closure financial assurance being considered by the licensing authority." Ohio Adm.Code 3745-400-13(A)(5).

{¶170} Here, both the October 26, 2012 and December 19, 2012 NODs stated that the Health Department believed Minerva's financial assurance cost estimates to be deficient and contained a sentence indicating that the Health Department was seeking to revise the estimates to match the reference numbers listed on Ohio EPA's FACE spreadsheet. Thus, even if not precisely articulated, the NODs satisfied the requirements of Ohio Adm.Code 3745-400-13(A)(5) because they (1) contained a description of the deficiency (i.e., that some components of Minerva's financial assurance cost estimates did not reflect what the Health Department believed to be accurate third-party closure costs), and (2) indicated potential adjustments to the amount of financial assurance (i.e., to match the reference costs).

{¶171} The Commission acknowledges Minerva's concern regarding the specific language used and also rejects the Health Department's contention that the language contained in its NODs should be construed as an invitation to supply additional information.[8] However, the Commission finds it lacks jurisdiction to hear Minerva's argument regarding the 2013 Application review process to the extent Minerva raises to a due process claim, rather than merely alleging non-compliance with Ohio Adm.Code 3745-400-13(A)(5). *Lund v. PLAA*, ERAC No. 13-016726 (Dec. 19, 2013) ("It is well

[8] The Commission notes the NODs do not expressly request Minerva submit additional information in support of its financial assurance cost estimates. Instead, the NODs state, "[p]lease recalculate the closure costs using at least the minimum reference costs."

settled that the Commission does not have jurisdiction to hear constitutional challenges to rules or statutes."), citing *BP Exploration & Ohio, Inc. v. Jones*, ERAC No. 184134 (March 21, 2001).

{¶172} Having found that the Health Department's 2013 NODs satisfied the requirements of Ohio Adm.Code 3745-400-13(A)(5) and that the Commission lacks jurisdiction over Minerva's due process claim, the Commission finds the Health Department acted lawfully and reasonably when reviewing Minerva's 2013 Application.

{¶173} Similarly, regarding Minerva's challenge to the review process for the 2014 Application, the Commission finds the Health Department acted lawfully and reasonably. Again, although not precisely worded, the relevant NOD satisfied the requirements of Ohio Adm.Code 3745-400-13(A)(5) because it (1) contained a description of deficiency (i.e., that some components of Minerva's financial assurance cost estimates did not reflect what the Health Department believed to be accurate third-party closure costs), and (2) indicated potential adjustments to the amount of financial assurance (i.e., to match 2013 values).

{¶174} As with its 2013 application, to the extent Minerva's argument regarding the 2014 application review process raises a due process claim, rather than merely alleging non-compliance with Ohio Adm.Code 3745-400-13(A)(5), the Commission lacks jurisdiction. *Lund*, ERAC No. 13-016726 (Dec. 19, 2013).

{¶175} Accordingly, Minerva's argument regarding the overall review process is not well-taken and the Commission finds the Health Department acted lawfully and reasonably with regard to the overall review process for both the 2013 and 2014 C&DD licenses.

FINAL ORDER

{¶176} For the foregoing reasons, the Commission finds the Stark County Health Department acted unreasonably in rejecting Minerva's cost estimate for item 4H (surveying) in both the 2013 and 2014 C&DD license applications.

{¶177} The Commission finds Minerva's challenges to items 1C (leachate sampling), 3B (groundwater sampling), 4B (cleaning and grubbing), and 5D (logs and records storage) are moot.

{¶178} The Commission affirms the Health Department's action with regard to items 2A (installation of surface water controls), 4A (equipment mobilization and demobilization), 4C and 4D (compacted soil layer and fertile soil layer), and 4E (seeding and mulching).

{¶179} Therefore, the Commission hereby REMANDS Minerva's 2013 and 2014 C&DD licenses to the Stark County Health Department for action consistent with this decision.

{¶180} In accordance with Ohio Adm.Code 3746-13-01, the Commission informs the parties of the following:

> 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

Entered into the Journal of the Commission this _____ day of October 2014.

_____
Melissa M. Shilling, Chair

_____
Shaun K. Petersen, Vice-Chair

_____
Michael G. Verich, Member

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