BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO

JULIAN W. PERKINS, INC.,	:	Case No. ERAC 476331
	:	Case No. ERAC 476332
and	:	
	:	
PAUL BRINE,	:	Case No. ERAC 476333
	:	
Appellants,	:	
	:	
v.	:	
	:	
DONALD C. COOPER,	:	
STATE FIRE MARSHAL	:	
	:	
Appellee.	:	

RULING ON MOTIONS FOR SUMMARY JUDGMENT

Rendered on March 6, 2014

Meagan L. Moore and *Joseph T. Dattilo* for Appellants
Julian W. Perkins, Inc. and Paul Brine

Michael DeWine, Attorney General, and *Timothy J. Kern* for
Appellee Donald C. Cooper, State Fire Marshal

{¶1} These matters come before the Environmental Review Appeals Commission ("Commission") on two notices of appeal filed by Appellants Julian W. Perkins, Inc. ("Perkins") (Case Nos. ERAC 476331 & 476332) and Paul Brine (Case No. ERAC 476333) (collectively "Appellants") on April 22, 2009. Appellants challenge two Final Findings and Orders ("FFOs") issued by Appellee Donald C. Copper, State Fire Marshal ("Fire Marshal") on March 20, 2009. ERAC No. 476331, Case File Item A; ERAC Nos. 476332-33, Case File Item A.

{¶2} Although the notices of appeal each contain several assignments of error, Perkins and the Fire Marshal filed a Joint Stipulation and Briefing Schedule ("Joint Stipulation") on October 25, 2013, limiting the scope of the appeals as follows:

> * * *
>
> 6. Julian Perkins agrees that except for the statute of limitations issue on whether civil penalties could lawfully be assessed for the violations stated in the State Fire Marshal's Final Findings and Orders, the Findings and Orders for both Bill Baker and Reiter Union are lawful and reasonable, including but not limited to, the closure and corrective action requirements in the Findings and Orders and the amount of the civil penalties in the Findings and Orders.
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> * * *
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> 8. Moving forward with this appeal, the only issue remaining is the application of R.C. 3745.31(B) as to whether the State Fire Marshal's Final Findings and Orders could lawfully assess civil penalties for the violations stated in the Findings and Orders. As such, the parties agree to enter into a briefing schedule to allow each party to submit dispositive motions to the Commission on the statute of limitations issue as to the assessment of civil penalties. * * *
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> * * *

ERAC No. 476331, Case File Item FFF, ¶¶6-8; ERAC Nos. 476332-33, Case File Item FFF, ¶¶6-8.

{¶3} In addition, Perkins, Mr. Brine, and the Fire Marshal filed a supplemental Joint Stipulation ("Supplemental Stipulation") on February 13, 2014. The Supplemental Stipulation states, in full, as follows:

> Appellants Julian W. Perkins Inc. and Paul Brine and Appellee the Ohio State Fire Marshal ("Parties") hereby agree and stipulate that Julian W. Perkins Inc. is the proper "Respondent," as named in the heading, and not Paul Brine as named in Section I., in the State Fire Marshal's Final Findings and Orders *In the Matter of: Reiter Union, 3745 Pearl Road, Lorain, Ohio, Lorain County* issued March 20, 2004 ("Reiter Union Site Orders"). Since Julian W. Perkins, Inc. should have been named as the "Respondent" in both the heading and Section I. of the Reiter Union Orders, rather than Paul Brine, the Parties further agree and stipulate that the appeal by Paul Brine of the Reiter Union Site Orders, Case No. ERAC

> 476332, should be dismissed by the Commission. Finally, the parties agree that this [Supplemental Stipulation] does not dismiss Julian W. Perkins, Inc.'s appeal of the Reiter Union Site Orders, Case No. ERAC 476333.

ERAC No. 476331, Case File Item VVV; ERAC Nos. 476332-33, Case File Item VVV.

{¶4} The Commission construes the parties' Supplement Stipulation as a joint motion to dismiss the appeal filed by Paul Brine (Case No. ERAC 476333).

{¶5} On November 22, 2013, Perkins filed a Motion for Summary Judgment ("Perkins's Motion"), and the Fire Marshal filed a Brief Stating that the Civil Penalty in the Findings and Order are Not Barred by the Statute of Limitations in R.C. 3745.31 ("Fire Marshal's Motion"), which the Commission construed as a motion for summary judgment. ERAC No. 476331, Case File Items III, JJJ; ERAC Nos. 476332-33, Case File Items III, JJJ.

{¶6} The Fire Marshal filed a Response to Perkins's Motion on December 6, 2013, and Perkins filed a Response to the Fire Marshal's Motion on December 9, 2013. ERAC No. 476331, Case File Items LLL, MMM; ERAC Nos. 476332-33, Case File Items LLL, MMM.

{¶7} The Fire Marshal and Perkins filed their Replies on December 16, 2013 and December 17, 2013, respectively. ERAC No. 476331, Case File Items NNN, PPP; ERAC Nos. 476332-33, Case File Items NNN, PPP.

{¶8} Based on the pleadings and motions, as well as the relevant statutes, regulations, and case law, the Commission issues the following Findings of Fact, Conclusions of Law, and Final Order GRANTING Perkins's Motion and DENYING the Fire Marshal's Motion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Standard of Review

{¶9} Revised Code 3745.05 sets forth the standard ERAC must employ when reviewing a final action of the Fire Marshal. 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.

{¶10} 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).

{¶11} The Commission is required to grant "due deference to the [Fire Marshal'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.*

{¶12} This deference in regards to the interpretation of 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.*

{¶13} Further, the Commission's standard of review does not permit ERAC to substitute its judgment for that of the Fire Marshal 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 [Fire Marshal'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 [Fire Marshal's] action and not whether the [Fire Marshal's] action is the best or most appropriate action, nor whether [ERAC] would have taken the same action." *Id.*

{¶14} Similar to the deference afforded the Fire Marshal 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 [Fire Marshal's] action." *Id.*

II. Summary Judgment Standard of Review

{¶15} Although not strictly bound by the Ohio Rules of Civil Procedure ("Civ.R."), the Commission has historically applied the civil rules when appropriate to assist in resolution of appeals. *Meuhlfeld v. Boggs*, ERAC No. 356228 (Mar. 17, 2010).

{¶16} Civ.R. 56(C) states in pertinent part:

> * * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law * * *

{¶17} Thus, under Civ.R. 56, "[t]he moving party has the burden of showing that there is no genuine issue as to any material fact as to critical issues." *Stockdale v. Baba*, 153 Ohio App.3d 712, 2003-Ohio-4366, 795 N.E.2d 727, at ¶23. However, "an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response * * * must set forth specific facts showing that there is a genuine issue for trial." *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 65 (1978). All doubts and evidence should be construed against the moving party, and "[s]ummary judgment may not be rendered unless it appears that reasonable minds can come to but one conclusion and that conclusion is adverse to the part[y] against whom [the] motion is made." *Stockdale*, 2003-Ohio-4366, at ¶32.

{¶18} "If the moving party has satisfied its initial burden under Civ.R. 56(C), then the nonmoving party has a reciprocal burden * * * to set forth specific facts showing that there is a genuine issue for trial. If the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." *State v. Pryor*, Franklin App. No. 07AP-90, 2007 Ohio 4275 (Aug. 21, 2007), citing *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).

III. Discussion

{¶19} On June 16, 1995, Perkins removed underground storage tanks from a site located at 3745 Pearl Road, Lorain, Ohio ("Reiter Union Site"). On June 26, 1995, Perkins removed underground storage tanks from a site located at 15 East Avenue, Elyria, Ohio, Lorain County ("Bill Baker Site"). ERAC No. 476331, Case File Item FFF, at ¶1; ERAC Nos. 476332-33, Case File Item FFF, at ¶1.

{¶20} Pursuant to Ohio Administrative Code ("Ohio Adm.Code") 1301:7-9-12,[1] Perkins was required to submit a closure assessment report for each site to the Bureau of Underground Storage Tank Regulation ("BUSTR") within 90 days. On approximately January 17, 2002, BUSTR determined that Perkins failed to submit the required closure assessment reports. ERAC No. 476331, Case File Item FFF, at ¶2; ERAC Nos. 476332-33, Case File Item FFF, at ¶2.

{¶21} Having not received the reports, the Fire Marshal ultimately issued separate State Fire Marshal's Final Findings and Orders ("FFOs") for the Reiter Union Site and the Bill Baker Site on March 20, 2009.[2] ERAC No. 476331, Case File Item FFF, at ¶4; ERAC Nos. 476332-33, Case File Item FFF, at ¶4.

{¶22} The FFOs ordered Appellants to complete a closure assessment and submit a closure assessment report for each location. Additionally, the Fire Marshal

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[1] Ohio Adm.Code 1301:7-9-12(J)(1) states as follows:

> (1) Owners and operators shall submit one copy of the written closure report to the state fire marshal, which shall be received by the state fire marshal within ninety days from the date of collecting the samples required by this rule.

Ohio Adm.Code 1301:7-9-12(J)(1).

[2] The Fire Marshal issued the FFO for the Bill Baker Site to Perkins and the FFO for the Reiter Union Site to Mr. Brine. However, as noted above, the parties agree and stipulate that the FFO for the Reiter Union Site should have been issued to Perkins rather than to Mr. Brine. ERAC No. 476331, Case File Item VVV; ERAC Nos. 476332-33, Case File Item VVV.

assessed a separate civil penalty of $25,338.00 in each of the FFOs for failure to submit a closure assessment report. ERAC No. 476331, Case File Item A; ERAC Nos. 476332-33, Case File Item A.

{¶23} Revised Code ("R.C.") 3745.31 [Statute of Limitations.] provides in pertinent part as follows:

> * * *
>
> (B)(1) Except as provided in division (B)(2) of this section, any action under any environmental law for civil or administrative penalties of any kind brought by any agency or department of the state or by any other governmental authority charged with enforcing environmental laws shall be commenced within five years of the time when the agency, department, or governmental authority actually knew or was informed of the occurrence, omission, or facts on which the cause of action is based.
>
> (2) If an agency, department, or governmental authority actually knew or was informed of an occurrence, omission, or facts on which a cause of action is based prior to July 23, 2002, the cause of action for civil or administrative penalties of any kind for the alleged violation shall be commenced not later than five years after July 23, 2002.

* * *

R.C. 3745.31(B)(1).

{¶24} In its Motion for Summary Judgment, Perkins argued that the civil penalty components of the FFOs were unlawful because they were barred by the statute of limitations provisions set out in R.C. 3745.31. Specifically, Perkins contended that because BUSTR was aware of the violations as of January 17, 2002, the deadline to commence an action for civil penalty was July 23, 2007. Because the Fire Marshal did not issue the FFOs until March 20, 2009, Perkins asserted that R.C. 3745.31 prohibited the inclusion of any civil penalty within the FFOs. ERAC No. 476331, Case File Item III; ERAC Nos. 476332-33, Case File Item III.

{¶25} Conversely, the Fire Marshal posited that a separate and distinct violation arose each day Perkins failed to submit the required reports. Thus, the FFOs assessed civil penalties based on the 1,555 discrete violations that had occurred between March 21, 2004 and March 20, 2009.[3] Further, because BUSTR could not have become aware of each violation until it occurred, the Fire Marshal argued that the March 20, 2009 FFOs lawfully assessed civil penalties based on the 1,555 discrete violations, each of which fell within the five-year statute of limitations period. ERAC No. 476331, Case File Item JJJ; ERAC Nos. 476332-33, Case File Item JJJ.

{¶26} In support of his argument, the Fire Marshal noted that several federal courts have applied the "discrete violations theory"[4] when interpreting 28 United States Code ("U.S.C.") 2462, which sets forth the federal statute of limitations applicable to civil penalties. See *Nat'l. Parks Conservation Ass'n., Inc. v. Tenn. Valley Auth.*, 480 F.3d 410 (6th Cir. 1007) (finding that each day in which defendant failed to apply BACT and failed to obtain an appropriate construction permit constituted a discrete violation for purposes of 28 U.S.C. 2462); *Knight v. Columbus*, 19 F.3d 579 (11th Cir. 1994) (finding that each paycheck issued in violation of FLSA constituted a discrete violation for purposes of 28 U.S.C. 2462); *Mayes v. Environmental Protection Agency*, E.D.Tenn No. 3:05-CV-478 (Jan. 4, 2008) (finding that each day in which defendant failed to comply with RCRA constituted a discrete violation for purposes of 28 U.S.C. 2462, and

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[3] The Commission notes that the Fire Marshal's Motion did not contain admissible evidence, of the type required by Ohio Rule of Civil Procedure ("Civ.R.") 56, sufficient to establish that the civil penalties contained in the FFOs were indeed based upon violations occurring between March 21, 2004 and March 20, 2009.

[4] For simplicity in discussing the Fire Marshal's argument, the Commission summarizes the concept that each day Perkins failed to submit the required reports constituted a separate and distinct violation as the "discrete violations theory."

noting that "[a]ny other ruling would also reward attempts at concealing [non-compliance], which would be at odds with the statute's stated spirit and purpose of protecting human health and the environment").

{¶27} Additionally, the Fire Marshal's Motion cited *State ex rel. Ohio Atty. Gen. v. Sands Trailer Park & Sales, Inc., et al.*, Lake C.P. No. 09CV616 (June 4, 2009). In *Sands*, the defendants contended that the state's action was barred by R.C. 3745.31, arguing that "inasmuch as the instant action was filed on February 26, 2009, and Plaintiff has been *trying to get Defendants to tie into a public sanitary system since at least 1997*, Plaintiff's action is untimely." *Id.* at 8 (emphasis added). The Court, however, ultimately rejected defendants' argument, noting simply that the state sought civil penalties based on violations beginning on April 1, 2004, and that the action was filed on February 26, 2009—i.e., within five years of the earliest alleged violation. *Id.* at 13.

{¶28} Perkins responded that the facts in both *Sands* and the federal cases cited by the Fire Marshal are distinguishable from those in the instant matter. Specifically, Perkins argued that each of the cases cited by the Fire Marshal involved a series of actions—such as the operation of a plant, the discharge of pollutants, or the use of a UST—which established new, discrete violations of a continuing obligation or requirement. Perkins argued that here, no new action can be identified, following the original failure to submit the closure assessment reports, because the USTs at issue were removed from both the Bill Baker Site and the Reiter Union Site in 1995. ERAC No. 476331, Case File Item MMM; ERAC Nos. 476332-33, Case File Item MMM.

{¶29} Further, Perkins contended that at least one other federal court has found that a scenario similar to the facts presented here constituted a single violation,

rather than a series of discrete violations. *U.S. v. Ameren*, E.D.Mo. No. 4:11 CV 77 RWS (Jan. 27, 2012).

{¶30} In his Reply, the Fire Marshal noted that Perkins's obligation to submit the required closure assessment reports continued until the reports were actually submitted.[5] Further, the Fire Marshal theorized that Perkins's proposed application of R.C. 3745.31 would frustrate the purpose of a civil penalty. Case File Items NNN; ERAC Nos. 476332-33, Case File Items MMM.

{¶31} Specifically, the Fire Marshal noted that R.C. 3737.882(C)(2), which establishes the Fire Marshal's authority to assess civil penalties, provides as follows:

> (2) Whoever violates division (C)(1) of this section or division (F) of section 3737.881 of the Revised Code shall pay a civil penalty of not more than ten thousand dollars for each day that the violation continues. * * *

The Fire Marshal contended that if the failure to submit a closure assessment report constituted a single violation, the effect would be to limit the resulting penalty, regardless of how many days have passed, to a flat rate of $10,000. The Fire Marshal asserted that such a flat rate penalty would not provide a sufficient deterrent against continued violations of the applicable regulations. Case File Items NNN; ERAC Nos. 476332-33, Case File Items MMM.

{¶32} The Commission finds the "discrete violations theory" advanced by the Fire Marshal inapplicable to the specific scenario presented here. First, application of the discrete violations theory to the facts of this case would conflict with both R.C. 3745.31(B) and R.C. 3737.882(C)(2). Second, the facts outlined in the FFOs describe

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[5] The Fire Marshal's Reply indicates that Perkins submitted closure assessment reports for both the Reiter Union and Bill Baker sites on December 11, 2009. Following BUSTR's determination that the reports were deficient, the Fire Marshal's Reply indicates that Perkins submitted Tier 1 Source Investigation reports for the Reiter Union and Bill Baker sites on May 17, 2011, and May 19, 2011, respectively. Case File Item OOO, Affidavit of David N. Sauer.

continuing violations of a single requirement rather than a series of identifiable, discrete actions. And finally, this case is distinguishable from both *Sands* and the federal cases cited in the Fire Marshal's Motion.

{¶33} Because the discrete violations theory is inapplicable to the present appeals and BUSTR became aware of the underlying violations by January 17, 2002, the deadline for the Fire Marshal to commence an action for civil penalty lapsed on July 23, 2007. Thus, the Commission finds the Fire Marshal acted unlawfully by issuing FFOs containing civil penalties on March 20, 2009.

A. The application of the discrete violations theory to the present scenario would be inconsistent with R.C. 3745.31(B) and R.C. 3737.882(C)(2).

{¶34} The Commission finds that the application of the discrete violations theory to the specific scenario presented here would conflict with R.C. 3745.31(B) and R.C. 3737.882(C)(2).

{¶35} R.C 3745.31(B) provides, in pertinent part, as follows:

> (B)(1) Except as provided in division (B)(2) of this section, any action under any environmental law for civil or administrative penalties of any kind brought by any agency or department of the state or by any other governmental authority charged with enforcing environmental laws *shall be commenced within five years of the time when the agency, department, or governmental authority actually knew or was informed of the occurrence, omission, or facts on which the cause of action is based*.
>
> (2) If an agency, department, or governmental authority actually knew or was informed of an occurrence, omission, or facts on which a cause of action is based prior to July 23, 2002, the cause of action for civil or administrative penalties of any kind for the alleged violation shall be commenced not later than five years after July 23, 2002.

(Emphasis added).

{¶36} Pursuant to the R.C. 3745.31, the five-year statute of limitations period begins when the relevant agency, department, or governmental authority "actually knew

or was informed of" the violation. Significantly, the statute of limitations period does *not* begin from the time the action accrues. In other words, the statute does not simply provide a timeframe beyond which a responsible party may conclude that no enforcement action will be forthcoming. Rather, by beginning the five-year period from the date the regulatory agency gains knowledge of the violation, the statute imposes a specific deadline *on the regulatory agencies tasked with enforcement* by which commencement of actions for civil penalties must occur.

{¶37} Here, the Commission finds that the application of the discrete violations theory would be inconsistent with R.C. 3745.31. By construing each day as a separate violation, the application of the discrete violations theory would render meaningless the statute's deadline for the commencement of actions for civil penalties. In fact, far from requiring prompt enforcement, the application of the discrete violations theory would function to impose no deadline whatsoever for the commencement of an action for civil penalty.

{¶38} To illustrate, consider the following hypothetical example. Suppose that rather than issuing the FFOs on March 20, 2009, the Fire Marshal instead issued the FFOs 100 years later on March 20, 2109. If the discrete violations theory applied, the hypothetical FFOs could lawfully assess an identical civil penalty, provided any civil penalty contained therein was based upon violations that "occurred" during the preceding five years (i.e., 2104-2109). Thus, the application of the discrete violations theory would fail to require prompt enforcement by regulatory agencies.

{¶39} Moreover, the Commission finds that application of the discrete violations theory to the present scenario would conflict with R.C. 3737.882(C)(2). That statute, which sets out the Fire Marshal's authority to assess civil penalties, expressly

contemplates a scenario in which a single violation may continue for more than one day, providing in relevant part as follows:

> (C)(2) Whoever violates division (C)(1) of this section or division (F) of section 3737.881 of the Revised Code shall pay a civil penalty of not more than ten thousand dollars for each day that *the* violation continues. * * *

(Emphasis added).

{¶40} Significantly, the use of the definite article "the" in the phrase "for each day the violation continues" indicates that a *single* violation may continue for multiple days.

{¶41} Here, application of the discrete violations theory—which holds that each day constitutes a separate violation—would necessarily imply that each particular violation lasts no longer than 24 hours. Accordingly, the Commission further finds that application of the discrete violations theory would be inconsistent with R.C. 3737.882(C)(2).

B. The facts, as set forth in the FFOs, describe continuing violations of a single requirement rather than a series of discrete actions.

{¶42} Additionally, the Commission finds that the specific violations described in the FFOs—namely, Perkins's failure to submit closure assessment reports—constitute continuing violations of a single requirement, rather than a series of discrete actions.

{¶43} As an initial matter, the Commission notes that Perkins's obligation to submit closure assessment reports accrued after the USTs had been removed from the Bill Baker and Reiter Union Sites in 1995. Thus, the underlying requirement to submit the reports originated from two specific past events, rather than, for example, from the continuing obligation to operate a facility in a particular manner. Because Perkins's subsequent noncompliance with the requirement to submit closure assessment reports

cannot be evaluated separately from the removal of the USTs, the Commission is not persuaded that each successive day in which Perkins failed to submit the reports constitutes an *independent* violation of the regulation.

{¶44} Further, unlike the continued discharge of a pollutant or repeated discriminatory employment practices, no new *action* can be identified as occurring on each successive day in which Perkins did not submit the required closure assessment reports. Instead, it is precisely Perkins's continued *inaction* following the removal of the USTs that gave rise to the violation.

{¶45} Thus, although Perkins's obligation to submit closure assessment reports indeed continued until the requirement had been satisfied, the Commission finds Perkins's failure to submit closure assessment reports for the Bill Baker Site and the Reiter Union Site are most accurately described as *single* violations that began when the reports were due to BUSTR and *continued* until Perkins ultimately submitted the reports to BUSTR.

{¶46} The Commission acknowledges that the potential harm caused by the failure to submit closure assessment reports may increase in severity with the passage of time. The Commission notes, however, that in contrast to the argument presented by the Fire Marshal, BUSTR retains the authority to assess a civil penalty of greater than $10,000 for a single violation that continues for multiple days, regardless of the Commission's holding in this matter.

{¶47} Specifically, R.C. 3737.882(C)(2) authorizes the Fire Marshal to assess a civil penalty of "not more than ten thousand dollars for each day that the violation continues." Thus, provided BUSTR commences its action for civil penalty within five years of gaining actual knowledge of the violation, it may lawfully assess a civil penalty

of up to $10,000 for each day any single violation continues. Applied to the present scenario, for example, if the Fire Marshal had issued the FFOs on March 20, 2007, rather than on March 20, 2009, he could have lawfully assessed a civil penalty based on two violations that began in 1995 and continued through the issuance date of the FFOs. In sum, the Fire Marshal would *not* have been limited to a single civil penalty in the amount of $10,000.

C. The present appeals are distinguishable from *Sands* and the federal cases applying 28 U.S.C. 2462.

{¶48} Finally, the Commission finds that the present appeals are distinguishable from *Sands* and from the federal cases applying 28 U.S.C. 2462.

{¶49} In *Sands*, the Director of Environmental Protection ("Ohio EPA") issued a National Pollutant Discharge Elimination System ("NPDES") permit to Sands Trailer Park & Sales, Inc. and David Ungers (collectively "defendants"). The NPDES permit had an effective date of April 1, 2004. *Sands*, Lake C.P. No. 09CV616 (June 4, 2009), at 1.

{¶50} Based on several alleged violations of defendants' NPDES permit, the state of Ohio ("State") commenced an enforcement action on February 26, 2009. *Id.* at 8.

{¶51} The State subsequently moved for summary judgment, seeking both injunctive relief and civil penalties *Id.* at 5. In opposition to the State's motion, defendants argued that the State's action was time-barred pursuant to R.C. 3745.31. *Id.* at 8. Specifically, defendants argued, "inasmuch as the instant action was filed on February 26, 2009, and Plaintiff has been trying to get Defendants to tie into a public sanitary system since at least 1997, Plaintiff's action is untimely." *Id.*

{¶52} The State replied that its action was not barred by R.C. 3745.31 because it did not seek civil penalties based on violations occurring prior to February 26, 2004.

Id. at 9-10. Instead, the State argued its complaint alleged various violations of defendants' NPDES permit, which did not become effective until April 1, 2004. *Id.* Because the State commenced the action within five years of April 1, 2004, the State contended its action was timely. *Id.*

{¶53} The Court ultimately rejected defendants' argument that the State's claims were untimely, noting simply that R.C. 3745.31(B)(1) and (2) "[did] not preclude [the State] from seeking civil penalties for violations occurring on or after February 26, 2004." *Id.* at 13.

{¶54} Significantly, however, the Court's opinion indicated that the State specifically sought a civil penalty for violations *of the NPDES permit*, which did not become effective until April 1, 2004. Although Ohio EPA may indeed have been "trying to get Defendants to tie into a public sanitary system since at least 1997," any violation *of the NPDES permit terms* could not have begun prior to effective date of the permit on April 1, 2004.

{¶55} Here, the Commission finds that the facts in *Sands* are not analogous to those presented in these appeals. Specifically, the parties do not dispute that the original obligation to submit closure assessment reports began more than five years prior to the issuance of the FFOs. Thus, the Commission does not find *Sands* appositive to its analysis of lawfulness of the specific civil penalties at issue in the present matter.

{¶56} Similarly, the Commission finds that the present appeals are distinguishable from the federal cases cited in the Fire Marshal's Motion. In each of the federal cases cited, the court analyzed 28 U.S.C. 2462, which sets forth the applicable *federal* statute of limitations. *Nat'l. Parks Conservation Ass'n., Inc. v. Tenn. Valley Auth.*, 480 F.3d 410 (6th Cir. 1007) (finding that each day in which defendant failed to

apply BACT and failed to obtain an appropriate construction permit constituted a discrete violation for purposes of 28 U.S.C. 2462); *Knight v. Columbus*, 19 F.3d 579 (11th Cir. 1994) (finding that each paycheck issued in violation of FLSA constituted a discrete violation for purposes of 28 U.S.C. 2462); *Mayes v. Environmental Protection Agency*, E.D.Tenn No. 3:05-CV-478 (Jan. 4, 2008) (finding that each day in which defendant failed to comply with RCRA constituted a discrete violation for purposes of 28 U.S.C. 2462, and noting that "[a]ny other ruling would also reward attempts at concealing [non-compliance], which would be at odds with the statute's stated spirit and purpose of protecting human health and the environment").

{¶57} The federal statute of limitations, set forth in 28 U.S.C. 2462, provides as follows:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced *within five years from the date when the claim first accrued if*, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

(Emphasis added).

{¶58} Significantly, the federal statute of limitations period begins to run from the date the cause of action accrues, rather than from the date the relevant regulatory agency gains actual knowledge of the violation. Thus, implementation of the express text of the federal statute functions differently than R.C. 3745.31. Rather than imposing a specific deadline on the regulatory agencies tasked with enforcement by which commencement of actions for civil penalties must occur, the federal statute of limitations simply provides a timeframe beyond which a responsible party may conclude that no enforcement action will be forthcoming.

{¶59} Accordingly, because 28 U.S.C. 2462 operates materially different than R.C. 3745.31(B), the Commission finds the cases cited in the Fire Marshal's Motion are distinguishable from the present appeals.

IV. Conclusion

{¶60} Having found that the discrete violations theory does not apply to the present appeals, the Commission finds that the deadline for the Fire Marshal to have commenced an action for civil penalty lapsed on July 23, 2007. Because the Fire Marshal did not issue the FFOs until March 20, 2009, the Commission finds that the Fire Marshal acted unlawfully by including civil penalties therein.

FINAL ORDER

{¶61} As stated above, the Commission construes the parties' Supplemental Stipulation as a joint motion to dismiss. The Commission hereby GRANTS the motion and ORDERS that the appeal filed by Paul Brine (Case No. ERAC 476333) be DISMISSED.

{¶62} Further, for the foregoing reasons, the Commission finds that the Fire Marshal acted unlawfully by including civil penalties in the March 20, 2009 FFOs. The Commission hereby GRANTS Perkins's Motion and DENIES the Fire Marshal's Motion.

{¶63} The Commission hereby MODIFIES the FFOs by STRIKING Part IX (Civil Penalty) from the both the Bill Baker Site FFO and the Reiter Union Site FFO.

{¶64} Pursuant to the agreement of Perkins and the Fire Marshal contained in their Joint Stipulation, the Commission AFFIRMS the Fire Marshal's March 20, 2009 FFOs in all other respects.

{¶65} 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 March 2014.

_____
Melissa M. Shilling, Chair

_____
Shaun K. Petersen, Vice-Chair

_____
Michael G. Verich, Member

Copies Sent to:

JULIAN W. PERKINS, INC.	[CERTIFIED MAIL]
PAUL BRINE	[CERTIFIED MAIL]
DONALD C. COOPER	[CERTIFIED MAIL]
STATE FIRE MARSHAL	
Meagan L. Moore, Esq.	
Joseph T. Dattilo, Esq.	
Timothy J. Kern, Esq.	

C E R T I F I C A T I O N

I hereby certify that the foregoing is a true and accurate copy of the RULING ON MOTIONS FOR SUMMARY JUDGMENT in **Julian W. Perkins, Inc. and Paul Brine v. Donald C. Cooper, State Fire Marshal**, Case Nos. ERAC 476331, 476332, 476333 entered into the Journal of the Commission this ___ day of March 2014.

_____
Julie A. Slane, Executive Secretary

Dated this _____ day of
March 2014