

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO

SKYE METALS RECOVERY, INC. : Case No. ERAC 12-076593
: :
Appellant, : :
: :
v. : :
: :
SCOTT NALLY, DIRECTOR OF : :
ENVIRONMENTAL PROTECTION, : :
: :
Appellee. : :

RULING ON DIRECTOR’S MOTION TO DISMISS

Rendered on August 16, 2012

Edward Kropp for Appellant Skye Metals Recovery, Inc.

Mike DeWine, Attorney General, *Samuel Peterson*, and
Cameron Simmons for Appellee Director of Environmental
Protection

{¶1} This matter comes before the Environmental Review Appeals Commission (“Commission”) upon a Notice of Appeal filed on May 3, 2012, by Appellant Skye Metals Recovery, Inc. (“Skye Metals”). Appellant challenges the March 28, 2012 Final Air Pollution Permit to Install and Operate, Permit No. P0108469 (“Permit”), issued by Appellee Scott Nally, Director of Environmental Protection (“Ohio EPA,” “Director”). Appellant alleges that the terms of the Permit are not technically supported and not based on sound engineering practices; therefore, the Director’s actions were unlawful and unreasonable.

{¶2} Before the Commission is the Director’s Motion to Dismiss filed on June 19, 2012. Appellant filed a Memorandum in Opposition on July 6, 2012, and the

Director filed a Reply on July 11, 2012. Based on the pleadings and relevant statutes, regulations, and case law, the Commission hereby GRANTS the Director's Motion to Dismiss and issues the following Findings of Fact, Conclusions of Law, and Final Order.

FINDINGS OF FACT

{¶3} Appellant owns and operates a spent nickel catalyst and metal grinding facility located at 10 Blue Knob Road, Warren Township, Ohio 45750 ("Ohio facility"). Appellant's principal place of business is located at 5513 Regency Oaks Drive North, Mobile, Alabama 36609 ("Alabama facility"). Case File Item J.

{¶4} On March 28, 2012, the Director issued the Permit at issue in this appeal, authorizing the initial installation and operation of equipment at Appellant's Ohio facility. A copy of the Permit was sent by United States Postal Service certified mail and delivered on April 2, 2012, to the Alabama facility. Case File Item H, J.

{¶5} Nancy Danneker, wife of the president of Skye Metals, signed on behalf of Skye Metals for the delivery of the Permit. Appellant acknowledges that Mrs. Danneker received the Permit at the Alabama facility on April 2, 2012. Appellant contends, however, that Mrs. Danneker failed to notify the president or other officers that she had signed for the Permit. Further, Appellant claims that its officers at the Ohio facility did not receive a copy of the Permit, or notice of issuance of the Permit, via mail and only became aware of the Permit after viewing it on Ohio EPA's website. Case File Item K.

{¶6} The Director argues that he sent the Permit to the Alabama address because this was the address furnished by Skye Metals in its application for the Permit. In contrast, Appellant asserts that during the initial stages of the permit application process, Ohio EPA officials corresponded with Skye Metals officers at the Ohio facility. Notably, however, Skye Metals presented no evidence that it requested Ohio EPA

correspondence or notices be sent to the Ohio facility, nor does it argue that the notice in this case was improper. Case File Items H, J.

{¶7} Appellant filed a Notice of Appeal on May 3, 2012, challenging certain terms contained in the Permit. Case File Item K.

{¶8} On June 19, 2012, the Director filed a Motion to Dismiss for lack of subject matter jurisdiction. In his motion, the Director argues that Appellant's appeal was not timely filed pursuant to Revised Code ("R.C.") 3745.04(D), which imposes a thirty-day deadline for filing an appeal of a final action after notice has been given. The Director states that 31 days elapsed between the receipt of the Permit by Mrs. Danneker on April 2, 2012, and the filing of the Notice of Appeal on May 3, 2012. Accordingly, the Director argues that the Commission lacks jurisdiction over the appeal pursuant to R.C. 3745.04(D). Case File Items H, L.

{¶9} Appellant responds that the appeal should be allowed to proceed in accordance with principles of equity. Noting that the appeal was filed only one day late, Appellant contends that because the Director sent the copy of the Permit to the Alabama facility, rather than the Ohio facility, Appellant is entitled to equitable consideration that justifies an exception to the thirty-day appeal deadline. Appellant further argues that it will be prejudiced if the appeal is dismissed. Specifically, Appellant contends that if the Commission dismisses the appeal, it will be unable to challenge certain cost-increasing provisions contained in the Permit and will suffer the loss of litigation expenses incurred in preparation for a hearing before the Commission. Case File Item K.

CONCLUSIONS OF LAW

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

{¶11} Pursuant to Civ.R. 4.2(F), notice may be served upon a corporation by serving the agent authorized by appointment or by law to receive service of process, *serving the corporation at any of its usual places of business* by a method authorized under Civ.R. 4.1(A)(1), or serving an officer or a managing or general agent of the corporation.

{¶12} In this case, Skye Metals does not directly challenge the notice of issuance of the Permit as improper. Appellant simply argues that the notice should have been delivered to its Ohio facility. Appellant does not dispute that it received a copy of the Permit at its Alabama facility on April 2, 2012, and acknowledges this location is its principal place of business. As a result, the Commission finds that notice was properly given on April 2, 2012.

{¶13} Revised Code 3745.04 confers jurisdiction on the Commission. Specifically, R.C. 3745.04(D) provides in pertinent part, “[t]he appeal shall be filed with the commission within thirty days after notice of the action.” The Commission has previously held that for those directly subject to the Director’s action, this thirty-day period begins to run when notice has been provided to the permittee. Ruling on Motion to Dismiss, *Beougher v. Nally*, ERAC No. 11-546558 (Feb. 15, 2012).

{¶14} Notwithstanding having received the Permit on April 2, 2012, Appellant did not file its Notice of Appeal until May 3, 2012, 31 days after it received notice of the Permit’s issuance.

{¶15} The Commission has consistently held that it lacks subject matter jurisdiction over appeals that are not timely filed. *Citizens for Buckeye Basin Parks, Inc. v. Schregardus*, EBR No. 483871-72 (Mar. 17, 1998).

{¶16} Further, the Tenth District has held that compliance with the thirty-day deadline under R.C. 3745.04 is a mandatory condition precedent to the Commission's authority to hear an appeal. Noncompliance with this requirement precludes the Commission from exercising jurisdiction. *Johnson v. Williams*, Case No. 77AP-776 (Feb. 16, 1978).

{¶17} Because Appellant did not file the Notice of Appeal until 31 days after receiving notice of the issuance of the Permit, Appellant's failure to comply with the terms of R.C. 3745.04 deprives the Commission of subject matter jurisdiction over this appeal. Equitable principles cannot convey jurisdiction where it does not otherwise exist.

FINAL ORDER

{¶18} In light of the foregoing, the Commission hereby GRANTS the Director's Motion to Dismiss and orders that the instant appeal be DISMISSED.

{¶19} 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
August 2012.

Melissa M. Shilling, Vice Chair

Shaun K. Petersen, Member

Copies Sent to:
SKYE METALS RECOVER, INC.
SCOTT NALLY, DIRECTOR OF
ENVIRONMENTAL PROTECTION
Edward Kropp
Samuel Peterson
Cameron Simmons

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[CERTIFIED MAIL]