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BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION  
STATE OF OHIO

DENNIS SCOTT WALLACE,	:	Case No. ERAC 15-6833
	:	
and	:	
	:	
DONALD L. VOS,	:	Case No. ERAC 15-6834
	:	
Appellants,	:	
	:	
v.	:	
	:	
CRAIG W. BUTLER, DIRECTOR OF ENVIRONMENTAL PROTECTION,	:	
	:	
and	:	
	:	
PENNOHIO WASTE, LLC,	:	
	:	
Appellees.	:	

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RULING ON APPELLEE PENNOHIO, LLC'S MOTION FOR  
SUMMARY JUDGMENT

Rendered on September 9, 2015

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Dennis Scott Wallace and Donald L. Vos, pro se Appellants

*Michael DeWine*, Attorney General, *George Horvath*, and  
*Elyse Akhbari* for Appellee Craig W. Butler, Director of  
Environmental Protection

*Michael A. Cyphert* and *Leslie G. Wolfe* for Appellee  
PennOhio Waste, LLC

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{¶1} This matter comes before the Environmental Review Appeals Commission ("Commission," "ERAC") on a notice of appeal filed by Appellants Dennis Scott Wallace and Donald L. Vos (collectively "Appellants") on March 9, 2015. Mr. Wallace and Mr. Vos challenge the issuance a 2015 construction and demolition debris

("C&DD") license by Craig Butler, Director of Environmental Protection ("Director," "Ohio EPA") on February 19, 2015. Case File Item A.

{¶2} Before the Commission is Appellee PennOhio Waste, LLC's ("PennOhio") Motion for Summary Judgment, filed August 14, 2015 ("Motion"). The Commission received a Response from Appellants on August 24, 2015. Case File Items TT, VV.

{¶3} Based upon the pleadings and the relevant statutes, regulations, and case law, the Commission issues the following Findings of Fact, Conclusions of Law, and Final Order GRANTING PennOhio's Motion for Summary Judgment and ORDERING the above-captioned appeal be DISMISSED.

#### **FINDINGS OF FACT**

{¶4} On February 19, 2015, Ohio EPA issued a 2015 C&DD license to Tervita, LLC ("Tervita") for a C&DD facility located at 7555 North Street, Negley, Ohio ("Negley Facility").<sup>1</sup>

{¶5} On March 9, 2015, Appellants filed a Notice of Appeal challenging the Director's issuance of the 2015 C&DD license. Generally, Appellants argue that the Director's issuance of the 2015 C&DD license was unlawful and unreasonable because the facility was not in substantial compliance with various provisions of the Ohio Revised Code ("R.C.") and Ohio Administrative Code ("Ohio Adm.Code"). Case File Item A.

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<sup>1</sup> On March 31, 2015, the Director approved the transfer of the Negley Facility's license from Tervita to PennOhio Waste, LLC. Tervita then filed a Motion for Substitution of PennOhio Waste LLC for Tervital, LLC as Appellee, which the Commission granted on May 14, 2015. Case File Items A, U, Z.

{¶6} Appellant Dennis Scott Wallace resides at 6607 Carbon Hill Road, East Palestine, Ohio. Appellant Donald L. Vos resides at 39916 Hazel Run Road, Hammondsville, Ohio. Case File Item A.

{¶7} On June 24, 2015, counsel for PennOhio served Mr. Wallace and Mr. Vos with separate sets of discovery requests containing requests for admission, interrogatories, and requests for the production of documents. Case File Item TT, Affidavit of Leslie G. Wolfe, at ¶7; Case File Item TT, Exhibits A and B.

{¶8} The discovery requests served upon Mr. Wallace contained the following requests for admission:

**REQUEST FOR ADMISSION NO. 1**

Admit that the 2015 License was properly granted.<sup>2</sup>

**REQUEST FOR ADMISSION NO. 2**

Admit that the Director's issuance of the 2015 License was lawful and reasonable.

**REQUEST FOR ADMISSION NO. 3**

Admit that the 2015 License Transfer was lawful and reasonable.

**REQUEST FOR ADMISSION NO. 4**

Admit that the Exemption Approval was lawful and reasonable.

**REQUEST FOR ADMISSION NO. 5**

Admit that neither You nor Your property has suffered any damage from operations of the PennOhio Facility.

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<sup>2</sup> The discovery requests defined the term "2015 License" as "the Ohio EPA C&DD Facility License dated February 19, 2015, issued to Tervita, LLC for the PennOhio Facility, and which was transferred to PennOhio Waste LLC on or about March 31, 2015. Case File Item TT, Exhibits A, B.

**REQUEST FOR ADMISSION NO. 6**

Admit that during the 2014 license year, the PennOhio Facility was operated in substantial compliance with O.A.C. Chapters 3745-400 and 3745-37.

**REQUEST FOR ADMISSION NO. 7**

Admit that during the 2014 license year, the PennOhio Facility was operated in substantial compliance with the terms of its 2014 operating license.

**REQUEST FOR ADMISSION NO. 8**

Admit that during the 2014 license year, the PennOhio Facility was operated in substantial compliance with applicable provisions of O.R.C. Chapters 3714, 3704, 3734, and 6111, and any rules issued thereunder.

**REQUEST FOR ADMISSION NO. 9**

Admit that during the 2014 license year, the PennOhio Facility was operated in substantial compliance with all applicable orders issued by the Director, Summit County Public Health, the Ohio Environmental Review Appeals Commission, and courts having jurisdiction under O.A.C. Chapter 3746-13.

**REQUEST FOR ADMISSION NO. 10**

Admit that You have no evidence that during the time the 2014 License for the PennOhio Facility was in effect, the PennOhio Facility was in violation of any applicable local, state or federal law or regulations.

**REQUEST FOR ADMISSION NO. 11**

Admit that You have no evidence that during the time the 2014 License for the PennOhio Facility was in effect, the PennOhio Facility was in violation of O.R.C. Chapter 6111.

**REQUEST FOR ADMISSION NO. 12**

Admit that You have no evidence to support Your claim that any improper material has been placed in the PennOhio Facility in violation of Ohio law.

**REQUEST FOR ADMISSION NO. 13**

Admit that You have no evidence to support Your claim that the NPDES Permit for the PennOhio Facility has been violated.

**REQUEST FOR ADMISSION NO. 14**

Admit that You have no evidence to support Your claim that “Class Three Streams are adversely impacted by the operation of the Landfill.”

**REQUEST FOR ADMISSION NO. 15**

Admit that You have no evidence to support Your claim that any wetlands or streams have been adversely impacted by the operation of the PennOhio Facility.

**REQUEST FOR ADMISSION NO. 16**

Admit that You prepared the Notice of Appeal that was filed in Case Nos. ERAC 15-6833 and 15-6834.

**REQUEST FOR ADMISSION NO. 17**

Admit that You prepared the “Request for Temporary Restraining Order and or a Permanent Injunction to Stop 2015 Operation Permit Issued to Tervita LLC for the Operation of Their Landfill and or Dump in Negley Ohio Until All Appeals Are Finnished [sic] on the 2014 Permit That is Still in an Appeals Process” that was filed in Case Nos. ERAC 15-6833 and 15-6834.

**REQUEST FOR ADMISSION NO. 18**

Admit that You prepared the “Request for Commission to Suspend and or Stay Execution of 2015 Permit Issued to Penn-Ohio Landfill in Negley, Ohio” that was filed in Case Nos. ERAC 15-6833 and 15-6834.

**REQUEST FOR ADMISSION NO. 19**

Admit that You prepared the “Plaintiff’s Objection to Tervita’s Motion for Substitution of PennOhio Waste LLC for Tervita, LLC as Appellee” that was filed in Case Nos. ERAC 15-6833 and 15-6834.

Case File Item T, Exhibit A.

{¶9} Except for Requests for Admission 16 through 19, the discovery requests served upon Mr. Vos were identical to those served upon Mr. Wallace. Requests for Admission 16 through 19, served upon Mr. Vos, stated as follows:

**REQUEST FOR ADMISSION NO. 16**

Admit that Dennis Scott Wallace prepared the Notice of Appeal that was filed in Case Nos. ERAC 15-6833 and 15-6834.

**REQUEST FOR ADMISSION NO. 17**

Admit that Dennis Scott Wallace prepared the "Request for Temporary Restraining Order and or a Permanent Injunction to Stop 2015 Operation Permit Issued to Tervita LLC for the Operation of Their Landfill and or Dump in Negley Ohio Until All Appeals Are Finnished [sic] on the 2014 Permit That is Still in an Appeals Process" that was filed in Case Nos. ERAC 15-6833 and 15-6834.

**REQUEST FOR ADMISSION NO. 18**

Admit that Dennis Scott Wallace prepared the "Request for Commission to Suspend and or Stay Execution of 2015 Permit Issued to Penn-Ohio Landfill in Negley, Ohio" that was filed in Case Nos. ERAC 15-6833 and 15-6834.

**REQUEST FOR ADMISSION NO. 19**

Admit that Dennis Scott Wallace prepared the "Plaintiff's Objection to Tervita's Motion for Substitution of PennOhio Waste LLC for Tervita, LLC as Appellee" that was filed in Case Nos. ERAC 15-6833 and 15-6834.

Case File Item T, Exhibit B.

{¶10} On July 15, 2015, PennOhio received from Mr. Vos a reproduction of the June 24, 2015 discovery requests, containing handwritten responses to each of the requests for admission. In response to each of the nineteen requests for admission, Mr. Vos wrote, "Denied." The document was not, however, signed by Mr. Vos. Case File Item TT, Affidavit of Leslie G. Wolfe, at ¶9; Case File Item TT, Exhibit C.

{¶11} Similarly, on August 11, 2015, PennOhio received from Mr. Wallace a reproduction of the June 24, 2015 discovery requests, containing handwritten responses to each of the requests for admission. In response to each of the nineteen requests for admission, Mr. Wallace wrote, "Denied." The document was not, however, signed by Mr. Wallace. Case File Item TT, Affidavit of Leslie G. Wolfe, at ¶11; Case File Item TT, Exhibit D.

{¶12} On August 14, 2015, PennOhio filed a Motion for Summary Judgment. PennOhio argues that each of the nineteen requests for admission for each appellant should be deemed admitted because neither Mr. Wallace's nor Mr. Vos's answers to PennOhio's requests for admission are valid. Specifically, PennOhio argues that Mr. Wallace's responses were untimely<sup>3</sup>, and neither Mr. Wallace nor Mr. Vos had signed his document. Therefore, PennOhio contends neither response is valid pursuant to Ohio Adm.Code 3746-6-05. Case File Item TT.

{¶13} PennOhio asserts that inasmuch as each of the requests for admission should be deemed admitted, no genuine issues of material fact remain and Appellees are entitled to judgment as a matter of law. Case File Item TT.

{¶14} On August 24, 2015, Appellants filed a Response to PennOhio's Motion for Summary Judgment. Appellants' Response states in full as follows:

1. Attorney Wolfe claims that Appellants failed to respond to PennOhio's Request for admissions is unfounded and a LIE.
2. There is a genuine issue of material fact and that is whether the Director of the Ohio Environmental Protection violated the law, when he issued a permit to PennOhio to advertise as is required by the Rules.
3. It seems that Attorney Wolfe cannot understand that the only issue in the pending appeal before this Commission is if the Director violated the Rules in granting the permit.
4. There is no need for the Appellants to bring any other witness to trial, as it is a fact that the Director of the Ohio Environmental Protection violated the Rules when he issued the permit PennOhio without requiring them to advertise.
5. Summary Judgment cannot be issued when there is a genuine issue of material fact.

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<sup>3</sup> Pursuant to the Commission's July 23, 2015 Order, Mr. Wallace's responses to PennOhio's discovery requests were due on August 5, 2015. Case File Item OO.

6. The Appellant, Donald L. Vos does not live in Jeffereson County, Ohio, this is another Lie to the Commission by Attorney Wolfe as the Appellant lives in Columbiana County, Ohio.
7. All of PennOhio's Request for Admissions were denied by Both Dennis Scott Wallace and Donald L. Vos.
8. It is a fact that the Appellants intend to file a Federal Court Action after exhausting all State Remedy, not only against PennOhio, But against the Director of the Ohio environmental Protection as well should we not find satisfaction within the Appeal process, as we have a Legal Right to do so.

Case File Item VV (capitalization and punctuation in original).

{¶15} Significantly, Appellants' Response offers no explanation as to why Appellants failed to sign their responses to PennOhio's requests for admission. Case File Item VV.

### CONCLUSIONS OF LAW

#### **I. Summary Judgment Standard of Review**

{¶16} 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).

{¶17} 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 \* \* \*

{¶18} 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.

{¶19} “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).

## II. ERAC Standard of Review

{¶20} 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.

{¶21} 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).

{¶22} 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.*

{¶23} 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.*

{¶24} 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.*

{¶25} 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.*

### III. Discussion

{¶26} In its Motion for Summary Judgment, PennOhio argues that, pursuant to Ohio Adm.Code 3746-6-05, the aforementioned requests for admission should be deemed admitted because Mr. Wallace and Mr. Vos failed to sign their answers to those requests.

{¶27} The Commission's rule regarding requests for admission, Ohio Adm.Code 3746-6-05, mirrors Civ.R. 36(A)(1) and provides in pertinent part as follows:

\* \* \* The matter is admitted unless, within twenty-eight days after the service of the request, or within such shorter or longer time as the commission may order, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection, *signed by the party or by his attorney.* \* \* \*

(Emphasis added).

{¶28} The Commission has previously held that if a party fails to timely respond to a request for admission, the request may be deemed admitted and conclusively established against the party. *Lundberg v. Korleski*, ERAC No. 256453 (May 31, 2011) (noting that it is within the Commission's discretion whether to accept late responses to requests for admission); *Wallace v. Nally*, ERAC Nos. 14-156806 & 14-416807 (July 23, 2014).

{¶29} Additionally, Ohio courts have relied upon the signature requirement of Civ.R. 36(A)(1) in deeming requests for admission to be admitted. See e.g., *Actionlink, Inc. v. Kahn*, Summit C.P. No. CV 2011-08-4763 (Nov. 5, 2013) (“Since Defendants’ Answers are unsigned by either the party or the party’s attorney, the matters are deemed admitted”); see also *Sandler v. Gossick*, 87 Ohio App.3d 372 (8th Dist. 1993) (affirming trial court’s decision to deem requests for admission to be admitted on the basis of untimely and unsigned responses).

{¶30} Here, neither Mr. Wallace nor Mr. Vos signed his answers to PennOhio’s requests for admission. Additionally, in their Response to PennOhio’s Motion for Summary Judgment, Appellants offered no explanation for their failure to sign their answers to PennOhio’s requests for admission. Accordingly, the Commission finds Appellants’ answers to PennOhio’s requests for admissions insufficient under Civ.R. 36(A)(1). Therefore, the Commission deems Requests for Admission 1 through 19 admitted in both Mr. Wallace’s and Mr. Vos’s appeals.

{¶31} Significantly, the first request for admission in each set of discovery requests states, “Admit that the 2015 License was properly granted.” Having found that the requests for admission at issue are deemed admitted and conclusively established against Mr. Wallace and Mr. Vos in this appeal, the Commission finds that the 2015 license was properly granted. Accordingly, the Commission concludes that the Director’s issuance of a 2015 C&DD license to Tervita was lawful and reasonable.

**CERTIFICATION**  
 I, the undersigned for the Environmental Review Appeals Commission, hereby certify that the foregoing is a true and exact reproduction of the original

\_\_\_\_\_ of the Commission.

Executive Secretary \_\_\_\_\_  
 Name  
 \_\_\_\_\_  
 Date

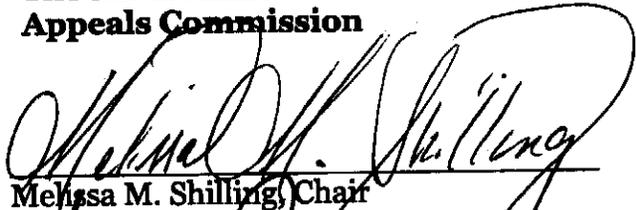
**FINAL ORDER**

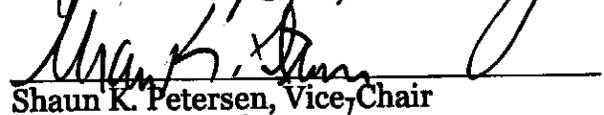
{132} For the foregoing reasons, the Commission GRANTS PennOhio's Motion for Summary Judgment and hereby ORDERS that the above-captioned appeal be DISMISSED.

{133} 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**

  
Melissa M. Shilling, Chair

  
Shaun K. Petersen, Vice-Chair

  
Michael G. Verich, Member

Entered into the Journal of the Commission this 9<sup>th</sup> day of September 2015.

**CERTIFICATION**

I, the undersigned for the Environmental Review Appeals Commission, hereby certify that the foregoing is a true and exact reproduction of the original

Order on Appellee PennOhio LLC's Motion for Summary Judgment  
of the Commission.

Name  Date 9/9/15  
Executive Secretary

Copies Sent to:

DENNIS SCOTT WALLACE

[CERTIFIED MAIL]

DONALD L. VOS

[CERTIFIED MAIL]

CRAIG BUTLER, DIRECTOR OF  
ENVIRONMENTAL PROTECTION

[CERTIFIED MAIL]

PENNOHIO WASTE, LLC`

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