BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO

DENNIS SCOTT WALLACE,	:	Case No. ERAC 14-156806
and	:	
DONALD L. VOS,	:	Case No. ERAC 14-416807
Appellants,	:	
v.	:	
SCOTT NALLY, DIRECTOR OF ENVIRONMENTAL PROTECTION,	:	
and	:	
TERVITA, LLC,	:	
Appellees.	:	

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

Rendered on July 23, 2014

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

Michael DeWine, Attorney General, and *George Horvath* for Appellee Scott Nally, Director of Environmental Protection

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

{¶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 January 21, 2014. Mr. Wallace and Mr. Vos challenge the issuance of a 2014 construction and demolition debris ("C&DD") license issued by Scott Nally, Director of Environmental Protection

("Director," "Ohio EPA") to Tervita, LLC ("Tervita") on December 24, 2013. Case File Item A.

{¶2} Before the Commission is Tervita's Motion for Summary Judgment, filed June 23, 2014. The Commission received a response from Appellants on June 27, 2014. The Director filed a Joinder to the Motion for Summary Judgment Filed by Appellee Tervita, LLC on July 17, 2014. Case File Items GGG, HHH.

{¶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 Tervita's Motion for Summary Judgment and ORDERING the above-captioned appeal be DISMISSED.

FINDINGS OF FACT

{¶4} Tervita, LLC operates a C&DD landfill facility (known as the Tervita – Penn Ohio Landfill) located at 7555 North Street, Negley, Ohio. On December 24, 2013, Ohio EPA issued a 2014 C&DD license to Tervita for the Tervita – Penn Ohio facility. Case File Item A.

{¶5} 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.

{¶6} On January 21, 2014, Appellants filed a notice of appeal challenging the Director's issuance of the 2014 C&DD license. Generally, Appellants argued that the Director's issuance of the 2014 C&DD license was unlawful and unreasonable because Tervita and Ohio EPA engaged in fraud during the license application process, and because the facility was not in substantial compliance with various provisions of the

Ohio Administrative Code ("Ohio Adm.Code") and Ohio Revised Code ("R.C."). Case File Item A.

{¶7} On April 11, 2014, counsel for Tervita 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 GGG, Affidavit of Leslie G. Wolfe, at ¶11; Case File Item GGG, Exhibits H and I.

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

> **REQUEST FOR ADMISSION NO. 1**
>
> Admit that the 2014 License was properly granted.[1]
>
> **REQUEST FOR ADMISSION NO. 2**
>
> Admit that neither You nor Your property has suffered any damage from Facility operations
>
> **REQUEST FOR ADMISSION NO. 3**
>
> Admit that the Facility is not discharging contaminants or pollutants into the groundwater or surface waters in violation of Ohio law.
>
> **REQUEST FOR ADMISSION NO. 4**
>
> Admit that the Facility is not depleting groundwater beneath the Facility or the source of water or local springs.
>
> **REQUEST FOR ADMISSION NO. 5**
>
> Admit that the Facility does not emit dust or other air contaminants in violation of Ohio law.
>
> **REQUEST FOR ADMISSION NO. 6**
>
> Admit that the Facility is not filling in streams or springs in violation of Ohio law.

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[1] The discovery requests defined the term "2014 License" as "the Ohio EPA C&DD Facility License dated December 24, 2013, issued to Tervita-Penn Ohio Landfill. Case File Item GGG, Exhibits H and I.

REQUEST FOR ADMISSION NO. 7

Admit that the groundwater monitoring system at the Facility is capable and adequate to detect a release of contaminants.

REQUEST FOR ADMISSION NO. 8

Admit the nature of the site and hydrogeology beneath the Facility were accurately identified in the 2014 License application.

REQUEST FOR ADMISSION NO. 9

Admit there is no danger from subsidence from the Facility.

REQUEST FOR ADMISSION NO. 10

Admit that during the 2013 license year, the Facility operated in substantial compliance with Chapter 3745-400 of the Ohio Administrative Code and the terms of its 2013 operating license.

REQUEST FOR ADMISSION NO. 11

Admit that You have prepared legal documents and papers that other individuals signed which were filed in cases pending before the Environmental Review Appeals Commission.

REQUEST FOR ADMISSION NO. 12

Admit that You prepared the Notice of Appeal that was filed in Case Nos. 14-156806 and 14-416807.

REQUEST FOR ADMISSION NO. 13

Admit that You prepared the document titled, "Appellants' Answer to GRAIG W. BUTLER'S Motion for Extension of Time To File CERTIFIED RECORD" that was filed in Case Nos. 14-156806 and 14-416807.

REQUEST FOR ADMISSION NO. 14

Admit that You prepared the document titled, "Motion Stating Both Above Stated Cases Are One Case And Was Filed As One Case, And Requires Only One Fee Which Was Paid" that was filed in Case Nos. ERAC 14-156806 and 14-416807.

REQUEST FOR ADMISSION NO. 15

Admit that You prepared the document titled, "Agreement To Attorney Wolfe's Proposed Case Management Schedule" that was filed in Case Nos. 14-156806 and 14-416807.

REQUEST FOR ADMISSION NO. 16

Admit that You prepared the document titled, "Addendum To Appeal Of 2014 Permit With Request For Discovery" that was filed in Case Nos. 14-156806 and 14-416807.

REQUEST FOR ADMISSION NO. 17

Admit that You are not qualified to determine whether a construction and demolition debris landfill needs a 404 or 401 permit.

REQUEST FOR ADMISSION NO. 18

Admit that the groundwater underlying Your property has not been depleted as the result of the Facility's operation.

REQUEST FOR ADMISSION NO. 19

Admit that the surface water on Your property and the source of surface water on Your property has not been depleted as the result of the Facility's operation.

REQUEST FOR ADMISSION NO. 20

Admit that You have no evidence that during the time the 2013 License for the Facility was in effect, the Facility was in violation of any of the statutes or regulations listed in Paragraph 8 of Your Notice of Appeal.

REQUEST FOR ADMISSION NO. 21

Admit that You have no evidence that during the time the 2013 License for the Facility was in effect, the Facility was in violation of Ohio Revised Code Chapter 6111 as alleged in Paragraph 9 of Your Notice of Appeal.

Case File Item GGG, Exhibit I.

{¶9} Except for Requests for Admission 11 through 16, the discovery requests served upon Mr. Vos were identical to those served upon Mr. Wallace. Requests for Admission 11 through 16, served upon Mr. Vos, stated as follows:

REQUEST FOR ADMISSION NO. 11

Admit that Dennis Scott Wallace prepared legal documents and papers that You signed which were filed in cases pending before the Environmental Review Appeals Commission.

REQUEST FOR ADMISSION NO. 12

Admit that Dennis Scott Wallace prepared the Notice of Appeal in Case Nos. 14-156806 and 14-416807.

REQUEST FOR ADMISSION NO. 13

Admit that Dennis Scott Wallace prepared the document titled, "Appellants' Answer to GRAIG W. BUTLER'S Motion for Extension of Time To File CERTIFIED RECORD" that was filed in Case Nos. 14-156806 and 14-416807.

REQUEST FOR ADMISSION NO. 14

Admit that Dennis Scott Wallace prepared the document titled, "Motion Stating Both Above Stated Cases Are One Case And Was Filed As One Case, And Requires Only One Fee Which Was Paid" that was filed in Case Nos. ERAC 14-156806 and 14-416807.

REQUEST FOR ADMISSION NO. 15

Admit that Dennis Scott Wallace prepared the document titled, "Agreement To Attorney Wolfe's Proposed Case Management Schedule" that was filed in Case Nos. 14-156806 and 14-416807.

REQUEST FOR ADMISSION NO. 16

Admit that Dennis Scott Wallace prepared the document titled, "Addendum To Appeal Of 2014 Permit With Request For Discovery" that was filed in Case Nos. 14-156806 and 14-416807.

Case File Item GGG, Exhibit H.

{¶10} Tervita did not receive a response from either Mr. Wallace or Mr. Vos to its April 11, 2014 discovery requests. Case File Item GGG, Affidavit of Leslie G. Wolfe, at ¶12.

{¶11} On June 23, 2014, Tervita filed a Motion for Summary Judgment, arguing that because Mr. Wallace and Mr. Vos failed to respond to the aforementioned requests for admission, the Commission should deem those requests admitted. If those requests are deemed admitted, Tervita contends that no genuine issues of material fact exist and the present appeal should be dismissed.

{¶12} On June 27, 2014, Appellants filed a Response to Tervita's Motion for Summary Judgment. Appellants' Response states in full as follows:

> 1. There can be no Summary Judgment granted against another party when there are questions of fact that need to be resolved by Jury Trial.
>
> 2. The Assistant Attorney General opened Pandura's (sic) Box when at hearing with the Commission he brought up the issue of Blood and Body Parts in the Tervita Dump Facility.
>
> 3. The Appellants have requested over and over again for discovery of all materials brought into the dump and The Director and Tervita refuse again and again to provide the requested discovery material.
>
> 4. Attorney Wolfe claims there is no discovery material for the material brought into the dump.
>
> 5. As the Assistant Attorney General brought up the issue of the Blood and Body parts in the dump, the Appellants are entitled to such discovery as it is vital to the Appellants ability to proceed with all other aspects of the trial and appeals process.

(Capitalization and punctuation in original.) Case File Item HHH.

{¶13} Significantly, Appellants' Response offered no explanation as to why Appellants failed to respond to Tervita's requests for admission. Case File Item HHH.

CONCLUSIONS OF LAW

I. Summary Judgment Standard of Review

{¶14} 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).

{¶15} 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 * * *

{¶16} 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.

{¶17} "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

{¶18} 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.

{¶19} 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).

{¶20} 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.*

{¶21} 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.*

{¶22} 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.*

{¶23} 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

{¶24} In its Motion for Summary Judgment, Tervita argues that, pursuant to Ohio Administrative Code ("Adm.Code") 3746-6-05, the aforementioned requests for admission should be deemed admitted because Mr. Wallace and Mr. Vos failed to submit written answers to those requests within the requisite twenty-eight day period.

{¶25} The Commission's rule regarding requests for admission, Ohio Adm.Code 3746-6-05, 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. * * *

{¶26} 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).

{¶27} In *Lundberg*, the appellee served the appellant with requests for admission on February 23, 2011. *Id.* at ¶22. Among others requests, the appellee's fourth request for admission stated, "[a]dmit that you are not aggrieved, adversely affected or otherwise harmed by the Director's Action." *Id.*

{¶28} The appellant did not respond until March 25, 2011—ten days after the twenty-day deadline.[2] *Id.* at ¶23. Interpreting Ohio Adm.Code 3746-6-05, the Commission stated that it is within its discretion whether to accept a late filing or to allow for a withdrawal of an admission, but declined to do so, finding the appellant's justification "less than compelling." *Id.* at ¶¶26-27. Thus, the Commission deemed the request admitted and granted the appellee's summary judgment on standing grounds.

{¶29} Here, Mr. Wallace and Mr. Vos did not simply fail to file their responses within the twenty-eight day deadline; they have not, to date, filed any response to the requests at all. Accordingly, the Commission deems the instant requests for admission admitted and conclusively established against Mr. Wallace and Mr. Vos in this appeal.

{¶30} Significantly, the first request for admission in each set of discovery requests states, "[A]dmit that the 2014 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 2014 license was properly granted. Accordingly, the Commission concludes that the Director's issuance of a 2014 C&DD license to Tervita was lawful and reasonable.

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[2] The then-effective version of Ohio Adm.Code 3746-6-05 provided for a twenty-day deadline to respond to requests for admission.

FINAL ORDER

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

{¶32} 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 25 day of July 2014.

Copies Sent to:

DENNIS SCOTT WALLACE	[CERTIFIED MAIL]
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