

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO

WILLIAMS COUNTY ALLIANCE, : Case No. ERAC 15-6849
: :
Appellant, : :
: :
v. : :
: :
CRAIG BUTLER, DIRECTOR OF : :
ENVIRONMENTAL PROTECTION, : :
: :
and : :
: :
TITAN TIRE RECLAMATION CORP., : :
: :
Appellees. : :

RULING ON MOTIONS FOR SUMMARY JUDGMENT

Rendered on May 11, 2016

Terry J. Lodge for Appellant Williams County Alliance

Michael DeWine, Attorney General, *Sarah T. Bloom Anderson*, and *Elizabeth R. Ewing* for Appellee Craig Butler, Director of Environmental Protection

Louis E. Tosi, *Cheri A. Budzynski*, and *Michael A. Snyder* for Appellee Titan Tire Reclamation Corp.

{¶1} This matter comes before the Environmental Review Appeals Commission (“Commission,” “ERAC”) upon a Notice of Appeal filed by Appellant Williams County Alliance on July 6, 2015. Appellant challenges the June 4, 2015 issuance of Permit-to-Install (“PTI”) P0117873 by Appellee Craig Butler, Director of Environmental Protection (“Director,” “Ohio EPA,” “Agency”) to Appellee Titan Tire Reclamation Corp. (“Titan Tire”). Case File Item A.

{¶2} On March 30, 2016, the Director and Titan Tire each filed separate motions for summary judgment. Titan Tire also filed a memorandum in support of the Director's motion. Williams County Alliance ("WCA") filed responses to both motions on April 15, 2016.¹ Titan Tire and the Director filed their replies on April 25, 2016 and April 29, 2016, respectively. Case File Items BB, DD, EE, GG, HH, II, JJ, NN.

{¶3} Based upon a review of 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 the Director's Motion for Summary Judgment.

FINDINGS OF FACT

{¶4} On October 15, 2014, Titan Tire filed an application for a PTI with Ohio EPA, Division of Air Pollution Control. In its application, Titan Tire requested permission to install a thermal vacuum reactor to recover material from scrap and used tires. Case File Item EE, Smidi Affidavit, ¶8.

{¶5} On October 22, 2014, Ohio EPA published a public notice of its receipt of the application in the Bryan Times, a daily newspaper of general circulation in Williams County. The notice indicated that Ohio EPA had received Titan Tire's application for a PTI. The notice also included contact information for obtaining additional instructions for submitting comments, requesting information or a public hearing, or filing an appeal. Case File Item EE, Smidi Affidavit, ¶9.

{¶6} Ohio EPA did not receive any public inquires in response to the public notice. Case File Item EE, Smidi Affidavit, ¶9.

¹ Along with its responses, WCA filed a Motion for Leave to file its responses. The Commission hereby finds Appellant's Motion for Leave MOOT. Case File Item FF.

{¶7} After reviewing Titan Tire's application, Ohio EPA issued PTI PO117873 ("Permit) on June 4, 2015. Prior to issuing the Permit, Ohio EPA did not issue a draft action, and no public comment period was provided. Case File Item EE, Smidi Affidavit, ¶¶10-16.

{¶8} The Permit requires Titan Tire to apply for a Title V permit-to-operate ("PTO") within twelve months after commencing operation of the thermal vacuum reactor. The application process for a Title V PTO will require the issuance of a draft permit and a public comment period. Case File Item EE, Smidi Affidavit, ¶17.

{¶9} Additionally, the Permit contains emissions limitations, operational restrictions, monitoring and recordkeeping requirements, reporting requirements, and testing requirements for all criteria pollutants. In his affidavit, Mr. Mohammad Smidi, Environmental Specialist 2 with Ohio EPA's Division of Air Pollution Control, averred that these limitations are protective of public health and the environment. Case File Item EE, Smidi Affidavit, ¶¶18-19.

{¶10} Following Ohio EPA's issuance of the Permit, on July 6, 2015, Williams County Alliance filed a Notice of Appeal with the Commission, raising ten assignments of error:

1. The Director erred as to the proposed PTI because it should have been circulated for public review and comment according to the provisions of OAC § 3745-77-08 and other provisions of the Ohio Administrative Code. It should have been publicized according to the public notification requirements of those administrative and statutory provisions.
2. The Director erred because the Pyrolysis Unit should have been subjected to OEPA requirements for emissions testing and disclosure of those test results.
3. The Director unlawfully and unreasonably approved the PTI by failing to incorporate any articulated or enforceable restrictions upon operations of the Pyrolysis Unit which reflect protection of the

public health and the environment, in violation of the requirements of Ohio law which prohibit administrative agencies from acting in an arbitrary and capricious manner.

4. The Director unlawfully and unreasonably approved the order by utilizing general, but unknown and unspecified, standards for summary approval of the PTI that amounted to "rules" as defined in Chapter 119 of the Ohio Revised Code but which were not adopted pursuant to the required procedural and substantive safeguards for rules promulgation under Ohio law.
5. The Director unlawfully and unreasonably approved the order without any minimum direction, criteria or standards from the Ohio General Assembly and thereby unlawfully exercised legislative power in violation of the constitutional doctrine of separation of powers.
6. The Director acted unlawfully and unreasonably in approving the order by creating a scheme to circumvent the statutorily-created program for the issuance of permits-to-install governed by Chapter 3734 of the Ohio Revised Code.
7. The Director unlawfully and unreasonably approved the PTI by failing to incorporate into it enforceable requirements for the operation of the facility or governing the potential for the final products of its treatment process to contaminate the environment or endanger human health.
8. The Director unlawfully and unreasonably approved the PTI by using an ad hoc means of approval without following promulgated and effective rules. Consequently, the Director could not reasonably and lawfully find that a proper basis exists for the conclusion that the Pyrolysis Unit would not result in an adverse effect on public health or safety.
9. The Director unlawfully and unreasonably refused to require the applicant to address the matter of whether there are solid waste or hazardous waste materials which must be disposed of with regulatory oversight.
10. The Director unlawfully and unreasonably has prevented disclosure, except in response to public record requests, of any information about the subject PTI, including copies of the permit draft, the application, and all relevant supporting materials the initial permit application, compliance plan, permit, and monitoring and compliance certification report.

{¶11} On March 30, 2016, both the Director and Titan Tire filed motions for summary judgment. The Director argues that Ohio EPA is entitled to summary judgment because the application review and permit issuance processes complied with all public participation requirements prescribed in Ohio's statutes and regulations. Specifically, the Director asserts that the decision whether to issue a draft permit and conduct a public hearing is purely discretionary. Additionally, the Director contends that the Permit contains terms and conditions that are protective of public health and the environment, and Appellant's remaining assignments of error fall outside the Commission's jurisdiction. Case File Item EE.

{¶12} Titan Tire argues it is also entitled to summary judgment because WCA lacks standing. Specifically, Titan Tire argues that WCA's members have not demonstrated any actual and immediate, or threatened harm that could be redressed in this appeal. Case File Item BB.

{¶13} Williams County Alliance filed responses to both motions for summary judgment on April 15, 2016. In its response to the Director's motion, WCA conceded all arguments relating to assignments of error two, five, and nine. Further, WCA acknowledged that no provision of the Ohio Administrative Code ("Adm.Code") expressly requires Ohio EPA to issue a draft permit or accept public comments prior to the issuance of a PTI. Case File Item GG.

{¶14} Nonetheless, WCA argues that summary judgment is inappropriate because the Director's failure to issue a draft action and accept public comments violated the due process clauses of the state and federal constitutions, amounted to an unlawful rulemaking by the Agency, and was unreasonable in light of internal comments by Ohio EPA staff during the review process. In essence, WCA argues that although the

Director did not promulgate administrative regulations to articulate specific criteria to consider in determining whether to issue a draft action, the Director *should* have done so, and the Director's failure to do so resulted in the unreasonable and unlawful issuance of the Permit in this instance. Case File Item GG.

{¶15} Regarding WCA's remaining assignments of error, WCA does not articulate any specific theory as to how the Director's issuance of the Permit might result in harm to public health or the environment. Instead, WCA simply reiterates its arguments regarding the lack of a draft permit or public comment period with respect to these assignments of error, as well. Case File Item GG.

{¶16} In response to Titan Tire's motion, WCA argues that although it can articulate no specific theory as to how its members might suffer concrete harm as a result of the Director's action, it need not do so with such particularity at this stage in its appeal. Williams County Alliance asserts that its members live near Titan Tire's facility and will thus breathe emissions from its thermal vacuum reactor. Case File Item HH.

CONCLUSIONS OF LAW

I. Summary Judgment Standard of Review

{¶17} 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).

{¶18} 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 * * *

{¶19} 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.

{¶20} “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

{¶21} Revised Code (“R.C.”) 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.

{¶22} 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).

{¶23} 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*, 10th Dist. Franklin Nos. 12AP-278, 12AP-279, 12AP-80, 12AP-81, 2013-Ohio-3923, ¶56. Thus, such agencies are entitled to considerable deference when reviewing their interpretation of their own governing rules and regulations. *Id.*

{¶24} 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.*

{¶25} 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*, ¶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.*

{¶26} 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*, 10th Dist. Franklin No. 07AP-780, 2008-Ohio-2423, ¶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. Director's Motion for Summary Judgment

A. Procedural Issues

{¶27} Williams County Alliance asserts that the Director acted unlawfully and unreasonably by failing to issue a draft action and hold a public hearing and/or public comment period prior to the issuance of the Permit.

{¶28} In his motion for summary judgment, the Director argues that the decision whether to utilize the draft permit and public hearing/comment procedure is discretionary. Because the Agency received no inquiries in response to its public notice of receipt of Titan Tire's application, the Director contends the Agency's decision to

issue the Permit without first publishing a draft action and conducting a public hearing or otherwise receiving public comments was both lawful and reasonable.

{¶29} The Commission agrees.

{¶30} Ohio Administrative Code 3745-31-06(H) governs public participation requirements for air PTIs. It states in pertinent part:

(H) Public participation/notification requirements.

The director shall do the following:

(1) Notify the public, by advertisement in a newspaper of general circulation in each county in which the proposed air contaminant source would be constructed and operated, of the application, the draft action (*if issued*), the ambient air impact that is expected from the nonattainment NSR permit or the PSD permit, if any, *and of the opportunity to request a public hearing, comment at that public hearing or submit written comments on any draft action.* This notice shall follow the requirements under Chapter 3745-49 of the Administrative Code.

* * *

(Emphasis added).

{¶31} Similarly, R.C. 3745.07, which governs proposed actions, states in pertinent part:

Before issuing * * * any permit * * *, the director of environmental protection *may* issue a proposed action to the applicant that indicates the director's intent with regard to the issuance * * * of the permit * * *.

* * *

If the director issues * * * a permit * * * without issuing a proposed action, * * * any person who would be aggrieved or adversely affected thereby, may appeal to the environmental review appeals commission within thirty days of the issuance * * *.

(Emphasis added).

{¶32} Thus, both the applicable regulation and statute contemplate that the Director may issue a permit without first issuing a draft action. Moreover, as WCA concedes in its response, the applicable statutes and regulations do not contain any

criteria the Director must consider in determining whether to issue a draft action. Therefore, the Commission finds the decision whether to issue a draft action prior to the issuance of a final permit is within the discretion of the Director.

{¶33} Although, as noted above, the Director's discretion is not absolute, the Commission finds the Director acted lawfully and reasonably in this instance.

{¶34} Here, Ohio EPA published public notice of the Agency's receipt of Titan Tire's application in a newspaper of general circulation in Williams County. This notice not only stated that Ohio EPA had received Titan Tire's application, but also provided contact information for obtaining additional instructions for submitting comments, requesting information or a public hearing, or filing an appeal. Ohio EPA did not receive any inquiries in response to its public notice, and the Commission finds the Director did not abuse his discretion in issuing the Permit without first issuing a draft action, holding a public hearing, or otherwise accepting public comments.

{¶35} The Commission also finds WCA's public policy arguments regarding Ohio EPA's review and issuance procedures unpersuasive.

{¶36} First, WCA argues that the Director's decision to issue the Permit without first issuing a draft action or utilizing the public hearing/comment procedure violated the due process clauses of both the state and federal constitutions. It is well-settled, however, that the Commission lacks jurisdiction to hear constitutional claims. *BP Exploration & Ohio, Inc. v. Jones*, ERAC No. 184134 (Mar. 21, 2001).

{¶37} Second, WCA argues that Director's failure to issue a draft action and accept public comments amounted to an unlawful rulemaking by the Agency. The Commission finds that this is, in essence, a collateral attack on Ohio Adm.Code Chapter 3745-31. As with its constitutional claims, the Commission finds such a collateral attack

on Ohio's air PTI regulations not within the Commission's jurisdiction in this appeal. *Lund v. PLAA, et al.*, ERAC No. 13-016726 (Dec. 19, 2013), at ¶¶87-88.

{¶38} Finally, WCA contends that the Director's decision to not issue a draft action or utilize the public hearing/comment procedure was unreasonable because he ignored the advice of Ohio EPA employees. In support of this assertion, WCA cites deposition testimony from Mr. Smidi. The deposition transcript, however, was not filed with the Commission. Therefore, the Commission finds WCA's factual assertion—namely, that Ohio EPA staff recommended the issuance of a draft action—not supported by evidence of the type required by Civ.R. 56 and thus insufficient to satisfy WCA's reciprocal burden to set forth material facts showing there is a genuine issue for hearing.

{¶39} Accordingly, the Commission finds the Director's motion for summary judgment well-taken with respect to the Agency's decision to not issue a draft action or utilize the public hearing/comment procedure.

B. Effect on Public Health and the Environment

{¶40} Regarding WCA's remaining assignments of error, Mr. Smidi averred on behalf of the Director that the emissions limitations contained in the Permit are protective of public health and the environment. In response, WCA did not articulate any specific theory as to how the Director's issuance of the Permit might result in harm to public health or the environment. Instead, WCA simply reiterated its arguments relating to the lack of a draft permit or public comment period.

{¶41} The Commission finds that, through Mr. Smidi's affidavit, the Director's motion for summary judgment satisfied the initial burden under Civ.R. 56(C) to set forth facts demonstrating there are no genuine issues of material fact as to whether the Permit is protective of public health and the environment. Because WCA's responses are

not supported by evidence of the type required by Civ.R. 56, the Commission finds WCA did not satisfy its reciprocal burden to set forth specific facts showing that there is a genuine issue for hearing.

{¶42} Accordingly, the Commission finds the Director's motion for summary judgment well-taken with respect to WCA's remaining assignments of error.

IV. Titan Tire's Motion for Summary Judgment

{¶43} Having found the Director's motion for summary judgment well-taken, the Commission declines to address Titan Tire's motion for summary judgment and its arguments regarding standing.

FINAL ORDER

{¶44} For the foregoing reasons, the Commission hereby rules to GRANT the Director's motion for summary judgment and ORDERS the above-captioned appeal be DISMISSED.

{¶45} The Commission finds Titan Tire's Motion for Summary Judgment MOOT.

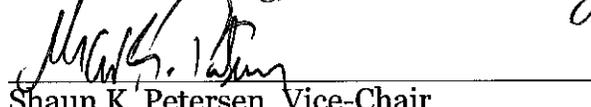
{¶46} In accordance with Ohio Adm.Code 3746-13-01, the Commission informs the parties of the following:

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 11th day of May
2016.

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