BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION

STATE OF OHIO

BUCKEYE EGG FARM, L.P., ET AL.	:	Case No. ERAC 455343-455345
Appellants	:	
v.	:	
FRED L. DAILEY, DIRECTOR, OHIO DEPARTMENT OF AGRICULTURE	:	
Appellee.	:	Issued: October 15, 2003

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND FINAL ORDER

Issued By:

ENVIRONMENTAL REVIEW APPEALS COMMISSION
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This matter comes before the Environmental Review Appeals Commission ("ERAC" or "the Commission") upon an appeal filed on July 10, 2003, by Appellants Buckeye Egg Farm, L.P. ("BEF", "Buckeye Egg"), Croton Farm, LLC and Anton Pohlmann (collectively referred to as "Appellants") from the July 8, 2003 final action of Appellee, the Director of the Ohio Department of Agricultural ("Director," "ODA"), in which he revokes twelve permits to install ("PTIs") previously issued by the Director of the Ohio Environmental Protection Agency ("OEPA") and he denies eleven pending applications for PTIs. A Motion for Stay Pending Appeal and a Motion for An Order Scheduling Argument of Counsel On the Motion for Stay were filed by Appellants that same day. On July 18, 2003, Appellee Director filed a Memorandum in Opposition to Motion for Stay. The Commission entertained Oral Arguments on the Motion for Stay on July 23, 2003. At the conclusion of the argument, and after a review of the pleadings, arguments of counsel and pertinent case law, the Commission ruled to grant Appellants' Motion for Stay.

Subsequently, on July 24, 2003, Appellants filed a Motion for a Hearing for the Introduction of Additional Evidence. Appellee Director filed a Memorandum in Opposition to this Motion on July 28, 2003. Upon a review of the filings, the Commission granted Appellants' Motion and ordered a hearing to commence on August 6, 2003, for the express purpose of receiving newly discovered additional evidence that could not have been ascertained prior to the adjudication hearing held below. The hearing was held, as scheduled, on August 6, 2003.

On August 8, 2003, the Humane Society of the United States ("HSUS") filed a Motion to Intervene and/or Motion for Permission to File *Amicus* Brief with the Commission. After a

review of the Motion and the Parties' responses thereto, the Commission ruled to deny HSUS intervener status, but granted it permission to file an *Amicus* brief addressing only the issue of the humane treatment of chickens in light of Appellee Director's closure schedule.

Finally, on August 27, 2003, the Commission held an Oral Argument on the merits of the instant appeal. Appellants were represented by Mr. David E. Northrop, Esq. and Mr. Daniel T. Swanson, Esq., Porter, Wright, Morris & Arthur, Columbus, Ohio. Appellee Director was represented by Ms. Margaret A. Malone, Esq. and Mr. John L. Shailer, Esq., Assistant Attorneys General, Columbus, Ohio.

After a review of the record as certified by the Director of ODA, the additional evidence submitted at the August 6, 2003 hearing before the Commission, and the relevant statutes, regulations and case law, the Commission hereby makes the following Findings of Fact, Conclusions of Law and Final Order.

FINDINGS OF FACT

1. On December 14, 2000, the Governor of Ohio signed Sub. S.B. 141, with an effective date of March 15, 2001. This legislation enacted Ohio Revised Code Chapter 903, which effected numerous changes regarding authority over the installation and operation of concentrated animal feeding facilities ("CAFFs"). (Sub. S.B. 141, 123rd General Assembly.)

2. Revised Code Section 903.02(A)(1) provided that not later than one hundred and eighty days after the effective date of the section, the Director of ODA was to prepare a program for the issuance of PTIs for CAFFs. (Sub. S.B. 141.)

3. The relevant regulations regarding this program became effective on July 2, 2002 and are found in chapters 901:10-1 to 901:10-6 of the Ohio Administrative Code ("OAC"). Further, on

August 19, 2002, the Director finalized the program required under R.C. 903.02(A)(1). Accordingly, as of that date, the Director of ODA obtained the exclusive authority to enforce terms and conditions of PTIs previously issued by the Director of OEPA for animal feeding facilities; and, similarly, all pending PTI applications for such facilities were transferred from the OEPA to the ODA for further processing. (R.C. 903.04(B); R.C. 903.09(J); CR Item 24.)

4. The term "concentrated animal feeding facilities" is defined in R.C. 903.01(E) as an animal feeding facility with a total design capacity of more than 1,000 animal units. Relative to laying hens, which are at issue herein, the act defines "animal unit" as the number of laying hens multiplied by .01. (R.C. 903.01(C)(7).)

5. Pursuant to these definitions, Appellants own and operate[1] four CAFFs, generally referred to as the "Croton," "Mt. Victory," "Goshen" and "Marseilles" facilities. Specifically, the Croton facility was established in December 1980, in and around Hartford, Licking County, Ohio and currently consists of four layer sites (Layer Sites 1 through 4, each comprised of sixteen layer barns), four pullet[2] sites (Pullet Sites 1 through 4, comprised of twenty-one barns total), a hatchery, breeder-layer barns, breeder-pullet barns, and support facilities; the Mt. Victory facility was established in May 1994 near the Village of LaRue, Hardin County, Ohio and consists of fourteen layer barns; the Goshen facility was established in April 1995 in the Village of LaRue, Hardin County, Ohio and consists of ten pullet barns; and the Marseilles facility was established in March 1996 in Harpster, Wyandot County, Ohio and consists of

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[1] A more detailed discussion regarding the ownership and control of the instant facilities is set forth in Finding of Fact No. 14.

[2] "Pullet" is the term used to refer to a chicken from birth to the age of sixteen to eighteen weeks, at which time it becomes a "layer." (Testimony, Leininger.)

sixteen layer barns.[3] (ODA Exhibit 36; Testimony, Michael Galloway; Patrick Wilson.)

6. On August 19, 2002, the Director issued a Notice of Opportunity for Hearing ("Notice") addressed to Buckeye Egg Farm, L.P. and Croton Farm, LLC, Attention: Bill Leininger, Operations Manager, in which he indicated, in part, as follows:

> This document is to serve as a notice that the Ohio Department of Agriculture ("Department"), under the authority of the Ohio Revised Code ("ORC" or "Revised Code") Section 903.09(F) proposes to issue an order to Buckeye Egg Farm, L.P. (hereinafter "BEF") to revoke the permits to install (hereinafter "PTI or PTIs") listed below in paragraph two (2) because of BEF's failure to comply with rules 901:10-1-03(A)(5), 901:10-1-03(B), and 901:10-1-10(F) of the Ohio Administrative Code ("OAC" or "Administrative Code").
>
> Further, the Ohio Department of Agriculture proposes to issue an order to deny the pending applications for permits submitted by BEF listed below in paragraph one (1) based on the applicant BEF's history of substantial noncompliance in violation of rule 901:10-1-03(B) of the OAC. (Certified Record ["CR"] Item 24.)

7. Specifically, the Director proposed to revoke the following twelve permits to install:

Croton facility:	PTI 01-382
	PTI 01-454
	PTI 01-491
	PTI 01-382M
	PTI 01-2475
	PTI 01-039-IW
	PTI 01-7152
	PTI 01-7269
Mt. Victory facility:	PTI 03-7224
	PTI 03-9594
Goshen facility:	PTI 03-11083-IW
	PTI 03-10878-IW

[3] The Marseilles, Mt. Victory and Goshen facilities are sometimes referred to collectively as the "northern facilities" or "northwest facilities." (ODA Exhibit 36.)

In addition, the Director proposed to deny the following eleven permit applications:

Croton facility:	PTI 01-265 PTI 08-075-CD
Mt. Victory facility:	PTI 03-137-IW PTI 08-071-NW PTI 08-072-NW
Goshen facility:	PTI 08-070-NW
Marseilles facility:	PTI 03-113-IW PTI 03-139-IW PTI 03-9775[4] PTI 08-043-NW PTI 08-073-NW

8. The Director's Notice of Opportunity for Hearing continued by setting out specific terms and conditions of the permits proposed for revocation. In addition, the Notice enumerated various complaints for civil penalties and injunctive relief, charges of contempt and a civil suit for enforcement which had been filed against Appellants during the relevant time period[5], as well as itemizing the following: 1) forty-nine paragraphs citing instances where Appellants had violated the terms and conditions of the permits issued for the Croton facility; 2) ten paragraphs citing instances where Appellants had violated the terms and conditions of the permits issued for the Mt. Victory facility; 3) three paragraphs citing instances where Appellants had violated the terms and conditions of the permits issued for the Goshen facility; and 4) eight paragraphs citing instances where Appellants had violated the terms and conditions of the permits issued for the

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[4] Permit to Install Nos. 01-265, 03-113-IW, 03-139-IW and 03-9775 had all previously been vacated and remanded by the Commission to the Director of the OEPA.

[5] In evaluating a history of substantial noncompliance, OAC 901:10-1-03(B)(1)(a) provides that the relevant time period is the five years preceding the date of the application at issue.

Marseilles facility.

9. Finally, the Notice stated:

> Pursuant to Ohio Revised Code Chapter 119, you have the right to request a formal hearing should you disagree with the Department's proposal. Any request for a hearing must be made to Peter C. Esselburne, Staff Counsel, Legal Section, Ohio Department of Agriculture, 8995 East Main Street, Reynoldsburg, Ohio 43068, or telephone (614) 728-6430 within thirty (30) days from the mailing of this Notice. . . .
>
> At a Chapter 119 hearing, you may appear in person, an attorney may represent you, or you may present your position, arguments, or contentions in writing. Margaret A. Malone, David G. Kern, and Barbara A. McGinn, Assistant Attorneys General representing the Ohio Department of Agriculture, will be representing the Department at the hearing. A court reporter will be present to make a record of the proceedings and swear in any witnesses who are called. You may present evidence and examine witnesses appearing for and against you, to show cause why the proposed revocations and proposed denials should not be ordered against you. At the conclusion of the hearing, the hearing officer will prepare a report of the facts and submit the report to the Director of Agriculture for his consideration. (CR Item 24.)

10. On September 18, 2002, Appellants Buckeye Egg Farm, L.P. and Croton Farm LLC timely filed a request for adjudication hearing relative to the Director's proposed action of August 19, 2002. (CR Item 22.)

11. On October 11, 2002, the Director sent Appellants Buckeye Egg Farm, L.P. and Croton Farm LLC a second Notice of Opportunity for Hearing, nearly identical to the August 19, 2002 Notice. The only distinction between this Notice and the earlier Notice was the individual to whom the Notice was directed; i.e., the August 19, 2002 Notice was sent to the attention of "Bill Leininger, Operations Manager," while the October 11, 2002 Notice was sent to the attention of "Anton Pohlman" (sic.). As indicated by the Hearing Examiner, the purpose of the second

Notice was to name Mr. Pohlmann as a respondent in this matter.[6] (CR Item 23.)

12. On that same day, October 11, 2002, Appellee Director sent a letter to the Editor of *The Columbus Dispatch* newspaper, in Columbus, Ohio, in which he stated:

> After reading your editorial about my statements in a recent national radio interview ("No time to U-turn"), I want to clear up any confusion about my position on Anton Pohlman's (sic.) Buckeye Egg Farm. I stated last spring that I support revoking his permits to operate in Ohio. I have not wavered from my position.
>
> I repeated this the very day in August our agency was assigned the responsibility to enforce large livestock and poultry farm permits. Noting Mr. Pohlman's (sic.) substantial history of compliance problems, I said we had 'crossed the Rubicon' in announcing our intention to revoke his permits - there was no turning back.
>
> I say it again today. The careful due process of revoking Mr. Pohlman's (sic.) permits continues this week in our department's scheduling of a legal hearing on the matter.
>
> His farm properties are up for sale now. If there is no buyer, we intend to shut the farm down. If a responsible new owner wants to purchase the property to establish a new farm, he will have to do so under new, stringent state laws and rules - among the strictest in the nation. This is precisely the point I was trying to make in the radio interview.
>
> All of our large livestock and poultry farms should be responsibly regulated so they operate as good neighbors and the environment is protected. Our work to revoke the permits held by Anton Pohlman's (sic.) Buckeye Egg Farm is an important part of that policy.[7] (BEF Proffered Ex. 1; emphasis in original.)

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[6] Although the parties herein do not question the posture of Mr. Pohlmann as a party in this action, the Commission has reservations concerning whether one can be properly named as a party by simply sending a Notice of Opportunity for Hearing to that individual's attention. Clearly, Mr. Leininger was not perceived as a party, though the first Notice was sent to his attention. Thus, we are perplexed as to how Mr. Pohlmann could become a party under the identical scenario. However, since Mr. Pohlmann would clearly be an appropriate party in this case, and since no one challenges his standing as such, the Commission will accept that Mr. Pohlmann was actually a party below.

[7] Appellants offered the Director's October 11, 2002 letter into evidence at the adjudication hearing below. The Hearing Examiner ruled that it was inadmissible as irrelevant,

13. On October 24, 2002, Appellant Anton Pohlmann timely filed a request for an adjudication hearing relative to the proposed action of October 11, 2002.[8] (Introductory remarks of Hearing Examiner.)

14. An eight day adjudication hearing was held before a Hearing Examiner commencing on November 25, 2002 and concluding on December 10, 2002. Prior to the hearing, the parties entered into 13 Joint Stipulations (Related to Overall Proceedings) and 8 Joint Stipulations (Related to Specific Paragraphs in the Notice of Hearing). The Joint Stipulations may be summarized, in relevant part, as follows:

> - The parties stipulate that the Director bears the burden of proof relative to the proposed revocations, while Appellants bear the burden of proof relative to the proposed denials.
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> - The applications relative to the PTIs which the Director has proposed to deny were prepared and submitted to the OEPA prior to finalization of the ODA Livestock Environmental Permitting Program ("LEPP") and, therefore, do not conform in all respects to the requirements of the LEPP regulations. Therefore, the parties stipulate that the issue before the Director is whether to allow Appellants to revise and resubmit the applications to conform to the applicable regulations.
>
> - The parties stipulate to the authenticity of the following: 1) documents relating to laboratory analyses of water samples, copies of the complaints; 2) consent orders for preliminary injunction ("COPI"), the March 1, 2001 consent order, and the court's rulings on preliminary injunction, manure moisture, summary judgment and contempt in Licking County Court of Common Pleas Cases Nos. 99-CV-353 and 99-CV-756; 3) copies of the PTIs (together with any related permit applications, approved livestock waste management plans, insect control management plan and approved wastewater management plans) previously issued by the OEPA; and 4) the Director of the OEPA's Final Findings and Orders issued on September 12, 1997, relating to Appellant's Mt. Victory facility.

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but accepted it as a proffer. (BEF Proffered Ex. 1.)

[8] Counsel for Appellants and the Hearing Examiner indicated that Mr. Pohlmann had also timely filed a request for an adjudication hearing, however, the Commission notes that this request is not reflected in the Certified Record of the case.

- The parties stipulate that during the entire period relevant to the evaluation of compliance history under OAC 901:10-1-03(B)(1), i.e., the five year period commencing August 19, 1997, Anton Pohlmann has owned, and continues to own all of the land and physical buildings and facilities in Ohio which have been operated by Buckeye Egg Farm, L.P., formerly known as AgriGeneral Company, L.P.. On August 19, 1997, AgriGeneral Company L.P. consisted of a general partner, GJD Egg Corporation, owning 5% of the partnership, and a limited partner, Anton Pohlmann, owning 95% of the partnership. On October 4, 1997, AgriGeneral Company L.P. was renamed "Buckeye Egg Farm, L.P." ("BEF"). As of that date, and continuing to the present, BEF is comprised of a general partner, Croton Farm LLC, owning 1% of the partnership, and a limited partner, Anton Pohlmann, owning 99% of the partnership. Since the creation of Croton Farms, LLC on October 4, 1997, Anton Pohlmann has held at least a 99% ownership in Croton Farms, LLC and currently holds a 100% ownership.

- The parties stipulate that during the period from August 19, 1997 until May 8, 2002, Anton Pohlmann had the authority to make business and operational decisions for Appellants, including those related to the day-to-day management of any or all BEF facilities in Ohio. However, Mr. Pohlmann was not the only individual making such decisions for BEF, as there was a management team in place to manage the day-to-day operations. A management agreement executed on May 8, 2002 with Compliance Consulting Associates, LLC ("CCA") and continuing to the present under a management agreement executed on July 12, 2002 with CLM Group LLC ("CLM"), provides, with specifically noted exceptions relating primarily to the provision of funding, insurance and requested information, that "Mr. Pohlmann will not be involved in the day-to-day managing or operating [of] the Facilities." [9]

- The parties stipulate that during the entire period from August 19, 1997 to the present, Anton Pohlmann, by virtue of his ownership interest, is responsible to provide, or arrange for the provision of, all funds needed to operate the BEF facilities in Ohio and to pay all costs and expenses to operate the facilities.

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[9] Mr. Armentrout, a managing member of CCA, testified that on May 8, 2002, CCA, a limited liability company comprised of David Ricke, Andrew Hansen, Thomas Menke and himself, signed a management agreement with Anton Pohlmann, BEF and Hartford Farms, LLC, to transfer operating authority for the BEF facilities from Mr. Pohlmann to CCA. Pursuant to an express term of the agreement, this agreement terminated as a result of the July 2, 2002 decision of Judge Frost in the action captioned State of Ohio v. Buckeye Egg Farm, L.P., Case No. 99 CV 756 (Licking County, Ohio). On July 12, 2002, CLM Group, another limited liability company comprised of the same individuals involved in CCA, entered into a new agreement with Anton Pohlmann, BEF and Hartford Farms, LLC, exclusively for the purpose of providing management oversight at the BEF facilities. (Testimony Armentrout; BEF Exhibits 2, 3.)

- The parties stipulate that there were five sets of charges of contempt filed by the state in the Licking County Court of Common Pleas against Anton Pohlmann, Croton Farm, LLC and BEF prior to the March 1, 2001 Consent Order referenced above and that the court did not render any decisions regarding those charges. After the March 1, 2001 Consent Order was entered, there were four additional sets of charges of contempt filed by the state against Anton Pohlmann, Croton Farm, LLC and Buckeye Egg Farm, L.P. Specifically, the Licking County Court of Common Pleas issued a Judgment Entry on the State's Sixth Charge of Contempt on August 6, 2001, a Judgment Entry on the State's Seventh Charge of Contempt on December 3, 2001, a Judgment Entry on the State's Eighth Charge of Contempt on April 3, 2002 and a Judgment Entry on the State's Ninth Charge of Contempt on July 2, 2002. Each of these charges of contempt alleged that the operation of BEF's facilities in Ohio had resulted in violations of the consent order and permits. The parties agree that the findings of fact and conclusions of law set forth in the Judgment Entries shall be binding on the parties in the instant proceeding and further agree that no additional evidence will be offered for the purpose of proving the allegations set forth in the specified charges.

- On June 7, 1999, the Ohio Attorney General filed a complaint for civil penalties and injunctive relief against Appellants for alleged violations of R.C. Chapters 6111 and 3767. On that same day, Appellants agreed to the entry of a COPI.

- On December 1, 1999, The Ohio Attorney General filed a complaint for civil penalties and injunctive relief against Appellants for alleged violations of R.C. Chapters 3704, 3734, 6111 and 6109. On December 21, 1999, Appellants agreed to the entry of a COPI.

- On March 1 and March 31, 2000, the Ohio Attorney General filed charges of contempt against Appellants for allegedly violating the December 21, 1999 COPI and applicable law, and its permits. In June/July[10], 2000, BEF agreed to the entry of a COPI for Stormwater Control.

- On April 13, 2000, the Licking County Court of Common Pleas issued a Judgment Entry on the State's Motion for Preliminary Injunction against Appellants. The parties stipulate that a copy of the State's Motion and Judgment Entry may be introduced into evidence in the instant proceeding. The parties further stipulate that the findings of fact and conclusions of law set forth in the Judgment Entry shall be binding on the parties, and further, that no additional evidence will be offered for the purpose of proving the allegations set forth in the Motion for Preliminary Injunction. (CR Item 25.)

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[10] There was testimony offered at the hearing indicating that the record was unclear as to whether the COPI, which was signed in June, was actually entered in June or July of 2000, hence the reference to the "June/July 2000 Consent Order." (Testimony, Harry Kallipolitis; ODA Exhibit 33.)

15. During the eight day adjudication hearing in this matter, eighteen witnesses testified and 357 exhibits were either entered into evidence or proffered by the parties. Briefly, the Director presented the testimony of ten Ohio EPA employees (Michael Galloway, Michael Dalton, Harry Kallipolitis, John Kessler, Patrick Wilson, Gerald Gerber, Paul Vandermeer, Paul Painter, Edgar Pulido, and Cathy Alexander) who testified regarding various permit violations, spills, discharges, etc., at the BEF facilities during the relevant five year time period. The Director also presented the testimony of two ODA employees (Andrew Rogowski and Jim Young) and three Ohio Department of Health, Vector Borne Disease Program employees (Kim Winpisinger, Robert Anthony Restifo and Dr. Richard Lee Berry), who specifically addressed the fly problems at the BEF facilities and surrounding areas. Appellants offered the testimony of David Armentrout, Thomas Menke and Cale Ayers. Mr. Armentrout testified primarily regarding the management agreements entered into with CCA and CLM, and relative to changes instituted at BEF since the execution of these agreements regarding environmental compliance and the operation of the facilities. Mr. Menke testified briefly regarding the management agreements and issues relating to the storm water ponds at the facilities, as well as proffering testimony regarding the draft fly control plan and additional testimony relative to the storm water ponds. Finally, Mr. Ayers, the Senior Compliance Officer at BEF since January 2001,[11] testified relative to the following matters: BEF's insect control management program; BEF's manure management plan; the installation of automatic rain shutoffs on the center pivot systems; the crop cover in the center pivot application area; and, a pit inspection report that he had devised

[11] Mr. Ayers testified that he was unsure whether he had assumed the position of Senior Compliance Officer in December of 2000 or January of 2001.

(BEF Exhibit 7). Mr. Ayers also proffered testimony regarding the draft fly control plan. (CR Items 10 - 17 [Hearing Transcript Volumes I through VIII].)

16. Pursuant to a briefing schedule established by the Hearing Officer, and modified by agreement of the parties, Post-Hearing Briefs and Proposed Findings of Fact and Conclusions of Law were filed by Appellee Director and Appellants, on March 26 and 27, 2003, respectively. Appended to Appellants' filing were the following two items: 1) a February 20, 2003 Judgment Entry of the Common Pleas Court of Licking County in Case No. 99-CV-756, in which Judge Gregory L. Frost granted a motion filed by BEF for permission to discontinue closure of certain poultry barns and to re-open previously closed barns at the northwest facilities; and 2) the ISE Eggs of Ohio, Inc. "Insect and Rodent Control Plan," dated January 27, 2003. (CR Items 8, 8A, 9.)

17. On April 11, 2003, the parties filed Post-Hearing Reply Briefs. In addition, on that same day, Appellee Director filed a Motion to Strike the February 29, 2003 Judgment Entry of the Common Pleas Court of Licking County and the January 27, 2003 Insect and Rodent Control Plan attached to Appellants' Post-Hearing Reply Brief. Specifically, Appellee contended that, since both documents postdate the adjudication hearing in this matter, Appellants should have moved to reopen the hearing if it they wished to introduce these items into evidence. The Hearing Officer granted Appellee's Motion to Strike in the body of his Report and Recommendation. (CR Items 3, 4, 5, 6 and 7.)

18. On June 19, 2003, the Hearing Officer submitted his Report and Recommendation ("R&R") to the Director of ODA. Based upon the evidence and testimony adduced at the hearing, which was set out in the R&R, and an analysis of the pertinent statute and regulations,

the Hearing Examiner determined that "[r]evocation of the Respondents' existing permits is required pursuant to OAC 901:10-1-03(A)(5) and OAC 901:10-1-03(A)(6), and is appropriate pursuant to OAC 901:10-1-03(B)" and "[d]enial of the Respondents' pending permit applications is appropriate pursuant to OAC 901:10-1-03(B)." In keeping with his findings, the Hearing Examiner recommended to the Director as follows:

> In view of all the foregoing, I recommend that, subject to any terms or conditions necessary to assure the orderly and environmentally acceptable cessation of operations at the Respondents' facilities, the Respondents/Applicants' pending applications for PTI Nos. 01-265, 08-075-CD, 03-137-IW, 08-071-NW, 08-072-NW, 08-070-NW, 03-113-IW,03-139-IW, 03-9775, 08-043-NW and 08-073-NW be denied, and that the Respondents' existing permits, PTI Nos. 01-382, 01-454, 01-491, 01-382M, 01-2475, 01-039-IW, 01-7152, 01-7269, 03-7224, 03-9594, 03-11083-IW and 03-10878-IW, be revoked.[12] (CR Item 3.)

19. On July 1, 2003, pursuant to R.C. 119.09, Respondents filed Objections to the Hearing Officer's Report and Recommendation with the ODA in which they specifically objected to the following ten aspects of the hearing below:

> 1) The Hearing Examiner's ruling during the course of the adjudication hearing that the Director's letter of October 11, 2002, to *The Columbus Dispatch* (BEF Proffered Ex. 1) is inadmissible as irrelevant, and his conclusion in the Report that the Due Process Clause of the Fourteenth Amendment would not be violated by an order of the Director revoking Buckeye Egg's permits;
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> 2) The Hearing Examiner's ruling that revocation of Buckeye Egg's permits may be based on OAC 901:10-1-03(A)(6), despite there being no citation to that regulation in the Director's proposed action and notices of hearing;

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[12] As indicated above, paragraph C of the Joint Stipulations entered into by the parties indicated, in part, that "[t]he parties agree that . . . the issue before the Director in this proceeding is whether to afford Appellants an opportunity to revise and resubmit the applications to conform to applicable ODA regulations for review by ODA." In his R & R the Hearing Examiner acknowledged this stipulation and found that "given the Respondents' history of substantial noncompliance established in this Records (sic.), the provision of such additional time would be pointless. Therefore, it is my opinion that the Respondents' subject permit applications should be denied."

3) The Hearing Examiner's ruling that revocation of Buckeye Egg's permits may be based on OAC 901:10-1-03(B), despite that regulation's language limiting its application to an "applicant" for a "new or modified facility," not the operator of existing facilities such as Buckeye Egg;

4) The Hearing Examiner's ruling that in exercising discretion to revoke permits afforded by OAC 901:10-1-03(B), the Director may not consider facts pertaining to the difficulty of closing the facilities in a manner that would protect the environment and public health, and the adverse economic impact of permit revocation on Buckeye Egg's employees, suppliers, and the communities and school districts that receive substantial tax revenues;

5) The Hearing Examiner's rulings during the adjudication hearing that such evidence pertaining to matters set forth in the preceding paragraph was inadmissible as irrelevant;

6) The Hearing Examiner's failure to consider substantial measures implemented by Buckeye Egg farm to prevent future violations, and his failure to make findings of fact pertaining to such measures so as to inform the Director's exercise of discretion under OAC 901:10-1-03(B);

7) The Hearing Examiner's ruling that revocation of permits may be based on OAC 901:10-1-03(A)(5) due to past discharges of contaminants [sic.] waters of the State, despite that regulation's reference only to whether facilities are presently designed so as to prevent such discharges;

8) The Hearing Examiner's rulings throughout the course of the hearing that important evidence offered by Buckeye Egg is inadmissible as irrelevant;

9) The Hearing Examiner's refusal to consider the February 20, 2003, decision of Judge Frost of the Licking County Court of Common Pleas, wherein the court ruled that Buckeye Egg had made substantial improvements to its fly control program so as to prevent future fly outbreaks, and his ruling that Judge Frost's decision was irrelevant to this case; and,

10) The Hearing Examiner's recommendation that pending permit applications should be denied, rather than affording to Buckeye Egg the opportunity to modify the present applications or submit superseding new applications that conform to ODA rules. (CR Item 2.)

20. On July 8, 2003, the Director issued Order No. 2003-255, in which he specifically adopted the Findings of Fact and Conclusions of Law contained in the R&R and approved and

confirmed the Recommendation made by the Hearing Officer. The Director's Order indicated that "Appellants' objections to the Report and Recommendation, the parties briefs, and relevant portions of the transcript and exhibits were considered by the Department before approving, modifying or disapproving the Report and Recommendation." Additionally, the Order provided as follows relative to the closure of Appellants' facilities:

> a. Respondents shall close two barns every five (5) business days, commencing within twenty (20) business days of the effective date of this ORDER in the sequence set forth in paragraphs (a)(1) through (a)(4). All barns closed as of the effective date of this ORDER shall be considered closed and shall remain closed. Respondents shall adhere to all applicable laws in completing the closures.
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> 1) Respondents shall begin barn closures commencing at the Marseilles facilities located in Wyandot County.
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> 2) Respondents shall next commence barn closures at the Croton facilities, located in Licking County. Respondents shall proceed as follows for the Croton facilities:
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> a) Close all barns at Layer Site No. 2;
> b) Close all barns at Layer Site No. 1;
> c) Close all barns of the pullet sites, breeder site, and hatchery.
> d) Close all barns of the remaining Layer sites.
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> 3) Respondents shall next commence barn closure at the Goshen facility located in Hardin County.
>
> 4) Respondents shall next commence barn closure at the Mt. Victory facilities located in Hardin County.

The Order further provided that all barns at Respondents' facilities were to be closed no later than June 1, 2004, and that manure was to be removed from all manure storage or treatment facilities no later than September 1, 2004. (CR Item 1.)

21. On July 10, 2003, Appellants timely filed an appeal of the July 8, 2003 action of the Director, set out in Order No. 2003-255, to the Commission pursuant to R.C. 903.09(F). In their

Notice of Appeal, Appellants enumerated a number of assignments of error, all which challenged procedural aspects surrounding the hearing below. Specifically, Appellants asserted the Director's Order is unreasonable and unlawful for the following reasons:

1) The Director was biased against Appellants, and prejudged the merits of the proceeding prior to the evidentiary hearing, as evidenced by his October 11, 2002 letter to the Editor of *The Columbus Dispatch.* As such, the Director's action was unlawful as contrary to the Due Process clause of the Fourteenth Amendment of the United States Constitution.

2) The Director erred in adopting the Hearing Officer's rulings that excluded relevant evidence and struck from Appellants' Post-Hearing Reply Brief the February 20, 2003 Judgment Entry of the Licking County Common Pleas Court. Specifically, Appellant asserts the following testimony and evidence was inappropriately excluded:

- The Director's October 11, 2002 letter to the Editor of *The Columbus Dispatch.* (BEF's Proffered Ex. 1.)

- Evidence compiled by Matthew Doyle, BEF's Chief Financial Officer, regarding the adverse economic impact closure of Appellants' facilities would have on Appellants' suppliers, employees and the State and local governments and school districts that currently receive tax revenues from their operation. (BEF Proffered Ex. 4.)

- Testimony and evidence regarding improvements to Appellant BEF's fly control program, including the November 7, 2002 report of H.M. Keener and D.L. Elwell of The Ohio State University ("the Keener study") regarding the Frontier turning machine study (BEF Proffered Ex. 5), and a draft insect control plan developed by Thomas Menke. (BEF Proffered Ex. 6).

- Testimony of David Armentrout regarding potential difficulties in complying with the closure portion of Appellee Director's Order due to loss of labor and other considerations. (Proffered Testimony, Armentrout.)

3) The Hearing Officer and Director erred in failing to consider, and making Findings of Fact, regarding changes that Appellants have made in Management and in the BEF physical facilities to prevent further violations.

4) The Hearing Officer and Director erred in invoking OAC 901:10-1-03(A)(6) as a ground for revocation of Appellants' permits, since that regulation was not cited in the Notices of Opportunity for Hearing as required by R.C. 119.07.

5) The Hearing Officer and Director erred in invoking OAC 901:10-1-03(A)(5) as a ground for revocation of permits due to past discharges of pollutants, because that regulation applies only to facilities as they are presently constructed and operated.

6) The Hearing Officer and Director erred in applying OAC 901:10-1-03(B) to BEF's existing facilities, since that regulation applies only to applicants for permits for proposed new or modified facilities.

7) The schedule and order of closure for Appellants' facilities set out in the Director's Order is unreasonable as lacking a valid factual foundation. (Case File Item A, Notice of Appeal.)

22. On August 6, 2003, pursuant to OAC 3746-9-02, the Commission conducted a one day hearing for the admission of newly discovered evidence. At this hearing, the Commission confined the testimony and evidence presented to issues surrounding the proposed closure of Appellants' facilities.

23. Specifically, at this hearing, Appellants presented the testimony of William Leininger, BEF's Director of Operations, whose testimony may be summarized, in relevant portion, as follows: 1) BEF adheres to the Food Marketing Institute Guidelines regarding the proper treatment and handling of chickens in achieving its current pace of flock removal of one barn every two weeks at the northern facilities and approximately three barns each four weeks at Croton and, therefore, the Director's pace of flock removal (i.e., two barns every five business days) is unreasonable under BEF's current removal capabilities; 2) the only rendering facility which BEF currently uses[13] (G. A. Wintzer & Son Company ["Wintzer"]) does not have sufficient capacity to comply with the pace set out in the Order of the Director; 3) landfilling removed chickens is a less desirable option than rendering because it is more expensive, it is less

[13] Mr. Leininger indicated that BEF did not use the only other chicken rendering facility in the state, i.e. Holmes By-Products, because Holmes requires defeathering of the chickens prior to rendering. (Testimony, Leininger.)

humane, it does not incorporate the chickens into another product and it is not as environmentally friendly as rendering; and 4) the Director's prescribed order of closure is unreasonable because it requires the premature destruction of both layers and pullets. In addition, Counsel for Appellants directed the Commission to the testimony of David Armentrout proffered at the adjudication hearing, which addressed potential problems attributable to lost labor that may arise as a result of the closure order. (Testimony, Leininger; Proffered Testimony, Armentrout.)

24. Conversely, Appellee Director offered the testimony of Kirk Azbell, an employee of Wintzer, and Dr. David Glauer, the State Veterinarian. Specifically, Mr. Azbell testified that on July 10, 2003, he had prepared a tentative schedule, reflected in Appellee's Exhibit No. 2, regarding the number of chickens Wintzer could handle during the weeks from July 28, 2003 through December 29, 2003. The exhibit indicated that a total of 4,300,000 chickens could be rendered by Wintzer during this time period, however, Mr. Azbell did indicate that this number might overestimate actual current capacity due to the acceptance of additional customers since his preparation of the document. In addition, Dr. Glauer testified that adequate landfill capacity presently exists for the number of chickens required to be removed under the Director's Order and, further, he indicated that he felt landfilling of the chickens fit the guidelines for legal disposal. (Testimony Azbell, Glauer; Appellee's Exhibit No. 2.)

CONCLUSIONS OF LAW

1. Ohio Revised Code Section 903.02 provides in relevant part:

> (D) The director shall issue permits to install in accordance with section 903.09 of the Revised Code. The director shall deny a permit to install if either of the

following applies:

> (1) The permit application contains misleading or false information.
>
> (2) The designs and plans fail to conform to best management practices.

Additional grounds for the denial of a permit to install shall be those established in this chapter and rules. . . .

(F) The director may modify, suspend, or revoke a permit to install in accordance with rules. (Emphasis added.)

2. Further, R.C. 903.09(F) provides as follows:

> The denial, modification, suspension, or revocation of a permit to install, permit to operate, or NPDES permit without the consent of the applicant or permittee shall be preceded by a proposed action stating the director's intention to issue an order with respect to the permit and the reasons for it. The director shall not issue an order that makes the proposed action final until the applicant or permittee has had an opportunity for an adjudication hearing in accordance with Chapter 119. of the Revised Code, except that section 119.12 of the Revised Code does not apply. An order of the director that finalizes the proposed action or an order issuing a permit without a prior proposed action may be appealed to the environmental review appeals commission under sections 3745.04 to 3745.06 of the Revised Code. (Emphasis added.)

3. Relative to an appeal to the Commission in the above-cited situation, R.C. 3745.05 provides, in part:

> In hearing the appeal, if an adjudication hearing was conducted by the director of environmental protection[14] in accordance with sections 119.09 and 119.10 of the Revised Code, the environmental review appeals commission is confined to the

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[14] Ohio Revised Code Section 3745.04 states, in relevant part:

> As used in this section and sections 3745.05 and 3745.06 of the Revised code, "director of environmental protection " and "director" are deemed to include the director of agriculture and "environmental protection agency" is deemed to include the department of agriculture with respect to actions that are appealable to the commission under Chapter 903. of the Revised Code.

> record as certified to it by the director. The commission may grant a request for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the director. . . . (Emphasis added.)

4. Ohio Revised Code Section 3745.05 further provides that the statutory duty of review imposed upon the Commission is a determination of whether the action of the Director under appeal is "unlawful" or "unreasonable." "Unlawful" means that the action taken by the Director was not in accord with the relevant, applicable law. "Unreasonable" means that the action was not in accord with reason, or that it had no valid factual foundation. It is only in those cases where the Commission can find from the record on appeal that there was no valid factual foundation for the Director's action, or that his action was not in accord with the relevant, applicable law, that the action under appeal can be found to be unreasonable or unlawful. Conversely, where the record on appeal before the Commission demonstrates that the action taken by the Director was reasonable and lawful, the Commission must affirm the action. In such an instance, the Commission is not permitted to substitute its judgment for that of the Director. (C.F. Water v.Schregardus, Franklin App. 98AP-1481 (1999); Citizens Committee to Preserve Lake Logan v. Williams, 56 Ohio App. 2d 61 (1977).)

5. In addition, it is well-accepted that where the Director is charged with the implementation of statutes and regulations, the Commission must show deference to his interpretation and application of those statutes and rules. (Concerned Citizens of Central Ohio v. Jones, ERAC Case Nos. 514120-514126 (January 16, 2001); North Sanitary Landfill, Inc. v. Nichols, 14 Ohio App. 3d 33 (1984); State ex rel. Celebrezze v. National Lime & Stone Co., 68 Ohio St. 3d 377 (1984).) This deference is not, however, without limits. (See e.g., B.P. Exploration & Oil, Inc., et al. v. Jones, Ruling on Motion for Summary Adjudication and Final Order, issued March 21,

2001), in which the Commission noted that such deference must be granted to the Director's interpretation and application of his statutes and rules, "particularly if the Director's interpretation is not at variance with the explicit language of the regulation.")

6. Pursuant to the provisions and dictates set out above, the Commission hereby resolves the seven assignments of error asserted by Appellants as follows:

I. DEPRIVATION OF DUE PROCESS CLAIM

7. In their first assignment of error, Appellants contend that the Director's action revoking Appellants' permits, denying Appellants' permit applications, and ordering the shutdown of Appellants' facilities, was unlawful as contrary to the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Specifically, Appellants claim that the Director's bias against Appellants and prejudgment of the merits of the proceeding prior to the evidentiary hearing is evidenced by his October 11, 2002 letter to the Editor of *The Columbus Dispatch,* set out above. (BEF Proffered Exhibit No. 1.) In support of their contention, Appellants specifically direct the Commission's attention to Gibraltor Mausoleum Corp. V City of Cincinnati, 1 Ohio App. 3d 107 (Hamilton County, 1981).

8. Conversely, Appellee Director claims: 1) the Commission does not have the authority to decide constitutional issues and, therefore, it may not address this assignment of error; 2) since Appellants do not contend that the Hearing Examiner was biased or prejudiced, the Director's decision to revoke Appellants' permits, deny Appellants' permit applications and shut down the facilities, which was based upon the unbiased decision and recommendation of the Hearing Examiner, is proper; 3) the Director's letter simply restated the substance of the Director's

proposed action, as set out in the Notices of Hearing, and acknowledged that an adjudication hearing would be conducted in this matter; and 4) the letter was properly excluded from the record as irrelevant.[15]

9. Relative to Appellee's first assertion, while the Commission concedes that it is not authorized to entertain questions regarding the constitutional validity of a statute or regulation, that is not the factual situation being presented today. Appellants herein are not questioning the validity of any statute or regulation, rather, they are claiming the Director's action was unlawful due to his alleged bias and prejudgment of the issues to be adjudicated at the hearing. Both state and federal cases appear to recognize a distinction between adjudicating the constitutionality of a statute or regulation and the type of factual situation being presented today.[16] Thus, the Commission initially finds that the relevant case law does not preclude our review of challenges of this nature, since we are not being asked to adjudicate the constitutionality of an underlying statute or regulation. (See e.g., Environmental Services Inc. v. Schregardus, ERAC Case No.

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[15] This claim is considered in Subsection II of the instant opinion, where the Commission addresses the evidentiary rulings by the Hearing Examiner.

[16] See e.g., Thunder Basin Coal Company v. Robert b. Reich, Secretary of Labor, et al. (1994), 510 U.S. 200, in which the Court discussed the review by administrative agencies of the constitutionality of federal statutes as follows:

> As for petitioner's constitutional claim, we agree that adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies," Johnson v. Robinson, 415 U.S. 361, quoting Oestereich v. Selective Serv. System Local Bd. No. 11, 393 U.S. at 242 (Harlan, J., concurring in result); accord, Califano v. Sanders, 430 U.S. 99, 109, 51 L. Ed. 2d 192, 97 S. Ct. 980 (1977). This rule is not mandatory, however, and is perhaps of less consequence where, as here, the reviewing body is not the agency itself but an independent Commission established exclusively to adjudicate Mine Act disputes . . .

843354 (February 5, 1997); Truck World, Inc. v. McAvoy, EBR No. 80-3 (June 10, 1980); Herrick v. Kosydar (1975), 44 Ohio St. 2d 128; Cincinnati v. Whitman (1975), 44 Ohio St. 2d 588; Benton Township v. Williams, EBR No. 75-50 (November 10, 1975); Mobile Oil v. Rocky River (1974), 38 Ohio St. 2d 23; City of Dayton v. Whitman, EBR No. 74-23 (August 6, 1974); City of Canton v. Whitman, EBR No. 74-30 (September 4, 1974); State, ex rel. Park Invest. Co. v. Bd. of Tax Appeals (1972), 32 Ohio St. 2d 28; S.S. Kresge v. Bowers (1960), 170 Ohio St. 405.)

10. Counsel for Appellee next points out that Appellants have never contended that the Hearing Examiner was biased or prejudiced and, therefore, since the Director's decision regarding revocation and denial was consistent with the report and recommendation of an unbiased Hearing Examiner, that decision was proper. We reject Appellee's contention that the sole inquiry herein revolves around the Hearing Examiner's conduct at the adjudication hearing. Although the dictates of due process clearly require that a litigant obtain a meaningful and impartial adjudication hearing before an unbiased Hearing Examiner, those same dictates require that the ultimate decision maker, in this case the Director, not prejudge the facts of a case or exercise bias against the litigant. Thus, we turn next to an analysis of the October 11, 2002 letter sent by Director Dailey to the Editor of *The Columbus Dispatch* to evaluate whether the contents of that correspondence indicate an impermissible bias on the part of the Director or prejudgment of the facts to be adjudicated at the hearing.

11. As set out above, the Director's letter plainly and unequivocally stated that he supported revoking the permits held by Anton Pohlmann's Buckeye Egg Farm and that, in the absence of a purchaser for the facilities, he intended to shut them down. Despite the fact that the Director's

statements are direct and unambiguous, the Commission may not evaluate these comments in a vacuum; rather, it is necessary to examine the Director's comments in the factual context and pursuant to the legal requirements attributable to this entire proceeding, as well as in light of the relevant case law defining what constitutes impermissible bias or prejudice on the part of a decision maker.

12. The situation being presented herein is factually and legally unique in that R.C. 903.09(F) provides that Appellants are entitled to an adjudication hearing only after the Director has already made a definitive pronouncement regarding his intentions, including the reasons therefore, in a proposed action. Thus, implicit in the issuance of any proposed action pursuant to R.C. 903.09(F) is that the Director has already reached a conclusion, based upon the facts before him, regarding the course he intends to pursue. Indeed, the Notices of Opportunity for Hearing herein, which are a matter of public record, specifically indicate that the Director proposes the revocation of Appellants' existing permits and denial of Appellants' pending permit applications. The notices also set out, in tremendous detail, the various permit violations, complaints for civil penalties and injunctive relief, Consent Orders for Preliminary Injunction, charges of contempt, a civil suit for enforcement, and other legal proceedings upon which the Director is basing his proposed action. Significantly, Appellants do not dispute any of the factual predicates upon which the Director based his proposed action. Thus, taking into account the unique factual situation inherent in a system which requires the issuance of a proposed action prior to the conducting of an adjudication hearing, the question for the Commission remains whether the pronouncements in the Director's October 11, 2002 letter to the Editor, evince an improper bias against BEF, such that the Due Process Clause of the Fourteenth Amendment was

violated.

13. In reaching our decision, the Commission reviewed and analyzed a number of cases in which courts addressed situations similar to the one being presented today. Notably, a recurrent inquiry for determining the presence of bias in many of the cases reviewed was whether the decision maker had, in advance of hearing, prejudged facts in dispute, as well as the law, of a particular case. (See e.g., The Cinderella Career & Finishing School, Inc. v. FTC 425 F. 2d 583 (D.C. Cir. 1970); United States v. Oregon Water Resources Department 774 F. Supp. 1568 (1991); Gilligan, Will & Co. v. SEC, 267 F. 2d 461, cert. denied, 361 U.S. 896 (1959); Municipal Servs. Corp. v. State, 483 N.W. 2d 560 (1992); Clisham v. Board of Police Commissioners, 223 Conn. 354 (1992).) As discussed at length above, in the instant case, R.C. 903.09(F) mandates that the Director not only state his intended action, but also the reasons providing the basis for that intended action. After the issuance of such a proposed action, in which the Director explicitly sets out his intentions and the reasons therefore, the affected party may request an adjudication hearing. Thus, well before his October 11, 2002 letter to the Editor of *The Columbus Dispatch,* the Director had, as required by statute, reached a conclusion, based upon facts not in dispute, regarding the action he proposed to take relative to Appellants' permits and permit applications. Accordingly, the Commission finds that the statutory framework herein, which requires the Director to make certain requisite factual and legal determinations prior to issuing a proposed action, coupled with Appellants' stipulated agreements regarding the validity of the facts relied upon by the Director, render the instant case distinguishable from those cases in which bias was found as a result of a decision maker's impermissible prejudgment of the facts in dispute.

14. For similar reasons, the Commission is also unpersuaded by Appellants' reliance upon the case of Gibraltor Mausoleum Corp. v. City of Cincinnati, supra. In Gibraltor, the Cincinnati Fire Prevention Board of Appeals ("the Board") granted a rehearing to an applicant for a variance following its initial denial of the variance request. The rehearing was specifically granted because the Board had incorrectly informed the applicant in its notice of determination that it had 30 days to appeal its decision when, in fact, it only had 10 days. At the rehearing, the applicant, who was represented for the first time by counsel, was prepared to present a more thorough case, including additional testimony, evidence and witnesses. Shortly after the commencement of the rehearing, one Board member indicated that he had already reached his conclusion and he left, despite the intention of applicant's counsel to present matters not discussed in the first hearing. At the conclusion of the rehearing, the Board, once again, ruled to deny the applicant's request for a variance. On appeal, the court reversed the decision of the Board, finding that the applicant had been denied due process of law at the rehearing. Specifically, the court found that the applicant, "had no means of knowing, with sufficient certainty, what it was required to do in order to assert its right to a full and fair hearing; and moreover, the Board itself appeared confused as to its own function as an appellate tribunal, particularly as to whether it would hear new evidence on issues raised at the first hearing or whether it would hear only new evidence on new issues relevant to the ultimate question presented for its review." The court continued by stating:

> This is nowhere more evident than in the action taken by one Board member in delivering himself of his opinion and then excusing himself from the balance of the rehearing where, according to the Chairman, a review of the Board's previous action would be undertaken. If the purpose of the rehearing was to reopen the entire matter, then the Board member's prejudgment was error so clearly prejudicial to appellant's cause that it alone deprived appellant of the requisite

> due process. If, on the other hand, appellant was to be precluded from presenting new evidence at the hearing, then the Board, in granting the rehearing due to its own negligence, created in the appellant a right without a remedy, an unhappy circumstance for any individual faced with the task of dissuading members of an administrative tribunal from preconceived conclusions felt to be based upon an insufficient factual base. (Emphasis added.)

15. Clearly, the factual situation presented to the court in the Gibraltor case is distinguishable from the case before us today. In Gibralter, the Board was both adjudicator and the final decision maker. Thus, unlike the members of the Cincinnati Fire Prevention Board of Appeals, who were required to refrain from reaching a decision until all admissible evidence had been received, in the instant appeal, the statute mandated that the Director state his intentions relative to Appellants' permits and permit applications, along with the reasons underlying his proposed action, before the adjudication hearing was even held. Consequently, it was not necessary for the Director to wait for the relevant facts to be proven at the adjudication hearing, since those facts, which were the basis for the opinion stated in his letter to *The Dispatch*, had already been irrefutably established in the numerous legal proceedings cited by the Director in his proposed action. The Commission finds this very fundamental factual distinction between the instant case and Gibraltor to be pivotal and, thus, finds the Gibraltor case to be inapposite to the action herein.

16. In view of the distinct regulatory requisites and the very unique factual situation presented herein, and for the reasons discussed above, the Commission does not find that the Director's actions constituted a violation of Appellants' right to due process. Accordingly, the Commission finds Appellants' first assignment of error not well taken.

II. HEARING EXAMINER'S EVIDENTIARY RULINGS EXCLUDING EVIDENCE OFFERED BY APPELLANTS

17. Appellants' next assignment of error challenges rulings by the Hearing Examiner in which he refused to admit the following testimony and evidence as irrelevant:

1) The Director's October 11, 2002 letter to the Editor of *The Columbus Dispatch*, discussed above. (BEF Proffered Ex. 1.)

2) A document prepared by Matthew Doyle, BEF's Chief Financial Officer, setting forth information regarding the adverse economic impact closure of the BEF facilities would have on BEF employees, suppliers, recipients of tax payments, etc. (BEF Proffered Ex. 4.)

3) Testimony of Tom Menke, an agricultural consultant for BEF, regarding a revised plan to control flies that he had developed for BEF. (Proffered Testimony, Menke.)

4) Two exhibits presented during Mr. Menke's testimony; specifically, BEF Proffered Ex. 5, a report prepared by Dr. H.M. Keener of The Ohio State University regarding a study of the use of manure turning machines as a tool for controlling flies in poultry barns, and BEF Proffered Ex. 6, a draft insect control plan that testimony indicated BEF it was beginning to implement.

5) Testimony of David Armentrout regarding difficulties that may be encountered in closing the poultry barns, largely due to an anticipated loss of necessary labor. (Proffered Testimony, Armentrout.)

6) The Judgement Entry of Judge Gregory Frost of the Licking County Court of Common Pleas, entered on February 20, 2003, which Appellants appended to its Post-Hearing Memorandum (CR Item 8). Appellee Moved to Strike the appendix, which the Hearing Officer granted.

18. First, it is well-established that administrative hearing officers are not required to strictly adhere to the rules of evidence.[17] Second, the relevant case law establishes that evidentiary

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[17] Ohio Evidence Rule 101(A), which defines the scope of the rules of evidence, does not expressly refer to administrative agencies; it says only that the rules of evidence govern proceedings in the courts of the state. Thus, it has been widely held that, as a general rule, administrative agencies are not bound by the strict rules of evidence. (See e.g., McCutcheon v. State Medical Board of Ohio (1989), 65 Ohio App. 3d 49.)

rulings by the Hearing Examiner herein are to be reviewed pursuant to the extremely high abuse of discretion standard and, further, that such rulings are reversible only upon a showing of prejudicial error.[18] As explained by the Ohio Supreme Court in Cedar Bay Construction Inc. v. Fremont (1990), 50 Ohio St. 3d 19, "The meaning of the term 'abuse of discretion' . . . connotes more than an error of law or of judgment; it implies an unreasonable, arbitrary, or unconscionable attitude . . . ." (Citing Steiner v. Custer (1940), 137 Ohio St. 448; Conner v. Conner (1959), 170 Ohio St. 75; Rohde v. Farmer (1970), 23 Ohio St. 2d 82; and State v. Adams (1980), 62 Ohio St. 2d 151.)

19. With this in mind, the Commission does not find that the Hearing Examiner below abused his discretion in refusing to admit the evidence at issue. Indeed, in reviewing the testimony and evidence proffered below, the Commission more specifically comments as follows:

> 1) Relative to the Director's October 11, 2002 letter to the Editor, the Commission finds that it would have been premature for the Hearing Officer to make a determination regarding the Director's alleged bias prior to the Director's issuance of a final action in this matter. Therefore, we do not find that the Hearing Examiner's ruling that the letter was inadmissible as irrelevant was an abuse of discretion.
>
> 2) Relative to the document prepared by Matthew Doyle addressing the potential adverse economic impacts from closure of the BEF facilities, and the proffered testimony of David Armentrout regarding the difficulties which may be encountered in closing the poultry barns due to a loss of labor, the Commission finds that the Director is not required to consider such information pursuant to the relevant statutes and regulations. The regulatory criteria utilized by the Director to issue, deny, revoke or suspend a permit does not require that he consider the potential difficulty a facility may have in complying with his order, or any ancillary impacts which may result from his order.[19] Therefore,

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[18] (See e.g., Nestle Food Co. v. Abbott Lab., 1997 U.S. App. LEXIS 494 [9th Cir., January 9, 1997]; State v. Sova, 1998 Ohio App. LEXIS 1512 [April 9, 1998]; Kunz v. Utah Power & Light Co., 913 F. 2d 599 [9th Cir., August 29, 1990].)

[19] That is not to say that a factual situation could never exist where an order of the Director would be deemed unreasonable due to the impossibility of a facility meeting certain

the Commission does not find that the Hearing Examiner's ruling that such testimony and evidence was inadmissible as irrelevant constituted an abuse of discretion.

3) Relative to the report regarding the Keener Study, and the testimony and evidence of Tom Menke regarding a draft insect control management plan which had been developed for BEF, the Commission finds that the relevant inquiry for both the Hearing Examiner and the Director under the relevant regulations was the past and current operation of the facilities at issue. Any testimony or evidence regarding potential improvements which BEF may have begun to implement was not a matter which the Hearing Examiner was required to entertain.[20] Therefore, we do not find that the Hearing Examiner's ruling, that such testimony and evidence was inadmissible as irrelevant, constituted an abuse of discretion.

4) Relative to the February 20, 2003 Judgment Entry of Judge Frost of the Licking County Court of Common Pleas, since it was a definitive statement by the court, the Commission feels it would have been permissible for the Hearing Examiner to consider the Judge's entry without formally reopening the case below, however, we do not find his refusal to do so to constitute an abuse of discretion.

20. Accordingly, the Commission finds Appellants' assignment of error challenging evidentiary rulings by the Hearing Examiner not well taken.

III. FAILURE OF DIRECTOR AND HEARING OFFICER TO CONSIDER APPELLANTS' EVIDENCE REGARDING CHANGES IN MANAGEMENT AND PHYSICAL FACILITIES

21. In their next assignment of error, Appellants assert that the Hearing Examiner and the Director erred in failing to consider, and make Findings of Fact, regarding changes that Appellants have made in management and in physical facilities to prevent further violations.[21]

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deadlines or other conditions relating to closure. In such an instance, proffered testimony and evidence might be relevant. However, the Commission does not find that to be the case herein.

[20] Indeed, it is important to note that the changes about which Appellants sought to introduce testimony and evidence were not authorized under Appellants' existing permits and could not be implemented without a modification of those permits.

[21] In keeping with our resolution of Appellants' sixth assignment of error, set out below, in which the Commission finds that existing permits may not be revoked pursuant to

22. The only relevant regulation indicating that mitigating or explanatory evidence may be presented by an applicant, is found in OAC 901:10-1-03(B), which provides as follows:

> (B) The director may deny, suspend or revoke a permit to install or permit to operate if:
>
> (1) The applicant and persons associated with the applicant, in the operation of concentrated animal feeding facilities, have a history of substantial noncompliance with the Federal Water Pollution Control Act, the Safe Drinking Water Act, as defined in section 6109.01 of the Revised Code, any other applicable state laws pertaining to environmental protection or environmental laws of another country that indicates that the applicant lacks sufficient reliability, expertise and competence to operate the proposed new or modified facility in substantial compliance with Chapter 903. of the Revised Code and this chapter.
>
> (a) In evaluating a history of substantial noncompliance as required, the director may consider all of the following for a period of five years preceding the date of the application:
>
> (i) Any information submitted on ownership and background pursuant to rule 901:10-1-02 of the Administrative Code;
>
> (ii) Any administrative enforcement action (including administrative order of notice of violation), civil suit, or criminal proceeding that is:
>
> (*a*) Pending against the applicant or a business concern owned or controlled by the applicant;
>
> (*b*) Resolved or dismissed in a settlement agreement, in a consent order or decrees, is adjudicated or otherwise dismissed and that may or may not have resulted in the imposition of :
>
> (*i*) A sanction such as a fine, penalty, payment or work or service performed in lieu of a fine or penalty; or
>
> (*ii*) Cessation or suspension of operations.

OAC 901:10-1-03(B), we will address the instant assignment of error solely as it relates to the Director's denial of Appellants' pending permit applications.

> (*c*) Any revocation, suspension, or denial of a license or permit or equivalent authorization; or
>
> (*d*) With respect to paragraph (B)(1)(a) of this rule, any explanation that the applicant may choose to submit. (Emphasis added.)

23. First, unlike the mandatory nature of OAC 901:10-1-03(A) ("[t]he director shall deny, suspend or revoke a permit to install or permit to operate if ..."), it is important to note that all of the provisions of OAC 901:10-1-03(B) regarding the possible actions which may be taken by the director are permissive in nature (i.e., "[t]he director may deny, suspend or revoke. . .", "[i]n evaluating a history of substantial noncompliance as required, the director may consider . . ."). Accordingly, the Commission finds that the Director is afforded broad discretion pursuant to this section relative to the information which he may consider and the actions which he may take.

24. Further, as discussed above, Appellants do not dispute that their facilities have had a "history of substantial noncompliance" as that phrase is to be construed in OAC 901:10-1-03(B). Indeed, the stipulations entered into by the parties, alone, support such a finding.

25. Therefore, taking into account the discretionary nature of OAC 901:10-1-03(B), and the overwhelming evidence regarding the significant history of substantial noncompliance at Appellants' facilities, the Commission does not find the failure of the Hearing Examiner and Director to make specific Findings of Fact regarding evidence and testimony offered relative to changes made by Appellants to the management and physical structure of the facilities at issue to be fatal. Although Findings of Fact relating to such matters would have been appropriate and permissible, we do not feel that the absence of such Findings invalidates the Director's action. This is especially true when one considers that the evidence which the Hearing Examiner failed to include in his R & R had no relevance to the numerous permit violations and history of

noncompliance at Appellants' facilities, upon which he based his recommendation.

26. However, despite our conclusion that the Hearing Examiner and Director were not required to specifically address the evidence and testimony offered by Appellants regarding changes which had been effected, the Commission acknowledges that its examination of the transcript of the adjudication hearing below reveals the tremendous strides which have been made at the BEF facilities since the execution of the May 8, 2002 management agreement with CCA. The testimony and evidence offered by Appellants indicates a positive shift in management philosophy and a commitment to environmental compliance which is to be commended. We have no reason to doubt the sincerity of the current day-to-day operations team when they pronounce their dedication to creating profitable, yet environmentally responsible poultry facilities. It is unfortunate that this present commitment is overshadowed by a troublesome history replete with environmental violations.

27. Accordingly, the Commission finds Appellants' third assignment of error not well taken.

IV. INVOCATION OF OAC 901:10-1-03(A)(6) AS GROUND FOR REVOCATION

28. In its next assignment of error, Appellants assert that the Notices of Opportunity for Hearing failed to comply with the notice requirements of R.C. 119.07 and were, therefore, fatally defective. Specifically, Appellants argue that since OAC 901:10-1-03(A)(6) was not cited in the Notices of Opportunity for Hearing, the Director was precluded from relying on this provision in revoking Appellants' permits.[22]

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[22] No disagreement exists regarding the fact that OAC 901:10-1-03(A)(6) was not cited in the Notices of Opportunity for Hearing, but was one of the provisions relied upon by the Director in revoking Appellants' permits.

29. Revised Code Section 119.07 provides that a notice of hearing "shall include the charges or other reasons for the proposed action," as well as "the law or ruling directly involved, . . .".

30. The Notices at issue herein stated, in pertinent part:

> This document is to serve as a notice that the Ohio Department of Agriculture . . . proposes to issue an order to Buckeye Egg Farm, L.P. (hereinafter 'BEF') . . . to revoke the permits to install listed below . . . because of BEF's failure to comply with rules 901:10-1-03(A)(5), 901:10-1-03(B) and 901:10-1-10(F). (CR Items 23 and 24.)

31. Specifically, OAC 901:10-1-03(A)(6), which was not cited in the Director's Notices, provides:

> (A) Criteria for decision making by the Director. The director shall deny, suspend or revoke a permit to install or permit to operate if: . . .
>
> > (6) The director determines that the applicant has not complied with rule 901:10-1-10 of the Administrative Code.

32. Despite the Director's failure to cite OAC 901:10-1-03(A)(6) in his Notices, he did cite OAC 901:10-1-10(F), a subsection of the provision actually referenced in OAC 901:10-1-03(A)(6).

33. Specifically, OAC 901:10-1-10(F) provides:

> (F) No person shall violate the terms and conditions of a permit to install, permit to operate, review compliance certificate, or NPDES permit.

34. Appellants assert that irrespective of the Director's citation of OAC 901:10-1-10(F) in the Notices, his failure to cite OAC 901:10-1-03(A)(6) prevents him from invoking that regulation later in the proceeding. Appellants argue that, in keeping with R.C. 119.07, OAC 901:10-1-03(A)(6) is the charge or other reason for the proposed action. In support of this argument Appellants cite two cases: Fogt v. Ohio State Racing Commission (1965) 3 Ohio App.2d 423 and Ohio Motor Vehicle Dealer's and Salesmen's Licensing Board v. Memphis Auto Sales (1957)

103 Ohio App. 347. As discussed below, the Commission finds both of these cases factually distinguishable from the situation before us today

35. In Fogt, supra, a Notice of Hearing sent to Mr. Fogt cited a substantive rule (Rule 259.01) which was entirely different than the rule the Ohio State Racing Commission believed Mr. Fogt had violated (Rule 264). Thus, in that case, it was clear that the Notice of Hearing at issue was defective. In fact, in its opinion, the court of appeals explicitly stated that, "the record amply supports the trial court's conclusion that the notice of hearing was defective." Significantly, had Mr. Fogt relied on the rule cited in the Notice of Hearing, he would have been unprepared to defend himself relative to the actual substance of the charges against him.[23]

36. Similarly, in Motor Vehicle Dealers, supra, the court determined that the notice requirements of R.C. 119.07 had been violated based on the fact that the Notice of Hearing in that case charged the appellant with "a violation of one section of the [law], and the findings of the board and order promulgated thereunder were for the violation of another section of the law."

37. In the instant action, the Notices of Opportunity for Hearing cited OAC 901:10-1-10(F) as a reason for the proposed revocation. Thus, the Notices informed Appellants that this was the rule which was directly involved in the charges against them and the reason underlying the proposed action. Appellants were adequately and fully apprized of the fact that they would be

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[23] The court does not indicate whether or not Mr. Fogt arrived at the hearing prepared to defend himself based on the rule actually cited in the Notice of Hearing. The court does make it clear, however, that Mr. Fogt "appeared in person before the Racing Commission; that he expressly indicated he wanted to proceed without a lawyer; that he specifically waived any defects in the notice of the alleged violation of Rule 259.01; and that he specifically consented to an amendment of the original citation to include an alleged violation of Rule 264." Fogt, supra, at 424.

expected to defend allegations regarding permit violations.[24]

38. Ohio Administrative Code Section 901:10-1-03(A)(6) is simply the provision which instructs the Director that he shall deny, suspend or revoke a permit if he finds that one or more of the prohibitions set out in OAC 901:10-1-10 have occurred. Thus, if the Notice had only cited OAC 901:10-1-03(A)(6), Appellants would have known only that the Director was contending that Appellants had violated one or more of several possibly relevant provisions contained in OAC 901:10-1-10. Therefore, by specifically citing OAC 901:10-1-10(F), the Director was actually providing Appellants with more precise information regarding the basis for his proposed action.

39. In sum, the fact that OAC 901:10-1-03(A)(6) was later "invoked" by the Director in this proceeding did not in any way change the substance of the violation being alleged against Appellants. We agree with the Hearing Officer's opinion below that OAC 901:10-1-03(A) merely identifies the consequences resulting when the circumstances set out in OAC 901:10-1-10 are found to exist.

40. The Commission notes that the instant assignment of error only addresses the Director's

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[24] In discussing the provisions of R.C. 119.07 in the context of a hearing before the State Dental Board, the Hamilton County Court of Appeals stated in Sohi v. Ohio State Dental Board, (1998), 130 Ohio App. 3d 414, as follows:

> An administrative agency such as the Dental Board cannot revoke or suspend a professional license without safeguarding the statutory and due process rights of the respondent. Pursuant to R.C. 119.07, the Dental Board was required to provide Dr. Sohi with sufficient notice of the charges against him to allow preparation of a defense to the charges.

Clearly, Appellants herein were well aware of the fact that the Director intended to consider prior permit violations in reaching a decision regarding whether to revoke or deny Appellants' existing permits and permit applications.

failure to cite OAC 901:10-1-03(A)(6) in the Notices of Hearing. That is, unlike their sixth assignment of error, addressed below, Appellants do not claim that the Director erred in applying OAC 901:10-1-03(A)(6) on the basis that the regulation employs the term "applicant." Thus, our resolution of the instant assignment of error should not be read to suggest that the Commission is ignoring the presence of the word "applicant" in OAC 901:10-1-03(A)(6), only that this is not an issue which the Commission is permitted to reach, as it was not raised by Appellants.

41. Accordingly, for the foregoing reasons, we find Appellants' fourth assignment of error not well taken.

V. INVOCATION OF OAC 901:10-1-03(A)(5) AS A GROUND FOR REVOCATION

42. In its next assignment of error, Appellants contend that the Hearing Examiner and Director erred in invoking OAC 901:10-1-03(A)(5) as a basis upon which Appellants' permits may be revoked due to past discharges to waters of the State, given that the regulation applies only to facilities as they are presently constructed and operated.

43. OAC 901:10-1-03(A)(5) provides that the Director shall deny, suspend or revoke a permit to install if:

> The facility is not designed or constructed as a non-discharge system or operated to prevent the discharge of pollutants to waters of the state or to otherwise protect water quality.

44. Applying this regulation to the facts before him, the Hearing Examiner stated in his Conclusions of Law, in relevant part, as follows:

> 3. . . . This rule requires the revocation of a permit if at any time in the operation of a facility it has been operated so as (sic.) result in the discharge of pollutants to waters of the state or has otherwise not been operated so as to protect water quality.

4. The evidence established that the Respondents' facilities have not been operated to prevent the discharge of pollutants to waters of the state or to otherwise protect water quality. (CR Items 1, 3; emphasis added.)

45. The Hearing Examiner further stated in his R & R:

> This Rule clearly was intended to proscribe unauthorized discharges and operation of facilities so as to result in the introduction of pollutants into waters of the state or other compromise of water quality. A reading of the Rule that limits its application to the precise moment of the operation of a facility is being examined is not reasonable. It would be virtually impossible to apply such a rule. An interpretation of a rule that deprives it of meaning is not an interpretation that should be favored. In my opinion, a reasonable reading of OAC 901:10-1-03(A)(5) requires the operation of a facility on a continuing basis so as to prevent the discharge of pollutants to waters of the state and to otherwise protect water quality. Operation, at any time, contrary to that requirement constitutes the violation of the Rule. The evidence in this Record establishes that the Respondents have not complied with OAC 901:10-1-03(A)(5). Pursuant to this Rule, then, the Director shall revoke the Respondents' permits. (CR Items 1, 3.)

46. In addressing this assignment of error, the Commission turns first to R.C. 1.42 [25], which provides, in part:

> Words and phrases shall be read in context and construed according to the rules of grammar and common usage. (Emphasis added.)

47. Further, R.C. 1.43(C) states:

> (C) Words in the present tense include the future.

48. Applying these two directives to the instant inquiry, the Commission finds that the grammatically appropriate way to read OAC 901:10-1-03(A)(5) is that the provision applies to the facility as currently designed, constructed and operated, not to how it was historically operated. Simply stated, in this sentence the verb "is" dictates the time frame upon which the

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[25] Ohio Revised Code Section 1.41 specifically provides that, "Sections 1.41 to 1.59, inclusive, of the Revised Code apply to all statutes, . . . and to rules adopted under them." Thus, it is clear that the mandate contained in R.C. 1.42 applies to the construction of regulations such as OAC 901:10-1-03(A)(5). (Emphasis added.)

reader should focus. The Commission finds that in order for the past operational history of the facility to have been relevant under this specific provision, it should read, "The facility is not designed or constructed as a non-discharge system or has not been operated to prevent the discharge of pollutants to waters of the state or to otherwise protect water quality; . . ."

49. The Commission further finds that construing OAC 901:10-1-03(A)(5) to apply only to the current design, construction and operation of a facility is consistent not only with the rules of grammar, but also satisfies the goals and philosophy underlying the environmental statutes and regulations of the state. Specifically, it appears to the Commission that the relevant inquiry should be whether a facility is currently designed, constructed and operated in such a manner that there is no risk posed to the environment. In the absence of such a risk, there is no reason to justify the denial, suspension or revocation of a permit under this subsection.

50. Thus, the Commission finds that the relevant inquiry pursuant to OAC 901:10-1-03(A)(5) should have been whether Appellants' facilities are currently designed, constructed and operated as a non-discharge system. Although there was a fair amount of testimony and evidence offered regarding this issue,[26] the Director never conclusively reached a decision regarding the present design, construction and operation of these facilities due to his interpretation of OAC 901:10-1-03(A)(5). Accordingly, in keeping with the well-accepted tenet that the Commission is not initially to stand in the place of the Director, our decision today is confined to our conclusion that the Hearing Examiner and, ultimately, the Director, misinterpreted and misapplied OAC 901:10-1-03(A)(5) as a ground for revoking Appellants' existing permits. To this extent, Appellants' fifth assignment of error is well-taken.

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[26] See e.g., the testimony of Harry Kallipolitis, Patrick Wilson, Thomas Menke.

VI. INVOCATION OF OAC 901:10-1-03(B) FOR REVOCATION

51. Appellants next contend that the Director erred in applying OAC 901:10-1-03(B) to BEF's existing facilities, since that regulation applies only to "applicants" for permits for "proposed new or modified facilities."[27]

52. The Director counters by arguing that the presence of the terms "suspend" and "revoke"in OAC 901:10-1-03(B) makes it clear that this provision was intended to authorize the suspension or revocation of existing permits in those circumstances where prior compliance history would justify such action, and that failing to give effect to these terms renders portions of the regulation meaningless. More specifically, the Hearing Examiner's Conclusions of Law, which were adopted in their entirety by the Director, found in relevant part:

> 10. OAC 901:10-1-03(B) should be interpreted to apply to circumstances of substantial noncompliance with an existing, effective permit, whether or not the permit holder is an applicant for a permit for a new or modified permit.
>
> 11. The evidence establishes that the Respondents have a history of substantial noncompliance with their permits indicating the lack of sufficient reliability, expertise and competence to operate their facilities in substantial compliance with O.R.C. Chapter 903. and applicable rules.
>
> 12. Revocation of the Respondents' existing permits is required pursuant to OAC 901:10-1-03(A)(5) and OAC 901:10-1-03(A)(6), and is appropriate pursuant to OAC 901:10-1-03(B).
>
> 13. Denial of the Respondents' pending permit applications is appropriate pursuant to OAC 901:10-1-03(B).

53. Once again, for purposes of clarity, the Commission sets out OAC 901:10-1-03(B) in its entirety below:

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[27] Although Appellants' assignment of error is broadly worded, it is clear from Appellants' arguments and briefs that they are only challenging the Director's reliance on OAC 901:10-1-03(B) relative to the permit revocations herein, not the permit denials.

(B) The director may deny, suspend or revoke a permit to install or permit to operate if:

(1) The applicant and persons associated with the applicant, in the operation of concentrated animal feeding facilities, have a history of substantial noncompliance with the Federal Water Pollution Control Act, the Safe Drinking Water Act, as defined in section 6109.01 of the Revised Code, any other applicable state laws pertaining to environmental protection or environmental laws of another country that indicates that the applicant lacks sufficient reliability, expertise and competence to operate the proposed new or modified facility in substantial compliance with Chapter 903. Of the Revised Code and this chapter.

(a) In evaluation a history of substantial noncompliance as required, the director may consider all of the following for a period of five year preceding the date of the application:

(i) Any information submitted on ownership and background pursuant to rule 901:10-1-02 of the Administrative Code;

(ii) Any administrative enforcement action (including an administrative order of notice of violation), civil suit, or criminal proceeding that is:

(*a*) Pending against the applicant or a business concern owned or controlled by the applicant;

(*b*) Resolved or dismissed in a settlement agreement, in a consent order or decrees, is adjudicated or otherwise dismissed and that may or may not have resulted in the imposition of:

(*i*) A sanction such as a fine, penalty, payment or work or service performed in lieu of a fine or penalty; or

(*ii*) Cessation or suspension of operations;

(*c*) Any revocation, suspension, or denial of a license or permit or equivalent authorization; or

(*d*) With respect to paragraph (B)(1)(a) of this rule, any explanation that the applicant may choose to submit. (Emphasis added.)

54. To resolve this assignment of error, the Commission first notes the well-accepted tenet that unambiguous statutes[28] are to be construed according to the plain meaning of the words used and, courts are not free to delete or insert other words. (Roxane Laboratories, Inc. v. Tracy (1996), 75 Ohio St. 3d 125; State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn. (1994), 69 Ohio St. 3d 217.)

55. Additionally, the Commission turns, once again, to Ohio R.C. 1.42 ("Common and technical use."). This section provides in relevant part:

> Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

56. In fact, in the instant action, OAC 901:10-1-01(D) does define "applicant" as "a person applying for a permit, certificate, or submitting a claim of trade secrecy to the director."[29] Further, while the phrase "proposed new or modified facility" is not specifically defined in the relevant statutes or regulations, the plain and unambiguous meaning of this phrase dictates that the provision at issue is to be applied in the case of new facilities, or in those instances where a modification is being sought for an existing facility.

57. Applying these rules of construction to the facts herein, the Commission finds that

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[28] The "plain meaning" rule also applies in construing regulations. (See e.g., Friends of Ottawa River et al. v. Schregardus, et al., (September 16,1999) Franklin App. No. 98AP-1314, unreported, (1999 Opinion 3592).)

[29] This definition of "applicant" is consistent with the definition of this term in many other environmental regulations (see e.g., OAC Section 3745-27-01[B][2], 3745-32-01[A], 3745-36-02[B] 3745-91-01[A] and 3745-400-01[A]), as well as the common definition found in Webster's Seventh New Collegiate Dictionary ("one who applies").

Appellants are not "applicants" relative to those permits which the Director has revoked and, further, the permits being revoked are clearly not attributable to a "proposed new or modified facility." Indeed, the illogical construction being advanced by the Director for OAC 901:10-1-03(B) is accentuated when one considers that several of the permits being revoked were initially issued in the early 1980s. (See e.g., ODA Exhibits 12, 13, 14 and 15.)

58. As stated by the United States Court of Appeals for the Sixth Circuit in Ohio Cast Products, Inc. v. The Occupational Safety & Health Review Commission, et al. (2000), 246 F. 3d 791:

> An administrative agency's interpretation of its own regulations is entitled to substantial deference. . . . This court accords substantial deference to the Secretary's construction of an OSHA standard if it is ambiguous and the Secretary's interpretation of it is reasonable. . . . The Secretary's interpretation need not be the only reasonable interpretation for it to be sustained. . . .
>
> But, where 'an alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulations promulgation,' this court need not defer to the Secretary's interpretation. . . . When an agency promulgates regulations, it is bound by those regulations, and it may not attempt to subvert the rulemaking process through interpretation unsupported by the regulation's language.

59. In sum, the Commission declines to read OAC 901:10-1-03(B) in the strained manner proposed by the Director, particularly in light of the fact that these regulations are newly-adopted and being applied by the Agency for the first time. Rather, the logical and plain meaning of OAC 901:10-1-03(B) indicates that its provisions are confined to applicants for proposed new or modified facilities. Thus, the Commission finds that it was unlawful for the Director to determine that it was appropriate to revoke Appellants' twelve existing permits based upon OAC 901:10-1-03(B).

60. Accordingly, Appellants' sixth assignment of error is well taken.

VII. SCHEDULE AND ORDER OF CLOSURE OF FACILITIES

61. In its final assignment of error, Appellants contend that the schedule and order for closure of the facilities set out in the Director's Order is unreasonable as lacking a valid factual foundation.

62. Conversely, Appellee argues: 1) the Director's establishment of a barn closure schedule is an exercise of his enforcement discretion which may not be reviewed by the Commission; and 2) the evidence and testimony demonstrates that the schedule and order of closure is reasonable and capable of being implemented by Appellants.

63. The Commission received evidence and testimony regarding this issue during the hearing conducted on August 6, 2003, pursuant to OAC 3746-9-02. First, the Commission disagrees with the Director's assertion that the exercise of enforcement discretion is never reviewable. While it is true that he has considerable latitude in determining whether or not to initiate enforcement action against a given entity and that he has a number of options regarding the form such action might take (e.g., Notices of Violations, requests for injunctions in civil courts, Final Findings and Orders, and revocations), it is not true that once he determines to exercise this authority, the actions taken are not reviewable by this Commission or any other appropriate tribunal. Second, having reached the conclusion that the Commission may review the closure plan, however, we further find that the evidence presented by Appellants does not establish that the schedule and order of closure imposed by the Director was unreasonable. Rather, we find that the testimony and evidence, taken in its entirety, indicates only that Appellants will be required to

modify their existing business practices to comply with the mandates set out in the July 8, 2003 Order of the Director.

64. Accordingly, the Commission finds Appellants' seventh assignment of error not well taken.

FINAL ORDER

In light of the resolution of Appellants' seven assignments of error set out above, the Commission hereby finds that Appellee Director reasonably and lawfully revoked Appellants' twelve existing permits pursuant to OAC 901:10-1-10(F), and reasonably and lawfully denied Appellants' eleven permit applications pursuant to OAC 901:10-1-03(B). Accordingly, the Director's action regarding the revocation of Appellants' permits and denial of Appellants' permit applications is hereby affirmed. However, this action is remanded to the Director to allow for the revision of the closure portion of the July 8, 2003 Order, since barn closures were to have commenced within twenty business days of the effective date of the Director's Order.

The Commission, in accordance with Section 3745.06 of the Revised Code and the Ohio Administrative Code 3746-13-01, informs the parties that:

> Any party adversely affected by an order of the Environmental Review Appeals Commission may appeal to the Court of Appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulations to the court of appeals of the district in which the violation was alleged to have occurred. Any party desiring to so appeal shall file with the Commission a Notice of Appeal designating the order appealed from. 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 of Environmental Protection. Such notices shall be filed and mailed within thirty days after the date upon which the Appellant received notice from the

Commission by certified mail of the making of an order appealed from. No appeal bond shall be required to make an appeal effective.

THE ENVIRONMENTAL REVIEW
APPEALS COMMISSION

Julianna F. Bull, Chair

Toni E. Mulrane, Vice-Chair

Melissa M. Shilling, Member

Entered in the Journal of the
Commission this 15th
day of October, 2003.

Mary J. Oxley, Executive Secretary

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