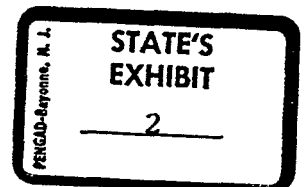


BEFORE THE  
OHIO ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	:	Case No. 87-WI-003
	:	
FAIRPORT RECLAMATION AND	:	REPORT AND RECOMMENDATION
CLEVELAND ELECTRIC ILLUMINATING	:	
COMPANY	:	
	:	
	:	
Petitioners	:	

FINDINGS OF FACT

1. The Cleveland Electric Illuminating Company (CEI) engages in an industrial process involving the combustion of coal at its Eastlake Plant. (Szejkowski, Tr. 81, 96-97). Coal ash, consisting of both bottom ash and fly ash, is a by-product of such combustion. Coal ash from CEI's Eastlake Plant is disposed of at the Fairport Reclamation Project site on Fairport-Nursery Road and Hardy Road, Painesville Township, Lake County, Ohio. (Fairport Reclamation site). (Szejkowski, Id.).
  
2. The Fairport Reclamation Project employs a filter barrier which retains suspended sediment and fly ash. (Ohio EPA Ex. 1, Szejkowski, Tr. 92; Lee, Tr. 148; Powell, Tr. 222). The Fairport Reclamation Project employs a lagoon and/or settling ditches which allow suspended sediment and coal ash to settle. (Powell, Tr. 223).
  
3. The Fairport Reclamation site has caused and will cause contaminants to enter waters of the state. (Szejkowski, Tr. 92-93, 105; Lee, Tr. 123-126, 154-155; Powell, Tr. 316; Khourey, Tr. 393, 395-396).



4. It is the position of the Ohio Environmental Protection Agency that the Fairport Reclamation site is a "disposal system" as that term is defined in section 6111.01(G) of the Ohio Revised Code, and that, pursuant to Rule 3745-31-02 of the Ohio Administrative Code, the installation of such disposal system necessitates the obtaining of a wastewater permit to install from the Director of Environmental Protection.
  
5. It is the position of CEI and Fairport Reclamation (collectively, the Petitioners) that, as nontoxic fly ash is expressly excluded from the definition of "solid wastes" by section 3734.01(E) of the Ohio Revised Code, the Ohio EPA does not have the authority to regulate the disposal of such material under either Chapter 3734. or Chapter 6111. of the Revised Code. Accordingly, it is the Petitioners' position that a wastewater permit to install cannot be required by the Ohio EPA for a facility such as the Fairport Reclamation site at which such material is deposited.
  
6. On March 16, 1987, CEI, under protest, filed with the Ohio EPA an application for a wastewater permit to install with respect to the Fairport Reclamation site.
  
7. Also on March 16, 1987, the Petitioners filed the instant request for hearing pursuant to section 119.06 of the Revised Code. Section 119.06 provides, in pertinent part:

Whenever an agency claims that a person is required by statute to obtain a license, it shall afford a hearing upon the request of a person who claims that the law does not impose such a requirement.

8. An adjudication hearing in this matter was held on May 18 and 19, 1987. The sole issue for determination is whether the Ohio EPA has statutory authority to require the Petitioners to obtain a wastewater permit to install for the disposal of nontoxic fly ash at the Fairport Reclamation site.
  
9. Subsequent to the hearing in this case, the Environmental Board of Review issued Findings of Fact, Conclusions of Law and Final Order in Dayton Power and Light Company v. Shank, Case No. EBR 571485 (November 5, 1987).

#### CONCLUSIONS OF LAW

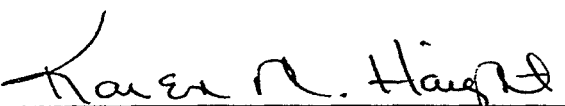
1. Notwithstanding the fact that nontoxic fly ash is excluded from the definition of "solid waste" in section 3734.01(E) of the Revised Code, the disposal of fly ash is subject to regulation under Chapter 6111. of the Revised Code. Dayton Power and Light Company v. Shank, Case No. 571485, Findings of Fact, Conclusions of Law and Final Order (November 5, 1987).
  
2. The coal ash deposited at the Fairport Reclamation site is an "industrial waste" as defined by section 6111.01(C) of the Revised Code. See Dayton Power and Light Company v. Shank, *supra*. Contrary to the assertion of the Ohio EPA, however, such ash is not an "other waste" as defined by section 6111.01(D). Section 6111.01(D) limits the definition of "other waste" to "substances that are not sewage or industrial waste."

3. The placing of an industrial waste in a location where it causes pollution of waters of the state, except where the Director has issued a valid and unexpired permit as provided in sections 6111.01 to 6111.08 of the Revised Code, is prohibited by section 6111.04 of the Revised Code.
4. The Fairport Reclamation site encompasses a "treatment works" as that term is defined in section 6111.01(F) of the Revised Code, and a "disposal system" as that term is defined in section 6111.01(G) of the Revised Code.
5. Pursuant to Rule 3745-31-02 of the Ohio Administrative Code, no person shall cause, permit, or allow the installation of a new disposal system without first obtaining a permit to install from the Director (subject to certain exceptions not relevant here).
6. The establishment of the Fairport Reclamation site requires the obtaining of a wastewater permit to install pursuant to Chapter 3745-31 of the Ohio Administrative Code.
7. The Examiner makes the following Rulings on objections that were not ruled upon at the adjudication hearing in this matter:
  - (a) The objection to Dennis Lee's testimony concerning the effects of fly ash disposal at reclamation facilities other than Fairport is overruled (Tr. 127);
  - (b) The objection to the admission of slides of various CEI fly ash disposal sites and to testimony concerning those slides is overruled (Ohio EPA Slides 1-32) (Tr. 225);

- (c) The objection to the testimony of Chris Kourey concerning an Ohio EPA preliminary site inspection of Fairport is overruled (Tr. 394);
- (d) The objection to the testimony of Chris Kourey regarding Ohio EPA geological review of Fairport is overruled (Tr. 396);
- (e) The objection to the admission of leachate sample from the Beckjord station site is sustained (Tr. 374); and,
- (f) The objection to the admission of information concerning sampling from the Coffey site is sustained (Tr. 375).
- (g) The objections to the admission of Ohio EPA's Exhibits 1, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, are overruled and such exhibits are hereby received into evidence;
- (h) The objections to the admissions of Petitioner's Exhibits F, G, H, I, are overruled and such exhibits are hereby received into evidence;
- (i) The objection to the admission of Ohio EPA's Exhibit 18 is sustained (Tr. 450).

RECOMMENDATION

The Examiner recommends that the Director adopt the above Findings of Fact and Conclusions of Law.

  
KAREN M. HAIGHT  
Presiding Hearing Examiner

MAY 26 1989  
Date