

BEFORE THE ENVIRONMENTAL BOARD OF REVIEW

STATE OF OHIO

JACKSON COUNTY ENVIRONMENTAL :
COMMITTEE, ET AL. : Case No. EBR 402277-402278
: :
Appellant, : :
: :
v. : :
: :
DONALD SCHREGARDUS, DIRECTOR : :
OF ENVIRONMENTAL PROTECTION, ET AL. : :
: :
Appellees. : Issued: August 10, 1993

FINDINGS OF FACT, CONCLUSIONS OF LAW AND
FINAL ORDER

Issued By:

ENVIRONMENTAL BOARD OF REVIEW
Julianna F. Bull, Chairwoman
Toni E. Mulrane, Vice-Chairwoman
Jerry Hammond, Member

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This matter comes before the Environmental Board of Review (the Board) upon an appeal by Agnes I. Martin and the Jackson County Environmental Committee from a final action of the Director of the Ohio Environmental Protection Agency (Director) granting Appellee, The Mead Corporation (Mead), a Permit to Install (PTI). This PTI, which was issued on August 6, 1990, authorizes Mead to apply paper mill sludge onto certain Mead-owned abandoned strip mine land located in Jackson County, Ohio.

The public notice of this action was published on August 15, 1990, in the Journal Herald newspaper in Jackson, Ohio, and Appellants filed their Notice of Appeal with the Board on September 14, 1990. The parties waived the statutorily required de novo hearing in this matter and submitted the case on a Joint Stipulation of Issues and Facts. Additionally, the parties submitted written briefs, and an oral argument was held on April 15, 1993.

Appellant Agnes I. Martin was represented in this action by Mr. William C. Martin. Appellant Jackson County Environmental Committee was represented by Agnes I. Martin. Appellee Mead was represented by Mr. J. Wray Blattner and Mr. Ben L. Pfefferle of Thompson, Hine and Flory, Dayton, Ohio. Appellee Director was represented by Mr. James O. Payne, Jr. and Ms. Gertrude Kelly, Assistant Attorneys General, State of Ohio.

Based upon the joint stipulation of the parties, the oral argument, pleadings, briefs and memoranda filed herein and the record certified to the Board pursuant to section 3745.04 of the Ohio Revised Code, the Board makes the following Findings of Fact, Conclusions of Law and Final Order.

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THE STATE OF OHIO
C.M.C.

FINDINGS OF FACT

1. On August 6, 1990, the Director issued Permit to Install No. 06-2872 ("the PTI") to The Mead Corporation. (CR 3)
2. The PTI was issued as a final action and was not preceded by a proposed action. (CR 1, 2)
3. The PTI authorizes Mead to apply paper mill sludge to two 20-acre tracts of Mead-owned abandoned mine sites in Jackson County as an experimental reforestation project. (CR 3, 4)
4. The paper mill sludge to be applied by Mead contains detectable levels of dioxins and dibenzofurans. (CR 4)
5. The Ohio EPA has not promulgated regulations establishing permissible concentrations of dioxins and dibenzofurans in sludge which is to be land applied.
6. On April 24, 1989, the Ohio EPA issued a document entitled "Guidelines for Land Application of Paper Mill Sludge" ("Guidelines"). These Guidelines explicitly related to the land application of sludge by Mead, as evidenced by the fact that the Mead Corporation is specifically referred to at least 17 times in the Guidelines. Among other things, the Guidelines specified the allowable concentration levels of "total dioxin equivalents" (a measure of dioxins and dibenzofurans). (CR 9)
7. Mead's PTI is conditioned, inter alia, upon Mead's compliance with all the terms of the 1989 Guidelines, which are incorporated into the PTI by reference. (CR 3, 8, 9)
8. In the August 13, 1990 issue of the OEPA Weekly Review the Director provided public notice of the issuance of the PTI. (CR 2)
9. On August 15, 1990, public notice of the issuance of the PTI appeared

in the Journal Herald newspaper in Jackson, Ohio. (CR 1)

10. Both notices referred to the action of the Director as the "Final Issuance of Permit to Install" for "Mead AML Experimental Reforestation Project Utilizing Papermill Sludge for Mulga and Goose Run Projects" and stated that the effective date of the final permit to install was August 6, 1990. The notices further indicated that the action was related to a wastewater facility, that the permit application number was 06-2872, and that Milton and Bloomfield Townships were the affected geographic areas. Both notices also informed the reader that this final action was not preceded by a proposed action, that further communications regarding the action were to be sent to: Hearing Clerk, OEPA, P.O. Box 1049, Columbus, Ohio, 43266-0149, Phone (614) 644-2115, and that the final action was appealable to the EBR. Neither notice indicated the presence of dioxins or dibenzofurans in the papermill sludge. (CR 1, 2)

11. Appellants Jackson County Environmental Committee and Agnes I. Martin filed their Notice of Appeal of the PTI on September 14, 1990.

12. Numerous documents in evidence before the Board indicate that as of the date of the issuance of the PTI, Appellants were aware that Mead's sludge contained dioxin and/or dibenzofurans. (Exhibit A to the Joint Stipulation of Issues and Facts.)

13. On February 14, 1993, the parties filed a Joint Stipulation of Issues and Facts in which they stipulated that the following two issues are the only two issues to be resolved by the Board:

- a) Did the Director act unreasonably or unlawfully by issuing Permit to Install No. 06-2872 without first promulgating rules delineating allowable concentrations of dioxins and dibenzofurans in the application of paper mill sludge to abandoned mine lands; and

- b) Did the Director act unreasonably or unlawfully by issuing Permit to Install No. 06-2872 without having the public notice of such action expressly indicate the existence of dioxins in the paper mill sludge?

14. In addition to the two stipulated issues, at the oral argument and in her hearing brief in this matter, Appellant Martin asserted that the 1989 Guidelines upon which the PTI was, in part, premised are effectively rules, and were therefore, required to be adopted pursuant to Ohio Revised Code Chapter 119 (the Administrative Procedure Act). Appellant further contends that since the Guidelines were not adopted in accordance with the procedures contained in Chapter 119, they are unlawful and invalid, as is the PTI which incorporate the Guidelines.

CONCLUSIONS OF LAW

1. In reviewing and deciding an appeal, the Board must determine whether or not the action of the Director which is in question in the appeal was unlawful or unreasonable. Unlawful means the action is not in accordance with law. Unreasonable means the action is not in accordance with reason or that it has no factual foundation. It is only where the Board can properly find from the evidence that there is no valid factual foundation for the action of the Director that such action can be found to be unreasonable. [Citizens Committee to Preserve Lake Logan v. Williams, 56 Ohio App. 2d 61 (1977)]

2. Where the Certified Record and evidence before the Board demonstrates that the action taken by the Director is reasonable and lawful the Board must affirm the action of the Director. The Board may not substitute its judgment for that of the Director. [Citizens Committee to Preserve Lake Logan, Supra]

3. The environmental statutes of the state of Ohio grant the Director broad discretionary authority to prevent, control and abate pollution. [ORC

section 3745.011, ORC chapter 6111, ORC chapter 3704 and ORC chapter 3734]

4. The mandatory duties imposed on the Director under Ohio's Water Pollution Control Law (ORC Chapter 6111) and Ohio EPA's Permit to Install regulations do not include any obligation to issue rules specifically establishing allowable levels of dioxins and dibenzofurans in sludge to be land applied.

5. In the absence of a specific state or federal mandate requiring the Director to issue regulations establishing allowable levels of dioxins and dibenzofurans in sludge to be land applied, the Director does not act unreasonably or unlawfully in declining to formally adopt such rules and choosing, instead, to address the matter on a case-by-case basis. [Hamilton County Board of Mental Retardation and Developmental Disabilities v. Professional Guild of Ohio, 46 Ohio St. 3d 147 (1989)]

6. The "Guidelines for Land Application of Paper Mill Sludge" issued by the Director and incorporated by reference into Mead's PTI, were not agency rules, but rather, were standards which explicitly and solely related to the land application of sludge by Mead. As such, these Guidelines were not required to be adopted pursuant to the mandates of Ohio Revised Code Chapter 119.

7. Assuming arguendo that the Guidelines were "off-the-books administrative standards" which should have been adopted pursuant to Ohio Revised Code Chapter 119, Appellant has no standing to raise this issue at this time since the Guidelines were issued by the Director on April 24, 1989 and any challenge of this action must have been appealed no later than May 24, 1989 in order to be timely pursuant to ORC 3745.04.

8. The Director's duties with respect to public notice of the final issuance of a permit are set forth in R.C. 3745.07 and OAC 3745-47-08.

9. Ohio Revised Code Section 3745.07 provides in relevant part:
The Director shall cause notice of . . . each issuance
. . . of a permit, license, or variance for which no
proposed action was issued . . . to be published in a
newspaper of general circulation in the county where the
permit, license, or variance is sought . . . within fifteen
days after the date of the . . . issuance . . .

10. Ohio Administrative Code Section 3745-47-08(D) provides that, to the extent known to the agency, the following must be included in the public notice of the issuance of a permit: (1) The name of the agency and the address and telephone number where further information may be obtained and agency files and records pertaining to the proceedings may be inspected and copied; (2) The name and address of the person responsible for the source; (3) The location of the source; (4) The date of issuance; and (5) A statement of the right to appeal to the Environmental Board of Review.

11. The August 13, 1990 and August 15, 1990 public notices of the Director's action contained all the information required by law and, therefore, the notices were lawful and reasonable.

12. Based on the evidence before the Board, we find that the Director's action in issuing a PTI to Mead for the land application of sludge at abandoned strip mine land was both reasonable and lawful and therefore should be affirmed.

FINAL ORDER

The action of the Director of the Ohio Environmental Protection Agency in issuing the PTI of August 6, 1990 was both reasonable and lawful and is hereby AFFIRMED.

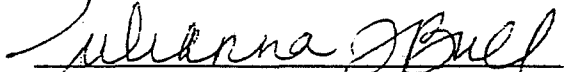
The Board, in accordance with Revised Code Section 3745.06 and Ohio

Administrative Code Section 3746-13-01, informs the parties that:

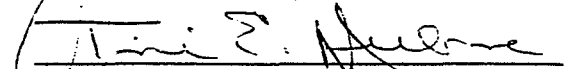
Any party adversely affected by an order of the Environmental Board of Review may appeal to the Court of Appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation to the court of appeals of the district in which the violation was alleged to have occurred. Any party desiring to so appeal shall file with the Board 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 Appellant received notice from the Board by certified mail of the making of an order appealed from. No appeal bond shall be required to make an appeal effective.

Entered in the Journal
of the Board this 10th
day of August, 1993.


THE ENVIRONMENTAL BOARD OF REVIEW



Julianna F. Bull, Chairwoman



Toni E. Mulrane, Vice-Chairwoman



Jerry Hammond, Member

FINDINGS OF FACT
AND FINAL ORDER

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Case No. EBR 402277-4022778

COPIES SENT TO:

JACKSON COUNTY ENVIRONMENTAL

COMMITTEE

(CERTIFIED MAIL)

AGNES I. MARTIN

DONALD SCHREGARDUS, DIRECTOR

(CERTIFIED MAIL)

MEAD CORPORATION

(CERTIFIED MAIL)

William C. Martin, Esq.

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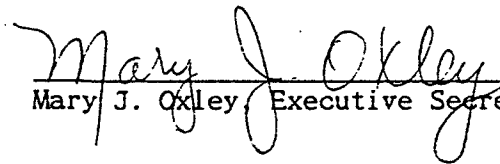
James O. Payne, Jr., Esq.

Gertrude Kelly, Esq.

FINDINGS OF FACT
AND FINAL ORDER
CASE NO. EBR 402277-402278

C E R T I F I C A T I O N

I hereby certify that the foregoing is a true and accurate copy of the FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER in JACKSON COUNTY ENVIRONMENTAL COMMITTEE, ET AL. V. DONALD SCHREGARDUS, DIRECTOR OF ENVIRONMENTAL PROTECTION, ET AL., Case No. EBR 402277-402278 entered into the Journal of the Board this 10th day of August, 1993.



Mary J. Oxley, Executive Secretary

Dated this 10th day of August, 1993, at Columbus, Ohio.