STATE OF OHIO	)	IN THE COURT OF COMMON PLEAS
	) SS:	
COUNTY OF CUYAHOGA	)	CASE NO. 236290

STATE OF OHIO, ex rel., LEE FISHER Attorney General of Ohio, etc.	)	
Plaintiff	)	**SEPARATE FINDINGS OF FACT AND CONCLUSIONS OF LAW**
vs.	)	
THE CLEVELAND TRINIDAD PAVING CO., et al.	)	Judgment and Order
Defendants	)	

Ralph A. McAllister, J.:

FINDINGS OF FACT

1. Defendant Cleveland Trinidad Paving Co. is an Ohio corporation which, at all relevant times, owned and operated an asphalt mixing plant at Cleveland, Ohio for the manufacture of asphalt to be used in paving operations, pursuant to a Permit to Operate No. 13-18-00-1799P902 (PTO 902), issued March 25, 1988 by the Director of the Ohio Environmental Protection Agency (EPA), who imposed terms and conditions on defendants' manufacturing operations which are an Air Pollution Source.

2. Defendant Gary Helf at all relevant times was President and Chief Operating Officer, having ultimate authority and responsibility for Cleveland Trinidad's manufacturing operations.

3. Although the asphalt manufacturing process necessarily involves the release of pollutants into the ambient air, they first pass through a pollution control device known as a "wet scrubber" and are limited by the terms of the Permit to Operate (P902), which prohibits

emissions from defendants' asphalt plant in excess of twenty percent opacity, as recorded by a qualified observer, to the nearest five percent at fifteen-second intervals on an observational record sheet, with a minimum of twenty-four observations being recorded over at least a six-minute observation period. This procedure is known as "Method 9" as described in 40 C.F.R., Part A, Appendix A.

4. The evidence of environmental violations by defendants on June 1, 1989, August 22, 1990, October 21, 1990, and October 26, 1990, consisted of testimony by "expert witnesses" who testified that they had employed Method 9 and recorded emissions from defendants' plant which exceeded the twenty percent opacity standard. However, the only basis for establishing the credibility or validity of Method 9 is that it is employed by the federal government, as set forth in the Code of Federal Regulations, and has been adopted by the Ohio EPA. No evidence was presented by the plaintiff to establish that this method has " . . . gained such standing and scientific recognition among the (scientific) authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made." *Frye v. United States* (1923), 293 Fed. 1013. Although this Court has accepted such testimony from plaintiff's "experts," the Court finds that it is very weak testimony. Additionally, the Court finds that the evidence offered to support the qualifications of plaintiff's "experts" was also very weak. However, the Court does find that defendants did violate the Ohio Air Pollution Standards on the foregoing dates.

5. On May 23, 1990, defendants' plant emitted particulate matter which fell from the sky and landed on cars parked at the business of Mobile Refrigeration across the street from defendants' plant. This was due to a malfunction in defendants' plant.

6. After the close of the asphalt paving season of 1990, defendants voluntarily shut down and sealed the offending plant (Source No. P902) and arranged to replace the air pollution equipment before the commencement of the asphalt paving season of 1991. On January 28, 1991, defendant Cleveland Trinidad submitted plans and specifications, and applied for and sought appropriate permits from the Director of the Ohio EPA and from the City of Cleveland, for the installation and operation in compliance with all laws and regulations of a new asphalt plant for the 1991 paving season, at a total cost substantially in excess of $200,000.00.

7. Although a permit to install the new asphalt manufacturing machine known as "Source No. P904" was not issued by the Director of the Ohio EPA until April 10, 1991, and the application for permission to install the plant indicated construction of the source would commence on or about March 15, 1991, defendants had erected a concrete pad by March 15, 1991, and by April 10, 1991 the construction and erection of the component parts for the new plant had been commenced.

8. The State has brought no claims in this lawsuit and has offered no evidence of violation of the operations requirements or the air contaminant and pollution laws of the State of Ohio by defendants' new asphalt manufacturing plant.

9. Defendant Cleveland Trinidad is an Ohio small business, with seasonal operation.

10. The testimony of the State's expert witness, who determined that economic benefit to the defendants of non-compliance is $15,210.00, was based upon hearsay information and false assumptions, and is not reliable evidence.

CONCLUSIONS OF LAW

1. Defendants are each a "person" for the purposes of R.C. Chapter 3704 and the rules adopted and permits issued thereunder.

2. The two asphalt mixing plants operated by defendants (air pollution Source Nos. P902 and P904) each constitute an "air contaminant source," a "source operation," a "source" and an "emissions source".

3. The defendants' asphalt mixing plant, air pollution Source No. P904, constitutes a "new source".

4. Defendant Cleveland Trinidad is the owner and operator of the "facility" that includes air pollution Source Nos. P902 and P904.

5. Test Method 9 has been judicially established as accurate in many jurisdictions and has been incorporated in federal, Ohio and city regulations, and, therefore, the Court concludes as a matter of law that it is an accepted and correct method for determining the opacity of visual emissions within the field of air pollution control. (*City of Cleveland v. CEI* (1991), CA 8 unreported No. 41808, 41809, 41810, and 41811.)

6. The terms and conditions of Permit No. 13-18-00-1799 (P902) prohibit emissions of visible air contaminants in excess of, or equal to, twenty percent opacity released on a six-minute average, which defendant Cleveland Trinidad did violate on four separate occasions as alleged in Count One of the Complaint.

7. Permit No. 13-18-00-1799P902, issued to Cleveland Trinidad, contained a restriction that defendant's plant not emit visible air contaminants equal to or exceeding twenty

percent opacity on a six-minute average basis, a restriction which defendant did violate on four separate occasions, as alleged in Count Two of the Complaint.

8. Count Two in practical effect duplicates Count One, and therefore, civil penalty imposed herein will apply to Count One only.

9. The injunctive relief sought by plaintiff in Counts One and Two of the Complaint is not appropriate. The Court finds that it is not necessary under all the circumstances and facts presented to enjoin defendants from violating the statute, R.C. §3704.06(B). The Court finds on the evidence presented that the defendants are not violating, nor are they threatening to violate, any section of Chapter 3734, R.C., nor the rules adopted thereunder, nor terms or conditions of the permits under which defendant Cleveland Trinidad operates. If they should violate a statute or regulation, plaintiff has an adequate remedy at law.

10. The Court finds as a matter of law that there is a failure of proof by plaintiff to support a finding that defendants, or either of them, failed to report equipment malfunctions, as alleged in Count Three of the Complaint.

11. The Court finds as a matter of law that defendants did not cause, permit or allow the installation of a new source of air pollutants and contaminants by commencing the construction of Air Contaminant and Pollution Source No. P904, for the reason that Ohio Adm. Code 3745-31-02(A) prohibits the *installation* of a new source of air pollutants without first obtaining a permit to install from the Director. On the evidence presented by plaintiff, the Court finds defendants did not *install* a new source of air pollutants when they merely cleaned the site and placed a concrete pad for the convenience of cleanliness of the workplace. To claim, as plaintiff does, that site-cleaning and placement of a concrete pad are somehow to be construed

as "installation of a new source of air pollutants" is patently absurd. (In Ohio, in the absence of statutory or judicial definition, the Court is privileged to turn to the dictionary. (*Adamski v. B.U.C.* (1959), 108 Ohio App. 198, 213. *Webster's New World Dictionary* defines "installation" as a noun meaning "a complete mechanical apparatus fixed in position for use.")

12. The Court finds that Counts Two, Three and Four of the Complaint ought to be, and therefore are, dismissed for failure of proof. Further, this Court finds them to have been frivolous.

13. The Court finds that the claims and proof against defendant Gary Helf, President and Chief Operating Officer of Cleveland Trinidad, are the same as those against Cleveland Trinidad. Both defendants are jointly liable for a penalty as claimed in Count One of the Complaint for the unlawful emissions described therein. Plaintiff may not have a double recovery.

14. Plaintiff is entitled to civil penalty against defendants Cleveland Trinidad and Helf, jointly, to remedy their violations of Ohio Administrative Code 3745-31-02(A) and R.C. §3704.05(A) and (H). In assessing the appropriate civil penalty, the Court has considered the purpose of the penalty and the fact that it must be large enough to make the violator reluctant to repeat the violations and be large enough also to be more than a mere acceptable cost of doing business, and thus large enough to deter others from perpetrating similar violations of law. The Court has also considered the defendants' cooperation with Ohio EPA, the exigencies of the business, and the fact that no recalcitrance, defiance, or indifference to the law on the part of defendants has been established. Further, the Court has considered the threat of harm, or actual harm, to the environment caused by the four violations proved by the plaintiff in this case, the

failure of proof regarding the claim of economic benefit inuring to the defendants by their non-compliance with Ohio's air pollution control law, and the ability of Cleveland Trinidad to pay a substantial penalty.

15. Accordingly, the Court has determined, and therefore does, assess a civil penalty against Cleveland Trinidad Paving Co. in the total amount of $10,000.00, being $2,500.00 for each day of the excess emissions.

16. Further, defendant Cleveland Trinidad is ordered to install within forty-five days of this decision a flow meter and recorder, and a pressure-drop gauge and recorder, each of adequate and sufficient capacity, at a location and of a type to be agreed upon between Cleveland Trinidad and the Ohio Environmental Protection Agency and/or its delegate agency, and further that Cleveland Trinidad maintain and operate these instruments at all times and maintain all records from each such instrument continuously for three years after each reading.

It is So Ordered

RALPH A. McALLISTER, JUDGE

DATE: June 23, 1993

Attorney General
Lee Fisher

MEMORANDUM

TO: NANCY MILLER, DEPUTY CHIEF COUNSEL

FROM: DAVID GARY COX, AAG D.G.C.
TODD MUSHEFF, AAG
ENVIRONMENTAL ENFORCEMENT SECTION

DATE: JUNE 30, 1993

RE: RECENT JUDGEMENT AND ORDER

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

Please find attached a decision from the Cuyahoga County Court of Common Pleas finding in favor of the State on one Count and against the State on Three other Counts. The decision stems from a trial of violations of ORC Chapter 3704., Ohio's air pollution control laws.

In Counts One and Two of the Complaint, we alleged a violation of an opacity limitation, separately imposed by a Rule (3745-17-07) and by a Permit term and condition. Although the opacity limitation itself was the same, *i.e.* 20% opacity, one limitation was imposed by Rule while the other was imposed by a permit term or condition. The Court held that although the limitation itself was violated, the State was entitled to a civil penalty for only one violation. Thus, the Court found in favor of the State on Count One, but dismissed Count Two as being "frivolous".

For Count Three, the Court held the State did not meet its burden of proof in proving malfunction violations. For Count Four, the Court held that Defendants did not install a "new source" of air contaminants without first receiving a permit to install.

Of notable interest, is the Court's upholding of Test Method Nine, the means by which visible emissions are observed and detected when demonstrating a 20% opacity violation. Also, the Court imposed liability on the company's chief Corporate Officer and found "joint" liability between the Corporate Defendant and the Corporate Officer Defendant.

cc: All EES Attorneys