

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO

DENNIS SCOTT WALLACE,	:	ERAC No. 156521
	:	ERAC No. 12-156600
Appellant,	:	ERAC No. 13-156723
	:	
v.	:	
	:	
SCOTT NALLY, DIRECTOR OF	:	
ENVIRONMENTAL PROTECTION,	:	
	:	
and	:	
	:	
TOTAL WASTE LOGISTICS, LLC,	:	
	:	
and	:	
	:	
TERVITA, LLC,	:	
	:	
Appellees.	:	

RULING ON APPELLEE DIRECTOR'S
MOTION FOR SUMMARY JUDGMENT

Rendered on July 31, 2013

Dennis Scott Wallace, pro se Appellant

Michael DeWine, Attorney General, *Julianna Bull*, *John F. Cayton*, and *Nicholas J. Bryan* for Appellee Scott Nally, Director of Environmental Protection

Michael A. Cyphert and *Leslie G. Wolf* for Appellees Total Waste Logistics, LLC and Tervita, LLC

{¶1} This matter comes before the Environmental Review Appeals Commission (“Commission,” “ERAC”) on three notices of appeal filed by Appellant Dennis Scott Wallace. Mr. Wallace challenges the 2011, 2012, and 2013 construction and demolition debris (“C&DD”) licenses issued by Scott Nally, Director of Environmental

Protection (“Director,” “Ohio EPA”) for a C&DD disposal facility located in Negley, Ohio (“Negley Facility”). ERAC No. 156521, Case File Item A; ERAC No. 12-156600, Case File Items A; ERAC No. 13-156723, Case File Item A.

{¶2} Before the Commission is the Director’s Motion for Summary Judgment, filed May 3, 2013. The Commission has not received a response from Mr. Wallace. ERAC No. 13-156723, Case File Item W.

{¶3} Based upon the pleadings and the relevant statutes, regulations, and case law, the Commission issues the following Findings of Fact, Conclusions of Law, and Final Order GRANTING the Director’s Motion for Summary Judgment and ORDERING the above-captioned appeals be DISMISSED.

FINDINGS OF FACT

{¶4} Appellant Dennis Scott Wallace resides in Columbiana County at 6607 Carbon Hill Road, East Palestine, Ohio 44413. ERAC No. 13-156723, Case File Item A; ERAC No. 12-156600, Case File Item A; ERAC No. 156521, Case File Item A.

{¶5} Prior to December 11, 2012, Appellee Total Waste Logistics, LLC (“TWL”) operated the Negley Facility, which is located at 7555 North Street, Negley, Ohio 44441. On December 11, 2012, the Director approved the transfer of the Negley Facility’s C&DD license to Appellee Tervita, LLC (“Tervita”), which has operated the facility since that date. ERAC No. 13-156723, Case File Item A; ERAC No. 12-156600, Case File Items A, KK; ERAC No. 156521, Case File Item A.

{¶6} On February 3, 2011, the Director issued a 2011 C&DD license to TWL for the Negley Facility. On March 3, 2011, Mr. Wallace filed an appeal challenging the 2011 C&DD license. During the pendency of Mr. Wallace’s 2011 appeal, the Director issued a 2012 C&DD license for the Negley Facility, which Mr. Wallace appealed on May

29, 2012. Finally, in his most recent appeal filed February 19, 2013, Mr. Wallace challenges the Director's issuance of the Negley Facility's 2013 C&DD license, raising the following sixteen assignments of error, which appear as follows:¹

1. The Director's action in issuing the license was unreasonable and/or unlawful because the landfill is discharging contaminants and pollutants, including toxic and hazardous wastes, into the groundwater and surface waters in the vicinity of the landfill in violation of OAC 3745-1-05 of Ohio law. and Director NPDES PERMIT Not In compliance with the provisions of the Federal Water Pollution Control Act. as amended (33 U.S.C. 1251 et. seq., hereinafter referred to as the "Act"), and the Ohio Water Pollution Control Act (Ohio Revised Code Section 6111).
2. The Director's action in using the license was unreasonable and/or unlawful because the landfill is depleting the groundwater beneath the landfill and also depleting the source of numerous local springs in violation of OAC 3745-520 of Ohio law.
3. The Director's action in issuing the license was unreasonable and/or unlawful because its operation constitutes a public nuisance due to the emission of dust and other air contaminants and heavy equipment noise on a continuing basis in violation of OAC 3745-27-01 of Ohio law
4. The Director's action in issuing the license was unreasonable and/or unlawful because the landfill has filled in streams and springs in the vicinity of the landfill without a lawful permit authorizing such filling in continuous violation of OAC 3745-27-02(K)(2) and 3745-520 of Ohio law.
5. The Director's action in issuing the license was unreasonable and/or unlawful because the Groundwater monitoring system authorized by the license is inadequate because distribution and characteristics of materials are not defined properly the zones requiring monitoring may be identified incorrectly, and releases may remain undetected. as evidenced by the monitoring wells records past year and half 2011-2012 not detecting the year long leachate outbreak on st. rt. 170; site hydrogeology has been improperly documented facility in violation and requires sanction OAC 3714.101 of Ohio law.

¹ Appellant's assignments of error, as set out in this Ruling, appear, in format and text, as they did in the original and amended notices of appeal.

6. The Director's action in issuing the license was unreasonable and/or unlawful because the landfill has failed to accurately identify the nature of the site and the hydrogeology beneath and beside the facility in violation of OAC 3745-27-02(K)(2) of Ohio law.
7. The Director's action in issuing the license was unreasonable and/or unlawful because it fails consider and prevent harm to the public and to the environment from the extensive mining activities that have occurred at the landfill site and the fault that was detected with test bore #1 & # 2 of the site characterization report and cross section B-B map dated 2-29-00 which creates a very real potential for subsidence in violation of OAC 3745-27-01(M)(2) (U) (2) of Ohio law.
8. The Director's action in issuing the license was unreasonable and/or unlawful because the landfill was originally permitted in violation of OAC 3734.44 of Ohio law [reference G-14
9. The Director's action in issuing the license was unreasonable and/or unlawful because oepa engineers are in violation of OAC 4733-35-03 (A) (C) of Ohio law
10. The Director's action in issuing the license was unreasonable and/or unlawful because oepa engineers are in violation of OAC 4733-35-07 (B)of Ohio law
11. The Director's action in issuing the license was unreasonable and/or unlawful because TWL are in violation of 3745-520 of Ohio law GENERAL SETBACKS
12. The Director's action in issuing the license was unreasonable and/or unlawful because TWL are in violation of OAC 3745-520 of Ohio law ISOLATION DISTANCE
13. The Director's action in issuing the license was unreasonable and/or unlawful because TWL are in violation of OAC 3745-400-11 (E) (O) (1) (2) (3) (B)of Ohio law
14. The Director's action in issuing the license was unreasonable and/or unlawful because TWL are in violation of OAC 3745-400-07 (B)of Ohio law
15. The Director's action in issuing the license was unreasonable and/or unlawful because permit is in violation of OAC 3745-1-54 (b) (vii) (3)of Ohio law
16. The Director's action in issuing the license was unreasonable and/or unlawful because TWL are in violation of OAC 3745-27-02 (K) (2)of Ohio law

{¶7} On March 8, 2013, Mr. Wallace filed an Amended Notice of Appeal to the 2013 C&DD license. Mr. Wallace's Amended Notice of Appeal raises seven assignments of error, which appear as follows:

1. The Directors action in issuing the 2013 license and permit is unreasonable and/or unlawful because the license and permit is likely to adversely affect the public health or safety or the environment in violation of Ohio Adm. The Directors Code 3745-400-15(c).
2. The Director's action in issuing the 2013 license and permit is unreasonable and/or unreasonable because the landfill has failed to accurately identify the nature or the site and the hydrology beneath the facility.
3. The Directors action in issuing the 2013 license and permit is unreasonable and/or unlawful because the Director's action fails to consider and prevent harm to the public and to the environment from the extensive mining activities that have occurred at the landfill site and the resulting potential for subsidence and failure of the landfill's engineering features.
4. The Director's action is issuing the 2013 license and permit is unreasonable and unlawful Because the Director's action fails to consider and comply with the applicable regulatory Requirement that the facility and its components be constructed on a surface able to bear the weight of the facility without allowing a failure to occur through settling.
5. The Director's action in issuing the 2013 license and permit is unreasonable and unlawful because the Director's action fails to address, consider, and prevent harm to the public health and safety and to the environment arising from the likelihood of water pollution through contamination of the groundwater beneath the facility and the failure to adequately monitor for such contamination.
6. The Director's action in issuing the 2013 license modification is unreasonable and unlawful because the landfill is currently discharging contaminants and pollutants, including toxic and hazardous wastes ,into the groundwater and surface waters in the vicinity of the landfill in violation of Ohio law, including discharges contaminating Little Beaver Creek, a wild and scenic river.
7. The Director's action in issuing the 2013 license and permit is unreasonable and/or unlawful because the landfill is depleting the

groundwater beneath the landfill and the source water of numerous local spring streams and thereby adversely affects the environment and neighboring Landowner's water rights.

ERAC No. 13-156723, Case File Item H (punctuation in original).

{¶8} On March 26, 2013, counsel for the Director served Mr. Wallace with Appellee Director's First Set of Interrogatories, Requests for Production of Documents, and Requests for Admission. The Director's first set of discovery requests contain the following dispositive requests for admission relevant to this appeal:

REQUEST FOR ADMISSION NO. 2

Admit that during the period of time the Facility's 2012 annual license was in effect, the Facility operated in substantial compliance with the terms and conditions of its 2012 annual license and Ohio Administrative Code Chapter 3745-400.

REQUEST FOR ADMISSION NO. 3

Admit that during the period of time the Facility's 2011 annual license was in effect, the Facility operated in substantial compliance with the terms and conditions of its 2011 annual license and Ohio Administrative Code Chapter 3745-400.

REQUEST FOR ADMISSION NO. 4

Admit that during the period of time the Facility's 2010 annual license was in effect, the Facility operated in substantial compliance with the terms and conditions of its 2010 annual license and Ohio Administrative Code Chapter 3745-400.

ERAC No. 13-156723, Case File Item W.

{¶9} The Director did not receive a response from Mr. Wallace regarding his first set of discovery requests. ERAC No. 13-156723, Case File Item W.

{¶10} On May 3, 2013, the Director filed a Motion for Summary Judgment, arguing that because Mr. Wallace did not respond to the aforementioned requests for admission, the Commission should deem those requests admitted. Further, the Director argues that "substantial compliance" with Ohio Adm.Code Chapter 3745-400 is the

relevant standard Ohio EPA must apply when evaluating a C&DD license application. The Director concludes that because Mr. Wallace is deemed to have admitted that TWL and Tervita operated the Negley Facility in substantial compliance with Ohio Adm.Code Chapter 3745-400, there are no genuine issues of material fact with regard to the lawfulness and reasonableness of the Director's issuance of the 2011, 2012, and 2013 C&DD licenses and the Director is entitled to summary judgment in his favor. ERAC No. 13-156723, Case File Item W.

CONCLUSIONS OF LAW

I. Standard of Review

{¶11} Although not strictly bound by the Ohio Rules of Civil Procedure (“Civ.R.”), the Commission has historically applied the civil rules when appropriate to assist in resolution of appeals. *Meuhlfeld v. Boggs*, ERAC No. 356228 (Mar. 17, 2010).

{¶12} Civ.R. 56(C) states in pertinent part:

* * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law * * *

{¶13} Thus, under Civ.R. 56, “[t]he moving party has the burden of showing that there is no genuine issue as to any material fact as to critical issues.” *Stockdale v. Baba*, 153 Ohio App.3d 712, 2003-Ohio-4366, 795 N.E.2d 727, at ¶23. However, “an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response * * * must set forth specific facts showing that there is a genuine issue for trial.” *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 65 (1978). All doubts and evidence should be construed against the moving party, and “[s]ummary judgment may not be rendered unless it appears that reasonable minds can come to but one

conclusion and that conclusion is adverse to the part[y] against whom [the] motion is made.” *Stockdale*, 2003-Ohio-4366, at ¶32.

{¶14} “If the moving party has satisfied its initial burden under Civ.R. 56(C), then the nonmoving party has a reciprocal burden * * * to set forth specific facts showing that there is a genuine issue for trial. If the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.” *State v. Pryor*, Franklin App. No. 07AP-90, 2007 Ohio 4275 (Aug. 21, 2007), citing *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).

II. Discussion

A. Director’s First Set of Discovery Requests

{¶15} In his Motion for Summary Judgment, the Director argues that, pursuant to Ohio Adm.Code 3746-6-05, Requests for Admission Two, Three, and Four should be deemed admitted because Mr. Wallace failed to submit a written answer within the requisite twenty-eight day period.

{¶16} The Commission’s rule regarding requests for admission, Ohio Adm.Code 3746-6-05, provides in pertinent part as follows:

* * * The matter is admitted unless, within twenty-eight days after the service of the request, or within such shorter or longer time as the commission may order, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection, signed by the party or by his attorney. * * *

{¶17} The Commission has previously held that if a party does not timely respond to a request for admission, the request may be deemed admitted and conclusively established against the party. *Lundberg v. Korleski*, ERAC No. 256453 (May 31, 2011).

{¶18} In *Lundberg*, appellee served the appellant with requests for admission on February 23, 2011. *Id.* at ¶22. Among others requests, appellee’s fourth request for admission stated, “[a]dmit that you are not aggrieved, adversely affected or otherwise harmed by the Director’s Action.” *Id.*

{¶19} Appellant did not respond until March 25, 2011—ten days after the twenty-day deadline.² *Id.* at ¶23. The Commission noted that it is within its discretion whether to accept a late filing or to allow for a withdrawal of an admission, but declined to do so, finding the appellant’s justification “less than compelling.” *Id.* at ¶¶26-27. The Commission thus deemed the request admitted and granted the appellee summary judgment on standing grounds.

{¶20} Here, Mr. Wallace did not simply fail to file his responses within the twenty-eight day deadline; he has not, to date, filed any response at all. Accordingly, the Commission finds Requests for Admission Two, Three, and Four deemed admitted and conclusively established against Mr. Wallace in his 2013 appeal.³

B. Scope of the Director’s Evaluation of C&DD License Applications

{¶21} Having deemed Requests for Admission Two, Three, and Four admitted, the Commission will now address the Director’s argument that because Mr. Wallace is deemed to have admitted TWL and Tervita operated the Negley Facility in substantial compliance with Ohio Adm.Code Chapter 3745-400, there are no genuine issues of

² The then-effective version of Ohio Adm.Code 3746-6-05 provided for a twenty-day deadline to respond to requests for admission.

³ The Director’s first set of discovery requests are captioned as applying to Mr. Wallace’s 2013 appeal only. Case File Item W.

material fact regarding the lawfulness and reasonableness of the Director's issuance of the 2011, 2012, and 2013 C&DD licenses.

{¶22} Ohio Adm.Code 3745-37-03(C) sets forth the criteria for issuance of C&DD licenses. It provides in pertinent part as follows:

(C) The licensing authority shall not issue a construction and demolition debris facility license unless:

(1) All portions of the proposed facility meet the requirements contained in rule 3745-400-06 of the Administrative Code; and

(2) The applicant has operated the facility in substantial compliance with all applicable provisions of Chapter 3714. of the Revised Code and with Chapters 3745-400 and 3745-37 of the Administrative Code; and

(3) The owner or operator, who has previously or is currently responsible for the management or operation of one or more facilities licensed under Chapters 3714. or 3734. of the Revised Code, has managed or operated such facility in substantial compliance with applicable provisions of Chapters 3714., 3704., 3734., and 6111. of the Revised Code, and any rules and permits issued thereunder, and has maintained compliance with all applicable orders issued by the director, or from a board of health maintaining a program on the approved list, the environmental board of review, or courts having jurisdiction in accordance with Chapter 3746-13 of the Administrative Code, in the course of such previous or current management or operations.

{¶23} The Commission finds that under Ohio Adm.Code 3745-37-03(C)(2), substantial compliance with Ohio Adm.Code Chapter 3745-400 alone is not sufficient to establish the lawful issuance of a C&DD license. Instead, Ohio Adm.Code 3745-37-03(C)(2) requires the licensing authority to affirmatively find that the applicant has operated in substantial compliance with both Ohio Adm.Code Chapter 3745-37 and R.C. Chapter 3714, in addition to having operated in substantial compliance with Ohio Adm.Code Chapter 3745-400. Accordingly, Appellant's failure to answer Director's Requests for Admission Two, Three, and Four—which establish that TWL and Tervita operated the Negley Facility in substantial compliance with Ohio Adm.Code Chapter

3745-400 only—is not, in isolation, sufficient to conclusively establish that the Director’s issuance of the 2011, 2012, and 2013 C&DD licenses was lawful and reasonable.

{¶24} The Commission finds the Director established that TWL and Tervita operated the Negley Facility in substantial compliance with Ohio Adm.Code Chapter 3745-400, but has not established that the facility operated in substantial compliance with Ohio Adm.Code Chapter 3745-37 or Ohio Revised Code (“R.C.”) Chapter 3714.

{¶25} Nonetheless, the Commission notes that several assignments of error are essentially based upon various provisions of Ohio Adm.Code Chapter 3745-400. Further, as discussed below, Mr. Wallace alleges numerous violations of Ohio law outside of the scope of what the Director must consider when evaluating a C&DD license application under Ohio Adm.Code 3745-37-03(C)(2). Thus, in the interest of judicial economy, the Commission will now discuss Mr. Wallace’s twenty-three assignments of error.

C. Original Notice of Appeal

{¶26} Mr. Wallace raises sixteen assignments of error in in his original Notice of Appeal, filed February 19, 2013.

i. Assignment of Error 1

The Director’s action in issuing the license was unreasonable and/or unlawful because the landfill is discharging contaminants and pollutants, including toxic and hazardous wastes, into the groundwater and surface waters in the vicinity of the landfill in violation of OAC 3745-1-05 of Ohio law. and
Director NPDES PERMIT Not In compliance with the provisions of the Federal Water Pollution Control Act.
as amended (33 U.S.C. 1251 et. seq., hereinafter referred to as the “Act”),
and the Ohio Water Pollution Control Act (Ohio Revised Code Section 6111).

{¶27} Mr. Wallace argues that the Negley Facility is polluting groundwater and surface water and that the facility is not operating in compliance with the terms of a National Pollutant Discharge Elimination System (“NPDES”) permit,⁴ the federal Clean Water Act, and the Ohio Water Pollution Control Act.

{¶28} As an initial matter, the Commission notes that compliance with NPDES permit terms, the federal Clean Water Act, and the Ohio Water Pollution Control Act fall outside the scope of the Director’s evaluation of a C&DD license application under Ohio Adm.Code 3745-37-03(C)(2). Ohio Adm.Code 3745-37-03(C)(2) explicitly requires the Director to consider substantial compliance with Ohio Adm.Code Chapter 3745-400, Ohio Adm.Code Chapter 3745-37, and R.C. Chapter 3714.

{¶29} Ohio Adm.Code 3745-400-11(B)(16), which is within the scope of the Director’s evaluation under Ohio Adm.Code 3745-37-03(C)(2), provides that the “owner or operator [of a C&DD disposal facility] shall not cause water pollution.” As discussed above, however, Mr. Wallace is deemed to have admitted that the Negley Facility operated in substantial compliance with Ohio Adm.Code Chapter 3745-400 from 2010 through 2012. Accordingly, Assignment of Error 1 is not well-taken.

ii. Assignment of Error 2

The Director’s action in using the license was unreasonable and/or unlawful because the landfill is depleting the groundwater beneath the landfill and also depleting the source of numerous local springs in violation of OAC 3745-520 of Ohio law.

{¶30} Mr. Wallace argues that the operation of the Negley Facility is “depleting” the groundwater near the facility. Although the precise nature of this assignment of error is unclear, the Commission construes Mr. Wallace’s claim as

⁴ The record does not indicate whether the Director issued an NPDES permit for the Negley Facility.

asserting that the operation of the Negley Facility constitutes an unlawful “taking” under the Ohio and/or Federal Constitution. It is well-established that the Commission lacks jurisdiction to hear constitutional challenges. E.g., *Bohne v. Koncelik*, ERAC No. 225990 (Aug. 7, 2008). Accordingly, to the extent that Mr. Wallace advances a constitutional claim, Assignment of Error 2 is not well-taken.

{¶31} Furthermore, Ohio Adm.Code Chapter 3745-520 [Construction and Demolition Debris Facilities.] contains only one regulation, Ohio Adm.Code 3745-520-50 [Ground water monitoring fee.]. This regulation pertains exclusively to ground water monitoring fees and does not address ground or surface water depletion. Additionally, Ohio Adm. Code Chapter 3745-520 is outside the scope of the Director’s evaluation of a C&DD license application under Ohio Adm.Code 3745-37-03(C)(2), which requires the Director to determine whether a facility was operated in “substantial compliance” with Ohio Adm.Code Chapter 3745-400, Ohio Adm.Code Chapter 3745-37, and R.C. Chapter 3714. The Director was not required to consider whether the Negley Facility operated in “substantial compliance” with Ohio Adm.Code Chapter 3745-520 in evaluating Tervita’s 2013 C&DD license application. Thus, to the extent Mr. Wallace alleges a violation of Ohio Adm.Code Chapter 3745-520, Assignment of Error 2 is not well-taken.

iii. Assignment of Error 3

The Director’s action in issuing the license was unreasonable and/or unlawful because its operation constitutes a public nuisance due to the emission of dust and other air contaminants and heavy equipment noise on a continuing basis in violation of OAC 3745-27-01 of Ohio law

{¶32} As discussed above, the Director need only consider substantial compliance with Ohio Adm.Code Chapter 3745-400, Ohio Adm.Code Chapter 3745-37, and R.C. Chapter 3714 in evaluating a C&DD license application under Ohio Adm.Code

3745-37-03(C)(2). Thus, substantial compliance with Ohio Adm.Code 3745-27-01 is outside the scope of such evaluation.

{¶33} Ohio Adm.Code 3745-400-11(B)(15), which is within the scope of the Director's evaluation under Ohio Adm.Code 3745-37-03(C)(2), prohibits a C&DD disposal facility from operating in a manner that constitutes a nuisance. As discussed above, however, Mr. Wallace is deemed to have admitted that the Negley Facility operated in substantial compliance with Ohio Adm.Code Chapter 3745-400. Accordingly, Assignment of Error 3 is not well-taken.

iv. Assignment of Error 4

The Director's action in issuing the license was unreasonable and/or unlawful because the landfill has filled in streams and springs in the vicinity of the landfill without a lawful permit authorizing such filling in continuous violation of OAC 3745-27-02(K)(2) and 3745-520 of Ohio law.

{¶34} Here, Mr. Wallace appears to argue that TWL and/or Tervita should have been required to obtain a Section 404 permit from the Army Corps of Engineers pursuant to 33 United States Code 1344, which governs permits for dredged or fill material. To the extent Assignment of Error 4 alleges that federal law prohibits the activity authorized under the Negley Facility's 2013 C&DD license, Mr. Wallace essentially raises a claim based upon the Supremacy Clause, over which the Commission lacks jurisdiction. *Sierra Club v. Koncelik*, ERAC Nos. 256002-256006 (Feb. 29, 2012).

{¶35} Ohio Adm.Code Chapter 3745-27 [Solid Waste and Infectious Waste Regulations.], and Ohio Adm.Code Chapter 3745-520, and its sole regulation addressing ground water monitoring fees, are outside of the scope of the Director's evaluation of a C&DD license application under Ohio Adm.Code 3745-37-03(C)(2). To the extent Assignment of Error 4 alleges ongoing violations of these rules, Assignment of Error 4 is not well-taken.

v. *Assignment of Error 5*

The Director's action in issuing the license was unreasonable and/or unlawful because the Groundwater monitoring system authorized by the license is inadequate because distribution and characteristics of materials are not defined properly the zones requiring monitoring may be identified incorrectly, and releases may remain undetected. as evidenced by the monitoring wells records past year and half 2011-2012 not detecting the year long leachate outbreak on st. rt. 170; site hydrogeology has been improperly documented facility in violation and requires sanction OAC 3714.101 of Ohio law.

{¶36} Mr. Wallace argues that the groundwater monitoring system at the Negley Facility is insufficient to detect releases of contaminants and that the site characterization report fails to accurately describe hydrology beneath the facility. In essence, Mr. Wallace argues that the groundwater monitoring system fails to meet the requirements of Ohio Adm.Code 3745-400-10 and that the site characterization report submitted to the Director during as a part of Tervita's license application failed to meet the requirements of Ohio Adm.Code 3745-400-09. As discussed above, Mr. Wallace is deemed to have admitted that the Negley Facility operated in substantial compliance with Ohio Adm.Code Chapter 3745-400. Accordingly, Assignment of Error 5 is not well-taken.

vi. *Assignment of Error 6*

The Director's action in issuing the license was unreasonable and/or unlawful because the landfill has failed to accurately identify the nature of the site and the hydrogeology beneath and beside the facility in violation of OAC 3745-27-02(K)(2) of Ohio law.

{¶37} The Commission finds Mr. Wallace's Assignment of Error 6 in his original Notice of Appeal most closely aligns with Ohio Adm.Code 3745-400-09(C), which requires site characterization reports to include certain information about ground

and surface water.⁵ In essence, Mr. Wallace argues that the site characterization report included as a part of Tervita's 2013 C&DD license application did not satisfy the requirements of Ohio Adm.Code 3745-400-09(C) in that it failed to accurately characterize the hydrogeology beneath the facility. As discussed above, Mr. Wallace is deemed to have admitted that the Negley Facility operated in substantial compliance with Ohio Adm.Code Chapter 3745-400.

{¶38} Further, Ohio Adm.Code Chapter 3745-27 [Solid Waste and Infectious Waste Regulations.] is outside the scope of the Director's evaluation of a C&DD license application under Ohio Adm.Code 3745-37-03(C)(2).

{¶39} Accordingly, Assignment of Error 6 is not well-taken.

vii. *Assignment of Error 7*

The Director's action in issuing the license was unreasonable and/or unlawful because it fails consider and prevent harm to the public and to the environment from the extensive mining activities that have occurred at the landfill site and the fault that was detected with test bore #1 & # 2 of the site characterization report and cross section B-B map dated 2-29-00 which creates a very real potential for subsidence in violation of OAC 3745-27-01(M)(2) (U) (2) of Ohio law.

{¶40} Again, Mr. Wallace appears to argue that the site characterization report failed to meet the requirements Ohio Adm.Code 3745-400-09(C). As discussed above, Mr. Wallace is deemed to have admitted that the Negley Facility operated in substantial compliance with Ohio Adm.Code Chapter 3745-400 from 2010 through 2012.

{¶41} Further, as discussed above, Ohio Adm.Code Chapter 3745-27 is not subject to the Director's inquiry under Ohio Adm.Code 3745-37-03(C)(2).

{¶42} Therefore, Assignment of Error 7 is not well-taken.

⁵ Ohio Adm.Code 3745-400-09 governs site characterization reports, which must be included as a component of a C&DD license application pursuant to Ohio Adm.Code 3745-37-02(E)(1) and 3745-400-07(A)(1).

viii. *Assignment of Error 8*

The Director's action in issuing the license was unreasonable and/or unlawful because the landfill was originally permitted in violation of OAC 3734.44 of Ohio law [reference G-14

{¶43} Mr. Wallace argues that the Director's issuance of the 2013 C&DD license is unlawful and/or unreasonable because the Director previously issued an unlawful permit to install pursuant to R.C. Chapter 3734 [Solid and Hazardous Waste]. As discussed above, compliance with R.C. Chapter 3734 is outside the scope of the Director's evaluation of a C&DD license application under Ohio Adm.Code 3745-37-03(C)(2). Accordingly, Assignment of Error 8 is not well-taken.

ix. *Assignment of Error 9*

The Director's action in issuing the license was unreasonable and/or unlawful because oepa engineers are in violation of OAC 4733-35-03 (A) (C) of Ohio law

{¶44} Here, Mr. Wallace argues that the Director's issuance of the 2013 C&DD license is unlawful and/or unreasonable because Ohio EPA engineers violated Ohio Adm.Code 4733-35-03, which governs ethical responsibilities for engineers and surveyors. Ohio Adm.Code 3745-37-03(C)(2) does not require the Director to consider substantial compliance with Ohio Adm.Code Chapter 4733-35 when evaluating a C&DD license application. Accordingly, Assignment of Error 9 is not well-taken.

x. *Assignment of Error 10*

The Director's action in issuing the license was unreasonable and/or unlawful because oepa engineers are in violation of OAC 4733-35-07 (B) of Ohio law

{¶45} Mr. Wallace argues that the Director's issuance of the 2013 C&DD license for the Negley Facility is unlawful and/or unreasonable because Ohio EPA engineers violated Ohio Adm.Code 4733-35-07, which defines improper conduct for engineers and surveyors. Ohio Adm.Code 3745-37-03(C)(2) does not require consideration of substantial compliance with Ohio Adm.Code Chapter 4733-35 when evaluating a C&DD license application. Accordingly, Assignment of Error 10 is not well-taken.

xi. *Assignment of Error 11*

The Director's action in issuing the license was unreasonable and/or unlawful because TWL are in violation of 3745-520 of Ohio law GENERAL SETBACKS

{¶46} Ohio Adm.Code Chapter 3745-520 contains one regulation, and it governs the groundwater monitoring fee levied on C&DD disposal facilities. It lacks any reference to "general setbacks." To the extent it may be possible be in non-compliance with Ohio Adm.Code Chapter 3745-520, the Commission notes that the provision is outside the scope of the Director's evaluation of a C&DD license application under Ohio Adm.Code 3745-37-03(C)(2).

{¶47} Ohio Adm.Code 3745-400-09(B)(5)-(7) contains certain setback provisions. The regulation states that a "ground water monitoring well system * * * is required * * * unless * * *," among other conditions, several setback requirements are met. However, as discussed above, Mr. Wallace is deemed to have admitted that the

Negley Facility operated in substantial compliance with Ohio Adm.Code Chapter 3745-400 between 2010 and 2012.

{¶48} Accordingly, Assignment of Error 11 is not well-taken.

xii. Assignment of Error 12

The Director's action in issuing the license was unreasonable and/or unlawful because TWL are in violation of OAC 3745-520 of Ohio law ISOLATION DISTANCE

{¶49} As noted previously, Ohio Adm.Code Chapter 3745-520 governs the groundwater monitoring fee levied on C&DD disposal facilities and lacks any reference to "isolation distances." To the extent it may be possible be in non-compliance with Ohio Adm.Code Chapter 3745-520, the Commission notes that the provision is outside the scope of the Director's evaluation of a C&DD license application under Ohio Adm.Code 3745-37-03(C)(2).

{¶50} Ohio Adm.Code 3745-400-09(B)(1)-(4) contains certain isolation distance provisions. The regulation states that a "ground water monitoring well system * * * is required * * * unless * * *," among other conditions, several isolation distance requirements are met. However, to the extent that Assignment of Error 12 can be construed as alleging a violation of Ohio Adm.Code 3745-400-09(B)(1)-(4), the Commission notes that Mr. Wallace is deemed to have admitted that the Negley Facility operated in substantial compliance with Ohio Adm.Code Chapter 3745-400.

{¶51} Accordingly, Assignment of Error 12 is not well-taken.

xiii. Assignment of Error 13

The Director's action in issuing the license was unreasonable and/or unlawful because TWL are in violation of OAC 3745-400-11 (E) (O) (1) (2) (3) (B) of Ohio law

{¶52} Here, Mr. Wallace argues that the Director's issuance of the 2013 C&DD license was unreasonable and/or unlawful because the Negley Facility did not operate in compliance with Ohio Adm.Code 3745-400-11(B), Ohio Adm.Code 3745-400-11(E), and Ohio Adm.Code 3745-400-11(O). As discussed above, however, Mr. Wallace is deemed to have admitted that the Negley Facility operated in substantial compliance with Ohio Adm.Code Chapter 3745-400 between 2010 and 2012. Accordingly, Assignment of Error 13 is not well-taken.

xiv. Assignment of Error 14

The Director's action in issuing the license was unreasonable and/or unlawful because TWL are in violation of OAC 3745-400-07 (B) of Ohio law

{¶53} Mr. Wallace argues that the Director's issuance of the 2013 C&DD license was unreasonable and/or unlawful because the Negley Facility did not operate in compliance with Ohio Adm.Code 3745-400-07, which governs facility design requirements and construction specifications. As discussed above, however, Mr. Wallace is deemed to have admitted that the Negley Facility operated in substantial compliance with Ohio Adm.Code Chapter 3745-400 between 2010 and 2012. Therefore, Assignment of Error 14 is not well-taken.

xv. *Assignment of Error 15*

The Director's action in issuing the license was unreasonable and/or unlawful because permit is in violation of OAC 3745-1-54 (b) (vii) (3)of Ohio law

{¶154} Here, Mr. Wallace argues that the Director's issuance of the 2013 C&DD license was unreasonable and/or unlawful because Negley Facility did not operate in compliance with Ohio Adm.Code 3745-1-54, Ohio's wetlands anti-degradation rule. As discussed above, Ohio Adm.Code 3745-37-03(C)(2) does not require the Director to consider substantial compliance with Ohio Adm.Code 3745-1-54 when evaluating a C&DD license application. Assignment of Error 15 is not well-taken.

xvi. *Assignment of Error 16*

The Director's action in issuing the license was unreasonable and/or unlawful because TWL are in violation of OAC 3745-27-02 (K) (2)of Ohio law

{¶155} Mr. Wallace argues that the Director's issuance of the 2013 C&DD license is unlawful and/or unreasonable because the Director previously issued an unlawful permit to install pursuant to Ohio Adm.Code 3745-27 [Solid Waste and Infectious Waste Regulations.]. As discussed above, compliance with Ohio Adm.Code 3745-27-02 is outside the scope of the Director's evaluation of a C&DD license application under Ohio Adm.Code 3745-37-03(C)(2). Therefore, Assignment of Error 16 is not well-taken.

D. Amended Notice of Appeal

{¶156} The Commission will also discuss the seven assignments of error raised in Mr. Wallace's Amended Notice of Appeal, filed March 8, 2013.

i. Assignment of Error 1

The Directors action in issuing the 2013 license and permit is unreasonable and/or unlawful because the license and permit is likely to adversely affect the public health or safety or the environment in violation of Ohio Adm. The Directors Code 3745-400-15(c).

{¶157} Here, Mr. Wallace argues that the 2013 C&DD was unlawful and/or unreasonable because the Director previously granted an unlawful/unreasonable modification under Ohio Adm.Code 3745-400-15. Although Ohio Adm.Code 3745-400-15 does not appear to impose substantive restrictions on the *operation* of a C&DD disposal facility, the Commission notes that Mr. Wallace is deemed to have admitted that the Negley Facility operated in substantial compliance with Ohio Adm.Code Chapter 3745-400 between 2010 and 2012. Thus, Assignment of Error 1 in Mr. Wallace's Amended Notice of Appeal is not well-taken.

ii. Assignment of Error 2

The Director's action in issuing the 2013 license and permit is unreasonable and/or unreasonable because the landfill has failed to accurately identify the nature or the site and the hydrology beneath the facility.

{¶158} Similar to Assignment of Error 5 in his original Notice of Appeal, Mr. Wallace appears to argue that the site characterization report included as a part of the 2013 C&DD license application failed to meet the requirements of Ohio Adm.Code 3745-400-09(C) in that it failed to accurately characterize the hydrology beneath the facility. As discussed above, however, Mr. Wallace is deemed to have admitted that the Negley Facility operated in substantial compliance with Ohio Adm.Code Chapter 3745-400 from 2010 through 2012. Accordingly, Assignment of Error 2 in Mr. Wallace's Amended Notice of Appeal is not well-taken.

iii. Assignment of Error 3

The Directors action in issuing the 2013 license and permit is unreasonable and/or unlawful because the Director's action fails to consider and prevent harm to the public and to the environment from the extensive mining activities that have occurred at the landfill site and the resulting potential for subsidence and failure of the landfill's engineering features.

{¶59} Similar to Assignment of Error 7 in his original Notice of Appeal, Mr. Wallace appears to argue that the site characterization report failed to meet the requirements Ohio Adm.Code 3745-400-09(C) in that it failed to identify mines located beneath the facility. As discussed above, Mr. Wallace is deemed to have admitted that the Negley Facility operated in substantial compliance with Ohio Adm.Code Chapter 3745-400. Thus, Assignment of Error 3 in Mr. Wallace's Amended Notice of Appeal is not well-taken.

iv. Assignment of Error 4

The Director's action is issuing the 2013 license and permit is unreasonable and unlawful Because the Director's action fails to consider and comply with the applicable regulatory Requirement that the facility and its components be constructed on a surface able to bear the weight of the facility without allowing a failure to occur through settling.

{¶60} As with Assignment of Error 7 in his original Notice of Appeal and Assignment of Error 3 in his Amended Notice of Appeal, Mr. Wallace appears to argue that the site characterization report failed to meet the requirements Ohio Adm.Code 3745-400-09(C). Again, Mr. Wallace is deemed to have admitted that the Negley Facility operated in substantial compliance with Ohio Adm.Code Chapter 3745-400. Thus, Assignment of Error 4 in Mr. Wallace's Amended Notice of Appeal is not well-taken.

v. *Assignment of Error 5*

The Director's action in issuing the 2013 license and permit is unreasonable and unlawful because the Director's action fails to address, consider, and prevent harm to the public health and safety and to the environment arising from the likelihood of water pollution through contamination of the groundwater beneath the facility and the failure to adequately monitor for such contamination.

{¶61} Similar to Assignments of Error 5 and 6 in his original Notice of Appeal, Mr. Wallace appears to argue that the site characterization report and the groundwater monitoring system do not satisfy the requirements of Ohio Adm.Code 3745-400-09(C) and Ohio Adm.Code 3745-400-10, respectively. Regarding the alleged defect with the site characterization report, the Commission notes that Mr. Wallace is deemed to have admitted that the Negley Facility operated in substantial compliance with Ohio Adm.Code Chapter 3745-400, which includes the applicable regulations governing site characterization reports.

{¶62} Likewise, regarding the alleged defect with the groundwater monitoring system, Mr. Wallace's admission with respect to Ohio Adm.Code Chapter 3745-400 controls, as the pertinent regulations governing groundwater monitoring plans are contained within Ohio Adm.Code 3745-400-10.

{¶63} Assignment of Error 5 in Mr. Wallace's Amended Notice of Appeal is not well-taken.

vi. *Assignment of Error 6*

The Director's action in issuing the 2013 license modification is unreasonable and unlawful because the landfill is currently discharging contaminants and pollutants, including toxic and hazardous wastes ,into the groundwater and surface waters in the vicinity of the landfill in violation of Ohio law, including discharges contaminating Little Beaver Creek, a wild and scenic river.

{¶64} Similar to Assignment of Error 1 in his original Notice of Appeal, Mr. Wallace argues that the Director's issuance of the 2013 C&DD license is unreasonable and/or unlawful because the Negley Facility is currently polluting surface and groundwater. The Commission recognizes that Ohio Adm.Code 3745-400-11(B)(16) prohibits the operation of a C&DD facility in a manner that causes water pollution. As discussed above, however, Mr. Wallace is deemed to have admitted that the Negley Facility operated in substantial compliance with Ohio Adm.Code Chapter 3745-400 from 2010 through 2012. Accordingly, Assignment of Error 6 in Mr. Wallace's Amended Notice of Appeal is not well-taken.

vii. *Assignment of Error 7*

The Director's action in issuing the 2013 license and permit is unreasonable and/or unlawful because the landfill is depleting the groundwater beneath the landfill and the source water of numerous local spring streams and thereby adversely affects the environment and neighboring Landowner's water rights.

{¶65} Finally, as in his Assignment of Error 2 in his original Notice of Appeal, Mr. Wallace argues, in essence, that the operation of the Negley Facility constitutes an unlawful "taking" under the Ohio and/or Federal Constitution. The Commission lacks jurisdiction to hear constitutional claims, and thus, Assignment of Error 7 in Mr. Wallace's Amended Notice of Appeal is not well-taken.

E. Motion for Summary Judgment –2013 Appeal

{¶66} In light of the foregoing, the Commission finds that there are no genuine issues of material fact and that the Director is entitled to judgment as a matter of law. Mr. Wallace admits the Negley Facility operated in substantial compliance with Ohio Adm.Code Chapter 3745-400 between 2010 and 2012, and other alleged violations raised in Mr. Wallace’s assignments of error either do not fall within the scope of the Director’s evaluation of a C&DD license application or fall outside of the Commission’s jurisdiction.

{¶67} Having found Mr. Wallace’s twenty-three Assignments of Error not well-taken, the Commission GRANTS the Director’s Motion for Summary Judgment with respect to his challenge to the Negley Facility’s 2013 C&DD license.

F. Motion for Summary Judgment – 2011 and 2012 Appeals

{¶68} Further, because the Commission granted the Director’s Motion for Summary Judgment as it relates to Mr. Wallace’s 2013 appeal, the Commission finds Mr. Wallace’s appeals of the 2012 and 2011 C&DD licenses are MOOT because the Commission would be unable to grant meaningful relief.

FINAL ORDER

{¶69} For the foregoing reasons, the Commission hereby GRANTS the Director’s Motion for Summary Judgment and ORDERS that the above-captioned appeals be DISMISSED.

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

Any party adversely affected by an order of the commission may appeal to the court of appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred. The party so appealing shall file with the commission a notice of appeal designating the order from which an appeal is being taken. A copy of such notice shall also be filed by the appellant with the court, and a copy shall be sent by certified mail to the director or other statutory agency. Such notices shall be filed and mailed within thirty days after the date upon which appellant received notice from the commission of the issuance of the order. No appeal bond shall be required to make an appeal effective.

**The Environmental Review
Appeals Commission**

Entered into the Journal of the
Commission this _____ day
of July 2013.

Melissa M. Shilling, Chair

Shaun K. Petersen, Vice Chair

Michael G. Verich, Member

Copies Sent to:

DENNIS SCOTT WALLACE
SCOTT NALLY, DIRECTOR OF
ENVIRONMENTAL PROTECTION
TOTAL WASTE LOGISTICS, LLC
TERVITA, LLC
HARRY J. HERBERT
Julianna Bull, Esq.
John F. Cayton, Esq.
Nicholas J. Bryan, Esq.
Michael A. Cyphert, Esq.
Leslie G. Wolf, Esq.

[CERTIFIED MAIL]
[CERTIFIED MAIL]
[CERTIFIED MAIL]
[CERTIFIED MAIL]