

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION

STATE OF OHIO

RON AND PAM BROERING	:	Case No. ERAC 195635
	:	
Appellants	:	
v.	:	
	:	
FRED DAILEY, DIRECTOR OF	:	
AGRICULTURE, ET AL.	:	
	:	
Appellees.	:	Issued: April 13, 2005

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND FINAL ORDER

Issued By:

ENVIRONMENTAL REVIEW APPEALS
COMMISSION

Toni E. Mulrane, Chair
Julianna F. Bull, Vice-Chair
Melissa M. Shilling, Member

309 S. Fourth Street, Room 222
Columbus, Ohio 43215

Telephone: 614/466-8950

COUNSEL FOR APPELLANT:

Appellants appeared *pro se*

COUNSEL FOR APPELLEE
DIRECTOR:

Mary Elizabeth Ruttan, Esq.
Assistant Attorney General
Environmental Enforcement Section
30 East Broad Street, 25th Floor
Columbus, Ohio 43215

COUNSEL FOR APPELLEE ROSS-
MEDFORD FARMS, LLC

Jack A. Van Kley, Esq.
JONES DAY
P.O. Box 165017
Columbus, Ohio 43216-5017

This matter comes before the Environmental Review Appeals Commission ("ERAC," "Commission") upon the July 15, 2004 appeal filed by Appellants Ron and Pam Broering of the June 18, 2004 issuance of a Permit to Install ("PTI") and Permit to Operate ("PTO") to Appellee Ross-Medford Farms, LLC ("Ross-Medford") by Appellee Director of the Ohio Department of Agriculture ("Director," "ODA," "Department").

A *de novo* hearing was held before the full Commission on February 7 - 8, 2005. Appellants Ron and Pam Broering appeared *pro se*. Appellee Ross-Medford was represented by Mr. Jack A. Van Kley, Esq., Jones Day, Columbus, Ohio. Appellee Director was represented by Ms. Mary Elizabeth Ruttan, Esq., Assistant Attorney General, State of Ohio.

Based upon the testimony and evidence adduced at the *de novo* hearing, the Certified Record ("CR") which was jointly moved into evidence, and the depositions of Steve Oftelie, Ron Hubenthal and William Randall, which were moved without objection into evidence by Appellee Ross-Medford, the Commission hereby makes the following Findings of Fact, Conclusions of Law and Final Order affirming the Director's issuance of PTI No. ROSS-0001.PI001.DARK and PTO No. ROSS-0001.PO001.DARK to Appellee Ross-Medford.

FINDINGS OF FACT

1. On January 27, 2004, Brian and Kevin Winner, Ralph, Chris and Randy Rindler and Kasey and Ronald Schwieterman submitted an application for a PTI and PTO to the ODA via e-mail on behalf of Ross-Medford Farms, LLC. Ross-Medford Farms is located on a parcel of land situated at 13803 Ross-Medford Road, New Weston, Darke County, Ohio. The application, which had

been prepared by Kasey Schwieterman, in conjunction with Ross-Medford's consultant, Steve Carter, P.E., of TriCar Ltd., stated that it was for a proposed expansion of an existing concentrated animal feeding facility ("CAFF") into a major concentrated animal feeding facility ("MCAFF")¹. Mr. Schwieterman's cover letter, which accompanied the e-mail indicated, "I also mailed our attachments (such as soil tests, water tests, crop rotations, certified livestock manager paperwork, etc.) this afternoon. You should be receiving them in the mail in the next day or two." (CR Item 123; testimony, Kasey Schwieterman.)

2. The existing CAFF is a poultry farm owned by the Winner family ("WB Poultry") that was permitted by the ODA to house 183,000 laying hens in one high rise barn. The proposed expansion, to be renamed "Ross-Medford Farms," will accommodate 1,277,000 laying hens. Specifically, the PTI would allow the construction of four additional barns, each with a design capacity of 288,000 laying hens, one covered manure storage building, with a storage capacity of 7 ½ months, and one manure storage facility (hereinafter referred to as the "egg wash pond") with a total storage volume ("TSV") of 2 million gallons. Specifically, the egg wash pond will hold water and detergent generated during the egg washing process, as well as minute amounts of manure washed off of the eggs. (CR Item 123; testimony, Brian Winner.)

3. Of particular relevance for purposes of the instant appeal are the questions numbered "5.j." and "8" in Part B of the application filed by Appellee Ross-Medford. Specifically, question 5.j. of the application, and Appellee's response thereto, provided as follows:

5. Siting Criteria for a Manure Storage or Treatment Facility 901:10-2-02

¹ The definitions of "concentrated animal feeding facility" and "major concentrated feeding facility" are set out in Ohio Revised Code Section ("R.C.") 903.01. In general, MCAFFs have a total design capacity of more than ten times the design capacity of a CAFF.

Note: ODA can assist the owner/operator with these determinations

a. . . .

j. A fabricated structure or manure storage pond or manure treatment lagoon that contains liquid manure shall be located no closer than: Rule 901:10-2-02

No, This MCAFF wastewater holding pond will be with in (sic.) 2000 ft. of a neighboring residence. ODA allowance was given based on reason that we will aeriate (sic.) the wastewater holding pond.²

1,000 ft. of a neighboring residence - if CAFF
2,000 ft. of a neighboring residence - if MCAFF

If the fabricated structures for new or expanded facilities do not meet the restrictions set forth in paragraphs i. and j., above, then the applicant must provide for additional designs as described in the Appendix to Rule 901:10-2-02.
(CR Item 8, emphasis and bold in original.)

4. Additionally, question 8 in Part B of the application requested the following information of relevance to the instant appeal:

In addition to the information required in this **Part B Application for a Permit to Install**, a complete application for a Permit to Install (PTI) (or a permit to modify by an expansion of 10 per cent or more over the authorized design capacity) must have the following included and submitted for a complete application: . . .

8. Site Map 901:10-2-01(C)(5)
Map

a. . . .

b. For a major concentrated animal feeding facility of 10,000 animal

² Brian Winner and Kasey Schwieterman testified that the aeration technology referenced in response to question 5.j. in the original application filed on January 27, 2004 was a windmill with attached tubes running into the bottom of the egg wash pond. (Testimony Winner, Schwieterman.)

units³ or more provide a site map of the location of the manure storage and treatment facilities that demonstrates a 2,000 foot radius of surrounding this location.

- c. For both a. and b., above, include any landmarks such as residence (sic.) or barns or machine storage that serve as points of reference for boundaries and for locations of manure storage and treatment facilities. . . .
- e. For a. and b., above, insure that the map shows location and compliance with the siting criteria for manure storage and treatment facilities. (CR Item 123; bold in original.)

5. Mr. Andy Ety, P.E., a Livestock Environmental Engineer in the Livestock Environmental Permitting Program ("LEPP") at the ODA, is the individual at the Department who had primary responsibility for reviewing the instant applications. On March 15, 2004, Mr. Ety e-mailed four pages of Department comments on Ross-Medford's PTI/PTO applications to Kasey Schwieterman, Steve Carter, Kevin Elder⁴, Randy Rindler and Brian Winner. The comments specifically addressed Appellee's responses to questions 5.j. and 8 in Part B of the application as follows:

2. Page 5 - Item J- In regards to siting criteria from neighboring residences, I have reworded this on the attached PTI form.⁵ In addition, I talked to Brian Winner and

³ For purposes of laying hens, "animal units" was a term previously defined in R.C. 903.01(C) as "[t]he number of laying hens or broilers multiplied by one-hundredth." Amendments effective November 5, 2003 delete references to animal units, and instead define CAFFs and MCAFFs in terms of the absolute numbers of animals present at the facility.

⁴ Kevin Elder is the Executive Director of the Livestock Environmental Permitting Program at the ODA.

⁵ The reworded statement provided by Mr. Ety provided as follows:

No, this MCAFF wastewater holding pond will be within 2000 ft. of a neighboring residence. ODA rules allow for a reduction of siting criteria from neighboring residences if proven technology is implemented into the design of the system. One

told him that we would need some description/design specifications included as part of the permit application.

3. Page 6 - Item #8 - Site Map - Provide a site map that shows the facility and other relevant items requested in a.-e. of this item. Make sure to mark a production well as the one that will be used to pull water quality sample. An aerial map of the facility will suffice by drawing or identifying required features (wells, property lines, neighboring residences, etc.) as was completed for the Rindler Poultry Permit. Also, if this map is not to scale, dimension the distance from the manure storage pond and manure storage building from the features required. Possibly TriCar has this information and could provide a good site map showing these distances and features. (CR Item 115-2.)

6. On March 22, 2004, Kasey Schwieterman e-mailed revisions for the Ross-Medford permit application to Andy Ety. In the cover sheet accompanying the revisions, Mr. Schwieterman indicated as follows:

Attached are the revisions for our permit. Tomorrow, I will be sending via mail an aerial map, new crop rotation sheet, scientific windmill study for the lagoon, and signed notifications from the commissioners/trustees. I count on Steve Carter dropping of (sic.) the engineering changes on Wednesday. I hope that everything looks good to you and if you have any questions or problems, give me a call. (CR Item 112.)

7. Mr. Schwieterman testified that an engineering map delineating the Ross-Medford Farm Expansion, prepared by TriCar Ltd., and an aerial photograph depicting the Ross-Medford Farm property and immediately surrounding area were submitted to ODA. Of seven residences located within 2,000 feet of the proposed egg wash pond, only two were shown on the engineering map. The closest residence, owned by Roger and Patricia Winner and inhabited by one of the partners in Ross-Medford, Kevin Winner, is located approximately 1,000 feet from the egg wash pond;

proven technology that is acceptable based on Appendix to rule 901:10-2-02 is aeration in the manure storage pond. Ross-Medford Farms plans to utilize an aeration system in the proposed manure storage pond as shown on pages ____ to ____ and incorporated as part of the permit information along with detailed drawings for the manure storage pond. (CR Item 115-23.)

and, a residence owned by Lucille Monnin is located approximately 1150 feet from the egg wash pond.⁶ Appellants' residence, which was not depicted on the engineering map, is located approximately 1,600 feet from Appellee's proposed egg wash pond.⁷ (CR Items 8-74, 110-113;

⁶ Ohio Administrative Code Section ("OAC") 901:10-1-01(WW) provides:

Neighboring residence means any occupied permanent dwelling not under ownership of the owner or operator of the facility (sic.) the time the permit to install or permit to operate application is submitted to the director.

At the time the PTI/PTO applications were filed, the residence occupied by Kevin Winner constituted a "neighboring residence" under the definition since the owners of that property (Kevin Winner's parents) were not owners or operators of the facility. At the *de novo* hearing, testimony indicated that Kevin Winner's father had become a partner in Ross-Medford Farms. However, despite the subsequent addition of Mr. Winner as a partner, the relevant time frame under the definition of "neighboring residence" is when the PTI/PTO application is submitted to the Director. Thus, for purposes of the relevant siting criterion, Kevin Winner's home is the closest residence to the egg wash pond, with Mrs. Monnin's home being the next closest. (Testimony, Brian Winner.)

⁷ It is unclear from the evidence in the record precisely when a site map depicting the 2000 foot radius from the egg wash pond was first received by ODA. Mr. Winner testified that an engineering drawing depicting two houses, which was submitted with the original applications, was the site map delineating the relevant 2000 foot radius. Similarly, Mr. Schwieterman testified that this engineering drawing, in conjunction with an aerial photograph depicting the Ross-Medford Farms and immediate vicinity, submitted with the original applications, constituted the required site map. Mr. Ety testified that he agreed with Mr. Schwieterman's assessment that the engineering drawing, in concert with the aerial photograph, satisfied the requirement that the applicant provide a site map. However, it appears to the Commission that the engineering drawing and aerial photograph may have been provided in response to Mr. Ety's March 15, 2004 e-mail to Mr. Schwieterman, since the first time these items appear in the Certified Record is in the Draft Permits dated, April 13, 2004. (CR Item 110-155 and 110-113.) Finally, a more expansive aerial map, containing circles depicting a 2,000 foot radius from various points of the egg wash pond, and clearly delineating all seven residences located within the 2,000 foot radius, first appears in the Certified Record as the last page of the final permits. Testimony relative to this map indicated that it was prepared by Appellee Ross-Medford, with assistance from ODA personnel, at some point after the May 20, 2004 public meeting, but prior to the Director making his final decision on Appellee's applications. (CR Item 110-155; CR Item 115; CR 8-197; Testimony, Winner, Schwieterman, Ety.)

testimony, Brian Winner, Pam Broering.)

8. Mr. Winner and Mr. Schwieterman both testified regarding the engineering drawing's failure to depict all seven residences located within 2000 feet of the egg wash pond. Specifically, Mr. Winner testified that he knew in January, 2004 that there were seven residences within the prescribed 2000 foot radius, however, once Ross-Medford was committed to using proven technology to have the relevant siting criterion reduced it did not matter if there was "one residence or fifty residences" within the pertinent area. Similarly, Mr. Schwieterman testified that once he knew that there was one residence within 2000 feet of the egg wash pond, he knew that proven technology would be required, so it did not matter if there was more than one residence within the prescribed area. (Testimony, Winner, Schwieterman.)

9. On April 15, 2004, the Department sent letters to interested parties and specified public officials, and issued a news release to various media outlets regarding Ross-Medford's Draft PTI/PTO. The news release and letters contained information concerning a public information session to be held on May 6, 2004 and a public meeting scheduled for May 20, 2004. The news release stated "[a]t the public information session, a presentation about the draft permits will be made, followed by a question and answer session." The news release further provided that the May 20, 2004 public meeting "will be a time when interested persons can submit oral or written comments on the record concerning the draft Permit to Install and draft Permit to Operate for Ross-Medford Farms." Finally, the news release indicated that copies of the draft permits could be viewed at the ODA, LEPP offices, or at the Darke Soil and Water Conservation District office. (CR Items 103, 104, 105 and 106.)

10. Additionally, on April 16, 2004, the ODA placed a public notice in the *Greenville Daily*

Advocate regarding Ross-Medford's Draft PTI and Draft PTO and the public meeting to be held on May 20, 2004. In pertinent part, the public notice provided as follows:

... Public notice is hereby given that the Ohio Department of Agriculture is accepting comments on Ross-Medford Farm's draft Permit to Install for four 288,000 - laying hen barns, one covered manure storage building and one manure storage pond. ... Public comments are also being accepted on Ross-Medford Farms draft Permit to Operate for the entire farm. ... In accordance with rule 901:10-6-01 of the Ohio Administrative Code, ODA will provide an opportunity for public comment concerning these permits. A request for a public meeting has been made by the permit applicant. Oral comments can be made on the record at the public meeting on May 20, 2004, at 7 p.m. at the Knights of Columbus (Council #2640), 151 East Main St., St. Henry, Ohio 45883. Any person may submit written comments on the draft permits at any time within 30 days. Written comments must be received by ODA no later than 5 p.m. on May 27, 2004, which is 5 business days after the date of the public meeting. ... Copies of the draft Permit to Install and draft Permit to Operate may be reviewed and/or copies made at the ODA Livestock Environmental Permitting Program, 8995 East Main Street, Reynoldsburg, Ohio 43068, by first calling 614-387-0470 to make an appointment. (CR Item 102.)

11. The May 6, 2004 public information session consisted of two discrete portions. First, a technical session was held at 3 p.m. to allow local officials to ask questions about the Draft PTI and Draft PTO. Subsequently, an information session was held at 7 p.m. to allow the public to ask questions regarding the draft permits. Technical staff from the ODA's Livestock Environmental Permitting Program were present at both sessions to answer questions. (CR Items 103, 104.)

12. Thirty-five individuals signed in at the 7 p.m. public information session and twenty-eight cards containing questions about the proposed expansion were submitted at this time. Appellants Ron and Pam Broering were among those in attendance at the 7 p.m. session. (CR Items 93, 94.)

13. On May 7, 2004, the LEPP section of the ODA received a revised set of drawings for the Ross-Medford project. In the cover letter accompanying the drawings, Appellee's consultant,

Steve Carter, explained the purpose of the revisions as follows:

. . . As I mentioned over the phone, the concrete contractor for the project indicated that he could provide the Owners with some cost savings if he were to construct the manure storage building foundation without having to excavate the bottom of the footing. Therefore, at the Owners' request, we have revised the structural details for the proposed manure storage building foundation and wall as shown on Sheet 13 of the revised drawings herein. . . . (CR Item 100.)

14. Seventy-four individuals signed in at the May 20, 2004 public meeting on the Ross-Medford draft permits. Of the attendees, seventeen individuals, including Appellants Ron and Pam Broering, presented oral testimony and three written comments were submitted.⁸ The concerns expressed in the Broerings' testimony, which remain of particular relevance for purposes of the instant appeal, can be summarized as follows:

- Appellee Ross-Medford has failed to provide ODA with an appropriate site map depicting the seven residences located within a 2000 foot radius of the proposed egg wash pond. Specifically, Mrs. Broering testified that "ODA keeps saying there's (sic.) only four residents."

- The Director should not reduce the 2000 foot siting criteria in reliance upon the type of aeration Appellee Ross-Medford is proposing for the egg wash pond because it is not proven technology.⁹ (CR Item 78.)

⁸ All three of the written comments that were submitted were read into the record by individuals who testified at the public meeting.

⁹ The original application submitted by Appellee Ross-Medford proposed the installation of one aerator, powered by a windmill, to control odors at the egg wash pond. In response to concerns expressed during the public comment period regarding the effectiveness of a windmill-powered system on calm days, the partners of Ross-Medford decided to increase the number of aerators and have the system powered by electricity. The record is unclear regarding precisely when the Department received detailed plans and specifications regarding the continual electrical aeration system ultimately proposed and permitted. On June 4, 2004, Steve Oftelie of Aeration Industries faxed Andy Ety "a proposed layout drawing for the seven 2hp Aire-O2 Series II aerators." Further, the final version of the permits contains an eleven page discussion regarding aeration technology, in general, as well as a specific discussion of the technology to be utilized at Ross-Medford. As indicated by their testimony at the May 20, 2004 public meeting, Appellants herein challenged the effectiveness of the originally proposed windmill-powered aeration system, and they continue to challenge the redesigned electrical system contained in the final permits,

15. In addition to the testimony offered at the May 20, 2004 public meeting, the ODA received a number of written and e-mail comments before the close of the public comment period on May 27, 2004. In addition to their oral testimony, Appellants Ron and Pam Broering each submitted written comments to the Department. (CR Items 31-34, 38-44, 48-77, 82-84, 86, 89-92, 92, 95, 96 and 101.)

16. On June 18, 2004, the ODA issued its "Responsiveness summary to public comments on the Ross-Medford Farms draft Permit to Install and draft Permit to Operate." In this responsiveness summary, the Department specifically responded to 88 oral and written comments submitted between April 26, 2004 and May 27, 2004 concerning the draft permits. (CR Item 2.)

17. On that same day, the Director issued PTI No. ROSS-0001.PI001.DARK and PTO No. ROSS-0001.PO001.DARK to Appellee Ross-Medford Farms, LLC. In the cover letter accompanying the permits, the Director stated, in relevant part, as follows:

Based upon findings that the Facilities are of correct design capacity; that the Facilities' Manure Management Plans, Insect and Rodent Control Plans, and Mortality Management Plans all conform to best management practices; and that the Facilities are operated in a manner that protects the waters of the state, the Director orders the Permit to Install and the Permit to Operate to be issued. . . .
(CR Item 8.)

18. Also on June 18, 2004, Kelly Harvey of the ODA staff sent a memorandum to other ODA employees which outlined the "changes and/or revisions" between Appellee Ross-Medford's draft permits and its final permits. Three of the fourteen entries contained in the memorandum are pertinent to the instant proceedings:

alleging that they do not constitute "proven technology" as required in OAC 901:10-2-02(A)(1)(I)(i) to allow for the reduction of the 2,000 foot siting criterion. (Testimony Winner, Schwieterman, Pam Broering, Ron Broering; CR Items 28, 8-48 through 8-58.)

3. Aeration system design product information was exchanged for the aeration research paper. . . .

6. A new aerial property map was added. (exchanged? but I didn't take an old one out) . . .

8. Aeration operation narrative was added. . . . (CR Item 11.)

19. On June 21, 2004, the ODA issued a Fact Sheet regarding Appellee Ross-Medford's Final PTI and PTO in which the Department discussed and addressed the most frequent comments it had received concerning the permits. In relevant part, the Fact Sheet provided as follows:

Siting of the Egg Wash Water Manure Storage Pond

Public comments showed that the largest issue of concern was the siting of the egg wash water manure storage pond. The egg wash pond is legally defined as a liquid manure pond because it contains traces of manure and detergent from washing the eggs. With the completed expansion, Ross-Medford Farms will have more than 1.2 million birds. Any farm with more than 1 million chickens is considered a major concentrated animal feeding facility. With more than 1 million birds, the egg wash water manure storage pond siting criteria would increase to 2,000 feet from the nearest residence; . . .

Ross-Medford Farms proposed to install aerators in the egg wash pond to reduce odors and reduce siting of the pond from the nearest resident - something allowable under state rules when using this technology. It is the first time a farm has requested to use this rule to reduce siting criteria. . . .

Aeration in the Egg Wash Water Manure Storage Pond

Aeration is listed in the rules (Rule 901:10-2-02 of the Ohio Administrative Code) as a proven technology; therefore it does not have to be proven for each permit. Because of the many comments concerning aeration by use of a windmill, the farm submitted a revised detailed aeration design powered by electricity for the final permit. The mechanical equipment actually used in the pond will be seven aerators operated by two-horse powered (sic.) electrical motors. Ross-Medford changed the design to a continual aeration system, consisting of electrical motors, with an alarm in the office if the power to the motor fails. The controlling factor in the design is the mixing requirements for stagnant water to get even distribution and mixing of the oxygen. Therefore, seven aerators will be used to mix the egg wash water manure storage pond when fewer aerators would be required to simply treat

the egg wash water for BOD.¹⁰

Number of residences located within 2,000 feet

A newspaper reporter asked ODA on May 17 how many residences were within 2,000 feet of the egg wash water manure storage pond. ODA erroneously responded by saying four residences were within 2,000 feet. As a result of several public comments on the number of houses located within 2,000 feet of the egg wash water manure storage pond, ODA asked the farm to provide a better site map that included all siting criteria, including residences, roads, streams, wells, known tiles, and property lines. This new map shows seven residences within 2,000 horizontal feet of the egg wash water manure storage pond, with the nearest residence being 1,150 feet from the egg wash water manure storage. . . . (CR Item 6.)

20. On July 15, 2004, the Commission received a letter from Appellants Ron and Pam Broering, which was construed to be a timely appeal of the PTI and PTO issued to Appellee Ross-Medford Farms on June 18, 2004. The assignments of error set out in Appellants' Notice of Appeal, all of which related to the 2,000 foot set back requirement contained in the siting criteria outlined in OAC 901:10-2-02(A)(1)(I), can be summarized as follows:

1. The site map provided by Appellee Ross-Medford to the Department did not depict seven residences located within 2,000 feet of the egg wash pond and, therefore, the Director reduced the 2,000 foot set back requirement based on false information.

2. The Director's reduction of the 2,000 foot requirement contained in the siting criteria was based on his finding that the technology being proposed by the applicant was proven technology, when it was not.

3. The living conditions and possible health effects of the facility's expansion on the residents living within 2,000 feet of the farm should have been considered. (ERAC Case Nos. 195635-195636, File Items A, E.)

21. A *de novo* hearing on the instant appeal was conducted by the full Commission on February 7-8, 2005.

¹⁰ As explained in the Fact Sheet, biochemical or biological oxygen demand ("BOD") is "the amount of oxygen required by aerobic microorganisms to decompose the organic matter in a sample of water."

22. As previously agreed to at the final pre-hearing conference, Appellants, who were appearing *pro se*, presented their case first, with each Appellant testifying in support of the allegations contained in their Notice of Appeal. At the outset of the hearing, Mrs. Broering clarified that all of Appellants' assignments of error relate to whether the Director appropriately reduced the 2,000 foot siting criteria set out in OAC 901:10-2-02(A)(1)(I). More specifically, Mrs. Broering's testimony centered upon the following:

1) Her contention that the Director should have denied Appellees' PTI pursuant to R.C. 903.02(D)(1), because the application contained false or misleading information, i.e., the map that was submitted did not properly delineate the number of residences within 2000 feet of the proposed egg wash pond. Mrs. Broering further testified that she had never seen the site map depicting all seven residences located within 2,000 feet of the egg wash pond which appears on the last page of the final permits, as issued. She also testified that this map was not present in the final permits which are on file at the Darke County Water and Soil Conservation District.

2) Her allegation that the aeration technology being proposed for the egg wash pond does not constitute "proven technology" since it has never been used at a farm in Ohio.
(Testimony, Pam Broering.)

23. In his testimony, Mr. Broering also challenged whether the aeration technology permitted for the egg wash pond was proven technology and he further questioned the propriety of revising the technology to be used after the conclusion of the public meeting on the permit application, thus precluding the public from presenting testimony regarding the technology which was ultimately selected. (Testimony, Ron Broering.)

24. Next, Appellee Ross-Medford submitted its case, which consisted of offering into evidence the depositions of Steve Oftelie, Ron Hubenthal and William Randall¹¹, and presenting the live

¹¹ The depositions of Messrs. Oftelie, Hubenthal and Randall were admitted into evidence, without objection. In addition, Mr. Hubenthal was accepted as an expert in environmental engineering and the design of aeration systems for odor control and Mr. Randall was accepted as an expert in biology and chemistry, specifically relative to the development of aeration

testimony of Brian Winner and Kasey Schwieterman, two of the partners in Ross-Medford Farms, as well as Tim Rensch, an agricultural engineer with Nutrient Control Systems, Inc. (Testimony, Oftelie, Hubenthal, Winner, Schwieterman, Randall and Rensch.)

25. Mr. Oftelie, Mr. Hubenthal and Mr. Randall all testified, by deposition, that they are employed by Aeration Industries International, Inc. ("Aeration Industries"), a company located in Chaska, Minnesota, which manufactures aeration equipment used to treat industrial, municipal and agricultural wastewater. Aeration Industries is also the company which manufactures the aeration equipment to be used in the egg wash pond at the Ross-Medford Farms. Mr. Oftelie, who is the regional sales manager for the northern part of the United States and the provinces of Quebec, Ontario and the Maritime Provinces of Canada, testified generally regarding the types of aeration equipment sold by Aeration Industries. He further testified regarding specific agricultural facilities he had visited that use Aeration Industries' technology. Of particular relevance for purposes of the instant appeal, were Mr. Oftelie's comments involving Rose Acres Farms, a poultry facility with two locations in Indiana. In reference to odors emanating from the egg wash ponds at one of the Rose Acres facilities, Mr. Oftelie stated "[t]here was very little odor as you stood right on the side of the lagoons" and he could not smell anything from the pond at a distance "greater than 40 feet." (Deposition testimony, Oftelie, Hubenthal, Randall.)

26. Mr. Ron Hubenthal, a process engineer at Aeration Industries, and the individual who designed the aeration system for Ross-Medford Farms, more specifically testified regarding the premise and workings of aeration technology, as well as testifying relative to how he determines

technology. While Appellants were invited to participate in the depositions, which were conducted by telephone, they chose not to take part.

what aeration equipment is appropriate for a given project. Further, similar to Mr. Oftelie, Mr. Hubenthal testified that, in his opinion, if the equipment designed for Appellant's egg wash pond is properly used, one would not be able to detect odors at a distance of 1,100 feet or more away from the pond. Mr. Hubenthal also stated that, in his professional opinion, the aerators designed for the egg wash pond at Ross-Medford Farms constitute proven technology. In support of this opinion, Mr. Hubenthal pointed to the fact that this type of technology has been effectively used for the prevention of odors for over thirty years. (Testimony, Hubenthal.)

27. Appellant Ross-Medford's final deposition witness was Mr. William C. Randall. Mr. Randall, who is the Vice President of Technical Sales at Aeration Industries, described in greater detail how the appropriate odor control system for a project is selected and, more specifically, how and why the aeration technology at issue herein was chosen. Mr. Randall also offered his expert opinion that the aeration equipment at the Ross-Medford Farms will be successful in controlling odors from the egg wash pond. Mr. Randall further testified that if the aeration equipment is installed and operated according to the recommendations of Aeration Industries, "there is no reason that there should be any odor from the lagoon when you're standing, basically, right on the edge of the lagoon." (Testimony, Randall.)

28. In addition to the testimony discussed previously, Mr. Winner and Mr. Schwieterman offered further testimony regarding the proposed design and operation of the farm expansion. Mr. Winner generally described the layout of the facility, and provided a more detailed explanation regarding the laying barns, the manure storage building¹² and the egg wash pond. Mr.

¹² Originally, the manure storage building was to be used exclusively for manure storage, with a separate building being used for composting. In the final expansion plans, one portion of the manure storage building will be used for composting, with the remainder being used for

Schwieterman provided further comments regarding the composting operations at the farm and explained in greater detail how the circles were drawn on the aerial map contained in the final version of the permits, designated as a Darke County Engineer's Real Property Map. Finally, both Mr. Winner and Mr. Schwieterman testified that they are Certified Livestock Managers¹³. (Testimony, Winner, Schwieterman; CR Item 8-197.)

29. Finally, Mr. Tim Rensch appeared on behalf of Appellee Ross-Medford. Mr. Rensch, who was accepted, without objection, as an expert in environmental engineering, specifically regarding odor reduction and animal waste, is an agricultural engineer with Nutrient Control System, Inc., a company which specializes in applying wastewater treatment technology to agricultural facilities. Mr. Rensch testified extensively regarding the history, design parameters and effectiveness of aeration technology. He stated that aeration, in general, is an effective technology for reducing odors in any organic waste stream. Furthermore, Mr. Rensch testified specifically regarding the aeration technology to be used at Ross-Medford Farms and opined that it would be "highly effective to control odors." (Testimony, Rensch.)

30. After the conclusion of Appellee Ross-Medford's case, Appellee Director presented the testimony of Andrew Ety and Kevin Elder, both of the ODA. In his testimony, Mr. Ety indicated that he has been involved with approximately 100 permit applications during his employment with the ODA and that he was the individual at the Department with primary responsibility for reviewing the Ross-Medford permit applications. Mr. Ety initially testified, in general, regarding

manure storage. (Testimony, Winner.)

¹³ An additional partner in the farm, Ralph Rindler, is also a Certified Livestock Manager. (CR Item 8.)

the permit application process. For instance, Mr. Ety testified that changes are permissible between the draft and final versions of a permit, in order to allow the applicant and the Department to address matters which might arise as a result of public comments. Further, he indicated that while a Public Information Session, such as conducted in this case, is not required by rule to be held, public notice of all draft permits must be issued and a public meeting must be held if requested by the applicant, or by twenty or more individuals. Finally, he stated that R.C. 903.02(B) and 903.03(B) allow ODA personnel to supply guidance and technical assistance to parties during the application process and that the provision of such assistance is not unusual. (Testimony, Ety.)

31. Specific to the permits at issue herein, Mr. Ety testified that he felt the first sheet of the engineering drawings submitted by the applicant (CR Item 110-155), along with the aerial photograph of the farm (CR Item 110-113), satisfied the site map requirement set out in OAC 901:10-2-01(C)(5). He also stated that he knew by May 6, 2004, at the latest, that there was at least one residence within 2000 feet of the egg wash pond. He further indicated that if there is even one house present within the critical area, an applicant is required to use proven technology before the applicable siting criterion in OAC 901:10-2-02(A)(1)(I) can be reduced by the Director and, therefore, it was sufficient to know that there was one house present. Mr. Ety also expressed his belief that “in no way” did Appellee Ross-Medford attempt to mislead the Department in its applications. He further stated that he feels the aeration technology proposed by Appellee Ross-Medford constitutes proven technology, and he believes this technology would be encompassed in two categories in the Appendix to OAC 901:10-2-02 [“**Liquid Manure - Manure Treatment Lagoon**” and “**Liquid Manure - Lagoon with odor control** (e.g. aeration in the Manure

Storage Pond or Manure Treatment Lagoon.”]. (Testimony, Ety.)

32. Mr. Elder also began his testimony by providing general information regarding the LEPP, and continued by offering more specific comments relative to Appellee Ross-Medford’s permits. Mr. Elder reiterated Mr. Ety’s statement that the presence of one residence within 2,000 feet of the egg wash pond would trigger the provision that proven technology be used before the relevant siting criterion could be reduced. Mr. Elder also confirmed that the Department considers aeration to be proven technology and agreed with Mr. Ety’s assessment that aeration could fall in either of two categories set out in the Appendix to OAC 901:10-2-02. Additionally, Mr. Elder pointed out that the list of proven technologies contained in the Appendix is not exhaustive. Mr. Elder also stated that he thinks that the Ross-Medford application demonstrated the use of best management practices in the area of odor minimization. Relative to Mr. Broering’s claim that it was inappropriate to revise the technology to be used after the public meeting on the draft permits, Mr. Elder testified that, unlike permit modifications, with draft permits, it is within the Director’s discretion as to whether to re-public notice the permits as the result of changes to a draft permit. Finally, Mr. Elder summarized his testimony by offering his opinion that the Ross-Medford permit applications did not contain any misleading information and that they met all applicable rules. (Testimony, Elder.)

CONCLUSIONS OF LAW

1. Pursuant to R.C. 3745.05, the statutory duty of review imposed upon the Commission after a *de novo* hearing is a determination of whether the action of the Director which is under appeal is unlawful or unreasonable.

2. “Unlawful” means that the action taken by the Director is not in accordance with the

) relevant, applicable law. "Unreasonable" means that the action is not in accordance with reason, or that it has no valid factual foundation. It is only in those cases where the Commission can find from the testimony and evidence that the Director's action was not in accordance with the relevant law, or that there was no valid factual foundation for the Director's action, that the matter under appeal can be found to be unlawful or unreasonable. (C.F./ Water v. Schregardus, Franklin App. 98AP-1481 (1999); Citizens Committee to Preserve Lake Logan v. Williams, 56 Ohio App. 2d 61 (1977).)

3. Conversely, where the evidence in the record before the Commission demonstrates that the action taken by the Director was lawful and reasonable, the Commission must affirm the action of the Director. In such an instance, the Commission may not substitute its judgment for that of the Director. (Citizens Committee to Preserve Lake Logan v. Williams, *supra*.)

) 4. It is also well-settled 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).)

5. In the instant appeal, the Commission must determine if the Director of the ODA acted reasonably and lawfully in his issuance of PTI No. ROSS-0001.PI001.DARK and PTO No. ROSS-001.PO001.DARK to Appellee Ross-Medford. Ross-Medford Farms is a MCAFF as that term is defined in R.C. 903.01(N). The pertinent statutes relating to MCAFFs are contained in R.C. Chapter 903, with the relevant regulations set out in Ohio Administrative Code Chapters 901:10-1 to 901:10-6. Appellants herein specifically challenge the Director's interpretation and

application of OAC 901:10-2-01(C)(5) and 901:10-2-02(A)(1)(I), and the attached Appendix, and, relatedly, Appellants claim that Appellee's applications should have been denied pursuant to R.C. 903.02(D)¹⁴ because they contained misleading or false information.

6. Ohio Revised Code Section 903.02(D) sets forth the general circumstances under which the Director must deny a PTI as follows:

(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. (Emphasis added.)

7. Ohio Administrative Code Section 901:10-2-01 sets out the items which must be contained in the PTI application referred to in R.C. 903.02(D)(1). Specifically, OAC 901:10-2-01(C) provides in relevant part:

(C) Contents of an application for a permit to install.

Unless otherwise indicated, an application for a permit to install shall contain the information and criteria as required in rules 901:10-1-02 and 901:10-1-03 of the Administrative Code and shall attach and/or include all of the following information:

- (1) ...
- (5) A scaled map adequate to show detail that includes, but is not limited to:
 - (a) Approximate overall dimensions of the manure storage or treatment facility;

¹⁴ A comparable provision, relating to the issuance of PTOs, can be found in R.C. 903.03(D).

- (b) Boundaries of the concentrated animal feeding facility;
- (c) Location and siting distances from the manure storage or treatment facility. *For purposes of identifying and illustrating the siting criteria, the owner or operator is to submit a document that demonstrates compliance with the siting criteria in rule 901:10-2-02 of the Administrative Code;*
- (d) Identify the approximate location of all known subsurface drains within one hundred feet of the proposed manure storage or treatment facility. (Emphasis added.)

8. The precise siting criterion at issue in the instant appeal is contained in OAC 901:10-2-02(A)(1)(l) and relates to the requisite distance between neighboring residences and manure storage or treatment facilities, i.e., Appellee's egg wash pond. Specifically, this provision states:

(A) Manure storage or treatment facilities shall be designed and constructed in accordance with the criteria in paragraphs of (A)(1)(a) to (A)(1)(l) of this rule. In this rule siting means a measure of horizontal or vertical distance for purposes of installing the manure storage or treatment facility.

(1) Siting criteria and minimum setbacks.

(a) . . .

(l) Neighboring residences.

<u>Solid Manure</u>	Concentrated animal feeding facility shall be no closer than five hundred feet.	Major concentrated animal feeding facility shall be no closer than one thousand feet.
<u>Liquid Manure</u>	Concentrated animal feeding facility shall be no closer than one thousand feet.	<i>Major concentrated animal feeding facility shall be no closer than two thousand feet. (Emphasis added.)</i>

9. Accordingly, under OAC 901:10-2-02(A)(1)(l), any manure storage or treatment facility

must be located at least 2000 feet from the nearest residence. However, this regulation continues by setting out a mechanism by which the Director may reduce this 2000 foot distance requirement. Specifically, OAC 901:10-2-02(A)(1)(i) provides:

(i) When utilizing proven technology, the siting criteria may be reduced by the director by referring to the list of technologies appended to this rule.

10. The Appendix to OAC 901:10-2-02, captioned "How to Determine a Reduction in the Required Criteria," states, in part:

In considering reductions in siting criteria under this rule, the director will consider the use of technologies for manure storage or treatment facilities as characterized and listed in this appendix. The technologies are listed in order of environmental protectiveness with the first being the most protective of technologies. The technologies listed are not inclusive of all available technologies. The technologies listed in this appendix are required to be fully described in detail plans and specifications, engineering drawings, and maps that shall be reviewed and approved by the director in deciding whether or not to reduce any applicable siting criteria as a reasonable exercise of the director's discretion.

11. The Appendix continues by setting out the physical manure characteristics (i.e., "solid" or "liquid"¹⁵), the type of manure storage or treatment facility, and the acceptable technologies, listed in descending order of environmental protectiveness.

12. With the above-cited statute and regulations in mind, the Commission will now specifically address the challenges to the instant permits raised by Appellants. Appellants' first assertion is that there was never an appropriate site map depicting the presence of seven residences within a 2,000 foot radius of the egg wash pond and, therefore, the Director should have denied the PTI and PTO pursuant to R.C. 903.02(D)(1) because the permit applications contained misleading or

¹⁵ Under the rule, "solid manure" contains greater than 20% solids, while "liquid manure" has equal to or less than 20% solids.

false information.

13. While the Commission agrees that R.C. 903.02(D) commands that the Director deny a permit if the permit application contains false or misleading information, we disagree with Appellants that this provision is applicable to the facts presented herein. It appears to the Commission that the terms “misleading” and “false” as used in R.C. 903.02(D) connote a concerted effort on the part of the applicant to deceive the Director. Facts to support such a finding are simply not present in the instant case. While the Commission readily acknowledges that the applications originally submitted by Appellee Ross-Medford failed to contain all of the information required under the statutes and regulations, the final applications upon which the Director took action were accurate and complete.

14. Further, Appellants presented no evidence to support a finding that any of the items submitted by Appellee Ross-Medford contained false or misleading information. Rather, it appears to the Commission that the factual scenario presented herein represents the typical evolution of a permit application which routinely involves a continuing dialogue and exchange of information between the permit applicant and the Department. Indeed, the regulations recognize that an initial permit application is oftentimes incomplete and, accordingly, provide a mechanism to address such deficiencies. Specifically, OAC 901:10-1-02(A)(3)(c) states “[i]f the application and accompanying materials submitted to the department is (sic.) deemed to be incomplete, the department will notify the owner or operator with instructions as to what is missing or what needs to be completed.” The anticipated interaction between the permit applicant and the Agency is also apparent in R.C. 903.02(B), which provides: “[t]he director or the director’s authorized representative may help an applicant for a permit to install during the permitting process by

providing guidance and technical assistance.” In sum, the Commission finds that an appropriate site map depicting the seven residences located within 2,000 feet of the proposed egg wash pond was properly submitted and considered by the Director prior to the issuance of the instant permits and, further, the permit applications at issue herein did not contain misleading or false information.

15. Appellants next contend that the Director’s action should be reversed because the final permits on file at the Darke County Soil and Water Conservation District do not contain a copy of the site map which appears at CR Item 8-197. While the Commission does not dispute Appellants’ contention that the final permits on file at the Darke County Soil and Water Conservation District do not contain the map appearing at CR Item 8-197, it finds no requirement that the District maintain a complete copy of such permits. Indeed, it appears to the Commission that final permits must be kept in the files at the ODA and, pursuant to OAC 901:10-1-02, they must be maintained at the office of Ross-Medford Farms.¹⁶ The Director is under no obligation to provide a complete copy of the permit to the District. Thus, the fact that the District may possess an incomplete final permit cannot constitute a basis for challenging an action of the Director.

16. In their next assignment of error, Appellants allege that the technology to be used by Appellee Ross-Medford, and relied upon by the Director in reducing the 2,000 foot siting criterion, does not constitute “proven technology.” Appellee Ross-Medford presented the expert testimony of three witnesses (Ron Hubenthal, William C. Randall and Tim Rensch) who opined

¹⁶ Ohio Administrative Code Section 901:10-1-02(B) provides: “The owner or operator shall maintain a copy of the current permit to install, permit to operate or NPDES permit issued by the department at the facility site office.”

that the aeration technology at issue herein is both proven and highly effective in controlling odors. These witnesses, and others, i.e., Mr. Ety and Mr. Elder, also testified that, in their opinions, the aeration technology being proposed by Ross-Medford could fall within two distinct categories of the listed proven technologies in the Appendix to OAC 901:10-2-02(A)(1)(I): Liquid Manure (Manure Treatment Lagoon), or, Liquid Manure (Lagoon with odor control).

17. The Commission finds the testimony offered by Appellee's witnesses to be both persuasive and credible. Further, there was no evidence presented by Appellants to counter the testimony of any of Appellee's expert witnesses in this regard. Mere unsupported assertions by Appellants that the aeration technology to be used at Ross-Medford Farms can not be considered "proven" because it has never been used at a farm in Ohio is insufficient in light of the significant expert testimony and evidence substantiating a finding that the technology, in fact, constitutes proven technology. Evidence at the *de novo* hearing clearly established aeration as an effective and practical technology for odor control in numerous situations, including egg wash ponds. Thus, in light of the uncontested evidence presented in this regard, we find the Director acted reasonably and lawfully in determining that the aeration technology proposed by Appellee Ross-Medford Farms constitutes proven technology under the Appendix to OAC 901:10-2-02 and, further, that the Director acted reasonably and lawfully in considering this proven technology to reduce the siting criterion set out in OAC 901:10-2-02(A)(1)(I).

18. Appellants' last contention is that it was inappropriate for the Director to allow the applicant to revise the odor control technology to be used in the egg wash pond after the public meeting, thus precluding the public from commenting on the revised technology contained in the final permits. A significant reason for accepting public comments and holding a public meeting

regarding draft permits, is to solicit concerns from the public and identify and evaluate any potential problems which exist with the permits as proposed, so that they may be addressed prior to the issuance of a final permit. Indeed, OAC 901:10-2-02(B)(2) explicitly acknowledges the evolutionary nature of the permitting process. [“The owner or operator may amend the application for a permit to install prior to the conduct of any public meeting that may be held for the draft permit to install *and/or while the permit to install application is pending before the director.*” (Emphasis added.)] Specifically, in the instant action, the aeration technology to be used in the egg wash pond was revised and improved, in large part, due to public comments and concerns submitted to the ODA.

19. Regarding whether such a revision to a draft permit would require the issuance of a second public notice, Mr. Elder testified that this was a matter within the Director’s discretion. Based on the testimony and evidence presented, the Commission finds the Director reasonably and lawfully exercised his discretion in not issuing a second public noticing regarding the instant permits, based on the revisions to the permits incorporated after the close of the public comment period.

20. In light of the foregoing, the Commission hereby finds that Appellee Director’s issuance of PTI No. ROSS-0001.PI001.DARK and PTO No. ROSS-0001.PO001.DARK to Appellee Ross-Medford Farms was both reasonable and lawful.

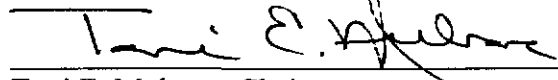
FINAL ORDER

The Commission finds that Appellee Director’s June 18, 2004 issuance of PTI No. ROSS-0001.PI001.DARK and PTO No. ROSS-0001.PO001.DARK to Appellee Ross-Medford Farms was both reasonable and lawful and is hereby AFFIRMED.

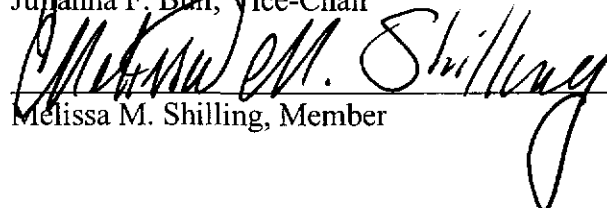
The Commission, in accordance with Ohio Administrative Code Section 3746-13-01, informs the parties that:

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**


Toni E. Mulrane, Chair


Julianna F. Bull, Vice-Chair


Melissa M. Shilling, Member

Entered in the Journal of the
Commission this 13th
day of April, 2005.


Mary J. Oxley, Executive Secretary

COPIES SENT TO:

RON AND PAM BROERING
FRED DAILEY, DIRECTOR
ROSS-MEDFORD FARMS, LLC
Mary Elizabeth Ruttan, Esq.
Jack A. Van Kley, Esq.

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