

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION

STATE OF OHIO

COLUMBIANA COUNTY GENERAL  
HEALTH DISTRICT

Appellant,

v.

CHRISTOPHER JONES, DIRECTOR  
OF ENVIRONMENTAL PROTECTION

Appellee.

Case No. ERAC 155600

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FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND FINAL ORDER

Rendered on October 16, 2008

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SHILLING, COMMISSIONER

This matter comes before the Environmental Review Appeals Commission ("ERAC," "Commission") upon an appeal filed on May 12, 2004 by Appellant Columbiana County General Health District ("CCHD," "CCGHD," "District," "Health District") of Appellee Director of the Ohio Environmental Protection Agency's ("Director," "Ohio EPA," "Agency") April 15, 2004 determination to remove CCHD from the list of approved health districts.



Based on the testimony and evidence adduced at the de novo hearing held April 26, 27, and 28, 2006 and the Certified Record ("CR"), which was moved into evidence without objection, the Commission hereby issues the following Findings of Fact, Conclusions of Law, and Final Order AFFIRMING the Director's action removing the Columbiana County General Health District from the list of approved health districts.

## **FINDINGS OF FACT**

### **Overview**

{¶1} This case arises from the Director's removal of CCHD from the approved list of health districts authorized to administer and enforce Ohio's solid waste and construction and demolition debris ("C&DD") laws and regulations. The "delisting" process, as it is commonly called, began when the Director sent a September 9, 2002 letter detailing deficiencies found during the 2001 annual surveys of CCHD's solid waste and construction and demolition debris programs and culminated with the Director's April 15, 2004 letter to CCHD documenting his decision to delist the CCHD. (Testimony Weber.)

{¶2} To summarize, the Director removed CCHD from the approved list of health districts upon determining that CCHD had not substantially complied with applicable laws and regulations. Specifically, CCHD's:

- (a) continued failure to cite and/or appropriately enforce open dumping laws;
- (b) continued failure to cite C&DD landfills for illegal acceptance of solid waste;
- (c) issuance of two illegal exemptions;

(d) issuance of a C&DD license renewal to a landfill in not in substantial compliance with Chapters 3734 and 3714; and

(e) continued failure to take appropriate action to ensure proper closure of C&DD landfills. (CR Item 1.)

**{¶3}** The Columbiana County General Health District is comprised of townships and villages in Columbiana County and is governed by a five-member board of health ("Board of Health," "Board"). The cities of East Liverpool and Salem are exempted from the health district; however, the city of Salem contracts with the CCHD to provide services to the city. (Testimony Amato.)

**{¶4}** In August 1990, the Board of Health adopted a set of rules designed to license and regulate construction and demolition debris landfills. During that time, the Ohio legislature was in the process of enacting C&DD laws, but Columbiana County was already experiencing a growth in landfill development activities; so they decided to adopt C&DD rules prior to Ohio EPA's development of a statewide C&DD regulatory scheme. Revised Code ("R.C.") Chapter 3714. [Construction and Demolition Debris] became effective July 24, 1990, and the regulations promulgated thereunder, Ohio Administrative Code ("Ohio Adm.Code") 3745-400 [Disposal Methods for Construction and Demolition Debris; Licensed Facilities] became effective September 30, 1996. (Appellant Exhibit ("Ex.") 53; testimony Amato, Morehead.)

**{¶5}** Like other health districts placed on the Director's approved list pursuant to R.C. 3714.09 and R.C. 3734.08, CCHD was subject to annual surveys conducted by Ohio EPA. The purpose of annual surveys is to verify compliance with applicable environmental laws and regulations. (Ohio Adm.Code 3745-37-08; testimony Weber.)

**The Exemptions  
("Variances"<sup>1</sup>)**

{¶6} One of the reasons cited by the Director to support his removal of CCHD from the approved list of health districts is the Board's passage of, and refusal to repeal, two exemptions. The two exemptions were first proposed by C&DD facilities operating within Columbiana County, A&L Salvage, Inc. ("A&L Salvage") and Elkrum Industries C&DD Landfill ("Elkrum"). The first proposed exemption would allow "de minimus amounts of waste that are nonhazardous or noninfectious, such as paper, packaging, cloth, or plastic, that are generated as a result of construction or demolition activities \* \* \*" to be disposed of in a C&DD landfill facility. (CR Item 81; testimony Morehead, Weber.)

{¶7} The second proposed exemption would "exempt the operator from the requirements of [accepting only C&DD waste] if prohibited materials are removed from the working face in a timely fashion." Ohio regulations, at that time, set forth a different standard than the ones proposed in the exemption. Ohio Adm.Code 3745-400-11(F)(2) explicitly delineated the only types solid waste permitted in a C&DD landfill.<sup>2</sup> Any other solid waste appearing in a C&DD landfill had to be removed. And, even if the solid waste were subsequently removed from the working face of the landfill, the inspector was required to issue a citation to the owner or operator for violating the applicable regulation. (CR Item 81; testimony Morehead, Weber.)

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<sup>1</sup> Although the Board referred to A&L Salvage's proposal as variances, Jerry Weber, Ohio EPA, testified that, under R.C 3714.04, the proper term for these actions is "exemptions." (Testimony Weber.)

<sup>2</sup> It is undisputed that the type of solid waste allowed in C&DD landfills by applicable provisions of the Ohio Adm.Code was not the type of solid waste at dispute in the instant matter.

**{¶8}** On June 19, 2002, Robert Morehead, Health Commissioner for CCHD, and Matthew Stefanek, Health Commissioner in Mahoning County, sent correspondence to Dan Harris, Ohio EPA Division Chief of Solid and Infectious Waste Management ("DSIWM"), requesting to discuss two possible exemptions to their respective C&DD programs. (CR Item 81.)

**{¶9}** Through a letter sent on July 8, 2002, a representative of A&L Salvage formally requested that the Board pass the proposed exemptions. The Board first introduced the exemptions, as submitted by A&L Salvage, at a July 10, 2002 board meeting. The exemptions were proposed as follows:

1. Definition of Construction and Demolition Debris

In accordance with OAC 3745-400-01(F), Construction and Demolition Debris includes deminimus [sic] amounts of waste that are nonhazardous or noninfectious such as paper, packaging, cloth, plastic, etc.[sic] that are generated as a result of construction or demolition activities and as a result of those activities are commingled with structural and functional materials comprising the structure and surrounding site improvements.

2. Removal of Wastes from Landfill Working Face

In accordance with OAC 3745-400-11, the owner or operator shall unload the debris in the designated unloading zone. The owner or operator shall inspect the unloaded debris and remove prohibited materials that are visible prior to placing the debris on the working face. The owner or operator shall re-inspect the debris placed on the working face and shall remove prohibited materials. If prohibited materials are removed from the working face in a timely fashion, the owner or operator is exempt from the requirement of OAC 3745-40011(F)(a) and 3745-400-11(F)(4)(c). [sic]<sup>3</sup>(CR Item 66-4, 66-7; testimony Morehead.)

**{¶10}** On July 11, 2002, Dan Harris sent a letter to all Health Commissioners in the state of Ohio clarifying Ohio EPA's position on solid waste disposal in a C&DD

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<sup>3</sup> The Commission notes that the Ohio Adm.Code sections cited in A&L Salvage's proposed exemptions do not exist. See generally, Ohio Adm.Code 3745-400-11(F).

landfill. Mr. Harris stressed the impermissibility of accepting solid waste in a C&DD landfill and cited to Ohio Adm.Code 3745-400-11(F)(3), which states specifically that, except for certain enumerate circumstances, “[t]he owner or operator shall only accept construction and demolition debris.” (CR Item 79.)

**{¶11}** Ultimately, and in direct contravention to Ohio EPA’s directive regarding solid waste in C&DD landfills, the Board passed the “variances” as proposed by A&L Salvage during its August 22, 2002 board meeting.<sup>4</sup> Unlike Columbiana County, Mahoning County did not enact either of the proposed exemptions. (CR Item 80, testimony Morehead, Weber.)

**{¶12}** Dr. Jack Amato, MD was appointed to CCHD’s board in 1979. Since the mid-1990s, he has served as the District’s Health Director. At the hearing, Dr. Amato testified that he believed neither exemption permitted owners or operators of C&DD facilities to dispose of solid waste at C&DD facilities within CCHD’s jurisdiction. Dr. Amato explained that the first exemption applied only to materials generated as a result of construction or demolition activities. Mr. Morehead added that this exemption only permitted such solid waste to be disposed if it was “commingled with structural or functional and surrounding site improvements.” (Testimony Amato, Morehead.)

**{¶13}** Additionally, Dr. Amato testified that pursuant to the second exemption, all visible “prohibited material” must be removed at the facility’s unloading zone, the area at a C&DD facility where the delivery trucks are unloaded. Dr. Amato further explained that once the debris was inspected at the unloading zone and “non-C&DD material” had been removed, a bulldozer moved the debris into the working face of the landfill,

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<sup>4</sup> Both A&L Salvages’ proposed exemptions and the Board’s passed exemptions contained the same citation error; “OAC 3745-400-11(F)(a)” and “OAC 3745-400-11(F)(4)(c)” do not exist.

where the workers continued to remove “prohibited material.” In sum, Dr. Amato stated that the second exemption did not allow the owner or operator to dispose of solid waste in a C&DD landfill, but rather allowed workers to remove any solid waste found at the unloading zone or in the working face of the landfill. And, if workers removed the “prohibited waste” from the unloading zone and working face, then CCHD inspectors would not issue citations for improper disposal of solid waste to the facility. A CCHD inspector would only issue a citation if solid waste was still present after the workers had “picked,” or removed, visible solid waste from the working face of the landfill. (Testimony Amato, Harris.)

**{¶14}** During the hearing, Mr. Harris confirmed that it was within the Board’s purview to exempt solid waste removed in the unloading zone as proposed in the second exemption, but emphasized that it was not permissible for a Board of Health to enact any exemption allowing solid waste to be placed in the working face of a C&DD landfill. Exemptions relating to solid waste were relegated exclusively to Ohio EPA. (Testimony Amato, Harris.)

**{¶15}** Ohio EPA did not discover that the Board had passed the two exemptions until November 2002. On January 13, 2003, Bruce McCoy, an Environmental Specialist in DSWIM, sent a memorandum to the Director outlining that CCHD’s exemptions were unlawful; because pursuant to R.C. 3734.02(G), only the Director is authorized to grant solid waste variances or exemptions. (CR Item 69, 73-1; testimony Harris, McCoy, Weber.)

**{¶16}** On several occasions, Ohio EPA notified CCHD that the exemptions were illegal under R.C. 3714.04 and R.C. 3734.02(G), in that the Board was attempting to



regulate solid waste. Notably, in a letter dated January 28, 2003, Mr. Harris advised CCHD that the Board lacked the statutory authority to grant exemptions by stating, “[t]he Director of Ohio EPA has the exclusive authority to issue exemptions or variances which affect solid waste or authorize the disposal of solid wastes in facilities which do not strictly satisfy the requirements of ORC 3734.” Mr. Harris informed CCHD that the Agency intended to refer this matter to the Ohio Attorney General’s office to appeal the Board’s action, but would prefer to work with the Board to resolve this issue and encouraged CCHD to reconsider its position regarding the exemptions. (CR Item 67; testimony McCoy, Morehead.)

{¶17} Soon thereafter, Mr. Morehead traveled to Columbus to meet with Ohio EPA representatives to discuss the exemption matter. Following the meeting, Mr. Harris sent a letter dated February 11, 2003, to Mr. Morehead detailing fully Ohio EPA’s concerns about the legality of the Board’s action and advising the Board to “take appropriate measures at the February 19, 2003 meeting to rescind” the exemptions. (CR Item 65; testimony Morehead.)

{¶18} Significantly, CCHD never rescinded the exemptions. (Testimony Morehead.)

{¶19} Ohio EPA’s concern about CCHD’s exemptions extended beyond the question of whether the Board, in fact, possessed the authority to enact the exemptions. Its concern also encompassed the detrimental effect the exemptions had on the efficacy of CCHD’s C&DD program. Ohio EPA noted that CCHD and Ohio EPA applied distinctly different definitions to determine when waste has been disposed in a C&DD landfill. Paula Cope, a CCHD employee who conducted numerous inspections of C&DD facilities within CCHD’s jurisdiction, testified that waste is considered

disposed when it is covered with other waste or fill. Conversely, Jerry Weber, an inspector with Ohio EPA, countered that waste is considered disposed when it is deposited in the working face, which is "that portion of a C&DD landfill where debris is placed for its final disposition." (State's Ex. 89; testimony Cope, Weber.)

**{¶20}** Further, Ms. Cope testified that prior to the exemptions, she was "supposed to" cite violations for illegal disposal of solid waste whenever she observed impermissible solid waste in the working face of a C&DD landfill, even if it was subsequently removed. Despite this awareness, Ms. Cope did not always issue a citation when she saw impermissible solid waste in the working face, even though she would note its presence in her report. For example, in a July 1, 2002 inspection report of Elkrum, Ms. Cope identified "very minimal amounts of prohibited solid waste" and that "[t]his was a definite measurable improvement from the last inspection dated May 9, 2002." Yet, Ms. Cope issued no violations for either inspection. (State's Ex. 89; testimony Cope, Weber.)

**{¶21}** It appeared to Ohio EPA that even before the Board passed the exemptions, Ms. Cope and other CCHD inspectors were already allowing solid waste to be disposed of in the working face of C&DD facilities. For example, in the inspection report resulting from a December 31, 2001 inspection at Elkrum, Mr. Morehead failed to cite a violation, even though he saw solid waste deposited at Elkrum. Comments in his report included, "[t]his site appeared in good condition on this date, however, I did see small amounts of solid waste within the deposited materials" and "[m]inor assortment of solid waste and deposited materials. Talked with owner/operator. Pickers can handle this." (State's Ex. 85, testimony Morehead, Weber.)

**{¶22}** Additionally, Ms. Cope testified that she conducted the majority of the inspections after the Board passed the exemptions and that “[i]n my own judgment, if I felt that they had gotten the majority of it and were really trying to – to get it all, then I wouldn’t – I wouldn’t cite them.” For example, during the November 22, 2002 inspection of A&L Salvage, Ms. Cope and Mr. Morehead noted, “[t]he solid waste should have, for the most part, been picked.” Yet again, no citations accompanied the inspection report, even though the amount of solid waste observed “exceeded the Board’s expectation of incidental amounts of waste.” Of significance to Ohio EPA was the fact that Ms. Cope allowed the landfill operators to pick through the working face of the C&DD landfill and remove solid waste before considering whether either of CCHD’s exemptions were applicable; thus allowing solid waste to be placed directly in the working face. (Testimony Cope.)

**{¶23}** Ohio EPA asserts the record before the Commission is replete with examples documenting events similar to the ones described above; events where solid waste was observed illegally deposited in landfills within CCHD’s jurisdiction, yet the landfill owner or operator was not cited as having violated applicable open dumping or disposal of solid waste regulations. Indeed, Dr. Amato testified that the purpose of the exemption was to allow an operator to remove solid waste from C&DD landfills so that a citation would not be necessary. (Testimony Amato, Weber.)

### **Surveys**

**{¶24}** Over the course of several days, May 7, 8, 9, and June 18, 2002, Ohio EPA conducted an annual survey of CCHD’s solid and infectious waste and C&DD programs. During an annual survey, the Agency reviews the board of health’s activities

and gathers information so that the Agency can properly determine whether a board of health is in compliance with applicable provisions of the Ohio Adm.Code. The Agency may also accompany the health district's inspectors during site inspections of facilities within the board's jurisdiction. The results of Ohio EPA's annual surveys were sent to the Health District via certified mail on September 9, 2002 and are captioned as the "2001 ANNUAL SURVEY C&DD" ("2001 C&DD Survey") and the "2001 ANNUAL SURVEY SOLID AND INFECTIOUS WASTE." ("2001 Solid Waste Survey") (CR Items 60-17, 60-3; testimony, Weber.)

**{¶25}** The annual survey for each program was conducted by Jerry Weber, R.S., Environmental Specialist, DSIWM, and included a pre-survey conference with Mark Nichol, Environmental Director for CCHD, and Paula Cope, an inspector for CCHD. Ms. Cope, who was new to inspecting C&DD facilities, participated in the 2001 surveys as part of her training. She and Mr. Weber visited all C&DD facilities within CCHD's jurisdiction, including all CCHD-licensed facilities, as well as landfill facilities that were no longer operating, but had not been closed pursuant to requirements set out in Ohio Adm.Code. The survey also included an "Administrative Review of Records," during which Ohio EPA inspected CCHD records dating from March 20, 2001 through May 7, 2002, and a "Facility Inspections/Inspection Documentation," which involved an Ohio EPA employee observing "CCHD inspectors conducting comprehensive facility inspections and evaluation of the resulting inspection documentation" during the time period from March 28, 2001 though June 18, 2002. (CR Items 60-17, 60-3; testimony Cope.)

**{¶26}** During Mr. Weber's eleven and one-half years with Ohio EPA, he conducted between two and three dozen annual survey inspections. Prior to working at Ohio EPA, Mr. Weber was employed by the Stark County Health Department, where he participated in five annual inspections conducted by Ohio EPA. Before beginning the 2001 annual survey process, Mr. Weber reviewed CCHD's 2000 annual survey reports authored by Ohio EPA employee, Colum McKenna. Mr. Weber used these earlier surveys to familiarize himself with CCHD and ascertain the status of CCHD's programs. His review of the 2000 annual surveys of CCHD's solid waste and C&DD programs revealed that the Board's programs had been experiencing many of the same problems he later documented during the 2001 annual surveys and during the subsequent resurvey conducted just prior to the Director's removal of CCHD from the approved boards of health list. (State's Ex. 49, 50; testimony Weber.)

#### **The 2001 Annual C&DD Survey**

**{¶27}** The September 9, 2002, twenty-two page 2001 C&DD Survey letter addressed to Robert Morehead, CCHD Health Commissioner, "is divided into three main sections: 1) Administrative Review of Records; 2) Facility Inspections/Inspection Documentation; and 3) Summary of Findings/Further Comments and Recommendations." The first two sections identify applicable Ohio Adm.Code regulations and discuss whether CCHD was in compliance with those particular regulations. The third portion of the letter, the summary, details Ohio EPA's concerns with CCHD's implementation of its C&DD program. (CR Item 60-17.)

**{¶28}** In the summary section, Ohio EPA discussed its finding that CCHD was "not in compliance" with five Ohio Adm.Code regulations, as follows:

- **OAC 3745-37-08(D)(2):** The health department issued 2002 C&DD licenses to A&L Salvage C&DD Landfill, the Elkrum Industries C&DD Landfill, and the Penn-Ohio C&DD Landfill, despite the fact that the license applications submitted by the owner or operator of these facilities did not contain all of the required information.

The health department was also found to be out of compliance with the rule during the 2000 annual survey. None of the four C&DD license applications received for the 2001 licensing year contained all of the required information, however, the health department issued the licenses.

- **OAC 3745-37-08(D)(4):** The health department did not submit a certification of inspection and compliance of the C&DD landfills licensed during 2002 to the director as required by this rule.

The health department was also found to be out of compliance with this rule during the 2000 annual survey. At the time of the 2000 annual survey, the health department had not conducted an inspection of the Elkrum C&DD Landfill within 30 days of the annual license renewal, and it had not made certification to the director in accordance with this rule. DSIWM-NEDO [Division of Solid and Infectious Waste Management-Northeast District Office] was contacted by DSIWM-CO [Central Office] on several occasions requesting licensing documentation which had not been submitted by the health department. Jerry Weber eventually had to go to the health department to obtain copies of these documents.

- **OAC 3745-37-08(D)(5):** The health department did not conduct the minimum number of required comprehensive quarterly inspections at the following facilities during 2001 and 2002:

- A&L Salvage C&DD Landfill
- Elkrum C&DD Landfill
- Wastemasters C&DD Landfill

The health department was also found to be out of compliance with this rule during the 2000 annual survey. CCHD failed to conduct an inspection of the Elkrum C&DD Landfill during the first quarter of 2001.

- **OAC 3745-37-08(D)(7):** The health department did not take appropriate actions to bring about compliance with Chapter 3714. of the Revised Code and Chapters 3745-400 and 3745-37 of the Administrative Code during 2001 and 2002.

The health department was also found to be out of compliance with this rule during the 2000 annual survey. CCHD failed to take appropriate actions against the Lisbon C&DD Landfill. The health department issued

this facility a 2000 license with three conditions which the facility owner/operator failed to comply with, however, it did not take appropriate actions to bring about compliance.

▪ **OAC 3745-37-08(D)(8):** The health department did not take appropriate actions when necessary to bring about compliance with [Ohio Adm.Code] Rule 3745-37-08(D)(7) during 2001 and 2002. As a result, Ohio EPA has concerns that immediate action may not have been taken to abate potentially serious hazards to public health resulting from violations of Chapter 3714. of the Revised Code and Chapters 3745-400 and 3745-37 of the Administrative Code.

The health department was also found to be out of compliance with this rule during the 2000 annual survey. (CR Item 60-17.)

**{¶29}** Ohio EPA continued by expressing a generalized concern about the manner CCHD was operating its C&DD program, as follows:

In addition to the above, Ohio EPA has observed that the health department maintains a different philosophy than the agency with respect to enforcing the State's existing C&DD laws and rules. While there may always [be] differences in opinion regarding the classification of waste types, etc., the health department has an obligation to act as a representative of the director when regulating C&DD facilities in Columbiana County. This includes implementing the C&DD program in accordance with existing C&DD laws and rules as well as with Ohio EPA's interpretation of these laws and rules. (CR Item 60-17.)

**{¶30}** Ohio EPA concluded the 2001 C&DD Survey by cautioning CCHD, that the Agency:

\* \* \* has determined that [CCHD] has not carried out its responsibilities as an approved health department, and subsequently, as a representative of the director of Ohio EPA. The health department has not implemented the C&DD program in accordance with Ohio Revised Code and Ohio Administrative Code requirements or with Ohio EPA's interpretations of these laws and rules. As a result it shall be recommended to the director that the [CCHD] be issued a '180-day Warning Letter.'

Upon receiving the warning letter, the health department shall have up to 180 days to attempt to correct the violations outlined in this letter, after which time Ohio EPA will conduct a survey [of] the health department in order to determine if the C&DD program is being implemented in accordance with [Ohio Adm.Code] 3745-37-08.

\* \* \* (CR Item 60-17.)

{¶31} At the hearing, CCHD commented on various sections of the 2001 C&DD Survey. Regarding missing financial assurance documents from CCHD's files for A&L Salvage, Elkrum, and Penn-Ohio C&DDs (Ohio Adm.Code 3745-37-08(D)(2)), Mr. Morehead explained that CCHD maintained copies of the necessary documents, but had returned the originals to the applicants. Mr. Morehead further stated that, upon receipt of the 2001 C&DD Survey, the Board changed its procedure so that it now retains the original financial assurance documents. He also noted that CCHD obtained a performance bond dated September 27, 2001, from Penn-Ohio C&DD and the original irrevocable standby letters of credit from Elkrum C&DD. The CCHD also directed A&L Salvage to provide an original, signed irrevocable standby letter of credit to be placed in CCHD files. (Testimony Morehead.)

{¶32} Mr. Weber confirmed that the Board had corrected the deficiency relating to lack of financial assurance documents prior to Ohio EPA's resurvey of CCHD's solid waste and C&DD programs. (Testimony Weber.)

{¶33} Regarding missing quarterly inspection reports (Ohio Adm.Code 3745-37-08(D)(4)), Mr. Morehead testified that CCHD staff subsequently found one of the missing quarterly inspection reports and notified Ohio EPA that it had been located. Mr. Morehead further explained that Vic Samora, the CCHD employee who had been responsible for C&DD inspections during this time, was placed on administrative leave in late 2001 and eventually was terminated from employment in December 2001. In late January 2002, Diane Possage began performing inspections for CCHD. Ms. Cope, who also performed inspections for CCHD, acknowledged that CCHD had not



conducted quarterly inspections as required by the Ohio Adm.Code., but once aware of the deficiency in performing regular inspections, CCHD began performing them at regulated facilities at least quarterly. (Testimony Morehead, Cope.)

{¶34} Mr. Weber testified that Ohio EPA views quarterly inspections as more than just a regulatory requirement. Indeed, during a quarterly inspection, every aspect of a landfill and its operation is examined. An inspection forms the cornerstone of an effective enforcement program. Should enforcement actions be necessary, failure to cite violations makes escalation of enforcement very difficult. (Testimony Weber.)

{¶35} Mr. Morehead testified as to CCHD's alleged failure to take appropriate actions against Wastemasters C&DD and A&L Salvage. He explained that, regarding Wastemasters C&DD, the Board had taken appropriate action to collect on the financial assurance bond when it referred the matter to the Columbiana County Prosecutor on November 26, 2001, for collection on the bond from the insurer. The Board had taken this action prior to Ohio EPA's 2001 survey of its C&DD program. (CR Item 44; testimony, Morehead.)

{¶36} Regarding events at A&L Salvage, CCHD:

\* \* \* acknowledge[d] that a staff member was requested by Mr. Jerry Weber to accompany Mr. Weber when Mr. Weber conducted his inspection of A&L Salvage and prepared his report of that inspection. Mr. Jerry Weber then ordered the District's staff member to issue an identical report. That staff member respectfully declined that order. The Board respectfully submits that the Board has the duty and responsibility to exercise independent judgment when complying with the requirements of the C&DD statutes and regulations. The board further respectfully submits that those statutes and regulations do not subject the District's employees to the supervision and control of the OEPA's field staff. Indeed, the District would be remiss if it permitted the field staff of any agency to control and supervise the District's employees. (CR Item 44.)

{¶37} Morehead explained that CCHD did not believe it was necessary to comply with Mr. Weber's instruction because Ohio EPA, not CCHD, conducted the inspection. Moreover, Mr. Morehead stated that because CCHD employees do not report to Mr. Weber, CCHD's employee was not required to follow Mr. Weber's instruction to issue an inspection report. (Testimony Morehead.)

{¶38} In responding to Ohio EPA's assertion that the health department did not take appropriate actions to bring about compliance with Ohio Adm.Code 3745-37-08(D)(7) during 2001 and 2002 and, thus, may not have taken "immediate action \* \* \* to abate potentially serious hazards to public health resulting from violations," Mr. Morehead contended that he did not find any "serious hazards to public health noted in" Mr. Weber's report. (Testimony Morehead.)

### **The 2001 Solid and Infectious Waste Survey**

{¶39} The fourteen-page 2001 Solid Waste Survey letter from Mr. Weber to Mr. Morehead, dated September 9, 2002, was formatted identically to the 2001 C&DD Survey, but its content related exclusively to CCHD's Solid and Infectious Waste program. In the summary of the 2001 Solid Waste Survey, Ohio EPA "identified several concerns with CCHD's implementation of the solid and infectious waste program." These four concerns are listed below:

- **OAC 3745-37-08(C)(5)** – The health department did not submit a certification of inspection and compliance of the Mat Shop to the director as required by this rule.

The health department was also found to be out of compliance with this rule during the 2000 annual survey. At the time of the 2000 annual survey, the health department had not conducted an inspection of the Mat Shop within 30 days of the annual license renewal, and it had not made certification to the director in accordance with this rule. DSIWM-NEDO

was contacted by DSIWM-CO on several occasions requesting licensing documentation which had not been submitted by the health department. Jerry Weber eventually had to go to the health department to obtain copies of these documents.

▪ **OAC 3745-37-08(C)(6)** – The health department did not conduct the minimum number of required comprehensive quarterly inspections at the following facilities during 2001 and 2002:

- Center Township Landfill
- Dispose All Landfill
- East Liverpool Landfill
- Mat Shop

The health department was also found to be out of compliance with this rule during the 2000 annual survey. CCHD failed to conduct quarterly inspections of the above facilities for at least one quarter between August 3, 1999 and April 3, 2001.

▪ **OAC 3745-37-08(C)(8)** – The health department did not take appropriate actions to bring about compliance with Chapter 3734. of the Revised Code and Chapters 3745-27 and 3745-37 of the Administrative Code during 2001 and 2002.

▪ **OAC 3745-37-08(C)(9)** – The health department did not take appropriate actions when necessary to bring about compliance with [Ohio Adm.Code] Rule 3745-37-08(C)(8) during 2001 and 2002. As a result, Ohio EPA has concerns that immediate action may not have been taken to abate potentially serious hazards to public health resulting from violations of Chapter 3734. of the Revised Code and Chapters 3745-27 and 3745-37 of the Administrative Code.

The health department was also found to be out of compliance with this rule during the 2000 annual survey. Specifically, the health department's failure to cite open dumping violations and to properly document open dumping investigations. (CR Item 60-3.)

**{¶40}** Ohio EPA also expressed a generalized concern about the way CCHD was conducting its solid and infectious waste program. The Agency determined:

\* \* \* that the Columbiana County Health Department has not carried out its responsibilities as an approved health department, and subsequently, as a representative of the director of Ohio EPA. The health department has not implemented the solid and infectious waste program in accordance with Ohio Revised Code and Ohio Administrative Code requirements or with

Ohio EPA's interpretations of these laws and rules. As a result, it shall be recommended to the director that the Columbiana County Health Department be issued a '180-day Warning Letter.' (CR Item 60-3.)

{¶41} As in the 2001 C&DD Survey, Ohio EPA continued by advising CCHD that upon receipt of the "180-day Warning Letter," the health department would have 180 days to "attempt to correct the violations outlined" in the 2001 Solid Waste Survey, "after which time Ohio EPA will conduct a survey" of the CCHD to determine if it is managing its solid and infectious waste program in accordance with Ohio Adm.Code 3745-37-08. Finally, before concluding the letter, Ohio EPA recommended that CCHD address four additional areas relating to CCHD's solid and infectious waste program.<sup>5</sup> (CR Item 60-3.)

{¶42} At the hearing, CCHD responded to several sections of the 2001 Solid Waste Survey. Regarding Ohio EPA's concern that CCHD had not timely performed an inspection of the Mat Shop, CCHD believed that it simply misinterpreted an email from Ohio EPA regarding the applicable regulation. Ohio Adm.Code 3745-37-08(C)(5) requires a health district to conduct an inspection "within thirty days after issuance" of a solid waste license. Mr. Morehead testified he was aware of an email from Mr. Weber that he believed allowed the CCHD to conduct the inspection within thirty days prior to, or thirty days following, the issuance of a solid waste license. The CCHD had conducted an inspection of the Mat Shop within thirty days prior to the issuance of the solid waste license. Further, Mr. Morehead testified he did not believe this was a "serious hazard to public health," and once the misunderstanding was corrected, all subsequent inspections were performed timely. (Testimony Morehead.)

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<sup>5</sup> Because these four recommendations were not the subject of the appeal or the basis of the director's decision, ERAC will not evaluate these recommendations.

{¶43} Addressing the missing quarterly inspections reports from inspections performed by CCHD, Mr. Morehead testified that upon review of its files, CCHD discovered one of the missing reports, which had been misfiled. He also explained that Vic Samora, who is no longer with CCHD, was responsible for maintaining these files for CCHD. (Testimony Morehead.)

{¶44} On February 14, 2003, Jerry Weber sent a memorandum to Christopher Jones, Director of the Ohio EPA, summarizing the “findings of the most recent [CCHD] annual survey, which led to our conclusion that the health department is *not in substantial compliance* with OAC 3745-37-08.” (Emphasis in original.) Specifically, the memorandum highlighted on-going compliance issues and an increasingly disparate philosophical view regarding implementation of the C&DD program. The memorandum also drew the Director’s attention to two areas outside the scope of the surveys in which CCHD appeared unwilling to follow applicable laws. First, the health department had passed the two “illegal variances.” Second, CCHD had failed to cite violations of illegal disposal of solid waste at the A&L Salvage site during a November 13, 2002 co-inspection by Ohio EPA. (CR Item 62-4.)

### **180-Day Warning Letter**

{¶45} On March 13, 2003, Director Jones sent correspondence to Robert Morehead, Health Commissioner, CCHD, advising him that the CCHD is “not in substantial compliance with the requirements of remaining on the director’s list of health districts authorized to administer and enforce Ohio’s solid and infectious waste laws and [C&DD] laws” (“Warning Letter”). The purpose of the Warning Letter is to give the recipient a chance to understand the issues confronting it so it can more effectively

make the necessary adjustments and corrections to bring its program back into substantial compliance. (CR Item 60-1; testimony Turkel.)

**{¶46}** In support of the Warning Letter, the Director attached both 2001 Annual Survey letters, which provided detailed accounts of the health department's inadequacies regarding its solid and infectious waste and C&DD programs. The Director also noted that, since the time of the surveys, CCHD has "failed again to document appropriate violations regarding the disposal of prohibited solid wastes recently during a C&DD inspection conducted with Ohio EPA [NEDO] inspectors on November 13, 2002, at the A&L Salvage C&DD Landfill." (CR Item 60-1.)

**{¶47}** In the Warning Letter, the Director advised Mr. Morehead, that in order for CCHD to "remain on the director's approved list of districts administering and enforcing solid and infectious waste and C&DD programs, it must take appropriate measures to bring the programs into substantial compliance." Further, he directed CCHD to the September 9<sup>th</sup> survey letters, as they "specify some of the measures which must be taken to return both programs to substantial compliance with OAC Rule 3745-37-08." The Director also offered that Ohio EPA staff was available for consultation and to "recommend steps to return" the programs to substantial compliance. (CR Item 60-1.)

**{¶48}** Significantly, the Director notified Mr. Morehead that "[b]etween 120 and 180 days after receipt of this notice, Ohio EPA will resurvey" CCHD's administration of its solid and infectious waste and C&DD programs. "If the survey reveals that the programs are in substantial compliance with" R.C. Chapters 3734. and 3714. and Ohio Adm.Code Chapters 3745-27, 3745-400, and 3745-37, the CCHD will remain on the "approved list." If, however, substantial compliance has not been achieved, CCHD will

be removed from the “approved list, and Ohio EPA will administer and enforce the solid and infectious waste and C&DD programs in Columbiana County.” (CR Item 60-1.)

**{¶49}** After receiving the Warning Letter, Mr. Morehead, Ms. Cope, and Mr. Nichol began implementing corrective actions to cure the deficiencies in CCHD’s C&DD and Solid and Infectious Waste programs. (Testimony Morehead.)

**{¶50}** On April 12, 2003, Ronald E. Alexander, Esq., representing CCHD, sent correspondence to Director Jones requesting that Ohio EPA provide various documents to support the allegations asserted in the March 13<sup>th</sup> Warning Letter. (CR Item 56.)

**{¶51}** On April 30, 2003, Mr. Weber, through Murat Tukel, Environmental Supervisor, DSIWM-NEDO, through Kurt Princic, Environmental Manager, DSIWM-NEDO, sent an interoffice communication to Director Jones and Bill Skowronski, Chief of Ohio EPA’s NEDO. This communication detailed their proposed response, and offered “perspective” regarding Mr. Alexander’s April 12<sup>th</sup> response to Ohio EPA’s Warning Letter. (CR Item 55.)

**{¶52}** On May 13, 2003, Mr. Alexander sent correspondence to Director Jones requesting copies of all “complaints” referenced in the Warning Letter so that CCHD could adequately prepare for the upcoming resurvey. Additionally, Mr. Alexander outlined several scenarios that his client believed demonstrated that Mr. Weber’s relationship with the Health District had “grown contentious” and that his actions “reveal a personal hostility toward” the district. He also requested a response to his April 12<sup>th</sup> letter. (CR Item 46.)

**{¶53}** On May 14, 2003, Director Jones responded to Mr. Alexander's April 12<sup>th</sup> inquiry regarding the Warning Letter. In his five-page response, the Director detailed the foundation for the items described in his March 13<sup>th</sup> Warning Letter and invited Mr. Alexander to contact Ohio EPA if he had further questions. (CR Item 50.)

**{¶54}** On July 7, 2003, Director Jones responded to Mr. Alexander's May 13<sup>th</sup> letter by explaining that the "complaints," which were reviewed during the resurvey, will be "complaints" that have already had been received by CCHD and explained that the resurvey process would follow the annual survey process with which his client is already familiar. Director Jones also addressed CCHD's concern about Mr. Weber's potential bias against the Board and stated that Mr. Weber "has consistently exhibited the highest level of integrity in the conduct of his professional duties, and I am confident that he will continue to do so in performing his responsibilities with respect to the Health District." Director Jones advised Mr. Alexander that Mr. Weber will be conducting the resurvey and will be accompanied by other personnel from the Agency. (CR Item 46, 51.)

**{¶55}** On July 23, 2003, Mr. Morehead sent a memorandum with attachments to Director Jones. The memorandum conveyed Mr. Morehead's desire to demonstrate that CCHD is "capable and willing to enforce the applicable requirements of the Ohio Revised Code and the Director's implementing regulations with respect to the [solid and infectious waste] and C&DD programs in Columbiana County." Through this communication, Mr. Morehead contended that the items of noncompliance "set forth in the 2001 annual surveys did not constitute substantial noncompliance by the District \* \*

\*, and further, that the District is currently in compliance with the applicable



requirements.” In support, he included two documents titled the “2001 Re-Survey C&DD Program” and the “2001 Re-Survey Solid/Infectious Waste Program.” (CR Item 44.)

{¶56} Responding to the deficiencies in their C&DD program, Mr. Morehead outlined the following comments:

- [3745-37-08](D)(2) – Incomplete applications.

Executed original Financial Assurance documentation of financial instruments, which included the dollar amount for final closure of the facility.

\* \* \*

In order to address these matters in the 2001 Survey Report, the District has implemented a new policy regarding these original documents. Henceforth, the original signed financial assurance documents will not be returned to the licensee at the conclusion of the period covered by such instruments.

- [3745-37-08](D)(5)(A) – Failure to inspect each facility quarterly.

The District’s staff reviewed these files and found a report of inspection of A&L in September 2001.

- [3745-37-08](D)(7) – Failure to undertake appropriate actions against license holders whenever necessary to bring about substantial compliance.

Wastemasters. Failure to collect money from owner or bond in order to properly close landfill. No action to collect on bond.

The minutes of Board’s meeting on November 26, 2001, record that the Board did take action on this matter. The Board referred this matter to the Columbiana County Prosecutor on that date. \* \* \*

A&L. Failure to cite violations, as instructed by Ohio EPA, resulting from March 13, 2002, partial violation.

The District acknowledges that a staff member was requested by Mr. Jerry Weber to accompany Mr. Weber when Mr. Weber conducted his inspection of A&L and prepared his report of that inspection. Mr. Weber then ordered the District's staff member to issue [a report identical to his own]. That staff member respectfully declined that order. The Board respectfully submits that the Board has the duty and responsibility to exercise independent judgment when complying with the requirements of the C&DD statutes and regulations. The Board further respectfully (sic) submits that those statutes and regulations do not subject the District's employees to the supervision and control of OEPA's field staff. Indeed, the District would be remiss if it permitted the field staff of any agency to the (sic) control and supervise District employees.

[CCHD similarly discussed a comparable inspection event occurring on November 12, 2002.]

Bye Road Complaint. District failed to cite violations against Eugene Biser on the property at 5467 Bye Road, E. Palestine.

The District did cite Mr. Biser for violations. Following the District's inspections of this facility on April 4 and April 10, 2001, the District issued a Notice of Violation and Order to Abate on April 10, 2001.

[CCHD explained the events surrounding a direct complaint of open burning and commented that it never received the complaint from Ohio EPA.]

- [3745-37-08](D)(7) – Failure to take immediate action to abate serious hazards to public health resulting from the violations listed above in 8(D)(7) [sic].

"The District respectfully submits that any instances of noncompliance that the Director may determine regarding Mr. Weber's assertions under the heading 'OAC 3745-37-08(D)(7)' on pages 4 and 5 of the [2001 C&DD Survey] do not pose hazards to public health and certainly no **serious** hazards to public health. Indeed, that report does not define or identify 'hazards' posed by any of those facilities. \* \* \*" (Bold and underling in original.) (CR Item 44.)

{¶57} In the companion document titled "2001 Re-Survey Solid/Infectious Waste Program," Mr. Morehead addressed Agency concerns regarding CCHD's solid and infectious waste program. Relevant portions of this document are excerpted and summarized as follows:

- [3745-37-08](C)(5) – Failure to perform certification inspection within thirty days after issuance of license.

"The Mat Shop was the only Solid Waste facility that presented a SIW licensing matter during the 2001 Survey period – Mat Shop's license was renewed on April 12, 2001. \* \* \* " CCHD had inspected the Mat Shop on March 21, 2001. CCHD believes this mistake is an innocent mistake, as it had misinterpreted an email from Mr. Weber in which Mr. Weber stated that "such inspections were to be 'within 30 days of issuing the license.'" CCHD believed it actually had 60 days, 30 prior and 30 following the issuance of a license, in which to conduct the inspection.

- [3745-37-08](C)(6) – Failure to conduct quarterly inspections.

A "[r]eview of the District's files has produced a quarterly report for March 27, 2001" for the Center Township Landfill.

- [3745-37-08](C)(8) – Failure to undertake appropriate actions whenever necessary to bring about substantial compliance.

CCHD believes it "did address the Dave Moore matter" at its October 2, 2000 board meeting, during which the board "unanimously approved a motion to proceed with legal action. \* \* \* The Prosecutor retained jurisdiction in this matter until July 6, 2001, when the Prosecutor closed his file in this matter because the OEPA had assumed enforcement jurisdiction."

Failure to take appropriate action against Eugene Biser.

"The District did issue a Notice of Violation and Order to Abate on April 10, 2001."

Failure to respond in timely manner to all complaints involving compliance with ORC and OAC.

"It is not possible to respond to this allegation, since Mr. Weber failed to reference any specific complaints in this allegation. \* \* \*"

- [3745-37-08](C)(9) – Failure to take immediate action to abate serious hazards to public health resulting from the violations in 8(C)[9] [sic].

“The Board did take action in the Moore matter to promptly address any hazards to public health posed by this facility; however, the OEPA subsequently assumed jurisdiction of this matter. The other matters listed \* \* \* did not pose hazards to public health, and certainly not ‘serious’ hazards. The Center Township Landfill had been closed for several years prior to the 2001 Survey period and the Biser facility was merely a junkyard.”

[CCHD next makes two notations about pages 13 and 14 of the 2001 Solid and Infections Waste Survey. CCHD asserts that it was aware of both the Director’s May 14, 2002 Final Findings and Orders regarding Center Township Landfill and the December 19, 2002 Final Findings and Orders regarding East Liverpool Landfill when conducting inspections of those two facilities.] (Underlining in original.) (CR Item 44.)

### **The Resurvey**

{¶58} On July 23, 24, 25, 29, and August 5, 2003, Ohio EPA conducted a resurvey of CCHD pursuant to Ohio Adm.Code 3745-37-08(G). The findings of the resurvey, which include many of the same issues identified in the 2000 and 2001 Annual Surveys, are discussed in full in the Director’s April 15, 2004 removal letter. (CR Item 1.)

{¶59} Testimony at the hearing provided additional background into the Director’s resurvey activities and his ultimate decision to delist CCHD. The Director’s testimony focused on five main areas: (1) the Bye Road property; (2) the Dave Moore property; (3) A&L Salvage; (3) Elkrum Industries; (4) Penn-Ohio; and (5) the overall philosophical differences between Ohio EPA and CCHD regarding implementation of regulations relating to solid waste and C&DD landfills within CCHD’s jurisdiction.

{¶60} Regarding Eugene Biser's Bye Road property, Mr. Weber testified that during his three or four visits to the Bye Road property, he observed solid waste and C&DD "bulldozed" to approximately 6-7 feet high and 100-150 feet long on the back of Mr. Biser's property. From April 2001 through April 2006, Ohio EPA issued "three or four" notices of violation to Mr. Biser. Yet, despite retaining jurisdiction over this site, CCHD failed to issue any notices of violation to Mr. Biser. Interestingly, Mark Nichol, Environmental Director for CCHD, testified that he was aware of hundreds, perhaps "low thousands," of properties where waste was stored in the same manner as it was stored on Mr. Biser's property. Though not at issue in the instant matter, Ohio EPA highlighted that CCHD did not issue citations for any of the numerous properties Mr. Nichols described; demonstrating another area in which the Agency and CCHD disagree. (Testimony Nichol, Weber.)

{¶61} CCHD testified that the reason it did not pursue enforcement at the Bye Road property is because it did not believe it retained jurisdiction over the Bye Road property after September 9, 2002, when the Director issued the 2001 Annual Surveys. Pointing to the portions of the 2001 Annual Surveys that state that OEPA had assumed "control in this case in order to resolve" the issue of "illegal disposal of C&DD at this property," CCHD contends that Ohio EPA intended to exert exclusive control of the Bye Road property. Thus, after the issuance of the 2001 Annual Surveys, it would have been Ohio EPA's, not CCHD's, responsibility to cite Mr. Biser for any violations of Ohio's regulations. The full text from the survey referenced by Appellant provides background for the Agency's statement:

Illegal disposal and open burning of C&DD has taken place on this property. The health department referred this matter to Ohio EPA for

action. The Division of Air Pollution Control has taken action against the property owner for the open burning violations, however, the health department is also responsible for taking action against the property owner for the open dumping of solid waste. Since the health department failed to cite appropriate violations for open dumping of solid waste at this property, Ohio EPA has had to assume control of this case in order to resolve this issue. (Appellant's Ex. 21; testimony Morehead.)

**{¶62}** Contrary to CCHD's assertion, Mr. Weber testified that a health district does not lose its authority over a property within its jurisdiction unless it is delisted. Both Ohio EPA and a health district can enforce applicable regulations and issue citations to facilities within the health district's jurisdiction. (Testimony Weber.)

**{¶63}** Regarding its second area of concern, Ohio EPA noted that CCHD failed to take action to correct or cite Dave Moore for violations at his scrap tire dump. The Board contends that it did not retain jurisdiction over Mr. Moore's property, but during the time Ohio EPA was not exerting control over Mr. Moore's scrap tire property, CCHD properly cited violations and took appropriate enforcement actions, when necessary. The Board pointed to at least five enforcement-type actions initiated in April 1986, June 1989, June 1995, August 1997, and September 1997, to stop open dumping on Mr. Moore's property. Eventually, CCHD recognized that abatement orders and subsequent fines levied by the Columbiana Prosecutor's Office were insufficient to halt Mr. Moore's open dumping activities and began working with Ohio EPA to "curtail" Mr. Moore's activities. (Testimony Amato, Morehead).

**{¶64}** In support of its position that it did not retain jurisdiction over Dave Moore's property, CCHD points to the 2001 Annual Solid Waste Survey in which the Director stated that CCHD had not cited appropriate violations nor had it taken enforcement action against Dave Moore for open dumping of scrap tires. "As a result,

Ohio EPA has assumed the lead on this case and is proceeding with enforcement against Mr. Moore.” (CR Item 1, 60-3.)

{¶65} Appellant CCHD also highlighted meetings and conversations between CCHD and Mr. Weber that it believed substantiates Ohio EPA's exclusive jurisdiction over Mr. Moore's property beginning in Fall 1998. In September 1998, Mr. Weber attended a board meeting to discuss Mr. Moore's property in Yellow Creek Township, which is within CCHD's jurisdiction, and his East Liverpool property, which is outside CCHD's jurisdiction. According to Mr. Weber's testimony, discussions at the meeting centered on how to expedite the clean up of the Yellow Creek Township property by potentially combining it with the East Liverpool case Ohio EPA was already pursuing. The Board believes that Mr. Weber had committed to pursuing enforcement actions relating to both properties, simultaneously. Mr. Weber's later testimony, however, supports that he was unable to pursue the two Moore matters simultaneously because CCHD failed to provide the proper documentation on the Yellow Creek Township site so that he could refer the matter relating to that property to the Ohio Attorney General for enforcement.<sup>6</sup> (Testimony Morehead, Weber.)

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<sup>6</sup> Although none of CCHD's Assignments of Error appears to correlate directly with whether CCHD retained jurisdiction over certain facilities during the periods it believed that Ohio EPA had taken "control of" a case to resolve an issue or had "assumed the lead" on a case to pursue enforcement, a significant amount of time was dedicated to this topic at the de novo hearing. The Commission notes that despite CCHD's belief that it no longer retained control over the Bye Road property and Mr. Moore's property, CCHD failed to direct the Commission to any point of law that would preclude both CCHD and Ohio EPA from enforcing concurrently applicable laws and regulations within CCHD's jurisdiction.

The Commission notes that the key regulations divesting a board of health of authority over facilities within its jurisdiction are found in the delisting process. See, R.C. 3714.09 and 3734.08. Moreover, R.C. 3734.08(C)(2) grants the Director the authority " \* \* \* to initiate and pursue any appropriate judicial remedy, available under this chapter to enforce solid and infectious waste provisions and any rules or terms or condition of any permit, license variance, or order adopted or issued under them, \* \* \* *regardless of whether a facility is located in a health district that is on the approved list under this section.*" (Emphasis added.) (Revised Code 3714.10(C)(2) contains a similar provision granting the Director authority over C&DD facilities.) Because delisting had not yet occurred when the Director properly exercised his authority over these facilities, the Commission is unable to rely

**{¶66}** Regarding its third area of concern, Ohio EPA noted several problems with A&L Salvage - both before the resurvey and on five separate instances throughout the resurvey period. During inspections, CCHD failed to cite violations for illegal disposal of solid waste in a C&DD landfill; specifically on November 12, 2002, March 4, 2003, March 26, 2003, June 13, 2003, and June 18, 2003. (CR Item 1.)

**{¶67}** In her testimony regarding the November 12, 2002 inspection, Ms. Cope testified that she had observed solid waste in the working face, which was to be picked and removed by the facility workers. She determined that only a de minimus amount of solid waste was present; therefore, no violation occurred pursuant to CCHD's second exemption. She further noted that she was not with Mr. Weber when he observed certain solid waste items, and thus, she was unable to cite them in her report. The Board maintains that Ohio EPA and CCHD can conduct concurrent inspections, yet have differing outcomes because Mr. Weber and Ms. Cope did not see the same things and because the de minimus amounts of solid waste observed in the working face would not have been considered violations under CCHD's exemptions. (Testimony Cope, Weber.)

**{¶68}** More specifically, the philosophical differences between Ohio EPA and CCHD regarding inspections and citations are well-illustrated in their individual Notice of Violations ("NOVs") from the November 12, 2002 joint inspection of A&L Salvage. Ms. Cope's inspection report dated November 22, 2002, did not include any violations of R.C. 3734.03 or Ohio Adm.Code 3745-400-11, despite the fact she noted that the amount of solid waste in the landfill "exceeded the Board's expectation of incidental

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on CCHD's assertion that the reason it failed to pursue actions relating to certain facilities was because Ohio EPA had usurped CCHD's jurisdiction over specific facilities.



amounts of waste” and “[t]he solid waste observed should have, for the most part, been picked.” Conversely, Ohio EPA’s Notice of Violation dated December 6, 2002, cited violations based on Mr. Weber’s identification of at least fifty different types of solid waste. He also noted that “[p]rohibited waste was observed spread across and compacted into the entire working face and was not limited to any discrete area.” As a result, Mr. Weber cited A&L Salvage for violations of illegal solid waste, listing R.C. 3734.03 [Open dumping of solid waste]; Ohio Adm.Code 3745-400-11 [Acceptance of prohibited solid waste at a C&DD landfill; and Ohio Adm.Code 3745-400-11(F)(2) [Disposal of prohibited materials]. (CR 1; State Ex. 10, 12; testimony Cope, Weber.)

**{¶69}** And, in the few months just prior to the Director’s issuance of the April 15, 2004 Removal Letter, the Director noted the following instances of CCHD’s failure to cite A&L Salvage for illegal disposal of solid waste:

- a. December 30, 2003 – a boot and beverage containers;
- b. January 9, 2004 – shoes, beverage containers, book, French fry bag, folders;
- c. February 10, 2004 – shoe, beverage container, filing folder;
- d. February 18, 2004 – toy, bible, plastic chair; and
- e. April 1, 2004 – beverage containers, shoe. (State Ex. 57, 55, 54, 53, 51.)

**{¶70}** Similarly, the resurvey noted instances where CCHD failed to cite Elkrun for a violation for illegal disposal of solid waste during a July 1, 2002 inspection. Moreover, despite the Director’s urging, CCHD failed to correct the inspection report. CCHD is aware that it is permissible to correct inspection reports after the inspection has occurred. Indeed, Mr. Weber sent a corrected survey to Mr. Morehead when Ohio

EPA had omitted a field inspection report from his survey report. (State Ex. 1, 44, 89; testimony Weber.)

{¶71} Conversely, CCHD contends that the Director failed to identify the specific violations and corrections that should have been made following the Elkrum inspection. Mr. Morehead testified that the board acted properly and believes that an inspector should not “rewrite” an inspection report because it is “not kosher \* \* \* you just don’t go back and recreate something. \* \* \* if there’s deficiencies, you try to fix them and make sure they don’t happen again. You can’t go back and change things you’ve already done and signed off on.” (Testimony Morehead.)

{¶72} Ohio EPA further testified that on at least two occasions following the 2001 Annual Survey and before the Director issued the Removal Letter, CCHD failed to cite Elkrum for illegal disposal of solid waste found during an inspection. The CCHD inspection report from December 4, 2003, documents the presence of a dog food sack and beverage containers; and their inspection report from January 14, 2004 notes that beverage containers, a table cloth, a magazine, and a newspaper were present in the C&DD waste. Yet, no violations were cited. (State Ex. 94, 95.)

{¶73} Additionally, Ohio EPA asserted that CCHD had engaged in similarly flawed inspection techniques when inspecting the Penn-Ohio facility. During a June 25, 2003 inspection, CCHD failed to site Penn-Ohio for illegal disposal of solid waste, i.e., a keyboard in the working face of the landfill. During that inspection, inspector Paula Cope noted that while walking the “perimeter of the working face,” she noticed a computer keyboard. She testified that it was possible the computer keyboard was later removed, because “during inspections, pickers typically follow behind me, note what I

observe, and then pick it up.” She continued her description of how she conducted inspections by noting that once the Board adopted the exemptions, she no longer cited owners or operators for violations of solid waste if the pickers removed the solid waste from the working face. (Testimony Cope.)

{¶74} Relating to the Penn-Ohio site, Ohio EPA produced documents supporting that CCHD failed to cite Penn-Ohio on fifteen other occasions after the issuance of the 2001 Annual Survey report. Specifically:

<u>Inspection Letter Date</u>	<u>Solid Waste Found</u>	<u>State's Ex.</u>
July 16, 2003	Three beverage containers, wrench	64
August 27, 2003	Sofa cushion, beverage containers, boot, license plate	67
September 4, 2003	No “appreciable solid waste” found	68
November 13, 2003	No “appreciable solid waste” found	69
November 21, 2003	Shoes, beverage containers	70
December 30, 2003	Shoe, pillow, beverage containers	72
January 9, 2004	Beverage containers, plastic swimming pool	73
January 14, 2004	Magazine, computer mouse, beverage containers	74
January 22, 2004	Beverage containers, plaque	75
February 5, 2004	Cans, shoe, stuffed toy, yogurt container	76
February 12, 2004	X-ray film (listed as “Potential Violation”)	77
February 17, 2004	Boot, shoe, beverage containers	78
March 12, 2004	Fliers, Doritos bag, book, yogurt & beverage containers	81
March 25, 2004	Food containers, ball, music book	82
April 19, 2004	Beverage containers, deodorant, ice tray	83

{¶75} During the de novo hearing, the Agency pointed out several other items illustrating CCHD’s unwillingness to uphold their duties as an approved health district. First, Ohio EPA stated that, although initially raised in the 2001 Annual Survey, CCHD had still not recovered closure money from Wastemasters C&DD Landfill and that Ohio EPA, itself, had to take action to collect the bond money. (State Ex. 21; testimony Weber.)

{¶76} The Board contended that it did attempt to collect the financial assurance money from the “facility or operator’s bond” and believed that this issue was resolved

by the statement included in Mr. Morehead's July 2003 letter, in which he advised the Director that the Wastemasters matter had been referred to the Columbiana County Prosecutor for further action. Specifically, in the Fall of 2001, CCHD referred this matter to the prosecutor and directed him to collect the monies from Wastemasters' financial assurance bond. In July 2002, the prosecutor sent correspondence to Frontier Insurance Company referencing previous conversations and stated "the sum of the bond, up to \$178,430.00 must be released to the Health District for final closure." Ultimately, Frontier Insurance Company declared bankruptcy, and in January 2004, notified the Board that it would pay only \$75,000. (Appellant Ex. 18, 42; testimony Morehead.)

{¶177} Second, on November 5, 2003, Mr. Harris of Ohio EPA, sent correspondence to Mr. Morehead outlining Ohio EPA's on-going enforcement action relative to A&L Salvage. In relevant part, Mr. Harris stated:

*\* \* \* Ohio Administrative Code (OAC) Rule 3745-37-03(C)(2) specifies that the licensing authority is prohibited from issuing a construction and demolition debris facility license to an applicant that has failed to operate the facility in substantial compliance with ORC Chapter 3714. and OAC Chapters 3745-400 and 3745-37. The escalation of an enforcement action against a facility is a significant factor in determining whether a facility is in substantial compliance with the State's laws and regulations.*

In this case, Ohio EPA has initiated formal enforcement proceedings through the issuance of an invitation to negotiate DFF&Os. This invitation to negotiate was made as a result of A&L Salvage, LLC's substantial violation of Ohio's construction and demolition debris and solid waste laws. Therefore, \* \* \* Ohio EPA considered A&L Salvage, LLC not to be in substantial compliance as required by OAC Rule 3745-37-03(C)(2), and therefore if Ohio EPA were the licensing authority in this matter, it would issue a proposed denial of A&L Salvage, LLC 2004 license application. In this instance, [CCHD] is an approved health district and, therefore, carries out the delegated powers of the Director of Ohio EPA in Columbiana County. Accordingly, Ohio EPA recommends that the [CCHD] should issue a proposed denial of A&L Salvage, LLC's 2004 license application if

A&L Salvage, LLC has not entered into a satisfactory consent agreement with Ohio EPA before December 31, 2003.

On behalf of Ohio EPA's solid waste program, I would greatly appreciate your health district's cooperation and look forward to resolving any issues associated with a proposed denial of A&L Salvage, LLC's 2004 license. Ohio EPA will inform you if settlement of this matter has been reached by December 31, 2003. \* \* \* [For reference, Mr. Harris attached a copy of the DFFOs sent to A&L Salvage in September 2003.] (CR Item 37-6.)

{¶78} Upon receipt of Mr. Harris's November 5<sup>th</sup> recommendation that the Board deny A&L Salvage's request for a 2004 license, the Board instructed Mr. Morehead to request documentation from Mr. Harris substantiating why Ohio EPA believed that A&L Salvage was not in substantial compliance and should not receive a 2004 license. (Testimony Morehead.)

{¶79} In a letter dated December 22, 2003, Director Jones responded to CCHD's inquiry and articulated the rationale for his recommendation that A&L Salvage was not in substantial compliance. First, Director Jones clarified that the November 5<sup>th</sup> letter was intended to be a "proactive attempt to" apprise the District of Ohio EPA's actions regarding A&L Salvage and to ask for its cooperation by not issuing the 2004 license. (CR Item 37-3.)

{¶80} Director Jones continued by stating:

The unresolved compliance issues that are occurring at the A&L Salvage construction and demolition debris landfill should not be a surprise to you. The Ohio EPA has had numerous communications with you and your staff about this matter for more than a year now. For example, as part of the annual survey of your health district, I sent you a letter dated March 13, 2003. This letter, and the attachments contained therein, outlines the deficiencies in your health district's solid and infectious waste and construction and demolition debris programs and specifically identifies some of the ongoing compliance problems at the A&L Salvage facility. These issues included, but are not limited to, the owner/operator's failure to utilize an unloading zone separate from the working face at the facility, and the owner/operator's disposal of solid waste at the facility. As a

health district on the approved list of health districts administering and enforcing [such programs], it is the health district's responsibility to take appropriate action against owners and operators of facilities to ensure that they are maintaining substantial compliance with Ohio's environmental laws. It is your health district's failure to take action against A&L Salvage that has prompted Ohio EPA to escalate enforcement action. (CR Item 37-3.)

**{¶81}** The Director also took "strong exception to" CCHD's "characterization that Ohio EPA wishes to 'shut down' the operations of the A&L Salvage facility," and stated:

\* \* \* This Agency, as well as health districts on Ohio EPA's approved list of health districts, are charged to administer and enforce Ohio's solid and infectious waste and construction and demolition debris programs. To do any less would ignore the intent of the rules and statute. The goal of the enforcement action and the proposed consent agreement is not to 'shut down' A&L Salvage \* \* \*, but rather to set a schedule for the owners and operators of that facility to attain substantial compliance with Ohio's environmental regulations.

A 'proposed' denial of an operating license does not necessarily mean that the owner or operator of a facility needs to cease operations. Whenever a licensing authority determines that it is unable to approve a particular operating license, it must first issue a 'proposed' license denial and allow the owner/operator an opportunity to request that a hearing take place prior to issuing a 'final' action. The owner/operator may continue to operate the facility during the pendency of the hearing. \* \* \* (CR Item 37-3.)

**{¶82}** The CCHD did not receive the Director's 3-page letter before it approved A&L Salvage's 2004 license application during its December 23, 2003 Special Meeting. (CR Item 37-3; testimony Morehead.)

**{¶83}** During a Board of Health Special Meeting held on December 23, 2003, the Board approved the 2004 licenses for several facilities within their jurisdiction, including A&L Salvage despite the Agency's recommendation to the contrary. Dr. Amato and Mr. Morehead testified that the Board had retained the services of Vadose Research, Inc., an environmental consulting firm, to review, among others, A&L Salvage's application

for its 2004 operating license. Mr. Morehead testified that Vadose Research advised CCHD that A&L Salvage was in substantial compliance with Ohio laws and regulations and recommended that the Board issue the 2004 operating license. (Appellant Ex. 29; testimony Morehead.)

**{¶84}** During the hearing, Dr. Amato testified that the Board would not have approved A&L Salvage's application if it believed A&L Salvage was not in substantial compliance with the C&DD laws in the state of Ohio. Further, Mr. Morehead explained why it was his personal belief that A&L Salvage was in substantial compliance with Ohio's C&DD laws. Specifically, he testified:

We were doing inspections at the A&L site weekly. The EPA is not out there anywhere near that often. I felt we were in a better position to determine whether they were in substantial compliance. In Mr. Harris' letter and Director Jones' letter, they basically say it's our call. We're the licensing authority and we make that determination. They recommended – they did not say you can't do this. They said, you are the licensing authority. We recommend that you don't approve. (Testimony Amato, Morehead.)

**{¶85}** On February 6, 2004, a survey "exit conference" was convened at Ohio EPA-NEDO wherein several Ohio EPA employees and CCHD employees were present to discuss the results of the resurvey and ways that CCHD could be brought into compliance so as to avoid being delisted. (Appellant Ex. 32; testimony Weber.)

**{¶86}** On February 13, 2004, Mr. Alexander sent correspondence to Director Jones in which he referenced the 2001 Annual Surveys and summarized his client's position following the February 6<sup>th</sup> exit conference. Mr. Alexander noted that CCHD had corrected or resolved several of the items originally listed by Ohio EPA in their 2001 Annual C&DD and Solid Waste Surveys. He also explained that his client felt it had not been given sufficient documentation to support the Director's concerns and

requested that the exemptions matter and the A&L Salvage matter not be included in the Director's determination as to whether CCHD should remain on the approved list of health districts. (CR Item 20-5.)

{¶87} On March 17, 2004, in a letter responding to Mr. Alexander's February 13<sup>th</sup> letter, the Director acknowledged that an exit meeting had been held in February 2004 and that CCHD had resolved to Ohio EPA's satisfaction certain matters noted in prior letters, as well as discussed at the exit conference. Most importantly, however, the Director listed eight "very serious," unresolved matters identified in the 2000 Annual Surveys, the 2001 Annual Surveys, the resurvey, and at the survey exit conference. These matters are summarized below and include:

- Bye Road Open Dump. CCHD failed to take appropriate action by not citing the owner who was in "violation for open dumping of solid waste and for illegal disposal of C&DD, and by not taking escalated enforcement action against the property owner for failure to comply with solid waste laws and rules. Solid waste and C&DD still remain on the property."
- Dave Moore Scrap Tire Open Dump. CCHD failed to "consistently cite violations and to take escalated enforcement action. \* \* \* [t]his case clearly illustrates a significant misunderstanding by the Health District. For many years, the Health District has contended that it is Ohio EPA's responsibility to take action against illegal scrap tire disposal sites, when in fact it is a Health District's responsibility as an approved health department authorized to administer and enforce solid and infectious waste laws."
- A&L Salvage C&DD Landfill. "The Health District failed to cite appropriate violations relating to disposal of solid waste at this facility during inspections conducted on November 12, 2002, March 4 and 26, 2003 and June 13 and 18, 2003." Additionally, CCHD "issued the 2004 operating license despite the fact that Ohio EPA recommended that the license not be issued due to the compliance issues that Ohio EPA has with the owner or operator of the facility."
- Elkrum Industries C&DD Landfill. During an inspection conducted on July 1, 2002, CCHD failed to "cite appropriate violations relating to disposal of solid waste at this facility. \* \* \*"



- Penn-Ohio C&DD Landfill. During an inspection conducted on June 25, 2003, CCHD failed to "cite appropriate violations relating to disposal of solid waste at this facility. \* \* \*"
- Wastemasters C&DD Landfill. CCHD failed to "take appropriate action against the owner of this property by not initiating escalated enforcement action in order to pursue proper closure of the facility in accordance with C&DD laws and rules." CCHD also failed to collect, in a timely manner, money from the financial assurance closure bond. "The bond funds should have been used to close the facility in accordance with all appropriate construction and demolition debris laws and rules."
- C&DD Files. "The Health District failed to include all of the required documents, including copies of exemptions issued to C&DD facilities, pending litigation, and complaint documentation in the files for each facility."
- "On August 22, 2002, the Health District granted a variance to the owners or operators of C&DD landfills operating in Columbiana County. The variance allows the owners and operators to dispose of solid waste regulated by ORC 3734. and OAC Chapter 3745-27 in the working faces of their C&DD landfills. The health district exceeded its statutory authority by granting such a variance." (CR Item 20-1 through 20-4.)

{¶88} The Director continued this letter by explicitly detailing additional areas upon which CCHD and Ohio EPA differ. First, the Director addressed Mr. Alexander's assertion that two issues should be excluded from the material the Director will consider when deciding whether CCHD should remain on the approved health district list. Specifically, Mr. Alexander believed that the Director should not consider the pending litigation Ohio EPA initiated against CCHD for allegedly wrongfully granting exemptions to C&DD landfills in Columbiana County. He also urged the Director to exclude CCHD's issuance of 2004 operating license to A&L. (CR Item 20-1 through 20-4.)

{¶89} The Director countered that, indeed, these matters should be considered when evaluating whether CCHD should remain on the approved list. First, the

exemptions should be considered because CCHD issued the exemptions shortly after the 2001 annual review. Further, they were discussed numerous times throughout the removal process and again at the February exit meeting, during which time the Director repeated his request that the CCHD rescind the exemptions. Yet, despite the Director's unambiguous objection and explicit request, CCHD refused to rescind the exemptions. (CR Item 20.)

**{¶90}** Second, Ohio EPA had recommended to CCHD that it not issue the 2004 operating license to A&L Salvage due to the fact the "owner or operator of the facility is not in substantial compliance with Ohio's environmental rules." Appellant CCHD blatantly chose to ignore Ohio EPA's recommendation, disregarded Ohio's rule that prohibits license issuance under such conditions, and issued the 2004 operating license to A&L Salvage on December 23, 2003. Because CCHD issued the license prior to the survey exit conference held in February 2004, the Director considered this matter to be "germane and subject to review and consideration for the purposes of determining the adequacy of the health district's program." (CR Item 20.)

**{¶91}** Significantly, the Director stated that "[i]n both instances, the Health District has demonstrated an unwillingness to implement the solid and infectious waste and C&DD programs as expected by my office." The Director closed his letter by advising the CCHD that he will consider these items as he makes his "final determination regarding the Health District's eligibility to remain on the approved list of health districts." (CR Item 20.)

### Removal Letter

{¶92} In an April 15, 2004 certified letter, the Director notified Mr. Morehead that “[b]ased on the resurvey, I have determined that the CCHD is not eligible to continue to remain on the approved list of health districts authorized to administer and enforce the solid and infectious waste laws and rules in accordance with ORC Section 3734.08, nor on the approved list of health districts authorized to administer and enforce the C&DD laws and rules in accordance with ORC Section 3714.09.” (CR Item 1; testimony Weber.)

{¶93} The Director began his correspondence by referencing the March 13, 2003 Warning Letter he had sent to Mr. Morehead “outlining the deficiencies” in CCHD’s solid and infectious waste and C&DD programs and notifying him that the health department would be “resurveyed within 120 to 180 days.” (CR Item 1.)

{¶94} The Director continued:

On July 23, 24, 25, and 29, and August 5, 2003, Ohio EPA conducted [the] resurvey of the CCHD pursuant to OAC Rule 3745-37-08(G). On February 6, 2004, Ohio EPA staff held an exit conference with CCHD representatives to discuss the general findings of the resurvey. The resurvey demonstrated that the CCHD failed to administer and enforce the solid and infectious waste and C&DD programs as required by law. In particular, I have serious concerns regarding the manner in which the CCHD has handled the following situations:

- Bye Road Open Dump. During the resurvey period, the CCHD has continued to fail to take appropriate action against the owner of this property by not continuing to cite the property owner in violation for open dumping of solid waste and for illegal disposal of C&DD, and by not taking escalated enforcement action against the property owner for failure to comply with solid waste and C&DD laws and rules. This is an example of the CCHD failing to comply with OAC Rules 3745-37-08(C)(8) and 3745-37-08(D)(7), which require the CCHD to undertake appropriate action to bring about substantial compliance with Ohio Revised Code (ORC) Chapters 3734., 3714., and OAC Chapters 3745-27 and 3745-400.

- A&L Salvage C&DD Landfill. During the annual survey and the resurvey period, the CCHD failed to cite appropriate violations relating to disposal of solid waste at this facility during the inspections conducted on November 12, 2002, March 4 and 26, 2003, and June 13 and 18, 2003. In addition, the CCHD issued the 2004 operating license to A&L Salvage despite the fact that the owners and operators of the facility are not in substantial compliance with Ohio's environmental rules. As I have indicated to CCHD previously, it is my position that A&L Salvage has not maintained substantial compliance with Ohio's environmental rules and laws. Consistent with ORC Chapters 3714. and 3734., and OAC Rules 3745-37-03(C)(2) and (C)(3), CCHD was prohibited from issuing a C&DD facility license to A&L Salvage since it has failed to operate the facility in substantial compliance. What is of even more concern to me is that Ohio EPA provided guidance to the CCHD and recommended it deny the license, yet the CCHD chose to ignore the recommendation and the rules which prohibit license issuance in such circumstances. As you know, in order to uphold Ohio's environmental laws, Ohio EPA was obligated to appeal this illegal action of CCHD to the Environmental Review Appeals Commission. In addition, Ohio EPA has initiated enforcement action in this matter against the owners and operators of A&L Salvage because the CCHD failed to ensure that A&L Salvage maintained substantial compliance. CCHD has failed to comply with OAC Rule 3745-37-08(C)(8) and 3745-37-08(D)(7) which require the CCHD to undertake appropriate actions to bring about substantial compliance with ORC Chapters 3734., 3714., and OAC Chapters 3745-27 and 3745-400.
- Elkrum Industries C&DD Landfill. CCHD failed to cite appropriate violations relating to disposal of solid waste at this facility during an inspection conducted on July 1, 2002. During the resurvey period, the CCHD never corrected this inspection letter by citing appropriate violations of Ohio's C&DD and solid waste regulations and directing the owner/operator to remove the prohibited waste. This is an example of the CCHD's failure to comply with OAC Rules 3745-37-08(C)(8) and 3745-37-08(D)(7) which require the CCHD to undertake appropriate action to bring about substantial compliance with ORC Chapters 3734., 3714., and OAC Chapters 3745-27 and 3745-400.
- Penn-Ohio C&DD Landfill. During the resurvey period, the CCHD failed to cite appropriate violations relating to disposal of solid waste at this facility during an inspection conducted on June 25, 2003. This, again, clearly illustrates the philosophical differences which exist between the CCHD and Ohio EPA. When solid waste is disposed of in the working face of the facility, the owner/operator must be cited by CCHD for the appropriate violations associated with illegal disposal of solid waste in a construction and demolition debris facility. It is the responsibility of all health districts on the approved list to enforce the C&DD and solid and

infectious waste laws of the State. CCHD has failed to comply with OAC Rule 3745-37-08(C)(8) and 3745-37-08(D)(7) which require the CCHD to undertake appropriate actions to bring about substantial compliance with ORC Chapters 3734., 3714., and OAC Chapters 3745-27 and 3745-400.

- Wastemasters C&DD Landfill. During the resurvey period, the CCHD continued to fail to take appropriate action against the owner of this property by not initiating escalated enforcement action in order to pursue proper closure of the facility in accordance with all appropriate C&DD laws and rules. The CCHD also failed to take appropriate action by not attempting to collect the money from the financial assurance closure bond in a timely manner so that the bond funds could be used to close the facility in accordance with all appropriate construction and demolition debris laws and rules. This issue was again raised in my March 13, 2003 letter and the CCHD has not demonstrated to date that it has taken any escalated enforcement action against all appropriate parties to bring about compliance. CCHD has failed to comply with OAC Rule 3745-37-08(D)(7) which requires the CCHD to undertake appropriate action to bring about substantial compliance with ORC Chapter 3714. and OAC Chapter 3745-400

- On August 22, 2002, the CCHD granted a variance to the owners or operators of C&DD landfills operating in Columbiana County. The variance allows the owners and operators to dispose of solid waste regulated by ORC Chapter 3734. and OAC Chapter 3745-27 in the working faces of their C&DD landfills. The CCHD exceeded its statutory authority by granting such a variance. As you know, since CCHD has refused to rescind its action in the matter, Ohio EPA has initiated a civil action in the Columbiana County Court of Common Pleas to bring about compliance.

- Dave Moore Scrap Tire Open Dump. The CCHD failed to consistently cite violations and to take escalated enforcement action against Mr. Moore for open dumping scrap tires on his property, located in Yellow Creek Township. For many years CCHD has contended that it is Ohio EPA's responsibility to take action against illegal scrap tire disposal sites, when in fact it is a health district's responsibility if it is maintained on the approved list of health districts authorized to administer and enforce solid and infectious waste laws. CCHD has failed to comply with OAC Rule 3745-37-08(C)(8) which requires the CCHD to undertake appropriate actions to bring about substantial compliance with ORC Chapter 3734., and OAC Chapter 3745-27. As a result, Ohio EPA subsequently stepped in and initiated enforcement against Mr. Moore in an attempt to resolve the case. This case clearly illustrates yet another difference between the CCHD's philosophy and the manner in which I expect an approved health

district to administer and enforce Ohio's solid and infectious waste program. (CR Item 1.)

{¶95} In response to the Director's letter, which constitutes a final appealable action, CCHD filed a timely Notice of Appeal on May 4, 2004, containing the following Assignments of Error:

- 1) The Director's determination in his letter dated April 15, 2004, that the CCGHD is not eligible to continue to remain on the approved list of health districts authorized to administer and enforce the C&DD laws and rules is unlawful and unreasonable as set forth herein.
- 2) The Director's determination in his letter dated April 15, 2004, that the CCGHD is not eligible to continue to remain on the approved list of health districts authorized to administer and enforce the solid and infectious waste laws and rules is unlawful and unreasonable as set forth herein.
- 3) The Director failed to determine that the CCGHD is not substantially complying with Revised Code Chapter 3714. and the rules adopted thereunder, as required by Revised Code Section 3714.09(B)(2) and Administrative Code Section 3745-37-08(F).
- 4) The Director failed to determine that the CCGHD is not substantially complying with Revised Code Chapter 3734. and the rules adopted thereunder, as required by Revised Code Section 3714.09(A) and Administrative Code Section 3745-37-08(F).
- 5) The Director's determination in his letter dated April 15, 2004, is based, in part, upon his finding that the CCGHD 'issued the 2004 operating license to A&L Salvage.' Since that license was issued after the resurvey, the Director failed to base his determination solely upon the resurvey, as required by Revised Code Sections 3714.09(A) and 3734.08(B).
- 6) The Director's determination in his letter dated April 15, 2004, is based, in part, upon his finding that the CCGHD 'issued the operating license to A&L Salvage **despite the fact that the owner and operator of the facility are not in substantial compliance with Ohio's environmental rules.**' (Emphasis added.) The Director's finding that the 'owners and operators of the [A&L] facility are not in substantial compliance with Ohio's environmental rules.' is unlawful and unreasonable. (Emphasis and notation of emphasis in original.)
- 7) The Director's determination in his April 15, 2004, letter is based, in part, upon his finding that the CCGHD 'exceeded its authority by granting

[a variance to the owners or operators of C&DD landfills operating in Columbiana County].’ This determination is unlawful and unreasonable, and violates the prohibition set forth in the Comment to Administrative Code Section 3745-37-08(D) that ‘[a] health district will not be removed from the construction and demolition debris program list for issuing an exemption \* \* \*.’ (Bracketing in original.)

8) The Director has failed to consult with and advise the CCGHD regarding its ineligibility to be placed on both the solid and infectious waste program approved list and the C&DD program approved list and the steps to be taken to bring the solid waste program and infectious waste program and C&DD program into compliance, as required by Administrative Code Section 3745-37-08(F).

9) Although the resurvey was conducted on July 23, 24, 25, and 29 and August 5, 2003, the Director’s letter is dated more than eight months later. The Director failed to comply with the requirement that he act promptly as required by Administrative Code Section 3745-37-08(G).

## CONCLUSIONS OF LAW

### General Law

{¶1} Ohio Revised Code 3745.05 prescribes the Commission’s authority upon completion of a de novo hearing as follows:

If upon completion of the hearing, the commission finds that the action appealed from was lawful and reasonable, it shall make a written order affirming the action; if the commission finds that the action was unreasonable or unlawful, it shall make a written order vacating or modifying the action appealed from.

{¶2} “Unlawful” means that the action taken by the Director was not in accord with the relevant, applicable law. *Citizens Committee to Preserve Lake Logan v. Williams* (1977), 56 Ohio App.2d 61; *Northeast Ohio Regional Sewer Dist. v. Shank* (1991), 58 Ohio St.3d 16. “Unreasonable” means that the action was not in accord with reason, or that it had no valid factual foundation. *Id.* The Commission will find the action under appeal unlawful or unreasonable only in those cases where the evidence

establishes that the Director's action was not in accord with the relevant law, or where there was no valid factual foundation for his action. *Id.*

{¶3} The Tenth District Court of Appeals, in emphasizing its holding in *Citizen's Committee*, further clarified:

\* \* \* We also stated in *Citizens Committee* that 'the ultimate factual issue to be determined by the [Commission] upon the *de novo* hearing is *whether there is a valid factual foundation* for the Director's action and not whether the Director's action is the best or most appropriate action, nor whether the board would have taken the same action.' (Emphasis by court.) *Swan Super Cleaners, Inc., v. Tyler* (1988), 48 Ohio App.3d 215, citing *Citizens Committee, supra*.

{¶4} Where the evidence before the Commission demonstrates that the Director's action was lawful and reasonable, the Commission must affirm the action of the Director. In such instances, the Commission may not substitute its judgment for that of the Director. See *CFWater v. Schregardus* (October 27, 1994), Case No. 112570, 1994 Ohio EVN LEXIS 15\*18; *American Legion Post 526 v. Ioannides* (December 31, 1991), Case No. 292410, 1991 Ohio ENV LEXIS 8. Further, the Commission is cognizant of the well-accepted principal that deference should be granted to the Director's "'reasonable interpretation of the legislative scheme' governing his Agency." *Sandusky Dock Corp. v. Jones*, 106 Ohio St. 3d 274, 2005 Ohio 4982, 834 N.E.2d 786, citing *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad* (2001), 92 Ohio St.3d 282; *State ex rel. Celebrezze v. National Lime & Stone Co.* (1994), 68 Ohio St.3d 377; *North Sanitary Landfill, Inc. v. Nichols* (1984), 14 Ohio App.3d 331.



### **Law Regarding Approved Health Districts**

**{15}** To protect public health and safety and the environment, the General Assembly vested the Director with, inter alia, the authority to issue permits and licenses to solid waste, infectious waste, hazardous waste and C&DD facilities. R.C. 3734.02; R.C. 3714.02. Concomitantly, the Director is required to inspect solid, infectious, and hazardous waste facilities, as well as C&DD facilities to determine whether the owners or operators of those facilities are in compliance with Ohio's applicable environmental laws and regulations. Id.

**{16}** Pursuant to Ohio Adm.Code 3745-37-08, the Director is required to maintain the following approved lists of health districts:

(A)(1) The solid and infectious wastes program approved list of health districts for the purpose of issuing a license to a solid waste facility \* \* \*;  
and

(2) The construction and demolition debris program approved list of health districts for the purpose of issuing a license to a construction and demolition debris facility \* \* \*.

**{17}** Ohio Adm.Code 3745-37-08(B) states that health districts placed on the solid and infectious waste program approved list are concurrently placed on the construction and demolition debris program approved list. Similarly, health districts removed from the solid and infectious waste program approved list are also removed from the construction and demolition debris program approved list. Id. A health district may request to be placed solely on the C&DD approved list. R.C. 3714.09(B)(1) and Ohio Adm.Code 3745-37-08(B).

**{18}** Approved boards of health are vested with the authority to deny, suspend, or revoke a license for solid and infectious waste facilities and construction and demolition debris facilities. See, R.C. Chapters 3734.08, 3714.10.

**{19}** Further, the Director:

\* \* \* shall survey annually each health district on the solid and infectious wastes program approved list as provided by section 3734.05 or 3734.81 of the Revised Code to determine whether there is substantial compliance with this chapter and rules adopted under it, and upon determining that

there is substantial compliance, shall place the health district upon an approved list. The director shall make a resurvey when in his opinion it is necessary and *shall remove from the approved list any health district not substantially complying with this chapter and the rules adopted under it.* R.C. 3734.08. See also Ohio Adm.Code 3745-37-08(A).

**{¶10}** In a manner similar to the solid and infectious waste rules, the Director will conduct annual surveys of each health district to evaluate whether the health district is in substantial compliance with applicable C&DD laws and regulations. R.C. 3714.09 and Ohio Adm.Code 3745-37-08(A)(2).

**{¶11}** In administering a solid and infectious waste program, approved health districts are required to complete certain tasks. The Director's determination of whether a health district is operating in substantial compliance is based upon the following criteria:

- (1) applications for each solid and infectious waste facility are on file; and
- (2) applications are complete; and
- (3) all known solid and infectious waste facilities operating in the health district hold valid licenses; and
- (4) no new license has been issued prior to the director's approval of required detailed plans; and
- (5) the health district certifies inspection and compliance to the director within 30 days of issuance of a solid and infectious waste facility license; and
- (6) the health district inspects each solid and infectious waste facility at least quarterly; and
- (7) the health district maintains a file on each solid and infectious waste facility with requisite information; and
- (8) the health district takes appropriate actions to bring about substantial compliance with applicable R.C. and Ohio Adm.Code chapters and sections against all holders of solid and infectious waste licenses or those who operate solid and infectious waste facilities without a license; and

- (9) the health district takes immediate action to abate serious health hazards to the public health resulting from violation of applicable laws and regulations; and
- (10) the health district complies with Ohio Adm.Code 3745-37-07; and
- (11) the health district seeks legal assistance from appropriate state and local agencies to carry out its assigned duties. Ohio Adm.Code 3745-37-08(C)(1) – (11).

**{¶12}** The rules governing the Director's review of whether a health district's C&DD program is in substantial compliance mirror the regulations governing solid and infectious waste programs, except that a health district must also maintain a file containing all exemptions relating to local C&DD facilities. Ohio Adm.Code 3745-37-08(D)(1) – (12). The solid waste rules do not contain a similar provision, because boards of health are not authorized to adopt exemptions relating to solid and infectious waste facilities. See generally, Ohio Adm.Code 3745-37-08(C) and (D).

**{¶13}** If the Director determines that the health district is in substantial compliance, the health district may operate as an approved health district. Ohio Adm.Code 3745-37-08(E)(1) and (2). If, however, the Director determines that the health district is not in substantial compliance, "he shall promptly notify the health district of his determination by certified mail." Ohio Adm.Code 3745-37-08(F). The Director must also "consult with and advise the health district regarding its ineligibility to be placed on the [approved list]" and "steps to be taken to bring the \* \* \* program into compliance." Ohio Adm.Code 3745-37-08(F)(1) and (2). The Director shall resurvey the health district between 120 and 180 days after giving notice that the health district is not in substantial compliance. Ohio Adm.Code 3745-37-08(G).

{¶14} Finally, if after the resurvey, the Director determines that the health district is still not in substantial compliance, the Director is authorized to remove the health district from the approved list. R.C. 3734.08(B); Ohio Adm.Code 3745-37-08(G)

{¶15} Though CCHD does not challenge the Director's classification of waste as C&DD or solid waste, it is important to delineate and define the two types of waste at issue herein. Construction and demolition debris waste is defined as:

\* \* \* [t]hose materials resulting from the alteration, construction, destruction, rehabilitation, or repair of any manmade physical structure, including, without limitation, houses, buildings, industrial or commercial facilities, or roadways. 'Construction and demolition debris' does not include material identified or listed as solid waste or hazardous waste pursuant to Chapter 3734. of the Revised Code and rules adopted under it; materials from mining operations, nontoxic fly ash, spent non toxic foundry sand, and slag; or reinforced or nonreinforced concrete asphalt, building or paving brick, or building or paving stone that is stored for a period of less than two years for recycling into a usable construction material. R.C. 3714.01(C)

{¶16} Ohio Adm.Code 3745-400-01(F) more explicitly characterizes construction and demolition debris materials as:

\* \* \* 'materials resulting from the alteration, construction, destruction, rehabilitation, or repair of any manmade physical structure,' are those structural and functional materials comprising the structure and surrounding site improvements, such as brick, concrete and other masonry materials, stone, glass, wall coverings, plaster, drywall, framing and finishing lumber, roofing materials, plumbing fixtures, heating equipment, electrical wiring and components containing no hazardous fluids or refrigerants, insulation, wall-to-wall carpeting, asphaltic substances, metals incidental to any of the above, and weathered railroad ties and utility poles.

{¶17} In *City of Mentor v. Nozik*, 1990 Ohio App. LEXIS 5227 (Ohio Ct. App., November 30, 1990 ), the Eleventh District Court of Appeals stated, "material from construction operations or demolition operations' are those items affixed to the structure being constructed or demolished, such as brick, concrete, stone, glass,

wallboard, framing and finishing lumber, roofing materials, plumbing, plumbing fixtures, wiring, and insulation, but excludes materials whose removal has been required prior to demolition.” Id. at \*10-\*11. The court further explained, “examples may include stone, brick, clay or sand, but certainly would not include automobile frames, refrigerators, hot water tanks, television sets, mattresses or plastic containers.” Id at \*11. The court noted that a determining factor as to whether the material is solid waste or C&DD material is whether the material is “intimately integrated” with the structure, such as “concrete, plumbing fixtures, and wiring.” Id.

{¶18} Solid waste is defined as “such unwanted residual solid or semisolid materials as results from industrial, commercial, agricultural, and community operations, excluding \* \* \* other waste materials of the type that normally would be included in demolition debris.” R.C. 3734.01(E).

### **Assignments of Error**

{¶19} In Assignments of Error Three and Four,<sup>7</sup> Appellant asserts that the Director “failed to determine that the CCGHD is not substantially complying” with applicable solid waste and C&DD laws and regulations. At the de novo hearing, Appellant expressed concern that Director Jones was not present at the hearing to describe in detail precisely how he personally reached his final determination to delist CCHD. Appellant was also concerned that none of the state’s witnesses “were able to identify any documents that Director Jones reviewed prior to signing his Decisions,

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<sup>7</sup> Appellant’s first two Assignments of Error set forth allegations that need not be fully addressed by this Commission, as they appear to be tandem allegations generally establishing Appellant’s position that the Director’s action of delisting CCHD was “unlawful and unreasonable as set forth herein.” (Case File Item A.)

except one – the draft of the April 15<sup>th</sup> Decision that had been prepared by staff.” After struggling to interpret Appellant’s Third and Fourth Assignments of Error, based on the testimony at the hearing, the Commission was able to discern that Appellant’s underlying assertion is grounded in the fact that the Director was not personally available to testify regarding the materials that were reviewed prior to reaching his decision to delist CCHD. According to Appellants, for the Director’s action to be lawful and reasonable, it would be necessary for the Director to appear and testify before the Commission to identify the precise documents that were reviewed prior to making his determination to remove CCHD from the approved list of health districts. (Case File Item OOOO.)

**{¶20}** Ohio Adm.Code 3746-5-12(A) requires the Director to “prepare and certify to the commission the record of proceedings out of which the appeal arises.” Ohio Adm.Code 3745-5-12(B) prescribes the composition of the certified record and states:

The record on appeal shall include, but not be limited to, all papers, exhibits, documents, correspondence, and the transcript of proceedings, if any, including exhibits relating to the action from which the appeal arises.

**{¶21}** Ohio EPA employees testified that they reviewed and considered all information relating to the underlying matter when preparing the Certified Record. The Certified Record filed with the Commission contains more than one hundred documents, fifteen of which were stricken and not reviewed by the Director or the Commission.

**{¶22}** A review of the above-regulations, along with the Certified Record prepared by Ohio EPA and filed in the instant matter, establish that the Certified Record is an organized compilation of relevant material documenting communications

and events that occurred at the Agency, up to and including, the Director's final action. The Commission is satisfied that the information contained in this Certified Record is the information Ohio EPA employees reviewed and relied upon when making their recommendation to the Director. The Commission is further satisfied that the Certified Record, as filed with the Commission, represents the material the Director considered when reaching his determination that CCHD should be removed from the list of approved health districts.

**{¶23}** It is undisputed that on April 15, 2004, the Director sent a certified letter notifying CCHD that he had removed the District from the list of approved health districts in the state of Ohio. Thus, he did, in fact, personally make a determination that CCHD was not in substantial compliance. Accordingly, the Commission finds that the Director determined that CCHD should be removed from the approved list of health districts and that he based his determination on documents contained in the Certified Record.

**{¶24}** In its Fifth Assignment of Error, Appellant asserts that the Director's action was unlawful and unreasonable because the Director based his decision, in part, on the fact that CCHD issued the 2004 operating license to A&L Salvage. The District argued that, when reaching the determination as to whether CCHD was in substantial compliance with applicable laws and regulations, the Director should have "based his decision solely upon the resurvey," and because the Board issued the license after the resurvey period, the Director could not consider CCHD's issuance of a 2004 operating license to A&L Salvage.

{¶25} Appellants cite R.C. 3714.09(A) and 3734.08(B) as authority that the Director must confine his determination to the results of the resurvey. Revised Code 3714.09(A) states:

The director of environmental protection shall place each health district that is on the approved list under division (A) or (B) of section 3734.08 of the Revised Code on the approved list for the purposes of issuing licenses \* \* \* . Any survey or resurvey of any such health district conducted under section 3734.08 of the Revised Code shall also determine whether there is substantial compliance with this chapter. If the director removes any such health district from the approved list under division (B) of that section, he shall also remove the health district from the approved list under this division \* \* \* .

{¶26} In pertinent part, R.C.3734.08(B) states:

If, after a survey or resurvey is made as provided by this section, the director determines that a health district is not eligible to be placed on the approved list or to continue on the list, he shall certify that fact to the board of health of the health district, and the director shall administer and enforce this chapter and rules adopted under it in the health district until such time as the health district is placed on the approved list. \* \* \*

{¶27} Appellant's reliance upon the above-two code sections, to the exclusion of other code sections relating to the Director's duties regarding resurveys, is misplaced. Specifically, in pertinent part, R.C. 3734.08(A) states:

\* \* \* The director shall make a resurvey when in his opinion it is necessary and *shall remove from the approved list any health district not substantially complying with this chapter and rules adopted under it.* (Emphasis added.)

{¶28} Nearly identical to the code section above relating to solid waste, the section relating to C&DD facilities states:

\* \* \* The director shall make a resurvey when in his opinion a resurvey is necessary and *shall remove from the approved list under division (B)(1) of this section any health district not substantially complying with this chapter and rules adopted under it.* (Emphasis added.) R.C. 3714.09(B)(2).



**{¶29}** Notably, both code sections authorize, indeed require, the director to remove a health district from the approved list if that health district is not substantially complying with the applicable Revised Code Chapters and the rules adopted under them. Though pursuant to applicable Ohio law the Director is required to conduct a resurvey “when in his opinion a resurvey is necessary,” nothing in the laws or regulations adopted thereunder prohibits him from considering matters not specifically identified during the actual, on-site resurvey, which are relevant to determining whether the health district is operating in substantial compliance with applicable laws and regulations.

**{¶30}** The Commission finds that even though CCHD’s issuance of the 2004 operating license to A&L Salvage was not specifically addressed during the resurvey, which occurred several months prior to CCHD’s issuance of the 2004 license, the Director was not precluded from considering this material because it directly related to whether CCHD was substantially complying with the C&DD laws and regulations. Importantly, Ohio EPA had repeatedly communicated its concern regarding the A&L Salvage license matter to representatives of CCHD during the delisting process, including during the exit conference. These communications demonstrate that CCHD was well-aware that the Director had recommended the issuance of a proposed denial of the 2004 license and that, when reaching his decision whether to delist CCHD, he would consider CCHD’s action regarding A&L Salvage’s 2004 license. Accordingly, the Commission finds that the Director lawfully and reasonably considered CCHD’s issuance of the 2004 license to A&L Salvage in evaluating whether CCHD should remain on the approved list of health districts.

**{¶31}** In Appellant's Sixth Assignment of Error, CCHD asserts that the Director's action was unlawful and unreasonable because he based his decision, in part, "upon his finding that the CCGHD 'issued the operating license to A&L Salvage despite the fact that the owner and operator of the facility are not in substantial compliance with Ohio's environmental rules' The Director's finding that the 'owners and operators of the [facility] are not in substantial compliance with Ohio's environmental rules' is unlawful and unreasonable."

**{¶32}** Revised Code 3714.08(A) states that a licensing authority shall require each C&DD facility within its jurisdiction "to be in substantial compliance with this chapter and the rules adopted under it." Ohio Adm.Code 3745-37-09(C)(2) specifies that the licensing authority is prohibited from issuing a license to a C&DD facility unless that facility is "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."

**{¶33}** The District asserts that A&L Salvage was, in fact, in substantial compliance with applicable laws and regulations, and that the Director's determination that A&L Salvage was not in substantial compliance was unlawful and unreasonable. The District believed its determination that A&L Salvage was in substantial compliance was more accurate because it visited the site more frequently, and thus, had a better understanding of what was actually occurring on the premises. It is important to note that when inspecting A&L Salvage, CCHD frequently relied upon its own exemptions to avoid issuing NOVs or citations for solid waste appearing in the C&DD facility.

**{¶34}** In its November 5, 2003 letter to Mr. Morehead, however, Ohio EPA made clear that the issuance of DFFOs to a facility represents the Director's escalation of an enforcement action against a facility. "[E]scalation of an enforcement action against a facility by Ohio EPA is a significant factor in determining whether a facility is in substantial compliance with the State's laws and regulations." The Agency then detailed why A&L Salvage should not be considered to be operating in substantial compliance with applicable laws and regulations. Finally, Ohio EPA unambiguously summarized that, if Ohio EPA were the licensing authority reviewing this matter, it would issue a proposed denial of A&L Salvage's 2004 license application. The Agency closed the letter by asking for CCHD's "cooperation in this matter" and stated that it "look[ed] forward to resolving any issues associated with a proposed denial" of A&L Salvage's 2004 license.

**{¶35}** In reaching his conclusion that A&L Salvage was not in substantial compliance, the Director relied heavily on his proposed DFFOs dated September 30, 2003, commencing enforcement against A&L Salvage, in which the Director cited numerous examples of violations of applicable laws and regulations, notably, solid waste observed in the working face of the C&DD landfill.

**{¶36}** The Commission finds that the Board of Health is precluded from collaterally attacking the Director's enforcement proceedings against A&L Salvage. While it is true that CCHD may have visited A&L Salvage more frequently than Ohio EPA, it is also true that CCHD viewed disposal activities at A&L Salvage manifestly different than did Ohio EPA. Specifically, CCHD invoked its own solid waste exemptions to avoid issuing NOVs or citations for solid waste appearing in the C&DD

landfill. Conversely, the Director applied Ohio's established C&DD regulations, as written, and cited solid waste violations in A&L Salvage's facility, as well as other C&DD landfills within CCHD's jurisdiction. Given the delinquent attack on the Director's DFFOs and CCHD's questionable standing to even assert such a claim, the Commission finds Appellant's attempt to vacate a 2003 action of the Director through the instant appeal not well taken. Accordingly, the Commission finds that the Director acted reasonably and lawfully when he relied, in part, on CCHD's issuance of the 2004 license to A&L Salvage when evaluating whether CCHD should remain on the approved list of health district.

**{¶37}** In Appellant's Seventh Assignment of Error, CCHD asserts that the Director's decision was unlawful and unreasonable because he based his determination, in part, on the fact that CCHD had "exceeded its authority" by granting exemptions to C&DD facilities in its jurisdiction. In support of their position, Appellant cites to the Comment section following Ohio Adm.Code 3745-37-08(D), which states "\*\* \* \* [a] health district will not be removed from the construction and demolition debris program approved list for issuing an exemption or adding terms and/or conditions to a license. \* \* \*."

**{¶38}** Ohio EPA agrees, and R.C. 3714.04 confirms, that a board of health is authorized to issue an exemption relating to construction and demolition debris. "The director of environmental protection or the board of health may by order exempt any person disposing of or proposing to dispose of construction and demolition debris" from certain provisions of this chapter, so long as the exemptions are unlikely to adversely affect the public health or safety or the environment. *Id.*

**{¶39}** Ohio EPA argues, however, that it was illegal for CCHD to attempt to regulate the disposal of solid waste by issuing an exemption to its C&DD program. Citing R.C. 3734.02(G), Ohio EPA argues, that unlike the authority to issue a C&DD-related exemption, the authority to grant an exemption relating to disposal of solid waste resides exclusively with the director of Ohio EPA. Revised Code 3734.02(G) states:

The director, by order, may exempt any person generating, collecting, storing treating, disposing of, or transporting solid wastes or hazardous waste, or processing solid wastes that consist of scrap tires, in such quantities or under such circumstances that, in the determination of the director, are unlikely to adversely affect the public health or safety or the environment from any requirement to obtain a registration certificate, permit, or license or comply with the manifest system or other requirements of this chapter. Such an exemption shall be consistent with and equivalent to any regulations adopted by the administrator of the United States environmental protection agency under the 'Resource Conservation and Recovery Act of 1976' \* \* \*, except as otherwise provided in this chapter.

**{¶40}** The distinction between types of exemptions that the Director may grant and the types of exemptions a health district is authorized to grant is further bolstered by examining the list of duties a health district is required to execute to remain on the approved list of health districts. The regulations specifying what a health district must do to remain on the approved list of health districts authorized to regulate C&DD facilities contain twelve items, including a provision that all exemptions relating to C&DD facilities must be maintained in their own file at the health district. Ohio Adm.Code 3745-37-08(D)(12). Conspicuously absent from the list of duties concerning management of a solid and infectious waste program is a similar provision requiring health district to maintain a file of exemptions relating to its solid and infectious waste program. The Commission finds that no corresponding provision is present in the solid

and infectious waste rules because exemptions relating to solid and infectious waste are reserved for the director of Ohio EPA. See Ohio Adm.Code 3745-37-08(C).

{¶41} Significantly, on their face and in their application, CCHD's two exemptions allow for disposal of solid waste in C&DD facilities. Indeed, the language of the first exemption states that "de minimus amounts of waste that are not hazardous or infectious, such as paper, packaging, cloth, or plastic, that are generated as a result of construction or demolition activities \* \* \*" are permitted to be disposed of in C&DD facility. The second exemption exempts "the operator from the requirements of [accepting only C&DD waste] if prohibited materials are removed from the working face in a timely fashion." Additionally, the record supports that CCHD, on numerous occasions, invoked these exemptions to allow for the disposal of solid waste, as defined in the Ohio Adm.Code, to be placed and remain in C&DD facilities within its jurisdiction. Moreover, evidence supports that Ohio EPA notified CCHD that these exemptions were illegal and advised that they would be included in the Director's evaluation of whether CCHD should be removed from the approved list of health districts.

{¶42} Further, the Ohio Supreme Court has held that local governments may only pass regulations that are consistent with state law. *Weir v. Rimmelin* (1984), 15 Ohio St.3d 55; 472 N.E.2d 341. "The query is whether the local regulation complements the statute. In determining if a municipal ordinance in conflict with a general state statute, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa." *Id.* at 56-57. Though exemptions to a C&DD program are not municipal ordinances, the Commission believes that the

exemptions at issue herein are sufficiently analogous to local regulations, and thus, like the ordinances in *Weir*, the exemptions enacted by a health district must be consistent with state law.

{¶43} Because CCHD's exemptions are outside the scope of legal authority granted to a local board of health and are in conflict with state law, the Commission finds the exemptions illegal. Accordingly, the Commission further finds that the Director acted reasonably and lawfully when he based his determination, in part, on the fact that CCHD had improperly attempted to permit the disposal of solid waste in C&DD landfills.

{¶44} In its Eighth Assignment of Error, Appellant asserts that the Director's action was unlawful and unreasonable because he failed to consult with and advise CCHD regarding its "ineligibility to be placed on both the solid and infectious waste program list and the C&DD program approved list and the steps to be taken to bring" the programs into compliance as required by Ohio Adm.Code 3745-37-08(F).

{¶45} Ohio Adm.Code 3745-37-08(F) prescribes the following:

(F) If the director determines that:

(1) In accordance with division (B) of section 3734.08 and division (A) of section 3714.09 of the Revised Code, there is not substantial compliance with Chapter 3734. and 3714. of the Revised Code and Chapters 3745-27, 3745-400 and 3745-37 of the Administrative Code he shall promptly notify the health district of his determination by certified mail. *The director or his authorized representative shall also consult with and advise the health district regarding its ineligibility to be placed on both the solid and infectious wastes program approved list and the steps to be taken to bring the solid waste program and/or infectious waste program and/or construction and demolition debris program into compliance, and \* \* \**<sup>8</sup>  
(Emphasis added.)

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<sup>8</sup> Ohio Adm.Code 3745-37-08(F)(2) is nearly identical to Ohio Adm.Code 3745-37-08(F)(1), except that it applies to boards of health that are only authorized to administer C&DD programs.

{¶46} At the hearing, the Director presented persuasive evidence that he communicated with CCHD throughout the delisting process. Indeed, as early as the 2001 annual surveys, the initial documents in the removal process, Ohio EPA closed its letters by inviting Mr. Morehead to contact Mr. Weber should the Board desire further assistance addressing Ohio EPA's concerns. The record also reflects that CCHD frequently availed itself of Ohio EPA's open-ended invitation to discuss the underlying matter. Specifically, as demonstrated earlier in this opinion, the parties vigorously engaged in numerous exchanges via telephone, email, and in person to discuss and address the Director's findings throughout the entirety of the delisting process. Further, as late as March 2004, approximately one month before removing CCHD from the list of approved health districts, the Director responded to a letter sent by Mr. Alexander noting what CCHD had corrected thus far, and identified, once again, what deficiencies Ohio EPA observed in CCHD's programs. The Director very specifically highlighted eight items about which he continued to have concerns and that he would evaluate when making his determination.

{¶47} It is difficult to image a case in which the Director offered greater assistance while consulting with and advising a health district on how to avoid being delisted. Not only did the Director close nearly every correspondence inviting CCHD to seek additional input from the Agency, if it so desired, he explicitly described actions CCHD could take to resolve specific issues of concern. For example, the Director advised CCHD to rescind the two exemptions relating to solid waste explaining that the Board had acted beyond its scope of authority and had enacted the exemptions illegally. The Director also advised CCHD that it should revoke A&L Salvage's 2004



license because the facility was no longer in substantial compliance and, therefore, was not entitled to the license. Despite the Director's clear directives, CCHD declined to implement any of these changes. Accordingly, the Commission finds that although the consultation and advice offered by the Director may not have been what CCHD wanted to hear, the Director, nonetheless, lawfully and reasonably fulfilled his regulatory obligation to consult with and advise CCHD regarding its infectious and solid waste and C&DD programs. Accordingly, the Commission finds that the Director reasonably and lawfully consulted with and advised CCHD as to how to correct its program deficiencies and remain on the approved list of health districts.

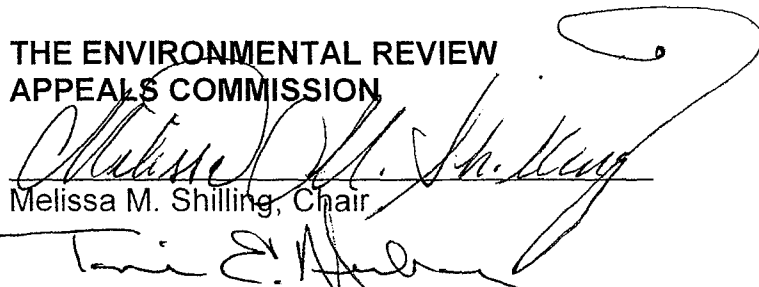
**{¶48}** In Appellant's Ninth Assignment of Error, Appellant asserts that the Director's action was unlawful and unreasonable, because the Director failed to act promptly in issuing his determination letter following the resurvey. The resurvey was conducted on July 23, 24, 25, 29, and August 5, 2003. On April 15, 2004, approximately nine months later, the Director removed CCHD from the list of approved health districts.

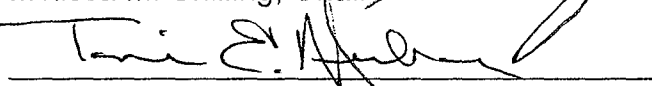
**{¶49}** Appellant points to no specific statutory timeframe within which the Director should have acted, but rather, generally asserts that the nearly nine months between the resurvey and the Director's determination letter removing the health district from the approved list was excessive.

**{¶50}** While Appellant may have preferred a swifter timeline, the Commission does not believe that the Director's actions were unreasonably or unlawfully lengthy. Interestingly, in the previous assignment of error, Appellant claims that the Director failed to consult with or advise it during the delisting process. The Commission, again,

order. No appeal bond shall be required to make an appeal effective.

**THE ENVIRONMENTAL REVIEW  
APPEALS COMMISSION**

  
Melissa M. Shilling, Chair

  
Toni E. Mulrane, Vice-Chair

  
Lisa L. Eschleman, Member

Entered into the Journal of the  
Commission this 16<sup>th</sup>  
day of October, 2008.

**COPIES SENT TO:**

COLUMBIANA COUNTY GENERAL  
HEALTH DISTRICT  
CHRIS KORLESKI, DIRECTOR  
Ronald E. Alexander, Esq.  
Thomas C. Loepp, Esq.  
George Horvath, Esq.  
Edward W. Hastie, III, Esq.

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Case No. ERAC 155600

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notes that numerous communications occurred between the parties, not only before, but following the resurvey process as well. Viewed collectively, these multiple communications appear to be an attempt to further clarify and resolve the issues facing CCHD. Had Ohio EPA neglected to engage in these on-going exchanges with CCHD, it is likely that Ohio EPA would not have satisfied its duty to consult with and advise a health district. Consultation and advice take time, and the Commission believes that the Director struck a proper balance between making Ohio EPA available for advice and consultation and acting in a timely fashion. Accordingly, the Commission finds that the Director did not unreasonably or unlawfully delay his ultimate decision to remove CCHD from the approved list of health districts.

MULRANE AND ESCHLEMAN, COMMISSIONERS, CONCUR.

### FINAL ORDER

Based on the foregoing, the Commission hereby AFFIRMS the Director's April 15, 2004 removal of the Columbiana County General Health District from Ohio EPA's approved list of boards of health.

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 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



FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND FINAL ORDER

Case No. ERAC 155600

CERTIFICATION

I hereby certify that the foregoing is a true and accurate copy of the FINDINGS  
OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER in COLUMBIANA COUNTY  
GENERAL HEALTH DISTRICT V. CHRISTOPHER JONES, DIRECTOR OF  
ENVIRONMENTAL PROTECTION, Case No. ERAC 155600 entered into the Journal  
of the Commission this 16<sup>th</sup> day of October, 2008.

  
Mary J. Oxley, Executive Secretary

Dated this 16<sup>th</sup> day of  
October, 2008, at Columbus, Ohio.

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