

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION

STATE OF OHIO

FARM SUPPLY CENTER, INC.

Case No. ERAC 606319

Appellant,

v.

MICHAEL P. BELL,  
STATE FIRE MARSHAL

Appellee

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DECISION

Rendered on June 21, 2011

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*Scott D. Eickelberger, Esq.*, for Appellant Farm Supply Center, Inc.

*Mike DeWine, Attorney General, Sari L. Mandel, Esq.*, for Appellee State  
Fire Marshal

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COMMISSIONER, SHILLING

This matter comes before the Environmental Review Appeals Commission ("Commission") upon an appeal filed by Appellant Farm Supply Center, Inc. ("Farm Supply") regarding the State Fire Marshal, Bureau of Underground Storage Tank Regulations' ("State Fire Marshal," "BUSTR") imposition of a civil penalty against Farm Supply in the amount of \$39,211.00.

Based on the testimony and evidence adduced at the de novo hearing held on April 28, 2010, the Commission hereby issues the following Findings of Fact,



Conclusions of Law, and Final Order finding that the State Fire Marshal acted lawfully and reasonably when he issued a civil penalty to Farm Supply for non-compliance with BUSTR rules.

### **FINDINGS OF FACT**

**{¶1}** The State Fire Marshal is comprised of eight distinct bureaus, including BUSTR. Funded by federal grants and other funds from program and service fees. BUSTR is responsible for the regulation of underground storage tanks located throughout Ohio. Ohio Revised Code ("R.C.") 3737.882.

**{¶2}** On January 4, 1990, BUSTR learned of a suspected release of petroleum from an Underground Storage Tank ("UST") located on property owned and operated by Farm Supply located at 411 Linden Avenue, Zanesville, Ohio. On January 11, 1990, the State Fire Marshal issued a Notice of Violation ("1990 NOV") to Mr. Regis Michel at Farm Supply. Farm Supply failed to respond to the 1990 NOV. Certified Record ("CR") Items 25-1 to 25-3.

**{¶3}** On August 10, 1990, the State Fire Marshal issued an Administrative Order instructing Farm Supply to investigate whether a release of petroleum had in fact occurred on its property. The 1990 Administrative Order instructed Farm Supply to conduct a tightness test of all petroleum UST's and connected underground piping by August 24, 1990. Farm Supply was also required to conduct an analysis of soil core samples for hydrocarbon contamination in the unsaturated zone under the UST systems by October 3, 1990. Farm Supply failed to timely respond to and did not appeal the 1990 Administrative Order. Thereafter, BUSTR and Farm Supply agreed that Farm

Supply would remove all USTs and conduct and submit a closure assessment report to BUSTR no later than July 2, 1991. Farm Supply removed the UST's and submitted a closure assessment report on July 3, 1991. The closure assessment report indicated it was likely that a petroleum release from the USTs had occurred. CR Items 19-1 to 19-2, 18-1 to 18-14, 25-1 to 25-3, 28-1 to 28-12.

{¶4} Testimony at the de novo hearing supports that Farm Supply failed to remediate the likely petroleum release on its property for 19 years. From November 7, 2002 to October 30, 2007, BUSTR sent a total of six letters<sup>1</sup> to Farm Supply. Each letter documented Farm Supply's lack of response thus far and advised it of its continuing obligation to conduct a site assessment pursuant to Ohio Administrative Code ("Ohio Adm.Code") 1301:7-9-13(I) ("1992 rules"). In three correspondences, BUSTR informed Farm Supply of the new corrective action rule, effective March 1, 2005, under which Farm Supply now was required to conduct a Tier 1 Source Investigation pursuant to Ohio Adm.Code 1301:7-9-13(H) ("2005 rules"). All letters were addressed to Mr. Regis Michel at Farm Supply's business address. Farm Supply took no action to correct the violations during this time. Testimony Israel, Michel; CR Items 17-1, CR 16-1 to 16-5.

{¶5} Similarly, on June 3, 2008, BUSTR sent an NOV to Mr. Regis Michel stating that Farm Supply was in violation of Ohio Adm.Code 1301:7-9-13(H)(3) because it had failed to submit a Tier 1 Evaluation or a Tier 1 Delineation Notification. Unlike the prior communications, the NOV was returned to BUSTR by United States Mail as "deceased." Mr. Regis Michel had died in December 2004. Though Mr. Paul Michel, son

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<sup>1</sup> These correspondences are dated August 5, 2003, December 6, 2004, January 9, 2006, December 28, 2006, October 30, 2007, and June 3, 2008.

of Regis Michel, recalled receiving a few letters from BUSTR during this period, he does not recall exactly what happened with them. CR Items 15-1, 15-5, 15-7 to 15-8; Testimony Michel.

{¶6} After receiving notice of Regis Michel's death, on July 3, 2008, BUSTR sent the same NOV correspondence to Nancy Peck, the statutory agent for Farm Supply. The 2008 NOV instructed Farm Supply to contact BUSTR by July 16, 2008, to discuss options on how to return to compliance with BUSTR rules. The 2008 NOV also cautioned Farm Supply that it could be subjected to a maximum civil penalty of \$10,000 per day for continued non-compliance. CR Items 15-1 to 15-2.

{¶7} On July 18, 2008, Nancy Peck and Paul Michel contacted BUSTR by telephone to discuss options under which Farm Supply could come into compliance with BUSTR rules. BUSTR informed them that Farm Supply must complete a Tier 1 Investigation and submit a Tier 1 Delineation Notification or a Tier 1 Evaluation report to BUSTR as soon as possible. Farm Supply failed to conduct a Tier 1 Investigation in 2008. Because Farm Supply failed to conduct a Tier 1 Investigation in a timely manner, the State Fire Marshal issued an Administrative Order on March 4, 2009, assessing a civil penalty in the amount of \$39,211.00. Testimony of Michel, Grecco; CR Items 13-1, 14-1.

{¶8} Farm Supply timely filed its Notice of Appeal on April 2, 2009, and an Amended Notice of Appeal on April 16, 2009. Farm Supply essentially alleged that the State Fire Marshal's March 2009 Administrative Order and civil penalty were unlawful and unreasonable. The Commission construed Farm Supply's sole Assignment of Error

to contend that the civil penalty did not represent damage caused by the alleged actions of Farm Supply; thus, the civil penalty should be dismissed.<sup>2</sup> Case File Items A, GG.

{¶9} At the de novo hearing, the State Fire Marshal presented evidence detailing how it calculated the civil penalty assessed to Farm Supply. Verne Ord, witness for the State Fire Marshal, testified that in calculating the civil penalty, BUSTR relied on a United States Environmental Protection Agency ("US EPA") UST Penalty Worksheet ("Penalty Worksheet"), a guidance document for state agencies receiving federal grant money and implementing UST programs. According to Mr. Ord, the \$39,211.00 penalty represents a \$22.60 per day penalty multiplied by 1,735, the total number of days Farm Supply was in violation of BUSTR rules. Testimony Ord, CR 3-1 to 3-4.

{¶10} To determine the actual number of days in violation, BUSTR added together all days that fell within the five year statute of limitations period. Specifically, BUSTR calculated the following: 1) from March 3, 2004 to September 1, 2005, BUSTR concluded that Farm Supply was in violation due to its failure to submit a site assessment report under the 1992 rules; 2) from September 1, 2005 to December 1, 2005, BUSTR determined that Farm Supply was in violation of the new 2005 rules; and

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<sup>2</sup> Farm Supply did not set out specific assignments of error, but instead, explained the background of the situation and what steps it intended to take to resolve this matter. First, Farm Supply stated that it believed it had resolved the 1990 NOV by removing the USTs and submitting a closure assessment in July 1991. Second, Farm Supply believed that the matter was closed because it did not have any communication with the State Fire Marshal from 1991 to 2002. Third, Farm Supply explained that Regis Michel's long-term illness and death in 2004 affected Farm Supply's ability to respond to requests from BUSTR. Fourth, Farm Supply asserted that the civil penalty should be dismissed because it had the full intention of complying with the requests made by the State Fire Marshal and that it had contracted with BJAAM Environmental, Inc. to perform a Tier 1 Investigation.

3) from December 1, 2005 to March 3, 2009, when the March 2009 Administrative Order was issued, BUSTR found Farm Supply in violation of the 2005 rules due to its failure to submit a Tier 1 Evaluation or Tier 1 Delineation Notification. Based on the dates outlined above, BUSTR determined that Farm Supply was in violation for a total of 1735 days. The Commission finds BUSTR had a valid factual foundation for computing how many days Farm Supply was in violation of BUSTR regulations. Testimony Ord.

{¶11} In calculating the per day penalty rate, Mr. Ord testified that BUSTR used several factors, including: 1) Farm Supply's total number of days in violation; 2) economic benefit to Farm Supply by avoiding and delaying compliance; 3) the gravity of the potential for harm for violating a BUSTR rule and the extent that Farm Supply deviated from complying with BUSTR rules; 4) the degree of Farm Supply's cooperation with BUSTR and the degree of willfulness or negligence; and 5) the environmental sensitivity of the area impacted by Farm Supply's continued violation of BUSTR rules. Testimony Ord; CR Items 3-1 to 3-4.

{¶12} Mr. Ord determined the economic benefit of avoiding and delaying compliance by accounting for both the costs that Farm Supply Center will never have to spend because the 1992 rule is no longer in effect ("avoided costs") plus the amount that Farm Supply saved by not spending the money to come into compliance in a timely manner ("delayed costs"). BUSTR determined that Farm Supply's avoided costs were \$9,000 and its delayed costs were also \$9,000, the amount that Farm Supply would have spent to conduct a Tier 1 Evaluation or Tier 1 Delineation Notification under the

2005 rules. BUSTR then took these numbers and applied factors as instructed in the Penalty Worksheet<sup>3</sup> to arrive at a total economic benefit of \$16,786.00. Testimony Ord.

{¶13} To calculate the gravity of the potential for harm for violating BUSTR rules and the extent that Farm Supply deviated from complying with the rules, BUSTR applied a major deviation matrix value of \$1,500. Based on Farm Supply's failure to timely investigate a suspected release of petroleum on its property, BUSTR concluded a major deviation matrix value was appropriate. Additionally, BUSTR increased the \$1,500 matrix value by 10 percent because Farm Supply failed to timely comply with the 1990 Administrative Order, failed to timely respond to six notices of deficiency, and failed to timely submit a Tier 1 Evaluation after responding to the July 2008 NOV. BUSTR also increased the \$1,500 matrix value by an additional 5 percent to account for the degree of willfulness or negligence Farm Supply exhibited when it misled BUSTR into believing that it would come into compliance with the law following discussions in July 2008. Added together, the total adjusted matrix value for the civil penalty totaled \$1,725. Testimony Ord.

{¶14} To determine the monetary value to correspond with the gravity-based component, BUSTR took into account the environmental sensitivity of the Farm Supply site. In particular, BUSTR weighed the fact that the Farm Supply site is adjacent to the Licking River and is located within 300 feet of a day care center. Under the Penalty

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<sup>3</sup> To calculate the economic benefit by avoiding and delaying compliance costs, BUSTR added the avoided costs of \$9,000 and delayed costs of \$9,000 and multiplied the sum by 9.1 percent, US EPA's interest factor, and multiplied that figure by 1,735, days of violation. Finally, BUSTR divided this outcome by 365 days for a total of \$12,893.05 in avoided costs. To calculate Farm Supply's delayed costs, BUSTR multiplied the delayed costs of \$9,000 by the 9.1 percent interest rate and 1,735 days of violation. BUSTR then divided that outcome by 365 days for a total of \$3,893. Thus, BUSTR determined that the total economic value to Farm Supply was \$16,786.



Worksheet guidelines, the corresponding level of environmental sensitivity is 2.0. BUSTR calculated the total gravity-based component of the civil penalty by multiplying the adjusted matrix value of \$1,725 by 2.0, the environmental sensitivity multiplier, and by 6.5, the days of non-compliance multiplier. The total gravity-based component came to \$22,425. To reach the full penalty amount, BUSTR added the total economic benefit (\$16,786) to the total gravity-base component (\$22,425), which equals \$39,211. Testimony Ord.

**{¶15}** The Commission finds BUSTR possessed a valid factual foundation for determining the penalty to Farm Supply to be 1,735 days in violation times the per-day-violation rate of \$22.60.

**{¶16}** Both Paul Michel and Jason Grecco, Farm Supply's environmental consultant, acknowledged that Farm Supply only decided to conduct a Tier 1 Evaluation after receiving the March 2009 Administrative Order and civil penalty. Also, Jason Grecco testified that additional testing for environmental contamination was necessary for Farm Supply to become compliant with BUSTR rules. Testimony Michel, Grecco; CR Items 12-1 to 12-9.

### **CONCLUSIONS OF LAW**

**{¶17}** Pursuant to R.C. 3737.882(D), appeals from certain final actions of the State Fire Marshal are appealable to the Commission. R.C. 3737.882(D) provides the following:

Orders issued under division (A) of section 3737.88 of the Revised Code and divisions (A)(1) and (C) of this section, and appeals thereof, are subject to and governed by Chapter 3745. of the Revised Code. Such

orders shall be issued without the necessity for issuance of a proposed action under that chapter. For purposes of appeals of any such orders, the term "director" as used in Chapter 3745. of the Revised Code includes the fire marshal and an assistant fire marshal.

**{¶18}** Revised Code 3745.05 sets forth the standard ERAC must employ when reviewing a final action of the State Fire Marshal. The statute provides, in relevant part:

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, or if the commission finds that the action was unreasonable or unlawful, it shall make a written order vacating or modifying the action appealed from. R.C. 3745.05.

**{¶19}** The term "unlawful" means "that which is not in accordance with law," and the term "unreasonable" means "that which is not in accordance with law," and the term "unreasonable" means "that which is not in accordance with reason, or that which has no factual foundation." *Citizens Committee to Preserve Lake Logan v. Williams* (1977), 56 Ohio App.2d 61, 70. This standard does not permit ERAC to substitute its judgment for that of the State Fire Marshal as to factual issues. *CECOS Internatl., Inc. v. Shank* (1992), 79 Ohio App.3d 1, 6. "It is only where [ERAC] can properly find from the evidence that there is no valid factual foundation for the [State Fire Marshal's] action that such action can be found to be unreasonable. Accordingly, the ultimate factual issue to be determined by [ERAC] upon the de novo hearing is whether there is a valid factual foundation for the [State Fire Marshal's] action and not whether the [State Fire Marshal's] action is the best or most appropriate action, nor whether [ERAC] would have taken the same action." *Id.*

**{¶20}** Where the evidence before the Commission demonstrates that the State Fire Marshal's actions were lawful and reasonable, the Commission must affirm the State Fire Marshal's action. *Id.* In such an instance, the Commission may not substitute

its judgment for that of the State Fire Marshal. *Id.* Further, it is well-established that the Commission must grant deference to the State Fire Marshal's interpretation of the regulations he is authorized and empowered to enforce. *Jones Metal Products Co. v. Walker* (1972), 29 Ohio St. 2d 173; *Rings v. Nichols* (1983), 13 Ohio App. 3d 257.

**{¶21}** The Commission is required to grant "due deference to the [State Fire Marshal's] 'reasonable interpretation of the legislative scheme governing his Agency.'" *Sandusky Dock Corp. v. Jones* (2005), 106 Ohio St.3d, 274, citing *Northwester 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. The deference is not, however, without limits. (See e.g., *B.P. Exploration and Oil, Inc., et al v. Jones*, Ruling on Motion for Summary Adjudication and Final Order, issued March 21, 2001, in which the Commission noted that such deference must be granted to the Director of Ohio EPA's interpretation and application of his statutes and rules, "particularly if the Director's interpretation is not at variance with the explicit language of the regulations.")

**{¶22}** The issue presented is whether the State Fire Marshal acted lawfully and reasonably when he assessed a civil penalty in the amount of \$39,211.00 to Farm Supply pursuant to R.C. 3737.882(C)(2).

**{¶23}** Farm Supply's Amended Notice of Appeal alleges, "Farm Supply Center, Inc. has been adversely affected by the State Fire Marshal's Final Findings and Orders and in particular, the civil penalty rendered against Farm Supply, Inc. does not fairly and reasonably represent any damage caused by the alleged actions of Farm Supply Center, Inc."

{¶24} The Commission will first address the question of whether the State Fire Marshal acted lawfully when assessing the civil penalty against Farm Supply. Revised Code sections 3737.88 through 3737.94 establish an underground storage tank and corrective action program and grant the State Fire Marshal the authority to regulate underground storage tanks located throughout Ohio. Revised Code 3737.88(A)(1) establishes BUSTR's jurisdiction over USTs, as follows:

*The fire marshal shall have responsibility for implementation of the underground storage tank program and corrective action program for releases from underground petroleum storage tanks established by the "Resource Conservation and Recovery Act of 1976," 90 Stat. 2795, 42 U.S.C.A. 6901, as amended. To implement the program, the fire marshal may adopt, amend, and rescind such rules, conduct such inspections, require annual registration of underground storage tanks, issue such citation and orders to enforce those rules \* \* \*. Emphasis added.*

{¶25} In pertinent part, R.C. 3737.882(C) provides the following:

(1) No person shall violate or fail to comply with a rule adopted under division (A) of section 3737.88 of the Revised Code or division (B) of this section, and no person shall violate or fail to comply with the terms of any order issued under division (A) of section 3737.88 of the Revised Code or division (A)(1) of this section.

(2) Whoever violates division (C)(1) of this section \* \* \* *shall pay a civil penalty of not more than ten thousand dollars for each day that the violation continues. The fire marshal may, by order, assess a civil penalty under this division, or the fire marshal may request the attorney general to bring a civil action for imposition of the civil penalty in the court of common pleas of the county in which the violation occurred. Emphasis added.*

{¶26} Further, Farm Supply asserts the State Fire Marshal's application of the federal penalty guideline worksheet was inappropriate because the federal penalty

guideline is not explicitly enumerated in the state's statutes regulating USTs. The Commission finds this argument unpersuasive.

{¶27} The federal UST program contained in the Resource Conservation and Recovery Act of 1976 ("RCRA") is primarily implemented by states and territories. R.C. 3737.88(A)(1). In implementing the UST program, the State Fire Marshal may "adopt, amend, and rescind such rules, conduct such inspections, require annual registration of underground storage tanks, *issue such citation and orders to enforce those rules \* \* \**." Emphasis added.

{¶28} Further, the State Fire Marshal is authorized to "*\* \* \** by order, assess a civil penalty under this division, *\* \* \**." R.C. 3737.882(C). Inherent in the ability to assess a penalty is the authority to calculate a penalty. Thus, the Commission finds it lawful for the State Fire Marshal to rely on and utilize the Penalty Worksheet guidelines, which were authored by US EPA, the very entity delegating authority to the states to regulate USTs.

{¶29} The Commission now turns to the issue of whether the State Fire Marshal acted reasonably with respect to calculating the civil penalty assessed against Farm Supply. In its Amended Notice of Appeal, Farm Supply asserted four reasons why the \$39,211.00 civil penalty was unreasonable.

{¶30} Farm Supply first noted that after the removal of its USTs and submission of a closure assessment report on July 3, 1991, Farm Supply believed it had taken all necessary steps to come into compliance with BUSTR rules. Farm Supply's closure assessment report, however, indicated it was likely that a petroleum release from the USTs had occurred. At the de novo hearing, David Israel, the State

Fire Marshal Enforcement Coordinator, testified that for nearly 19 years, Farm Supply failed to remediate the release of petroleum. Farm Supply failed to introduce any evidence demonstrating it took steps to address the likely petroleum leak.

{¶31} Farm Supply also argued that because no communication occurred between Farm Supply and the State Fire Marshal for nearly 11 years, Farm Supply believed it had taken all appropriate steps to correct the problems associated with the likely petroleum leak. Although the State Fire Marshal and Farm Supply had no communication from July 1991 through November 2002, the record reflects the State Fire Marshal again pursued communications with Farm Supply commencing with a no response letter to Farm Supply dated November 7, 2002, in which the State Fire Marshal plainly advised Farm supply that BUSTR had conducted a review of Farm Supply's facility file and determined that soil contamination existed on the site. This November 2002 communication resumed BUSTR's efforts toward communicating with Farm Supply, and despite regular correspondences from the State Fire Marshal, Farm Supply failed to respond to BUSTR's continuing communications until the summer of 2008.

{¶32} Farm Supply also argued that Regis Michel's long-term illness and subsequent death in December 2004, affected the business's ability to respond to requests from the State Fire Marshal. The six no response letters sent from November 2002 to June 2008 were addressed to Regis Michel at Farm Supply's business address. Regis Michel died on December 4, 2004, and it was not until June 11, 2008, that the State Fire Marshal was notified that Regis Michel had passed away. While each no response letter was addressed to Regis Michel, Paul Michel testified that he

remembers receiving some correspondences from BUSTR but failed to take any action to contact BUSTR or correct the violations.

{¶33} Lastly, Farm Supply asserted that the civil penalty should be dismissed because Farm Supply had every intention of complying with BUSTR's regulatory requirements and the State Fire Marshal's requests. Farm Supply argued that it had contracted with BJAAM Environmental, Inc. to perform a Tier 1 Investigation. At the de novo hearing, both Paul Michel and Jason Grecco admitted that Farm Supply had only decided to conduct a Tier 1 Evaluation after BUSTR had issued the March 2009 Administrative Order and accompanying civil penalty.

{¶34} The final question remaining is whether the amount of the civil penalty assessed against Farm Supply was reasonable.

{¶35} It is well established that the purpose of a civil penalty is to deter the defendant's and other similarly situated persons from violating the law and conducting actions that are contrary to a regulatory scheme. *Celebrezze v. Thermal-Tron, Inc.* (1992), 71 Ohio App. 3d 11, 19. Further, the State Fire Marshal correctly notes that where an agency has provided a reasonable explanation for the penalty assessment and the assessed amount falls within the broad range of penalty guidelines, a court should not substitute its judgment absent a showing that the agency has committed a clear error or an abuse of discretion. *Mayes v. EPA*, 2008 U.S. Dist. LEXIS 700, \*60-61.

{¶36} Pursuant to R.C. 3737.88(C)(2), the State Fire Marshal was authorized to issue a civil penalty not to exceed \$10,000 per day for each violation. The State Fire Marshal followed U.S. EPA's Penalty Guidance for Violations of UST Regulations in

calculating the amount of the civil penalty, \$39,211.00. Having determined that BUSTR's penalty calculations were supported by a valid factual foundation, the Commission correspondingly finds that the State Fire Marshal acted reasonably when he assessed the calculated penalty against Farm Supply for violations of BUSTR regulations.

### **FINAL ORDER**

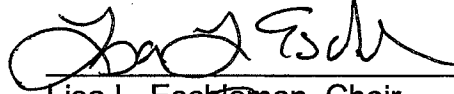
In light of the foregoing, the Commission hereby **AFFIRMS** the Ohio State Fire Marshal's action and find the State Fire Marshal's assessment of a civil penalty of \$39,211 against Farm Supply was both lawful and reasonable.

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

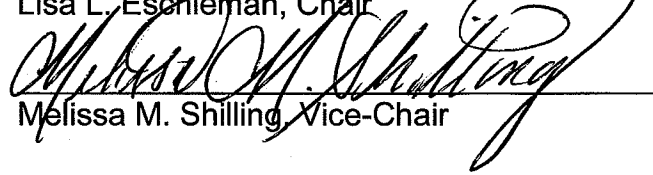
Any party adversely affected by an order of the commission may appeal to the court of appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred. The party so appealing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



**THE ENVIRONMENTAL REVIEW  
APPEALS COMMISSION**



Lisa L. Eschleman, Chair



Melissa M. Shilling, Vice-Chair

Entered into the Journal of the  
Commission this 21<sup>st</sup>  
day of June 2011.

**COPIES SENT TO:**

FARM SUPPLY CENTER, INC.  
MICHAEL P. BELL, STATE FIRE MARSHALL  
✓ Scott D. Eickelberger, Esq.  
Sari L. Mandel, Esq.

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