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COURT OF APPEALS
FRANKLIN CO. OHIO
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CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Parents Protecting Children et al.,	:	
Appellants-Appellants,	:	
		No. 09AP-48
v.	:	(ERAC Nos. 596096 & 596097)
Christopher Korleski, Director of Environmental Protection et al.,	:	(ACCELERATED CALENDAR)
	:	
Appellees-Appellees.	:	

D E C I S I O N

Rendered on September 3, 2009

Richard C. Sahli, for appellants.

Richard Cordray, Attorney General, *Nicole M. Candelora-Norman* and *Robert Kenneth James*, for appellee Christopher Korleski.

Bott Law Group LLC, April R. Bott and *Sarah Herbert*, for appellee Washington Environmental, Ltd.

APPEAL from the Environmental Review Appeals Commission.

McGRATH, J.

{¶1} Appellants, Parents Protecting Children and Patricia Collins, appeal from an order of the Environmental Review Appeals Commission ("ERAC") that affirmed the decision of appellee, Chris Korleski, Director of the Ohio Environment Protection Agency ("the Director" or "OEPA") dismissing appellants' verified complaint.

{¶2} On October 21, 2003, OEPA issued an air permit to install ("PTI") to Washington Environmental, Ltd. ("WEL") for a proposed construction and demolition debris ("C&DD") landfill to be sited on a 62-acre plot of land located at the northwest corner of State Route 61 and County Road 29, Washington Township, Morrow County, Ohio. The PTI permitted two specific emissions units: an "F001 – Unpaved Roadways and Parking Areas" and an "F002 – Construction Debris and Demolition debris landfill activities including unloading area, dumping, spreading, compacting, and covering." (PTI at 6 and 12.) Paragraph A8 of the permit contained a termination provision that essentially reiterated the termination provision contained in Ohio Adm.Code 3745-31 and states:

> This Permit to Install shall terminate within eighteen months of the effective date of the Permit to Install if the owner or operator has not undertaken a continuing program of installation or modification or has not entered into a binding contractual obligation to undertake and complete within a reasonable time a continuing program of installation or modification. This deadline may be extended by up to 12 months if application is made to the Director within a reasonable time before the termination date and the party shows good cause for any such extension.

{¶3} Accordingly, for the unpaved road the initial 18-month period would have expired on April 21, 2005. WEL, however, applied for, and was granted, a 12-month extension, thus extending the termination date for the PTI to April 21, 2006.

{¶4} Appellants advised OEPA staff in March 2007 of the lack of any construction at the landfill site. Upon inquiry, the OEPA was informed that while no new roads had been built at the facility, in March 2006, an existing road had been improved through the placement of additional gravel, grading, and apron improvements. OEPA

employees visited the site on March 20, 2007. After review, the OEPA determined the work on the roadway at the facility constituted a continuing program of installation to prevent the termination of the air PTI.

{¶5} On July 17, 2007, appellants filed a verified complaint that in essence alleged the termination provision of the PTI had been violated. An investigation into the allegations of the verified complaint was conducted. The investigative report concluded that the information gathered supported WEL's claim that road improvement work was done in March 2006 and again in April 2007, and that the company had satisfied a "continuing program of installation." On September 6, 2007, the Director issued a final action dismissing the verified complaint.

{¶6} A notice of appeal was filed with ERAC alleging the Director acted unlawfully and unreasonably in dismissing the verified complaint. Arguing that no genuine issues of material fact were presented, the parties filed cross-motions for summary judgment. ERAC issued a final order on December 18, 2008, denying appellants' motion for summary judgment, granting summary judgment in favor of appellees, and affirming the Director's September 6, 2007 final action dismissing appellants' verified complaint. ERAC concluded the improvements to the roadway performed by WEL comprised the start of actual construction of the C&DD landfill and that the Supreme Court of Ohio's decision in *State ex rel. Celebreeze v. Natl. Lime & Stone Co.*, 68 Ohio St.3d 377, 1994-Ohio-486, did not dictate a different conclusion. Additionally, ERAC concluded the phrase "continuing program of installation" was broad enough to allow the Director to consider not only WEL's physical acts of construction or installation, but also WEL's efforts to secure and defend all requisite licenses and permits.

{¶7} Appellants appealed to this court and bring the following two assignments of error for our review:

> I. ERAC ERRED AS A MATTER OF LAW IN CONCUDING THAT MAINTENANCE ON AN EXISTING ROADWAY CONSTITUTES AN ACT OF "INSTALLATION."
>
> II. ERAC ERRED AS A MATTER OF LAW IN HOLDING THAT OBTAINING NEEDED PERMITS AND BEING IN LITIGATION LEGALLY CONSTITUTE PART OF A "CONTINUING PROGRAM OF INSTALLATION."

{¶8} R.C. 3745.05 sets forth the standard ERAC must employ when reviewing a final action of the Director. That statute provides, in relevant part that, "[i]f, 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." This standard does not permit ERAC to substitute its judgment for that of the Director as to factual issues. *CECOS Internatl., Inc. v. Shank* (1992), 79 Ohio App.3d 1, 6. The term "unlawful" 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. "It is only where [ERAC] can properly find from the evidence that there is no valid factual foundation for the Director'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 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." Id.

{¶9} R.C. 3745.06 provides the standard this court must employ when reviewing a final order of ERAC. That statute provides, as pertinent here, that "[t]he court shall affirm the order complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it shall reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law."

{¶10} In determining whether ERAC's decision is supported by the requisite quantum of evidence, we must weigh and evaluate the credibility of the evidence presented to ERAC. *Tube City Olympic of Ohio, Inc. v. Jones*, 10th Dist. No. 03AP-295, 2004-Ohio-1464, ¶26, citing *City of Perrysburg v. Schregardus*, 10th Dist. No. 00AP-1403, 2001-Ohio-4085. This process involves a consideration of the evidence and, to a limited extent, would permit a substitution of judgment by the reviewing court. Id., citing *Perrysburg*. However, we must bear in mind that the General Assembly created administrative bodies to facilitate certain areas of the law by placing the administration of those areas before boards or commissions composed of individuals who possess special expertise. *Club 3000 v. Jones*, 10th Dist. No. 07AP-593, 2008-Ohio-5058, ¶29, citing *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 1993-Ohio-122, paragraph one of the syllabus. Accordingly, this court must afford due deference to ERAC's interpretation of rules and regulations, as well as its resolution of evidentiary conflicts. Id.

{¶11} This matter was decided by way of summary judgment, which requires de novo review. *Waste Mgmt. of Ohio, Inc. v. Cincinnati Bd. of Health*, 159 Ohio App.3d 806, 2005-Ohio-1153, ¶49, citing *Helton v. Scioto Cty. Bd. of Commrs.* (1997), 123 Ohio App.3d 158, 162. However, we must be conscious of the long-accepted principle that "considerable deference should be accorded to an agency's interpretation of rules the agency is required to administer." *Natl. Lime & Stone Co.* at 382. Unless the agency's interpretation is unreasonable or conflicts with a statute covering the same subject matter, courts should follow that interpretation. *Textileather Corp. v. Korleski*, 10th Dist. No. 06AP-955, 2007-Ohio-4129, ¶54, citing *Natl. Lime & Stone*, at 382; *City of Salem v. Koncelik*, 164 Ohio App.3d 597, 2005-Ohio-5537, ¶16.

{¶12} In their first assignment of error, appellants contend ERAC erred as a matter of law in concluding that maintenance of an existing roadway constitutes an act of "installation" so as to prevent the PTI's termination provision from being triggered. The parties agree that under the facts of this case, WEL had to undertake a "continuing program of installation" to prevent the PTI from terminating. Appellants, however, argue the actions taken by WEL do not constitute "installation" but, instead, simply constitute the repair of an existing structure. Because, according to appellants, the repair of an existing structure is legally incompetent to satisfy the "continuing program of installation" requirement, it is appellants' contention that the PTI at issue has expired.

{¶13} In support of their position that ERAC's interpretation of "continuing program of installation" is unreasonable, appellants rely on *Natl. Lime & Stone*, supra. In that case, National Lime and Stone Company ("National") had operated a limestone quarry

and lime processing plant since 1927. In 1927, National installed two Raymond mills[1] known as the East mill and the West mill. In 1974, National was issued a single permit to operate ("PTO") both mills. In 1986, the single PTO was split and a separate PTO was provided for each mill. Sometime thereafter, the East mill was taken out of service, and in April 1987, the West mill was removed and replaced with a like-kind mill.

{¶14} In September 1988, the OEPA informed National that a PTI was required for the replacement like-kind mill. In March 1990, the Ohio Attorney General filed a complaint against National alleging various violations of the Ohio Administrative Code for failing to secure a PTI before installation of the replacement and for operating the mill without a PTO as the previous PTO issued in 1986 had expired. At that time, Ohio Adm.Code 3745-31-02(A) provided that, "[N]o person shall cause, permit, or allow the *installation* of a *new source of air pollutants* * * * or cause, permit, or allow the modification of an air contaminant source * * * *without first obtaining a permit to install* from the director." (Emphasis sic.) *Natl. Lime & Stone*, at 381. The Supreme Court of Ohio reasoned that the word "installation" connotes the establishment or formation of something that has yet to be in existence and "does not explicitly or implicitly refer to the *replacement* of a virtually identical (like-kind) component of a complicated manufacturing scheme." (Emphasis sic.) Id. at 382. Therefore, the Supreme Court found the commission's interpretation that the word "installation" embraced the replacement of a like-kind part of a complex manufacturing process, thereby requiring National to undergo the rigors of new-source review, to be unreasonable. Specifically, the Supreme Court stated:

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[1] The Raymond mill is a piece of equipment that ground hydrate into a fine dust-like material.

> A like-kind replacement of a piece of equipment that is a component of a complex manufacturing operation involving the emission of an air contaminant does not constitute "the installation of a new source of air pollutants" within the meaning of Ohio Adm.Code 3745-31-02(A).

Id. at syllabus.

{¶15} The parties agree that the case sub judice does not present a "like-kind replacement" scenario. Appellants nonetheless contend *Natl. Lime & Stone* is instructive because of its discussion of the meaning of the word "installation." According to appellants, *Natl. Lime & Stone* compels a conclusion that the placement of gravel and grading on an existing roadway is an act of "maintenance" on an existing structure and not an act of installation or part of a "continuing program of installation" so as to toll the termination date of April 21, 2006. We disagree.

{¶16} The holding in *National Lime & Stone* is that because there was neither a "modification" nor an "installation" but, rather, there was a "replacement with like-kind" of something already existing, a PTI was not required by Ohio Adm.Code 3745-31-02(A). Of concern to us is Ohio Adm.Code 3745-31-06 and whether ERAC's determination that WEL's actions constitute a "continuing program of installation" so as to prevent expiration of the PTI is unreasonable.

{¶17} There is no dispute that the unpaved roadway at issue existed prior to the issuance of the PTI and that no permits were required prior to the PTI's issuance because of the unpaved roadway's use as a farm access road. Thus, appellants' argument that to meet the requirements of the PTI, WEL was required to install something new, i.e., a *new* road not already in existence, is untenable. WEL had a set period of time to begin a "continuing program of installation" of the air contaminant source after the issuance of the

PTI. As defined by Ohio Adm.Code 3745-31-01(BBB), "installation" means "to begin actual construction, erect, locate or affix any air contaminant source." "Begin actual construction" means "in general, initiation of physical on-site construction activities on an air contaminant source project that are of a permanent nature." Ohio Adm.Code 3745-31-01(R).

{¶18} There is no dispute that WEL placed gravel, graded the roadway and made apron improvements to the unpaved roadway for which it was issued a permit. We do not find unreasonable ERAC's interpretation that this evidence demonstrates that WEL did begin a "continuing program of installation." *Natl. Lime & Stone's* definition of installation, i.e., the creation of something new, or the establishment of something yet to be in existence, is not applicable here because it is the unpaved roadway's now-intended use that is requiring the PTI to be issued. In this instance, we find ERAC's interpretation of "begin actual construction" and "installation" to be reasonable and do not find *Natl. Lime & Stone* requires a contrary finding.

{¶19} Accordingly, we overrule appellants' first assignment of error.

{¶20} In their second assignment of error, appellants contend ERAC erred in holding that WEL's efforts to obtain requisite permits constituted a "continuing program of installation."

{¶21} In dismissing the verified complaint, the Director stated, "[t]his road construction activity under an air PTI for roadways, parking lots and material handling, coupled with the permitee's efforts to obtain an operating license from the District, indicated, in our judgment, an acceptable undertaking of a continuing program of installation in light of the overall circumstances." (Sept. 6, 2007 Order at 2.)

{¶22} According to appellants, the definition of "install" involves only physical acts, and, therefore, ERAC erred in considering WEL's efforts to secure requisite permits and licenses to determine whether WEL instituted a "program of installation" sufficient to prevent expiration of the PTI. Appellants further contend such an expansive reading of "program" has been rejected by federal courts interpreting analogous provisions of the federal Clean Air Act. In support, appellants cite *Sierra Pacific Power Co. v. United States Environmental Protection Agency* (C.A.9, 1981), 647 F.2d 60, *United States of America v. City of Painesville* (C.A.6, 1981), 644 F.2d 1186, *Sierra Club v. Franklin Cty. Power of Illinois, LLC* (C.A.7, 2008), 546 F.3d 918.

{¶23} We first note these cases discuss the phrase "continuing program of construction" as opposed to the phrase "continuing program of installation" that is before us. Secondly, these cases are factually distinguishable and render little guidance on the controversy at issue here.

{¶24} In *Sierra Pacific*, the company argued it commenced construction prior to September 19, 1978, and, therefore, it was exempt from the standards promulgated on that date. The Environmental Protection Agency ("EPA") disagreed. Interpreting the phrase "commence construction" to include actual physical acts and not planning and design activity, the EPA concluded the company's actions prior to September 19, 1978, did not constitute the commencement of construction, and, therefore, the company was not exempt from the rules promulgated on that date. The Ninth Circuit upheld the EPA's determination reasoning that although the EPA might have adopted the company's broad reading of the word "program," its failure to do so was not an abuse of discretion or otherwise unreasonable.

{¶25} Similarly, in *City of Painesville*, the EPA determined a boiler to be a "new source" under the Clean Air Act as the city contracted for the boiler's purchase a full year after the promulgation of amendments setting rigorous limits on the amounts of pollutants that may be emitted from "new sources" of air pollution. The Sixth Circuit, having reviewed the regulations and the EPA's application of the same to the instant facts, did not find the EPA's interpretation to be "plainly erroneous" and upheld the EPA's determination.

{¶26} Finally, in *Sierra Club*, the Illinois EPA ("IEPA"), determined the company's prevention of significant determination ("PSD") permit expired because the company failed to "commence construction" of the plant within an 18-month period as required under the permit. The court upheld the IEPA's determination and, in doing so, noted the lack of any kind of permanent construction activity. The court also relied on a memorandum from the Director of Stationary Source Enforcement at the IEPA that stated *generally* the erection of auxiliary buildings does not satisfy the "commence construction" requirements unless there is clear evidence through contracts or otherwise that construction of the facility will definitely go forward.

{¶27} Here, ERAC looked to the precise wording of the rule and termination provision at issue before us. In giving each word effect as is required, ERAC reasoned that it was significant that what is required is a continuing *program* of installation and not just continuing installation. Program being generally defined as a plan of action to accomplish a specified end, ERAC held this can encompass more than mere physical construction of the facility. ERAC further reasoned that often times, as here, permits and licenses are required before any physical construction or operation at the facility can

commence. Therefore, in this circumstance, ERAC found the Director's interpretation of the phrase "continuous program of installation" to be a reasonable one.

{¶28} First, we find it significant to note that neither the Director, nor ERAC, relied solely on WEL's efforts to obtain the requisite licenses and permits, but relied also on the physical acts of placing gravel, and grading and apron improvements to determine whether WEL commenced a program of installation prior to the expiration of the PTI. Secondly, the federal cases cited by appellants do not appear to have entailed external circumstances beyond the permit holder's control as was present in the instant case. Given the deference required to be given to an agency in the interpretation of its own rules, we do not find ERAC's interpretation in this matter to be unreasonable.

{¶29} Accordingly, we overrule appellants' second assignment of error.

{¶30} For the foregoing reasons, appellants' two assignments of error are overruled, and the judgment of the Environmental Review Appeals Commission is hereby affirmed.

Judgment affirmed.

BROWN and KLATT, JJ., concur.

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