

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

State of Ohio, ex rel. Marc Dann,
Attorney General of Ohio

Plaintiff,

v.

Eslich Environmental, Inc., et al.

Defendants.

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CASE NO. CV 2007-07-5118

SUMMIT COUNTY
CLERK OF COURTS

JUDGE ELINORE MARSH STORMER

Judgment Entry
(Final, appealable)

This case was tried before the Court on January 5, 2009. Both parties appeared, represented by counsel. Plaintiff seeks money damages from Defendant for its failure to comply with environmental regulations and reporting requirements. For the reasons set forth below, the Court finds in favor of Plaintiff, in part, and Defendant, in part.

At trial, the Court directed a verdict in favor of Richard Eslich, individually, on the issue of his personal liability for the acts of Eslich Environmental. What remain are six causes of action alleging a number of violations of Ohio environmental regulations. The Court reviews each individually.

On June 7, 2000, the Ohio EPA granted Eslich Environmental a permit to install (PTI) and operate a concrete and brick crushing facility at 725 Baltimore Avenue in Akron, Ohio. The concrete and brick crushing process emits a harmful dust, known as fugitive dust. Fugitive dust is the subject of federal and state regulation vis-à-vis the Clean Air Act and the Ohio Environmental Protection Agency. The Ohio EPA communicated these regulations to Eslich Environmental through the issuance of a permit to install, which outlined the maximum allowable emission of fugitive dust per year.

Shortly after the issuance of the permit to install, Eslich Environmental applied to relocate its operation to One General Street, also in Akron, Ohio. In April of 2001, the Akron

Regional Air Quality Management District (ARAQMD) began receiving citizen complaints of dust blowing off of the piles of crushed concrete at the site. Consequently, the ARAQMD sent inspectors to observe Eslich Environmental's operations.

The State alleges that the ARAQMD inspector found violations of the permit to install. These include Eslich Environmental's alleged failure to submit deviation reports, failure to obtain a permit to install for a new source of air pollution, and failure to renew site approval. However, the Eslich Environmental disputes these findings and the manner in which the ARAQMD inspector conducted his tests.

I. Count One – Failure to Suppress Fugitive Dust Emissions

The State presented evidence of Eslich Environmental's failure to suppress fugitive dust emissions on April 23, 2001, August 26, 2003, and April 12, 2005. On each of these dates, an inspector from ARAQMD personally inspected the site at One General Street. The Court will review each of the alleged violations separately.

A. April 23, 2001

On April 23, 2001, ARAQMD engineer Russ Risley inspected the site and noted several violations of the PTI and Ohio environmental regulations. He memorialized these findings in a complaint form. The findings in the complaint indicate that there was inadequate watering to control dust on the roadways, traffic areas, worked storage piles, and process material piles. The PTI specifies that in order to determine whether or not Eslich Environmental complied with environmental laws an inspector must conduct either a Method 22 or Method 9 test. The type of test conducted depends on whether the inspector is observing areas such as roadways or soil piles versus the actual crushing operation.

At trial, both Risley and ARAQMD inspector Frank Markunas confirmed that no Method 22 test was conducted at the site. The Method 9 test did not yield conclusive results.

Therefore, because neither of the specified tests showed a violation of the PTI, the State of Ohio cannot show by a preponderance of the evidence that Eslich Environmental violated the terms of the PTI on April 23, 2001.

B. August 26, 2003 and Count Five

The State charges that Eslich Environmental violated the terms of the PTI and Ohio environmental regulations on August 26, 2003 with respect to large soil storage piles near the site at One General Street. There is no dispute that the soil pile was not included the PTI. The question before the Court is whether the soil pile emitted sufficient dust to warrant a PTI. Resolution of this matter turns on the soil pile's potential to emit fugitive dust in excess of 10 pounds per day. The Court will also address Count Five of the State's complaint because it is closely related to the alleged August 26, 2003 violation.

In Count Five, the State claims that Eslich Environmental failed to obtain a permit to install for a large pile of fill dirt that it stored at the site. Generally, any operation that emits fugitive dust into the air must be approved by the State and would subsequently be subject to the terms of a Permit to Install. But where an air contaminant source produces less than ten pounds per day it is *de minimis* in nature and an operator is exempt from the general provisions on air pollution control. OAC 3745-15-05(B). In order to take advantage of this exception, an operator must provide adequate information to an authorized representative of the Ohio EPA. OAC 3745-15-05(C).

ARAQMD requested information concerning the potential for the storage pile to emit fugitive dust. In response, James Riffle, an air quality scientist and certified industrial hygienist, prepared calculations for Eslich Environmental and mailed them to Markunas on December 19, 2003. Markunas responded to Riffle's calculations observing that Riffle calculated the soil piles emission factor in pounds per ton. Markunas pointed out that the

required standard for an emission factor under the *de minimis* rule is pounds per day. He requested a new calculation using the correct units and requested that additional variables be included in a revised calculation. Markunas requested that these calculation be completed by January 23, 2004. Defendant never completed this calculation. Therefore, the Court finds that Eslich Environmental did not sustain its burden in adequately showing that the soil piles were a *de minimis* source of pollution.

This does not end the Court's inquiry on the matter. At trial, Riffle testified that he prepared a second report in which he calculated the potential to emit by pounds per day using the data collected in 2003. Based on the second calculation, he testified that he could determine that the soil pile emits less than ten pounds per day. Markunas testified that ARAQMD never performed a calculation to show the soil pile emits more than the *de minimis* amount per day. Therefore, the Court finds that the soil piles are a *de minimus* source of pollution and that Eslich Environmental is not liable for failing to include the soil piles in the PTI. However, because this violation persisted from January 23, 2004 until the beginning of trial, the Court finds that Eslich Environmental violated OAC 3745-15-05(C) for a total of 1809 days.

C. *April 12, 2005*

On April 12, 2005, ARAQMD engineer Frank Markunas again inspected the site. ARAQMD received citizen complaints regarding excessive amounts of dust emanating from the concrete crushing operation, the storage piles, and the roadways. Markunas observed that the entire site was dry and that there was no water truck hooked up to the concrete crusher. Markunas conducted a Method 22 test on the roadway and observed over 8 minutes of visible emissions over a 28 minute period.

When Markunas arrived, the foreman at the site agreed to shut the entire operation down because there was no water truck hooked up to the crusher. Eventually, a water truck arrived on site and they hooked it back up to the crusher and resumed operations.

On cross-examination, Markunas testified about the manner in which he conducted the Method 22 test. Eslich Environmental presented evidence showing that a Method 22 requires both specific training and the use of two timers with half-second intervals. Markunas admitted that he did not have Method 22 training or the appropriate equipment to conduct the test. Instead, Markunas relied on his wristwatch to time his observations.

The PTI requires that unpaved roadways and parking areas emit “no visible particulate emissions except for 3 minutes during any 60-minute period.” It further requires Eslich Environmental to use best available control measures sufficient to minimize or eliminate fugitive dust emissions. Despite Markunas’ methodology in conducting the Method 22 test on the roadway, the Court nonetheless finds that Eslich Environmental did not comply with the PTI on April 12, 2005 with respect to the unpaved roadways. Markunas’ observation of visible emissions for 8 minutes over a 28 minute period is enough to demonstrate a violation of the PTI despite Markunas’ technical failure to comply with the testing methodology. Markunas’ testimony also showed that Eslich Environmental was not employing Best Available Technology to control the emission of dust from the roadway. Therefore, the Court finds that Eslich Environmental violated the terms of the PTI on April 12, 2005 with respect to failing to suppress emissions from the unpaved roadway. This constitutes one day of violation.

The State also alleges that Eslich Environmental’s failure to have a water truck hooked up to the concrete crusher also violates the terms of the PTI. The PTI requires that the operations do not produce fugitive emissions of greater than 15 percent opacity for the crushing operation and 10 percent opacity for the screening operation. Both the crushing and

screening operation must also employ best available control measures to minimize or eliminate visible emissions. The evidence also demonstrates that Eslich Environmental was not using any control measures to control visible emissions of fugitive dust.

Therefore, the Court finds that Eslich Environmental was separately out of compliance with the PTI by not having the water truck installed on the concrete crusher. This constitutes another violation of the PTI for which the Court will assess an additional day of violation.

II. Count Two – Failure to Comply with Requirement to Report Visible Emissions

The State also charges that Eslich Environmental's failure to report the visible emissions to ARAQMD on each of the dates discussed above constitutes a separate violation of environmental regulations. Under the PTI, Eslich Environmental must provide "quarterly written reports of (a) any deviations (excursions) from emission limitations [...] *** (These quarterly reports shall exclude deviations resulting from malfunctions reported in accordance with OAC rule 3745-15-06.)" Pursuant to OAC rule 3745-15-06(B), "In the event that any emission source, air pollution control equipment, or related facility breaks down in such a manner as to cause the emission of air contaminants in violation of any applicable law, the person responsible for such equipment shall immediately notify the Ohio environmental protection agency district office or delegate agency of such failure or breakdown."

None of the quarterly reports submitted by Eslich Environmental to ARAQMD report any deviations or violations. However, Eslich Environmental argues that pursuant to OAC rule 3745-15-06 it was not required to include the deviations in which an inspector had occurred on the quarterly report because they "notified" the ARAQMD inspectors while they were at the site.

Reading the PTI and the OAC rule together, the Court finds that Eslich Environmental was not required to submit written reports of any deviations if the deviation is reported

pursuant to OAC 3745-15-06. The Court finds that ARAQMD was notified of the deviations within the meaning of OAC Rule 3745-15-06. Therefore, the Court finds in favor of the Defendant on Count Two of the Plaintiff's complaint.

III. Counts Three and Four – Failure to Timely Submit Quarterly and Semi Annual Deviation Reports

In Counts Three and Four, the State charges that Eslich Environmental failed to submit Quarterly and Semi Annual reports to ARAQMD or the Ohio Department of Environmental Protection. Markunas stated that ARAQMD had not received the required quarterly and semi-annual reports from Eslich Environmental between the years 2000 and 2003. Markunas' testimony directly conflicts with that of John Eslich and Richard Eslich, who stated that they had regularly submitted the required reports to ARAQMD. The Court admitted into evidence copies of reports produced by Eslich Environmental that shows it submitted the required reports over the disputed time period. Essentially, ARAQMD denies receiving these reports.

The State did not produce a witness nor any evidence regarding ARAQMD's procedure upon receiving reports from Eslich Environmental. Markunas testified that between 2000 and 2003 ARAQMD did not record the receipt of a quarterly or semi-annual report. Based on evidence presented at trial, the Court cannot determine by a preponderance of the evidence that Eslich Environmental failed to submit their quarterly and semi-annual reports. Therefore, the Court finds in favor of the Defendant Eslich Environmental on Counts Three and Four.

IV. Count Six – Failure to Renew the Site Approval

Finally, the State seeks relief for Eslich Environmental's failure to obtain renewed approval to operate on the site at One General Street. Eslich Environmental's PTI states, "Any site approvals issued by the Ohio EPA *** shall be valid for no longer than three years

and are subject to renewal.” The evidence shows that after receiving site approval on June 7, 2000, Eslich Environmental did not seek renewed site approval until July 2007.

Eslich Environmental argues that because ARAQMD issued the site approval, as opposed to the Ohio EPA, that it does not need to renew its site approval after three years. The Court does not find that argument well taken. At all other times, Eslich Environmental worked with ARAQMD as if it were the authorized agent of the Ohio EPA. Therefore, Eslich Environmental cannot argue now that ARAQMD had no authority to act on behalf of the Ohio EPA.

The Court finds in favor of the State of Ohio on this count. Eslich Environmental did not properly reapply for its permit from June 7, 2003 until July of 2007. Therefore, the Court finds Eslich Environmental in violation of the permit to install for a total of 1485 days.

V. Damages

Having addressed the claims of the parties to this action, the Court now turns its attention to the issue of damages. A person who violates environmental regulations may be subject to civil penalties of not more than \$25,000. R.C. 3704.06(C). In making an assessment of a civil penalty, this Court is guided by the analytical framework employed in *State ex rel. Brown v. Dayton Malleable, Inc.* (Apr. 21, 1981), 2d Dist. No. 6722, 1981 Ohio App. LEXIS 12103. The first step allows for the Court to analyze a penalty appropriate to address the harm caused to the public, remove the economic benefit gained from delayed compliance, the violator’s degree of defiance or indifference to the law, and consideration of the unusual enforcement costs thrust on the public. *Id.* Second, the Court can reduce the sum to reflect on any noncompliance by the government itself, and the sum appropriate to reflect any noncompliance caused by factors beyond the offender’s control. *Id.* Finally, the Court will consider the violator’s financial condition or ability to pay. *Id.* The civil penalty should

be large enough to deter future violations, but not so large as to send the violator into bankruptcy. *Id.*

The Court first considers Eslich Environmental's violation for failure to provide a calculation showing the soil piles to be a *de minimis* source of fugitive dust. The fact that the soil piles were a *de minimis* source of pollution demonstrates that it did not cause any significant harm to the public. The public does bear a cost for the efforts that ARAQMD made in attempting to get Eslich Environmental to show that the soil pile was a *de minimis* source. However, the Court reduces the award because the evidence demonstrated that ARAQMD was not helpful or direct in communicating to Eslich Environmental what calculation was to show the soil piles were a *de minimis* source of fugitive dust. Therefore, the Court awards the State of Ohio \$1 for each day of violation for a total of \$1,809 days.

Eslich Environmental's next violation is for its failure to renew its site approval. In failing to renew the PTI, Eslich Environmental showed indifference to the law and the terms of the PTI. But, Markunas testified that the purpose behind the site reapproval was to allow the public to give feedback concerning the concrete operation and its effects on the surrounding neighborhood. Despite this concern and the protracted dispute between the parties, Eslich Environmental's successor corporation received renewed site approval in 2007. Furthermore, the testimony at trial demonstrates that ARAQMD may not have even been aware of Eslich Environmental's failure to obtain renewed site approval until long after such approval was due. Therefore, despite Eslich Environmental's indifference to the terms of the PTI, the Court assesses damages in the amount of \$1 per day for the 1485 days that site approval was overdue. The total dollar amount for this violation is \$1485.

With respect to Eslich Environmental's violation on April 12, 2005, the Court will grant a statutory penalty near the maximum allowable by law. The Court may impose a penalty up

to \$25,000. OAC 3704.06(C). Below this ceiling, the amount of the amount of the penalty rests in the informed discretion of the trial court. *State ex rel. Petro v. Maurer Mobile Home Court, Inc.* (May 11, 2007), 6th Dist. No. WD-06-053, 2007 -Ohio- 2262, at ¶54. In determining this amount, the Court considers the testimony of Markunas regarding the potential harm caused by the emission of fugitive dust to the health and property of the public at large. The Court also finds that Eslich Environmental derived substantial economic benefit from not complying with the PTI and Ohio environmental regulations. The State introduced evidence of dozens of citizens' complaints regarding the facility during the time of operation. Although the State did not perform Method 9 and 22 tests following receipt of each complaint, the Court finds that Eslich Environmental was likely out of compliance on more occasions than merely April 12, 2005. On that date Eslich Environmental had no equipment on site to control the emission of fugitive dust displays a degree of indifference and defiance which justifies the imposition of a fine near the statutory limit.

The Court notes that neither the State nor Eslich Environmental introduced evidence concerning Eslich Environmental's ability to pay a fine of any amount. The only evidence regarding the appropriate amount of a civil penalty was introduced by the defense. The defense introduced an exhibit a document showing a settlement in the matter of Great Lakes Crushing LTD. Counsel for the defense argued that this is an example of an appropriate penalty in a case involving a concrete crushing operation. He also suggested that Eslich Environmental is a corporation in good standing in the state of Ohio. Because the State did not introduce any evidence concerning Eslich Environmental's financial condition and because the Court has no other evidence from which to draw this conclusion, the Court imposes a fine of \$13,000 for the April 12, 2005 violation.

The parties provided the Court with cases from other jurisdictions to help guide a damages determination. The Court has reviewed those cases and the applicable law. Having determined that Eslich Environmental violated the PTI and Ohio Environmental law with respect to its failure to suppress fugitive dust on April 12, 2003, failure to provide ARAQMD with a proper calculation showing the soil pile to be a *de minimis* source of pollution, and failure to renew its site approval, the Court awards the State \$16,294 in damages.

Therefore, the Court finds in favor of Plaintiff the State of Ohio and awards Plaintiff \$16,294.00 in damages. Costs are to be divided equally between Plaintiff and Defendant.

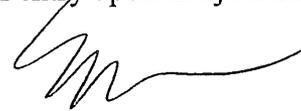
This is a final appealable order. There is no just cause for delay.

IT IS SO ORDERED.



JUDGE ELINORE MARSH STORMER

Pursuant to Civ.R. 58(B), the Clerk of Courts shall serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.



JUDGE ELINORE MARSH STORMER

cc: Attorney Christina Grasseschi, Attorney Nicole Candelora, Attorney Nicolas Bryan,
Attorney Michael Cyphert, Attorney Bonnie Finley