[Cite as *Stark C & D Disposal, Inc. v. Bd. of Health of Stark Cty. Combined Gen. Health Dist.*, 2010-Ohio-4607.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Stark C & D Disposal, Inc.,	:	
Appellant-Appellee,	:	
v.	:	No. 10AP-51 (ERAC No. 766132)
Board of Health of the Stark County Combined General Health District,	:	(REGULAR CALENDAR)
Appellee-Appellee,	:	
(Osnaburg Township Board of Trustees et al.,	:	
Appellees-Appellants).	:	
Stark C & D Disposal, Inc.,	:	
Appellant-Appellee,	:	
v.	:	No. 10AP-103 (ERAC No. 766132)
Board of Health of the Stark County Combined General Health District,	:	(REGULAR CALENDAR)
Appellee-Appellant,	:	
(Osnaburg Township Board of Trustees et al.,	:	
Appellees-Appellees).	:	

D E C I S I O N

Rendered on September 28, 2010

John D. Ferrero, Prosecuting Attorney, *Deborah Dawson* and *Amy A. Sabino,* for appellant Board of Health of the Stark County Combined General Health District.

Richard C. Sahli, for appellants Osnaburg Township Board of Trustees and Donna Middaugh, Trustee.

Walter & Haverfield LLP, *Michael Cyphert* and *Leslie G. Wolfe*, for appellee Stark C & D Disposal, Inc.

APPEALS from the Environmental Review Appeals Commission

TYACK, P.J.

{¶1} Appellee, Stark C & D Disposal, Inc. ("C & D"), operates a landfill in Osnaburg Township of Stark County, Ohio, which is in the city of East Canton. C & D operates under a license issued by the Board of Health of the Stark County Combined General Health District ("Board of Health"), under the authority of the Ohio Environmental Protection Agency. The Board of Health and the Osnaburg Township Board of Trustees ("Township") are the appellants in this dispute, which began in September 2005, when C & D applied to expand its landfill from its current size of 28.5 acres to 117.4 acres. Following a lengthy review and a quasi-formal hearing, the Board of Health denied the application because the proposed expansion would bring the landfill within 1,000 feet of several private water wells. The Board of Health contends that it could not approve the expansion because of Ohio Adm.Code 3701-28-10, which prohibits the siting of any private water source within 1,000 feet of a potential source of contamination.

{¶2} Pursuant to R.C. 3745.04(B), C & D appealed the decision to the Environmental Review Appeals Commission ("ERAC") on December 21, 2007. ERAC found that Ohio Adm.Code 3701-28-10 is meant to apply to private well owners, and not to landfill operators, because landfills are governed by their own set of statutes and

regulations. ERAC, thus, reversed the Board of Health's decision, based primarily on R.C. 3714.03, which is the statute that sets forth the siting restrictions on the type of landfill at issue, and which does not prohibit these facilities from operating within the setback rule in Ohio Adm.Code 3701-28-10. ERAC also based its decision on R.C. 3714.02, upon which the EPA director promulgated Ohio Adm.Code 3745-400-09(B), which allows the siting of landfills within the 1,000 feet setback rule, so long as an acceptable groundwater monitoring well system is installed. Finally, ERAC concluded that the proposed expansion was "unlikely to adversely affect the public health or safety or the environment."

{¶3} Both the Board of Health and the Township have filed appeals of ERAC's decision, pursuant to R.C. 3745.06, which provides that this court has jurisdiction over appeals from that administrative body. See *Kimble Clay & Limestone v. McAvoy* (1979), 59 Ohio St.2d 94, paragraph two of the syllabus.

{¶4} The Board of Health presents a single assignment of error:

> ERAC ERRED IN SUBSTITUTING ITS JUDGMENT FOR THAT OF THE STARK COUNTY BOARD OF HEALTH BY AFFORDING NO DEFERENCE TO THE BOARD'S INTERPRETATION OF ITS OWN STATUTORY AUTHORITY AND IN FINDING THE BOARD'S ACTION UNLAWFUL.

{¶5} The Township presents two assignments of error:

> I. ERAC LEGALLY ERRED BY FAILING TO READ THE ODH AND OHIO EPA STATUTES *IN PARI MATERIA* AND CONCLUDING THAT THE AGENCIES HAVE A CO-EXISTING RIGHT OF REGULATION.
>
> II. ERAC LEGALLY ERRED BY FAILING TO APPLY [OAC] 3701-28-10 AS A GENERAL AND UNIFORM STANDARD AND ERRONEOUSLY CONCLUDING THAT IT APPLIED ON A CASE-BY-CASE BASIS.

{¶6} All three assignments of error are interrelated—essentially attacking ERAC's interpretation of the relevant statutes and regulations—we will therefore consider them together. Our standard of review is provided by R.C. 3745.06. See *Robinson v. Whitman* (1975), 47 Ohio App.2d 43, 53–54. Using this standard of review, this court must affirm ERAC's decision if it is supported by reliable, probative, and substantial evidence, and is in accordance with law. Id.; *Red Hill Farm Trust v. Schregardus* (1995), 102 Ohio App.3d 90, 95.

{¶7} The facts in this case are largely undisputed. At issue is whether ERAC properly interpreted and applied the relevant statutes and regulations to appellants' disposition of the C & D's application to expand.

{¶8} The subject matter of this case is construction and demolition debris ("C&DD"), which, as the name suggests, comprises the leftover construction materials from the alteration, construction, destruction, rehabilitation, or repair of any manmade, physical structure. R.C. 3714.01(C). It is important to emphasize that C&DD "does not include materials identified or listed as solid wastes or hazardous waste." Id. C&DD is regulated by Chapter 3745-400 of the Ohio Administrative Code, which is promulgated by the EPA director, in conjunction with Chapter 3714 of the Revised Code. See R.C. 3714.02 (granting the EPA exclusive jurisdiction to promulgate rules for siting C&DD landfills). Before any individual or entity may operate a C&DD facility, they must apply for, and obtain a license, which is typically procured from the local board of health, acting under the direction of the EPA.[1] R.C. 3714.05 and 3714.06(A). Each license is valid for

[1] The Board of Health has operated under the EPA's approval since the C&DD program took effect in 1996. (ERAC, at 22.)

one year, and must be renewed annually in order for the facility to continue its operations. R.C. 3714.06(B).

{¶9} C & D has operated its facility in Stark County since 1989. (Jan. 6, 2010 ERAC decision, at 3.) Prior to the enactment of Ohio Adm.Code 3745-400, which became effective on September 30, 1996, C & D was regulated entirely by the Board of Health. After the new regulations took effect, around September 1997, C & D filed its first license application and site characterization[2] with the Board of Health. (See In re: Stark C & D Landfill, Stark Cty. Bd. of Health, Nov. 14, 2007 Tr. 59-62) (hereafter "Tr."). The new regulations also required C & D to implement groundwater testing, because the site characterization revealed the existence of a private water well within 1,000 feet of the landfill's footprint. See id; see also Ohio Adm.Code 3745-400-09(B)(7).

{¶10} On January 1, 2000, Ohio Adm.Code 3701-28-10 took effect, which is the "setback rule" discussed earlier. This regulation does not appear in Ohio Adm.Code 3745-400, which pertains to C&DD facilities; rather, it appears in the Ohio Administrative Code chapter that regulates private water systems:

> (A) Each private water system shall be properly maintained and operated according to the requirements of this chapter. In the case where two or more dwellings are serviced by a private water system, the entire private water system shall be owned, operated and maintained by one person.
>
> * * *
>
> (G) A water source shall be located according to the following minimum distance requirements:
>
> * * *

[2] A narrative report using maps and cross sections that clearly convey the nature of the site, and the hydrogeology (distribution of underground water) beneath the facility. *Harmony Env. Ltd. v. Morrow Cty. Bd. of Health*, 10th Dist. No. 04AP-1338, 2005-Ohio-3146, ¶13.

> Municipal solid waste, residual waste, industrial waste, and *construction and demolition debris* waste landfills – 1000′[.]

Ohio Adm.Code 3701-28-10.

{¶11} After preliminarily reviewing C & D's application to expand the landfill, the Board of Health issued a notice of deficiency to C & D on December 23, 2005. (ERAC, at 4.) In response to this notice, on February 23, 2006, C & D's consulting firm, Bowser-Morner, submitted its first report to the Board of Health. Id. On May 12, 2006, however, the Board of Health issued a second notice of deficiency to C & D. Bowser-Morner submitted a second report to the Board of Health, which outlined a revised groundwater monitoring plan, with two additional down-gradient wells. But the Board of Health was still not satisfied, and issued C & D a third notice of deficiency on July 20, 2006. This third notice of deficiency stated that the Board of Health could not approve C & D's proposed modification because of the following:

> The proposed modification encompasses private water wells that are located less than 1,000 feet of the modification. In order to comply with [OAC] 3701-28-10, the modification cannot be within 1,000' of a private water system.

(ERAC, at 5, citing exhibit No. 3.)

{¶12} In their response, C & D argued that the site need only comply with the requirements of Ohio Adm.Code 3745-400, and that Ohio Adm.Code 3701-28 applies only to private well owners. (ERAC, at 5.)

{¶13} In addition to its own internal review, the Board of Health sought clarification of Ohio Adm.Code 3701-28-10 from the Ohio Department of Health ("ODH"), and asked for an opinion regarding C & D's application. Id. On October 6, 2006, Bowser-Morner submitted a document to ODH on behalf of C & D entitled "Additional Water Well

Information Relative to the Stark C & D Disposal Facility, East Canton, Ohio." The Board of Health responded to the submission by restating its points from the May 12 and July 20 notices of deficiency—that the Board could not approve the proposed modification because of the setback rule in Ohio Adm.Code 3701-28-10.

{¶14} On December 27, 2006, ODH issued its opinion to the Board of Health, recommending that they deny C & D's application because it would violate Ohio Adm.Code 3701-28-10(G). (Letter from Rebecca J. Fugitt to Kirk Norris, at Appendix 3.) ODH's opinion also relied on Ohio Adm.Code 3701-28-10(K), which prohibits any potential source of contamination from being constructed or permanently placed within the 1,000 foot buffer zone. See id. As a manner of enforcing the private well system regulations in Ohio Adm.Code 3701-28 upon C & D (which was purportedly to be regulated by Ohio Adm.Code Chapter 3745-400), ODH pointed to language appearing at the bottom of C & D's actual license issued by the Ohio EPA on December 29, 2005: "Issuance of this license does not relieve the licensee of the duty to comply with all applicable federal, state, and local laws, regulations and ordinances." (Construction and Demolition Debris Facility License, at Appendix 4.) In other words, using the catchall, boilerplate language in C & D's facility license, ODH and the Board of Health were attempting to bootstrap the regulations governing private water systems in Ohio Adm.Code 3701-28 into the C&DD regulations in Ohio Adm.Code 3745-400.

{¶15} Over the next few months, the two sides apparently attempted to work out a mutually-agreeable resolution, but after negotiations broke down, Stark County Environmental Health Director, Kirk Norris, issued his recommendation to the Board that they deny C & D's application. (ERAC, at 8–9; Tr. 15–16.) This prompted William

Franks, Commissioner of the Stark County Board of Health to convene an informal hearing on April 23, 2007, during which he informed C & D that he considered the landfill expansion to create a potential source of water contamination, and that he would be recommending the denial of their application. (ERAC, at 8-9; Tr. 39–40.)

{¶16} The Board of Health convened a formal adjudicatory hearing on November 14, 2007. (ERAC, at 10.) At this hearing, Mr. Norris and Commissioner Franks both testified on behalf of the Board. Their testimony focused only on the (undisputed) facts, and the laws and regulations heretofore mentioned. (ERAC, at 10-12, 14; Tr. 17–27, 40–41.) The only new information that came out of Norris' and Franks' testimony was the fact that nobody from the Board of Health had conducted any studies or tests of the landfill site to determine whether it was likely, much less plausible for a contaminant from the site to reach any of the identified private wells:

> [COUNSEL]: So you have no scientific data to indicate whether or not a contaminant that would be released by this facility would ever reach the public water supply wells that you have placed on Exhibit 2?
>
> MR. NORRIS: We've done no study, and we have none of that information.

(ERAC, at 13; Tr. 34.)

{¶17} Mr. Norris also testified that he was unaware of whether there was any scientific evidence or literature indicating that a 1,000 foot setback distance was necessary to protect public health, or water safety. (ERAC, at 13; Tr. 35.) Commissioner Franks eventually admitted the same, on cross-examination. (Tr. 43.)

{¶18} C & D presented the testimony and expert reports of Beth P. Ullom, and Patrick J. Loper, III, whom they retained to render scientific opinions on whether the

proposed expansion of the landfill presented any potential dangers or public health concerns. (ERAC, at 14.) Ms. Ullom is a senior environmental scientist at Bowser-Morner. She holds a bachelor of arts in biological sciences from Indiana University, and bachelor and master of science degrees, both in geology, from the University of Texas, and Kent State University, respectively. Id.; (Tr. 57-58.) She is also a "certified ground water scientist," as defined in Ohio Adm.Code 3745-400-01(HH). (ERAC, at 14.)

{¶19} Ms. Ullom conducted a comprehensive study of the site, proposed expansion acreage, and the surrounding areas, which included the private property and water wells that were the focus and scrutiny of the Board of Health and ODH.[3] (ERAC, at 15; Tr. 62–66.) This study included the analysis of data obtained from the C & D site and groundwater monitoring wells over roughly a ten-year period. Her objective in all of this was to calculate how much time it would take for any potential contaminant from the site, as expanded, to potentially reach any of the private wells that were within 1,000 feet thereof. In short, Ms. Ullom estimated that, "[e]ven in the unlikely event of potential impact to groundwater by the Stark C & D Disposal facility, the expected travel time[] * * * is conservatively calculated to be in excess of 1,000 years." (ERAC, at 17; Tr. 67.)

{¶20} Based on all of her studies, and the time of travel calculation, Ms. Ullom concluded that within a reasonable degree of scientific certainty, the proposed expansion of the C & D site "is unlikely to impact public health and safety and the environment." (ERAC, at 17; Tr. 69–70.)

[3] Ms. Ullom's study included the results of site characterization activities at the Stark C&D site, including: information obtained from the advancement of seven borings, and the installation of three groundwater monitoring wells in 1997; the excavation of test pits in 2003, 2004, and 2006; the log of a highwall from 2007; and the advancement of 37 additional borings in the ILDA in 2007. This information was used to ascertain the lithology and stratigraphy present at the Stark C&D site. (ERAC, at 15.)

{¶21} Following Ms. Ullom's testimony, Bowser-Morner Vice President and Dayton Engineering Department Manager Pat Loper testified on C & D's behalf. (Tr. 80-110.) Mr. Loper testified from an engineer's perspective, focusing on the structural aspects and technical specifications of the landfill, and how the C & D site, as expanded, would meet or exceed all state regulations. Mr. Loper has a bachelor of science degree in civil engineering from The Ohio State University, and is licensed as a professional engineer by the state of Ohio. (Tr. 80–81.) He has more than 17 years of experience in landfill design, construction, and monitoring, during which time he worked on more than 20 different C&DD landfill sites. (ERAC, at 17; Tr. 81–82.)

{¶22} In lay terms, Mr. Loper stated that the types of materials in C & D's landfill were such that they would qualify for an exemption from the typical requirements of having a soil liner. (Tr. 84.) Further, he stated that such an exemption notwithstanding, the C & D site would have a soil liner, as an added measure of security, and safety for public health and the environment. Id. Mr. Loper also testified that the site expansion would include adding seven groundwater monitoring wells, which would be placed as close as practical to the edge of the landfill, enabling the earliest possible detection of the release of any potential contaminant. (Tr. 84–87.) The earlier that a potential for contamination is detected, the earlier that C & D can make corrective measures to prevent any of the potential contaminants from reaching a water supply. Finally, Mr. Loper testified that, of the more than 20 C&DD landfills he had previously worked on, "most of them" were sited within 1,000 feet of private water wells. (Tr. 91.) Furthermore, he stated that he was unaware of any instance of the EPA or a local health department attempting to apply Ohio Adm.Code 3701-28-10 to any of those facilities. (Tr. 93.)

{¶23} Mr. Loper, thus, concluded that based on the historical operations of the existing landfill, design features that meet or exceed the regulations in Ohio Adm.Code 3745-400, and the addition of the seven groundwater monitoring wells, the proposed expansion was unlikely to adversely affect public health, safety, or the environment. (Tr. 93–95.)

{¶24} At the conclusion of Mr. Loper's testimony, the Board adjourned the hearing, and reconvened two weeks later, when they unanimously adopted a resolution denying C & D's application. (Stark Cty. Health Dept. Resolution No. 6-2007, Nov. 28, 2007, at Appendix 2.) C & D filed a notice of appeal with ERAC on December 21, 2007. The sole issue in that appeal was whether the Board of Health lawfully and reasonably applied Ohio Adm.Code 3701-28-10 to the application for modification filed by C & D. (ERAC at 25–26.)

{¶25} After reviewing the record on appeal, ERAC concluded that, "A careful reading of [Ohio Adm.Code 3701-28-10] reveals that its focus is the appropriate siting of water systems and water sources, not the siting of C&DD landfills. Indeed, the only explicit reference to C&DD landfills in this regulation is found in subsection (G), which provides that '[a] water source shall be located' according to certain minimum distances, including 1,000 feet from a C&DD landfill." (ERAC, at 26, ¶54.) (Emphasis omitted.) But ERAC did not dismiss subsection (K), which prohibits placing any *potential source of contamination* within the isolation distances in Ohio Adm.Code 3701-28-10(G). They did emphasize, however, the language "potential source of contamination," and thus concluded that the restriction in subsection (K) would not apply in situations where there was no such risk. (ERAC, at 26-27, ¶55.)

{¶26} Since the Board of Health had not performed any scientific research or study of the C & D site, ERAC looked to the testimony of Ms. Ullom and Mr. Loper for guidance with regard to whether the facility presented a potential source of contamination to the private wells in the vicinity:

> The Commission finds it notable that the opinions offered by Ms. Ullom and Mr. Loper were formed after extensive reviews of the Stark C&D site, facility, and operations. Conversely, the Board's determination * * * is devoid of any similar analysis regarding the specifics of the Stark C&D landfill itself; rather, the Board simply accepted that because the proposed modification would be located within 1,000 feet of a public water source it would necessarily adversely affect the public health, safety, and the environment. The Commission believes such an inference is completely unsupportable in view of the uncontested testimony offered by Ms. Ullom and Mr. Loper that the proposed expansion would not adversely affect the public health, safety, or the environment.

(ERAC, at 27, ¶57.) (Emphasis sic.)

{¶27} ERAC also focused on R.C. 3714.03, which is the statute proscribing improper siting locations for C&DD facilities. (See ERAC, at 28.) In 2005, when C & D filed its application to expand the site, there were only two explicit siting restrictions set forth in R.C. 3714.03: C&DD facilities could not be sited within the boundaries of a 100-year flood plain, or sole source aquifer. See R.C. 3714.03(B) (West 2005). "If the Ohio General Assembly had intended to impose a restriction similar to that contained in [Ohio Administrative Code] 3701-28-10 during its enactment of R.C. Chapter 3714, it could have easily done so." (ERAC, at 28.) ERAC, thus, concluded that because the plain language in R.C. 3714.03 did not place a minimum distance between C&DD landfills and private water wells, the legislature did not so intend. Id.

{¶28} ERAC further noted that if there was to be a bright-line rule prohibiting C&DD facilities from operating within 1,000 feet of any private well, then there would have been no need for the EPA director to promulgate Ohio Adm.Code 3745-400-09, which requires the implementation of groundwater monitoring systems at any facility where, inter alia, the limits of debris placement are within 1,000 feet of a private well.

{¶29} Fundamental rules of statutory construction impose a duty on courts to interpret legislative acts so that all of their provisions retain their full effect, and not to interpret any statute or regulation in a manner that would yield an absurd result. See, e.g., *Griffin v. Oceanic Contractors, Inc.* (1982), 458 U.S. 564, 575, 102 S.Ct. 3245; *State ex rel. Dispatch Printing Co. v. Wells* (1985), 18 Ohio St.3d 382, 384 (*State ex rel. Cooper v. Savord* (1950), 153 Ohio St. 367; *Canton v. Imperial Bowling Lanes, Inc.* (1968), 16 Ohio St.2d 47); see also *Brown v. Toledo Mental Hygiene Clinic* (1977), 63 Ohio App.2d 73, 75. The only way that we can interpret Ohio Adm.Code 3701-28-10 so that it does not conflict with Ohio Adm.Code 3745-400, and R.C. Chapter 3714, is to hold that it applies to owners of private water systems, and not to C&DD facilities. This interpretation is also consistent with the organization of the titles and chapters of the Ohio Administrative Code.

{¶30} Local boards of health operate under the direction of the EPA, which has exclusive jurisdiction over the siting of C&DD facilities. ERAC has exclusive jurisdiction to review final decisions of the director of the EPA, and any local board of health. See R.C. 3745.04(B). Because the local board of health had no scientific evidence to support its decision denying the C&DD modification, ERAC did not err in reversing that decision.

{¶31} We do not reach this conclusion summarily, or take its effect lightly, and our decision should not be interpreted as being unsympathetic to environmental concerns. Regardless of our legal analysis, which, alone supports this decision, the only *scientific* evidence in the record demonstrates that the ramifications of allowing C & D to proceed with its site expansion will not adversely affect the environment. This evidence is and remains uncontroverted. We are therefore able to feel comfortable with our decision as being environmentally sound, in addition to its adherence with the rule of law.

{¶32} Accordingly, we overrule all assignments of error, and affirm the ruling of the Environmental Review Appeals Commission. This cause is now remanded to the Stark County Board of Health, with instructions to grant C & D's application as prescribed in ERAC's decision.

Judgment affirmed.

CONNOR, J., concurs.
FRENCH, J., concurs separately.

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FRENCH, J., concurring separately.

{¶33} I agree with the majority's conclusion that the decision of the Environmental Review Appeals Commission ("ERAC"), should be affirmed. I reach this conclusion, however, by way of different reasoning.

{¶34} As applicable here, the authority of the Board of Health of the Stark County Combined General Health District ("the board") arises from R.C. 3714.05, which allows a board, upon approval by the director of the Ohio Environmental Protection Agency ("Ohio EPA"), to "provide for the issuance of permits to install for" construction and demolition debris ("C&DD") facilities. That section gives no authority to an approved board, any

other board of health or the Ohio Department of Health, to adopt rules respecting C&DD facilities. Rather, R.C. 3714.02 grants to Ohio EPA the exclusive authority to adopt rules governing C&DD facilities, including rules for the issuance of permits to install those facilities. In particular, R.C. 3714.02(A)(4) expressly grants to Ohio EPA the authority to establish grounds for the modification of permits to install C&DD facilities.

{¶35} Pursuant to this exclusive rulemaking authority, Ohio EPA adopted Ohio Adm.Code 3745-400-15(C), which requires a board of health to approve a modification if it finds that the modification is "unlikely to adversely affect the public health or safety or the environment or create a fire hazard." Here, the board found that the proposed modification of appellant's license "would adversely affect the public health, safety and the environment." The board had no evidence on which to make that finding, however. Rather, as stated in the board's resolution, the board made that finding based solely on Ohio Adm.Code 3701-28-10, a rule adopted by the Ohio Department of Health for the location, operation, and maintenance of private water systems. Ohio Adm.Code 3701-28-10(G) states that a "water source shall be located" in accordance with the distances prescribed in the attached chart, which identifies a distance of 1,000 feet for a C&DD landfill. Ohio Adm.Code 3701-28-10(K) states: "No potential source of contamination may be constructed or permanently placed within" the prescribed "isolation distances from a water supply of a private water system."

{¶36} By simply applying the isolation requirements contained in Ohio Adm.Code 3701-28-10 without making a finding that the modification is likely to adversely affect the public health or safety or the environment, the board acted contrary to Ohio Adm.Code 3745-400-15(C). There was no evidence before the board or before ERAC of adverse

effects from the proposed modification. Rather, as the majority details, all of the evidence showed that the modification was unlikely to impact the public health, safety or the environment at all, at least within the first 1,000 years. Therefore, ERAC did not err by concluding the board's action was unlawful. For these reasons, I concur in the majority's decision to affirm the judgment of ERAC.