

STATE OF OHIO, COUNTY OF BELMONT
COURT OF COMMON PLEAS

STATE OF OF OHIO, ex rel.,
Plaintiff

Vs.

TRI-STATE GROUP INC., et al.,
Defendant

Case No.: 00 CV 0180

JUDGMENT ENTRY

FILED
COMMON PLEAS COURT
BELMONT CO., OH
2007 AUG 27 PM 9 22
RANDY L. MARPLE
CLERK OF COURT

This matter came on for oral, Evidentiary Hearing, on April 30, 2007, Plaintiff's Motion to hold Defendants, Tri-State Group Inc. and Glenn Straub, in Contempt of Court for their failure to comply with this Court's Order for injunctive relief issued September 2, 2003, for failing to conduct Closure at the site; failure to submit a Hydrogeological Investigation Report and Ground Water Monitoring Plan and to install, implement and maintain Ground Water Monitoring at the site; and failure to pay the civil penalty and interest. The Court, having reviewed the evidence submitted at the Hearing, to include Plaintiff's Exhibits 1 thru 15 and Defendants Exhibits 1 thru 5, and the testimony of Abbot Stevenson, OEPA Environmental Specialist; Janet Jacobs, Hydrogeologist; and Defendant, Glenn Straub, hereby finds, as follows:

Defendants' have violated the mandatory requirements of the permanent injunction, as set forth in Paragraph II, Sub-paragraphs (E), (F), (G), (H), (I) and ~~(J)~~ of the Judgment of the Court, filed September 2, 2003; Paragraph II... *- STRIKE (J)*

- (E) **Submittal of a post closure plan to assure proper installation and growth of the vegetative cover;**
- (F) **Submittal of a proposal (which must be approved by OEPA) for erosion controls;**
- (G) **Submittal of a proposal (which must be approved by OEPA) for leachate controls;**

- (H) **Re-establishment of the ground water monitoring system and replacement of destroyed and/or non-functioning wells (the final configuration and amount of wells to be approved by OEPA upon hydrogeologic evaluation).**
- (I) **Imposition of deed restriction to control use of property for industrial purposes only.**

The Court further finds that said Defendants have violated the Order of the Court, by failing to complete Closure of the site within twelve (12) months of the September 2, 2003 Judgment Entry, or September 1, 2004, and by failing to provide a report from a professional engineer, certifying Closure **work to be in accord with the Court Ordered OEPA Approved Closure Plan.** The Court specifically finds that the Construction Project Update, dated September 2004 (**State Exhibit 8 and Defendants Exhibit 4**) does not constitute **a Court Ordered OEPA Approved Closure Plan**, and that said Defendants' attempt to portray such report as an OEPA Approved Closure Plan, is simply direct evidence of their knowing and reckless disregard for the Order of this Court and their contumacious recalcitrance to rectify the harm caused to Belmont County by the Fly Ash Site.

In addition, the Court further finds that Defendants, Tri-State Group Inc. and/or its respective subsidiaries, affiliates, assigns, officers, directors, agents, employees and/or successors in interest and Defendant, Glenn Straub, an individual, jointly and severally, **failed to install, implement, maintain and monitor for contaminants, a Ground Water Monitoring System at the Site, in accord with Paragraph IV, Sub-paragraph (A), (B), (C), (D), (E) and (F) of the Judgment of the Court, filed September 2, 2003. Said Monitoring System is mandated to be "constructed in strict accordance with the requirements set forth in Tri-State's PTI and NPDES Permits", which include, pursuant to Court Order, the installation and implementation, under the supervision of a qualified ground water expert (hydrogeologist), the following mandatory requirements to re-establish Ground Water Monitoring at the Site:**

- (A) Completion of a Hydrogeological Investigation Report at the Site by a qualified hydrogeologist within ninety (90) days of the September 2, 2003 Judgment Entry;**
- (B) Based upon the results of the Hydrogeologic Investigation Report, a Ground Water Monitoring Plan for the Site shall be prepared and submitted to the Southeast District Office within six (6) months of the date of the September 2, 2003 Judgment Entry and shall be incorporated as part of the Court Ordered OEPA Approved Closure Plan;**
- (C) The proposed Ground Water Monitoring Plan shall include the proposed number of wells necessary to monitor the Site, an assessment outline, and a sampling analysis plan;**
- (D) In order to obtain the required baseline data, ground water sampling shall be required for five (5) years from the date the Site Closure Plan is approved, to be monitored quarterly for the first year and semiannually thereafter;**
- (E) The parameters of contaminants that must be sampled are set forth in Tri-State's NPDES Permit, page 3 of 12;**
- (F) Implementation of the new Ground Water Monitoring System shall be completed in accord with the Court Ordered OEPA Approved Closure Plan; however, in no event, shall said implementation be delayed beyond nine (9) months from the date of the Judgment Entry (September 2, 2003).**

CIVIL CONTEMPT AND PENALTIES

Therefore, based upon the above-stated findings, it is Ordered, Adjudged and Decreed that Defendant, Tri-State Group, Inc., and/or its respective subsidiaries, affiliates, assigns, officers, directors, agents, employees and/or successors in interest and Defendant, Glenn Straub, an individual, are jointly and severally liable for Contempt of Court, for knowingly, recklessly and contumaciously allowing continued violations at the site and otherwise for violating the permanent injunction of this Court,

by their knowing and reckless failure to implement a reasonable, necessary and appropriate Closure of the Site, in accord with the requirements set forth in Tri-State Asphalt Corp.'s Permit To Install (PTI) and NPDES Permits, and the mandated Closure, in accord with a Court Ordered OEPA Approved Closure Plan, embodying the above-cited mandatory requirements, as such were set forth in this Court's Judgment Entry, filed September 2, 2003.

It is Ordered that Defendants, Tri-State Group, Inc., and Glenn Straub, shall be incarcerated in the Belmont County Jail, said sentence to begin on November 26, 2007 and to continue indefinitely until all requirements for the Closure of the Site and for the installation implementation, and maintenance of the new Ground Water Monitoring System have been completed, in accord with a Court Ordered OEPA Approved Closure Plan, as set forth in the original findings of this Court in this Judgment Entry filed September 2, 2003.

Specifically, based upon the above-mentioned findings, it is hereby Ordered, Adjudged and Decreed that Defendant, Tri-State Group Inc. and/or its respective subsidiaries, affiliates, assigns, officers, directors, and/or successors in interest, and Defendant, Glenn Straub, an individual, are jointly and severally liable for Civil Contempt of this Court. Therefore, the appropriate punishment is determined to be remedial or coercive and for the benefit of the Complainants (State of Ohio/Belmont County). The prison sentences are conditional. Tri-State Group Inc., and/or Glenn Straub carry the keys of their prison in their own pocket since they will be freed if they agree to do as Ordered. **Brown v. Executive 200, Inc., 416 N.E. 2d 610 (Ohio 1980).**

In addition, as a result of the above-stated findings, it is Ordered, Adjudged and Decreed that Defendant, Tri-State Group Inc. and/or Defendant, Glenn Straub, an individual, are jointly and severally liable, in accord with R.C. §6111.09 (A) for an additional appropriate, reasonable and necessary civil penalty in the amount of two hundred ten dollars (\$210.00) per day (three times \$70.00 per day equal \$210.00), effective June 4, 2004 (the first day after the nine months allotted for the re-implementation of the

ground water monitoring system) thru the date of this Entry (1179 days x \$210.00= \$247,590.00) with interest to accrue at 8% per annum from said June 4, 2004.

Finally, as a result of the above-stated findings, the Court, in its discretion to award attorneys fees in Contempt proceedings, hereby Orders said Defendants to pay Plaintiff's attorney fees as part of the costs taxable to said Defendants, who have been found guilty of Civil Contempt. Planned Parenthood Ass'n v. Project Jericho, 52 Ohio St. 3d 56. An oral, Evidentiary Hearing on the reasonable amount of Plaintiff's attorneys fees shall be set for November 26, 2007 at 9:00 a.m.

The Court specifically finds that the above-stated Civil Penalty for failure to comply with this Court's injunctive Order is the result of Defendants failure to comply with the Orders of this Court pertaining to the Closure of the Site in accord with the Court Ordered OEPA Approved Closure Plan and the installation, implementation and maintenance of a Ground Water Monitoring System, and that, in accord with the Court's Entry, dated September 2, 2003, the Civil Penalty initially imposed by the Court, which amounted to seventy dollars (\$70.00) per day for violations of law that preceded these violations for Contempt, is separate and distinct from this Civil Penalty.

In order that the record will clearly evidence the Court's reasoning herein, the Court finds that the imposition of this Civil Penalty is separate and distinct from the Civil Penalty imposed by the Court in the amount of three hundred sixty-two thousand one hundred eight-five dollars (\$362,185.00), **which penalty was subsequently compromised, without the approval of this Court**, by a settlement agreement between Plaintiffs and Defendants, and which settlement evidences an unpaid Civil Penalty balance in the amount of one hundred ninety-six thousand thirty-six dollars (\$196,036.00). Rather, this Civil Penalty is imposed for the direct violation of this Court's Order for Defendants to comply with the OEPA Approved Closure Plan and the installation, implementation and maintenance of a Ground Water Monitoring System and the agreement between the parties to compromise the original Civil Penalty

imposed by the Court, in no manner, affects this Civil Penalty for Defendants' knowing, reckless, and contumacious violations of this Court's Order for injunctive relief.

The determination of an appropriate, reasonable and necessary Civil Penalty is based upon the number of days of violations times one hundred five dollars (\$105) per day per each permit (PTI Permit and NPDES Permit - 1179 days x \$105 + \$105 = \$247,590.00). Said amounts are less than the allowable statutory amount per day, which cannot exceed ten thousand dollars (**R.C. §6111.09**). This formula has been applied, in light of, and adjusted for, certain relevant criteria previously established as precedent for the evaluation of this environmental claim, as such are set forth in **State ex. rel. Brown v. Dayton Malleable, Inc. (October 12, 1979), Montgomery C.P., 13 ERC 2189; 1 Ohio St. 3d 151 (1982) and this Court's Judgment Entry filed September 2, 2003.**

Said relevant evaluating criteria include: (a) Harm to human Health and/or environment; (b) Risk of harm to human health and/or environment; (c) **Recalcitrance or indifference to the requirements of the law;** (d) Economic benefit for delayed compliance; and (e) **Deterrence to Defendants, as well as others, from future violations of the law.** Except for the factors identified as (c) Recalcitrance or indifference to the requirements of the law and (e) deterrence to Defendants, as well as others, for future violations of the law, which conditions have been reconsidered by this Court in light of said Defendants' knowing, reckless and contumacious acts resulting in Civil Contempt, the Court hereby adopts its previous findings and factored amounts. However, in view of Defendants' knowing, reckless and contumacious disregard for the Orders of this Court to close this site in accord with Court Ordered OEPA Approved Closure Requirements and to install, implement and maintain a new Ground Water Monitoring System at the site, the original Per Diem amount of seventy dollars (\$70.00) is increased by this Judgment Entry, to the amount of two hundred ten dollars (\$210.00) per day (\$150 per each PTI and NPDES Permits), effective June 4, 2004 (first day after nine months allotted fore reimplementation of Ground Water Monitoring System), for a total of eleven hundred seventy-nine (1179) days through August 27, 2007, establishing a total additional Civil Penalty in the amount

of \$247,590.00. This Court hereby reserves jurisdiction to determine if such Civil Penalty shall continue to accrue from August 27, 2007 until Closure of the Site and installation, implementation and maintenance of Ground Water Monitoring System.

In the event Defendants would choose to purge themselves from Civil Contempt, to avoid an indefinite jail sentence, by proceeding, in good faith, to Closure of the Site in accord with the Court Ordered OEPA Approved Closure requirements and to install, implement, and maintain a new Ground Water Monitoring System at the site, this Court shall allow the application of reasonable costs expended by Defendants in accomplishing such objectives to be applied to reduce the above-mentioned Civil Penalty, dollar for dollar, but only in the event such costs are expended within the next ninety (90) days (November 26, 2007), and "good faith" compliance is demonstrated to this Court.

Further, since it has now become apparent to this Court that, in addition to Defendants, Plaintiffs (OEPA Representatives and counsel) have been remiss in effecting an appropriate resolution of this case, in accord with previous Orders of this Court, all parties and their respective employees and/or attorneys, **(to include Tri-State Group Inc., Glenn Straub, Larry Zink, Tim Kearn, Abbott Stevenson, and Janet Jacobs)** are hereby Ordered to appear in this Court on November 26, 2007 at 9:00 a.m., to report on compliance with this Court's Order. On that date, if the Court is otherwise satisfied that the parties are proceeding to appropriate Closure of the Site and installation, implementation and maintenance of a Ground Water Monitoring System at the site, the Court shall consider suspension of Defendants' jail sentence and shall set a new date for review ninety (90) days thereafter and every ninety (90) days until this site is properly closed. Failure of any party to appear pursuant to the Order of this Court shall result in a warrant for the arrest of said party for Contempt of Court.

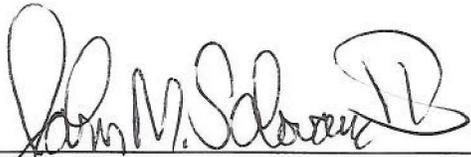
It is further Ordered, Adjudged and Decreed that the proposed Deed restriction submitted by Defendant as Instrument #200600006925, recorded in Deed Vol. 69, page 535, does not sufficiently address the industrial use restriction to be imposed upon Defendant's property, upon which the Fly Ash Site is located. Said Deed restriction does not reference the remaining portion of Defendant's property, which may also be

contaminated and said Deed does not reference the previous Deed by which Defendant acquired ownership of the property, nor does it indicate a reference to said prior Deed Instrument. The parties are directed to resolve these issues to allow for a re-recording of the Deed restriction prior to the hearing on November 26, 2007.

In the event Defendant would choose to Appeal the Decision of this Court prior to implementation of this Decision, then in that event, the Judgment of this Court shall not be stayed unless and until Defendant files with this Court a Supersedeas Bond in the amount of one million dollars (\$1,000,000.00). This provision for Supersedeas Bond is in accord with Ohio Appellate Rule 7(A) and (B), and is based upon this Court's findings that, at least such amount of bond is necessary to assure and insure that Defendant's will comply with the Orders of this Court to clean up the site, pay the civil penalty, reasonable attorney's fees for Plaintiffs' counsel, and all costs herein.

All subject to further Order of the Court.

Dated: August 27, 2007



JOHN M. SOLOVAN, II - JUDGE

pc: Timothy J Kern, Atty./Pl.
Larry A Zink, Atty./Def.