

THE COURT OF COMMON PLEAS

COUNTY OF CUYAHOGA

JUSTICE CENTER

1200 ONTARIO

CLEVELAND, OHIO 44113

ROBERT E. FEIGHAN
JUDGE

April 26, 2004

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**Re: State of Ohio, ex rel. v. Mercomp, Inc., et al., Case No. 444454,
Cuyahoga County Court of Common Pleas, Cuyahoga County, Ohio,
Judge Robert E. Feighan**

Dear Michael:

Enclosed is a time-stamped copy of the Court's Findings of Fact and Conclusions of Law in the aforementioned case.

If you have any comments or questions regarding the enclosed Findings of Fact and Conclusions of Law, please do not hesitate to contact me.

Very truly yours,



Douglas R. Simek, Esq.
Judicial Staff Attorney
Cuyahoga County Court of Common Pleas
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**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

STATE OF OHIO, ex rel.)	CASE NO. 444454
JIM PETRO)	
ATTORNEY GENERAL OF OHIO)	JUDGE ROBERT E. FEIGHAN
)	
Plaintiff,)	
)	
-vs-)	
)	
MERCOMP, INC., et al.)	
)	
Defendants.)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court determines this case is complex litigation, having considered divisions (A)(1) to (7) of Sup. R. Rule 42.

FINDINGS OF FACT

1. Defendant Mercomp is the owner of a solid waste landfill, commonly known as the Schaaf Road Landfill located at 1329 Schaaf Road, in Brooklyn Heights, Ohio (“Schaaf Road Landfill” and “the Landfill”).

2. Defendant Manuel Rock is the sole shareholder and corporate officer of Defendant Mercomp.

3. The Schaaf Road Landfill began accepting waste between 1970 and 1980, and ceased accepting waste on May 31, 1994.

4. On April 13, 2000, the Director of the Ohio Environmental Protection Agency, (“Ohio EPA”) issued his approval, with conditions, of the Closure Plan for the

Landfill. Paragraph 2 on page 2 of the Director's approval of the Closure Plan states the following condition:

"The owner/operator shall execute and fund a financial assurance instrument meeting the requirements of OAC [Ohio Administrative Code] Rules 3745-27-16 and 3745-27-17 for post-closure care in the following manner:

- a) Not later than thirty (30) days after the effective date of this closure plan approval, the post-closure care financial assurance instrument shall be established in an amount not less than the total present value of \$395,663.00.
- b) Not later than sixty (60) days after the effective date of this closure plan approval, the amount listed in the financial instrument shall be increased to an amount not less than a total present value of \$884,640.00.
- c) Not later than ninety (90) days after the effective date of this closure plan approval, the amount listed in the financial assurance instrument shall be increased to an amount not less than a total present value of \$1,289,160.00."

5. The regulations requiring financial assurance for the Schaaf Road Landfill were effective in 1990.

6. To date, Defendants have not selected or funded a post-closure financial assurance instrument for the Schaaf Road Landfill.

7. By operating the Landfill until 1994, Defendants had a period of four years during which they could have set aside income from the operation of the Landfill to fund the financial assurance instrument required for the Landfill's post-closure costs.

8. Defendant Manuel Rock currently has a net worth of \$1.932 million, including a Merrill Lynch investment account containing marketable securities with a value of \$353,291.00 and six rental properties valued at \$1,333,500.00.

9. In September of 2002, Defendant Manuel Rock had approximately \$1.1 million in his personal Merrill Lynch investment account, approximately \$650,000.00 in his Mercomp Merrill Lynch investment account, and owned six rental properties.

10. In the period between 1996 and 1997, Defendant Manuel Rock had approximately \$1.9 million in his personal Merrill Lynch investment account and \$1.6 million in his Mercomp Merrill Lynch investment account.

11. The Ohio EPA's current estimate of the annual cost of post-closure care at the Landfill is \$64,055.00, including the cost of ground water assessment monitoring. Over a thirty-year period, the cost totals approximately \$1.92 million. The annual costs include the following:

a.	Regrading	\$4,819
b.	Reseeding	\$2,176
c.	Erosion	\$5,472
d.	Basin Maintenance	\$916
e.	Road Maintenance	\$1,131
f.	Methane Gas	\$4,884
g.	Groundwater Detection and Assessment	\$41,393
h.	Site Maintenance	\$1,088
i.	Reports	\$1,088
j.	Engineering	\$1,088
<hr/>		
TOTAL ANNUAL COST		\$64,055

12. Over the past ten years, Defendants' annual ground water monitoring cost has averaged approximately \$57,000.00, including \$45,000.00 for consultants and \$12,000.00 for drilling and lab work.

13. Over the past ten years, Defendants' annual methane gas collection and monitoring cost has averaged approximately \$7,500.00.

14. Since 1998, Defendants' annual cap maintenance cost for the Landfill has averaged \$50,000.00.

15. The first post-closure cost estimate for the Landfill, prepared by Defendants' consultant, Hovancsek & Associates, in 1994 and concurred with by another consultant of Defendants, CT Consultants, projected the annual post-closure cost for the Landfill, not including the cost of ground water assessment monitoring, to be \$62,000.00. Over a thirty-year period, this is a total of approximately \$1.86 million.

16. CT Consultants reviewed Hovancsek & Associates' 1994 post-closure cost estimate related to re-grading, erosion control, sedimentation basin maintenance, a methane gas control system and gas monitoring for the Landfill and concurred that the estimate was reasonable.

17. In 1995, after Defendants told the Ohio EPA that they could not fully fund their financial assurance for the post-closure costs of the Landfill, and without a justification for a change of position, Defendants' consultant, CT Consultants, prepared a new estimate of the post-closure costs for the Landfill. That estimate, not including the cost for ground water assessment monitoring, totaled \$23,340 per year. Over a thirty-year period, this is a total of approximately \$700,200.

18. In an October 6, 1995 letter, Defendants' consultant, Stephen Hovancsek, revised his total annual post-closure cost estimate for the Landfill. Mr. Hovancsek's revised estimate, not including the cost of ground water assessment monitoring, was an annual cost of \$30,740.00. Over a thirty-year period, this is a total of approximately \$922,200.00.

19. After ceasing the acceptance of waste at the Landfill in 1994, Defendants began constructing a cap on the Landfill. In the process, Defendants sought to save money by acquiring the dirt and other fill materials for free or at a minimal cost from

persons who brought the materials to the Landfill over time. This cost saving strategy was a factor contributing to Defendants' completion of the construction of the cap on the Landfill later than the deadline prescribed by Ohio Adm. Code 3745-27-11(I) and the extension granted by the State.

20. Defendants constructed the cap on the Landfill themselves.

21. In a November 29, 1994 letter from their consultant, Stephen Hovancsek, Defendants requested an extension, until June 30, 1995, to complete the closure of the Landfill.

22. The Ohio EPA granted the extension request, allowing Defendants until June 30, 1995, to complete closure of the Landfill.

23. On July 10, 1995, Defendants requested a second extension, until December 31, 1995, to complete closure of the Landfill.

24. The Ohio EPA did not grant a second extension, but informed Defendants that the Ohio EPA would not implement escalated enforcement activities if Defendants completed closure by December 31, 1995.

25. Defendants' office manager, Marcella Naylor, admitted that Defendants completed the cap on the landfill in 1998.

26. Defendants' consultant, Owen Karickhoff, admitted that Defendants did not complete the cap construction work at the Landfill until October 1997.

27. On April 22, 1998, nearly three years after the extended closure deadline of June 30, 1995, Defendants submitted their first Closure Certification Report to the Ohio EPA.

28. Defendants admit in their April 22, 1998 Closure Certification Report that the overlying frost protection and vegetative layers of the Landfill, as well as the final grading, were not completed until October of 1997.

29. In a June 17, 1998 letter, the Ohio EPA informed Defendants of several deficiencies in the April 22, 1998 Closure Certification Report.

30. On August 31, 1998, Defendants submitted their amended Closure Certification Report to the Ohio EPA.

31. In a December 3, 1998 letter, the Ohio EPA informed Defendants that there were several deficiencies in the August 1998 Closure Certification Report, and that the post-closure care period for the facility would not begin until Defendants submitted a complete certification report to the Ohio EPA.

32. On February 16, 1999, Defendants submitted an addendum to their previously submitted Closure Certification Report.

33. In a August 2, 1999 letter, the Ohio EPA informed Defendants of several deficiencies still remaining in the Defendants' April 1998 Closure Certification Report and Defendants' responses to the Ohio EPA's Notice of Deficiency letters.

34. In an April 10, 2000 Notice of Violation letter, the Ohio EPA cited Defendants for eleven violations of Ohio Adm. Code Chapter 3745-27 related to Defendants' deficient Closure Certification Report and Defendants' failure to fund a financial assurance instrument, including of Ohio Adm. Code 3745-27-11(I), 3645-27-08(H)(3), 3745-27-08(G), 3745-27-19(D)(2)(a)(i), 3745-27-08(C)(1)(o), and 3745-27-11.

35. In a November 13, 2000 letter, the Ohio EPA notified Defendants that based on Defendants' Cap Investigation report, received by the Ohio EPA on September

7, 2000, follow up discussions between the parties, and an inspection of the Landfill on November 3, 2000, the Ohio EPA determined that Defendants' closure construction activities had been completed in accordance with Ohio's solid waste rules, and that the post-closure period of the Landfill began on September 7, 2000.

36. The Schaaf Road Landfill has no leachate collection system.

37. There is a greater environmental risk at a landfill with no leachate collection system than at a landfill with a leachate collection system.

38. Erosion problems have been occurring at the Schaaf Road Landfill.

39. In or around 1998, while Defendants' consultant, Owen Karickhoff, was working at the Landfill, liquid outbreaks occurred in the southwest corner of the Landfill. Liquid was coming from the subsurface of the Landfill and causing the sloped soil cover of the Landfill to become liquid and fail. At that time, Owen Karickhoff believed these liquid outbreaks were leachate outbreaks.

40. It is not unusual for liquid outbreaks and side slope failures to occur at a closed landfill as a result of water that percolates into the landfill and builds up until it finds a way to escape.

41. Leachate outbreaks are an indication of leachate building up in a landfill.

42. If a landfill has had side slope failures in the past, it is likely to have them in the future.

43. Leachate outbreaks have been observed at the Landfill by the Ohio EPA. A recent leachate outbreak at the Landfill was sampled on February 3, 2004, by the Ohio EPA. Defendants concur that the liquid coming from the Landfill that was sampled on February 3, 2004, was leachate.

44. Upon analysis, the leachate sampled by the Ohio EPA on February 3, 2004, was found to contain ethylbenzene, barium and thallium, each over the Maximum Containment Level (“MCL”) (a risk-based ground water protection standard applicable to ground water remediation at leaking solid waste landfills under Ohio Adm. Code 3745-27-10) as well as arsenic, lead, nickel and benzene.

45. Tallium, barium and ethylbenzene, when present in amounts above the MCL, can pose a risk to human health.

46. Acetone, a volatile organic compound (“VOC”), was detected at the Landfill in two consecutive sampling events in 1999 and 2000.

47. Without the outermost sand and non-compacted soil layers that finished the cap of the Landfill when they were added sometime in 1997 or 1998, the clay layer directly over the waste in the Landfill was left exposed to cold winter weather and may have frozen, potentially affecting the permeability of the clay cap left exposed.

48. Since 1998 or subsequently, during the time that Owen Karickhoff was working for Defendants, Defendant Manuel Rock conducted maintenance on the sedimentation basin next to the Landfill because the basin was filling up with sediment.

49. The sedimentation basin next to the Landfill could fill up again and require further maintenance.

50. Defendants have had problems establishing a vegetative cover on the Landfill.

51. The waste in the Landfill is decomposing, causing the Landfill cap to settle.

52. The decomposition and settling of the waste in the Landfill is causing ponding of water to occur on the surface of the Landfill.

53. As the Landfill has settled, Defendants have added soil to the cap and done re-grading in various efforts to maintain proper rain runoff and drainage on the cap.

54. The expense of adding soil and re-grading the Landfill cap will be a future cost of the Landfill.

55. On June 13, 2000, Defendants submitted a revised Ground Water Sampling and Analysis Plan to the Ohio EPA.

56. On September 11, 2000, after several necessary modifications by Defendants in response to Notice of Deficiency letters, the Ohio EPA determined that Defendants' revised Ground Water Program was in compliance with Ohio Adm. Code 3745-27-10.

57. As part of their Ground Water Sampling and Analysis Plan, Defendants conducted a sampling event on July 11, 2000, and reported the results of that sampling event in their July 2000 Semiannual Ground Water Monitoring Report.

58. When the Ohio EPA reviewed Defendants' July 2000 Semiannual Ground Water Monitoring Report, the Ohio EPA determined that monitoring well 6 ("MW'6") had a statistically significant increase ("SSI") of a leachate and/or leachate-derived substance (ammonia), indicating the Landfill could be leaking leachate into ground water under the Landfill.

59. As cited in Ohio EPA's December 19, 2000 NOV letter, Ohio EPA's review of Defendants' July 2000 Semiannual Monitoring Well Sampling Event Report

determined the following violations of Ohio Adm. Code Chapter 3745-27 related to ground water detection monitoring (Count Three of the State's Complaint):

- a. 3745-27-10(D)(7)(b) – Defendants failed to notify the Director within 75 days of a statistically significant increase in the parameters of ammonia in MW-6.
- b. 3745-27-10(C)(1) – Defendants used a sampling method that was not consistent with their sampling analysis procedures and was not protective and an accurate representation of ground water quality.
- c. 3745-27-10(C)(1) – Defendants did not obtain ground water samples that were an accurate representation of ground water quality.
- d. 3745-27-10(C)(8) – By using the wrong background well, Defendants did not determine if they had statistically significant increases.
- e. 3745-27-10(C)(7)(d) – Defendants did not calculate tolerance intervals that were protective of human health and the environment.
- f. 3745-27-10(C)(1) – Defendants did not use consistent sampling methods with each monitoring well in each formation.

60. As cited in Ohio EPA's July 9, 2002 NOV letter, Ohio EPA's review of Defendants' July 2001 Annual Monitoring Well Sampling Event Report determined the following violations of Ohio Adm. Code Chapters 3745-27 related to ground water detection monitoring (Count Three of the State's Complaint):

- a. 3745-27-10(B)(3)(e) – Defendants failed to maintain monitoring wells in a manner that allowed collection of representative samples for ground water monitoring.
- b. 3745-27-10(C)(1) – In relation to tolerance limits, Defendants did not use statistical methods protective of human health and the environment because the statistical methods were not an accurate representation of ground water quality.
- c. 3745-27-10(C)(1) – Based on the temperatures of Defendants' ground water samples, Defendants' sampling methods were not representative of ground water quality.

- d. 3745-27-10(C)(1) – Defendants failed to utilize consistent sampling procedures to provide an accurate representation of ground water quality.
- e. 3745-27-10(C)(1) – By not discussing and evaluating VOC detections, Defendants failed to implement ground water sample analysis and statistical methods capable of producing sample results representative of ground water quality and protective of human health and the environment.
- f. 3745-27-10(C)(7)(d) – Defendants failed to establish tolerance limits protective of human health and safety and the environment.

61. As noted in the Ohio EPA’s July 9, 2002 NOV letter, Ohio EPA’s review of Defendants’ 2001 Annual Monitoring Well Sampling Event Report determined the following violations related to ground water assessment monitoring (Count Four of the State’s Complaint):

- a. 3745-27-10(B)(3)(e) – Defendants failed to maintain monitoring wells in a manner that allowed collection of representative samples for assessment monitoring.
- b. 3745-27-10(C)(1) – Defendants did not use statistical methods protective of human health and the environment because their tolerance limits did not produce an accurate representation of ground water quality.
- c. 3745-27-10(C)(1) – Based on the temperatures of ground water samples, Defendants’ sampling analysis methods were not representative of ground water quality.
- d. 3745-27-10(C)(1) – By not analyzing sufficient trip blanks, Defendants failed to utilize consistent sampling procedures to provide an accurate representative of ground water quality.
- e. 3745-27-10(C)(1) – By not evaluating VOC detections Defendants failed to implement ground water sample analysis and statistical methods capable of producing results representative of ground water quality, and therefore, protective of human health and the environment.
- f. 3745-27-10(C)(7)(d) – Defendants failed to establish tolerance limits protective of human health and safety and the environment.
- g. 3745-27-10(E)(1) – Defendants failed to submit a report regarding alternate source demonstration, and subsequently, failed to submit and implement a ground water assessment monitoring program.

- h. 3745-27-10(E)(1) – Defendants failed to implement the sampling required for an assessment monitoring program.
 - i. 3745-27-10(E)(2) – Defendants failed to submit a revised ground water quality assessment plan for MW-3 and MW-4.
 - j. 3745-27-10(E)(4)(a)(i) – Defendants failed to conduct assessment monitoring for MW-3 and MW-4 and the associated background wells.
 - k. 3745-27-10(E)(4)(b)(ii) – Defendants failed to conduct assessment monitoring for wells already in the ground water quality assessment monitoring program (MW-15, MW-16, MW-17).
62. As cited in Ohio EPA’s July 9, 2002 NOV letter, Ohio EPA’s review of Defendants’ July 2001 Semiannual Monitoring Well Sampling Event Report, determined the following violations of Ohio Adm. Code Chapter 3745-27 related to ground water detection monitoring (Count Three of the State’s Complaint):
- a. 3745-27-10(B)(3) – As indicated by elevated turbidity and pH values, Defendants failed to maintain wells in a manner which allowed for the collection of representative ground water samples.
 - b. 3745-27-10(C)(1) – Defendants used detection levels equaling or exceeding Maximum Containment Levels (“MCLs”), and therefore, failed to use analytical and statistical methods in their ground water monitoring program that were protective of human health and the environment.
 - c. 3745-27-10(C)(1) – Defendants used turbidity-elevated tolerance limits that were not likely to detect a release from their landfill, and therefore, failed to use statistical methods in their ground water monitoring program protective of human health and the environment.
 - d. 3745-27-10(C)(7)(d) – Defendants used turbidity-impacted data to calculate tolerance limits, and therefore, used a statistical method not protective of human health and the environment.
 - e. 3745-27-10(D)(5)(a)(ii)(b) – Defendants failed to sample MW-3 for all the required parameters.
 - f. 3745-27-10(C)(8) – Defendants failed to properly compare down-gradient ground water quality to background ground water quality.

63. As cited in Ohio EPA's July 9, 2002 NOV letter, Ohio EPA's review of Defendants' 2001 Annual Monitoring Well Sampling Event Report – Addendum determined the following violations of Ohio Adm. Code Chapter 3745-27 related to ground water assessment monitoring (Count Four of the State's Complaint):

- a. 3745-27-10(B)(3)(e) – As indicated by elevated ground water turbidity values, Defendants failed to maintain wells in a manner which allowed for the collection of representative ground water samples.
- b. 3745-27-10(C)(1) – Defendants used turbidity-elevated tolerance limits that were not likely to detect a release from their landfill, and therefore, failed to use statistical methods in their ground water monitoring program protective of human health and the environment.
- c. 3745-27-10(C)(1) – Defendants failed to submit chain-of-custody records to the Ohio EPA, and therefore, failed to utilize consistent sampling and analysis procedures that were protective of human health and the environment.
- d. 3745-27-10(C)(1) – Defendants failed to discuss and evaluate the detection of xylene in MW-6 and therefore, failed to implement a ground water monitoring program that, by providing an accurate representation of ground water quality, ensures protection of human health and environment.
- e. 3745-27-10(C)(3) – Defendants failed to measure ground water levels in their monitoring wells, and therefore, failed to determine ground water flow direction.
- f. 3745-27-10(C)(7)(d) – Defendants used turbidity-impacted data to calculate tolerance limits, and therefore, used statistical limits not protective of human health and the environment.

64. As cited in Ohio EPA's July 9, 2002 NOV letter, Ohio EPA's review of Defendants' 2001 Assessment Monitoring Well Sampling Event Report, determined the following violations of Ohio Adm. Code Chapter 3745-27 related to ground water assessment monitoring (Count Four of the State's Complaint):

- a. 3745-27-10(C)(1) – Defendants used turbidity-elevated tolerance limits not likely to detect a release from their landfill, and therefore, failed to use

statistical methods in their ground water monitoring program capable of producing results representative of ground water quality in order to be protective of human health and the environment.

- b. 3745-27-10(C)(7)(d) – Defendants used turbidity-impacted data to calculate tolerance limits, and therefore, used statistical limits not representative of ground water quality and protective of human health and the environment.
- c. 3745-27-10(E)(1) – Defendants failed to implement the ground water sampling required for an assessment monitoring program.
- d. 3745-27-10(E)(4)(a)(i) – Defendants failed to sample background wells and analyze ground water samples for leachate or leachate-derived constituents listed in Appendix I and II.
- e. 3745-27-10(E)(4)(b)(ii) – Defendants failed to annually sample MW-15, MW-16, and MW-17 for Appendix II parameters.

65. As cited in Ohio EPA’s July 15, 2002 NOV letter, Ohio EPA’s review of Defendants’ First Determination Report determined the following violation of Ohio Adm. Code Chapter 3745-27 related to ground water assessment monitoring (Count Four of the State’s Complaint):

- a. 3745-27-10(E)(5) – Defendants failed to conduct assessment monitoring and follow their assessment monitoring plan, and as a result, failed to determine the rate, extent and concentration of leachate or leachate-derived constituents in ground water.
- b. 3745-27-10(E)(6) – Defendants failed to make a first determination of rate, extent and concentration of leachate or leachate-derived constituents in ground water.
- c. 3745-27-10(E)(10) – Defendants failed to submit quarterly assessment activities reports.

66. As cited in Ohio EPA’s September 20, 2002 NOV letter, Ohio EPA’s review of Defendants’ Addendum to the First Determination Report determined the following violations of Ohio Adm. Code Chapter 3745-27 related to ground water assessment monitoring (Count Four of the State’s Complaint):

- a. 3745-27-10(E)(5) – Defendants failed to conduct assessment monitoring in accordance with their assessment monitoring plan, and as a result, failed to determine the rate, extent and concentration of leachate or leachate-derived constituent in ground water.
- b. 3745-27-10(E)(6) – Defendants failed to make a first determination of rate, extent and concentration of leachate or leachate-derived constituents in ground water.
- c. 3745-27-10(E)(10) – Defendants failed to submit quarterly assessment activities reports.

67. As cited in Ohio EPA's September 20, 2002 NOV letter, Ohio EPA's review of Defendants' 2002 Semiannual Monitoring Well Sampling Event Report determined the following violations of Ohio Adm. Code Chapter 3745-27 related to ground water detection monitoring (Count Three of the State's Complaint):

- a. 3745-27-10(B)(3)(e) – As indicated by elevated ground water turbidity and pH values, Defendants failed to maintain wells in a manner allowing for the collection of representative ground water samples.
- b. 3745-27-10(C)(1) – Defendants used turbidity-elevated tolerance limits not likely to detect a release from their landfill, and therefore, failed to use statistical methods in their ground water monitoring program that are protective of human health and the environment.
- c. 3745-27-10(C)(1) – Defendants' sampling methods produced ground water samples with elevated temperatures that were not representative of actual ground water quality.
- d. 3745-27-10(C)(1) – Defendants failed to collect sufficient trip blanks as required by their sampling and analysis plan, and therefore, failed to utilize consistent sampling procedures which were protective of human health and the environment.
- e. 3745-27-10(C)(3) – Defendants failed to properly construct potentiometric maps, thereby failing to determine the direction of ground water flow.
- f. 3745-27-10(C)(7)(d) – Defendants used tolerance limits that were based on turbidity-impacted data, and therefore, were not protective of human health and the environment.

68. As cited in Ohio EPA's September 20, 2002 NOV letter, Ohio EPA's review of Defendants' 2002 Semiannual Monitoring Well Sampling Event Report determined the following violations of Ohio Adm. Code Chapter 3745-27 related to ground water assessment monitoring (Count Four of the State's Complaint):

- a. 3745-27-10(B)(3)(e) – As indicated by elevated turbidity and pH values, Defendants failed to maintain wells in a manner that allowed for the collection of representative ground water samples.
- b. 3745-27-10(C)(1) – Defendants used turbidity-elevated tolerance limits not likely to detect a release from their landfill, and therefore failed to use statistical methods in their ground water monitoring program that are protective of human health and the environment.
- c. 3745-27-10(C)(1) – Defendants' sampling methods produced ground water samples with elevated temperatures that were not representative of actual ground water quality.
- d. 3745-27-10(C)(1) – Defendants failed to collect sufficient trip blanks as required by their sampling and analysis plan, and therefore, failed to utilize consistent sampling procedures that were protective of human health and the environment.
- e. 3745-27-10(C)(3) – By failing to properly construct potentiometric maps, Defendants failed to determine the direction of ground water flow.
- f. 3745-27-10(C)(7)(d) – Defendants used tolerance limits that were based on turbidity-impacted data, and therefore, not protective of human health and the environment.
- g. 3745-27-10(E)(1) – Defendants failed to sample background and down gradient wells, and analyze the samples as required by their ground water quality assessment plan.
- h. 3745-27-10(E)(4)(a)(i) – Defendants failed to sample background wells and analyze samples for all leachate and leachate-derived constituents in Appendix I and II.
- i. 3745-27-10(E)(4)(b)(ii) – Defendants failed to sample background wells and MW-15, MW-16, and MW-17 for Appendix II parameters.

69. As cited in Ohio EPA's December 31, 2002 NOV letter, Ohio EPA's review of Defendants' Revised Ground Water Quality Assessment Plan determined the following violations of Ohio Adm. Code Chapter 3645-27 related to ground water assessment monitoring (Count Four of the State's Complaint):

- a. 3745-27-10(C)(1) – Defendants' ground water assessment plan does not include consistent ground water assessment sampling procedures that are protective of human health and the environment.
- b. 3745-27-10(C)(1) – Defendants' procedure for disposal of purge waters removed from assessment wells is not protective of human health and the environment.
- c. 3745-27-10(C)(1) – Defendants' ground water assessment plan does not include well redevelopment procedures to adequately lower turbidity.
- d. 3745-27-10(C)(1) – Defendants' procedures for evaluating purge water stabilization based on field measurements is not sufficient to determine that the wells are adequately purged so that representative ground water samples can be collected.
- e. 3745-27-10(C)(1) – Defendants failed to include specifications for distilled and de-ionized water used for equipment decontamination, which are needed to ensure consistent sampling and analysis procedures.
- f. 3745-27-10(E)(3)(b)(i) – Defendants' assessment plan does not contain location, depth and construction of detection monitoring wells.
- g. 3745-27-10(E)(3)(b)(ii) – Defendants' assessment plan does not contain language regarding the summary of detection monitoring, ground water analytical data, and written documentation of the results
- h. 3745-27-10(E)(3)(f) – Defendants' assessment plan did not contain a schedule of implementation.
- i. 3745-27-10(E)(4)(a)(i), 3745-27-10(E)(4)(a)(ii), 3745-27-10(E)(4)(b)(i), 3745-27-10(E)(4)(b)(ii) – Defendants' assessment plan does not adequately describe the scope of assessment sampling time frames and parameters to be analyzed.
- j. 3745-27-10(E)(4)(d) – Defendants' assessment plan does not adequately describe the collection and analysis of Appendix II background samples.

- k. 3745-27-10(E)(5) – Defendants’ Assessment plan failed to discuss when or how Defendants will make a first determination of the rate, extent and concentration of leachate and leachate-derived constituent in ground water.
- l. 3745-27-10(E)(6) – Defendants’ assessment plan does not discuss the submission of a ground water quality assessment report and does not discuss the date by which the facility will make a first determination of the rate, extent and concentration of leachate and leachate-derived constituents in the ground water.
- m. 3745-27-10(E)(7)(a) – Defendants’ assessment plan does not describe how the Director may reinstate a detection monitoring program at the Landfill.
- n. 3745-27-10(E)(7)(c) – Defendants’ assessment plan does not state that until the Director approves reinstatement of the detection monitoring program, Defendants will continue assessment monitoring or corrective measures.

70. As cited in Ohio EPA’s March 4, 2003 NOV letter, Ohio EPA’s review of the ground water files for the Landfill determined the following violations of Ohio Adm. Code Chapter 3745-27 related to ground water detection monitoring (Count Three of the State’s Complaint):

- a. 3745-27-10(D)(5)(a)(ii) – Defendants did not collect and analyze ground water samples during the second 2002 semiannual ground water monitoring event.
- b. 3745-27-10(C)(8) – Defendants did not determine whether there was a statistically significant increase during the second 2002 semiannual monitoring event.
- c. 3745-27-10(D)(5)(a)(iii) – Defendants did not statistically analyze ground water data.

71. As cited in Ohio EPA’s February 5, 2004 NOV letter, Ohio EPA’s review of the ground water files for the Landfill determined the following violations of Ohio Adm. Code Chapter 3745-27 related to ground water detection monitoring (Count Three of the State’s Complaint):

- a. 3745-27-10(A)(1)(a) – Defendants failed to conduct detection monitoring for the first 2003 semiannual monitoring event.
- b. 3745-27-10(C)(1)(a) – Defendants failed to conduct ground water monitoring as specified in the August 2000 Revised Sampling and Analysis Plan.
- c. 3745-27-10(D)(1) – Defendants failed to determine concentration or value of the parameters listed in Appendix I as stated in the August 2000 Revised Sampling and Analysis Plan.

72. As cited in Ohio EPA’s February 5, 2004 NOV letter, Ohio EPA’s review of the ground water files for the Landfill determined the following violations of Ohio Adm. Code Chapter 3745-27 related to ground water assessment monitoring (Count Four of the State’s Complaint):

- a. 3745-27-10(A)(1)(b) – Defendants failed to conduct ground water assessment monitoring during the first 2003 semiannual monitoring event.
- b. 3745-27-10(C)(1)(a) – Defendants failed to conduct assessment monitoring as specified in the March 5, 2002 Revised Ground Water Quality Assessment Plan.
- c. 3745-27-10(E)(1) – Defendants failed to implement the March 5, 2002 Revised Ground Water Quality Assessment Plan and did not conduct assessment monitoring during the first half of 2003.

73. Defendants last conducted regular, semiannual ground water detection monitoring at the Landfill in April of 2002. Since the second half of 2002, Defendants have not collected ground water samples, analyzed ground water samples and statistically evaluated the analytical results to evaluate if a release of waste or waste-derived constituents is impacting the ground water under the Landfill.

74. After Defendants conducted a semiannual sampling event in April of 2002, Defendants did not conduct regular, semiannual sampling in the second half of 2002, or at any time in 2003.

75. Defendants' consultant, Dan Brown, testified that regular ground water monitoring should be re-initiated by Defendants at the Landfill for the protection of human health and the environment.

76. Ground water assessment monitoring, under Ohio Adm. Code 3745-27-10(E), has not been conducted at the Landfill since April of 2002.

77. Defendants' consultant, Dan Brown, testified that under the regulations, Defendants should currently be conducting assessment monitoring at the Landfill.

78. Under the ground water proposal submitted by Defendants' consultant, Dan Brown, Defendants would only perform one monitoring event per year at the Landfill, even though Dan Brown agreed that the regulations require semiannual monitoring events.

79. Ground water samples collected by Defendants at the Landfill have not been representative of ground water quality for the following reasons:

- a. Ground water samples from background well, MW-11D, have exhibited pH values that range from 11 to 12 standard pH units, which are not representative of natural ground water quality in Ohio.
- b. Ground water samples collected by Defendants during the July – August 2001 semiannual sampling event had recorded temperatures that exceeded 65° F and ranged as high as 90° F. Natural ground water temperature in Ohio typically ranges between 50° F and 60° F.
- c. The turbidity of ground water samples Defendants collected from background monitoring wells MW—11D and MW-14 was extremely high, averaging approximately 10,000 nephelometric turbidity units (“NTUs”), and ranging as high as 63,000 NTUs. These elevated turbidity values have caused ground water analytical results for arsenic, barium, chromium, lead, and zinc to be artificially elevated, and therefore not representative of ground water quality.

80. Defendants' consultants, Daniel Putz and David Hagen, agreed that the elevated temperatures of Defendants' ground water samples could cause the samples to volatilize, i.e., lose VOCs, and thus, may not be representative of actual ground water.

81. Defendants' consultant, Dan Putz, admitted that ground water samples with a high pH may not be representative of actual ground water quality.

82. The laboratory analytical results of Defendants' ground water samples for arsenic, barium, chromium, cobalt, copper, lead, nickel, potassium, vanadium, and zinc are not representative of ground water quality due to the elevated turbidity of Defendants' ground water samples.

83. Since July 2000, Defendants have not submitted an alternate source demonstration request per Ohio Adm. Code 3745-27-10(D)(7)(c) [Ohio Adm. Code 3745-27-10(D)(7)(c)(ii) under the 2003 solid waste rules] or Ohio Adm. Code 3745-27-10(E)(7)(b) [Ohio Adm. Code 3745-27-10(E)(9)(b) under the 2003 solid waste rules] to demonstrate that statistically significant constituents detected in ground water underlying the Landfill are due to a source of contamination other than the Landfill.

84. The Ohio EPA has never concurred with an alternative source demonstration by Defendants.

85. Since 2000, Defendants have not submitted a written request to the Director of the Ohio EPA for a variance or exemption related to ground water monitoring.

CONCLUSIONS OF LAW

1. R.C. Chapter 3734, is a public welfare statute providing strict liability for anyone who violates it.

2. Upon a determination of a violation of R.C. Chapter 3734 and rules adopted thereunder, the Court shall issue an injunction to abate the violation. Ackerman, Director of Department of Health v. Tri-City Geriatric & Health Care (1978), 55 Ohio St.2d 51, 378 N.E.2d 145; R.C. 3734.10.

3. The Court shall not attempt to “balance the equities” by considering evidence or arguments presented by Defendants about motives, alleged attempts to comply, financial condition, or other equity considerations. Ackerman; R.C. 3734.10.

4. The evidence presented at trial establishes the violations of R.C. Chapter 3734 and Ohio Adm. Code Chapter 3745-27 at the Landfill as set forth in Counts One through Four of the State’s Complaint.

5. Mercomp is the owner of the Schaaf Road Landfill. Ohio Adm. Code 3745-27-01(B)(25).

6. Both Defendant Manuel Rock and Defendant Mercomp are “operators” of a solid waste landfill. Ohio Adm. Code 3745-27-01(B)(24).

7. As an owner of a landfill, Defendant Mercomp is liable for all violations of R.C. Chapter 3734 and the rules adopted thereunder that occur at the Landfill. Kays v. Schregardus (2000), 138 Ohio App.3d 225, 229, 740 N.E.2d 1123.

8. Defendants, as owners and/or operators of a solid waste landfill, are required to comply with the Closure Plan that has been approved by the Director of the Ohio EPA for the Landfill. Ohio Adm. Code 3745-27-16(B)(2) (effective September 1, 2002, and which superceded Ohio Adm. Code 3745-27-16(A)(3)(b), cited in the State’s Complaint).

9. Under Ohio Adm. Code 3745-27-14 (effective June 1, 1994 through August 14, 2003), Defendants must conduct the following post-closure care activities at the Landfill for a minimum of thirty years from the closure date of April 13, 2000:

- a. Continuing operation and maintenance of:
 - i. surface water management system
 - ii. gas extraction and/or control system
 - iii. explosive gas monitoring system

- b. Maintaining the integrity and effectiveness of the cap system by correcting the effect of:
 - i. settling
 - ii. dead vegetation
 - iii. subsidence
 - iv. erosion
 - v. leachate outbreaks (contain/manage/collect/treat/dispose/minimize production)
 - vi. control surface water run-on and run-off

- c. Monitoring and Reporting Requirements
 - i. ground water
 - ii. explosive gas
 - iii. landfill emissions
 - iv. annual operating report

Ohio Adm. Code 3745-27-14(A)(1), (2), and (4).

10. Defendants are required to select and fully fund a post-closure financial assurance instrument from among the available options listed in Ohio Adm. Code 3745-27-16(F), (G), (H), (I), (J), (K), and (L). Ohio Adm. Code 3745-27-16(E).

11. Defendants have failed to choose and fund a post-closure financial assurance mechanism from the available options listed in Ohio Adm. Code 3745-27-16(F), (G), (H), (I), (J), (K), and (L), and failed to fund a post-closure financial assurance mechanism as required in the Closure Plan approved by the Director of the Ohio EPA.

Defendants' failure to do so constitutes a violation of Ohio Adm. Code 3745-27-16(B)(2) that began on May 13, 2000, and is continuing each day until Defendants fund a post-closure financial assurance mechanism in compliance with the Closure Plan.

12. Under Ohio Adm. Code 3745-27-11(I), closure construction must be completed within 180 days of the cessation of waste acceptance. Ohio Adm. Code 3745-27-11(I). Because Defendants ceased accepting waste on May 31, 1994, Defendants were required by Ohio Adm. Code 3745-27-11(I) to complete closure construction at the Landfill by November 29, 1994. Ohio Adm. Code 3745-27-11(I).

13. Because the Ohio EPA granted Defendants a 180-day extension of their closure deadline, Defendants were required to complete closure construction at the Landfill by June 30, 1995.

14. Defendants did not complete the final closure construction at the Landfill until, at the earliest, October of 1997. Thus, Defendants were in violation of Ohio Adm. Code 3745-27-11(I) for more than 2 years beyond the extended deadline of June 30, 1995, granted by the Ohio EPA, and approximately 22 months beyond December 31, 1995, the date before which the Ohio EPA agreed that it would not pursue enforcement action.

15. In violation of Ohio Adm. Code 3745-27-11(J), Defendants did not certify to the Ohio EPA the closure of the Landfill until April 22, 1998.

16. Due to the deficiencies of Defendants' closure certification report, as submitted to the Ohio EPA in April and August of 1998, Defendants did not demonstrate that the closure activities of the Landfill had been completed in accordance with Ohio Adm. Code 3745-27-11(J) until September 7, 2000, over 2 years beyond when they were

required to demonstrate that the closure activities of the Landfill were completed. Therefore, Defendants were in violation of Ohio Adm. Code 3745-27-11(J) from August of 1998 until September 7, 2000.

17. Based upon Defendants' demonstration that the closure activities of the Landfill had been completed in accordance with applicable solid waste laws on September 7, 2000, the post-closure period related to the Landfill began on September 7, 2000.

18. Defendants were required to comply with ground water monitoring regulations in Ohio Adm. Code 3745-27-10 beginning on April 13, 2000, the date the Director of the Ohio EPA approved Defendants' Closure Plan. Ohio Adm. Code 3745-27-10 (1994 version was effective from June 1, 1994 until August 14, 2003. 2003 version of 3745-27-10 became effective August 15, 2003).

19. Defendants are required to collect, analyze, and statistically evaluate ground water samples to determine if a release of leachate or leachate-derived constituents is impacting the ground water under the Landfill. Ohio Adm. Code 3745-27-10(D).

20. Beginning the second half of 2002, and continuing to the present, Defendants have failed to properly implement their Ground Water Program in accordance with Ohio Adm. Code 3745-27-10(A), (C) & (D) and, consequently, Ohio Adm. Code 3745-27-14(A)(4), as a result of the following violations:

- a. Failure to conduct semiannual groundwater detection monitoring. 3745-27-10(A), (C) & (D).
- b. Failure to include in their Ground Water Program, sampling and analysis procedures, including an appropriate statistical method, in accordance with

Ohio Adm. Code 3745-27-10(C). Ohio Adm. Code 3745-27-10(A)(1)(a)(iii).

- c. Failure to include in their Ground Water Program detection monitoring procedures, including monitoring frequency and a parameter list, in accordance with Ohio Adm. Code 3745-27-10(D). Ohio Adm. Code 3745-27-10(A)(1)(a)(iv).
- d. Failure to notify the Director of the Ohio EPA of any “statistically significant change” with their ground water samples “not later than seventy-five days after withdrawing a sample from the well, that upon analysis, demonstrates a statistically significant change.” Ohio Adm. Code 3745-27-10(D)(7)(b).
- e. Failure to collect ground water samples that are representative of ground water quality with respect to pH, temperature, and turbidity, as required by Defendants violated Ohio Adm. Code 3745-27-10(C)(1).
- f. Failure to use a statistical method in their ground water monitoring program that is protective of human health and the environment and provides results that accurately represent ground water quality. Ohio Adm. Code 3745-27-10(C)(1).
- g. Failure to use a statistical method in accordance with Ohio Adm. Code 3745-27-10(C)(1) by not including an appropriate statistical method to determine whether or not leachate or leachate-derived constituents have been released to ground water from their landfill. Ohio Adm. Code 3745-27-10(C)(1).
- h. Failure to use a statistical method that meets the requirements of Ohio Adm. Code 3745-27-10(C)(1). Ohio Adm. Code 3745-27-10(A)(4).
- i. Failure to enter into a Ground Water Quality Assessment Program by January 11, 2001, when a leachate or leachate-derived substance was released into ground water in a statistically significant amount as determined by Ohio Adm. Code 3745-27-10(D)(7). Ohio Adm. Code 3745-27-10(E)(1).

21. Beginning on January 11, 2001, and continuing to the present, Defendants have failed to implement a Ground Water Quality Assessment Monitoring program, in accordance with Ohio Adm. Code 3745-27-10(E)(1), as a result of the following violations:

- a. Failure to prepare a Ground Water Quality Assessment Monitoring Plan that meets the requirements of Ohio Adm. Code 3745-27-10(E)(3) under the 1994 solid waste rules of Ohio Adm. Code 3745-27-10(E)(4) under the 2003 solid waste rules. Ohio Ad. Code 3745-27-10(E)(3) (1994 rules); Ohio Adm. Code 3745-27-10(E)(4).
- b. Failure to implement ground water quality assessment sampling in accordance with Ohio Adm. Code 3745-27-10(E)(4) under the 1994 solid waste rules or Ohio Adm. Code 3745-27-10(E)(5) under the 2003 solid waste rules. Ohio Adm. Code 3745-27-10(E)(4) (1994 rules); Ohio Adm. Code 3745-27-10(E)(5).
- c. Failure to complete a first determination of the rate, extent, and concentration of ground water contamination underlying their landfill in accordance with Ohio Adm. Code 3745-27-10(E)(5) under the 1994 solid waste rules or Ohio Adm. Code 3745-27-10(E)(6) under the 2003 solid waste rules. Ohio Adm. Code 3745-27-10(E)(4) (1994 rules); Ohio Adm. Code 3745-27-10(E)(5).
- d. Failure to prepare Assessment Activity Reports as required by Ohio Adm. Code 3745-27-10(E)(10) under the 1994 solid waste rules or Ohio Adm. Code 3745-27-10(E)(12) under the 2003 solid waste rules. Ohio Adm. Code 3745-27-10(E)(10) (1994 rules); Ohio Adm. Code 3745-27-10(E)(12).

22. Defendants presented no evidence to show that the elevated pH values of their ground water samples were the result of a contamination source other than grout contamination from MW-11D itself.

23. Defendants presented no evidence to show that the high temperatures of their ground water samples were representative of ground water underlying the Landfill, nor did Defendants conclusively identify or explain the cause of the elevated ground water temperatures.

24. Defendants did not perform a data analysis, cite scientific publications or provide any other evidence to show that the elevated turbidity of ground water samples from MW-11D and MW-14 are naturally occurring and representative of ground water quality.

25. In some cases, the tolerance limits of Defendants' ground water sampling exceeded MCLs.

26. Defendants produced no evidence in support of tolerance limits that exceeded MCLs, no evidence that the ground water at the Landfill contained naturally occurring concentration of metals that exceed MCLs, and no evidence that the elevated metals concentration in the ground water at the Landfill was due to an off-site contamination source.

27. Because Ohio Adm. Code 3745-27-10 requires two semiannual monitoring events, Defendants' ground water monitoring proposal prepared by Defendants' consultant, Dan Brown, which calls for only one monitoring event per year, does not conform with Ohio Adm. Code 3745-27-10.

28. Defendants never received approval from the Director of the Ohio EPA for any alternate source demonstration, alternate parameter list, variance or exemption under Ohio Adm. Code 3745-27-10 that would relieve Defendants of their responsibility to implement a Ground Water Quality Assessment Monitoring Program at the Landfill. Therefore, Defendants are required to implement Ohio Adm. Code 3745-27-10(E) and implement a Corrective Measures Program under Ohio Adm. Code 3745-27-10(F) if required. Ohio Adm. Code 3745-27-10(E); Ohio Adm. Code 3745-27-10(F).

29. Defendants cannot enter the Corrective Measures Program until they complete the Ground Water Quality Assessment Monitoring Program in accordance with Ohio Adm. Code 3745-27-10(E). Ohio Adm. Code 3745-27-10(E).

30. Under Ohio Adm. Code 3745-27-10(E), surface water monitoring cannot be used to meet the requirements of the Ground Water Quality Assessment Monitoring

Program in areas such as the south side of the Landfill where installation of monitoring wells is practicable. Therefore, the surface water monitoring performed to date at the Landfill does not meet the requirements of Ohio Adm. Code 3745-27-10. Ohio Adm. Code 3745-27-10(E).

31. Neither Ohio Adm. Code 3745-27-10(D) nor Ohio Adm. Code 3745-27-10(E) permit a risk assessment in lieu of any Ground Water Detection Monitoring Program requirements or the Ground Water Quality Assessment Monitoring Program requirements. Ohio Adm. Code 3745-27-10(D); Ohio Adm. Code 3745-27-10(E).

32. The Court, being satisfied that the requirements of Belvedere Condominium Unit Owners' Ass'n v. R. E. Roark Companies, Inc. (1993), 67 Ohio St.3d 274, 617 N.E.2d 1075, have been met, and finding that the State has demonstrated the violations alleged in Counts One through Four of its Complaint, finds both Mercomp and Defendant Manuel Rock strictly liable under R.C. Chapter 3634 and Ohio Adm. Code Chapter 3745-27. See Court's January 28, 2004 Entry.

33. As a result of Defendants' violations of R.C. Chapter 3734 and Ohio Adm. Code Chapter 3745-27, Defendants are subject to a statutory injunction pursuant to R.C. 3734.10, and pursuant to R.C. 3734.13, are subject to a civil penalty of up to \$10,000.00 per day for each day of violation.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, this Court finds Defendants Mercomp and Manuel Rock in violation of R.C. Chapter 3734 and Ohio Adm. Code Chapter 3745-27, and issues an Order, pursuant to the Court's authority, as follows:

1. Enforcement of the Ohio's laws governing solid waste landfills is necessary to ensure the protection of human health and the environment. Even though no injury to persons or property is alleged in the record, the risk remains and must be guarded against;

2. Pursuant to R.C. 3734.10, Defendants are preliminarily and permanently ordered to comply with the requirements of R.C. Chapter 3734 and the rules promulgated thereunder;

3. Pursuant to R.C. 3734.10, Defendants are preliminarily and permanently ordered to comply with Ohio Adm. Code 3745-27-16 by choosing and fully funding an approved, financial assurance instrument sufficient to provide for the post-closure costs of Defendants Landfill for the next thirty years. Defendants shall execute and fund the post-closure care financial assurance instrument by **September 1, 2004**;

4. Pursuant to R.C. 3734.10, Defendants are preliminarily and permanently ordered to comply with Ohio Adm. Code 3745-27-10, 3745-27-14(A), and 3745-27-16 by properly re-implementing their Ground Water Program. Defendants shall make any applicable revisions to their Ground Water Program, and implement any measures required by Ohio Adm. Code 3745-27-10, 3745-27-14(A), and 3745-27-16 by **December 31, 2004**;

5. Pursuant to R.C. 3734.10, Defendants are preliminarily and permanently ordered to comply with Ohio Adm. Code 3745-27-10 and 3745-27-14(A) by entering into and implementing a ground water assessment monitoring program. Defendants shall implement a ground water assessment monitoring program as required by Ohio Adm. Code 3745-27-10 and 3745-27-14(A) by **December 31, 2004**;

6. Pursuant to R.C. 3734.13(C), Defendants are preliminarily and permanently ordered to pay the State a civil penalty in amount of One Million Nine Hundred and Thirty-Two Thousand Dollars (\$1,932,000.00) to provide for the post-closure costs of Defendants Landfill for the next thirty years, with the condition that Defendants may avoid the civil penalty in part or altogether by fully funding a financial assurance instrument sufficient 'to provide for the post-closure costs of Defendants' landfill for the next thirty years by **September 1, 2004;**

7. Affirmative Defenses of Defendant Manuel Rock are hereby denied. Further, on the Counterclaims of Defendant Manuel Rock against the State of Ohio for Abuse of Process and Selective Enforcement, judgment is entered in favor of Plaintiff;

8. Defendants are ordered to pay all costs and fees for this action, including reasonable attorney fees assessed by the Office of the Attorney General; and

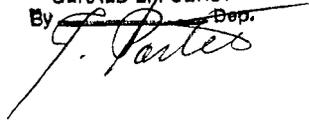
9. This Court retains jurisdiction of this case until all Orders issued by the Court are complied with in all respects.

IT IS SO ORDERED.


JUDGE ROBERT E. FEIGHAN
COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

RECEIVED FOR FILING

APR 26 2004

GERALD E. FUERST
By  Dep.