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COMMON PLEAS COURT
DARKE COUNTY, OHIO

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CINDY PIKE
CLERK

IN THE COMMON PLEAS COURT OF DARKE COUNTY, OHIO

STATE OF OHIO, ex. rel. : CASE NO. 08-CV-64753
ATTORNEY GENERAL OF OHIO :

Plaintiff, :

vs. : JONATHAN P. HEIN, JUDGE

STATE LINE AGRI, INC, et. al. :
Defendants. : DECISION AND ENTRY –
Trial to the Court

This matter came before the Court for trial on the complaint filed by the Plaintiff on July 9, 2008. The State of Ohio was represented by Assistant Attorneys General Margaret A. Malone, Aaron S. Farmer and Erica M. Spitzig. The Defendants were represented by Jack A. VanKley, Esq. Testimony was presented over the course of five trial days. An extensive number of trial exhibits were admitted on behalf of both parties. [Efforts by counsel to enter stipulations and otherwise maximize courtroom efficiency were effective – and appreciated.]

The Court notes that it issued a decision on cross-motions for summary judgment on November 17, 2009. Such decision entered dispositive rulings on various causes of action. Such decisions will be incorporated herein.

OVERVIEW OF CASE FACTS

State Line Agri, Inc. operates a livestock confinement facility in Brown Township, Darke County which raises approximately 4,400 hogs from feeder pig size to market weight. Based on the size of this facility and the number of buildings, regulatory responsibility is

vested in both the Ohio Environmental Protection Agency and the Ohio Department of Agriculture. Regulations are set forth in the Ohio Revised Code and the Ohio Administrative Code. Further, the implementation of these regulations is documented in extensive documents known as the Permit to Operate ("PTO") approved by the Ohio Department of Agriculture (ODA) and National Pollution Discharge Elimination System (NPDES) permit approved by the Ohio Environmental Protection Agency (OEPA). The regulatory purposes include prevention of pollution into the waters of the State of Ohio and promoting use of best farming management practices. Regulatory methods include both self-monitoring by the Defendants and on-site inspections from regulators. The Plaintiff filed claims on behalf of both ODA and OEPA.

State Line Agri., Inc. (SLA) is a corporation organized under the laws of the State of Ohio and is owned equally by Rick L. Kremer and his spouse. Mr. Kremer is solely responsible for operational and management decisions regarding corporate matters. This corporation operates hog confinement facilities in both Darke and Mercer counties. The facility in Mercer County is west of Celina, Ohio, and is in the Wabash River watershed; the facility in Darke County is south of Ansonia, Ohio, and is in the Stillwater River watershed. The PTO applies to the Darke County facility. The corporation employs various individuals to oversee daily operations and to complete required tasks assigned by Mr. Kremer, including Richard Fisher, who was charged to oversee record keeping and administrative duties.

Stateline Resource Management, Inc. (SLRM) is a limited liability company organized under the laws of the State of Ohio, effective September 14, 2007. Before this date, the entity was a fictitious (doing business as) entity, operated by Neal Kremer under the SLRM trade name. While there was some conflicting testimony, the Court finds that SLRM was owned solely by Neal Kremer, son of Rick Kremer. [Pl. Exs. 46, 95.] Daily operational and

management decisions for SLRM are made by Neal Kremer. Roman Kremer was employed by SLRM to spread manure and assist in the business of SLRM. He was also employed by SLA for livestock management services, and he received state certification in livestock management. [Pl. Ex. 36.]

SCOPE OF LIABILITY

The Plaintiff has alleged violations against four individuals and two legal entities. For sake of clarity in deciding the merits and extent of liability, the Court first considers the scope of liability.

SLA is a corporation authorized to do business in the State of Ohio. It entered into the PTO with the OEPA. As a corporation, SLA is liable for the consequences of its management, employees and agents for actions involving the operation of its business purposes and its assets.

Rick L. Kremer was the signatory of the PTO application and attested to the accuracy of its contents; he signed as the "owner or operator" and attested that "the information submitted is true, accurate and complete." While these attestations do not establish individual liability for actions of the corporation, such attestations placed on him personal knowledge of the statutory and contractual duties arising from the PTO. Further, from the testimony, it is clear that all operational management decisions for SLA were made by Rick L. Kremer; such is the common practice for a closely held family farming business. If an operational event occurred, it was because he approved it; if an operational event did not occur, it was because he did not want it to occur. Within such a closely held management structure, there necessarily results the imputation of liability to Mr. Kremer for violations of statutory and administrative codes. The Court finds that Rick Kremer is individually responsible for all damages, monetary and

injunctive, assessed herein. See *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Companies, Inc.* (1993), 67 Ohio St.3d 274; *Yo-Can, Inc. v. The Yogurt Exchange* (2002), 149 Ohio App.3d 513 at ¶ 46, 47; R.C. 6111.07.

Neal Kremer conducted the manure distribution in February, 2007 at two locations near Ansonia (the 36 acre tract and the 6 acre tract). Since the articles of organization for SLRM as a limited liability company were not filed until September, 2007, he was acting as an individual contractor for SLA under the business name of SLRM. [Pl. Exs. 94A - 94D, 95.] Since SLRM was not organized until after the events involved herein, SLRM is not responsible for the actions of Neal Kremer prior to its organization. By operating SLRM in a regulated business such as agricultural manure management, Neal Kremer held himself out as being qualified and competent to conduct manure distribution practices as required by law. Accordingly, the Court finds that Neal Kremer is determined to be responsible for any violations of statutory and administrative codes for his conduct in February, 2007 (Counts IX to XIII, XV, XVIII to XXIII). See R.C. 6111.07.

Roman Kremer primarily acted as an employee of SLA and SLRM during the events involved in this case. Although he is the son of Rick Kremer and brother of Neal Kremer, he does not appear to have any operational management responsibilities for SLA or SLRM. Roman Kremer acknowledged work experience with SLA beginning in 2000 and knowledge of manure management regulations since 2004. On April 8, 2007, he applied for certification as a livestock manager; his application indicated completion of pre-requisite course work in February, 2007. [Pl. Ex. 37.] He received certification as a livestock manager in July, 2007. The Court finds that employment alone with SLA and SLRM prior to April 8, 2007 is an insufficient basis upon which to place liability for violations of livestock management duties. Roman Kremer is

determined to be liable only for any livestock management violations after April 8, 2007 since his knowledge of regulatory requirements is only proven from that date forward. See R.C. 6111.07.

Richard Fisher is the self described "Operations Manager" for SLA. He was an independent contractor from August, 2006 through August, 2008; he is currently an employee and does not hold any corporate office for SLA. His duties are mostly administrative, including record keeping and regulatory reporting. While familiar with the PTO and NPDES agreements [P. Exs 2 and 72], he was not a signatory to such agreements. He does possess knowledge of industry practices due to a long history of employment in the agricultural industry, including aspects of animal husbandry. In this matter, it does not appear that he was involved in any decision making or personal conduct directly related to polluting the waters of the state. The Court finds that employment alone with SLA is an insufficient reason to hold him responsible for the conduct involved in this matter which resulted in polluting waters of the state. However, failures set forth in Counts V and VIII are conduct for which he is responsible.

ASSESSMENT OF MONETARY DAMAGES

In its decision on motions for summary judgment, the Court previously determined that Plaintiff would prevail on several claims in the complaint. Therefore, discussion about the extent of damages and purposes to be accomplished therefrom is appropriate.

Where it is determined that pollution violations exist in violation of the PTO and applicable water standards, R.C. 903.16(D)(3) provides for imposition of civil penalties in the way of monetary fines:

(3) A person who has committed a violation for which the attorney general may bring an action for a civil penalty under division (D)(1) or (2) of this section shall pay a civil

penalty of not more than ten thousand dollars per violation. Each day that a violation continues constitutes a separate violation.

Where it is determined that pollution violations exist in violation of the NPDES and applicable water pollution standards, R.C. 6111.09 provides for imposition of civil penalties in the way of monetary fines:

§ 6111.09. Civil penalties for water pollution control violations

(A) Any person who violates section 6111.07 of the Revised Code shall pay a civil penalty of not more than ten thousand dollars per day of violation. Any person who purposely violates section 6111.10 or 6111.11 of the Revised Code shall pay a civil penalty of fifty dollars for a first violation and a civil penalty of not more than five hundred dollars for each subsequent violation occurring within twelve months of the first violation.

When the Court finds that a Defendant has violated terms of the PTO and/or the NPDES plan, both contrary to provisions in Chapter 9 and Chapter 61 of the Ohio Revised Code, the Court is required to order monetary fines. [citations omitted.] The amount of the monetary penalty is within the Court's discretion, and should serve the purpose of deterring future violations. The amount should not be so ordinary that it becomes an anticipated or accepted cost of doing business. *State ex rel. Brown v. Dayton Malleable* (1982), 1 Ohio St.3d 151. Other purposes and factors to consider are outlined in *State ex rel. Celebrezze v. Thermal-Tron, Inc.* (1992), 71 Ohio App.3d 11. Inducements to achieve future compliance with regulatory schemes should be considered, as should efforts at mitigation. *State of Ohio v. Tri-State Group, Inc.* 2004-Ohio-4441.

The imposition of monetary penalties herein considers the punitive and rehabilitative purposes to be served. However, the analysis used by the Court has been on the penalties imposed on all counts, not on an individual basis. Further, when the same conduct

violates both ODA regulations (Title 9) and OEPA regulations (Title 61), penalties are awarded for each regulatory violation.

IMPOSITION OF INJUNCTIVE RELIEF

Where it is determined that pollution violations exist in violation of the PTO and applicable water standards, R.C. 903.16(C.) provides for imposition of injunctive relief:

(C) The attorney general, upon the written request of the director, shall bring an action for an injunction in any court of competent jurisdiction against any person violating or threatening to violate section 903.02, 903.03, or 903.04 of the Revised Code; the terms and conditions of a permit to install, permit to operate, or review compliance certificate, including the requirements established under division (C) of section 903.06 or division (A) of section 903.07 of the Revised Code; rules adopted under division (A) of section 903.10 of the Revised Code; or an order issued under division (B) of this section.

Where it is determined that pollution violations exist in violation of the NPDES and applicable water pollution standards, R.C. 6111.07 provides for imposition of injunctive relief:

§ 6111.07. Prohibited acts - prosecutions and injunction by attorney general

(A) No person shall violate or fail to perform any duty imposed by sections 6111.01 to 6111.08 of the Revised Code or violate any order, rule, or term or condition of a permit issued or adopted by the director of environmental protection pursuant to those sections. Each day of violation is a separate offense.

(B) The attorney general, upon the written request of the director, shall prosecute any person who violates, or who fails to perform any duty imposed by, sections 6111.01 to 6111.08 of the Revised Code or who violates any order, rule, or condition of a permit issued or adopted by the director pursuant to those sections.

The attorney general, upon written request of the director, shall bring an action for an injunction against any person violating or threatening to violate this chapter or violating or threatening to violate any order, rule, or condition of a permit issued or adopted by the director pursuant to this chapter. In an action for injunction to enforce any final order of the director brought pursuant to this section, the finding by the director, after hearing, is prima-facie evidence of the facts found therein.

With regard to the purposes for the injunctive relief, the Court acknowledges the legislative purposes to be accomplished by environmental laws and regulations involved herein. The credible testimony of Robert Miltner [Pl. Ex. 79] and exhibits related thereto [Pl. Ex. 80, 81] capably demonstrated the detriments to water quality and aquatic life as a result of pollutants in surface waters of the state. The Court notes that persuasive arguments were made by the Defendants regarding the difficulties in proving the precise cause of the pollution and direct damages related therefrom. Other possible sources of pollutants include defective private sanitation systems and permitted effluents from municipal waste water treatment plants [Def. Ex. K, L, M, N, O, P] and the Plaintiff overstates its case by laying blame solely at the feet of agribusiness interests. [The channelization of the Wabash River due to dredging and tree clearing practices by governmental entities has long been suspected of deteriorating water quality and habitation for aquatic life.] Nonetheless, the existence of poor quality water in the Wabash River basin and the Stillwater River basin is undisputed – and the causes thereof are clearly within the regulatory duties entrusted to ODA and OEPA.

Based on the Court's previous findings that various Defendants have violated terms of the PTO and the NPDES plan, both contrary to provisions in Chapter 9 and Chapter 61 of the Ohio Revised Code, the Court is authorized to issue injunctive relief in favor of the State of Ohio, as more particularly described in the conclusion below. Such injunctions are designed to improve water quality and accomplish the legislative purposes assigned to ODA and OEPA.

AFFIRMATIVE DEFENSE

In their motion for summary judgment, the Defendants claimed that Plaintiff cannot pursue claims set forth in Counts 1, 2, 21 and 22 since R.C. 6111.04(F)(3) exempts farming activities from water pollution regulation. R.C. 6111.04(F)(3) provides:

(F) This section does not apply to any of the following:

(3) Application of any materials to land for agricultural purposes or runoff of the materials from that application or pollution by animal waste or soil sediment, including attached substances, resulting from farming, silvicultural, or earthmoving activities regulated by Chapter 307. or 1511. of the Revised Code.

However, the Court previously determined that the exception of R.C. 6111.04(F)(3) does not give agribusiness in general, or the Defendants in particular, *carte blanche* exemption from the legislative purpose and societal benefits of abating water pollution. Such reasoning was based on R.C. 1511.021, OAC 1501:15-5-01 and OAC 1501:15-5-05. The Court would have concurred if SLA had obtained an "operation and management plan" for its agricultural enterprise from the Soil and Water Conservation District and had complied with the plan in the operation of its agri-business. In the absence of such plan, the provisions and protections of R.C. 1515 are not applicable herein, and regulates of R.C. 6111 are enforceable against the Defendants.

MERITS OF THE COMPLAINT

Count I

Allegation: Causing Pollution to Waters of the State from the Ansonia Facility in July, 2003 in violation of R.C. 6111. In the decision regarding summary judgment as filed on November 17, 2009, the Court granted summary judgment in favor of the State of Ohio on this count. R.C. 6111.01(H) includes as "waters of the state" accumulations of water on the surface that border the drainage ditches of a state highway, such as State Route 118, which was involved herein in 2003. Additional proof was not necessary at trial. The Court again finds that the Plaintiff prevails on this Count against SLA and Rick Kremer for conduct in July, 2003. And, as Plaintiff agreed at the time of the summary judgment decision, Roman Kremer is

determined to have had no involvement in any pollution in July, 2003. Regarding a monetary award, it is a mitigating factor that the pollution amount in the ditch along the highway that flowed into the tributary to the Stillwater River was less than the other pollution involved herein. Also, the rain fall of July 4, 2003 was extra-ordinary in amount. [Def. Ex. J.] A monetary award is assessed as follows: \$5,000 fine, jointly and severally. Injunctive relief, as described below, shall be ordered.

Count II

Allegation: Causing Pollution to Waters of the State from the Celina Facility in 2006 in violation of R.C. 6111. The Court finds that SLA caused manure to be spread onto land and that the manure was discharged into the Crab Branch tributary to the Wabash River, a water of the State of Ohio, in violation of provisions of R.C. 6111. The Court also finds that Plaintiff proved that suspended particulate materials and ammonia levels were increased as a result of the manure discharge into the Crab Branch tributary. The demonstrative evidence [Pl Exs. 16 - 20, 52, 55, 66, 67] and testimony of the on site investigators was credible. The guilty plea to criminal charges in Celina Municipal Court by SLA to pollution charges supports the Plaintiff's allegation as to liability of SLA. [Pl. Ex. 9] Any possible tampering with water samples due to the storage facility being unlocked or due to possible access by others does not convince the Court that there was any actual tampering with the water samples. Further, while other livestock confinement facilities are located in the immediate area, there was no evidence of any simultaneous or recent distribution of manure onto the fields in the surrounding area which might raise a credible question about the source of the pollution.

While there was no direct proof of negative impacts on aquatic life as a result of the spill, such as dead fish, the testimony Robert Miltner and circumstantial evidence is

persuasive that the ammonia and suspended particulate materials in the manure caused negative conditions for stream vertebrates and other life forms in the Crab Branch. [Pl. Exs. 78, 80, 81.]

As concluded in the decision regarding summary judgment, proof of the discharge does not exist for November 29, 2006. However, proof does exist for violations on November 30, 2006 and December 1, 2006. Plaintiff prevails on this Count against SLA and Rick Kremer. The volume of pollutant and extent of watershed involved are exacerbating factors in setting damages. A monetary award is assessed as follows: \$7,500 fine for November 29, 2006 and \$7,500 fine for December 1, 2006, jointly and severally. [Total fine of \$15,000.] Injunctive relief, as described below, shall be ordered.

Count III

Allegation: Causing Violations of Ohio Water Quality Standards in 2006 at the Celina Facility. In Count II, the Court determined that pollution occurred in the Crab Branch in violation of R.C. 6111. However, does proof of pollution create a *per se* violation of OAC 3745-1-04? This section provides as follows:

3745-1-04 Criteria applicable to all waters.

The following general water quality criteria shall apply to all surface waters of the state including mixing zones. To every extent practical and possible as determined by the director, these waters shall be:

- (A) Free from suspended solids or other substances that enter the waters as a result of human activity and that will settle to form putrescent or otherwise objectionable sludge deposits, or that will adversely affect aquatic life;
- (B) Free from floating debris, oil, scum and other floating materials entering the waters as a result of human activity in amounts sufficient to be unsightly or cause degradation;
- (C) Free from materials entering the waters as a result of human activity producing color, odor or other conditions in such a degree as to create a nuisance;
- (D) Free from substances entering the waters as a result of human activity in concentrations that are toxic or harmful to human, animal or aquatic life and/or are rapidly lethal in the mixing zone;

(E) Free from nutrients entering the waters as a result of human activity in concentrations that create nuisance growths of aquatic weeds and algae;

* * *

As the Court previously concluded in the decision regarding summary judgment, proof of the existence of increased ammonia levels, the existence of increased particulate materials, and/or the existence of the "free froms" listed above cannot be used to establish violations of water quality standards set forth in OAC 3745-1-04. Proof of pollutants being introduced into state waters can be used to establish violations R.C. 6111 and the PTO, but the existence of the "free froms" listed above do not constitute separate violations. Based on the summary judgment decision, Defendants prevail on Count III regarding alleged violations of water quality standards set forth in OAC 3745-1-04. [The Court notes the Plaintiff's post-trial briefing to the contrary and exhortations to reconsider; however, whether the trial court was correct or not, the law of the case was determined in the summary judgment motion and remains throughout the trial.]

Count IV

Allegation: Failure to Maintain Adequate Operating Levels in a Fabricated Structure at the Ansonia Facility. The Plaintiff contends that there must be six inches (6") of unused storage space (known as free board) in the manure pits under the hog confinement buildings. This requirement is alleged to exist by reason of OAC 901:10-2-08¹ and the PTO.

However, the report for the inspection of May 20, 2005 [Pl. Ex. 86] indicates on page 8 that the six-inch freeboard requirement is not applicable to the buildings. A similar notation is found in a later 2005 inspection report. [See Pl Ex. 87.] And the inspection report for 2006 indicates the freeboard requirement is twelve inches (12").

¹OAC 901:10-2-08(A)(4)(b) provides that "[t]he operating level of fabricated structures must not exceed the level that provides adequate storage to contain a precipitation event as required in rules 901:10-3-02 to 901:10-3-06 of the Administrative Code, plus an additional six inches of freeboard, unless the fabricated structure is designed and maintained for solid manure and is not subject to precipitation."

Based on the ambiguity and variance in application of the regulations, the Court finds that the Plaintiff failed to establish the applicable standards for freeboard height. The Defendants prevail on this Count. [While the Court does not determine the free board height, and presuming clarification from Plaintiff, future excuses based on ambiguity may be questionable.]

Count V

Allegation: Failure to Properly Conduct and/or Document Inspections of Manure Storage Facilities in the Operating Record at the Ansonia Facility. In its prior decision regarding summary judgment, the Court determined that the frequency of record keeping requirements was a monthly basis. See OAC 901:10-1-09.² This conclusion is again adopted as the law of the case. Therefore, any month wherein an inspection occurred and was documented is considered to be compliance with the inspection requirements. Plaintiff's contention that inspections were needed each week is rejected since changes mandated by the Ohio Administrative Code are not self implementing. Specific, advance notice to a permit holder

²901:10-1-09. Permit modifications

1. (A) No facility or activity regulated by a permit to install or a permit to operate or a NPDES permit under this chapter shall be modified unless the modification is in compliance with this rule. When a permit is modified, only the conditions subject to modification are reopened. A draft permit incorporating the proposed changes must be prepared and is subject to public notice and public participation procedures as set forth in rules 901:10-6-01 to 901:10-6-06 of the Administrative Code.

(B) The director may propose to modify a permit and may seek the consent of the owner or operator modifying the permit. the director may modify a permit for the following reasons which include, but are not limited to:

- (1) Information submitted by the owner or operator requesting to modify the permit;
- (2) Information obtained through inspections;
- (3) A permit is reviewed by the director, or
- (4) Other causes as provided in 40 CFR section 122.62(a) (2005).

(C) If the director seeks to modify the permit with the consent of the owner or operator and the owner or operator does not consent to the director's modification, the director shall issue a notice of the proposed modified permit with the opportunity for an adjudication hearing in accordance with Chapter 119. of the Revised Code.

(D) If the director seeks to modify the permit without seeking the consent of the owner or operator, the director shall issue a notice of the proposed modified permit with the opportunity for an adjudication hearing in accordance with Chapter 119 of the Revised Code. See OAC 901:10-1-09 above.

that changes have been made to the frequency of inspections is a condition precedent to enforcement of the weekly inspections. The Court cannot conclude that the PTO was modified by mere operation of law when changes to the OAC were adopted. Given the fact that on-site inspections are performed at least semi-annually, and in view of the ongoing, close relationship between all permit holders and regulators, notice of the change could easily have been made by Plaintiff. [It is a faint argument that the enormity of Plaintiff's agencies could not have notified SLA (and apparently 150 other permit holders in Ohio) of the changes to the OAC requiring weekly inspection requirements.]

Regarding the substance of the allegations, as the trial testimony established, extensive record keeping requirements exist for animal feeding operations licensed by the state. The PTO [Pl Ex. 2] sets forth these requirements, as does OAC 901:10-2-16, which identify the contents of the records (eg. types of structures to be inspected, nature of the measurements, etc.). Testimony was presented on these allegations. The Court has considered various exhibits. [Pl. Exs. 30 - 35; Def Ex. R.] The Court finds the following inspection violations (within the time periods set forth in Count Five of the complaint) :

Barns 1 and 2 (manure levels, structure and operability)	19 months
Barns 3 and 4 (manure levels and structure)	15 months
Manure storage ponds 1 & 2 (manure levels and operability) ³	0 months

The Court finds that the Plaintiff prevails against SLA, Rick Kremer and Richard Fisher. A monetary award is assessed as follows: \$100 per violation each month for \$3400 fines against

³The Court previously determined that both ponds worked together as one unit and that only one inspection was required. See Decision filed November 17, 2009 at page 7.

SLA and Rick Kremer, jointly and severally, and an additional fine of \$350 against Richard Fisher. Injunctive relief, as described below, shall be ordered.

Count VI

Allegation: Land Application of Manure in Violation of the Terms and Conditions of the PTO. The Plaintiff alleges that SLA applied mortality compost (a dead hog carcass which is considered manure) to land on May 6, 2006 when the PTO required incineration of the carcass. The conduct is also alleged to violate OAC 901:10-2-15. Based on the Court's decision on summary judgment, set forth on page 7 thereof, and as agreed by Defendants, the Court again determines that Plaintiff shall prevail on this allegation against SLA and Rick Kremer. Roman Kremer is not included in liability since his duties and knowledge of applicable regulations were not proven to the Court's satisfaction. A monetary award is assessed as follows: \$500 fine against SLA and Rick Kremer, jointly and severally. Injunctive relief, as described below, shall be ordered.

Count VII

Allegation: Disposal of Mortality in Violation of the Terms and Conditions of the PTO. Related to the facts in Count Six, the Plaintiff alleges that the SLA changed the PTO from incineration to composting without notice and approval by the ODA. In its decision on the request for summary judgment, the Court determined that such operational changes did not require notice to, and approval by, the ODA. See also OAC 901:10-1-09; Pl. Ex. 86: letter at page 2 and inspection report at page 3; Def. Exs. H, I. The Defendants prevail on this Count.

Count VIII

Allegation: Failure to Maintain Vegetation on and Around the Manure Storage Ponds at the Ansonia Facility. The Plaintiff alleges that on December 4, 2006, SLA

permitted grass and vegetation to grow approximately 18 to 24 inches high around the manure storage pond. The decision herein is governed by application of OAC 901:10-2-8 (A)(4), which requires inspections as follows:

(j) Inspect the protective vegetative cover and any other approved means or materials for erosion control to determine that cover is maintained on all disturbed areas (lagoon or pond embankments, berms, pipe runs, erosion control areas, etc.).

(k) Ensure that any emerging vegetation such as trees, shrubs and other woody species shall not be allowed to grow on the pond or lagoon dikes or side slopes. Pond or lagoon areas are to be kept mowed and accessible unless these areas are grassed waterways or buffers that manage precipitation and runoff.

From the testimony presented, and based on a review of the exhibits [PI Exs. 22C, 22D, 22E], the Court finds that SLA failed to properly mow vegetation around the edges of the storage pond. The condition of the vegetation is such that inspection of the interior bank of the pond is not possible, thereby preventing opportunities to detect erosion, cracking or structural weakness. However, the proof did not establish the duration of this violation; but from the evidence of the size of plants and extent of growth, the Court determines that 30 days of failure occurred. The Court finds that the Plaintiff prevails against SLA, Rick Kremer and Richard Fisher. A monetary award is assessed as follows: \$1,000 fine against SLA and Rick Kremer, jointly and severally, and additional fine of \$250 against Richard Fisher. Injunctive relief, as described below, shall be ordered. [The testimony and post-trial briefing included a violation for September, 2007, but such date was not alleged in the complaint and was necessarily disregarded by the court.]

Count IX

Allegation: 2007 Land Application of Manure in Violation of the Terms and Conditions of the PTO - Ansonia Facility. This allegation involves conduct that occurred on February 27 and 28, 2007 where the State claims that Roman Kremer as an employee of SLRM

spread manure from SLA on a 36 acre tract owned by a third party, and on a 6 acre tract owned by SLA, and committed the following violations: (1) distribution at a rate in excess of 5,000 gallons per acre (this limit was required because the land was frozen and there was less than 80% residue cover on the land); (2) failure to monitor drainage after the application; (3) distribution of manure when weather conditions included 50% or higher probability of precipitation within 24 hours after distribution; (4) failure to prevent ponding and run-off; (5) failure to timely notify regulators after pollution ran off the field into waters of the state; and (6) failure to provide written reports of the incident.

The testimony and exhibits [Pl. Exs. 37 - 45] demonstrate that SLA and SLRM failed to follow regulations regarding spreading manure on both tracts of frozen fields, including spreading excessive quantities of manure on frozen fields with low residue cover, failing to prevent ponding and run-off, failing to comply with weather restrictions, failing to monitor, failing to timely notify regulators after the run-off, failing to timely provide written reports. Plaintiff has proven its case on these allegations against SLA, Rick Kremer and Neal Kremer. The Court rejects Defendants' argument that SLRM acted in its sole judgment to spread the manure since the operations are so closely related, there was proof of dual employment of Neal Kremer by SLRM and SLA, the ownership of 6 acres by SLA and the obligation of SLA to comply with regulations. A monetary award is assessed as follows: \$10,000 fine for February 28, 2007 against SLA and Rick Kremer, jointly and severally, and \$10,000 fine for March 1, 2007 against SLA and Rick Kremer, jointly and severally. [Total fine of \$20,000.] An additional \$1,000 fine for February 28, 2007 against Neal Kremer and \$1,000 fine for March 1, 2007 against Neal Kremer are awarded. [Total fine of \$2,000.] Injunctive relief, as described below, shall be ordered.

Count X

Allegation: Land Application of Manure in Violation of Precipitation Related Conditions on NPDES General Permit – Ansonia Facility. This Count is related to the facts of Count IX but the Plaintiff alleges that the conduct was a violation of the provisions of R.C. 6111. More specifically, Plaintiff alleges manure distribution when weather conditions, within 24 hours after the application, exceeded a 50% probability of precipitation. From the testimony and exhibits [Pl. Exs. 42, 43], the Court finds that the Plaintiff has proven its case by a preponderance of the evidence as to manure distribution on February 28, 2007 because there was a 60% chance of precipitation during the next day and 70% probability the next night. The Defendants did not contest the facts regarding the weather forecast or the spreading of manure. Instead, Defendants claim that the duty to comply was placed on Phoenix Farms since the manure was provided to Phoenix Farms for distribution on its land and that the distribution occurred at its direction. However, the Court finds that compliance with NPDES permits rests upon the permittee and its representatives who performed the distribution. Plaintiff has proven its case on these allegations against SLA, Rick Kremer and Neal Kremer. A monetary award is assessed as follows: \$5,000 fine against SLA and Rick Kremer, jointly and severally. An additional \$500 fine is assessed against Neal Kremer. Injunctive relief, as described below, shall be ordered.

Count XI

Allegation: Land Application on Frozen and/or Snow Covered Ground Without Prior Approval of the ODA – Ansonia Facility. This Count is related to the facts of Counts IX and X but the Plaintiff alleges that the conduct was a violation of the provisions of OAC 901:10-2-14(G)(1)(a) wherein Plaintiff claims that advance notice of distribution onto

frozen ground must be given. In its decision regarding summary judgment, the Court previously determined that notice was not necessary regarding distribution onto the 36 acre tract known as the Phoenix farms land. However, based on the exhibits and inferences from the testimony, the Court finds that Plaintiff has proven the failure to provide prior notice of manure distribution as to the 6 acre tract. Plaintiff has proven its case on these allegations against SLA, Rick Kremer and Neal Kremer. A monetary award is assessed as follows: \$2,000 fine against SLA and Rick Kremer, jointly and severally. An additional \$200 fine is assessed against Neal Kremer.

Injunctive relief, as described below, shall be ordered.

Count XII

Allegation: Exceeding Application Rate in Violation of the PTO – Ansonia Facility. In its decision on summary judgment, the Court previously determined that the Plaintiff would prevail on the claim that Defendants failed to limit land application of liquid manure to 5,000 gallons per acre on the surface of frozen or snow covered ground. See OAC 901:10-2-14(G)(1)(c). This conduct is alleged to violate OAC 901:10-1-10(C) and (G).

Based upon the testimony, the Court finds that there was excessive distribution as to the 36 acre tract, but no excessive distribution on the 6 acre tract. [Pl. Ex. 10, 44.] Regarding allegations pertaining to the 36 acre tract, judgment is granted in favor of Plaintiff against SLA, Rick Kremer and Neal Kremer. A monetary award is assessed as follows: \$2,000 fine against SLA and Rick Kremer, jointly and severally. An additional \$200 fine is assessed against Neal Kremer. Injunctive relief, as described below, shall be ordered.

Count XIII

Allegation: Exceeding the Application Rate in Violation of the Terms and Conditions of NPDES General Permit – Ansonia facility. Based on the determination of facts

and conclusions of law incorporated in Count XII above, the Court finds that the Plaintiff has proven its case by a preponderance of the evidence as to the 36 acre tract. Plaintiff has proven its case on these allegations against SLA, Rick Kremer and Neal Kremer. A monetary award is assessed as follows: \$2,000 fine against SLA and Rick Kremer, jointly and severally. An additional \$200 fine is assessed against Neal Kremer. Injunctive relief, as described below, shall be ordered.

Count XIV

Allegation: Land Application of Manure on Frozen and/or Snow Covered Ground With Less Than 80% Residue Cover – Ansonia Facility. To prove the conduct described in the above allegation, the Plaintiff provided proof of the nature and consistency of the ground cover by Christine Pence and Andrew Ety, field inspectors for Plaintiff. No precise, slide-rule analysis was provided – nor expected. By its nature, the testimony as to percentage of ground cover was subjective. Upon a review of the evidence, the Court is not convinced that the residue cover on the ground was less than 80% on February 28, 2007. The Defendants prevail on this Count. [The Court notes that Plaintiffs' counsel agreed that a directed verdict should be granted for Defendants as to violations which might have occurred on February 27, 2007.]

Count XV

Allegation: Land Application of Manure on Frozen and/or Snow Covered Ground With Less Than 90% Residue Cover in Violation of NPDES General Permit – Ansonia Facility. As stated in Count XIV, the testimony by Christine Pence was subjective regarding the nature and consistency of the ground cover. However, the testimony of Ms. Pence was consistent, credible and based on her years of experience and personal observations. Upon review of the evidence, the Court finds that it is convinced that there was not at least 90% cover

residue on the land at the time of the manure distribution on February 28, 2007. Therefore, the Court finds that the Plaintiff proved this allegation by a preponderance of the evidence as to conduct on February 28, 2007. Plaintiff has proven its case on these allegations against SLA, Rick Kremer and Neal Kremer. A monetary award is assessed as follows: \$2,000 fine against SLA and Rick Kremer, jointly and severally. An additional \$200 fine is assessed against Neal Kremer. Injunctive relief, as described below, shall be ordered. [The Court notes that Plaintiffs' counsel agreed that a directed verdict should be granted for Defendants as to violations which might have occurred on February 27, 2007.]

Count XVI

Allegation: Failure to Properly Monitor Application Field Surface Drainage at the Ansonia facility. The Plaintiff's witnesses were not present on February 27 and 28, 2007 when the manure was distributed and could not testify whether field tiles were monitored at the time of the manure distribution, as required by OAC 901:10-2-14(G)(2). Records of the event fail to indicate that the tiles were monitored. [Pl. Exs. 44, 45.] Therefore, any evidence of non-compliance is circumstantial and inferential. However, to contradict any inferences, Kyle Stegall testified that he checked the boundaries of the field; he further testified that he did not know how or whether to complete any reports. This direct evidence counters the Plaintiff's circumstantial evidence and reasonable inferences therefrom. Therefore, the Plaintiff has failed to prove its case on this Count regarding monitoring field tiles. Defendants prevail on this Count.

Count XVII

Allegation: Failure to Properly Monitor Application Field Surface Drainage in Violation of the Terms and Conditions of NPDES General Permit at the Ansonia

Facility. Based on the Court's findings in Count XVI, the Court finds that the Plaintiff has failed to prove this Count.

Count XVIII

Allegation: Failure to Properly Notify ODA after 2007 Pollution Spill at

Ansonia Facility. Regarding Count IX, the Court determined that excessive manure was distributed on a 36 acre tract on February 27 and 28, 2007. This Count alleges that SLA failed to properly notify ODA of the violation. Immediate notice is required by the PTO, Part C (Bates page 81) and OAC 901:10-1-10(G). The obligation is placed on SLA to immediately notify ODA of the spill. While SLA denied any knowledge of the spill, the Court's determination that a spill occurred necessarily results in a conclusion that the duty to report also existed. In this case, there is no proof that SLA provided immediate notification to ODA. To the contrary, the spill was discovered by ODA inspectors on March 1, 2007. The Court finds that the Plaintiff has proven this allegation by a preponderance of the evidence against SLA, Rick Kremer and Neal Kremer. A monetary award is assessed as follows: \$2,000 fine against SLA and Rick Kremer, jointly and severally. An additional \$200 fine is assessed against Neal Kremer. Injunctive relief, as described below, shall be ordered.

Count XIX

Allegation: Failure to Properly Notify OEPA after 2007 Pollution Spill at

Ansonia Facility. Again regarding Count IX, the Court determined that excessive manure was distributed on a 36 acre tract on February 27 and 28, 2007. This Count alleges that SLA failed to properly notify OEPA of the violation. Oral notice to OEPA within two hours after a spill is required by the NPDES permit, and written notice to OEPA within 14 days after ^a spill is also required by the NPDES permit. The obligation is placed on SLA to provide the notice. While

SLA denied any knowledge of the spill, the Court's determination that a spill occurred necessarily results in a conclusion that the duty to report also existed. In this case, there is no proof that SLA provided timely notifications to OEPA. The Court finds that the Plaintiff has proven this allegation by a preponderance of the evidence against SLA, Rick Kremer and Neal Kremer. A monetary award is assessed as follows: \$2,000 fine against SLA and Rick Kremer, jointly and severally. An additional \$200 fine is assessed against Neal Kremer. Injunctive relief, as described below, shall be ordered.

Count XX

Allegation: Polluting Waters of the State in 2007 in Violation of the NPDES Permit. This Count again concerns conduct that occurred on February 27 and 28, 2007. Based on the Court's prior findings that manure waste spilled off the land and into waters of the state, the Court necessarily finds that the NPDES permit was also violated. The Plaintiff has proven this allegation by a preponderance of the evidence against SLA, Rick Kremer and Neal Kremer. A monetary award is assessed as follows: \$2,000 fine against SLA and Rick Kremer, jointly and severally. An additional \$200 fine is assessed against Neal Kremer. Injunctive relief, as described below, shall be ordered.

Count XXI

Allegation: Polluting Water of the State in 2007 in Violation of Revised Code Chapter 6111 – Ansonia Facility. This Count again concerns conduct that occurred on February 27 and 28, 2007. Based on the Court's prior findings that manure waste spilled off the land and into the waters of the state on February 28, 2007 and March 1, 2007, the Court necessarily finds that R.C. 6111.07 and OAC 3745-1-04 (C) were violated. [The NPDES permit is based on these codified laws.] The Plaintiff has proven this allegation by a preponderance of

the evidence as to the Ansonia facility against SLA, Rick Kremer and Neal Kremer. A monetary award is assessed as follows: \$2,000 fine against SLA and Rick Kremer, jointly and severally. An additional \$200 fine is assessed against Neal Kremer. Injunctive relief, as described below, shall be ordered. [The amount of fines are mitigated due to larger fines being imposed on Count IX for violations on the same dates.]

Count XXII

Allegation: Violations of the NPDES Permit in 2007 resulting in run-off and ponding. This Count again concerns conduct that occurred on February 27 and 28, 2007. The Court previously determined that manure run-off occurred and that the manure entered waters of the state on February 28, 2007. The Court specifically finds, based on the testimony and photographic evidence [Pl. Exs. 38A - 38H], that there was run-off and ponding of the liquified manure. The Plaintiff has proven this allegation by a preponderance of the evidence against SLA, Rick Kremer and Neal Kremer. A monetary award is assessed as follows: \$2,000 fine against SLA and Rick Kremer, jointly and severally. An additional \$200 fine is assessed against Neal Kremer. [Mitigating circumstances exist since prompt notice would not likely have reduced the amount of pollution into waters of the state.] Injunctive relief, as described below, shall be ordered.

Count XXIII

Allegation: Failure to Provide Manure Nutrient Analysis to Recipients of Manure. In considering pre-trial motions for summary judgment, the Court previously determined that SLA failed to provide recipients of manure with nutrient analysis related to the manure. See OAC 901:10-2-11(A)(2). [The apparent purpose of this information is to help the recipient understand soil fertility with regard to managing their own fertility and nutrient needs.]

The Court granted summary judgment in favor of Plaintiff. The Plaintiff prevails against SLA, Rick Kremer and Neal Kremer. A monetary award is assessed as follows: \$1,000 fine against SLA and Rick Kremer, jointly and severally. An additional \$100 fine is assessed against Neal Kremer. Injunctive relief, as described below, shall be ordered.

IMPOSITION OF MONETARY AWARDS

The Court finds that the numerous violations by SLA are due to an on-going lack of attention to details of the PTO and NPDES permit at the Ansonia facility. This inattention is attributed to its principal, Rick Kremer. He has operated SLA, and been personally involved in various aspects of animal confinement operations, for most of his life. His inattention is not due to lack of knowledge of regulatory requirements. Recalcitrance with regulators is noted, including repeated communications of misunderstandings or disagreement with instructions and interpretations from inspectors. However, blatant disregard for the purposes of regulations does not seem to be the case. Efforts to earn profits in order to maintain SLA's agri-business appear to motivate his lack of regulatory compliance (which is understandable – but not acceptable -- in the current economics of farming). His failure to foresee storage capabilities and to plan for proper manure disposal appear to be the primary cause of disposing of manure under the conditions involved herein which ultimately were determined to violate regulatory mandates.

Neal Kremer and Roman Kremer are both young men who have chosen to follow their family's involvement in agri-business. Neither appear to be recalcitrant, but they did not appear overly eager to fully comprehend and implement both the spirit and the provisions of ODA and OEPA regulations. Typically, their violations of regulatory mandates were motivated by obedience to their father's ill-advised directions and attitude.

Richard Fisher's culpability is limited herein due to the lack of decision-making authority instilled upon him. While self-described as an operations manager, his primary duties appear to be record-keeping and regulatory responses. Admittedly, there were instances where he should have more fervently notified Rick Kremer of regulatory requirements; also, he should have provided guidance to help anticipate manure storage problems. However, from the testimony, Richard Fisher's culpability was limited.

Regarding factors to consider regarding the penalty to impose, the Court was not provided with any economic data of any economic benefit that Defendants would have received for non-compliance. Further, although regulatory compliance efforts and litigation enforcement actions were evident, there was no testimony relating the actual economic costs incurred by the Plaintiff. However, the parties did stipulate that Defendants would not raise "ability to pay" as a mitigating circumstance.

Due to the lack of prior violations, and the circumstances stated in the previous paragraphs, a "bottom up" approach was used to determining the amount of the civil fine. See *United States v. Gulf Park Water Co.* (D. Miss. 1998), 14 F. Supp. 2nd 854. The Plaintiff's demand for a judgment of \$261,800 – based on maximum penalties available – was rejected by the Court.

IT IS THEREFORE ORDERED AND DECREED that injunctive relief is ordered as follows:

(1) For two years after the date of the final order herein (from the trial and/or appellate court), SLA and Rick Kremer are enjoined from violating the terms and conditions of the PTO ,

the NPDES plan and applicable state laws and regulations regarding the Ansonia facility. The Court retains continuing jurisdiction concerning compliance with this injunction.

(2) Within 90 days hereafter, SLA and Rick Kremer shall file applications with OEPA, ODA and/or Mercer County Soil and water Conservation District for compliance with applicable regulations for the Mercer County facility involved herein. After submitting necessary applications, SLA and Rick Kremer shall promptly comply with supplemental requests for information and all other usual and customary steps to accomplish appropriate licensing of the Mercer County facility with OEPA, ODA and/or Mercer County SWCD.

IT IS FURTHER ORDERED AND DECREED that monetary awards are ordered as follows:

(1) SLA and Rick Kremer, jointly and severally, shall pay fines to the Clerk of Courts in the total amount of \$68,900 within 45 days hereafter. [\$37,000 for EPA violations and \$31,900 for ODA violations.] Following receipt, the Clerk of Courts shall forward payments to the Plaintiff via counsel of record.

(2) Neal Kremer shall pay fines to the Clerk of Courts in the total amount of \$4,400 within 45 days hereafter. [\$1,700 for EPA violations and \$2,700 for ODA violations.] Following receipt, the Clerk of Courts shall forward payments to the Plaintiff via counsel of record.

(3) Richard Fisher shall pay fines to the Clerk of Courts in the total amount of \$600 within 45 days hereafter. [\$600 for ODA violations and \$0 for EPA violations.] Following receipt, the Clerk of Courts shall forward payments to the Plaintiff via counsel of record.

IT IS FURTHER ORDERED AND DECREED that payment of \$60,000 of the fines by SLA and Rick Kremer (listed in paragraph (1) above) is suspended on the following conditions:

(1) that SLA and Rick Kremer comply with terms of the injunction issued herein; and

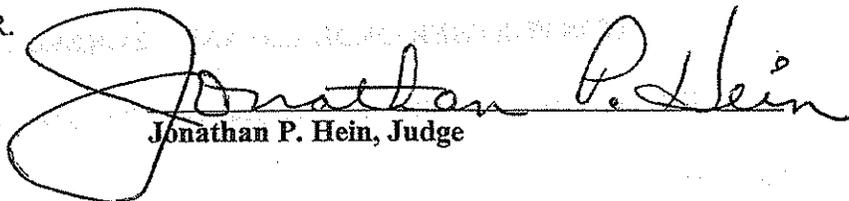
(2) that SLA and Rick Kremer contribute \$40,000 to a non-profit, charitable foundation organized in Darke County to establish an endowment fund wherein the net income shall be distributed by the foundation to applicant(s) who provide educational programs and/or events in Darke County which promote agricultural - environmental awareness, promote water and soil pollution control, and promote water and soil conservation, such as those that may be encouraged or organized by Soil and Water Conservation District, Future Farmers of America, OSU Extension Office, institutions of public or private education, etc.

The Court has suspended \$60,000 of the fine in order to reduce animosity between Plaintiff and Defendants, to encourage future cooperation, and to ameliorate any suspicion that Plaintiff's enforcement is motivated by self-interest in the fines. Establishment of a \$40,000 endowment fund seeks to accomplish the same purposes. The \$8,900 fine payable by SLA and Rick Kremer to the Plaintiff acknowledges the Plaintiff's investigative and prosecution expenses. [\$4,450 to ODA and \$4,450 to OEPA.]

Violations of the above terms may subject SLA and Rick Kremer to payment of the remaining \$20,000 fine. [Presuming \$40,000 is deposited with a foundation, the remainder subject to further payment will be \$12,550 to OEPA and \$7,450 to ODA.] The Court retains continuing jurisdiction over the terms of this Order for two years after the date of the final order herein (either from the trial court or any appellate court).

Court costs to be paid by Defendants, jointly and severally.

FINAL APPEALABLE ORDER.


Jonathan P. Hein, Judge

cc: Margaret Malone / Aaron Farmer, Ass't. Attorneys General for Plaintiff (via U.S. mail)
Jack Van Kley, Attorney for Defendants (via U.S. mail)

jph/summary jdg/trial decision farm pollution

