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State of Ohio Hazardous Waste Facility Board

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Chairman

MEMORANDUM

TO: DISTRIBUTION

FROM: ROBERT E. BROWN, ACTING EXECUTIVE DIRECTOR

RE: TRANSMITTAL OF OPINION AND FINAL ORDERS - *IN THE MATTER OF SOUTHDOWN, INCORPORATED*, CASE NO. 91-NF-0700, CD 2.3-

DATE: September 19, 1994

Transmitted herewith is a true and accurate copy of the Opinion and Final Orders issued in the above-captioned case, as such documents were entered in the Journal of the Board on September 19, 1994.

Included in the document is the manner in which an appeal of the Board's Order may be effectuated.

encls.

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cc: Alan Rowley, Southdown Incorporated
Thomas Crepeau, DHWM, Ohio EPA
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Bruce Cornet, Greene Environmental Coalition

September 19, 1994

ENTERED BOARD'S JOURNAL

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STATE OF OHIO
HAZARDOUS WASTE
FACILITY BOARD

BEFORE THE
STATE OF OHIO
HAZARDOUS WASTE FACILITY BOARD

IN THE MATTER OF
SOUTHDOWN, INCORPORATED
FAIRBORN, OHIO
CASE NO. 91-NF-0700

OPINION AND FINAL ORDERS

ISSUE DATE:	MARCH 23, 1994
JOURNALIZATION DATE:	SEPTEMBER 19, 1994
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TABLE OF CONTENTS

I. OPINION	1
A. STATEMENT OF CASE	1
B. STATUTORY BASIS OF DECISION	1
C. INTRODUCTORY INFORMATION	3
1. Facility Description	3
2. Application	4
3. Parties to the Proceeding	4
4. Site Visit	5
D. REPORT AND RECOMMENDATION OF THE ADJUDICATION PANEL	6
E. PERMIT DECISION MAKING PROCESS	6
1. The Issuance of a Hazardous Waste Permit - Right or Privilege	6
2. Burden of Proof / Standard to be Demonstrated	7
3. Responsibility of Board as a Permit Decision Making Authority	8
F. RISK ASSESSMENT	8
G. REVIEW	9
H. APPLICANT'S FIRE RISK SCENARIO	11
1. Flame and Plume Temperature Estimates	12
2. Residence Time Calculation Inconsistent Mass Flow	14
3. The Use of Inconsistent Mass Flows is a Major Departure from the Methods of Applicant's References, Ndubizu and Fang	16
4. Confusion Regarding the Definitions of Heat Transfer and Coefficient of Heat Transfer	17
5. Violation of the First Law of Thermodynamics	19
6. Inconsistency in Selection of Values for the Coefficient of Convective Heat Transfer	21
7. Destruction and Removal Efficiency	22
8. Inconsistency Between the Total Evaporation Rate and the Burn Rate	25
9. Inconsistency Between Applicant's DRE and Ndubizu's Combustion Efficiency	29
I. SCENARIO OF SPILL INTO BEAVER CREEK	32
J. RESPONSE OF APPLICANT TO BOARD STAFF INQUIRY	34
1. Applicant's Response to Inconsistency in Mass Flows	35
2. Applicant's Response to Questions Regarding Flame Temperature	37
3. Applicant's Response to Questions Regarding the Difference Between the Burn Rate and the Evaporation Rate	40
4. Applicant's Response to Questions on the Relationship Between Radiant Heat Transfer from the Flame and Evaporation Rate of Waste Fuel	43

September 19, 1994

ENTERED BOARD'S JOURNAL

K. REVIEW OF THE TECHNICAL ARGUMENTS IN CD 2.35, APPLICANT'S REQUEST FOR RECONSIDERATION 45

 1. Applicant Claims the First Law of Thermodynamics Was Not Violated
 by Applicant's Model 46

 2. Applicant Claims Mr. Brown Erred When He Asserted that the
 Evaporation Rate Must at Least Equal the Burn Rate 50

 3. Conclusions Regarding the Competency and Credibility of Information
 in CD 2.35 51

L. MARCH 23, 1994 BOARD MEETING 52

M. DISCUSSION OF PROCEDURE AND ACTION 57

 1. Record As Exclusive Basis Of Decision 57

 2. Due Process 60

N. SUMMARY OF FUNDAMENTAL SCIENTIFIC AND ENGINEERING
 ERRORS, INCONSISTENCIES AND INADEQUACIES 65

O. CONCLUSION 67

II. FINAL ORDERS 70

94 SEP 19 PM 2:56

2.39

In the Matter of: OHIO
HAZARDOUS WASTE
SOUTHDOWN, INCORPORATED :
Fairborn, Ohio

Applicant :

Case No. 91-NF-0700

OPINION AND FINAL ORDERS

I. OPINION

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DISCUSSION¹

A. STATEMENT OF CASE

This matter came before the State of Ohio, Hazardous Waste Facility Board ("Board"), convened in open sessions on September 29, 1993 and March 23, 1994, on the application of Southdown, Incorporated ("Southdown" or "Applicant") for a hazardous waste facility installation and operation permit ("hazardous waste permit" or "permit").

B. STATUTORY BASIS OF DECISION

R.C. 3734.05(D)(6)(c) provides that:

The board shall not approve an application for a hazardous waste facility installation and operation permit unless it finds and determines as follows:

* * *

That the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of various alternatives, *and other pertinent considerations....* (Emphasis added.)

¹Those findings of fact to which a citation does not attach, are taken from the Report and Recommendation.

The Board may consider criteria not explicitly set forth in R.C. 3734.05(D)(6), only if it deems such to be a "pertinent consideration" under R.C. 3734.05(D)(6)(c), but is under no statutory obligation to do so. *West Virginia v. Hazardous Waste Facility Board* (1986), 28 Ohio St. 3d 83 at 85.²

In the case *sub judice*, the Board finds it necessary to consider as a R.C. 3734.05(D)(6)(c) pertinent consideration:

that there be competent, credible evidence³ presented by Applicant in support of its application, which provides a reasonable assurance of trustworthiness in Applicant to employ and/or follow fundamental scientific and engineering principles and practice in the construction, operation and management of its facility.

²In that case:

the board did consider the appropriateness of the proposed location, and decided not to require additional siting information. This court will not substitute its judgment for that of the board, especially in the areas of administrative expertise. *Drudukovich v. Housing Authority* (1979) 58 Ohio St. 2d 202, 207.

Id.

³As used in this *Opinion*, "evidence" is used as comprehending every form of evidence, not only testimony but also documentary evidence, exhibits, and every other thing which may properly be presented to the Board upon the issues presented. 4 O Jur 3d. Appellate Review 334. The term "every other thing" includes oral argument, as such occurred at the March 23, 1994 Board meeting.

The Board at its March 23, 1994, meeting voted 4:1⁴, that it could not find and determine the afore-described R.C. 3734.05(D)(6)(c) pertinent consideration, thereby disapproving the Report and Recommendation of the adjudication panel and denying the permit application.

The reasons for that decision are set forth in this *Opinion*. As to the other decisional criteria established in R.C. 3734.05(D)(6), the Board makes no finding or determination.

C. INTRODUCTORY INFORMATION

1. Facility Description

Applicant's hazardous waste facility, part of Southdown's Quarry Plant which manufactures hydraulic portland cements, is located in Bath and Xenia townships, Greene County, 3½ miles south, southeast of Fairborn, Ohio. The facility, consisting of approximately 600 acres, is located in a rural area, with the surrounding land primarily used for agriculture, with some residences situated nearby.

⁴Before the Board was a motion by Dr. Pinto, second by Mr. Tyler, to deny the Southdown permit application (and to disapprove the Report and Recommendation of the adjudication panel). Voting aye were Dr. Pinto, Mr. Tyler, Mr. Mason, and Chairman Ioannides. Voting nay was Dr. Bair. The motion passed 4:1. March 23, 1994 Board Meeting Transcript ("Tr.") at 145-148.

2. Application

The application before the Board, considered as a new facility, consisted of the following:

- a. Four existing 30,000 gallon storage tanks;
- b. Four new 30,000 gallon storage tanks and a new secondary containment system, to replace the above-listed existing tank system;
- c. Container storage building for 172,800 gallons of solid hazardous waste; and
- d. Authority to store 97 waste codes in both tanks and containers, prior to use as supplemental fuel in its cement kiln. These waste codes consist of ignitable wastes (D001), toxic characteristic wastes, wastes from non-specific and specific sources (F and K wastes, respectively), and off-specification commercial product wastes (U wastes). The requested maximum throughput was 81,000 tons/year.

The cement kiln was not a subject of the application and thus, not before the Board.

3. Parties to the Proceeding

The statutory parties to this proceeding are Southdown, Ohio EPA, Greene County Commissioners, Bath Township Trustees, and Xenia Township Trustees. The Greene Environmental Coalition (a citizen environmental group) and the Village of Yellow Springs were granted intervenor status.