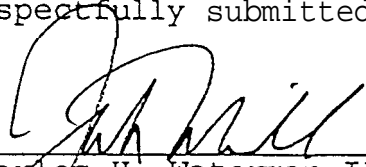


Amendment to the United States Constitution and the Ohio
Constitution, Art. I, Sec. 16. Southdown's motion is fully
supported in-the attached memorandum.

Respectfully submitted,



Charles H. Waterman III
Frank L. Merrill
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Telephone: 614/227-2300
Counsel for Applicant,
Southdown, Inc.

**MEMORANDUM IN SUPPORT OF
APPLICANT'S MOTION FOR
RECONSIDERATION PRIOR TO ISSUANCE OF BOARD ORDER**

Because of incomplete and inaccurate information at the March 23, 1994 HWFB meeting, it appears that the Board has strayed from its statutory duties under Ohio Rev. Code §3734.05 and confused some basic tenets of risk assessment protocol. At the March 23, 1994 HWFB meeting, the Board Staff and the Board raised some questions and concerns regarding Southdown's screening-level risk assessment. A detailed summary response to these questions and concerns is attached hereto as Exhibit A. It should also be noted that Southdown's risk assessment was not conducted or designed to address the HWFB siting criteria. The risk assessment was prepared at the request of the Regional Air Pollution Control Agency (RAPCA) in conjunction with the air permitting process for Southdown's cement kiln. Southdown submitted the risk assessment into the record in this proceeding in response to public comments at a public hearing on March 19, 1992. In this proceeding, the risk assessment has been taken out of context and not used for its intended purpose.

Additionally, the Board's deliberation process on Southdown's permit application was conducted in an unlawful manner which further supports reconsideration of Southdown's permit application at this time. The Board's rules indicate that the record shall be the exclusive basis for the decision by the Board. OAC 3734-1-50(B). In this case the record officially closed on March 26, 1993. Therefore, in reaching its decision

the Board, as required by law, should have restricted itself to the record as it existed on March 26, 1993. **All information pertaining to Southdown's risk assessment provided after March 26, 1993, was not part of that record and was therefore outside the Board's authority to review.**

The Board also unlawfully applied requirements outside of the siting criteria set forth in Ohio Rev. Code §3734.05(D)(6). The Franklin County Court of Appeals has expressly held that factors outside the statutory siting criteria are not within the Board's prerogative in reviewing a permit application. In the Matter of IT Corp., 61 Ohio App. 3d 470, 479-480 (1989). Southdown's risk assessment has no relevance to any of HWFB's siting criteria and was not conducted for or in conjunction with this permitting process. The Board, however, has taken this information out of context and used it to deny Southdown's permit application.

The only arguably relevant siting criterion is the need to demonstrate a minimum risk of fires and explosions. The risk assessment, however, does not evaluate the chances of fire or explosion or whether such occurrence is likely to happen, but rather shows the impact of such an occurrence in a worst-case scenario (i.e., assuming all safeguards fail at the worst possible time). The potential effect of a fire and explosion has nothing to do with the minimum risk that it will happen in the first place. **These are two entirely different issues.** Therefore, the risk assessment has no relevance to the applicable

siting criteria, and the Board's use of this information to base its denial is unlawful and in violation of Ohio Rev. Code §3734.05(D) (6).

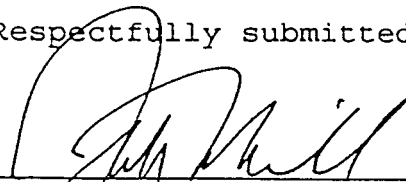
Finally, the March 23, 1994, HWFB hearing violated the due process guaranteed by the Fourteenth Amendment to the U.S. Constitution. Southdown has a property right in its permit application which can only be denied after due process of law. See, e.g., Bell v. Burson, 402 U.S. 535, 542 (1971); Rickard v. Ohio Dent. of Liquor Control, 23 Ohio App. 3d 101, 107 (1985). Courts have consistently held that a party is entitled to fair notice of the issues upon which an agency's decision will turn. See Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970). Because the Board failed to restrict its consideration of Southdown's permit application to the statutory criteria enumerated in Ohio Rev. Code §3734.05(D) (6) and failed to limit the basis of its decision to information properly in the record, the Board deprived Southdown of fair notice of the standards by which its application would be reviewed. Southdown was never put on notice that its risk assessment had become a "disputed issue" upon which the Board's decision would be based. Instead Southdown was surprised at the March 23, 1994, HWFB meeting to learn that there were doubts relating to the execution of the risk assessment. The failure to give Southdown fair notice of this issue prior to the meeting constitutes a deprivation of property without due process of law.

Moreover, Southdown was not given a meaningful opportunity to respond to these new issues. Courts have consistently held that an opportunity to respond is essential to due process of law. See, e.g., Ohio Bell Telephone Co. v. Public Utilities Comm. of Ohio, 301 U.S. 292 (1937); State, ex rel. Canter v. Industrial Comm. of Ohio, 28 Ohio St. 3d 377 (1986). Once Southdown realized that the risk assessment had become a major issue in the eyes of the Board, Southdown requested an opportunity to provide the technical consultant capable of responding to the Board's questions. This request was denied. The Board's failure to provide this opportunity to respond in a meaningful manner violates Southdown's due process rights.

As a result of the foregoing, Southdown respectfully requests that the Board immediately reconsider Southdown's permit application and convene a "working session" before the full Board with all parties present, similar to the procedure used In the Matter of Envirosafe, HWFB Case No. 87-MR-0092. Southdown further requests that after the "working session" the Board proceed to immediate vote on Southdown's application. This manner of reconsideration will not prejudice any party because

all parties will have the same opportunity to participate and advocate their respective positions in a fair and meaningful manner.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Applicant's Motion for Reconsideration Prior to Issuance of Board Order was served upon the following by regular U.S. mail, postage prepaid this 17 day of August, 1994:

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Chairman, Bath Township Trustees
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Fairborn, Ohio 45324

The Greene County Commissioners
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