

MEMORANDUM IN SUPPORT OF
APPLICANT'S MOTION FOR RECONSIDERATION

I. BACKGROUND

On May 3, 1991, Southdown submitted a Part B permit application to the Ohio Environmental Protection Agency ("Ohio EPA") pursuant to Ohio Rev. Code §3734.05. Southdown's application was reviewed by Ohio EPA, and the Director of Ohio EPA then transmitted the application to the Hazardous Waste Facility Board ("HWFB" or the "Board") on October 4, 1991, stating that the application appeared to comply with applicable Ohio EPA rules and appeared to meet the performance standards set forth in division (D), (I) and (J) of Ohio Rev. Code §3734.12.⁶

A public hearing on Southdown's application was conducted on March 19 and 20, 1992, pursuant to Ohio Administrative Code ("OAC") 3734-1-16. An adjudication hearing on Southdown's application was conducted in September 1992 and January 1993 pursuant to OAC 3734-1-20. On June 30, 1993, the Adjudication Panel issued a Report and Recommendation recommending that the Board issue Southdown a hazardous waste facility installation and operation permit.⁷ The Adjudication Panel concluded that Southdown satisfied the siting criteria

⁶ See correspondence from Donald R Schregardus, Director of Ohio EPA, to Gerry Ioannides, HWFB Chairman, dated October 4, 1991 (CD .00).

⁷ Report and Recommendation of the Adjudication Panel, issued June 30, 1993 (CD 2.01), p. 243.

of Ohio Rev. Code §3734.05(D)(6).⁸ On March 26, 1993, the Adjudication Panel also issued an entry closing the record on the Southdown proceeding.’

On March 15, 1994, approximately one week before the scheduled HWFB vote on Southdown’s permit application, Southdown received from the Board notice of some questions regarding Southdown’s risk assessment.¹⁰ The notice indicated that since Ohio EPA declined to respond to the Board’s request for this information, the Board felt that it was obliged to gather the information, presumably from Southdown. The notice indicated that “[the Staff’s] review of the Siting Criteria Document (CD .97) (sic) indicated several calculations and/or assumptions that are unclear” and proceeded to ask questions regarding the risk assessment contained in “Appendix I of CD .97.”¹¹

Southdown submitted written responses to the Staff’s questions on March 21, 1994. **In effect**, Southdown was provided just three (3) business days to respond to these questions because of the impending Board meeting.

^a Id. at pp. 240-242.

⁹ See Entry Closing the Record (CD 1.99); see also Public Notice of Advertisement/Closing of Record, issued April 4, 1993 (CD 2.00).

¹⁰ See Extension of Tie, Proposed Procedure of Board Meeting, Opportunity to Meet with Staff (CD 2.24).

¹¹ Id. at p. 1. Southdown’s “Siting Criteria Document”, however, is not document number CD .97, but CD .47. Southdown did not submit the risk assessment as part of its Siting Criteria Document. The risk assessment was attached as Appendix I to Southdown’s “Written Responses to Questions from the Public Hearings” (CD .97). Southdown placed the risk assessment in the record at the request of the Board’s Staff and at the request of public comments. See Southdown’s Written Responses to Questions from the Public Hearings (CD .97), p. 17. Southdown’s risk assessment report was prepared for reasons unrelated to this proceeding, i.e., it was conducted at the request of the Regional Air Pollution Control Agency (RAPCA) in conjunction with the air Permitting process for Southdown’s cement kiln. The scope and purpose of the risk assessment were not designed to address the Board’s siting criteria, and its use in this proceeding has been taken out of context.

On March 23, 1994, Mr. Robert Brown of the Board's Staff gave a presentation on alleged inaccuracies contained in Southdown's risk assessment. Board member, Dr. Nevell Pinto, followed up with detailed questions regarding these alleged inaccuracies. This was the first time that Southdown had been given notice of most of these questions and concerns (e.g., whether the risk assessment violates the first law of thermodynamics, alleged underestimation of air emissions). In fact, the overheads and material used in Mr. Brown's presentation were not received by Southdown until March 24, 1994, the day after the hearing. In addition, Mr. Brown's presentation did not appear to take into consideration any of Southdown's responses provided in its Response to the Staff's Questions on Applicant's Risk Assessment (CD 2.30). Southdown requested that the Board allow Southdown additional time to **respond**,¹² but this request was **denied**.¹³ Because of Southdown's inability to respond to these new questions on the spot, Dr. Pinto moved to deny Southdown's application. Three of the four remaining Board members voted to approve Dr. Pinto's motion.

II. SUMMARY OF ARGUMENT

In denying Southdown's application, the Board has **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

¹² See Transcript of Regular Meeting Before the Hazardous Waste Facility Board, March 23, 1994, (hereinafter "March 23, 1994 Transcript"), pp. 120-122.

¹³ Id. at p. 122.

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).

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, including Mr. Brown's presentation and the **Staff's** questions and concerns raised prior to the March 23, 1994, hearing, was not part of that record and was therefore outside the Board's authority to review. While the **Board's** rules do provide

for supplementation of the record after the adjudication panel's report and recommendation, the Board failed to **follow** these procedures." Consequently, the Board proceeded to consider matters outside the record, thereby invalidating the Board's decision.

In order to justify its action within the confines of its statutory authority, the Board in its Final Order has disingenuously created a new siting criterion requiring that an applicant present "competent, credible evidence . . . which provides a reasonable assurance of trustworthiness in [an applicant] to employ and/or **follow** fundamental scientific and engineering principles and practice in the construction, operation and management of its facility."" The Board has clearly exceeded its statutory authority by creating new siting criteria which can only be enacted by the Ohio General Assembly. Moreover, this new standard was never articulated at the Board's March 23, 1994 meeting and was **first** revealed to Southdown last week in the Board's Final Order. Therefore, Southdown was never given **reasonable** notice of this new siting criterion, nor was Southdown **afforded** a meaningful opportunity for a hearing on this issue. This total lack of notice and opportunity for hearing violates even rudimentary notions of due process of law and resulted in a hearing resembling a Kafkaesque trial.

As a result, the March 23, 1994, **HWFB** hearing violated even the most rudimentary dictates of due process as 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

¹⁴ See Correspondence from John K. McManus and Paul Jesse, Assistant **Attorneys General**, to Michael A. Shapiro and Robert E. Brown, **HWFB**, dated March 9, 1994, copy of which is **attached hereto** as Exhibit **D**; ~~see also~~ OAC 3734-1-50(B).

¹⁵ See Final Or&r, p. 2.
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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 an 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 serious doubts by some members of the Board relating to the execution of the risk assessment. The failure to give Southdown fair notice of this issue prior to the meeting and the resultant permit denial constitute 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. 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 summarily denied without justification. The Board's failure to provide this opportunity to respond in a meaningful manner violates Southdown's due process rights and permanently taints the Board's decision.

The Board's attempt in its **Final** Order to **justify** the "notice and opportunity to be heard" **afforded** Southdown is unconvincing given the timing of the opportunity to table the application from Southdown's perspective. Southdown understood that the Board had "questions" about its risk assessment prior to the March 23, 1994 meeting, albeit only one week prior to the meeting; however, the extent and gravity of some of these "questions" were never communicated to Southdown **until** after Sarah Foster's presentation and the subsequent questioning by Dr. Pinto. Prior to the March 23, 1994 meeting and even **after Mr.** Brown's presentation, **Southdown** and its risk assessment consultant believed that the Board's "questions" on Southdown's risk assessment were based on a lack of a **fundamental** understanding of *risk* assessments and could be **sufficiently** addressed to the Board's satisfaction. Therefore, after Mr. Brown's presentation Southdown declined the Board's offer to table a decision on Southdown's **application**.¹⁶ After that offer was extended by the Board, Sarah Foster gave a brief presentation on Southdown's risk *assessment* and attempted to answer questions from the Board, primarily **from** Dr. Pinto. After this exchange of questions and answers, **Southdown** realized for the first time that the Board did not understand the risk assessment and had serious *concerns* with the risk assessment requiring responses to detailed technical questions which could only be adequately addressed by Mr. **Paul** Chrostowski, formerly with Clement International and currently with the Weinberg Group. At that time, Southdown requested it be **afforded** the opportunity to have **Mr.** Chrostowski appear before the Board to respond to these questions." Southdown's request was summarily denied without

¹⁶ **See** Transcript of March 23, 1994 **HWFB** meeting, p. 79

¹⁷ **Id.** at pp. 121-122.

explanation. The obvious inequity of this denial was apparent to at least one Board member, who moved to table Southdown's application to provide Southdown with the opportunity to respond to these new issues. Even though this motion did not pass, its timing **illustrates** that there was a question as to the **fundamental** due process **afforded** Southdown and that Southdown must be given reasonable notice and a meaningful opportunity to be heard on the issues before its permit can be denied.

In addition to the procedural infirmities summarized above, Southdown's risk assessment has been taken out of **context**. Contrary to assertions by the Board in its Final Order, 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.

The Board erred by evaluating Southdown's screening level risk analysis as a full-blown health **risk** analysis. Southdown's risk assessment was actually a screening level analysis to **identify** whether a more detailed health risk analysis was warranted. Its results are only designed to be accurate within an order of magnitude at best.

In conclusion, Southdown's Motion for Reconsideration will provide an opportunity for the Board to receive all relevant information on the risk assessment issue, providing the Board with the true facts upon which to base an informed decision. Moreover, a suspension of the