

EXHIBIT D



Attorney General
Lee Fisher

TO: Michael A. Shapiro, Chief Legal Counsel, HWFB

FROM: John K. McManus, Assistant Attorney General

SUBJECT: In the Matter of Southdown, Inc., Case No. 91-NF-0700
Requests for Clarification and Comments
Service of My Memo Dated March 9, 1994

DATE: March 15, 1994

As I indicated in your phone call to me yesterday, I did not serve my memo of March 9, 1994, on the other parties to this action; Neither the Board's rules nor the Code of Professional responsibility require **service** in this situation- However, as I indicated, I have no objection to providing a copy of ~~the~~ memo to the other parties. Therefore, in accordance with your request, I am sending a copy of that memo to the other parties to this action

cc Jack Van Mey, Chief, Environmental Enforcement
Bryan Zima, Assistant Attorney General
Ed Lim, OEPA, DHWM
All Parties to In the Matter of Southdown, Inc., Case No. 91-NF-0700



Attorney General
Lee **Fisher**

TO: Michael A. Shapiro, Chief Legal Counsel, HWFB
Robert E. Brown, Chief Technical Advisor, HWFB

FROM: John K. McManus, Assistant Attorney General
Paul Jesse, Assistant Attorney General

SUBJECT: In the Matter of Southdown, Inc., Case No. 91-NF-0700
Requests for Clarification and Comments

DATE: March 9, 1994

The staff of Ohio EPA is gathering the **information** that you requested. Despite **its** current heavy work load, the Division of Hazardous Waste Management will complete this process by March 17, 1994.

However, while the staff of Ohio EPA is anxious to respond to your request and to assist the Board in its decision on this **permit, we have concerns** about the request. The Board's rules do not appear to provide for the type of request that you have made. OAC 3734-1-50 discusses the record of proceedings. Paragraph (B) of that section states that "[t]he record shall be the exclusive basis for decision by the board.". However, that same paragraph goes on to limit the methods by which the record can be expanded after the hearing examiner issues his report:

After the filing of the report of the hearing examiner, the board, upon its own motion or the motion of a party, may permit the parties to introduce further documentary evidence, or, after granting an opportunity to any opposing party for preparation, may take additional testimony or remand the matter to the hearing examiner for the **taking** of additional testimony. In deciding whether to permit the taking of additional testimony, the board shall consider potential harm to the public welfare or the environment from a delay in the proceeding.

Your memo requesting clarification and comments does not appear to be among the methods delineated for expanding the record. First, the request seems to come from the staff and not from the Board. Second, the information does not seem to be requested in the form of documentary evidence or testimonial evidence subject to open cross-examination by all parties. As the stated purpose of this information is to assist the staff in its presentation to the Board, the information

Michael A. Shapiro
Robert E. Brown
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may, at the very least, give the appearance that the Board has considered matters outside the record.

RC 3734.05(D)(7) requires the court of appeals to examine whether the Board's order was in accordance with the law. If the court of appeals were to conclude that the Board considered evidence outside the record, the court might reverse the Board's decision because the Board had violated its own rule, and, hence, did not deliver a decision in accordance with the law.

Again, the staff at Ohio EPA is anxious to supply the HWFB with the information requested by you. However, we have advised our client that this information should be supplied in conformity with the law. Therefore, we ask that you renew your request in the form contemplated by OAC 33734-01-50(B).

cc: Jack Van Kley, Chief, Environmental Enforcement
Bryan Zima, Assistant Attorney General
Ed Lim, OEPA, DHWM