[Cite as *CLUB 3000 v. Jones*, 2008-Ohio-5058.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

CLUB 3000 et al.,	:	
Appellants-Appellants,	:	
v.	:	Nos. 07AP-593, 07AP-598, 07AP-599 (ERAC Nos. 795307-795320, 795323 and 795334)
Christopher Jones, Director of Environmental Protection et al.,	:	
Appellees-Appellees.	:	(REGULAR CALENDAR)

O P I N I O N

Rendered on September 30, 2008

Richard C. Sahli, for appellant, CLUB 3000.

Peter A. Precario, for appellant, Village of Bolivar.

Black, McCuskey, Souers & Arbaugh, Thomas W. Connors and *Kristin R. Zemis*, for appellant, Stark-Tuscarawas-Wayne Joint Solid Waste Management District.

Baker & Hostetler, LLP, Maureen A. Brennan and *Jason P. Perdion,* for appellee, Republic Waste Services of Ohio, LLC.

Nancy H. Rogers, Attorney General, *R. Benjamin Franz* and *Nicholas J. Bryan*, for appellee, Christopher Jones, Director of Environmental Protection.

APPEAL from The Environmental Appeals Review Commission.

McGRATH, P.J.

{¶1} Appellants, CLUB 3000 ("CLUB 3000"), the Village of Bolivar ("the Village"), and Stark-Tuscarawas-Wayne Joint Solid Waste Management District ("the District") (collectively "appellants"), appeal from an order of the Environmental Review Appeals Commission ("ERAC") that affirmed the decision of appellee, Christopher Jones, Director of the Ohio Environmental Protection Agency ("the Director" or "OEPA"), to grant appellee-cross appellant, Republic Waste Services of Ohio, LLC ("Republic"), a permit to install ("PTI" or "application") an expansion to Countywide Recycling Disposal Facility, a solid waste landfill that it has owned and operated in East Sparta, Stark County, Ohio, since 1995. Because reliable, probative, and substantial evidence supports the order, and the order is in accordance with law, we affirm.

I. PROCEDURAL BACKGROUND

{¶2} The following facts and procedural background are germane to our discussion. On February 14, 2001, Republic submitted an application for a PTI for approval to expand its existing facility. The application consisted of five bound volumes; the first two volumes contained the application, and the remaining three volumes contained engineering plans, a ground water monitoring plan ("ground water plan"), and a report authored by Eagon & Associates, a consulting firm hired by Republic, "Hydrogeologic Investigation for Countywide Recycling and Disposal Facility Lateral and Vertical Expansion" ("the HGI report"). For ease of reference, Republic's application also included a reference chart, which listed the OEPA rules and identified where information corresponding to a particular rule could be located in the application. A plethora of maps, charts, graphs, and tables accompanied the application, as well as various reports.

{¶3} The HGI report prepared by Eagon included information previously collected by Burgess & Niple, Ltd. and Golder Associates, which were consulting firms that had been involved with the site before it was operated by Republic.[1] In addition to the reports penned by those firms, the HGI also included data from 200 borings and approximately 100 wells and piezometers, the results of approximately 100 hydraulic tests (pump, slug, and packer tests), water-level data collected on 40 different dates between 1995 and 2000, and data collected from wells, springs, and seeps.

{¶4} During the two years Republic's application was pending, representatives from Republic and the OEPA engaged in numerous and extensive discussions. Jeffrey Rizzo ("Rizzo"), a hydrogeologist for the OEPA's Division of Drinking and Ground Water, reviewed the hydrogeology and geology portions of the application for compliance with the applicable rules in the Ohio Administrative Code ("administrative code"). Rizzo noted two potential compliance deficiencies, which he brought to the attention of Judith Bowman ("Bowman"), who was an environmental specialist with OEPA's Division of Solid and Infectious Waste Management. Bowman contacted Vandersall, Republic's general manager, regarding Rizzo's comments. Vandersall collaborated with James Walker, a registered engineer hired by Republic to serve as the PTI's project manager, who revised the application in response to Rizzo's concerns. Walker's revisions did not wholly satisfy Rizzo, who recommended the inclusion of two additional conditions to the application that

[1] Previous site investigations dated back to the late 1980's. Burgess & Niple, Ltd. conducted the initial hydrogeologic investigation, and issued a report that was submitted in connection with the first PTI application. Golder Associates was another firm that was hired to perform hydrogeologic field investigations between 1992 and 1994. Golder Associates submitted a report in connection with a PTI application that was submitted and approved on March 30, 1995. Several months later, in August 1995, another report was presented; this report contained data generated from various field programs that Golder Associates had been working on during the interim.

addressed the deficiencies he noted. Republic assented to the additional conditions, and, in late 2001, Rizzo advised Bowman that Republic's hydrogeological investigation and ground water monitoring plan satisfied the administrative code's criteria.

{¶5} After a review of the PTI application and additional submittals relating to revisions, the OEPA issued a final recommendation for approval to the Director on May 21, 2002. Republic further revised its application to include conditions that were added in response to comments that the OEPA received during the public comment period. On June 2, 2003, the Director issued a lateral and vertical expansion PTI to Republic, authorizing them to increase the size and total capacity of the landfill. The final PTI requires Republic to comply with all applicable laws and regulations, as well as all permit conditions mandated by the Director. The permit approval also included financial assurances for closure and post-closure care.

{¶6} Appellants appealed to ERAC, which reviewed the matter for over two years. A 19-day de novo hearing was conducted over five months, during which, considerable testimony was received. On June 27, 2007, in a 100-page, single-spaced decision, ERAC affirmed the Director's final action. Pursuant to R.C. 3745.06, appellants appealed to this court.

II. JURISDICTION

{¶7} Prior to delving into the merits of the instant matter, we must, as a threshold matter, determine whether we possess jurisdiction to hear the appeals filed by the District and the Village. The right to appeal from an administrative order is governed by statute. The Supreme Court of Ohio has long held that "an [administrative] appeal, the right to which is conferred by statute, can be perfected only in the mode prescribed by statute.

The exercise of the right conferred is conditioned upon compliance with the accompanying mandatory requirements." *Zier v. Bur. of Unemployment Comp.* (1949), 151 Ohio St. 123, paragraph one of the syllabus. The court recently repeated this axiom of jurisdiction in *Hughes v. Ohio DOC*, 114 Ohio St.3d 47, 2007-Ohio-2877.

{¶8} The statute at issue here is R.C. 3745.06, which provides, in pertinent part:

> * * *Any party desiring to so appeal shall file with the commission a notice of appeal designating the order appealed. A copy of the notice also shall be filed by the appellant with the court, and a copy shall be sent by certified mail to the director of environmental protection unless the director is the party appealing the order. Such notices shall be filed and mailed within thirty days after the date upon which the appellant received notice from the commission by certified mail of the making of the order appealed.* * *

Thus, R.C. 3745.06 requires that a notice of appeal be filed with ERAC and the appropriate court, designating the order that is being appealed. The statute also requires that the appealing party serve the Director of Environmental Protection ("the Director") a copy of the notice of appeal by certified mail. The foregoing requirements must be satisfied in order to invoke the jurisdiction of this court. *Kimble Clay & Limestone v. McAvoy* (1979), 59 Ohio St.2d 94, paragraph two of the syllabus ("An appeal from the order of the Environmental Board of Review in a permit or licensing proceeding must be filed in a timely and proper manner with the Court of Appeals for Franklin County and as otherwise prescribed by R.C. 3745.06").

{¶9} At oral argument, this court sua sponte raised the issue of jurisdiction, questioning both the District and the Village as to whether they had complied with R.C. 3745.06 by serving the Director a copy of their notices of appeal by certified mail. Both parties asserted that they had complied with that requirement of the statute.

{¶10} Following oral argument, Republic moved to dismiss the appeals filed by the aforementioned parties on jurisdictional grounds. Citing to the certificates of service attached to both notices of appeal, Republic argued that both parties had, in fact, not served the Director by certified mail as required by R.C. 3745.06. Republic also supported its motion with the affidavit of Miles Davison ("Davison"), the legal office manager for the OEPA. In his affidavit, Davison stated that he had "reviewed all of the files, records and correspondence relating to [the District and the Village] and he was unable to find "any evidence or proof in the files, records or correspondence that the Director of Ohio EPA received, by certified mail, a copy" of the notices of appeal filed by the District or the Village. (Davison affidavit at ¶3.)

{¶11} Subsequent to filing, Republic moved to withdraw its motion as to the District. It explained that the District had "contacted [Republic] and provided evidence that [it] had timely served its notice of appeal on the director of environmental protection by certified mail." (Republic's motion to withdraw motion to dismiss at 1.) Republic further indicated that it was not withdrawing its motion as to the Village, as it had failed to provide Republic with any evidence demonstrating that it had served the Director in accordance with R.C. 3745.06.

{¶12} The Village responded to Republic's motion to dismiss, asserting that it had served the Director with a copy of its notice of appeal by certified mail, and, thus, had complied with the statute. In support, the Village attached the affidavit of its counsel, Peter Precario, Esq. ("Precario"), who opined that he caused the Director to be served by certified mail, but was unable to locate any documents (i.e., a mailing receipt or tracking number) to evidence the same.

{¶13} The primary function of a certificate of service is to demonstrate that service was accomplished. Such takes on new significance when considering a statute such as R.C. 3745.06, which makes the perfection of service by a particular method upon a specified individual a jurisdictional requirement. In this case, the certificates of service attached to the notices of appeal filed by the District and the Village do not indicate that the Director was served by certified mail, but, rather, his *counsel* was served by ordinary mail. In the context of an administrative appeal, when a statute directs an appealing party to serve a particular individual, service upon that individual's counsel has been held insufficient to invoke jurisdiction. See, e.g., *Salem Med. Arts and Dev. v. Columbiana Cty.* (1998), 80 Ohio St.3d 621 (because R.C. 5717.01 required that the appealing party serve the board of revision, service of a copy of a notice of appeal upon the board's counsel was insufficient, and the appeal was properly dismissed); *Powell v. Chemi-Trol Chem. Co.* (June 12, 1981), Sandusky App. No. S-80-20 (jurisdictional defect existed where appealing party served counsel for the interested party but not the interested party as required by R.C. 4141.28); see, also, *Evans v. Ohio Depart. of Ins.*, Delaware App. No. 04CA80, 2005-Ohio-3921.

{¶14} In addition to the certificates of service, the affidavit of Davison also states that neither the District nor the Village served the Director by certified mail. While the District may have provided Republic with documentary evidence demonstrating its compliance with R.C. 3745.06, such was not provided to this court for our consideration. Given that a court may sua sponte raise the issue of subject matter jurisdiction, which this court did, it was incumbent upon the District to clarify the matter before us.

{¶15} This brings us to our consideration of the Village, which proffered the affidavit of its counsel, who attested to having caused the Director to be served by certified mail. While this court has no reason to doubt the assertions contained in Precario's affidavit, we are hard-pressed to hold that an affidavit purporting compliance, without more, can be substituted for an accurate certificate of service. We find that determination is especially appropriate in light of Davison's affidavit. Indeed, if this court were to accept an affidavit attached to a memorandum contra to a motion to dismiss as evidence of statutory compliance, it is not difficult to imagine the potential abuses that might result.

{¶16} By sua sponte raising the issue during oral argument, this court put the District and the Village on notice that it was questioning whether it had subject matter jurisdiction to consider their appeals. At no time thereafter, has either party provided this court with any evidence, aside from an unsupported affidavit, that demonstrates the Director was served in accordance with R.C. 3745.06. Nor has either party provided an explanation that reconciles the certificates of service attached to their notices of appeal, which clearly indicate that the Director's counsel was served by ordinary mail (and not that the Director was served by certified mail), with the positions taken after oral argument and after Republic filed its motion to dismiss.

{¶17} Given that the evidence before this court does not reflect that either the District or the Village served the Director by certified mail in accordance with R.C. 3745.06, we are compelled to conclude that this court is without subject matter jurisdiction to consider the appeals filed by the District and the Village. That determination renders

Republic's cross-appeal moot. Having resolved the issue of jurisdiction, we turn now to the merits of CLUB 3000's appeal.

III. CLUB 3000

A. The Underlying Science.

{¶18} Although the scientific underpinnings of this case are geologically complex, a short discussion of only a few terms and principles is necessary for an understanding of the matter. Succinctly stated, our discussion involves groundwater and the material through which it travels.

{¶19} Groundwater is the water that is found underground and fills the cracks and openings between sand and rock. It is formed when precipitation permeates the soil and moves downward to the water table. Water in the ground is stored in the spaces between rock particles, and, through movement, may eventually be expressed above ground in streams, rivers, lakes, or oceans.

{¶20} An aquifer is "a geologic formation, group of formations, or part of a formation that is capable of yielding a significant amount of water to a well or spring." Ohio Adm.Code 3745-34-01 (D). An aquitard is a rock formation, which acts as a confining unit, and impedes the flow of groundwater from reaching the formations around it. The terms "hydraulically active" or "hydraulic conductivity" refer to a formation's ability to transmit water.

{¶21} A fracture is a break in the continuity of a material and is created by pressure. A fracture's ability to transmit water depends upon its size, type, and orientation. Not all fractures, however, are capable of transmitting water; for example, a fracture may be filled in with a substance or material that prevents transmission.

"Fracture flow is water moving along a fracture within a rock, like a conduit. Porosity, or porous flow, is water moving between the grains or matrix of the formation." (ERAC decision at 20-21, footnote 15.)

B. The Site's Geology.

{¶22} The landfill rests upon the Clarion Shale, which is a "tight" shale formation with low permeability. Directly below the Clarion Shale is the Putnam Hill formation ("Putnam Hill"), which consists of Brookville No. 4 underclay ("Brookville Clay"), the Brookville No. 4 coal, and the Putnam Hill limestone; these strata are interconnected through fractures and share similar water bearing characteristics. The Putnam Hill is 100 times more permeable than the Clarion Shale. (Hearing Tr. at 3174.) According to Republic, the fractures that exist in the Putnam Hill allow groundwater to flow horizontally beneath the Clarion Shale and above the Brookville Clay. Because the Putnam Hill "daylights" at the sides of the hill upon which the landfill is situated, groundwater flows horizontally through it, where it exists at the hillside as seeps or springs.

{¶23} The Putnam Hill was designated as the uppermost aquifer system ("UAS") and the Clarion Shale as its confining unit. To ascertain the hydrogeologic properties of the bedrock underlying the site, slug and packer testing was performed throughout the Clarion Shale, the Putnam Hill, and Brookville Coal No. 4. The results of these tests, which were contained in the HGI report, were interpreted to mean that the Clarion Shale could not be considered part of the UAS because of the hydraulic conductivities it exhibited. It is also significant that the Putnam Hill had been recognized as the UAS by the OEPA prior to Republic's PTI application, as evidenced by a letter drafted by Bowman in 1994.

C. Assignments of Error.

{¶24} CLUB 3000 assigns the following two assignments of error.

> ASSIGNMENT OF ERROR NO. 1
>
> ERAC ERRED AS A MATTER OF LAW IN AFFIRMING THE PERMIT WHERE THE DIRECTOR NEVER MADE AN INITIAL DETERMINATION OF THE SIGNIFICANCE OF THE FRACTURES BENEATH THE LANDFILL AND ERAC MADE THAT INITIAL DETERMINATION ITSELF.
>
> ASSIGNMENT OF ERROR NO. 2
>
> ERAC ERRED BY HAVING NO VALID FACTUAL FOUNDATION FOR ITS INDEPENDENT DETERMINATION ON THE SIGNIFICANCE OF THE FRACTURES BENEATH THE LANDFILL.

{¶25} In its first assignment of error, CLUB 3000 asserts that ERAC's decision is unlawful because the Director did not evaluate the significance of the fractures beneath the landfill, despite a duty to do so. Given the Director's failure to make a determination regarding their significance, CLUB 3000 contends that ERAC, pursuant to the standard by which it reviews a final action of the Director, was obligated to either vacate or modify the order that issued the PTI. Instead, however, CLUB 3000 asserts that ERAC made that determination itself based upon its de novo review, an act which CLUB 3000 contends constituted error as a matter of law. ERAC's unlawful act notwithstanding, CLUB 3000 asserts in its second assignment of error that there was no valid factual foundation to support ERAC's determination that the fractures were not hydraulically communicative.

{¶26} An application will be deemed complete when all the statutory and regulatory enumerated and mandatory components of the application have been

reasonably and fully answered. *Harmony Environmental Ltd. v. Morrow Cty. Dist. Bd. of Health*, Franklin App. No. 04AP-1338, 2005-Ohio-3146. Pertinent to this appeal, Ohio Adm.Code 3745-27-06 contains an extensive list of details that must be included in order for an application to be complete. Contrary to CLUB 3000's contentions, the Director was not required to conduct additional testing to ensure Republic complied with the criteria set forth in Ohio Adm.Code 3745-27-06, but could rely on the information contained in the application, and submitted therewith, before issuing a permit. See *CECOS Internatl., Inc. v. Shank* (1991), 74 Ohio App.3d 43 (distinguishing between quality and completeness in an application). By so phrasing its argument, CLUB 3000 attempts to persuade this court to reweigh the evidence the Director used to support his decision. This court, however, reviews all the evidence presented to ERAC at the de novo hearing, not just that contained in the permit application. *Northeast Ohio Regional Sewer Dist. v. Shank* (1991), 58 Ohio St.3d 16, paragraph two of syllabus. Because, under the proper standard of review, CLUB 3000's argument essentially raises the same issue presented in its second assignment of error, we will discuss it under that assignment of error.

{¶27} With respect to the appropriate standards of review, R.C. 3745.06 sets out this court's standard for reviewing ERAC orders. We "shall confirm the order" if we find "upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law." R.C. 3745.06. "In the absence of such a finding," the court "shall reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law." Id. Accord

Save the Lake v. Schregardus (2001), 141 Ohio App.3d 530, appeal not allowed, 92 Ohio St.3d 1429.

{¶28} R.C. 3745.05 sets out the standard that ERAC must employ when reviewing a final action of the Director. That statute provides, "[i]f, upon completion of the hearing, the commission finds that the action appealed from was lawful and reasonable, it shall make a written order affirming the action, if the commission finds that the action was unreasonable or unlawful, it shall make a written order vacating or modifying the action appealed from." This standard does not allow ERAC to substitute its judgment for that of the Director, nor to stand in the place of the Director. *CECOS Intl. Inc. v. Shank* (1992), 79 Ohio App.3d 1, 6. The term "unlawful" means "that which is not in accordance with law," and the term "unreasonable" means "that which is not in accordance with reason, or that which has no factual foundation." *Citizens Committee v. Williams* (1977), 56 Ohio App.2d 61, 70. "It is only where the board can properly find from the evidence that there is no valid factual foundation for the Director's action that such action can be found to be unreasonable. Accordingly, the ultimate factual issue to be determined by the board upon the *de novo* hearing is whether there is a valid factual foundation for the Director's action and not whether the Director's action is the best or most appropriate action, nor whether the board would have taken the same action." Id.

{¶29} Putting the above discussion in the context of this case, ERAC reviews the quality of information contained in a permit application and, together with testimony adduced at the de novo hearing, considers whether the Director's actions were unreasonable or unlawful, ultimately determining whether a factual foundation supports the Director's action. *Citizens Against Megafarm Dairy Dev., Inc. v. Dailey*, Franklin App.

No. 06AP-836, 2007-Ohio-2649, at ¶22 (citations omitted). In turn, this court's review is limited to whether reliable, probative, and substantial evidence supports ERAC's order finding that it was not unreasonable or unlawful for the Director to conclude that Republic submitted an application that adequately characterized the site-specific geology, thereby submitting an application that complied with the requirements found in Ohio Adm.Code 3745-27-06(C)(2)(a). It is important to keep in mind that the General Assembly created administrative bodies to facilitate certain areas of the law by placing the administration of those areas before boards or commissions composed of individuals who possess special expertise. See *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, paragraph one of the syllabus. Accordingly, courts should give due deference to the administrative interpretation of rules and regulations, as well as the administrative resolution of evidentiary conflicts. *Harmony Environmental Ltd. v. Morrow Cty. Dist. Bd. of Health*, Franklin App. No. 04AP-1338, 2005-Ohio-3146, at ¶8. (Citations omitted.)

{¶30} At the de novo hearing before ERAC, the parties offered conflicting testimony as to the site's specific geology and hydrology. While all the parties agreed that some fracturing beneath the landfill was present, they disagreed as to the nature and extent of the same. Specifically, and as germane to this appeal, the parties disagreed whether a significant fracture network exists, allowing hydraulic communication between the Putnam Hill (the UAS) and the Clarion Shale. If these strata are connected through fractures, as CLUB 3000 contends, then the Clarion Shale would be considered part of the UAS, as opposed to its confining unit. Such would then mean Republic's application, as approved by the Director, ran afoul of the siting restrictions set forth in Ohio Adm.Code 3745-27-07(H)(2)(e) ("The isolation distance between the uppermost aquifer system and

the bottom of the recompacted soil liner of a sanitary landfill facility is not less than fifteen feet of in-situ or added geologic material deemed acceptable by the director."). CLUB 3000 also asserts that hydraulic communication between the UAS and the Clarion Shale poses a serious threat to the public water supply for area residents.

{¶31} CLUB 3000 cites to three specific pieces of data, which it claims were either not included in Republic's application or were ignored by the Director. The first concerns the results of two borings (Boring 99-10 and 57), which CLUB 3000 claims "unequivocally established that hydraulically active fractures existed immediately beneath the landfill in multiple locations." (CLUB 3000's brief at 24.) The second involves the direction of the flow of water from the seeps associated with the Clarion Shale, which it claims was not characterized as required by Ohio Adm.Code 3745-27-06(C)(2)(c)(iv)(b). The third piece of data was the rapid water transport that occurred with the drilling of Monitoring Wells 20 and 20A ("MW 20" and "MW 20A"). CLUB 3000 contends the application omitted and/or the Director ignored the above, and all three demonstrate the existence of hydraulically active fractures within the Clarion Shale. As such, the conceptual model proposed by Republic was flawed, and the Director erred in approving the same.

{¶32} To support its argument before ERAC, CLUB 3000 offered the testimony of Dr. Julie Weatherington-Rice ("Dr. Rice"). A synthesis of Dr. Rice's testimony reflects that she believes there is a significant fracture system present at the site, and these fractures hydraulically connect the Clarion Shale with the UAS. Dr. Rice based her opinion on: the water loss recorded for Borings 99-10 and 57; the existence of the fractures noted as detected in the borehole logs contained within the HGI report; oxidization and precipitate observed on fractures in the borehole logs; and the rapid water transport noted in

connection with the drilling of MW 20 and MW 20A. Dr. Rice applied hydrogeologic principles to the foregoing, and explained how an application of that science supported her conclusion that a highly communicative fracture network exists. While Dr. Rice was qualified as an expert in the areas of geology, hydrogeology and geomorphology, in general, she was not accepted as an expert in the areas of geological and hydrogeological mapping, fracture flow analysis, and economic geology. The hearing examiner did indicate, however, that her opinion would be taken into account and assigned the appropriate weight when resolving the appeal. (Hearing Tr. at 381.)

{¶33} Rizzo, who was involved in evaluating Republic's application, testified at the hearing. He asserted that Republic adequately characterized the site based on the information provided in the HGI report, and, thus, Republic's application complied with all applicable administrative code requirements, including Ohio Adm.Code 3745-27-06(C)(2). Rizzo testified that in the ten years that he has been reviewing data from the site, he has seen nothing that suggests the existence of "conduits that would allow water to move" swiftly through the Clarion Shale to the Putnam Hill. (Hearing Tr. at 3610.) Rizzo testified that the areas that were noted to be highly fractured were located on the hillsides, which is "what we'd expect to see." Id. at 3616. Given that Borings 99-10 and 57 were located on a weathered and fractured hillside, he found the loss of water from these borings to be consistent with Republic's conceptual model. Rizzo further explained that the hydrogeology of the region needs to be considered on the whole, as opposed to myopically viewing each section. Thus, he opined that it would be incorrect to view the data from MW 20 and MW 20A and/or Boring 99-10 and 57 as anomalies because when viewed "in relation to the cross-section and see where that falls on the hillside," the data is

not contradictory, but, rather, characteristic and serves to support "all the other data." Id. at 3617. When questioned as to whether there were any OEPA regulations that would require Republic to "analyze the effect of the discontinuous fractures in the Clarion Shale in order to adequately characterize the site," Rizzo replied that none existed. Id. at 3765.

{¶34} David John Sugar ("Sugar"), a hydrogeologist employed by Eagon, testified on behalf of Republic. Sugar has been involved with the site since 1990, upon which he has installed numerous monitoring wells and conducted hydraulic testing. Sugar explained that the oxidation observed on fractures suggests that the surface of that material was probably, at some point in time, exposed to air and water, but that oxidation could also occur without water. With respect to the fractures throughout the Clarion Shale, Sugar described them as the "typical weathering pattern that you are going to get with the shale." Id. at 2687. He testified that the concentration of fractures decreased with depth, and were "pretty sparse when you get to the UAS." Id. Sugar bored and logged Borings 99-10 and 57. He acknowledged the amount of water lost in connection with those borings, but explained that such does not necessarily indicate a "highly transmissive fracture." Id. at 2788. He testified that packer testing is used to determine whether fractures are capable of transmitting water, and the results of the packer testing performed within the Clarion Shale did not indicate that a network of fractures capable of transmitting water was present.

{¶35} Another hydrogeologist employed by Eagon, Allan Razem ("Razem"), testified on behalf of Republic, and was qualified as an expert in geology, hydrogeology, geomorphology, groundwater chemistry, and the design of groundwater monitoring well systems. Razem has been evaluating the geology and hydrogeology of the site since

1990, and was involved in developing and preparing the PTI application. Razem testified that the water lost in connection with MW 20, MW 20A, Boring 99-10, and Boring 57 "was nothing unusual." Id. at 3072. He discounted the possibility that the loss was due to hydraulic conductivity between the two wells because, if such were the case, then MW 20 would have drained when MW 20A was being drilled, which did not occur; thus, because the presence of water was observed in MW 20, it followed that MW 20A was not draining out through a fracture. Id. at 3089-3090. Razem explained that finding, when viewed together with the low permeability of the Clarion Shale as demonstrated by slug and packer testing, did not suggest that there was hydraulic communication between the fractures. He also opined that, based upon a reasonable degree of scientific certainty, that Republic accurately characterized the Putnam Hill as the UAS.

{¶36} Republic also offered the testimony of Dr. Michael Sklash ("Dr. Sklash"), who was qualified as an expert in geology, hydrogeology, and geomorphology. Dr. Sklash was initially retained by Republic to evaluate the sufficiency and quality of data contained in the PTI application, as well as review the expert reports submitted by parties opposing the application. With respect to the issue of fractures detected at the site, Dr. Sklash opined that when the 200 plus borelogs are reviewed on the whole, he does not find an "obvious relationship between where the fractures are and where the water is." Id. at 3153. For example, he explained that because Boring 99-10 is topographically located in a valley, "[t]here is less confining stress on the rock, so it would tend to fracture more than it would away from the valley." Id. at 3300. Dr. Sklash testified that he did not believe the fractures present within the Clarion Shale were capable of transmitting water because when he physically inspected the site, he did not observe water being emitted

from the fractures, and that is what he would "expect" to see in the event of hydraulical activity.[2] He also concluded that "[t]he hydraulic performance of the monitoring wells in the Clarion Shale indicate that the fractures are not well connected." Id. at 3240. In sum, Dr. Sklash's expert opinion that there was no hydraulic communication between fractures within the Clarion Shale was based on his physical inspection of the boreholes and his interpretation of the Clarion Shale's hydraulic behavior. The reasons offered in support of his opinion included: (1) the lack of water issue issuing from fractures while surveying the site and the Homes mine; (2) "the monitoring wells that were formally in the Clarion Shale didn't produce water"; and (3) water was not observed on a widespread basis when doing "core work or boring work." Id. at 3296-3297.

{¶37} In addition to witness testimony, the evidence before ERAC also included the data submitted in connection with Republic's application, including the HGI report and the ground water monitoring plan. After considering the competing testimony, ERAC concluded the evidence supported the Director's determination that Republic adequately characterized the geology and hydrogeology of the site, and, thus, its application met the requirements set forth in the administrative code. Accordingly, it found the Director possessed a valid factual foundation when he approved Republic's PTI application, and his action was reasonable. And, upon our review of the record, we find that reliable, probative, and substantial evidence supports ERAC's decision.

{¶38} As relevant to the issue before us, ERAC explained in its decision:

> Evidence presented at the *de novo* hearing supports the Director's decision to accept Republic's characterization, *i.e.* although some fractures are present, no fracture network

[2] Regarding the fractures within the Clarion Shale, "there's a poor relationship between where we see fractures and where water was seen on drilling." Id. at 3236.

exists that will transmit water differently than characterized in their hydrogeologic report. To substantiate the presence of a fracture system, Appellants cite to fractures and water loss noted on borehole logs during the drilling process. Experts who inspected Republic's borehole logs determined that the fractures are small, discontinuous and unmappable. The fractures noted in the borehole logs could not create the brick-layer like structure as asserted by Appellants. Further, water loss during the drilling process is not uncommon. The noted behavior of MWs20 and 20a during the drilling process does not prove the Putnam Hill limestone/Brookville coal is connected by fractures to the Clarion shale. If a fracture had connected MW20 with the Putnam Hill limestone/Brookville coal, MW20 would have drained to that formation and would not have had water in it when MW20A was drilled. Further, MW20 slug test results showed low permeability in the Clarion shale.

Additionally, personal observations made and exhibits presented by Appellees' experts revealed no evidence of a fracture system like the one advanced by Appellants. Indeed, Appellees['] exhibits demonstrated a poor correlation between the presence of fractures and the presence of water in the Clarion shale.

Importantly, if an aggressive fracture system, capable of producing the hydraulic communication posited by Appellants, were present at the Countywide site, the fractures would have drained the formation and no saturated zone would exist. Further, in a 1994 letter from OEPA responding to Republic's inquiry as to whether the Clarion shale is a significant zone of saturation, OEPA concluded "[t]he Clarion shale is a very poor sustainer of ground water flow as witnessed by monitoring wells installed . . . being purged dry during routine sampling and during past in-situ well testing." Ohio EPA concluded by stating the Clarion shale lacks "any of the properties needed to act as a preferential pathway of migration away from the limits of solid waste placement."

* * *

In summary, the Commission rejects Appellants' assertions relating to whether Republic adequately characterized the geology and hydrogeology at the Countywide site. Having found that the Director possessed a valid factual foundation to determine that Republic adequately characterized the geology and hydrogeology at the site, the Commission,

> correspondingly, finds the Director's action reasonable in this regard.
>
> In reaching his conclusion that Republic satisfied the regulations regarding characterization of geology and hydrogeology (OAC 3745-27-06, generally, and OAC 3745-27-06(C)(2)(a), more specifically), the director extensively reviewed, examined and considered numerous documents and sources, including the 2001 Hydrogeologic Report and the 2001 Ground Water Monitoring Plan.
>
> The Commission finds that Republic's application contained sufficient hydrogeologic information to allow the Director to determine the suitability of the site for solid waste disposal, identify and characterize the hydrogeology of the uppermost acquifer and all geologic strata that exist about the uppermost aquifer system and to sufficiently characterize the site geology in such a way that allows the Director to evaluate the proposed design of the sanitary landfill facility to ensure compliance with OAC regulations.
>
> Accordingly, the Commission finds that the Director's action in determining that Republic had satisfied OAC 3745-27-06 was lawful. As such, the Commission denies Appellants' assignments of error relating to adequate characterization of the geology and hydrogeology.

ERAC June 27, 2007 Final Order at 85, 86.

{¶39} The record reflects that fractures detected at the site were noted in the borelogs, and Republic's expert witnesses, Razem and Sklash, testified that these fractures were not hydraulically communicative. Dr. Sklash testified that hydraulic testing was conducted at the site, including the fractures, and any additional evaluation would be superfluous. The testimony given by Rizzo and Sugar was in accord with that of Razem and Dr. Sklash. These witnesses provided ample testimony regarding the site's geology and offered explanations based on accepted hydrogeologic principles, and all agreed that the Putnam Hill was accurately designated as the UAS and the Clarion Shale as its confining unit. Although CLUB 3000 contends that the Director failed to evaluate the

significance of the fractures detected beneath the landfill, the collective testimonies of Razem, Sklash, Rizzo, and Sugar, when combined with the data considered by the Director in connection with the PTI application, makes clear that CLUB 3000 disagrees with the interpretation of the results, and not that the issue was never considered. Thus, we find that the testimony and the record in toto provided a valid factual foundation for ERAC to determine that the fractures were qualitatively and quantitatively evaluated through various hydraulic testing, and met the applicable administrative requirements.

{¶40} Additionally, the testimony of Razem, Sklash, Rizzo, and Sugar provided scientific explanations for the loss of water that occurred in connection with MW 20, MW 20A, Boring 99-10, and Boring 57, and the oxidation observed on the fractures detected at the site. These witnesses also provided testimony as to the characterization of the recharge and discharge areas identified in Ohio Adm.Code 3745-27-06, as well as explained how Republic's application complied with that specific section of the administrative code. Although CLUB 3000's expert witness, Dr. Rice, contested the accuracy of, and asserted differing opinions from, the witnesses mentioned above, ERAC was charged with the duty to weigh the evidence and determine its credibility. Because the requisite quantum of evidence supports ERAC's decision, this court must defer to ERAC's special expertise for resolving the evidentiary conflicts. To that end, a review of the application and data accompanying it, as well as the testimony adduced at the hearing, undercuts CLUB 3000's argument that ERAC made the initial determination regarding the fractures based on the evidence presented at the de novo hearing.

IV. CONCLUSION

{¶41} Based on the foregoing, given the determination that we lack jurisdiction to consider the appeals filed by the District and the Village, the appeals filed by those parties are hereby dismissed, and Republic's cross-appeal is dismissed as being moot. We overrule CLUB 3000's two assignments of error, and the judgment of the Environmental Review Appeals Commission is affirmed.

Judgment affirmed.

BROWN, J., concurs.

TYACK, J., concurs separately.

TYACK, J., concurring separately.

{¶42} I believe that an affidavit of counsel, an officer of the court, suffices to demonstrate that certified mail was sent to the former director of the Ohio EPA. I would not dismiss any of the appeals on a theory that experienced, capable counsel did not comply with R.C. 3745.06. That being noted, we address the same central issues with regard to the *Club 3000* appeal. I agree that ERAC's order is supported by reliable, probative and substantial evidence and that the order is in accordance with law. I, therefore, also would affirm.

_____