

STATE OF OHIO, COUNTY OF BELMONT FILED
COURT OF COMMON PLEAS COMMON PLEAS COURT
BELMONT CO., OH

DOCKET AND JOURNAL ENTRY

2003 SEP 2 AM 10 55

STATE OF OHIO, ex rel.,

Plaintiff

Vs.

TRI-STATE GROUP INC., et al.,

Defendant

RANDY L. MARPLE
Case No.: 00 CV 0180 OF COURT

Date of Entry: September 2, 2003

It is hereby Ordered, Adjudged and Decreed that Defendant, Tri-State Group, Inc. and/or its respective subsidiaries, affiliates, assigns, officers, directors, agents, employees and/or successors in interest and Defendant, Glenn Straub, an individual, are hereby permanently enjoined from continuing the operation of the Flyash Disposal Site, located in Dilles Bottom, along SR 7, situated in Section 35, Mead Township, Belmont County, Ohio. Likewise, each Defendant is permanently enjoined from continuing the violations of R.C. §6111.07 (A), as such specific violations are set forth in Counts I, II and III of Plaintiffs Complaint, and as such were determined in this Court's Decision Sustaining Plaintiffs Motion for Summary Judgment against Defendant, Tri-State Asphalt Corp., now known as Tri-State Group, Inc.

It is hereby Ordered, Adjudged and Decreed that Defendant, Tri-State Group Inc. and/or its respective subsidiaries, affiliates, assigns, officers, directors, and/or successors in interest, and Defendant, Glenn Straub, an individual, are jointly and severally liable, in accord with R.C. §6111.09 (A) for an appropriate, reasonable and necessary civil penalty in the amount of \$362,185.00, with interest to accrue at 10% from the date of this Judgment Entry. All costs of these proceedings are assessed to Defendants, Tri-State Group, Inc. and Glenn Straub, an individual, jointly and severally.

(SEE SPECIAL JUDGMENT ENTRY, FINDINGS OF FACT AND CONCLUSIONS OF LAW)

pc: Timothy J Kern, Atty./Pl. and Larry A Zink, Atty./Def.

JOHN M. SOLOVAN, 0

JOHN M. SOLOVAN, II - JUDGE

THIS ENTRY MUST NOT BE REMOVED FROM THE CLERK OF COURTS' OFFICE

FILED
COMMON PLEAS COURT
BELMONT CO., OH
**STATE OF OHIO, COUNTY OF BELMONT
COURT OF COMMON PLEAS**

2003 SEP 2 AM 10 55

RANDY L. MARPLE
CLERK OF COURT

STATE OF OHIO, ex rel.,

Case No.: 00 CV 0180

Plaintiff

Vs.

TRI-STATE GROUP INC., et al.,

**JUDGMENT ENTRY ORDERING
PERMANENT INJUNCTION AND
ASSESSING CIVIL PENALTY**

Defendant

This matter has come before the Court on all issues presented at Trial, which was held on August 12, 2002, the Ohio Supreme Court having Overruled Defendant's Motion for Disqualification of this Judge as Factfinder.

Before addressing issues presented at Trial, this Entry shall first incorporate previous Judgment Entries of this Court, dated February 8, 2002 and February 19, 2002, wherein the Court Overruled Defendants' Motion for Summary Judgment as to the Dismissal of Defendant, Glenn Straub, personally, and Sustained Plaintiff's Motion for Summary Judgment against Defendant, Tri-State Asphalt Corp. (herein after referred to as Tri-State), which ruling specifically held Defendant, Tri-State, liable for violations of **R.C. §6111.07 (A)**, as such specific violations are set forth in Counts I, II, and III of Plaintiff's Complaint. All previous findings contained in those Judgment Entries, which pertain to Defendant, Tri-State, and/or Defendant, Glenn Straub, personally, are hereby adopted by the Court and incorporated herein.

Based upon the above-stated findings, the issues to be decided at Trial included the following:

- (1) The extent of appropriate injunctive relief and/or reasonable, appropriate and necessary civil penalties to be assessed against Defendant, Tri-State.
- (2) Whether Defendant, Glenn Straub, as an individual, is personally liable, on a joint and several basis, for the above-mentioned violations of **R.C. §6111.07 (A)**, as such specific violations are set forth in Counts I, II and III of Plaintiff's Complaint, and the extent of appropriate injunctive relief, if any, and/or civil penalties, if any, to be assessed against Defendant, Glenn Straub, as an individual, if found to be liable.

JUDGMENT OF THE COURT

Upon review of the above-stated issues in light of the previous findings of this Court, and based upon the evidence submitted at Trial, it is the Judgment of the Court, as follows:

I. It is hereby Ordered, Adjudged and Decreed that Defendant, Tri-State Group, Inc. and/or its respective subsidiaries, affiliates, assigns, officers, directors, agents, employees and/or successors in interest and Defendant, Glenn Straub, an individual, are hereby permanently enjoined from continuing the operation of the Flyash Disposal Site, located in Dilles Bottom, along SR 7, situated in Section 35, Mead Township, Belmont County, Ohio. Likewise, each Defendant is permanently enjoined from continuing the violations of R.C. §6111.07 (A), as such specific violations are set forth in Counts I, II and III of Plaintiffs Complaint, and as such were determined in this Court's Decision Sustaining Plaintiffs Motion for Summary Judgment against Defendant, Tri-State Asphalt Corp., now known as Tri-State Group, Inc. (Judgment Entry dated February 19, 2002)

II. It is further Ordered, Adjudged and Decreed that Defendant, Tri-State Group Inc., and/or its respective subsidiaries, affiliates, assigns, officers, directors, agents, employees and/or successors in interest, and

Defendant, Glenn Straub, an individual, are jointly and severally, liable for the continuing violations at the Site, as such were found by this Court, **and are, therefore Ordered to cease and desist and are permanently enjoined from continuing said violations by implementing a reasonable, necessary and appropriate Closure of the Site in accord with the requirements set forth in Tri-State Asphalt Corp.'s Permit To Install (PTI) and NPDES Permit, and which Closure mandates a Court Ordered OEPA Approved Closure Plan, embodying the following ten (10) mandatory requirements:**

- (A) Preparation of disposal Site for, and installation or placement of, a 20-mil CPE (polyethylene) liner; to be placed over all flyash deposits at the Site;
- (B) Provision for detailed engineering specifications, quality control, and quality assurances, setting forth that the liner will be installed properly and meet all liner specifications;
- (C) Provision of detailed specifications for installation of the soil cover, fully describing the type of material and its source;
- (D) Provision of detailed specifications for the installation of a vegetative cover, fully describing the type of vegetative cover as well as the procedure for the installation of the vegetative cover, such as seeding rates and fertilizer rates;
- (E) Submittal of a post closure plan to assure proper installation and growth of the vegetative cover;
- (F) Submittal of a proposal (which must be approved by OEPA) for erosion controls;
- (G) Submittal of a proposal (which must be approved by OEPA) for leachate controls;
- (H) Re-establishment of the ground monitoring system and replacement of destroyed and/or non-functioning wells (the final configuration and amount of wells to be approved by OEPA upon hydrogeologic evaluation);
- (I) Imposition of deed restriction to control use of property for industrial purposes only; and

- (J) Provision for extensive testing at the Site of the existing treatment pond, and, if tests reveal the presence of leachate exceeding 30 times the levels specified in **Rule 3745-81-11 (B)**, for the Parameters of Arsenic, Barium, Cadmium, Chromium, Lead, Mercury and/or Selenium, then and in that event, the existing treatment pond shall be dug up and the pond material and pond liner to be placed on the area of the Site to be closed, or to be properly disposed at a solid waste landfill. (**Goff T., pp. 292-303; Px 32, Policy No. 4.07**)

III. It is further Ordered, Adjudged and Decreed that said Defendants, Tri-State Group Inc. and Glenn Straub, while implementing closure of Tri-State's PTI, in accord with this Court Ordered OEPA Approved Closure Plan, shall not, in any manner, divert from the implementation of the previously approved cap specifications, **e.g., the twenty-mil C.P.E. liner.**

In the event Defendants, Tri-State and Straub, would chose to modify the Court Ordered OEPA Approved Closure Plan, said Defendants must submit an appropriate written Amendment of Tri-State's PTI for an OEPA Approved Closure Plan, but said Modified Plan shall include and address the ten (10) mandatory requirements listed above as an essential part of any PTI Application to Modify. The policy guidance which shall be followed in preparing an approvable, modified closure plan is set forth in Ohio OPEA Policy No. 407. The Court Ordered OEPA Approved Closure Plan or an Amended PTI Application seeking modification, shall be submitted to the Ohio EPA's Southeast District Office within six (6) months from the date of this Entry, and said Defendants shall implement the closure of the Site within six (6) months of approval by the OEPA. In any event, **it is Ordered, Adjudged and Decreed that said Closure shall be complete within twelve (12) months of the date of this Entry. It is further Ordered** that a report from a professional engineer, certifying the Closure work to be in accord with the Court Ordered OEPA Approved Closure Plan, shall be submitted immediately upon completion of closure work.

IV. It is further Ordered, Adjudged and Decreed, in accord with the Court Ordered OEPA Approved Closure Plan, that Defendant, Tri-State Group Inc. and/or its respective subsidiaries, affiliates, assigns, officers, directors, agents, employees and/or successors in interest, and Defendant, Glenn Straub, an individual, jointly and severally shall install, maintain and monitor for contaminants, a Ground Water Monitoring System at the Site, which Monitoring System is mandated to be "constructed in strict accordance with the requirements set forth in Tri-State's PTI and NPDES Permits", and which shall include implementation, under the supervision of a qualified ground water expert (hydrogeologist), of the following mandatory requirements to re-establish Ground Water Monitoring at the Site:

- (A) Completion of a hydrogeological investigation report at the Site by a qualified hydrogeologist within ninety (90) days of the date of this Entry;
- (B) Based upon the results of the hydrogeologic investigation report, a ground water monitoring plan for the Site shall be prepared and submitted to the Southeast District Office within six (6) months of the date of this Entry and shall be incorporated as part of the Court Ordered OEPA Approved Closure Plan;
- (C) The proposed ground water monitoring plan shall include the proposed number of wells necessary to monitor the Site, an assessment outline, and a sampling analysis plan;
- (D) In order to obtain the required baseline data, ground water sampling shall be required for five (5) years from the date the Site Closure Plan is approved, to be monitored quarterly for the first year and semiannually thereafter;
- (E) The parameters of contaminants that must be sampled are set forth in **Tri-State's NPDES Permit, page 3 of 12;**
- (F) Implementation of the new Ground Water Monitoring System shall be completed in accord with the Court Ordered OEPA Approved Closure Plan; however, **in no event, shall said implementation**

be delayed beyond nine (9) months from the date of this Entry.

- (G) The original requirements which Defendants were bound to compile, were detailed in the PTI No. 17-307 (**PX 30**), the plans approved by the PTI (**PX 31**) and the NPDES Permit (**PX 34**). In the event contamination is found in the Site ground water, Defendant shall take corrective measures to address the contamination, which measures shall otherwise be subject to the written approval of the OEPA. (**Goff T., pp. 295-296; Jacobs T., pp. 389-396; PX 30 and 36**) The policy guidance that shall be followed in preparing an approvable ground water monitoring plan is said forth in Ohio EPA Policy No. GD 0303.010 (**Jacobs T., pp. 390-392; PX 36**).
- (H) The Court specifically finds that new or revised OEPA guidance must be applied in the event a modification for approved plans is sought or if the treatment system has been destroyed and/or non-operational and must be re-established. (**Jacobs T., pp. 451-452**) Therefore, in the event Defendants propose to modify the approved closure, the current closure guidance shall implement the PTI requirements to ensure proper closure. (**Goff T., pp. 303-308**) Further, since the Court has found that the approved Ground Water Monitoring System has been destroyed and/or is non-operational, the current ground monitoring guidance will assure that the PTI requirement for adequate ground water monitoring will be implemented. (**Jacobs T., pp. 389 and 451-452**)

CIVIL PENALTY

V. **It is hereby Ordered, Adjudged and Decreed** that Defendant, **Tri-State Group Inc.** and/or its respective subsidiaries, affiliates, assigns, officers, directors, and/or successors in interest, and Defendant, **Glenn Straub**, an individual, are jointly and severally liable, in accord with R.C. §6111.09 (A) for an appropriate, reasonable and necessary civil penalty in the amount of **\$362,185.00**, with interest to accrue at **10%** from the date of this Judgment Entry. All costs of these proceedings are assessed to Defendants, **Tri-State Group, Inc.** and **Glenn Straub**, an individual, jointly and

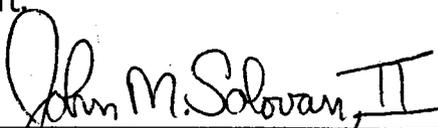
severally. In the event said Defendants, immediately and "in good faith", comply with the Court Ordered OEPA Approved Closure of the Site and the implementation of the Ground Water Monitoring System within the time-frames imposed by this Entry, the "per diem" penalty shall not continue to accrue from the date of Judgment to the completion of Closure. However, the civil penalty imposed by this Entry (**\$362,185.00**) shall be paid in full and interest, assessed at the statutory rate of 10%, shall continue to accrue on the civil penalty until paid in full. Further, in the event said Defendants fail to comply with the Order of this Court pertaining to the Court Ordered OEPA Approved Closure Plan and the installation and maintenance of a Ground Water Monitoring System, then and in that event, the Civil Penalty shall continue to accrue from the date of this Judgment Entry, with interest thereon at the statutory rate.

The parties are directed to Findings of Fact and Conclusions of Law in support of the Court's Decision, filed at or about the same date of this Judgment Entry.

In accord with the Findings of Fact and Conclusions of Law, as they relate to Defendant, Glenn Straub, individually, the Court hereby Withdraws its Notice of Intention to Proceed in Contempt Against Defendant, Glenn Straub, individually, due to the finding of the Court that said Defendant's failure to provide materials in discovery does not impact upon this Court's decision.

All subject to further Order of the Court.

Dated: **September 2, 2003**


JOHN M. SOLOVAN, II - JUDGE

pc: Timothy J Kern, Atty./Pl.
Larry A Zink, Atty./Def.

STATE OF OHIO, COUNTY OF BELMONT
COURT OF COMMON PLEAS

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COMMON PLEAS COURT
BELMONT CO., OH

2003 SEP 2 AM 10 56

STATE OF OHIO, ex rel.,

Plaintiff

Vs.

TRI-STATE GROUP INC., et al.,

Defendant

Case No.: 00 CV 0180

RANDY L. MARPLE
CLERK OF COURT

**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

FINDINGS OF FACT

(1) Tri-State group, Inc. is a validly existing, but non-operating, Ohio Corporation with its principal place of business at 56290 Dillies Bottom Road, Shadyside, Ohio 43967. (**Plaintiff's Complaint ¶3; Straub T., pp. 564-565**)

(2) On May 30, 1985, Defendant, Tri-State, obtained a Permit to Install (PTI) a flyash facility. The Site was designed to be developed in phases to reach a maximum capacity of one million tons of flyash, or 711 cubic yards. On December 12, 1985, the OEPA also issued a National Pollutant Discharge Elimination System (NPDES) Permit. (**Straub T., pp. 726-730; PX 30, 34**)

(3) Due to the premature closing of the Site, the size of the area where flyash has been actually deposited is approximately two (2) acres of the total twenty-two (22) to thirty (30) acre Site. Approximately ninety thousand (90,000) tons of flyash has been deposited on the Site. Tri-State acquired flyash from Ohio Edison during 1985 and 1986. (**Straub T., pp. 749-752**)

(4) In accord with the previous findings of this Court, violations of any Order, Rule, Term or Condition of a Permit issued or adopted by the Director of Environmental Protection constitutes a violation or failure to perform a duty and is, therefore, contrary to **R.C. §6111.07 (A)**. (**Judgment Entry, filed February 19, 2002, p. 2**)

(5) The wastewater treatment system at the flyash disposal Site has continuously been in violation of the requirements of Tri-State's PTI and NPDES Permit since November, 1988, and the ground water monitoring system has also continuously been in violation of Tri-State's PTI and NPDES Permit since November, 1988. **(Judgment Entry, filed February 19, 2002, pp. 2-4)**

(6) Personal observations at the Site on June 4, 2002, by Plaintiff's experts, Ohio EPA Inspector, Abbot Stevenson, and Ohio EPA Hydrogeologist, Jane Jacobs, and the most recent review and analysis of monthly operating reports by Ms. Stevenson, established that the permit violations continue unabated through the time of the Trial. **(Stevenson T., pp. 127-130; Jacobs T., pp. 383-390; Joint Ex. 1)**

(7) Regarding the issue of termination of Site operations, Defendants admitted in their October 22, 1992 letter to Ohio EPA that the flyash disposal Site has not received any flyash since 1987. Trial testimony confirmed this admission. **(Kiral T., p. 54; PX 11; DX 18)**

(8) Since the cessation of waste disposal at the Site, Defendants, Tri-State and Straub, have deviated from the approved plans of the PTI Permit without the express, written approval of the OEPA contrary to the terms of the PTI **(PX 30, p. 2)**, and said Defendants have failed to maintain in good working order and operate as efficiently as possible all treatment or control facilities or systems installed, contrary to the terms of their NPDES Permit No. OIN 00107 *AD. **(PX 34, p. 7)** The violations relate to the treatment system and ground water monitoring system, each of which systems were not properly operated and monitored. **(Kiral T., pp. 35, 44-49, 53, and 107; Stevenson T., pp. 135-137, 167-170, 172-173, 178-180, 183-189, 204-205, 216-217, and 236-237; Lecznar T., pp. 245-247, 271, and 274; Straub T., p. 748; PX 7, 9, 21, 22, 23, 27, and 28)**

(9) Eugene Kiral, an employee of Ohio River Sand and Gravel, was the Site operations manager between 1982 and 1994. Mr. Kiral never worked for Tri-State **(Kiral T. pp. 26, 31, and 52; Straub T., pp. 579-580)** Although Mr. Kiral was directed by Defendant, Straub, to oversee Site operations **(Kiral T., pp. 34-35; Straub T., pp. 745-746)**, Mr. Kiral failed to read the construction plans during

construction and cannot recall if he ever read them during his involvement at the Site and had a very limited understanding of the requirements of the PTI and the NPDES Permits. (**Kiral T., pp. 32 and 53; Straub T., pp. 745-746**) As operation manager Mr. Kiral oversaw the flyash Site and made sure that everything was placed properly and that there was no fugitive dust (**Kiral T., pp. 33 and 52**) and he was the contact person with the Ohio EPA regarding the flyash Site. (**Kiral T., pp. 36 and 53**); however, Mr. Kiral never had any authority to expend money for operations and/or repairs at the Site. (**Kiral T., pp. 40 and 92-93**)

(10) In 1996, after the sale of the assets of Tri-State, the corporation became a non-operating company (**Straub T., pp. 564-565; PX 23 and 41**), and the only other persons having any involvement with Site issues, besides Defendant, Straub, were Brian Mowder, Carl Potts and Mike Waldo, all of whom are employed by other Straub companies. (**Straub T., pp. 556-557; Waldo T., pp. 680-681**) Waldo, a self-proclaimed troubleshooter or problem fixer (**T. p. 680**) admitted he had no experience pertaining to compliance issues for a flyash disposal Site. (**T. p. 708**) Yet Waldo, upon conferring with Defendant, Straub, (**T. pp. 709-712**) performed repairs at the Site (**T. p. 685-688**) and met with OEPA officials at the Site. (**T. pp. 688-691**) The testimony of OEPA inspector, Stevenson, establishes that Tri-State never had anyone at the Site with knowledge or experience pertaining to compliance with environmental regulations and/or Permit requirements. (**Stevenson T., pp. 188-189**)

Site Closure Plan

(11) The flyash Site is located in Dillies Bottom, along S.R. 7 in Section 35 of Mead Township, Belmont County, Ohio. The Site consists of a low-lying area just north of the active sand and gravel pit operated by Ohio River Sand and Gravel Inc. adjacent to the Ohio River. Acid mine drainage was noted entering this system at a seep zone near S.R. 7 near the northwestern end of the Site. The geology of the Site consists of relatively thick deposits of glacial outwash sand and gravel overlain by variable

thicknesses of alluvial silt. Thicknesses of overlying clay and sandy clay deposits range from zero to thirty-six feet. **The sands and gravels underlying the Site are among the state's most productive aquifers.** The wells at the adjacent Ohio Edison Burger Plant produce 400 to 500 gallons of water per minute. Large municipal and industrial wells can be expected to yield as much as 1000 gallons of water per minute or more in such areas. Due to the apparent acid mine drainage/coal run off noted at and near the Site, acid conditions are probable. **This environment would tend to mobilize any of the available heavy metals present in the flyash. (PX 44)**

(12) The Court adopts the opinion of Plaintiff's expert hydrogeologist, Ms. Jacobs, who testified that the ground water at the Site is "an exceptional source of drinking water." (**Jacobs T., pp. 374-375; PX 44**)

(13) Plaintiff's expert, Mr. Goff, an environmental engineer, is responsible for authorizing Permits for all flyash disposal Sites and other water pollution Sites for the area that encompasses OEPA's Southeast District Office. The Court adopts his expert opinion and finds that the Site, as it now exists, constitutes a threat to ground waters and must, therefore, be closed in accord with the procedure said forth in the PTI. (**Goff T., pp. 283; 289-291**)

(14) Defendants, Tri-State and Straub, clearly understood the standards upon which the Permit requirements were based. Defendant, Straub, who admitted his involvement in the construction phase, wrote "I feel this Site will meet with your **geological requirements** for such a Site." (**PX 5**) Further, Defendant's consultant, at Section 5.0 of the Construction and Operation Plan, states "The design of the Tri-State Asphalt Landfill incorporates state-of-the-art measures for protection of the environment that meet or exceed current O.E.P.A. criteria." (**PX 31**)

(15) In accord with the testimony of Mr. Goff, the Court finds the necessary closure requirements for this Site must be embodied in a closure plan prepared and submitted by a professional engineer. (**Goff T., pp. 292-203**)

(16) The Court further finds the necessary requirements for a closure plan for the Site are as follows:

- (A) Preparation of disposal Site for, and installation or placement of, a 20-mil CPE (polyethylene) liner; to be placed over all flyash deposits at the Site;
- (B) Provision for detailed engineering specifications, quality control, and quality assurances, setting forth that the liner will be installed properly and meet all liner specifications;
- (C) Provision of detailed specifications for installation of the soil cover, fully describing the type of material and its source;
- (D) Provision of detailed specifications for the installation of a vegetative cover, fully describing the type of vegetative cover as well as the procedure for the installation of the vegetative cover, such as seeding rates and fertilizer rates;
- (E) Submittal of a post closure plan to assure proper installation and growth of the vegetative cover;
- (F) Submittal of a proposal (which must be approved by OEPA) for erosion controls;
- (G) Submittal of a proposal (which must be approved by OEPA) for leachate controls;
- (H) Re-establishment of the ground monitoring system and replacement of destroyed and/or non-functioning wells (the final configuration and amount of wells to be approved by OEPA upon hydrogeologic evaluation);
- (I) Imposition of deed restriction to control use of property for industrial purposes only; and
- (J) Provision for extensive testing at the Site of the existing treatment pond, and, if tests reveal the presence of leachate exceeding 30 times the levels specified in **Rule 3745-81-11 (B)**, for the Parameters of Arsenic, Barium, Cadmium, Chromium, Lead, Mercury and/or Selenium, then and in that event, the existing treatment pond shall be dug up and the pond material and pond liner to be placed on the area of the Site to be closed, or to be properly disposed at a solid waste landfill. (**Goff T., pp. 292-303; Px 32, Policy No. 4.07**)

(17) Upon implementing closure of Tri-State's PTI, any approved closure plan must include the above-stated ten (10) requirements (A thru J) and must provide for implementation of the previously approved cap specifications e.g., the twenty-mil C.P.E. liner. (PX 31, Page 6, Section 4.0; Goff T., pp. 292-303) In the event Defendant, Tri-State, would chose to modify the OEPA approved closure, said Defendant must submit an appropriate written amendment to its PTI for a closure plan, which addresses the ten (10) requirements listed above as part of a new PTI application for approval by the director of the OPEA. (Goff T., pp. 303-308; PX 30, Page 2 of PTI 17-307) The policy guidance which must be followed in preparing an approvable, modified closure plan is set forth in Ohio OPEA Policy No. 407. (Goff T., pp. 307-308; PX 32) The OEPA approved closure plan or PTI application seeking modification must be submitted to the Ohio EPA's Southeast District Office within six (6) months from the date of this Entry, and Defendants must implement the Closure of the Site in accord with the ten (10) requirements within one (1) year of the date of the Judgment Entry herein or six (6) months from written approval by the OEPA in the event Defendants seek and acquire a PTI modification, but in no event beyond one (1) year from the date of the Judgment Entry, and a report from a professional engineer certifying the work, must be submitted immediately after the closure work has been completed. (Goff T., pp. 296-299)

Ground Monitoring System

(18) A Ground Water Monitoring System "constructed in strict accordance with the plans" and then properly maintained and monitored for contaminants is required by Tri-State's PTI and NPDES Permits. (PX 30, Section 5.0 of Construction and Operation Plan; PX 31, Page 2 of PTI No. 17-307 and Page 5 of Report of Application for Permit to Install; PX 34, Pages 3, 5, and 7, Part III, Item 3 A of NPDES Permit; February 19, 2002 Judgment Entry, Pages 3-4)

(19) Re-establishment of the Ground Water Monitoring System at the Site and subsequent, proper monitoring for contaminants in the flyash is necessary and appropriate to protect one of the State's most productive, but extremely vulnerable, aquifers. **(Jacobs T., pp. 376-377; SX 44 and 45)** In accord with previous findings contained in this Court's judgment entry February 19, 2002, and based upon the testimony of Plaintiff's expert, Ms. Jacobs, the Court finds that the entire Ground Water Monitoring System at the Site is inadequate. **(February 19, 2002 Judgment Entry, pages 2-3; Jacobs T., pp 382-384 and 387-388; Joint Exhibit 1; PX 32; PX 44; PX 45)** This is based upon the fact that not only are three (3) of the six (6) monitoring wells either destroyed (**Wells Nos. 4 and 5**) or blocked (**Well No. 2**) but the remaining three (3) wells are not being properly monitored and/or maintained. **(February 19, 2002 Judgment Entry, pages 2-3; Stevenson T., p. 130; Jacobs T., p. 387)**

(20) Concerning the issue of invalid sampling results from presently-existing wells, which resulted from the decision of Defendant to prematurely close the Site in 1989, as well as the landslide (**wash-out**) in 1987 (**wiping out well number five (5)**), the Court finds that the presently-existing monitoring wells are not close enough to the area of waste placement, and thus, the monitoring results do not accurately report whether the wastes at the Site are polluting the ground water. **(Jacobs T., pp. 372, 383-384, 407-408, 423-425, and 445; Joint Ex. 1)** Further, the Court finds that upgradient well number one (1) was never properly positioned as required by the PTI. **(Jacobs T., p. 388; Joint Exhibit 1)**

(21) In view of the previous findings of this Court contained in its Judgment Entries for Summary Judgment dated February 8, 2002 and February 19, 2002, and the previous Findings of Fact herein, and in accord with the testimony of Plaintiff's expert, Ms. Jacobs, the Court finds that the necessary requirements to be carried out by a qualified ground water expert to re-establish the Ground Water Monitoring System at the Site are, as follows:

- (A) Completion of a hydrogeological investigation report at the Site by a qualified hydrogeologist within ninety (90) days of the date of this Entry;
- (B) Based upon the results of the hydrogeologic investigation report, a ground water monitoring plan for the Site shall be prepared and submitted to the Southeast District Office within six (6) months of the date of the Court's Judgment Entry and shall be incorporated as part of Defendant's Site Closure Plan;
- (C) The proposed ground water monitoring plan shall include the proposed number of wells necessary to monitor the Site, an assessment outline, and a sampling analysis plan;
- (D) In order to obtain the required baseline data, ground water sampling shall be required for five (5) years from the date of the Site Closure Plan is approved, to be monitored quarterly for the first year and semiannually thereafter;
- (E) The parameters of contaminants that must be sampled are set forth in **Tri-State's NPDES Permit, page 3 of 12**;
- (F) Implementation of the new Ground Water Monitoring System shall be completed in accord with the OEPA Approved Site Closure Plan, but in no event, shall said implementation be delayed beyond nine (9) months from the date of this Entry;
- (G) The original reporting requirements which Defendants are bound to compile, are detailed in the PTI No. 17-307 (**PX 30**), the plans approved by the PTI (**PX 31**) and the NPDES Permit (**PX 34**). Such reporting data remain as requirements under the PTI and NPDES Permits. In the event contamination is found in the Site ground water, Defendant shall take corrective measures to address the contamination, which measures shall otherwise be subject to the written approval of the OEPA. (**Goff T., pp. 295-296; Jacobs T., pp. 389-396; PX 30 and 36**) The policy guidance that shall be followed in preparing an approvable ground water monitoring plan is set forth in Ohio EPA Policy No. GD 0303.010 (**Jacobs T., pp. 390-392; PX 36**).
- (H) The Court specifically finds that new or revised OEPA guidance must be applied in the event a modification for approved plans is sought because the treatment system has been destroyed and/or non-operational and must be re-established. (**Jacobs T., pp. 451-**

452) Therefore, in the event Defendants propose to modify the approved closure, the current closure guidance shall implement the PTI requirements to ensure proper closure. (**Goff T., pp. 303-308**) Further, since the Court has found that the approved Ground Water Monitoring System has been destroyed and/or is non-operational, the current ground monitoring guidance will assure that the PTI requirement for an adequate ground water monitoring will be implemented. (**Jacobs T., pp. 389 and 451-452**)

(22) So as to clarify the record as to the bases for this Court's findings of the appropriate manner in which closure of the Site should occur, the Court finds that Defendants' proposals to address Site closure were provided by two (2) witnesses, Defendant, Glenn Straub, and Mike Waldo, each of whom admittedly, have no expertise as to the necessary requirements to properly "close" a flyash waste disposal Site. (**Waldo T., pp. 705-708, 712, and 716-717; Straub T., pp. 785-789**) Defendant, Straub, when asked during his testimony whether he would be willing to submit his proposal in the form of a PTI application subject to review by the OEPA and issuance or denial by the director, would not make a commitment. (**Straub T., pp. 814-816**) This Court cannot allow Defendants' delay and defiance of OEPA regulations and the requirements of PTI and NPDES Permits to continue, when said Defendants have no expertise to address the potentially serious ground water problem their Site poses to the aquifer immediately below the Site.

Appropriate Civil Penalty

(23) As previously determined by this Court in its February 19, 2002 Judgment Entry, the Plaintiff has proven the violations against Defendant, Tri State, as such appear in Counts I through III of the Complaint (**February 19, 2002 Judgment Entry, pages 1-7**). Said findings of violations were confirmed by the evidence presented in the Trial of this matter. In accord with the findings of the Summary Judgment decision, and as evidenced at Trial, the violations contained in Count I, pertaining to the treatment system and the violations contained in Count II, pertaining

to the Ground Water Monitoring System, were first committed in November, 1988 and continue up to the date of Trial and through the date of this Entry. (**February 19, 2002 Judgment Entry pages 2-4; testimony evoked at Trial**) The evidence is clear and convincing that said violations have continued unabated from 1988 to the present. At the time of this Entry, the violations, as set forth in Counts I, II, and III of the Complaint, constituted, at least, 10,706 days of violations. (**Stevenson T., pp. 127-130; Jacobs T., pp. 383-388; Joint Exhibit 1; PX 30; PX 34**)

(24) As previously stated in **Findings of Fact, Paragraph 11**, the evidence establishes that the flyash Site is situated upon one of the state's most productive aquifers (drinking water resource). Due to the lack of significant clay fraction, combined with acidic oil conditions from mine acid drainage, the aquifer is extremely susceptible to contamination from the heavy metals contained in the flyash leachate and has no natural protection without utilizing the best possible engineering controls. (**PX 44, 45, 46; Stevenson T., pp. 166-167; Goff T., pp. 290-291; Jacobs T., pp. 374-377**)

(25) While Defendants repeatedly assert, as defenses, (1) no direct evidence of actual environmental contamination at the Site (**Stevenson T., pp. 213 and 214; 229; Lecznar T., p. 258; Goff T., p. 314; Jacobs T., p. 572; Straub T., p. 801**); (2) that other flyash Sites and/or gob piles were closed in a different manner (**Kiral T., p. 79; Stevenson T., p. 200**); and (3) that flyash is a non-toxic and non-hazardous substance (**Goff T., pp. 328 and 329**), the Court finds, by clear and convincing evidence, that Defendants, Tri-State and Straub, were aware of the necessity to utilize the best possible engineering controls to avoid contamination of the aquifer from the heavy metals contained in the flyash leachate due to the fragile nature of the Site. (**See Findings of Fact, Paragraphs 11, 12 and 13**) In addition, previous findings, time and again, establish Defendants' knowledge of the risk of harm to the aquifer, their intentional delay and/or diversion from correcting the environmental problems at the Site by offering unexpert, non-complying measures that did not meet the Statutory Requirements, Environmental Regulations and/or requirements of their respective PTI

and NPDES Permits (**See Summary Judgment Entries and Previous Findings of Fact**)

(26) Defendants clearly understood the standards (**Ground Water Protection Criteria**) upon which the Permit requirements were based. (**PX 31, p. 1, ¶ 1.0**) Straub admitted that he was involved in the geological issues at the Site and that he was aware of the citizens' concerns about their ground water and that is why they had a public meeting in 1983. (**Straub T., pp. 65-66**) Further, in Defendants' request on July 25, 1990 to use the flyash as road base, said Defendants provided a diagram showing that the flyash would be encapsulated and stated that, "extreme caution will be taken so as to avoid use of the flyash products in areas where it could get into rivers, creeks, or wells." (**Stevenson T., pp. 170-171 and 238-239; Goff T., p. 346; PX 46**) In addition, Defendants' consultant, in the Final Report submitted to the OEPA, determined that the flyash disposed at the Site would generate significant amounts of leachate. (**Jacobs T., pp. 379-382; PX 31: Hydrologic and Hydraulic Computations Section**)

(27) The Site liner, leachate collection system, and Ground Water Monitoring System were required to be operated in strict compliance with the PTI (**no deviation from approved plans**) and NPDES ("**shall maintain in good working order-shall effectively monitor**") Permits. (**PX 30, Page 2 of PTI No. 17-307; PX 34, Page 7, Part III, Item 3 (A) of NPDES Permit; T. Stevenson pp. 187-189; February 19, 2002 Judgment Entry, Pages 2-4**)

(28) As previously found in the Court's Summary Judgment decision, since 1988 the necessary treatment and monitoring facilities and systems at the flyash disposal Site have been damaged, have not been maintained in good working order, have not been operated efficiently, have failed to achieve compliance with the terms and conditions of the respective Permits, and have been left in a state of disrepair. (**Judgment Entry February 19, 2002; Kiral T., pp. 35, 46, 53, and 107; Stevenson T., pp. 135-137, 167-170, 172-173, 178-180, 183-189, 204-205, 216-217, and 236-237; Lecznar T., pp. 245-247, 271, and 274; Straub T., p. 748; PX 7, 9, 21, 22, 23, 27, 28, 30, and 34**)

(29) The evidence establishes that Defendants' Ground Water Monitoring System began to deteriorate in November 1988 when well number five (5), the one well closest to the disposed waste, was destroyed by a landslide (**wash-out**). (**Stevenson T., p. 130; Jacobs T., pp. 384 and 417; Joint Exhibit 1; DX 15; February 19, 2002 Judgment Entry, Page 4**) Further, since November 1988, two (2) other downgradient wells have been destroyed or blocked and the remaining three wells presently have no caps and, thus, are not being properly maintained. (**Stevenson p. 130; Jacobs T., pp. 384, 387, 423; Joint Exhibit 1; February 19, 2002 Judgment Entry, Page 4**) The monitoring data submitted from these existing wells is influenced by rainwater and is, therefore, is invalid. (**Jacobs T., p. 387**)

(30) Since no flyash waste has been disposed at the Site since 1987, the flyash waste at the Site has not been disposed in accord with the requirements contained in Defendants' PTI application. (**Kiral T., p. 54; Jacobs T., pp. 383-388 and 408; Joint Ex. 1; PX 30, Report on Application for Permit to Install, Page 2; PX 11, DX 18**) As a result of Defendants' decision to prematurely stop receiving flyash in 1987, and in view of the wash-out in 1987, as well as Defendants' failure to maintain existing wells in good working order, the present location of the existing wells is not close enough to the disposed wastes to properly monitor for contamination. (**Jacobs T., pp. 372, 383-384, 407, 423-425, and 445; Joint Ex. 1**)

(31) **Therefore, whether the aquifer is contaminated is unknown and can not be determined until Defendants re-establish a modified ground water monitoring system, which will properly monitor the wells, which modification requires the installation of additional facilities in accord with the written approval and/orders of OEPA. (Jacobs T., pp. 393-396; PX 30; PX 34)**

(32) Although Plaintiff's expert, OEPA hydrogeologist, Jane Jacobs, testified that on at least two different occasions the submitted monitoring well data has reported a contamination concern (following 1986, four quarters of increased trends of mineralization) (**Jacobs T., pp. 378-379, 417-419, and 566-574; PX 44, 45, 46, and DX 2**), she also admitted that she did not have scientific data to support her assumption that the landfill was properly leaking. (**Jacobs T., p. 572**) However, in

responding to Defendants cross-examination pertaining to direct evidence of actual harm, non-toxic characterization of flyash and/or other defenses (**Jacobs T., pp. 396-450**), she did not change her expert opinion as to the need to re-establish the Ground Water Monitoring System due to the present conditions at the Site. (**Jacobs T., pp. 452-453**) Although no actual environmental harm has been proven, the evidence supports the re-establishment of the Ground Water Monitoring System in view of the violations of Permits (**Judgment Entry February 19, 2002**), the fragile geological conditions at the Site, including the acidic soil, combined with the present lack of the best possible engineering controls, thus creating the potential risk of harm to one of the state's most productive aquifers and the potential resulting harm to the drinking water of residents in that area. (**PX 30, 31, 44, 45**)

Recalcitrance/Indifference

(33) By letter dated February 1, 1989 and mailed directly to Defendant, Glenn Straub, OEPA advised that immediate efforts were needed to correct the treatment system failures caused by the wash-out and that the failure to correct the violations would result in heightened enforcement action by OEPA. (**Attachment 10 in State's Summary Judgment Motion and Affidavit of Ohio EPA Inspector Steve Lind**) In response to OEPA's February 1, 1989 notice of violation letter, Defendant, Straub, without written approval from OEPA, authorized a temporary repair to the treatment system (**installation of storage tank and attempts at repair - seal breaks and correct sags in conveyance pipe**) by Mike Waldo, Mr. Straub's troubleshooter, who was not employed by Tri-State and who admitted that he had no knowledge of the PTI and NPDES Permit requirements for a flyash disposal Site. (**February 19, 2002 Judgment Entry, page 3; Kiral T., pp. 44-49; Stevenson T., pp. 137, 169, 178, 187-189, and 236-237; Straub T., pp. 606-608**) Straub, who, based on his knowledge of the PTI (**admitted knowledge of construction of Site and named as responsible person to contact on the PTI, at Page 2, PX 30**), knew or should have known of the procedure for modification, as such is set forth in the PTI and

NPDES Permits. Further, Defendant, Straub, should have provided the necessary expertise (qualified operator) to maintain the facilities and system in good working order and operating as efficiently as possible to achieve compliance with the terms and conditions of the Permits. Instead, he authorized Mike Waldo, his troubleshooter (non-Tri-State employee), who also had no knowledge of the requirements of the PTI and NPDES Permits, and/or of the procedure for modification set forth in the Permit, and who testified that he attempted to repair the conveyance pipe continuously since 1989. **(Waldo T., pp. 682-686)**

(34) The actions of Defendant, Straub, constitute a reckless disregard for the terms of the Permit and a knowingly inadequate response to the continuing violations at the Site. This all occurred despite the fact that, as evidenced by financial documentation, Defendant, Tri-State, retained millions of dollars of unencumbered money and other assets, which could have been used to repair the Site until its sale in 1996. Ultimately, Defendant, Straub, would subsequently distribute a large portion of the monies to himself and/or his daughters as management fees and/or provide for loans of said monies without interest to his other companies. **(Snyder T., pp. 466-479 and 489; Straub T., pp. 624-642, 648-661, and 668-671; PX 30, 34, 37, 38, 39, 40, and 41)**

(35) After an April 24, 1991 inspection, Abbot Stevenson, an Environmental Engineer in the OEPA Enforcement and Compliance Section again advised Defendant, Straub, in a letter dated May 28, 1991, that the previous violations at the Site had not been corrected and that enforcement action would be initiated unless compliance was attained. As stated on page 2 of the letter, OEPA offered Defendants an opportunity to informally resolve the violations and avoid an enforcement action. **(Stevenson T., pp. 167-169; PX 7)** Defendants responded to the April 24, 1991 inspection letter by a letter, dated August 27, 1991, stating their intention to remove the flyash for use on an ODOT road project **(Stevenson T., pp. 169-171; PX 8)** The first paragraph of said letter evidences Defendants' blatant disregard for their obligations under their respective Permits. The emergency had passed **(wash-out in November 1988)**; yet, two and one half years later, Defendants had continued to use the temporary use

system, which was not approved in writing by the OEPA, in direct violation of Tri-State's PTI and NPDES Permits. In one (1) month's time, OEPA had approved the beneficial use project for the flyash. **(PX 8 and 46; Straub T., pp. 808-812)** However, though OEPA approval was obtained, Defendant, Straub, admitted that the flyash from the Site was never used for the roadway project, while he sought to shift the blame to OEPA and to Ohio Edison. **(Straub T., pp. 777-781)** For whatever reasons, Defendants chose to leave the Site abandoned and made no effort to maintain it in good working order and efficiently operate facilities and systems installed and/or to correct the continuing violations in accord with the terms of their respective Permits. **(February 19, 2002 Judgment Entry, Page 3; Kiral T., pp. 35, 44-49, 53, and 107; Stevenson T., pp. 135-137, 167-170, 172-173, 178-180, 183-189, 204-205, 216-217, 236-237; Lecznar T., pp. 245-247, 271, 274; Straub T., p. 748; PX 7, 9, 21, 22, 23, 27, 28, 30, 31 and 34)**

(36) In October 1992, proposed Director's Findings and Orders were submitted. **(PX 10 and 12; Stevenson T., pp. 173-174)** Defendants responded to the proposed Director's Orders by claiming that they had no notice of the violations and by threatening to take legal actions against the OEPA **(Stevenson T., pp. 174-175; PX 11; DX 18)** OEPA referred the matter to the Ohio Attorney General in November 12, 1992 **(Stevenson T., p. 175; PX 13)** From the date of the November 1992 referral to the Ohio Attorney General through November, 2000, the OEPA has made repeated efforts to resolve this matter in accord with a proposed consent order before the filing of a lawsuit. **(Stevenson T., pp. 176-189, 203-205, 237; Lecznar T., pp. 271 and 274; PX 15, 17, 18, and 24)** Despite enforcement efforts, Defendants refused to attempt to resolve the violations **(Stevenson T., pp. 187-188)**

(37) In November 2000, Defendant, Straub, finally agreed to meet face to face with the State to discuss the enforcement action. **(Lecznar T., pp. 247-248; PX 29)** Counsel from the Ohio Attorney General's office and OEPA employees came to St. Clairsville to discuss the issues with Defendant, Straub. **(Lecznar T., pp. 249 and 252-253)** Straub, after hearing Plaintiff's proposals, stated that he had nothing to discuss and walked out of the meeting. **(Lecznar T., pp. 249 and 252-253)**

(38) After November 2000, the state continued its attempts to resolve the issues in accord with a proposed consent order and continued to respond to issues raised by Defendant, Straub. **(PX 25 and 26 Admitted for the Limited Purpose of Establishing Defendants Knowledge of Plaintiffs Attempt to Resolve)**

(39) The Court finds that Defendants have deviated from the approved plans set forth in their PTI; have installed additional facilities, storage tank and conveyance pipe without written OEPA approval contrary to the terms of their PTI Permit; have failed to maintain in good working order and operate as efficiently as possible all treatment or control facilities or systems installed to achieve compliance with the terms and conditions of their NPDES Permit; and have refused to return the flyash disposal Site to OEPA compliance. **(Kiral T., pp. 35, 44-49, 53, and 107; Stevenson T., pp. 135-137, 167-170, 172-173, 178-180, 183-189, 204-205, 216-217, and 236-237; Lecznar T., pp. 245-247, 271, and 274; Straub T., p. 748; PX 7, 9, 21, 22, 23, 27, 28, 30, and 34; February 19, 2001 Judgment Entry Pages 2-4)**

(40) Based on the limited financial documentation **(Px. 37, 38, 39, 40 and 41)** provided to Plaintiffs by Defendants (Defendants' failure to provide documentation in discovery), the Court finds that Tri-State retained assets valued at millions of dollars, a percentage of which should have been used to return the flyash disposal Site to compliance. **(Snyder T., pp. 466-469; PX 37-38, 39, 40 and 41)** However limited, the financial documents demonstrate that, when the assets of Defendant, Tri-State, were sold in 1996 for 6.426 million dollars, the money was subsequently distributed to other Straub companies in the form of non-interest loans; to Defendant, Straub, personally as a shareholder of the company; and/or to the daughters of Glenn Straub in the form of significant management fees when the corporation that had no employees and was otherwise winding down its business affairs. **It is also interesting to note, at this juncture, that Defendant, Straub, who had promised to provide corporate minutes for the corporation, Tri-State Asphalt Corp., as well as the 1996 corporate tax return, in fact, failed to produce such documents and, while testifying, in this case, evaded, misstated and otherwise rendered testimony that lacks credibility as to why said documents were not produced.**

(Straub T. pp. 491-495; 619-629; 642-662) Even though the flyash Site has been in violation of environmental requirements for fourteen (14) years, eight (8) months, which violations pose a threat to one of Ohio's most prolific aquifers (drinking water resource), Defendant, Straub, rather than expend Tri-State's monies for necessary compliance at the Site, instead, through financial manipulation of his corporation, Tri-State, transferred over two million dollars of Tri-State's assets to himself and 1.9 million dollars in Tri-State's assets to his daughters under the guise of management fees. **(Slater T., pp. 465, 474-475, and 489; Straub T., pp. 624-642, 648-661, and 668-671; PX 37, 38, 39 and 40)**

(41) Straub's testimony, wherein he attempted to explain the 3.9 million dollars in distributions of Tri-State's assets to himself and his daughters as legitimate payments for corporate work performed for a corporation that, as of 1996, had no employees and was otherwise winding down its business affairs, is simply not credible. **(Straub T., 626-631 and 650-659)** Defendant, Straub, President, Chairman, CEO and 100 percent stockholder in Defendant, Tri-State, who executed the agreement to sell Tri-State in 1996 for 6.426 million dollars and who provided incorrect and evasive answers during discovery **(PX-43)**, also lacks credibility when he claims he did not know if he ever received the two million dollars transferred from Defendant, Tri-State. **(Straub T., pp. 632-636; PX 37, 41)** Further, in regard to the 1.9 million dollars of corporate assets distributed to his daughters, Defendant, Straub, testified that his daughters management company provided services for Tri-State. **(Straub T., pp. 626-631 and 650-659)** His daughters were receiving hundreds of thousands of dollars per year in the years after the assets of Tri-State were sold and after Tri-State ceased to be an operating company. **(Straub T., pp. 626-631 and 650-659; PX 21, 23, 37, 38, 39, 40 and 41)** In 1998, two (2) years after the assets of Tri-State were sold; the daughters' management company was paid seven hundred thousand dollars. **(Straub T., pp. 650-652; PX 41)**

(42) This Court finds, based upon the testimony of Plaintiff's Expert, Steven Snyder, as well as the **incredible testimony of Straub**, that Defendants, Tri-State and Glenn Straub, personally gained an economic benefit by their refusal to spend the

necessary compliance dollars after the violations began on a continuous basis in 1988. **(Snyder T., pp.459-460)** As stated by Plaintiff's Expert, a benefit is gained when the cost of a compliance requirement is delayed. **(Snyder T., pp.459-460)** If Defendants, at this time, expend the funds to assure necessary compliance in response to this Court's Injunctive Relief Order, a benefit has been gained by their intentions to delay of the cost of compliance for fourteen (14) years, eight (8) months. **(Snyder T., pp. 459-460)** When the assets of Tri-State were sold in 1996 for 6.426 million dollars, the Site had been abandoned for about eight years and proper "closure" of the Site, in accord with the PTI and NPDES Permits, including the reestablishment of the Ground Water Monitoring System, was still required. **(February 19, 2001 Judgment Entry, pages 2-4; PX 30; PX 34)** Instead of expending the assets gained from the sale, to assure compliance with its PTI and NPDES Permits, Defendant, Straub caused and personally manipulated Defendant, Tri-State, to transfer a significant portion, or all of the 6.4 million dollars, first to non-interest loans for his other businesses, distributions to himself and/or distributions to his daughters in the form of management fees. **(Snyder T., pp. 475-479; Straub T., pp. 668-671; PX 37, 38, 39, 40 and 41)**

(43) The evidence establishes that Defendant, Tri-State, was a solvent company in 1996 and, as represented by Defendant, continues as a solvent company with unencumbered assets. **(Snyder T., p. 468; PX 40)** Defendant, Tri-State, pays no employee wages; it has no employees; pays no officer salaries, as demonstrated on the federal tax return; and is a non-operating company, that has the luxury of gifting 2 million dollars to Defendant, Glenn Straub and 1.9 million dollars to his daughters during the time that serious environmental violations **(causing serious risk of harm to the drinking water of Belmont County)** were being committed. **(Snyder T., pp. 465, 469, 474-475, and 489; Straub T., pp. 562-565; 625-636 and 650-659; PX 21, 23, 37, 38, 39 and 40)** Tri-State's federal tax returns and the testimony of Defendant, Straub, and Eugene Kiral, establish that Straub had several other business interests. **(Kiral T., p. 79; Straub T., pp. 505, 518, 554-555, 618 and 637-639)**

Defendant, Glenn Straub, is Personally Liable.

(44) In its previous decision Overruling a Motion for Summary Judgment to Dismiss Defendant, Glenn Straub, personally, this Court found as follows: "Further, sufficient evidence exists, when viewed most favorable to Plaintiff, for the fact finder (Court) to reasonably infer that Defendant, Straub, in his capacity as a corporate officer and/or director of Defendant, Tri-State, participated, directed, collaborated or ratified alleged wrongful acts against Plaintiff. The disposal Site, itself, is not owned by Tri-State, but Ohio Sand and Gravel, Inc., a separate and distinct corporation owned one hundred percent (100%) by Defendant, Glenn Straub. It is uncontroverted that Straub was the person who controlled all the costs and fiscal decisions for Tri-State and that Straub had knowledge of OEPA violations and made a decision when a wash-out of the disposal Site occurred, to design and direct a temporary system without OEPA written approval." **(February 19, 2002 Judgment Entry, page 2; Straub Dep. T., Vol. 1, pp. 80, 89-90, 143-144, 259-260, 255-256; Kiral Dep. T., pp. 13-15, 27-28, 42, 70-72, 85-85, and 90-91)** In that same Summary Judgment Decision, in reference to the issue of Straub's personal control of Tri-State, this Court found "evidence exists of Straub's control of Tri-State's costs and corporate assets; the failure of Tri-State to conduct significant corporate meetings in the last fifteen (15) years; its failure to elect corporate officers; Straub's personal direction of employees from his other companies to do work at the disposal Site; ownership of the Site by Ohio Sand and Gravel, Inc., a company owned one hundred percent (100%) by Straub; as well as numerous admissions by Straub, himself, and his employees, Eugene Kiral and Michael Waldo, as to Straub's knowledge of operations at the Site from 1985 to the present." **(February 19, 2002 Judgment Entry, page 2; Straub Dep. T., Vol. 1, pp. 100-101, 109, 112-113, 117-121, 179-180, and 266 and Vol. 2, p. 47; Kiral Dep. T., pp. 9-15)**

(45) At Trial, the Court carefully considered the testimony of Eugene Kiral. Although Mr. Kiral was operations manager for Ohio Sand and Gravel, Inc., between

1982 and 1984 (**never Tri-State employee**), and oversaw the placement of flyash and dealt with OEPA, the evidence establishes that, though Kiral worked for another corporation, he took orders from Glenn Straub; that he did not participate in the issuance of PTI and NPDES Permits and that he had a limited understanding of them; that he supervised the Site because Straub gave him direction to be involved; that when he dealt with the OEPA he passed the information to Straub and that his responses to OEPA were with Straub's knowledge; that he assumed that Straub arranged for repairs at the Site; that only Straub authorized costs (**he researched it and assumed that Glenn made the decision**); that closure was discussed with Straub, who authorized it; and that the collection tank was installed pursuant to Straub's authority. (**Kiral T., pp. 25-84**)

(46) Mr. Kiral's testimony further established that he never met with any other Tri-State officer at the Site; that there were no other Tri-State employees at the Site and that he did not even know who was collecting the samples from the wells in spite of the fact that he was operations manager. (**Kiral T., pp. 107-108**)

(47) Mr. Kiral's testimony also established that, although he attended the public meeting for concerned citizens in the area, just to inform them as what would happen at that location, Straub led the discussion as to what was going to happen and fielded questions. (**Kiral T., pp. 30-32; PX 2 - admitted to establish knowledge of public meeting**)

(48) Michael Waldo, an employee of Burrell Industries (not Tri-State employee), who labeled himself a "troubleshooter, problem-fixer", conducted repairs at the Site without expertise concerning flyash Sites and without being involved in the preparation or having reviewed construction plans. (**Waldo T., pp. 680-708**) He also testified in regard to directions by Straub, by first admitting that he had made an inconsistent statement, but that, when called by Brian Mowder to come down to the Site, **he first went to Glenn Straub who told him to go down to the Site.** (**Waldo T., pp. 709-712**)

(49) The evidence at Trial establishes that Glenn Straub understood the geological requirements for such a Site (**PX 5**); that he understood potential liability

under his PTI Permit (**PX 7**); that he received notification from OEPA that Tri-State's NPDES Permit could not be renewed because the treatment system did not reflect the one approved in PTI Permit #17-307 and that the temporary system did not reflect the best available treatment technology (**PX 7**); that Mr. Straub was seeking other alternatives to closure through Andrew Turner, Chief, Division of Water Pollution Control (**PX 8**); that Mr. Kiral's response (**PX 11**) to Plaintiff's correspondence to Tri-State Asphalt Corporation, dated October 5, 1992, begins with the pronoun "I" but soon thereafter reverts to the pronoun "we", when describing the action taken at the Site to meet OEPA guidelines, which infers that others were involved when, in fact, Tri-State Asphalt had no employees other than its one (1) corporate officer and one hundred percent (100%) shareholder, Glenn Straub (**See PX 11 cc: Glenn F. Straub; see also DX 15, ¶1 "our desire to close"; Kiral T., pp. 93-94**); that on April 14, 1998, Straub admitted that there were no corporate officers at the Site and that he was the only officer (**PX 21**); that OEPA recognized Straub as the person to contact on its Permit to Install (PTI) (**PX 30, pp. 1 & 2**); and that Straub executed the Agreement to sell the assets of Tri-State Group Inc. as Chairman and C.E.O. of the company (**PX41**).

(50) Defendant, Straub, verified in his sworn affidavit that he had reviewed the discovery responses submitted to the State and that to the best of his knowledge the responses were true. (**PX 43, Verification Affidavit Attached; Straub T., pp. 491-494**) Based on Defendant, Straub's, testimony and his prior deposition testimony, the person listed in the discovery responses as the President of Tri-State, Robert Mullroy, from 1986 until the present, in fact, died in 1985. (**PX 43, p. 10; Straub T., pp. 494-502**) In the discovery responses, Defendant, Straub, claimed he was merely Tri-State's Vice-President from 1986 until the present. (**PX 43, p. 10**) Yet, in the 1996 Assets Sale Agreement, Glenn Straub signed the Agreement as Tri-State's Chairman and C.E.O.. (**PX 41, pp. 14 & 16; Straub T., pp. 520-522**)

(51) Defendant, Straub, in his Trial testimony, contradicts statements from his deposition establishing his control of Tri-State, his complete control of the costs and fiscal decisions that resulted in fourteen (14) years, eight (8) months of continuous violations (**Straub T., pp. 523-528, 543-546, and 591-596**). As an example, while

at Trial, Straub denies making "all financial statements - - financial decisions or the majority of financial decisions" (**Straub T., p. 525**), he admits, in his deposition, that he made the decision to spread out the asphalt grindings at the Site. (**Straub Dep. pp. 80-81**); at Trial, he subsequently denies that he made the asphalt grindings decision for the flyash pit. Instead, he offers that "he made the decision for Tri-State Asphalt on the highway job". (**Straub T., p. 528**) When asked the question "was it one of your duties as Vice-President of Tri-State Asphalt Corporation to make financial decisions for the company" he replied, "I can't answer that question, because I need to know the level of financial decisions." (**Straub T., p. 531**) Yet, this answer is also inconsistent with his deposition testimony (**Straub Dep., pp. 88-90**), as well as his subsequent testimony at Trial, wherein he suggested that he didn't understand the question as posed in the deposition. (**Straub T., p. 532**) He testified that fifty (50) people (without naming them) within his business organization can spend any amount of money without corporate oversight. (**Straub T., pp. 540-541**) When asked if there had been a meeting of corporate officers, he replied "yeah, I am sure a minute book shows every day." (**Straub T., p. 547**) Yet when the Court advised Mr. Straub that minute books requested in discovery had not been produced, he stated "if Larry doesn't have it, since he is the local lawyer around here, I would say Craig Galley has it in Florida. What year are we missing, sir, your honor?" (**Straub T., pp. 547-550**) Then, finally, in response to the question "and in the last ten (10) to fifteen (15) years, the officers of the company never met together in a single place?" Mr. Straub responded "I don't think that we ever physically met at one location for a board meeting." (**Straub T., p. 551**) Although Kiral testifies that he was directed by Straub to go to the Site, Straub denied telling him to work at the Site. He claimed that he was not Kiral's superior, but that he was one of the fifty (50) people Kiral answered to. He stated Kiral probably called him to answer questions, but that Kiral was otherwise incorrect in his testimony that he consulted with Straub. He testified, contrary to Kiral and his own deposition, that he did not authorize costs at the Site, although he admitted to looking at bills in regard to the temporary tank. He subsequently admitted to approving the bill for the placement of the storage tank. In spite of his deposition testimony, (**Straub**

Dep. Vol. 1, p. 60) wherein he admitted that the quantity of asphalt grindings could have covered the Site as deep as five (5) feet in one spot or one (1) foot in another, at Trial he denies that the asphalt grindings were placed on the Site, but rather insists that they were placed in the roadway to the Site. He claims that he never authorized the conveyance pipe to be repaired, but that Carl Potts did it without instructions from him. Yet, he subsequently testifies that "we hired a guy to fix the humps" (**Straub T., p. 611**) and then proceeds to testify regarding his detailed knowledge as to the different types of treatment pipe (**solid, perforated, flexible**) and the amounts of money needed for materials, thus demonstrating an intimate knowledge of this particular issue at the Site. (**Straub T., pp. 612-617**) He admits that the property where the Site is located is owned by Ohio River Sand and Gravel and that in 1985 he became one hundred percent (100%) owner of that company, but he denies one hundred percent (100%) ownership of the stock, claiming that he gave it to his wife through estate planning. Although promised on his first day of testimony that he would acquire the missing corporate minutes and the 1996 corporate tax return, his answer as to why it wasn't produced was "I have no idea." (It was at this juncture that the Court advised Mr. Straub that it intended, at a future date, to order him to appear to show cause why he should not be held in contempt for his failure to provide discovery and/or his otherwise cavalier answers as to why the records were not produced. The Court has reconsidered its decision to compel Defendant to "show cause" based upon its determination that such records would not necessarily bear upon the final decision of the Court.) He admitted that he had an understanding of the geological requirements of the Site, that he knew of the concerns of the public and that is why the public meeting was held, but he denied that the issue of ground water came up at the public meeting. (**Straub T., pp. 576-625**)

(52) On direct examination, Mr. Straub detailed an intimate knowledge of the construction process at the Site, demonstrating a comprehensive understanding of the engineering concepts, clearly pointing out the difference between the conveyance pipe outside of the Site (transporting leachate to the pond), which was to be under twelve inches (12") of dirt, as opposed to the perforated collector pipe underground at the

Site. He testified, with a straight face, that Kiral, without experience and/or knowledge of Permits, is responsible for the operations at the Site and that the corporate entity, Tri-State (without employees), simply disappears after construction, even though Tri-State continues to hold the Permits. He testified as to the precise tonnage of flyash actually placed on the Site from July 1985 through November 1988; as to the manner in which it was brought in, placed on the Site, compacted and he admitted to hiring people (not Tri-State employees) to compact the flyash. He testified as to the wash-out in November 1988 and how Carl Potts called Michael Waldo to bring the tanks down because Mr. Kiral was not around; how the repairs to the eight inch (8") black pipe only affected a few joints and that employees made the repairs. He testified as to Tri-State's plans in regard to the wash-out of the well and how "we" sent letters to the OEPA. He understood that the OEPA did not accept the proposal to cap the Site with twelve inches (12") of clay. His testimony, combined with **DX 16, PX 46, DX 17 and PX 7**, evidence his intimate knowledge of the water problems created by flyash contaminants. (**Straub T., pp. 720-783**)

(53) Straub, admitting that operations have ceased, testified as to Tri-State's desires in accomplishing a Closure of the Site. Without proclaiming himself an expert on OEPA Closures, Straub, by his own admissions, proclaims minimal Closure recommendations, as follows:

- (1) a concrete cap;
- (2) remove all vegetation from the top of where the flyash is;
- (3) grate the existing sand and gravel cap;
- (4) rototill and disk the Site area;
- (5) incorporate a cement treated flyash base;
- (6) provide a layer of dirt;
- (7) if its approved in theory at OEPA then go out and hire engineers;
- (8) provide a seal coat on the concrete cap;
- (9) the seal coat concrete cap would be mixed-in-place at the Site;
- (10) he also suggested that it was his position, based upon experience that no one needed to sign the monthly operating reports.

(Straub T., pp. 792-799)

(54) The evidence, including Tri-State's federal tax returns, the testimony of OEPA's economist, Steve Snyder, and Defendant, Straub, establish a complete and total domination by Straub of his corporations, including Ohio River Sand and Gravel, Tri-State Asphalt Corporation, Tri-State Group, Inc., Burrell Industries and/or other related corporate entities and their respective employees. **(Snyder T., pp. 466-469, 471-479 and 489; Straub T., pp. 624-642, 648-661, and 668-671; PX 37, 38, 39, 40, 41, 43; Summary Judgment Entries, dated February 19, 2002, wherein the Court made specific findings in regard to Mr. Straub on the issue of personal liability.)**

(55) The evidence at Trial re-affirms the decision of the Court in regard to the Motions for Summary Judgment. The evidence is clear and convincing that Defendant, Straub, in his capacity as a corporate officer and/or director of Defendant, Tri-State, and in his individual capacity, participated, directed, collaborated in and/or ratified the wrongful acts of Defendant, Tri-State, **(violations of R.C. §6111.07 (A))** against Plaintiff, thus creating a substantial risk of serious harm to the aquifer upon which the flyash Site is situated and causing potential risk of serious harm to the drinking water of Belmont County, Ohio. The disposal Site, itself, is not owned by Tri-State, but rather, Ohio Sand and Gravel, Inc., a separate and distinct corporation owned one hundred percent (100%) by Straub. Mr. Straub is also the one hundred percent (100%) owner of Defendant, Tri-State Asphalt Corp. and he has been and continues as President, Chairman of the Board, and Chief Executive Officer of Tri-State Group Inc., the successor corporation of Tri-State Asphalt Corporation. It is uncontroverted that Straub was the person who controlled all costs and fiscal decisions for Tri-State (even though he attempts to suggest fifty (50) other corporate officers have similar capability); that Straub had knowledge of the OEPA violations and made knowing decisions to design and direct a temporary system without OEPA written approval when the wash-out of the disposal Site occurred. Evidence further establishes Straub's control of Tri-State's costs and corporate assets; the failure to Tri-State to conduct significant corporate

meetings in the last fifteen (15) years; the absence of corporate records; the absence of the 1996 corporate tax return which Mr. Straub promised to provide in discovery; its failure to elect corporate officers; Straub's personal direction of employees from his other companies to do work at the disposal Site; the lack of Tri-State personnel at the disposal Site; the lack of expertise of those working at the Site in OEPA regulations, Permits, construction and/or operation; as well as numerous admissions by Straub, himself, and his employees, Eugene Kiral and Michael Waldo, as to Straub's knowledge of the operations at the Site from 1985 to the present. (**Summary Judgment Entry, filed February 19, 2002, Overruling Defendant, Straub's, Motion to Dismiss, page 2; Summary Judgment Entry, filed February 19, 2002, Sustaining Plaintiff's Motion for Summary Judgment, page 8; PX 37, 38, 39, 40, 41; Straub T., entire testimony including direct and cross-examination**)

(56) The 1997 through 2000 federal tax returns, which list Defendant, Straub, as one hundred percent (100%) owner of Tri-State, demonstrate that no compensation was paid to corporate officers; that in 1997 Straub paid two million dollars to himself; that "self-charged" income from other Straub companies of approximately 1.9 million was paid into Tri-State, and that Straub subsequently then paid out 1.9 million of Tri-State's money to his daughters. (**Snyder T., pp. 466-467, 469, 471-473 and 489; Straub T., pp. 562-565; 625-636 and 650-659; PX 37, 38, 39 and 40**) The evidence also demonstrates that Defendant, Straub, took the 6.424 million dollars in proceeds from the sale of Tri-State in 1996, disguised as retained assets of Tri-State, then caused loans to his other companies with no requirement to pay interest. (**Snyder T., pp. 475-479; Straub T., pp. 668-671; PX 41**)

CONCLUSIONS OF LAW

(1) In the Judgment Entries, filed February 19, 2002, the Court found that Defendant, Tri-State Group, Inc. ("Tri-State"), was liable for the violations of R.C. §6111.07 (A), as such specific violations were set forth in Counts I, II and III of Plaintiff's Complaint. Based upon the findings contained in the previous Judgment

Entries and the evidence admitted during Trial, and in accord with these Findings of Fact, the Court finds and concludes that the conditions and operations at the flyash disposal Site have been, since November, 1988, and continue to the date of Trial, and the date of this Entry, to be in violation of Tri-State's Permit to Install ("PTI") and its National Pollution Discharge Elimination System ("NPDES") Permit. In addition, the Site has not accepted new flyash and has received less than minimal or no maintenance at all since 1987. Defendant, Tri-State, is a non-operating company with no employees. The Court further concludes that the flyash disposal Site is abandoned **and is subject to permanent closure, including the re-establishment of the Ground Water Monitoring System. (R.C. §6111.07 (B))**

Injunctive Relief

(2) The purpose of an injunction is to preserve the status quo and to restrain acts, actual or threatened, which are contrary to equity and good conscience and which give rise to a cause of action to the injured party for which the law affords no adequate or complete relief. The grant or denial of an injunction is governed by fundamental and established principles which guide equity courts and influence their judicial action. **Am. Jur. 2nd Injunctions §§1; 12-23.** A permanent injunction is appropriate when: (1) [the movant] succeeds by clear and convincing evidence on the merits of the case; (2) the issuance of the injunction will prevent irreparable harm; (3) the potential injury that may be suffered by the [enjoined party] will not outweigh the potential injury suffered by [the movant] if the injunction is not granted; and (4) when applicable, the public interest will be served by the granting of the injunction. **City of Cleveland v. Cleveland Electric & Illuminating Co. (1996), 115 Ohio App. 3rd 1** The interest of the public may also bear upon the granting of injunctive relief to protect private rights. **U.S. Bung Mfg. Co. v. City of Cincinnati, 73 Ohio App. 80 (1st Dist. Hamilton Cty. 1943)** However, Courts have discretion in weighing the benefits and burdens that granting or denying an injunction would have on the public. These four

factors must be balanced "with the flexibility which traditionally has characterized the law of equity." City of Cleveland at P. 14. In deciding whether to grant the injunction, the Court must consider established principles of equity and all the circumstances of the case. Perkins v. Village of Quaker City, 165 Ohio St., 12; Jefferson Place Condominium Assn. V. Naples, 125 Ohio App. 3rd 394 (7th Dist., Mahoning County, 1998)

(3) This Court has carefully considered these equitable principles in its **Findings of Fact and Conclusions of Law.** The Court's Findings and Conclusions demonstrate a balancing of the character of the interests to be protected (**statutory duties to assure compliance with Environmental Protection Regulations versus property rights of a Permit holder to discharge wastes**); irreparable harm Plaintiffs' will suffer absent an injunction (**The Site, in its present state, without OEPA compliance upon closure, poses substantial and incalculable significant risks of serious environmental harm to the ground waters of Belmont County, Ohio**); Plaintiffs' success on the merits by clear and convincing evidence (**See Findings of Fact 1 thru 56**); adequacy of an injunction in comparison to other remedies (**no other legal remedies are available to effect approved closure and to assure compliance with OEPA Regulations**); unreasonable delay in bringing the suit (**although Plaintiffs delayed prompt filing of lawsuit, the record clearly reflects numerous "good faith" attempts by Plaintiffs to resolve compliance and closure issues prior to filing**); misconduct by Plaintiffs (**no evidence of misconduct in the record**); misconduct by Defendants (**knowingly defiant behavior with reckless disregard to consequences, contrary to Ohio law, regulation and the requirements of the PTI and NPDES Permits**); comparison of hardship to Plaintiffs if relief is denied and hardship to Defendants if relief is granted (**Plaintiffs - State of Ohio and Ohio Environmental Protection Agency - will suffer irreparable harm if permanent closure and/or compliance requirements are not met, resulting in substantial and incalculable significant risks of serious environmental harm to the ground waters of Belmont County, Ohio, while Defendants, upon closure and**

compliance, may otherwise utilize the Site in accord with their established property rights, but limited by restrictions imposed upon said property rights by this proceeding); the interest of the public or others (substantial and incalculable significant risks of serious environmental harm to the ground waters of Belmont County, Ohio, in the event Defendants would fail to permanently close the Site and continue to monitor the ground water in accord with OEPA approval); and the practicality of framing the order or judgment (an injunction appropriately addresses the threatened substantial and incalculable significant risks of serious environmental harm to the ground waters of Belmont County, Ohio).

(4) Each of the above-stated factors has been weighed and balanced in a qualitative rather than a quantitative manner. The rule as to the balance of convenience does not go to the power to allow the injunction, but rather is a guide tending to show whether or not the power should be exercised **56 Ohio Jur. 3rd, Injunctions §39; Shaw v. Queens City Forging Co., 7 ONP 254**

(5) The purpose of the PTI and NPDES Permits (guidance documents) is to assure uniform application of the Ohio Environmental Protection Agency's authority, by the Director, as such authority is set forth in **R.C. §6111.03 (J)**, pertaining to the issuance of Permits for the discharge and treatment of industrial waste into the waters of the state. (**Goff T., pp. 307-308, 311-312, 325, 333, and 356-358; Jacobs T., pp. 389 and 391-393 and 401; R.C. §6111.01 (C), (F), (G) and (H); R.C. §6111.03 (J) (1)**) Upon the issuance of a Permit by the Director, the requirements are clearly detailed in the Permit and the Permit holder is required to strictly comply with the terms of their respective Permit. (**R.C. §6111.03 (J) (1-7); R.C. §6111.07 (A)**) Based upon the Court's Findings of Fact, **this Court concludes and Orders that the flyash disposal Site, located at state Route 7 in Mead Township Road 533, Mead Township, Belmont County Ohio shall be permanently "closed" pursuant to this Court Ordered OEPA Approved Closure Plan or in accord with Modifications to Closure contained in a new Permit to Install issued by the Director, which Modification Plan shall embody all of the Closure**

Requirements adopted by this Court in its Findings of Fact, ¶15, 16, and 17. In addition, the Court concludes and Orders that Defendants shall re-establish the Ground Water Monitoring System at the Site, as required and approved by OEPA, and in accord with all of the monitoring requirements mandated by the Court in Findings of Fact ¶21, and that the ground water shall be monitored for a period of five (5) years; and corrective measures, as such are determined necessary by OEPA, shall be implemented at the Site, if ground water contamination is detected, as set forth in Findings of Fact ¶31; (R.C. §6111.07 (A) and (B))

(6) An injunction ordering Defendants to discontinue operation at the Site and mandating requirements for proper Closure of the Site and mandating requirements for Defendants to follow to assure proper monitoring of the groundwater at the Site, imposes upon Defendants less significant harm (**costs of closure in accord with OEPA Regulations**) than the substantial and irreparable harm to Plaintiffs (**substantial and incalculable significant risks of serious environmental harm to the ground waters of Belmont County, Ohio**) and otherwise maintains a status quo as to the property rights of Defendants, as such property rights have been declared by this Court to be subject to R.C. §6111.01 thru 6111.08, the OPEA Regulations implementing said statutory sections, and/or the Requirements set forth in PTI and NPDES Permits. Further, an injunctive order, at this juncture of the proceedings, is the only appropriate equitable remedy to prevent Defendants' invasion upon Plaintiffs' clearly superior rights to protect the groundwater of Belmont County, Ohio. If an injunction is not granted, Plaintiffs will suffer significantly increased risks to the groundwater that is contained in the prolific aquifer under the Site, as well as substantial, incalculable and otherwise prohibitive costs of repair and/or remediation, so long as significant risk of harm to the water exists, all of which will result in Plaintiffs' inability to protect the groundwater of Belmont County, Ohio. Plaintiffs have established their rights by statute, regulation and Permit requirements to so limit the property rights of Defendants and no other legal remedies, except those entered herein, can expeditiously and completely protect for the injury sought to be avoided or

remedied. In this case no adequate remedy of law exists because the amount of compensation for such invasion of rights is impossible to ascertain. **42 Am. Jur. 2nd Injunctions §24** It is clearly in the public interest to protect the groundwater of Belmont County, which directly impacts upon the public interest of Belmont County. The Court concludes that the public interest of Belmont County, Ohio would not benefit from Defendants' continued failure to comply with an OEPA Approved Closure of the Site and OEPA Approved Monitoring of the groundwater at said Site. **Based upon clear and convincing evidence, with all equitable factors considered, the Court Orders such permanent injunction.**

Appropriate Civil Penalty

(7) In accord with R.C. §6111.09 (A), the appropriate civil penalty shall be determined on a per diem basis at not more than Ten Thousand Dollars (\$10,000.00) per day of violation. The evidence establishes and the Court concludes that Defendant, Tri-State's Group Inc. (fka: Tri-State Asphalt Corp.), and Defendant, Glenn Straub, as an individual, have knowingly and with reckless disregard, ignored environmental compliance requirements, by failing to acknowledge and address environmental compliance requirements at the flyash disposal Site for fourteen (14) years and eight (8) months (**as of the date of this Entry**) despite repeated enforcement efforts by the OEPA and the State of Ohio. The Court finds evidence of non-compliance first occurred after the wash-out of the Site in November, 1988. The evidence establishes, and the Court concludes, that non-compliance continued from January 1, 1989 (**the Court having allotted Defendants a reasonable period for written reporting and modification**) to the date of Trial (**August 12, 2002**) and, finally, to the date of decision (**August 31, 2003**), absent evidence of compliance while the case has been pending (**delay due to Defendants seeking recusal of this Factfinder by the Ohio Supreme Court**), for a total of fourteen (14) years, eight (8) months of non-compliance. When computed into days, the non-compliance totals 5,353 days. (**When considering the technical fact that the non-compliance pertains to separate**

violations of the PTI Permit and the NPDES Permit respectfully, the total non-compliance days for each Permit total 5353 days for a grand total of 10,706 days.)

(8) Not only has each Defendant (Tri-State and Straub) knowingly and, with reckless disregard, ignored the operations and conditions at the Site, creating substantial and incalculable, significant risks of serious environmental harm to one of the most productive aquifers in the State of Ohio, but Defendant, Straub, in his individual capacity, has knowingly manipulated his corporate entities, Ohio River Sand and Gravel Inc., Tri-State Asphalt Corp., Burrell Industries, and Tri-State Group Inc., so as to avoid compliance issues and OEPA detection for his corporations and himself due to his violations of law resulting from his failure to comply with the environmental compliance requirements, in accord with O.R.C. §6111.07, regulations implementing said section and the mandatory requirements of the respective PTI and NPDES Permits issued to Tri-State. Further, Defendant, Straub, has knowingly ordered and participated in such manipulative behavior so as to directly benefit his own financial interests, to include a two million dollar payment to himself, the funneling of 1.9 million dollars to his daughters in the form of management fees and/or otherwise diverting numerous amounts of monies to his other business interests in the form of non-interest loans.

(9) As previously stated, the determination of an appropriate, reasonable and necessary civil penalty is based on the number of days of violation (5,353) per each Permit (PTI Permit and NPDES Permit), multiplied by the allowable statutory maximum amount per day, which cannot exceed \$10,000.00 (R.C. §6111.09).

(10) This formula is applied, in light of and adjusted for, certain relevant criteria established as precedent for the evaluation of an environmental claim, as set forth in State, ex. rel. Brown v. Dayton Malleable, Inc. (October 12, 1979), Montgomery C.P., 13 ERC 2189; 1 Ohio St. 3rd 151 (1982).

(11) Said relevant evaluating criteria are listed as following:

- (A) Harm to human health and/or the environment;
- (B) Risk of harm to human health and/or the environment;
- (C) Recalcitrance or indifference to the requirements of the law;
- (D) Economic benefit for delayed compliance; and

- (E) Deterrence to Defendants, as well as others, from future violations of the law.

State, ex. rel. Brown v. Dayton Malleable, Inc. (October 12, 1979),
Montgomery C.P., 13 ERC 2189

Harm and/or Risk of Harm to Human Health
And/or the Environment

(12) The evidence establishes, and the Court concludes, that a civil penalty of \$25.00 per day per violation of the PTI and the NPDES Permits respectively, is reasonable, appropriate and necessary, in light of the criteria that said violations created substantial and incalculable, significant risks of serious environmental harm to the aquifer under the Site. Although no direct evidence has been introduced establishing that actual harm has occurred to the aquifer (**contaminants in ground water**), Defendants have knowingly and with reckless disregard caused serious risks of harm to the ground water at the Site, which risks threaten a prolific aquifer (**drinking water resource**). The potential risks of harm were first made known to Defendants at the time they constructed the flyash disposal Site. Awareness of risks was reinforced by numerous warnings (**oral and written**) from the OEPA at or about the time of the first apparent problems at the Site (**wash-out in November, 1988**). Because the aquifer was deemed, by experts, to be extremely susceptible to contamination, the project was only permitted to proceed based upon utilization of the best possible engineering controls. Defendants' failure to immediately report the incident and/or their failure to cause repair to the conveyance pipe in accord with OEPA approval (**Requirements of PTI and NPDES Permits**), and Defendants' failure to monitor the test wells and replace and/or repair test wells when they failed or were otherwise destroyed, constitutes **knowing actions with reckless disregard** as to potential risks, proximately causing serious **risks of harm** to the ground water under the Site. Defendants knowing acquiescence, by permitting such

failure of compliance to exist continuously at the Site since 1988, enhances the amount of penalty to be imposed upon Defendants. The extent of harm, if any, will not be known until proper monitoring has been re-established, a condition that Defendants have knowingly evaded for fourteen (14) years, eight (8) months. The purpose of a civil penalty "not only accounts for actual harm caused, but also the risk of harm that was threatened by the violations." (**August 2, 2001 Judgment Entry, page 3**) Defendants cannot simply rely upon their defense that "flyash" is a non-toxic material or their irrelevant assertions that other "gob piles" and flyash Sites have been closed in a different manner. Although it is true that flyash may be used in other products and that its harmful effects are reduced when encapsulated, Defendants knew, from the beginning of this project, that certain contaminants from the flyash posed a danger to the aquifer at this Site (**circumstances which are different from other Sites**), and said Defendants have simply chosen to ignore the risks to the aquifer for fourteen (14) years, eight (8) months to secure their financial gain.

Recalcitrance/Indifference to the
Requirements of the Law

(13) **The evidence establishes, and the Court concludes, that a civil penalty of \$25.00 per day per violation for the PTI Permit and NPDES Permit respectfully is reasonable, appropriate and necessary based upon the recalcitrant attitude of Defendants to repair violations and/or monitor the Site and the indifference of said Defendants to the consequences of their action and to the law.** Defendants have knowingly and with reckless disregard failed to maintain, in good working order and operate as efficiently as possible, all treatment or control facilities or systems installed or used by Defendant, Tri-State, necessary to achieve compliance with the terms and conditions of Tri-State's NPDES Permit. In addition, the Court concludes that Defendants have, knowingly and with reckless disregard, deviated from the approved plans of their PTI Permit without written approval of OEPA. Further, when advised on numerous occasions (**See Findings of**

Fact) by OEPA that additional facilities were necessary to be installed because the temporary repairs performed by Defendants were inadequate and otherwise failed to meet applicable standards, said Defendants, knowingly and with reckless disregard of OEPA oral and written requests, evaded compliance; persisted in asserting their deviations from the PTI Permit to be correct without the necessary expertise to make such decisions; and, otherwise, with blatant indifference to law, regulation and the requirements of their Permits, knowingly and with reckless disregard caused a delay of fourteen (14) years, eight (8) months for the implementation of appropriate OEPA approved Closure of the flyash disposal Site, all in direct contravention of their PTI Permit. Further, said Defendants knowingly and with reckless disregard, failed to maintain in good working order and operate as efficiently as possible, treatment and control facilities and systems in accord with the terms and conditions of Tri-State's NPDES Permit, demonstrating a callous disregard for potential risks to the aquifer, under the Site. Instead, during the time period, constituting fourteen (14) year and eight (8) months, while Defendant, Tri-State, ignored compliance issues and the associated risks to the aquifer, Defendant, Straub, manipulated his corporate entities so as to allow for the distribution of approximately four million dollars to himself and his daughters, as well as non-interest loans to his other business entities, when some portion of these assets could and should have been directed to return the Site to compliance with requirements of its respective Permits.

(14) If Defendants ultimately spend the necessary compliance funds in response to the Court's Injunctive Relief Order, a benefit will have been gained by delaying the cost of compliance for fourteen (14) years and eight (8) months. (See **Snyder T., pp. 459-460**) When the assets of Tri-State were sold in 1996 for 6.426 million dollars, the Site had been abandoned for approximately eight (8) years and proper "closure" of the Site, in accord with the PTI and NPDES Permits, including the re-establishment of the Ground Water Monitoring System, was still required. (**February 19, 2002 Judgment Entry, pages 2-4; PX 30 and 34**) Instead of spending the assets gained from the sale on compliance with its PTI and NPDES Permits, Defendant, Straub, personally manipulated Defendant, Tri-State, and

transferred some portion or all of the 6.426 million dollars first to no-interest loans for his other businesses, distributions to himself and/or distributions to his daughters in the form of management fees. (**Synder T., pp. 475-479; Straub T., pp. 668-671; PX 37, 38, 39, 40 and 41**)

(15) The term "recalcitrant" is defined as "obstinately defiant of authority or restraint". (**Webster's Collegiate Dictionary**) The actions of Defendant, Tri-state, (through its only acting corporate officer, one hundred percent shareholder and employee, Straub, and the actions of Defendant, Straub, as an individual, wherein each Defendant knowingly and with reckless disregard ignored the serious environmental risks to the aquifer under the Site with full knowledge of its extreme susceptibility to contamination, and wherein each Defendant manipulated and/or allowed for the manipulation of Straub's business entities to gift away millions of dollars from Defendant, Tri-State, which should otherwise have been used to address OEPA's compliance requirements, is the true definition of recalcitrance. **Therefore, the Court concludes that a civil penalty of \$25.00 per day per violation per PTI and NPDES Permits respectfully, is reasonable, appropriate and necessary in light of the criteria factor of recalcitrance and/or indifference, and which finding is fully supported by the evidence in the case.**

Economic Benefit for Delayed Compliance

(16) A monetary benefit was clearly gained by Defendants, Tri-State and Straub, when each Defendant knowingly and with reckless disregard refused to use some portion of the 6.5 millions of dollars available, as assets of Tri-State, to address the necessary OEPA compliance and closure requirements and necessary Ground Water Monitoring. Although an exact amount of economic benefit cannot be determined, at this time, since the exact cost of compliance and closure is unknown, due to Defendants' knowing failure to realistically assess the OEPA environmental compliance and closure requirements at the Site, and the exact amount of which cannot be determined until Defendants comply with the Injunctive Order of this Court, the

evidence clearly and convincingly establishes that Defendants, Tri-State and Straub, gained a substantial economic benefit in excess of the amount of the civil penalty imposed for each day, by their refusal to comply and/or to close the Site in accord with OEPA requirements. **Therefore, the evidence establishes, and the Court concludes, that a civil penalty of \$25.00 per day per violation of the PTI and NPDES Permits respectfully, is reasonable, appropriate and necessary in light of the criteria of economic benefit gained for delayed compliance.**

Deterrence to Defendants as Well as Others,
From Future Violations of Law.

(17) Deterrence is also a necessary criteria for the Court to consider when imposing a civil penalty. "The purpose of the civil penalty is not only to compensate the State for harm done, but to deter Defendants, as well as others, from future violations of the law." (August 2, 2001 Judgment Entry, page 3, citing Ohio ex rel, Brown v. Dayton Malleable, Inc., 13 ERC, at 2193) **Therefore, the evidence establishes, and the Court concludes, that a civil penalty of \$10.00 per day per violation of the PTI and NPDES Permits respectfully, is reasonable, appropriate and necessary in light of the criteria of deterrence to Defendants, as well as others, from future violations of the law.** In this case, if Defendants were not ordered to pay a civil penalty of, at least, \$85.00 per day per Permit violation, Defendants would be rewarded for their defiant behavior, they would not be deterred from continued defiance in the future, and others would be more inclined to violate the law, the regulations implementing the law and/or their requirements of their respective permits.

Civil Penalty Summary

(18) In their proposed Findings and Conclusions, Plaintiffs suggest that violations of the PTI and NPDES Permits respectfully, constitute separate violations for purposes of establishing the per diem penalty, thus allowing for a doubling effect for each Permit violation (5,353 doubled to 10,706 days). This system of assessing a penalty unduly complicates the matter. The violation of each Permit is a part of the whole, and the total non-compliance period of 5,353 days is predicated upon what happened at the beginning. From all the facts and circumstances, the Court finds that a penalty of \$85.00 per day for each of the 5,353 days is fair and reasonable and accordingly will assess a total penalty against Defendants for the risk of harm, recalcitrance and indifference, economic benefit derived, and deterrence for Defendants and others from future violations of the law, for a total penalty of **\$455,005.00** (5,353 days multiplied by \$85.00 per diem equals \$455,005.00).

Mitigating Factors

(19) However, consideration must be given to positive mitigating factors, for which Defendants should be awarded credit. While there was no evidence that any failure of compliance was due to governmental indifference, there were certain factors beyond Defendants' control which, even if said factors did not excuse performance, they, at least, explain Defendants' initial behavior. The first was the wash-out of the Site (**destruction of monitoring well**) in 1988, which led to the unilateral and unapproved installation of the temporary reservoir and repairs to the conveyance pipe. Defendants have offered no argument requesting such credit (**perhaps due to Defendants attitude that nothing harmful has occurred**). However, certain credit may be allowed for this make-shift measure proposed by Defendants, but a credit of \$85.00 per day from November, 1988 through December 31, 1989 (**426 days**), the

period within which a reasonable compliance should have been assured is appropriate, for a total of \$36,210.00. (**\$85.00 multiplied by 426 days equals \$36,210.00**) Secondly, although the State of Ohio, in "good faith", attempted to resolve this matter short of litigation, some regard and credit must be awarded to Defendants, due to the fact that litigation was not initiated until May 4, 2000 (earlier filing would have assured an earlier decision by this Court). The Court finds that a credit of \$15.00 per day should be awarded Defendants as a mitigating factor, for a total of 3,774 days (**from January 1, 1990 to May 4, 2000**) or \$56,610.00 (**3,774 days multiplied by \$15.00 equals \$56,610.00**). Therefore, under the credit formula for mitigating factors, Defendants are entitled to a credit of \$92,820.00 (**\$36,210.00 plus \$56,610.00 equals \$92,820.00**) and the total penalty to be assessed is **\$362,185.00 (\$455,005.00 minus \$92,820.00 equals \$362,185.00)**.

Defendant, Glenn Straub, is Personally Liable Under Participation in Wrongful Acts Doctrine of Personal Liability.

(20) In view of the Findings of the Court when Overruling Defendants Motion for Summary Judgment (**Entry filed February 19, 2002**) and based upon the evidence presented at Trial (**See Findings of Facts**), the evidence is uncontroverted that Defendant, Glenn Straub, was the only corporate officer of Tri-State, (**President, Chairman of the Board, Chief Executive Officer**); was the sole shareholder of Tri-State (**one hundred percent owner, as well as the one hundred percent owner of the corporation that owned the real estate, on which the flyash Site is situated - Ohio Sand and Gravel Inc.**); and the only employee of Tri-State (**See Findings of Fact**). In addition, the evidence is clear and convincing, and, as a result, the Court concludes, that Defendant, Glenn Straub, as an individual, caused the violations of R.C. §6111.07, regulations enforcing said statute, and/or the PTI and NPDES Permit Requirements imposed upon Defendant, Tri-State, when, acting as a corporate officer of Tri-State, Straub knowingly and with reckless disregard, ordered,

directed, collaborated in, and/or ratified the above-stated violations and wrongful acts of Defendant, Tri-State, and/or failed to act despite having authority to prevent said violations and wrongful acts. (**February 12, 2002 Judgment Entry Overruling Defendant, Straub's, Motion for Summary Judgment, page 1; Young v. Featherstone Motors, Inc. (1954), 97 Ohio App. 158, 171; Centennial Ins. Co. v. Vic Tanny International (1975), 46 Ohio App. 2nd 137, 141; Arales v. Furs by Weis, Inc. (January 21, 1999), Cuyahoga App Ct. No. 74301 (page 9)**) As a result, Straub, as a corporate actor, is personally liable for the tortuous acts he has committed, ordered, directed, collaborated in, participated in and/or ratified, during the course of his corporate activity. **State Ex. rel Fisher v. American Courts, Inc. (1994), 96 Ohio App. 3rd 297** In fact, no reasonable doubt exists as to Straub's participation in and/or direction of the violations by Defendant, Tri-State.

(21) Therefore, the Court finds Defendant, Straub, is personally liable based upon the participation doctrine establishing his personal liability, in accord with Ohio's Environmental Protection Statutes, which impose liability against the "person" committing the violation (**See R.C. §6111.07(A); 6111.01(J); and R.C. §1.59**). This finding is in accord with other Ohio Courts in environmental cases, which have either found corporate officers/directors or corporate stockholders individually liable or have refused to dismiss them from cases. (**State v. Norway Environmental Services, et al. (October 24, 1985), Cuyahoga C.P., No. 0286557, (pages 7-9) (November 13, 1986), Cuyahoga App. Ct., Nos. 51209, 51220 and 51227 (page 24)**) Individuals involved in the operation of hazardous waste facilities may be held personally liable for the corporation's activities.

(22) Defendant, Straub, knew of the violations and easily appreciated and clearly understood that a substantial amount of money would be necessary to correct them. However, rather than authorize the expenditure of Tri-State's assets to address compliance and closure issues, Straub directed Tri-State's assets to himself, his daughters and his other business entities in the form of non-interest loans. (**See Findings of Fact**) Such conduct further indicts Defendant, Straub, as personally liable in this case pursuant to the Participation in Wrongful Acts Personal Liability Doctrine.

Defendant, Straub, is Personally Liable Under
Doctrine of Piercing the Corporate Veil

(23) Defendant, Straub, is also personally liable under the Doctrine of Piercing the Corporate Veil and in accord with the three-pronged test set forth in **Belevedere Condominium Unit Owners' Association v. R. E. Roark Cos. Inc. (1993) 67 Ohio St. 3rd 274**, the Court having determined that all three (3) prongs of the veil piercing test to have been conclusively met in this case. As to the first prong in **Belevedere** - complete control so that the corporation has no separate mind - the evidence is clear and convincing that Straub controls Tri-State completely and totally and, in fact, Tri-State has no existence of its own. If Tri-State had a separate mind, it would not have exposed itself to the penalties in this case without paying money solely for Straub's personal interests (**himself and his daughters**) and other business entities. Instead, Straub, the only corporate officer and the one hundred percent (100%) shareholder, who made all financial decision for the corporation (**See Findings of Fact**), chose to have no Tri-State employees at the Site and/or chose employees from his other business entities, who had no knowledge or experience in dealing with OEPA regulations and/or Permits. Further, Straub, with intimate knowledge of the Site, especially in reference to the existence of the prolific aquifer which was extremely susceptible to containments in the flyash, actively directed and participated in the failure to repair and/or otherwise comply with OEPA Regulations and Permit Requirements and/or otherwise manipulated Tri-State and his other business entities so as to allow 6.424 million dollars to be paid out to himself and others, thus demonstrating his complete control and dominance of Defendant, Tri-State.

(24) As to the second prong in **Belevedere** - that control over the corporation by Straub was exercised in such a manner as to commit fraud or an illegal act - the evidence clearly and convincingly establishes, and the Court concludes, that Straub controlled Tri-State, the Permit holder, so completely that he caused the illegal acts, i.e. the violations of the Permits as previously set forth herein. Straub ignored the environmental violations and all attempts to ensure compliance by the OEPA and he

refused to authorize the necessary funds to return the flyash disposal Site to compliance and to establish new monitoring at the Site. Straub, the only person who could have made any financial decisions on behalf of the disposal Site, caused the violations to continue unabated for fourteen (14) years and eight (8) months.

(25) As to the third prong in **Belevedere** - injury or unjust loss has resulting to Plaintiff from such control and wrong - the State of Ohio and the citizens of Belmont County, (**specifically those in Dilles Bottom where the aquifer affects their lives**), have been injured by fourteen (14) years, eight (8) months of violations, failures to assure compliance with Permit requirements, failures to re-establish monitoring of the ground water, purposeful delays, knowing evasion and manipulation of business entities, all of which have created substantial and incalculable, significant risks of serious environmental harm to the aquifer underlying the Site, which now must be addressed by injunctive relief and the payment of an appropriate civil penalty. **Kays v. Schregardus, Director of Ohio EPA (2000), 138 Ohio appellate 3rd 225, 229-**

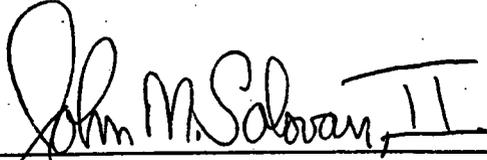
231 This Court has applied the three (3) prongs of the **Belevedere** test and concluded that the evidence clearly and convincingly establishes that the injury to the State and the citizens of Belmont County, in fact, is the continuing, unabated existence of the flyash disposal Site without proper closure and adequate monitoring, which conditions at the Site has created the substantial and incalculable significant risks of serious environmental harm to the groundwater, a risk to public health and safety. In addition, the State of Ohio and the Ohio EPA has been further injured by having to expend significant enforcement costs, first, to verify the violations and then, to seek the necessary relief from this Court.

Conclusion

The evidence considered by the Court in deciding its Motions for Summary Judgment as well as all of the evidence submitted at Trial, establish, by clear and convincing evidence, the necessity for the injunctive relief, with all mandated

requirements, payment of \$362,185.00 as a civil penalty, and the imposition of joint and several liability for Defendants, Tri-State Group Inc. and Glenn Straub, personally, in accord with **R.C. §6111.07 and 6111.09**

Dated: **September 2, 2003**


JOHN M. SOLOVAN, II - JUDGE

pc: Timothy J Kern, Atty./Pl.
Larry A Zink, Atty./Def.